**(2010) 01 GAU CK 0040**

**In the Gauhati High Court**

**Case No :** Writ Appeal No (s) . 333, 334 and 335 of 2009

Assam State Electricity Board and Others — APPELLANT

Vs

Win Power Marketing (P.) Ltd. and Another — RESPONDENT

**Date of Decision :** 07-01-2010

**Acts Referred:**

**Citation :** (2011) 3 GLR 356

**Hon'ble Judges :** Ranjan Gogoi, J;Brojendra Prasad Katakey, J

**Bench :** Division Bench

**Advocate :** B.D. Das and Mr. H.K. Sarma, for the Appellant; N. Dutta and Mr. I. Choudhury, for the Respondent

**Final Decision :** Allowed

## Judgement

Ranjan Gogoi, J.—All these appeals being directed against the common judgment and order dated 23.9.2009 passed by a learned Single Judge of this court were heard analogously and are being disposed of by this common order.

2. The writ petitions out of which these appeals have arisen were filed by the respondents/writ petitioners challenging an order dated 13.5.2009 cancelling the contracts awarded to them. The said order dated 13.5.2009 was passed after issuance of show-cause notices to the respondents/writ petitioners and after giving them a personal hearing in the matter. The contracts awarded to the respondents/writ petitioners were cancelled by the impugned order dated 13.5.2009 on the ground that the bank guarantees submitted by the respondents/writ petitioners on account of performance guarantee of the contract works, on enquiry, were found to be fake documents. The further action of lodging criminal prosecutions against the respondents/writ petitioners; black listing them and debarring them from award of future contracts was kept reserved by the impugned order dated 13.5.2009 until completion of the on going police investigation into the matter.

3. For a meaningful analysis of the issues arising in the cases under

consideration and to determine the correctness of the view taken by the learned Single Judge in allowing the writ petitions, a brief resume of the relevant facts of the cases under consideration will be necessary. A recital of the facts involved in WP(C) No. 1998/2009 will be an adequate narration of the facts involved in all the cases except for the slight modification of the relevant dates of the principal events of the cases.

4. Pursuant to the tenders/bids submitted by the respondents/writ petitioners for award of different contract works pertaining to rural electrification under the "Rajiv Gandhi Grameen Vidyutikaran Yojna (RGGVY): Scheme for Rural Electricity Infrastructure and House Hold Electrification", Letters of Award were issued to the respondents/writ petitioners accepting the bids submitted by them for the specific works, the details of which need not be recited. Two items of works were awarded to the respondents/writ petitioners in WP(C) No. 1998/2009 by the Letter of Award dated 8.1.2009. The respondents/writ petitioners was required to submit the performance guarantee by way of a valid bank guarantee within twenty days from the date of issuance of the Letter of Award which date was subsequently extended to 27.3.2009. On the said date two bank guarantees of the required amount issued by the Union Bank of India, TF Gole Market, Swahid Bhagat Singh Place, New Delhi were submitted to the appellant-Board by the respondent, writ petitioner in WP(C) No. 1998/2009. On receipt of the guarantee documents, the appellant-Board by letter dated 31.3.2009 wrote to the Bank in question to confirm the bank guarantees furnished by the respondents/writ petitioners. It appears that on 11.4.2009 a letter was received by the appellant-Board from the Bank in question confirming the validity of the bank guarantees. There is some dispute as to how the aforesaid communication dated 11.4.2009 was served on the appellant-Board. In this regard, while, according to the appellant-Board, the said confirmation dated 11.4.2009 was submitted by a representative of the respondents/writ petitioners, the writ petitioners deny the said fact.

