

A.F.R.

COURT OF ORISSA: CUTTACK

O.J.C. No.5038 of 2002

In the matter of an application under Articles 226 and 227 of the Constitution of India.

Sri Zakir Khan,
Plot No.1374, Gandamunda,
Bhubaneswar

... Petitioner

-Versus-

State of Orissa and others ... Opp. Parties

For Petitioner : M/s S.N.Panda, D.K.Mohapatra
& D.P.Mohapatra

For Opp. Parties : M/s Srimanta Das & S.Rath
(For O.P. No.3)
M/s J.M.Mohanty, A.K.Panigrahi,
A.N.Upadhyaya & N.K.Rath
(For O.P. No.10)

M/s A.K.Mohapatra, A.Mohapatra,
A.Mishra & A.Patra
(For intervenors)
M/s B.Baug, S.Dash & S.Mohanty
(For intervenors)

P R E S E N T:

**THE HONOURABLE THE CHIEF JUSTICE SHRI.V.GOPALA GOWDA
AND**

THE HONOURABLE SHRI JUSTICE B.N.MAHAPATRA

Date of Judgement: 30.09.2011

B.N. Mahapatra, J. The petitioner, who claims to be a social activist and is engaged in taking up various grievances of the common people for securing redressal thereof, has filed this writ petition in the nature of a Public Interest Litigation (PIL) with a prayer for issuance of a direction to opposite party-State authorities to take immediate steps to ban all construction activities within the radius of 1 km around the boundaries of Nandan Kanan Wild Life

Sanctuary and to prepare a comprehensive plan to sustain the fragile eco system of the area and not to change the nature and status of the land.

2. Petitioner's case in a nutshell is that the construction activities undertaken in the vicinity of Nandan Kanan Wild Life Sanctuary are putting severe strain on the eco-system. Nandan Kanan Zoological Park is a popular tourist place/destination, which was established on 29th December, 1960. Every year thousands of tourists from inside and outside India are coming to visit the Zoo. During 41 years of its existence, the Zoological Park has bred a number of species of animals and kids. The most notables amongst them are Ghadials and White Tigers. Still large patches of forest are existing inside the park where free living wild animals like spotted Deer, wild boar, Jackal, Mongoose, Snakes like Python are found. In the year 1979, keeping in view the diversity and fragility of the eco-system, two Demarcated Protected Forest (DPF) blocks; Krishna Nagar and Jajnagarh along with Kanjia Lake, a natural water body and some private lands and government waste lands over 437 hectares were notified as Nandan Kanan Sanctuary. The Sanctuary area is surrounded by wet land all around. The swamps and Kanjia lake inside the sanctuary area form a contiguous unit. Any change in the topography of the wet land is bound to affect the very existence of Kanjia Lake. The Kanjia Lake, which along with the Zoo and Botanical Garden, constitutes the sanctuary area, is the life line of the ecosystem. The animals in the Zoo primarily depend on the water of this lake. Urbanization in the close vicinity of the sanctuary area will pollute the swamps which in turn will pollute the lake beyond recovery.

3. Kanjia Lake and the surrounding swamps impound water from rain and natural springs. They are monsoon fed water bodies. The natural drainages pattern of the surrounding areas feed these water bodies during rainy season. Large scale construction in the vicinity of the water bodies may disturb the rain water drains which in turn may badly affect the water level as well as the water quality of these water bodies. It may also cause disturbance to aquifers which are the source of ground water. The hydrology of the area may be disturbed. Every year during rainy and winter seasons thousands of migratory birds flock to these marshy swamps which surround the sanctuary area. There has been a proposal to declare the entire wet lands along with the Kanjia Lake as a bird sanctuary. A notification for acquisition of the land has already been made. The Nandankanan Wild Life Sanctuary has been pursuing Wild Life conservation and captive breeding. It is the only place available in the State for capture, management, conservation and rehabilitation of population of the wild animals. Master Plan has been prepared to take care of all the requirements of multifarious activities of Zoological Park. It has been approved by the Central Zoo Authority. Any construction activity in the vicinity is bound to affect the master plan and will destroy the harmonious development of the sanctuary. The requisition for acquisition of the land, adjacent to the sanctuary for expansion of the sanctuary and for conservation of the wet lands is pending and now under process. The development of land by the builder groups if not restrained, it will defeat the very purpose of acquisition of land. It is alleged that since opposite party Nos.1 to 9-State Authorities are not taking

