

(2011) 02 OHC CK 0018

In the Orissa High Court

Case No : Writ Petition (C) No. 12041 of 2009

Jogendranath Tarai and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 04-02-2011

Acts Referred:

Coastal Aquaculture Authority Act, 2005 — Section 4, 4(1), 4(3)
Orissa Land Reforms Act, 1960 — Section 8, 8A

Citation : (2011) 111 CLT 868

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

Bench : Division Bench

Advocate : Sukanta Kumar Dalai and T.K. Swain, for the Appellant; Government Advocate, G.N. Padhi, B.K. Sahoo, S.K. Mishra and N.R. Mohanty, Biswajit Parida and M.K. Mohapatra, for the Respondent

Final Decision : Dismissed

Judgement

B.N. Mahapatra, J.—In the present Writ Petition the Petitioners seek to challenge the illegal and arbitrary action of the Opp. Parties in taking a decision for demolition of earthen embankment, which surrounds the villages of Siandi and Noliapatna as well as the agricultural land, to a length of 2 Kms which has been constructed from the time immemorial by the villagers with the help of the Government. The said embankment is also used as a passage to go to the sea beach for fishing and it directly protects the villagers as well as the agricultural land from entering the saline water of the sea and Chilika. Thus, the action of the Opp. Parties-Government is completely against the interest of the villagers of 3 Panchayats, namely, Siandi, Siala and Malud as it directly affects the livelihood of the villagers living in and around Chilika.

2. The present Writ Petition is in the nature of a Public Interest Litigation. Petitioner Nos. 1 and 2 are the senior citizens; Petitioner No. 3 is one of the responsible persons of the locality and Petitioner Nos. 4 and 5 are the students, who are continuing their MBA and Post Graduate Courses respectively and they

are involved with many social organizations engaging themselves in various social activities in representative capacity of the villagers of Siandi and Noliapatna.

3. According to the Petitioners, the population of Krushna Prasad Tahasil is about 15,000 consisting of both fishermen and non-fishermen. The villagers mostly depend upon the agricultural lands belonging to them adjacent to Chilika and cultivation of those lands mostly depend on rain water, where they use to grow paddy and other Rabi and Kharif crops. To this Tahasil, No. irrigation facility is provided by the State Government. Some of the villagers belonging to Fishermen community are earning their livelihood by fishing during rainy season from the water flowing from sea and the rest part of the year on deep Chilika.

4. Mr. S.K. Dalai, Learned Counsel appearing on behalf of the Petitioners submits that Chilika Policy was framed in the year 1994 pursuant to the direction of this Court in the case of Kholamuhana Primary Fishermen Co-operative Society and Others, etc. Vs. State of Orissa and Others, and accordingly, Chilika was surveyed. As per said survey, the area of Chilika is 47,000 acres. There are two types of sources introduced; one is culture source and other is capture source. This Court directed the State Government to form a policy both for fishermen and non-fishermen. The culture source was meant for both fishermen and non-fishermen and the capture source was made only for fishermen. Out of the total area of Ac 47,000, Ac 20,000 were reserved for carrying on culture with a ratio of 60:40 for non-fishermen and fishermen respectively and rest 27,000 acres of land were categorically fixed as capture source for the fishermen. The land in question was accordingly distributed to different adjacent villages for culture source. In the year 1997 in the case of S. Jagannath Vs. Union of India and others, , the Apex Court directed to prohibit any type of culture within the coastal Regulation zone which covers the Chilika Lake. Thus, the only right of fishermen continued to capture inside Chilika. After the decision of the Apex Court in the year 1997 the Government has not formulated any policy in the interest of the inhabitants and citizens of Orissa. On the other hand, by the name of eviction every year the Government is spending huge amount of public money and in the process, the Government is losing crores of rupees. In the year 1994 the Prawn Mafias were the monarchs of Chilika, but now-a-days the Officers like Collector, Sub-Collector and Tahasildar, who supervise directly the eviction process are the real monarchs of Chilika.

5. In constructing earthen embankment In question, the Government has played a greater role and the same is being developed from time to time by the State Government. The State Government has constructed four culverts to let out and to come in the logging water which directly affects the livelihood of 30,000 villagers of three Grama Panchayats, namely, Siandi, Siala and Malud. Crores of rupees have been invested to construct the aforesaid embankment, which ultimately acts as a protector from the entrance of the saline water and sea water into the villages. The Government has now taken a decision pursuant to

