
(2004) 12 GAU CK 0017
In the Gauhati High Court
Case No : Writ Appeal No. 387 of 2004

Era Kacharipara Gaon Min Samabai Samittee Ltd.	APPELLANT
Vs	
Singara Beel Min Samabai Samittee Ltd. and Another	RESPONDENT

Date of Decision : 20-12-2004

Acts Referred:

Assam Fisheries Rules, 1953 — Rule 12
Transfer of Property Act, 1882 — Section 105

Citation : (2005) GLT 679 Supp

Hon'ble Judges : D. Biswas, Acting C.J.; B.P. Katakey, J

Bench : Division Bench

Advocate : N. Dutta, K.N. Choudhury, B. Bhuyan and R. Debey, for the Appellant; K.C. Mahanta, S.S. Dey and D.P. Borah, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Katakey, J.—This appeal is directed against the common judgment and order dated 06.10.2004 passed in WP(C) No. 4134 of 2004 and 4597 of 2004 whereby the learned Single Judge allowed WP(C) No. 4134 of 2004 and set aside the order dated 11.06.2004 impugned in the said writ petition and further allowed Singara Beel Meen Samabai Samity Limited, the Respondent No. 1 in the present appeal, to operate the fishery in question. The learned Single Judge by the said judgment dismissed the writ petition No. 4597 of 2004 on the ground of being infructuous. The Appellant who was the Respondent No. 4 in WP(C) No. 4134 of 2004 has preferred the present writ appeal challenging the aforesaid judgment and order allowing the said writ petition.

2. The facts leading to the filling of the writ petition being WP(C) No. 4134 of 2004 is narrated below:

Singara Beel Meen Samabai Samity Limited was the settlement holder in respect of No. 1 Choulkhowa river fishery for a period of 5 years with effect from 13.03.2001 to 12.03.2006, lease of which was granted by the Government of Assam by invoking the power under proviso to Rule 12 of the Assam Fishery

Rules. Pursuant to the lease granted by the Government of Assam, a lease deed was executed by the said society on 19.03.2001, whereby certain conditions of lease were stipulated. One of the conditions for the lease was that the Lessee shall not have the power to sell his right of lease of the fishery or to sublet to any one or to admit any one as a partner without informing the Deputy Commissioner and, in the event of infringement of any of the conditions of the lease, a power has been granted to the Deputy Commissioner to cancel the lease. The said order of settlement dated 13.03.2001 was challenged in WP(C) No. 1849 of 2001 by M/s. Batgaon Nayapar Fishery Sambai Samity Limited, who was the writ Petitioner in WP(C) No. 4597 of 2004, however, the said writ petition was dismissed on 20.11.2001. The possession of the said fishery was delivered to the present Respondent No. 1 society on 27.11.2001. Thereafter the Government of Assam during continuance of the lease vide order dated 14.11.2003 cancelled the settlement made in favour of the present Respondent No. 1 on the ground of violation of the condition No. 6 of lease agreement i.e. on the ground of subletting to one Shri Pranjit Kumar Pathak. The said order of cancellation of the settlement was questioned by the present Respondent No. 1 as writ Petitioner in WP(C) No. 9578 of 2003 and the cancellation order was set aside vide order dated 07.01.2004 on the ground that the same was passed in violation of the principles of natural justice. A further direction was issued in the said case directing the authority to pass fresh order in the matter after allowing the present Respondent No. 1 an opportunity to show cause, after making, the materials relied upon in support of the charge of subletting, available to it. By the said order it was further directed that operation of the fishery by any one of the parties will be allowed only after the fresh orders, as directed, are passed. The Government of Assam in pursuant to the direction contained in the order dated 07-01- 2004 passed in WP(C) No. 9578 of 2003 issued show cause notices to the Respondent No. 1 society and accordingly the Respondent No. 1 society, which was the settlement holder, submitted their reply to the said show cause notice. Written statements were also filed by the present writ Appellants as well as by the Writ Petitioner in WP(C) No. 4597 of 2004, who alleged that the fishery in question was sublet by the Respondent No. 1 society to one Shri Pranjit Kumar Pathak and as such the lease granted by the Government in favour of the Respondent No. 1 society was liable to be cancelled in terms of the clause of the lease agreement. The Deputy Secretary to the Government of Assam, Fishery Department thereafter cancelled the settlement of the Respondent No. 1 society on the ground of subletting and granted a fresh lease in favour of the present Appellant for a period of 5 years with effect from 11.06.2004 to 10.06.2009 at an enhanced revenue of 15% over the last year's annual revenue. Said order passed by the Deputy Secretary on 11.06.2004 was challenged by the settlement holder, namely, M/s. Singara Beel Meen Samabai Samity Limited.

