

(2011) 09 GAU CK 0083

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 5184 of 2010

Enjil Choudhury

APPELLANT

Vs

Assam Fisheries Development Corporation & Ors.

RESPONDENT

Date of Decision : 01-09-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 226, 299, 299

Citation : (2011) 5 GLT 49

Hon'ble Judges : B.P.Katakey, J

Bench : Single Bench

Advocate : Advocates appeared for the Petitioner: Mr.A. K. Sarma, Mr. H. Deka & Mrs. P. Gogoi, Advocates appeared for the Respondents: SC, AFDC, Mr. P. N. Goswami, For Caveator, Mr. D. K. Sarmah, Mr. P. S. Lahkar & Ms. A. Talukdar, Advocates appearing for Parties

Judgement

B. P. Katakey, J.—The process for settlement of Berbhangi Chora Fishery, amongst others, was initiated by the Manging Director of Assam Fishery Develoment Corporation Ltd. (in short the Corporation) by issuing the Notice Inviting Tender (in short NIT) dated 06.04.2010 fixing 22.4.2010 as the last date of submission of tender with certain conditions stipulated in the tender notice, amongst others, requiring the tenderers to deposit 15% of the minimum value fixed by the Corporation for the first year as earnest money and also submission of tenders in the prescribed form, to be obtained from the Corporation's office, wherein certain information including the information relating to the name of the bank, call deposit number and date of the call deposit submitted towards the earnest money deposit were required to be furnished. The petitioner, the respondent No.3 and 6 (six) others submitted their tenders quoting different amount. While the petitioner offered Rs. 1,71,7777per year, the respondent No. 3 offered Rs. 1,65,000/ per year. The other tenderers offered the amount, which are less than the offers of the petitioner and the respondent No.3. The petitioner made the earnest money deposit in the form of demand draft. The respondent No.3 deposited the earnest money in the form of call deposit. Though the tender

papers submitted by the petitioner and the respondent No.3 were found to be in order in all other respect except the deposit of the earnest money in the form of demand draft by the petitioner, the settlement of the fishery for a period of 7 (seven) years was made in favour of the respondent No.3 with effect from the financial year 201011 vide order dated 7.6.2010, rejecting the offer of the petitioner on the ground that Ms tender paper was found to be defective for making earnest money deposit in the form of demand draft. Hence the present petition.

2. I have heard Mr. A. K. Sarma, learned counsel for the petitioner, Dr. B. Ahmed, learned standing counsel appearing for the respondent Nos. 1 and 2 and Mr. D. K. Sarma, learned counsel appearing for the respondent No.3.

3. Referring to the conditions in the NIT and also the prescribed form in which the tender paper is to be submitted by a tenderer, it has been submitted by the learned counsel for the petitioner that the tender paper submitted by a tenderer can be rejected as defective only if there is violation of the conditions of the NIT or the detailed terms and conditions supplied by the Corporation and not otherwise, hi the case in hand, according to the learned counsel, there was neither any stipulation in the NIT nor in the detailed terms and conditions supplied by the Corporation requiring deposit of earnest money in any form like the call deposit, demand draft, bankers cheque, etc., and hence the petitioner's tender papers cannot be rejected on the ground that the earnest money was deposited in the form of demand draft issued by a bank, by taking advantage of a stipulation in the prescribed form supplied by the Corporation where the name of the bank issuing the call deposit as well as the call deposit number and date are required to be mentioned. The learned counsel submits that such stipulation in the form cannot be treated as a condition for submission of tender papers having not been specifically mentioned in the terms and conditions of the tender, more so, when there is no indication relating to cancellation of the tender papers submitted by any tenderer, if such earnest money is not deposited in the form of call deposit. The learned counsel further submits that even assuming that there is requirement for making the earnest money deposit in the form of call deposit, such requirement being not essential condition of eligibility but merely ancillary or subsidiary with the main object to be achieved by the condition, the tender papers submitted by the petitioner cannot be rejected on the ground of making deposit of earnest money in the form of demand draft issued by the bank, as the object sought to be achieved by taking earnest money deposit would not be defeated in making such deposit in the form of bank demand draft issued in favour of the Corporation. It has also been submitted that it is evident from the records produced by the learned standing counsel of the Corporation that the earnest money deposited by the respondent No.3 has been encashed within 1 (one) month from the date of issuance of the settlement order in his favour and as such the demand draft submitted by the petitioner could have also been encashed by the respondent Corporation, even if the time limit of 6(six) months extendable by another 6 (six) months is attached to the demand draft, which

would not have put the Corporation in any difficulty or in any disadvantageous position in accepting the demand draft deposited by the petitioner towards the earnest money. The learned counsel, therefore, submits that the ground on which the petitioner's tender papers has been rejected is not tenable in law and as such the order of settlement made in favour of the respondent No.3 may be set aside and the Corporation may be directed to settle the fishery in favour of the petitioner, he being the highest bidder. The learned counsel in support of his contention has placed reliance on the decision of the Apex Court in *G J. Fernandez Vs. State of Karnataka & Ors.* reported in (1990) 2 SCC 488, in *Poddar Steel Corporation Vs. Ganesh Engineering Works & Ors.* reported in (1991) 3 SCC 273, in *Tata Cellular Vs. Union of India* reported in (1994) 6 SCC 651 and on a Single Bench judgment of this Court in *Benjamin Lalrinawma Vs. State of Mizoram & Ors.* reported in 2005 (3) GIT580.

