

(2020) 10 OHC CK 0001

In the Orissa High Court

Case No : Writ Petition (C) No. 24789 Of 2020, I.A. No.11476 of 2020

Subrat Bhoi And Another

APPELLANT

Vs

State Of Orissa And Others

RESPONDENT

Date of Decision : 09-10-2020

Acts Referred:

Citation : (2020) 10 OHC CK 0001

Hon'ble Judges : K.R. Mohapatra, J

Bench : Single Bench

Advocate : Partha Sarathi Nayak, Prafulla Kumar Rath, S.S. Mohapatra, S. Hota, R. Behera

Final Decision : Disposed Of

Judgement

K.R. Mohapatra, J

1. As per the direction made by this Court on 30.09.2020, this matter is taken up today for further orders in IA No.11476 of 2020 filed by opposite party No.4-M/s Vedanta Ltd., Jharsuguda (for short, 'the Company') for recalling of order dated 29.09.2020 passed by this Court in IA No.11105 of 2020 of 2020.

2. This writ petition has been filed assailing the notice/advertisement dated 27.08.2000 under Annexure-1 published by opposite party No.3-Member Secretary, State Pollution Control Board, Odisha, Bhubaneswar (for short, 'SPCB') for a public hearing for the purpose of expansion of Aluminium Smelter Capacity from 16 LTPA to 18 LTPA, Captive Power Plant (CPP) capacity of 1215 megawatt by adding 2 LTPA Smelter Plant at village Bhurkamunda of opposite party No.4-Company in the district of Jharsuguda, to obtain environmental clearance from the Ministry of Environment, Forest and Climate Change, Government of India, New Delhi (for short, 'MoEF'). The said notice was issued in terms of the Government of India notification No.SO.1533(E) dated 14.09.2006 of MoEF. It specified that the persons who desires to give view and objections etc. relevant to the project may do so in writing within thirty days from the date of publication

Interlocutory Applications would require hearing of the matter on merit. As such, on consent of learned counsel for the petitioner, opposite party No.4 as well as Additional Government Advocate for opposite party Nos.1 and 2, the matter is taken up for admission and final hearing.

4. Mr. Prafulla Kumar Rath, learned counsel appearing in the matter on consent of Mr.Partha Sarathi Nayak, learned counsel for the petitioners, submitted that the petitioners are villagers of Brundamal, Badamal which is one of the villages likely to be affected in the event of proposed expansion of opposite party No.4- Company is granted. In that regard, the petitioners along with other-co-villagers have made a representation on 21.09.2020 (Annexure-5) to opposite party No.3- Member Secretary, SPCB to postpone the public hearing till the pandemic of COVID-19 normalizes. The petitioners also made representation dated 21.09.2020 to opposite party No.2- Collector, Jharsuguda under Annexure-6 in that regard, but to no effect. Hence, this writ petition is filed to defer /postpone the date of public hearing pursuant to notice under Annexure-1.

4.1 Mr.Rath, learned counsel appearing on behalf of the petitioners further elaborating his submission, placed reliance on Clause-2 (iv) of Order No.5039/R & D(DM) dated 31.08.2020 (Annexure-2). For ready reference, Clause-2 of notification dated 31.08.2020 reads as follows:-

"2. Regulation of activities in areas outside the Containment Zones

The following establishments/activities will continue to remain closed till 30th September, 2020 throughout the State:

- i. Religious places/places of worship for public;
- ii. International air travel of passengers, except as permitted by MHA;
- iii. Cinemahalls,swimmingpools, entertainment complexes, theaters, auditoriums, assembly halls and similar places;

However, open air theaters and similar places will be permitted to open with effect from 21st September, 2020.

- iv. Social, political, sports, entertainment, academic, cultural, religious functions and other large congregations;
- v. Schools, colleges, universities, other educational/training/coaching institutions, anganwadis, etc. will remain closed for the purpose of teaching till end of Puja vacations in the month of October 2020.

