

GAHC010084992023



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

Case No. : WRIT PETITION (C) No. 2160/2023

Ajoy Kumar Basumatary Son of Munindra Kumar
Basumatary Resident of Village- Lallangpara P.O.- Gerua
Bazar P.S.- Rowta In The District of Udalguri [BTAD],
Assam, Pin- 784514

.....Petitioner

-Versus-

1. The State of Assam, Represented by the Secretary, Forest,
Bodoland Territorial Council, Tengapara, Kokrajhar, Assam,
Pin- 783370.
2. The Additional Principal Chief Conservator of Forests-Cum-
CHD, Bodoland Territorial Council, Kokrajhar, Pin- 783370.
3. The Assistant Conservator of Forests, Dhansiri Division,
Udalguri, Bodoland Territorial Council, Pin- 784114.
4. The Divisional Forest Officer, Dhansiri Forest Division,
Udalguri, Bodoland Territorial Council, Pin- 784114.
5. Nasi Ram Daimari, Son of Late Budhu Ram Daimari,
Resident of Village - Rowta Pathar [Balisiha], P.O.-
Bhalukmari, Udalguri, Assam, Pin- 784508.

.....Respondents

Advocates :

Petitioner : Mr. A. Dhar, Advocate.
Respondent nos. 1 - 4 : Mr. S.R. Rabha, Standing Counsel,
Bodoland Territorial Council [BTC]
Respondent no. 5 : Mr. A. Das, Advocate
Date of Hearing, Judgment & Order : 10.10.2023

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
JUDGMENT & ORDER [ORAL]

The instant writ petition under Article 226 of the Constitution of India is preferred to assail a Communication bearing no. FGW.24/Genl./Dhansiri/MMC/1205 dated 16.03.2023 of the respondent no. 2, addressed to the respondent no. 4. By the Communication dated 16.03.2023, the respondent no. 2 had *inter alia* conveyed that the Bodoland Territorial Council [BTC] had approved the Comparative Statement to settle the Rowta Bagan Sand and Stone Mahal under Dhansiri Forest Division, Udalguri by granting the mining contract in favour of the respondent no. 5, terming the respondent no. 5 as the successful bidder in the comparative bidding process initiated by a Tender Notice dated 05.12.2022. The respondent no. 2 had thereby, requested the respondent no. 4 to take necessary steps to settle the Rowta Bagan Sand and Stone Mahal from his end as per the provisions of the Assam Minor Mineral Concession Rules, 2013.

2. To appreciate the nature of controversy involved in this writ petition, it is appropriate to exposit, in brief, the relevant background facts.

3. By a Tender Notice dated 05.12.2022, the competent authority in the BTC

invited bids for grant of mining contract for stone/sand/sand gravel/gravel on tender sale basis on fulfillment of the terms and conditions set forth therein. One of the sand and stone mahals sought to be so settled by the Tender Notice dated 05.12.2022, was Rowta Bagan Sand and Stone Mahal. As per Schedule A to the Tender Notice, the Government value for Rowta Bagan Sand and Stone Mahal had been fixed Rs. 24,31,000/-. Schedule A had further mentioned that the stipulated quantity of sand and stone which could be collected from Rowta Bagan Sand and Stone Mahal per year would be 6500 M³ and 6500 M³ respectively.

4. It transpires that altogether 10 [ten] nos. of bidders by responding to the Tender Notice dated 05.12.2022, had submitted their bids for the Rowta Bagan Sand and Stone Mahal by quoting respective bid values and submitting the documents, as asked for by the Tender Notice dated 05.12.2022.

5. The Bid Evaluation Committee had scrutinized the tenders along with the documents submitted therewith of all the participant bidders and after such scrutiny, had prepared a Comparative Statement in order to settle the Rowta Bagan Sand and Stone Mahal in favour of the successful bidder. For ready reference, the relevant excerpts of the Comparative Statement, which is made part of the writ petition as Annexure-4, are extracted herein below :-

Tender Sl. No.	Name Of Tenderer	C.F.	Decl.	E/M	GST	Pan Card	IT	FSC	Caste Certificate		Amount Offered	Scrutiny Observation	Remarks
									ST	Genl			
DDU/01	Sri Nasi Ram Daimari [Respondent 5]	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Genl	Rs.30,38,750	Offered 25% Above Govt. value	All documents furnished & regular
DDU/12	Sri Jayanta Boro	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	-	Rs.30,38,750	As above	All documents furnished & regular

