

GAHC010123112024



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

Case No. : WP(C)/3134/2024

M/S ASSAM SUPPLY SYNDICATE
HAVING ITS REGD. OFFICE AT -
KRISHNA NAGAR, CHATTRIBARI ROAD,
GUWAHATI-01, ASSAM, DIST- KAMRUP (M), ASSAM

REP. BY ITS PARTNERS

1). MANJU JALAN
W/O- LATE RAMAUTAR JALAN,
2). ANURAG JALAN,
S/O- LATE RAMAUTAR JALAN,
3). CHIRAG JALAN
S/O- LATE RAMAUTAR JALAN,
ALL ARE R/O- FLAT NO-7903, BLOCK -A, NEHA APARTMENT, S.J ROAD,
ATHGAON,
GUWAHATI-01, DIST- KAMRUP (M), ASSAM

VERSUS

UNION OF INDIA AND 2 ORS
REP. BY ITS SECRETARY TO THE GOVT. OF INDIA, MINISTRY OF
RAILWAYS, RAIL BHAWAN, RAFI MARG, NEW DELHI-01

2: THE GENERAL MANAGER CONSTRUCTION
N.F RAILWAY
OPP. SANJEEVANI HOSPITAL
MALIGAON
GUWAHATI-11

3: TENDER COMMITTEE
REP. BY THE GENERAL MANAGER CONSTRUCTION
N.F RAILWAY
OPP. SANJEEVANI HOSPITAL
MALIGAON
GUWAHATI-1

Advocate for the Petitioner : MR K AGARWAL

Advocate for the Respondent : DY.S.G.I.

**BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA**

ORDER

Date : 19.06.2024

Heard Mr. K. Agarwal, learned Senior counsel, assisted by Mr. G. Agarwal, learned counsel for the petitioners and Ms. R. Devi, learned counsel for all the respondents.

2. The petitioners' prayer is for a direction to be issued to the respondents to consider the petitioners' representation/ clarification dated 11.06.2024 and to set aside the refusal to consider the petitioners' representation/clarification, which was uploaded in GeM portal on 14.06.2024, with regard to the disqualification of the petitioners' technical bid.

3. The petitioners' case in brief is that M/s Assam Supply Syndicate a partnership firm consisting of the petitioners, who are two brothers and their mother, participated in a NIT dated 22.03.2024 and bid corrigendum dated 30.04.2024 issued by the respondent No. 2, for supply of 42000 meters of cable. One of the conditions required of bidders to participate in the said bidding process was that the prospective tenderer, were to have an average annual turnover of more than Rs. 10 Crores in the last 3 financial years ending on 31.03.2023.

4. The petitioners' counsel submits that M/s Assam Supply Syndicate was initially a proprietorship firm in the name of the petitioner Nos. 2 & 3's father, i.e., Late Ramautar Jalan, who expired on 17.01.2024. Prior to the death of Late Ramautar Jalan, a deed of partnership had been executed on 01.11.2023, which consisted of Late Ramautar Jalan and the petitioner Nos. 2 & 3, by converting the aforesaid proprietary business into a partnership business. The said deed was duly notarized on 04.11.2023, vide Instrument No. 09. However, the deed of partnership dated 01.11.2023 could not be given effect to. After the death of Late Ramautar Jalan on 17.01.2024, the aforesaid partnership was reconstituted and a deed of partnership was executed on 14.02.2024, inducting the petitioner No. 1, i.e. the wife of Late Ramautar Jalan into the partnership firm. A deed of declaration was also executed on 01.04.2024, where it was specifically declared that the partnership firm shall resume the running of the business of the proprietary concern with all the assets and liabilities as a going concern after the close of business on 31.03.2024.

5. The petitioners thereafter submitted their bid as a partnership firm, pursuant to the NIT dated 22.03.2024. However, as the NIT required prospective bidders to show that they had the average annual turnover of more than Rs.10 Crores per annum for the last 3 financial years, the petitioners submitted the financial turnover of the proprietary firm, M/s Assam Supply Syndicate.

