
(2016) 06 GAU CK 0048
In the Gauhati High Court
Case No : W.P.(C) No. 143 of 2015

C. Lalfakzuala

APPELLANT

Vs

State of Mizoram

RESPONDENT

Date of Decision : 23-06-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 6 GauLJ 748 : (2017) 1 GauLR 234

Hon'ble Judges : Michael Zothankhuma, J.

Bench : Single Bench

Advocate : Mr. C. Lalramzauva, Sr Advocate. Mr. A.R. Malhotra, Mr. Johnny L. Tochhawng Mr. Benjamin Lalthlamuana, Mr. Lalpianfela Chawngthu Mr. Jonathan L. Sailo Mr. K. Laldinliana Mrs. Lalramnghaki Ms. Lalramsangzuali, Advocates, for the Petitioner; Mr. Samuel Vanl

Final Decision : Allowed

Judgement

Michael Zothankhuma, J. (CAV) - Heard Mr. C. Lalramzauva, learned senior counsel assisted by Mr. Benjamin Lalthlamuana, counsel for the petitioner. Also heard Mr. Samuel Vanlalhriata Chhangte, learned Govt. Advocate for the respondents.

2. The petitioner's counsel submits that in pursuance to a Tender Notice dated 13.8.2014, inviting Sealed quotations for taking on lease various Tourist Homes, Restaurants and Lodges run by the Tourism Department in the State of Mizoram, the petitioner submitted his sealed quotation for Tourist Home, Lungmual. As per the terms and conditions laid down in the tender notice, the base price reserved by the respondents for the Tourist Home, Lungmual was Rs.10,000/- p.m.

3. The respondents made a comparative statement showing the rates quoted by the tenderers. The petitioner was the highest bidder having submitted a bid of Rs.50,000/- p.m. while the lowest bidder, i.e. one C. Zarzokimi, resident of Bawngkawn had quoted 10,195/-p.m.

4. The petitioner was expecting to be offered the allotment of the Tourist Home, Luangmual in pursuance to condition No.7 of the Tender Notice, which is as follows :-

"7. The Properties will be leased out to the highest bidder and in no case he/she is allowed to withdraw the bid once his/her quotation is approved and accepted by the Department."

5. The petitioner's counsel submits that the petitioner was surprised on coming to learn of an "Expression of Interest" (EOI), which was advertised in the Vanglaini Daily Newspaper dated 23.9.2015. The EOI dated 23.9.2015 called for sealed quotations from interested parties for operation and management cum leasing contract to provide quality services for 8 Nos. of Tourst Homes, Lodges and a picnic spot run by the Tourism Department, Govt. of Mizoram. The EOI dated 23.9.2015 included the Tourist Home, Luangmual, which was renamed as Tourist Home, Zonuam in the EOI dated 23.9.2015. The base price and upper ceiling price for Tourist Home, Zonuam was Rs. 5,000/- and Rs.8,000/- respectively. Condition No. 5 of the EOI dated 23.9.2015 states as follows :-

"Price quoted below the Base Price and above the upper ceiling as shown in the Annexure-1 will summarily be rejected."

6. The petitioner's counsel submits that the action of the State respondents in calling for a new Tender vide EOI dated 23.9.2015 is arbitrary as the petitioner should have been offered allotment of the Tourist Home, Lungmual/Zonuam on lease, on the basis of bid amount of Rs.50,000/- p.m, made in pursuance to the Tender Notice dated 13.8.2015. The petitioner's counsel submits that no reason has been furnished by the State respondents as to why the respondents have not acted upon the bids quoted in response to the earlier tender notice and have instead called for fresh bidders vide the EOI dated 23.9.2015. The petitioner's counsel submits that there is no justification for the State respondents to put a ceiling on the bid amount in the EOI dated 23.9.2015, while the petitioner is willing to pay Rs.50,000/- p.m. The petitioner's counsel thus submits that the petitioner should be allotted on lease the management contract in respect of Tourist Home, Lungmual/Zonuam and that the impugned EOI dated 23.9.2015 should be set aside.

7. Mr. Samuel Vanlalhriata Chhangte, Govt. Advocate submits that the reasons for disinvestment and placing the various Homes, Lodges, Restaurants etc. being run by the Tourism Department and handing over the same to the private sector is due to the heavy loss sustained by the Department in running the establishments. He also submits that the disinvestment policy has been made due to the shortage of manpower and difficulties in management caused by financial constraints faced by the State Government. The counsel for the respondents also submits that the rationale for disinvestment is aimed to create an opportunity for sustainable means of livelihood for the public.

