

(1979) 06 CAL CK 0019
In the Calcutta High Court

Pratima Devi

APPELLANT

Vs

Jyotish Chandra Mukherjee

RESPONDENT

Date of Decision : 08-06-1979

Acts Referred:

West Bengal Estates Acquisition Act, 1953 — Section 44, 49, 52, 6

Citation : 83 CWN 743

Hon'ble Judges : B.C. Chakraborti, J;A.K. Sen, J

Bench : Division Bench

Advocate : Manindra Nath Ghosh and Ashutosh Ganguly, for the Appellant;Nigam Chakraborty and Samaresh Kumar Nandi, for the Respondent

Final Decision : Dismissed

Judgement

1. This appeal from the appellate decree has been heard along with revision case being C. R. No. 3775 of 1969 which had been directed to be heard along with the appeal. The appeal is by the defendant/appellant (hereinafter referred to as the defendant) and it arises out of a suit for declaration of the plaintiff/respondent's (hereinafter referred to as the plaintiff) tenancy right in the suit property which is a tank and for a declaration that the entries in the revisional settlement records in respect of the same is erroneous and for confirmation of plaintiff's possession in the suit property and permanent injunction restraining the defendant from interfering with the plaintiff's possession thereof.

2. The disputed tank named Gopal Dighi measures 2.72 acres in area and appertains to C.S. plot No. 4060, Khatian No. 2032, Mouza Bainchi, District-Hoogly.

3. The case of the plaintiff shortly was that he was a lessee in respect of the disputed tank under the defendant who is the admitted owner thereof, and as such, he was in possession thereof by rearing and catching fish and also by using the banks thereof. The plaintiff relied in an unregistered kabuliat for 9 years reciting a rental of Rs. 50/- per year and mentioning the period of 9 years

commencing from 22nd Jaistha, 1358B. S. The plaintiff claimed that under the provisions of the West Bengal Estates Acquisition Act, 1953, (hereinafter referred to as the said Act) the superior interest of the defendant vested in the State so far as the disputed tank is concerned. The tank, however, had been erroneously recorded in the record of rights to be in the khas possession of the defendant and the defendant having attempted to disturb the plaintiff's possession on the basis of such entry, the plaintiff instituted the suit for the above relief's.

4. In contesting the suit, the defendant pleaded that the plaintiff had only jalkar right in the disputed tank and that the same had been surrendered and possession had been deliver in her favour in the year 1360 B.S. and since that date the defendant had been in khas possession of the disputed tank, and as such, the plaintiff is not entitled to any relief as claimed.

5. The learned trial judge on consideration of the evidence on record found that what was settled with the plaintiff in 1358 B.S. was merely the jalkar right or the right of pisciculture but not the tank itself. The learned trial judge further found that the plaintiff had not been in possession of the dispute tank since 1360 B.S. and on such a finding he dismissed the plaintiff's suit.

6. On an appeal before the lower appellate court the learned Additional District Judge affirmed the finding of the learned trial judge that what was settled with the plaintiff was merely the jalkar right and not the tank itself. The learned judge in the court of appeal below, however, reversed the finding of the learned trial judge on the point of possession and found that the plaintiff did continue to remain in possession upto the date of the suit. But since the period of settlement had already expired, the learned judge in the court of appeal below held that he plaintiff is not entitled to any relief because the interest of the defendant in the disputed tank did not vest in the State of West Bengal and the plaintiff did not become a tenant directly under the State.

7. Along with the suit, the plaintiff also preferred an objection before the settlement authorities u/s 44 (2a) of the said Act, objecting to the recording of the name of the defendant as in khas possession of the disputed tank. The said objection was disputed of on a finding that the disputed tank might be recorded in the name of the plaintiff to be in permissive possession. Feeling aggrieved by the said decision of the settlement authorities, both the plaintiff and the defendant preferred appeals before the tribunal being Miscellaneous Appeals Nos. 313 and 341 of 1960. Those appeals come up for hearing before the learned Additional District Judge who heard the appeal arising out of the suit. The learned judge in the court of appeal below allowed the appeal of the defendant and dismissed that of the plaintiff and directed that the disputed tank do stand recorded as in khas possession of the defendant.