6. The petitioners' bid was rejected by the respondents at the technical bid evaluation stage and the same was communicated to the petitioners on 10.06.2024. The reason for rejection of the petitioners' bid was that the petitioners had participated as a partnership firm in the tendering process.

However, the turnover details that had been submitted were of a proprietary firm. The petitioners' partnership firm was accordingly not found technically suitable/eligible for opening their financial bids.

7. The petitioners' counsel submits that the GeM portal was kept open for 48 hours, i.e. till 12.06.2024, for facilitating the bidders to submit their clarifications and/or to make representation, if any, with regard to the technical evaluation done by the respondents. The petitioners uploaded their representation/clarification along with some documents on 11.06.2024. However, the same was rejected by the respondents on 14.06.2024, as displayed in the GeM portal.

8. The petitioners' counsel submits that the rejection of the petitioners' representation dated 11.06.2024 is reflected in the GeM portal on 14.06.2024, wherein it has been stated that the petitioners' representation has not been considered by the tender committee and as such, the petitioners' disqualification remained the same. He submits that a direction should be issued to the respondents to consider the petitioners' representation/clarification dated 11.06.2024. He further submits that the disqualification of the petitioners' technical bid on 10.06.2024 and the rejection of the petitioners' representation/clarification dated 11.06.2024, as shown in the GeM portal on 14.06.2024, should be set aside, as it is an admitted position that the petitioners had participated in the NIT as a partnership firm, but had submitted the turnover as a proprietary concern, which is basically the same.

9. The petitioners' counsel submits that one of the requirements of the respondent in the NIT was the submission of annual turnover of the prospective

bidders, without clarifying whether it should be annual turnover of a proprietorship firm or a partnership firm. He submits that paragraph 7.3.5 of the Manual for Procurement of Goods issued by the Ministry of Finance, Department of Expenditure, Government of India is to the effect that during evaluation and comparison of bids, the purchaser may, at his discretion, ask the bidder for clarifications on the bids. The shortfall information/documents should be sought only in case of historical documents, which pre-existed at the time of the tender opening and which has not undergone change since then. He submits that as the petitioners have made a clarification as to why only the turnover of a proprietary concern could be submitted by the petitioners, the same should have been accepted by the respondents and their financial bid opened.

10. The petitioners' counsel submits that in the case of ***New Horizons Limited and Another vs. Union of India***, reported in ***(1995) 1 SCC 478***, the Supreme Court has held that credential of a person, who is to enter into a contract, is to be examined from a commercial point of view, which means that if the contract is to be entered with a company, he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. While going into the past experience of the company, he would not go by the name of the company, but by the persons behind the company. Thus, when a person, having past experience, has entered into a partnership and the tender has been submitted in the name of the partnership firm, which may not have past experience in his name, that does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration.

11. He also submits that as per the judgment of the Allahabad High Court in

the case of ***Commissioner of Income Tax, Ghaziabad vs. M/s Prisma Electronics***, reported in ***2014:AHC:130140-DB***, the Allahabad High Court has held that the benefit under Section 80-1B of the Income Tax Act, 1961 could be available to a partnership firm, which has been changed from a proprietary concern. He accordingly submits that the annual turnover of the proprietary concern had to be construed to be the annual turnover of the partnership firm consisting of the petitioners.

12. Ms. R. Devi, learned counsel for the respondents submits that subsequent to the disqualification of the petitioners' technical bid, the respondents have initiated the reverse auction process with the remaining valid bidders, which ended on 18.06.2024 at 6 PM. She further submits that the petitioners' representation dated 11.06.2024 was considered by the authorities and the rejection of the petitioners' representation on 14.06.2024, clearly shows that the additional documents that the petitioners had submitted along with their representation had been rejected, on the ground that the same had not been submitted by the petitioners along with their bid documents. She accordingly submits that the additional documents that were a part of the petitioners' representation dated 11.06.2024 could not be taken into account, after the technical bid evaluation stage had been crossed. She accordingly submits that there has been a consideration of the petitioners' representation and the words used by the respondents while rejecting the petitioners' representation dated 11.06.2024, clearly shows that the petitioners' representation had been considered. She also submits that the rejection of the petitioners' technical bid is a reasonable order, as the petitioners had participated as a partnership firm, while giving the turnover of a proprietorship firm.

