
(1972) 03 GAU CK 0007
In the Gauhati High Court
Case No : Civil Rule No. 991 of 1971

Bipin Chandra Phukan

APPELLANT

Vs

The State of Assam and others

RESPONDENT

Date of Decision : 27-03-1972

Acts Referred:

Constitution of India, 1950 — Article 154, 226, 32

Citation : (1972) 03 GAU CK 0007

Hon'ble Judges : R.S. Bindra, J;M.C. Pathak, J

Bench : Division Bench

Advocate : J.P. Bhattacharjee, Prashanta Kr. Goswami, for the Appellant; J.C. Medhi, Advocate General, Assam, K. Saran, appearing as Govt. Advocate, P.G. Barua and N.C. Das, for the Respondent

Final Decision : Allowed

Judgement

M.C. Pathak, J.—The facts of the case as appear from the record are as follows:

The Divisional Forest Officer, Sub-sagar Division (Respondent No. 4), invited tenders under the Assam Settlement of Forest Coupes and Mahals by Tender System Rules, 1967 (hereinafter referred to as the Rules) for the sale of No. 2 Kokilamukh Thatch Mahal of Mariani Range for the period from 1st October, 1971 to 30th June, 1972 by sale Notice dated 23-6-1971. Three persons filed tenders in pursuance of the said sale notice. The Secretary, Lakhimikhat Krisi-Pam-Samabai Samity, Dessoingar, Jorhat, offered Rs. 14,051/- Mileswar Bora offered Rs. 13,101.75 and Priyadhar Majumdar (Respondent No. 5) offered Rs. 8,500/-. The Divisional Forest Officer opened the tenders on 30-7-1971 and forwarded the same with his report to the Conservator of Forests (Respondent No. 4), who refused to accept any of the three tenders on the ground that two of the tenders were invalid and the bid of the third tender was too low and accordingly he directed the Divisional Forest Officer to re-advertise the Mahal. No appeal was taken by any of the tenderers against this order of the Conservator of Forests as provided under the Rules.

2. The Respondent No. 4, however, without complying with the requirements of Rule 3 regarding publication of sale notice, accepted fresh tenders from the aforesaid three persons for the second time reducing their bids. Respondent No. 5 offered Rs. 5,101/- and incidentally that was the highest bid. Respondent No. 4 then accepted the tender of Respondent No. 5 at Rs. 5,101/- and by order dated 17-9-1971 provisionally settled the thatch mahal for the period from 1-10-1971 to 30th June, 1972 subject to appeal that may be preferred by any party under the Rules. Coming to know about this settlement without publication of the sale notice as required under Rule 3, the Petitioner and Respondents 6, 7 and 8 submitted an application dated 21-9-1971 before the Conservator of Forests praying for setting aside the order of the Divisional Forest Officer and for directing settlement of the Mahal after issuing fresh sale notice. The Conservator of Forests after calling for a report on the petition found that apart from the complaints received from the Petitioner and others, the publicity of the sale notice for the second time was inadequate and the offers received were very low in comparison to sale price of the Mahal in question for the last few years and therefore directed the Divisional Forest Officer to withdraw the said thatch mahal from settlement under Rule 20 of the Rules and to re-advertise the sale notice properly. In pursuance of the order of the Conservator of Forests, Respondent No. 4 cancelled the provisional settlement of the thatch mahal with Respondent No. 5 and issued fresh sale notice on 4-10-1971 inviting fresh tenders for settlement of the aforesaid mahal for the period from 1st November, 1971 to 30th June, 1972. The last date for submission of tender was fixed on 26th October, 1971.

3. The Respondent No. 5, there-after submitted an application to the Minister-in-charge of Forests, Assam against the order of Respondent No. 3. The Minister of Forests by order dated 25-10-1971 stayed the operation of the sale notice dated 4th October, 1971 by wire. In view of the stay order, Divisional Forest Officer in the meantime notified that no tenders would be accepted and so the Petitioner and others could not file tenders. The petitioner then submitted an application dated 4-11-1971 before the Chief Conservator of Forests for giving him an opportunity of being heard at the time of hearing of Respondent No. 5's application before the Minister of Forests. Subsequently the Petitioner was made a party and notice was issued to him, and the matter was heard by the Minister of Forests on 10-11-1971. On 17-11-1971 the Government passed an order directing the Conservator of Forests to rescind his earlier order and to confirm the settlement of the mahal with Priyadhar Majumdar at his own bid of Rs. 8,500/- offered by him in pursuance of the first sale notice.

