

GAHC010010272024



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

Case No. : WP(C)/248/2024

AJANTA DAS
WIFE OF SRI ASHIM SAHA,
RESIDENT OF WARD NO. 7,
KHARUPETIA RAM NARAYAN ROAD,
P.O. AND P.S.- KHARUPETIA,
DIST.- DARRANG, ASSAM.

VERSUS

STATE OF ASSAM AND 4 ORS.
REPRESENTED BY THE COMMISSIONER AND SECRETARY TO THE
GOVERNMENT OF ASSAM,
EXCISE DEPARTMENT, DISPUR, GUWAHATI- 781006.

2:COMMISSIONER OF EXCISE
ASSAM
HOUSEFED COMPLEX
GUWAHATI- 781006.

3:THE DISTRICT COLLECTOR CUM DISTRICT COMMISSIONER
DARRANG DISTRICT
P.O.- MANGALDOI
DISTRICT- DARRANG

ASSAM.

4:SUBHAM SAHA
SON OF SRI SANJIB SAHA

RESIDENT OF WARD NO. 8
RAMNAGAR

P.O. AND P.S.- KHARUPETIA

DIST.- DARRANG
ASSAM.

5:SANJAY BASAK
SON OF LATE DULAL CHANDRA BASAK

RESIDENT OF NATUNPATTY
WARD NO. 5

KHARUPETIA
P.O. AND P.S.- KHARUPETIA

DIST.- DARRANG
ASSAM

BEFORE
HON'BLE MR. JUSTICE MICHAEL ZOTHANKHUMA

For the petitioner : Mr. D.P. Borah Advocate.

For the respondent nos.1 & 2 : Mr. K.P. Pathak Advocate.

For the respondent no.3 : Mr. K. Gogoi Advocate.

For the respondent no.4 : Mr. A.K. Barua Advocate.

Dates of hearing : 20.02.2024

Date of Judgment : 04.03.2024

JUDGMENT AND ORDER (CAV)

1. Heard Mr. D.P. Borah, learned counsel for the petitioner. Also heard Mr. K.P.

Pathak, learned counsel for the respondent no.1 & 2 and Mr. A.K. Barua, learned counsel for the respondent no.4. Mr. K. Gogoi, learned counsel appears for the respondent no.3.

2. The petitioner's bid for grant of Indian Made Foreign Liquor (IMFL) Retail Off Licence at Ward No.5, Kharupetia Municipal Board (Urban) Shop No. DRG 8 in pursuance to E-Bid Notice bearing Bid Identification No.2023-ED-34088-1 dated 20.11.2023 (hereinafter referred to as "the NIT") issued by the respondent no.3 was disqualified at the Technical Evaluation Stage and as such, she has challenged the same.

3. The petitioner's case is that pursuant to an NIT, the petitioner had submitted her Online Bids, both technical and financial on 21.12.2023 with a bid amount of Rs.36,00,000/-. However, as there was no Drop Box for submission of the hard copy of her Technical Bid, the petitioner submitted the same to the dealing assistant of the concerned office, on the last date of submission of bids prior to the deadline i.e. 5 p.m. The petitioner's Technical Bid was however disqualified at the Technical Evaluation Stage on 27.12.2021, on the ground that the petitioner did not submit a hard copy of the Technical Bid, as was required as per the terms and conditions in the NIT. Further, the petitioner did not submit any undertaking as per Clause 6.2.4 and 6.2.7 of the NIT, which are as follows:

- “6.2.4 Undertaking in Annexure-D about submission of bid for other shop(s) with names of the shop and their bid number in the same district or any other district.
- 6.2.7 Undertaking in Annexure-E to the effect that if the bidder is declared as H1 bidder in respect of one shop, he

stands disqualified for all other remaining bids for any other shop in the same district or any other district in Assam."

4. The petitioner's counsel submits that after the Technical and Financial Bids were opened, by excluding the bid of the petitioner in the Financial Evaluation Stage, the respondents awarded the respondent no.4 the IMFL Retail Off Licence. He submits that the award of the IMFL Off Licence to the respondent no.4 has been made, even though the respondent no.4 did not fulfil Clause 6.2.18 and 6.2.19 of the NIT, which required the respondent no.4 to submit "No Electricity Dues" Certificate issued by the APDCL and "Medical Fitness" Certificate of the Proprietor. He submits that the "Medical Fitness" Certificate submitted by the respondent no.4 was issued by a Dental Surgeon, while the "Medical Certificate" should have been issued by an MBBS doctor. The respondent No.4 did not submit any "No Electricity Dues" Certificate issued by the APDCL, but instead submitted his last electricity bill along with his tender.

