

(1971) 07 OHC CK 0003
In the Orissa High Court
Case No : O.J.C. No. 1584 of 1968

Padmanav Pradhan and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 30-07-1971

Acts Referred:

Constitution of India, 1950 — Article 14

Vires of Orissa Prevention of Land Encroachment Act, 1954 — Section 5, 6

Citation : AIR 1972 Ori 88 : (1971) 37 CLT 877

Hon'ble Judges : G.K. Misra, C.J.; S.K. Ray, J

Bench : Division Bench

Advocate : L. Rath, for the Appellant; A.G., for the Respondent

Final Decision : Allowed

Judgement

G.K. Misra, C.J.—The case of the petitioners may be stated in short. They are members of one family and they are residents of the ex-State of Pallahara which merged with the State of Orissa on 1-1-1948. Their ancestors had excavated the disputed tank in village Dimiria with an area of 2.80 acres pertaining to khata No, 58, on plot Nos. 502. 921 and 922, about 80 years back. After excavation of the tank their ancestors had planted several fruit bearing trees on its embankment. The ancestors and after their death their heirs, and at present the petitioners are in actual physical possession of the tank. They enjoy the fruits of the trees and the fish from the tank. In the finally published record-of-rights in 1916 the possession of their ancestors was noted in the remarks column. Thus the petitioners are in possession of the disputed tank with its embankment openly, peaceably and in their own right and have acquired right, title and interest in the disputed tank. In or about the year 1963, one Fakir Mohan Pradhan the then Sarpanch of Dimiria Grama Panchayat, who bore a personal grudge against petitioner No. 1, created disturbance over the possession of the tank. In a proceeding u/s 145, Criminal P. C. the possession of the petitioners was declared on 17-2-1964 by an order Annexure A. The Sarpanch asserted his

claim on the basis of an order of transfer of the tank in favour of the Grama Panchayat by the Government. Being unsuccessful in the 145 proceeding he got a proceeding started by the Tahasildar under Sections 3 and 5 of the Orissa Prevention of Land Encroachment Act, 1953 (Act 15 of 1954) (hereinafter to be referred to as the Act).

The Tahsildar passed the order (Annexure-B) on 10-3-1966 to the following effect:--

"The case record is put up today. Perused the case record and evidence adduced in this connection. Plot Nos. 502, 922 and 921 of village Dimiria are Government land and the encroachers are in unauthorised occupation. The encroachment is objectionable in the interest of community. They are there-fore assessed to pay assessment of Rupees 55.40 and penalty of Rs. 700/- for unauthorised occupation. Inform R. I. concerned.

As regards the claims of the encroachers that the encroached land is their private land in 1917 settlement is not acceptable in face of records of 1932 settlement now in force. The parties aggrieved if any may take shelter of any competent court of law for redressing their grievance.

The encroachment being objectionable case record submitted to S. D. O., Pallahara for eviction u/s 6 of O. P. L. E. Act, 1954."

By an order (Annexure-C) the appeal to the S. D. O. was dismissed on 20-7-1966.

The petitioner's revision before the Additional District Magistrate (Executive), Dhenkanal succeeded on 16-12-66-By then the Dimiria Grama Panchayat had filed Title Suit No. 6 of 1966 in the Court of the Munsif, Pallahara, for declaration of right, title and interest of the Grama Panchayat in the tank. The Addl. District Magistrate held that as the Civil Court was already in seisin of the matter, the disputed property cannot be treated as encroachment. He also held that in fact there was no encroachment and directed the Sub-Divisional Officer to take Interest and render all assistance to the Grama Panchayat to establish its title in the Civil Court. Against this adverse order the State of Orissa came up in revision before the Revenue Divisional Commissioner, Northern Division, Sambalpur. He by his order (Annexure-F) dated 18-12-1967 set aside the order of the A. D. M. His ultimate conclusion may be stated in his own words.

"I, therefore, allow the revision preferred by the State and hold that the Encroachment is objectionable and the eviction order passed by the Sub-Divisional Officer is correct and valid in law. The action proposed by the Sub-Divisional Officer should, therefore be upheld and be carried out in due course."

It is to quash this order that the writ application has been filed under Arts. 226 and 227 of the Constitution.

