

(1970) 09 CAL CK 0047
In the Calcutta High Court
Case No : A.F.O.O. No. 211 of 1970

Mihir Kumar Sarkar and Others

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 23-09-1970

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 1972 Cal 355 : (1972) 1 ILR (Cal) 613

Hon'ble Judges : Salil Kumar Datta, J;S.K. Chakravarti, J

Bench : Division Bench

Advocate : Noni Coomar Chakraborty, Ganendra Narayan Roy and Samaresh Chandra Nandi, for the Appellant; A.K. Jana and Moni Bhusan Sarkar, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Chakravarti, J.—This appeal is at the instance of the petitioners in an application under Article 226 of the Constitution against an order passed by our learned brother A. K. Sen, J. by which he had dismissed the application on the ground that the "petitioners have no locus standi to maintain this application disputing [he validity or otherwise of the purported acquisition of the aforesaid R. S. Plot No. 212."

2. The facts giving rise to this appeal are as follows : Certain plots including R. S, Plot No. 212 were notified for acquisition for reclamation of the Salt Lake Area and the notification was published on the 14th of February, 1956. The declaration u/s 6 was made on the 22nd of May, 1968. The present appellants challenged the proceedings on the ground that they were entitled to get notice thereof, and that the same was mala fide and was not for any public purpose etc. That was registered as C.R. 7132(w) of 1968. In that proceeding the R.S. Plot No. 212 was left out. That rule was made absolute on the 115th July, 1969. On the 15th of October 1969 on the self same grounds the petitioners challenged the proceeding in respect of R. S. Plot No. 212 alleging inter alia that through inadvertence it

was not included in the earlier application. They claimed that this plot was actually a fishery and formed a part and parcel of their fisheries known as Nalban fisheries, there being no demarcating line between this plot and other plots, and that they had been in occupation of this plot as a fishery since more than 100 years. They had also made out an alternative case to the effect that they had taken settlement of the fishery right on, this plot in the benam of Sambhu Nath Chakraborty who had also taken settlement in the benam of some persons known as Pradhans. The State of West Bengal contested this application and raised a preliminary objection to the effect,--we quote the exact words of the learned Trial Judge--that this R.S. Plot No. 212

"is not the property belonging to the petitioners and as the petitioners cannot claim any right, title or interest therein they have no locus standi to maintain this application. According to the respondents the said land belonged to some other person who has not only submitted to the acquisition but also taken a compensation therefore. Thus a dispute as to title having been raised an opportunity was given to the petitioner to substantiate his locus standi to maintain this application by showing that he has got any right, title or interest in the aforesaid plot. Mr. Chakra-borty for the petitioner took time to file an additional affidavit to substantiate his points and a supplementary affidavit has since been filed."

3. The learned! Judge discussed the questions involved and came to the opinion that it was "really difficult to decide such a disputed issue as to title on such materials alone and in a proceeding like the present one wherein even the alleged benamdars are not parties." He also came to the conclusion that the petitioners have no locus standi and dismissed the case. Hence this appeal.

4. Mr. Nani Coomar Chakraborty learned counsel appearing for the appellants has very strenuously contended that the learned Judge was in error in the view he had taken and that there are no complicated questions of title involved in this proceeding and that he could easily decide the same. Mr. Chakraborty has relied on two decisions of the Supreme Court in this connection. Smt. Gunwant Kaur and Others Vs. Municipal Committee, Bhatinda and Others, and the other is an unreported decision in Orn Prakash v. State of Haryana, (Civil Appeal No. 2542 of 1969, D/- 16-3-1970 (SC)).

5. In both the cases referred to above the applications were dismissed in limine without any notice having been issued even on the other side. In this particular case notice had been issued on the other side. They had filed an affidavit and the learned Judge had even granted an opportunity to the petitioners to file supplementary affidavit. This fact alone would distinguish the instant proceeding from the decisions referred to and relied on by Mr. Chakraborty.

6. What is more, even if we apply the principles enunciated in these two decisions to the facts of the instant proceeding, we do not think that the case would improve, so far as the appellants are concerned. In Gunwant's case, AIR

1970 SC 602 the Supreme Court observed as follows:

"The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit-in-reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made, dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons."

