
(1997) 04 GAU CK 0010
In the Gauhati High Court
Case No : Civil Rule No. 6011 of 1996

Bhagya Kalita

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 10-04-1997

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (1997) 2 GLR 215

Hon'ble Judges : M. Sharma, J;A.K. Patnaik, J

Bench : Division Bench

Advocate : R. Gogoi, R. Baruah, A. Dutta and P. Kalita, for the Appellant; H.N. Sarma, Addl. Sr. G.A., P.K. Goswami and K.P. Sarma, Sr. C.G.S.C., for the Respondent

Judgement

A.K. Patnaik, J.—In this application under Article 226 of the Constitution (sic) Petitioner, Sri Bhagya Kalita, has challenged the award of work relating to instruction of about 16 k.m. of road work on NH-31 under Rangia NH Division (sic) the Slate of Assam to Respondent No. 8, M/s Eastern Enterprise.

2. Relevant facts, briefly, are that by a Notice Inviting Tenders dated 8.11.95 for short "NIT") issued by the Chief Engineer, Public Works Department (Roads), (for brevity, "Chief Engineer"), application bids for pre-qualification were (sic) from experienced and competent contractors for execution of the aforesaid subject of construction of about 16.000 K.ms of road works on NH-31. The said (sic) inter alia, stated that the pre-qualification shall be based on an objective evaluation of details regarding past performance, technical and financial capabilities and resourcefulness of the applicants and that the Chief Engineer reserved the right to reject any or all pre-qualification applications without assigning any reason. As per the said NIT, along with their application bids for pre-qualification, the intending applicants were also required to submit financial tender, but such financial tenders of only those bidders who were found technically suitable by the Ministry of Surface Transport, New Delhi, (herein after referred to as the

"MOST") were to be opened. Pursuant to the said NIT, several tenderers including the Petitioner and the Respondent No. 8 submitted their application bids for pre-qualification as well as their financial tenders on 27.12.95. Thereafter, the Chief Engineer sent the pre-qualification bids and the financial tenders of different tenderers with his comments to the MOST. The pre-qualification bids were evaluated by the MOST and the results of the said evaluation of the pre-qualification bids were sent along with the unopened financial bids to the Chief Engineer. The Chief Engineer then intimated six tenderers including the Petitioner and the Respondent No. 8 in his letter dated 29.3.96 that they had been pre-qualified for the (sic) subject to the conditions stated in the said letter and that their financial bids would be opened in his office at 1.00 p.m. on 4.4.96. As scheduled, the financial bids were opened on 4.4.96 and it was found that the financial bid of the Petitioner was in lowest at 35.50% above the schedule of rates enclosed with D/NIT at Rs. 6,18,73,22 and that of the Respondent No. 8 was the second lowest at 45% above the schedule of rates enclosed with D/NIT at Rs. 6,62,11,205/-. Thereafter, the Tender Commission recommended for awarding the work in favour of the Petitioner, but the work (sic) awarded in favour of the Respondent No. 8. Aggrieved, the Petitioner filed the present Civil Rule and prayed for interim orders directing the State-Respondents (sic) to issue the work order in favour of the Respondent No. 8.

3. On 9.12.96, the learned single Judge issued a Rule but the prayer for (sic) order was rejected by his order dated 19.12.96. Against the said order dated 19.12.96 of the learned single Judge, the Petitioner preferred Writ Appeal No. 5 of 19(sic) After hearing the parties, the Division Bench in its order dated 8.1.97, however took a view that the writ appeal should be heard along with the Civil (sic) Accordingly, we have heard both the Civil Rule and the Writ Appeal on 9.1. (sic)10.1.97 and 16.1.97. Pursuant to our orders passed on 10.1.97, the learned Government Advocate, Assam, as well as the learned Senior Central Govt. Standing Counsel, appearing for the Union of India, have produced the relevant records.