5. According to the respondents/writ petitioners, they had tried to secure the requisite bank guarantees from their regular banker, i.e., Federal Bank Ltd. However, it was informed by their banker that the approval of the head office was required in the matter. In these circumstances, as the time limit for submission of the bank guarantees was approaching, they had to take the help of a service provider, one M/s S.S. Capital and Financial Services who eventually provided the bank guarantees on payment of usual charges. According to the writ petitioners, it subsequently came to their knowledge that the bank guarantees made available by the service provider were fake. On coming to know the said fact, the respondents/writ petitioners informed the matter to the appellant-Board on 23.4.2009 and had also informed the jurisdictional Police Station about the events that had taken place. This was on 24.5.2009. Furthermore, according to the respondents/writ petitioners, similar bank guarantees obtained from the service provider were furnished to the Government of Nagaland in the Department of Power and the Power Grid Corporation of India

 

in respect of other contracts awarded by the said authorities. The anomalies in the said bank guarantees were allowed to be corrected on explanations being offered and the bank guarantees furnished to the aforesaid two authorities were replaced by valid guarantees issued by the regular banker of the respondents/ writ petitioners. According to the respondents/writ petitioners, in a similar manner they had submitted valid bank guarantees issued by their regular banker to the appellant-Board on 4.5.2009 in place of invalid bank guarantees which were, however, not accepted.

6. According to the appellant-Board the above facts, as claimed by the respondents/writ petitioners, are not correct. According to the Board, on receipt of the FAX confirmation dated 11.4.2009, as the said confirmation was not from the branch that had issued the bank guarantees to whom queries of the appellant-Board were directed by the letter dated 31.3.2009, the Board made further enquiries with the head office of the Union Bank of India. Pursuant to the said queries, the Assistant General Manager of the Union Bank of India informed the appellant-Board by letter dated 15.4.2009 that sixteen Nos. of bank guarantees, in respect of which confirmation was sought by the appellant-Board, had not been issued by the Union Bank of India. The communication dated 15.4.2009 was followed by two other communications, both dated 16.4.2009, wherein there was a further denial of the authenticity of the confirmation document dated 11.4.2009. In these circumstances, according to the appellant-Board, the show-cause notices dated 24.4.2009 were served on the respondents/ writ petitioners and on consideration of the reply and the explanations submitted in response thereto and after a personal hearing in the matter, the impugned order dated 13.5.2009 has been passed cancelling the contracts awarded to the respondents/writ petitioners.

7. The learned Single Judge hearing the writ petitions thought it proper to allow the same and interfere with the impugned orders dated 13.5.2009 primarily on the ground that the impugned cancellation of the contract works awarded to the respondents/writ petitioners proceeded on the basis that the writ petitioners were involved in the commission of a fraud in collusion with the service provider in the matter pertaining to the furnishing of the bank guarantees. In this regard, the learned Single Judge held that commission of fraud was not the allegation levelled against the respondents/writ petitioners in the show-cause notices issued wherein the allegation levelled was one of submission of fraudulent documents. According to the learned Single Judge, there is a difference between the charge levelled and the charge held to be established. The finding of commission of fraud, according to the learned Single Judge, was recorded without any opportunity thereby occasioning breach of a fundamental principle of natural justice in a matter involving the civil rights of the writ petitioners. Accordingly, the learned Single Judge thought it proper to allow the writ petitions and interfere with the impugned order dated 13.5.2009. Aggrieved, the appellant-Board has instituted the present appeals.

 

8. We have heard Sri. B.D. Das, learned counsel for the appellant-Board and Sri. N. Dutta, learned senior counsel appearing on behalf of the respondents/writ petitioners.

