

Case Note: Case concerning ownership and rights over 'marshy land' and 'tank fisheries'.

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AIR1993SC2103, 1993(2)SCALE749, 1993Supp(4)SCC674, [1993]3SCR481

IN THE SUPREME COURT OF INDIA

Decided On: 03.05.1993

State of West Bengal and others

v.

Suburban Agriculture Dairy & Fisheries Pvt. Ltd. and another

Hon'ble Judges:

T.K. Thommen, V. Ramaswamy and K. Ramaswamy, JJ.

ORDER

K. Ramaswamy, J.

1. Special leave granted.

2. This appeal arises against the judgment dated October 8, 1991 of the Division Bench of the Calcutta High Court made in F.M.A.T. No. 22532 of 1991. The first respondent, a limited Company filed under Article 226 of the Constitution of India Civil Order No. 16339 (W) of 1998 for a mandamus to refrain the appellants from giving effect to the vesting of the lands in Dag No. 1, Khatian No. 10, Tauzi No. 56, J.L. No. 26, Mouza Chowkgaria within P.S. Kasba, admeasuring 128.40 acres and to take possession of tank fisheries lying therein pursuant to the provisions of West Bengal Estate Acquisition Act, 1953, Act 1 of 1954, for short 'the Act'. The learned Single Judge directed an action under Section 10(2) of the Act after giving an opportunity to the respondents and to take possession of the said lands pursuant thereto. On appeal the Division Bench in the impugned judgment held that the appellants should take action under the West Bengal Land Reforms Act, 1955 within a period of two months from the date of the said judgment and on its failure, the respondent would be at liberty to deal with and dispose of the lands in its own manner. Until then the appellants were retained to take possession of the land. Feeling aggrieved against the said direction the above appeal under Article 136 has been filed."

3. The Revenue Officer found from finally published record of rights that the lands in question were classified as 'Beel' (marshy land) and tank fisheries would be classified as 'Beel Mash Khas'. The learned single Judge and the Division Bench of the High Court found that when the Revenue Officer initiated proceedings to revise the old Jama Rs. 1230/- 9 Anas in three Jamas of Rs. 1, 188 and odd in Khata No. 102; Rs, 396 and odd in

Khata No. 128 and Rs. 3024 and odd in Khata No. 131, the respondent succeeded in his appeal under Section 44(3) of the Act holding the lands to be 'Tank fisheries' and that, therefore, old Jama was to be maintained. So the Division Bench directed to take action under the Land Reforms Act,

4. Shri P.S. Poti, learned Senior Counsel for the appellants contended that by operation of Sees. 4 and 5 of the Act, fisheries being one of the interests that stood extinguished and vested in the State Govt. free of all incumbrances with effect from June 1, 1956, the respondents have lost right, title and interest therein. Section 6 only enables an intermediary to retain possession of certain enumerated lands which includes "tank fisheries" provided he makes an application in form 'B' within the specified time expressing his intention to retain the lands. Since the respondent had failed to do so the entire lands including tank fisheries stood vested in the State. As per the entries in the record of rights the lands are only Beel (Marshi lands) and not tank fisheries and, therefore, even the exercise of the option to retain possession is not available. Even assuming that the lands are tank fisheries, what was saved from the operation of the Act is the entitlement of the respondent to hold the land as a tenant without any interest therein except the right to remain in Khas (physical) possession subject to such terms and conditions as may be prescribed by the Govt. and payment of rent. Since the respondent raised a dispute the learned Single Judge rightly directed an enquiry under Section 10(2) in this behalf and to take action pursuant to its result under Section 10(1). The Division Bench committed gravest error in treating that the decision of the Tribunal under Section 44(3) relating to Jama to be final and the lands to be tank fisheries and that the respondent is entitled to retain Khas possession with all right, title and interest therein as owner. The direction given to initiate the action under the Land Reforms Act 1955 within the specified period and on failure thereto liberty given to the respondent to alienate the lands is beyond the relief sought in the writ petition. Therefore, the division bench committed manifest error of law warranting interference.

