(2023) 08 OHC CK 0214

In the Orissa High Court

Case No : Writ Petition (C) No. 27195 Of 2023

Madan Mohan Pradhan	APPELLANT
Vs	
State Of Odisha And Others	RESPONDENT

Date of Decision : 28-08-2023

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Mines and Minerals (Development and Regulation) Act, 1957 — Section 15(1)
Odisha Minor Mineral Concession Rules, 2016 — Rule 27(10), 27(16), 43(1)

Citation : (2023) 08 OHC CK 0214

Hon'ble Judges : Dr. B.R. Sarangi, J;Murahari Sri Raman, J

Bench : Division Bench

Advocate : S.K. Dalai, S. Mohapatra P. Swain, P. Dash, T. Pattnaik

Final Decision : Disposed Of

Judgement

Dr. B.R. Sarangi, J

1. The petitioner, by means of this writ petition, seeks to quash the order dated 08.08.2023 under Annexure-7, by which the Collector, Gajapati, in compliance of the judgment passed by this Court in the case of Madan Mohan Pradhan v. State of Odisha and others, 2022 (Supp.) OLR 813, has cancelled the long term lease of "Khandava Sand Quarry" granted by the competent authority, i.e., Tahasildar, Kashinagar in No.5409/Sairat dated 15.11.2021 under Rule 27 (10) of the Odisha Minor Mineral Concession Rules, 2016 and directed him to go for fresh auction of the said quarry.

2. The factual matrix of the case, in brief, is that a notice bearing no. 4898/Sairat was issued on 20.09.2021 by the Tahasildar, Kashinagar-opposite party no.4 inviting applications from the intending bidders to participate in the auction for grant of long-term lease of different sairat sources under Kashinagar Tahasil in the State of Odisha, for a period of 5 years from the financial year 2021-22 to 2025-26, as per the Odisha Minor Mineral Concession Rules, 2016 (for short "OMMC Rules, 2016"). In the said notice, Khandava Sand Quarry, which was one

of the sairat sources, had been put to auction. As per the said notice, interested bidders were required to apply in Form-M enclosing the required documents in a sealed cover and drop the same in the drop box at the Tahasil office between 08.10.2021 and 03.11.2021. It was also indicated that applications will not be accepted after the due date and time, i.e., 5.30 PM of 03.11.2021. The name of the sairat source and number of the sairat case were to be reflected in the envelope. On 05.11.2021 at 11.00 p.m. scrutiny of the applications for opening of the bids in presence of the lease applicants or their authorized representatives was to be conducted and incomplete applications were to be rejected. Applications received after 5.30 p.m. of 03.11.2021 were not to be taken into consideration. It was also indicated therein that the Competent Authority and the Collector, Gajapati shall have the right to cancel or suspend the auction without assigning any reason thereof.

2.1 Pursuant to the auction notice, as referred above, the petitioner made his application in Form-M, along with the required documents, in respect of "Khandava Sand Quarry", which was mentioned at sl. no. 14 of the details of the Sairat Sources of the notice dated 20.09.2021, within the time specified. The petitioner, along with 9 others, participated in the auction process. The petitioner had quoted additional charges of Rs.156/-per Cum of sand. Out of 9 participants, 6 participants had quoted more additional charges than the additional charge quoted by the petitioner, but they were disqualified as they had not adhered to the conditions stipulated in the notice. Form-F was issued in favour of the petitioner directing him to deposit Rs.40,000/- towards cost of preparation of Mining Plan and for execution of agreement supported by deposit of security money, as envisaged under Rule 43 (1) of the OMMC Rules, 2016. The petitioner deposited such amount, which was duly acknowledged by the authority. On 04.02.2021, opposite party no.4 issued notice to the petitioner to submit pre-feasibility report and other required documents, before the Competent Authority for grant of environment clearance, which was under progress.

2.2 At that point of time, the petitioner was served with the letter of cancellation of his bid in respect of "Khandava Sand Quarry" by the Tahasildar, Kashinagar, vide Annexure-6 dated 20.12.2021, wherein the petitioner was intimated that the Collector, Gajapati-cum-Controlling Authority had cancelled the bid of "Khandava Sand Quarry" dated 05.11.2021 as per Rule 27 (10) of the OMMC Rules, 2016, owing to the reason as communicated by the Additional District Magistrate, Gajapati, vide letter dated 17.12.2021, that the bid amount quoted by the petitioner was comparatively very less in comparison to the sources in the vicinity.

Therefore, selection of the petitioner, as the highest bidder in respect of "Khandava Sand Quarry", was cancelled.

