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**(2013) 09 GAU CK 0020**

**In the Gauhati High Court**

**Case No : Writ Petition (C) No. 152 (K) of 2013**

Jemti AO

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

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**Date of Decision :** 18-09-2013

**Acts Referred:**

**Citation :** AIR 2014 Guw 59 : (2013) 5 GLT 464

**Hon'ble Judges :** Prasanta Kumar Saikia, J

**Bench :** Single Bench

**Advocate :** Taka Masa, Mr. K. Lotan and Mr. Arenlong, for the Appellant; N.M. Jamir, Addl. Sr. G.A., Mr. N. Mozhui, Ms. K. Kire, K. Likhase Sangtam, A. Kire and Mr. R. Richa, for the Respondent

**Final Decision :** Allowed

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## **Judgement**

Prasanta Kumar Saikia, J.—Heard Mr. Taka Masa, learned counsel for the petitioner. Also heard Mr. N.M. Jamir, learned Additional Senior Government Advocate appearing for the State respondent Nos. 1 and 2 as well as Mr. N. Mozhui, learned counsel appearing for the respondent No. 3. In this proceeding, the order dated 25.06.2013 approving of work for construction of Tuli Feeder Road under SPA 2012-2013 in favour of the respondent No. 3 as well as allotment order dated 04.07.2013 in favour of the same respondent are called into question.

2. The brief facts, as they emerge from the writ petition, and which are necessary for disposal of the present proceeding, are that the petitioner is a Class-1, Government Contractor, registered with Government of Nagaland under Regd. No. 1/197. He is also a member of the Nagaland Contractors and Suppliers Union (in short, NCSU), his Card Number being the card No. 2264.

3. The respondent authorities issued NIT dated 20.12.2012 seeking bids for construction of Tuli Feeder Road. The petitioner took part in that tender process and was also allotted the work, vide order dated 07.01.2013. Subsequently, by

the letter dated 14.03.2013, the said work order had been cancelled without assigning any reason, whatsoever. Such a cancellation order, however, caused the petitioner to suffer huge loss since by the time he received the cancellation order vide order dated 14.3.2013, he invested huge amount of money in executing the work, allotted to him.

4. The learned counsel for the petitioner has pointed out that though the NIT dated 20.12.2012 invited bid for as many as 15 works including the work allotted to the petitioner, the work order, issued only in favour of the petitioner, had been cancelled. This only shows that the respondent authorities singling out the petitioner for cancellation of the work order aforesaid committed profound illegality since the discrimination met out to him write large on the face of such cancellation order.

5. Being aggrieved by the cancellation of such work order, the petitioner submitted representation seeking withdrawal of cancellation order dated 14.03.2013. However, representation dated 21.03.2013 could evoke no positive result. Instead, the respondent authorities retendered the work by issuing NIT dated 29.05.2013, the value of the work was estimated at Rs. 4,71,46,000/-. Having found no other way out, the petitioner participated in that tender process with another tenderer, namely, the respondent No. 3 herein.

6. It has been stated that the NIT dated 29.05.2013 was conducted in two bids system, technical bid and price bid. So far price bid is concerned, respondent No. 2 had asked the prospective bidders to quote rates by percentage above/below @ SOR 2010. As stated above, in respect of work under consideration, both the petitioner and the respondent No. 3 participate in the tenderer process and both of them were found technically qualified.

7. However, in the price bid, the petitioner quoted price 2% below SOR 2010 whereas the respondent No. 3 had quoted rates as per NPWD SOR 2010. The tender Committee examined the bids made by the petitioner and the private respondent but without making any recommendation in respect of bids, so made by the petitioner and the respondent No. 3, simply forwarded the tender papers to the Government for approval.

8. The Government by its letter dated 25.06.2013 at Annexure-M to the writ petition approved the bid made by the respondent No. 3 without assigning any reasons as to why the respondent No. 3 was allotted with the work in question despite the petitioner being the lowest tenderer. Thereafter, the respondent authorities issued in favour of respondent No. 3 the work order dated 04.07.2013 which is attached to the writ petition as Annexure-N.