5. Dr. Ghosh, learned senior counsel for the respondents, contended that initially Devendra Nath Dey Sarkar purchased the lands from Harikishan Mondal, the original Zamindar in 1911 and from him the respondents had purchased the leasehold rights in 1937 and ever since they have been using the lands as tank fisheries. When notification under Section 4 was issued, the lands were being used as tank fisheries. Despite its vesting, by operation of Section 6(2) the respondent has right to retain possession as an owner. In support thereof he placed reliance on State of U.P. v. Krishna Gopal and Anr. (1988) Suppl 2 SCR 391, State of West Bengal v. Atul Krishna Shaw and Anr. (1990) Supp. 1 SCR 91 and Sasanka Sekhar Mailty and Ors. v. Union of India. He further contended that the liability of dispossession of the respondent from the lands would arise only if the possession is found to be unlawful. But by operation of Sees. 6(2) and 10(5) the possession is lawful. The order of the Appellate Tribunal passed in 1957 under Section 44(3) having been allowed to become final and the civil suit for declaration that it is Beel and not tank fisheries having filed by the State and got dismissed, concludes that the lands in question are only "tank fisheries". By operation of Sub-section (2) of Section 6 of the Act the respondent is entitled to retain possession and the action for dispossession under Section 10(1) is illegal. The division bench, therefore, rightly

directed to initiate proceedings under the Land Reforms Act and to take action thereunder.

6. Admittedly the Act came into force on February 12, 1954. Notification under Sections 4(1) and (3) was published in the prescribed manner specifying the date of vesting of the estate and had come into effect from June 1, 1956. By operation of Sub-section (1) of Section 5 the estate and all the rights of intermediaries including fisheries in the estate shall stand determined and ceased and stood vested in the State free from all incumbrances. "Incumbrance" defined under Section 2(h) of the Act means in relation to estate and rights of intermediaries therein, does not include the rights of a raiyat or of an under raiyat or of a non-agricultural tenant, but shall, except in the case of land allowed to be retained by an intermediary under the provisions of Section 6, include all rights or interests of whatever nature, belonging to intermediaries or other persons, which relates to lands comprised in estates or to the produce thereof. Therefore, title to, rights or interests in lands which include fisheries held by an intermediary shall stand extinguished and ceased and stood vested in the State free of all incumbrances. The respondents being purchasers of lease hold interest in tank fisheries, as per their own case, it also stood extinguished. But, however, since the appellant treated the respondent as an intermediary, we proceed on that footing. The exceptions engrafted in the incumbrance and exempted from the operation of Sections 4 and 5 are only the rights of a raiyat or of an under-raiyat or of a non-agricultural tenant and the right of retention of possession allowed to an intermediary under Section 6 of the Act. All other rights, interest of whatever nature or title belonging to the intermediaries or other persons who held the lands under lease from intermediary should also stand extinguished. All grants and confirmation of title, to estates and rights therein, to which the declaration of vesting applies, and which were made in favour of intermediaries shall stand dismissed and ceased by operation of Section 5(1)(b) of the Act.

7. Section 6 postulates by a non-obstante clause that notwithstanding anything contained in secs. 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 with effect from the date of vesting", various kinds of lands like homestead etc. enumerated therein including 'tank fisheries' covered by Clause (e) thereto. The explanation of tank fisheries' means "a reservoir or place for the storage of water, whether formed naturally or by excavation or by construction of embankments, which is being used for pisciculture or for fishing, together with the sub-soil and the banks of such reservoir or place, except such portion of the banks as are included in a homestead or in a garden or orchard and includes any right of pisciculture or fishing in such reservoir or place". Therefore, if lands comprised of tank fisheries whether naturally formed or by excavation or by construction of embankments being used for pisciculture or fishing, the intermediaries become entitled to retain possession, despite the intermediaries having been divested of right, title and interest therein. This is made manifest by Section 10(5) of the Act which postulates that 'nothing in this section shall authorise the collector to take khas possession of any estate or of any right of an intermediary therein, which may be retained under se,c.6'. Sub-section (2) of Section 6 declares that, "An intermediary who is entitled to retain possession of any land under Sub-section (1) shall "be deemed to hold

such land" directly under the State from the date of vesting as a tenant, subject to such terms and conditions as may be determined under the provisions of this Act and as entered in the record or rights finally published under Chapter V except that no rent shall be payable for land referred to in clause(h) or (i), provided that if any tank fishery or any land, comprised in a tea-garden, orchard, mill, factory or workshop was held immediately before the date of vesting under a lease, such lease shall be deemed to have been given by the State Govt. on the same terms and conditions as immediately before such date, subject to such modification therein as the State Govt. may think fit to make'.

