
(2005) 11 GAU CK 0001
In the Gauhati High Court
Case No : C.R. No. 179 of 1997

Atindra Bhowmik

APPELLANT

Vs

Agartala Municipal Council and Others

RESPONDENT

Date of Decision : 18-11-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 26 Rule 10
Constitution of India, 1950 — Article 226

Citation : (2006) 3 GLT 630

Hon'ble Judges : T. Vaiphei, J

Bench : Single Bench

Advocate : D.K. Biswas, for the Appellant; A.K. Bhowmik, A. Ghosh, T.D. Majumder and P. Chakraborty, for the Respondent

Final Decision : Dismissed

Judgement

T. Vaiphei, J.—Two principle reliefs, namely, (i) for directing the Respondents No. 1 and 2 to remove the encroachments made by the Respondents No. 3 to 8 on the 50 feet wide road and (ii) for directing the same Respondents to ensure the width of the road by proper supervision in compliance with the survey made by the joint survey team on 20.3.1996 (Annexure-LA) are claimed by the Petitioner in this writ petition.

2. The case of the Petitioner is that he has a residential house on his jote land situate at Dhaleswar, Agartala, bordering the western boundary of Dhaleswar, Road No. 1 and is filing this writ petition to protect his own interest as well as the interest of others using the said road, which connects Jail Ashram Road with I.T.I., Indranagar. As he could not contact other affected persons and due to urgency, he has to file this petition alone. The Petitioner claims that Dhaleswar, Road No. 1 was constructed on the land acquired by the Government in 1970 and that by two subsequent acquisitions, the road was widened and by the last acquisition made in 1977, the road had attained a uniform width of 50 feet all through except for the 6 feet on the western boundary at the entry point from

jail Ashram road, which has a total width of 45 feet. According to the Petitioner, the initial point of the road had to be narrowed down to save the foundation of the existing pucca building of one Smt. Namita Debnath. It is also the case of the Petitioner that the said road is an important road as it connects the eastern part of the town directly with the northern end i.e., G.B. Hospital etc. but on completion of the acquisition proceeding, the Respondents No. 3 to 8 gradually encroached upon some portion of the road on either side bordering their respective holdings. The Petitioner annexed to the writ petition a hand sketch map prepared by him with the help of a surveyor to point out the position of the road as per the land acquisition plan and the encroachments made over the years on either side thereof.

3. The Petitioner further avers that in the year, 1995, when the Respondent No. 1 took up the town improvement projects, it was, as part of the projects, decided to construct RCC drain from Joyguru Pharmacy in Dhaleswar road to Katakhal sluice gate in which the area starting from the initial point of the said road from Jail Ashram Road was covered in the Group-II work. The work order was allotted to one Sibhu Saha, a Contractor of Shibnagar with an estimated cost of Rs. 33,41,508/-. It is the further case of the Petitioner that before the work could commence, he and other residents of the area considered it proper to get the boundary of the road demarcated due to sporadic encroachments by the private Respondents thereon and, accordingly, requested the Respondent No. 1 to cause proper demarcation of the same for keeping a clear 50 feet width all through. The Respondent No. 1 thereupon fixed 20.3.1996 (10 am) for survey and demarcation of the road. The survey team, after giving due notice to all concerned, undertook the survey and demarcated the western boundary by posting pillars, thereby indicating that the boundary on the eastern side would be 50 feet from the pillar posted on the western boundary, which is still in existence on the western flank of the road. According to the Petitioner, the Respondents No. 3 to 8 still refused to clear their encroachments whereupon they made representations to the various authorities to remove such encroachments but to no effect. It is the case of the Petitioner that the map showing the position and formation of Dhaleswar Road No. 1 is available with the East Agartala Tehasil and the L.A. Collector and that the road in question was widened upto 50 feet in public interest by paying compensation to all concerned from public money, which cannot be narrowed by the encroachments of the private Respondents. It is contended by the Petitioner that the Respondent No. 1 has a public duty to remove such encroachments before construction of the permanent R.C.C. drain. It is also stated by the Petitioner that the Respondent No. 1 is not following the measurement with reference to the posts and pegs posted by the joint survey team on 20.3.1996 by leaving the encroached lands to protect the interest of the private Respondents. Hence, this writ petition.