5. The petitioner's counsel further submits that the petitioner is not required to submit documents in terms of Clause 6.2.4 and Clause 6.2.7 of the NIT, as she has not submitted any bids for any other shop, except pursuant to the present shop licence in the NIT. The petitioner's counsel thus prays that the respondent authorities should be directed to accept the Technical Bid of the petitioner for grant of the IMFL Retail Off Licence and they should also consider her financial bid. Further, the State respondents should disqualify the bid of the respondent no.4, as his bid was not in consonance with Clause 6.2.18 and Clause 6.2.19 of the NIT.

6. Mr. K.P. Pathak, learned counsel for the respondent nos.1 & 2 submits that the petitioner did not submit two documents required under Clause 6.2.4 and Clause 6.2.7 of the NIT, i.e., undertaking regarding submission of a tender in respect of another shop. He further submits that in paragraph 6 of the affidavit-in-opposition filed by the respondent no.3, it has been specifically pleaded that the petitioner submitted her online bid in the said tender process, but failed to submit physical copies of her bid along with the original copies of the supporting documents, as mandated under Clause 10.2.2 and 10.5.6 of the NIT. In fact, the petitioner attempted to submit her physical bid only on 27.12.2023, but the same could not be accepted, as the last day for submission of bids had already passed on 21.12.2023. The learned counsel for the respondent nos.1 & 2 submits that the above averments made in paragraph-6 of the affidavit-in-opposition filed by the respondent no.3 has not been denied by the petitioner by way of any subsequent affidavit, which proves that the petitioner had violated the tender conditions.

8. The learned counsel for the respondent nos.1 & 2 further submits that the respondent no.4 had submitted his last electricity bill, though "No Electricity Due" Certificate from the APDCL had not been submitted. However, the State respondents had accepted the same in lieu of "No Electricity Due Certificate" from the APDCL, as the State respondents objective in asking for the same was to ascertain whether the bidders were defaulters in paying their electricity bills. The respondent no.4's latest electricity bill showed that the respondent No. 4 was not a defaulter and was not having arrears in payment of electricity dues. He also submits that the Medical Fitness Certificate of the respondent no.4 was

issued by a Dental Surgeon. However, Clause 6.2.19 of the NIT did not specify that a Medical Fitness Certificate could only be issued by an MBBS Doctor. He thus submits that Clause 6.2.18 and Clause 6.2.19 have been substantially complied with and the same was accepted by the authorities. He also submits that whether a term of an NIT is an essential condition or not, is a decision to be taken by the employer/author of the NIT, which should be respected. Even if a term in the NIT is an essential condition, the employer has the inherent authority to deviate from it, provided that the deviation is applicable to all bidders/potential bidders. In this respect, he has relied upon the judgment of the Supreme Court in the case of ***Central Coalfields Limited & Another vs SLL – SML (Joint Venture Consortium) & Others***, reported in ***(2016) 8 SCC 622***. He has also relied upon the judgment of the Supreme Court in the case of ***Bharat Coking Coal Limited & Others vs. AMR Dev Prabha & Others*** reported in ***(2020) 16 SCC 759***, wherein it has been held that in addition to arbitrariness, illegality or discrimination under Article 14, public interest too is to be demonstrated, before a remedy can be sought in contractual matters. The Hon'ble Supreme Court in the above case further held that unless the Court is satisfied that there is a substantial amount of public interest involved or transaction is entered into malafide, the Court should not intervene under Article 226 in disputes between two rival tenderers. Mr. K.P. Pathak thus submits that the writ petition should be dismissed.

9. Mr. A.K. Barua, learned counsel for the respondent no.4 submits that a perusal of Clause 10.2.2, Clause 10.4.2, Clause 10.4.4 and Clause 10.5.6 shows that the requirement of submitting a hard copy of the Technical Bid was a mandatory condition. He further submits that a letter of acceptance dated

17.01.2024 of the respondent No.4's bid has been issued by the State respondents. The petitioner had submitted her online tender/bid on 21.12.2023. The learned counsel for the respondent no.4 also submits that the petitioner does not have the *locus standi* to file the present writ petition, inasmuch as, she is not qualified to be considered for the said contract work. In this regard he has relied upon the judgment of the Supreme Court in ***Raunaq International Limited vs. I.V.R. Construction Limited*** reported in **(1999) 1 SCC 492**, which states that any judicial relief at the instance of a party who does not fulfil the requisite criteria seems to be misplaced. He has also relied upon the judgment of this Court in the case of ***Macrocosm Builders & Others vs. State of Assam & Others***, reported in **2016 (4) GLT 312**, wherein this Court had held that the basic case of the writ petitioner therein was that the petitioner being eligible in terms of the tender notice, the official respondents committed an error in eliminating the petitioner from the fray. But once it was found on scrutiny/perusal of the original tender document of the writ petitioner therein, that the ground of its elimination was not perverse, nothing remained to be decided in the writ petition.

