
(2012) 03 GAU CK 0125
In the Gauhati High Court
Case No : Writ Petition (C) No. 6390 of 2011

Sabiba Begum

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 29-03-2012

Acts Referred:

Citation : (2012) 3 GLD 287

Hon'ble Judges : Arup Kumar Goswami, J

Bench : Single Bench

Advocate : M.U. Mondal, A.F.N.U. Mollah and Mr. A. Hussain, for the Appellant;
B.J. Ghosh, Jr. G.A., for the Respondent

Final Decision : Dismissed

Judgement

A.K. Goswami, J.—Heard Mr. M.U. Mondal, learned counsel appearing for the petitioners in this batch of writ petitions. Also heard Mr. B.J. Ghosh, learned State counsel, Assam appearing for the respondents. As agreed by the learned counsel for the parties, these writ petitions are taken up together for disposal at the admission stage.

2. The learned counsel for the parties are agreed that the issue raised in all the writ petitions is one and the same. Mr. B.J. Ghosh, learned State counsel has submitted that an affidavit has been filed in W.P.(C) No. 6358/11 and an affidavit-in-reply has also been filed by the writ petitioner to the said affidavit-in-opposition. The learned counsel for the parties submit that W.P.(C) No. 6358/11 should be taken up as the lead case.

3. The respondent No. 6 had issued a tender sale notice dated 2.5.11 under the provisions of Assam Sale of Forest produce, Coupes, and Mahals Rules, 1977 as amended, for short, the Rules, on 2.5.11, inviting tenders for sale of timber lots of Goalpara Division. Though the writ petition is silent about the number of timber lots, from the affidavit-in-opposition, it would appear that 133 Nos. of timber lots were put up for sale by the said tender sale notice dated 2.5.11. The

tenders were to be received up to 3 p.m. of 2.6.11. Subsequently, an Addendum Notice dated 27.5.11 was issued including timber lots which were not included in the tender sale notice dated 2.5.11 for sale on the same terms and conditions. From the affidavit-in-opposition, it appears that 9 timber lots were put to sale by this Addendum Notice.

4. The total No. of lots numbering 133 and 9 by the tender sale notice dated 2.5.11 and Addendum Notice dated 25.7.11 is not disputed by Mr. Mondal, learned counsel for the petitioners.

5. It is stated in the writ petition that against the total 142 Nos. of lots, 20 tenderers including the petitioner had submitted his tender and the bid of the petitioner was found highest in respect of 6 Nos. of lots and the comparative statement reflects the said position. As there was considerable delay to bring the process of sale to its logical conclusion, the petitioner had approached the authorities requesting them to do the needful in this regard and while the matter rested thus, another Short Sale Notice dated 26.8.11 was published in a daily newspaper, "Khabar", for the sale of aforesaid 142 Nos. of timber lots including the lots in respect of which the petitioner had emerged as the highest tenderer, fixing 13.9.2011 for submission of tender. It is also stated that one similarly situated tenderer, namely, Tasir Uddin Sheikh, who was found to be a highest tenderer, in respect of 10 Nos. of lots, had approached this Court in W.R. (C) No. 4528/11 and this Court by an order dated 16.11.11, disposed of the matter directing the respondent authorities to accept the 10 Nos. of lots in favour of the petitioner.

6. The petitioner, in the Circumstances, has challenged the Short Sale Notice dated 26.8.11 and has prayed for a direction to the respondent authorities to sell 6 Nos. of timber lots to the petitioner in terms of the sale notices dated 2.5.11 and 27.5.11.

