
(1956) 08 OHC CK 0010

In the Orissa High Court

Case No : O.J.C. No's. 26, 31, 39, 62, 111 and 244 of 1954

Ramachandra Deb and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 02-08-1956

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1898 (CrPC) — Section 145
Specific Relief Act, 1877 — Section 9

Citation : AIR 1957 Ori 80 : (1957) 23 CLT 324

Hon'ble Judges : Narasimham, C.J.; P.V.B. Rao, J

Bench : Division Bench

Advocate : H. Mohapatra, R.N. Misra and N.V. Ramdas, in 26 of '54, D.V.N. Rao and A.K. Tripathy, in No. 62 of '54, N.V. Ramdas, in No. 244 of '54, D.V.N. Rao and S.C. Palit, in Nos. 31, 39 and 111 of '54, for the Appellant; Adv.-General, for the Respondent

Final Decision : Allowed

Judgement

Narasimham, C.J.—These are applications by six of the ex-Zamindars of Ganjam district under Article 226 of the Constitution praying for

relief against the State of Orissa, from apprehended danger to their property situated in portions of Ganjam Agency tracts known as "Maliahs" by

threat of executive action. The questions of law involved in all these applications are identical, and hence they were heard together and will be dealt

with in one judgment.

2. The zamindaris of these applicants were all situated in Ganjam plains (now partly in Orissa and partly in Andhra State) and had been

permanently settled with them by the well-known Madras Regulation No. XXV of 1802. These zamindaris have been acquired by the respective

Governments under the provisions of the Estate Abolition Act. Adjacent west of Ganjam plain lie hilly tracts (inhabited mainly by aboriginals)

known as Agency tracts, portions of which were granted to these zamindars by various Sanads of the Governor-in-Council of Fort St. George

Madras, sometime in 1874 and 1875. These tracts were known as "Maliahs" and the applicants were styled "Muthadars" of these Maliahs. These

tracts were always considered as separate from the permanently-settled areas of the Zamindars and held on some sort of service tenure.

Government seem to have been in some doubt as to whether these zamindars had any proprietary interests in these Maliahs. The Collector of

Ganjam appears to have thought sometime in February 1954 that the Zamindar of Bodokhimedi (applicant in O. J. C. 26 of 1954) had proprietary

interest which could be acquired only on payment of compensation, and he called upon the zamindar to meet him by his letter No, 346/1954 dated

18-2-1954, and asked him to suggest a consolidated amount as compensation.

Subsequently, however, Government presumably acting on legal advice thought that these Zamindars had no proprietary interest at all and that the

tenures were resumable by mere issue of notice terminating the services of these Zamindars in the Maliahs. Accordingly by various notices dated

30-3-1954 these "Muthadars" were informed that their services were no longer required, and that the "Muthas" would be resumed with effect

from that date. The notice issued to the Muthadar of Bodokhimedi may be taken as typical and is quoted below in full.

Government of Orissa Revenue Department.

No. 1146/R. II-1/1954. Cuttack, the 30-3-1954.

To,

The Muthadars of Bodokhimedi Maliahs, The Governor of Orissa hereby declares that the services required to be performed by you in pursuance

of the Sanad dated 17-7-1874 by the Agent to the Governor in the district of Ganjam are no longer required.

(2) The Governor accordingly resumes your interest as Muthadar of the Muthas of Bodokhimedi Maliahs.

(3) This resumption will take effect from the date of this order. With effect from this date the duties and obligations imposed on you need not be

performed.

Boundaries of the Mutha of Bodokhemidi Maliahs
East... ..Sannokhimedi ex-estate, Bodokhimedi ex-
estate and Surangi ex-estate.

West.... .Koraput district.

North... .Sannokhimedi Maliahs,

South... .Parlakhimedi Maliahs.

By Order of the Governor V. Ramanathan, Addl.

Secretary, Revenue Department,

After due service of this notice the local Anchal Adhikary called upon the Muthadars to deliver possession of the Muthas and also threatened to

forcibly dispossess them if they refused to give up possession peacefully. The applicants' main grievance is that they have proprietary interests in

these Maliahs and if Government wanted to extinguish those interests they ought to have acquired them by paying adequate compensation and that

it was high handed on the part of Government and its officials to threaten to forcibly dispossess them by merely giving notice terminating their

service tenures.

