

(1987) 06 CAL CK 0004
In the Calcutta High Court
Case No : C.R. No. 1619 of 1983

Yakub Sheikh (Dead), represented by his heirs Anwar Begum and Others APPELLANT

Vs

Hasina Khatun RESPONDENT

Date of Decision : 22-06-1987

Acts Referred:

Constitution of India, 1950 — Article 227
Criminal Procedure Code, 1973 (CrPC) — Section 4, 4(i)
Evidence Act, 1872 — Section 1, 165, 3, 4, 4(1)
Oaths Act, 1969 — Section 4, 7
West Bengal Restoration Of Alienated Land Act, 1973 — Section 4, 4(4), 4B

Citation : 92 CWN 307

Hon'ble Judges : A.M. Bhattacharjee, J

Bench : Single Bench

Advocate : Indrani Pal, for the Appellant; Sardar Amzad Ali, for the Respondent

Judgement

A.M. Bhattacharjee, J.—After hearing the learned Counsel for the parties and having gone through the records myself, I am satisfied for the reasons stated hereunder, the Rule is to be made absolute, the impugned orders are to be set aside and the order to be sent back for trial afresh according to law. The application, which has given rise to the present proceeding, is under the provisions of section 4 of the West Bengal Restoration of Alienated Land Act, 1973, hereinafter referred to as "the Act". That section provides for restoration to the seller of lands sold by him under certain circumstances and the conditions for the application of that section are as hereunder:-

1. the sale has taken place after the expiry of the year 1967 and before the date commencement of the Act, or the amending Act of 1980;
2. the seller was not holding more than 2 Hectares of land in the aggregate on the date of sale;
3. the sale has been made by the seller either being in need of money for the

maintenance of himself and his family or for meeting the cost of cultivation or made with an agreement for the reconveyance of the land to the seller; and

4. the application for restoration has been made within 10 years from the date of commencement of the Act.

2. Section 4(4) provides further that the Special Officer, before whom such an application is to be filed, shall, if he is satisfied that the aforesaid four conditions have been complied with, make an order in writing restoring the land sold to the seller and directing the seller to pay to the purchaser the amount of consideration paid together, with some more amount towards interest and compensation.

3. The petitioner before me filed the application u/s 4 of the Act which has wended up to this court in the present proceeding. As would appear from the impugned order of the Special Officer, the learned Officer, having "gone through the depositions of both sides" and "on perusal of all evidence arrived into the decision that the case is confusing one and the petition was dismissed by the Special Officer in case No. 161/327K.II of 1980. An appeal was preferred by the petitioner u/s 4B of the Act and the appellate authority also dismissed the appeal in R.A.L. Case. No. M.P. 229/82.

4. If the matter rested at that only, then sitting in revision as a court of superintendence under Article 227 of the Constitution, it would not have been Open to me to make a reassessment or reappraisal of the evidence on record and interfere with the impugned orders. But I do not know how could the Special Officer go through the "deposition of both sides" and make a "perusal of all evidence" when he palpably failed to have the witnesses examined and to record their depositions and evidence in the manner required by law. u/s 1 of the Evidence Act, the provisions of the said Act would apply to all judicial proceedings in or before any court and section 3 of that Act defines a court to include "all persons, except the arbitrators, legally authorised to take evidence". Section 4(3) of the Act clearly directs a Special Officer to "receive such evidence as may be adduced by the transferor and the transferee" while hearing an application u/s 4(1) and section 8 of the Act confers on the Special Officer "all the powers of a Civil Court under the "Code of Civil Procedure, 1908 for the purpose of receiving evidence, administering oaths, enforcing the attendance of witnesses and compelling the production of documents". A Special Officer under the Act, therefore, is "a person legally authorised to take evidence" and as such, a court within the meaning of the Evidence Act.

5. The proceeding before a Special Officer u/s 4 of the Act is obviously a judicial proceeding. The expression "judicial proceeding" has been defined in section 4(i) of the Code of Criminal Procedure, "1973 as to include "any proceeding in the course of which evidence is or may be legally taken on oath". But even if this definition is taken to-be one for the purpose of the Code only, there should be no doubt that a proceeding is judicial if the object of it is to determine a jural

relation between one person and another. And that being so, a proceeding u/s 4 of the Act before a Special Officer judicial proceeding, the object thereof being to determine the jural relation between the transferor and the transferee in respect of the restoration of the land transferred by the former to the latter.

