
(1990) 05 CAL CK 0034
In the Calcutta High Court
Case No : S.A. No. 991 of 1980

Sailendra Nath Ghosh

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 18-05-1990

Acts Referred:

West Bengal Estates Acquisition Act, 1953 — Section 10(2), 4, 44(2a), 5, 6

Citation : 95 CWN 225

Hon'ble Judges : P.K. Banerjee, J;Lilamoy Ghosh, J

Bench : Division Bench

Advocate : S.P. Sen, for the Appellant;Monoranjan Basu, for the Respondent

Final Decision : Allowed

Judgement

Pabitra Kumar Banerjee, J.—The short and possibly the only point involved in this appeal is whether the property described in the schedule to the plaint is a Tank Fishery as claimed by the plaintiff or a Riverine Fishery as urged, by the State Government and an answer to this would be decisive of the appeal. We propose to narrate only those facts which are germane for this purpose. The plaintiff-appellant Sailendra Nath Ghosh filed a suit against State of West Bengal and five others, alleging inter alia that the disputed fishery, having an area of about 68.90 acres comprising C.S. Plots 145, 250 and 444 appertaining to khatian no. 392 of Mouza Mollahati in the district of 24 Parganas is locked up by embankments and dissociated from river Ichamati. The said fishery, a natural reservoir, along with the sub-soil has been and is being held by the plaintiff and pro-forma defendant no. 5 Satish Chandra under a lease from Gour Mohan Sarkar and others in non-occupancy right at an annual rental of Rs. 525/- and the same is being used jointly by the leasees as a Tank Fishery for the purpose of rearing, growing, catching and selling fish. The water of the "Khal" recorded in CS. Plot no. 303 is dried up and does not remain in communication with the main stream during all seasons of the year. The State Government through the Sub-Divisional land Reforms Officer and Collector initiated proceedings u/s 44(2a) of the West Bengal

Estates Acquisition Act, 1953 (hereinafter referred to as the Act) followed by notice u/s 10(2) directing the plaintiff to deliver up possession of the disputed fishery to the State. The plaintiff apprehends that he might be dispossessed by the State Government. Hence the suit in which the plaintiff prayed for a declaration that the disputed property is a "Tank Fishery", that the proceedings u/s 44 (2A) are void and illegal and for permanent injunction restraining the State defendant from dispossessing the plaintiff from the disputed fishery.

2. The defendant no. 1 State of West Bengal contested the suit by filing a written statement in which it was alleged that the disputed Fishery is connected with the navigable river Ichamati by a channel in R.S. plot no. 336 and it is not a natural reservoir. The claim of the plaintiff that the disputed Fishery is a Tank Fishery has been seriously challenged and it is claimed that notice u/s 10(2) and the proceedings u/s 44(2a) of the Act are lawful and valid. The pro-forma defendant no. 5 also filed a written statement but, he did not appear at the trial.

3. On the aforesaid pleading parties went to the trial with 9 issues. The learned Subordinate judge, 2nd Court, Alipore by the judgment, and order dated 16.9.78 dismissed the suit with the findings that the disputed Fishery is a riverine fishery and not a Tank Fishery. On appeal, the learned Addl. Dist. Judge, 9th Court, Alipore affirmed the findings and decision of the learned Subordinate Judge and accordingly the appeal was dismissed. Feeling aggrieved, the plaintiff has come up in second appeal.

4. Mr. S.P. Sen. the Learned Counsel for the appellant, took us through the evidence on record and with reference to the Record of Rights and the report of the pleader Commissioner contended, in the first instance, that the disputed fishery does not in any way form part of river Ichamati, but that it falls within the definition of "Tank Fishery" u/s 6(2) of the Act. In this connection the Learned Counsel relied on and cited two decisions reported in 50 CWN 606 (RANI PRABHABATI SAHEBA V. SECRETARY OF STATE AND ORS.) and Ganesh Chandra Khan and Others Vs. State of West Bengal and Others, respectively. The learned State Counsel, on the other hand supported the concurrent findings of the Courts below mainly on the ground that the disputed fishery having direct connection with river Ichamati through a well defined canal, and the river water flowing to the disputed plots occasionally, the said fishery must be deemed to be a riverine and not Tank Fishery. In these circumstances, the arguments concluded, the disputed property had vested in the state by operation of law and the plaintiff is not entitled to any relief in this Suit. In the context of the rival contentions aforesaid it becomes necessary to examine the evidence on record first and then to set forth the legal principles applicable to the facts of the case.

