

(1985) 08 OHC CK 0020

In the Orissa High Court

Case No : Original Jurn. Case No. 806 of 1984

Sri Narayan Gosain and Others

APPELLANT

Vs

The Collector, Cuttack and Others

RESPONDENT

Date of Decision : 19-08-1985

Acts Referred:

Constitution of India, 1950 — Article 226, 299

Contract Act, 1872 — Section 10

Transfer of Property Act, 1882 — Section 105

Citation : AIR 1986 Ori 47 : (1985) 60 CLT 514

Hon'ble Judges : K.P. Mohapatra, J;J.K. Mohanty, J

Bench : Division Bench

Advocate : S. Misra, No. 2, for the Appellant; A. Rath, A.S.C. and S. Misra, No. 1, for the Respondent

Final Decision : Allowed

Judgement

K.P. Mohapatra, J.—Petitioner No. 1 is deity Sri Sri Narayan Gosain of Singapur. Petitioners 2 to 7 are some of the villagers who claim to represent the deity. In this writ petition they have prayed for quashing of Annexures 1 and 2, both relating to long term lease of a tank in favour of opposite party No. 2 for pisciculture. Their case in brief is that the stone image of the deity held in great veneration by the people of Singapur within the former estate of Madhupur remains submerged under the water of the disputed tank within an area Ac. 5.33 decimals appertaining to plot No. 141 in Khata No. 241 of mouza Singapur throughout the year except on three days during Pana Sankranti. The Sebvats, the residents of Singapur and the people of neighbouring village offer Seva Puja to the deity on the bank and in the water of the tank. During Pana Sankranti the stone image of the deity is taken out of the water of the tank, installed in the temple and is worshipped by thousands of people during the festival. The tank is locally known as Narayan Gosain Pokhari and the land on which the temple has been constructed is called Jatra Padia. The place in due course of time has been sanctified as "Madhu Tirtha".

After vesting of the estate of Madhupur, the tank and the Jatra Padia were erroneously recorded as belonging to the State in the record-of-rights. Opposite party No. 2 leased out the tank in favour of opposite party No. 3 for a period of ten years for the purpose of pisciculture as evidenced by Annexure 2, an order of opposite party No. 1, Collector, Cuttack and a registered deed of lease dt. 8-12-81 (Annexure-1). To raise and rear fish, opposite party No. 3 polluted the water of the tank by mixing cow-dung and obnoxious chemicals. The tank was also fenced for protection. As a result, the water became unfit for drinking and bathing purposes. The devotees of the locality could not offer puja to the deity as and when they liked. Thereby, the customary communal right of the villagers referred to above was invaded and curtailed. Annexure-1 was executed completely ignoring the provisions of Article 299 of the Constitution of India. According to the petitioners, therefore, it is necessary to quash Annexures 1 and 2 and restore the right of the public in respect of the tank.

2. In their counter-opposite parties 1 and 2 have stated that the tank belonged to the Raja of the Madhupur estate which vested with the State according to the provisions of the Orissa Estates Abolition Act, 1951 ("Act" for short). On 27-11-1952, the Raja of Madhupur being the ex-intermediary, filed an application under Sections 6 and 7 of the Act for settlement of Ac. 67.85 decimals of land including the tank with him. By an order dt. 17-5-1969, the Collector under the Act settled the tank with the ex-intermediary by passing the following operative order : --

"In view"of the above facts I assess Ac. 5.33 bearing plot No. 141 Khata No. 241 in the name of Birabar Brundaban Chandra Dhir Narendra Marfatdar "Narayan Goswami" at the fair rate of Rs. 4.49 N.P. per acre subject to the condition that the public right to bathe and drink the waters of the tank reserved for all times to come."

