

(1960) 04 OHC CK 0005
In the Orissa High Court
Case No : First Appeal No. 47 of 1953

Brajamohan Panda

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 07-04-1960

Acts Referred:

Constitution of India, 1950 — Article 300
Government of India (Amendment) Act, 1935 — Section 176
Government of India Act, 1915 — Section 32
Land Acquisition Act, 1894 — Section 4, 5
Orissa Land Acquisition Act, 1948 — Section 13, 2(2), 2(3), 3, 3(2)

Citation : AIR 1961 Ori 124

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

Bench : Division Bench

Advocate : R.N. Sinha and R.K. Mohapatra, for the Appellant; Govt. Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Misra, J.—The plaintiff's suit of 1951, claiming damage at Rs. 60,000/- against the State of Orissa, having been dismissed, he has Come up in the present appeal. The plaintiff's case is that villages Ranga-lipali and Raghunathpali in the district of Sambal-pur belonged to him; that there was a notification u/s 4(1) of the Land Acquisition Act (Central Act 1 of 1894) issued by the Government of Orissa for carrying survey and other allied acts in connection with the Hirakud Dam Project, as provided by Section 4(2) of the said Act; that the officers authorised in the said notification to carry out the survey, instead of confining their actions to the actual survey, entered upon the plaintiff's land from April to October 1948 and caused unwarranted damages to it and fell trees, for which no payment was made or tendered; that in village Kengalipali, trees worth Rs. 42, 766-8-0 were cut., and in village Raghunathpali, trees worth Rs. 14,271/- were cut, Besides, certain pits were dug and roads were open ed over the paddy fields which caused to the plain tiff damages worth Rs. 1090/-.

Claiming interest at Rs. 1872-8-0, the plaintiff put his total claim at Rs. 60,000/-. The defend was that the plaintiff was not the sole landlord of those villages; that the suit was barred by limita tion; and that the notice u/s 80, C. P. C. was defective. It was further pleaded that the Officers of the Central Water, Irrigation, Navigation and Canal Department (CWINC) had entered upon the plaintiff's land and fell trees and did the other works for purposes mentioned in the Central Land Acquisition Act 1 of 1894 and the Orissa Act XVIII of 1948, and no law or rule was violated by them, and whatever was done by them was done in good faith.

The correctness of the trees alleged to be cut and the lands alleged to have been dug was denied, and so also the valuation claimed in that respect. Nothing was stated in the written statement about what trees were actually cut or what damages were done to any land. The defendant further claimed that whatever might have been done by those officers, the defendant was not liable for any damages; and that the suit was barred under the provisions of Orissa Act XVIII of 1948.

2. The trial court held that the plaintiff was the sole proprietor of those villages; and that the suit was not barred by limitation, nor was the notice u/s 80 C. P. C, defective. It was, however, of the view that the suit was barred by the provisions of Orissa Act XVIII of 1948; that since the officers who were alleged to have done the unauthorised acts were not parties, their non-joinder was fatal to the suit, and that the plaintiff could not maintain a cause of action against the State of Orissa for acts done by officers against law and rules.

As to the extent of the trees alleged to have been Cut, since the defendant made no counter allegation nor adduced any counter evidence, the trial court accepted the list given by the plaintiff to be correct. But the trial court did not accept the valuation given by the plaintiff in respect of the damages done since there was no allegation on the plaintiffs side that the trees so cut had been removed by the officers who got them cut, and since the valua- tion claimed, according to the trial court, not only covered the damage for actual cutting, but the price of the cut timber also; as there was no clue to ascertain what was the extent of the loss in either case, the trial court observed.

"The Court cannot assess any damages as the plaintiff has not himself assessed the loss which is due to the cutting of the trees excluding the timbers and hence this issue is left open,"

3. The points raised on the appellant's side are (1) that Orissa Act, XVIII of 1948 does not hit the present suit; (2.) that the State of Orissa was liable for the wrongful action of those officers; and (3) that the trial Court should have held that the damage claimed was the damage in respect of cutting of the trees, irrespective of who removed the cut timber. On the other hand, the learned Government Advocate sought to urge that the plaintiff had failed to prove that all the trees alleged to have been cut had really been cut under the authority of the

officers concerned.

4. Coming to the first point, that is, how far Orissa Act of XVIII of 1948 bars the suit, the original notice Issued by the Government for preliminary investigation was u/s 4(1) of the Central Act I of 1894. Clause (2) of the said section provides that after the notice is published, it shall be lawful for any officer authorised by the Government to enter upon and survey, to dig or bore into the sub-soil, to set out the boundaries, and where otherwise survey Cannot be completed and the levels taken and the boundaries and line marked, to cut down and clear away any part of any standing crop, fence or jungle.

