
(2016) 06 OHC CK 0039

In the Orissa High Court

Case No : W.P.(C) No. 17960 of 2015 (With Batch)

Patitapaban Panda

APPELLANT

Vs

State of Odisha

RESPONDENT

Date of Decision : 24-06-2016

Acts Referred:

Constitution of India, 1950 — Article 14, 21

Cuttack Development Authority Act, 1982 — Section 10, 11, 19, 2

Citation : (2016) 2 ILRCuttack 94

Hon'ble Judges : S. Panda, J.

Bench : Single Bench

Advocate : In person, for the Petitioner; M/s. G.K. Acharya, P.K. Das, S.K. Behera, D.P. Mishra, D.K.Naik, M/s. D. Mohapatra, M. Mahapatra, G.R. Mohapatra, A.Dash, B.K. Mukharji, M/s. S.K. Nayak-1, D. Nayak, B.P. Swain, Debasmitta Nayak, M/s. A.K. Mohapatra, B/Panda,

Final Decision : Disposed Off

Judgement

S. Panda, J.—As all the Writ Petitions involve common questions and parties are same, the matters are taken up for hearing together and are

disposed of by this common judgment.

2. W.P.(C) No. 17960 of 2015 has been filed by the petitioner challenging the illegal action of opposite party no.5 in running private hostels in the

residential area of C.D.A over Plot No.1498/C, Sector-10, C.D.A, Cuttack which is adjacent to the petitioner's residential house.

2.1 W.P.(C) No. 23245 of 2015 has been filed by the petitioner challenging the notice dated 14.12.2015 issued by the Law Officer, Cuttack

Development Authority, Cuttack to the Inspector-in-Charge, Markatnagar Police Station for closure of Ladies Hostel running in the building of the

petitioner over Plot No. 1498/C, Sector-10, C.D.A, Cuttack.

2.2 W.P.(C) No. 227 of 2016 has been filed by the petitioner challenging the notice dated 30.12.2015 issued by the Law Officer Cuttack

Development Authority, Cuttack directing for closure of the Ladies Hostel running in the building of the petitioner over Plot No. 1498/C, Sector-10, C.D.A, Cuttack.

2.3 W.P.(C) No. 1334 of 2016 has been filed by the petitioner challenging the show cause notice dated 15.01.2016 issued by the Law Officer,

Cuttack Development Authority, Cuttack under Sections 91 (1) and (2(1) of Orissa Development Authorities Act, 1982 in U.C Case No.21 of

2016 for running a Hostel Restaurant over Plot No. 11-2B/1095, Sector-11, C.D.A, Cuttack.

2.4 And W.P.(C) No. 1425 of 2016 has been filed by the petitioner challenging the notice dated 18.1.25016 issued by the Law Officer, Cuttack

Development Authority, Cuttack directing closure of the Boys Hostel running in the building of the petitioner over Plot No. 5-B/1667, Sector-10, C.D.A, Cuttack.

3. The brief facts of the cases are that Cuttack Development Authority (CDA) created under Orissa Development Authority Act, 1982 had

launched residential plotted scheme being commonly known as "Abhinab Bidanasi Project Area, Cuttack" in order to cater the needs of residential

houses in Cuttack City. Under the aforesaid residential plotted scheme various plots were created in a phased manner having different sectors. The

plots are being allotted on long term lease basis for residential purposes only. There is a specific condition in the allotment order as well as in

application Brochure that the allotted plots shall be used only for residential purposes with certain terms and conditions under the Orissa

Development Authorities Act, 1982 (hereinafter referred to as "the Act"). However, it is alleged that some owners violating the terms and

conditions of the land allotment letter and Brochure issued by Cuttack Development Authority are running private hostels in the residential area for

commercial purposes. The moot question in all these Writ Petitions is as to whether residential plots allotted by Cuttack Development Authority in

"Abhinab Bidanasi Project Area, Cuttack" can be used for commercial purposes.

4. The petitioner has taken a stand that opposite party no. 5 has violated the terms and conditions of allotment order as well as the approved plan,

which creates nuisance in the residential area. The petitioner espouses the cause of all the local residents, who are being affected by air, noise and water pollution and all these are in the interest of public. The petitioner has fundamental right to live peacefully and in a good condition within the residential area specified by the authorities as per the statutory provisions. The petitioner has made a complaint before the C.D.A authorities regarding the nuisance created due to utilisation of residential building as hostel and the Town Buses, which are running in the area not only creates sound and air pollution but also endanger to the life of the small children, who are playing nearby. However, the C.D.A authorities have not taken any action. His constitutional right has been affected due to inaction of Cuttack Development Authority.