2.3 Challenging the above action of the authority, the petitioner approached this Court by filing W.P.(C) No.40431 of 2021 contending therein that, while passing the order impugned dated 20.12.2021, no reason has been assigned nor the

Tahasildar, Kashinagar has communicated any reason to the petitioner. Furthermore, Rule 27 (10) of the OMMC Rules, 2016 provides that if the second highest bidder has quoted unusually low price in comparison to the highest bidder of the same source or other sources in the vicinity, the Competent Authority may bring it to the notice of the Controlling Authority, who, after proper verification and with due justification, may cancel the bid and direct for fresh auction and, thereby, since Rule 27 (10) of the OMMC Rules, 2016 was not complied with, sought for quashing of the said letter dated 20.12.2021. But, on the basis of the report submitted by the Additional District Magistrate, Gajapati, vide letter dated 17.12.2021, that the bid amount quoted by the petitioner was comparatively very less in comparison to the sources in the vicinity, the selection of the petitioner, as the highest bidder in respect of "Khandava Sand Quarry", was cancelled. The further stand in the said writ petition was that without assigning any reason, as required under the provisions of the OMMC Rules, 2016, the order under Annexure-6 dated 20.12.2021 having been passed the same cannot be sustained in the eye of law. After due adjudication, this Court came to a conclusion that the order dated 20.12.2021 under Annexure-6 communicated by the Tahasildar, Kashinagar, pursuant to the order of the Collector, Gajapati, basing on the report of the ADM dated 17.12.2021 under Rule 27 (10) of the OMMC Rules, 2016, cannot be sustained in the eye of law. By holding so, this Court, vide judgment dated 12.05.2022, quashed the aforesaid orders and remitted the matter back to the Collector, Gajapati to pass appropriate order complying with the provisions contained either under Rule 27(10) or Rule 27 (16) of the OMMC Rules, 2016, as the case may be, in the interest of justice, equity and fair play, and above all in the interest of augmentation of revenue of the State. In compliance of the said judgment dated 12.05.2022 passed in W.P.(C) No. 40431 of 2022 [reported in 2022 (Supp.) OLR 813], the order impugned dated 08.08.2023 in Annexure-7 has been passed. Hence, this writ petition.

3. Mr. S.K. Dalai, learned counsel appearing for the petitioner vehemently contended that the Collector, Gajapati has committed same error and passed the order under Rule-27 (10) of the OMMC Rules, 2016 by cancelling the long term lease of "Khandava Sand Quarry" made by the competent authority, i.e., Tahasildar, Kashinagar in No.5409/Sairat dated 15.11.2021 under Rule 27 (10) of the Odisha Minor Mineral Concession Rules, 2016 and directed for fresh auction of the said quarry. It is further contended that Rule-27(10) of the OMMC Rules, 2016 has not been adhered to in letter and spirit, by which the competent authority is required to bring it to the notice of the controlling authority, who after proper verification and with due justification may cancel the bid and direct for fresh auction. But in the present case, once the competent authority has passed the order on 15.11.2021, the same having not brought to the notice of the controlling authority, he has no occasion to pass the order under Rule-27 (10) of the OMMC Rules, 2016 for cancellation of the long term lease and also to direct for fresh auction. Thereby, invoking wrong provision under Rule-27 (10) of the OMMC Rules, 2016 the cancellation having been made, the same cannot be

sustained in the eye of law. It is further contended that though the Collector has taken note of Rule-27(16) of the OMMC Rules, 2016 in the order itself, but the order impugned having been passed under Rule-27(10) of the OMMC Rules, 2016, the same is liable to be quashed.

4. Mr. T. Pattnaik, learned Addl. Standing Counsel appearing for the State-opposite parties although admitted that the Collector, Gajapati has quoted the wrong provision, i.e., Rule-27 (10) of the OMMC Rules, 2016, in the order dated 15.11.2021, while cancelling the long term lease granted in favour of the petitioner in respect of "Khandava Sand Quarry", but contended that such mentioning of wrong provision cannot disentitle the opposite parties to cancel the lease, as because Rule-27 (16) of the OMMC Rules, 2016 clearly provides that the Collector or the Conservator of Forest, as the case may be, shall have power to cancel the bid duly recording the reasons thereof, if he is not satisfied with the publicity, participation of bidders and amount of additional charges quoted. It is thus contended that if power has been vested with the Collector under Rule-27 (10) of the OMMC Rules, 2016 to cancel the bid, even if there is wrong reference of the provision, i.e., Rule-27 (10) of the OMMC Rules, 2016, the same cannot vitiate the proceeding. Therefore, it is contended that the order so passed by the Collector is well justified and the same does not warrant any interference of this Court at this stage. Consequentially, dismissal of the writ petition is sought for.

