

(1999) 03 CAL CK 0043
In the Calcutta High Court

Case No : Constitutional Writ Jurisdiction, C.R. No. 12440 (W) of 1979

Sanat Kumar Mal and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 04-03-1999

Acts Referred:

Constitution of India, 1950 — Article 19, 21, 226

West Bengal Estates Acquisition Act, 1953 — Section 5A(1), 5A(6), 5A(7), 6(1)

Citation : (1999) 2 CALLT 30

Hon'ble Judges : Satyabrata Sinha, J

Bench : Single Bench

Advocate : Mr. Kanan Kumar Ghosh, Mr. B. Gayen, Mr. Sanjib Kr. Mal, Mr. Dipankar Dutta and Mr. Guru Das Mitra, Mr. Samir Kr. Banerjee, for the Appellant; Mr. Mrinal Kanti Roy and Mr. K.C. Sahoo, for the Respondent

Judgement

S.B. Sinha, J .

The petitioners in this writ application, inter alia, have prayed for the following reliefs:--

"(a) A Writ of Certiorari commanding the respondents Nos. 1 to 7 to forthwith produce, certify and/or cause production of the records of the case No. 4 of 1962 of District Hooghly started against Munindra Nath Mal, father of the petitioners, u/s 5A of the West Bengal Estates Acquisition Act and Estates Acquisition Appeals Nos. 9 and 10 of 1974 of the court of the Special Judge u/s 5A(6) of the said Act, being the District Judge, Hooghly and the papers and documents relating to the purported order of vesting passed by the Respondents Nos. 1 to 7 so that the same may be perused and set aside by this Hon'ble Court.

(b) A Writ of Mandamus commanding the Respondents Nos. 1 to 7, their officers, servants and agents to cancel, revoke and/or rescind the orders impugned in the present petition and also the purported order of vesting passed by the Revenue Officer and not to give any effect or further effect to the said Impugned orders

and to act in accordance with law."

2. The case has a chequered history. One Munindra Nath Mal was an ex-Intermediary. The petitioners are heirs and legal representatives of the said Munindra Nath Mal. The said ex-intermediaries allegedly owned and possessed the following lands:

(a) Agricultural 13.22 Acres

(b) Non- Agricultural 16.91 Acres

(i) Tank & Doba 4.84 Acres

(ii) Danga 8.86 "

(iii) Bamboo 3.21 "

(c) Home Stead 1.07 Acres

(d) Orchard 13.79 Acres.

3. Admittedly by reason of a registered deed of settlement dated 25.11.1953 the said ex-intermediary made the following settlements in favour of his sons:--

(a) Sushil Kumar

(i) Agricultural .49 Acres

(ii) Non-Agricultural 1.65 Acres

(a) Tank .34

(b) Danga 1.01

(c) Bamboo .30

(iii) Homestead .16 Acres.

(iv) Orchard .18 Acres.

2.46 Acres.

(b) Sanat Kumar Mal.

(i) Agricultural 1.20 Acres.

(ii) Non-Agricultural 2.45 Acres.

(a) Tank & Doba .43

(b) Danga 2.02

(iii) Orchard 1.45 Acres.

5.10 Acres.

(c) Saroj Kumar Mal.

(i) Agricultural .76 Acres.
(ii) Non-Agricultural .96 Acres.
(a) Tank & Doba .47
(b) Danga .44
(c) Bamboo .05
(iii) Home Stead .15 Acres
(iv) Orchard .91 Acres
2.78 Acres

(d) Santosh Kumar Mal.
(i) Agricultural 2.17 Acres.
(ii) Non-Agricultural 2.14 Acres.
(a) Tank & Doba .47
(b) Danga .63
(c) Bamboo 1.04
(iii) Homestead .15 Acres.
(iv) Orchard .84 Acres.
5.30 Acres.

(e) Sunil Kumar Mal.
(i) Agricultural 1.25 Acres.
(ii) Non -Agricultural 1.29 Acres.
(a) Tank & Doba .36
(b) Danga .47
(c) Bamboo .46
(iii) Homestead .15 Acres.
(iv) Orchard .42 Acres.
3.11 Acres.

4. The petitioners further alleged that Sushil Kumar Mal, Saroj Kumar Mal and Santosh Kumar Mal had Independently acquired the lands of the following descriptions :--

(a) Sushil Kumar Mal.

