

GAHC030004702024



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

Case No. : WP(C)/76/2024

Prasad and Company (Project Works) Pvt. Ltd. and Anr.
R/b its Executive Director S. Mani Raju
Having its registered office at 6-3-871/3, Snehalata, Greenlands Road, Begumpet,
Hyderabad-50001, Telengana, India

VERSUS

National Building Construction Corporation Limited (NBCC) India Ltd. and 7 Ors.
R/b its Chairman cum Managing Director, having its registered office at NBCC
Bhawan, 2nd Floor, Lodhi Road, New Delhi-110003

Advocate for the Petitioner : Mr. H. Buragohain

Advocate for the Respondent : Mr. J Patowary

Linked Case : WP(C)/77/2024

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Advocate for the Petitioner : Mr. H. Buragohain
Advocate for the Respondent : Ms. Aswini Thakur for R1-6

:::B E F O R E:::

HON'BLE MR. JUSTICE NELSON SAILO

Date of hearing : 13.08.2024
Date of Judgment : 22.08.2024

J U D G M E N T & O R D E R (CAV)

This Order will dispose of both the writ petitions. The parties in both the writ petitions are one and the same except Surya Roshini Ltd., who was found to be L2 in the price bid is not a party in the second writ petition filed by the petitioners. The writ petitions were initially filed in the Principal Seat at Guwahati but later on they were transferred to the Aizawl Bench of the Gauhati High Court and renumbered. The grievance projected by the petitioners is that the Notice Inviting e-Tender (NIT) dated 10.11.2023 has been arbitrarily and illegally settled in favor of the respondent No. 8 in violation of the terms and conditions of the NIT and that the petitioners being the third lowest tenderers and duly qualified to undertake the

work in terms of the NIT should be allotted the work.

[2.] Brief facts of the case is that the respondent Nos. 1 to 6 floated NIT dated 10.11.2023 for Supply, Fixing, Testing and Commissioning (SITC) of LED Flood Light in Dampa Tiger Reserve Forest (DTRF) area from near BP No. - 2313 to near 2305/2-RI along Indo-Bangladesh Border in Mizoram State for approximate length of 60 Km. The estimated cost of the work was Rs. 53,93,97,046.00 which is divided into two (2) parts namely, Part-A and Part-B. Part-A is for the execution of the work amounting to Rs. 47,57,00,082.00 and Part-B which is for the maintenance and amounting to Rs. 6,36,96,964.00. The completion period for the project is 15 months and the time given for operation of maintenance after handing over the project is 12 months. As per the NIT, the last date and time of submission of online tender was up to 26.12.2023 by 11 AM (IST). The technical bid was to be opened at 11:30 AM of 26.12.2023 and the date and time of opening of the financial bid was to be intimated later on.

[3.] Three (3) firms including the writ petitioners participated in the tender process and submitted their respective bids. The technical bid was opened on 26.12.2023 as was scheduled and it was then that, the petitioners came to learn about the deficiencies in the technical bid of the respondent No. 8. The petitioners therefore submitted their representations before the respondent authorities but despite assurance given to them as the grievance projected were not addressed

and the respondent authorities proceeded to open the price bids on 12.01.2024. As per the price bids offer, the petitioners were found to be L3 while the private respondent Nos. 7 & 8 were placed at L1 and L2 respectively. Since the grievance projected by the petitioners was not addressed, the petitioners filed WP(C) No. 434/2024 in the Principal Seat of this Court which on transfer has been renumbered as WP(C) No. 76/2024. During the pendency of the writ petition, since the respondent authorities have issued the Letter of Award (LOA) in favor of the respondent No. 8 on 30.01.2024, the petitioners filed their second writ petition i.e., WP(C) No. 787/2024 which again on transfer to the Aizawl Bench has been renumbered as WP(C) No. 77/2024. This Court on 25.01.2024 while issuing notice of motion declined to pass any interim order but however observed that the work which was issued to the respondent No. 8 shall be subject to the outcome of the writ petition. Since the respondent No. 7 despite being L1 was not issued the LOA, the respondent No. 7 has failed to appear despite notice in WP(C) No. 76/2024 and consequently was struck off from the arrayed respondents vide order dated 09.04.2024 on the prayer of the counsel for the petitioners.

