

GAHC010034162023



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

Case No. : WA/93/2023

1. PRISM LOGISTICS PRIVATE LTD.,
A COMPANY WITHIN THE MEANING OF THE COMPANIES ACT, 2013,
HAVING ITS REGISTERED OFFICE AT 33A, JAWAHARLAL NEHRU ROAD,
4TH FLOOR CHATTERJEE INTERNATIONAL SUITE NO. 3 KOLKATA-700071.

2. ANSHUMAN BANKA, DIRECTOR OF PRISM LOGISTICS PRIVATE
LIMITED, WORKING FOR GAIN AT 33A, JAWAHARLAL NEHRU ROAD 4TH
FLOOR CHATTERJEE INTERNATIONAL SUITE NO.3, KOLKATA-700071.

.....**Appellants**

-VERSUS-

1. THE UNION OF INDIA,
SERVICE THROUGH THE PRINCIPAL SECRETARY, MINISTRY OF MICRO,
SMALL AND MEDIUM ENTERPRISES, HAVING ITS OFFICE AT A-WING, 7TH
FLOOR, NIRMAN BHAWAN, MOULANA AZAD ROAD, NEW DELHI-110108.

2:UNION OF INDIA,
SERVICE THROUGH THE PRINCIPAL SECRETARY,
MINISTRY OF PETROLEUM AND NATURAL GAS HAVING ITS OFFICE AT A-
WING, SHASTRI RAJENDRA PRASAD ROAD, NEW DELLHI-110001.

3:NUMALIGARH REFINERY LIMITED,
A GOVERNMENT COMPANY HAVING ITS REGISTERED OFFICE AT122A
G.S. ROAD, CHRISTIAN BASTI, GUWAHATI, ASSAM-781005.

4:TECHNIP INDIA LIMITED,
A COMPANY WITHIN THE MEANING OF COMPANIES ACT,
2013 HAVING ITS REGISTERED OFFICE AT 19,
VELACHERY MAIN ROAD, GUINDY, CHENNAI-600032

5:CENTRAL VIGILANCE COMMISSION,
GOVERNMENT OF INDIA,
HAVING ITS OFFICE AT SATARKATA BHAWAN,
BLOCK-A, GPO COMPLEX, INA,
NEW DELHI-110022.

6:ABC INDIA LIMITED,
A COMPANY WITHIN THE MEANING OF COMPANIES ACT,
2013 HAVING ITS REGISTERED OFFICE AT P-10,
NEW C.I.T. ROAD KOLKATA-700073.

..... **Respondents**

7:ALL CARGO LOGISTICS LIMITED,
A COMPANY WITHIN THE MEANING OF COMPANIES ACT,
2013 HAVING ITS REGISTERED OFFICE AT 6TH FLOOR,
AVASHYA HOUSE, CST ROAD,
KALINA SANTACRUZ (EAST), MUMBAI-40009.

..... **Proforma Respondent**

– BEFORE –

HON'BLE THE CHIEF JUSTICE

HON'BLE MRS. JUSTICE MITALI THAKURIA

For the Appellants : Mr. Indraneel Choudhury, Senior Advocate assisted by
Mr. S. Biswakarma, Advocate, Mr. C. Agarwal, Advocate
and Mr. N. R. Surana, Advocate.

For the respondent(s) : Mr. N. Deka, Advocate and Mr. M. Gogoi, Advocate (for
respondent No.3)
Mr. Diganta Das, Senior Advocate assisted by Mr. K.
Talukdar, Advocate and Mr. Deepak Agarwal, Advocate
for respondent No.6.

Date of Hearing : 07.06.2023

Date of Judgment : 12.06.2023.

JUDGMENT & ORDER

[Sandeep Mehta, CJ]

The instant intra Court writ appeal is directed against the judgment/final order dated 22.12.2022 passed by the Single Bench in WP(C) No.2871/2022 along with I.A.(Civil) No.1628/2022.

