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(2003) 08 GAU CK 0034

In the Gauhati High Court

Case No : Writ Petition (C) No''s. 7936, 7938, 7939, 8165, 8273 of 2001 and 1090 of 2002

Antique India Pvt. Ltd. APPELLANT

Vs

State of Assam and Others RESPONDENT

Date of Decision : 20-08-2003

Acts Referred:

Citation : (2004) 1 GLR 22 : (2004) 1 GLT 441

Hon'ble Judges : D. Biswas, J

Bench : Single Bench

Advocate : P. Pathak, S. Saikia and S. Shyam, for the Appellant; A.C. Buragohain, for the Respondent

Final Decision : Allowed

Judgement

D. Biswas, J.—By this common judgment, Writ Petition (C) No. 7936 of 2001, Writ Petition (C) No. 7939 of 2001, Writ Petition (C) No. 8165 of 2001, Writ Petition (C) No. 7938 of 2001, Writ Petition (C) No. 8273 of 2001 and Writ Petition (C) No. 1090 of 2002 are being disposed of. In all these petitions, the order dated 13.11.2001 issued by the respondent authority is in challenge. By this order, the Respondent No. 1 awarded the contract for supply of Potable Alcohol/Rectified Spirit to the Tinsukia Excise Warehouse in favour of the Respondent No. 3, Shri Prassana Dutta.

2. By the order dated 13.11.2001, the Under Secretary to the Government of Assam, Excise Department informed the Commissioner of Excise that decision has been taken to award the contract for wholesale supply of Potable Alcohol/ Rectified Spirit (Grade-1) to the Tinsukia Excise Warehouse with Mr. Prasanna Dutta of Sibsagar at his quoted rate of Rs. 10.45 paise per L.P.L. for the term 2001-2004.

3. The aforesaid decision of the Government has been challenged by the writ petitioners on the ground that the State authority ought to have awarded the

contract with them since the rates quoted by them were lower than that quoted by the Respondent No. 3. Besides, the petitioners have assailed the decision on the ground that the respondent authority set on motion an exercise to determine the viable rate beyond the terms of the NIT after opening of the quotations of the tenderers.

It may be mentioned that the tenderers including the Respondent No. 3 quoted the following rates :

1. Golak Bora, Sivasagar Rs. 6.15 per LPL 2. Millenium India Pvt. Ltd., Guwahati. Rs. 7.55 per LPL 3. Sibsagar Trading Co., Sivasagar Rs. 8.05 per LPL 4. J.K. Mahanta RG Barua Road, Guwahati Rs. 8.49 per LPL 5. Noble Sales Agency, Guwahati Rs. 8.96 per LPL 6. Civilian Enterprises, Chenikuthi, Guwahati, Rs. 9.23 per LPL 7. Vijay Kumar Kakoty Hatigaon, Guwahati Rs. 9.51 per LPL 8. Antique India Pvt. Ltd. Guwahati Rs. 9.51 per LPL 9. Mayur Talukdar, Karbipath Guwahati. Rs. 9.61 per LPL 10. Rivanpartnership, Dibrugarh Rs. 9.63 per LPL 11. Rangpur Trading Co., Sivasagar Rs. 9.92 per LPL 12. Energy India Development (P) Ltd., Rs. 10.16 per LPL Dibrugarh 13. Prasanna Dutta, Sivasagar Rs. 10.45 per LPL 14. Indo Mercentile Pvt. Ltd., Guwahati Rs. 10.55 per LPL 15. H.R. Goswami, Nazira Rs. 10.61 per LPL 16. Ms. Panshi Mahanta, Guwahati Rs. 10.82 per LPL 17. Neelkantha Pinbuild (Pvt.) Ltd., Guwahati Rs. 10.85 per LPL 18. Royal Enterprise, Tinsukia Rs. 10.91 per LPL 19. Mridula Doloi, Jorhat Rs. 11.10 per LPL 20. GalibAnwar Rs. 11.60 per LPL 21. Network Travels, Guwahati Rs. 14.50 per LPL 22. S.K. Agarwalla Rs. 21.68 per LPL 23. Naresh Kumar Dewari Rs. ------."

4. From above, it would appear that Shri Prasanna Dutta quoted Rs. 10.45 paise per L.P.L., while the writ petitioners quoted lesser or higher than Rs. 10.45 paise. The authority determined the viability rate at Rs. 10.33. The rate has been determined taking into consideration of average cost price of different distilleries and transportation charges and other factors like standing of the firm etc. The procedure followed appear to be just and proper; yet the fact remains that the procedure adopted were not spelt put in the NIT in details. On this background, it has to be ascertained whether the respondent-authority was justified in embarking upon an exercise for determining the viable rate after having known the rates quoted by different tenderers including the writ petitioners. It necessitates reference to the provisions in the NIT.

5. The NIT was issued on 26.6.2001. Clause 28 of the NIT reads as follows:

"Offer of contract will be considered to the lowest tenderer in the viable range for smooth and continuous supply of spirit. The viable range will be determined on the basis of cost analysis."