3. The learned Single Judge upon hearing the parties allowed the Writ Petition being No. WP(C) No. 4134 of 2004 filed by the original settlement holder (Respondent No. 1 in the present appeal) and set aside the order dated

11.06.2004 passed by the Deputy Secretary to the Government of Assam, Fishery Department and allowed the said settlement holder to operate the fishery by holding that:

(i) There is no whisper in the order that the existing settlement in favour of the present Respondent No. 1 was cancelled in view of alleged subletting.

(ii) There is no positive finding as regards the violation of terms of agreement or contract so as to cancel the settlement. Minor fraction or presumption will not be sufficient to defeat the right of existing lease holder.

(iii) There is no material for holding that the fishery was sublet by the settlement holder and the Respondent State seems to have relied on the decision of the High Court on the point of subletting though there is absolutely no finding by the Court that there was any subletting.

(iv) Merely because two contending parties did not find favour in the matter of settlement and had approached the State Government making certain allegation of subletting and one stranger approached the Civil Court claiming certain relief on the basis of an agreement and subsequent withdrawal of the same, cannot be said that the settlement holder had sublet the fishery.

4. We have heard Mr. N. Dutta, learned senior Counsel for the Appellant and Mr. S.S. Dey, learned Counsel for the Respondent Nos. 1 and 2 and also Mr. K.C. Mahanta, learned Government Advocate, Assam.

5. Mr. Dutta, learned Senior Counsel has submitted that the finding recorded by the learned Single Judge to the effect that there was no positive finding about subletting of the fishery by the settlement holder, is perverse on the face of the order passed by the Government dated 11.06.2004 since a positive finding has been recorded by the Deputy Secretary in his order dated 11.06.2004 (Annexure-7 to the writ appeal) to the effect that the settlement holder had sublet the fishery to one Pranjit Kumar Pathak. Mr. Dutta has further submitted that since a positive finding regarding subletting has been recorded by the Deputy Secretary, there is no alternative but to cancel the lease granted in favour of the Respondent No. 1 society in view of Clauses (6) and (7) of the lease deed. Alternatively, Mr. Dutta has submitted that learned Single Judge has misdirected himself by allowing the Respondent No. 1 to manage the fishery after recording the finding that there was no positive finding relating to the subletting recorded by the Deputy Secretary in the order impugned in the writ petition as the learned Single Judge in exercise of the Certiorari jurisdiction ought to have remanded the matter to the Government for making a fresh enquiry and to positive give finding in the matter of subletting. It has further been contended that such finding can only be recorded by settling authority by examining the witnesses to the agreement by which the fishery was allegedly sublet by the Respondent No. 1 society. Mr. Dutta very strenuously argued that High Court in exercise of the Certiorari jurisdiction should not embark upon a fact finding exercise and ought to leave the same to be decided by the settlement

authority and hence, the entire matter is required to be sent back to the Government for giving a fresh decision by arriving at a conclusive finding as regards the agreement relating to subletting and thereafter to pass a fresh order.

6. Mr. Dey, learned Counsel for the Respondent No. 1 while supporting the judgment passed by the learned Single Judge has submitted that since no positive findings regarding subletting has been recorded by the Deputy Secretary before cancelling the settlement, the learned Single Judge has rightly set aside the order of cancellation of settlement dated 11.6.2004 and rightly directed the Respondent authority to allow the Respondent No. 1 to manage the fishery in terms of its earlier settlement, since the Respondent No. 1 has already been subjected to a number of litigations. Mr. Dey further submitted that Deputy Secretary has passed the order of cancellation of settlement on the ground that the High Court in order dated 7.1.2004 passed in WP(C) No. 9778 of 2003 observed about subletting of the fishery, which in fact is not correct since there is no such observation in the said order. It has further been contended that the report of the Deputy Commissioner does not reflect any finding regarding subletting by the Respondent No. 1 society and the settlement in favour of the Respondent No. 1 cannot be cancelled on the basis of an alleged agreement allegedly entered into with one Pranjit Kumar Pathak. Further contention of Mr. Dey is that no agreement was ever executed by the Respondent No. 1 society in favour of Pranjit Kumar Pathak and in fact some signed papers were left in the hand of the father of said Pranjit Kumar Pathak, who is an employee of the High Court and which was converted to an agreement. Mr. Dey further contended that even for argument's sake, if such agreement was executed, the same cannot in any stretch of imagination be termed as lease agreement subletting the fishery in favour of said Pranjit Kumar Pathak. The further contention of Mr. Dey is that during the enquiry conducted by the officials of District Deputy Registrar of Cooperative Societies it was found that there was no subletting of the fishery by the Respondent No. 1 society which was duly reflected in his report dated 4.7.2003 (Annexure 16 to the writ petition). Hence, there was no violation of the condition of the lease.