However, the followings will be permitted:

- a. Conduct of examinations, evaluation and other administrative activities;
- b. Online/distance learning shall continue to be permitted and shall be encouraged;

c. School & Mass Education Department/Higher Education Department may permit upto 50% of teaching and non-teaching staff to be called to the schools at a time for online teaching/tele-counselling and related work, in areas outside the Containment Zones only with effect from 21st September, 2020 as per Standard Operating Procedure (SOA) to be issued by the Ministry of Health & Family Welfare (MoHFW);

d. Skill or Entrepreneurship training will be permitted in National Skill Training Institutes, Industrial Training Institutes (it is), Short term training centres registered with National Skill Development Corporation or State Skill Development Missions or other Ministries of Government of India or State Governments;

National Institute for Entrepreneurship and Small Business Development (NIESBUD), Indian Institute of Entrepreneurship (IIE) and their training providers will also be permitted.

These will be permitted with effect from 21st September, 2020 for which SOP will be issued by MoHFW. Skill Development & Technical Education Department will issue necessary order/guideline in this regard.

e. Higher Education Institutions only for research scholars (Ph.D.) and post-graduate students of technical and professional programmes requiring laboratory/experimental works. These will be permitted by the Department of Higher Education (DHE) in consultation with MHA, based on the assessment of the situation, and keeping in view incidence of COVID-19 in the States/UTs.

Subject to other provisions of this order, activities that are not specifically prohibited/regulated/restricted above are allowed subject to adherence to safety and health protocols and SOPs/guidelines issued by appropriate authorities."

Since the place where public hearing is scheduled to be held is not within the containment zone regulation of activities in that area should be guided by Clause-2 of the order under Annexure-2. He accordingly submitted that the establishment/ activities more fully described in Sub-clause (i) to (v) of the said Clause-2 would continue to remain closed till 30th September, 2020 throughout the State. Sub-clause (iv) of Clause-2 specifically provides that social, political, sports, entertainment, academic, cultural, religious functions and other large congregations has been directed to remain suspended till 30th September, 2020 throughout the State. As villagers of five revenue villages are likely to congregate in the public hearing, there will be large congregation, which is strictly prohibited under Clause-2(iv) of Order under Annexure-2.

4.2 He further submitted that public hearing is not an empty formality. It has to be conducted in strict adherence to the guidelines issued from time to time to achieve the purpose for which it is so conducted. Although public hearing was held at the scheduled place on 30.09.2020 pursuant to the direction of this Court dated 30.09.2020 in IA No.11476 of 2020 only 90 persons of the five revenue

villages were present. The same cannot at all be considered to be an effective public hearing for the purpose of which it is being conducted, more particularly when the population of the five revenue villages likely to participate in the public hearing is more than ten thousand. He further submitted that the petitioners were not made parties in W.P.(C)(PIL) No.24669 of 2020, which was disposed of on 28.09.2020. The order issued by the Special Relief Commissioner, Government of Odisha, Bhubaneswar on 31.08.2020 (Annexure-2) was not discussed in the order dated 28.09.2020 while disposing of W.P.(C) (PIL) No.24669 of 2020. The said order was also not within the knowledge of the petitioners. As such, the order passed by the Hon'ble Division Bench in W.P.(C) (PIL) No.24669 of 2020 does not have any binding effect on the petitioners in view of the doctrine of sub silentio. In support of his submission, Mr.Rath relied upon the case law decided by the Hon'ble Supreme Court in the case of Ajit Kumar Rath Vs. State of Orissa and others, reported in (1999) 9 SCC 596 and State of U.P. and another Vs. Synthetics and Chemicals Ltd. and another, reported in (1991) 4 SCC 139. Participation of only 90 villagers out of more than ten thousand population of five revenue villages itself shows that there was no proper representation in the Grama Sabha/public hearing. Although, the petitioners were given opportunity to participate in the public hearing, due to the interim order passed on the previous day, i.e., 29.09.2020 they were indisposed and could not participate in the said public meeting due to lack of unpreparedness. In continuation to his submission, Mr.Rath contended that Mr.Mishra, learned Senior Advocate, during the course of hearing of IA No.11476 of 2020, submitted that if necessary more than one public hearing can be held, which is recorded by this Court in order dated 30.09.2020 in its order at the concluding lines of para-9.

