
(2015) 09 GAU CK 0016

In the Gauhati High Court

Case No : W.P.(C) Nos. 3279 of 2011, 1439 and 7098 of 2013

Arup Kumar Choudhury and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 21-09-2015

Acts Referred:

Constitution of India, 1950 — Article 19(1)(g), 226

Citation : (2015) 5 GLT 55

Hon'ble Judges : Ujjal Bhuyan, J.

Bench : Single Bench

Advocate : A.C. Borbora, R. Borbora, M. Smith, N. Sarma, N. Das, R. Chakraborty, A.D. Choudhury, S. Deka and D. Choudhury, Advocates, for the Appellant; S. Katakey, S. Bora, D. Saikia, M. Hazarika, S. Kataki, A.N. Chowdhury, R.M. Das and M. Kalita, Advocates, for the Respondent

Final Decision : Allowed

Judgement

Ujjal Bhuyan, J.—This order will dispose of WP(C) Nos. 3279 of 2011, 1439 of 2013 and 7098 of 2013. Since subject matter of all the 3 (three) writ petitions are identical, the 3 (three) writ petitions were heard together and are being disposed of by this common order.

2. However, for the sake of convenience, facts and pleadings of each individual case are briefly stated separately at the outset.

WP(C) No. 3279 of 2011

3. By filing this petition under Article 226 of the Constitution of India, petitioners seek quashing of advertisement dated 05.04.2010, issued by the Commissioner, Gauhati Municipal Corporation (GMC) for development of the basement of GMC market at Fancy Bazar as a cold storage facility under the Public Private Partnership (PPP) mode on lease basis.

4. 27 (twenty-seven) petitioners have joined together and have instituted the present common proceeding. Petitioners were shop and stall owners in the old

GMC market at Fancy Bazar, Guwahati. The said market was gutted by fire in the year 1989. Petitioners were temporarily accommodated in a nearby place so that they could continue their business from the same area, where the earlier market stood. GMC constructed a new 3 (three) storied market building and in the year 2004, all the petitioners were shifted to the newly constructed market building where they were handed over their respective shops and stalls on payment of fresh registration fees and security deposit. Since the year 2004, all the petitioners are carrying on their business from the newly constructed GMC market.

5. A large number of vendors selling vegetables and fish were illegally carrying on their vending business on the roads and footpaths in and around the Fancy Bazar market including on the T.R. Phukan Road. According to the petitioners, this had created an unhygienic environment in the entire area besides obstructing movement of traffic and pedestrians.

6. A policy decision was taken by the Government as well as by the GMC to shift such market to a place called Paschim Boragaon on the outskirts of the city. For this purpose, lands were acquired by the district administration at Paschim Boragaon.

7. This move by the State for shifting of the vegetable market led to a series of litigation before this Court, including PIL No. 26 of 2004. All the petitions were finally dismissed and decision of the State to shift the market to Paschim Boragaon was upheld subject to certain directions that State would develop the land and infrastructure so that the vendors can carry on their business in a proper manner.

8. When Special Leave Petition was filed, the Hon'ble Supreme Court passed an order on 17.06.2010, issuing notice and directing the parties to maintain status quo.

9. It was in this backdrop that the impugned advertisement was issued by the Commissioner, GMC. Following the advertisement, an order dated 04.11.2010 was passed whereby respondent No. 2 (Commissioner, GMC) allotted 6,500 square feet of the basement area of the Fancy Bazar market to respondent No. 5 on lease for 30 years. A lease deed was executed on 30.09.2010 between the Commissioner, GMC and respondent No. 5 for 30 years. However, as per Clause - 1.11 of the Lease Deed, it was provided that if the project, i.e., construction of cold storage facility was not permissible in the area/technically not viable/not viable due to any other reasons, Commissioner reserved the right to allow the same lessee under the same terms and conditions of the Lease Deed to use the place for other commercial purpose.

10. Petitioners had no knowledge about the aforesaid development but subsequently, they came to know about it after obtaining information furnished under the Right to Information Act, 2005.

