

(2012) 10 OHC CK 0010

In the Orissa High Court

Case No : Original Jurisdiction Case No. 7386 of 1999 and Writ Petition (Civil) No. 13313 of 2005

Fakir Charan Singh (Since Dead)

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 18-10-2012

Acts Referred:

Constitution of India, 1950 — Article 252(1)
Urban Land (Ceiling and Regulation) Act, 1976 — Section 10, 10(3), 10(5), 10(6), 11
Urban Land (Ceiling and Regulation) Repeal Act, 1999 — Section 3, 3(1)(a), 3(2)(a) (b), 4

Citation : (2013) 1 OLR 125

Hon'ble Judges : V. Gopala Gowda, C.J.; B.N. Mahapatra, J

Bench : Division Bench

Advocate : Bijan Ray, C. Choudhury, B. Mohanty, S. Mohanty, B. Moharana and Miss Vijayashree, for the Appellant; R.K. Mohapatra Addl. Govt. Advocate, R.K. Rout, R.K. Nanda for Intervenor in WPC 13313/ 2005, B.S. Das, A.K. Panigrahi, K.C. Nayak and M.K. Biswal for Intervenor in both cases, for the Respondent

Final Decision : Allowed

Judgement

V. Gopala Gowda, C.J.—These two writ petitions have been filed by the declarant/ owners under the repealing Urban Land (Ceiling and Regulation) Act, 1976 seeking the relief to quash the order dated 28.3.1998 passed by the Special Officer and Competent Authority, Urban Agglomeration, Cuttack in U.L.C. Case Nos. 4/83, 5/83, 11/84, 12/84, 13/84 and 14/84 as well as the order dated 5.5.1999 of the appellate authority, namely, Revenue Divisional Commissioner, Central Division, Cuttack in U.L.C. Appeal No. 2 of 1998 and to allow the claim of the petitioners in the said U.L.C. cases. Bereft of unnecessary details, the short facts, which are necessary for effectual adjudication of the case are that:

Late Sanatan Singh had five sons, namely, Fakir, Ashok, Rabindra, Ajad and Saroj and his widow Lobha Bibi. During the year 1972, Fakir Singh (the deceased petitioner) filed a suit for partition bearing T.S. No. 112 of 1972 in the Court of

the learned Subordinate Judge, Cuttack and ultimately the said suit was decreed on 5.4.1973 on compromise, thereby the land in question was partitioned in equal shares amongst all the five brothers. After more than three years of the said partition, the Urban Land (Ceiling and Regulation) Act, 1976 (Act 33 of 1976), hereinafter to be referred to as "Act", in short, came into force imposing ceiling on the vacant land in the urban agglomeration. Pursuant to Section 7(1) of the said Act, the deceased petitioner filed return before the competent authority, which was registered as Ceiling Case No. 4 of 1983. Similarly, the mother of the deceased petitioner and other four brothers filed separate returns, which were also registered as Ceiling Case No. 5 of 1983, 11 of 1984, 12 of 1984, 13 of 1984 and 14 of 1984 respectively. The competent authority under the Act heard all the matters and by a common order dated 28.3.1998 held that the brothers and their mother got Ac. 19.532 dec. of surplus land. Challenging the said common order, the deceased petitioner as appellant filed U.L.C. Appeal No. 2 of 1998 before the appellate Court, namely, Revenue Divisional Commissioner, Central Division, Cuttack, wherein the appellate Court also confirmed the order passed by the competent authority.

2. Challenging the orders passed by the competent authority and the appellate Court, the deceased-petitioner filed OJC No. 7386 of 1999 on 23.09.1999. In the meantime the Urban Land (Ceiling and Regulation) Repeal Act, 1999, (Act 15 of 1989) hereinafter to be referred to as "Repeal Act" came into force with effect from 22.3.1999, which was adopted by the State Government on 5.4.2002 vide resolution passed in the State Legislature published in the Orissa Gazette Extraordinary No. 574 dated 27.4.2002, Section 3 (2) whereof provides that where any land is deemed to have vested in the State Government under Sub-section (3) of Section 10 of the Principal Act, possession of which has not been taken over by the State Government or any person duly authorized by the State Government in this behalf or by the competent authority and any amount has been paid by the State Government with respect to such land, then such land shall not be restored unless the amount paid, if any, has been refunded to the State Government and u/s 4 of the Repeal Act, all proceedings relating to any order made or purported to be made under the Principal Act pending immediately before the commencement of the Act, before any Court, Tribunal or other authority, shall abate.