9. The learned counsel for the appellant-Board has strenuously argued that the facts of the cases, proved and established by the materials on record, would go to show that the enquires initiated by the appellant-Board to determine the validity of the bank guarantees furnished by the respondents/writ petitioners revealed that the bank guarantees purported to have been furnished by the Union Bank of India were fake/fabricated documents. The learned counsel has argued that the total value of the works involved in the cases under consideration would exceed Rs. 100 crore and the value of the bank guarantees alone would be about Rs. 35 crore. The respondents/writ petitioners are responsible for furnishing proper, valid and authentic bank guarantees which, admittedly, they have not done. According to Sri Das, there is no dispute that the bank guarantees furnished by the respondents/writ petitioners are fraudulent and not-existent documents. In such circumstances cancellation of the contracts for submission of such fraudulent documents was rightly made by the appellant-Board, Sri Das has further submitted that furnishing of other bank guarantees by the respondents/writ petitioners being in respect of other contract works, the said fact cannot legitimately come into the arena of the present decision making process. Sri Das has also submitted that the subsequent bank guarantees furnished by the respondents/writ petitioners from the regular banker or acceptance of such bank guarantees by the Government of Nagaland or the Power Grid Corporation of India Ltd. would not be relevant for deciding the validity of the action of cancellation made by the appellant-Board.

10. Controverting the submissions advanced on behalf of the appellant-Board, Sri N. Dutta, learned senior counsel for the respondents/writ petitioners has strenuously argued that while the allegation levelled against the respondents/writ petitioners in the show-cause notices issued was one of submission of fraudulent documents, the contract has been cancelled on the finding that the respondents/writ petitioners had committed a fraudulent act in collusion with their service provider. According to Sri Dutta, the charge levelled is different from the one held to be proved which had formed the basis of the impugned cancellation. The respondents/writ petitioners had no opportunity to defend themselves against the charge of commission of fraud and, therefore, according to Sri Dutta, the impugned cancellation is vitiated in law. Sri Dutta has elaborately submitted the circumstances in which the respondents/writ petitioners had to approach the service provider (the details of which have already been noticed above) as also the fact that immediately on coming to know of the submission of invalid bank guarantees by them they had informed the appellant-Board as well as the jurisdictional police authorities. Sri Dutta has further submitted that valid bank guarantees issued by the regular banker of the respondents/writ petitioners were submitted to the respondent-Board on 4.5.2009. Furthermore, according to Sri Dutta, a similar situation had arisen in

 

respect of contracts awarded to the respondents/writ petitioners by the Government of Nagaland and the Power Grid Corporation of India. The correct position having been explained and the invalid/defective guarantee documents having been replaced by valid bank guarantees furnished subsequently, the said authorities had accepted the explanations submitted by the respondent, writ petitioners and have allowed them to execute the contract works in question. In addition, Sri Dutta has submitted that apart from the items of work involved in the present cases, the respondents/writ petitioners are engaged in execution of several other works under the appellant-Board in respect of the very same electrification scheme. In connection with all such works valid bank guarantees of huge amounts are lying in deposit with the appellant-Board. In these circumstances, according to Sri Dutta, the appellant-Board was not justified in cancelling the contract works awarded to the respondents/writ petitioners and the interference made by the learned Single Judge is correct and would, therefore, not call for any interference in appeal.

11. We have carefully considered the facts of the cases, the pleadings of the parties, the various documents brought on record as well as the oral submissions advanced at the hearing of the cases.

12. The show-cause notice dated 24.4.2009 issued to the respondents/writ petitioners by the appellant-Board is in the following terms :

With reference to the above, this is to inform you that the contract performance guarantee furnished by you vide the Bank Guarantees (2, 3, 4 and 5) against RGGVY Nagaon district package NGN-1 have been disowned by the Union Bank of India, Field General Managers Office, Shaheed Bhagat Singh Place, 3rd Floor, Bangla Sahib Marg, Gole Market, New Delhi - 110001. This act of submission of fraudulent documents is against the interest of the Assam State Electricity Board.

Therefore, you are to show cause as to why the above mentioned contract agreements shall not be terminated and you shall not be debarred from future business with the Assam State Electricity Board in addition to any other action that may be taken against you. Your reply should reach the undersigned within 7(seven) days from the date of issue of this notice.

13. The allegation levelled against the respondents/writ petitioners is one of submission of fraudulent documents. No allegation that the respondents/writ petitioners were involved in the commission of any fraud either by themselves or in collusion with the service provider, had been levelled in the show-cause notice dated 24.4.2009.

