

CASE NO.:
Appeal (civil) 940 of 2006

PETITIONER:
Milk Producers Association, Orissa & Ors.

RESPONDENT:
State of Orissa & Ors.

DATE OF JUDGMENT: 02/02/2006

BENCH:
S.B. Sinha & P.K. Balasubramanyan

JUDGMENT:
J U D G M E N T
[@ Special Leave Petition (Civil) Nos. 16362-16363 of 2004]

S.B. SINHA, J :

Leave granted in all the SLPs.

The Appellants herein carry on business in milk. They have admittedly encroached upon government lands in the town of Bhubaneswar. The State of Orissa intended to evict them. The Chief Minister of the State of Orissa evolved a scheme allegedly for their rehabilitation. The villages selected for carrying out such rehabilitation job were not found to be suitable therefor. As they are sought to be evicted without offering them alternative plots, the Appellants filed writ petitions before the Orissa High Court. In the writ petitions it was inter alia averred:

"4. That since most of these Petitioners belong to the poorer strata of the society, their rehabilitation have engaged attention of the authorities at the highest level since the year 1987. In a meeting held on 1.6.87 under the Chairmanship of the Chief Secretary, it was decided that sites for such rehabilitation of Gowalas operating within Bhubaneswar city shall be selected by a committee consisting of Director of Veterinary Services; representatives of OMFED; A.D.M., Bhubaneswar; S.D.O., Bhubaneswar and representative of Bhubaneswar Development Authority. The minutes of the meeting held on 1.6.87 was sent to Chief Secretary, Secretary, Finance Department, Special Secretary, General Administration Department, Secretary, Forest and Animal Husbandary Department, Secretary, Revenue Department, Secretary, Housing and Urban Development Department, Vice-Chairman, Bhubaneswar Development Authority etc; vide letter no. 9838/CA, dated 14.7.87 by the Joint Secretary to Government in the Department of General Administration, Govt. of Orissa and Ex-officio Director of Estates.

5. That as per the decision of the High Power Committee, the site selection committee met on 11.6.87 and recommended that the milkmen/ private milk producers like Petitioners No. 2 to 240 be settled at Pratap Sasan, Tulsadeipur and Jamukoli.

6. That during 1989, the Government gave press statements to the effect that the Government had formulated scheme of rehabilitation, which is as follows:
(a) Allotment of Govt. land measuring 40 x 30 free of premium.

- (b) Payment of disturbance allowance of Rs. 500/-.
- (c) Payment of construction assistance of Rs. 3,000/- in two instalments for construction of dwelling house at the new site.
- (d) Free Transportation of personal belonging of each Gowalla family.
- (e) Provision of drinking water at the new site.
- (f) Opening of fair price shop at the new site for sale of essential commodities.
- (g) Opening of a fodder sale centre.
- (h) Collection of milk by OMFED from the Goallas who want to sell milk to it at the new site.
- (i) Medical and Educational facilities at the new site\005

7. That despite all these exercise nothing has been done in the matter. Later on the Petitioners understand that vide letter No. Misc-BP-126/93 2240/BP/BDA Bhubaneswar, 7.4.94, the Advisor-cum-Planning Member wrote to Director of Estates that the site at Pandara seems to be the best suited for the purpose of rehabilitation because of the availability of water near by and open spaces for cattle movement. In return the Director of Estates vide letter dated 3.9.94 intimated to Vice-Chairman, Bhubaneswar Development Authority that Government have already decided to rehabilitate the Gowallas in Mouza Pandara, Gakana, Patrapada, and Jokalandi. The Director of Estates requested the Bhubaneswar Development Authority to carve out plots in the above area for the purpose of rehabilitation of Gowallas. Thus, though the Government unilaterally changed the sites selected for rehabilitation, the Petitioners welcomed such action of the Government\005

