

GAHC010075082023



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

Case No. : WP(C)/2001/2023

MD. AZAD ALI
S/O- LATE BAKHAR ALI,
RESIDENT OF POLO FIELD ROAD,
P.O. AND P.S.- TEZPUR,
MOUZA- MAHABHAIRAB,
DIST.- SONITPUR, ASSAM- 784001.

VERSUS

THE STATE OF ASSAM AND 4 ORS
REPRESENTED BY COMMISSIONER AND SECRETARY TO THE GOVT. OF
ASSAM,
URBAN DEVELOPMENT DEPARTMENT,
DISPUR, GUWAHATI- 781006

2:THE DIRECTOR
MUNICIPAL ADMINISTRATION
GOVT. OF ASSAM
DISPUR GUWAHATI- 781006.

3:TEZPUR MUNICIPAL BOARD
THROUGH ITS CHAIRPERSON
NEAR HEAD POST OFFICE
TEZPUR ASSAM- 784001.

4:THE DEPUTY COMMISSIONER
SONITPUR TEZPUR- 784001.

5:CHANDAN BORA
S/O- MONIDHAR BORA
RESIDENT OF MALIK NAGAR
OPP.- KALI MANDIR
P.O.- NIKAMUL TEZPUR
DIST- SONITPUR ASSAM- 784001

Advocate for the Petitioner : MR. A GANGULY

Advocate for the Respondent : GA, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA**

ORDER

Date : 27.02.2024

Heard Mr. A. Ganguly, learned counsel for the petitioner and Mr. M. Chetia, learned counsel for the respondent Nos. 1, 2 and 4. Also heard Mr. G. Choudhury, learned counsel for the respondent No. 5. No one appears for the respondent No. 3, even though the order dated 05.06.2023 passed by this Court states that service of notice upon the respondent No. 3 is deemed to be complete.

2. The petitioner is aggrieved with the notice dated 30.03.2023 by which Paltan Pukhuri, known for Pond and it's Litchi Trees, has been settled with the respondent No. 5, pursuant to the NIT dated 14.03.2023 (hereinafter referred to as 'the NIT').

3. The petitioner's case is that the petitioner has been associated with the Paltan Pukhuri since 1967 till date, except for a brief period of three years in between. In pursuance to the NIT, which provided that any bid less than the minimum value and in excess of 10% of the minimum value, i.e., Rs. 1,50,000/-, would not be accepted, four bidders including the petitioner, quoted Rs. 1.65 Lakh each for the Paltan Pukhuri.

4. The petitioner, being aggrieved with the ceiling put in the NIT, which provided that the bids could not be made beyond 10% of the minimum value, put to challenge the same, vide WP(C) 1619/2023.

5. WP(C) 1619/2023 was dismissed vide order dated 22.03.2023, by giving opportunity to the petitioner to approach this Court again, if the need arose. The order dated 22.03.2023 passed in WP(C) 1619/2023 is reproduced hereinbelow as follows:-

“Heard Shri A. Ganguly, learned counsel for the petitioner, who has put to challenge an NIT dated 14.03.2023. The apprehension of the petitioner is that no procedure has been laid down for evaluation of the bids. This Court is of the opinion that no cause of action has arisen as the petitioner is yet to submit his bid and no evaluation has taken place till now.

Writ petition is accordingly dismissed at this stage giving liberty to the petitioner to approach this Court if the need arises”

6. Subsequent to the order dated 22.03.2023 passed in WP(C) 1619/2023, the Paltan Pukhuri was settled with the respondent No. 5, who is a handicapped person, vide notice dated 30.03.2023.

7. Being aggrieved with the same, the petitioner has filed the present writ petition with the following prayers:-

“a) to issue an appropriate writ, order or direction setting aside the

impugned Memo No. TM/J/2022-23/1856 dated 30.03.2023 issued by the respondent no. 3, by which the respondent no. 5 has been selected as the successful tenderer in respect of the Paltan Pukhuri Pond and Trees;

b) to issue an appropriate writ, order or direction directing the respondent no. 3 Board to award the tender/lease in respect of the Paltan Pukhuri (litchi and pond) to the writ petitioner;

c) to issue such other order or direction in favour of the petitioner and against the Respondents as may be deemed fit and proper in the interest of justice.”

