

HIGH COURT OF MEGHALAYA
AT SHILLONG

WP(C) No.123 of 2020

Date of Decision: 01.12.2023

Ms. La Monte Enterprise Represented Vs. Union of India & Ors.
by Shri Bhupinder Singh.

Coram:

Hon'ble Mr. Justice B. Bhattacharjee, Judge

Appearance:

For the Petitioner/Appellant(s) : Mr. S. Dey, Adv.

For the Respondent(s) : Dr. N. Mozika, DSGI with
Ms. A. Pradhan, Adv.

i)	Whether approved for reporting in Law journals etc:	Yes/No
ii)	Whether approved for publication in press:	Yes/No

JUDGMENT AND ORDER

This application under Article 226 has been filed by the petitioner challenging the impugned order dated 27-05-2020 issued by the respondent No.2 by which the contract awarded to the petitioner against the Tender Notice No. iv. 18081/2018-19/Ord/M&E/Mod-iii/CISR dated 26 Sep 2018 and Corrigendum dated 26 Oct 2018 and 12 Nov 2018 stood terminated with immediate effect and the petitioner was banned from business and debarred from entering into any business dealings with the Assam Rifles. The impugned order also directed for filing of a criminal complaint with

the jurisdictional police station against the petitioner for committing fraud against the Assam Rifles.

1. The brief fact of the case is that an open tender was floated on 26-09-2018 by the respondent authority for online tender under two bid system (technical & financial bid) for purchase of the store of Composite Indore Shooting Range (CISR). The petitioner participated in the said tender process and submitted his bid along with all relevant documents on 18-11-2018. Apart from the petitioner, three other firms participated in the said tender process, namely, (i) M/s Paramahansa Technologies Ltd., (ii) M/s GSG Associates and (iii) M/s Lotus Machines Pvt. Ltd. After technical evaluation, the M/s Lotus Machines Pvt. Ltd. was disqualified. Thereafter, the remaining three firms submitted their Detailed Project Report (DPR) and at that stage M/s Paramahansa Technologies Ltd. was disqualified for non-compliance of detailed technical parameters leaving the petitioner and M/s GSG Associates as qualified bidders for financial evaluation. After financial evaluation, the Tender Committee headed by the respondent No.2 recommended awarding of contract to the petitioner being the lowest (L1) bidder on 18-02-2019. Thereafter, an offer letter dated 20-02-2019 was issued to the petitioner and the petitioner was asked to furnish security deposit. The petitioner furnished security deposit on 21-02-2019 and on 22-02-2019 the petitioner was issued with the supply order requiring the work/delivery to be completed by 22-08-2019. By a subsequent order dated 21-10-2019, the time for completion of the work/delivery was extended till 31-03-2020. On 11-11-2019, the petitioner submitted final drawing of CISR to the respondent for approval and thereafter the site was handed over on 03-12-2019 to him and the work started immediately.

2. On 25-02-2020, a notice was issued by the respondent on the ground of violation of Code of Integrity for Public Procurement (CIPP) asking the petitioner to confirm his spousal relationship with the proprietor of M/s GSG Associates. The petitioner confirmed his spousal relationship with the proprietor of M/s GSG Associates and further by a letter dated 02-03-2020 clarified that he and his wife are separate business entity having no business transaction whatsoever between them. On 17-03-2020, the petitioner received a show-cause notice for termination of the contract for alleged violation of clause (iii) “Anti-Competitive Practice” and clause (v) “Conflict of Interest” of the Appendix – L of the tender document which was submitted by the petitioner along with his bid as certificate for abiding by the Code of Integrity for Public Procurement. The petitioner submitted a detailed reply to the show-cause on 24-05-2020 and denied that there was any violation or breach of any condition and no false declaration or suppression was ever made by him while taking part in the tender process. The impugned order dated 27-05-2020 was passed thereafter by the respondent No.2 terminating the contract awarded in favour of the petitioner and debarring him from taking part in any business dealings with the Assam Rifles. The impugned order also directed for filing of criminal complaint against the petitioner for committing fraud.