8. That pursuant to request under Annexure-2, the Advisor cum Planning member of Bhubaneswar Development Authority vide letter No. 5615/B/BDA/Misc-BP-176/93 Bhubaneswar, the 5.10.94 intimated the Director of Estates that as desired the layout plans of the concerned land in mouza Gadakana, Pandara, Patrapada and Joklandi have been prepared after determination of the optimum plot size required for a Gowala family. The plot size determined was 30' x 60'. The said letter also made it clear that each plot would accommodate a shed of 11 to 12 cows, a residential unit with a plinth area of 484 sq. ft. and space for cow dung dumping and Gobar Gas Plant. Copy of the letter dated 5.10.94 is in the custody of Director of Estates. Ultimately, 432 plots have been carved out during 195 for allotment to the Gowallas at villages, Garkana, Pandara, Patrapanda and Jokalandi\005

9. That the Petitioners understand that on 2.9.95, the director of Estates held further meeting in the presence of planning member of Bhubaneswar Development Authority, officer of Bhubaneswar Municipal Corporation, Orissa State Housing Board for immediate rehabilitation of Gowallas. Though in the said meeting a

decision was taken to rehabilitate the Gowallas of Bhubaneswar immediately at Pandara, Gadakana, Jokalandi and Patrapada, till date nothing has been done in the matter."

The said statements were not denied and disputed in the counter affidavit, as would appear from paragraph 7 thereof which is as follows:

"That with regard to the averments made in para \026 4 to 9, it is submitted that rehabilitation scheme has received for active consideration of Gowallas, it is submitted that present Milk Producers Association and Utkal Jadev Mahasangha have prayed for their rehabilitation. In the meeting held on 2.9.1995, the Members of Milk Producers Association have expressed that if they are rehabilitated in Village Pandaras, they will have no objection. In the meantime, Government have taken a decision to rehabilitate the Petitioners in Pandara Mouza and accordingly land measuring an area of AC. 28.180 dec. has been identified for the said purpose. Accordingly, B.D.A. has prepared a plan and Government have decided to allot 25X40' size plots to the Petitioners/ Gowallas and they shall have to pay premium on the prevailing rate fixed by the Government. If these lands in village Pandara is not found to be sufficient few plots can be allotted in village Patrapada, Jamukoli and Jokalandi for their rehabilitation."

The Appellants before us raised a contention that they are not averse in moving out of the town of Bhubaneswar but they should be provided with alternative accommodation in terms of the rehabilitation scheme wherefor they are ready and willing to pay the market value for the plot which may be allotted. The contention of the Respondent, on the other hand, is that having regard to the provisions contained in the Orissa Municipal Corporation Act, 2003 and in view of the Master Plan, the Appellants must vacate the lands possessed by them. Further contention of the State is that keeping in view of the changed situation, a policy decision had been taken that for hygienic and other reasons, it is not possible to rehabilitate them in the villages which come within the purview of the planned area of Bhubaneswar. It was stated that the members of the Appellant No. 1 Association are not poor and in view of the averments made by them in the petition for special leave that they produce and supply about 10,000 litres of milk to the residents of Bhubaneswar, their average family income would be about Rs. 1,85,950/- after deducting 50% of the total income towards establishment and maintenance charges and some of them have their own lands and houses in the town of Bhubaneswar.

Mr. B.A. Mohanti, learned senior counsel appearing on behalf of the Appellants would submit that keeping in view the fact that the State of Orissa had come out with a policy decision that on their eviction the Appellants would be rehabilitated, there is absolutely no reason as to why such policy decision should not be adhered to. It was submitted that before the High Court, even it was not contended by the State that the said policy decision had become unworkable and it is in that view of the matter, the High Court made the following observation:

"\005Let the State Government take appropriate steps for rehabilitation of the gowallas of Bhubaneswar City. It is open for the Government to take up rehabilitation but that cannot be a condition precedent for the eviction of the Petitioners. It is also open for the Government to proceed with eviction of the gowallas in accordance with law."

According to the learned counsel, it is against only that portion of the

judgment of the High Court, the Appellants are before us.

Mr. Janaranjan Das, learned counsel appearing on behalf of the Respondents, on the other hand, argued that if the Chief Minister was the author of the earlier policy decision, he has resiled therefrom as would appear from a notesheet dated 18.10.2005.

Mr. Das would contend that as the members of the Appellant No. 1 Association are not poor people, they do not deserve any sympathy.