7. The contention of Mr. Mahanta, learned Government Advocate is that the Government has rightly passed the order dated 11.06.2004 cancelling the settlement granted in favour of the Respondent No. 1 on the ground of subletting.

8. For better appreciation, Clauses (6) and (7) of the lease deed executed by the Respondent No. 1 on 19.03.2001 in terms of order of settlement dated 13.03.2001 is quoted below:

6. You shall have no power to sell your right of lease of this fishery or to sublet it to any one, or to admit any one as partner, without informing the Deputy Commissioner who may refuse his sanction thereto.

7. Should you or your partner, or any person holding from you infringe of the condition of this lease, the Deputy Commissioner may cancel your lease of his

own authority in which case all sums paid by you will be forfeited and you will further be held liable for any loss which may be incurred by Government in releasing the fishery by the Deputy Commissioner.

9. We have very carefully gone through the order dated 11.06.2004 cancelling the settlement earlier granted in favour of the Respondent No. 1 for a period of 5 years with effect from 13.03.2001 to 12.03.2005 as well as the records. It appears from the report of the Deputy Commissioner which was taken into consideration by the Government while passing the order of cancellation of the lease that there is no finding recorded by the Deputy Commissioner about subletting of the fishery by the Respondent No. 1 and what has been mentioned in the said report was about entering into an agreement for financial help and filing of the suit and injunction petition. It is also evident from the report dated 04.07.2003 submitted to the District Deputy Registrar of Cooperative Societies, Barpeta (Annexure - 16 to the writ petition) that the fishery in question has been in exclusive possession of the Respondent No. 1 society and the agreement of alleged subletting was false. The Deputy Secretary to the Government of Assam, Fishery Department has cancelled the settlement granted in favour of the Respondent No. 1 only by reciting that an agreement was entered into by the Respondent No. 1 society with one Pranjit Kumar Pathak without coming to any definite finding as to whether the said agreement constitute "subletting" within the meaning of Clause (6) of the terms of lease. There being no positive finding recorded by the Deputy Secretary relating to subletting in the impugned order, in our considered view the learned Single Judge has rightly held that the order of cancellation of settlement is illegal in view of non-recording of positive finding relating to subletting.

10. Since the Government has passed the order cancelling the settlement, without recording any positive finding as to the subletting, the normal course, is to remand the matter to the Government for a fresh decision. But we do not desire to send this matter back to Government for recording positive finding and fresh disposal, in view of the fact that the Respondent No. 1 has been subjected to a series of litigation and the period of settlement will be over by March, 2006. To put to an end to further litigation, we have decided to consider the point whether the agreement in question constitute subletting within the meaning of "Clause 6" quoted above. For better appreciation, the translated version of the agreement is quoted below:

(Translated copy)

AGREEMENT:

1st Party: Sri Pranjit Kumar Pathak Son of Prafulla Kumar Pathak Vill. Nagaon, P.O.-Nagaon Dist. Barpeta.

2nd Party:

Sri Mahishar Das, S/o Late Jayram Das, Secretary, Singara Beel Meen Samabai

Samitty Ltd. Vill. Nagaon, Dist. Barpeta.

This is a deed of agreement in respect of Management of Fishery Mahal. The 1st party rendered financial help in getting settling of the No. 1 Chawolkhowa Meen Mahal under Barpeta district in the name of 2nd party's society. Whereas the 2nd party was in need of help for management of the said fish Mahal, the 1st party conceded to help and the 2nd party agreed thereto in management, today both the execute this deed of agreement with the following conditions.

