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

Case No. : WP(C)/5701/2021

M/S LEON BARUAH AND ASSOCIATES AND ANR
A PROPRIETORSHIP FIRM HAVING ITS REGD. OFFICE AT CHROMA
HYDROPONIC NURSERIES, BHOGA ALI, MOHANAGHAT, P.O.
MOHANAGHAT, P.S. AND DIST.- DIBRUGARH, PIN- 786008, ASSAM, REP. BY
ITS PROPRIETOR THE PETITIONER NO.2 SHRI LEON BARUAH

2: LEON BARUAH
S/O- SHRI CHIRANJEET BARUAH
PROPRIETOR OF M/S LEON BARUAH AND ASSOCIATES
R/O- OPP. BLOCK NO.12 CHIRINGAON RAILWAY COLONY
P.O. C R BUILDING
P.S. AND DIST.- DIBRUGARH
PIN- 786003
ASSA

VERSUS

THE STATE OF ASSAM AND 5 ORS
REP. BY THE COMM. SECY., DEPTT. OF ENVIRONMENT AND FOREST

2:THE PRINCIPAL CHIEF CONSERVATOR OF FOREST AND HEAD OF
FOREST FORCE
ARANYA BHAWAN
PANJABARI
GHY-37

3:THE CONSERVATOR OF FOREST
EASTERN ASSAM CIRCLE
JORHAT

4:THE DIVISIONAL FOREST OFFICER
DIBRUGARH DIVISION
P.O. CR BUILDING
DIST.- DIBRUGARH



ASSAM
PIN- 786003

5:TECHNICAL BID EVALUATION COMMITTEE
REP. BY THE CHAIRMAN
THE CONSERVATOR OF FOREST

6:BISHWAJIT GOGOI
S/O-SRI MOHAN GOGOI
R/O-LEKAI THAKUR THAN
P.O-SESSA
P.S. AND DIST--DIBRUGARH
ASSAM
PIN-786003.

7:KHELAN GOGOI
S/O- SRI MOHAN GOGOI
R/O VILL.- JOKAI CHAMAGURI GAON
P.O.- KALIANI
P.S.- BORBARUAH
DIST.- DIBRUGARH
ASSAM
PIN- 786003

Advocate for the Petitioner : MR. B D DEKA

Advocate for the Respondent : SC, FOREST

BEFORE

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

Advocate for the petitioner : Shri BD Das

Advocate for respondents : Shri D. Das, Sr. Adv.
Shri S. Khound, R-6
Shri MP Sharma, R-7
Shri KP Pathak, SC-Forest



Date of hearing : 21.03.2023

Date of judgment : 05.06.2023

JUDGMENT & ORDER

The issue of maintaining transparency and fairness in matters of distribution of State largesse has once again been raised by means of the present writ petition. While the petitioner alleges that there has been gross violation of the established principles of law pertaining to distribution of State largesse, the version of the respondents is that no infirmity or illegality has been committed in the connected tender process and therefore there is no requirement of any interference by this Court in exercise of its powers of judicial review.

2. Before going to the issue which is required to be adjudicated, it would be convenient if the facts of the case are narrated in brief.

3. A Notice Inviting Tender dated 05.05.2021 was issued by the Forest Department for settlement of seven numbers of mineral concession areas for extraction of sand and ordinary clay. The area in serial no. 6 of the said notice namely, Khamtighat is connected with the present petition.

4. The petitioners contend that the petitioner No. 1 had participated in the said tender process and submitted its bid along with four numbers of other bidders. It is further stated that certain complaints were received by the Tender Committee on the aspect of mis-evaluation of the tender documents. Accordingly, the Tender Evaluation Committee conducted a fresh evaluation of the technical bids and prepared a fresh comparative statement on 12.07.2021. In the new evaluation, three bidders were found ineligible and accordingly disqualified and therefore, there remained two bidders including the petitioner No. 1, Firm. However, on 21.07.2021, the other technically

qualified bidder, namely, Shri Ranjan Dutta had withdrawn his tender and therefore the petitioner remained as the only technically qualified bidder.