8. The petitioner's counsel submits that all the four tenderers, who participated in the tender process, submitted the same bid price, i.e., 10% beyond the reserve price, which is Rs.1,65,000/-. However, the respondent No. 5 was selected over all the other bidders, only on the ground that he was a handicapped person. He submits that there was no justification for the respondents in selecting the respondent No. 5 over the petitioner, only because he was a handicapped person, as he had also submitted the same bid amount as the respondent No. 5. He submits that Section 27(1) of the Assam Public Procurement Act, 2017 was not followed, while selecting the successful bidders. He further submits that in terms of the judgment of the Division Bench of this Court in the case of ***Ansal Properties and Industries Ltd. VS State of Assam and Ors.***, reported in ***(1999) 3 GauLT 195***, it has been held that when a tender is floated inviting offers without specifying any reservation for special consideration, the authority assigned with the duty to accept the best available tender cannot during the course of consideration, attribute any preferential treatment to any class or group of competing tenderers. He also

relied upon the Supreme Court's judgment in the case of ***Harminster Singh Arora -vs- Union of India & Others***, reported in ***(1986) 3 SCC 247***, wherein the 10% price preference given to a Government undertaking was held to be arbitrary, as the same had not been incorporated in the tender notice. He accordingly submits that as the tender notice did not incorporate any Clause stating that a handicapped person would be given preference, the settlement of the pond and litchi trees with the respondent No. 5 was arbitrary and has to be set aside.

9. Mr. M. Chetia, learned counsel for the respondent Nos. 1, 2 and 4 submits that as per the Board Resolution No. 4 held on 21.02.2023, the ceiling on the maximum price bid had been made due to the fact that tenderers quoting very high bids were not able to subsequently perform their contract work. He also submits that the Board of Directors in the resolution dated 21.02.2023 had taken a decision to give preference to handicapped persons. He further submits that as all the bidders had quoted the same bid amount, i.e., Rs. 1.65 Lakh. As all the bidders were equal in all respects in terms of the tender conditions, there was no infirmity in giving preference to a handicapped person, as against an able bodied person.

10. Mr. G. Choudhury, learned counsel for the respondent No. 5 submits that there is no arbitrariness in the decision of the State respondents to settle Paltan Pukhuri with the respondent No. 5. He further submits that the petitioner has not made any challenge to the NIT Clause providing that bids beyond 10% of the minimum price would not be accepted. He also submits that the Government should have the liberty to have a fair play of the joints. In support

of his submissions, he has relied upon the decisions of the Supreme Court in the case of:-

(1) ***Master Marine Services (P) Limited -vs- Metcalfe & Hodgkinson (P) Ltd. And another***, reported in ***(2005) 6 SCC 138*** ;

(2) ***Jagdish Mandal -vs- State of Orissa and others***, reported in ***(2007) 14 SCC 517***; and

(3) ***Uttar Pradesh Avas Evam Vikas Parishad and Ors -vs- Om Prakash Sharma***, reported in ***(2013) 5 SCC 182***;

11. I have heard the learned counsels for the parties.

12. Section 27(1) of the Assam Public Procurement Act, 2017 states as follows:-

“27. *Award of contract:-*

(1) *Subject to the provisions of section 25 and sub-section (2) of section 6, the procuring entity shall consider a bid as successful, -*

(a) *where price is the only award criterion, the bid with the lowest bid price;*

(b) *where there are price and other award criteria, the most advantageous bid ascertained on the basis of the criteria and procedures for evaluating bids as specified in the bidding documents;*

(c) *where there are no financial criteria, the most advantageous bid ascertained on the basis of selected non-financial criteria or other parameters for evaluating bids as specified in the bidding*

documents.”

