(1999) 07 GAU CK 0017

In the Gauhati High Court

Case No : Writ Petition (C) 2365 of 1999

Garjan Bullutjan Matchyajibi Samabai Samity Ltd. APPELLANT

Vs

State of Assam and Others RESPONDENT

Date of Decision : 02-07-1999

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : AIR 2000 Guw 7 : (1999) 2 GLT 537

Hon'ble Judges : D.N. Chowdhury, J

Bench : Single Bench

Advocate : N.C. Das, A.N. Buzarbaruah and D. Sinha, for the Appellant; H.N. Sarma, Addl. Sr. Govt. Advocate, N. Dutta, A. Hazarika and I. Choudhury, for the Respondent

Final Decision : Allowed

Judgement

D.N. Choudhury, J.—The legitimacy of the order of settlement of Gorjan Bullutjan Min Mahal (Fishery) in favour of the respondent No. 4 by the respondents Nos. 2 and 3, is the subject-matter of this proceeding under Article 226 of the Constitution of India.

2. Respondent No. 3, the Managing Director, Assam Fisheries Development Corporation Ltd., hereinafter referred to as the Corporation, by his communication dated 10-5-99, made the following order :

"Sub : Matters regarding to Garjan Meen Mahal at Hajo.

Ref : Your application dated 24-3-99 and 30-3-99.

Sir,

With reference to your application it has been decided to settle the Garjan Bullutjan Fishery which is situated at Hajo of Kamrup district is settled with you for a period of 5 years (i.e. 1999 to 2004) or decided to run the said Mahal according to the agreement made between you and corporation.

1999-2000

Rs.

2,70,435/-

2000-2001

Rs.

3, 52,110/-

2001-2002.

Rs.

4,47,700/-

2002-2003

Rs.

5,00,410/-

2003-2001

Rs.

5,92,900/-

Total

Rs.

21,72,555.00

(Rupees twenty one lakhs, Seventy two thousand five hundred fifty five only)

If you agree with this proposal, then you ran make an agreement for running the fishery by depositing 10% of the amount settled for the year 1999-2000 as a security deposit and 15% money as first instalment by a bank draft in the name of the Corporation and last Bakijai clearance certificate. For the Agreement you shall take stamp paper of Rs. 7/-."

The above order is challenged in this proceeding by the petitioner as arbitrary, discriminatory in the circumstances set out below.

The petitioner/society, M/s. Gorjan Bullutjan Matchyajibi Samabai Samity Ltd., is a reorganised fishery co-operative society formed with 100% actual fishermen by profession, belonging to SC community of Assam. It is asserted that the Govt. of Assam settled the Gorjari Bullutjan fishery in favour of the petitioner/society since the fishery fell within the area of operation of the petitioner/society, for a number of times. The fishery-in-question was transferred to the Assam Fishery Corporation and thereafter to the Assam Fisheries Development Corporation Ltd. for Implementing developmental activities of large scale fish production in the

State. The respondent No. 3/Managing Director of the Corporation, by his order dated 30-3-94, in a most illegal fashion, settled the fishery-in-question with respondent No. 4 for the period from 1994-95 to 1998-99, i.e., for a period of five years up to 31 3 99. According to the petitioner, the respondent No. 4 misused the settlement by sub-letting the fishery to the prejudice of the local population. The matter was brought to the notice of the respondent No. 3/ Corporation, but 110 action so far was taken by the respondent No. 3. The Corporation invited sealed tenders in prescribed form for a number of fisheries of the State including the fishery-in-question in the district of Kamrup by Notification No. 1/99 dated 16-3-99. The last date for filing of tender was up to 2 PM of 1st April, 1999. The notification further indicated that tenders would be opened on the same day, i.e. on 1st of April, 1999 in presence of the intending tenderers or their representatives. The petitioner pursuant to the above tender notice, made all the necessary arrangements for submission of tender, reached the office of the respondents/Corporation on the 1st of April, 1999 for submitting its tender as per the tender notice; but the Corporation did not accept the tender paper of the petitioner. On enquiry, the petitioner/society came to know that pursuant to the direction issued by the Govt. of Assam, Department of Fishery, the respondent No. 3/Corporation withdrew some of the fisheries from the tender process vide its letter No. 138/98/4983-87 dated 31-3-99. The petitioner in this proceeding stated that in spite of their best efforts, they could not procure a copy of the communication dated 31-3-99. The petitioner, however, averred that the respondents withdrew the fishery-in-question without assigning any reason from the purview of the tender process. The petitioner further contended that the above withdrawal was made arbitrarily in order to favour the respondent No. 4. After the withdrawal of the fishery from the purview of the tender process, the petitioner also put forward its proposal for a negotiated settlement of the fishery. However, the respondents instead of considering the proposal of the petitioner, arbitrarily settled the said fishery with respondent No. 4 as mentioned earlier. The legitimacy of the withdrawal of the fishery-in-question from the tender process and its settlement/extension made in favour of the respondent No. 4 vide the impugned order dated 10-5-99, are accordingly assailed in this proceeding.