8. The plaintiff preferred a second appeal to this court as against the decree passed in the title appeal and a revision as against the order disposing of the two miscellaneous appeals arising out of the two miscellaneous appeals arising out of

the said Act. The second appeal and the revision come up before a Division Bench of this court for hearing and the learned judges in allowing the second appeal remanded the case to the court of appeal below for re-hearing of the appeal on further evidence, in terms of the direction incorporated in the order of remand. The learned judges in this court did not set aside the concurrent findings of the two courts below to the effect that what was settled with the plaintiff in the year 1358 B.S. was merely the jalkar right and not the tank itself. Nevertheless, the learned judges held that in case the defendant judges held that in case the defendant be adjudged a raiyat intermediary on the provision of section 52 of said Act, then under the provision of section 6(2) :

The plaintiff who being admittedly the holder of the jalkar right under the defendant, which includes, on admission of the parties here, the right of pisciculture and the right of fishing would be the holder or lessee of a tank fishery within the meaning of the said proviso in view of the definition of tank fishery in the explanation annexed to section 6(1) (e).

The learned judges specifically overruled the contention put forward on behalf of the defendant that even if she be a raiyat intermediary her interest in the disputed tank would not vest, the plaintiff being merely the holder of jalkar rights. The learned judges were of the view that one it is found that the defendant is a raiyat intermediary, the plaintiff though the holder of the jalkar right would be entitled to the declaration that he had become a lessee directly under the State and to other relief's on beliefs on that footing. But since the courts below had not specifically gone into the issue as to whether the defendant is a raiyat intermediary or not, the learned judges remanded the appeal to the lower appellate court for finding out on further evidence as to whether the defendant is a raiyat intermediary or not The learned judges further directed :

In case she is found to be such a raiyat, the plaintiff's suit would be decreed by giving the plaintiff a declaration that he, as the lessee of the jalkar or the right of pisciculture and fishing, as noted above would be holding as such lessee directly under the State in accordance with law. If, on the other hand, the finding be that the defendant was not a raiyat the plaintiff 's claim for a declaration, as above, would be dismissed.

Along with the appeal, the learned judges disposed of the revision case by setting aside the appellate decision and directed the miscellaneous appeals to be re-heard in the light of their decision and on finding to the recorded after remand.

9. The appeal to the lower appellate court thus having been remanded, the learned District Judge reheard the appeal on further evidence. He held that when in the revisional settlement records the defendant has been recorded as a raiyat stitiban (a settled raiyat) and such an entry has not been disputed by the defendant as erroneous there would arise a presumption that she is a raiyat and the evidence that was led was not sufficient to the learned District Judge concluded that the defendant is a raiyat who became an intermediary on a

notification being issued u/s 49 and hence all her right, title and interest in respect of the disputed tank vested in the State. On that finding the plaintiff's suit was decreed. The miscellaneous appeals which were heard analogously were disposed of by following the appeal preferred by the plaintiff and dismissing the one preferred by the defendant and thereby directing the record of rights to be corrected by recording the name of the State. Being aggrieved, the defendant has, this time, preferred the present second appeal to this court directed against the appellate decree passed after remand and has also obtained a Rule being C.R. No. 3775 of 1969 challenging the decision of the learned District Judge in the two miscellaneous appeals arising out of the proceedings u/s 44(2a) of the said Act. Relying strongly on the decision of the Supreme Court in the case of *The State of West Bengal Vs. Shebait of Iswar Sri Saradia Thakurani and Others*, it has been contended by Mr. Ghosh appearing in support of this appeal that the interest of the defendant in the disputed tank could not have vested in the State of West Bengal under the provisions of the said Act, and as such, the plaintiff could not have obtained a decree for declaration that on such a vesting he became a lessee directly under the State. According to Mr. Ghosh, even if the defendant be a raiyat intermediary, still she being in khas possession of the tank fishery was entitled u/s 6(1) of the said Act, to retain the tank and the settlement of the jalkar right in favour of the plaintiff does not constitute a lease in this favour within the meaning of the proviso to section 6(2) so that the defendant's interest can never vest and the plaintiff can never claim himself to be a lessee directly under the State.