Dated 25.03.2001.

CONDITIONS

1. The 2nd party today fully concede to the management of the No. 1 Chowalkhowa Meen Mahal under Barpeta district to the 1st party, settled in the name of 2nd party's fishery society, as per the Resolution adopted in the meeting of its General Body. The fish Mahal settled with the 2nd party can be managed till 12.03.2006.
2. The 1st party will engage fisherman (Jalowa) etc as per their own choice for managing the said No. 1 Chawolkhowa Meen Mahal. The 1st party will keep the sale proceeds from of fish with themselves. The 1st party will have to pay the Government revenue from the proceeds of sale offish in the name of the society through president/ secretary of the society by challan/receipts.
3. In case of prosecuting/instituting any case for interference of any other person in the affairs of the Meen Mahal or in the necessity of seeking police help, the expenditure will be borne by the 1st party.
4. The Security money amounting to Rs. 15,757.00 has been deposited on 17.03.2001 in the name of the 2nd party. Apart from that, there was another expenditure of Rs. 58,000/-(Rupees fifty eight thousand) towards liquidation of the society from 1999-2000.
5. The accounts assistance (Sarkar) will get the monthly salary at the rate of Rs. 600/- (Six hundred) P.M. from the 1st party and he will get fooding and lodging from the camp cost.
6. The fishermen (Jalowa) engaged by the 2nd party will be able to fish in the said Meen Mahal abiding by the canon prevalent among the other Jalowas. The Jalowas will get the daily wage everyday.
7. In case of breach this agreement by one party, the other party at liberty to sue that party.
8. The above said No. 1 Chawolkhowa Meen Mahal has been settled with the 2nd party on consideration of Rs. 1,57,568.00 as yearly revenue. And we sign/ execute this agreement for management of this Meen Mahal today after having read and understood conditions, there is sound Mind and body. Fines 25.03.2001.

Sd/- Mahidhar Das, Secretary, Beel Min Samabai Samitee Ltd. Sri Pranjit

Pathak, Nagaon

Witnesses:

1. Sri Apurba Talukdar, Nagaon

2. Sri Pradyot Deb Adhikari, Nagaon

3. Matur Rahman, Chenga No. 1 Chawolkhowa River Fisher Sarukheti Mouza, coming from Easter boundary of Sarukheti Mouza to Jamrkuti of Danda Beel near Nagaon village. Area-100 Bigha

Written by Sri Dhiraj Pathak, Nagaon 25.3.

11. It appears from the said deed of agreement dated 25.03.2001, which is the basis for alleged subletting by the Respondent No. 1, that an agreement was arrived at between the Secretary of the Respondent No. 1 society and one Pranjit Kumar Pathak regarding management of the fishery in question by stipulating that said Pranjit Kumar Pathak will engage fishermen and keep the sale proceeds of the fish with themselves and also to pay the Government revenue from the sale proceeds. Except this document there is nothing on record to show subletting by the Respondent No. 1 society in favour of said Pranjit Kumar Pathak.

12. Section 105 of the Transfer of Property Act defines a lease, which is a transfer of right to enjoyment of property, made for a certain time in consideration of a price paid or promise. In the present case in hand there is no dispute regarding the lease of the fishery by the Government in favour of the Respondent No. 1, what is in dispute is the alleged subletting by Respondent No. 1 society to one Pranjit Kumar Pathak, which if proved will entail cancellation of the lease by virtue of Clauses (6) and (7) of the lease agreement.

13. What will constitute "subletting" for the purpose of fishery settlement has not been specified under the Assam Fishery Rules, 1953. Therefore, before holding that an action on the part of the Respondent No. 1 constitute "subletting", it is necessary to find out what is "subletting/sub-leasing." According to Black's Law Dictionary "sublease" means a lease by lessee to a third party, conveying some or all of the lease property for a shorter term than that of the lessee, who retain a conversion in the lease. The meaning of the lease according to Black's Law Dictionary is as under:

Lease-To grant the possession and use (land, building, rooms, movable property etc.) to another in return for rent or other consideration.

