

GAHC010132762024



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

Case No. : WA/217/2024

M/s. Assam Supply Syndicate,

Having its registered office at Krishna Nagar, Chatribari Road, Guwahati-01,
Assam, District: Kamrup (M), Assam,

represented by its Partners,

- 1) Manju Jalan, Wife of Late Ramautar Jalan,
- 2) Anurag Jalan, Son of Late Ramautar Jalan,
- 3) Chirag Jalan, Son of Late Ramautar Jalan,

All are resident of Flat No.7903, Block-A,

Neha Apartment, S.J Road, Athgaon,

Guwahati-781001, District: Kamrup (M), Assam.

.....Appellant

-Versus-

1. The Union of India,

Represented by its Secretary to the Government of India, Ministry of
Railways, Rail Bhawan, Rafi Marg,
New Delhi-110001.

2. The General Manager (Construction), N.F. Railway, Opposite of
Sanjeevani Hospital, Maligaon,
Guwahati-781011.

3. Tender Committee, represented by the General Manager (Construction),
N.F. Railway, Opposite of Sanjeevani Hospital, Maligaon, Guwahati-781011.

.....Respondents

– B E F O R E –

HON'BLE THE CHIEF JUSTICE MR. VIJAY BISHNOI
HON'BLE MR. JUSTICE KARDAK ETE

For the appellant : Mr. K. Agarwal, Senior Advocate
Assisted by Mr. G. Agarwal, Advocate
For the respondents : Mrs. R. Devi, Central Govt. Counsel

Date of hearing : 22.07.2024
Date of Judgment : 25.07.2024

JUDGMENT & ORDER (CAV)

(Vijay Bishnoi, C.J.)

- 1.** Though this writ appeal is listed for admission, however, looking to the fact that the matter pertains to award of contract and the stay order in respect of issuance of work order is in currency, we have decided to hear this writ appeal finally with the consent of counsel for the parties.
- 2.** This writ appeal is filed by the appellant being aggrieved with the order dated 19.06.2024 passed by the learned Single Judge in WP(C) 3134/2024 whereby the writ petition filed by the appellant herein has been dismissed.
- 3.** The brief facts of the case are that the respondent N.F. Railway has floated an NIT on 22.03.2024 and bid corrigendum dated 30.04.2024 for supply of 42000 meters of cable. One of the requisite conditions for the bidders, interested in

participating in the bidding process, was that the prospective tenderer should have an average annual turnover of more than Rs.10 Crores in the last 3 financial years ending on 31.03.2023. The appellant has submitted its technical bid along with other bidders. However, the Tender Evaluation Committee has rejected the bid offered by the appellant on 10.06.2024 for the following reasons:

“Since the bidders offer have not qualified the para 1 of GeM bid & Para 3 of the GeM bid specific T&C i.e. as per the documents submitted by the bidder it is found that the bidder Turnover which has been submitted cannot be considered for the bidder since the bidder has participated as a partnership firm and the turnover details has been submitted of propriety firm. Hence not found technically suitable and not eligible for opening of Financial bid.”

It would be apposite to quote para 1 of GeM bid and para 3 of GeM bid specific terms and conditions, reference of which are made while rejecting the technical bid of the appellant.

“1. The minimum average annual financial turnover of the bidder during the last three years, ending on 31st March of the previous financial year, should be as indicated above in the bid document. Documentary evidence in the form of certified Audited Balance Sheets of relevant periods or a certificate from the Chartered Accountant/Cost Accountant indicating the turnover details for the relevant period shall be uploaded with the bid. In case the date of constitution/incorporation of the bidder is less than 3 year old, the average turnover in respect of the competed financial years after the date of constitution shall be taken into account for this criteria.

3.Turnover

Bidder Turn Over Criteria: The minimum average annual financial turnover of the bidder during the last three years, ending on 31st March of the previous financial year, should be as indicated in the bid document. Documentary

evidence in the form of certified Audited Balance Sheets of relevant periods or a certificate from the Chartered Accountant/Cost Accountant indicating the turnover details for the relevant period shall be uploaded with the bid. In case the date of constitution/incorporation of the bidder is less than 3 year old, the average turnover in respect of the competed financial years after the date of constitution shall be taken into account for this criteria.”