7. In the affidavit-in-opposition, the respondent No. 2 had stated that the tender sale notice dated 2.5.11 was published in "Dainik Agradoot," a newspaper, consecutively on 10.5.11 and 11.5.2011. Addendum Notice dated 27.5.11, was, however, not published in newspaper. A public complaint was received on 3.6.11 alleging that some Forest Officials along with some contractors had submitted tenders and the rates offered was very less and there would be loss of Government Revenue unless the tender process is stopped. An enquiry was conducted for examination and scrutiny of the matter by 3 Assistant Conservators of Forests and a report was submitted to the Conservator of Forests, Central Assam Circle, who, vide letter dated 30.7.11 ordered for cancellation of the sale as from the enquiry report it was found that some irregularities and discrepancies/anomalies were noticed in the above tender process and asked the Divisional Forest Officer, Goalpara Division to put the lots to re-sale after wide circulation. Consequently, by tender sale notice dated 26.8.11, 142 Nos. of timber lots were put to re-sale indicating that all other terms and conditions would remain the same as per sale notice dated 2.5.11,

fixing 13.9.11 as the last date for receipt of tenders. In view of the irregularities noticed in the said tender notice dated 26.8.11, by an order dated 7.9.11 issued by the Planning Officer-I, office of the Principal Chief Conservator of Forests, Assam and Head of Forests Force, Assam, Rehabari, Guwahati, the said sale tender notice dated 26.8.11 was withdrawn. In the said affidavit, the respondent No. 2 has also narrated the process for formation of timber lots as well as details of irregularities and illegalities in the process of sale of timber lots as well as in operation of lots.

8. In the affidavit-in-reply, the petitioner sated that the tender notice dated 2.5.11 was duly published in the local daily newspaper prior to one month from the last date of submission of tenders. It has also been submitted that the respondent No. 2 had suppressed material facts regarding market price of the timber lots and that at no point of time, any opportunity was afforded to the petitioner before issuing re-sale notice dated 26.8.11. It has also been stated that as timber lots are easily perishable and subject to natural decay, appropriate direction should be issued to the respondent authorities to sell the timber lots to the petitioner for which he was the highest bidder at the earliest.

9. Mr. Mondal, learned counsel for the petitioner submits that all the petitioners involved in the writ petitions under consideration, are highest bidders in respect of particular lots. He also submits that the impugned re-sale notice dated 26.8.11 cannot be sustained, the same being contrary to Rule 17 of the Rules. Elaborating further, he submits that it is an admitted position that no tenders had been accepted in the instant case pursuant to tender sale notices dated 2.5.11 and 27.5.11 and therefore, there could not have been any occasion for issuing a re-sale notice. Conceding that there is a right of withdrawal under Rule 20 of the Rules, he emphatically asserts that in the instant case, the materials on record would unmistakably demonstrate that the respondent authorities had cancelled the sale notice dated 2.5.11. He further contends that under Rule 20, Government in the Forest Department has the right to withdraw any coupes or Mahal from sale at any time before issue of order of acceptance of tender or otherwise by negotiation but the same is not the case in the instant case. He also submits that in view of the order passed by the Court in W.P. (C) No. 4528/11, the petitioner is entitled to get similar benefits and as such, the respondents are liable to accept the tenders of the writ petitioners as highest bidders. Mr. Mondal further submits that even in respect of the complaint, allegedly lodged by some contractors, the petitioner was not afforded any opportunity of hearing and the entire proceeding was carried out in gross violation of the principles of natural justice. It is also his submission that the tender submitted by the petitioner is much above the Government valuation for the lots in question. In support of his contention, he has placed reliance on paragraph 7 of the judgment in the case of Shri Charan Muchahary v. State of Assam and others, reported in 2005(2) GLJ 233.

