
(2013) 12 GAU CK 0003
In the Gauhati High Court
Case No : Writ Petition (C) No. 66 of 2013

David Zohmachhuana

APPELLANT

Vs

State of Mizoram and Others

RESPONDENT

Date of Decision : 17-12-2013

Acts Referred:

Citation : AIR 2014 Guw 26 : (2014) 3 BC 445

Hon'ble Judges : L.S. Jamir, J

Bench : Single Bench

Advocate : C. Lalramzauva, A.R. Malhotra, Zoramchhana, Johnny L. Toehhong and Lalchhuansanga Sailo, for the Appellant; A.K. Rokhum, A.A.G., for the Respondent

Final Decision : Allowed

Judgement

L.S. Jamir, J.—By this writ petition the petitioner is challenging the validity and legality of the recommendation of the State Purchase Advisory Board (in short SPAB) in its meeting held on 12.2.2013 recommending for issuing fresh tender for procurement of High Protein Soya Noodles. Heard Mr. C. Lalramzauva, learned senior counsel assisted by Mr. A.R. Malhotra, learned counsel for the petitioner as well as Mr. A.K. Rokhum, learned Addl. Advocate General, Mizoram for the State respondents.

2. Pursuant to the Tender notice dated 3.10.2011 floated by the Department of Social Welfare Department, Govt. of Mizoram inviting tender for supply of High Protein Soya Noodles for Aizawl and Lunglei areas. The petitioner also participated in the said Tender bids along with 3 (three) others. The bids were opened on 28.10.2011 in the presence of the Tenderer/representative and thereafter comparative statement was prepared for consideration by the SPAB. In the comparative statement all the tenderer except A.R.T. Industry, Zuangtui, Aizawl are shown to have fulfilled the terms and conditions of the NTT. From the said comparative statement it is seen that one firm namely Zo Cereal Product, Vaivakawn, Aizawl had offered the lowest bid. The petitioner firm namely, M/s.

Z.D. Food Products, Zuangtui has offered the second lowest rate and the 3rd tenderer, i.e. A.R.T. Industry, Zuangtui, Aizawl was shown to be the 3rd lowest tenderer. However, in respect of A.R.T. Industry, Zuangtui violation of some clauses of the NIT was also reflected. The other tenderer i.e. Lacto Noodles, Zuangtui, Aizawl was shown to have offered the highest rate and is shown to have fulfilled all the terms and conditions of the NIT. The SPAB held its meeting on 16.01.2012 to consider the said tenders as reflected in the comparative statement and decided/recommended that the quotation for procurement of High Protein Soya Noodles may be re-tendered on the following grounds:-

(1) Analysis Certificates submitted by tenderers other than A.R.T. Industry were obtained before the Tender Notice was floated.

(2) The lowest tenderer i.e. ZO Cereal Product submitted withdrawal of his tender due to certain reason and requested the Department not to forfeit his Earnest Money Deposit since the firm being registered under Mizoram Preferential Stores Purchase (MPSP) Rules is entitled to be exempted from payment of Earnest Money and Security Deposit. The Board carefully examined the MPSP Rules and decided that since the item i.e. noodles is not listed in Schedule I and is not entitled for exemption of Earnest Money/Security Deposit, the firm should forfeit the Earnest Money deposited for the said item. The SPAB further recommended that the practice of withdrawal of tender after opening of the same should be banned in future.

3. Thereafter, respondent No. 2 issued a fresh Tender notice dated 1.3.2012 inviting tenders under sealed covers from bona fide manufacturers or their authorized Agents/Dealers for supply of high protein soya noodles without recalling or canceling the earlier Tender Notice dated. 3.10.2011.

4. Being aggrieved by the decision of the SPAB on 16.1.2012 and floating of fresh Tender Notice dated 3.10.2011 the petitioner had approached this Court by way of W.P. (C) No. 17 of 2012 praying for setting aside the same. After hearing both the parties this court by judgment and order dated 28.9.2012 had disposed of the aforesaid writ petition with the following directions.

In the result, the writ petition is allowed. The recommendation of the SPAB held on 16.01.2012 recommending re-tendering is set aside. The SPAB is directed to reconsider again and make a fresh recommendation on the basis of the available documents and materials with reference to the Tender Notice dated 3.10.2011 and take an appropriate decision in that regard in accordance with law. As a corollary, till the authorities take an appropriate decision regarding the first NIT Tender Notice dated 3.10.2011 in accordance with law, the subsequent NIT Tender Notice dated 1.03.2012 cannot be acted upon.

