

UNREPORTED

**IN THE HIGH COURT OF JUDICATURE
AT BOMBAY**

BENCH AT AURANGABAD.

WRIT PETITION NO.13840 OF 2017

The Mula Thadi Machhimar
Cooperative Society Ltd.,
Baragaon Nandur, Tq. Rahuri,
Dist.Ahmednagar, through its
Chairman - Bhagwan Barku Barde,
Age 56 years, Occ.Agril.,
Having office at above mentioned
address. ... Petitioner.

Versus

1. The State of Maharashtra
through Department of
Agriculture, Animal Husbandary,
Dairy Development and Fisheries
Mantralaya, Mumbai-32.

2. The Maharashtra Fishery
Development Corporation Ltd.,
Mumbai, through its Vice
Chairman and Managing
Director, having office at 3rd
floor, NKM International House,
Behind Jivan Vima Mandal,
Babu Bhai M.Chinoy Road,
Mumbai-400 021.

3. The Commissioner,
Fishery Business, Maharashtra
State, Mumbai.

4. The Divisional Commissioner,
Fishery Business, Nashik.

5. Assistant Commissioner,

Fishery Business (Technical),
Ahmednagar, having office at
1st floor, Parag Building,
Besides District Collector,
Ahmednagar-414 001.

6. M/s Bridge Fisheries,
through its Proprietor,
Mohd. Bilal Khan,
C/o Mohd. Bilal Khan,
Shop No.7, Near LAG Samaj
Mandir, Bank of India Road,
Sector-9, Nerul, New
Bombay-406.

... Respondents.

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Mr.A.K.Gawali, advocate for the petitioner.
Mr.P.S.Patil, Additional Government Pleader for
the State.

Mr.A.S.Bajaj, advocate for Respondent No.2.

Mr.S.P.Shah, advocate for Respondent No.6.

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**CORAM : S.V.GANGAPURWALA AND
A.M. DHAVAL, JJ.**

**Reserved on : 26.04.2018.
Pronounced on : 04.05.2018.**

JUDGMENT (Per S.V.Gangapurwala, J.)

1. The petitioner assails the tender process initiated in furtherance of the e-tender notice No.2/2017 and further challenged the agreement dated 14.9.2017 executed by Respondent NO.2 in favour of Respondent No.6 permitting him to carry out fishing activity in Dnyaneshwar

Sagar dam, situated at Taluka Rahuri, District Ahmednagar. The petitioner also seeks directions for initiating disciplinary action against the officials of Respondent No.2 for floating tenders for allotment of the 56 cages and tender for allotment of contract of carrying out fishing activity in Dnyaneshwar Sagar dam.

2. Mr.Gawali, learned counsel for the petitioner submits that the petitioner society is established with the object to provide infrastructural facility to local fishermen who are mostly tribal, in order to obtain Government benefits and stream line the business of fishing activity at Dnyaneshwar Sagar dam. The petitioner was established in the year 1973 and since its establishment was awarded the contract for doing fishing business at Dnyaneshwar Sagar dam till 2007. In 2007, one Abhinav Matsya Vyavsay Vikas Va Prakriya Sahakari Sanstha, Maryadit, another fishery society registered on Dnyaneshwar Sagar was allotted the tender up to 2012, for carrying out fishing activity on the said dam. In the year 2012, though Respondent

No.2 was not authorised to issue tenders in respect of carrying out fishing activity in Dnyaneshwar Sagar dam and in the 56 cages constructed with the assistance of Central Government funds, the Respondent No.2 floated separate tenders for both purposes. The same was awarded to Abhinav Matsya Vyavsay Vikas Va Prakriya Sahakari Sanstha, Maryadit.