8. The counsel for the respondents also submits that the Meeting Minutes of the

Disinvestment Committee dated 18.1.2015 discloses that it was decided to defer leasing of 5 Tourist Homes/Lodges out of the 15 mentioned in the Tender Notice dated 13.8.2014 as very few of the tenderers had a background in the hospitality industry and as the bidders financial capacities could not be ascertained objectively. The respondents counsel also submit that in the EOI dated 23.9.2015, a base price and upper ceiling had been determined by the respondents on the basis of an analysis made on the revenue earned by each of the tourist facilities for the last 5 (five) years. The respondents counsel submits that the petitioner's bid amount is exorbitant and impractical and that it was doubtful that the petitioner would have been able to run the facility. The respondents counsel also submits that under the "terms and conditions" No.17 of the Tender Notice dated 13.8.2014, "the Tourism Department reserves the right to accept or reject any or all of the quotations without assigning any reasons thereof."

9. The respondents counsel also submits that the petitioner's tender document being valid for a period of 2 (two) months from the last date of submission of the tender, as stipulated in terms and conditions No.2 of the Tender Notice dated 13.8.2014, the petitioner's writ petition should be rejected as the petitioner has filed his writ petition only in the month of October, 2015, by which time the petitioner's price bid had become invalid. The respondents counsel also submits that the aim of its disinvestment policy of Tourist Resorts, being run by the Tourism Department, is to garner revenue.

10. The respondents counsel also submits that the petitioner is not of a good character and he had been evicted from Tuikhuahtlang area of Aizawl. The respondents counsel submits that the petitioner had altercation with the public of Zemabawk because he had threatened the Local Council President at gun point. The respondents counsel submits that there is a Criminal case filed against the respondent and an investigation is being carried on by the Police.

11. The respondents counsel also submits that the shady nature of the petitioner's character came to the notice of the State respondents in the month of November, 2015 at the time of filing of the affidavit-in-opposition by the State respondents.

12. I have heard the counsels for the parties. On perusal of the materials on record and the official records, I find that in pursuance to the earlier Tender Notice dated 13.8.2014, 17 persons had submitted their bids for Tourist Home, Luangmual/Zonuam and that the quotations varied from Rs.10,195/- to Rs.50,000/- per month. However, without going into any detailed analysis of why the Tender Notice dated 13.8.2014 was not taken to its logical conclusion, the EOI dated 23.9.2015 has been issued, wherein the tenderers/quotationers are expected to bid not less than Rs.5,000/- and not more than 10,000/- p.m. for Tourist Home, Luangmual/Zonuam as per meeting minutes of the Disinvest Committee dated 8.1.2015. The fixing of the upper ceiling does not seem to have any basis. The affidavit in opposition filed by the respondents tries to cast a

shadow on the petitioner as being a person of a shady nature. The affidavit in opposition is however silent of in respect of all the other 16 tenderers who had submitted their bids along with the petitioner in response to the Tender Notice dated 13.8.2014. Assuming that the petitioner could not have been allotted the management of Tourist Home, Luangmual/Zonua in pursuance to the Tender Notice dated 13.8.2014, no reasons have been given by the State respondents as to why the same was not allotted to the other remaining 16 tenderers.

13. On perusal of the Meeting Minutes of Disinvestment Committee held on 18.1.2015, the same shows that the tenders were opened on 10.10.2014 and that out of the 15 Tourist Homes, Lodges etc, it was decided to defer leasing of 5 properties including the one in which the petitioner had made his bid.

14. Extract of the Meeting Minutes of the Disinvestment Committee dated 8.1.2015, states as follows:-

"The meeting was held under the chairmanship of Commissioner and Secretary, Tourism for consideration and selection of candidates for leasing out 15 Tourist Lodges and Highway Restaurants to be Privatized under Phase 1 of Disinvestment under Tourism Department. The Department has floated tender in local newspapers in the month of August, 2014 and opened the tender on 10.10.2014 for which response from 77 (seventy seven) bidders were received.

