

Amar Hazarka Vs State of Assam and Others

Court: Gauhati High Court

Date of Decision: June 25, 1998

Acts Referred: Constitution of India, 1950 " Article 14

Control and Management of Ferries Rules, 1968 " Rule 14, 15, 19, 34, 4(1)

Fisheries Rules, 1953 " Rule 12, 190A

Northern India Ferries Act, 1878 " Section 12, 3, 8

Citation: (1999) 1 GLT 183

Hon'ble Judges: J.N. Sharma, J

Bench: Single Bench

Advocate: N. Dutta, S. Kakati and A.J. Das, for the Appellant; H.N. Sarma, D.K. Bhattacharya, B.M. Choudhury and B.C. Sarma, for the Respondent

Judgement

J.N. Sarma, J.

This writ application has been filed with a prayer to dispose of the application for extension of lease of the Petitioner

regarding Neamatighat Kamalabari Ferry Service. Thereafter, an application for amendment of the writ application was filed to issue a writ to

quash the settlement order issued by the authority on 1.4.98 settling the ferry with Respondent No. 4.

2. I have heard Sri N. Dutta, Learned Advocate for the Petitioner, Sri HN Sarma, Learned Govt. Advocate for the Respondents No. 1,2 and 3

and Sri D K Bhattacharjee, Learned Advocate for the Respondent No. 4. The settlement with Respondent No. 4 was made by order dated

1.4.98 and that order is quoted below:

Sub : Director Settlement of Neamati-Kamalabari Ferry Service for the year 1988-99 (commencing from 02.04.98 to 31.03.99)

Ref: Your letter No. DWT. 1/96/345, dated 31.3.98

Sir,

I am directed to state that as per provision of Rule 4(2) of Control and Management of Ferry Rules, 1968 as amended, the Govt. is pleased to

settle the Neamati-Kamalabari ferry service directly with Sri Suren Ch. Das at the highest bid amount of Rs. 11,11,111/-(Rupees Eleven lakhs

Eleven thousand one hundred eleven) only including staff salary subject to the condition that in case of subsequent hike in rates/tolls etc. by the

Government proportionate increase of the bid amount (based on the proportionate increase in the estimated amount) will have to be accepted by

the lease on usual forms and conditions and also subject to the fulfilment of all requirements and as mentioned below before taking over the ferry

service by the lease for a period of one year with effect from 02.04.98 to 31.3.99.

(i) He will have to bear the staff salary as required. If the landed property does not cover the bid money at which the ferry is settled, the difference

should be covered either by cash or by equal amount of collateral property or security for which mortgage deed should also be executed.

The charge of ferry is to be given to the proposed lease commencing from 02.04.1998 morning without fail after observing all formalities as

required under the rules and realising the 1st kist money and necessary security deposit. The lease agreement may be executed accordingly before

handing over charge of the ferry service.

You are requested to make all the relevant rules/conditions of the lease etc. known to the lessee concerned so that all the rules/conditions could be

strictly followed.

3. The settlement of ferry is governed by Section 8 of the Northern India Ferries Act, 1878. The relevant portion is quoted below:

The tolls of any public ferry may, from time to time, be let by public auction for a term not exceeding five years with the approval of the

Commissioner or by public auction, or otherwise than by public auction, for any term with the previous sanction of the State Government.

4. A set of Rules in the name and style of Control and Management of Ferries Rules, 1968 was framed by the State of Assam, Rule 4(1) and (2)

are quoted below:

4 (1) All ferries which are let by public auction or by calling for tenders shall be managed by the lessee subject to these rules and the conditions

entered in the lease granted for each ferry. Ferry which could not be settled either by public auction or by calling for tenders shall be managed by

the executive engineer or Sub-divisional officer, as the case may be, with the approval of the Government.

(2) The Secretary to the Government of Assam in the Transport Department may settle any ferry directly or by negotiation, if so required u/s 3 of

the Northern India Ferries Act for any term after taking the technical and administrative opinion of the Director, Inland Water Transport and Chief

Ship Surveyor, Assam, if necessary.

5. Rule 14, 15, 19 and 34 of the Rule are quoted below:

Rule 14

All ferries shall be let by the officer-in-charge of the ferry either by public auction or if the Government so direct by calling for tenders.

Rule 15

Letting of ferries by public auction or by calling tenders." The period for which the ferry shall be leased, shall be as fixed" by the Director subject

to the approval of the State Government in the Transport Department.