4.3 He further submitted that the opposite party No.4 has also filed W.A. No.574 of 2020 assailing the order dated 29.09.2020 passed in IA No.11105 of 2020. As such, two parallel proceedings against the self-same order is not maintainable. In support of his case he relied upon the case law in the case of Jai Singh Vs. Union of India and others, reported in (1977) 1 SCC 1.

4.4 He, therefore, submitted that there is no impediment for this Court to grant liberty to the petitioner to submit their written objection and consideration of the same by another public hearing. The petitioners undertake to submit their objection(s) within a stipulated date, if they are given such liberty.

5. Mr.S.P.Mishra, learned Senior Advocate appearing for opposite party No.4-Company, on the other hand, reiterated his submissions made on 30.09.2020. It is his submission that self-same advertisement/notice was under challenge in W.P.(C) (PIL) No.24669 of 2020 filed by one NGO, namely, Anchalik Parvesh Surakhya Sangh, Jharsuguda. The Hon'ble Division Bench of this Court, considering all relevant aspects as well as the office memorandum dated 14.09.2020 (Annexure-C to the IA) issued by the MoEF and Climate Change Assessment Division, Government of India, held as under:-

"5. We have heard learned counsel for the parties, gone through the impugned Notice under Annexure-1 and given our thoughtful consideration on the matter.

6. In the impugned Notice dated 27.08.2020 (Annexure1) it has been clearly mentioned that persons, who desire to submit their views, comments, objections etc. relevant to the project, may do so in writing within 30 days from the date of publication of the notice addressing the same to the Member Secretary, State Pollution Control Board, Odisha through Registered Post. Besides this, persons interested to submit their views relevant to the proposed project in writing or orally, may also do so during the public hearing to be conducted on 30.09.2020 at 11.00 A.M. at Govt. Upper Primary School, Kurebaga. Public hearing shall be conducted strictly observing guidelines contained in Covid-19 on Social Distancing and also COVID-19 SOP issued by the Government. We do not find any merit in the argument that the State Pollution Control Board has deliberately fixed the public hearing during pandemic of COVID-19. From the above Notice, it appears that the authority has given liberty to the public to file their objections/suggestions/views not only on the date of public hearing fixed but also in writing to the opposite party No.5, within 30 days from the date of Notice. The authority has thus not confined the submission of objection to the public hearing only on the date and time fixed, but it has given liberty to the general public to file their objections/suggestion in writing any time during the period of thirty days. Therefore, the stand taken by the petitioner cannot be accepted that the date fixed for public hearing will frustrate the purpose, as the local people may not participate in the meeting.

7. The further stand of the petitioner that due to pandemic situation offices are functioning with half of employees and therefore, it may not be possible on the part of the people to collect the documents from the offices. The said assertion also cannot be accepted for the reason that in the impugned notice it has also clearly mentioned that persons desirous of participating in the public hearing may go through the Environmental Impact Assessment (EIA)Environmental Management Plan (EMP) of the said project which will be available at the offices as mentioned in the notice and the same can also be downloaded from the given website free cost.

8. Again, the impugned notice has been issued on 27.08.2020 inviting objections within 30 days and fixing 30.09.2020 as the date of open public hearing, but the petitioner has filed this writ petition much belatedly on 24.09.2020 and further before completion of 30 days period or holding of such public hearing with an apprehension that public may not participate in the meeting, which cannot be well-founded. It is open for the petitioner as well as all the interested public at large to give their objections/suggestions/views not only at the time of public -6-hearing but at any time within 30 days from the date of said notice in writing.

9. In view of the above, we do not see any reason to accept the stands taken by the petitioner and to interfere in the matter. The writ petition lacks merit and is accordingly dismissed."

