
(2006) 09 OHC CK 0008
In the Orissa High Court

I.G.R.-cum-Excise Commissioner and Another	APPELLANT
Vs	
Prafulla Kumar Das and Others	RESPONDENT

Date of Decision : 13-09-2006

Acts Referred:

Constitution of India, 1950 — Article 21

Citation : (2007) 103 CLT 485 : (2006) 2 OLR 821

Hon'ble Judges : P.K. Mohanty, J;J.P. Mishra, J

Bench : Division Bench

Final Decision : Allowed

Judgement

P.K. Mohanty, J.—The Inspector General of Registration-cum-Excise Commissioner, Orissa and the Sub-Registrar, Soro are the writ petitioners against the orders of the Tahasildar, Soro, in a suo motu Mutation Proceeding on the basis of a letter of the Collector, Baiaore and allowing a 4" passage to O.P. No. 1's land by carving out a 4" wide Road to the O.P. No. 1's land from out of the premises of the Sub-Registrar, Soro, recorded in the name of the Government in P.W.D. Department which has been confirmed in appeal by the Sub-Collector, Baiaore and the order of the Commissioner, Land Records in revision.

2. The brief facts of the petitioners' case are that a Suo Motu Mutation Proceeding registered as Misc. Case No. 1 of 1991 was initiated by the Tahsildar, Soro on the basis of the order of the Collector, Baiaore communicated in Letter Nc.5290 dtd.30.9.1991. One Prafulla Kumar Das, Opp. Party No. 1 moved the Collector that he had purchased a patch of land bearing Hal Plot No. 64 under Khata No. 81 measuring an area Ac.0.20 decimals and had constructed a house upto roof level. But he has not completed the house because there is no way to his plot to carry building materials and, therefore, he should be allowed a 4" wide road from out of the land of P.W.D. which is under the possession of Sub-Registrar, Soro to the adjoining house appertaining to Plot No. 78 in Khata No. 188 which can connect to his house. The Collector on such application instructed the Tahasildar to start a Suo Motu Proceeding and after correction of record of

right carve out a 4" passage from the land of Sub-Registrar, Soro and the boundary will be constructed at the cost of the applicant/Opp. Party No. 1. The Sub-Registrar, Soro objected to the initiation of Suo Motu Proceeding and challenged the jurisdiction of the Collector inter alia on the ground that said Sri Das had filed Title Suit No. 128 of 1976 in the Court of learned Munsif, Balasore impleading several persons including the State of Orissa as Defendant No. 6 and prayed for a declaration of right of passage over the land in question and for injunction to restrain the Defendants not to interfere/challenge the passage over Plot No. 78. The suit was contested by the defendants, but ultimately was dismissed by the judgment dated 2.1.1979 and the said judgment was confirmed in Appeal No. 17 of 1979 by the Addl. Subordinate Judge, Balasore vide judgment dated 24.8.1979. Said Sri Das having failed in his attempt to get the declaration in respect of the plot of land to exercise his right of passage over plot No. 78 belonging to the Public Works Department and in possession of the Sub-Registrar, Soro over which the Sub-Registrar's Office is situated, he moved the Collector for carving out a 4" wide land and to record the same as a public road. The copy of the objection has been annexed as Annexure-1 to the writ application. However, the Tahasildar without having any jurisdiction to carve out any land belonging to the Sub-Registrar, in order to show favour to Sri Prafulla Kumar Das, in his order dated 8.5.1992 carved out 21/2 decimals of land from out of Plot No. 78 to be bifurcated as per the sketch map by marking Plot No. 78/1 with an area of 21/2 decimals by deleting the same from khata No. 188 and directed to record the same under Government Khata under the classification as "Public Path". The copy of such order is Annexure-2.

