
(2003) 06 GAU CK 0009
In the Gauhati High Court
Case No : Writ Petition (C) No. 4785 of 2002

Nilotpal Das

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 15-06-2003

Acts Referred:

Assam Excise Act, 1910 — Section 15, 16, 3(14), 3(3)
Assam Excise Rules, 1945 — Rule 53, 57, 91, 92, 93
Constitution of India, 1950 — Article 14

Citation : (2005) GLT 404 Supp

Hon'ble Judges : Amitava Roy, J

Bench : Single Bench

Advocate : A.B. Choudhury, J. Abedin, B. Gogoi and A. Ganguly, for the Appellant; P. Borthakur and B. Acharyya, for the Respondent

Final Decision : Dismissed

Judgement

Amitava Roy, J.—The Petitioner herein has questioned the decision of the State Respondents in allowing the Respondent No. 7 to set up a bottling plant at Silchar Excise Warehouse and to award it the bottling contract of liquor, vide order dated 12.4.2000.

2. I have heard Mr. A.B. Choudhury, assisted by Shri J. Abedin, learned Counsel for the Petitioner, Mr. R.K. Bora, learned State counsel for the official Respondents and Shri P. Borthakur, Sr. Advocate assisted by Mr. D. Sur, advocate for Respondent No. 7.

3. The thumb nail facts necessary for comprehending the issues are that the Petitioner is an educated unemployed youth interested in the business of Excise. He came across a news items in the issue dated 22.7.2002 of Daily "DAINTK JUGAS ANKHA" to the effect that the Silchar Country Spirit Bottling Plant had been settled with the Respondent No. 7 on 12.7.2002 without inviting any tender thus depriving the local educated unemployed youth of the District of Cachar. On enquiry being made, he came to understand that the said bottling plant was

settled with the private Respondent as far back as on 12.4.2000. Two writ petitions being W.P. (C) 3976/2000 and W.P. (C) 5841/2000 had already been filed wherein interim orders have been passed for which the said Respondent could not start the operation of the bottling plant. The writ petitions, however, were eventually dismissed. Thereafter, by order dated 27.6.2002 the Commissioner of Excise, Assam, was asked to request the Deputy Commissioner, Cachar to ensure functioning of the bottling plant after complying with the conditions of the agreement. According to the Petitioner, in the meantime, the Excise Superintendent had submitted a report to the Deputy Commissioner Cachar pointing out various difficulties in the matter of operation of the bottling plant being opposed to the terms and conditions of the agreement. The Deputy Commissioner, Cachar on receipt of the said report informed the Commissioner of Excise, Assam by his letter dated 19.7.2002 that it was thus not feasible to start operation of the bottling plant. In spite of the above, the Addl. Commissioner of Excise, Assam by his letter dated 18.7.2002 requested the Deputy Commissioner Cachar to allow the private Respondent to operate the plant.

4. The Petitioner has contended that the contract of bottling liquor is a Government contract and settlement whereof amounts to distribution of State largess and therefore, it was obligatory on the part of the State Respondents to grant the same either by tender or public auction permitting participation of all eligible members of the public. According to him, the State Respondents did not do so and settled the contract with the Respondent No. 7 clandestinely and therefore, the process is vitiated by unfairness and lack of transparency warranting interference by this Court. He has further contended that the manner in which the bottling contract has been awarded to the Respondent No. 7 is also in contravention of Rule 91 of the Assam Excise Rules, 1945 (hereinafter referred to as the Rules), and on that count as well, the impugned decision is illegal and unconstitutional. He has asserted that he was and is willing to undertake the operation of the Excise bottling plant at Silchar and was eagerly waiting for a public advertisement in that regard. But the State authorities most illegally and arbitrarily settled the said contract with the Respondent No. 7 in a hush-hush manner in total violation of the constitutional requirements in the matter of distribution of State largess.