11. Aggrieved, the present writ petition has been filed.

12. Contention of the petitioners is that the aforesaid move to allow respondent No. 5 to start cold storage facility in the basement of GMC market at Fancy Bazar is nothing but an attempt to circumvent the orders of the Court and to frustrate shifting of the vegetable market to Paschim Boragaon. Further contention is that as per the Master Plan and Zoning Regulation, cold storage facility is permissible only in the Industrial and Composite Zone-II. As per the Master Plan and Zoning Regulation, the GMC market complex at Fancy Bazar falls within the commercial zone. Therefore, construction of cold storage in the basement of the GMC market complex at Fancy Bazar would be in total violation of the Master Plan and Zoning Regulation. Construction of cold storage in the basement of the GMC market at Fancy Bazar would lead to chaos in the area, inasmuch as, there will be frequent movement of heavy vehicles bringing in and taking out vegetables from the cold storage which in turn, would lead to frequent traffic congestion and pollution. It is contended that impugned advertisement was not issued bona fide.

13. On 30.06.2011, this Court while issuing notice passed an interim order to the effect that no steps should be taken for construction or erection of cold storage facility at the GMC market complex at Fancy Bazar. Thereafter, vide order dated 13.12.2012, the writ petition was admitted for hearing.

14. Respondent No. 2 has filed affidavit through the Joint Commissioner, GMC. Maintainability of the writ petition has been questioned on the ground that petitioners are strangers to the contract entered into between GMC and respondent No. 5. Therefore, such contract cannot be challenged by the petitioners that too in a proceeding under Article 226 of the Constitution of India. GMC has not been impleaded as a respondent though it is a body corporate and a necessary party to the present proceeding. Contention of the petitioners that they are facing difficulties or hardship in running their respective business due to presence of the vegetable market at T.R. Phukan Road has been denied. However, it is admitted that some vendors used to do vending business in and around the GMC market at Fancy Bazar illegally, but eviction drive was carried out against such illegal vendors from time to time. It is stated that the Master Plan and Zoning Regulation of GMC was notified vide Notification No. GMDA/MP/1/98/Part-1/103 dated 7.7.2009. According to the Master Plan and Zoning Regulation Part-II and Clause 13.3 of Table 13.1 thereof, cold storage is permissible only in Industrial and Composite Zone - II and not in a market area which falls in commercial zone. Plan of the Fancy Bazar GMC market complex was approved in the year 1989. As per the approved plan, a part of the basement was allotted specifically for cold storage but with the introduction of the notification dated 07.07.2009 notifying the Master Plan and Zoning Regulation, GMC market at Fancy Bazar falls under commercial zone, whereas cold storage can be constructed only in Industrial and Composite Zone - II.

15. Respondent No. 5 has filed a detailed counter affidavit. Preliminary objection has been raised as to the maintainability of the writ petition. It is contended that

petitioners have no locus standi to challenge the Lease Deed entered into between GMC and respondent No. 5. Petitioner cannot raise objection to the business carried on by the members of respondent No. 5, which is a fundamental right under Article 19(1)(g) of the Constitution of India. Due to execution of the Lease Deed, petitioners have not suffered any legal injury. Therefore, petitioners cannot be termed as persons aggrieved. Plan of the GMC market with provision for cold storage facility in a part of the basement area was prepared and approved in the year 1989 itself. No objection was raised by the petitioners for all these years. Even after the advertisement was issued and lease deed executed, no objection was raised; writ petition was belatedly filed on 21.06.2011. There is, thus, clear delay and laches in the filing of the writ petition. Challenge of the petitioners to the advertisement and the consequential steps taken pursuant thereto would also be barred on account of estoppel by conduct. Lastly, it is stated that the GMC market at Fancy Bazar belongs to GMC. Respondent No. 2 is an authority of GMC. GMC is a body corporate having perpetual succession and can sue and can be sued in its own name. GMC is, therefore, a necessary party to the present proceeding. However, GMC has not been impleaded as a respondent. Therefore, the writ petition is bad for non-joinder of necessary party.

15.1. On merit, it is stated that respondent No. 5 has been allotted space in the basement of the GMC market at Fancy Bazar through a tender process. Thereafter, allotment order was made and Lease Deed has been executed. Possession of the space has been handed over to respondent No. 5 and thereafter, construction was started. Objection by the petitioners is not bona fide as it is borne out of business rivalry. Stand taken by respondent No. 5 is that Master Plan and Zoning Regulation was notified on 07.07.2009. Approval to the plan of the GMC market at Fancy Bazar providing for cold storage in the basement was granted in the year 1989. Approval accorded prior to notification of the Master Plan and Zoning Regulation cannot be termed as illegal. As per the said approved plan, separate spaces in the basement of GMC market at Fancy Bazar have been provided for parking and cold storage. Petitioners cannot prevent respondent No. 5 and its members from carrying on their legitimate business on the alleged apprehension that business of respondent No. 5 would adversely affect the business of the petitioners. Therefore, respondent No. 5 seeks dismissal of the writ petition.

