(2018) 10 GAU CK 0019

In the Gauhati High Court

Case No : Writ Appeal No.274, 275 Of 2018

Shri Jaidev Das @APPELLANT@Hash Bhagaban Das

Date of Decision : 05-10-2018

Acts Referred:
Assam Fishery Rules, 1953 — Section 12

Citation : (2018) 10 GAU CK 0019

Hon'ble Judges : A.K. Goswami, J;Ajit Borthakur, J

Bench : Division Bench

Advocate : N. Dutta, A.M. Mazumdar, R. Dhar

Final Decision : Disposed Off

Judgement

A.K. Goswami, J.

1. Heard N. Dutta, learned senior counsel for the appellant in Writ Appeal No.274/2018 and Writ Appeal No.275/2018. Also heard Mr. A.M.

Mazumdar, learned senior counsel, appearing for the respondent No.1 in Writ Appeal No.274/2018 and for respondent No.7 in Writ Appeal

No.275/2018, Mr. R. Dhar, learned Additional Senior Government Advocate, Assam, appearing for the respondent Nos.2, 3, 4 & 5 in Writ Appeal

No.274/2018 and for the respondent Nos.2 & 3 in Writ Appeal No.275/2018, Dr. B. Ahmed, learned standing counsel, Co-operation Department,

appearing for the respondent Nos.4 & 5 in Writ Appeal No.275/2018 and Mr. S. Borthakur, learned counsel, appearing for the respondent No.6 in

Writ Appeal No.275/2018. Respondent No.1 in Writ Appeal No.274/2018 and respondent No.7 in Writ Appeal No.275/2018 is the same entity.

Similarly, writ appellant in both the cases is also same.

2. Writ Appeal No.274/2018 is preferred against the common judgment & order dated 30.08.2018 passed by the learned Singe Judge in WP(C)

No.6502/2016 and Writ Appeal No.275/2018 is preferred in connection with WP(C) No.7121/2017.

3. The writ appellant was settled with No.46 Howlighat Boralia Min Mahal in the district of Nalbari by an order dated 19.10.2016 passed by the

Secretary to the Government of Assam, Fishery Department, in exercise of the powers conferred under proviso to Rule 12 of the Assam Fishery

Rules, 1953 (for short, â??1953 Rulesâ?), pursuant to a Notice Inviting Tender (NIT) dated 14.09.2016 issued by the Deputy Commissioner, Nalbari

inviting tenders for a period of 7(seven) years. The order of settlement made in favour of the appellant was the subject matter of challenge in WP(C)

No.6502/2016.

4. We will come to the subject matter of challenge in WP(C) No.7121/2017 a little later.

5. The writ petitioner, who is the respondent No.1 in Writ Appeal No.274/2018 and respondent No.7 in Writ Appeal No.275/2018, undoubtedly, was

the highest tenderer at ` 1,51,001/-. The writ appellant had submitted his tender for ` 91,701/-. The tender of the highest tenderer was rejected by the

settling authority on 3(three) counts â?" (i) it had not deposited call deposit; (ii) photocopy of the Secretary of the tenderer Co-operative Society was

not affixed; and (iii) audited balance-sheet was not submitted. There was a tenderer in between the appellant and the highest tenderer, whose tender

was also rejected. The appellant was, thus, the third highest tenderer. Settlement was offered holding that the appellant had submitted all documents

required for settlement of the fishery. Challenge made by the highest tenderer, i.e. respondent No.1 in Writ Appeal No.274/2018 and respondent No.7

in Writ Appeal No.275/2018 contending that the settling authority acted illegally and arbitrarily in rejecting the tender on the grounds noticed above

was upheld by the learned Single Judge as the aforesaid conditions were not put in the NIT. The learned Single Judge, accordingly, held as follows:-

â??21. It is a settled proposition of law that a tender cannot be rejected on the grounds which are not mentioned or stipulated in the NIT. The grounds

on which the tender of the petitioner was rejected were not stipulated in the NIT. Such rejection is, therefore, arbitrary and unreasonable, more

particularly when the bid of the petitioner was the highest. Though respondent No. 5 has tried to raise another ground in its additional affidavit that petitioner does not comprise of 100% actual fishermen, Court is not inclined to enter into this aspect of the matter because this was not the ground for

rejecting the tender of the petitioner.