3. The said writ petition (OJC No. 7386 of 1999) was disposed of with a direction to the State Government to consider the application of the petitioner u/s 20 and pass appropriate order in consonance with the Repeal Act as also the circulars and resolutions issued by it at an early date. Pursuant to the said direction of this Court, no order was passed applying the said provisions of the Repeal Act despite the fact that the State Government represented by the Housing and Urban Development Department in its meeting held on 26.4.2002 passed a resolution regarding restoration of the surplus land to the land owners. Thereafter, the deceased-petitioner filed a review petition bearing RVWPET No. 112 of 2005 before this Court to review the order dated 29.6.2005 passed in OJC No. 7386 of

1999. In the said review petition, it was specifically averred that neither possession was taken over nor any compensation was paid to the petitioners and in appropriate cases where possession has neither been taken over nor compensation has been paid, the State Government still holds the power to grant exemption as prescribed u/s 20 in view of the adoption of the Repeal Act by the State Legislature. This Court while allowing the review petition, in paragraph 6 and 7 observed as follows:

6. In view of the fact that when in the Central Act adopted by the State Government, it has been specifically provided that no compensation should be paid for the land possession of which was not taken, in the instant matter, it was mentioned by the petitioner that the Government being conscious of such violation, on 30.5.2003 directed the competent authority as under:

Though Tahasildar was directed on 6.5.1999 for taking over possession, eventually actual physical possession having not yet been over, he may further be directed to take steps for taking over possession and evict.....

7. In view of the above, we think that it is a fit case for rehearing of the writ petition out of which this review petition arises. Accordingly, the order dated 29.6.2005 passed in OJC No. 7486 of 1999 is set aside and the review petition is allowed.

Registry is directed to list OJC No. 7386 of 1999 in the next month for fresh hearing along with W.P. (C) No. 13313 of 2005 and the connected contempt case. However, counter affidavit may also be filed by the parties, if they so desire.

4. During pendency of the review petition, the other writ petition bearing W.P. (C) No. 13313 of 2005 was filed by the deceased petitioner for the reliefs as prayed for in the first writ petition (OJC No. 7386 of 1999). W.P. (C) No. 13313 of 2005 was listed before this Court along with Misc. Case Nos. 4019 of 2008 and 15566 of 2009 and the first writ petition (OJC No. 7386 of 1999) for hearing. The matters have been adjourned from time to time on the request of the learned counsel for the State to produce the records to show whether the authorized officer of the State Government u/s 10(5) of the Act, has taken over possession of the land involved in the case after the notification was published u/s 10(3) of the Repeal Act in order to examine the contention urged on behalf of the petitioners. However, during pendency of both the writ petitions, the original petitioner, Fakir Singh died and by order dated 25.10.2011 passed in W.P. (C) No. 13313 of 2011, the present petitioners have been substituted as the legal heirs of the deceased petitioner Fakir Singh. Ultimately on 14.2.2012, the matters were heard and reserved for judgment.

5. Mr. Bijan Ray, learned Senior Counsel appearing for the petitioners submitted that the Act came into force with effect from 22.3.1999 and the competent authority over-riding the Civil Court decree dated 5.4.1973 in T.S. No. 112 of 1972, passed the impugned order dated 28.3.1998 holding that the deceased petitioner and his brothers and mother got Ac. 19.532 dec. of surplus land and