Section 5 of the Central Act provides that the officer so authorised shall at the time of such entry pay or tender payment for all necessary damages to be done as aforesaid, and, in case of dispute as to the sufficiency of the amount so paid or tendered, he shall at once refer the dispute to the decision of the Collector or other chief revenue officer of the district, and such decision shall be final. In the present case, while the notice for preliminary investigation had been issued u/s 4 of the Central Act in 1946, the Orissa Act XVIII of 1948 came into force from 11th January, 1949.

Section 3 (1) of the Orissa Act provided straightway for a notice for acquisition without previous preliminary investigation. Section 3 (2) of the Orissa Act made provisions almost similar to Section 4(2) of the Central Act, and Section 3 (3) of the Orissa Act made provisions almost parallel to Section 5 of the Central Act. u/s 3(4) of the Orissa Act, it was provided that any notification issued under the provisions of Section 4 of the Land Acquisition Act of 1894 for acquisition of land for a public purpose in respect of the Hirakud Dam Reservoir and other necessary requirements of the Mahanadi Valley Scheme before the commencement of this Act shall be deemed to be publication of notification under Sub-section (1) of Section 3 of the Orissa Act.

Under the Central Act, the scheme was that after the notice u/s 4, objection could be offered against the acquisition u/s 5A of the Act and after the said objection was decided, there would be a declaration by the Government for acquisition and a further notification as to from what date the Government would take possession of the land and from the date of taking possession, the property would vest in the Government.

Under the Orissa Act, the process was cut short and it is provided that once there has been a service of notice u/s 3 (1), the land shall vest in Government, and objection to acquisition, if any, could be brought forward after the vesting within a prescribed period, and the State Government was at liberty to withdraw from acquisition of any land of which possession had not been taken.

The contention of Mr. Sinha for the appellant is that since the initial notice was under the Central Act and since there was no payment or offer of payment for damages to be done in surveying as provided by Section 5 of the said Act, the action of the officers was illegal, and as the Central Land Acquisition Act makes

no provision for any remedy for the person affected in such cases the only remedy available is by way of a suit.

According to Mr. Sinha, if there was payment or tender of payment for the damages to be done and there was dispute about the sufficiency of the amount so paid or tendered, then alone the Central Act provided for a reference to and decision of the dispute by the Collector; but there was no room for any reference to or decision by the Collector when there was no payment or any tender of payment. In this connection Mr. Sinha sought to rely upon *Rameswar Singh v. Secy, of State for India* ILR Cal 470.

The learned Government Advocate contended that the Orissa Act, though it came into force later, was made retrospective in its operation to all notices previously issued under the Central Act in respect of the Hirakud Dam and so the provisions of the Orissa Act were applicable and under that Act the land, in respect of which the notice had been provisionally issued u/s 4 of the Central Act, became vested in the Government from the date of service of the previous notice; that once the land is so vested in the Government u/s 5 of the Orissa Act, the said Section provides for compensation payable to the person affected at the time of taking possession, and Section 8 (2) of the Orissa Act provides that whenever the State Government withdraws from any such acquisition, the competent authority shall determine the amount of compensation due for the damage suffered by the owner in consequence of the notice Or of any proceedings thereunder and the provisions of Section 7 of the Act shall apply, so far as may be, to the determination of the Compensation payable under this section.

According to the contention of the learned Government Advocate, what the Orissa Act actually provides is that after the land vests in the Government, the Government will pay compensation if it actually takes possession, and it shall pay compensation also, if necessary, if it does not take possession, and since in the case of the appellant the Government did take subsequent possession of the villages -- which is the admitted case on both sides -- the compensation adjudged in favour of the appellant must have necessarily included the value of the trees etc., and if it did not, the matter could be agitated before the arbitrator u/s 7 of the Act.

The argument of the learned Government Advocate has the following issues. Though u/s 5 of the Orissa Act, the property vested in the Government retrospectively from 1946 the Government did not take up to compensate any loss from the date of vesting. u/s 5 (3) of the Orissa Act, the competent authority is to estimate value of the crops and the trees as standing at the time of taking possession (which is to be taken separately independent of prior vesting) and include that in the compensation, and the said section carries no provision to take into accounts the trees cut before taking possession and after vesting.

It is unnecessary to consider the scope of Section 6 of the Orissa Act, which

makes provision for compensating loss in cases where after vesting the Government withdraws from acquisition of the property, since the present case is not one of that Category. Section 3 (3) of the Orissa Act makes provision for loss accruing to the owner for carrying on survey even though the property Concerned has, by that time, vested in the Government, and the Provisions of Section 3 (3) are parallel to Section 5 of the Central Act.