5. It is the case of the petitioners that the bidding document itself contained a Clause being Clause No. 8 as per which a sole bidder could be given the offer at an amount that shall be greater than 200% of the reserved price and his initial price offered. However, in spite of the aforesaid provision by which the case of a sole bidder could be considered without compromising with the aspect of revenue, the tender was cancelled vide a notice dated 04.08.2021. The petitioners further submits that after the disqualification of the three bidders, six numbers of Members of the Legislative Assembly, Assam had written a letter to the Guardian Minister of the Dibrugarh district alleging certain anomalies in the tender process and the said complaints were forwarded by the Guardian Minister to the authorities for necessary action. The petitioners alleges that the impugned cancellation has been done only because of the fact that three bidders were held to be ineligible and on the intervention of certain MLAs, the entire process was cancelled so as to give a further chance to the ineligible bidders. Accordingly, the instant writ petition has been filed.

6. On the other hand, the projection made by the petitioners have been refuted by the respondent by stating that the cancellation has been done in accordance with law and in the interest of public. Certain other objections including the objection of waiver has been taken by the respondents.

7. I have heard Shri B. D. Deka, learned counsel for the petitioners. I have also heard Shri K. P. Pathak, learned Standing Counsel, Forest Department whereas the private respondent No. 6 is represented by Shri D. Das, the learned Senior Counsel assisted by Shri S. Khound. Shri M. P. Sharma, the learned counsel has appeared for the respondent No. 7.

8. Shri Deka, the learned counsel for the petitioners submits that the impugned action is absolutely unreasonable, arbitrary and opposed to the public interest. He also

submits that the action is in violation of the terms of the tender document.

9. The learned counsel submits that there was no basis for cancellation of the process which was initiated vide the NIT dated 05.05.2021 pertaining to the Khamtighat Mahal. While refuting the projection made on behalf of the authority that there was a situation of a single bid, he submits that after the fresh evaluation, two bidders were found to be eligible and, therefore, it cannot be said that a situation of one bidder had emerged. He submits that it is totally a different matter that the other technically qualified bidder Shri Ranjan Dutta had withdrawn his bid. It is also submitted that the tender process in question contains an inbuilt mechanism to deal with a situation wherein only one bidder is found eligible in the technical bid, even assuming that a situation of a single bid had arisen.

10. Referring to the tender document, more particularly Clause-8 A which is with regard to the first round of e-auction, the learned counsel submits that under the proviso to Sub-Clause-D, if only one bidder is found to be technically qualified than the bidder shall be made an offer to accept an amount that shall be greater of the 200% of the reserved price and his initial price offer. It is further provided that if the bidder accepts the offer, he shall be the preferred bidder and his price offer shall become the dead rent / contract money / permit money once he is declared as successful bidder. The learned counsel submits that vide a message sent via SMS, the petitioner No. 1 was informed regarding its qualification in the technical evaluation. However, vide the cancellation notice dated 04.08.2021, it was notified that the tender process was cancelled and the reasons cited was transparency of the entire process.

11. The learned counsel submits that vide communication dated 15.07.2021 issued by the Divisional Forest Officer, Dibrugarh Division, it transpires that initially an evaluation was done in which, 11 bidders had participated out of which 5 were found to be qualified. However, since certain errors were detected, a second evaluation was conducted in which out of the 11 bidders, only two bidders were found to be qualified.



12. The learned counsel submits that on 03.08.2021, the Divisional Forest Officer, Dibrugarh Division issued a communication to the Conservator of Forest, Eastern Assam Circle informing that the earlier Technical Bid Evaluation Report was cancelled. By the said communication, a fresh e-auction was recommended. The records further revealed that a communication dated 02.08.2021 was issued by the Addl. PCCF (SIO) to the Addl. PCCF (T) whereby a direction for cancellation of the tender process was issued and the matter be taken *de novo*.

13. The learned counsel, Shri Deka has submitted that the entire process is vitiated by bias and *mala fide* inasmuch as, the impugned action is an outcome of certain intervention by six MLAs for political interest. It is submitted that the intervention was by way of a letter written to the Guardian Minister by the six MLAs, which had also been annexed to the writ petition.

14. The learned counsel for the petitioners has also referred to an order dated 29.10.2021 passed by this Court in IA(C) No.1789/2021 which was filed as a fresh Notice Inviting Tender dated 08.10.2021 was issued. By the aforesaid order, this Court had however stayed the process.