13. Ms. R. Devi, learned counsel for the respondents further submits that the petitioners did not submit any document along with the bid documents, showing that the proprietorship firm had been converted into a partnership firm. She submits that as per the preliminary instructions given to her, vide letter dated 19.06.2024 issued by the NF Railway, the petitioners submitted their representation dated 11.06.2024 and enclosed additional documents to establish their conversion from proprietorship to partnership firm like deed of partnership, certificate of registration, deed of Partnership (Re-constitution), deed of declaration, certificate issued by CA for conversion of status of firm, financial turn over dated, death certificate of Late Ranautar Jalan, next of kin certificate, bid specific authorization letter. She submits that none of the above documents were submitted by the petitioners with the original bid documents, except for bidder turn over statement and bid specific authorization. She submits that as the additional documents had been submitted by the bidder, after the bid opening date, i.e., 19.04.2024, the tender committee had disqualified the bid of the petitioners. She further submits that the scope of juridical review is very limited in contractual matters and unless the petitioners are able to make out case of public interest, the writ petition should not be allowed.

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

15. The proprietorship firm of M/s Assam Supply Syndicate was in the name of Late Ramautar Jalan. None of the petitioners here were the proprietor of M/s Assam Supply Syndicate at any point of time. M/s Assam Supply Syndicate became a partnership firm, consisting of three petitioners herein, when the deed of partnership was purportedly reconstituted on 14.02.2024, after the

death of Late Ramautar Jalan on 17.01.2024. As stated earlier, the NIT required bidders to have the average annual turnover of more than Rs. 10 Crores for the last 3 financial years. The petitioners however submitted the annual turnover of the proprietorship firm, M/s Assam Supply Syndicate, without making any clarification as to why they had submitted the turnover of a proprietorship firm in their bid documents. The petitioners' technical bid was rejected on the ground of having submitted the annual turnover details of a proprietorship firm, while the petitioners had participated as a partnership firm. The representation dated 11.06.2024 issued by the petitioners, consisted of additional documents, giving reasons for submitting the annual turnover of M/s Assam Supply Syndicate, as a proprietorship firm.

16. As can be seen from the submissions made by the counsel for the respondents, the petitioners did not submit various documents at the time of submitting their bid, which may have clarified and allowed for the petitioners to have submitted the turnover of a proprietary concern, while taking part in the NIT as a partnership firm.

17. Clause 7.3.5 of the Manual for Procurement of Goods (updated June, 2022), issued by the Ministry of Finance, Department of Expenditure, Government of India, states as follows:-

“7.3.5 Clarification of Bids/Shortfall Documents

During evaluation and comparison of bids, the purchaser may, at his discretion, ask the bidder for clarifications on the bid. The request for clarification shall be given in writing by registered/speed post, asking the tenderer to respond by a specified date, and also mentioning therein that, if the tenderer does not comply or respond by the date, his tender will be liable to be rejected. Depending on the outcome, such tenders

are to be ignored or considered further. No change in prices or substance of the bid shall be sought, offered or permitted. No post-bid clarification at the initiative of the bidder shall be entertained. The shortfall information/documents should be sought only in case of historical documents which pre-existed at the time of the tender opening and which have not undergone change since then. These should be called only on basis of the recommendations of the TC. (Example: if the Permanent Account Number, registration with sales tax/ VAT has been asked to be submitted and the tenderer has not provided them, these documents may be asked for with a target date as above). So far as the submission of documents is concerned with regard to qualification criteria, after submission of the tender, only related shortfall documents should be asked for and considered. For example, if the bidder has submitted a supply order without its completion/performance certificate, the certificate can be asked for and considered. However, no new supply order should be asked for so as to qualify the bidder.”

