

GAHC010058552018



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/1788/2018

MAZAHARUL SULTAN
S/O- LATE RUSTOM ALI, R/O- VILL- BHITORSUTI,
GOTLONG, P.O- KALIABHUMURA,
PIN- MOUZA- BHAIKABPAD, TEZPUR,
DIST- SONITPUR, ASSAM

VERSUS

THE STATE OF ASSAM AND 6 ORS.
REP. BY THE COMMISSIONER AND SECRETARY TO THE GOVT OF ASSAM,
DEPTT. OF TOWN AND COUNTRY PLANNING, DISPUR, GUWAHATI- 6

2:THE DIRECTOR
TOWN AND COUNTRY PLANNING
DISPUR GUWAHATI-6

3:THE CHAIRMAN
TEZPUR DEVELOPMENT AUTHORITY
TEZPUR SONITPUR ASSAM

4:THE DEPUTY DIRECTOR
TOWN AND COUNTRY PLANNING
TEZPUR DIST- SONITPUR ASSAM

5:THE DEPUTY COMMISSIONER
TEZPUR DIST- SONITPUR ASSAM

6:THE CIRCLE OFFICER
TEZPUR REVENUE CIRCLE
TEZPUR DIST- SONITPUR ASSAM

7:SRI NRIPESH CHANDRA DAS ROY
S/O SAILESH CHANDRA DAS ROY
R/O RUBBER BAGAN

BYE LANE- 3
TEZPUR TOWN
P.O. AND P.S. TEZPUR
MOUZA- MAHABHAIRAB
DIST.- SONITPUR
TEZPUR
ASSAM-784001.

8:SRI ANUP DUTTA
S/O LT. KALYAN DUTTA
R/O VILL- RUBBER BAGAN
BYE LANE-5
P.O. AND P.S. -TEZPUR
MOUZA- MAHABHAIRAB
DIST.- SONITPUR
ASSAM-784001.

9:SMT. ILA DUTTA
W/O LT. KALYAN DUTTA
R/O VILL- RUBBER BAGAN
BYE LANE-5
P.O. AND P.S.- TEZPUR
MOUZA- MAHABHAIRAB
DIST.- SONITPUR
ASSAM-784001.

10:SMT. RUMI DUTTA
D/O LT. KALYAN DUTTA
R/O
VILL- RUBBER BAGAN
BYE LANE-5
P.O. AND P.S.- TEZPUR
MOUZA- MAHABHAIRAB
DIST.- SONITPUR
ASSAM-784001

Advocate for the Petitioner : MR. P MAHANTA

Advocate for the Respondent : GA, ASSAM

Linked Case : WP(C)/521/2023

MAZAHARUL SULTAN
S/O- LT. RUSTAM ALI
R/O- BHITORSUTI
GOTLONG P.O. KALIABHOMORA
MOUZA- BHAIRABPAD TEZPUR

DIST.- SONITPUR
ASSAM PIN- 784027

VERSUS

THE STATE OF ASSAM AND 6 ORS
REP. BY THE COMM. AND SECY. TO THE GOVT. OF ASSAM
DEPTT. OF TOWN AND COUNTRY PLANNING
DISPUR GHY-06

2:THE DIRECTOR
TOWN AND COUNTRY PLANNING
DISPUR GHY-06

3:THE CHAIRMAN
TEZPUR DEVELOPMENT AUTHORITY
TEZPUR SONITPUR
ASSAM

4:THE DY. DIRECTOR
TOWN AND COUNTRY PLANNING
TEZPUR
DIST.- SONITPUR
ASSAM

5:THE DY. COMMISSIONER
TEZPUR
DIST.- SONITPUR
ASSAM

6:THE CIRCLE OFFICER
TEZPUR REVENUE CIRCLE
TEZPUR
DIST.- SONITPUR
ASSAM

7:DOLABARI GAON PANCHAYAT
REP. BY ITS CHAIRMAN
DOLABARI
GOTLONG GAON
ASSAM
DIST.- SONITPUR
ASSAM
PIN- 784027

Advocate for : MR. P MAHANTA
Advocate for : SR. GA
ASSAM appearing for THE STATE OF ASSAM AND 6 ORS

**BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA**

ORDER

Date : 19.03.2024

Heard Mr. P. Mahanta, learned counsel for the writ petitioner in both the cases. Also heard Mr. S. S. Roy, learned counsel for the respondent Nos. 1, 2, 4, 5 & 6 in both the cases; Mr. G. Choudhury, learned counsel for the respondent Nos. 7, 8, 9 & 10 in WP(C) 1788/2018, and Mr. A. Baruah, learned counsel for the respondent No. 3 in both the cases. No one appears for the respondent No. 7, Dolabari Gaon Panchayat in WP(C) 521/2023.