7. In Om Prakash's case, (Civil Appeal No. 2542 of 1909, D/- 16-3-1970 (SC)) the Court observed as follows:

"The two judgments referred to by the High Court proceeded on the ground that the High Court would not in deciding a petition for a writ under Article 220 of the Constitution enter upon disputed questions of fact. But whether in the present case there are disputed questions of fact of such complexity as would render it inappropriate to try in hearing a writ petition is a matter which has never been decided. There is no rule that the High Court will not try issues of fact in a writ petition. In each case the Court has to consider whether the party seeking relief has an alternative remedy which is equally efficacious by a suit, whether refusal to grant relief in a writ petition may amount to denying relief, whether the claim is based substantially upon consideration of evidence oral and documentary of a complicated nature and whether the case is otherwise fit for trial in exercise of the jurisdiction to issue high prerogative writs."

8. In the instant proceeding the learned Judge had referred to a number of facts for the purpose of finding out that the disputed questions of fact were of such complexities as it would not be convenient to try in a writ petition. This conclusion he arrived at after considering the affidavits which had been filed by both the parties. In *Sarajuddin and Co. v. Michael Golodetz* AIR 1960 Cal 46 this Court has observed with regard to the discretion used by the Judge.

"That it should not be lightly interfered with is well established on the authorities, but we do not think that law does, in any way, fetter the power of the appellate Court to interfere in a proper case. Where the discretion has been exercised on a

consideration of all relevant materials and circumstances and in accordance with sound judicial principles and no injustice has been done, or is likely to result from the trial Court's order, no question of interference arises even if the appellate Court does not agree with the trial Court's actual exercise of discretion or conclusion on the point and might have decided differently if the original discretion had lain with it. In other words, in such circumstances, the appellate Court would not have been entitled to substitute for the trial Court's exercise of discretion in the matter its own exercise of the same. Where, however, the trial Court has not considered all the relevant materials or has proceeded on assumptions, not borne out or justified by the records, or has applied wrong legal principles, leading to an unjust order, it is not only the right--and in the powers of the appellate Court,--but clearly also its duty to interfere with the same and set matters right by undoing the mischief and injustice, occasioned by the trial Court's order."

9. Here, we have been led through the affidavits in question and also the order passed by the learned Judge and we are of opinion that the discretion which he has used is the proper one. There can be no doubt of the fact that the appellants must prove that they have got an interest in the sub-soil of the R. S. Plot No. 212 or at least in the watery portion thereof. So far as the sub-soil is concerned, their case is that they have been in possession of the same for more than 100 years. The record of rights, however, is against them and shows some Mallicks are in possession of it and the right to catch fish was also recorded in the name of one Jew Pradhan from the year 1357 B.S. to 1366 B.S. The Mallicks also claimed compensation as the owners of the lands and that compensation had also been paid to them on the 11th of July, 1969, long before the instant application had been filed. The Mallicks are not parties also in this proceeding. In the circumstances, the complicated questions of title in the plot itself cannot be properly decided in this proceeding. So far as the watery portion is concerned, the petitioners contended that it formed a part and parcel of their Nalban fishery. The State has sworn affidavit to show that it is not correct and that there was always a boundary between the petitioners' Nalban fishery and the watery portion of this land. In the original application or even in affidavit-in-reply the petitioners did not disclose as to how they had acquired the right in the waters. It is only by a supplementary affidavit that they filled up this blank. They alleged that after the lease in favour of Jew Pradhan had expired, Jew's sons had taken lease of the fisheries from the Mullicks on the 2nd December, 1959 and had also executed a deed of nadabi in favour of Dr. Chakraborty who is alleged therein to have taken bandobast of the jalkar in the name of Jew's sons, and that Dr. Chakraborty was also the henamdar of the petitioners, and in affidavit had admitted that. The very fact that Jew's name was recorded as having the right of fishing over this plot from 1357 to 1366 B.S. would negative the petitioners' contention that they had been in possession of this fishery for more than 100 years. There is no affidavit from Jew to show that he had given up the possession on the expiry of the period of his lease. Moreover, the petitioners'

case depends on a double benami which is, on the very face of it, very improbable. It cannot be understood as to why this double benami had to be gone into. Merely because a person says that he is the benamdar of another, would not show that it is benami. The question of benami is always a mixed question of law and fact and should not be decided in the circumstances of this case in a writ petition. It should also be noted in this connection that in the supplementary affidavit in paragraph 3 (d) the petitioners have definitely made out a case that

"the said Jew Prodhan became a direct lessee under the State of West Bengal in accordance with the provisions of Section 6(2) proviso of the Estates Acquisition Act. I submit that the said Giri Mohan Mallick and/or his successor-in-interest, namely, the said Sambhu Nath Mallick and others not having possessed the said Plot No. 212 on the date of vesting; but the said Jew Prodhan having possessed the said "Tank Fishery" on the date of vesting under a Jalkar lease for a period from 1357 to 1366 B.S. the said Giri Mohan Mallick and his successors namely Sabhu Nath Mallick and others were only entitled to compensation for their superior interest in the said Jalkar under the provisions of the West Bengal Estates Acquisition Act."

