22-A. PROVISIONS OF ENQUIRY UNDER SECTION 5A OF THE WBEA ACT.

LECTURE NOTE ON

"Clandestine Disposal of Khas land and Enquiries under Section 5A of the West Bengal Estates Acquisition Act with Special reference to High Court Rulings on the subject"

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Introduction to the Subject : The West Bengal Estates Acquisition Act, 1953 Act I of 1954 was passed with high hopes. Besides other provisions the said Act provided for the following two principal measures :

(1) To eliminate the interests of all zamindars and other intermediaries in existence between the State and the rent paying tenant of the last grade, except in some special and limited classes by acquisition on payment of compensation.

(2) To permit all intermediaries to retain possession of their khas lands upto certain ceiling and to treat them as tenants holding directly under the State, treating different classes of lands under different limits.

The subject matter "Enquiries u/s. 5A of the West Bengal Estates Acquisition Act with special reference to High Court Ruling on the subject" which should be explained and focussed amanates from the second objective which is by far the more important and complex of the two. It not only involves acquisition of surplus khas lands by the State, but distribution of the same to the landless people was also anticipated as a consequential measure. Equitable distribution of land for bridging up the economic gap between the land holders and landless people, stepping up agricultural production and general social improvement would have been the natural outcome of this objective.

But unfortunately the shape of things that came proved to be otherwise. This objective has so far been practically frustrated due to various manmade factors. the Land Revenue Commission Report of 1940, and the Bengal Administrative Enquiry Report of 1945 made the big land holders alert. With the Independence of India, when they realized that some progressive measures on land tenure system and land distribution were inevitable they started steadily and gradually to transfer their surplus khas lands, may be legally but not morally, to their relations or friends who lent their names in favour of the transferor. These surreptitious disposal of khas lands, as it was neither necessary for them nor was desired for social interest, became all the more palpable with the passing of the Bill. Such land holders proved to be more willy and intelligent than the lawmakers, and Government had to yield perceptibly to their whims and grabbing nature.

Vesting and Retention of Khas Land : All estates and the rights of every intermediary in each such estate shall vest in the State free from all encumbrances. Thereafter such intermediary will have to exercise option u/s. 6 for retention of khas lands. Section 6 of the West Bengal Estates Acquisition Act, 1953 provides how much land an intermediary is entitled to retain. No such "Ceiling" or limit is however prescribed for religious or charitable trusts which are exclusive in character. Forests cannot in any case be retained by any intermediary or religious or charitable trust excepting the Tea Garden when there is special order to that effect by the State Government.

Defects : Persons possessing lands of the above descriptions bordering to the prescribed limits retained the lands normally and this Act did not disturb them at all. But the big land holders, who possessed land much above the ceilings under each classification, have escaped or attempted to escape those provisions of law by various methods and have in most cases

retained more lands beyond the allowable limits. A statewise investigation has been taken up to examine such cases. Results of that investigation have proved the said apprehension. Investigation so far tabulated now reveals that the patterns of transfer or devise to retain more lands are more or less common in all the districts.

The broad and glaring means adopted for such transfers are enumerated below :

(1) Transfers by ante-dated dakhilas, amalnamas and unregistered deeds.

(2) Conversion of different classifications of lands from the nomenclature having surplus land to other heads having lands below ceiling or to those heads having no ceiling at all.

(3) Suppression of land holding.

(4) Registered transfers in the form of sale, gift, partition, family settlement, creation of debottars or trusts or companies, etc.

(5) Benami transfers including subletting

(6) Law of inheritance in mitakshara School of law.

(7) Auction purchase in fraudulent rent sales.

(8) Solenamas executed in Civil Suits without making the State a Party, and

(9) The cases of retention of lands by the Tea Gardens

Restriction on transfers within certain dates :

In the wake of the West Bengal Estates Acquisition Act when such transfers subletting and conversion of classification for retention of more lands to defraud the State became rampant and provocating, the law-makers grew extremely worried and legislated some restrictions on transfers which eventually took shape in the form of Section 5A of the West Bengal Estates Acquisition Act. Section 5A was not provided when the Act was passed originally. But it was inserted with retrospective effect by the Amendment of Act 1954. Major mischief was committed during that gap.

The provision of Section 5A are summarised below. This is our moot point on which the entire action will base.

(i) The case of transfer of any land by an intermediary, made between the 5th May, 1953 and the date of vesting may be the subject matter of enquiry.

(ii) On enquiry such a transfer may be held as either bonafide or as not bonafide.

(iii) If after such enquiry the State Government finds that the transfer was bonafide, the following consequences will follow :

(a) The land shall be deemed to be the property of the transferor and

(b) If any such land is retained by the transferor u/s. 6, such land may be taken into account calculating the land which may be retained by the transferor as if such land had never be transferred and were retained by him.

(iv) A transfer shall be held to be not bonafide if it was made principally with the object of increasing the amount of land which a person may retain, or principally or partially with the object or increasing the amount of compensation. A transfer in favour of one or more of the relations as described in the section made between the specific dates shall be presumed to be not bonafide until the contrary is proved. If after such enquiry the State Government finds that the transfer was not bonafide, it shall make an order to that effect and thereupon the transfer shall stand cancelled as from the date on which it was made or purported to have been made.

In holding the enquiries u/s. 5A the following points must be observed :-

(a) The enquiry may be made only after the date of vesting.

(b) It is the State Government that may start the enquiry.

(c) The enquiry is limited to the case of transfer of any land by an intermediary.

(d) Such transfers must be within the specified period of time between 5-5-1953 and the date of vesting.

(e) It must form an opinion that there are prima facie reasons for believing that such transfer may not be bonafide.

The enquiry should be taken up only when the above five conditions are fulfiled.

But the mischief being caused by the designing land holders by clandestine disposals could not however be controlled and completely counteracted, as precisely and as effectively as was desired, even by the restrictive provisions u/s. 5A, as adequate resources were wanting to plug all the loop holes. How the object of the West Bengal Estates Acqusition Act in taking over the khas vested lands was frustrated need be examined in proper perspective.

Surreptious Disposals how Manipulated :

The ways and methods adopted by the land holders to retain khas lands above the ceiling have been enumerated above. But they need some explanation and elucidation.

(1) Transfers by ante-dated dakhilas, amalnamas and unregistered deeds.

