(2008) 09 PAT CK 0190

Patna High Court

Case No: CWJC No. 14312 of 2007

M/s Maa Durga Enterprises		APPELLANT
	Vs	
The State of Bihar and Others		RESPONDENT

Date of Decision: Sept. 24, 2008

Acts Referred:

- Constitution of India, 1950 - Article 226, 32
- Transfer of Property Act, 1882 - Section 108(h), 108(j)

Citation: (2009) 2 PLJR 1000

Hon'ble Judges: Navaniti Pd. Singh, J

Bench: Single Bench

Advocate: Naresh Dixit, Purshottam Jha, Y.V. Giri, Vikas Kumar and Pranav Kumar, for the Appellant; S.B.N. Singh, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

Navaniti Pd. Singh, J.

The present case is illustrative of how responsible Officers abuse their power indiscriminately to the detriment of the rights of citizens. The petitioner is a proprietorship firm, which was running cold storage for storing potatoes/potatoes seeds. Its cold storage was allegedly arbitrarily sealed by the authorities of Bihar Industrial Area Development Authority (hereinafter referred to as "BIADA") and later realizing that the sealing would result in the stocks of potato to rot unsealed it, which was too late and which damage has left the petitioner to face large number of compensation applications lodged against the petitioner before the District Consumer Forum, Madhubani running into several lakh of rupees. BIADA defends its action and notwithstanding large number of cases filed against the petitioner, as well as, admission of its own Officers, denies any loss and seeks to cover it up for obvious fear of being held liable to compensate the petitioner and it is for these

reliefs the writ petition ultimately came to be heard for. Originally, the writ petition was filed against letter dated 30.10.2007 of the Executive Director of BIADA at Patna issued pursuant to telephonic direction of its Managing Director, to the Development Officers of BIADA in the Regional Office at Darbhanga. By this letter or telephonic instructions of the Managing Director of BIADA the Development Officers were directed to immediately lock and seal the cold storage of Bihar State Cooperative Marketing Union Limited (hereinafter referred to as "BISCOMAUN"), which was being operated for allegedly non-industrial purposes and was being operated by another (Petitioner) without prior permission of BIADA. This was followed by posting of guards of BIADA at the cold storage premises, on 2.11.2007, restraining operation of the cold storage. Apprehending that potatoes would rot if the petitioner was not permitted to operate the cold storage and deliver potatoes to the farmers and that BIADA may lock and seal the premises, the writ application was filed.

2. Subsequently, interlocutory application has been filed bringing further facts on record. It is now stated that while writ application was being filed, on 4.11.2007 the cold storage was formally locked and sealed by Officers of BIADA with the help of Executive Magistrate and police, in spite of protest on behalf of petitioner with 10,000 bags of potatoes/potatoes seeds weighing 50 Kgs. each totalling to about 5000 quintals. On behalf of petitioner on 5.11.2007 protest was lodged before the Managing Director of BIADA at Patna, clearly stating that Potatoes would get destroyed. Pursuant thereto, on 6.11.2007 the Executive Director (pursuant to whose intimation that the cold storage had been locked and sealed) directed the Development Officer, Regional Office at Darbhanga of BIADA to immediately open the cold storage otherwise potatoes and other things stored therein would start rotting. Pursuant to this on 7.11.2007 the Officers of BIADA came alongwith Executive Magistrate and others and unsealed the premises, clearly stating that they had sealed the premises in presence of Executive Magistrate, on 4.11.2007 and now on 7.11.2007 they in presence of Executive Magistrate unsealed the same. In the said document prepared they also noted that there were about 10,000 bags of potatoes/potatoes seeds in the cold storage now in rotting condition. The said report was signed on behalf of petitioner and by two Officers of BIADA. In the meantime, the report of sealing as sent by the Development Officer of BIADA to BIADA Head Office at Patna dated 4.11.2007 is also on record. This also estimates that there were about 10,000 bags of potatoes out of which 8,000 bags were in the chamber and about 2000 bags outside the chamber. It is then pointed out that on 26.11.2007 at the instance of BIADA a first information report was lodged with Sakari Police Station, which on the same day was forwarded to Pandaul (Sakari Police Station) and Case No. 314 dated 26.11.2007 was registered. This F.I.R. was registered on basis of a purported letter dated 7.11.2007, inter alia, stating that when the authorities of BIADA went to unseal the cold storage premises, representatives of petitioner alongwith antisocial elements got unsealing report

forcibly drawn up showing that there were 10,000/-bags of potatoes, which were found to be rotting on unsealing.