3. At the outset, before the matter is taken up for consideration on merit, learned DSGI submits that the respondents have taken a decision not to initiate or file any criminal complaint against the petitioner. He further submits that during the pendency of this writ petition, the competent authority of Assam Rifles has also taken a decision to cancel the entire project of CSIR for which the petitioner was awarded the contract. In view of the above, the learned Counsel appearing for the petitioner submits that

the petitioner will not press the aforesaid two issues and challenge to the impugned order dated 27-05-2020 in the present writ petition be confined and limited only to the issue of banning and debarring the petitioner from entering into any business dealings with the Assam Rifles.

4. Mr. S. Dey, learned counsel appearing for the petitioner submits that the issuance of the impugned order solely on the basis of the existence of the spousal relationship between the petitioner and the proprietor of M/s GSG Associates is totally arbitrary and illegal. He submits that the very basis of issuing the show-cause notice and finding arrived at the impugned order is not tenable in law, inasmuch as, the Certificate of the Code of Integrity for Public Procurement (CIPP) as per Appendix – L of the tender document nowhere lay down any disqualification criteria for participating in tender by husband and wife or by any family member. He submits that the terms and conditions stipulated in the tender document nowhere mandate disclosure of existence of spousal relationship or family relationship between the different participating bidders. Referring to the show-cause notice, the learned counsel submits that the same has been based on the code of integrity made in the Appendix – L and the petitioner was asked to reply on violation of codes under two headings, namely, clause (iii) “Anti-competitive Practice” and clause (v) “Conflict of Interest”. He submits that there is no material on record to indicate or remotely suggest that the petitioner has given indulgence in “Anti-competitive Practice” while taking part in the tender process inasmuch as there is no evidence of collusion, bid rigging or anti-competitive arrangement. With regard to the “Conflict of Interest”, he submits that there is also no allegation of his having relationship or financial or business transaction with any officials of the tendering authority. He further submits that finding recorded in the impugned order by the respondent No.2 is

totally misconceived and not founded on the requirements of the clauses (iii) & (v) of the code of integrity mentioned in the Appendix – L of the tender document. He submits that the show-cause notice reveals that the same was based upon a complaint of another bidder which prompted the concerned authority to call for the reply from the petitioner, but the details of the said complaint was never made available to the petitioner. He contends that the impugned order does not in anywhere disclose as to how the existence of the matrimonial relationship between the petitioner and the proprietor of M/s GSG Associates has breached any of the code of conduct specified in the Appendix – L of the tender document and thus, the entire process of disqualification is misconceived and unwarranted in law. He submits that the terms and conditions stipulated in the tender document and the related provisions contained in Section 3 of the Competition Act, 2002 do not prohibit close relatives having separate business identity from taking part in any tender process. He contends that the respondent authority has no power to ban the petitioner for an indefinite period and the entire action of the respondent is liable to be interfered with by this Court. In support of his submission, the learned counsel for the petitioner placed reliance on a decision of the Competition Commission of India rendered in case No. 09 of 2021 (para - 17).

5. Per contra, Dr. N. Mozika, learned DSGI appearing for the respondent submits that the petitioner at the time of taking part in the tender process did not make any disclosure with regard to his relationship with the proprietor of M/s GSG Associates. He submits that the existence of relationship of husband and wife between the petitioner and the proprietor of M/s GSG Associates is sufficient to draw adverse inference of existence of collusion, bid rigging and anti-competitive arrangement against the petitioner. He submits that when there exists close relationship between

two bidders in a tender process, it puts them in a position to have access to information about each other and in that view of the matter the impugned order blacklisting the petitioner suffers from no infirmity. He further submits that if the petitioner had divulged the fact of his spousal relationship with the proprietor of M/s GSG Associates, his tender would have been rejected summarily. He submits that the petitioner should have maintained highest standard of business ethics and honesty while participating in the tender process and his failure to do so lead the respondent authority to come to an adverse finding against the petitioner. He submits that the impugned order has been passed keeping in view the mandate of law as enshrined in the Competition Act, 2002 and all other provisions of General Financial Rules, 2017 and also as per the terms and conditions stipulated in the standard document and Manual for Procurement of Goods, 2017 to ensure observance of the high standard of ethics. The learned DSGI draws attention of this Court to Rule 175 (1) (ii) of the General Financial Rules, 2017 and Clause 5.1.4 (ix) (d) of the Manual for Procurement of Good, 2017 and submits that petitioner has contravened the disclosure clause of “Conflict of Interest” and “Anti-Competitive Practice” by not furnishing the details of his relationship with the proprietor of M/s GSG Associates and, as such, there is no infirmity or illegality in the passing of the impugned order. He, however, fairly submits that as per Rule 151 (iii) of the General Financial Rules, 2017, the respondent authority has the power to debar a bidder for a period not exceeding two years only and the impugned order is incorrect only to the extent it refers to the period of debarment or blacklisting of the petitioner. He further submits that the period of two years has since lapsed from the date of the impugned order and at present there remains nothing to be decided in the writ petition and the same may be dismissed.