9. It has now been contended that the approval order dated 25.06.2013 at Annexure-M as well as allotment of work order dated 04.07.2013 Annexure-N to the writ petition are profoundly illegal since such order(s) were issued in gross violation of terms and conditions specified in the NIT dated 29.05.2013 as well as the principle of natural justice thereby perpetuating enormous injustice on the

petitioner.

10. The further case of the petitioner was that the State Government has taken a decision that all contracts and supply works in the State of Nagaland are to be awarded only to the NCSU Card holder, vide Memorandum dated 30.06.1986 and Memorandum dated 04.10.1995 at Annexure-H & Annexure-I to the writ petition respectively. Though the petitioner is an NCSU Card holder and although the respondent No. 3 is not a member of the aforesaid union, the respondent authorities overlooked those vital aspects and allotted the work in question to the respondent No. 3 in total disregard to the directions rendered in the aforesaid memoranda.

11. Aggrieved by such illegal conduct on the part of the respondent authorities, the petitioner submitted representation before the concerned authority. However, same had never been attended to by the authorities concerned. Having found no other way out, the petitioner had approached this Court seeking the reliefs aforesaid.

12. Notice of the proceeding was served on the respondents. The State respondents as well as respondent No. 3 filed separate counter-affidavits to contend that the State respondents have committed no illegality in settling the contract work in question in favor of respondent No. 3. In their counter-affidavit, the State respondents had stated that the work order dated 07.01.2013 had to be cancelled since it was issued in gross violation of Rules and Procedure which govern allotment/distribution of public largesse.

13. In regard to rejection of the petitioner despite he being the lowest tenderer, it has been stated that the bid with 2% below SOR 2010 was found totally unworkable since prices of all the commodities required for execution of the work in question have increased manifolds since 2010 and on that price, no one can execute the work above without compromising the quality of the work, much less someone doing such as work at the rate 2% below the SOR 2010. It is on that ground that bid made by the petitioner was rejected.

14. In regard to awarding the contract work in favour of respondent No. 3 despite he being not a NCSU Card holder, it has been stated that on earlier occasion too, the respondent authorities has allotted respondent No. 3 work without his furnishing the membership Card from NSCU and as such, on present occasion too, there cannot be any hassle in settling the work aforesaid in favor of the private respondent despite his not furnishing the membership Card from the NSCU, more so, when the NIT did not require the prospective bidders to furnish such a Card from the NSCU.

15. The relevant paragraphs of the counter-affidavit of the State respondents are reproduced herein below:-

6. That with regard to the statements made in paragraph 6 of the petitioner the answering respondents states that the respondent No. 3 is a reputed

Government Registered Contractor having vast experiences in construction works and he had successfully taken up several major projects of the Department which he had completed to the satisfaction of all concerned. It is to specifically states that by NIT dated 28.05.2013 (Annexure-E of the petitioner) ids were invited from Registered Contactors of Nagaland PWD Class-1/CPWD?MES and nowhere it has mentioned about the holders of identity Cards of NCSU. In the earlier occasions after issuing Memorandums dated 30.06.1986 and dated 04.10.1995 when the respondent authorities have allotted various works to the respondent No. 3 there were no objection from the NCSU on the basis of issuing works only to the holder of NCSU identity cards.

7. That with regard to the statement made in paragraph 7 of the petition the answering respondents states that due to high costs of materials, transportation and labour charges it is found impossible to execute the work with 2% below SOR 2010. In other words, executing the work with 2% below SOR 2010 in the year 2013 will amount to compromising with the quality of the work which will have adverse affect on the developmental works of the State. In this connection, the respondents state that as SOR 2010 is becoming unworkable, the Department has prepared SOR 2013 which is under submission to the State Government for approval. It is to further state that both the petitioner and respondent No. 3 had qualified the Technical Bids and after opening the Financial Bids the matter was forwarded to the State Government and after considering the work experiences between the two Bidders, the State Government has conveyed its approval for allotting the work to the respondent No. 3.