Opposite parties have filed a counter-affidavit asserting that the finally published

record-of-rights of the year 1916 is a mutilated document and although the name of one Pitabas Pradhan had been mentioned in the remarks" column, there is erasure of some words arousing suspicion. In 1932 settlement, however, the "Rajsirkar" was recorded as owner of the tank and the trees. Neither the petitioners nor their ancestors were ever in possession. In 1955 the management of the tank was transferred to the Grama Panchayat and ever since then the Grama Panchayat was in possession.

2. There is no dispute before us that there has been no proper enquiry by taking evidence to determine the question whether the possession of the petitioners was an unauthorised encroachment. The issue raised before the revenue authorities was whether the disputed tank belonged to the petitioners or to the State. The civil right of the petitioners is in issue. If in fact they are owners in possession, they cannot be divested of their right, title and interest in the property without an appropriate finding in a proper enquiry. The learned Advocate General conceded that the impugned order (Annexure-F) is liable to be quashed and the case is to be remanded for a proper enquiry. The Revenue Divisional Commissioner also committed an error of record in saying that the eviction order passed by the Sub-Divisional Officer is correct. The Sub-Divisional Officer passed no order of eviction. In fact, the Tahasildar submitted the record to the S. D. O., Pallahara, for eviction u/s 6 of the Act on which no action had been taken by the S. D. O. yet.

3. Though a number of contentions had been raised in the writ application. Mr. Rath for the petitioners ultimately advanced the following arguments,

(i) Sections 3, 5 and 6 of the Act are hit by Article 14 of the Constitution. These sections constitute the core of the Act and therefore the entire Act was void being still-born.

(ii) The Orissa Prevention of Land Encroachment (Amendment) Act, 1970 (Orissa Act 20 of 1970) (hereinafter to be referred to as the amending Act) was also void inasmuch as it purported to amend a still-born and dead Act.

(iii) The amending Act does not even re-enact Sections 5 and 6 of the Act and as such even if the amending Act is valid, there is no substantive provision for eviction. Section 3 being integrally connected with Section 6 cannot stand in isolation even after the amendment.

(iv) The procedure for eviction and levy of penalty and assessment under the Act imposes unreasonable restrictions on the right to property and is hit by Article 19(1)(f) and Article 31 of the Constitution as no suit can be filed either to prove that the land is not Government land or to challenge the assessment or penalty for the period of occupation.

4. The first question for consideration is whether Sections 3, 5 and 6 of the Act are hit by Article 14 of the Constitution. In Brahmananda Sahu and Others Vs. State of Orissa and Others, Section 6 of the Act was struck down as being

violative of Article 14 of the Constitution. It was said in that case that it entirely lay within the discretion of the State Government to take a proceeding for eviction either under the Act or through courts. There was nothing in the Act to control the Collector's discretion as to why some would be evicted through court and others through the procedure prescribed under the Act. The exercise of the discretion was wholly unguided and there was no rational nexus between the classifications sought to be made and the object of the Act.

5. Similarly, Section 5 of the Act was held to be hit by Article 14 of the Constitution in (1970) 36 CLT 602, (Arjun Pradhan v. Revenue Divisional Commr., Southern Division. Berhampur). The conclusion was based on the same reasoning. It was open to the State to proceed against the encroacher for recovery of damages in Civil Court and alternatively for recovery of penalty u/s 5. The State had the wide discretion to choose one or the other of the two remedies and there was absence of guiding line in the Act for exercise of discretion in one way or the other.

6. In paragraph 6 of that decision it was observed that the vires of Section 3, providing for levy of assessment, was not challenged. Mr. Rath challenges the constitutionality of Section 3 in this case.

7. Sections 3 and 4 run thus:--

"3. Levy of assessment on lands un-authorisedly occupied:-- Any person un-authorisedly occupying any land which is the property of Government shall be liable to pay by way of assessment--

(i) if the land so occupied was at any time assessed to rent the full assessment for the whole period of occupation or a part thereof proportionate to the area occupied as the case may be, provided that for special reasons the Collector or subject to his control a Deputy Collector or a Sub-Deputy Collector may impose the full assessment of rent or any lesser sum irrespective of the area occupied;

(ii) if the land so occupied was not at any time assessed to rent, an assessment on the area occupied calculated from the same period at the rate imposed on lands of a similar description and with similar advantages in the vicinity or when no such prevailing rate exists, in such manner as may be prescribed u/s 8:

Provided that notwithstanding anything in the Tenancy Laws for the time being in force payment of assessment under this section shall not confer any right of occupancy.