4. Dr. Ahmed, learned standing counsel appearing for the respondent Nos. 1 and 2 on the other other hand supporting the decision of the respondent Corporation to settle the fishery in question in favour of the respondent No. 3, by rejecting the tender paper submitted by the petitioner on the ground of the same being defective for nonsubmission of earnest money in the form of call deposit, has submitted that it is evident from the prescribed form in which the tender is to be submitted by a bidder that such earnest money is required to be deposited in the form of call deposit and not in any other form and as such, such condition has to be fulfilled by a tenderer. According to the learned standing counsel it is open to the respondent Corporation to put reasonable condition in the NIT and such condition must be complied with by the tenderer and useless such conditions are complied with the bid of such tenderer cannot be treated as valid. It has also been submitted that such condition was put in the form keeping in view the fact that while demand draft or the bankers cheque issued by a bank is valid only for a period of 6 (six) months extendable by another 6 (six) months and thereafter those cannot be revalidated, there is no validity period attached to the call deposit issued by a bank and as such in a given case if the process of settlement could not be completed within a period of 6 (six) months or 1 (one) year, the respondent Corporation 1 to ask the tenderer to submit a fresh draft unlike in the case of call deposit." learned counsel, therefore, submits that to avoid all such eventualities a decision taken by the respondent Corporation to accept the earnest money deposit in the form of call deposit and not otherwise, which condition having been fulfilled by the writ petitioner, the settlement was not offered to him, though his bid was higher than the bid of the respondent No.3, the tender paper having been found to be defective.

5. Mr. Sarma, learned counsel appearing for the respondent No.3 supporting the arguments advanced by the learned standing counsel for the respondent Corporation also submits that since it is the prerogative of the respondent Corporation to put any reasonable condition in the NIT, such condition has to be complied with. Referring to the form in which the offer by a tenderer is to be submitted, the learned counsel submits that all the tenderers were specifically

informed that the earnest money is to be deposited in the form of call deposit and not otherwise and such a condition having been put, the Corporation is bound by such condition and cannot accept the offer of a tenderer who did not furnish the earnest money in the form of call deposit. Mr. Sarma, learned counsel further submits that the petitioner knew about such condition and despite that did not submit the earnest money in the form of call deposit and therefore cannot subsequently turn around and challenge the decision of the respondent Corporation to award the contract in favour of the respondent No.3 by rejecting the tender paper submitted by him as defective. Mr. Sarma further submits that the scope of judicial review of such administrative action, in exercise of the jurisdiction under Article 226 of the Constitution of India, is very limited and in the case in hand, since all the tenderers were informed about the requirement of furnishing the earnest money in the form of call deposit, this Court would not interfere with the decision of the respondent Corporation in rejecting the tender paper submitted by the petitioner for nonsubmission of earnest money in the form of call deposit. It has also been submitted that the writ petition, apart from the above ground also deserved to be dismissed on the ground of delay as the same has been filed after more than 3 (three) months from the date of issuance of the order of settlement in favour of the respondent No. 3. Mr. Sarma in support of his contention has placed reliance on the decision of the Apex Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India & Ors.* reported in AIR 1979 SC 1628, in *Directorate of Education & Ors. Vs. Educomp Datamatics Ltd. & Ors.* reported in (2004) 4 SCC 19 and of his Court in *Purbottar Trade & Marketing Cooperative Society Ltd. & Ors. Vs. State of Assam & Ors.* reported in 2000 (2) GLT 145, *mJabedAli & Anr. Vs. State of Assam & Ors.* reported in 2002 (1) GLT 281, in *Bikash Bora Vs. State of Assam & Ors.* reported in 2005 (2) GLT 485, in *Raja Das Vs. Assam Fisheries Devp. Corp. & Ors.* reported in 2005 (3) GLT 544 and in *Benjamin Lalrinawma Vs. State of Mizoram & Ors.* reported in 2005 (3) GLT 580.

