

GAHC040002952024



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

Case No. : WA/8/2024

M/s Nabam Tullon LLP

Having its registered office at Nirjuli Shortcut, PO Nirjuli, Papumpare District, AP
represented by its Managing Director Shri Nabam Tullon, S/o Late Nabam Tana,
resident of Gumto, PO and PS Doimukh, Papumpare District, Arunachal Pradesh

VERSUS

The State of AP and 9 Ors

represented by the Commissioner, Public Works Department, Govt of Arunachal
Pradesh, Civil Secretariat, Itanagar 2:The Principal Secretary

Age: 0

Occupation :

3:The Chief Engineer

Age: 0

Occupation :

4:The Superintending Engineer

Age: 0

Occupation :

5:The Executive Engineer

Age: 0

Occupation :

6:The Assistant Engineer

Age: 0

Occupation :

7:M/S Kenge Construction
Age: 0
Occupation :

8:M/S Tanor Engineering
Age: 0
Occupation :

9:M/S T K Engineering Consortium Pvt Ltd
Age: 0
Occupation :

10:M/S Gannon Dunkerly and Co. Ltd.
Age: 0
Occupation

Advocate for the Petitioner : P J Saikia

Advocate for the Respondent : GA (AP)

BEFORE
HONBLE MR. JUSTICE SUMAN SHYAM
HONBLE MR. JUSTICE KARDAK ETE

ORDER

Date : 18-03-2024
(Suman Shyam, J)

Heard Mr. P.J. Saikia, learned Sr. counsel assisted by Mr. R.S. Misra, learned counsel appearing on behalf of appellant. Mr. S. Tapin, learned Sr. Govt. Advocate, Arunachal Pradesh is present on behalf of respondent Nos. 1 to 6. Mr. N. Deka, learned counsel representing respondent No. 7 has addressed the Court through Remote VC.

2. This writ appeal is directed against the order dated 29-01-2024 passed by the learned Single Judge in W.P.(C) No. 23/2024 refusing to grant interim relief as prayed for

by the appellant/ writ petitioner as well as the subsequent order dated 22-02-2024 passed in Review Petition No. 02(AP)/2024 dismissing the review application.

3. The facts and circumstances of the case giving rise to the filing of the instant writ appeal, briefly stated, are as follows:-

The Executive Engineer, PWD, Naharlagun Division i.e. the respondent No. 5 had issued RFP No. ND/EPC/2023-24 dated 16-10-2023 inviting bids for construction of *"Double lane road to provide airport connectivity from Donyi Polo Airport Itanagar to Naharlagun Railway Station via Sonajuli and Durpang"* at an estimated cost of Rs. 317.00 Crores. It was a two bid system whereby only the bidders, whose technical bids are found to be technically responsive, would be permitted to submit their financial bids. In response to the RFP dated 16-10-2023, the appellant herein, along with some other bidders, had submitted their technical bids. However, the bid of the appellant was declared to be technically non-responsive vide order dated 15-01-2024 on the ground of non-fulfillment of the criteria laid down in clause 1.7.4(i) of the bid document pertaining to annual average turnover. As such, upon considering the financial bid of the eligible bidders, the contract in question was awarded in favour of the respondent No. 7 by issuing Letter of Acceptance (LoA) dated 05-02-2024. Aggrieved by the same, the appellant, as writ petitioner, had approached this Court by filing W.P.(C) No. 23/2024, *inter alia*, assailing the order dated 15-01-2024.

4. Although the record of the writ petition is not available before us, yet, it appears from the materials on record that after taking note of the grievance expressed in the writ petition, the learned Single Judge had initially passed an order dated 24-01-2024 granting

time to the learned Govt. Advocate, Arunachal Pradesh to obtain instruction and in the meantime, had ordered that no final order of allotment of the work should be made till the next date fixed by posting the matter again on 29-01-2024. On 29-01-2024 the learned Single Judge had, however, vacated the order dated 24-01-2024 and observed that any action taken pursuant to the RFP in question shall be subject to the outcome of the writ petition. As such, the respondent No. 7 had commenced the work as per the LoA dated 05-02-2024.

