(1997) 03 GAU CK 0021

In the Gauhati High Court

A.K.Patnaik APPELLANT

Vs

State of Assam RESPONDENT

Date of Decision : 06-03-1997

Acts Referred:

Citation : (1997) 03 GAU CK 0021

Hon'ble Judges : A.K.Patnaik, J and S.Barman Roy, J

Bench : Division Bench

Advocate : P.Barman, P.Pathak, G.N.Sahewalla, A.K.Goswami, Advocates appearing for Parties

Judgement

A. K. Patnaik, J.—This is an appeal against the judgment and order passed by a learned Single Judge dated 29.1.96 dismissing Civil Rule No. 1703 of 1994 filed by the appellant.

2. The facts, briefly, are : That by a notice dated 25th August, 1993 the Commissioner of Excise, Assam invited sealed tenders for supply of potable alcohol rectified spirit (Grade I) to retail vendors from various parties for a period of 3 years in respect of, inter alia, Nazira Wareshouse. Pursuant to the said tender notice various parties including the appellant and respondent No.5 submitted their tenders. Rates quoted by various parties are as follows :

1. M/s Himangshu Enterprise, Dibrugarh Rs. 9.15

2. Shri JatindraNathSaikia, Dibrugarh Rs. 9.95

3. M/s Dutta Associates (India) Pvt Ltd, Dibrugarh Rs. 11.00

4. Shri Pradip Kumar Dutta, Dibrugarh Rs. 11.25

5. Shree Sales Corporation, Guwahati Rs. 11.85

6. Shri Sidhartha Sankar Borgohain, Dibrugarh Rs. 11.59

7. M/s Onus Enterprise, Guwahati Rs. 12.57

8. M/TEshroh India, Guwahati Rs. 12.87

9. M/s ACE Traders, Guwahati Rs. 13.20

10.M/S Necom Trade and Suppliers, Guwahati Rs. 13.91

11. M/s North Eastern Trade Agency, Guwahati Rs. 14.05

12. Shri JP Borgohain, Sibsagar Rs.14.12

13. M/s Chevalier Enterprise, Guwahati Rs. 14.28

14. M/s Abhijit International, Dispur Rs. 14.55

'' 15. Shri Bijoy Kumar Jasrasaria, Guwahati 9 Rs. 15.25

16. M/s SK Dutta and Sons (P) Ltd, Jorhat Rs. 15.35

17. M/s Indo Mercantiles Pvt Ltd, Guwahati Rs. 15.75

18. M/s Noble Sales Agency, PO : Dispur Rs. 16.25

19. Shri Prodip Kumar Khetan, Jorhat Rs. 16.43

20. M/s New Asish Enterprise, Guwahati Rs. 16.75.

The Commissioner of Excise, Assam, however, in his letter dated 7th April, 1994 indicated that only eight of the aforesaid twenty tenderers were financially sound and amongst the aforesaid eight tenders, respondent No.5 was included but the appellant was not included. Thereafter the Government settled the tender in favour of respondent No.5 at the rate of Rs. 15.25 per LPL quoted by the said respondent No.5.

3. At the hearing of the appeal Mrs. P. Barman, learned counsel for the appellant submitted that the judgment delivered by the learned Single Judge was a common judgment in respect of Civil Rule No. 1703 of 1994 and Civil Rule No. 1601 of 1994 in which similar settlement of tender for supply of potable alcohol/ rectified spirit (Grade I) for the Jorhat Wareshouse was challenged. By the impugned common judgment and order (1996 (1) GLJ 469) the learned Single Judge had also dismissed the aforesaid Civil Rule No. 1601 of 1994 and Writ Appeal No.80 of 1996 was filed against the judgment of the learned Single Judge in Civil Rule No. 1601 of 1994 and a Division Bench of this Court allowed the said appeal (1997 (1) GLJ 316) with a direction that there was nothing on record to show that Rs. 15.25 quoted by the 5th respondent in the aforesaid appeal was viable rate. After setting aside the impugned judgment of the learned Single Judge in the said Civil Rule No. 1601 of 1994, the Division Bench directed that the matter be sent back to the setting authority to make fresh settlement after taking into consideration all aspects and pass a reasoned order. Mrs. Barman submitted that since the present appeal also arises out of the said common judgment and order of the learned Single Judge, the appeal should be allowed, the judgment of the learned Single Judge should be set aside and the matter

should be remanded back to the settling authority with a direction to make fresh settlement after taking into account all aspects of the matter. Mrs. Barman further submitted that the rate that was quoted by respondent No.5 was not the lowest rate and that the lowest rate quoted was Rs.9.15 by one M/s Himangshu Enterprise, Dibrugarh. She also submitted that the bid of respondent No.5 at Rs. 15.25 per LPL was perhaps accepted by the Government on the ground that it was a viable rate. In the case of Dutta Associates Pvt Ltd vs. Indo Merchantiles Pvt Ltd & others [(1997) 1 SCC 53] the Supreme Court held that unless the tender notice specifically stipulated about the viability range and viability rate, the settling authority could not take into consideration the fact that the rate quoted by the lowest tenderer was not viable while settling the tender in favour of a party at a higher viable rate. Mrs. Barman produced before us a copy of the said judgment delivered by the Apex Court on 18th November, 1996.

