

GAHC010190572023



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

Case No. : WP(C)/4920/2023

KARNATAKA AGRO CHEMICALS AND ANR.
A COMPANY WITHIN THE MEANING OF THE COMPANIES ACT, 2013
HAVING ITS REGISTERED OFFICE AT 180, 1ST MAIN ROAD,
MAHALAKSHMI LAYOUT, BANGALORE-560086, KARNATAKA

2: BHOLANATH KUNDU
THE OFFICER INCHARGE AND AUTHORIZED PERSON OF KARNATAKA
AGRO CHEMICALS
S/O LATE SUDHIR KUMAR KUNDU
HAVING OFFICE AT SADANA WAREHOUSING AND AGENCIES PVT. LTD
1ST FLOOR
RUKMINIGAON
G.S. ROAD
GUWHATI-781022
DIST- KAMRUP (M)
ASSA

VERSUS

THE STATE OF ASSAM AND 2 ORS.
REPRESENTED THROUGH THE CHIEF SECRETARY, HAVING OFFICE AT
ASSAM SACHIVALAYA, DISPUR, GUWAHATI-781006, DIST- KAMRUP (M),
ASSAM

2:THE ADDITIONAL CHIEF SECRETARY
GOVT. OF ASSAM AND AGRICULTURE PRODUCTION COMMISSIONER
(APC)
ASSAM AGRICULTURE DEPARTMENT
HAVING OFFICE AT ASSAM SACHIVALAYA
DISPUR
GUWAHATI-781006
DIST- KAMRUP (M)
ASSAM

3:THE DIRECTORATE OF AGRICULTURE
ASSAM
REPRESENTED BY ITS DIRECTOR
HAVING ITS OFFICE AT KHANAPARA
GUWAHATI
ASSAM-78102

Advocate for the Petitioner : MR. P KHATANIAR

Advocate for the Respondent : GA, ASSAM

Linked Case : WP(C)/4922/2023

GREEN PLANET BIO PRODUCTS AND ANR.
A COMPANY WITHIN THE MEANING OF THE COMPANIES ACT
2013 HAVING ITS REGISTERED OFFICE AT GP TOWER PLOT NO. 1 AMAR
GARDEN NH-1
AMRITSAR BYE PASS
JALANDAR-144004
PUNJAB

2: ANIL DEKA
THE OFFICER INCHARGE AND THE AUTHORIZED PERSON OF GREEN
PLANET BIO PRODUCTS
S/O SRI DHANESWAR DEKA
HAVING OFFICE AT SREE NAGAR PATH
SUBHASH PALLY
BELTOLA TINIALI
GUWAHATI-781028
DIST- KAMRUP (M)
ASSAM
VERSUS

THE STATE OF ASSAM AND 2 ORS.
REPRESENTED THROUGH THE CHIEF SECRETARY
HAVING OFFICE AT ASSAM SACHIVALAYA
DISPUR
GUWAHATI-781006
DIST- KAMRUP (M)
ASSAM

2:THE ADDITIONAL CHIEF SECRETARY
GOVT. OF ASSAM AND AGRICULTURE PRODUCTION COMMISSIONER
(APC)

ASSAM AGRICULTURE DEPARTMENT
HAVING OFFICE AT ASSAM SACHIVALAYA
DISPUR
GUWAHATI-781006
DIST- KAMRUP (M)
ASSAM
3:THE DIRECTORATE OF AGRICULTURE
ASSAM
REPRESENTED BY ITS DIRECTOR
HAVING ITS OFFICE AT KHANAPARA
GUWAHATI
ASSAM-781022

B E F O R E

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

Advocates for the petitioners : Shri P. Khataniar, Advocate.

Advocates for respondents : Shri B. Choudhury, SC, Agriculture Department.

Date(s) of hearing : 12.12.2023 & 05.01.2024

Date of judgment : 11.01.2024

JUDGMENT & ORDER (CAV)

Both the writ petitions being analogous and pertaining to the same subject have been heard together and are being disposed of by this common judgment and order. The petitioners in these two cases have challenged the action of the respondent authorities in cancelling a tender process. Such tender process was for supply of fertilizers. The petitioners, amongst various grounds have submitted that such action is arbitrary and unreasonable and also in violation of the statutes holding the field.

2. Before going to the issue which has arisen for adjudication, the facts pleaded by the parties may be narrated in brief.