- (i) Agricultural .68 Acres.
- (ii) Non-Agricultural .41 Acres.

(a) Tank & Doba .07

(b) Danga .34

- (iii) Orchard .09 Acres.

1.18 Acres.

(b) Saroj Kumar Mal.

- (i) Non-Agricultural .47 Acres.

(a) Danga .32

(b) Bamboo .15

.47 Acres.

(c) Santosh Kumar Mal.

- (i) Agricultural .10 Acres.

(ii) Non-Agricultural .16 Acres.

(a) Danga .16

.26 Acres

5. After coming into force of the West Bengal Estate Acquisition Act the said ex-intermediary filed a return in Form-B on 11.10.1955. However, a big Ralyat case being Case No. 4 of 1962 was initiated against him by the Assistant Settlement Officer.

6. By a Judgment and order dated 14.2.1963 the Assistant Settlement Officer held that the said ex-intermediary held lands in excess of the ceiling limit where against an appeal was preferred which was marked as E.A. No. 1 of 1963. The appellate authority being the District Judge, Hooghly, allowed the said appeal and remitted the matter back to the Assistant Settlement Officer for re-hearing by an order doted 24.9.63. The Assistant Settlement Officer by an order dated 19.11.63 again held that the said ex-Intermediary possessed excess lands where against an appeal was preferred which was marked as E.A No. 4 of 1963. The said appeal was again allowed and the matter was again remitted back to the Assistant Settlement Officer by the District Judge. Hooghly by an order dated 27.2.1973.

7. By reason of an order dated 18.6.1974 the Assistant Settlement Officer held that the aforementioned ex-intermediary possessed 7.45 acres of land in excess of the ceiling limit prescribed under the Act.

8. Two appeals were preferred there against one. by the ex-intermediary, and

another, by one Biswanath Bapuli which were marked as E.A. No. 10 of 1974 and E.A. No. 9 of 1974. By reason of the impugned Judgment and order dated 25.4.79 both the appeals were dismissed.

9. Mr. Kanan Kumar Ghosh, the learned counsel appearing on behalf of the petitioner has, inter alia, submitted that even if the deed of settlement executed on 25.9.53 in favour of his sons is ignored, he could not be held to have more than the agricultural lands in excess of the ceiling limits Inasmuch as the claim to the extent of 3.21 acres as Bamboo garden and 1.41 acres as Orchard had wrongly been rejected without taking into consideration the provisions of section 6(1)(f) of the said Act. The learned counsel submits that if the said lands are held to be non-agricultural lands/ orchards, the petitioners would be holding 40.31 acres of land and. thus, the agricultural lands held by the said ex-intermediary cannot be said to be in excess of the ceiling limits. It has further been submitted that 5 acres of agricultural land held by Biswanath Bapull could not be included with the land held by Munindra Nath Mal. It has been pointed out that this court in State of West Bengal v. Mangal Chandra Burman reported in ILR 1968 Cal 114 has clearly held that bamboo clumps do not come within the purview of the agricultural lands. It has further been pointed out that another learned single Judge of this court, however, without taking the aforementioned decision into consideration in State of West Bengal Vs. Mir Fakir Mohammad, has held that bamboo garden would not be an Orchard. However, although the said decision has affirmed by the apex court in Mir Fakir Mohd. Vs. State of West Bengal, it does not appear that the said question had been gone Into, and, thus, it is not an authority for the proposition that the bamboo garden is an agricultural land.

10. Mr. Samir Kumar Banerjee. the learned counsel appearing on behalf of the State, however, has supported the Judgment under appeal.

11. West Bengal Estates Acquisition Act was enacted by the State to provide for acquisition of estates, of rights of intermediaries therein and of certain rights of raiyats and under- raiyats and of the rights of certain other persons in lands comprised in estates.

12. Non-agricultural land has been define to mean land other than agricultural land or other than land comprised in forest.

By reason of section 5A of the said Act, the State had been empowered to make an inquiry as regard transfer of any land by an intermediary made between the 5th day of May 1958 and the date of vesting, if in its opinion there are prima facie reasons for believing that such transfers are not bona fide.