10. Mr. B.J. Ghosh, learned State counsel submits that Rule 4 of the Rules

stipulates, amongst others, that tender notice for sale of Mahal/timber lots is to be published in a local daily newspaper on at least 2 (two) consecutive dates by the Divisional Forest Officer at least one month prior to the last date of submission of tender and in the instant case, the sale notice dated 2.5.2011 was published on 10.5.2011 and 11.5.2011 and therefore, it did not meet the requirement of 30 days publication in the newspaper from the last date fixed for submission of tender, which was fixed on 2.6.2011. The allegation made in the complaint was also duly enquired and a conscious decision was taken to put the timber lots for re-sale after wide circulation and the sale notice dated 26.8.2011 was also withdrawn in view of the fact that the said notice also did not fulfil the requirement of Rule 4 of the Rules. He submits that there is presently no sale notice for sale of the aforesaid 142 lots of timbers. He has relied upon the enquiry report to make a point that there was wide spread irregularities in piece-passing and that most of the logs do not match with piece-passing list. In view of the aforesaid report, the learned State counsel submits that presently the authorities are not taking any steps for issuing tender notice for sale of the said logs. The learned State counsel submits that the re-sale notice dated 26.8.11 was withdrawn on 8.9.2011, much before the writ petition was filed in the Month of December, 2011 and the writ petitioner is guilty of suppression of material fact inasmuch as the writ petitioners did not mention about the withdrawal of the re-sale notice dated 26.8.2011 by the notice dated 8.9.2011. According to him, in view of absence of challenge to the order dated 30.7.2011, there is no surviving cause of action in the present batch of writ petitions. Mr. Ghosh also submits that the materials on record would indicate that the authority had decided to withdraw the tender sale notice dated 2.5.2011 because of infraction of Rule 4 of the Rules and also because of irregularities and though the order dated 30.7.2011 has used the word "cancelled", for all intents and purposes, the sale notice dated 2.5.2011 was withdrawn and it should be construed as such. He submits that the order passed by this Court in W.P.(C) No. 4528/11 also cannot be pressed into service by the petitioners in view of the fact that the said order dated 18.11.2011 came to be passed due to inability of the Government counsel to obtain instructions. He further submits that a review application has been filed on 20.1.2012 against the said order dated 18.11.2011. passed in W.P. (C) No. 4528/11 and the petition is still pending disposal. Mr. Ghosh has relied on the following judgments to bolster his submissions:--

1. J and K Housing Board and Another Vs. Kunwar Sanjay Krishan Kaul and Others, ;
2. Meerut Development Authority Vs. Association of Management Studies and Another, .
3. Bipin Chandra Phukan Vs. The State of Assam and others .

11. I have considered the rival submissions of the learned counsel for the parties. I have also perused and considered the pleadings. Part. 1 of the Rules provides for sale by tender system and having regard to the contentions raised,

it is only appropriate that Rule 4, Rule 17 and Rule 20 of the Rules are extracted for easy reference:

Rule-4

Notice for tender-Brief advertisement inviting tender (Tender Notice) for sale of Mahal/Timber lots containing the names of the Mahals/lots, Areas of the Mahal/quantity of timber, period of lease/settlement which shall not exceed two years along with the date, time and venue for receipt of tender, shall be published in the "Local daily newspapers" for at least consecutive two days by the Divisional Forest Officer at least one month prior to the last date fixed for submission of tender stating the details of the Mahals/lots and other terms and conditions shall be available in the sale notice, which can be procured from the offices of the Divisional Forest Officer during office hours of any working day on payment of Rs. 50.00 (Rupees fifty) per copy of the sale notice. Provided that for re-sale of any Mahal or timber lot, publication of short sale notice at least fifteen days before the last date of receipt of the tender shall be made which mayor may not be published in the newspapers."

Rule-17

Cancellation and re-sale for failure to pay Security installments and to execute agreement. If the tenderer whose tender has been accepted fails to pay the security or to pay the installment on due dates mentioned in Rule 5 or to execute agreement mentioned in Rule 10, the sale of the coupe or mahal shall be liable to be cancelled and the coupe or the mahal shall be resold for the remaining part of the coupe or mahal period at the risk of such tenderer as regards the loss to Government and if the proceeds on re-sale are less than the value at which it originally sold, the difference shall be realisable from him, and further the earnest money shall be forfeited and the whole of the fixed security deposit or part thereof as may be necessary, shall be adjusted against the dues.

Rule-20

Right of withdrawal of any coupe or mahal from sale. Government in Forest Department and the authority competent to accept tender shall have the right to withdraw any coupe or mahal from sale at any time before issue of final order of acceptance of tender or otherwise by negotiation.

