

The Bihar Eastern Gangetic Fishermen Co-Operative Society Ltd.

Vs

Sipahi Singh and Others

Civil Appeal No. 1478 Of 1976

(P. K. Goswami, Jaswant Singh, P. K. Kailasam JJ)

01.09.1977

JUDGMENT

JASWANT SINGH, J. –

1. This appeal by special leave is directed against the judgment and order dated August 20, 1976, of the High Court of Judicature at Patna in Civil Writ Judicial Case 1463 of 1976 (filed by respondent 1) restraining the appellant and respondents 2 to 4 herein from acting on the basis of letter 10/S-4032/76-1976 dated June 29, 1976 addressed by the Department of Revenue and Land Reforms, Government of Bihar, to the Deputy Commissioner, Santhal Pargana, Dumka (which formed Annexure-4 to the aforesaid writ petition and directing respondent 2 to execute the lease of the fishery rights in question in favour of respondent 1 and to put him in possession thereof, if not already done.

2. The facts and circumstances giving rise to this appeal are : The appellant which is a co-operative society commenced taking settlement of Gangapath Islampur Jalkar, bearing Tauzi no. 614 (hereinafter referred to as the 'Jalkar') immediately after its establishment and registration in 1950 (A.D.). The fishery rights in the Jalkar which were settled with the appellant for the year 1974-75 as theretofore was to run from July 1, 1974, to the end of June, 1975 at the Jamma of Rs. 1,50,000. At the end of the said year, it was discovered that the appellant had defaulted in payment of the Jamma to the extent of Rs. 66,869. The settlement of fishery rights in the Jalkar for the period commencing from July 1, 1975 to June 30, 1976 was made in favour of respondent 1 by respondent 2 through its Revenue Department as a result of the public auction at which the former offered the highest bid of Rs. 1,65,000. In February, 1976, respondent 1 made a representation to the Revenue Department of the Government of Bihar praying for a remission of Rs. 75,000 in the amount at which the settlement had been made in his favour on the ground that he had suffered a heavy loss during the aforesaid period of settlement as a result of the unlawful activities of the members of the appellant society. In the alternative, he prayed that in case the State Government was not in a position to grant the remission, the settlement of fishery rights of the Jalkar be continued with him for a further period of three years at the same amount in order to enable him to recoup the aforesaid loss suffered by him. After some inquiry and consideration of the matter, the Revenue Department of the Government of Bihar ordered that the settlement of the Jalkar should continue with respondent 1 for the years 1976-77 and 1977-78 at Rs. 1,65,000 per year. The Government, however, made the deposit of the settlement fee of Rs. 1,65,000 by respondent 1 a sine qua non to the issue of the order of settlement. An intimation of this order was given by the Government to its Deputy Commissioner, Santhal Pargana, Dumka, vide its letter 10-9-4032/76R dated April 30, 1976, forming Annexure-1 to the writ petition. A copy of this communication was also sent to respondent 1 with the direction that he should deposit Rs. 1,65,000 before the issue of the settlement order for

the aforesaid two years. In compliance with this order, respondent 1 deposited a sum of Rs. 1,65,000 on May 3, 1976, vide challan 18 (Bank) dated May 3, 1976 and by his letter of the even date, he requested the Sub-Divisional Officer, Sahibganj, to issue the patta of settlement of the Jalkar for the years 1976-77 and 1977-78 in his favour. Respondent 1 also communicated the fact of the deposit by him of Rs. 1,65,000 to the Secretary to the Government of Bihar, Revenue Department, by telegram dated May 5, 1976. However, taking a favourable view of the representations made by the appellant on February 18, 1976 and March 9, 1976 to its Revenue Minister and the Chief Minister respectively, the Government of Bihar changed its mind and informed the Deputy Commissioner of Santhal Pargana, Dumka vide its letter 10/S-4032/76-1976R dated June 29, 1976 that it had "taken the decision that settlement of the aforesaid Jalkar with the Society (i.e. the appellant) be done for the year 1976-77 on the additional conditions (besides those laid down by the prescribed rules and conditions) that it would make the deposit of all earlier arrears of Rs. 58,868 along with the amount of settlement of Rs. 1,65,000 for this year (i.e. 1976-77) in three equal instalments; the first instalment to be deposited before taking the settlement" and within a week from that date. It was made clear in the concluding part of the communication that in case the appellant failed to make the deposit as aforesaid, 'the settlement be issued by highest bid'. On June 30, 1976, when respondent 1 went to obtain the 'dakhil parwana', he is stated to have been informed of this subsequent decision of the State Government. Averring that he had been put to a considerable financial loss as a result of the aforesaid subsequent order of the Government settling the fishery rights in Jalkar in favour of the appellant, respondent 1 filed a petition under Article 226 of the Constitution in the High Court of Judicature at Patna on July 2, 1976 praying that the aforesaid order settling the fishery rights of the Jalkar with the appellant be quashed by a writ of certiorari and the State Government be directed by a writ of mandamus to execute the lease in his favour for the years 1976-77 and 1977-78 and not to disturb his possession over the fishery rights in question during the currency of the term of the lease. The respondent also prayed for such other orders, as the Court might think fit and proper.

