



GAHC010079942023

Page No.# 1/14



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

Case No. : WP(C)/2088/2023

DHARMA KANTA DAS
(PROPRIETOR- M/S GANAPATI ENTERPRISE)
S/O- LATE PUSPA RAM DAS,
R/O- H/NO. 156, JAYANAGAR,
NEAR SUKAFI BHAWAN,
KHANAPARA, GUWAHATI,
P.O.- KHANAPARA, P.S.- DISPUR,
DIST- KAMRUP(M), ASSAM,
PIN- 781022.

VERSUS

THE STATE OF ASSAM AND 6 ORS.
REPRESENTED BY THE SECRETARY TO THE GOVT. OF ASSAM,
GUWAHATI DEVELOPMENT DEPARTMENT,
DISPUR, GUWAHATI, PIN- 781006.

2:THE HONOURABLE MAYOR
GUWAHATI MUNICIPAL CORPORATION
GUWAHATI
P.O. AND P.S.- PANBAZAR

DISTRICT- KAMRUP(M)
ASSAM

PIN- 781001.

3:THE COMMISSIONER
GUWAHATI MUNICIPAL CORPORATION
GUWAHATI
P.O. AND P.S.- PANBAZAR

DISTRICT- KAMRUP(M)
ASSAM



PIN- 781001.

4:THE JOINT COMMISSIONER
GUWAHATI MUNICIPAL CORPORATION
GUWAHATI
P.O. AND P.S.- PANBAZAR

DISTRICT- KAMRUP(M)
ASSAM

PIN- 781001.

5:THE ADDITIONAL COMMISSIONER
GUWAHATI MUNICIPAL CORPORATION
GUWAHATI
P.O. AND P.S.- PANBAZAR

DISTRICT- KAMRUP(M)
ASSAM

PIN- 781001.

6:THE CHAIRPERSON
MARKET BRANCH
GUWAHATI MUNICIPAL CORPORATION
GUWAHATI
P.O. AND P.S.- PANBAZAR

DISTRICT- KAMRUP(M)
ASSAM

PIN- 781001.

7:FATIK DAS
R/O- BAMUNIMAIDAM RAILWAY COLONY

BYELANE NO. 2 NEAR BIHU FIELD

P.O. AND P.S.- CHANDMARI

DISTRICT- KAMRUP(M)
ASSAM.
PIN- 781021



Linked Case : WP(C)/3388/2023

FATIK DAS
R/O- BAMUNIMAIDAM RAILWAY COLONY
BYELANE NO. 2
NEAR BIHU FIELD
P.O. AND P.S. CHANDMARI
DIST. KAMRUP(M)
ASSAM
PIN- 781021.

VERSUS

THE STATE OF ASSAM AND 3 ORS.
REPRESENTED BY THE SECRETARY TO THE GOVT. OF ASSAM
GUWAHATI DEVELOPMENT DEPARTMENT
DISPUR
GUWAHATI
PIN- 781006.

2:THE HONBLE MAYOR

GUWAHATI MUNICIPAL CORPORATION
GUWAHATI
P.O. AND P.S. PANBAZAR
DIST. KAMRUP(M)
ASSAM
PIN- 781001.
3:THE COMMISSIONER

GUWAHATI MUNICIPAL CORPORATION GUWAHATI
P.O. AND P.S. PANBAZAR
DIST. KAMRUP(M)
ASSAM
PIN- 781001.

4:DHARMA KANTA DAS
(PROPRIETOR M/S GANAPATI ENTERPRISE)
R/O- H/O. 156
JAYANAGAR
NEAR SUKAFI BHAWAN
KHANAPARA
GUWAHATI
P.O. KHANAPARA
P.S. DISPUR
DIST. KAMRUP(M)
ASSAM-781022.

B E F O R E
HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

JUDGMENT & ORDER

Advocates for the petitioner : Shri W.R. Medhi, Advocate [in WP(C)/2088/2023]
Shri K. Singha, Advocate [in WP(C)/3388/2023]

Advocates for respondents : Shri P. Nayak, SC, GMC & GDD.

Date of hearing : 15.12.2023.

Date of judgment : 22.12.2023.

1. Both these two writ petitions being connected to the same tender process and filed by rival parties, the same were heard together and are being disposed of by this common judgment and order. The matter pertains to the settlement of the Beltola Bi-weekly Market under the Guwahati Municipal Corporation. Before going to the issue which has arisen for determination, it would be convenient if the facts of the cases are narrated in brief.

