

GAHC010238812022



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

Case No. : WP(C)/7520/2022

M/S RANA CONSTRUCTION AND ENGINEERS PVT LTD
SURAJ COMPLEX, ULUBARI CHARIALI,
KAMRUP(METRO), GUWAHATI- 781007,
ASSAM REPRESENTED BY ONE OF ITS DIRECTORS RANA ZAMAN,
AGED ABOUT 50 YEARS,
SON OF ALHAZ RAHMAN ALI,
RESIDENT OF NO. 62, RAHMAN MANSION,
SOUTH SARANIA, P.O.- ULUBARI, DIST.- KAMRUP(M), ASSAM,
GUWAHATI- 781007.

VERSUS

THE STATE OF ASSAM AND 2 ORS
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE
GOVERNMENT OF ASSAM,
PUBLIC WORKS DEPARTMENT,
DISPUR, GUWAHATI- 781006.

2:THE CHIEF ENGINEER

PUBLIC WORKS DEPARTMENT (BORDER ROADS)
ASSAM

CHANDMARI
GUWAHATI- 781003.

3:NATIONAL RURAL INFRASTRUCTURE DEVELOPMENT AGENCY
MINISTRY OF RURAL DEVELOPMENT

GOVT. OF INDIA

15 NBCC

5TH FLOOR

BHIKAJI CAMA PLACE

NEW DELHI- 110066

Advocate for the Petitioner : MR. K N CHOUDHURY

Advocate for the Respondent : SC, PWD

Linked Case : WP(C)/5053/2022

M/S RANA CONSTRUCTION AND ENGINEERS PVT. LTD.
SURAJ COMPLEX
ULUBARI CHARIALI
KAMRUP(M)
GUWAHATI-781007
ASSAM
REPRESENTED BY ONE OF ITS DIRECTORS RANA ZAMAN
SON OF ALHAZ RAHMAN ALI
RESIDENT OF HOUSE NO. 62
RAHMAN MANSION
SOUTH SARANIA
P.O. ULUBARI
DIST. KAMRUP(M)
ASSAM
GUWAHATI-781007.

VERSUS

THE STATE OF ASSAM AND 2 ORS.
REPRESENTED BY THE COMMISSIONER AND SPECIAL SECRETARY TO THE
GOVERNMENT OF ASSAM
PUBLIC WORKS ROADS DEPARTMENT
DISPUR
GUWAHATI-781006.

2:THE CHIEF ENGINEER
PUBLIC WORKS DEPARTMENT (BORDER ROADS)
ASSAM
CHANDMARI
GUWAHATI-781003.

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

Advocates for the petitioner: Shri K.N. Choudhury, Sr. Advocate
Shri R.M. Deka, Advocate.

Advocates for respondents : Shri D. Saikia, Advocate General,
Shri B. Gogoi, Advocate,
Shri K. Gogoi, Advocate.

Date of hearing : 16.12.2022

Date of judgment : 25.01.2023

- 1.** The nature of the grievance being similar in these two writ petitions filed by the same petitioner, the same are taken together for analogous hearing and are disposed of by this common judgment and order.
- 2.** The issue briefly is with regard to the requirement in the tender notice to deposit the Bid Security and the Tender Document Cost by online payment. The amount as such is not the subject matter of dispute and it is only the manner

prescribed which the writ petitioner has raised for a re-consideration by invoking the writ jurisdiction of this Court for a judicial review.

3. Before coming to the issue in details, it would be convenient to place the facts of the case in brief.

4. It may be mentioned that this Court has not gone into the detailed facts of the work connected as the same would not be relevant for adjudication of the dispute.

WP(C) No./ 5053/2022

5. This writ petition concerns a Notice Inviting Tender dated 19.07.2022 concerning 7 (seven) numbers of works which are:

- (i) MRL08-Athuagaon to Chungapota via Dangtol Bazar,
- (ii) T05- Rongsai to Borjhora Road (NEC),
- (iii) MRL08-Rangauti Pt II to Chandrapur via Borbond Pt III,
- (iv) T03-Subansah to Halogaon via Dhaireswari Mandir,
- (v) MRL 14- Bechimari to Daipangpara,
- (vi) T03- Gomothagaon Bherbheri Chalchali Road and
- (vii) MRL04-NH-52 Koomsang to Gulapjan via Bordubi TE factory.