Mr.Gawali, learned counsel submits that the lease period in favour of Respondent No.2 was to expire on 30.6.2017. The petitioner on 14.1.2017, addressed the plight of members of the petitioner society, no fishery seeds since last 10 years were deposited in the Dnyaneshwar Sagar dam. The petitioner requested Respondent No.5 to intimate about the tender process for carrying out fishing business in Dnyaneshwar Sagar, since the petitioner society intended to participate in the tender process. The learned counsel strenuously contends that the lease period of Respondent No.2 - Maharashtra Fishery Development Corporation Ltd., Mumbai, expired on 30.6.2017 and without any legal authority and without

giving any adequate publicity to e-tender process had undertaken tender process of which even Respondent No.5 pleaded ignorance. There was cartel and without fixing the estimated realisation cost as per formula provided in the Government Resolution dated 30.6.2017, the work order for doing fishing activity for five years was awarded to Respondent No.6 at paltry amount of Rs.8,29,999/- (Rupees eight lac twenty nine thousand nine hundred ninety nine). The said tender process was initiated on 13.9.2017.

Mr.Gawali, learned counsel submits that on five counts, the petitioner is assailing the action of Respondent No.2 in awarding contract to Respondent No.6 :

- i) Issuance of tender is without jurisdiction;
- ii) There is inherent flaw in tender as it is against the policy;
- iii) The tender is against the public interest;
- iv) There was no sanction by the Government prior to issuance of tender. Post-

facto sanction will not regularise the action void abinitio;

v) It is a case of procedural impropriety.

3. It is submitted by the learned counsel that as per clause 8 of the GR dated 18.2.2012, the Respondent No.2 is only a nodal agency. It has no source of power to issue fresh tender for fishing activity in dam. It is a nodal agency for implementation of National Protein supplement scheme. Funds are granted by the Central Government for implementation of two projects viz; cage culture in Reservoir and Intensive Aqua Culture in Pond. Dnyaneshwar Sagar dam had been given on lease to Respondent No.2 subject to 15 conditions in the GR dated 30.6.2012. The Respondent No.2 does not have the independent authority to issue tenders in respect of :

- a) Fishing by cage culture;
- b) Fishing in dam of Dnyaneshwar Sagar dam.

Thus, the action of issuing tender notice dated

21.8.2017 and consequential work order dated 14.9.2017 was void abinitio. As the action is void abinitio, therefore, post facto sanction dated 7.12.2017, issued by the State Government can not cure the defect of lack of basic authority and jurisdiction to issue tender. The learned counsel further submits that as per GR dated 30.6.2017, it is only the Committee headed by the Commissioner Fishery that has authority to issue tender. According to the learned counsel, Respondent No.2 has been funded by the Central Government as per GR dated 18.2.2012 and has been directed to conduct fishing activity in cage as well as dam subject to conditions mentioned in GR dated 30.6.2012, with the assistance of local fishing society, the Respondent No.2 has misused its authority by itself carrying out fishing activity and thereafter issuing tender for cage culture. According to learned counsel, the Respondent Nos.1 to 5 have not shown any independent authority or letter by virtue of which Dnyaneshwar Sagar dam have been allotted to the Respondent No.2 Corporation for issuing tender in respect of fishing rights as per GR

dated 30.6.2017.

As the action itself is illegal, arbitrary, this Court in exercise of its power of judicial review can intervene and set aside the tender. The learned counsel relies on the judgment of the Apex Court in a case of **"Rishi Kiran Logistics Private Limited Vs. Board of Trustees of Kandla Port Trust and others"** reported in **(2015) 13 Supreme Court Cases 233** and in the case of **"Tata Cellular Vs. Union of India"** reported in **AIR 1996 Supreme Court 11**.

4. Mr. Bajaj, learned counsel for Respondent No.2 submits that the petitioner has no locus-standi to file the Writ Petition. The petition is filed only to serve the purpose and cause of Abhinav Matsya Vyavsay Vikas Va Prakriya Sahakari Sanstha, Maryadit. From 2012 till the contract was with Abhinav society, the members of the petitioner society were doing the fishing for Abhinav Matsya Vyavsay Vikas Va Prakriya Sahakari Sanstha, Maryadit. At that time the petitioner did not challenge the issuance of tender notice.

