

GAHC010118392023



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

WRIT PETITION (C) No. 2645/2013

1) Sri Utpal Kumar Choudhury, S/o Sri Dhireswar Choudhury, R/o – Ward no. 5, Bongaigaon, P.O., P.S. & District – Bongaigaon, Pin – 783380

2) Smti. Sadhana Barman Choudhury, D/o Late Pran Kishor Barman, R/o – Ward no. 5, Bongaigaon, P.O., P.S. & District – Bongaigaon, Pin – 783380

.....Petitioners

-Versus-

1) The State of Assam

2) The Commissioner & Secretary to the Government of Assam, Urban Development Department, Dispur, Guwahati – 781006

3) The Director, Municipal Administration, Assam, Dispur, Guwahati – 781006

4) The Bongaigaon Municipal Board, Bongaigoan, Assam, Pin – 783380 [represented by its Vice-Chairman]

5) The Vice-Chairman, Bongaigaon Municipal Board, Bongaigoan, Assam, Pin – 783380

.....Respondents

Advocates :

Petitioners : Mr. P.B. Mazumder, Advocate

Respondents : Mr. S.S. Roy, Junior Government Advocate, Assam

Date of Hearing, Judgment & Order : 24.08.2023

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

Two petitioners have joined together to institute the instant writ petition under Article 226 of the Constitution of India stating that they are similarly affected and have a common cause of action. They have assailed a decision taken by the respondent Bongaigaon Municipal Board authorities which had been conveyed to the two petitioners by a letter dated 19.03.2013. By the letter dated 19.03.2013, the two petitioners were informed that their application for withdrawal of their bids were conditionally accepted, with the condition that the Earnest Money Deposits [EMDs] deposited by them, would be released only after acceptance and realization of the 1st *kist* money from the 2nd highest bidder, since both of them were co-guarantors of the 2nd highest bidder.

2. By a Tender Notice dated 15.02.2013, the respondent Bongaigaon Municipal Board invited sealed bids for settlement of a number of markets and parking places situated within the respondent Municipal Board areas for the year : 2013 – 2014. One of the markets for which bids were so invited, was 'Chilarai Daily Market [except on Tuesday and Friday] along with Milk Mahal' ['the Market', for short]. Responding to the Tender Notice dated 15.02.2013, the two petitioners herein submitted their bids, conspicuously, quoting the same bid value @ Rs. 36,00,000/-. After the last date of submission of bids, the respondent Municipal Board opened the bids received in response to the Tender Notice dated 15.02.2013. On opening and upon scrutinization of the bids, it emerged that both the petitioners quoted the highest bid value @ 36,00,000/- each for the Market.

3. The respondent Bongaigaon Municipal Board issued a letter dated 15.03.2013 to the two petitioners herein requesting them to attend the office of the respondent Bongaigaon Municipal Board on 16.03.2013 to take a final decision on the matter of settlement of the Market under the provisions of the Assam Municipal Act, 1956 as both of them had quoted the same bid value of Rs. 36,00,000/- in respect of the Market. By a letter dated 19.03.2013, written jointly, the two petitioners wrote to the respondent Bongaigaon Municipal Board stating to the effect that they could come to know that problems had arisen due to quoting of the same bid value by the two of them. It was proposed to the respondent Bongaigaon Municipal Board that the two petitioners were ready to withdraw their bids if the EMDs they had deposited with their tenders, were returned to them. In response to the letter dated 19.03.2013, the respondent Municipal Board wrote to the two petitioners to the effect that the Municipal Board had taken a decision to consider the petitioners' application for withdrawal of the bids, subject to the condition that the EMDs would be released only after the acceptance and realization of the 1st *kist* money from the 2nd highest bidder where the two petitioners were, incidentally, co-guarantors of the 2nd highest bidder viz. Smti. Ganga Bala Choudhury.
4. The respondent Municipal Board by another letter dated 19.03.2013, informed the 2nd highest bidder that the Market had been settled at her quoted bid value @ Rs. 30,50,000/- and requested the 2nd highest bidder to deposit 50% of the bid value within 21.03.2013. After receipt of the letter dated 19.03.2013, the 2nd highest bidder, by a letter dated 21.03.2013, requested the respondent Municipal Board to extend the time period to deposit 50% of the bid value by 5 [five] days. Even after granting extension of the time period by 5 [five] days to deposit 50% of the bid value, the offer of settlement was not accepted by the 2nd highest bidder and the said bidder did not deposit the amount asked for. Thereafter, the 3rd highest bidder was offered the settlement but he also expressed his inability to accept the offer. As a result of the offer of withdrawal by the two joint highest bidders, that is, the two petitioners followed by subsequent refusals to accept the offer of settlement by the 2nd highest bidder and the 3rd highest bidder respectively, the Market in question could not be settled with any of the bidders. The respondent Bongaigaon