13. That with regard to the statements made in paragraph 18 of the petition the answering respondents states that after receiving the instant writ petition the Addl. Chief Engineer, PWD (R & B) vide Letter No. CON/Enc/Legal/Gen-64/2013-14 dated 08.08.2013 had written to the Executive Engineer, PWD (R & B), Tuli Feeder Road Division, vide Letter No. EE/FR/TLI/TB-36 dated 13.08.2013 submitted the progress report of the work with detail break-up of 8 (eight) numbers of roads, under Tuli Feeder Roads. It is to state that out of 8 (eight) numbers of roads, works has been started and progressing in 6 (six) numbers of Roads and in (1) one road namely, Mernagkong Village-Tamlu works has been progressed upto 20%. As such, the statements made in paragraph 16 and the certificate dated 27.07.2013 issued by the SDO, PWD (R & B), Feeder Road, Tuli Division is absolutely false and baseless.

16. It is also the contention of the State respondents that respondent No. 3 was chosen also because of his vast experience in the field of work which he has been engaged in, as is evident from Annexure-K and Annexure-L to the writ petition. Therefore, one cannot find fault with the State respondents for their favoring the private respondent with the work in question. State respondents, therefore, pray for dismissal of the proceeding at hand.

17. Echoing the submission, advanced by the State respondents, the respondent No. 3 has also stated that there was no fault, on the part of the respondent

authorities, in allotting the work in his favour. It has been stated that 2% below the SOR 2010 is not a workable rate when one compares the prices of the commodities in 2010 and 2013. Since price of all the materials including the materials to be used in executing the work in question have increased manifolds since 2010, it is almost impossible on the part of the petitioner to execute the work without compromising the quality of the work if the petitioner is allowed to execute the work above at 2% below the SOR of 2010.

18. In regard to the allegation that he is not a member of the NCSU, it has been pointed out that NIT aforesaid never requires that one should be the member of the NCSU to be successful bidder. Even then, he is the member of the Nagaland Contractor Associations, an Association duly registered with the Government of Nagaland. More importantly, the Nagaland Contractor Associations is an affiliated unit of the NCSU.

19. Since the petitioner is a member of Nagaland Government Registered Class-I Contractors and since the said Union is also under the umbrella of the NCSU, his tender could not be rejected on the ground that he is not a direct member of the NCSU, more so, when the NIT dated 29.05.2013 did not require of the prospective bidder to submit membership card from the NCSU.

20. It has also been contended by the learned counsel for the respondent No. 3 that after receiving the order, he had already started executing the work, assigned to him and in some the segments, he had even completed 20% of the work in question as evident from Annexure-14 to his counter-affidavit. In such a situation, if the work order is quashed and set aside, as prayed for by the petitioner, he would suffer enormous hardship which cannot be measured in terms of money.

21. On all these counts, the learned counsel for the respondent No. 3 has urged this Court to dismiss the present proceeding and also to recall the interim order(s) passed in the proceeding in hand in favour of the petitioner. The petitioner has filed affidavit-in-reply to the counter-affidavits filed by respondent Nos. 1 and 2 and respondent No. 3 wherein it has reiterated its earlier position.

22. Before I proceed further, let us see whether State respondents were justified in rejecting the bid made by the petitioner despite he being the lowest bidder. In this connection, it may be stated that one cannot claim allotment of the work only for his being the lowest bidder as is evident from Clause 8 of NIT dated 29.05.2013. Nor can there be any quarrel over the fact that Clause 7 thereof did not empower the State respondent (respondent No. 2 in particular) to reject any offer without assigning any reasons whatsoever.