It is clear that the case made out in this paragraph is inconsistent with the main case made out by the petitioners. If the interest of the Mallicks had vested during the continuance of the lease of Jew, then the Mullicks could not have leased the same again to the sons of Jew through whom the petitioners claim. It is obvious therefore that the petition raises questions of fact of a complex nature, which require oral evidence to be taken and also to be decided in the presence of the Mullicks, Jiut, his son and Dr. Chakraborty, and cannot appropriately be decided in a writ petition.

10. In the circumstances, we agree with the learned Judge in the view that he had taken and dismiss the appeal. The interim injunction is vacated.

11. There will be no order as to costs in this appeal.

Saul Kumar Datta, J.

12. I agree that the appeal should be dismissed as proposed and I would like to say my reasons in support.

13. This is an appeal by the petitioners against the order passed by A. K. Son, J. on March 5, 1970, dismissing the application of the appellants under Article 226(1) of the Constitution. The preliminary ground on which application was dismissed was that the petitioners had no locus standi to move the application.

14. The facts as borne out by the petition and supplementary affidavits as also by documents produced at the hearing are as follows:

(a) The petitioners and their co-sharers had been the owners in possession over a century of two fisheries known as Nalban Fishery and Bherry No. 4 in village

Dhapa Manpur comprising one common sheet of water over various plots including plot No. 212. The petitioners in or about August, 1968, came to know from newspapers about the land acquisition proceedings for acquisition of the lands of the said fisheries and they challenged the acquisition proceedings on various grounds, by filing petition under Article 226(1) of the Constitution giving rise to Civil Rule No. 7132 (W) of 1968. Similar rules on petitions filed by other persons in respect of their fisheries were issued by this Court and by its judgment made in all the rules it was held that the acquisition proceedings were not in accordance with the provisions of the Land Acquisition Act, 1894 and accordingly a writ of mandamus was issued restraining the State of West Bengal from proceeding with the said acquisition.

(b) The petitioners contended that B. S-Plot No. 212 formed part of their Nalban Fishery within its common sheet of water and had always been in their ownership and possession but through inadvertence, the said plot was not mentioned in the petition of Civil Rule No. 7132(W) of 1968. Taking advantage of the omission, the State Government had been taking steps to fill up the portion of Nalban Fishery appertaining to the said plot with sand and silt of Ganges. On the ground as were urged in the above rules the petitioners by filing another application under Article 226(1) of the Constitution challenged the acquisition proceedings as being void as it was not in accordance with law and prayed inter alia for a writ of mandamus commanding the State Government and its officers to forbear from proceeding further with the said acquisition proceedings.

(b) Upon the issue of rule nisi on the said application the State Government filed its affidavit-in-opposition as return to the said rule, contending that the petitioners had no locus standi to file the application, as the R.S. Plot No. 212, which was demarcated by a bundh, did not belong to the petitioners. It was stated that the plot belonged to Giri Mohan Mallick and on his death his heirs Sambhunath Mallick and others inherited the same. The name of Giri Mohan Mallick appeared in the resent settlement record and the said heirs duly filed their claim u/s 9 of the Land Acquisition Act. An award was made in their favour for the acquisition of their interest by the State and the compensation was duly received by them, as it appears, on July 11, 1969, while possession thereof was taken by the State Government in due course. Other allegations about the alleged illegality of the land acquisition proceeding were denied. The petition accordingly, it was submitted, was not maintainable in law.

(c) The petitioners filed an affidavit-in-reply wherein they stated that in the revisional record of right, the name of one Jent Prodhan was recorded as holding the Jalkar lease under Giri Mohan Mallick and under the West Bengal Estates Acquisition Act, 1953, the interest of Sambhunath Mallick and others vested in the State of West Bengal on April 15, 1955. Jeut Prodhan, who held the lease from 1357 B.S. to 1860 B.S., became, on the vesting of his landlords' interest, a direct tenant under the Government. The Mallicks thus had no subsisting interest in the land for which they could be entitled to compensation and possession of

the plot could not be taken from them as stated in the affidavit on behalf of the State. The petitioners reiterated their and their co-sharers' title and possession of the said fisheries including the disputed plot for over a century.