16. Petitioners have filed rejoinder affidavits to the counter affidavits filed by respondent No. 2 as well as by respondent No. 5.

17. Respondent No. 2 has subsequently filed an additional affidavit on 20.03.2013. In the said additional affidavit, it is stated that a resolution was adopted by the Standing Assessment Market and Trade Committee, GMC, on 01.11.2004, whereby, it was resolved to convert the proposed cold storage area to an underground market. It is further stated that GMC was suspended by the Government in the year 2008 and upon suspension of GMC, an administrator was appointed. Thereafter, advertisement and subsequent decisions were taken as

per approval of the Administrator.

WP(C) No. 1439 of 2013

18. This petition has been filed by 5 (five) shop owners. Their shops are located just adjacent to the Fancy Bazar GMC market. In this writ petition also, petitioners have challenged the Lease Deed dated 21.10.2010 as well as the allotment order dated 04.11.2010 allowing respondent No. 5 to construct cold storage in the basement of the GMC market at Fancy Bazar. It is contended that such construction besides being in violation of the Guwahati Building Construction (Regulation) Act, 2010, would lead to chaos in the Fancy Bazar area, which in turn will adversely affect their business.

19. This case was admitted for hearing on 19.03.2013 and by a subsequent order dated 24.6.2013 it was directed to be listed along with WP(C) No. 3279 of 2011.

20. No affidavit has been filed by the respondents in this case.

WP(C) No. 7098 of 2013

21. This petition has been filed by a shop owner of the GMC market at Fancy Bazar. He was earlier a shop owner of the old market which was gutted by fire in the year 1989. After the new market was constructed, he was allotted a shop therein in the year 2004 and since then, he is carrying on his business from his allotted shop in the first floor of the GMC market by filing the present writ petition, petitioner has challenged the allotment order dated 04.11.2010, whereby, GMC has allotted a portion of the basement of the GMC market at Fancy Bazar in favour of respondent No. 5 for construction of cold storage. Petitioner further seeks quashing of the lease agreement dated 30.09.2010 entered into between the GMC and respondent No. 5. Further prayer made is for a direction to the respondents to remove the vegetable and fish vendors, who are illegally carrying on their vending business in the basement of the GMC market complex in the name of cold storage facility.

22. According to the petitioner, a large number of vendors were selling vegetables and fish along the entire stretch of T.R. Phukan Road including on footpaths and in the process, obstructed traffic and movement of pedestrians. It was creating an unhygienic environment in the entire area causing severe hindrance to the conduct of business by the petitioner as it had become difficult for customers to come to the GMC market at Fancy Bazar.

23. There were numerous public complaints about unauthorized vending of vegetables in the Fancy Bazar area including on the T.R. Phukan Road. Government as well as GMC took a policy decision to shift the wholesale and retail vegetable market to Paschim Boragaon on the outskirts of the city. This led to filing of a number of writ petitions before this Court including one PIL No. 26 of 2004. All the cases were disposed of on 07.06.2010 upholding the decision of the State to shift the market to Paschim Boragaon. Respondent No. 5 preferred

Special Leave Petition before the Hon''ble Supreme Court against the order of this Court dated 07.06.2010. However, the Hon''ble Supreme Court vide order dated 23.03.2012 had dismissed the Special Leave Petition.

24. When GMC started the process of shifting, one organization called M/s. Machkhawa Vegetable Retailers Association preferred a writ petition before this Court being WP(C) No. 1703 of 2012, which was, however, dismissed on 05.04.2012. Writ appeal filed against the aforesaid decision was also dismissed. Thereafter, M/s. Machkhawa Vegetable Retailers" Association filed Special Leave Petition before the Hon''ble Supreme Court, which was, however, dismissed on 12.12.2012.

25. It is in this backdrop that the impugned move of GMC to allow respondent No. 5 to construct and operate cold storage in the basement of GMC market at Fancy Bazar is required to be considered. It is contended that construction of cold storage in the basement of the GMC market at Fancy Bazar is not only illegal but is an attempt to set up the vegetable market again in Fancy Bazar.

26. Notice in this case was issued on 16.12.2013 and by a subsequent order dated 13.05.2015, this case was directed to be listed along with WP(C) Nos. 3279 of 2011 and 1439 of 2013.

