

(1988) 05 OHC CK 0007

In the Orissa High Court

Case No : O.J.C. No's. 287 and 1953 of 1988

Sudhir Chandra Mandal and Others

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 13-05-1988

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 226, 299
Orissa Estates Abolition Act, 1951 — Section 7

Citation : AIR 1989 Ori 70 : (1988) 66 CLT 361

Hon'ble Judges : S.C. Mohapatra, J; R.C. Patnaik, J

Bench : Division Bench

Advocate : B.L.N. Swamy, B.V.B. Das, B. Routray, S.K. Nayak, R.K. Dash and U.K. Samal, for the Appellant; Addl. Standing Counsel, S. Mishra, S. Mantry, R.C. Rath, A.K. Misra, R.C. Dash, S.S. Rao and S. Swain, A.S.C., for the Respondent

Judgement

S.C. Mohapatra, J.—Settlement of fishery sairat sources of State Government in the Revenue Department is the subject matter of these two writ applications.

2. Fishery sairat sources in question belonged to Kujanga estate which vested in the State of Orissa under the Orissa Estates Abolition Act, 1951 in the year 1952. Thereafter, those were being administered by the Kujanga tahasil till the bifurcation in the year 1959 i.e., (i) KujangaTahasil, and (ii) Marsaghai Tahasil. The dispute arose when the Tahasildar. of Marsaghai Tahasil issued notice for settlement of the fishery sairats within his jurisdiction on 28-11-1986 inviting offers for the same. An application was filed before the additional District Magistrate by the Kalinga Karnadhar Primary Fishermen's Co-operative Society for settlement of those fishery sairats with them. The notice was issued after the resolution was made by a committee on the basis of representation to the State Government In the resolution 56 fishery sources were mentioned to be part of Saharapenth Macchdia and those were to be settled in accordance with the principle laid down in the Government instruction dated 27-6-1974. After considering the matter, the Additional District Magistrate held that the Kalinga Karnadhar Primary Fishermen's Cooperative Society had no justification to lay

any claim on the fishery sources beyond the 56 sources listed by the committee, in its resolution dated 10-5-1985 and the Tahasildar, Marsaghai would be at liberty to settle all the fishery sources other than those 56 sources in accordance with the principle laid down in, the instruction of the State Government dated 27-6-1974. He further held that the Block Development Officer, Marsaghai will be at liberty to settle all the fishery sources already transferred to the Grama Panchayat concerned.

3. This order of the Additional District Magistrate was challenged before the Revenue Divisional Commissioner by Kalinga Karnadhar Primary Fishermen's Co-operative Society. The Commissioner has accepted the grievance of the Co-operative Society in part and turned down the same in respect of the other part.

4. Order of the Additional District Magistrate for settlement of some of the fishery sairats with Kalinga Karnadhar Primary Fishermen's Co-operative Society was not assailed by the petitioners in O.J.C. No. 287 of 1988 which has become final. The short disputes are regarding the extension of the number of sairats to be settled with the Co-operative Society and exclusion of the sairats said to have been vested with Grama Panchayat. Order of the Revenue Divisional Commissioner has been assailed by the Sarpanchas of five Grama Panchayats and a Co-operative Society in O.J.C. No. 287 of 1988. Kalinga Karnadhar Primary Fishermen's Co-operative Society has also assailed the order in O.J.C. No. 1053 of 1988.

5. Challenge of Mr. B.L.N. Swamy, the learned counsel for the petitioners in O.J.C. No. 287 of 1988 is to the validity of instructions issued by the State Government in Revenue Department on 27-6-1974 (Annexure-2), where a principle has been laid down that the fishery sairat sources in the State would ordinarily be settled in favour of bona fide Co-operative Societies consisting of genuine local fishermen and excluding middlemen and speculators wherever the same exist or may come up in future. He submitted that it creates a monopoly right and is hit by Articles 14 and 19 of the Constitution as has been held in *Hrudananda Patra and Another Vs. Revenue Divisional Commissioner Central Division and Others*, . Mr. Swamy has commented upon a decision reported in *Maa Mangala Primary Fishery Development Co-operative Society, Dhankanal Vs. State of Orissa and Others*, where it was held that the settlement of fishery sources should be strictly in accordance with the principles contained in the said instruction until the same is superseded by different principles. His main attack on this decision is that the earlier decisions on the question have not been taken into consideration. Mr. R. K. Mohapatra, the learned counsel for the Co-operative Society submitted that the society consists of members of the fishermen caste who are scheduled caste. When the State Government has issued instruction for protecting the livelihood of these fishermen by issue of instruction in the year 1974, as assailed by Mr. Swamy the same should be upheld in view of the directive principles contained in Article 46 of the Constitution. Mr. Mohapatra submitted that a permanent fishery right of fishing of the Keutas granted by the ex-intermediary long before the

estate vested cannot be interfered with by the State Government after vesting in view of Section 8 of the Orissa Estates Abolition Act although the rent can be enhanced. The last submission of Mr. Mohapatra relating to the fishery right of Keutas is contested by Mr. B. L. N. Swamy on the short ground that a Co-operative Society cannot claim a right of its members who are independent of the Society which is a separate juristic person. Since Co-operative Society is a legal entity and its rights and liabilities would depend upon the object with which it is registered under the Orissa Cooperative Societies Act, the title of the individuals or group of persons who are not members of the society cannot be affected.

6. Whether the Keutas of the villages have a permanent fishery right in Saharapenth Machhadia of Kujanga estate cannot be decided in this writ application in the absence of Keuta community of erstwhile Kujang estate being heard who are not parties. As has rightly been held by the Revenue Divisional Commissioner the extent and area, of Saharapeth Machhadia is to be determined in future. Such a controversial question which would depend upon full enquiry into facts ought not to be decided in this writ application relating to settlement of fisheries by the Tahasildar. This question is left open to be agitated in appropriate forums after following the principle, of natural justice.

