(1973) 04 OHC CK 0029

Orissa High Court

Case No: O.J.C. No. 944 of 1970

Bishnu Charan Swain		APPELLANT
	Vs	
Secretary, Works and Transport Department and Others		RESPONDENT

Date of Decision: April 27, 1973

Acts Referred:

- Constitution of India, 1950 - Article 14, 15(4)
- Evidence Act, 1872 - Section 57

Citation: AIR 1974 Ori 115

Hon'ble Judges: S.K. Ray, J; B.K. Panda, J

Bench: Division Bench

Advocate: L. Rath, R.C. Ram, for the Appellant; Govt. Advocate, for the Respondent

Final Decision: Dismissed

Judgement

Panda, J.

This is a petition under Articles 226 and 227 of the Constitution seeking to quash a proposed action conveyed in Letter No. 17165 dated 31-7-1970 (Annexure 8) issued by the Secretary to the Government, Works and Transport Department, to the Chief Engineer, projects (Express Highway) suggesting leasing out of the road-side lands to the Express Highway No. 1 for agricultural and piscicultural purposes temporarily on annual basis to landless Harijans, preference being given to the Fishery Co-operative Societies of the landless Harijans.

2. Facts leading to the above petition are as follows: Fortyfour decimals of land lying in village Saintipur belonging to petitioner Bishnu Charan Swain of village Padmalavpur, who is a non-Harijan, was acquired for the construction of the express Highway from Daitari to Paradip. Out of this land. 32 decimals appertain to Khata 12 and the balance to Khata 16. There was due notification for acquisition and there is no challenge that the compensation amount has not been received. The Express

Highway No. 1 became complete by 1967 (1968 according to the counter) and it is open to traffic thereafter. Out of the acquired lands, the Highway runs actually over almost the middle portions leaving some lands on either side for digging earth therefrom and spreading the same for the construction of the Highway leaving certain lands intact for future use in repairing the Highway. From the lands earth was taken, great pits have formed that contain water all the Year round and so fit for pisciculture. Under the impugned Annexure 8, the secretary to the Government Works Department, wrote to the Chief Engineer. Projects (Express Highway), suggesting that the lands on either side of the Express Highway may be leased out temporarily for agricultural and piscicultural purposes to landless Harijang subject to the conditions noted below:

Agriculture:

1. Agreement should be executed in the form (Enclosed) before the land is allotted to lessee.

2. The land should be settled with the landless Harijans on annual basis and these Harijans should belong to the neighbouring villages and if no Harijans of other villages would be entertained (sic).

3. The lands to be settled by this process as indicated at Item No. 2 should not exceed 3 acres per individual lessee. This lease is valid for a period of one year. After the 1st year the temporary lessee may be continued after renewal of agreement The temporary lessees mentioned above will be liable to pay an amount of Rs. 25/- (Rupees twentyfive) per acre annually. This will be in addition to the basic water rate and optional water rate where leviable under the Orissa Irrigation Act, 1959.

4. All the papers relating to lease alone with landless certificates will be endorsed to Works Department for finalisation and execution of Agreement with the landless Harijans.

Pisciculture :

1. Agreement should be executed in the form (enclosed) before the borrow pit is allotted to lessee.

2. The borrow pits should be settled with the landless Harijans on annual basis for the purpose of pisciculture and these Harijans should belong to the neighbouring villages and if no Harijans of the neighbouring villages are available, then Harijans of other villages would be entertained. Preference should be given to the Fisheries Co-operative Societies of the landless Harijans.

3. The lessee will have to provide access at every three hundred feet approximately through the borrow pits for borrowing earth for road work.

4. The lessee should have no objection in case water from borrow pits has to be utilised for Express Highway and the embankment should not rest beyond ground

level.

5. The lessee will be liable to pay Rs. 25/- per acre annually. This will be in addition to basic water rate and optional water rate where leviable under the Orissa Irrigation Act, 1959.

6. This lease is valid for a period of one year and it may continue after renewal of agreement.

7. All the papers will be endorsed to Works Department for finalisation and execution of agreement with the person or persons or with Departments or Corporation."

