
(2019) 10 GAU CK 0032

In the Gauhati High Court

Case No : Writ Petition (C) No. 6113 Of 2019

Kayakuchi Gaon Meen Samabai Samitee Ltd.

APPELLANT

Vs

State Of Assam And 3 Ors

RESPONDENT

Date of Decision : 29-10-2019

Acts Referred:

Assam Fishery Rules, 1953 — Rule 12
Constitution Of India, 1950 — Article 14, 226

Citation : (2019) 10 GAU CK 0032

Hon'ble Judges : Suman Shyam, J

Bench : Single Bench

Advocate : S Katak

Final Decision : Allowed

Judgement

1. Heard Mr. S. Katak, learned counsel for the petitioner. I have also heard Mrs. R.B. Bora, learned Government Advocate, Assam, representing the

respondent nos. 1, 2 and 3 and Mr. S. Khound, learned counsel appearing for the respondent no.4. Assailing the decision of the respondent No 2 to

issue a fresh tender for settlement of No. 15 Kaldia River Fishery situated in the district of Barpeta, the present writ petition has been filed.

2. This is the second round of litigation pertaining to the settlement of the aforesaid fishery and, therefore, the brief factual backdrop of the case may

be noticed as follows :-

(a) The Deputy Commissioner, Barpeta i.e. the respondent no. 3 herein, had issued a Notice Inviting Tender (NIT) dated 06/09/2017 inviting bids for

settlement of No. 15 Kaldia River Fishery for a period of 7 (seven) years. In the NIT dated 06/09/2017, it was mentioned that the minimum reserve

price for the fishery for the first year of settlement would be Rs. 6,40,000/- and

those tenders quoting below the reserve price shall be rejected.

(b) In response to the NIT dated 06/09/2017, the writ petitioner and the respondent no.4, besides other bidders had submitted their tenders. Upon

opening the tenders, it was found that the respondent No 4 had quoted the highest amount of Rs. 1,00,50,000/-. One Shri Dilip Das had quoted Rs.

77,11,151/- which was the second highest, whereas Shri Abhiram Sarkar i.e. the Secretary of the writ petitioner society, having quoted a sum of Rs.

64,50,000/-, was the third highest bidder in terms of rates quoted by the parties.

(c) Upon preparation of the comparative statement, it transpired that there were several deficiencies in the tender submitted by the respondent No 4

represented by one Ananda Ram Das. Notwithstanding the same, by issuing the order dated 23-07-2018, the fishery in question was settled with the

respondent No 4 for a period of seven years. Aggrieved thereby, M/s. Palahartal Schedule Fishery Cooperative Society Ltd., which was one of the

tenderers, had approached this Court by filing WP(C) No 5013/2018 assailing the order of settlement dated 23-07-2018. By judgement and order dated

09/04/2019 passed in WP(C) No. 5013/2018, this Court had set aside the order of settlement dated 23/07/2018, and remanded the matter to the

Government to take a fresh decision in the matter in accordance with law. In terms of the order dated 09/04/2019 passed by this court, the respondent

No 2 has examined the matter and thereafter, has issued the impugned order dated 06/08/2019 cancelling the settlement process initiated under the

NIT dated 06/09/2017 and has decided to issue a fresh tender for settlement of the fishery. By the order dated 06/08/2019, it has further been

provided that till such time, settlement of the fishery is made through a tender process, the fishery be allowed to be operated on daily basis through the

highest bidder i.e. the respondent no. 4 at 5% above the minimum annual Government Revenue of Rs. 6,40,000/-, which amounts to Rs. 2600/- per

day. The respondent no. 3 was accordingly directed to handover possession of the fishery to the respondent no. 4.

3. By referring to the order dated 06/08/2019, Mr. S. Kataki submits that the respondent no. 2 has recorded a categorical finding of fact that the bids

of the highest and the second highest bidders were technically defective and, therefore, invalid. It has further been observed that the writ petitioner

herein, which had offered the third highest amount of Rs. 64,50,000/- for seven

years, was the highest valid bidder. Therefore, according to Mr.

Kataki, the respondents were under a legal obligation to issue the order of settlement in favour of the writ petitioner. However, instead of doing so, the authorities have decided to cancel the tender process and go for fresh tender only to deny the settlement order to the writ petitioner.

