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IN THE HIGH COURT OF ORISSA AT CUTTACK

W.P. (C) No.6675 of 2003

(An application under Articles 226 and 227 of the Constitution of India)

Hrudananda Biswal ***Petitioner***

Mr. Goutam Mukherji, Senior Advocate

-versus-

Union of India and Others ***Opposite Parties***

Mr. S.R. Pattnaik, Advocate for Railways.

**CORAM:
THE CHIEF JUSTICE
JUSTICE B.P. ROU TRAY**

JUDGMENT
31.05.2021

Dr. S. Muralidhar, CJ

1. Aggrieved by the refusal of the General Manager, South Eastern Railways, Kolkata (Opposite Party No.2) to accord him a right of passage over railway land in order to gain access to a public road on the eastern side of the plot purchased by him, the Petitioner approached this Court with the present writ petition in 2003.

2. The Petitioner has challenged the letter addressed to him on 6th July, 1993 by Opposite Party No.2 refusing such permission as well the communication addressed, almost ten years thereafter on 27th March, 2003, by Opposite Party No.2 to the then Member of the Legislative Assembly (MLA), Odisha reiterating the decision.

3. The background facts are that, the Petitioner claims to be the owner in possession of the property situated on Plot No.1422/1493

(P) under Khata No.668 of mouza Ashok Nagar, Sub-Registry – Bhubaneswar City (hereafter ‘the plot’), which he purchased by means of a Registered Sale Deed dated 21st April, 1977. The Record of Rights (RoR) in respect of the plot is stated to have been mutated thereafter in the Petitioner’s name.

4. The Petitioner states that he applied for and got building permission from the Bhubaneswar Development Authority (BDA) for constructing a six-storied building over the plot. While on three sides of the plot there are lands belonging to other private persons, the eastern side of the plot faces a public road. However, according to the Petitioner, when the construction work on the plot was in progress some time in 1990, it was obstructed by the Railways on the plea that the land between the Petitioner’s plot and the public road belongs to the Railways and could not be used for transporting materials to the construction site.

5. According to the Petitioner, to buy peace and set the matter at rest, he made an application to the Railway authorities to grant him permission to utilize the said land for the purpose of ingress and egress to his plot from the public road. According to the Petitioner, by letter dated 31st July 1990, the Railway authorities informed that they had no objection for a passage of 3.5 meters to 8.5 meters over the land to facilitate access of the Petitioner to his plot. A sketch map was also enclosed with the said letter.

6. According to the Petitioner, on the basis of the sketch map he constructed the approach road strictly as per the specifications. According to him, he utilized the road for carrying building

materials to his site and with such materials the petitioner constructed a four-storied structure in accordance with the plan sanctioned by the BDA. When the construction was in progress, the Petitioner received letter dated 6th July 1993 from Opposite Party No.2 which stated: *“It is regretted to inform you that the passage right as asked for, is not agreed to.”*

7. According to the Petitioner, the RoR in respect of the said land between the Petitioner’s plot and the public road as of 1983 shows it to be in the name of the G.A. Department, Government of Odisha and was also described as “Road”. It is accordingly contended that the obstruction by the Railways by fencing the eastern boundary wall of the Petitioner’s plot with a barricade was illegal and was required to be removed forthwith. The Petitioner made a representation to that effect to the BDA.

8. According to the Petitioner, by letter dated 21st November, 1995, the Divisional Railway Manager (Engg), S.E. Railways, Khurda Road (Opp. Party No.4) informed the Petitioner’s Contractor M/s. R.D.B Industries Ltd. (‘M/s. RDB’) that the Railways had no objection for the passage right to the Petitioner’s plot and asked the Contractor to attend its office to complete the necessary formalities.