Rule 19

The sale by auction/tender shall generally be to the highest bidder/tenderer. The officer conducting the sale/calling for tender may however, refuse

to accept the bid/tender if any of the requirements of the bid/tender is not satisfied or, for sufficient reasons to be recorded in writing under his own

hand he may refuse to accept the offer of the highest bidder or tenderer of any bid/tender. The officer shall in accepting the bid/tender consider the

following factors amongst others:

(i) whether the bid/tender amount is sufficient to earn approximately the revenue which could be normally expected for the ferry;

(ii) whether the bidder/tender is indigenous of the State or permanent resident of the State or outsider;

(iii) whether the tenderer/bidder suffers from moral turpitude or has been convicted by Court/black listed or a defaulter of land revenue; (iv)

whether the tenderer/bidder possesses periodic Patta land of value not less than the bid/tender money in his own name within the District/sub-

division ; (v) whether the tenderer/bidder has sufficient experience to run the ferry efficiently.

Rule 34:

The lessee shall have no claim for compensation of remission or refund of any portion of kist money on account of closure of traffic for a

continuous period not exceeding, 15 days due to any flood or any other reasons.

6. The contentions of Sri Dutta are as follows :(i) That no direct settlement can be made directly or by negotiation without first making an attempt

to settle it by public auction or by calling for tender. Further, there must be justification for making settlement directly or by negotiation as the Rule

itself provides ""if so required

(ii) Even if there is direct settlement or settlement by negotiation, it must adhere to the principle of fairness and transparency, it should not suffer

from the vice of nepotism, favouritism nor it should appear to be high handed, capricious and arbitrary action.

7. Sri D K Bhattacharjee, Learned Advocate for the Respondent No. 4 and Sri H N Sarma, Learned Govt. Advocate join issue on point No. 1

and submits that there is no necessity first to go for public auction or tenderer to exercise the power by direct settlement. If that contention is

accepted the whole power of direct settlement shall be nugatory and that will mean loss of revenue to the State in the process for making

settlement directly or by negotiation.

8. Regarding second point, it is fairly submitted by them that no doubt the direct settlement made by the authority must satisfy the test of fairness

and transparency but at the same time, the authority must have the power to play in the joint and each and every action of the authority does not

call for interference at the hand of the court.

9. Let us first take up the question whether the authority has the power to make direct settlement. This matter regarding the power of the authority

to make direct settlement even before the Rules were formulated giving the power of direct settlement came up for consideration before this Court in

Purna Kanta Saikia Vs. State of Assam and Others, and in paragraph 10 of the judgment, it was pointed out as follows:

We have, therefore, to examine whether any power is left with the Government for the purpose of direct settlement purporting to act u/s 8 of

Northern India Ferries Act on any occasion they so desire. Reading the Act as a whole the scheme seems to be that the State Government

exercise only a power of approval or superintendence under certain cases either before or after the settlement and the Government is not

competent to exercise the power of direct settlement unless it is so empowered by any of the rules framed u/s 12 of the Act which provides for

framing of rules subject to the Government control, generally to carry out the purpose of the Act and for the purpose enumerated therein.

The settlement directly by the government as a special case, is nowhere provided for under the rules so far framed. But the only thing provided is

that the provincial Government can sanction certain other procedure previous to the settlement, when it does not come within the first part of

Section 8 of the Northern India Ferries Act, In the present case of Government by the selfsame notification asked for tenders without first laying

down what would be the procedure, namely, as to who will make the settlement or enforce the conditions under the lease. Mr. Chaudhury's

contention is that the Government cannot sanction its own action by way of self protection nor can they do it as an administrative measure.

10. But as indicated above, already Rules have been framed and in the judgment (supra) in paragraph 12 it was pointed out as follows:

Wording in Section 8 of the Northern India ferries Act are more in keeping with the wordings in Rule 190A of the Fishery Rules as quoted above

and the Government's power must be interpreted to be confined to the limits of laying down the mode by which the settlement will be made, unless

some provision is made authorising the Government to make direct settlement as in Rule 12 of the Fishery Rules.

11. As now the Rules have been framed, the Govt. will have the power to make the direct settlement. Another case on the interpretation of Section

8 is Baij Nath Prasad Vs. The State of U.P. and Others, There the question arose whether the ferry can be settled by private negotiation and

relying on the words in Section 8 or otherwise than by public auction the Allahabad High Court accepted the position that a ferry can be settled

even by private negotiation and the decision of the court is as follows:

(a) u/s 8 of the Northern India Ferries Act, where the term does not exceed five years, the tolls may be let out by public auction with the approval

of the Commissioner. If the State Government accords its previous sanction the tolls may be let out for any term either by public auction or

otherwise than by public auction. Where the procedure of a public auction is not accepted, any other procedure is open and there is no indication

that this procedure must be of the same nature as that of a public auction.