The estimated value of the said work was Rs. 2940.871 lakhs and the last date of submission of the tender and the opening of tenders was fixed on 12.08.2022.

WP(C) No. 7520/2022

6. This writ petition concerns a Notice Inviting Tender dated 14.11.2022 concerning eleven nos. of roads and ten nos. of bridges work in the districts of Barpeta, Karbi-Anglong, Kokrajhar, Darrang, Nagaon, Sibsagar and Chirang including routine maintenance for five years under Pradhan Mantri Gram Sadak Yojana for the year 2022-2023.

The last date for submission of tender is fix on 24.11.2022.

7. The petitioner claims to be eligible in all respects and accordingly procured a copy of the tender document. Clause 7.1 of the said document however provides that the tenderers have to deposit Bid Security and Tender Document Cost by making online payment.

8. It is the case of the petitioner that the said direction cannot be insisted upon as such payment should also be accepted in the form of Bank Guarantee.

9. It is the case of the petitioner that deposit of Bank Guarantee against such requirement is beneficial to the tenderers to participate in a tender process and such practice has been prevalent since a long time. It is the further case of the petitioner that on no count, any prejudice would be caused to the owner if the payment is made by way of Bank Guarantee. The petitioner alleges that the aforesaid requirement has been introduced only to limit the competition amongst certain blue eyed persons.

10. I have heard Shri K.N. Choudhury, learned Senior Counsel assisted by Shri R.M. Deka, learned counsel for the petitioner in both the cases whereas the State is represented by its Advocate General, Shri D. Saikia assisted by Shri B. Gogoi, the learned counsel. Shri K. Gogoi, learned counsel has represented the respondent no. 3 which is an Agency of the Government of India.

11. Shri Choudhury, the learned Senior Counsel for the petitioner has submitted that on principle, there is no opposition or objection on the part of the petitioner regarding the payment to be made against earnest money and Bid Security which are usual requirements in a tender. He submits that the only grievance is with regard to the mode of making such payment which as per the impugned tender notice is by online payment.

12. It is submitted that the said requirement can at best be termed as directory in nature and this according to the petitioner stood substantiated by other contemporaneous tender notices.

13. Attention of this Court has been drawn to the affidavit-in-reply filed by the petitioner dated 23.09.2022 filed in WP(C)/5053/2022 with which a Notice Inviting Tender dated 19.07.2022 by the PWD, Assam has been annexed.

14. The learned Senior Counsel submits that in the said tender, the Bid Security was to be in the form of Bank Guarantee issued by any Scheduled Commercial Indian Bank or a Foreign Bank approved by the Reserve Bank of India. A further example has been given of a Notice Inviting Bid dated 27.05.2022 issued by the PWD, Assam for construction of a road in which also the Bid Security was

to be given in the form of a Bank Guarantee.

15. Shri Choudhury, the learned Senior Counsel has further referred to the interim order whereby it was directed that the petitioner be provisionally permitted to submit the Bid Security by means of a Bank Guarantee which according to the petitioner has been done.

16. The learned Senior Counsel submits that the conduct of the respondents in allowing deposit to be made by way of Bank Guarantee for Bid Security and earnest money deposit in contractual matters of the same period, the insistence on online payment for the same purpose is wholly unreasonable and therefore, an interference from this Court is sought for.

