

GAHC010109602024



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

Case No. : WP(C)/2899/2024

BACCHU DUTTA
S/O- LATE PRAMULYA CHANDRA DUTTA,
R/O- VILLAGE MALUGRAM,
DEVI PRASAD SCHOOL ROAD,
P.O AND P.S- SILCHAR,
DIST- CACHAR, ASSAM

VERSUS

THE STATE OF ASSAM AND 5 ORS
REPRESENTED BY COMMISSIONER AND SECRETARY TO THE GOVT. OF
ASSAM, INLAND WATER TRANSPORT DEPARTMENT, DISPUR, GUWAHATI-
6.

2:THE DIRECTOR
OF INLAND WATER TRANSPORT DEPARTMENT
ASSAM
ULUBARI
GUWAHATI-7.

3:THE EXECUTIVE ENGINEER
I.W.T. DIVISION
CHANDMARI
TARAPUR

P.O- SILCHAR
DIST- CACHAR
ASSAM

4:THE DEPARTMENTAL TENDER COMMITTEE
INLAND WATER TRANSPORT DEPARTMENT
HEADED BY THE DIRECTOR

INLAND WATER TRANSPORT
ASSAM
ULUBARI
GUWAHATI-7.

5:FAKHAR UDDIN BARBHUIYA
S/O- LATE HARUN RASHID BARBHUIYA

R/O- GOSSAIPUR
PART III
UDHARBAND

DIST- CACHAR
ASSAM
PIN-788030

6:ANCHAR HUSSAIN BORBHUIYA
S/O- LATE SIRAJ UDDIN BARBHUIYA

R/O- GONIGRAM PART IV

DIST- CACHAR
ASSAM
PIN-78803

Advocate for the Petitioner : MR. J I BORBHUIYA

Advocate for the Respondent : Ms. M.D. Bora, SC, IWT

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA

ORDER

11.06.2024

- 1.** Heard Mr. J. I. Barbhuiya, learned counsel for the petitioner and Ms. M. D. Bora, learned Standing Counsel for the Inland Water Transport Department.
- 2.** The petitioner's case is that pursuant to an NIT dated 07.02.2024, for

settlement of Rajnagar Ferry Service, the petitioner submitted his bid document. Clause 8 of the terms and conditions of the NIT required the tenderers to submit up-to-date non-Encumbrance Certificate, regarding the land under periodic patta from the DC/ADC/SDO Sadar/SDO(Civil) of Sub-Division or concerned Sub-Registrar. However, none of the three tenderers submitted up-to-date Non-Encumbrance Certificates, as required in Clause 8 of the terms and conditions of the NIT.

3. Learned counsel for the petitioner submits that despite none of the tenderers submitting up-to-date Non-Encumbrance Certificates (NEC), the State respondents opened the financial bids of all the tenderers, including the petitioner, instead of cancelling the entire tender process. The respondent No. 5, who submitted the highest bid amount, was found to be H1 vis-a-vis the petitioner's bid, which was found to be the lowest (H3). He further submits that once it was found that all the tenderers had not submitted up-to-date NEC, in terms of Clause 8 of the NIT, it was incumbent on the State respondent to cancel the entire tender process and issue a fresh tender for the said Rajnagar Ferry Service. He accordingly prays that a direction should be issued to the State respondents to cancel the NIT dated 07.02.2024 and direct them to issue a fresh NIT.

4. The learned counsel for the petitioner submits that the essential conditions of a tender cannot be relaxed in terms of the judgment of the Supreme Court in the case of ***B.S.N. Joshi & Sons Ltd. Vs. Nair Coal Services Ltd. & Others***, reported in ***(2006) 11 SCC 548***.

5. Ms. M. D. Bora, learned Standing Counsel, Inland Water Transport Department, on the other hand, submits that none of the tenderers submitted up-to-date Non-Encumbrance Certificate, due to the non-functioning of E-portal of the Government of Assam. Thus, the Tender Committee took a decision not to disqualify any of the bids of the tenderer on that ground, the NEC could not be issued as the E-portal was not functioning. Accordingly, the tenders of all the tenderers were considered to be valid by the Tender Committee, as recorded in the meeting minutes dated 12.03.2024. As the tenderers had passed the technical bid evaluation stage, the financial bids of the tenderers were opened, wherein it was found that the petitioner's bid was the lowest amongst all the three tenders. She submits that the State respondents are going to take a decision, pursuant to the NIT dated 07.02.2024, for settlement of Rajnagar Ferry Service.

6. The counsel for the respondents also relies upon the same judgment relied upon by the petitioner's counsel, i.e. ***B.S.N. Joshi & Sons Ltd. (supra)*** in support of her submission that relaxation or deviation from an essential condition of a contract is permissible.

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

8. The question that arises for consideration is whether there was any infirmity in the State respondents accepting the bids of all the tenderers as valid, despite none of them submitting up-to-date Non-Encumbrance Certificates.