(b) Therefore, where the State Government had accorded its sanction, the authority could grant a lease even by private negotiation in favour of an

individual and he would not be bound to adopt a procedure which throws the letting of tolls open to the members of the public.

12. It is not necessary in this case to consider that aspect of the matter anymore in view of the Rules.

13. The need/necessity/requirement to make direct settlement may arise in various situations. The authority in a particular case can have option or

adopt a method of tender system which may provide adequate revenue as accepted or estimated in terms of earnings/revenue of the past years. In

such a situation also the authority instead of going to settle the ferry by adopting the method of tender of public auction may enter into a private

negotiation or go for direct settlement to protect its revenue. There may be other situations where the authority may find that because of the

circumstances it is not possible to go for public tender or auction and in such a situation also the authority may go for direct settlement but in

making the direct settlement, the authority must adopt a fair and reasonable procedure. It is expected that the position of the authority to make the

direct settlement shall be notified by it in the notice board of the Executive Engineer to give bare minimum publicity to persons who may be

interested to get settlement of the ferry. As quoted above in the Rule it is provided that in making settlement experience of persons shall be taken

into consideration. The Authority in a particular case may write to those experienced persons to come up with a necessary application for direct

settlement. The procedures to be adopted may vary from situation to situation. All the settlement must be decided on the anvil of fairness and justice.

It must not have to the colour of being arbitrary/carpicious and/or whimsical. If it is an exercise of the power tainted with the Vice indicated above

by way of illustration, such settlement cannot stand in the acrutiny of the court through such power of the court may be only through microscopic

hole.

14. Regarding interpretation/construction of Rule 4(2) quoted above one should be conscious of the fact that it is an edict of legislature, and one

should seek the intention of its maker. An interpretation should not be given which will make the rule otiose and/or nugatory. The court cannot

adopt an approach to make midnight the noon, there of course may be a difficult situation say to determine the precise moment when twilight

becomes dark. Basically all law/rules are actuated with some policy to curb some public evil or to effectuate some public benefit, that must be kept

in mind in construction/interpreting a Rule. A destructive analysis of a law/rule is not to be given by the court, basically courts are finishers, refiners

and polishers". A court should be imbued with creativity, and realism in interpreting (See D.R. Venkatachalam and Others Vs. Dy. Transport

Commissioner and Others,). By adopting that approach the submission of Sri Dutta that direct settlement can be adopted as a last resort on failure

of the other modes cannot be accepted. Of course to play each game certain rules are framed and the game must be played by adhering to the

rules. Even if no rules are farmed their basic concept of justice must be adhered to. The executive does not have the power to do

anything/everything according to its pleasure .The settlement of a ferry has to serve the public and at the same time must give due protection to

public revenue, coupled with the duty/obligation to maintain fairness/tansparency and reasonableness. The record must reveal that at the time of

making direct settlement the authority was conscious of all these and made necessary approach to the matter by adhering to all these requirements.

15. The next question is that whether before going for direct settlement, an attempt should be made to settle the ferry by public auction/tender

and/or private negotiation. No doubt direct settlement cannot be the usual mode to settle a fairy but at the same time when there is the element of

need of urgency/emergency, the authority always may go for such a direct settlement and in such a situation it cannot be urged that the authority

should first go for the modes as indicated above and failing which only it can go for direct settlement. There must be justification and/or reason to

go for direct settlement and when that justification and/or valid reasons are questioned, the authority by producing the necessary record must justify

the same. The authority must also justify that by going for direct settlement, the authority has not suffered any loss of revenue rather the revenue

due to it is protected. In this particular case earlier, the ferry was settled with the Petitioner and this year also the authority was ready to settle it

with the Petitioner at a price of Rs. 8.50 lacs but the Petitioner did not accept that offer and in the meantime, there was delay and as such the

authority was compelled to settle with the Respondent No. 4 at an amount of Rs. 11, 11,111/-. The order which has been quoted will show that

the Govt. took adequate measure to protect its revenue. Further, it appears from the record produced by the Learned Govt. Advocate as follows:

(i) That the bid which was offered by the present Petitioner was too low.

(ii) At the appraisal for calling tender to lease out the ferry for the year 1998-99 is yet to be received from the Govt., and the time is very short to

call tender so we should make alternative arrangement to lease out the ferry. It is impossible to run all the ferries departmentally due to non supply

of POL by the Depot at Guwahati. As the past experience, the Govt. is not in a position to provide sufficient fund for purchasing POL due to

stringent financial position.