The record-of-rights were prepared under Chapter–V of West Bengal Estates Acquisition Act on the fundamental principles of the Bengal Tenancy Act, 1885. To be more precise, the provisions of W.B.E.A. Act were superimposed on the ground work of Bengal Tenancy Act.

The tenancies and modes of transfer developed prior to the promulgation of Indian Registration Act. The tenancies were safe guarden by contract and custom also as provided in the Bengal Tenancy Act. Besides registration was also not compulsory in many cases under the Bengal Tenancy Act as is pre-requisite according to the provisions of other Acts. Further, owing to the prevailing animosity between the landlords and their tenants in the past, the state naturally helped the right causes of the tenants. Consequently right, title and possession of the tenants were accepted and admitted even without registration only on possession.

But during the preparation of record-of-rights under the W.B.E.A. Act the position has changed. Previously the tie of interest was between the landlord and tenant when the State was not a party. But now the State is a direct party, the interest of the State is vitally involved in preparation of the record of rights under the W.B.E.A. Act.

As unregistered deeds, amalnamas, dakhilas etc. were accepted as instruments of conveyance under the B.T. Act, those methods of transfer or subletting were also accepted during preparation of record-of-rights under the West Bengal Estates Acquisition Act. As soon as the big land holders realized this position they took full advantage of this lecuna and manipulated large scale transfers in favour of their benamdars or near relations through such instruments or conveyance. Whenever such transfers were challenged and enquired into, they took recourse to Civil Courts. The Courts in most of those cases passed judgement in favour of the transferees, even on collusive suits between the transferors and transferees, either on the basis of compromise or on the basis of one sided evidence offered in those cases or believing such papers as genuine and without any purpose following the old convention left behind by the Bengal Tenancy Act.

(2) Conversion of classification :

Classification of lands have been changed in numerous cases for the very some purpose of retaining lands beyond the ceiling. Agricultural lands have been classified as orchards, beels or baors, tanks, which are used for the purpose of irrigation and are being treated as agricultural lands, have been classified as Tank-Fishery by producing fictitious accounts showing the transactions of pisciculture. Forests in certain cases have been classified as orchards. Instances are not rare that when they failed to change the classification of land in the Revenue courts they took recourse to Civil Courts and the Courts gave judgements in favour of plaintiffs on the basis of evidence produced by them before the Court. All such cases will be reveal that the conversion are mostly from agricultural land to classification for which there is no ceiling.

(3) Suppression of details of land holdings :

It is obligatory on the part of a Chapter II intermediary to file 'B' statement exercising option to retain khas lands u/s. 6 irrespective of the fact whether he has lands above or below the ceiling. But this was not so in the case of Chapter – VI intermediaries if they had lands below the ceiling. Intermediaries under Chapter – II once filed 'B' statements for their lands recorded in the intermediary interest. This was prior to the enforcement of Chapter VI. The details of their raiyati and under raiyati holdings were not then furnished by them at all. With the application of provisions of Chapter –VI the intermediaries both under Chapter II and Chapter VI were asked to revise their options showing the details of all lands held by them in any capacity and in any place within the State. In view of the scattered lands throughout the State and in absence of any proper indexing, they were able to suppress some of the details of their holdings and continued to enjoy those lands. Suppression of details was more convenient to the Chapter VI intermediaries and it was a herculian task to get the details of their holdings.

(4) Registered transfers e.g. gift, sale etc. including creation of religious or charitable trusts :

Transfers to prescribed relations became restricted by section 5A. But it could not demur the intelligence of the landholders. They continued to transfer lands, by registered deeds, and the transferees monstly were benamdars of the transferors and these benamdars had ultimately reconveyed those lands subsequent to the original transferors or the members of the family. These transfers were described as sale, gift, confirmatory deeds to indicate previous verbal transfers, partition of properties amongst to co-sharers including their succesors-in-interest or family settlement. They were carried with the impression that such descriptions of deeds would not attract section 5A. The chief and common means to grab more land was creation of religious or charitable trusts by registered deeds.

The common form of religious trusts is Debottar. Dedication of some property to a deity is not only very common, but it also fits in with the prevalent religious sentiment. Consequently , lands bequeathed to those debottars were retained by the Shebaits being mostly the family members of the donor. Apart from the debottars recorded in the Last Settlement Operation, religious or charitable trusts were created freely since 1942-43, and more rampantly just when the West Bengal Estates Acquisition Act was on the process of legislation. The Shebaits in these debottars have thus two fold advantages they are entitled to enjoy perpetual annuity out of their tenanted lands and they can possess the khas lands which are not affected by section 6. There is another advantage. Even some of these subletting are fictitious. In such cases the profits are thus doubled.

The donors or the Shebaits were having merry time so long in enjoying the usufructs of the dedicated properties as the debottars were treated as exclusive on the basis of dedication. If it is found that the intention of the dedicator was a malafide one and was a mere device to extract some benefits for the family in the name of religion, the dedication should be held void, even if it was effected by a registered deed.

The question as to how the intention of the dedicator is to be ascertained is very subtle whether in the cases created long ago or recently. In this connection the observations made by different Law Courts in this country are cited below for information and guidance :

(a) In the case Iswar Lakshi Jonerdan-Vs-Kshitish Chandra (550L.J.26) it was held that mere execution of a deed although it may purport on the face of it to dedicate property to an idol, is not enough to constitute a valid endowment. It is necessary to the validity of a deed of endowment, that the executant should divest himself of the property dedicated. Whether he has done so or not is to be determined by the subsequent acts and conduct of the party or parties.

(b) In the case of Ramchandra-Vs-Ranjit (4CWN 405) the issue of dealing with the question whether the endowment was real or normal was examined. It was held that the manner in which the dedicated property was held and enjoyed was the most important point of consideration.

(c) In the case of Madhab-Vs-Sarat Kumari (15CWN 126) the yard stick as to how a valid endowment is to be dedicated was examined. It was held that the grant was made with the intention that profits should be applied for the particular religious purpose must be proved and also that the profits have been so applied.

It is, therefore, clear as in an enquiry to ascertain the character of a Debottar the cardinal point of consideration should be the intention of the dedicator which should be determined from the subsequent conducts of the shebaits and also from the mode of appropriation of the usufructs from the property.