13. Sub-section (7) of section 5A of the said Act reads thus :

"In this section,--

(i) a transfer shall be held to be not bona fide if it was made principally or partially with the object of increasing the amount of land which a person may

retain under this Chapter or principally or partially with the object of increasing the amount of compensation payable under Chapter III or Chapter IV;

(ii) a transfer in favour of one or more of the following relatives of the transferor, that is to say,-- a wife, a husband, a child, a grand-child, a parent, a grand-parent, a brother, a sister, a brother's son, a sister's son, a daughter's husband, a son's wife, a wife's brother or sister, or a brother's wife, made between the 5th day of May, 1953 and the date of vesting shall be presumed to be not bona fide until the contrary is proved :

Provided that no such presumption shall be made in respect of transfer of land by an Intermediary if the aggregate area of such land owned by the intermediary at any time between the 5th day of May, 1953 and the date of transfer did not exceed twenty acres in extent in the case of non-agricultural land and twenty five acres in extent in the case of agricultural land;

(iii) "transfer" means a transfer by sale, mortgage, tease, exchange or gift:

(iv) "transferor" and "transferee" include the successor-in-interest of a transferor or a transferee."

14. In view of the aforementioned provisions, there cannot be any doubt that a presumption has to be raised that the transfers made in between 5th May, 1953 and the date of vesting, would not be presumed to be bonafide. The transfer in favour of his sons by the ex-intermediary, having been made on 25.11.1953, the same must be held to be not bona fide transfer. The findings of fact arrived at by the learned Assistant Settlement Officer and the learned Tribunal respectively cannot thus be said to be bad in law. However, the findings to the effect that settlement made in favour of the aforementioned Biswanath Bapull in relation to 5 acres of land cannot be said to be correct. The aforementioned land had been recorded in the name of the said Biswanath Bapuli. The said Bapull was not a relation of the ex-intermediary. He claimed settlement in the year 1353 B.S i.e. much prior to coming into force of West Bengal Estate Acquisition Act. It further appears that a suit was filed by him and an ex parte decree was obtained in Title Suit No. 105/63. The name of the said Biswanath Bapuli has also been mutated and the rent had been accepted from him. In the aforementioned situation the concerned respondents could not have brushed aside the deed as also the subsequent events only on the ground that the State was not a party to the Suit.

15. Keeping in view the fact that the name of the aforementioned Blswanath Bapull appeared in the record of rights, a presumption that he was in possession of the property in question would arise. The decree passed in a Civil Suit although not binding upon the State had a probative value. The learned Tribunal has also wrongly placed onus of proof upon the petitioners. In view of the fact that sub-section (7) of section 5A of the said Act was not attracted, the onus to prove that the apparent state of affairs was not the real state of affairs was upon the State. The State does not appear to have adduced any evidence whatsoever to rebut the said presumption. It may be true that Munindra Nath Mal claimed

only two of the plots as his own and has filed return in the year 1958 in respect of the said plots but the question which ought to have been considered was as to whether Blswanath Bapull was bound thereby.

16. Furthermore, from the orders passed by the learned Tribunal below, it does not appear that any such case had been made out by the State or any evidence was adduced in support of such contention. Despite the fact that no evidence in support of the said contention had been adduced on behalf of the State the learned Tribunal below held that the lands did not belong to Bapull. Furthermore, the notice Issued in relation to the said matter, was not issued in terms of section 5A(1) of the said Act as therein it had not been stated that there existed prima facie reasons for believing that such transfer was not bonafide. The materials in support of the prima facie reasons were required to be disclosed but the same had not been done.

17. Had the intention of the legislature been otherwise, a provision similar to that of sub-section (7) of section 5A could have been enacted. Furthermore, the learned Tribunal below has not taken into consideration the evidences adduced by the parties at all. The learned Tribunal below in his impugned order as contained in annexure "C" to the writ application has failed to consider the relevant facts and in that view of the matter there cannot be any doubt whatsoever that the aforementioned findings contains an error apparent on the face of the record. The finding to the effect that such lease had been created in the year 1963 cannot also be upheld in view of the fact that the Title Suit had been instituted in the year 1962 in respect of the same land wherein an exparte decree had been passed but the same had not been taken into consideration.

18. Admittedly a local inspection has been held, a copy of the report is contained in annexure "D" to the writ application wherein in respect of Plot No. 265 clearly it has been shown that the same contains several trees including fruit bearing trees and thus a part of it should have been treated as Orchard so far as those areas covered by the fruit bearing trees are concerned. The learned Tribunal below has not assigned any reason whatsoever in support of his finding while agreeing with the conclusion arrived at by the Assistant Settlement Officer in that regard. It was obligatory on his part to consider the materials on record in that respect and arrive at an independent finding.