4. By referring to the justification cited in the impugned order dated 06/08/2019, Mr. Kataki submits that the rates quoted by invalid bidders could not have been compared by the authorities to come to a conclusion that acceptance of the tender submitted by the writ petitioner would result into loss of Government revenue. By placing reliance upon a decision of this Court rendered in the case of Dangarkuchi Paka Betbari Meen Meen Samabai Samity Ltd. Vs. State of Assam and others reported in 2018 (2) GLT 80, Mr. Kataki submits that such comparison of rates quoted by invalid bidders have been held by this Court to be untenable in the eye of law.

5. Mr. Kataki has also relied upon and referred to two decisions of this Court rendered in the case of Kamala Sarmah Vs State of Assam and others reported in 2018 (3) GLT 230 and Sujit Sarkar Vs. State of Assam and others reported in 2018 (3) GLT 584 to submit that since the bid of the petitioner was valid, hence, it ought to have been treated as the valid highest bidder, and the order of settlement ought to have been issued in favour of the petitioner.

6. By referring to the decision of the Honâ??ble Supreme Court of India in the case of B eg Raj Singh Vs. State of U.P. and others reported in (2003) 1 SCC 726, Mr. Kataki submits that the order of settlement dated 23/07/2018 having been set aside by this Court by the judgement and order dated 09/04/2019 and the matter having been remanded back to the Government, the only course open for the respondents was to issue the order of settlement in favour of the valid highest bidder i.e. the writ petitioner, which has not been done in the present case. As such, the petitionerâ??s counsel has prayed for issuing a direction upon the respondents to settle the fishery with the petitioner by setting aside the impugned order dated 06/08/2019.

7. Mrs. R.B.Bora, learned Government Advocate, Assam has referred to the affidavit filed on behalf of the respondents to argue that the rate quoted by the petitioner is far below those offered by the highest and second highest

bidder and therefore, settling the fishery with the writ petitioner would result into substantial loss of revenue on the part of the Government. It is also the submission of the learned Government Advocate that in matters of Government revenue, the authorities must have the discretion of choosing the best bidder so as to protect the interest of the revenue and, therefore, the present is a fit case where the authorities should be permitted to issue fresh tender for settlement of the fishery.

8. Mr. S. Khound, learned counsel for the respondent no. 4 submits that the order for issuance of a fresh tender has been issued based on cogent reasons recorded in the order and, therefore, there is no ground for this Court to interfere with the impugned order in exercise of powers of judicial review.

9. I have considered the submissions made by the learned counsel for the parties and have also perused the materials available on record.

10. At the outset, it needs to be noted herein that by the order dated 09/04/2019 passed by this Court in WP(C) 5013/2018, the order of settlement of fishery dated 23/07/2018 issued in favour of the respondent no. 4 had been set aside and the matter was remanded for a fresh decision by the Government. The respondent no. 4 has not challenged the judgement and order dated 09/04/2019 passed by this Court, as a result of which, the same has attained finality in the eye of law. Therefore, the question as to whether the technical bid of the respondent no. 4 was valid or not, is no longer open for consideration at this stage.

11. Likewise, the 2nd highest bidder has also neither challenged the order dated 23-07-2018 nor the finding of facts recorded in the order dated 06/08/2019 to the effect that his bid was technically defective. On the other hand, a categorical finding has been recorded by the Respondent No 2 in the order dated 06-08-2019 that the writ petitioner is the highest valid bidder and the said finding of fact has also not been disputed by the contesting parties. Therefore, there can hardly be any doubt about that fact that the writ petitioner in this case is the highest valid bidder. However, the order of settlement has been denied to the petitioner by comparing the rates quoted by the invalid bidders so as to reach a conclusion that re-tender would fetch better revenue for the Government. The question that would, therefore, arise for consideration of this court is as to whether, the decision to issue fresh

tender on the stated ground is sustainable in law in the facts and circumstances of the case.

12. It is trite that in a commercial tender, rates quoted by an invalid bidder would be wholly inconsequential and cannot be taken into account for any

purpose. It is only the price quoted by a valid bidders which would come into play while deciding the outcome of the tender process. Therefore, the

rates quoted by the respondent no. 4 and the second highest bidder, did not have any relevant bearing for settlement of the fishery.