In O.L.R. Case No. 348 of 1974 against the Raja of Madhupur, Ac. 69.40 decimals of land including the tank were found to be ceiling surplus area and so the aforesaid land vested with the State according to Section 45 of the Orissa Land Reforms Act, 1960. On 4-1-1977 the State took possession of the tank and recorded it in the Sairat Register maintained in the office of opposite party No. 2, Tahasildar Darpan to generate income from pisciculture. During the years 1977-78 to 1980-81 opposite party No. 2 leased out the tank on annual basis. Thereafter, by the orders of opposite party No. 1, Collector, Cuttack (Annexure-2) the tank was leased out in favour of opposite party No. 3, a Fishing Co-operative Society for a long term of ten years for consideration for the purpose of pisciculture and the deed of lease Annexure-1 was duly executed. It was specifically stipulated in the deed of lease that easementary right of the general public of the area in respect of the portion of the tank, occupied by the deity shall not be interfered with in any manner. It is averred that the limited easementary right of the general public is being duly safeguarded. The villagers are not being prevented from using the water of the tank as usual. There was no

interruption for performance of daily seva puja and the festival during Pana Sankranti is being held regularly for three days. Therefore, there is absolutely no cause of action for the writ petition which accordingly deserves (to be) dismissed.

3. Opposite party No. 3 filed a separate counter-affidavit and besides endorsing the defence raised by opposite parties 1 and 2 in their counter-affidavit, averred that the deity is the private deity of ex-intermediary and Raja of Madhupur estate and not a public deity. Petitioners Nos. 2 to 7 are in no way connected with the affairs of the deity and so they have no locus standi to file the writ petition claiming reliefs on behalf of the deity. There are four tube wells around the tank which are used by the villagers to draw drinking water and so they are in no way inconvenienced for that particular problem. The villagers are free to take their bath and offer Puja to the deity which they actually do. The annual festival during Pana Sankranti is; also duly performed. It is stated that the water of the tank is not being polluted in any manner. Cow-dung and harmful chemicals are not mixed with the water. Ground nut oil cakes, paddy powder and Chira Kunda (husk dust) are mixed with the water of the tank as fish feed. A sum of Rs. 40,000/- has been secured as loan by opposite party No. 3 for the purpose of pisciculture and if at this stage its leasehold right is interfered with in any manner, the cooperative society will sustain a huge loss.

4. On the contentions raised by the learned counsel appearing for both parties the following points arise for consideration.

1. Have the general public of village Singapur the right of offering Seva Puja to the deity Sri Sri Narayan Gosain (petitioner No. 1), perform the festivals and other ceremonies connected with the deity and use the water of the tank for drinking and bathing purposes?

2. Have petitioners 2 to 7 locus standi to represent the deity Sri Sri Narayan Gosain (petitioner No. 1) for filing the writ petition?

3. Are Annexures 1 and 2 liable to be quashed on the ground of non-compliance of Article 299 of the Constitution?

5. On consideration of the facts stated in the petition and the counter-affidavits, it is amply established on the admission of both parties that the stone image of the deity Sri Sri Narayan Gosain remains submerged under the water of the tank throughout the year. The Sebayats, as well as the general public offer Puja in the water, as well as, on the bank of the tank. For three days during Pana Sankranti the stone image is taken out of the water and installed inside a temple, on the Jatra Padia by the side of the tank. The festival is also performed by active participation of the general public. It is further not disputed that the general public of the village use the water of the tank for the purpose of drinking and bathing. Although in the meanwhile four tube wells have been dug around the tank to provide clean and unpolluted drinking water to the villagers, yet it cannot be denied that the villagers have the right to use the water of the tank for the purpose of drinking. Such right of the villagers has been recognised by the

Collector in his order Annexure A/3 in case No. 24/40 of 1957-58 under Sections 6, 7 and 8 of the Act, and the deed of lease (Annexure-1) executed on 8-12-1981. This public right subsists despite the fact that the tank ultimately, by operation of the Act and the Orissa Land Reforms Act, 1960, vested in the State Government and become its property. We do not, therefore, have any difficulty in view of the admitted position in pronouncing that the villagers of Singapur have the customary public right of offering Seva Puja to the deity Sri Sri Narayan Gosain, perform the annual festival during Pana Sankranti and use the water of the tank for communal purposes such as, bathing and drinking.