(iii) In view of the above recommendation for direct settlement, as per Rule 4(2) may be at the last bid value of Rs. 8.50 lacs for 1998-99.

16. The authority after this first made the offer to the Petitioner for settlement of the ferry at Rs 8.50 lacs as he did not accept it, thereafter number

of applications were filed for direct settlement i.e. one by Bani Hazarika, another by Saben Hazarika and another by Respondent No. 4 and the

bid offered by this Respondent No. 4 was the highest bid and was accepted by the authority. That POL was not available to run the ferry, that will

be evident from the record. So, there was difficulty in running the ferry departmentally.

17. In *Shri Sachidanand Pandey and Another Vs. The State of West Bengal and Others*, the Supreme Court was considering the disposal of State

owned or public owned property. The Supreme Court pointed out that public auction or inviting tender is the normal rule but not invariable one.

Public interest is paramount consideration That was a case of allotment of public land for constructing a five star hotel and the deal was finalised by

the authority by negotiations with leading Hotelier company instead of inviting tenders or holding auction. The Supreme Court found that to be a

valid one and in paragraphs 39 and 40 it is pointed out inter alia as follows:

39 "Public interest is the paramount consideration one of the methods of securing the public interest, when it is considered necessary to dispose of

a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be

situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and

should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an

appearance of bias, jobbery or nepotism.

40. "Applying these tests, we find it is impossible to hold that the Government of West Bengal did not act with probity in not inviting tenders or in

not holding a public auction but negotiating straightway at arm's length with the Taj Group of Hotels.

18. In the concurring judgment Khalid, J. in paragraph 57 pointed out as follows:

A deal like this cannot be concluded by public auction. Here, we do not have a case again of sale of a Government property. Therefore, public

auction has necessarily to be ruled out. Only Taj Group of Hotels came forward with an offer to start the hotel the lease was the culmination after a

long elaborate and open procedure with nothing to hide which therefore cannot justifiably be subject to adverse criticism.

19. In *New Horizons Limited and Another Vs. Union of India (UOI) and Others*, . In paragraph 17 the Supreme Court pointed out as follows:

At the outset, we may indicate that in the matter of entering into a contract, the State does not stand on the same footing as a private person who is

free to enter into a contract with any person he likes. The state, in exercise of its various functions, is governed by the mandate of Article 14 of the

Constitution which excludes arbitrariness in State action and requires the State to act fairly and reasonably. The action of the State in the matter of

award of a contract has to satisfy this criterion. Moreover a contract would either involve expenditure from the State exchequer or augmentation of

public revenue and consequently the discretion in the matter of selection of the person for award of the contract has to be exercised keeping in

view the public interest involved in such selection. The decisions of this Court, therefore, insist that while 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 the standards or norms which are

not arbitrary, irrational or irrelevant. It is, however, recognised that certain measure of "free play in the joints" is necessary for an administrative

body functioning in an administrative sphere (See *Ramana Dayaram Shetty v. International Airport Authority of India* (SCR P. 1034 : SCC pp.

505 -06 para 12) *Kasturi Lal Lakshmi Reddy v. State of J & K* (SCR p 1355; SCC pp 1112, para 11) *Fasih Chaudhary v. Director General*

Doordarshan (SCR p 286; SCC p. 92) *Sterling Computers Ltd. v. M & N. Publications Ltd.* *Union of India v. Hindustan Development*

Corporation (at p. 513).

20. In paragraph 18 (Supra) the case of Tata Cellular Vs. Union of India, has been quoted and principle No. 5 of that case is quoted below

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body

functioning in an administrative sphere or quasi administrative sphere. However, the decision must not only be tested by the application of

Wednesbury principle of reasonableness (including its other facets pointed out above) but must be free from arbitrariness not affected by bias or

actuated by mala fides.

21. It is on the background of this law that the action of the authority in the present case must be judged, as indicated above, in the present case,

there is absolutely no arbitrariness. The authority adhered to the rules, took appropriate action to protect its revenue, the deal was fair and

accordingly, I do not find any illegality and/or infirmity in the action of the authority.

22. Accordingly, this writ application is dismissed stay order passed earlier shall stand vacated, as because of the stay order, the Respondent No.

4 has been deprived of a particular period, that period either may be added to the lease of Respondent No. 4 or the authority may do the needful

to compensate him for the loss by remission of money for the period in as much as the Respondent No. 4 has suffered because of circumstances

beyond his control.

23. I leave the parties to bear their own costs.