5. The State Respondents in their affidavit-in-opposition while controverting the allegations regarding unfairness and lack of transparency have contended that there is no bottling plant in the Excise Warehouse at Silchar and therefore, the country spirit was being issued to the lessee in loose drums and other containers which were not hygienic, exposing the public to serious health hazards. While the Government was contemplating to set up a bottling plant at the Excise Warehouse at Silchar, M/s. Purbanchal Associates, Gauhati (Respondent No. 7) and M/s. Baidyanath Dairy Ltd., Silchar came forward with plans and estimates for setting up a bottling plant at Silchar at their own cost. The plan and estimate submitted by the Respondent No. 7 were found suitable and it was therefore allowed to establish the bottling plant subject to the express condition in a

written agreement that all expenses therefore would be borne by the firm and after 5 years, the bottling plant would become the property of the Government alongwith its equipments. The answering Respondents further contended that the contract was awarded on 27.10.1998. While referring to the earlier two writ petitions, with regard to the same settlement, the State Respondents contended that the same had been dismissed and therefore, the Respondent No. 7 had been directed to start the operation of the plant. They maintained that the Government has the right to grant licence of the nature as in the instant case without calling for any tender.

6. The Respondent No. 7, while substantially replicating the stand taken by the official Respondents, has stated in its counter that the bottling plant was settled with it after the concerned authorities were satisfied with the plan and estimate submitted for the purpose and following acceptance of its rates. It asserted that before deciding to settle the contract with it, a quotation was invited by the authorities and its rates having been found to be acceptable, the contract was awarded to it. It contended that they had already deposited a sum of Rs. 15,000/- as security deposit and the agreement had been executed on 8.11.2000. According to it, the earlier two writ petitions also raised same issues and the same having been dismissed, it was not open for the Petitioner to reiterate the same contentions once again. It maintained that the bottling plant at Silchar had been decided to be set up by the Government for supplying potable alcohol in bottles in place of Jerrycans, tubes etc. in absence of a bottling plant. Its case is that it has experience in potable alcohol business and on enquiry could come to learn about the contemplated move of setting up of abottling plant at the Silchar Excise Warehouse. It accordingly submitted its plan and estimate together with a project report for the bottling plant of Country spirit at the Silchar Excise Warehouse to the Commissioner of Excise, Assam. One more firm M/s. Baidyanath Dairy Ltd. had also submitted its candidature. The authorities being satisfied with its project report as well the rates offered by it (Respondent No. 7) awarded it the contract. The stand of the answering Respondent is that Rule 91 of the Rules was not applicable in the facts of the present case and that it was not necessary on the part of the Government to make any public advertisement or to invite tenders as contended by the Petitioner. According to it, by awarding the contract in the manner so done, there has been neither any contravention of the Rules nor deviation from any laid down procedure. It questioned the bona fide of the Petitioner also on the ground of delay and asserted that the decision of the Government to set up a bottling plant being a policy decision in the interest of public health and safety and there being no illegality in the process adopted for the purpose, the writ petition did not merit any consideration.

7. Mr. Choudhury, learned Counsel for the Petitioner has strenuously argued that the settlement in question is in the nature of public contract and therefore, in order to ensure fairness and transperancy in the process, the State Respondents ought to have invited tenders from the willing and eligible members of the public

and the omission to do so has vitiated the impugned decision to its core. He has further argued that the process undertaken by the State Respondents in the instant case is clearly in violation of the procedure laid down under Rules 91, 92 and 93 of the Rules and on that ground alone, the impugned decision being illegal and unconstitutional is liable to be adjudged as such.

