

GAHC010198612023



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

Case No. : WP(C)/5195/2023

M/S NIHARIKA ENTERPRISES
34, SOUTH SARANIA MAIN ROAD, NEAR SHIV MANDIR, ULUBARI,
GUWAHATI-781007, REPRESENTED BY ITS PROPRIETOR SRI SATYABRATA
DEVA MISHRA, S/O LATE MAHADEV MISHRA, AGED ABOUT 54 YEARS,
R/O 34, SOUTH SARANIA MAIN ROAD, NEAR SHIV MANDIR, ULUBARI,
GUWAHATI-781007

VERSUS

THE STATE OF ASSAM AND 4 ORS.
REPRESENTED BY THE PRINCIPAL SECRETARY, HEALTH AND FAMILY
WELFARE DEPARTMENT, 3RD FLOOR, CM BLOCK, ASSAM SECRETARIAT,
DISPUR, GUWAHATI-6

2:THE DIRECTOR OF MEDICAL EDUCATION
ASSAM
SIXMILE
KHANAPARA
GUWAHATI-22

3:THE PRINCIPAL-CUM-CHIEF SUPERINTENDENT
TEZPUR MEDICAL COLLEGE AND HOSPITAL
TEZPUR
BIHAGURI-784010
ASSAM

4:THE MEDICAL SUPERINTENDENT
TEZPUR
MEDICAL COLLEGE AND HOSPITAL
TEZPUR
BIHAGURI-784010
ASSAM

5:THE TENDER EVALUATION COMMITTEE
TEZPUR MEDICAL COLLEGE AND HOSPITAL
TEZPUR
BIHAGURI-784010
ASSA

BEFORE

HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

For the petitioner : Mr. I. Choudhury, Sr. Advocate,
Mr. S. Biswakarma, Advocate
For the respondents : Mr. B. Gogoi, SC
Date of hearing & Judgment : 18.03.2024

JUDGMENT AND ORDER

Heard Mr. I. Choudhury, learned Senior Counsel, assisted by Mr. S. Biswakarma, learned counsel for the petitioner. Also heard Mr. B. Gogoi, learned Standing Counsel, Health & Family Welfare Department, appearing for all the respondents.

2. The petitioner is aggrieved with the rejection of his bid amount, on the ground that he had not submitted the IT return for the assessment year 2022-2023, in terms of the tender condition.

3. The petitioner's case in brief is that a tender notice was issued on 01.08.2023 by the Tezpur Medical College & Hospital, for supply of stationary items and 16.08.2023 was the last date for submission of bids. The tender was to be opened on the same date, i.e., 16.08.2023 at 2 P.M.

4. The document required to be submitted as per the Annexure 1 of the tender notice included at Serial Nos. 3 and 7 as follows:-

“3. I.T. Clearance Certificate/I.T. Return of last assessment year and PAN card (photocopy duly attested.)

7. Financial Statement of last 3 years from C.A. is to be enclosed.”

5. At the time of opening of the tender in the presence of the authorized representative of the petitioner, an objection was raised by the respondent authorities that the petitioner had not submitted the IT return for the assessment year 2023-2024 along with the tender documents. The petitioner thereafter immediately submitted a letter dated 16.08.2023 at 4.20 P.M. to the respondent authorities, stating that the question of filing the IT return for the assessment year 2023-2024 did not arise, in terms of Section 44 AB(a) read with Explanation 2 of Section 139 of the Income Tax Act, 1961 (in short, 'the Act, 1961').

6. Subsequent to the above facts, the petitioner was informed, vide letter dated 07.09.2023 issued by the respondent, that his bid had been rejected, on the ground that the petitioner had not submitted the IT return for the assessment year 2023-2024, which was a requirement as per the list of documents enumerated in the tender notice.