2. The Guwahati Municipal Corporation (GMC) had issued a tender notice dated 02.03.2023 inviting tender for the settlement of the Beltola Bi-weekly Market (hereinafter the market) for the year 2023–24 with effect from 01.04.2023 to 31.03.2024. The estimated government value of the market was fixed at Rs.1,03,41,540/-. Both the petitioners in these two petitions had submitted their respective bids. It may be mentioned that the petitioner in WP(C)/3388/2023 was the earlier settlement holder.

3. The bids were opened on 23.03.2023 wherein three numbers of bids were found. The bidder with the highest bid was however having major defects in his bid and was accordingly disqualified. So far as the bid of the petitioner in WP(C)/2088/2023 is concerned namely, Shri Dharmakanta Das who is the proprietor of M/S Ganapati enterprise, the amount offered by him was Rs.1,25,15,000/- whereas the bid of Shri Fatik Das who is the petitioner in WP(C)/3388/2023 was Rs.1,28,50,700/-. It however, appears that the Earnest Money Deposit (EMD) of Shri Fatik Das was short by Rs.35/-. It was the term of the contract that the EMD was fixed at 10% of the offered value if the candidate belongs to the General Category and 5% if the candidate was of Schedule Caste category. It is not in dispute that Shri Fatik Das belongs to the Scheduled Caste category and therefore his Earnest Money Deposit was to be 5% of the bid offered.

4. It is the case of the petitioner in WP(C)/2088/2023 i.e., Dharmakanta Das that it was his bid which was the only valid bid and therefore the settlement ought to have been made with him.

5. On the other hand, the case projected by Sri Fatik Das however is that while making the calculation of the EMD, there was an inadvertent mistake and the initial Demand Draft for the EMD was for an amount of Rs.6,42,500/-. However, on realizing the mistake, on the same day itself i.e., 23.03.2023, another Demand Draft of Rs.100/- was deposited. It is however not in dispute that the balance amount of Rs.35/- which was deposited by a Demand Draft, though was after the stipulated time, it was on the same date.

6. It appears that since the matter was to be resolved, vide an order dated



01.04.2023, Fatik Das was given an extension by a month. As noted above, Fatik Das was the earlier lessee of the market. It is the case of Dharmakanta Das that since there was no response in the RTI application, WP(C)/2088/2023 was filed.

7. This Court vide order dated 12.04.2023 while issuing notice had directed that no fresh NIT should be issued and no extension should be given to Fatik Das for the month of April, 2023. However, the petitioner in that case - Dharmakanta Das may be allowed to run the market or run the same themselves. Consequently, an order was passed on 13.04.2023 of cancellation of the entire process of the tender. The aforesaid order of cancellation as well as non-consideration of the bid is the subject matter of WP(C)/3388/2023 instituted by Shri Fatik Das.

8. I have heard Shri WR Medhi learned counsel for the petitioner in WP(C)/2088/2023 whereas the petitioner in WP(C)/3388/2023 is represented by learned counsel, Shri K Singha. The Department, namely, the Guwahati Development Department as well as the GMC is represented by its Standing Counsel Shri P. Nayak, who has also produced the records of the case.

9. Shri Medhi, the learned counsel for Dharmakanta Das has submitted that though the value of the bid is a relevant factor, such value is to be in the context of a valid bid. He submits that though there were three numbers of bidders, it was only the bid of his client which was found to be valid and therefore the settlement ought to have been given to his client. He further submits that giving extension to Fatik Das itself was an arbitrary action.

10. In support of his submission, Sri Medhi, the learned counsel has relied

upon an Order dated 25.03.2022 passed in WP(C)/4448/2021 [***M/S United Enterprise vs. The Guwahati Municipal Corporation and Ors.***]. In the aforesaid case, this Court, after relying upon certain decisions of the Hon'ble Supreme Court has laid down that the authorities are not under any obligation to accept the highest bid and no rights accrue to any bidder. It has further been laid down that the authorities have the right, for good and sufficient reasons not to accept the highest bid. Reference has been made to the cases of ***Trilochan Mishra vs. State of Orissa*** reported in ***(1971) 3 SCC 153*** and ***Meerut Development Authority vs. Association of Management Studies*** reported in ***(2009) 6 SCC 179***.

11. Shri Medhi, the learned counsel accordingly submits that necessary direction is liable to be issued to settle the market with his client Dharmakanta Das.

12. *Per contra*, Shri Singha, the learned counsel for the petitioner in WP(C)/3388/2023, i.e., Fatik Das has submitted that though there was a shortage in the EMD offered by him which is required to be calculated on the basis of the bid offered, the shortage was minimal for an amount of Rs.35/-. However, on the same date itself, i.e., 23.03.2023, his client had deposited a further Demand Draft of Rs.100/-. The learned counsel has however fairly conceded that though the Demand Draft was deposited on the same date which was prescribed in the tender notice, it was beyond the time. He however, submits that in any case, such defect can be addressed and can be treated to be curable in nature and since the difference in price offered by his client is a major one and not allowing his client to compete in the tender process would not only amount to causing injustice to him but also would adversely affect the

public interest.

