GAHC010272402019

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : I.A.(Civil)/3593/2019 in
WP(C) No. 5146/2019

ANCHAD JWHALAO BRAHMA
S/O LATE LEBENDRA NATH BRAHMA, R/O VILL. CHANGBANDHA, P.O. TIPKAI, DIST. KOKRAJHAR, ASSAM, PIN 783337,

VERSUS

THE STATE OF ASSAM AND 5 ORS.
REPRESENTED BY THE PRINCIPAL SECY. TO THE GOVT. OF ASSAM, ENVIRONMENT AND FORESTS DEPTT., DISPUR, GUWAHATI 781006

2:THE PRINCIPAL CHIEF CONSERVATOR OF FOREST AND HEAD OF FOREST FORCE
ASSAM
PANJABARI
GUWAHATI 781037

3:THE PRINCIPAL CHIEF CONSERVATOR OF FOREST (T)
LOWER ASSAM ZONE
KACHARIGHAT
GUWAHATI.

4:THE DIVISIONAL FOREST OFFICER
DHUBRI DIVISION
DHUBI
DIST. DHUBRI
ASSAM
PIN 783301

5:THE ADDITIONAL PRINCIPAL CHIEF CONSERVATOR OF FOREST
CHD
(BTAD)
KOKRAJHAR
DIST. KOKRAJHAR

ASSAM
PIN 783370

6:THE DIVISIONAL FOREST OFFICER
PARBATJHORA DIVISION
SUPARIGHAT
DIST. KOKRAJHAR
ASSAM
PIN 78333

Advocate for the Petitioner : MR. B D KONWAR SR. ADV.

Advocate for the Respondent : MR. P N GOSWAMI, SC, FOREST

Linked Case : I.A.(Civil)/1956/2020

BISWAJIT BRAHMA
S/O- LATE BINOD BRAHMA
R/O- WARD NO. 4
KOKRAJHAR TOWN
DIST.- KOKRAJHAR
ASSAM

VERSUS

ANCHAD JWHALAO BRAHMA AND 6 ORS
S/O- LATE DEBENDRA NATH BRAHMA
R/O- VILL.- CHANGBANDHA
P.O. TIPKAI
DIST.- KOKRAJHAR
ASSAM

2:THE STATE OF ASSAM
REP. BY THE PRINCIPAL SECRETARY TO THE GOVERNMENT OF ASSAM
ENVIRONMENT AND FOREST DEPARTMENT
DISPUR
GUWAHATI- 781006.
3:THE PRINCIPAL CHIEF CONSERVATOR OF FOREST AND HEAD OF FOREST FORCE
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7:THE DIVISIONAL FOREST OFFICER

PARBATJHORA DIVISION
SUPARIGHAT
DIST.- KOKRAJHAR
ASSAM
PIN- 783339.

Advocate for : MR K P PATHAK
Advocate for : MR. P N GOSWAMI
SC
FOREST appearing for ANCHAD JWHALAO BRAHMA AND 6 ORS

Linked Case : WP(C)/5146/2019

ANCHAD JWHALAO BRAHMA
S/O- LATE LEBENDRA NATH BRAHMA
R/O- VILL.- CHANGBANDHA
P.O. TIPKAI
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ASSAM.

Advocate for : MR. B D KONWAR SR. ADV.
Advocate for : SC
FOREST appearing for THE STATE OF ASSAM AND 6 ORS.

BEFORE
HONOURABLE MR. JUSTICE SANJAY KUMAR MEDHI

Date : 21-12-2020

JUDGEMENT & ORDER

Both the Interlocutory Applications being filed for modification / vacation of the interim order dated 08.11.2019 passed in IA(C) No.3593/2019 arising out of WP(C) No.5146/2019, the same are heard together and disposed of by this common order. It may be mentioned that IA(C) No.1956/2020 is filed by the private respondent no. 7, who was newly impleaded in the writ petition vide order dated 12.11.2020 passed in IA(C) No.1875/2020 whereas IA(C) No.2039/2020 is filed by the Forest Department.

2. For appreciation of the rival contentions, a brief narration of the facts of the case would be necessary.

3. Initially, there were four Mahals under the Dhubri Forest Division, namely, Sapatgram, Silbari, Khoraghat and Changbandha. Since creation of the Bodoland Territorial Council (BTC), a dispute had arisen regarding the jurisdiction over the Silbari and Khoraghat Mahals. The said dispute was ultimately resolved by this Court vide an order passed in WP(C) No.4892/2009 directing the Department to settle the matter. Pursuant to the said direction, 2 separate Mahals were carved out from each of the two aforesaid Mahals. From Silbari, Bhelakopa was carved out whereas, from Khoraghat Soulmari was carved out. Thus Bhelakopa and Khoraghat fell within BTC whereas, Silbari and Soulmari fell within the jurisdiction of the State. The aforesaid decision is the subject matter of challenge of the writ petition. The principal ground is that the new sand Mahals are upstream the Tipkai river which were in close vicinity and if the proposed new Mahals were settled with prospective bidders, the business of the writ petitioner would be jeopardized who is the settlement holder of the Mahals which are downstream. It is the admitted case of the petitioner that the petitioner is the settlement holder of two sand Mahals, namely, Changbandha and Sapatgram.

