

(1999) 03 OHC CK 0003

In the Orissa High Court

Case No : Original Jurisdiction Case No. 2337 of 1993

Goutam Chandra Patra

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 16-03-1999

Acts Referred:

Orissa Prevention of Land Encroachment Act, 1972 — Section 7(1), 7(2)

Citation : (1999) 1 OLR 599

Hon'ble Judges : S. Chatterji, Acting C.J.; P.K. Mohanty, J

Bench : Division Bench

Advocate : Addl. Government, S. Dash and S.K. Sahoo, D.R. Mohapatra, for the Appellant; B.H. Mohanty, D.P. Mohanty, S.C. Mohanty and J.K. Bastia (for O.Ps.), for the Respondent

Judgement

P.K. Mohanty, J.—On the basis of a letter received from the petitioner this writ petition has been registered as O.J.C. No. 2337 of 993 as a public interest litigation.

Misc. Case No. 6634 of 1993 has been filed on behalf of some villagers of village Mankha for intervention and the intervention has been allowed by order dated 5.10.1994. Subsequently, Misc. Case No. 5388 of 1997 was filed by one Braja Kishore Panda and Swapneswar Panda for intervention and the same was allowed by order dated 1.7.1997 and the intervenors were impleaded as opposite parties.

2. The petitioner's case as revealed from the petition and as submitted by Sri B. R. Sarangi, appearing for the petitioner amicus qitriae is that he is the son of Gunanidhi Patra who was a poor freedom fighter of village Majurai and whose property has been forfeited during the British Rule. It is claimed that the petitioner has no source of income from landed property and from other sources. Plot No. 623/ 986 comprising of an area of Ac. 0.38 decimals in "Kisam-Nayanjori" under Khata No. 238 of village Mankha, P.S.Govindpur, Dist. Cuttack belongs to Irrigation Department and this land is being leased out to different persons and that out of the said Ac. 0.28 decimals, the petitioner who is a

landless and homestead person, had constructed a thatched house over an area of Ac. 0.01 decimals of the above land by taking a loan from the Bank to use the house for living purpose and to run a small business. It is alleged that without prior notice/intimation the Tahasildar, Niali suddenly sent a notice under the Orissa Prevention of Land Encroachment Act (hereinafter referred to as the "Encroachment Act") to vacate the land without giving him an opportunity of being heard. The petitioner filed Encroachment Appeal before the Sub-Collector, Cuttack Sadar bearing O.P.L.E. Appeal No. 25 of 1992 which was dismissed by order dated 9.9.1992 as against which he preferred O.P.L.E. Revision No. 9 of 1992 before the Addl. District Magistrate (Revenue), Cuttack. It is asserted that by order dated 11.12.1992 the Addl. District Magistrate (Revenue), Cuttack remanded the matter to the Tahasildar, Niali with a direction to settle the land annually in favour of the landless persons in terms of the Government Order. It is submitted on behalf of the petitioner that he filed a lease application before the Tahasildar on 28.1.1993 for settlement of the land in his favour since he fulfils all the conditions indicated in the Addl. District Magistrate's order, but the Tahasildar without giving an opportunity of personal hearing, dismissed the Encroachment Case No. 41 of 1992 by order dated 15.3.1993 behind his back. In spite of production of medical ticket of Adaspur P.H.C. and City Hospital, Cuttack, but however, the lease application is still pending and no steps has been taken by the Tahasildar. However, the petitioner filed Appeal No. 19 of 1993 on 24.2.1993 before the Sub-Collector, Cuttack and the Sub-Collector has called for the L.C.R. from the Tahasildar while granting stay operation of the notice. But however, when the petitioner met the Tahasildar subsequently regarding finalisation of his lease application, no action is being taken. In the above background, the petitioner has prayed as follows :

"In the above premises, the applicant fervently prays that the Hon"ble Court may be graciously pleased to consider the miserable condition of the applicant and since the applicant is in doubt as to the justice to be given to him by the Tahasildar and other executive authorities the matter may kindly be enquired into and steps may kindly be taken at your and directing the Tahasildar to settle the land in favour of the petitioner on lease basis as per lease application submitted by the applicant, as per the order of the A.D.M."

