



GAHC010092592022

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

Case No. : WP(C)/3308/2022

ANJALA BASUMATARY
W/O- SATHO BASUMATARY
R/O- VILLAGE JYOTINAGAR
(WARD NO-2)
P.O AND P.S- SILAPATHAR
DIST- DHEMAJI
ASSAM

VERSUS

THE STATE OF ASSAM AND 4 ORS
REP BY THE PRINCIPAL SECRETARY.
TO THE GOVT. OF ASSAM , ENVIRONMENT AND FOREST DEPARTMENT,
ASSAM SECRETARIAT DISPUR, GUWAHATI-781006, ASSAM

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

3:THE ADDL. PRINCIPAL CHIEF CONSERVATOR OF FOREST
(T)
UPPER ASSAM ZONE
BASISTHA
GUWAHATI-781061

4:THE DIVISIONAL FOREST OFFICER
DHEMAJI DIVISION
DIST- DHEMAJI



ASSAM

5:BIRAT BASUMATARY
R/O- SILAPATHAR
BHAGAWAN
DHEMAJI
DIST- DHEMAJI
ASSAM
PIN-78705

BEFORE

HON'BLE MR. JUSTICE KALYAN RAI SURANA

For the petitioner	: Mr. T.J. Mahanta, Senior Advocate, : Mr. J. Sarmah, Advocate.
For the State respondents	: Mr. P.N. Goswami, Mr. D. Gogoi, : Mr. R.R. Gogoi, Standing Counsel.
For respondent no.5	: Mr. S. Borthakur, Mr. D. Gogoi, : Advocates.
Date of hearing	: 30.06.2023, 10.11.2023.
Date of judgment	: 19.01.2024.

JUDGMENT AND ORDER

(CAV)

Heard Mr. T.J. Mahanta, learned senior counsel, assisted by Mr. J. Sarmah, learned counsel for the petitioner. Also heard Mr. D. Gogoi, learned standing counsel for the State respondent nos. 1 to 4 and Mr. S. Borthakur, learned counsel for private respondent no.5.

2) By filing this writ petition under Article 226 of the Constitution of India, the petitioner has prayed for setting aside the Letter of Intent (LoI for short) and consequential Work Order dated 01.12.2021, issued by the Divisional Forest Officer, Dhemaji Division (hereinafter referred to as 'DFO' for short)



(respondent no.4) in favour of the private respondent no. 5. The petitioner has also prayed for directing the respondent authorities to consider the tender submitted by the petitioner as technically qualified for participation in the second stage of auction along with other technically qualified bidders.

3) The case of the petitioner, in brief, is that the "Likabali Sand and Gravel Mahal Contract Area" (hereinafter referred to as "Likabali Mahal" for brevity under Dhemaji Forest Division was put for on-line sale vide e-Auction notice dated 21.06.2021. The bid was a two stage bid, and only the technically qualified and approved bidder in the first round of tender evaluation could participate in the on-line bidding process. The petitioner had submitted his on-line bid with earnest money along with all requisite documents, offering bid amount of Rs.4,45,00,511/- (Rupees Four crore forty five lakh five hundred eleven only). However, the petitioner was not invited for the second stage of on-line bidding. It is alleged that the status of the petitioner was not disclosed in the on-line bidding portal and therefore, the petitioner had submitted a RTI application dated 09.09.2021, demanding certain documents. As the information was not furnished, the petitioner had preferred an RTI appeal, which was allowed by order dated 08.10.2021 and accordingly, some of the documents were provided by the State Public Information Officer (SPIO for short) on 12.11.2021. The petitioner had procured a copy of the work order issued by the respondent no. 4 in favour of the respondent no. 5 for a bid amount of Rs.1,13,00,000/- (Rupees one crore thirteen lakh only). Thus, in this writ petition, it is projected that the respondent no. 4 and other respondent authorities had prevented the petitioner from getting access to the relevant bidding documents, comparative statement, etc. In the meanwhile, the Likabali Mahal was settled with the respondent no. 4, which has caused financial loss of

Rs.3,33,00,511/- (Rupees three crore thirty three lakh five hundred fifty one only) to the State exchequer.

