

(1994) 02 OHC CK 0008

In the Orissa High Court

Case No : Original Jurisdiction Case No. 406 of 1991

Sri L. Syamababu Patro

APPELLANT

Vs

The Collector and Others

RESPONDENT

Date of Decision : 09-02-1994

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Orissa State Urban Land Settlement Rules, 1959 — Rule 17

Vires of Orissa Prevention of Land Encroachment Act, 1954 — Section 7(2)

Citation : (1994) 78 CLT 414 : (1994) 1 OLR 485

Hon'ble Judges : L. Rath, J; D.M. Patnaik, J

Bench : Division Bench

Advocate : S. Ghose, for the Appellant; C.R. Das, ASC, for the Respondent

Final Decision : Allowed

Judgement

L. Rath, J.—The facts of this case reveal a saga of indecision of authorities vested with statutory and administrative powers spreading over a period of nearly quarter of a century and consequent harassment of a citizen who had thought of invoking the power of the State to allot a piece of land to him, 5 cent in area, to construct his residential house. He being a landless and homeless person. He has been compelled to approach this Court after all that time because instead of the settlement being made, after the reports had been submitted in his favour by different officials as had been called upon to submit those, ultimately proceeding of encroachment and his consequent eviction have been decided to be resorted to. The application of the petitioner was made on 1-2-1971 to settle the land in plot No. 321/1183 from the Anabadi Khatq of the title. The application was attended to under the Orissa State Urban Land Settlement Rules, 1959 (hereinafter referred to as the "U L S. Rules") and on the very next day the Tahasildar (opp. party No. 2. being authorised by the Collector (opp. party. No. 1) issued proclamation inviting objections from the public. That application was registered as U L S. Case No. 6 of 1971. While that case was pending, the Revenue Inspector submitted a report of encroachment against the petitioner on

13-4-1971 and Encroachment Case No. 10 of 1971 was also started against him for the self-same land directing his appearance on 13-5-1971 and filing of show-cause u/s 7 of the Orissa Prevention of Land Encroachment Act, 1953 (Orissa Act 15 of 1954). Rule 17 of the U. L. S. Rules provides that if a site has been occupied without authority and the settlement of the site for house building is not otherwise objectionable and the Revenue Divisional Commissioner recommends the settlement. Government may dispense with settlement of house site by public auction and direct private settlement of the site or such part thereof as may be recommended by the Revenue Divisional Commissioner, with the occupier for a fair market price together with penalty of not less than 25 percent of the said price. Both the cases were clubbed up by the orders passed on 14-4-1971. On the same day, the Tahasildar passed orders directing the petitioner to pay penalty of Rs. 187/- in addition to the Salami of Rs. 750/- and referred the matter to the Sub-Divisional Officer (opp. party No. 3) who on 21-4-1971 recorded the order that the site was unobjectionable. He therefore referred the matter to the Collector (opp. party No. 1) for recommendation under Rule 17 of the U, L. S. Rules for settlement of the land in favour of the petitioner. The collector in his turn also recommended to the Revenue Divisional Commissioner in favour of the petitioner on 19-2-1972. Everything was forgotten thereafter for six years and on 22-2-1978 the Tahasildar recorded the order of his having perused the Government order dated 20-1-1976 to examine the case in the light of the provisions of Section 7 of the Orissa Prevention of Land Encroachment Act and fix up responsibility for slackness shown in the case. The reason, for the Government to direct examination of the case in the light of the provisions of Section 7 of the Orissa Prevention of Land Encroachment Act was that Orissa Act 15 of 1954 has in the meantime been declared ultra vires of the Constitution by this Court and the new Act, Orissa Act 6 of 1972 had been enacted which made provision in Section 7(2) that notwithstanding anything contained in Sub-sec. (1) thereof i. e. carrying on the eviction proceeding, the Collector may decide not to take action for eviction if the unauthorised occupation does not amount to objectional encroachment and also does not prejudicially or adversely affect any development scheme programme or work or the interests of the general public or of the village community. The Tahasildar passed orders on 22-2-1978 asking the Amin, Sri L. Sahu to enquire and report the number of sites possessed by the petitioner and other members of his family living with him jointly together with the plot number, etc. The report called for was submitted by the Amin on 9-3-1978 to the effect that it was the contention of the petitioner that he was separated from his father and that the land in question had been recorded to be with the petitioner as being under his forcible possession. In the report another piece of land measuring 1.35 hectares had been shown as having been encroached by the petitioner, but it is the conceded case of the State that he has since been evicted therefrom. After getting the report, the Tahasildar again directed on 18-12-1978 the Revenue Supervisor to enquire and ascertain as to whether the petitioner was living in jointness. The report in question was submitted on 19-5-1979, certified copy of which has been

