BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 28.10.2021
CORAM
THE HONOURABLE MR.JUSTICE SENTHILKUMAR RAMAMOORTHY
W.P.(MD).Nos.13591 and 15088 of 2021
and
W.M.P.(MD).Nos.12010, 12450, 10527, 10529, 10531 of 2021

W.P.(MD).No.15088 of 2021

K.Muthukannan ... Petitioner

Vs.

1.The District Collector,
Theni District,
Theni.

2.The Revenue Divisional Officer,
Uthamapalayam,
Theni.

3.The Joint Director of Fisheries,
Fisheries and Fisheries Welfare Department,
Theni Vaigai Dam,
Theni District.

4.FMD-10 Bodi Fisherman Co-operative Society,
No.71-C, Solai Chokkalingam Nagar,
Kaupasamy Kovil Street,
Bodinayakkanur,
Theni District. ... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Mandamus, by directing the third and fourth respondents to grant tender for fishing rights of Meenathicipuram Kanmai, Theni District in the petitioner's favor by accepting the balance bid amount of Rs.26,25,000/- and consequently direct the respondents not to indulge in any type of fishing activities or other activities in the meantime by considering the petitioner's representation dated 19.08.2021 and pass orders on merits and in accordance with law within the period that may be stipulated by this Court.

For Petitioner	:	M/s.K.Safar Badhusha
For R-1 to R-4	:	Mr.Veerakathiravan Additional Advocate General Assisted by Mr.P.Subbaraj, Counsel for State.

W.P.(MD).No.13591 of 2021

FMD - 10, Bodi Fishermen Cooperative Society,
Represented by its President,Tamilarasan

Vs

1.The Director of Fisheries,
Fisheries Department,
Saidapet,
Chennai.

2.The Deputy Director of Fisheries,
O/o.Deputy Director of Fisheries,
Madurai,
Madurai District.

3.The Assistant Director of Fisheries,
Theni Zone,
Vaigaidam,
Aundipatty,
Theni District.

4.Muthukannan

Prayer : Writ Petition filed under Article 226 of the Constitution of India, praying this Court to issue a Writ of Certiorarified Mandamus, to call for the records pertaining to Tender Cum Public Auction Notification dated 09.07.2021 issued by the third respondent in Dinamani Newspaper in respect of leasing out of fishing rights in Meenakshiamman Tank at Bodinayakanur Taluk, Theni District and quash the same as illegal and consequently direct the respondents 1 to 3 to grant the lease of fishing right in the above said tank to the petitioner's society namely FMD-10, Bodi Fishermen Cooperative Society in the light of G.O.Ms.No.201 dated 19.10.2017 and G.O.Ms.No.15 dated 29.01.2020 issued by the Animal Husbandry, Dairying and Fisheries Department and also complying with terms of the order dated 03.02.2021 in W.A.(MD).No.1251 of 2020 and W.A.(MD). No.923 of 2020 rendered by this Court.

For Petitioner	:	Mr.K.S.Viswanathan For M/s.A.Mithun Chakravarthi
For R-1 to R-3	:	Mr.Veerakathiravan Additional Advocate General Assisted by Mr.P.Subbaraj, Counsel for State.
For R-4	:	Mr.Safar Badhusha

COMMON ORDER

Both these Writ Petitions pertain to an auction of fishing rights in respect of the Meenakshiamman Tank (the Tank) at Bodinayakanur Taluk, Theni District, which is a large tank admeasuring about 182.5 hectares.

