
(1957) 08 CAL CK 0027
In the Calcutta High Court
Case No : Civil Revision No. 3143 of 1955

Ganesh Chandra Khan and Others	Vs	APPELLANT
State of West Bengal and Others		RESPONDENT

Date of Decision : 12-08-1957

Acts Referred:

Constitution of India, 1950 — Article 226
Transfer of Property Act, 1882 — Section 3
West Bengal Estates Acquisition Act, 1953 — Section 10, 4

Citation : AIR 1958 Cal 114 : 62 CWN 49

Hon'ble Judges : Sinha, J

Bench : Single Bench

Advocate : Atul Gupta, Sarat Chandra Janah, Chandra Narain Laik, A.K. Mukherjee and Murari Mohan Dutt, for the Appellant; J. Majumdar and Somendra Chandra Bose, for the Respondent

Judgement

Sinha, J.—The petitioners in this case were in possession of certain jalkars in touzi Nos. 199 and 486, respectively, of the Murshidabad Collectorate. They held under a document, a vernacular copy of which has been annexed to the affidavit of Bhupati Nath Bhattacharya affirmed on the 5th of July, 1957. This document is described as a "perpetual lease letting in darpatni 18 jalkar mehals on an yearly rental of Rs. 1,941/- for consideration of Rs. 1,941/-". The document is executed by one Jagabandhu Roy of Devanandpur Kanchantola in favour of one Faresh Nath Pandey. It recites that the said Jagabandhu Roy grants a darpatni of certain jalkars in touzi No. 199 in favour of the said Paresh Nath Pandey. It further recites that the grantor had a patni right in the said Jalkars and was granting the darpatni right therein to the grantee for the consideration mentioned in the document. The nature of the jaikars does not appear from the document excepting that the recitals indicate that there was some sort of connection with the river. This document is dated Jaistha 1272 B.S. corresponding to May, 1865. The petitioners claim to be the successors-in-interest of the original grantee. It is claimed that the said Jalkars consist of various watery tracts having different

local names which have no connection with, and which are totally dissociated from, any land or sub-soil of the tauzi or tauries or mouza or mouzas in which they may be located. The West Bengal Estates Acquisition Act, 1953 (West Bengal Act I of 1954) came into operation on the 12th of February, 1954. The notification No. 12540-L Ref dated the 16th August, 1954 made u/s 4 of the said Act declared that with effect from 1st Baisakh 1362 B.S. all estates and the rights of every intermediary in each such estate situated in the district of Murshidabad shall vest in the State free from all incumbrances. This notification was published in the Calcutta Gazette on the 11th November, 1954. Sometime to July, 1955 several orders were Issued by the Collector of Murshidabad u/s 10(2) of the said Act and Rule 7 (1) of the Rules framed thereunder, and served upon the petitioners, calling upon them to give up possession of the interests in their possession as specified in the schedules of the said orders, which included the Jalkars mentioned above. This Rule was Issued on or about the 20th of September, 1955 calling upon the opposite parties to show cause why a writ in the nature of mandamus should not issue commanding them to recall, withdraw or cancel the orders mentioned above and why a writ in the nature of certiorari should not issue quashing the same and/ or setting aside the said orders and why such further or other orders should not be made as to this Court may seem fit and proper.

2. Mr. Atul Gupta appearing on behalf of the petitioners raised the following points:

1. It was argued that the jalkars were river fisheries and that the petitioners were not intermediaries nor did they have any right which could be described as an estate or right in an estate of an intermediary. This was because the petitioners held a mere right of fishing in the Jalkars which was an incorporeal right having no connection with the soil. Thus, it did not come within the scope of the West Bengal Estates Acquisition Act.

2. Alternatively, it was argued that if it was not a river fishery then it was a tank fishery and as such the petitioners were entitled to regain the same u/s 6(e) of the said Act.

