



GAHC010150632023

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

Case No. : WP(C)/3958/2023

PURBANCHAL BUILDTECH PRIVATE LTD. AND ANR
A REGISTERED PRIVATE LIMITED COMPANY HAVING ITS REGISTERED
OFFICE AT HOUSE NO. 2, SEWALI PATH, FA AHMED NAGAR, SIX MILE,
GUWAHATI-781022, KAMRUP (M), ASSAM TO BE REPRESENTED BY ONE
OF ITS AUTHORIZED DIRECTOR VIZ. MD MATLEBUDDIN AHMED

2: MD MATLEBUDDIN AHMED
S/O GIAS UDDIN AHMED
DIRECTOR
PURBANCHAL BUILDTECH PRIVATE LIMITED
A REGISTERED PRIVATE LIMITED COMPANY HAVING ITS REGISTERED
OFFICE AT HOUSE NO. 2
SEWALI PATH
FA AHMED NAGAR
SIX MILE
GUWAHATI-781022
KAMRUP (M)
ASSA

VERSUS

THE STATE OF ASSAM AND 5 ORS.
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE
GOVERNMENT OF ASSAM, PWD (NH WORKS), ASSAM, DISPUR,
GUWAHATI-781006

2: THE CHIEF ENGINEER
PWD (NH WORKS)
ASSAM
CHANDMARI
GUWAHATI-781003
ASSAM

3: THE CHIEF ENGINEER



PWD (BORDER ROADS)
ASSAM
CHANDMARI
GUWAHATI-781003
ASSAM

4:THE TECHNICAL BID EVALUATION COMMITTEE
REPRESENTED BY ITS CHAIRMAN
CHIEF ENGINEER
PWD (NH WORKS)
ASSAM
GUWAHATI-781003
ASSAM

5:SANJAY KUMAR SINGH
CHIRWAPATTY ROAD
TINSUKIA
P.O.-TINSUKIA
ASSAM-786125

6:BIRMIWAL AND ASSOCIATES
CHARTERED ACCOUNTANTS
HEAD OFFICE 404 COMMERCE HOUSE
AT ROAD
ATHGAON
GUWAHATI-781001
KAMRUP (M)
ASSA

BEFORE

HON'BLE MR. JUSTICE SANJAY KUMAR MEDHI

Advocates for the petitioner : Shri KN Choudhury, Sr. Advocate;
Shri RM Deka, Advocate.

Advocates for the respondents : Shri D. Nath, SC – PWD;
Shri BD Konwar, Sr. Advocate;
Shri H. Agarwal, R. – 5.

Dates of hearing : **08.01.2024, 11.01.2024 & 19.01.2024**
Date of Judgment : **25.01.2024.**

JUDGMENT & ORDER

The legality and correctness of a decision dated 14.06.2023 taken by the Technical Bid Evaluation Committee of the PWD (NH) by which the bid of the petitioner no. 1 has been held to be technically non-responsive is the principal subject matter of challenge in this petition filed under Article 226 of the Constitution of India. Amongst others, the ground of challenge is non-application of mind to the relevant factors and taking into account extraneous and irrelevant factors for rejecting the bid of the petitioner.

2. Before going to the issue which has arisen for determination, the facts of the case can be briefly narrated as follows.

3. A Notice Inviting Tender (NIT) dated 11.04.2023 was floated by the PWD (NH), Assam for the work of "periodic renewal of Makum – Rupai Bypass from Km 0.000 to Km 23.482 (L = 23.482 km) under ARP for 2022-23 under EPC mode under Dibrugarh NH Division in the State of Assam bearing Job No. TA/15/2022-23/266 and being Package No.PWD-NH(R)/DIB/2023-24/EPC/01". The petitioner no. 1 is a Company which was incorporated on 02.06.2022 and is a Class-I (A) registered contractor and had submitted its bid by claiming that it meets all the eligibility criteria. The petitioner no. 2 is one of the Directors of the petitioner no. 1 who, however, had earlier executed works with the PWD both Roads and Building & NH Departments in his individual capacity. After incorporation of the petitioner no. 1 as a Company, it is the case projected that certain on-going works in the name of the petitioner no. 2 in his individual capacity were transferred to the petitioner no. 1- Company. However, such works did not include any of the works done by the petitioner no. 2 with the

