

(1979) 09 CAL CK 0004
In the Calcutta High Court
Case No : Civil Rule No. 3565 of 1965

State of West Bengal

APPELLANT

Vs

Bidhu Bhusan Mitra Chowdhury

RESPONDENT

Date of Decision : 19-09-1979

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 228
West Bengal Estates Acquisition Act, 1953 — Section 4, 5A, 5A(1), 5A(6), 5A(7)
West Bengal Estates Acquisition Rules, 1954 — Rule 9

Citation : AIR 1980 Cal 175

Hon'ble Judges : D.C. Chakraborti, J

Bench : Single Bench

Advocate : A.N. Banerjee and Tapan K. Sengupta, for the Appellant; Swadesh Bhushan Bhunia, for the Respondent

Final Decision : Allowed

Judgement

D.C. Chakraborti, J.—This Rule arising out of an application under Article 227 of the Constitution of India is directed against an order made by the Special Judge in an appeal under Sub-section (6) of Section 5-A of the West Bengal Estates Acquisition Act preferred from the decision of the Revenue Officer taken in a proceeding u/s 5-A of the said Act.

2. The facts relevant for the present purposes are as follows:

3. The concerned Assistant Settlement Officer started proceedings u/s 5-A of the said Act for holding enquiry into the alleged transfer of 71.07/5 ----- acres of land by Jyotindra Lal 12 Mitra Chowdhury, the father of the present opposite parties Nos. 1 to 3 in their favour. The case of the opposite parties is that the transfer was made by a registered Nirupanpatra executed on September 5, 1953 and registered on September 18, 1953. The further case of the opposite parties Nos. 1 to 3 is that their father on February 26, 1953 by an unregistered, schedule showing allotment of different lands to his three sons, that is, the opposite parties Nos. 1 to 3, transferred the lands in question and made over

possession to them and that the opposite parties Nos. 1 to 3 have been possessing the lands as per the said Schedule since February 26, 1953.

4. The case of the State of West Bengal, the petitioner, is that the transfer in question took place between the period of mischief, namely, May 5, 1953 and the date of vesting of the estates in the State. The Schedules referred to above were unregistered, antedated documents. As the transfer was made within the period referred to in Sub-section (1) of Section 5-A of the said Act and as the transfer was in favour of the sons of the transferee who had lands in excess of the ceiling prescribed by the West Bengal Estates Acquisition Act, the transfer was not a bona fide one and should, therefore, stand cancelled.

5. The Assistant Settlement Officer on consideration of the materials before him came to the conclusion that the 3 unregistered schedules were nothing but antedated documents created by said Jatindra Lal Mitra Chowdhury, the father of the opposite parties Nos. 1 to 3 for avoiding enquiry u/s 5-A of the West Bengal Estates Acquisition Act (hereinafter referred to the said Act). He also found that the Nirupan-patra executed by the said Jatindra in favour of his sons, the opposite parties, was a colourable device for the purpose of retaining more lands than what the prescribed ceiling permits. The Assistant Settlement Officer accordingly found that the transfer sought to be effected by the said Nirupanpatra was not bona fide and should as such stand cancelled.

6. The learned Special Judge reversed the findings of the Assistant Settlement Officer and declared the impugned transfer to be bona fide.

7. Mr. A. N. Banerjee, the learned Advocate for the State of West Bengal, the petitioner, contended that the learned Judge went beyond the bound of his authority in reversing the findings of the Assistant Settlement Officer solely on the basis of conjectures and mistaken view of law. It will appear from the 3 schedules (Exts. B, C and D) which were alleged by the petitioners to have been executed on February 26, 1953 by said Jatindra that they contained a list of some lands and did not and could not have effected any transfer of such lands. The Nirupanpatra (Ext. A) which was executed on September 5, 1953 and registered on September 18, 1953 would show clearly that transfer of the lands in question was made by that instrument, namely, the Nirupanpatra. Admittedly, the said Nirupanpatra was executed and registered within the period referred to in Sub-section (1) of Section 5-A of the said Act. That being so, and when the Assistant Settlement Officer was of opinion that there were prima facie reasons for believing that the transfer was not bona fide the proceeding u/s 5-A of the said Act was validly and legally initiated