The following were decided at the meeting :

1. It was seen that very few bidders have experience in the Hospitality Industry and the financial capabilities of the bidders for assessing their ability to invest in running of larger tourist lodges cannot be ascertained objectively. Therefore, the Committee decided to defer the leasing out of the larger properties on major routes which are of key importance to the development of Tourism in the state of Mizoram. Hence, it was decided to defer leasing of the following properties.

Tourist Home Luangmual

Traveller's Inn Vairengte

Highway Restaurant Thingdawl

Tourist Resort Hmuifang

Tourist Lodge Bairabi"

2. In case of the below mentioned properties, no bids were received:

Tourist Lodge Pangzawl

Tourist Lodge Tawipui "S"

Tourist Lodge Changsil

Tourist Lodge Darlawn

3. It was decided that since only few of the bidders have submitted supporting documents to show their background in Hospitality Industry, the Committee will consider selection based on the highest bidder. One by one the bids were scrutinized and the following selections were made:

I. Highway Restaurant, Chhiahtlang:

Selected Bidder

Vanlalhruaia Republic Vengthlang

Bid Amount

Rs. 10,000/-

Base Price

Rs. 4,000/-

II. Tourist Lodge, Buhchang:

Selected Bidder

Thansanga Dawrpui, Aizawl.

Bid Amount

Rs. 1,050/-

Base Price

Rs. 1,000/-

III. Tourist Lodge, Sakawrdai:

Selected Bidder

Lalfakzuala Sakawrdai

Bid Amount

Rs. 9,000/-

Base Price

Rs. 4,000/-

IV. Tourist Lodge, Saipum:

Selected Bidder

Lalkhawngaiha

Bid Amount

Rs. 1,000/-

Base Price

Rs. 1,000/-

V. Tourist Lodge, Paithar:

Selected Bidder

B. Sanghluna Mual Veng, Chaltlang.

Bid Amount

Rs. 1,250/-

Base Price

Rs. 1,000/-

VI. Tourist Lodge, Khanpui:

Selected Bidder

V. Vanlalneli

Bid Amount

Rs. 3,100/-

Base Price

Rs. 1,000/-

15. The Disinvestment Committee also stated that no bids were received for 4 (four) other properties and in respect of the remaining 6 (six) properties, bids were scrutinized and selections made. The Meeting Minutes of the Disinvestment Committee dated 18.1.2015 does not support the case of the respondents that the tender document shall be valid for a period of 2 (two) months from the last date of submission of the tender, as no such reason is recorded in the Meeting Minutes. The last date of submission of the tender being 10.10.2014, on which date, the tender was opened, the validity of the tender document would have been only up till 10.12.2014. Selection in respect of 6 (six) properties, out of the 15 mentioned properties in the Tender Notice dated 13.8.2014 having been made beyond the 2 (two) months period, i.e. 18.1.2015, the respondents counsel's contention that the petitioner does not have the locus standi to file the present writ petition as his bid is invalid cannot be accepted. The Govt. has to have a level playing field for all the tenderers, especially when all the bids and the selection of 6 persons to run the 6 tourist facilities all arose out of the same Tender Notice dated 13.8.2014.

16. With regard to the respondents counsel's contention that the State respondents have the right to accept or reject any quotation without assigning any reasons, it is settled law that all administrative action must be informed by reason. In the case of Kumari Shrilekha Vidyarthi and others v. State of U.P. and others reported in 1991 1 SCC 212, the Apex Court has held -

"That every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 and basic to the rules of law, the system which governs us, arbitrariness being the negation of the rule of law. Non-arbitrariness, being a necessary concomitant of the rule of law, it is imperative that all actions of every public functionary in whatever sphere must be guided by reason and not humour, whim, caprice or personal predilections of the persons entrusted with the task on behalf of the State and exercise of all powers must be for public good instead of being an abuse of power. Action of renewability should be gauged not on the nature of function but public nature of the body exercising that function and such action shall be open to judicial review even if it pertains to the contractual field. The State action which is not informed by reason cannot be protected as it would be easy for the citizens to question such an action as being arbitrary."

17. In the case of Kranti Associates Private Limited and another v. Masood Ahmed Khan and others reported in 2010 9SCC 496, the Apex Court has held that :

"Recording of reasons also operates as a valid restraint on any possible arbitrary exercise of judicial and quasi-judicial or even administrative power".

18. In the case of Tata Cellular v. Union of India reported in 1994 6SCC 651, the Apex Court has held that para 70 as follows :-

"70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender."

