



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

Case No. : WA/13/2023

M/s Balaji Enterprise
Pappu Nallah, Naharlagun, PO/PS Naharlagun, District Papum Pare, Arunachal Pradesh 791110. Represented by its Proprietor Shri Yukar Taw, S/o Shri Yukar Tadu

VERSUS

THE STATE OF AP and 8 Ors.
Represented by the Secretary, Department of PWD, Govt. of Arunachal Pradesh, Itanagar 2:The Chief Engineer (Western Zone)
Age: 0
Occupation :

3:The Superintending Engineer
Age: 0
Occupation :

4:The Chairman
Age: 0
Occupation :

5:The Executive Engineer
Age: 0
Occupation :

6:The Assistant Engineer
Age: 0
Occupation :

7:M/s Taro Tagia Construction
Age: 0
Occupation :

8:M/s Eka Enterprises

Age: 0

Occupation :

9:M/s T. K and Sons Enterprises.

Age: 0

Occupation

Advocate for the Petitioner : T T Tara

Advocate for the Respondent : GA (AP)

BEFORE

THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

THE HON'BLE MR JUSTICE KARDAK ETE

For the petitioner :Mr. T.T. Tara, Advocate.

For the Respondents : Mr. R.H. Nabam, Addl. A.G., A.P.
Mr. T.T. Tagum, Advocate

Date of Hearing : 15.11.2023

Date of Judgement :15.11.2023

JUDGEMENT & ORDER (ORAL)

(A.D. Choudhury, J)

1. Heard Mr.TT Tara, learned counsel appearing on behalf of the appellant. Also heard Mr. R.H. Nabam, learned Additional Advocate General, Arunachal Pradesh and Mr. T.T. Tagum, learned counsel for the respondent Nos. 9. Though respondent Nos. 7 and 8 were duly served through dasti service, none appears for them.

2. The background fact:

- I. The present intra court appeal is preferred against the order dated 30.03.2023 passed by the learned Single Judge in WP(C) 158/2023.
- II. Pursuant to an IFB dated 02.09.2022, issued by the Executive Engineer, Sagalee Division, Public Works Department for the work 'construction of road from MarungGika to Panior Bridge Point via Sarchgai, MateKushuk and Pan, 21.00 k.m. under NESIDS 2nd Call', the petitioner along with the respondent Nos. 7,8 and 9 and some other bidders offered their bids for the work in question.
- III. By an order dated 13.03.2023, issued by the respondent No. 5, the bid submitted by the petitioner and 12 others bidders were rejected for the reason of the same being technically non responsive for non-fulfillment of the eligibility criteria as per clause 4.2 and clause 2.0 (11) (iii) of the ITB.
- IV. To be more precise, the tenders were rejected for non-compliance of 4.2(j), 4.2(i) and 4.2(v) of Section 1 of ITB and clause 2.0(11)(iii) of Section 2 of the ITB. The aforesaid clauses provide for the following:

“4.2(j) affidavit executed before First Class Magistrate/ Notary indicating that furnished statements are true and will abide by the terms and conditions of tender.

4.2(i) undertaking regarding litigation history in the form of affidavit executed before the First Class Magistrate/ Notary.

4.2(v) details of construction plant and equipment likely to be used in carrying out the work with supporting documents such as Affidavit/ Undertaking/ Lease document certifying all the tools and machinery are in possession with bidder. For details refer Annexure-I of Appendix to ITB.”

- V. Further, Clause 2.0(11)(iii) of Section 2 of the ITB provides for declaration of having not more than two ongoing works in hand by way of an affidavit to be sworn before First Class Magistrate.
- VI. A very important fact, which is required to be noted is that subsequent to issuance of IFB dated 02.09.2022, another IFB relating to the same work was issued on 29.10.2022 and the same was challenged by another bidder in WP(C) 415/2022, who participated in the tender process pursuant to IFB dated 02.09.2022. Said writ petition was allowed by the learned Single Bench by its order 13.02.2023 and the decision and reason is reflected at paragraph 12 of the said order, which is quoted hereinbelow:

“12. Apart from the justification given in the counter-affidavit of the respondent authorities, which has been quoted hereinabove for issuing the 3rd NIT dated 29.10.2022, no materials(s) have been placed before the Court, indicating the decision taken and notified by the respondent authorities on the bids submitted by the 16 bidders pursuant to NIT dated 02.09.2022. Once an NIT is issued by the authorities and the bids submitted pursuant thereto, I am of the view that the respondent authorities are duty bound to take a decision in the matter either rejecting or accepting the bids submitted with cogent reason(s). It is so because, the participants/ bidders, who have submitted their respective bids pursuant to NIT dated 02.09.2022 have the right to know as to what is the fate of the bids submitted by them.”