3. Two sets of counter affidavits have been filed, one by the Executive Engineer and the other by opposite parties who have intervened in the case and the impleaded as opposite parties by order dated 5.10.1994. Relating to the claim of the petitioner, it is asserted that the petitioner is not a resident of village Mankha, but is a resident of village Majurai which is about 4 k.ms. away from village Mankha. The intervenor- opp. parties claimed that the petitioner is an anti-social and he has suffered three years imprisonment in a Bihar case, inasmuch as by suppression of material facts, the petitioner is trying to get sympathy of this Court, it is asserted that the petitioner is the owner in possession of several parcels of land in village Majurai. In the record-of-rights of 1983, the properties of the petitioner stood recorded in the name of his father Gunanidhi Patra out of

which some were his joint family properties and some of which are self-acquired. Some record-of-rights have been annexed as Annexures A and B to show that the petitioner is not a landless person. It is further alleged that the petitioner had constructed a thatched house in the homestead plot and the same has been let out to different monthly tenants. In essence, the opp. parties" claim that the disputed land is situated in village Mankha and recorded as a "Nayanjori" running as a longstrip by the side of Kakatpur Branch chanel and belongs to the Irrigation Department, the land is left apart during the time of construction of the chanal embankment to provide access to the general public and from the road running on the canal embankments to their private lands. It is claimed that the "Nayanjori" is the only plot of land which can be used as a passage to approach the main road running on the canal embankment and obstruction over this Nayanjori will cause obstruction of passage and serious prejudice to the villagers having their lands by the side of the Nayanjori land. It is the case of the Executive Engineer as well as the intervenor- opposite parties that at the time of necessity earth is removed from the Nayanjori and is used for repair works of the road and canal embankment. However, the Irrigation Department leases out this land to different villagers for agricultural purpose only. It is alleged that in the year 1992, the present petitioner forcibly encroached this Nayanjori land and constructed a structure thereon and the Tahasildar coming to know of it started encroachment proceeding against the petitioner which was numbered as Encroachment Case No. 41 of 1992 under the provisions of Orissa Prevention of Land Encroachment Act, 1972. Due notice was issued, orders were passed against the petitioner for eviction as against which the petitioner moved the appellate authority, the Sub- Collector, Cuttack which was also dismissed. The petitioner preferred a Revision before the Addl. District Magistrate, Cuttack, who remanded the matter to the Tahasildar for fresh consideration. Pursuant to the notice, the petitioner appeared before the Tahasildar, admitted the encroachment and prayed for leasing the encroachment land in his favour, but the Tahasildar by order dated 17.2.1993 rejected his prayer. The petitioner was duly evicted following proper procedure of law. The entire order-sheet of Encroachment Case No. 41 of 1992 has been annexed as Annexure-D to the counter affidavit.

4. The Executive Engineer, Prachi Irrigation Division in his affidavit claims that Plot No. 623/900 under Khata No. 235 of village-Mankha belongs to Irrigation Department, which is a side cutting land by the side of the road of Kakatpur branch canal between R.D. 20.39 K.M. to 20.577 K.M. and it is leased out on annual basis, when borrowing of earth is not necessary. In paragraph-3 of the affidavit, it has been stated that the disputed plot was leased out to one Braja Kishore Panda of village Mankha for one year during 1992-93 on payment of Rs. 100/-vide S.D.O.,PratapNagari"s Receipt No. 9728/493381 dated 11.5.1992. But however, during the subsistence of the lease period, the petitioner Gautam Patra with the help of others of village Majurai had forcibly constructed a thatched house over this plot on 19.6.1992 and the lessee Sri Braja Kishore Panda having brought this fact to the notice of the Sub-Division Officer, Pratapnagari on

20.6.1992, the Section Officer, Jharpada has reported the fact to the Executive Engineer, Prachi Irrigation Division who in turn informed the Officer- in-charge, Govindpur P.S. for taking necessary action by letter No. 153 dated 24.6.1992. The matter was also intimated to the Tahasildar and the Tahasildar removed the temporary thatch on 31.3.1993 constructed unauthorisedly by the petitioner after starting an encroachment proceeding.

5. Mr. B.R.Sarangi, learned counsel appearing as *amicus curiae* for the petitioner has submitted that in facts and circumstances of the case and in view of the order of the Revisional Authority, the Addl. District Magistrate, Cuttack dated 11.12.1992, it was incumbent upon the Tahasildar to allow the petitioner an opportunity of being heard and proceed with the case in accordance with the direction of the Addl. District Magistrate, but the Tahasildar illegally has refused to take any action. It is further submitted that the land has been recorded as Nayanjori, but there is no impediment u/s 7 of the O.P.L.E. Act to settle that with the petitioner who is a landless and homesteadless person. Mr. B. H. Mohanty, learned counsel for the opp.parties-intervenors has however seriously objected to the claim for settlement and contended that the Nayanjori land is in the category of Rakhit land for the public purpose inasmuch as it is reserved for the purpose of taking earth for repair of embankment and the road. It is his further contention that the disputed land in question is used as a road for the ingress for the adjacent land owners to the embankment road since the embankment road and the land of the op. parties are intervened by the disputed land which is used as the only path.

