

(2015) 03 GAU CK 0070

In the Gauhati High Court

Case No : Writ Petition (C) Nos. 456(AP) and 472(AP) of 2014

Sandip Tindya

APPELLANT

Vs

State of Arunachal Pradesh and Others

RESPONDENT

Date of Decision : 18-03-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)(g), 226
Northern India Ferries Act, 1878 — Section 10, 12, 4, 8, 9

Citation : (2015) 3 GLT 42

Hon'ble Judges : Rumi Kumari Phukan, J

Bench : Single Bench

Advocate : S. Mow, S.K. Deori, T. Boo, K. Dabi and A.M. Bugarbaruah, for the Appellant; G. Deka, Sr. GA and B. Dutta, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Rumi Kumari Phukan, J—Heard Mr. Sunil Mow, learned counsel for the petitioner, Ms. G Deka, learned Sr. Govt. Advocate, appearing on behalf of State respondent Nos. 1 & 2 and Mr. B. Dutta, learned counsel appearing on behalf of private respondent No. 3 in both the writ petitions. WP (C) 456 (AP) 2014 has been filed by the petitioner under Article 226 of the Constitution of India praying for issuance of a writ in the nature of mandamus directing the respondent No. 2 to issue the final settlement order of Ferry Service over Lohit-Kamlang River in his name and to rescind, recall or forbear from allowing the respondent No. 3 in running the ferry service and during the pendency of this case, the operation of ferry service by the respondent No. 3 be stayed and direct the Revenue Department or Respondent authorities to collect the tolls.

2. It is the case of the petitioner in WP(C) 456 (AP) 2014 that the Deputy Commissioner, Namsai, who has been arrayed as respondent No. 2, issued a Notice Inviting Tender (NTT) dated 21.10.2014 inviting tenders from all the intending Contractors/Working Agencies of Namsai and Lohit Districts, for ferry service for crossing of HMT/LMW Two Wheeler and passengers over the Lohit-

Kamlang River for the year 2014-15. it is the contention of the petitioner that he is the highest bidder amongst all the bidders and has been waiting for the issuance of the final settlement order for operating the ferry service and the respondent No. 3 is the second highest bidder. The respondent No. 2 i.e. Deputy Commissioner, Namsai District, Namsai, without any reason, refused to issue the final settlement order in favour of the petitioner, and allowing the private respondent No. 3 for operating the ferry service, in question, illegally & arbitrarily. The petitioner has alleged that the said respondent No. 3 is the son of a local ML A and nephew of the local Minister of the present Government and he is running the said ferry service for the last five years without any authority of law. The respondent No. 2 in violation of law and by misusing the official power and privilege has allowed the respondent No. 3 to run the said ferry-ghat by way of irregularity, illegality, nepotism and favouritism. Hence, this writ petition.

3. The subsequent writ petition being WP(C) 472 (AP) 2014 has been filed by the same petitioner under Article 226 of the Constitution of India, praying for setting aside the impugned Re-tender Notice issued by the respondent No. 2 vide order dated 10.12.2014 for ferry service over Lohit-Kamlang River between Digaru-Alubari and directing the respondent No. 2 to issue the final settlement order of ferry service over Lohit-Kamlang River in the name of the petitioner. By this petition, the petitioner has also prayed for staying of the impugned Re-Tender Notice dated 10.12.2014 during pendency of this petition and to direct the Revenue Department or the Government Officer to collect the tolls.

4. The facts, narrated by the petitioner, in this case, is that, there were public resentment against the respondent No. 2 for non-issuance of tender for the last five years and in allowing the operation of the ferry service over Lohit Kamlang River between Digaru-Alubari Ghat to private respondent No. 3 (son of the local MLA). The respondent No. 2 viz. Deputy Commissioner, Namsai, had issued the original NIT dated 21.10.2014 inviting sealed tender from the intending contractors/working agencies of Namsai and Lohit District for ferry service for crossing the HMV/LMV/Two Wheeler and passengers over the Lohit Kamlang River during the year 2014-15. In the said NTT, the petitioner is the highest bidder and the respondent No. 3 is the second highest bidder in the fray. The respondent No. 2 refused to issue the final settlement order in favour of the petitioner without assigning any reason and allowing the respondent No. 3 illegally and arbitrarily for operating the ferry service over the said Digaru-Alubari Ghat. Being aggrieved with the arbitrary action of the respondent No. 2, the petitioner filed WP(C) 456 (AP) 2014 on 06.12.2014 whereupon notice was issued on 10.12.2014. It is the case of the petitioner that during pendency of the aforesaid writ petition, the impugned Re-Tender Notice dated 10-12-2014 was issued by the respondent No. 2 for the same ferry service behind the back of the petitioner in violation of the Northern India Ferry Act & Rules, norms of the NTT and by misusing the official power and privilege, which infringes the petitioner's fundamental rights guaranteed under Articles 14 and 19(1)(g) of the Constitution of India.