9. Thereafter the Petitioner was informed that approval had been sought from the headquarters and after such approval, the formalities would be completed. When there was an inordinate delay in granting approval, M/s. RDB filed O.J.C. No.15483 of 1997 in this Court. The said writ petition was disposed of by order

dated 12th January, 1998 permitting the Petitioner to approach the Opposite Parties. According to the Petitioner, despite his approaching them on several occasions, nothing concrete transpired. On 22nd June, 1999 a letter was addressed to the Petitioner by the Senior Divisional Engineer (Central), S.E. Railways asking him to obtain a certificate from the local Civil Authorities to the effect of “non availability of any other means of access to properties/houses” so that the further action can be taken.

10. The Petitioner states that being frustrated by the continued inaction of the Railway authorities, he approached the local M.L.A. to impress upon the Railway authorities to grant him the passage right. While responding to a query by the local M.L.A., the General Manager, S.E. Railways in a letter dated 23rd March, 2003 stated as under –

“I have had the matter examined afresh. At present Shri Biswal has got Sec.144 imposed in the vicinity of demanded location which prevents Railways in executing developmental as well as land fill up works materials. If the way leave facility is given to Shri Biswal, it shall block the main VIP entrance of Bhubaneswar Platform No.1 on officer’s rest house side.

Keeping in view the above aspect, Railway is not in a position to give way leave facility to Shri H.N. Biswal.”

11. It is in those circumstances the present petition was filed seeking the quashing of both the aforementioned letters and for a writ of mandamus to the Railway authorities to grant the Petitioner the right of passage to his property.

12. A counter affidavit was filed by the Railways on 16th August, 2003, raising a preliminary objection that the writ petition raised disputed questions of fact which could not be adjudicated in a petition under Article 226 of the Constitution of India. Further it was pointed out by the Railways that similar relief was turned down in O.J.C. No.15463 of 1997 by this Court by an order dated 12th September 1999 and, therefore the petition was barred by the principle of *res judicata*. It was further pointed out that, suppressing the fact of dismissal of the earlier writ petition, the present Petitioner had filed a complaint before the Secretary, B.D.A. alleging obstruction of his right to passage by the Railways, which was registered as UAP No.207 of 2002. It was stated that on 14th August 2003, the hearing of the said case was concluded and orders were reserved.

13. As regards the land between Petitioner's plot on the eastern side and the public road, the Railways stated as under:

“The area adjacent to petitioner's land on its eastern side is Railway's land bearing Plot No.2745 and recorded in Hal Khata No.1994. The Railway's land is a narrow strip of high land and is situated between petitioner's land and Railway's road leading to Bhubaneswar Railway station. This high land is in a height of 1.6 meter and is separated from Railway's road by a drain of 0.6 meter wide and 0.9 meter depth.

In accordance with the existing instructions in para 1047 Indian Railway Code for Engg. Department (1993 edition) Railway boundary posts and fencing with Tie bar panel was fixed along Railway boundary opposite to Railway Officer's Rest house and VIP entrance to Bhubaneswar Railway Platform No.1.

As a part of it, such fencing and rail posts were fixed along Railway Boundary to prevent ingress and egress from private land adjoining Railway's land, i.e. petitioner's land.”

14. It was contended by the Railways that the construction of a multi-storied apartment on Petitioner's plot with its entrance facing the railway land would cause a security hazard and block the main VIP entrance to Bhubaneswar Platform No.1. Further, it was pointed out that the permission granted by the BDA to the Petitioner was subject to Section 16(3) of the Orissa Development Authority Act. Clause-D of the permission under the aforesaid Act reads as under:

“the land over which the construction is proposed must be accessible by an approved means of access of not less than 50' in width”.

15. It was submitted by the Railways that in the absence of such access, BDA could not have granted permission for raising a six-storied structure. It was pointed out that the building plan was not enclosed with the writ petition and BDA was not impleaded as a party. The Railways contended that the Petitioner's Contractor M/s. RDB could provide an alternative right of way for the building through the apartment constructed on the plot adjacent to the Petitioner's plot on the northern side. The Railways therefore sought to justify their denial of permission to the Petitioner for a right of passage.