4) The submissions of the learned senior counsel for the petitioner as well as the learned counsel representing the respondents are referred to hereinafter.

5) In support of his submissions, the learned senior counsel for the petitioner has cited the following cases, viz., *National High Speed Rail Corporation Ltd. v. Montecarlo Limited*, (2022) 6 SCC 401, and *Star Enterprises & Ors. v. City Industrial Development Corporation of Maharashtra Ltd. & Ors.*, (1990) 3 SCC 280.

6) Having heard the submissions from all sides, the point of determination which arises in this writ petition are as follows:-

i. *Whether the rejection of the tender of the petitioner during technical evaluation was justified merely because the affidavit submitted by the petitioner with her tender was not in the format given in the tender document?*

ii. *Whether the rejection of the tender of the petitioner during technical evaluation was justified merely because the "Likabali Sand and Gravel Mahal Contract Area" was mentioned as "Likabali Quarry" in the affidavit submitted by the petitioner with her bid?*

iii. *Whether on the ground that by technically disqualifying the petitioner, the State exchequer would suffer financial loss to the extent of Rs.3,33,00,511/- (Rupees three crore thirty three lakh five hundred fifty one only), the technical rejection*



of the tender of the petitioner warrants interference by the Court?

iv. Whether the petitioner has become disentitled to equitable relief in this writ petition on the ground of delay?

v. Whether the petitioner would be entitled to relief as prayed for?

Point of determination no. (i):

7) The point as to whether the rejection of the tender of the petitioner during technical evaluation was justified merely because the affidavit submitted by the petitioner with her tender was not in the format given in the tender document is being taken up first.

8) The learned senior counsel for the petitioner had submitted that the broad stand of the respondents is to the effect that her affidavit submitted along with the on-line bid was not as per the format given in the tender document, which is frivolous because an aberration in typing out the affidavit vis-à-vis the form is a condonable defect under the head of "minor deviations" which is provided for in "important information" section of the bid document under heading no. 13 "General conditions regarding tender process". It was submitted that by not taking recourse to condoning the mere defect in form under "minor deviation" clause contained in the tender, the respondent authorities had evaluated the tender as per their whims and fancies.

9) Per contra, the learned standing counsel for the respondent nos. 1 to 4 had submitted that the affidavit of the petitioner, which is available at pages 61-62 and 93-94 of this writ petition is not verified in accordance with the format. It was also submitted that the respondent authorities had considered the same as a formal defect in the bid submitted by the petitioner. Moreover, it

was submitted that the petitioner had not moved the competent authority for condoning the defect under the head of "minor deviations" as provided in the tender document. The learned standing counsel for the respondent nos. 1 to 4 has produced scanned copy of the bid documents submitted by the petitioner in a pen-drive for the perusal of the Court.

10) It is seen that the two affidavits of the petitioner, which are available at the pages referred to by the learned standing counsel for the respondent nos. 1 to 4 do not contain the verification as per the format. In this regard, the Court has also perused the scanned copy of the said two affidavits, which were provided by the learned standing counsel for the Forest Department in the pen drive.

11) In this regard, the Court is of the considered opinion that it must be left for the tendering authority to decide which of the clauses of the tender document, according to them, is mandatory and which clauses thereof are directory.

12) In the case of *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.*, (2016) 16 SCC 818, it has been held by the Supreme Court of India to the effect that 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 and that the constitutional courts must defer to this understanding and appreciation of the tender documents unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It was further held to the effect that it is possible that the owner or the employer of a project may give an interpretation that is not acceptable to the constitutional courts but that by itself

is not a reason for interfering with the interpretation given.

13) Therefore, as admittedly the verification of the two affidavits submitted by the petitioner along with her bid is not in the prescribed form, the Court is not inclined to interfere with the technical rejection of the bid of the petitioner on the said count.