3. Then, on record is brought, a show cause issued by BIADA to BISCOMAUN dated 20.7.2007 asking BISCOMAUN to respond why its lease for the lands be not cancelled for non-industrial use and subleasing.

4. Petitioner in the writ application itself has asserted that pursuant to tender notice published by BISCOMAUN in newspaper on 25.12.2006 (Annexure-2) invited offers from parties to take its cold storage, in question, on lease for T1 years. Petitioner responded and was selected and accordingly on 19.1.2007 lease deed between BISCOMAUN and the petitioner was drawn up for a period of 11 years, commencing from March 2007, on a yearly lease rent of Rs. 4.21 lakhs with increments in subsequent years.

5. It is also admitted by BIADA that the cold storage was set up as far back as in 1992 by BISCOMAUN and that as far back as 17.9.2007 (Annexure-L to BIADA''s supplementary counter affidavit) they had received full report that petitioner had been sub-leased the cold storage and was running it.

6. From the aforesaid facts petitioner asserts that they had validly taken sublease of the cold storage, which was in the knowledge of BIADA from much before sealing. Instead of taking action in a civilized manner, at the telephonic orders of the Managing Director of BIADA, they locked and sealed the cold storage with potatoes therein leading to destruction of the entire stocks and as such they may be compensated. Because of this uncivilized and illegal arbitrary actions petitioner was now facing several cases for compensation from agriculturists before the District Consumer Forum, Madhubani and would be ruined for no fault of theirs.

7. In defence on behalf of BIADA the case that has been set up is that BISCOMAUN to whom 7 acres of land at Industrial Area, Pandaul was given on lease by the BIADA in 1981. They had constructed a cold storage on part thereof in 1992 out of their own funds and had unauthorizedly without permission of BIADA leased it to the petitioner. As such, petitioner was a rank trespasser and could not complain against running cold storage for non-industrial purpose.

8. As to the submission, that petitioner was rank trespasser without the knowledge of the BIADA, its stand, stands falsified by documents produced by BIADA itself in counter affidavit, wherein, there is a inspection report dated 17.9.2007, which clearly noted that the cold storage was leased by BISCOMAUN to the petitioner and was operative since April 2007 (Annexure-L to the supplementary counter affidavit of BIADA) was leased to the petitioner for 11 years. Then as to the alleged non-industrial user, their stand is misconceived inasmuch as it is not a sudden discovery by BIADA. They themselves admitted that the cold storage was there since 1992 now suddenly after a decade and a half it becomes unauthorized which is a curious stand. This user was accepted for over 15 years. Now it is too late in the day

to object.

9. It was then suggested with reference to the report dated 4.11.2007 (Annexure-N) to the counter affidavit that in fact the cold storage was found closed from before. It was further stated that immediately after sealing realizing that potatoes would get damaged on 6.11.2007 on protest of petitioner the Executive Director of BIADA directed the Development Officer, Regional Office of BIADA at Darbhanga to unseal the premises to save potatoes from rotting. Though, the unsealing report dated 7.11.2007, in which the factum of 10,000 bags of potatoes/ potatoes seeds weighing 50 Kgs. each having found rotted at the time of unsealing is not denied, but, it was alleged that it was forcibly taken by the petitioner in presence of unruly mob and have submitted that in fact no potatoes/ potatoes seeds have rotted nor could have rotted in 3 days that the cold storage remain locked and sealed, as per alleged expert opinion of a surveyor Sri Arun Kumar Singh from whom such a expert report was obtained on 27.4.2008 and is Annexure-U to the supplementary counter affidavit of BIADA.

10. Thus, the first, issue is, whether petitioner was rank trespasser or not of the cold storage premises. From the facts brought on record by the BIADA itself it is admitted that they had given 7 acres of land on lease to BIADA. Thus, the status of BISCOMAUN is that of a lessee of land from BIADA. From the counter affidavit of BIADA itself its stand admitted that BISCOMAUN out of its own funds, to the knowledge of BIADA constructed a cold storage on part of the land, apart from other units in the year 1992. The cold storage was not objected to by BIADA, who was the lessor of the land.