3. Although these two points were taken to start with, Mr. Gupta later on abandoned the second point. He formulated his argument thus: He relied on the affidavit-in-opposition filed in this case by one Kshitish Chandra Malakar dated the 28th November 1955 wherein he stated as follows :

"I state that none of the aforesaid Jalkars are Tank fisheries within the meaning of the Act. These Jalkars with some local names form part and parcel of the river Bhagirathi being channels and/or tributaries thereof and as such these cannot be claimed as Tank fisheries. In any event these were being held under subsisting leases as aforesaid, and as such these come within the mischief of the proviso to Sub-section 2 of Section 6 of the Act, and the petitioners cannot claim any relief as prayed for. I say all these Jalkars had vested in the State u/s 5(a)(ii)."

4. In this paragraph Mr. Malakar was really resisting the claim that the petitioners were entitled to retain the Jalkars as tank fisheries u/s 6(e) of the said Act. The objection taken was that the petitioners had leased out the Jalkars and on the date of vesting they were in the position of lessors and consequently were hit by the proviso to Section 6(2) which runs as follows :

"Provided that if any tank fishery or any land comprised in a tea-garden, orchard, mill, factory or workshop was held immediately before the date of vesting under a lease, such lease shall be deemed to have been given by the State Government on the same terms and conditions as immediately before such date."

5. This section and the proviso thereto have been construed by a Division Bench of this Court in *Reliance Development and Engineering Ltd. v. Corporation of Calcutta* 61 CWN 533 (A), It was held there that if immediately before the date of vesting under the West Bengal Estates Acquisition Act. somebody held the land on the basis of a lease under an intermediary, Section 6(1) of the Act would not be applicable even though the land comes under Clause (g) or (h) of Sub-section (1) of Section 6 of the Act. In such a case, the rights of the intermediary would be completely gone. Mr. Gupta argued that this decision is wrong, but of course this is binding upon me. However, in the course of dealing with the question of the leases Sri Malakar has put forward an admission that the Jalkars are part and parcel of the river Bhagirathi being channels and/or tributaries thereof. Mr. Gupta takes advantage of this admission and argues that in law an interest of fishing in a river fishery cannot be the subject matter of acquisition under the said Act. Mr. Gupta has pointed out that u/s 4 of the Act, upon the issue of a notification mentioned therein, the estates and the rights of the intermediaries in such estates vested in the State free from all incumbrances. The word "intermediary" is defined in S 2(i) as meaning a proprietor, tenure-holder, under-tenure-holder, or any other intermediary above a raiyat or a non-agricultural tenant. The word "estate" has not been denned in the Act but Section 2(p) lays down that expressions used in this Act and not otherwise defined have, in relation to the areas to which the Bengal Tenancy Act, 1885, applies, the same meaning as in that Act. The Jalkars here are certainly within that area and Mr. Gupta argues that the particular rights enjoyed by his client did not come within the definition of an "estate" as defined in the Bengal Tenancy Act.

6. Mr. Gupta has first of all referred me to the certified copies of the "A" register, which are annexures to the affidavit-in-reply. It appears in this case that the most important documents have been disclosed in the affidavit-in-reply. The "A" register, annexure "D", deals with touzi No. 199. Under the heading "Name of Mouza" there are some lands both cultivated and uncultivated, and there are several Jalkars. In fact, in touzi No. 199 there appears to be a number of Jalkars (about 15). These Jalkars are shown as mouzas and the character of the land is described as "Sayer". While the others are described merely as Jalkars, e.g., Pashkhali Jalkar, Mal Jalkar, Chandrama Dara Jalkar, the 15th Jalkar is described as a River Jalkar, There is one Mouza for example Dayarampur etc., which is not