PWD (Roads). In connection with the bid submitted by the petitioner no. 1, the respondent no. 5 who is another bidder had submitted a complaint, copy of which was not served upon the petitioners. Upon such complaint, a communication was issued from the Chief Engineer, PWD (NH) to the Chief Engineer (Border Roads) with regard to three works which were the subject matter of complaint. The said communication was, however, answered vide communication dated 26.05.2023 that those three works were in the name of the petitioner no. 2. The Technical Bid Evaluation Committee, however, vide the impugned minutes of meeting dated 14.06.2023 has rejected the bid of the petitioner no. 1 as being technically non-responsive. It has been held that such rejection is as per clause 2.6.2 as it has been held that there has been deliberate misrepresentation of facts. Apart from challenging the aforesaid decision, it is projected by the petitioners that the tender documents of the respondent no. 5 were also defective for which a complaint was lodged. Specific allegation has been made with regard to the Unique Document Identification Number (UDIN) as well as concealment of material facts.

4. I have heard Shri KN Choudhury, learned Senior Counsel assisted by Shri RM Deka, learned counsel for the petitioners. I have also heard Shri D.Nath, learned Standing Counsel, PWD, Assam. Shri BDKonwar, learned Senior Counsel assisted by Shri H.Agarwal, learned counsel has appeared for the private respondent no. 5. Shri Nath, learned Standing Counsel has also produced before this Court the original records of the Department.

5. Shri Choudhury, learned Senior Counsel for the petitioners has submitted that the decision making process suffers from non-application of mind wherein irrelevant and extraneous factors have been taken into consideration and the relevant factors which are germane to the issue in hand have been overlooked.

He submits that the entire action has been triggered by a complaint lodged by the respondent no. 5 who is a competitor with the sole intention to reduce/lessen a fair competition. He accordingly submits that such complaints ought not to have even been taken into consideration. The learned Senior Counsel, however, submits that even if such complaint is taken into consideration, the same was not based on any valid ground which is revealed from the steps taken by the Department to verify the same. By drawing the attention of this Court to the clarification sought for by the concerned NH Department vide communication dated 25.05.2023 which was issued to the Border Roads Department, the reply dated 26.05.2023 would clearly show that the three works which were the subject matter of the query was in the name of the petitioner no. 2 in his individual capacity and these works were never transferred to the name of the petitioner no. 1- Company after its incorporation unlike few other works. He submits that a company is a juristic person having its own legal entity and therefore, it is the works which were in the name of the Company that were to be taken into consideration in the context of evaluation of the technical bid.

6. Shri Choudhury, learned Senior Counsel further submits that Clause 2.6.2 under which the technical bid has been sought to be rejected is directly connected with Clause 2.2.2.1 which is with regard to bid capacity. He submits that even if for arguments sake, the aforesaid three works are to be taken into consideration, the same will not have any effect on the bid capacity. It is submitted that while the required bid capacity is Rs. 19.29 crores, the bid capacity of the petitioner no. 1 is Rs. 55.65 crores. It is submitted that the total balance value of the three works which were the subject matter of the complaint is about Rs. 15 crores and even if this amount is deducted, the bid

capacity of the petitioner no. 1 would still be much more than the required bid capacity.

7. On the issue of the validity of the bid of the private respondent no. 5, Shri Choudhury has submitted that the NIT stipulates that UDIN is required to be submitted by the bidders. He submits that the UDIN of the respondent no. 5 appears to be varying in the documents submitted by the said bidder and therefore, he raises a serious doubt on the authenticity of the same. It is also submitted that though specific allegations of concealment was made in the complaint filed by the petitioners against the respondent no. 5, the Department had simply ignored the said allegation.

