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HARIDWAR SINGH

v.

BAGUN SUMBRUI AND ORS.

February 25, 1972

B [K. S. HEGDE AND K. K. MATHEW, JJ.]

Contracts—Acceptance of auction bid by Divisional Forest Officer subject to confirmation by Government does not result in concluded contracts in the absence of confirmation by Government—Rules of Executive Business of Bihar Government made under Art. 166(3) *of Constitution—Rule* 10(1) *as relaxed does not prohibit grant of lease by* C *private treaty—Rule* 10(1) *in so far as it requires prior consultation with Finance Department is mandatory.*

The right to exploit a bamboo coup in the Hazaribagh district of Bihar was auctioned in August 1970. The reserve price was Rs. 95,000/- but the appellant's bid of Rs. 92,001/- being the highest was accepted by the Divisional Forest Officer. The petitioner deposited the security required and executed an agreement. The Divisional Forest Officer reported D about the auction sale to the Conservator of Forests, Hazaribagh Circle. As the price for which the coup was provisionally settled exceeded Rs. 50,000/- the Conservator of Forests forwarded the papers regarding the auction sale to the Deputy Secretary to the Government of Bihar, Forest Department for confirmation of the acceptance by the Government. Since provisional settlement was made for an amount less than the reserve price the matter was also referred to the Finance Department. When the E matter was pending the appellant expressed his willingness to take the settlement at the reserve price of Rs. 95,000/- by his communication dated October 26, 1970. The appellant thereafter filed an application on November 3, 1970 praying for settlement of the coup on the basis of the highest bid. The Minister of Forest by his proceedings dated November 27, 1970 directed that the coup may be settled with the highest bidder *viz.*, the appellant at the reserve price. A telegram was sent by the Government to the Conservator of Forests, Hazaribagh Circle on November F 28, 1970 with copy of the same to the Conservator of Forest, Bihar confirming the auction sale at the reserve price of Rs. 95,000/-. As no intimation was received by the Divisional Forest Officer he did not communicate the proceedings of the Minister to the appellant. On December 24, respondent No. 6 filed a petition to the Government offering to take the settlement of the coup in question for Rs. 101125/-. The Minister, by his proceedings dated December 13, 1970 cancelled the settlement of the coup with the appellant and settled the same with res- G pondent No. 6 for Rs. 101125/-. The appellant filed a writ petition in the High Court contending that there was a concluded contract when the bid of the appellant was accepted by the Divisional Forest Officer though that was subject to the confirmation by the Government and when the Government confirmed acceptance by its proceedings dated December 27, 1970 it was no longer within the power of the Government to make the settlement of the coup upon the 6th respondent. It was also con- H tended that the settlement of the coup in favour of the 6th respondent was invalid because (a) rule 10(1) of the Rules of Executive Business made under Art. 166(3) of the Constitution as relaxed by the letter of the Deputy Secretary to the Government dated November 27, 1967 prohibited the grant of lease by private treaty and (b) the requirement of

prior consultation in r. 10(1) with the Finance Department was mandatory and had not been complied with. The High Court rejected the appellant's contentions. In appeal to this Court by special leave. A

HELD : (1) The acceptance of the appellant's offer was subject to confirmation by the Government and in the absence of such confirmation there could be no concluded contract.

The appellant's bid was for Rs. 92001/-. The acceptance of the bid by the Divisional Forest Officer was therefore, subject to confirmation by the Government. The proceeding of the Minister dated November 27, 1970 would show that he did not confirm acceptance of the offer by the Divisional Forest Officer. What the Minister did was not to confirm the acceptance made by the Divisional Forest Officer but to accept the offer made by the appellant in his communication dated October 26, 1970 that he would take the coup for the reserved price of Rs. 95,000/. There was, therefore, no confirmation of the acceptance of the bid to take the coup in the settlement for the amount of Rs. 92,001/-. [634-G-635B] B C

If the offer that was accepted was the offer contained in the communication of the appellant dated October 26, 1970 it could not be said that there was any communication of the acceptance of that offer to the appellant. The telegram sent to the Conservator of Forest, Hazaribagh by the Government on November 28, 1970 could not be considered as a communication of the acceptance of that offer to the appellant. The acceptance of the offer was not even put in course of transmission to the appellant; and so even assuming that acceptance need not come to the knowledge of the offeror, the appellant could not contend that there was a concluded contract on the basis of his offer contained in his communication dated October 26, 1970, as the acceptance of that offer was not put in the course of transmission. Apart from that the appellant himself revoked the offer made by him on October 26, 1970 by his letter dated November 3, 1970 in which he stated that the coup may be settled upon him at the highest bid made by him in the auction. There was, thus no concluded contract between the appellant and the government. [635B-D] D E

The Rajanagaram Village Cooperative Socity v. Veeraswami Mudaly, [1950] II M.L.J. 486, distinguished.

