

PETITIONER:
ANANDA BEHERA AND ANOTHER

Vs.

RESPONDENT:
THE STATE OF ORISSA AND ANOTHER.

DATE OF JUDGMENT:
27/10/1955

BENCH:
BOSE, VIVIAN
BENCH:
BOSE, VIVIAN
AIYAR, N. CHANDRASEKHARA
DAS, SUDHI RANJAN
JAGANNADHADAS, B.
IMAM, SYED JAFFER

CITATION:
1956 AIR 17 1955 SCR (2) 919

ACT:
Fundamental Rights, Enforcement of-Oral sale of fishery rights for future years by owner of estate before it vested in the State by legislation-Nature of such rights-Profit a prendre, if immovable property requiring registered instrument for transfer--Such sale, if creates any right to property-Non-recognition by the State, if transgresses any fundamental rights Constitution of India, Arts. 19(1) (f).31(1)-Orissa Estates Abolition Act, 1951 Orissa Act I of 1952)-Transfer of Property Act (IV of 1882), s. 54.
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HEADNOTE:
The petitioners obtained oral licenses for catching and appropriating fish from specified sections of the Chilka Lake from its proprietor, the Raja of Parikud, on payment of heavy sums and obtained receipts in accordance with the prevailing practice. This was before the passing of the Orissa Estates Abolition Act of 1951 by which ownership of the estate vested in the State of Orissa. The licenses, however, were in respect of years subsequent to such vesting. The State of Orissa refused to recognise them and was seeking to reaction the rights of fishery. The petitioners contended that it had thereby infringed or was about to infringe their fundamental rights under Arts. 19(1)(f) and 31(1) of the Constitution and claimed that the transactions being sales of future goods, namely, the fish, the Act which was confined to immovable property had no application. Held, that the right sought to be acquired by the petitioners by their several purchases was not in respect of any future goods as claimed by them but was a license to enter on the land coupled with a grant to catch and carry away the fish, in other words, a profit a prendre which is immovable property within the meaning of the Transfer of Property Act read with s. 3(25) of the General Clauses Act. Accordingly s. 54 of the former Act applies. That as the sale of the profit a prendre in the present case was valued at more than one hundred rupees and was effected without writing and registration it contravened s. 54 of the

Transfer of Property Act, and so no title or interest therein passed to the petitioners and consequently, they had no fundamental rights to enforce.

Firm Chhotabhai Jethabai Patel & Co. v. The State of Madhya Pradesh, ([1953] S.C.R. 476), distinguished and held inapplicable.

That it was not necessary in the present case to decide whether the contract was property within the meaning of Arts. 19(1)(f) and 31(1), but assuming it to be so, the State has not taken such property away from the petitioners or prevented them from acquiring, holding or disposing of it. The State merely refuses to recognise the contract and refuses to consider itself bound by it. That may give a cause of action for a suit on the contract but no fundamental right arises as the State has not confiscated or acquired or taken possession of the contract as such by claiming any benefits under it.

JUDGMENT:

ORIGINAL JURISDICTION: Petition No. 286 of 1955.

Under Article 32 of the Constitution for the enforcement of Fundamental Rights.

H.Mahapatra and G. C. Mathur, for the petitioners.

C. K. Daphtary, Solicitor-General for India, (Porus A. Mehta and P. G. Gokhale, with him), for respondent No. 1.

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1955. October 27. The Judgment of the Court was delivered by

BOSE J.-This judgment will also govern Petitions Nos. 287, 288, 289 and 304 of 1955. We will set out the facts in Petition No. 286 of 1955. The others follow the same pattern.

The dispute is about fishery rights in the Chilka lake which is situate in what was once the estate of the Raja of Parikud. This estate vested in the State of Orissa under the Orissa Estates Abolition Act, 1951 (Orissa Act I of 1952) on 24-9-1953 and has now ceased to exist in its original form. The Act came into force on 9-2-1952.

The further facts are set out in paragraphs 2 and 3 of the petition in the following terms:

"That the petitioners carry on the business of catching and selling fish particularly. from fisheries within the said lake.

That long before the vesting of the estate the petitioners had entered into contracts with the expropriator and had obtained from the latter, on payment of heavy sums, licences for catching and appropriating all the fish from the fisheries detailed in the schedule given in the accompanying affidavit and had obtained receipts on payment in accordance with the prevailing practice".

The lake is divided into sections and this petition is concerned with four of them. The licenses relating to them were purchased as follows:

- I On 30-7-50 for rights in Gerasar
Prawn for 1955-56
2. On 2-8-50 for rights in Jayamal
Prawn for 1955-56
3. On 18-9-51 for rights in Solakudi
Prawn for 1955-56
4. On 6-5-52 for rights in Jayamal
Chungudi for (1956-57
(1957-58
(1958-59

It will be seen that though the licenses were acquired before the estate vested in the State of Orissa they

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were for future years, all after the date of vesting.

