

GAHC010210662021



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

Case No. : WP(C)/6712/2021

M/S ANN ASSOCIATES
A PARTNERSHIP FIRM HAVING ITS OFFICE AND PRINCIPAL PLACE OF
BUSINESS AT HOUSE NO 21, SIX MILE, GUWAHATI, ASSAM 781022 AND IS
REPRESENTED BY ITS DULY AUTHORIZED PARTNER.

VERSUS

THE GENERAL MANAGER,NORTHERN FRONTIER RAILWAY
MALIGAON, GUWAHATI, ASSAM 781011.

2:THE DEPUTY GENERAL MANAGER (G)
NORTHERN FRONTIER RAILWAY
MALIGAON
GUWAHATI
ASSAM 781011

3:THE DIVISIONAL RAILWAY MANAGER

RANGIYA DIVISION
NORTHERN FRONTIER RAILWAY
DRM OFFICE BUILDING
RANGIA
ASSAM.

4:THE SENIOR DIVISIONAL COMMERCIAL MANAGER

RANGIYA DIVISION
NORTHERN FRONTIER RAILWAY
DRM OFFICE BUILDING
RANGIA
ASSAM

Advocate for the Petitioner : MR A K RAI

Advocate for the Respondent : SC, NF RLY

**BEFORE
HONOURABLE MR. JUSTICE SANJAY KUMAR MEDHI**

10.03.2023.

Judgment & Order

The present challenge is with regard to an office order dated 25.10.2021 by which a tender floated by the Railways was discharged without assigning any reasons. The petitioner claims suffering of legal prejudice by such action and has, therefore, approached this Court under Article 226 of the Constitution of India.

2. Before delving into the issue which has arisen for adjudication, it would be convenient if the facts of the case are put on record in brief.

3. The petitioner is a partnership firm and carries out the business of general contractors. On 09.11.2020, a Tender Notice was floated by the Divisional Railway Manager, Rangia Division, inviting Expression of Interest (EoI) for developing the existing Goods Sheds at Baihata (BIZ), Rangia (RNY) and Ghograpar (GOE) Railway Stations of the Rangia Railway Division through private investment. Subsequently, on 19.05.2021, the office of the Sr. Divisional Commercial Manager, Rangia Railway Division, NRF issued tender notification pursuant to which, on 24.06.2021, the petitioner had submitted its bid along with earnest money which was a two bid system, viz, technical and financial.

4. It is the case of the petitioner that its technical bid was found to be responsive and accordingly, its financial bid was opened which was found to be the lowest.

Thereafter, on 11.10.2021, the petitioner was invited for some negotiations. However, vide the impugned communication dated 25.10.2021, the Tender in question, was discharged without assigning any reasons. Accordingly, vide communication dated 28.10.2021, the petitioner had asked for the reasons for such action. The said letter was not replied to, whereafter the instant writ petition has been filed. The contesting respondent-Railways have filed an affidavit-in-opposition dated 19.02.2022 disputing the claim of the petitioner.

5. I have heard Shri VS Kushwaha, learned counsel for the petitioner whereas the Railways are represented by its Standing Counsel, Shri S Chakraborty.

6. Shri Kusuwaha, learned counsel for the petitioner has submitted that the impugned action is out and out most unreasonable and arbitrary, as the Railways, without any reason or grounds, has discharged the work. The learned counsel submits that some semblance of reasons are discernible from the minutes of the Tender Committee held on 20.10.2021. The relevant discussions are found against Sl. No. 19 of the said minutes. The authorities took notice of the fact that the petitioner had quoted 20% of share for self and 80% share for the Railways. The calculation has also been done by stating that the aforesaid 20% would come to Rs. 5.87 cores which the petitioner would be getting as gross profit for 10 years. It has further been stated that if the Railway manages the Goods Sheds than approximate cost of maintenance would be around Rs. 25 lakhs for 10 years. The Railway authorities have also discussed the extent of viability of the rate and ultimately, recommended for discharge of the tender in question. In the recommendation part, it has been stated that the revenue sharing percentage is against the interest of Railways and that Railway will be at big loss under the present situation. The learned counsel has contended that such decision has been taken after opening of the financial bid of the petitioner and thereby exposing the same in the open market which has caused immense prejudice. It is the specific

case of the petitioner that after the aforesaid discharge, another tender was floated which, however was rescinded.

