The State of West Bengal

Vs

Shebaits of Iswar Sri Saradia Thakurani and Others

Civil Appeal No. 521 of 1966

(J. M. Shelat, C. A. Vaidialingam JJ)

04.03.1971

JUDGMENT

SHELAT, J. -

1. This appeal, by special leave, arises out of proceedings under Section 44(2-a) of the West Bengal Estates Acquisition Act, 1 of 1954 (hereinafter referred to as the Act) and concerns a tank fishery known as 'Napukar' situate in Mauza Kandi, District Murshidabad.

2. The tank is the absolute debuttar property of the deity known as Iswar Sri Saradia Thakurani, of whom the respondents are and have at all material times bess the shebaits. The last district Settlement Record recorded the interest of the deity in the said tank and described it as a rent-free tenure. The maintenance of the deity and expenses connected with her seba puja are met from the income and of the tank. The Revisional Record of Right under the Act also described the tank as the absolute debuttar property of the deity. But the entry also mentioned that one Kumarish Chandra Saha and Aswini Kumar Saha were the tenants of tank paying an annual rent of Rs. 60/-. A receipt issued by the respondents also stated that the tank had been leased for a period of nine years, i.e., from 1358 B.S. to 1366 B.S., at the rate of Rs. 60/- a year. But there was no registered deed or any document at all in respect of the said alleged lease. The appellant State relied on the said entry and the said receipt for its case that the tank was under a lease for a period of nine years and the said Sahas were is in possession as lessees thereof.

3. The Act was passed with the object of compulsory acquisition by the State of estates and all rights of intermediaries therein. It came into force on February 12, 1954. Section 4 of the Act empowers the State Government to declare by notification that with effect from the date therein mentioned all estates and the rights of every intermediary in each such estate situated in the district specified in the notification shall vest in the State free from all incumbrances. Under Section 5(1)(a), upon the notification under Section 4 and from the date of vesting, the estates and the rights of intermediaries therein, to which the declaration under Section 4 applies, shall vest in the State, and under clause (c) of Section 5(1), every non-agricultural tenant holding any land under an intermediary shall hold, subject to the provisions of Section 6(3) the same directly under the State, as if the State had been the intermediary, on the same terms and conditions as immediately before the date of vesting. A non-agricultural tenant under Section 2(k) means a tenant of non-agricultural land who holds inter alia under a tenure-holder. If the Sahas were the lessees, as was the case of the State, they would be non-agricultural tenants of the deity, an intermediary and under the combined effect of Sections 4, 5(1)(a) and (c) would become the direct tenants of the State. Section 6(1), however, provides that :

"Notwithstanding anything contained in Sections 4 and 5, an intermediary shall, except in the cases mentioned in the proviso to sub-section (2) but subject to the other provisions of that sub-section, be entitled to retain effect from the date of vesting -

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(c) non-agricultural land in his khas possession including land held under him by any person, not being a tenant, by leave or license;

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(e) tank fisheries;"

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Tank fisheries, as defined by the explanation to Section 6 (1) means a reservoir or place for the storage of water used for pisciculture or for fishing, together with the sub-soil and the banks of such reservoir or place and includes any right of pisciculture or fishing in such reservoir or place. Section 6(2) provides that an intermediary, who under sub-section (1) is entitled to retain possession of any land, shall be deemed to hold such land directly under the State as a tenant subject to such terms and condition as laid down therein. But the proviso to this sub-section, which is by way of an exception, lays down that if any tank fishery or any land of the description there set out "was held immediately before the date of vesting under a lease, such lease shall be deemed to have been given by the State Government ..... ". Briefly stated, the effect of these provisions is that if the tank fishery in question was under a lease in favour of the said Sahas immediately before the date of vesting, as the State authorities asserted, the interest of the deity as an intermediary would, by reason of Section 5 and this proviso, be wiped off and the said Sahas would become the direct tenants of and under the State Government.

4. Chapter V of the Act deals with preparation of Record-of-rights which presumably became necessary in consequence of the changes which came about in the rights of holders of lands as a result of the vesting of estates in the State Government. Section 39 in that Chapter authorities, therefore, the Government to make an order, for carrying out the purposes of the Act directing preparation of a record-of-rights. Under Section 42, when an intermediary is entitled to retain possession of any land under Section 6(1), then, except in cases falling under the proviso to Section 6(2), the Revenue Officer shall determine the rent payable by him to the State in accordance with the principles set out in the section. Under Section 44(1), when the record-of-rights has been prepared or revised, the Revenue Officer has to publish a draft thereof and to receive objections thereto, if any. On disposal of such objection, that officer would finally frame the record and cause such record to be published in the prescribed manner. Sub-section (2-a) of Section 44 then provides that an officer especially empowered by the Government may, either on an application or suo motu within the time prescribed therein revise an entry in the record-of-rights, even though it has been finalised and published under sub-section (1).