To substantiate the contention, learned Addl. Standing Counsel for the State-opposite parties has relied upon the judgment of the apex Court in the case of N. Mani v. Sangeetha Theatre, (2004) 12 SCC 278.

5. This Court heard Mr. S.K. Dalai, learned counsel appearing for the petitioner and Mr. T. Pattnaik, learned Addl. Standing Counsel appearing for State-opposite parties in hybrid mode and perused the records. Having regard to the issue involved, since there is no other private party, this writ petition is being disposed of finally at the stage of admission upon hearing learned counsel appearing for the petitioner and the State-opposite parties.

6. Based on the factual matrix and rival contentions, as narrated above, the only question falls for consideration of this Court is that whether the order impugned dated 08.08.2023 passed by the Collector, Gajapati under Annexure-7, referring to the provisions contained under Rule-27(10) of the OMMC Rules, 2016, in cancelling the long term lease of "Khandava Sand Quarry" granted by the competent authority, i.e., Tahasildar, Kashinagar, vide notification No.5409/Sairat dated 15.11.2021, and the consequential direction issued for fresh auction can be sustained in the eye of law or not.

7. As is apparent from the record, the petitioner had earlier approached this Court by filing W.P.(C) No.40431 of 2022, which was disposed of on 12.05.2022 by passing the following order:-

"17. In view of the facts and circumstances as well as the principles of law, as discussed above, this Court is of the considered view that the order dated

20.12.2021 under Annexure-6 communicated by the Tahasildar, Kashinagar, pursuant to the order of the Collector, Gajapati basing on the report of the ADM dated 17.12.2021, under Rule 27 (10) of the OMMC Rules, 2016 cannot sustain in the eye of law and same is liable to be quashed and is hereby quashed. The matter is remitted back to the Collector, Gajapati to pass appropriate order by complying the provisions contained either under Rule 27(10) or Rule 27 (16) of the OMMC Rules, 2016, as the case may be, in the interest of justice, equity and fair play, and above all in the interest of augmentation of revenue of the State."

8. After the matter was remitted back to the Collector, Gajapati to pass order by applying the provisions contained either under Rule 27(10) or Rule 27 (16) of the OMMC Rules, 2016, as the case may be, in the interest of justice, equity and fair play, and above all in the interest of augmentation of revenue of the State, the Collector has passed the order impugned on 08.08.2023 under Annexure-7. The relevant portion of the order is extracted hereunder:-

"……When the matter came to the notice of the District Administration through an allegation petition dated 12.11.2021 of Sri Subash Chandra Rout, one of the bidder of the same sairat source, a report was called for from the Tahasildar, Kashinagar in District Office letter No.9750/Touzi dated 20.11.2021. The Tahasildar, Kashinagar submitted a detailed report in letter No.5682/Sairat dated 26.11.2021. After going through the said report, it was observed that the bid amount quoted by the successful bidder is comparatively very less in comparison to the sources in the vicinity. The bid of Khandava Sand Quarry dated 05.11.2021 was cancelled as per Rule 27(10) of OMMC Rules, 2016 and the Tahasildar was directed to go ahead for fresh caution of the said source in District Office letter No.10766/Touzi dated 17.12.2021. In response the Tahasildar, Kashinagar in his letter No.6035/Sairat dated 20.12.2021 intimated the same to the present petitioner.

Rule 27 (10) of the OMMC Rules, 2016

If the second highest bidder has quoted unusually low price in comparison to the highest bidder of the same source of other sources in the vicinity, the competent authority may bring it to the notice of the Controlling Authority, who after proper verification and with due justification may cancel the bid and direct for fresh auction.

Rule 27 (16) of the OMMC Rules, 2016

The Collector or the Conservator of Forest, as the case may be, shall have the power to cancel the bid duly recording the reasons thereof, if he is not satisfied with the publicity, participation of bidders and amount of additional charge quoted.

In the instant case Rule 27 (10) of the Odisha Minor Mineral Concession Rules, 2016 is relevant. The 1st highest bidder Sri Chitri Raja Nirmala has offered Rs.239/-and the highest bidder Sri Madan Mohan Pradhan has offered Rs.156/-

as additional charge for Khandava Sand Quarry. The second highest bidder has quoted unusually low price in comparison to the highest bidder of the same source. The competent authority, i.e., Tahasildar, Kashinagar should have brought it to the notice of the Controlling Authority (Collector, Gajapati) but without doing so he has selected the second highest bidder at his level violating the provisions of Rule 27 (10) of the OMMC Rules 2016. This cause a great loss to government exchequer from the source.