6. In view of the rival contentions of the parties, the moot question that arises for consideration is whether the land which was in unauthorised occupation of the petitioner, could be settled in favour of the petitioner in view the provision of Sub-section (2) of Section 7 of the Encroachment Act, 1972. Section 7(1) provides for summary eviction, forfeiture and fines. Any person occupying the land for which he is liable to pay assessment u/s 7, shall be summarily evicted by the Tahasildar and any crop or other produce raised on the land, any encroachment such as building and other constructions or anything deposited thereon shall be liable to forfeiture. However, under Sub-section (2) of Section 7. if the land is in unauthorised occupation of a landless person settled the same with him subject to further conditions laid under Clause (a) of Sub-section (2). Under Clause (b) of Sub-section (2), however, where any land is in unauthorised occupation of a homesteadless person, which is being utilised by him as homestead, the Tahasildar shall, instead of evicting such person, settle the same with him subject to the conditions laid therein. However under the proviso to Sub-section (2), no such settlement shall be made if the land belongs to the categories enumerated therein. Sub-section (2)(b) of Section 7 may be quoted hereunder :

"(2)(b) Where any land is in the unauthorised occupation of a homesteadless person, which is being utilised by him as homestead, the Tahasildar shall, instead

of evicting such person, settle the same with him, so, however, that the land so settled with him shall not exceed one-tenth of an acre :

Provided that no such settlement shall be made if the land belongs to any of the following categories, namely :

(a) lands recorded as Gochar, Rakhit or Sarbasadharan in any record-of-rights prepared under any law;

(b) lands which are -

(i) set apart for the common use of villages;

(ii) used as house-site, back-yard or temple-site whether or not recorded as such, in the record-of-rights:

(iii) likely to be required for any development scheme and are declared as such by the State Government by a notification;"

It is revealed from the records that the petitioner has already been evicted from his unauthorised occupation, but the question remains whether he could be settled with the land if he fulfils the conditions and restrictions imposed u/s 7 of the Encroachment Act. The intervenor villagers have raised several contentions and referred to several decisions in support of their contentions that the land in question being of kissam "Nayanjori", it is a communal land and a part of the embankment road necessarily being utilised for the purpose of repair of the embankment and the road, and therefore is of objectionable in nature and cannot be settled with the petitioner. Further, the land is being used by the villager as a road for ingress to their land adjacent to the embankment. From the impugned orders, it appears that the Revenue Authorities have not directed their enquiry towards the eligibility of the petitioner or otherwise for settlement of the land and the nature and kissam of the land as to whether it is available to be settled or not, serious disputed questions of facts have been raised by the intervenors- opposite parties as to the objectionable nature of land and question whether the land can be settled with an encroacher inasmuch as the encroachment of the petitioner is for hardly few months. The eligibility of an applicant, the nature of the land and its availability for settlement in accordance with the scope and ambit of Encroachment Act has to be determined on appreciation of several factors placed and therefore the authorities under the said Act are adequately suited to determine the matter. A writ Court is not the appropriate forum to get into the factual matrix of the matter when the facts are seriously in dispute. Undisputedly, the appeal of the petitioner against the order of the Tahasildar rejecting his application for settlement is pending consideration before the Sub-Collector, Cuttack, Sadar in O.P.L.E. Appeal No. 19 of 1993.

7. In that view of the matter, we quash the order of the Tahasildar rejecting petitioner's application for settlement of the land in his favour and direct the Tahasildar, Niali to consider the petitioner's application for settlement of the land afresh in accordance with law. Consequently, O.E.A. Appeal No. 19 of 1993

pending before the Sub- Collector, Cuttack shall stand disposed of. It is further directed that while considering the said application, the Tahasildar shall allow the petitioner as well as the intervenors-villagers to place all relevant materials for consideration of their respective claims and after hearing the parties or their counsel, pass appropriate orders in accordance with law. The petitioner having been already evicted, this exercise should be completed preferably within a period of six months from the date of communication of this order.

The writ petition is disposed of with the aforesaid terms.

S. Chatterji, A.C.J.

I Agree