10. It appears to us that such a contention was raised on behalf of the defendant in this court on the earlier occasion and the learned judges appear to have overruled the same. It appears that the learned judges laid emphasis on the definition of the tank fishery as given in the explanation to section 6(1) (e) and took the view that in order to constitute tank fishery for the purpose of the Act, it need not be the tank itself. On the other hand, on the inclusive part of the definition any right of pisciculture or fishing in such a tank would as well be the tank fishery. According to the learned judges, a lease in respect of such a right would as well be the lease of the tank fishery within the meaning of section 6(2) proviso so that the plaintiff in the present case being a lessee in respect of such right would come within the said proviso. Though not referred to in the judgment, the learned judges were obviously relying upon the Full Bench decision of this court in the case of *Fadu Jhala v. Gour Mohan*, ILR 19 Cal 544, and the decision of the Supreme Court in the case of *Ananda Behera and Another Vs. The State of Orissa and Another*, in holding that such a right is immovable property, and as such, capable of being leased out.

11. In the case of *State of West Bengal v. Saradia Thakurani* (supra) relied on by Mr. Ghosh the facts were comparably similar to the facts of the present case. There, the Supreme Court held that the settlement did not constitute lease of the tank since neither the sub-soil nor the embankments were the subject matter of the alleged lease and in the absence of any such lease of the tank the proviso to

section 6(2) is not attracted. A Special Bench of this court in the case of Ahindra Nath v. Manmatha Nath, AIR 1953 Cal 168 went a little further in reading the aforesaid decision of the Supreme Court as an authority for the proposition that a jalkar right in a tank cannot be leased at all and settlement of such a right merely constitutes licence. In that view, the Special Bench held that a person in whose favour such a right has been settled, cannot be considered to be a lessee within the meaning of the proviso to section 6(2). The view expressed by the Special Bench that there can in law be no valid lease in respect of jalkar right or the right of pisciculture without the subsoil is just contrary to the earlier decision of this court in the case of Saroj Kumar Bose Vs. Jatindra Nath Mondal and Others, and the view expressed in the above remand order. Those bench decisions appear not to have been considered at all by the Special Bench. Nor do we find any support for such a proposition in the decision of the Supreme Court relied on by the Special Bench. Supreme Court therein held that settlement of such a jalkar right does not constitute lease of the tank itself so that a person enjoying such a right becomes a licensee in respect of the tank and the sub-soil. It was not, however, therein held by the Supreme Court that such a right by itself cannot be the subject-matter of lease though of course it was held that there being no lease in respect of the tank, such settlement is not a lease contemplated by section 6(2) proviso. What cannot be held to be lease within the meaning of that particular provision has been extended by the Special Bench to be not a lease at all in law. It is, however, doubtful whether the decision of the Supreme Court can be read as an authority for such an extended proposition. Mr. Justice Dutt who delivered the judgment in the Special Bench case as above, affirmed his views once again in the Bench decision in the case of Jnanendra Nath Bose and Others Vs. Sushil Kumar Safui and Another, .