It is his submission that Sub-clause (ii) and (iii) of office memorandum dated 14.09.2020 (Annexure-C to the IA) are relevant for the instant purpose, which reads as follows:-

"(ii) If the number of participants is more than such ceiling, more than one Public Hearing shall be conducted by staggering the time and/or dates;

(iii) Use of virtual platform/online facilities may also be employed in addition to the physical Public Hearing process;"

He therefore submitted that public hearing has been allowed to be held with a ceiling of one hundred persons in the said public hearing following the guidelines and protocol of COVID-19. If the number of participants would be more than such ceiling, more than one public hearing could be conducted by staggering the time and/or dates. But the participants in the public hearing in question, as submitted by learned counsel for the petitioners, was only 90. This Court has also given the liberty to the petitioners to participate in the said public hearing, if so advised. But for the reasons best known to the petitioners they neither filed their written statement/objection within thirty days of the said advertisement/notice under Annexure-1 nor they have participated in the public hearing, although liberty was granted by this Court. It clearly shows that the petitioners want to frustrate the public hearing and to drag the matter. The petitioners in the instant writ petition can only agitate their individual grievances and not the grievance of the public at large, as it is not a Public Interest Litigation. Moreover, Public Interest Litigation assailing the self-same advertisement/notice has already been dismissed by this Hon'ble Court. Non-consideration of the office order issued by the Special Relief Commissioner, Government of Odisha restricting 'other large congregation', as stipulated in Clause-2(iv) of the said order is not applicable to public hearing in view of the office memorandum issued by the Government of India in the Ministry of Environment, Forest and Climate Change Impact Assessment Division, New Delhi, as the same was issued by the concerned Department specifically dealing with the subject 'public hearing'. Since the petitioners have been given ample opportunity to participate in the public hearing in question no further opportunity as sought for should be given. In that view of the matter, he prayed for dismissal of the writ petition.

6. Mr.Muduli, learned AGA heavily relied upon the order passed in W.P.(C)(PIL) No.24669 of 2020 dismissed on 28.09.2020. He submitted that ample opportunity was given to the petitioners and the averments made in the instant writ petition clearly establishes that the petitioners had the knowledge of the notice/advertisement issued under Annexure-1, but for the reasons best known to him, they neither filed any written objection within thirty days, as stipulated in the said notice under Annexure-1 nor participated in the public hearing in spite of liberty given by this Court in order dated 30.09.2020. He further submitted that the date of public hearing should neither be changed nor extended as sought for by the petitioners, at the subsequent stages of granting environmental clearance, if any, would be delayed. Although the impugned notice/advertisement was

issued on 27.08.2020, they approached this Court belatedly only on 25.09.2020. The Hon'ble Division Bench has also taken note of approaching the Court belatedly by the petitioner in W.P.(C)(PIL) No.24669 of 2020 and deprecated the same. In that view of the matter, the instant writ petition also merits no consideration and the same is liable to be dismissed.

7. Upon hearing learned counsel for the parties and on perusal of the order passed in W.P.(C)(PIL) No.24669 of 2020, it appears that the self-same notice/advertisement issued by opposite party No.3-State Pollution Control Board, Odisha, Bhubaneswar for public hearing has been challenged in both the writ petitions, i.e., W.P.(C)(PIL) No.24669 of 2020 as well as in the instant writ petition. The Division Bench, on a threadbare discussion of the contentions raised as well as taking note of the office memorandum issued on 14.09.2020 (Annexure-C to the IA filed for vacation of interim order dated 29. 09.2020), dismissed the earlier writ petition.