3. The parties entered appearance. Respondents Nos. 2 and 3 contested the ease though the respondent No. 3 did not file affidavit. Respondent No. 4 though did not file affidavit in the main case, it has placed on record its stand in its application dated 25-5-99, which is registered and numbered as Misc. Application No. 607/99, accompanied by its affidavit. The respondent 4 in the aforesaid application submitted that the settlement was made bona fide in exercise of the powers vested in the Corporation and considering the fact that the respondent No. 4 incurred heavy loss in the earlier settlement. The respondent contended that the above consideration by the respondent No. 3 was a relevant consideration and, therefore, the order of settlement cannot faulted as arbitrary. The respondent No. 4 further contended in the application that the petitioner

knowing well about the withdrawal of the fishery, did not challenge the same; on the other hand, it moved the respondents Nos. 2 and 3 for settlement of the fishery-in-question on their favour. In these circumstances, the respondent No. 4 prayed for dismissal of the writ petition.

4. Respondents Nos. 2 and 3 did not file any affidavit or application, but placed the records of the case which were called for. Respondents Nos. 2 and 3 through its counsel, however, supported the order of settlement made in favour of respondent No. 4 as a lawful order.

Mr. N.C. Das, learned senior counsel assisted by Mr. R. C. Das, appearing on behalf of the petitioner, assailed the validity and rationality of the actions of the respondents which led to the passing of the impugned order dated 10-5-99. That the Corporation being a "State" is subject to the limitations imposed by the Constitution and, therefore, its actions must be informed by reason and rationality. Mr. Das, the learned senior counsel referring to the power of the Corporation pointed-out that the duty of the Corporation is to develop the fisheries under it and under no circumstances, the Corporation is vested with the power of direct settlement like that of the State Government. The learned senior counsel thereafter pointed out that the Corporation knowing its own limitation, initiated the tender process, invited tenders from intending bidders/lessees; but instead of allowing the tender process to come to a logical conclusion, arbitrarily withdrew the fishery-in-question from the tender process and in a most illegal fashion, settled the fishery with the respondent No. 4, which per se was unjust, arbitrary and, therefore, unlawful. Mr. Das further submitted that the actions of the respondents/Corporation lacked transparency and were contrary to the own guidelines of the Corporation.

5. Mr. N. Dutta, learned senior counsel assisted by Mr. Indranil Choudhury, on the other hand referring to the pleadings of the writ petition, submitted that the petitioner did not question the withdrawal of the fishery from the tender process. That the petitioner after withdrawal of the tender process, sought for direct settlement of the fish-cry-in-question and only on its failure to get the settlement, came to this Court challenging the settlement made with respondent No. 4. Mr. Dutta, the learned senior counsel, submitted that the Corporation is vested with the power of management of the fisheries under it which also includes the power of settlement as well as extension. That the Corporation is vested with the power of management and thus it possessed the ancillary and consequential powers of settlement and extension which forms part of the power of management. The fisheries those are vested in the Corporation cease to be a Government fishery and are wholly vested in the Corporation, thus in these circumstances, the Corporation was Justified in settling the fishery with the respondent No. 4 on considering the fact situations. Mr. Dutta, the learned senior counsel referring to his application, submitted that since the society incurred loss in the earlier settlement, it is a legitimate and relevant consideration in the matter of extension and settlement of a fishery. When the Corporation exercises

its power, within its competence, question of looking to the merits of the decision is not subject to judicial review, submitted the learned senior counsel on behalf of respondent No. 4.

