

(2004) 10 OHC CK 0021
In the Orissa High Court
Case No : Writ Petition (C) No. 7230 of 2003

Jagdish Rai Puri

APPELLANT

Vs

Epari Bhaskar Patra and Others

RESPONDENT

Date of Decision : 08-10-2004

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Government Grants Act, 1895 — Section 3

Citation : (2005) 99 CLT 54

Hon'ble Judges : A.K. Patniak, J; A.K. Parichha, J

Bench : Division Bench

Advocate : Party in Person, for the Appellant; I. Mohanty, B.K. Sharma, A.K. Mohanty, S.R. Mohanty, K.A. Guru, G.K. Dash and K.K. Nayak (for Opp. Party No. 3), for the Respondent

Final Decision : Allowed

Judgement

A.K. Parichha, J.—The petitioner has filed the present Writ Petition challenging the Order dated 23.5.2003 of the Government of Orissa in General Administration Department, wherein permission was refused for the second time for transfer of the lease-hold property by Sri Epari Bhaskar Patra-Opp. Party No. 1 to the petitioner.

2. The facts leading the present writ petition can be summarily narrated as follows :

Plot No. A/116 measuring 60" x 90" near Governor's house in Unit-III, Bhubaneswar was leased out by the Government of Orissa to one Col. B. K. Sharma in the year 1967 under lease deed dated 5.7.1967. Col. B. K. Sharma while in possession of the said property transferred the same to Opp. Party No. 1- Epari Bhaskar Patra for a consideration of Rs. 95,000/- on 17.7.1975 after obtaining due permission from the G.A. Department of the Government of Orissa vide order dated 28.5.1975. In the year 1979, Opp. Party No. 1 expressed his desire to transfer the case land to the petitioner and an agreement between Opp.

Party No. 1 and the petitioner was executed on 17.2.1979 at Bhubaneswar setting the price of the property at Rs. 1,30,000/-. It was agreed that Opp. Party No. 1 would receive a sum of Rs. 11,000/- as advance and would receive the balance consideration of Rs. 1,19,000/- at the time of registration of the document in favour of the petitioner. Pursuant to the said agreement, Opp. Party No. 1 received an advance of Rs. 11,000/- but, thereafter, though the petitioner was always ready and willing to perform his part of the contract, Opp. Party No. 1 avoided to receive the remaining consideration and execute a deed of conveyance. On inquiry, the petitioner learnt that some dues of the LIC were outstanding against Opp. Party No. 1 concerning the case land. The petitioner, therefore, issued a notice asking Opp. Party No. 1 to clear up the dues of the LIC to get permission from the G.A. Department and execute a registered deed of transfer of the case land in his favour or else to pay compensation of Rs. 22,000/- with interest as stipulated in the agreement. Since Opp. Party No. 1 refused to receive the notice and did not take any step for transfer of the case land, the petitioner filed a suit bearing O.S. No. 761/1980-I in the Court of the Learned Subordinate Judge, Bhubaneswar for specific performance of contract. The said suit was, however, dismissed by the Learned Subordinate Judge on 20.10.1984. The petitioner preferred an appeal bearing First Appeal No. 348 of 1984 before this Court, which was dismissed for default on 2.1.1989. Subsequently, the said First Appeal No. 348 of 1984 was restored on 18.4.1991 and was disposed of by order dated 30.8.1994 with a direction to Opp. Party No. 1 to submit an application to the State Government seeking permission for sale of the case land to the petitioner within two months and on obtaining such permission to execute the sale deed within a month of receipt of the permission. It was also observed that if Opp. Party No. 1 failed to apply for permission to the State Government or to execute the sale deed, the Learned Subordinate Judge, Bhubaneswar would take necessary steps in the matter. Alternative relief was also granted by stipulating that if the State Government refused to accord permission for sale, the petitioner would be entitled to receive damages of Rs. 22,000/- with 9% interest as mentioned in the agreement. Since Opp. Party No. 1 did not comply with the direction given in the First Appeal, the decree was put to execution vide Execution Proceeding No. 44 of 1996 in the Court of the Learned Subordinate Judge, Bhubaneswar. The executing Court directed the State Government either to grant or refuse permission for the transfer of the case land in favour of the petitioner within a stipulated period as per the direction of this Court in the First Appeal No. 348 of 1984. The executing Court also observed in the order that in case the State Government refused to accord permission for sale of the case land to the petitioner, the petitioner would be entitled to receive damages of Rs. 22,000/- with interest at the rate of 9% as stipulated in the agreement. The petitioner filed OJC No. 18734 of 1998 in this Court seeking to quash the order dated 18.11.1998 of the Executing Court which was subsequently converted to Civil Revision No. 476 of 1999. The said Civil Revision was dismissed by this Court on 21.6.2000 against which SLP was filed by the petitioner before the Supreme Court. The said SLP was dismissed on

