

GAHC010132832023



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

WRIT PETITION (C) No. 3571/2023

Nabajit Bora, Son of Late Mahendra Bora, R/o - Barpathar
Town, Ward No. 7, P.S. and P.O.- Barpathar, District -
Golaghat, Assam.

.....Petitioner

-Versus-

- 1) The State of Assam, represented by the Commissioner & Secretary to the Government of Assam, Department of Housing and Urban Affairs, A-Block, Ground Floor, Janata Bhawan, Dispur, Guwahati-6.
- 2) Director of Municipal Administration, Assam
Dispur, Guwahati-6.
- 3) The Deputy Commissioner, Golaghat District, P.O. & P.S.- Golaghat, District- Golaghat, Assam, PIN- 785621.
- 4) Sub-Divisional Officer (Civil), Dhansiri Sub-Division,
Sarupathar, District- Golaghat, Assam, PIN- 785601.
- 5) The Chairman, Barpathar Municipal Board, Barpathar,
P.O. & P.S.- Barpathar, District - Golaghat, Assam, PIN- 785601.
- 6) The Executive Officer, Barpathar Municipal Board,
Barpathar, P.O. & P.S. - Barpathar, District - Golaghat,
Assam, PIN- 785601.
- 7) Nityananda Dey, Son Of Late Narayan Chandra Dey,

R/o - Ward No. 8, Barpathar Town, P.O. & P.S.- Barpathar,
District - Golaghat, Assam, PIN- 785601.

8) Premananda Dey, Son of Late Narayan Chandra Dey,
Resident of Ward No. 8, Barpathar Town, P.O. & P.S.-
Barpathar, District - Golaghat, Assam, PIN- 785601.

9) Bibekananda Dey, Son of Late Narayan Chandra Dey,
R/o - Ward No. 8, Barpathar Town, P.O. & P.S.- Barpathar,
District - Golaghat, Assam, PIN- 785601.

.....Respondents

Advocates :

Petitioner : Mr. T.J. Mahanta, Senior Advocate,
Mr. P.P. Dutta, Advocate

Respondent nos. 1 – 4 : Mr. S.R. Baruah, Jr. Government Advocate, Assam

Respondent nos. 5 – 6 : Mr. M. Chetia, Advocate

Respondent no. 7 : Ms. K. Devi, Advocate

Respondent no. 8 : Ms. M. Bora, Advocate

Respondent no. 9 : Ms. B. Choudhury, Advocate

Date of Hearing, Judgment & Order : 25.08.2023

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

This writ petition under Article 226 of the Constitution of India has been preferred by the petitioner to assail the action on the part of the Barpathar Municipal Board authorities in settling a market viz. 'Barpathar Weekly Market' [the Market', for short] in favour of the respondent no. 9 *inter alia* on the ground that the bid of the petitioner was found to be a valid and higher one than that of the respondent no. 9. The petitioner has challenged an order of settlement dated 28.03.2023 issued under the hand of the Chairman, Barpathar

Municipal Board whereby the Market has been settled in favour of the respondent no. 9 for the year : 2023-2024.

2. The facts which are necessary for adjudication of the controversy raised in this writ petition can be narrated, in brief, as follows:-

2.1 A Tender Notice dated 02.03.2023 ['Tender Notice', for short] for settlement of 3 [three] nos. of markets and 1 [one] parking place which are within the territorial jurisdiction of the respondent Barpathar Municipal Board, was published by the Barpathar Municipal Board inviting sealed bids from intending bidders. By the Tender Notice, it was notified that the last date of submission of bids was fixed up-to 01-00 p.m., 13.03.2023. One of the markets sought to be settled by the bidding process initiated by the Tender Notice dated 02.03.2023 was 'Barpathar Weekly Market' ['the Market'], with the Government fixed value of Rs. 7,00,000/-.

