
(1958) 02 PAT CK 0011
In the Patna High Court
Case No : Misc. Judl. Case No. 853 of 1956

Ramphal Singh

APPELLANT

Vs

District Magistrate of Patna and Others

RESPONDENT

Date of Decision : 13-02-1958

Acts Referred:

Constitution of India, 1950 — Article 19(1), 226

Citation : AIR 1959 Patna 72 : (1958) 6 BLJR 343

Hon'ble Judges : V. Ramaswami, C.J.; R.K. Choudhary, J

Bench : Division Bench

Advocate : P.R. Das, B.C. Ghosh, Srideo Misra and Man Bihari Lall, for the Appellant; Govt. Pleader, for the Respondent

Final Decision : Dismissed

Judgement

K.K. Choudhary, J.—The petitioner is a lessee of river ferries in the State of Bihar. He has been, for a long time, plying boats at twenty-five ferries of the Patna District Board under the authority of that Board, and the last parwana was granted to the petitioner in 1956 for a period of one year terminating on 31-3-1957. One of the ferries settled with the petitioner is known as Chowtha Nawada Ferry which extends from village Jajira in the Patna district to village Sultanpur in the district of Darbhanga on the northern side and from Pundarak Ghat to Umanath Temple in Barh on the southern side.

The above ferry service is sometimes between places in Darbhanga district, Muzaffarpur district or Patna District according as the river shifts. It is stated that for over fifty years efforts have been made by the Government of Bengal to lew what is known as Paimali and to settle Paimali rights besides the ferry rights in these ghats, but, as objections have been raised throughout by the lessees of the ferry rights as also by the raiyats Over whose-lands these rights are being claimed, the authorities concerned have refused to settle the paimali rights.

It is further stated that the respondents are attempting to levy paimali and settle

paimali rights in Railli-Pundarak Coal Ghat which falls within the limits of the Nawadah-Chowtha and Pundarak-Chairaya Toke ferries which have been settled with the petitioner by the District Board of Patna. The Sub-divisional Officer of Barh, respondent No. 2, made an order on 6-3-1956, for settling the aforesaid paimali right, and the District Magistrate of Patna, respondent No. 1, has, by his order dated 6-11-1956, rejected the objections raised by the petitioner to the settlement of the above right.

According to the petitioner, the respondents were anxious for taking steps to settle the above right and it is stated that the settlement of that right will prejudice the petitioner's business and trade and will cause loss in his ferry service. The petitioner, therefore, presented this application under Article 226 of the Constitution of India for issue of a writ of certiorari to quash the above orders of the Sub-divisional Officer of Barh and the District Magistrate of Patna and a writ of mandamus directing the respondents not to settle the paimali right. Cause has been shown on behalf of the respondents who have filed counter-affidavit and the application is opposed by the learned Government Pleader on their behalf.

2. Several contentions have been raised by Mr. Das" appearing for the petitioner. Two of them, however, may be summarily disposed of They are: (1) the paimali rights have been refused to be settled by the Government for over the last fifty years and (2) lands on either side of the river are raiyati lands and the Government have no right to settle the paimali rights over those lands. In support of the first of the above two contentions, our attention has been drawn to several documents, namely, annexures "C", "D", "E" "F" and "G", attached to the petition, which show that the proposal for settling the above rights of Mokamah Ghat had been given up for the last fifty years.

By annexure "C" the Sub-divisional Officer of Barh passed an order on 8-9-1927, for cancellation of the settlement of paimali at Mokamah and directed that the same should not be settled in future. By annexure "D" it was directed, in connection with the paimali right of Mokamah Ghat by order dated 4-2-1935, that it should not be settled by the Khas Mahal as this was opposed to the interest of the traders. Again in 1952-53, in relation to the above right of Mokamah Ferry Ghat, the Collector of Patna observed that paimali rights have not been settled in the past and passed an order that the auction, if held, is not confirmed, and the money, if deposited, would be refunded to the persons concerned (vide annexure "E"),

Again by order dated 12-10-1955, the Collector of Patna with regard to the same right ordered that in view of the past practice, paimali rights need not be settled (vine annexure "F"). By annexure "G", the Additional Collector of Darbhanga passed order on 5-7-1956, refusing to settle paimali rights in certain Ghats situated on the Ganges in the district of Darbhanga. It may be noted that the above order was passed at the instance of the petitioner who was the lessee of the ferry designated as Chowtha Nawadah Ferry referred to above.