There is no provision u/s 3 (3) of the Orissa Act as to what would be the position if no payment is made or tendered for damages to be done in course of survey. Though the Orissa Act was in certain matters made retrospective, the right that accrued to one u/s 5 of the Central Act, was kept intact under Sections 3 (2) and 3 (3) of the Orissa Act.

So, whether the Survey in the present case was made u/s 4 of the Central Act or deemed to have been made u/s 3 ,of the Orissa Act, the necessity for payment Or tender of payment for all damages to be done was there, and that being absent -- it is not the defence case categorically either in the pleading or in the evidence that there had been such payment or tender of payment --and there being no provision in either Act as to any remedy for the person affected, his only right is to institute a suit. Section 13 of the Orissa Act did not stand in the way of such a suit, since the alleged non-payment was not in pursuance of any provision of the Act or any order made thereunder. Hence differing from the trial Court, I hold that the suit is not barred by the Orissa Act XVIII of 1948.

5. The next point is whether the plaintiff had any remedy against the State of Orissa. When the Crown took over the Government of Indm from the hands of the East India Company; it was provided by Section 65 of the Government of India Act, 1858, that every person shall have the same remedies against the Secretary of State in Council as he might have had against the East India Company, if the Government of India Act, 1858, had not been passed,

This provision was reproduced in Section 32 of the Government of India Act, 1915, and the Government of India Act of 1935, also maintained that position *mutatis mutandis*, and the present Constitution makes no departure therefrom. The doctrine of immunity of the Sovereign had been extended to the East India Company in respect of its "sovereign acts". The East India Company was held not to be liable for acts done by the Company or its servants, in the exercise of its "sovereign powers", and, consequently, the Company's successor, which was the Secretary of State for some time and the Indian Union of the States subsequently, is entitled to the same privilege.

In the case of *Uday Chand v. Province of Ben-gal*, reported in 51 C WN 537, Chakravarti, J., illustrated the distinction between acts done in the exercise of non-sovereign and sovereign functions thus :--

"Acts of the former class are mercantile Operations or operations of like kind in which the East India Company actually engaged itself before and even after it had acquired sovereignty. The reason why an action lies against the crown with

reference to acts of this type is on the one hand, a historical reason, because actions could, in fact, be brought against the E. I, Co., at the relevant time, and, on the other hand, a statutory reason, because a specific provision, saving the right of action in such cases, has been made in all the successive Government of India Acts." Acts done in the exercise of sovereign powers were said to fall under the categories.

"One class are Acts of State, properly so called, such as making a treaty, commandeering private-property for war purposes, or quelling civil disturbances. Such acts are never justiciable in courts of law"

"The other class of acts are those which are" done under the sanction of some municipal law or statute and in exercise of powers thereby conferred. This class can be sub-divided further into two classes (1) those consisting in detention by the crown of land, goods, or chattels belonging to the subject and (ii) those done by officers of the Crown in the discharge of their official duties."

"With regard to acts of sub-class (i), no action would lie in the Courts in India With regard to acts of sub-class (ii), however, no action would lie except in cases where it can be proved that the impugned Act had been expressly authorised by the Crown or that the Crown had profited by its performance. The reason why no action lies except on proof of special authorisation by the Crown is that, in the absence of such proof, the act is considered to have been done in exercise of the power or the discretion vested in the officer by the relevant law and not in pursuance of any implied authority derived from the Government"

The aforesaid position is more or less reiterated in State of Bihar Vs. Rani Sonabati Kumari, which lays down :-

"The State is liable for the negligence of its employees in the course of their employment in the same way as any private employer in a similar case, where the act complained of is of a private nature and not done in the exercise of powers usually called sovereign or Government power in the performance of an act of State. (Secy. of Stnte for India in Council v. Moment 40 I A 43 (PC)). "Acts done in the exercise of sovereign powers are broadly divisible into two groups (i) the first covering the acts of State property so called, such as, making a treaty, commandeering private property for war purposes, or quelling civil disturbances by force, over which the Court has no jurisdiction --as regards which, the agent is protected as well as the principal, and (ii) the second covering the acts done under colour of municipal law as to which the agent, at any rate, is always responsible. These acts done under colour of municipal law are again divisible into two sub-groups (1) those consisting in detention by the crown, of land, goods or chattels belonging to the subject, and (2) those done by officers of the crown in the discharge of their official duties. The former, as stated above, constitutes the second exception to the general rule. As a rule, acts falling in the second sub-group done by the servants in the discharge of their duties imposed

upon them by the Municipal law do not constitute a liability for action against the State on the principle that in exercising such authority or in exceeding if they cannot be, considered to have been the agents of the authority appointing them so as to render the latter liable. In such cases, neither the doctrine of *Respondeat Superior* apply. Story on Agency in his well known passages says that the Government itself is not responsible for "misfeasance, or wrongs or negligences or omission of duty of the subordinate officers or agents engaged in the public service, for it does not undertake to guarantee to any person the fidelity of any of the officers or agents whom it employs since that would involve it, in all its operations in endless embarrassments and difficulties and losses which would be subversive of the public interest".