7. Shri Khuswaha, learned counsel for the petitioner has submitted that even if the minutes of the meeting dated 20.10.2021 are taken into consideration, the said grounds cannot be said to be reasonable and free from arbitrariness. He has also contended that the decision is merely based on speculation.

8 In support of his submission, the learned counsel for the petitioner has relied upon the following decisions:

i) (1990) 3 SCC 280, *Star Enterprises & Anr. Vs. City and Industrial Development Corporation*,

ii) (2001) 8 SCC 491, *Union of India Vs. Dinesh Engineering*,

iii) Order dated 04.02.2012 in WP(C)/4489/2011 (*Green Express Vs. Union of India*).

9. The case of *Star Enterprises & Anr. (supra)* has been cited in support of the submission regarding the powers of this Court under Article 226 of the Constitution of India *qua* the authority which is a "State" within the meaning of Article 12 of the Constitution of India. For ready reference, paragraph 10 of the judgment is extracted hereinbelow:

“In recent times, judicial review of administrative action has become expansive and is becoming wider day by day. the traditional limitations have been vanishing and the sphere of judicial scrutiny is being expanded. State activity too is becoming fast pervasive. As the State has descended into the commercial field and giant public sector undertakings have grown up, the stake of the

public exchequer is also large justifying larger social audit, judicial control and review by opening of the public gaze ; these necessitate recording of reasons for executive actions including cases of rejection of highest offers. That very often involves large stakes and availability of reasons for actions on the record assures credibility to the action ; disciplines public conduct and improves the culture of accountability. Looking for reasons in support of such action provides an opportunity for an objective review in appropriate cases both by the administrative superior and by the judicial process. the ; submission of Mr Dwivedi, therefore, commends itself to our acceptance, namely, that when highest offers of the type in question are rejected reasons sufficient to indicate the stand of the appropriate authority should be made available and ordinarily the same should be communicated to the concerned parties unless there be any specific justification not to do so.”

10. The case of *Dinesh Engineering (supra)* has been relied upon to bring home the contention that even in contractual matters, a public authority cannot have unfettered discretion. For ready reference, the relevant extracts are quoted hereinbelow:

“15. Coming to the second question involved in these appeals, namely, the rejection of the tender of the writ petitioner, it was argued on behalf of the appellants that the Railways under Clause 16 of the Guidelines was entitled to reject any tender offer without assigning any reasons and it also has the power to accept or not to accept the lowest offer. We do not dispute this power provided the same is exercised within the realm of the object for which this clause is incorporated. This does not give an arbitrary power to the Railways to reject the bid offered by a party merely because it has that power. This is a power which can be exercised on the existence of certain conditions which in the opinion of the Railways are not in the interest of the Railways to accept the offer. No such ground has been taken when the writ petitioner's tender was rejected. Therefore, we agree with the High Court that it is not open to the

Railways to rely upon this clause in the Guidelines to reject any of every offer that may be made by the writ petitioner while responding to a tender that may be called for supply of spare parts by the Railways. Mr. Iyer, learned senior counsel appearing for the EDC, drew our attention to a judgment of this Court in Sterling Computers Ltd. v. M/s. M. and N. Publication Ltd., (1993) 1 SCC 445 which has held : (1993 AIR SCW 683 : AIR 1966 SC 51) (Para 12 of AIR)

"Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the Courts, such decisions are upheld on the principle laid down by Justice Holmes, that Courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive."

16. But then as has been held by this Court in the very same judgment that a public authority even in contractual matters should not have unfettered discretion and in contracts having commercial element even though some extra discretion is to be conceded in such authorities, they are bound to follow the norms recognised by Courts while dealing with public property. This requirement is necessary to avoid unreasonable and arbitrary decisions being taken by public authorities whose actions are amenable to judicial review. Therefore, merely because the authority has certain elbow room available for use of discretion in accepting offer in contracts, the same will have to be done within the four corners of the requirements of law especially Article 14 of the Constitution. In the instant case, we have noticed that apart from rejecting the offer of the writ petitioner arbitrary, the writ petitioner has now been virtually

debarred from competing with the EDC in the supply of spare parts to be used in the governors by the Railways, ever since the year 1992, and during all this while we are told the Railways are making purchases without any tender on a proprietary basis only from the EDC which, in our opinion, is in flagrant violation of the Constitutional mandate of Article 14. We are also of the opinion that the so-called policy of the Board creating monopoly of EDC suffers from the vice of non-application of mind, hence, it has to be quashed as has been done by the High Court.”