2.2 It is an admitted position, as revealed from the records of settlement as well as from the Comparative Statement prepared after opening of the bids, that in response to the Tender Notice for settlement of Barpathar Weekly Market ['the Market'], a total of 8 [eight] nos. of bids were received from the bidders quoting different bid values. The bid values, in descending order, quoted by the 8 [eight] nos. of bidders were as under :-

Sl. No.	Bidder number	Bid value offered
1	Bidder no. 1 [the respondent no. 7]	Rs. 14,50,000/-
2	Bidder no. 2 [the respondent no. 8]	Rs. 14,25,000/-
3	Bidder no. 3 [the petitioner]	Rs. 14,21,600/-
4	Bidder no. 4	Rs. 11,00,000/-
5	Bidder no. 5 [the respondent no. 9]	Rs. 8,51,000/-
6	Bidder no. 6	Rs. 8,00,000/-
7	Bidder no. 7	Rs. 7,80,000/-
8	Bidder no. 8	Rs. 7,10,000/-

2.3 When the respondent Municipal Board issued the order of settlement dated 12.03.2023 settling the Market in favour of the respondent no. 9 at his offered bid value of Rs. 8,51,000/-, the petitioner has approached this Court by this writ petition challenging the said action on the part of the respondent Municipal authorities.

3. I have heard Mr. T.J. Mahanta, learned senior counsel assisted by Mr. P.P. Dutta, learned counsel for the petitioner; Mr. S.R. Baruah, learned Junior Government Advocate, Assam for the respondent nos. 1 – 4; Mr. M. Chetia, learned counsel for the respondent nos. 5 – 6; Ms. K. Devi, learned counsel for the respondent no. 7; Ms. M. Bora, learned counsel for the respondent no. 8; and Ms. B. Choudhury, learned counsel for the respondent no. 9.

4. Mr. Mahanta, learned senior counsel appearing for the petitioner drawing attention to the Comparative Statement prepared by the respondent Municipal Board authorities, has submitted that the Bid Evaluation Committee [BEC] had recorded its remarks in the said Comparative Statement as regards submission or non-submission of requisite documents by each of the participant bidder as per the list indicated in the Tender Notice. He has contended that in so far as the bid of the petitioner is concerned, the Comparative Statement had clearly indicated that the petitioner had submitted all the requisite documents in compliance of the terms and conditions of the Tender Notice. It is the case of the petitioner that the 1st highest bidder [the respondent no. 7] and the 2nd highest bidder [the respondent no. 8] had withdrawn from the fray and as a result, the petitioner emerged as the highest valid bidder in the bidding process with his offered bid value of Rs. 14,21,600/-. But, ignoring the higher valid bid of the petitioner, the respondent Barpathar Municipal Board authorities had proceeded to settle the Market in favour of the respondent no. 9 who was only 5th highest bidder amongst the 8 [eight] participant bidders, at his offered bid value of Rs. 8,51,000/-. Mr. Mahanta has submitted that the respondent Municipal Board authorities in settling the Market in favour of the respondent no. 9, had not followed the provisions of the Assam Municipal Act, 1956 and the Rules framed thereunder

for settlement of markets. He has further contended that the respondent Municipal Board authorities appeared to have not accepted the bid of the petitioner on the specious ground that the bid value offered by the petitioner was exorbitant.

5. Mr. Chetia, learned counsel representing the respondent Municipal Board authorities has relied on the original records of settlement to make his submissions, as no counter affidavit has been filed on behalf of the respondent Municipal Board authorities traversing the statements and contentions made by the petitioner in the writ petition. He has contended, by referring to the Minutes of the Meeting of the Barpathar Municipal Board, held on 23.03.2023, that by Resolution no. 4 adopted therein, the respondent Municipal Board authorities had decided to settle the Market in favour of the respondent no. 9 at his offered bid value of Rs. 8,51,000/- which amount was 11% higher than the settlement amount of the Market for the previous year, so as to safeguard the interests of the general public and the traders trading in Barpathar Weekly Market.

