
(2008) 04 GAU CK 0052
In the Gauhati High Court

Madan Kalita

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 03-04-2008

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2009) 5 GLR 322 : (2008) 4 GLT 316

Hon'ble Judges : H.N. Sharma, J

Bench : Single Bench

Judgement

H.N. Sarma, J.—Heard Mr. B. Banerjee, learned Counsel for the petitioner and Mr. C. K. Sarma Baruah, learned Senior Counsel for the Respondent No. 4. Mrs. Phukan represents the State respondents.

2. Refusal to exercise jurisdiction by the Assam Board of Revenue to interfere with the judgment and order dated 21.10.1991 impugned in 28 RA(K)/92 has led the petitioner/tenant to approach this Court by filing this application under Article 226 of the Constitution of India, challenging the said decision.

3. The relevant factual matrix as emerged from the pleadings of the parties, as projected in this petition, are as follows:

The father of the petitioner late Bahiram Kalita was a tenant in respect of an area of land measuring 20 bighas, 3 kathas and 4 lee has of land covered by Dag No.286 situated at village Beltola, District - Kamrup, Assam.

4. While the Assam (Temporarily Settled Districts) Tenancy Act, 1935 was in operation, the father of the petitioner was issued a tenancy Khatian being a Khatian number 66 wherein his name was duly recorded as "occupancy tenant". After expiry of the father of the petitioner, when the Assam (Temporarily Settled Areas) Tenancy Act, 1971 came into operation repealing the Assam (Temporarily Settled Districts) Tenancy Act, 1935, record of rights of the tenants were prepared under Chapter-X of the 1971 Act and in the said process necessary draft Khatian was prepared in the name of the petitioner complying with the

relevant ailes which was finalised after expiry of the period so prescribed by the Rules. A final publication of the record of rights was also made in the year, 1982. After issuance of the final Khatian in the name of the petitioner as tenant, the Respondent No. 4 filed an application under Rule 37 of the Assam (Temporarily Settled Areas) Tenancy Rules, 1972 for correction of the mistakes in the record of rights allegedly occurred due to entering the name of the petitioner as tenant in respect of the land in question.

5. The prayer of the Respondent No. 4 having been registered, an appeal was filed by him before the Settlement Officer on 7.6.1983 which was registered as Appeal No.67/8283. The grievance of the respondent was that during the process of preparation of the record of rights of tenant, he was not notified about the same, although his name was very much recorded as landlord in respect of the said area of land, he having purchased it from the original landlord and also being armed with a power of attorney from the original landlord. According to him there is no relationship of landlord and tenant between him and the petitioner and as such a bonafide mistake has been crept into in preparing the tenant record of rights incorporating the name of the petitioner as tenant over the disputed land under him, which requires rectification.

Notice of the proceedings having been issued to the petitioner, he contested the claim of the respondents refuting the same and the Settlement Officer after going through the matter in pros and cons and upon hearing both sides, rejected the claim of the respondents vide an elaborate order passed on 24.2.1984. The Respondent No.4 appealed against the said order u/s 59 of the Act before the Director of Land Records, Assam. Vide order dated 30.8.1984 passed in Case No. 6/846 the DLR allowing the appeal remanded the matter back for fresh disposal by the Settlement Officer. The petitioner also participated in the aforesaid appeal before the DLR. After remand, the matter was taken up by the Settlement Officer; but in the meantime the settlement operation having come to an end the matter was taken over the Additional DC, Kamrup for necessary disposal. The Additional DC vide order dated 20.10.1991, by an order elaborate judgment, allowed the prayer of the respondent/landlord and annulled the Khatian No.66 issued in the name of the petitioner, holding that several bonafide mistakes occurred in preparing the same.

6. The aggrieved petitioner appealed against the said order before the Assam Board of Revenue by filing the Revenue Appeal No. 28 RA(K)/92 u/s 147 of the Assam Land and Revenue Regulation (for short the Regulation). The Assam Board of Revenue though initially admitted that the said appeal was to be heard by the Board, finally on 26.2.1998 having held that appeal is barred u/s 67(1) of the Assam Tenancy Act, 1971, dismissed the appeal as not maintainable. According to the learned Board the appeal pertains to preparation of records of rights under Chapter-X of the Act and hence the appeal is not maintainable.