described as jalkar but the nature of the land is described as "Sayer". From this Mr. Gupta argues that the Jalkars are mere rights to fish in the river and have no connection with the soil and as such they are not estates or rights therein which come within the mischief of the Act. He has cited a number of cases before me to show that in such cases there is no connection between a fishery and the subsoil, as I shall presently show, such a proceeding as this is entirely unsuitable for determination of the title of a party/specially when it depends on disputed questions of fact. I shall how-ever briefly mention the authorities cited. The first case cited is David v. Grish Chandra Guha, ILR Cal 183 (B). In this case, Field J relied on the earlier case of Radha Mohun Mundal v. Neel Madhub Mundul 24 Suth WB 100 (C), and held that a Jalkar was not an interest in land and was not a tenure, in the opinion of the learned Judge, in India a Jalkar did not necessarily imply any right in the soil and that a patni or Jalkar was not a tenure within the meaning of the Road Cess Act. The next case cited is Raja Shyam Chunder Mardraj and others Vs. The Secretary of State for India in Council (D). In this case the Government having acquired the foreshore of the sea under the Land Acquisition Act, leased the fishery rights therein to certain persons. Subsequently, proceedings were taken under the Land Acquisition Act to re-acquire the fishery rights. It was held that so far as the land was concerned, the Government had already acquired it and the attempt at acquiring the rights of fishery, which is an incorporeal right, was not permissible under the Land Acquisition Act. It was stated that under the Land Acquisition Act, land was defined as including benefits arising out of land, but land was not defined as meaning, benefits arising out of land. Therefore fishery rights are not land and it is only land, including the rights arising out of it, but not the rights detached from the land, that can be acquired under the Land Acquisition Act. The next case cited is Krishna Lal v. Salim Mahomed 19 CWN 514: (AIR 1916 Cal 82) (E). The learned Judges said as follows :

"It is contended on behalf of the Appellants that the lease in the present case not merely confers a right over a fishery within the meaning of Section 193 of the Bengal Tenancy Act, but also creates an interest in land and that as such does not come within the purview of the Bengal Tenancy Act. A jalkar does not necessarily imply any right to the soil (see David v. Grish Chandra Guha (B) (supra) and Radha Mohun Mundal v. Neel Madhub Mundul (C) (supra)) and we are of opinion that the lease in the present case does not confer any right to land, it merely gives a right to fish in a Jalkar belonging to the Plaintiffs' zamindary

Upon a consideration of all the terms of the lease, we are of opinion that the lease merely conferred a right of fishing and no right to land was conferred".

7. The next case cited is the Privy Council case of Srinath Roy v Dinabandhu Sen ILR Cal 489 : (AIR 1914 PC 48 (2)) (P). In this case the appellants claimed as proprietors of a "several jalkar" or fishery in certain tidal navigable waters in Eastern Bengal. It was held that it must now be taken as decided in Bengal that

the Government grantee of a jalkar right can follow the shifting river for the enjoyment of his exclusive fishery so long as the waters of the river system are within the upstream and downstream, limits of his grant, whether the Government owns the soil subjacent to such waters as being the long-established bed, or whether the soil is still in a riparian proprietor as being the site of the river's recent encroachment. Put briefly the position is as follows:

8. In a tidal navigable river, the bed is of course vested in the Government. In England, Government could not grant a monopoly of fishing to a private person; but in India it has been the immemorial custom to do so. If a right to fish is granted, that is, an incorporeal right; where the river changes its bed either directly or through a channel, the question *inter alia* arises as to whether the right to fish shifts to the new bed or the new channel, although it runs on land belonging to another proprietor. It has been held that it does. But further complicated questions may arise where a river has changed its bed or made a channel and then the bed of the channel again shifts, with the result that there is a land-locked Beel or tank which may either be wholly unconnected with the river and/or there may be connection with the river only in the wet season, or only in times of flood. It appears that in such cases the bed of the enclosed water and the fishing rights therein revert back to the owner of the Solum In *Nani Lal Mandal Vs. Priya Nath Roy and Another*, , by looking into the instruments of lease it was found that there was not only a right to fish but that the grantee might use the embankments for non-agricultural purposes, paying a consolidated rent for the whole thing. It was held that it would come u/s 193 of the Bengal Tenancy Act. In AIR 1946 92 (Privy Council) , the Judicial Committee was considering a jalkar called Ganga-path Islampur which incidentally is Situated near the Bhagirathi Gangapath Jalkar which is the subject-matter here. In this case the bed had shifted, but at the moment of consideration it had become land-locked, although water did pass to the jalkar by "overflow in the wet season, from the river. It was held that it was no longer a diversion but had become an independent fishery which could not in law be regarded as an adjunct or component part of the fishery in the river. In order that the fishing in any waters may be claimed as an adjunct of a river fishery, these waters must be in continuous connection with the river throughout the year, in the dry season as well as in the web season. Waters which cease to be continuously connected with a river, cease to be adjuncts of it and the fishing in such disconnected waters cease to be parts of the river fishery and pass to the owners of the solum.