any action for protecting the environment, the petitioner has filed this writ petition.

4. Mr. S.N.Panda, learned counsel appearing for the petitioner submitted that various plots have been developed by various builders in the vicinity of the Nandankanan Sanctuary area and proposed bird sanctuary area, which severely denting the carrying capacity of the ecosystem operating in the environmental surroundings. The callous indifference attitude of opposite party Nos.1 to 9-State Authorities is encouraging the unscrupulous builders to encroach upon the ecologically fragile swamps. The ecosystem is now under severe strain and the absence of corrective measures may lead to permanent and irreparable damages. It is further submitted that if the development of the land by the builder groups is not restrained it would defeat the very purpose of acquisition. The nature of the land on which, plotting schemes coming up are agricultural, water logged or village forest lands. The construction activities are going on without any conversion and without any clearance from the forest authorities in gross violation of Section 8-A of the Orissa Land Reforms Act, 1960 and the Forest Act, 1972.

5. The large scale construction activities in the close vicinity of the sanctuary areas is bound to cause adverse impact on the local ecology. Hence, there is an urgent need to prepare action plan (based on environmental study) to create a green corridor, so that no further harm will be caused to the ecology of the Nandankanan Sanctuary. The "Precautionary Principle" makes it mandatory for the State Government to anticipate, prevent and attack the causes of environmental degradation. In order to

protect the Nandankanan Wild Life Sanctuary from environmental degradation, it is necessary to ban the construction activity in the close vicinity of the sanctuary. In support of his contention, Mr.Panda, learned counsel for the petitioner has placed reliance on the decisions of the Hon'ble Supreme Court in the case of *Vellore Citizens' Welfare Forum vs. Union of India, (1996) 5 SCC 647* and *M.C. Mehta vs. Union of India, (1997) 3 SCC 715*.

6. Learned counsel for the petitioner drew attention of this Court to all minutes of the second meeting of the State Board for Wildlife Orissa held on 06.01.2011 at 11.00 A.M. under the Chairmanship of the Hon'ble Chief Minister, Orissa in which Mr. G.B.N. Chaini, Professor (Zoology), Utkal University, Vani Vihar pointed out that within one kilometre radius of Nandankanan, lot of constructions are going on and within no time Nandankanan will be surrounded by high raised buildings. Since, there is a sanctuary as well as Zoological Park and Botanical Garden, the construction activities may affect the hygiene of wild animals for their breeding etc. The park provides a free eco for research.

7. Learned counsel appearing on behalf of opposite party Nos.1, 8 and 9, submitted that the opposite parties being conscious of the position have already taken various steps in the matter. The matter is still under process and there has been substantial progress to reach the goal for the purpose it is augmented. The construction activities or reclamation activities within the radius of one kilometre from Nandankanan Zoological Park are envisaged on the land outside Nandankanan on which the Zoo authority does not have any control or jurisdiction to prevent any such activities. No

