(2014) 07 GAU CK 0003

In the Gauhati High Court

Case No : Writ Appeal No. 52 of 2014

Ouguri, Khatahguri — APPELLANT

Vs

State of Assam — RESPONDENT

Date of Decision : 22-07-2014

Acts Referred:

Fisheries Act, 1897 — Section 6

Citation : (2015) 1 GLD 714 : (2014) 4 GLT 981

Hon'ble Judges : Abhay Manohar Sapre, C.J;Nishitendu Chaudhury, J

Bench : Division Bench

Advocate : H.R.A. Choudhury, Sr. Advocate and S.K. Sinha, Advocate for the Appellant; B.J. Talukdar, State Counsel and B. Sarma, Advocate for the Respondent

Judgement

Nishitendu Chaudhury, J.—Whether comparative nearness to the fishery in question is a relevant consideration for settlement of fishery under proviso to Rule 12 of the Assam Fishery Rules when more than one tenderer belong to neighbourhood of the fishery, is the question to be answered in this writ appeal. The essential material facts sans unnecessary particulars are required to be stated first. The Deputy Commissioner, Morigaon district issued a tender notice on 22.07.2009 inviting applications for settlement of No. 5, Sonai Nadi Part-III Meen Mahal for a period of 7 years. In this tender notice it was mentioned that the fishery in question belongs to 60% category and that revenue for the previous, year was Rs. 2,81,681/- for the said fishery. The terms and conditions for the settlement were laid down in the tender notice itself. One of the conditions was that, the fishery would be settled with the Co-operative Societies/ Self Help Groups/Non Government Organisations constituted by 100% actual fishermen belonging to scheduled caste or Maimal community of Barak Valley residing in the neighbourhood of the fishery. The notice made it clear that the settlement would be made by following tender process for which tenders would be collected in the office of the Deputy Commissioner on 24.08.2009 from 10 a.m. to 2 p.m. and that the same would be opened on that day itself after closing hour. The papers required to accompany the tender were also mentioned in the tender notice itself.

2. Pursuant to the aforesaid tender notice dated 22.07.2009 the writ petitioner, the private respondent No. 5 and three others submitted their tenders. After the tenders were opened, it was found that the value quoted by each of them were as follows:

3. The Deputy Commissioner after consideration of the tender papers submitted his comments against each of the tenderers. So far as the highest bidder Sri Santosh Barman is concerned, it was mentioned that he did not submit required call deposits and the balance sheet of the co-operative society and that it is situated about 7 k.m. away from the fishery. However, the society is composed of 100% actual fishermen belonging to scheduled caste. The second tenderer Dhiren Das (writ petitioner herein) was also found to represent Co-operative Society consisting of 100% actual fishermen belonging to scheduled caste and that the society was within half a kilometer from the fishery in question. The amount quoted by this tenderer was third highest among all the tenderers. The next tenderer belonging to Garulo Min Samabai Samitee Ltd. was also found to be formed by 100% actual fishermen belonging to scheduled caste community but it failed to submit required documents. The value offered by it was lowest. Private respondent No. 4 was the next tenderer who submitted all the required documents. It comprises of 100% actual fishermen belonging to scheduled caste community and it is situated at 2 k.m. away from the fishery. The value quoted by private respondent was found to be second highest bid. The 5th and the last tenderer Satanguri Fishery Samabai Samitee Ltd. quoted fourth highest value. It is composed of 100% actual fishermen belonging to scheduled caste but the tender papers did not include essential documents. At the end of the comments Deputy Commissioner desired that writ petitioner who is a third highest bidder was fit for selection.

4. The Commissioner after perusal of the tender papers and the comparative statements submitted by the District Authority found that the highest bidder not having submitted security deposit and annual balance sheet of the society, his tender was liable to be rejected and it was accordingly rejected. The second highest bidder (private respondent herein) was eligible having complied with all requirements. Consequently by an order passed on 27.04.2010 the fishery was settled in favour of the private respondent No. 4 under Rule 12 of the Assam Fishery Rules, 2005.