which, action has already been started for demolition of Gherries meant for prawn culture and such gherries include zero nets for creation of small prawn by putting other artificial barriers inside the Chilika Lake and application of chemical and other mechanized process. The villagers are in No. way connected with any such kind of prawn culture. The affected villagers are the supporters of Congress Party and as the Biju Janata Dal is in power and the local M.L.A. belongs to Biju Janata Dal, in the name of the operation of removal of unauthorized encroachers inside Chilika the local administration has been directed to demolish the earthen embankment only to harass the Petitioners and the inhabitants of the above said three Grama Panchayats. The villagers and the inhabitants have No. hesitation for evicting the encroachers carrying on prawn culture but by No. stretch of imagination the embankment in question can be said to be helping encroachment and shall be subject to demolition. The villagers are ready to cooperate with the Government and local administration for identification of encroachers, the area encroached for the purpose of prawn culture and for removal of such Gherries. The public money is being misutilized by the District Administration at the behest of the local M.L.A. for political satisfaction. The step taken for removal of earthen embankment covering villages by deployment of floating excavation is highly illegal and arbitrary. Chilika is the largest brackish water lagoon in Asia and it provides livelihood for about one and half lakhs of people (both fishermen and non-fishermen) living in and around Chilika in about 132 villages. After 1998 No. policy has been framed either by the State Government or Central Government to protect Chilika or to safeguard the livelihood of the local inhabitants of the area. The embankment in question is neither coming under Coastal Regulation. Zone nor is adjacent to the Chilika Lake or Bay of Bengal nor under prawn culture area. Concluding his argument Mr. Dalai submitted that the State Government may be directed to frame policy in accordance with the direction of the Apex Court as well as this Court safeguarding the interest of the local inhabitants of Chilika.

6. Learned Government Advocate appearing for Opp. Party No. 2-Collelctor, Puri and opposite No. 4- Tahasildar, Krushnaprasad submitted that the Petitioners have suppressed many material facts and have not approached this Court with clean hands for which they are not entitled to any relief as prayed for by them and as such the Writ Petition is liable to be dismissed. Since the Petitioners have unauthorizedly constructed an earthen embankment covering an area of Ac. 429.79 dec. which touches the original saline ring on both the sides (i.e. North and South) and have been doing prawn culture which is not only affecting the free flow of Chilika water but also obstructing the excess logging of rainwater from the paddy lands of different villages situate nearby the permanent Saline Ring. Therefore, there is No. illegality in demolishing the earthen embankment constructed by the Petitioners as the same was constructed unauthorizedly violating the orders of the Apex Court as well as the instruction of the Government issued from time to time so far the Chilika Policy is concerned. This Hon''ble Court and the Apex Court deprecated the illegal and unauthorized

construction of Gherries for the purpose of prawn culture and have directed to demolish the same in the greater interest of public and since the Petitioners have constructed the earthen embankment for prawn culture thereby encroaching upon the Government land, the so-called "Podakhia-Jano". The prayer of the Petitioners to declare the action of the Opp. Parties as illegal and arbitrary, merits No. consideration and the same is liable to be rejected. A single scrap of document has not been filed by the Petitioners to establish their claim over the disputed land, on the contrary, on the basis of a paper cutting, vide Annexure 1 which has No. substance at all vis-a-vis their rights, the Petitioners have made some vague, baseless and wild allegations against the Opp. Parties. There is No. infirmity or defect in the action of the Opp. Parties in demolishing the earthen embankment in question. Neither the demolition of earthen embankment around the Jano affects the interest of the general public nor the saline water of Chilika would cause damage to the agricultural lands of the Petitioners.

7. Pursuant to the judgment of the Apex Court in the case of S. Jagannath (supra), the firing incident in Soran, the State Government in Revenue & Excise Department in their letter No. 32845/R dated 18.06.1999 have completely banned prawn culture in the Chilika Lake ceasing the rights of both fishermen and non-fishermen. A Task Force was constituted for the purpose of supervising the eviction process in Chilika for implementation of the Government Policy and to take action to make the Chilika free from encroachments. The earthen embankment in question constructed by the villagers is encouraging Prawn Culture in Chilika which goes against the Government instruction and the orders of the Apex Court passed in SLP No. 561 of 1994. The earthen embankment in No. way protects the agricultural land of the villagers from the saline water could be appreciated from the tentative map under Annexure A/4. As per instruction of the District Office, the Tahasildar, Krushna Prasad draws program for eviction of prawn gherries in the Chilika Lake including unauthorized construction as well as demolition of earthen embankment constructed obstructing free flow of Chilika water. The existing earthen embankment does not serve the common interest of general public in any manner whatsoever, rather the embankment around the Jano is a hindrance to the free movement of flora and fauna of the Chilika Lake.