3. The writ petition was contested by the appellant as also by respondents 2 to 4 herein. In the counter affidavit jointly filed by them in opposition to the petition, respondents 2 to 4 averred inter alia that there was no completed contract and hence no formal agreement was executed between the State and respondent 1 and no 'parwana' was issued in favour of the latter; that the State had full right and authority to revoke its decision before execution of the agreement and that in view of the well established principles, 'the settlement of the Jalkar had to be given to the appellant if it was willing to take the lease'. The respondents also denied their liability for the expenses alleged to have been incurred by respondent 1 in connection with the preparation for the lease ordered in his favour by the Government vide the aforesaid Annexure-1 to the writ petition. They, however, admitted that the appellant indulged in unlawful activities for four days in 1975-76 which had caused a meagre loss to respondent 1. In the counter affidavit filed by it, the appellant while denying that it was a defaulter, averred that its petition for remission was pending before the Remission Committee appointed by the State; that the Assistant Registrar and the Registrar of the Co-operative Societies had recommended the settlement of fishery rights of the Jalkar in its favour and on representations made by it to the Revenue Minister and the Chief Minister, the Government of Bihar had, in conformity with mandatory orders and instructions, issued an order of settlement in its favour on June 28, 1976, that pursuant to that order, it made the necessary deposit by 10.35 a.m. on July 1, 1976 and that respondent 1 had no right to challenge the settlement of the fishery rights of the Jalkar in its favour.

4. The High Court while holding that there was no binding or enforceable contract between respondent 1 and the State Government allowed the writ petition relying on the doctrine of promissory estoppel. Aggrieved by this judgment and order, the appellant has, as already stated,

come up in appeal to this Court.

5. Appearing on behalf of the appellant, Mr. Patel has urged the following points :

1. That since there was no completed binding and enforceable contract between the State of Bihar and respondent 1 as contemplated by Article 299 of the Constitution, the aforesaid writ petition filed by respondent 1 was not maintainable.
2. That to a case like the present one, the doctrine of promissory estoppel had no application and the High Court has erred in relying upon the same.
3. That in any case, since there was no breach of any statutory duty in the present case, a writ of mandamus could not have been issued by the High Court.

6. Mr. Lal Narain Sinha has, on the other hand, submitted that in the facts and circumstances of the case, the High Court was justified in applying the principle of promissory estoppel and there is no warrant for interfering with the judgment and order passed by the High Court.

7. We shall deal seriatim with the aforesaid three contentions raised on behalf of the appellant. But before attempting to do that, we would like to dispose of the preliminary objection raised on behalf of respondent 1 to the effect that as the period for which the impugned order dated June 29, 1976 settling the Jalkar with the appellant was issued has expired and the State has not chosen to prefer any appeal against the aforesaid judgment and order of the High Court the appellant has no manner of right or locus standi to challenge the continuance of settlement with respondent 1 for the year 1977-78 and to continue to prosecute the present appeal. It is no doubt true that the year 1976-77 has run out and the State has not preferred any appeal against the adverse decision of the High Court but since it has been impleaded as a respondent to the present appeal and is actively supporting the appellant who was indisputably in possession and enjoyment of the Jalkar at the commencement of the proceedings under Article 226 of the Constitution and lost the same as a result of the judgment and order of the High Court and the appellant could not effectively pursue the application for the lease for the year 1977-78 and the reversal of the judgment and order of the High Court which proceeds on grounds common to the appellant and respondents 2 to 4 can be made in favour of respondent 2 to meet the ends of justice under Order 41, Rules 4 and 33 of the Code of Civil Procedure and the State Government might have been prevented from settling the Jalkar in favour of the appellant because of the mandatory injunction granted by the High Court, the appellant is, in our judgment, vitally interested in the matter and is entitled to maintain and continue to prosecute the appeal and to show that the writ of mandamus issued by the High Court is unsustainable in law. We accordingly overrule the preliminary objection and proceed to consider the aforesaid contentions raised on behalf of the appellant.

