

(1998) 03 GAU CK 0030

Gauhati High Court

Case No: Writ Appeal No. 387 of 1996

Majorati Minsamabai
Samity Ltd.

APPELLANT

Vs

Sukhraj Minsamabai
Samity Ltd. and Others

RESPONDENT

Date of Decision: March 11, 1998

Acts Referred:

- Constitution of India, 1950 - Article 226
- Fisheries Rules, 1953 - Rule 12
- Industries (Development and Regulation) Act, 1951 - Section 11, 18A, 18A(1), 18AA(1)

Citation: (1998) 1 GLT 405

Hon'ble Judges: V.D. Gyani, J; P.C. Phukan, J

Bench: Division Bench

Advocate: K.N. Choudhury, P. Barman and A.K. Sarma, for the Appellant; S.A. Laskar, J. Mollah and J. Ahmed, for the Respondent

Judgement

V.D. Gyani, J.

This Writ Appeal is directed against the order dated 19.7.96 as passed by a learned Single Judge of this Court in Civil Rule No. 1178 of 1995 thereby setting aside the order dated 12.1.1995 filed as Annexure-H to the writ petition and as Annexure-A to this Appeal. It was this order which was the subject matter of challenge before the learned Single Judge and as has been rightly noted by the learned Single Judge in the opening sentence of his judgment "the only question involved in this writ petition is as to whether the Petitioner received a fair consideration of his case before the administrative authority in the matter of distribution of State largesse."

2. Since the whole argument advanced before us veers round this order dated 12.1.95, Annexure-H and submissions based on microscopic view of the minutest factual details have been made. It would not be out of place to reproduce the order itself not only as a

ready reference, but it would also facilitate better appreciation of facts:

No. FISH. 104/84/211 dated Dispur, the 12th Jan"95.

ORDERS BY THE GOVERNOR

Matters relating to settlement of No. 49/51 - Patuakata/Chalakata/Bhaluakata/Morsonai Group Fishery.

Read : 1) The Deputy Commissioner, Morigaon"s report No. MRF. 15/89/82 dated 7.6.94 in respect of M/s. No. 165/166/167/168 Purana Sonai/Chola/Garanga/Sukraj Min Samabai Samittees Ltd.

2) The Deputy Commissioner Morigaon"s report No. MRF. 15/89/119, dtd. 20.12.94 in respect of M/s. Majorati Min Samabai Samittee Ltd.

Also: All other relevant documents/records pertaining to the settlement of No. 49/51 -Patuakata/Chalkata/Bhaluakata/Morsonai Group Fishery.

ORDER

3. Perused the records and reports it is found that there are three contenders seeking for settlement of fishery in question. The first contender is M/s. No. 165/166/167/168 Purana Sonai/Chola/Garanga/Sukraj Min Samabai Samittee Ltd., the second one is M/s. No. 122-Garalu Min Samabai Samittee Ltd. and third contender is M/s. Majorati Min Samabai Samittee Ltd. The second one is the sitting lessee. From the record it appears that the sitting lessee has sold out the fishery to some others which is supported by the report of the Deputy Commissioner, Morigaon. There is also a Court order available in the records which also confirm the subletting of the Fishery Rules and disqualify the lessee from getting the settlement of the fishery.

4. In view of the above, the prayer of the sitting lessee for re-settlement of the fishery is rejected.

5. The another contender is namely M/s. No. 165/1667167/168 Purana Sonai/Chola/Garanga/sukraj Min Samabai Samittee Ltd. Against mis society documents are available on the record that this Society had made an agreement although not registered with non-schedule caste people that they will sub-let the fishery in case they get the settlement of the fishery. From it, it is very clear that this Society is alsamentally prepared to sub-let to some unauthorised persons which will deprive the benefit of the actual schedule caste people. Subsequently, it appears that they have put up an application that the so-called agreement has been withdrawn and they have been informed the Government. This is not enough to make the Govt. believe that they will not do the mischief of sub-letting in case they get the settlement of the fishery in question. On the other hand, it proves that this Society has preplanned to sub-let the fishery to others

as in done by the sitting lessee during their tenure.