9. Therefore the ultimate position is as follows:

(1) Where there is a tidal navigable river, then a mere right to fish in it is an incorporeal right unconnected with the soil. It is not "land" as defined in the Land Acquisition. Act. It may however be considered as a *profit a prendre*, a benefit arising out of land.

(2) Where the tidal navigable river changes its bed or runs into another channel, the right to fish travels with it, irrespective of the fact as to upon whose land the

river bed or the channel runs.

(3) But when there is no more any permanent connection with the river, and the fishery is transformed into an enclosed sheet of water, other considerations arise. In such a case, the fishery would no longer be a river fishery, but may be a tank fishery, notwithstanding the fact that there might be some kind of connection with the river in the wet season or in times of flood.

(4) Whether in any given case the right in a fishery is connected with the land is a question of fact and would inter alia depend upon the nature of the fishery, the construction of the lease, and the surrounding circumstances.

10. Let us apply these tests to the facts of the present case as disclosed in the pleadings. The first document which I have already refer-red to is the patta of May 1865. The grantor there describes himself as a patnidar and the grantee is described as a darpatnidar, which are expressions usually connected with rights in land. The nature of the interest of the grantor is not described in detail. The grantee is the predecessor-in-title of the petitioners, but the documents by which they hold have not been disclosed. Coming to the "A" register, it will be found that the jalkars are described as "mouzas" and also "Sayers". There is no reference in the Bengal Tenancy Act to the word "Sayer" and the learned Advocates on behalf of the parties do not agree to the incidences of it. Next we come to the stand taken by the parties themselves. Firstly, we come to annexure "B", the affidavit of Sri Malakar. This is a petition made by the present petitioners before the Additional Collector, Estates Acquisition, Nadia-Murshidabad, and is an objection to the order passed u/s 10(2) of the Estates Acquisition Act. I may incidentally mention that this objection is still pending and not decided. The petitioner inter alia states as follows :

"That the Jalkar in question is a Tank fishery and was in the khas possession of your humble petitioners on the last 31st day of Chaitra, 1361 B.S. and is still in khas possession of your humble petitioners".

11. I have already mentioned that in the affidavit-in-opposition of Malakar the Jalkars have been described as river fisheries. It is clear therefore that the facts are all disputed and that it is impossible to decide the title without the taking of evidence. Mr. Gupta however strongly argues that the matter ought to be disposed of on the admission of Malakar in the affidavit. He says that he abandons his case that it is tank fishery and holds the Respondents to their statement that it is a river fishery. On the other hand, Mr. Majumdar says that he abandons his case that it is river fishery and holds the petitioners to their petition before the Collector that it is a tank-fishery. He further says that if it is a tank fishery he has shown in his affidavit that on the day of vesting, the entire fishery was let out to third parties who have submitted claims as mentioned in the affidavits, and that under the proviso to Section 6(2) of the said Act the petitioners have no further rights. This again is a disputed question of fact. That the Jalkars were let out is not disputed, but there is a dispute as to the dates on

which the leases terminated, it being said that some were surrendered before the date of termination, which of course is not admitted. This point again involves disputed questions of fact. As far as I can see, on the face of it the jalkars were let out on the date of vesting but further evidence may have to be taken upon the question of surrender. I have already mentioned that an objection has been preferred to the Additional Collector, and the matter is pending before the Collector. Clearly I cannot take evidence or resolve the disputed questions of fact in this jurisdiction.

