

GAHC010061132024



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

Case No. : WP(C)/1681/2024

SIMANTA GOGOI
S/O- BHADRESWAR GOGOI,
R/O- MILON NAGAR, P.S- GHILAMARA, DIST- LAKHIMPUR, ASSAM, PIN-
787053

VERSUS

THE STATE OF ASSAM AND ORS
REPRESENTED BY THE SECRETARY TO THE GOVT. OF ASSAM, EXCISE
DEPARTMENT, DISPUR, GUWAHATI-06

2:THE COMMISSIONER OF EXCISE

GOVERNMENT OF ASSAM

HOUSEFED COMPLEX
DISPUR-BELTOLA ROAD
DFISPUR
GUWAHATI-6.

3:THE DISTRICT COMMISSIONER
CUM CHAIRMAN
E- BIDDING COMMITTEE
LAKHIMPUR
ASSAM
PIN-787001

4:THE SUPERINTENDENT OF EXCISE
LAKHIMPUR
ASSAM
PIN-787001

5:DHRUBAJYOTI SAIKIA
S/O- DHANESHWAR SAIKIA

R/O- KHELMATI
WARD NO-14
NORTH LAKHIMPUR
DIST-LAKHIMPUR
ASSAM
PIN-78700

Advocate for the Petitioner : MR G PEGU, MR R B GOSWAMI, MS. M K SHARMA, MS. M D BORAH

Advocate for the Respondent : SC, EXCISE DEPTT., MS. A K CHOPHI (r-5), MR. M BISWAS (r-5), GA, ASSAM

BEFORE
HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

Advocate for the petitioner : Mrs. M.D. Borah
Mr. R.B. Goswami, Advocate

For the respondents : Mr. R.R. Gogoi, Advocate (R1, 2 and 4)
Mr. M. Chetia (R3)
Mr. M. Biswas, Advocate (R5)

Dates of hearing : 13.08.2024

Date of Judgment : 28.08.2024

JUDGMENT AND ORDER (CAV)

1. Heard Mrs. M.D. Borah, learned counsel for the petitioner, who submits that the disqualification of the petitioner's technical bid by the Technical Bid Evaluation Committee should be set aside, as there is no infirmity in the technical bid submitted by the petitioner.

2. The petitioner's case in brief is that the State respondents had issued a Notice Inviting Bid dated 20.12.2023, for grant of IMFL Retail Off Licence for various places in Lakhimpur district, including Shop No. LKP 13 at C.D Road,

Lakhimpur. As there were no participants for the said tender notice, the same was cancelled and a subsequent Notice Inviting E-Bid dated 23.02.2024 (NIT in short) was issued by the respondents. However, the petitioner's technical bid was disqualified on two grounds, i.e., **(1)** The site plan was not countersigned by the Assistant Executive Engineer, PWD (B) and **(2)** Point 22.3 of the NIT had been violated.

3. The petitioner's counsel submits that in terms of the Notice Inviting E-Bid (NIT) dated 23.02.2024 (Page 56 of the writ petition), the details were to be submitted by referring to "the previous bid document" and as per the revised timeline given in the chart, i.e., the documents were required to be submitted in terms of the earlier tender notice dated 20.12.2023. The documents to be submitted as per the previous bid documents is reflected in Annexure-C of the NIT. Further, the documents to be submitted along with the technical bid were reflected in the "Documents to be submitted along with technical bid", hereinafter referred to as the "List of documents." Serial No.18 of the "List of documents" states as follows:-

*"18. Annexure **C, D and E.**"*

4. Annexure-C of the NIT is the "Checklist of Bidder Eligibility Criteria in Technical Bid" and is divided into 7 columns. Column 2 speaks of "Basic Requirement" and Column 3 speaks of "Specific Requirement." Column 2 & 3 of Serial No.12 states as follows:-

