

(1952) 08 GAU CK 0007

In the Gauhati High Court

Case No : Original Miscellaneous Case No's. 64 to 68 of 1950 and Civil Rules No's. 104 and 105 of 1951

Mahindra Mohan Lahiri and Others

APPELLANT

Vs

The State of Assam

RESPONDENT

Date of Decision : 01-08-1952

Acts Referred:

Assam Management of Estates Act, 1949 — Section 3
Constitution of India, 1950 — Article 31(2)
Government of India Act, 1935 — Section 299(5)

Citation : AIR 1953 Guw 84

Hon'ble Judges : Thadani, C.J.;Deka, J

Bench : Division Bench

Advocate : S.K. Ghose and P. Chaudhuri, N.M. Dam and A.K. Ghose, in cases other than Nos. 64 and 65 of 1950, for the Appellant; S.M. Lahiri, A.G. and D.N. Medhi, G.A., for the Respondent

Final Decision : Dismissed

Judgement

Thadani, C.J.—We have before us five petitions under the provisions of Article 226, Constitution of India and two Rules taken out under the provisions of Article 228. The petitions under Article 226, Constitution of India, are entitled original Misc. cases NOS. 64 to 68 of 1950, and the petitions under Article 228 are registered as civil Rules NO SECTION 104 and 105 of 1951. In all the seven matters, a declaration is sought against the constitutional validity of the Assam Management of Estates Act, 1949 (Act 17 of 1949) which received the assent of the Governor-General on 25-10-1949. For the sake of brevity the Assam Management of Estates Act, 1949, will hereafter be referred to as the impugned Act, the Bihar State Management of Estates and Tenures Act, 1949 (Bihar Act 21 of 1949) as the Bihar Act, and Legislative items NOS. 9 and 21 in List 2 of Schedule 7 to the Government of India Act, 1935, as items 9 and 21 in the 1935 Act, and item 36 in List 2 of Schedule 7 to the Constitution of India, as item 36 in the Constitution of India. In some of the petitions under Article 226, Constitution

of India, the identity of the estates has been questioned. We do not propose to deal with the question of the identity of the estates as it should be properly raised in a suit. In none of the petitions under Article 228 has the identity of the estates been questioned.

2. Mr. Ghose who appears for all the petitioners contends (i) that the impugned Act was not within the legislative competence of the Assam Legislature; (2) that the impugned Act is void as it does not conform to the provisions of Section 299, Government of India Act, 1935; (3) that the impugned Act is void as it infringes the petitioners' fundamental right guaranteed by Article 19(1)(f), Constitution of India, in that the provisions of the impugned Act are not reasonable restrictions imposed in the interest of the public; (4) that the certificate granted by the President of India under Article 31(6) does not debar this Court from considering the question as to whether the acquisition, if there was an acquisition of the estates involved," was for a public purpose.

3. In support of his contentions, Mr. Ghose has relied upon the judgment of Shearer and Sinha JJ. in *Kameshwar Singh v. Province of Bihar* A. I. R. 1950 Pat. 392 (S. b.) and he has invited us to give effect to their judgment rather than the judgment of Das J., who, while agreeing with Shearer and Sinha JJ., in the result, quite clearly expressed himself against their view, namely, that the Bihar Legislature was incompetent to enact the Bihar Act. Shearer and Sinha JJ., had taken the view that, the Bihar Act did not fall under any of the items in the 1935 Act. Das J. on the other hand took the view that the Bihar Act fell within the purview of item 9 in the 1935 Act. He, however, agreed with his brother Judges in the view that the Bihar Act was void as it did not comply with the provisions of Section 299(2), Government of India Act, 1935.

4. In the matter of a challenge to the constitutional validity of a legislative enactment, it is necessary to bear in mind certain principles. As stated by Stone J. at p. 488, *Frank's Cases on Constitutional Law* (of the United States of America),

"The power of Courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that Courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the Government is subject to judicial restraint the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books, appeal lies not to the Courts but to the ballot and to the processes of democratic Government."

5. We think it is not unreasonable to say that the self-restraint referred to by Stone J. might legitimately favour of a knowledgeable bias in favour of the competence of a Legislature to enact a law until that bias is displaced by a more knowledgeable bias operating against the competence of the Legislature to enact

the law. Another guiding principle is to be found at p. 548 [and p. 553] of *American Federation of Labor v. American Sash and Door Co.* 1949 335 U. S. 538, stated in these terms :

"It would be arbitrary for this Court to deny the States the right to experiment with such laws, Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a Court debilitates popular democratic Government. Most laws dealing with economic and social problems are matters of trial and error. That which before trial appears to be demonstrably bad may belie prophecy in actual operation. It may not prove good, but it may prove innocuous. But even if a law is found wanting on trial, it is better that its defects should be demonstrated and removed than that the law should be aborted by judicial fiat. Such an assertion of judicial power deflects responsibility from those on whom in a democratic society it ultimately rests--the people."

