

(1969) 11 OHC CK 0017
In the Orissa High Court
Case No : O.J.C. No"s. 539 and 540 of 1969

Arjun Pradhan

APPELLANT

Vs

The Revenue Divisional Commissioner, Southern Division and
Another

RESPONDENT

Date of Decision : 18-11-1969

Acts Referred:

Constitution of India, 1950 — Article 14

Vires of Orissa Prevention of Land Encroachment Act, 1954 — Section 10(1), 3, 5, 6

Citation : (1970) 36 CLT 602

Hon'ble Judges : G.K. Misra, C.J;S.K. Ray, J

Bench : Division Bench

Advocate : P.V.B. Rao, for the Appellant; A.G., for the Respondent

Final Decision : Allowed

Judgement

G.K. Misra, C.J.—92, 42 acres in village Kirtipur are in dispute in O.J.C. No. 539 of 1969 and 250.59 acres in village Lodigam are in dispute in O.J.C. No. 540 of 1969. Both lie in Survey Number 259 within Berhampur Tahsil. The Plaintiff is the same in both the applications. The Plaintiff purchased the lands in 1945 from Srimati Ashalata for a consideration of Rs. 4500/-. The vendor in her turn had purchased the same from the original owner on 13-2-1929. The original owner was in continuous possession from 1916. Cist at the rate of 25 paisas per acre was being paid since then. The disputed lands are sandy and are unfit for any agricultural purpose; but they are fit for growing casuarina plantation. On 19-1-1962 a proceeding for eviction, u/s 0 of the Orissa Prevention of Land Encroachment Act, 1953 (Orissa Act is of 1954) hereinafter to be referred to as the Act was started against the Plaintiff. The proceedings were dropped on 30-4-1962 as the encroachment was not found to be objectionable. But subsequently, on 5-8-1963 another proceeding was started as the encroachment was found to be objectionable and eviction was ordered. Against the order of eviction an appeal was taken to the Additional District Magistrate Ganjam u/s 10(1) of the Act and it was dismissed on 19-2-1966. A revision to the Revenue

Divisional Commissioner, Southern Division, Berhampur, u/s 10(1) was also dismissed by his order dated 2-1-1969. The learned Revenue Divisional Commissioner, passed the final order in the following terms:

Accordingly I am of the view that the encroacher should be evicted. The encroacher has raised a plantation on the land and naturally he will require some time to dispose it of. Considering the fact that this is a long standing encroachment continuing for quite a number of years, I feel that it will meet the ends of justice if time till the end of the current agricultural year is allowed to him to remove the encroachment. The learned lower Courts have not at all considered if this is a fit case in which penalty u/s 5 of the Act is leviable. Therefore, the contention of Mr. Das that the Plaintiff has been permitted to continue on the land on payment of assessment only does not mean that levy of penalty is ruled out. The competent authority will consider if, under the circumstances of the case, penalty is leviable u/s 5. The Plaintiff will also be liable to pay assessment u/s 3 of the Act till the encroachment is actually vacated. Subject to these observations the revision petitions are rejected.

It was perhaps in pursuance of these orders of the Revenue Divisional Commissioner, that the Tahsildar directed the imposition of a penalty of Rs. 69286/-. The two writ applications have been filed against the revisional order of the Revenue Divisional Commissioner dated 2-1-1969 and the order of the Tahsildar, dated 10-4-1969 imposing penalty.

2. Mr. P.V.B. Rao on behalf of the Plaintiff contends that Sections 5 and 6 of the Act are hit by Article 14 of the Constitution and are void. In *Brahmananda Sahu and Ors. v. State of Orissa* and Ors. 1969 C.L.T. 1304, a Bench of this Court declared Section 6 of the Act to be unconstitutional and void as being hit by Article 14. For reasons given therein, the order of the learned Revenue Divisional Commissioner dated 2-1-1969 confirming the order of eviction must be quashed. A writ of certiorari would accordingly issue quashing the same.

3. The next question for consideration which did not arise for examination in O.J.C. No. 509 of 1969 is whether Section 5 is hit by Article 14. Section 5 runs thus:

5. Subject to the provisions of Section 7, any person liable to pay assessment u/s 3 shall, at the discretion of the Collector or, subject to his control, of a Deputy Collector or a Sub-Deputy Collector, be liable to pay, in addition to the assessment, by way of penalty a sum calculated at a rate not exceeding twenty-five rupees per acre of land for each year of unauthorised occupation.

The section thus makes provision for imposition of a penalty. No period of limitation has been prescribed beyond which penalty cannot be imposed. Before taking a proceeding u/s 5, a notice specifying the lands so occupied and calling upon the encroacher to show cause before a certain date as to why he should not be proceeded against u/s 5, shall be issued.

4. Section 13 deals with saving of operation of other laws in force. The relevant portion thereof may be quoted:

13. Nothing contained in this Act shall be construed as exempting any person unauthorisedly occupying land from liability to be proceeded against under any law for the time being in force:

Provided that if any penalty has been levied from any person u/s 5 of this Act, no similar penalty shall be levied from him under any other law for the time being in force in respect of such occupation:

It would be clear from this section that it is open to the State to proceed against the encroacher for recovery of damages in civil Court. Thus there would be two remedies available to the State against the same class of persons, namely encroachers on land which is the property of Government. The State has the discretion to choose one or the other of the two remedies and there is no provision in the Act, to guide the authority as to how this discretion would be exercised. There is no rational nexus between the classification and the object of the Act. If the authority chooses to impose penalty under the Act, there is no trammel of limitation. If, on the other hand, the concerned authority files a civil suit for recovery of damages for unauthorised occupation, the suit would be governed "by the periods of limitation prescribed in the Indian limitation Act. This will materially affect the ultimate relief and cause prejudice.

5. The first proviso appended to Section 13 does not improve the situation. It only says that if penalty has been levied from a person u/s 5 of the Act, no similar penalty shall be levied from him under any other law. In other words if the authority chooses to impose a penalty under the Act, a civil suit in respect of the same relief is barred. The proviso does not affect the discretion of the competent authority initially to file a suit for damages and not to proceed under the Act. On the principle invoked in O.J.C. No. 509 of 1969 Section 5 of the Act, is hit by Article 14 of the Constitution. Section 5 is void and is unenforceable in law on this conclusion, the direction of the learned Revenue Divisional Commissioner to start a proceeding for imposition of penalty as also the subsequent order of the Tahsildar imposing penalty are both void and inoperative.

6. The vires of Section 3, providing for levy of assessment, is not however challenged and hence the order of the Revenue Divisional Commissioner directing that the Plaintiff will be liable to pay assessment under that section till encroachment is actually vacated is not to be set aside.

7. In the result, the writ application succeeds in part. A writ of certiorari be issued quashing the impugned order of the Revenue Divisional Commissioner dated 2-1-1969 and of the Tahsildar, dated 10-4-1969 in so far as they relate to action being taken under Sections 5 and 6 of the Act. A writ of mandamus be also issued prohibiting the opposite parties from evicting the Plaintiff and from

imposing penalty on the basis of the aforesaid orders. Proceedings, if any, for assessment u/s 3 will however remain unaffected. In the circumstances, there will be no order as to costs.

S.K. Ray, J.

8. I agree.