8. Mr. Choudhury, in support of this submission has invited the attention of this Court to the definition of the words "bottle" and "liquor" as contained in Section 3(3) and 3(14) of the Assam Excise Act, 1910 (hereinafter referred to as the "Act") as well as Sections 15 and 16 thereof which requires grant of licence for bottling liquor for sale. He also relied on Rule 53 and 57 of the Rules to impress upon this Court that potable liquor cannot be bottled without a licence being granted by the appropriate authority. Referring to Rule 91 of the Rules the learned Counsel strongly argued that the same made it incumbent on the State Respondents to call for tenders also for the settlement of the nature involved in the present case and that the omission on their part to comply with the requirements of the said provisions of the Rules has rendered the process void, ab-initio. Mr. Choudhury, also referred to the documents annexed to the writ petition to contend that the Respondent No. 7 has been shown undue favour by permitting it to start operation of the bottling plant even without complying with the stipulations contained in the related agreement. In all, it is submitted that the impugnd settlement process suffers from legal and constitutional infirmities and therefore, it is a fit case in which this Court in exercise of its writ jurisdiction would interfere with the decision of the settlement in favour of the Respondent No. 7 and direct the authorities to initiate a fresh process for such settlement by inviting tenders. Mr. Choudhury, in support of his submissions pressed into service the following decisions of the Supreme Court:

Chaitanya Kumar and Others Vs. State of Karnataka and Others,

1995 (3) GLT 124, Progoti Supply and Co-op. Society Ltd. v. State of Assam.

9. Per contra, Mr. Bora, learned State counsel has contended that the settlement in question involved setting up of the bottling plant apart from execution of the bottling contract and therefore, Rule 91 has no application at all. It was thus permissible on the part of the State Respondents to settle the contract without inviting tenders.

He submitted that the facts and circumstances of the case, would clearly reveal that the concerned authorities of the Government after applying their minds to the plans and estimates submitted by the Respondent No. 7 and another firm accepted the proposal of the Respondent No. 7 and its rates and accordingly settled the contract with it in public interest. He maintained that the Petitioner has failed to establish that the impugned decision is opposed to public interest or the process is in contravention of any statutory requirement or any established procedure and therefore, the writ petition is liable to be dismissed. Learned State counsel also produced the relevant records in support of his submissions.

10. Mr. Borthakur appearing for Respondent No. 7 while endorsing the submissions made by Mr. Bora, has urged at the outset that the petition is not a bona fide one inasmuch as it is not only unduly delayed but also is by a person who has no locus standi to assail the order of settlement in its favour. He contended that two writ petitions had been filed earlier raising the same issues and as those had been dismissed by this Court, the Petitioner cannot be permitted to reiterate the same contentions once again. He argued that the contract in hand is not one purely for bottling liquor, but one for setting up of the plant as well and therefore, the Rules 91, 92 and 93 of the Rules, are not attracted in any view of the matter. The concerned authorities of the Government in public interest decided to set up a bottling plant at the Excise Warehouse at Silchar and coming to know about the same, the Respondent No. 7 and another firm M/s. Baidyanath Dairy Ltd. submitted their plans and estimates along with rates and the concerned authorities being satisfied that the offer of the Respondent No. 7 was acceptable in all respects rightly settled the contract with it. By doing so, the State Respondents did not make any departure from any established procedure. The decision to set up a bottling plant being clearly in the interest of public health and safety and the impugned action of the said Respondents not being in violation of any requirement of law or procedure, the learned Counsel argued that the Petitioner has failed to make out any case warranting interference of this Court. According to Mr. Borthakur, the process had started far back in the year, 1998 and the settlement was made in the year 2000, but due to filing of writ petitions before this Court one after another and for the interim orders passed therein, the Respondent No. 7 has not been able to operate smoothly the plant, though in the meantime, it has completed all necessary formalities under the agreement and has made substantial investments for the purpose. learned Counsel for the said Respondents has placed reliance on the following decisions of the Apex Court:

Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another,

State of Orissa and Others Vs. Harinarayan Jaiswal and Others,

M/s. Ugar Sugar Works Ltd. Vs. Delhi Administration and Others,

Secretary to Govt., Tamil Nadu and Another Vs. K. Vinayagamurthy,

11. Before embarking upon the rival contentions of the parties on merits, it would be appropriate to deal with the preliminary objections.