28.8.2000. The petitioner then filed one review petition, which was also dismissed on 5.12.2000. In the meantime, the Government of Orissa-Opp. Party No. 2 refused permission for transfer of the case land in favour of the petitioner by its order dated 21.12.1998 and accordingly, the executing Court by order dated 21.1.1999 directed pay merit of all damages by Opp. Party No. 1 to the petitioner in accordance with the judgment and decree in F. A. No. 348 of 1984. The petitioner challenged the order of Opp. Party No. 2 dated 21.12.1998 before this Court in OJC No. 10072 of 2000. This Court by order dated 31.7.2002 directed the State Government-Opp. Party No. 2 for fresh consideration of the request made by the executing Court regarding grant of permission for sale of the land in question in favour of the petitioner after giving an opportunity of hearing to the parties including the intervenor- Opp. Party No. 3. This order was also challenged by the petitioner in the Apex Court vide SLP (Civil) No. 21830 of 2002 but the Supreme Court by order dated 9.12.2002 rejected the said SLP giving an observation that the competent authority of the Government shall take a decision regarding grant/refusal of permission within a period of four months from the date of the matter being placed before it. The matter was accordingly taken up by Opp. Party No. 2 for consideration and the parties were noticed. But in the meantime, Opp. Party No. 3 filed a Writ Petition bearing WPC No. 2551 of 2003 in this Court challenging the order of this Court dated 31.7.2002 in OJC No. 10072 of 2000 and an interim stay was granted but subsequently order was passed directing Opp. Party No. 2 to proceed with the matter subject to the result of the Writ Petition. The competent authority of the State Government heard the petitioner and Opp. Party No. 3 (as Opp. Party No. 1 did not appear), perused the relevant papers and passed order dated 23.5.2003 refusing permission for transfer of the case land by Opp. Party No. 1 in favour of the petitioner. The petitioner thereafter has filed the present Writ Petition under Article 226 of the Constitution of India seeking the following reliefs :

- (a) To quash the order dated 23.5.2003 under Annexure-1 refusing to transfer the lease-hold property by Sri Patra (Opp. Party No. 1) to the petitioner.
- (b) To direct to finalise the sale deed in favour of the petitioner.
- (c) To direct Civil Judge (Sr. Division), Bhubaneswar to arrange for vacant possession of the suit property within such time as this Court may deem fit as the property is in illegal possession of a stranger for the last several years.
- (d) To direct the Dy. Commissioner of Police and/or Senior Superintendent of Police, Bhubaneswar to assist the Civil Judge (Sr. Division), Bhubaneswar to reject the "illegal occupant of the suit property, etc.".

3. Opp. Party No. 1 did not file any counter. Opp. Party No. 2 in its counter essentially supported the impugned order dated 23.5.2003 passed by the Special Secretary to Government of Orissa, G.A. Department, and pleaded, inter alia, that the grant or refusal of permission to transfer a lease-hold plot is the discretion of the lessor-State Government which cannot be questioned,

particularly when the order impugned is in accordance with the direction of this Court and the provisions of Section 3 of the Government Grants Act. It is also pleaded that Opp. Party No. 1 having violated the terms of the lease, is now not entitled to get any permission for transfer of the case land and that the case land is to be resumed by the State Government.

