

(2017) 12 OHC CK 0071

In the Orissa High Court

Case No : 10462 of 2016

Biswanath Behera

APPELLANT

Vs

Orissa Industrial Infrastructure Development Corporation &
others

RESPONDENT

Date of Decision : 08-12-2017

Acts Referred:

Orissa Public Premises (Eviction of Unauthorised Occupants) Act, 1972, Section 5(1), Section 5(2), Section 9 -
Orissa Industrial Infrastructure Develo

Citation : (2017) 12 OHC CK 0071

Hon'ble Judges : B.K. Nayak, D.P. Choudhury

Bench : DIVISION BENCH

Advocate : D. Mohapatra, M. Mohapatra, G.R. Mohapatra, A. Dash, A.K. Pattnaik, A.C. Panda, S.D. Ray, S. Sahoo, S. Priyadarshni, G. Mukherji, K.K. Bhuyan, R.C. Pattanaik, N. Panigrahi

Final Decision : Disposed

Judgement

1. Challenge has been made to the illegal and arbitrary order of cancellation of allotment made in favour of the petitioner. FACTS

2. The factual matrix leading to this writ petition is that the petitioner is the proprietor of M/s. Pooja Fabrication at Plot No.B/30/2, Industrial Estate, Chandaka, Bhubaneswar. On the application of the petitioner he was allotted the said Plot No.B/30/2 in Chandaka Industrial Estate vide Allotment Letter No.16854 dated 29.10.2003. The said Plot has got an area of Ac.0.073 decimals. The petitioner has been allotted that plot for installing Fabrication Unit and he installed the Fabrication Unit. On 17.8.2006, a show cause notice was issued to the petitioner to cancel the allotment on the ground that no Industrial activities was going on in the allotted plot and the plot was used for residential purpose. The petitioner gave detailed show cause denying the allegation levelled against him. But the opposite parties again issued notice on 10.9.2008 wherein there is

already cancellation of the allotment of the plot in question on the ground that the petitioner has encroached the IDCO land adjoining the allotted plot in question and had also sub-let the premises of the allotted plot.

3. Be it stated that, the petitioner preferred appeal against the order of cancellation before the Estate Officer, IDCO with a request to revoke the cancellation order but the said letter was not entertained by the Appellate Authority. It is the case of the petitioner that while the Unit is running, its employees are living there for the interest of the Unit. So far encroachment of extra land, the petitioner claims same to be the land being not useful for any purpose and if that land is allotted to another person, it would obstruct the passage to the road from his Fabrication Unit. It is averred that on 12.4.2017 all on a sudden the IDCO authority with Police personnel entered into the premises to evict the petitioner. On protest by the petitioner the opposite parties showed the eviction order in EUO Case No.1095 of 2011 dated 3.3.2016 and forcibly locked up three rooms. The allegation of the opposite parties that the petitioner is running a Hotel thereon is not correct. Since the petitioner is running the Unit and same is the only source of his livelihood, the eviction order passed without any opportunity of hearing being offered to him, not only amounts to snatching away his earning but also is violative of the principles of natural justice. So, the petitioner has prayed to quash the order of cancellation of allotment as well as the order of eviction with further prayer to direct the opposite parties to consider for allotment of the additional area adjoining to the allotted plot.

4. Opposite parties 1 to 3 filed counter stating that the opposite parties though had allotted Plot No.B/30/2 to the petitioner to establish Fabrication Unit but since the petitioner did not start any construction within six months and did not commence the commercial production but utilized the plot for residential purpose, a show cause notice was issued. Not only this but also the petitioner also encroached the road side land adjoining the allotted plot compelling to issue show cause notice on 17.8.2006. In spite of issue of notice, the petitioner continued to misutilise the allotted land. Then on 10.9.2008, opposite parties issued another notice for cancellation of allotment on the same ground with additional ground that he has let out part of the case land for opening Hotel, namely, "Sanjha Chulha".

5. It is also averred in the counter affidavit that to evict the petitioner from the encroached land, an eviction proceeding was started against the petitioner under OPP (EOU) Act vide EOU Case No.1095 of 2011 before the Estate Officer, IDCO. The petitioner also appeared before the Estate Officer, IDCO and asked for time to submit reply. The time was allowed. Like this, the petitioner dragged the proceeding till 1.2.2012. Since no show cause was filed, on 4.8.2012 the Estate Officer, IDCO issued a notice under Section 5 (1) of the Orissa Public Premises (Eviction of Unauthorised Occupants) Act, 1972 (hereinafter called "the OPP (EUO) Act") directing the petitioner to file the show cause within fifteen days. It is stated that on 1.12.2015 the petitioner submitted undertaking before the

Estate Officer, IDCO that he would vacate the IDCO land encroached by him and would stop the canteen within fifteen days. It is alleged inter alia that since the petitioner did not vacate the encroached land and continued the hotel, on 3.3.2016 the Estate Officer, IDCO issued order of eviction of the unauthorized occupant after following due process of law. Thus, the petitioner filed this writ petition. Since the opposite parties have been following the prescribed norms and petitioner has violated the terms and conditions of the allotment letter, the petitioner has got hardly any ground to get relief in the writ petition.

