

(2009) 05 GAU CK 0065

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 89 (SH) of 2009

Shri Krolion M. Sangma

APPELLANT

Vs

Executive Member, Garo Hills Autonomous District Council
and Others

RESPONDENT

Date of Decision : 13-05-2009

Acts Referred:

Garos Hills Autonomous District (Market tax) Regulations, 1970 — Regulation 11, 6, 8(5)

Citation : (2009) 2 GLD 156

Hon'ble Judges : A. Potsangbam, J

Bench : Single Bench

Advocate : A.H. Hazarika, for the Appellant; S. Dey and N.D. Chullai, for the Respondent

Final Decision : Allowed

Judgement

A. Potsangbam, J.—Heard Mr. A.H. Hazarika, learned Counsel appearing for the petitioner, Mr. S. Dey, learned Counsel appearing for the respondent Nos. 1, 2 and 3 and Mr. N.D. Chullai, learned Counsel appearing for the Respondent No. 4.

2. The facts of the case, shorn of details, may be stated hereunder.

2(i). It is stated that the petitioner is the existing lessee of Chibinang daily and weekly Hat (hereinafter referred to as Chibinang Hat) situated in the Garo Hills District of Meghalaya for the year 2008-2009 i.e. the period from 1.3.2008 to 31.3.2009. On the basis of bidding, the Garo Hills Autonomous District Council (in short GHADC) settled the market with the petitioner vide Order No. 248 and Memo No. GDC.REV/947/98/P-III/2124-28 dated 10.4.2008 for the aforesaid period for an amount of Rs. 7,35,200/-. On becoming the lessee of the Chibinang Hat, as stated above, the petitioner used to collect tolls from the Hat in question and he had never defaulted in any manner during the lease period of 2008-2009.

2(ii). The Garo Hills Autonomous District Council, Tura through its Secretary,

Executive Committee, issued a composite tender notice dated 24.10.2008 (Annexure-IV) for settlement of Chibinang Hat and Ferry Ghats for the year 2009-2010 and fisheries for the period from 2009-2012, inviting sealed tenders from the interested parties and the tender notice stipulated therein that the last date for submission of sealed tenders would be 21.11.2008 and the registration would commence from 3.11.2008.

2(iii). In response to the aforesaid tender notice dated 24.10.2008, the petitioner submitted his tender on 19.11.2008 for settlement of Chibinang Hat along with caste certificate, professional tax clearance certificate for 2008-2009 from the taxation, Garo Hills Autonomous Dist. Council, Tura, two passport size photos, copy of up-to-date payment of land revenue receipt/house settlement of Chibinang Hat duly acknowledged by the District Council, Tura. The registration was made on 3.11.2008. The bid offer of the petitioner was Rs. 15,51,000/- (Fifteen lakhs fifty-one thousand) only.

2(iv). It is also stated that the petitioner submitted an application on 13.3.2008, to the respondent No. 3 seeking information as to whether the Hat had been settled in favour of the respondent No. 4 and if already settled, details were sought for. But the same, it is alleged, were not furnished to the petitioner. On coming to know that respondent No. 4, whose bid amount is only Rs. 7,37,250/-, which is less than half of the amount offered by the petitioner, has been settled with the lease of the hat in question vide Office Order No. 349 dated 17.3.2009 (Annexure VI) issued by the Secretary, Executive Committee, GHADC, (Respondent No. 3), this writ petition has been filed assailing the aforesaid order dated 17.3.2009 which is impugned in this writ petition.

3. It is contended by the petitioner that he being the highest bidder in the tenders floated for settlement of Chibinang Hat for the year 2009-2010 and also in view of the fact that he is the existing lessee without any default, the authority ought to have settled the lease of the aforesaid Hat in favour of the petitioner. Further, it is submitted that the contract/lease involved in the instant case is not a non-statutory one but it is a statutory contract/lease which is regulated by the provisions of Garo Hills Autonomous District (Market tax) Regulation, 1970 (hereinafter referred to as Regulation, 1970), wherein it is provided for levy and collection of tax on the entry of goods into the market for sale within autonomous districts of Garo Hills. For settlement of hat/ferry-ghat etc., it is statutorily provided that a sale notice or tender notice is to be issued and be published by the authority in the manner provided in Regulation 6 of the Regulation, 1970, which is reproduced hereinbelow:

6. Publication of sale notice.-(1) The Secretary or the officer authorized in this behalf shall publish the sale notice in the prescribed form for sale in public auction of the right to collect the prescribed taxes at least 30 days ahead of the date fixed for opening of such tenders but not later than 20th January of the year preceding the year in which the lease is to take effect.