Municipal Board authorities had thereafter, took a resolution in its Meeting, held on 30.03.2013, to forfeit the EMDs of the two petitioners, submitted by them along with their bids, and to issue a fresh Tender Notice. Accordingly, a fresh Tender Notice was issued on 01.04.2013 and the Market had to be settled by the respondent Municipal Board with the highest bidder in the subsequent process at a much lesser bid value of Rs. 12,00,000/-.

5. I have heard Mr. P.B. Mazumder, learned counsel for the petitioners and Mr. S.S. Roy, learned Junior Government Advocate, Assam for the State respondents.
6. Mr. Mazumder, learned counsel for the petitioners has referred to the provisions of Section 5 of the Indian Contract Act, 1872 and three decisions – [i] Abdus Salam Choudhury vs. the State of Assam and others, reported in AIR 1991 Gauhati 9; [ii] Sambar Rangpi vs. Guwahati Municipal Corporation and another, reported in 2000 [2] GLR 55; and [iii] Shillong Municipal Board and another vs. Latiplang Kharkongor and others, reported in 2005 [4] GLT 411, to contend that a proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.
7. Mr. Roy, learned Junior Government Counsel, Assam for the State respondents has drawn attention to Clause 2 of the Tender Notice to buttress his point that once the tender was accepted, the EMD made by such a bidder would entail forfeiture if such bidder, at a later point of time, would express inability to accept the offer. The said condition had made it clear that in the event of such withdrawal by the bidder, the Municipal Board authorities would be at liberty to get it re-compensated from such a bidder.
8. I have considered the submissions of the learned counsel for the parties and have also gone through the materials on record.
9. When a query is made to the learned counsel for the parties as regards preferring the writ petition by the two petitioners jointly, the learned counsel for the petitioners has admitted that the two petitioners are husband and wife by relation and they reside together in the same house. A look at the addresses of the petitioners, that is, Ward no. 5, Bongaigaon, Post Office & Police Station – Bongaigaon, Pin – 783380, also goes to indicate that they are from the same locality. On a further query, the learned counsel for the petitioners has fairly submitted that one of the two petitioners was previous lessee of the Market. It is quite

clear from the aforesaid facts that quoting of the same bid value by the two petitioners, who are husband and wife, for the same Market, was not a mere coincidence and the act of quoting the same bid value was, on the face of it, a pre-determined and deliberate one. There is no whisper in the pleadings of the writ petition that the two petitioners are husband and wife by relation and one of them was the previous lessee of the same Market. The fact that they are also co-guarantors of the 2nd highest bidder cannot be also termed as a mere coincidence. It has further emerged from the Minutes of the Meeting of the respondent Municipal Board dated 19.03.2013, that the two petitioners were also co-guarantors of the 3rd highest bidder, Sri Nirmalendu Das.