11. Now, the first thing one must notice is Section 108(h) of the Transfer of Property Act, which clearly recognizes the independent right of lessee on the constructions by it made on leased land. The normal law is that anything attached to the earth forms part of the earth, but, this so far as India is concerned, in view of this provision, is different. Here the right in land and the right in property built on the land by the lessee are two distinct independent rights and is recognized as such by the said provision. I need not dwell much upon this aspect as this aspect has been discussed in detail in recent decision of this Court in the case of Emarat Co-operative Housing Societies Limited vs. The State of Bihar and Others since reported in 2008(2) PLJR 792.

12. Even if it be taken otherwise that having constructed upon land of BIADA the cold storage became property of BIADA, which is not strictly legally correct, then, by virtue of the lease between the BIADA and BISCOMAUN, BISCOMAUN was a lessee in respect of the cold storage. Then again a reference may be made to Section 108(j) of the Transfer of Property Act, wherein, a lessee has been given right to sub-lease whole or any part of his interest in property with further right to transferring it upon the sub-lessee.

13. In the present case, neither is it pleaded nor has it been shown with reference to any document that BISCOMAUN by any agreement amongst parties was prohibited from transferring its rights in the building constructed by it to any person. Thus, in view of the two statutory provisions referred to above of the Transfer of Property Act to hold the petitioner to be a rank trespasser is absolutely and uncondonably wrong. The stand of BIADA cannot be accepted in this regard.

14. Pausing for a moment, even if it be assumed that petitioner was a rank trespasser on the property leased to BISCOMAUN even then BIADA had no authority to take any action in the matter. BISCOMAUN could have complained but they could not and they have not complained, because they gave it to petitioner on long term lease. The law in respect of rank trespasser is again well settled. One may usefully refer to the case of Ram Rattan and Others vs. State of Uttar Pradesh since reported in AIR 1977 Supreme Court 619, wherein, this principle has been discussed in details. Once, a trespasser has perfected his possession then he can only be removed in accordance with procedure established by law and not by show of force or by resorting to such extra legal methods of forcibly locking and sealing the premises, otherwise than pursuant to orders of competent Court or authority, which admittedly and undisputedly BIADA lacked.

15. Thus, on these findings, it is clear that the entire action at the telephonic instruction of the Managing Director of BIADA and at the behest of BIADA locking and sealing the cold storage premises was most uncivilized, illegal, unlawful, arbitrary and capricious, if not mala fide in law.

16. In fairness to learned counsel for BIADA, I must notice one small argument that report dated 4.11.2007 (Annexure-N to the counter affidavit of BIADA) consequent to sealing received by BIADA from its Officers indicated that the premises was locked from before. This desperate argument was made probably to cut the case of the petitioner at the root itself, but, in fact is not factually correct, rather, is contrary to the nothings in the said report itself. This report in clear term refers to the fertilizer storage godown of BISCOMAUN at Pandaul and clearly notices that there were 1000 bags of fertilizer and other goods in the said godown, which was locked from before. This has no reference to the cold storage. Cold storage is referred to in the later part of the report specifically and what is most damaging for BIADA''s case is that this report itself estimates 10,000 bags of potatoes/potatoes seeds being there at the time of sealing, 8000 in chamber and 2000 outside. This document is a clear admission of BIADA about the functioning of cold storage and potatoes to the extent of 10,000 bags being there at the time of sealing/unsealing.

17. Now, we come to the aspect of damage caused. It does not require to be established, because, it is a well established fact that November is a month when cold storages storing potatoes are open for unloading of potatoes, which was stored therein for over last 6 months. This is clear from the report Annexure-N, as referred to above, wherein, substantial quantities of potatoes were found in the cooling

chamber and some outside, notwithstanding the same the premises were locked. There is no denial that in fact it is from 2.11.2007 that petitioner were effectively restrained from operating the cold storage by placing of guards by BIADA and formerly on 4th November 2007, in spite of protest, in obedience of the orders of the Managing Director of BIADA the premises was locked and sealed unconcerned about the fate of potatoes and the rights of the petitioner and others. The realization that potatoes may get damaged came only later when on 6.11.2007 (Annexure-P to the counter affidavit of BIADA) apprehending potatoes to rot, orders were issued to open the cold storage and unseal it, which was admittedly done on the next day i.e. 7.11.2007. For this entire period i.e. 2.11.2007 to 7.11.2007 cold storage remained shut and out of bounds for the petitioner.