8. In support of his submissions, Shri Choudhury, learned Senior Counsel has relied upon the case of ***SR Venkatarama Vs. Union of India***, reported in ***(1979) 2 SCC 491***. In paragraph 6 thereof, the following has been laid down:

“It is however not necessary to examine the question of malice in law in this case, for it is trite law that if a discretionary power has been exercised for an unauthorised purpose, it is generally immaterial whether its repository was acting in good faith or in bad faith. As was stated by Lord Goddard C.J., in Pilling v. Abergele Urban District Council(1), where a duty to determine a question is conferred on an authority which state their reasons for the decision,

"and the reasons which they state show that they have taken into account matters which they ought not to have taken into account, or that they have failed to take matters into account which they ought to have taken into account, the court to which an appeal lies can and ought to adjudicate on the

matter."

9. *Per contra*, Shri D. Nath, learned Standing Counsel, PWD has defended the impugned action. He has submitted that the rejection of the bid of the petitioner no. 1 on technical evaluation is based only on the aspect of material misrepresentation. He clarifies that the rejection has nothing to do with the bid capacity, as has been tried to be projected by the petitioners.

10. By referring to Clause 2.6.2 of the NIT, the learned Standing Counsel submits that material misrepresentation is a notified ground for rejection of the bid and appropriation of the bid security. He has also referred to Clause 3.1.6 which is in connection with "Tests of Responsiveness". He submits that for evaluation of a technical responsiveness, it is obligatory on the part of the bidder to submit details in particular formats which were given as appendix and annexures. Annexure I is with regard to details of bidder and Annexure IV is with regard to details of eligible projects. He submits that all details of the bidder and the eligible projects are required to be given in the aforesaid annexures.

11. By referring to the pleadings made in paragraph 10 of the writ petition, he submits that even to the understanding of the petitioners, bid capacity is not the issue for which the impugned rejection has been made. He further submits that in the affidavit-in-opposition filed on 15.11.2023 by the respondent nos. 1, 2 and 4, the entire details for taking the decision have been stated. It is submitted that the petitioner no. 1 had submitted an affidavit dated 15.07.2022 in the prescribed format along with the bid as per which it was stated that all the credentials, technical, financial, experiential, managerial and whatsoever of the petitioner no. 2, who was earlier the sole proprietor may be counted for the petitioner no. 1 - Company from 01.08.2022 for all purpose of fresh bids. It has

further been stated that the petitioner no. 2 holds 80% of the shares of the petitioner no. 1.

12. It has also been submitted that in the details of the works given by the petitioner no. 1, reference has also been made to a work at Bilasipara town for the year 2016-17 which was allotted to and completed by the petitioner no. 2. It is submitted that from the same, it becomes apparent that the petitioner no. 1 had inherited the credentials of the petitioner no. 2 for past works even outside the purview of the PWD (NH) works. It has also been stated in the said paragraph that since the petitioner no. 1 Company has relied upon a work done by the petitioner no. 2, all other credentials of the petitioner no. 2 are to be taken into account for making the technical evaluation of the petitioner no. 1. Reference has also been made to one of the existing ongoing commitments regarding improvement of Roads / approach Roads under the MukhyaMantriUnnoto Paki Path NirmanAchani for the year 2022-23. A clarification has been given that though the bid capacity was to be evaluated on the basis of existing commitments, works for which a bidder has emerged as the "winner" but LoA has not been issued as on the date before opening the financial bids shall also be considered for calculating the bid value.

13. Shri Nath, learned Standing Counsel, in support of his submissions, has placed reliance upon the case of ***Silppi Constructions Vs. Union of India*** reported in **(2020) 16 SCC 489**. In the said case, it has been laid down that in contractual matters, the reasons for a decisions is not required to be given at all stages.

