



GAHC010160662023

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

Case No. : WP(C)/4163/2023

AMAL CHANDRA BORA
S/O- LATE DINANATH BORA, R/O- RAJAHOWLI, SONARI GAON, P.O.
KOROKATOLI, JORHAT, DIST. JORHAT, ASSAM, PIN- 785015.

VERSUS

THE STATE OF ASSAM AND 4 ORS.
REPRESENTED BY THE COMMISSIONER AND SECRETARY, HIGHER
EDUCATION DEPARTMENT, DISPUR, GUWAHATI-6.

2:THE DIRECTOR
TECHNICAL EDUCATION

KAHILIPARA
GUWAHATI-781019.

3:THE JORHAT INSTITUTE OF SCIENCE AND TECHNOLOGY

REPRESENTED BY ITS PRINCIPAL
SOTAI
JORHAT-785010.

4:THE PRINCIPAL

JORHAT INSTITUTE OF SCIENCE AND TECHNOLOGY
SOTAI
JORHAT-785010.

5:SIDHARTHA SANKAR DUTTA
PROPRIETOR OF M/S HIRU TOURS AND TRAVELS
S/O- LATE BIDYA DUTTA
R/O- PUB BONGALPUKHURI



CLUB ROAD
P.O. AND DIST. JORHAT
PIN- 785001

Advocate for the Petitioner : MR B D DAS

Advocate for the Respondent : SC, HIGHER EDU

**BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA**

JUDGMENT

Date : 08.04.2024

Heard Mr. B.D. Das, senior counsel, assisted by Ms. B.B. Hussain and Mr. H.R. Das, learned counsel for the petitioner, Ms. P.R. Mahanta, learned Standing counsel for the Higher Education Department, representing respondent nos. 1 to 4 and Mr. D.J. Boro, learned counsel for the respondent no.5.

2) By filing this writ petition under Article 226 of the Constitution of India, the petitioner has assailed the work-order no. JIST/TMC/2022/566 dated 26.06.2023, for hiring buses on contract basis, issued by the Principal, Jorhat Institute of Science and Technology, Jorhat (JIST for short) (respondent no.4) issued in favour of respondent no.5.

3) The case of the petitioner is that he is the owner of 2 (two) numbers of buses, which was provided on hire to the JIST upto 31.07.2023. On 28.03.2023, the respondent no.4 had issued notice inviting tender (NIT for short) for awarding contract for hiring of buses, with stipulation that the vehicles offered should not be older than more than 5 (five) years and should not have more than 30-35 seating capacity. The said NIT was assailed by the petitioner by filing a writ petition before this Court, which was registered as W.P.(C) 2283/2023. The said writ petition was disposed of by order dated 03.05.2023 by

directing the respondent nos. 3 and 4 to dispose of the representation dated 04.04.2023, submitted by the petitioner. Accordingly, the Tender Committee took a resolution dated 08.05.2023 to the effect that the age of the bus cannot be more than 3 (three) years.

4) Thereafter, the respondent no. 4 had published a fresh NIT dated 11.05.2023, for hiring 2 (two) buses. Out of the various tender conditions, tender clause no. 1(a) was that the bidder should be registered as travel agent/registered handling agent under the Registration Act and as per tender clause no. 1(f), the supplier must have 1 (one) spare registered bus of similar capacity in his/ her name against which he is submitting the bid. The tender was awarded to the respondent no. 5 by issuing the impugned work-order dated 26.06.2023 to provide 2 (two) buses from 01.08.2023 for a period of 3 (three) years. The said award is challenged, *inter-alia*, on the ground that the contract was awarded in violation of tender clauses 1(a) and 1(f) respectively.

5) The learned senior counsel for the petitioner has submitted that if the petitioner was made aware that deviation from tender condition was otherwise permissible, he too could have participated with some deviation of conditions of NIT. Thus, it was submitted that the acceptance of tender which did not conform to the clauses of NIT was bad and liable to be interfered with. In support of his submissions, reliance was placed on the following two cases, being (i) *Reliance Energy Limited & Anr. v. Maharashtra State Road Development Corporation Ltd. & Ors.*, (2007) 8 SCC 1: 2007 STPL 17685 SC, and (ii) *Rabi Baruah v. N.F. Railway & Ors.*, 2024 (2) GLT 344.