13. In the case of Dangarkuchi Paka Betbari Meen Samabai Samity Ltd. (Supra), the aforesaid question, in the context of settlement of a fishery, had

arisen for consideration by this Court, wherein, the learned Single Judge while rejecting the similar stand of the respondent authorities, had set aside

the impugned decision to go for re-tender by making the following observations :-

14. In the aforesaid context, when the records of the settling authorities is verified, it is noticed that the only reason for arriving at a

conclusion that the fishery in question could have fetched a higher public revenue is that the invalid higher bids had indicated a much

higher revenue that the fishery could have fetched. There is no other independent finding of the authorities or any other materials on

record that the bid offered by the petitioner would fetch a public revenue, which would be less than what it could have otherwise fetched.

15. By further referring to the communication of the Deputy Commissioner regarding the revenue fetch by the concerned fishery for the last

three settlements, a fair opinion can also be arrived at by the tendering authorities as to what would be the expected revenue from the

fishery. When the said rate is compared with the rate offered by the petitioner, it is noticed that the petitioner's rate is in fact approximately

two times higher than what the fishery had fetched during its last settlements. It is noticed that the Minister while arriving at its conclusion

that the fishery could have fetched a higher revenue, have not taken the aforesaid piece of information which possibly could have been

made available at the relevant point of time.

16. The said aspect of the matter also leads to a conclusion that while arriving at the conclusion that the fishery could have fetched a higher

revenue, relevant consideration that were available or could have been made

available were ignored whereas other irrelevant

consideration, which does not meet the sanction of Article 14 of the Constitution of India were taken into consideration. Such a procedure

adopted by the respondent authorities also warrants a conclusion that the decision of the Minister to go for a re-tendering on a purported

conclusion that the fishery could have fetched a higher revenue is also not acceptable.

17. Accordingly, the decision of the Minister dated 24.11.2016 directing the authorities to go for a re-tender in the interest of Government

revenue and also the communication contained in the letter dated 09.12.2016 are hereby set aside.â??

14. The aforesaid decision of a Coordinate Bench would be binding upon this Court. Having regard to the facts and circumstances of the present case,

I am of the considered opinion that the ratio laid down in the case of Dangarkuchi Paka Betbari Meen Samabai Samity Ltd. (Supra) would be squarely

applicable to the facts of the present case as well. Such being the position, the comparison made by the respondent no. 2 between the rates quoted by

the petitioner and the respondent no. 4 as well as the second highest bidder, is held to be untenable in the eye of law since the tenders submitted by

both the aforementioned bidders were invalid.

15. Having held that the impugned order dated 06/08/2019 has been passed on irrelevant considerations, the next question that arises before this Court

is to the relief that can be granted to the petitioner in the facts and circumstances of this case. As would be apparent from the facts alluded above, the

NIT dated 06/09/2017 had culminated in the order of settlement dated 23/07/2018 issued in favour of the respondent no. 4. As such, the tender

process had reached its logical conclusion with the issuance of the order of settlement. However, the said order of settlement was set aside by this

court by holding that the bid of the respondent No 4 was defective. As such, following the spirit of the order passed by this Court, it was incumbent

upon the respondents to issue the order of settlement in favour of the highest valid bidder i.e. the writ petitioner. But instead of doing so, the

respondent no. 2 has cancelled the tender and has decided to go for retender.

16. It is settled law that a tender is in the nature of an offer made by the

interested parties in response to the NIT and, therefore, it would always be open for the authorities to accept or reject any of the offers, particularly when the interest of revenue is involved in the matter. Upon opening the bids, if the authority, for any cogent reason, is of the view that none of the bids can be accepted and decides to go for re-tender, the writ courts in exercise of power of judicial review would not ordinarily interfere with such decision as long as the decision making process is fair and transparent. The matter would, however, be completely different when the respondents are seeking to cancel the tender process after having issued the order of settlement in favour of one of the bidders. If the respondents are allowed to cancel the tender process only because a particular bidder does not find favour with the authorities, than the same would amount denying relief to the successful bidder even after having established his rights upon showing that a wrong had earlier been committed by the authorities in awarding the settlement in favour of an invalid bidder. Such a recourse, in the opinion of this Court, would also militate against the basic philosophy of equality enshrined in Article 14 of the Constitution of India.

