
(1955) 02 OHC CK 0003
In the Orissa High Court
Case No : O.J.C. No"s. 21 and 23 of 1954

Hari Jali and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 21-02-1955

Acts Referred:

Orissa Estates Abolition Act, 1951 — Section 18, 3(1), 5, 5(1)

Citation : AIR 1956 Ori 20 : (1955) 21 CLT 275

Hon'ble Judges : Panigrahi, C.J; Mohapatra, J

Bench : Division Bench

Advocate : H. Mohapatra and R.N. Mishra, for the Appellant; A.G., for the Respondent

Final Decision : Allowed

Judgement

Mohapatra, J.—These three petitions were heard together as involving similar questions of fact and identical questions of law and they will be disposed of by this judgment of ours.

2. The petitioners in the three petitions are fishermen by profession and carry on business of sale of fish particularly from the Chilka Lake. O. J. C, Nos. 21 and 22 are in respect of different portions of Chilka Lake with their local names within the zamindari of the ex-proprietor of Pari-Kud (O. P. No. 2) & O. J. C. No. 23 is in respect to the portion of Chilka Lake locally known as Kandakhai Jana within the zamindari of O. P. Nos. 2 and 3, that is, Mt. Hoorjahan Begum alias Mahani Bibi and Mt. Jebunissa Bibi.

These three petitions are under Article 226 of the Constitution questioning the legality of the notices served in the petitioners on 3-11-1953 u/s 5 (h), Orissa Estates Abolition Act, 1951 (Orissa Act 1 of 1952), hereinafter referred to as "the Act", calling upon the petitioners to give up possession of these Janas, that is, the areas of the Chilka Lake.

The petitioners' case is that they entered into contracts with the ex-proprietors

of the areas concerned to take all the fish from the portions of the Chilka Lake with their local names for a specified period. They had also paid heavy sums as considerations for the said contract. The State Government of Orissa (O. P. No. 1) published a Notification u/s 3 (1) of the Act on 23-9-1953 as a consequence of which the estates concerned vested in the State free from all encumbrances.

Thereafter on 3-11-1953, the Collector of Puri served notices on the petitioners u/s 5(h) of the Act calling upon them (the petitioners) to give up possession of the Janas from out of which they were catching and taking away fishes. The petitioners' representations before the Collector were not favourably considered and ultimately the Anchal Adhikari demanded a further payment of 20 per cent, of the money paid to the out-going proprietors for the purpose of allowing the petitioners to continue in possession of the fisheries for a period of two year's only. The petitioners therefore have come up with these petitions under Article 226.

3. At the outset it will be pertinent to quote the provisions of Section 5 (h) of the Act under which notices had been served on the petitioners who are challenging the legality of such notices. Section 5 (h) of the Act runs as follows:

"Where, by operation of this Act, the right to the possession of any estate or any part thereof vests in the State Government, the Collector may, by written order served in the prescribed manner, require any person in possession of such estate or any part thereof to give up possession of the same by a date specified in the order, and it shall be competent for the Collector to take, or cause to be taken such steps as, in the opinion of the Collector, may be necessary for securing compliance with the said orders or preventing any breach of the peace." The sole question is whether the State Government are entitled to take steps under the above provisions against the present petitioner when the estates concerned are vested in the State Government under the provisions of the Act. It is clear from the language of Clause (h) that

"the State Government through the Collector may require any person in possession of such estate or any portion thereof to give up possession of the same by a date specified in the order".

Can it be said, in view of the above facts of the cases, that the petitioners are in possession of such estate or any part thereof? From the facts stated by both parties, it is clear that the petitioners' rights are only contractual rights on the basis of which they have been permitted merely to catch and take away fish from out of the particular area of the Chilka Lake. It is clear that there has been no transference of the ownership of the fisheries. Neither can it be said that there has been a transfer of possession of any part of the fisheries. It is clear to us that the position of the petitioners cannot be anything else than that of mere licensees to catch and take away fishes from the particular areas of the Chilka Lake--permission having been given by the ex-proprietors on receipt of heavy sums as considerations for granting such Licenses.

It is stated before us that these contracts on the basis of which the petitioners are claiming their light to catch and take away fish are mere oral contracts in accordance with the prevailing practice of the areas concerned and we should see no reason why we should not accept the position. It can never therefore be said that the petitioners are persons in possession of any of the estates concerned or any part thereof. What is vested in the State is the estate free from all encumbrances.