2. The petitioner in W.P.(MD).No.13591 of 2021 is a fishermen's co-operative society (the Society), whereas the petitioner in W.P.(MD).No.15088 of 2021 is the successful bidder at a tender-cum-auction conducted for the grant of fishing rights. In the year 2018-2019, the fishing rights in the Tank were granted at Rs.40,00,000. Thereafter, the Society was granted a licence in respect of the Tank for three years, 2019-2020 to 2021-2022, at a licence fee of Rs.5,87,520 for the first year, Rs.6,46,272 for the second year and Rs.7,10,899 for the third year. This was challenged by the petitioner therein, S.T.Mani, by filing W.P. (MD) No.5485 of 2020 on the ground that the fixation of the upset price was not done by taking into account the productivity of the Tank, water retentivity, cost of stocking and other factors in terms of G.O.Ms. No.201 dated 19.10.2017 of the Animal Husbandry, Dairying and Fisheries (FS-6) Department of the Government of Tamil Nadu (G.O.Ms.601). The said petitioner was willing to pay a sum of Rs.40 lakhs for the licence for fishing rights. By order dated 31.08.2020, W.P. (MD) No.5485 of 2020 was disposed of by directing the Secretary of Government, Fisheries Department to issue a tender notification and call for offers. The amount tendered by the highest bidder was directed to be offered to the Society. If the Society agrees to take the licence at such price, it should be granted; otherwise, it should go to the highest bidder. This order was challenged in W.A. (MD).No.1251 of 2020 and W.A.(MD).No.923 of 2020 by the official respondents and Society, respectively. The said Writ Appeals were disposed of by judgment dated 03.02.2021. By such judgment, the Court concluded that the upset price fixed by the Government was very low and that State largesse cannot be handed over on a platter by ignoring the financial implications. Consequently, the official respondents were directed to re-do the exercise. The State relies upon paragraph 10 of the said judgment which specifies a methodology to be followed in such regard. On the other hand, the Society relies upon paragraphs 9 and 14 of the judgment. On such basis, the Society contends that the State was required to fix the upset price and offer the same to the Society. According to the Society, it is only with regard to subsequent years that the methodology specified in paragraph 10 would be applicable.

3. By relying on paragraph 10 of the judgment of the Division Bench, the State proceeded to conduct a tender-cum-auction. It appears that such tender-cum-auction was conducted three times unsuccessfully inasmuch as licence was not granted on such basis to the highest bidder in such auctions. The precise details of such auctions are not on record. In any case, the focus of this lis is the fourth tender-cum-auction (the Auction), which was held pursuant to a tender-cum-auction notice dated 09.07.2021 (the Auction Notice). A reserve price of Rs.40,00,000 was fixed and each bidder was required to deposit a sum of Rs.20,00,000 as an earnest money deposit. The petitioner in W.P.(MD).No.15088 of 2021 was the successful bidder at the Auction for a price of Rs.52,50,000/- (Rupees Fifty Two Lakhs and Fifty Thousand only). In accordance

with the terms and conditions of the Auction, about 50% of the bid amount was remitted by the highest bidder.

4. In the above facts and circumstances, the Society assails the Auction Notice. The main basis on which such notice is challenged is G.O.(Ms).No.201, Animal Husbandry, Dairying and Fisheries Department dated 19.10.2017. The petitioner relies upon the priority clause in the said Government Order. In terms thereof, it is contended that fishermen's societies, such as the Society, should be given priority for taking lease of fishing rights of intensive inland fish culture tanks before leasing through public tender by paying the upset price up front. The Society contends that the State is required to arrive at an upset price and make an offer of fishing rights to the Society at such upset price. Only in the event that the Society declines to accept the lease at such upset price, the State is entitled to proceed with the tender or auction process. As indicated earlier, the Society contends that the judgment of the Division Bench did not direct deviation from G.O.(Ms).No.201 as regards the current auction. According to the Society, all that the order held was that such upset price should be re-fixed in view of the fact that the upset price fixed previously was very low.

5. On the contrary, the State contends that it should derive reasonable revenue from the use of its resources. On account of the fact that it is difficult to arrive at a fair price, the Division Bench specified a methodology for arriving at such price. According to the State, the Division Bench called upon the official respondents to opt for a tender and adopt the highest bid amount at such tender as the reserve price to be offered to the Society. By following the direction of the Division Bench, it is stated that the present auction process was concluded successfully by receiving the highest bid of Rs.52,50,000/- (Rupees Fifty Two Lakhs and Fifty Thousand only). Therefore, the State submits that the Society should indicate whether the said highest bid amount is acceptable to it or not.