5. Learned counsel for the petitioner in W.P.(C) No. 17960 of 2015 further submitted that opposite party no. 5 is running a Private Hostel in the residential area of C.D.A for commercial purposes, which is creating nuisance to women and elderly people and the same may be shifted to commercial premises or institutional areas. The vehicular movement is very difficult and the area is polluted due to overcrowded of the inmates of the Hostel. Due to accommodation of a large number of inmates the debris's are thrown here and there causing atmosphere pollution, roof of the nearby residential houses are completely dirty and become unused and there is also air and noise pollution. The area is being fully polluted due to unhygienic situation created by boys and girls hostels run by some private persons for commercial gain and thereby the peaceful life of the inhabitants has been seriously affected. In support of his contention he has relied on the decisions reported in AIR 1997 SC 579, AIR 2000 SC 2623 and 2015 (2) Supreme 677.

5.1 In the case of Dr. K. Madan v. Smt. Krishnawati and another reported in AIR 1997 SC 579 the Apex Court held that controller cannot merely ask for payment of penalty or compensation permitting the misuser to continue.

5.2 In the case of Munshi Ram and another v. Union of India and others reported in AIR 2000 SC 2623 it was held that tenants using premises in breach of terms of lease, paramount lessor, Development Authority taking action to terminate lease - not debarred for exercising its

rights under the terms of lease.

5.3 The Apex Court in the case of Anirudh Kumar v. Municipal Corporation of Delhi and others reported in 2015 (2) Supreme 677 held

that the litigation initiated by appellant, though resident of the same building, espouses cause of all the local residents, therefore, it is public interest

litigation.

6. Learned counsel appearing for opposite party no. 5-Debendra Hazra submitted that opposite party no. 5 is running a private hostel in Plot No.

1498/C, Sector-10, C.D.A, Cuttack allotted to him by the Cuttack Development Authority for residential purposes. He further submitted that as

per the definition of "Residential Building" in Regulation 21 (G) of the 2010 Regulations, hostels have been included in the definition which was not

there in the 2001 Regulations or the ODA Act of 1982. Hence a Hostel can be run in a residential building of the CDA Sectors, the same being

permissible under the Regulations which have been brought into effect after receiving concurrence from the State Government. He further

submitted that the use of hostels does not come within the purview of commercial activities. The hostels are not run for profits but merely provide

an accommodation to the students of the college, who only pay the room rent and subsidies rates for their food. Opposite party no. 5 has filed an

application before the C.D.A authorities on 12.4.2013 seeking permission to use his residential building as a Hostel, which is pending as alleged.

He also submitted that proceedings under Section 90 and 91 of the Act are initiated against 456 individuals including opposite party no. 5 for use

of residential plots for commercial purposes. He further stated that the Writ Petition is not maintainable in view of alternative remedy available

under law. In support of his contention he has relied on the decisions reported in 2004 (I) OLR (SC) 81, 2006 (II) OLR 423 and 1996 (I) OLR

282.

6.1 In the case of 2004 (I) OLR (SC) 81 the Apex Court held that the rule of exclusion of writ jurisdiction by availability of an alternative remedy

is a rule of discretion and not one of compulsion. The High Court may exercise its writ jurisdiction in at least three contingencies:

(i) Where the writ petition seeks enforcement of any of the fundamental rights,

(ii) Where there is failure of principles of natural justice or,

(iii) Where the orders or proceedings are wholly without jurisdiction on the vires of the Act is challenged.

6.2 This Court in the case of Bireswar Das Mohapatra and another v. State Bank of India reported in 2006 (II) OLR 423 held that the

existence of an alternative remedy only inhibits the exercise of discretion by the High Court, not its jurisdiction. Though certain exceptions have

been carved out through judicial pronouncements, indicating where High Court can intervene despite the existence of an alternative remedy, but

those are in the nature of guidelines for exercise of discretion by the High Court. They are, if I may say so, not exhaustive but are illustrative. In fact

there is no straight jacket formula in this regard. Whether a High Court would exercise its discretion in the given facts of a case depends on its facts

and the legal questions arising from those facts.