7.1 Mr. Rath, learned counsel for the petitioners submitted that the office order dated 31.08.2020 (Annexure-2) issued by the Special Relief Commissioner prohibiting 'other large congregation' as per Clause-2(iv) of the said office order was not taken into consideration by the Division Bench. As such, the findings given by the Division Bench is not binding on the petitioners in view of principles of sub silentio. Hon'ble Supreme Court in Ajit Kumar Rath (supra) and Synthetics and Chemicals Ltd. (supra) on the principles of binding effect of an order, held as follows:-

7.2 In Ajit Kumar Rath (supra), it is held as follows:-

"32. Learned counsel for the respondents has referred to the judgment of the Orissa High Court passed in identical situation and relating to the same service on 12th March, 1985, by which the seniority was denied to certain promoted officers over those appointed by direct recruitment, on the ground that ad hoc promotion was contrary to rules. It is contended that a Special Leave Petition against that judgment was dismissed by this Court on 28.3.1998. A copy of the order by which the Special Leave Petition was dismissed has been placed on record which indicates that no reasons were given for dismissing the petition. This order, therefore, would not constitute a binding precedent. Moreover, the judgment of the Orissa High Court was delivered on 12th March, 1985, that is to say, many years earlier than the decision rendered by the Constitution Bench in the 1990 case of Direct Recruit Class-II Engg. Officers Association (supra). On the basis of the Constitution Bench decision as also the other decisions of this Court, the efficacy of the judgment passed by the Orissa High Court has altogether vanished and there was no occasion for the Tribunal to have relied upon that judgment in preference to the Constitution Bench decision while writing the Review judgment."

7.3 In Synthetics and Chemicals Ltd. (supra), Hon'ble Supreme Court on the principles of sub-silentio held as follows:-

"41. Does this principle extend and apply to a conclusion of law, Which was neither raised nor preceded by any consideration. In other words can such conclusions be considered as declaration of law? Here again the English Courts and jurists have carved out an exception to the rule of precedents. It has been explained as rule of sub-silentio. A decision passed sub-silentio, in the technical sense that has come to be attached to that phrase, when the particular' point of law involved in the decision is not perceived by the Court or present to its mind' (Salmond 12th Edition). In Lancaster Motor Company (London) Ltd. v. Bremith Ltd., [1941] IKB 675 the Court did not feel bound by earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'. It was approved by this Court in Municipal Corporation of Delhi v. Gumam Kaur, [1989] 1 SCC 101. The Bench held that, 'prece- dents sub-silentio and without argument are of no moment'. The Courts thus have taken recourse to this principle for relieving from injustice perpetrated by unjust precedents. A decision which is not express and is not founded on reasons nor it proceeds on consideration of issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141. Uniformity and consistency are core of judicial discipline. But that which escapes in the judgment without any occasion is not ratio decedendi. In Shama Rao v. State of Pondicherry, AIR 1967 SC 1680 it was ob- served, 'it is trite to say that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law."

The office order dated 31.08.2020 under Annexure-2 refers to 'other large congregation' which does not include a 'public hearing'. Further, it is made clear in the said order under Annexure-2 that the subject to other provisions in the said order, the activities not specifically prohibited/regulated /restricted in the said order are allowed subject to adherence to safety and health protocols and SOPs/guidelines issued by the appropriate authorities. On the other hand, office memorandum dated 14.09.2020 (Annexure-C to the IA) has been issued by the concerned Ministry, specifically on the subject of conducting 'public hearing' during pandemic of COVID-19. The said office memorandum under Annexure-C also restricts the congregation with a ceiling of one hundred persons. To meet with a situation where the number of participants are more than such ceiling, provision has been made under Clause-3(ii) of the said office memorandum, which prescribes that if the number of participants are more than such (100 persons) ceiling, more than one public hearing shall be conducted by staggering the time and/or dates. Thus, the restrictions imposed by the Special Relief Commissioner in his office order dated 31.08.2020 under Annexure-2 cannot be said to include a 'public hearing', if conducted as per the guidelines given under office memorandum under Annexure-C to the IA. In that view of the matter, the

principles of sub silentio is not applicable to the case in hand.