This principle, we think, answers the criticism of Shearer J. in the *Bihar* ca99 when he characterised the Bihar Act as an hazardous experiment. The proper approach to the question involving challenge to the constitutional validity of an Act is laid down by Lord Selbourne in *The Queen v. Burah* 5 Ind. App. 178 in the following passage :

"The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can, of course, do nothing beyond the limits which circumscribe these powers But when acting within these limits, it is not in any sense an agent or delegate of the Imperial Parliament but has, and was intended to have, plenary powers of legislation as large, and of the same nature as those of Parliament itself. The established Courts of Justice, when a question arises whether the prescribed limits have been exceeded, must of necessity determine that question; and the only way in which they can properly do is by looking to the terms of the instrument by which, affirmatively the legislative powers were created, and by which, negatively, they are restricted. If what has been done is legislation, within the general scope of the affirmative words which give the power, and if it violates no express condition or restriction by which that power is limited (in which category would, of course, be included any Act of the Imperial Parliament at variance with it), it is not for any Court of Justice to inquire further, or to enlarge constructively those conditions and restrictions."

6. The source of provincial legislative power before the Constitution of India came into force was Sub-section (3) of Section 100, Government of India Act, 1935. In the provincial legislative List 2, item 9 in the 1935 Act is "Compulsory acquisition of land" and item 21 is

"Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans ; colonization; Courts of Wards! encumbered and attached estates; treasure trove."

The word "acquisition" is not defined in the Government of India Act of 1935, but

we think that Sub-section (3) of Section 299 of the 1935 Act is of assistance in arriving at the meaning of the word "acquisition" as used in item 9 in the 1935 Act. Sub-section (3) of Section 299 of the 1935 Act is in these terms :

"No Bill or amendment making provision for the transference to public ownership of any land or for the extinguishment or modification of rights therein, including rights of privileges in respect of land revenue shall be introduced or moved in the Dominion Legislature without the previous sanction of the Governor-General, or in a Chamber of a Provincial Legislature without the previous sanction of the Governor."

7. There is no doubt that the impugned Act makes provision for the transference to public ownership of certain estates and tenures for the purpose of management by the State Government. In doing so, the State Government manifestly has taken away the right of the petitioners to possess, enjoy and use their estates. It is contended by Mr. Ghose that notwithstanding the fact that sanction to introduce the bill was obtained as provided by Section 299(3) of the 1935 Act, there was no transference to public ownership of any of the estates in question. According to Mr. Ghose, all that was transferred to public ownership was the right of management which hitherto was exercised by the petitioners. We think the use of the word "right" in connection with management is somewhat inappropriate. Management is a power, and not a right. The right is the right to hold the land, a very substantial right indeed involving as it does the right to possess, use and enjoy, a right which is aptly regarded as nine points of the law. By the transference of the estates in question to public ownership, the right of the petitioners to possess, use and enjoy the estates has been taken away. The power of management of the estates by the State comes into being only after the State has assumed the estates, by depriving the owners of their right to possess, use and enjoy them.

8. The impugned Act not only refers to the efficient use of the land for agriculture and for improvement, conservation and efficient management of forests, fisheries, etc., in the Preamble, but incorporates the purpose and scope outlined in the preamble as substantive provisions in s. 3 of the impugned Act. Section 3 is in these terms :

"3. (1) Notwithstanding any law for the time being in force or the terms of any contract or grant, whenever it appears to the Provincial Government that, for the purpose of improving the economic and social conditions of the agriculturist and for ensuring full and efficient use of land for agriculture, or for improvement, conservation and efficient management of forests, fisheries, hats, bazars, and ferries, it is necessary to assume management of any estate or tenure of a proprietor, land-holder or tenure-holder, the Provincial Government may, by notification in the official Gazette, direct that the estate or tenure or the portion thereof specified in the notification be managed by the Court of Wards :

Provided that no such notification shall be issued in respect of any estate or

tenure the total area of which does not exceed 400 bighas.

2. A copy of the notification shall be served upon the proprietor, land-holder or tenure-holder in the manner prescribed.

3. A copy of the notification shall also be published at a convenient place in the locality where the estate or tenure is situated.

4. The publication of a notification under Sub-section (1) shall be conclusive evidence that the direction has been duly given and that the assumption of management has been validly taken."

