
(2009) 08 GAU CK 0094
In the Gauhati High Court
Case No : Writ Petition (C) No. 2161 of 2009

Pani Ram Kalita

APPELLANT

Vs

The State of Assam and Others

RESPONDENT

Date of Decision : 20-08-2009

Acts Referred:

Control and Management of Ferries Rules, 1968 — Rule 16, 16(1), 19, 4, 4(2)
Northern India Ferries Act, 1878 — Section 12, 3

Citation : (2009) 1 GLD 623 Supp

Hon'ble Judges : B.D. Agarwal, J

Bench : Single Bench

Judgement

B.D. Agarwal, J.—A common question i.e. whether the Notice Inviting Tenders dated 27.5.2009 for Nimati Kamalabari Ferry Service for the year 2009-2010 Can be set aside on the ground of non-publication of Ist NIT dated 19.1.2009 in the newspapers has been raised in all the writ petitions. Hence, all the there writ petitions were heard analogously and being disposed of by this common judgment.

2. Heard argument of Shri M. Bhuyan, Shri B. Gogoi and Shri P. Bora, learned Counsel for the writ petitioners respectively. Argument on behalf of respondents were advanced by Shri A.K. Bhuyan, learned Counsel. I have also perused the pleadings of the parties as well as relevant files produced by learned Counsel for the respondents.

3. Facts necessary for disposing of writ petitions are that as usual the Executive Engineer, Inland Water Transport Department, Dibrugarh issued NIT dated 19.1.2009 under memo No. ESF-17/2008-9/2667 for as many as 8 (eight) Ferry services (This NIT is hereinafter referred to as the Ist NIT"). In pursuance of the aforesaid Ist NIT as many as 9 (nine) tenders were submitted and the tenders were opened on 4.2.2009. In the previous year the Nimati Kamalabari Ferry Service (briefly N-K Ferry Service) fetched highest bid of Rs. 41 lacs. As per the Ist NIT the highest bid has been quoted at Rs. 74 lacs; followed by 65 lacs, 60

lacs and so on. However before the settlement of the N-K Ferry Service the sitting lessee Shri Gautam Kalita challenged the Ist NIT dated 19.1.2009 on the ground that the concerned authorities illegally refused to extend his lease for another three years. The said writ petition was registered as WP (C) No. 387 of 2009 and dismissed on 9.2.2009. Soon thereafter 5 persons lodged a common complaint before the Commissioner, IWT on 12.2.2009 alleging that N-K Ferry Service was being settled without any publicity. After this formal complaint the news was also reported in local dailies and another group of 10 persons also prayed for cancellation of Ist NIT, submitting a representation to the Principal Secretary, IWT Department on 7.2.2009. On the basis of these complainants/representations the Government issued another tender notice for the said N-K Ferry Service on 18.5.2009 under memo No. ESF-18/2008-09/375 superseding the 1st NIT. The aforesaid NIT dated 18.5.2009 was published in local newspapers on 27.5.2009. Petitioners are challenging this 2nd NIT being arbitrary, discriminatory, illegal and without jurisdiction.

4. Learned Counsel for the petitioner that once tenders are opened and become public the Government is restrained and estopped from inviting fresh tenders, as it would be contrary to the concept of "confidential bidding". Learned Counsel for the petitioner also submitted that if there was material irregularity in issuing Ist NIT the respondents ought to have recalled the entire NIT dated 19.1.2009, but instead of doing that the respondent have picked up only N-K Ferry Service for resale. In this way, as contended by the learned Counsel for the petitioners it is an act of approbate and reprobate by the State that cannot be permitted. According to the learned Counsel appearing in WP (C) No. 2182 of 2009 and WP (C) No. 2162 of 2009 the 2nd NIT has been issued at the instance of sitting lessee and/or with pre-conceived mind to settle the ferry service with a particular person of its choice. It may be mentioned here that the learned Counsel appearing in WP (C) No. 2161 of 2009 do not subscribe to this view since he is the father of the sitting lessee. However, all the learned Counsel for the writ petitioners were of identical views that publishing tender notice in newspapers is not a sine qua non under the relevant rules and more particularly there was reason for withdrawing the Ist NIT since as many as 9 tenders were submitted and the highest being the offer of Rs. 74 lacs in comparison to previous bidding of Rs. 41 lacs. Learned Counsel for the petitioners also submitted that legality of the Ist NIT dated 9.1.2009 has already been examined by this Court in WP (C) No. 387 of 2009 and in this view also the 2nd NIT is unsustainable in law.