4. The present writ petition is directed against the order dated 17-11-1971 passed by the Government.

Mr. J. P. Bhattacharjee, the learned counsel appearing for the petitioner, submitted that the settlement order dated 17-11-1971 passed by the State Government in favour of Respondent No. 5 was in contravention of the Rules for

Settlement of Forest Coupes and Mahals and it was without jurisdiction and illegal.

Dr. J. C. Medhi, the learned counsel appearing for Respondent No. 5. and Mr. K. Sarma, the learned counsel appearing for the State, submitted that the impugned order of the State Government was quite within jurisdiction and valid in law. Their further submission was that even if it were assumed that the impugned order was not in conformity with the Rules or without jurisdiction, the Petitioner had no legal right to move this Court under Art. 226 of the Constitution and as such in any view of the matter the petitioner was not entitled to any relief in this writ petition.

5. u/s 34(1) of the Assam Forest Regulation. 1891, (hereinafter referred to as the Regulation), no person shall make use of any forest produce of any land at the disposal of the Government and not included in a reserved forest or village forest, except in accordance with rules to be made by the State Government in this behalf, or as provided by Section 36 of the Regulation. Sub-section (2) of S. 34 deals with matters which may be regulated, prescribed or authorised by such rules.

6. It is common case that the Thatch Mahal in question is covered by the provisions of Section 34 of the Regulation. The Assam Settlement of Forest Coupes and Mahals by Tender System Rules. 1967, have been framed by the Governor of Assam in exercise of the powers conferred by Sections 33, 34 and 72(e) of the Regulation. The law is now well settled that if for the exercise of a particular executive power of the State Government some law, regulation or rule is enacted, made or framed, such executive power must be exercised by the State Government or any of its officers having jurisdiction to do so in accordance with such law, regulation or rule as the case may be.

In this connection the following observations of the Supreme Court in *Rai Sahib Ram Jawaya Kapur and Others Vs. The State of Punjab*, , may be usefully quoted:-

The executive Government, however, can never go against the provisions of the Constitution or of any law. This is clear from the provisions of Art, 154 of the Constitution.

The following observations of the Supreme Court in *T. Cajee Vs. U. Jormanik Siem and Another*, , are also apposite:-

Doubtless when regulations are made under para 19 (1) (b) or laws are passed under para 3(1) with respect to the appointment or removal of the personnel of the administration, the administrative authorities would be bound to follow the regulations so made or the laws so passed.

7. Section 33 of the Regulation lays down that use of any forest produce as in the instant case may be made only in accordance with Rules to be made by the State Government in this behalf. u/s 33, the State Government have made the

Rules of 1967. No overriding power of settlement of the coupes or mahals has been retained or reserved in favour of the State Government in any of these Rules. In the circumstances we are clearly of the opinion that the settlement of the coupes and mahals covered by the Rules of 1967 may be made in accordance with those Rules only and not in any other manner. This view, in our opinion, is in complete accord with the concept of the Rule of law enshrined in the Constitution.

8. In the instant case therefore the settlement of the forest mahal in question may be made only in accordance with the Rules framed in this regard. Under Rule 3 of the Rules a notice calling for tender for settlement of a coupe or a mahal shall be published in the Official Gazette not less than 15 days before the last date fixed for submission of tender.

Admittedly the second sale notice was not published in the official Gazette. It was stated in the counter affidavit filed on behalf of the Government that the sale notice was locally circulated and affixed in notice board of some offices. In other words the Respondents' submission is that there was substantial compliance with Rule 3. In view of this submission, the question arises whether R. 3 is mandatory or directory.

Rule 3 is in the following terms:

3. Notice for tender.- A notice calling for tender for settlement of a coupe or a mahal shall be published in the Official Gazette not less than 15 days before the last date fixed for submission of tender.

The purpose of publication of the notice in the Official Gazette is to get it circulated throughout the whole State so that any person interested in the settlement of the coupe or mahal may, if he so chooses, file a tender. The wide publication opens an opportunity to persons already interested in such settlement or persons who may be interested for the first time in these days of acute unemployment in the State. The wide publication is also in the interest of public revenue inasmuch as it will check collusive low bid. The publication in the Official Gazette as required under Rule 3 will also check favouritism, nepotism and making settlement unfairly to the detriment of public revenue making a show of observation of the other Rules.

