

(1976) 07 CAL CK 0030
In the Calcutta High Court
Case No : Second Appeal No. 1658 of 1965

State of West Bengal

APPELLANT

Vs

Mir Fakir Mohammad

RESPONDENT

Date of Decision : 21-07-1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2
West Bengal Estates Acquisition Act, 1953 — Section 2, 6(1)

Citation : AIR 1977 Cal 29

Hon'ble Judges : R. Bhattacharya, J

Bench : Single Bench

Advocate : Panchanan Pal, Sailendra Nath Dutta and Jyotsna Das, for the Appellant; Lala Hemanta Kumar and Manick Chandra Banerjee, for the Respondent

Final Decision : Allowed

Judgement

R. Bhattacharya, J.—The defendant, the State of West Bengal, has preferred this second appeal against the judgment and the decree passed by a Subordinate Judge, Alipore affirming those of the Munsif of the Additional Court at Sealdah in a suit brought by the respondent Mir Fakir Mohammad. The suit was brought for a declaration that the suit lands were orchards and that he was entitled to retain the same under the provision of the West Bengal Estates Acquisition Act, 1953 amongst other reliefs. The plaintiff got the decree against the State of West Bengal and in the first appeal taken by the State, the appellant was unsuccessful.

2. The allegation of the plaintiff, in short, is that he is in possession of agricultural lands. The draft record of the recent revisional settlement prepared by the State Government was on the basis of the cadastral survey records published long ago showing the lands as agricultural. After the publication of the said C. S. records, the plaintiff converted some of his danga lands into gardens by planting fruit trees, banana plants and bamboos and he has been in possession of the same for more than 30 years as such. The suit was instituted

on 20-7-1960. It is stated in the plaint that due to his mental unrest on account of promulgation of the Estates Acquisition Act, 1953 and also on account of his ignorance of law, he included the suit lands as agricultural lands in the "B" form prescribed under the law. The inclusion of these lands was due to mistake. In fact, according to the provision of the West Bengal Estates Acquisition Act he is entitled to retain them and as such he wanted to amend the "B" form to exert his right of retention of the lands in question. As the prayer of the plaintiff was refused, he now prays in this suit for declaration that the lands in question are orchards and non-agricultural lands so as to be retained by the plaintiff according to the law. The State appeared and contested the suit on the allegation that the lands in dispute were not gardens or orchards, but in fact, they were agricultural lands. The case of the defendant further is that those lands have already vested in the State and cannot be retained by the plaintiff under the law.

3. The only question that has been agitated before me is whether or not the disputed lands can be called orchards or non-agricultural lands as alleged by the plaintiff. Both the Courts below have held that the suit lands were not agricultural lands. The trial Court held that bamboo gardens were non-agricultural land and banana gardens were orchards. The First Appellate Court below was of the view that the suit lands were orchards. Mr. Pal, the learned Advocate appearing on behalf of the appellant has mainly attacked the findings of the Courts below on two grounds. The first point of attack is that both the Courts below failed to read the plaintiff's case as made out in the plaint which was changed at the time of hearing and to read correctly the evidence on record. The second point is that even according to the case of the plaintiff and the materials on record, the suit lands ought to have been held to be agricultural lands and not orchards or gardens. Mr. Lala appearing on behalf of the respondent has contended that the findings of both the Courts are based on records and arrived at on proper appreciation of the case of the parties.

4. Coming to the first point raised by Mr. Pal, we find from the reading of the plaint that the suit lands were agricultural lands upto the publication of the C. S. records of right, but subsequently the plaintiff converted the suit lands into gardens by planting fruit trees, banana plants and bamboos. The plaintiff, since then, has been possessing those lands as gardens or orchards for more than 30 years. This is the specific fact pleaded by the plaintiff. It has been alleged that due to some mistake of law, he wrongly included the disputed lands in "B" form under the wrong impression that these were agricultural lands. Later on, being aware of the fact that he was entitled to retain orchards in khas under the law, he wanted to amend the "B" form claiming retention of the disputed lands, but, he got no relief. From the judgment of the Courts below, it appears that the plaintiff took the point at the time of hearing that the suit lands could be called non-agricultural lands because the banana plants and bamboos appearing in the suit lands grew spontaneously and the plaintiff did not cultivate the land or make any effort for the purpose of growing banana plants and bamboos. As "agriculture" implies cultivation of land and making of some effort for culturing