6. Before entering into the rival contentions of the parties, it would be appropriate to make a survey of the relevant factual matrix. Materials on record disclose that the respondent No. 4 was the lessee of the fishery-in-question for the period 1994 to 1999 which was to expire on 31-3-99. Respondent No. 4 as the lessee defaulted in payment of the last kist. On failure to deposit the revenue despite notice on the respondent, the lease was cancelled. Respondent No. 4 submitted a petition before the Minister, Fishery, on 7-1-99, requesting him to extend the period of time for deposit of the kist money till the month of January, 1999. In that petition filed before the Minister, respondent No. 4 stated that because of high water level in the fishery, the lessee could not fish and, therefore, the lessee failed to deposit the instalment on time. Meanwhile, the lessee/respondent No. 4 received notices from the Corporation desisting him from fishing. The Minister of Fisheries, Assam, on receipt of the petition/letter dated 7-1-99, endorsed the petition to the Managing Director of the Corporation directing him to extend the period for deposit of the kist money till the month of January, 1999 on the same date. From the note sheets of the record, it appears that the respondent No. 4 deposited a sum of Rs. 60,000/- (Rupees sixty thousand) only which was received by the Corporation on 29-1-99 by means of two demand drafts. From another note in the records dated 16-2-99, the respondent No. 4 deposited further amounts of Rs. 24,000/-and Rs. 25,000/- by two different demand drafts leaving a outstanding dues of Rs. 15,350/-. Meanwhile, the Corporation invited sealed tenders in prescribed forms for settlement, of different fisheries under the Corporation including the fishery-in-question. The notice indicated that the details of bills, prescribed tender forms, minimum revenue fixed and other terms and conditions, would be available in the office of the Corporation up to 31-3-99. Information about the same can also be had from the offices of the Deputy Commissioners and Sub-Divisional Officers. The notice indicated that the last date for filing tender was up to 2 PM of 1-4-99 which was to be opened on the same date in presence of the intending tenderers or their representatives. Respondent No. 4 again moved the Minister of Fisheries by means of an application dated 23-3-99, for extension of the lease of the fishery or for a fresh lease. In the said application, the (sic) stated that the fishery-in-question was leased-out to him for five years from 1994 to 1999 for the revenue amounting to Rs. 17,95,500/- (Rupees seventeen lakhs ninety five thousand and five hundred) only. The English rendering of paragraph 2 of the said application dated 23-3-99, is extracted hereinbelow :

"Sir, I paid the kist money (instalment) by managing the affairs of the fishery for the last five years by adhering to the rules and norms. It. Is very sad and disappointing that I incurred a loss of about two three lakhs during these five years. On demand by the authority, even by mortgaging my house and landed property, I deposited the instalment money on time."

The respondent accordingly prayed for either extension of the lease of the fishery or for a fresh settlement in his favour. The application dated 23rd March, 1999 was placed before the Minister on 24-3 99, who issued directions to the Deputy Secretary. Fishery Department, the English rendering of which reads as follows :

"Taking note of the fact that the applicant as a sitting lessee did not make any default even at the cost of mortgaging his personal properties, and to the huge loss incurred, to recoup the loss incurred, steps be taken to direct the MD, AFDC, to settle the fishery for one full term in favour of the applicant."

The under-Secretary to the Govt. of Assam, Fishery Department., by his memo No.FISH.201/86/46 dated 25th March. 1999 communicated as follows :

"SUB ; PRAYER FOR EXTENSION OF THE MAHAL TERM in RESPECT OF THE GARJAN BULLUTJAN FISHERY MAHAL UNDER KAMRUP DISTRICT.

Sir,

I am directed to forward herewith a copy of prayer petition, dated 23-3-1999 in original from one Shri Bipin Chandra Das reported to be the Sitting Mahaldar of the Garjan Bullutjan Fishery Mahal along with the endorsement of the Hon''ble Minister thereon the contents of which speak for itself and to request you kindly to take necessary action in the matter.

Yours faithfully, Sd/- Illegible 25-3-99 Under Secy. to the Govt. of Assam Fishery Department"

