

(1980) 09 GAU CK 0007

In the Gauhati High Court

Case No : Civil Rule No. 222 of 1980

Bapakhat Jibikapath Min Samabay Samity Ltd.Bapakhat

APPELLANT

Vs

State of Assam and Ors.

RESPONDENT

Date of Decision : 17-09-1980

Acts Referred:

Assam Fisheries Rules, 1953 — Rule 12 Proviso, 12 Proviso

Citation : (1982) 1 GLR 311

Hon'ble Judges : B.L.Hansaria, J

Bench : Single Bench

Advocate : B.C.Barua, B.P.Bora, J.P.Bhattacharjee, M.K.Sarma, S.N.Medhi, U.Baruah, Advocates appearing for Parties

Judgement

Hansaria, J.—The main thrust of the challenge in the present case has been met by the Full Bench decision of this Court in Civil Rules No. 174 and 175 of 1980, decided on 21.8.80. The same was that the sale notice inviting tenders for the fishery in question (Basduarkhabali fishery) having been issued, it was not open to withdraw the fishery to give direct settlement. The Special Bench, speaking through Pathak, C. J, (Acting.), has examined all the relevant rules and the case law on the subject and has held that it was open to the State Government to have invoked its power under the proviso to Rule 12 of the Fishery Rules, as inserted in 1976. The surviving attack on the order of direct settlement which was passed on 3.5.80 is, therefore, mainly on these grounds: (i) the order having been passed after this court had restrained the respondents 1, 2 and 3 from making direct settlement by an order passed on 2.5.80, the same must be regarded as in violation of this court's order and as such ineffective ; (2) the prerequisites necessary for invoking the power under the proviso to Rule 12 were not satisfied and as such the order is without jurisdiction ; and (iii) the order in any case was passed arbitrarily and cannot therefore be sustained.

No. 2 to 7 not printed,

8. Apropos the third submission, it may first be noted that there is no averment

about it in the petition. It is not a grievance of the petitioner either in his first application or in the amended petition that the Government had exercised its power under the proviso to Rule 12 arbitrarily. But this argument has been built up on being found by perusing the records submitted by the Government that the report of the Deputy Commissioner relating to the petitioner had been received in the Secretariat on 5.5.80, whereas the impugned order had been passed on 3.5.80. The submission, therefore, is that the Government had not awaited for the report of the Deputy Commissioner relating to the petitioner society and as such its case had even not been considered before passing the impugned order.

9. Shri Barua took the stand that as the Government has almost unfettered discretion while exercising its power of direct settlement, no question of following any rigid procedure arises as the Government is really not discharging any public duty in these matters the order of settlement must be regarded, according to Shri Barua, as a private order which does not affect the right of anybody. It was stated that though in *State of Assam vs. Keshab Pros ad Singh*, AIR 1953 SC 309, Bose. J. had made strong remarks against the Government by stating that it was acting like "bold brave despot which knows no laws but its own", the decision in *Gangaram Das*, AIR 1957 SC 377, must be taken to have substantially watered down the above observations, as it was stated in *Gangaram* that no limitation is placed on the power which has been vested in the State Government under Rule 12 and that no fetter could be placed on the discretion of the Government in this regard.

10. No doubt, it is within the discretion of the Government to decide whether it would like to invoke its power of direct settlement given by the rules, but it is not permissible, according to me, to say that the power can be exercised arbitrarily. It was stated in *Gangaram* itself:

"It would not be open to the State Government to contend that it had absolute property in these fishery rights and it was, therefore, entitled to settle these in any manner whatsoever."

10A. Reference may usefully be made in this connection to the recent decision of the Supreme Court in *Ramana Dayaram vs. International Airport Authority*, AIR 1979 SC 1628, in para 11 of which the growing role of the Government in a welfare State was noted ; so was the fact that many individuals and many more businessess enjoy largess in the form of Government contracts which often resemble subsidies. The new forms of wealthlease, licence, contract, etc. may be in the nature of legal right, but it was recognised that majority of these were in the nature of privileges. It was then observed :

"But on that account, can it be said that they d o not enjoy any legal protection? Can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure? Is the position of the Government in this respect the same as that of a private giver? We do not think so."