If these cases are cases of mere licenses without creating any interest for the petitioners in the land or water, but by virtue of the contracts they are simply permitted to catch and take away fishes, such contractual rights of the petitioners do not vest in the State on account of the vesting of the concerned estates under the Notification u/s 3 (1) of the Act. The word "license" as defined in Section 52 Easements Act is:

"Where one person grants to another or to a definite number of other persons the right to do or continue to do, in or upon the Immovable property of the grantor, something which would, in the absence of such right, be unlawful and such right does not amount to an easement or an interest in the property, the right is called a license".

Here the petitioner on the basis of the contracts are not claiming any easement or interest in the property but are merely permitted to catch and take away fish for a particular period within the specified Janas.

4. We agree with the contention of the Advocate-General that if these contracts can be termed as encumbrances within the meaning of the Act the State Government have got the right to take the estates free from all encumbrances and as such the notices u/s 5 (h) are perfectly valid and legal notices. But we cannot accept the contention that these contractual rights are in the nature of encumbrances.

The word "encumbrances" has not been defined or explained in any of the provisions of the Act, Such licenses as above cannot be taken to be encumbrances as ordinarily understood. By reference to the provisions of Section 18 of the Act it is clarified that the Act contemplates cases of encumbrances in the case of mortgages and charges on the estate. Section 18 provides for the procedure in accordance with which the claims of the creditors, whose debts are secured by mortgage or a charge on the property vested in the State u/s 3, may be determined by Claims Officer. The section also provides for the determination of the claims to be made by maintenance-holders whose maintenances are a charge on the estate.

Mr. Advocate-General however strongly relies upon Explanation (i) in support of his argument that these are cases of leases as contemplated under Explanation (i) and they must be deemed to be debts secured by mortgages. Explanation (i) runs as follows:--

"For the purpose of this section, a usufructuary mortgage or a lease executed in lieu of advances made, or a dower debt of a widow in lieu of which she is in possession of an estate shall be deemed to be a debt secured by mortgage"" .

The Explanation speaks of leases which are only akin to usufructuary mortgages; & the essential requisite which is necessary for bringing the case within meaning of Explanation (i) is that there must be a relationship of creditor and debtor as between the contracting parties, that is it must, be a case of debt.

The present cases cannot be taken to be of leases executed in lieu of advances made. And it is clear there is no question of any debt in the present transactions. The substantial money paid by the petitioners is only consideration for licenses, granted in their favour permitting them to catch and take away fishes. There is no indication that they are advances by way of loans to be discharged only by the possession of the petitioners of the different areas, in question.

It is also clear to us that the petitioners cannot be taken to be "Intermediaries" as defined in the Act as they are neither proprietors, sub-proprietors, landlords, etc. as mentioned in the definitions; nor are they holders of any interest in land between the raiyat and the State.

5. A similar point arose in our Court in the case of -- "Muhammed Khan v. State ILR (1954) Cut 671(A). In that case also the petitioner under Article 226 of the Constitution questioned the legality of the notice u/s 5 (h) of the Act. The petitioner claimed right on the basis of a contract to collect and remove Kendu leaves from zamindari forest, reserved and unreserved, and from the waste, pasture and village forests of the zamindari for a period of 5 years from 1950 to 1955.

My Lord the Chief Justice in the judgment to which I was a party had elaborately discussed the meanings of the words "encumbrances", "licenses and the different provisions of the Act to determine what vests with the State Government and in what case they are entitled to serve notice u/s 5 (h) of the Act. We found that the contract on the basis of which the petitioner in that case was entitled to collect and take away Kendu leaves from the forest areas was a mere license in favour of the petitioner and was not affected by the Vesting order of the proprietarily interest over the estate.

In that case, we had respectfully relied upon a decision of the Supreme Court in the case -- Firm Chhotabhai Jethabai Patel and Co. and Others Vs. The State of Madhya Pradesh, , where the previous proprietors having granted the right to pluck, collect, and carry away Tendu leaves, to collect, culture and acquire lac and to cut and carry away teak, timber and trees, question arose that the Madhya Pradesh Government had no right under the Madhya Pradesh Abolition of Proprietary Rights (Estates,. Mahals, Alienated Lands) Act (1 of 1951) to interfere with the petitioners as they had no interest in the proprietarily rights nor were their contracts encumbrances within the meaning of the Act.