8. The Opp. Party No. 1-Commissioner-cum-Secretary to Revenue & Disaster Management Department, Government of Orissa, in response to the Order Dated 26.07.2010 filed an affidavit stating therein that the Government has taken necessary steps to implement the direction issued by the Hon"ble Supreme Court as per sub-paras 1 to 16 of paragraph 45 of the judgment in the case of S. Jagannath (supra) insofar as the matter relates to the said department under the Government Rules of Business. By letter No. 14048/R dated 18th March 1997 of the erstwhile Revenue & Excise Department, instructions were issued to the Collectors of the Coastal Districts namely, Balasore, Bhadrak, Kendrapara, Jatatsinghpur, Puri, Khurda and Ganjam to evict persons encroaching upon the government land for shrimp culture. By letter No. 52160/R dated 12.10.1999 of erstwhile Revenue & Excise Department, instructions were issued to the

Collectors of the aforesaid coastal districts to ensure that No. shrimp culture ponds are set up in the C.R.Z. area excepting those using traditional and improved traditional types of technology. It was clarified that any person who is using or converting his agricultural land for shrimp culture ponds within the C.R.Z. area by adapting any intensive or semi- intensive type of technology which does not conform to the traditional and improved traditional methods is liable for eviction from the land u/s 8 of the OLR Act. The instructions clearly spelt out that No. permission shall be granted by the Authorized Officers for use/ conversion of agricultural land for construction of shrimp culture ponds u/s 8-A of the OLR Act and the connected rules within the Coastal Regulation Zone area except for traditional and improved traditional types of shrimp culture as decided in the judgment of the Apex Court in the case of S. Jagannath (supra).

9. The Policy of the State Government with regard to settlement of fisheries in the Chilika Lake has been framed since long and the last comprehensive Policy was issued vide letter No. 23240/R dated 23.05.1994 (Annexure C) of the erstwhile Revenue & Excise Department. The said Chilika Fishery Policy was subsequently revised vide letter No. 29253/R dated 05.07.1994, letter No. 52561/R dated 07.12.1994 (Annexures-D & E) respectively. By letter No. 32845/R dated 18.06.1999 (Annexure F), the Government completely banned grant or renewal of lease for culture fishery within the lake area either in favour of any Primary Fishermen Co-operative Society or in favour of groups/ societies or non-fishermen inhabitants of the adjoining villages/ hamlets. By letter No. 33682/R. dated 27.07.2000 (Annexure G), the Government in Revenue Department constituted three District Level Monitoring Committees in the districts of Puri, Khurda and Ganjam to supervise and monitor the functioning of the Task Forces at the district level. Two Task Forces with separate operational units at Satapada and Balugaon for protection of Chilika Lake, Task Force so constituted have been assigned with the following functions:

(i) Enforcement of Orissa Marine Fishery Regulation Act (OMPR Act) by way of prevention of the Poaching of Prawn Juvenile regulating the fishery activities in the restricted areas etc. of Chilika Lake.

(ii) Enforcement of Wildlife Protection Act to prevent poaching and trapping of birds in Chilika Lake.

(iii) The Task Force shall evict encroachments from the area in accordance with the provisions of the relevant Acts and Rules framed thereunder and maintain constant vigil in the areas to prevent unauthorized fishing and poaching of birds etc., and (iv) Any other functions as assigned to the Task Force from time to time for protection of Chilika Lake.

For Regulation of fishery activities in Chilika Lake and sustainable management of the aquatic resources of Chilika, the Forest & Environment Department has drafted comprehensive guidelines. The said department is finalizing the draft guidelines in consultation with the Law Department.

10. The Commissioner-cum-Secretary to Government, Department of Fisheries and Animal Resources Development in its affidavit dated 06.11.2010 submitted that in exercise of power conferred by Sub-sections (1) and (3) of Section 4 of the Coastal Aquaculture Authority Act, 2005 (24 of 2005), the State Government in Fisheries & ARD Department have constituted a State Level Committee in order to consider applications for registration of Coastal Aquaculture Farms in the State of Orissa vide Notification No. 5824 dated 06.05.2006 (Annexure A). Accordingly, the State Level Committee on Coastal Agricultural Authorities is being held under the Chairmanship of the Commissioner-cum -Secretary to Government, Fisheries and ARD Department along with the officials of Marine Products Export Development Authority as well as the representative of the Forest & Environment Department.

11. The Principal Secretary to Government, Department of Forest and Environment, in its affidavit dated 04.11.2010 filed in pursuance of Order Dated 26.07.2010 stated that after coming into force a special Act namely, Coastal Aquaculture Authority Act, 2005 and Rules framed thereunder, the State Fisheries and Animal Resources Development Department which is acting as the State Nodal Department to regulate Coastal Aquaculture farms and their activities in the State, issued a Notification No. 5824/FARD dated 06.05.2006 constituting the State Level Committee and District Level Committees in respect of Coastal Districts comprising the Members of different Departments of the State Government in order to consider applications for registration of Coastal Aquaculture Farms in the State of Orissa. The Fishery Policy on Chilika is in existence since long, which has been modified from time to time. However, a new draft policy guideline has been prepared taking into account the Judgments of the Apex Court as well as this Court in consultation with all concerned departments of the State Government.