2. The writ petitioners/appellants herein filed the aforesaid writ petition being aggrieved of the cancellation of its bid and acceptance of the bid of the respondent No.6 including the work order granted in favour of the respondent No.6 pursuant to the NIT dated 26.03.2021 issued by the respondent Nos.3 and 4 inviting bids from eligible persons/entities for erection/installation of ODC/OWC including Multimodal Transportation from Haldia Port/Kolkata Port to the sites specified in the NIT.

3. The appellants have questioned the legality of the order dated 22.12.2022 rejecting the writ petition wherein, challenge was laid to the declaration of the respondent No.6 as the successful bidder and rejection of the consortium bid offered by the appellants/writ petitioners and the proforma respondent No.7 for the said work on the grounds that, the bid offered by the appellants/writ petitioners was the lowest; that the respondents, tinkered with the technical criterion of the bidder qualification requirement just in order to favour the respondent No.6.

4. The learned Single Bench non-suited the appellants/writ petitioners and dismissed the writ petition primarily on the ground that the appellants/writ

petitioners had filed a bid in consortium with the proforma respondent No.7 but the said consortium partner did not join the writ petitioners/appellants herein as a petitioner in the writ petition. Despite the opportunity given by the Court, the respondent No.7 was not transposed as a petitioner; that the writ petitioners along with the proforma respondent No.7 could only have been regarded as a bidder and hence, individually the writ petitioners could not be termed to be persons aggrieved so as to maintain the writ petition.

5. Mr. Indraneel Choudhury, learned Senior counsel representing the appellants/writ petitioners, vehemently and fervently contended that the learned Single Judge, virtually accepted all the submissions advanced on behalf of the appellants/writ petitioners on merits of the case but while concluding the matter on the aspect of maintainability, the judgment of this Court in the case of ***Merolyn Engineering Works(P) Ltd. and Anr. Vs. State of Assam***, reported in ***(2022) 1 GLR 715*** was applied so as to non-suit the appellants/writ petitioners whereas, the said judgment is not applicable to the controversy at the hand because in that case, the bid was filed in joint venture as against the bid, in the present case, which was as a consortium. Mr. Choudhury further urged that the appellants' case on merits that the procuring entity, tweaked and modified the conditions of the original bid so as to suit the cause of the respondent No.6, was virtually accepted by the learned Single Bench and hence, it was his contention that it is a fit case, wherein the writ appellants should not be non-suited merely on technicality and the case should be decided on merits.

6. Mr. Choudhury urged that at para No.37 of the impugned judgment dated 22.12.2022, the learned Single Judge held that the bid submitted by the petitioner No.1 and the proforma respondent No.7 as a consortium was not a

bid as a joint venture and rather, it was merely a bid as a consortium of bidders. As per Mr. Choudhury, having held so, the learned Single Judge was totally unjustified in rejecting the writ petition by applying the ratio of a judgment dealing with a case of joint venture bid. He, thus, urged that the writ appeal deserves to be allowed by holding that the appellants/writ petitioners are entitled to file the writ petition in their individual capacities and thereafter, to direct the learned Single Bench to decide the matter on merits by setting aside the impugned order dated 22.12.2022. His alternative submission was that while deciding the issue of *locus standi* of the appellants/writ petitioners to bring in the writ petition in their own capacity, the matter may be considered on merits in this appeal itself.

7. Per contra, Mr. Diganta Das, learned Senior counsel representing the contesting respondent No.6, who has been awarded the work in question after accepting its bid, urged that the learned Single Bench was absolutely justified in non-suited the appellants/writ petitioners and dismissing the writ petition because the proforma respondent No.7 who was the second member of the consortium bid did not join the appellants/writ petitioners as a petitioner in the writ petition in spite of liberty granted by this Court. He urged that even before the work order was issued, the consortium bidder had sold its business and thus, the bid of the appellants/writ petitioners in consortium with the proforma respondent No.7 did not sustain. He further urged that the allegation leveled by the appellants/writ petitioners that the conditions of the original NIT were modified so as to facilitate the bid of the respondent No.6 who was not qualified in terms of the original NIT, is not tenable. The appellants/writ petitioners and the respondent No.7 as a consortium and the respondent No.6 (the successful bidder) submitted their bids in pursuance of the original NIT, however, none of