In view of above, the long term lease of Khandava Sand Quarry made by the Competent Authority, i.e., Tahasildar, Kashinagar in No.5049/Sairat dated 15.11.2021 is hereby cancelled the bid under Rule 27 (10) of the OMMC Rules, 2016 and he is directed to for fresh auction of the said quarry. The matter is disposed accordingly in compliance to the order dated 12.05.2022 of the Hon'ble High Court of Orissa passed in W.P.(C) No. 40431 of 2021. All concerned be intimated accordingly.

Order pronounced in the open court on this 8th day of August 2023."

9. The validity of the above mentioned order is under scrutiny of this Court in the present writ petition. Needless to say, in exercise of powers conferred by sub-section (1) of Section 15 of the Mines and Minerals (Development and Regulation) Act, 1957 and in supersession of the provisions contained in the Odisha Minor Mineral Concession Rules, 2004, except as respect things done or omitted to be done before such supersession, the State Government made the Rules called "Odisha Minor Mineral Concession Rules, 2016". Chapter-IV of the OMMC Rules, 2016 deals with grant of quarry lease. Under Rule-27 of the said Chapter-IV detailed procedure has been envisaged with regard to grant of quarry lease in favour of the lessee. Rule-27 (9) of the OMMC Rules, 2016 provides that in the event of default by the selected bidder, the competent authority may issue intimation as specified in sub-rule (6) to the next highest bidder, who shall then be required to convey his acceptance and to make the security deposit calculated in the manner mentioned in sub-rule (7). Sub-rule (10) of Rule-27 of the OMMC Rules, 2016 provides that if the second highest bidder has quoted unusually low price in comparison to the highest bidder of the same source or other sources in the vicinity, the competent authority may bring it to the notice of the controlling authority, who after proper verification and with due justification may cancel the bid and direct for fresh auction.

9.1 Needless to say, in the case at hand, the competent authority being the Tahasildar, without bringing the fact to the notice of the controlling authority, namely, the Collector had granted the lease in favour of the petitioner. But, subsequently, when allegation was received against the petitioner on 12.11.2021 from one of the bidders of the very same 'sairat source', a detailed inquiry was conducted by the Addl. District Magistrate and thereafter a report was called for from the Tahasildar, Kasinagar on 20.11.2021. In response to the same, the Tahasildar, on 26.11.2021, submitted his report, wherefrom it is revealed that the second highest bidder has quoted unusually low price in comparison to the highest bidder. As a consequence thereof, the Collector, being the controlling authority, cancelled the lease granted in favour of the petitioner by the competent authority, namely, Tahasildar on 15.11.2021 and directed for fresh auction and by letter dated 17.12.2021 the same was communicated to the petitioner, which was subject matter of challenge in the earlier writ petition. In the said writ petition, this Court, having come to a conclusion that there was non-adherence of the provisions contained under Rule-27 (10) of the OMMC Rules, 2016, quashed the same and remanded the matter back to the Collector to pass appropriate order under Rule-27(10) or Rule-27 (16) of the OMMC Rules, 2016. Consequentially, the order impugned dated 08.08.2023 under Annexure-7 has been passed where reasons have been assigned that the first highest bidder had offered Rs.239/-, whereas the petitioner had offered Rs.156/- as additional charges for "Khandava Sand Quarry". As the second highest bidder had quoted an unusually less price in comparison to the highest bidder of the very same source, this fact ought to have been brought to the notice of the controlling authority by the Tahasildar. But, without doing so, the Tahasildar selected the second highest bidder. By this process, the Collector, while passing the order of cancellation, had not adhered to the provision under Rule-27 (10) of the OMMC Rules, 2016. But, while passing the order impugned, the Collector has specifically mentioned that there would be great loss to the government exchequer from the source. Therefore, though the order has been passed under Rule-27 (16), but there is a wrong recording of the provision, i.e., Rule-27 (10) of the OMMC Rules, 2016 in the order impugned.