8. On the issue of notification under Section 49, Section 52 prescribed procedure to deal with raiyats and under-raiyats covered in Chapter II etc. It says that the provisions in Chapter II shall with such modification as may be necessary apply mutatis mutandis to raiyats or under-raiyats as if such raiyats or non-raiyats were intermediaries and the land held by them were estates and such a person holding under a raiyat or an under-raiyat were a raiyat for the purpose of Clause (c) and (d) of Section 5, provided that, where a raiyat or an under-raiyat retains under Section 6 any land comprised in a holding, then notwithstanding anything to the contrary contained in Sub-section (2) of Section 6, then he shall pay the rent as prescribed in Clauses (a) to (d) thereto. Under Section 5(c) every raiyat holding any land under an intermediary shall hold the same directly under the state as if the State had been the intermediary and on the same terms and conditions as immediately before the date of vesting. Thus the right, title and interest of a raiyat or under-raiyat in the lands in his possession and enjoyment are saved. By operation of law they became full owners thereof subject to the terms and conditions that may be imposed under sec,52 and payment of Jama existing on the date of notification or revised from time to time and finally entered in Record of Rights.

9. The pre-existing rights of the intermediaries in the estate to which the declaration applied shall stand vested in the State free from all incumbrances. Section 6 does not have the effect of divesting the State of the vested right, title and interest of the intermediary. One of the rights i.e. possession held by the intermediaries is the only interest saved by Section 6. from the operation of Sees. 4 and 5. The fishery rights also stood vested. The preexisting rights, title and interest therein also shall stand determined as against the State and ceased. The Collector had symbolic possession under Section 10. But by use of non-obstante clause in Section 6(1) the respondent became entitled to retain Khas possession of tank fisheries, and he shall hold tank fisheries directly under the State on such prescribed terms and conditions and subject to payment of such rent as may be determined under the Act from time to time as finally entered in Record of Rights. If any lease by the intermediary of any tank fisheries granted prior to the date of vesting, by operation of the proviso to Sub-section (2) of Section 6, the lease shall be deemed to have been given by the State Govt. on the same terms and conditions and subject to such modification therein as the State Govt. may think fit. Such holding of the land by intermediary of the tank fishery shall be as a tenant. The word 'retain' has been defined in Blacks Law Dictionary, 6th Edition, page 1316 to mean 'to continue to hold, have, use, recognise, etc and to keep'. In Collins English Dictionary at page 1244 'retain' has been defined as 'to keep in one's possession, to be able to hold or contain, to hold in position, to keep for one's future use as by paying a retainer or nominal charges'. In Webster

Comprehensive Dictionary, International Edition, Volume II, at page 1075, the word 'retain' has been defined, 'to keep or continue to keep in one's possession'.

10. Section 10(2) of the Act empowers the Collector, after his taking charge of the estate and the interest of the intermediaries under Section 10(1), to issue a written order serving, in the prescribed manner requiring the intermediary or any person in possession (Khas or symbolic) or any such estate or any interest to give up such possession by a date to be specified in the order which shall not be earlier than 60 days from the date of service of the order, etc. Sub-section 5 of Section 10 prohibits him to take Khas possession of any right of intermediary in the estate retained under Section 6.

11. The conjoint operational conspectus assists us to conclude that the pre-existing right, title and interest in the lands situated in the estate stood extinguished and ceased to have effect on and from notified date i.e. June 1, 1956 and stood vested in the State free from all incumbrances. The non-obstante clause under Section 6 excluded from the operation of Sections 4 and 5 only of the interest of the respondent to retain physical possession of the lands covered by Section 6, subject to Section 6(2). The intermediary by operation of Section 10(2) shall be required to submit in form 'B' within 60 days from the date of issuing notice under Section 10(1) of his intention to retain possession of the tank fisheries. On such submission of Form 'B', the Collector without dispossessing him/it shall be entitled to prescribe such terms and conditions to which the intermediary or the lessee shall be bound and hold the tank fishery and shall remain in possession, using the tank fisheries for pisciculture or for fishing and subject to payment of such rent as may be determined under the Act and finally entered in the Record of Rights.