9. In *The Collector of Monghyr and Others Vs. Keshav Prasad Goenka and Others*, the Supreme Court observed:-

The question whether any requirement is mandatory or directory has to be decided not merely on the basis of any specific provision which, for instance, sets out the consequences of the omission to observe the requirement, but on the purpose for which the requirement has been enacted, particularly in the context of the other provisions of the Act and the general scheme thereof.

In *Raza Buland Sugar Co. Ltd. Vs. Municipal Board, Rampur*, the majority of the Hon'ble Judges in that case observed:-

The question whether a particular provision of a statute which on the face of it appears mandatory inasmuch as it uses the word "shall" or is merely directory cannot be resolved by laying down any general rule and depends upon the facts of each case and for that purpose the object of the statute in making the provision is the determining factor. The purpose for which the provision has been made and its nature, the intention of the legislature in making the provision, the serious general inconvenience or injustice to persons resulting from whether the provision is read one way or the other, the relation of the particular provision to other provisions dealing with the same subject and other considerations which may arise on the facts of a particular case including the language of the provision, have all to be taken into account in arriving at the conclusion whether a particular provision is mandatory or directory.

Considering the purpose of Rule 3 and the observation of the Supreme Court regarding the mandatory or directory nature of a particular provision of law, we hold that Rule 3 of the Rules is mandatory.

In the circumstances we are of the opinion that the order dated 17-9-1971 passed by the Divisional Forest Officer was in contravention of the mandatory Rule 3 and this illegality was considered by the Conservator of Forests and therefore he correctly cancelled the provisional settlement order made by the Divisional Forest Officer, and correctly directed withdrawal of the mahal from sale and for settlement in accordance with Rules after issuing fresh sale notice. Accordingly the Divisional Forest Officer issued the sale notice dated 4-10-71.

10. Under the Rules the State Government has no power of direct settlement except in accordance with the Rules. In pursuance of the second sale notice, the Divisional Forest Officer settled the mahal with Respondent No. 5 which was set aside by the Conservator of Forests. Under Rule 9 an order in appeal passed by the Conservator of Forests is final and no second appeal or revision lies to the Government under the Rules. The learned counsel for the Respondents could not point out any provision in these rules by which the State Government could settle the mahal with Respondent No. 5.

We have already observed that when the tenders filed in pursuance of the first sale notice were rejected by the Conservator of Forests, no appeal or revision or representation was filed or made against that order of the Conservator by the interested parties and as such that order of the Conservator remained as a final and valid order and consequently there cannot be any scope for subsequently reopening the question of non-acceptance of any of the tenders filed in pursuance of the first sale notice dated 23-5-1971.

11. Under the Rules a tender may be accepted or rejected. Under Rule 5 a tenderer has to deposit earnest money before submission of any tender. Under Rule 6 (4) (i) a tender shall be accompanied with a copy of the treasury challan or bank draft evidencing deposit of the prescribed earnest money. Any tender filed without first depositing the earnest money required under Rule 5 cannot be

entertained. In the instant case the Conservator of Forests rejected all the three tenders filed in pursuance of the first sale notice dated 23-6-1971 by his order dated 16-8-1971 and thereafter Respondent No. 5 withdrew the earnest money. That being the position so far as his tender filed in pursuance of the first sale notice, Respondent No. 5 must be held to have withdrawn his tender or in other words after the withdrawal of the earnest money. Respondent No. 5's tender filed in pursuance of the first sale notice ceased to exist in the eye of law. The impugned Government order settling the mahal with Respondent No. 5 Priyadhar Majumdar at his own bid of Rs. 8,500/- as per the first sale notice was wholly without jurisdiction inasmuch as when the order was passed on 17-11-1971 by the Government there was no tender of Respondent No. 5 in the eye of law, he having withdrawn the earnest money. The language of Rule 17 goes to show that any tenderer whose tender has been accepted is not entitled to withdraw the earnest money till he has paid up all the instalments of the sale price as determined under R. 15. because that is subject to forfeiture on account of non-compliance with any of the matter mentioned in Rule 17.

On consideration of the facts of the case and the law applicable thereto we are clearly of opinion that the impugned order of the State Government settling the mahal with Respondent No. 5 on his tender filed in pursuance of the first sale notice was without jurisdiction and bad in law being in violation of the Rules.