15. It appears that supplementary affidavits were affirmed on behalf of the petitioners, with leave of Court, to explain their locus standi to move the application on which a preliminary objection was taken by the State. While again asserting their and their co-sharers right and possession over a century to the said fisheries, it was stated that Jeut Prodhan as the lessee of the jalkar right from 1357 to 1366 B.S. (middle of April, 1959) was the benamidar of the petitioners. After the expiry of the lease, the petitioners got a lease executed on December 2, 1959, by Shambhu Nath Mallick and others, heirs of late Giri Mohan Mallick in the name of Kedar Nath Prodhan and Ram Ugra Prodhan sons of Jeut Prodhan for ten years from December 2, 1959 to December 1, 1969. This lease was duly registered and was obtained by the petitioners in the names of the said sons of Jeut Prodhan through their friend one Sambhu Nath Chakraborty. It is further alleged that at the instance of the petitioners, a nadabi patra was executed and registered by the said lessees in favour of Sambhu Nath Chakraborty on April 27, 1963, in respect of the Jalkar interest. The petitioners contended that the lease was obtained by them by way of abundant caution, though they as owners had been in actual possession throughout. Though the nadabi was executed in the name of Sambhu Nath Chakraborty, he never had any interest in or possession of plot No. 212 nor any right to receive compensation for the acquisition. To complete the case of the petitioners, there is another supplementary affidavit by Sambhu Nath Chakraborty who stated that he was a family friend of the petitioners and as the petitioners did not want to prejudice their claim of title and possession of the Nalhan Fishery including plot No. 212, they could not themselves take any lease of the plot from Sambhu Nath Mallick and others. Accordingly they had to take the lease in benami and at their instance, Sambhu Nath Chakraborty took the lease as their benamdar in the benami of the sons of Jeut Prodhan, though he had no interest and the lease in fact was taken by the petitioners in the above process. On the basis of their original title and possession as also of the transactions evidenced by the documents referred to above, the petitioners claimed that they had title and possession in the disputed plot which gave them the locus standi to move the application.

16. The rule came up for hearing before A. K. Sen, J. who was of opinion, on the preliminary objection taken by the State, that the petition was bound to fail. The State raised a dispute regarding the title of the petitioners to the land and in support of their claim the petitioners filed the supplementary affidavits. The Court was of opinion that ex facie the settlement record did not support the petitioners on their title or even on possession. Further even on the supplementary affidavits it was not possible to hold that the petitioners had any locus standi to dispute the acquisition or to challenge the same by the present petition. On the above findings the rule was discharged. The present appeal is

against the said decision.

17. Mr. Noni Coomar Chakravarti, the learned counsel appearing for the appellants, contended that merely because a fact is disputed or complicated questions of title are involved in a petition, it will not be proper exercise of jurisdiction to dismiss an application under Article 226(1) of the Constitution on either ground. It is often possible to decide questions of fact on affidavits as here and even if that was not possible the Court should give opportunity to the parties to establish their case by filing affidavits or by issue of commission or even by setting down the application for trial on evidence. In support reliance was also placed on decisions of the Supreme Court in *Smt. Gunwant Kaur and Others Vs. Municipal Committee, Bhatinda and Others*, where it was laid down that it would not be proper to dismiss a petition under Article 220 merely because questions of fact may befall to be determined in considering the petitioner's right to relief and in such petition, the High Court has jurisdiction to try issues both of fact and law. In *Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another*, it was held that merely because a question of fact has been raised the High Court will not be justified in requiring the party to seek relief by somewhat lengthy, dilatory and expensive process by a Civil Suit against a public body. On the above authorities, Mr. Chakravarti contended that if the learned Judge felt any difficulty to decide the question of title, the petitioners should have been given further opportunity to produce oral and other evidence in support of their claim in a trial on evidence to prove their locus standi and dispute the acquisition. The finding of the learned Judge that the petitioners had no locus standi to dispute the acquisition was also assailed as being contrary to the materials on record. On the above grounds, Mr. Chakravarti wants this Court to set aside the judgment under appeal and refer back the matter for trial in accordance with law and established principles of procedure.

18. Mr. Arun Kumar Janah, the learned counsel appearing for the State of West Bengal, has contended that on the materials on record the learned Judge made no error on facts or in law in holding that the petitioners had no locus standi to dispute the acquisition, as having no title or possession of the disputed plot. Further the learned Judge has properly exercised his discretion on consideration of all relevant materials and circumstances and in accordance with sound judicial principles and such discretion should not be interfered with by the appellate Court even if the appellate Court may not agree with the trial Court's discretion or conclusion, as was held in *AIR 1960 Cal 46* at p. 51. Further the question of investigation of title as claimed by the petitioners would be inappropriate in proceedings under Article 226(1) of the Constitution.