12	Site information	Site plan certified by an engineer, Bidder's right/title of the premises.	Land holding/ Jamabandi, Valid Lease agreement with the owner of the premises.
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5. There is nothing stated in Column Nos.2 & 3 of Serial No. 12 that any particular grade/cadre of engineer is to certify the site plan. However, Serial No.22 of the "List of documents" states that the site plan is to be signed by the Assistant Executive Engineer. As there was no bar for any Engineer to sign the site plan, in terms of the earlier tender notice dated 20.12.2023 and Annexure-C, the petitioner had submitted the site plan signed by an Assistant Engineer (in short 'AE') and not by an Assistant Executive Engineer. The petitioner's counsel submits that the site plan submitted by the petitioner being certified by an Assistant Engineer, the petitioner's technical bid could not have been disqualified, on the ground that site plan had not been signed by an Assistant Executive Engineer, as was required under Serial No.22 of the "List of Documents".

6. Clause 22.3 of the bid document states that no Bidder shall contact any member of the Tender/Bid Committee on any matter related to the bid, from the time of the opening of bids to the time of issue of the Letter of Acceptance (LoA). Any effort from the part of a Bidder to Influence the Tender/Bid Committee in its decision in respect of bid evaluation, bid comparison or issue of the Letter of Acceptance (LOA) would result in the rejection of the bid and forfeiture of the earnest money deposit (EMD). During the bid preparation process, bidders will focus their inquiries and communications, if any, only to the authorized nodal officer of the District Commissioner. The petitioner's counsel submits that the petitioner did not meet any member of the Bid Committee to influence the outcome of his tender documents.

7. Mr. R.R. Gogoi, learned counsel for the Excise Department, on the other hand, submits that while the bid documents in relation to the earlier tender

notice dated 20.12.2023 did not require the site plan to be signed by the Assistant Executive Engineer only, the same was required to be signed in the present NIT dated 23.02.2024. He submits that as per Serial No.22 of the "List of Documents", the site plan was to be signed by the Assistant Executive Engineer (for short 'AEE'). As a clarification had been made in Serial No.22, that the site plan had to be signed by an AEE, Serial No.22 would have to be read into Serial No.12 of Annexure-C, by superseding the requirement mentioned therein that the site plan should be certified by an Engineer. He further submits that the petitioner had violated Clause 22.3 of the bid documents, as the petitioner had contacted the Finance & Accounts officer, who was a member of the Bid Committee, to try and influence him to award the licence to the petitioner. In this respect, the Finance and Accounts Officer in the DC's office, Lakhimpur has written a letter dated 06.03.2024, to the effect that the petitioner had contacted him and tried to influence him regarding the bid submitted by the petitioner.

8. Serial No.22 of the "List of Documents" to be submitted by tenderers is as follows :

"Site Plan duly signed by Assistant Executive Engineer"

9. Mr. M. Biswas, the learned counsel for the respondent No.5 submits that the site plan to be submitted by tenderers, had to be signed by the Assistant Executive Engineer only, in terms of Serial No.22 of the "List of Documents." As the petitioner has not complied with Serial No.22 and as there is no challenge made to Serial No.22, there is no infirmity with the State respondents disqualifying the petitioner's technical bid, for noncompliance with Serial No.22.

He also submits that contractual matters can only be interfered with, if there is some public interest involved. However, no averment has been made by the petitioner in the writ petition that any public interest is involved. He further submits that though Annexure-C at Serial No.12 provides that the site plan can be signed by any Engineer, the clarification of the same having been made in Serial No.22 of the "List of Documents", wherein it is specified that the site plan has to be signed by an Assistant Executive Engineer, the specific term and condition in the NIT would override/supersede the general term and condition. He submits that Annexure-C is only for submission of particular documents and further instructions with regard to signing of documents is clarified in Serial No.22 of the "List of Documents." In support of his submission, he has relied upon the judgment of the Supreme Court in the case of ***Maya Mathew Vs. State of Kerala and Ors.,*** reported in ***(2010) 4 SCC 498.***