12. The Petitioner has stated that he had come to learn about the impugned decisions only from News Item dated 22.7.2002 in the local daily named hereinabove. The writ petition had been filed on 1.8.2002. There is nothing on record to indicate that Petitioner had the knowledge about the impugned settlement before that date. this Court had issued notice of motion on 2.8.2002 and by the same order had restrained Respondent No.7 from operating the bottling plant. In that view of the above, I am not inclined to non-suit the Petitioner on

the ground of delay.

13. W.P. (C) 3976/2000 filed earlier relating to the same Warehouse was dismissed by this Court by judgment and order dated 24.7.2001 without adjudicating the issues involved therein on merits. W.P. (C) 5841/2000 was dismissed by judgment and order dated 1.5.2002 holding that the issue involved there was covered by the judgment and order dated 24.7.2001 rendered in W.P. (C) 3976/2000. Thus, the issues in the said writ petition were also not examined on merits. I am therefore, not inclined to agree with the learned Counsel for the Respondents that the decisions of this Court in the earlier two writ petitions would come in the way of the Petitioner from assailing the order of settlement. The preliminary objections, therefore, fail.

14. A bare reading of the provisions of the Act and the Rules relied upon by the learned Counsel for the Petitioner would suggest that the legislative mandate contained therein is that for the purpose of establishing a distillery, brewery and a Warehouse under the Act and the Rules and for bottling liquor for sale, a licence from the prescribed authority is mandatory and any operation in connection therewith has to be subject to the terms and conditions contained in such licence. Rules 91, 92 and 93 envisage the procedure for settlement of contract for supplying Country spirit to Warehouses. For the said purpose, tenders are to be invited and on submission thereof, those are to be forwarded by the Excise Commissioner to the Government. In case, none of the tenders are acceptable to the Government it may grant licence even to any person who has not tendered but is considered suitable in all respects. The provisions referred to above clearly relate to the process for settlement of a contract for supplying country spirit from a distillery to licenced vendors. By its very nature, the contract for setting up the bottling plant at the Excise Warehouse at Silchar and of bottling liquor therein is distinctly different from the one contemplated under Rule 91 of the Rules. Though the contract in hand can be said to be one distantly dealing with liquor, compared to the contract of supply thereof to the licenced vendors, it is not possible to comprehend that the rule makers had contemplated that the procedure prescribed under Rules 91, 92 and 93 would also apply for the contract of the nature involved in the instant proceeding. There cannot be two opinions that a licensee of a bottling contract has to handle liquor and assuming that the process tantamounts to dealing in liquor, no one can claim any fundamental right to be involved in such business. It is an exclusive privilege of the State to deal in the said commodity. However, once it decides to permit public participation therein, subject to the terms and conditions prescribed by it, its actions have to be fair, reasonable and transparent.

15. Having regard to the nature of the contract was it incumbent on the said authorities to resort to the tender system before awarding the contract?

16. In my view the nature of the contract would have a decisive bearing on the issue. Admittedly, there is no bottling plant at the Excise Warehouse at Silchar when the process for settlement of the contract had been initiated, and potable

liquor used to be supplied then in drums, jerrycans, tubes etc. which being unhygienic posed serious health hazards. The concerned authorities of the Government, therefore, felt the necessity of setting up a bottling plant at the said Warehouse so as to ensure the supply of liquor in clean hygienic containers i.e. bottles. The need to set up the bottling plant therefore, was prompted by public interest. It was not a case of awarding bottling contract in an existing bottling plant. Two inseparable jobs are involved in the contract. One for setting up the bottling plant and the other for executing the contract of bottling liquor. In course of the arguments, the learned State counsel had submitted that generally in case of existing bottling plants as at Tinsukia, Nazira and Jorhat Warehouses, the contract for bottling liquor is awarded by calling tenders. The contract in the instant case as noticed hereinabove, is not only for bottling liquor, but also for setting up the bottling plant. From the records submitted on behalf of the State Respondents it appears that the Respondent No. 7 and one M/s. Baidyanath Dairy Ltd. offered to set up the bottling plant on some terms and conditions and also quoted the rates for the bottling contract. The concerned authority, namely, the Commissioner of Excise, Assam, after examining the offers made and on scrutinising the plan and estimate and the project particulars submitted by Respondent No. 7 was satisfied that its offer was most practicable, feasible and suitable and recommended the acceptance thereof by the Government. While recommending the Respondent No. 7, the said authority, inter alia, took note of the fact that the firm had experience in spirit supply contract and the infrastructural facilities that can be made available by the Government for the purpose. The records further reveal that following the acceptance of the offer of the Respondent No. 7, it has acted on it and has set up the bottling plant which has been duly approved on inspection by the concerned authorities.