6. Ms. Devi, learned counsel for the respondent no. 7 has submitted that in the Comparative Statement, the respondent no. 7 was declared as the 1st highest bidder with his offered bid value of Rs. 14,50,000/- and the petitioner's bid was the 3rd highest, which was Rs. 29,000/- lesser than the bid value offered by the respondent no. 7. Ms. Devi has, however, submitted that the respondent Municipal Board authorities used their discretion to settle the Market in favour of the respondent no. 9. She has further submitted that as the respondent no. 7 had already offered settlement of another market by the same Municipal Board, the same was the reason for not challenging the offer of settlement made in favour of the respondent no. 9.

7. Ms. Bora, learned counsel for the respondent no. 8 has also submitted in similar lines like Ms. Devi. Ms. Bora has additionally submitted that the respondent no. 8 had never expressed his unwillingness to accept any offer of settlement for the Market. She has, however, submitted that the respondent no. 8 has not challenged the offer of settlement made in favour of the respondent no. 9, as the respondent no. 8 had felt that the

respondent Municipal Board had rightly exercised the discretion keeping the interests of the general public in mind.

8. In reply, Mr. Mahanta, learned senior counsel appearing for the petitioner has submitted that the respondent no. 7, the respondent no. 8 and the respondent no. 9 are brothers as their father's name is one and the same, that is, Late Nayan Chandra Dey.

9. I have considered the submissions of the learned counsel for the parties and have also gone through the materials brought on record by the parties through their pleadings. I have also gone through the original records of settlement including the Minutes of the Meeting of the respondent Barpathar Municipal Board, dated 23.03.2023, produced by Mr. Chetia, learned counsel representing the respondent Municipal Board.

10. As per Rule 1 of the Rules for Procedure for Sale of Pounds and Markets by Municipal Boards and Town Committees in Assam, framed in exercise of the powers conferred by Section 147, Section 148 and Section 301 of the Assam Municipal Act, 1956, all markets established by, vested in or placed under the control and administration of the Municipal Board shall be farmed out by tender, subject to observance of rules and procedures for inviting tender. The said Rule has further *inter alia* provided that the Municipal Board may, in its discretion and for reasons to be recorded, reserve any such pound or market from lease and administer it directly. Rule 7 has stipulated that every bid made shall be recorded in writing by the officer conducting the sale and he is not bound to accept the highest or any bid. But, if he does not accept the highest or any bid, he shall have to record his reason in writing.

11. The reason recorded by the Municipal Board authorities in the Minutes of its Meeting, held on 23.03.2023, vide Resolution no. 4 to settle the Market in favour of the respondent no. 9 at his offered bid value of Rs. 8,51,000/, which is 11% lesser than the settlement amount for the Market in the previous year, was that settlement of the Market at that amount would ensure that the general public and traders would not be harassed.

12. It is settled that a bidder who has participated in a competitive bidding process atleast has a right to equality and fair treatment in the matter of evaluation of the competitive bid offered by him in response to a notice inviting tender in a fair and transparent manner, free from any hidden agenda and in that respect, he is entitled to be treated in a fair, equal and non-discriminatory manner in the matter of evaluation of his bid. A bidder has an enforceable right to that limited extent before the Court and the Court can definitely examine the issue as to whether the petitioner has been treated unfairly or discriminated against. An obligation is also cast on the tendering authority to proceed with the matter in a fair, just and transparent manner by undertaking the exercise in accordance with law.

13. As have been noted above, 8 [eight] nos. of bidders responded to the Tender Notice dated 02.03.2023. After receipt of the bids from the 8 [eight] participant bidders, the Barpathar Municipal Board opened the bids and after going through the documents submitted along with the bids, the Bid Evaluation Committee [BEC] constituted by the Barpathar Municipal Board, processed the same and decided to settle the Market in the manner, discussed above. The bidders are considered to be prudent businessmen who prepare their tenders by taking into consideration a host of factors including the terms and conditions incorporated in the tender document, the estimated amount and the quantum of profit they are likely to earn and accordingly, they arrive at their tendered bid values. One prepares his tender to the best of his estimation, by quoting his tendered bid value at a definite amount on the premise that at such amount, he would be able to perform the obligations under the contract if the tender is settled in his favour and at the same time, would also be able to earn a particular amount of profit. A number of bidders participate in a tender process and the bidders tender different bid values but only one of them emerges successful. Thus, the preparation of the tendered bid value is at the risk and peril of rejection of one's tender if the same does not emerge as the highest valid one and a tender process is always competitive.

