

(2003) 04 GAU CK 0026
In the Gauhati High Court
Case No : Writ Petition (C) . No. 3082 of 1999

Abdul Khalek

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 11-04-2003

Acts Referred:

Assam Executive Business Rules, 1968 — Rule 11, 12
Assam Sale of Forest Produce Coupes and Mahals Rules, 1977 — Rule 21

Citation : (2003) 3 GLT 661

Hon'ble Judges : Aftab H. Saikia, J

Bench : Single Bench

Advocate : A.S. Choudhury and R. Hussain, for the Appellant; K.C. Mahanta and U. Bhuyan, for the Respondent

Judgement

A.H. Saikia, J.—Heard Mr. A.S. Choudhury, learned Sr. counsel assisted by Mr. R. Hussain. Also heard Mr. K.C. Mahanta, learned State counsel appearing on behalf of State Respondents as well as Mr. U. Bhuyan, learned Counsel for the private Respondent No. 5.

2. The communication dated 25.5.99 issued by the Joint Secretary to the Govt. of Assam, Forest Department, Dispur, to the Chief Conservator of Forests (Territorial) Assam, Panbazar, Guwahati-1, reproducing the order dated 21.5.99 of the Minister, Forest passed after hearing the matter relating to the settlement of Pabha Game Reserve Fishery Mahal No. 1 (for short "the Fishery") on 6.5.99 in terms of the order dated 18.2.99 passed by this High Court in Writ Appeal No. 282/98 (Annexure-12 to the writ petition) has been assailed in this writ petition. The challenge has been made mainly on two grounds: (1) Failure to give reasons for canceling the extension order of the Petitioner and (2) Violation of the Assam Rules of the Executive Business, 1968(for short, "the business Rules").

3. The impugned communication dated 25.5.99 maybe read as follows:

Government of Assam Forest Department::: Dispur

No. FRS-37/92/Pt/128, Dated Dispur, the 25th May, 1999.

From Shri A.B. Md. Eunus, ACS,

Joint Secretary to the Govt, of Assam.

To,

The Chief Conservator of Forests (Territorial) Assam, Panbazar, Guwahati-1

Sub: Settlement of Pabha Game Reserve Fishery Mahal No. 1

Lakhimpur Forest Division

Sir,

I am directed to reproduce below the order dated 21.5.99 of the Minister, Forest in connection with the hearing dated 6.5.99 as per direction of the Hon''ble Gauhati High Court's order dated 18.2.99 in Writ Appeal No. 282 of 1998.

Heard both the parties through their Advocates on 6.5.99. The learned Advocate for the Petitioner (Sri Abdul Khaleque) submitted that since the matter has already been adjudicated upon by the Hon''ble High Court on 18.2.99 in Writ Appeal No. 282 of 1998, the possession of the fishery should be restored to him. On the other hand, the learned Advocate for Sri Sunanda Das submitted that the Government order dated 8.5.98 cancelling Government order dated 27.4.98 i.e., extension of the period of Mahal in favour of Sri Abdul Khaleque was in line with the provision under Rule 21 of the Assam Sales of Forest Produce(Coupes and Mahal) Rules, 1997. The learned Advocate for the Petitioner stated that the power of the Government in extending the Mahal period was discretionary. But his contention is that canceling the extension of the mahal without giving opportunity to the mahaldar of being heard was against the principle of natural justice.

On hearing the arguments put forward by both the parties, it is clear that giving extension of the Mahal falls within the discretionary power of the Government and the present extension in favour. Sri Abdul Khaleque had been void ab initio. The only snag left in canceling the extension order has been that the same was done "without affording opportunity of hearing."

The above quoted observation of the Hon''ble Gauhati High Court has put no restrictions on the Government to pass Suo-moto orders in the matter hence onward. The observation has, in effect, buttressed the same contention.

Be that as it may, after both the parties having been heard keeping in view the order dated 18.2.99 of the Hon''ble Gauhati High Court. Government is pleased to set aside the prayer made by Sri A. Khaleque for reviving extension of the Mahal in his favour, for reasons of safeguarding Government revenue. The Government, is pleased to go ahead with the settlement of the mahal in favour of Sri Sunanda Das as conveyed vide order No. FRS. 266/89/129, dated 08.5.98

You are requested kindly to communicate the above order to the parties concerned and ask the Divisional Forest Officer, Lakhimpur Division to take necessary action for its implementation.

Yours faithfully, Joint Secretary to the Govt, of Assam, Forest Department, Dispur.

4. The facts leading to filing this writ petition briefly are that initially the Fishery was settled with the Petitioner by way of "risk sale basis" by order dated 29.3.96 for a term upto 13.12.98. Having suffered severe loss out of the flood and other natural scourge during the initial period of settlement, the Petitioner approached the authority with a request for extension and the competent authorities on consideration of the said request by order dated 27.4.98 extended the lease in favour of the Petitioner for one and half years but immediately thereafter, the Govt. by order dated 8.5.98 cancelled the said extension order dated 27.4.98 and settled the said fishery with the Respondent No. 5. The said order of cancellation of the extension of the fishery in favour of the Petitioner as well as settlement of the same with Respondent No. 5 was challenged before this Court in Civil Rule No. 2379/98 which was dismissed by this Court vide judgment and order dated 15.9.98. In the Writ Appeal being W.A. No. 282/98 preferred against the said judgment and order passed in the writ proceeding, the Division Bench of this Court by order dated 18.2.99 allowed the appeal preferred by the Petitioner and quashed the order dated 8.5.98 holding that since the impugned order was passed without affording any adequate opportunity to the Petitioner, the Petitioner had a right to know the reason of cancellation and to explain the same and accordingly, the Govt. was directed to pass appropriate orders in accordance with law by giving proper notice to the Petitioner.