6. Learned counsel for the opposite parties contended that petitioners 2 to 7 have no locus standi to represent the deity so as to file the writ petition challenging Annexures 1 and 2, Learned counsel for the petitioners, on the other hand, urged that petitioners 2 to 7 having the public right of offering Seva Puja to the deity Sri Sri Narayan Gosain and using the water of the tank for communal purposes have the further right to see that the tank is protected, its water is not polluted in any manner so as to make it unfit for the purposes of bathing and drinking, the sanctity of the place of worship is not disturbed and such public right is not invaded by any illegal action committed either by the State Government or public officers or other persons.

7. The legal principle relating to locus standi have very lucidly been exposed in S.P. Gupta Vs. President of India and Others, . The majority view in the said case was expressed as follows : --

"It may therefore now be taken as well established that where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right or any burden is imposed in contravention of any constitutional or legal provision or without authority of law or any such legal wrong or legal injury or illegal burden is threatened and such person or determinate class of persons is by reason of poverty, helplessness or disability of socially or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226..... But it must not be forgotten that procedure is but a hand maiden of justice and the cause of justice can never be allowed to be thwarted by any procedural technicalities. The Court would therefore unhesitatingly and without the slightest qualms of conscience cast aside the technical rules of procedure in the exercise of its dispensing power and treat the letter of the public minded individual as a writ petition and act upon it."

This judgment in the case known in the legal circle as "Judges" case" and many other recent judgments in cases of Bihar, the meaning of locus standi has vastly been expanded in order that public spirited men will take up causes of the underling, the poor and the helpless and the mute sufferers of high handed and illegal action of public officers and others for securing justice. The above being the view of the highest Court of justice of the land which by an epoch making

judgment gave rays of hope into the minds and showered beams of sunshine to the hearts of the above categories of people to fight against invasion of their legal rights and injustice it can hardly be argued in this particular case that the admitted legal rights of the petitioners and many other villagers like them were not only invaded but also drastically curtailed by the actions of opposite parties 1 and 2 in leasing out the fishery rights of the suit tank in favour of the opposite party No. 3. Here is a case in which the deity is mute. Though venerated even by the members who constitute opposite party No. 3, it cannot protest against any wrong. The Raja of Madhupur who was previously the Marfatdar of the deity has vanished with his estate. Opposite parties 1 and 2 thought more of pisciculture to generate income for the Gram Panchayat than the religious beliefs of the people of the locality. They forgot the mandate of Article 25 of the Constitution which guarantees right to freedom of religion. They equated the tank with any other tank. They completely lost sight of the fact that the tank has its own singular feature hardly present in any other tank. It is a tank inside the water of which the deity remains submerged throughout the year except during Pana Sankranti. People offer seva puja in the water, as well as, on the bank. The whole tank is sanctified and is a place of worship. Such a place of worship is not expected to be polluted and disturbed by fishing so as to hurt the religious sentiments of the local people. If in order to vindicate the public right of the people of the locality, the petitioners have come forward, it cannot, in our view be said that they have no locus standi. It is, therefore, needless to say that whether the petitioners 2 to 7 legally represent the deity Sri Sri Narayan Gosain or not, for protection of their right of assessment in respect of the tank, they have locus standi, being members of the general public of the village Singapur, to move this Court for exercise of its writ jurisdiction under Arts. 226 and 227 of the Constitution.

8. The important point which now falls for decision is whether there was non-compliance of the provisions of Article 299 of the Constitution. Before advertng to its provision and focusing the principle of law enunciated by the Supreme Court, it is necessary to state a few facts. In para 3 of the counter-affidavit of opposite parties 1 and 2 it is averred that from 1958 to 1960, the disputed tank was transferred to Singapur Gram Panchayat which remained in control and management thereof. There is no averment anywhere in their counter-affidavit that after 1960 control and management of the disputed tank were transferred to Singapur Gram Panchayat. Therefore, the disputed property was neither transferred to nor vested with the Singapur Gram Panchayat in accordance with law. No document was also produced to show such transfer or vesting after the year 1960. It can therefore be safely concluded that the disputed tank was not the property of Singapur Gram Panchayat. This being the position, the disputed tank did not vest in the Grama Sasan in accordance with Section 71 of the Orissa Gram Panchayat Act, 1964.

