Union of India

Vs

Sudhansu Mazumdar and Others

Civil Appeal No. 974 of 1968

(CJI S. M. Sikri, J. M. Shelat, C. A. Vaidialingam, A. N. Grover, A. N. Ray JJ)

29.03.1971

JUDGMENT

GROVER, J. -

1. This is an appeal from a judgment of a learned single judge of the Calcutta High Court who granted a certificate under Article 132(1) of the Constitution. It involves primarily the question whether the cession of a territory by India as a result of a treaty with Pakistan would be compulsory acquisition of the property comprised in that territory by the Union of India and would, therefore, attract the provisions of Article 31 of our Constitution.

2. At the outset it may be mentioned with reference to a preliminary objection which has been raised by the respondents that the judgment under appeal was delivered by the learned single judge in a petition under Article 226 of the Constitution and it appears that on an oral prayer made to him he granted a certificate under Article 132(1) even though under the Letters Patent of the High Court an appeal lay to a Division Bench of that Court. This Court has said on an earlier occasion in clear and unequivocal terms that the practice of a single judge deciding the case and giving a certificate under Article 132(1) for appeal to this Court, although technically correct, was an improper practice. The right of the parties to file an appeal in the High Court itself against the decision of the single judge should not be short-circuited. Indeed in R. D. Agarwala and Another, etc. v. Union of India and Others (1970 (1) SCC 708.) the certificate was cancelled. In Union of India v. J. P. Mitter (1971 (1) SCC 396.) it was observed that a certificate by a single judge under Article 132(1) should be given in very exceptional cases where a direct appeal was necessary. Even though the present case may be of an exceptional kind we have been deprived of the benefit of the judgment of a larger bench of the High Court on points which are of substantial importance. Presumably a number of matters which had no bearing on the real questions to be determined and which have been dealt with by the learned single judge would have been either satisfactorily disposed of or would not have been the subject matter of discussion by the Court, being irrelevant and unnecessary, if the decision had been given by a larger Bench.

3. The facts may be shortly stated. On September 10, 1958, an agreement was entered into between the Government of India and Pakistan called the Indo-Pakistan Agreement. Item No. 3 of the agreement related to Berubari Union No. 12 which was a group of villages lying within the territory of India. This territory was to be so divided as to give one half area to Pakistan. The other half adjacent to India was to be retained by India. Subsequently a doubt arose whether the implementation of the agreement relating to Berubari Union required legislative action either by way of an Act of Parliament relatable to Article 3 of the Constitution or by way of a suitable amendment of the Constitution in accordance with the provisions of Article 368 or both. A similar

doubt had also arisen in respect of another item of the agreement which related to the exchange of certain enclaves but with which we are not concerned. The President of India made a reference to this Court under Article 143(1) of the Constitution for its advisory opinion. The opinion was delivered on March 14, 1960. (In re : The Berubari Union and Exchange of Enclaves Reference Under Article 143(1) of the Constitution of India). ((1960) 3 SCR 250 : AIR 1960 SC 845 : 1960 SCJ 933 : (1961) 1 SCA 22.) As mentioned in the advisory opinion Berubari Union No. 12 had an area of 8.75 sq. miles and a population of 10 to 12 thousand residents. It was situated in the district of Jalpaiguri. This Court expressed the view that since the agreement between India and Pakistan amounted to cession of a part of the territory of India in favour of Pakistan its implementation would naturally involve the alteration of the content of and the consequent amendment of Article 1 and of the relevant part of the First Schedule to the Constitution which could be made only under Article 368. Pursuant to the opinion delivered by this Court the Parliament enacted the Constitution (Ninth Amendment) Act, 1960 on December 28, 1960. In order to implement the provisions of the above Act a physical division of the Berubari Union in accordance with the agreement and demarcation of the portion that was to go to Pakistan was necessary. Some of the inhabitants of the Berubari Union filed a petition under Article 226 of the Constitution challenging its proposed partition with the object of transferring its southern part to Pakistan. The writ petition was dismissed and an appeal was brought to this Court which was disposed of on August 11, 1965. (Ram Kishore Sen and Others v. Union of India and Others ((1961) 1 SCR 430 : AIR 1966 SC 644.). It was held that the Ninth Constitution Amendment Act had been passed by the Parliament in the manner indicated in the advisory opinion of this Court. No merit was found on the other points which were agitated. The appeal was dismissed.