Furthermore, it was urged that in view of the amendments in the Orissa Municipal Corporation Act, it is now impermissible to keep cattle within the town of Bhubaneswar. It is no doubt true that the Chief Minister of the State of Orissa in view of the representations made before him took a policy decision that the members of the Appellant No. 1 Association would be rehabilitated in certain villages and in particular, villages of Pandara, Patrapada, Gadakana and Jokalandi; but it was later on detected that all the aforementioned villages are within the Master Plan since 1982. Before the Chief Minister, admittedly a notesheet was produced wherein it was inter alia stated:

"(c) In the area identified in Mouza-Pandara measuring Ac. 16.120 dec., there have been many encroachments besides as mentioned at Para 4(e) of P. 25/N an area of Ac. 4,084 dec. out of this area is subjudice vide OJC No. 13516 of 2001 (Laxmidhar Bhoi and others Vs. State of Orissa).

(d) Orissa Municipal Corporation Act, 2003 has been enacted which prohibits keeping of animals in the premises so as to be nuisance or danger to any persons besides having other stringent conditions with regard to keeping the cows and buffalos within the city limits of Bhubaneswar."

Mr. Das submitted that in view of the fact that these plots were not free from encroachment and other litigations, rehabilitation of Gowallas according to the said notesheet became an impractical proposition for the reasons stated therein.

Before, we advert to the rival contentions raised by the parties, we may state that a xerox copy of the said notesheet was directed to be handed over to the learned counsel for the petitioner and the entire records were allowed to be inspected. The Appellants upon inspection of the said record have filed an affidavit contending that no decision had been taken by the State as yet to resile from the earlier policy decision and merely a decision had been taken to affirm an affidavit before this Court to the effect that it is not possible to rehabilitate the members of the Appellant No. 1 Association.

Paragraphs 8 (a), 8(d), 8(e), 8(f), 9 and 10 of the said notesheet read as under:

"(a) Bhubaneswar is rapidly growing city with the BDA projection of a population of 8.5 lakhs in the year 2005. The health and traffic hazards caused by Gowallas needs to be stopped. The new Orissa Municipal Corporation Act, 2003 has specific and stringent provisions in this regard.

(d) Rehabilitation of Gowallas within the master plan of Bhubaneswar will be against the spirit of the Orissa Municipal Corporation Act, 2003 as well as other environmental laws.

(e) No villages outside the Master Plan area have been located or identified nor feasibility of the same has been

conducted keeping in view the availability of Government land.

(f) There is also an issue of providing a non-discriminatory treatment in the matter of rehabilitation. At no stage, the Government has prepared the full plan for rehabilitation of all Gowallas nor has it been found to be feasible. On the other hand, encroachments in the name of "Gowallas" have been growing in the Bhubaneswar city as is evident from the SLP itself. For instance, the petitioner has mentioned in the SLP that there are 1000 families who will be affected. While it is not possible to confirm these numbers without a survey, it is clear that the problem of Gowallas in the Bhubaneswar city has further grown as in 1994, 686 such 'Gowallas' were identified. There have been many decisions by Hon'ble High Court as well as by the Supreme Court, where it has been held that there should not be on any premium on encroachment. For instance, in OJC 2312/89 of High Court of Orissa have passed an order in which the Hon'ble Court clearly ordered "the rehabilitation scheme is neither requirement of law nor a mandatory condition precedent for eviction of encroachers or unauthorized occupations of Government land".

9. In view of the above reasons, it may be appropriate if the Government reviews its earlier decision with regard to rehabilitation of Gowallas in Village \026 Pandara, which is within the Bhubaneswar Municipal Corporation area in view of the difficulties involved not only in practical implementation but also because of with new stringent requirements which have come up under Orissa Municipal Corporation Act 2003 subsequent to the earlier decision of the Government in 2002.

