

(1981) 03 CAL CK 0002
In the Calcutta High Court
Case No : Civ. Rule No. 320 (W) of 1976

Hazi Esanuddin

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 16-03-1981

Acts Referred:

Constitution of India, 1950 — Article 226
Evidence Act, 1872 — Section 91
Transfer of Property Act, 1882 — Section 111(I), 123, 26
West Bengal Estates Acquisition Act, 1953 — Section 44(2)(a), 44(2a), 47, 6(a)

Citation : 85 CWN 614

Hon'ble Judges : M.N. Roy, J

Bench : Single Bench

Advocate : Satindra Chandra Dasgupta, Harinarayan Mukherjee and Chunilal Goswami, for the Appellant; Ashok Kumar Sengupta and Jolly Seth, for the Respondent

Judgement

M.N. Roy, J.—In this Rule, which was obtained with the corresponding interim order for maintenance of status quo as on that date, was obtained on 6th January 1976, against orders of vesting in respect of lands, the particulars whereof are mentioned hereinafter. The petitioner is stated to be a cultivator and it is his case that at all material times, he, maintained and still he maintains himself and his family consisting of two wives and six daughters, out of the usufructs from the lands as involved in this case.

2. It has also been stated that lands in question, were and are in khas possession of the petitioner and they are below the ceiling limit, as prescribed under the West Bengal Estates Acquisition Act, 1953 (hereinafter referred to as the said Act).

3. The petitioner has stated that as far back as on 15th Baisakh 1354 B. S. corresponding to April 1947, a Deed of Settlement (Ekrarnama), was executed dividing a part of the lands belonging to the petitioner among his four sons who

are Respondent Nos. 6 to 9. The copy of the said Ekrarnama has been annexed as in Annexure-A to the petition. The petitioner has stated that on the basis of the said document in Annexure A, his sons, who as mentioned hereinbefore, are Respondent Nos. 6 to 9, got their names mutated in the Sherista of the then landlord viz Sahapur Estate and other on payment of selami and obtained kharija receipts. It has been stated that thereafter, those Respondent Nos. 6-9, entered into possession of the lands in question and as such, since 1947, they have been possessing those lands through cultivation and enjoyment on their own rights. It is also the case of the petitioner that those sons, at all material time were and still are separate in mess and boarding from the petitioner and he has no connection either with them or their holding. Apart from the lands as involved in the concerned Ekrarnama, the petitioner has stated that he had khas lands measuring 23.06, the particulars whereof are in Annexure-B to the petition. The lands which were involved in the concerned Ekrarnama, were 2.63 and 2.16 acres respectively and the necessary particulars of them are available in the Schedule 2 of the said Ekrarnama as in Annexure-A.

4. The petitioner has stated that lands in his khas possession, being below the ceiling there was no question of vesting of any part or portion thereof. So far as the lands involved in the Ekrarnama, the petitioner has stated that his name was initially recorded as the owner but thereafter, on objection being taken by Respondent Nos. 6-9, u/s 44 (2a) of the said Act, proceeding was started and order was passed on 13th July 1960, by the Revenue Officer concerned who duly corrected the Record of Rights in the Revisional Settlement Records, by entering the name of those Respondent Nos. 6-9 in column 13 with the remark "without Registered document". It is the case of the petitioner that after coming into operation and force of the said act the Respondent Nos. 6-9 became raiyati-sthitiban tenants in possession under the State of West Bengal, in respect of the lands falling in their shares and the State of West Bengal, in their turn, have accepted and are accepting rents from those Respondents.

5. It appears that a proceeding, being Case No. 263 of 1970, u/s 6 (a) read with section 47 of the said Act. was started against the petitioner and by an order dated 25th September 1970 the Assistant Settlement Officer, Respondent No. 3, declared the lands covered by the Ekrarnama as vested to the State. The petitioner has stated that Respondent Nos. 6-9 being aggrieved and seriously prejudiced and effected by such order, moved separate applications under Article 226 of the Constitution of India before this Court and obtained Civil Rule Nos. 129 (W) to 132 (W) of 1971, on the grounds amongst others that notices were not served on them, of the proceeding u/s 6 (a) and that on the basis of the concerned Ekrarnama and Kharija receipts, they were in enjoyment and possession of the lands in question, from long before the coming into force of the said Act. It was also contended that while making the impugned order u/s 6(a) as mentioned above, the Revenue officer concerned did not take into consideration the relevant documents. These Rules were made absolute on 25th July 1974 and the learned Judge, dealing with them, set aside the order, dated

25th September 1970 and directed the Revenue officer concerned to re-hearing the matter on proper notice to the Respondent Nos. 6-9 herein and after taking into consideration the factum, validity and or effect of the Ekrarnama and kharija receipts. The said order is in Annexure E to the petition.