27. Respondent No. 5 has filed counter affidavit, which is almost identical to the counter affidavit filed in WP(C) No. 3279 of 2011. Similar objection, both preliminary and on merit, have been raised by respondent No. 5 against the writ petition.

28. Petitioner has filed rejoinder affidavit to the affidavit filed by respondent No. 5.

29. Heard Mr. A.C. Borbora, learned Senior Counsel, Mr. A.D. Choudhury and Mr. N. Das, learned counsel for the petitioners. Also heard Mr. S. Bora, learned Standing Counsel, GMC and Mr. S. Kataki, learned counsel for respondent No. 5.

30. Mr. A.C. Borbora, learned Senior Counsel leading the arguments on behalf of the petitioners submits that impugned advertisement as well as all consequential decisions taken thereafter are wholly impermissible in view of the Master Plan and Zoning Regulation of GMC, which came into effect from 07.07.2009. GMC market complex at Fancy Bazar is situated in a commercial zone. Under the Master Plan and Zoning Regulation, cold storage is permissible and can be set up only in Industrial and Composite Zone - II. Therefore, inviting expression of interest vide the impugned advertisement and allotment of a portion of the basement of the GMC market at Fancy Bazar to respondent No. 5 to construct cold storage facility and execution of Lease Deed for the purpose are non est in the eye of law. Reference has also been made to Section 34 of the Gauhati Municipal Corporation Act, 1971 as well as Section 2(43)(f) of the Building and Construction Regulation Act, 2010. Further submission of Mr. Borbora is that the impugned steps have to be examined in the light of the Government decision to

shift the wholesale and retail vegetable market from Machkhowa to Paschim Boragaon on the outskirts of the city, which decision has been upheld by a Division Bench of this Court and Special Leave Petition filed against which having been dismissed by the Hon"ble Supreme Court. According to learned Senior Counsel, it is nothing but an attempt to re-establish the vegetable market in the area through the backdoor. In support of his submissions, learned Senior Counsel has placed reliance on the following decisions:--

- 1) Fertilizer Corporation Kamgar Union (Regd.), Sindri and Others Vs. Union of India (UOI) and Others,
- 2) Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, .
- 3) G. Ramegowda, Major and Ors Vs. Special Land Acquisition Officer, Bangalore, .

31. Mr. S. Kataki, learned counsel appearing for respondent No. 5 has raised preliminary objection as to the maintainability of the writ petition. He has questioned the locus standi of the petitioners to question the advertisement, Lease Deed, allotment order etc. of GMC. According to him, petitioners did not respond to the impugned advertisement. They are strangers to the Lease Deed entered into between the GMC and respondent No. 5. Petitioners cannot challenge the legality and validity of the Lease Deed entered into between GMC and respondent No. 5. Learned counsel has also raised the issue of delay in instituting the challenge by the petitioners. He submits that after the old market was gutted by fire, a plan was drawn up by the approved architects of GMC in 1989 itself. As per the plan, which was approved, a part of the basement of the GMC market to be constructed afresh at the site of the old market was to be utilized for cold storage facility. This fact was known to the petitioners right from the beginning, yet it was never challenged. Even after the advertisement was issued on 05.04.2010, there was no immediate challenge to the same by the petitioners. First writ petition was filed on 21.06.2011 after the allotment order was made and after the Lease Deed was executed. Not only that, the place earmarked for cold storage in the basement was handed over to the respondent No. 5 and, thereafter, construction was started. It was only at that stage that WP(C) No. 3279 of 2011 was filed. He, therefore, submits that the writ petitions are not only hit by delay and laches, which have remained unexplained, those are also hit by waiver and acquiescence. He also submits that though Commissioner, GMC has been arrayed as a respondent, GMC has not been made a party respondent to the proceeding. Decision to have cold storage facility at the basement of the GMC market at Fancy Bazar is of the GMC, which is a body corporate with perpetual succession. It can sue or be sued in its own name. In such circumstances, GMC is a necessary party to the proceeding and in the absence of GMC, writ petition cannot be maintained. On merit, he submits that prior to notification of the Master Plan and Zoning Regulation building plan of the GMC market at Fancy Bazar was approved. Therefore, such plan would not be

covered by the Master Plan and Zoning Regulation. He submits that members of respondent No. 5 have a fundamental right to carry on trade and business in the form of vending of vegetables, which cannot be breached or taken away at the instance of the petitioners on the alleged ground that carrying on their business would adversely affect the business of the petitioners. In support of his submissions, learned counsel for respondent No. 5 has placed reliance on the following decisions:

- 1) The Nagar Rice and Flour Mills and Others Vs. N. Teekappa Gowda and Bros. and Others, .
- 2) Jasbhai Motibhai Desai Vs. Roshan Kumar, Haji Bashir Ahmed and Others, .
- 3) Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, .
- 4) State of M.P. and Others Vs. Nandlal Jaiswal and Others, .
- 5) Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, .
- 6) National Highway Authority of India Vs. Ganga Enterprises and Another, .
- 7) The Security Printing and Minting Corporation of India Limited and Another Vs. Gandhi Industrial Corporation, .
- 8) Shankara Co-op Housing Society Ltd. Vs. M. Prabhakar and Others, .
- 9) Ravi Yashwant Bhoir Vs. District Collector, Raigad and Others, .

32. Mr. S. Bora, learned Standing Counsel, GMC has adopted the arguments advanced by Mr. S. Katak, learned counsel for respondent No. 5. Additionally, he submits that construction of cold storage facility in Fancy Bazar market was permissible in the year 1989. Accordingly, plan and estimate was drawn up which was approved by the GMC. New Master Plan and Zoning Regulation have come into force from 07.07.2009. Therefore, the present cold storage would not be covered by the new Master Plan and Zoning Regulation.

33. In his reply, Mr. Borbora, learned Senior Counsel for the petitioners submits that question of delay and laches in instituting the challenge does not arise, inasmuch as, immediately, when the petitioners could come to know about the mischief being played by the GMC and respondent No. 5 they filed the first writ petition. It is the expression of interest published by way of advertisement on 05.04.2010, lease agreement dated 30.09.2010 and allotment order dated 04.11.2010, which are under challenge in the present proceeding. The first writ petition having been filed on 21.06.2011, it cannot be said that there has been delay and laches in approaching the Court. Challenge made is not to any of the clauses of the lease agreement. No relief is sought based on a claim on the Lease Deed. What is under challenge is the very basis of the Lease Deed as well as the expression of interest being contrary to law. What is contended is that there

cannot be any cold storage within the GMC market at Fancy Bazar under the law. Petitioners being shop owners of the said market certainly have the locus standi to challenge the action of GMC. On the point of non-joinder of GMC as a party respondent despite being a necessary party, learned Senior Counsel submits that on 23.08.2011, petitioners of WP(C) No. 3279 of 2011 had filed an application for impleading GMC as respondent No. 6 in the said proceeding. The said application was registered as Misc Case No. 2464 of 2011 and is pending. No objection has been filed by the respondents. In any case, he submits that in WP(C) No. 1439 of 2013, GMC has been arrayed as respondent No. 3. Since all the 3 (three) writ petitions are being heard together, on this hyper-technical ground the other 2 (two) writ petitions may not be dismissed, more so, when application for adding GMC as a party respondent is pending in WP(C) No. 3279 of 2011 for the last 4 (four) years and the case having been admitted for hearing. He finally submits that building permission granted to respondent No. 5 for construction of cold storage was for 1 (one) year only. That period has expired long back. No extension has been granted thereafter. In such circumstances, construction of cold storage in the basement of the GMC market at Fancy Bazar is not possible in any view of the matter.

34. Submissions made by the learned counsel for the parties have been considered. Also perused and considered the large number of decisions cited at the Bar.

35. Having heard learned counsel for the parties and on consideration of the materials on record, Court is of the view that the preliminary objection raised by respondent No. 5 in his affidavit may be attended to at the outset. As has already been noticed above, respondent No. 5 has raised preliminary objection as to the maintainability of the writ petitions on account of lack of locus standi on the part of the petitioners to institute the challenge, delay and laches in filing the writ petitions and consequential acquiescence and finally, non-joinder of GMC as a respondent being a necessary party.

