
(2010) 12 GAU CK 0034
In the Gauhati High Court
Case No : Writ Petition (C) No. 4717 of 2010

Bimal Das

APPELLANT

Vs

Assam Fisheries Development Corporation and Others

RESPONDENT

Date of Decision : 21-12-2010

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2011) 3 GLR 402

Hon'ble Judges : Iqbal Ahmed Ansari, J

Bench : Single Bench

Advocate : S.S. Dey, Mr. M. Nath, Mr. D.P. Borah and Mr. A. Roy, for the Appellant; B. Ahmed, S.K. Deuri, Khayeruddin and Mr. A.M. Buzarbaruah, for the Respondent

Final Decision : Dismissed

Judgement

I.A. Ansari, J.—Heard Mr. S.S. Dey and Mr. M. Nath, learned counsel appearing for the petitioner, and Dr. B. Ahmed, learned Standing Counsel, Assam Fisheries Development Corporation, appearing for respondent Nos. 1 and 2. Also heard Mr. A.M. Buzarbaruah, learned counsel appearing on behalf of respondent No. 3.

2. Pursuant to a tender notice, dated 1.6.2010, issued by the Assam Fisheries Development Corporation ("the respondent-Corporation"), inviting tender for settlement of, amongst others, Darrow Meenmahal, (i.e., Darrow Fishery) of Sivasagar District, the petitioner, the respondent No. 3 and some others submitted their tenders and participated in the selection process. The tender box was opened on 5.6.2010. The petitioner's grievance is that though he was the highest eligible bidder and the respondent No. 3 was found to be the second highest bidder, the respondent-Corporation has not accepted the tender of the petitioner and settled the said Fishery, in favour of the respondent No. 3, by means of the order, dated 30.7.2010, at the rate, which was quoted by the petitioner. The petitioner, therefore, seeks with the help of this application, made under article 226 of the Constitution of India, issuance of appropriate writ(s)

setting aside and quashing the order of settlement, dated 30.7.2010, aforementioned.

3. While considering the present writ petition, it needs to be noted that in terms of the comparative statement, which has been prepared in the present case, the petitioner was, admittedly, the highest tenderer, his quoted rate being Rs. 1,10,211, whereas the offer of the respondent No. 3 was Rs. 1,05,000, the respondent No. 3 being the second highest bidder and the difference between their respective quoted rates being barely Rs. 5,211. Ordinarily, the settlement of the Fishery ought to have been made with the petitioner, he being the highest bidder. The State respondents have, however, settled the Fishery in favour of the respondent No. 3 at the bidden amount of the present petitioner. Thus, settlement of the Fishery with the respondent No. 3 does not cause any financial loss to the respondent-Corporation.

4. The moot question, therefore, which arises, in the present case, is: whether the respondent-Corporation acted within the ambit of law in making settlement of the Fishery in favour of the respondent No. 3?

5. Seeking to justify the act of settlement of the Fishery in favour of respondent No. 3, Dr. B. Ahmed, learned Standing Counsel for the respondent-Corporation, has produced the relevant records to show that though the petitioner was the highest bidder, he was found to be ineligible and since he did not remain eligible, the mere fact that he was the highest bidder could not have been made a ground to settle the Fishery in his favour.

6. It is not in dispute that if the petitioner, as a tenderer, was found ineligible, then, it is immaterial whether he was the highest bidder or not. The highest bidder, in order to be a selected, has to be an eligible one too.

7. Pointing out as to what infirmity the petitioner's tender suffered from, Dr. Ahmed has pointed out that in terms of the conditions of eligibility, a tenderer is required to affix his photograph, which has to be duly attested by a Gazetted Officer, and if the tenderer is a Cooperative Society, the recent photograph of the person, authorized by the Executive Committee, duly attested by a gazetted officer. In the case at hand, according to Dr. Ahmed, the photographs, which the petitioner had submitted along with his tender documents, were not attested by a gazetted officer as was required under clause 4.1.1 of the tender notice.

8. Appearing on behalf of the petitioner, Mr. S.S. Dey, learned counsel, has contended that attestation of the photograph, as stipulated in the tender notice, was not a mandatory requirement and, hence, the mere fact that the petitioner's photograph was not attested by a gazetted officer could not have been made a ground to disqualify him or to treat him as an ineligible tenderer. To buttress his submission, Mr. Dey further points out that a close examination of the various terms and conditions as stipulated in the tender notice, in the present case, would show that wherever an omission to satisfy a condition warranted the consequence of disqualification of a tenderer, the same has been mentioned in

the tender notice itself. Such an instance can be noticed, points out Mr. Dey, in clause 4.1.7, whereby it has been made clear that a tenderer, who fails to give revenue clearance certificate and is a defaulter, his tender would not be considered; whereas the non-attestation of the photograph of the tenderer by a Gazetted Officer was not such a defect, which would have disqualified the tenderer; otherwise, the terms and conditions, contained in the tender notice, would have so mentioned. Thus, contends Mr. Dey.

9. In support of his submission that every term and condition of a tender notice need not necessarily be treated as mandatory and that only those terms and conditions shall be treated to be mandatory, which would go to the root of the selection process, Mr. Dey has referred to, and relied upon, M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, .