6. The submissions made by the rival parties are given careful consideration. For better appreciation of the matter in hand, it would be apposite to refer to the Appendix – L, particularly clauses (iii) & (v), of the related tender document which reads as follows: -

CHAPTER-VI

Appendix-L

CERTIFICATE FOR ABIDING BY CODE OF INTEGRITY FOR PUBLIC PROCUREMENT (CIPP)

1. I/We _____ (Name of Prop & Firm) hereby solemnly affirm and certify that we will observe the highest standard of ethics and will not indulge in the following prohibited practices, either directly or indirectly, at any stage during the procurement process or during execution of resultant contracts: -

(i)

(ii)

(iii) **"Anti-competitive Practice"**. Any collusion, bid rigging or anti-competitive arrangement, or any other practice coming under the purview of The Competition Act, 2002, between two or more bidders, with or without the knowledge of the Procuring Entity, that may impair the transparency, fairness and the progress of the procurement process or to establish bid prices at artificial, non-competitive levels.

(iv)

(V) **"Conflict of interest"**. Participation by a bidding firm or any of its affiliates that are either involved in the consultancy contract to which this procurement is linked, or if they are part of more than one bid in the procurement, or if the bidding firm or their personnel have relationships or financial or business transactions with any official of Procuring Entity who are directly or indirectly related to tender or execution process of contract, or improper use of information obtained by the (prospective) bidder from the Procuring Entity with an intent to gain unfair advantage in the procurement process or for personal gain, and

(vi)

2. At any stage if we am/are found in case of any transgression of this CODE OF INTEGRITY FOR PUBLIC PROCUREMENT (CIPP) as mentioned above I/we shall be not only liable to be removed from the list of registered suppliers, but would be liable for other punitive actions such as cancellation of contracts, banning and blacklisting or action in Competition Commission of India, and so on. (Rule 175 of GFR 2017).

Signature of the tenderer & Stamp (Authorized signatory of company)

7. A perusal of the above clauses (iii) & (v), of the code of integrity for public procurement, breach of which has been alleged against the petitioner, do not indicate that the petitioner was required to disclose about existence of his spousal relationship with any other participating bidder. Clause (v) of the aforementioned code requires disclosure in the event of the bidding firm or their personnel have relationship or financial or business transaction with any official of procuring entity who are directly or indirectly related to tender or execution process of contract. In the present matter, it is not the case of the respondent that the petitioner is having any kind of relationship or business or financial transaction with any of the officials of the tendering authority. The non-disclosure of the existence of spousal relationship between the petitioner and the proprietor of M/s GSG Associates, as such, cannot be taken as a violation of the said code. In addition, the stipulated terms and conditions of the relevant tender process nowhere prohibits or forbids participation of close relatives or members of a family including husband and wife in the bidding process. Thus, the petitioner could not have been disqualified on the pretext of violation of the clause (v) of the aforesaid code of integrity.

8. The clause (iii) of the aforesaid code lays down that any collusion, bid rigging or anti-competitive arrangement or other practice coming under the purview of the Competition Act, 2002 between two or more bidders, that may impair the transparency, fairness and progress of the procurement process or to establish bid prices at artificial, non-competitive levels shall be regarded as prohibited practice. The said code does not say that just because there exists a spousal relationship between two bidders, the presumption of existence of collusion, bid rigging or anti-competitive arrangement will be automatic. The provisions of the Competition Act, 2002 also do not contain any provision by which members of a family including husband and wife or any other close relative are barred from taking part in a tender process for advancing their business interest. Therefore, the Clause (iii) of the aforesaid code cannot be interpreted in a way to curtail rights of two individuals on the basis of existence of spousal relation between them.