17. It follows from the type of the contract and the works involved in it, that the awardee thereof would be required to make substantial investments for setting up the plant initially before taking up the bottling work. The contract thus is not one for bottling of liquor alone. In absence of any provision in the Act or the Rules or any established procedure to the contrary, in my view the Government has to be conceded a discretion to choose a method for awarding such contract and unless the process associated with it, does on the face of it, disclose, any unfairness, lack of transparency or malafide, the same cannot be dubbed as illegal, arbitrary and unconstitutional. True it is that in the matter of distribution of State largess the generally accepted mode of settlement of a public contract is by calling tenders or holding public auction. But depending on the nature of the contract and other justifying circumstances, a departure therefrom by itself would not render the process unacceptable or expose it to any attack to its validity. On a perusal of the records, it is clear that the move to set up the bottling plant was in public interest and two firms including the Respondent No. 7 had submitted their offers. Admittedly there has been no public advertisement for tenders or auction. Notwithstanding this, the concerned authorities while settling the contract had taken note of the distinguishable features thereof and

after applying their minds to the plans and estimates and project reports of the said two firms selected the Respondent No. 7. The decision does not appear to be influenced by any extraneous consideration. There is no allegation in the petition that the impugned settlement is against public interest. The only complaint is that no tenders were called for to facilitate public participation in the process. The Petitioner has not furnished particulars in the writ petition about his financial soundness and other credentials reflecting his suitability for taking up the contract. He has not claimed that he had been ready and willing to set up the bottling plant by making investments. On a consideration of the facts and circumstances in their entirety, more particularly, the fact that the Respondent No. 7 has been settled with the contract in the year 2000 and has in the meantime, set up the bottling plant and had for some time operated the same before being restrained by the interim order of this Court. I cannot persuade myself to agree with the contentions raised on behalf of the Petitioner. To interfere with the impugned decision of the State Respondents in the conspectus of facts would amount to dislodge a process already completed and not opposed to public interest.

18. The judicial precedents may be referred to at this stage. The Apex Court in *Chaitanya Kumar (supra)*, upheld the decision of the Karnataka High Court setting aside the bottling contract of the Appellants and others on the ground that the same was not only opposed to the provisions of the relevant Rules, but also was influenced by extraneous considerations.

19. In *Progoti Supply and Co-operative Societies Ltd. (supra)*, the Petitioners therein alongwith others had submitted tenders for undertaking the job and preparation of supply of photo identify cards for all electors. The facts revealed that the Respondent authority in awarding the contract had entered into a secret negotiation with one of the successful tenderers. It was held in the above factual background that the decision to settle the contract with the said tenderer was vitiated by arbitrariness in State action. It was, however, while dealing with the scope of judicial review in the matter of Government contract, held that an administrative authority functioning in an administrative sphere or quasi administrative sphere must be permitted a free play in the joints in such matters.