4. On June 11, 1965, the respondents filed another petition under Article 226 of the Constitution before the High Court challenging the validity of the proposed demarcation principally on the ground that they would be deprived of the right of citizenship conferred by the Constitution of India and also of their property without payment of compensation. D. D. Basu, J. called for an affidavit in opposition and after hearing lengthy arguments delivered an elaborate judgment (AIR 1967 Cal 216) directing the issue of rule nisi limited to ground No. 3 of the writ petition. This ground was :

> "For that no Act of the State is involved in the transfer of Berubari Union No. 12 to Pakistan and as such your petitioners are entitled to compensation in terms of Article 31(2) of the Constitution inasmuch as the operation of transfer involves deprivation of their right to property for which no provision has been made in the Constitution Ninth Amendment Act, 1960."

According to the allegation in the writ petition respondent Dhaneswar Roy had 2 acres 64 decimals of Khas land in the area in question. It was also claimed that the respondents had their household property, ancestral homes and cultivated lands in the Berubari Union No. 12.

5. The constitutional question formulated by the learned judge was whether compensation under Article 31(2) of the Constitution was to be provided for the respondents before the demarcation in implementation of the Constitution (Ninth Amendment) Act took place. We may mention some of the material conclusions of the learned judge out of the numerous matters dealt with by him. These are : (1) The treaty making power must be exercised subject to the fundamental rights guaranteed by the Constitution. (2) Once it is established that a treaty making law involves a transfer which attracts Article 31(2), it cannot be exempted from the requirements of that Article on the ground that it is a treaty of "cession". (3) Although under the International law the private rights of the inhabitants of the ceded territory are not instantly affected they shall have no legal right to assert against the new

State under its own municipal law to which such inhabitants shall be subject from the moment the cession is complete. (4) As a result of cession it would be competent for the Government of Pakistan to deal with the disputed territory as absolute owner in complete disregard of the existing rights of the respondents. "The rights of the Government of Pakistan under its municipal law would in no way be less than what would have happened if the lands were vested in that Government by a direct Act of the Government of India. Such vesting the Government of India could arrange for only after acquiring the disputed lands". (5) The present case will not be covered by clause 2(A) of Article 31 of the Constitution as so far all the cases which have been held to fall within its purview have been those in which there was exercise of the regulatory power of the State. (6) The cession of the disputed properties sought to be implemented by the impugned demarcation involved compulsory acquisition of those properties by the Union of India within the meaning of Article 31(2) and unless competent legislation is enacted to provide for compensation the Union cannot announce the appointed day within the meaning of Section 2(a) of the Constitution (Ninth Amendment) Act, 1960 and for constructing pillars to demarcate Berubari Union No. 12 for the purpose of effecting the transfer of the specified portion to Pakistan.

6. According to Dr. Singhvi learned Counsel for the appellant the High Court has fallen into serious error inasmuch as it has proceeded on many assumptions, reasoned on a priori theories and has founded its judgment on certain premises which do not exist either in fact or in law. Stress has been laid on the true import of "cession". According to all authorities on International Law "cession" is the transfer of sovereignty over the State territory by the owner State to another State" (Oppenheim's International Law, Vol. I, 8th Edn. at pp. 547, 551.). Under the International Law two of the essential attributes of sovereignty are the power to acquire foreign State (supra at p. 281) Hardship is certainly involved in the fact that in all cases of cession the inhabitants of the territory ceded lose their old citizenship and have to submit to a new sovereign whether they like it or not. As the object of cession is sovereignty over the ceded territory all such individuals domiciled thereon as are subjects of the ceding State become ipso facto, by the cession, subjects of the acquiring State (supra at p. 551).