3. The State of Orissa, on the other hand, contended that these applicants had no proprietary Interests at all in the Maliahs, that they held them

merely as office holders who were remunerated for their services by being permitted to appropriate the emoluments from those Maliahs, and that

the service tenures were therefore resumable after due notice terminating their services. In the counter-affidavit filed by Mr. V. Ramanathan on

behalf of the State of Orissa the specific allegation made by the applicants to the effect that the Anchal Adhikary threatened to dispossess them

forcibly if they would not surrender possession Peacefully and that there was threat of Immediate dispossession, was not challenged.

On the contrary, in reply to a specific question put by this Court the learned Advocate-General said that Government were not prepared to give an

undertaking that they would not dispossess the applicants from the Maliahs without their consent "otherwise than in due course of law". He urged

that Government were legally entitled to use minimum force necessary for the purpose of dispossessing the applicants in view of their claim that the

Maliahs were resumable tenures. Doubtless, the Advocate-General filed a memo

to the effect that Government would act "in accordance with law" while giving effect to their orders of resumption.

But when called upon to explain what he meant by the expression "in accordance with law" he stated that it only meant that the State would act in accordance with what Government considered to be "lawful" for the purpose of taking possession, and that the expression did not exclude the use of force if Government considered it necessary

4. I may now quote the terms of the Sanad dated the 17-7-1874 granted to the Zamindar of Bodokhimedi (alias Peddakhimedi) when settling the

Bodokhimedi Maliahs with him:

Sannad-i-Millicut Isthimirar or Deed of Permanent Property granted by the Right Hon^{ble} the Governor in Council of Port St. George, on behalf

of the Right Hon^{ble} the Secretary of State for India in Council,

To,

Shri Lakshminarayana Ananga Bhim Devu Keseri Muthadar of Peddakhimedi Maliahs in the Ganjam district.

Whereas the Right Hon^{ble} the Governor In Council, on behalf of Her Majesty's Secretary of State for India in Council, has determined to

continue to you and your heirs in perpetuity the possession of the hill tract commonly called the Peddakhimedi Maliahs in the district of Ganjam,

this Sanad certifying the said grant is issued to you accordingly on the conditions following:

(1) You shall attend with your Samasthanam Palks whenever called upon to do so by the Agent to the Governor, and shall perform all such duties

as are customarily rendered on such occasions.

(2) You shall pay an annual Nazur of Rs. 500/-every 1st of April from the commencement of Fasli 1284.

(3) This permanent annual Nazur is fixed, exclusive of the revenue derived from the manufacture and sale of salt and salt petre; exclusive of the

Sayer or duties of every description whether by sea or land, the entire administration of which the Government reserves to itself; exclusive of the

Abkari or tax on sale of spirituous liquors an intoxicating drugs; exclusive of all taxes personal and professional; as well as those from markets, fairs

and bazars; exclusive of Lakhraj lands (lands exempt from payment of public

revenue); and of all other alienated lands paying a small quit vent (which quit rent unchangeable by you is induced in the assets of your Mutha) and of all lands and Roosooms heretofore appropriated to the support of Police establishments.

The Government reserves to itself the entire exercise of its discretion in continuing or abolishing temporarily or permanently the articles of revenue included according to the custom and practice of the country under the several heads above stated.

(4) Your Mutha being held by you In consideration of services to be rendered to the State, the emoluments thereof are inalienable from the Office of Muthadar by mortgage, sale, gift or otherwise; and the Civil Courts are by Act XXIII of 1871 prohibited from taking cognizance of any claim thereto except under a certificate from the Collector of the district, and the power to decide all such claims is reserved to the Collector.

(5) On the occurrence of the vacancy in the Office of Muthadar by death, clause 3, rule 10 of the Agency rules, sanctioned by the Governor-in-Council, in virtue of the powers vested in him by Section IV of Act XXIV of 1839, shall regulate the succession, namely:

"Clause 3. On the death of any proprietor, the Agent shall personally investigate all claims to the succession to hill Zamindaris or other landed possessions held in feudatory tenures; and shall through the Board of Revenue, submit the result of his inquiry for the orders of Government who, should there be more than one claimant, will exercise their inherent right to select, as successor, the one among whom most acceptable to the people, and be qualified to fulfil the duties of the situation."