6. It has been stated that after the matter was sent back on remand, the Revenue officer concerned, duly served notices on all parties including the petitioner. But even this time, the said officer, on pure misconception of fact and law, but his order dated 9th October 1975, again declared that the entire lands belonging to the petitioner as mentioned in the schedule which is in Annexure to the petition, as vested to the State. The copy of the relevant order is in Annexure-F to the petition and the particulars of the lands or those directed to be vested, would appear from Annexure G to the petition. The order as incorporated in Annexure F and G. have been claimed by the petitioner to have been passed by the officer concerned, in utter misconception of law and fact and it has been categorically stated that the officer concerned failed to consider and appreciate the effect of the Ekrarnama and the kharija receipts.

7. Although the affidavit-in-opposition in the instant case dated 6th September 1979, was filed through Shri Ashok Kumar Sengupta, but at the time of hearing he mentioned that he was no longer appearing in the case since he was not in the panel and as such Miss Seth on being instructed by the Respondents, concerned appeared, The affidavit-in-opposition as mentioned hereinbefore, was filed through Shri Nirmal Chandra Kundu, Special Revenue officer, Grade-II and Assistant Settlement Officer, being Respondent No. 4. This deponent has stated that the Ekrarnama in question, was not a legal and valid document of transfer of the lands in question in favour of Respondent Nos. 6-9 and the same was not registered. It has also been stated that in the Record of Rights, the name of those Respondents, were recorded along with the petitioner in column-13 of the concerned khatian and the name of those Respondent Nos. 6-9 were recorded in column-16 in the manner as mentioned hereinbefore viz. "without registered deed". The deponent has denied that those Respondents have received any interest in the land by such unregistered Ekrarnama, even on having their names mutated in the Sherista of the ex-landlord and on payment or (sic) and obtaining the kharija receipts, the deponent has further denied the possession of the Respondent Nos. 6-9 in respect of their respective holdings and has claimed that even if those Respondents were and are in possession, such possession would be that of licensees. He has further claimed that the lands mentioned in or covered by the Ekrarnama, were appropriately recorded as the lands of the petitioner and as such it has been claimed that the petitioner had lands above the ceiling. The deponent has further stated that as it was considered that Respondent Nos. 6-9 were mere licensees under the petitioner and they were having their alleged possession of the lands in question through permission only and the order u/s 44 (2a) in Case No. 18 of 1960 were duly, regularly and legally passed on 13th July 1960. The deponent has further denied that Respondent Nos. 6-9 became Raiyat in possession under the State of West Bengal.

8. It has further been stated that on consideration of the relevant records papers and evidence, it was found that lands in question were owned and possessed by the petitioner. It has further been stated that the order dt. 9th October 1975, was also duly passed after serving notices on Respondent Nos. 6-9 herein and that too, in terms of the observations of this Court in the concerned Rules, the particulars whereof have already been mentioned. In any event, it is denied that the impugned order dated 11th, December 1975, was passed by the order concerned without applying his (sic) and without taking into Consideration of the previous orders as passed u/s 44 (2a) or the (sic) Act. Insure, the deponent, has calmed that the (sic) order in Annexure-F and in this proceeding to have been passed and legally, bonafide, properly and in appropriate exercise ox powers of jurisdiction.