4. The Respondents No. 3 to 7 jointly filed their counter affidavit on 21.3.1997 wherein they virtually deny all the allegations of the Petitioner. On the contrary, they asserted therein that it was the Petitioner himself, and some other persons,

namely, Smt. Namita Debnath, Shri Pradip Kumar Nath, Shri Sailendra @ Sailesh Chandra Debnath, Shri Jadab Chandra Debnath and Shri Hemanta Kumar Roy are the ones who encroached upon the lands adjacent to the west of Dhaleswar Road No. 1, and are themselves encroachers of a Government lands. They specifically asserted that when they apprehended that the Respondents No. 1 and 2 were likely to recover the lands illegally occupied by them that this writ petition came to be filed with oblique motive. They also averred that their respective homestead lands lie on the eastern side of Dhaleswar Road No. 1, adjacent to the R.C.C. Box culvert drain now under construction. They also pointed out that the lands sought to be acquired from them in the earlier notifications were subsequently reduced to 0.01 acre and 0.04 acre respectively, whereas the lands sought to be acquired on the western side of the said road got increased in the second notification to the extent of 0.016 acre, 0.025 acre, 0.005 acre and 0.014 acre, which naturally resulted in modification of the road alignment. They disputed the correctness of the sketch map annexed to the writ petition and claimed that the land plan prepared by the Executive Engineer, Agartala P.W.D., Division No. III at the time of the land acquisition proceeding in question should be treated as an authentic document and as the basis for physical verification thereof. They also denied that on 20.3.1996, the survey team of the Municipal Council made demarcation of the western boundary of the road or indicated that the boundary of eastern side would be 50 feet from the pillars posted on the western side or that such pillars are still in existence. On the contrary, they asserted that the pillars posted on 2.11.1979 by the Joint demarcation in the land acquisition proceeding were still lying intact on the eastern side of the road while those in the western side had all been removed by the occupants of the western side. These are the sum and substance of the case of the Respondent Nos. 3 and 7.

5. The Respondent Nos. 4 and 5 also jointly filed their counter-affidavit on 31.3.1997 and virtually supported the case of the Petitioner. They also claimed that they agreed to release such area from their possession, which might be found to be encroached upon by them. The Respondent Nos. 9 and 10, who were subsequently impleaded in the case, in their counter-affidavit broadly supported the case of the Petitioner and prayed for ordering fresh demarcation of the acquired land with the help of the map available with the L.A. Collector and also the map of the Settlement Department, East Agartala District Tehasil, which would give a clear picture about the encroachment and the portion of the road position of the road at different points. According to these Respondents, the Respondents No. 3 was apparently encroaching more land than has been alleged in the writ petition and, as such, he be directed to produce his title deed in respect of his land. At this stage, it may be noticed that on 7.7.1997, this Court was informed by all the parties about the demarcation of the acquired land made by a Survey Team appointed in terms of the Memo dated 15.3.1996 (Annexure-4A) in respect of construction of road leading from Jail Ashram Road to Katakhal embankment (Dhaleswar Road No. 1) whereupon this Court directed

that the report be produced in Court. When the report was placed before this Court on 22.7.1997, the counsel for the Petitioner as well as the counsel for the Respondent Nos. 3, 7 and 9 did not accept the same claiming that the report was vague and prayed that the Respondent No. 1 be directed to state the width of the road as per the approved plan. Accepting the prayer of the counsel for the parties, this Court directed the Respondent Nos. 1 and 2 to submit the approved plan on 1.8.1997. Finding that the approved plan, when produced, was not helpful, this Court directed the L.A. Collector, West Tripura to produce the land plan and map on the basis of which the notifications dated 9.3.77 and dated 12.4.77 were issued. However, when the land plan and map were ultimately produced in Court, it was directed that a survey team led by one Janendra Chandra Das, Surveyor in the Agartala Municipal Council, be appointed to demarcate the acquired land with reference to the said land plan and map under the instruction and supervision of two Revenue Officers of the Respondent No. 1.