the bidders were qualifying in terms of the original NIT dated 26.03.2021 and accordingly, a pre-bid meeting was held on 09.04.2021 and thereafter, in order to give a fair chance to all the prospective bidders, an amended NIT was issued on 12.06.2021 in light of the discussions held in the pre-bid meeting. He urged that in the original NIT, a consortium bid was not acceptable but just in order to facilitate the consortium bid filed by the appellants/petitioners, this condition was relaxed and a consortium was also permitted to file a bid. He further urged that the technical bid was opened on 16.07.2021 and the financial bids were opened on 24.09.2021 wherein, the respondent No.6 qualified as the successful bidder. The LOI was issued on 29.10.2021 which has not been challenged in the writ petition which came to be filed in the month of April, 2022. Before the writ petition was filed, the proforma respondent No.7 sold its business which fact was concealed by the writ petitioners/appellants herein.

It was urged that the appellants/writ petitioners having participated were not entitled to challenge the conditions of the modified NIT dated 12.06.2021. He, thus, urged that the learned Single Bench was justified in rejecting the writ petition filed by the appellants/writ petitioners.

8. Learned counsel Mr. N. Deka, representing the employer NRL, urged that the writ petitioners/appellants herein were not eligible to file the bid in their individual capacities. Thus, after pre-bid discussions, the appellants/writ petitioners herein forwarded a letter dated 15.06.2021 requesting relaxation in the criterion of past experience of 450 Metric Tons by multimodal transportation for consortium members. The said prayer of the appellants/writ petitioners was acceded and a corrigendum was issued to this effect, wherein the earlier criterion that both the consortium partners shall have to meet the criterion specified in 3.1 of the NIT (Technical Criteria), 3.2 of the NIT (Commercial

Criteria) and 3.3 of NIT (Financial Criteria) was relaxed.

9. It was further contended that after the initial NIT, discussions for relaxing the criterion were made in the pre-bid meeting wherein, the representative of the appellants/petitioners also participated and its request to allow consortium bidding was accepted. It was thus contended that alteration in the conditions of the NIT was made in terms of the discussions held in the pre-bid meeting. It was further contended by learned counsel for the NRL that the appellants/writ petitioners having participated in the modified NIT, cannot be allowed to question the conditions thereof. It was further submitted that the appellants/writ petitioners in their individual capacity, could not have maintained the writ petition because the other member of the consortium, i.e. proforma respondent No.7 was to perform specific tasks as per the distribution of work presented along with the bid of the appellants/petitioners. As the said respondent did not question the rejection of the consortium bid and acceptance of the bid of respondent No.6, the writ petitioners/appellants in their individual capacities are not entitled to challenge the decision of the authorities by invoking the extra-ordinary writ jurisdiction of this Court.

10. On these submissions, the learned counsel for the respondents, implored the Court to affirm the judgment rendered by the learned Single Bench and dismiss the writ appeal.

11. We have given our thoughtful consideration to the submissions advanced at Bar and have gone through the material available on record.

12. There is no dispute on the aspect that in pursuance of the first NIT when bids were received and evaluated, none of the bidders qualified therein. Thereafter, pre-bid meetings were held and the suggestions were received for

relaxing certain criterion including those put forth on behalf of the appellants/writ petitioners and their consortium partner i.e. the respondent No.7. The most important issue raised on behalf of the appellants/writ petitioners was that they should be allowed to bid as a consortium, which was not permissible in the original NIT. The said condition was relaxed in the revised NIT being Condition No.3.5.6. Thus, there is no substance in the allegation leveled on behalf of the appellants/writ petitioners that the conditions of the NIT were altered simply to suit the respondent No.6.