Given in Ootacamund this seventeenth day of July 1874 by the Right Hon^{ble} the Governor-in-Council, on behalf of the Right Hon^{ble} the Secretary of State for India in Council.

The Sanads granted to the other Zamindars (applicants in O. J. Cs. Nos. 31, 39, 62, 111 and 244 of 1954) are all dated 7-12-1875 and they are practically Identical with the Sanad granted to the ex-Zamindar of Bodokhimedi (Peddakhimedi): except for the insertion of an additional (sixth) clause to the following effect:

6. So long as I continue to perform the above stipulations and discharge the duties of allegiance to the British Government, its law and regulations,

which I now solemnly engage to do, I consider myself authorised and empowered to hold, at the permanent annual Nazur therein named....

This sixth clause is however absent in the Sanad relating to Bodokhimedi.

5. On behalf of the applicants it was urged that the terms of the Sanad indicated unmistakably that the service tenure was irremovable, being in the

nature of a grant of land burdened with service. Special emphasis was laid on the description of the grant as "Sanad-i-Millicut Istimhari or Deed of

Permanent Property" and on the following words in the first clause of the Sanad:

Whereas the Right Hon^{ble} the Governor-in-Council on behalf of Her Majesty's Secretary of State for India in Council has determined to

continue to you and your heirs in perpetuity the possession of the hill tracts commonly known as... .

and also on some other terms of the Sanad which need not be described in detail at this stage.

The Advocate-General on the other hand contended, relying mainly on conditions 1 and 4 of the Sanad, that the tenure as in the nature of a grant

of office the performance of whose duties was remunerated by the use of certain lands and as such was removable. The distinction between these

two classes of service tenures which was first pointed out in *Alexander John Forbes v. Meer Mohamed Tuquee*, 13 Moo Ind App 438 (PC) (A)

has been emphasised in innumerable subsequent decisions.

6. On the materials placed before this Court including the affidavits of the parties and copies of certain correspondence that passed between the

then Agent to the Governor of Ganjam and the Government of Madras it is obviously impossible for this Court to decide this important question of

title. It can be decided only in a properly constituted title suit where both parties would get ample opportunities to adduce all available evidence.

The "question will, to some extent, depend on the nature of the services rendered by the Zamindars prior to and after the grant of the sanads and

also on the nature of possession exercised by them over these Maliahs and the extent of control exercised by Government over them. From the

correspondence filed on behalf of the Government of Orissa, however, it appears that even in Governmental circles there were some doubts as to

whether these tenures were merely grants of office or grants of land burdened with service. In one of the letters of the Government of Madras in

the Revenue Department, dated the 26th January 1893, Government seem to have taken the view that in Bodogodo and Bodokhimedi Maliahs the Zamindars had some sort of proprietary interest. In the subsequent correspondence especially from the Agent to the Governor in Ganjam to the Government of Orissa, the Agent seemed to have stressed the position that these Zamindars were mere holders of office and that the tenures were all resumable. The Government of Madras consulted their Advocate General Late Sir P.S. Sivaswamy Ayyar some years ago in respect of their rights over Jolanthra Maliahs which were held on terms similar to those of Bodogodo Maliahs and acted on the assumption that they were resumable service-tenures.

7. As it was obvious that the right of Government to resume these tenures cannot be decided summarily in these Writ applications we made it clear to counsel for both sides that this question can be decided only in a properly-constituted title suit. Mr. Mohapatra on behalf of the applicants thereupon contended that pending the adjudication of title in the Civil Court the applicants were entitled to remain in possession of these tracts and where there is apprehended danger of their dispossession by the use of force by Government, this Court should exercise its extraordinary Jurisdiction under Article 226 and give them relief.