12. On the rival contentions, the question that falls for consideration by this Court is as to whether any direction can be issued to the Opp. Parties for not taking steps for demolition of the earthen embankment in question.

13. The prayer of the Petitioners is for a direction to the Opp. Parties for not taking any step for demolition of earthen embankment in question which was constructed by the villagers for protection of the villages of three Grama Panchayats, namely, Siandi, Siala and Malud as well as agricultural lands of the length of 2 K.Ms and for use as passage to come to sea beach for fishing. According to the Petitioners, demolition of the said embankment would affect the livelihood of the villagers living inside Chilika in those Grama Panchayats. On the other hand, the specific stand of the Commissioner-Cum -Secretary, Revenue and Disaster Management in their affidavit is that they are taking sincere steps to implement the direction issued by the Hon''ble Supreme Court of India as per sub-paras 1 to 16 of Paragraph 45 of the judgment in the case of S. Jagannath (supra). In the counter affidavit filed by Opp. Party No. 2- Collector, Puri and Opp. Party No. 4- Tahasildar, Krushna Prasad, it is stated that the Petitioners had

unauthorizedly constructed the embankment in question which touches the original Saline Ring on both the sides i.e. North and South and have been doing illegal prawn culture. The said embankment also affects free flow of Chilika water and also obstructs the excess logging of rain water from the paddy lands of different villages situated nearby the permanent Saline Ring. The construction of the said embankment is in violation of the orders of the Hon''ble Supreme Court of India as well as the instruction of the government issued from time to time so far the Chilika Policy is concerned. It is further stated that the Apex Court on many occasions has deprecated the illegal and unauthorized construction of Gheries for the purpose of prawn culture and has directed to demolish the same in the greater interest of public as the Petitioners have constructed the earthen embankment for prawn culture thereby encroaching upon the Government land. Since the Hon''ble Apex Court in *S. Jagannath's* case (supra) has completely banned prawn culture in Chilika Lake ceasing the rights of both fishermen and non-fishermen in Chilika Lake, various actions were taken by the Government to implement the direction of the Hon''ble Supreme Court and the policy of the State Government and to make Chilika free from encroachment. The earthen embankment does not serve any interest of the general public in any manner whatsoever, rather the embankment adjacent to Jano is a hindrance to the free movement of flora and fauna of the Chilika Lake. Therefore, the process of demolition of embankment will not affect any change of water level in any side of Chilika Lake nor will cause any additional water flow or less flow of water or loss to the general public. Now in the above scenario, we have to examine the claim of the Petitioners.

14. It is the settled legal proposition that the policy decision taken by the State or its authorities/instrumentalities is beyond the purview of judicial review unless the same is found to be arbitrary, unreasonable or in contravention of the statutory provisions or it violates the rights of individuals guaranteed under the statute.

In *M/s. Ugar Sugar Works Ltd. Vs. Delhi Administration and Others*, , it has been held that in exercise of their power of judicial review, the Courts do not ordinarily interfere with the policy decisions of the executive unless the policy can be faulted on the ground of mala fide, unreasonableness, arbitrariness or unfairness etc. Indeed arbitrariness, irrationality, perversity and mala fide render the policy unconstitutional. However, if the policy cannot be touched on any of these grounds, the mere fact that it may affect business interest of a party does not justify invalidating the policy. The Apex Court in the case of *Narmada Bachao Andolan Vs. Union of India and Others*, , held as under:

255. It is now well-settled that the Courts, in the exercise of their jurisdiction, will not transgress into the field of policy decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy making process and the Courts are ill equipped to adjudicate on a policy decision so undertaken. The Court, No.

doubt, has a duty to see that in the undertaking of a decision, No. law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution.

In BALCO Employees Union (Regd.) Vs. Union of India and Others, , the Apex Court held as under:

45. It is evident from the above that it is neither within the domain of the Courts nor the scope of the judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are our Courts inclined to strike down a policy at the behest of a Petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical.

15. In the fact situation, this Court is not inclined to interfere with the decision taken by the Opp. Party-authorities for demolishing the earthen embankment in question as well as evicting the unauthorized prawn culture in Chilika which is in conformity with the judgment of the Hon"ble Apex Court in S. Jagannath's case (supra) and the Chilika Policy framed by the Government.

16. In the result, the Writ Petition is dismissed. No. order as to costs.

V. Gopala Gowda, J.

I agree.