On these documents it is contended that the paimali rights having been refused to be settled for a very long time, the orders of the Sub-divisional Officer of Barh and the District Magistrate of Patna referred to above are unjust and should not have been passed. On behalf of the respondents, however, it is contended, as has been stated in the counter-affidavit, that, so far as the paimali right in the Railli Pundarak Coal Ghat is concerned, the same has all along been settled and actually in 1949-50 the settlement was taken by one Jungi Singh, the brother of the petitioner, on payment of Rs. 1010/- and in 1950-51 it was taken by the petitioner himself on payment of Rs. 825/-.

Thus there is a controversy over the question whether this right had or had not been settled in past. The question is of fact and a controversial question of fact cannot be gone into in a writ application. Moreover, the documents of settlement referred to above have only historical importance and they do not create any estoppel against the Government. It may be mentioned that it has not been argued on behalf of the petitioner that any principle of estoppel is involved in this case on the above ground.

3. The other point is with regard to the lands on both sides of the Ganges being raiyati lands. It is stated in paragraphs 8 and 8A of the writ application that the lands on either side of the river on which the ghats are located and sheds are constructed are all raiyati lands and are in possession of raiyats and that the landing places and sheds are both over raiyati lands. On behalf of the respondents it is stated in the counter affidavit that only some of the lands are raiyati and the others are gainnazma malik lands in possession of the State of Bihar.

A rejoinder to the counter affidavit has been filed on behalf of the petitioner and in that rejoinder again it is stated that all those lands are raiyati lands and a list of the raiyats who, according to the petitioner, hold those lands, has been given therein. That list includes the names of Punit Manto & Ramdhari who, according to the counter affidavit referred to above, had themselves taken settlement of the paimali rights of the Ghat in question on several occasions. It is, however, submitted by Mr. Das that the orders of the Sub-Divisional Officer dated the 20th of February, 1956, and the 5th of March, 1956, and the order of the Collector dated the 6th of November, 1956, which are sought to be quashed, themselves give full indications that they are the raiyati lands.

It is however, an admitted case of the parties that at least some of the lands are raiyati lands. The learned Government Pleader, however, has contended that as the Ghats are always shifted, it is not possible to locate, on the materials available on the record of this case, as to which lands are raiyati lands over which paimali rights have to be exercised throughout the year according as the Ghat shifts. This question again is a question of fact over which the parties are not in agreement, and, as already observed, such controversial fact cannot be gone into in a writ application.

It has, however, been contended that admittedly some of the lands being raiyati lands, the Government could not, by making settlement of paimali right, interfere with the private, right of the raiyats, and in support of that contention reliance has been placed on a Bench decision of the Calcutta High Court in *Chairman, Midnapore District Board Vs. Monmotha Nath Mondal and Others*, in which it was held that such an interference would, in effect, amount to confiscation of private property without a corresponding award of compensation and thus taking away rights of private individuals and vesting the same in the public.

There is no doubt as to the correctness of the above principle. But in the present case it is difficult to apply the same inasmuch as the raiyats whose rights are alleged to be interfered with by the settlement in question have not made any grievance and come to this Court and it is not possible to issue any writ at the instance of the petitioner who has not claimed to have acquired any interest from the raiyats concerned. On the other hand, as the counter affidavit shows, some of the raiyats themselves have taken settlement in the past. The above two grounds, therefore, fail.

4. The main grounds on which the application is sought to be supported are (1) that both under the Bengal Ferries Act as well as by the law of easements of necessity, the petitioner is entitled to the use of the lands on both sides of the river for the purpose of stacking, loading and unloading goods and for erecting huts for passengers and the respondents were not entitled to interfere with that use by settling the paimali rights over those lands and (2) that the settlement of the above rights infringes the provisions of Article 19(1)(g) of the Constitution of India.

The first ground taken appears to be sound and the principles of law involved therein have not been challenged by the learned Government Pleader appearing for the respondents. But that, as I will presently show, does not, in any way, assist the petitioner. So far as the second ground is concerned, it has no merit.

5. "Paimali", according to Wilson's Glossary, means "compensation for damage done to standing crops by the passage of troops." From the orders sought to, he impugned it appears that "paimali", as the term connotes, is "the toll or utilising the lands of khas mahal in course of holding of a mela, transport of goods and throwing of sacrificial goats in the Ganges". The above meaning of paimali is not in dispute, and Mr. Das appearing for the petitioner does not challenge the right of the respondents to settle this paimali right so far as the holding of a mela and throwing of sacrificial goats in the Ganges are concerned. His objection relates only to the settlement of the above right so far as the transport of goods is concerned.