14. Appearing for the private respondent no. 5, Shri BD Konwar, learned Senior Counsel, while endorsing the submissions and defence of the learned Standing Counsel of the Department has further submitted that Clause 2.6.3

clarifies that in case of material misrepresentation, even if a bidder is selected, such allotment can be terminated. With regard to the Test of Responsiveness as laid down in Clause 3.1.6 wherein a bidder is required to disclose existing commitments, the petitioner no. 1, as a bidder had given the details of three works in paragraph 12 of the writ petition which were in fact taken into consideration by the Bid Evaluation Committee. He submits that in the format submitted by the petitioner no. 1 which is a part of the affidavit-in-opposition of the respondent nos. 1, 2 and 4, works for the period 2017 to 2022 have been mentioned and all those works were done by the petitioner no. 2 as the petitioner no. 1 was incorporated only thereafter on 01.08.2022.

15. Shri Konwar also submits that initially no interim order was passed in this petition and the petitioners had accordingly preferred WA/296/2023. However, the learned Senior Government Advocate, Assam had made assurance that the work order shall not be issued to the respondent no. 5 and the said assurance was recorded in the order dated 23.08.2023.

16. It is submitted on behalf of the respondent no. 5 that a work of which LoA was issued on 10.03.2023 to the petitioner no. 1 was not disclosed. With regard to the allegation of *mala fide* against the petitioners, it is submitted that complaints by the respondent no. 5 were given not only against the petitioner no. 1 but also against another bidder. With regard to the complaints made by the petitioners against his client, Shri Konwar, the learned Senior Counsel has submitted that the issue of UDIN has been adequately explained by its Chartered Accountant and therefore, will not have any relevance.

17. In support of his submissions, Shri Konwar, learned Senior Counsel for the respondent no. 5 has placed reliance upon the following case laws-

- i. ***G.J. Fernandez Vs. State of Karnataka [(1990) 2 SCC 488]***
- ii. ***JagdishMandal Vs. State of Orissa [(2007) 14 SCC 517]***
- iii. ***Central Coalfields Ltd. Vs. SLL-SML (Joint Venture Consortium) [(2016) 8 SCC 622]***
- iv. ***Afcons Infrastructure Limited Vs. Nagpur Metro Rail Corporation Limited and Anr. [(2016) 16 SCC 818]***
- v. ***Uflex Limited Vs. Government of Tamil Nadu &Ors. [(2022) 1 SCC 165]***
- vi. ***Agmatel India Private Limited Vs. Resoursys Telecom &Ors. [(2022) 5 SCC 362]***
- vii. ***National High Speed Rail Corporations Vs. Montecarlo Limited &Anr. [(2022) 6 SCC 401]***
- viii. ***Tata Motors Limited Vs. Brihan Mumbai Electric Supply & Transport Undertaking (BEST) &Ors. [2023 SCC OnLine SC 671]***

18. In the case of ***G.J. Fernandez*** (supra), the Hon'ble Supreme Court has held that the executive authority should be given the discretion in dealing with contractual matters unless arbitrariness is proved. A similar view has been taken in the case of ***JagdishMandal*** (supra) with an additional caveat that in commercial functions, principles of equity and natural justice stay at a distance.

19. In the cases of ***Central Coalfields Ltd.*** (supra), ***Agmatel India Private Limited*** (supra) and ***Afcons Infrastructure Limited*** (supra), similar views have been laid down on the restraint to be observed by a Court in exercising powers of judicial review in contractual matters and further that the author of the tender document is the best person to interpret the clauses and

appreciate the requirements.

20. In the case of **Uflex Limited** (supra), a further caveat has been laid down that in contractual matters, the losing party must bear the cost in case of delay.

21. In the case of **National High Speed Rail Corporations**(supra), the Hon'ble Supreme Court has again reiterated the requirement of restraint of a Court in examining contractual matters unless there are evidence of *mala fide*, arbitrariness or favouritism. A similar view has been expressed in the case of **Tata Motors** (supra).

22. The rival submissions have been carefully examined and the materials, including the original records have been duly perused.