3. It is averred in the writ petition that this letter which has been termed as ''order'' is illegal and ultra vires the Constitution as it envisages a preferential treatment to Harijans to the exclusion of other persons. It is specifically alleged that there is no Scheduled Caste or Scheduled Tribes in Orissa known as Harijans and, therefore, no special provision can be made for them by the State. The pith and substance of the attack is that it is discriminatory and. therefore, hit by Articles 14 and 15 of the Constitution, In that context, it is averred in para. 23 that "there are various other backward classes who are economically much less advanced than the Harijans and no such order for settlement of lands with Harijans can be upheld since there is no determination of the fact that the Harijans of the locality are backward class".

There are certain other assertions in the petition, namely, that the acauisition of the lands was a colourable one; that the lands have not been utilised for the Express Highway: that the petitioner still continues to be a tenant in respect of these lands eyen after acquisition and is in possession of the same and "so there cannot be further settlement of the lands afresh; that the petitioner is vitally interested in the land and so his case is bound to be considered by the State," or else it would be hit by Article 19 of the Constitution. These averments, though not at all relevant for determination of the point at issue, need be mentioned to show the attitude of the petitioner towards the impugned proposed action,

4. In the petition initially there are four opposite parties, who are officers of the State. Substantially their counter is that for the construction of the Express Highway, some lands acquired under the Orissa Express Highway Act, 1964, have become deep pits due to utilisation of earth from them and also some small patches have been left out for borrowing earth therefrom later for the maintenance of the road. Government in Works Department under the impugned Annex. 8 ordered to lease out these lands only to landless Harijans with a distinct clause that earth can be removed at any time even if there may be standing crops for the maintenance of the road. It is admitted that 44 decimals of land from Mouza Saintipur belonging to the petitioner have been acquired by the Express Highway Organisation for the construction of the Express Highway No. 1. It is asserted that possession of these lands have been duly taken over from the Land Acquisition Officer. Paradip. Cuttack:

and that due compensation has been paid to the petitioner in 1965. The allegation that vast areas were unnecessarily acquired under the pretext of construction of the express Highway has been denied. So far as the lands of the petitioner are concerned, it is said that they have been fully utilised and other small patches of lands from which earth has not been removed will be required for borrowing earth for the annual maintenance of the said Highway as every year huge quantity of earth is required for filling up the rain-cuts and other depressions. The alleged continuance of possession of the petitioner is stoutly denied.

Government Issued the impugned order to lease out the surplus lands which have not been utilised for the construction and maintenance of the Express Highway and also the pits for agricultural and piscicultural purposes respectively on annual basis to the landless Harijans with a distinct clause that earth from these lands can be excavated and removed for the maintenance of the Express Highway as and when required even if there may be crops standing over them. Conditions 4 and 5 of the lease-deed, according to which lands are proposed to be leased out clearly make mention of these facts and a copy of the lease-deed is enclosed as Annexure A. As the proposed lease is In favour of landless Harijans, it is averred that it is not violative of any fundamental right guaranteed under the Constitution.

5. Certain Harijans of the locality have appeared as interveners and they are opposite parties 5 to 22. In their counter, while supporting the contemplated action of the State, it is stated that they belong to the Scheduled Caste popularly called as "Harijans": that they have no lands for cultivation and they maintain their livelihood either on labour or by cultivating the lands of others. They also allege to be taking to fishing in different fisheries for their maintenance. It is further stated that they have formed a registered society named as Anchalika Harijana Parishad and this Parishad is striving hard to find out ways and means for employment of Harijans in different avocations and no other avenue being available either for agriculture or pisciculture, the Government was moved to lease out these lands lying idle on both sides of the Express Highway for cultivation and pisciculture on annual lease basis. The concerned department of the Government taking into consideration their financial position and being satisfied, has proposed to lease out the same to different landless Scheduled Caste persons. In the circumstances, there is no discrimination either under Article 14 or Article 15, of the Constitution and that the property being of the Government, it is quite competent to lease it out and the petitioner has nothing to be aggrieved therefor.