4. Though the essence of Regulation 6 remains the same, the Regulation 6 is expressed in different languages in two of the documents, one being in the Official Gazette and another being in a book published by the District Council. The Regulation 6, which is extracted hereinabove, is from the Official Gazette, which is available as Annexure-I to the rejoinder affidavit filed by the petitioner.

5. The contention of the petitioner is resisted by the respondents. Respondent Nos. 1, 2 and 3 have filed affidavit-in- opposition controverting and disputing the averments of the petitioner. It is contended by the official respondents that the petitioner was not the highest bidder and that the highest bidder in the aforesaid tender was one Shri Himbath M. Sangma whose bid amount was Rs. 15,52,000/-, which is higher than the bid amount offered by the petitioner. The affidavit also disclosed that the said Himbath M. Sangma, the highest bidder, intimated the respondent No. 2 vide communication dated 11.3.2009 that he was in financial constraint and as such, he was not in a position to pay the instalment amount of first kist which was found to be too high for him. Accordingly, the said H.M. Sangma surrendered the offer of settlement by declaring that he had no objection in settling the Chibinang Hat with any other person. The affidavit also further disclosed that on 12.3.2009, an application was submitted by the respondent No. 4 for settlement of Chibinang Hat at the amount offered by him i.e. Rs. 7,37,250-. The Executive Committee of the Council in its meeting held on 13.3.2009, considered the application of respondent No. 4 and resolved to settle the Chibinang Hat in favour of the respondent No. 4 at the bid amount referred to above for the year 2009-2010. The resolution, referred to above, reflects that the respondent No. 4 has donated a plot of land adjoining the Chibinang Hat for creation of a livestock market, which is, perhaps one of the reasons prompting the official respondents to take a resolution in favour of the respondent No. 4.

6. It is also contended by the official respondents that in view of Clause 10 of the tender notice, the Executive Committee of GHADC reserves the right for settlement of hats and terry-ghats etc. and there is nothing wrong in settling the lease of the hat in favour of the respondent No. 4 by invoking Clause 10 the tender notice. That apart, it is further contended by the official respondents that it is only the respondent No. 4 who has shown interest in the settlement of Chibinang Hat by filing an application, as discussed above and that the case of the other bidders including the petitioner, were excluded from consideration as no application was forthcoming from any of them.

7. In the course of hearing, the learned Counsel for the official respondents, Mr. S. Dey has placed before the Court a copy of the comparative statement of the tenders. The comparative statement indicates that there were 8 bidders who submitted their tenders for settlement of the Hat in question. The position of the tenderers as per the comparative statement is quoted below:

1. Shri Himbath Rs. 15,52,000/- settled. N. Sangama 2. Shri Krolion M. Rs. 15,51,000/- Sangma 3. Shri Abdul Rs. 14,25,000/- no up-to- Mojit Bapary date khajana receipt. 4. Shri Dhonjith R. Rs. 13,32,000/- no court- Marak fee 5. Shri

Mazial Rs. 12,71,100/- Hoque 6. Smt. Sengchira Rs. 9,34,600/- Sangma 7 Smt. Anjella D. Rs. 7,81,100/- Marak 8. Shri Dilatson Rs. 7,37,250/- Marak

From the above comparative statement, it may be noticed that S1. No. 3 and 5 had been disqualified for want of requisite revenue receipt and for non-payment of court-fee, respectively. Therefore, only 6 bidders remained in the fray. Out of the aforesaid 6, the highest bidder, Shri Himbath N. Sangma had surrendered the offer of settlement of the hat because of financial constraints and, as a result, only 5 remained in the fray for consideration of the authority. Out of the remaining five bidders, the petitioner is the highest bidder and the respondent No. 4 is the lowest bidder. The position of 5 tenderers who remained in the fray, are shown below:

1. Shri Krolion M. Sangma Rs. 15,51,000/- 2. Shri Mazial Hoque Rs. 12,71,100/- 3. Smt. Sengchira Sangma Rs. 9,34,600/- 4. Smt. Anjella D. Marak Rs. 7,81,100/- 5. Shri Dilatson Marak Rs. 7,37,250/-

