

(2005) 03 GAU CK 0012**Gauhati High Court****Case No:** None

Charan Machahary

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision: March 29, 2005**Citation:** (2006) 3 GLR 723 : (2005) 2 GLT 358**Hon'ble Judges:** D. Biswas, Acting C.J.; Ranjan Gogoi, J**Bench:** Division Bench**Final Decision:** Allowed**Judgement**

Ranjan Gogoi, J.

A learned Single Judge of this Court having negatived the challenge made by the present appellant, as the writ petitioner, as against, a resale notice dated 4.9.2004 published in the newspaper on 17.9.2004 in respect of the Khagrabari Sand and Stone Mahal (hereinafter referred to as "the Mahal"), the present appeal has been Bed.

2. The brief fact's that would be necessary for us to effectively adjudicate the rival projections, may be set out as hereunder:

The term of the previous lessee of the Mahal, one Monojit Goswami, being due to expire on 11.2.2004, a sale notice dated 27.1.2004 was issued under Rule 4 of the Assam Sale of Forest Produce, Coupes and Mahal Rules, 1977 (hereinafter referred to as "the Rules") fixing 27.2.2004 as the last date for submission of tenders for a fresh term of 2 years. The previous lessee, who had filed an application, for extension of his lease, aggrieved by the issuance of the sale notice dated 27.1.2004, instituted a writ proceeding before this Court, i.e., WP(C) No. 709/04, wherein this Court by an order dated 3.2.2004 directed, the authority to decide on the entitlement of the said, previous lessee for extension prior to finalization of the tenders for the ensuing term. Thereafter on 15.2.2004, the Government passed an order extending the term of the previous lessee by a period, of 6 months. In view of

the aforesaid development W.P.(C) No. 709/04 was withdrawn on 20.2.2004. The extension granted to the previous lessee by order dated 15.2.2004 was subsequently reduced from 6 to 3 months by another order dated 6.5.2004 whereafter the said previous lessee again approached this Court by instituting a writ proceeding, i.e., WP(C) No. 3654/04. By an interim order dated 28.5.2004, this Court suspended the reduction of the extended term of the previous lessee made by order dated 6.5.2004 and while the aforesaid writ proceeding, i.e., WP(C) 3654/04 remained pending, the extended term of the lease of the previous lessee expired, on 15.8.2004 whereafter possession of the Mahal was handed over by the previous lessee to the State authority. It must also be noticed at this stage that while the aforesaid development had been taking place, a re-sale notice dated 30.6.2004 was issued inviting tenders for settlement of the Mahal for the fresh period. However, no effect So the foresaid notice dated 30.6.2004 could be given in view of the pendency of WP(C) No. 3654/04. After the extended term of 6 months granted to the previous lessee had expired on 15.8.2004, the impugned re-sale notice dated 4.9.2004 signed by the authority on 8.9.2004, was published in the newspaper on 17.9.2004 fixing 24.9.2004 as the last date for submission of tenders.

According, to the petitioner-appellant, he could come to know of the re-sale notice dated 4.9.2004 only after publication of the same in the newspaper and thereafter he had approached the concerned authority for the tender forms. The same were made available to him on 23.9.2004. According to the petitioner-appellant, the required formalities for submission of tender could not be completed by him within the time available and, therefore, he could not submit his tender by the last date fixed, i.e., 24.9.2004. In these circumstances, the appellant, as the writ petitioner, instituted, the proceedings out of which, this appeal has arisen contending, inter alia, that the re-sale notice dated 4.9.2004 was for the first time published in the newspapers on 17.9.2004 thereby violating the mandatory period of 15 days notice stipulated by the proviso to Rule 4 of the Rules for resale of a Mahal. Alternatively and additionally, it was contended that as there was no sale of the Mahal pursuant to the initial sale notice dated 27.1.2004, the authority could not have proceeded to re-sell the Mahal under the provisions of Rules, particularly Rule 17 thereof and, therefore, the re-sale notice dated 4.9.2004 published in the newspaper could not have formed the basis for the initiation of the fresh process of settlement of the Mahal. The learned Single Judge, by the impugned judgment said order dated 4.3.2005, having negatived the aforesaid challenge on the grounds and reasons assigned, the present appeal has been filed.