3. The Directorate of Agriculture had issued a tender notice dated 19.09.2022, inviting bids from eligible bidders for supply of various natures of fertilizers for the year 2022–2023. The petitioners being interested with the aforesaid tender process had participated in the said process. It has been specifically pleaded that the bid documents were released on 20.09.2022, which was followed by a pre-bid meeting held on 26.09.2022 and the last date of submission of bids was 14.10.2022. The authorities had thereafter issued a corrigendum dated 29.09.2022, whereby the last date was extended upto 20.10.2022. The same was followed by further corrigenda whereby there were further extensions of the last date which was ultimately fixed on 04.11.2022. The bids were to be opened on 05.11.2022.

4. It has been pleaded that a number of bidders had participated in the said tender process and a substantial amount was collected by the Directorate from the bidders in terms of the price of the bid document and other processing fees. The tenders were opened on 05.11.2022 as stated above but no evaluation of the technical bids were made. As per the petitioners, they qualify in all the respects and their bids were valid for a period of 365 days. While it is the case of the petitioners that they were expecting the process to be brought to a logical conclusion, vide the impugned notice dated 28.07.2023, the tender process was cancelled. Such cancellation was as per the decision of the Departmental Bid Committee Meeting held on 28.07.2023. Further, the provisions of Section-III of Clause-26 of the bid document were also taken into consideration. It is the legality and validity of the aforesaid action by which the tender process has been cancelled which is the subject matter of these writ petitions.

5. I have heard Shri P. Khataniar, learned counsel for the petitioners whereas

the Agriculture Department is represented by Shri B. Choudhury, its Standing Counsel, who has also placed before this Court the records of the case in original which have been examined.

6. Sri Khataniar, the learned counsel for the petitioners has submitted that the cancellation of the tender process by taking recourse of Section-III of Clause-26 of the bid document is arbitrary and unreasonable. It is submitted that once a valid tender process was initiated at the expense of the public exchequer, the same could not have been cancelled in the manner as has been done. He submits that such action has been resorted to with mala fide intention so as to give undue benefit to certain blue eyed parties. It is submitted that no valid reasons are cited for issuing the cancellation order. The impugned order only mentions about the decision of the meeting held on 28.07.2023 and Clause-26 of Section-III and it is accordingly submitted that the same is cryptic.

7. By referring to Clause-26, the learned counsel has submitted that though the authorities have reserved the right to accept or reject any or all bids, such Clause is general in nature and cannot be resorted to arbitrarily.

8. By referring to the ***Assam Public Procurement Act, 2017*** and the ***Assam Public Procurement Rules, 2020***, (hereinafter the Act and Rules respectively) the learned counsel for the petitioners has submitted that under Section 26, the procedure has been prescribed for cancellation of a procurement process. Under Section 26 (3), communication of reasons is mandatory. He has also referred to Section 4 which lays down the fundamental principles of public procurement and Section 9 which prescribes the time for such process. Reference has also been made to Rule 10 which lays down the time-frame for procurement process and has submitted that both the provisions of the Act and the Rules are mandatory in nature as there is a provision for penalty in case of

non-compliance. He submits that the Rules are sought to be circumvented by causing intentional delay in finalization of the process. By referring to Section V of the tender conditions which deals with the schedule of requirements, it is submitted that the tentative quantity of the supply was huge. By dealing with the ground projected on behalf of the respondents that in the meantime, certain supplies have been done through the North Eastern Regional Agricultural Marketing Corporation Ltd. (NERAMAC), he submits that the said supply constitutes only a very minor part of the quantity connected with the impugned cancellation order which has been quantified to be around 10%.

9. By referring to the documents, Shri Khataniar, the learned counsel has submitted that even before the cancellation order which has been impugned in this writ petition, it appears that negotiations were on which would suggest that the impugned action was pre-determined. As regards the alleged ground of cancellation on the expiry of the validity of the bid, he submits that apart from the fact that such grounds have not been cited in the impugned order, as per the tender conditions, the validity period of a bid can be extended with the consent of the bidders and in any case, the bid of the petitioner was valid upto 365 days. He has referred to Clause 13 (b) and Rule 23 (4) in this regard and has submitted that expiry of bid validity cannot be taken as a ground as validity can be extended in accordance with law.

10. In support of his submission, Shri Khataniar, the learned counsel for the petitioners relies upon the following case laws:-

- i. **(2023) 6 GLT 541 [M/s Leon Barua and Associates & Anr. Vs The State of Assam & Ors.]**
- ii. **(2001) 8 SCC 491 [Union of India & Ors. etc. Vs Dinesh Engineering Corporation & Anr. etc.]**
- iii. **2011 (3) GLT 695 [Ackruti Security Plates Private Limited**

Vs The State of Tripura represented by the Chief Secretary to the Govt. of Tripura and Ors.]

iv. (2010) 10 SCC 388 [M/s Sushila Chemicals Pvt. Ltd. & Anr. Vs Bharat Coking Coal Ltd. & Ors.]

v. 2023 0 Supreme (Kar) 108 [Karnataka Commercial and Industrial Corporation Pvt. Ltd. Vs State of Karnataka, Represented by the Director of Horticulture Department of Horticulture & Ors.]