6. The successful bidder opposes the petition of the Society. Such successful bidder points out that the Society did not challenge the three rounds of tender/auction that were conducted previously. The successful bidder also points out that the Society is required to collect the money from its members to make payment for fishing rights and that this cannot be undertaken without calling for a meeting of the members. As regards the current tender/auction, the successful bidder points out that the terms and conditions thereof were very stringent. In specific, he points out that the sum of Rs.20,00,000/- (Rupees Twenty Lakhs only) was specified as EMD and that it was also specified that if any bidder places a bid for less than Rs.40,00,000, the amount was liable to be forfeited. Having duly participated at the tender/auction and submitted a bid for Rs.52,50,000/- (Rupees Fifty Two Lakhs and Fifty

Thousand only), out of which a significant proportion has already been deposited, the successful bidder contends that the tender/auction process is not liable to be interfered with.

7. The grant of licence or lease in respect of fishing rights and, in particular, the price at which such licence should be granted is a contentious issue because competing policy objectives are involved, each of which is legitimate. On the one hand, the fishermen's cooperative societies, such as the Society, are established to promote the welfare of fishermen, who are dependent on fishing for their livelihood. Therefore, the State is required to take into consideration the welfare of such fishermen and protect their livelihood. Equally important is the effective utilisation of the State's limited resources so as to derive income therefrom to meet the enormous and ever burgeoning expenditure of the State. A third dimension is the rights of farmers and the like who may be dependent on the water from such water bodies for irrigation or drinking water purposes. G.O. Ms.No.201 gives expression to all these policy objectives by providing priority to fishermen's cooperative societies in the grant of fishing rights while attempting to ensure a fair price for the State by specifying criteria for fixing the upset price, and stipulating that irrigation rights take precedence.

8. Therefore, G.O.(Ms).No.201 warrants closer scrutiny. Clauses i) and ii) of the amendment to G.O.(Ms).No.33, which is a part of G.O.(Ms).No.201, is set out below:-

> "*i) The local Fishermen Co-operative Society shall be given the priority for taking lease of fishing rights of intensive Inland fish culture tanks before leasing through public tender by paying the upset price upfront.*
>
> *ii) Upset price should be fixed once in 3 years for each tank taking into account the cost of stocking, productivity of the tank, water retentivity and other factors by the Assistant Director of Fisheries concerned subject to approval by Regional Joint/Deputy Director of Fisheries and Commissioner of Fisheries.*"

9. The fixation of such upset price by the Fisheries Department was the focal point of the earlier round of litigation, which culminated in the judgment of the Division Bench. The said judgment also needs to be examined because it has been subjected to differing interpretations. While the Society relies upon paragraphs 9 and 14, the State relies upon paragraph 10. Accordingly, the said three paragraphs are set out below:-

> "*9.However, in the case on hand, for the reasons best known, grossly inadequate upset price*

has been fixed, excluding the fact that a larger amount was fixed on the last occasion. The Government would be the looser and therefore, it is in Public Interest. To that extent, we find the reasoning of the learned Single Judge requires to be confirmed. Therefore, we call upon the official respondent to re-do the exercise, by keeping in view of the price augmented on the last occasion. The State largesse cannot be given to some one on a flatter ignoring the financial implication. Accordingly, the official respondents are hereby directed to re-do the exercise of the upset price and offer the same to the appellant in W.A.(MD). No.923 of 2020, particularly, keeping in mind the price that was fixed for the last year.

10.For the ensuing years, we call upon the official respondents, including the Secretary to Government, Fisheries Department, to adopt a different methodology as suggested by the learned Single Judge, by fixing the upset price and thereafter, call for tender. The highest amount offered by the successful bidder will have to be offered to the Bodi Fisherman Society. It is better to follow this methodology in future in all cases, as the Government would not loose the revenue and in any case, fixation of the upset price is a starting point and the same will not be the actual price that will fetch in an auction. It is a price, which will facilitate somebody to take part in the auction, being the minimum value of the subject matter of the licence.

14.The official respondents shall undertake the exercise as aforesaid within a period of four weeks from the date of receipt of a copy of this judgment. If the appellant in W.A.(MD)No.923 of 2020 is not inclined to take the fishing rights, it can be brought up for auction."