11. The case of *Green Express (supra)* has been relied upon on the issue of exposing the rate of the petitioner before taking the decision to discharge the Tender. For ready reference, the relevant extract is given below:

“20. Both the writ petitioners have exposed their rates and if the fresh bids are floated for the same space, the rival competitors would be in an advantageous situation while deducing their rattles. Such exposition no doubt has severely prejudiced the writ petitioner, if those are not acted upon for purpose of settlement of the tender. On aggregate consideration of the fact and law as stated, this Court is strongly persuaded to interfere with the decision of discharging the tender. As such the decision contained in the communication dated 04.07.2011 (Annexure-2 of WP(C) No.4489/2011) and letter dated 29.08.2011 (Annexure-P10 of WP(C) No.4668/2011) is set aside. But it is made clear that if the highest bidders i.e. the writ petitioners' firms undertake to accept the non-incorporated clause (as executed in the CCM's note dated 18.05.2011), which could not be made part of the tender, the railway respondents shall consider their highest bid for acceptance. If the writ petitioners are ready to undertake that they would abide by the said non-incorporated clause, they shall furnish an undertaking in writing to the tendering authority within a period of 7(seven) days from this day and the tendering authority i.e. the railway respondents shall determine the tender

within 15 days from the date of receipt of the said undertaking.”

12. *Per contra*, Shri S Chakraborty, learned counsel for the Railways has submitted that none of the grounds taken by the petitioner are tenable and therefore, the writ petition is liable to be dismissed. He submits that there are two kinds of sheds, namely, Brown Field and Green Field. In Brown Field, a shed is already existing which has been built by the Railways and the job of the Contractor is only to maintain the same and Baihata is a Brown Field. He submits that the initial offer of the petitioner was in the ratio of 95:5 i.e., 95% would be retained by the Contractor and 5% would be given to the Railways. However, after negotiations, the offer was renewed drastically to the extent of 20:80 wherein the Contractor would retain 20% of the collection and 80% would be given to the Railways. Shri Chakraborty, learned Standing Counsel has submitted that even this 20% comes to a substantial amount of Rs. 5.87 crores for 10 years which, according to the Railways, is not a viable option.

13. By referring to the prayer made in the writ petition, the Railway counsel has questioned the right to pray for a writ in the nature of Mandamus. By drawing the attention of the tender document, more specifically, Clause 3 of the Disclaimer, it is submitted that the Railway reserves the right to reject any or all bids, at any stage, without assigning any reasons, whatsoever. Clause 4 further gives the right to the Railways to change / modify / amend any provisions of the tender document.

14. The learned counsel for the Railways, accordingly submits that the present decision to discharge is in consonance with the public interest, as the same would not be a viable option. The following decisions have been cited by Shri Chakraborty, learned Standing Counsel in support of his submissions:

i) (2016) 14 SCC 173, *State of Jharkhand Vs. CWE-SOMS Consortium*,

ii) (1991) 1 SCC 492, *Raunaq International Ltd. Vs. IVR Construction Ltd. & Ors.*,

iii) (2002) 6 SCC 617, *Air India Ltd. Vs. Cochin International Airport Ltd.*,

iv) (2020) 16 SCC 489, *Silppi Constructions Contractors Vs. Union of India*,

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v) Order dated 21.03.2022 in Civil Appeal No. 1846/2022 (Supreme Court), *M/S NG Projects Ltd. Vs. M/S Vinod Kumar Jain*,

(2022) 6 SCC 127

vi) Order dated 29.03.2022 (*Municipal Committee Barwala Vs. Jai Narayan and Company*),

(2022) 5 SCALE 432

vii) Judgment dated 18.02.2022 in WP(C)/5826/2021 (*M/S NAD & Associates & Anr. Vs. Shri Paras Didwania*).

