

GAHC010167352024



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

Case No. : WP(C)/4323/2024

M/S N P ASSOCIATES AND ANR
A SOLE PROPRIETORSHIP CONCERN
REPRESENTED BY ITS PROPRIETOR
SRI NILOTPAL PACHANI AND HAVING ITS
REGISTERED OFFICE AT VILL. NAKARI WARD NO. 1,
LAKHIMPUR, DIST.- LAKHIMPUR, ASSAM, PIN- 781306.

2: NILOTPAL PACHANI
(SOLE PROPRIETOR)

SON OF LATE TANKESWAR PACHANI

RESIDENT OF VILLAGE NAKARI WARD NO. 1

LAKHIMPUR
DIST.- LAKHIMPUR
ASSAM
PIN- 781306

VERSUS

THE STATE OF ASSAM AND 12 ORS
REPRESENTED BY THE SECRETARY TO THE DEPARTMENT OF
HANDLOOM, TEXTILES AND SERICULTURE,
GOVERNMENT OF ASSAM, DISPUR, GUWAHATI-6, ASSAM.

2:THE DIRECTOR OF HANDLOOM AND TEXTILES
ASSAM
GNB ROAD
AMBARI
GUWAHATI- 781001
ASSAM.

3:THE BID EVALUATION COMMITTEE

REPRESENTED BY THE CHAIRMAN

BEING THE DIRECTOR
HANDLOOM AND TEXTILES
ASSAM

GNB ROAD
AMBARI
GUWAHATI- 781001
ASSAM.

4:M/S ARUNODOI UDYOG
KAIKARA
MANGALDAI
DIST. DARRANG
ASSAM
PIN- 784125.

5:M/S B.R. TEXTILES
DAKARGHAT BYE-PASS
DIST. NAGAON
ASSAM
PIN- 782003.

6:M/S BARUAH TIMBER DEPOT AND SUPPLIERS
KAIKARA
PATIDARRANG
MANGALDAI
DIST.- DARRANG
ASSAM
PIN- 784125.

7:M/S JIMACHAYA INDUSTRIES
DAKHINGAON
KAHILIPARA
GUWAHATI
DIST.- KAMRUP(M)
ASSAM
PIN- 781019.

8:M/S MAA SLEY HOUSE
CHAMATA
DIST.- NALBARI
ASSAM
PIN- 781306.

9:M/S MANOJ BAH BET UDYOG
WARD NO. 12

HAJO ROAD
DIST. NALBARI
ASSAM
PIN- 781102.

10:M/S SIPINI BHANDAR
MUNICIPALITY MARKET
BARPETA ROAD
DISTRICT- BARPETA
ASSAM
PIN- 781315.

11:M/S PALMARIAN ENTERPRISE
DERGAON TOWN
WARD NO. 2
DIST.- GOLAGHAT
ASSAM
PIN- 785614.

12:M/S POPULAR FURNITURE AND WEAVING INDUSTRIES
NILBAGAN
DIST.- HOJAI
ASSAM
PIN- 782445.

13:M/S RANU INDUSTRIES
RONGAJAN TINIALI
KURUKA
MORONGI
DIST.- GOLAGHAT
ASSAM
PIN- 785613

**BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA**

For the petitioner : Mr. B. Sharma, Advocate
For the respondent Nos.1 to 3 : Mr. R. Dhar, G.A., Assam.
For the respondent Nos.4 to 13 : Mr. D.K. Nath, Advocate.

Date of hearing : 12.11.2024.
Date of Judgment : 26.11.2024.

JUDGMENT AND ORDER (CAV)

- 1.** Heard Mr. B. Sharma, learned counsel for the petitioners. Also heard Mr. Mr. R. Dhar, learned counsel for the State respondents and Mr. D.K. Nath, learned counsel for the private respondents.
- 2.** The grievance of the petitioners is that the petitioners' technical bid has been disqualified by the Technical Bid Evaluation Committee, vide meeting minutes dated 22.02.2024, on the ground that the petitioners had (1) submitted documents, which were not in conformity with Clause 13(h) of the NIT, as the petitioners did not submit the Annual Audited Report (balance sheet and profit & loss account) and Income Tax Return for one particular year, i.e. 2022 – 2023 and (2) UDIN number in CA Certificate was not distinct.
- 3.** The petitioners' case is that the petitioners participated in the e-Tender Notice dated 11.01.2024 (*hereinafter referred to as the 'NIT'*), for empanelment of manufacturers and suppliers for supply of handloom and handloom accessories under the various schemes of Government of India and Government of Assam, implemented by the Directorate of Handloom and Textiles, Assam.
- 4.** The petitioners' counsel submits that in terms of Clause 3(b) of the NIT, relating to the eligibility criteria of the bidders, bidders were to have not less than Rs. 50 Lakhs as the average annual financial turnover during the last three years, i.e., 2020-2021, 2021-2022 & 2022-2023 and they were also required to have the experience of supply of handloom and handloom accessories for an aggregated value of a minimum of Rs. 10 Lakh during the last three financial years in terms of Clause 3(c). He further submits that in terms of Clause 3(e) of the NIT, Micro and Small Enterprises (MSEs) are exempt from submitting their

Average Annual Financial Turnover and experience in all public procurements, subject to meeting the quality and technical specification.