8. On the other hand, the Advocate-General contended that this was a case of simple dispute between the grantor and the grantee over the right to resume a service-tenure and that the parties should be left to seek protection in the ordinary law Courts. He urged that if the applicants were dispossessed they could easily file title suits to establish their claim. He also submitted, relying on Maharaj Umeg Singh and Others Vs. The State of Bombay and Others, that Government Would have no objection if these applications are kept pending till the filing of a civil suit against the State for declaration of their title, after service of notice u/s 80, Civil P. C. The controversy between the parties is thus narrowed down to the limited question as to whether the applicants should be maintained in their possession of the Maliahs until eviction in due course of law, or else whether they should be driven to the Civil Court to establish their right after Government have successfully evicted them by use of force or show of force.

9. The admitted facts are as follows:

These tracts were in the possession of the applicants' forefathers prior to the dates of the Sanads granted to them in 1874 and 1875. These

Sanads merely "continued" them in possession of the tracts in perpetuity. As regards the nature of the possession exercised by the Zamindars in

these areas, the correspondence filed by Government would show that they used to collect "Mamuls" from the various Patros (village headmen)

and also realise some income from the sale of timber and forest produce from the forests situated in the Maliahs. The income from some other

sources was exclusively reserved for Government by Clause 3 of the Sanad and Government were also receiving certain sums annually as Nazur

from the Zamindar, but these Nazurs had no direct connection with the income derived by the Muthadarg and they were fixed in perpetuity. It was

further stipulated that the tenures were inalienable and in case of disputed succession to the office of Muthadar Government could select someone

from amongst the heirs of the previous holder.

It is admitted by Government that this type of possession over the Muthas has been held continuously by the applicants and their forefathers for

more than 80 years. The limited question for consideration by this Court is whether it could exercise its extraordinary jurisdiction under Article 226

to maintain such possession against Government.

10. Though the language of Article 226 of the Constitution is very wide it was held by the Supreme Court in *The State of Orissa Vs. Madan Gopal*

Rungta, that the existence of a right is the foundation of the exercise of the jurisdiction of the High Court under Article 226. That right need not

necessarily be the right of a full owner over his property. Even the possessory right of a person in long continued possession of immovable

property will be right which may have to be protected, in appropriate cases, under Art, 226 against apprehended danger from a person against

whom the possessor has no other effective remedy. As pointed out in *Bawa Chhatagir v Matanomal*, 4 Ind Cas 359 (Sind) (D):

possession in law is a substantive right or Interest which exists and has legal incidents and advantages, apart from the true owner's title."

This seems to be the principle on which the provisions of Section 9 of the Specific Relief Act and Section 145, Criminal P. C. are based. Section 9

of the Specific Relief Act confers on a person who is dispossessed without his

consent of Immovable property otherwise than in due course of law

a right to recover possession thereof notwithstanding any title that may be set up by the opposite party. Doubtless, this right is of a very limited

nature and is subject to the result of a regular title suit and recovery of possession based on declaration of that title. But a limited right to recover

possession based on mere possessory title is implicit in Section 9 of the Specific Relief Act. The object of that Section is to prevent persons from

taking the law into their own hands and from disturbing the peaceful possession except by the due process of law: see *Budrappa v. Narsingrao*

ILR 29 Bom 213 (E) and *Sona Mia and Another Vs. Prokash Chandra Bhattacharjya and Others*, . Similarly Section 145, Cri. P. C requires a

Magistrate to maintain a party in possession irrespective of all questions of title until he is evicted "in due course of law". It is true that the primary

object of a proceeding u/s 145, Cri. P., C. is to prevent breach of peace, but the principle on which that section is based is that whatever may be

the strength of anyone's title he should not take the law into his own hands and disturb public peace: see *Ghasi Bam v. Amrit Mal* AIR 1917 Pat

606 (G).

11. In this respect the right of a person in possession of property as against the true owner is not the same in India as in England.

English law permits though it does not encourage a person who is actually entitled to the possession of immovable property and is out of

possession, to re-enter without breach of peace if he can. This concession to self-help was inevitable in days when superior courts were closed for

a great part of the year and twenty miles were counted a long journey. Such cases are not now frequent, though not wholly unknown.

Pollock and Mulla on the Indian Contract Act and the Specific Relief Act, 7th Edition, Page 653.