5. The subject matter in dispute comprises three plots which have been recorded a plot nos. 250, 133 and 379 during C.S. operation and as plot nos. 250, 145 and 444 during the R.S. operation. The river Ichamati, a navigable river, flows at a distance of 700/800 cubits from the disputed plots. There is a canal (Khal) recorded in C. S. plot 303 and RS plot 336 connecting Ichamati at one end and

the disputed plots at the other. The geographical extent of the disputed plots, the canal, the river and adjoining plots have undergone slight changes since the CS operation (1925-30) and according to the Pleader Commissioner (PW 1) these changes or diversions are "negligible". It has been conclusively proved that the three disputed plots have been leased out to the plaintiff and pro-forma defendant no. 5 by the superior landlords long before the Estates Acquisition Act, 1953 came into force. The plaintiff had 12 annas share and his co-sharer 4 annas share and the grant included right in the subsoil and the right of fishery. The RS record of rights Ext. 10, rent receipts exts. 9 to 9(b), Nadali Ext. 6 CS Map Ext 12 are documents supportive of the plaintiff's title to the disputed property immediately before the Act came into operation. At this juncture it would be most appropriate to look into the report and sketch map Ext 1 filed by PW 1 Rash Mohan Pal. It appears that the witness was appointed Pleader Commissioner in another suit being TS no. 86 of 1962 filed by pro-forma defendant no. 5 in respect of the same property which is the subject matter in dispute in this suit. The Pleader Commissioner has deposed as PW 1, proved the report, sketch map etc and the defendant got sufficient opportunity to cross examine the witness. It further appears that at no stage of the suit any objection was raised from any quarter regarding the authenticity of the report or with regard to the admissibility of the report, map etc. submitted by the commissioner. For these reasons the Appellate Court noticed that "both parties freely referred to them". The field works were conducted on several dates between 24.4.66 and 27.5.66. During the investigation which was attended to by the representatives of both the parties, the pleader commissioner found, "the bundh at a distance of 16 feet towards the west of its original position according to the CS Map line which shows the Board or fishery quite separated from and unconnected with the said khal though the recent RS map shows the khal with an opening connecting the sid Boar....." The Commissioner failed to understand "how and why this change of CS map occurred". At some places of the canal water was less than knee deep although the depth of the bed was about 12 feet and he found, "no water reaching the bundh, the khal was dried up". (Emphasis supplied). In another place of the Report it was written that, "It is not likely that at times of high water specially during rains water may flow towards and dash against the bundh which keeps the disputed fishery or Boar separated from or unconnected with the said khal". PW 3 Sabed Ali who was 62 and PW 4 Nagen aged 60 in 1978 live close to the disputed fishery. From their deposition as also from the deposition of PWs 5 and 6 it has been proved that water of the disputed fishery is sweet and that of Ichamati is saline, the canal waters do not fall into the disputed fishery and that the bundh separating the canal from the disputed fishery is existing for a long time. The most striking feature is that the disputed fishery is higher in level than the canal. As a matter of fact the defined pathway over the bundh is used by the pedestrains and cattle and the khal is crossed with the help of an improvised bridge. These facts strongly suggest that the bundh is existing for a long period. It is not disputed that Ruhi, Katla and Mrigel which are sweet water fishes are grown in the disputed fishery. The local features described

by PWs agree with those noted by the Commissioner in his report. As against the evidence adduced on behalf of the plaintiff, the defence evidence seems to be weak and unsound. DW 1 Mongal sardar who claims to be the member of the Mollahati Panchpota Fishermen's Cooperation Society did not hesitate to state that the canal remains full of water all through the year, although the Commissioner's report represents contrary state of things. The story that every day during full tide Ichamati water flows into the disputed fishery and during ebb tide the fishery water recedes to the river is nothing short of absurdity. If this process was actually allowed to continue, no pisciculture would have been possible in the disputed fishery. Upon assessment of the evidence adduced by the respective parties it is apparent that members of the Fishermen's Co-operative Society out of greed and self interest are trying hard to take charge of the valuable fishery and in the nefarious activities, some officers of the Settlement Department of the State Government have lent their hands for some unknown reasons. That is the reason why the JIRO was prompt in settling the 12 annas share in the disputed fishery to the co-operative society as soon "as the plaintiff's earlier suit was dismissed and little time was wasted in instituting the present suit. For these reasons it would be unsafe to discard the plaint case upon reliance on the defence case, which is otherwise unacceptable.