17. *Per contra*, Shri D. Saikia, the learned Advocate General, Assam has vehemently opposed the writ petitions. He submits that when all other tenderers could submit the Bid Security in the prescribed mode of online payment, there cannot arise any situation for making change for a particular individual to his personal convenience. On the merits of the case, Shri Saikia, the learned Advocate General has submitted that the work in question is under the Pradhan Mantri Gram Sadak Yojana (PMGSY) wherein prescriptions are laid down by the concerned Ministry of the Central Government and it is under such directions that the present requirement has been insisted. By referring to the affidavit-in-opposition dated 02.09.2022 filed in WP(C)/5053/2022 by the respondent no. 2, the learned Advocate General has drawn the attention of this Court to the averments made in paragraph-4 of the same wherein necessary pleadings have been made. He submits that for the present work, 90% funding

is done by the Ministry of Rural Development (MoRD), Government of India and the work is implemented through the National Rural Infrastructure Development Agency (NRIDA). It is the NRIDA which had issued the amended Standard Bidding Document wherein the provision of online Bid Security was included. This was done to integrate with the NIC's e-tendering system. It is submitted that as payment gateway is made ready in NIC's e-tendering portal, the department had switched over to the online mode of receiving Bid Security since February, 2021 and the process is continuing smoothly. In this regard, the Standard Bidding Document dated 24.06.2020 has also been referred to, which has been annexed to the affidavit-in-opposition.

18. The learned AG, Assam submits that the requirement of the online payment which is specifically mentioned in the clause of the NIT is not the subject matter of challenge and therefore, no relief, whatsoever is liable to be granted to the petitioner.

19. The learned State Counsel has also submitted that the petitioner is estopped from making the present prayer inasmuch as the same petitioner had participated in several other tenders of PMGSY following the same system since the year 2020-21 and was also granted the works pursuant to such participation. The affidavit-in-opposition had also annexed a number of such works which are as follows:

- (i) LOA dated 06.08.2022 for upgradation of Roads from T04-Abhyapuri, Pachnia Road.
- (ii) LOA dated 06.08.2022 for upgradation of Roads

from MRL 11- Road from Majirgaon to Borjhar via Agchia.

(iii) LOA dated 06.08.2022 for upgradation of Roads from MRL07-Tetelia Lakhitari to Maheswari Mitani.

(iv) LOA dated 06.08.2022 for upgradation of Roads from T05 - Dimaruguri, Kamarpur Road.

20. The learned AG has submitted that about 900 bidders had participated in the tender process which would belie the allegation that the competition has been sought to be reduced to favour any blue eyed person. The learned AG further submits that if there could be such large participation by following the process online payment, the petitioner should not have any difficulty in the same, more so, when the petitioner himself had participated in other tender process by making such online payment.

21. In support of his submission, the learned AG has referred to the case of ***Central Coal Fields Limited vs. SLL-SML (Joint Venture Consortium & Ors.)*** reported in ***(2016) 8 SCC 622***. The learned AG has submitted that the issue in the aforesaid case before the Hon'ble Supreme Court was almost similar where the requirement under the tender document was furnishing a Bank Guarantee in a prescribed format which though done was not under the particular format.

22. The learned Advocate General, Assam also submits that there are *bona fide* consideration for insisting upon such mode of online payment. Apart from the consideration that such payment would be in sync with the process of digitization of all commercial transactions, the same would also avoid

unnecessary litigation involving revocation of Bank Guarantee which causes delay in execution of projects of public importance.

23. The Hon'ble Supreme Court, however, held that such requirement was essential in nature and when it was so prescribed in the tender document, any deviation would not be permissible. The Hon'ble Supreme Court in the said case has also referred with approval the land mark case of ***Nazir Ahmed Vs. King Emperor***, reported in **AIR 1936 253 PC (II)**.

24. Shri K. Gogoi, learned C.G.C. appearing for the respondent no. 3 while endorsing the submission of the learned Advocate General, Assam has further submitted that there is no prayer in either of the writ petition challenging the condition of requirement of online payment and in absence of such prayer, the question of granting any relief will not arise. He further submits that the work is under the Ministry of the Government of India which has laid down the aforesaid condition in the Standard Bidding Document which the State Government cannot deviate from.

25. Shri Gogoi, the learned C.G.C. has also referred to the case of ***Michigan Rubber (India) Ltd. vs. State of Karnataka*** reported in **(2012) 8 SCC 216**. In paragraph 23 of the said judgment, it has been laid down as follows:

“23. From the above decisions, the following principles emerge:

(a) the basic requirement of [Article 14](#) is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior

purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.”