(5) Benami Transfer :

Transfers are made in favour of trusted friends, relations or employees of the transferor or even in favour of non-existing persons. Prima-facie such transactions appear to be transfers, but the usufructs of the trusted properties are actually being enjoyed by the vendors themselves. The transferee simply lends his name and has no title.

In a benami transaction some sort of confidence is reposed by the real owner in the benamdar, but the benamdar does not by virtue to that confidence acquire any right of ownership over the property so as to give rise to the trust relationship. The real owner retains the possession himself and never gives the benami deed to the benamdar. In many cases the benamdar does not even know the existence of the benami deed, the assent of the benamdar not being necessary for such a transaction. The benamdar is even not entitled to bring suits in his own name. The benamdar is therefore a mere alias for the real owner and in no sence a trustee except in those rare cases where the legal estate happens to vest on him.

Such transfers are very complex and are posing a great problem. The system of benami has been introduced in India by the Mohamedans and is a custom of very great, antiquity prevalent both amongst Hindus and Mohamedans. It has been recognized by the Courts in India and has always been given effect to by them. The system of acquiring and holding property and even carrying on businss in names other than those of the real owners, usually called the benami system, is and has been a common practice in India. It is a custom of the country and msut be recognized till otherwise ordered by law. The legislature has not, by any general measure, declared such transaction to be illegal, and therefore they must still be recognized.

The habit of Indian people of either acquiring or keeping properties in benami may be attributed to several causes. The following causes may be treated as the main reasons :-

1) Joint family system

2) Intention to make secret family provisions

3) Debottar or Wakfs

4) Fraud

5) Avoidance of annoyance of the rulers in the past;

6) Mysterious desire to keep matters secret and

7) Risk a society.

A nominal transfer is distinct from a sham transfer. In the latter there is no intention to transfer at all while in the former there is an intention to transfer to one's nominee so that he shall hold the property openly for himself but secretly for the transferor using the document as a cloak to gave it from his creditors. The essence of a sham transaction is that though a deed of transfer is brought into existence no title of any kind is intended to have passed to any person. If there is no intention of passing the title in the property to a third person, the transaction is a sham one.

When the purpose of origin of the system of benami transaction is examined thoroughly it appears that such transfers were motivated exclusively to enjoy the usufructs of the excess properties which could not have been shared or claimed to share, by the co-sharers or any other interested party. Had this been so, it therefore naturally and automatically attracts the provisions of section 5A.

But as the system of keeping lands in benami was perfectly legal in India, it would be very difficult to detect the benami land expeditiously unless the law was suitably amended and benami declared illegal. That being so, the benami transactions could not be hit under the W.B.E.A. Act till 1963-64 when the issue cropped up for decision in the High Court.

In the Civil Revision case no. 3678 of 1961 the first point that came up for examination and decision is that benami transfer cannot be a subject of enquiry under section 5A of the W.B.E.A. Act. In the case of Ananta Kumar Datta-Vs- Land Revenue Officer, II (Reported in AIR 1958 Calcutta 143) the following observation was made :

"But the short answer to that is that section 5A of the Act does not cover or contemplate the case of a benami transaction, but transfer which is not bonafide. A benami transaction is no transfer at all, the title remaining where it always did. I cannot see how this undisputed question of benami can be settled except by way of a suit".

The above position made the situation from bad to worse. The hands of the Revenue Officers became all the more restrained. But the whole purpose of enquiry u/s. 5A is to find out whether the suspected transfer is a mere device or subterfuge to retain more land than permissible or to get more compensation than justifiable under the Act. When the entire object of this enquiry is to find out if the transfer is real or simulated and an evasion of the statute it therefore became completely unjustifiable to say that section 5A does not cover or contemplate a benami transfer as it then defeats the very section itself. The provisions of this section cover all transfers, benami or not benami. If benami transfer is considered to be outside the scope of section 5A it will be to frustrate the very major purpose of this statutory provision.

The above interpretation has been accepted and applied in different full bench judgements of the High Court. In view of the explanation of the principle of section 5A made by the High Court examination of benami transaction within the purview of section 5A has now become open to the Revenue Officers.

(6) Law of Inheritance in Mitakshara School of Law :

There are two distinct schools of law of inheritance— the Dayabhaga and the Mitakshara Schools of Law. The Dayabhaga School of law is broadly and commonly applicable in this Province. But the people of Northern India are generally being controlled by the

Mitakshara School of Law. But if once they adopted the other school of law, i.e. Dayabhaga, they are not entitled to switch back again to Mitakshara School.

So when those people gradually migrated to this Province many of them adopted the local principle. But now they have made attempts to get the records prepared according to Mitakshara school of law which would have given them the following additional benefits :

Records are prepared in the name of head of the family showing the full share against him. The names of other co-parceners also feature in the records, but without any share. In such a case the 'Karta' of the family is treated to be a single unit. Retention of khas lands and determination of slab in assessment of compensation will depend on that single unit.

But if there be a valid partition, all the coparceners will become co-sharers and there will be as many units as there are co-shareres. This entails not only wider retention of khas lands but also they get maximum advantage of assessment of compensation by going down to lower slabs. Persons governed by Mitakshara school of law without any change also made similar attempts to have their co-parceners recorded as co-shares on the basis of partition for the very same purpose.

Instances are not rare that the names of co-parceners of each such family feature in the records for the purpose stated above. Considerable quantity of khas land has been divested in this way too which required to be counteracted by reviewing the cases.

(7) Auction purchase in fraudulent Rent Sales :

The land holders created fictitious and sham tenancies in the wake of the W.B.E.A. Act. They put those tenancies in Rent Sales through the Civil Courts on grounds of arrear rent. Those tenancies were purchased by the near relatives, trusted friends or servants of the landholders. Such cases are actually benami transactions. But the modus operandi is so subtle that action could be generally taken u/s. 5A earlier. The lands involved in such cases were actually being enjoyed by the land holders which would have otherwise vested had it not been manipulated so nicely through the cloak of law.

(8) Civil Suits and Collusive Suits in the form of obtaining favourable decrees through 'Solenamas' :

The designing and interested land holders have freely used the Civil Courts in ratifying their sham transactions of reclassification of lands. Court decrees are, however, not by themselves independent sources for evasion of ceiling.

The persons brought suits against the big land holders claiming that they took settlement of lands from them some times back. The defendants, i.e. the landholders in such cases either came to compromise or put up practically no defence at all resulting in decrees in favour of the settlement holders. The entire show was false and made up.