4. Opp. Party No. 3 in it's counter while denying the claim of the petitioner for transfer of the case land in his favour pleaded that being unaware of the prior purchase agreement between the petitioner and Opp. Party No. 1, it entered into an agreement with Opp. Party No. 1 for purchase of the case land for a sum of Rs. 15 lakhs on 10.1.1991 when no litigation was pending in respect of the case land and by paying an advance of Rs. 14 lakhs out of the consideration amount of Rs. 15 lakhs, it took over possession of the case land. Then, basing on an irrevocable power of attorney granted by Opp. Party No. 1 in favour of Opp. Party No. 3, construction of building worth about Rs. 40 lakhs was undertaken on that land for housing of the high level executives of the company. According to Opp. Party No. 3 the decree in F.A. No. 348 of 1984 and the order of the executing Court clearly postulate that in case of refusal of permission by Opp. Party No. 2 the petitioner would be entitled to compensation of Rs. 22,000/- with 9% interest thereon and so, he has no right to demand quashing of the order dated 23.5.2003 of Opp. Party No. 2 more so, when the said order has been passed after hearing the concerned parties and taking into consideration the relevant documents and circumstances. It is further claimed that the agreement between Opp. Party No. 1 and Opp. Party No. 3 having been executed during the period when no litigation was pending and Opp. Party No. 3 having entered into that agreement being unaware of the earlier agreement, it is protected under the law of equity. Now, in view of the decree of the Civil Judge (Senior Division), Bhubaneswar in Title Suit No. 354 of 1997 directing specific performance of contract by Opp. Party No. 1, the G.A. Department should accord permission for transfer of the case land in favour of Opp. Party No. 3. It has taken a further plea that when the building worth Rs. 40 lakhs has come up on the case land, grant of permission for transfer of the land in favour of the petitioner would entail in illegal enrichment of the petitioner violating the settled norms of equity.

5. From the respective stand of the parties, it appears that the only point of debate is the propriety and legality of the impugned order dated 23.5.2003 of the Special Secretary to Government, G.A. Department (Annexure-1). The stand of the petitioner is that the impugned order is arbitrary and violative of the rules of natural justice and equity. The opposite parties on the other hand have taken a stand that according or refusing permission for transfer of the leasehold plot by a lessee to an outsider is purely within the discretion of the State Government and such decision cannot be called in question in a Writ Petition.

6. According to Section 3 of the Government Grants Act, 1895, the State Government can grant lease of land to individuals as well as organizations stipulating the terms and conditions of the lease. The tenor of Section 3 and the

terms of the lease undoubtedly give a discretion to the State Government to allot/ cancel such lease or accord permission for transfer of the lease-hold plot by a lessee, but the question is whether such discretion of the State Government is unfettered as claimed by Opp. Party Nos. 2 and 3.

7. The scope of discretion vested in public authorities incidentally came up for discussion before the House of Lords in 1905 in the case of *Mayor of London v. London and North Western Railway Company* 1905 LAC 426. The question in that case was whether discretion vested in the Local Government/ Sanitary authority to install public lavatories on places of their choice could be exercised ignoring the convenience and inconvenience of the local residents. The contention raised from the side of the Local Government was that where the Legislature has confided the power to a particular body with discretion, it is beyond the power of any Court to contest that discretion. Answering that contention, the House of Lords observed thus :

"...It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably...."

8. The aforesaid principle was reiterated by the Constitution Bench of the Supreme Court in *S.G. Jaisinghani Vs. Union of India (UOI) and Others*, While analyzing the discretionary power of the State, their Lordships had the occasion to pronounce thus :

"The absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be continued within clearly defined limits. The Rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be practicable and the citizen should know where he is. If a decision is taken without any principle or without any rule, it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the Rule of Law."

9. In the case of *Smt. Harbans Kaur etc. Vs. Commissioner of Wealth-tax, Jullundur*, the Division Bench of the Supreme Court exercised that when the discretion is conferred on an authority, the same must be held fairly and not arbitrarily, justly and not fancifully. The same ratio was again reflected in the judgment by a three-judge Bench of the Apex Court in the case of *Suman Gupta and Others Vs. State of Jammu & Kashmir and Others*, The words used by their Lordships are borrowed below :

"... It must be remembered that our entire constitutional system is founded on the Rule of Law, and in any system, so designed it is impossible to conceive of legitimate power which is arbitrary in character and travels beyond the bounds of reason. To contend that the choice of a candidate selected on the basis of his

ability to project the culture and ethos of his home State must necessarily be left to the unfettered discretion of executive authority is to deny a fundamental principle of our constitutional life. We do not doubt that in the realm of administrative power the element of discretion may properly find place, where the statute or the nature of the power intends so. But there is a well recognized distinction between an administrative power to be exercised within defined limits in the reasonable discretion of designated authority and the vesting of an absolute and uncontrolled power in such authority. One is power controlled by law countenanced by the Constitution, the other falls outside the Constitution altogether. ..."

So, the principle that has been consistently propounded by the Apex Courts is that exercise of all administrative powers vested in public authorities must be structured within the system of controls informed by both relevance and reason; relevance in relation to the object which it seeks to serve and reason in regard to the manner in which it attempts to do so. While using discretion, the public functionaries should also be duty conscious rather than power charged as their action and decisions touch the rights of the common man and has far reaching repercussion.