Though there were some conflicting decisions in England on this question it was recognised in the well known case of *Hemmings v. Stoke Poges*

Golf Club Ltd. (1920) 1 KB 720 (H) that an original owner may by the use of minimum force eject a trespasser even though the latter might have

been in possession of the land. In India, however, Section 9 of the Specific Relief Act expressly confers on the person in possession the right to be

restored to possession if ejected without his consent by the true owner, even

though such ejection might have taken place peacefully and without use of force. This Section is based on a provision of Roman Law under which by an interdictum de vi a person wrongfully dispossessed of property could recover it by proving previous possession.

It is not necessary in these applications to discuss why there is this distinction between English law and Indian law on this subject. Salmond In his well-known book on Jurisprudence 10th Edition discusses it at some length at pp. 313-316. It may be that the evils of violent self-help were

deemed so serious in India that the Legislature thought that it must be discouraged by taking away all advantages which anyone may derive from it.

12. The Advocate-General, though conceding that as between two private parties a person in possession of immovable property may have a

limited right to be retained in possession until eviction in due course of law urged that no such right could be claimed as against Government. In

support of this argument he relied on the express provision of Section 9 of the Specific Relief Act barring any suit against Government. This

argument is based on two fallacious assumptions, namely, (1) possessory right was impliedly conferred for the first time by Section 9 of the

Specific Relief Act and (2) where a remedy for the enforcement of a right is barred that right also ceases to exist.

13. I have already shown that the limited possessory right on the recognition of which Section 9 of the Specific Relief Act is based, is itself derived

from the provisions of the Roman Law. This right, though not fully recognised in England has been recognised in many other legal systems, in the

Continent. It was recognised in India also long before the Specific Relief Act came into force. In fact Section 9 of that Act is practically a

reproduction of Section 15 of the Limitation Act of 1859 (Act XIV of 1859). The clause in Section 9 of the Specific Relief Act barring suits

against Government under that section seems to be based on Section XVII of the Limitation Act of 1859 which ran as follows:

This Act shall not extend to any public property or right, nor to any suit for the recovery of public revenues or for any public claim whatever, but

such suit shall continue to be governed by the laws or rules of limitation now in force.

In Aggarwala's "Law of Specific Relief Act in India and Pakistan" (First Edition),

while discussing Section 9 of the Specific Relief Act it is pointed out (at page 11) as follows:

Words have been introduced to show expressly that this provision does not apply to lands claimed to belong to Government. This exemption in fact resulted from Section XVII of Act XIV of 1859.

It seems obvious therefore that any "public property or right" which was expressly kept outside the scope of Act XIV Of 1859 by Section XVII

of that Act, was also kept outside the scope of Section 9 of the Specific Relief Act. There is no authoritative pronouncement as to why such

property was exempted from the operation of Section 9 of the Specific Relief Act, and the learned counsel for both sides could not give me any

material help in -this matter. All that can be reasonably Inferred is that it was assumed that Government unlike a private individual, would not lay

claim to any property unless their title to the same was absolutely clear. In any case no civilised Government is expected to take the law into their

own hands, or to dispossess a person of his property without his consent where the title to the same is not clear and requires adjudication by law

Courts.

14. Again it is not correct to say that merely because a remedy for the enforcement of a right is barred, there is no legislative recognition of the

existence of the right on which alone that remedy is based. It is well known that there are many instances where though rights exist remedies are

barred by express provision of the statute under certain circumstances. In fact, this absence of a remedy against Government u/s 9 of the Specific

Relief Act is itself a good ground for this Court to give appropriate relief under Article 226 of the Constitution. The power of this Court, under

Article 226, is not in any way controlled by the provisions of Section 9 of the Specific Relief Act and the applicants can urge, with considerable

force that the extraordinary jurisdiction of this Court should be invoked since they have no other effective remedy.