9. On the other hand, it is the specific case of opposite parties 1 and 2 made out in paras 3, 7, 9 and 10 of their counter affidavit that by operation of Section 45 of the Orissa Land Reforms Act, 1960 the disputed tank vested with the State

Government which became the owner thereof and as such took possession of the same on 4-1-1977. Thereafter it was shown as a Sairat source in the register maintained in the office of the Tahasildar, Darpan according to the provisions of Manual of Tahsil Accounts.

10. Collector, Cuttack (opposite party No. 1) passed an order as in Annexure 2 in June, 1981 purported to be under Rule 86 of the Orissa Gram Panchayat Rules, 1968 sanctioning lease of the disputed tank and the right of pisciculture in favour of opposite party No. 3 for a period of ten years for consideration. In pursuance of this order, Tahasildar, Darpan (opposite party No. 2) as the lessor and some members of opposite party No. 3 as lessees executed an agreement of lease in form E prescribed in the Orissa Gram Panchayat Rules, 1968 on 8-12-1981 and duly registered the document. It is pertinent to recall that the State Government did not transfer the disputed tank in favour of Singapur Gram Panchayat and so by operation of Section 71 of the Orissa Gram Panchayat Act, 1964 it did not vest in the Grama Sasan. Therefore Rule 86 of the Orissa Gram Panchayat Rules, 1968 relating to transfer of property by Grama Sasan by way of sale, gift, mortgage or exchange had no application to this case. Accordingly, Collector, Cuttack (opposite party No. 1) could not pass the order as per Annexure-2 purporting to be in exercise of powers under R. 86 of the Orissa Gram Panchayat Rules, 1968. As a matter of fact, he did not derive any power to sanction lease of the tank belonging to the State Government in favour of the opposite party No. 3 under Rule 86 of the Orissa Gram Panchayat Rules, 1968. Furthermore, no document or order has been produced to show that Collector, Cuttack (opposite party No. 1) was authorised by the State Government for disposition of property belonging to it. There is also no order to show that the State Government sanctioned the lease of the tank in favour of opposite party No. 3. It is thus clear that Collector, Cuttack (opposite party No. 1) had no authority under law to sanction transfer of the tank by way of lease in favour of opposite party No. 3 nor did the State Government by order sanction the lease. This leads us to consider whether the deed of lease (Annexure-1) was executed in accordance with the provisions of Article 299 of the Constitution of India.

11. According to Section 10 of the Indian Contract Act. all agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object which are not expressly declared to be void, Section 105 of the Transfer of Property Act provides for lease of immovable property which is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. For a lease of immovable property, there must be a lessor and a lessee. An agreement of lease must also be executed lawfully by the lessor and the lessee containing the terms and the conditions of the lease for lawful consideration. The lessor and lessee must also be persons who are competent to contract. Unless the aforesaid requirements

are satisfied, an agreement of lease of immovable property cannot be lawfully made and executed. A lawful agreement of lease of immovable property is therefore a contract within the meaning of Section 10 of the Contract Act.

12. According to Article 299(1) of the Constitution, all contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise. Section 175 of Government of India Act, 1935 contained provisions with regard to the power to acquire property and to make contracts etc. In *Seth Bikhraj Jaipuria Vs. Union of India (UOI)*, , Section 175(3) of the Government of India Act, 1935 came up for interpretation. It was held as follows : --

"It is clear that the Parliament intended in enacting the provision contained in Section 175(3) that the State should not be saddled with liability for unauthorised contracts and with that object provided that the contracts must show on their face that they are made on behalf of the State, i.e., by the Head of the State and executed on his behalf and in the manner prescribed by the person authorised. The provision, it appears, is enacted in the public interest, and invests public servants with authority to bind the State by contractual obligations incurred for the purposes of the State."

In *The Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. Vs. Sipahi Singh and Others*, , the question that arose for consideration was whether settlement of a fishery right was in accordance with Article 299 and if not, whether the contract was binding. It was held as follows : --

"It is now well settled that the provisions of Article 299 of the Constitution which are mandatory in character require that a contract made in the exercise of the executive power of the Union or of a State must satisfy three conditions viz. (i) it must be expressed to be made by the President or by the Governor of the State, as the case may be; (ii) it must be executed on behalf of the President or Governor, as the case may be and i"iii) its execution must be by such person and in such manner as the President or Governor may direct or authorise. Failure to comply with these conditions nullifies the contract and renders it void and unenforceable."