15. The records also revealed that the respondent No. 6 had filed IA(C) No. 832/2022 for vacation of the aforesaid interim order dated 29.10.2021. It may be mentioned that both the respondent No. 6 and respondent No. 7 got themselves impleaded by filing separate Interlocutory applications being IA(C) No. 294/2022 and IA(C) No. 631/2022. Both the aforesaid respondents have pleaded that they were amongst the technically qualified bidders in the fresh NIT which has been stayed by this Court. They further submitted that the technical evaluation was already done which however did not proceed due to the stay order passed by this Court.

16. It is submitted on behalf of the petitioners that in view of the provisions made in the tender document, even assuming that it was a situation of a single bidder, without making an offer to the petitioner in terms of the tender clause, a fresh tender



process could not have been initiated.

17. Since an objection regarding waiver has been taken by the respondents in their affidavit, Shri Deka, the learned counsel for the petitioners had submitted that the said objection is not sustainable in law as the petitioner was not even aware regarding the outcome of the evaluation and it was only upon an application made under the RTI Act that he had come to know about such evaluation. Shri Deka, learned counsel affirmatively submits that the results of the evaluation was never uploaded and therefore there was no transparency in the matter. Accordingly, on 23.08.2021 he had applied for refund of the Earnest Money Deposit (EMD) and that by itself would not amount to waiving his right. He further submits that the second evaluation was also never published in the public domain.

18. At this stage, this Court deems it fit to record that the aforesaid submission regarding non-publication of the results of the evaluation has been admitted by Shri Pathak, the learned counsel for the Department.

19. Shri Deka, the learned counsel for the petitioners has also dealt with the objection taken by the respondents regarding the Clause in the tender document giving a right to the authorities to reject any bid, which is provided in Clause-13. He submits that the aforesaid Clause is a standard Clause and has to be read in a manner that the said Clause is required to be applied only if it passes the test of fairness and transparency.

20. Shri Deka, the learned counsel has also submitted that in fact the present was not even a case of a single bidder inasmuch as, along with the petitioner, there was another bidder, namely, Shri Ranjan Dutta, who was found to be technically qualified. In any case he submits that even if it is assumed that a situation of a single bidder had arisen, there was a mechanism in the interest of the revenue and without taking recourse to the said mechanism, the entire process of tender could not have been cancelled. He submits that the entire purpose of the provision is to take care of a



situation of a single bid to avoid a second round of evaluation and as well as to safeguard the revenue. He accordingly submits that the present is a fit case for intervention by this Court in exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India.

21. The learned counsel for the petitioner, Shri Deka has relied upon the case of Union of India and others versus ***Dinesh Engineering Corporation and another*** reported in ***(2001) 8 SCC 491***. In the said case, it has been laid down that a public authority should not have unfettered discretion, even in contractual matters, and in contracts having commercial element, even though some extra discretion is to be considered, those norms are bound to be followed which are recognized by Courts while dealing with matters pertaining to distribution of State largesse. It has further been laid down that the said requirement is necessary to avoid unreasonable and arbitrary decisions being taken by public authorities whose actions are amenable to judicial review. It has further it been stated that because an authority has certain elbow room available for use of discretion in accepting offer in contracts, the same will have to be done within the four corners of the requirement of law laid down in Article 14 of the Constitution of India.

22. Shri Pathak, learned Standing Counsel, Forest Department, at the outset has fairly submitted that the interim order was passed on 29.10.2021 which was a Friday and before the said order was passed, the technical evaluation were already done. However, on the next working day itself i.e. 01.11.2021, *status-quo* has been maintained. He submits that there was no intention to disregard any order of this Court.

23. Fully supporting the impugned action, the learned Standing Counsel submits that it is not the case of the petitioner that his bid was rejected. He clarifies that a situation had arisen where the tender process was required to be cancelled. He submits that the tender document itself makes it clear that the State Government / Competent



Authority had got the right to reject any bid as well as the right to cancel the tender process. He submits that the DFO, Dibrugarh Division vide communication dated 15.07.2021 to the Conservator of Forest had recorded the entire facts and circumstances including receipt of a number of complaint alleging mis-evaluation. Accordingly, it was conveyed that the service provider was requested to prepare the comparative statement afresh.