14. The Apex Court in Dipak Banerjee v. Lilabati Chakraborty, reported in (1987) 4 SCC 151, while dealing with a case relating to the rent control and eviction under West Bengal Tenancy Act, 1956 has held that to constitute "subletting" one must part with the possession of the lease property without retaining any control over it. The Apex Court in M/s. Delhi Stationers and Printers Vs. Rajendra Kumar, has also held that for the purpose of constituting "subletting" transfer of an exclusive right to enjoy the property in favour of the third party in lieu of

payment of some compensation or rent accompanied by parting of legal possession, is necessary. The Apex Court in the said case has held that mere occupation is not sufficient to infer either "sub-tenancy or parting with possession". Similar view has also been taken by the Apex Court in *United Bank of India Vs. Cooks and Kelvey Properties (P) Ltd.*, The Apex Court in the said case by taking into consideration the provision of Section 105 of the Transfer of Property Act has held that there must be transfer of a right to enjoy the property for consideration as envisaged u/s 105 of the Transfer of Property Act so as to constitute "subletting". Similar view has also been taken by the Apex Court in *Mahendra Saree Emporium Vs. G.V. Srinivasa Murthy*, wherein the Apex Court in paragraph 16 of the judgment has held that:

The term "sub-let" is not defined in the Act. New or Old. However, the definition of "lease" can be adopted *mutates mutandis* for defining "sub-lease". What is "lease" between the owner of the property and his tenant becomes a sublease when entered into between the tenant and tenant of the tenant, the latter being sub-tenant qua the owner-landlord. A lease of immovable property as defined in Section 105 of the Transfer of Property Act, 1882 is a transfer of a right to enjoy such property made for a certain time for consideration of a price paid or promised. A transfer of a right to enjoy such property to the exclusion of all others during the term of the lease is *sine qua non* of a lease. A sub-lease would imply parting with by the tenant of a right to enjoy such property in favour of his subtenant.

In *Shama Prashant Raje Vs. Ganpatrao and Others*, the Hon'ble Supreme Court has held that to prove "subletting" two ingredients, namely, parting with possession and some consideration therefore must be established.

15. Therefore, to constitute the sub-lease/subletting the lessee must convey the lease property to a third party accompanied by the delivery of possession i.e. parting with possession of the lease property and some consideration thereof.

16. A bare perusal of the agreement in question which has already been reproduced above shows that it is only an agreement to do something in respect of the fishery and there is no transfer of exclusive right to enjoy the fishery in question in favour of said Pranjit Kumar Pathak and possession of the fishery has not been parted with. The condition precedent to constitute "sublease/subletting" on the face of the agreement being absent, the same cannot be the basis for holding that the fishery was sublet to said Pranjit Kumar Pathak by the Respondent No. 1 so as to invite penal action stipulated in Clause (7) of the lease agreement. It is also apparent from the said agreement that at the most it is merely an agreement for management of the fishery without accompanying delivery of possession. In fact, the said Pranjit Kumar Pathak instituted a suit for specific performance of the contract arising out of the said agreement and when he failed to obtain an order of injunction upto the Hon'ble Supreme Court, the suit was withdrawn by him. After withdrawal of the suit, the Appellant of the present writ appeal had filed an application before the Government for

cancellation of the lease on the ground of subletting based on the said agreement. There is absolutely nothing on record except the said agreement, which according to the writ Appellant has constituted "subletting". The allegation of "subletting" having been brought by the writ Appellant, the burden lies on the Appellant society to prove "subletting" so as to invite penal action against the Respondent No. 1 who is enjoying the property lawfully in terms of the settlement order made in their favour for a period of 5 years from 2001 to 2006. The Appellant society, in view of the denial of subletting by the Respondent No. 1 society, ought to have taken steps to prove "subletting" and also by proving the transfer of right and enjoyment and possession of the fishery to the sub-lessee. In the absence of any such evidence it cannot be held that the fishery in question was sublet by the Respondent No. 1 so as to invite penal action under the lease deed.

17. Therefore, we are of the view that the agreement as quoted above, which is the only basis for the allegation of subletting does not constitute subletting within the meaning of "Clause 6" of the lease so as to invite penal action under "Clause 7" of the lease deed.

18. In view of the above, we do not consider it to be a fit case to interfere with the judgment passed by the learned Single Judge and hence the writ appeal filed by the Appellant merits dismissal, which we hereby do.

19. Considering the facts and circumstances of the case, we do not make any order as to costs.