- VII. The respondent State, in the aforesaid writ proceeding, by filing an affidavit took a stand and cited a reason for cancellation of IFB dated 02.09.2022 that the clauses incorporated in the IFB regarding requirement of swearing affidavit before Magistrate First Class was a mistake and such insertion was in contravention and in derogation of

provision of statutory Rule 4.(ii)(e) of the Arunachal Pradesh District Based Entrepreneur and Professional Rules, 2018 (for short Rules, 2018) framed under the provision of Arunachal Pradesh District Based Entrepreneur and Professional Act, 2015 (for short Act, 2015).

VIII. However, subsequently, as discussed hereinabove, the bid of the petitioner and 12 other bidders were found technically non-responsive only for the reason that all of them sworn the affidavits before the Executive Magistrates and not before Magistrate First Class.

IX. Such decision was challenged by the appellant in WP(C) 158(AP)/2023. The learned Single Judge made the following conclusions:

A. No distinction is made in the Oaths Act, 1969 of Magistrate before whom the affidavit is to be sworn so long as a Magistrate is empowered to administered oath by the Government. (para 15).

B. The affidavit sworn before the Executive Magistrate by the petitioner is a substantial compliance of the term of ITB. (para 15).

C. The prescription of an affidavit to be sworn before the First Class Magistrate by the bidder as provided in ITB is beyond the requirement under the Act, 2015 and the Rules, 2018 framed thereunder. (para 15).

X. However, after having such conclusion, the learned Single Judge relying on the decision of the Hon'ble Apex Court rendered in

Jagdish Mandal Vs. State of Orissa &Ors reported in **(2007) 14 SCC 517**, declined to entertain the challenge and dismissed the writ petition. The precise reason can be summarized as follows:

- A. While issuing the impugned notification the ITB of the IFB have rigorously been applied by the tender issuing authority to all bidders alike and therefore the process adopted by the authority is neither malafide nor the same has been done in a manner intended to favour any of the bidders. (para 20)
- B. As the invitation for bid have uniformly applied to all bidders the process adopted cannot be said to be arbitrary, discriminatory or irrational so that the court can say the decision is such that no responsible authority acting responsively in accordance with relevant law, could have reached.

XI. Such decision is under challenge in the present appeal.

3. Mr. T.T. Tara, learned counsel for the appellant argues the followings:

- I. In view of the specific stand taken by the respondent in the affidavit filed in the proceeding of WP(C) 415/2022 that the clauses itself are in derogation of the statutory Rule, 2018, the bid of the petitioner could not have been rejected by the respondent authorities.
- II. The employer cannot dilute a statutory provision by incorporating clauses in the IFB in derogation of such statutory provision.
- III. Having been admitted that the insertion of the clauses regarding swearing in affidavit before Magistrate First Class itself is in contravention of Rule, 2018 the respondent State cannot allowed to interpret the same in a different manner at a subsequent stage of

the same tender. Therefore, such action is not only against law but also arbitrary and unreasonable.

4. Mr. Nabam, learned Additional Advocate General, Arunachal Pradesh argues the followings:

- I. The terms of the invitation for ITB has to be strictly followed by the State respondent and interpretation of ITB by the employer is not open to a judicial scrutiny, unless it is found that the same has been tailor-made to benefit any particular tenderer or class of tenderers and therefore, the learned Single Judge has rightly dismissed the writ petition inasmuch

as there has been no arbitrary exercise of power by the tender issuing authority and the tender issuing authority has acted in a fair manner.
- II. In a case of this nature, even when some defects are found in the decision making process, the court must exercise its discretionary power under Article 226 of the Constitution of India with great caution and should exercise in public interest only and should not act on merely making out of a legal point. Therefore, this court should not interfere with the decision either of the tendering authority or of the learned Single Judge.
- III. The work in question relates to construction of road and therefore, such public project should not be stalled even if there is some arbitrary exercise of power inasmuch as the petitioner can be compensated if any wrong is committed to him in the process.
- IV. In support of his contentions, Mr. Nabam relies on the decisions of Hon'ble Supreme Court rendered in ***Maa Binda Express Carrier &***

