
(2016) 12 GAU CK 0044
In the Gauhati High Court
Case No : WP(C) 7151 of 2015

Md. Bahar Uddin	Vs	APPELLANT
Assam Fisheries Development Corporation Ltd.		RESPONDENT

Date of Decision : 20-12-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2017) 1 GauLT 535

Hon'ble Judges : Mr. Arup Kumar Goswami, J.

Bench : Single Bench

Advocate : Mr. H. K. Mahanta, Advocate, for the Petitioner; Mr. S. B. Sarma, learned Standing counsel, AFDC, for the Respondent Nos. 1 and 2; Mr. B. Gogoi, Advocates, for the Respondent No. 3

Final Decision : Dismissed

Judgement

Mr. Arup Kumar Goswami, J.— Heard Mr. H.K. Mahanta, learned counsel, appearing for the petitioner. Also heard Mr. S.B. Sarma, learned Standing counsel, Assam Fisheries Development Corporation, appearing for respondent Nos. 1 and 2, and Mr. B. Gogoi, learned counsel, appearing for respondent No. 3.

2. By this application under Article 226 of the Constitution of India, the petitioner calls into question the order dated 16.11.2015, passed by the Managing director, Assam Fisheries Development Corporation (for short, "AFDC"), cancelling the order of settlement, dated 18.09.2015, settling No. 37 Fulbari Anuwa Fishery (for short, "fishery") in favour of the petitioner, and settling the same in favour of respondent No. 3 herein for 7 years with effect from the revenue year 2015-2016 to 2021-2022 at Rs. 10,46,001/- yearly.

3. A Notice Inviting Tender (NIT) dated 10.08.2015 was issued by the Managing Director, AFDC, for settlement of the fishery. Four tenderers, including the petitioner and respondent No. 3, had submitted their tenders. While respondent No. 3 emerged as the highest tenderer, the petitioner was the second highest

tenderer. However, as noted earlier, order of settlement of the fishery was issued in favour of the present petitioner.

4. Being aggrieved, respondent No. 3 approached this Court by filing a writ petition under Article 226 of the Constitution of India, which was registered as WP(C) 5947/2015. The order of settlement dated 18.09.2015, made in favour of the petitioner, which is available in the records produced by Mr. S.B. Sarma, goes to show that the tender of respondent No. 3 was not considered as the Non-Bakijai Certificate (Bakijai Clearance Certificate - a certificate showing that there is no arrears of payment of revenue) submitted by him had some defects and, therefore, settlement was offered to the petitioner at his bid amount of Rs. 9,51,000/- holding that the defect in his bid, namely, his photograph being not attested, is not significant.

5. Clause 4.1.7 of the NIT dated 10.08.2015, amongst others, required the tenderers to submit "Non-Bakijai Certificate" from the office of the Deputy Commissioner concerned.

6. The aforesaid writ petition, namely, WP(C) 5947/2015, filed by respondent No. 3 was disposed of by this Court by an order dated 04.11.2015. Perusal of the order of this Court dated 04.11.2015 goes to show that the Non-Bakijai Certificate submitted by the present respondent No. 3 (petitioner therein) did not indicate the period for which it was applicable and the same was also not attested. It also goes to show that by means of an affidavit, the respondent No. 3 herein (petitioner therein) had brought on record a certificate, as corrected by the competent authority, indicating the period for which the certificate was applicable. Objection was raised by the learned counsel for the present petitioner as well as by Mr. Sarma, learned Standing counsel, AFDC, contending that the said corrected certificate could not have been taken into consideration as the last date of opening of tender had since expired on 28.08.2015. At that stage, it appears from the said order, that a prayer was made by the learned counsel for the petitioner therein (respondent No. 3 herein) that he be allowed to make a representation before the competent authority highlighting his grievance in respect of the Non-Bakijai Certificate. On the aforesaid submission, this Court disposed of the writ petition in the following terms:

"At this stage Mr. B. Gogoi, learned counsel representing the petitioner submits that he be allowed to make representation before the competent authority i.e. the Assam Fisheries Development Corporation highlighting his grievances in respect of the Non-Bakijai Certificate. The said prayer made by the petitioner appears to be reasonable.