19. For the self-same reason plot No. 336 which also contained 12 Babla trees, 11 Date trees which were not of recent origin although might not have been treated as orchard but should be treated as non-agricultural land. Without assigning any reason the learned Tribunal below held that the trees had not been planted many years ago. Such a finding is based on surmise and conjectures and it does not appear that there exists any evidence on records to prove that same.

20. Plot Nos. 484, 93/701. 523 and 643 are tanks, plot No. 1991 is a Doba. Without assigning any reason plot No. 134 has been treated to be a land which

can be utilised as an agricultural land. The question as to whether settlement of tanks and doba has been made for agricultural purpose or not is essentially a question of fact. Such a question can only be determined on the basis of the materials on records. The Tribunal below has failed to consider the evidences on records and appears to have proceeded only on the basis of the opinion contained in the said Inspection reported.

21. Similarly so far tank-fisheries are concerned the same is either agricultural or non-agricultural in nature which could be determined only upon taking into consideration, the deeds of settlements, the user thereof and other relevant factors.

22. In *Badal Chandra Das v. Kinkar Chandra Das* reported in 87 CWN 543, a division bench of this court has clearly held that the question as to whether a particular land is agricultural or non-agricultural would depend on how the same was being used on the date of vesting. This aspect of the matter had not been considered at all. To the same extent, it must be held that there is no basis for arriving at a finding that the doba was being used for agricultural purposes, such a finding could not have been arrived at only on the basis of a day's inspection and. thus, it was necessary on the part of the authorities below to consider the materials on record. It may further be noticed that the question as to whether small fish or big fishes are reared in a tank is wholly irrelevant for the purpose of arriving at a finding as to whether the tank in question is being used for the purpose of fishery or not. Such a finding arrived at only on the ground small fishes are being reared in the tank has been arrived at on a wrong legal principle.

23. The orchards or tank fisheries should have been excluded from computing the ceiling area in view of section 6(1)(0) of the West Bengal Estate Acquisition Act.

24. The question as to whether the bamboo grove is a tree or not is not free from doubt. However, *Bljayesh Mukherji. J. In State of West Bengal v. Mangal Chandra Barman* reported in ILR 1968 Col. 114, upon considering the meaning of the words "agricultural land" and "horticultural land" came to the conclusion that the land upon which bamboo clumps stand cannot be cultivated. The learned Judge, *Inter alia*, observed that in the case there had been no evidence of cultivation. Similar is the position in the instant case. In support of the aforementioned decision the learned Judge had relied upon *Commissioner of Income Tax, West Bengal, Calcutta Vs. Raja Benoy Kumar Sahas Roy*, .

25. However, in *State of West Bengal Vs. Mir Fakir Mohammad*, a learned Judge of this court considered the aforementioned Supreme Courts decisions and discussed as to what would constitute true in paragraph 9 of the Judgment. However, in relation to bamboo tree no reason has been assigned as to why it would not come within the purview of definition of tree. The learned Judge noticed:

"Trees" are described as taller and more robust than the shrubs. Their main axis

remains unbranched for some distance above the ground and forms trunk."

26. Even if a bamboo garden may not be considered to be an orchard but the same cannot be considered to be agricultural lands also.

27. In *Mir Fakir Mohd. Vs. State of West Bengal*, , the apex court merely held that banana plant is not tree. The Supreme Court itself referred to the Shorter Oxford Dictionary to find out the meaning of word of the trees which is to the following effect:--

"In view of cl. (p) of section 2 of the Act, it will not be wrong to look to this definition in the Land Reforms Act, for guidance. This definition, it will be seen, substantially conforms to the dictionary meaning of the term "orchard". According to the Oxford Dictionary, the modern connotation of "orchard" is "an enclosure for the cultivation of fruit trees." Webster's New World Dictionary, also, gives its meaning as "an area of land, generally enclosed, devoted to the cultivation of fruit trees, nut trees." Thus, the existence of cultivated fruit trees on a compact area, is central to the connotation of "orchard". The question before us, therefore, resolves into the issue, whether a banana plant is a "tree"? A "tree" according to the Shorter Oxford Dictionary, is "a perennial plant having a self-supporting woody main stem or trunk (which usually develops wood branches at some distance from the ground) and growing to a considerable height."

