(1960) 12 CAL CK 0017

Calcutta High Court

Case No: Civil Revision Cases No. 1846 and 2019 of 1960

Gopeswar Setiar	APPELLANT
Vs	
Addl. Collector, Estates Acquisition, Maldah	RESPONDENT

Date of Decision: Dec. 7, 1960

Acts Referred:

- West Bengal Estates Acquisition Act, 1953 - Section 44(2a), 45, 5, 6, 6(1)

Citation: 66 CWN 511

Hon'ble Judges: Niyogi, J; Banerjee, J

Bench: Division Bench

Advocate: Manindra Chandra Chakrabartty, for the Appellant;N.C. Chakravartti, for the Respondent

Judgement

Banerjee, J.

These two rules are directed against an appellate order passed by the learned District Judge of Maldah, sitting as a Tribunal under the West Bengal Estates Acquisition Act, 1953, (hereinafter referred to as ''the Act'') whereby he remanded two cases to the Revenue Officer for rehearing of objections u/s 44(2a) of the Act. The petitioner was admittedly an intermediary in the District of Maldah, whose estate vested in the State Government under the provisions of the Act. Included within his estate were C.S. Plots Nos. 155 and 179 of Mouza Janglitola and C.S. Plot No. 234 of Mahalla Babla.

2 The petitioner alleged that the aforesaid plots were tank fisheries in his khas possession and that he was entitled to retain them under the provisions of section 6(1)(e) of the Act. The petitioner further alleged that he did file a return in form ''B'' (prescribed under the rules framed under the Act) expressing his intention to retain the aforesaid plots as his tank fisheries.

3. In the settlement records, prepared under Chapter V of the Act, the petitioner was recorded as a tenant under the State Government in respect of the aforesaid plots and the rent payable by him was recorded as Rs. 25/2/-. The said settlement records described all the three plots as ''Beels''.

4. On December 12. 1955, the petitioner alleged, the Additional Collector of Maldah called upon the petitioner to give up possession of the said plots to the State Government and thereafter made his men trespass on the said plots and wrongfully catch fishes therefrom. It appears that the petitioner moved against the aforesaid order of the Additional Collector and obtained a Rule from this Court, being Civil Rule No. 2690 of 1956, which is now pending.

5. Thereafter, on May 17, 1957, there was an attempt made on behalf of the State Government, under the provision of Section 45 of the Act, to have the settlement records corrected by deleting the name of the petitioner as tenant and by showing the aforesaid plots as vested in the State Government. The attempt failed.

6. After the introduction of section 44 (2a) in the Act, by the Amending Act XXV of 1957. there was a second attempt made on behalf of the State Government to have the said records of rights corrected. The nature of objection taken to the recording was that the aforesaid plots constituted a ''Beel; the said Beel was incapable of user in any other way excepting by catching fishes therefrom; the Beel not having been in the khas possession of the present petitioner, on the date of the vesting, must have vested in the State Government; the Jalkar right therein should therefore be recorded in the name of the West Bengal Government.

7. The objection failed before the Revenue officer. The State Government appealed against the order of the Revenue Officer to the District Judge.

8. The learned District Judge came to the following conclusions:

(a) These three plots constitute a big beel known as Babla Dhap which is connected with another beel named Sadipur Dhap lying to its contiguous north. It will be thus seen that Babla Dhap is only a part of the bigger beel comprising Sadipur Dhap and Babla Dhap which belonged to two different proprietors. Addittedly Gopeswar Satiar was the proprietor of touzi Nos. 468 and 245 to which the disputed dags appertained. Admittedly also he leased out the beel Babla Dhap to a certain Mir Tajerali upto the end of Chaitra, 1361 B.S.

(b) Before the learned Revenue Officer the propriety and correctness of the entries in the c.s. Khatians were challenged in two ways. On the one hand it was contended that Babla Dhap was a fishery within the meaning of Sec. 5 and not a tank fishery as mentioned in Sec. 6 of the Act. This is one part of the case. The other part of the case was that the Babla Dhap being not in khas possession of the respondent at the relevant time could not be legally retained by Gobeswar Satiar. Both these contentions were, however, overruled by the learned R.O.

(c) Having considered the submissions of the parties I am of opinion that these cases ought to go back to the learned R.O. on remand in order to meet the ends of justice. The reasons that induce me to come to this conclusion, are briefly as below:

(d) The appellant contends that the disputed dags are not at all tank fisheries and to achieve this end employs two independent lines of argument. The first is that there being no bank demarcating the Babla Dhap from the Sadipur Dhap to its north, the Babla Dhap cannot be considered to be a landlocked sheet of water. In other words the argument is that since the Babla Dhap is a part of a beel, so it cannot be a tank fishery within the explanation to Sec. 6(e). To my mind this argument cannot prevail, for it will be an affront to common sense to suppose that if the whole be a tank fishery, the part thereof will be otherwise.

