(1998) 06 GAU CK 0038

In the Gauhati High Court

Case No : Civil Rule No''s. 972 and 2539 of 1998

Sontosh Kr. Guha and Others APPELLANT

Vs

State of Assam and Others RESPONDENT

Date of Decision : 17-06-1998

Acts Referred:
Constitution of India, 1950 — Article 14, 226

Citation : (1998) 2 GLT 440

Hon'ble Judges : V.D. Gyani, Acting C.J.;H.K.K. Singh, J

Bench : Division Bench

Advocate : A. Dasgupta, S. Chakraborty and P.G. Baruah, A.G, for the Appellant; N.N. Saikia, V. Hansaria and J. Chutia, for the Respondent

Final Decision : Dismissed

Judgement

V.D. Gyani, Actg. C.J.

1. In both the writ petitions, the Petitioners challenge the Respondents action of leasing out of Bongaigaon Thermal Power Station at Salakathi to a private foreign operator; M/s. Ogden Corporation, a public limited Company of New Jersy, USA. Except for the change of names of the Writ Petitioners both these petitions are substantially identical in nature. The Petitioner No. 1 in Civil Rule No. 972 of 1998 claims to be a social worker actively associated with different Trade Unions holding elected offices in Trade Union Organisations while Petitioner No. 2 is a teacher in M.E. School. He also claims to be associated with various works of development at Salakathi and President of Salakathi Development Committee which in his own showing was constituted by the people of that locality. On their own showing the Bongaigaon Thermal Power Station for short, ''BTPS'' ever since it was installed in the year 1976 in generating 240 MW has failed to generate power to his optimum capacity for various reasons.

Petitioners have based their petitions essentially on a news item as published in the ASEB House Magazine, ''Bijulee'', Annexure-3 which is reproduced below:

It has become possible to ensure a steady of electricity in the state by importing it from the eastern grid. Although low generation of electricity by the ASEB has emerged as a matter of concern now, the situation is expected to improve by the next July.

The Board is still in a frecasions financial state. An immediate solution to this financial creench is yet to be found. A three years implementation schedule on reformation and restructuring of the Board has already been envisaged in the meantime a scheme on management and financial management of the ASEB has been prepared and sent to the State Government for approval.

With a view to renovating the BTPS discussion has been initiated with an American based Company in the line of leasing out the plant to the Company. However, in doing so priority would be given on ensuring the interest of the existing employees of the plant. A proposal has been adopted by the Board to renovate Chandrapur, Namrup and Lacuwa power station with finance earmarked by die planning commission for the jobs as well as by the finance proposed to be procused from the power finance Corporation. The Power Finance Corporation has been agreed to sanction loan to die ASEB with a condition to implement the reforms in the power sector as recommended.

In the meantime request has been made to the State Government to convert a portion of the existing Government loan into Government equity in the ASEB and to readjust the interest payable by the Board to the Government with the subvention payable by the Govt. on account of tariff subsidy to the ASEB.

Further request has been made to the Government to ensure the payment of arrear energy bills of the various Government departments as well as the State undertakings along with the release of plan money to the ASEB.

I am confident that the present problem faced by the Board could be solved with our joint efforts.

2. They have also relied on other news items as published in the local press on 12.6.97 and 11.12.97. The reliefs claimed by the Writ Petitioners are that the letter of understanding and the Memorandum of Agreement be quashed and the Government of Assam and Assam State Electricity Board be restrained from transferring the BTPS by issuing a Writ of Prohibition. By order dated 2.3.98, a learned Single Judge of this Court directed maintaining of status quo as regards BTPS. The order is quoted below:

In the interim, it is directed that status quo with regard to the Bongaigaon Thermal Power Station shall be maintained.

3. The other connected petition is filed by an Association of Engineers has rightly pointed out by Mr. Hansaria, learned Counsel spearing for the Board that it is adverbatim the same as Civil Rule No. 972 of 1998 except for the change of the name of the Petitioners. By order dated 27.5.98 passed by a learned Single Judge of this Court, Rule was issued and it was further directed that this Civil

Rule 2539 of 1998 shall be heard along with Civil Rule No. 972 of 1998 and the Petitioners shall take steps for service of notice on Respondent No. 4 by registered post. The record does not show any steps having been taken by the Petitioner in this petition. In the meantime, the ASEB filed an application for vacating the status quo order dated 2.3.98 passed in Civil Rule No. 972 of 1998. This application has been registered as Misc. Case No. 543 of 1998, Considering the urgency and importance of the matter both these petitions were heard together. An elaborate order was passed on 29.5.98 which is self explanatory of the circumstances. Since, this order covers many of the submissions made by the learned Counsel appearing for the Petitioners in both the petitions it could not be out of place to reproduce the same.