17. In the case of Union of India and another Vs. S.B. Vohra and others reported in (2004) 2 SCC 150, the Honâ??ble Supreme Court had extensively dealt with the power of judicial review exercised by the High Court and has observed that although it is not possible to exhaustively lay down as to in what situation a Writ of Mandamus will issue and in what situation the Court will not exercise the discretion, all would depend upon the law which governs the field. The Supreme Court has further observed that at the first instance, the Court should allow the statutory authorities to perform their own function and would not usurp the said jurisdiction itself but when the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute, the High Courts would have the jurisdiction under Article 226 of the Constitution of India to issue Writ of Mandamus or to give necessary directions to the Government or public authority. The aforesaid decision had been rendered by relying upon an earlier judgement rendered in the case of Comptroller and Auditor General of India Vs. K. S. Jagannathan reported in (1986) 2 SCC 697.

18. Coming to the facts of this case, the spirit of the judgement and order dated 09/04/2019 leaves no shadow of doubt that after setting aside the

order of settlement dated 23/07/2018, the matter was remanded to the Government to take a fresh decision on the question of issuance of order of settlement in favour of the highest valid bidder. Therefore, it was incumbent upon the respondent no. 2 to exercise its discretion correctly and issue the order of settlement in favour of the writ petitioner. But as notice above, instead of doing so the tender process itself has been cancelled, thereby acting in a manner which is wholly impermissible in the eye of law.

19. A perusal of the impugned order dated 06/08/2019 shows that the only reason why no order of settlement was issued in favour of the writ petitioner was that the rate quoted by the petitioner is far below the rates quoted by the respondent no. 4 and the second highest bidder. Therefore, it is apparent that the impugned decision apart from being illegal, is also driven by purely commercial interest of the Government. However, in the case of Arabinda Das and others Vs. State of Assam and others [Civil Rules Nos. 174 and 175 of 1980] (AIR 1981 GAU 18 a) Full Bench of this Court, while interpreting Rule 12 of Assam Fishery Rules, 1953, has categorically observed that the objective of the Rules is to provide work to the actual fishermen to improve their lot rather than deriving revenue for the exchequer. The observations made by the Full Bench in para 9 of the said decision is reproduced herein below for ready reference:-

“9. The successive amendments of the Rules noticed above, show the anxiety of the Government to give a better deal to the deserving persons, the Co-operative Society formed by actual fishermen and actual individual fishermen by settling more and more fisheries with them. The emphasis in these rules indicates that the Government is more concerned about providing work to the actual fishermen to improve their lot than deriving revenue for the exchequer.”

20. In another decision of the Supreme Court rendered in the case of Beg Raj Singh (Supra), it has been clearly held that the petitioner having been found to be entitled to a right to relief, the Court would place the successful party in the same position in which he would have been, if the wrong complained against would not have been done to him. In this case also, had the respondents correctly assessed the bids, then in that event the writ petitioner would have emerged as the highest valid bidder even in the first instance. As such, I am of the view that the writ petitioner having

succeeded in establishing that it is the highest valid bidder in the tender process in question, there is no scope for denying relief to the petitioner, in the facts of the present case.

21. Although Mrs. Bora, learned Government Advocate has relied upon an unreported decision of the Delhi High Court in the case of Man Industries

(India) Ltd. Vs. Union of India and another [WP(C) No. 9595/2009] to contend that the State must be permitted the discretion to protect the interest

of revenue, the ratio laid down in the said decision, in the opinion of this Court, would not have any relevant bearing in the facts of the present case

22. For the reasons stated herein above, the impugned order dated 06/08/2019 stands set aside. Since the respondents have failed to properly exercise

their discretionary powers in this case, the respondent no. 2 is directed to issue the order of settlement in favour of the petitioner, as per the terms of

the NIT dated 06/09/2017, so as to take effect from the date of handing over possession of the fishery to the writ petitioner.

23. The order passed by this Court shall be implemented within a period of two weeks from the date of receipt of a certified copy of this order.

Writ petition stands allowed.

There would be no order as to costs.