

(2000) 09 OHC CK 0013

In the Orissa High Court

Case No : Original Jurisdiction Case No. 5105 of 2000

Chintamani Bhue and Others

APPELLANT

Vs

Collector and Others

RESPONDENT

Date of Decision : 08-09-2000

Acts Referred:

Orissa Grama Panchayat Rules, 1968 — Rule 86, 86(2), 87

Citation : (2000) 2 OLR 521

Hon'ble Judges : P.K. Misra, J

Bench : Single Bench

Advocate : Samir Kumar Mishra, S. Dash and S. Dutta, for the Appellant; A.R. Dash, N. Lenka, N. Das, for OP 4 and H.S. Mishra, for OP 5, for the Respondent

Judgement

P.K. Misra, J.—Heard Mr. S.K. Misra for the petitioners, learned Additional Government Advocate for opposite parties 1 to 3, Mr. H.S. Misra for opposite party No. 5 and Mr. A.R. Dash for opposite party No. 4.

2. The dispute in the writ application relates to a ferry ghat which adjoins Chadeipank Grama Panchayat on one side and Binika Notified Area Council on the other side of river Mahanadi. It is apparent from Annexure-1 that it was decided to put the ferry ghat to auction for the year 2000-2001 in accordance with Rule 87 of the Orissa Grama Panchayat Rules, 1968 (in short, the "Rules")- It may be noticed that for previous two to three years also the ferry ghat had been put to auction. As per Annexure-1, the auction was scheduled to be held by the Block Development Officer (in short, the "B.D.O."), the prescribed authority to hold the auction as contemplated in Rule 87 (d) of the Rules, on 28.3.2000 at 11.00 A.M. and accordingly the notice dated 10.3.2000 (Annexure-2) was duly issued. While the matter stood thus, by a subsequent notice dated 25.3.2000 (Annexure-3), the B.D.O. issued a notice to the general public stating that the auction cannot be hold on 28.3.2000 due to "some unavoidable reasons". However, in the said Annexure-3, reason for not holding the auction had not been indicated. It appears that subsequently, the Collector has given a direction

that the ferry ghat in question should be settled with present opposite party No. 5. The action of the B.D.O. in not holding the auction as well as the action of the Collector in directing that the ferry ghat in question should be settled with opposite party No. 5 is being impugned in the present writ application.

3. Opposite party No.1, the Collector, has filed a counter. Without indicating anything as to under what authority auction was directed not to be held, opposite party No. 1 has tried to justify the auction by stating that on some earlier occasions, the highest bidder who had taken the ferry ghat on auction had exploited the boatmen and had not paid the minimum wages payable. It is also indicated that decision has been taken to settle the ferry ghat with opposite party No. 5 in accordance with the provisions contained in Rule 86(2) and (3) of the Rules.

4. Opposite party No. 5 has filed a separate counter affidavit wherein it is indicated that opposite party No.5 is a Society consisting of fishermen and members of such Society were being earlier engaged by the previous highest bidders of the ferry ghat and were not being paid their minimum daily wages on earlier occasions. It has been indicated that with a view to improve the condition of these fishermen, a scheme has been prepared by the Collector and on the basis of such scheme, the Society has been registered.

5. The learned counsel for the petitioners has contended that the question of settlement of ferry ghat management of which is vested in any Grama Panchayat is to be decided in accordance with the provisions contained in the Orissa Grama Panchayat Act and the Rules framed thereunder. The relevant provisions of Rules 86 and 87 of the Rules are extracted hereunder :

"86. Transfer of Property.

(1) No immovable property vested in Grama Sasan shall be transferred by way of sale, gift, mortgage or exchange without the approval of the State Government.

(2) Whenever in respect of any property vested in or under the management and control of the Grama Sasan, the State Government deem it expedient so to do, they may by general or special order made in that behalf and subject to such conditions, as may be specified therein direct that such property shall be leased out in favour of any Registered Co-operative Societies by negotiation. The agreement for such lease shall be in Form-F.

(3) Notwithstanding anything contained in these rules, the water area vested in or under the management and control of the Grama Sasan may with the approval of the Collector be leased out by negotiation for a period not exceeding ten years in favour of an individual who is a fishermen by caste or profession, any group of individuals or a registered Co-operative Society consisting only fishermen by caste or profession, landless labourers, marginal farmers, scheduled caste and scheduled tribe persons, who are desirous to take pisciculture on modern lines in such water area and are recommended by the

Chief Executive Officer of the Fish Farmer Development Agency within whose operational jurisdiction such water area is situated. When such agency is not in operation such recommendation can be made by the district level Fisheries Officer. The lease consideration for the first two years of the lease shall not be less than the amount equal to average of the lease amount of the water area for the last three years and from the third year shall be at the rate of five hundred rupees per year per hectare. The lease amount for a year should be paid in advance and if the amount is not paid in advance, the lease shall automatically stand cancelled. The agreement for such deed shall be in Form "F".