19. In view of the above decisions of the Apex Court, the State respondents should give reasons for not following up on the Tender Notice dated 13.8.2014. The only discernible reason given by the State respondents in their affidavit-in-opposition as to why all the bids of the tenderers, including the petitioner's bid was rejected is allegedly due to the bids becoming invalid, after the expiry of 2 months from the last date of submission of the bids. This reason, however does not find a place in the Meeting Minutes of the Disinvestment Committee dated 08.01.2015.

20. With respect to the respondents fixing an upper ceiling for the Tourist Home, there is no justification for the same. All the tenderers had given their bids pursuant to the earlier Tender Notice dated 13.8.2014 and all of them had quoted above the ceiling price given in the EOI dated 23.09.2015. There is nothing brought before this Court to show that the bids of the other tenderers were not feasible. The decision of the respondents to arrive at an upper ceiling

on the basis of an alleged analysis made by the revenue earned by each unit for the last 5 (five) years, cannot be accepted as no documents are in the official records to prove their case. There is nothing to show as to how many rooms, facilities are available. What is the cost price of room rent and food, facilities etc. In any event, the Govt. having run the tourist facilities/resorts at a loss, they cannot claim to be an authority knowing the strengths and weakness of the tourist facilities or how much profit is going to be made by each tourist facility. Otherwise, they themselves could have made the necessary corrective steps to make the loss making tourist facilities into a profit making venture. If the Department was an expert body having the wherewithal to run the Tourist Home/Lodge etc. as a profit making/revenue generating venture, they would not have embarked on the policy of Disinvestment. The State respondents having made a loss all through the years, they cannot be said to be competent to come to a finding as to the amount of profit or loss to be sustained by private individuals who are eventually going to take over the management of the Tourist Homes/Lodges.

21. In the present case, the aim of the respondents is to earn maximum revenue as is evident from the terms and conditions No.7 & 11 of the Tender Notice dated 13.8.2014. However, the said provisions are conspicuously absent from the EOI dated 23.9.2015. The action of the State respondents in putting an upper ceiling is suspect. In view of the fact that all the tenderers bid amounts in pursuance to the earlier Tender Notice are above the upper ceiling (as per the EOI dated 23.9.2015), the action of State respondents in putting an upper ceiling clearly implies that the tourist facilities have been under-valued. It should be remembered that public interest requires that the Government cannot act in a manner which would benefit a private party at the cost of the State. When the Govt. can earn revenue above the ceiling price on the lease of the tourist Home, the insistence of the Govt. that no tender above the upper ceiling will be considered gives rise to a suspicion that everything will not be done above board and not in the interest of the Public Exchequer. The condition No.5 of the EOI dated 23.9.2015 which states that price below the base price and upper ceiling will be summarily rejected seems to suggest that there is a likelihood of bias and favouritism, which will come into play in selecting the successful tenderers.

22. In the case of Meerut Development Authorities v. Association of Management Studies and another reported in 2009 6SCC 171, the Apex Court has held as follows :-

"The executive does not have an absolute discretion, certain principles have to be followed, the public interest being the paramount consideration. It has been stated by this Court in Kasturi Lal case.

"14..It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to

public interest. The Government, therefore, cannot, for example, give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so."

23. In the case of *Noida Entrepreneurs Association v. Noida and others* reported in 2011 6 SCC 508, the Apex Court has held as follows :-

"Power vested by the State in a public authority should be view as a trust coupled with duty to be exercised in larger public and social interest. Power is to be exercised strictly adhering to the statutory provisions and fact situation of a case. "Public authorities cannot play fast and loose with the powers vested in them." A decision taken in an arbitrary manner contradicts the principle of legitimate expectation. An authority is under a legal obligation to exercise the power reasonably and in good faith to effectuate the purpose for which power stood conferred. In this context, "in good faith" means "for legitimate reasons". It must be exercised bona fide for the purpose and for none other".

