

(1990) 12 GAU CK 0001

In the Gauhati High Court

Case No : Civil Rules No's. 1974 of 1989 and 780 of 1990

Haren Hazarika

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 06-12-1990

Acts Referred:

Assam Fisheries Rules, 1953 — Rule 13
Assam Land and Revenue Regulation, 1886 — Section 155, 156
Civil Procedure Code, 1908 (CPC) — Section 115
Constitution of India, 1950 — Article 226

Citation : (1991) 2 GLR 384

Hon'ble Judges : A. Raghuvir, C.J.; B.P. Saraf, J

Bench : Division Bench

Advocate : A.M. Mazumdar, S.N. Bhuyan, S.A. Laskar and sic, for the Appellant; B.P. Bora, Government Advocate, A.K. Phukan, P.C. (sic) and D. Kataki, for the Respondent

Final Decision : Dismissed

Judgement

A. Raghuvir, C.J.—The above two writ petitions are filed by Haren Hazarika. The questions he raised in the two petitions relate to the settlement of a fishery called and known as No. 29, Doria Dubi Fishery, Majuli (No. 29 Fishery.) A Co-operative Society by the title Pokajora Min Silpa Samabay Samiti Ltd. incorporated under Act 1 of 1950, claims fishery rights in No. 29 fishery for the period April 1, 1989 to March 31, 1991. Haren Hazarika the Petitioner also claims No. 29 Fishery as to have been settled in his favour for the same period.

2. Before that issue is determined an incidental issue loomed large at the debate. The incidental issue related to the fact whether No. 29 Fishery was a reserved fishery under Rule 13 of the Assam Fishery Rules. These rules were promulgated under Sections 155 and 156 of the Assam Land & Revenue Regulations, 1886 read with Indian Fisheries Act, 1897. In the case of a reserved fishery no person in a district other than an incorporated society can obtain settlement. In the balance of 40% fisheries individuals other than Societies can seek settlements.

In the sweep of non-reserved fisheries an incorporated society also can seek settlement. The incidental issue is whether in the calendar year 1989 Fishery No. 29 was categorised as 60% reserved fishery. Haren Hazarika disputes the factum of reservation. In any event he asserts that On September 30, 1989 when the settlement was made in his favour Fishery No. 29 was not a reserved fishery. The society asserts on September 1, 1989 Fishery No. 29 was settled in its favour and the fishery in question was in the category of reserved fishery.

3. While hearing the first among the two writ petitions this Court with a view to resolve the conflict in the various orders of the Government remitted the subject matter for determination by the Government and further to decide whether the Government under the Fishery Rules was vested with the power of review their orders. The Government held No. 29 Doria Dubi Fishery, Majuli was a 60% reserved fishery and as to the powers of review the issue was held in the affirmative. Thereupon the second writ petition was filed to assail the order of the State Government on both the courts. The incidental issue as to reservation does not directly arise in the instant cases and we keep open the question in these proceedings.

4. The word review in administrative law denotes orders passed in varying circumstances. Review is used when an ex-parte order is set aside. Such an order is at times called review order. When a notice is not properly served and the resultant order is corrected later the corrected order is referred as "order in review" In proceedings governed by the CPC review is understood as in Order 47 of CPC In United Kingdom an order and passed without proper notice is referred as an order passed on merits are called regular orders. The words regular and irregular trigger off different connotations in India due to the provisions in the code of Civil Procedure. (See Section 115 Code of Civil Procedure). In *Issacs v. Robertson* (1984) All ER 140, the features of regular and irregular orders in United Kingdom was explained: " The contrasting legal concepts of voidness and voidability form part of the English law of contract. They are inapplicable to orders made by a court of unlimited jurisdiction in the course of contentious litigation such an order is either irregular or regular. If it is irregular it can be set aside by the court that made it on application to that court; if it is regular it can only be set aside by an appellate court on appeal if there is one to which an appeal lies."