24. Referring to the records which have been placed before this Court in original, the learned Standing Counsel has submitted that the records are transparent and in this connection, reference has been made to the letter dated 15.07.2021 issued by the Conservator of Forest to the Additional Principal Conservator of Forest and also the letter dated 26.07.2021 whereby the Additional PCCF (T) had recommended the said cancellation. Reference has also been made to the note sheets to clarify that the projection made by the petitioner on the chronology of events is not correct. He has further clarified that copy of the order dated 02.08.2021 was marked to the DFO. However, on 03.08.2021, the DFO arrived at the same conclusion and on the next date i.e. 04.08.2021 the order of cancellation was passed by the DFO. He submits that in paragraph 12 of the affidavit-in-opposition dated 09.12.2021 filed by the respondent no. 4, the DFO, Dibrugarh Division, the reasons for cancellation have been cited. A perusal of the said paragraph would reveal that the reliance upon Clause 13.1 of the tender document have been made with regard to the power of the State Government to reject any bid and / or to annul the tender process and reject all the bids without assigning the reasons thereof. It has further been stated that the provisions of Clause 8.A.(d) of the tender document was not applied in the interest of fairness and transparency in distribution of State largesse. The decision to cancel on the behest of the several MLAs while on one hand being denied, it has also been stated that the public representatives had a duty to highlight the grievances of the members of the public.

25. Dealing on the rights of the petitioners, Shri Pathak, the learned Standing



Counsel has submitted that no vested right had accrued upon the petitioners and juxtaposed with the contractual provision giving the authority the right to cancel, the instant writ petition is not maintainable. He submits that the offer of 200% or more is not applicable in this case as the petitioner did not emerge as the sole technical bidder inasmuch as, there was another technical bidder who however had withdrawn his bid.

26. In support of his submission, Shri Pathak, the learned Standing Counsel, Forest Department has submitted that the right of a bidder is limited to a fair consideration only and once it is demonstrated that the bidders were treated fairly, there may not arise a case for interference by this Court. He finally submits that in the new NIT, the aforesaid proviso is also not there. He submits that no relief is entitled to by the petitioners as no indefeasible right would accrue upon a bidder to have a settlement in his favour.

27. In support of his submission, Shri Pathak, the learned Standing Counsel has placed reliance upon the case law of ***Uttar Pradesh Awam Vikas Parishad and Others versus Om Prakash Sharma*** reported in **(2013) 5 SCC 182**. In that case, the Hon'ble Supreme Court, by referring to an earlier case of ***Meerut Development Authority versus Association of Management Studies*** reported in **(2009) 6 SCC 171** has laid down the legal principle that a bidder who has participated in a tender process has no other right, except the right to equality and fair treatment in the matter of evaluation of competitive bids. The Hon'ble Supreme Court has also referred to the case of ***State of UP versus Vijay Bahadur Singh*** reported in **(1982) 2 SCC 365** and also the case of ***Rajasthan Housing Board versus GS Investments*** reported in **(2007) 1 SCC 477**. It has been laid down that merely because the bid offered is the highest would not vest any right to a bidder for settlement in his favour.

28. The learned Standing Counsel for the Department has also relied upon the case of ***Bharat Coking Coal Ltd and Others versus AMR Dev Prabha and Others***



reported in **(2020) 16 SCC 759**. In the said case, it has been laid down that apart from arbitrariness, illegality or discrimination under Article 14 or violation of Article 19(1)(g) of the Constitution of India, public interest too is required to be demonstrated before a remedy is sought for. The same requirement is necessary to prevent by-passing of Civil Courts and use of Constitutional avenues for enforcement of contractual obligations.

29. Shri Das, learned Senior Counsel for the respondent no. 5 while endorsing the submissions made on behalf of the Department has submitted that no case for interference has been made out by the petitioners. The learned Senior Counsel for the respondent no. 5 has taken a serious objection on the ground of waiver. Elaborating the said objection, he submits that on 04.08.2021, a decision was taken to cancel which was followed by the notice dated 05.08.2021 cancelling the tender process. On 23.08.2021, the petitioner had submitted an application for refund of the EMD. He submits that by such conduct, the petitioner had waived his right. He also submits that it is a settled position that ignorance of law is no excuse and therefore, the petitioner cannot be given the benefit of not being aware.