6. It follows from what has been stated above that the disputed fishery is locked up by embankments at least on three sides and the narrow canal is CS plot 303 has some communication with river Ichamati. The other end of the canal leads upto the bundh separating the disputed fishery from the canal. There is no history that the disputed plots are old river bed and due to changes in the river course through passage of time the vast sheet of water has been left behind as back water. It may be recalled that while the appellant insists that the disputed fishery is a Tank Fishery, the respondent State asserts that it is a river fishery. Such disputes affecting fishing rights of the parties have given rise to difficult legal questions over a century which have been much litigated. Reference may be made to a few cases, old and current, where such questions were raised and decided. We propose to start with the case of *Bhaba Prosad v. Jagadindra Nath Rai*, reported ILR 33 Cal 15. In that case it was held that if a river shifts its course leaving lakes, dobas or sheets of water in its old bed, the lessee of the exclusive right of fishery in the river retains that right over such lakes and dobas so long as these latter remain in communication with the main channel at all seasons of the year.

7. In the case of *Ishan Chandra Dass Sarkar Vs. Upendra Nath Ghosh and others* Their lordships observed that when on account of a change in the course of a public navigable river an arm of the river ceases to be an arm of the flowing river, the person who had a right of fishery in the river ceases to have any right to it and it becomes the property of the adjunct owner. In that case old stagnant water which was closed both ends and later formed a piece of stagnant water which was back water of the river. The case of *RANI PRABHABATI SAHEBA V. SECRETARY OF STATE AND ORS.*, reported in 50 CWN 606 lays down some

important guidelines which might assist us in arriving at the correct conclusion. In that case the defendants claimed right of fishery in the adjoining waters as adjunct of river fishery and their Lordships of the Privy Council resolved the dispute in this way. In order that the fishings in any waters may be claimed as an adjunct of a river fishery these waters must be in continuous connection with the river throughout the year, in the dry season as well as in the wet season. Waters which cease to be continuously connected with a river, cease to be adjuncts of it and the fishing in such disconnected waters cease to be parts of the river fishery and pass to the owners of the soil. (Underlining is ours;) In the case of Ganesh Chandra Khan and Others Vs. State of West Bengal and Others, His Lordship D. N. Sinha J, (as His Lordship then was) was called upon to answer the question almost similar to that involved in this appeal and this was answered in this way. When there is no more any permanent connection with the river and the fishery is transformed into an enclosed sheet of water, in such a case the fishery would no longer be a river fishery, but may be a tank fishery, notwithstanding the fact that there might be some kind of connection with the river in the wet season in time of flood. In formulating such a proposition His Lordship had occasion to refer to a good number of reported decisions dealing with the question of fishery right from the case of SRINATH V. DINABANDHU, reported in ILR 42 Cal 489 down to the case of RANI PRABHABATI SAHEBA (Supra). In this connection the following passage from Halsbury's Laws of England, 4th Edition Vol. 18 para 632 may be appropriately quoted: "In canals (including reservoirs and artificial water courses) which are made over land, the right of fishing as an incident of the soil is prima facie in the owner of the soil and he may let or otherwise deal with it. When a river is canalised under a statute, the right of fishing remains in the original owners unless the Act contains provisions to the contrary". In the light of the ratio and principles emerging out of the decisions cited above, we can safely conclude that the fishery in the disputed property is a "Tank Fishery" and not a "Riverine Fishery" because the most distinguishing feature, namely, the permanent and continuous communication with the river throughout the year, in the dry season as well as in the wet season is absent in the case at hand. The Courts below failed to appreciate the aforesaid aspects and misdirected themselves due to failure to apply correct legal principles applicable to the instant suit. The next question which arises for our consideration is whether the disputed "Tank Fishery" had vested in the State by operation of the provisions of the West Bengal Estates Acquisition Act, 1953.