8. Bare perusal of the writ petition as well as the representations annexed to it as Annexures-5 and 6, which are identical in nature, only suggests that the representationists therein pray for keeping the public hearing scheduled to be held on 30.09.2020 in abeyance till COVID-19 situation is normalized. The representations do not throw any light as to how the petitioners will be affected if the proposed expansion of opposite party No.4-Company is permitted. The case law decided by the Hon'ble Supreme Court in Orissa Mining Corporation Limited Vs. Ministry of Environment and Forests and others, reported in (2013) 6 SCC 47, as relied upon by learned counsel for the petitioners has no application to the instant case, as in the said case law the issue was with regard to environmental clearance for diversion of forest land for alumina refinery project (ARP)/bauxite mining project (BMP). The issue of non-consideration of religious rights, i.e., customary rights of worship in the mountains, especially a hilltop known as Niyam-Raja by the Scheduled Tribe communities and other tribal forest dwellers were involved. But in the instant case, the same are certainly not in issue.

9. Further argument has been raised by Mr.Rath, learned counsel for the petitioners that two parallel proceedings assailing the self-same interim order dated 29.02.2020, one by filing I.A. No.11476 of 2020 for recall of the said order and another by filing Writ Appeal bearing WA No.576 of 2020 is not maintainable. In support of his case, the case law in Jai Singh Vs. Union of India and others, reported in (1977) 1 SCC 1, wherein the Hon'ble Supreme Court held/observed as follows:-

"4. The High Court dismissed the writ petition on the ground that it involved determination of disputed questions of fact. It was also observed that the High Court should not in exercise of its extraordinary jurisdiction grant relief to the appellant when he had an alternative remedy. After hearing Mr. Sobhagmal Jain on behalf of the appellant, we see no cogent ground to take a view different from that taken by the High Court. There cannot, in our opinion, be any doubt on the point that the extent of purity of the gypsum won by the appellant is a question of fact. It has also been brought to our notice that after the dismissal of the writ petition by the High Court, the appellant has filed a suit, in which he has agitated the same question which is the subject matter of the writ petition. In our opinion, the appellant cannot pursue two parallel remedies in respect of the same matter at the same time."

9.1 He, therefore, submitted that two parallel proceedings are not maintainable in the eye of law. The arguments advanced by Mr.Rath is not sustainable in view of the fact that Mr.Mishra, learned Senior Advocate appearing on behalf of opposite party No.4 very fairly submitted that although he had filed the I.A. No.11476 of 2020 seeking recall of interim order dated 29.09.2020 passed in IA No.11105 of 2020, but in view of the fact that this Bench was not supposed to sit on 30.09.2020, opposite party No.4 also filed W.A. No.576 of 2020 and moved the Hon'ble the Chief Justice to take up the matter. However, pursuant to the

direction of Hon'ble the Chief Justice, the matter, i.e., the IA No. No.11476 of 2020, was taken up by a special list on 30.09.2020. He also fairly submitted that he has not moved the WA No.576 of 2020 in view of the fact that the instant IA for recalling of interim order dated 29.09.2020 passed in IA No.11105 of 2020 was taken up.

10. Mr.Rath, learned counsel for the petitioners submitted that only 90 persons have participated in the public hearing held on 30.09.2020 pursuant to order dated 30 09.2020 passed in IA No.11476 of 2020, which cannot be said to be a substantial representation of villagers of five revenue villages having population of more than ten thousand and there was no effective 'public hearing' at all. However, there is no material available before this Court to test the veracity of the same. If that be so, then petitioners may make a representation to the opposite party No.2-Collector, Jharsuguda within a period of three days hence, i.e., by 12.10.2020, who shall consider the same and pass necessary orders thereon in consultation with the stakeholders, if necessary, by taking steps to hold another 'public hearing' pursuant to notice under Annexure-1.

11. With the aforesaid observation, the writ petition as well as IA No.11105 of 2020 and IA No.11476 of 2020 are disposed of.

11. 1 An authenticated copy of this order downloaded from the website of this Court shall be treated at par with certified copy in the manner prescribed in this Court's Notice No.4587 dated 25.03.2020.