His submission is that in law the petitioner, being the settlee of river ferries, is entitled to use the lands on both sides of the Ganges even if the same be of the khas mahal for the transport of goods and the levying of any tolls over the

transport by settling the paimali right with respect to the same infringes with his enjoyment over such lands for the purpose of carrying out the ferry business.

6. Section 5 of the Ferries Act defines "Ferry" as including a bridge of boats, pontoons or rafts, a swing-bridge, a flying-bridge, a temporary bridge and a landing stage. Rule 19 of the rules made under the above Act lays down that the lessee shall provide and keep in proper order, to the satisfaction of the Magistrate, the landing stages on both sides of the ferry, and shall move them when necessary according to rise and fall of the water and that he shall also provide proper rest houses or travellers' sheds on the banks of the ferry as required by the Magistrate, and shall make all proper arrangements and provide all suitable accommodations for the ferry boats for passengers and goods traffic.

Under Rule 10 the lease has to be executed in a prescribed form, paragraph 4(d) of which requires the lessee to agree to provide and keep in order the landing stages and the traveller's sheds at either or both banks of the river and the slopes and approaches to the ferries. It has, therefore, been argued that by taking settlement of the ferries the petitioner is entitled to the use of the lands on both sides of the river so as to fulfill the requirements of the above rule and to have a landing stage as being part of the settlement of a ferry.

Reliance has also been placed in this regard on a decision of this Court in Jeobaran Singh and others Vs. Ramkishun Lal in which, relying on the definition of the term "ferry" given in the Act, it was held that in order to constitute a ferry such as is contemplated by the Act in this country it is necessary that there should be two points on both sides of the river so that people and property may be conveyed from one side of the river across the other and that it must be connected on both sides with land on the bank of the river. In my opinion, the decision referred to above is perfectly correct, and, there is no doubt that the petitioner is entitled to the use of lands on both sides of the river for the purposes referred to above.

7. Apart from the above right being guaranteed to the petitioner under the Ferries Act itself, he is entitled to the use of the above lands for the above purposes by way of easements of necessity. The law on the subject is to be found in Gale on the Law of Easement, 10th edition, page 113, which is to the following effect:

"Apart from implied grants of ways of necessity, or of what are called continuous and apparent easements, the cases in which an easement can be, granted by implication may be classified under two heads. The first is where the implication arises because the right in question is necessary for the enjoyment of some other right expressly granted. The principle is expressed in the legal maxim "*Lex est cuicumque aliquis quid concedit concedere vide-tur et id sine quo res esse non potuit*".

Thus the right of drawing water from a spring necessarily involves the right of going to the spring for the purpose....The second class of cases in which

easements may impliedly be created depends not upon the terms of the grant itself, but upon the circumstances under which the grant was made. The law will readily imply the grant or reservation of such easements as may be necessary to give effect to the common intention of the parties to a grant of real property, with reference to the manner or purposes in or for which the land granted or some land retained by the grantor is to be used."

A similar proposition of law is found in Halsbury's laws of England, second edition, volume 22 at page 661, paragraphs 1419 and 1420. The relevant portions of the above paragraphs run as follows:

"There is prima facie incident to the ownership of mines, power on the part of the mine-owner to enter upon the surface, to dig pits and get the minerals; to drive shafts vertically through an upper seam, or make underground communication through a vertical barrier separating excepted mines

An express liberty to dig pits implies prima facie a right to fix on the surface, machinery necessary for draining the mines and raising the minerals; and, if necessary, to erect steam engines for these purposes, with an engine house and a pond for supplying the engines with water. Similarly, a liberty with servants, carriages, and horses to enter and carry away the minerals may authorise the construction of a railway; and liberty to make a sough, or drain carries with it liberty to make sough pits for its repair....."

In *Peter v. Kendal* (1827) 108 ER 610 Holroyd J. referring to the incident of the ferry, observed as follows:

"The owner of the ferry must, as incident to the ferry, have such right to use the land on both sides as to enable him to embark and disembark his passengers; but he need not for that purpose have any property in the soil. It is sufficient if he has a right to use in the land for all purposes of his ferry. That is a right to use the land of another for a particular purpose, and is an incorporeal hereditament."

As already observed, the correctness of the above principles of law has not been challenged by the learned Government pleader. The petitioner is undoubtedly entitled to use the lands on both sides of the river for the purposes referred to above. But beyond that he does not get any right over the said lands, or, in other words, as held in the case just referred to above, he need not for that purpose have any property in the soil.