10. The occupation of cattle-rearing and is best served in rural areas, as it requires availability of land, water ponds, free movement space and other linkages with agriculture. In urban areas the density of population is growing and the traffic problems are acute, this occupation becomes a public nuisance and health and traffic hazard. The supply of milk to Bhubaneswar is adequate. People in urban areas buy milk in hygienic conditions, Government has separately promoted big dairying activity in rural areas with adequate investment on chilling and pasteurization plants from where city gets its supply of milk easily without any difficulties. The Gowallas, who wish to carry out their occupation move to the rural areas and supply milk through linkages already established. The Department of Animal Husbandry is of the similar view which is reflected in their affidavit."

Indisputably, the said proposal found favour with the Chief Minister and pursuant to or in furtherance thereof, an affidavit has been filed before us on behalf of the State of Orissa wherein it has been stated:

"5. A rehabilitation programme for Gowallas under the present circumstances is not found to be feasible. The earlier Government attempt to carve out plots for only a few of the petitioners could not succeed due to reasons mentioned at Para 3 above. On the other hand, encroachments in the name of "Gowallas" have been growing in Bhubaneswar city as is evident from the

Special Leave Petition itself. For instance, the petitioners have mentioned in the Special Leave Petition that there are 1000 milkmen families who will be affected. Although it is not possible to confirm or rebut these numbers without a survey, it is clear that the problem of encroachments by Gowallas in the Bhubaneswar city has only grown. In 1994, for instance, only 686 such 'Gowalla families' were identified in a survey.

7. That occupation of cattle rearing will be best suited for rural areas, as it requires availability of land, water ponds, free movement space and other linkages with agriculture. In urban areas, where the density of population is high and traffic problems are acute, this occupation becomes a public nuisance and health and traffic hazard. The supply of milk to Bhubaneswar is adequate. People in urban areas buy milk in hygienic conditions, Government has separately promoted big dairying activity in rural areas with adequate investment on chilling and pasteurization plants from where city gets its supply of milk easily without any difficulties. The Gowallas, who wish to carry out their occupation, should make their own arrangements to shift to rural areas on their own and supply milk through linkages already established.

Due to the fact and circumstances submitted in the foregoing paragraphs, the Government does not intend to rehabilitate Gowallas who have been encroaching Public land."

It has further been contended that encroachments by Gowallas also pose health and traffic hazards for the residents of Bhubaneswar and in view of the fact that other encroachers had also started seeking for rehabilitation package, the State cannot have special programme for rehabilitation for one class of encroachers and not for others. From the records, it further transpires that the Orissa State Cooperative Milk Producers' Federation Limited (OMFED) had come into being. It is also in a position to satisfy the need of milk to the residents of town of Bhubaneswar. OMFED is prepared to collect milk from Gowallas if they become member of the nearest Milk Producing Society / District Milk Producers Union affiliated to it and if they move out of the town of Bhubaneswar, there cannot be any problem to provide feed and fodder along with medical facility for the cattle through the existing infrastructure available in the close proximity of the area. It has further been brought on record that all milkmen are economically sound stating:

"\005As admitted by the petitioners in the present Special Leave Petition, per day milk production is about 50000 litres and as per survey of General Administration Department, Government of Orissa about 687 nos. of Gowallas families are residing in Bhubaneswar City. So income per annum of each family comes out to about Rs. 3,71,910.00 (50,000 Lts./687 families x 365 x Rs. 14.00 per litre). Deducting 50% out of the total income towards establishment & maintenance charges, net annual income per family comes to around 1,85,950.00. So it cannot be admitted that all Gowallas are economically poor. On the other hand, it is brought to the kind notice of this Hon'ble Court that about 30 Gowalla families are quite rich and now own their own land and building in Bhubaneswar city."

The State has enacted Orissa Municipal Corporation Act in the year 2003, the relevant provisions whereof are as under:

"409. (1) No person shall tether any animal in any public street.

(2) Any animal tethered as aforesaid may be removed by the Commissioner, or by any Corporation Officer or employees and made over to a police officer or may be removed by a police officer, who shall deal therewith as with an animal found straying."

"543. (1) No person shall \026

(a) without the written permission of the Commissioner or otherwise than in conformity with the terms of such permission, keep any swine in any part of the city;

(b) keep any animal on his premises so as to be a nuisance or danger to any person; and

(c) feed any animals, or suffer or permit any animal, to be fed, or to feed with or upon excrementitious matter, dung, stable refuse or other filthy matter."