10. On perusal of paragraph 9, it is clear that the Court concluded that the upset price had not been fixed correctly and that the State's resources should not be handed over on a platter to the Society. The factual context was that the licence was granted for a sum of Rs.40,00,000 for the year 2018-2019. Therefore, the official respondents were directed to re-fix the upset price and offer the same to the appellant in W.A.(MD).No.923 of 2020, i.e. the petitioner in W.P.(MD).No.13591 of 2021. Such upset price was required to be fixed by keeping in mind the prices

fixed in the previous year. By placing reliance on this paragraph and paragraph 14, the Society contends that the State has contravened the judgment of the Division Bench. To the contrary, the State relies on paragraph 10 which indicates that for the ensuing years a tender should be called for and the highest bid value be offered to the Society. The State has adopted such methodology.

11. The above judgment was issued in February 2021. Meanwhile, the second wave of the Covid-19 pandemic intervened thereby delaying the process considerably. As a result, as on date, fishing activities in the Tank are not being undertaken, and the licence is likely to be worked by the end of the year or early next year. The State also says that its earlier attempts to fix the upset price were strongly criticised by the Court. In these circumstances, the State fixed the upset price of Rs.40,00,000 on the basis of the grant of licence for the year 2018-2019 at Rs.40,00,000, the said year being the last year of the previous three year term, and conducted the Auction by which a price of Rs.52,50,000 was discovered. Even if paragraph 9 of the Division Bench's order were to be construed in isolation in the above factual context, in the manner canvassed by the Society, the State should have fixed an upset price reasonably higher than Rs.40,00,000 by reckoning escalation between 2018-2019 and 2021-2022. Instead, by relying on paragraph 10 of the Division Bench's judgment and by citing difficulties in discovering the fair upset price, the State conducted the Auction. If a cumulative view is taken of the facts and circumstances, the State was justified in following the methodology prescribed in paragraph 10 of the judgment as a method of discovering the price to be offered to the Society. However, while adopting such methodology, the State did not specify in the tender-cum-auction notice that the highest bid value would be offered to the Society, and only upon refusal by such Society, the licence or lease of fishing rights would be offered to the successful bidder. Therefore, the tender process followed by the State is not fully in compliance even with paragraph 10 of the judgment of the Division Bench.

12. Keeping in mind all of the above said, a solution needs to be arrived at as regards the current Auction. As indicated above, the mandate of G.O.(Ms).No.201 is to offer fishing rights on priority basis to the Society. Therefore, such priority cannot be disregarded. The question that remains to be considered is the price at which the offer should be made to the Society. The successful bidder made a bid for a sum of Rs.52,50,000/- (Rupees Fifty Two Lakhs and Fifty Thousand only), and remitted a sum of Rs.26,25,000. While the contention of the Society that the State should have fixed the upset price without undertaking a tender or auction is not wholly devoid of merit, public interest demands that a price discovered through a credible price discovery mechanism not be disregarded. Nonetheless, the other contention of the Society that

it is not a commercial entity and, therefore, cannot compete on equal terms with persons who undertake fishing activities on commercial basis is tenable and warrants attention. In order to address this aspect, a reasonable discount is required to be offered to the Society. If a large discount is offered, it defeats the legitimate State interest of deriving reasonable revenue from the use of its resources. In order to balance the competing interests and resolve the current impasse, the State should offer a discount of 10% on the highest bid amount of Rs.52,50,000/- (Rupees Fifty Two Lakhs and Fifty Thousand only) to the Society, which would reduce the offer price to Rs.47,25,000. This would also represent a fair mark-up on the price of Rs.40,00,000 at which the licence was granted in 2018-2019. The Society shall make the payment of the sum of Rs.47,25,000 (Rupees Forty Seven Lakhs Fifty Two Thousand only) within a period of four (4) weeks from the date of receipt of a copy of this order. In the event of default in making the said payment, the State is at liberty to award the contract to the successful bidder. If the Society remits the amount specified above within the time limit specified herein, the amounts deposited by the successful bidder shall be refunded to him within a period of two (2) weeks from the date of receipt of the amount from the Society. If such amount had been deposited in an interest bearing account, the amount shall be returned along with interest accruals to the successful bidder. It is made clear that the Society shall not undertake fishing activities in the relevant tank until they make the entire payment in terms of this order.