action can be initiated legally against such activities under the provisions of the Wildlife (Protection) Act. The Revenue Department, District Collector, Khurda, Sub-Collector, Khurda and Tahasildar, Bhubaneswar are the agencies of the Government having jurisdiction and control over these lands and areas within 1 km radius of Nandankanan Zoo. Regarding status of the land situated within 1 km radius of Nandankanan, it can be appraised by the Revenue Authorities since they are competent for the same. However, it is worthwhile to submit that all such lands more particularly the private lands situated within 1 km radius of Nandankanan Zoo are not guided by any regulation so as to adequately prohibit such building and reclamation activities. On an average, 12 lacs visitors prefer to visit the Zoo during a year. Kanjia lake which spreads over 66.1 hectares and is situated between the Zoological Park and Botanical Garden is the lifeline for the Zoo as the water supply to the animals depends on this lake. The apprehension that the urban growth and consequential disposal of land in close vicinity of the lake may pollute the water body is not unfounded. The lake is visited by the migratory birds during winter season and there is a residential population of open bill storks in the nests in the Zoo premises. Birds use the water body for their feeding and other activities. Kanjia Lake is a part of Nandankanan Wildlife Sanctuary notified earlier in the year 1979. The master plan has been duly approved by the Central Zoo Authority and the Government of Orissa. The process of land acquisition of private land within the limits of Nandankanan Wildlife Sanctuary is at the final stage.

It was further submitted that the large scale construction activities close to sanctuary area and zoo will adversely affect the local

ecology and a green belt of buffer zone is desirable for maintaining proper ambience in the vicinity of the zoo. Opposite party no.9 in his letter dated 31.07.2003 instructed the Wildlife Conservation Officer, Nandankanan (now Deputy Director) to take up the matter with the District Administration to prevent any such activities in violation of Court's order dated 16.05.2002. The Zoo Authority does not have any control or jurisdiction over the land outside Nandankanan.

8. Opposite party No.3-State Pollution Control Board has filed counter affidavit dated 23.02.2004 stating therein that so far as the alleged construction work is concerned, the same is beyond the purview of the powers of the State Pollution Control Board under the Water (Prevention and Control) Act, 1974, Air (Prevention and Control) Act, 1981 and The Environment (Protection) Act, 1986. No notification restricting such construction under the aforesaid Acts has been made authorizing the Board to implement the same. Therefore, the writ petition is not maintainable as against opposite party No.3.

9. The Assistant Director, Tourism-cum-Under Secretary to Government, Department of Tourism, Paryatan Bhawan, Lewis Road, Bhubaneswar, Dist: Khurda, stated that the proposed site of the Public Convenience Centre is situated at a considerable distance from the boundary of Nandankanan Zoological Park. It will be only used by the floating public. The Public Convenience Centre is highly essential to provide the basic amenities of toilet to the tourists. Unless such amenities are provided, the huge public visiting the Nandankanan Zoological Park will pollute the environment by attending the call of nature here and there which

will cause environmental pollution and unhygienic conditions. This construction undertaken by Assistant Director of Tourism should not be treated as ordinary construction of building and reclamation activities. Unless the interim order dated 16.05.2002 passed by this Court is modified and/or clarified to the extent of giving permission for completion of the project in question in all respects, the State's interest will be jeopardized.

10. Mr. Rath, learned counsel appearing for opposite party no.10, submitted that the Sanctuary is situated over more than 1100 acres of land. The actual need of this zoo is only within 100 acres of land. Therefore, another more than 1000 acres of land have been kept for future development/ betterment of the sanctuary. The construction of the residential house outside the Sanctuary boundary wall will not put any strain upon the plants, animals and birds of the sanctuary. The entire wet land has been acquired by the Nandankanan Sanctuary Authority and permanent construction has been made by them. The proposed project area of this opposite party No.10 is at least 5 ft down that of the Kanjia Lake. The petitioner's apprehension is that the large scale construction in the vicinity will affect the water level as well as water quality, but the proposed project of opposite party No.10 is far away from Kanjia Lake. Any construction activity in the vicinity would not affect the master plan and harmonious development of the sanctuary and will not defeat the purpose of the said acquisition. The sanctuary authorities have constructed permanent stone wall covering the swamp area and the proposed project of opposite party No.10 is not hampering/causing any such damage to Kanjia Lake or even the proposed bird sanctuary. The plotting scheme areas are water logged or

