
(1986) 10 OHC CK 0034
In the Orissa High Court
Case No : O.J.C. No. 1317 of 1986

Ratnakar Sahani and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 01-10-1986

Acts Referred:

Orissa Municipal Act, 1950 — Section 254, 3(29)

Citation : AIR 1987 Ori 194 : (1986) 62 CLT 719

Hon'ble Judges : L. Rath, J;G.B. Patnaik, J

Bench : Division Bench

Advocate : P. Palit and R. Mohapatra, for the Appellant; C.V. Murty, C.A. Rao and C.M.K. Murty, for the Respondent

Final Decision : Allowed

Judgement

Rath, J.—The primary question urged in this petition under Articles 226 and 227 of the Constitution of India is whether issue of notice u/s 254 of the Orissa Municipal Act (Annexure-2) for removal of encroachment on road side lands is authorised, since according to the petitioners, road side land is not Road with which Section 254 of the Orissa Municipal Act concerns itself. Besides, the petitioners have also impugned the action of the Municipality on the grounds of lack of reasonable notice to them to show cause against such demolition and that the action of the Municipality is not bona fide as the road to which the encroachment relates is stated to be 200 feet wide. According to the petitioners, there is no road of such width at Jharsuguda and hardly also exists at any other place in the State.

2. The petitioners, who claim themselves to be petty artisans, state that they are landless persons and since were without houses of their own, constructed along with others some 25 years ago, small thatched residential houses on the jungle lands in village Atali. The lands were under Atali Gram Panchayat and in the year 1975 were included in the Jharsuguda Municipality. Encroachment cases were initiated against the petitioners in 1985 by the Tahasildar, Jharsuguda, the

opposite party No. 5 with issue of show cause notices to them for taking action under Sections 3, 5 and 6 of the Orissa Prevention of Land Encroachment Act, 1954. The petitioners appeared in pursuance of the notices before the Tahasildar and showed cause of having continued in possession for nearly 25 years and that the lands should be settled with them. While such was the state of affairs, the Executive Officer, Jharsuguda Municipality, opposite party No. 4 served notice u/s 254 of the Orissa Municipal Act (for brevity, the Act) on the petitioners for removal of the structures within twenty four hours from the receipt of the notices stating that the structures were on the road side land at Bhaskar Textile Mills and were hazards to public safety and convenience. The petitioner No. 1 submitted an application soon thereafter to the opposite party No. 4 pointing out that he had no jurisdiction to direct removal of the structures. However, immediately after service of notice and without affording any opportunity to show cause, the Executive Officer along with the Sub-Divisional Officer, Jharsuguda and armed forces came to the spot and started demolishing the houses with the help of bulldozers without paying any heed to the protest of the petitioners. Many houses were completely demolished and some were left over due to want of time. The petitioners have moved this Court for quashing of the notice issued u/s 254 of the Orissa Municipal Act and issue of directions to the authorities not to demolish their houses.

3. A counter affidavit has been filed by Chairman and the Executive Officer, Jharsuguda Municipal Council negating most of the contentions of the petitioners. The case of the Municipality so far as is relevant for decision of the case, is that the petitioners, who admittedly are encroachers, are not landless persons and have lands within the limits of Jharsuguda Municipality and that they are also not artisans as claimed by them. They being admitted encroachers, notice in Annexure-2 was served on them on 28-3-1986. The petitioner No. 1 submitted a representation on 29-3-1986 by which time decision had been made final to demolish the encroachment after expiry of the period of notice. Hence the representation was rejected. The actual demolition was made on 30-3-1986 (wrongly stated to be 30-4-86 in paragraph 11 of the counter affidavit) after 2.00 p.m. There was no objection to the removal of encroachments except that of the petitioner No. 1.

4. The Municipality has further explained that the encroachments were officially detected in 1985 when a letter was addressed by the Assistant Engineer (R and B) to the Executive Officer intimating him of the encroachments and a letter was also issued by the Sub-Divisional Officer, Jharsuguda on 28-8-1985 to the Executive Officer as well as the Assistant Engineer regarding the fact of encroachment. An enquiry was caused by the Executive Officer through the Municipal Amin who submitted a report about the details of the persons and the encroachments. The encroachments constituted a major risk on the road and was the cause of many accidents.

5. A counter affidavit has also been filed by the State of Orissa, the Collector,

Sambalpur and the Tahasildar, Jharsuguda, opposite parties 1, 2 and 5 mainly supporting the Municipality and further stating that the encroachment cases started by the Tahasildar against the petitioners have been dropped after the demolitions.