6. The Surveyor submitted his report before this Court on 16.3.98 and the parties were furnished with copies of the report. The Petitioner, however, did not accept the report and submitted his written objection. This was followed suit by the affidavit of the Respondent Nos. 3 and 7 countering the written objection of the Petitioner. The said Respondents thereafter filed their application dated 11.8.1998 praying for dismissal of the writ petition on the ground that complicated questions of facts were involved in the writ petition, which cannot be properly and effectively decided by this Court in a writ proceeding. However, on 20.11.1998 this Court, after observing that the road and drains should be immediately constructed, directed the District Magistrate & Collector, West Agartala, to appoint a competent and senior Surveyor to demarcate the acquired land for the purpose of construction of the road in question and, on such demarcation, the Respondent No. 1 would proceed with the construction. It further directed that any person affected by such construction might approach the appropriate civil court for declaration of his rights and payment of compensation, if found entitled to. Though this order is interim in nature, the Respondent Nos. 3 and 7 preferred a writ appeal being W.A. No. 113 of 1998 before the Division Bench of this Court, which by the judgment and order dated 10.8.1999 allowed the appeal and directed that the report of the Surveyor dated 24.2.1998 be examined on merit. The Division Bench held therein that once a survey by a competent surveyor was ordered, the report submitted pursuant thereto ought to have been taken to the conclusion either by accepting or rejecting it. The order dated 20.11.1998 was accordingly set aside.

7. On going through the pleadings of the parties and the materials on record, which have become quite voluminous, the core issue calling for the decision of this Court is whether the Respondent Nos. 3 to 10 have encroached upon the Dhaleswar Road No. 1 which connects Jail Ashram Road with I.T.I., Indranagar. The reliefs claimed by the Petitioner can be granted on the determination of this issue in favour of the Petitioner. As noted earlier, there have been assertion of facts by the Petitioner and the denial thereof by the Respondents and thereafter their claims and counter-claims. The Petitioner alleged that the private Respondents

encroached upon the said road, which was acquired from public money. On the other hand, the said Respondents, in turn, claimed that it was none other than the Petitioner along with those residents occupying the land adjacent to the western side of the road, who encroached upon the road. The demarcation made by the survey team appointed in terms of Memo dated 15.3.1996 in respect of the road was not accepted by the Petitioner, which prompted this Court to appoint another survey team led by one Janendra Chandra Das, Surveyor in the Agartala Municipal Council. The Surveyor in his report dated 24.2.1998 stated that the distance on the ground from Jail Ashram Road to South side of C.S. Plot No. 18813 is 354 feet and not for Dhaleswar Road No. 1. He further observed that the Xerox copy of the certified true copy of the map was not obtained from the original since the signatures of the Executive Engineer Division No. IV and the signature of the Collector were not available. Since this report is quite material for deciding the writ petition, the relevant portions thereof are reproduced herein below:

1) The distance from Jail Ashram Road to south side of C.S. Plot No. 18813 on the ground is 354' -0" which tallies with the measurement on cadastral map but does not tally with the measurement on certified copy obtained, hence acquired land shown on the certified copy of map obtained cannot be relied for demarcation. From the reference note on the certified copy of land acquisition map, width of the proposed road was mentioned to 50' -0" ft. and boundary of the acquired land in both sides of Dhaleswar Road No. 1 in this segment appears more or less straight.

2) On the ground some pillars posted in 1979 during handing over possession of acquired land by the Surveyor of L.A. Collector to the Surveyor of R.W.D. are still on the ground. 1 (one) pillar is found in C.S. Plot No. 18806/41389 leaving 5'-0" acquired land in west by the north side of Jail Ashram Road. Another pillar is available in C.S. Plot No. 18807/30489 which is 258'-9" ft. away from Jail Ashram Road towards north in west side of Dhaleswar road No. 1. Interested persons who were present during demarcation have no objection about these two pillars.