9. On the pleadings as above, the admitted facts in this case are, Hazi Esanuddin and two wives and by them six daughters and tour sons. The said four sons are Respondent Nos. 6-9 in this proceeding. The Ekrarnama in question, was executed in or about 1947 and thereafter, mutation was done and in 1954 and it was found that all properties were recorded in the name of Hazi Esanuddin. Thereafter, in or about 1960, proceeding u/s 44 (2) (a) of the said Act, was initiated at the instance of the sons, Respondent Nos. 6-9 herein, and on 13th July 1960, an order was made recording the names of the sons in Column-13 and thereafter, the State of West Bengal received rents from them. Then, on 26th September 1970, the Ekrarnama properties were sought to be vested in the State and on such, Civil Rule No. 129 to 132 (W) of 1971 were obtained, which Rules as mentioned above, were made absolute on 25th July 1974, with the necessary order or remand, the particulars whereof have been mentioned hereinbefore.

10. Mr. Das Gupta, appearing in support of the Rule, contended that after such remand order, notices were served not only on Hazi Esanuddin, but also on the four sons, who were petitioners in the Rules as mentioned above and Respondent Nos. 6-9 in this Rule. It was claimed by Mr. Dasgupta during the course or hearing on remana rent receipts were produced and in making the determinations this time the officer concerned tailed to take into consideration or the fact, in actually considering the effect of Kharija Dhakila Kharija means excluded or separated from the original and Kharija Dhakila is a rent receipt in respect of a separated portion of the tenancy. In view of the above definition of the terms, Mr. Das Gupta contended that since much prior to the coming into force of the said Act, the Kharija Dhakilas were obtained from the erstwhile land lords, that would mean that tenancies, which were so long possessed and enjoyed by Hazi Esanuddin under those landlords, were divided and the lands covered by those Kharija Dhakilas were taken out or curved out of the lands of Hazi Esanuddin and as such, and more particularly on receipt of the relevant rents from the Respondent sons they became Raiyats under the said Act and thus entitled to hold lands of their own, without taking into consideration the lands held by petitioners Hazi Esanuddin. In fact, it was contended by Mr. Das

Gupta that on receipt or execution of the said Kharija Dhakilas, there was a sub division of tenancy. In support of his submissions as mentioned above, Mr. Das Gupta, placed reliance on the Full Bench determinations in the case of Raja Peharimohan Mukherjee v. Gopal Paik, 2 C.W.N. 375 which incidentally was a determination u/s 88 of the Bengal Tenancy Act 1885 and has land down, that a receipt for rent, given by the landlord or his duly authorised agent in the form prescribed in the Bengal Tenancy Act, containing a reel that a (sic) is registered in the landlords Sherista, as the tenants of a portion of the original holding at that which is a portion of the original rent amounts to a consent in writing by the landlord to a division of the holding and a distribution of the rent payable in respect thereof within the meaning of section, 88 of the Bengal Tenancy Act. Reference was also made by Mr. Das Gupta to the case of Rajkumari Bhasnabi vs. Shayama Bibi 25 C.W.N CIXIII (Notes portion) that was the determination on the effect of unregistered lease and the reference to the said determination was made by Mr. Das Gupta, as he contended that, registered instrument in the instant case, was not necessary or required. Such argument was advanced or put-forward by Mr. Das Gupta, as it was contended by the answering Respondents that the Ekrarnama in question, in this case, was required to be registered and because of the paucity of such evidence, the same could not be looked into or given effect to and acted upon. As mentioned above it was not in dispute that the tenancies in favour of the Respondent sons were created in 1947. In the case as referred to hereinbefore, the determination was made on the basis, that in this country it is possible to establish a tenancy without the production of a lease, by proof of payment of rent by the tenant and acceptance of the same by the landlord. While on the question a reference to section 88 of the Bengal Tenancy Act which is to the following Effect :

A division of tenure or holding, or distribution of the rent payable in respect thereof, shall not be binding on the landlord unless it is made with his express consent in writing or with that of his agent duly authorized in that behalf.

Provided that, if there is proved to have been made in any landlord's rent-roll any entry showing that any tenure or holding has been divided or that the rent payable in respect thereof has been distributed such landlord may be presumed to have given his express consent in writing to such division or distribution.