"548. No person shall \026

(a) steep in any tank, reservoir, stream, well or ditch, any animal, vegetable or mineral matter which will likely to render the water thereof offensive or dangerous to health;

(b) while suffering from any contagious, infectious or loath some disease, bathe on, in or near any bathing platform, lake tank, reservoir, fountain, duct, standpipe, stream or well."

The said Act also contains a penal provision in the following terms:

"652. Whoever, in any case in which a penalty is not expressly provided by this Act, fails to comply with any notice or order or requisition issued under any provisions thereof, or otherwise contravenes any of the provisions of this Act, shall be punishable with fine which may extend to one thousand rupees, and in the case of a continuing failure or contravention, with an additional fine which may extend to one hundred rupees for every day after the first during which he has persisted in such failure or contravention."

Bhubaneswar is the capital of the State of Orissa. As stated in the affidavits filed on behalf of the State, several steps had been undertaken for attracting more tourists. The statute also prohibits maintenance of cowsheds or dairies in or around the town of Bhubanewsar. The Master Plan of Bhubanewsar prepared as far back in 1982 is in force. Within its ambit not only the town of Bhubanewsar, but several other villages come. In civic society, Town planning indisputably plays an important role. Unauthorised occupation by the encroachers in the areas which are meant for planned development goes a long way in thwarting the goals sought to be achieved by such town planning.

The question came up for consideration, in Friends Colony Development Committee v. State of Orissa and Others [(2004) 8 SCC 733] wherein this Court observed:

"In all developed and developing countries there is emphasis on planned development of cities which is

sought to be achieved by zoning, planning and regulating building construction activity. Such planning, though highly complex, is a matter based on scientific research, study and experience leading to rationalisation of laws by way of legislative enactments and rules and regulations framed thereunder. Zoning and planning do result in hardship to individual property owners as their freedom to use their property in the way they like, is subjected to regulation and control. The private owners are to some extent prevented from making the most profitable use of their property. But for this reason alone the controlling regulations cannot be termed as arbitrary or unreasonable. The private interest stands subordinated to the public good. It can be stated in a way that power to plan development of city and to regulate the building activity therein flows from the police power of the State. The exercise of such governmental power is justified on account of it being reasonably necessary for the public health, safety, morals or general welfare and ecological considerations; though an unnecessary or unreasonable intermeddling with the private ownership of the property may not be justified.

The municipal laws regulating the building construction activity may provide for regulations as to floor area, the number of floors, the extent of height rise and the nature of use to which a built-up property may be subjected in any particular area. The individuals as property owners have to pay some price for securing peace, good order, dignity, protection and comfort and safety of the community. Not only filth, stench and unhealthy places have to be eliminated, but the layout helps in achieving family values, youth values, seclusion and clean air to make the locality a better place to live. Building regulations also help in reduction or elimination of fire hazards, the avoidance of traffic dangers and the lessening of prevention of traffic congestion in the streets and roads. Zoning and building regulations are also legitimised from the point of view of the control of community development, the prevention of overcrowding of land, the furnishing of recreational facilities like parks and playgrounds and the availability of adequate water, sewerage and other governmental or utility services."

Yet again in *N.D. Jayal and Another v. Union of India and Others* [(2004) 9 SCC 362], a 3-Judge Bench of this Court noticed that several factors including flora and fauna, water quality maintenance and impact on health and rehabilitation are relevant factors for the purpose of maintenance of ecology. Emphasising the need of adherence to sustainable development principle for the maintenance of the symbiotic balance between the rights to environment and development, it was observed:

"Right to environment is a fundamental right. On the other hand, right to development is also one. Here the right to "sustainable development" cannot be singled out. Therefore, the concept of "sustainable development" is to be treated as an integral part of "life" under Article 21. Weighty concepts like intergenerational equity (*State of H.P. v. Ganesh Wood Products*), public trust doctrine (*M.C. Mehta v. Kamal Nath*) and precautionary principle (*Vellore Citizens*), which we declared as inseparable ingredients of our environmental jurisprudence, could only be nurtured by ensuring sustainable development."