7. Although the learned Board dismissed the appeal as not maintainable it also went on to make certain comments and observation on the merit of the rival

claim of the parties. The aggrieved petitioner has approached this Court challenging the aforesaid judgment and order by filing this writ petition. Although notice of motion in this petition was issued on 16.1.1998 no counter has been filed either by the State or by the private respondents.

8. During the pendency of the petition the original Respondent No. 4(b) having expired, the prayer of his legal representatives for impleadment as respondent No. 4 (1) was allowed vide order dated 19.11.2004 passed in M.C. No. 2638/2005, the newly impleaded respondents have also not filed any counter.

9. Mr. Banerjee learned Counsel for the petitioner submits that the learned Board has committed manifest error in law in refusing to exercise jurisdiction vested on it u/s 147 of the Regulation in not interfering with the order passed by the Additional D.C., Kamrup, against the appeal so filed before it, on merit, and thus committed an error apparent on the face of the record, Counsel further submits that the learned Board having held the appeal as not maintainable in view of bar u/s on the one hand committed further error in touching the merit of claim on the other hand which also amounts to improper exercise of jurisdiction.

Referring to the various provisions of Assam Tenancy Act, 1971, Mr. Banerjee submits that such an appeal would lie before the Assam Board of Revenue in the absence of any appellate forum after closure of the settlement operation as provided u/s 59 of the Act.

10. Per contra Mr. Sharma Baruah, learned Senior Counsel, supporting the order passed by the Board contends that the remedy, if any, is by way of filing an appeal before the Director of Land Records and not before the Assam Board of Revenue, the present proceedings being a special proceedings initiated under the Tenancy Act, 1971, the provision of Section 147 of the Regulation would not be applicable and the provisions of the Regulation would not come into operation to confer appellate jurisdiction to challenge the impugned order and accordingly the petitioner has got no legs to stand. Learned Counsel further submits that the order of the Additional Deputy Commissioner clearly demonstrates the fact that the petitioner's name has been wrongly entered as tenant over the disputed land in question although he has not attained such a status of tenant within the meaning of the Act and Rules framed thereunder.

11. I have considered the rival submissions made by the learned Counsel for the parties.

12. The petitioner claims his right as a tenant over the disputed land being the heir of the original tenant his father late Bahiram Kalita. Tenancy right under the relevant statute, is heritable and transferable, After repeal of the Assam Tenancy Act, 1935, the status of a tenant so acquired under the said Act was protected by the subsequent legislation of Assam Tenancy Act, 1971.

A tenant is conferred with specific rights/privileges/obligations over the tenanted area and the landlord under the Assam Land and Revenue Regulation. In order to

regulate the rights and liabilities of agriculture tenant and their landlords in certain land the Assam (Temporarily Settled District) Tenancy Act, 1935 was enacted under which certain important rights of such tenant vis-a-vis obligations in relation to their landlords had been crystallized. The subsequent legislation over the filed namely the Assam (Temporarily Settled Areas) Tenancy Act, 1971, which repeals the 1935 Act is a step further in recognizing such rights of tenant. In the 1971 Act specific provisions have been made regarding acquisition of occupancy/non-occupancy rights and incidence thereof, obligation to pay fair rent, right of transfer, protection from ejectment, acquisition of intermediary and ownership rights etc.

13. Chapter-X of the Act containing Section 55 to 62 deal with the preparation and maintenance of record of rights or tenants. Section 55 empowers the State Govt. to make order in case of local area, estates or part thereof directing preparation of record of rights for all or any class or classes of tenants by a settlement officer, where a settlement operation under Chapter-III of the Assam Land and Revenue Regulation 1986 is not being carried out, and this is to be done by issuing a notification in the official gazette, Section 56 provides the particulars to be recorded. The draft record of right is published by way of preliminary publication u/s 57 and thereafter final publication is made disposing the objection that might be raised against draft record of right and a certificate to that effect is prepared.