In addition, the Minister of Fishery, by writing a personal letter to the respondent No. 3, Managing Director of the Corporation, dated 26-3-99, directed to withdraw the Garjan Bullutjan Fishery from the tender process and to take necessary steps for direct settlement, of the Fishery with the respondent No. 4, Shri Bipin Das, to compensate his loss. The Minister in his letter, advised the Managing Director to implement the directions given in the Government letter in that regard by giving the weightage thereto. The aforesaid letter dated 26-3-99 of the Fishery Minister is at page 242 of the relevant file No.AFDC/47/94 of the Corporation/respondent No. 2. The respondent No. 4 pursued the matter further before the Minister and accordingly submitted another petition on 30-3-99 before the Minister which was numbered as Dy.No. 52/99 dated 30-3-99. In the application, the respondent No. 4 stated the same facts as were stated in his application dated 23-3-99. In addition, he informed the Minister about the fact of Notice inviting tenders dated 16-3-99 for settlement of the Fishery. By the application, the respondent No. 4 requested the Minister to cancel the tender process and to re-settle the Fishery with him. The Minister, this time, issued the following direction to the Under Secretary to the Govt. of Assam, Fish-cry Department, on the body of the application which reads as follows :

"U/s Fish

Please direct MD.AFDC not to put the Garjan Bullutjan Fishery in sale by tender system & extend the term of the Fishery by another 5 years with the sitting lessee Sri Bipin Ch. Das considering the loss incurred by the petitioner.

Sd/- Illegible. 30-3-99 Minister of Fisheries, Assam, Dispur, Guwahati-6"

From the note dated 6-4-99 in the relevant file put up to the Managing Director, AFDC, it transpires that the lessee was to pay the outstanding dues. Only on clearance of the outstanding dues or payment of security deposit, it would be possible to take steps for settlement. Note dated 7-4-99 indicated that the outstanding dues were deposited on that date. It further transpires that the respondent No. 4 deposited the balance of the last instalment for the financial year amounting to Rs. 15,350/- and cleared the outstanding dues. The file was thereafter put up before the Chairman by the Managing Director. The Managing Director endorsed the file to the Chairman for extension of the lease for a period of five years with proportionate increase of revenue by his note dated 28-4-99. The Chairman accepted the note and ordered as follows on the file :

"MD/AFDC

Settlement, has been given accordingly. Proposal by increasing 10% revenue on existing revenue for 5 (five) years."

The details for instalments were worked-out and when the file was put up before the Chairman, he gave the approval. In terms of the decision as stated above, the fishery was settled with the respondent No. 4.

7. The Corporation is an independent entity incorporated under the Companies Act, 1956 regulated by the memorandum of association and the Articles of Association. All the Directors are appointed by the Governor. The Governor is also the person who is authorised to appoint the Chairman and the Deputy Chairman in the Board of Directors. For the conduct and management of the business of the Company in general subject to the control and supervision of the Board of Directors, the Governor may empower the Chairman to exercise the functions of Managing Director or appoint one of the Directors to be the Managing Director who will be the Chief Executive Officer of the Corporation though Clause 143 of the Articles of Association enjoins upon the Governor to issue such directives or instructions as may be considered necessary in regard to finances, conduct of business and affairs of the Company.

As indicated earlier. AFDC is an independent entity and is not part of the Government. The Corporation is an instrumentality of the State and is also a "State" within the meaning of Article 12 of the Constitution of India; but the Corporation is not the State Government and, therefore, the Corporation does not ipso facto possess any right over the fisheries as embodied in Section 16 of the Assam Land and Revenue Regulation, 1886 save and except over those fisheries which are specifically transferred to the Corporation in terms of such transfer. The provisions of the Assam Fishery Rules made under Sections 155 and 156 are not ipso facto applicable to the Corporation fisheries. However, whether the Corporation possesses the power of direct settlement or extension of fisheries sans the Assam Fishery Rules, is another question.

Mr. N.C. Das, learned senior counsel submitted that the Corporation does not have the power of direct settlement or the power of extension of the lease, which in view is too broad a proposal for acceptance. When the fishery or the fisheries arc duly vested in the Corporation without any reservation, it will always be open to the Corporation to deal with its properties in terms of the instrument of transfer or otherwise the implied authority of the Corporation. The controversy raised in this petition can be decided even without going to the nuances as to whether the Corporation is armed with the power of direct settlement or extension. The legality and validity of the action of the respondent/authorities can be gone into without going to the above issue.