4. At the hearing, Mr. Ranjan Gogoi, learned Counsel appearing for the Petitioner, contended that the records would show that the Petitioner was (sic) awarded the contract because his previous performance in respect of some (sic) contracts has not been satisfactory. He contended that as per the NTT, the Petitioner submitted his pre-qualification document and in the said pre-qualification document he gave the details of different works that were executed by him and were (sic) executed by him amongst all other particulars. The pre-qualification document of the Petitioner was duly considered by the Chief Engineer and (lie MOST and, thereafter, the Petitioner was intimated by letter dated 29.3.96 that he had been pre-qualified for the work subject to certain conditions namely, adequate proof of availability of modern machinery as per MOST specification, adequate proof of firm arrangement made by contractor to procure sufficient quantity of required quality materials, and firm execution programme from start to finish of various items of work. It is only after the Petitioner was found to be pre-qualified that

the: financial tender of the Petitioner and other tenderers were opened and the tender of the Petitioner was found to be the lowest. But, thereafter, when the Tender Committee recommended that the contract should be awarded to the Petitioner his tender being the lowest, the State Government at the behest of the Minister, PWD, again raked-up the question of previous performance of the Petitioner. He further submitted that when the State Government called for a report with regard to the previous performance, of the Petitioner, initially in its letter dated 11.9.96 the Office of the Chief Engineer reported to the Secretary to the Government of Assam, Public Works Department, that the progress of one of the works undertaken by the Petitioner on NH-39 was not satisfactory and that there was absolutely no progress of the work of the Petitioner in respect of a bridge across river Jarnuna since June, 1994 but by its subsequent report dated 25.9.96, the office of the Chief Engineer informed the Secretary to the Government of Assam, Public Works Department, that the Petitioner has not been able to proceed in respect of the aforesaid balance work as an amount of Rs. 6 lacs due to the Petitioner was yet to be cleared by the Department and that the Petitioner was found to be the pre-qualified contractor by MOST and that the Chief Engineer, P.W.D. and the Commissioner and Secretary to the Government of Assam, P.W.D., had certified about his past performance. Mr. Gogoi vehemently argued that the State Government does not appear to have considered the subsequent report dated 25.9.96 of the office of the Chief Engineer which certified about the satisfactory previous performance of the Petitioner. He submitted that it is a settled law that while awarding a contract, the authority has to take into consideration all relevant aspects and if some relevant aspect has been (sic) the decision of the authority in awarding contract, is liable to be quashed by the Court. Mr Gogoi further contended relying on the averments made in the reply of the Petitioner to the affidavit-in-opposition filed by the Respondents that the Respondent No. 8 had been awarded the contract works relating to strengthening of the existing lane pavement in K. Ms. 393-397 under Jorhat NH Division in NH-37 (sic) in the inspection report dated 11.9.96, the office of the Regional Pay and Accounts office, MOST, has observed that only 35% of the works has been completed in about 32 months against the stipulated 12 months of completion and that the quality of the work was sub-standard. But the State Government has ignored this report (sic) the performance of the Respondent No. 8 a copy of which had been sent to the Chief Engineer. Mr Gogoi then urged that in any case the Petitioner and the Respondent No. 8 were found to be pre-qualified and their financial tenders were opened and it was found that the financial bid of the Petitioner was the lowest and that of the Respondent No. 8 was the second lowest, but the State Government in a discriminatory manner called for a report with regard to the previous performance of the Petitioner, but did not call for a similar report with regard to the previous performance of the Respondent No. 8. The obvious intention of the authorities was to ensure that the Petitioner is excluded from the award of the work and that the Respondent No. 8. was awarded the work. The impugned decision of the State Government therefore to award the contract in favour of the Respondent No. 8 was on the

facts and in the circumstances of the case violative of the rights of the Petitioner to equal treatment and fair play under Article 14 of the Constitution. In support of his contention, Mr. Gogoi relied on the decisions of the Supreme Court in the cases of *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another, Common Cause, A Registered Society v. Union of India and Ors.* (1996) 6 SCC 530 , and *Shivsagar Tiwari Vs. Union of India (UOI) and Others*, In the latter two decisions, Mr. Gogoi pointed out that the Supreme Court has held that the exercise of discretion by public authority in the matter of awarding largesse must be transparent, just, fair and that the authorities cannot enjoy absolute discretion to pick and choose in arbitrary and discriminatory manner a person of their choice in awarding such largesse. In the instant case, according to Mr. Gogoi, the Petitioner's tender was the lowest and the award of the contract to Respondent No. 8 has resulted in violation of the right of the Petitioner under Article 14 of the Constitution and the Court should direct the authority to re-consider the matter if it is not inclined to affect the progress of the work by quashing the contract in favour of the Respondent No. 8.