5. The facts and circumstances, including the issues, being common and identical, both the writ petitions have been heard together and being disposed of by this common judgment and order.

6. The contention raised by the petitioner by filing the additional affidavit is that the petitioner filed the first writ petition being WP(C) 456 (AP) 2014 against the non issuance of the settlement order to him and on 05.12.2014, the Board was constituted for fixing the rates of ferry service. Accordingly, the Board recommended the respondent No. 3 to operate the ferry service over the said ferry-ghat till 31st December, 2014 for Rs. 2,50,000/- per month and the respondent No. 2 most illegally, arbitrarily accepted the recommendation of the Board on 10.12.2014 so as to accommodate the respondent No. 3 and further issued re-tender notice dated 10.12.2014. The petitioner, on receipt of RTI information from one Sri Chetung Kri of Dungalai Village, Lohit District, informed him that the tender notice dated 21.10.2014 was revoked and cancelled and fresh tender notice was issued on 10.12.2014, but no such revocation or cancellation order cancelling the earlier NTT dated 21.10.2014 has not been furnished to him, which infringes of the principle of natural justice and provision of Section 10 of the Northern India Ferry Act. No opportunity of hearing was given to him for such cancellation of tender notice dated 21.10.2014 and therefore, the cancellation of the said tender notice dated 21.10.2014 is a facet of giving unequal treatment to equals and thereby violating Article-14 and 19(1) (g) of the Constitution of India as well as Section 10 of the Northern India Ferry Act & Rules and hence, the said cancellation order issued by the respondent No. 2 is illegal, arbitrary and mala fide and therefore, the same is liable to be quashed and set aside.

7. The learned counsel for the petitioners submits that since the period of settlement of the respondent No. 3 was over on 31.12.2014, he may be allowed to operate the ferry service by setting aside the mala fide, illegal, arbitrary and favouritism action of the respondent No. 2 for the interest of justice and if the petitioner is not allowed to run or operate the ferry service, he would suffer irreparable loss and injuries.

8. The private respondent No. 3 by filing their affidavit-in-opposition has stated that it is ludicrous on the part of the writ petitioner to vie for being awarded the contract, when he does not have nor can possibly arrange to have mechanized boats; a requirement quintessential for participation in the tender process. It is stated in the affidavit that respondent authorities have vested upon with the power and authority to issue re-tender notice and the same cannot be adjudicated in judicial review. When the re-tender notice barely clarified the requirements through earlier settlement, there is no discernable fact that the re-tender notice can be faulted with, least at the ipse-dixit of the writ petitioner, who is not even qualified to participate in the tender process. Further, he stated that the writ petitioner being not qualified to participate in the re-tender process by reason of not having mechanized boats as well as other essential requisite

skill and the petitioner having resorted to suppression of facts, the writ petition is not maintainable in law and is liable to be dismissed.

9. Basing on the affidavit-in-opposition, the respondent No. 3 has submitted that the petitioner mainly assailed the re-tendering notice of the ferry-ghat in question on the ground that the re-tender notice dated 10.12.2014 issued in violation of Sections 8, 9 and 10 of the Northern India Ferries Act, but in contrary, the ferry-ghat in question is neither a public ferry nor the ferry-ghat in question declared as public ferry-ghat by way of notification as required under Section 4 of the Northern India Ferries Act. The Government of Arunachal Pradesh is yet to frame the Ferries Act in the State or any establishment of Inland Water Transport Department to frame appropriate rules in pursuance of Section 12 of the Ferries Act, like Assam and in that view of the matter, the ferry-ghat in question is deemed to be private ferry-ghat out of the purview of the Ferries Act and as such, the writ petition is liable to be dismissed.