6. In view of the above circumstances the prayer of the Society is also cannot be considered for settlement of the fishery.

7. The third contender Society is M/s. Majorati Min Samabai Samittee Ltd., it appears from the record that this Society is not the sitting lessee nor has any other fishery under them at present. It composed with 100% actual fishermen as per rule. It is within the area of operation and financial position is sound. The Committee has been constituted properly. As such this Society has fulfilled all conditions to get settlement of this Fishery.

8. In view of the above and in exercise of the powers conferred by proviso to Rule 12 of the rules for settlement of fisheries as amended vide notification No. VFF.

10/76/Pt.II-A/12 dtd. 5.6.76, the Governor of Assam is pleased to settle the No.

49/51-Patuakata/Morsonai/Bhaluakata/Salkata Group Fishery of Morigaon District with M/s. Majorati Min Samabai Samittee Ltd. on the enhanced annual revenue of the rate of 10%, 15%, 20%, 25%, 30% on the existing revenue of Rs. 32, 143/- for a period of 5 (five) years accordingly as shown below with immediate effect, subject to observance of usual terms and conditions laid down in the rules for settlement of fisheries:

1) First year - Rs. 35,357/- (Rupees thirty five thousand three hundred fifty seven)

2) Second year - Rs. 40,660/- (Rupees forty thousand six hundred sixty)

3) Third year - Rs. 48,792/- (Rupees forty eight thousand seven hundred ninety two)

4) Fourth year - Rs. 60,990/- (Rupees sixty thousand nine hundred ninety)

5) Fifth year - Rs. 79,287/- (Rupees seventy nine thousand two hundred eighty seven).

9. The society is further directed to stock fish seed in the fishery during fishing season as per guidelines of the Government failing which the settlement order shall be cancelled.

10. It would be seen from the above order that the Fishery Department, Government of Assam had decided to lease out and settle a group of fishery known as Patuakata/Chalkata/Bhaluakata/Morsonai Group fishery, there were three contenders, having gone through the procedural requirements in obtaining reports, the authority on the basis of material placed before it found the Appellant (Respondent No. 5) in the writ petition as the most suitable and settled the fishery in question with the Appellant vide impugned order dated 12.1.95. It was this order which was challenged by filing a writ petition in Civil Rule No. 1178/95 on 21.3.95 attacking the above order dated 12.1.95, inter alia, on the ground that it cast a stigma, not only against the Writ Petitioner, but also the society as well who were not afforded any opportunity of hearing before casting such stigma. As has been rightly noted by the learned Single Judge, that the claim of the writ Petitioner-Respondent Society for settlement of fishery, was rejected by the settling

authority on the following grounds:

- (i) That the society made unregistered agreement with non-scheduled caste people;
- (ii) That they will sub-let the fishery in case they get the settlement of the fishery and documents to this effect are available in record.

The other contentions as advanced were that (i) Writ Petitioner society was sitting idle over since 1987, 1988 and its members had virtually been dragged to starvation ; (ii) the writ Petitioner Society"s claim for settlement of fishery was duly endorsed by report dated 4.6.94 as submitted by the Deputy Commissioner, Morigaon and also recommended by local MLA.

11. Incidentally a reference has also been made to another Society, namely, No. 122-Garalu Min S.S. Ltd. with whom the fishery in question was earlier settled for three years vide order dated 26.2.92, but again as has been rightly noted by the learned Single Judge that he has deliberately refrained from considering the claim of Garola Min S.S. Ltd. since it had not approached before the Court with any grievance and in this appeal as well we are primarily concerned with the rival claims of the Appellant and the Respondent No. 1.

12. It was the writ Petitioner Respondent who came out with allegations, against the Garalu Min Samabai Samittee (with whom the fishery in question was settled for a period of three years) vide order dated 26.2.92 and was a sitting lessee, had during the period of settlement, subleased the fishery to non-scheduled non-fisherman community, thereby incurring a serious disqualification (see para 5 of the petition) as in fact a major part of the writ petition is right upto paragraph 14 is devoted to narratim of frantic efforts made by the Petitioner to see to it that the lease granted to Garalu Min Samabai Samittee was cancelled on the ground of sub-lease.