5. Mr H.N. Sarma, learned Additional Senior Government Advocate, appearing for the State of Assam-Respondents, relied on Clauses-5 and 6 of NIT to show that the previous performance of a tenderer was to be taken into consideration before awarding the contract. He stated that although the Tender Committee recommended that the contract be awarded to the Petitioner as his tender was the lowest, Annexures-I, II, III and IV to the affidavit-in opposition filed by the State-Respondents indicated that the progress of the work of the Petitioner with regard to re-construction of Bridge No. 39/2 across the river Jamuna under Bakulia NH Division, construction of RCC Bridge over river Pagladia at Ulabarighat and the work undertaken in respect of NH-39, in section Numaligarh to Dimapur were not at all satisfactory. Mr Sharma also relied on the averments in Para-12 of the affidavit-in- opposition in which allegations against the Minister, P.W.D., Assam, made by the Petitioner have been denied and it has been stated that the contract has been awarded in favour of the Respondent No. 8 after taking into consideration all relevant facts and circumstances and in the public interest. He cited the judgment of the Supreme Court in the case of *Tata Cellular Vs. Union of India*, and argued that the scope of judicial review in matters relating to award of contract was limited and if the Court finds that all relevant aspects were considered by the authority and there was no discrimination against any party, the Court may not interfere with the award of contract by the authority in favour of any particular party.

6. Mr. P.K. Goswami, learned Counsel appearing for the Respondent No. 8, urged that the Supreme Court has held in the case of *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, as well as in the case of *Tata Cellular (supra)* that in matters relating to award of contract if the court finds that the view that is taken by the Government was one of the possible views that could have been taken, the court will not interfere with the decision of the Government merely

because it is of a different view. This is because the Court while exercising its power of judicial review does not sit over the decision of the Government as an appellate authority but only enquires as to whether the decision making process has been fair and proper. Mr. Goswami also relied on the decision of the Apex Court in the case of A.M. Allison Vs. B.L. Sen, wherein the Supreme Court upheld the decision of the Assam High Court refusing to issue writs on being satisfied that there was no failure of justice. In the present case, Mr Goswami contended that the record would indicate that as the Petitioner had not been performing well in the matter of execution of previous contracts, the authority had taken a decision not award the contract in his favour and instead awarded the contract to the Respondent No. 8 whose lender as the second lowest after that of the Petitioner. There was nothing arbitrary in the aforesaid decision of the Government and the view taken by the Government was a possible view with which the court will not interfere just because it takes a different view. That apart, Mr Goswami submitted that Clause-6 of the NIT clearly stipulated that if the contract for NH work awarded to any of the prospective applicant had been rescinded during last 5 years, he cannot be awarded the contract, and as far as the Petitioner is concerned, the contract in respect of construction of about 8 k.m.s of Diversion road of NH-39 near Numaligarh Refinery had been awarded in favour of the Petitioner but the same had been rescinded by letter dated 26.9.95 of the Executive Engineer, P.W.D., NH Division, Golaghat and although the said decision was challenged by the Petitioner before this Court, the Division Bench of this Court in its judgment delivered on 11.4.96 in Civil Rule Nos. 1971/95, 4221/95 and 4458/95 did not interfere with the said decision of the Government. The Petitioner, therefore, was not qualified to be considered for award of contract as per Clause-6 of the NIT. Finally, Mr Goswami contended that the contract that has been awarded in favour of Respondent No. 8 was in respect of National Highway and was of urgent, nature and the court while exercising its discretionary power under Article 226 of the Constitution ought not to interfere with the same, unless it comes to a definite finding that the award of contract in favour of Respondent No. 8 was arbitrary and violative of Article 14 of the Constitution.