10. For the purpose of clarity, clause 4.1.1 and clause 4.1.7 of the Tender Document are reproduced below :

4.1.1. In the form there should be photograph of the tenderer duly attested by a Gazetted Officer. In case the tenderer being a Co-operative Society, the recent photograph of the person duly authorized by the Executive Committee duly attested by a Gazetted Officer.

4.1.7. The attested copy of the Bakijai Clearance Certificate from Deputy Commissioner/Sub-Divisional Officer. In case the tenderer being a Cooperative Society, the Bakijai Clearance Certificate should be in the name of the Co-operative Society. The Bakijai Clearance Certificate should be issued after the previous financial year of the year of accepting the tender. Any tenderer having been found as defaulter of the Corporation, the said tender will not be considered.

11. It is no doubt true that clause 4.1.7 does state clearly that any tenderer, who has been a defaulter, would not be considered, but the consequence of not attesting the photograph, as required by cause 4.1.1, is not mentioned in the tender notice. In other words, it is not specifically mentioned in the tender notice that the omission to attest the photograph would render a tenderer ineligible for consideration; whereas the tender documents clearly stated that a tenderer, who was found to be a defaulter, would be treated ineligible.

12. The limited question, therefore, in the present case, is whether the attestation of the photograph of a tenderer by a Gazetted Officer shall be treated a mandatory requirement of the conditions of tender or not In this regard, it has been pointed out by Mr. A.M. Buzarbaruah, learned counsel for the respondent No. 3, that it is not uncommon for the courts to receive, in Assam, allegations of lessee of a fishery of the respondent-Corporation sub-leasing fishery and it is in order to know as to who the tenderer is that his photograph is required to be attested by a Gazetted Officer so that the person, operating the fishery, becomes known and the act of sub-leasing fishery can be easily detected.

13. Apart from the fact that there is substance in what Mr. Buzarbaruah

contends, nothing could be submitted, on behalf of the petitioner, to show as to what is the reason for requiring attestation of a photograph of a tenderer by a person none less than a Gazetted Officer. It is not merely attestation of the photograph of a tenderer, but attestation by a Gazetted Officer, which is the requirement of the conditions of the tender. Such a requirement cannot be wished away by saying that it is not a mandatory requirement.

14. Coupled with the above, what is required to be noticed is that the tenders were opened on 5.6.2010 and even at that time, the petitioner did not satisfy the requirement of producing any duly attested photograph of his. It is in such circumstances that the tender documents were considered by the respondent-Corporation. When the respondent-Corporation, on examining the tender papers/documents, found the petitioner's photograph without having been attested by a Gazetted Officer, the respondent-Corporation was bound to treat the petitioner as ineligible. In the circumstances indicated hereinbefore, no wrong can be said to have been committed by the respondent-Corporation in treating the petitioner ineligible.

15. In the present fact situation, it could not be explained, on behalf of the petitioner, as to what steps the respondent-Corporation ought to have taken, when they had found the petitioner's photograph without having requisite attestation. Nothing could be shown from the tender documents to indicate that the respondent-Corporation, in such a situation, as the one at hand, was required to inform the petitioner and invite him to rectify the defect merely because he was the highest bidder.

16. While considering the case of M/s. Poddar Steel Corporation (supra), which Mr. S.S. Dey, learned counsel relies upon, it may be noted that, in M/s. Poddar Steel Corporation (supra), it has been pointed by the Supreme Court that the requirements, in a tender notice, can be classified into two categories - those, which lay down the essential conditions of eligibility, and the others, which are merely ancillary or subsidiary to the main object to be achieved by the condition. In the first case, the authority, issuing the tender, may be required to enforce them rigidly. In the other appropriate cases, it must be open to the authority to deviate from, and not to insist upon, the strict literal compliance of the condition.

17. Thus, what the decision, in M/s. Poddar Steel Corporation (supra), points out is that a condition of eligibility, which is essential, cannot be deviated from and cannot be relaxed; whereas a condition of eligibility, which is ancillary or subsidiary to the main object, which the tender seeks to achieve, such a condition may be relaxed. The main object of including every condition, in a tender notice, has to be examined and ascertained and not merely the fact as to whether the tender notice has specifically mentioned or not as to what consequence, an omission to comply with such a condition, would follow. What is, however, extremely important to note is that relaxation cannot be in every case but only in "appropriated cases" as indicated in M/s. Poddar Steel Corporation (supra). In effect, thus, while it is not possible for an authority,

which floats tender notice, to relax an essential condition of eligibility, a condition, which is not essential, may be relaxed provided the facts of the case so warrant. The observations made, in this regard, in M/s. Poddar Steel Corporation (supra), read as under :

(6) It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause No. 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. *** **

However, it remains to be seen as to which of the two clauses the present case belongs.