DDU/14	Sri Abhinash Daimari	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	-	Rs. 30,38,750	As above	All documents furnished & regular
DDU/16	Sri Amud Daimari	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	-	Rs. 30,38,750	As above	All documents furnished & regular
DDU/17	Sri Mijingsha Brahma	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	-	Rs. 30,38,749	Offered 25% above Govt. value	All documents furnished & regular
DDU/32	Sri Ajoy Kumar Basumatary [Petitioner]	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	-	Rs. 30,38,750	Offered 25% above Govt. value	All documents furnished & regular
DDU/47	Sri Swgwmdao Basumatary	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	-	Rs. 30,38,750	Offered 25% above Govt. value	All documents furnished & regular
DDU/40	Sri Ransaugwra Boro	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	-	Rs. 30,38,700	Offered 25% above Govt. value	All documents furnished & regular
DDU/41	Sri Aniram Daimari	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	-	Rs. 30,38,650	Offered 25% above Govt. value	All documents furnished & regular
DDU/31	Sri Subhash Basumatary	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	-	Rs. 1,40,00,000	Offered 476% above Govt. value	All documents furnished & regular

6. The Competent Authority in the BTC considered and approved the said Comparative Statement and thereafter, accorded approval for granting the mining contract for Rowta Bagan Sand and Stone Mahal in favour of the respondent no. 5 by terming him as the successful bidder in the competitive bidding process, to be settled with the Rowta Bagan Sand and Stone Mahal. Assailing such approval to grant the mining contract for the Rowta Bagan Sand and Stone Mahal in favour of the respondent no. 5 by the Communication dated 16.03.2023, the writ petition has been preferred.

7. I have heard Mr. A. Dhar, learned counsel for the petitioner; Mr. S.R. Rabha, learned Standing Counsel, BTC for the respondent nos. 1 – 4; and Mr. K.N. Choudhury, learned Senior Counsel assisted by Mr. A. Das, learned counsel for the respondent no. 5.

8. Mr. Dhar, learned counsel for the petitioner has contended that out of the

10 [ten] participant bidders, 6 [six] nos. of bidders had quoted the same bid value of Rs. 30,38,750/-. The Bid Evaluation Committee had found all those 6 [six] bidders as responsive and the said fact had been duly recorded in the Comparative Statement. The respondent authorities had however, preferred to choose the respondent no. 5 as the successful bidder without indicating as to why he could be termed as the first amongst the 6 [six] equally placed responsive bidders. In the absence of any reason for choosing the respondent no. 5 as the first among 6 [six] equals, the decisions making process had suffered from arbitrariness on the touchstone of the principle embodied in Article 14 of the Constitution of India.

9. Mr. Choudhury, learned Senior Counsel appearing for the respondent no. 5 has submitted that the impugned Communication dated 16.03.2023 was issued pursuant to the approval of the Comparative Statement prepared for Rowta Bagan Sand and Stone Mahal for granting the mining contract in favour of the respondent no. 5 by the respondent BTC authorities vide Communication bearing no. BTC/Forest.100/2021/Pt-II/94 dated 15.03.2023 issued under the hand of the Secretary, BTC. Pursuant to such approval, a provisional Letter of Intent [LoI] had already been issued in favour of the respondent no. 5 on 17.03.2023. The respondent no. 4 had also, on 17.03.2023, requested the Director of Geology & Mining, Assam to prepare a mining plan in connection with mining contract area of Rowta Bagan Sand and Stone Mahal. The Director of Geology & Mining, Assam had thereafter, accorded its approval to the mining plan submitted for Rowta Bagan Sand and Stone Mahal on 28.03.2023. After completion of all such required formalities, a Contract Agreement was also executed for the mining contract area of Rowta Bagan Sand and Stone Mahal on

06.06.2023. As the process of granting the mining contract in respect of Rowta Bagan Sand and Stone Mahal had progressed to such an extent, there is no scope for interference in the matter as no public interest seemed to have suffered in view of grant of mining contract in favour of the respondent no. 5.

10. Though the respondent BTC authorities have not filed any counter affidavit in the writ petition, Mr. Rabha, learned Standing Counsel, BTC has produced the relevant records of settlement.