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

11. Clause 10.2.2, 10.4.2, 10.4.4 and 10.5.6 of the NIT are reproduced below as follows :

“10.2.2 The Bidder shall submit both technical and financial bids through on-line. One hard copy of technical bid along with supporting documents (Application Fee, EMD, Affidavits and undertakings in original and other self-attested documents)

shall be submitted in the envelope containing the "Technical Bid" and clearly marked "HARD COPY of technical bid". In the event of discrepancy between online and Hard copy of technical bid, the online bid shall prevail and shall be considered for evaluation.

- 10.4.2 The bidder shall also prepare one hard copy of the Technical Bid.
- 10.4.4 The Hard Copy shall be signed by the Bidder or his authorized signatory with entity seal, if any.
- 10.5.6 The envelope marked as "HARD COPY OF TECHNICAL QUALIFICATION BID" shall be deposited at the designated sealed box at the office of the District Collector before the end date and time of Bid submission."

12. In the case of ***Raunaq International Limited (supra)***, the Supreme Court held that any judicial relief at the instance of a party who does not fulfil the requisite criteria seems to be misplaced.

13. In the case of ***Bharat Coking Coal Limited (supra)***, the Supreme Court has held that there is no prohibition in law against public authorities granting relaxations for bona fide reasons.

14. In ***Shobikaa Impex (P) Ltd. vs. Central Medical Services Society***, the Supreme Court has held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the Court must exercise its

discretionary powers 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.

Even if there had been a minor deviation from explicit terms of the NIT, it would not be sufficient by itself in the absence of mala fide for courts to set aside the tender at the behest of an unsuccessful bidder.

15. In the case of ***Central Coalfields Limited (supra)***, the Supreme Court has held that whether a term of the NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it, provided the deviation is made applicable to all bidders and potential bidders. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds.

16. In the case of ***Jagdish Mandal vs. State of Orissa & Others***, reported in ***(2007) 14 SCC 517***, the Supreme Court has held that Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. *Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:*

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. Cases involving black-listing or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

17. In the present case, the petitioner's stand is that she could not submit the hard copy of her tender documents in the drop box on the last date of submission of tender, i.e., 21.12.2023. As such, she had submitted the same to the concerned dealing assistant of the office of the respondent No.3. The State respondents have, however, taken the stand that the petitioner did not submit the hard copy of her tender documents on 21.12.2023, but had attempted to submit the same only on 27.12.2023, which was not accepted by the State respondents. This is reflected in paragraph 6 of the affidavit filed by the respondent no.3. However, the said averments have not been controverted by the petitioner by any subsequent affidavit, thereby implying that the averments made by the respondent no.3 is admitted. In the case of **Smt. Naseem Bano vs. State of U.P & Others**, reported in **(1993) 4 SCC (supp) 46**, the Supreme Court has held that averments are deemed to be admitted, if not controverted.

18. A reading of the relevant clauses of the NIT, especially 10.2.2 and 10.5.6 clearly goes to show that submission of the bids through online mode and by

way of hard copy is a mandatory condition. The same also has been stated as such by the State respondents. As the State respondents have taken the stand that the petitioner did not submit the hard copy of her bid by the last date of submission of bids, which has not been controverted, this Court would have to accept the contention of the State respondents. In view of the fact that the petitioner has not fulfilled the requisite criteria of submission of the hard copy of the tender within the stipulated time in terms of the NIT, no relief can be granted to the petitioner in terms of the judgment of the Hon'ble Supreme Court in ***Raunaq International Limited (supra)***, where it has been held that any judicial relief at the instance of a party, who does not fulfill the requisite criteria, seems to be misplaced. Accordingly, this Court does not find any reason to allow the writ petition. However, if the petitioner has some evidence to prove that she had submitted the hard copy of her tender documents on time, she is given the liberty to approach the Civil Court or any other alternative forum to prove her case.

19. The writ petition is accordingly dismissed.

JUDGE

Comparing Assistant