

(1992) 03 OHC CK 0022

In the Orissa High Court

Case No : Original Jurisdiction Case No. 1095 of 1990

Siba Prasad Sahoo

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 10-03-1992

Acts Referred:

Orissa Grama Panchayat Act, 1965 — Section 44(1)

Citation : AIR 1993 Ori 206

Hon'ble Judges : B.L. Hansaria, C.J.;B.N. Dash, J

Bench : Division Bench

Advocate : J. Patnaik, H.M. Dhal and S.K. Patnaik, for the Appellant; S. Nayak, Additional Government Advocate, for the Respondent

Judgement

Hansaria, C.J.—This petition was once heard and was allowed on 18-5-1990 by quashing Annexures 3 and 4, by which the lease of the weekly market at Hadabadada granted in favour of the petitioner by Gram Panchayat for a period of five years (1-4-1989 to 31-3-1994) was cancelled pursuant to the order of the Government passed in exercise of the power u/s 152 of the Orissa Gram Panchayat Act, 1964 (for short "the Act"). This was so done, because the Court took the view that the Government had no authority to do so in exercise of its power u/s 152 of the Act. But then, an observation was made in paragraph 7 of the judgment that the "grant of lease in favour of the petitioner by private negotiation was no doubt contrary to the procedure prescribed in the Rules (meaning Orissa Gram Panchayat Rules, 1 (sic))". It was, therefore, felt by one of the Judges deciding that case as to whether "illegal obtaining of the lease..... should be allowed to stand" as stated in paragraph 13 of the judgment. A further hearing on this question was required. The case has accordingly come up for further hearing.

2. Before we address ourselves on the submissions made by Shri Patnaik, learned counsel for the petitioner, it would be in the fitness of things to say a few words as to why further hearing in the matter was required. As that order was

passed by one of us (Chief Justice) and no reason had then been given, it is deemed appropriate to put the same on record. That view was taken because a writ Court being essentially a Court of equity, it was felt that one who demands equity must do equity. The granting of relief by a writ of certiorari, which was issued in that case, being discretionary, it was felt that discretion may not be exercised in favour of one who had not come with clean hands. In this connection, reference may be made to what has been stated in Vol. 30 of Corpus Juris Secundum at page 473 under the heading "He who comes into equity must come with clean hands". This principle was explained by saying that "the clean hands maxim bars relief to those guilty of improper conduct in the matter as to which they seek relief. It is invoked to protect the integrity of the Court. It is further observed at page 476 that this is a "cardinal maxim and the expression of the elementary and fundamental conception of equity jurisprudence". Another reason requiring further hearing was that a Court has to protect the right of a person which has been legally acquired. It would not advance the cause of justice and the rule of law if illegally procured rights are also protected by Courts of law --this would give encouragement to people to acquire a right illegally and then come to Court to seek protection of the same.

3. These reasons are quite weighty and in fairness to Shri Patnaik it may be stated that he did not raise a whisper against the order of further hearing, but made heroic efforts to convince us that no illegality had been committed by the Gram Panchayat in the case at hand in leasing out the weekly market to the petitioner after private negotiation, instead of getting it settled by public auction, which is the procedure which should have been adopted as per the view taken by this Court earlier after referring to the concerned rules.

4. The main thrust of Shri Patnaik's argument is that the requirement that the lease should be granted following public auction is not a mandatory one, but is directory. This apart, the learned counsel contends that public interest having not suffered in the present case, the lease granted in favour of the petitioner, even if the same be not strictly in accordance with law, may not be cancelled at this stage when the petitioner has made huge investment by way of building of costly infrastructure.