6. The Special Officer under the Act being thus a Court and the proceeding before him u/s 4 of the Act being thus a judicial proceeding, the provisions of the Evidence Act would therefore apply to such proceeding. Now under the Evidence Act, statement of a witness would not amount to evidence proper unless opportunity has been given to the adverse party to cross-examine the witness. But the records of the case, recording, as they do, only some cryptic statements of the witnesses, don't show that any opportunity was in any way given to any of the parties to cross-examine" the witnesses. The Special Officer ought to have borne in mind that the transferor in a proceeding u/s 4 of the Act would obviously belong to the weaker section of the society, who because of his indigence, illiteracy or other socioeconomic disabilities, is not expected to know about his right to cross-examine and u/s 4 of the Act he is also not entitled to be represented by any legal practitioner, even if he can manage to have one through legal aid or otherwise. And the Special Officer ought to have realised that in such circumstances it was for him to make the transferor aware of his right to cross-examine and other legal rights so that social justice could properly be done to him, that being the paramount object for which a social legislation like the Act in question is enacted.

7. Even apart from the provisions of the Evidence Act, it is now well-settled that even Tribunals not bound to apply the provisions of the said Act are bound to observe rules of natural justice and, as pointed out by the Supreme Court in Union of India (UOI) Vs. T.R. Varma, , "stating it broadly and without intending it to be exhaustive it may be observed that rules of natural justice require that a party should have the opportunity of adducing all relevant evidence on which he relies, that the evidence of the opponent should be taken in his presence, and that he should be given the opportunity of cross-examining the witness examined by that party, and that no materials should be relied on against him without his being given an opportunity of explaining them". If these are the rules of natural justice which all Tribunals must observe; then it is all the more necessary that the Special Officer should make the transferor aware of his right to cross-examine under the rules of natural justice so that those rules can be observed, particularly when, as already noted, the transferor is expected to come from the weaker section of the society and to be without any legal aid..

8. As already noted, the Special Officer found the evidence to be confusing, All Judges should remember that, as was pointed out by Chief Justice Chakravarti speaking for the Division Bench of this Court in Sunil Chandra Ray v. State (57 Calcutta Weekly Notes 962 at 980), that a Judge is not a mere umpire at a combat between the parties whose duty is to enforce the rules of the game and declare at the end of the combat who has won and who has lost. He is expected,

and indeed it is his duty, to explore all avenues open to him in order to discover the truth and, to that end, question witnesses on points which appear to be overlooked by the parties or left obscure. If he finds the evidence, as has been found by the Special Officer in this case, to be "confusing", it is not for him to just to fold his hands and blame the parties and bang the case, but it is his duty to intervene with his own questions, particularly in a case like this where a party who initiates the proceeding is likely to be socially and/or economically handicapped due to indigence or otherwise. This is the principle which has been enacted in Section 165 of the evidence act which provides that "the Judge may, in order to discover or obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or of the parties about any fact, relevant or irrelevant". I have already pointed out that the provisions of the Evidence Act would apply to a proceeding before a Special Officer u/s 4 of the Act. But even otherwise, the principle enshrined in Section 165 of the Evidence Act is of universal application and should be applied by all Judges in all judicial proceedings. But this the special Officer did not do.

9. There is yet another matter. The Special Officer does not appear to have administered oath to any of the witnesses. u/s 4 of the Oaths Act, 1969, oaths or affirmation shall be made by all witness before any Court or person having by law authority to examine witnesses or to receive evidence. Failure to administer oath or affirmation to the witness by the Special Officer was, there for, a patent violation of the provisions of the Oaths Act. It is true that in view of Section 7 of Oaths Act, failure to administer oath or affirmation does not vitiate the proceeding or render any evidence inadmissible. But, as pointed out by the Supreme Court in Rameshwar Vs. The State of Rajasthan, , omission to do so might go a long way to affect the credibility of the witnesses. The Special Officer, therefore, ought to have administered oath or affirmation to the witnesses.

10. For all these reasons, I would make the rule absolute and set aside the orders of the Special Officer, Kalna II dated 22.3.82 passed in Case No. 161/327 K. II of 1980 and of the Appellate Authority, Kalna, dated 3.3.83 in R.A.L. Case No M.P. 229/82 and send the case back to the Special Officer for retrial in accordance with law and the observations made hereinabove. The Special Officer is directed to examine the witnesses produced by the parties after administering oath or affirmation to them and after giving each party due opportunity to cross-examine the witnesses of the adverse party and to depose of the case within six months from the date of the receipt of the record by him. I must record my appreciation of the very fair stand taken by Mr. Amjad Ali, the learned advocate for the Respondent, in conducting the proceeding and I would like to note that he has not hesitated to draw my attention to all the relevant aspects of the "case, both favourable and unfavourable, and that helped me considerably in coming to my decision.

The records to go down at once. No costs as *actus curiae neminem gravabit*.