10. By contesting the case, the Deputy Commissioner, Namsai District, Namsai (respondent No. 2) has filed the counter affidavit on 27.01.2015, wherein, he stated that vide his order dated 29.10.2014, constituted a Committee headed by E AC as Chairman to open the tenders at 4.00 PM. At the time of opening of tenders, the Committee found lapses. For example, as there is no mention of equipments required/documents to be submitted for JCB/Tractor/ Motor Boat (engine fitted) are required to be submitted along with the Tender by the tenderer. There is no mention of the boatman/engine operator/navigator/ experience certificate to be attached with tender by the tenderer. The rate charges of passengers/HMV/LMV and Motor Cycle etc. is not asked in the tender notice to be quoted by the tenderer and how many motor boat shall have to be placed by the tenderer for ferry services are also not mentioned in the tender notice. There is also no mention in the tender regarding requirement of documents about the fitness and validity of the motor boat and the authority from whom the certificate is to be produced by the tenderer. For safety and security of the passengers, some more machineries such as JCB/Tractor/Truck/ Motor Boat (engine fitted) are required and other technicalities like rate of ferry passengers/HMV/LMV/Motor Cycle, registration number/technically sound certificate from the department of Water Resources Division, permit of registration of boat/country boat and fitness certificate from Water Resource Department of the Government are required to be submitted.

11. Board further observed that the NTT dated 21.10.2014 was issued asking separate rates for (1) construction of wooden log bridge (2) ferry services on Lohit Kamlang River. Both the items are inter-dependent. But all the form the tenderers have not quoted separately for the items. Since a ferry service cannot be run in isolation without having a log bridge on the approaching road, it is recommended that all the four tenders should be cancelled, the earnest money be released and fresh tender with above condition should be called as early as possible. On this count, the private respondent No. 3 has been allowed to

operate the ferry service, in question, on the ground that service is indispensable for transportation of Army/Public/Ambulance/Patient/Vehicles movement to the sensitive international border, five districts i.e. Lohit, Anjaw, Lower Dibang Valley, Dibang Valley and Namsai and to Assam Medical College, Dibrugarh. In the interest of public/defence interest of nation, the private respondent No. 3 has been allowed to operate the ferry service in question, as an interim arrangement. There is no any vested interest or any nepotism and favouritism offered to the respondent No. 3 as he had all equipments readily available for functioning in the ferry services, in question.

12. Ms. G. Deka, learned Sr. Govt. Advocate submitted that Namsai District has been newly created and the district has started functional with effect from 15-08-2014. The Deputy Commissioner, Namsai, for the first time, the tender notice was floated by his office and on receipt of the recommendation of the Board, the same was cancelled vide order dated 27.11.2014 and thereafter the impugned fresh re-tender notice 10.12.2014 was floated describing all required terms and conditions. She also submitted that till finalization of the fresh re-tender, the Board, which was constituted has physically conducted inspection/verification on the spot and keeping the Board proceedings in mind, allowed the private respondent No. 3, for an interim arrangement, to operate the ferry-ghat in question, at the rate of Rs. 2,50,000/- per month for two months as stopgap period from 01.11.2014 to 31.12.2014, so that no loss occur to the State exchequer. Therefore, the loss of the State exchequer, as alleged by the petitioner, does not arise.

13. The learned Sr. Govt. Advocate further submitted that vide interim order dated 07.01.2015 passed in WP(C) 472 (AP) 2014, directed the respondent No. 2 not to extend the period of allowing the private respondent No. 3 to operate the ferry-ghat in question beyond 31.12.2014 and the ferry-ghat in question shall be operated by the State respondents with its own employees and/or with the help of Transport Department or Inland Water Department in the State and in compliance of the said interim order, the operation of ferry-ghat in question by the private respondent has been stopped forthwith. The respondent No. 2, Deputy Commissioner, Namsai, thereafter, initiated a communication to the Director of Transport, Govt. of Arunachal Pradesh requesting him to arrange necessary manpower & equipment to facilitate the ferry service in question. But in reply of the Director, Transport vide letter dated 16.01.2015, informed the Deputy Commissioner, Namsai that the Transport Department of the State, at present, does not possess any manpower or equipments with regard to the Inland Water Transport. The Deputy Commissioner, Namsai, thereafter, filed a misc. application being MC[WP(C)] 02 (AP) 2015 for vacating the interim order dated 07.01.2015 and vide order dated 20.01.2015, the execution of the earlier interim order dated 07.01.2015 was directed to be kept in abeyance. Since the re-tendering process has not yet been finalized, nothing illegality or arbitrary or favouritism have been committed on the part of the Official respondents in allowing the private respondent No. 3 to operate the ferry-service in question for

an stopgap/interim arrangement.