23. At the outset, this Court would like to clarify that the present scrutiny is in connection with the decision making process of the Technical Bid Evaluation Committee in its meeting held on 14.06.2023 pertaining to the consideration of the bid of the petitioner no. 1. While doing so, this Court is required to confine its scrutiny only with the reasons cited for holding the bid of the petitioner no. 1 to be technically non-responsive after such consideration. The law has been well settled in this regard that when an authority takes a decision, the same cannot be construed in the light of explanation subsequently given of what was in the mind of the decision maker. Such matters are to be construed objectively and in the context of the language used. This Court takes the aid of the observation and the law laid down by the Hon'ble Supreme Court in the celebrated case of **Commissioner of Police, Bombay vs. GordhandasBhanji** reported in **AIR 1952 SC 16**. In the judgment authored by *Hon'ble Justice Vivian Bose*, the following has been laid down-

“An attempt was made by referring to the Commissioner's affidavit to show that this was really an order of cancellation made by him and that the order was his order and not that of Government. We are clear that public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.”

24. The aforesaid view has been reiterated by the Hon'ble Supreme Court in a catena of subsequent decisions, including the Constitution Bench decision in the case of **Mohinder Singh Gill Vs. Chief Election Commissioner** reported in **AIR 1978 SC 851**. In the said case, it has further been added that the reasons of a decision cannot be supplemented by fresh reasons in the shape of the affidavit or otherwise. For ready reference, the relevant paragraph is extracted hereinbelow-

“8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. In Gordhandas Bhanji (AIR 1952 SC 16) :

‘Public orders publicly made, in exercise of a statutory

authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself’.

Orders are not like old wine becoming better as they grow older.”

25. In the above context, the impugned decision making process in the minutes of meeting dated 14.06.2023 is to be examined which has culminated into rejection of the bid of the petitioner no. 1. The discussion on the bid of the petitioner no. 1 is upon representation received alleging concealment of existing commitments by the petitioner no. 1. On those allegations, a verification exercise was made vide communication dated 25.05.2023 to the CE, PWD (Border Roads). The said authority had conveyed vide communication dated 26.05.2023 that the said commitments were in fact not completed which were in the name of the petitioner no. 2. The Bid Evaluation Committee had held that there was misrepresentation leading to disqualification as per clause 2.6.2.

26. Both the communications dated 25.05.2023 and 26.05.2023 have been brought to record by way of additional affidavit by the respondent nos. 1, 2 and 4. Details of three works which were sought for were package nos. AS-11-901, AS-16-202 and AS-11-930. This Court has however noticed that all the above three works were in the name of the petitioner no. 2 in his individual capacity. It is also clearly revealed that the dates of allotment of the works are respectively,

19.09.2022, 02.09.2022 and 19.09.2022. It is to be kept in mind that the petitioner no. 1 was incorporated as a Company on 02.06.2022. It is the further categorical stand of the petitioners that the works in the name of the petitioner no. 2 with the PWD Roads have not been transferred to the petitioner no. 1. In this connection, the averments made by the petitioners in paragraph 3 of the writ petition may be referred to, which read as follows:

“3. That the petitioner company has also got registered as Class I(A) Category Contractor for the year 2022-25 under the PWD (Roads), Assam vide Registration Certificate issued under No. CE/ADT(II)/22-25/69636 dated 11.11.2022. It is pertinent to mention herein that though after incorporation of the petitioner company and its registration under PWD (NH), Assam the pending works in PWD (NH) in the name of the one its Directors Md. Matlebuddin Ahmed was transferred in the name of the petitioner company vide abovementioned Office Order dated 21.07.2022, no such order of transferring the pending works in PWD (Roads), Assam in the name of Md. Matlebuddin Ahmed has been issued by the Chief Engineer, PWD (Roads), Assam till date. As such, the said pending / existing works allotted to the proprietorship firm of the aforementioned Director before incorporation and registration of the petitioner company are outside the purview of the petitioner herein and the said pending/existing works/commitments are being carried out by the said Director in his individual risk and capacity and said works have nothing to do with the present petitioner company. It is further stated that the running bills of the ongoing existing works under the PWD (Roads) are being released in the name of the sole proprietorship firm of the aforementioned Director and not in the name of the petitioner company.”