By resorting to e-tender method, the tenders were issued. In two newspapers having wide circulation, the tender notice was published and after following due process, Respondent No.6 was allotted the contract. Even Respondent No.6 has published an advertisement in the local newspaper inviting local fishermen to do fishing at the rate prescribed. Dnyaneshwar Sagar dam was handed over to Respondent No.2 for conducting the activities specified in GR dated 20.12.2012 for a period of five years from the date of issuance of said GR. It is the policy of the State Government since many years to hand over Reservoir to Respondent No.2 for conducting the activities. The tender notice dated 21.8.2017 was issued by the Respondent No.2 considering the letter dated 7.2.2017 issued by Respondent No.2 to the State Government for extension of period in respect of Dnyaneshwar Sagar dam i.e. the subject matter of the Writ Petition. It was policy decision taken by the Government as per clause 14(2) of the GR that fishing rights in Reservoir having above 1000 hectares shall be given by e-tender process by Respondent No.2.

Another GR dated 12.9.2017 was issued by the State, handing over three additional Reservoirs. The State Government has renewed and extended period of handing over Dnyaneshwar Sagar dam to Respondent No.2 by further period of five years commencing from 30.6.2017 by issuing GR dated 7.12.2017. Similar Writ Petition was filed by the Societies at Nagpur in respect of tender process issued by Respondent No.2 for fishing rights pertaining to Bembla Reservoir in Yavatmal District bearing W.P.No.2305/2017. The same is dismissed at Nagpur Bench. The learned counsel further submits that Respondent No.2 executed agreement dated 14.9.2017 with Respondent No.6 after being successful in e-tender process. Condition No.4.28 of the agreement makes it obligatory upon Respondent No.6 to allow members of the said District and neighbouring District fishing cooperative societies to conduct fishing activities. The interest of the petitioner is also protected. The petitioner did not participate in the tender process and now can not challenge the same.

Learned counsel submits that the Respondent No.2 is controlled and supervised by the State Government. Its shares are held by the State Government. Public interest is protected by the conduct of Respondents. The Respondent No.2 is not receiving any grants from the State Government for incurring its administrative expenses. Hence, the Respondent No.2 is required to engage and conduct various fishing related scheme on commercial basis in line with prevailing policies of the State Government.

5. Mr.Bajaj, learned counsel further submits that the petitioner in the petition has no where disclosed that the petitioner is qualified for participating in the tender and fulfills the conditions.

6. Learned counsel further submits that as clause No.13 of the GR dated 30.6.2017 provides fixing of the upset price. The calculations as per the criteria laid down comes to Rs.2,62,395 and Rs.4,88,802-25. The upset price was fixed at Rs.7,32,050/-. This upset price was fixed by

adopting the practice of the respondent No.2 which gets reflected in the policy dated 16.7.2016. The learned counsel further submits that the last contractor had quoted the bid of Rs.5,00,000/- (Rupees five lac) plus 10% increment per year and for fixing the upset price for the present tender amount of the 4th year was taken as base and after 10% increase which comes to Rs.7,32,050/- (Rupees seven lac thirty two thousand fifty). In clause 11 of the GR, it is specifically mentioned that the Respondent No.2 will be free to decide upset price as per its own policy.

7. Learned counsel further submits that in the small tanks, the total recovery expected and the returns are high and as such the contractor with less investment and without any fear of theft etc. is able to earn huge profit and as such quotes high for the small tank. The dams of size of 5500 hectares namely Upper Wardha Reservoir has fetched amount of Rs.13,33,200/- and the Yeldary Reservoir having area of 6272 hectares has fetched amount of Rs.9,01,500/-.

Similarly, Sidheshwar Reservoir having area of 2574 hectares has fetched amount of Rs.2,00,000/-.

8. Learned counsel further submits that in the GR, it is mentioned about the intensive aqua-culture in pond but the said scheme has not been adopted in the Mula Dam and not a single pie is paid by the Government to the respondent. This is very huge size dam and as such cage culture has been accepted and adopted for the Mula dam. As per new policy of the Government 1% of the area of the dam can be utilised for cage culture.