2. The two writ petitions are being disposed of by this common order, inasmuch as, the issue to be decided, i.e., the challenge to the notice given to the petitioner to demolish his constructions, as no prior permission was taken by him from the Tezpur Development Authority, pertains to both the writ petitions.

3. In WP(C) 1788/2018, the petitioner has prayed for setting aside the notice dated 19.03.2018 issued to the petitioner, directing him to demolish the petitioner's constructions. In WP(C) 521/2023, the petitioner has prayed for a direction to be issued to the State respondents not to implement the Gazette Notification dated 24.08.2010, publishing the Revised Master Plan & Zoning Regulation for Tezpur-2031, which is the basis for issuance of the notice dated 19.03.2018, to demolish the petitioner's constructions.

4. The petitioner's case is that the petitioner is the owner of land measuring 7 Bighas, 1 Katha, 10 Lechas land, out of total land measuring 28 Bighas, 2 Kathas under Dag No. 145(N) P.P. No. 45(N) in the revenue village Vitarsuti in

the district of Sonitpur. The classification of land has been shown as "*baotoli*", i.e., low agricultural land. The petitioner's further case is that since 1966, no agricultural activity has occurred over the said land.

5. The petitioner's counsel submits that the petitioner had purchased the aforesaid land in July, 2015 and made constructions, which was used as a market and he had established one ice factory in the year 2016. He also submits that prior to commencement of the ice factory, the petitioner had applied for trade licence, industry licence and food safety licence, which had been given to him in the year 2016 by the concerned authorities.

6. The petitioner's counsel submits that on 13.03.2018, a notice was issued by the Tezpur Development Authority to the petitioner, stating that he had made illegal constructions within Tezpur Master Plan area, which was brought under the Tezpur Master Plan, vide Assam Government Notification dated 25.10.1977. As the petitioner had started his construction work, without obtaining the prior permission of the Tezpur Development Authority (TDA, in short), in violation of Section 13(1) of the Assam Town & Country Planning (Amendment) Act, 1959 (in short, 'the 1959 Act'), the petitioner was asked to stop the construction work and to give a reply as to why appropriate action was not to be taken against him, as per the provisions of Section 30(B)(1), 31, 51 and 52 of the Act.

7. The petitioner thereafter submitted a reply dated 16.03.2018 to the notice dated 13.03.2018, stating that he had constructed an Assam type house for an ice factory besides constructing latrines and bathroom for use by the general public and shop keepers of the daily market. The petitioner stated that he was not aware that permission was required to be obtained from the Tezpur

Development Authority, prior to the constructions made by the petitioner. He accordingly apologized for not obtaining prior permission for making the constructions. Along with his reply dated 16.03.2018, the petitioner submitted his land documents along with a form taken from the State respondents office, for obtaining permission for the constructions made. Subsequent to the above events, the Tezpur Development Authority issued a notice dated 19.03.2018 to the petitioner, asking him to demolish all the illegal constructions done by him, as he had made the construction over *baotoli* land. The *baotoli* land was to be used purely for cultivation purposes and that construction of a building over cultivation land was not permitted, without obtaining prior permission from the office of the Tezpur Development Authority.

8. The petitioner's counsel submits that the notice dated 13.03.2018 issued to the petitioner by the respondent No. 3, to stop construction activity, had been made on the basis of the Assam Government Notification dated 25.10.1977. However, the respondents have not been able to produce the said Government Notification dated 25.10.1977 and have instead issued the notice dated 19.03.2018, directing the petitioner to demolish the constructions made by him for commercial purposes, pursuant to the State Government Notification dated 24.08.2010. He submits that as the notice dated 13.03.2018 had been issued on the basis the 1977 Notification, the State respondents could not have asked him to demolish his constructions, on the basis of the 2010 Notification.