13. With regard to the issue of extension, he submits that there is no *mala fide* involved and the reason for granting such extension to his client by one month was only because of the fact that his client was the sitting lessee. Shri Singha accordingly submits that the cancellation of the tender process vide order dated 13.04.2023 is liable to be set aside and the market in question be settled with him.

14. By opposing the WP(C)/2088/2023, Shri Singha the learned counsel has also submitted that said petition is not maintainable as the challenge to the extension order has already been taken care of by the Department.

15. In support of his submission, Shri Singha, the learned counsel relies upon the decision of ***Global Associates vs. State of Assam & Ors.*** reported in **2016 (4) GLT 491**. This Court after considering the law laid down by the Hon'ble Supreme Court has held as follows:

“15. In Poddar Steel Corporation Vs. Ganesh Engineering Works & Ors., reported in (1991) 3 SCC 273, the Hon'ble Apex Court held that as a matter of general proposition, it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the NIT in meticulous detail. It was held that requirements in a tender notice can be classified into two categories - those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary to the main object to be achieved. In the first case, the authority issuing the tender may be required to enforce them rigidly, while in the second case, such rigid enforcement is not insisted upon.”

16. Shri Nayak, the learned Standing Counsel, by producing the records in original has submitted that the decisions of the authorities do not suffer from any legal infirmity. He submits that three bids were received pursuant to the NIT in question. So far as the bid of bidder Rinku Borah was concerned, the same was held to be defective on three grounds and such rejection was not challenged. Out of the remaining two bids, the bid of Fatik Das was held to be defective with the remark EMD below by Rs.35/-. As a result thereof, a situation arose where the bid of M/S Ganapati Enterprise was found to be the only bid with a tendered amount of Rs.1,28,50,700/-. As regards, the bid of Fatik Das, the Standing Counsel has however fairly conceded that though the shortage of Rs.35/- was fulfilled beyond the stipulated time, it was on the last date of the submission of bids.

17. In support of the decision to cancel the entire tender process, the learned Standing Counsel has urged the following three grounds:

- (i) As per Clause 4.18 (b) of the CVC guidelines, a work pursuant to an NIT should not be granted in case of a single tender at least on the first occasion.
- (ii) The Procurement Rules of 2020 also lays down an embargo in such a situation. As per Rule 20 of the same Rules, granting of a work in a situation of a single bid would lead to lack of competition.
- (iii) As per Gazette Notification dated 01.04.2020, more specifically Clause 7 thereof, single bid is not to be accepted.

18. As regards the issue of extension of the settlement for a period of one month, the learned Standing Counsel has submitted that apart from the

situation demanding such an action, Clause 11 of the tender notice lays down the provision of adjustment of the lease period. Further, Clause 14 of the Gazette Notification dated 01.04.2020 has also been pressed into service which also provides for extension. He further submits that the extension was done not only for the market in question but was given as per decision in the 16th Meeting of the Mayor-in-Council dated 28.03.2023 which was general in nature concerning a number of settlements. Under paragraph 16 thereof, the extension of the present market was decided to be given with a caveat that such extension is only till the completion of the tender process which was also directed to be expedited. In any case, he submits that the order of extension dated 30.03.2023 was only for one month and even that order was cancelled on 13.04.2023 after coming to know of the Court's direction and presently, the market is being run by the Corporation on its own.

19. The learned Standing Counsel has relied upon the case of ***State of Jharkhand & Ors. vs. M/S CWE-SOMA Consortium*** reported in **(2016) 14 SCC 172**, the relevant portion of which is extracted herein below:

“22. The Government must have freedom of contract. In Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd., SCC in para 12 this Court held as under: (SCC p. 147)

“12. After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness but also must be free from arbitrariness not

affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

The Court does not have the expertise to correct the administrative decision as held in Laxmikant v. Satyawar, the Government must have freedom of contract.

23. *The right to refuse the lowest or any other tender is always available to the Government. In the case in hand, the respondent has neither pleaded nor established mala fide exercise of power by the appellant. While so, the decision of the Tender Committee ought not to have been interfered with by the High Court. In our considered view, the High Court erred in sitting in appeal over the decision of the appellant to cancel the tender and float a fresh tender. Equally, the High Court was not right in going into the financial implication of a fresh tender."*

20. The rival submissions have been duly considered and the original records have been examined.

21. Let us first examine the matter from the perspective and projection made in WP(C)/2088/2023 filed by Dharmakanta Das. His projection is that in the tender process for settlement of the market in question, his bid was the only valid bid and therefore, the settlement should be granted in his favour. As noted above, though there were two more bids of higher amounts, the first bidder Rinku Borah had major defects in his bid and was rejected and such rejection is not the subject matter of any challenge. The bid of the remaining bidder Fatik Das was not considered as his EMD was short by Rs.35/- and non-consideration of his bid is the subject matter of challenge in the other writ petition WP(C)/3388/2023. The other part of the challenge with regard to the extension by a month has already been taken care of in the meantime by the order dated 13.04.2023 passed pursuant to the direction of this Court.