13. Be that as it may, as the learned Single Bench did not delve deep into the merits of the matter and decide the writ petition on the grounds of maintainability at the instance of the appellants only, we need not make any further comments on this aspect. However, the fact remains that the appellants/writ petitioners and the proforma respondent No.7 filed their joint bid as a consortium pursuant to the revised NIT. The Technical bids were opened on 16.07.2021 and the financial bids were opened on 24.09.2021. Since the bid of the respondent No.6 was found to be lowest, LOI was issued to it on 29.10.2021. It is not in dispute that the appellants/writ petitioners, while filing the writ petition in April, 2022 did not challenge the decision of the procuring entity, i.e. respondent No.3 in accepting the financial bid of the respondent No.6 and awarding the work to it with the issuance of the LOI on 29.10.2021. The respondent No.7, being the consortium partner of the appellants/writ petitioners, sold its business in the month of March, 2022 and the writ petition came to be filed in the month of April, 2022.

14. The learned Single Bench, discussed in detail the entitlement and locus of the writ petitioners/appellants herein to bring in the writ petition without joining the second player in the co-petitioner i.e. the proforma respondent No.7

as a competitor. Opportunity was given to the appellants/writ petitioners by order dated 15.11.2022 to transpose the proforma respondent No.7 as a co-petitioner or to file a separate application challenging the action of the respondent authorities. However, neither any such application for transposition nor any separate application for challenging the impugned action came to be filed on behalf of the proforma respondent No.7. However, an additional affidavit was filed by the appellants/writ petitioners annexing therewith a letter addressed by the proforma respondent No.7 to the petitioner No.1, dated 01.12.2022 in which, it was mentioned that proforma respondent No.7 acted as a consortium member to the tender of the respondent No.4 for the respondent No.3 and the writ petitioner No.1 acted as a lead bidder for the consortium in the tender. Thus, this letter reaffirms the fact that the proforma respondent No.7 is an entity in itself and fully capable to perform the scope of work outlined in the MoU. The fact regarding proforma respondent No.7 having sold its business, is also not disputed. It is also not in dispute that from the overall scope of works to be performed under the NIT, precise tasks to be performed by the respective members of the consortium were identified and defined in the MoU filed along with the bid of the appellants/writ petitioners and the proforma respondent No.7.

15. Thus, the petitioners in their individual capacity could not qualify as successful bidders.

In this background, it was imperative that the respondent No.7 should either have joined the appellants/writ petitioners in the writ petition or else, it should have also in its own capacity, challenged the decision of the procuring entity in rejecting the bid of the consortium and accepting that of the respondent No.6. In addition, this Court is not in a position to lose sight of the

fact that the terms of the original NIT were modified after the pre-bid meeting was held in April, 2021 whereafter a revised NIT was issued. The terms and conditions of the revised NIT were not questioned by the appellants/writ petitioners nor the respondent No.7. Furthermore, even after opening of the financial bids on 24.09.2021, no action or protest was forthcoming from the side of the appellants/writ petitioners. Even the LOI dated 29.10.2021 issued in favour of the respondent No.6, was not challenged in the writ petition. Thus, foundation of challenge laid by the petitioners/appellants in the writ petition that the terms of the original NIT were tweaked so as to suit the respondent No.6 has no legs to stand.

16. In this background, we are of the firm opinion that the appellants/writ petitioners in their individual capacities, even as the even lead partners of the consortium were not entitled to lay challenge to the decision of the procuring entity in awarding the work to the respondent No.6. Non-joinder of the proforma respondent No.7, i.e. the second member of the joint venture as a petitioner in the writ petition in spite of opportunity being given, clearly reflects that it was not inclined to continue with its bid for the work in question. Furthermore, the omission to challenge the LOI issued to the successful bidder i.e. respondent No.6 in the writ petition is also fatal to the cause of the appellants.

17. As a consequence of above discussion, we affirm the judgment dated 22.12.2022 rendered by the learned Single Bench rejecting WP(C) No.2871/2022 with I.A.(Civil) No.1628/2022 filed by the appellants/writ petitioners.

18. The instant writ appeal is dismissed as being devoid of merit.

Pending Interlocutory Applications filed by the appellants/applicants are also dismissed.

JUDGE

CHIEF JUSTICE

Comparing Assistant