13. Before parting with this case, it is necessary to make a few general observations and suggestions. Water bodies in which fishing activities are carried on are of varying sizes and dimensions. Therefore, a one-size-fits-all approach may not be appropriate. Hence, keeping in mind the legitimate but competing interests indicated earlier, the State should formulate a policy for the auction of fishing rights in respect of the categories of water bodies by categorizing them, for instance, as small, intermediate and large. It is advisable to offer such rights through a licence rather than lease because licences are relatively easier to revoke. Consequently, a licence fee rather than lease rental should be collected from successful licensees. At present, there is considerable terminological confusion. The real challenge lies in price discovery. Since valuation is more art than science, the State says it is very difficult to arrive at the fair upset price merely by applying the non-exhaustive criteria indicated in G.O.Ms.No.201. Therefore, G.O.Ms. No.201 should be re-visited. If deriving the maximum revenue were the only objective and because price discovery is a function of demand-supply dynamics, a tender-cum-forward auction on an open ascending basis is theoretically best suited to elicit a good market price. In such method, a reserve price is fixed and tenders are received for prices higher than such reserve price. All eligible bidders improve on their bid at the auction until the contract is awarded to the highest bidder. This method may be

appropriate for large tanks and reservoirs. An alternative is to fix the reserve price and have a plain vanilla tender and pick the highest tender. The latter method is theoretically less suited to draw the best price but easier to administer and may be appropriate for intermediate tanks. This appears to be the method adopted in the impugned Auction, which is more sealed tender followed by public opening of bids than auction. In either case, in view of the policy objective of providing employment to fishermen by granting priority to fishermen's cooperative societies, both these methods would require tweaking and adaptation. For such purpose, as was done in this case, one method would be to undertake such tender or auction process as a means of price discovery and offer the highest bid value minus an appropriate discount to the relevant fishermen's co-operative society after putting the bidders on sufficient notice of the process. In order to avoid artificial boosting of prices to drive the fishermen's cooperative society out of the race, bidders should be called upon to remit the full cost of two auctions as the EMD, which would be liable to forfeiture in case of default, and the highest bidder should be required to remit at least 50% of the bid value on the date of declaring the highest bid. Such amounts should be parked in interest bearing accounts so as to enable refund along with interest accruals except in the event of default by such bidders. As regards small tanks, the cost involved in running a tender or auction process for price discovery purposes may not be justified on a cost-benefit analysis. Therefore, the State should endeavour to fix objective criteria for determining the upset price; fix the upset price on such basis and offer the contract to the fishermen's cooperative society, if any. If there is no fishermen's cooperative society, a plain vanilla tender followed by public opening of bids may be adopted. However, the above are merely suggestions and more sophisticated methods may be evolved by the State by drawing on expert advice.

14. W.P.(MD).Nos.13591 and 15088 of 2021 are disposed of on these terms without any order as to costs. Consequently, W.M.P.(MD).Nos.12010, 12450, 10527, 10529 and 10531 of 2021 stand closed.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)

tsg/nsr

Note : In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate/litigant concerned.

To

1.The District Collector,
Theni District,
Theni.

2.The Revenue Divisional Officer,
Uthamapalayam,
Theni.

3.The Joint Director of Fisheries,
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5.The Director of Fisheries,
Fisheries Department,
Saidapet,
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6.The Deputy Director of Fisheries,
O/o.Deputy Director of Fisheries,
Madurai,
Madurai District.

7.The Assistant Director of Fisheries,
Theni Zone,
Vaigaidam,
Aundipatty,
Theni District.

+1 CC to M/s.SPL.GP (SR-33379[F],33164,33380 dated 01/11/2021)

W.P.(MD).Nos.13591 and 15088 of 2021
28.10.2021

VK(CO)
KB(12.11.2021) 10P 9C