14. A set of rules known as Assam (Temporarily Settled Areas) Tenancy Rules, 1972 has also been framed in exercise of power u/s 75 of the Act providing inter alia the methodology for preparation of record of right of a tenant in a local area. Record of tenant's right has been ordered u/s 18 of the Regulation. The process of preparation of the record of right of tenants and adhiars passes through various process such as (a) Preliminary records, writing and survey, (b) Record attestation by settlement officer or Assistant Settlement Officer, (c) Preliminary publication of draft records and disposal of objection, (d) Preparation of final records, (e) Publication of final records and (f) Distribution of final records.

15. After causing necessary survey and demarcation of the boundaries of the holding of the tenants a draft of Chitha is prepared in the process, which is the field index wherein the names and residents of the tenant, the areas of the plot, the length of possession of the tenants thereon are to be incorporated. Thereafter a draft khatian is prepared from Chitha and the particulars included in the Chitha are ordinarily included in the draft Khatian. However in case the land is not used for the purpose connected with agriculture, the Khatian shall show the use to which the land is put.

16. Although there are specific provisions under the regulation that during the process of settlement operation names of the tenants and adhiars should be incorporated as such tenants and adhiars, the same was not found to provide effective protection to the interest of a tenant. Moreover, Land & Revenue Regulation does not contain any specific provision conferring extent of status or

privileges upon a tenant with the corresponding rights of the landlord under whom he possess the land and accordingly with a view to regulate the law relating to the rights and liabilities of agricultural tenants and their landlords, in certain classes of land in the State of Assam, not included in any permanently settled estate the Assam (Temporarily Settled Districts) Tenancy Act, 1935 was enacted with the previous sanction of the Governor General, u/s 80A(3) of the Government of India Act, 1935. The aforesaid Act for the first time made classification of the different tenants according to their period of tenancy, such as privileged raiyats, occupancy raiyats, non-occupancy raiyats, and under raiyats. The other enactments regulating the rights of agricultural tenant covering the permanently settled areas viz. Goalpara Tenancy Act, 1929 and the Shylet Tenancy Act, 1936 which were operated in permanently settled areas of the then Goalpara/Shylet district of which the present Karimganj district was apart. To cope with the present scenario of social revolution in terms of spirit of the Constitution of India and having noticed that the aforesaid Tenancy Act has not been effectively and properly dealt with in interest/status of a tenant the Assam Temporarily Settled Act, 1971 was enacted, repealing the-1935 Act. The preamble of the Act shows that the Act was enacted when it was found necessary and expedient to regulate rights and liabilities of agricultural tenants and their landlords in temporary settled area of Assam.

Section 4 of the Act recognizes occupancy and non-occupancy tenants and Section 4(2) provides inter alia that from the date of commencement of the Act, any person whose name is recorded in the record of right a privileged tenant under the provisions of the Assam (Temporarily Settled Districts) Tenancy Act, 1935, should be recorded as occupancy tenant providing that he shall continue to pay rent at the same rate as before the commencement of the Act. Under this provision the status of a privileged raiyat acquired under the old Act is recognized but abolishing the "under tenants".

Section 5 of the Act prescribes the procedure of acquisition of occupancy right by a tenant over any land, according to which a person who continuously holds land for a period not less than three years as a tenant, the tenant shall have occupancy of right over the land.

It is further provided therein u/s 5 that the period of three years may wholly or partly began before or after the commencement of the new Act. The incidence of occupancy right has been provided u/s 6 according to which occupancy tenants shall have heritable and transferable right of use and occupancy in the land of his holding subject to the other provisions of the Act.

Section 8 recognizes right of transfer of his holding by an occupancy tenant. The procedure for ejectment of tenant is provided u/s 54 of the Act.

Section 54(A) of the Act provides for restoration of possession of tenant under certain circumstances as mentioned therein, who is dispossessed from his holding illegally.

Chapter-X of the Act deals with the provisions, preparation and maintenance of record of right of a tenant even at a stage when the settlement operation under the Assam Land Revenue Regulation is not in progress. The State Government is empowered at any time to issue direction that the record of rights with or without survey for all or any class of tenant to be prepared by settlement operation by issuance of necessary notification in the official gazette with or without any survey of the land.