11. The Tender Notice dated 05.12.2022 had mentioned that maximum outright price which a tenderer was prepared to pay for the stipulated quantity of the minor minerals should be clearly and legibly written both in figures as well as in words, Operation cost, if any as mentioned in the Schedule 'A' would have to be paid in addition to the offered price as per usual rates. Clause 12 of the Tender Notice had provided that preference would be given to those tenderers who are inhabitants of the areas within the Bodoland Territorial Region [BTR] with bid value up to 25% above the Government value fixed in the Tender Notice. Clause 12 had indicated that the approval was granted for according such preference.

11.1. Clause 13 of the Tender Notice had specified that a bid had to be accompanied with the following documents :-

[a] Passport size photograph of tenderer [Attested].

[b] A call deposit Bank Draft for earnest Money.

[c] Pan Card No., GST, Bank A/C No., Telephone No. [Res./Mobile] etc. to

be mentioned in the tender Form.

[d] A financial soundness Certificates from any Nationalized Bank or the concerned Circle Officer ascertaining the Financial capacity to operate the mining contract.

[e] Other information required to be submitted as stated in the tender Form as per Rule.

11.2. It was indicated in the Tender Form, which was to be affixed with Court-Fee Stamps worth Rs. 8.25/-, that Income Tax Clearance Certificate had to be annexed with the bid. It further stipulated that in case the bidder belongs to ST/SC/OBC, the original or certificate copy in support of his claim that he belongs to such community, ST/SC/OBC was to be submitted from the Deputy Commissioner/Sub-Divisional Officer.

12. When taking into account the above conditions set forth in the Tender Notice and the Tender Form, the Comparative Statement available in the records produced by the learned Standing Counsel, BTC, is examined, it is revealed that the Bid Evaluation Committee had found bids of 6 [six] out of the 10 [ten] participant bidders including the petitioner and the respondent no. 5, compliant to the afore-mentioned terms and conditions on the premise that they had submitted the requisite court fees/declaration, earnest money, GST certificate/Income Tax Clearance Certificate, Financial Soundness Certificate and Caste Certificate. In the Remarks column of the approved Comparative Statement, the Bid Evaluation Column had mentioned that all the documents were furnished by those 6 [six] participant bidders and accordingly, their bids were termed regular. Thus, a scenario had emerged before the respondent

authorities where 6 [six] of the participant bidders were found to be equally placed as responsive bidders, they had quoted the same bid value of Rs. 30,38,750/-, and in such scenario, it had to choose one as the first among equals.

13. Mr. Rabha, learned Standing Counsel, BTC has submitted that all such quotations of similar bid value by those bidders could be related to Clause 12 of the Tender Notice wherein it was indicated that preference would be accorded to those bidders who are inhabitants of BTR area and who had quoted bid value upto 25% above the quoted fixed value i.e. 25,30,000/-. As regards the reason as to why respondent no. 5 had been chosen as the first among the 6 [six] equals, the learned Standing Counsel, BTC has submitted that the reason for preferring the respondent no. 5 as the successful bidder can be found out in the Note Below [N.B.] Remarks made by the Bid Evaluation Committee after preparation of the Comparative Statement wherein 6 [six] of the 10 [ten] participant bidders were found responsive, and their offered bid values were same, that is, Rs. 30,38,750/-. In the Note Below [N.B.] Remark recorded in the Comparative Statement, the Bid Evaluation Committee had reported that the respondent no. 5 had submitted a Turn Over certificate for 5 [five] years and the Bid Evaluation Committee had further reported that as per the turnover of the last financial year, that is, FY : 2021 – 2022, the annual turnover of the respondent no. 5 was Rs. 1,87,74,112/-. The Bid Evaluation Committee had further remarked that the other 9 [nine] nos. of bidders had not submitted such Annual Turnover Certificate. It transpires that when the matter was placed before the competent authority in the BTC for according approval to the Comparative Statement prepared for the Rowta Bagan Sand and Stone Mahal

with the above remarks of the Bid Evaluation Committee, the Competent Authority in the BTC had accorded approval to the Comparative Statement with the further approval to grant the mining contract to the respondent no. 5.

14. The records produced by the learned Standing Counsel, BTC contain the documents as regards the Annual Turnover of the respondent no. 5 on the basis of which the Bid Evaluation Committee had proceeded to term the respondent no. 5 as the first among the 6 [six] equally placed responsive bidders. The document as regards annual turnover is found to be a document issued by the Chartered Accountant of the respondent no. 5 indicating the Annual Turnover [in Rupees] of the respondent no. 5 during the five Financial Years : FY : 2017 – 2018, FY : 2018 – 2019, FY : 2019 – 2020, FY : 2020 – 2021 and FY : 2021 – 2022 dated 22.11.2022.