The second ground taken, however, deserves serious consideration. Before me the State has put forward a positive case that the Babla Dhap is connected with the river Pagla through a Dara or Channel and for this purpose relied upon a map prepared by the Estate Acquisition department officer. The respondent likewise has filed a copy of the revisional settlement map to show that there is no such channel. The two maps filed by the parties give two different results and the riddle thus presented cannot, in my opinion, be solved unless an on-the-spot inspection and enquiry are held. A remand, therefore, is inevitable.

(e) In order to confirm the khatians it has to be further seen if the respondent had possession thereof on the date of vesting. The learned R.O. however, does not decide this question of actual possession of the dags by the contending parties. Mr. Maitra for the respondent seeks to justify the course thus adopted by the R.O. on the ground that there is no limiting words before the expression ''the tank fisheries'' mentioned in clause (e) Arguing from this he submits that once the property is held to be a tank fishery, then possession or no possession, the respondent automatically retains the property unless, of course that right is taken away by the proviso to sub-section 2. I cannot, however, persuade myself to accept this contention. The use of expression ''retain'' in the opening words of section 6(1) makes it abundantly clear that the intermediary must possess.

(f) In the instant case all that we know for certain is that the disputed dags were held by Mir Tajer Ali as a lessee under the respondent upto the end of Chaitra, 1361 B.S. Considerable controversy, however, exists if after the expiry of the lease Mir Tajerali gave up possession in favour of the ex-proprietor, the respondent, who accordingly came upon the lands as claimed by Mr. Maitra or continued in possession on the basis of settlement granted by the State of West Bengal as asserted by the learned G.P. The learned R.O., therefore, went wrong in saying that in the face of the finding of His Lordship P. B. Mukharjee, J., in the case of Sankar Prosad Mukherjee v. The State of West Bengal the claim of the State of West Bengal did not stand as the lease of Mir Tajerali expired before the date of vesting. His Lordship was dealing with a case where the term of the lease expired on the 31st Chaitra 1361 B.S. and the old

lessee did not hold over or continue in possession. On the other hand, the possession of the tank fishery by the intermediary was an accepted and acknowledged fact in that case. In the case before me the facts are quite different. Here, the possession of the disputed lands by the intermediary after the expiry of the lease of Mir Tajerali is hotly disputed and also not clearly proved.

9. In the view that he took, the learned District Judge remanded the case to the Revenue Officer for rehearing after giving opportunities to both the parties to adduce further evidence in support of their respective claim.

10. The order of remand by the learned District Judge is being disputed before us at the instance of the quondam proprietor petitioner.

11. Mr. Manindra Chandra Chakravartti, learned Advocate for the petitioner, contended before us, in the first place, that inasmuch as the disputed plots of land constituted a Beel, even according to the case made by the State Government, it would come under the definition of tank fishery as in the Explanation to section 6(1) (e) of the Act. He contended, in the next place, that in the objection filed on behalf of the State Government, there was no case made that the disputed plots were, on the date of the vesting, in possession of the petitioner''s lessee Mir Tajer Ali, even though the term of his lease had ended with the expiry of the month of Chaitra 1361 B.S. The learned District Judge, therefore was not right in allowing liberty to the State Government to make a new case to the effect that it was not the petitioner but his lessee, Mir Tajer Ali, who was in possession of the disputed plot on the date of the vesting.

12. We are unable to give effect to the first contention made by Mr. Chakrabartti for reasons hereinafter stated.

13. The word Beel (or Bil) is a generic term for a number of geographical features. The word ordinarily means a marsh and "includes unculturable land producing grasses only or low culturable lands growing ''boro'' paddy" (see Guide and Glossory to Survey and Settlement Records in Bengal 1917, published by Order of the Government of Bengal).

14. According to Wilson''s Glossory Beel means "a lake, a pond, a swamp, a low marshy ground."

15. Nature creates Beels and lakes in more ways than one. "They are sometimes formed when waters from several directions accumulate in a particular low land, producing in course of time a stagnant pool of water of large area. It often happens that when a river changes its course leaving its old bed dry, beels and lakes are found here and there in the site of the old bed. The sand laden tides and current of the Sea sometimes throw up a beach across the mouth of a river, or an arm or inlet of sea. which chokes up the river or the arm causing the formation of a lake behind it. These are chiefly the ways in which beels or lakes are formed." (T. N. Ghosh-Law

of Alluvion and Diluvion).