the plants, the plaintiff took up this position to show that lands are not agricultural relying upon certain decisions. The plaintiff examined himself during trial and examined some of his witnesses on his side. The plaintiff is P. W. 2. He says that out of 25 acres of agricultural land, he mentioned the suit properties in "B" form wrongly. He says that those lands have been mentioned in Schedule "A" to the plaint as orchards. According to the plaintiff's evidence, he has got bamboos and fruit trees on these lands. He says that these bamboos grew spontaneously and he wants to retain them as non-agricultural land. He further says that banana plants also grew spontaneously and that no cultivation is necessary for the growth of banana plants. Of course, he has admitted also that some new banana plants were planted when some plants had died. He wants to retain the banana garden as orchard. He has also stated that there are some mango plants, jack trees, date trees, sajina plants and tamarind plants on some plots. From the witnesses examined on the side of the plaintiff, it appears that they wanted to say that no cultivation or manual care or effort would be necessary for the growth of banana plants or bamboo plants or to maintain the gardens. Two witnesses were examined on the side of the State of West Bengal. D. W. 1 was an Assistant Settlement Officer. According to him, an orchard consists of fruit bearing trees. D. W. 2 has stated that for cultivation of banana one is to stir the banana plants and to remove the old plants for proper growth of new plants. He has also stated that for proper growth of bamboos, the roots are to be cleared. The plaintiff has relied upon an inspection report of a Pleader Commissioner appointed by the Court to ascertain the nature of some of the suit lands. In the report we find that some of the lands were banana gardens and some were bamboo gardens. The inspection was made in presence of both the parties. From his report we get that the Commissioner found the gardens to be "cultured". He also found some trees like mango, simul and tamarind. But their number is insignificant. From the reading of the evidence of the Commissioner along with his report, Ext. 1, there can be no doubt that the banana gardens and the bamboo gardens inspected by the Commissioner were cultured. The plaintiff's case in the plaint is that he had agricultural lands and that some danga lands were converted by him into gardens by planting bamboos, banana plants and fruit trees. The evidence also shows that he sells the product of the gardens and for maintaining the garden, the plaintiff cultured them by employing efforts as evidenced by the Commissioner's report. At the time of trial when giving evidence, the plaintiff, however, changed his case and he wanted to say that the banana plants and the bamboo plants grew spontaneously and without any effort. His case at that time was that no care or effort was to be made for maintaining the garden. This is contradictory to the one appearing in the plaint. In order to get any relief in this suit, the plaintiff must prove his own case pleaded in the plaint. It appears that the learned Courts below did not pay their attention to the pleading of the plaintiff and allowed the plaintiff unlawfully to adduce evidence at the time of trial for setting up a new and a different case. It also appears that the learned Courts below did not consider the report of the Commissioner as also the evidence adduced on the side of the defendant. They

overlooked the fact that the banana and bamboo gardens were found by the Commissioner to be "cultured" and that the fruit bearing trees like mango, jack trees, tamarind, sajina were very few. The materials on record coupled with the original case of the plaintiff in the pleading clearly prove that the suit lands were banana and bamboo gardens properly grown and cultured by the plaintiff himself by his efforts. The plaintiff in evidence does not give any reasonable explanation why he made wrong statements in "B" form. In this view of the matter when the case pleaded in the plaint was different from the case set up at the time of trial, the latter case ought to have been rejected and the suit dismissed. The first point raised by Mr. Pal is accepted.

5. Coming to the second point the question arises whether the suit lands can be retained by the plaintiff as claimed. Section 4 of the West Bengal Estates Acquisition Act, 1953 speaks about the notification vesting the estates and rights of the intermediaries in the State free from all encumbrances. Section 5 of the Act mentions the effect of notification and enumerates the rights and extent in the properties of the intermediary. Sub-section (1) of Section 6 of the Act mentions the property which the intermediary shall be entitled to retain. Clause (f) of Sub-section (1) of Section 6 is relevant for our purpose because the plaintiff claims his right to retain the suit lands under this provision. The plaintiff claims himself to be an intermediary and Clause (f) relied upon by him is as follows :--

"(f) Subject to the provisions of subsection (3), land comprised in tea gardens or orchards or land used for the purpose of livestock breeding, poultry farming or dairy".

The plaintiff further relied on Clause (c) which says that an intermediary is entitled to retain non-agricultural land in his khas possession under certain circumstances mentioned therein.

6. In this connexion we should note the definitions of agricultural land and non-agricultural land. In Clause (b) of Section 2 of the Act "agricultural land" is defined in the following language :--

"(b) "Agricultural land" means land ordinarily used for purposes of agriculture or horticulture and includes such land, notwithstanding that it may be lying fallow for the time being."

In Clause (j) of Section 2 we get :

"(j) "Non-agricultural land" means land other than agricultural land or other than land comprised in a forest."

