
(1957) 10 OHC CK 0007
In the Orissa High Court
Case No : O.J.C. No. 314 of 1956

Sarada Charan Parija

APPELLANT

Vs

The State and Another

RESPONDENT

Date of Decision : 14-10-1957

Acts Referred:

Constitution of India, 1950 — Article 226
General Clauses Act, 1897 — Section 2(25)
Income Tax Act, 1961 — Section 2
Orissa Estates Abolition Act, 1951 — Section 2, 3(1), 5, 7(1)

Citation : (1958) 24 CLT 17

Hon'ble Judges : Narasimham, C.J.; Mahapatra, J

Bench : Division Bench

Advocate : H. Mahapatra and P.K. Mohanty, for the Appellant; A.G., for the Respondent

Final Decision : Dismissed

Judgement

Narasimham, C.J.—This is a petition under Article 226 of the constitution by the co-sharer proprietors of touzi No. 1467 of Cuttack Collector ate, against the Notification of the State Government u/s 3(1) of the Orissa Estates Abolition Act, 1951 vesting the said touzi in the State of Orissa free from all encumbrances.

2. The touzi is a fishery mahal and the right of the proprietors of the touzi is limited to the right to fish in the waters of river Paika (a branch of the river Mahanadi) in that portion which flows through Parghana Abartak. It appears that in the said Parghana the river flows over 21 villages and its bed is recorded in the Anabadi Khata of several private zamindars, under several touzis described in detail in paragraph 2 of the petition. The fishery Mahal was carved out during the Mahratta period (vide Annexure A) but was subsequently held in Khas for some years by the Government and then settled with private proprietors with a separate touzi number. In the Current Settlement of Orissa also (annexure B) the revenue payable for this touzi was fixed at Rs. 22/8/0. Petitioners 1 to 9 are all sons of one Padma Charan Parija who hold -/8/- annas interest in the touzi.

Petitioners 10 to 12 hold the remaining -/8/-. It is an admitted fact that after the death of Padma Charan Parija the names of Petitioners 1 to 9 were mutated in Register-D of Cuttack Collectorate maintained under the provisions of the Bengal Land Registration Act, 1876.

3. Mr. H Mohapatra on behalf of the Petitioners urged that a fishery of this type in which the proprietors had absolutely no interest over the bed of the river or over its waters, would not be an "estate" as defined in Section 2(g) of the Orissa Estates Abolition Act. That definition, omitting immaterial portions, is as follows:

2(g) "Estate" means any land held by an intermediary and Included under one entry in any of the general registers of revenue-paying lands...prepared and maintained under the law for the time being in force by the Collector of a district.

Mr. Mohapatra rightly conceded that In as much as a separate touzi number was given to this mahal and the necessary entry was made in register-D maintained under the provisions of the Bengal Land Registration Act, 1876, the latter portion of the aforesaid definition may apply, but as this property is not "land" it cannot be deemed to be an "estate". The expression "land" is nowhere defined in the Orissa Estates Abolition Act; and according to Mr. Mohapatra a mere fishery

Mahal, without any interest in the land on which the water flows, wilt not be an "estate".

4. A fishery mahal is a well known feature of the zamindari system prevalent in Bengal, Bihar & Orissa. Exclusive right of fishery without any interest in the land or water, used to be granted even in pre-British times to certain persons and such a right was recognized In the Permanent Settlement and separate touzis were allotted to such mahals. I need only refer to Raja Srinath v. Dinabandhu AIR 1914 P.C. 48, and AIR 1946 92 (Privy Council) , where other rights incidental to the rights of the proprietor of a fishery mahal were fully discussed. Such an exclusive right of fishery in alieno solo has always been recognized as a profit a prendre or benefit arising out of land and as such "immovable property" as defined in Section 2(25) of the General Clauses Act See Jadu Jhalo v. Gaur Mohan Jhalo ILR Cal. 544, Shibu Halder v. Gupi Sundari ILR Cal. 449 and Lakshman Gowroji Nakhwa Vs. Ramji Antone Nakhwa, . In a recent decision of the Supreme Court reported in Anand Behera v. State of Orissa 22 C.L.T. 101 (S.C.), this view was endorsed and such a right of fishery was held to be a "benefit arising out of land" and as such "immovable property".

