

(1986) 06 CAL CK 0004
In the Calcutta High Court
Case No : Appellate Decree No. 548 of 1971

Hrishikesh Hati and Another

APPELLANT

Vs

Bibhuti Bhusan Mondal and Others

RESPONDENT

Date of Decision : 19-06-1986

Acts Referred:

Registration Act, 1908 — Section 49

Transfer of Property Act, 1882 — Section 107

West Bengal Estates Acquisition Act, 1953 — Section 6(1), 6(1)(a), 6(1)(e), 6(2)

Citation : 91 CWN 332

Hon'ble Judges : Sukumar Chakravarty, J; A.M. Bhattacharjee, J

Bench : Division Bench

Advocate : Bimal Banerjee and S.K. Kar, for the Appellant; S.P. Roy Chowdhury and Pradip Chakrabarti, for the Respondent

Final Decision : Dismissed

Judgement

A.M. Bhattacharjee, J.—Under clause (e) of Section 6(1) of the West Bengal Estates Acquisition Act, 1953, an intermediary is ordinarily entitled to retain possession of a tank fishery and if the intermediary does so, then u/s 6(2) of the Act, he shall, with effect from the date of vesting, be deemed to hold the tank fishery directly under the State as a tenant. The proviso to Section 6(2), however, provides that if any tank fishery 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, subject to such modification therein as the State Government may think fit to make. It is not disputed by the learned counsel for the appellants that if the defendant/respondent no. 1 was holding the tank fishery in question under a lease from the vendors of the plaintiffs- appellants immediately before the date of vesting, then the defendant/respondent no. 1 would now be deemed to have held the tank fishery under a lease given by the State Government and in that case the suit and the first appeal arising therefrom were rightly dismissed and the present second appeal would also deserve dismissal. Was the defendant/

respondent no. 1 a lessee in respect of the tank fishery in question, or, was he a mere holder of a right of pisciculture and of fishing in the tank? That is the question that arises for determination in this second appeal. The expression "tank fishery" has been defined in the Explanation to Section 6(1)(e) of the West Bengal Estates Acquisition Act as hereunder:

"Tank fishery" means a reservoir or place for the storage of water, whether formed naturally or by excavation or by construction of embankments which is being used for pisciculture or for fishing, together with the sub-soil and the banks of such reservoir or place, except such portion of the banks as are included in a homestead or in a garden or orchard and includes any right of pisciculture or fishing in such reservoir or place.

This definition would at once give rise to the impression that not only a reservoir or a place for the storage of water, which is being used for pisciculture or for fishing, together with its sub-soil and banks, is a tank fishery, but any right of pisciculture or of fishing in such reservoir or place, even apart from and independent of any right to the sub-soil or banks, is also a tank fishery. The first part of the definition, quoted above, having expressly defined "tank fishery" to mean a reservoir or a place for storage of water "which is being used for pisciculture or for fishing", the second part providing that "tank fishery" also "includes any right of pisciculture or fishing in such reservoir or place" would be entirely meaningless unless a bare right of pisciculture or fishing, without any right to the sub-soil or the banks of the reservoir or the place, is also taken to be "tank fishery" within the meaning of the definition. This was also the view of a Division Bench of this Court in *Saroj Kumar Bose Vs. Jatindra Nath Mondal and Others*, where it has been held (at 768) that "whether there is any right to the sub-soil or not, a right of pisciculture is also covered by the definition of "tank fishery" ". But this view must now be taken to have been overborne by the Supreme Court in *The State of West Bengal Vs. Shebait of Iswar Sri Saradia Thakurani and Others*, and by a Special Bench of this Court in *Ahindra Nath Mukhopadhyaya and Others Vs. Manmatha Nath Kurmi and Others*, following, as it must, the aforesaid Supreme Court decision in *Saradiya Thakurani* (supra). It has been held by the Supreme Court in *Saradiya Thakurani* (supra), and it has been faithfully reiterated by the Special bench in *Ahindra Nath* (supra), that a mere right to rear and catch fish in a tank can not be the subject matter of a lease within the meaning of the proviso to Section 6(2) of the West Bengal Estates Acquisition Act, 1953. Whether the Supreme Court and. the Special bench of this Court have gone that far as to rewrite the Explanation to Section 6(1)(a) of the Act and to hold that a right of pisciculture or fishing without any right to the sub-soil or the banks would not be a "tank fishery" within the meaning of the Explanation to Section 6(1)(e) even though, as already noted, the Explanation has expressly defined such bare right also as "tank fishery", is a different matter. But this must now be taken to have been settled that such a right, whether amounting to a "tank fishery" or not, would constitute a licence only and can not be the subject-matter of a lease. As has been reiterated by a