The daughters, sisters-in-law (brothers wife) etc. brought Civil Suits against them claiming that the landholders had gifted them some lands at the time of marriage which have not been recorded as such. In such cases also they came to comprise and executed solenamas and the decrees were passed on the basis of those solenamas.

The state has rarely been made party in those suits. Even when the State was made a party, they produced so formidable and manipulated evidence against the State that the Court decrees went invariably in their favour.

The designing landholders took refuge to civil suit when all their attempt in the Revenue Courts failed to record settlement on ante-dated dakhilas, a claim of creation of debottar or charitable trust, reclassification of lands, application of Mitakshara school of inheritance. It is no denying fact that those cases were not properly contested by the State in

the past. But even then the landholders proved to be more resourceful and intelligent in wining the cases.

(9) Cases of Retention of lands by Tea Gardens :

The Tea Gardens are allowed to retain lands of any classification including forests, and of course excluding sairati interest. A committee has been set up for examining the cases. The recommendations for retention of lands by the Tea Gardens are made by the said Advisory Board. The State Government passes order of retention in such cases.

The manner in which the Tea Gardens have been allowed to retain agricultural lands calls for further probing. Had the agricultural lands leased out by the Tea Garden to their own labourers been made to vest, some more landless agricultural people, having no other source of any income, could have been provided with some land.

Process of detection of such cases :

In view of the entire picture as described above it is not at all easy to detect the cases of clandestine disposal of land. The accumulated cases since 1952-53 are quite heavy in number and are also scattered throughout the State. Raiyatwari system is absent here in West Bengal. As such 'one man-one khatian' is also wanting for which personwise indexing is not readily possible. If any question is raised about how the case of a particular intermediary stands, even with methodical and systematic records under the system so long existed, the answer cannot be readily furnished.

Local knowledge is the best source to trace out such cases. This was possible upto 1958. But as the camps have since been centralized and as the old officers have also been transferred local knowledge is not forthcoming effectively at all. This may be furnished by the local progressive people who care for social reforms. But they are handful in number. Even if they furnish some names of vendors the relevant particulars regarding the names of mouzas, khatians etc. and the names of the vendees etc. are not forthcoming from them. In such cases we are to hunt up all possible records like groping into the darkness. This process not only involves hudge labour and time, but also its accuracy cannot be vouchsafed. Still then, this process is being resorted to as far as possible, in absence of any other dependable information. This is more or less an external source and this source is made good use of as far as possible.

But a systematic approach to spot out those big landholders is being made internally depending on our records and other allied registers. This includes the following actions :

(a) All the big raiyat cases along with the cases of their co-sharers are being re-examined and reviewed where there are additional informations of retention of more lands not detected previously;

(b) The case records of all cases u/s. 5A of the W.B.E.A. Act as entered in the Register are being scrutinised;

(c) Miscellaneous petitions alleging surreptitious transfers likely to attract section 5A are being examined with special attention;

(d) Many fraudulent and sham sales were passed over, were acknowledged and recorded in the R.O.Rs through the proceedings u/s. 44(1) and 44(2a) of West Bengal Estates Acquisition Act on the strength of registered deeds on the convention left ever by the Bengal Tenancy Act. In very many such cases the intention or purport of such transfers were seldom examined and the fact of possession in the lands involved was not properly looked into. Consequently many sham transactions were regularized in such proceedings unwillingly and good chunks of land, which would have vested in the State normally, were divested.

It is now considered absolutely necessary to check up those suspected cases and re-examine them in the light of present background. Card indices of the transferors and transferees in such cases are now being prepared, consolidated and cross-verified with the card indices prepared under many different heads described above.

(e) The "Levy" lists prepared by the Block Development Officers have been obtained for checking up. They have been consolidated and a dependable index to spot the big-raiyats have been made out.

(f) Agricultural Income Tax papers are being looked into and all possible data are being collected from those papers for the said purpose;

(g) Genealogical tables of notable families are being prepared after comparing the present records with Last Settlement Records.

The aim and object at drawing up the genealogical tables bringing together all the members of a family for examination of the scope of vesting of khas lands under the West Bengal Estates Acquisition Act, have ultimately been streamlined and the concept of "Family Ceiling" has been provided for under the West Bengal Land Reforms Act, 1955.

This even is not considered adequate to detect the transferors and also the transferees. Card indices under the above heads (a) to (e) should be prepared, verified with the present records, consolidated and arranged alphabetically dictionariwise under each head. The total results under each such head should there after be verified and cross-checked with each other for arriving at a more dependable and thorough result. This final list thus prepared will indicate, approximately correctly, the list of big landholders who suppressed their surplus khas lands in various ways as described earlier. The list obtained or prepared locally should also thereafter be verified with the final list prepared by the office and new names found to be missing there should be included in the final list.

This work should be entrusted to a squad to be established centrally at Headquartes and also in the outlying Charge Offices. The Camps will be responsible for preparation of card indices of all categories verifying them with the records and despatching them to Central Squad. The Central Squad will be responsible for consolidating and cross checking them and preparing the final list. Thereafter the cases should be initiated, where necessary, and finalized by the Central Squad.

Legal Basis of Action :

The question now crops up as to under which section action should be taken to undo the accumulated mischief. Is section 5A the only answer and remedy? Perhaps it is not. Different types of cases with different materials will have to be dealt with under different sections of the W.B.E.A. Act. Sections 5A, Section 6(1), Section 44(2a) will be necessary according to the merits of each case. The Big Raiyat cases, which require correction on subsequent detection of additional land beyond the ceiling and the debotar cases suspected to be sham may have to be taken up under Section 6. The cases of transfers within the prohibited dates will have to be taken up under section 5A. The cases of change of classification of lands may have to be taken u/s. 44(2a).

Procedure of Enquiry u/s. 5A :

There is no hard and fast rule or instruction which lays down any process of enquiry u/s.5A. The enquiry must be aimed at proving that the transfer was boanfide or not bonafide. The process of enquiry will mainly depend on the merit of a case. Though variable in nature of enquiry depending on different materials of each case, yet the process in general sense may be outlined as follows :

(1) The relationship between the transferor and the transferee should be looked into.

(2) The date of transfer, the most vital factor in each enquiry, should be properly studied.

