
(1978) 12 CAL CK 0018
In the Calcutta High Court
Case No : C.R. No. 6762 (W) of 1974

Marchhia Sahun and Another

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 04-12-1978

Acts Referred:

Constitution of India, 1950 — Article 131A, 226, 226(3), 226A, 32
West Bengal Estates Acquisition Act, 1953 — Section 44(2a), 47, 5A, 6(1)

Citation : 83 CWN 222

Hon'ble Judges : S.K. Datta, J

Bench : Single Bench

Advocate : Saktinath Mukherjee and Samaresh Nandi, for the Appellant; Kanika Banerjee, for the Respondent

Judgement

S.K. Datta, J.—This Rule is directed against order No. 8 dated 16.9.70 in case No. 36 of 1970 u/s 44 2(a) of the West Bengal Estates Acquisition Act, 1953 passed by the S.R.O. II & A. S. O. O.S.E. u/s 44 (2a). The proceedings were instituted by the said officer in respect of Khatian No. 226 (14.80 acres) and Khatian No. 299(1) (3.80 acres) of Mouza Bhatijora, P.S. Gazole on the ground that the entries of the last settlement record were eliminated without following the principles laid down in Schedule B appended to rule 25 of the West Bengal Estates Acquisition Rules. It appears that Sakhi Chand Saha who died after vesting had in his possession 22.52 acres of land in khas possession and by a registered deed of gift dated 31.1.46, 18.60 acres of land of khatian 226 and 299(1) were gifted to the petitioners who are his daughter and daughter's son respectively. The officer was of opinion that these transactions were not bona fide and during khasra enquiry or plot to plot verification of the possession of Mouza Batijora in June 1954 all the lands of the said two khatians were found to be in possession of Sakhi Chand Saha himself and none of the petitioners were found to be in actual possession during 1944 to 1954. The officer was of opinion that Sakhi Chand Saha managed to curtail 41 acres of his land in his possession to 22.52 acres to evade the provisions of section 6(1) of the Act. According to

him, the record of right was made to be recorded in favour of the petitioners by misrepresentation of facts in respect of possession and by suppression of facts that the deeds of gift were not translated into action even within eight years. As a result he ordered that the names of the petitioners in respect of these two khatians to be struck out and the name of Sakhi Chand Saha having 16 annas share be recorded in respect of the lands of the said khatian. This order, was passed by a judgment dated 16.9.70 and the fact of delivery of judgment has been recorded by order No. 9 on 25.9.70. Immediately thereafter on 26. 9. 70 the Officer started proceedings u/s 6(1) read with section 47 of the Act and though no notice could be issued on Sakhi Chand Saha who was dead even before the passing of the earlier orders, one Musmt, Dukhni Saha appeared claiming to be his heiress and submitted a "B" form excluding the areas of the aforesaid khatians for the purpose of retention. In that view of the matter, the learned Officer vested the said lands in the State by order No. 4 dated 17.10.70.

2. It appears that the petitioners moved this Court in C. R. 416 (W) of 1971 against the order u/s 44 (2A) and the Rule was disposed of on July 9, 1974, by P. K. Banerjee, J. His Lordship noted that as orders had in the meantime been passed u/s 6 (1), he allowed the petitioners to withdraw the application with liberty to file fresh application challenging the order u/s 44 (2a) and also the order u/s 6(1) of the Act. The petitioner thereafter moved this Court on the 8th October, 1974 and obtained the Rule as also the interim order maintaining the status quo as on date.

3. The Rule has now come up for hearing before me. In the meantime the Constitution 42nd Amendment Act, 1976 was enacted and the old provisions of Article 226 were substituted by new Article 226 with effect from the 1st February, 1977. The relevant provisions are as follows :

226 (1) Notwithstanding anything in article 32 but subject to the provisions of article 131A and article 226A, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them,

(a) for the enforcement of any of the rights conferred by the provisions of Part III, or,

(b) for the redress of any injury of a substantial nature by reason of the contravention of any other provisions of this Constitution or any provision of any enactment or Ordinance or any order, rule, regulation bye-law or other instrument made there under; or

(c) for the redress of any injury by reason of any illegality in any proceedings by or before any authority under any provision referred to in Sub-clause (b) where such illegality has resulted in substantial failure of justice

(2) * * *

(3) No petition for the redress of any injury referred to in Sub-clause (b) or sub-clause (c) of clause (1) shall be entertained if any other remedy for such redress is provided for by or under any other law for the time being in force.

It may be mentioned here that by section 58 of the amended Act the provisions of Article 226 as amended were in effect given retrospective effect and thus made applicable to all pending proceedings.

4. Learned Advocate for the respondents, Mrs. Kanika Banerjee, has taken a point of demurrer contending that the orders u/s 44 (2a) which is the basis of orders u/s 6(1) are appealable orders and as such the petitioners had other remedies which they could avail of, if they so desired. As such remedy has not been availed of by them, the petition under Clause (3) of Article 226 is not maintainable in law.