14. In support of his contention, the learned counsel for the petitioner has submitted that he being the highest bidder of the tender, so processed, so the final settlement of ferry ghat service should be in his name and also he should be allowed to run the ferry-ghat, in question, he has relied upon the case law reported in 1962 Supp (3) SCR 508, *State of Assam & Anr. v. Tulsi Singh & Ors.*, wherein, para 3, it is held that the settlement in favour of the second respondent against the highest bidder is violative of Section 8 and Rule 19 of the Northern India Ferries Act, 1878.

15. Similarly, he has relied upon the case law reported in *Tokkong Tayeng Vs. State of Arunachal Pradesh and Others*, (2011) ACJ 1017 : (2009) 2 GLD 718 : (2009) 5 GLT 242 ., wherein, the State respondents are directed to frame appropriate Rules for maintenance of order and safety of the passengers and properties in the ferries under the provisions of the Northern India Ferries Act, 1878, within a period of six months from that day. The State respondents are also directed to consider the preventive/protective measures suggested in the inquiry report mentioned above for implementation. In the case of *Rifat Mazid Vs. State of Assam and Others*, (2000) 2 GLT 317 , wherein, rejecting the petitioner's highest bid settlement made in favour of the respondent No. 4, whose bid was the third highest, Minister held not a competent authority to make such settlement and therefore, the settlement made in favour of respondent No. 4 had been set aside. The learned counsel for the petitioner has also relied upon the decision of this Court reported in *Sargous Tours and Travels and Another Vs. Union of India (UOI) and Others*, AIR 2004 Guw 53 : (2004) 2 GLR 283 : (2003) 3 GLT 202 , *Sargous Tours and Travels & Ann v. Union of India & Ors.*, wherein, it has been held that rejection of tender of the petitioner on the ground that rates offered by him were less than 20% of Reasonable rates, held, not sustainable and the acceptance of tender of private respondent was set aside and the direction issued to float tender afresh.

16. By referring to the above observations given in the above mentioned cases, the petitioner tried to fortify his claim that his rejection of tender being the highest bidder is not legal and he should be allowed to continue the ferry-ghat, in question, instead of private respondent No. 3. On the other hand, the learned counsel for the private respondent No. 3, has vehemently contended against the submissions of the petitioner and submits that in various legal pronouncements, the Hon''ble Supreme Court has clarified being the highest bidder is not the sole criteria to settle the contract and it has been decided that it was the appropriate authority to deal such matter and make fresh settlement The Court cannot itself decide whatever entrusted to the executive authorities nor courts not entitled to interfere in the administrative policy matter. In support to his case, the learned counsel for the private respondent No. 3 has referred the following cases.

"1. *State of Assam Vs. Tulsi Singh*, (1962) 3 SCR 508 Supp

2. Tata Cellular Vs. Union of India, AIR 1996 SC 11 : AIR 1994 SC 11 : (1994) 4 JT 532 : (1994) 6 SCC 651 : (1994) 2 SCR 122 Supp

3. Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, AIR 1999 SC 393 : (1999) 1 ARBLR 431 : (1998) 8 JT 411 : (1998) 6 SCALE 456 : (1999) 1 SCC 492 : (1998) 3 SCR 421 Supp : (1999) 1 UJ 600 : (1999) AIRSCW 53

4. Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, AIR 2000 SC 801 : (2000) 1 CTC 594 : (2000) 1 JT 481 : (2000) 1 SCALE 346 : (1999) 4 SCALE 477(1) : (2000) 2 SCC 617 : (2000) 1 SCR 505 : (2000) AIRSCW 351 : (2000) 1 Supreme 351

5. Appeal (Civil) 2549 of 2008 [The Haryana State Agricultural Marketing Board & Ors. v. Sadhu Ram]

6. Jagdish Mandal Vs. State of Orissa and Others, (2008) 2 CTLJ 538 : (2007) 14 SCC 517 : (2006) 10 SCR 606 Supp

7. Michigan Rubber (India) Ltd. Vs. The State of Karnataka and Others, AIR 2012 SC 2915 : (2012) 4 BC 177 : (2012) 7 JT 446 : (2013) 1 RCR(Civil) 202 : (2012) 7 SCALE 414 : (2012) 8 SCC 216 : (2012) AIRSCW 4727 "

17. It is also peculiar to note that same case law reported in State of Assam Vs. Tulsi Singh, (1962) 3 SCR 508 Supp , has been referred by both the parties and it is interesting to note that the petitioner has referred the first portion of the judgment, para 3, wherein, the High Court has:

"accepted the contention that the person, who was highest bidder was entitled to the settlement under Rule 19 as the highest bidder".