(3) The fact of possession must be examined. It must be ascertained with whom the possession lies, whether with the transferor or with the transferee.

(4) Local enquiry for the above purpose may be necessary. The evidence of bargadars or kishans ploughing the land in question should be obtained to incidate to whom they deliver the crop in question and such evidences should be recorded and taken into consideration. In absence of any bargadar or kishan, the evidence of the cultivators tilling the adjoining lands should be recorded. The evidence to the fact of possession must be unassailable.

(5) It must be ascertained who is paying the rent of the land in question— whether the transferor or the transferee. This is a good piece of evidence to indicate with whom possession lies. The name of tenderer of rent as mentioned in the rent receipts issued by the Tahsildars must therefore also be examined.

(6) Instances of such surreptitious transfers even after the khasra survey made under the W.B.E.A. Act are not rare. The names of the possessors as recorded in khasra shall always be consulted and verified.

(7) The levy lists prepared by the Block Development Officers should also be examined. It will focusss as to who delivers the paddy due to the levy— whether the transferor or transferee. This is also a good piece of evidence.

(8) Settlement have often been made by issuing dakhilas or rent receipts. As most of them are antedated, those rent receipts should be verified with their counter-foils. The type of paper and print of the rent receipt and its counterfoil alongwith the trade mark and year of printing will also indicate whether the rent receipts so produced are genuine or not. The onus of production of the counterfoils must always be thrown on the parties, i.e. the transferor, failing which the natural presumption will go against them.

(9) The Chowkidary or Anchal Assessment lists should be consulted.

(10) Voters' list should also be consulted.

(11) Ration Cards must also be examined which will indicate whether the transferee is a producer and if so the extent of land he is enjoying. This will also indicate whether the transferee stays in joint messing with the transferor.

(12) Birth Resisters or the registers maintained in the Schools may have to be examined to ascertain the age of the transferee.

(13) The financial position of the transferee may be examined to see whether he is capable of purchasing the land or taking settlement of the same.

(14) Any or all of the above means may have to be taken recourse to for deciding the fact whether the transfer is bonafide or not bonafide.

(15) In holding an enquiry u/s. 5A, the enquiry officer must comply with the following five cardinal points :

(a) Formation of opinion is a necessary factor for initiating the case.

(b) Alongwith the notice he must enclose a copy of the Order Sheet.

(c) All the evidences must be recorded in writing.

(d) There must be a clear finding whether the transfer is bonafide or not bonafide, and

(e) There should be no order for consequential action (as this will have to be taken up separately u/s. 45A).

(16) It has already been explained that all cases will not come under the purview of section 5A. The mischief caused by the surreptitious transfers in such cases may have to be counteracted by drawing up proceedings u/s. 6(1) and 44(2a).

(17) Intentional and willful change of classification will be rectified u/s. 44(2a). A local survey of the land in question alongwith the evidences recorded will proceed that proceedings.

(18) Unauthorised partition in mitakshara families will have to be counteracted also u/s. 44(2a) if it has already been recorded as such assuming the Finally Published Records as erroneous.

(19) The character of religious trusts like debottars and pirottars wll be examined u/s. 6 Controversial pirottar or wakfs must be verified with the records and registers of the Wakf Commissioner, as the case may be. Correction of records after the finding will have to be made either u/s. 45A or 44(2a) as the case may be.

(20) Transfers in favour of the deities or partitions effected after 01.01.1952 will have to be examined also u/s. 44(2a) for purpose of section 14(3) of the counter check that no inflated compensation is paid to be transferee.

Clarifications made by the decisions in High Court cases :

The transfers on which section 5A will be applicable, the manner how the said section will be operated and its consequential effects have been delineated above. But the stage reached finally could not be achieved easily and readily. Amongst other provisions section 5A created a special atmosphere in the Judicial Courts. It was like the tug-of-war, with the interest of the State at one end and the interest of the intermediary at the other end. The intermediaries did not succumb to the findings of the Revenue Courts. Numerous appeal cases u/s. 5A(6) were preferred against such findings to the Special Judges. They were not even happy with the appallate judgements in most of the cases and moved the High Court challenging such judgements to uphold their causes. They moved the High Court with conflicting issues, interpreting the law according to their own convenience. Controversial points of law, interpretation of various clauses of section 5A and allied but conflicting issues have since been decided in the Civil Revision cases in the High Court. Those decisions not only deal with the question of constitutionality of the section of 5A and the scope of Article 227, but also counteracts the attack of the constitutionality of Section 5A and it has been held that section 5A does not offend article 14 and Article 31A of the Constitution and that further more it is saved by Article 31B of the Constitution.

The tussle so long continuing has been set at rest. The recent High Court decisions have emboldened the Revenue Officers in rightly carrying on with the enquires into transfers attracted by section 5A. As it will not be possible to quote the High Court Rulings on the numerous points of law within a limited canvas, it is expedient to touch the main provisions of those discourses by citing the relevant case rulings because these rulings will not only guide the future enquiries but also help in coming to correct decision in such enquiries u/s. 5A. In this connection it may also be stated that the questions raised in those Civil Revision cases are not mentioned, for the sake of brevity, as the answers will aptly indicate them.

A. Civil Revision Case No. 189 and 109 of 1962 in the case of Ambujakshya Banerjee – Vs- the State of West Bengal.

(1) The raiyats and under raiyats are also intermediaries and their interest become 'estate' within the meaning of Article 31A of the Constitution. In any event their interests become 'rights ' in relation to an estate within the meaning of Article 31A(2)(b) of the Constitution.

(2) The unconstitutionality of section 5A is protected by Article 31A of the Constitution.

(3) Section 5A does not abridge Articles 14, 19(1)(f) and 31 of the Constitution and therefore is not ultra vires the said provisions. Section 5A does not invade the right to hold property. It is not a legislation for deprivation of property.

(4) Section 5A(2) is not ultra vires Article 31(2) of the Constitution.

(5) Section 5A is not ultra vires Article 246(3) of the Constitution. The State legislature has legislative competence to enact section 5A.

(6) Section 5A is not ultra vires Article 154 of the Constitution and is not unconstitutional and void as it did not confer on the executive, the judicial powers and functions of a Court in declaring and cancelling the transfer made between 5-5-1953 and the date of vesting.

