

(1973) 02 CAL CK 0016

Calcutta High Court

Case No: Civil Rev. Case No. 1290 of 1968

Nishakar Pan and Others

APPELLANT

Vs

Mahadeb Ghosh and Others

RESPONDENT

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**Date of Decision:** Feb. 2, 1973**Acts Referred:**

- Transfer of Property Act, 1882 - Section 108
- West Bengal Estates Acquisition Act, 1953 - Section 4, 44, 6, 6(1)(c), 6(2)
- West Bengal Non-Agricultural Tenancy Act, 1949 - Section 23, 24, 24(1), 3, 3(2)

**Citation:** 77 CWN 747**Hon'ble Judges:** S.P. Mitra, J; S.K. Datta, J**Bench:** Division Bench**Advocate:** J.C. Pal with N.L. Pal, for the Appellant; D.K. Chowdhury for Opposite Parties 1 and 2, for the Respondent

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**Judgement**

Shankar Prasad Mitra, J.

This Rule has been obtained against an order of the Subordinate Judge, Asansol made on the 17th January, 1968 in Miscellaneous Case No. 2 of 1967 arising out of Misc. Case No. 20 of 1966 in the court of the Munsif, Second Court, Asansol. By this order the petitioners claim for pre-emption has been refused. The property in dispute is a tank. It is Dag No. 40, P. S. Kansa, Mouza Aima Biswanathpur, District Burdwan. The petitioners, the opposite party No. 3 and one Nrishingha Thakur were co-sharers of this tank having Niskar right. The petitioners had 12 annas share in the tank, the opposite party No. 3 had 2 annas share and Nrishingha Thakur had the remaining 2 annas share. On the 14th April, 1954, the West Bengal Estates Acquisition Act, 1953, came into force. In accordance with the provisions of this Act the aforesaid co-sharers retained the tank. In the record of rights under the Estates Acquisition Act several Khanda-khatians were made. These Khanda-khatians show that each of the co-sharers above-named was to pay a specified portion of the total rent in respect of specified areas of the tank which they had retained. On the 7th

July, 1965, the opposite party No. 3, Gopal Chandra Ghosh transferred out of his 2 annas share 5 piece share in the tank to the opposite parties Nos. 1 and 2. On the 28th February, 1966, the petitioners applied for pre-emption u/s 24(1) of the West Bengal Non-Agricultural Tenancy Act, 1949. The relevant provisions of this section are that if a portion or share of land is transferred, the immediate landlord or one or more co-sharer tenants of such land may, within four months of the service of notice issued u/s 23, apply to the Court for such land or portion or share thereof to be transferred to himself or themselves, as the case may be.

2. In the instant case, the application u/s 24(1) was allowed by the Munsif but the Subordinate Judge has set aside the Munsif's order.

3. The Rule was originally issued and heard by a Judge sitting singly of this Court. Mr. Justice Chakravartti who heard the Rule was of the view that the case raised an important point of law, namely, whether a tenancy which had been shown as Prithak in the revisional settlement operations had actually effected a partition of the tenancy to such an extent that the original co-sharer would cease to be a co-sharer. Mr. Justice Chakravartti has referred this question of law to a Division Bench.

4. We have to observe at the outset that the record-of-rights we have already referred to has now become final. It could have been challenged in accordance with the procedure laid down in Section 44 of the West Bengal Estates Acquisition Act but none of the co-sharers we have named above had chosen to take any steps for its rectification.

5. We have therefore to decide this matter in the context of the finality of the record-of-rights and the entries made in the Khanda-khatians.

6. Mr. J. C. Pal, learned Advocate appearing for the petitioners, does not dispute that when the West Bengal Estates Acquisition Act came into force the disputed property vested in the State and the rights and obligations as between the aforesaid co-sharers and their landlord were extinguished but u/s 6 of the Act these co-sharers were entitled to, and in fact did retain, the disputed property as non-agricultural land. The words "to retain" in Section C mean "to keep possession" or "to continue to have possession". u/s 6(1) (c) the intermediary was entitled to retain non-agricultural land in his Khas possession within a certain limit. In the instant case, says Mr. Pal, the non-agricultural land, namely, the tank was in the Khas possession prior to the vesting not of one intermediary but of several intermediaries, in other words, this was a case of joint Khas possession and when they exercised their option to retain that is to say, to keep in possession "or to continue to have possession" they were doing so jointly. Mr. Pal has invited our attention to Form B in Schedule B to the West Bengal Estates Acquisition Rules, 1954. This is a form which is used by intermediaries desirous of retaining lands u/s 6 of the West Bengal Estates Acquisition Act. Mr. Pal wanted us to consider particularly Column 4 of Form B. Under this Column the intermediary has to state his share "in

