

**13.5.2022**

**sl.23**

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**W.P.A. 7899 of 2022**

**Kausar Ali**

**Vs.**

**The State of West Bengal & Ors.**

Mr. Partha Pratim Roy

Mr. S.Sanyal

Ms. P.Chakraborty

... for the petitioner

Mr. Sudipta Panda

Mr. Pasupati Sana

... for the State

The petitioner is the existing operator of a ferry ghat from Mahammadpur to Bahura in the district of Murshidabad under the Raghunathpur-II Panchayat samity.

The petitioner had moved this Court on an earlier occasion by filing WPA 5263 of 2022. By an order dated March 29, 2022, the court directed that the prayer of the petitioner before the authorities to grant extension of the lease to operate the ferry ghat after the period had expired, be considered by the authorities sympathetically. Such prayer for extension of the lease was made on the ground that although the petitioner had deposited the entire rent, losses suffered due to the pandemic situation, could not be made up.

Accordingly, the petitioner's representation was decided. The petitioner was granted a hearing. A written statement was also filed by the petitioner.

The petitioner submitted instances where the Murshidabad Zilla Parishad had extended the lease of similarly situated ferry ghat operators.

The Executive Officer of Raghunathpur-II Panchayat samity by an order dated April 11, 2022 expressed the intention of the panchayat samiti to hold open auction for granting lease of all the six ferry ghats which were within the jurisdiction of Raghunathpur-II panchayat samiti. The matter was under active consideration of Artha-Unnayan O Parikalpana Samiti. The authorities further decided to allow the petitioner to continue until the proposed public auction would be finalised.

During the pendency of the writ petition, the parties called for a fresh tender and the fact has been brought on record by way of a supplementary affidavit.

The first contention of Mr. Roy, learned advocate for the petitioner is that when the Zilla Parishad allowed extension in respect of existing operators of other ferry ghats which were under the control of the Zilla Parishad, nothing prevented the Executive Officer, Raghunathpur-II Zilla Parishad from granting extension to the petitioner on humanitarian consideration. He next submits that the decision to hold a public auction is not backed by any reason. The decision to hold public auction instead of

granting an extension to the petitioner should be on the basis of certain considerations and not a whim or fancy.

According to Mr.Roy, the notice of invitation for holding public auction which was published subsequently on April 22, 2022, suffered from another irregularity, as the provisions of Rule 281 of the West Bengal Land Reforms Manual Act, 1991 have not been followed. His specific contention is that such public auction should be restricted to Patnis or local Boatmen's Co-operative Society.

The learned advocate for the State respondents submits that this Court had directed the Executive Officer of the concerned panchayat samiti to decide the issue in accordance with law and such decision has been taken. The authorities have thought it wise to hold public auction and as such interference of the Writ Court is not called for in this regard.

Heard the learned advocates for the parties.

This Court does not find that the rules with regard to settlement of the ferry ghat and the circulars issued in this behalf, permit continuation of the operators after expiry of the lease. It may so happen that under emergent situations and during the pandemic, a stop-gap arrangement was made by the authority. However, this Court sitting in judicial review under Article 226 of the Constitution of India,

cannot direct the authorities to allow the petitioner to operate indefinitely, without any legal backing. This is a policy matter and entirely within the domain of the executive.

This Court is of the view that, when the panchayat samiti has decided that the ferry ghat should be settled by public auction and has issued the notice of auction, such a policy decision cannot be interfered with under Article 226 of the Constitution of India.

Transparency and maximisation of revenue by allowing all eligible persons to participate in such tender, is the correct method.

The court does not have any authority to either set aside the auction or to hold the policy of the authority to be bad in law, for the following reasons:-

- a) Judicial review of an administrative decision is permitted only when the decision making authority does not act in accordance with law or acts arbitrarily and with mala fide intentions.

In the matter of ***Tata Cellular v. Union of India***, reported in **(1994) 6 SCC 651**, the Hon'ble Apex Court laid down the following principles with regard to judicial review of administrative action:-

- (1) The modern trend points to judicial restraint in 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 the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms 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 or award the contract is reached by process of negotiations through several tiers. 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 unbudgeted expenditure.

b) The auction notice has been issued as a policy decision and the court must refrain from interfering with the policies of the Government. There are no allegations of unreasonableness, arbitrariness and favouritism. The petitioner was himself awarded the settlement through a public auction which was held when the pandemic was in the rise.

