
(2013) 10 OHC CK 0006

In the Orissa High Court

Case No : Writ Petition (Civil) No. 14973 of 2012

Indira English Medium School

APPELLANT

Vs

Sub-Collector and Others

RESPONDENT

Date of Decision : 01-10-2013

Acts Referred:

Citation : (2013) 10 OHC CK 0006

Hon'ble Judges : Sanju Panda, J;B.R. Sarangi, J

Bench : Division Bench

Advocate : S.P. Mishra, S. Mishra, A.K. Dash, B. Mohanty, S. Panigrahi and S.K. Sahoo, for the Appellant; B.K. Bhuyan, Addl. Govt. Advocate for O.Ps. 1, 2 and 4, Mr. Ashok Mohanty along with Mr. R.K. Kar and S.K. Parai for O.P. No. 3, for the Respondent

Final Decision : Allowed

Judgement

B.R. Sarangi, J.—The petitioner-Indira English Medium School, has filed this writ petition seeking to quash the order dated 29.5.2007 passed by the Tahasildar, Bhubaneswar in D.R. No. 48 of 2001 & Alienation Case No. 25 of 2001 under Annexure-12, whereby the proposal for allotment of Ac.2.00 of land in favour of the petitioner-School has been dropped and also the consequential order of confirmation made by the Sub-Collector, Bhubaneswar vide order dated 24.6.2011 passed in W.L. Appeal (OGLS) Case No. 27 of 2008 under Annexure-16 on the ground that the same are arbitrary and unreasonable. The factual matrix of the case, in hand, is that, Indira English Medium School, hereinafter to be referred as "petitioner-School" is a Society registered under the Societies Registration Act, which started an English Medium Public School at A.G. Square, Bhubaneswar in the year 1990. In order to open a branch school at Patrapada, the petitioner-School filed an application before the Tahasildar, Bhubaneswar for grant of lease of Ac.2.00 of land under the Orissa Government Land Settlement Act in respect of Khata No. 779, plot No. 441(P) measuring Ac.2.00 in mouza Patrapada in the year 2001. On the basis of the said

application, Alienation Case No. 25 of 2001 was initiated and since de-reservation is required for granting lease, De-reservation Case No. 48 of 2001 was started at the instance of the petitioner-school for alienation of the same in its favour. It appears from the records that the Tahasildar, Bhubaneswar in D.R. Case No. 48 of 2001 and Alienation Case No. 25 of 2001 in Annexure-12 vide order dated 3.8.2001 directed the R.I. Patrapada to report after conducting in depth enquiry on the following points:

- (i) Whether the applied land is free of encroachment or not?
- (ii) Whether there is any forest growth of timber value or not?
- (iii) Whether the land is suitable for school building or not?
- (iv) Whether there is any public objection of the land is alienated in favour of the school

That as per the request of the record keeper the applied land recorded as Gochar, the Tahasildar, Bhubaneswar by order dated 11.9.2001 directed the R.I. Patrapada to start a De-reservation proceeding and issue istahar inviting public objection in the locality/G.P. by beat of drum to de-reserve as well as to alienate the applied land in favour of the petitioner-School. On verification of the case record, it is revealed that the kism of the land, as applied for, is Government Rakhit Khata No. 780, which has been recorded as Gochar and De-reservation proceeding bearing No. 48 of 2001 has been initiated. On verification of the area in question, it is found that an extent of Ac.33.370 is required for the village against which a total extent of Ac.204.991 of Goachar land is made available. Thus, an extent of Ac.172.621 is found excess than the actual requirement of the village and there is no bar to de-reserve Ac.2.000 dec. out of the said Gochar land as per the requirement of the petitioner-School in the said mouza and no objection had been received till that date. It is also indicated in the said order that mouza Patrapada is one of the restricted villages out of 62 villages banned by the Govt. in Revenue and Excise Department vide their notification No. 2864/R. dated 14.1.1986 with a view to keep these lands reserved for planned development in the Capital City. The Government in G.A. Department vide their letter No. 8123 dated 26.12.1989 have also restricted the mouza. However, the case of the petitioner may be considered at the level of the Government keeping in view the above restriction and necessity of opening an educational institution to meet the need of the rural based persons. The field enquiry report submitted by the R.I. Patrapada vide letter No 429 dated 19.10.2001, reveals that Khata No. 780, Plot No. 441 is recorded as Gochar and the suit land is free from all encumbrances and there is no forest growth over the plot and the land is suitable for house site. Considering the above facts and circumstances, recommendation has been made by the Tahasildar, Bhubaneswar by order dated 30.5.2003 for alienation of Ac.2.000 of land in favour of the petitioner-School. On perusal of the record, it is revealed that the Collector, Khurda has also intimated the Government in Revenue Department vide letter dated 23.12.2002 stating that

