(2003) 11 GAU CK 0021

In the Gauhati High Court

Case No : Writ Appeal No. 333 of 2003

Bijulibari Multipurpose Development Society APPELLANT

Vs

State of Assam and Others RESPONDENT

Date of Decision : 06-11-2003

Acts Referred:

Citation : (2004) 1 CTLJ 365 : (2003) 3 GLT 503

Hon'ble Judges : P.P. Naolekar, C.J;Iqbal Ahmed Ansari, J

Bench : Division Bench

Advocate : A.M. Mazumdar, N. Saikia, A. Borah, R. Goswami and S. Kalita, for the Appellant; Anima Hazarika, S. Sarma and A.K. Goswami, for the Respondent

Final Decision : Dismissed

Judgement

I.A. Ansari, J.—Can the State or its instrumentalities, in order to earn revenue, ignore the essential conditions of any Notice Inviting Tender (for short "the NIT")? In order to earn more revenue, should the State or its instrumentalities act contrary to the public policies? These are the moot questions, which this writ appeal has raised.

2. The settlement of Bothabeel Fishery, Sipajhar, (hereinafter referred to as "the fishery") in the district of Darrang, in favour of the respondent No. 3 for the period from 2003-2004 to 2009-2010 for lease amount of Rs. 26,88,400 by Assam Fishery Development Corporation Ltd. (for short "the Corporation") is under challenge in the present writ appeal.

3. For better appreciation of the real issues involved in the present appeal, we place hereinbelow, in a nutshell, the admitted and material facts giving rise to this appeal: The Managing Director of the Corporation issued the NIT, on 03.04.2003, inviting Tenders for settlement of the fishery for the period aforementioned, the last date being on 21.04.2003. Two Tenders were, eventually, submitted, one of the tenders being on behalf of the appellant society and the other by respondent No. 3. While the bid amount quoted by the

appellant Society was Rs. 51,00,000 the respondent No. 3 quoted Rs. 26,88,400. The NIT required the tenderers to submit, inter alia, Bakijai Clearance Certificate from the Deputy Commissioner concerned and the Tender form, inter alia, required the Tenderers to sign Tender form in the presence of a gazetted officer. The General Secretary of the appellant Society did not put his signature on the form in the presence of any gazetted officer nor did the Society submit Bakijai Clearance Certificate, the reason assigned for non-submission of the certificate being that the Society was a new one. On 07.05.2003, the appellant Society submitted a letter to the Managing Director of the Corporation stating, inter alia, that after offering bid amount of Rs. 51,00,000 the Society surveyed the surrounding areas of the fishery and came to learn that the fishery had been encroached upon and, hence, it was not possible to pay the revenue as quoted in the Tender document. By this letter, the appellant Society requested the Managing Director of the Corporation to treat its bid amount of Rs. 51,00,000 reduced to Rs. 29,00,000. However, when the settlement of the fishery was made in favour of the respondent No. 3 by order, dated 30.05.2003, issued by the corporation, the appellant Society, as writ petitioner, approached this Court to get set aside and quashed the settlement so made in favour of the respondent No. 3 on the ground, inter alia, that the appellant Society''s Tender was valid and even if its reduced offer of Rs. 29,00,000 was not acceptable to the Corporation, the Corporation ought to have settled the fishery with the appellant Society for Rs. 51,00,000 inasmuch as the appellant Society was still willing to offer Rs. 51,00,000 but the, Corporation, for no valid reasons, refused to accede to the renewed request so made by the appellant Society and arbitrarily settled the fishery with the respondent No. 3. The petitioner-appellant, therefore, prayed, inter alia, for a writ of mandamus directing the Corporation to settle the fishery in favour of the appellant Society. The learned Single Judge by his impugned judgment and order, dated 21.07.2003, dismissed the writ petition. Hence, the present appeal.

4. We have perused the materials on record. We have heard Mr. A.M. Mazumdar, learned Senior Advocate assisted by Mrs. N. Saikia, appearing on behalf of the petitioner-appellant. We have also heard Mr. S. Sarma, learned standing counsel for the Corporation, and Mr. A.K. Goswami, learned counsel for the respondent No. 3.

5. It has been submitted by Mr. Mazumdar that non-submission of Bakijai Clearance Certificate was not an essential condition of the NIT and, particularly, when the appellant Society was a newly registered society, omission to submit such a certificate could not have been treated to have materially affected the validity of the offer made by the appellant Society. It is also submitted by Mr. Mazumdar that the omission, on the part of the General Secretary of the appellant Society, to put his signature on the Tender form in the presence of a gazetted officer did not also materially affect the validity of the offer made by the appellant Society inasmuch as the identity of the bidder was not in dispute. Coupled with these facts, points out Mr. Mazumdar, the offer of the appellant

Society to pay revenue of Rs. 51,00,000 was an open offer and even if its subsequently reduced offer to pay revenue of Rs. 29,00,000 was not acceptable to the Corporation, the Corporation ought to have still settled the fishery in favour of the appellant Society on the bid amount of Rs. 51,00,000, but by refusing to do so, the Corporation, which is an instrumentality of the State, has lost huge amount of revenue amounting to almost Rs. 25,00,000 in as much as the fishery has been settled in favour of the respondent No. 3 for a paltry revenue amount of Rs. 26,00,000. Unable to appreciate the loss that the State had so sustained, which was contrary to the very purpose for which the settlement of the fishery were sought to be made, the learned Single Judge, contends Mr. Mazumdar, dismissed the writ petition. Mr. Mazumdar further submits that the present appeal seeks to protect not only the interest of the appellant Society, but also safeguard the interest of the State.