9. From the notification published in accordance with the rules framed under the impugned Act, it is clear that the State Government, with effect from 16-6-1950, has taken possession of the estates in question. It is true that the notification does not use the words "take possession"; the words used in the notification are "it is necessary to assume management of the estate." We think, in substance they mean "it is necessary to take possession for the purpose of management by the State." Mr. Ghose, however, contended that taking possession of a right or rights less than the totality of the rights in or over property is "requisition", and not "acquisition," and as Item 9 in the 1935 Acts refers only to acquisition, the Assam Legislature was incompetent to enact the impugned Acts. Mr. Ghose has referred us to the corresponding Item 36 in List 2 of Schedule 7 to the Constitution of India, and argued that the Constitution of India makes a distinction between acquisition and requisition, and that the absence of the word "requisition" in Item 9 in the 1935 Act tends to show that requisitioning of property is not a matter within the competence of the Assam Legislature. Mr. Ghose has relied upon the observations of Mukherjee J. in *Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others*, where it is stated ;

"It cannot be disputed that acquisition means and implies the acquiring of the entire title of the expropriated owner whatever the nature or extent of that title might be."

There is no doubt that that is the meaning of the word "acquisition" in Item 36 in the Constitution of India. It does not follow that the word "acquisition" used in Item 9 in the 1935 Act has that meaning only. Under the 1935 Act, the word "acquisition" contemplates not only the acquiring of the entire title of the expropriated owner but also taking possession of a right or rights less than the totality of the rights constituting property. That appears to us to be clear from the language of Sub-section (5) of Section 299 of the 1935 Act which says :

5. In this section "land" includes immovable property of every kind and any rights in or over such property, and "undertaking" includes part of an undertaking."

10. In Article 31, Constitution of India, no express provision similar to Sub-section (5) of Section 299 of the 1935 Act is made for the short reason that Article 31(2) has been so worded as to include the substance of Sub-section (5)

of Section 299 of the 1935 Act. Under the 1935 Act, taking possession of a right or interest in or over immovable property was regarded as acquisition, if the possession was transferred to public ownership. It is, therefore, not correct to say, as Mr. Ghose has contended, that under the 1935 Act, taking possession of a person's right or rights in or over property less than the entire bundle of rights did not constitute "acquisition" within the meaning of the word in Item 9. Indeed in substance there is no difference between the provisions of Section 299 of the 1935 Act and the provisions of Article 31, Constitution of India. Under the 1935 Act taking possession of a right in or over property as well as acquiring of the whole title to the property was regarded as "acquisition", whereas under the Constitution of India, taking possession of a right or rights short of the entire title to property is regarded as "requisition". Hence the necessity for the addition of the word "requisition" in Item 36 in the Constitution of India. Our view, namely, that the word "acquisition" in Item 9 in the 1935 Act includes "requisition" as described in the Constitution of India, derives support, for instance, from Section 35, Land Acquisition Act, an Act which does not use the word "requisition" in any of its provisions. Section 35 of that Act empowers the Provincial Government to occupy and use land provided compensation is paid for such use and occupation. We have no doubt, therefore, that the competence of the Provincial Legislature to enact a law empowering it to occupy and use land was an act of acquisition within the meaning of Item 9 in the 1935 Act. This view is in conformity with what is described as the State's power of eminent domain. It is settled law that the State's power of eminent domain not only extends to acquiring the entire title to the property but also to taking possession of a right or rights in or over property short of the entire title to the property. The transfer to public ownership, whether of a right in or over property or the whole bundle of rights constituting property, is, however, subject to the requirement that it must be for a public purpose, and that provision is made by the Legislature in the Act for compensation. In "Minister of State for the Army v. Dalziel" *Sawer's Australian Constitutional Cases*, 499, Rich J. observed :

"The meaning of property in such a connection must be determined upon general principles of jurisprudence, not by the artificial refinements of any particular legal system or by reference to *Shep and Touchstone*. The language used is perfectly general. It says the acquisition of property. It is not restricted to acquisition by particular methods or of particular types of interests, or to particular types of property. It extends to any acquisition of any interest in any property. It authorizes such acquisition, but it expressly imposes two conditions on every such acquisition. It must be upon just terms and it must be for a purpose in respect of which the Parliament has power to make laws."

In another case referred to in *Burdick's "Law of the American Constitution"* at page 420, it is stated ;

"Since it is the right in chattels and land which constitutes property rather than the objects themselves, the infringement of property rights constitutes a taking

which must be justified as having been done with due process."

Elsewhere in the same volume at page 552, reference is made to the flooding of the land of others for the creation of water power for mills. The reference is instructive as it tends to show that taking possession of a right by the State in the exercise of its power of eminent domain is acquisition. It is also instructive from the point of view of the requirement of public purpose--an aspect which we will presently consider.