6. The question is whether the above clause would salvage the situation for the State respondent created by them by determining the viable rate after opening of the rates offered by the writ petitioners and others? Clause 28, as it is, does not provide the manner and method of determination of viable rate. By this

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clause, right has been reserved by the authority to determine the viable rate after receipt of the tender documents. The Hon''ble Supreme Court in Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. and Others, clearly disapproved the concept of determination of viability range after receipt of the tender documents without spelling out the procedure to be followed in determining the viable rate in the NIT. Relying upon the judgment in Dutta Associates (supra), this Court on earlier occasion disposed of the Writ Petition (C) Nos. 7206 of 2000 and 1564 of 2001 setting aside the decision of the Government to award the contract after determination of viable rate after having known the rates quoted by the different tenderers. The observation made by this Court in the aforesaid writ petitions and relevant to the issues at hand are quoted below :

"6. There is no dispute that the NIT do not contain any clause empowering the authority, namely, the Commissioner of Excise to undertake such an exercise after receipt of the tender documents. The Hon''ble Supreme Court in Dutta Associates (supra) dealt with a similar matter arising out of an NIT issued by the Government of Assam in the Excise Department. The Hon''ble Supreme Court deprecated the acceptance of the appellant''s tender on the ground that the tender notice did not specify the "viability range" nor did it say that the tenders coming within the ''Viability range" will be considered. It was further observed that tender notice also did not mention that the Commissioner/Government will first determine the ''Viability range" and would then call upon the eligible tenderer to make a counter offer. According to the Hon''ble Supreme Court, fairness demand that the authorities should have notified in the tender notice the procedure which they proposed to adopt. With regard to viability range, the Supreme Court held that the tenderers are all hard-headed businessmen and they know their interest better. If they are prepared to supply rectified spirit at a particular rate, it is inexplicable why should the Government think that they would not be able to do so and still prescribe a far higher "viability range". Observing thus, the Supreme Court in paragraphs 5 and 7 held as follows :

"5. It is thus clear that the entire procedure followed by the Commissioner and the Government of Assam in accepting the tender of Dutta Associates (appellant herein) is unfair and opposted to the norms which the Government should follow in such matters, viz., openness, transparency and fair dealing. The Grounds 1 and 2, which we have indicated hereinabove, are more fundamental than the third ground upon which the High Court has allowed the writ appeal.

7. In the circumstances, we affirm the judgment of the Division Bench in writ appeal on the grounds stated above and direct that fresh tenders may be floated in the light of the observations made in this judgment. We reiterate that whatever procedure the Government proposes to follow in accepting the tender must be clearly stated in the tender notice. The consideration of the tenders received and the procedure to be followed in the matter of acceptance of tender should be transparent, fair and open. While a bona fide error or error of

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judgment would not certainly matter, any abuse of power for extraneous reasons, it is obvious, would expose the authorities concerned, whether it is the Minister of Excise or the Commissioner of Excise, to appropriate penalties at the hands of the courts, following the law laid down by this Court in Shiv Sagar Tiwari v. Union of India (In re., Capt. Satish Sharma and Sheila Kaul)."

7. It is clear from the decision of the Hon''ble Supreme Court in Dutta Associates (supra) that the procedure for determination of viable range after having known the rates quoted by different tenderers is not acceptable in law. Mere reservation of the right to determine the viability range without specifying the method and manner of determination thereof resonates a note of discord with the ratio available in Dutta Associates (supra). Clause 28 ex facie is bereft of the requirements as indicated by the Hon''ble Supreme Court. That being so, Clause 28 cannot be resorted to as a shield to protect the decision making. Despite having known the observation of the Hon''ble Supreme Court that the tenderers are all hard-headed businessmen and they know their interest better and if they are prepared to supply rectified spirit at a particular rate, it is inexplicable why should the Government think that they would not be able to do so, the State Government repeated the same mistake and awarded the contract at a higher rate. Situated thus, this Court is left with no option but to interfere with the impugned order dated 13.11.2001.

8. In the result, the writ petitions are allowed. The impugned order dated 13.11.2001 is hereby set aside. The State-respondent is directed to issue fresh tender notice for awarding the contract afresh keeping in mind the decision of the Hon''ble Supreme Court in Dutta Associates (supra). The NIT should spell out the procedure to be followed in working out the viable rate in details. This is indispensable for eliminating the scope for complicacies in future. The exercise in this behalf shall be completed within a period of four months, and till resettlement is made, the Government shall make interim arrangements for supply of Potable Alcohol/Rectified Spirit (Grade-1) to the Tinsukia Excise Warehouse in the manner they think best. If the Government decides to appoint any of the lowest valid tenderers during the interim period at his quoted rate, adequate security in cash to compensate the State in case of default should be insisted upon. In case the petitioners are non-responsive, the respondent No. 3 shall be allowed to continue , on the existing terms and condition.

Cost easy.

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