14. In order to resolve as to whether the appellant-Board has travelled beyond what was alleged in the show-cause notice, an issue on which there has been much debate, it will be convenient to extract herein the operative finding in this regard as recorded in the order dated 13.5.2009 :

I have gone through the entire case record. The fact remains that these three firms, i.e., (1) M/s. Fatehpuria Transformers & Switchgears (P.) Ltd., (2) M/s. Singhi Cables & Conductors (P.) Ltd. and (3) M/s. Win Power Marketing (P.) Ltd. submitted tenders and got the works of more than Its. 100 crore under the prestigious scheme of Government of India. It is expected that a firm undertaking such large volume of work will do its due diligence before submission of papers such as Bank Guarantees with the Assam State Electricity Board. They want to convince us that they actually fell into the trap laid by the unscrupulous elements. It is not understood as to why these firms believed that somebody will be prepared to give them Bank Guarantee of Rs, 33.51 crore by charging just a few lakh of Rupees. Such a proposal would have appeared to any prudent person as "too good to believe".

Ultimately, it was the greed of these firms that compelled them to be led through the garden path. I find no justification for these firms to have submitted completely forged documents to ASEB. Clause 7 of the guidelines for procurement of goods and services for implementation of Rural Electrification Project as circulated by the Rural Electrification Corporation Ltd., New Delhi is reproduced below : -

Fraud and Corruption

It should be kept in mind that all actions towards award of contracts and its implementation on the ground have to be fair, consistent, transparent and based on highest standard of ethics. Similarly, bidders/suppliers/contractors associated in the procurement and works, are expected to observe the highest standard of ethics during procurement and execution of contracts. In pursuance to above :

(a) proposal for award may be rejected, if it determines that the bidder, recommended for award, and/or its employees, sub-contractors, sub-vendors, agents have engaged in corrupt or fraudulent practices in competing for the contract in question;

(b) portion of the loan allocated to a contract may be cancelled, in full or in part, if it is determined that corrupt or fraudulent practices were engaged by contractor and/or its employees, subcontractors, sub-vendors, agents for getting the contract or during the execution of a contract;

(c) a firm may be declared as ineligible, either indefinitely or for a stated period of time, to be awarded a contract, if it, at any time, determines that the firm has been engaged in corrupt or fraudulent practices in competing for or in executing the contract.

For the purpose of above provision, the terms, "Corrupt Practice" and "Fraudulent Practice", mean following :

(i) "corrupt practice" means offering, giving, receiving or soliciting anything of value to influence the action of a public official(s) in the procurement process or in the contract execution; and

 

(ii) "fraudulent practice" means a misrepresentation of facts in order to influence a procurement process or the execution of a contract and includes collusive practices among bidders (prior to or after bid submission) designed to establish bid prices at artificial, noncompetitive levels.

15. A reading of the relevant part of the order dated 13.5.2009 extracted above clearly indicates that what was found by the appellant-Board after consideration of the reply submitted by the respondents/writ petitioners and the personal hearing afforded is that the respondent/writ petitioners were not diligent in submitting the requisite bank guarantees though the value of the works exceeded over Rs. 100 crore. As there can be no denial of the fact that the guarantee documents submitted by the respondents/writ petitioners turned out to be fraudulent documents, the finding with regard to the absence of due diligence on their part would be fully justified. The authority of the appellant-Board, thereafter, proceeded to consider the explanations submitted by the respondents/writ petitioners with regard to the circumstances in which the invalid/fake guarantee documents came to be submitted. On due consideration of the explanations submitted by the respondents/writ petitioners, the authority of the Board came to the conclusion that the same were not adequate justification for submission of the forged documents. The above is the conclusion that the authority of the Board thought it fit to arrive at after due consideration of the explanations submitted. Even if the court is to find some fault with the conclusion reached (no such fault can be found in the present cases), unless the conclusion arrived at is totally perverse interference of the writ court will not be justified. The view of the court in such matters cannot be substituted for that of the authority so long the view taken by such authority is a possible view.