11. In the case of ***Leon Boruah*** (supra), this Court was examining a similar Clause giving right to the authorities to reject any bid or cancel a tender process. It was held that such rights cannot be an unfettered right of the authorities.

12. The case of ***Dinesh Engineering*** (supra) has been cited to bring home the contention that mere existence of a clause to reject any tender offer without any reasons may not give a free power to the authorities. The aforesaid view has also been endorsed by this court in the cases of ***Leon Baruah*** and ***Ackruti Security*** (supra).

13. The case of ***Sushila Chemicals*** (supra) has been cited to support the contention that even in contractual matters, High Court may entertain a petition on grounds of violation of Article 14 of the Constitution of India.

14. The Case of ***Karnataka Commercial*** (supra) has been cited to support the contention that the provisions of the procurement act and the rules are mandatory in nature.

15. *Per contra*, Shri B. Choudhury, the learned Standing Counsel, Agriculture Department has raised a preliminary objection questioning the maintainability of the writ petition by submitting that no right, whatsoever has accrued to the petitioners in the tender process and therefore the writ petitions are liable to be

dismissed. He has also submitted that by the impugned action, no rights of the petitioners have been violated and the cancellation of the process was at the stage of technical evaluation. He submits that when the financial evaluation was not even done and the technical responsiveness of the petitioners itself was required to be evaluated, the petitioners cannot claim that they would be the successful bidders.

16. With regard to the contention on the validity of the bids, by referring to Rule 23 (4), Shri Choudhury, the learned counsel has submitted that the last date for submission of bids was fixed on 04.11.2022. By referring to Sub clause (ii), he submits that the extension has to be during the subsistence of the bid validity period.

17. He further submits that the sowing season was running out and therefore response was sought for from NERAMAC and National Agricultural Cooperative Marketing Federation of India Ltd. (NAFED) both of which are Government entities. In response thereto, NERAMAC had made an offer and accordingly new tender was floated as per Rules. He submits that there is no allegation of any mala fide and the work done through NERAMAC is strictly in accordance with law as NERAMAC is only an empanelling agency of the Central Government and the works of supply are given to empanelled vendors. The learned Standing Counsel accordingly submits that the writ petitions are liable to be dismissed.

18. In support of his submission, Shri Choudhury, the learned counsel for the Department has placed reliance upon the following case laws:-

- i. **(2016) 14 SCC 172 [State of Jharkhand Vs CWE-SOMA Consortium]**
- ii. **(2022) 3 GLR 567 [NAD & Associates Vs Union of India]**
- iii. **(2023) SCC Online 671 [Tata Motors Limited Vs Brihan**

Mumbai Electric Supply & Transport Undertaking (Best) & Ors.

19. In the case of **CWE-SOMA** (supra), the Hon'ble Supreme Court has laid down that when a tender process is cancelled, no rights of the bidders are violated. In the similar line, this Court in the case of **NAD** (supra) has laid down that no vested rights accrue upon a bidder to challenge a process of cancellation of an NIT. The case of **Tata Motors** (supra) have been cited to bring home this submission regarding the limited scope of judicial review. For ready reference, the relevant extracts are quoted herein below:-

“ 48. 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 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 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. 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. In his rejoinder, Shri Khataniar, the learned counsel for the petitioners has submitted that the quantity which has been sought to be supplied through NERAMAC is a very small one and therefore the justification given by the

Department is not acceptable. However, on a pointed query, the learned counsel for the petitioners has submitted that there is no embargo for the petitioners to participate in future tender process. The learned counsel however, hastily adds that all future tender process may be directed to be carried out strictly in accordance with law.

21. The rival submissions made by the learned counsel for the parties have been duly considered. The records in original have been examined.

22. At the outset, this Court notices and records that both the writ petitions have been structured with similar grounds of challenge and only the items of supply are different.

