

(2023) 03 GAU CK 0041
In the Gauhati High Court
Case No : Writ Appeal No. 2 Of 2018

State Of Assam

APPELLANT

Vs

Deepar Beel Pachpara Samabai Samity Ltd

RESPONDENT

Date of Decision : 24-03-2023

Acts Referred:

Wild Life (Protection) Act, 1972 — Section 2(9), 18, 18A, 19, 20, 21, 22(b), 24, 26A(1)(b)

Citation : (2023) 03 GAU CK 0041

Hon'ble Judges : Sandeep Mehta, CJ; Suman Shyam, J

Bench : Division Bench

Advocate : D Nath , H Das

Final Decision : Allowed

Judgement

1. This intra-court appeal, preferred by the State of Assam, is directed against the judgment and order dated 21.12.2017 passed by the learned Single Judge in WP(C) No.4113/2009 setting aside the notification dated 21.02.2009 issued under Section 18 and Section 26A(1)(b) of the Wild Life (Protection) Act, 1972 declaring an area of 4.1 Sq. K.M. of the water body commonly known as the "Deepor Beel" to be a Wildlife Sanctuary within the meaning of the Act of 1972. The brief factual matrix of the case, as apparent from the materials on record, is narrated hereunder.

2. On 12.01.1989, an initial notification expressing the intent of the Government to declare the "Deepor Beel" as a Wild Life Sanctuary was issued under Section 18 of the Wild Life (Protection) Act, 1972 (herein after referred to as "the Act of 1972") which was published in the Assam Gazette on 22.03.1989. Additional Deputy Commissioner (Revenue) was appointed as the Collector under Section 2(9) of the Act of 1972 so as to enquire into and determine the existence, nature and extent of rights, if any, in favour of any person. On 22.06.1993, notice was issued inviting claims of rights on the land over which the proposed sanctuary was to be created. In response to the notice dated 22.06.1993 some persons had

submitted their objections on 13.07.1993. On 22.07.1993 the Chairperson of No.32, Dharapur Gaon Panchayat had also submitted objection to the proposal for creation of a sanctuary over the "Deepor Beel". Taking note of the objections so received, on 07.01.1994, the Collector had expressed an opinion that there should be no hurry to declare the Deepor Beel as a Bird Sanctuary without first ensuring the alternative means of livelihood for the people living in the vicinity of the Beel. It appears that the Assam Fisheries Development Corporation (AFDC) had earlier entered into a seven years lease agreement granting fishing rights over a part of the beel. As such, on 14.07.1999, the Divisional Forest Officer (DFO), Assam State Zoo Division, Guwahati had requested the Managing Director of Assam Fisheries Development Corporation to withdraw the leasing rights granted in respect of the Deepor Beel on the ground that fishing activities were prohibited in the said beel under the Act of 1972. The lease was, however, cancelled on 29.11.1999 on account of non-payment of kists (installments) for the year 1999-2000 and the possession of the fishery was taken back by the Corporation. Notwithstanding the same, the respondents/writ petitioner Nos 1 and 2 had requested the Managing Director of AFDC to settle the Deepor Beel fishery with them. On 29.05.2002, an order was passed rescinding the draft notification dated 12.01.1989. However, by issuing a subsequent notification dated 17.08.2002, the order dated 29.05.2002 was withdrawn as a result of which, the initial notification dated 12.01.1989 was restored. It appears that on 05.01.2006, the Additional Deputy Commissioner (Rev) was appointed as the Collector to determine the existence, nature and extent of right, if any, existing in favour of any person and accordingly notice inviting claims and objections from interested parties issued by the Collector was published on 31.05.2006 in two local Dailies viz., "Amar Asom" and "The Sentinel". Since neither any objection nor any claim was received by the authorities, the impugned notification dated 21.02.2009 was issued declaring an area of 4.1 Sq.K.M. of water body as the "Deepor Beel Wild Life Sanctuary". The respondent Nos.1 and 2 as writ petitioners had approached this court by filing Writ Petition No 4113/2009 inter-alia challenging the notification dated 21.02.2009 by claiming that more than 1200 families belonging to the actual Fishermen community, represented by the writ petitioner society were enjoying traditional fishing rights over the beel and have been earning their livelihood by carrying out fishing activities therein. As such, a direction be issued to the authorities to protect and preserve the fishing rights of the fishermen community and also to restore the original status of the "Govt. Fishery" and settle the beel with writ petitioner's society and in the alternative, consider their prayer for rehabilitation of the affected fishermen by providing them alternative source of livelihood or to pay compensation.