15. In the case of *State of Jharkhand (supra)*, the scope of judicial review in Government contracts / Tenders have been reiterated. The Hon'ble Supreme Court has discussed the ambit of Article 298 of the Constitution of India *vis-a-vis* the requirement of reasonableness under Article 14.

16. In the case of *Raunaq International Ltd. (supra)*, the restraint to be exercised before passing of any interim order in matters of Government contract has been emphasized.

17. In the case of *Air India Ltd. (supra)*, the flexibility which is required to be granted to the State and its instrumentalities to the extent of choosing its own method to arrive at a decision has been highlighted.

18. In the case of *Silppi Constructions Contractors (supra)*, it has been held that the owner would be the best judge for interpretation of a clause of the contract and that judicial review in contractual matters of the State or its instrumentalities should be minimal.

19. In the case of *M/S NG Projects Ltd. (supra)*, Section 41 (ha) of the Specific Relief Act has been taken into consideration while holding that no restraint order should be passed in contracts involving infrastructure projects.

20. In the case of *Municipal Committee Barwala (supra)*, it has been held that the highest bidder has no vested interest to have the auction concluded in his favour.

21. In the case of *M/S NAD & Associates & Anr. (supra)*, this Court has reiterated that in exercise of powers under Article 226 of the Constitution of India, the Court does not act as a Court of appeal and only the decision making process is the subject matter of scrutiny.

22. Rejoining his submission, Shri Kushwaha, learned counsel for the petitioner submits that it is a fact that initially, the offer given by the petitioner on the profit sharing was 95:5. The said offer was given at a time when the entire country was under the pandemic where working condition was severely impaired. However, on negotiation, coupled with the fact that situation had improved, the offer was renewed to 20:80 in which case, 80% of the earnings were to be given to the Railways. The learned counsel for the petitioner further submits that floating of a new tender after decision to run the Shed on its own is wholly inconsistent and unreasonable. As regards the distinction sought to be made on Brown Field and Green Field, the learned counsel for the petitioner submitted that though the field at Baihata is Brown Field,

the roads are to be built and one building is required to be constructed. He further submits that delay in allotting the work would be against the public interest.

23. The rival contentions made by the learned counsel for the parties have been duly considered and the materials on record have been carefully examined.

24. The primary ground of challenge, as projected by the petitioner, is that the impugned order dated 25.10.2021 by which the tender has been discharged does not contain any reason. Ordinarily, such submission can be the basis of interference in a given case provided that the records of the case do not contain any preceding discussion. In fact, in the celebrated case of *Mohinder Singh Gill Vs. The Chief Election Commission*, reported in 1978 AIR 851, the Hon'ble Supreme Court after referring with approval to the landmark case of *Gordhandas Bhanji Vs. Commissioner of Police*, reported in (1978) 1 SCC 405 has held as follows:

*“8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose, J. in **Gordhandas Bhanji**:*

‘Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed

objectively with reference to the language used in the order itself.'

Orders are not like old wine becoming better as they grow older.”

25. The said proposition of law has been reiterated in a number of decisions, including the landmark decision of wherein, the following has been stated by the Hon’ble Supreme Court.

26. In the instant case, the contesting respondent nos. 2 to 5 have filed an affidavit-in-opposition on 19.02.2022 where, in paragraph 6, the justification for passing the impugned order has been elaborately stated. However, what is to be noted is that the said justification is based on the discussion of the Tender Committee which were recorded in the form of a minutes of meeting dated 20.10.2021 which has also been annexed to the affidavit-in-opposition. The minutes would reveal that the modified offer by the petitioner would lead to a situation wherein, the earnings of the Contractor would be about Rs.5.87 crores for 10 years. The discussions clearly state that if the maintenance is done by the Railways, the cost would be around Rs. 25 lakhs for 10 years. The Tender Committee, accordingly recommended that entering into the contract, at such rate, would cause loss to the Railways. Thus, on the ground of unviable financial implication, the discharge of the tender was recommended.