5. Let us first see whether the concerned rules require mandatorily granting of lease of the properties, like the one at hand, following public auction. To decide this, we have to note the relevant provisions. These are Section 44(1)(t) of the Act and Rule 87(a), (b) and (c) of the Rules which read as below :--

Section

"44. Obligatory functions. (1) Subject to the provisions of this Act and the Rules made thereunder, it shall be the duty of a Gram Panchayat, within the limits of its funds, to undertake, control and administer and be responsible for the following matters in respect of the Grama, namely :

(a) to (s) xx xx xx xx (t) regulation of melas, fairs and festivals and

establishment, maintenance and regulation of markets, hats and cart-stands including stands for carriage or motor vehicles within the meaning of the Motor Vehicles Act, 1939 (4 of 1939) and registration of sales of animals in such markets, hats and fairs within the Grama :"

Rules

"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 Gram 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 Gram 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 Gram Panchayat directly, other properties shall be leased out by public auction in the manner hereinafter prescribed.

(h) If the Sub-Divisional Officer, after hearing the Gram Panchayat and making such enquiry as he deems proper, finds either that the income derived from any property managed directly by it is inadequate or there exist any other reasons to be recorded in writing for which the property should be leased, he shall direct that such property be leased out by public auction. In making his decision, he may normally direct that any market and ferry shall be leased out by public auction and shall not be managed by Gram Panchayat directly, unless for any specific reason to be recorded in writing, he considers that direct management of a particular market or ferry is necessary in the interest of Gram Panchayat.

(c) The Sub-Divisional Officer, shall fix the period of lease and the minimum bid money, i.e., the offset price in respect of the property which is decided to be leased out taking into consideration the income from such property for the last three years. When information as to previous three years' income is not available or does not exist, the Sub-Divisional Officer shall fix the offset price taking the local conditions into consideration. The period of lease for properties which have seasonal value for effective operation, shall be fixed in such manner as the season is covered by the lease period."

6. Before we analyse the language of the rules, we may dispose of the argument of Shri Patnaik built on the provision contained in Section 44(1)(t) of the Act which, inter alia, confers the power of "regulation of markets" on a Gram Panchayat. The conferment of this power on a Gram Panchayat indicates, submits the learned counsel, that it is for the Gram Panchayat to decide as to how the markets should be managed or leased out in the best interest of the Gram Panchayat; and so, if a Gram Panchayat decides to settle the market by

private negotiation even against the advice of the concerned officer, of which mention has been made in the aforesaid rule, the same should not be held to be prohibitive, because a provision of rule cannot override the mandate of a statute; of course, the decision of the Gram Panchayat has to be bona fide and in the best interest of the Gram Panchayat.

7. To bring home the aforesaid submission, Shri Patnaik has referred us to *Asa Ram Vs. The District Board, Muzaffarnagar*, . It was stated in paragraph 4 that the word "regulation" would include the power of issuing a licence. That observation was made because a challenge had been made to the authority of the District Board in question in asking for a licence to run certain machines in exercise of its power of regulation of the trade. The argument was that the requirement of taking a licence or the power of issuing a licence would amount to "prohibition" and not "regulation". This was not accepted; indeed, the Solicitor-General appearing for the aggrieved person had conceded that regulation would include the power of issuing a licence. The rules have not denied in the present case the Gram Panchayat the power of issuing licence or lease; the question is what procedure or modality has to be followed before granting the lease? Though in this connection Shri Patnaik also referred to *Khargram Panchayat Samiti and Another Vs. State of West Bengal and Others*, and has drawn our attention in particular to paragraphs 4 and 5 of that judgment, what has been stated therein is not very relevant, because all that is said in this context is that the power of granting licence for holding of a hat or fair would include the power to make incidental or consequential orders specifying the day on which the hat or fair should be held. There cannot be two opinions on this proposition. In the case at hand, however, we are not concerned with the incidental or consequential power of the Gram Panchayat, but with the substratum of the power and how has the same to be exercised. The Act itself having empowered the State Government to make rules to carry out all or any of the purposes of the Act and the concerned rule having been so made, the provisions in the rules have to be read along with the statutory mandate; more so, when Section 44(1) itself states that what is provided therein shall be subject to the rules; of course, the rules cannot be inconsistent with the provisions of the Act, and if it were to be so, the rules shall have to give way to the statute. In the present case, the vires of the rules not having been challenged and on the face of it there being no inconsistency, we do not propose to pursue this matter further and would confine our attention as to what the rules really require.