7. The petitioner's counsel submits that no specific years for filing Income Tax Returns were mentioned in the Tender Notice. Further in terms of Section 44 AB(a) read with Explanation 2 of Section 139 of the Act, 1961, the due date for submitting the return of income for auditing the same was 31st day of October

of the assessment year, as the petitioner's gross receipts was over Rs. 1 Crore for the year ending 31.03.2022. As such, there was no opportunity for the petitioner to have submitted the IT return for the year 2022-2023, in terms of the tender notice dated 06.08.2023. Thus, the respondents could not insist upon early filing of an audited return, when Explanation 2 of Section 139 of the Act, 1961 provided the time for filing an Income Tax Return. He accordingly submits that the rejection of the petitioner's bid by the respondent authorities and any document issued by them in that regard should be set aside. Further, the petitioner's bid should be considered to have been submitted in terms of the conditions of the tender notice and his bid should be considered to be a valid bid. He submits that the State respondents cannot apply a hidden criterion at the time of consideration of the bids of the tenderers, when the said criterion was never published or made known to the bidders. In this respect, he has relied upon the judgment of the Supreme Court in the case of ***Dutta Associates Pvt. Ltd. -vs- Indo Merchatiles Pvt. Ltd. and others*** reported in ***(1997) 1 SCC 53***.

8. Mr. B. Gogoi, learned Standing Counsel, Health & Family Welfare Department submits that the tender notice clearly required the petitioner to submit IT Return Certificates for the last 3 years, which would include the Income Tax Return for the year 2022-2023. He submits that just because the provision of the Income Tax Act allowed the petitioner to submit his IT return for auditing till the 31st day of October of the assessment year, the same did not mean that the petitioner could not have submitted his IT return at an earlier point of time, thereby enabling the petitioner to submit his audited IT return for the year 2022-2023. He submits that the challenge to be made in a tender is

very limited and only the lawfulness of a decision can be questioned, not the soundness of the decision. In this respect, he has relied upon the judgment in the case of ***Central Coalfields Limited -vs- SLL-SML (Joint Venture Consortium) and others*** reported in ***(2016) 8 SCC 622***. He further submits that in terms of the judgment of the Supreme Court in the case of ***N.G. Projects Limited -vs- Vinod Kumar Jain and others*** reported in ***(2022) 6 SCC 127***, the question whether a bidder satisfies the tender condition, is primarily based upon the satisfaction of the authorities inviting the bids. As the respondents have taken a decision that the petitioner's bid did not conform to the tender conditions, the said decision cannot be questioned by way of judicial review.

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

10 The checklist, which is a part of the tender notice, requires that the IT return of the last assessment year should also be enclosed along with the tender document. At the outset, it may be stated here that there is no specific years mentioned in the Tender Notice, for which the IT Return Certificates for the last 3 years have to be provided. The IT return of the last assessment year which has to be submitted, has also not been specified in the tender notice.

11. The petitioner's gross receipts in terms of the Trading & Profit & Loss Account for the year ending 31.03.2022 issued by the Chartered Accountant on 07.10.2022, shows that the gross receipts amounted to Rs. 1,73,05,057.31.

12. Section 44 AB(a) read with Explanation 2 of Section 139 of the Act, 1961 provides that every person, carrying on business shall, if his total sales, turnover

or gross receipts, as the case may be, in business, exceed or exceeds 1 Crore Rupees in any previous year, shall get his accounts of such previous year audited by an Accountant before the specified date and furnish by that date, the report of such audit in the prescribed form duly signed and verified by such Accountant and setting forth such particulars as may be prescribed.

13. Section 139 of the Income Tax Act, 1961 provides the procedure for assessment of the return of income of a company or a firm or an individual and states that the said company, firm or individual shall, on or before the due date, furnish a return of the income in the prescribed form and verified in the prescribed manner. Explanation 2 of Section 139 of the Act, 1961 provides that the due date in terms of Section 139(1) of the Act shall be the 31st day of October of the assessment year.

14. In the present case, as the petitioner's gross receipts for the year ending 31.03.2022 crossed Rs.1 crore, the petitioner had until 31st day of October, 2023 to submit his return on income for the year 2022-2023 to the Income Tax authorities, which was to be audited in terms of Section 44 AB (a) of the Act, 1961. However, as the petitioner's Return on income for the year 2022-2023 had not been audited for the assessment year 2023-2024, the petitioner had submitted his income tax return for the assessment years 2020-2021, 2021-2022 and 2022-2023.

