

GAHC010203712021



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

Case No. : WP(C)/6455/2021

DIPANKAR DAS
S/O. DIGENDRA CHANDRA DAS, VILL. PIRNAGAR, P.O. JALALPUR, P.S.
KATIGORAH, DIST. CACHAR, ASSAM, PIN-788816.

VERSUS

THE STATE OF ASSAM AND 5 ORS
REP. BY THE COMM. AND SECY. TO THE GOVT. OF ASSAM,
ENVIRONMENT AND FOREST DEPTT., DISPUR, GUWAHATI-06.

2:THE PRINCIPAL CHIEF CONSERVATOR OF FOREST AND HEAD OF
FOREST

ASSAM
PANJABARI
GUWAHATI-781037.

3:THE CHIEF CONSERVTOR OF FORESTS

SOUTHERN ASSAM CIRCLE
SILCHAR
DIST. CACHAR
PIN-788001.

4:DIVISIONAL FOREST OFFICER

KARIMGANJ FOREST (T)
DHARAKUNA
DIST. KARIMGANJ
ASSAM
PIN-788712.

5:PUARNAM DEB
C/O. DIVISIONAL FOREST OFFICER

KARIMGANJ FOREST (T)
DHARAKUNA
DIST. KARIMGANJ
ASSAM
PIN-788712.

6:DEBOJIT DEB

C/O. DIVISIONAL FOREST OFFICER
KARIMGANJ FOREST (T)
DHARAKUNA
DIST. KARIMGANJ
ASSAM
PIN-788712

Advocate for the Petitioner : MR. S B LASKAR

Advocate for the Respondent : SC, FOREST

Linked Case : WP(C)/6210/2021

DIPANKAR DAS
S/O DIGENDRA CHANDRA DAS
VILL-PIRNAGAR
P.O.-JALALPUR
P.S.-KATIGORAH
DIST-CACHAR
ASSAM
PIN-788816

VERSUS

THE STATE OF ASSAM AND 3 ORS
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE
GOVERNMENT OF ASSAM
ENVIRONMENT AND FOREST DEPARTMENT
DISPUR
GUWAHATI-6

2:THE PRINCIPAL CHIEF CONSERVATOR OF FORESTS AND HEAD OF
FOREST FORCE
ASSAM
PANJABARI
GUWAHATI-37

3:THE CHIEF CONSERVATOR OF FORESTS
SOUTHERN ASSAM CIRCLE
SILCHAR
DIST-CACHAR
PIN-788001

4:DIVISIONAL FOREST OFFICER
KARIMGANJ FOREST (T)
DHARAKUNA
DIST- KARIMGANJ
ASSAM
PIN-788712

Advocate for : MR. S B LASKAR
Advocate for : SC
FOREST appearing for THE STATE OF ASSAM AND 3 ORS

Linked Case : WP(C)/577/2022

DIPANKAR DAS
S/O DIGENDRA CHANDRA DAS
VILL-PIRNAGAR
P.O.-JALALPUR
P.S.-KATIGORAH
DIST-CACHAR
ASSAM
PIN-788816

VERSUS

THE STATE OF ASSAM AND 5 ORS.
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE
GOVERNMENT OF ASSAM
ENVIRONMENT AND FOREST DEPARTMENT
DISPUR
GUWAHATI-6

2:THE PRINCIPAL CHIEF CONSERVATOR OF FOREST AND HEAD OF FOREST
ASSAM
PANJABARI
GUWAHATI-781037
3:THE CHIEF CONSERVATOR OF FORESTS
SOUTHERN ASSAM CIRCLE
SILCHAR AND CHAIRMAN OF BID EVALUATION COMMITTEE
DIST- CACHAR
ASSAM
PIN-788001

4:DIVISIONAL FOREST OFFICER
KARIMGANJ FOREST (T)
DHARAKUNA
DIST- KARIMGANJ
ASSAM
PIN-788712

5:PUARNAM DEB
S/O PRASANTA DEB
VILL- BONGRAM
P.O.-BHAGABAZAR
P.S.-DHOLAI
DIST- KARIMGANJ
ASSAM
PIN-788120

6:DEBOJIT DEB
S/O DIPANKAR DEB
VILL- BONGRAM
P.O.-BHAGABAZAR
P.S.-DHOLAI
DIST- KARIMGANJ
ASSAM
PIN-788120

Advocate for : MR. S B LASKAR
Advocate for : SC
FOREST appearing for THE STATE OF ASSAM AND 5 ORS.