16. A rejoinder was filed by the Petitioner, in which it was contended that O.J.C. No.15463 of 1997 was disposed of by this Court by an order dated 12th September, 1999. Without entering

into the merits of the case, this Court directed M/s RDB to appear before the Railway authorities as contemplated by the letter dated 22nd June, 1999. The said order of this Court reads as under:

“The alleged inaction on the part of the railway authorities in the grant of right of passage over the railway land to the flats which are built up by the Petitioner-Builders is assailed in this writ application.

Placing reliance on Annexure-5, a letter of the Divisional Manager (Engineering), South Eastern Railway, Khurda Road, it is contended that since the Railway had agreed to provide a passage, now they are not justified in not passing the formal order.

From a perusal of Annexure-5, we find that it is not a positive commitment. All that we find is that the railway authorities had no objection for passage right, but they had called upon the petitioner to attend the office for completing necessary formalities.

There is nothing on record to indicate that all formalities have been complied with by the Petitioner. However, as the learned counsel for the Petitioner submits that this petitioner may be disposed of by issuing an appropriate direction regarding consideration of the Petitioner's prayer by the railway authority, we feel, no useful purpose will be served in keeping this petition pending as it can be disposed of with the direction sought, to which Mr. D.N. Mishra, learned counsel appearing for the opposite parties, has no objection.

Accordingly, we, without expressing any opinion on the merits of the Petitioner's claim, dispose of this writ application with the direction that, in case the Petitioner appears before the concerned authority, as required by him by Annexure-5, the latter shall consider the grievance/case of the former on its own merits and in accordance with law.

Urgent certified copy of the order be granted as per the rules.”

17. The Petitioner maintained that the present writ petition was, therefore, not hit by the principles of *res judicata*. As regards the complaint made before the BDA is concerned, it was stated that the BDA had since taken the stand that it was not authorized to remove the barrier erected by the Railways. It was contended that during the pendency of U.A.P. No.207 of 2002 before the BDA, a joint inspection was conducted and BDA reiterated that the Railway land in question provided the only means of passage to the public road from the Petitioner’s plot and that the Petitioner did not have an alternative passage. It was pointed out by the Petitioner that the plot on the northern portion of the Petitioner’s plot belonging to one Mr. Binay Choudhury was separated by a stone boundary wall and it was not feasible for the Petitioner to get a passage through that plot. It was contended by the Petitioner that the Railways’ apprehension that the right of passage granted to the Petitioner would cause a security hazard and block the VIP entrance to Bhubaneswar Platform No.1 was an “afterthought”.

18. An additional affidavit was filed by the Petitioner on 17th May, 2007, stating *inter alia* that –

“the metalled road constructed by the Municipality is more than 50 feet wide which separates the station premises and the property now being claimed by the railways. This metalled road is a public road and runs through Ashok Nagar to connect the railway station and Rajpath on either side. The State Govt. through its Nodal Committee while considering the integrated development plan of Bhubaneswar have

taken a decision to widen the road for easy clearance of traffic from Janpath.”

19. It was submitted that the road in question is also shown in the Master Plan of the BDA connecting the Railway Station and Janpath, and since the road in question was a public road, the Railways could not claim exclusive privilege over it.

20. The present petition was listed for hearing on 11th July, 2003 when notice was issued. It was listed for few more dates in the same year but there was a gap of almost four years thereafter till 8th March, 2007 when it was next listed. Between 19th March, 2008 and 9th May, 2018, i.e. almost 10 years the writ petition was not listed for hearing even once.

21. By order dated 13th April, 2019, the BDA was impleaded as Opposite Party No.7. No effective hearing took place thereafter till 22nd March, 2021 when this Court required a senior level officer of the Railways conversant with the facts to present with the relevant records on the next date.

22. On 30th March, 2021 the following order was passed by this Court:

“Mr. Raj Kumar Patra at present working as Assistant Divisional Engineer, East Coast Railways, Bhubaneswar has appeared in the Court and produced certain photographs which according to him will go to show that there is a road now in the area, constructed by Railways which provides easy access to the plot in question and therefore no cause of action survives.