6. The main contention raised by Mr. Palit, learned counsel for the petitioners is that since admittedly in the notices issued to the petitioners, the encroachments are stated to be on the road side lands, Section 254 of the Orissa Municipal Act has no application and the Executive Officer of the Municipality has no jurisdiction to take action under that section for removal of the encroachments. It has been urged that Section 254 deals only with encroachment on roads but not on road side lands and hence action taken by the Municipality against the petitioners for demolition of their encroachments is wholly unauthorised.

7. Section 254 of the Orissa Municipal Act runs as follows : --

"254. Removal of encroachments. --(1) The Executive Officer may by notice require the owner or occupier of any premises to remove or alter any projection, encroachment or obstruction (other than a door, gate, bar ground floor window) situated against or in front of such premises and in or over any road).

(2) If the owner or occupier of the premises, as the case may be, proves that any such projection, encroachment or obstruction has existed for a period sufficient under the law of limitation to give any person a prescriptive title thereto or that it was erected or made with the permission or licence of any municipal authority duly empowered in that behalf, and that the period, if any, for which the permission or licence is valid, has not expired, the municipal council shall make reasonable compensation to every person who suffers damage by the removal or alteration of the same."

8. It is urged that since action u/s 254 can be taken against only encroachments which relate to road, the power under it would not extend to road side lands. Though Road has not been defined in the Act, yet "public road" has been so defined u/s 3(29). Section 121 of the Orissa Municipal Act vests all public roads as properties of the Municipal Council. Section 3(29) of the Act may be extracted with profit : --

"3(29) "public road" means any street, road, square, Court, alley, passage or riding path over which the public have a right of way, whether a thoroughfare or not, and includes--

(a) the roadway over any public bridge or causeway;

(b) the footway attached to any such road, public bridge or causeway: and

(c) the drains attached to any such road, public bridge or causeway and the land, whether covered or not by any pavement, verandah, or other structure, which lies on either side of the roadway up to the boundaries of the adjacent property whether that property is private property or property belonging to the State :"

The definition is an inclusive one and while the opening words refer to the Road proper, the different clauses relate to other properties which are included in public road. In Sub-clause (c) provision is made that the drains attached to the road, public bridge or causeway and the fund which lies on the either side of the roadway up to the boundary of the adjacent properties whether privately owned or belonging to the State is included in public road. It is contended by Mr. Palit that "land" in Sub-section (c) would refer only to the land over which the drain exists and not to separate land since if the legislature would have meant lands apart from the drain, then in all fitness of things it would have been mentioned under a separate sub-clause. We are however not impressed by such contention. If the meaning of land as ascribed by Mr. Palit is adopted, then the words up to the boundaries of the adjacent property whether that property is private property or property belonging to the State" would not fit in with the rest of the words in the provision and would be rendered meaningless. It is well known that in interpreting statutes, the Courts must adopt that meaning which interprets all the words in rational and harmonious manner and not in a way by which some words are treated as surplusage. It is of course true that dealing with the land which lies on the either side of the roadways, it would have been more properly brought under a separate sub-clause but however merely for the reason that legislation has not been drafted in an ideal manner, the intention of the legislature would not fail. Besides the use of the word "and" in the sub-clause would conclusively show that what is meant is land other than the drain, bridge or the causeway, Sub-clause (c) is thus susceptible to the only meaning that public road, among other things, will include the drains attached to the road, public bridge or causeway and it shall also include the land which lies in the either side of the roadway up to the boundaries of the adjacent property either owned privately or State owned, whether or not covered by any pavement, verandah or other structure. Such land would be evidently road side land and is included in public road. Public road is nothing but a species of road and road side lands being included in public road, encroachments thereon would be within the ambit of Section 254 of the Orissa Municipal Act vesting power in the Executive Officer to direct its removal.

9. To hold the contrary would lead to incongruity. It will not be conducive to proper local self administration if only the roadway and the drains are entrusted to the care of the Municipality while the road side lands are kept under the control of a different administration. Such a system may lead to conflict between different authorities and may result in failure of the set up. The Tahasildar, opposite party No. 5 was also aware of the jurisdiction of the Municipality and has dropped the encroachment cases started by him in view of the action taken by the Municipality. A counter affidavit has been filed by the State fully supporting the action of the Municipality. It has of course been urged by Mr. Palit referring to Annexure A/2 which is letter from the Sub-Divisional Officer, Jharsuguda to the Executive Officer, Jharsuguda Municipality and others that the lands in question are Government lands on the either side of the P.W.D. road. It

has been fairly conceded by the learned Additional Government Advocate appearing for the State of Orissa and other Officers of the Government that the reference in Annexure-A/2 to the land incidentally as Government land is a confused one and not factually correct. No support is available to the petitioners from such communication. Besides, a statement in the letter of the Sub-Divisional Officer would not militate against the provisions of Section 121 of the Municipal Act which makes the Municipal Council the owner of the property. There is no substance in the submissions which must be accordingly rejected.