24. The Meeting Minutes of the Disinvestment Committee quoted earlier clearly shows that the leasing out of the Tourist Home was made only on the basis of a finding that very few bidders had experience in the hospitality in the Industry and that the financial capabilities of the bidders could not be assessed for being able to run the larger tourist lodges/homes. There are no specifics given showing which of the tenderers do not have the said qualification. This finding in any event, does not disqualify the petitioner or other tenderers from being considered as it is not an essential condition of the contract as per Tender Notice dated 13.8.2014 and as such, the above findings cannot be made the reason for calling of a new tender. The Meeting Minutes also do not specify that the petitioner does not have experience in the hospitality business. Also the petitioner in W.P(C) No. 144/2015 having been given the lease in respect of Tourist Lodge at Khanpui in pursuance to the Tender Notice dated 13.08.2014 and at the same time not considering his bid along with the other tenderers for lease of the Traveller's Inn at Vairengte due to the reasons recorded in the meeting minutes of the Disinvestment Committee dated 8.1.2015 shows that experience or having a degree in the hospitality/tourism business is not an essential condition of the contract. A perusal of the term and condition No. 16 of the Tender Notice dated 13.08.2014 also shows that having a background in hospitality and having a degree/diploma in the field of Travel/Hospitality is not an essential condition of contract. As revenue is the main concern of the Govt., the respondents should settle the lease with the highest bidder as long as the bid does not violate the terms and conditions of the Tender Notice dated 13.08.2014. In respect of the financial capabilities of the bidders, the respondents can always ask for security deposit or advance payment while executing the agreement with the successful tenderer. The reasons mentioned in the Meeting Minutes of the Disinvestment Committee dated 8.1.2015 for calling for a new tender cannot be improved upon by the respondents by giving subsequent reasons in the affidavit-

in-opposition for not selecting the petitioner, as is sought to be done by the respondents. Subsequent explanations which were not a part of the decision making process cannot be considered or given effect to. The Apex Court in *Mohinder Singh Gill & Another v. The Chief Election Commissioner, New Delhi & Others*, reported in AIR 1978 SC 851 has held that "validity of an order must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise".

25. The object to privatize the tourist home, restaurant, etc by giving them on lease to private individuals having being made only for the purpose of earning revenue for the State Government, the calling for fresh tender/bids by way of the EOI dated 23.9.2015 by having an upper ceiling and on the basis of the Meeting Minutes of the Disinvestment Committee dated 08.01.2015 is not justified due to the reasons stated above. The question of whether the petitioner would be able to run the tourist home on profit making basis cannot be the concern of the respondents as long as they get revenue for the same. With regard to the concern of the State respondents that the tourist home should be run properly, the State respondents have the power to insert clauses into the agreement to be executed between the successful tenderers and the respondents, wherein the interests of the respondents and the public can be protected. In respect of the concern of the Govt. that the petitioner would not be able to deposit the bid amount as quoted in his bid, the State respondents can make a provision for deposit of security money from the petitioner. As the Tourist homes etc are to be used for the public, the respondents may also consider fixing the room rates etc., which would be in public interest. Further, a clause for termination of the agreement due to non-compliance with the terms of the agreement can also be inserted. In short, the concern of the State respondents at this juncture is only speculative and the concern of the Government can be protected by executing a detailed agreement with the successful tenderer. The Govt. should have a level playing field for all the tenderers. However, the respondents have selected some tenderers in respect of some of the tourist homes etc., while not acting upon the bids of other tenderers, though they originate from the same Tender Notice dated 13.8.2014. No doubt, the Tender Notice dated 13.8.2014 is only an invitation to offer and that the quotation of rates submitted by the tenderers amounts to an offer.

Though, there is no binding contract between the parties till the offers are accepted, the manner in which the respondents have re-advertised lease of the tourist homes by having an upper ceiling price, goes to show that the action of the State respondents is not in public interest. The Public Exchequer will be at a loss. No germane reasons have been given by the State respondents as to why the petitioner's rate is not acceptable. It is not the respondents' case that the petitioner's bid is in violation of any of the terms and conditions of the Tender Notice dated 13.08.2014. It is also not the case of the respondents that the Tender Notice dated 13.08.2014 is defective. Due to the reasons stated above, I find that the decision of the State respondents in issuing a fresh EOI dated

23.9.2015 is arbitrary. Accordingly, the EOI dated 23.9.2015 is hereby set aside. The respondents are directed to consider the case of the petitioner for allotment of the lease of the Tourist Home Luangmual/Zonuam to the petitioner along with the other tenderers in pursuance to the Tender Notice dated 13.8.2014. The same should be done within a period of 4 (four) weeks from the date of receipt of a copy of this Order. The writ petition is accordingly allowed. No cost.