Mr. Gautam Mukherji, learned Senior Counsel for the Petitioner states that he will have to seek instructions.

List on 26th April, 2021.”

23. The photographs produced did show that there was a road to the plot in question. However, Mr. Goutam Mukherji, learned Senior Counsel appearing for the Petitioner sought time to obtain instructions.

24. The petition was finally heard on 26th April, 2021. The Court heard the submissions of Mr. Mukherji, learned Senior counsel for the petitioner and Mr. B.K. Sahoo, learned counsel appearing for the Railways and reserved orders.

25. As regards the preliminary objections raised by the Railways, which have been reiterated by Mr. Sahoo, the Court notes that the present petition has been pending in this Court for 18 years. Although, the petition might raise questions that require evidence to be led, in view of the long pendency of the petition in this Court, and for the reasons stated hereafter, the Court sees no useful purpose being served in relegating the Petitioner to the civil Court at this stage.

26. As regards the earlier writ petition O.J.C. No.15463 of 1997 filed by M/s. RDB, the court notes that it was disposed of by the order dated 12th September, 1999 without entering into the merits of the case. Consequently it cannot be said that the present petition is barred by *res judicata*. Also, it appears that the proceedings before the BDA also did not end in an adjudication of the dispute.

27. As far as the main issue in the petition is concerned, Mr. Mukherji, learned Senior counsel for the Petitioner submitted that

although the photographs produced by the Railways do show that there is at present an approach road to the Petitioner's plot, it was not through the Railway land which was the shortest possible route. As per his instruction, the passage shown in the photographs was possible only on account of the owner of an adjoining plot being large-hearted to agree to provide such passage through her plot. He insisted that notwithstanding the said road, the Petitioner could still invoke the "rule of attribution" as explained in *Meridian Global Funds Limited Management Asia Ltd. v. Securities Commission (1995) 2 AC 500*, to urge that the Railways should be held vicariously liable to honour the promises made by its officers. According to Mr. Mukherji, the Railways cannot be permitted to resile from the assurance held out in both in the letter dated 31st July, 1990 as well as the subsequent communication dated 21st November, 1995 addressed to M/s. RDB that they had no objection to giving the Petitioner a right of passage over the railway land. Invoking the doctrine of promissory estoppel, Mr. Mukherji placed reliance on the decision in *Motilal Padampat Sugar Mill Company Ltd. v. State of Uttar Pradesh (1979) 2 SCC 409*. He also relied on the decision dated 14th November 2011 of a learned Single Judge of the Madras High Court in W.P. No.1115 of 2011 (*K. Selvraj v. District Collector*) where in more or less similar circumstances, the High Court issued a writ of mandamus to the Railways directing it to construct a rail overbridge on land of the Petitioner in that case.

28. According to Mr. Mukherji, the Petitioner could also assert an easementary right over Railway land as that was the only shortest approach to his land from the public road. In this context he placed

reliance on the decision in *Hero Vinoth v. Seshammal (2006) 5 SCC 545*. The decision in *State of Himachal Pradesh v. Umed Ram Sharma (1986) 2 SCC 68* was referred to assert a constitutional and fundamental right to a passage to the Petitioner's plot from the public road on its eastern side as the plot was surrounded on the other three sides by private plots.

29. The above submissions have been considered. The Court finds that the submission regarding the 'rule of attribution' as well as promissory estoppel is premised essentially on two letters of the Railways. The first letter dated 31st July, 1990 is in fact an internal communication from the Inspector of Works to another Deputy Engineer in the Railways. It is not addressed to the Petitioner at all. It refers to the letter written by the local M.P. on 12th July, 1990 to the D.R.M., Khurda Road and how the site had been personally verified by the officer. The letter states that the party applied for permanent lease of the land parallel to the plot which was not reasonable. The letter recommends that the Petitioner could be permitted a passage. On this there is an endorsement, which reads "Checking the Rly.Board's decision on allowing passage right 3.5 x 8.5 mtrs. given on short term lease basis."