village forest lands. Since the land in question has not been used for the purpose other than agriculture, it was not converted to homestead purpose. If the sanctuary authorities need more land than the existing 1100 acres of land, then the authority may acquire these areas as and when required. But the fundamental right of the people for using their lands as per their will should not suffer. Construction outside the sanctuary will not cause environmental degradation to the wildlife sanctuary. Opposite party No.10 has invested more than Rs.10.00 lakhs for his business in the proposed plotting scheme in the mouza Ragunathpur. The plotting schemes of opposite party No.10 or any other construction away from the boundary wall will not damage the sanctuary. The ratio of the judgment of the Hon'ble Supreme Court in Vellore Citizens' case (*supra*) has no application to the facts of the present case.

11. The intervention petition filed by the intervenors was allowed on 22.01.2010 and they were impleaded as opposite parties Nos. 11 to 40. In their written notes of submission, they have stated that the villagers around the Nandankanan Zoo consisting of 5 Mouzas of about 2 lakhs population have right, title and interest over their lands since long, but when they applied for conversion of the status of land from agriculture to homestead, the Tahasildar, Bhubaneswar rejected their petitions stating that since the matter is pending before this Court and also interim order dated 16.05.2002 passed in Misc. Case No.5284 of 2002 is in force, they are helpless in passing any orders for conversion. Thus, the helpless poor villagers are not able to utilize their land and construct any house although they have lawfully purchased the lands and are in possession of the same since long. If

the villagers will not be allowed to enjoy their legitimate property/land/plot and are debarred from even constructing their houses for residential purpose, it will affect their right to life and livelihood. As the price of land is going up in Bhubaneswar and adjacent areas, the villagers cannot afford to any alternative land and in such case their condition will be miserable. There is no such provision under any law that beyond the Sanctuary/Zoo area declared further 1 km or 2 km shall be reserved for the zoo and no construction can be made. The prayer of the petitioner for restraining others from making any construction outside the zoo area is unreasonable and without any substance which may be rejected.

12. It is further stated that the case of the Kolkata Zoo may be to some extent relevant for the purpose. The said Zoo is situated in a sprawling campus just opposite to Vice Legal lodge which was the official residence of erstwhile Vice-Roy till 1911, i.e., till the time of shifting of capital of British Empire from Kolkata to Delhi. The building occupied by erstwhile Vice-Roy is now the National Library which is visited by innumerable readers everyday. Further, adjacent to the Zoo, there is Bhawani Bhawan, which is the second power centre in metropolitan city of Kolkata after the Writers Building, the Secretariat of West Bengal Government. Many residential colonies particularly the high raised buildings have come up in and around Alipore Zoo, Kolkata, which is not affecting the animals and birds living in the said Zoo, as per the environment impact assessment made by many agencies and till date the Kolkata Zoo is one of the biggest Zoos in the country functioning from that crowded place. With these averments and further placing reliance on the decision of the Hon'ble Supreme Court in the

case of *State of Uttarakhand vs. Balwant Singh Chauhan & others*, (2010) 3 SCC 402, it is submitted on behalf of the intervenor-petitioners that the present writ petition which is filed in the garb of PIL may be dismissed with exemplary cost.

13. One Sri Bidyadhar Sahoo along with eight others filed an intervention petition dated 12.11.2008, wherein it was stated that the land of the Intervenors are situated in Mouza – Dadha under New Capital Police Station as per the Record of Rights of 1973 and the lands of the Intervenors are coming within 1 km radius around Nandankanan. Because of the interim directions of this Court, the intervenors who are stithiban tenants in respect of their respective lands are being restrained by the Revenue Authorities from reclaiming their lands and from taking any developmental construction, even for their residential purposes. By this process, the Revenue Authorities in pursuance of the direction of this Court are attempting to take away the property right of the Intervenors guaranteed to them under the Constitution of India.