According to Mr. Pal, the suit lands are all agricultural lands because according to the definition of the Act any land used for purposes of agriculture or horticulture will be agricultural land. His argument is that the plaintiff has been using the disputed lands either for banana garden or for bamboo garden, both of which require cultivation of land and human effort and care are also necessary for

culturing the growth and maintenance of the banana and bamboo plants. The cultivation, culturing and the growing of banana and bamboo plants amount to agriculture and even if it is not agriculture in the narrower sense, it must be so being horticulture as mentioned in the definition of "agriculture" in the Act. It has been contended that the banana gardens or the bamboo gardens cannot in any view be called orchards referred to in Clause (f) of Sub-section (1) of Section 6 of the Act on which the plaintiff relies to get retention of the same. In this connexion I will refer to the decisions relied upon by the trial Court to hold that the suit lands were not agricultural lands because bamboos and bananas on the suit land grew spontaneously. The first reference was made to the decision of the Allahabad High Court in Pratap Singh Vs. Commr. of Income Tax, . That was a cass which relates to the sale of forest trees of spontaneous growth. It was a reference under the Income Tax Act made by the Income Tax Appellate Tribunal. It is no use discussing the facts of that case. I quote below the relevant portion :--

"In the Statement of the case, the Tribunal has mentioned that it was conceded before the Bench that there was no evidence on the record of the assessment proceedings that there had ever been cultivation of the soil on which the trees stood. The form in which the question was formulated also implied that the growth of the trees on the land was natural and spontaneous and without the intervention of the human agency. If, therefore, human labour and skill were expended, they were not directed towards planting or growing of the trees. The skill and labour were directed towards regeneration and preservation of the forest trees. We are unable to hold that the use of human labour and skill merely for such purpose constitutes "agriculture," or that the land was being used for agricultural purposes".

In the case before us that decision will be of no help because this is not a case of forest trees. But, according to the plaintiff's case, he converted the lands into gardens by planting banana plants and bamboos. Moreover, there is the evidence that the gardens were cultured. This case is, therefore not relevant for the purpose of our decision.

7. The second decision of the Supreme Court relied upon by the trial Court is The Commissioner of Income Tax, Bihar and Orissa Vs. Sri Ramakrishna Deo, . That was also a case relating to the Income Tax Act and in that case also forest trees of spontaneous growth were involved. There the Supreme Court on consideration of some other decisions of its own noted as follows :--

".....that the term "agriculture" meant, in its ordinary sense, cultivation of the field, that in that sense it would connote such basic operations as tilling of the land, sowing of the trees, plantation and the like, and that though subsequent operations such as, weeding, pruning, watering, digging the soil around the growth and removing under-growths could be regarded as agricultural operations when they are taken in conjunction with and as continuation of the basic operations mentioned before, they could not apart from those operations, be

regarded as bearing the character of agricultural operations :"

This case will not, in my view, support the plaintiff-respondent here before me.

8. In this connexion I think it necessary to refer to the decision of the Supreme Court in the case of Commissioner of Income Tax, West Bengal, Calcutta Vs. Raja Benoy Kumar Sahas Roy, . Although that case relates to the Income Tax Act, yet that decision is instructive in the sense that there has been a long discourse upon the terms "agriculture" and "agricultural purpose" used in the definition of "agricultural income" in Section 2(1) of the Income Tax Act. There the said two terms "agriculture" and "agricultural purpose" were not defined in the Income Tax Act. In paragraph 10 of the judgment we find :

"The terms "agriculture" and "agricultural purpose" not having been defined in the Indian Income Tax Act, we must necessarily fall back upon the general sense in which they have been understood in common parlance. "Agriculture" in its root sense means ager, a field and culture, cultivation, cultivation of field which of course implies expenditure of human skill and labour upon land. The term has, however, acquired a wider significance and that is to be found in the various dictionary meanings ascribed to it".

Bhagwati, J. while delivering the judgment on behalf of the Court considered the meaning of the word "agriculture" appearing in different dictionaries and several decisions and he says in paragraph 16 of the judgment :

"These are the various meanings ascribed to the term "agriculture" in various dictionaries and it is significant to note that the term has been used both in the narrow sense of the cultivation of the field and the wider sense of comprising all activities in relation to the land, including horticulture, forestry, breeding and rearing of livestock, dairying, butter and cheese-making, husbandry etc."

On a consideration of meanings of the the word "agriculture" in different dictionaries and decisions Bhagwati, J. says :

"Whether the narrower or the wider sense of the term "agriculture" should be adopted in a particular case depends not only upon the provisions of the various statutes in which the same occurs but also upon the facts and circumstances of each case. The definition of the term in one statute does not afford a guide to the construction of the same term in another statute and the sense in which the term has been understood in the several statutes does not necessarily throw any light on the manner in which the term should be understood generally".