30. In support of his objection on the point of waiver, Shri Das, the learned Senior Counsel for the respondent no. 5 has relied upon the case of **ARCE Polymers Private Limited versus Alphine Pharmaceuticals Private Limited and Others** reported in **(2022) 2 SCC 221**. In the aforesaid case, the Hon'ble Supreme Court has laid down that waiver is an intentional relinquishment of a known right and applies when a party knows the material facts and is cognizant of the legal rights in that matter and yet for some consideration, consciously abandons his existing legal right, advantage, benefit, claim or privilege. It has further been laid down that a statutory right, may also be waived by implied contract, like, by wanting to take a chance for a favourable decision. The only requirement is that the other side has acted upon it.

31. Shri MP Sarma, learned counsel for the respondent no. 7 adopts the arguments

of both the Departments and the respondent no. 6 and submits that the writ petition ought to be dismissed.

32. Rejoining his submission, Shri Deka, learned counsel for the petitioner, by referring to the averments made in paragraph 7 of the affidavit-in-opposition of the Department has submitted that the Department had admitted that the petitioner was the sole technically eligible bidder. He submits that being the expressed stand taken on affidavit, the Department is not entitled to take a different stand at the time of arguments. As regards the justification given by the Department for not applying Clause 8.A.(d), he submits that the grounds are vague and unreasonable.

33. With regard to the objection of waiver, Shri Deka submits that the said objection would not be applicable in the present case. In support, the learned counsel has relied upon the case of ***Kalpraj Dharamshi and Anr. versus Kotak Investment Advisors Ltd.*** reported in ***(2021) 10 SCC 401***. In the aforesaid case, the Hon'ble Supreme Court after referring to certain earlier decisions laid down that a waiver cannot always, and in every case be inferred merely from the failure of the party to take the objection. It has further been held that waiver can be inferred only if and after it is shown that the party knew about the relevant facts and was aware of his right to take the objection in question. In paragraph 122 of the said judgment, the following has been stated.

“122. As such, for applying the principle of waiver, it will have to be established, that though a party was aware about the relevant facts and the right to take an objection, he has neglected to take such an objection.”

34. The rival submissions made by the learned counsel for the parties have been duly considered and the materials on records including those from the original file produced have been carefully examined.

35. The present tender process is a unique one wherein the situation of having one technically eligible bidder has been dealt with. The normal trend in matters of tender

was that when such a situation of one technically eligible bidder arises, a re-tendering is done. Apart from the fact that such prescription was also in accordance with the CVC guidelines, the primary objective was to maintain fairness and transparency so that there should not be loss to the public exchequer and opportunity be given to any intending bidders to compete in the bid. However, as has been indicated above, the present tender process has got an in-built mechanism to deal with such a situation. Under the said mechanism embodied as Clause 8.A.(d), it is provided that when one bidder is found to be technically qualified, the said bidder shall be made an offer to accept an amount which would be greater of the 200% of the reserved price and the initial price offered and in case of acceptance of the offer by the bidder, he shall be the preferred bidder and his price offered would be the dead rent and he shall be declared as the successful bidder. The option to reject the process would be opened only if the bidder does not accept the said offer.

36. For ready reference, the aforesaid provision of the tender document is extracted hereinbelow:

“8.A.(d) ...

Provided that if only one bidder is technically qualified then the bidder shall be made an offer to accept an amount that shall be greater of the 200% of the reserve price and his Initial Price offer. If the bidder accepts the offer, he shall be the "preferred bidder" and his price offer shall become the dead rent / contract money / permit money once he/she is declared as successful bidder. Otherwise, the auction process be annulled.”

37. The allegation made by the petitioner that the cancellation vide the order dated 04.08.2021 was only because of certain political intervention. The aforesaid allegation is not categorically controverted by the respondents. In fact, in paragraph 12 of the affidavit-in-opposition of the Department has rather tried to justify such intervention.