8. Re : Contention 1 : It is now well settled that the provisions of Article 299 of the Constitution which are mandatory in character require that a contract made in the exercise of the executive power of the Union or by a State must satisfy three conditions viz. (i) it must be expressed to be made by the President or by the Governor of the State, as the case may be; (ii) it must be executed on behalf of the President or the Governor, as the case may be, and (iii) its execution must be by such person and in such manner at the President or Governor may direct or authorise. Failure to comply with these conditions nullifies the contract and renders it void and unenforceable. (See decisions of this Court in *State of Bihar v. M/s Karam Chand Thapar & Brothers Ltd.* [(1962) 1 SCR 827 : AIR 1962 SC 110 : (1962) 2 SCJ 17.], *Seth Bikhraj Jaipuria v. Union of India* [(1962) 2 SCR 880 : AIR 1962

SC 113 : (1962) 2 SCJ 479.] and State of West Bengal v. M/s B.K. Mondal & Sons [1962 Supp 1 SCR 876 : AIR 1962 SC 779.].

9. It will also be useful to refer to the judgment of this Court in *Mulamchand v. State of Madhya Pradesh* [(1968) 3 SCR 214 : AIR 1968 SC 1218 : (1968) 2 SCJ 924.] where while reiterating the principles laid down in the aforesaid decisions, it was observed :

There is no question of estoppel or ratification in a case where there is contravention of the provisions of Article 299(1) of the Constitution. The reason is that the provisions of Section 175(3) of the Government of India Act and the corresponding provisions of Article 299(1) of the Constitution have not been enacted, for the sake of mere form but they have been enacted for safeguarding the Government against unauthorised contracts. The provisions are embodied in Section 175(3) of the Government of India Act and Article 299(1) of the Constitution on the ground of public policy - on the ground of protection of general public - and these formalities cannot be waived or dispensed with.

10. In the instant case, it is obvious that the settlement of the Jalkar with respondent 1 was not made and executed in the manner prescribed by Article 299 of the Constitution. Accordingly, it could not be said to be valid and binding on the State of Bihar and respondent 1 could not base his claim thereon.

11. That apart, there is an additional reason for holding that the settlement of Jalkar with respondent 1 was not valid and enforceable. The right to catch and carry away the fish being a 'profit a prendre' i.e. a profit or benefit arising out of the land, it has to be regarded as immovable property within the meaning of the Transfer of Property Act read in the light of Section 3(26) of the General Clauses Act. If a 'profit a prendre' is tangible immovable property, its sale has to be by means of a registered instrument in case its value exceeds Rs. 100 because of Section 54 of the Transfer of Property Act. If it is an intangible, its sale is required to be effected by a registered instrument whatever its value. Therefore, in either of the two situations, the grant of the 'profit a prendre' has to be by means of a registered instrument. Accordingly, the transaction of sale of the right to catch and carry away the fish if not effected by means of a registered instrument, would pass no title or interest. (See *Ananda Behera v. State of Orissa* [(1955) 2 SCR 919 : AIR 1956 SC 17 : 1955 SCJ 96.]). Even if the settlement of Jalkar with respondent 1 is regarded as a lease as described by him in Annexure-2 to the writ petition, it would not make any difference because a lease of fishery which is immovable property as defined by Section 2(6) of the Registration Act if it is for any term exceeding one year or reserves a yearly rent has also to be registered as required by Section 17(1)(d) of the Indian Registration Act, 1908 and Section 107 of the Transfer of Property Act. As in the instant case, the transfer of the 'profit a prendre' in favour of respondent 1 was admittedly for two years reserving a yearly rent and was not evidenced by a registered instrument, he had no right, title or interest which could be enforced by him. Manifestly therefore, the writ petition was misconceived and ought to have been dismissed.

12. Re : Contention 2 : It is also not a case where respondent 1 could invoke the doctrine of promissory estoppel particularly in view of the fact that he neither deposited Rs. 3713 (Rupees three thousand, seven hundred and thirteen only) required for execution of the lease agreement nor was any 'parwana' issued to him and the High Court rejected his plea that after the receipt of the Government order, he invested large amounts of money in purchasing boats, etc. and had to enter into contracts with large number of employees whose services were needed for the Jalkar. It would

be appropriate to refer to the following observations of the High court in this respect :

The statement referred to above is much too vague and general. No details or particulars have been given, nor any document annexed to the original writ application, or the rejoinder aforesaid in support of these averments. I, therefore, do not accept the correctness of the statements. However, it was very unlikely that the petitioner who had already a subsisting lease would not be having enough or sufficient materials and it was after the communication regarding lease for the period 1976 to 1978 that the petitioner started purchasing boats, etc. The vague and general statements that have been made in paragraph 17 of the original writ application do not appear to me to be acceptable.