the interests written in Column 3 and the date of the document under which interests were acquired". Counsel for the petitioners submits to us that when co-sharers are retaining land they have to specify in Column 4 what their respective undivided shares are. In the case before us Mr. Pal assumes that the co-sharers aforesaid had properly filed in Column 4 of Form B. Neither the original document nor any authenticated copy thereof were however produced before us.

7. Learned Advocate for the petitioners then referred to Section 6(2) which provides, inter alia, that the intermediary retains land directly under the State subject to such terms and conditions as may be prescribed. He then went on to Rule 4(2) of the West Bengal Estates Acquisition Rules, 1954, which, according to him, prescribes the terms and conditions of retention. Under this Rule land is retained by an intermediary as a tenant of the State under the provisions of the West Bengal Non-agricultural Tenancy Act, 1949.

8. We were then referred to Section 3 of the West Bengal Non-agricultural Tenancy Act, 1949. Section 3(2) of the Act defines a "tenant". A "tenant" means, inter alia, a person who has acquired from a proprietor or a tenure-holder a right to hold non-agricultural land for any of the purposes provided in the Act. We were then shown Section 6 which prescribed the manner of use of non-agricultural lands. Under this section a tenant holding non-agricultural land is entitled to (a) erect any structure including any pucca structure; (b) dig any tank; and (c) plant, enjoy the flowers, fruits and other products of, and fell and utilize or dispose of the timber of, any tree. Mr. Pal says that if these tests are applied the tank which is the disputed property in the suit, enjoyment in terms of the Non-agricultural Tenancy Act is possible only if it is held that it was in the joint possession of all the co-sharers.

9. It seems to us that the manner of enjoyment which Section 6 prescribes applies to non-agricultural land simpliciter. The rights given by this section have no relevance to the enjoyment of a tank.

10. Mr. Pal then took us to Section 7(2) of the West Bengal Non-agricultural Tenancy Act. Under this subsection if the non-agricultural land comprised in any tenancy has been or is created after the commencement of the Transfer of Property Act, 1882 and has been held for a term of not less than 12 years without any lease in writing, the non-agricultural tenant would enjoy certain rights specified therein. Mr. Pal contends that if the co sharers named above were non-agricultural tenants within the meaning of Section 7(2) they would be entitled to enjoy the property in the manner laid down in Section 6 but, as we have pointed out, Section 6 does not in terms apply to a tank.

11. Mr. Pal then invited us to look into the provisions of Section 108 of the Transfer of Property Act and said that the rights and obligations of a lessor and lessee enumerated in that section could not be given effect to if the entries in the Khanda khatians herein were accepted as correct. The landlord, argued Mr. Pal, cannot lease

out an undivided share in the property because he would be faced with difficulties in making over possession. And if separate possession cannot be given, the rights and obligations contemplated by Section 108 cannot also be enforced.

12. This argument of Mr. Pal would have deserved consideration if the property had been non-agricultural land simpliciter but in this case we do not feel the necessity of expressing our views on this question. The property in this case is a tank and there can be no question of enjoyment of a tank with portions separated for each co-sharer. What kind of difficulties would be created by Khanda-khatians of the nature we are dealing with in this revision case when the subject-matter is not a tank but a simple non-agricultural land does not call for our decision at the moment.