In the case of *Collector of Masulipatam v, Cavalry Vencata Narrainapah*, reported in "8 Moo I A 529 at p. 554, the Privy Council observed :-

"The acts of a Government Officer bind the Government only when he is acting in the discharge of a certain duty within the limits of his authority or if he exceeded that authority, when the Government in fact or in law directly or by implication ratified the excess."

In the present case, the appellant's pleading was that the officers concerned did not obey the statutory law laid down in Section 5 of the Central Land Acquisition Act, which enjoined on them to pay or to offer to pay damages to be done in surveying. It is nowhere the appellant's case that the State of Orissa authorised them to do so, or ratified their action or secured any advantage out of it.

That being the position, there could be no cause of action in tort against the State of Orissa though those particular officers might have been sued for the alleged illegality committed by them. The trial Court has taken the view that the State of Orissa is not liable since these officers have not been made parties. But that does not appear to be correct, inasmuch as if the State of Orissa was liable, it did not matter whether those officers were made or not made parties (vide *Secy, of State for -India v, Sheoramjee* ILR (1949) Nag 875 : (AIR 1952 Nag 213).

The learned Government Advocate sought to place the matter from another aspect and it was that, since the Central Government officers made the survey, at best the Union of India, but not the State of Orissa, could be liable for their tortious action. Since the Government of Orissa authorised the Central Government officers under its statutory power to make the survey, those officers must for that purpose be deemed "to have employed by the State of Orissa, and it did not matter who was their paymaster. However, for the reasons indicated earlier I agree with the finding of the trial Court that the plaintiff has no cause of action against the State of Orissa.

6. NOW coming to the question of quantum of damages, the evidence on the plaintiff's side is that on some occasion, the witnesses found some 10 to 15 officers directing cutting of trees from the plaintiff's land and on a subsequent

occasion, the plaintiff with the help of the witnesses went round through his villages and prepared a list of all the trees that had been cut and the lands that had been dug or otherwise damaged and made a note thereof in Ext. 2, which was signed by the witnesses so accompanying the plaintiff.

No doubt, there is no positive evidence on the plaintiffs side that each and every one of the trees, so found to be cut, had been cut, or every pit, so dug, had been dug under the authority of the officers concerned. But there was no suggestion on the defence side that apart from the officers any other third person went upon the plaintiff's land during the relevant time and cut the trees or dug earth unconnected with the activities of the officers.

The defendant could have well pleaded as to what trees were actually Cut by the officers concerned which must have been a matter of record. As a matter of fact, as appears from Ext. 1 (a), a letter from the Land Acquisition Office, to the plaintiff, counting of trees in those villages had been made by the Agricultural Development Officer of the Government of Orissa; but the State of Orissa has taken no positive stand as to what was the result of that counting.

In the absence of any suggestions either in the pleading or in the evidence that the damages caused to the plaintiff were done not only by the officers, but also other disconnected persons, the inference is irresistible that all the loss that accrued to the plaintiff was a result of the act of the officers. The trial Court did not decide the question of damages and left it open, since the plaintiff did not plead that the timbers or fuels cut had been removed away by the officers and since the plaintiff did not deduct the price of the cut timbers from the price of the (live ?) trees before they were cut, in assessing the damages.

The distinction, that the trial Court sought to make, did not arise out of the pleadings of the parties. The plaintiff estimated the price of his trees, because they- were cut, irrespective of whether left back or taken away. No doubt, the price of a living tree is always more than its price after it is cut. If a tort-feasor, after cutting a live tree, leaves it to the charge of the owner, then alone he can urge that he is liable only for the difference between the price of the standing tree and that of the cut tree.

If he cuts a tree without authority and does not specifically leave it to the custody of the owner he is liable to reimburse the owner for the loss of the whole tree and he cannot claim any concession on the ground that the owner does not prove that he has misappropriated the dead tree. So, I hold that the plaintiff has established the quantum of damages that has been claimed by him, of course minus the interest claimed, for which no justification has been indicated.

7. In the result, the appeal is dismissed with costs.

Das, J.

8. I agree.