Explanation:-- For the purpose of this action occupation for an incomplete portion of an agricultural year may be deemed to be occupation for the whole of such year.

4. Decision as to the amount of assessment shall not be challenged in any Civil Court:-- The decision as to the rata or amount of rent assessed payable u/s 3 shall be recorded in writing and shall not be called into question in any Civil

Court."

It would be apparent that even though a person in unauthorised occupation was liable to pay the assessment made u/s 3, it was open to the State to file suit for damages on account of trespass which would include the amount of assessment. The reasoning on the basis of which Section 5 was declared ultra vires fully applies to Section 3 also. It is not necessary to repeat the same reasoning. We are satisfied that Section 3 is also hit by Article 14 and is void.

8. The result of the aforesaid analysis is that Sections 3, 5 and 6 are violative of Article 14 and are accordingly void. In Civil Reference No. 3 of 1970 (Orissa), (Hari Sahu v. Union of India) we have held that if the particular sections of a statute which constitute the very core of the Act are struck down as being unconstitutional and void, then the rest of the sections which are merely ancillary to those sections and cannot independently survive must also be struck down. Sections 3, 5 and 6 constitute the very core of the Act and consequently the entire Act must be struck down as being still-born and dead and as such void.

9. It is contended on behalf of the State that after the passing of the amending Act the Act is intra vires and Sections 3, 5 and 6 of the Act are valid.

10. It is, therefore, necessary to read the provisions of the amending Act, It is in six sections. Section 1 deals with short title and commencement. Section 2 prescribes the period of limitation for starting a proceeding under Sections 3, 5, 6 and 6-A and for appeal which has not been provided in the Act. Section 3 says that Sections 13 and 14 of the principal Act shall be and shall be deemed always to have been omitted. Section 4 introduces Section 15-A in the principal Act barring alternative remedies in any other court of law. Section 5 deals with restoration of proceedings already dismissed and Section 6 with repeal and savings.

It would thus be seen from the scheme of the amending Act that it does not constitute re-enactment of the Act. The amending Act is not self-contained and complete in itself.

11. We have already held in Civil Reference No. 3 of 1970 (Orissa) that when an Act is struck down as unconstitutional it is still-born and dead from its inception. Such a still-born and dead Act cannot be resuscitated into life by an amending Act unless the latter is a complete re-enactment of the Act itself. In the process of re-enactment the Act may be given retrospective effect.

The amending Act in this case is not a re-enactment. It cannot, therefore, resuscitate the Act into life. Both the Act and the amending Act are unconstitutional and void and are accordingly struck down.

12. Even the amending Act is defective on the face of it. Sections 5 and 6 had already been declared ultra vires by this Court. The amending Act does not purport to revive Sections 5 and 6 into life. There is no reference to those two sections in it. The result is that even if the amending Act is valid, there would be

no sections corresponding to Sections 5 and 6.

13. We would now sum up our conclusions:--

(i) Section 3 of the Act is hit by Article 14 of the Constitution and is void.

(ii) Sections 3, 5 and 6 of the Act being void, the entire Act is still-born and void.

(iii) The amending Act is not a re-enactment. It cannot revive the Act into life.

(iv) Both the Act and the amending Act separately and together are void,

14. In view of our aforesaid conclusions, it is not necessary to examine the argument of Mr. Rath referred in paragraph 3 (iv).

15. The Act being void, there is no law on the basis of which the assessment or eviction proceeding could be started.

16. In the result, the writ application is allowed. The impugned order (Annexure-F) is quashed. The assessment made and penalty imposed by the Tahasildar and his suggestion to initiate a proceeding for eviction are quashed. A writ of certiorari be accordingly issued. In the circumstances there will be no order as to costs.

Ray, J.

17. I agree.