22. That being the position, Court is of the considered opinion that the impugned order of settlement is not justified. Overlooking the better claim of the

petitioner and settling the Fishery with respondent No. 5 at a much lower rate, that too, without holding negotiation with respondent No. 5 to increase

its bid at par with that offered by the petitioner, besides being arbitrary and unreasonable, is also not in the public interest and has vitiated the impugned

order dated 19.10.2016.

23. Considering the above, impugned order dated 19.10.2016 is hereby set aside and quashed. Matter is remanded back to the Secretary to the

Government of Assam, Fishery Department, to issue fresh settlement order to the highest valid tenderer from amongst the existing tenderers. This

shall be done within a period of 4 (four) weeks from the date of receipt of a certified copy of this order.â??

6. It will be apposite now, before we proceed further, to briefly indicate the cause of action for filing WP(C) No.7121/2017.

7. The appellant had approached this Court by filing a writ petition, which was registered as WP(C) No.3556/2017. It was contended in the said writ

petition that the respondent No.1 in Writ Appeal No.274/2018 and respondent No.7 in Writ Appeal No.275/2018 is not consisting of 100% actual

fishermen and to determine its status, a representation was filed before the Deputy Commissioner, Nalbari to make an enquiry. Grievance was

expressed that the said representation was not disposed of. This Court, by an order dated 14.06.2017, disposed of the said writ petition with the

following observations:-

â??As the final prayer of the petitioner is for a direction for disposal of the representation dated 25.01.2017, this Court deems it appropriate that the

appropriate notice upon the respondent No.4 need not be served. Accordingly the Deputy Commissioner, Nalbari shall consider and dispose of the

representation submitted by the petitioner by a reasoned order. But, however, it is provided that the Deputy Commissioner, Nalbari while considering

the representation of the petitioner shall invariably issue notice upon the respondent No.4 giving adequate and appropriate opportunity of hearing and also allow the respondent No.4 Society to produce all relevant materials that they may desire to produce to substantiate their claim against the

allegation made by the petitioner.

At the same time, the petitioner shall also be given the opportunity to produce all material that may be relevant in order to substantiate their claim that

the respondent No.4 Society does not comprise of 100% actual fishermen. The aforesaid exercise be carried out within a period of 2(two) months

from the date of receipt of a certified copy of this order.â??

8. Challenge in WP(C) No.7121/2017 was to an order, which was passed by the In-charge Deputy Commissioner dated 17.10.2017, holding that the

respondent No.1 in Writ Appeal No.274/2018 and respondent No.7 in Writ Appeal No.275/2018 does not consist of 100% actual fishermen as 2(two)

of the members, namely, Shri Dhireswar Das and Shri Rabindra Bora are teachers by profession.

9. The learned Single Judge allowed the writ petition by setting aside the order dated 17.10.2017. The order dated 17.10.2017 reads as follows:-

â??Perused the written reply submitted by Shri Bhagaban Das, Secretary, Shri Gopal Fishery Cooperative Society Limited and documents submitted

by Shri Jaydev Das, Secretary, Bornibari Matshyajibi Samabai Samity Limited. Also perused the order dated 14.06.2017 passed by Honâ??ble

Gauhati High Court in WP(C) No. 3556 of 2017 and the inquiry report submitted by the Assistant Registrar of Cooperative Societies, Nalbari, on the

representation submitted by Shri Jaydev Das, Secretary, Bornibari Matshyajibi Samabai Samity Limited against the â??Shri Gopal Fishery

Cooperative Society Limitedâ? regarding non-constitution of the Society with 100% fisherman. As per report submitted by the Assistant Registrar of

Co-operative Societies, Nalbari, vide his letter No. CNGF/2017-18/02, Dt. 28/07/2017, Shri Gopal Fishery Cooperative Society Limited is registered

with 115 shareholders. Those are 100% fisherman community who belongs to the Scheduled Caste (Namasudra) which is mandatory for participating

in the tender process under Rule 12 of Assam Fishery Rules, 1953.