But the second of the judgment, para 4, is crucial. Actually it is an appeal by SLP, wherein, the Hon"ble Supreme Court has concluded that the result of this conclusion is that-

"the authorities under the Act would have to be directed to consider the matter afresh and give a decision in accordance with law, but the learned Judges have proceeded further and observed that under Rule 19, the offer of the first respondent, being the highest should be accepted. The appellant contends that even on the view that the order of the Executive Engineer dated Jan 23, 1961, is not in accordance with law, it was for the appropriate authorities to deal with the matter and make a fresh settlement and that the court could not itself decide what is entrusted to the executive authorities under the Act. On appeal to this court, it was held that such a direction was clearly in excess of the powers and jurisdiction of the High Court. We must accordingly hold that the order of the High Court, in so far as it declared the rights of the highest bidder, is erroneous."

18. In TATA Cellular (Supra), it has been elaborately dealt with that while a decision making authority exceeded its power, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that

policy is fair. It is only concerned with the manner in which those decisions have been taken. It was further observed that the court does not sit as a court, of appeal but merely reviews the manner in which the decision was made. The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

19. Judgment, it has been observed as follows:--

"16. It is also necessary to reminder that price may not always be the sole criterion for awarding a contract. Often when an evaluation committee of experts is appointed to evaluate offers, the expert committee's special knowledge plays a decisive role in deciding which s the best offer. Price offered is only one of the criteria. The past record of the tenderers, the quality of the goods or services which are offered, assessing such quality on the basis of the past performance of the tenderer, its market reputation and so son, all play an important role in deciding to whom the contract should be awarded. At time, a higher price for a much better quality of work can be legitimately paid in order to secure proper performance of the contract and good quality of work-which is as much in public interest as a law price. The court should not substitute its own decision for the decision of an expert evaluation committee."

20. In Appeal (Civil) 2549 of 2008 (supra), the Apex Court has held that in the decision that the State Government and its instrumentalities cannot be said to have exercised an arbitrary power when they found that best offer made by the respondents could not be accepted because the market value of the plots in question would fetch better than the amount offered by the respondents. It was further held in that decision that since the power of judicial review is not an appeal from the decision, the court cannot substitute its own decision. In Jagdish Mandal (supra),it has also been observed that:

"a contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions: (1) whether the process adopted or decision made by the authority is mala fide or intended to favour some one; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached;; and (ii) whether public interest is affected.

21. The case of the petitioner was very much confronted by the other State respondents as well as private respondent No. 3 and it has come to a clear position that the respondent authorities while opening the tender, has appreciated all the pros and cons of the subject that the earlier tender process has not mentioned any of the safety and security measure to be taken neither the amount of fare and other necessary instruments like mechanizing boat and bridge so as to prevent untoward incident, which happens in the river. So they have ultimately decided to cancel the earlier tender and issued a fresh re-tender by raising the rates and by inserting all the requisite terms and conditions therein, which is very much apparent from the annexure so submitted in this regard.

22. As the ferry service is most essential aspect for the common public, which connected so many districts in the State. It is used by the common people in regular feature, the private respondent No. 3, who has all necessary instruments to run the ferry service since last so many years. So, for an interim measure, he was allowed to run the ferry service, in question, for two months as a stopgap arrangement. In the premises, the petitioner comes forward with this petition as if the contract has been settled with the private respondent No. 3 and has demanded that he should be allowed to run the ferry service, in question, in place of the private respondent No. 3. The petitioner has deliberately avoid to mention about the decision of the Board as to under what circumstances, they were compelled to cancel the earlier tender and has decided to issued a re-tender notice, by inserting all the terms and conditions only to ensure the safety and security of the general public. There is no sorts of any illegality or mala fide and/or arbitrary in the action of the State respondents in issuing second tender nor the engagement of private respondent No. 3 for running the ferry service, in question, for a stopgap arrangement only for two months, not appears to be arbitrary or mala fide and which has already expired on 31.12.2014. In view of the above, there is no merit in both writ petitions and accordingly the same are dismissed. There shall be no order as to costs. Interim order so passed earlier automatically stands vacated.