Immediately after knowing about the rejection of the technical bid, the appellant has filed a representation on 11.06.2024 before the respondent No.2 clarifying that the appellant firm was earlier registered as a proprietorship firm but later on, it was converted into a partnership firm with all assets and liabilities (including the income tax and GST) and therefore, this fact should be taken into consideration by the respondents. Along with the said representation, the appellant also produced certain documents, such as partnership deed, deed of declaration, CA certificate, death certificate and next of kin certificate. However, the said representation of the appellant came to be rejected by the respondents on 14.06.2024 and the respondents reiterated its decision of rejecting the technical bid of the appellant while treating it as disqualified.

4. Being aggrieved with the same, the appellant has approached the Writ Court with the prayer to set aside the decision of disqualifying the appellant in the technical evaluation and also to set aside the order dated 14.06.2024 whereby the respondents have refused to take into consideration the appellant's representation dated 11.06.2024.

5. The learned Single Judge has dismissed the writ petition filed by the appellant on the ground that the appellant furnished the annual turnover of proprietorship firm M/s Assam Supply Syndicate though it had submitted its bid as partnership firm.

6. It has been further observed by the learned Single Judge that the appellant failed to clarify as to why it had submitted the turnover of a proprietorship firm along with its bid documents. The learned Single Judge has opined that the appellant furnished clarification for submitting the turnover of the proprietary concern only after opening of the bid documents though it had sufficient time to submit all the required documents prior to opening of the technical bid.

7. The learned Single Judge has further negated the contention of the appellant based on the judgment of the Hon'ble Supreme Court rendered in ***New Horizons Limited and another vs. Union of India***, reported in ***(1995) 1 SCC 478*** while observing that none of the partners of the appellant firm was in the proprietary concern at any point of time. They only came into existence as partners in the partnership firm at a later stage. The learned Single Judge has further opined that 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 form, however, the fact remains that the appellant did not clarify the same fact at the time of submission of its bid and the said clarification was apparently furnished only after opening of the bid documents and the same cannot be allowed in terms of Clause 7.3.5 of Manual for Procurement of Goods.

8. Further, the learned Single Judge, relying on the judgment of Hon'ble Supreme Court rendered in ***Jagdish Mandal vs. State of Orissa and others***, reported in ***(2007) 14 SCC 517***, has concluded that the answers of the questions specified in the above referred judgment are in negative and therefore, this Court cannot exercise its discretion in the present case and accordingly has dismissed the writ petition.

9. Assailing the impugned order, Mr. K. Agarwal, learned senior counsel appearing for the appellant has submitted that the appellant firm was a

proprietorship firm up to 01.11.2023 and Ramautar Jalan was the proprietor. However, 01.11.2023 onwards, it has been converted into the partnership firm wherein the father Ramautar Jalan and his two sons, namely, Anurag Jalan and Chirag Jalan, were the partners. It is further submitted that after the death of the sole proprietor Ramautar Jalan, the partnership firm was reconstituted with the execution of the partnership deed dated 14.02.2024 including two sons and wife of Late Ramautar Jalan. It is contended that it is clear from the above fact that the appellant firm, which was earlier a proprietorship firm, was converted into a partnership firm and as such, the experience gained by the proprietorship firm can very well be termed as experience of the partnership firm.

10. It is vehemently contended that the respondents have never asked the appellant to furnish clarification before rejection of its technical bid and this fact itself is sufficient to conclude that the decision of the respondents in rejecting the technical bid of the appellant is arbitrary.

11. Learned senior counsel for the appellant has further submitted that though the fact that, there was substantial difference in the price quoted by the other bidders vis-a-vis the price quoted by the appellant, was pointed out before the learned Single Judge, however, the same was not taken into consideration. It is contended that the L-1, L-2 and L-3 bidders have quoted their price as Rs.44,31,00,000.00, Rs.45,36,00,000.00 and Rs.46,20,00,000.00, respectively, whereas the bid offered by the appellant was at Rs.22,79,76,000.00. It is contended that looking to the huge and substantial difference in the quoted price of L-1 to L-3 in comparison to the appellant, the decision of the respondents in rejecting the technical bid of the appellant is also liable to be set aside.

12. Learned senior counsel has, therefore, prayed that this writ appeal may kindly be allowed and the impugned order dated 19.06.2024 passed by the learned

Single Judge be set aside and the writ petition filed by the appellant be ordered to be allowed and the relief prayed for in the writ petition be granted.