12. Under Section 39 in Chapter V, the State Govt. has to carry out the purpose of the Act. It shall prepare the Records of Rights in respect of the lands in an estate in any district or a part of a district in the manner prescribed therein. Section 44 provides the procedure for publication of the draft and final Record of Rights prepared or 'revised'. Sub-section (1) thereof postulates that when a Record of Rights has been prepared or "revised" the Revenue Officer was enjoined to have it published in the prescribed manner. On receipt of objections, if any, made regarding any entry therein or any omission thereof, he shall consider the same and is enjoined to pass an order under Section 5A of the Act. By operation of the proviso to Sub-section (1) of Section 44 the order so passed under Section 5-A shall be final, subject to the order of the appellate Tribunal under Section 44(3) and during the continuance of that order it is not liable to be reopened. The respondent is not right in its contention, as found favour with the High Court, that entries once made shall be final and can never be revised. The word 'revised' under Sub-section (1) of Section 44 indicates that the State Govt. or its officers shall be entitled to revise from time to time the Record of Rights and to make necessary entries or corrections in the relevant columns of Record of Rights in its settlement operations or an per exigency envisaged under the Act and the rules made therein. The order under Section 44(3) becomes final so long as there is no revision effected. The question of res judicata, therefore, does not arise and the previous appellate order does not preclude the authorities to revise the Record of Rights. The Division Bench of the High Court, therefore, is not right in its conclusion that the order passed by the appellate authority

under Section 44(3) is final and the authorities have no jurisdiction to revise the Record of Rights. After the Act was amended by Act 33 of 1973, Section 57B was brought on statute which had barred the jurisdiction of the civil courts and exclusive jurisdiction has been conferred on the revenue authorities to deal with the matters arising under the Act. So the dismissal of the suit as having been abated is of little consequence.

13. The appellants contend that even on the date of vesting the lands in question are "Beel" lands and that it is not tank fisheries. The entries in the record of the rights disclose that the lands in question are being used as homestead or for agricultural purpose and that, therefore, it is not tank fishery. The respondents disputed the Govt. 's stand and so it is a disputed question of fact. We do not propose to go into, nor decide the same. It is true, as rightly contended by Dr. Ghosh, that the lands once retained under Section 6 by the intermediary and accepted by the authorities pursuant to form 'B' declaration, the intermediary is entitled to retain possession and is not liable to dispossession so long as he complies with the, terms and conditions, if any, imposed and the rent imposed is being paid. The avowed object of Act is to divest the pre-existing right, title and interest of the intermediary in the lands situated in an estate in a district or part of the district and shall stand divested from the Zamindar or intermediary except of a raiyat or under-raiyat or non-agricultural tenant. Notwithstanding such divestment thereof the intermediary has been empowered to hold and retain possession directly under the State and hold it as a tenant, subject to such terms and conditions and subject to payment of rent as may be determined under the Act. Therefore, the entitlement to retain possession of the land i.e. tank fisheries in this case is not absolute but hedged with the conditions precedent of expressing his intention to retain possession by filing from 'B' within 60 days and abiding to comply with such terms and conditions as may be imposed and also payment of rent. By operation of the explanation, to Section 6(1)(e) "tank fisheries" not only it must be a tank fishery at the date of vesting, but it must also continue to be used for pisciculture or for fishing. The emphasis on 'being used' obviously is that the tank fisheries should be continued to be used for public purpose, namely the fish seedling or fish must be made available for public consumption. Dr. Ghosh is right that the crucial date is the date of vesting with regard to tank fishery also. Not only that the intermediary shall hold the tank fishery on the date of vesting as tank fishery but continue to hold and use the same thereafter for pisciculture or fishing as explained in explanation 6(1)(e) of the Act. Subsequent conversion of the land as tank fisheries is not material.

14. Whether, as a fact, it was used as a tank fishery on the date of vesting i.e. June 1, 1956 and being continued to be used as such or converted later on is a question of fact to be adjudicated after giving reasonable opportunity to the respondents. Equally whether the respondents exercised the option to retain possession of tank fishery within 60 days from the date of publication of notification under Section 4 or the notice under Section 10(1), etc., is also a question of fact to be determined upon.