26. The issue which emerges for consideration is as to whether the condition of the tender requiring payment to be done online for security deposit can be permitted to be deviated from. In other words, whether the mode of such payment can be changed by this Court from online mode to the mode of Bank Guarantee.

27. This Court has seen that there is as such, no challenge made to the condition and in absence of such specific challenge whether it would be

appropriate on the part of this Court to tinker with such requirement of tender is an issue which will require deliberation. However, even ignoring that aspect of the matter, this Court has seen from the materials placed on record that the requirement has been incorporated as per the direction of the Central Government as the work is under the PMGSY wherein a specific requirement has been made by NRIDA in this Standard Bidding Document dated 24.06.2020. This Court also finds force in the argument made on behalf of the Central Government that since the work is one with 90% funding by the Ministry of Rural Development, Government of India, the State Government cannot deviate from the same. The allegation made that work of contemporaneous period did not insist upon such condition which were implemented by the same department i.e. PWD, is not legally tenable inasmuch, those work are not centrally sponsored work under PMGSY.

28. This Court also finds force in the contention of the learned AG, Assam in terming the present challenge to be one on flimsy ground inasmuch as the same petitioner had participated and were rather allotted a number of works by following the manner of online payment of Bid Security which has been noted above. The allegation of trying to favour any blue eyed person falls through inasmuch as about 900 bidders had participated in the process by following the requirement of the tender notice. The personal inconvenience of the petitioner cannot override the interest of the department which is to bring in a uniformity and digitization of all matters of commercial transaction.

29. It has been specifically pleaded that payment by online mode gets integrated with the NIC's e-tendering system.

30. This Court has also noted the submission of the learned AG that many projects suffer due to litigation on the aspect of revocation of Bank Guarantee and the same can be avoided by the present system of payment by online mode.

31. In the case of ***Central Coal Fields*** (supra) as indicated above, the issue appears to be a trivial one whereby the Bank Guarantee which was to be submitted in a particular format was not followed. However, the Hon'ble Supreme Court has held that such requirements are essential in nature. For ready reference, the relevant paragraphs are extracted herein below: 4, 13, 34, 38, 39 and 55.

“4. The question for our consideration is generally whether furnishing a bank guarantee in the format prescribed in the bid documents is an essential requirement in the bidding process of the Central Coalfields Limited and specifically whether a bid not accompanied by a bank guarantee in the format prescribed in the bid documents of the Central Coalfields Limited could be treated as non-responsive in view of Clause 15.2 of the General Terms and Conditions governing the bidding process. The answer to the general and the specific question is in the affirmative.

13. According to CCL it received 11 bids in response to the e-tender including that of SLL–SML a Joint Venture Consortium (for short JVC). One of the bids was apparently rejected. Nine of the bidders submitted a bank guarantee strictly in accordance with the pro forma provided in the GTC. A bank guarantee was provided by JVC - not in the prescribed pro forma but in another format in respect of some other contract provided in the GTC of which bore the heading "Governing Contractual Transportation & Loading in Areas of Central Coalfields Limited".

34. In Ramana Dayaram Shetty case, the expression "registered IInd Class

hotelier” was recognised as being inapt and perhaps ungrammatical; nevertheless common sense was not offended in describing a person running a registered IInd grade hotel as a registered IInd class hotelier. Despite this construction in its favour, Respondent 4 in that case were held to be factually ineligible to participate in the bidding process.

38. [In G.J. Fernandez v. State of Karnataka](#)⁴ both the principles laid down in Ramana Dayaram Shetty were (1990) 2 SCC 488 reaffirmed. It was reaffirmed that the party issuing the tender (the employer) “has the right to punctiliously and rigidly” enforce the terms of the tender. If a party approaches a Court for an order restraining the employer from strict enforcement of the terms of the tender, the Court would decline to do so. It was also reaffirmed that the employer could deviate from the terms and conditions of the tender if the “changes affected all intending applicants alike and were not objectionable.” Therefore, deviation from the terms and conditions is permissible so long as the level playing field is maintained and it does not result in any arbitrariness or discrimination in the Ramana Dayaram Shetty sense.