23. But then, it is a settled proposition of law as well as the principle of natural justice that before rejecting the lowest bidder, the authority must have some valid reasons as to why the lowest bid was not accepted. If the lowest bidder is rejected without there being any valid grounds of such rejection, such rejection will find itself exposed to all kinds of charges including the charge of arbitrariness.

24. Coming back to our instant case, I have found that the main reason for not accepting the lowest bid was that such a bid was found not workable. Let us see how far such explanation is found tenable with materials available on records. On the perusal of the NIT dated 29.05.2013, I have found that the NIT, above, allowed the prospective bidders to make bid on percentage/item rate basis above/below the Schedule of Rate, (in short, the SOR) of 2010. Allowing the bidders to make such bids, more particularly below the SOR of 2010 is enormously significant.

25. This is because of the fact that if the SOR of 2010 becomes so unworkable, the State respondents should have asked the bidders to make bid only above the SOR of 2010. But that was not done. Quite contrary to it, the State respondents allowed the prospective bidders to make bid--not only at the rate as per SOR of 2010--but--below that the SOR of 2010 as well. This speaks loud and clear that the department found the SOR of 2010 workable even on the date on which NIT dated 29.05.2013 was published.

26. Otherwise, the department would not have asked the prospective bidders to quote rate even below the SOR 2010. The fact that in all the NITs which are floated in recent past, the prospective bidders, as evident from Annexure-A to the writ petition, were asked to submit bids on percentage/item rate basis even below the SOR 2010 Nagaland PWD fortifies more and more my conclusion that the SOR 2010 was quite workable on the date on which NIT dated 29.05.2013 was published.

27. We may note here that in paragraph 9 of the writ petition, the petitioner had claimed that very recently, he was assigned a similar work. Quite importantly, he was asked to execute such a work at an interior place in the District of Mokokchung where there was no much of infrastructures in the terms of roads, transportation, and availability of raw materials and labours. Inadequacy of the infrastructure greatly increases the cost of execution of the project. In spite of all these, he was allowed to execute the work even 6% below the SOR of 2010.

28. On the other hand, the present work is to be executed at a place not far away from Amguri, in the State of Assam which is easily accessible from many other towns and cities thereby facilitating the contractor to carry out the work in question with much ease both in the terms of money and materials. In spite of above, the State respondents considers the work in question 2% below the SOR 2010 unworkable whereas the rate quoted by him 6% below the SOR 2010 for execution of similar work at a far too interior place was found very workable.

29. The respondents did not deny the petitioner's having been awarded aforesaid work. Nor did they deny the claim of the petitioner that he was asked to execute such work 6% below the SOR of 2010. It is also not their case that aforesaid work was to be executed at a place situated conveniently from all angles. But then, they had contended that since there is no material on record to show under what condition or conditions, the petitioner was asked to execute the

said work 6% below SOR 2010, no reliance can be placed on the above contention of the petitioner in questioning the work order under challenge.

30. It is true that it is not known under what condition or conditions, the petitioner was awarded aforesaid work. But then, averments in paragraph 9 of the writ petition, which remains unchallenged, clearly show that a similar work was assigned to the petitioner to be executed 6% below the SOR of 2010. What is, however, a matter of great importance is that such a work was to be executed at a place where infrastructures in the terms of road, transportation, availability of raw materials or labours, etc are either nearly absent or minimal.

31. These make it inescapable for this Court to hold that the rate quoted by the petitioner is quite workable, more so, when the place where the work in question is to be executed is located very conveniently from various angles. These are also forceful testimonies of State respondents doing everything possible to favour the private respondent although in the given situation, he was not best of the bidders, although such favouring means the depriving the best of the bidders of his dues and although such favouring requires the State exchequer to bleed badly.

32. One may also note here that respondents had contended that the respondent No. 3 was preferred over the petitioner due to his vast experience in the field of constructional work. Annexure-K and Annexure-L to the writ petition as well as Annexure 3 to 13 to the counter-affidavit filed by respondent No. 3 are said to be such testimonials of the private respondent. On the perusal of comparative statements, I have found that there cannot be any doubt over the fact that respondent No. 3 is more experienced than the petitioner.