10. Mr. M. Biswas submits that the authority that authors the tender document is the best person to understand and appreciate it's requirements. Thus, it's interpretation should not be second guessed by a Court in judicial review proceedings. He further submits that though the interpretation of the tender documents by the owner or employer may not be acceptable to the Constitutional Courts, that is, by itself not a reason for interfering with the interpretation given. He also submits that if a decision relating to award of contract is bona fide and is in public interest, Courts should not interfere. He submits that Courts should not use a magnifying glass, while scanning tenders and make every small mistake appear like a big blunder. In fact, the Courts must give "fair play in the joints" to the government and public sector undertakings, in matters of contract. He further submits that specific conditions in the NIT would override the general conditions in the NIT. In support of his

submissions, he has relied upon the judgments of the Supreme Court in the case of **(1) Agmatel India Private Limited Vs. Resoursys Telecom and Ors.**, reported in **(2022) 5 SCC 362**; **(2) Caretel Infotech Limited Vs. Hindustan Petroleum Corporation Limited and Ors.**, reported in **(2019) 14 SCC 81**; **(3) Tata Motors Limited Vs. Brihan Mumbai Electric Supply & Transport Undertaking (BEST) and Ors.**, reported in **2023 SCC OnLine SC 671** and **(4) Maya Mathew Vs. State of Kerala and Ors.**, reported in **(2010) 4 SCC 498**. He has also relied upon the judgment of this Court in the case of **Md. Azad Ali Vs. the State of Assam and 4 Ors., WP(C) 2001/2023**.

11. I have heard the learned counsels for the parties.

12. It is seen that the Finance and Accounts Officer in the DC's office is a member of the Tender/Bid Committee. However, on reading the letter allegedly issued by the Finance and Accounts Officer, who is not a party in the present writ petition, it is seen that there has been no reference to the petitioner, as the person who violated Clause 22.3 of the NIT. Clause 22.3 of the NIT states as follows :

“22.3 No Bidder shall contact any member of the Tender/Bid Committee on any matter relating to its bid, from the time of the opening of bids to the time of issue of the Letter of Acceptance (LOA). Any effort of the Bidder to influence the Tender/Bid Committee in its decision in respect of bid evaluation, bid comparison or issue of the Letter of Acceptance (LOA) shall result in the rejection of the bid and forfeiture of the EMD. During the bid preparation process, Bidders will focus their inquiries and communications, if any, to only the authorized nodal officer of the District Commissioner.

13. On considering the stand of the petitioner regarding the fact that the site plan submitted by the petitioner did not contain the signature of the Assistant Executive Engineer, this Court finds that Serial No.18 of the "List of Documents" read with Serial No.12 of Annexure-C in the NIT dated 23.02.2024 required the site plan to be signed by any Engineer, though Serial No.22 of the "List of Documents" shows that only an AEE could sign the site plan.

14. This Court, vide order dated 18.07.2024, had directed the Finance & Accounts Officer in the office of the Deputy Commissioner, North Lakhimpur to file an affidavit in support of the document allegedly submitted by the respondent no.3, regarding the attempt made to influence the Finance & Accounts Officer during the bid evaluation process.

15. The said Finance & Accounts Officer has submitted an affidavit dated 30.07.2024, which does not indicate/identify the petitioner as the bidder, who had tried to influence him with regard to the outcome of the tender selection process. The relevant paragraph-3 of the affidavit of the concerned Finance & Accounts Officer is reproduced hereinbelow, as follows :

"3. That I was one of the members of the Bid Committee. During the tender process one of the bidders had come with two other individuals on evening of 5th March, 2024 and tried to influence me for settlement of the tender. Accordingly, I had written a letter dated 06.03.2024 informing the Superintendent of Excise cum Member Secretary (e-tender committee), North Lakhimpur, Assam about the same. The letter dated 06.03.2024 is already on record in the instant writ petition in the affidavit-in-opposition filed by and on behalf of the Respondent No. 3 as ANNEXURE-A."