there is no bar for grant of lease and there is also necessity of an English medium school in the locality. Due to the delay caused by the authorities, the petitioner filed a representation on 3.1.2003 to the Hon'ble Minister, Revenue Department in consequence whereof, the Under Secretary to the Government requested the Collector, Khurda to expedite the lease proposal vide letter dated 21.2.2003. However in the D.R. alienation proceeding, certain defects were pointed out by the Tahasildar vide order dated 13.6.2003 and accordingly, by letter dated 20.6.2003, the Tahasildar, Bhubaneswar sought for clarification from the petitioner and in response to the same, immediately the petitioner gave its reply on 21.6.2003. The Collector intimated the Revenue Divisional Commissioner (C.D.), Cuttack about the lease proposal and sent the entire case record for consideration vide letter dated 10.12.2003. However, vide letter dated 6.3.2004, the Revenue Divisional Commissioner (C.D.), Cuttack intimated the Revenue Department to waive the restriction of the State Government to facilitate grant of lease. On consideration of the same, the Government in Revenue Department requested the Revenue Divisional Commissioner (C.D.), Cuttack to process the lease proposal and submit before the Department for examination vide letter dated 26.3.2004. Accordingly, the Revenue Divisional Commissioner (C.D.), Cuttack submitted the lease record before the Revenue Department for examination. However, on 12.10.2004, the Revenue Department intimated the Revenue Divisional Commissioner (C.D.), Cuttack that certain defects have been observed in the lease proposal and therefore, returned the lease record for necessary rectification.

2. At this juncture, the Orissa State Housing Board filed requisition for alienation of Ac.2.441 dec. of land out of the same Gochar plot No. 441 of mouza Patrapada and accordingly, the Tahasildar re-submitted the record to the Sub-Collector for kind consideration and onward transmission to the Collector, Khurda. The Sub-Collector vide letter dated 22.4.2006 stated that he has perused the compliance of the Tahasildar, Bhubaneswar and while resubmitting the proposal, he has mentioned about filing of requisition of Orissa State Housing Board for alienation of Ac.2.441 of Gochar land from Plot No. 441. The Sub-Collector observed in order dated 22.4.2006 that the Tahasildar being the manager of the estate, should clearly mention whether the applied land of Orissa State Housing Board is over the area (plot) involved in the lease proposal and if so, what is the present position and accordingly, the case record was returned to the Tahasildar. The Tahasildar, Bhubaneswar again by order dated 12.6.2006 stated that there were total area of Ac.7.480 in Plot No. 441 with kism Gochar under Khata No. 780 (Rakhit) of mouza Patrapada and vide order in D.R. Case No. 54 of 2002 an area of Ac.5.039 was de-reserved for alienation in favour of Orissa State Housing Board and further vide order passed in D.R. Case No. 48 of 2001 an area of Ac.2.000 were de-reserved for eventual alienation in favour of the petitioner-School. Thus, an area of Ac.0.441 is only available at present in plot No. 441. But the Orissa State Housing Board has filed a petition for alienation of Ac.2.441 of land in its favour for implementation of social housing scheme, which includes