7. Dr. Singhvi says that the first premise on which the High Court has proceeded is that as a result of cession it would be competent for the Government of Pakistan to deal with the disputed territory as an absolute owner in complete disregard of the existing rights of the respondents. In other words in has been assumed that the Government of Pakistan will not recognise ownership or other similar rights of the respondents in the lands and properties which belong to them. This, Dr. Singhvi claims, is contrary to the rule enunciated by Chief Justice Marshall in The United States v. Juan Perchman (8 L ed 604.) in the following words :

> "The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilised, world would be outraged, if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property, remain undisturbed."

The rule set forth in the Perchman's case (supra) has been followed in over forty American cases and has been accepted as the rule of International Law in English, French, German and Italian law.

8. This Court has had occasion to consider fully the Perchman's case (supra) as also the English law apart from several other authorities on International law and the decisions of the Permanent Court of

International Justice. In State of Gujarat v. Vora Fiddali Badruddin Mithibarwala ((1964) 6 SCR 461 : AIR 1964 SC 1043 : (1964) 2 SCA 563.) the following passage from the judgment of Mudholkar, J., at pages 590, 591 gives tersely the position which obtains in our country :

> "Thus while according to one view there is a State succession in so far as private rights are concerned according to the other which we might say is reflected in our laws, it is not so. Two concepts underline our law : one is that the inhabitants of acquired territories bring with them no rights enforceable against the new sovereign. The other is that the Municipal Courts have no jurisdiction to enforce any rights claimed by them, even by virtue of the provisions of a treaty or other transaction internationally binding on the new sovereign unless their rights have been recognised by the new sovereign."

The above case related to rights pertaining to the exploitation of the forests which were claimed under a Tharao which was held by the majority to be a grant to the jagirdars by the ruler of the erstwhile Sant State which merged in the Dominion of India as from June 10, 1948. It was thus held that rights derived by the inhabitants of the ceded territory from its former rulers could not be enforced by them against the new sovereign in the Courts of that sovereign unless they had been recognised by the new sovereign. It is altogether unnecessary to discuss the principles established by the decisions of this Court further because they can afford no assistance in deciding the present case in which no question arises of how the private rights of the inhabitants of a particular territory would be affected if the same were to be ceded to India. The cession involved is of territory to Pakistan and no evidence was placed before the High Court from which it could be concluded that under the Pakistan laws the private rights of the inhabitants therein would not be respected in accordance with the ordinary principles of International Law. In this situation it would be a wholly wrong approach to conclude that the respondents are bound to lose all their property rights in the territory which is being ceded by India to Pakistan. Even on the assumption that the respondents will not be entitled to enforce their private rights in the Municipal Courts of Pakistan unless they are recognised by the new sovereign it is incomprehensible how such a prospect or possibility can attract the applicability of Article 31(2) of our Constitution so as to entitle the respondents to compensation as provided thereby. Nor can we understand the process of reasoning by which the High Court has reached the result that cession would be tantamount to vesting by the direct act of the Government of India of the properties of the respondents in Pakistan.

9. In order to determine whether the case of the respondents would fall within Article 31(2) it is necessary to set out that provision as also Para 2-A of that Article which was added by the Constitution (Fourth Amendment) Act, 1950 :

> "(2) No property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of a law which provides for compensation for the property so acquired or requisitioned and either fixes the amount of the compensation or specifies the principles on which, and the manner in which, the compensation is to be determined and given; and no such law shall be called in question in any Court on the ground that the compensation provided by that law is not adequate.
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> (2-A) Where a law does not provide for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his

property."

As far back as 1950 Mukherjea, J. (as he then was) gave the meaning of "acquisition" in Charanjit Lal Chowdhury v. Union of India ((1950) SCR 869 at p. 902 : AIR 1951 SC 41 : 1951 SCJ 29 : 1951 SCA 235.) in the following words :

> "Acquisition means and implies the acquiring of the entire title of the expropriated owner, whatever the nature or extent of that title might be. The entire bundle of rights which were vested in the original holder would pass on acquisition to the acquirer leaving nothing in the former."