12. Mr. Majumdar however argues that even assuming that it is an incorporeal right, such right has vested in Government and that this must follow upon consideration of a Supreme Court decision to which I shall presently refer. The first point of Mr. Majumdar is that the jalkar may not be land, but it is Immovable property. He relies on the case of *Ram Gopal Bysack v. Nurumuddin*, ILB 20 Cal 446 (I). The learned Judge said as follows:

"The only question argued in this second appeal by the learned pleader for the appellant is that the Lower Appellate Court has erroneously held that the jalkar right in dispute between the parties in this suit was Immovable property within the meaning of Section 108 of the Transfer of Property Act.

We think that the decision is a correct one. We are of opinion that this jalkar right is Immovable property within the definition of Immovable property as set out in the General Clauses Act; that it is a benefit to arise out of land covered by water; and this conclusion we think is justified by the expression of opinion of at least three of the learned Judges who were parties to the Full Bench decision of *Fadu Jhala v. Gour Mohan Jhala* ILR Cal 544 (J)."

13. The next case cited is *Secy. of State Vs. Dist. Board of Tanjore*, , It was held that an exclusive right of fishery in a locality in the sense that even the lawful owner is excluded from its enjoyment is not a mere "profit a prendre" but is a heritable and transferable interest in Immovable property which can be acquired by 12 years" adverse possession as against the lawful owner. Reference was made to the case of *Henry Hill and Co v. Sheoraj Rai*, AIR 1923 Pat 58 (L).

13. The principles applicable to corporeal and incorporeal fisheries are complicated, and are thus summarised in Halsbury 3rd Edition, Vol 17, page 297, Article 505:

"The general principle is that fisheries are in their nature mere profits of the soil over which the water flows, and that the title to a fishery arises from the right to the soil. A fishery may be severed from the soil and it then becomes a profit a prendre in alieno solo and an incorporeal hereditament. The term corporeal fishery is, accordingly, used to describe a corporeal hereditament; that is, in tidal waters, a several fishery coupled with the soil thereunder, and, in non-tidal waters, the soil coupled with a right of fishing thereover. A corporeal fishery may be owned by one who owns no land adjacent thereto. The term incorporeal fishery is used to describe an incorporeal hereditament, that is, a mere right to

take fish or a specified class of fish in a defined stretch of water without interference with the soil. An incorporeal fishery cannot be exercised by means of engines fixed in the soil unless there is a specific provision in the grant, for the mere grant of such a fishery does not confer the right to occupy the soil, but the temporary driving in of stakes for holding a net in position may be regarded as ancillary to the grant."

14. Thus, the question whether it is a corporeal or an incorporeal right or whether it is a several fishery is a question of some complication which depends on questions of fact. As I have already pointed out, the parties are not ad idem on the questions of fact, sometimes calling it a tank-fishery and at other times a river-fishery, and in either case they are not disclosing all the facts to enable the Court to hold under what classification it should belong. It would appear that in the "A" register, most of the Jalkars are called "Sayers" which I take would mean large tracts of water which are enclosed by land. This must be so because it is in contradistinction to entries indicating that the jalkar is a river jalkar. The very fact that the petitioners themselves describe it as a tank fishery shows that it is not a bed of any river. Thus the admissions made in the pleadings which have been retracted at the hearing do not make the task of the Court any easier. However, assuming that the petitioners' rights are nothing but incorporeal rights, it appears that there is justification for the view that although they may be incorporeal rights, they are rights which may be called Immovable property. They may not be land, but they are benefits arising out of the land. So far as I am concerned, the matter is concluded by the decision of the Supreme Court in *Ananda Behera and Another Vs. The State of Orissa and Another*, . This was a dispute about fishery right in the Chilka lake which is situate in what was once the estate of the Raja of Parikud. This estate vested in the State of Orissa under the Orissa Estates Abolition Act 1931 (Orissa Act I of 1952) on 24th September 1953. The Act came into force on the 9th of February, 1952. The petitioners carried on the business of catching and selling fish, particularly from fisheries within the said lake. Before the vesting of the estate the petitioners had entered into a contract with the ex-proprietor and had obtained from the latter, on payment of heavy sums, licenses for catching and appropriating all the fish from fisheries situated in the Chilka lake. The State of Orissa refused to recognise these licenses and was about to re-auction the rights when the petitioners filed the petition u/s 32 before the Supreme Court. Bose J. stated as follows:

"The first question that we have to determine is whether the petitioners acquired any rights or interests in "property" by their several "purchases", as Arts. 19 (1) (f) and 31 (1) are dependent on that.