15. I may now refer to another Interesting argument raised by the Advocate-General. He stated that though there was an admission by

Government, that the applicants were in occupation of these Maliahs for a long time there was no admission that they were in "possession" as

legally understood, According to him, the status of the applicants was merely

that of servants who were permitted to occupy the Maliahs and to appropriate the emoluments thereof in view of the services to be rendered by them, and that consequently their occupation would be merely the occupation of a servant on behalf of his master, and that Juridical possession remained throughout with GOvernment as master. This argument indirectly attempts to force a decision from this Court of the very question that will have to be decided in the title suit between the parties, namely whether the grant was that of an office remunerated by appropriating the income from the land, or else whether it was a grant of land burdened with service. Moreover, it was nowhere the case of Government that the occupation of these Maliahs by the applicants was that of a servant on behalf of his master.

The emoluments from the Maliahs were entirely at the disposal of the applicants Government having absolutely no control over the same. The payment of Nazur to Government was not in any way dependent on the actual amount collected by the applicants from the Patros or by the sale of forest produce. It is true that the nature of possession was somewhat restricted but that was due to the fact that it was a service tenure. It is well known that acts indicative of possession vary according to the nature of property over which possession is exercised. Thus, if a person claims to be in possession of a Zamindari his possession will obviously be by way of collecting rents from tenants and ordinarily he would not be actually cultivating the lands.

Similarly, the applicants have been claiming to be in possession of vast tracts of jungle lands in Ganjam Agency hill tracts and their possession of such tenure consisted in the collection of "Mamuls" from village headmen and realization of income from forests. It is admitted that in respect of these two classes of income they have been in exclusive possession subject of course, to certain restrictions imposed by way of supervision and control. Such supervision and control is inherent in a service tenure of this type and does not reduce the holder of the service tenure to the position of a mere servant so far as the question of juridical possession is concerned. As pointed out in 4 Ind Cas 359 (Sind) (D):

Where a person has, in his own right and not merely as representative of another such control over immovable property as to be able to exclude

others from it and has the intention of exercising such power of exclusion he can be said to be in possession of it.

Government have never interfered with the collection of customary "Mamuls" by the applicants from the Patros, except when exorbitant demands

against customary usage were made. Similarly, in respect of realisation of forest income the control exercised by Government was of a regulatory

character with a view to preserve the forests, and was not that of an owner controlling the action of his servants. These are clear from a close

scrutiny of the correspondence filed by Government. In the Sanads also it was expressly stated that the applicants and their heirs would be

"continued in perpetuity in possession" of the hill tracts. Hence there can be no doubt that the necessary corpus and the animus co-existed and

these applicants were in physical and juridical possession of their service tenures and not in mere occupation of the same as servants of Government.

16. The Advocate-General, however, relied on a very recent decision of the Calcutta High Court reported in *Achhiman Bibi Vs. Abdur Rahim*

Naskar and Others, where it has been held that where the State purports to exercise its right of property the ordinary law applies and the remedy

of a high prerogative writ (under Article 226) is not available, and that a person in possession cannot seek the help of this Court under that Article

even though the use of force by Government to dispossess him could not be ruled out. If that decision be carefully scrutinised it will be found that it

was based on a previous Division Bench decision of the Calcutta High Court reported in *State of West Bengal Vs. Birendra Nath Basunia and*

Others, where it was held, relying on (1920) 1 K B 720 (H) that a true owner may use minimum force for the purpose of taking possession of land

from a person who had become a trespasser. It is indeed a matter for serious consideration whether that decision has not stated the principles too

broadly and failed to give due weight to the provisions of Section 9 of the Specific Relief Act and the rights of a person in possession even as

against the true owner.

But apart from this question that case is distinguishable from the present inasmuch as, there, the title of Government as true owner was beyond

question. A person had taken a lease from the previous Government of a tract of land and there was an express provision in the lease authorising

re-entry by Government in case the land was required for a public purpose. In exercise of this power of re-entry Government gave notice of their intention to take possession of the same for an admittedly public purpose, namely, resettlement of East-Bengal refugees. Their Lordships held, on those facts, that the right of re-entry coupled with Section 3 of the Crown Grants Act, made the position of Government similar to that u/s 25 of the Queen's Remembrancer Act.