6.3 In the case of Dr. Nirupama Rath v. State of Orissa and another reported in 1996 (I) OLR 282 this Court while dealing with Section 2

(4) of Orissa Shops and Commercial Establishments Act, 1956 have expressed their views with regard to the wider meaning of "Commercial

Establishment" and have categorized it into four headings and further sub-classified it. However, hostel was not covered in such classification or

sub-classifications.

7. A counter affidavit has been filed by Cuttack Development Authority - contending inter alia that the authority has already taken steps against the

allottee, who are using the plots contrary to the permission granted and the purpose for which the lease was given. CDA ensures use of the

residential plots exclusive for residential use and no commercial activities shall be permitted in the residential plots. CDA consciously prepared the

layout and carved out the plot exclusively for residential purpose. There is no contingency to allow conversion of the said plots otherwise than for

residential use. CDA developed comprehensive development plan for CDA area and such areas have been divided into different zones, each

zones were carved out for specific purpose and the permissible use of the zone have been specified in the Building Regulation. Such planning and

formation of zones has nothing to do with the special developed planning area over the land owned by the authority. Such areas are called as

Special Scheme area and one of such scheme is Abhinaba Bidanasi Project

Scheme. So far as Sector 10 and 11 of CDA are concerned the dominant purpose is for residential use and the carved out plots were allotted for residential house only and accordingly lease deeds are executed for that purpose. To facilitate the residential house, some plots in a specified scheme area are carved out for commercial use, health centre, institution, public utility and open space etc. Sector 10 and 11 of CDA does not provide any scheme for the purpose of hostel etc. Some of the allottees having residential plots are converting their plots and using it for hostel, school and other commercial purposes for which CDA has already taken steps to initiate proceedings.

8. Learned counsel for Cuttack Development Authority has produced the Development Plan prepared by the authorities as per Section 8 of the Act. It is not disputed that opposite party no. 5 has submitted plan for approval as per the statutory provisions and the construction was made for the purpose of residential house. The plot was allotted for the said purpose and he has given undertaking to the effect that he will construct the building for residential purpose. The plot was within the Scheme area developed by the Cuttack Development Authority and lay out plan has been drawn by the authorities. It is also not disputed that the land was allotted by the Government for the aforesaid purpose to the authorities. As per the said lay out plan the areas are divided into different sectors, each sectors comprises of different plots, different sizes such as residential, residential-cum-commercial plots and etc. The lay out plan exclusively provides various other amenities for public purpose. The relevant terms and conditions incorporated in the allotment letter issued in favour of opposite party no. 5 are quoted hereunder:-

4. The plot allotted shall be used only for residential purpose. The residential building must be constructed within a span of three years from the date of handing over of possession. In case of failure to construct the building within the stipulated period, the lease would be determined and allotment will be cancelled and the possession of the plot would be taken over by the Authority. In that eventuality the total amount paid would be refunded without payment of any interest.

9. The planning and building norms in force on Cuttack Development Authority would be applicable to the construction of residential building on

the plot.

17. The Authority reserves the right to alter or modify the plan, scheme, the size of plots, if required, in the interest of the scheme or due to the

conditions beyond its control. All information on dimensions and area are provisional.

22. Infringement or breach or non observance of any of the terms and conditions would result in immediate determination of the lease/cancellation

of allotment of plot and reversion of the plot of land to Authority free from all encumbrances without payment of any compensation for the loan or

for any structure erected thereupon or for any improvement done on the plot.

23. On the question of infringement of or breach or non-observance of any of the terms and conditions of this allotment, the Authority shall be the

sole judge and order of the Authority declaring that there has been such infringement or breach or non-observance, shall be final and conclusive

proof of such infringement or breach or nonobservance as between the Authority and the allottee.

24. On infringement of breach or non-observance of any of the aforesaid terms and conditions, the Authority may declare that the lease has been

determined/allotment has been cancelled and that after expiry of one month from the date of such order, the Authority or any of its officer shall be

entitled to re-enter and take possession of the plot of land and of the building and other structures erected thereupon.