Shri Dhireswar Das and Sri Rajeswar Bora have been nominated as internal Auditor of the Shri Gopal Fishery Cooperative Society Limited as per

resolution No.2 of the Annual General Meeting of the Society held on 31/08/2016. Both the Internal Auditors belong to the fisherman community although one of the members, i.e., Shri Dhireswar Das is a Teacher by profession. He was a shareholder of the Society since 1990 as per

Societyâ??s members register but he joined as a Teacher in the year 1991. Though the name of the Shri Rabindra Bora was raised by the petitioner

Shri Jaydev Das as Account Examiner of the Society, the name of Shri Rabindra Bora is found as shareholder of Shri Gopal Fishery Cooperative

Society Limited who belongs to the fisherman community of the Scheduled Caste (Namasudra), but he is a teacher by profession.

The Government Pleader, Nalbari in his opinion said that â??Sri Gopal Fishery Co-operative Societies Ltd is not comprised of 100 percent fisherman,

which is a statutory requirement for settlement of a Fishery. Considering all facts and figures, the undersigned has come to the decision that though

Shri Gopal Fishery Cooperative Society Limited consist of 100% fisherman community members belonging to the Scheduled Caste but by profession

they are not formed with 100% actual fisherman as Shri Dhireswar Das and Shri Rabindra Bora, both are Teachers by profession.â??

10. It was observed by the learned Single Judge as follows:-

â??27. A careful perusal of the order dated 17.10.2017 would reveal that the impugned order is in violation of the principles of natural justice. In-

Charge Deputy Commissioner had relied upon the enquiry report submitted by the Assistant Registrar of Cooperative Societies, Nalbari on

28.07.2017. It is trite that materials sought to be relied upon by the authority against an affected person have to be furnished to such person giving an

opportunity to the affected person to respond to such materials. It appears that copy of such report was not furnished to the petitioner which would be

in violation of the principles of natural justice. Admittedly, order dated 17.10.2017 would have far reaching consequences on the future prospects in so

far petitioner is concerned, vis-Ã -vis, settlement of fisheries. Therefore, it is of utmost importance that a fair procedure is adopted where principles of

natural justice are adhered to. When adverse comments are recorded in the order dated 17.10.2017 against Sri Dhireswar Das and Sri Rabindra Bora,

they were not given any opportunity to explain their position, so also the petitioner. That apart, In-charge Deputy Commissioner had also relied and

acted upon the opinion of the Government Pleader which course of action is again highly questionable. In such circumstances, Court is of the view that the impugned order dated 17.10.2017 was passed in complete violation of the principles of natural justice.

28. Besides, passing of the order dated 17.10.2017 by the In-Charge Deputy Commissioner, Nalbari is contrary to the direction of this Court dated

14.06.2017, passed in WP(C) No.3556 of 2017 filed by respondent No.7, whereby this Court had directed the Deputy Commissioner, Nalbari, to

dispose of the representation of respondent No.7 by a reasoned order. When the direction was to the Deputy Commissioner, Additional Deputy

Commissioner acting as In-charge Deputy Commissioner ought not to have passed the order dated 17.10.2017.â??

11. Mr. Dutta is gracious enough to concede that there was no stipulation in the NIT to make any deposit by way of call deposit and, therefore, the

tender of the highest tenderer could not have been rejected on that count. Photograph of the Secretary of the Society having been affixed with the

Tender Form, the settling authority could not have rejected the tender on that count either. The learned Single Judge had observed that affixing of the

photograph is not a requirement, overlooking the fact that photo indeed was affixed, he contends. Mr. Dutta has, however, tried to emphasize that

though not expressively stated in the NIT, having regard to the purpose for which the NIT was issued, i.e. to augment revenue, to demonstrate their

financial stability and capacity, it was necessary for the tenderers to have enclosed the audited balance-sheet, which every registered Co-operative

Society has to prepare every year. Accordingly, he submits that the settling authority was justified in rejecting the tender of the highest tenderer on the

ground that it had not submitted the audited balance-sheet.