Somasundaram Pillai v. *Provincial Government of Madras*, A.I.R. 1947 Madras, 366, applied. F

(ii) Rule 10(1) in so far as it was relevant to the present case only says that no department shall without prior consultation with the Finance Department authorise by any order the lease or license of mineral of forests. The rule read in the context of its relaxation as mentioned in the letter of the Deputy Secretary would only show that consultation with the Finance Department is not necessary for a lease if lease is of land of the value of more than Rs. 50,000/- and is granted in pursuance of public auction held in conformity with the conditions mentioned in the letter of the Deputy Secretary. The rule whether before or after relaxation did not prohibit the grant of leave by private treaty. [637C] G

(iii) It was clear from records relating to the proceedings for the grant of the lease in favour of the 6th respondent that the Finance Department was not consulted before the Minister passed the order on December 13, 1970 to grant lease. It could not be said that rule 10(1) in so far as it requires prior consultation with the Finance Department is only drirectory and therefore even if there was no prior consultation the settlement H

A was valid. The negative or prohibitive language of rule 10(1) is a strong indication of the intent to make the rule mandatory. Further rule 10(2) makes it clear that where prior consultation with the Finance Department is required for a proposal and the department on consultation, does not agree to the proposal, the department originating the proposal can take no further action on the proposal. The Cabinet alone would be competent to take a decision. Prior consultation is, therefore, B an essential prerequisite to the exercise of power. The order passed by the Minister of Forest, Government of Bihar on December 13, 1970 settling the coup in favour of the 6th respondent was, therefore bad and the order must be quashed. [637EF; 638D-F]

Dattatreya Moreshwar Pangerkar v. *The State of Bombay and Others*, [1952] 2 S.C.R. 612 applied.

C CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1807 of 1971.

Appeal by special leave from the judgment and order dated May 6, 1971 of the Patna High Court in C.W.J.C. No. 41 of 1971.

L. M. Singhvi, S. C. Dingra and *U. P. Singh*, for the appellant.

D *S. V. Gupte* and *B. P. Singh*, for respondents Nos. 1 to 5.

S. N. Prasad and *D. N. Mishra*, for respondent No. 6.

The Judgment of the Court was delivered by

Mathew, J. The appellant filed a writ petition before the E High Court of Patna praying for quashing an order passed by the Minister of Forest, Government of Bihar, on December 13, 1970, and for issue of a writ in the nature of *mandamus* directing the respondents 1 to 5 to give effect to the previous order of the Minister of Forest dated November 27, 1970. The writ petition was heard by a Division Bench of the Court and the petition was F dismissed. This appeal, by special leave, is from that judgment.

There is a bamboo coup know as "Bantha Bamboo coup" in Chatra North Division of Hazaribagh district. On July 22, 1970, the Forest Department of the Government of Bihar advertised for settlement of the right to exploit the coup by public G auction. The auction was held in the office of the Divisional Forest Officer on August 7, 1970. Five persons including the appellant participated in the auction. Though the reserve price fixed in the tender notice was Rs. 95,000/-, the appellant's bid of Rs. 92,001/-, being the highest, was accepted by the Divisional Forest Officer. The petitioner thereafter deposited the security amount of Rs. 23,800/- and executed an agreement. The Divi- H sional Forest Officer reported about the auction sale to the Conservator of Forests, Hazaribagh Circle, by his letter dated August 25, 1970. As the price for which the coup was provisionally