6. Controverting, the above submissions made on behalf of the petitioner appellant, Mr. S. Sarma has pointed out that furnishing of Bakijai Clearance Certificate as well as putting of the signature on the Tender form by the bidder in the presence of a gazetted officer were both essential conditions of a valid Tender and having failed to comply with both these requirements, the appellant Society had failed to make any valid offer and, hence, the Corporation was within the ambit of its power in declining to settle the fishery in favour of the appellant Society. Mr. Sharma has also contended that it is not permissible for a tenderer to change its offer after the Tenders are opened and bid of various tenderers become known and, hence, the subsequent offer made by petitioner Society could not have been legally considered by the Corporation and so far as the initial bid amount of Rs. 51,00,000 is concerned, the same did not survive for consideration.

7. Mr. A.K. Goswami, while adopting the submissions made by Mr. S. Sarma, has pointed out that though it has been contended on behalf of the petitioner appellant that the Corporation could have considered the petitioner Society''s initial bid amount of Rs. 51,00,000, the fact remains that while making the reduced offer of Rs. 29,00,000, the appellant Society had made it clear to the Corporation that it was not in a position to pay the bid amount of Rs. 51,00,000 and, hence, the Corporation committed no illegality in setting the fishery in favour of the respondent No. 3.

8. Let us, now, consider the merit of the rival submissions made before us. For this purpose, it is imperative to note that a Tender is nothing, but an offer and an NIT is nothing, but a notice inviting offer. In short thus, an NIT is nothing but an invitation to make offer. Explaining as to what a valid Tender means, the Apex Court in Tata Cellular v. Union of India reported in (1994) 6 SCC 851 : 1995(1) Arb. LR 193 (SC) has laid down as follows :

"(69) A Tender is an offer. It is something, which invites and is communicated to notify acceptance. Broadly stated, the following are the requisites of a valid Tender :

(1) It must be unconditional.

(2) Must be made at the proper place.

(3) Must conform to the terms of obligation.

(4) Must be made in the proper time.

(5) Must be made in the proper form.

(6) The person by whom the Tender is made must be able and willing to perform his obligations.

(7) There must be reasonable opportunity for inspection.

(8) Tender must be made to the proper person.

(9) It must be of full amount."

(Emphasis is supplied)

9. From what have been laid down above, it is more than abundantly clear that in a Tender process, the offer made by a tenderer must be unconditional for the purpose of invoking acceptance, the Tender must be made in the proper form, at the proper time, the tenderer must conform to the items of the obligations i.e. it must comply with the conditions of the NIT and it must be capable and willing to perform its obligation i.e., if it makes an offer, it must remain capable and willing to stand by its offer.

10. In the present case, when the Corporation issued the NIT, it basically invited unconditional bid by filling up of the Tender form in the manner as had been indicated in the form itself and in accordance with the conditions of the NIT, which included the requirement of signing of the Tender form by the tenderers in the presence of a gazetted officer as well as submission of Bakijai Clearance Certificate.

11. Admittedly, the appellant Society did not furnish along with its Tender form the Bakijai Clearance Certificate as was necessitated under the NIT. It is always for the authority issuing NIT to determine what conditions it must impose on the intending tenderers so as to enable the authority concerned to determine the competence and eligibility of tenderers/bidders. Bakijai Clearance Certificate is a certificate, which is issued by the authority concerned in proof of the fact that no revenue recovery proceeding is pending against the person concerned. Whether a Society is new or old is not at all material; what is material is that it should not have any revenue recovery procedure pending against it. Similarly, the requirement of asking every tenderer to put its/his signature on the form in the presence of a gazetted officer is obviously to ensure that bogus and frivolous Tenders are not submitted by persons, who either do not exist or who, after having made the offer, resile by showing that the offer was not made by them. The requirement of putting of signature of the tenderers in the presence of gazetted officer is, thus, aimed at lending authenticity to the identity of the

Tender concerned. Hence, none of these two conditions, namely, submission of Bakijai Clearance Certificate as well as putting of signature of the tenderer on the Tender form in the presence of a gazetted officer can be said to be mere formalities and/or optional. Far from this, both these conditions are essential conditions of the NIT, in question. The learned Single Judge has held both these two conditions to be essential conditions of the NIT and we see no reasons to take a different view of the matter.