The petitioner carried the matter in appeal before the Sub-Collector, Balasore. It is submitted that the Sub-Collector after hearing the appeal on a mis-conceived notion of law and on erroneous appreciation of facts held that the land in question has been used as a public path and, as such, there is no illegality committed by the Tahasildar in recording the same as a public path and, therefore, the recommendation of the Collector being appropriate, the Tahasildar has rightly carved out the passage as per the direction. The copy of the appellate order is annexed as Annexure-4. The petitioner then moved the revisional authority, the Commissioner of Land Records and Settlement in Mutation Revision No. 29 of 1994 and by order dated 24.3.1995 the Commissioner has dismissed the revision and hence the present writ application.

3. Opposite party No. 1 has filed a counter affidavit denying the allegations and the averments made in the writ application. It is his case that he has a residential house over Plot No. 64/543 under Khata No. 81 and he wanted to remodel his existing building to a building with concrete roof. While residing in the house he was using a portion of Plot No. 78 belonging to the P.W.D. Department as his approach road but due to obstruction caused by the petitioners, he could not complete the building, and as such he made a representation before the Collector, Balasore to consider his plights and carve out an approach road on the government land. According to opposite party No. 1,

the Collector made an enquiry and having realized the difficulties of opposite party No. 1 directed the Tahasildar to carve out a 4" wide road over plot No. 78 and accordingly the Tahasildar initiated a suo motu Mutation proceeding and on hearing the parties, he allowed the said case and created a separate plot No. 78/1 with an area of 2 1/2 decimals connecting the government road to his plot. Petitioner has admitted that plot No. 78 belongs to the P.W.D. Department along with plot Nos. 76,77 and 79 which is in possession of the Sub-Registrar, Soro. Opposite party No. 1 has taken a stand that filing of T.S. No. 128 of 1976 has no bearing on this case inasmuch as he has not asserted his right of way on the basis of decree in that suit rather he has made an appeal to the State Government through the Collector which can be better termed as mercy petition and that was considered by the Collector and relief was granted in terms of Article 21 of the Constitution as well as the Directive Principles of State Policy to provide road which is a part of right to life. He has supported the orders passed by the revenue authorities in the mutation proceeding, the appeal and the revision.

4. In view of the pleadings of the parties, the first question that falls for consideration is as to whether the Collector could have issued a direction to the Tahasildar to initiate a Suo Motu Mutation proceeding to carve out a portion of the Government land in the name of P.W.D. Department and in possession of the Sub-Registrar to facilitate an individual applicant, who moved the Collector for a road. The second question that is to be considered is whether in view of the decision of the learned Munsif confirmed by the learned Subordinate Judge dismissing opposite party No. 1 's suit for declaration of right of passage over the land in question and for injunction restraining the defendants from interfering with passage over plot No. 78, the Collector or the Tahasildar could have vested such a right on O.P. No. 1 in a suo motu Mutation proceeding and whether the impugned order could have, been passed in a mutation proceeding initiated by the Tahasildar.

5. In order to appreciate the contentions raised by the learned Counsel for the parties, it is necessary to consider the relevant provisions of law regarding mutation. Chapter-IV of the Orissa Survey and Settlement Rules, 1962 deals with maintenance of record-of-rights and maps. Under Rule 32, record-of-right and copy of the map as finally published in accordance with the provisions of the Act or deemed to be the record-of-rights and map finally published under the provisions of the Act and supplied to the Tahasildar shall be maintained and kept up-to-date in accordance with the rules. Rule 34 speaks of grounds on which correction of record-of-rights and maps is to be made. It is profitable to quote the provision of Rule 34 of the Rules. It reads as under:

34. Grounds on which correction of the record-of-rights and map is to be made - The Tahasildar may on application in that behalf of any person interested or on receipt of a report from any of his subordinate officers or on receipt of a notice from the Registrar or Sub-Registrar appointed under the Indian Registration Act,

1908, or from a Court or on his own motion, order any change of any entry in the record-of-rights according to the rules hereinafter prescribed on any one or more of the following grounds, namely:

- (a) that all persons interested in any entry in the record-of-rights wish to have it changed;
- (b) that by a decree in a civil suit, any entry therein has been declared to be erroneous;
- (c) that being founded on a decree or order of a Civil Court or on the order of any competent authority, the entry therein is not in accordance with such decree or order;
- (d) that such decree or order has subsequently been varied on appeal, revision or review;
- (e) that any entry therein has no relationship with the existing facts; and
- (f) that by preparation of a survey record under Chapter II of the Act, any change is necessitated in the record-or-rights.