Having held as above, it was found that the settlement of the fishery right was not made and executed in the manner prescribed by Art. 299 accordingly it could not be said to be valid and binding on the State of Bihar. If the aforesaid principle is applied to the facts of the case, it would be seen that the lease agreement was neither expressed to have been made by the Governor nor executed on behalf of the Governor in exercise of the executive power of the State. On the other hand, it was executed by Tahsildar, Darpan (opposite party No. 2) representing the Government of Orissa without however, any express authority for such

representation. No document has been produced in support of the fact that Tahsildar. Darpan (opposite party No. 2) was competent to represent the Governor of Orissa for execution of contracts, If the Tahsildar, Darpan (opposite party No. 2) had any such authority, the same ought to have been produced. If such authority would have been produced, it would be possible to consider and hold that independent of Annexure-2, the order of sanction of the Collector, Cuttack (opposite party No, 1) which was itself unauthorised, Tahsildar. Darpan (opposite party No. 2) had authority to enter into a contract of lease on behalf of the State so as to be binding on all concerned. But as the mandatory provisions of Article 299 were not complied with, we are unable to hold that the agreement of lease of the disputed tank by Tahsildar, Darpan (opposite party No. 2) in favour of opposite party No. 3 was a valid and binding document.

13. in view of the above findings, it is for consideration to what relief the petitioners are entitled in this writ petition. The customary and communal right of the petitioners and other villagers of Singapur has not only been admitted by opposite parties 1 and 2. it was specifically protected in Annexure-1. They claim that the water of the disputed tank should not be polluted in any manner by admixtures of any obnoxious substance much less cowdung and chemicals as fish feed and their right of performing seva puja and festivals of deity Sri Sri Narayari Gosain should not be curtailed in any manner. This being the specific and substantial relief they have claimed, it will be sufficient for the purpose of the writ and for preservation and recognition of the right of the petitioners to direct the opposite parties not to commit any act whatsoever which shall have the effect of invading or curtailing the communal right of the petitioners in respect of the tank. Annexures 1 and 2 have created personal right of opposite party No. 3 in respect of the tank over the head of the customary and communal right of the petitioners and other villagers in respect thereof. There is no doubt that such personal right curtails, abridges and invades the customary and communal right of the petitioners and other villagers of Singapur in respect of the tank. Over and above. Annexures 1 and 2 are not in accordance with law. Particularly, Annexure I was executed in violation of Article 299 and hence it is a completely void and inoperative document. We would therefore be amply justified in the facts and circumstances of the case to prevent the opposite Parties to curtail, abridge or invade the customary and communal right of the petitioners and the general public of village Singapur in respect of the user of the tank for the purposes already alluded to above and at the same time quash the original of Annexures 1 and 2.

14. Before closing, we observe with concern that provisions of Article 299 were completely given a go-by by public officers. There was a specific purpose for this provision being enshrined in the Constitution, which is the State should not be saddled with the liability of actions of public officers while entering into unauthorised contracts with third parties. The mandate is that, in each case of contract in respect of property belonging to the State Government or of other public contracts, the State should play a dominant role in finalising the contract

with leaving the same to the Government employees at lower levels except in cases in which there was statutory delegation of power. The contracts should be expressed and executed in the name of the Governor. This is a matter of public policy to be obeyed and observed. If the salutary provisions are followed at all levels, there is little doubt that contracts entered into by the State shall be for the well being of the people and there shall be no wastage of public exchequer for unauthorised contracts.

15. For the reasons stated above, the writ petition succeeds. A writ of mandamus shall issue quashing the originals of Annexures 1 and 2 and directing the opposite parties not to interfere, curtail, abridge or invade the customary communal right of the petitioners and the villagers of Singapur in respect of the tank in any manner. Hearing fee is assessed at Rs. 100/-.

J.K. Mohanty, J.

I agree.