6) The respondent no. 4 had filed an affidavit-in-opposition and it was contended that the respondent no. 5 was accepted as a registered travel



agent under Registration Act by the Scrutinizing Committee on the basis of GST Certificate issued by the Government of India, which registers him with a trade name of "Hiru Tours and Travel" with legal name as his own name and hence, the said certificate was accepted as registration/ trade licence is a pre-requisite for obtaining GST registration certificate. In respect of clause 1(f) of the tender conditions, the stand of the respondent no. 4 was that bidder must have two buses in his own name is understood to indicate that the bus may not be in his own name but in favour of his/her agency as the respondent no. 5 had applied as a travel agent only and therefore, power of attorney to the travel agency of respondent no. 5 is a legal way of using of the bus. It was also submitted that having not participated in the bidding process, it is not open to the petitioner to challenge the award of tender in favour of the respondent no.5.

7) The learned counsel for the respondent no. 5 has adopted the submissions made by the learned standing counsel for the respondent nos. 1 to 4 and has opposed the writ petition.

8) The learned standing counsel for the Higher Education Department has produced the original tender record. Perused the same.

9) As per the NIT dated 11.05.2023, the bid documents was to be received upto 2:00 pm on 31.05.2023, and was to be opened at 3.00 pm on the same day. It is seen that enclosed to his affidavit-in-opposition, the respondent no. 5 has annexed photocopy of 3 (three) power of attorneys in respect of three buses, which are marked as Annexure-2 (series), bearing the following notary serial nos., viz., (i) serial no. 78 dated 29.05.2023, (ii) serial no. 79 dated 29.05.2023, and (iii) serial no. 24 dated 13.06.2023.

10) There is nothing on record to show that the last date of

submission of bid was extended beyond 31.05.2023. Therefore, the third power of attorney bearing serial no. 24 dated 13.06.2023 could not have found place in the tender/ bid submitted by respondent no.5.

11) The relevant clause nos. 1(a) and 1(f) of the NIT under the head of "scope of works and terms and conditions" are quoted below:-

1(a) The bidder should be registered as travel/registered handling agent under Registration Act for providing vehicles on hire for which the agent shall have to submit evidence of registration.

* * *

1(f) The supplier must have at least one spared registered bus of similar capacity in hi/her name or in favour of his/her firm/name against which he is submitting the bid (Copy of R/C must be submitted with the bid).

12) There is nothing on record to show that the tendering authority had reserved its right to relax any of the tender clauses including tender clause nos. 1(a) and 1(f) after opening of the bids. It may be mentioned that the three buses offered by the respondent no. 5, which are covered by the said three power of attorneys are admittedly not in the name of the respondent no. 5 or his proprietorial firm under the name and style of M/s. Hiru Tours and Travels. Moreover, the said three power of attorneys may authorize the lawful attorney to use the buses, but power of attorney cannot be interpreted to deem that one spare bus is in the name of the respondent no. 5.

13) Such an interpretation runs counter to the statutory provision of section 3(30) of the Motor Vehicles Act, 1988, which is quoted below:-

2(30) "owner" means a person in whose name a motor vehicle stands registered, and where such person is a minor, the guardian of such minor, and in relation to a motor vehicle which is the subject of a hire-purchase, agreement, or an agreement of lease or an agreement of hypothecation, the person in possession of the vehicle under that agreement.

14) The clause 1(a) contains reference to Registration Act. The only act under such nomenclature is the Registration Act, 1908. The learned standing counsel for the respondent nos. 1 to 4 and the learned counsel for the respondent no. 5 could not show any provisions under the Registration Act, 1908 by which a travel agent is registered. The learned counsel for the respondent nos. 1 to 4 had referred to stand taken by the respondent no. 4 that the respondent no. 5 had GST registration certificate. Such an interpretation of tender clause 1(a) would squarely amount to re-writing of the rules of game after the game has begun.

15) Thus, in this case, the said clause nos. 1(a) and 1(f) has been given interpretation by the tendering authority which appears to be closely known only to the tendering authority i.e. respondent nos. 4 and the respondent no.5, which cannot be said to be in the public interest.