12. Rule 4 indicates, amongst others, that at least one month prior to the date fixed for submission of tender, an advertisement inviting tender (tender notice) for sale of Mahal/timber lots containing the names of the Mahal/timber lots etc., period of lease/settlement which shall not exceed 2 (two) years, along with date, time and venue of receipt of tender shall be published in the local daily newspapers for at least consecutive two days by the Divisional Forest Officer. Rule 4 also stipulates that for re-sale of any Mahal or timber lot, publication of short sale notice of at least 15 days before the last date of receipt of the tender shall be made which mayor may not be published in the newspaper.

13. Though Mr. Mondal had contended that tender sale notice dated 2-5-2011 was published in accordance with law as required under Rule 4 of the Rules, the materials on record disclose that the tender notice was published in the newspaper on 10-5-2011 and 11-5-2011, which is less than the period of one month from the last date fixed for submission of tender on 2-6-2011. The same is the case with the short sale notice dated 26-8-2011.

14. In *Bipin Chandra Phukan (supra)*, this Court was considering Rule 3 of the Assam Settlement of Forest Coupes and Mahal by Tender System Rules, 1967. The said Rules required publication of the notice in the official gazette and this Court, considering the purpose, namely, wide publication, which will open up opportunity to people to participate in the tender process as well as check favouritism, nepotism and making settlement unfairly to the detriment of public revenue, held it to be a mandatory provision.

15. In *J & K Housing Board (supra)*, the Apex Court was considering Section 4(1) of the Jammu and Kashmir Land Acquisition Act, 1990, which reads as follows:--

4. Publication of preliminary notification and powers of officers thereupon.--(1) Whenever land in any locality is needed or is likely to be needed for any public purpose the Collector shall notify it-

(a) through a public notice to be affixed at convenient places in the said locality and shall also cause it to be known by beat of drum and through the local panchayats and patwaris;

(b) in the Government Gazette; and

(c) in two daily newspapers having largest circulation in the said locality of which at least one shall be in the regional language.

In the light of language used in Section 4(1), the Apex Court held that the procedures, directions provided u/s 4(1)(a), (b) & (c) are mandatory and are required to be strictly complied with. The Apex Court also noticed that when any statutory provision provides a particular manner for doing a particular act, the said thing or act must be done in accordance with the manner prescribed therefor in the Act.

16. The provision of Rule 4 highlights the requirement of paper publication on two consecutive dates for the purpose of wider circulation of the sale notice and therefore, on the analogy of *Bipin Chandra Phukan (supra)* and *J & K Housing Board (supra)*, the said provision is to be scrupulously observed. In the instant case, for the irregularities and discrepancies, sale of tender lots held on 2-6-2011 had been cancelled and the timber lots were directed to be re-sold with wide circulation.

17. In *Meerut Development (supra)*, the Supreme Court laid down that authority has the right not to accept the highest bid and even to prefer tender other than the highest bidder if there exist good and sufficient reasons such as the highest

bid not representing the market price but there cannot be any doubt that the authorities action in accepting or refusing the bid must be free from arbitrariness or favouritism.

18. In Charan Muchahary (*supra*), the facts were to the effect that a sale notice dated 27-1-2004 was issued under Rule 4 of the Rules fixing 27-2-2004 as the last date for submission of tender for a fresh term of two years. The previous leasee, who had filed an application for extension of his lease challenged the notice dated 27-1-2004 in W.P. (C) No. 709 of 2004. The extension having been granted for a period of 6 (six) months, the said writ petition came to be withdrawn on 20-2-2004. The period of extension having been reduced to 3 (three) months from 6 months by an order dated 6-5-2004, W.R. (C) No. 3654 of 2004 was instituted by the said previous lease and an interim order was passed suspending the reduction of extended term. Ultimately, extended term expired on 15-8-2004. On 30-6-2004, a re-sale notice was issued, which, however, could not be given effect to because of pendency of W.R. (C) No. 36 (Sic) 4 of 2004. Thereafter, another re-sale notice dated 4-9-2004 was published in the newspaper on 17-9-2004 fixing 24-9-2004 as a last date for submission of tenders and this re-sale notice dated 4-9-2004 was the subject matter of challenge.