13. The same disqualification was incurred by the writ Petitioner society, who even before a settlement order could be passed in its favour, had already entered into an agreement with non-scheduled caste people to sub-lease the fishery in the event and in anticipation of the fishery in question being leased out to them (the Petitioner society) a sort of "spes accrescendi" or "spes successions".

14. The order dated 12.1.95 as quoted has elaborately dealt with this aspect of the matter. The settling authority has noted it as a fact that "documents are available on the record that this Society had made agreement although not registered with non-schedule caste people that "they will sub-let the fishery in case they get the settlement of the fishery". The settling authority has further noted "subsequently they have put up an application that the so called agreement has been withdrawn and they have informed the Government."

15. The learned Single Judge, finding fault with the approach and line of reasoning of the settling authority has assigned the following reasons for interfering with the impugned settlement order dated 12.1.95.

i) The order does not disclose the date of agreement;

ii) the names of the non-scheduled caste people;

iii) the agreement was withdrawn by the Society by making an application.

iv) Photo copy of the agreement as submitted by the Secretary of the Petitioner society did not disclose its date and the period for which it was to be sub-leased.

v) The agreement was not registered, therefore, had no legal status and was subsequently cancelled.

16. On the above noted points the settling authority having noted the fact that the agreement was withdrawn was of the view "...that the so called agreement has been withdrawn.... This is not enough to make the Government believe that they will not do the mischief of sub-letting in case they get the settlement of the fishery in question. The other hand it proved that the society was pre-planned to sub-let the fishery to others as is done by the sitting lessee during their tenure."

17. What was unreasonable about it ? Was not the settling authority justified in entertaining such an apprehension, on the basis of material available on record ? How can it be said that the authority acted in an unreasonable manner ? Judicial Review, howsoever liberally interpreted and applied, to what extent the powers of this Court under Article 226 can be exercised ? Can this Court substitute its own judgment in the matter; for that of the settling authority ? The answer has to be an emphatic "No". Even the learned Single Judge has also observed that if such an eventuality of subletting really takes place the authority is competent to cancel the lease. Even the learned Single Judge also appears to be convinced with the fact that the writ Petitioner-Respondent had entered into an agreement to sub-let the fishery in the event it was granted to the Society. But the learned Judge has taken the view that in such an eventuality of sub-letting by the writ Petitioner Settling Authority is competent to cancel the lease.

18. Now two question- arise for consideration at this stage, first and foremost is the object of Rule to provide means of livelihood to registered Co-operative Societies. These reasoning runs counter to the object behind the Rules. A direct settlement of fishery to a registered Co-Operative Society with 100% members of actual fishermen whose sole means of livelihood is fishing allowing sub-letting of fishery by such Society, to make money out of it is not the object. Direct settlement with Registered Co-operative Society as provided under the rules is not meant for sub-letting the Fishery, its primary intent to provide livelihood and prevention is always better than cure. The object and reasonings of the learned Single Judge, in this behalf cannot be subscribed to as it would defeat the

very object of the Rules. After all administrative efficiency does not lie in curing a wrong which can be averted and if the Settling Authority thought it fit on the basis of materials available on record that the Society who has already entered into an agreement to sub-let the Fishery apparently for monetary gain even before a settlement order is passed. Naturally such a move effects the credentials of the Society and therefore, the Settling Authority was justified in apprehending that mere withdrawal of agreement was not enough as such withdrawal of agreement itself do not guarantee for the Petitioner society would not indulge in sub-letting the fishery in the event it was granted. This apprehension is reasonable and not a mere conjecture and surmises on the part of the Settling Authority. A test of judicial review howsoever strictly applied would not justify interference with this approach on the part of an administrative authority.