14. On the rival contentions of the parties the only question that would arise for consideration by this Court is as to whether in the facts and circumstances of the case, various prayers made in the writ petition can be allowed.

15. To deal with the aforesaid question, it is necessary to extract the prayer made in the writ petition which is on the following terms:

“In the above premises, it is prayed that this Hon’ble Court may be pleased:

- (i) to issue a writ, direction or order or in the nature of mandamus and/or any other appropriate writ, directions or order directing-

- (a) the opposite parties to take immediate steps to stop all plotting schemes and construction activities within one kilometre radius all round the Nandankanan Wildlife Sanctuary.
- (b) the opposite parties Nos.1, 3, 8 and 9 to conduct an environmental study and prepare an environmental management plan (EMP) to save the ecology in and around the sanctuary area from further degradation.
- (c) the opposite parties Nos.1,2,3 and 4 to prepare an action plan for the development of a green belt at one kilometre radius all around the boundaries of the Nandankanan sanctuary.
- (d) the opposite parties to ensure the preservation of the nature and character of the land within one kilometre radius all around the sanctuary area.
- (e) the opposite parties Nos.1 to 9 to properly identify and demarcate the Nandankanan Sanctuary area and to expedite the land acquisition process.

(ii) to pass such other or further orders as may be deemed necessary on the facts and in the circumstances of the case."

16. This Court vide order dated 22.04.2008 appointed Sri Gautam Mishra, an Advocate of this Court and directed him to go to the spot and make an inspection and file his report in a sealed cover indicating therein whether there has been any violation of the order dated 16.05.2002 passed by this Court by carrying on the building activities or reclamation activities within one kilometre radius of Nandankanan Zoological Park. Sri Mishra submitted a report on 13.05.2008 pursuant to the order of this Court stating as follows:

“(i) There have been several constructions within 1 km radius of Nandankanan Zoo within the last five and half years.

(ii) Quarrying operations at two sites are also going on within one km radius of Nandankanan and the said operations have commenced after the passing of the interim order.

(iii) The roads to the quarries also run within one km radius of Nandankanan Zoo and in one particular case the road runs just by the side of the boundary wall of Nandankanan.

(iv) It also appears that the builders are in the process of floating plots for sale and the said plots come within the 1 km radius of the Zoo.

(v) It also appears that some of the roads to the proposed railway station run within the 1 km radius of the Zoo. However, the exact distance of the proposed railway station from the boundary wall of the Zoo could not be aerially measured. The road (winding road) to the proposed railway station which is under construction is around 1.1 km.

(vi) Some of the shops/Dhabas in front of Nandankanan Zoo have made permanent structures/extensions in the last 5 and half years.”

17. It is further reported by Mr.Mishra that in some cases the Range Officer, Nandankanan has lodged F.I.R. and there are several other cases, where no F.I.R. has been lodged.

18. This Court vide order dated 05.08.2010 directed the learned Government Advocate with reference to its earlier order dated 13.02.2009 to file a detailed statement by way of an affidavit indicating as to whether the State Government intends to acquire the area in respect of which the petitioner seeks for a direction for declaring it a green belt area for the reason that there is a Protected Wildlife Sanctuary. He was further

directed to indicate in the affidavit as to what steps have been taken pursuant to the notification dated 03.01.1988 which was published under Section 4 of the Land Acquisition Act in respect of area Ac. 50.683 decimals as indicated in Annexure-2 and also to indicate through the affidavit as to the manner in which the Nandankanan Zoological Park plans to utilize 1100 Acres of land in its possession. In response to the said order of this Court dated 05.08.2010, an affidavit dated 02.11.2010 was filed by one Dr. Sudarsan Panda, who was working as Director, Nandankanan Biological Park, inter alia stating as follows:

“3. That at present there is no proposal from Nandankanan Biological Park to acquire the land within one kilometre radius of the Park for declaration that area as a green belt. But for maintaining ecological integrity of Nandankanan sanctuary and also for the safety of the wild and captive animals, it is essential that the present land use pattern of the existing land situated within one kilometre radius around Nandankanan will remain unchanged.