9. Learned counsel further submits that for cage culture, Abhinav Cooperative Society failed to perform his part of contract and as such in 2013 no renewal was given to him. The respondent had suffered huge loss. The work of cage culture, thereafter was done by respondent itself but again the project was incurring huge loss and ultimately it was decided to invite tenders. Number of times the tenders were

called for but petitioner society never submitted any tender. Learned counsel further submits that the petitioner society at no point of time demanded an opportunity to participate in cage culture activity since 2012. As such, the petitioner has no locus to put forth any grievance to challenge the tender policy adopted by the respondent which is in interest of project and financial aspects.

10. Learned Additional Government Pleader submits that GR dated 30.6.2017, holds field with regard to fishing rights. This GR has superseded all the earlier GRs. The GR dated 30.6.2017 categorised tanks/reservoirs and dams on the basis of the area. The dam/reservoirs above 1000.01 hectares area, fishing rights are to be given by e-tender process. As per clause 13 of the GR upset price has to be mentioned. Considering the size of Dnyaneshwar Sagar dam i.e. 3511 hectares, the amount comes to Rs.4,88,802-25. As per clause 11 of the said GR, if the Corporation is to lease out the fishing right through tender process then the

Corporation will be at liberty to charge or fix the upset price as per clause 14.2. The Respondent No.2 had applied for extension of the lease period on 7.2.2017, however, because of administrative exigencies, the extension was granted on 7.12.2017 with effect from 30.6.2017 for further period of five years. The petitioner is mixing up two issues. The work allotted to Respondent No.6 is fishing in the dam and is nothing to do with the cage culture.

11. Mr.Shah, learned counsel for Respondent No.6 submits that notice inviting tenders were published in two newspapers having wide circulation, so also e-tender notice was also given. On 11.9.2017, bids were opened. Four participants qualified in the technical bids. The process was transparent. The right of local fishermen to fish at the dam is kept in-tact. The local fishermen are entitled to fish at the dam and will sell the catch to the contractor. The learned counsel also adopts the arguments of Mr.Bajaj and learned Additional Government Pleader.

12. We have considered the submissions canvassed by the learned counsel for respective parties.

13. The petitioner basically assails the tender issued by the Respondent No.2 and the work allotted pursuant to the tender process to Respondent No.6. The Government Resolution dated 30.6.2017 supersedes all earlier Government Resolution with regard to fishing in the Dam/Reservoir. Clause 12 of the GR dated 30.6.2017, prescribes that a Dam having area more than 1000.01 hectares shall be allotted by e-tender. It is also a matter of record that the lease of Dnyaneshwar Sagar dam is extended in favour of Respondent No.2 by the State Government for a period of five years under Resolution dated 7.12.2017, with effect from 30.6.2017. The petitioner has relied on clause 14 of GR dated 30.6.2017 to contend that if the e-tender process is to be initiated, the same can be done only by the Committee as detailed in clause 14, more particularly, clause 14.2 of the said GR. On that count the contention of the petitioner is

that the action of the Respondent No.2 in initiating tender process is without jurisdiction.

14. Clause 11 of the GR dated 30.6.2017 provides that the policy of giving contracts of dam also applies to Respondent No.2 and if the Respondent No.2 wants to give it to private contractors, prior permission of the Government would be required.

15. In the present case, the Respondent No.2 has not obtained prior permission of the State Government. However, the State Government under GR dated 7.12.2017, has granted post facto sanction to the e-tender process initiated by the Respondent No.2 and the said GR further provides that the Respondent No.2 shall follow the procedure laid down in GR dated 30.6.2017 while awarding contract. The post facto sanction dated 7.12.2017 granted to the e-tender process initiated by Respondent No.2 is not assailed by the petitioner in the present Writ Petition. Though in the month of August, when e-tender