8. From the survey of the facts, it emerges that the respondent/Corporation took a conscious decision for leasing out the fishery by resorting to tender system. The notice inviting tender is also one of the accepted norms, which is required to be adhered to in all public dealings under the public law system more so while dealing with public largesse. The Corporation never took any independent decision on withdrawal of the fishery from the tender system. In the applications dated 23-3-99 and 30-3-99, the applicant/respondent No. 4 made the statement about incurring loss of rupees two to three lakhs. The said applications further contained the statement that the respondent No. 4 duly cleared the instalments in time. The Minister without calling for a report or without ascertaining the fact from any other source, accepted the statement made by the respondent No. 4 on its face value and ordered for withdrawal of the fishery from the tender system/ process, and further ordered for extension of the settlement in favour of the respondent No. 4. However, the facts are contrary to the statements made by the respondent No. 4 in the petitions which were readily accepted by the Minister. For nonpayment of the lust money, the lease-in-question which was in favour of the respondent No. 4, was cancelled and the outstanding dues were allowed to be paid by the respondent/Corporation on the intervention of the Minister.

The Corporation, as indicated above, is an independent authority and is not subordinate to the Government. The respondents in this case acted mechanically in withdrawing the fishery-in-question from the tender process and thereafter settling the same with respondent No. 4 at the behest of the Minister. Respondent No. 4 was a lessee under the Corporation/respondent No. 2, who also defaulted in payment of the kist money. It was for the respondent. No. 2 to come to its own decision as whether the fishery was to be settled by tender system or otherwise. Similarly, it was again for the respondent No. 2 to make an independent decision of its own as to whether the fishery was to be at all settled with respondent No. 4 in the facts and circumstances of the case. It was also for the respondents Nos. 2 and 3 to decide as to whether there was any scope for extension of the lease of the Fishery-in-question after the expiry of the lease period on 31-3-99. Extension implies existence of something to be extended, here it was a ease of prolongation of the lease. Extension indicates that the lease continues in force during the additional period upon performance of some stipulated act. The question of extension after expiry of the period of lease was not called for. Respondent No. 4 was a defaulter till expiry of his lease and his outstanding dues were cleared only on 7-4-99.

The respondents were dealing with public properties which are to be made for public purposes. In the matter of disposing of such public properties, it is to be made openly and with transparency as also with perfect regularity. While dealing with such property, one would expect the public authority to behave in the same standard and circumspection as that of a private individual in the matter of his/ her own property. The disposal is meant not only to be just and fair, but it must meet the eye.

Distribution of largesse is to be judged on assessment of the competing claims and every effort is to be made to secure the maximum price as far as possible. Public properties, for that matter, the State owned properties arc not to be dealt like that of a private individual. Certain norms and principles are required to be observed. One of the methods of securing public interest in the matter of dispensation of properties is to sell it by public auction or by inviting tender. Justice is not only to be done, it must also appear to be done lest one is accused of bias, jobbery and nepotism.

9. As alluded earlier, in the instant ease, a conscious decision of the Corporation by adhering to the tender system as per the policy and accepted norms of the Corporation was scuttled by the Minister concerned without assigning any reason whatsoever. The Corporation is a body Corporate which is to act in terms of the memorandum and the articles of association as well as the provisions of the Companies Act. 1956.

A decision of the Board may be altered by the Board itself. In the case in hand, the Managing Director as well as the Chairman of the Corporation accepted the direction of the Government as well as the request of the Minister in derogation of the provisions of the law. Clause 143 was not meant, to erode the Corporate existence of the Company/Corporation. The said provision is meant for the defined purposes enumerated in the clause itself. The power of the Government to issue directions is relatable to the affairs of the Company, as such to conduct of business pertaining to management, performance and business practices as also to issue directions on the financial affairs of the Company.

Clause 143 is not meant to the individual cases like settlement or allotment of Company''s business. Such matters arc left to the discretion of the officers of the Company who are charged with the managing of its affairs. In the case in hand, the purported directions issued by the aforesaid authorities were in derogation of Clause 143. As alluded earlier, the property belonged to the Corporation and the power of management, for that matter the power of leasing out of the fishery(ies) is vested in the Corporation. It is for the Corporation to take a decision on its individual judgment which cannot, be arrogated by any other authority how high soever he/it may be. When a power is conferred on the authority, it is for that authority alone to exercise that power on applying its mind to the facts and circumstances of the case. Instead of exercising its discretion, if such authority acts mechanically at the behest of another authority without due care and caution or without a sense of responsibility in the exercise of the discretion, such exercise of power suffers from the vice of mechanical exercise of the power as well as non-application of mind. The decision making process of the Corporation on that count also, cannot be legally sustained.

For the reasons stated above, the impugned order dated 10-5-99, is liable to be set aside and accordingly, the same is set aside and quashed.

The writ petition is allowed. However, there shall be no order as to costs.