13. The doctrine of promissory estoppel could also not be pressed into service in the present case, as it is well settled that there cannot be any estoppel against the Government in exercise of its sovereign legislative and executive functions. (See *Excise Commissioner, U.P. Allahabad v. Ram Kumar* [AIR 1976 SC 2237 : (1976) 3 SCC 540 : 1976 SCC (Tax) 360.]).

14. The decision of this Court in *Union of India v. M/s Indo - Afghan Agencies Ltd.* [(1968) 2 SCR 366 : AIR 1968 SC 718 : (1968) 2 SCJ 889.] on which strong reliance is placed by Counsel for respondent 1 is clearly distinguishable. In that case, unlike the present one, the respondents were not seeking to enforce any contractual right. They were merely seeking to enforce compliance with the obligation which was laid upon the Textile Commissioner by the terms of the Export Promotion Scheme providing for grant (by way of incentives to exporters of woollen textiles and goods) of Entitlement Certificate to import raw materials of a total amount equal to 100% of the f.o.b. value of their exports. Their claim was founded upon the equity which arose in their favour as a result of the representation made on behalf of the Government in the aforesaid Scheme, the exports of woollen goods made by them to Afghanistan acting upon the representation and curtailment of the import entitlement by the Textile Commissioner without notice to them.

15. R : Contention 3 : This contention is also well founded and must prevail. There is abundant authority in favour of the proposition that a writ of mandamus can be granted only in a case where there is a statutory duty imposed upon the officer concerned and there is a failure on the part of that officer to discharge the statutory obligation. The chief function of a writ is to compel performance of public duties prescribed by statute and to keep subordinate tribunals and officers exercising public functions within the limit of their jurisdiction. It follows, therefore, that in order that mandamus may issue to compel the authorities to do something, it must be shown that there is a statute which imposes a legal duty and the aggrieved party has a legal right under the statute to enforce its performance. (See *Lekhraj Satramdas Lalvani v. Deputy Custodian-cum-Managing Officer* [(1966) 1 SCR 120 : AIR 1966 SC 334 : (1966) 1 SCJ 24.], *Dr. Rai Shivendra Bahadur v. The Governing Body of the Nalanda College* [1962 Supp 2 SCR 144 : AIR 1962 SC 1210 : (1962) 1 LIJ 247.] and *Dr. Umakant Saran v. State of Bihar* [AIR 1973 SC 964 : (1973) 1 SCC 485.]). In the instant case, it has not been shown by respondent 1 that there is any statute or rule having the force of law which casts a duty on respondents 2 to 4 which they failed to perform. All that is sought to be enforced is an obligation flowing from a contract which, as already indicated, is also not binding and enforceable. Accordingly, we are clearly of the opinion that respondent 1 was not entitled to apply for grant of a writ of mandamus under Article 226 of the Constitution and the High Court was not competent to issue the same.

16. This brings us to the consideration of the last question of the relief which can be granted to the

appellant. The settlement of Jalkar with respondent 1 undoubtedly did not create any legal right in his favour but as the year 1976-77 has already run out, the appeal in so far as that year is concerned has become infructuous but in so far as the appeal relates to the year 1977-78, we are of the opinion that as respondent 1 is not validly exploiting the Jalkar and the application by the appellant for settlement thereof with it is pending with the authorities and according to the revised policy and procedure formulated by it in exercise of its absolute authority and incorporated in its Revenue and Land Reforms Department's circular letter S. 8 Serial 6-0-4-663-R dated April 18, 1974, addressed to all the Collectors of the State, it is within the competence of the Government to give preference to a Fishermen Co-operative Society and to settle the Jalkar with the appellant for the remainder of the year 1977-78 at 90% of the highest bid amount i.e. 10% less of the highest auction amount but it may not be possible for it to do so in face of the impediment created by the mandamus issued by the High Court, we would allow the appeal in so far as the current year is concerned and leave it open to the Government to grant the fishery rights to the appellant in conformity with the aforesaid policy and procedure in case the latter fulfils the conditions laid down therein. In the event of the Government settling the Jalkar with the appellant or any other Fishermen Society in accordance with the policy and procedure laid down in the aforesaid circular letter, it shall, on the basis of Section 70 of the Contract Act refund to respondent 1 proportionate amount of the Jamma deposited by him for the year 1977-78 after going into the accounts which he was bound to maintain under order passed by this Court on May 6, 1977 for the period commencing from May 1, 1977 to August 30, 1977.

17. In the circumstances of the case, there will be no order as to costs.

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