

(1966) 07 CAL CK 0004
In the Calcutta High Court
Case No : Civil Revision Case No. 1774 of 1962

Asrurekha Dutta

APPELLANT

Vs

Diptimay Pal and Another

RESPONDENT

Date of Decision : 12-07-1966

Acts Referred:

Provincial Small Cause Courts Act, 1887 — Section 25
West Bengal Estates Acquisition Act, 1953 — Section 2(i)

Citation : 70 CWN 1079

Hon'ble Judges : Bijayesh Mukherji, J

Bench : Single Bench

Advocate : Manindra Nath Ghosh, for the Appellant; Lala Hemanta Kumar, for the Respondent

Judgement

Bijayesh Mukherji, J.—The decision of this rule obtained, u/s 25 of the Provincial Small Causes Court Act, 9 of 1887, by Shrimati Ashrurekha Datta, the principal defendant in a suit for recovery of arrears of rent for a moiety share of a certain fishery, turns on the true meaning of the term intermediary as defined in sec. 2, cl. (i) of the West Bengal Estates Acquisition Act, 1953, (1 of 19-54), shortened hereafter into "the Act". To the facts first. On May 4, 1901, Lala Nirmal Prakash Nandey granted a pottah in favour of a predecessor of the plaintiff opposite party, Diptimay Pal, as respects the tank in controversy, known as Dhopa Pukur, on a rent of Re. 1, annas 2 a year and a premium money (selami) of Rs. 2,204 in a lump. The same day, the aforesaid grantee too executed a kabuliyat in favour of the grantor, Nirmal Prakash Nandey, on the same terms. The original pottah is exhibit A. The certified copy of the kabuliyat is exhibit B. More than 54 years later, to be exact, on September 3, 1955, corresponding to Bhadra 17, 1362 B.S., Diptimay Pal, upon whom had devolved by then a moiety share of the tank, granted a bandobast of just that to Staya Charan Das for a term of 10 years from 1362 B.S. to 1371 B.S. on a rent of Rs. 150 a year : Vide the certified copy of the relative deed, exhibit 2, calling itself a "deed of indenture." On November 14, 1956, corresponding to Kartick 28, 1363 B.S., Satya Charan Das, short of money

as he was, sold his right, title and interest in the leasehold to Ashrurekha Datta, the petitioner before me : Vide the certified copy of the sale-deed, exhibit 1. On such devolutions, about which there is no controversy, Diptimay Pal sued Ashrurekha Datta for recovery of arrears of rent of the fishery as respects his moiety share in Dhopa Pukur for half of the year 1364 B.S. and for the whole of the three years : 1365 B.S. to 1367 B.S., at the rate of Rs. 150 a year, as also for interest at 6 per cent a year. The total claim thereby came to Rs. 525 on account of rent plus Rs. 31-8 annas on account of interest: Rs. 556-8 annas in all.

2. Diptimay Pal took care to implead Satya Charan Das also as a party defendant. But he did not contest the suit. Ashrurekha did.

3. The plea she resisted the suit with -- to notice only that which is material now -- was that, because of the vesting under the Act, the State was her lessor, and not the suing party, Diptimay.

4. The learned judge, Small Causes Court, negatived such plea, holding--

A. The subject-matter of the litigation was a tank fishery which Diptimay had the right to retain u/s 6, sub-section 1, clause (e), of the Act.

B. The proviso to sub-section 2 ibid could not stand between Diptimay and the tank fishery here, as Diptimay no intermediary.

5. He, therefore, decreed the suit. This is why Ashrurekha has come up to this court in revision and obtained the rule.

6. Satya Charan, also an opposite party before me, does not appear. Diptimay does, and opposes the rule.

7. A manifest error of law is plain to be seen in the way in which the learned judge below deals with the matter. Once you hold that Diptimay can retain this -- a tank fishery -- u/s 6, sub-section 1, clause (e) -- and this is what you hold -- you hold too that Diptimay is an intermediary. For, section 6, sub-section 1, provides for retention of land and tank fisheries by an intermediary only. Omitting the words not material here, it bears, and indeed almost opens with :

* * * * an intermediary shall * * * * be entitled to retain with effect from the date of vesting--

* * * * *

* * * * *

How can you say then the the proviso to sub-section 2 of section 6 does not hit Diptimay, because he is not an intermediary ? Finding A tabulated above therefore, contradicts finding B.

8. Thus, the judgment under revision is of little help. And the whole problem is deserving of a close examination in the light of submissions made by Mr. Ghosh for the petitioner Ashrurekha and by Mr. Lala Hemanta Kumar for the opposite

party Diptimay.