16. Furthermore, in reaching the aforesaid conclusion the authority of the Board took into account the fact that a prudent person would find it difficult to accept that bank guarantee to the extent of Rs. 33.51 crore can be made available on payment of fee/charge of a few lakh of rupees. The facts considered by the authority of the Board in arriving at the conclusion that the explanations offered by the respondents/writ petitioners are not acceptable cannot be said to be based on irrelevant facts. The conclusion recorded in the order dated 13.5.2009, extracted above, is to the effect that there is no justification for the respondents/ writ petitioners to submit forged documents to the ASEB. Thereafter, having regard to clause (7) extracted in the order dated 13.5.2009, the decision to cancel the contract awarded to the respondents/writ petitioners was taken and the matter of filing of a regular criminal case(s) and a decision with regard to blacklisting of the respondents/writ petitioners was kept pending till a full report of the on going police investigation in the matter is received. No finding that the respondents/writ petitioners were involved in the commission of the fraud in procuring the fake bank guarantees either by themselves or in collusion with the service provider or any other person has been recorded by the authority of the Board in the impugned order dated 13.5.2009. The principal issue arising in the cases, therefore, is capable of being answered on the basis of the above

conclusion reached by us which will also make the contrary conclusion recorded by the learned Single Judge open to interference.

17. Having answered the principal issue arising in the cases in the manner indicated above, the other questions raised on behalf of the respondents/writ petitioners need not detain the court. That the bank guarantees on account of the performance guarantee were required to be submitted was known to the respondents/writ petitioners as early as on 8.1.2009 [in WP(C) No. 1998/2009] or on other dates in the month of January 2009 (in other writ petitions). If they had a regular banker, as they claim, the respondents/writ petitioners should have taken steps to obtain valid bank guarantees from their regular banker instead of turning to a service provider at the eleventh hour when the date(s) on which the bank guarantees were required to be furnished were known to the respondents/ writ petitioners from the very first day. Acceptance of the explanations offered by the respondents/writ petitioners in the case of other contract works under the Government of Nagaland and Power Grid Corporation of India Ltd. cannot be a legally acceptable basis to compel the ASEB to accept the same explanations in the case of the instant contract works awarded by it, So long the decision making process is not vitiated by non-compliance with the fundamental requirements of a reasonable procedure or the decision itself is not a perverse one, the appellant-Board must be held to be free to decide the matter without being influenced by the decisions taken by other authorities, i.e., the Government of Nagaland and the Power Grid Corporation of India Ltd.

18. Submission of other valid bank guarantees of huge amounts by the respondents/writ petitioners to the appellant-Board in respect of other works, in our considered view, again cannot be construed to be a determinative factor for the decision required to be taken by the appellant-Board in the present cases. The appellant-Board had not cancelled the other contracts in respect of which valid bank guarantees had been submitted by the respondents/writ petitioners on the ground that they had submitted invalid/fraudulent bank guarantees for the works involved in the present cases. Such a decision has been taken only in respect of the works for which fraudulent bank guarantees had been submitted. We do not see how in the facts of the present cases, when submission of fraudulent bank guarantees by the respondents/writ petitioners has been established, in fact, admitted, the action of the appellant-Board in terminating the contracts in question can be faulted with on the ground that other contracts where valid bank guarantees have been submitted by the respondents/writ petitioners have been allowed to continue.

19. For the aforesaid reasons, we are of the view that the impugned order dated 13.5.2009 ought not to have been interfered with by the learned Single Judge and the same should have been allowed to come into operation. We, therefore, allow the appeals, set aside the order of the learned Single Judge dated 23.3.2009 and dismiss the writ petitions. However, in the facts and circumstances, we leave the parties to bear their own costs.

 