It was yesterday that at the instance of Mr. v. Hansaria, learned Counsel appearing for die ASEB that this Misc. Case No. 543 of 1998 was directed to be listed along with the Civil Rule No. 972 of 1998. Although the prayer made in this Misc. Case was to vacate the order of status quo as passed on 2.3.98, considering the nature of relief and the amount of time likely to consume, it was suggested that let the petition itself be heard and disposed of without going into the interim relief Learned Counsel Mr. A. Dasgupta appearing for the Writ Petitioner submitted that Mr. B.K. Goswami who had recently undergone a bypass surgery was appeared in this petition, he prayed for a short time, say for 2/3 days. But that will not enable Mr. Goswami to appear before the Court, and in that event the interim prayer for vacating the stay order was again insisted for taking up for consideration. However, Mr. Dasgupta agreed for final argument. Accordingly, the writ petition along with Misc. case were taken up for hearing. During the course of his submission, learned Counsel appearing for the Writ Petitioner also referred to yet another petition registered as Civil Rule No. 2539 of 1998 filed at the instance of Association of Engineers wherefrom he desires to refer some passage particularly the demand for information. Mr. Hansaria submitted that this writ petition is practically a carbon copy of Civil Rule No. 972 of 1998 and no interim order was passed in Civil Rule No. 2539 of 1998. At this stage, learned Advocate General Mr. P.G. Baruah also intervened and submitted that the Respondent State of Assam is facing a great hardship in view of the interim order passed on 2.3.98. If Civil Rule No. 972/98 is heard on merit, there is no reason why the other connected petition Civil Rule No. 2593 of 1998 should not be heard and disposed of.

We have heard learned Counsel for the Writ Petitioner Mr. A. Dasgupta. It must be said to his credit at the very out-set that he has absolutely no personal interest or vested interest, he further insisted for production of the agreement which the State Electricity Board has entered into with M/s. Ogden Corporation of New Jersy, USA. Mr. Hansaria appearing for the Board and learned Advocate General made it clear that there is no such agreement as yet arrived at, it is still in the process of negotiations and they have no hesitation in placing papers for Court''s inspection. Learned Counsel appearing for the Writ Petitioner also expressed its satisfaction if the documents forming part of correspondences leading to negotiations is inspected by the Court with a view to see that no State largesse is conferred to the detriment of the State interest, he went to the extent of submitting that the purpose of filing the petition would be served if these documents are gone through by the Court.

Considering the averments and the submissions and also technical nature of subject it would necessarily take some more time to pass a reasoned order. The Respondents Board is directed to keep the record ready and available for Court''s inspection at the end of the day today.

4. Mr. Hansaria, learned Counsel spearing for the Respondent Board submitted that the State Electricity Board has six power stations in the State of Assam and BTPS is the largest plant. It was commissioned in 1981 and 1986 four generating units of 60 MW each. With the technological advancement in the field of power generation eversince the year 1970 and 1980s when the plant at BTPS were installed, it was but natural that these plants needed regular maintenance up-keep and repairs which for paucity of funds could not be carried out, with the result that the life of the plant has been considerably reduced. It is around 20% over the last five years. Explaining the present position of the four units at BTPS, learned Counsel has taken us through the efforts made by the Board for rehabilitation and renovation of BTPS. Various expert bodies like NTPC, Calcutta Electric Supply Corporation, Tata Consultancy Service, RPG-RR (a firm from Poland) were consulted and the Asian Development Bank even conducted an expert study on BTPS but failed to yield any positive result. There were financial constrains during the entire 9th Five Year Plan. The Planning Commission having restricted the amount to be spent by the ASEB on renovation and modernisation of its power plants to Rs. 168 crores which could only carried out temporary basic work of renovation and modernisation of BTPS at an estimated expense of Rs. 60 crores. The Board also approached the Power Finance Corporation of India, a Government of India undertaking, for a loan of Rs. 60 crores so as to renovate and modernise the BTPS. The Corporation sought certain details which was supplied, but it agreed only to provide 70% of the cost inclusive of escalation and the balance 30% was to be borne by the Board/State Government. The Corporation was not agreeable to any commitment to make available Rs. 60 crores for temporary basic work of repair and renovation. During 1997-98 despite financial crisis the Board spent approximately Rs. 46 crores for fuel and operation and maintenance of BTPS as against this the revenue out of the total generation was only 28 crores. It was m the year 1991 the Government of India liberalised its policy of private participation in power sector so much so the Electricity Supply Act, 1948 was amended to enable the private parties to set up power generating companies. A scheme was formulated for encouraging private companies to participate in generation of power, such participation can be by competitive bid or by negotiation with a single party. This policy was given wide publicity by the Government of India and power companies all over the world were invited to set up power project in this country. In the result, multinational company viz. Ogden Energy Incorporation (OEI) came forward to