The proprietor of the soil is entitled to the use of the soil in any way he likes provided it does not interfere with the enjoyment of the ferry rights acquired by the petitioner under a lease from the District Board. This, however, does not mean that the Government cannot levy any toll for the use of the khas mahal lands or settle the paimali lands independent of the settlement of the ferry right by the District Board. The two rights, in my opinion, are different and independent of each other,

8. It has, however, been argued by Mr. Das that u/s 7 of the Ferries Act the control of all public ferries vests in the Magistrate of the district subject to the direction of the Commissioner and that Section 35 of the same Act makes it lawful for the Government to authorise the District Board to manage any public ferry situate in the district, and, a submission has been made that when the District Board has settled the ferries with the petitioner entitling him to use the lands on both sides of the river for landing stages and other purposes referred to above, the Government had no right to settle paimali rights over the same lands and thus make tolls payable for the use of the above lands in course of transport of goods.

I am unable to agree with this contention. The District Board and the Government are two different entities and each of them is entitled to make settlement of its own rights on a particular land. The Government is legally entitled to levy tolls on its lands payable by traders in course of transport of goods; at the same time the District Board also is entitled to create an incidental interest in a settlee for the use of the same lands for the purposes connected with, and as being part of, the settlement of a ferry.

The two lights are distinct and capable of separate enjoyment. Of course, the effect of the settlement of paimali may be that the traders may have to pay twice over to different bodies holding different interests in the lands. But that is the natural consequence of the user of a land held by different persons in different capacities. The petitioner cannot have any valid and legal grievance in that regard. For these reasons, as already observed, the first ground taken by Mr. Das is of no assistance to him.

9. The second contention equally fails. The argument advanced in support of this contention is that under Article 19(1)(g) of the Constitution of India the petitioner has been guaranteed a right to carry on any occupation, trade or business, but the settlement of the paimali rights by the government interferes with the petitioner's right as being a lessee of the ferries and thus infringes with the petitioner's above fundamental right,

The point has been taken in the writ application in paragraph 25(ix), wherein it is stated that the levy and settlement will violate and prejudice the petitioner's ferry rights, and, in paragraph 27, which states that the petitioner has an interest in the levy of paimali right inasmuch as he shall lose his right of toll since people will not pay twice. In support of this contention, reliance has been placed on a Supreme Court decision in Mohammad Yasin Vs. The Town Area Committee, Jalalabad and Another, . In that case bye-law No. 1 of Bye-laws of the Town Area Committee of Jalalabad (in the United Provinces) provided that no person shall sell or purchase any vegetables or fruit within the prescribed limits of the Town Area Committee by wholesale or auction, without paying the fees fixed by these bye-laws to the licensee appointed by the Town Magistrate.

Bye-law No. 4(b) provided that any person can sell in wholesale at any place in

the town area provided he pays the prescribed fees to the licensee. A person who had been carrying on the business of wholesale dealer in vegetables and fruits in his own shop at Jalalabad for a period of seven years applied for protection under Article 32 contending that these bye laws infringed his fundamental right to carry on his trade guaranteed by Article 19(1)(g) and were, therefore, void. It was held that the U. P. Municipalities Act did not empower the Town Area Committee to make any bye-law authorising it to charge any fees otherwise than for the use and occupation of any property vested in or entrusted to the management of the Town Area Committee including any public street.

It was further held that the bye-laws in question which imposed a charge on the wholesale dealer in the shape of the prescribed fee, irrespective of any use or occupation by him of immovable property vested in or entrusted to the management of the Town Area Committee including any public street, are obviously ultra vires the powers of the Committee and, therefore, the bye-laws cannot be said to constitute a valid law which alone may, under Article 19(6) of the Constitution, impose a restriction on the right conferred by Article 19(1)(g).

From the above case it appears that the petitioner in that case was required to pay a fee for carrying on his business over the land of which he was the owner. The municipality had no interest in that land. But in the present case the position is not the same. Here, the Government, being the owner of the khas mahal lands, is interested in the lands lying on both sides of the river and the respondents, therefore, were perfectly entitled to settle the paimali rights over these lands. Such a settlement, in my opinion did not infringe the fundamental rights of the petitioner guaranteed to him under Article 19(1)(g) of the Constitution of India.

10. On consideration of the facts and circumstances of the case as well as the law on the point my concluded opinion is that the respondents had the legal right to settle the paimali right in question. The petitioner has, therefore, failed to make out a case for issue of any writ under Article 226 of the Constitution of India. The application is, therefore, rejected with costs. Hearing fee: Rs. 100.

V. Ramaswami, C.J.

11. I agree.