It must be noticed at, this stage that though in the writ proceeding, the learned Single Judge by an interim order dated 8.11.2004 had stayed the process of final settlement of the Mahal pursuant to the re-sale notice dated 4.9.2004, the authority by an order dated 8.12.2004 had, provisionally settled the Mahal with the respondents No. 4. After the writ proceeding, instituted by the petitioner was disposed of by the judgment and order dated 4.3.2005 passed by the learned Single

Judge, the authority by another order dated 8.3.2005 has confirmed the settlement made in favour of the respondent No. 5 and has permitted the said respondent to complete fee requisite formalities including payment of last money so as to enable the said respondent to take possession of the Mahal in question.

3. We have heard Shri N. Dutta, learned senior counsel for the appellant, Dr. Y.K. Phukan, learned senior counsel appearing for respondent No. 5 and Shir P.K. Mushahari, learned senior Government Advocate, Assam appearing for the official respondents.

4. The arguments advanced on behalf of the appellant, though largely are in reiteration of the contentions advanced before the learned Single Judge may be briefly noticed at this stage. Shri Dutta, learned Counsel for the appellant, after placing the facts of the case, as noticed above, has drawn the attention of the court to the statements made by the official respondents in the counter affidavit filed to the effect that consequent to the litigations initiated by the previous lessee leading to the extension granted in his favour, the authority had withdrawn the earlier sale notices dated 27.1.2004 and 30.6.2004. Shri Dutta has submitted that if the respondent authorities had themselves admitted that the earlier sale notices had been withdrawn, the Mahal could not have been resold on the basis of the re-sale notice dated 4.9.2004 as published in the newspaper on 17.9.2004. Learned Counsel has submitted that in view of the stand taken by the official respondents that the earlier sale notices were withdrawn, the authority ought to have proceeded to issue a fresh sale notice by complying with the requirements of Rule 4 of the Rule's instead of proceeding to settle the Mahal by way of re-sale on the basis of the re-sale notice dated 4.9.2004. Arguing further, Shri Dutta next contended that Rule 17 of the Rules deals with the question of re-sale of Mahals and there is no other provision contained in the Rules with regard to the aforesaid aspect of the matter. Under Rule 17, re-sale of a Mahal is visualized after the sale thereof and default of any kind, as " contemplated under the aforesaid provision of the Rules by tile Mahaldar. In the present case, the Mahal not having been sold at all, no question of default on the part of the existing Mahaldar so as to enable the authority to re-sell the Mahal can and does arise, according to the learned Counsel for the appellant. A third alternative argument has also been advanced an. behalf of the appellant, which is to the effect that even if this Court is to hold the proposed action of re-sale to be sustainable in law, fee re-sale notice dated 4.9.2004 not having been published by providing the stipulated 15 days notice mandated by the proviso to Rule 4, this Court must strike down the aforesaid impugned re-sale notice dated 4.9.2004. The averments made in the writ petition to he effect that fee impugned, resale notice dated 4.9.2004 was published for the first time in the Newspapers on 17.9.2004 and that there was no earlier publication of the said Notice in any other manner have been pressed into service in this regard. The findings recorded by the learned Single Judge to the contrary on all the aforesaid issues as well as the finding of the learned Single Judge that the writ petition was delayed, and filed at a stage when the

process of settlement was almost finalized as contended to be wholly, unsustainable. According to Shri Dutta, learned Counsel for the appellant, the writ petition was filed, on 4.11.2004 whereas the comparative statement of eligible tenderers was prepared on 3.12.2004 and the order of provisional settlement was made on 8.12.2004. Therefore, there was no delay on the part of the petitioner-appellant in instituting the writ petition, it is contended.