Provides that in case the plot of land is so resumed, the allottee shall not be entitled to any compensation. Whatever, for the building or other

structures etc. erected by the allottee on the land. But the allottee will be at liberty to remove the materials and such buildings or structures etc.

within a month from the date of determination of the lease/cancellation of allotment order. Failing which, the Authority shall be entitled to cause

such materials or constructions removed at your cost and sell the same by public auction. You will in that event entitled to the balance of the same

proceeds after deduction of arrear of cost, arrear of ground rent, Municipal taxes etc.

Provides, however, that before such determination of lease/cancellation of allotment order, the Authority shall give you a written notice of its

intention to do so and you shall have the right to remedy/the infringement or

breach or non-observance complained of, with the given reasonable time from the date of such notice and in that event, the Authority shall not be entitled to reenter or take possession.

9. For better appreciation some of the provisions of the Act are quoted hereunder:-

Section 2 (v) of the Act: Building - includes any structure or erection or part of a structure or erection which is intended to be used for residential, commercial, industrial, or other purposes, whether in actual use or not.

Section 2 (viii) of the Act: Commerce - means the carrying on of any trade, business or profession, sale or exchange of goods of any type

whatsoever and includes the running of with a view to making profit, hospitals, nursing homes, infirmaries or educational institutions, and also

includes the running of sarais, hotels, restaurants and of boarding houses not attached to any educational institution and the word "commercial"

shall be construed accordingly.

Section 2 (ix) of the Act: Commercial use - includes the use of any land or building or any part thereof for purpose of commerce or for storage of

goods, or as an office, whether attached to any industry or otherwise.

Section 2 (xxviii) of the Act: Public building - means any building to which the public or any class or section of the public are granted access or any

building, which is open to the public or any class or section of the public and includes any building-

(a) used as a-

(i) School or College or a University or other educational institution,

(ii) Hostel,

(iii) Library,

(iv) Hospital, Nursing Home, Dispensary, Clinic, Maternity Centre or any other like institution,

(v) Club ,

(vi) Lodging House,

(vii) Choultry,

(viii) Coffee House, Boarding House, Hotel or Eating House.

Section 19 of the Act mandates regarding use of lands and buildings in

contravention of development plan - after coming into operation of any of the development plans in any area no person shall use or permit to be used any land or building in that area otherwise than in conformity with such development plan.

Provided that it shall be lawful to continue the use upon such terms and conditions as may be prescribed by regulations made in this behalf of any land or building for the purpose and to the extent for and to which it is being used upon the date on which such development plan comes into force.

10. Cuttack Development Authority in its counter affidavit has specifically stated that as per the development plan they have allotted the plot in

favour of opposite party no.5 within the residential area. The change of residential building for other purpose is not permissible as per the statutory

provisions. However, deviating the terms and conditions of the allotment, opposite party no. 5 and similarly persons who have been allotted with

plots for residential purpose, using the same for other purposes, for which CDA has already initiated proceedings. The action of the inmates of the

Hostels severely affects the peace and tranquillity of the area and creates severe health hazards to the members of the petitioner's family and his

children, who are prosecuting their studies as well as the localities. The youngsters coming to the area with motorbikes and loiter around for other

purposes, harassing young girls and old people. Use of residential building for other purposes and the City Buses create nuisance in the area, as

such those activities need to be stopped in the residential area more specifically as per the Town Plan, which was developed as per the Scheme.

11. The action of opposite party no.5 and inaction of opposite parties are violating the principle of sustainable development, public trust, inter-

generational equity which amounts to infurcation of Article 21 of the Constitution of India. It is the fundamental right of the citizen to live peacefully

in their residential/dwelling house. The peace and tranquillity of the residential area shall be maintained by all and those who are disturbing the same

in the area by creating nuisance need be strictly dealt with. All those activities need be stopped. Accordingly, this Court disposes of all the Writ

Petitions with a direction to the Cuttack Development Authority-opposite party no.2 to take a decision on the notices issued to the allottees, who

have deviated the approved plan and the terms and conditions of the allotment

order as expeditiously as possible, preferably within a period of two months from the date of production of certified copy of this judgment after giving opportunity of hearing to the parties. It is needless to say that the City Buses/Town Buses which are plying in the area and creating nuisance, the authorities more specifically opposite party no. 4 shall take steps so that the said Buses shall ply at a suitable distance from the residential area i.e. in the Ring Road area only, which is at a walk-able distance from any side of the residential area. The said Buses should not enter into the residential areas.