Without expressing anything on the merit of the case, this writ petition is disposed of allowing the petitioner to make a representation before the Assam Fisheries Development Corporation for the purpose as indicated above. In the event such representation is made, it would be incumbent upon the competent authority in the Assam Fisheries Development Corporation to look into the matter

and to pass appropriate order after giving due opportunity to the petitioner of being heard. The exercise, as noted above, be completed within a period of six weeks from the date of receipt of a copy of this order. The petitioner is permitted to produce a copy of this order along with a copy of the writ petition before the authority in the Assam Fisheries Development Corporation for his doing the needful.

Resultantly, this writ petition stands disposed of."

7. Pursuant to the aforesaid order, a hearing was accorded on 12.11.2015 to the respondent No. 3 (i.e., petitioner in WP(C) 5947/2015) and, thereafter, the impugned order was passed on 16.11.2015. The order, as translated and enclosed in the writ petition as Annexure-7, reads as follows:

"Assam Fisheries Development Corporation Ltd.

(A Govt. of Assam Undertaking)

Chachal, VIP Road, Guwahati-781036, E-mail afdc@1977gmail.com.in, web minigam.in

ORDER

Perused the Hon''ble High Court order dated 04.11.2015 passed in WP(C) No. 5947/15. In this regard a representation dated 06.11.2015 along with enclosures have filed by Mr. Arbesh Ali. In compliance of the Hon''ble High Court order dated 12.11.2015, hearing was conducted at Head Office of the Corporation.

On examination of the records of the office, it is found that in pursuance of the NIT No. 4/2015 dated 10.08.2015 for settlement of Fulbari Anowa Fishery of Cachar Dist. For seven years, four 9(4) tender applications were received. Md. Arbesh Ali submitted value of Rs. 10,46,001/- yearly and was in first position but as in non-bakijai certificate as no date was given to show from which date the applicant was free from bakijai. Therefore, at that time name of the First highest bidder could not be considered and accordingly, on 18.09.2015, settlement was given in favour of the Second highest bidder who offered tender of Rs. 9,51,000/- for seven years as per direction of the corporation. During hearing, the applicant Md. Arbesh Ali submitted a corrected non-bakijai certificate by inserting date. It is not subject matter to the applicant for giving date or not. If date mentioned in the corrected non-bakijai certificate submitted at present, the name of the applicant Md. Arbesh Ali could have been considered for settlement of the said fishery. Now, the real fact has come out, therefore, no reason to consider the name of the applicant as in similar circumstances, earlier the Hon''ble High Court issued directions to avoid small defectives of highest bidder and, moreover, the corporation has to face loss of Rs. 95,001/- yearly and in total Rs. 6,65,007/-.

Further, the present settlement holder, the second highest bidder Md. Baharuddin has required to pay revenue of 2nd kist for the year 2015-16 as per agreement

and is found unpaid till date. It is found that settlement holder has violated the agreement and terms and condition of the corporation. Therefore, considering all aspects, and keeping in view of revenue settlement order No. AFDC 682/2015/2660 dated 18.09.2015 issued in favour of Mr. Baharuddin is hereby cancelled and possession of the said fishery is taken by the Corporation. Further, tender of the First highest bidder Md. Arbesh Ali has been accepted and settlement of Fulbari Anowa fishery of Cachar District has been allowed in favour of Md. Arbesh Ali from the revenue year 2015-16 to 2021-22 for seven years at Rs. 10,46,001/- yearly.

Sd/- illegible

Managing Director

Assam Fisheries Development Corporation Ltd.

Guwahati-36.