make investment in power sector in India. It is a reputed company which builds, owns and operates over 2000 MW of power generating facilities around the world with wide experience in design, construction and operation facilities. The OEI approached the Govt. of Assam for making investment in power sector. A letter of understanding was executed in the month of February, 1997. Preliminary studies followed and a technical survey was conducted by highly qualified experts from Power Plant Improvement Ltd. (PPIL), a joint venture between Siemens of India and Bharat Heavy Electricals Limited. It was only after that negotiation between the Govt. of Assam, ASEB and the OEI started for revitalising the BTPS on lease, rehabilitate, operate and transfer (LROT) basis according to which BTPS can be given on lease to OEI who will thereafter rehabilitate, operate and maintain the same for a fixed period and after expiry of the said period transfer the plant to the Board. The power generated during the lease would be purchased by the Board under power purchase agreement to be executed between the parties within the guidelines of the Govt. of India. The ASEB had obtained consultancy services from the Administrative Staff College of India and also invited Industrial Credit Investment Corporation of India Ltd. a premier financial institution of India for guidance in the negotiation process for best possible terms. The negotiations are on and it is yet to be finalised and the Board has come out with a plain statement that the original record would not be at the public interest to disclose the details of negotiation. However, the original record has been produced for Court''s inspection.

5. Now, it is in the above background of fact essentially based on technological and financial experts that these petitions are to be appreciated. Going through these petitions, it is clear that the only contention raised by the Writ Petitioners is that there has been no open tender for renovation and modernisation of BTPS. Both the learned Advocate General appearing for the State of Assam and Mr. Hansaria, learned Counsel appearing for the Board submitted that invitation of tender and competitive bid is not an inflexible rule in the situational fact as noted above. They urged that a great deal of field work before negotiation and finalisation of terms of agreement is required to be undertaken by the generating Company and unless some kind of memorandum of understanding is executed nobody would like to come forward to spent huge sum of money of its own on a mere technical study and survey. In several other States agreement have infact been executed through negotiation and without open tender. It was also urged that the Petitioners have no locus standi to file the present writ petitions and there is ho public interest in stalling the project which is yet to be finalised and by stalling the project the Writ Petitioners are not serving any public cause or public interest. In fact, it has been adversely affecting the public interest by causing hindrance to the availability of power.

6. The only question that raised in these writ petitions is that, there had been no open tender for renovation and modernisation of BTPS. Now inviting tenders and competitive bidding is not a rule of inflexible rigid application in such matters. Negotiations has now been recognised as a reasonable method. In State of M.P.

and Others Vs. Nandlal Jaiswal and Others, the Supreme Court relying on its earlier judgment Kasturilal v. State of J and K AIR 1980 SC 1392 has categorically held that the State Govt. is entitled to negotiate with those who have come up with an offer to set up an industry. Of course, it was a case of setting up distilleries but the underline principle is the same. The setting up of factories for manufacturing resine, turpentine and other derivative was involved. The Supreme Court has clearly pointed out:

We may also point out that when the State Government is granting licence for putting up a new industry, it is not at all necessary that it should advertise and invite offers for putting up such industry. The State Government is entitled to negotiate with those who have come up with an offer to set up such industry....

It would thus be seen that the principle recognising the entitlement of the State Govt. to negotiate with those who come up with an offer has been unequivocally accepted by the Supreme Court.