issued notification u/s 10(5) of the Act without taking into consideration the partition of the land amongst the five brothers of the deceased petitioner. He further submitted that the appellate authority without examining the legal contentions urged on behalf of the appellant, (deceased petitioner), in the appeal against the order of the competent authority, dismissed the appeal on 5.5.1999. On 6.5.1999 the Government issued a letter to the Tahasildar to take over possession of the declared surplus urban land. He further submitted that the Tahasildar was not authorized by the State Government to take over possession as required u/s 10(5) of the Act. It is pleaded that formal possession was taken over by the Tahasildar. Again by another letter dated 30.5.2003, the Government directed the competent authority to take actual possession in respect of the land of the deceased petitioner, which was declared as surplus under the Repeal Act. It is needless to mention that on 6.5.2005 the petition u/s 20 of the Repeal Act was presented before the Government for grant of exemption to hold the surplus land, which was declared as surplus land by the competent authority vide order dated 28.3.1998. This Court also by order dated 29.6.2005 in OJC No. 7386 of 1999 directed the State Government to consider the application of the deceased petitioner u/s 20 of the Repeal Act for grant of exemption of land in question under the provisions of Repeal Act. Since the State Government did not comply with the said order passed in the above referred writ petition, the deceased petitioner filed a review petition being RVWPET No. 112 of 2005. Despite the direction of this Court to the learned Government Advocate to produce the records, the same were not produced, rather they filed a counter affidavit on 25.4.2006 taking untenable contentions that formal possession in respect of the land, which was declared as surplus was taken. This Court by order dated 20.9.2006 directed the Secretary of the Department to file affidavit as to whether the order of this Court dated 29.6.2005 has been complied with and the decision has been taken on the application of the deceased petitioner u/s 20 of the Act. Learned Sr. Counsel appearing on behalf of the petitioners submitted that the Repeal Act, which is adopted by the State Government of Odisha pursuant to the resolution of the State Legislature under Article 252(1) of the Constitution, is applicable to the cases, which are pending, and the same stands abated as per Section 4 of the said Repeal Act. It is vehemently contended by him that as on the date of adoption of the Repeal Act, since the first writ petition (OJC No. 7386 of 1999) was pending before this Court, Section 4 of the Repeal Act is attracted. Apart from the said legal contention, he has vehemently contended that after passing order u/s 10(3) of the Act, considering the objection to the draft statement prepared by the competent authority on the basis of the declaration made by the land owners regarding the surplus urban land, declared the land as excess vacant land and the same shall be deemed to have been acquired by the State Government and upon publication of such declaration, such land shall be deemed to have vested absolutely in the State Government free from all encumbrances with effect from the date so specified. Thereafter, Sub-section 4(i) and (ii) of Section 10 of the Repeal Act will come into operation that no person shall transfer by way of sale, mortgage, gift, lease or

otherwise any excess land specified in the notification and any such transfer made in contravention of the said provision shall be deemed to be null and void and no person shall alter or cause to be altered the use of such excess vacant land.

6. Learned Sr. Counsel has placed strong reliance upon Sub-section (5) of Section 10, which says that where any vacant land is vested in the State Government under Sub-section (3), the competent authority may, by notice in writing, order any person who may be in possession of it to surrender or deliver possession thereof to the State Government or to any person duly authorized by the State Government in this behalf within thirty days of the service of the notice. It is specifically averred that no such notice has been served upon the deceased petitioner either by the competent authority or any other person duly authorized by the State Government in that behalf. Reliance is also placed upon Sub-section (6) of Section 10, which stipulates that if any person refused or fails to comply with an order made under Sub-section (5), the competent authority may take possession of the vacant land or cause it to be given to the concerned State Government or to any person duly authorized by such State Government in this behalf and may for that purpose use such force as may be necessary. The said procedure has not been followed either by the competent authority or any other person duly authorized by such State Government in this behalf to take over possession by issuing thirty days notice to the deceased petitioner. Therefore, the stand taken by the State Government in its counter that formal possession was taken and the said contention is further reiterated by the State Government to the effect that the State Government directed the competent authority to take actual physical possession by letter dated 30.5.2003 is an afterthought. Thus, it makes it clear that by the said date, the Repeal Act was adopted by the State Government pursuant to the resolution passed by the State Legislature. Therefore, according to him, the provisions of Sections 3(2)(a)(b) and 4 of the Repeal Act are attracted to the fact situation. He further contended that the records, which are produced as per the direction of this Court, do not disclose the fact of taking over possession by the competent authority after the order passed u/s 10(3) of the Repeal Act and the notifications were issued in this regard by following the procedure contemplated u/s 10(5) and Section 10(6) of the Repeal Act. He further submitted that even assuming for the sake of argument that the State Government has taken actual physical possession of the said land but as per Section 11 of the Act where any vacant land is deemed to have been acquired by the State Government u/s 10(3), such State Government shall pay to the person or persons having any interest therein the amount as mentioned in the said provision. In the present case, no such amount has been paid either to the deceased petitioner or the brothers of the deceased petitioner. Therefore, learned Senior Counsel submits that the benefit of the provisions of the Repeal Act referred to supra shall be extended to the case of the petitioners.