5. The petitioners' counsel submits that even though the petitioners are a Small Enterprise, registered as a Micro and Small Enterprise (MSE), who were not required to submit the average annual financial turnover required and experience of supply of handloom and handloom accessories in terms of Clause 3(b)&(c) of the NIT, in view of Clause 3(e) of the NIT, the petitioners had submitted the documents in terms of Clause 3(b)&(c) of the NIT. He further submits that an Annual Audited Report (balance sheet and profit & loss account) and an Income Tax Return (ITR in short) is the same as an Average Annual Financial Turnover. As such, the Annual Audited Report and ITR mentioned in Clause 13(h) would have to be considered to be the same as Average Annual Financial Turnover provided in Clause 3(b). He accordingly submits that as the petitioners were exempt from complying with Clause 3(b) of the NIT, in terms of Clause 3(e) of the NIT, the petitioners should be exempt from submitting the Annual Audit Reports and ITRs of the last 3 years, i.e. 2020–2021, 2021–2022 and 2022-2023, which is the same as the Average Annual Financial Turnover provided in Clause 3(b). Accordingly, the disqualification of the petitioners' technical bid, on the ground that it's documents were not in conformity with the Clause 13(h) of the NIT, does not arise. He further submits that the petitioners' bid was also disqualified on the ground that the UDIN number in CA Certificate was not distinct. He also submits that similarly placed bidders as the petitioners, have been empanelled by the State respondents and as such, there is discrimination writ large, in disqualifying the technical bid of the petitioners only.

6. Mr. R. Dhar, learned counsel for the State respondents submits that Clause 3(h) of the NIT required the bidders to submit their Income Tax Returns and certified Annual Audited Report (balance sheet and profit & loss account) for the last 3 financial years 2020–2021, 2021–2022 and 2022-2023. However, the petitioners had not submitted the certified Annual Audited (balance sheet and profit & loss account) and ITR Report for the year, i.e. 2022 – 2023 as per Clause 13(h) of the NIT and that the UDIN number in CA Certificate was not distinct. As there is no exemption given to the requirements under Clause 13(h) of the NIT, in terms of Clause 3(e), there was no infirmity in the rejection of the petitioners Technical Bid.

7. The counsel for the State respondents further submits that the writ petitioner is not entitled to get any relaxation as per clause 3(e), as per OM dated 20.09.2016 issued by the Ministry of Finance, Department of Expenditure Procurement Policy Division, as the Handloom Weaving Accessories products to be manufactured falls within the equipment which needs to meet the safety standards of the end user or the weavers. The products need to pass the safety test conducted by competent experts, before commissioning the looms. A defective Handloom Weaving Accessories/products might create accidents and safety concerns. The bidder, as such, was not given any relaxation under clause 3(e) because of the conditions laid down in Paragraph 3 of the OM dated 20.09.2016 issued by the Ministry of Finance, Department of Expenditure, Procurement Policy Division.

8. The O.M. dated 20.09.2016 is reproduced hereinbelow, as follows :

“OFFICE MEMORANDUM

Subject Relaxation of Norms for Startups Medium Enterprises in Public Procurement regarding Prior Experience - Prior Turnover criteria.

The undersigned is directed to refer to this Department O.M. of even number dated 25th July, 2016, wherein it was clarified that all Central Ministries/ Departments may relax condition of prior turnover and prior experience in public procurement to all Start-ups [whether Micro & Small Enterprises (MSEs) or otherwise] subject to meeting of quality and technical specifications in accordance with the relevant provisions of GFR, 2005.

2. A doubt has arisen if it makes optional for Central Ministries/ Departments to relax condition of prior experience and prior turnover in public procurement to Startups. In this regard, it is again clarified that normally for all public procurement, the Central Ministries/ Departments have to ensure that criteria of prior turnover and prior experience for all Startups is relaxed subject to their meeting of quality and technical specifications.