Thus, for a plant to come within the connotation of "tree", it must have two essential characteristics: (a) it must be "perennial and not seasonal: and (b) its main stem must be woody and not herbaceous or pulpy."

28. A bamboo plant does or lack the aforementioned ingredients, thus, such lands upon which bamboo plants exist cannot be said to be agricultural lands.

29. It may be noticed that in *Mahabir Prasad Jalan and Another Vs. The State of Bihar and Others* , a Division Bench of the Patna High Court of which I was a member, while considering the question as to whether tea plants are trees noticed:--

"In *Encyclopaedia Britannica* 15th Edition (Vol. 18) at page 687 in respect of tree it has been stated as follows :

"Although the concept of a tree as a growth form is useful and generally well understood, it is not possible to provide a precisely delimiting definition of a tree. There is an imperceptible merging of plants that obviously are trees into shrubs and of weedy plant into herbaceous plants. To qualify as a tree a plant must be perennial (i.e. a plant that renews its growth each year; in addition trees usually have a single self-supporting trunk that contains woody tissues. The trunk generally is dominant for some distance above the ground and commonly produces secondary limbs, called branches : in some species, however, the trunk divides at low, sometimes even at ground level into two or more trunks. Most palms have no branches. Although height is often considered a factor in defining

trees--minimum limits of 15 or 20 feet (5 to 7 metres) be into most commonly accepted limits are an arbitrary measure of convenience; weedy plants, like all others are greatly Influenced by environment, and the same species, and even specimens propagated by cuttings or some other means from the same stock of one species, may vary tremendously in size depending upon where they grow and the treatment they receive. Pines, spruces, birches and many other trees, although reduced in size--in some cases to be more than a few Inches tall--at the northern most limits and the highest altitudes of their occurrence, may still have single weedy trunks. Specimens of many species grown under adverse conditions of soil, moisture, exposure to wind, and other environmental factors may be similarly dwarfed. The Japanese, by manipulating natural factors affect growth and by skilful pruning, practice the art of bonsai, in which a species that weed by forest trees in nature are so dwarfed that they never exceed a few inches to three feet or so in height; such trees developed the proportions and appearance of their fully developed counterpart however."

30. In *Maharaj Prashad Jain Vs. Commissioner of Income Tax*, , a Division Bench of the Allahabad High Court also made quotations from *Encyclopaedia Britannica* in respect of "Tea Plant" thus (AIR 1967 All 14):

"the tea plant is an ever green shrub which in its natural state grows to a height of 50-30 feet but the tea planter keeps it pruned down to height of 3-5 feet. It usually is grown from seed in nursery beds. On large tea estates the young plants are transplanted to the prepared tea field when they are six to eight Inches in height, usually in six months" time.....by the end of the third year they are ready for plucking...weeding. Cultivation between the rows and pruning goes on regularly at different periods for 25-50 years, the average life of a tea bush."

It is, therefore, clear that the petitioners have made out a case that tea bushes are really tea trees and that the tea bushes have some timber value."

31. The learned Tribunal below appeared to have relied upon a decision of the Andhra Pradesh High Court in *Officer-in-charge (Court of Words.) Officer-in-charge (Court of Wards) Paigah, Vicar-ul-umra, Hyderabad Vs. The Commissioner of Wealth-tax, Andhra Pradesh, Hyderabad*, . In that case while considering the provision of Wealth Tax Act, it has been held that the words "agricultural land" should be given, an Indian meaning. In that case the question raised herein had not been raised and the said judgment has been rendered in relation to a different statute and in a different context. The court in this case was considering the question as to whether the vacant land which could be used as an agricultural land would come within the purview of the words "agricultural land" for the purpose of Wealth Tax Act.

32. As indicated hereinbefore a Division Bench of this court in *Badal Chandra Das v. Kinkar Chandra Das* reported in 87 CWN 543 has categorically held that the object and purport of a fiscal statute and the vesting statute is different, thus, the said decision cannot be said to have any direct application in the facts and

circumstances of this case. In this view of the matter it must be held that had the matter been Interpreted by the learned Tribunals below in its correct perspective, they could not have held that the ex-Intermediary was in possession of land in excess of the ceiling area.

For the reasons aforementioned, this application is allowed and the impugned orders are quashed to the extent mentioned hereinbefore. However in the facts and circumstances of the case there shall be no order as to costs.

33. Application allowed