11. So far then as the legislative competence of the State of Assam to enact the impugned Act is concerned, we are clearly of the view that the impugned Act falls fairly and squarely within the purview of Item 9 of List 2 of Schedule 7 to the Government of India Act, 1935. It was urged by the learned Advocate-General for the State that the impugned Act is also covered by Item 21 in the 1935 Act. It is true that both Items 9 and 21 in the 1935 Act deal with land, but we think the distinction between Item 9 and Item 21 in the 1935 Act is clear enough. All legislation in regard to land is undoubtedly covered by Item 21 in the 1935 Act, but when a legislation enables a State to acquire the entire title to the land or a right in or over the land, it is "acquisition" and is covered by Item 9. This distinction has been pointed out by Das J. in *The State of Bihar Vs. Sir Kameshwar Singh*, in these words:

"There is no doubt that "land" in Entry 18 in List 2 has been construed in a very wide way, but if "land" or "land tenure" in that entry is held to cover acquisition of land also, then Entry 36 in List 2 will have to be held as wholly redundant, so far as acquisition of land is concerned, a conclusion to which I am not prepared to assent. In my opinion, to give a meaning and content to each of the two legislative heads under Entry 18 and Entry 36 in List 2 the former should be read as a legislative category or head comprising land and land tenure and all matters connected therewith other than acquisition of land which should be read as covered by Entry 36 in List 2. Further, the impugned Act purports to acquire all arrears of rent and a law for acquisition of the arrears of rent cannot possibly be said to be a law with respect to matters specified in Entry 18 in List 2 for it cannot be supposed to be a law relating to the collection of rent within the meaning of that entry, On this point, I find myself in agreement with Reuben and S.K. Das JJ., and I cannot accept the arguments of the learned Attorney-General to the contrary. Therefore, the arguments of Mr. P. R. Das founded on Entry 36 in List 2 and Entry 42 in List 3 cannot be rejected "in limine" but have to be considered and I proceed to do so immediately."

12. Mr. Ghose was somewhat inconsistent when he urged in one breath that the impugned Act had taken away everything but the husk of property rights and in another that the State had merely assumed the management of the property on behalf of the estate-owners, and in this connection he brought to our notice the provision in the impugned Act which requires the surplus to be made over to the estate-owners. On the strength of this provision, Mr. Ghose contended that no right in the property had been taken possession of by the State. We are unable

to accept this contention. By the notification issued in accordance with the rules framed under the impugned Act, the State has ordered the possession of the estates to be taken over. The making over of the surplus to the owners only indicates that the State has no intention of making profit out of the public use of the properties the management of which it has assumed, in taking up this dual position, Mr. Ghose had a purpose to serve, the purpose being that if the impugned Act is regarded as falling within the purview of item 21 in the 1935 Act, the question of restrictions in the impugned Act being reasonable and in the interests of the public, would have to be considered, and he seemed sure in view of what the Special Bench in the Bihar case had said bearing upon the Bihar Act, that we too would regard the restrictions in the impugned Act as unreasonable.

13. The answer to Mr. "Ghose's" contention based upon Article 19(1)(f) read with Clause (5) of Article 19 is this. When an Act of the State Legislature is covered by item 9 in the 1935 Act, it is an Act passed by the State in the exercise of its power of eminent domain, and is, therefore, not subject to the provisions of Article 19(1)(f), Constitution of India, in precisely the same way as when an Act passed by the State Legislature in the exercise of its police power depriving a person of his property by reason of his personal incapacity or disability or in the interests of public order, is not subject to the provisions of Article 19(1)(f). This aspect of the case has been considered by their Lordships of the Supreme Court in two cases involving interpretation of Article 21, Constitution of India. Article 21 is in these terms :

"21. No person shall be deprived of his life or personal liberty except according to procedure established by law."

Article 31 (1), Constitution of India says :

"31. (1) No person shall be deprived of his property save by authority of law".

Referring to Article 21 and its effect on Article 19, Kama C. J., observed :

"Deprivation (total loss) of personal liberty, which is sought to be protected by the expression "personal liberty" in Article 21, is quite different from restriction (which is only a partial control) of the right to move freely (which is relatively a minor right of a citizen) as safeguarded by Article 19. Deprivation of personal liberty has not the same meaning as restriction of free movement in the territory of India. Therefore, Article 19(5) cannot apply to* a substantive law depriving a citizen of personal liberty. The contention that the word "deprivation" includes within its scope "restriction" when interpreting Article 21, is not acceptable."