16) In this regard, the Court is of the considered opinion that in this case, the acceptance of bid submitted by the respondent no. 5 cannot be held to have been done in a fair and transparent manner. The Court is conscious of the fact that the Supreme Court of India, in the case of *Air India Ltd. Vs. Cochin International Airport Ltd & ors.*, (2000) 2 SCC 617, had held that only the decision making process and not the decision is amenable to judicial review and that it was open to the authorities not to accept a particular offer on a particular basis. It was further held that in a commercial transaction offer complex nature 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 was open to the respondents to choose its own method to arrive at a decision and the State can chose its method to arrive at a decision. It has been further held 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 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.

17) However, in this case, as stated hereinbefore, the decision making process was not fair and transparent because the process which the tendering authority would be accepting the bids was not disclosed. Had such a disclosure been made, the possibility cannot be ruled out that many others who might have been situated similar to the respondent no. 5 might have submitted their bid. In this regard, the Supreme Court of India, in the case of *Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. & Ors.*, (1997) 1 SCC 53, had held to the effect that whatever procedure the govt. proposes to follow in accepting the tender must be clearly stated in the tender notice. It was also held to the effect that the consideration of the tenders received and the procedure to be followed in the matter of acceptance of a tender should be transparent, fair and open.

18) In any case, the power of attorney bearing notary serial no. 24 dated 13.06.2023 stands as a testimony of fact that the said power of attorney was notarized on 13.06.2023, which is after the last date of submission of the bid. The acceptance of document after bidding is closed cannot be held to be in public interest.

19) In the case of *Reliance Energy Limited (supra)*, the observations of the Supreme Court of India in paragraphs 38 and 39 (extracted from 2007 STPL 17685 SC) are quoted below:-

38. *When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field".*

39. *In the case of Reliance Airport Developers (P) Ltd. v. Airports Authority of India and others -(2006) 10 SCC 1, the Division Bench of this Court has held that in matters of judicial review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself. This means that the decision-maker must understand correctly the law that regulates his decision-making power and he must give effect to it otherwise it may result in illegality. The principle of "judicial review" cannot be denied even in contractual matters or matters in which the Government exercises its contractual powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest. Expression of different views and opinions in exercise of contractual powers may be there, however, such difference of opinion must be based on specified norms. Those norms may be legal norms or accounting norms. As long as the norms are clear and properly understood by the decision-maker and the bidders and other stakeholders, uncertainty and thereby breach of rule of law will not arise. The grounds upon which administrative action is subjected to control by judicial review are classifiable broadly under three heads, namely, illegality, irrationality and procedural impropriety. In the said judgment it has been held that all errors of law are jurisdictional errors. One of the important principles laid down in the aforesaid judgment is that whenever a norm/benchmark is prescribed in the tender process in order to provide certainty that norm/standard should be clear. As stated above "certainty" is an important aspect of rule of law. In the case of Reliance Airport Developers (supra), the scoring system formed part of the evaluation process. The object of that system was to provide identification of factors, allocation of marks of each of the said factors and giving of marks had different stages. Objectivity was thus provided.*

20) Thus, the petitioner has been able to make out a case that if he was made aware that the conditions contained in clause 1(a) and 1(f) of the terms and conditions of the NIT was liable to be relaxed, he could have participated in the bidding process and he would have got a level playing field. Therefore, the case of *Rabi Baruah (supra)*, cited by the learned senior counsel



for the petitioner is found to help the petitioner. It is held that in this case, despite the fact that the petitioner is a non-bidder, it was open to the petitioner to assail the award of contract work in favour of the respondent no.5.

21) Therefore, this writ petition succeeds. Resultantly, the impugned office order bearing No. JIST/T.M.C./ 2022/566 dated 26.06.2023, issued by the Principal, Jorhat Institute of Science and Technology, Jorhat in favour of the respondent no. 5, namely, Sri Siddhartha Sankar Dutta, Proprietor, Hiru Tours and Travels is hereby set aside and quashed. All consequential actions taken by the respondent no.3 and 4 are also set aside.

22) The respondent no. 3 and 4 shall now call for a fresh NIT for hiring of buses, if required. The fresh bidding process should be completed within a period of two months from the date of service of a certified copy of this order in the office of the Principal, Jorhat Institute of Science and Technology, Jorhat (JIST). For the said outer period of two months and not beyond, the respondent no. 3 and 4 is permitted to continue with the present arrangement.

23) The parties are left to bear their own cost.

JUDGE

Comparing Assistant