15. When such statement of annual turnover of the respondent no. 5 is taken into by the Bid Evaluation Committee to term him as a successful bidder, is considered qua the documents/certificates, etc. set forth in the Tender Notice dated 05.12.2022 and the Tender Form, it clearly appears that such a kind of statement on annual turnover of a bidder was not a called for document by the Tendering Authority/BTC. The Tendering Authority had, however, proceeded to take such statement of annual turnover of the respondent no. 5 to term him as the successful bidder among 6 [six] participant bidders whose bid values were the same as the respondent no. 5 and whose bids were also found responsive.

16. It is well settled that the bidders participating in the tender process have no other right except the right in the matter of evaluation of competitive bids

offered by interested persons in response to a notice inviting tenders in a transparent manner and free from hidden agenda. The bidders participating in a tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that the participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. In the matter of award of contracts the State or its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the court which is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest. It is also well settled that while exercising the power of judicial review, the Court is more concerned with the decision-making process than the merit of the decision itself.

17. Having regard to the above principles in mind, this Court has found that the Tendering Authority/Bid Evaluation Committee/Competent Authority in the BTC in the matter of granting the mining contract in favour of the respondent no. 5 had proceeded to take a document which was never asked for either by the Tender Notice or by the Tender Form, for consideration as regards responsiveness or otherwise of a bid. The Bid Evaluation Committee had remarked in the Comparative Statement, which had ultimately affected the decision-making process and the interests of the other equally positioned responsive bidders, that the other 9 [nine] bidders had not submitted the

statement of annual turnover certificate and on the basis of the Tender Notice and the Tender Form, more particularly, the terms and conditions set forth therein, the said factor is found to be irrelevant, as such statement of annual turnover was never asked for at any point of time by the Tendering Authority, either by the Tender Notice or in the Tender Form or by any communication subsequent to the bid submission date. In such view of the matter, this Court is of the unhesitant view that in the decision-making process leading to the approval, the Tendering Authorities/Bid Evaluation Committee was found to have taken a completely irrelevant and extraneous factor in that they had taken a document like the statement of annual turnover certificate of the respondent no. 5 into consideration whereas the Tendering Authority/Bid Evaluation Committee ought to have confined themselves within the terms and conditions set forth in the Tender Notice and the Tender Form.

18. In such view of the matter, this Court is of the considered view that the decision making process leading to the decision of granting approval to the bid of the respondent no. 5 as the successful bid is found to have fraught with infirmities as in the process, the other 5 [five] participant bidders including the petitioner, whom the Bid Evaluation Committee/Tendering Authority had found to be also equally responsive, are found to have been treated in a discriminatory manner. Their bids were not considered to be successful on the sole ground that they had not submitted the statement on annual financial turnover, a statement which was never called for from them.

19. In view of the discussion made above and for the reasons assigned therein, this Court has found that the decision making process leading to the

decision of granting approval to the bid of the respondent no. 5 is liable to be interfered with. Accordingly, the approval granted by the Tendering Authority/BTC authorities to the bid of the respondent no. 5 as the successful bid is set aside and quashed. With the setting aside and quashing of the approval, the matter of settlement of Rowta Bagan Sand and Stone Mahal stands remanded to the respondent BTC authorities to proceed with the matter afresh for granting approval to successful bidder from the stage of preparation of the Comparative Statement and by taking into consideration only the relevant factors by confining themselves to the terms and conditions set forth in the Tender Notice dated 05.12.2022, the Tender Form and the documents required to submit by the participant bidders by the Tender Notice and the Tender Form. It is relevant to point out that such exercise shall be undertaken by the respondent BTC authorities/tendering authority by taking the bids of those participating bidders who are still in the fray. Mr. Rabha, learned Standing Counsel, BTC has submitted that a period of 1 [one] month would be a reasonable period for the respondent BTC authorities to undertake and complete such exercise. It is, therefore, directed to complete the exercise within a period of 1 [one] month from today.

20. With the observations and directions given above, the writ petition is allowed to the extent indicated above. The earlier interim order stands merged with this order. There shall be no order as to cost.

JUDGE

Comparing Assistant