5. Per contra, Shri A.K. Bhuyan, learned Counsel for the respondents submitted that it is the responsibility of the State to act in fairness and in a transparent manner and keeping in mind this solemn duty of the State the Ist NIT was immediately withdrawn having received complaints that the Ist NIT was not published in newspaper. The learned Counsel also submitted that N-K Ferry Service fetches highest revenue amongst 9 ferries and as such the Government is always receptive of the ideas, which can augment its revenue. Shri A.K. Bhuyan, learned Counsel for the State Respondents heavily relied upon the

judgment of this Court rendered in WP (C) No. 1993 of 2009 dated 3.6.2009 to buttress his argument that there is no illegality in withdrawing Ist NIT even after opening of tenders.

6. Sale of ferry services, its control and management are governed and regulated by the Control and Management of Ferries Rules, 1968 (hereinafter referred to as the "Rules"). These Rules have been framed u/s 12 of the Northern India Ferries Act, 1878. Rule 4(2) authorises the Government to settle ferry services directly or through negotiation. Rule 16 deals with settlement of ferry services by way of auction, with certain guidelines. In other words, Rule 16 is the only provision and the same holds the filed as of now in the matter of settlement of ferry services by way of auction/tender. Hence, relevant provisions of Rules 4 and 16 are extracted below:

4. (1) All ferries which are let by public auction or calling for tenders shall be managed by the lessee subject to these rules and the conditions entered in the lease granted for each ferry. Ferry which could not be settled either by public auction or by calling for tenders shall be managed by the executive engineer or sub-divisional officer, as the case may be, with the approval of the Government.

(2) The Secretary to the Government of Assam in the Transport Department may settle any ferry directly or by negotiating, if so required u/s 3 of the Northern India Ferries Act for any term after taking the technical and administrative opinion of the Director, Inland Water Transport and Chief Ship Surveyor, Assam, if necessary.

16. Auction sale shall be conducted on a date to be fixed by the officer-in-charge of the ferry in consultation with the Government in the Transport Department. Tender shall be invited by the officer-in-charge of the ferry if directed by the State Government in the transport department. At least 15 days' notice shall be given to the public before the date fixed for the auction sale and/or for receiving tenders and the notice shall be widely circulated.

(1) A bid/tender must be accompanied by the following documents failing which it will be treated as invalid.

(a) (i) xxxx xxxx xxxx

(ii) xxxx xxxx xxxx

(b) to xxxx xxxx xxxx

(e)

(f) In the case of a new tender, in addition to the above documents a certificate about the financial soundness of the tenderer from the Deputy Commissioner/ Additional Deputy Commissioner/Sadar sub-divisional Officer of the District/sub-divisional officer of the subdivision as the case may be or any nationalized Bank should be enclosed.

(g) Certificate of experience of ferry business from the depute Commissioner/ Additional Deputy Commissioner/Sadar sub-divisional Officer of the District/sub-divisional officer of the sub-division should be enclosed.

(i) Certificate in support of periodic patta land of value not less than the bid/ tender money, in his own name within the District or the sub-division from the Deputy Commissioner/Additional Deputy Commissioner/sub-divisional Officer of the District/Sadar Sub-divisional officer of the District or sub-divisional officer of the sub-division concerned should be enclosed.

(j) to xxxx xxxx xxxx

(n)

(2) The bid list and the result of auction sale shall be submitted to the Director, IWT, Assam in from in Appendix "C". A comparative statement about all the tenderer in the from in Appendix "C along with all tenders in original shall also be submitted to the Director by the Executive Engineer, IWT Division with his" endorsement. The Director shall submit all these document in original with his comments and recommendations taking into account the factors mentioned Rules 16(i) and 19, to Secretary to the Government of Assam in the Transport Department.

7. It is apparent from the Rules that there is no statutory requirement of publishing NITs in the newspapers. However, under Rule 16(1) there should be wide publicity of the tender notice. Learned Counsel for the respondents failed to produce any guidelines issued in this regard from the Government as to what method should be adopted for wide publicity of tender notices. However, wide circulation of tender notices is not only the requirement of Rules but the concept is also deeply rooted in the constitutional guarantees like equality, fairness, transparency and non-discrimination in the matter of State largesse. The words "widely circulated" incorporate under Rule 16 have to be read and understood in the back drop of Rule 4(2) which authorizes the Government to settle ferry services even directly or through negotiations. Files produced before me also revealed that few persons had indeed approached the Government for direct settlement of the ferry services but their approach was too late in the day since a decision had already been taken to sell the ferry services through tender system. In this way Rule 4(2) grossly dilutes and eclipses the rigour of Rule 16. It seems to me that in this background the ferry services in Assam are being auctioned and sold without publications of tender notices in the newspapers.