Anr. V North East Frontier Railway & Ors reported in **(2014) 3 SCC 760**, **Air India Ltd. v. Cochin International Airport Ltd & Ors** reported in **(2000) 2 SCC 617**, **N.G. Project Limited v Vinod Kumar Jain** reported in **(2022) 6 SCC 127.**, **Tata Motors Limited v. The Brihan Mumbai Electric Supply & Transport Undertaking (Best) and Others.(Civil Appeal No. 3897/2023)** and **M/s Om Gurusai Construction Company v M/s V.N. Reddy & Ors.(Civil Appeal No. 5375/2023).**

5. Mr. Tagum, learned counsel for the respondent No. 9 argues as follows:

- I. The condition prescribed under Tender Document has to be rigidly enforced and same cannot be relaxed at mere asking of the bidder. In support, he relies on the decision of the Hon'ble Apex Court in **Central Coalfield Ltd. v. SLL-SML (Joint Venture Construction)** reported in **(2016) 8 SCC, 622**.
- II. The word used in tender documents cannot be ignored or treated as redundant or superfluous. Each word in the tender document must be given meaning and significance and the owner/ employer of a project, having authored the tender document is the best person to interpret its document. In support, he relies on the decisions of the Hon'ble Apex Court in **Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.** reported in **(2016) 16 SCC 818** and in **Caretel Infotech Ltd. vs Hindustan Petroleum Corporation Limited** reported in **(2019) 14 SCC 81** and in **Jagdish Mandal Vs. State of Orissa & Ors** reported in **(2007) 14 SCC 517**.
- III. The writ court should refrain itself from imposing its decision over the decision of employer as to whether or not to accept the bid of a

tenderer. It is further argued that even if the court finds that there is total arbitrariness or that the tender has been granted in a malafide manner, still the court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. In support, he relies on the decision of the Hon'ble Apex Court in ***N.G. Project (supra)***.

- IV. In an intra court appeal, appellate court should not interfere with the finding of Single Bench, unless it is so perverse. In support he relies on the decision in the ***Management of Narendra & Company Pvt. Ltd. v The Workmen of Narendra & Company*** reported in ***(2016) 3 SCC 340***.

6. Determination & Decision:

- I. We have given our anxious considerations to the argument, advanced by the learned counsel for the parties. We have also perused the material available on record.
- II. This court is in total agreement with the finding of the learned Single Judge that there is substantive compliance of the ITB by the petitioner, so far the same relates to swearing in the affidavit before Executive Magistrate. This court is also in total agreement with the decision of the learned Single Judge that the prescription of affidavit to be sworn before the First Class Magistrate is beyond the requirement of the Act, 2015 and the Rules, 2018 framed thereunder.
- III. The fact also remains that in the proceeding of WP(C) 415/2022 relating to a challenge to the same bidding process, the bidding authority by filing affidavit therein took a stand that the insertion of

clause 4.2(j), 4.2(i) and 4.2(v) as quoted hereinabove and the prescription therein regarding swearing in of affidavit before First Class Magistrate was a mistake on the part of the bidding authority and there is no specific requirement for swearing in such affidavit before a "First Class Magistrate". Thus, not only the learned Single Judge has concluded that there is no such requirement of swearing an affidavit before "First Class Magistrate" and that there is substantive compliance of the bid conditions, but the State respondent had also interpreted the said clause that there is no requirement for swearing in affidavit before the "First Class Magistrate" and insertion of such clause was a mistake. That being the position, this court is to endeavor whether rejection of such bid of the petitioner and similarly situated persons on the failure to file affidavit sworn in before Magistrate First Class but before Executive Magistrate is an irrational and arbitrary act and such act is against public interest.

- IV. There is no dispute regarding the proposition of law as urged by the learned counsels for the respondents regarding the limitation of exercise of power of judicial review, when it comes to the judicial review of the tender/ contract matters. However, it is equally well settled that when the decision and/ or action of the authority is not reasonable and not in accordance with relevant law, such action can very well be judicially reviewed. Such action can also be judicially reviewed when it affects public interest. Further, it is a well settled proposition of law that when it is prima facie shown that any action of the State authority is uninformed by reason or it is contrary to prescribed mode of exercise of power or is unreasonable, then the

burden shifts to the State to disclose the material and reason, which led to the action being taken in order to show that it was an informed decision which is reasonable. (***Srilekha Vidyarthi vs State of U.P.*** reported in ***(1991) 1 SCC 212***).