14) The Court, under the facts of this case, is inclined to hold that the respondent authorities had provided the form of affidavit in the bid document, not for nothing and definitely not with the intention that the bidders would not adhere to the said format. Moreover, as the petitioner had not moved the respondent authorities for condoning the defect under the head of "minor deviations", this Constitutional Court would be slow to declare that the defects in the said two affidavits were condonable.

Point of determination no. (ii):

15) The second point of determination as to whether the rejection of the tender of the petitioner during technical evaluation was justified merely because the "Likabali Sand and Gravel Mahal Contract Area" was mentioned as "Likabali Quarry" in the affidavit submitted by the petitioner with her bid is taken up now.

16) It was submitted by the learned senior counsel for the petitioner that in the affidavit bearing serial no. 8494 dated 01.07.2021, submitted along with the bid, the petitioner had mentioned the name of the contract area i.e. "Likabali Mahal" as "Likabali Quarry". However, it was submitted that the said ground for technical rejection of the bid was also not sustainable because in a subsequent affidavit bearing serial no. 6742 dated 08.07.2021, submitted by the petitioner, the petitioner had mentioned the correct name of the contract area,

i.e. Likabali Sand and Gravel MCA". It has been submitted by all sides that "MCA" is the abbreviation of "Mahal Contract Area".

17) The issue of defect in the affidavit has already been elaborately dealt with in connection with the point of determination no. (i), the same finding would apply in this point also. As the respondent authorities have tendered the "Mahal Contract Area" or MCA, the mentioning of "Likabali Quarry" in the affidavit cannot be held to be a condonable defect.

18) The second point of determination is answered accordingly.

Point of determination no. (iii):

19) It has been submitted by the learned senior counsel for the petitioner that the petitioner had quoted a bid of Rs.4,45,00,511/- which was by much higher than any of the bidders. Therefore, by technically disqualifying the petitioner, the respondent authorities had caused loss to the State exchequer to the extent of Rs.3,33,00,511/- (Rupees three crore thirty three lakh five hundred fifty one only). Hence, it was submitted that in the larger interest of the State the technical rejection of the bid of the petitioner warrants interference by the Court.

20) It was submitted that the respondents have taken a plea that the financial bids were to be made in the second round of bidding process, which is false and not true. In this regard, it was submitted that the bid document specifically required that the bidders should make disclosure of their respective bid amount. Therefore, it has been submitted that the State respondents cannot feign ignorance that when they were technically disqualifying the petitioner, they were not aware of the bid amount submitted by the petitioner and the other bidders including the respondent no. 5.

21) Hence, it was submitted that at the time of technically disqualifying the petitioner the authorities were fully conscious and aware that that the State exchequer would suffer financial loss to the extent of Rs.3,33,00,511/- (Rupees three crore thirty three lakh five hundred fifty one only) by rejecting the bid of the petitioner.

22) Per contra, the learned standing counsel for the Forest Department had submitted that under clause-8(A)(ii) of the bid document under chapter "Important information", it was clearly disclosed that "*An initial price offer shall be equal to or greater than the Reserve Price.*" Moreover, it was submitted that in as per Schedule-A appended to the Long Tender Notice dated 21.06.2021, the reserve price was mentioned as (i) for gravel 33,600 cu.m @ Rs.67,20,000.00, and (ii) for sand 22,400 cu.m @ Rs.31,36,000.00 aggregating to a sum of Rs.98,56,000.00 (Rupees Ninety eight lakh fifty six thousand only). Thus, it was submitted that the disclosure of "initial offer" is only for technical evaluation purpose to see if the bidder was ready and willing to make an offer of a sum which is "equal to or more than the initial price offer".

23) In this regard, by referring to clause 8(B) of the bid document under chapter "Important information", it was submitted that irrespective of the initial price offer, it was provided that where the total number of technically qualified bidders is one or more, the auction process shall proceed to the second round of auction by the bidders offering their final price offer which shall be greater than the floor price, with provision for revision of bid by not less than 1% of the reserve price each time.