15. In *Saroj Kumar Bose v. Kanailal Mondal and Ors.* (1985) 2 SCR 393 the facts were that the predecessor in interest of the respondents took permanent lease of fishery right without sub-soil rights under a registered lease-deed prior to the Act came into force and they continued to remain in possession and was using the lands as tank fishery. The

lessor, filed a suit for recovery of rent together with interest. The appellant lessee resisted the suit liability contending that the tank fishery stood vested in the State and that, therefore, he was absolved of his liability to pay rent to the lessors. The trial court decreed the suit. On appeal, it was confirmed. Dismissing the appeal, this Court held that by operation of Section 6 of the Act the right to retain possession of tank fishery by an intermediary was saved and that, therefore, the lessor continued as an intermediary to remain in khas possession. In spite of the estate vested in the State, the tank fishery continued to remain in possession of the lessor. In that context it was held as relied on by Dr. Ghosh, the khas possession is not a necessary condition for retaining the property by intermediary. State had recognised the plaintiffs as tenant by accepting rent from them. Therefore, it was held that interest of the plaintiff did not vest in the State either.

16. In *State of West Bengal v. Atul Krishna Shaw and Anr.* (1990) Supp. 1 SCR page 90, by a bench of this Court to which one of us (K.Ramaswamy, J.) was a member, the facts were that after the estate vested in the State, the tank fisheries continued to remain in possession of the respondent intermediaries. Suo motu proceedings were taken for correction of the classification of lands on the grounds that the plots were wrongly recorded as fishery plots. The respondents objected to the re-classification contending that they were continuing to cultivate pisciculture in the lands. The claim of the respondents was negated by the Settlement Officer. On appeal, the Tribunal reversed the order of the Settlement Officer and confirmed the original classification as tank fishery. On a writ petition filed in the High Court by the State, it was dismissed in limine. While allowing the appeal, this Court held that the crucial date for consideration whether the lands were being used as tank fishery was the date of the vesting and subsequent conversion was not material and that by operation of Section 6(2) of the Act, the tank fishery stood excluded from the operation of Section 4 and Section 5 of the Act. Placing reliance on the findings at p.101A & B, namely, Therefore, when by means of reservoir or a place for storage of water whether formed naturally or by excavation or by construction of embankment, is being used for pisciculture or for fishing is obviously a continuous process as a source of livelihood, would be 'tank fisheries' within the meaning of Section 6(1)(e). Such tanks stand excluded from the operation of Sections 4 and 5 and the crucial date is the date of vesting.

17. As seen earlier the effect of the operation of Sees. 4 and 5 is divesting the intermediaries of his pre-existing right, title and interest in the estate except those which were exempted from the operation of the Act. One of the exemption is retention of the possession of the lands covered by Section 6 of the Act. Section 6(1)(e), tank fisheries is one such. Sub-section (2) amplifies that effect. Sub-section (2) transposes the pre-existing possessory right of the retained lands of an intermediary of tank fisheries into holder of it as a tenant without any interest therein. By fiction of law the respondent was transposed as "holder" of the possession directly under the State as tenant, subject to such terms and conditions as may be specified and subject to payment of rent as may be determined from time to time. Therefore, what was saved by non-obstante clause of Section 6(1) & (2) of the Act is the right of retention of the physical (khas) possession of the tank fisheries. What was intended in *Atul Kishan Shaw's* case was that Section 6(2) saved the retention

of possession of tank fisheries and not divesting the State of the vested rights etc. in the estate.