19. The learned Single Judge has interfered with the impugned order mainly on two grounds:

(i) violation of the rule *audi alterem partem*;

ii) exclusion of writ Petitioner's case from consideration as can be seen from the following passage extracted from the impugned judgment:

Assuming there was any existence of an agreement regarding the proposed sub-letting of the fishery before the settling authority, for the sake of justice and fairness, the said facts were required to be made available to the Petitioner giving them an opportunity to express their view on the same. The procedure adopted by the authority in excluding the case of the Petitioner from consideration is capricious, unjust and unfair. Sub-letting of a fishery is not only a mental process but the same is required to be completed by some overt act and if such eventualities really take place the authority is competent to cancel the lease. The settling authority, fell into serious error in pre-judging the issue before settlement of the lease *exparte*. The aforesaid finding of the settling authority is, therefore, also vitiated due to perversity and absurdity. The authority, therefore, acted illegally and exercised its discretion irrationally and whimsically.

20. The learned Judge, as rightly submitted by the Appellant's counsel has approached the case from a wrong stand point. It was not a case of exclusion from consideration not even the case of the writ Petitioner, nor can it be said by any stretch, the Petitioner society's case was excluded from consideration a bare reading of the impugned order would go to show that it was considered but not found fit for settlement of fishery. It is certainly not a case of exclusion from consideration.

21. Now coming to the question "*audi alterem partem*" there can be no quarrel with the applicability of the rule, the learned Judge has noted "facts were required to be made available" but where is the dispute that facts were not made available ? In deed it was the Petitioner society who made an application to the Government informing that the so called agreement had been withdrawn, as has been noted by the learned Judge, on

perusal of record placed before him. The fact that an agreement to sub-let the fishery in the event of its settlement with the Petitioner society is amply established and it is the writ Petitioner's own case that such an act is ruinous in effect to anyone claiming settlement of fishery. On proper analysis of facts as established, it cannot be said that the Petitioner society was not provided with the material that was against it as in deed the society itself was very much aware of it, that is why it hastened to inform the Govt. that the agreement had since been withdrawn. So much for the facts on rules of natural justice.

22. Now coming to the legal position, natural justice is not a capsule formula of universal application, varies in its application from case to case, depending on facts of each case. While it is true that since the decision of House of Lords in *Ridge v. Baldwin* 1963 (2) WLR 935, adopting a liberal view, natural justice has been expanded to administrative bodies and authorities as well, as has also been held by the Supreme Court in [A.K. Kraipak and Others Vs. Union of India \(UOI\) and Others](#), but at the same time it cannot be so applied as to defeat the ends of justice or to make the law itself lifeless absurd stultifying self defeating, on plainly contrary to common sense. It has to be applied and tested on the pragmatic touch stone of pragmatic realism. When so tested, where does the case of the Petitioner society stand who on its own showing had informed the Government that the agreement entered into for sub-letting the fishery, yet to be settled with, had been withdrawn. It was the Petitioner society itself, seeking cancellation of the sitting lessee, on the same ground of sub-letting, Mark the apparent contradiction in its own conduct. If in these circumstances, the settling authority was led to believe that mere withdrawal of agreement by the Petitioner society was not enough, the mischief could still be committed, what was wrong about it? After all it was for the settling authority to decide and this much latitude fair play in joints is to be granted to the authority as propounded by the Supreme Court in [Tata Cellular Vs. Union of India](#), The list of cases on the point of applicability of rules of audi alterem partem a part of natural justice between A.K. Kraipak (supra) a watershed in the Indian Administrative Law which expanded the right of hearing in the administrative process and one of most recent one [Shiv Sagar Tiwari Vs. Union of India and others](#), with other landmark judgments in [Mrs. Maneka Gandhi Vs. Union of India \(UOI\) and Another](#), characterising natural justice as a great humanizing principle [Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others](#), [S.L. Kapoor Vs. Jagmohan and Others](#), are but some of the cases upholding the rule of natural justice.

23. learned Counsel Mr. Laskar appearing for the Respondents has placed reliance on a judgment of this Court as reported in *Surat Ram Khadaria v. State of Assam* 1991 (1) GLR 384 It was a case of black listing of a firm to supply of mustard oil to the police Department and before black listing no opportunity was given to the Firm, thus violating the rules of audi alterem partem which has already been dealt with quite a length in the foregoing paragraphs of this judgment with reference to some of the leading judgments of the Supreme Court. The proposition of law as laid down cannot be disputed, the moot question is one of its applicability.