Their Lordships of the Supreme Court laid down that:

"the respondent-State cannot invoke in its aid Section 3, Sub-clause (1) of the Act which speaks of the vesting of proprietary rights free from of all encumbrances, because the rights of the petitioners either as buyers or lessees or licensees are not encumbrances as ordinarily understood. The last part of clause (a) of Section 4 (1) indicates that mortgage debts and charges on the proprietary right are meant by encumbrances".

This is exactly the position that arises on the interpretation of our Act also as we have indicated by reference, to Section 18 of our Act. Their Lordships of the Supreme Court had further observed:

"There is nothing in the Act to affect the validity of the several contracts and agreements. The petitioners are neither proprietors within the meaning of the Act nor persons having any interest in the proprietary right through the proprietors. There is no provision in the Act which extinguishes their right in favour of the State".

It was further held in that case that the contracts and agreements were in essence and effect licenses granted to the persons to cut, gather and carry away the produce in the shape of Tendu leaves or timber etc. In our view the principle laid down in that case is in no way different from the principle involved in the present cases.

6. Mr. Advocate-General however strongly argues that as is manifest from the petitions, the petitioners have the exclusive right of fishery over the particular areas which amounts to an interest in the Immovable property, and as such, the present contracts are leases to be termed as encumbrances within the meaning of the Act. He relies upon a decision of their Lordships of the Patna High Court in the case of -- "Henry Hill and Co., v. Sheoraj Rai" AIR 1923 Pat 58 (C). Their Lordships held:

"If the right claimed is a mere right to fish not excluding the lawful owner, it would appear to be an easement within the description of the word in the Limitation Act and can be acquired by 20 years" uninterrupted enjoyment. If it is an exclusive right of fishery it is an interest in Immovable property and can be acquired by 12 years adverse possession involving an ouster of the rightful owner."

There the main question involved was whether the plaintiffs had acquired any right of fishery by adverse possession. Their Lordships elucidated the principle in the way that if the plaintiffs claimed & enjoyed an exclusive right of fishery adverse to the lightful owner and involving an ouster, they could mature their rights by adverse possession for 12 years as such a right would amount to an interest in the Immovable property within meaning of Article 144 of Schedule 1, Limitation Act.

But if such a right was not enjoyed to the exclusion of the rightful owner

involving an ouster, then the plaintiffs could acquire an uneasementary right only by prescription on completion of 20 years uninterrupted enjoyment as required u/s 26, Limitation Act.

The position in the present cases is entirely different. The petitioners had never claimed any right adversely to the rightful owner and their claims never involve an ouster of the same. Neither do they claim any easementary right. The present cases being simply of mere licenses in favour of the petitioners permitting them to catch and take away fishes from particular areas for specified periods granted by the rightful owner on payment of substantial considerations are clearly out of the principles discussed and laid down by Dawson Miller C. J. of the Patna High Court in the above mentioned case.

7. Mr. Advocate-General lastly places reliance on the position that these are leases to catch and take away fish for a particular period and as such are to be deemed as encumbrances. We have made it clear by reference to the provisions of Section 18 of the Act that all leases are not to be deemed as encumbrances.

The Act contemplates such, leases to be encumbrances as are executed in lieu of advance made as contained in Explanation (i). The present cases, as we have held, "do not even suggest that the lessees were in the position of creditors and the leases were granted only for the purpose of paying up the debts advanced.

The only other provision regarding leases in the Act is contained in Section 5(i) that after the estate has vested if a lease of any land or mines or minerals comprised in such estate has been executed after 1-1-1946 with the object of defeating any provisions of this Act, the Collector will have the power to make enquiries in respect of such lease, and after giving reasonable notice to the parties concerned may set aside such lease on such terms as may appear to him to be fair and equitable. These are manifestly not leases for lands or mines or minerals as contemplated u/s 5(1).

8. In conclusion, therefore, the petitioners shall have a declaration that the notices served upon them by the Collector of Puri on 3-11-1953 u/s 5(h) of the Act are illegal and the rights acquired by the petitioners under the contracts entered into between the petitioners and the ex-proprietor of Parikud (O. P. No. 2 in O. J. Cs. 21 and 22 of 1954) and Mt. Noorjahan Begum alias Mahani Bibi and Mt. Jebunissa Bibi (O. P. Nos. 2 and 3 respectively in O. J. C. No. 23 of 1954) are unaffected by the provisions of the Act.