8. It should be borne in mind that immediately preceding the date of vesting on 1st of Baisakh 1362 B.S., the disputed property was held in Khas by the plaintiff and pro-forma defendant Satish Kundu. Notionally all interests of the "intermediaries" in the estates and all immovable properties held by raiyats in khas exceeding the ceiling prescribed under the Act and the Rules made thereunder had vested in the state, subject to the right of retention by an intermediary or a raiyat provided in the Act itself. The "Tank Fishery" is one such item included in section 6 of the Act which permits the Intermediary to retain

certain properties specified therein. Explanation to section 6(1)(c) of the Act reads as follows

Explanation..... "tank fishery" means a reservoir or place for the Storage of water or by construction of embankments, which is being used for pisciculture or for fishing, together with the sub soil and the banks of such reservoir or place, except such portion of the banks as are included in a homestead or in a garden or orchard and includes any right of pisciculture or fishing in such, reservoir". u/s 6(1) notwithstanding anything contained in sections 4 and 5, subject to the provisions contained in the proviso to sub-section (2) and other provisions of the Act, an intermediary shall be entitled to retain with effect from the date of vesting.....(e) tank fisheries. Kb ceiling has been fixed in respect of the tank fisheries. The right of retention extends even to cases where the person in possession has a mere right of fishing, which is an incorporeal right unconnected with any right in the sub-soil. Such being the position, the plaintiff, holding the disputed fishery in khas at the material time, is certainly entitled to retain the same. In fact, the plaintiff has openly expressed Ms intention to retain the disputed property. As admitted by DW 1 he reared and caught fish in the disputed fishery upto 1966. He moved the Hon"ble Court along with the pro-forma defendant in a writ petition and got the first notice under 10(2) quashed, both of them filed separate suits for establishing their valuable rights as accrued under the Act. Despite all these steps the State Government hastily and arbitrarily stuck to their improper stand to the prejudice of the rightful owners. It is true that u/s 44(2a) of the Act any officer empowered by the state Government can initiate suo-motu proceedings and revise entry in the finally published record of rights. But that must be disposed of after giving the person or persons interested an opportunity of being heard and after recording reasons. Upon consideration of the materia on record we are satisfied that the plaintiff was not given any such opportunity before the disposal of the proceedings u/s 44(2a) and the cryptic order recorded cannot be sustained in view of the infringement of plaintiff's rights in consequence of such suo-motto proceedings. We have already recorded the reasons why the revision of RS entry is unjust and improper. In the aforesaid view of the matter the plaintiff is entitled to the declarations sought for and there shall also be a decree for permanent injunction in so far as it relates to the State action by way of initiation of proceedings u/s 44(2a) and issuance of notice u/s 10(2) as averred in the plaint. While upholding the contentions of the plaintiff-appellant with reference to the pleadings and evidence admitted on such pleadings we however make It clear that we have entered into the merits of the plaintiff's right as it stood on 1st Baisakh 1362 B. S. and the date on which the proceedings u/s 44(2a) was. finally disposed of. The effect of The West Bengal Land Reforms Act, 1955 as amended in 1981 affecting the rights of the plaintiff in regard to the disputed fishery and those of the State Government to take appropriate action, if any, provided under that Act have neither been gone into nor decided in this judgment.

9. In the light of what has been discussed in the, preceding paragraphs we hold

that the judgments and decrees impugned cannot be sustained. The result is that the appellant succeeds. We, accordingly, allow the appeal and set aside the judgments and decrees of the courts below. The suit is decreed to the following effect. It is hereby declared that the disputed fishery is a "tank fishery" within the meaning of section 6(1) (e) of the West Bengal Estates Acquisition Act, 1953 and that the order dated 8.7.1960 passed by the ASO in the proceeding u/s 44 (2a) of the Act is void, illegal and inoperative.

10. The defendant-respondents are permanently restrained from taking possession of the disputed property pursuant to the aforesaid proceedings and notice. In the facts and circumstances, parties will bear their own costs throughout.

Lilamoy Ghosh, J.

I agree.