9.2 Rule-27 (16) gives power to the Collector on three contingencies, namely, publicity, participation of bidders and amount of additional charges quoted. In the present case, under third category the additional charges quoted by the petitioner is unusually low than the highest bidder and, therefore, there is every justification that the Collector has to cancel the bid by reasons recorded thereof. The Collector has also mentioned reasons why he has cancelled the source, as there is great loss to the government exchequer from the source itself. Thereby, the reason, which has been assigned in the order impugned, is fully covered by the provisions contained under Rule-27(16) of the OMMC Rules, 2016. There is no dispute that there is wrong mentioning of the provisions, inasmuch as, in place of Rule-27 (16) it has been mentioned Rule-27(10) . In the considered opinion of this Court, mere wrong mentioning of the provision cannot vitiate the proceeding and on that account it cannot be said that the order passed by the Collector is not justified. Rather, it is well justified and the same does not require any interference of this Court, particularly when the second highest bidder had quoted an unusually low price in comparison to the highest bidder and, as such, the same will cause a great loss to the government exchequer and by that the very purport of the Rule, which is to augment the revenue of the State, will be vitiated.

10. In Tihag v. State of Orissa, (1975) 2 SCC 436, the apex Court held that when an authority takes action which is within its competence, it cannot be held to be

invalid merely because it purports to be made under wrong provision, if it can be shown to be within its power under any other provision. A mere wrong description of the source of power or a mere wrong lable, cannot invalidate the action of an authority, if it is otherwise within its power.

11. The Constitution Bench of the apex Court in the case of Union of India v. Tulsiram Patel and others, (1985) 3 SCC 398 held that where source of power exits under more than one provision, failure to mention any one or some of them in the order made in exercise of that power would not vitiate the order. Partial mention, wrong mention or even non-mention of the provisions under which order is made would not vitiate the order.

12. In N. Mani (supra), the apex Court held that it is well settled that if an authority has a power under the law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exist and can be traced to a source available in law.

13. In Ram Sunder Ram v. Union of India and others, 2007 (9) SCALE 197, the apex Court held as under:-

"…….. It appears that the competent authority has wrongly quoted Section 20 in the order of discharge whereas, in fact, the order of discharge has to be read having been passed under Section 22 of the Army Act. It is well settled that if an authority has a power under law merely because while exercising that power the source of power is not specifically referred to or a reference is made to a wrong provision of law, that by itself does not vitiate the exercise of power so long as the power does exit and can be traced to a source available in law [see N. Mani v. Sangeetha Theatre and Ors., (2004) 12 SCC 278]. Thus, quoting of wrong provision of Section 20 in the order of discharge of the appellant by the competent authority does not take away the jurisdiction of the authority under Section 22 of the Army Act. Therefore, the order of discharge of the appellant from the army service cannot be vitiated on this sole ground as contended by the learned counsel for the appellant."

14. In Baljinder Singh v. Rattan Singh, 2008 (11) SCALE 198, the apex Court held as under:-

"13. A contention has been raised that the applications filed by the appellant herein having regard to the decisions of the Madras High Court could not have been entertained which were filed under Section 148 of the Code. Section 148 of the Code is a general provision and Section 149 thereof is special. The first application should have been filed in terms of Section 149 of the Code. Once the court granted time for payment of deficit court fee within the period specified therefore, it would have been possible to extend the same by the court in exercise of its power under Section 148 of the Code. Only because a wrong provision was mentioned by the appellant, the same, in our opinion, by itself would not be a ground to hold that the application was not maintainable or that the order passed thereon would be a nullity.”

15. In Mohd. Shahabuddin v. State of Bihar, (2010) 4 SCC 653, the apex Court held that if a notification quotes a wrong section and refers to a wrong provision, the same cannot be held to be invalid if validity of the same could be upheld on the basis of some other provision. When an authority passes an order which is within its competence, it cannot fail merely because it purports to be made under a wrong provision if it can be shown to be within its power under any other provision or rule, and validity of such impugned order must be judged on a consideration of its substance and not its form.

16. In State of Jharkhand and others v. Pakur Jagran Manch and others, (2011) 2 SCC 591, the apex Court held that omission to refer to correct provision of law which is source of power, or mentioning of a wrong provision, will not by itself render an order of Government invalid or illegal, if Government had power under an appropriate provision of law.

17. Taking into consideration the factual and legal position, as discussed above, this Court is of the considered view that the order impugned having been passed by the Collector as per the provisions contained under Rule-27 (16) of the OMMC Rules, 2016 and, as such, he is competent to pass such order, merely because of wrong mentioning of the provision in the order impugned, i.e., Rule-27 (10) of the OMMC Rules, 2016, the same cannot vitiate the order itself.

18. In the above view of the matter, we do not find any justification to interfere with the order dated 08.08.2023 passed by the Collector, Gajapati under Annexure-7. Consequentially, the writ petition merits no consideration and the same is hereby dismissed. However, there shall be no order as to costs.

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