[4.] Mr. H. Buragohain, learned counsel for the petitioners submits that the main grievance of the petitioners is that the respondent No. 8 was awarded the LOA despite not having the work experience of one similar work of the value which is not less than 80% of the estimated cost put to tender in the instant case. He

submits that as per the calculation of the official respondents themselves, the respondent No. 8 was required to have one work executed of atleast 43.15 crores in order to be eligible to be considered for awarding the LOA. He submits that the admitted position is that the respondent No. 8 has only completed work valued at Rs. 38,34.99 lakhs while the respondent No. 8 was required to have executed a work valued atleast amounting to Rs. 43.15 crores. Despite the deficit and despite having failed to fulfill the criteria provided in Clause A(iii)(a) of the NIT, the value of work executed by the respondent No. 8 was enhanced at a simple rate of 7% per annum calculated from the date of completion of the previous work till the last date of submission of the tender in terms of Clause A(iii)(b). The learned counsel submits that unless the stipulation of Clause A(iii)(a) is satisfied, the benefit of Clause A(iii)(b) cannot be given. Referring to the certificate issued to the respondent No. 8 by the Directorate of Municipal Administration, Govt. of Assam dated 24.08.2021, which is annexed to the counter affidavit of the respondent Nos. 1 to 6 as Annexure-2, the learned counsel submits that the respondent No. 8 was said to have undertaken the work which was of the tender value of Rs. 39,07,34,820.00 and the actual value of work completed was Rs. 38,34,98,990.00. It is therefore clear that the respondent No. 8 has failed to meet the requirement of Rs. 43.15 crores as stipulated under Clause 2.0A(i)(c) of the NIT. Therefore, the LOA issued in favor of the respondent No. 8 should be set aside.

[5.] The learned counsel further submits that on the maintainability of the writ petitions, there can be no doubt that they are maintainable. He submits that as per the NIT, the tenders were to be submitted online by the bidders interested to participate and that a hard copy of the Earnest Money Deposit if submitted in the form of Bank Guarantee was to be submitted in original. He submits that as per the NIT, the work to be executed is along the Indo-Bangla Border in the State of Mizoram and further, as per the LOA dated 30.01.2024, the respondent No. 8 has been asked to submit the performance guarantee along with other documents in the Regional Office of the respondent Nos. 1 to 6 at Guwahati, Assam. Therefore it is clear that the cause of action has arisen within the jurisdiction of this Court. The respondents therefore cannot raise any objection on the maintainability of the writ petition for want of jurisdiction. In support of his submission, the learned counsel relies upon the case of *Nawal Kishore -Vs- Union of India & Ors. (2014) 9 SCC 329* and *Shanti Devi Alias Shanti Mishra -Vs- Union of India & Ors. (2020) 10 SCC 766*. The learned counsel thus submits that the writ petitions should be allowed as prayed for and the LOA issued in favor of the respondent No. 8 should be set aside.

[6.] Ms. J.R Thakur, learned counsel for the respondent Nos. 1 to 6 on the other hand submits that the writ petition is not maintainable since as per the agreement entered between the parties, the courts in Delhi alone will have the jurisdiction to

deal with matters arising out of the claim made by the parties. She submits that the agreement was signed in Delhi between the parties and that as per Section 9 of the integrity pact made between the parties, the agreement entered upon is subject to Indian law and place of performance and jurisdiction is the registered office of the NBCC in New Delhi. Therefore, the writ petitions should be dismissed even for want of jurisdiction alone. In support of his submission, the learned counsel relies upon the case of *EXL Careers & Another -Vs- Frankfinn Aviation Services Private Limited*, (2020) 12 SCC 667 and *Simplex Projects Ltd. Through its Director 19, Nellie Sengupta Sarani -Vs- National Sports University (NSU), through its Vice Chancellor & Another*, 2022 SCC OnLine Mani 532.