7. Going through the petition and the record as placed by the Board, it cannot be said that there was any suddenness of decision or that it suffers from impulsive caprice or arbitrariness in reaching the decision. The earlier decision taken by the Respondent State Govt. was an informed one. The decision preceded consultation with reputed consultancy services in the field as already noted above. This decision is the result of Govt. of India Liberalised Policy of 1991 permitting private participation in power section which even led to the amendment of Electricity Supply Act, 1948. Of them technical surveys were conducted by OEI, comprising highly expert person from Power Plant Improvement Ltd. (PPIL). There is no material placed on record by the Writ Petitioner to warrant an inference of violation of Article 14. What the Writ Petitioner has relied upon is nothing but a press-clippings which in the eye of law is no better than hearsay (See Samant N. Balkrishna and Another Vs. V. George Fernandez and Others, and Laxmi Raj Shetty and Another Vs. State of Tamil Nadu, As against this press clippings, there is specific averments that expert bodies like National Thermal Power Corporation (NTPC), Calcutta Electric Supply Corporation (CESC), Tata Consultancy Services RPG-RR, a Police firm, were consulted for rehabilitation and modernisation of BTPS. However, none came forward to invest and rehabilitate the plant. Now these circumstances as clearly reflected from the record cannot be overlooked or ignored.

8. The distribution of State largesse and State agreement with selected industrial unit as a protective measure of assuring supply of sal seed at concessional rate came for consideration before .the Supreme Court in one of its very recent judgment as reported in M.P. Oil Extraction and Another Vs. State of M.P. and Others, and the Supreme Court rejecting the contention about the invalidity of a renewal clause held as follows:

Although to ensure fair play and transparency in State action, distribution of largesse by inviting open tenders or by public auction is desirable, it cannot be held that in no case distribution of such largesse by negotiation is permissible. In the instant case as a policy decision protective measure by entering into ''agreements with selected industrial units for assured supply of sal seeds at concessional rate has been taken by the Government. The rate of royalty has also been fixed on some accepted principle of pricing formula as will be indicated hereafter. Hence, distribution or allotment of sal seeds at the determined royalty to the Respondents and other units covered by the agreements cannot be assailed. It is to be appreciated that in this case, distribution by public auction or by open tender may not achieve the purpose of the policy of protective measure by way of supply of sal seeds at concessional rate of royalty to the industrial units covered by the agreements on being selected on valid and objective considerations.

9. The other question which necessarily remains to be considered is the scope of judicial review in such matters. The Writ Petitioners, except for harping on the State interests being sacrificed have not placed such material as to invoke this Court''s extra-ordinary power under Article 226 of the Constitution and the power of judicial review; In fact, the Respondent-Board has challenged their local standi but we are not going into this question.

10. We would however like to take up the question of public interest as professed by the Writ Petitioner. The first writ petition, Civil Rule No. 972/98 was filed by two individuals as already noted above, one of them is a social worker, while the other is a school teacher. The subsequent writ petition being Civil Rule No. 2539/98 has been brought by Association of Engineers. Assam State Electricity Board, a society registered under the Registration of Societies Act. On their own showing the object of this Association is to cater different activities for welfare of its members and well being of the Assam State Electricity Board. There are about 916 members of this Association but all of them claim to be Bachelor of Engineering or Associate Members of the Institute of Engineers. One would have expected something better than the earlier one in the new petition brought by the Engineers Association but it is nothing but a carbon copy version of the earlier petition. Now it is a matter of common knowledge that there is acute shortage of power in the State of Assam and the Electricity Board is suffering from financial crunch and crisis. The financial position of the Board is not such as to enable it .to undertake the renovation and modernisation of BTPS. The Supreme Court in Hasmattullah Vs. State of Madhya Pradesh and others, has categorically held that mere expression of views of the other unsupported by relevant data scientifically collected from reliable sources cannot form the basis of decision of the Court. The Writ Court should be very careful in selecting the material which it should rely. In the instant case, it is not any work of any author, what has been placed by the Writ Petitioners are some news items and comments, without collecting relevant data from reliable sources. Now public interest and public justice can coalesce in certain situation. The renovation and modernisation of BTPS is the need of the hour, how best can it be achieved is the task of the Board and there is no reliable data and material placed on record to

interfere with the decision arrived at by the Respondent State Government and Electricity Board.

11. In view of the foregoing discussion, both these petitions fail, they are accordingly dismissed. For a while, it was thought that costs should be imposed but we are not imposing any costs in view of the fair stand taken by Mr. Dasgupta, learned Counsel appearing for the Writ Petitioners. The petitions dismissed, needless to add, the interim order directing maintaining status quo automatically stands set aside.