39. Poddar Steel was a rather interesting case and added a new dimension to the discourse. The decision of the Allahabad High Court records that the relevant clause in the NIT gave the bidder the option of depositing the earnest money in cash or by a “demand draft drawn on DLW Branch of SBI in favour of Assistant Chief Cashier, DLW/- Varanasi.”⁵ As many as 21 parties had responded to the NIT, but 8 of them had not deposited any earnest money at all and the remaining 13 bidders had “deposited the earnest money by one mode or the other but [Ganesh Engineering Works v. Union of India and others](#), 1990 All. LJ 1140 not necessarily in the manner provided in the NIT except perhaps a few.” The Tender Committee deviated from the terms of the NIT and considered the bids of these 13 bidders and accepted the bid of Poddar Steel, who had given the earnest money not by cash or a demand draft but by “a loose cheque drawn

on its C/D account in the Union Bank of India, Sonarpura, Varanasi." On the issue of discriminatory treatment, the contention of the employer was that since all the 13 bidders who had made the earnest money deposit were treated equally, there was no issue of any discriminatory treatment.

55. On the basis of the available case law, we are of the view that since CCL had not relaxed or deviated from the requirement of furnishing a bank guarantee in the prescribed format, in so far as the present appeals are concerned every bidder was obliged to adhere to the prescribed format of the bank guarantee. Consequently, the failure of JVC to furnish the bank guarantee in the prescribed format was sufficient reason for CCL to reject its bid."

32. In the case of ***Michigan Rubber*** (supra) which has been extracted above, the Hon'ble Supreme Court has clearly held that in matter of formulating conditions of a tender document and awarding a contract, relaxation is required to be given to the authorities unless it is found that such exercise was *mala fide*.

33. This Court while exercising powers of judicial review only examines the decision making process. In the case of ***Tata Cellular Vs. Union of India*** reported in ***(1994) 6 SCC 651***, 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.

*88. We may now look at some of the pronouncements of this Court including the authorities cited by Mr Ashoke Sen. *Fasih Chaudhary v. Director General, Doordarshan*⁴⁶ was a case in which the Court was concerned with the award*

of a contract for show of sponsored TV serial. At p. 92 in paragraphs 5 and 6 it was held thus:

“It is well settled that there should be fair play in action in a situation like the present one, as was observed by this Court in Ram & Shyam Co. v. State of Haryana⁴⁷. It is also well settled that the authorities like Doordarshan should act fairly and their action should be legitimate and fair and transaction should be without any aversion, malice or affection. Nothing should be done which gives the impression of favouritism or nepotism. See the observations of this Court in Haji T.M. Hassan Rawther v. Kerala Financial Corpn.⁴⁸

While, as mentioned hereinbefore, fair play in action in matters like the present one is an essential requirement, similarly, however, ‘free play in the joints’ is also a necessary concomitant for an administrative body ☐ functioning in an administrative sphere or quasi-administrative sphere as the present one. Judged from that standpoint of view, though all the proposals might not have been considered strictly in accordance with order of precedence, it appears that these were considered fairly, reasonably, objectively and without any malice or ill-will.”

94. The principles deducible from the above are:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. ☐ Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
- (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted

expenditure."

34. This Court is also of the view that the changing scenario on the functioning of the Government where commercial transactions are sought to be digitalised to make it more transparent and hassle free, in the opinion of this Court, the present requirement is in sync with the doctrine of fairness and transparency and therefore, is not liable to be interfered with.

35. In the backdrop of the aforesaid discussion and following the principles laid down by the Hon'ble Supreme Court on this subject, this Court is of the considered opinion that the petitions lack merit and accordingly, the same are dismissed.

36. Consequently, the interim orders passed in these cases stands vacated.

JUDGE

Comparing Assistant