process was initiated and subsequently agreement executed in favour of Respondent No.6, prior permission of the State Government was not obtained by Respondent No.2. However, the State Government at the request of Respondent No.2 has granted post-facto sanction/approval to the act of Respondent No.2 in issuing e-tender. The post facto sanction is not challenged by the petitioner. The State Government has accepted the action of the Respondent No.2 in initiating the tender process and giving contract to Respondent No.6 in respect of fishing rights in Dnyaneshwar Sagar dam. No doubt, proper course for the Respondent No.2 was to seek prior sanction of the Government before initiating tender process, however, subsequently the Government has ratified the act of the Respondent No.2 in resorting to e-tender process and allotting tender to Respondent No.6 by giving post facto sanction. None of the parties except the petitioner has any objection to the act of issuance of e-tender by Respondent No.2. Similar Resolution is passed by the Government on 12.9.2017, giving right to the Respondent No.2 to

grant contract in respect of Girna dam in Nashik District, Chaskaman, Dist. Pune and Mukne in Nashik District. It appears to be the policy of the Government to allow Respondent No.2 to give contracts with regard to fishing rights of the dam given to it by the State Government on lease. Considering the fact that the post facto sanction granted by the State Government is not assailed and so also considering aforesaid aspects of the matter, the challenge to the e-tender process resorted to by the Respondent No.2 can not be upheld.

16. It would be seen that e-tender process can be resorted for fishing rights in respect of Dams covering area of 1000.01 hectares and more. Dnyaneshwar Sagar dam covers area of more than 3511 hectares. While resorting to e-tender process, naturally, on the web-site, e-tenders are displayed. E-tenders were also published in two newspapers i.e. in daily Samna and Punya Nagari. The Respondent No.2 has given figures i.e. Samna newspaper has circulation of 96016 copies per day in Mumbai edition and Punya Nagari

published from Ahmednagar has circulation of 38823 copies per day. Four contractors had qualified after the technical bid and Respondent No.6 was found better in all respects by Respondent No.2. The petitioner has not challenged the selection of Respondent No.6 being contrary to the tender notice. The objection of the petitioner is with regard to fixing upset price. The formula is given as to how upset price is fixed. Upset price has been fixed in accordance with the policy appearing in the Government Resolution. The same has been detailed in the affidavit-in-reply. In the policy matters of the State, the Court would have limited jurisdiction. It would be more concern with the due adherence to the decision making process rather than the decision. The flaw in the decision making process i.e. absence of prior permission before issuance of tender has been regularised by post-facto sanction granted by the State Government.

17. The petitioner did not participate in the tender process. The petitioner came forward

with the case that they were unaware of the tenders being floated. The advertisement for the tenders was published in two newspapers, so also on the web-site as e-tender process was resorted to. The petitioner now can not take a plea that they were unaware of the tenders being floated. The petitioners even in the year 2012 when the Respondent No.2 had floated the tender and it was allotted to Abhinav Matsya Vyavsay Vikas Va Prakriya Sahakari Sanstha, did not participate and were carrying out fishing activities. Now the contractor has changed i.e. in place of Abhinav Matsya Vyavsay Vikas Va Prakriya Sahakari Sanstha, Maryadit the contractor is Respondent No.6. The petitioner and local fishermen are not prevented from carrying out fishing activity. In fact, even public notice is issued by Respondent No.6 inviting the local fishermen to carry out the activity and sell the catch to Respondent No.6. The interest of local fishermen is not jeopardised. The malafides can not be attributed to the Respondents.

18. The Apex Court in the case of "Tata

Cellular Vs. Union of India" referred to supra has observed that principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism, however, there are inherent limitations in exercise of powers of judicial review. The principles as laid down by the Apex Court in the said case are as under :

"1. Whether a decision making authority exceeded its powers?

2. committed an error of law;

3. committed a breach of the rules of natural justice;

4. reached a decision which no reasonable Tribunal would have reached; or

5. abused its powers."

19. The objection of the petitioner of the Respondent No.2 exceeding its power could have been considered, had the Government not granted

post facto approval to the act of Respondent No.2 in issuing e-tender without prior permission of the State Government. The act of Respondent No.2 has been regularised by the State Government.

20. In view of the above, no case for interference is made out. The Writ Petition as such is disposed of. No costs.

Sd/-

(A.M.DHAVAL, J.)

Sd/-

(S.V.GANGAPURWALA, J.)

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