6. Mr. Rath, the learned counsel appearing for the petitioner, contended that (i) the proposed action is discriminatory; (ii) the acquisition was colourable and (iii) since the lands have not yet been utilised for the purpose for which they were acquired, they should be returned to the petitioner. But in view of the fact that the petitioner has prayed only to quash Annexure 8, Mr. Rath had to confine himself to the first point only.

7. The learned Government advocate contended that the petitioner has no locus standi to challenge the proposed action; that the petitioner has no right which is alleged to have been invaded; that there is no discrimination between persons equally situated and. therefore. Articles 14 and 15 of the Constitution have no application; and lastly that the property after due acquisition now belongs to the Government and so it is free to deal with its property in the manner it likes unless it is prohibited under law or mala fide. In the present case the proposed action being "to temporarily lease out the lands to landless Harijans", the action is neither discriminatory nor mala fide,

8. Law is well settled that Article 14 forbids a class legislation but does not forbid reasonable classification for the purpose of legislation. Classification, however, must not be arbitrary but must have a reasonable relation, to the object or the purpose sought to be achieved by the impugned legislation. Classification may be founded on different basis, namely, geographical or according to objects or occupations or the like. Legislation enacted for the achievement of a particular object or purpose need not be all embracing. Merely because certain categories which stand on the same footing as those which are covered by the legislation are left out, would not render the Legislation discriminatory. What is true of legislation is also true of an administrative or executive order. Law is well settled that administrative or executive orders or actions can come under the periphery of judicial scrutiny under writ prerogative. In the instant case there is no Act or law that is being challenged, but the letter (Annexure 8) which is only a contemplated action of the executive. For the petitioner, therefore to succeed he must establish that it Is discriminatory, hit by Article 14 not coming under Article 15(4) which is an exception to both Articles 14 and 15. Article 15(4) runs thus:

"Nothing In the Article or in Clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizen for Scheduled Castes and the Scheduled Tribes."

9. Admittedly Harijans do not come under the Scheduled Castes and Scheduled Tribes enumerated under the Constitution. Hence the line of reasoning of Mr. Rath firstly is that unless Harijans come under the category of "any socially and educationally backward classes of citizens", the impugned order would be directly hit by Article 14 on the ground of discrimination based only on caste as it is. Mr. Rath''s second contention in this regard is that there is no evidence nor is there any presumption that Harijans as a class are socially and educationally backward.

10. It is averred in the petition (paras. 22 and 23) that there are many landless persons even in other communities who are economically not more developed than the Harijans and as a matter of fact such Harijan community in the locality is at present much advanced, more affluent and economically advanced than persons belonging to other communities; that there are various other backward classes who are economically much less advanced than the Harijans and so no such order for

settlement of lands with the Harijans can be upheld since there is no determination of the fact that the Harijans of the locality are backward-class.

11. Mr. Rath, however, conceded that if the impugned order had been only confined to landless people he had no grievance to make. Also he conceded that while Article 14 prohibits discriminatory legislation directed against one Individual or class of individuals, it does not forbid reasonable classification and for the purpose even one person or group of persons can be a class (see Lachhman Das on Behalf of Firm Tilak Ram Ram Bux Vs. State of Punjab and Others, . According to him, since ''Harijans'' have been introduced, the classification has centered round caste which is prohibited under Article 14.

In this setting the limited question for consideration Is if the Harijans are socially and educationally backward classes of citizens to be entitled to the protection under Article 15(4), quoted above ?

12. Admittedly there is no caste as ''Harijans''. There is no definition of ''Harijan'' at any place. This term is of recent origin -- towards the middle of 1920s, the father of which was Mahatma Gandhi. According to the Lexicon (Bha-shakosh) the caste Hindus who looked down upon the non-caste Hindus took some of the castes as untouchables and that comprised this category. So Harijans are people of those castes whom the non-Harijans or the caste-Hindus or Sabarna-Hindus viewed as untouchables. It follows, therefore, that Harijans is not a caste but a conglomeration of people of different castes who were taken to be untouchables by the Sabarna-Hindus. The argument, therefore, that a classification like Harijan is based on caste, is not correct. The term ''Harijan carries with it something more than the concept of a caste.