BEFORE
HON'BLE MR. JUSTICE KALYAN RAI SURANA

For the petitioner	: Mr. S.B. Laskar, Advocate.
For the State respondents	: Mr. P.N. Goswami, Addl. Advocate General.
For the Forest Department	: Mr. I. Kalita, standing counsel.
For respondent no.5	: Mr. S.D. Purkayastha.
For respondent no.6	: Mr. B.K. Das.
Date of hearing	: 06.12.2022, 07.12.2022, 23.05.2023.
Date of judgment	: 25.05.2023.

JUDGMENT AND ORDER
(CAV)

Heard Mr. S.B. Laskar, learned counsel for the petitioner in this series of three writ petitions. Also heard Mr. P.N. Goswami, learned Addl. Advocate General for the State, along with Mr. I. Kalita, standing counsel for the

Forest Department, Mr. S.D. Purkayastha, learned counsel for the respondent no. 5 and Mr. B.K. Das, learned counsel for the respondent no. 6.

2. Case of the petitioner in W.P.(C) 6455/2021: During the pendency of W.P.(C) 6210/2021, the petitioner had come to know that his bid for *Kalain Stone Minor Mineral Unit-I* was not approved as per decision taken on 01.11.2021 in the office chamber of the Chief Conservator of Forests, Southern Assam Circle, Silchar, *inter alia*, on the ground that he had not uploaded digitally signed documents. The petitioner has alleged that the impugned minutes was prepared on extraneous considerations. In this writ petition, the successful bidders were arrayed as proforma respondent nos. 5 and 6. By order dated 06.12.2021, this Court had provided that the settlement of the *Kalain Stone Minor Mineral Unit-I* would be subject to outcome of the writ petition. However, notice of motion was issued by order dated 10.08.2022.

3. Case of the petitioner in W.P.(C) 6210/2021: The Divisional Forest Officer, Karimganj ("DFO, Karimganj" for short) had issued NIT for settlement of *Kalain Stone Minor Mineral Unit-I*. The petitioner had submitted his 1st Stage Bid (i.e. Technical Bid) on 05.09.2021 and was waiting to participate in the 2nd stage of bidding i.e. live auction, but the petitioner did not receive any information about the live bidding and therefore, he visited the office of the DFO, Karimganj on several occasions but he was not provided any information and he had learnt that the said authority was adopting a pick-and-choose method to settle the bid to others by depriving the petitioner. By order dated 23.11.2021, this Court had directed the respondent authorities to place the copy of evaluation of the technical bid dated 01.11.2021 before the Court.

4. Case of the petitioner in W.P.(C) 577/2022: During the pendency

of W.P.(C) 6210/2021 and W.P.(C) 6455/2021, the *Kalain Stone Minor Mineral Unit-I* was settled with the respondent no. 5. Therefore, the said settlement vide office order no. 73 dated 07.12.2021, has been challenged by filing the instant writ petition under Article 226 of the Constitution of India and the petitioner has also prayed for fresh e-auction of the mining contract in respect of the said NIT and for a direction upon the State respondents to take action against the private respondent nos. 5 and 6 as per Section 6(5)(iv), 11(1)(ii) and 25(1)(d) of the Assam Public Procurement Act, 2017 (hereinafter referred to as the "2017 Act") and Assam Public Procurement Rules, 2020 (hereinafter referred to as the "2020 Rules") framed thereunder.

Submissions of the learned counsel for the petitioner:

5. The learned counsel for the petitioner has meticulously referred to the various tender clauses and had submitted that along with the documents digitally uploaded, physical copies of documents accompanying the bid were also submitted. Thus, it was submitted that under sub-clause (ii) of clause (a) of heading 'A' - "First round of e-auction" appended to clause 8.1 of section "1. Important information" of the Bidding Document issued in connection with "e-auction sale notice dated 05.09.2021", it was provided that "... *In case of differences between documents submitted electronically and original document submitted physically, the original documents submitted physically shall prevail.*" It was also submitted that the presence of the petitioner was mandatory before opening of the bids as per the provisions of Rule 9 of the 2020 Rules, which mandates that the bidders shall be enabled to witness the electronic bid opening and status of bid evaluation online and thus, it was submitted that as the petitioner was not present, the opening of the bids of the respondent nos. 5 and 6 was illegal and in violation of Rule 9 (ii) of the said rules. Moreover, it was

also submitted that the defect on which the bid of the petitioner was not accepted was not a material defect. In this regard, by referring to the provision of Rule 13(iii) of the 2020 Rules, it has been submitted that the prescription of the said rule is as follows:-

“13. Determination of responsiveness:

(i) X X X

(ii) X X X

(iii) A "material deviation, reservation, or omission" is that,

(a) If accepted, shall:-

(i) effect in any substantial way the scope, quality, or performance of the subject matter of procurement specified in the bidding documents; or

(ii) limit in any substantial way, inconsistent with the bidding documents, the rights of the procuring entity or the obligation of the bidder under the proposed contract; or

(b) If rectified, shall unfairly affect the competitive position of other bidders presenting responsive bids."