12. The learned counsel for the Respondents strenuously submitted that in the instant case the petitioner had no locus standi to move this Court in writ jurisdiction inasmuch as he had no fundamental or legal right which was infringed or abridged and he was not an interested person entitled to challenge the impugned order in a writ petition. The learned counsel submitted that even if it were assumed that the impugned order of the State Government was without jurisdiction and made in contravention of the statutory Rules, he was not entitled to any relief in the writ petition under Art. 226 of the Constitution, which was after all a discretionary relief.

13. Dr. J. C. Medhi, the learned Advocate General of Assam, appearing on behalf of Respondent No. 5 referred to a number of Supreme Court decisions on the question who is entitled to file a petition under Art. 226 of the Constitution.

We may here consider a few of those decisions. In *The State of Orissa Vs. Madan Gopal Rungta*, , Kanja, C. J. delivering the court's judgment observed as follows:-

The language of the Art. 226 shows that the issuing of writs or directions by the Court is founded only on its decision that a right of the aggrieved party under Part III of the Constitution (Fundamental Rights) has been infringed. It can also issue write or give similar directions for any other purpose. The concluding words of Art. 226 have to be read in the context of what precedes the same. Therefore the existence of the right is the foundation of the exercise of jurisdiction of the Court under this Article.

In The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal

and Others, , Subba Rao, J. delivering the Court's judgment observed as follows:-

The first question that falls to be considered is whether the appellant has locus standi to file the petition under Art.226 of the Constitution. The argument of the learned counsel for the respondents is that the appellant was only managing the industry and it had no proprietary right therein and therefore, it could not maintain the application. Article 226 confers a very wide power to the High Court to issue directions and writs of the nature mentioned therein for the enforcement of any of the rights conferred by Part III or for any other purpose. It is, therefore, clear that the persons other than those claiming fundamental rights can also approach the Court seeking a relief thereunder. The Article in terms does not describe the classes of persons entitled to apply thereunder; but it is implicit in the exercise of the extraordinary jurisdiction that the relief asked for must be one to enforce a legal right. In *The State of Orissa Vs. Madan Gopal Rungta*, this Court has ruled that the existence of the right is the foundation of the exercise of jurisdiction of the Court under Art. 226 of the Constitution. In *Chiranjit Lal Chowdhuri Vs. The Union of India (UOI) and Others*, it has been held by this Court that the legal right that can be enforced under Art. 32 must ordinarily be the right of the petitioner himself who complains of infraction of such right and approaches the Court for relief. We do not see any reason why a different principle should apply in the case of a petitioner under Art. 226 of the Constitution. The right that can be enforced under Art. 226 also shall ordinarily be the personal or individual right of the petitioner himself, though in the case of some of the writs like habeas corpus or quo warranto this rule may have to be relaxed or modified.

From the facts of the case in *The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others*, as discussed in the judgment it is found that Calcutta Gas Company was appointed as Manager and the general management of the affairs of the Oriental Gas Co. was entrusted to it for a period of 20 years. In its capacity as Manager, Calcutta Gas Co. was put in charge of the entire business of Oriental Gas Co. and its assets in India and the former was given all the incidental powers necessary for the said management. Under the agreement Calcutta Gas Co. had the right to manage the Oriental Gas Co. for a period of 20 years and to receive remuneration for the same.

On the above facts the Supreme Court observed at page 1048 of the report as follows:-

Under the agreement, the appellant had the right to manage the Oriental Gas Company for a period of 20 years and to receive remuneration for the same. But u/s 4 of the impugned Act, it was deprived of that right for a period of five years. There was certainly a legal right accruing to the appellant under the agreement and that was abridged, if not destroyed, by the impugned Act. It is, therefore, impossible to say that the legal right of the appellant was not infringed by provisions of the impugned Act. In the circumstances, as the appellant's

personal right to manage the Company and to receive remuneration therefor had been infringed by the provisions of statute, it had locus standi to file the petition under Art. 226 of the Constitution.

14. In *Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others*, , *Subba Rao, J.*, as he then was delivering the Court's judgment, after quoting the relevant observations of the Supreme Court in *The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others*, dealing with the question of locus standi of the appellant in that case to file a petition under Art. 226 of the Constitution in the High Court observed:-

This court held in the decision cited supra that ordinarily the petitioner who seeks to file an application under Article 226 of the Constitution should be one who has a personal or individual right in the subject-matter of the petition. A personal right need not be in respect of a proprietary interest; it can also relate to an interest of a trustee. That apart, in exceptional cases as the expression "ordinarily" indicates, a person who has been prejudicially affected by an act or omission of an authority can file a writ even though he has no proprietary or even fiduciary interest in the subject-matter thereof. The appellant has certainly been prejudiced by the said order. The petition under Art. 226 of the Constitution at his instance is, therefore, maintainable.