These observations apply with equal force to the interpretation of Article 31. Where, therefore, a person is deprived of his property by authority of law, the question of the infringement of fundamental right of property guaranteed by Article 19(1)(f) does not arise and equally, the question of restrictions upon that right does not arise, for the person having (sic) been deprived of his property either in the exercise of the State's police power or in the exercise of its power

of eminent domain. 14. The only other question which remains for our consideration is as regards the effect of certification by the President of India of the impugned Act under Article 31(6), Constitution of India. So far as the question of compensation is concerned, it is concluded by the judgment of the Supreme Court in the recent abolition of zemindary cases. Mr. Ghose conceded that in view of the judgment of the Supreme Court in the cases to which we have referred, he would refrain from raising the question of the absence or inadequacy of compensation. He was content to address us only on the question of the requirement of public purpose. Mr. Ghose referred us to the unanimous judgment of Shearer, Sinha and Bass JJ., in which they had said that it did not seem to them that in the Bihar Act the requirement of a public purpose had been established. Mr. Ghose argued that the same is true of the impugned Act. We are unable to accept the contention that the requirement of a public purpose cannot be gathered from the provisions of the impugned Act. In the Bihar Act, the preamble is in these terms :

"Whereas it is expedient to provide for the State management of estates and tenures in the Province of Bihar."

The preamble to the impugned Act is:

"Whereas for the purpose of improving the economic and social conditions of the agriculturists and for ensuring full and efficient use of land for agriculture, and for improvement, conservation and efficient management of forests, fisheries, hats, bazars, and ferries, it is necessary to assume management of estates and tenures in the permanently and temporarily settled areas of Assam".

The words used in the preamble are reproduced in Section 3 of the impugned Act. In our view, not only is the requirement of public purpose apparent from the language of the preamble, but the controversy in this behalf must be regarded as having been set at rest by the judgment of the Supreme Court in *The State of Bihar Vs. Sir Kameshwar Singh*, a judgment which leaves no room for doubt that the requirement of public purpose in the impugned Act is demonstrable. Mahajan J. observed :

". . . it is unnecessary to state in express terms in the statute itself the precise purpose for which property is being taken, provided from the whole tenor and intendment of the Act it could be gathered that the property was being acquired either for purposes of the State or for purposes of the public and that the intention was to benefit the community at large.. . ."

Article 39 of the Directive Principles of State Policy states as follows :

"The State shall, in particular, direct its policy to wards securing, that the ownership and control of the material resources of the community are so distributed as best to subserve the common good; and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment." . . . "In other words, shortly put, the

purpose behind the Act is to bring about a reform in the land distribution system of Bihar for the general benefit of the community as advised. The Legislature is the best Judge of what is good for the community, by whose suffrage it comes into existence and it is not possible for this Court to say that there was no public purpose behind the acquisition contemplated by the impugned statute. The purpose of the statute certainly is in accordance with the letter and spirit of the Constitution of India."

Das J. observed :

"From what I have stated so far, it follows that whatever furthers the general interests of the community as opposed to the particular interest of the individual, must be regarded as a public purpose. With the onward march of civilization, our notions as to the scope of the general interest; of the community are fast changing and widening with the result that our old and narrower notions as to the sanctity of the private interest of the individual can no longer stem the forward flowing tide of time and must necessarily give way to the broader notions of the general interest of the community. The emphasis is unmistakably shifting from the individual to the community. This modern trend in the social and political philosophy is well reflected and given expression to in our Constitution."

The impugned Act and the Abolition of Zemindari Acts before their Lordships of the Supreme Court have at least one thing in common, and that is that both purport to deal with agrarian reforms. The observations of their Lordships of the Supreme Court bearing upon the requirement of a public purpose in Acts dealing with agrarian reforms are an answer to Mr, Ghose's contention that the impugned Act suffers from the absence of a public purpose.

15. Our conclusion then is that the impugned Act is a valid Act and "intra vires" the Assam (Legislature; that the question of the infringement of fundamental right of property guaranteed by Article 19(1)(f) does not arise, the Act having been passed in the exercise of the State's power of eminent domain; that the presence of public purpose is demonstrable.

16. The result is that the petitions under Article 22G, Constitution of India, are dismissed. The hearing fee is fixed at Rs 100 in one set. The two suits brought in the Court of the Additional Subordinate Judge, L. A. D., at Dhubri, in which Civil Rules 104 and 105 of 1951 have been taken out under Article 228 are transferred to this Court and dismissed with costs. The Civil Rules 104 and 105 are made absolute. The Rules taken out under Article 226, Constitution of India, are discharged.

Deka, J.

17. I agree.