[7.] The learned counsel on merits submits that although the respondent No. 8 has the experience of performing a similar work for the value of Rs. 3,834.99 lakhs but the respondent No. 8 on the basis of the calculation as per Clause 2.0A(iii)(b) of the NIT is enhanced to the value amount of Rs. 4,567.86 lakhs which can be rounded up to Rs. 45.68 crores. Therefore, the respondent No. 8 was accordingly issued the LOA. The learned counsel submits that Clause (a) & Clause (b) of Clause 2.0A(iii) are to be read separately and not conjointly. The learned counsel also submits that the scope of judicial review in contract matters such as the present one is limited and that as the work performed is a sensitive one and involved the security of the country besides the respondent No. 8 being in the midst of

executing the work for the last eight (8) months now, Court may therefore not interfere in the matter and dismiss the writ petitions. In support of the submissions, the learned counsel relies upon the case of *Tata Motors Limited -Vs- Brihan Mumbai Electric Supply & Transport Undertaking (BEST) & Ors. 2023 SCC OnLine 671*.

[8.] Mr. K.N. Choudhury, learned Senior Counsel appearing for the respondent No. 8 submits that the case of the petitioners is that the respondent No. 8 has failed to fulfill the eligibility criteria by not submitting the TDS certificates in support of its claim on past experience. He submits that a bare perusal of Clause 2.0A(iii)(b) of the NIT would go to show that the value of the executed work can be enhanced at the rate of 7% per annum from the date of completion of the previous work up to the last date of submission of the present tender. On that basis, the value of work executed by the respondent No. 8 has been enhanced to Rs. 45.69 crores. He submits that the same is not a benefit given to the respondent No. 8 but it is a condition of the tender. Besides, the petitioners have not challenged this enabling clause in their writ petitions and therefore they cannot raise this issue without any pleadings to that effect. In so far as the TDS certificates are concerned, since the respondent No. 8 has the experience of work with the Directorate of Municipal Administration, Govt. of Assam, certificates already submitted by the respondent No. 8 in this regard will suffice as provided under Clause 2.0A(ii) of the NIT. The

learned Senior Counsel submits that it is not even the case of the petitioners that the respondent No. 8 has no financial strength to execute the work and therefore, the writ petitions are only misconceived and without any basis. In so far as the application of Clause 2.0A(iii)(b) of the NIT is concerned, the learned Senior Counsel submit that the same is independent of Clause 2.0A(iii)(a) and the same has rightly been applied separately by the official respondents. He therefore submits that the writ petitions are without any merit and should be dismissed.

[9.] I have heard the submissions made by the learned counsels for the rival parties and I have perused the materials available on record. Since the respondents have raised the issue of maintainability of the writ petitions, the same is being considered before entering into the merits of the case. According to the respondents, the respondent Nos. 1 to 6 in particular, the NIT was invited from the Headquarters in Delhi although the tender was to be submitted online. Pursuant to the opening of the technical bid and the financial bid, the respondent No. 8 was selected for the work and that an agreement was signed between the parties concerned in Delhi. Further, Cause 83 of the GCC and Section of the Integrity Pact provides that in case of dispute between the parties, the courts in Delhi will have the jurisdiction. However, from the LOA issued to the respondent No. 8, it is seen that the respondent Nos. 1 to 6 have their Regional Office in Guwahati, Assam and the respondent No. 8 has been directed to contact the Chief General Manager

(Engineering) of the respondent corporation in Guwahati for carrying out all the requirements and formalities in settling the work in favor of the respondent No. 8. It may also be seen that the work to be executed is in the State of Mizoram, bordering the country of Bangladesh for an approximate length of 60 km.