7. There can be no dispute over the proposition that the court while exercising its power of judicial review in matters relating to award of contract by the administrative authority does not act as an appellate authority and cannot substitute its own view for that of the administrative authority and the Court will only examine as to whether all relevant facts and aspects have been taken into consideration and that the authority has not acted in an arbitrary and discriminatory manner. In the recent decision of the Apex court in the case of Common Cause, A Registered Society (supra) cited by Mr Gogoi, learned Counsel for the Petitioner, the Supreme Court as explained that the exercise of discretion by the administrative authority in the matter of distribution of State largessee must be transparent, just, fair and non-arbitrary manner in accordance with set norms, criteria or guidelines, and that non-transparency in the system promotes

nepotism and arbitrariness and even while acting under the guidelines, the authorities cannot enjoy absolute discretion to pick and choose their favourites in arbitrary and discriminatory manner. The question, therefore, in the present case is as to whether the State Government has acted in transparent, just and fair and non-arbitrary manner in accordance with the set norms, criteria or guidelines. The norms, criteria or guidelines for awarding the contract which is the subject-matter of this Civil have been set out in the NIT Clauses-5, 6, 8 and 9, which are relevant for the put pose of decision in this case are set out hereinbelow:

5. The prospective applicants should have satisfactorily completed during the last 6 years at least one work of similar nature and having a magnitude of 40% (price up dated @ 10% per annum compoundable) of the average value of work of a slab for which pre-qualification is sought, or he should be satisfactorily executing currently at least one work of similar nature and having completed billing not less than 40% of the value of the work for which pre-qualification is sought. In the case of joint venture (s) at least one of the constituent should conformed to the above requirement.

6. The prospective applicants or any of their constituent partners should not have abandoned any NH works nor any of their contract for NH works should have been rescinded during the last 5 years.

8. The completed pre-qualification document and details (one original and three copies) duly filled in all respects, should reach at the address given below upto 15.00 hours on 27.12.95. The financial tender also in one copy in sealed cover witli a validity period of 180 days from the date of receipt in prescribed forms subsequently to be drawn up in printed F-2 form the affixing non refundable court-fee stamp of Rs. 8.25 (Rupees eight and paise twenty five) only will be received upto 15.00 hours on 27.12.95. In case of holiday on the receiving date, the same will be received in the next working day at the same place and time. The financial tender of only those bidders who are found technically suitable by MOST, New Delhi will be opened. The Govt. will not accept any responsibility regarding non-receipt or delay in receipt of filled up pre-qualification document and financial tender sent through post.

9. The pre-qualification shall be based on an objective evaluation of details regarding past performance, technical and financial capabilities and resourcefulness of the applicants. The Chief Engineer, P.W.D. (Roads), Assam reserves the right to reject any or all pre-qualification applications without assigning any reason.

Clauses-5 and 7 quoted above clearly indicated the relevant factors which were to be taken into consideration for evaluating the previous performance of a prospective applicant. Clause-8 provided that a completed pre-qualification document and details duly filled in all respects should be submitted to the Chief Engineer and that the financial tender was to be submitted in a separate sealed

cover and it was made that in the said clause that the financial tenders of only those bidders who were found to be technically suitable by the MOST, New Delhi would be opened. Clause-9 of the NIT quoted above stated that the pre-qualification was to be based on an "objective evaluation of details regarding past performance, technical and financial capabilities and resourcefulness of the applicants"

8. After the pre-qualification document and the financial tenders were submitted by the tenderers including the Petitioner and the Respondent No. 8, the records indicate that the Chief Engineer sent his comments on the pre-qualification bids along with the financial bids in sealed envelopes to the Director General (Road Development), Government of India, MOST, along with his letter dated 9.2.96. The comments of the Chief Engineer with regard to the Petitioner, Sri Bhagya Kalita, and the Respondent No. 8, M/s Eastern Enterprise, are extracted hereinbelow:

...4. Shri Bhagya Kalita:

Shri Kalita is an established contractor in Assam P.W.D. and has got 15 years of experience in execution of Roads and Bridge works on N Hs and S Hs in Assam. The contractor is a resourceful and financially as well as technically sound. He has possessing adequate technical staff and necessary tools, plants and machineries. He has required infra-structures to execute any type and any volume of work.

He has earlier pre-qualified for the work of Job No. 031B-AS-89-743, Job No. 780, Job No. 744, Job No. 785 and for the work of construction of Diversion of NH-39 on account of proposed Refinery at Numaligarh (Ch. 9.174km to 17.967km).