8. As to the requirement of the rules, Shri Patnaik is at pains to persuade us to hold that settlement of markets etc. of the Gram Panchayat through public auction is only a directory requirement and not mandatory. In this connection, we may first state that the use of the word "shall" in Rule 87(b) cannot by itself be taken to be conclusive of the matter, because of the well settled position in law that the word "shall" may be read as "may" if a proper construction of the provision would indicate to Court's satisfaction that the authority making the provision so intended. We may also state that to find out whether a particular

provision is mandatory or directory, there is no cut and dried formula and the Court seized with such a question has to answer the same keeping in view the intention of the legislature, to ascertain which many and varied factors are to be borne in mind some of these being nature and design of the statute, consequences which would follow from construing it one way or the other, the effect of non-compliance visualised by the provision in question, and, of course, the reading of the Court as to whether by interpreting a provision in a particular way the object of the provision will be defeated or furthered. These are so well settled guides of interpretation in helping the Court to find out the real intention of the legislature and to ascertain whether a particular provision is mandatory or directory that we have not thought it necessary to burden this judgment with the decisions laying down these propositions. Shri Patnaik himself has referred to some decisions at page 11 of his written submissions - they being : The State of Uttar Pradesh and Others Vs. Babu Ram Upadhyaya, (para 29); Dr. H.S. Rikhy and Others Vs. The New Delhi Municipal Committee, (not quite to the point): and Govindlal Chhaganlal Patel Vs. The Agricultural Produce Market Committee, Godhra and Others, We would only apply these guidelines in resolving the controversy.

9. Before we apply our minds to find out the intention of the rule-making authority, we may observe that studying of intention becomes necessary when the language of the provision is not clear and clinching. If the legislature had expressed itself unambiguously, it is not open to the Courts to ignore the unambiguous language used in the statute and to give another meaning to the provision by going into the question of the intention of the legislature behind making the provision. Let us, therefore, see whether the aforesaid rules contain any ambiguity requiring deciphering of intention of the legislature to find out the true meaning of the provision. In this connection, the submission of Shri Patnaik is that the language of Rule 87(a) indicates that in case the concerned Sarpanch fails to forward to the Sub-Divisional Officer a list of immovable properties as specified in that sub-rule, the Sub-Divisional Officer shall call for the necessary information from the Grama Panchayat. This would show, according to the learned counsel, that the use of the word "shall" in the beginning of Rule 87(a) fastening the aforesaid responsibility on the Sarpanch is not mandatory, because the non-compliance of the same has been visualised by the sub-rule, and its remedy as well finds place in that sub-rule. This submission seems to have some force, but it is not conclusive of the aspect of the matter with which we are concerned. Our concern is to find out whether leasing out by public auction is a mandatory requirement. Though Rule 87(a) speaks that it would be for the Sub-Divisional Officer to decide which property should be leased out by public auction in the manner prescribed in the rules, and it may as well be that if the Sarpanch does not fulfil his obligation and the Sub-Divisional Officer also does not call for the necessary information, there would be no occasion for the Sub-Divisional Officer to decide this question, and so, the direction to lease out the named properties by public auction cannot be regarded to be a clear mandate of the

rule, because of the aforesaid exercise would not be done, the Sub-Divisional Officer would have no occasion to so direct, this by itself has not been deemed sufficient by us to hold that leasing out by public auction is a directory requirement. We have said so, because a close and purposeful reading of Sub-rule (b) would indicate that in case of those properties which are not to be managed by the Grama Panchayat directly (the present being not such a case), the Sub-Divisional Officer is required to "normally direct" leasing out these properties by public auction. Shri Patnaik strenuously urges that the use of the word "normally" would indicate that in some circumstances lease may be given without there being public auction. We would agree with this submission; but then, we would say that reasons for departing from the normal requirement must be incorporated as the sub-rule itself requires it, so that it would be known as to whether the direction to lease out the property without public auction was based on good and cogent grounds. Reading the rule on its plain language, we would say that public auctioning is the normal procedure and any departure from the same in a particular case has to be founded on good and cogent reasons.