5. The more difficult question to decide is whether a benefit arising out of land can be held to be "land" for the purpose of Section 2(g) of the Orissa Estates Abolition Act. The expression "land" has been defined in the Land Acquisition Act as follows:

Section 5(a) : "Land" includes benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth." As a general rule an inclusive definition would expand the meaning of the express on

defined and on J. strict construction of the aforesaid definition of the expression "land" it may be held that a benefit arising out of land is also "land", But there is a Calcutta decision in *Shyam Chander v. Secretary of State* ILR Cal. 525, where it was held that a fishery right in alieno solo though a benefit arising out of land will not be "land" as defined in the Land Acquisition Act. "It was observed that the definition would apply only to land including the rights arising out of it but not the rights detached from the land itself. This decision has been followed in a later Patna decision in *Dasarath Sahu v. Secretary of State* 35 I.C. 97 (Pat). Mr. Mohapatra relied very much on these two decisions and urged that a fishery right in alieno solo will not be land within the meaning of the Land Acquisition Act and as the said Act is in pari materia with the Orissa Estates Abolition Act (both the Acts being laws providing for compulsory acquisition for State purposes) the aforesaid decisions may be taken as a guide for construing the expression "land" occurring In the Orissa Estates Abolition Act.

6. Mr. Mohapatra is perhaps right in saying that the Land Acquisition Act is in pari materia with the Orissa Estates Act and the definitions given in the former Act may be taken as a guide in construing those expressions occurring in the latter Act which have not been defined therein. But I am not sure of the correctness of the construction put on the expression "land" in the aforesaid two decisions. It is, however, unnecessary to decide this question because this petition can be disposed of on other grounds.

7. The advocate-General relied on the recent decision of the Supreme Court in the *Kanika Case Sailendra Narayan v. State of Orissa* 22 C.L.T. 251 (S.C.), and urged that once It is admitted that the property is entered in Register-D with a separate touzi number it must be held to be an "estate" within the meaning of the Orissa Estates Abolition Act and it is not open to be recorded proprietor to urge that the entry in Register-D was not validly made. The definition of the expression "estate" in the Bengal Land Registration Act is as follows:

3(2) "Estate" includes:

(a) any land subject to the payment of land revenue either Immediately, or prospectively, for the discharge of which a separate engagement has been entered into with the Government;

(b) any land which is entered on the revenue-roll as separately assessed with land revenue whether the amount of such assessment be payable immediately or prospectively), although no engagement has been entered into with Government for the amount of revenue so separately assessed upon it as a whole;

(c) any land being the property of Government of which the Board shall have directed the separate entry on the general Register hereinafter mentioned or any other register prescribed for the purpose by rule made under this Act. It will be noticed that in all the three clauses of the aforesaid definition the opening words are "any land". In other words, the property to be entered in Register-D under the provisions of the Bengal Land Registration Act, must first be "land" and then

it must comply with the other conditions specified in the definition. Assuming that fishery in alieno solo is not "land" the admitted position is that it was recorded as a separate mahal, with a separate touzi number in Register-D. After the death of Padma Charan Parija, his sons (Petitioners 1 to 9) got their names mutated in that Register on the assumption that the property was an "estate" within the meaning of the Bengal Land Registration Act. Will it be open to them now to contend that the entry in Register-D was not validly made Inasmuch as the property is not "land"?

8. The Supreme Court decision in *Sailendra Narayan v. Slate of Orissa* 22 C.L.T. 251 (S.C.), gives a complete answer to this question. There the proprietor of Kanika estate whose name was all along entered in Register-D with a separate touzi number, urged that his property was not an "estate" in as much as his predecessor-in-interest has never entered into a separate engagement with the Govt. for payment of land revenue, which engagement is a condition prerequisite for the applicability of Clause (a) of the definition of the expression "estate" in the Bengal Land Registration Act. Their Lordships of the Supreme Court, while construing the definition of the expression "estate" in Section 2(g) of the Orissa Estates Abolition Act, observed: "The definition covers lands which are factually included is the particular Registered referred to. Whether they are estates within the meaning of the Bengal Land Registration Act, 187& and whether they were validly or properly entered according to the provisions of that Act appears to us to be wholly irrelevant or the purpose of construing Section 2(g) of the Abolition Act". These observations would support the Advocate-General's contention that once it is found that property of a particular kind is entered under one entry in Register-D it must be held to be an estate for the purpose of the Orissa Estates Abolition Act and the Court has no jurisdiction to examine the question as to whether such an entry was validly made under the provisions of the Bengal Land Registration Act. It is true that in the Kanika case the property in dispute was admittedly "land" and the only question in controversy was whether the proprietor had entered into a separate engagement with the Crown, but this is a distinction on facts which does not affect the principles laid down by their Lordships of the Supreme Court. The validity of an entry in Register-D may be challenged either on the ground that the property concerned is not "land" or else that there was no separate engagement with the Crown, or else that the other conditions given in the definition of "estate" in Clauses (b) and (C) of Section 3(2) of the Bengal Land Registration Act, were not satisfied. Whatever may be the reasons for such challenge to the validity of the entry, their Lordships of the Supreme Court held that once there is a factual entry in the register maintained under the provisions of the Bengal Land Registration Act, that property must be held to be an "estate" for the purpose of the Orissa Estates Abolition Act.