5. Thereafter, the SPAB in its meeting held on 12.2.2013 considered the Tender submitted by the petitioner and 3 (three) other Tenderers and took the following decisions:

SPAB observed that the L-I bidder, M/s. ZO Cereal Product, had withdrawn his tender deliberately after opening of tenders and knowing the rates of all bidders with mala fide intention of grabbing the contract at a higher rate in favour of its sister firm i.e. the 2nd lowest tenderer, M/s. ZD Food Products.

The SPAB further noted that the same tactic was used by these sister firms in the previous year's tender when M/s. ZD Food Products had withdrawn its tender to grab the contract at a higher rate in favour of M/s. Lacto Noodles causing huge loss to the State Exchequer.

The SPAB is convinced that the firms at Sl. 1, 2 & 4 above have been operating as a syndicate and indulging in mal-practices of withdrawal of tender after opening in order to get the contract at higher rates, thereby deliberately vitiating the competitiveness of the bidding process to defraud the government. It is a fact that proprietors of Firm Nos. 1 & 2 are siblings and proprietor of Firm No. 4 is close to Firm No. 1. While SPAB can have no objection to siblings and close relatives/friends participating in the same tender exercising their right to carry out business and commerce in accordance with the rules and procedures, it cannot allow them to make a mockery of the competitive nature of the bidding process and defraud the government by indulging in clandestinely collaborative bidding and using withdrawal of tender by L-1 collaborator in order to grab the order at a higher rate.

After careful scrutiny of the matter, the SPAB is of the view that sanctity of the bidding process has been irreparably vitiated by the misconduct of L-1 & L-2 bidders and therefore recommends cancellation of this tender and floating of a fresh tender for procurement of high protein soya noodles. It was therefore decided that fresh tender be issued on short notice of a week's duration in order to avoid lapse of funds during the current financial year.

6. Pursuant to the recommendation of the SPAB in its meeting held on 12.2.2013, the respondent No. 2 issued Tender Notice dated 5.6.2013 inviting Tender in sealed covers from bona fide manufacturers or their authorized Agents/Dealers for supply of High Protein Soya Noodles. By the said NTT, clause 10 of the terms and conditions was modified by providing that Certificate of Analysis of food item will be done by Social Welfare Department from any recognized/approved laboratory. Further, an additional condition was also provided under Clause 7 therein that in cases of withdrawal of tender (i.e. after opening of tender) or withdrawal after the selected firm and the quoted rate were duly recommended/approved by the SPAB/DPAB, the firm will be blacklisted from participating in subsequent tenders.

Being aggrieved by the decisions of the SPAB in its meeting held on 12.2.2013 as well as the floating of the Tender dated 5.6.2013 the present writ petition has been filed by the petitioner.

7. C. Lalramzauva, learned senior counsel appearing for the petitioner submits that the SPAB is only an advisory body in respect of purchase of materials/items

by the Government Departments and the concerned department ought to have taken a decision as to whether the said recommendation of SPAB was to be acted upon or not. However, in the instant case the respondent Nos. 1 to 3 had taken no decisions and had mechanically floated the NTT dated 5.6.2013 for the same item and for the same amount/quantity which is highly illegal, discriminatory and capricious and is also not in public interest. He also submits that the SPAB while taking the decision for canceling of the Tender dated 3.10.2011, the same was based on irrelevant and extraneous consideration which had no bearing on the said Terms & Conditions of the NTT and therefore, the said decisions of the SPAB is not sustainable in law. Further, submission is forwarded by the learned senior counsel that the meeting held on 12.2.2013 by the SPAB was on the basis of the judgment and order dated 28.9.2012 passed by this Court in W.P. (C) No. 17/2012. The SPAB therefore could not have traveled beyond what was directed by this Court and therefore the decision which was based purely on extraneous consideration without any basis and the same being beyond the directions and the parameters laid down by the Judgment and order dated 28.09.2012 passed by this Court the said decisions of the SPAB is liable to be set aside and quashed. He also submits that a direction be issued to the respondent to award the supply order in favour of the petitioner.

The learned counsel for the petitioner in support of his case has placed reliance in the cases of:

- (a) Tata Cellular Vs. Union of India,
- (b) Harinder Singh Arora Vs. Union of India (UOI) and Others,
- (c) Shimnit Utsch India Pvt. Ltd. and Another Vs. West Bengal Transport Infrastructure Development Corporation Ltd. and Others,