10. Clause 2 of the Tender Notice had stipulated that once the bid value was accepted and the selected bidder expressed his disinclination to accept the offer, then the Earnest Money Deposit [EMD] of such a bidder was liable to be forfeited and the offer of settlement for the Market was to be given to the next higher bidder. It was further stipulated that in the event of such refusal the Municipal Board had to suffer loss, then the Municipal Board would be at liberty to recover the entire loss from the bidder who had refused to accept the offer. It needs reiteration, even at the cost of repetition, that the two petitioners, that is, the husband and the wife, submitted their joint proposed to withdraw their bids, which was made with a condition, making it a conditional offer of withdrawal. The respondent Municipal Board did not ask for their withdrawal. The respondent Municipal Board invited the two petitioners for a Meeting to take the final decision on the matter of settlement of the Market as per the provisions of the Municipal Act and Rules, as both of them had quoted the same amount. When the two petitioners made such conditional offer of withdrawal, the respondent Municipal Board did not accept the condition while the petitioners expressed their desire to withdraw their bids, as is clear from its letter dated 19.03.2023. The Municipal Board made the offer of settlement to the 2nd highest bidder and the 2nd highest bidder also refused to accept the offer of settlement. Thereafter, the 3rd highest bidder was offered the settlement but he also refused to accept the offer of settlement. As a result of the conditional offer of withdrawal by the joint highest bidders, that is, the two petitioners in the wake of the invitation given to them to attend the office

of the Municipal Board for taking final decision in the matter of settlement of the Market, followed by subsequent refusals to accept the offer of settlement by the 2nd highest bidder and the 3rd highest bidder respectively, the respondent Municipal Board could not settle the Market in question with any of the bidders despite undertaking a valid bidding process by publication of the Tender Notice dated 15.02.2023. It cannot be accepted that the refusal to accept the offer of settlement by the 2nd highest bidder and the 3rd highest bidder was not within the petitioners' knowledge, because they themselves were the co-guarantors for the 2nd highest bidder and the 3rd highest bidder. After refusal to accept the offer by the 2nd highest bidder and the 3rd highest bidder, none of the petitioners conveyed any decision to accept the offer of settlement subsequently, which goes to show that they were not ready to accept the offer of settlement of the Market. The Municipal Board had, thereafter, required to take a resolution in its Meeting, held on 30.03.2013, to forfeit the EMDs of the two petitioners and to issue a fresh Tender Notice. Accordingly, a fresh Tender Notice was published on 01.04.2013 and the Market had to be settled by the respondent Municipal Board with the highest bidder in the subsequent bidding process at a much lesser value @ Rs. 12,00,000/-.

11. From the above discussion, it has emerged that because of the refusal to accept the offer of settlement by the two highest bidders who are husband and wife by relation and who quoted the same bid value of Rs. 36,00,000/- followed by refusals of the 2nd highest bidder and the 3rd highest bidder where the two petitioners were the co-guarantors and in the absence of disclosure of such inter-relationship, the respondent Municipal Board authorities could not settle in time and the bidding process got delayed. The respondent Municipal Board took the final decision to forfeit the EMDs of the two petitioners only in the Meeting, held on 30.03.2013. The said final decision of the respondent Municipal Board, taken on 30.03.2013, is not challenged in the writ petition.
12. The facts, in brief, which fell for consideration in *National Highways Authority of India vs. Ganga Enterprises and another*, reported in [2003] 7 SCC 410, were that the respondent therein submitted his bid in response to the tender notice for collection of toll along with a bid security. He withdrew bid security before acceptance of the offer. The NHAI authorities