5. Aggrieved by the order dated 29-01-2024, the writ appellant had earlier preferred Writ Appeal No. 03/2024 but no interim order was passed therein by the Division Bench as a result of which, the work had continued. On 08-02-2024, the appellant had withdrawn the writ appeal with liberty to file afresh. Thereafter, Review Petition No. 2(AP)/2024 was preferred which was dismissed by the learned Single Judge by order dated 22-02-2024. The appellant has, thereafter, approached this Court by filing the present writ appeal.

6. By inviting the attention of this Court to clause 1.7.4(i) of the bid document, Mr. Saikia, learned Sr. counsel for the writ appellant has argued that the average turnover of Rs. 158.50 Crores, as prescribed by clause 1.7.4.(i), ought to be reckoned for any one year and not for the entire five years. Contending that his client fulfills the requirement of clause 1.7.4(i), Mr. Saikia has argued that the Tender Evaluation Committee (TEC) has wrongly rejected the technical bid of the appellant on a misconstruction of the aforesaid clause. It is also the submission of Mr. Saikia even otherwise, non-fulfillment of clause 1.7.4(i) could not have been a valid ground for rejection of the technical bid of his client

inasmuch as the TEC did not have the power or authority to reject any bid. The third ground urged by the learned Sr. counsel for the appellant is that the successful bidder, i.e. the respondent No. 7 has relied upon a forged document to show that its annual turnover for the relevant period was in excess of Rs. 158.50 Crores with a view to meet the requirement of clause 1.7.4(i) whereas, the actual turnover of the respondent No. 7 was much less. Therefore, the respondent No. 7 has committed fraud. He submits that having practiced fraud in bagging the contract, the LoA issued to the respondent No. 7 is liable to be set aside on such count alone. According to Mr. Saikia, learned Sr. counsel for the appellant, although the said point was urged before the learned Single Judge, the same was not properly taken note of while passing the impugned order dated 29-01-2024 or the order dated 22-02-2024 passed in the review petition. Mr. Saikia has, therefore, prayed for an interim order from this Court suspending further work under the RFP and in the alternative, an order restraining the official respondents from releasing any payment in favour of respondent No. 7.

7. The learned Govt. Advocate Mr. Tapin appearing for the respondent Nos. 1 to 6 has argued that the writ petition is still pending before the learned Single Judge and all those grounds can be urged by the appellant during hearing of the writ petition. Contending that substantial work has already been done by the respondent No. 7 and in view of the ensuing rainy season, Mr. Tapin submits that any order of suspension of the work would be adverse to the public interest.

8. The respondent No. 7 has filed an affidavit in this appeal denying the allegations made against it. In the affidavit, it has also been stated that more than 18% work has

already been completed as on 05-03-2024, where-after, a sum of Rs. 49,56,96,131/-, being the first bill, has been raised by it. Questioning the locus of the appellant to institute this proceeding on the ground that its technical bid had been rejected, the respondent No. 7 has prayed for dismissal of the appeal.

9. We have considered the submission made at the Bar and have also gone through the materials available on record. Since the first point urged by the appellant's counsel pertains to clause 1.7.4(i) regarding financial soundness of the bidders, the said clause is reproduced hereinbelow for ready reference:-

1.7.4(i) The bidder should have had average annual financial turn-over (gross) of not less than Rs. 158.50 Crore on any works contract during the last available 5 (five) years balance sheets duly audited by Chartered Accountant.