22. Therefore, there arise a situation where the bid of Dharmakanta would remain as the sole bid. Under such situation, the contentions made on behalf of

the Department would have to be considered. The CVC guidelines as well as the Procurement Rules of 2020 clearly lay down that in case there is a single bid in the tender process, the same should be re-tendered at least for one more time. Such prescription, apart from not being the subject matter of challenge is also in sync with the doctrine of fairness and transparency and to avoid formation of any cartel and monopoly. Therefore, this Court is of the opinion that no effective relief can be granted to the petitioner Dharmakanta Das.

23. In alternative perspective also petitioner Dharmakanta Das will not be entitled to any relief if the bid of the petitioner in the other case (Fatik Das) is considered as the amount offered by Fatik Das is more. Therefore, for all purposes, no relief whatsoever can be granted to petitioner Dharmakanta Das.

24. Coming to the claim made by petitioner Fatik Das in WP(C)/3388/2023 is concerned, the admitted position is that he being a Schedule Caste candidate is required to deposit the EMD at a concessional rate of 5% of the offered value. The value offered by him was Rs.1,28,50,700/- and therefore, the EMD would come to Rs.6,42,535/-. However, the EMD deposited was for an amount of Rs.6,42,500/- which is short by Rs.35/-. Though it is submitted that the shortage of the amount is minimal, such submission may not be acceptable as the degree / quantum of shortage would not have much relevance as a matter of principle. However, at the same time, the attending facts and circumstances of the instant case cannot be overlooked. It is an admitted case that though not within the time stipulated, on the same date, the shortage was rectified by submitting another Demand Draft of Rs.100/-.

25. If a very strict and technical approach is adopted, the rejection of the bid of Fatik Das by the authorities may not be found fault with. However, the settled

law in matters of contracts is that the authorities would have the discretion to adopt a procedure which would be best to protect the interest of public. In the opinion of this Court, the shortage of Rs.35/- in the EMD appears to be an inadvertent and *bona fide* mistake as the bidder does not gain anything by doing so. On the contrary, he faces the risk of rejection of his bid. The aforesaid view of the Court is fortified by the fact that on the same day itself, the shortage in EMD of Rs.35/- was sought to be cured.

26. The Hon'ble Supreme Court in the case of ***Poddar Steel Corporation Vs. Ganesh Engineering Works & Ors.***, reported in **(1991) 3 SCC 273** has explained the concept of a curable and incurable defects in a bid. In other words, what conditions are essential and what conditions are ancillary to the main object to be achieved have been laid down.

For ready reference, the relevant portion is extracted herein below:

“6. It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause 6 of the tender notice was not obeyed literally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories — those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in C.J. Fernandez v. State of Karnataka a case dealing with tenders. Although not in an entirely identical situation as the present one, the observations in the judgment support our view. The High Court has, in the impugned decision, relied upon Ramana Dayaram Shetty v. International Airport Authority of India but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender

notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted to illegal discrimination. The judgment indicates that the court closely examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment demonstrates the difference between the two categories of the conditions discussed above. However it remains to be seen as to which of the two clauses, the present case belongs.”

27. This Court also cannot lose sight of the fact that on a comparative assessment of the price bids of the rival parties, the difference is a substantial one. As noted above, the bid of Fatik Das is Rs.1,28,50,700/- and that by Dharmakanta Das is Rs.1,25,15,000/-. Therefore, the difference is more than Rs.3,00,000/- (Rupees Three Lakhs).

28. Taking into consideration, the attending facts and circumstances, this Court is of the opinion that the present would be a fit case wherein the authorities should use their discretion to condone the defect of the bid of bidder Fatik Das which was in the form of shortage of EMD by Rs.35/- which amount was otherwise also deposited on the same date and consequently grant the settlement with him who is the valid highest bidder in accordance with law. Since the settlement is for one year and a substantial period is already over, the aforesaid direction be complied with as early as possible and in any event within three weeks from today.

29. Both the writ petitions accordingly stand disposed of. Interim order, if any, stands merged with this final order.

30. Original records are handed over back to the learned Standing Counsel.

JUDGE

Comparing Assistant