Section 56 provides the necessary particulars that are to be recorded while preparing the record of rights of a tenant. The detailed procedure for preparation of record of rights has been provided in Chapter-VII of the Rules framed under the Act. As per Rule 26, after publishing necessary order Section 55 of the Act the Deputy Commissioner or the Settlement Officer is to cause proclamation to be published about the order made u/s 55(1) of the Act through the local bodies of the area concerned calling upon the tenants and landlords to demarcate the boundaries on the ground of each holding within the specified time. Each landlord of the area for which order has been made u/s 55 of the Act is also liable to furnish the names and addresses of such tenant which might be under him with full particulars direct to the Settlement Officer.

The preparation of record of rights passes through various stages-

- (a) Preliminary record writing and survey where necessary;
- (b) Record attestation by settlement officer or assistant settlement officer including local explanation;
- (c) Preliminary publication of draft and disposal of objection;
- (d) Preparation of final record;
- (e) Publication of final record and
- (f) distribution of final record.

17. Any person aggrieved by the draft record may file objection under Rule 33 before the assistant settlement officer having jurisdiction over the area who is to dispose such objection after hearing such other persons who are materially interested in the case, against such an order disposing the objection an appeal lies under Rule 33(2) to the settlement officer, if preferred within two months from the date of the order and the appeal shall be disposed of after giving opportunity to the parties materially interested. Thereafter, the final record of rights shall be prepared and published under Rules 34 and 35.

However, u/s 59 of the Act an appeal lies to the Director of Land Records or any other officers authorized by the State Government in this behalf or any order passed by a settlement officer prior to the final publication of the record of rights on any objection made and the order of such appellate authority would be final subject to the revisional power as provided u/s 59(2) of the Act.

After final publication of the record of right in terms of Rules 34 and 35 read with Section 57 of the Act the settlement officer within a time to be specified by the State Government shall make a certificate stating the fact of such publication or in the absence of such certificate, a certificate signed by the Deputy Commissioner of the district stating that a record of right finally published on the specified date shall be conclusive proof of such publication and date thereof. The State Govt. may also by notification declare that a record of right has been finally published in respect of an area and state to which it relates and such notification shall be conclusive proof of such publication.

The record of rights prepared and published under Chapter-X of the Act or duly certified copy thereof, or extract there from carries a presumption that such record of rights has been finally published, unless contrary is proved.

18. Section 58(5) attaches presumption of correctness about the entry made in such finally published record of right which would be conclusive proof of the matter recorded therein until that is proved by evidence to be incorrect.

19. Section 67 of the Act makes a provision for a right to file an appeal before the Assam Board of Revenue from the original order of the Deputy Commissioner or the settlement officer or the Deputy Commissioner or the settlement officer from the order passed by any revenue officer subordinate to him even if they were exercising delegated powers of Deputy Commissioner or Settlement Officer when passing such an order.

The period of limitation for filing an appeal before the Revenue Board is sixty days and the Deputy Commissioner is thirty days. There is a restriction in filing an appeal u/s 67 to the effect that such an appeal could be filed except in connection with the preparation of the record of rights under Chapter-X and except where otherwise expressly provided for. After publication of the final records, within a period of two years from the date of certification of the final publication the Settlement Officer or when there is no settlement officer, the DC is conferred with a power for correction of bonafide mistake in record of right.

20. According to the scheme of the Act, the appeal as against the preparation of the record of right is to be filed only before the final publication of record of right, as provided in Section 59. After publication of the final record of right, there is no right of appeal against the objections that a party might have in connection with the preparation of record of right under Chapter-X as has been specifically provided u/s 67 of the Act.

21. After publication of the final records of rights and issuance of certificate to that effect the settlement operation would come to an end which started in terms of Notification issued u/s 55 of the Act.

22. As per Rule 23, the Deputy Commissioner of the District is conferred with the powers conferred by the Regulation upon a Settlement Officer and Survey Officer for the purpose of Chapter-X of the Act.

These are summarily the relevant procedures in vis-a-vis power that are provided by the Act and Rules in preparation and publication of a tenant's record of right.

23. In the instant case after remanding the appeal by the DLR, which was admittedly preferred u/s 59 of the Act, the settlement officer took over the matter as an appellate authority.