6. By referring to Clause B of Schedule I – Format of Technical Bid, appended to the Bid document, it was submitted that under sub-clause (1)(d) (viii) thereof, it was required that all the documents should be digitally signed and that it was not a condition of the tender document that each page must be digitally signed. It was also submitted that as per internal page 34 of the bid document, the AMTRON was required to provide technical details regarding online e-auction and that vide Annexure-10 to W.P.(C) 577/2022, the AMTRON had given instructions in form of two note that *"Above listed documents need to be compiled into a single PDF and digitally signed PDF to be uploaded by the bidder."*, and *"The bid document can be uploaded only once. Please ensure that the bid document is correct before uploading. In case of loss of any document neither the Forest Department nor AMTRON shall be held responsible."* Thus, it is reiterated that the rejection of the bid of the petitioner at the initial stage,

without evaluating the bid was illegal, arbitrary and was liable to be interfered with.

7. Moreover, by referring to Section 25 of the 2017 Act, it was submitted that the reason of the procuring entity to exclude the bid of the petitioner was required to be properly recorded and communicated to the petitioner, and as the same was not done, the petitioner was compelled to institute the first two writ petitions. Accordingly, it was submitted that as the provision of Section 25(2) and 25(3) of the 2017 Act was violated, the sale/settlement of *Kalain Stone Minor Mineral Unit-I* was liable to be set aside and the respondent authorities be directed to call for a fresh bid.

Submissions by the learned Addl. AG:

8. Per contra, the learned Addl. AG had submitted that the present tender process was for sale/ settlement of *Kalain Stone Minor Mineral Unit-I*, which was not for procurement of 'goods', 'works' or 'services', but the said tendering process was initiated as per the provisions of the Assam Minor Mineral Concession Rules, 2013. It was submitted that all the documents were not digitally signed and therefore, the bid of the petitioner was having a non-curable formal defect, which went to the root of the matter. It was submitted that all the documents appended to the bid was required to be digitally signed and that all the documents were required to be compiled into one PDF file, which was done by other bidders. It was submitted that his instructions are to the effect that if the entire documents are converted into one PDF file, it ensures that all the pages get digitally signed and there is no chance of tampering of electronic document. By referring to the affidavit-in-opposition filed by respondent no. 4, it was submitted that the tender was called in e-auction online platform

“assamforestonline.in” maintained by AMTRON and all decisions in respect of the bid in question was uploaded therein and by submitting his login credentials, the petitioner could see all information contained in the online platform, including information regarding 2nd stage of bidding. It was also submitted that the ‘earnest money deposit’ of Rs.88,55,000/- was also refunded to the petitioner on 23.06.2022 through ‘real time gross settlement’ (RTGS for short). In support of his submissions, the cases of (i) *National High Speed Rail Corpn. Ltd. v. Montecarlo Ltd. & Anr.*, (2022) 6 SCC 401, (ii) *The Bharat Coking Coal Ltd. & Ors. v. AMR Dev Prabha & Ors.*, (2020) 16 SCC 759, (iii) *The Silppi Constructions v. Union of India & Anr.*, (2020) 16 SCC 489, and (iv) *Jagadish Mandal v. State of Orissa & Ors.*, (2007) 14 SCC 517 were relied upon.

Submissions by the learned counsel for respondent no. 5 and 6 respectively:

9. The learned counsel for the respondent nos. 5 and 6 by referring to their respective affidavit-in-opposition, have supported the stand taken by the learned Addl. AG and the learned counsel for the respondent no. 5 has submitted that a letter of intent (LoI for short) has been issued on 07.12.2021 in favour of the said respondent and he has taken over the mining site. In support of his submissions, the learned counsel for the respondent no. 5 has placed reliance on the following cases viz., (i) *Central Coalfields Limited & Anr. v. SLL-SML (Joint Venture Consortium) & Ors.*, (2016) 8 SCC 622, and (ii) *Air India Ltd. v. Cochin International Airport Ltd. & Ors.*, (2000) 2 SCC 617.