3. From a perusal of the averments made in the writ petition, It appears that the notification dated 21.02.2009 was assailed primarily on the ground that the same was issued without following the due process of law and also without taking into account the traditional fishing rights enjoyed by the petitioners who

were entitled to secure lease of the Government fishery. According to the petitioners, since the initial notification dated 12.01.1989 issued under Section 18 of the Act of 1972 declaring the intention of the Government to constitute a Wild Life Sanctuary over a part of the Deepor Beel was rescinded on 29.05.2002, hence, without issuing a fresh notification under Section 18, the respondents could not have declared the creation of the Wild Life Sanctuary by issuing the notification dated 21.02.2009. It was also the case of the writ petitioners before the learned Single Judge that there was a requirement under the law to publish the proclamation issued under Section 21 of the Act of 1972 in the neighbourhood of the declared area which was never done by the authorities. According to the petitioners, mere publication of the proclamation in the newspaper would not be in sufficient compliance of the mandate of Section 21. It has also been contended that the failure on the part of the Collector to undertake and examine the existing claims of fishing rights of the petitioners as per sub-section (b) of Section 22 of the Act of 1972 would have a vitiating effect on the notification dated 21.02.2009. The claim of the writ petitioners, was however, refuted by the State.

4. After taking note of the case projected by both the sides, the learned Single Judge was of the view that the fishing rights claimed by the writ petitioners were not relatable to the lease granted to them by the AFDC but were in the nature of traditional fishing rights since only those persons exercising traditional fishing rights would be entitled to secure lease of Government fishery. It was further held that since the impugned notification dated 21.02.2009 was issued by the State Government without making alternative arrangements to protect the rights of the affected persons and since no attempt had been made to address the livelihood issues, the same would have a vitiating effect on the impugned notification itself. The learned Single Judge was also of the view that the impugned notification dated 21.02.2009 was not preceded by proper publication of proclamation in the manner envisaged by Section 21 of the Act of 1972 and the departure thereof had not been properly explained by the Collector.

5. Mr. D. Mazumdar, learned Additional Advocate General, Assam has argued that the right claimed by the petitioners is nothing but commercial right under a lease agreement which stood terminated after the cancellation of the lease. According to Mr. Mazumdar, the claim of traditional fishing right set up by the petitioners is totally incorrect and has remained wholly unsubstantiated. Therefore, the learned Single Judge had erred in recognizing such a right in favour of the writ petitioners. The learned Additional Advocate General has further argued that while issuing the impugned notification the Government has followed the prescription of law as laid down under the Act of 1972 and proper notices had been published as per the statutory requirement. According to Mr. Mazumdar, since the notification dated 29.05.2002 was withdrawn by the subsequent notification dated 17.08.2002, hence, the same had the effect of restoring the initial notification dated 12.01.1989. Under the circumstances, there was no requirement under the law to issue any fresh notification under Section 18 of the

Act of 1972 before issuing the impugned notification.

6. Mr. U. K. Nair, learned senior counsel appearing for the private respondent Nos.1 and 2, on the other hand, has argued that his clients are not opposed to the decision of the Government to declare a part of the Deepar Beel as a Wild Life Sanctuary but such decision must not come at the cost of his clients' traditional fishing rights over the Beel. The learned senior counsel for the respondent Nos.1 and 2/writ petitioners urged that his clients would be satisfied if they are provided with an alternative means of earning their livelihood.