- V. In the case in hand as discussed hereinabove, a specific stand was taken by the bidding authority, on oath, before the learned Single Judge in WP(C) 415(AP)/ 2022 regarding non-requirement of swearing affidavit before First Class Magistrate and the bidding authority has also taken a further stand that such prescription is in derogation of law enacted in the shape of the Act, 2015 and Rules, 2018 made thereunder. However, in the appeal, a different stand has been taken saying that the said condition being a tender condition, it is the prerogative of the bidding authority to interpret the clause as it deem fit by the said authority. This court is of the firm opinion that such action on the part of the respondent authority is such that no responsible authority acting reasonably and in accordance with the Act, 2015 and Rules, 2018 framed thereunder, could have reached. Secondly, the State respondent has failed to disclose any material or reason to show the diametrically opposite stand taken. Therefore, in the considered opinion of this court, a writ court cannot wash out its hand on the ground that the action is bonafide and relates to only procedural aberration or error in assessment. However, learned Single Judge after reaching its own conclusion and after holding that the petitioner and similarly situated persons have substantially complied with the tender condition in question and such tender condition is in derogation of the relevant law, declined to interfere with the matter. Accordingly, it is the considered opinion of this court

that such decision of the tendering authority and the decision of the learned Single Judge is liable to be interfered with.

- VI. Yet another aspect of the matter is the effect of such decision on public interest. The Act, 2015 and Rules, 2018, more particularly Rule 4(ii) were enacted with an object to give preference to District Based Entrepreneurs and Professionals in development and welfare projects. The further object of such enactment is to ensure equitable distribution of State Developmental Works among different categories of entrepreneurs and to ensure greater participation by district based entrepreneurs and professionals. One of the pre-condition to participate in a tender, is that the tenderer must be a domicile of the respective districts, where the developmental work in question is being executed by the State. The Rule 4(ii) provides for fulfillment of certain requirement by the participating tenderers which are enumerated under clause (a) to clause (g) of Rule 4(ii). The clause (e) of Rule 4.(ii), being relevant is quoted hereinbelow:

*“(e) in the larger interest of public and for equitable distribution of developmental works amongst the eligible contractors and also to ensure effective management and quality of works a contractor shall be allowed to have 2 (two) works in hand in any of the Departments under Government of Arunachal Pradesh at a time and for which **he shall make a declaration to be executed in an affidavit** that he is not engaged in more than two any tender works under the State Government.....”*

- VII. Thus, to achieve such public object, in the considered opinion of this court, the larger participations of bidders are necessary. Larger

participation shall not only help the State to achieve its object enacted through the Act, 2015 and Rules, 2018 but also such participation shall give a competitive price bidding and in the process the ultimate beneficiary shall be the public exchequer resulting in larger public interest. Such aspect of the matter has not been gone into, not only by the learned Single, but also ignored by the tendering authority, that too after taking a stand that the prescription made regarding swearing affidavit before First Class Magistrate is not necessary at all and that it was a mistake on the part of the tendering authority in making such prescription which is in derogation of the Act, 2015 and Rules, 2018.

- VIII. In view of such specific stand on oath, as discussed hereinabove, the respondent State cannot be allowed to approbate and reprobate the same at the cost of public interest that too without disclosing any material and reason which lead to such diametrically opposite stand. Such stand, therefore, is nothing but an irrational stand depriving majority of bidders. As held in ***Jagadish Mandal (supra)***, this court can exercise its judicial review by interfering in a tender matter where public interest is affected and where the decision made is irrational.
- IX. In view of the forgoing reasons and discussion, this court is of the unhesitant view that after arriving at the conclusion as discussed at paragraph 2(IX) of this order, the learned Single Judge ought not to have dismissed the writ petition on the ground that the Hon'ble Apex Court has laid down certain principle of restrain in ***Jagadish Mandal (supra)*** while exercising of power of judicial review in tender matters. Accordingly, the aforesaid part of the judgment is

interfered with.

7. Directions:

- I. The impugned notification dated 13.03.2023 is set aside and quashed.
- II. The tendering authority shall initiate a fresh re-evaluation of the technical bid submitted by the petitioner firm and similarly situated bidders, in terms of the determination made by this court hereinabove.
- III. In the aforesaid term, this writ petition stands allowed. Parties to bear their own costs.

JUDGE

JUDGE

Comparing Assistant