9. What exactly was demised to Diptimay's predecessor has got to be known first. That will facilitate the application of the law. Examining the earliest documents, the pottah and the kabuliyat of May 4, 1901, it is found that the fishery in Dhopa Pukur was, of course, demised by Lala Nirmal Prakash Nandey to the predecessor of Diptimay Pal. It is found too that a little more was demised as well

puskarini mojkura ichhanusarey panka uddhar kareya jalkar keyadansa bharat kareya tahatey ichhanusarey bagan kareya falbhog o gach kartan kareya o motsya cholaiya o dhariya * * * putra pautradi oarishan * * * kromey * * * ichhanusarey param sukhey bhog dakhal karibey.

which, turned into English, reads--

You shall be at liberty to clear the tank aforesaid of its mud, to fill part of the jalkar (watery portion) therewith, to raise a garden thereon, to enjoy the usufruct thereof, to cut the trees (that will stand thereon), to rear and catch fishes ; and (by so doing) you shall be in enjoyment of the same, with the maximum of happiness, and down to your sons, sons's sons and heirs.

What is it I see in such stipulation? Jalkar only ? That is to say, a fishery simplicitor, and no more ? And that is what Mr. Lala Hemanta Kumar invites me to hold. Or a lot more than a jalkar ? That is what Mr. Ghosh invites me to hold. I am clear, Mr. Ghosh's contention must prevail over Mr. Lala's. Where will mud come from unless from the bed of the tank (talkar) and its adjoining banks under the water ? Surely mud will not float above the water or hang in the air. Then, the raising of the garden on the watery portion filled up, the cutting away of the trees grown thereon etc., are there. So, what was demised to the predecessor of Diptimay was much more than a mere jalkar; it was jalkar and talkar too : the water above, as also the land below and around.

10. Mr. Lala Hemanta Kumar seeks to escape the plain consequence of such stipulation in his client's own instrument of title by contending that the words in the pottah, I have underlined in the excerpt quoted in the preceding paragraph and marked A, are an interpolation. Apart from the fact that such a question of fact is raised for the first time before me in exercise of my revisional jurisdiction, I find convincing materials on record which prove to demonstration, so to say, that this belated contention is wholly destitute of merit. One, though true it is that the words complained of appear to have been written in a different ink, the kaifiyat (explanation) at the foot of the pottah, exhibit A, explains :

On the second page of this deed, just below three lines (from the top) one line has been written with a quill-pen.

And the words Mr. Lala complains of are just there with what looks like a distinctive mark of a quill-pen having been pressed into service. Two, -- and it is a revelation going heavily against Mr. Lala's contention -- in the certified copy of

the corresponding kabuliyat executed by the predecessor of Diptimay in favour of Lala Nirmal Prakash Nandey, exhibit B, a copy which was made from the copy of the original kept in the registry, the very same words are to be found. So, an interpolation, it is not, an interpolation it cannot be.

11. Thus, the conclusion come to : that the predecessor of Diptimay -- let him be named now : Radha Raman Pal -- took settlement of Dhopa Pukur, with its jalkar, talkar and all, that is to say, with its land and water, stands. Still remains the question of all questions : what is the status of Radha Raman, or, after him, of Diptimay's father, Rohini Kumar, or of Diptimay now ? Upon a true answer to this question depends the fate of this litigation depending before me.

12. To begin from the record of rights, khatian No. 1544 of Burdwan town, exhibit 6, records this tank Dhopa Pukur, as plot No. 6002, within the limits of the Burdwan Municipality, in the name of Diptimay's immediate predecessor and father, Rohini Kumar Pal, entering his status as dakhalkar on the basis of the pottah, exhibit A, in favour of Radha Raman Pal. A dakhalkar is not, and cannot be, a raiyat. Plainly he is a non-agricultural tenant. So was, to start with, Radha Raman paying a rent of Re. 1/2 annas a year to Lala Nirmal Prakash Nandey, as the pottah and the kabuliyat of 1901, exhibits A and B, go to show. So was Diptimay's father, Rohini Kumar, paying the same rent on the foot of the same documents, to the then superior-interest-holder, presumably a tenure-holder, Tulsi Deyi Devi, as the relevant khatian, exhibit 6, evinces. And so is now Diptimay after him. The presumption this record of rights raises remains un-rebutted.

13. Does such a status -- that of a non-agricultural tenant -- fit the definition of that term in section 2, clause (j), of the Act ? It does. To the definition, first, of agricultural land : section 2, clause (b). It means land ordinarily used for purposes of agriculture or horticulture and includes such land, notwithstanding that it may be lying fallow for the time being. Dhopa Pukur, which is plot No. 6002, having an area of 1.485 acres, as the khatian records, is land too, though covered with water, ordinarily used for pisciculture, neither for horticulture and far less for agriculture. A little horticultural use is, no doubt, provided for in the pottah and the kabuliyat, when mud is cleared off and part of the jalkar filled up therewith. But that is when it becomes in the interest of the fishery to do so. Too much of mud and too little of water will not make it a going fishery. So, the whole of the land, covered with water, is to be, and is, ordinarily used for pisciculture : for rearing and catching fishes, as the pottah and the kabuliyat say. Such horticultural use -- for raising a garden on part of the jalkar filled up with mud cleared out and all that--, as is permitted by the said documents, refers only to the incidental use as distinguished from the ordinary use of the whole of plot No. 6002 which Dhopa Pukur is. It is ordinarily used for fishery and fishery only. It may be incidentally used for a little gardening and that too on one or the other fringe of the tank with a total area of a little less than 5 bighas in the town of Burdwan. That little only is provided for, not in derogation of the right of

fishery (which remains paramount), but in addition to it. My conclusion therefore is that the land demised, along with the water above it and inside of it under the name of Dhopa Pukur, is not agricultural land within section 2, clause (b).