16. In the case of Sm. Rajnandini Debi v. Monmatha Pal Ghowdhury & Ors. (1) (44 C.W.N. 1079) the question arose whether a beel formed by a shifting river and connected with the water in certain seasons still formed part of the river system. The case came up before Nasim Ali and Rau, JJ. In the separate judgment, Rau, J. made an analysis of case laws on the point from the earliest times and observed:

Whether a beel is or is not part of a certain river is a question of fact. If it is connected with the river throughout the year there should hardly be any doubt that it is a part of the river. Similarly, if it is not connected with the river at all at any time of the year, there can be no room for doubt that it is not a part of the river. The real difficulty arises where, as in the present case, the connection exists only during a portion of the year and then dries up.

17. We may start with the basic proposition that a river is bounded by its banks. It includes the waters comprised within the banks, but not any outside. From this it follows that a beel which is outside the banks is not a part of the river even if the river should flow into it during the rainy seeson. Most rivers in Bengal overflow their banks in the rains and flood the surrounding country, and the mere fact that a beel is connected with the river in the rains is not therefore enough to make it a part of the river. Other circumstances must also be taken into account. If after considering all. the relevant circumstances, we can say that the stretch of land which separates the beel from the river in the dry season is a part of the bank of the river, the beel must be regarded as being outside the banks and therefore no part of the river; and a jalkar of the river would not in such a case extend to the beel. To my mind this is the fundamental test., since it follows from the very definition of a river and its banks.

18. Certain other tests that suggest themselves are not so fundamental and some of them at least are unsafe.

19. Thus the rule that if the fish in the beel can be said to be the fish of the river, the beel must be deemed to be a part of the river, would be unsafe in Bengal conditions; for, it is probable that most beels in the alluvial areas of Bengal are connected with some river or other in the rains, when almost the entire country is under water. Doubtless both fish and fish-spawn enter the beels from the rivers while the flood lasts and the adoption of this test without qualification might result in the disappearance of all fishing rights over a large part of lower Bengal except those in river fisheries. So too might the adoption of the rule that if the beel was originally formed by a river, it must be regarded as continuing to be a part of the river until the connection between the two completely ceases even during the rains. Bengal is largely the gift of its rivers and in the lower parts of the Province it might be difficult to point to any beel which was not originally formed by a neighbouring river and which is not connected with that river during the rains along with the rest of the

adjoining country.

20. Therefore, the safest course would appear to be to go no further than the almost self-evident rule that a beel must be deemed to be part of a river if it is within the river banks, but not if outside. The problem in each case is. then, that of determining the banks from an examination of all the circumstances regarded as relevant.

21. In Mussamut Bibi Ahmodi Begum and others Vs. Mahasay Taraknath Ghose and others the beel was found to be within the banks of the Ganges and was accordingly held to be included in the jalkar of the river. In that case the river flowed between permanent high banks and showed no signs of shifting its bed, so that the determination of the true banks did not present much difficulty. Where, however, a river is in process of shifting its bed, an element of uncertainty is introduced. The shifting of the bed usually means the buildup of a new bank which gradually rises from the dying bed and takes the place of an existing bank. At what stage of this process can we say that the new formation has ceased to be a part, of the bed and has become a bank?

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22. The effect of the decisions has invariably been that when a river is in process of shifting its bed, a beel in the dying bed is not a part of the river unless it is connected with the river throughout the year. Or, to state the same thing from the present point of view, as soon as the ground between the dying bed and the live bed is sufficiently high to be above water in the dry season, it is to be regarded as a part of the new bank.

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23. Taking all the decided cases in Bengal upto the present day, we may say that a beel in the dying bed of a river has always been held to form no part of the river unless connected with it throughout the year. As regards beels in the live bed, as in Mussamut Bibi Ahmodi Begum and others Vs. Mahasay Taraknath Ghose and others and also, in my view, in Jogendra''s case (ILR 32 Cal. 1141) a different view has been taken and connection in normal monsoon flood has been held to be sufficient to make the beel a part of the river. Grounds of equity justify, if indeed they do not necessitate, this distinction; for in the former type of case the grantee of the river jalkar has, after the decision in Srinath Roy''s case (L.R. 41 IndAp 221), the undoubted right to follow the new channel, and unless his rights in the dying bed were reasonably curtailed at the same time, the result, over a large part of the delta of Bengal, where all beels must once have been in the bed of some river or other, might be to extinguish all fishery rights except those in river Jalkars. But apart from consideration of this kind, there is a real physical difference between the two classes of cases. Where a river is in process of shifting its bed, a new bank is in process of forming and the decided cases may be looked upon as laying down a working rule that in such cases the new bank must be deemed to have been completely formed