16. In view of the fact that the Finance & Accounts Officer has not identified the petitioner as the person who had tried to influence him with regard to the

outcome of the Technical Bid Evaluation process, the ground for rejecting the petitioner's Technical Bid for violating Clause 22.3 of the Tender Notice does not arise. Accordingly, the said ground being unsustainable, is set aside.

17. The issue that still remains to be decided is whether the site plan can be signed by any Engineer as provided in Serial No.18 of the "List of Documents" read with Annexure-C of the NIT or whether the site plan is to be signed by an AEE only in terms of Serial No.22 of the "List of Documents".

18. In the case of ***Jagdish Mandal Vs. State of Orissa and others, reported in (2007) 14 SCC 517***, the Supreme Court held that if a decision relating to award of contract is made bona fide and is in public interest, Courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. The Supreme Court held that the following questions should be answered by a Court before interfering in a tender, which is as follows:-

“(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible

authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226."

19. In the case of ***Caretel Infotech Limited(supra)***, the Supreme Court has relied upon the judgment in ***Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd.,*** reported in ***(2016) 16 SCC 818***, wherein it was observed that the decision making process in accepting or rejecting a bid should not be interfered with. Interference is permissible only if the decision-making process is arbitrary or irrational to an extent that no responsible authority could have reached such a decision. Further, the author of the document is the best person to understand and appreciate it's requirement and that though the interpretation given by the author may not be acceptable to the Constitutional Court, that would not be a reason for interfering with the interpretation given, unless there is malafides or perversity in the understanding or appreciation or in the application of the terms of the tender condition.

20. In the case of ***Tata Motors Limited (Supra)***, the Supreme Court has held that the Supreme Court was normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality was made out. Further, the Courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

21. In the case of ***Agmatel India Private Limited(supra)***, the Supreme Court has held that technical evaluation or comparison by the Court is

impermissible and if the interpretation of the author of the document is manifestly in consonance with the language of the tender document or subserving the purchase of the tender, the Court would prefer to keep restraint.

22. In the case of ***Maya Mathew(supra)***, the Supreme Court held that when a subject is governed by two sets of Rules, one being a general law and the other being a special law governing a matter, the Court should endeavour to apply a harmonious construction to the said provisions. But where the intention of the rule making authority is made clear either expressly or impliedly, as to which law should prevail, the same shall be given effect. If the repugnancy or inconsistency subsists in spite of an effort to read them harmoniously, the prior special law will continue to apply and prevail, in spite of a subsequent general law. Where a later special law is repugnant to or inconsistent with an earlier general law, the later special law will prevail over the earlier general law.

23. In the case of ***Vidarbha Irrigation Development Corporation and Ors. Vs. Anoj Kumar Agarwala and Ors.***, reported in ***(2020) 17 SCC 577***, the Supreme Court has referred to the judgment in ***Afcons Infrastructure Ltd. (supra)*** and in ***R.D. Shetty Vs. International Airport Authority***, reported in ***(1979) 3 SCC 489***, which is 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. The Court must defer to this understanding and appreciation of the tender documents, unless there is mala-fides or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. Further, the word used in the tender documents cannot be ignored or treated as redundant or superfluous and they must be given meaning and their necessary significance. Para 16 of the decision of the Supreme Court in

Vidarbha Irrigation Development Corporation and Ors. (supra) is reproduced herein below as follows:-

“It is clear even on a reading of this judgment that the words used in the tender document cannot be ignored or treated as redundant or superfluous – they must be given meaning and their necessary significance. Given the fact that in the present case, an essential tender condition which had to be strictly complied with was not so complied with, the appellant would have no power to condone lack of such strict compliance. Any such condonation, as has been done in the present case, would amount to perversity in the understanding or appreciation of the terms of the tender conditions, which must be interfered with by a constitutional court.”