(7) Section 5A(4) cannot be struck down for excessive delegation by the State Government to its Officers to form the opinion. It is not a case of double delegation in view of section 54(1). Rule 3A of the Rules is not ultra vires section 5A(1) for the such delegation.

(8) The expression "I am of opinion" and "may not be bonafide" satisfy the requirement of section 5A(1) of the Act. Formation of opinion by the State Government or its Officers u/s. 5A(1) must not be an airy opinion. There must be prima facie reasons to support the same. The proceedings for enquiry does not become defective only on the ground for entertaining applications from Bargadars or other persons prior to the starting of the enquiry.

(9) After the opinion is rightly framed by the State Government the initial onus would be on the transferor or transferee to prove otherwise.

(10) The rights and interests of raiyats and under raiyats in their lands have vested in the State.

(11) There is no difference to the rights of the raiyats and under raiyats in khas possession of their lands. They cannot complain that they had no knowledge of the coming statute.

(12) Section 5A does not violate the principles of natural justice and is, therefore, not void. Procedure in section 5A is not an attempt to roll up in one organ the judge, the prosecutor and the party.

(13) The proceeding u/s. 5A is a quasi-judicial proceedings and the power is a quasi-judicial power and not executive. The decision by the Tribunal in the enquiry u/s. 5A never partakes the charter of a decisions which disposes of the whole matter for all purposes. The decision, though a reasoned document, must rest content with the limited purpose, viz. with the declaration as to whether a transfer is bonafide or not bonafide. No decision of right and title of the parties is permissible.

(14) It is no part of the duty of the State Government or its Officers to administer the consequences in the section 5A(3)(i) and 5A(3)(ii) of the Act for deduction of the land from the ceiling of the transferors retained lands. The provisions of section 5A(3)(ii) is not a provision for penalty.

[This action for deduction of land from the ceiling should be taken u/s. 45A.]

(15) Section 5A is not discriminatory between the same class of bonafide transferors similarly circumstanced. Section 5A(7)(ii) is not discriminatory because of the exclusion of other relations.

(16) Both the tests in section 5A(7)(i) can be applied and can go together in the case of the same transfer.

(17) Presumption in the proviso to section 5A(7)(ii) would arise only when the transferor owned between 5-5-1953 and the date of vesting more than 25 acres of agricultural lands. The said presumptioin is rebuttable.

(18) Benami transfers can be enquired into u/s. 5A.

(19) Bargadars are necessary parties in enquiry cases u/s. 5A.

(20) Section 5A applies to transfer of lands situate within Government khas mohal. It also applies to transfer of lands pertaining to Chukani tenure in the district of Jalpaiguri.

(21) The question whether section 5A enquiry cases be directed to the transfers in respect of land containing mines and minerals or tank fisheries is kept open.

(22) Starting of separate 5A enquiry proceeding on separate khatian is permissible.

(23) On the point of resjudicata it is permissible for the Enquiring Officer to hold a transfer as bonafide in one part of the document and to hold another transfer as not bonafide in the other part of the same document but it is not permissible for the State Government or its officers to have successive enquiries over the same transfer between the same transferor or transferee or their heirs or assignees, when the said purpose has been considered and when the earlier Tribunal was of competent jurisdiction.

(24) Enquiry u/s. 5A can be started regarding the transfer of the lands in respect of which the Record of rights is finally published.

(25) The Appellate Tribunal constituted u/s. 5A (6) has the power to remand to the Enquiring Officer for rehearing of the 5A cases.

(26) The service of the copy of the order under Rule 3A(2) of the Rules is to be effected particularly when the parties have not appeared.

(27) The duties of the Enquiring Officers are to follow the principles of reason and justice and to ignore the policy of the Government and other extraneous consideration. The proceeding including evidence are to be duly recorded. They should give a proper hearing. Enquiry must be public and the proceeding is open.

(28) High Courts power of superintendence under Article 227 might be excercised even suo-moto as the custodian of all the justice and for vindication of its position on different sets of tests laid down by the Supreme Court.

(29) But when the properly constituted Tribunal had exercised the jurisdictions entrusted to it in good faith not influenced by extraneous or irrelevant consideration and not arbitrarily or illegally, the High Court should not interefere.

(30) The types of orders that the Enquiring Officer or the Appellate Tribunals are entitled to pass in section 5A enquiry cases is a declaration as to whether a transfer is bonafide or not bonafide.

(31) The transfer of lands by the father to his sons within 5-5-1953 and the date of vesting, which may described as family settlement or Nirupanpatra or sale or mortage or exchange or gift will come within section 5A(7)(iii) of the Act.

(32) 'Opinion' should be formed by the State Government through the instrumentality of an officer or some personnel of the Government.

'Opinion' is individual but the opinion of an institution, such as the state, must be in the ultimate analysis be of individual authorized by the institution.

(33) The function or power of the State Government u/s. 5A(1) of the Act, whether considered as power or as function, can be delegated to the officers and this delegation is not ultra vires the section of the Act.

(34) Enquiries u/s. 5A have no reference whatsoever to the final publication of the Record-of-rights. It is independent of all record-of-rights. Publication of the records-of-rights cannot conclude and determine the liability and obligations u/s. 5A of the Act.

(35) The type of the order is declaration as to whether a transfer is bonafide or not bonafide. [The finding of the Enquiring Officer that the transfer 'does not come within the purview of section 5A is neither an order nor a declaration.]

B. 66 C.W.N 404. In the case of Ratnakar Ghosh and another -Vs- The State of West Bengal.

(36) Article 31A of the Constitution saves section 5A(3) of the Act.

C. Civil Revision No. 1043-56 of 1961. In the case of Debendra Nath Sarkar and Others -Vs- The State of West Bengal.

(37) The Appellate Authority u/s 5A(6) has the power to remand a case back to the Revenue Officer. The disposals of appeal according to the prescribed procedure be construed to include the power of remand.

D. Civil Revision No. 2678 of 1961. In the case of minor Santosh Kumar Sadhu –Vs- The State of West Bengal.

(38) In the case of Ananta Kumar Dutta –Vs- Land Revenue Officer II, Estates Acquisition Branch, Nadia reported in A.I.R. 1958 the observation was that section 5A does not cover or contemplate the case of Benami transaction on the reason that a benami transaction is no transfer at all, the title remaining where it always did.