settled exceeded Rs. 50,000/-, the Conservator of Forests forwarded the papers regarding the auction sale to the Deputy Secretary to Government of Bihar, Forest Department, for confirmation of the acceptance by the Government. Since the provisional settlement was made for an amount less than the reserve price, the matter was also referred to the Finance Department. The Finance Department invited comments from the Divisional Forest Officer as to why the settlement was made for a lesser amount. The Divisional Forest Officer, by his letter dated October 30, 1970, submitted his explanation for the provisional settlement at an amount below the reserve price. When the matter was pending before the Government, the appellant expressed his willingness to take the settlement at the reserve price of Rs. 95,000/-, by his communication dated October 26, 1970. The appellant thereafter filed an application on November 3, 1970, praying for settlement of the coup on the basis of the highest bid. The Minister of Forest, by his proceedings dated November 27, 1970, directed that the coup may be settled with the highest bidder, namely the appellant, at the reserve price. A telegram was sent by the Government to the Conservator of Forests, Hazaribagh Circle on November 28, 1970, with a copy of the same to the Conservator of Forest, Bihar, confirming the auction sale to the appellant at the reserve price of Rs. 95,000/-. As no intimation was received by the Divisional Forest Officer, he did not communicate the proceedings of the Minister to the appellant. One Md. Yakub, Respondent No. 6, filed a petition on December 4, 1970, before the Government of Bihar, Respondent No. 1, offering to take the settlement of the coup in question for Rs. 1,01,125/-. A telegram was sent by the Government on December 5, 1970, to the Divisional Forest Officer, directing him not to take any action on the basis of the telegram dated November 28, 1970, sent to him in pursuance of the proceedings of the Government dated November 27, 1970. That telegram was received by the Divisional Forest Officer on December 10, 1970, and the Divisional Forest Officer, by his letter dated December 10, 1970, informed the Government that the previous telegram dated November 28, 1970, was not received by him and so it content was not communicated to the appellant. The whole matter was thereafter placed before the Minister of Forest and the Minister, by his proceedings dated December 13, 1970, cancelled the settlement of the coup with appellant and settled the same with Respondent No. 6 for Rs. 1,01,125/-. The Government thereafter sent telegrams on December 21, 1970, to the Conservator of Forests and the Divisional Forest Officer, informing them that the coup had been settled with Respondent No. 6. The Divisional Forest Officer, by his letter dated December 23, 1970, directed Respondent No. 6 to deposit the security amount and to pay the first instalment. Respondent No. 6 deposited the same and executed an agreement.

A The contention of the appellant in the writ petition was that there was a concluded contract when the bid of the appellant was accepted by the Divisional Forest Officer though that was subject to confirmation by the Government and that, when the Government confirmed the acceptance by its proceedings dated November 27, 1970, it was no longer within the power of Government B to make the settlement of the coup upon the 6th Respondent by its proceedings dated December 13, 1970. It was also contended in the alternative that the settlement of the coup in favour of the 6th Respondent was in violation of statutory rules and, therefore, in any event, that settlement was invalid.

C As already indicated, the High Court negatived these contentions and upheld the validity of the settlement in favour of the 6th Respondent.

The special conditions in the tender notice makes it clear that the Divisional Forest Officer has the right to accept a bid of less than Rs. 5,000/-, that acceptance of a bid of more than D Rs. 5,000/- by him is subject to confirmation by the Chief Conservator of Forests and the Forest Department of the Bihar Government, that an auction sale for an amount of more than Rs. 5,000/- would not be recognised until it is confirmed by the competent authority, and that a bid made in auction and which has been provisionally accepted by the Divisional Forest Officer E shall be binding on the bidder for two months from the date of auction or till the date of rejection by the competent authority, whichever is earlier.

Counsel for the appellant contended that there was a conditional acceptance of the offer of the appellant by the Divisional Forest Officer, that on confirmation by the Government, that F acceptance became unconditional and, therefore, there was a concluded contract when the Government confirmed the acceptance, even though the confirmation was not communicated to the appellant. In support of this, he relied on *The Rajanagaram Village Cooperative Society* v. *Veerasami Mudaly*(1). There it was held that in the case of a conditional acceptance in the presence of a G bidder, the condition being that it is subject to approval or confirmation by some other person, the acceptance, though conditional, has to be communicated and when that is communicated, there is no further need to communicate the approval or confirmation which is the fulfilment of the condition. It was further held that a conditional acceptance has the effect of binding the highest bidder to the contract if there is subsequent approval or confirma- H tion by the person indicated, that he cannot resile from the contract or withdraw the offer, and if there is approval or confirma-

(1) [1950] 11 M.L.J. 486.

tion, the contract becomes concluded and enforceable. This decision was considered in *Somasudaram Pillai* v. *Provincial Government of Madras*(1) where Chief Justice Leach, speaking for the Court said that, to have an enforceable contract, there must be an offer and an unconditional acceptance and that a person who makes an offer has the right to withdraw it before acceptance, in the absence of a condition to the contrary supported by consideration. He further said the fact that there has been a provisional or conditional acceptance would not make any difference as a provisional or conditional acceptance cannot in itself make a binding contract.