Demonstration of the Online bid document submitted by the petitioner:

10. It may be mentioned that in course of hearing, by order dated 06.12.2022, the Court had granted liberty to the learned Addl. Advocate General to have a technical persons knowing the modalities to open the e-bids of the

petitioner which is stated to be in the computer system of AMTRON. Accordingly, on 07.12.2022, the following persons had appeared before the Court when this case was called, viz., (1) Sri Vashanthan B, DFO, Karimganj; (2) Sri Anupam Barman, Senior Assistant, Consultant Head, Forest Online Project, AMTRON; (3) Sri Partha Baruah, System Support Engineer, Forest Online Project; (4) Sri Pankaj Kalita, Range Officer, Kalain, Karimganj District. In course of the hearing, the said officials had opened the concerned web-portal/site in respect of e-auction/digital platform maintained by AMTRON, where the bids were to be uploaded and by use of passwords and security key, the documents uploaded by the petitioner with his bids was shown. It was successfully demonstrated that only the "list of documents" was digitally signed and that the documents which were uploaded with the bid were not digitally signed.

11. The officials of AMTRON, who were present in Court, had demonstrated that under the easily available digital technology, it was possible to digitally sign all documents and then compile all such digitally signed document into one PDF file.

Discussion and decision:

12. Considered the writ petition, affidavit-in-opposition filed separately by the respective respondent nos. 4, 5 and 6 and affidavit-in-reply filed by the petitioner against the affidavit-in-opposition filed by the respondent no. 4. Also considered the documents appended to herein before referred pleadings.

13. The respondent no. 4 has specifically stated in para-6 of their affidavit-in- opposition to the effect that the bidder can log into the online platform to enquire about the fate of his bid offered against any bid (term used

in para-6 is 'MCA'). A print-out of the live auction details is also annexed to their affidavit-in-opposition as Annexure-C. The said fact is not specifically denied in the affidavit-in-reply filed by the petitioner.

14. The officials of AMTRON, who were present in Court on 07.12.2022, had demonstrated that under the easily available digital technology, it was possible to digitally sign all documents and then compile all such digitally signed document into one PDF file. The note of AMTRON [Annexure-10 to W.P. (C) 577/2022] also indicates that the listed documents were required to be compiled into a single PDF and that the digitally signed PDF was to be uploaded by the bidder. The Court does not find that any other interpretation was possible to the note of AMTRON, referred to herein before.

15. Therefore, the Court is constrained to hold that except for the index page, none of the bid documents were digitally signed or converted into one single PDF file before uploading in the online e-auction platform for the auction held for *Kalain Stone Minor Mineral Unit-I*, which was maintained by AMTRON on behalf of the tendering authority, i.e. Environment and Forest Department. Resultantly, the uploading of the bid by the petitioner was not in accordance with the directions contained in the bid document read with instructions provided by AMTRON [i.e. Annexure-10 to W.P.(C) 577/2022].

16. The Court is also inclined to hold that when the bid submitted by the petitioner is not in accordance with the bid document read conjointly with instructions provided by AMTRON [i.e. Annexure-10 to W.P.(C) 577/2022], the bid submitted by the petitioner had suffered from material defect.

17. The provision of Section 2(b) of the 2017 Act provides as

follows:-

“2(b) “bidder” means any person, company, firm, agency, institution, etc. participating in a procurement process of a procuring entity for procurement of any Goods, Works or Services;”

18. With the said definition of “bidder”, the petitioner has not been able to show that the petitioner had participated in any bid called by the DFO, Karimganj for procurement of ‘goods’, ‘works’, or ‘services’. Rather, the mining contract would be squarely covered within the meaning of the Assam Minor Mineral Concession Rules, 2013, as clearly mentioned in the e-Auction Sale Notice dated 05.09.2021. Therefore, when the respondent no. 4 had floated the sale notice of mining contract, the 2017 Act and 2020 Rules would stand excluded by implication, not being a contract for procurement of goods, works or services. Therefore, the provisions of 2017 Act and 2020 Rules cannot be read into the tender for mining contract of minor minerals.

19. In the cases cited by the learned Addl. Advocate General, it has been well settled that the tendering authorities, who are the authors of the bid document, would be the best judge to interpret it and that the Court should be slow in doing so and it has also been held that even if there are some aberrations, Courts should not interfere with the tenders, which are in the realm of contract and that if the unsuccessful tenderer is aggrieved by the decision of the tendering authority, such tenderer should be relegated to approach the civil Court and claim compensation.

20. As a result of the discussions above, the bid submitted by the petitioner suffered from material defect and therefore, the rejection of his bid is not liable to be interfered with and thus, the petitioner is not found entitled to any relief and therefore, these three writ petitions stand dismissed with no order

as to cost.

21. If the petitioner still feels aggrieved, he is at liberty to approach the civil court having jurisdiction and claim compensation. It is provided that if such a case is filed, the same shall be tried in its own merit without being influenced by this judgment and order.

JUDGE

Comparing Assistant