In their petition the petitioners claim that the transactions were sales of future goods, namely of the fish in these sections of the lake, and that as fish is moveable property Orissa Act, I of 1952, is not attracted as that Act is confined to immovable property

There can be no doubt that the lake is Immovable property and that it formed

part of the Raja's estate. as such it vested in the State of Orissa when the notification was issued under the Act and with it vested the right that all owners of land have to bar access to their land and the right to regulate, control and sell the fisheries on it.....

The facts disclosed in para 3 of the petition make it clear that what was sold was the right to catch and carry away fish in specific sections of the take over a specified future period. That amounts to a license to enter on the land coupled with a grant to catch and carry away the fish, that is to say, it is a "profit a prendre" see 11 Halsbury's laws of England (Hailsham Edition) pages 382 and 383.

In England this is regarded as an interest in land (11 Halsbury's Laws of England,, page 387) because it is a right to take some profit of the soil for the use of the owner of the right (page 382). In India it is regarded as a benefit that arises out of the land and as such is Immovable property.

Section 3(2G), General Clauses Act, defines "immovable property" as including benefits that arise out of the land. The Transfer of Property Act does not define the term except to say that Immovable property does not include standing timber, growing crops or grass.

As fish do not come under that category the definition in the General Clauses Act applies and as a "profit a prendre" is regarded as a benefit arising out of land it follows that it is immovable property within the meaning of the Transfer of Property Act

It was then argued that a contract is "property" within the meaning of Articles 19 (1) (f) and 31 (1). Again, we need not decide this because even if it be assumed that it is that kind of property the State of Orissa has not taken the petitioners' contract away from them or prevented them from ""acquiring, holding or disposing" of it.

They are free to sue on it or to assign it if they want. The State merely says, as any other person might say: "I was not a party to that contract. Neither its rights nor its liabilities have devolved on me and I refuse to recognise it or to assume the obligations of either contracting party."

If the State is wrong in its attitude that may give rise to a suit against it for damages for breach of contract or possibly, (though we do not say it would), to a right to sue for specific performance; but no questions under Arts. 19 (1) (f) and 31 (1) can arise because the State has not confiscated or acquired or taken possession of the contract as such."

15. The position therefore may be summed up as follows: The petitioners claim to be the darpatnidars in respect of certain jalkars. It is claimed on behalf of the petitioners that they have an incorporeal right of fishing unconnected with the soil. Although that case is made in the present petition, immediately prior thereto, they have made a claim before the State Authorities which claim is still

pending, on the ground that it is a tank fishery. In fact, in the return that was made, a copy whereof I have directed to be filed, it has certainly been treated as if it was an estate or a right in an estate. Before me, affidavits have been filed on behalf of the respondents stating that it was a river fishery and that it is part of a river bed. At the hearing, both parties have retracted from their respective positions, and would hold the other side to the admissions made. Considering the legal tests to be applied for a satisfactory solution of the problem, it is clear to me that the same cannot be done without further evidence and that the petitioners' title cannot be properly adjudicated without an investigation as to facts which cannot be conveniently done in this application. But assuming that we are to consider the rights of the petitioners as mere incorporeal rights of "fishing, still under the authority of the Supreme Court decision mentioned, above, it is a benefit arising out of land, that is to say, a "profit a prendre" and it vests in the State by virtue of the West Bengal Estates Acquisition Act. If there is any breach of contract, the petitioners may have a right to bring appropriate proceedings against the State in the form that they may be advised. That being so, it is clear that no relief can be granted in this application and the application must fail.

16. The Rule is accordingly discharged,

17. All interim orders are vacated.

18. There will be no order as to costs.

19. The operation of this order will remain. stayed for three weeks from date to enable the petitioners to prefer an appeal, as prayed for.