6. The learned counsel for the petitioner, in reply to the submission made by the learned counsel appearing for the respondents, while reiterating the submissions advanced by him, has also submitted that the writ petition is not suffered from vices of delay as the petitioner on coming to know about the order of settlement dated 07.06.2010, which does not disclose the reason for which his bid was rejected, filed application seeking information under the Right of Information Act, 2005 which was supplied to him on 06.08.2010 disclosing the reason for rejection of his tender paper and thereafter on 16.9.2010 he filed the writ petition challenging the decision of the respondent Corporation in awarding the contract in favour of the respondent No.3.

7. I have considered the submissions of the learned counsel for the parties, perused the pleadings and also the records of settlement produced by the learned standing counsel of the respondent Corporation.

8. As noticed above, the petitioner offered the highest amount of Rs. 1,71,777/

per year as against the offer of respondent No.3, which was Rs. 1,65,000/ per year in respect of the fishery in question. The offer of other tenderers were less than the amount offered by the petitioner and the respondent No.3. The petitioner's tender paper was found to be defective on the ground that the earnest money was not deposited in the form of call deposit but was deposited in the form of demand draft from a nationalized bank though his offer was higher than the offer of the respondent No.3 According to the respondents since there is a condition to make such deposit in the form of call deposit, the same has to be complied with.

9. The notice inviting tender dated 6.4.2010 issued by the Managing Director of the respondent Corporation provides for purchasing the prescribed form, in which the tender is to be submitted, along with detailed terms and conditions of the tender on payment of Rs. 100/. The petitioner and the respondent No. 3 accordingly purchased the form along with the detailed terms and conditions of the tender from the respondent Corporation and submitted their bids. In the detailed terms and conditions it has been stipulated that the offer by the tenderer is to be made in the form supplied by the Corporation and it should be accompanied by the documents/information mentioned in clause 4 of the terms and conditions. One of the requirements in clause 4 is that the tenderer has to furnish the earnest money to the tune of 15% of the minimum value fixed by the Corporation for the first year. There is no stipulation relating to the form in which such earnest money is to be deposited like the call deposit, bank draft or bankers cheque. In clause 5 of such detailed terms and conditions of the tender, the said position has been reiterated requiring the tenderer to furnish the earnest money to the tune of 15% of the minimum value fixed by the Corporation for the first year with further stipulation that the unsuccessful bidder would be refunded the earnest money deposit and in case of the successful bidder the same would be refunded subject to fulfillment of the conditions of settlement. There is also a stipulation for forfeiture of the earnest money in the eventualities stipulated in clause 5.4 of the detailed terms and conditions. In the prescribed form in which the tenderer is to submit his offer, there is a mention in clause 4 (ka) to furnish the call deposit number and date as well as the name of the bank issuing such call deposit. In the prescribed form there is also no indication that the earnest money, only in the form of call deposit, would be accepted and not otherwise.

10. The purpose of taking the earnest money deposit is to ensure the sincerity of a tenderer to perform the contract in case of awarding the same and in case he is defaulted in carrying out his part of the contract, the said amount is forfeited so that the authority awarding the contract do not suffer any loss for such default of the tenderer. The earnest money is apart of the purchase price and the same is forfeited when the transaction falls through by reason of the default or failure on part of the tenderer. The whole purpose of taking the earnest money, as discussed above, being to ensure the faithful completion of the contract and when the record reflects that it is the pursued practice of the respondent Corporation to encash the earnest money deposited by a successful tenderer and

to credit the same in Corporation's account, subject to the refund on completion of the contract or forfeiture, as the case may be, it is not significant whether the earnest money deposit is made in the form of call deposit or demand draft, though the period of validity of the bank draft may be 1 (one) year, as the Corporation is not expected to sit over the matter of settlement of a fishery for a period of 1 (one) year from the date of issuance of the tender notice. In the case in hand, the tender notice was issued on 6.4.2010, the order of settlement was made in favour of the respondent No.3 on 7.6.2010 and the earnest money deposited by the successful bidder, namely, the respondent No.3 was encashed and credited to the account of the respondent Corporation on 3.7.201. i.e. within 3 (three) months from the date of issuance of the tender notice and 1 (one) month from the date of issuance of the order of settlement. Therefore, the respondent Corporation would not have been put to any disadvantageous position had the earnest money furnished by the petitioner, who was the highest bidder, in the form of bank demand draft, been accepted, as the same also could have been encashed and deposited in the Corporation's account within the time limit attached to such bank draft, as normally done by the Corporation in the matter of settlement. The Corporation in that case would not have suffered any loss of revenue as the petitioner's offer was higher than the offer of the respondent No.3.

11. It is no doubt true that if the authority stipulates any condition in the NIT, those are required to be fulfilled and it cannot deviate from such conditions unless of course those are essential conditions of eligibility and not merely ancillary or subsidiary with the main object to be achieved by such condition. In case any condition stipulated in the NIT is merely ancillary or subsidiary with the main object to be achieved by such condition, it is open to the authority to deviate from and not to insist upon the strict compliance of the condition in appropriate cases, as opined by the Apex Court in *G. J. Fernandez (supra)* and *Poddar Steel Corporation (supra)*.