SUBMISSIONS

6. Learned counsel for the petitioner submitted that the order of eviction without any notice for disposal of the case to the petitioner is a sheer violation of the principles of natural justice. He further submitted that the opposite parties ought to have considered the condition of lease which does not spell out a single word about eviction of the petitioner from the case land and encroached land without affording proper opportunity of hearing to the petitioner and as such principle of natural justice has been grossly violated. The opposite parties ought to have considered the fact that the land in between the road and the allotted land being occupied by the petitioner, equity tilts in favour of the petitioner to allot said piece of land to him.

7. Learned counsel for the petitioner further submitted that the Fabrication Unit is running on the allotted land and due to nature of work of the unit, the employees were living on the case land to watch and ward the Fabrication Unit of the petitioner.

8. Learned counsel for the petitioner further submitted that the additional land in possession of the petitioner adjoining the allotted land should be allotted in his favour as per the provisions of law but the opposite parties are trying to allot the same to some other persons to the detriment of interest of the petitioner.

9. It is further submitted by the learned counsel for the petitioner that the allegation of opening hotel and opening of any other institution require evidence to prove same. According to him, principle of equity warrants that the case of the petitioner should be considered with proper perspective. Without any sort of rhyme or reason and notice to the petitioner, the opposite parties have illegally passed the order of cancellation of the allotment of plot in question.

10. Mr. G. Mukherji, learned counsel for the IDCO submitted that there was allotment of such plot in question to the petitioner for establishment of the general fabrication unit. As per Clause-17 of the agreement the petitioner was required to start civil construction on the alleged plot within a period of six months and start commercial production within two years from the date of taking over the possession. When the petitioner did not perform any industrial activity on the plot in question and used the same as residential purpose by encroaching the neighbouring land of the IDCO, a notice to show cause was issued to stop the misutilisation of the allotted land on 17.8.2006. When the reply to the show

cause was not satisfactory, on 10.9.2008 the Opposite party Nos.1 to 3 issued a notice for cancellation of the allotment on the same grounds. In addition to the grounds to show cause, the opposite party Nos.1 to 3 have also alleged inter alia that the petitioner had purportedly let out a part of the land for hotel business, namely, "Sanjha Chulha". At the same time in 2011 the opposite party Nos.1 to 3 initiated eviction proceeding against the petitioner under the OPP (EUO) Act vide EUO Case No.1095 of 2011 before the Estate Officer, IDCO. On 25.8.2011 the petitioner appeared before the Estate Officer, IDCO and took time to file show cause.

11. It is further submitted by Mr. Mukherji, learned counsel for the opposite party Nos.1 to 3 that when the show cause was not filed in spite of giving many adjournments, the Estate Officer, IDCO issued notice under Section 5(1) of the Act on 4.8.2012. Thereafter on 1.12.2015 the petitioner submitted undertaking that he would vacate the IDCO land encroached by him and stop the hotel business. Again on 3.3.2016 notice under Section 5 (2) of the said Act was issued for eviction of the petitioner after following due process of law. It is submitted by the learned counsel for the IDCO that since the allotted plot was not utilized in accordance with the agreement and further there is encroachment of other plot unauthorisedly by the petitioner, the order of eviction from the adjoining plot of the IDCO and cancellation of the allotment of the allotted plot are proper and legal. He submitted that adequate notice has been served on the petitioner to show cause against proposed eviction and cancellation of allotment for which it cannot be said there is violation of natural justice. So, he submitted to dismiss the writ petition.

12. Mr. Mukherji, learned counsel for the opposite party Nos.1 to 3 also submitted that in Delhi State Industrial and Infrastructure Development Corporation Limited v. M/s. Delhi Tanneries and Leather Goods Manufacturing Company and others, the Delhi High Court in the similar facts and circumstances held that there being provision for appeal against the decision of the Estate Officer for eviction, the writ is not maintainable.