But in the State of West Bengal v. Subodh Gopal Bose and Others, ((1954) SCR 587 : AIR 1954 SC 92 : 1954 SCJ 127 : 1954 SCA 65.) the view taken in the judgment of the majority was that Clauses 1 and 2 of Article 31 were not mutually exclusive in scope and content but should be read together and understood as dealing with the same subject. Thus a wider meaning was given to acquisition, deprivation contemplated in Clause 1 being no other than the acquisition or taking possession of the property referred to in Clause 2. In Dwarkadas Shrinivas of Bombay v. The Sholapur Spinning and Weaving Co. Ltd and Others ((1954) SCR 674 : AIR 1954 SC 119 : 1954 SCJ 175 : 1954 SCA 132.) this court, while confirming the above principle, held that the word "acquisition" had quite a wide concept, meaning the procuring of property or taking of it permanently or temporarily and it was not confined only to the acquisition of a legal title, by the State in the property taken possession of. This was the position relating to Article 31 as it stood before the Constitution (Fourth Amendment) Act. Clause 2-A was inserted in 1955 with the object of superseding the majority decision in Subodh Gopal's case (supra) as also in Saghir Ahmed v. The State of Uttar Pradesh ((1955) 1 SCR 707 : AIR 1954 SC 728 : 1954 SCJ 819 : 1954 SCA 1218.) in which the earlier decisions were followed. It was pointed out in Gullapalli Nageswara Rao and Others v. Andhra Pradesh State Road Transport Corporation and Another ((1959) Supp 1 SCR 319 : AIR 1959 SC 308 : 1959 SCJ 967 : (1958) Andh LT 1014.) :

> "The Constitution (Fourth Amendment) Act, 1955 amended Clause 2 of Article 31 and inserted Clause 2-A in that article. The amendments, in so far as they are relevant to the present purpose, substitute in place of the words 'taken possession of or acquired' the words 'compulsorily acquired or requisitioned' and provide an explanation of the words 'acquired and requisitioned' in Clause 2-A. The result is that unless the law depriving any person of his property provides for the transfer of the ownership or right to the possession of any property to the State, the law does not relate to 'acquisition or requisition' of property and therefore the limitations placed upon Legislature under Clause 2 will not apply to such law."

It is therefore essential that in order to constitute acquisition or requisitioning there must be transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State. Article 12 provides that in Part III (in which Article 31 appears) unless the context otherwise requires the State "includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. The effect of the Constitution (Ninth Amendment) Act, 1960 by which part of the Berubari Union No. 12 shall be ceded to Pakistan can by no stretch of reasoning be regarded as a transfer of the ownership or right to possession of any property of the respondents to the State within the meaning of Article 12 of the Constitution. The amendment of 1955 makes it clear that mere deprivation of property unless it is

acquisition or requisitioning within the meaning of Clause 2-A will not attract Clause 2 and no obligation to pay compensation will arise thereunder.

10. Cession indisputably involves transference of sovereignty from one sovereign State to another. There is no transference of ownership or right to possession in the properties of the inhabitants of the territory ceded to the ceding State itself. The Constitution (Ninth Amendmend) Act, having been enacted in accordance with the advisory opinion of this court (supra) there can be no impediment in the way of ceding part of Berubari Union No. 12 pursuant to the Indo Pakistan Treaty, 1958. The view of the High Court that the cession of the said territory involves transfer of the ownership and other private property rights to Pakistan through the Union of India which was outside Clause 2-A of Article 31 and was covered by Clause 2 of that article is to say the least wholly untenable and cannot be sustained. In our judgment no question of acquisition within Article 31(2) is involved in the present case and even though a good deal of hardship may result to the respondents owing to the change of sovereignty they cannot claim compensation for the simple reason that there has been no transfer of the ownership of their property to the State namely the Union of India which would attract the applicability of Article 31(2).

11. The appeal, therefore, succeeds and it is hereby allowed. In view of the nature of the points decided there will be no order as to costs.

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