In the instant case the petitioner has submitted that because of non-publication of the second sale notice in accordance with the mandatory rule, the petitioner could not submit his tender and that he was interested in obtaining settlement and would have submitted his tender if appropriate notice were given following the rules. In their affidavits the Respondent No. 5 as well as the Under Secretary to the Government of Assam Forest Department, did not admit that the petitioner was interested in obtaining settlement of the mahal on the ground, inter alia, that the Petitioner did not file any tender in pursuance of the first sale notice nor did he file any tender for thatch mahal on any occasion previously. In his application the Petitioner has stated that he is the present lessee of the Auniati Lakhiraj Thatch Mahal and that he is associated with the forest department for about ten years last and he took settlement of various coupes before entering into the thatch business. That the Auniati Thatch Mahal of which the Petitioner is the present lessee is adjacent to the thatch mahal in question and as such the Petitioner is very much interested in obtaining the settlement of the thatch mahal in question. On the facts disclosed from the materials on record it cannot be said that the Petitioner is not interested in settlement of various coupes and mahals and particularly in the settlement of the thatch mahal in question which is adjacent to the Auniati Lakhirai Thatch Mahal settled with the Petitioner. If there would have been publication of the second sale notice it could not be legally presumed that the Petitioner would not have filed any tender. He is not debarred under any rule or law for filing a tender in pursuance of a sale notice. The facts of the case go to show that the petitioner is dwelling an adjacent thatch mahal and he can reasonably be held to be interested in

settlement of Government thatch mahal. In the circumstances the Petitioner is found to be an affected person by the impugned order of the State Government which we have already found to be in contravention of the Rules and without jurisdiction.

15. In K.N. Guruswamy Vs. The State of Mysore and Others, , Bose, J. delivering the Court's judgment observed as follows:-

But that apart, this would, in our opinion, run counter to the policy of the legislature which is that matter of such consequence to the State revenue cannot be dealt with arbitrarily and in the secrecy of an office. Whatever is done must be done either under the Rules or under a Notification which would receive like publicity and have like force, and of which the people at large would have like notice. Arbitrary improvisation of an "ad hoc" procedure to meet the exigencies of a particular case is ruled out. The grant of the contract to Thimmappa was therefore wrong.

The next question is whether the appellant can complain of this by way of a writ. In our opinion, he could have done so in an ordinary case. The appellant is interested in these contracts and has a right under the laws of the State to receive the same treatment and be given the same chance as anybody else. Here we have Thimmappa, who was present at the auction and who did not bid - not that it would make any difference if he had, for the fact remains that he made no attempt to outbid the appellant. If he had done so it is evident that the appellant would have raised his own bid.

The procedure of tender was not open here because there was no notification and the furtive method adopted of settling a matter of this moment behind the backs of those interested and anxious to compete is unjustified. Apart from all else, that in itself would in this case have resulted in a loss to the State because, as we have said, the mere fact that the appellant has pursued this writ with such vigour shows that he would have bid higher. But deeper considerations are also at stake, namely the elimination of favouritism and nepotism and corruptions not that we suggest that that occurred here, but to permit what has occurred in this case would leave the door wide open to the very evils which the legislature in its wisdom has endeavoured to avoid. All that is part and parcel of the policy of the legislature. None of it can be ignored.

16. In the facts and circumstances of the instant case and in view of the observations of the Supreme Court in this regard, we hold that the Petitioner has locus standi to file the petition under Art. 226 of the Constitution in this case. The Respondents' contention that the Petitioner has no locus standi to file the writ petition, has no substance.

17. In the result this petition is allowed and the impugned order of the State Government dated 17-11-1971 setting aside the order of the Conservator of Forests dated 1-10-1971 and settling the thatch mahal in question with Respondent No. 5. is quashed. We further direct that the order of the

Conservator of Forests dated 1-10-1971 directing settlement of the thatch mahal in accordance with Rules after due publication of the sale notice as required under the Rules shall be given effect to by the Respondents 1 to 4. The Rule is made absolute. The petition is allowed with costs payable by Respondent No. 1. Advocate's fee is assessed at Rs. 200/-.

K.S. Bindra, J.:

18. I agree.

Rule made absolute.