3) In the east of Dhaleswar road, 1 (one) pillar posted in 1979 is also available in C.S. Plot No. 18827 which is 195'-6" away from Jail Ashram road towards north in east side.

4) 0.015 acre land was acquired from C.S. Plot No. 18819 for widening of Dhaleswar Road No. 1, i.e. 9'-0" width strip

(area = width or $0.015 \times 43.56 = 653$ sft. =Length

72 length

9'-0").

5) The distance from west side of C.S. Plot No. 41335 to south west corner of boundary wall made in C.S. Plot No. 18819 appears 59'-0/ on cadastral map

50"-0" width acquired, but on the ground the same appears a bit more, hence 50" width of the road at this segment shall be measured from south west corner of boundary wall in C.S. Plot No. 18819 towards west to 50-0" existing pillar in C.S. Plot No. 41335 be shifted to 0"-6" towards west.

6) Considering the position of the pillars posted in 1979 in C.S. Plot No. 18806/41389 and Plot No. 30489 are correct, 2 (two) points one (marked on hand sketch as "A") is fixed leaving 10"-0" from the pillar in Plot No. 18806/41389 towards east and another (marked on hand sketch is "B") is fixed leaving 15"-0" from the pillars in C.S. Plot No. 30489 towards east on the ground. By joining these 2 (two) points a straight line has been fixed on the ground which shall be a parallel line a acquired land boundary taking the line as base, distances are measured from the line to each corner of the occupied lands in west side of Dhaleswar Road No. 1 for the purpose of determining boundary of acquired land in west side and encroachment.

7) A line 15" ft away from the base line towards west shall be the western boundary of acquired land as shown on enclosed hand sketch map and a straight line shown in red ink on sketch from south-west corner of the boundary wall in C.S. Plot No. 18819 (marked as "C") to the point marked as "D" on hand sketch V-9 east from south-west corner of occupied land in Plot No. 18825 or a straight line, 35"-0" away from the base line A, B towards east, shall be the eastern boundary of acquired land.

8) Encroachment found after demarcation as follows:

SL Name of C.S. Encro- Encroa- No. occupants Plot achment ched No. land Area
1. Smti Namita 41389(p) North- 812sft. Debnath 10"7" South- 5"-0" Length- 104"-3"
2. Sri Pradip 30490(p) North- 229 sft. Debnath 30491(p) 3"-0" South- 4"-0" Lengthen 65"-5"
3. Sri Suresh Ch. 18807(p) North- 3375 sft. Debnath 3"-0" South- 3"-0" Length- 11"-3"
4. Shri Atindra 18807(p) North- Bhowmik 30489(p) 2"-8" South- 3"-0" Length- 27-0" 76"41 sft.
5. Shri Jadab 30489(p) North- Debnath 1"-3" South- 2"-8" Length- 27-0" 6011 sft.
6. Shri Haripada 30489(p) North- Nandy 0"-0" C/O SureshCh. South- Naha 1"-8" Length- 23/-0" 38"18 sft. In the East side
7. Shri Manindra 18825(p) North- Ch. Debnath 30521(p) 1"-0" 30520(p) South- 1"-9" Length- 155"-8" 214"03 sft.
8. Shri Asish 18819(p) North- Bhowmik 2"-6 South- 0"-0" Length- 155"-8" 31"98 sft.
9. Shri Niranjana 18827(p) North- Debnath 0"-0" Shri Harendra South- Ch. Das 1"-0" Length- 40"-0" 20"sft.

9) A hand sketch statement of acquired land and its average width are enclosed herewith with details of the acquired land.