10. Let us now see what was the intention of the rule-making authority in this regard. To enable us to do so, it would be in fitness of things to remind ourselves as to why public auction is required. We may not labour hard on this point, because by a catena of decisions, starting principally from *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , the Apex Court has laid down the need of public auction or invitation of tenders before leasing out public properties. *Ramana Dayaram, found Bhagwati, J.* (as he then was) proclaiming widely and boldly that while granting largess, the Government cannot act arbitrarily at its sweet will, but must act in conformity with the standard or norms which would show that it has acted fairly in granting the largess without discrimination and without unfair procedure. It is because of this that open invitation either by way of inviting tenders or putting the property to auction publicly was said to be the requirement of Article 14 of the Constitution. A public property settled by private negotiation cannot, therefore, receive Court's approval in normal circumstances. Of course, where calling of tenders or putting in auction is impracticable, settlement by private negotiation may not play foul with Article 14.

11. On the heels of the aforesaid case, came another judgment of Bhagwati, J, in *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, , in which it was emphasised that the settling action of the concerned authority in this regard must be reasonable and in public interest; and so, the Government cannot give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless, of course, there are other considerations which render it reasonable and in public interest to do so. It is the need of obtaining the highest consideration which requires public auction or invitation of tenders. In *Ram and Shyam Company Vs. State of Haryana and Others*, , it was reiterated that all attempts must be made by the Government to obtain the best

available price while disposing of its property because, the greater the revenue, the welfare activities will get a fillip and a shot in the arm and financial constraints may weaken the tempo of activities. In this connection, we may also refer to State of Uttar Pradesh Vs. Shiv Charan Sharma and Others, wherein the Court observed that public auction with open participation and a reserve price guarantees public interest being fully subserved.

12. The above shows that the intention of the rule-making authority in insisting on public auction in normal circumstances is to advance the cause of public interest, which has to receive procedure over private interest in a welfare State like ours, when we examine the question of the mode of disposal of public properties as distinguished from private properties in settling which factors such as personal attachment, affinity, kinship, empathy, religious sentiments etc. may have their play, which have no place in dealing with public properties. We would, therefore, be absolutely cautious in allowing a departure from the procedure of public auction (or for that matter invitation of tenders) for allowing settlement of public properties. Of course, there may be cases and situations where there may be compelling reasons necessitating a departure from this rule; but then, the reasons for the departure must be rational and should not be suggestive of discrimination. As appearance of public justice is as important as doing justice, nothing should be done which gives an appearance of bias, jobbery or nepotism, as stated in paragraph 39 of Shri Sachidanand Pandey and Another Vs. The State of West Bengal and Others, . In that case, the settlement of some plot of land in favour of the Taj Group for setting up a 5-Star hotel following private negotiation was not disturbed by the Court, because it was felt that the fact situation did not call for public auction or invitation of tenders.

13. Having informed ourselves about the need of public auction in settling public properties, let us consider whether the requirement of public auction visualised by Rule 87 has to be regarded as mandatory or directory. The broad tests to determine this controversy having been spelt out earlier, let us apply the same to the present case. The nature and design of the provision being to obtain the maximum revenue for the Grama Panchayat and public auction being one such method, this test would lean in favour of the requirement being regarded as mandatory. Public dealing of public properties also takes care of the allegation of favouritism and so, under normal circumstances this method of settlement has to be preferred. In this connection, we may deal with one submission of Shri Patnaik which is based on the stand of the Grama Panchayat that due to unholy alliance, the object of public auctions may be made ineffective by reducing the bid money. It is because of this that Shri Patnaik in his written submission at page 10 has stated that the method of settlement by public auction, instead of safeguarding and augmenting the income of the Grama Panchayat, would act as a prejudice to the interest of the Panchayat and so a strict adherence to the procedure of public auction would be a negation of public interest. We have duly applied our minds to this submission and we would not reject it outright because there may be instances where the intending bidders form an unholy alliance and