[10.] The Apex Court in the case of *Nawal Kishore Sharma* (supra) while examining the powers of the High Court to issue certain writs under Article 226(2) of the Constitution of India held that on a plain reading of the said provision, it is clear that the High Court can issue a writ when the person or the authority against whom the writ is issued is located outside its territorial jurisdiction, if the cause of action wholly or partially arises within the court's territorial jurisdiction. Cause of action for all intent and purpose in respect of this Article must be assigned the same meaning as envisaged under [Section 20\(c\)](#) of the Code of Civil Procedure.

[11.] The Apex Court in *ONGC -Vs- Utpal Kumar Basu, (1994) 4 SCC 711* held that High Court can exercise the power to issue directions, orders or writs for the enforcement of any of the fundamental rights conferred by Part III of the Constitution or for any other purpose if the cause of action, wholly or in part, had arisen within the territories in relation to which it exercises jurisdiction, notwithstanding the fact that the seat of the Government or authority or the residence of the person against whom the direction, order or writ is issued is not within the said territories.

[12.] In *Chand Kour -Vs- Pratab Singh*, reported in *ILR (1889) 16 CAL 98*, Lord Watson said that the cause of action has no relation whatsoever to the defence upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action or in other words, to the media upon which the plaintiff asks the court to arrive at a conclusion in his favour.

[13.] The Apex Court in *Kusum Ingots & Alloys -Vs- Union of India*, (2004) 6 SCC 251 reiterated the meaning of cause of action to mean that even if a small fraction of cause of action accrues within the jurisdiction of the Court, the Court will have jurisdiction in the matter. The aforesaid decisions have been taken into account by the Apex Court subsequently in *Shanti Devi Alias Shanti Mishra* (supra).

[14.] From what has been stated above, it is only clear that a part of the cause of action has arisen within the jurisdiction of this Court although the agreement between the parties concerned may have been made in Delhi where the Headquarters of the respondent corporation is also located. The learned counsels for the official respondents have relied upon the Apex Court decision in *EXL Careers & Anr.* (supra) and the decision of the Manipur High Court in *Simplex Projects Ltd.* (supra) wherein the High Court had relied upon the decision of the Apex Court rendered in *Swastik Gases Private Limited -Vs- Indian Oil Corporation Limited*, (2013) 9 SCC 32. However, one common feature which can be noticed in these decisions is that the disputes were between the parties who had entered into

an agreement. The Apex Court held that although in the facts of the case, the cause of action may have arisen in more than one place but since it was agreed upon by the parties through an agreement to oust the jurisdiction of one of the Courts and therefore, the parties in disputes will have to approach the court concerned. In other words, when the decision of a court is ousted by way of an agreement, the parties would have to approach the court which has the jurisdiction in terms of the agreement. In the present case, it may be seen that the agreement was reached between the official respondents and the respondent No. 8 giving the jurisdiction of the courts in Delhi in case of disputes. However, the petitioner is not a party to the agreement and therefore, in the considered view of this Court, the agreement is not binding upon the petitioner and therefore, the writ petitions will be maintainable.

[15.] Coming to the merit of the case, the main controversy lies in the application of the minimum eligibility criteria provided under Clause 2.0 of the NIT dated 10.11.2023. The relevant portion of the said provision may be abstracted hereunder:-

“2.0 MINIMUM ELIGIBILITY CRITERIA:

The interested bidders should meet the following minimum qualifying criteria:

A. Work Experience:

i) Experience of having successfully completed similar works during the last 7 years

ending initial stipulated last date of submission of tenders as per NIT.

a. Three similar works each costing not less than 40% of the estimated cost put to tender;

OR

b. Two similar works each costing not less than 50% of the estimated cost put to tender;

OR

c. One similar work costing not less than 80% of the estimated cost put to tender.