8. The affidavit of the State-Respondents does not whisper that it is that regular features to publish tender notices with respect to settlement of ferry services in newspapers. Even then a question would arise what would constitute "wide notice" stipulated under Rule 16. The rules were framed nearly 4 (four) decades ago and despite radical development and changes in the field of leasing out State largesse the State Rules have not been updated. In my considered opinion the words "wide notice" are relative terms and publication of notice in a few selected

local dailies may still be construed insufficient publicity.

9. Due to the rise of literacy rate as well as improvement of infrastructure required for journalism, good number of newspapers are being published. Only a few newspapers can be considered as national newspapers and majority are regional newspapers. Even few regional newspapers are not widely circulated throughout a state territory. In other words, circulations of few newspapers remain confined to a limited area. Hence it is high time for the Government to ponder over the question as to what guidelines should be framed for publicity of tender notices of Ferry Services in the State of Assam. When one sector of a state largesse has adopted electronic method of tendering, the rules relating to settlement of Ferry Services in the State of Assam have not spelt out the method of publicity of tenders and the ferry services are being settled directly or through limited circulation of tender notices.

10. As noted earlier, the respondents have not pleaded that it was the standing practice to publish NIT for Ferry Services in newspapers. Precisely, this was the reason for not ascertaining publication of NIT dated 19.1.2009 in the newspapers, by the Executive Engineer before opening the tenders, despite a copy of the Ist NIT was sent to Directorate of Information and Public Relation, Assam for publishing the same in two local dailies. This fact alone proves that publication of tender notices in newspapers was not a practice in the past. However, even after opening of tenders the Government surrendered to two groups of persons complaining about inadequate publicity of the tender notice, without ascertaining the antecedents of the complainants and tentative motive for filing such complaints. In the representation there are no averments that any one of the complainants had ever participated in the tender process of Ferry Services in the past to take a view that genuine persons were actually left out to compete for the Ferry Service. Strangely all the 15 complainants (5 + 10) have stated in their representation that they are unemployed youths and despite that they have protected about settlement of N-K Ferry Service which is the costliest ferry service amongst nine ferry services put for sale under Ist NIT. Silence of the complainants to speak about the remaining ferry services in their complaints that were also put for sale under the same NIT speaks volume.

11. The above apart, under Rule 16(1)(f) the Tenderers must have to submit documents about their financial soundness and under Clause (g) certificates of experience in ferry business are also required to be submitted along with tenders. However, the complainants being unemployed persons could not have fulfilled the aforesaid criteria to get the settlement of N-K Ferry Service, which is considered to be a premium/major ferry service. However, this noticeable feature in the complaints also went unnoticed of the Government wherefrom an inference can be drawn that the decision of re-tendering the Ferry Service was taken in a haste without any discussion about the implication of frivolous complaints upon the tenderers which were already opened and made public, pursuant to Ist NIT. While browsing office files I stumbled upon a representation

submitted by an apolitical organization to the Government urging to settle the ferry on the basis of Ist NIT. However, this State wide renowned organization's representation was also left out of consideration, while taking decision of re-tendering the Ferry Service. On the top of it the list of tenderers of 2nd NIT includes name of Shri Gautam Kalita (sitting lessee), who had earlier unsuccessfully challenged the Ist NIT by way of filing WP (C) No. 387/2009. Be that as it may, not a single person who had protested the settlement of the Ferry Service on the basis of Ist NIT has submitted tender on the basis of 2nd NIT. This fact alone is sufficient to draw inference that proxy complaints were made by vested interest after opening of the tenders on the basis of Ist NIT and dismissal of WP (C) No. 387/2009. Besides this, the Government also failed to consider the fact that as many as nine tenders were received against Ist NIT and the highest amount of Rs. 74 lacs has been quoted by one of the tenderers against the previous settlement amount of rupees 41 lacs. The office files shown to me by the learned standing counsel for IWT also do not reveal that serious consideration was given to the fact that tenders were already opened and the rates of as many as nine serious bidders were already made public. Under such circumstances, the Government ought not to have taken a decision to withdraw the Ist NIT so casually.