5. The third bidder as writ petitioner challenged the settlement order by filing WP(C) No. 2819 of 2010, inter alia, on the ground that the Deputy Commissioner having stated in the comment that writ petitioner society is situated within half a kilometer from the fishery and that the private respondent is situated at a distance of 2 k.m. from it and that the Deputy Commissioner having recommended for settling the fishery in favour of the writ petitioner, the official respondent acted illegally and arbitrarily in issuing the settlement order dated

27.04.2010 in favour of the private respondent. Both private respondent and the official respondents submitted their respective affidavits-in-opposition. The official respondent No. 3 disclosed that tender papers were opened on 24.08.2009 in presence of the tenderers and thereupon comparative statements were made. The writ petitioner was found to be third highest bidder among all the tenderers. It is stated in the affidavit that thereafter, comparative statements along with tender papers were sent to Commissioner and Secretary to the Government of Assam, Department Fishery for taking necessary actions. The respondent No. 4, who is the private respondent, submitted separate affidavit in opposition stating that the tender of the highest bidder being defective was rejected by the authority. On the other hand, the private respondent submitted all documents as required by the NIT and being second highest bidder was rightly settled with the fishery by the authority. He claimed that there was no illegality or impropriety in doing so. The writ petitioner was the third highest bidder among the 5 tenderers and so could not have been settled with the fishery to the exclusion of the private respondent. It was pleaded that there was no illegality, arbitrariness, and violation of administrative fair play in the process. The writ petitioner submitted an affidavit in reply to the same and reiterated its stand taken in the writ petition.

6. After hearing both sides the Hon''ble Single Judge by his judgment and order dated 21.11.2013 dismissed the writ petition holding that both the petitioner and the private respondent are situated in the neighbourhood of the fishery in question. Relying on the judgments of this Court in the case of Brahmaputra Par II Mach Mahal Samabai Samity Ltd. Vs. State of Assam and Others, and Satanguri Meen Samabai Samity Ltd. Vs. State of Assam & Ors. reported in 2006 (Suppl.) GLT 137 the Hon''ble Single Judge held that ''neighbourhood'' cannot be interpreted in terms of inches, feet or yards and a more pragmatic and purposive interpretation has to be provided. It does not express any definite idea of distance and no mathematical formula has been devised to define and measure neighbourhood. The Hon''ble Single Judge held that there is evidently an element of flexibility while dealing with proviso to Rule 12 of the Assam Fishery Rules and it would neither be permissible nor desirable to ascertain the neighbourhood by a measuring tape. The Hon''ble Single judge held that the question of neighbourhood being essentially a question of fact writ court cannot go into it in the absence of any overwhelming materials to the contrary. Since, the settling authority recorded a clear finding that respondent No. 4 is situated in the neighbourhood of the fishery, there was no scope to interfere with such finding of fact of the statutory authority under writ jurisdiction. Having so observed, the Hon''ble Single Judge dismissed the writ petition.

7. Challenging this judgment of the Hon''ble Single Judge in the present appeal, the writ petitioner has reiterated the same stand that there being specific mention in the comment submitted by the District authority that society of the writ petitioner is situated within half a kilometer from the fishery and that the same of private respondent is situated at a distance of 2 k.m., there was no

disputed question of fact in this regard and thus, settling authority acted illegally in not preferring the nearest society of the fishery for settlement. The question, therefore, necessarily arises as to whether proviso to Rule 12 of the Assam Fishery Rules, 2005 (as amended) contemplates comparative nearness of fisheries to be a relevant consideration for settlement?

8. We have heard Mr. H.R.A. Choudhury, learned Senior Counsel assisted by Mr. S.K. Sinha, learned counsel for the appellant, Mr. B.J. Talkudar, learned State Counsel for the official respondents and Ms. B. Sarma, learned counsel for the private respondent No. 4. We have perused the relevant records.

9. Rule 12 as amended on 31.03.2005 with effect from 08.04.2005 is quoted below:

"12. Except those referred to in sub-rule No. 8(b) above, all registered Fisheries shall be settled under tender system of sale in place of sale auction;]

"Provided that the Government shall settle a 60% category fishery with special category of Co-operative Societies, Non-Government Organisations and Self Help Groups consisting of 100% actual fishermen in the neighbourhood of the fishery concerned by the Tender System."

Explanation 1:- For the purpose of this rule, the words "special category" means and includes the Co-operative Societies, Self Help Goups, Non-Governmental Organisations comprising of 100% actual fishermen of the Scheduled caste community or Maimal community of erstwhile Cachar district. Who cannot participate in competitive bidding because of poor financial condition due to famine, flood, draught, epidemic of any other circumstances which are beyond control of the Co-operative Society, Non-Governmental Organisation or Self Help Groups as the case may be;

Explanation 2:- For the purpose of this rule "a 60% category fishery" means 60% of registered fisheries available in a Civil Sub-Division eligible for settlement in a particular year."]

10. Rule 12 provides that all registered fisheries are to be settled under tender system and not by auction. In the proviso to this rule it is further mandated that a 60% category fishery can be settled with special category of Co-operative Societies, NGOs and Self Help Groups consisting of 100% actual fishermen in the neighbourhood of the fishery concerned by the tender system. The ingredients of this proviso can be noted as below:

(i) The 60% category fishery shall be settled with special category of Co-operative Societies/NGOs/Self Help Groups;

(ii) These cooperative societies/NGOs/Self Help Groups must be composed of 100% actual fishermen in the neighbourhood of the fishery; and

(iii) Settlement shall be made by tender system.