27. The respondent authorities in their affidavit-in-opposition filed on 15.11.2023 while dealing with the aforesaid averments have stated that the petitioner no. 2 is one of the Directors of the petitioner no. 1– Company with 80% shareholding. Allegations have also been made regarding concealment of an ongoing commitment being package no. MMUPPNA_RIDF_XXVIII_22_23_57 and consequently, the aspect of Bid Capacity has also been brought in with the further explanation that even though the LoA of the aforesaid work was issued subsequently, the same would be taken into consideration.

28. It is trite law that a Company is a separate juristic person with its own legal entity and the bidder for the work in question is the petitioner no. 1 which is a Company. Though the petitioner no. 2 is a Director of the petitioner no. 1, he is a separate legal entity. Though certain works which were earlier undertaken and were in the name of the petitioner no. 2 have been transferred to the petitioner no. 1, the three works in question were admittedly not transferred to the petitioner no. 1. Under that context, this Court is of the opinion that it would be wholly unreasonable to raise the allegation of misrepresentation in not disclosing the aforesaid three works. The disclosure has to be understood to be in the context of works in the name of the bidder.

29. It was strenuously argued on behalf of the contesting respondents that since certain works which were in the name of the petitioner no. 2 have been relied by the petitioner no. 1 as a part of his credentials, the aforesaid three works should also have been disclosed. The aforesaid contention however cannot countenance in view of the fact that the works which were relied by the petitioner no. 1 in support of its credentials were officially transferred to its name whereas the above three works continued to remain in the name of the petitioner no. 2.

30. An attempt has been made to improve the case of the respondents by bringing additional ground in support of such rejection. However, in view of the settled law in the cases of **Gordhandas Bhanji** (supra) and **Mohinder Singh Gill** (supra), this Court is of the view that such attempt is not permissible in law and therefore, not required to be gone into. It has further been averred by the Department that even in case, a bidder has emerged as the winner of the bids but LoA has not been issued as on the day before opening of the financial bids shall also be considered for calculating the bid value. It ultimately transpires that though the rejection of the bid on technical grounds is by invoking Clause 2.6.2 which is in connection with material misrepresentation, it appears that subsequently in the affidavit, the aspect of Bid Capacity has also been tried to be brought in which is under Clause 2.2.2.1. In this connection, it has already been brought on record that while the required Bid Capacity for the work in question is Rs.19.29 crores, the Bid Capacity of the petitioner no. 1 is Rs.55.65 crores and even if the aforesaid work is taken into consideration, it would not affect the required Bid Capacity.

31. To allay any doubts regarding the reasons for the impugned action, the original file including the note sheets which have been placed on record have been carefully examined. As per the note sheet, the only reason for rejection of the bid of the petitioner no. 1 on technical evaluation is non-disclosure of the ongoing commitments which were enquired into and response received from the Chief Engineer, PWD (Border Roads) vide communication dated 26.05.2023. The said communication has been discussed in details above along with the query raised vide communication dated 25.05.2023.

32. The aforesaid discussion brings this Court to a conclusion that the factors which have been taken into consideration for holding the bid of the petitioner



no. 1 to be technically non-responsive are irrelevant and extraneous. This Court is of the opinion that there was no obligation on the part of the petitioner no. 1 to disclose the three works which were in the name of the petitioner no. 2 and were admittedly not transferred to the petitioner no. 1 and therefore, it cannot be said that the bid of the petitioner no. 1 had suffered from any material misrepresentation inviting a rejection under Clause 2.6.2.

33. This Court has also seen from the materials placed before this Court that the financial bid of the petitioner no. 1 is significantly less than that of the respondent no. 5 and therefore, the element of public interest is also involved and this aspect is also relevant which cannot be overlooked.

34. In view of the aforesaid finding arrived at by this Court, the writ petition stands allowed and the impugned decision making process of the Bid Evaluation Committee leading to the rejection of the bid of the petitioner no. 1 dated 14.06.2023 is set aside. Consequently, the financial bid of the petitioner no. 1 is required to be considered and the work in question be allotted to the L1 bidder in accordance with law.

35. No order as to cost.

36. The original records are handed over back to the learned Standing Counsel, PWD.

JUDGE

Comparing Assistant