(4) The management of the property vested in a Grama Sasan for the time being in any manner whatsoever, excepting the property mentioned in Sub-rule (3), shall be made in the manner hereinafter provided.

87. (a) Before the end of October of each year, the Sarpanch shall forward to the Sub-divisional Officer, through the Block Development Officer, a list of immovable properties whether directly managed by the Grama Panchayat or leased out, specifying the location of each such property, with income derived from each of such property, during the last three years in Form No. 8. In case the Sarpanch fails to forward the list of immovable properties within the time-limit specified, the Sub-divisional Officer shall call for necessary information from the Grama Panchayat concerned. After excluding the properties, which are leased out or to be leased out under Sub-rule (2) of Rule 86. and such other properties which shall be decided by the Sub-divisional Officer to be managed by Grama Panchayat directly, other properties shall be leased out by public auction in the manner hereinafter prescribed.

**** ** *** (d) The Sub-divisional Officer shall send a list of properties, that are to be leased out by public auction indicating the period of lease and upset price, to the respective Block Development Officers who shall thereupon fix the date for auction of all or any of such properties and issue notices for auction sale. He may authorise any other officer to conduct auction sale of properties whose upset price is rupees one hundred only or less. The notice for auction shall be issued before fifteen clear days of the date fixed for auction and shall be published in the notice board of the Panchayat, Panchayat Samiti, Sub-division Office and at such other place or places as the Block Development Officer or his junior officer, as the case may be, deem necessary.

**** ** *** (i) If for any reason (which must be recorded in writing) the auction does not take place on the fixed date or the minimum bid in respect of any property is not reached in the auction, a fresh auction shall be held on a subsequent date to be fixed by the officer conducting the auction. The notice for such auction shall be published in the notice board of the Panchayat, Panchayat Samiti, Sub-division Office and such other place or places as the officer conducting the auction may deem necessary before fifteen clear days of the date fixed for the auction.

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There is no doubt that the provisions contained in Rules 86 and 87 must be construed harmoniously. A combined reading of Rule 86(2) and Rule 87(a) makes the following things clear :

(a) when the State Government deem it expedient so to do, they may by general or special order made in that behalf, direct any property under the management and control of the Grama Sasan to be leased out in favour of any registered Co-operative Society by negotiation;

(b) The appropriate authority, namely, the Sub-divisional Officer may decide that any property may be directly managed by the Grama Panchayat;

(c) Properties which are not to be given on the basis of negotiation under Rule 86 (2) or to be directly managed by the Grama Panchayat under Rule 87 (a) "shall be leased out by public auction in the manner hereinafter prescribed". (The other provisions contained in Rule 87 prescribe the manner of holding the auction and other ancillary features).

Rule 87(d) which has already been extracted is important. It is not disputed that in the present case on the basis of action of the Sub-divisional Officer in accordance with Rule 87 (d), the B.D.O. had fixed the date of auction.

6. From the aforesaid, it is amply clear that unless the State Government decides by general order or special order to lease out any particular property by negotiation with a registered Co-operative Society, as envisaged in Rule 86(2), other properties shall either be managed by the Grama Panchayat or settled in accordance with Rule 87. There is no dispute that in the present case, it had been decided that the ferry ghat in question shall be put to public auction. The opposite parties do not claim that the State Government has taken any decision by general or special order to lease out the ferry ghat in question by negotiation with any registered Co-operative Society. It is also not the case of opposite parties that the ferry ghat in question is to be directly managed by the Grama Panchayat.

7. The learned counsel appearing for opposite party No. 5 in course of hearing of this writ application has produced a copy of the letter No. 8122/G&M., dated 26.3.1999 written by the Collector, Sonapur, to the Revenue Divisional Commissioner recommending that the ferry ghat in question should be settled with the present opposite party No. 5. Even though the said letter does not form a part of the record as the same has not been filed with the counter of opposite party No. 1 or even the counter of opposite party No. 5, yet I have perused the same. I do not find anything in the said letter which justifies the postponement of the auction. That letter had been written in August, 1999. Obviously, the Collector had initiated a proposal that the property should be settled by way of negotiation in accordance with Rule 86. However, decision in accordance with Rule 86 (2) is yet to be taken by the State Government. Moreover, in spite of

such letter being written in August, 1999, it is obvious that the competent authority had subsequently taken the decision to put the ferry ghat to auction. Merely because the Collector had recommended that the ferry ghat in question should be settled in accordance with Rule 86 (2) by way of negotiation, the auction which had already been notified could not have been postponed.

8. Rule 87(i) clearly envisages that "if for any reason (which must be recorded in writing) the auction does not take place on the fixed date..... a fresh auction shall be held on a subsequent date to be fixed by the officer conducting the auction." In the present case, in the notice about the stoppage of the auction no reason has been given. Merely indicating that the auction cannot be held due to "unavoidable reasons" does not amount to giving of reason. Even in the counter affidavit filed by opposite party No. 1, no reason has been indicated as to why the auction which had been fixed was postponed. Curiously enough it has been stated that such auction was stopped on the basis of a phone call received.