5. Mr. Mukherjee, appearing for the petitioners, submitted that the provisions of Article 226(3) would have no application where the challenge is to the assumption of jurisdiction by the authority. He contended that the provisions of the said Article would be applicable only when other remedy is provided and there is no dispute over the question of assumption of jurisdiction. In this case, as the question of jurisdiction is involved, the application would be maintainable if the petitioners' application as to jurisdiction is ultimately upheld by this Court. Mr. Mukherjee has referred to a decision in Ramesh Ch. Sood Vs. A.S.O. Sub-Division, Ranaghat and Others, , in which it has been held by A. K. Sen, J. is as follows :--

* * * if the proceeding was initiated only to adjudicate the title of the petitioner vis-a-vis the father to find out whether son is the real owner or merely the benamdar for the father or not, it was not within the jurisdiction of the Assistant Settlement Officer to hold any such adjudication.

The learned Judge further observed that of course it would be within his jurisdiction to be prima facie satisfied that the land never belonged to the petitioner or was not in his possession and the entry, as it stands, is erroneous so that it should be corrected. The position accordingly is that as a question of assumption of jurisdiction by the officer is involved in this case, in my opinion, the application seems to be prima facie maintainable.

6. It would further appear that when question of jurisdiction is involved, the provisions of Article 226(3) have been held to be no bar to the maintainability of such application. In Probodh Chandra Roy Vs. Life Insurance Corporation of India and Others, it has been held by M.N. Ray, J. that if an inferior court or Tribunal of the first instance acts wholly without jurisdiction or patently in excess of jurisdiction or manifestly conducts the proceedings before it in such a manner which is contrary to the rules of natural justice and of accepted rules of procedure and which shakes the conscience of the superior Court's sense of

fairplay the power to issue prerogative writ of certiorari to correct the error of the Court or Tribunal in any circumstance of the case is available. Accordingly the position seems to be that where a question of assumption of jurisdiction by an inferior Tribunal is involved, the provisions of Article 226 (3) would not stand as a bar.

7. There is another aspect which also requires to be considered. Under clause (3) of Article 226 no application for redress of injury referred to in sub-clause (b) or (c) of clause (1) shall be entertained if there is any other remedy for such redress provided for by or under any other law for the time being in force. This clause expressly excludes provisions of clause (a) of sub-article (1) of Article 226 which provides for issue of appropriate writs for the enforcement of any of the rights conferred by the provisions of Part III of the Constitution. If, therefore, an infringement of fundamental rights takes place according to the aggrieved party, there also the amended Article 226(3) does not stand as a bar. It has been contended that if the redress of any injury comes under the clauses (a) and (b) or (c) of sub-article (1) of Article 226 or all such clauses the petitioner will not be entitled to invoke the issue of prerogative writs when there are other remedies available under the relevant statute. On a reading of the provisions, it does not appear that any such limitation in respect of the operation of the aforesaid clause (a) is warranted by the provisions of sub-article (1) 6i Article 226. Whether other clause (b) or (c) are attracted or not, if there is any question of enforcement of any of the rights conferred by the provisions of Part III of the Constitution, an alternative remedy will not be a bar to the invocation of High Court's power under Article 226.

8. In the case before us, the effect of the order u/s 44 (2a) and section 6(1) is to vest the lands which have been gifted to the petitioners in 1946 which they are claiming to be their own. According to their case the effect of the order would be to take away their right to the property so gifted to them. Accordingly on this ground also it appears to me that the application is maintainable in law. In the premises I overrule the preliminary objection taken on behalf of the respondents about the maintainability of the application under article 226. It has been pointed out to me that no ground has been taken or made out in this regard by the petitioners in the petition; even so as there is no dispute on question of fact and examination of the above proposition does not involve any further scrutiny of any question of fact, I think the point so raised, being wholly a point of Jaw, can be agitated in this proceeding.

9. Coming to the legality of the, impugned orders, it would appear that the officer in issuing the notice u/s 44 (2a) was trying to prove the intention of the deed of gift by a registered instrument in 1946. As has been held in the case cited above, the authority under the revising entries u/s 44 (2a) are not entitled to look into the motive of transaction except within limited period by invocation of powers u/s 5A. Accordingly it appears to me that the learned Officer was not justified in going into the question of propriety or motive of the deed of gift of

the disputed lands in 1946. He has also based his decision on the question of possession and is of opinion that when the khasra enquiry was made, possession was found to be in Sakhi Chand Saha himself. In this connection I may refer to the decision in State of West Bengal Vs. Sm. Jyotsna Bhowmik and Others, in which it was held following the decision in Kanakarathanammal Vs. V.S. Loganatha Mudaliar and Another, , that in the Hindu family there is nothing wrong in the father's retaining control and possession of land gifted to his daughter and daughter's son, who may otherwise be incompetent to manage their affairs, for the benefit of the donees. Therefore, prima facie, mere possession and control of the lands by the donor without more do not warrant a conclusion that the gift was a transaction not acted upon or that donees were mere benamdars of the donor, a question simpliciter the authority under the Act is not entitled to go into.

For all these reasons, the Rule succeeds and is made absolute. The proceedings u/s 44 (2a) as also u/s 6 (1) of the West Bengal Estates Acquisition Act are quashed. Let appropriate writs issue accordingly.

There will be no order as to costs.