12. The decision of the Supreme Court in the case of State of West Bengal v. Saradia Thakurani (supra) may otherwise support the contention of Mr. Ghosh to a great extent because though not said expressly it must be held that in the said decision the Supreme Court interpreted "tank fishery" to mean the right of pisciculture or fishing along with the tank and its sub-soil and not independent thereof. The Supreme Court was, therefore, laying down that a person who is not a lessee in respect of the tank would not be a lessee in respect of the proviso to section 6(2) and the settlement of the mere right of pisciculture or fishing in his favour would not entitle him to become a lessee directly under the State. Mr. Chakravarti, the learned advocate for the plaintiff-respondent no doubt draws our attention to the definition of the term "tank fishery" in the explanation to section 6(1)(e) in pointing out that when under that definition the term would include any right of pisciculture or fishing any lease in respect of such a right would as well be a lease of the tank fishery. That happens to be the view taken by the learned judges in making the remand order and that was also the view expressed in the bench decision in the case of Saroj Kumar v. Jatindra (Supra). But to us it appears that such a construction has been impliedly overruled by the Supreme Court in the above case.

13. Whatever be the merit of such a contention put forward by Mr. Ghosh, unfortunately for his client, such a contention is not open any longer in this court in view of the earlier order of remand. We have pointed out hereinbefore that such a contention though raised on behalf of the defendant was overruled by the learned judges and in any event when the learned judges in directing the remand gave a specific direction that in a case the defendant is found to be a raiyat intermediary the plaintiff's claim of declaration that he became a lessee directly under the State and that the right, title and interest of the defendant had vested in the State should be decreed necessarily shuts out the scope for raising a contention as sought to be raised by Mr. Ghosh before us. Mr. Ghosh, however, strongly contended that the Supreme Court having laid down the law subsequent to the order of remand we are entitled to go behind the order of remand and hold it to be erroneous. Strong reliance is place by Mr. Ghosh on some of the decisions of Allahabad High Court in support of his contention that the court hearing an appeal from a decree passed after remand is not bound by the findings or the views expressed in the order of remand. But those decisions, in our view, have no bearing because those are cases of remand under Order 41 Rule 25 of CPC where the appeal itself ha not been disposed of. Here, in the present case, however, the appeal that was preferred to this court on the earlier occasion was disposed of and the points that were finally decided became binding between the parties, and as such, there is no scope for reopening those findings by us exercising co-ordinate jurisdiction. This portion seems to be settled in view of the Supreme Court decision in the case o Satyadhyhan Ghosal and Others Vs. Sm. Deorajin Debi and Another, . In a still later decision in the case of Jasraj Inder Singh Vs. Hemraj Multanchand, , the Supreme Court had observed : "It is equally true that the same high Court, hearing the matter on a second occasion or any other court of co-ordinate authority hearing the matter cannot discard the earlier holding." Such being the position, even if the view expressed by the learned judges in directing the remand is erroneous it is not open to us to hold as such and set aside the decree now under appeal on that account.

14. So far as the point which is still open it must be held that the learned District Judge rightly concluded that the defendant is a raiyat so that on the notification being issued u/s 49 of the said Act, she became a raiyat intermediary on the provision of section 52 thereof. The learned District Judge was perfectly justified in holding that the fact that the defendant has been recorded as a settled raiyat in the finally published record of rights raises a presumption which the evidence adduced on her behalf had failed to rebut. Though it was sought to be contended by Mr. Ghosh that even on the application of section 52 in order to render the raiyat to be an intermediary, the raiyat must have an under-raiyat under him, we find no substance in this contention. On the provision of section 52 on a notification being issued u/s 49 all the raiyats become intermediaries. No doubt it is difficult to conceive of an intermediary unless there is some one under him yet section 52 in a way introduces a fiction and renders all raiyats and under-raiyats to be intermediaries irrespective of whether they had created any interest

subordinate to them. This view of ours finds support from the Bench decision of this court in the case of Bhutnath Das and Others Vs. State of West Bengal and Others, . Such being the position, we cannot but uphold the decree as passed by the learned District Judge in view of the earlier order of remand from this court. This appeal, therefore, fails and is dismissed. There will be no order for costs.

15. So far as the revision case is concerned, for the very same reason the same should fail and the decision of the appellate tribunal must be upheld. That Rule is, therefore, discharged but there will be no order for costs.