7. Mr. R.K. Mohapatra, learned Government Advocate sought to justify the order of the competent authority affirmed by the appellate authority and contended

that the direction issued by this Court on 29.6.2005 to consider the application u/s 20 of the Repeal Act could not have been considered in view of the repeal of the principal Act as on that date and further contended that since the land has been vested to the State Government, the provisions of Sections 3(2)(a)(b) or Section 4 of the Repeal Act are not attracted to the case in hand for the reason that the order of the competent authority has been affirmed by the appellate authority and possession of the land has been taken over by the Tahasildar being duly authorized by the State Government. Therefore, the benefit of the provisions of the Repeal Act as adopted by the State Government vide resolution of the State Legislature, is not available to the petitioners in the fact situation. Therefore, he prayed for dismissal of both the writ petitions.

8. With reference to the aforesaid factual and legal contentions, the following points would emerge for consideration of this Court.

(i) Whether the provisions of Section 3 (2)(a)(b) and Section 4 of the Urban Land (Ceiling and Regulation) Repeal Act, 1999 adopted by the State Legislature vide resolution published in the Orissa Gazette Extraordinary No. 574 dated 27.4.2002 shall be applicable to the case of the writ petitioners ?

(ii) Whether the mandatory provisions of Sections 10(5) and 10(6) of the Act have been complied with either by the competent authority or by any other person duly authorized by the State Government to take over possession of the declared surplus land of the petitioners ?

(iii) Whether during pendency of the writ petitions against the orders of the competent authority and the appellate authority, the provisions of the Repeal Act have to be extended to the case of the petitioners ?

(iv) To what order ?

9. To appreciate the points involved in this case, it is necessary to quote the relevant provisions of Sections 3 and 4 of the Repeal Act, which are as under:

3 (1) The repeal of the principal Act shall not affect -

(a) the vesting of any vacant land under Sub-section (3) of Section 10, possession of which has been taken over by the State Government or any person duly authorized by the State Government in this behalf or by the competent authority;

(b) the validity of any order granting exemption under Sub-section (1) of Section 20 or any action taken thereunder, notwithstanding any judgment of any Court to the contrary;

(c) any payment made to the State Government as a condition for granting exemption under Sub-section (1) of Section 20.

(2) Where -

(a) any land is deemed to have vested in the State Government under Sub-

section (3) of Section 10 of the Principal Act but possession of which has not been taken over by the State Government or any person duly authorized by the State Government in this behalf or by the competent authority; and

(b) any amount has been paid by the State Government with respect to such land, then such land shall not be restored unless the amount paid, if any, has been refunded to the State Government.

4. All proceedings relating to any order made or purported to be made under the principal Act pending immediately before the commencement of this Act, before any Court, Tribunal or other authority shall abate:

Provided that this section shall not apply to the proceedings relating to Sections 11, 12, 13 and 14 of the principal Act in so far as such proceedings are relatable to the land, possession of which has been taken over by the State Government or any person duly authorized by the State Government in this behalf or by the competent authority.