17. In the present case, however, the title of Government to resume the tenure has been neither admitted by the applicants, nor adjudicated by a proper Court of law. It has not been expressly recognised in the Sanads either. The applicants have been admittedly in possession for nearly 80 years. To allow Government to use such force as they may consider necessary for the purpose of dispossessing the applicants from their tenures merely because Government consider the tenures to be resumable would be to encourage arbitrary and high handed action on the part of the Executive. If the dispute was one between two private parties the Court would not ordinarily exercise its powers under Article 226 because the parties may be left to fight out their dispute in a Magistrate's Court u/s 145, Criminal P. C., if there is an apprehension of breach of peace, or by a suit u/s 9 of the Specific Relief Act.

But as against Government a private party cannot seek any relief u/s 9 of the Specific Relief Act. Similarly, action u/s 145, Criminal P. C. against Government is out of question, especially under the existing set-up of judicial administration in this State where all Magistrates are directly subordinate to Government and separation of the Judiciary from the Executive enjoined by Article 50 of the Constitution has not taken place. It is always possible for the State Government to over-awe a private individual by show of force and then summarily turn him out of his property.

It is in such circumstances that, I think, Article 226 should be applied. The position may slightly differ if the title of Government, i.e., their right to resume the tenure, has been either admitted by the applicants or adjudicated by the proper Court, or is very clear from the terms of the grant. In that case the person in possession is clearly a trespasser and there may be some force in the Advocate-General's contention that Article 226 should not be applied against Government. For deciding the present case it is

unnecessary to consider whether Article 226 will be available to a person in possession who has been found to be a trespasser, and I would leave this question open.

But where a person has been admittedly in possession of a service tenure for nearly 80 years and on the materials placed before us it cannot be held clearly whether the tenure is resumable or not and whether Government have the right to terminate the same by mere notice of resumption, the right to possession as between the trespasser and the true owner does not arise, and Government should not be permitted to take the law into their own hands on their own view of that right. Otherwise in all cases of bona fide dispute about title between a private individual in possession of immovable property, on the one hand, and Government on the other, the former would be placed at a disadvantage and great injustice may be done by executive excesses.

Properly constituted law Courts are there for adjudication of disputed questions of title and there is no reason why Government should claim the special privilege of not taking recourse to such Courts merely because they think that their title is clear and they have got sufficient power to enforce their right. We also could not believe in the first instance that a Government whose primary function is to maintain "law" first & "order" next would ever think of taking the law into their own hands, and but for the persistent refusal of the Advocate-General to give any undertaking on behalf of the State that they would take steps to obtain possession of these service tenures in due course of law the necessity for issuing an order under Article 226 would not have arisen.

I may also, in this connection refer to two decisions, one of Hyderabad High Court reported in *Kistareddy v. Commissioner City Police*,

Hyderabad AIR 1952 Hyd 36 (K) and another of the Pepsu High Court reported in *Mohinder Singh T. State of Pepsu* AIR 1955 Pepsu 60 (L).

In these two cases, where a private party had been dispossessed by executive action the High Court directed restoration of possession without deciding the question of title. In the present case though there has been no actual dispossession there is real apprehension of dispossession by possible use of force in view of the refusal of the Advocate-General to give any undertaking on behalf of the State, apart from a vague statement

that Government would act according to what they consider to be lawful.

18. I am therefore satisfied that this is a fit case in which the applicants' possession of the service tenures should not be disturbed "otherwise than

in due course of law". It is perhaps unnecessary to elaborate about the significance of the expression "due course of law". I may quote the

following passage in 1LR 29 Bom 213 (E):

To read the words "due course of law" in Section 9 of the Specific Relief Act, as merely equivalent to the word "legally" is, we think, to deprive

them of a force and a significance which they carry on their very face. For a thing which is perfectly legal, may still be by no means a thing done in

due course of law"; to enable this phrase to be predicated of it, it is essential, speaking generally that the thing should have been submitted to the

consideration and pronouncement of law and "due course of law" means we take it the regular normal process and effect of the law operating on a

matter which has been laid before it for (Adjudication).""

19. I would therefore direct the issue of a writ under Article 226, requiring the Government of Orissa not to dispossess the applicants--without

their consent--of the Malishs, otherwise than in due course of law.

20. The applications are allowed with costs. Hearing fee is assessed at Rs. 100/- (Rupees one hundred) in each of the applications.

P.V.B. Rao, J.

21. I agree.