(2007) 06 GAU CK 0035

In the Gauhati High Court

Case No : Writ Petition No. 1921 of 2007

Laba Baruah and Another — APPELLANT

Vs

State of Assam and Others — RESPONDENT

Date of Decision : 07-06-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 141, 226
Contract Act, 1872 — Section 23

Citation : AIR 2007 Guw 164

Hon'ble Judges : Aftab H. Saikia, J

Bench : Single Bench

Advocate : S. Kataki, R. Islam and R. De, for the Appellant; K.N. Chaudhury, A.A.G. and J. Patowary, Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Aftab H. Saikia, J.—Whether "The Call Deposits" from Guwahati Co-operative Urban Bank (for short, ''the Bank'') in respect of submission of tender despite the specific condition for submitting the earnest money by way of NSC/KVP or by Fixed Deposit Receipt (FDR), Term Deposit Receipt (T.D.R.J/Guarantee Bond of a Nationalized Bank can be accepted by the State Authority as an earnest money, is the limited and short question to be answered in this writ petition.

2. In the instant case "Call Deposits" from the Bank were submitted by the petitioners as earnest money along with their respective/separate tenders for settlement of a contract as regards the supply of dietary and other articles under different groups to various jails particularly, to the Superintendent District Jail, Mongaldoi and to the Superintendent Central Jail, Guwahatl. However, the State Authority rejected all such "call deposits" as earnest money being violative of the specific terms and conditions of the Notice Inviting Tender (for short, "the NIT").

3. In the backdrop of this sole issue raised before this Court, this Court has to now consider the arguments so advanced by the learned Counsel for the contesting parties.

4. Heard Mr. S. Kataki, learned Counsel for the petitioners and also Mr. K.N. Choudhury, learned Addl. Advocate General, Assam assisted by Mr. J. Patowary, learned Counsel appearing for the official respondents.

5. Mr. Kataki, learned Counsel for the petitioners has vehemently submitted that the entire process of rejecting the petitioners'' tenders on the 3ole ground that they have deposited the "Call Deposits" of Bank instead of the stipulated conditions as laid down in the terms and conditions in the NIT, is absolutely arbitrary, discriminatory and violative of Article 14 of the Constitution of India and Section 23 of the Indian Contract Act. In order to drive home his submissions, the learned Counsel has relied upon on the following Apex Court''s decisions as well as the decision of this Court:

(1) M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others,

(2) Bibhu Bhushan Choudhury Vs. Union of India (UOI) and Others,

(3) 2000 AIR SCW 2030 Lt. Col. P.R. Chaudhury (Retd.) and Ors. v. Municipal Corporation of Delhi and Ors. (2000) 4 SCC 572;

(4) Hindustan Times and Others Vs. State of U.P. and Another,

(5) Global Engineering Ltd. and Ors. v. Advance Exports Ltd. and Ors.;

(6) B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others,

6. The basic argument of Mr. Kataki is that the ''Call Deposits'' presented by the petitioners as earnest money in submitting their respective tenders pursuant to the NIT dated 26-2-2007 cannot be ignored and discarded as the same were being validly presented in terms of conditions laid down in the, NIT. "No other form of remittance except the ones mentioned above will be acceptable as earnest money to that extent" is violative of Article 14 of the Constitution of India and Section 23 of the Indian Contract Act and in the above premises, the impugned rejection of the tenders on the plea of deposit of earnest money by way of "Call Deposits" is liable to be set aside and quashed.

7. In support of such rejection of the NIT on the sole ground of submission of "Call Deposits", Mr. Choudhury, learned Addl. Advocate General, Assam has submitted that since the contract floated by the State by the NIT in question itself is a commercial transaction, a duty has been cast upon the State to act fairly and reasonably in such commercial transaction and as such insertion of consequential conditions especially in Clause 2(j) of the NIT to the effect that ''No other form of remittance except the one mentioned above will be acceptable as earnest money'' by way of deposit of NSC/KVP or by Fixed Deposit Receipt (FDR)/Term Deposit Receipt (TDR)/Guarantee Bond of a Nationalized Bank, cannot be said to be unreasonable or irrational so as to get secured earnest money. His simple case is that since the Government has entered into a commercial transaction, the authority has the right to secure the concerned Deposits as earnest money and to achieve such, of object it is felt that the

earnest money must be drawn in the form mentioned above including from a Nationalized Bank. In the instant case, the petitioners have deposited the ''Call Deposits'' as earnest money of the Bank instead of a Nationalized Bank which is basically in violation of the terms and conditions so stipulated in the NIT.