7. Mr. B. L. N. Swamy, submitted that by the circular of State Government in 1974, a monopoly is created which contravenes Article 19 of the Constitution. He relied upon a decision reported in *Mannalal Jain Vs. The State of Assam and Others*, where Assam Food Grains (Licensing and Control) Order, 1961, was considered and licence granted to Co-operative Society was held to be creation of monopoly. If there would have been a statutory provision in matter of settlement of fishery *sairats*, we would have considered the submission of Mr. B.L.N. Swamy. The materials in both the writ applications are not sufficient to apply the principle decided in *Mannalal Jain Vs. The State of Assam and Others*, . The decision reported in *Hrudananda Patra and Another Vs. Revenue Divisional Commissioner Central Division and Others*, relating to settlement of *sairats* on a previous lessee avoiding the highest bidder recommended by the Subordinate authorities would be distinguishable on facts.

8. Mr. B. L.N. Swamy relied upon a decision of this Court reported in *Raghunath Behera Vs. Revenue Divisional Commissioner (Southern Division) and Others*, The petitioner in this case was claiming to be fisherman by caste and profession and a member of fishermen's Co-operative Society for which there was no supporting material. One of the considerations for refusing the prayer was that the executive instruction does not create a right and no person has a vested right to get any lease although he may have a right to get his application for lease disposed of fairly and not arbitrarily. There can be no dispute to this principle. This decision is also distinguished on fact.

9. Mr. Swamy's attack on the decision reported in *Maa Mangala Primary Fishery Development Co-operative Society, Dhankanal Vs. State of Orissa and Others*, is

not justified since earlier decisions were not required to be considered in the said decision. In the said decision, the petitioner was a society taking the fishery lease annually in the previous years. Without giving notice when the petitioner expected to apply for lease, it was settled with another. This was held to be contrary to the instructions in the circular dated 27-6-1974. The subordinate authorities not having followed the instructions of the State Government, it was observed :

".....When Government have framed principles, it behoves the instrumentalities to abide by the same. Any acting otherwise would generate distrust in the minds of the citizens in the administration. By acting according to the principles, the instrumentalities can avoid any accusation of nepotism or favouritism."

10. In the decision reported in Bhagabati Primary Fishermen's Co-operative Society Vs. State of Orissa and Others, relied upon by Mr. Swamy, it has been observed that the circular of 1974 only speaks that ordinarily, i.e. in a large majority of cases, the said instruction would be followed and invariably in all cases. In the said case, a Co- operative Society assailed the notice issued for auction of the sairats as being violative of the principle of settlement of fisheries contained in the year 1974 circular. This Court took into consideration the fact that in the previous years the sairats were being put to auction and held that it would be open to the authorities to either to settle such fishery rights with Co-operative Societies or to put the same to auction for considerably increasing the revenue. The said decision would also not govern the present case on facts.

11. Mr. Swamy has relied upon some decisions relating to settlement of fishery right in tanks under the Grama Panchayat Rules. These being statutory provisions it was held in those decisions that those provisions are to be followed. The said principle need not be applied to the present case.

12. Mr. R. K. Mohapatra, the learned counsel for the Co-operative Society submitted that in the absence of any materials for exclusion of some sairats transferred by the Tahasildar to the Block Development Officer cannot be held to be the sairats of the Grama Panchayat. We called upon the State Government to produce the orders of vesting of such sairats in the Grama Panchayat. No such specific order of vesting could be produced before us. Under the Grama Panchayat Act, Tahasildar is not competent to transfer sairats to the Block Development Officer on behalf of any Grama Panchayat. Accordingly, we are inclined to agree with Mr. Mohapatra in absence of any materials in support that there is no scope for exclusion of such sairats from the scope of 1974 instruction on the sole ground that the Tahasildar had transferred the same to the Block Development Officer.

13. From the discussion as made above, we arrive at the following conclusions :
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"(a) Rights of fishermen of the villages as per the patta granted by the ex-intermediary cannot be adjudicated in the writ forum;

(b) When instructions are given by the State Government, they are to be followed by the instrumentalities who are not to avoid the same;

(c) No monopoly is created by the circular of 1974 issuing instruction for ordinarily settling the sairats with bona fide Co-operative Societies consisting of genuine local fishermen and excluding middle men and speculator wherever the same exist or come up in future; and

(d) There is no material that the sairats excluded by the order of the Revenue Divisional Commissioner were actually vested by the State Government in Mahakalapada Grama Panchayat.

14. Since the dispute arose with regard to a notice give by the Tahasildar, Marsaghai in November, 1986, the period for settlement has expired Normally, the writ application is of academic interest. However, the Revenue Divisional Commissioner having made some permanent arrangements, we considered the dispute at length. Although, the Revenue Divisional Commissioner was correct in coming to the conclusion when he considered the matter that the Kalinga Karnadhar Primary Fishermen's Co-operative society came within the category of the Co-operative Society as envisaged in the instruction of the State Government, a situation may arise in future where several Co-operative Societies may be registered with the same object. In such cases, it is desirable that notice is given for public auction, so that the revenue from the sairats can be augmented. However, the instrumentalities may take into consideration to protect the members of scheduled caste and scheduled tribes or weaker sections and their economic development which should weigh with the instrumentalities in comparison to the revenue to be available from these water sources. If such notice for auction is given, the Co-operative Societies as envisaged get a chance to bid and offer the consideration which would be taken into consideration by the instrumentalities under the instruction while settling or recommending the sairats.

15. The the result, both the writ applications are allowed to the extent indicated above. There shall be no order as to costs.

R.C. Patnaik, J.

16. I agree.