19. In the background of the aforesaid facts, this Court opined that Rule 17 is the only provision contained in the Rules dealing with re-sale of the Mahals and that Rule 17 contemplates re-sale following lapses or default committed by the Mahalder to whom the Mahal may have been initially sold and also that the very word "re-sale" would signify an act of an earlier sale.

20. Mr. Mondal is correct in submitting that the timber lots were not settled with any tenderer and therefore, there could not have been any cancellation and re-sale of the said lots. However, there is no dispute that under Rule 20 of the Rules, the Government in the Forest Department and the authority competent to accept the tender shall have the right to withdraw any coupe of Mahal from sale at any time before issue of final order of acceptance of tender, It is also seen that subsequent re-sale notice dated 26-8-2011 was also withdrawn by withdrawal notice dated 8-9-2011 and as such the prayer made by the writ petitioner for cancellation of the tender sale notice dated 26-8-2011 has been rendered Infructuous much before the petitioner came before this Court in the month of December, 2011. However, on the basis of materials on record, this Court is not inclined to take a view that the petitioners had tried to suppress the aforesaid withdrawal notice dated 8-9-2011. The decision to cancel the sale of lots on 2-6-2011 has also not been challenged. Be that as it may, if it is accepted that the word "cancellation" was wrongly used instead of the word "withdrawal" as argued by the learned State counsel, then the authority could not have issued re-sale notice for sale of the lots in question and the only option left would be to issue a sale notice in view of the fact no order of settlement had been issued pursuant to the sale notice dated 2-5-2011 as published on 10-5-2011 and

11-5-2011 in the newspaper. The other submission of Mr. Mondal that there had been violation of principles of natural justice in the instant case, is not tenable in the facts and circumstances of the case. For conducting an enquiry departmentally in response to allegations in the matter of distribution of State largesse, it is not necessary to afford a hearing to the Tenderers. What is required is a fair degree of fairness in action.

21. It is noticeable that in case of resale notice, a notice of 15 days is required and such re-sale notice may or may not be published in the newspaper. Re-sale notice can only be issued if there is cancellation of a lease for default committed by the Mahalder for settlement the remaining period of Mahal. In a case where competent authority orders for withdrawal of the sale notice before the final acceptance of the tender, if the authority again decides to issue tender for the same Mahal/lot, authorities cannot take recourse to re-sale notice by giving 15 days notice but has to follow the procedure prescribed by Rule 4, requiring publication in newspaper on two consecutive dates prior to at least one month of the last date fixed for submission of tender.

22. Even though there is no challenge to the cancellation, assuming that the cancellation is illegal and arbitrary, the next question that arises for consideration is as to whether a direction can be given to the State authorities for sale of the timber lots to the petitioner in terms of tender sale notice dated 2-5-2011 and 27-5-2011.

23. As has been discussed earlier, the said notices were issued in violation of Rule 4 of the Rules. This Court cannot also gloss over the recommendations made on 5-01-2012 by the Enquiry Committee constituted by the Principal Chief Conservator of Forests and Head of Forests Force on 14-12-2011 in respect of aforesaid 142 timber lots under Goalpara Territorial Division as also the irregularities and illegalities noticed by the said Enquiry Committee. If a decision relating to award of contracts is bona fide and is in public interest, Courts may not exercise the power of judicial review and interfere even if it is accepted for sake of argument that a fine legal point is made out or that there is a procedural lacuna. Considering the matter in its entirety, no directions can be issued to the authorities to sell the lots to the petitioners. The reliance placed by Mr. Mondal on the order passed by this Court on 18-11-2011 in W.P. (C) No. 4528 of 2011 is misconceived in view of the fact that the same was passed due to inability of the State to file affidavit or to produce record, which is not the case here as State has placed its case supported by affidavit.

24. In view of the discussions above, there is no merit in these writ applications and accordingly, the same are dismissed. No order as to costs.