8. Mr. Choudhury, learned Addl. Advocate General, Assam has also relied upon the following decisions:

(1) G.B. Mahajan and others Vs. The Jalgaon Municipal Council and others, and

(2) Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others,

9. We have carefully considered the extensive arguments so advanced by the learned Counsel for the parties and also meticulously scanned the materials made available on record including the pleadings exchanged by and between the parties.

10. Both the Superintendents of Jail, District Jail, Mongaldoi as well as the Superintendents of Central Jail, Guwahati floated their respective NIT dated 26-2-2007. In both the NITs, Clause 2 including (J) contemplates as under:

2. The following procedures, terms and conditions are to be strictly adhered to by the intending tenderers in submitting the tenders, failing which their tenders will be liable to be rejected.

(a)Tenders must be submitted to the undersigned in prescribed Tender Form which will be available in the office of the undersigned on payment of Rs. 500.00 (Rupees Five Hundred) only by Cash and Money Receipt will be issued in the name of the intending tenderers who purchases the Tender Form. Only the purchasers of Tender Form will be eligible for submitting tender.

(b) Separate tenders must be submitted for separate Groups in separate sealed covers addressed to the undersigned and marked as "Tender for Supply of Articles of Groups "A" or "B", "C" (as the case may be) on the top of each sealed cover. Unsealed tenders will be summarily rejected.

(c) Only one tender shall be submitted for one Group by any tenderer, and in case of submission of more than one tenders for the same Group by the same tenderer quoting different rates, all such tenders of the said tenderer for the said Group will be deemed as automatically rejected.

(d) Tenderers must quote rate for all articles of a Group as specified in the Schedule, including the controlled commodities viz. Rice, Atta and Sugar, which will also be included in the comparative statement and taken into account in determining the relative positions of the tenderers in terms of tender value for a particular Groups. In respect of LPG, the rate should be quoted only for profit margin per cylinder. If a tenderer omits to quote the rate/rates of any article/ articles of a particular Group as mentioned in the Schedule, the tender for the said Group will be treated as incomplete and rejected.

(e) Tenderers must quote only one rate for each article and any tender in which more than one rates are quoted for the same article will be rejected.

(f) Tenderers must quote their rates both in figures and words, failing which the tender will be rejected. The rates quoted should be inclusive of all taxes, duties, etc. Rate once submitted shall hold good for the entire period of contract, irrespective of the market rates being higher of any time and no representation for enhancement of rates in view of any increase in the market rates will be entertained.

(g) Any alteration, erasure or addition made in a tender must be initiated by the tenderer, failing which the tender will be rejected. Further no alteration or modification of rates will be allowed after a tender is submitted.

(h) Any tender which is not duly signed by the concerned tenderer both in the Tender Form and in the rate schedule will be rejected.

(i) Quoting of fictitious rate for any article, including any controlled commodity viz. Raice/Atta/sugar may lead to rejection of any tender at the discretion of the Inspector General of Prisons, Assam.

(J) Earnest Money equal to the amount specified below against each Group must be furnished with a tender by NSC/KVP or by Fixed Deposit Receipt (FDR), Term Deposit Receipt (T.D.R.) Guarantee Bond of a Nationalized Bank each assigned in favour of the undersigned failing which the tender will be rejected.

Group ''A'' - Rs. 66,000/- (Rupees Sixty Six thousand) only

Group ''B'' - Rs. 4300/- (Rupees Four thousand three hundred) only

Group ''C'' - Rs. 14,600/- (Rupees Fourteen thousand six hundred) only

Group ''D'' - Rs. 9,100/- (Rupees Nine thousand one) only

Group ''E'' - Rs. 3,700/- (Rupees Three thousand seven hundred) only

Group ''F'' - Rs. 3,000/- (Rupees Three thousand) only.

In case of the tenderers belonging to Schedule Tribes/Scheduled Castes /Other Backward Classes (ST/SC/OBC), the earnest money will be half of the abovementioned amount. The earnest money will have to be furnished separately for each tender, and not collectively for different tenders. No other form of remittance except the ones mentioned above will be acceptable as earnest money. (Emphasis supplied). Also any security deposit furnished by a tenderer in connection with any previous contract will not be acceptable as earnest money for a current tender.