10. The undisputed fact is that the competent authority passed order declaring an extent of Ac. 19.532 dec. as surplus urban land despite the Civil Court's decree partitioning the shares amongst five brothers of the deceased petitioner. The notification u/s 10(3) of the Act was published on 25.6.1998 and that must be followed by taking over possession either by the competent authority or by duly authorized person as provided u/s 10(5) of the Act. Against the said order of the competent authority, appeal was filed in Appeal Case No. 2 of 1998 before the Revenue Divisional Commissioner, Central Division, Cuttack which was dismissed on 5.5.1999, against which order the deceased petitioner approached this Court by filing a writ petition on 23.6.1999 bearing OJC No. 7386 of 1989. The said writ petition was listed before this Court on 1.7.1999, on which date, notice was issued to the opposite parties. By that time the principal Act was repealed by Central Act 15 of 1999, which came to be effective from 22.3.1999. The said Repeat Act was adopted by the State Legislature vide Notification dated 26.4.2002, which was published in the Orissa Gazette Extraordinary No. 574 dated 27.4.2002. This Court by order dated 24.12.2003 stayed the distribution of the case land involved in the proceedings under Annexures 1 and 2. The said writ petition was disposed of on 29.6.2005 directing the State Government to consider the application filed by the deceased petitioner u/s 20 of the principal Act and pass orders in consonance with the Repeal Act as also the circulars and resolutions issued by it at an early date. That apart, during pendency of the review petition, the other writ petition, i.e. W.P. (C) No. 13313 of 2005 was also filed on 26.10.2005. So, the proceedings under the provisions of Section 10 against which appeal is provided u/s 12 were under challenge in the said writ petition proceedings. Therefore, the provisions of Section 4 of the Repeal Act are attracted to the fact situation. Apart from the said factual and legal contentions urged on behalf of the petitioners, learned Sr. Counsel, has also rightly contended that possession of the declared surplus land of the deceased petitioner vide notification u/s 10(3) dated 25.6.1998 was not taken, which is evident from

the Government letter dated 6.5.1999 to the Tahasildar to take over possession. On perusal of the records produced by the learned Government Advocate, we do not find any material that the State Government in the Urban Development Department represented by the political executives has authorized the Tahasildar to take over possession, rather by a simple letter dated 6.5.1999 the State Government directed the concerned Tahasildar to take over possession, which does not amount to authorization by the State Government as required under the Business Transaction Rules. Apart from the said factual position, in the review order at para-6, there is specific mention regarding the direction by the Government to the competent authority on 30.5.2003 to take actual physical possession, which fact goes to show that possession of the declared surplus land was not taken over by the competent authority from the deceased petitioner. That apart, no compensation has been paid by the State Government in lieu of acquisition of the vacant land of the deceased petitioner as required u/s 11 of the Act.

11. The Apex Court in *Balwant Narayan Bhagde Vs. M.D. Bhagwat and Others*, while dealing with a case under the Land Acquisition Act, 1894, has distinguished "actual possession" and "symbolic possession". In para 26 of the said judgment, it has been held as follows:

In a proceeding under the Act for acquisition of land all interests are wiped out. Actual possession of the land becomes necessary for its use for the public purpose for which it has been acquired. Therefore, the taking of possession under the Act cannot be "symbolical" in the sense as generally understood in Civil Law. Surely it cannot be a possession merely on paper. What is required under the Act is the taking of actual possession on the spot. In the eye of law the taking of possession will have the effect of transferring possession from the owner of the occupant of the land to the Government.

....It is therefore, clear that taking of possession within the meaning of Section 16 or 17(1) means taking of possession on the spot. It is neither a possession on paper not a "symbolical" possession as generally understood in Civil Law. But the question is what is the mode of taking possession ? The Act is silent on the point. Unless possession is taken by the written agreement of the party concerned the mode of taking possession obviously would be for the authority to go upon the land and to do so some act which would indicate that the authority has taken possession of the land. It may be in the form of a declaration by beat of drum or otherwise or by hanging a written declaration on the spot that the authority has taken possession of the land. The presence of the owner or the occupant of the land to effectuate the taking of possession is not necessary. No further notice beyond that u/s 9 (1) of the Act is required. When possession has been taken, the owner or the occupant of the land is dispossessed. Once possession has been taken, the land vests in the Government.

While dealing with a similar matter like the present one, the apex Court in *Vinayak Kashinath Shilkar v. Dy. Collector and Competent Authority and others*,

2012 (3) SCALE 385 held as follows:

It is clear from the above provisions that where the possession of the vacant land has not been taken over by the State Government by any person duly authorized by the State Government in this behalf or by the competent Authority, the proceedings under the Act would not survive. Mere vesting of the vacant land with the State Government by operation of law without actual possession is not sufficient for operation of Section 3(1)(a) of the Repeal Act.