It is settled law that policy decisions of the State are not to be disturbed unless they are found to be grossly arbitrary or irrational. In the case of ***Directorate of Film Festivals & Ors. Vs. Gaurav Ashwin Jain & Ors.***, reported in (2007) 4 SCC 737, the Hon'ble Apex Court held that the scope of judicial

review of governmental policy is now well defined. Courts do not and cannot act as Appellate Authorities examining the correctness, suitability and appropriateness of a policy. Nor are courts advisors to the executive on matters of policy which the executive is entitled to formulate.

The scope of judicial review when examining a policy of the government is to check whether it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution, or opposed to any statutory provision or is manifestly arbitrary. Courts cannot interfere with policy either on the ground that it is erroneous or on the ground that a better, fairer or wiser alternative is available. Legality of the policy, and not the wisdom or soundness of the policy, is the subject of judicial review. The scope of judicial review in policy matters is no longer *res integra*.

c) The idea of open auction is to ensure maximization of revenue and the panchayat samity cannot be faulted for having taken a policy decision to go for open auction when the pandemic situation has improved considerably and normalcy has resumed in every aspect of life.

In the matter of ***The Goa foundation vs. M/s Sesa Sterlite Limited & ors, [Special Leave to Appeal (Civil) No.32138 of 2015]*** the Hon'ble Apex

Court held that, the State was duty bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process. That natural resources could not be alienated by way of largesse and there must be a reciprocal consideration either in the form of earning revenue or sub-serving the common good or both. The State's endeavour must be towards maximization of revenue returns.

In the matter of ***Centre for Public Interest Litigation v. Union of India***, reported ***in (2012) 3 SCC 1***, the Hon'ble Apex Court held as follows:-

“95. This Court has repeatedly held that wherever a contract is to be awarded or a licence is to be given, the public authority must adopt a transparent and fair method for making selections so that all eligible persons get a fair opportunity of competition. To put it differently, the State and its agencies/instrumentalities must always adopt a rational method for disposal of public property and no attempt should be made to scuttle the claim of worthy applicants. When it comes to alienation of scarce natural resources like spectrum, etc. it is the burden of the State to ensure that a non-discriminatory method is adopted for distribution and alienation, which would necessarily result in protection of national/public interest.

96. In our view, a duly publicised auction conducted fairly and impartially is perhaps the best method for discharging this burden and the methods like first-come-first-served when used for alienation of natural resources/public property are likely to be misused by unscrupulous people who are only

interested in garnering maximum financial benefit and have no respect for the constitutional ethos and values. In other words, while transferring or alienating the natural resources, the State is duty-bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process.”

Mr. Roy’s contention with regard to the illegality in the auction notice dated April 22, 2022 where no reservation has been made for Patnis and local Boatmen’s Co-operative Society is not accepted by the Court.

The petitioner was also granted the lease upon his participation in public auction. The petitioner also wants to continue on the basis of such lease granted through a public auction and at this stage the petitioner cannot turn around and submit that public auction should not be the method for settlement of a ferry ghat. The petitioner cannot approbate and reprobate at the same time.

This would only mean that no party can be allowed to accept and reject the same thing, and thus cannot blow hot and cold. It is a principle of equity coming under the contours of common law. Therefore, he who knows that if he objects to an instrument, he will not get the benefit he wants, cannot be allowed to do so while enjoying the fruits. One cannot take advantage of one part while rejecting the rest. A person cannot be allowed to

have the benefit of an instrument while questioning the same. An element of fair play is inbuilt in this principle. It is also a species of estoppel dealing with the conduct of a party.

In the decision relied upon by Mr. Roy in support of his contentions, namely, **Kaljani Group Samity and ors. Vs. State of West Bengal and Ors. passed in W.P. No. 2851 (W) of 2005** this Court finds that His Lordship had categorically held that the prayer for renewal of lease and extension of period of lease could not be granted as it was opposed to public policy, the selection should be made either by auction or by tender.

In this case, the petitioner entered into the contract/lease agreement with his eyes open and when the petitioner is a beneficiary of the public auction held some time in 2017-18 and was granted lease pursuant to the public auction, the petitioner cannot turn around and challenge a similar public auction, by claiming reservation for Patnis and local Boatmen's Co-operative Societies.

Accordingly, the writ petition is disposed of, without any orders. The petitioner may participate in the public auction.

However, there will be no order as to costs.

All the parties are directed to act on the basis of the server copy of this order/or learned advocate's communication.

**(Shampa Sarkar, J.)**