8. It is submitted by the learned Counsel for the petitioner that the contract/ lease in question being statutorily governed and regulated by the provisions of Regulation, 1970, settlement of lease in respect of the hat in question is to be determined in accordance with the provisions of Regulation, 1970 and in case of any area not being specifically covered by any provision of the aforesaid Regulation, 1970, the same shall have to be dealt with in accordance with judicially approved norms and practices as laid down by the Apex Court as well as by this Court. It is further submitted by the petitioner that Regulation 8(5) of the Regulation, 1970 provides that in case the successful bidder, in all probability the highest bidder, is unable to deposit the kist money, the hat/ferry-ghat which have been put to auction ought to be settled with the next highest bidder in the manner provided therein. In view of the aforesaid facts situation, the authority ought to have settled the Hat in question with the petitioner who, without having any disqualification, became the highest bidder after the surrender by the said Himbath N. Sangma. It is also further submitted that the purpose and intent of Regulation 8(5) is in consonance with the judicially approved norms and practice and nothing contrary can be read into Regulation 8(5). The Regulation 8(5) is reproduced herein below:

The earnest money shall be forfeited in the case of successful bidder/tenderer fails to deposit the kist money immediately on acceptance of his bid/tender and the market shall be put to resale in auction or settle with the next highest tenderer as the case may be subject to the condition that the defaulting bidder/tenderer shall be required to make good the difference between his bid/tender and the amount of the subsequent bid/tender as the case may be.

9. In the backdrop of the factual position as discussed above, the Court will now examine the justifiability and the reasons for refusing the settlement of Chibinang Hat with the petitioner who became the highest bidder in the fray, after the surrender of the highest bidder, Sri Himbath N. Sangma, and also the

sustainability of the approach and reasons adopted by the official respondents for settling the hat in question with the respondent No. 4, who is the lowest bidder.

10. A careful perusal of the tender notice dated 24.10.2008 would reveal, without any ambiguity, that the tender notice does not contain any clause/para enabling the official respondents to entertain any application from the tenderers for settlement of the hat, for which tenders have been floated. From further perusal of the tender notice as well as the provisions of the Regulation, 1970, it is noticed that there is no discretion available to the respondents to take into account any extraneous consideration while considering the settlement of the hat.

11. Admittedly, the tender process which emanated from the tender notice dated 24.10.2008, as referred to above, had not been cancelled nor has the same been withdrawn or modified at any point of time. It is not the case of the petitioner that the settlement of the Chibinang Hat with the respondent No. 4 was made after the cancellation or withdrawal of the tender process. Thus, the irresistible conclusion is that the tender process for settlement of the hat in question remains alive till date. Further, the respondents are not able to establish and demonstrate that there was permissibility in the tender notice to take into account other extraneous consideration like donation of land etc. while considering the settlement of the Chibinang Hat. Thus taking into consideration the alleged donation of land by respondent No. 4 while settling the Chibinang Hat in favour of respondent No. 4 is outside the tender notice and contrary to the provisions of the Regulation, 1970.

12. Another argument advanced by the official respondents is that Clause 10 of the tender notice reserves the right of settlement of the hat to the Executive Committee of the GHADC, Tura, and as such the settlement of the hat in question with the respondent No. 4 is within the power and jurisdiction of the District Council Authority. This argument of the respondent is not acceptable for the simple reason that Clause 10 of the tender notice, as discussed above, shall have to be read along with Regulation 11 of the Regulation, 1970 which runs as follows:

11. Acceptance of bid/tender.-(1) The officer conducting the sale does not bind himself to accept the highest bid or may refuse to record the bid of any bidder for the reason to be recorded by him in writing.

(2) The Executive Committee or the officer authorized in this behalf may refuse to accept the highest tender for reasons to be recorded in writing.

13. It is true that it may not be obligatory for the District Council Authority to accept the highest bid and in case of refusal of the highest bid, reasons must be recorded in writing and such reason must be lawful and valid. In the instant case, no reason is assigned either in the resolution of the Executive Committee or in the pleadings of the official respondents as to why the offer of the highest and higher bidders should not be considered for settlement of the hat and, therefore, the resolution adopted by the respondents in the Executive Committee meeting

held on 13.3.2009 which ultimately led to the issuance of the impugned order 17.3.2009, is arbitrary and unsustainable in the eye of law.