23. The challenge is against an order dated 28.07.2023 whereby the tender process has been cancelled. Though it is submitted that no reasons have been assigned, the minutes of meeting which has been referred in the cancellation order would reveal that the Committee in its meeting held on 28.07.2023 had taken a conscious decision for cancellation of the process. Though the cancellation notice also refers to Clause-26 of Section (III) which gives the power to the authorities to cancel authorities to reserve to accept or reject any bid and to annul the bidding process and reject all bids at any time prior to contract award without incurring any liability, this Court is of the view that though such Clause may be there in a tender document, resorting to such powers without any reason may not be held to be justified in all conditions. At the same time, the instant case is not one where the bids of the petitioners have been rejected per se but the entire tender process has been cancelled. There is a huge difference in the two situations of rejecting one bid of a party and cancellation of the process as a whole. This Court has also noted that such cancellation was even prior to the technical evaluation. Under those

circumstances, the right of the petitioners to institute the present challenge itself becomes questionable. Accepting such challenge would be in the realm of speculation as a party has, at first to overcome the technical evaluation and thereafter emerge as the L1 bidder and only then, a challenge may be maintainable. However, in the instant case, the process had not been started and therefore this Court is inclined to accept the submission made on behalf of the respondent authorities that no rights, whatsoever have accrued upon the petitioners.

24. The learned Standing Counsel has fortified his argument by citing the case of **CWE-SOMA** (supra). For ready reference, the relevant paragraph is extracted herein below:-

“13. In case of a tender, there is no obligation on the part of the person issuing tender notice to accept any of the tenders or even the lowest tender. After a tender is called for and on seeing the rates or the status of the contractors who have given tenders that there is no competition, the person issuing tender may decide not to enter into any contract and thereby cancel the tender. It is well settled that so long as the bid has not been accepted, the highest bidder acquires no vested right to have the auction concluded in his favour.”

25. As regards the work done through NERAMAC, though this Court has noticed that the quantity is less, NERAMAC being an instrumentality of the Centre and an empanelling agency and also taking into account the urgency expressed as the sowing seasons were running out, this Court is not inclined to endorse the contention made on behalf of the petitioners. This Court has further noticed that though *mala fide* has been alleged, no individual by name has been made party and therefore such allegations have to be termed as vague. This Court has also noticed that there would be no embargo upon the petitioners to submit their bids in subsequent process of tender for similar supplies.

26. As regards, the case laws relied upon on behalf of the petitioners, this Court has noticed that facts are different. On the point of a clause to reject any tender, the same has been adequately explained in the case of ***Dinesh Engineering*** (supra) itself by the Hon'ble Supreme Court in the following manner:-

*“ 15. Coming to the second question involved in these appeals, namely, the rejection of the tender of the writ petitioner, it was argued on behalf of the appellants that the Railways under clause 16 of the Guidelines was entitled to reject any tender offer without assigning any reasons and it also has the power to accept or not to accept the lowest offer. We do not dispute this power provided the same is exercised within the realm of the object for which this clause is incorporated. This does not give an arbitrary power to the Railways to reject the bid offered by a party merely because it has that power. This is a power which can be exercised on the existence of certain conditions which in the opinion of the Railways are not in the interest of the Railways to accept the offer. No such ground has been taken when the writ petitioner's tender was rejected. Therefore, we agree with the High Court that it is not open to the Railways to rely upon this clause in the Guidelines to reject any or every offer that may be made by the writ petitioner while responding to a tender that may be called for supply of spare parts by the Railways. Mr. Iyer, learned senior counsel appearing for the EDC, drew our attention to a judgment of this Court in *Sterling Computers Ltd. etc. v. M/s. M & N Publications Ltd. & Ors.* (1993 1 SCC 445) which has held :*

"Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive."

27. Further, the instant case is not with regard to rejection of a particular bid, but cancellation of the entire tender process as such.

28. With regard to the case of ***Sushila Chemicals*** (supra), there is absolutely no dispute to the fact regarding the powers of a High Court under article 226 of the Constitution of India to entertain a petition concerning a contract matter if there is violation of Article 14 of the Constitution of India and inappropriate cases where in the impend suffers from legal malice.

29. Shri Khataniar, the learned counsel for the petitioners has given much emphasis on the requirement of following the Act and the Rules. There cannot be any dispute with the proposition that the supplies of similar nature which are governed by the Act of 2017 and the Rules of 2020 are to be undertaken strictly in accordance with the Rules. Therefore, while the impugned challenge is held to be without any merits, it is directed that all future process undertaken by the Directorate for supply of similar natures are to be done strictly in accordance with the Act and the Rules governing the fields. This Court also gets support from the case of ***Karnataka Commercial*** (supra) cited on behalf of the parties.

30. Both the writ petitions are accordingly disposed of.

31. No order as to cost.

32. The records are returned herewith to the learned Standing Counsel.

JUDGE

Comparing Assistant