36. From a careful perusal of the prayers made in all the writ petitions, it is seen that challenge made therein are to the expression of interest as published in the newspaper on 05.04.2010, allotment order dated 04.10.2010 and Lease Deed dated 21.10.2010. While considering objection to the maintainability of the writ petitions on the ground of delay and laches, one has to examine the same in the light of the overall facts of the case and the legal position. Objection as to the maintainability of a writ petition on the ground of delay and laches cannot be decided in a vacuum. The background facts have already been narrated above. Objections were raised by the citizens of the area against vending of vegetables and fish being carried on by the vendors in the greater Machkhawa and Fancy Bazar area on the roads as well as on the footpaths, more particularly, on T.R. Phukan Road, which had created chaos and unhygienic condition in the entire area. A sustained campaign was started in this regard which also included filing of PDL. Ultimately, the State took a decision to shift such market to Paschim

Boragaon on the outskirts of the city. This decision came to be challenged before this Court. Ultimately, Division Bench of this Court upheld the decision of the State to shift the market. Special Leave Petition filed against such decision was rejected. It is the contention of the petitioners that through the guise of cold storage respondent No. 5 is trying to set up a vegetable market afresh. It is contended that a number of vendors have started squatting on the basement of the GMC market, thus, trying to frustrate the decision of the State to shift such vendors to Paschim Boragaon as upheld by this Court. The legal point raised by the petitioners is that after coming into force of the Master Plan and Zoning Regulation in the year 2009, question of construction of cold storage in a non-permissible area such as in Fancy Bazar does not arise even though the plan was conceived prior to that. As noticed above, WP(C) No. 3279 of 2011 was filed on 21.06.2011, i.e., about 1 (one) year from the advertisement and 7/8 months from the letter of allotment. Therefore, in the light of the above, Court is of the view that WP(C) No. 3279 of 2011 cannot be said to be hit by delay and laches. Moreover, the writ petition was admitted for hearing on 13.12.2012. That being the position, the preliminary objection as to the delay in filing the writ petition is rejected. Consequently, objection as to acquiescence of the petitioners cannot also be sustained, inasmuch as, the plan and estimate for construction of cold storage in the basement of the GMC market at Fancy Bazar remained on paper from the time it was conceptualized until issuance of the advertisement. The challenge to the advertisement and the consequential steps taken has been made on the ground that those are in violation of the law. It goes without saying that there cannot be any acquiescence or estoppel against the law. In so far, locus standi of the petitioners are concerned, Court is of the view that since petitioners are shop-owners of the GMC market at Fancy Bazar and since the challenge to construction of cold storage in the basement of the GMC market is made on the ground of same being in violation of the law, petitioners have the locus standi to file the writ petitions. This leads to the question of non-joinder of GMC as a respondent to the proceedings. Though it is true that a necessary party has to be arrayed as a respondent and in the absence of the necessary party no relief can be granted, the fact of the matter is that Commissioner, GMC has been arrayed as a respondent. Impugned advertisement as well as the allotment order was issued by the Commissioner, GMC. The Lease Deed was entered into with respondent No. 5 by the Commissioner, GMC. Therefore, Commissioner, GMC is a necessary party to the proceeding. Petitioners have arrayed Commissioner, GMC as a respondent. On the point of objection of respondent No. 5 that in addition to Commissioner, GMC, GMC on its own should have been impleaded as a party respondent, it is seen that petitioners of WP(C) No. 3279 of 2011 have filed MC No. 2464 of 2011, seeking impleadment of GMC as respondent No. 6 in the proceeding. The said application was filed on 23.08.2011, 4 (four) years ago and is pending. Respondent No. 5 has not filed any objection to the said application. As already stated above, all the 3 (three) cases have been heard together since issue raised in all the 3 (three) petitions is the same. Moreover, in WP(C) No. 1439 of 2013, GMC has been impleaded as respondent No. 3 in addition to

Commissioner, GMC. In addition, Standing Counsel, GMC, has argued all the cases on behalf of GMC. In the light of the aforesaid, it cannot be said that non-joinder of GMC as a respondent in WP(C) No. 3279 of 2011 and WP(C) No. 7098 of 2013 has caused prejudice to the respondents and would defeat the cause of the petitioners as a whole. Accordingly, this objection of respondent No. 5 is also overruled.