keep the bids at low level. But then, this would be regarded as an aberration, and not a rule. This apart, the provision of fixing offset price of which mention has been made in Rule 87(c) of the Rules would adequately protect the Grama Panchayat from the evil of unholy alliance. So, there would be no jeopardy to public interest if public auctions are held. It may be stated incidentally here that in the present case the Sub-Divisional Officer had fixed the offset price for the lease in question at a figure of Rs. 3,90,000/- whereas the settlement with the petitioner was at a sum of Rs. 3,15,000/-. In the preceding year (1988-89), the settlement of this market itself was for a consideration of Rs. 3,13,000/- which was the highest bid given in the public auction and so, it cannot be said that the Grama Panchayat had a reasonable cause to believe that if the settlement is made through public auction, proper price may not be fetched, which is one of the reasons advanced by the Grama Panchayat before the Collector who was approached in appeal against the order of the Sub-Collector.

14. The next (sic) is consequences which would follow if the requirement is read as directory instead of mandatory. No doubt, the status has not provided any penalty for non-compliance with the provision requiring settlement of these properties by public auction, but the same is not sufficient to rule out a provision being mandatory in nature. If we were to hold that settlement through public auction is not mandatory, the consequence would be that room for favouritism, nepotism and jobbery would find place and the Grama Panchayats would become hot beds of these undesirable trends. We would not, therefore, interpret the provision at hand as directory; but would regard it as mandatory. The effect of non-compliance, therefore, strongly suggests that the provision should be regarded as mandatory.

15. Whether the subject of the provision will be defeated or furthered if public auction is not held is difficult to state categorically either way. We have put the matter thus because in a certain fact situation the object may be frustrated which would be so in case of no unholy alliance, whereas in other cases the object would be advanced. As, however, unholy alliance has been taken to be an exceptional circumstance, we would say that this test also indicates or suggests that the provision should be regarded as mandatory.

16. In view of all the above, we would hold that settlement through public auction has to be the normal feature as indicated in Rule 87(b) itself by the use of the word "normally". We would add that the departure from the normal rule has to be for specific reasons to be recorded in writing and this decision has to be taken not by the Grama Panchayat but by the Sub-Divisional Officer. Needless to say that the reasons must be cogent, relevant and (sic) Recording of such reasons would ensure non-arbitrary exercise of power which would admittedly protect public interest.

17. Now let us see what happened in the present case. The Grama Panchayat resolved as early as 30-6-1988 to lease out the market in question to the petitioner for a period of ten years with effect from 1989 onwards. The Block

Development Officer, however, recommended the lease for a period of five years at an annual consideration of Rs. 3,15,000/-. But the Sub-Divisional Officer disapproved the resolution of the Grama Panchayat and by a communication dated 15-2-1989 asked the Block Development Officer for issue of auction sale notice of the market at an offset price of Rs. 3,90,000/- (as mentioned in the memorandum of appeal filed by the Grama Panchayat before the Collector as at Annexure 5 of O.J.C. No. 4916/90). Against this order, an appeal was preferred before the Collector by the Grama Panchayat who allowed the same on 28-3-1989 by approving the resolution following which order lease was executed by the petitioner on 3-4-1989 whereafter he has been running the market.

18. The above facts show that the Grama Panchayat had from the beginning acted against the mandate of Rule 87 inasmuch as Sub-rule (a) of that rule requires that necessary step has to be taken by the Sarpanch of the Panchayat before the end of October of each year seeking appropriate order of the Sub-Divisional Officer as to whether the property in question should be managed directly by the Grama Panchayat or should be leased out by public auction. In the present case, the decision to lease the market in favour of the petitioner was taken much before the end of October, as the resolution was adopted on 30-6-1988. It may, however, be that the Grama Panchayat bona fide felt the need of leasing out the market to the petitioner because he was a previous lessee and had greatly improved the market and had never defaulted in payment of his dues and that if, the settlement was to be made in favour of some outsider (the petitioner being a local person) it would involve the Grama Panchayat in unnecessary litigation in collection of its dues as is being experienced in other Grama Panchayats of the district, as stated in its grounds of appeal to the Collector; but then, the ground that public auction would entail loss because of its vagaries has not been regarded as cogent and convincing by us because in the preceding year itself the market had been put to public auction and the settlement was at a sum of Rs. 3,13,000/-. Even so, as the settlement in favour of the petitioner was following the order of the Collector approving the resolution of the Grama Panchayat, we would not see any tainted hand of the petitioner behind the deal and so, we would not say that he had come to this Court with unclean hands or that the lease had been obtained by him illegally.