11. Special category has been defined under Explanation 1 to the proviso. This means that Co-operative Societies, Self Help Groups and Non-Government Organisation comprising of 100% actual fishermen of the scheduled caste community or Maimal community of erstwhile Cachar District who cannot participate in competitive bidding because of poor financial condition. Such special category has been thought of keeping in mind that once tender notice is issued inviting all intending parties to participate irrespective of their financial and social status, the members forming groups of special category would not be able to compete in bidding because of their marginalized economic condition beyond their control. But by further providing that such settlement among contenders belonging to special category would be by tender system, it is to be understood that limited competition among participants belonging to special category is contemplated under the Rules. The essential characteristics of tender system is that the participants shall submit their respective bids quoting price in sealed envelope within a fixed period of time where after the bids will be opened after last date and time of submission of tenders and thereupon, the best and suitable would be chosen. Competition is inherent in tender system and so not only the bid value but practicability of the quoted amount falls within consideration of the settling authority. Under the tender system sometimes two types of bids are called. First type is the technical bid to ensure that only technically competent participants are permitted to contest. This means that by technical bids, the ineligible participants are first separated from the eligible ones. Once, only the eligible and competent bidders are separated from others, their respective price bids are considered on competitive basis and thereupon, the best and the suitable is chosen. Even in the present case the bidders are supposed to establish first that they belong to the special category within the meaning of proviso to Rule 12 read with explanation 1 under the rule. As pointed out above a Co-operative Society/NGO/Self Help Group shall be eligible to become a special category within the meaning of the Rule if-

(i) It is composed of 100% actual fishermen belonging to scheduled caste community or Maimal community of erstwhile Cachar district; and

(ii) It is situated in the neighbourhood of the fishery.

12. The question of neighbourhood arises to bring a Co-operative Society/Non Government Organisation/Self Help Group within special category within the meaning of the Rules as referred to above and not for any other purpose. If it is a criterion of eligibility only the question of the magnitude of the nearness for ascertaining eligibility does not arise. The selection ultimately has to be based on tender system on competitive basis. Once a participant is found to be eligible by qualifying itself as a one of special category, the next question would arise who among such eligible bidders is to be favoured with settlement. This obviously can be done by taking recourse to comparison of the bids. Government puts a fishery on sale for augmenting revenue and so definitely the highest bidder shall be of choice to settling authority unless it is felt by the settling authority that the

highest bid is unworkable or impracticable. Since, the learned Senior Counsel arguing for the appellant submits that when more than one tenderers are found to be eligible in terms of Rule 12 as aforesaid, the settling authority is duty bound to make settlement to the nearest bidder to the exclusion of others. According to the learned counsel, Rule 12 has been devised only for providing adequate means of livelihood to the actual fishermen residing in the area and not for augmenting Government revenue, it is necessary to examine as to whether such a submission emerges from the Rule 12.

13. To answer the aforesaid question, it would be profitable to consider the nature and object of the Rule 12 of the Assam Fishery Rules 1953 (hereinafter referred to as ''the Rule''). Rights in fishery are governed by section 16 of the Assam Land and Revenue Regulations, 1886 (hereinafter referred to as ''the regulation''). It provides that the Deputy Commissioner, with previous sanction of the State Government, may by proclamation published in the prescribed manner, may declare any collection of water, running or still, to be a fishery, and no rights in fishery so declared shall be deemed to have been acquired by the public or any person either before or after commencement of the regulations except as provided in the rule made under section 155 of the regulations. Section 155(f) of the regulations empowers the government to frame rules for granting of licenses or rights inter alia in fisheries, lime quarries, salt wells etc. Accordingly, in exercise of power under Sections 155 and 156 of the Assam Land and Revenue Regulations, 1886 as well as section 6 of the Indian Fisheries Act, 1897, the Government of Assam framed The Assam Fishery Rules, 1953 (hereinafter referred to as ''the Rules'').