9. Rule 87(i) further contemplates that if for any reason, the auction does not take place, the officer conducting the auction shall fix a date for holding fresh auction. In the present case, Annexure-3 simply indicates that the auction is not to take place and no fresh date has been fixed. It is thus obvious that the notice under Annexure-3 is in gross contravention of the provisions contained in Rule 87 (i).

10. The learned counsel appearing for opposite party No. 5 has tried to justify the economic and social reasons for which the Collector had decided to settle the ferry ghat with opposite party No. 5. Even assuming that the suggestion of the Collector, keeping in view its so-called objectives, is very laudable, the legality of such action has to be tested with the touchstone of the provisions contained in the Orissa Grama Panahayat Act and the Rules framed thereunder.

The learned Addl. Government Advocate appearing for opposite party No. 1 has very fairly submitted that under the relevant provisions of the Act or the Rules, there is no such power authorising the Collector to stop the auction. Even though in the counter affidavit, reference has been made to Rule 86(2) and (3), on closer scrutiny it becomes clear that Rule 86(2) and Rule 86(3) do not justify that action. Rule 86(2) vests the power with the State Government. Even though for some purposes, the Collector of a district may be said to be the representative of the State Government, it cannot be said that for the purpose of Rule 86(2), the State Government means, the Collector. The State Government obviously means the head of the appropriate Department. This becomes clear from the fact that the authority is vested with the State Government in Rule 86(2) whereas Rule 86(3) refers to the power of the Collector. In fact, in course of hearing of the writ application, the learned counsel for the State as well as opposite party No. 5 have fairly stated that the action of the Collector was only recommendatory in nature and he has forwarded the proposal to the Revenue Divisional Commissioner for sending the same to the State Government for consideration. If and when the State Government takes a decision that the ferry

ghat in question is to be settled by negotiation with any particular registered Co-operative Society, then only such decision, if otherwise valid and legal, is to be implemented. Before that, in anticipation of such decision of the State Government, it was not open to the Collector, nor any subordinate official not to hold the auction which had already been notified.

11. A bare reading of Sub-rule (3) of Rule 86 makes it clear that it has got no application to operate a ferry ghat. Sub-rule (3) of Rule 86 indicates that if there is any proposal for taking any water area for pisciculture on modern lines, such water area may be settled by way of negotiation on long term basis. It is not understood as to how opposite party No.1 has tried to justify the action by making a reference to Sub-rule (3). It only shows gross non-application of mind on the part of the opposite party.

12. It is also contended that the previous contractors had exploited the boatmen and huge amounts were yet to be received from them. If the previous contractors were exploiting the persons engaged as boatmen, it was open to the appropriate authority to take proper action in accordance with law. Similarly, if the auction amount has not been realised from the previous Contractors, it was open to the authority including the Grama Panchayat to realise the amount by initiating appropriate proceeding, but these facts do not justify postponement of the auction.

13. Learned counsel for opposite party No. 5 has vehemently contended that even assuming that the notice of not holding the auction is illegal, yet no direction can be given by the High Court to the B.D.O. to hold any fresh auction. This submission ignores the statutory duty conferred on the authority as envisaged in Rule 87(i). If the notice about not holding the auction is not justified, there cannot be any doubt that such notice has to be quashed. Similarly, if it is found that the authority enjoined to act in accordance with the statutory provision contained in Rule 87(i) has not acted in accordance with such provision, a writ of mandamus can be directed to such authority to act in accordance with the provisions contained in the statute. Since the notice does not indicate any reason and subsequent counter affidavit also does not give any justification for not holding the auction, there cannot be any doubt that the notice under Annexure-3 is illegal and if for any justifiable reasons, the auction had been postponed, it was incumbent upon the authority in accordance with the provision contained in Rule 87(i) to fix a fresh date for auction. Since such statutory duty has not been performed by the public authority, namely, the B.D.O., an appropriate writ is to be issued. For the aforesaid reasons, the notice/order under Annexure-3 is quashed. Opposite party No.2 is directed to hold auction in accordance with the provisions contained in Rule 87 as expeditiously as possible preferably within a period of one month.

14. From the counter of opposite party No. 5, it appears that the Collector has requested the Sub-Collector to settle the ferry ghat in favour of opposite party No.5. Since such a power is not vested with the Collector, such direction cannot

be held to be valid or legal. It further appears that the Grama Panchayat has permitted the present petitioner No. 1 to operate the ferry ghat until further orders. The auction in question should be held as expeditiously as possible. Till auction is held, the arrangement made by the Grama Panchayat shall continue.

Subject to the aforesaid observation and direction, the writ application is allowed. There will be no order as to costs.