8. Mr. S. B. Bhunia, the learned Advocate appearing for the opposite parties argued that as it was already held in the case of Ambujakhya Mukherjee v. The State ILR (1966) 1 Cal 495 that the State could not be regarded as a party to a transfer which is the subject-matter of enquiry u/s 5-A of the said Act, it had no right to come up in revision before this Court. Mr. Bhunia argued that in the case

of Ambujakhya Mukherjee (supra) the contention that the provision of Section 5-A of the said Act was unconstitutional as the State was both a Judge and a prosecutor was repelled by the Court on the footing that the State could not, having regard to the provisions of that section, be regarded as a party to the proceeding. The scope of enquiry u/s 5-A of the said Act was very limited and the enquiry was to be directed to ascertain whether a transfer which was made within the period referred to in Section 5-A of the said Act was bona fide or not. It has been rightly pointed out by P. B. Mukharji, J. (as his Lordship then was) in his decision rendered in Ambujakhya's case (supra) that the State Government was not responsible for the transfer which was being investigated u/s 5-A of the Act and that the State Government was not, therefore, a party to the transfer under the enquiry. It was further pointed out in that decision that the transferor and the transferee were engaged in the transfer in full view of the Statute announcing that on a particular date the lands were to vest in the Government, that before that date of vesting came private transfers were made. In many cases obviously with a view to preventing the lands from vesting in the State, that the amendment of the said Act whereby Section 5-A was introduced had as its object the prevention of such evasion of the Statute by authorising the Government to start enquiry only in specific cases of transfer, of particular classes and between particular dates, that the Officer of the State Government to whom powers were delegated u/s 5-A(4) and who had to work according to the elaborate procedure laid down in Section 5-A(5) in an appeal u/s 5-A(6) could not be said to be the persons who were combining the roles of the prosecutor, judge and the party and that such an argument was entirely wrong not only on the interpretation of the Act but also on the scheme provided therein. In that view of the matter the argument that the provisions of Section 5-A were unconstitutional was held to be of no substance. C. N. Laik J. also held in the case of Ambujakhya (supra) that the theory that a man should not be a Judge in his own cause was not applicable in the case of institutional causes or interest but that theory had application only to personal and pecuniary interest of a man but it cannot be said that as the State was not a party properly so-called to a proceeding u/s 5-A, it cannot have right to proceed against the decision of the Special Judge whereby he disposes of an appeal from the decision of the Revenue Officer. Section 5-A, as already indicated, was introduced with a view to preventing evasion of the application of the said Act. The consequences of such evasion would be to prevent lands from vesting in the State. Thus, even though strictly speaking the State is not a party to a proceeding u/s 5-A which is initiated by either the State itself or by an Officer referred to in Section 5-A the State is vitally interested in seeing that the enquiry is duly held and such transfers as are not bona fide are held to be so. It has every right to support its own order or an order made by its Officer u/s 5-A of the said Act. In these circumstances I find no substance in the contention of Mr. Bhunia.

9. There can be no doubt that the State has three distinct functions, namely, executive, legislative and judicial. The executive, the legislature and the judiciary

are three distinct limbs of the State and they have distinct duties to perform. Ordinarily there should be no inroad made by any of these three limbs into the domain of the others. But it is rightly observed in the decision of S. K. Dutta, J. in *Sk. Bafatulla Mukhtear and Others Vs. State of West Bengal and Others*, that in the complexity of modern social conditions and expanding activities of the Government, it is no longer possible to maintain a rigid separation of powers, that in our Constitution while there is no rigid separation of powers there is also no provisions therein prohibiting conferment of judicial and quasi-judicial powers on the Government, that the practice in modern times has been to set up by law independent Tribunals vested with judicial powers of the State to adjudicate specified disputes of importance between the subjects or between the State and its subjects and that very often even the Government is invested with the judicial powers of the State to adjudicate such disputes. Regarding the limited scope of enquiry u/s 5-A and the constitutionality of the provisions of Section 5-A S. K. Datta J. makes the following observation in the case referred to above:

"Section 5-A of the West Bengal Act 1 of 1954, on the other hand, is concerned with an enquiry as to whether any transfer of land within a certain period amounts to defeating the purposes of the Act, and the consequences following the findings. The proceeding here is initiated not at the instance of any party interested in the transaction but by the executive itself in implementing the policy of legislation and the provisions of the Act. The enquiry, in essence, is to examine, for the purpose of the Act, if the transfer is "bona fide" as defined in the section and parties have been given opportunity to adduce evidence in support of the "bona fide" character of the transaction. There is thus no lis between the parties to the transaction in the enquiry and the State Government is not required to decide rights between the transferor and the transferee and the decision in the enquiry, it is expressly provided, will not affect the rights the parties otherwise may have against each other. There is no scope for any representation? by the parties of their respective cases or rights nor is the decision directly capable of execution. For all these reasons it is not possible to hold that in the exercise of functions u/s 5-A, the State Government, in any way, exercises judicial functions or acts as a Tribunal or otherwise usurps the functions of the judicial organ of the State. Assuming that u/s 5-A, the State Government is invested with the judicial powers, in absence of any rigid separation of powers or any provisions in respect thereof in our Constitution, it will not be possible to hold in view of the modern practice prevailing in other countries including ours and also of the above authorities that conferment of such powers in the State Government is, in any way unconstitutional or ultra vires the Constitution."

10. S. K. Datta, J. quotes with approval the following from Halsburys Laws of England, Simonds Edn. Vol. VII, Article 409:

"The executive : Although the legislative, executive and judicial powers are formally distinct, it is not the case that legislative functions are exclusively performed by the legislature, executive functions by the executive, or the judicial

functions by the judiciary. Executive functions are incapable of comprehensive definition, for, they are merely the residue of the functions of the Government after legislative and judicial functions have been taken away.....

In the performance of these functions public authorities are bound to issue orders which are not far removed from legislation and to make decisions affecting personal and proprietary rights of individuals, which, while not strictly judicial are quasi-judicial in character, Discretionary action of both these types must now be considered normal on the part of the executive."

11. Further, Rule 3-B lays down the procedure to be followed in the matter of disposal of appeals u/s 5-A(6) of the said Act. According to that Rule the procedure laid down in Rule 9 for disposal of an appeal u/s 11(2) of the said Act shall, mutatis mutandis, apply to the procedure for disposal of an appeal u/s 5-A(6). Rule 9 (e) lays down that the Special Judge shall fix a date for hearing of the appeal within 6 weeks of the presentation of the petition and shall cause notice thereof to be served on the Collector within 10 days from the date of presentation of the petition. This shows that the Collector who represents State shall be given an opportunity of being heard before disposal of an appeal u/s 5-A(6).

12. According to the provisions of Section 4 of the said Act as a result of declaration made by a notification issued by the State Government all estates and the rights of every intermediary in each such estate situated in any district or part of a district specified in such notification shall vest in the State free from all incumbrances. Such notification shall have to be issued so as to ensure that the whole area to which the said Act extends vests in the State on or before the 1st day of Baisakh of the Bengali year 1362.

13. There can, therefore, be no denying the fact that all estates did vest in the State at the latest on the 1st day of Baisakh of the Bengali year 1362. When the Bill seeking to amend the said Act by introduction of Section 5-A was on the legislative anvil many transactions which were colourable and collusive were made with a view to retaining more land or getting greater amount of compensation. Thus, by transfers which were not bona fide the State was sought to be deprived of lands which would as a re-suit of the operation of the said Act have vested in the State. Accordingly, the State is vitally interested in seeing that the scheme and object of the said Act be not defeated by unscrupulous and mala fide transfers. When an order is made either by the State or the Officer concerned u/s 5-A and a party aggrieved prefers an appeal before the Special Judge u/s 5-A(6) the State has every right to defend the order made by it or by its Officer. That is why the State was impleaded as a party respondent in the memorandum of appeal preferred before the Special Judge and there was a provision made for service of notice of such appeal on the State by the Special Judge. Accordingly, the contention of Mr. Bhunia that the State has no locus standi is of no substance.