18. Now, on 7.11.2007 a report was drawn up signed by Senior Officers of BIADA admitting sealing and unsealing in presence of officials (Executive Magistrate) and the factum of 10,000 bags of potatoes seen rotting. The defence of BIADA is that such a report was forcibly got drawn up which finds support from the F.I.R. that was lodged. To me, this is unacceptable for the simple reason that if F.I.R. were to be lodged it ought to have been lodged on 7.11.2007 itself, as the police outpost was at Pandaul itself. Purporting to be letter of 7.11.2007, information was lodged at Sakari Police Station on 26.11.2007, almost after 20 days and case was registered by Pandaul (Sakari) Police Station on the same day i.e. 26.11.2007 with absolutely not a whisper of any explanation for the delay of almost 20 days. It is self-serving F.I.R. lodged in defence long after the incident took place. If respondent-BIADA was sanguine that potato had not actually rotted and they were made sign a wrong report forcibly, they had at their hand the entire district administration that could on that very date have been activated to ascertain this fact. But, no steps were taken and belatedly after 20 days a formal F.I.R. was lodged with no explanation for delay between the letter which was the first information report and the institution of the F.I.R.

19. Now, we come to the certificate dated 27.4.2008 issued by one Sri Arun Kumar Singh, Surveyor and loss Assessor, which is found as Annexure-U to the supplementary counter affidavit of BIADA. This certification obtained 6 months later, only says that in general and as per past experience the closing of cooling process for the period of 72 hours (3 days) may not affect the stocks of potatoes kept in the cooling chamber. This in my view is of no relevance as firstly, it is given in response to a general query made by BIADA by their letter dated 25.4.2008 and secondly the said surveyor is none else than regular surveyor employed by BIADA for its work, as would be evident from Annexure-T of BIADA''s own counter affidavit. He is used by BIADA for valuation of its properties and his valuation report in relation to the said cold storage dated 28.1.2008 is Annexure-T. It is an obtained opinion. Further the cold storage was not closed for mere 3 days but 5 days as noted earlier. Further if potatoes did not deteriorate and rot then how large number of cases were instituted by agriculturists before the District Consumer Forum, Madhubani against

the petitioner in respect of loss of their potatoes stored with the petitioner at that time.

20. Thus, on these findings, it is established that petitioner was in lawful possession of the cold storage, which had been illegally and unlawfully locked and sealed by BIADA with about 10,000 bags of potatoes/potatoes seeds, therein, as per BIADA''s own report dated 4.11.2007 and on petitioner''s protest, orders of unsealing to save potatoes from rotting was passed on 6th and on 7th November the cold storage was unsealed. Thus, effectively from 2nd November to 7th November potatoes lay uncared for and consequentially rotted.

21. I may note here that the action of respondent-BIADA in subsequently canceling the lease of BISCOMAUN has already been set aside by this Court in a collateral independent proceeding. Now, the question is to what relief petitioner is entitled to.

22. On the facts found above the petitioner suffered because of actions of the officials of BIADA acting in violation and excess of the powers vested in such agency and that too without care and caution. BIADA is thus liable to compensate petitioner for their abuse of power. In my view, they cannot plead that they were either statutory functionaries or employees of statutory functionaries and thus exempt from any liability in respect of such excesses on principles akin to sovereign immunity. In this connection, I may refer to the Apex Court judgment in the case of SAHELI, a Women''s Resources Centre through Ms. Nalini Bhanot and Others vs. Commissioner of Police, Delhi and Others since reported in AIR 1990 Supreme Court 513, wherein, their Lordships held referring to the case of Joginder Kaur vs. The Punjab State, 1968 Acc CJ at p. 32: (1969) Lab.C 501 at p. 504 (Punj.)