19. Because of the aforesaid conclusion, we would not set aside the lease granted in favour of the petitioner by the Grama Panchayat; more so, because he has by now invested a large amount of money and as no grievance about the settlement of the lease with the petitioner has been made by anybody. In this connection, it may be stated that even if an illegality comes to the notice of the Court relating to the procedure adopted for granting largess, the Court may not set aside the order in question if the same would be inequitable, as it would be in the present case, because of the considerable expenditure incurred in the meantime by the petitioner. This was the view taken in *Ramana Dayaram* (supra) itself, which is the path-maker of this branch of law. (See paragraph 35 of the judgment). *Shri Patnaik* also referred in this context to *Khalid Hussain (Minor)*,

Represented by Father Dr. Akthar Hussain Vs. Commissioner and Secretary to Government of Tamil Nadu, Health Department, Madras and Ors, , wherein, though the selection of the respondent to the course of M.B.B.S. was found to be wrong, the same was not interfered with as it would have been unjust to him for the reasons indicated in the judgment.

20. So, in the background of what has happened, we do not propose to order cancellation of the case. But then, we have to say something about the consideration for which the settlement was made. As already noted, the same was at a sum of Rs. 3,15,000/- per year. Shri Patnaik contends that this was reasonable because Rule 87 (c) visualises fixing of offset price by taking into consideration the income from such property for the last three years. In the present case, if this is done, this figure would come to Rs. 1,52,000/-, as mentioned at page 5 of the written submission of Shri Patnaik, which calculation is based on the consideration for which the market in question had been settled in 1986-87 (Rs. 71,000/-); 1987-88 (Rs. 71,000/-) and 1988-89 (Rs. 3,13,000/-). The Sub-divisional Officer had, however, fixed the offset price at Rs. 3,90,000/-. It is not known on what basis this offset price was fixed. The order of the Collector by which the resolution of the Grama Panchayat was approved does not contain much discussion about this aspect of the matter as the only observation made in this regard is that the sum of Rs. 3,15,000/-per year "is slightly higher than the auction value of last year" because of which the valuation by the Grama Panchayat did not require interference. Having however, noted that the consideration money had gone up to Rs. 3,13,000/- in the year 1988-89 as against Rs. 71,000 - in the immediately preceding year (1987-88), we are of the view that the market in question is highly profitable and settlement of the same with the petitioner for a long period of five years at a consideration of Rs. 3,15,000/- per year was not in the best interest of the Grama Panchayat. Even if the offset price has to be fixed keeping in view the income from the property for the last three years, this price would have been atleast Rs. 3,15,000/- for the year 1992-93 as the average for the last three years would have come to the figure of Rs. 3,15,000/- because for these three years the lease has been granted to the petitioner himself at an annual sum of Rs. 3,15,000/-. So, the lease for the years 1992-93 and 1993-94 should be, according to us, at a consideration of Rs. 3,90,000/-which was the annual offset price fixed by the Sub-divisional Officer. While fixing the sum of Rs. 3,90,000/- for the two years in question, for which years also lease has been granted in the present case to the petitioner, we have borne in mind the fact that the consideration of the lease has gone up to a considerable extent between the years 1987-88 and 1988-89.

21. In the result, the writ petition is disposed of by directing the settling authorities to ask the petitioner to execute a fresh deed of lease containing the condition that for the years 1992-93 and 93-94, he would pay the consideration money of Rs. 3,90,000/- for each year. After expiry of the present period of lease, the Grama Panchayat shall put the market to public auction and thereafter act in accordance with law.

B.N. Dash, J.

22. I agree.