3. However, there may be circumstances (like procurement of items related to public safety, health, critical security operations and equipments, etc.) where procuring entities may prefer the vendors to have prior experience rather than giving orders to new entities. For such procurements, wherever adequate justification exists, the procuring entities may not relax the criteria of prior experience/turnover for the Startups.

4. This issues with the approval of Finance Secretary.”

9. Mr. D.K. Nath, learned counsel submits that the private respondents have all submitted their Annual Audited Report and ITR in terms of Clause 3(h) of the NIT.

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

11. Clause 3(b), Clause 3(e), Clause 13(h) and 13(i) of the NIT are reproduced hereinbelow as follows :

“3(b) *The average annual financial turnovers during the last three years i.e. 2020-21, 2021-22 & 2022-23 should not be less than **Rs.50.00 Lakh**. The audited/certified balance sheet should be submitted along with IT return files for the years as stated above.”*

“3(e) *As per the Government Policy Circular No.1(2)(1) 2016-MA, dated 10/03/2016 issued by O/o Development Commissioner (MSME), Ministry of Micro, Small & Medium Enterprises, Government of India, **Micro & Small Enterprises (MSEs) are exempted from prior turnover and experience in all public procurements subject to meeting of quality and technical specification**. The bidders need to submit the up-to-date copy of Certificate of registration for Micro or Small Enterprises (Udyam Registration Certificate) issued by Ministry of Micro, Small & Medium Enterprises (MSME), Government of India. Moreover, the bidders must be genuine manufacturer of handlooms that clearly mention in the Udyam Registration Certificate. In case of MSE payment of EMD and bid cost are exempted as per Government of India OM, No.F.No.1(3)/2018-MA, Pt-III, dated 27/10.2022.”*

“13(h) *Copy of Income Tax return and annual audited report (Balance Sheet & Profit and Loss A/C of the last three financial years (i.e., 2020-21, 2021-22 & 2022-23) duly certified by the Chartered Accountant.”*

“13(i) *Certificate from Registered Chartered Account/Statutory Auditor indicating annual financial turnover during the last three years should be furnished with UDIN No.”*

12. As the petitioners stand is that Clause 3(e) is applicable to the documents required under Clause 13(h) of the NIT, despite the O.M. dated 20.09.2016, the question that has to be decided is whether the Annual Audited Report (the

balance sheet and profit and loss account) and the ITR provided in Clause 13(h), would be the same as the Average Annual Financial Turnover, which is provided in Clause 3(b). This Court is also of the view that the O.M dated 20.09.2016 is not applicable to this case, due to the insertion of Clause 3(e) of the NIT.

13. A perusal of Clause 3(b) clearly shows that the bidders are to submit their Average Annual Financial Turnover for the last 3 years pertaining to 2020 – 2021, 2021 – 2022 and 2022- 2023, which should not be less than Rs.50.00 lakhs. Clause 3(e) of the NIT exempts the petitioner no.1 who is an MSE, from submitting “turnover documents” as required under Clause 3(b). It does not exempt a MSE from submitting copy of ITR and Annual Audited Report. Clause 3(e) of the NIT does not state that there is exemption from submitting documents required under Clause 13(h) of the NIT.

14. The word “Average” and “Rs.50 lakhs” is not found in respect of the Annual Audited Report and ITR mentioned in Clause 13(h), while the same is present in Clause 3(b). The word “Average” as defined in Black’s Law Dictionary is that it is a single value that represents the midpoint of a broad sample of subjects. In mathematics, it is the mean of a series. Thus, while Clause 3(b) of the NIT requires the bidder to submit the Average Annual Financial Turnover of not less than “Rs.50 lakhs” for the last 3 years, Clause 13(h) requires the bidder to submit an Annual Audited Report (the balance sheet and profit and loss account) and ITRs for the last 3 years. Clause 13(h) does not allow for the submission of Average or the mean of the Annual Audited Reports for the last 3 years. It requires the Annual Audited Report and ITRs to be submitted for the

last 3 years, as exactly as it was possible to be made.

15. The very fact that the petitioners have submitted their Average Annual Financial Turnover for the last 3 years which is not less than “Rs.50 lakhs” in terms of Clause 3(b) and have also submitted separate documents in terms of Clause 13(h), shows that the petitioners are aware that the documents required under the above two clauses are different. It is not the case of the petitioners that they have submitted the same documents under both Clause 3(b) and Clause 13(h). They have submitted different documents.

16. On considering the above two Clauses in the NIT, this Court finds that Annual Turnover refers to the total revenue generated from the sale of goods or services during a financial year before deducting any expenses. It is a measure of business activity and operational performance. It is focused solely on the sales and revenue generated in the normal course of business. It does not factor in expenses, taxes, or other financial liabilities. Annual Turnover may be reported using different accounting methods (cash or accrual basis) based on the company's accounting policies, but it must be consistent with generally accepted accounting principles.