14. It is submitted by the learned Counsel for the petitioner that the settlement of the Chibinang Hat in favour of the respondent No. 4 on the basis of an application dated 12.3.2009 submitted by the respondent No. 4 is impermissible and the course of action adopted by the respondent is neither specified in the tender notice nor contemplated in any of the provisions of Regulation, 1970 and as such, the impugned order dated 17.3.2009 stands vitiated. There is a considerable force in the submission of the learned Counsel for the petitioner. In support of the aforesaid contention, the learned Counsel for the petitioner pressed into service a decision of the Apex Court reported in *Dutta Associates Pvt. Ltd. Vs. Indo Merchantes Pvt. Ltd. and Others*, wherein, the Apex Court held that whatever procedure proposed to follow in accepting the tender must be clearly stated in the tender notice, otherwise contract/supply order issued by adopting a procedure not specified in the tender notice, would stand vitiated. In the above cited case, a concept of "viability range" which was not specified in the tender notice was evolved by the authority. It was also observed by the Apex Court that most significantly, the tender notice did not even speak that after receiving the tenders, the Commissioner/Government would first determine the viability range and then call upon the less eligible tenderers to make counter-offer. The exercise of determining the viability range and to call upon appellant therein to make a counter-offer was outside the ambit of the tender notice and therefore, the Apex Court held that the award of contract was vitiated.

15. The instant case is clearly covered by the principle laid down in the above cited case inasmuch as entertaining of an application from one of the bidders i.e. the lowest bidder, for settlement of contract and consequently settling the Chibinang Hat in favour of such applicant is not only outside the tender notice but also is contrary to the provisions of Regulation, 1970. It is now well-settled that distribution of public largesse should be devoid of arbitrariness and discrimination. In *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, the Apex Court expressed the following:

The Government, is not and should not be as free as an individual in selecting the recipients of its largesse. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal.

The same point was made by this Court in *Erusian Equipment and Chemicals Ltd. v. State of West Bengal* where the question was whether blacklisting of a person without giving him an opportunity to be heard was bad? Ray, C.J., speaking on behalf of himself and his colleagues on the Bench pointed out that blacklisting of a person not only affects his reputation which is, in Poundian terms, an interest both of personality and substance, but also denies him equality in the matter of entering into contract with the Government and it cannot, therefore, be

supported without fair hearing. It was argued for the Government that no person has a right to enter into contractual relationship with the Government and the Government, like any other private individual, has the absolute right to enter into contract with any one it pleases. But the Court, speaking through the learned Chief Justice, responded that the Government is not like a private individual who can pick and choose the person with whom it will deal, but the Government is till a Government when it enters into contract or when it is administering largesse and it cannot, without adequate reason, exclude any person from dealing with it or take away largesse arbitrarily. The learned Chief Justice said that when the Government is trading with the public, the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions. The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure. This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

16. Mr. N.D. Chullai, learned Counsel for the respondent No. 4 has relied upon a decision of the Apex Court reported in Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, . In that case, Clause 1.4 of the NIT empowers the Board to grant contract by relaxing the qualifying criterion and the same clause also enables the owner to make his own assessment on capability and capacity to perform, should be circumstances warrant such an assessment in the overall interest of the owner. That apart, the price quoted by the petitioner before the Supreme Court was the lowest and as such, there was price advantage to the authority. It was also observed by the Apex Court that the writ petitioner did not fulfil the requisite criteria and as such, judicial relief, at the instance of a party, which did not fulfil the requisite criteria would be misplaced. The case cited by the respondent No. 4 shall be of no help to him inasmuch as there was Clause 1.4 in the NIT, as discussed above, whereas such clause is not available in the instant case either in the tender notice or in provisions of Regulation, 1970.

17. In view of the above discussions and decisions of the Apex Court cited above, this Court is of the considered view that the settlement of the Chibinang Hat with the respondent No. 4 for the year of 2009-2010 is outside the purview of tender notice and also contrary to the provisions of Regulation, 1970 and consequently, the impugned order dated 17.3.2009 (Annexure-6) is liable to be quashed as arbitrary and unsustainable in law and accordingly the same is quashed.

18. Considering the matter in its entirety, the official respondents are directed to consider settlement of the Chibinang Hat on the basis of tender process initiated pursuant to the tender notice dated 24.10.2008 keeping in view the observations and discussions made in the foregoing paragraphs of this judgment and till such decision is taken by the District Council Authority, as directed above, the petitioner shall continue to manage the Chibinang Hat in terms of the interim order dated 27.3.2009, which shall stand merged with this judgment.

In the result, the writ petition is allowed. No order as to costs.