Provided further that (1) no division of a tenure or holding or distribution or rent shall be valid unless made with the consent of all the co-sharer landlords and co-sharer tenants and. (2) also that when a landlord withholds his consent to division of tenancy or to the distribution or rent on the application of a tenant made on that behalf, or when a co-sharer tenant withholds his consent to such subdivision of tenancy or distribution of rent, or when a co-sharer tenant considers himself aggrieved by the landlord, the Civil Court may, on an application made on that behalf by the tenant within six months from the date of notice to the landlord hereinafter provided, by an order in writing direct such division of the tenancy or distribution or rent as it considers fair and equitable or

annul or modify the division or distribution made by the landlord, if considered unfair and inequitable.

Nothing herein contained shall be deemed to authorise a Court to make an order for sub-division of the tenancy or distribution of rent,

(i) if the division results in the creation of unreasonably small holding :

(ii) if the distribution of rent result in bringing the rent for any portion below Rs. 2-8 in case of holding an I Rs. 4 in case of tenures.

No Court shall make any such order without notice of the application made to it to all the landlords and tenants and no such application as is provided for in this proviso shall be made without a notice of the same sent to the landlord or other co-sharer tenants or both as the case may be by registered post.

Every order of the Court directing division of the tenancy or distribution of rent shall also direct payment by the applicant to the landlord of a mutation fee being equal to twice the amount of rent made payable by the tenant in case of tenures, and four times such rent in case of holdings,

The said section applies both to the tenures and holding. Generally speaking a division of the tenancy by partition or transfer, or a distribution of the liability for rent by some arrangement as between the tenants, or as between the tenants and their transferees, are not binding on the landlord, who is entitled to look upon the tenancy as one and undivided, to hold the entire land comprised in the tenancy liable for his rent, and each of the tenants and their transferees jointly and severally would be liable for the entire rent. The main object of the section is that the landlords security for rent may not be diminished. Under the section, the landlord may be bound to recognise the transferee or successor of a share of a tenure or holding as one of the tenants holding the tenancy jointly, but he is not bound to split up the tenancy and look upon the transferee or successor as a separate tenant of such share only. Thus, in terms of the determinations in the case of *Jogamaya v. Girindra*, 4 C.W.N. 590 and *Kishori v. Ananta*, 10 C.W.N. 270 the transferee of a part of a tenure is liable with his co-sharer for his whole rent. Mr. Das Gupta further claimed that in view of the Kharija receipts as mentioned above and specially in the facts of this case there was implied surrender in terms of section 111 (I) of the Transfer of Property Act, since by such surrender or by operation of law, (1) there was a creation of new relationship or (2) there was relinquishment of possession.

11. In view of the above, it was the specific submissions of Mr. Das Gupta that to treat the properties, which in fact belonged to the sons, Respondent Nos. 6-9, as the properties of Hazi Esanuddin viz. the petitioner, the authorities concerned acted illegally and with material irregularity, apart from being without jurisdiction or on due appreciation of law and fact.

12. Miss Seth, appearing for the answering Respondents, on reference to the determination dated 13th July 1960 in Case No. 18 u/s 44 (2) (a) of the said Act,

which was a proceeding initiated by a son of the petitioner, claimed and contended that the determinations as made therein not having been challenged or the position as disclosed therein having been accepted this Rule cannot succeed or allowed to be continued. Such determinations, admittedly show that the name of the son concerned, was directed to be recorded in column 13. She also contended that similar determinations were made in respect of the other sons. It was claimed by Miss Seth, that from the records as produced in this proceeding, it would appear that the admitted fact is that the parties are living jointly and such joint possession would also be established from a reference to the Ekrarnama in Annexure-A and since such promise in favour of Hazi Esanuddin was recorded therein, the said Ekrarnama was not valid in law. In fact, it was claimed that the Ekrarnama in question on the basis of the recitals, cannot be treated as a partition deed, it may not also be a Heba u/s 138 of the Mohanmedan law. It was also contended by her that the said deed was not a deed of transfer but an unilateral action by the petitioner. Hazi Esanuddin, to keep under his control, lands more than the ceiling and on the basis of the contents of the same, it should be held and in fact the incorporation was such that the sons were mere licensees. In fact she contended that such being the findings, arrived at on due consideration of the relevant facts and material, this Court cannot and must not interfere. She further contended that the Ekrarnama in question, not being a registered one, the same should not also be looked into or given effect to.