The State of Orissa refused to recognise these licenses and were about to re-auction the rights when the petitioners filed the present petition seeking writs under article 32 on the ground that their fundamental rights under articles 19(1)(f) and 31 (I) were, or were about to be, infringed.

The first question that we have to determine is whether the petitioners acquired any rights or interests in "property" by their several "purchases", as articles 19(1)(f) and 31(1) are dependent on that.

In their petition the petitioners claim that the transactions were sales of future goods, namely of the fish in these sections of the lake, and that as fish is moveable property Orissa Act I of 1952 is not attracted as that, Act is confined to immoveable property. We agree with the learned Solicitor-General that if this is the basis of their right, then their petition under article 32 is misconceived because until any fish is actually caught the petitioners would not acquire any property in it.

There can be no doubt that the lake is immoveable property and that it formed part of the Raja's estate. As such it vested in the State of Orissa when the notification was issued under the Act and with it vested the right that all owners of land have, to bar access to their land and the right to regulate, control and sell the fisheries on it. If the petitioners' rights are no more than the right to obtain future goods under the Sale of Goods Act, then that is a purely personal right arising out of a contract to which the State of Orissa is not a party and in, any event a refusal to perform the contract that gives rise to that right may amount to a breach of contract but cannot be regarded as a breach of any fundamental right. But though that is how the matter is put in the petition we do not think that is a proper approach to this case.

The facts disclosed in paragraph 3 of the petition make it clear that what was sold was the right to catch and carry away fish in specific sections of the lake over a specified future period. That amounts to

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a license to enter on the land coupled with a grant to catch and carry away the fish, that is to say, it is a profit a prendre: see 11 Halsbury's Laws of England, (Hailsham Edition), pages 382 and 383. In England this is regarded as an interest in land (11 Halsbury's Laws of England, page 387) because it is a right to take some profit of the soil for the use of the owner of the right (page 382). In India it is regarded as a benefit that arises out of the land and as such is immoveable property.

Section 3 (26) of the General Clauses Act defines "immoveable property" as including benefits that arise out of the land. The Transfer of Property Act does not define the term except to say that immoveable property does not include standing timber, growing crops or grass. As fish do not come under that category the definition in the General Clauses Act applies and as a profit a prendre is regarded as a benefit arising out of land it follows that it is immoveable property within the meaning of the Transfer of Property Act.

Now a "sale" is defined as a transfer of ownership in exchange for a price paid or promised. As a profit a prendre is immoveable property and as in this case it was purchased for a price that was paid it requires writing and

registration because of section 54 of the Transfer of Property Act. If a profit a prendre is regarded as tangible immoveable property, then the "property" in this case was over Rs. 100 in value. If it is intangible, then a registered instrument would be necessary whatever the value. The "sales" in this case were oral: there was neither writing nor registration. That being the case, the transactions passed no title or interest and accordingly the petitioners have no fundamental right that they can enforce. It is necessary to advert to Firm Chhotabhai Jethabai Patel & Co. v. The State of Madhya Pradesh⁽¹⁾ and explain it because it was held there that a right to "pluck, collect and carry away" tendu leaves does not give the owner of the right any proprietary interest in the land and so that sort of right was not an "en-

(1) [1963] S.C.R. 476.

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cumbrance" within the meaning of the Madhya Pradesh Abolition of Proprietary Rights Act. But the contract there was to "pluck, collect and carry away" the leaves. The only kind of leaves that can be "plucked" are those that are growing on trees and it is evident that there must be a fresh crop of leaves at periodic intervals. That would make it a growing crop and a growing crop is expressly exempted from the definition of "immoveable property" in the Transfer of Property Act. That case is distinguishable and does not apply here.

It was then argued that a contract is "property" within the meaning of articles 19(1)(f) and 31(1). Again, we need not decide this because even if it be assumed that it is that kind of property the State of Orissa has not taken the petitioners' contract away from them or prevented them from "acquiring, holding or disposing" of it. They are free to sue on it or to assign it if they want. The State merely says, as any other person might say: "I was not a party to that contract. Neither its rights nor its liabilities have devolved on me and I refuse to recognise it or to assume the obligations of either contracting party". If the State is wrong in its attitude that may give rise to a suit against it for damages for breach of contract or possibly, (though we do not say it would), to a right to sue for specific performance; but no question under articles 19(1)(f) and 31(1) can arise because the State has not confiscated or acquired or taken possession of the contract as such. If it had it would have claimed the benefits under it. It would have taken the money that the petitioners paid to the Raja from the Raja or demanded it over again from the petitioners. But it is not doing that. It simply refuses to recognise the existence of the contract.

The petition fails and is dismissed with costs.

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