8. The State respondents have filed their affidavit-in-opposition. Mr. A.K. Rokhum, learned Addl. Advocate General appearing on behalf of the State respondents has vehemently objected to the submissions made by the learned senior counsel appearing for the petitioner. He submits that the petitioner firm is not a registered Industrial Unit under the Mizoram preferential Stores Purchase Rules, 1994 for the manufacturing/processing of High Protein Soya Noodles. A spot verification of the manufacturing unit of M/s. Z.D. Food Products was conducted on 15.01.2010 by the Officers of Social Welfare Department. By the said verification report, it was revealed that the Firm possessed only a Mixer and a Grinder for processing food products and the Firm has no Pharmaceutical laboratory and Drugs licence to manufacture Vitamin and Calcium. He has drawn the attention of this Court to the certificate of the petitioner Firm issued by the Director of Industries which has been appended as Annexure-II to the affidavit-in-opposition where the petitioner firm is shown not to be manufacturing/processing High Protein Soya Noodles. Further referring to Annexure-1A of the writ petition, the learned Addl. Advocate General submits that the certificate issued by the District Industries Centre, shows that the petitioner is not engaged in production

of High Protein Soya Noodles which is apparent from the certificate. He also submits that the said certificate is having a validity of one year. The initial certificate was issued on 12.11.2007 and was valid upto 12.11.2008. Thereafter, there has been no renewal and was renewed only on 12.11.2011 at Sl. No. 2 whereas Sl. No. 1 has been left blank which shows that there is manipulation for some ulterior motive.

9. Learned Additional Advocate General also submits that the 3 firms namely: M/s. ZO Cereal Product, Vaivakawn, M/s. ZD Food Products, Zuangtui, Aizawl and M/s. Lacto Noodles, Zuangtui, Aizawl are closely related and were involved in their dubious activities even in the past. They are working as a syndicate and indulging in mal-practices to get the contract at high rates which has caused huge loss to the State Exchequer. He also submits that the petitioner has violated Clause 6 of the NIT dated 3.10.2011 and has drawn the attention of this Court to Clauses 13 and 21 therein. He therefore, submits that the SPAB was of the view that the sanctity of the bidding process has been vitiated and therefore a fresh tender was required. There is nothing wrong in the decision taken by the SPAB and therefore warrants no interference by this court.

10. I have heard the learned counsels for the respective parties. Before entering into the merits of the case, it is pertinent to mention that this court had directed the SPAB by Judgment and Order dated 28.9.2012 passed in W.P. (C) No. 17 of 2012 to reconsider again and make a fresh recommendation on the basis of the available documents and materials with reference to the Tender notice dated 3.10.2011 and take an appropriate decision in that regard in accordance with law.

11. From a consideration of the Minutes of the SPAB meeting held on 12.2.2013, it is seen that the decision was taken to float fresh Tender for procurement of High Protein Soya Noodles on the ground that the lowest Bidder had withdrawn his Tender deliberately after opening of the Tender and knowing the rates of all the bidders with the mala fide intention of grabbing the contract at a higher rate in favour of its sister firm i.e. the present petitioner. SPAB further noted that the same tactic was used by these sister firms in the previous years tender and therefore, the SPAB was convinced that the firms are operating as a syndicate and indulging in malpractices thereby vitiating the competitiveness of the bidding process to defraud the government. A bare perusal of the decision of the SPAB would clearly show that none of the materials available on records with reference to the Tender Notice dated 3.10.2011 was considered. From a reading of the comparative statement it is seen that none of the surviving tenderers were shown to have violated the terms and conditions of the NIT dated 3.10.2011. While considering the contention of the State respondents that the petitioner firm had violated Clause 6 of the NIT, it is seen that the comparative statement speaks otherwise insofar as the petitioner firm is concerned. The decision of the SPAB to float new fresh tender was taken on the ground that the firms had been operating as a syndicate in the past as well as in the present NIT to get the contract at a higher rate thereby defrauding the government. This court is of the

opinion that the reasons for floating afresh NIT by the SPAB is not tenable inasmuch as when the petitioner and other tenderers were found to have fulfilled the terms and conditions of the NIT, SPAB should have decided to award the contract to a firm whose rate was found to be viable. The firms having been found to have fulfilled the terms and condition of the NIT dated 3.10.2011, the SPAB could not have taken a decision to do away with the NIT dated 3.10.2011 without first hearing the tenderers. The decision of the SPAB to float fresh tender also therefore amounts to violation of natural justice. Also the directions given by Judgment and Order dated 28.9.2012 has not been adhered to by the SPAB.

12. It is now well settled that the respondent are not bound to accept the lowest tenderer. This court therefore while sitting under writ jurisdiction would not like to pass any further direction except to remand back the matter to the SPAB to reconsider the matter and take a decision for awarding the contract keeping in mind the judgment and order dated 28.9.2010 and the directions contained therein.

13. In view of the above, the decision of I the SPAB held on 12.2.2013 for floating of a fresh tender for procurement of High Protein Soya Noodles is quashed and set aside. Consequently, the Tender Notice dated 1st March, 2012 and 5th June, 2013 are also quashed and set aside. The SPAB shall reconsider the matter within a period of one month from the date of receipt of the judgment and order by this Court and take appropriate decision in accordance with law. With the above observation and direction, this writ petition is allowed. No costs.