Para 12 contains the following emphatic declaration :

"It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant."

11. After the aforesaid decision, it would be too late in the day to contend that Government could act even in the matter of granting of settlement of fisheries in the way it chooses. In view of the aforesaid decision of the Supreme Court, I am not referring to those which were mentioned by Shri Bhattacharjee in this regard except stating that where no procedure is prescribed while conferring the power, the procedure has to be one which is pragmatic, flexible and functionally viable as stated in *J. P. Kulshrestha vs. Chancellor*, (1980) 3 SCC 418. No Government order, no matter whether it is purely administrative, can be passed arbitrarily. It cannot be forgotten that absence of arbitrary power is the first essential of the rule of law upon which our constitutional system is based and the dictate of rule of law in this regard is as stated in *Jaishinghani vs. Union of India*, AIR 1967 SC 1427, that the "decision should be made the application of known principles and rules," as "if a decision is taken without principle or without any rule, it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law." The aforesaid Special Bench decision has also stated categorically that the power under the proviso to Rule 12 is not arbitrary.

12. The exercise of power would be arbitrary not only where the prerequisites are absent, but where the procedure followed is unknown and unreasonable. So, for the invocation) of the power in question, apart from the existence of all the prerequisites, the procedure to be followed must also be fair, just and reasonable. The minimum that is expected of the Government while exercising this power is that its decision must be made known well in advance to all concerned in the way deemed fit and that all the applications which are received in pursuant to the above declaration are duly considered after calling for reports from the concerned authorities. This alone would take care of the allegations of favoritism or nepotism. Needless to say that even while exercising the present power, the same must appear to be bonafide and not tainted with any collateral motive. As observed in *Ramana* : The choice must be dictated by public interest and must not be unreasoned or unprincipled."

13. Let it be seen whether power in the present case was exercised arbitrarily and whether the same has resulted in failure of justice. The grievance relating to arbitrary exercise of power had not been made in any of the petitions, as already noted. So, the State did not get opportunity to rebut this allegation. Then, the report which was received relating to the petitioner from the Deputy Commissioner, Lakhimpur, has stated that "the fishery is outside the jurisdiction of the Society and the financial position of the Society is uncertain." Its case was

therefore not recommended by the Deputy Commissioner. As such, on the facts of the present case, there is no failure in justice due to nonconsideration of the report relating to the petitioner. So, the attack on the anvil of arbitrariness also has ultimately not appealed to me to set aside the order on this ground as I have not found any injustice having been caused to the petitioner because of it. The approach to this Court being in its writ jurisdiction, and the main subsisting prayer being to issue a writ of certiorari, mere violation of any rule or principle has not been regarded as sufficient by me, in the absence of real injustice to the petitioner to invoke the extraordinary discretionary power of this court.

14. The only other submission faintly urged by Shri Bhattacharjee is that the impugned order having not stated that the prerequisites were satisfied, the same has introduced infirmity in the order. This point is not pressed and rightly, as the concerned Rules have not required, that there should be such a recital in the order itself. It is then stated that challenge being made to the validity of the order on the ground that the prerequisites were absent, it was incumbent on the part of the respondents 1 to 3 to satisfy the court about the same. Reference is made to *Swadeshi Cotton Mills vs. State Industrial Tribunal*, AIR 1961 SC 1381. The aspect relating to existence or nonexistence of the prerequisites in question has already been gone into and nothing more remains to be stated at this stage.

15. Thus, on the facts of the instant case, I do not think if it would be sound exercise of discretion to set aside the impugned order on the grounds advanced by Shri Bhattacharjee. The result is that the petition stands dismissed. Before closing, I would like to state that it has been noted that while sending records, the authorities have been withholding note sheets. As these form part of the record and throw much light as to how the matter had been dealt with by the Department or the authority, production of the same is incumbent while submitting records, unless privilege is claimed, which has to be done in accordance with law. It is hoped that the authorities, more so, the Government counsellors, would bear this in mind in future.