24. In the case of **N.G. Projects Limited Vs. Vinod Kumar Jain**, reported in **(2022) 6 SCC 127**, the Supreme Court has referred to the case of **Uflex Ltd. Vs. Government of Tamil Nadu**, reported in **(2022) 1 SCC 165**, wherein it has been held that judicial review of contractual matters has its own limitations. Judicial review of administrative actions is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala-fides. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties have to be governed by principles of commercial prudence. To that extent, the principles of equity and natural justice have to stay at a distance. It further held that the Supreme Court could not lose sight of the fact that a tenderer or contractor with a grievance can always seek damages in a civil court and thus, attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of

molehills of some technical/procedural violation or some prejudice to self, and persuade Courts to interfere by exercising the power of judicial review, should be resisted.

The Supreme Court thus held that the position of law with regard to the interpretation of the terms of the tender is that the question as to whether the terms of a tender is essential or not, is to be viewed from the perspective of the employer and by the employer.

25. As can be seen from the NIT, Serial No.18 of the "List of Documents" required that Annexure-C was to be followed. Annexure-C is the Check List of Bidder Eligibility Criteria in respect of the Technical Bid to be submitted by the bidders. Column-2 of Annexure-C relates to "Basic Requirement", while Column-3 relates to "Specific Requirement". Serial No.12 of Annexure-C shows that the Basic Requirement is "site information" and the Specific Requirement is that the site plan is to be certified by an Engineer. Thus, in terms of the Specific Requirement under Annexure-C, there is no bar for an Assistant Engineer or any other Engineer to certify the site plan. However, Serial No.22 of the "List of Documents" requires the site plan to be duly signed by an AEE.

26. On a careful reading of Serial No.18 and Serial No.22 of the "List of Documents", this Court is of the view that there is no indication in the NIT that Serial No.22 should supersede or prevail over Serial No.18 read with Annexure-C. In ***Maya Mathew (supra)***, the Supreme Court held that when there are two sets of rules, the Court should endeavour to apply a harmonious construction to the said provisions. Similarly, in this case, as the site plan can be certified under Serial No.18 or 22 of the "List of Documents" by an Assistant Engineer and AEE respectively, the rejection of the petitioner's technical bid only

on the ground that the petitioner's site plan had been signed by the AE and not AEE is found to be arbitrary. Further, this Court finds that the requirement under Serial No.18 of the "List of Documents" and Annexure-C, regarding the manner in which the site plan to be submitted, is a "specific requirement". Similarly, serial No.22 is also a "specific requirement." As such, this Court is of the view that the terms of the tender notice having provided for a bidder to submit his site plan in terms of Serial No.18 or Serial No.22, the State respondents cannot insist upon the site plan being signed by an AEE, when the other provision also allows for the same to be signed by an AE. In the view of this Court, the decision to reject the petitioner's Technical Bid on the basis of an ambiguity between Serial No.18 & 22 appears to be arbitrary. Further, no reason is discernible as to whether the AE's certification would amount to anything less than a certification made by the AEE, especially when an AE can certify a site plan in terms of Serial No. 18 of the "List of Documents" read with Annexure-C. This Court is accordingly of the view that a harmonious construction of serial No.18 and 22 of the "List of Documents" allows for a site plan to be considered as valid, if the same is signed by an AE or AEE.

27. The State knowing its requirement can no doubt author the tender conditions to suit its needs. However, it has to play an equally important role to ensure that there is no dichotomy between two tender conditions, as is apparent in the present NIT. Accordingly, the State respondents should be more careful in future, so that a similar situation does not arise. This case is not a case where two interpretations of a single tender condition can be capable of being made. In this case, there are two different tender conditions in the same NIT, which are at variance/odds with each other.

28. In view of the reasons stated above, the disqualification of the petitioner's

technical bid is set aside. Any subsequent action/s taken by the State respondents after disqualification of the petitioner's technical bid is also set aside. The State respondents shall open the petitioner's financial bid and consider the same along with other valid bids in pursuance to the NIT.

29. The writ petition is accordingly allowed.

JUDGE

Comparing Assistant