13. Miss Seth referred to the determinations in the case of Sri Maharani Beni Pershad Koeri v. Ramdhin Panda 10 C.W.N. 216. This was a case under section. 88 of the Bengal Tenancy Act as quoted hereinbefore and has laid down that receipts for rent granted separately by the landlord's Tahsilder to the tenant of a holding whose names were also entered in the landlord's sherista in the place of that of the tenant who hold the tenancy before them, does not amount to a consent in writing on the part of the landlord, to a sub-division of the tenancy within the meaning of section. 88 of the Bengal Tenancy Act. In fact, on a reference to this decision, Miss Seth appropriately contended that the determinations in the case of Raja-Peharimohan Mukherjee vs. Gopal Paik (Supra) have been distinguished. As such, she claimed that the said determination in Pearimohan Mukherjee's case would not hold good in the facts of this case. Thereafter, Miss Seth referred to the determinations in the case of Jananendra Mohan Chowdhury v. Gopal Das Chowdhury, 8 C.W.N. 923, wherein it has been observed that the consent in writing by the landlord, to the division of a tenure or holding, has the effect of the substituting a new contract for the old. It should therefore be complete in itself and embody distinctly the terms of the new contract, should it fail to do so no extraneous evidence, to prove the terms of the contract, would be admissible, having regard to the terms of section 91 of the Evidence Act and in this also, the determinations in the case of Pearimohan Mukherjee vs. Gopal Paik, were distinguished. In this case, upon a construction of dakhila, it was observed that it did not amount to a consent in writing by the

landlord to the division of the holding within the meaning of section 88 of the Bengal Tenancy Act. It has further been observed that the fact that some of the joint occupiers of a joint tenure, paying portions of the rent due from all, corresponding with the shares for which the joint occupiers are liable, cannot prevent the landlord from suing them all or making all answerable for the joint debt.

14. In support of her submissions that the transfer, as effected by the Ekrarnama in the instant case, should have been registered, Miss Seth referred to section 123 of the Transfer of Property Act, which lays down that for the purpose of making gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor and attested at least by two witnesses. The said section further lays down that for the purpose of making a gift of moveable property, the transfer may be effected either by registered instrument signed as aforesaid or by delivery, and such delivery may be made in the same way as goods sold may be delivered. That apart, Miss Seth relied on section 5A(2) (ii) of the Estates Acquisition Act, 1953. Section 5A create restriction on certain transfers and sub section (ii) of section 5A(2) , lays down that if any such land or any part thereof is retained by the transferor under the provisions of the chapter, such land or such part thereof, may be taken into account in calculating the land, which would be retained by the transfer under the chapter, as if such land or such part thereof, had never been transferred and were retained by the transferor or chosen by him as lands to be retained by him. In fact, it was specifically contended by Miss Seth that such and above being the position, under the provisions of Estates Acquisition Act 1953, the transfer in the instant case, was neither bonafide nor real but the properties sought to be transferred were left with the transferor viz. Hazi Esanuddin. Apart from the above, Miss Seth, made a reference to section 26 of the Transfer of Property Act, which lays down that where the terms of a transfer of property, imposed a condition to be fulfilled before a person can take an interest in the property, the condition shall be deemed to have been fulfilled, if it has been subsequently complied with and contended that in that view of the matter, on the basis of the terms of the Ekrarnama or in view of the contents of the same, the petitioner cannot claim any benefit as asked for. Miss Seth specifically contended that the transfer by the Ekrarnama in this case was not a partition and the said deed was not also a partition deed. She stated that since the deed in question, was not a deed of partition, then by virtue of the same the Respondent sons merely became licensees. Such arguments were put forward by Miss Seth, also on her constructions, reading and interpretation of the Ekrarnama.

15. In reply, Mr. Das Gupta claimed that the determinations in the case of Sri Maharani Beni Pershad Kouri v. Ramdhin Panda & Ors (Supra), where the case of Raja Pearimohan Mukherjee vs. Copal Paik (Supra), were distinguished, were on different context and more particularly when, in the facts of the case and on a reference to Kharija receipts and other receipts, it has been proved and established that the son Respondent Nos. 6 to 9, were holding the tenancies

separately. It was contended by Mr. Das Gupta that in this case, separate tenancies by acceptance of rent, were created.