the land de-reserved for the petitioner-School. The proposal of Orissa State Housing Board initiated in W.L. Case No. 31 of 2005 (A) was submitted to the Sub-Collector for onward transmission to the Collector, Khurda. As per the decision in the meeting under the Chairmanship of Hon"ble Minister, Revenue in the presence of the Commissioner-cum-Secretary, Revenue and Revenue Divisional Commissioner (C.D.), Cuttack the proposal for alienation of Ac.2.441 of Govt. land in mouza Patrapada submitted by the Orissa State Housing Board was processed and since the case land relates to the proposal given by the petitioner-School, it was directed to process the same in favour of the Orissa State Housing Board in respect of the said land and so far as it relates to the petitioner, the proposal was directed to be dropped vide order dated 29.5.2007. Finding no other alternative, the petitioner approached this Court by filing W.P. (C) No. 12527 of 2007 and vide order dated 4.5.2008 this Court directed that if the petitioner is so advised, he may file an appeal before the appropriate forum within one week along with an application for condonation of delay, which shall be considered liberally and if the appeal along with the application for condonation of delay is filed, then each of them be heard and disposed of in accordance with law and if he is so advised, the petitioner may apply the appellate court for interim protection and it is for the appellate court to consider the same strictly in accordance with law and further directed that the interim protection granted by this Court on 9.10.2007 in Misc. Case No. 11552 of 2007 shall continue for a period of seven days. With the above direction, the said writ petition was disposed of vide order dated 14.5.2008. In compliance to the same, the petitioner filed OGLS Appeal No. 27 of 2008 before the Sub-Collector, Bhubaneswar under the provisions of the O.G.L.S. Act. Learned appellate authority, namely, Sub-Collector, Bhubaneswar vide order dated 24.6.2011 in Annexure-16 declined to interfere with the order of the Tahasildar taking into consideration the following facts:

It is a fact that the application of lease by the appellant was processed upto the level of RDC(CD), Cuttack but it never got the sanction of the Government. On the contrary it was decided in a meeting chaired by the Hon"ble Minister, Revenue in presence of the Commissioner-cum-Secretary, Revenue and the RDC(CD), Cuttack to accept the proposal for lease of Ac.2.441 of land in Mouza-Patrapada in favour of OSHB, Bhubaneswar as has been communicated to the Tahasildar vide Letter No. 756 dated 16.5.2007 of the A.D.M., Khordha. It is also true that the suit land was de-reserved by the Collector, Khordha with a purpose to sanction the said land in favour of the applicant. But lease attains finality only after execution of the deed between the lessor and lessee. The Government exercising the eminent domain can decline sanction of lease. As regards the question of limitation the order dated 14.5.2008 of the Hon"ble High Court in W.P. (C) No. 12527 puts to rest the interpretation of limitation.

3. Mr. S.P. Mishra, learned Sr. Counsel appearing for the petitioner specifically urged that the application for grant of lease filed by the petitioner-School being earlier one, the subsequent application filed by the Orissa State Housing Board

for the very same land should not have been entertained. Apart from the same, he further urged that the appellate authority should not have dismissed the appeal observing that although the lease proposal of the petitioner was processed, the Government exercising the eminent domain can decline sanction of lease and return the lease application of the petitioner, and there is no illegality in the order of the Tahasildar. As per the provisions contained in the Act, procedure has been prescribed for settlement of Government land and power to de-reserve the land and the purpose for which such settlement can be done has been envisaged under the Government Land Settlement Rules, 1983 and the same having been followed, the subsequent dropping of the proceeding by the Tahasildar is vitiated and as such steps taken by the petitioner-School is in furtherance of the directive principles of State policy to make the provision for free and compulsory education of children up to 14 years and for promotion of educationally weaker sections of Scheduled Castes and Scheduled Tribes and other weaker sections of the Society. He contended that when recommendation has been made for alienation of the land in favour of the petitioner-School at the fag end due to interference of the Hon''ble Minister in the meeting held under the Chairmanship of Hon''ble Minister, in the presence of the Commissioner-cum-Secretary, Revenue Department and Revenue, Revenue Divisional Commission (C.B.), Cuttack, the proposal has been diverted to the Orissa State Housing Board instead of the petitioner. That itself indicates that there is arbitrary, unreasonable exercise of the power by the authority, who has not been vested with the power under the statute to do so.

4. Mr. B. Bhuyan, learned Addl. Government Advocate appearing for the State, vehemently urged that the action taken by the authorities is well within their jurisdiction and competence and as such, dropping of the proceeding is in conformity with the provisions of law and also admits that on the basis of the decision of the meeting held under the Chairmanship of the Hon''ble Minister, Revenue and Disaster Management, Orissa on 1.5.2007, it was decided to lease out the said land in favour of Orissa State Housing Board and also stated that the necessity of leasing out the land in question in favour of Orissa State Housing Board accorded the priority compared to allotment of the same in favour of the petitioner-School and accordingly, prays for dismissal of the writ petition.