14. Once the conclusion is so, it becomes non-agricultural land within section 2, clause (j), which bears :

"non-agricultural land" means land other than agricultural land, (omitted the words not needed). Now to the definition in clause (k):

"non-agricultural tenant" means a tenant of non-agricultural land who holds under a proprietor, a tenure-holder, a service tenure-holder or an under-tenure-holder.

Diptimay, the plaintiff opposite party, is just that.

16. He cannot therefore be an intermediary, a term which, according to clause (i) of section 2,

"means a proprietor, tenure-holder, under-tenure-holder, or any other intermediary above a raiyat or a non-agricultural tenant." (I have omitted the words not needed in the context.)

Diptimay is no raiyat. Diptimay is a non-agricultural tenant (dakhalkar). Therefore, he is not an intermediary. One above him is ; not he.

16. Section 5, clause (c), of the Act, Mr. Lala refers me to, bears, in so far as it is material here :

every non-agricultural tenant holding any land under an intermediary shall hold the same directly under the State, as if the State had been the intermediary, and on the same terms and conditions as immediately before the date of vesting.

This only lends assurance -- a very great assurance indeed -- to the conclusion I have come to in the preceding paragraph : that Diptimay, a non-agricultural tenant, is not an intermediary; that he cannot be an intermediary. Indeed, the State is the statutory intermediary under whom he holds Dhopa Pukur.

17. Section 6, then, -- be it subsection 1, clause (c), under which an intermediary can retain a tank fishery, or be it sub-section 2 with the proviso, under which the State becomes the statutory lessor of a tank fishery held under a lease immediately before the date of vesting, -- can do no duty here. It cannot, because no intermediary is to be seen. And section 6 deals with the right of an intermediary to retain certain lands and the like. What is seen here instead is a non-agricultural tenant who is not an intermediary, though any one amongst the people over whom, in the hierarchy of tenancies, is.

18. Had section 6 applied, the grant made by Diptimay on September 3, 1955, to Satya Charan Das, the predecessor-in-interest of Ashrurekha, would have been regarded as a tank fishery, even though nothing more than jalkar, without any reference to land, was demised thereby. The definition of tank fishery is so

compendious that this jalkar right, without more, would have come under it. The definition concludes:

(tank fishery) includes any right of pisciculture or fishing in such reservoir or place.

So, a bare right of fishing is a tank fishery too. And by virtue of the proviso to sub-section 2, Ashrurekha would have been a direct lessee under the State; the intermediary Diptimay (if he were one) would have been eliminated. Could I enter into section 6, I would have held so, rejecting Mr. Lala's contention and accepting Mr. Ghosh's. But Diptimay is not an intermediary, as I have just held. So, section 6 must remain idle here.

19. I have not referred so far to the only case cited before me: Saroj Kumar Bose v. Jatindra Nath Mondol and others, (1963) 67 C.W.N. 764, because the sole right of the plaintiffs (lessors) there was limited only to jalkar jama which had nothing to do with the land, just the opposite of the facts I am seized of here: grant of jalkar and the land too to the predecessor of the plaintiff before me. And it was held that the jalkar, an encumbrance created by the proprietor, the touzi-holder, one Dalai by name, and necessarily an intermediary, in favour of the plaintiffs' predecessor, would be extinguished, but that the plaintiffs would be the direct lessees under the State, by virtue of the specific provisions of section 6, sub-section 2. And if they remained the lessees, the defendant would be their under-lessee and bound to pay rents to them : page 771 of the report. May I put it thus ? Dalai, an intermediary, could have retained the tank fishery: section 6, sub-section 1 clause (c). But there was a lease immediately before the date of vesting. So Dalai could not, and his lessee could: section 6, sub-section 2, proviso. Be that as it may because of different facts before me, I am going a different way altogether. The plaintiff here, Diptimay, is a non-agricultural tenant and therefore not an intermediary. The State is the statutory intermediary under whom he holds: section 5, clause (c). Section 6 is therefore kept out of his way. Hence, the lease he granted to Satya Charan stands. Upon Ashrurekha, the vendee of Satya Charan, such lease is binding. Ergo, she is bound to pay rents to Diptimay, who is incidentally none else than her step-brother, as Diptimay says in his evidence.

20. Thus, the conclusion come to by the learned judge, Small Causes Court, appears to be right, though it has not been possible for me to accept the reasons he sets out in support of his conclusion. In the result, the rule fails and do stand discharged. This being a matter between a step-brother and a step-sister, and the law involved being somewhat difficult, and almost one of first impression, for all I know, I direct, each party do pay and bear its costs here and below.