In view of the definition of "agricultural land" inserted in the West Bengal Estates Acquisition Act, it cannot be stated that such land has been used in the narrowest sense, but in fact, it is meant to be used in a more or less wider sense and in that view of the matter the suit lands, we are concerned with, are agricultural lands.

9. Now, the question is whether the plaintiff shall be entitled to take advantage

of Clause (f) of Sub-section (1) of Section 6 of the Act for retaining them on the ground that they are orchards. The word "horticulture" appearing in the definition of "agricultural land" has not been defined in the Act. Horticulture, according to Webster's Seventh New Collegiate Dictionary means "the science and arts of growing fruits, vegetables, flowers or ornamental plants". The word according to the Pocket Oxford Dictionary means "gardening". In Chamber's 20th Century Dictionary we get the meaning of the word as "the art of gardening". If the suit lands are taken to relate to horticulture which is a species of agriculture, it is to be decided whether the suit lands can be called orchards which are connected with horticulture. "Orchard" according to the Pocket Oxford Dictionary means, enclosure with fruit trees. According to the Chambers's Dictionary it is an enclosed garden of fruit trees. Webster's Seventh New Collegiate Dictionary says that the word "Orchard" means a planting of fruit trees or nut trees. "Tree" according to this Dictionary means a woody perennial plant having a single use, elongate main stem generally with few or no branches or its lower parts. In Pocket Oxford Dictionary "tree" has been described as a perennial plant with single woody self supporting stem called the trunk usually unbranched for some distance above ground. According to the Chambers's Dictionary "tree" is a large plant with a single branched woody trunk. An orchard, therefore, means a garden of trees. A question again arises whether bamboos and plantain or banana plants can be called trees. To show the nature of tree as distinguished from other kinds of plants Mr, Pal relies upon the "Text Book of Botany" by H. Mukherjee, 6th Edn. meant for college students. At page 49 of the book it is stated that nature of stem and its branches often determine the types of plants. Thus, the denomination of plants into herbs, shrubs and trees is mainly based on the woody nature and size of the stem. According to the author, herbs are low growing plants with tender stems which are usually not woody. In some perennial herbs woody tissues may develop with age. Plants which live for a number of years are called perennials. The perennial herbs send out sub-aerial shoots for vegetative and reproductive purposes once a year during the periods favourable for growth. Shrubs have been described as small, perennial woody plants without a main trunk. China rose, Gardenia, etc. are examples of this type. "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. Mango, Tamarind. Banyan etc. are given as examples of trees. From what I have discussed above, it cannot be held that plantain or banana plants and bamboos are trees. The banana garden and the bamboo gardens referred to in the suit cannot be called orchards. In my view, therefore, the claim for retention of the said gardens by the plaintiff cannot be sustained on the basis of Clause (f) of Sub-section (1) of Section 6 of the West Bengal Estates Acquisition Act, 1953. The second point urged by Mr. Pal from the side of the appellant also succeeds.

10. Mr. Lala on behalf of the respondent filed a petition for taking note of a subsequent event after the disposal of the first appeal in support of the decree passed in favour of the plaintiff-respondent. He relies upon the judgment of a

Bigh Raiyat Case No. 8 where an order was passed in favour of the plaintiff-respondent allowing him to retain several lands on the basis of the decree passed in Title Suit No. 23 of 19G2 confirmed by the learned Subordinate Judge in the Title Appeal No. 1462 of 1962. Mr Lala's argument is that when in the meantime plaintiff's claim has been allowed by the Settlement Officer, the appellant, the State of West Bengal cannot challenge the character of the suit lands to deprive the plaintiff of his legitimate right of retention. The said application is opposed by the appellant. On consideration of the affidavits filed by both the parties and considering the judgment passed, I find that the application has got no merit. The order was passed by the Settlement Officer on the basis of the judgment and the decree passed by the trial Court duly affirmed by the Subordinate Judge in the first appeal below. The decisions of the lower Courts have been challenged in this second appeal before me. The decisions of the Courts below were not final and the Settlement Officer, when the said judgments were produced before him, could not disregard the said judgments of the Civil Court and pass order on the basis thereof and not on the merits of the plaintiff's claim considered independently. When in my view as indicated above, the judgments and the decrees of the Courts below were illegal, erroneous and unsustainable and also liable to be set aside, the order passed by the Settlement Officer on the basis of those erroneous decisions is of no value and the plaintiff cannot rely upon that in support of his claim. The plaintiff gets no assistance from the said judgments and no relief can be granted to the respondent on the basis of that application. The said application is thus disposed of.

11. In the result, the appeal is allowed and the judgments and the decrees of the Courts below are hereby set aside. The plaintiff's suit is dismissed. In the facts and circumstances, however, the parties will bear their own costs in this appeal as well as in the Courts below.