12. The only trump card for the respondents to defend issuance of 2nd NIT is the judgment of this Court dated 3.6.2009 passed in WP (C) No. 1993 of 2009. In this writ petition one person challenged the settlement of Dubrugarh Majorbari Ferry service on the ground that the Ferry Service was settled without publishing tender notice in newspapers. I make it clear that that the decision to issue 2nd NIT for N-K Ferry Service, withdrawing Ist NIT, was taken sometime in the month of February, 2009. In other words, judgment of this Court passed in WP (C) No. 1993 of 2009 was not made the basis of issuing 2nd NIT. Be that as it may, I have no reason to differ with the view/opinion indicated by the Hon'ble Judge in WP (C) No. 1993 of 2009 that publication of tender notices in newspapers should be the rule to make the tenders process transparent and adequately competitive. However, the said judgment confined to only Dubrugarh-Majorbari Ferry service, since one of the aggrieved persons challenged the settlement before a judicial forum. However, in the present case the decision to revoke the Ist NIT was taken by the Government itself without deliberation of facts and also and also the fact that publication of tender notices in newspapers is not a sine qua non as per the existing rules. This apart, if the Government accepted the judgment passed in WP (C) No. 1993 of 2009, it ought to have cancelled settlement of all the remaining ferry service. Hence it appears to be a case of discrimination with one Ferry Service.

13. Shri A.K. Bhuyan, learned Counsel for the respondents submitted that N-K Ferry Service is the most important Ferry Service, fetching high revenue and as such the Government considered re-tendering of only N-K Ferry Service without touching the remaining Ferry Services. In my considered opinion when one talk about principle facts are inconsequence. In the additional affidavit of the

respondents, it has been admitted that considerable number of bids were received against each ferry as per the Ist NIT and as such it was presumed that the intending bidders were aware of the NIT in respect of other Ferry Services. I fail to understand as to why the same criterion was not applied in the case of N-K Ferry Service, which received highest number of tenders (9 tenders). Besides this, in the affidavit it has also been stated that calling of "re-tender is not a routine claim". However, this rule was not applied to N-K Ferry Service. It may also be mentioned here that in WP (C) No. 387 of 2009, filed by the sitting lessee, decided on 9.2.2009 the High Court allowed the Government to proceed with the NIT dated 19.1.2009. Even this judgment was ignored by the Government before issuing 2nd NIT.

14. In the case of S. Ali v. Union of India reported in 1995 (1) GLR 127 a Division Bench of this Court was confronted with a situation when a prospective tenderer was allegedly prevented by unsocial elements to submit his tender and then the petitioner sent the tender papers by post, which did not reach the concerned authorities on time. Hence the tender was left out of consideration and the writ petition was filed. The writ petition was dismissed and the matter was carried in appeal. While rejecting the . appeal this Court observed as below :

8-A. The purpose of notice inviting tender is to get work done by the best possible contractor and at the competitive price. For this purpose tenders are to be submitted in sealed cover and these are to be opened in presence of tenderers on the date and time fixed earlier as per tender notice. Opening of such tender in presence of the tenderer is a protection for the tenderers so that subsequently rates quoted by each tenderer cannot be changed. If a tender is allowed to be accepted after opening of other tenders the whole object of calling for tenders in sealed cover will be frustrated.

15. In the case before me, the rates quoted by the writ petitioners had already become public and no safeguard to their rates/offers has been made in the second NIT. I have already mentioned earlier that the sitting lessee has also submitted his tender pursuant to 2nd NIT. What would be to the consequence if the sitting lessee submits his tender quoting a little high amount than the petitioners with the help of surrogate tenders? This situation was also not visualized by the Government. Be that as it may, I have already hold that neither the rules mandatorily require publication of tender notices in newspapers nor the decision of the Government for issuing 2nd NIT was based on cogent ground. Above all, if the 2nd NIT is allowed to sustain, it would certainly infringe inviolable rights of the petitioners after opening of the tenders submitted against a valid NIT.

16. For the reasons set forth herein above, I hold that the impugned 2nd NIT dated 27.5.2009 is unsustainable in law. Consequently, the said 2nd NIT is hereby declared inoperative in law. The respondents are directed to proceed to settle the N-K Ferry Service on the basis of Ist NIT.

17. With the aforesaid direction, this batch of writ petitions stand allowed. Interim order stand vacated.