17. An annual audited report is a comprehensive document that provides a detailed overview of a company's financial performance and position over a specific financial year. It is prepared by the company's management and then audited by an external auditor to ensure accuracy and compliance with accounting standards. An annual audited report typically includes:

1. Financial statements (income statement, balance sheet, cash flow statement).

2. Notes to the financial statements.
3. Auditor's report, which provides an opinion on the fairness and accuracy of the financial statements.
4. Management discussion and analysis (MD&A), which offers insights into the company's performance and future outlook.

18. An Income Tax Return is a formal document filed with the tax authorities that reports income, deductions, and taxes owed for a given financial year. It encompasses various sources of income, including but not limited to turnover. An Income Tax Return includes comprehensive financial details such as total income, allowable deductions, tax credits, and the final tax liability. It may also reflect income from investments or other non-operational sources. Income Tax Returns require adherence to specific tax regulations and formats prescribed by the tax authorities, which may include the inclusion of various forms and schedules.

19. The purpose of an Annual Financial Turnover is to provide a clear picture of a company's revenue-generating capacity. It is often a critical criterion for assessing a bidder's financial strength in tender applications. The purpose of an annual audited report is to provide stakeholders (investors, creditors, regulators, etc.) with a reliable and transparent view of the company's financial health and compliance with accounting standards.

20. In view of the above reasons, this Court is of the view that the Average Annual Financial Turnover for 3 years provided in Clause 3(b) cannot be the

same as or said to be an Annual Audited Report and ITR under Clause 13(h), which are completely different documents. As stated earlier, Clause 3(e) only exempts MSEs from submitting “experience” and “turnover documents”, not ITR and AAR.

21. Having stated the above, the Supreme Court in various judgments has held that the author of the tender document is the best person to understand and appreciate its requirement and interpret its documents. It has further been held that Court’s interference should be minimal in relation to the interpretation to the terms and conditions of a tender. Further, the Writ Court does not have the expertise to correct decisions made in matters of Government contract, by substituting its own decision for the decision of the authority. It has also been held that the words in the tender documents cannot be ignored or treated as redundant or superfluous. They must be given meaning and their necessary significance.

22. In the case of ***Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. & Another***, reported in ***(2016) 16 SCC 818***, the Supreme Court has held as follows-

“The owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents.”

In the case of ***Silppi Constructions Contractors vs. Union of India & Another***, reported in ***(2020) 1 SCC 489***, the Supreme Court has held as follows:-

“The essence of the law laid down in regard to the scope of judicial review. in

respect of government contracts 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 the case of ***Utkal Suppliers -vs- Maa Kanak Durga Enterprises***, reported in **(2021) 14 SCC 612**, the Supreme Court has held that judicial review in the matters of Government contracts is equivalent to judicial restraint in these matters. What is reviewed is not the decision itself but the manner in which it was made. The writ court does not have the expertise to correct such decisions by substituting its own decision for the decision of the authority. The words used in the tender documents cannot be ignored or treated as redundant or superfluous. They must be given meaning and their necessary significance. In the matter of government contracts and tenders, employer/competent authority is better placed to appreciate the requirements of the tender conditions and to interpret them. Courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. Courts should give way to the opinion of experts unless the decision is totally arbitrary or unreasonable.

24. The above being said, as an Annual Audited Report (balance sheet and profit and loss account) and ITRs cannot said to be an Average Annual Financial

Turnover document, this Court holds that the relaxation provided to MSEs under Clause 3(e) would not cover the documents required to be submitted by a bidder under Clause 13(h). As the petitioners have not submitted the Annual Audited Report (balance sheet and profit & loss account) and ITRs for the year 2022-2023, which is not in consonance with Clause 13(h), this Court does not find any infirmity with the decision of the respondent authorities in disqualifying the petitioners Technical Bid. It should also be noted that the petitioners not having invoked the exemption Clause provided under Clause 3(e), as they have submitted their documents required under Clause 3(b) and Clause 3(c), the petitioners cannot now seek to indirectly invoke the exemption clause under Clause 3(e), for their deficiency in submitting all the required documents under Clause 13(h).

25. In view of the above, this Court is not going into the issue whether the State respondents were justified in disqualifying the petitioner's Technical Bid on the second ground, i.e. "UDIN number and CA Certificate is not distinct", though it *prima facie* appears that the said defect is a curable defect.

26. The writ petition is accordingly dismissed.

JUDGE

Comparing Assistant