12. Mr. Dutta has further submitted that the settling authority had overlooked certain omissions in the tender of the highest tenderer and to

demonstrate the same, he has taken us through the Tender Form, more particularly, to Clauses 10 & 11 of the Tender Form, which were left blank.

He contends that the highest tenderer did not enclose sales tax clearance certificate, income tax clearance certificate as well as caste certificate as

required under Clause 10. Furthermore, in terms of Clause 11, no certificate was annexed demonstrating that there was no liability to pay any tax etc.

The certificate at Page 48 (Annexure-7) of Writ Appeal No.274/2018 was a document of the year 1993 and the said document also does not indicate that all the members of the Society was actual fishermen. It is submitted that it is no longer res integra that under proviso to Rule 12 of the 1953 Rules,

settlement can be offered, apart from other conditions, to a registered Co-operative Society consisting of 100% actual fishermen belonging to Schedule

Caste communities. For these infirmities also, the tender of the highest tenderer was liable to be rejected.

13. Mr. Dutta has submitted that the learned Single Judge may have been justified in setting aside the order dated 17.10.2017 passed by the In-charge

Deputy Commissioner, Nalbari, on the ground of non-furnishing of the report of the Assistant Registrar of Co-operative Societies, but according to

him, in the circumstances, the learned Single Judge ought to have remanded the matter back to the Deputy Commissioner, Nalbari for fresh

adjudication after furnishing a copy of the inquiry report to the parties and after hearing the parties. Because no such direction was issued, the effect

of the order of the learned Single Judge is that the highest tenderer was held to be a valid tenderer notwithstanding the fact that the report indicated

that the respondent No.1 in Writ Appeal No.274/2018 and respondent No.7 in Writ Appeal No.275/2018 is not consisting of 100% actual fishermen,

and thus ineligible to get settlement.

14. Per contra, it is submitted by Mr. Mazumdar that the highest tenderer was the previous sitting lessee of the fishery, it having been offered the

fishery by an order dated 02.03.2009. In the above settlement process, the present appellant, who had also participated, was held to be a defaulter and

a society whose area of operation did not extend to the fishery. This order was not challenged by the present appellant and, therefore, the conclusions

recorded by the settling authority having attained finality, the appellant, ex facie, does not fulfil the conditions precedent for getting settlement under

proviso to Rule 12 of the 1953 Rules. He submits that the learned Single Judge was wholly justified in holding that the settling authority arbitrarily

rejected the tender of the highest tenderer on non-existent grounds. It is submitted by him that the tender of the highest tenderer cannot be made

subject to further scrutiny in the writ appellate stage. Mr. Mazumdar further submits that the earlier order of settlement dated 02.03.2009 having not

been challenged, the plea advanced by the appellant that the highest tenderer is not consisting of 100% actual fishermen cannot be entertained and, therefore, the learned Single Judge was wholly justified in not remanding the matter for re-consideration by the Deputy Commissioner.

15. We have considered the submissions of the learned counsel appearing for the parties and have perused the materials on record.

16. A perusal of the writ petition, which has given rise to WP(C) No.7121/2017, will go to show that a statement is made that in the comparative

statement forming the basis of the earlier settlement order dated 02.03.2009, it was observed that the area of operation of the appellant was not in the

vicinity of the fishery and that it was not in the neighbourhood of the fishery. No other allegations have been made regarding the appellant not fulfilling

the essential requirements as visualised by proviso to Rule 12 of the 1953 Rules. It, however, has to be noted that there was no finding in the order

dated 02.03.2009 that the appellant was not within the neighbourhood of the fishery in question. This aspect of the matter was not considered while

passing the order dated 02.03.2009. The area of operation is not relevant reconsideration as was held by this Court in the case of Babul Das -Vs-

State of Assam & Ors., reported in (1989) 1 GLR 263 for the purpose of grant of settlement.