as soon as it is high enough to be above water in the dry season. No such rule is needed where no new bank is in process of formation. The rule may appear to be defective because, instead of taking into account all the circumstances, such as the character of the soil of the new formation, the nature of the vegetation growing thereon, etc., it treats only one single consideration as relevant, namely, whether the land is high enough to be above water in the dry season. But what is thus lost in completeness is gained in simplicity and certainty: for, the rule does provide a simple and definite test in the class of cases to which it is intended to apply, namely, those where a beel is in the dying bed of a river. Of course, before the rule can be applied, we have still to decide whether the beel is in the live bed or in a dying bed; but this may not offer much difficulty in practice. Are we bound to follow this rule? It is true that in deciding questions of fact-and the question whether a beel is or is not part of a river is, after all, a question of fact-previous decisions are not usually of much value; but if they show that a particular test has been uniformly adopted by the Courts over a prolonged period, a departure from it might have an unsettling effect on rights of property. It would seem, in fact, that all those considerations of geography, convenience, and precedent which have led to the adoption in Bengal of the rule that the grantee of a river Jalkar has the right ''to follow the river'' compel also the adoption of the present rule, which in effect imposes a limitation on his rights in the old channel as he follows the new."

24. Such being the characteristics of ''Beels'', we have now to see whether "tank fisheries", as in section 6(1) (e) of the Act, may also come under the expresion, ''Beel''. In section 6(1) (e) the word ''tank fishery'' is explained to mean:

* * a reservoir or place for the storage of water, whether formed naturally or by excavation or by construction of embrankments, 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.

25. Since a ''tank fishery'' under the Explanation includes also a reservoir formed naturally, it may not be necessarily a different thing from Beels of every type. But nevertheless, a Beel, which on account of its connection with a river remains a part of the river, is not and cannot be a tank fishery. In our reading of the Explanation to Sec. 6(1) (e) of Act, whatever else the Explanation intended to include, it never aspired to include a river or part of the river within its scope and consequently must be deemed to have excluded Beels, which are parts of a river.

26. By way of explanation we add that the phrase "part of the river" has been used in this judgment to mean nothing more than what was said to be part of the river in the case reported in (1) 44 CWN 1079 .

27. In the instant cases it is stated in. paragraph 3(f) of the affidavit-in-opposition on behalf of the opposite parties as follows:

The deponent states that the rivers Pagla and Bhagirathi being connected with the navigable river Ganges, there is continuous flow of water during rains in the ''Babla Dhap'' through the said channels Dharampur Dara and Tulsinagar Dara.

28. In paragraphs 3(b) and 5 of the affidavit-in-reply the case made in the affidavit-in-opposition was disputed.

29. Before the court below, the case made before us now was also the case made by the petitioner. On the materials before us we are unable to decide this dispute. That was also the difficulty with the learned District Judge. The learned District Judge, therefore, was right in directing a remand of the case for further investigation. While directing a remand, however, he should have pointed out that a mere periodic connection of a beel with a flowing river would not necessarily make it part of a river. Other circumstances must also be taken into account. What those other circumstances are, appear fully in the judgment by Rau, J., in (1) 44 CWN 1079 , wherefrom we have already extensively quoted. We, therefore, over-rule the first contention of Mr. Chakravartti.

30. The other point argued by Mr. Chakravartti may be shortly disposed of. The point that Mir Tajer Ali was in possession of the disputed plots of land, holding over under the petitioner, after the expiry of the lease was no doubt not specifically taken in the objection filed u/s 44 (2a) of the Act. But nevertheless it was indicated that the petitioner was out of possession of the disputed lands. We are not inclined to shut the State Government out from making a specific case that Mir Tajer Ali was'' holding over under the petitioner after the expiry of the lease and even after the material date. If Mir Tajer Ali was really holding over as a lessee under the petitioner, then of course the petitioner was not entitled to retain the disputed plots as plots in his khas possession. An investigation on this point will not prejudice the petitioner because after remand he will be at liberty to lead all the evidence that he may require. We, therefore, also overrule the second contention advanced by Mr. Chakravartti.

31. The result is that these two Rules are discharged subject to this observation that in finding out whether the disputed. plots being a Beel was not a tank-fishery, the Revenue Officer shall bear in mind the observations made in the decision, reported in (1) 44 G.W.N. 1079 (Supra) and reiterated in this judgment. There will be no order as to costs in these two Rules.

Niyogi, J.

I agree.