38. Even if the aforesaid factor of intervention is overlooked, in view of the in-built

provision of the tender in question by which an offer was required to be made to the petitioner, the cancellation is not at all justified. The reasons sought to be advanced in support of such cancellation which appears in paragraph 12 of the affidavit-in-opposition of the DFO are not at all justified.

39. For ready reference, the relevant averments made in paragraph 12 of the said affidavit is extracted hereinbelow:

“... Though the provisions of Clause 8.A.(d) of the tender document allowed the bid to finalize in favour of a sole bidder, the same was not done in the interest of fairness and transparency in matters of distribution of State largesse.”

40. This Court has also examined the purpose and objective of the Clause in the tender by which such a situation is dealt with. It appears that the said Clause has been inserted to avoid the requirement of another tender process which will not only delay the settlement but would also lead to further expenditure from the public exchequer. So far as the issue of safeguard of public revenue is concerned, the Clause makes it clear that the offer to be made to the sole technically eligible bidder would be the greater of the 200% of the reserved price and his initial price offer and on acceptance of such offer the bidder is to be declared as the successful bidders. The annulment of the auction process can be taken recourse to only when the bidder declines to accept such offer.

41. An objection has been taken on the point of waiver mainly on the ground that the petitioner took refund of the EMD and therefore, he had waived his right to maintain the present challenge. The Hon'ble Supreme Court in the aforesaid case of ***Kalpraj Dharamshi (Supra)*** has made it clear that the doctrine of waiver would apply only when a party is aware of the facts. In the instant case, it is on record that the petitioner had come to know about the second evaluation only on receipt of a reply to an application made under the RTI Act and the said evaluation was never uploaded. The RTI information was received by the petitioner on 30.09.2021 whereas



the application for refund was made on 23.08.2021. Further, in view of the categorical admission by the learned Standing Counsel for the Department regarding non-publication of the second evaluation, this Court is of the unhesitant opinion that the doctrine of waiver would not be applicable.

42. A shield has been raised by the Department to defend the impugned action by falling back upon certain Clauses of the tender document which gives a right to the Department to reject any bid or to cancel the tender process without assigning any reasons. This Court is unable to accept such submissions in view of the settled principles of law that any decision taken by the authorities are required to be supported by cogent reasons which appeals to a reasonable mind. Mere existence of such a Clause in a tender document cannot mean that there is an unfettered or unbridled right of the Department to act in a manner detrimental to the interest of an aspiring dealer. Allowing that to be done would be against the very essence of Rule of Law. This Court is of the opinion that even such tender Clauses are required to pass the test of fairness and reasonability which are the hallmark of Article 14 of the Constitution of India.

43. This Court has also noted that there are anomalies in the communication from which it is difficult to decipher from where the decision to cancel the process has emanated in spite of certain explanations sought to be advanced by the learned Standing Counsel. However, even ignoring the aforesaid anomalies, the impugned decision does not appear to be supported by justifiable grounds and cogent reasons.

44. This Court exercising powers under Article 226 of the Constitution of India has jurisdiction to examine the decision making process without even going into the merits of such decision. The Hon'ble Supreme Court in the landmark case of **Tata Cellular Vs. Union of India** reported in **(1994) 6 SCC 651** has laid down as follows:

"74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application of judicial review is made, but the decision



making process itself.”

45. This Court in exercise of its writ jurisdiction is required to examine the decision making process and in the words of the Hon’ble Supreme Court, it is the lawfulness of the decision and not the soundness which are to be examined by a Writ Court. In the instant case, the decision making process does not appear to be reasonable, fair and transparent and rather appears to be based on irrelevant factors and extraneous circumstances.

46. Under the aforesaid facts and circumstances, this Court is of the opinion that the impugned decision of the authorities in issuing the cancellation notice dated 04.08.2021 as well as the action to go for a fresh tender process vide notice dated 08.10.2021 is unsustainable in law and accordingly set aside and quashed. The authorities are accordingly directed to finalize the tender process initiated vide the NIT dated 05.05.2021 and make the settlement in accordance with law.

47. The writ petition is accordingly allowed.

48. No order, as to cost.

49. Records, in original be returned to the learned Standing Counsel of the Department.

JUDGE

Comparing Assistant