13. *Per contra*, Ms. R. Devi, learned Central Government Counsel appearing for the respondents has vehemently opposed the writ appeal and submitted that there is no illegality in the impugned order passed by the learned Single Judge. It is contended that the learned Single Judge has taken into consideration the fact that the appellant did not submit necessary documents along with bid offer in support of its claim that the appellant firm was earlier a proprietorship firm and later on, converted into a partnership firm and therefore, the turnover of the proprietorship firm is also liable to be taken into consideration for the purpose of meeting the eligibility criteria mentioned in the GeM bid document and GeM Bid Specific Terms and Conditions and therefore, the learned Single Judge has dismissed the writ petition on the ground that the said explanation was furnished by the appellant only after opening of the technical bid.

14. It is argued that the Hon'ble Supreme Court in various pronouncements has specifically held that in contractual matters, the Court should refrain from exercising the extraordinary jurisdiction until and unless a case of arbitrariness or *mala fide* is made out. It is further contended by the learned Central Government Counsel that the technical bid submitted by the appellant firm was considered by the Technical Evaluation Committee and after considering each and every aspect, the same was rejected by giving reasons. It is submitted that initially the Evaluation Committee sent its recommendation to the higher authority, i.e. PCMM/CON, and after considering the same, the said authority ordered for re-evaluation of the technical bid submitted by the appellant. However, the Evaluation Committee has again recommended for rejection of the technical bid submitted by the appellant by supplying reasons and the PCMM/CON has concurred with the said

recommendation. It is argued that in such circumstances, it cannot be said that the decision of the respondents in rejecting the technical bid of the appellant is suffering from any arbitrariness.

15. So far as the contention of the learned senior counsel for the appellant to the effect that there is substantial difference between the price quoted by the appellant and the L-1 to L-3 is concerned, it is contended that the price difference may not be the sole criteria for awarding a contract. In support of the above contention, the respondent has placed reliance on the decision of the Hon'ble Supreme Court rendered in ***Raunaq International Ltd. Vs. I.V.R. Construction Ltd.***, reported in ***(1999) 1 SCC 492***. Learned counsel for the respondents, therefore, submitted that there is no force in this writ appeal and the same is, therefore, liable to be dismissed.

16. Heard learned counsel appearing for the parties and perused the impugned order as well as the material available on record.

17. The technical bid submitted by the appellant was rejected by the respondents apparently for the reason that though the appellant furnished its technical bid as a partnership firm but to meet out para 1 of GeM bid and para 3 of GeM bid specific terms and conditions, the appellant firm furnished the documents regarding financial turnover of a proprietorship firm.

18. We have perused the record of the tender process produced by the counsel for the respondents and it is revealed that the documents submitted by the appellant in support of its technical bid were not found sufficient by the Evaluation Committee to ascertain the status of the bidder as to whether it is a proprietorship firm or partnership firm. Thereafter, the Evaluation Committee enquired the status of the appellant firm from GeM and in response furnished by

the GeM, it was understood that the appellant firm participated as a partnership firm and not as a proprietorship firm.

19. From the own admission of the appellant firm, it is clear that they have clarified the relationship between the erstwhile proprietorship firm and the partnership firm by submitting a representation on 11.06.2014, i.e. much after the last date of opening of the technical bid.

It is to be noticed that in the GeM bid specific terms and conditions, clause 9(9) clearly stipulates that non-submission or incomplete submission of documents will result in rejection of offer and no representation will be entertained. At this stage, it is relevant to quote Clause 9(9) of Bid Specific Terms and Conditions of the NIT, which reads as under:

“(9) The bidder shall submit an undertaking in the mentioned format as,

.....

Non-submission or Incomplete submission of documents will result in rejection of offer and no representation will be Entertained.”

20. Looking to the above facts, we are of the view that no fault can be found with the decision of the respondents in rejecting the technical bid submitted by the appellant as the required clarification was furnished by the appellant at a later stage, i.e. after opening of technical bid.

21. The Hon’ble Supreme Court in its various pronouncements has specifically laid down that while exercising powers under Article 226 of the Constitution of India, the High Courts are required to exercise restraint and caution in contractual matters and can interfere in such matters only to prevent arbitrariness, irrationality, *mala fide*, bias or perversity.