9. In the case of ***B.S.N. Joshi & Sons Ltd. (supra)***, the Supreme Court has held that if there are essential conditions, the same must be adhered to and if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied, where it is possible for all the parties to comply with all such conditions fully. In the present case, the submission of Non-Encumbrance Certificate was mandatory and as such should have been adhered to. However, due to the fact that the e-portal of the Government of Assam which issues the Non-Encumbrance Certificate was not functioning, which resulted in all the tenderers not submitting any Non-Encumbrance Certificates, it is clear that it was not possible for any of the tenderers to comply with the mandatory condition for submission of Non-Encumbrance Certificates. In view of the above reason, the State respondents took a decision to consider all the bids of the tenderers as valid, despite none of them submitting any Non-Encumbrance Certificates.

10. The Supreme Court in ***B.S.N. Joshi & Sons Ltd. (supra)*** held that if a deviation is made to all the parties in regard to any of essential conditions, ordinarily a power of relaxation may be held to be existing. The Supreme Court further held that once a power of relaxation is exercised, one of the questions which would arise for consideration, is as to whether the exercise of such power was fair, reasonable and bona fide.

11. Paragraph 66 and 69 of the judgment of the Supreme Court in ***B.S.N. Joshi & Sons Ltd. (supra)*** is reproduced below as follows :

“66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now

having regard to the principles laid down in the aforementioned decisions may be summarized as under:

- i) If there are essential conditions, the same must be adhered to;*
- ii) If there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;*
- iii) If, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing*
- iv) The parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance of another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction.*
- v) When a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with.*
- vi) The contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority.*
- vii) Where a decision has been taken purely on public interest,*

the Court ordinarily should exercise judicial restraint.

69. *While saying so, however, we would like to observe that that having regard to the fact that a huge public money is involved, a public sector undertaking in view of the principles of good corporate governance may accept such tenders which is economically beneficial to it. It may be true that essential terms of the contract were required to be fulfilled. If a party failed and/or neglected to comply with the requisite conditions which were essential for consideration of its case by the employer, it cannot supply the details at a latter stage or quote a lower rate upon ascertaining the rate quoted by others. Whether an employer has power of relaxation must be found out not only from the terms of the notice inviting tender but also the general practice prevailing in India. For the said purpose, the court may consider the practice prevailing in the past. Keeping in view a particular object, if in effect and substance it is found that the offer made by one of the bidders substantially satisfies the requirements of the conditions of notice inviting tender, the employer may be said to have a general power of relaxation in that behalf. Once such a power is exercised, one of the questions which would arise for consideration by the superior courts would be as to whether exercise of such power was fair, reasonable and bona fide. If the answer thereto is not in the negative, save and except for sufficient and cogent reasons, the writ courts would be well advised to refrain themselves in exercise of their discretionary jurisdiction."*

12. As has been stated earlier, essential conditions of a tender must be adhered to and if there is no power of general relaxation, ordinarily the same should not be exercised. The principle of strict compliance would be applied, where it is possible for all the parties to comply with all such conditions fully. However, if a deviation/relaxation is made, it should be made in relation to all the parties. Further, the relaxation should be fair, reasonable and bona fide. The parties who have taken the benefit of such relaxation, should not ordinarily be

allowed to take a different stand in relation to compliance with another part of the tender contract. Further, where a decision has been taken purely on public interest, the Court should ordinarily exercise judicial restraint. In the present case, none of the tenderers had submitted Non-Encumbrance Certificates due to the same not being possible for reasons stated earlier. As such, there was no unreasonableness or lack of bona fides in relaxing the said Clause by the State respondents for all the tenderers. The said Clause having been relaxed against all the tenderers, it can be said that there was an existing power to relax the clause for submission of the Non-Encumbrance Certificate. The petitioner was also a recipient of the said relaxation given by the State respondents and as such, the petitioner cannot now turn around and challenge the selection process, only because his bid amount was lowest among all the bidders. The judgment of the Supreme Court quoted by both the parties having clearly held that there can be a relaxation of essential conditions of service, provided the same has been made applicable to all the parties and for bona fide reasons. When a condition cannot be complied with by any of the tenderers, the deviation/relaxation of the same cannot be said to be arbitrary, as did not cause any prejudice to the petitioner.

13. The petitioner had participated in the tender process knowing fully well that he did not submit the NEC. The petitioner was also given the benefit of non-submission of the NEC, as was given to all other tenderers. Thus, the petitioner's tender had passed the Technical Evaluation Stage and because of his bid being the lowest, he must probably be apprehending that he will not be selected as the successful tenderer. This challenge made by the petitioner to the tender process, wherein he was a recipient of the deviation/relaxation of the

tender clause cannot be allowed. In the case of ***Sibaram Deka vs. The State of Assam & 7 others***, WA 395/2022, the Division Bench of this Court 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 turn around and contend that the process was unfair by virtue of existence of a clause in the NIT. In the present case, the petitioner while availing of the relaxation of the clause requiring submission of NEC, is now taking an opposite stand, by saying that the clause requiring submission of NEC has to be strictly followed and cannot be deviated from. The petitioner cannot be allowed to blow hot and cold over the said issue and as held by the Supreme Court, a condition in the tender can be deviated/relaxed, provided the same is made applicable to all tenderers, for bona fide reasons and in public interest, as per the law laid down in ***B.S.N. Joshi & Sons Ltd. (supra)***.

14. In view of the reasons stated above, this Court does not find any reason to allow the writ petition. The writ petition is accordingly dismissed.

JUDGE

Comparing Assistant