made available by the petitioner, disclosing that the father of the petitioner had six sons who were all separated since three years and that the petitioner was living in a house at Phulbani Hatpada near R. I. Quarters. It is conceded by the learned Additional Standing Counsel that reference was made to the same house which the petitioner had constructed unlawfully. Two years went by thereafter and on 4-5-1981 notice was issued to the petitioner to appear before the Tahasildar. He appeared on 17-8-1981 and filed affidavit again that he was living separately from his father. Again order was passed on 14-9-1981 by the Tahasildar directing the Revenue Inspector to enquire and report on the affidavit filed by the petitioner keeping Section 7 of the Orissa Prevention of Land Encroachment Act in view. The report was submitted by the Amin on 21-12-1982 that no land was recorded in the name of the petitioner and he was in forcible possession of the disputed land and was residing separately from his family. The report is Annexure-6 to the petition. It would be seen that by that time the matter should have been clear to the opp. party No. 2 that the encroachment was unobjectionable, the petitioner was separately living and he along with his family was residing in the house constructed on the disputed site. Again order was passed on 16-4-1984 directing the Revenue inspector to report whether the petitioner or his family members had got any homestead land. On 12-8-1985 the opp. party No. 2 directed issue of proclamation inviting objection from the public even though such a step had already been taken on 2-12-1971. He also directed the petitioner to file fresh affidavit to the effect that neither he nor his family members had any house site in any urban area. The affidavit was filed by the petitioner on 23-8-1985 and on 6-11-1985 the Revenue Supervisor also submitted a report. In the report the same fact of the petitioner as putting up separately from his father and brothers was reiterated. Order was passed by the opp. party No. 2 on the very same day that the petitioner had no other house or house site in any urban area of the State and that hence he was directed to pay premium of Rs. 5500/- and ground rent of Rs. 77/- as also interest of Rs. 77/- from 1971 till 1985. The case was posted to 11-8-1985. As directed, the petitioner deposited the amount on 21-11-1985. On 7-7-1986 the Tahasildar after perusal of the report of the Revenue Inspector and the fresh affidavit filed by the petitioner, passed orders recording that the petitioner had already deposited the premium, ground rent and interest, and referred the matter to the Collector for assignment of the house site in his favour. About three years thereafter on 30-5-1989 order was passed by the Tahasildar stating that the Collector had directed to refund the premium received from the petitioner and close the case and that the Encroachment Case No. 10 of 1971 should proceed against him as had been directed by the Revenue Divisional Commissioner. The Tahasildar directed the petitioner to receive the amount deposited by him and returned the Encroachment Case to the concerned Section. It is this order which is being impugned in this case.

2. From the narration of facts it is apparent that the opp. party No. 2, the Tahasildar was simultaneously proceeding with a statutory and a non-statutory