"In the matter of liability of the State for the torts committed by its employees, it is now the settled law that the State is liable for tortious acts committed by its employees in the course of their employment."

23. Then, their Lordships have referred to the case of State of Rajasthan vs. Mst. Vidhyawati, AIR 1962 Supreme Court 933 at page 940, it has been held in paragraph 13 of SAHELI (supra):-

"Viewing the case from the point of view of first principles, there should be no difficulty in holding that the State should be as much liable for tort in respect of a tortious act committed by its servant within the scope of his employment and functioning as such as any other employer. The immunity of the Crown in the United Kingdom was based on the old feudalistic notions of Justice, namely, that the King was incapable of doing a wrong, and, therefore, of authorizing or instigating one, and that he could not be sued in his own courts. In India, ever since the time of the East India Company, the sovereign has been held liable to be sued in tort or in contract, and the Common Law immunity never operated in India...."

24. Next, I may usefully refer to the judgment of the Apex Court in the case of N. Nagendra Rao & Co. vs. State of Andhra Pradesh since reported in AIR 1994 Supreme Court 2663. In that case certain stocks of fertilizers were seized, but, in spite of order for return of them to the owner, the commodities were left to deteriorate in quality and quantity due to negligence of the Officers of the State. The action for price of the commodity as compensation was negatived by the High Court on principles of sovereign immunity and statutory functions, even though, the Trial Court had decreed the suit. Their Lordships discussed the principle of sovereign immunity i.e. that the King can do no wrong, starting from Manu, Vedic period Hindu law and Muslim law, as well as the times of East India Company. Their Lordships held that the doctrine for the defence by the "act of State" is not the same as "sovereign immunity". Their Lordships referred to inter alia the case of Smt. Nilabati Behera alias Lalita Behera vs. State of Orissa and Others since reported in AIR 1993 Supreme Court 1960, and in paragraph 12 at page 2677 of the reports in the case of N. Nagendra Rao & Co. {supra) their Lordships noted thus:-

Paragraph 12: "...It may be mentioned straightway that award of compensation in a proceeding under Article 32 by this Court or by the High Court under Article 226 of the Constitution is a remedy available in public law, based on strict liability for contravention of fundamental rights to which the principle of sovereign immunity does not apply, even though it may be available as a defence in private law in an action based on tort...."

25. In the same decision, it was observed by Hon''ble Dr. Justice A.S. Anand:-

"...The purpose of public law is not only to civilize public power but also to assure the citizen that they live under a legal system which aims to protect their interests and preserve their rights."

26. In paragraph 14 their Lordships held thus:-

"Paragraph 14: That apart, the doctrine of sovereign immunity has no relevance in the present day context when the concept of sovereignty itself has undergone drastic change..."

27. In paragraph 21 their Lordships held thus:-

"Paragraph 21: The old and archaic concept of sovereignty thus does not survive. Sovereignty now vests in the people. The legislature, the executive and the judiciary have been created and constituted to serve the people. In fact the concept of sovereignty in the Austinian sense, that King was the source of law and the fountain of justice, was never imposed in the sense it was understood in England upon our country by the British rulers...."

28. In paragraph 24 at page 2683 of the said reports their Lordships held:-

"Paragraph 24: ...But there the immunity ends. No civilized system can permit an executive to play with the people of its country and claim that it is entitled to act in any manner as it is sovereign...."

29. Thus, their Lordships ultimately held that the power conferred on the authorities under the Essential Commodities Act were such State actions which is not primary or inalienable, and an Officer acting negligently is liable personally and the State vicariously.

30. Now, I may refer to the judgment of the Chairman, Railway Board and Others vs. Chandrima Das (Mrs.) and Others since reported in AIR 2000 Supreme Court 988. Here, a Bangladeshi woman was raped by Railway employees in a building belonging to Railways. The Apex Court held that a writ petition for compensation by the victim would be maintainable notwithstanding that suit could be filed for damages in Civil Court. The Court held the Central Government vicariously liable for the tortious acts committed by its employees in its building. In this case their Lordships have held in detail in paragraph 9.

"Paragraph 9: ...Though, initially a petition under Article 226 of the Constitution relating to contractual matters was held not to lie, the law underwent a change by subsequent decisions and it was noticed that even though the petition may relate essentially to a contractual matter, it would still be amenable to the writ jurisdiction of the High Court under Article 226 of the Constitution...."