7. After hearing the arguments advanced by the learned counsel for the parties, the core question that arises for consideration in this case is as to whether, the notification dated 21.02.2009 is vitiated due to violation of the statutory procedure. In order to answer the aforesaid question, it would be necessary to briefly refer to some of the relevant provisions of the Act of 1972.

8. Section 18 of the Act of 1972 lays down the procedure to be followed by the Government to declare its intention to constitute any area as a sanctuary. Section 18 is quoted herein below for ready reference :-

"18. Declaration of sanctuary.-- [(1) The State Government may, by notification, declare its intention to constitute any area other than an area comprised within any reserve forest or the territorial waters as a sanctuary if it considers that such area is of adequate ecological, faunal, floral, geomorphological, natural or zoological significance, for the purpose of protecting, propagating or developing wild life or its environment.]

(2) The notification referred to in sub-section (1) shall specify, as nearly as possible, the situation and limits of such area."

9. Section 18A of the Act of 1972 deals with protection to the sanctuaries, which is reproduced herein below :-

"18A. Protection to sanctuaries.--(1) When the State Government declares its intention under sub-section (1) of section 18 to constitute any area, not comprised within any reserve forest or territorial waters under that sub-section, as a sanctuary, the provisions of sections 27 to 33A (both inclusive) shall come into effect forthwith.

(2) Till such time as the rights of affected persons are finally settled under sections 19 to 24 (both inclusive), the State Government shall make alternative arrangements required for making available fuel, fodder and other forest produce to the persons affected, in terms of their rights as per the Government records."

10. As per Section 19, the Collector is required to enquire into and determine the existence, nature and extent of the rights of any person in an area over the land comprised within the limits of the sanctuary. Section 19 is reproduced herein below :-

"19. Collector to determine rights.---[When a notification has been issued under

section 18,] the Collector shall inquire into, and determine, the existence, nature and extent of the rights of any person in or over the land comprised within the limits of the sanctuary.”

11. Section 20 refers to bar of accrual of rights on or over any land comprised within the limits of the sanctuary after issuance of a notification under Section 18. Section 21 of the Act of 1972 provides for issuance of proclamation by the Collector. Section 21 is reproduced herein below for ready reference :-

“21. Proclamation by Collector. --- When a notification has been issued under section 18, the Collector shall¹[within a period of sixty days] publish in the regional language in every town and village in or in the neighbourhood of the area comprised therein, a proclamation--

(a) specifying, as nearly as possible, the situation and the limits of the sanctuary; and

(b) requiring any person, claiming any right mentioned In section 19, to prefer before the Collector, within two months from the date of such proclamation, a written claim in the prescribed form, specifying the nature and extent of such right with necessary details and the amount and particulars of compensation, if any, claimed in respect thereof.”

12. A conjoint reading of Sections 19 and 21 of the Act of 1972 leaves no room for doubt that after a notification under Section 18 is issued, the Collector would be required to enquire into and determine the existence, nature and extent of any rights of persons over the land comprised within the limits of the sanctuary and no further. It is only when such a right over the land coming within the limits of the sanctuary is claimed that there would be requirement to issue a proclamation under Section 21. Once a claim to a right on and over any land referred to in Section 19 is made, the Collector can pass an order as per Section 24 of the Act of 1972 either admitting or rejecting the same in whole or in part.

13. In the present case, as noted above, the writ petitioners have claimed traditional fishing rights in the Beel but there is not even an iota of material available on record to substantiate the said claim. The aforesaid aspect of the matter assumes great significance on account of the fact that the appellant/ State has all along disputed the existence of such traditional right claimed by the writ petitioners/respondent Nos.1 and 2. Therefore, it is evident that the question of existence of any traditional fishing right of the writ petitioners over any part of the “Deepor Beel” is a disputed question of fact which cannot be adjudicated in a writ petition.