24) Thus, it was submitted that even if some bidder disclosed an astronomical initial offer, much greater than the reserve price, but the auction

process would begin from the stage of "reserve price", and not from highest disclosed initial price offer by a particular bidder.

25) In other words, it was submitted that despite the petitioner offering her initial price offer of Rs.4,45,00,511/- (Rupees Four crore forty five lakh five hundred eleven only), the bidding process would commence from the reserve price of Rs.98,56,000/- (Rupees Ninety eight lakh fifty six thousand only) and not from Rs.4,45,00,511/- disclosed by the petitioner in the technical bid. Accordingly, it was submitted that it was a fanciful thinking of the petitioner that the State exchequer had suffered a financial loss to the extent of Rs.3,33,00,511/- (Rupees three crore thirty three lakh five hundred fifty one only).

26) In the said context, it may be mentioned that in the tender document in clause-9 under chapter "Important information", the reserve price is printed as Rs.98,56,00,000/-.

27) In this regard, on a conjoint reading of the clauses 8(A)(ii) and 8(B) of the bid document under chapter "Important information", the Court is of the considered opinion that at the first stage of bidding process, to become technically qualified, amongst others, a bidder is required to make "*an initial price offer equal to or greater than the Reserve Price*". Thus, despite the petitioner making an initial price offer of Rs.4,45,00,511/- (Rupees Four crore forty five lakh five hundred eleven only), the second round of bidding process, as per clause 8(B) referred herein before, would commence from the reserve price of Rs.98,56,000/- (Rupees Ninety eight lakh fifty six thousand only).

28) The petitioner has not been able to demonstrate from the tender document that in the second round of bidding process, her bid has to

commence on and from her initial price offer of Rs.4,45,00,511/- and that there is any clause in the bid document prohibiting her from commencing her bid from the reserve price of Rs.98,56,000/-.

29) Therefore, the Court is unable to accept that by settling the tender to the respondent no. 5, at a bid of Rs.1,13,00,000/- (Rupees One crore thirteen lakh only), the respondent authorities have caused a loss of Rs.3,32,00,511/- to the State exchequer.

30) In this regard, we find support from the decision of the Supreme Court of India in the case of *Maa Binda Express Carrier & Anr. v. North East Frontier Railway & Ors., (2014) 3 SCC 760*, where it has been held that the bidders participating in the tender process cannot insist that their bids/ tenders should be accepted simply because a bid is highest or lowest.

31) Thus, the point of determination is answered in the negative and against the petitioner by holding that the technical disqualification of the bid of the petitioner does not warrant interference of this Court.

Point of determination no. (iv):

32) The learned standing counsel for the Forest Department representing the respondent nos. 1 to 4 and the learned counsel for the respondent no. 5 had both submitted that the petitioner has become disentitled to equitable relief in this writ petition on the ground of delay.

33) It was submitted by the learned counsel for the respondent no. 5 that the tender was issued on 21.06.2021 and the technical bid evaluation result was declared on 03.09.2021 by rejecting the bid submitted by the petitioner. The petitioner had submitted RTI application on 09.09.2021, but it is projected

that no reply was served upon the petitioner. However, on 30.09.2021, provisional LoI was issued in favour of the respondent no. 5. Thereafter, RTI reply dated 12.11.2021 including comparative statement was issued to the petitioner, which was received by her. Thereafter on 01.12.2021, work order was issued in favour of the petitioner. Thus, it was submitted that in this case the decision of the respondent authorities to award the contract to the petitioner was not taken in haste. But, the petitioner had belatedly approached the Court by filing this writ petition on 13.05.2022, by which time, the respondent no. 5 had incurred huge expenditure.

34) In support of their respective contention on the issue of delay, reliance was placed on the case of (i) *Union of India & Ors. v. N. Murugesan & Ors.*, (2022) 2 SCC 25, (ii) *R And M Trust v. Koramangala Residents Vigilant Group*, (2005) 3 SCC 91, (iii) *State of M.P. & Ors. v. Nandlal Jaiswal & Ors.*, (1986) 4 SCC 566, (iv) *M/s. ASCON & Anr. v. The State of Assam & Ors.*, W.P.(C) 334/2017, decided by a coordinate Bench of this Court on 14.12.2017.