5. The arguments advanced on behalf of the appellant have been refuted by Shri Mushahari, learned senior Government Advocate appearing for the official respondents as well as by Dr. Y.K. Phukan, learned senior counsel appearing for the respondent No. 5. A common thread being noticeable in the arguments advanced by the learned Counsels for the respondents, it may be convenient for this Court to jointly recapitulate the argument advanced on behalf of the respondents. Placing before the court the averments made in the writ petition and the reply of the respondent No. 5 as contained in the Misc. Application filed for vacation, of the interim order, which was treated as the counter affidavit of the said respondent, the argument advanced is that both the sides had proceeded on the basis that the earlier sale-notices dated 27.1.2004 said 30.6.2004 were not withdrawn by the authority but were merely kept in abeyance due to the pendency of WP(C) No. 3654/04. In such a situation, according to the learned Counsel for the, Respondents, the learned Single Judge had verified the records and it is on the basis of the records so yenned that the teamed Single Judge had come to the conclusion that the earlier re-sale notices were not withdrawn by the authority. Dr. Y.K. Phukan, teamed counsel fix the respondent No. 5 has additionally argued that though it has own stated in the affidavit of the official respondent that the earlier sale notices were withdrawals, the said statements would be of little legal consequence, inasmuch as, withdrawal of any Government Notification or Memorandum including a sale notice must be by way of publication of another Notification/ Notice clearly indicating the withdrawal made. In file present case, no notice of such withdrawal was published and, therefore, notwithstanding the statements made in the counter affidavit of the official respondents, the court must uphold the finding recorded by the learned Single Judge to the effect that the earlier sale notices were not withdrawn. In this connection reliance has been placed by Dr. Phukan on two judgments of the Apex Court in the case of R. Vijayakumar and Others Vs. Commissioner of Excise and Others, and in the case of M/s. Lipton India Ltd. and another Vs. State of Karnataka and others, Dr. Phukan, teamed counsel for the respondent No. 5 has farther argued, that as the earlier sale notice dated 27.1.2004 cannot be treated by the court to have been withdrawn, the impugned re-sale notice dated 4.9.2004 must be understood, by the court, to be in continuation of the earlier sale notice dated. 27.1.2004 which, fact is also expressly mentioned in the impugned re-sale notice dated 4.9.2004. According to Dr. Phukan, there is no statutory requirement that a sale notice in continuation of an earlier notice must be published by giving any particular length of time to the

intending bidders to submit their tenders. The requirements of Rule 4 cannot be imported to such a sale notice which is m. continuation of an earlier notice. Dr. Phukan has further argued that in any case the petitioner-appellant had admitted knowledge of the re-sale notice after publication of the same in the newspaper on 17.9.2004. If that be so, the petitioner/appellant has not satisfactorily explained why he could not submit his tender on or before the last date feed, i.e., 24.9.2004 though the respondent No. 5 and other tenderers, who had participated in the tender process could obtain their tender papers on 20.9.2004 and submit the same within the stipulated lime, i.e., on 24.9.2004 in this regard. Dr. Phukan has placed before the court the statements made in the Misc. Application filed by the respondent No-5 to the effect that all the tenderers who had participated had obtained the tender papers on 20.9.2004 and could submit the same on or before 24.9.2004. The petitioner-appellant was himself responsible for not submitting the tender papers within the stipulated date though he had sufficient time to do so and, therefore, it is not open to the appellant to contend that any prejudice was caused to him. It is, therefore, argued that the appellant must be held to be estopped from challenging the re-sale notice dated 4.9.2004 on the grounds now advanced.

6. The rival contentions advanced oil behalf of the parties, as noticed above, make it imperative for this Court to deeds, at the first instance, the entitlement of the petitioner-appellant to raise the question with regard to the validity of the re-sale notice in the light of the acts performed by the petitioner-appellant an the basis of the said notice. The materials on record would go to demonstrate that the only act that the petitioner had performed in this regard is to apply for and obtain, a set of tender forms, which he did not submit. That the tender forms could have been obtained by the petitioner earlier which case the petitioner would have had some more time to submit the same is a question that cannot be understood to have any logical or reasonable connection with the locus of the petitioner to contend before the court that the re-sale notice itself is void on account of the failure of the authority to publish a due notice giving the mandatory period of 30 days as contemplated under the Rules. The petitioner-appellant, in the aforesaid circumstances cannot be understood to have waived any of his legal rights to maintain the present challenge.