4. Mr. Sahewalla, learned counsel appearing for the respondent No.5, however, strenuously contended that so far as the appellant was concerned, the Commissioner of Excise in his report dated 7th April, 1994 to the Government had clearly stated that the appellant was not financially sound and it was on account of that report of the Commissioner of Excise that the learned Single Judge in her impugned judgment and order had dismissed the Civil Rule of the appellant, amongst other reasons. According to Mr. Sahewalla, therefore, the appellant was not at all eligible to be considered for settlement in question and had really no locus standi to file the civil rule and this appeal. Mr. Sahewalla further submitted that even if the matter was remitted back to the State Government, as prayed for by Mrs. Barman on behalf of the appellant, the Government cannot consider the case of the appellant as it was found to be financially unsound by the Commissioner of Excise, Assam.

5. The aforesaid argument of Mr. Sahewalla appears to be very attractive and we agree with him that the appellant having been found to be financially unsound by the Commissioner of Excise, it will not be entitled to settlement. But in the present case, we find that in the report dated 7.4.94 of the Commissioner of Excise, of the 8 tenderers stated to have financial soundness to operate the contract, the lowest rate was that on M/s Dutta Associates (India) Pvt Limited, Dibrugarh which was at Rs.l 1.00 per LPL and the rate quoted by respondent No.5 at Rs. 15.25 per LPL was the 6th lowest. Hence admittedly even amongst the 8 tenderers found to be financially sound, the rate of respondent No,5 was not the lowest. On perusal of the record we further find that the State Government settled the contract in favour of respondent No.5 at Rs.l5.25 per LPL because the workable rate as suggested by the Commissioner of Excise was between Rs.l 4.58 to Rs.l 5.57 per LPL and the rate of respondent No.4 was the lowest within the aforesaid workable rate. In other words, the State Government took into consideration the viability range and then awarded the contract in favour of respondent No. 5 even though its tender was not the lowest amongst the tenderers found to be financially sound. Deprecating this approach of the Government in settling contracts on die basis of viability range, the Supreme

Court in the case of Dutta Associates Pvt Ltd vs. Indo Merchantiles Pvt Ltd & others, made the following observations :

"After hearing the parties, we are of the opinion that the entire process leading to the acceptance of the appellant''s tender is vitiated by more than one illegality. Firstly, the tender notice did not specify the ''viability range'' nor did it say that only the tendeers coming within the viability range will be considered. More significantly, the tender notice did not even say that after receiving the tenders, the Commissioner/ Government would first determine the ''viability range'' and would then call upon the lowest eligible tenderer to make a counter offer. The exercise of determining the viability range and calling upon Dutta Associates to make a counter offer on the alleged ground that he was the lowest tenderer among the eligible tenderers is outside the tender notice. ''Fairness demanded that the authority should have notified in me tender notice itself the procedure which they proposed to adopt while accepting the tender."

After making the aforesaid observations, the Supreme Court in the aforesaid ease directed that fresh tenders be floated and pending finalisation of the contract pursuant to the tenders quoted, temporary arrangement that had been earlier made by the State Government pursuant to the judgment of the Division Bench of this Court which was under appeal before the Apex Court, would continue.

6. Considering the fact that in the present case admittedly the tender notice did not specify the viability range nor did it say that only the tenders coming within the viability range would be considered nor having it said that after receipt of the tenders the Commissioner/Government would first determine the viability range, we are of the opinion that the present process of settlement of tender in favour of respondent No.5 on the ground that the rate quoted by it came within the viability range is liable to be quashed. Mr. Sahewalla, however, submitted that the settlement made in favour of respondent No.5 would come to an end on 30th of April, 1997 and that the respondent No.5 has been operating the settlement till today and that the rate for supply of potable alcohol/rectified spirit under the contract has now been reduced by the Government to Rs.9.15 and under the circumstances it is a fit case in which the respondent No.5 should be allowed to operate the contract till 30th of April, 1997. Since we have held that the entire process of tender is vitiated we are not inclined to pass any order allowing the respondent No.5 to reap any further benefit of tender process which stood vitiated. Nevertheless, it will be open for the State Government or the Commissioner of Excise, as the case may be, to consider the said prayer of the respondent No.5 to continue with the supply of potable alcohol/rectified spirit by way of a temporary arrangement till the fresh tender notice is issued and the tender is settled by the competent authority. The aforesaid fresh tender process would be completed by the competent authority as soon as possible in accordance with the aforesaid judgment of the Apex Court in the case of Dutta Associates Pvt Ltd vs. Indo Merchantiles Pvt Ltd & others.

7. The appeal is accordingly disposed of.