In a case reported In State Vs. Puranchand, , while interpreting the word ''Harijan'' it is said :

"It is well known that the word ''Harijan'' applies to untouchables and the use of that word by the witnesses should have been accepted as sufficient to hold that Mohanlal was prevented from going inside the temple as he was an untouchable."

Mr. Rath could not cite any authority for the proposition that the classification as a Harijan or non-Harijan is based on caste. In fact, on the contrary all the citizens of India can be classified into two classes, viz. Harijans and non-Harijans -- each division taking in its fold several castes. So we would repel the contention that a classification as ''Harijan'' is based on ''caste''.

13. The next point that arises for consideration is whether the Harijans are socially and educationally backward classes of citizens. According to Mr. Rath, they are not and amongst them there are very rich people in affluent condition and highly educated and the Court will not be justified in drawing an inference that Harijans are socially and educationally backward classes of citizens coming under the

protection of Article 15(4). True in the petition there is a vague allegation as auoted above that some Harijans of the locality are well off whereas some people of other castes are not so advanced as the Harijans of the locality; but no specific instance has been given or the percentage indicated to show how they are better off than the caste-Hindus. Even so, if some Harijans have become Ministers or high executive officers, does it mean that Harijans as a class are not socially and educationally backward ? Exceptions do not prove the rule. The socially and educationally backward class intended under Article 15(4) are people who are also not economically well off. Mr. Rath very much relied on a case law reported in Shri Janki Prasad Parimoo and Others Vs. State of Jammu and Kashmir and Others, on the Interpretation of the words "backward class". Therein it is stated :

"Article 15(4) speaks about "socially and educationally backward classes of citizens" while Article 16(4) speaks only of "any backward class of citizens". However, it is now settled that the expression "backward class of citizens" in Article 16(4) means the same thing as the expression "any socially and educationally backward class of citizens" in Article 15(4). In order to qualify for being called a "backward class citizen" he must be a member of a socially and educationally backward class. It is social and educational backwardness of a class which is material for the purposes of both Articles 15(4) and 16(4). It is not merely the educational backwardness or the social backwardness which makes a class of citizens backward; the class identified as a class as above must be both educationally and socially backward. In India social and educational backwardness is further associated with economic backwardness. Backwardness, socially and educationally, is ultimately and primarily due to poverty. But if poverty is the exclusive test, a very large portion of the population in India would have to be regarded as socially and educationally backward, and if reservations are made only on the ground of economic considerations, an untenable situation may arise because even in sectors which are recognised as socially and educationally advanced there are large pockets of poverty. In this country except for a small percentage of population the people are generally poor -- some being more poor, others less poor. Therefore, when a social investigator tries to identify socially and educationally backward classes, he may do it with confidence that they are bound to be poor. His chief concern is. therefore, to determine whether the class or group is socially and educationally backward. Though the two words "socially" and "educationally" are used cumulatively for the purpose of describing the backward class, one may find that if a class as a whole is educationally advanced it is generally also socially advanced, because of the reformative effect of education on that class. The words "advanced" and "backward" are only relative terms there being several layers or strata of classes, hovering between "advanced" and "backward", and the difficult task is which class can be recognised out of these several layers as being socially and educationally backward."

We think this does not help the petitioner In any way, rather it goes against him.

14. We may now address ourselves to the second contention of Mr. Rath that the Court cannot take notice of the fact that Harijans are "socially and educationally backward" in the absence of any evidence therefor. In the matter of issuing writs, the Court does not take evidence but works on affidavits. We have already referred to the vague manner in which it has been stated in the petition that the Harijans of the locality are not socially and educationally backward and are in affluent conditions.

The intervenes in their counter have denied the same and have ascerted that they belong to Scheduled castes popularly called Harijans having no lands for cultivation. They earn their livelihood either by labour or by cultivating the lands of others. They further aver that they have formed one Society which is striving hard to find out ways and means for their employment in different avocations of life. In short, the interveners assert how they are socially and educationally backward and it is born of their poverty.