The question whether by an acceptance which is conditional upon the occurrence of a future event a contract will become concluded was considered by Williston and this is what he says : (2)

> "A nice distinction may be taken here between (1) a so-called acceptance by which the acceptor agrees to become immediately bound on a condition not named in the offer, and (2) an acceptance which adopts unequivocally the terms of the offer but states that it will not be effective until a certain contingency happens or fails to happen. In the first case there is a counter-offer and rejection of the original offer; in the second case there is no counter-officer, since there is no assent to enter into an immediate bargain. There is, so to speak, an acceptance in escrow, which is not to take effect until the future. In the meantime, of course, neither party is bound and either may withdraw. Moreover, if the time at which the acceptance was to become effectual is unreasonably remote, the offer may lapse before the acceptance becomes effective. But if neither party withdraws and the delay is not unreasonable a contract will arise when the contingency happens or stipulated event occurs"

In this case, it is not the want of communication of the confirmation by the Government to the appellant that really stands in the way of there being a concluded contract, but rather the want of confirmation by the Government of the conditional acceptance by the Divisional Forest Officer. The appellant's bid was for Rs. 92,001/-. The acceptance of the bid by the Divisional Forest Officer was, therefore, subject to confirmation by Government. The proceedings of the Minister dated November 27, 1970, would show that he did not confirm the acceptance of the

(1) A.I.R. 1947, 34 Madras, 366.

(2) Williston On Contracts, Vol. 1, 3rd Ed. Section 77A.

A offer by the Divisional Forest Officer. What the Minister did was not to confirm the acceptance made by the Divisional Forest Officer, but to accept the offer made by the appellant in his communication dated October 26, 1970, that he would take the coup for the reserved price of Rs. 95,000/-. There was, therefore, no confirmation of the acceptance of the bid to take the coup in B settlement for the amount of Rs. 92,001/-. If the offer that was accepted was the offer contained in the communication of the appellant dated October 26, 1970, we do not think that there was any communication of the acceptance of that offer to the appellant. The telegram sent to the Conservator of Forest, Hazaribagh, by the Government on November 28, 1970, cannot be considered C as a communication of the acceptance of that offer to the appellant. The acceptance of the offer was not even put in the course of transmission to the appellant; and so even assuming that an acceptance need not come to the knowledge of the offeror, the appellant cannot contend that there was a concluded contract on the basis of his offer contained in his communication dated October 26, 1970, as the acceptance of that offer was not put in the D course of transmission. Quite apart from that, the appellant himself revoked the offer made by him on October 26, 1970, by his letter dated November 3, 1970, in which he stated that the coup may be settled upon him at the highest bid made by him in the auction. We are, therefore, of the opinion that there was no concluded contract between the appellant and the Government.

E This takes us to the question whether the settlement in favour of the 6th Respondent was in violation of any statutory rule. The appellant's contention was that the settlement in favour of the 6th Respondent by a private treaty was in violation of the rules of executive business made under Article 166(3). Rule 10 of the Rules provides :

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> "10(1) No department shall, without previous consultation with the Finance Department, authorise any orders (other than orders pursuant to any general or special delegation made by the Finance Department) which :
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> G (a) either immediately or by their repercussion. will affect the finances of the State, or which, in particular,
>
> (i) involve any grant of land or assignment of revenue or concession, grant, lease or licence of mineral or forests, rights or a right to water H power of any easement or privilege in respect of such concession.
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> ** ** **

(2) Where on a proposal under this rule, prior consultation with the Finance Department is required, but on which the Finance Department might not have agreed, no further action shall be taken on any such proposal until the cabinet takes a decision to this effect."

A copy of the letter from the Deputy Secretary to the Government of the Accountant General, Bihar, dated November 22, 1967 would show that some relaxation of Rule 10(1) of the rules of executive business was made by the Finance Department relating to lease of forest Coups or forest produce of the value of more than Rs. 50,000/-. That letter reads as under :

"*Subject* : Revision of procedure in issuing any order involving any grant of lease, sale or licence of minerals of forest rights if such order is issued by the Administrative Department at the Secretariat level.

"Sir,

I am directed to say that in relaxation of rule 10(1) of the Rules of Executive Business, Government have been pleased to decide that the Forest Department shall authorise orders sanctioning leases of Forest coups or produce of the value of more than Rs. 50,000/- (rupees fifty thousand) each, subject to the following conditions that :—

(1) Reserve price of the coup has been fixed before auction.