proceedings, one under the Orissa Prevention of Land Encroachment Act and the other under the U.L.S. Rules. The Orissa Prevention of Land Encroachment Act originally made provision in Section 7(2) not to proceed for eviction if the encroachment is unobjectionable. That provision was amended and substituted by Act 4 of 1975 providing that notwithstanding anything contained in Sub-section (1), where any land is in the unauthorised occupation of a person who does not own any land, other than homestead, the Tahasildar may, instead of evicting such person from the land in his unauthorised occupation, settle the same with him so however that the land so settled with him together with the land (excluding homestead), if any, owned by him shall on no account exceed two acres. By the proviso brought in by the said amendment certain riders had been added in settling the land belonging to the categories of lands recorded as Gochar, Rakhit or Sarbasadharan in any record-of-rights prepared under any law; lands which are set apart for the common use of villages, used as house site, backyard or temple-site whether or not recorded as such in the record-of-rights, and likely to be required for any development schema and are declared as such by the State Government by a notification; and lands belonging to an establishment or undertaking owned, controlled or managed by any State Government or a Department of such Government, any company in which not less than fifty-one per cent of the share capital is held by one or more State Governments, and a Corporation established by law which is owned, controlled or managed by any State Government. By Act 25 of 1976, Sub-section (2) of Section 7, excluding the provisos thereto, was substituted to the effect that notwithstanding anything contained in Sub-section (1), where any land is in the unauthorised occupation of a landless person, the Tahasildar may, instead of evicting such person from the land in his unauthorised occupation, settle the same with him so however that the land so settled with him together with the land (excluding homestead), if any, owned by him and the lands owned by all the members of his family who are living with him in common mess, shall on no account exceed two acres. The extent of the area which would disentitle a person to settlement was amended by Act 25 of 1979 as being one standard acre. By Act 13 of 1982, after the words "one standard acre occurring in Sub-section (2) of Section 7, the words "and shall not include more than one-fifth of an acre of land which is being utilised or can be utilised for purposes of homestead" added. The provision of Section 7 (2) has since been amended again by Act 10 of 1988 providing that the Tahasildar may, instead of evicting such person from the land in his unauthorised occupation, settle the same with him so however that the land so settled with him together with the land excluding homestead, if any, owned by him and the lands owned by all the members of his family who are living with him in common mess, shall, on no account exceed one standard acre and shall not include more than one-tenth of an acre of land which is being utilised or can be utilised for purposes of homestead. The provision prohibiting the settlement if the land belongs to any of the objectionable categories is maintained with some modifications.

3. Since the encroachment case was being proceeded against the petitioner

simultaneously with the U.L.S. Case, it has to be Considered that the power of settlement was all along available with the Tahasildar under the statute itself. Once a statutory power of settlement was available to a functionary under the Act and such a proceeding under the statute had been initiated, it was no longer possible to continue the proceeding also under the administrative provisions like the U.L.S. Rules which lays down a different procedure. The U.L.S. Rules could never take precedence over the statutory provisions of the Orissa Prevention of Land Encroachment Act and the petitioner, as an admitted encroacher upon the land, had a right to be considered for settlement if the encroachment was unobjectionable and did not belong to the prohibited categories. The discretion so vested in the Tahasildar was to have been exercised by him judiciously under the statute and the exercise of the Jurisdiction is not to be fettered by the provisions of the Administrative Rule. Hence if the Tahasildar was satisfied that the petitioner was otherwise a person entitled to settlement and the land was also available to be settled, he was to exercise his discretion and not to refer the matter to the superior authorities. We find that because of the confusion created by simultaneous proceeding of the two proceedings, gross delay crept into these without any rational explanation whatsoever. The various reports called for by the Tahasildar amply disclose that the petitioner satisfied all the requirements necessary to be considered by the Tahasildar and the settlement could be ordered. He himself reached the conclusion that the petitioner should be assigned a piece of land and himself fixed up the premium as also the penalty. His discretion having been already so exercised and it having been found that there was no further necessity of making a reference to the Sub-Divisional Officer or the Collector or the Revenue Divisional Commissioner, the land was to have been settled with the petitioner. This is so particularly because to the knowledge of the Tahasildar the petitioner had not only encroached upon the land since 1971 but also to the knowledge of the authorities had also constructed a house thereon and had been living therein with his family. .

4. In that view of the matter. we find the order passed on 30-5-1989 purporting to drop the U.L.S. Case and to proceed with the encroachment proceeding for his eviction as a confused one since at any rate the U.L.S. Case could not have continued in view of the statutory proceeding already initiated against the petitioner and as in that proceeding the Tahasildar had already reached the satisfaction of the land being settleable with the petitioner, only formal orders were to be passed settling the land.

5. In the result, we allow the petition with cost and direct the opp. party No. 2 to settle the land with the petitioner after observing the legal formalities, if any, still required to be complied with, within a period of three months from the date of receipt of the writ from this Court. Hearing fee is assessed at Rs. 500/-.

D.M. Patnaik, J.

I agree.