14. Further, Mr. Bhunia's argument that when the State itself appoints the Special Judge u/s 5-A(6) the State cannot figure as party before the Special Judge. Section 5-A(6) lays down the qualifications to be possessed by one so that he may be appointed a Special Judge. As already pointed out there can be no rigid separation of powers and in a modern State it is not possible that different limbs of the State will perform the only functions in its exclusive jurisdiction. The executive is at times to exercise powers involving quasi-judicial functions. Conferment of such powers cannot therefore be challenged as unconstitutional. It was rightly held in said Ambu-jakhya's case (supra) that having regard to the scheme of the said Act u/s 5-A, in particular, Revenue Officers and appellate authorities cannot be said to be judges in their own cause. In the present case, therefore, only because it is the State that appoints a Special Judge it cannot be said that in an appeal before the Special Judge u/s 5-A(6) the State can have no right of an audience or that the State cannot challenge the order of the Special Tribunal before the High Court under the provisions of Article 226, 227 or 228 as the case may be. Further, there are certain safeguards provided by law. The State can appoint a Special Judge only from among the persons who had been or is a District Judge or Additional District Judge. A Special Judge so appointed is also subjected to the power of superintendence of the High Court.

15. The State should have a right to defend its own order before the Special Judge. If the State were deprived of such a right such deprivation would go against principles of natural justice.

16. Mr. Bhunia further argued that in exercise of its power of superintendence under Article 227 of the Constitution this Court was not competent to go into question of fact or law and cannot disturb the findings of fact arrived at by the Special Judge, however, erroneous they be, nor was this Court competent to interfere even if the Special Judge erred in law. It is by now settled law that in exercise of its power of superintendence under Article 227 of the Constitution the High Court can interfere when the Special Judge goes beyond the bounds of his authority. C. N. Laik, J. in his judgment in said Ambujakhya's case gives a list of circumstances where the Special Judge may be said to have gone beyond the limits of his authority necessitating the exercise of the power of superintendence of this Court under Article 227 of the Constitution. The following are those cases:

- (a) when the Court or Tribunal below outstrips the limits of its jurisdiction.
- (b) acts in excess of the authority vested in it by law.
- (c) acts within the limits of its authority but not within letter and spirit of law,
- (d) contravenes the Act or the Rules,
- (e) where there are flagrant violations of law,
- (f) where the findings are not supported by any evidence or based on no evidence, or

(g) where there is miscarriage of justice.

17. The State of Orissa v. Muralidhar Jena, AIR 1963 SC 404, is also an authority for the proposition that if the impugned findings recorded by the Administrative Tribunal are not supported by any evidence the High Court would be justified in setting aside such findings. I am not oblivious of the fact that the power of superintendence conferred on High Court by Article 227 of the Constitution has to be exercised most sparingly and only for the purpose of keeping the Subordinate Courts within the bounds of their authority and not for correcting mere errors, whether of fact or law. The Special Tribunal must act judicially. If it does not so act it is a case of improper exercise of jurisdiction.