13. Learned counsel for the opposite party No.4 submitted that he has been allotted the IDCO Plot No.B/30/2 for an area of 269 decimals but the petitioner having adjoining allotted plot in question has encroached some area within the allotted plot of the opposite party No.4 in violation of the agreement between him and the IDCO. Since opposite party No.4 is suffering a lot due to such unauthorized encroachment by the petitioner, he supported the action of the opposite party Nos.1 to 3 about eviction of the petitioner from the allotted plot and unauthorizedly encroached plot.

14. Main point for discussion:- (i) The main point for discussion whether the order of cancellation from the allotted plot in question and order of eviction from the adjoining land are proper and legal?

DISCUSSION

15. It is not in dispute that the plot in question, i.e., Plot No.B/30/2 in question was allotted to petitioner's Unit for industrial activity, i.e., to start fabrication Unit. It is admitted fact that the petitioner utilized the said premises as residential purpose by allowing his staff to live there. It is also not in dispute that the petitioner has encroached some portion of the adjoining plot for which eviction proceeding was initiated against him. It is also not in dispute that in the eviction proceeding not only the order was passed to evict from the encroached IDCO land but also from the allotted land.

16. Considering the submission of the respective counsel, it appears that the opposite party Nos.1 to 3 have cancelled the allotment of the plot in question on 10.9.2008 solely on the ground that the petitioner misutilised the allotted plot by not utilizing the same for the purpose it was allotted and has sub-let the premises by utilizing the same for residential purposes. The further ground of cancellation is that the petitioner has encroached the adjoining IDCO land. It is the contention of the learned counsel for the petitioner that the petitioner removed the encroachment from the adjoining land and there are no terms and conditions in the lease agreement that the allotted plot will be cancelled if there is encroachment of the IDCO land by the petitioner. On the other hand, learned counsel for the opposite party Nos.1 to 3 submitted that as per Clause 17, the petitioner was to start civil construction on the allotted plot and utilize the same for commercial activity within two years from taking over possession.

17. In the counter it is not clear whether Clause-17 has been violated. Of course, in the counter it is stated that a notice to show cause was issued vide letter No.5941 dated 17.8.2006 as to why the petitioner had not started any industrial activity on the allotted plot but used the same as residential purpose.

18. On perusal of the lease deed dated 27.11.2003 between the petitioner and opposite party Nos.1 to 3, it is not clear that the encroachment of any portion of the adjoining plot would be a ground for the opposite party Nos.1 to 3 to cancel the allotment.

19. So far utilization of land for residential purpose by subletting same to one hotel "Sanjha Chulla", the petitioner disputed such fact by taking the plea that his staff who are working in the fabrication unit are living there to promote the industrial activity. Apart from this, how much portion of the allotted plot is utilized for residential purpose and whether the fabrication unit is running in rest of the portion are all questions of fact. These question of facts should have been decided by the IDCO in 2008 after giving proper opportunity of being heard to the petitioner. However, a writ Court cannot entertain such question of fact while exercising the jurisdiction under Article 226 of the Constitution of India.

20. Although the cancellation of the plot in question could not be agitated by the petitioner in 2008 in reply to the show cause issued to him, same is the ground now before the Estate Officer of IDCO while passing the order in question to evict him from the allotted plot and adjoining encroached plot. Here also the petitioner

takes the plea that he was not given adequate opportunity of being heard before the order of eviction was passed. Section 29 of the Orissa Industrial Infrastructure Development Corporation Act, 1980 (hereinafter called "the OIIDCO Act") prescribed as follows: "29. Application of Odisha Public Premises (Eviction) Act, 1972, to Corporation Premises-(1) The State Government may, by notification, provide that from such date as is stated there in the Odisha Public Premises (Eviction of Unauthorized Occupants) Act, 1972 (Odisha Act 7 of 1972) shall, subject to the provisions of Sub-section (2), apply to the premises belonging to vesting in, or leased by the Corporation.

(2) On a notification being issued under Subsection (1), the aforesaid Act and the rules made thereunder shall apply to premises of the Corporation with the following modifications, namely:

(a) the State Government shall appoint an officer of the Corporation who is holding or has held office whether under the Government or the Corporation, which in the opinion of the State Government is not lower in rank than that of a Deputy Collector or an Assistant Engineer, to be the Estate Officer for the purposes of the aforesaid Act and one or more officers may be appointed as Estate Officers for different areas for the same area;

(b) reference to "public premises" in that Act and those rules shall be deemed to be reference to premises of the Corporations and references to "the State Government" in Sections 6, 12 and 15 thereof shall be deemed to be references to the Corporation."