We would, therefore, direct that the opposite parties should not interfere with the rights of the petitioners during the unexpired portion of the period covered by their agreements. The petitioners are entitled to costs of the proceedings before us. Hearing fee is assessed at one hundred rupees (Rs. 100/-) in each of the petitions. The writ will contain the unexpired contracts as mentioned in the petitions with local names and the periods.

Panigrahi, C.J.

9. I was never in doubt as to what our decision in this case should be.

10. The State of Orissa claims that the right of fishing in the several fisheries known as Kurupal, Tarakashi, Gerasar-Pahanda, Chikhili and Gobori in the Chikla Lake has vested in the State u/s 5, Orissa Estates Abolition Act. The section declares that the entire estate of a proprietor, including tanks, water-channels, fisheries, forests, vest absolutely in the State free of all encumbrances.

As I pointed out during arguments, there is a distinction in legal parlance between a "fishery" and a "right to fish". The term "fishery" is used to describe a place or area where fish are caught, as well as the liberty to fish in another man's water or in one's own. The term is also applied to particular classes of fishing such as whale fishery and oyster fishery. Wharton describes a fishery as "the right to take fish".

The exclusive right of fishing in a public river is called "free fishery". The right of fishing in another man's water is known as "Common of fishery". The exclusive right of fishing in another man's water is called "several fishery". In respect of the disputed fisheries, known by different local names, undoubtedly the right to the soil under the water and the right to take fish found over that soil belonged to the proprietor and has now passed over to the State.

But the right to take the fish had been severed from the ownership of the land prior to vesting. Such right may be confined to a particular kind of fish or may extend to all kinds of floating fish.

11. In discussing fisheries and their attributes, Lord Haldane, in -- "Attorney-General for British Columbia v. Attorney-General for Canada" 1914 AC 153 :

"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 the fishery arises from the right, to the solum. A fishery may, of course, be severed from the solum and then it becomes a "profit a prendre in aliena solo", and is an incorporeal hereditament. "The severance may be effected by grant or prescription."

This broad principle is not restricted to inland, or non-tidal waters. Thus, the right to fish is a right which may exist either in connection, with or independent, of the ownership of the soil over which the water flows. When this right is connected with the ownership of the soil, it is a right of property, one of the profits of the land, and is called a territorial fishery".

When it is independent of the ownership of the soil, it is either a common right like the public right of fishery in the sea and tidal waters, or it is a profit over the soil of another founded upon a grant or prescription from the owner of the soil, or from the Crown as the owner of the bed or tidal water (Coulson and Forbes). The owner of the soil has the exclusive right of fishing and he may part with the soil reserving to himself the fishery. Conversely, he may part with the right to fish, reserving the right to the soil.

12. The petitioners claim the bare right to fish under a contract and not from ownership of the subjacent soil, or the water that stands upon it. It is a right detached from the right to the land of the water, and they are in the same position as agricultural tenants. They have paid for the fish for a period of years.

The Estate Abolition Act does not purport to affect moveable commodities. Reference may be made to similar provisions in the Land Acquisition Act. Section 16, Land Acquisition Act of 1894 says that when the Collector has made an award u/s 11, he may take possession of the land which may thereupon vest absolutely in the Crown," free from all encumbrances. It has been held that a several fishery in a navigable river cannot be regarded as an encumbrance on the land and is not destroyed on a compulsory acquisition of the subjacent soil by force of the provision of Section 16, Land Acquisition Act -- Brojendra Kishore Vs. Governor-General in Council, . See also -- "Shyam Chandra v. Secretary of State" 7 CLJ 445 (F), where it was held that a fishery right is not land, but is a right detached from land, and would not vest in the State under the Land Acquisition Act.

It has similarly been held in AIR 1923 Pat 58 (C) that a mere right to fish is an easement unless it amounts to an interest in Immovable property, to the exclusion of the owner of the soil. It is necessary to state here that the petitioners do not claim any exclusive right as against the owner of the soil, and their right to fish is co-existent with the proprietor's right to fish as well.

13. I have, therefore, arrived at the conclusion that the right to fish claimed by the petitioners does not vest in the State, u/s 5, Orissa Estates Abolition Act. I would accordingly agree with the order proposed by my learned brother.