4. The aforesaid writ petition was moved on 29.07.2019 on which date, this Court was not inclined to pass any interim order. Consequently, a short E-Auction notice was published on 30.10.2019 for settlement of the Silbari Sand and Gravel Minor Mineral Unit and the Soulmari Sand and Gravel Minor Mineral Unit. The said move was challenged by the writ petitioner by filing IA(C) No.3593/2019. This Court vide the order dated 08.11.2019 while issuing notice had directed that the respondents may go ahead with the E-Auction process but shall not issue any final order of settlement till the returnable date. Though the process was sought to be gone ahead, on account of the fact that no bids were received, a fresh notice was issued on 15.06.2020 in which apart from the applicant-respondent no. 7, the writ petitioner had also participated. So far as the Silbari Sand and Gravel Minor Mineral Unit is concerned, on opening of the tenders, the offer made by the applicant-respondent no. 7 of Rs.4,85,00,000/- (Four crores eighty five lakhs) only was found to be the highest. The said price was more than the reserve price by Rs.2,00,000/- which was communicated vide letter 25.08.2020. So far as the Soulmari Unit is concerned, the bid of the private respondent was found to be highest at Rs.17,11,13,319/- whereas, the bid of the writ petition was Rs.11,01,51,000/-.

5. I have heard Shri KP Pathak, learned Senior Counsel for the applicant-respondent no. 7, Shri PN Goswami, learned Standing Counsel, Forest Department, Assam, who has filed the other application for vacating stay and Shri BD Konwar, learned Senior Counsel for the opposite party / writ petitioner.

6. Since the Interlocutory Application filed by the private respondent no. 7 is prior in point of time, let us deal with the submissions made by Shri KP Pathak, learned Senior Counsel. This Court, however, makes it clear that the present consideration is only on the application for vacating the interim order and therefore, would be guided by the three golden principles governing interim orders, namely, *prima facie* case, irreparable loss and injury and balance of convenience. The fourth principle formulated by the Courts, namely, overwhelming public interest would also be a relevant consideration.

7. Shri Pathak, the learned Senior Counsel has submitted that to invoke the jurisdiction of this Court under Article 226 of the Constitution of India, a legal injury by any action of the State has to be made out. In the instant case, nothing has been able to be demonstrated regarding violation of any legal right of the writ petitioner by the decision to bifurcate the two Mahals. It is submitted that the decision of the Department being in compliance of an order of this Court, if at all aggrieved, steps should have been taken to either file an appeal or review against the said order which was, admittedly, not done. It is submitted that the projected case on merits is also not tenable inasmuch, as it is an admitted case that both the Mahals on the extreme upstream, namely, Sapatgram and the extreme downstream, namely, Changbandha are being operated by the writ petitioner. Further, the writ petitioner himself having participated in the tender process and having failed in the same, he is estopped from making any challenge to the tender process which is an established principle of law. The conduct of the writ petitioner is also put to question as he has chosen not to challenge the process of settlement of the Bhelakopa and Khoraghat Mahals which are within the BTC. The factual projection regarding the distance of the Mahals in question, with the Mahals being operated by the writ petitioner is also disputed by contending that the distance is such that there is no question of suffering any loss by the writ petitioner. The learned Senior Counsel accordingly submits that the interim order dated 08.11.2019 is liable to be vacated which would also be in consonance with the overwhelming interest of public service.

8. Shri PN Goswami, learned Standing Counsel, Forest Department by referring to IA(C) No.2039/2020 filed by the Department while endorsing the submissions of Shri Pathak, learned Senior Counsel, additionally submits that the tender notice in respect of which the interim order dated 08.11.2019 is concerned, could not be gone ahead due to lack of bids and the same was accordingly abandoned. Thereafter, a fresh Notice Inviting Tender (NIT) dated 08.01.2020 was issued which was not put to challenge by the writ petitioner and rather, he had participated in the same and in the evaluation, it was the bid of the private respondent no. 7 which was found to be the highest. It is submitted that based on the aforesaid facts into consideration and taking a strict view of the matter, there is no embargo so far as the fresh NIT dated 08.01.2020 is concerned. However, in order to show substantial

compliance of the interim order, the authorities have not gone ahead for issuing the final order of settlement. That apart, it is submitted that the distance factor as projected by the writ petitioner by referring to a Google map is from the perspective of the road travel which is not relevant at all and what is relevant is the river length. The learned Standing Counsel submits that a bare perusal of the map would show that from Changbandha to Soulmari, the distance is almost 8 kilometers in between which the Khoraghat Mahal is situated and from Sapatgram to Silbari, the distance is more than 7 kilometers which include Bhelakopa Mahal in between. Therefore, the question of suffering any loss does not arise at all. In any case, the Mahals are carved out after making all the necessary survey and after clearance from the respective authorities. He finally submits that overwhelming public interest would demand vacation of the interim order.