This Court highlighted the necessity of strict compliance of the provisions of the Environmental Protection Act, 1986 stating:

"Thus the power under the Act cannot be treated as a power simpliciter, but it is a power coupled with duty. It is the duty of the State to make sure the fulfilment of conditions or direction under the Act. Without strict compliance, right to environment under Article 21 could not be guaranteed and the purpose of the Act will also be defeated. The commitment to the conditions thereof is an obligation both under Article 21 and under the Act."

We have noticed hereinbefore that the provisions of the Orissa Municipal Corporation Act also aim at maintenance of health and hygienic amongst the residents of the town of Bhubaneswar.

In *Sushanta Tagore and Others v. Union of India and Others* [(2005) 3 SCC 16], this Court was concerned with interpretation of the provisions of Visva-Bharati Act, 1951 which was enacted to preserve and protect the uniqueness, tradition and special features of Visva-Bharati University. Therein, this Court opined:

"It may be true that the development of a town is the job of the Town Planning Authority but the same should conform to the requirements of law. Development must be sustainable in nature. A land use plan should be prepared not only having regard to the provisions contained in the 1979 Act and the Rules and Regulations framed thereunder but also the provisions of other statutes enacted therefor and in particular those for protection and preservation of ecology and environment.

As Visva-Bharati has the unique distinction of being not only a university of national importance but also a unitary one, SSDA should be well advised to keep in mind the provisions of the Act, the object and purpose for which it has been enacted as also the report of the West Bengal Pollution Control Board. It is *sui generis*."

Mr. Mohanti may be right in his contention that by reason of such notesheet dated 18.10.2005 alone no policy decision was laid down but evidently thereby earlier policy decision was resiled from. Mr. Das has placed before us the entire records. As indicated hereinbefore, the said records were made available to the Appellants for inspection. It is neither in doubt nor in dispute that it was the Chief Minister himself who thought of rehabilitating the members of the Appellant No. 1 Association in the year 1994-95.

Rightly or wrongly, the same has not been given effect to. The State, furthermore, proceeded on a mistaken notion that the villages named therein are outside the Master Plan and that the rehabilitation programme could be carried out in the said villages. The said villages, apart from being subjected to encroachments and other litigations being within the Master Plan of Bhubaneswar, no rehabilitation programme could be carried out. No policy decision has been brought to our notice as such which could give rise to a legal right in the Appellants. No notification in terms of Article 162 of the Constitution of India had been issued. The assurance on behalf of the Government came from the notesheet approved by the Chief Minister and on the basis whereof the State took a stand in its affidavit before the High Court. Evidently, the matter has been considered afresh and the same had been brought to the notice of the Chief Minister. He having agreed thereto, must be held to have expressly resiled from the earlier promise, if any. Furthermore, even an executive action on the part of the State must give way to the statutory scheme. As by reason of the Orissa Municipal Corporation Act, within the periphery of the town, dairies or cowsheds cannot be

maintained, the State would not be entitled to adhere to its earlier plan of rehabilitating them in the villages mentioned therein.

It may be true that the members of the Appellant No. 1 Association were to pay for the plot. But, only because they are agreeable to pay for the plot which may be allotted to them, that by itself in our considered view would not clothe them with the legal right to be rehabilitated. There does not exist any legal concept which confers a legal right upon an encroacher to be rehabilitated. The matter may be different where the State comes out with a policy decision which meets the constitutional scheme as envisaged under Article 162 of the Constitution of India. In the instant case, we have noticed that the Appellants have failed to show the existence of any such scheme, which can be said to be irretrievable in nature. In view of the 2003 Act, even the doctrine of Promissory Estoppel will have no application.

For the reasons aforementioned, we are of the opinion that the High Court has not committed any illegality in passing the impugned judgment warranting interference by us with the directions of the High Court that the State would be entitled to proceed to evict the Appellants in accordance with law. The appeals, for the forgoing reasons, are dismissed. However, in the facts and circumstances of this case, there shall be no order as to costs.