22. In *The Silppi Constructions Contractors Vs. Union of India & Anr. Etc. Etc.*, reported in **(2020) 16 SCC 489**, the Hon'ble Supreme Court, after taking note of the earlier decisions rendered in *Tata Cellular Vs. Union of India*, (1994) 6 SCC 651; *Raunaq International Ltd. Vs. I.V.R. Construction Ltd.*, (1999) 1 SCC 492; *Air India Limited Vs. Cochin International Airport Ltd.*, (2000) 2 SCC 617; *Karnataka SIIDC Ltd. Vs. Cavalet India Ltd.*, (2005) 4 SCC 456; *Master Marine Services (P) Ltd. Vs. Metcalfe & Hodgkinson (P) Ltd.*, (2005) 6 SCC 138; *B.S.N. Joshi & Sons Ltd. Vs. Nair Coal Services Ltd.*, (2006) 11 SCC 548; *Jagdish Mondal Vs. State of Orissa*, (2007) 14 SCC 517; *Michigan Rubber (India) Ltd. Vs. State of Karnataka*, (2012) 8 SCC 216; *Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd.*, (2016) 16 SCC 818; *Montecarlo Vs. NTPC Ltd*, AIR 2016 SC 4946; *Municipal Corporation, Ujjain Vs. BVG India Ltd.*, (2018) 5 SCC 462; and *Caretel Infotech Limited Vs. Hindustan Petroleum Corporation Limited*, 2019 (6) SCALE 70, has held in paragraphs 19 and 20 as under:

“19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clearcut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of [Article 12](#) of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As [laid down in](#) the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give “fair play in the joints” to the

government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. *The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity."*

23. In *Tata Motors Limited Vs. The Brihan Mumbai Electric Supply & Transport Undertaking (BEST) & Ors., [Civil Appeal No.3897 of 2023, arising out of SLP(C) No.15708 of 2022]*, decided on 19.05.2023, the Hon'ble Supreme Court in paragraph No.48 has held under:

"48. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fide and bias. However, this Court has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realize their limitations and the havoc which needles interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate

upon technical issues beyond our domain. The courts should not use a magnifying glass which scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give “fair play in the joints” to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer. [See: Silppi Constructions Contractors Vs. Union of India, (2020) 16 SCC 489]

24. Relying upon the decision in ***Tata Motors Limited (supra)***, the Hon’ble Supreme Court in the case of ***BTL EPC Ltd. vs. Macawber Beekay Pvt. Ltd. and others [Civil Appeal No.5968 of 2023 (Arising out of SLP(C) No.18100 of 2023)]*** decided on 18.09.2023, has held in paragraph 36 as under:

“36. The Court ought to defer to the discretion of the tender inviting authority which, by reason of having authored the tender documents, is best placed to interpret their terms. The Courts ought not to sit as courts of appeal but review the decision-making process and examine arbitrariness or mala fides, if any. [Monte Carlo Vs. National Thermal Power Corporation Limited, (2016) 15 SCC 272]”

The appellant has not alleged *mala fide* in the action of the respondents and we have also not found any arbitrariness in the action of the respondents.

25. So far as the contention of the appellant in respect of the price quoted by it in comparison to L-1 to L-3 bidders is concerned, the same is also liable to be rejected in view of the decision of the Hon’ble Supreme Court in ***Raunaq International Ltd. (supra)*** wherein the Supreme Court has held as under:

“16. It is also necessary to remember that price may not always be the sole criterion for awarding a contract. Often when an evaluation committee of experts is appointed to evaluate offers, the expert committee's special knowledge plays a decisive role in deciding which is the best offer. Price offered is only one of the criteria. The past record of the tenderers, the quality of the goods or services which are offered, assessing such quality on the basis of the past performance of the tenderer, its market reputation and so on, all play an

important role in deciding to whom the contract should be awarded. At times, a higher price for a much better quality of work can be legitimately paid in order to secure proper performance of the contract and good quality of work-which is as much in public interest as a low price. The court should not substitute its own decision for the decision of an expert evaluation committee.”

Later, the Hon’ble Supreme Court in ***Air India Limited (supra)*** has again reiterated that price need not always be the sole criteria for awarding a contract.

26. In view of the above discussions, we do not find any case for interference in the impugned order dated 19.06.2024 passed by the learned Single Judge in WP(C) 3134/2024. Hence, this writ appeal is dismissed. *Interim* order passed on 02.07.2024 is vacated.

No orders as to costs.

The original record of the Tender Process be handed over to the counsel for the respondents forthwith.

JUDGE

CHIEF JUSTICE

Comparing Assistant