18. A perusal of the above shows that the request for clarification may be asked for by the purchaser and the shortfall information/documents should be sought only in case of historical documents, which pre-existed at the time of the tender opening. For example, permanent account number, registration with sales tax/VAT, etc. Clause 7.3.5 has also stated that no post bid clarification at the initiative of the bidder shall be entertained.

19. In the present case, the petitioners have tried to clarify the reasons for giving the turnover of the proprietary concern, after the bids had been opened, while they had ample time to submit all the required documents, prior to opening of the bids on 19.04.2024.

20. As stated earlier, no post bid clarification initiated by the bidder can be

entertained, in terms of the Manual for Procurement of Goods. The rejection of the petitioners' representation dated 11.06.2024 on 14.06.2024 by the respondent states as follows:-

“The bidder has participated in this GeM bid with Bid Specific Authorisation from Mis product). The original offer o of the bidder has been deliberated on the basis by them and accordingly disqualification has been communicated to them. The bidder had Turnover certificate the bidder. Now the bidder und to be relevant for the bidder and accordingly the disqualification has been communicated to the along with their representation has submitted additional instant bid has been published on 22.03.2024 and opened on 19.04.2024. All the documents san OEM for the tendered and the offer submitted to mention that the an opportunity to submit their bid complete in all respect as per the Terms and Conditions of GeM bid, in this case after disqualification has been communicated to the bidder they have submitted additional documents From the above it is evident that the bid submitted was not complete and was having shortfall documents which has been submitted by the bidder With representation since the additional documents have been submitted by the bidder along with representation of bidder with regard to bid opening date of 19.04.2024, the additional documents submitted by the bidder along with representation is not considered by the Tender Committee. The bidder's disqualification still stands good at this stage also. (Read less)”

21. Though the petitioners have tried to bring the facts of this case within the fact situation of the Supreme Court in the case of ***New Horizons Limited (supra)***, wherein the past experience of one of the partners of a partnership firm was enough to enable a contract to come into existence, even if the requirement of experience was absent with the other partners of the partnership firm, the fact remains that none of the petitioners were in the proprietary concern at any point of time. They only came into existence as

partners in the partnership firm. Though, it is possible to take a view that the turnover of the proprietary concern could also be considered to be the turnover of the partnership firm, the fact remains that the petitioners had not clarified the said fact at the time of submission of their tender/bid. The clarification has apparently only been made after opening of the bid documents, which cannot be allowed in terms of Clause 7.3.5 of the Manual for Procurement of Goods. The additional documents were submitted by the petitioners in their representation dated 11.06.2024, which was not accepted by the respondents, for reasons stated in the foregoing paragraphs.

22. On considering the reasons stated above, this Court is of the view that there is no infirmity with the decision of the respondents disqualifying the bid of the petitioners, on the ground that they had submitted their bids as a partnership firm, while submitting the turnover as a proprietary concern, without clarifying the issue at the time of submission of their bid documents.

23. The above being said, the Supreme Court in the case of ***Jagdish Mandal vs. State of Orissa and others***, reported in ***(2007) 14 SCC 517***, has held that judicial review of an administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala-fides. Its purpose is to check whether choice or decision is made lawfully and not to check whether the decision is sound. Evaluating tenders and awarding the contracts are essentially commercial transactions. If the decision relating to award of contract is bona fide and in public interest, the Court will not, in exercise of the power of judicial review, interfere with it. 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. It thus held that a Court before interfering in

a tender or contractual matter in exercise of the power of judicial review, should pose to itself the following questions:

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. Cases involving black-listing or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

24. On considering the test laid down by the Supreme Court in ***Jagdish Mandal (supra)***, this Court finds that in this case, the answers to the above questions are in the negative. As such, in terms of the judgment of the Supreme Court in ***Jagdish Mandal (supra)***, this Court cannot exercise its discretion in the present case.

26. In view of the reasons stated above, the writ petition stands dismissed.

JUDGE