12. It is also of immense importance to note that the NIT and the Tender form, which is required to be filled up by the tenderers, cannot be read in isolation by keeping them in watertight compartments nor can the same be read separately from each other. When read together, it becomes crystal clear that filling up of the Tender form in accordance with the requirements of the form is an essential condition of the NIT and if a form is not filled up in accordance with the requirements of the Tender form, such a Tender cannot be said to be valid. Thus, though the NIT does not mention that tenderer has to put its/his signature on the Tender form in the presence of a gazetted officer, the fact remains that the Tender form imposes such a condition and since the same has not been complied with by the appellant, its Tender could not have been regarded as a valid Tender.

13. We have also carefully perused the records and we find that at the time, when the Tender was opened, the appellant Society did not state anything in justification of non-production of the Bakijai Clearance Certificate nor did the appellant Society offered any explanation for its omission to put signature on the Tender form in the presence of a gazetted officer. Thus, for the fact that the Tender submitted by the writ petitioner was not, contrary to the essential conditions of the NIT, accompanied by Bakijai Clearance Certificate and for the further fact that in the Tender form, the tenderer had nor put its signature in the presence of a gazetted officer, the appellant Society''s Tender was invalid and the appellant Society was not even eligible for consideration of its bid amount.

14. Coupled with the above, it is equally important to note that the appellant Society had clearly stated in its letter, dated 07.05.2003, addressed to the corporation that it was not possible for the appellant Society to pay Rs. 51 lakhs as revenue. In the face of such a clear and categorical withdrawal of the offer of Rs. 51 lakhs, the petitioner-appellant cannot subsequently insist that it ought to have been given the settlement of the fishery, in question, at its original bid amount of Rs. 51 lakhs. As the offer of the appellant Society stood withdrawn, the question of setting the fishery with the appellant Society for such a high bid amount of Rs. 51 lakhs was legally not possible.

15. So far as the subsequent offer of Rs. 29 lakhs made by the appellant Society is concerned, it needs to be carefully noted in this regard that when the Tenders were opened on 21.04.2003, the bid quoted by the tenderers became known to all and, hence, in such a situation, it was not legally permissible for the authorities concerned to accept the fresh bid of Rs. 29 lakhs offered by the appellant Society. If such a course of action is permitted, it would, undoubtedly,

destroy and set at naught the very purpose and concept of settlement of fisheries by Tender process. Thus/neither the subsequent offer of Rs. 29 lakhs nor the original bid amount of Rs. 51 lakhs offered by the appellant Society could have been considered by the authorities concerned as valid or existing offer. Viewed from this angle, the authorities concerned had, to our mind, no option but to keep the offer of the appellant Society excluded from the purview of its consideration. In such a situation, there was no reason for the authorities concerned not to accept the offer of Rs. 26,08,400 made by the respondent No. 3, particularly, when the petitioner appellant did not, in the whole of its writ petition, state anything to show that the Tender submitted by the respondent No. 3 suffered from any infirmity/defect. The decision of the Corporation to settle the fishery with the respondent No. 3 cannot, therefore, be said to be arbitrary, illegal and/or unjust.

16. The offer of the appellant Society reducing its original bid of Rs. 51 lakhs to Rs. 29 lakhs was, as correctly held by the learned Single Judge, tantamount to fresh Tender and if the same would have been entertained, it would have amounted to accepting the Tender after the last date fixed by the NIT. Such a course would have been wholly unacceptable to law. Learned Single Judge, therefore, correctly held that the date on which the Corporation considered the issue of settlement of fishery, in question, the Tender of the appellant Society did not survive for being taken note of. In view of the fact that the appellant Society made it clear that it was not possible for it to pay the bid amount of Rs. 51 lakhs as revenue and in view also of the fact that its offer of Rs. 29 lakhs subsequently made was not a valid offer under the law, there was no subsisting offer on behalf of the appellant Society and the appellant Society cannot, now, raise the grievance that they were denied the opportunity of hearing before the final decision on settlement of the fishery was made.

17. We may also mention here that after hearing of this appeal was concluded, written argument was submitted on behalf of the appellant. We have perused the written argument and we find that the dispute, now, raised in this written argument by the appellant is that the Tender of the respondent No. 3 ought to have been rejected as defective on the ground that the respondent No. 3 had not submitted the balance sheet of its profit and loss along with the Tender form. We have minutely examined the writ application and we find that no such assertion was made y the writ petitioner in its writ petition. Such a statement of fact cannot be allowed to be raised for the first time, now, when no foundation for the same was laid in the writ petition nor has any foundation for such a submission has been laid even in the present writ appeal.

18. Considering, therefore, the matter in its entirety, we find no merit in this writ appeal and the same deserves to be dismissed.

19. In the result and for the reasons discussed above, this appeal fails and the same is dismissed with cost of Rs. 1,000.