At present has been executing the work of strengthening work of package 1 of NH-39 (Job No. 039-AS-93-785). Besides, the work of the construction of diversion of NH-39 on account of proposed Refinery at Numaligarh also was allotted to him in Jan. 1995. But after execution of some p.c. of work, the work has been withdrawn from him in Sept., 1995 as per Govt. decision. He is recommended for selection.

...8. M/s Eastern Enterprise:

The firm has 24 years of experience in Civil Engineering works. However, the firm has been executing works under this deptt., only from last few years.

Presently that firm have executing the works of Job No. 037-AS-90-761 (Km 393 to 397 of NH-37) since March, 1992 and upto date progress achieved is about 80% only. Another works of construction of Foot path cum Drain on NH-37 within Dibrugarh University area has been executing since Sept. 1995 and the work is in progress.

The firm is seems to be sound in respect of man power and machineries. The

firm may be considered for selection.

The aforesaid comments show that the Chief Engineer found both the Petitioner and the Respondent No. 8 as prequalified and recommended their case for selection. Thereafter, an objective evaluation was made by the Screening Committee of the MOST comprising of Chief Engineer (Roads) East, MOST, Additional Chief Engineer, P.W.D., Assam, nominated by the Chief Engineer, PWD (Roads), Assam, and the Superintending Engineer (Roads), MOST. The evaluation chart of the Screening Committee is extracted below:

EVALUATION OF PRE-QUALIFICATION BIDS FOR THE WORK OF STRENGTHENING 2 LANE CARRIAGEWAY IN KM. 1051/0-1052/70, 1053/4-1055/70, 1062/20-1068/70 and 1074/0-1079/38 of NH 31 IN ASSAM (JOB No. 031 AS 95791).

ESTIMATED COST OF WORK: Rs. 665.26 LAKHS

INITIAL SCREENING CRITERIA

SL No. Name of Firm Liquid assets+ Bank Loan 665x5% =33 laths Should Have executed of similar nature of at least 40% magnitude of this project (Rs. 263 lakhs) Should possess requisite machinery Whether qualified for final evaluation.

1. Sh. MK Agarwalla 10000 No. Yes No.
2. M/s United Emterprises 120.00 Yes Yes Yes
3. Sh. Dungarmal Jain 180.00 Yes Yes Yes
4. Sh. Bhagya Kalita 205.00 Yes Yes Yes
5. Sh. Mukul Hussain Nalbari 151.00 Yes Yes No. (C)
6. Sh. GL Agarwalla 110.00 Yes Yes Yes
7. M/s Gautam Cons. Co. 65.00 Yes Yes Yes
8. M/s Eastern Enterprises 200.00 Yes Yes Yes

if)has not executed/completed single work of minimum, 40% of the estimated cost of work under consideration.....

On the basis of the aforesaid evaluation made by the Screening Committee, (sic) tenderers including the Petitioner and the Respondent No. 8 were found to be pre-qualified by the said Screening Committee and the Screening Committee recommended that the envelopes containing the financial bids of the aforesaid six pre-qualified tenderers should be opened in its proceedings held on 11.3.96. Accordingly, by letter dated 19.3.96, the Superintending Engineer (Roads), MOST, informed the Chief Engineer, P.W.D. (Roads), Assam that the six contractors including the Petitioner and the Respondent No. 8 have been found to be pre-qualified subject to the following conditions:

(i) Adequate proof of availability of modern machinery as per MOST specification/3rd Revision. In case of order placed for the machinery the firms should supply proof of the delivery time by which these would be available for the proposed job.

(ii) Adequate proof of firm arrangement made by contractor to procure sufficient quantity of required quality material either through own arrangement or through procurement from local sources.

(iii) Firm execution programme of start to finish of various items of work.

After receiving the said letter dated 19.3.96, the Chief Engineer informed the tenderers including the Petitioner and the Respondent No. 8 in his letter dated 29.3.96 that they had been pre-qualified for the work subject to the aforesaid conditions. The Chief Engineer therefore had intimated this decision in accordance with Clause-9 of the NIT quoted above that the six tenderers including the Petitioner and the Respondent No. 8 had been found to be pre-qualified. The Chief Engineer are not choose to reject the pre-qualification bid of the Petitioner on the ground that his earlier contract for construction of about 8 k.ms of Diversion road of NH-39 near Numaligarh Refinery had been rescinded and instead decided to entertain the financial lender of the Petitioner presumably because the circumstances under which the said contract was rescinded no longer subsisted.