Similar view has also been taken by the Apex Court in *Ritesh Tewari and Another Vs. State of U.P. and Others*, wherein it has been held that all proceedings pending before any Court/authority under the 1976 Act, stood abated automatically on coming of 1999 Act into force, provided the possession of the land involved in a particular case had not been taken by the State.

12. In view of the aforesaid legal position enunciated by the Apex Court and the factual situation that the possession of the land in question has not been taken by the Government of Odisha, we are satisfied that the petitioners would be entitled to the relief as claimed and we declare that the proceedings under the Act in relation to the subject property stood abated. Therefore, the provisions of Sections 3(2)(a)(b) and 4 of the Repeal Act are attracted to the facts of the case.

13. Apart from that, the provisions of Sections 10(5) and 10(6) of the Act are to be strictly adhered to by the competent authority by issuing notice to the deceased petitioner, who was the declarant/owner and his brothers by giving thirty days clear notice. In view of the factual contention urged by the petitioners' counsel, we also do not find any document evidencing the fact of service of notice, as required u/s 10(5), either by the competent authority or by any person duly authorized by the State Government in this behalf. If upon service of notice u/s 10(5) on the deceased-petitioner or his brothers to deliver vacant possession of the land within thirty days they failed to comply with the same, then the competent authority or duly authorized person by the State Government, in its behalf made for that purpose might have used such force, as may be necessary as provided u/s 10(6) of the Act. No document is forthcoming from the records produced by the opposite parties to show that such procedure has been followed. Without compliance of the statutory provisions as provided under Sections 10(5) & 10(6) of the Act, taking over possession of the land declared as surplus by the opposite parties would entail a serious civil consequences, as a result of which the petitioners will be deprived of their ownership of such land, which would be in violation of the constitutional rights. It is necessary for this purpose to refer to the judgment of the Supreme Court reported in *Babu Verghese and Others Vs. Bar Council of Kerala and Others*, , wherein the apex Court referring the decision of the Privy Council and earlier decisions laid down that statute prescribes a particular procedure to do in a particular manner and it must be done in that manner or not at all. It is worthwhile to extract para 31 and 32 of the said judgment, which are as follows:

31. It is the basic principle of law long settled that if the manner of going a particular act is prescribed under any Statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in *Taylor v. Taylor*, (1875) 1 Ch D 426 which was followed by Lord Roche in AIR 1936 253 (Privy Council) who stated as under:

Where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all.

32. This rule has since been approved by this Court in *Rao Shiv Bahadur Singh and Another Vs. The State of Vindhya Pradesh*, and again in *Deep Chand Vs. The State of Rajasthan*, . These cases were considered by a Three Judge Bench of this Court in *State of Uttar Pradesh Vs. Singhara Singh and Others*, and the rule laid down in *Nazir Ahmad's case* (supra) was again upheld. The rule has since been applied to the exercise of jurisdiction by Courts and has also been recognised as a salutary principle of administrative law.

In view of the foregoing discussions, point Nos. (i) and (ii) are answered in favour of the petitioners.

14. Point No. (iii) is required to be answered in favour of the petitioners and against the opposite parties. There is no dispute that against the impugned orders of the competent authority and appellate authority, writ petitions are pending. By that time the Repeal Act came into force and the same has been adopted by the State Legislature with effect from 26.4.2002, as a result of which all proceedings including the order passed by the competent authority publishing the notification u/s 10(3) of the Act abated. Since the proceedings under the principal Act are pending before this Court, the provisions of the Repeal Act are applicable to the case of the petitioners. Accordingly point No. (iii) is answered in favour of the petitioners.

15. Since point Nos. (i) to (iii) are answered in favour of the petitioners, this Court is required to hold that the order of the competent authority dated 28.3.1998, which was affirmed by the appellate Court on 6.5.1999 and the declaration of the petitioners' land as surplus are null and void and are accordingly quashed. The petitioners are entitled to get the benefit of the provisions of Sections 3(2)(a)(b) and 4 of the Repeal Act.

16. The writ petitions are allowed. No costs.

B.N. Mahapatra, J.

I agree.