“Similar works” shall mean “Electrical works pertaining to Flood Lightning/Township Lightning/Street Lightning/Highway Electrical works/Railway Electrical works.”

ii) The past experience in similar nature of work should be supported by certificates issued by the client's organization. In case the work experience is of Private sector the completion certificate shall be supported with copies of Letter of Award and copies of Corresponding TDS Certificates. Value of work will be considered equivalent to the amount of TDS Certificates.

iii) (a) The value of executed works, for the purpose of this clause shall also include the value of any materials (such as cement, steel etc.), services (scaffolding, batching-plant, other machinery etc.), which have been supplied by client/employer free of cost/on discounted price to the contractor, and which have not been already included in the 'value of works executed' that is reflected/declared on the relevant 'experience certificate' or 'Letter of Award'. Such exclusion shall be specifically mentioned on the Letter of Award. 'Experience Certificate' and the 'value of free supplies' shall be separately certified by the employer, or in cases where the employer is a private entity, by

a practicing cost/chartered accountant (holding valid certificate of practice). However, work executed as labour contract shall not be considered.

(b) The value of executed works shall be brought to the current level by enhancing the actual value of work done at a simple rate of 7% per annum, calculated from the date of completion of previous day of initial stipulated last date of submission of tenders."

[16.] From the above abstract, it may be seen that the interested bidders are required to have the minimum qualifying criteria towards their work experience. The respondent No. 8 admittedly has relied upon Clause 2.0 A(i)(c) by claiming to have executed one similar work costing not less than 80% of the estimated cost put to tender as per the NIT dated 10.11.2023. The official respondents in their counter affidavit have calculated the minimum work value under the said provision as Rs. 43.15 crores. However, the respondent No. 8 had produced a certificate showing the value of work completed as Rs. 38,34,98,990.00. In order to bring the same to the current level i.e., Rs. 43.15 crores, the official respondents have enhanced the value amount to Rs. 45.68 crores by applying Clause 2.0 A(iii)(b) of the NIT. According to the respondents, the provisions of Clause 2.0 A(iii)(a) is independent to Clause 2.0 A(iii)(b). However, upon a careful reading of the two provisions, it only transpires that both the provisions fall under Clause (iii) of Clause 2.0 A and are to be read conjointly. In other words, in order to get the benefit of Clause (iii)(b), the tenderer concerned will have to satisfy the terms and prescription of Clause (iii)(a). There are no materials on record to show that the

respondent No. 8 has satisfied the prescription of Clause (iii)(a). Therefore, the official respondents ought to have taken the same into consideration before awarding the LOA to the respondent No. 8. The error committed appears to be writ large.

[17.] Notwithstanding the above observation and finding of this Court, it has to be kept in mind that the courts in commercial matters or in contracts involving technical issues do not have the necessary expertise to deal with such matters. Therefore, the courts discretionary powers are to be exercised with a great deal of restraints and caution. The Apex Court in *Jagdish Mandal -Vs- State of Orissa, (2007) 14 SCC 517* in the given facts of that case held that while invoking the power of judicial review in matters relating to tenders or award of contracts, certain special features should be borne in mind that evaluations of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters. if the decision relating to award of contract is bona fide and is in public interest, courts will not interfere by exercising powers of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer is made out. Power of judicial review will not be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The said decision was adopted and relied upon by the Apex Court in a subsequent decision rendered in *Tata Motors Limited* (supra).

[18.] The admitted position at this stage is that pursuant to the issuance of the LOA to the respondent No. 8, the respondent No. 8 is in the midst of executing the work for the last eight (8) months. As per the NIT dated 10.11.2023, the time for completion of the project is 15 months and thereafter, once the work is handed over, the period for operation and maintenance would be 12 months. The petitioners have tried to project that undue advantage and favoritism has been given and shown to the respondent No. 8. However, the essential ingredients for examining as to whether there was any malafides in the selection of the respondent No. 8 appears to be missing. From an overall consideration of the matter in its entirety, this Court is of the view that it would not be in the interest of the public if the on-going work is interrupted particularly when the work is more than half way through and also having regard to the involvement of the nation's security especially in recent times. This Court therefore is not inclined to interfere with the LOA issued to the respondent No. 8. It would however be open for the petitioners to claim damage compensation by approaching the appropriate forum in accordance with law. The writ petitions are thus dismissed by leaving the parties to bear their own cost.

JUDGE

Comparing Assistant