14. Clause 12 of the Tender Notice had stipulated that the lessee cannot collect fees at a rate higher than one fixed by the Municipal Board. Thus, it is clear that a lessee if he is

settled with the Market under the aegis of the respondent Municipal Board, has to collect fees in the Market only at the rates fixed by the Municipal Board. The lessee cannot collect fees at higher rates than the rates fixed by the respondent Municipal Board. In the event a lessee is found to have breached such condition, his lease is liable to be terminated. Therefore, the rates of fees to be collected by the lessee are fixed and such rates of fees do not vary with the amount of bid offered by a bidder and there is no co-relation between prescribed rates of fees to be collected in the Market and the lease value at which the Market has been settled with. The settlement of the Market in favour of the highest valid bidder or any other bidder in view of the fact that the lessee is to collect the fees at the prescribed rates, to be fixed by the respondent Municipal Board, would not have any effect on a third person like a trader who would trade in the Market or any general public who would visit the Market to purchase. But, acceptance of a bid of a lower valid bidder would bring in lesser revenue to the State exchequer.

15. A query is made to Mr. Chetia, learned counsel for the respondent Municipal Board as to whether the Barpathar Municipal Board had, at the time of publication of the Tender Notice, fixed a viability range with the condition that any bid value above any fixed upper ceiling would not be accepted for settlement. In response, Mr. Chetia has fairly submitted that there was no viability range fixed by the respondent Municipal Board at the time of publication of the Tender Notice.

16. At this stage, it is apt to refer to the observations made in the case of **Jespar I. Slong vs. State of Meghalaya and others**, reported in [2004] 11 SCC 485. The State of Meghalaya owned a weighbridge at Morkjiange and the Government decided to lease out the weighbridge to contractors who were willing to take the weighbridge on lease on yearly basis. A notice inviting tender was published inviting bids from interested persons for operating the weighbridge. In response to the notice inviting tender, a number of bids were received. One of the highest bid received was for a sum of Rs. 1,21,00,000/-. The State of Meghalaya accepted the bid of the said bidder and a contract was executed in favour of the said bidder. One of the participant bidders challenged the award of contract made at Rs. 1,21,00,000/-, by preferring a writ petition before the High Court *inter alia* on the ground

that the bid amount accepted was speculative and predatory in nature. The writ petition was allowed holding that the bid offered by the highest bidder was speculative and predatory in nature. It was observed by the learned Single Judge that the approximate value of the contract would have been only Rs. 40,29,613/-, which figure was arrived at by taking into consideration a report submitted by the Enforcement Staff of the Department of Transport. Direction was made to call for fresh tenders and re-examine and reassess the value of the tender keeping in view the observations made in the judgment. Thereafter, a fresh assessment for the approximate value of the tender was made on the basis of the report of the Enforcement Staff of the Transport Department and the traffic census data provided by the Public Works Department [PWD] and a tender – approval committee came to a conclusion that the annual collection from the weighbridge fees would be to the tune of Rs. 2.11 crores and it evaluated the value of the tender at Rs. 2 crores. A fresh notice inviting tender was published and 27 nos. of bidders participated in it. The first two highest bids were found defective. The third highest bid which was for Rs. 1,75,00,576/- and was valid in all aspects, was accepted by the tender acceptance committee. But the Departmental Minister disagreed with the said recommendation and he recommended that the tender of one of the three bidders who had offered Rs. 40,29,600/- each, be accepted. As the time stipulated for compliance by the High Court had expired, the State of Meghalaya made an application for extension of time before the High Court. The learned Single Judge while considering the application, passed an order allocating one year of settlement for each of the said three bidders. Aggrieved by such arrangement, one of the parties preferred a writ appeal and the Division Bench setting aside the order of the learned Single Judge, directed the State of Meghalaya to settle the matter. When the matter came back, the State Government decided to settle the weighbridge in favour of the one of the three bidders who offered a sum of Rs. 49,29,600/-. The said decision was challenged by another participant bidder who offered a bid of Rs. 60,70,797/- by filing a writ petition.