9. Mr. A. Baruah, learned counsel for the respondent No. 3 submits that though the notice dated 13.03.2018 may have referred to 1977 State Government Notification, there is no infirmity with the State respondents taking action, on the basis of the 2010 State Government Notification. He submits that

the 2010 State Government Notification shows that the area in which the petitioner had made his constructions without the permission of the TDA, is within the Revised Master Plan for Tezpur. He also submits that in terms of Sections 3 & 4 of the Assam Agricultural Land (Regulation of Re-Classification and Transfer for Non-Agricultural Purpose) Act, 2015 (hereinafter referred to as 'the 2015 Act'), there is a bar on the use of agricultural land for non-agricultural purposes, without re-classification of land and permission for construction being given by the competent authority, i.e., Tezpur Development Authority.

10. I have heard the learned counsels for the parties.

11. The pleadings in the writ petition make it clear that the petitioner had purchased the land in which he had made the constructions for commercial purposes only in July, 2015 and that the said land had been classified as a *baotoli* land, i.e., agricultural land. This is reflected in paragraph 2 of the writ petition.

12. Section 3 of the 2015 Act provides that no person shall use or transfer agricultural land for intended non-agricultural purposes, without re-classification and permission in the manner provided in Section 3 of the 2015 Act. Section 3(iv) of the 2015 Act provides that no permission is required to be obtained from the Deputy Commissioner, when an agricultural land not exceeding one bigha is intended to be used or transferred for construction of one's own dwelling house, when the same is limited to two-storeys. In such a case, the Deputy Commissioner may *suo-moto* or on an application received from the owner or the transferee, re-classify such land into a residential class land. Section 4(i) of the 2015 Act provides that an agricultural land, which has

become unfit for agricultural purposes or where no agricultural activity has been undertaken for at least 10 years preceding the date of application for permission, shall only be re-classified or reclassified-cum-transferred for intended non-agricultural purposes, with the prior approval of the Deputy Commissioner. Section 2(y) of the 2015 Act defines re-classification to mean change of land use from agricultural purpose to intended non-agricultural purpose and re-classified land means land for which permission under the 2015 Act is granted for use for non-agricultural purposes.

13. The above provisions of the 2015 Act clearly show that there is a bar on use or transfer of agricultural land for non-agricultural purposes, unless re-classification of the land and permission for the same is obtained from the concerned authority. Section 2(y), Sections 3 & 4 of the 2015 Act are reproduced hereinbelow as follows:-

2.(y) *"reclassification" means change of land use from agricultural purpose to intended non-agricultural purpose and "reclassified land" means land for which permission under this Act is granted for use for non-agricultural purpose;*

3. *No person shall use or transfer agricultural land for intended non-agricultural purposes without reclassification and permission in the manner as mentioned herein below:-*

(i) No agricultural land shall be put for intended non-agricultural purpose without the prior permission of the Deputy Commissioner. The Deputy Commissioner shall be competent accord permission only after reclassification of the said land.

(ii) No agricultural land shall be transferred for intended non-agricultural purpose without the prior permission of the Deputy Commissioner. The Deputy

Commissioner shall be competent to accord permission only after reclassification of the said land.

(iii) The Deputy Commissioner shall examine the bonafides of applications received for 'issue of permission for reclassification' or reclassification-cum-transfer under clause (i) and (ii) of this section and issue the permissions only when he is satisfied that the permission has been sought for bonafide use of the land for non-agricultural purposes.

(iv) No permission is required to be obtained from the Deputy Commissioner under this section, when an agricultural land not exceeding one bigha is intended to be used or transferred for construction of one's own dwelling house and when construction of the said structure is limited to two-storeys. In such cases the Deputy Commissioner may suo-moto or on an application received from the owner or the transferee reclassify such land into residential class.

4. (1) *Such land which is recorded as agricultural land but has already become unfit for agricultural purposes or where there has been no agricultural activity for at least ten years preceding the date of application for permission, shall only be reclassified or reclassified-cum- transferred for intended non-agricultural purposes with the prior approval of the Deputy Commissioner.*

(2) No agricultural land under cultivation during ten years preceding the date of application for permission as required under sub-section (1) of section 5 shall be reclassified or reclassified-cum-transferred for non-agricultural purpose by the Deputy Commissioner without the prior approval of the State Government in the Revenue Department.