21. In view of the aforesaid provision, the Act, 1972 would be applicable in case of IDCO land for eviction of an unauthorized person. In terms of the above provision, EOU Case No.1095 of 2011 was initiated against the petitioner by the Estate Officer of the IDCO. Annexure-A/1 shows that in said E.O.U. Case the petitioner had appeared and took time to get ready for hearing. Annexure-B/1 shows that the Estate Officer allowed time as last chance to file show cause. Annexure-C/1 shows that on 4.8.2012 the Estate Officer passed order of eviction in following manner: "IN THE COURT OF ESTATE OFFICER: IDCO:

IDCO TOWERS:JANPATH: BHUBANESWAR:-22

No.HO-EUO-1095/11 Regd Post with A.D. Dt.04.08.12

Form=B

(See Rule-5)

IDCO

Vrs.

Sri Biswanath Behera.

M/s. Pooja Fabrication,

IDCO Plot No.B/30/2,

I.E., Chandaka, Dist-Khurda

Order of Eviction in EUO No.1095/11

Form of order under Sub-Section (I) of Section-5 of the Orissa Public Premises Eviction of Unauthorized Occupant Act, 1972.

Whereas I, the undersigned for the reason recorded below am of the opinion that Sri Biswanath Behera is in unauthorized occupation of the public premises specified in the schedule below:

REASONS

Whereas IDCO Plot No.B/30/2 in I/E Chandaka was allotted to M/s Pooja fabrication for general fabrication unit in the year Dt.29.10.03.

Whereas due to non utilization of the allotted property, using the plot for residential purpose, subletting of the plot & encroachment of IDCO land, the allotment offer was cancelled by the DH BCD-I (AT present BCD II) vide L. No.5760 Dt.10.09.08.

Whereas following cancellation of allotment due to the above reason, & on requisition filed by the DH-BCD-II EOU Case was instituted against the O.P. for unauthorized occupation, mis-utilization of the allotted property & thereby contravention of terms & conditions of the allotted property.

Whereas in spite of reasonable opportunity of being heard given, the promoter i.e. M/s Pooja Fabrication didn't turn up to that effect & continues to possess the said property unauthorisedly.

Now, therefore, in exercise of the powers conferred on me under Sub-Section (I) of Section-5 of the Orissa Public Premises (Eviction of Unauthorized Occupants) Act, 1972 hereby order that the proprietor said Sri Biswanath Behera of M/s. Pooja Fabrication and all persons thereof to vacate the said premises within 15 days of the date of publication of this order. In the event of refusal or failure to comply with this order within the period specified above, the said Sri Biswanath Behera of M/s. Pooja Fabrication and all other persons concerned are liable to be evicted from the said premises, if need be by use of such force as may be necessary.

Case posted to: Dt.22.08.12.

SCHEDULE

Mouza-Patia P.S.-Chandrasekharapur District-Khurda Khata No.-474/1607 Revenue Plot No.2(P) IDCO Plot No.B/30/2

Area-Ac.0.073 Industrial Estate-Chandaka

Sd/-

Signature and Seal of the

Estate Officer

Memo No. /Dt.

Copy to the Divisional Head, IDCO BCD-II for information with a request to serve the notice by person or by affixing on the outer door or some other conspicuous part of the public premises and proclaim the content in the locality by beat of drum and return the served copy to the undersigned by 21.08.12.

Sd/-

Signature and Seal of the

Estate Officer

Memo No. /Dt.

Copy P.S. to C.M.D. IDCO, Bhubaneswar for kind information of C.M.D.

Sd/-

Signature and Seal of the

Estate Officer

Memo No.14591/Dt.4.8.12

Copy to the Chief General Manager (ID), IDCO, Bhubaneswar for kind information & necessary action.

Sd/-

Signature and Seal of the

Estate Officer"

22. Annexure-D/1 shows that before the Estate Officer the petitioner undertook to vacate the IDCO land encroached by him and also to stop the Canteen. Further he gave undertaking that he would not use the plot for residential purpose. Annexure-E/1 shows that D.H., MSME-1, IDCO, Bhubaneswar intimated that the present petitioner has not vacated the encroached land and continuing the hotel for which the impugned order was passed to evict him by arraying him as unauthorized occupant and submit report by 14.3.2016. On the one hand the petitioner is claiming that he has vacated the unauthorized land but on the other hand opposite party Nos.1 to 3 submitted that the petitioner has not vacated the IDCO premises. Here again the questions of fact arise as to whether he has actually vacated the unauthorized premises. It can be only gone through in the appeal proceeding as the Appellate Authority can go into the facts and the law. Section 9 of the Orissa Public Premises (Eviction of Unauthorised Occupants) Act, 1972 states in the following manner: "9. Appeals. - [(1) An appeal shall lie from every order of the Estate Officer made under Section 4-A, Section 5 or Section 7.