14. If the claim of fishing rights made by the writ petitioners is under the lease agreement with the AFDC, then also, the contours of such right would be governed by the terms of the lease. But since it is not in dispute that the lease originally granted by the AFDC in favour of the writ petitioners/ respondent Nos.1 and 2 has since been cancelled, no right of fishing can be recognized in favour of

the writ petitioners at this point of time based on such lease agreement which ceased to exist. Therefore, viewed from any angle, there is no material for this court to recognize any right of the writ petitioners over the "Deepor Beel".

15. From a plain reading of the scheme of the Act of 1972, more particularly the provisions of Sections 19 and 24, we are convinced that those provisions would come into play once a right over the land coming within the limits of the sanctuary is raised. It is only then that there will be a requirement on the part of the Collector to make an enquiry and determine such a claim. Sections 19 to 24 of the Act of 1972, in our considered view, does not admit of any other right except right over land. Since, the land falling in the deepor beel is admittedly and evidently a government land, hence, in our opinion, there was no occasion for the Collector to make any enquiry under section 19 at the instance of the writ petitioners.

16. In so far as the plea regarding non-publication of the proclamation under Section 21 of the Act of 1972 is concerned, we have already noticed that the same was published in as many as two local daily newspapers pursuant whereunto, objections and claims were also received from several interested parties. We have already held that the writ petitioners have failed to establish any right over the land of "Deepor Beel". Since the other objectors, if any, are not before us hence, the issue regarding improper publication of the proclamation need not detain this court. In any event, since it has already been held that there is no right that can be recognized in favour of the writ petitioner Nos.1 and 2 coming within the ambit of Sections 19, 20 and 21 of the Act of 1972 no prejudice can be said to have been caused to the writ petitioners on account of improper publication of the proclamation issued under section 21 of the Act of 1972.

17. We have also noticed that the initial proclamation dated 12.01.1989 has been assailed by the writ petitioners by filing a writ petition in the year 2009 i.e. after a delay of 10 years. During that period the notification dated 12.01.1989 was all along in force. In view of the bar created by section 20 of the Act of 1972, there cannot be accrual of any right of any person over any part of the land comprised within the limits of the sanctuary after the issuance of the notification under section 18. There is also nothing on record to show that the writ petitioners had ever lodged any written claim within the meaning section 21 (b) of the Act and that too within the prescribed time period of two months from the date of publication of the proclamation. We are, therefore, of the view that the writ petition itself was hit by the principles of delay and laches and hence, was liable to be dismissed on such count as well.

18. It would be pertinent to note here-in that 'Deepor Beel' is a permanent fresh water lake located in the south western part of the city of Guwahati. It is the only wetland of international significance in Assam and is included in the list of Ramsar sites w.e.f. 19.08.2002. Apart from being a staging site for the migratory birds, Deepor Beel is the only major storm water storage basin for the city of Guwahati. Therefore, preservation and protection of Deepor Beel is a measure in

larger public interest for the residents of the Guwahati city. Realizing the importance of the 'beel' even the writ petitioners have underscored the need to preserve and protect it from pollution and encroachment.

19. For the reasons stated herein above, we are of the considered view that the impugned judgment and order dated 21.02.2017 is unsustainable in the eye of law. The same is accordingly set aside. The writ petition stands dismissed.

20. Before parting with the records, we deem it necessary to observe here-in that the views expressed here-in-above are purely based on the materials available on record and this court does not, in any way, express any opinion as regards claim of the writ petitioners, if any, over any part of the land coming under the "Deepor Beel Bird Sanctuary" or their traditional fishing right, as may be. We make it clear that notwithstanding this order, it will be open for the writ petitioners to assert their claim, if any, coming within the ambit of sections 18A(2)/ 19 of the Act of 1972 and seek appropriate relief in respect thereof, for establishing such right in an appropriate proceeding and in accordance with law, if so advised.

The Writ Appeal stands allowed. Parties to bear their own cost.