(3) This section shall not apply when agricultural land not exceeding one bigha is used or reclassified or reclassified-cum-transferred for construction of one's own dwelling house and when construction of the said structure is limited to twostoreys.

14. In the present case, there is no dispute with regard to the fact that the land of the petitioner, in which he has made constructions for commercial purposes, is agricultural land. It is also not in dispute that the petitioner had not applied for permission, prior to making his constructions in the agricultural land. It is also not in dispute that the petitioner has not made any application to the competent authority, for re-classification of his land for non-agricultural purposes.

15. The above being said, the Notification dated 24.10.2010 published in the Assam Gazette dated 31.12.2010, has notified the area of the Revised Final Master Plan for Tezpur and the same shows that the village Vitarsuti, in which the petitioner's land is located, is included in the Revised Master Plan for greater Tezpur-2031. In that view of the matter, it was necessary for the petitioner to obtain necessary approval and permission for his constructions for commercial purposes from the Tezpur Development Authority, in terms of the Assam Town & Country Planning Act, 1959, read with the Assam Town & Country Planning (Publication of Master Plan and Zoning Regulations) Rules, 1962 and subsequent amendment.

16. With regard to the contention of the petitioner's counsel that the State respondents could not have applied the State Government Notification dated 24.08.2010, which notified the area of the Revised Final Master Plan for Tezpur, as the notice dated 13.03.2018, asking the petitioner to stop his construction work, had been done in terms of the Assam Government Notification dated 25.10.1977, this Court is of the view that the said submission does not hold any water. The reason being that the Assam Government Notification dated 24.08.2010 covers the area of the petitioner's constructions. There is no reason

for this Court to hold that the policy decision of the State Government, wherein the State Government has notified the areas which should be included within the Revised Master Plan area for Tezpur, to be in violation of Article 14 of the Constitution. The notification dated 24.08.2010 clearly being an administrative exercise, which is not violative of any fundamental and legal right of the petitioner, this Court does not find any ground to set aside the said notification.

17. With regard to the submission of the petitioner's counsel that the notice dated 19.03.2018 issued to the petitioner, on the basis of the Notification dated 24.08.2010, directing the petitioner to demolish his constructions could not have been issued, as the earlier notice dated 13.03.2018 had referred to the Government Notification dated 25.10.1977, this Court is of the view that it would be profitable to refer to the judgment of the Supreme Court in the case of ***Union of India vs. Tulsiram Patel*** reported in **(1985) 3 SCC 398**, wherein it has been held that source of power must exist for its exercise. Further, in the case of ***CCE vs. Pradyumna Steel Ltd., SLP(C) No. 18531 of 1995***, the Supreme Court has held that mere mention of a wrong provision of law when the power exercised is available even though under a different provision, is by itself not sufficient to invalidate the exercise of that power.

18. In the present case, even though the earlier notice dated 13.03.2018 had referred to the State Government Notification dated 25.10.1977, this Court does not find any infirmity with the exercise of power by the State Government, in terms of the notification dated 24.08.2010, which has been notified in the Assam Gazette on 31.12.2010 and by which, the Assam Town & Country Planning Act, 1959, read with the Assam Town & Country Planning (Publication of Master Plan and Zoning Regulations) Rules, 1962 and subsequent

amendment come into play. Further, in view of the provision of Section 3 of the 2015 Act, the petitioner could not have made constructions on his agricultural land for commercial purposes, without getting approval from the competent authority and without re-classification of his land. As such, this Court does not find any reason to interfere with the impugned notice dated 19.03.2018.

19. These writ petitions are accordingly dismissed.

20. The above being said, the petitioner is given the liberty to approach the respondent authority for re-classification of the land in question, for the purpose of allowing him to use his constructions for commercial purposes. If the petitioner files an application for re-classification of his land, the competent authority will decide the same as per their discretion. If the petitioner applies for re-classification of his land, within a period of 1 week from today, the respondents should take a decision on the same immediately. The notice dated 19.03.2018 shall not be acted upon till a decision is taken on the petitioner's representation, provided it is submitted to the respondent No. 3 within one week from today.

JUDGE

Comparing Assistant