12. In the case in hand, as discussed above, there is no stipulation in the detailed terms and conditions of the NIT supplied to the petitioner as well as to the respondent No. 3 and other bidders that the earnest money has to be deposited only in the form of call deposit and not in any other form. The prescribed form supplied by the respondent Corporation, in which the offer has to be submitted by the tenderer, also does not stipulate that such earnest money has to be furnished in the form of the call deposit though it requires furnishing certain information relating to the call deposit. Such information as sought for in the form cannot be treated as terms and conditions of the NIT, having not stipulated so in the detailed terms and conditions supplied to the tenderers, more so, when there is no stipulation that nonfurnishing of the earnest money in the form of call deposit entails disqualification.

13. It is by now wellsettled that the scope of judicial review would also apply to the exercise of contractual powers by the Government bodies in order to prevent

arbitrariness or favouritism, however, with inherent limitations in exercise of such power of judicial review. While the State or the instrumentality of the State is the guardian of its finance, it is expected to protect the financial interest of the State or the instrumentality. The State or its instrumentalities, however in the matter of exercise of contractual power, have to keep in view the principles laid down under Article 14 of the Constitution. The terms of the invitation of the tender is also not open to judicial scrutiny, unless those are arbitrary, unreasonable and tailor made to favour a particular tenderer, because the invitation to tender is in the realm of contract and the Government must have freedom of contract, meaning thereby a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasiadministrative sphere. Such decision, however, must not only be tested by the application of Wednesday principle of reasonableness but must be free from arbitrariness and not affected by bias or actuated by male fides. [Tata Cellular (supra) and Educomp Datamatics (supra)].

14. As discussed above, there was no stipulation either in the NIT or in the detailed terms and conditions of the NIT about requirement of furnishing the earnest money in the form of call deposit only and as such nonfurnishing of the earnest money in the form of call deposit cannot be the ground for rejection of the tender submitted by a tenderer, as has been done in the case in hand. The action on the part of the respondent authority, in the case in hand, in rejecting the tender submitted by the petitioner on the ground of nonfurnishing the earnest money in the form of call deposit, is arbitrary, in the absence of any stipulation in that regard, as discussed above, either in the NIT or in the detailed terms and conditions of the tender. In *Raja Das* (supra) this Court has held that for rejection of a tender on the ground of nonfulfilment of the conditions, such conditions have either to be put in the NIT or in the guideline framed by the Corporation for settlement of fishery. In the said case the decision to reject the tender of a tenderer on the ground that the tenderer did not put his signature in the tender papers in presence of the Gazetted Officer and counter signed the same by such Gazetted Officer, has been interfered with as such a condition was neither put in the NIT nor in the guideline framed by the Corporation for settlement of the fishery. In *Benjamin Lalrinawma* (supra) this Court has held that a tender paper not submitted in the prescribed form cannot be rejected unless a condition in the NIT relating to submission of the bid in the prescribed form only is stipulated. It has, however, been held that all the essential terms and conditions of the NIT has to be fulfilled to adjust an offer of a tenderer as valid. The decisions rendered by this Court in *Porbottar Trade & Marketing Cooperative Society Ltd.* (supra), in *Jabed Ali* (supra) and in *Bikash Bora* being based on different facts are applicable in the facts and circumstances of this case and hence not discussed.

15. The contention of the learned counsel appearing for the respondents that the writ petition suffers from vices of delay also cannot be accepted as the petitioner on coming to know about the order of settlement dated 7.6.2010, which does not

disclose the reason for rejection of tender submitted by him, filed application on 2.8.2010 under Right to Information Act, 2005, for supply of the information and accordingly the respondent Corporation on 6.8.2010 supplied the information relating to the reason for rejection of his tender paper and within 1? months from the date of receipt of such information, the petitioner filed the writ petition challenging the settlement made in the favour of the respondent No.3. It is no doubt true that the Court would refused to exercise its discretion under Article 226 of the Constitution of India and would not grant the relief to the writ petitioner even if he is entitled to the same, if the writ petition suffers from vices of undue delay or latches. In *Ramana Dayaram Shetty (supra)* the Apex Court keeping in view the facts involved in that case refused to grant the relief though it was found that the action of the respondent authority was arbitrary. The principle laid down by the Apex Court in the said decision, however, is not applicable in the facts and circumstances of this case.

16. In view of the above, the impugned order dated 7.6.2010 passed by the Managing Director of the Corporation is set aside. The matter is remitted to the Corporation to pass a fresh order of settlement keeping in view the finding as well as the observation made herein above in this judgment, which shall be done within a period of 1 (one) month from today.

17. The writ petition is accordingly allowed as indicated above. No costs.