30. By no means can the above endorsement be viewed as an unequivocal assurance or promise held out by any Railway official to the Petitioner that he would be provided the right of passage over Railway land. In fact the subsequent letter dated 6th July 1993 of the DRM (Central) addressed to the Petitioner left him in no doubt that the Railways had not agreed to give him such a right of passage.

31. The same must be said of the second letter dated 21st November 1995 addressed to M/s. RDB. Although the letter does say that the Railways have no objection to the passage ‘as requested’, it is not an unqualified approval. It is hedged in by the requirement of the builder having to complete “the necessary formalities.” The further letter dated 22nd June 1999 was in the same vein. It asked the Petitioner to get a clarification from the local civil authorities that there was no alternative passage available. These letters only go to show that the so-called ‘approval’ was not an unqualified one. There was no ‘assurance’ or ‘promise’ to the Petitioner that led him to believe that it would be acted upon and relying on which he altered his position.

32. What also is now clear is that the above letters by the DRM had obviously to be further approved by the higher official in the Railways i.e. the General Manager in Kolkata. The latter in fact explained to the local M.P by the second impugned letter dated 27th March 2003 why the approval could not be granted. The apprehension expressed by the Railways in the said letter that if such passage were given to the Petitioner, it would pose a security hazard to the VIPs approaching Bhubaneswar Platform No.1 are matters over which the Court cannot sit in judgment. These are in any event matters of evidence, and the mere assertion by one party and its denial by another would not facilitate its resolution, and definitely not in a writ petition under Article 226 of the Constitution.

33. To invoke the 'rule of attribution' as explained in *Meridian Global Funds Limited Management Asia Ltd.* (*supra*) it has to be shown that the organizational structure of the Railways permitted officers at the level of DRM to take decisions that could be considered final and binding on the Railways. However, given the functioning of a State body like the Railways in India, which is governed by complex decision-making structures, it appears that the 'rule of attribution' which might be relevant to the functioning of a limited company, where the doctrine of vicarious liability ties down the company to the decisions of its servants and agents, would be inapposite. Factually, in the present case, it is apparent that the decision taken at the level of the DRM of the Railways, favourable to the Petitioner, was not concurred with at the higher level of the General Manager. Consequently, the Petitioner cannot possibly rely on the 'rule of attribution' to bind the Railways down to the decision of the DRM.

34. Turning now to the doctrine of promissory estoppel, the Supreme Court has explained it succinctly in *Motilal Padampat Sugar Mills* (*supra*) as under (SCC @ p.442-444):

"36. The law may, therefore, now be taken to be settled as a result of this decision that where the Government makes a promise knowing or intending that it would be acted on by the promisee and, in fact, the promisee, acting in reliance on it, alters his position, the Government would be held bound by the promise and the promise would be enforceable against the Government at the instance of the promisee, notwithstanding that there is no consideration for the promise and the promise is not recorded in the form of a formal contract as required by Article 299 of the Constitution."

35. Therefore, the sequence is of some importance. First there has to be a promise or assurance held out, in this case, by the Railways. Thereafter the promisee has to act on it and alter his position. In the present case, at no time prior to the Petitioner purchasing the plot in question in 1977 was he given an assurance by the Railways about granting him a right of passage to the public road on the eastern side of the plot through their land. In fact at no time prior to his commencing construction on the plot, more than twelve years later in 1990, was there such an assurance. Therefore, an important ingredient for invoking the doctrine, viz., that the Petitioner as a promisee should have altered his position relying on such assurance is missing in this case. Here, the Petitioner 'altered' his position by commencing construction even before he sought permission from the Railways. It was not the other way around viz., it was not that the Railways held out an assurance to the Petitioner that they would provide him a passage through their land, and then acting on such assurance the Petitioner altered his position. The Court is therefore not persuaded that the Petitioner can invoke the doctrine of promissory estoppel to seek a mandamus to the Railways to provide him a right of passage to the public road through their land.