5. As stated earlier, both the last District Settlement and the Revisional Settlement have recorded the tank fishery as the debuttor property in respect of which the names of the respondents were entered as shebaits. But in view of the names of the Sahas appearing therein as tenants paying Rs. 60/- as annual rent, a notice was served on the respondent by the Collector of Murshidabad to hand over

possession of the said tank. The respondents objected to the said notice. The State Government thereupon filed an objection under Section 44(2-a) for revising the entry in the record-of-rights. The objection was heard by the Settlement Officer, Kandi, under Section 44(2-a). He rejected the Government's objection and held that the said tank was not leased out to the said Sahas, that what was described as lease in the said entry was no more than a right of fishing without any right in the sub-soil of the tank or its embankments, and therefore, the must be held to have been in the khas possession thereof immediately before the date of vesting under the Act. In an appeal by the Government, the District Judge, as the appellate tribunal under the Act, reversed the order of the Settlement Officer and held that the said Sahas were the tenants of the tank fishery immediately before the date of vesting, and that, therefore, the proviso to Section 6(2) applied and the said Sahas must be deemed to be the direct tenants of the Government.

6. The respondents thereupon filed a writ petition in the High Court for having the said order of the tribunal quashed. The High Court agreed with the Settlement Officer and held that what was mentioned in the Revisional Record was an arrangement between the respondents and the said Sahas, under which the latter, in consideration of their cleansing the tank and payment of Rs. 60/- per year were to have the fish which they might catch from the tank, and that, therefore, Section 6(2) proviso, was not attracted. This appeal by the State Government disputes that view.

7. On the facts on record there can be no manner of doubt that the deity was the intermediary in respect of the tank fishery within the meaning of Section 2(i). It is also beyond doubt that if the proviso to sub-section (2) of Section 6 were not to apply, the respondents as the shebaits of the deity would be entitled, notwithstanding Sections 4 and 5, to retain the said tank fishery under Section 6(1) but would hold it, under sub-section (2) of Section 6, directly under the State as tenants from the date of vesting.

8. Did the proviso to Section 6(2) then apply to the present case ? The answer to that question depends upon, as the proviso says, whether the tank fishery was held immediately before the date of vesting under a lease by the said Sahas. If so, the lessees under such a lease, and not the lessors, would become the direct tenants of the State. In other words, the interest in the tank of the intermediary would disappear.

9. It is true that both the entry in the Revisional Record and the receipt passed by the respondents in favour of the Sahas mentioned them as tenants. The receipt mentions that the tank was leased to them for a period of nine years at an annual rent of Rs. 60/- from 1358 B.S. to 1366 B. S. Two facts, however, emerge from the record. The first is that there was no deed, much less a registered deed, evidencing the alleged lease. The second is that neither the sub-soil nor the embankments of the tank were the subject-matter of the alleged lease. In the absence of any registered deed there could be no valid lease of the tank for a period of nine years as was the case of the appellant State. No right, either in the sub-soil of the tax or its embankments, was acquired by the said Sahas. The only interest, therefore, they could have acquired was in the fish in the tank. The materials on record show that their interest was confined to the fish they would catch from the tank in consideration for which they had agreed to pay Rs. 60/- per year and in addition were under the obligation to cleanse the tank and keep it cleansed. Such an arrangement would not mean a lease within the meaning of the proviso to Section 6(2), but only constitutes a licence under which, for the consideration above stated, they became entitled to fish yielded by and caught by them from the tank.

10. A point somewhat similar to the one in this appeal arose in Ananda Behera v. State of Orissa ((1955) 2 SCR 919 : AIR 1956 SC 17) where it was held that a right to catch fish is profit a prendre

which is immovable property within the meaning of the Transfer of Property Act read with Section 3(25) of the General Clauses Act, which would be accompanied by a licence to enter upon the land, in the present case the embankments, for the purpose of going into the tank to catch the fish and to keep the tank cleansed. It is clear, therefore, that there was no legally enforceable lease of the tank in the favour of the Sahas immediately before the date of vesting, so as to attract the proviso to Section 6(2). Therefore, it was the deity through the respondents, who was entitled under sub-section 6(2) read with Section 6(1) to become the tenant of the State and not the said Sahas. The notice directing the respondents to hand over possession to the State was, therefore, without jurisdiction and was liable to be quashed.

11. In our view, the High Court was right in quashing the order of the appellate tribunal, inasmuch as the tribunal by wrongly interpreting the Revisional Record appropriated to itself the jurisdiction under Section 44(2) of the Act to revise the entry in the Record-of-rights.

12. The appeal fails and is dismissed with costs.

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