10. The other submission made by Mr. Palit however has substantial force. It is admitted by the Municipality in its counter-affidavit that the notice in question was served on the petitioner on 28-3-1986 and that they submitted representation on 29-3-1986. The actual demolition was carried out on 30-3-1986. By the time the representation was received, it is stated, the decision to demolish had been made final and hence the representation was rejected. On its own showing, the Municipality had no occasion to consider the representation "since immediately after issue of the notice, the decision was finalised to effect the demolition. It is apparent that the issue of the notice or the receipt of the representation, under the circumstances was a mere formality for the Municipality. It was held in ILR (1975) Cut 1470, Emarti Devi v. District Magistrate, Cuttack that the power of demolition conferred u/s 254 is subject to the precondition of giving the owner or occupier reasonable notice to voluntarily demolish the encroachment or in default to show cause against such demolition. The notice must give reasonable time and after the end of the notice period, even before defences available against demolition are adjudicated upon by the concerned authority, encroachments may be demolished. But this power must be exercised bona fide. Exercise of the power of demolition before the defences put forth are heard and decided against the owner or occupier, can be held to be bona fide in certain circumstances where, for instance, the encroachment cannot be allowed to continue until the dispute raised is decided for weighty reasons like health hazards or other emergent reasons of like nature in the interest of the public.

Keeping the said facts in view, it does not appear that the Municipality has either given a reasonable notice to the petitioners for representation or for voluntary demolition or has acted bona fide in the matter. It was incumbent upon the Municipality to have afforded sufficient opportunity to the petitioners to put forth their say before it. Notice for twenty four hours can hardly be called a reasonable notice when it is kept in mind that the notice is a direction to cause voluntary demolition. Even the Municipality itself with all its might was not able to carry out all the demolitions with the help of bulldozers for want of time and some houses were left over. It was gravely unfair to expect the petitioners to demolish the structures and remove their belongings within a period of twenty-four hours. It was as if the Municipality wanted to take no chances and was determined to go ahead with the programme with the least possible delay, sacrificing in the process the basic requirement of the rule of law. The right of representation of

the petitioners against the demolition could not be reduced to be a mere formality. Public authorities endowed with public functions are also saddled with public duties which burden they must discharge with openness and with a sense of justice and fairplay. This is more so in the case of an authority like a local self Government and it should not be the office of the Court to remind public functionaries of their desired role to play.

11. An analysis of facts also pointed to a lack of bona fide in the Municipality so far as actual demolition is concerned. There is no case made out that the encroachments could not have been allowed to continue until representations of the petitioners were decided and that because of imminent reasons like health hazards or other reasons of like nature, the Municipality was compelled to take such precipitate action. It appears only from the letter in Annexure A/1 sent on 22-8-1985 from the Assistant Engineer, Jharsuguda (R & B) Sub-Division to the Executive Officer, Jharsuguda Municipality that since because some persons had encroached the road side land from 1/0 to 3/0 K.M., and had constructed houses thereon, many accidents had happened. From this itself it does not appear that there was any menacing necessity to have suddenly started demolition even without disposing of the representations of the petitioners. The absence of any bona fides of the Municipality is further evident from the fact that notice for demolition in Annexure-2 is itself dated 28-3-1986, but however had been signed on 5-9-1985 which could evidently mean only Sept. 1985. Thus a notice which was issued giving the encroachers 24 hours time to remove the encroachments, was itself issued about six months later, a fact, which speaks volumes about the bona fides of the Municipality.

12. We are thus constrained to hold that while the Municipality undoubtedly has the authority to evict the encroachers from the road side lands and cause demolition of the encroachments, yet the procedure adopted was far from bona fide and was unfair and unjust and hence the action taken needs an appropriate condemnation. The notice in Annexure-2 must accordingly be quashed.

13. We however make it clear that the Municipality is not debarred from performing its lawful activities by following a procedure in consonance with Rule of Law. Administration must be tempered with mercy, and is to be carried on with the consciousness of common human short-comings. It is a canon of universal application that seal of administration must be filled by good men, not so absolute in their goodness, as to forget what human frailty is.

14. In the result, the writ application is allowed. Let a writ of mandamus be issued setting aside the notice in Annexure-2. There shall be no order as to costs.

G.B. Patnaik, J.

15. I agree.