27. The situation is also required to be seen from another perspective. Apart from the fact that the offer of the petitioner has been held to be unviable, the work has not been offered to any other party by re-tender. Though it is a fact that such re-tender was called for, the Railway on its own had abandoned the same. Therefore, the element of *mala fide* or bias will not come in, as there has been no intention to favour any other party.

28. Shri Chakraborty, learned Standing Counsel, Railways has drawn the attention of this Court to certain clauses of the contract with regard to the exclusive right of the owner to reject or not to finalize the contract, as stipulated in Clauses 3 and 4 of the Tender documents. Even holding such right not to be an unfettered one, this Court, in exercise of its powers of judicial review, is to look for the reasons assigned to support the impugned order. As indicated above, the minutes of meeting dated, 20.10.2021 contain reasons including the aspect of relative loss which would be caused to the Railways which is the owner.

29. While it is trite law that if the reasons projected are *prima facie* acceptable and the Court may not even delve into the sufficiency of such reasons, in the instant case, a bare perusal of the minutes dated 20.10.2021 would show that a threadbare discussion was held wherein, a calculation was also made regarding the percentage of profit that would be earned by the contractor on the offered rate and the viability of the work, if done by the Railways on its own. The aforesaid factors are not only germane but also beneficial to the owner which, otherwise also cannot be forced to enter into a contract to its own peril.

30. Even though there is no allegation of *mala fide* in the impugned action, this Court has also noticed that the decision taken to discharge the tender is not to give benefit to any other competitive bidder and therefore, the question of bias or *mala fide* will not arise. The fact that though subsequently, another Tender was floated but, was later rescinded, would also be a factor in favour of the owner.

31. Though certain decisions have been cited on behalf of the petitioner, the same would not come to its aid. In the case of *Star Enterprises & Anr. (supra)* which is of the year 1990, the ambit of Article 12 of the Constitution of India was given emphasis in exercising the power of judicial review. In the case of *Dinesh Engineering (supra)*, the

aspect of judicial review in contracts and commercial matters has been discussed and in the case of *Green Express (supra)*, this Court interfered with the aspect of floating of fresh Tender after exposing the rates of the petitioner. However, in the instant case, no fresh tender process has been initiated and going by the minutes of the meeting dated 20.10.2021, the work in question, would be done by the Railways internally.

32. In the case of *Air India Ltd. (supra)*, the Hon'ble Supreme Court has laid down that the State can choose its own method to arrive at a decision. In the case of *Silppi Constructions Contractors (supra)*, the restrictions to be imposed in dealing with contractual matters has been reiterated. The case of *Raunaq International Ltd. (supra)* as well *M/S NG Projects Ltd. (supra)* though, mainly are on the aspect of restraint in passing interim orders, also reiterates the requirement of self-imposed restrictions by a writ court in contractual matters.

33. In the case of *Tata Cellular Vs. Union of India*, reported in (1994) 6 SCC 651, the Hon'ble Supreme Court while referring to an earlier case of *Fasih Chaudhary Vs. Director General, Doordarshan & Ors.*, reported in AIR 1989 SC 157 has observed that just as fair play has to be maintained, the authorities should also have a "free play in the joints" and unless, such decision is vitiated by *mala fide*, a writ court should be loath in interfering with such decision. Further, on the aspect of judicial review in the case of *Tata Cellular (supra)*, the Hon'ble Supreme Court laid down as follows:

"74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application of judicial review is made, but the decision making process itself."

34. This Court is of the opinion that powers by a writ court is to be exercised only to examine the decision making process. In other words, what is to be looked into is to

whether such decision has been taken by considering all the relevant factors, namely, whether any irrelevant or extraneous factors have been considered; whether the person taking the decision has the power and jurisdiction to take such decision and whether such decision has been taken *bona fide*. Though the instances may not be exhaustive in nature and each case would depend upon its own facts and circumstances, the aspect of adherence to the principles of natural justice cannot be overlooked or ignored. Further, in contractual matters, unless arbitrariness or unreasonableness is writ large on the face of the decision making process, a Court exercising powers under Article 226 of the Constitution of India would be loath in interfering.

35. Under the aforesaid circumstances, this Court is of the considered view that no case for interference is made out and accordingly, the writ petition is dismissed.

JUDGE

Comparing Assistant