9. Coming to Rule 175 (1) (ii) of the General Financial Rules, 2017 and Clause 5.1.4 (ix) (d) of the Manual for Procurement of Good, 2017 on which reliance has been placed by the learned DSGI to support the impugned order, it is seen that the aforesaid rules/guidelines are framed in the line of the mandate of law contained in the Competition Act, 2002. The very interpretation of the said rules/guidelines, as such, also will have to be within the framework of the provisions of the Companies Act, 2002. The reference of term “relationship” in Clause 5.1.4 (ix) (d) of the Manual for Procurement of Good, 2017 has to be taken as business relationship and not personnel relationship or social relationship. Business relationship in a commercial transaction would mean connection between stake-holders in the process of business and, therefore, mere presence of existence of personal relation or social relation between two bidders cannot be termed as

“relationship” in a commercial process so as to attract the violation of the Integrity Code of “Conflict of Interest” and “Anti-Competitive Practice”.

10. The finding recorded in the impugned order dated 27-05-2020 indicates that the same is based only on the fact of existence of spousal relationship between the petitioner and the proprietor of M/s GSG Associates and also for the reason of non-disclosure of the said fact by the petitioner at the time of taking part in the tender process. The petitioner’s role in indulging in violation of clause (iii) “Anti-competitive Practice” and clause (v) “Conflict of Interest” is also judged on surmises and conjectures surrounding the fact of the existence of the spousal relationship between the petitioner and the proprietor of M/s GSG Associates. The respondent No.2 while passing the impugned order did not even bother to discuss and take into consideration the very words of the clause (iii) “Anti-competitive Practice” and clause (v) “Conflict of Interest” of the Appendix – L and in the process failed to appreciate that the aforesaid clauses did not make it mandatory for the petitioner to disclose about existence of personal relationship with the proprietor of M/s GSG Associates at the time of taking part in the tender process. The respondent No.2 also did not refer and rely on any materials on record to determine whether there was existence of close business relationship between the aforesaid two bidders and whether the petitioner was directly or indirectly controlling the business of M/s GSG Associates and also invoked doctrine of Alter-Ego without recording a finding that any of the firms lack separate business identity. The impugned order was also passed on the premises that had there been disclosure of existence of spousal relationship by the petitioner at the time of taking part in the tender process, it would have resulted in rejection of petitioner’s bid summarily in view of the terms of the tender offer; whereas, in reality there exists no such terms and conditions in the

tender document. The impugned order does not show that the respondent No.2 have even bothered to take into consideration the details of the offer made by the petitioner and the proprietor of M/s GSG Associates in the bidding process in order to determine existence of business relations between them. There is no reference of existence of any stipulation in the tender document which debar or prohibit married couple from taking part in the tender process in the name of their individual business identity.

11. Husband and wife are two different identities in law and the same relationship cannot lead to any disqualification in a tender process until and unless there exist a specific restriction incorporated in the related terms and conditions. No law has been placed before this Court which can permit any restriction on two separate business establishments irrespective of the fact of being they relate two each other as husband and wife. The provision of Section 3 of the Competition Act, 2002 also nowhere in specific term restricts participation of husband and wife as two separate business identity in a bidding process. There is also no allegation of petitioner having an agreement, express or implied, with the proprietor of M/s GSG Associates or they have formed a cartel to create non-competitive levels in the bidding process.

12. For what have been discussed above, the impugned order dated 27-05-2020, insofar as it relates to banning and debarring the petitioner from entering into any business dealing with Assam Rifles is concerned, cannot be sustained in law and the same is set aside to that extent.

13. It is made clear that the observation and finding recorded hereinabove shall not have any bearing on the merits of any claim and counter-claim between the parties which may arise out of the events taken

place during the subsistence of the contract entered into between the petitioner and the respondents.

14. The writ petition stands disposed of in the aforesaid terms.

15. There will be no order as to costs.

Judge

Meghalaya
01.12.2023
"Biswarup PS"