8. At paragraph 8 of the report, the Surveyor described his findings on the encroachment made by the persons occupying lands adjacent to the road on either side. The Respondent No. 3 found that the total area of the road encroached upon by the Petitioner to the extent of 1"9"for the length of 155"8". Respondent Nos. 4 and 5 are also found to have encroachment upon the road by

similar area in a length of 28 and 22" respectively. In so far as the Petitioner is concerned, it is interesting to note that he was found to have encroached upon the road by 2'8" in the north and 3" in the south over the length of 27 feet. Thus, according to the Surveyor, the width of the road has been narrowed down by the encroachment of the Petitioner and encroachment of the Respondent Nos. 3, 4 and 5 are insignificant paled into insignificance when compared to the encroachment of the Petitioner. The Petitioner did not accept the report and duly submitted his written objection against it. The grounds of his objection are: (a) the demarcation was not as per the L.A. Plan and map furnished by the L.A. Collector; (b) the report that the initial segment of 354 feet is more or less straight is incorrect when the map itself shows that the middle of the segment is about 6 feet bent and the end of the same segment is 10-12 feet bent while the sketch map drawn by the Surveyor is also shown as straight disregarding the position of L.A. map and (c) the length of the Petitioner's land along the road is measured actually as 26 feet, but the surveyor records it as 27 feet. Numerous other points were raised by the Petitioner in his written objection against the demarcation report, which need not be reproduced here in extenso. The Respondent Nos. 3 and 7 also filed an affidavit countering each and every point raised by the Petitioner in his written objection. From the materials on record, I cannot but observe that this Court by entertaining this writ petition has unwittingly converted itself into a Commission of Inquiry and a fact-finding committee to make roving inquiry as to whether the Petitioner can be allowed to establish his right rather than to enforce his established right. It is true that the public certainly have the right to demand that the authority prevent encroachment of public road or remove such encroachment. When this Court is called upon to enforce direct public authorities to enforce the law or to discharge their constitutional or statutory duties, it will not shirk its responsibility and or shut its door to bonafide citizens whose rights have been infringed. But then, the exercise of its writ jurisdiction by this Court is conditional upon the concerned litigant of showing his established rights to the relief claimed.

9. It is a trite law that Article 226 of the Constitution can be invoked to enforce established rights and not to establish rights. However, in an appropriate case, a writ court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar in regard thereto. This proposition was explained by the Apex Court in *Babubhai Muljibhai Patel Vs. Nandlal Khodidas Barot and Others*, as follows:

A writ petition under Article 226 is essentially different from a suit and it would be incorrect to assimilate and incorporate the procedure of a suit into the proceedings of a petition under Article 226. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the Petitioner's right of relief, questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is no doubt discretionary, but the discretion must be exercised on sound judicial principles. When the

petition raises complex questions of fact, which may for their determination require oral evidence to be taken and on that account the High Court is of the view that the dispute should not appropriately be tried in a writ petition, the High Court may decline to try a petition.

If the facts pleaded are of such a nature as do not involve any complicated questions of fact needing elaborate investigation, the High Court may exercise jurisdiction under Article 226. In *Tamil Nadu Electricity Board Vs. Sumathi and Others*, where disputed questions of fact pertaining to the interpretation/meaning of documents or part (s) thereof are involved, the Apex Court held that the Courts can very well go into the same and decide the objections if facts permit and that merely because one of the parties wants to dispute the meaning of a document or part thereof would not make it a disputed fact. Again, in *S.P., Forest Cell, Adyar and Another Vs. M/s. Kannans Co.*, the Apex Court held that the High Court committed in error in adjudicating the question whether the sandalwood was legally or illegally seized or was it or was it not in wrongful possession or whether the seized sandalwood is or is not the subject-matter of criminal cases for the reason that there is not exist any evidence on record to decide or conclude any such findings. In *Moti Das Vs. S.P. Sahi*, The Special Officer In Charge of Hindu Religious Trusts and Others, the Apex Court held that the questions whether the trusts are public or private trusts or the properties are private or trust properties are questions which involve investigation of complicated facts and recording of evidence and such investigation could not be done on writ proceedings. Lastly, it will be instructive and illustrative to quote the observations of the Apex Court in *Chairman, Grid Corporation of Orissa Ltd. (Gridco) and Others Vs. Smt. Sukamani Das and Another*, below:

6. In our opinion, the High Court committed an error in entertaining the writ petitions even though they were not fit cases for exercising power under Article 226 of the Constitution. The High Court went wrong in proceeding on the basis that as the deaths had taken place because of electrocution as a result of the deceased coming into contact with snapped live wires of the electric transmission lines of the Appellants, that "admittedly/prima facie amounted to negligence on the part of the Appellants". The High Court failed to appreciate that all these cases were actions in tort and negligence was required to be established firstly by the claimants. The mere fact that the wire of the electric transmission line belonging to Appellant I had snapped and the deceased had come in contact with it and had died was not by itself sufficient for awarding compensation. It also required to be examined whether the wire had snapped as a result of any negligence of the Appellants and under which circumstances the deceased had come in contact with the wire. In view of the specific defences raised by the Appellants in each of these cases they deserved an opportunity to prove that proper care and precautions were taken in maintaining the transmission lines and yet the wires had snapped because of circumstances beyond their control or unauthorized intervention of third parties or that the deceased had not died in the manner stated by the Petitioners. These questions could not have been

decided properly on the basis of affidavits only. It is the settled legal position that where disputed questions of facts are involved a petition under Article 226 of the Constitution is not a proper remedy. The High Court has not and could not have held that the disputes in these cases were raised for the sake of raising them and that there was no substance therein. The High Court should have directed the writ Petitioners to approach the civil court as it was done in OJC No. 5229 of 1995.

10. As noted earlier, in this writ petition, this Court has been called upon to direct the Respondents No. 1 and 2 remove the encroachments made by the private Respondents on the 50 feet wide Dhaleswar Road No. 1, which connects Jail Ashram Road with I.T.I., Indranagar on the basis of the survey made on 20.3.1996 by the joint team. Normally, this Court undoubtedly has the jurisdiction to issue such a direction if and only if, such encroachments are undisputed facts or are established facts on record. I am afraid, the available materials on record or the conflicting assertions made by affidavits given by both sides cannot persuade me to hold that the allegations of encroachments of Dhaleswar Road No. 1 by the private Respondents are undisputed/admitted facts or are established facts. It may be noted that the report of the Survey Team dated 20.3.1996, upon which the Petitioner bases his claim, are seriously disputed by the Respondents. The report of the survey Team constituted in terms of Memo dated 15.3.1996 (Annexure-4A), which was produced before this Court on 22.7.1997, was also not accepted by the Petitioner as well as the Respondents No. 3, 7 and 9. Thereafter, another Survey Team led by one Janendra Chandra Das, Surveyor in the Agartala Municipal Council, was appointed by this Court to demarcate the concerned land with reference to the land plan and map prepared at the time of the land acquisition proceeding. When the report of this Survey Team was submitted before this Court, it was the Petitioner who did not accept the same by filing his written objection. It may be pointed out here that this report, instead of helping the case of the Petitioner, goes against him. It is now the turn of the Petitioner to explain as to whether he himself was one of the encroachers of the road in question. The Respondents No. 3 and 7, apparently emboldened by the report of this latest report of the Survey Team, filed an affidavit countering the written objection of the Petitioner. On careful examination of the latest report of the Survey Team, the written objection of the Petitioner and the affidavit of the Respondents No. 3 and 7, it becomes crystal clear that this writ petition involves extremely complicated questions of fact needing detailed enquiry to the extent of taking oral evidence of witnesses, without which no definite findings can be given to the points raised by the Petitioner. The report of the Survey Team led by the said Janendra Chandra Das, in the teeth of the opposition by the Petitioner, cannot be accepted without recording further evidence including examination of the Survey Team in accordance with the principles laid down in Order XXVI, Rule 10 of the Code of Civil Procedure, 1908. A writ petition under Article 226 of the Constitution being essentially different from a suit, it would not proper to assimilate and incorporate

the procedure of a civil suit into the proceedings of a petition under Article 226. In that view of the matter, the report of the Survey Team dated 24.2.1998 cannot be accepted.

11. The net result of the foregoing discussion is that this writ petition is not maintainable due to the involvement of complex disputed questions of fact. Consequently, the writ petition is hereby dismissed. However, on the facts and circumstances of the case, the parties are directed to bear their own costs.