16.1. When the matter reached the Hon'ble Supreme Court of India, the Hon'ble Supreme Court of India noticed that the income from the weighbridge was to be received from the fees charged for weighing of trucks which would pass through the route on which the weighbridge was situated. The trucks mostly used to carry coal and as per the relevant

notification, the person operating the weighbridge, could only charge a sum of Rs. 30/- for a loaded truck and Rs. 10/- for an unloaded truck. In such scenario, it was observed that the fee to be collected from the transporters for weighment of their vehicle was fixed and it would not vary with the amount of bid offered by the contractor. The contract would not have any effect on the price of coal, since weighment charges were fixed by the Government and the contractor had no right to increase the same, thereby, to cause loss to the public. It has been held that the payment of the bid amount is purely a matter between the contractor and the State. As a matter of fact, obtaining higher revenue by accepting the eligible highest bid would only be in public interest because the State stands to gain more revenue in that way. It has also been observed that offering of the bid after knowing the commercial value of the contract is a matter left to the business acumen or prudence of the tenderer and no third party's interest is involved in such a contract. If the State decides to give its largesse to the public it has an obligation to see it fetches the best possible value for the same, provided otherwise it does not in any manner affect the rights of other persons.

17. It is settled proposition of law that the judicial review of administrative action is intended *inter alia* to prevent arbitrariness or irrationality. In the absence of viability range fixed at the time of publication of the Tender Notice, the act of not accepting the bid of the petitioner at bid value of Rs. 14,21,600/- and the act of accepting the bid of the respondent no. 9 at bid value of Rs. 8,51,000/- are found to be arbitrary and unjustified. The reason assigned for accepting the bid of the respondent no. 9 only on the ground that the general public, etc. would not be harassed is *ex-facie* irrational. In view of the discussion made above and the reasons assigned therein, the process of settlement resulting into the order of settlement dated 28.03.2023 in favour of the respondent no. 9 is found to be arbitrary and irrational one as the respondent Municipal Board authorities took irrelevant factors into consideration and ignored relevant factor from consideration in the decision-making process and the same is liable to be set aside. It is accordingly set aside.

18. Consequently, the Barpathar Municipal Board authorities are directed to revisit the matter of settlement once again on the basis of the records containing the tender

documents of the participant valid bidders and to arrive at a decision on the settlement of Borpathar Weekly Market for the remaining period of the settlement period. While taking such decision, the respondent Municipal Board authorities shall also take into consideration the conduct of the other bidders including the respondent no. 7 and the respondent no. 8, who did not made any challenge to the order of settlement, impugned by the petitioner in this writ petition, as the respondent no. 7 and the respondent no. 8 in the counter affidavit, had accepted the position in the matter of settlement made in favour of the respondent no. 9, who is incidentally their brother. The entire exercise shall be undertaken and completed on or before 18.09.2023.

19. At this stage, Ms. Choudhury, learned counsel for the respondent no. 9 has submitted that the respondent no. 9 has already deposited the requisite installment amount to operate the Market and the respondent no. 9 is presently operating the Market. Thus, he may be allowed to operate the Market till 18.09.2023. In view of the directions given above, the respondent no. 9 may be permitted to operate the Market up-to 18.09.2023 and if after that, any excess amount is required to be refunded to the respondent no. 9 due to deposit already made by him, the same shall be refunded by the respondent authorities forthwith thereafter.

20. With the observations made and directions given above, the writ petition stands allowed to the extent indicated above. There shall, however, be no order as to cost.

JUDGE

Comparing Assistant