9. Only after the pre-qualification bids of six tenderers were accepted, the financial tenders of the aforesaid six tenderers found to be pre-qualified were opened and the Petitioner's financial tender was found to be the lowest at Rs. 6,18,73,229/- whereas that of the Respondent No. 8 was the second lowest at Rs. 6,62,11,205/-. Accordingly, the Tender Committee recommended award of contract in favour of the Petitioner. But strangely enough, the State Government did not accept the said recommendation of the Tender Committee and instead decided to award the contract in favour of Respondent No. 8, the second lowest tenderer. Considering the fact that the Petitioner was the lowest tenderer, the State Government could award the contract to the Respondent No. 8 only for good reasons which would show that the action of the State Government was fair, transparent, just and non-arbitrary and that the discretion enjoyed by the authorities was in accordance with the set norms, criteria or guidelines as laid down in the NIT. The only reason that has been given by the State Government in the affidavit-in-opposition is that the previous performance of the Petitioner had not been found to be satisfactory. But when the previous performance of the Petitioner had already been objectively evaluated by the screening committee constituted by the MOST as indicated above in accordance with the set norms, criteria and guidelines laid down in the NIT, we fail to understand as to what prompted the State Government to again reopen the question of previous performance of the Petitioner.

10. In any case, assuming that the State Government before finally deciding to

award the contract in favour of the Petitioner wanted to examine as to whether the performance of the Petitioner had been rightly evaluated, the State Government should have made an objective evaluation regarding the details of performance of the Petitioner in accordance with clause-9 of the aforesaid NIT, but the records do not indicate that any such objective evaluation was made by the State Government. All that is found in the records submitted by the State Government is a report dated 11.9.96 submitted by the Office of the Chief Engineer to the Secretary to the Govt. of Assam, Public Works Department which indicated that the progress of the work of the Petitioner has not been satisfactory with regard to improvement of existing 2 lane pavement on NH-39 and the bridge work across river Jamuna and subsequent report dated 25.9.96 from the very same office of the Chief Engineer stating that the Petitioner was a pre-qualified contractor of MOST and his past experience had been certified earlier by the Executive Engineer and the Commissioner and Secretary, P.W.D., and that the balance work could not be executed by the Petitioner on account of liability of Rs. 6 crores which was to be paid by the Department to the Petitioner. On the other hand, the approach of the State Government towards the respondent No. 8 has been entirely a different. It is true, as has been submitted by Mr. Goswami, that the Respondent No. 8 had been found to be pre-qualified by the Screening Committee of the MOST, but the Petitioner v/as also found to be pre-qualified by the said Screening Committee of the MOST. Yet while deciding the question as to whether the State Government should award the contract in favour of the Petitioner who was the lowest tenderer, the State Government chose to again examine the previous performance of the Petitioner, but when it came to taking a decision as to whether the contract should be given to Respondent No. 8 who was the second lowest tenderer, the State Government chose not to look into the previous performance of the Respondent No. 8.

11. We are, therefore, of the considered opinion that the manner in which the State Government finally considered the recommendation of the Tender Committee and decided to reject the lowest financial tender of the Petitioner and award the contract in favour of the Respondent No. 8 was not at all transparent, just, fair and was contrary to the objective procedure laid down in Clause-9 of the NIT. But considering the fact that the work is a work in respect of National Highways and the stipulated time for completion of the contract is 36 months and the work should not be stopped, we are not inclined to quash the award of contract in favour of the Respondent No. 8, but we direct that the State-Respondent will reconsider the tender of the Petitioner and the Respondent. No. 8 in accordance with the observations made in this judgment as well as in accordance with the law and take a fresh decision in the matter within a period of two (2) months from today, and the balance work in question will be awarded in accordance with the fresh decision taken by the State Government.

12. With the aforesaid observations and direction, the writ petition is finally disposed of. However, considering the entire facts and circumstances of the case, we leave the parties to bear their own costs.