24. The Supreme Court in [Swadeshi Cotton Mills Vs. Union of India \(UOI\)](#), had occasion to consider whether the management ought to be given a hearing before taking over an undertaking as contemplated by Section 18-A(1) of the Industries (Development and Regulation) Act pointed out the marks difference between Section 18-A and Section 18 AA (1). It was urged that the Parliament is statutorily excluded hearing, but the Court rejected the argument observing that urgency may not always exclude natural justice. But here again the Apex Court also pointed out that natural justice is a flexible concept and the competing claims of "hurry and hearing" should be reconciled. The rule of fair play cannot be allowed to be jettisoned save in very exceptional circumstances where compulsive necessity so demands. The Apex Court cautioned that the Court must make every effort to salvage this cardinal rule to the maximum extent possible, with situational modifications.

25. Once again averting to the facts, it was the writ Petitioner-Respondents case that the agreement to sub-let the fishery in question had been withdrawn, it was not as if the settling authority was making use of an extraneous fact, off the record without apprising the writ Petitioner. Now here comes the situational modifications and flexibility of concept of natural justice as propounded by the Supreme Court in *Swadeshi Cotton Mills* (supra). The facts are too glaring to be ignored. The writ Petitioner-Respondent himself was chasing the sitting lessee alleging sub-letting of fishery, approaching the Ministers and successfully persuade its grievance resulting cancellation of settlement.

26. The other two judgments relied upon by the learned Counsel related to fulfilment of conditions under Rule 12. The Single Bench judgment of this Court in *Mangaldoi Pioneer Fishery Cooperative Society v. State of Assam* (1996) 3 GLR 79:(1996) (3) GLT 547/has been reversed by a Division Bench of this Court in *M/s. Baghpori Maimal MSS Ltd. v. State of Assam* decided on 16.7.97 in W.A. No. 393 of 1996, reported in 1997 2 GLT582.

27. The question of neighbourhood and area of operation has been the subject matter of debate and discussions in several judgments and even the learned Single Judge has also made a reference to it, towards end of the judgment, indicating as to what is meant by neighbourhood in the context of Rule 12. Without disputing the proposition, here again, the question that falls for consideration is one of the extent and scope of judicial review whether this Court in exercise of its power under Article 226 examine the question of neighbourhood with such minutest factual details as to measure every inch of the distance at which a Society, is situated.

It is something to be measured in foot and inches, all that this Court extending the writ jurisdiction such an extent would be nothing sort being violent to the Article 226 of the Constitution, all that the Court can examine as to whether the condition and requirements of neighbourhood, as prescribed under the Rule, it was present to the mind of the settling authority. It is not expected that the writ Court would be the Surveyor and measure the distance in meter and centimeter. If the Settling Authority is alive to the requirements of the Rules and the same is reflected in the order of settlement of a Fishery, the Writ Court

will not be justified an undertaking and exercise of measuring the distance between two competent claimants. After all "neighbourhood" is a relative term which is to be taken into account alongwith other conditions. It is not the intend of Rules to treat neighbourhood with geometrical altitude and procedure.

28. The Full Bench in Arabind Das v. State of Assam (1982) 1 GLR 280 has laid down the pre-requisites which must be satisfied before the power of direct settlement can be exercised by the State Government, they are as follows:

- (a) a settlement of a registered fishery can only be made with a fishery co-operative;
- (b) formed with hundred per cent actual fishermen of fishing population;
- (c) in the neighbourhood of the fishery concerned;
- (d) belonging to the Scheduled Castes of the State of Maimal Community of the Cachar District; and
- (e) at a revenue calculated and for a period decided by the State Government from time to time.

29. In Shri Babul Das v. The State of Assam (1989) 1 GLR 263, the confusion as regards area of operation and neighbourhood has been clarified. There can be no dispute with the propositions as laid down in the above two judgments, but the core question is one of extent of judicial review as already noted above. While determining the question of neighbourhood of a Co-operative Society whether it is expected of the writ Court to go into every minutest factual details relating to neighbourhood. The following principles have been laid down by the Supreme Court in Tata Cellular (supra).