10. In the touchstone of the above rioted principle, we shall proceed to examine the correctness, fairness, and reasonableness of the impugned order dated 23.5.2003. At this juncture, it will be profitable to indicate some relevant facts, which stand established and are not in controversy.

11. Col. B. K. Sharma got lease of the case land from the State Government and while in possession of the same, obtained permission from the State Government and transferred the case land to Opp. Party No. 1 in 1975. Opp. Party No. 1 entered into an agreement with the petitioner in 1979 for sale of the case land for a consideration of Rs. 1,30,000/- and accepted advance of Rs. 11,000/-. But thereafter, in spite of request of the petitioner, he did not receive the balance consideration and did not execute the deed of transfer after obtaining permission from the State Government and the petitioner had to file a suit bearing O.S. No. 76 of 1980-1 in the Court of the Subordinate Judge, Bhubaneswar. An ex parte decree was passed in that suit on 12.2.1981 directing Opp. Party No. 1 to execute the sale deed in favour of the petitioner after obtaining permission from the P and S Department, failing which the plaintiff was directed to apply to the Court for getting the sale deed registered. Since Opp. Party No. 1 did not comply with the aforesaid direction, the petitioner deposited the rest part of consideration money in the Court and moved the G.A. Department, Government of Orissa and vide order dated 12.10.1983 the Director of Estates and Deputy Secretary to Government of Orissa, G.A. Department informed the petitioner vide Annexure-9 that pursuant to the decree of the civil Court he may obtain sale deed for the above plot through Court duly registered and on production of the same the plot in question would be mutated in his name. After the ex parte decree was set aside, Opp. Party No. 1 contested the suit and the suit was

dismissed. First Appeal No. 348 of 1984 was preferred in the High Court against that order and the appeal was allowed. Pursuant to the direction given in the appeal, execution was carried in the Court of the Sub-ordinate Judge, Bhubaneswar. In that Execution Case, the Sub-ordinate Judge, Bhubaneswar asked the State Government to allow or reject the permission for transfer of the case land in favour of the petitioner. In the meantime, Opp. Party No. 3 entered into an agreement with Opp. Party No. 1 in 1991 for purchase of the case land for a consideration of Rs. 15 lakhs and an agreement was entered into between them. Opp. Party No. 3 took over possession of the case land by paying an advance of Rs. 14 lakhs and raised constructions thereon. Opp. Party No. 1 also applied to the Government in G.A. Department for according permission to transfer the case land in favour of Opp. Party No. 3. Taking all these situations into account, the then Special Secretary, G.A. Department vide order dated 21.12.1998 refused permission for sale of the case land by Opp. Party No. 1 in favour of the petitioner. The reason for refusal was that the Opp. Party No. 1 applied for permission to sell the case land to various persons at various points of time and since he had currently applied for such permission in favour of Opp. Party No. 3, permission for transfer of the case land in favour of the present petitioner pursuant to the decree passed in F.A. No. 348 of 1984 would not be proper. This order of refusal was challenged and this Court as well as the Supreme Court directed the State Government to reconsider grant or refusal of permission for transfer of the case land in favour of the petitioner. The Special Secretary to Government in G.A. Department again refused permission on the ground that Opp. Party No. 1 violated the terms of Clause 2(xiv) of the lease, which puts an embargo that the lessee shall not use the land for any other purpose for which it was allotted except with the consent/leave of the State Government. The Special Secretary observed that Opp. Party No. 1 having allowed Opp. Party No. 3 to take possession of the case land and construct a building on the same for commercial purpose has violated Clause 2(xiv) of the lease and so, he cannot be permitted to transfer the case land to the petitioner and that the Government would consider resuming back the plot from Opp. Party No. 1.

12. In such backdrop the subtle question which arises for consideration is whether the order dated 23.5.2003 of the Special Secretary to Government in G.A. Department is reasonable, fair, just and satisfies the norms laid down by the Apex Court in the cases noted above.