5. Mr. Ashok Mohanty, learned Sr. Counsel appearing for the Orissa State Housing Board, opposite party No. 3 reiterated the contentions raised by Mr. Bhuyan and also referring to the counter filed by the Orissa State Housing Board submitted that the Government allotted Ac.5.039 dec. out of total area of Ac.7.480 of land in mouza Patrapada under Khata No. 778 and Plot No. 441 on 24.3.2004 for implementation of Social Housing Scheme and since the allotted area became insufficient for planned housing scheme due to want of passage to the allotted area, the opposite party No. 3 filed an application to allot the balance Ac.2.441 dec. of the said plot for compactness and contiguity of the area for planned housing scheme. Referring to the decision of the high level meeting held on 1.5.2007, he submitted that the Government decided to allot Ac.2.00 dec. of

land out of balance Ac.2.441 dec. in favour of the opposite party No. 3 and to retain Ac.0.441 dec. as Gochar. Mr. Mohanty again brought to the notice of the Court that out of Ac.2.00 dec., Ac.0.450 dec. of land was required for construction of 4/6 lane road for AIIMS at Sijua under Bhubaneswar Tahasil for which the Collector by letter dated 7.6.2007 recommended the proposal of the Orissa State Housing Board to the Revenue Divisional Commissioner (CB), Cuttack for sanction of Ac.1.550 dec. out of Ac.2.00 dec. It is further urged that the said land measuring Ac.2.00 dec. was badly essential to ensure approach to the entire land of Ac.5.039 dec. as well as compactness and contiguity of the said area as per Section 18(s) and subsequent explanation enshrined in the Odisha Housing Board Act, 1968. According to Mr. Mohanty, equity stands in favour of supplying house accommodation to needy people than in favour of a school, which intends to teach in English medium since dwelling house is required for all the needy persons, but teaching in English Medium School is not required for all. Therefore, he submitted that the claim of the petitioner is not sustainable and accordingly, he seeks for dismissal of the writ petition. That apart, he also argued that since alternative remedy is available the writ petition should be dismissed.

6. Admittedly, the petitioner filed an application for de-reservation of the land in its favour, which has been registered as D.R. Case No. 48 of 2001 and Alienation Case No. 25 of 2001 for allotment of Ac.2.00 dec. for its institution. On perusal of Annexure-12, it appears that all through initiation has been taken by the petitioner for allotment of Ac.2.00 of land in its favour and whenever a query has been made, the same has been complied with and after satisfying the conditions when the authorities competent was about to allot the land in favour of the petitioner-School, at this juncture, the Orissa State Housing Board intervened in the matter and though Ac.5.039 dec. of land has been already allotted in its favour, the Board sought for further allotment of Ac. 2.441 dec. of land, which includes Ac.2.00 dec. recommended for allotment in favour of the petitioner-School. But on the basis of the decision taken by the so-called high level committee, recommendation has been made for allotment of Ac.2.00 of land in favour of Orissa State Housing Board, which has been recommended earlier for allotment in favour of the petitioner. Law is well settled that if the power has been vested on a particular authority under the Statute, the same should be exercised by the same authority and any higher or lower authority has no jurisdiction to interfere with the same. The same view has also been taken in *L. Lavender & Sons Ltd. v. Minister of Housing and Local Government*, (1970) 3 All.E.R. 871 wherein it is held that a statutory power conferred on a particular authority should be exercised by that authority. Therefore, considering the above proposition of law, the application for de-reservation as well as the proposal for alienation has been considered by the Tahasildar and recommended to the Sub-Collector in accordance with law and thereafter to the Collector, but because of the so-called decision of the high level committee, decision has been taken to drop the proposal for alienation of land in favour of the petitioner-School and to

process the proposal for allotment in favour of Orissa State Housing Board, which itself amounts to over-reaching the power vested under the Statute and thus, such decision is vitiated. The impugned order passed by the Tahasildar clearly indicates that in view of the decision taken by the high level committee, he has recommended for allotment of the land in favour of Orissa State Housing Board and dropping the proceeding initiated in favour of the petitioner. That very action of the authority being not in conformity with the provisions of law and any action taken pursuant to the decision taken by the high level committee cannot be sustainable inasmuch as the order suffers from gross material irregularities committed by the authority vested with such statutory powers. Apart from the same, in appeal though the judgment of the apex Court reported in *Mahabir Auto Stores and others Vs. Indian Oil Corporation and others*, has been cited by the petitioner and though referred to in its written note of submission, the same has not been taken into consideration in proper perspective. On the other hand, the appellate court dismissed the appeal referring to the phrase "eminent domain" without understanding the implication thereof. The question of "eminent domain" came up for consideration by the apex Court in *Jilubhai Nanbhai Khachar, etc. etc. Vs. State of Gujarat and another, etc. etc.*, which reads as follows:

The right of eminent domain is the right of the sovereign State, though its regular agencies, to reassert, either temporarily or permanently, its dominion over any portion of the soil of the State including private property without its owner's consent on account of public exigency and for the public good. Eminent domain is the highest and most exact idea of property remaining in the Government, or in the aggregate body of the people in their sovereign capacity. It gives the right to resume possession of the property in the manner directed by the Constitution and the laws of the State, whenever the public interest requires it. The term "expropriation" is practically synonymous with the term "eminent domain".