7. Whether the earlier sale notices dated 27.1.2004 and 30.6.2004 had been withdrawn is a question that has to be answered by the court oh the basis of the records. Nothing has been placed before the court to indicate that the sale notices had been withdrawn in a manner permissible and authorised, in law. Consequently, the statements mach in the affidavit of the official respondents which, are suggestive of the withdrawal of the earlier sale notices cannot be safely acted upon by the court to arrive at the logical consequences that work follow such a decision. The alternative argument advanced on behalf of the petitioner in this regard, i.e., that if the earlier sale notices cannot be treated to have been withdrawn, the validity of the re-sale notice elated 4.9.2004 has to be tested in the light of the provisions of

the Rules, therefore, is the next question that has to be answered by thy court. Rule 17 is the only provision contained in the Rules dealing with the re-sale of Mahals. Not only Rule 17 contemplate re-sale following lapses or defeat committed by the Mahaldar to whom the Mahal may have been initially sold, the very word "re-sale" would signify an, act of an earlier sale. Admittedly, the Mahal in question was not sold pursuant to the sale notice dated 27.1.2004. In such a situation, it is difficult Co appreciate as to how the Mahal could have been attempted to be resold by issuing the resale notice dated 4.9.2004. We are fortified in the view that we have taken by a decision of this Court rendered in the case of Gujarat Water Supply and Sewerage Board, Gandhinagar Vs. Unique Erectors (Guj) Pvt. Ltd. and Another. Having taken the view indicated, it is only logical that we arrive at the conclusion that the Mahal could not have been attempted to have been sold by publication of the re-sale notice dated 4.9.2004 and what should have been done is publication of a fresh sale notice after conforming to the requirements spelt out by Rule 4 of the Rules. The argument advanced on behalf of the respondents that the re-sale notice must be deemed to be in continuation of the initial sale notice dated 27.1.2004, even if accepted, would not obviate the necessity of adhering to the requirement laid down by Rule 4, inasmuch, as, having regard to the long efflux of time that had occurred and the object behind the enactment of Rule 4 in its present form, it would, according to us, be more reasonable to require compliance with the period of notice contemplated by Rule 4. Such a requirement will also ensure consistency and uniformity in Governmental action in such matters. Not only that, we have noticed that after the initial re-sale notice dated 27.1.2004 was published, the Mahal had been extended for a period of 6 months with the original lessee by orders passed by the State Government on 15.2.2004. When the Mahal had been extended for as long a period as 6 months and that too, soon after the publication of the sale notice dated 27.1.2004, it is our considered view that the sale notice dated 27.1.2004 must be construed by as to have spent its force and. my attempt to re-sell the Mahal after expiry of the extended period of the original lessee, as has been sought to be done in the present case, ought, to have been only by publishing a fresh sale notice in accordance with the provisions of Rule 4 of the Rules.

8. The view that we have taken, would not require us to address any other contentions advanced on behalf of the parties, as the said view recorded by as would be conclusive of the matter. Accordingly and for the reasons already alluded to we interfere with the impugned judgment and order dated 4.3.2005 passed by the learned Single Judge, allow this appeal, and consequently allow the writ petition, by interfering with the re-sale notice dated 4.9.2004 as published in the newspaper on 17.9.2004. All consequential actions taken by the authority on the basis of the re-sale notice dated 4.9.2004 including the fresh settlement granted to the respondent No. 5 shall naturally stand interfered with. It will now be open for the State Government to settle the Mahal in accordance with the provisions of Rule 4 of the Rules and the observations and directions contained, in our present judgment

and order.