31. Here, I may notice that authorities of BIADA were working in public domain and not strictly private law domain. It cannot be disputed that actions in public law domain are amenable in the writ jurisdiction of the High Court under Article 226 and it is too late in the day to urge otherwise. The order of compensation by the writ Court in that case was upheld subject to enhancement in case actions in any suit or proceedings were brought and relief was granted therein.

32. At this stage, I may notice one other related issue, as to what would be the consequence if citizens were not granted relief by this Court, on the ground that Officers were exercising either statutory power or powers akin to statutory powers. In my view, the result would be total anarchy. An Officer could violate and trample upon with impunity, the rights of citizens and then sit back and say that I may have acted wrongly and caused the injury, my order can be set aside, but, I am not answerable for my actions. In a democratic society governed by rule of law, such a position is wholly unacceptable. An Officer of State is held liable and is answerable for his actions, because that is the only check on otherwise drastic power capable of causing irreparable loss to citizens. For example, a Licensing Authority cannot say that I have wrongly cancelled your licence depriving you of right to do business, earn livelihood and live in a dignified manner. Court can set aside my order, but, I am not answerable for the loss caused. If such is permitted then statutory powers would flagrantly violated to the detriment of the citizen''s rights with no safeguard

or no relief to the citizen, who may have suffered irreparable injury, in the meantime till the orders are set aside. It is to check this utter disregard to rule of law that the Courts are holding authorities answerable for their action.

33. In this connection, I may refer to four recent decisions of this Court in case of Md. Abu Hasnain Vs. State of Bihar and Others, , in the case of Mahesh Ram, Ganesh Ram and Chandradeo Ram Vs. State of Bihar and Others , in the case of Shishir Kumar Jain vs. The Patna Regional Development Authority & Ors. since reported in 2008(1) PLJR 707(DB) and in the case of Sri Lalu Prasad Vs. The Commissioner of Income Tax, Central, Patna and Others .

34. In the first case, this Court found that even before time to file objection and show cause expired, in disregard to statutory provisions, warrants of arrest was issued committing the petitioner to civil prison against statutory provisions. On those facts, it was held that State was vicariously liable for actions of its officials. In the second case, a person was falsely implicated by the police on a false F.I.R. lodged by them (police) in relation to having murdered of his newly wedded wife and then police obtain a so-called confession, whereupon, he was charge-sheeted and sent up for trial before Sessions Court and remained in custody on such a charge for nearly a year. Whereas, it was later found that no such offence was at all committed as the wife soon after marriage escaped and was married to another and was living happily in Delhi. The petitioner was charged for an offence which was never committed. Compensation was ordered by this Court. In the third case for wrongful demolition of house by the authorities under the Patna Regional Development Authority damages in the shape of compensation was awarded. Similarly, in the last case, where statutory powers under the Motor Vehicles Act were flagrantly violated, compensation was awarded.

35. I may note that compensation is not mere compensation for tort committed, but is a deterrent against abuse of power. It is akin to exemplary damages.

36. Now, the question is what are the reliefs to be granted to the petitioner. He has suffered immense loss and he is facing multiplicity of action for damages by the farmers and others, who had stored their potatoes in his cold storage but could not be delivered the same, because, they rotted because of abuse of power by the authorities of BIADA.

37. In my view, firstly, the facts justify awarding petitioner compensation to be paid by State to the extent of Rs. 1 lakh, and the payment should be made within one month from today. But, this certainly does not end the miseries of the petitioner, who is yet left to defend large number of cases before the District Consumer Forum, Madhubani. I, therefore, direct that in all such cases the petitioner would apply to the District Consumer Forum, Madhubani for adding BIADA as defendant-opposite party and in case the District Consumer Forum finds the petitioner liable to compensate the complainants therein, the compensation would be payable by

BIADA, because, it was their action that brought about the situation. However, I direct that any compensation or damages that are paid by the State or by BIADA in these regards, they would be at liberty to recover the same from any Officer whom they may ultimately find responsible for initiating and perpetuating this wrong but payment of compensation would not await any such enquiry in regards individual responsibilities. With these observations and directions, the writ application is allowed.