The entire object of enquiry u/s. 5A is to find out if the transfer is real or simulated and an evasion of the statute. To say that section 5A does not cover or contemplate a became transfer is to defeat the very section itself. To set benami transfer outside the scope of section 5A will be to frustrate the very major purpose of this statutory provisons.

(39) The document of a transfer can be partly real and partly benami. Section 5A can be attracted for the benami portion.

E. Civil Revision No. 465 of 1960. In the case of Nityananda Mondal -Vs- the State of West Bengal and another.

(40) The transfers in raiyaty holdings within the dates 5-5-1953 to the date of vesting will also attract section 5A. As section 52 of the Act is retrospective there is no ground to hold that transfers in raiyaty holdings will not be hit by section 5A.

The High Court decision in Aftabuddin Ahmed –Vs- the State of West Bengal, (reported in 71 C.W.N. pages 300-302) it has been effectively and conclusively established that the provisions of section 5A will apply equally to Chapter – II and Chapter – VI intermediaries and the effective date in respect of raiyats and under raiyats also is 5th May, 1953.

F. Civil Revision No. 4658 of 1960. In the case of Haripada Mondal –Vs- The State of West Bengal.

(41) It was argued that once a document of transfer has been found to be bonafide, it cannot be enquired into and found to be not bonafide in respect of some other land. The transfer of some other land covered by a document once examined cannot be questioned u/s. 5A on the ground of resjudicata or principles analogous thereto.

(a) The decision was that a document may be partially bonafide in respect of some transfer and partially not bonafide in respect of other transfers even if all these transfers are covered by one document. It is not strictly a case of res-judicata at all. That which is conclusive is res-judicata. A decision by nature or character inconclusive is not normally res-judicata. Orders u/s. 5A do not appear to be of that conclusive character at all. It is a very limited order with a very limited effect in a very limited proceedings u/s. 5A of the Act. There can be no res-judicata on questions of title or of legal rights.

(b) The doctrine of res-judicata is a doctrine interparties. The judgement binds the parties to the judgement. Res-judicata cannot conclude a person who is not a party which include the party's representative and successor in interst.

The Government or the State should invariably be a party in the proceedings u/s. 5A. If the State was not a formal or informal party at any stage either before the Revenue Officer or before the Appellate authority, the principle of res-judicata cannot operate against the State or the Government which is not a party to the decision. The procedure u/s. 5A is a quasi-judicial procedure and the decisions rendered under that procedure are not in that sense a decision of the State Government to the extent as to make those decisions binding on the State Government. In an appropriate case the State Government may intervene even before the Revenue Officer or Appellate authority and be added as a party to the procedure and in an appropriate case and if aggrieved it can also appeal as a party or a petitioner before the High Court under Article 226 and 227 of the Constitution.

Action in the above lines has so far been taken relentlessly and zealously since 1967. The fruits of this labour are also quite appreciable. Lands to the extent of 5,05,490.00 acres have vested to the State since 1967 due to the constant and painstaking efforts. This is in addition to the normal vesting of 19,13,193.00 acres. The total vesting of this State works out at 24,18,688.00 acres upto July, 1972, which is the highest contribution of any state.

Inspite of such best endeavours it has not been feasible to bring all cases of clandestine disposal of surplus khas lands within control either for want of adequate informations or for legal transfers which could not be hit by the provisons of the W.B.E.A. Act. So some cases, which call for action to cause bonafide vesting still exist.

Government of West Bengal
Office of the Director of Land Records & Surveys
& Jt. Land Reforms Commissioner, West Bengal
35, Gopalnagar Road, Alipur, Calcutta–700027

Memo No. 34/1398-1406/C/95 Dated, Alipur, the 15th April, 1997

To
1. ***
2. District Land & Land Reforms Officer, Purulia.
3-9) ***

Sub : Relevance of the date 5.5.1953 in the matter of holding enquiry u/s. 5A of W.B.E.A. Act over the transferred territories.

A copy of the circular bearing memo. No.34/1397/C/95 dated 15.4.97 in the above mentioned subject is enclosed.

He is requested to kindly look into the matter and take necessary action accordingly.

Enclo : 5 (five) sheets.

A. Brahmachary,
For Director of Land Records & Surveys
& Jt. Land Reforms Commissioner, W.B.

CIRCULAR

Memo No. 34/1397/C/95 dated 15th April, 1997

Sub : Relevance of the date 5.5.1953 in the matter of holding Enquiry u/s. 5A of the WBEA Act over the transferred territories.

Under notification no. 11047(7)-L.Ref. dated, Calcutta, the 22nd Aug, 68 the Governor was pleased to direct that colourable transaction made in the transferred territories, will as in the rest of State, come under the purview of Sec. 5A ibid, if made between the 5th day of May, 1953 and the date of vesting.

The Governor was also pleased to direct that order dated 14th Aug. 1964 conveying the decision of the Govt. that the transfers made between 1st November, 1956 and the date of vesting should be taken into account for the purpose of enquiry under section 5A of the WBEA Act, 1953, shall be deemed to be withdrawn and concelled.

The Officers of Law Cell of DLLRO's offices at Uttar Dinajpur and Purulia have been, for quite sometimes past, contacting the Dte. Law-Cell seeking clarification regarding relevance of the date 5.5.53 over the transferred territories because question are often raised before Civil Courts and Ld. AGPs have been, in their turn making quirries to satisfy themselves for submission of facts before Court.

The following facts may, therefore, be brought to the knowledge of the officers at the erstwhile transferred territories.

By Section 5 of the Bihar and West Bengal (Transfer of Territories) Act, 1956, i.e. Act 40 of 1956, certain areas were transferred from Bihar to West Bengal with effect from 1.11.1956. But Section 43 of the Act 40 of 1956 lays down the provisions of sec. 3 of Transfer of Territories Act, 1959, shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed date extends or applies and territorial reference, to any such law to Bihar or West Bengal until otherwise provided by a competent legislature or other competent authority, be constituted as meaning the territories within the State immediately before the appointed date, i.e. 1.11.1956. By Section 4 of the said Act, the appropriate Government was empowered to adopt or modify any law.

West Bengal Transferred Territories (Assimilation of Laws) Act, 1958 coming into force on 1st July, 1959 was enacted to provide for assimilation of certain laws in force in the territories transferred from Bihar to West Bengal by Sec. 3 of Act 40 of 1956. But West Bengal Estates Acquisition Act occurred in schedule III of Assimilation of Laws Act which meant that with effect from 1st day of November, 1959, West Bengal Estates Acquisition Act would not come into force in the territories transferred from Bihar to West Bengal.