35) In reply, it was submitted by the learned senior counsel for the petitioner that the other ground taken by the respondents is that the petitioner had approached this Court belatedly, which was also not sustainable, because the petitioner has explained the delay in paragraphs 5 to 10 of the writ petition, which was not denied by the respondents and thus, amounted to admission by them. It was submitted that the respondent authorities had prevented disclosure of information to the petitioner and did not provide comparative statement and other relevant documents, without which the writ petition could not have been filed. In the said context, it was submitted that it is well settled law that the order passed, but not communicated to the petitioner, who was

required to be informed, is absolutely not a valid order. In this connection, reliance has been placed on the case of *M/s. Star Enterprises & Ors. v. City and Industrial Development Corporation of Maharashtra & Ors., (1990) 3 SCC 280*.

36) In this regard, the Court is of the considered opinion that notwithstanding that the Court has answered the point of determination no. (iii) against the petitioner, but in light of the allegations that by accepting the bid of the respondent no. 5 for an amount of Rs.1,13,00,000/- would cause the State exchequer a loss of Rs.3,32,00,511/-, though there was some delay in filing of the writ petition, but in view of the questions raised by the petitioner, the said delay is held to be not fatal so as to non-suit the petitioner at the threshold.

37) Thus, the point of determination no. (iv) is answered accordingly.

Point of determination no. (v):

38) In light of the discussions on the point of determination nos. (i) to (iii) above, the Court is of the considered opinion that the technical rejection of the bid of the petitioner on two counts, firstly that the two affidavits submitted with her bid were in not verified as per the form appended to the bid document, and secondly as an incorrect name or nomenclature of the concerned *mahal* was mentioned in the affidavit bearing serial no. 8494 dated 01.07.2021, cannot be perverse or *ex facie* incorrect.

39) In tender matters, it has been held in a catena of decisions by the Supreme Court of India as well as by this Court from time to time that the Constitutional Courts can only examine the decision making process and the High Court cannot sit over the tender matters as if it was sitting in appeal against the decision by the tendering authorities. If one needs an authority on the point, we may refer to the case of *Air India Ltd. v. Cochin International*

Airport Ltd. & Ors., (2000) 2 SCC 617, where it has been held to the effect that only the decision making process and not the decision was amenable to judicial review and that it was open to the authorities not to accept a particular offer on a particular basis. Moreover, it was also held that in a commercial transaction a lot of balancing work has to be done while weighing all the relevant factors and all the final decision has to be taken after taking an over-all view of the transaction and as such it is was open to the State to choose its own method to arrive at a decision. It has also been held therein that even when some defect is found in the decision making process, the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point and that the Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not and only when it comes to a conclusion that overwhelming public interest requires interference, the Court should interfere.

40) In this case, the petitioner had not requested the respondent authorities to consider "minor deviation" in her affidavit. Thus, non-invoking of "minor deviation" clause of the bid document is not found to have vitiated the decision making process of the respondent authorities.

41) The learned senior counsel for the petitioner had cited the case of *National High Speed Rail Corporation Ltd. (supra)*, to impress upon the Court that the Supreme Court of India had cautioned the High Court not to interfere in tender matters where delay may lead to high escalation of project cost and thus, it was submitted that as this was a tender for extraction of minor minerals, there is no question of any cost escalation. The Court is unable to accept the



said submissions because in this case in hand, the tender or bid submitted by the petitioner was found to be technically disqualified and that the decision making process is not found to be vitiated by any factor whatsoever like arbitrariness, mala fide, or any other illegality whatsoever.

42) Thus, for the reasons as discussed herein before, this writ petition fails and the same is dismissed.

43) There shall be no order as to cost.

JUDGE

Comparing Assistant