13. There was an agreement between Opp. Party No. 1 and the petitioner for transfer of the case land and basing on that agreement the competent Court granted the decree directing Opp. Party No. 1 to perform his part of the contract. Because Opp. Party No. 1 did not co-operate, the Court asked the Government in G.A. Department to consider grant of permission in favour of the petitioner so that deed of transfer would be executed by the Court. Initially, the Government indicated that such permission is implied and asked the petitioner to get the sale deed registered so that his name can be mutated against the case plot. Then at a

later stage, permission was refused by the G.A. Department with observation that Opp. Party No. 1 is asking for permission to sell the case plot to different persons and had recently applied for permission to sell the case land to Opp. Party No. 3. Now, in the impugned order, permission for transfer of the land in favour of the petitioner has been refused on the plea that Opp. Party No. 1 has violated the terms of the lease by allowing Opp. Party No. 3 to construct a commercial building on the plot. From these orders, it appears that permission was not refused for any fault or lapse on the part of the petitioner. It is to be noted that the petitioner entered into a valid agreement and also obtained valid decree from the competent Court and in course of execution of that decree, the Court requested the Government in G. A. Department to accord or refuse permission in favour of the petitioner. In that situation, the Government being a public authority was required to use discretion in a rational, judicious, fair and just manner. If the petitioner would have committed any error, irregularity or illegality or made collusion with Opp. Party No. 1 or would have violated any of the terms of the lease, then refusal of permission for transfer of the case land in favour of the petitioner would have been reasonable and fair. But it appears that for the violations committed by Opp. Party Nos. 1 and 3 permission in favour of the petitioner has been refused. If such decision of the State is accepted as fair and reasonable, then every unscrupulous seller would enter into collusion with a third party and deprive the rightful purchaser or decree holder from obtaining a rightful permission for transfer of the lease land in his favour. Here, Opp. Party No. 3 entered into an agreement subsequently and basing on that agreement, it constructed a commercial complex without obtaining permission or clearance from the Government. To cover up its lapses it also got a decree in the year 2003 from the Additional District Judge, Bhubaneswar directing Opp. Party No. 1 to execute the sale deed in favour of Opp. Party No. 3 without bringing the previous developments to the notice of that Court. Now, for all these anti-actions of Opp. Party No. 3 it is not expected of the Government to refuse permission for transfer of the case land in favour of the petitioner, who has got a valid decree of a competent Court. It is worthwhile to note that because Opp. Party No. 1 did not perform his part of the contract and did not abide by the directing of the Court, the executing Court had to write to the State Government for granting or refusing the permission for transfer of the case plot in favour of the petitioner.

14. In view of the circumstances and reasons noted above, we are constrained to conclude that the impugned order is neither reasonable nor fair and the State Government failed to exercise the discretion in a judicious manner. Such an order is not legally sustainable.

15. Learned Counsel for Opp. Party No. 3 submits that Opp. Party No. 3 had already constructed a building worth Rs. 40 lakhs on the case land and grant of permission for transfer of the land in favour of the petitioner at present of permission for transfer of the land in favour of the petitioner at present would not only cause drastic financial loss to the Opp. Party No. 3 but also entail in unjust enrichment of the petitioner. It is to be noted that Opp. Party No. 3

undertook the construction on the case land without getting any approval from the Government. In that situation, it has now no legal right over the case land and it cannot also demand compensation for the construction. However, one cannot also over look the fact that Opp. Party No. 3 has spent huge amount of money for the unauthorized construction on the case land and now handing over of the building along with the case land to the petitioner for nothing would amount to unjust enrichment of the petitioner, which is strictly against the norms of equity.

16. Taking all these factors into consideration, we set aside the impugned order dated 23.5.2003 passed by the Special Secretary to Government in G.A. Department and direct the State Government to accord necessary permission for transfer of the case land in favour of the petitioner within a period of two months from today. Thereafter, Opp. Party No. 1 will execute the deed of transfer in favour of the petitioner within a period of one month from the date of grant of such permission by the State Government and if Opp. Party No. 1 fails to execute the deed of transfer, then the executing Court, namely, Civil Judge (Senior Division), Bhubaneswar would execute the deed of transfer for the case land. We further direct that a valuation of the constructions on the case land made by the Opp. Party No. 3 will be made by the Executive Engineer, C.P.W.D. on the basis of information furnished by the petitioner, Opp. Party No. 1 and the Opp. Party No. 3 and the value so determined will be intimated by the Executive Engineer, C.P.W.D. to the petitioner and the petitioner will pay a bank draft for the said value to the Opp. Party No. 3 within six months of such intimation failing which the petitioner will sell the case land to the Opp. Party No. 3 at the market price as on today to be determined by the Collector, Khurda District after obtaining permission from the State Government.

17. The Writ Petition is accordingly allowed. No costs.

A.K. Patnaik, J.

I agree.