15. In the case of ***Dutta Associates Pvt. Ltd. (supra)***, the Supreme Court has held that "*whatsoever procedure the Government proposes to follow in accepting the tender must be clearly stated in the tender notice. The consideration of the tenders received and the procedure to be followed in the*

matter of acceptance of a tender should be transparent, fair and open.”

16. In the case of ***N.G. Projects Limited (supra)***, the Supreme Court has held that the satisfaction whether a bidder satisfies the tender condition is primarily upon the authorities inviting the bids.

17. In the case of ***Central Coalfields Limited (supra)***, the Supreme Court has held that whether a term of a notice inviting tender is essential or not is a decision to be taken by the employer, which should be respected. It further held that even if a term of the NIT is essential, the employer has the inherent authority to deviate from it provided that the deviation is made applicable to all the bidders. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. It further held that though lawfulness of a decision can be taken on very limited grounds, the soundness of a decision taken by the authorities in a tender process cannot be questioned.

18. The clauses of the tender notice requiring the bidders to submit their IT Return for the last Assessment Year and the Financial Statement of last 3 years from the Chartered Accountant have been submitted by the petitioner. The only problem that has arisen is that the State respondents wanted the IT Return for the Assessment Year 2023-2024. This Court is well aware of the judgments of the Supreme Court, which is to the effect that the decision making process of the employer or the owner of project in accepting or rejecting the bid of a tenderer should not be interfered with, unless the decisions are found to be arbitrary and irrational. A mere disagreement with the decision making process or the decision of the Administrative Authority is no reason for a Writ Court to interfere in a tender proceeding, as the author of a tender document is the best

person to understand and appreciate it's requirement and interpret it's documents.

19. The problem that however arises in the present case is that the respondents have not stated clearly, the specific years of the Financial Statement that were required by the tenderers. In the present case, the petitioner whose gross receipts was over Rs.1 crore, was required to have his Income Return audited, in terms of Section 44 AB(a) read with Explanation 2 of Section 139 of the Act, 1961. When the statutory law provides that the petitioner had until 31st October of the Assessment Year to have his return on income audited, there was no infirmity with the petitioner not submitting his Income Tax Return for the period prior to 2022-2023, as the period for submitting the same for auditing had not expired as per the Act, 1961. This is purely due to the fact that the State respondents in the tender notice have not clearly specified the years for which the IT Returns were required to be submitted by the tenderers.

20. In the case of ***Dutta Associates Pvt. Ltd.(supra)***, the respondents had called for tenders for wholesale supply of rectified spirit. However, the "viability range" had not been specified in the tender notice. The exercise of determining the "viability range" was looked into by the State respondents only after the tenders had been submitted by the tenderers. The Supreme Court held that the exercise of determining the "viability range", only after submission of the tenders, was unfair and opposed to the Government norms which the Government should follow in matters of tender, i.e. openness, transparency and fair dealing. In the present case also, the State respondents have not stated the years for which the IT Return was to be submitted by the tenderers. The

respondents have also called for Financial Statements for the last 3 (three) years from the Chartered Accountant, without specifying the years required in terms of the Act, 1961. Those tenderers having gross receipts of over Rs.1 crore would require their Income Tax Return to be audited, while those having less than Rs.1 crore do not require their return of income to be audited. Thus, it was imperative for the State respondents to specify the years for which a document was required, as there were two classes of persons. Not having done so, this Court is of the view that in terms of the judgment of the Supreme Court in ***Dutta Associates Pvt. Ltd. (supra)***, the respondents have not been transparent, fair and open, as the respondents should have made a clarification/specification in the tender notice.

21. In view of the reasons stated above, this Court is of the view that the petitioner's bid would have to be considered to be valid. In the alternative, the respondents should give an opportunity to the petitioner to submit the IT Return for the Assessment Year 2023-2024. The respondents shall thereafter consider the petitioner's bid along with all other valid bidders. Consequently, the impugned letter dated 07.09.2023 is set aside.

22. The writ petition is accordingly allowed.

JUDGE

Comparing Assistant