forfeited the bid security. When a writ petition was preferred for refund of the amount, the High Court considered whether the forfeiture of security deposit was without any authority of law and without any binding contract between the parties and also contrary to Section 5 of the Indian Contract Act. The High Court held that the offer was withdrawn before it was accepted and, thus, no completed contract had come into existence as it was always open to a party to withdraw its offer before its acceptance. The Hon'ble Supreme Court of India, apart from other observations regarding maintainability of a writ petition, has observed that the Indian Contract Act merely provides that a person can withdraw his offer before its acceptance. But withdrawal of an offer, before it is accepted, is a completely different aspect from forfeiture of earnest/security money which has been given for a particular purpose. A person may have a right to withdraw his offer but if he has made his offer on a condition that some earnest money will be forfeited for not entering into contract or if some act is not performed, then even though he may have a right to withdraw his offer, he has no right to claim that the earnest/security be returned to him. Forfeiture of such earnest money, in no way, affects any statutory right under the [Indian Contract Act](#). Such earnest money is given and taken to ensure that a contract comes into existence. It would be an anomalous situation that a person who, by his own conduct, precludes the coming into existence of the contract is then given advantage or benefit of his own wrong by not allowing forfeiture. It has been observed that in Government contracts, such a term is always included in order to ensure that only a genuine party makes a bid. If such a term is not there even a person who does not have the capacity or a person who has no intention of entering into the contract will make a bid. The whole purpose of such a clause, that is, to see that only genuine bids are received would be lost if forfeiture is not permitted. The earnest money deposit is in essence an earnest to be given to ensure that the bidder does not withdraw his bid during the period of bid validity.

13. There is another aspect in the case which cannot be ignored. The two petitioners are found to have approached the Court not with clean hands. Their hands are found to be soiled as they have not fully disclosed the material facts and concealed some relevant facts. In **K.D. Sharma vs. SAIL**, reported in [2008] 12 SCC 481, the Hon'ble Supreme Court of India has held that the jurisdiction of the Supreme Court under Article 32 and of the High

Court under Article 226 of the Constitution is extraordinary, equitable and discretionary and it is imperative that the petitioner approaching the writ court must come with clean hands and put forward all the facts before the Court without concealing or suppressing anything and seek an appropriate relief. If there is no candid disclosure of relevant and material facts or the petitioner is guilty of misleading the Court, his petition may be dismissed at the threshold without considering the merits of the claim. In **Prestige Lights Ltd. vs. SBI**, reported in [2007] 8 SCC 449, the Hon'ble Supreme Court of India has held that in exercising power under Article 226 of the Constitution of India the High Court is not just a court of law, but is also a court of equity and a person who invokes the High Court's jurisdiction under Article 226 of the Constitution is duty-bound to place all the facts before the Court without any reservation. If there is suppression of material facts or twisted facts have been placed before the High Court then it will be fully justified in refusing to entertain a petition filed under Article 226 of the Constitution

14. From the facts and circumstances obtaining in the case, more particularly, from the conduct of the two petitioners, who are husband and wife by relation, it is discernible that the bidding process initiated by the respondent Municipal Board was clearly affected by the conditional proposal of the two petitioners to withdraw their bid after they emerged as the joint highest bidders. The fact that both of them were also co-guarantors of the 2nd highest bidder and the 3rd highest bidder, who also refused the offers of settlement when offered to them, is a clear pointer of an act, which cannot be said to be bona fide.
15. A decision is an authority for what it decides and not what can logically be deduced therefrom and even a slight distinction in fact or an additional or different fact may make a lot of difference in the decision-making process. In view of the discussions made above, the decisions referred to by Mr. Mazumder are found to be of no assistance to the cause of the two petitioners.
16. In the absence of any challenge to the final decision dated 30.03.2013, taken by the respondent Municipal Board to forfeit the EMDs of the petitioners and disentitlement of the petitioners to seek relief on equitable grounds for reasons discussed hereinabove, this Court does not find any good, valid and sufficient ground to interfere with the final decision

of the respondent Municipal Board authorities to forfeit the EMDs of the petitioners. Thus, this writ petition apart from suffering from lack of bona fide, is also found devoid of any merit. Consequently, the same is liable to be dismissed. It is accordingly dismissed. There shall, however, be no order as to cost.

JUDGE

Comparing Assistant