It is an admitted fact that none of the grounds contemplated under Rule 34 is available to the opposite parties for correction of the record-of-rights. Mutation proceeding has been initiated by the Tahasildar solely on the basis of an order of the Collector to carve out a portion of the government land for granting benefit of a 4" wide road in favour of opposite party No. 1. Learned Counsel for opposite party No. 1 has not been able to point out any provision of law in the Orissa Survey and Settlement Act, the Rules made thereunder or in any other law to show that the Collector is vested with the power to direct the Tahasildar to carve out a portion of government land as road to an individual's plot of land. Opposite party No. 2 in whose favour the land had been directed to be carved out in a mutation proceeding had filed T.S. No. 128 of 1976 in the Court of the learned Munsif, Balasore for declaration of right of passage over the land in question and for injunction to restrain the defendants not to interfere with the plaintiff's exercise of right of passage over plot No. 78. The said suit was contested by several defendants including the writ petitioners and ultimately the suit was dismissed by judgment dated 2.1.1979. Plaintiff-opposite party No. 1 carried an appeal before the learned Subordinate Judge, Balasore in Appeal No. 17 of 1979. The learned Subordinate Judge dismissed the appeal and confirmed the order of the learned Munsif, Balasore dismissing the plaintiff's suit.

The learned Munsif has recorded a finding that the plaintiff has failed to prove that the suit land is being used as a pathway by the members of public of Soro. In the earlier partition suit filed by the vendor of the plaintiff bearing O.S. No. 198 of 1956-1, there was no whisper of any claim of a pathway in the adjoining plot belonging to the State Government. There is also no mention of such a passage in the major settlement record-of-right. Plot No. 78 is bounded by compound wall. The learned Munsif came to the conclusion that the suit land was

not ever used as a passage by the villagers of Gudasahi or people of Soro area and, as such, they have not acquired any right of way over the same. The finding and decision of the learned Munsif was confirmed in appeal and there was no second appeal as against the same. The O.P. No. 1 having failed in his attempt to establish his right of passage over the suit plot in the duly constituted suit, for the reasons best known to him, moved the Collector and the Collector seems to have directed to the Tahasildar to carve out a 4" wide road for him by initiating a mutation proceeding.

A mutation proceeding under Rule 34 of the Orissa Survey and Settlement Rules is to be initiated by the Tahasildar only on the grounds stated under Clauses (a) to (f) of Rule 34. None of the grounds was available to the Tahasildar to initiate a proceeding and pass order for carving out a path. The order of the Collector can neither be construed as a decree of the civil Court nor an order by any competent authority. The Collector could not have settled the land in favour of the applicant before him nor has he done so. The direction of the Collector to the Tahasildar is thoroughly misconceived inasmuch as the Collector is not vested with any power to direct carving out a path for an individual, specially when such individual's claim of a right of way has been dismissed by the competent civil Court and confirmed in appeal.

In any event, a reading of Rule 34 makes it abundantly clear that the Tahasildar in any view of the matter could not have passed an order in a mutation proceeding and altered the area of the land belonging to the Government in order to carve out a passage for an individual like Opp.Party No. 1. The action of the Collector in directing the Tahasildar to initiate a mutation proceeding to carve out a passage is clearly without jurisdiction and has to be declared invalid. Consequently, the initiation of the mutation proceeding by the Tahasildar in purported execution of the order of the Collector for carving out a pathway that too in a mutation proceeding is without the sanction of law and has to be quashed. The order of the appellate authority as well as the reviewing authority as in Annexures-3 and 4 has thus to be quashed.

In the result, the writ petition is allowed. The impugned orders in Annexures-2, 3 and 4 are quashed. However, there shall be no order as to costs in the facts and circumstances of the case.

J.P. Mishra, J.

I agree.