10. According to the appellant, the turnover of Rs. 158.50 Crore can be of any one year out of five years and therefore, the tender of his client was wrongly rejected. The learned Single Judge has rejected such argument of the appellant by holding that the turnover, as prescribed in the clause, has to be the average turnover for the five years, as reflected in the balance sheet and not only for one year. After going through the materials on record, more particularly, clause 7.2 of the CPW Works Manual, 2022 pertaining to the initial criteria for eligibility and also the use of the expression 'gross' in clause 1.7.4(i), we are of the *prima facie* opinion that the interpretation of the tender clause, as made by the learned Single Judge, is correct. However, since the writ petition is pending disposal, we refrain from making any further observation on the merit of the case.

11. Coming to the second point that the TEC did not have the power to reject the bid

of the petitioner/ appellant, we are unable to agree with such submission of appellant's counsel. Since it is the TEC which is entrusted with the job of assessing the technical responsiveness of the bids, it was certainly open for them to point out any deficiency in the tender and also make appropriate recommendations if the bid of any of the bidders is not found to be technically responsive.

12. Insofar as the plea of fraud and misrepresentation and/ or use of fake documents raised by the appellant's counsel by referring to Form-A submitted by the respondent No. 7 and mismatch of figures in the certificate prepared by his Chartered Accountant is concerned, we find that such a plea had been substantively raised by the writ petitioner in the writ petition in paragraph No. 8(iii). However, the learned Single Judge has not dealt with the same in the impugned order. Be that as it may, the said aspect of the matter would have to be gone into and decided by the learned Single Judge in the pending writ petition at the stage of hearing of the petition, which stage is yet to arrive. We are informed that although the departmental authorities have filed their counter affidavit in the writ petition, the respondent No. 7 is yet to file counter affidavit in the writ petition. Unless the pleadings are complete and the writ petition is taken up for hearing on merit, the allegation regarding uses of fake documents and/ or perpetration of fraud by the respondent No. 7 cannot be determined by the Court.

13. It is no doubt correct that the third allegation raised by the appellant alleging uses of fake documents by the respondent No. 7 is of serious nature and if found to be correct, may entail serious adverse consequences upon the said respondent. However, it is to be borne in mind that unless a proper finding of fact is recorded by the Court, establishing

the aforesaid plea, no order can be passed by this Court merely on assumption of fraud. In order to avoid any prejudice being caused to either side, we refrain from making any further comment in the matter at this stage.

14. We are also conscious of the provision contained in Section 41(ha) of the Specific Relief Act, 1963 restricting injunction orders staying "infrastructure project" and also the recent decision of the Hon'ble Supreme Court in the case of ***N.G. Projects Ltd. Vs. Vinod Kr. Jain & Ors.*** reported in ***(2022) 6 SCC 127*** wherein it has been held that construction of road, being an infrastructure project and keeping in mind the legislative intent behind Section 41(ha) of the Specific Relief Act, 1963 to the effect that infrastructure projects should not be stayed, the Courts to refrain from staying infrastructure projects.

15. For the reasons stated hereinabove, we are not inclined to interfere with the orders impugned in this writ appeal. We, therefore, dispose of the writ appeal with a request to the learned Single Judge to hear the writ petition on merit and pass final order(s) therein by taking note of all the pleas raised by the contesting parties, as expeditiously as possible.

16. In order to ensure that the interest of the appellant is protected till such time the writ petition is finally disposed of and keeping in mind the public interest at large, balancing the equities, we direct the authorities not to release payment in favour of the respondent No. 7 beyond the ceiling of 70% (seventy percent) of total estimated cost of the work, subject, however, to fulfillment of all other criteria by the contractor. The respondent No. 7 would be at liberty to approach the learned Single Judge, seeking

modification of the above ceiling (70%), at an appropriate stage, by furnishing sufficient justification, if so advised, if the writ petition remains pending at a stage when more than 70% of payment falls due to the contractor/ respondent No. 7, under the contract.

In the meantime, it will be open for the respondent No. 7 to proceed with the execution of the work.

The connected writ petition be listed on 22-04-2024, in the appropriate column, as a fixed item.

Writ appeal stands disposed of accordingly.

JUDGE

JUDGE

GS

Comparing Assistant