Memo No. AFDC-682/15/3230-3238

Date 16.11.2015"

8. From the perusal of the said order, it transpires that during the hearing, the respondent No. 3 (petitioner therein) had produced a corrected Non-Bakijai Certificate by inserting the date and the authority decided to accept the said certificate. It is also reflected in the order that on earlier occasions this Court had directed to consider the tenders of the highest tenderers ignoring minor defects in the tenders. It is also noted in the said order that the present writ petitioner had not paid revenue of second kist for the year 2015-2016 as per agreement and the same was not paid till then and, as such, the settlement holder had violated terms and conditions of the agreement executed by and between the present writ petitioner and the AFDC. Holding thus, the settlement made in favour of the present petitioner was cancelled and settlement was offered to the present respondent No. 3 by accepting his tender, which is otherwise the highest tender. It is also reflected in the said order that possession from the writ petitioner was taken back by the AFDC.

9. Mr. Mahanta, learned counsel for the writ petitioner has admitted that the petitioner could not deposit the second kist money which was required to be deposited within 31.10.2015. However, he submits that as per Clause 10.3.3 of the tender agreement, time could have been allowed to the petitioner till 30.11.2015 and, therefore, the petitioner had not violated any of the terms and conditions of the agreement. He has strenuously argued that the impugned order of cancellation of the settlement order made in favour of the petitioner was made without affording any opportunity of being heard and, therefore, in view of the violation of the principles of natural justice, the order dated 16.11.2015 is liable to be set aside and quashed. Mr. Mahanta has placed reliance on the judgement of the Apex Court rendered in the case of Canara Bank v. B.K. Awasthi, reported in (2005) 6 SCC 321.

10. Mr. Sarma, learned Standing counsel, AFDC, has submitted that this Court, by order dated 04.11.2015, had permitted the petitioner in WP(C) 5947/2015 (i.e., respondent No. 3 herein) to make a representation and had directed the respondent authorities to afford him due opportunity of hearing in case he submitted any representation and, therefore, when the petitioner WP(C) 5947/2015 (respondent No. 3 herein) had submitted representation, only the petitioner in WP(C) 5947/2015 was heard as there was no direction for hearing the respondent No. 3 therein (petitioner herein). He has submitted that in the aforesaid background, the plea raised with regard to violation of the principles of natural justice is not tenable.

11. Mr. B. Gogoi, learned counsel for respondent No. 3 herein has endorsed the submission of Mr. Sarma. He has further submitted that a Division Bench of this Court, in the case of Abu Talib v. The Assam Fisheries Development Corporation Ltd. and Ors., by judgement and order dated 29.09.2011, had opined that the requirement of submitting Bakijai Clearance Certificate is not a rigid requirement and, therefore, in the very first place, the AFDC authorities had acted illegally in rejecting the tender of the petitioner on the ground that the Non-Bakijai Certificate submitted by the respondent No. 3 did not indicate the date up to which there was no Bakijai (arrear revenue) dues though the certificate, per se, was dated, which is 13.05.2015. Even without the corrected certificate submitted by the respondent No. 3, settlement ought to have been offered to respondent No. 3 and if there was any doubt, the respondent No. 3 ought to have been granted an opportunity to produce a corrected certificate as the mistake was committed by the Certificate Officer, which is the issuing authority. If that be so, it is submitted by him that it will be an empty formality to remand back the matter to the AFDC for fresh consideration and, therefore, the plea raised by the petitioner alleging violation of principles of natural justice may not be entertained.

12. In reply, Mr. Mahanta has submitted that fairness demands that an opportunity of being heard ought to have been offered to the petitioner.

13. I have considered the submissions of the learned counsel for the parties and have perused the materials including the records produced by Mr. Sarma.

14. Records produced by Mr. Sarma reveal that in the corrected Non-Bakijai Certificate it was certified that there was no bakijai dues against the respondent No. 3 in the Bakijai courts of Deputy Commissioner, Cachar, as per available office records as on 13.05.2015. In the said certificate, as was originally produced along with the tender, the portion "13.05.2015" was not written and the date that should have followed "as on" was kept blank. The certificate submitted along with the tender was, however, dated 13.05.2015.