8. The Petitioners' contention that the property in question is not an "estate" must be rejected.

9. Mr. Mohapatra then urged that if it be held on a purely notional basis that this fishery right is "land" the Petitioners should be held to be ryots under the State by virtue of Section 7(1)(a) of the Orissa Estates Abolition Act. That clause says:

All lands used for agricultural or horticultural purposes which Were in Khas possession of the intermediary on the date of vesting shall be deemed to be settled with him as a ryot having occupancy rights. Mr. Mohapatra therefore urged that the Petitioners' rights in the fishery should be declared to be rights analogous to or similar to the rights of a "ryot having occupancy rights".

10. There are, however, two objection to the acceptance of this argument. Firstly, there is no reliable evidence to show that the fishery rights 10 the mahal were 10 khas possession of the Petitioners. On the other hand in the counter-affidavit filed by the State of Orissa (see paragraph 7) it was definitely stated that the Petitioners themselves never caught fish but used to lease out the "fishery right to fishermen. There is no challenge to this statement, by the Petitioners. Mr. Mohapatra however relied on some observations of the Assistant Settlement Officer during the Current Settlement (Annexure B) where it was reported that Padma Charan Parija who owned -/8/- interest in the fishery used to let out the fishery to the highest bidder whereas the other co-sharers of the touzi used to get fish caught by fishermen in the fishing season under their supervision and pay wages to those fishermen. This report of the Assistant Settlement Officer in 1931 may doubtless show that till that year at any rate, the eight-anna co-sharers, (other than Padma Char an Parija), were in khas possession of the fishery. Padma Charan was, however, never in khas possession. Petitioners 1 to 9 are the sons of Padma Charan. They have not stated in their petition that they, obtained khas possession of the fishery later on.... Petitioners 10 to 12 who hold the remaining -/8/- have also not expressly stated in the petition that they exercised their right of fishery by getting fish caught by engaging fishermen as hired labourers. The counter affidavit of the State of Orissa has thus remained uncontradicted. It cannot therefore be held that the fishery in question was in khas possession of any co-sharer proprietors so as to attract the provisions of Section 7(1)(a) of the Orissa Estates Abolition Act even if it be assumed for argument's sake that the said provision would otherwise apply.

11. Secondly, even if the fishery right be held to be "land" it does not necessarily follow that it is land (sic) for agricultural or horticultural purposes as required by Section 7(1)(a) of the Estates Abolition Act. The expression agricultural purpose occur in the Indian income tax Act and it has been held by a series of decisions of the Patna, Calcutta and Madras High Courts that income from fishery will not be income from land which is used for agricultural purposes within the meaning of Section 2(a) of the Indian income tax Act. It was pointed out that the word "agriculture" even In its widest sense as including not only cultivation of the soil but also Including other ancillary operations such as rearing of livestock and poultry, would not include rearing of fish in rivers or tanks. See *Probhat Chandra Barua Vs. Emperor, , Maharajadhiraja of Dharbhanga v. Commissioner of Income*

Tax AIR Pat. 474, and The Commissioner of Income Tax Vs. V.T.S. Sevuga Pandia Thevar, . I have been shown no authority to the contrary. Hence I would hold that income from fishery in alieno solo win not be income from land used for agricultural or, horticultural purposes so as to attract the provisions of Section 7(1)(a) of the Orissa Estates Abolition Act.

12. For the aforesaid reasons the petition is rejected. But in the circumstances of the case, both parties will bear their own costs.

Mohapatra, J.

13. I agree.

14. Petition rejected.