37. Having answered the preliminary objection as above, the merit of the challenge may now be gone into. A reading of the expression of interest (advertisement) would show that GMC had proposed to lease out the basement of the GMC market at Fancy Bazar to interested private companies/individuals for development of cold storage facility. Therefore, the objective was to develop the cold storage facility in the basement of GMC market at Fancy Bazar. It is an admitted position that this advertisement was issued after the Master Plan and Zoning Regulation was notified on 07.07.2009. After coming into force of the Master Plan and Zoning Regulation, all building activities must be in conformity with the said plan and regulation notwithstanding the fact that any plan and estimate was approved much before coming into force of the Master Plan and Zoning Regulation. If such approved plan had not been executed prior to coming into force of the Master Plan and Zoning Regulation, in order to implement such plan it would have to be in conformity with the Master Plan and Zoning Regulation. It is the admitted position that setting up of cold storage facility is permissible only in Industrial and Composite Zone-II. It cannot be set up in a market area like the Fancy Bazar GMC market complex which falls under commercial zone. Though the plan of the Fancy Bazar GMC market complex was approved in the year 1989 and as per the approved plan construction of the market complex was completed in the year 2004, the cold storage was not constructed in the basement, which is stated to be a part of the approved plan. In the meanwhile, the Master Plan and Building Regulation came into force on 07.07.2009. In such circumstances, though construction of cold storage in the basement was as per the approved plan, in view of the restriction imposed by the Master Plan and Zoning Regulation the same would no longer be permissible to be constructed after 07.07.2009.

38. In the additional affidavit filed by the GMC on 20.03.2013 in WP(C) No. 3279 of 2011, it has been stated that the Standing Assessment Market and Trade Committee, GMC, after thorough discussion regarding feasibility of cold storage in the basement of the GMC market had adopted a resolution on 01.11.2004 to convert the cold storage to an underground market. The said Resolution No. 3 dated 01.11.2004 has been placed on record as Annexure-A to the said additional affidavit. For a ready reference, the said resolution is quoted hereunder:--

"The meeting held today has also discussed about the feasibility of keeping the cold storage space at the ground floor of the said market. However, while going into the depth of the subject, the Committee opined that the space in the cold

storage should be converted into market on the following grounds:--

- i) As the vehicles of light and heavy type are required to get in and out from the cold storage godown for dropping bulk materials, as such the Committee apprehends that plying of vehicles in such manner, in and around the cold storage from time to time may create pollution problem and as such the plan of keeping the market space reserved for cold storage should, therefore, be cancelled.
- ii) It is undoubtedly presumed that Cold Storage House always requires high density of electric consumption. However, considering irregular and poor electricity supply it expected that for want of proper power supply, the cold storage purpose will be disturbed and defeated as such the plan has to be cancelled.
- iii) The plying and movement of the heavy vehicles may cause threat to the longevity of the GMC market building for which the provision of keeping the space reserved for cold storage therefore requires to be cancelled.
- iv) The frequent movement of the vehicles may cause extreme traffic problems for which plan has been cancelled.

Having been aware with these problems and also keeping the interest of GMC in mind, the SAMTC thus consider it necessary to resolve that the cold storage plan in the long run may create one problem after another and as such instead of using the space for cold storage, it would indeed, be better in the larger public interest to convert the cold storage space into an underground market. Same conditions will apply of allotment in basement for space provided for cold storage. However, premium of Rs. 1 (one) lakh is fixed for allotment with required necessary registration fees of Rs. 1000/- (Rupees one thousand) and rent will be fixed at Rs. 7/- (Rupees seven) per square feet."

39. Therefore, in the light of the decision of the GMC itself, inviting expression of interest for setting up cold storage facility in the basement of the GMC market at Fancy Bazar was wholly untenable as GMC had cancelled the plan to have cold storage in the basement of the GMC market at Fancy Bazar.

40. A perusal of the Lease Deed dated 30.09.2010, particularly, Clause 1.11 thereof shows that the said area can be leased out to the same lessee for commercial purpose other than setting up of cold storage if the project is not permissible or technically not viable. This is a clear mischief as GMC had already cancelled the plan to have the cold storage in the basement of the GMC market at Fancy Bazar because it was found to be technically not feasible and viable (this was prior to coming into force of the Master Plan and Zoning Regulation w.e.f. 07.07.2009). Be that as it may, Clause-1.11 of the Lease Deed reads as under:--

"If the project is not permissible in the area/technically not viable/not viable due to any other reasons, Commissioner reserves the right to allow the same lessee

under same terms and conditions of this deed to use the place for other commercial purpose."