later Division Bench of this Court in Jnanendra Nath Bose and Others Vs. Sushil Kumar Safui and Another, , speaking through the same learned Judge who spoke for the Special Bench in Ahindra Nath (supra), a right of pisciculture or fishing can not be the subject-matter of a lease within the meaning of the proviso to Section 6(2). Be it noted that this Division Bench, however, has treated such a right to amount to "tank fishery" as would be apparent from the words used therein (supra, at 255) namely, "where under an intermediary, a person holds a tank fishery having only, the right to rear and catch fish, that is, the right of pisciculture or fishing". But it has nevertheless been ruled that such right, even if amounting to tank fishery, can not be the subject matter of a lease. Therefore, if defendant no. 1 had only such a bare right of pisciculture and fishing, he had only a licence, but no lease, in respect of any tank fishery and accordingly did not hold any tank fishery under a lease within the meaning of the proviso to Section 6(2) of the Estates Acquisition Act. The proviso in that case would not operate to make the defendant no. 1 to hold the tank fishery under a lease directly under the State, but under the provisions enacted in the body of Section 6(2), the predecessor- in-interest of the plaintiffs-appellants would have held the same as a tenant under the State from the date of vesting and could validly transfer the same to the plaintiffs-appellants.

2. As already noted, the only question for our determination is whether a bare right of pisciculture and fishing was created in favour of the defendant no. 1 or whether what was conveyed to him was a leasehold in respect of the tank fishery. Let us remind ourselves that the law as at present settled by the Supreme Court (supra) and The Special Bench of this Court (supra) is that if only a right of pisciculture or fishing is granted it would never amount to a lease and a lease of a tank fishery should comprehend the right to the sub-soil and the banks of the tank. To borrow from our vocabulary, it must not be Jalkar only, it must be Sthalkar too. The two rent receipts for the years 1361 and 1362 B.S. granted by the Court of Wards, being Ext. C and Ext. C(I), would show that what was tenanted to the defendant no. 1 was the plot of land wherein the tank fishery is situated, that is the tank with the soil and the banks. A Kabuliyat, (Ext. B), was also executed by the defendant no. 1 for the purpose and on a consideration of the terms of the Kabuliyat both the courts below have concluded that the same comprehended not merely a bare right of pisciculture or fishing, but a right to the tank itself including its soil and banks. It is true that Kabuliyat being a unilateral document can not effectively operate as a lease in view of Section 107 of the Transfer of Property Act, which requires a lease to be bilateral and to be executed both by the lessor and by the lessee and, as has been pointed out by the Special Bench in Ahindra Nath (supra, at 170) a unilateral document like a Kabuliyat is inoperative as a lease for a tank fishery if the lease is from year to year or for more than a year or reserving a yearly rent. But nothing would prevent us from looking at the Kabuliyat, even though void as a lease, to ascertain what was the subject-matter of the demise, its nature or extent, and whether what was sought to be conveyed was a bare right to rear and catch fish

in the tank or the tank itself with its sub-soil and banks. The Kabuliyat in out-view, would have been admissible for that purpose u/s 49 of the Registration Act, even if it was void for non-registration.

3. The kabuliyat unmistakably shows, that what was demised was the tank, i.e., the land and the water, the "Bhumi", "Bhumyadi", "Pukur", "Jami" and not merely the right to rear and catch fish in the watery portion of the tank. It is now settled law since the decision of the Supreme Court in Ram Kumar Das Vs. Jagadish Chandra Deb Dhabal Deb and Another, that a lease is also made by possession under a void indenture of lease by payment and acceptance of rent and such a lease is presumed to be a lease from month to month and reference, if need be, may be made, among others, to a Division Bench decision of this Court in Sm. Durgesh Nandini Devi Vs. Aolad Shaikh, . We have already noted that, the kabuliyat apart, the rent receipts granted to the defendant no.1 clearly show that the tank including its soil and banks was tenanted. The courts below have rightly held that even if the kabuliyat was not effective and operative as a lease, a lease from month to month was nevertheless created by payment and acceptance of rent. A lease does not necessarily mean or require an indenture of lease. We, therefore, agree with the concurrent finding of the courts below that the defendant No.1 held the tank fishery in question under a lease.

4. As noted at the outset, if there was a lease of the tank fishery in favour of the defendant no.1 immediately before the date of vesting within the meaning of the proviso to section 6(2) of the West Bengal Estate Acquisition Act, the suit and the first appeal therefrom were rightly dismissed and this second appeal also would merit dismissal. We accordingly dismiss the appeal, but make no order as to costs.

Sukumar Chakravarty, J.

I agree.