5. In India, the words, regular, irregular are not used when orders are reviewed. The *Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal and Others*, Para 13 explained the position in India. When an order passed without proper notice is reviewed it is called a procedural review. An order passed in other circumstances the order is called a " review on merits." The Supreme Court explained that view point as under:

We are unable to appreciate the contention that merely because the ex-parte award was based on the settlement of the Appellant the order setting aside the ex-parte award, in fact, amounts to review. The decision in *Patel Narshi Thakershi*

and Others Vs. Shri Pradyumansinghji Arjunsinghji, is distinguishable. It is an authority for the Proposition that the power of review is not an inherent power, it must be conferred either specifically or by necessary implication. Sub-section (1) and (3) of Section 11 of the Act themselves make a distinction between procedure and powers of the Tribunal under the Act, while the procedure is left to be devised by the Tribunal to suit Carrying out its functions under the Act, the powers of Civil court conferred upon it are clearly defined. The question whether a party must be heard before it is proceeded against is one of procedure and not of power in the sense in which the words are used in Section 11. The answer to the question is therefore, to be found in Sub-section. (1) Of Section 11 and not in Sub-section (3) of Section 11. Furthermore, different considerations arise on review. The expression review is used in two distinct senses, namely, (1) a procedural review which is either inherent or implied in a court or Tribunal to set aside a palpably erroneous order passed under a mis-apprehension by it, and (2) a review on merits when the error sought to be corrected is one of law and is apparent on the face of the record. It is in the latter sense that the court in Nardhi Thakershi's case held that no review lies on merits unless a statute specifically provides for it, obviously when a review is sought due to a procedural defect, the inadvertent error committed by the Tribunal must be corrected ex debito justitiae to prevent the abuse of Its process, and such power inheres in every Court or Tribunal. (Para 13)

6. A review On merit does not lie in the nature of things. In a recent case one of us (Dr. Saraf, J.) explained in *Indra Mohan Chakravorty v. State of Assam* (1989) 2 GLR 281 that power of review unless is conferred by statute there is no inherent power to review merits. In *Dr (Smt.) Kuntesh Gupta Vs. Management of Hindu Kanya Mahavidyalaya, Sitapur (U.P.) and Others*, the Supreme Court observed: "It is now well established that a quasi-Judicial authority cannot review its own order unless the power of review is expressly conferred on it by the Statute under which it derives its jurisdiction. The Vice Chancellor in considering the question of approval of an order of dismissal of the Principal, acts as a quasi judicial authority. It is not disputed that the provisions of the U.P. State Universities Act, 1973 or of the Statutes of the University do not confer any power of review on the Vice Chancellor. In the circumstances, it must be held that the Vice Chancellor acted wholly without jurisdiction in reviewing her order dated January 24, 1987 by her order dated March 7, 1987. The said order of the Vice Chancellor dated March 7, 1987 was a nullity." (Para 11.) We understand and hold the impugned order is a procedural review order.

7. The principal issue among the two contenders is the right to No. 20 Fishery from April 1, 1989 to March 31, 1991. The society assert on September 1, 1989 settlement was made in its favour and their right were set at naught without notice by the Government on September 30, 1989. Haren Hazarika asserts the fishery No. 29 was settled in his favour by the Government on September 30, 1989 and was set at naught without notice to him by order on December 5, 1989. The two contenders press their case on the basis of the rule of audi

alteram partem, the order the Government passed on September 30, 1989 prevails which was another order passed by the Government in violation of the principle of audi alteram partem. The Supreme Court resolved such a conundrum in the case of Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others, in the following manner:

The result of the discussion may be stated thus: The Primary Health Centre was not permanently located at Dharmajigudem. The representatives of the said village did not comply with the necessary conditions for such location. The panchayat Samithi finally cancelled its earlier resolutions which they were entitled to do and passed a resolution for locating the primary Health Centre permanently at Lingapalem. Both the order of the Government, namely, the order dated March 7, 1962 and that dated April, 18, 1963 were not legally passed: the former, because it was made without giving notice to the Panchayat Samithi, and the latter, because the Government had no power u/s 72 of the Act to review an order made u/s 62 of the Act and also because it did not give notice to the representatives of Dharmajigudem village. In those circumstances, was it a case for the High Court to interfere in its discretion and quash the order of the Government dated April 18, 1963 ? If the High Court had quashed the said order, it would have restored an illegal order-it would have given the Health Centre to a village contrary to the valid resolution passed by the Panchayat Samithi. The High Court, therefore, in our view, rightly refused to exercise its extra ordinary discretionary power in the circumstances of the case.

8. The passage is self-explanatory. Following that case We "refuse" to exercise power under Article 226. For all the aforesaid reason the two writ petitions are dismissed. No Costs.