(7) The nature of payment by a certified cheque was considered by this court in Sita Ram Jhunjhunwala Vs. Bombay Bullion Association Ltd. and Others, . Several objections were taken there in support of the plea that the necessary condition in regard to payment was not satisfied and in that context this court quoted the observations from the judgment in an English decision [vide Spargo's case (1873) L.R. 8 Ch. App. 407] that it is a general rule of law that in every case where a transaction resolves itself into paying money by A to B and then handing it back again by B to A, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards. This court applied the observations to a transaction requiring payment by one to another. The High Court's decisions in B.D. Yadav and M.R. Meshram Engineers and Contractors Vs. Administrator of the City of Nagpur and Another, and T.V. Subhadra Amma Vs. Kerala Board of Revenue and Others, are also illustrations where literal compliance of every term of the tender notice was not insisted upon.

(8) In the present case the certified cheque of the Union Bank of India drawn on its own branch must be treated as sufficient for the purpose of achieving the object of the condition and the Tender Committee took the abundant caution by a further verification from the bank. In this situation it is not correct to hold that the Diesel Locomotive Works had no authority to waive the technical literal compliance of clause 6, specially when it was in its interest not to reject the said bid which was the highest. We, therefore, set aside the impugned judgment and dismiss the writ petition of the respondent No. 1 filed before the High Court. The appeal is accordingly allowed with costs throughout. Appeal allowed.

18. In the case of M/s. Poddar Steel Corporation (supra), the requisite condition was that the earnest money was to be paid by cash or by demand draft on the State Bank of India. What the tenderer, in M/s. Poddar Steel Corporation (supra), had done was that it had given a certified cheque of the Union Bank of India in respect of the said earnest money. In this context, the Supreme Court was required to decide if the said certified cheque was sufficient compliance of the conditions of eligibility. It is in context of this fact situation that the Supreme Court pointed out that since the purpose of depositing earnest money, by cash or by demand draft, was to ensure realization of the earnest money, should there be a default, this interest was equally protected even when a person gave a certified cheque of a nationalized bank.

19. Thus, the objective of the requirement of depositing the earnest money, by way of cash or by demand draft drawn on the State Bank of India, was equally served with the certified cheque of the United Bank of India. It is in the context of the facts of such a case that it was decided by the Supreme Court, in M/s. Poddar Steel Corporation (supra), that though the tenderer did not strictly adhere to the conditions of eligibility, prescribed in the tender notice, his action nevertheless satisfied the condition of eligibility and, hence, it was legally permissible to treat the tender as valid relaxing the requirement of deposit of earnest money by cash or by demand draft drawn on the State Bank of India only.

20. In the case at hand, the obvious purpose of requiring a tenderer's photograph to be attested by a Gazetted Officer was to identify the tenderer and ensure that it is he, who find not someone else, operates the fishery, for, an actual fisherman, under the Governmental scheme, is the one to whom a fishery, under the respondent-Corporation, is aimed to be leased out. This apart, no step was taken by the petitioner to satisfy the condition of eligibility even at the time, when the sealed tenders were opened. It was not the duty of the respondent-Corporation to inform the petitioner of the defect with which his tender was suffering from and to invite him to furnish to the respondent-Corporation an attested copy of his photograph.

21. Situated thus, this court is of the firm view that in the facts and attending circumstances of the present case, the respondent-Corporation was wholly justified in treating the petitioner as ineligible. When the petitioner was rightly treated as ineligible, he could not have been granted the settlements. This apart, the recommendation, made by the Managing Director of the respondent-Corporation, to the Chairman of the Corporation, gives complete details of the facts as to why the petitioner was treated to be ineligible and it is in such a situation that the respondent-Corporation, instead of granting the settlement in favour of the petitioner, at his quoted rate, made the settlement in favour of the respondent No. 3 at the highest bid received in the tender process, the highest bid being that of the petitioner. In the circumstances, as indicated hereinbefore, the action of the respondent-Corporation cannot be said to have suffered from

any infirmity, legal or factual.

22. It is trite that the scope of judicial review, in contractual matters, is circumscribed. While reviewing the administrative decision taken by a person, the court does not examine the merit of a selection. What the court examines, in such a case, is whether the administrator has taken into account all facts, which were relevant, and whether the administrator has kept eschewed from the purview of his consideration every such fact or element, which was irrelevant. If the administrator is found to have taken into account all the relevant facts and kept excluded from his consideration every irrelevant fact, the court would not, while exercising power of judicial review under article 226 of the Constitution of India, interfere with the decision, which the administrator reaches, for, the court does not sit, on appeal, against the decision and does not examine the merit of the decision. Interference would be possible, when the administrator is guided by bias, prejudice or his selection is mala fide, irrational or arbitrary. In the case at hand, no mala fide, on the part of the respondent-Corporation, could be pointed out by the petitioner. This apart, when the administrative decision has not taken into account any irrelevant fact and is not shown to have omitted to take into consideration any relevant fact, the administrative decision does not invite, and cannot be said to have invited, invoking of this court's extraordinary jurisdiction under article 226 of the Constitution of India.

23. Because of what has been discussed and pointed out above, this court does not find any merit in this writ petition. The writ petition is, therefore, not admitted and shall accordingly stand dismissed.

24. No order as to costs.

25. Let the relevant records be returned to the learned standing counsel for the respondent-Corporation.