Ch.VIII was introduced by the West Bengal Estates Acquisition (Second Amendment) Act, 1963 (W.B.Act XL of 1963). This chapter came into force on 1st March, 1964 vide Notification No. 2672-L Ref. dated 17.02.1964.

The question of legislative competence of the West Bengal State Legislature to project the provision of the West Bengal Estates Acquisition Act, 1953 on those territories transferred from Bihar to West Bengal was raised in Devi Mata –Vs- State of West Bengal 1,76 CWN 939, AIR 1973 Cal 171 and it was held that legislature is competent to do so.

Section 61 of the chapter provides that on the issue of Notification under Section 60 in the area in respect of which such notification is issued –

1) The Bihar Land Reforms Act 1950 shall stand repealed and provisions of the foregoing chapters of this Act shall mutatis mutandis apply.

2) In exercise of power conferred by Section 60 of the WBEA Act, 1953 the Governor was pleased to appoint 1st day of March, 1964 as the date on which the provisions of Ch VIII of the said Act came into force in all the areas of transferred territories. In terms of sec. 61, therefore, Bihar Land Reforms Act, 1950 stood repealed and provisions of foregoing chapters were extended to transferred territory.

3) Extension of provisions of Section 5A of the WBEA Act over the transferred territories, is thus rendered valid by way of notification no. 2672-L.Ref. dated 17.2.1964.

The period of enquiry (i.e. from 5.5.53 to date of vesting) and relevant notification has been discussed in the preamble of this notice.

A question may arise whether the effective date can be traced back to a date before 1.11.56 in the transfer of territories.

As discussed earlier, Bihar Land Reforms Act, 1950 was prevalent over the transferred territories during the date of transfer of territories (i.e. 1.11.56). Bihar Land Reforms Act, 1950 (Bihar Act 30 of 1950) on receipt of President's assent was published in the Bihar Gazette, Extraordinary of the 25th December, 1950. This was an Act to provide for the transference to the State of the interests of proprietors and tenure holders in land and of the mortgagees and lessees of such interests including interests in tress, forests, fisheries, Jalkars, ferries, hats, bazaars, mines and minerals and to constitute a land commission for the State of Bihar with powers to advise the State Government on the agrarian policy to be pursued by the State Govt. consequent upon such transference and for other matters connected thereto.

Chapter II of the Bihar Land Reforms Act, 1950 dealt with vesting of an Estate or Tenure in the State and its consequences under sub-section (1) of Sec. 3, the State Govt. may from time to time, by notification, declare that estates or tenures of a proprietor or tenure holder, specified in the notification, have passed to and become vested in the State. Under provisions of Section 3A(I) of the said Act, without prejudice to the provisions in the last preceding section, the State Government may, at any time by notification, declare that the intermediary interests of all intermediaries on the whole of the State have passed to and become vested in the State.

The aforesaid provisions of the Bihar Land Reforms Act, 1950 are similar to provisions of Sec. 4 of the WBEA Act, 1953. Provisions were also made [S.4(h)] in the Bihar Land Reforms Act, 1950 to hold enquiry in respect of transfers made with the object of defeating the purpose of the Act. This section is identical to provisions laid down in sec. 5A of the WBEA Act, 1953

Sec. 4(h) of the Bihar Land Reforms Act, 1950 reads as follows :

"The Collector shall have power to make inquiries in respect of any transfer including the settlement or lease of any land comprised in such estate or tenure or the transfer of any land of interest in any land of interest in any building used primarily as office or cutchary for collection of rent of such estate or tenure or part thereof, made at any time after the first day of January, 1946 and if he is satisfied that such transfer was made with object of defeating any provisons of this Act or causing loss to the state or obtaining higher compensation thereunder, the Collector, may, after giving reasonable notice to the parties concerned to appear and be heard and with previous sanction of the State Govt. cancel such transfer, dispossess the person claiming under it and take possession of such property on such terms as may appear to the Collector to be fair and equitable".

This section was inserted by Bihar Land Reforms (Amendment) Act, 1953. It can, therefore, be seen, that the legislature apprehended transfer of land by intermedieries to evade ceiling provisons or to get more compensation and enacted such a provisions. Sec. 5A of the West Bengal Estates Acquisition Act closely resembles provision of Sec. 4(h) of the Bihar Land Reforms Act, 1950.

May it be noted in this connection that the interests of proprietors or tenure holders in any building or part of a building comprised in each estate or tenure and used previously as office or cutchery for the collection of rents of estates or tenures and his interests in trees, forests, fisheries, Jalkar, hat, bazars, ferries and all other sairati interests in all sub soils including mines and minerals with effect from date of vesting, vests absolutely in the state

free from all encumbrances. This is the consequence of vesting of an estate or tenure in the State under provisions of Sec. 4(a) of the Bihar Land Reforms Act, 1950.

Under Sec. 5A of the WBEA Act, enquiry is made to examine transfer from 5.5.53 to date of vesting. The date 5.5.53 signifies the date on which WB Estates Acquisition Bill 1953 was published in the official gazettee.

But under sec. 4(h) of the Bihar Land Reforms Act, 1950 transfer made between 1.1.1946 to date of vesting can be enquired into. The date 1.1.1946, so fixed was in view of the unanimous resolution of the State legislature which was passed in 1946 and which recognized the principle of abolition of proprietors.

It is, therefore, evident that apprehension of transfer of lands with ulterior motive to frustrate the ceiling provisions by intermediaries were every much prevelant in the State of Bihar and provisions of sec 5A of the WBEA Act empowering the State to hold enquiry into transfers made with ulterior motive safeguards the interest of state for the purpose of proper implementation of ceiling laws envisaged in the WBEA Act.

Provisions similar to that as contained in Section 5A of the E.A. Act was always applicable in the transferred area. It was applicable with effect from 1.1.1946 when the area was in Bihar. But the area being transferred to the State of West Bengal, the application of the provision has been postponed to 1.5.53 to fit the enactment of the WBEA Act.

P. Bandyopadhyay
Director of Land Records & Surveys &
Jt. Land Reforms Commissioner,
West Bengal