14. A view on the anatomy of the Rules may also be of some help to identify the real character of Rule 12. Rule 3 of the Rules speaks of sale of fisheries and its procedure. Rule 4 prescribes that Sadar Cutchery of the District shall be the place for sale of fisheries in Sadar Sub-division and the sub divisional Cutchery in other sub divisions. Rule 5 prescribed the conditions for sale. Rule 5(2)(a) relates to tender submitted by co-operative societies other than members of actual fishermen belonging to scheduled castes or member of Maimal community of the District of Cachar. These co-operative societies are required to furnish in cash security equal to 25% of the revenue of the fishery for the first year of full time settlement. This requirement is relaxed for co-operative societies formed by 100% actual fishermen belonging to scheduled castes or member of Maimal community of the District of Cachar. They are required to deposit only 10% of the first year''s revenue as cash deposit immediately on acceptance of tender. However, it is mandated for both the groups that in case they fail to make such deposit, the fisheries shall very sold at their risk forthwith and at their cost and risk. Rule 8 on the other hand vest powers on the Deputy Commissioners or the Additional Deputy Commissioners in case of Sadar Sub divisions and sub divisional officers in case of other sub divisions to be authorities for settlement of all registered fisheries under tender system of sale in their jurisdiction. By Rule 8(b) power of extension of such lease has also been conferred on the settling

authority under specific circumstances. Rule 12 is an exception to the aforesaid Rules. It starts with the words ''except those referred to in Rule 8(b)'' and relates to all registered fisheries. It prohibits auction sale in case of registered fisheries and prescribes tender system in its place. However, by inserting proviso thereunder, power has been given to the Government to settle a 60% category of registered fishery with special category of co-operative societies/Non Government Organisation/Self Help Group. Thus as in Rule 8, Deputy Commissioner does not have any power to make settlement under Rule 12 and it is Government alone who can take a decision in this regard. The view or recommendation given by the Deputy Commissioner in this case as stated above, therefore, has no binding effect on the settling authority.

15. Settlement of fishery in favour of some or other candidate belonging to special category within the meaning of proviso to Rule 12 involves distribution of State largesse. If revenue was not at all a consideration for settlement of a fishery, Rule 3 of the Rules would not have spoken of sale. The whole of the Rules deal with how a registered fishery is to be sold. The word ''sale'' may not occur in Rule 12 but it speaks of settlement by tender system. Tender means offering a price against settlement. To ensure fair competition among all eligible tenderers, the procedure of sealed tender process is generally followed. Candidates offer various prices as per their capacity and these prices naturally become the yardstick for selection. Such quoting of price in the sealed tender is only to pave way for fair competition among the eligible candidates. No doubt in the process Government earns revenue. If the price quoted by the bidders is of no significance, then there would be no necessity for preparation of comparative statement of bids and of determining the position of bidders as highest, second highest and so on. Even in the case in hand a comparative statement was prepared and the bidders have been described in seriatim depending on the prices quoted by them. This is how Santosh Barman has been described as highest bidder, the private respondent No. 4 has been described as Second highest bidder and the writ petitioner has been described as third highest bidder. Even if the argument that augmenting revenue is not the principal consideration for the Government in the process of settlement yet it serves a reasonable and rational basis for selecting the candidate for settlement of fishery. It is for this reason bidders are described as highest, second highest and so on. In that view of the matter also the importance of bid value cannot be undermined.

16. Consideration of the Rule 12 in the manner as aforesaid irresistively leads to inference that benefit under Rule 12 is available only to the special category of Co-operative Societies/Non Government Organisations/Self Help Groups within the meaning of Explanation 1 under the proviso to the Rule and not to others. To satisfy that a candidate belong to special category it is required to know as to whether it is comprises of 100% actual fishermen of the Scheduled caste community or Maimal community. It is also to be ensured that these fishermen are in the neighbourhood of the fishery so as to constitute special category of Co-operative Societies/Non Government Organisations/Self Help Groups. The

candidates belonging to such special category are only eligible to submit tender. So, requirement of fishermen being in the neighbourhood of the fishery is merely an eligibility so as to entitle the society constituted by them to participate in tender process. If more than one eligible candidates belonging to special category satisfying conditions precedent prescribed under Rule 12 approach the settling authority, in that event the selection is to be made by comparative consideration of their respective candidature. In so doing the usual practice of making settlement on the basis of price quoted in tender becomes the guiding factor. Here in this case there is no allegation that the price quoted by successful tenderer is improbable or impracticable. The difference between the two tenders of the second highest bidder and the writ petitioner (third bidder) is only Rs. 6,62,739/-.

17. The Hon''ble Single Judge has considered the earlier judgments of this Court in regard to question of ''neighbourhood'' within the meaning of Rule 12 of the Rules and did not find any reason to substitute the view of the settling authority. Having decided the question of law argued by the learned Senior Counsel for the appellant as aforesaid the consideration of comparative nearness of the tenderers does not appear to emerge from Rule 12. Accordingly, there is no scope to interfere with the judgment of the Hon''ble Single Judge. The writ appeal fails. It is accordingly dismissed. No order as to cost.