(2) Highest bid should be accepted.

(3) Highest bid should not be less than the reserve price.

(4) Any relaxation to the above conditions may not ordinarily be allowed except with the prior concurrence of the Finance Department."

Before the High Court the contentions of the 6th Respondent were, firstly, that the rule 10(1) is not a statutory rule and. secondly, that it did not concern lease of forest land. The High Court, without deciding the question whether the rule is a statutory rule, held that the rule has nothing to do with the lease of forest coups and said that there was nothing which prevented the Government from giving the coup on lease by private treaty. The High Court, therefore, held that there was no bar, statutory or otherwise, to the settlement of the coup in favour of Respondent

A No. 6 by private negotiation and as such the settlement in his favour was valid.

Counsel for the appellant argued that the High Court went wrong in its conclusion that rule 10(1) as relaxed, did not apply to the grant of the lease of the coup in question and that it really prohibited a lease of forest land except by public auction. We B are not satisfied that the construction contended for is correct. Neither rule 10(1) nor the rule as relaxed says that forest land can be leased only by public auction. Rule 10(1) in so far as it is relevant to the present case only says that no department shall, without prior consultation with the Finance Department, authorise by any order, the lease or licence of mineral or forests. The C relaxation made to rule 10(1) as evidenced by the letter from the Deputy Secretary to the Government is to the effect that in the case of lease of forest land of the value of more than Rs. 50,000/-, if made by public auction, it can only be made subject to the conditions mentioned there. In other words, rule 10(1) as relaxed does not prohibit the grant of a lease by private treaty. D The rule read in the context of its relaxation as mentioned in the letter of the Deputy Secretary would only show that consultation with the Finance Department is not necessary for a lease, if the lease is of land of the value of more than Rs. 50,000/- and is granted in pursuance of a public auction held in conformity with the conditions mentioned in the letter of the Deputy Secretary.

E Now the question is whether the coup in question was settled in favour of the 6th Respondent in accordance with Rule 10(1). It is clear from the records relating to the proceedings for the grant of the lease in favour of the 6th Respondent that the Finance Department was not consulted before the Minister passed the order on December 13, 1970, to grant the lease. But counsel F for the Government of Bihar and 6th Respondent contended that rule 10(1), in so far as it requires prior consultation with the Finance Department, is only directory in character and, therefore. even if there was no prior consultation, the settlement was valid. So, the question arises whether rule 10(1) which requires prior consultation with the Finance Department is mandatory or not.

G Several tests have been propounded in decided cases for determining the question whether a provision in a statute, or a rule is mandatory or directory. No universal rule can be laid down on this matter. In each case one must look to the subject matter and consider the importance of the provision disregarded and the relation of that provision to the general object intended to be H secured. Prohibitive or negative words can rarely be directory and are indicative of the intent that the provision is to be mandatory (see Earl T. Crawford. *The Construction of Statues*, pp. 523-4).

Where a prescription relates to performance of a public duty and to invalidate acts done in neglect of them would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty, such prescription is generally understood as mere instruction for the guidance of those upon whom the duty is imposed [see *Dattatreya Moreshwar Pangerkar* v. *The State of Bombay and others*(1)]. A B

Where, however, a power or authority is conferred with a direction that certain regulation or formality shall be complied with, it seems neither unjust nor incorrect to exact a rigorous observance of it as essential to acquisition of the right or authority (see Maxwell, *Interpretation of Statutes*, 6th edition, pp. 649-650). C

In this case, we think that a power has been given to the Minister in charge of the Forest Department to do an act which concerns the revenue of the State and also the rights of individuals. The negative or prohibitive language of rule 10(1) is a strong indication of the intent to make the rule mandatory. Further, rule 10(2) makes it clear that where prior consultation with the Finance Department is required for a proposal, and the department on consultation, does not agree to the proposal, the department originating the proposal can take no further action on the proposal. The cabinet alone would be competent to take a decision. When we see that the disagreement of the Finance Department with a proposal on consultation, deprives the department originating the proposal of the power to take further action on it, the only conclusion possible is that prior consultation is an essential pre-requisite to the exercise of the power. We, therefore, think that the order passed by the Minister of Forest, Government of Bihar on December 13, 1970. settling the coup in favour of the 6th Respondent was bad and we quash the order. D E F

We allow the appeal to the extent indicated but make no order as to costs.

G.C. *Appeal allowed.*