5. In pursuance of the said direction of this Court, as it appears from the perusal of impugned order, the matter was heard on 6.5.99 by the Minister, Forest in presence of the learned Counsel of both the parties and upon hearing both the parties by order dated 21.5.99 rejected the prayer of the Petitioner for reviving the extension of the Mahal in his favour and upheld the earlier settlement of the fishery with the Respondent No. 5.

6. Remonstrating against the impugned order, Mr. Choudhury, learned Sr. counsel for the Petitioner has vehemently argued that the Govt. failed to pass the order in accordance with the direction of the Hon'ble High Court rendered in the judgment dated 18.2.99 and the same is seemingly apparent on the face of the order itself. According to him though the Petitioner was afforded of opportunity of hearing, no reason whatsoever was assigned for such cancellation of the extension granted to him earlier. On careful perusal of the impugned order, it appears that the authority did not consider the case of the Petitioner even as hearing was given and the matter was disposed of, without giving any reason, just merely observing that giving of extension of the Mahal fell within the discretionary power of the Government and the present extension in favour of Sri Abdul Khaleque had been void ab initio. Further it was also observed that the High Court's direction did not put any restrictions on the Government to pass-

suo-moto orders in the matter hence onward.

7. Taking into consideration the findings in the impugned order, this Court finds enough force in the submission of learned Counsel for the Petitioner. It is correct that the Govt. is empowered to exercise discretionary power in a case of extension of Mahal or Coupe for the period as provided under Rule 21 of the Assam Sale of Forest Produce, Coups and Mahals Rules, 1977 (for short, the "Sale Rule") which provides as follows:

....

21. Extension of Mahal or Coupe period (1) No extension of the coupe or mahal period shall ordinarily be admissible. In exceptional cases, Government may however reserve to itself the right of extension on merit of each case at its discretion.

....

Though the Rule 21 of the Sale Rules vests in the Govt. the power to exercise its discretionary power, it is incumbent on the part of the administrative authority to adhere to the basic established principles in exercising such power. It must act in just, fair and reasonable manner, meaning, thereby, a duty has been cast on the administrative authority to assign reason whatsoever in taking a decision in order to bring transparency and fairness into the entire matter. Effort needs be made to dispel any doubt in administrative discretion. In the instant case, this Court is convinced that the authority failed to give any reason in canceling the extension of the fishery in favour of the Petitioner.

8. In his second limb of submission, Mr. Choudhury, learned Sr. counsel has urged that the impugned order ex-facie was the reflection of infraction of the Business Rules inasmuch as per Rules 11 and 12 all orders made on behalf of the Government shall be expressed to be made in the name of the Governor of Assam and shall be signed either by a Secretary, a Joint Secretary, an under Secretary or such other Officer as may be specifically empowered. For the sake of convenience those Rules i.e., Rule 11 and 12 of the Business Rules maybe noticed as under:

11. All orders or instruments made or executed by or on behalf of the Government of Assam shall be expressed to be made or executed in the name of the Governor of Assam.

12. Every order or instrument of the Government of the State shall be expressed to be made in the name of the Governor and shall be signed either by a Secretary, an Additional Secretary, a Special Secretary, a Joint Secretary, a Deputy Secretary, an Under-Secretary, or such other Officer as may be specially empowered in that behalf and such signature shall be deemed to be the proper authentication of such order or instalment.

According to the learned Counsel, in the instant case, the said instruction was

not followed. By the impugned communication, the Joint Secretary, simply reproduced the order dated 21.5.99 passed by the Minister, Forest, and as such the impugned communication is not tenable under the law being contrary to the provision of Rule 11 and 12 of the Business Rules. This Court does not propose to concur with this view expressed by the learned Counsel for the Petitioner. There is no doubt that every order or instrument of the Govt. shall be expressed in the name of Governor and the same shall be signed either by the Secretary or Joint Secretary or a Deputy Secretary or an Under-Secretary or any other officer so empowered for such purpose. But non compliance of the same, as happened, in this case, cannot vitiate the finding arrived at the Minister concerned. In a Parliamentary form of Government, the Governor, being the Executive Head of the State, has to act on the aid and advice of the Council of Ministers headed by the Chief Minister and the Governor shall, on the advice of the Chief Minister, allot amongst the Ministers the business of the Government by assigning one or more Departments to the charge of a Minister and as such it can be safely said that when the concerned Minister is assigned to one particular department for proper functioning of the Govt., the said Minister's finding relating to certain matter cannot be said to be vitiated for mere procedural irregularities. In the instant case, it appears that the Joint Secretary communicated the Government's order by reproducing the order passed by the Minister which ought to have been passed in the name of the Governor and signed by the Joint Secretary. But failure to do so, in the opinion of this Court, did not affect the finding of the Govt.

9. At this juncture, Mr. U. Bhuyan, learned Counsel appearing on behalf of the private Respondent No. 5 has pointed out that the lease period in question had already been over and thereafter fresh NIT was also floated where the Petitioner did not participate and presently the Respondent No. 5 has been enjoying the settlement of the fishery in terms of fresh settlement of the same by the Govt. It is admitted by the learned Counsel for the parties that the present settlement with the Respondent No. 5 has not been challenged in any court of law. That being so, it seems that the entire matter has virtually become infructuous. That being the admitted position, this Court finds that no direction needs be passed in this case.

10. Accordingly, this writ petition is closed.