15. Thus the question that poses for consideration is whether in the above setting the Court can legitimately infer the fact that "Harijans" are socially, educationally and economically backward. Mr. Rath could not cite any authority prohibiting the Court from drawing any such inference. Indian Evidence Act in Part II. Chapter III lays down the "facts which need not be proved". Section 57 thereof enumerates "facts of which the Court must take judicial notice". Independent of the pleadings the Court''s power to take judicial notice of some facts being recognised, it is to be seen if the Court can take judicial notice of the fact that the Harijans are as a class socially, educationally and economically backward. It is now the settled law that facts of which judicial notice may be taken are not limited to those of the nature specifically mentioned in Clauses (1) to (13) of Section 57 of Evidence Act Besides the matters mentioned in those clauses, there are numerous others which are considered too notorious to require proof; such matters are therefore ''judicially noticed''. In matters of such common knowledge that it would be an insult to intelligence to require proof, are to be dealt with in this way. As Judges must bring to the consideration of the questions they have to decide, their knowledge of the common affairs of life it is; not necessary on the trial of an action to give formal evidence of matters with which, men of ordinary intelligence are acquainted, whether in general or in relation to natural phenomenons and whether in peace or war (Halsbury''s Laws of England Vol. 15. 3rd Ed. p. 3991. There is a wide range of things of which the Court can take judicial notice, viz., historical facts, geographical truths, scientific inventions, socio-economic condition at a particular time and events of every day life and the like, as much as an axiomatic truth or natural phenomenons.

The tendency of modern practice is to enlarge the field of judicial notice. Even it has been extended to the case of Jurors and said "Jurors like Judges are not, because of their judicial functions, compelled to strip themselves of the knowledge which they

possess of matters commonly and notoriously known."

By way of reinforcing what we have said, we propose to refer only to two decisions -- one of the Supreme Court Kumari Chitra Ghosh and Another Vs. Union of India (UOI) and Others, of this Court Sheonath and Another Vs. The State, .

The passage quoted below (underlined portions) would show how much their Lordships of the Supreme Court rely on common knowledge. It is also an authority for the proposition how Annexure 8 is not discriminatory.

"The first group of persons for whom seats have been reserved are the sons and daughters of residents of Union territories other than Delhi. These areas are well known to be comparatively backward and with the exception of Himachal Pradesh they do not have any Medical College of their own. It was necessary that persons desirous of receiving medical education from these areas should be provided some facility for doing so. As regards the sons and daughters of the Central Government servants posted in Indian Missions abroad it is equally well known that due to exigencies of their service these persons are faced with lot of difficulties in the nature of education. Apart from the problems of language it is not easy or always possible to get admission into institutions imparting medical education in foreign countries. x x x Regarding Jammu and Kashmir scholars it must be remembered that the problems relating to them are of a peculiar nature and there do not exist adequate arrangements for medical education in the state itself for its students."

The classification in all these cases is based upon intelligible differentia which distinguished them from the group to which the petitioners belong.

In the latter case Narasimham, J. (as he then was) held:

"The Court can take judicial notice of the fact that Sambalpur district is a surplus district as regards rice and there was extensive smuggling from the district to the adjacent States such as Bihar and Central Provinces."

16. The purpose of Annexure 8 is to confer some beneficial facilities to the needy Harijans. It does not say that the lands will be leased out absolutely and permanently to Harijans as a class. Various galling restrictions are there and any Harijan cannot get the advantage unless he is landless. Thus the object is not only noble and action bona fide keeping with the avowed policy of the State in striving for building up a socialistic pattern of society but also keeping with the directive principles laid down in the Constitution, particularly Article 46 which says "the State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation."

17. From the above discussion our findings are that Annexure 8 is not discriminatory; that there is a reasonable nexus between the classification and the

object in view, that it is in consonance with the directive principles of the Constitution without offending the Fundamental Rights enshrined under it and therefore valid and cannot be struck down. In view of these findings it is unnecessary to go into the points raised on behalf of the State some of which are not without substance.

18. In the result, we hold that not only the petition has no merit but it is frivolous and hence dismissed with costs. Hearing fee of Rs. 150/- (Rupees one hundred and fifty) only.

S.K. Ray, J.

19. I agree.