20. The decision in *M/s. Kasturilal Lakshmi Reddy (supra)*, was relied upon by the learned Counsel for Respondent No. 7 to draw sustenance from the observations of the Apex Court therein that the Government in formulating its policies may have to take note of infinite variety of considerations and that the Court would have to decide whether the action of the Government is reasonable and in public interest by taking note of the same. The Apex Court further observed therein that there is always a presumption that the Government action is reasonable and in public interest and it cannot be lightly assumed that the action is contrary thereto. The burden of showing otherwise is on the party challenging the validity of such action and the same has to be discharged to the satisfaction of the Court by producing proper and adequate materials.

21. The question which arose before the Apex Court in the State of Orissa and Ors. v. Harinarayan Jaiswal and Ors. (supra) was whether the Government under the Bihar and Orissa Excise Act, 1915, after having provisionally accepted the bids in an auction could award the settlements at higher rates by private negotiation on the ground that the price obtained in the auction was inadequate. The Apex Court while observing that the citizens do not have any fundamental right to trade or carry on business in the properties or rights belonging to the Government held that there could be no complaint of infringement of Article 14 if the Government tried to get the best available price for its valuable rights. It was held that the Government having declined to accept the highest bid in auction, it was free to have recourse to other methods. This authority has been relied upon by the learned Counsel for the Respondent No. 7 to underline the fact that it is not obligatory for the Government to award a contract of the nature involved in the present case through tender system alone.

22. The Apex Court in Ugar Sugar Works Ltd. (supra) had held that each State is empowered to formulate its own liquor policy keeping in view the interest of its citizens and the Courts in exercise of their power of judicial review would not ordinarily interfere with the policy decision of the executive unless the policy can be faulted on grounds of mala fide, unreasonableness arbitrariness or unfairness. The mere fact that the policy would hurt business interests of a party would not justify invalidation of the policy. In that case, the Delhi Administration had for the purpose of improving the quality of liquor to be supplied, raised the Minimum Sales Figures Criterion for the lowest price brand to be met by the parties wishing to be granted a licence.

23. The Apex Court in Secretary to Government of T.N. and Anr. v. Vinayagamurthy (supra) reiterated the legal proposition that no citizen can claim to have trade in liquor.

24. The judicial dicta noticed hereinabove thus is that no one can claim any legal or fundamental right to trade in liquor, it being the exclusive privilege of the State and it reserves to itself the right to allow participation therein. In controlling the said trade it may evoke a policy suiting the public interest, depending on a variety of considerations. It is the burden of the person challenging the policy that the same is illegal, arbitrary and opposed to public interest. Though generally, if the State decides to allow public participation in the process for settlement of contract relating to liquor, it is done through tender or auction system. There may be a host of factors which may justify departure from the said modes. The Apex Court in Netai Bag and Others Vs. The State of West Bengal and Others, while dealing with that aspect had held that non-floating of tenders or not holding of public auction would not in all cases be deemed to be the result of the use of executive power in an arbitrary manner and the constitutional Courts are not expected to presume the alleged irregularities, illegalities or unconstitutionality nor the Courts can substitute their opinion for the bona fide opinion of the State executive. It held that the Government was

entitled to make pragmatic adjustments depending on the situation and that the rule of distributing State largess by public auction or by inviting tenders is not an invariable Rule.

25. In view of the pronounced judicial opinion, as recorded hereinabove, and having regard to the facts and circumstances of the case, met out hereinbelow. In my opinion, the Petitioner has failed to make out any case warranting interference with the impugned decision. The State Respondents in exercise of their administrative powers have to be permitted a free play in the joints. Within the permissible limits, the authorities have a discretion to decide their course of action and unless the discretion has been exercised arbitrarily, as a result of which the consequential action is marred by blatant illegalities, this Court in exercise of its power of judicial review is not called upon to substitute its views for those of the administrative authorities. The case in hand, does not present any such infirmity.

26. The petition is thus devoid of merits and is dismissed. It is however, ordered that the official Respondents would ensure that while permitting the Respondent No. 7 to enjoy the settlement the terms and conditions subject to which the same has been made as well as those of the related agreement should be scrupulously enforced. The interim order stands vacated. There is no order, as to costs.