9. In support of his submissions, Shri Goswami refers to a recent decision of the Hon'ble Supreme Court, reported in (2019) SCC Online SC 1133 (Silppi Constructions Contractors Vs. Union of India & Anr.), relevant paragraphs of which are quoted: -

> "*8. In Raunaq International Ltd. vs. I.V.R. Construction Ltd., this Court held that superior courts should not interfere in matters of tenders unless substantial public interest was involved or the transaction was mala fide.*
>
> *18. Most recently this Court in Caretel Infotech Limited vs. Hindustan Petroleum Corporation Limited and Others12 observed that a writ petition under Article 226 of the Constitution of India was maintainable only in view of government and public sector enterprises venturing into economic activities. This Court observed that there are various checks and balances to ensure fairness in procedure. It was observed that the window has been opened too wide as every small or big tender is challenged as a matter of routine which results in government and public sectors suffering when unnecessary, close scrutiny of minute details is done.*
>
> *19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loath to interfere in contractual matters unless a clearcut case of*

arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

10. Replying to the aforesaid submissions, Shri BD Konwar, learned Senior Counsel submits that the map projected by the applicants is not proper and it is the map annexed to the writ petition which should be taken into consideration. By referring to the same, Shri

Konwar submits that the distance has to be calculated from the perspective of the proximity of the National Highway and if the new Mahals are allowed to be operated, it would not be viable at all for the writ petitioner, who is the settlement holder of the two Mahals at the extreme upstream and extreme downstream. It is further submitted that the writ petitioner does not have serious objection so far as extraction of gravel is concerned and it is only with regard to the sand which would cause loss to the petitioner. In this connection, the additional affidavit filed by the writ petitioner has been referred to. As regards the cancellation of the earlier NIT dated 08.11.2019 is concerned, it is submitted that contrary to the submissions of Shri Goswami that no challenge to the new NIT dated 08.01.2020 is made, it was the obligation of the authorities to take leave of this Court before going ahead with a decision for issuing a fresh NIT. On that account only, it is submitted that the new NIT dated 08.01.2020 is liable to be interfered with. As regards, participation in the new NIT, it is submitted that such participation is without prejudice to the rights of the writ petitioner in the writ petition which is pending adjudication before this Court.

11. The rival submissions made by the learned counsel for the parties have been duly considered and the materials placed before this Court have been duly examined.

12. Let us first examine the matter from the point of view of *prima facie* case of the respective parties. The projected case of the writ petitioner is that by the impugned decision to open the two new Mahals, loss would be suffered by him inasmuch, as the distance between the Mahals is such that once the extraction starts in the new Mahals, the same would adversely affect the business of the writ petitioner. The aforesaid submission *prima facie* appears to be fallacious inasmuch, as it is the writ petitioner who is the settlement holder of the two Mahals on the extreme North and extreme South, namely, Sapatgram (upstream) and Changbandha (downstream). Secondly, the Mahals have been opened in compliance of the order of this Court which has not been put to challenge by the petitioner. The petitioner has elected to challenge the two Mahals in question without challenging the opening of the Bhelakopa Mahal and the Khoraghat Mahal, which are part of the same decision. The projection of distance from the National Highway also appears to be erroneous

apart from being not pleaded in the writ petition. What is further relevant is that the orders of settlement, both for the writ petitioner and the respondent no. 7 stipulate of particular quantity of materials to be extracted and even assuming that the writ petitioner would not be in a position to extract the stipulated quantity, remedies in law are available for him. The final nail in the coffin is the conduct of the writ petitioner in electing to participate in the tender process dated 08.01.2020 and thereby submitting to the decision. Such conduct on the part of the writ petitioner apart from raising serious doubts on the conduct of the writ petitioner is hit by the principles of approbate and reprobate.

13. Coming to the aspect of overwhelming public interest, by following the guidelines in various decisions of the Hon'ble Supreme Court, including the case of Silppi Constructions Contractors (*supra*), this Court is of the view that to justify judicial intervention in matters of distribution of State largesse, the need of overwhelming public interest has to be there. In the instant case, on the contrary, the overwhelming public interest is against the continuation of the interim order. This Court in exercise of jurisdiction under Article 226 of the Constitution is a Court of Equity and unless glaring illegality can be demonstrated in the decision making process in matters relating to distribution of State largesse, this Court would be loath in interfering.

14. In view of the aforesaid facts and circumstances, this Court is of the view that the interim order dated 08.11.2019 is liable to be vacated and accordingly, the same stands vacated. It is needless to mention that the observations made in the order are on a *prima facie* view of the matter and the final decision would be taken by considering the merits of the case.

15. Both the Interlocutory Applications are accordingly allowed.

JUDGE

Comparing Assistant