18. Mr. Banerjee, appearing on behalf of the State, contended that the Special Judge based his conclusions on mere conjectures and that accordingly it acted beyond the limits of its authority in reversing the decision of the Assistant Settlement Officer whose findings are supported by the materials on record. The learned Special Judge was of the view that if it be found that since February 26, 1953 which is the date of execution of the unregistered schedules of property (Exts. B, C & D) the sons of Jatindra were in possession of the lands it had to be held that the transfer was a bona fide one. There can be no transfer effected by the schedules of properties (Exts. B, C and D). Further the materials relied upon by the learned Special Judge are the said Schedules, some receipts showing payment of Union Board Taxes, Municipal Taxes and receipt granted by the State. Some papers showing that no tax was payable by the said Jatindra Lal Mitra Chowdhury as he was found to be in possession of about 2 acres of land and he transferred other lands in favour of his sons, and a levy order dated May 13, 1964 were filed. It is significant in this regard to note that the receipts showing payment of Union Board Tax, Municipal Tax and payment of rent to the Government are all bearing dates long after the date of said Ni-rupanpatra whereby the transfer of the lands in question were sought to be made in favour of the sons by their father Jatindra. The papers showing that Agricultural Income Tax was not payable related to a case of the year 1959-60. So those papers also were in respect of a period long after the said Schedules. The said levy order was dated May 13, 1964, that is, long after the date of the said Schedules. In the circumstances, these are all papers which do not in any way prove possession of the lands in question by the sons of Jatindra at any time before the execution of the said Nirupan-patra. Accordingly, all those papers were of no assistance to the opposite parties so far as the question of possession of the lands by them since the time of the schedules is concerned. Thus, the documentary evidence available could at best prove the possession of lands by sons of Jatindra from after the date of Nirupanpatra. In these circumstances, the Assistant Settlement Officer was wholly justified in concluding that the schedules were antedated documents created for the purpose of proving the alleged story that Jatindra put his sons in possession of the property mentioned in the Schedules from the time of the execution of the schedules referred to above. Further, the unregistered Schedules could in no way have effected transfer of the lands in question. The

oral testimony regarding possession of the lands in question by the sons of Jatindra was also wholly unsatisfactory. Aditya Jena who claims to have written the Schedules spoke of the distribution of lands in 1359 B- S. and the commencement of possession in 1360 B. S. He spoke of separate payment of Union Board Tax by the sons but the documentary evidence referred to above shows that this statement was entirely incorrect Further, this witness stated that since the execution of Nirupanpatra Jatindra Babu did not exercise any act of possession over the lands and in course of cross-examination he said that since the execution of Nirupanpatra the sons resorted to separate cooking. Ramprasad who claims to be a bargadar is a resident of a place 6 miles away from the lands in question and does not know names of Jatindra's sons except that of Phani. Further he admitted that his name was not recorded as a bargadar and there was no receipt showing delivery of share produce.

19. This being the state of evidence, I cannot but agree with the learned lawyer for the petitioner, the State, that the learned Special Judge in reversing the decision of the Assistant Settlement Officer proceeded wholly on the basis of conjectures. His findings are not supported by evidence. Further the learned Special Judge proceeded on the footing that the said Nirupanpatra was a deed of settlement and is not a deed of gift and that accordingly it is not transfer within the meaning of Section 5-A(7)(iii). The habendum and the operative part of the said Nirupanpatra would show clearly that it was a deed of gift and is as such 3 transfer within the meaning of Section 5-A(7)(iii). From what has been stated above it will also appear that the learned Special Judge was entirely wrong in saying that the lands in question were distributed long before the execution of the Nirupanpatra. There is no evidence to that effect- on the other hand, the evidence clearly shows that the possession was made over not before the execution of the said Nirupanpatra.

20. The discussion aforesaid would, therefore, pearly indicate that the learned Special Judge in arriving at his conclusions did not apply his mind to the materials on record but based his findings on mere conjectures. Further there was also on his part flagrant violation of law and all this resulted in miscarriage of justice.

21. As the transfers in this case were all made by a father in favour of his sons during the period referred to in Section 5-A(1) the Assistant Settlement Officer was justified in holding that there was a presumption u/s 5-A(7)(iii) that the transfers in question were not bona fide. There was no material to rebut that presumption.

22. In view of what is stated above I cannot but hold that the impugned judgment and order of the learned Judge ought to be set aside and that of the Assistant Settlement Officer restored.

23. The Rule is accordingly made absolute. The impugned judgment and order are set aside and the decision of the Assistant Settlement Officer is affirmed.

There will, however, be no order as to costs.