24. In the meantime, the tenancy settlement operation having been closed after final publication of the record of rights that matter was taken up by the Deputy Commissioner of the District (Revenue) subsequently the Additional Deputy Commissioner (J/C Revenue) vide impugned judgment and order dated 21.10,1991 heard the appeal and allowed the prayer of the respondent/landlord made under Rule 37 of the Act and cancelled the Khatian No. 66 issued in favour of the petitioner on the ground that the said Khatian was prepared through several mistakes which were inconsistent with the provisions of the Act and incorrect on records and without jurisdiction. The Additional Commissioner corrected the records in the above manner in purported exercise of the power conferred u/s 137 of the Rules. The said order was the subject matter appeal before Board of Revenue.

25. Although the learned Revenue Board narrated certain material facts on the merit of the appeal allegedly based on records ultimately the appeal was dismissed stating it to be barred u/s 67(1) of the Act.

26. A bare discussion and record of the case disclose that after remand of the case from the Director of Land Records, the matter was dealt with by the Additional D.C. The impugned order has not been passed by the Settlement Officer but by the Additional Deputy Commissioner, in the District I/C Revenue, apparently, in exercise of power under Rule 23 of the Rules.

Rule 23 itself provides that the Deputy Commissioner shall have the power conferred by the regulation on the Settlement Officer and Survey Officer for the purpose of Chapter-X of the Act. But u/s 59(1) an appeal before the DLR lies only prior to final publication of the record of rights on any objection made.

27. Under Section 67, the appeal lies against an order except those passed in connection with publications and preparations of records of rights under Chapter-X to the Assam Board of Revenue from the original order of the D.C. or Settlement Officer.

28. In the instant case the Deputy Commissioner in exercise of the power conferred under Rule 37 has allowed the prayer of the landlord and corrected the records by canceling the final Khatian so published. The purport of impugned order is that the petitioner has no status of a tenant over the disputed land in fact the very status of the petitioner, which was conferred upon him even under the 1935 Act has been cancelled.

29. Rule 23 provides specific power upon the D.C. to exercise the power of the

Settlement Officer as conferred by the Regulation. When the tenancy settlement is in operation after issuance of Notification u/s 55(1) of the Act it is the settlement officer who gets the necessary jurisdiction to prepare the tenant's record of rights. The D.C.'s role would come in to play only after closer of the settlement operation. Since the Deputy Commissioner is exercising the power conferred by the Regulation, such an order passed by the Deputy Commissioner would also be subject to the provisions of the appeal as provided u/s 147 of the Regulation.

There is no express restriction in exercise of the appellate power by the Revenue Board against an order passed by the D.C. exercising such jurisdiction u/s 147 of the Regulation. The Assam Board of Revenue while disposing the appeal did not consider this aspect of the matter.

30. Mr. Banerjee has strenuously urged that the Additional D.C. had no jurisdictional authority to cancel the said Khatian in the name of correction record of rights in purported exercise of power under Rule 37 of the Rules. In fact the learned Board also failed to address its mind about the extent of power that may be exercised under Rule 37 of the Rules and as to whether in correcting the alleged bonafide mistake, the entire stratum of the tenant which acquired by him even under the 1935 Act could have been taken away.

31. However, I am not inclined to deal with the said appeal in this petition and the learned Board dismissed the appeal only on the point of jurisdiction.

32. In view of the above discussions, I am of the view that the learned Assam Revenue Board committed an error apparent on the face of records in dismissing the appeal as not maintainable and in exercise of certiorari jurisdiction, the impugned order dated 21.10.1991 is set aside and quashed.

33. The matter is remanded back to the Board and the Board of Revenue is directed to dispose of the appeal on merit after hearing the parties providing opportunities to both the parties.

34. As agreed to by the learned Counsel both the parties shall appear before the Assam Board of Revenue for obtaining instructions from the Revenue of Board on 3.7.2008. Since the matter is a very old one, the learned Board shall dispose the appeal as expeditiously, as its business permit, preferably within three months from the date of appearance of the parties.

35. In the facts and circumstances of the case, the parties are directed to bear their own costs.