4. That in pursuant to the Notification dated 3.1.1998 which was published under Section 4 of the Land Acquisition Act in respect of Ac 50.683 decimals of land in village Jujhagarh, all the formalities for acquisition of the said land have been completed by Land Acquisition Officer, Puri. An amount of Rs.15,70,052/- has been paid for acquisition of land of Ac 50.683 in village Jujhagarh for development of Nandankanan Biological Park. The possession of the said land covering an area of Ac 50.683 decimals in village Jujhagarh has been delivered to the Range Officer, Nandankanan by the Land Acquisition Officer, Puri on 26.12.1990. The land has been utilized for establishment of fodder firm by Nandankanan Biological Park.

5. That the Nandankanan Zoological Park which was established on 29th December, 1960 covers an area of 362.1 ha including the water body of Kanjia lake 66.1 ha. The State Botanical Garden of Nandankanan covers an area of 75 ha. The Zoological Park together

with Kanjia lake and Botanical Garden has been notified as Nandankanan Wildlife Sanctuary by the Government of Orissa through a Notification dated 3rd August, 1979. The total area of 437.1 ha. (1092.75 ac or rounded to 1100 ac) of the Sanctuary has been utilized for the conservation of fauna and flora.”

19. In view of the aforesaid stand taken by the Director of Nandan Kanan Zoological Park general directions cannot be given as prayed for in this writ petition.

20. Law is well settled that a right to hold property is a constitutional right as well as human right.

21. The Hon’ble Supreme Court in ***Lachhman Dass Vs. Jagat Ram & Ors.***, (2007) 10 SCC 448, held as under:

“..... To hold property is a constitutional right in terms of Article 300-A of the Constitution of India. It is also a human right. Right to hold property, therefore, cannot be taken away except in accordance with the provisions of a statute. If a superior right to hold a property is claimed, the procedures therefore must be complied with. The conditions precedent therefor must be satisfied. Even otherwise, the right of pre-emption is a very weak right, although it is a statutory right. The court, while grating a relief in favour of a pre-emptor must bear it in mind about the character of the right vis-à-vis the constitutional and human right of the owner thereof.”

22. The Hon’ble Supreme Court in ***Chairman, Indore Vikas Pradhikaran Vs. Pure Industrial Coke and Chemicals Ltd. & Ors.***, AIR 2007 SC 2458 held as under :-

“**54.** The right to property is now considered to be not only a constitutional right but also a human right.

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56. Earlier human rights were existed to the claim of individuals right to health, right to livelihood, right to shelter and employment, etc. but now human rights have started gaining a multifaceted

approach. Now property rights are also incorporated within the definition of human rights. Even claim of adverse possession has to be read in consonance with human rights.”

23. In the fact situation, so far as acquisition of land aspect is concerned, in view of the affidavit dated 02.11.2010 of the Director of Nandankanan Zoological Park extracted above *inter alia* stating “that at present there is no proposal from Nandankanan Biological Park to acquire the land within 1 k.m. radius of the Park for declaration of that area as a green belt”, there cannot be any direction qua the land in question.

24. We make it clear that if there is infraction of any of the provisions of the Water (Prevention and Control) Act, 1974, Air (Prevention and Control) Act, 1981 and The Environment (Protection) Act, 1986 as alleged in the writ petition, the concerned Authorities are free to take necessary action against the persons concerned.

25. The writ petition is disposed of accordingly.

In view of the above judgment, interim orders passed earlier stand vacated.

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B.N.Mahapatra, J.

V. Gopala Gowda, C. J. I agree.

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Chief Justice

Orissa High Court, Cuttack
The 30th September, 2011/skj/ssd/ss