41. The lease deed was entered into following the expression of interest dated 04.04.2010. The expression of interest as advertised did not mention that if cold storage facility was not permissible or was not technically viable or not feasible for any other reason, the selected party would be permitted to use the same space for any other commercial purpose. No such condition being mentioned in the expression of interest, perhaps other parties, who did not have the expertise to set up cold storage facility, but had the expertise and the capacity to use the said space for other commercial purpose, could have responded to the expression of interest (advertisement). When the expression of interest was specifically for setting up of a cold-storage facility, which, in any case was earlier cancelled by the GMC itself and now is not permissible at the GMC market at Fancy Bazar under the present law, respondent No. 5 could not have been permitted to use the said space for "other commercial purpose". What is "other commercial purpose" has also not been explained or indicated. It is a very vague expression susceptible to misinterpretation and misuse. In the light of the State Government decision to shift the vegetable market from the Fancy Bazar/ Machkhowa area, and respondent No. 5 being an association of vegetable retailers, an inference may be drawn that such a decision allowing respondent No. 5 to use the basement area of the GMC market at Fancy Bazar for "other commercial purpose" may amount to allowing respondent No. 5 and its members to carry on vegetable retail trade at Fancy Bazar market. Such a course of action would be in violation of the order of this Court dated 07.06.2010 passed in PIL No. 26 of 2004 upholding the Government decision to shift the vegetable vendors represented by respondent No. 5 to Paschim Boragaon on the outskirts of the city of Guwahati. GMC as well as respondent No. 5 must be careful in their activities and ensure that they refrain from such conduct which may be suggestive of violating the order of this Court, which reads as under:--

"After long run argument, the State Government, Municipal Corporation and M/s. Machkhowa Vegetables Retailers Association have come to the following terms:--

i) The State Government would provide an alternative site to the petitioners at Paschim Boragaon on the Southern side of National Highway Bye pass at Gorchuk. It is undisputed before us that the State Government has drawn appropriate requisition proceeding under the Assam Requisition and Acquisition Act, 1964 and after issuance of the order by the Deputy Commissioner, Karmrup, Guwahati, possession of the said land has already been taken. It is also contended by the learned counsel for the State that after taking possession of the property, the land for the purpose of maintenance and development has already been handed over to the Municipal Corporation, Guwahati.

ii) That within 30 days from today, the land would be developed so that the vegetable vendors, wholesalers/retailers, are in a position to occupy the land and sell vegetables to the retailers.

iii) That after the land is developed appropriate infrastructure would be provided by the concerned authorities after taking everybody into confidence. If the vegetable vendors propose to develop the area at their own cost with the same willingness which they have proposed to develop Sonaram High School area, then they would be entitled to place their programme/projects before the State Government and the Municipal Corporation, Guwahati. If such programme/project is found to be valid and feasible, then appropriate required sanction would be given by the State Government and the Municipal Corporation, Guwahati.

In case, the vegetable vendors Association or the Fish vendors find that the place earmarked for their settlement has not been properly developed, then they would be entitled to submit their objections to the Government claiming basic minimum facilities. The parties agree that the place where as on today the vending is taking place there are no basic infrastructure nor any facilities are provided to the vegetable vendors or to the fish vendors. Everything is sold on the road and therefore, to that extent the liability would be on the State Government and on the Municipal Corporation to provide an appropriate area so that open vegetable/fish market is; properly run/managed and operated.

iv) The State Government after the above referred development shall either through the Deputy Commissioner or through the Municipal Corporation, Guwahati issue appropriate notices to the President and the Secretary of M/s. Machkhowa Vegetable Retailers Association for their shifting and within one week of receipt of such notices all the vendors, who are represented by the petitioner Association, shall shift from the TR Phookan Road to Paschim Boragaon on the Southern side of National Highway Bye pass at Gorchuck. After receipt of such notices, if the vegetable retailers do not shift from TR Phookan Road to the place earmarked for them, then the State Government so also the Municipal Corporation would be entitled to take appropriate action to close the market activities and to take appropriate measures and to place proper force for shifting of the vegetable and fish market from TR Phookan Road to Paschim Boragaon on the Southern side of NH Highway Bye pass at Gorchuck.

5. All the matters stand disposed of."

42. As already noticed, Court has been informed that SLP filed in the Supreme Court against such decision has been dismissed. That apart, GMC had on its own on 01.11.2004 had cancelled the plan to construct cold storage facility in the basement of the GMC market at Fancy Market. Furthermore, after coming into force of the Master Plan and Zoning Regulation w.e.f. 07.07.2009, construction of cold storage in market area is not permissible. GMC cannot violate its own Master Plan and Zoning Regulation.

43. In the light of the above discussions, Court is of the view that impugned action of the Commissioner, GMC in issuing expression of interest (advertisement) dated 5.4.2010, Lease Deed entered into with respondent No. 5

on 21.10.2010 and issuing of allotment order dated 04.11.2010 cannot be sustained and are hereby set aside and quashed. All the writ petitions are accordingly allowed, but without any order as to costs.