15. This Court, in Abu Talib (supra), which had also arisen out of an order of settlement made by the AFDC, had held that requirement of submitting Bakijai Clearance Certificate could not be taken as a rigid requirement. Learned Single Judge had set aside the order of settlement made in favour of the settlement

holder on the ground that he had not submitted Bakijai Clearance Certificate. Accordingly, the order of the learned Single Judge was set aside by the Division Bench.

16. Learned counsel for the writ petitioner was not able to place any judgement of the Supreme Court holding that submission of Bakijai Clearance Certificate is a mandatory requirement of the NIT and, therefore, the legal position as obtaining today is that the AFDC could not have validly rejected the highest tender of the petitioner on the ground of defect in the Bakijai Clearance Certificate. It is not even a case of non-submission of Bakijai Clearance Certificate.

17. No doubt, while disposing the earlier writ petition, being WP(C) 5947/2015, this Court did not specify regarding grant of opportunity of hearing to the writ petitioner herein and had only provided that the writ petitioner therein (respondent No. 3 herein) is to be heard on the representation to be submitted by him. The writ petitioner therein had made a submission that a representation would be submitted highlighting grievances relating to Non-Bakijai Certificate and this Court had directed the authority in the AFDC to look into such matter and to pass appropriate order. Therefore, having regard to the aforesaid order, there is no escape from the conclusion that the issue of rejection of Non-Bakijai Certificate was kept open for consideration by AFDC. As a corollary thereto it also follows that in case the authority decided to review its earlier decision regarding rejection of Non-Bakijai Certificate, the inevitable consequence would be that the tender of the respondent No. 3 herein was valid and, resultantly, settlement of the petitioner herein would have to be cancelled. In the aforesaid perspective, merely because there was no direction by this Court to hear the settlement holder (the petitioner herein), it cannot be construed that there was no necessity to hear him inasmuch as in the event of allowing the representation, he would have been visited with civil consequences. This is precisely what has happened as upon hearing the respondent No. 3 herein on his representation, his tender was accepted.

18. It is another matter that non-payment of revenue for the 2nd kist by the writ petitioner was also taken as a ground for cancellation of the settlement of the writ petitioner. But that aspect of the matter may not detain this Court any further as it is only a secondary and incidental issue, the primary issue being the correctness or otherwise of the decision to reject the tender of the respondent No. 3 herein at the time when settlement was offered to the present writ petitioner.

19. Now the question is as to whether the impugned order is liable to be interfered with on the ground of violation of principles of natural justice, the petitioner having not been afforded with an opportunity of being heard while granting such opportunity to the respondent No. 3 at the time of consideration of his representation.

20. In *Canara Bank (supra)*, the Supreme Court, while dealing with the concept

of natural justice, had noted that when a quasi-judicial body embarks upon to determine disputes between the parties or when any administrative action involving civil consequences is in issue, it is essential that party should be put on notice before any adverse order is passed against him and, in the absence of a notice and reasonable opportunity to defend, the order passed becomes wholly vitiated. At the same time, in the said case, the Supreme Court had also considered what is known as "useless formality theory".

21. There are many shades of "useless formality theory" but it appears that even in cases where the facts are not all admitted or beyond dispute, the courts can, in exercise of its discretion, refuse certiorari, prohibition, mandamus or injunction even though natural justice is not followed. The learned counsel for the petitioner is unable to demonstrate how any prejudice is caused to the writ petitioner in view of not being afforded the opportunity of being heard. In view of the decision in Abu Talib (supra), even if the impugned order is set aside and opportunity of being heard is granted to the writ petitioner, the grant of writ will be in vain as the result would have been the same. 22. Therefore, in view of the above discussion, I am of the considered opinion that though petitioner was not granted an opportunity of being heard, if the same is now granted and the case is remitted to the respondents for fresh consideration, it will be but a formality in view of the decision rendered by the Division Bench of this Court in Abu Talib (supra). If that be so, the impugned order dated 16.11.2015 does not require interference on the ground that the said order militated against the principles of natural justice.

22. Resultantly, I find no merit in this writ application and, accordingly, the same is dismissed.