13. Reliance was placed on behalf of the petitioners on the judgment of Mr. Justice Chatterjee in (1) [Dhananjoy Senapati and Others Vs. Debendranath Senapati and Another](#). At page 850 the learned Judge has observed as follows :

By an amendment of the Estates Acquisition Act in 1956, subsequent to this purchase in 1953 the interest of the occupancy raiyats was declared to be deemed to be that of an intermediary. The result was that u/s 4 of the Estates Acquisition Act the interest of the intermediaries would vest in the State of West Bengal free from all encumbrances and, therefore, the interest of the tenants as tenants under the then landlord would cease and the tenancy would cease. Therefore, whatever interest, the parties had, before the vesting under the Estates Acquisition Act, would be extinguished and the original rights of the parties would be gone. The interest of the petitioners by virtue of their purchase in 1953 (before the vesting) as co-sharers of the tenancy then existing would cease, but subsequent to such vesting and as a result of such vesting the persons, who are deemed to be intermediaries, would still be entitled to retain the land and if they retain the land, they would become tenants of a new tenancy under the State of West Bengal on such terms as the State may prescribe. The terms have now been prescribed under the rules and under the rules if the land is agricultural, they would retain the land under the State with the right of an occupancy raiyat. Hence, at the date of the application for pre-emption which was subsequent to the date of vesting or at the date of the transfer in question which was also subsequent to the vesting, the interest of all the co-sharers in the new tenancy was created not by any act of parties nor by any purchase but by operation of law, namely, the provisions of the Estates Acquisition Act and the rules thereunder. Therefore, the opposite party No. 1 and the petitioners ceased to be co-sharers of the original holding but became co-sharers of a new holding under the State of West Bengal.

14. Ordinarily, there can be no dispute, persons who were co-sharers before the date of vesting would become co-sharers in the new tenancy under State of West Bengal. But in the peculiar facts of our case the position is different. Here we find that when the new tenancy was created it was not a tenancy between the State of West Bengal on the one hand and the co-sharers on the other. On the contrary,

several new tenancies came into existence between the State of West Bengal as the landlord and the previous co-sharers as the tenants. The original Khatian was Khatian No. 74 which ceased to exist and in its place and stead five separate khatians came into existence, namely, Khatianas No. 385, 387, 390, 417 and 424. The rents payable under each of these separate khatians have been fixed and the shares that each of the khatian holders would enjoy have also been separately fixed.

15. On these facts we have to consider the provisions of sub-section 2 of Section 6 of the West Bengal Estate Acquisition Act 1953 which runs thus : "An intermediary who is entitled to retain possession of any land under subsection (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 prescribed and subject to payment of such rent as may be determined under the provisions of this Act and as entered in the record of rights finally published under Chapter V....."

16. For our purposes, therefore, the finally published record-of-rights is the only relevant document. This record indicates the splitting up of tenancies and separation of the interests of the tenants. The present petitioners do not appear to be co-sharers under the khatians in respect whereof this application arises.

17. It is relevant to refer in this connection to the judgment of Mr. Justice Bijayesh Mukherji in (2) [Sri Chakradhar Ghosh Mandal and Others Vs. Sri Ram Ratan Pal and Others](#), . Mr. Justice Bijayesh Mukherji has said that a Khanda-khatian means a khatian which has been cut off from the parent khatian, for a separate tenancy for the land retained by the individual owner up to the prescribed ceiling. And to allow the persons recorded in the parent khatian to hold lands in Khanda-khatians carved out thereof is to bring back latifundia to destroy which the Estates Acquisition Act is there all these years. Therefore, the learned Judge has held that, no case for pre-emption u/s 24 of the West Bengal Non-agricultural Tenancy Act can lie, when the sole recorded tenant in a Khanda-khatian, necessarily with no co-sharer, sells his land. We are in agreement with this view and if we apply this principle to the facts of the case before us, we find that the petitioners' claim for pre-emption was not maintainable at all. There has been a separation of tenancies as reflected by the Khanda-khatians. The non-agricultural land we are dealing with is a tank. Physically it is impartible and if any person purchases any portion of this tank he is to enjoy it in collaboration with others. The Khanda-khatians have not been challenged u/s 44 of the Estates Acquisition Act. They have now become final. Even if the entries therein are wrong, in a collateral proceeding of this nature they cannot be challenged. Since the petitioners on the face of the Khanda-khatians have ceased to be co-sharers of the tank, they have no right of preemption.

This Rule therefore is discharged.

There will, however, be no order as to costs.

S.K. Datta, J.

I agree.