18. In south Indian States of A.P. and Tamilnadu etc. of the Madras Province, Madras Estate (Abolition and Conversion into Raiyatvari) Act, 26 of 1948 is in operation. After the States reorganisation, in Tamilnadu it is called Tamilnadu Act and in Andhra Pradesh it is called Andhra Pradesh (Andhra Area) Act. Thereunder Section 11 provides procedure to grant raiyatvari patta to a raiyat in occupation. Section 3(2)(d) proviso gives statutory protection to a raiyat from dispossession till raiyatvari patta has been granted; Sections 12 to 14 give right to landholder to obtain patta and Section 15 empowers the settlement officer to grant patta to the landholders. Section 19 provides that "where any raiyat or non-raiyat land has been sold by any landholder for non-agricultural purpose before first day of July, 1945, the buyers shall be entitled to keep the land subject to payment by him to the Govt. of the raiyatvari assessment or ground rent which may be imposed upon the land and under the proviso it was declared that sale was not void or illegal under any law enforce at that time. The object of those provisions is to confer raiyatvari rights on person in occupation be it raiyat or landholder absolutely with no further conditions. Thereafter he is entitled to use the raiyati land as if he is the owner thereof and the liability is to pay only land assessment or cist. There is no limitation on the nature of user of the land. But the language in the Act appears to be different. As regards the raiyat or under-raiyat they are treated differently from intermediary. As regards the raiyat and non-raiyat is concerned his preexisting right, title and interest in the land was not abolished and he is entitled to retain all his bundle of rights as intermediary directly under the State subject to the orders passed as per the procedure prescribed under Section 52 and the relevant rules and payment of rent. But in the case of an intermediary, he has been given only right to retain possession under Sec.6 of the homestead lands or land comprised in or appertaining to buildings and structures, 25 acres of agricultural lands in khas possession, factories, workshops, tank fisheries or other enumerated properties etc. without any interest therein and subject to the terms and conditions that may be imposed and payment of rent existing or revised as per the provisions relevant thereto. Sub-section (2) of Section 6 expressly postulates that if he holds the tank fisheries should be for continued for use as tank fisheries and it would be subject to such terms and conditions and subject to payment of rent as may be fixed. The holding of the land is as a tenant, the emphasis is that his possession is without any interest in the land. Under T.P. Act a tenant has leasehold interest in the land. But in Section 6(2) as a tenant for the purpose of payment of the rent and retention of possession and appears to be nothing more. As regards tank fishery is concerned, though exemption has been granted, it is subject to the condition of continued user for pisciculture or fishing. From the scheme of the Act it would appear that the intermediary or the lessee gets no absolute right in the tank fisheries which were already divested but to remain in khas possession and to enjoy the usufruct thereof i.e. for pisciculture or fishing without any interest or sub-soil rights and subject to such terms and conditions and subject to payment of rent as prescribed under the Act, but not as owner thereof. The direction, therefore, by the High Court that the respondents are entitled to dispose of the land is contrary to and in negation of the scheme of the Act and Rules, Therefore, it is manifestly illegal.

19. The appeal is accordingly allowed. The order, of the Division Bench of the High Court is set aside. The direction of the Single Judge is restored. The appellant is free to issue notice to the respondent under Section 10(2) of the Act and conduct an enquiry into and find:- (1) on the date of the vesting whether the lands were being used for pisciculture or fishing i.e. tank fisheries; (2) whether the respondent had submitted Form 'B' within the prescribed time exercising the option to retain possession of the lands in question as tank fisheries; and (3) whether the respondent is continuing to use the lands in question as tank fisheries. Reasonable opportunities shall be given to the respondents to prove its/ their case.

20. On the enquiry if it is found that the lands are not tank fisheries as on the date of the vesting or that the respondent had not submitted option in Form 'B' to retain possession of the lands as tank fisheries within the prescribed period, then the lands stood vested in the State free from all incumbrances and authorities are entitled to take possession of the land under Section 10(i) read with Section 10(3). In case if it finds that the lands were being used as tank fisheries as on the date of vesting and that the respondents exercised the option within the time to retain possession and is continuing to use the tank fishery for pisciculture or for fishing; and if it has been continuing in possession of tank fishery, it is free to impose, if not already imposed, such terms and conditions as may be necessary to ensure continued use of tank fishery for pisciculture or for fishing, subject to payment of such rent as may be fixed or revised and ultimately entered in the Record of Rights. In case the respondent commits contravention thereof, it is open to the State to resume possession. In case the respondent is not using the tank fishery for pisciculture or for fishing or alienated the lands it is open to the appellants to take possession of the lands and all sales if made by the respondents do not bind the State.

21. The appeal is accordingly allowed with the above modification and the rule absolute issued by the learned Single Judge of the High Court will stand modified to the above extent and the writ petition is disposed of accordingly. In the circumstances parties are directed to bear their own costs throughout.