7. Mr. S.P. Mishra, learned Sr. Counsel appearing for the petitioner cited the recent judgment of the apex Court in *Laxman Lal (Dead) Through L.Rs. and Another Vs. State of Rajasthan and Others*, wherein in para 15, the apex Court held as follows:

The statutory provisions of compulsory acquisition contained in the 1953 Act are not materially different from the 1894 Act. This Court has explained the doctrine of eminent domain in a series of cases. Eminent domain is the right or power of a sovereign State to appropriate the private property within the territorial sovereignty to public uses or purposes. It is an attribute of sovereignty and essential to the sovereign government. The power of eminent domain, being inherent in the Government, is exercisable in the public interest, general welfare and for public purpose. The sovereign is entitled to reassert its dominion over any portion of the soil of the State including private property without its owner's consent provided that such assertion is on account of public exigency and for public good.

8. In view of the aforesaid provision of law, dismissal of the appeal by the appellate authority using the phrase "eminent domain" is absolutely misconceived one. Therefore, the impugned order dated 24.6.2011 passed by the Sub-Collector, Bhubaneswar in W.L. Appeal (OGLS) Case No. 27 of 2008 under Annexure-16 confirming the order dropping the proceeding initiated at the instance of the petitioner is liable to be set aside.

9. In the present context under the O.G.L.S. Act, even though there is a provision for revision, but that ipso facto cannot take away the jurisdiction of the Court on the ground of availability of alternative remedy. In support of such position, Mr. Mishra, learned Sr. Counsel relies upon the judgments of this Court in M/s. Crystal Towers v. Commissioner of Commercial Taxes, Orissa and others, 1998 (1) OLR, 14 (para-13), Sri Durga Construction Vs. Sales Tax Officer, Ganjam II Circle,) and Rabindranath Choubey Vs. Chairman-cum-Managing Director, Mahanadi Coalfields Ltd. and Another, , Sri Raghunath Jew and another v. Commissioner of Endowments, Orissa and others, AIR 1990 Ori 87 (para-8).

10. The Constitution Bench of the Supreme Court in K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc., held that Article 226 of the Constitution confers on all the High Courts a very wide power in the matter of issuing writs. The said power is limited. However, the remedy of writ is an absolutely discretionary remedy and the High Court has always the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. Similar view has been reiterated by the Apex Court in Sangram Singh Vs. Election Tribunal, Kotah, Bhurey Lal Baya, , holding that the power of issuing writs are purely discretionary and no limit can be placed upon that discretion.

11. The aforesaid view has also been taken subsequently in catena of decisions including the judgments cited by Mr. Mishra. It is stated that out of Ac.2.00, Ac.0.450 dec. was required for construction of 4/6 lane road to AIIMS from Sijua to Bhubaneswar, the balance Ac.1.550 dec. should be considered for allotment in favour of the petitioner-School with the premium, ground rent and cess applicable for such allotment. So far as applicability of equity is concerned, it is stated that the housing accommodation is made for needy people. Equally education is also essential for all categories of people remaining in and around the locality. Therefore, the contention raised that teaching in English medium school is not required for all, is bereft of any substance.

12. In view of the aforesaid facts and circumstances, and the law applicable to the present context, the impugned order dated 29.5.2007 passed in D.R. Case No. 48 of 2001 and Alienation Case No. 25 of 2001 under Annexure-12 and confirmation thereof vide order dated 21.5.2008 in W.L. Appeal (OGLS) Case No. 27 of 2008 under Annexure-16 are hereby quashed and the Tahasildar, Bhubaneswar is directed to proceed for allotment of the remaining land measuring Ac.1.550 dec. out of Ac.2.00 in favour of the petitioner-School. The writ petition is accordingly allowed. There shall be no order as to cost.

Sanju Panda, J.

I agree.