33. However, in the facts and circumstances of the present case, such a fact alone cannot tilt the balance in favour of respondent No. 3. I have found that the present tender is conducted in two bids system. While first one is technical bid, next one is price bid. Once a bidder qualifies technical bid he can participate in the price bid. But his technical superiority cannot be allowed to influence the bids made on price unless all price bidders are found equally placed on all other aspects.

34. But in our instant case, such is not a situation. I have already found that the petitioner is the best of the bidders as far as price bid is concerned since his bid is found very workable and most competitive in the facts and circumstances of the present case. Being so, there is no scope for the respondents to press in to service the superior technical qualifications of the private respondent in order to favour him with the contract in question. Therefore, the contention that respondent No. 3 was chosen for his being more experience cannot be accepted as a genuine contention.

35. On my further perusal of the pleadings. I have also found that on earlier occasion, work in question was allotted to the petitioner. But such allotment order was admittedly cancelled subsequently. The petitioner also claims that by

the time the work order was cancelled, he had invested huge sum of money in executing the work aforesaid. These projections have not been seriously question by the respondents.

36. Such revelations should have influenced the State respondents in considering the bids in respect of the work in question and they must have give some more weightage to the bidder who was already made to suffer for no fault of his own, even in the event of all the bidders are found equally placed. Unfortunately, that was not done. In my considered opinion, on the above count too, the petitioner ought to have been favoured with the work under challenge.

37. This brings us to the contention of the petitioner that State respondents ought to have rejected the respondent No. 3 for his not being a member of the NCSU. But such a contention is found to be without any substance. This is because of the fact that when the NIT in question did not stipulate such a condition, it would be totally unjust and unfair on the part of the State respondents to reject the respondent No. 3 only for his not submitting membership's card from the NCSU.

38. One may note here that in contractual matters where State is a party, the writ Court should be very cautious and circumspect in invoking its authority under Article 226 of the Constitution of India. Only when there is a proven case of miscarriage of justice, the writ Court can utilize its power to correct a serious mistake, committed by State authorities in settling the contract in favour of someone not deserving.

39. Coming back to our case, I have found that the petitioner has clearly made out that by depriving the work under challenge, the State respondent had committed enormous injustice to the petitioner which needs this Court to invoke its authorities to correct the mistake aforesaid. That being so, in my considered opinion, it is a fit case where the prayers, sought for are required to be granted.

40. In view of our foregoing discussion, I am to hold that the work order dated 25.06.2013 approving the work for construction of Tuli Feeder Road under SPA 2012-2013 to the respondent No. 3 as well as allotment of work order dated 04 07.2013 are liable to be set aside.

41. In the result, I set aside the order of approval dated 25.06.2013 as well as work order dated 04.07.2013.

42. I have already found that the private respondent has already carried out some part of the work assigned to him as it is evident from Annexure-14 to the counter affidavit of the private respondent (corresponding to the Annexure-III to the counter affidavit of the State respondents).

43. In the face of the above revelations, I direct the State respondents to measure the work already executed by the private respondent in the terms of approval order and work order aforesaid and thereafter suitably reimburse him for the expenditure, he had already incurred in executing the work aforesaid till



the date of his receipt of the stay order passed by this Court. This exercise needs to be completed within a period 3(three) months from the date of receipt of the copy of this order.

44. In the event of failure to carry out this direction, the State respondents would have to pay him interest at the rate of 6% on the amount, so invested by the private respondent in carrying out the work in question.

45. The State respondents are also directed to issue necessary order in favour of the petitioner to execute the remaining part of the work in question as early as possible but in no case beyond 2 (two) months from the date of receipt of copy of this order. With the aforesaid directions, the present proceeding is allowed, off course, without any cost.