- (1) The modern trend points to judicial restraint in the administrative action;
- (2) The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made.
- (3) The Court does not have the expertise to correct the administrative decision. If a review of administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The term of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender of award the contract is reached by process of negotiations through several tires. More often than not, such decisions are made qualitatively by experts.
- (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 facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgetted expenditure.

30. [Dharambir Singh Vs. Union of India \(UOI\) and Others](#), was a case of grant of Mining lease where the Supreme Court indicated the mode of exercise of discretionary power and recognising the right of the Government to grant or refuse to grant any prospective licence to any applicant has held as follows:

Thus it would be seen that while granting a prospecting licence or mining lease, the area of discretion has been circumscribed by several factors enumerated in Section 11. In grant of mining lease of a property of the State, the State Government has a discretion to grant or refuse to grant any prospective licence or licence to any applicant. No applicant has a right, much less vested right, to the grant of mining lease for mining operations in any place within the State. But the State Government is required to exercise its discretion, subject to the requirements of the law. Therefore, the Tribunal of the Central Government has rightly held that it being in the area of discretion of the State Government, merely because the applicant had applied for, the State Government was not enjoined to grant the mining lease. The Petitioner had taken the plea that since he alone had discovered the mines, he has got a preferential right over any other person. The Tribunal of the Central Government and the High Court rightly rejected that contention of the Petitioner, that contention has not been passed before us. We find no illegality in the order of the Tribunal refusing to grant mining lease to the Petitioner nor is there any illegality in the order of the High Court.

31. Dealing with the power of the High Court under Article 226 of the Constitution to issue a writ or Order for correcting the record vis-a-vis the finding of fact recorded by inferior Court or Tribunal has very clearly pointed out:

It is true that the High Court while exercising its jurisdiction under Article 226 of the Constitution, cannot convert itself into a Court of appeal and assess the sufficiency or adequacy of the evidence in support of the finding of fact reached by the competent Courts or the Tribunals.

(See [Jacob Yahannan, The Administrator Dadra Nagar Haveli and Another Vs. H.P. Vora and Others](#),

32. In the instant case the learned Single Judge has interfered with the finding of fact arrived at by the Settling Authority on the ground of supposed violation of Rule of Audi Alterem Partem as already discussed above, there is no such violation of rule of natural justice. Therefore, the impugned judgment and order as passed by the learned Single Judge cannot be allowed to stand, it is liable to be quashed and accordingly quashed.

33. During pendency of this appeal a new development has taken place. After the impugned judgment dated 19.7.96 passed by the learned Single Judge, the Government of Assam in the Fishery Department vide order No. FISH: 104/84/253 dated 4.9.96 has settle a group of fishery in question with the writ Petitioner-Respondent No. 1 for a period of 4 years and this fact came to light during the course of hearing of this Writ Appeal on 10.7.97 when the Government Advocate produced the record of the case and it was for this reason that the order dated 4.9.96 could not be impugned in this Writ Appeal. It was on 10.7.97 that the counsel for the Appellant Society was served with a copy of the order dated 4.9.96 by learned Senior Govt. Advocate. This order dated 4.9.96 would reveal that it was passed by the Respondent-State behind the back of the Appellant-Society without any application of mind without affording the Appellant-Society to place its case before the concerned authority before passing of the order. Apart from the Government has not been informed the Appellant-Society about the date of hearing pursuant to the impugned judgment dated 19.7.96 as passed by the learned Single Judge. The purport of the judgment rendered by the learned Single Judge, was to remit the matter to the State Government for fresh consideration in accordance with law and it could not have been decided without affording the Appellant society an opportunity of being heard. If there is any violation of rule audi alterem partem, it is here apart from this violation, the Appellant-society being one of the claimants for settlement of the Group Fishery in question had legitimate expectation of being afforded an opportunity to place his case before the Settling Authority which has not been done. That apart, the judgment of the learned Single Judge itself having been set aside, the order dated 4.9.96 settling the fishery with the writ Petitioner-Respondent has no legs to stand: It would be pertinent to note that the affidavit dated 11.7.97 as filed by the Appellant-Society has not been controverted by the Respondent-State, subsequent settlement vide order dated 4.9.96 is also quashed. The appeal stands allowed with cost of counsel Rs. 5,000/-.