17. The edifice of the writ petition, numbered as WP(C) No.6502/2018, was that the tender of the highest tenderer being valid, settlement could not

have been awarded to the third highest tenderer after rejecting the tender of the highest tenderer on perverse considerations.

18. We are unable to accept the submission of Mr. Dutta that the settling authority rightly rejected the tender of the highest tenderer on the ground

that it had not submitted audited balance-sheet along with the tender. A tendering authority must indicate in its tender without any ambiguity the

requirements to be fulfilled and it cannot resort to any hidden criteria. If the authority wanted demonstration of financial stability, it could have very

well indicated in the tender what documents are required to be submitted for the said purpose while submitting the tenders. That having not been done

and requirement of submitting audited balance-sheet having not been indicated in the NIT, we find no infirmity in the reasoning of the learned Single

Judge with regard to rejection of the tender of the highest tenderer by the settling authority.

19. While we are in accord with the learned Single Judge that tender of the highest bidder could not have been rejected on the grounds on which it

was so rejected by the setting authority, it also appears to the Court that though required, the highest tenderer had not enclosed the documents as

required under Clauses 10 & 11 of the Tender Form. We are not offering any comment as to how much the omission to enclose such documents will

impact the tender of the highest tenderer as this aspect will now have to be gone into by the settling authority.

20. Admittedly, the inquiry report of the Assistant Registrar of Co-operative Societies, which was against the highest tenderer, was not made available

to the highest tenderer. When any material is sought to be used against a party to its detriment and prejudice, such materials are required to be made

known to the party so as to afford the party concerned with an opportunity to explain adverse circumstances appearing against it. It is a facet of fair

procedure. Therefore, the order dated 17.10.2017 cannot stand the scrutiny of law. To that extent, we are wholly in accord with the order of the

learned Single Judge. However, the order dated 17.10.2017 having been set aside on procedural infirmities, being violative of the principles of natural

justice, in our considered opinion, the Deputy Commissioner, Nalbari ought to have been directed to consider in accordance with law the report of the

Assistant Registrar of Co-operative Societies in terms of the earlier order of this Court dated 14.06.2017 passed in WP(C) No.3556/2017. The fact

that it was not so ordered had made the order dated 14.06.2017 passed in WP(C) No.3556/2017 redundant. The report had not been set aside by the

learned Single Judge and, therefore, such report had to be taken to its logical end in terms of the order dated 14.06.2017 passed in WP(C)

No.3556/2017.

21. In view of the above discussions, we direct the settling authority to evaluate the tender of the appellant and the respondent No.1 in Writ Appeal

No.274/2018 and respondent No.7 in Writ Appeal No.275/2018 and thereafter, pass appropriate orders setting the fishery. It is made clear that only

the tender of the appellant and the respondent No.1 in Writ Appeal No.274/2018 and respondent No.7 in Writ Appeal No.275/2018 shall be considered

for the above purpose. The Deputy Commissioner, Nalbari is directed to pass appropriate order(s) after hearing the appellant and the respondent No.1

in Writ Appeal No.274/2018 and respondent No.7 in Writ Appeal No.275/2018 in terms of the order dated 14.06.2017 passed in WP(C) No.3556/2017 within a period of 1(one) month from the date of receipt of a certified copy of this judgment & order.

Before such hearing, copy of the report of the Assistant Registrar of Co-operative Societies dated 28.07.2017 shall be furnished to the respondent

No.1 in Writ Appeal No.274/2018 and respondent No.7 in Writ Appeal No.275/2018 and it will be afforded with an opportunity to file an objection to

such report. The order of the Deputy Commissioner to be passed shall be communicated to the Secretary to the Government of Assam, Fishery

Department. After receipt of such order of the Deputy Commissioner, Nalbari, the process directed for consideration of settlement, shall be initiated

and taken to its logical end within a period of 2(two) months from the date of passing of the order by the Deputy Commissioner.

22. Till the exercise, as indicated above, is carried out, the appellant will be allowed to continue to operate the fishery.

23. With the aforesaid observations and directions, the writ appeals stand disposed of. No cost.