[(i) in respect of any public premises situated within Cuttack and Bhubaneswar Municipal areas and owned by the General Administration Department of the Government to an appellate authority who shall be the Director of Estates or such other officer including the Additional Director of Estates as the Government may by notification specify in this behalf; and]

(ii) in respect of any other public premises to the Collector within whose jurisdiction such premises are situate.

(1-A) All appeals filed under this section and pending before the Revenue Divisional Commissioner prior to the date of commencement of the Orissa Public Premises (Eviction of Un-authorised Occupants) Amendment Act, 1989 shall, on the date of such commencement, stand transferred to the Director of Estates Orissa or as the case may be, the Collector within whose jurisdiction such premises are situate and shall be disposed of by him in accordance with the provisions contained in this section.

Provided that an appeal against the orders of the Director of Estates passed in the capacity of an Estate Officer under this Act which is so pending before a Revenue Divisional Commissioner shall be disposed of by such Revenue Divisional Commissioner.]

(2) An appeal under Sub-section (1) shall be preferred-

(a) in the case of any appeal from the order under Section 5, within [twelve days] from the date of publication of the order under Sub-Section (1) of that section; and

(b) in the case of in appeal from an order [under Section 4-A or Section 7] within [twelve days] from the date on which the order is communicated to the appellant.

Provided that the appellate authority may entertain the appeal after the expiry of the said period of [twelve days] if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

[Transitory provision - All appeals filed under Section 9 of the Principal Act and pending in the Court of a District Judge on the date of commencement of this Act shall stand transferred to the Revenue Divisional Commissioner within whose jurisdiction the concerned premises are situate and shall be disposed of by him in accordance with the provisions contained in that Section.]

(3) Where an appeal is preferred from an order of the Estate Officer, the appellate authority may stay the enforcement of that order for such period and on such conditions as it deems fit.

(4) Every appeal under this section shall be disposed of by the appellate authority as expeditiously as possible."

In view of the above provision, it is clear that any person aggrieved by the order of eviction can prefer appeal. It is also reported in (1990) 4 SCC 406; Ashok

Marketing Ltd. and another v. Punjab National Bank and others, where at para-71 Their Lordships observed as follows:

"71. In Civil Appeal No. 3723 of 1966, Shri Yogeshwer Prasad sought to raise contentions relating to the particular facts of that case, namely, that the termination of the lease of the appellant is vitiated by mala fides and that the said appellant could not be held to be a person in unauthorised occupation of the premises and further that the proceedings have not been taken in accordance with the provisions of the Public Premises Act. We find that in this case the appellant filed a writ petition in the High Court directly against the order passed by the Estate Officer without filing an appeal against the said order before the Appellate Authority. The High Court has held that the question of mala fides is a disputed question of fact and the same could not be gone into in proceedings under Article 226 of the Constitution. We are in agreement of the said view of the High Court. As regards the other contentions we are of the view that the appellant cannot be permitted to agitate matters which could be agitated by him in appeal before the Appellate Authority."

23. With due regard to the said decision, it is for the Appellate Authority under the Act, 1972 to decide about all the facts agitated by the petitioner before this Court and decide the fact and law. The said decision has also been relied upon by the Delhi High Court in "Delhi State Industrial and Infrastructure Development Corporation Limited v. M/s. Delhi Tanneries and Leather Goods Manufacturing Co. and Others (W.P.(C) No.587 of 2013, decided on 2.7.2013)".

24. In view of the aforesaid analysis, it is reiterated that the allegation of the petitioner that he has not utilized the allotted plot for residential purpose and not let out same for Hotel and the contention of the opposite parties that the petitioner has not vacated the premises, being questions of fact are to be decided before the Appellate Authority as there is provision for appeal under the Act, 1972. It is true that in spite of the provision for appeal, the writ jurisdiction can be exercised but particularly in such nature of cases where the Hon"ble Apex Court has observed as above, this Court is loath to give finding, without going to the question of the facts that the cancellation of the plot allotment is illegal and the order of eviction is equally improper. The point is answered accordingly.

CONCLUSION

25. It is prayed by the petitioner in the writ petition that natural justice has been violated by not giving adequate opportunity of being heard before cancellation of the plot in question and passing the order of eviction. Since we are of the view that there is provision for appeal and the contentions raised before us can be gone into by the Appellate Authority, we refrain from addressing the issue in this writ petition. We hereby direct the petitioner to file appeal, if so advised, within four weeks from today with petition for condonation of delay and the Appellate Authority would condone the delay, if filed within such period and take a decision on merits after affording opportunity of being heard to both the parties. The writ petition is disposed of accordingly.