13. In the case of ***Raidak Burarchora Fishery Co-Op Society -vs- State of Assam***, reported in ***2018 2 GauLR 19***, the Division Bench of this Court, while considering the case of settlement of a fishery, had held that a much higher bid amount enures to the interest of the Government revenue. Therefore, it was more deserving that the settlement of the fishery had been done with the highest bidder. However, the Full Bench of this Court in the case of ***Arabinda Das and Tapasila Das -vs- State of Assam and others, (1982) 1 GauLR 280*** has held that the purpose of settlement of the fishery was not only to derive revenue but also to help the weaker section of the society, viz the members of the SC/ST communities, in terms of the Assam Fishery Rules, 1953.

14. The above being said, the present matter pertains to individual bidders vying for looking after the Paltan Pukhuri. There is not only a financial criteria requirement, but the bidders have to also comply with all the other terms and conditions of the tender notice, before the Paltan Pukhuri is settled with the successful bidder. As can be seen from the NIT, the selection of the successful bidder is to be made on the basis of the price bid and having the requisite criteria, in terms of the NIT. Even if this Court were to ignore the Board Resolution dated 21.02.2023 to give preference to handicapped persons, this Court fails to understand why the tender cannot be settled against a handicapped person, as against an able bodied person. In this respect, it has to be kept in view that the petitioner is 76 years of age as per his affidavit, while the respondent No. 5 is 57 years of age. As such, it does not appear that Section 27(1)(c) of the Assam Public Procurement Act, 2017 has been violated, only because a handicapped person has been selected over other able bodied

bidders.

15. The issue to be decided here is whether there was any infirmity with the respondent authority settling the Paltan Pukhuri with the respondent No. 5, who is a handicapped person. As can be seen from the prayer made by the petitioner and the pleadings, the petitioner's prayer is to be settled with the pond and litchi trees, only because he has been looking after the same for the last more than 50 years.

16. In the case of ***Master Marine Services (P) Limited (supra)***, the Supreme Court has held that while exercising the power of judicial review in respect of the contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the decision making process. Further, the Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere.

17. In the case of ***Jagdish Mandal (supra)***, the Supreme Court has held that if the decision relating to award of contract is bona fide and is in public interest, Courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances,

wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. The Supreme Court held that the following questions should be answered by a Court before interfering in a tender, which is as follows:-

“(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226.”

18. In the case of ***Uttar Pradesh Avas Evam Vikas Parishad (supra)***, the Supreme Court has held that the bidders, who have participated in a tender process, have no other right, except the right to equality and fair treatment in the matter of evaluation of bids offered by an interested person in response to the NIT.

19. In the present case, there is no challenge to the Clauses in the NIT, especially the Clause providing that no bids beyond 10% of the minimum value would be accepted. All the bidders had quoted the same amount. Further, as all

the bidders had the requisite criteria to be a valid bidder, the State respondents can be allowed to have a fair play in the joints, in awarding the tender to a handicapped person out of four valid tenders, instead of awarding the same to an able bodied person. This Court fails to see any unreasonableness in the State giving an opportunity to a handicapped bidder, especially when there is no averment made by the petitioner that the respondent No. 5 would not be able to do his job. Further, it cannot be said that the decision of the State respondents was so arbitrary and irrational, which no responsible authority could reasonably have made such a decision in accordance with relevant laws. Also, there is no averment that public interest would be affected in awarding the tender to the respondent No. 5. As such, in terms of the judgment of the Supreme Court in ***Jagdish Mandal (supra)***, the present case does not call for the interference of this Court under Article 226 of the Constitution of India. Also, the Division Bench of this Court in WA No. 395/2022 (***Sibaram Deka -vs- State of Assam and others***) has held that when a tenderer participates in a tender process without objection and is subsequently found to be not successful, a challenge to the process is precluded. Such a tenderer cannot be allowed to turnaround and contend that the process was unfair by virtue of existence of a Clause in the NIT.

20. In view of the reasons stated above, this Court does not find any reason to interfere with the settlement of the Paltan Pukhuri with the respondent No. 5.

21. The writ petition is accordingly dismissed.

JUDGE

Comparing Assistant