16. The word "partition" as observed in the determinations in *Girija Nandan Singh and Others Vs. Girdhari Singh and Others*, involved two concepts (1) change of status and (2) division of property. Severance of status does not require to be proved by any documentary evidence at all, nor is it necessary that for the purpose of proving actual division of property between the members of a joint family, a written instrument is essential. Thus, where, there is evidence that there was an actual division of property between the parties and that they went into possession of their respective shares in accordance with that division, and there are also circumstances to show that the conduct of the parties are inconsistent with any thing except the factum of separation a Court of law may very well hold, apart from any instrument of partition, that the parties are separated in status and effected partition of the family properties. Partition also means a division of properties belonging to co-owners and allotment among them of parts, so as to put an end to community of ownership, between some or all of them. It would also mean transformation of co-ownership into separate ownership of each as to the portion allotted. Such partition may be effected by instruments like the present one viz the Ekrarnama, which has been said to have executed in 1947 and on a construction of the same or the terms thereof, I find that there was or has been no ambiguity and the intention of the donor to have the properties in the schedule to have partitioned. The Ekrarnama as involved in this case, was not admittedly registered. The question which would thus be required to be answered first is whether the same was required to be registered. In fact, as mentioned above, Miss Seth contended that reading the character of the Ekrarnama and the nature and terms of the same, registration was necessary. By the Ekrarnama admittedly, immovable properties were sought to be transferred and as such, in terms of section 123 of the Transfer of Property Act, the same was required to be registered apart from the other satisfactions or precautions as required by the section. The requirements of section 123, have not at all and admittedly been followed or complied with in this case. Thus the contentions of Miss Seth on the effect of admitted non-registration of the Ekrarnama, should succeed and as such, it must be held that by the deed in question, nothing passed on the Respondent Nos. 6-9 and it cannot but be held that the said Ekrarnama cannot be treated as an absolute transfer of the properties, as by the same, the donor also retained some interest. Thus it can also be observed that the officer concerned in holding that by the concerned document, Hazi Esanuddin really wanted to keep under his control, lands more than the ceiling, was not absolutely wrong or such finding was without any jurisdiction or substance. In fact, I hold that by the Ekrarnama there was no real and absolute transfer of the properties to the sons. It is also true that if the Ekrarnama was a duly registered one, then position would have been otherwise, as the same was executed in 1947 i.e. long prior to the coming into force of the said Act or even the same was not in contemplation.

17. In view of the above, now, we shall have to consider the effect of Kharija receipts. The relevant contentions have been recorded hereinbefore. While on this point, we have to keep in mind, the provisions of section 88 of the Bengal Tenancy Act, as quoted herein before. Kharija means, excluded or separated Kharija Dakhil which is also known as Dakhil Kharij means excluding and including and is applied to transfer of property, especially to lands transferred from one name to another in the collector's books, Khariji name is a deed of separation or division of a deed for the partition of a point estate, or for the separation of an individual share. The mutation of the names of Respondent Nos. 6-9, were made in the sherista of the then landlord viz Sahapur Esate and others, on payment of selami and kharija receipts were obtained, on the basis of the Ekrarnama. If the said Ekrarnama, was a property executed document and Kharija receipts, on mutation of names by Respondent Nos. 6-9, were obtained on the basis thereof, then the position would have been different. But as the Ekrarnama, on the basis where of the Kharija receipts were obtained was not a proper deed of transfer, the Kharija receipts as obtained on the has is thereof, were not appropriately looked into or considered. These apart, on the basis of the determinations in the case of Sri Maharani Beni Pershad Kouri vs. Ramdhin Panda & Ors (Supra) which has distinguished the determinations in the case of Raja Peari Mohan Mukherjee v. Gopal Paik (Supra), and on perusal of terms of section 88 of the Bengal Tenancy Act, it must be held that the Kharija receipts in this case and in view of the findings as above, cannot be treated as a consent on the part of the landlord, to a subdivision of the tenancy, within the meaning of the section. The above being the position, the arguments of Mr. Das Gupta fail, so also the Rule. The same is as such discharged. There will be no order as to costs.