19. On a consideration of the respective contentions of the parties, it appears to me that the judgment under appeal must be sustained. The petitioners, in support of their case, have claimed title on alternative basis which are inconsistent with and even destructive of each other. Their principal claim to the lands of the fishery including the disputed land is on the basis of their ownership

and possession for over a century, while the records of rights do not record their title or possession. Excepting that bare statement in the petition and affidavits, there is no evidence in rebuttal of the presumption arising from the records of rights and it is not possible to find their title and possession from mere assertion of the claim. As to the other alternative claim that on vesting, Jeut Prodhan, whose name was recorded in the records of rights as the lessee of the jalkar, became the direct tenant under the State, and that Jeut Prodhan was the benamdar of the petitioners, there is no document of release or otherwise from Jeut Prodhan nor any evidence in support excepting again the bare assertion of the petitioners. Again if Jeut Prodhan became the direct tenant under the State and the interests of Mallicks vested in State, the lease taken by the sons of Jeut Prodhan from Mallicks has no legal consequence and conferred no interest on them and there is again no evidence of any surrender by Jeut Prodhan or of extinguishment of his interest. Further on the materials on record, it is also extremely difficult to appreciate the reasons for creating benami in the names of the sons of Jeut Prodhan and again in the name of Sambhu Nath Chakravarty for the same property, while the nadabi document by Prodhans makes no mention of the petitioners at all. On the materials on record, it is clear that the petitioners have failed to establish that they had any interest or legal right or possession in the disputed plot and I agree with the findings of the learned Judge that the petitioners have failed to discharge the onus that they have the locus standi to dispute the land acquisition proceedings regarding the disputed plot.

20. It may be mentioned here that the learned Judge, while stating in the judgment that it is really difficult to decide such a disputed issue as to title on such materials atone, really proceeded to consider the evidence adduced and on consideration of the materials arrived at the finding that the petitioners had no locus standi in the matter. The decisions cited by Mr. Chakravarti have therefore no application and in fact in both the cases, as pointed out by Mr. Janah, the applications were dismissed in limine and it also appears that the questions of the fact involved therein were elementary. In the present case the applications were considered apart from the usual affidavits of the parties, also on supplementary affidavits on behalf of the petitioners in support of their case and the questions of fact involved was anything but elementary. There could thus be no grievance On the ground that the Court rejected the application merely it involved disputed question of title.

21. As to the other contention of the petitioners that the application should have been set down for trial on evidence in a case like this, as contended by Mr. Chakravarti, undoubtedly similar contention found support in the decision in Kavalappara Kottarathil Kochunni Moopil Nayar Vs. The State of Madras and Others, where in respect of applications under Article 32 of the Constitution, the Court took the view that in appropriate cases, the Court to determine a disputed question of fact may direct issue of commission or set down the application for trial on evidence. In the present case, the petitioners were given an Opportunity to file further affidavits to support their claim of title and possession to the land

in dispute and the petitioners availed of the opportunity. The Court found the affidavits insufficient to establish the petitioner's claim and rightly so, in my Opinion. The petitioners thereby failed to discharge the onus that lay on them. There was no prayer, at any point of time, for production of further evidence or for trial on evidence and there could be thus no question of granting any further opportunity to the petitioners to adduce evidence. In fact no grievance is made on that ground by the petitioners even in the memorandum of appeal before us.

22. Mr. Chakravarti however contended that the learned Judge should have taken further evidence in a trial on evidence in the circumstances of the case if he found any difficulty, as he did find, in coming to a finding about the petitioners' claim on the materials on record, on the authority of the decision in Smt. Gunwant Kaur and Others Vs. Municipal Committee, Bhatinda and Others, . It was observed in that case as follows:

"The High Court is not deprived of Its Jurisdiction to entertain a petition under Article 226 merely because in considering the petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on the view that the dispute may not be appropriately be tried in a writ petition, the High Court may decline to try a petition."

There is no doubt that the present petition raises complicated questions of fact and law and involves rights of persons who are not before us. Even if the learned Judge should have normally embarked upon the enquiry as to title as contended, the present case, in view of the complex questions of fact and law involved was not one, in my opinion, in which such enquiry should have been made. Even on the authority of decision referred to above, it would not be proper for the Court to determine complicated questions of title and possession involving protracted hearing involving title of persons who are not even parties in the proceedings. Such question should appropriately be tried in regular suit and I feel unable to concede to the prayer of the petitioners for a trial on evidence in such State of affairs.

23. In the circumstances the appeal fails and is dismissed in the manner proposed by my learned brother.