36. Factually, it is clear that there is now an approach road to the Petitioner's plot and therefore there is no denial of access to the said plot. Further, the Railways have put forth an explanation that providing access through their land would not be possible for security reasons. This is therefore an additional factor why the Court is not inclined to grant the relief prayed for by the Petitioner.

37. It must be recalled that in *Motilal Padampat Sugar Mills* (*supra*) the Supreme Court added a caveat as under:

“But it is necessary to point out that since the doctrine of promissory estoppel is an equitable doctrine, it must yield when the equity so requires. If it can be shown by the Government that having regard to the facts as they have transpired, it would be inequitable to hold the Government to the promise made by it, the Court would not raise equity in favour of the promise and enforce the promise against the Government. The doctrine of promissory estoppel would be displaced in such a case because, on the facts, equity would not require that the Government should be held bound by the promise made by it. When the Government is able to show that in view of the facts as have transpired, public interest would be prejudiced if the Government were required to carry out the promise, the Court would have to balance the public interest in the Government carrying out a promise made to a citizen which has induced the citizen to act upon it and after this position and the public interest likely to suffer if the promise were required to be carried out by the Government and determine which way the equity lies.”

38. As regards the right of easement, here it must be presumed that the Petitioner is seeking to establish a right of easement of way by ‘necessity’ and not by ‘prescription’ or ‘grant’, although the pleadings in the petition are inadequate in this regard. The importance of pleadings and evidence to establish such a right has been explained by the Supreme Court in the following passage in *Bacchaj Nahar v. Nilima Mandal AIR 2009 SC 1103*:

“Easements may relate to a right of way, a right to light and air, right to draw water, right to support, right to have overhanging eaves, right of drainage, right to a water course etc. Easements can be acquired by different ways and are of different kinds, that is easement by grant, easement of necessity, easement by prescription, etc. A dominant owner seeking any

declaratory or injunctive relief relating to an easementary right shall have plead and prove the nature of easement, manner of acquisition of the easementary right, and the manner of disturbance or obstruction to the easementary right. The pleadings necessary to establish an easement by prescription, are different from the pleadings and proof necessary for easement of necessity or easement by grant. In regard to an easement by prescription, the plaintiff is required to plead and prove that he was in peaceful, open and uninterrupted enjoyment of the right for a period of twenty years (ending within two years next before the institution of the suit). He should also plead and prove that the right claimed was enjoyed independent of any agreement with the owner of the property over which the right is claimed, as any user with the express permission of the owner will be a licence and not an easement. For claiming an easement of necessity, the plaintiff has to plead that his dominant tenement and defendant's servient tenement originally constituted a single tenement and the ownership thereof vested in the same person and that there has been a severance of such ownership and that without the easementary right claimed, the dominant tenement cannot be used. We may also note that the pleadings necessary for establishing a right of passage is different from a right of drainage or right to support of a roof or right to water course. We have referred to these aspects only to show that a court cannot assume or infer a case of easementary right, by referring to a stray sentence here and a stray sentence there in the pleading or evidence.”

39. The decision cited by Mr. Mukherji, viz., *Hero Vinoth v. Seshammal* (*supra*) further underscores the importance of both pleadings and evidence for establishing an easementary right. Apart from the pleadings in the present case being inadequate, a petition under Article 226 would be wholly inappropriate to test the proposition. This is essentially a matter for evidence.

40. As far as the present case is concerned, the fact remains there is now an approach road to the Petitioner's plot even if it may not be through the Railway land that is adjacent to the public road. For the reasons already spelt out in detail, this Court is not inclined to grant the reliefs prayed for.

41. The writ petition is accordingly dismissed, but in the circumstances, with no order as to costs.

42. As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court's website, at par with certified copy, subject to attestation by the concerned advocate, in the manner prescribed vide Court's Notice No.4587, dated 25th March, 2020 as modified by Court's Notice No.4798, dated 15th April, 2021.

(Dr. S. Muralidhar)
Chief Justice

(B.P. Routray)
Judge

S.K. Parida.