11. Pursuant to the said NIT both the petitioners submitted their tenders but earnest money was deposited through ''Call Deposits'' from the Bank instead of NSC/KVP or by FDR, TDR/Guarantee Bond of Nationalized Bank as stipulated in the terms and conditions laid down in the NIT as stated above.

12. In Paragraph 9 of the Plaint, the petitioners admitting the ''Call Deposits'' from the Bank abovementioned have averred as under:

9. That the petitioners beg to state that at the time of submission of Tender pursuant to the Tender Notice dated 26-2-2007, the petitioners have approached their Bank viz. The Guwahati Co-Operative Urban Bank Ltd. and the bank informed the petitioners that the ''Call Deposits'' in one type of guarantee bond for tender and the department concerned may realize the amount of ''Call Deposits'' at any time. Accordingly, the petitioners obtained the ''Call Deposits''. Equal to the amount specified against each group in the tender notice and submitted the ''Call Deposits'' issued by the Guwahati Co-operative Urban Bank Ltd. along with the respective tenders of the petitioners as earnest money on bona fide belief that the ''Call Deposits'' will be accepted as earnest money for the purpose of tender.

13. From an ordinary reading of this Paragraph 9 along with the conditions so stipulated in Clause 2(j), it transpires that the petitioners have not submitted their ''Call Deposits'', although "Call Deposits" are not called for as earnest money, in strict adherence to the terms and conditions prescribed therein. In other words, ''Call Deposits'' were submitted by the petitioners not even from a Nationalized Bank but from the Bank which is not declared as Nationalized Bank till date.

14. Now let us examine the propositions of law laid down in those cited cases so relied upon by Mr. Kataki, learned Counsel for the petitioner.

15. In M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, in inviting tender the authority put a condition in relevant Clause 6 to the effect that the deposit of earnest money shall be made either in cash or by Demand Draft on the State Bank of India and since the payment therein was deposited by a certified cheque drawn on Union Bank of India instead the State Bank of India in terms of Clause 6 of the Tender Notice, the authority rejected such deposit for which the matter was carried to the Apex Court. It was ruled by the Supreme Court in Paragraphs 6 to 8 that the certified cheque of the Union Bank of India so deposited by the appellant must be treated as sufficient for the purpose of achieving the object of the condition.

16. In arriving at such a decision, the Supreme Court in Paragraph 6 observed as under:

6. ...The requirements in a tender notice can be classified into two categories-those which lay down the essential conditions as of eligibility and the other which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first cause the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in C.J. Fernandez v. State of Karnataka, a case dealing with tenders. Although not in an entirely

identical situation as the present one, the observations in the judgment support our view. The High Court has, in the impugned decision, relied upon Ramana Dayaram Shetty v. International Airport Authority of India but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour of one of the bidders, which amounted to illegal discrimination. The judgment indicates that the Court clearly examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment demonstrates the difference between the two categories of the conditions discussed above. However it remains to be seen as to which of the two clauses, the present case belongs.

17. Coming to the decision of this Court in Bibhu Bhushan Choudhury Vs. Union of India (UOI) and Others, it is seen that the respondent-authority therein issued public notice inviting tender for the works in question by deposit of earnest money. However, since the petitioner therein in submitting such earnest money deposited the same in the name of wrong person and not in the name of the petitioner, on that count alone tender notice was rejected. Dealing with such issue so raised challenging such cancellation of the earnest money, this Court in paragraph 12 of the judgment opined that such dispute was more or less not in substance and the same was curable and accordingly, such rejection was rejected by this Court.

18. In Lt. Col. P.R. Chowdhury''s case 2000 AIR SCW 2030 (supra) in Paragraphs 6 and 7 the Supreme Court dealing with the scope of Article 141, Constitution of India observed that the law as interpreted by the Apex Court would not be brushed aside on the mere assertion that it did not conform to the statutory provisions.

19. In Global Engineering''s case (supra) in Paragraph 8 the Supreme Court opined that the deposit of some amount of earnest money was a normal condition offender. The object was that only such parties who were financially sound and were serious in getting work of contract should make a bid otherwise any number of person who having no capacity financial or otherwise would like to take a chance by making a bid.

20. In B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others, the Apex Court in Paragraph 63 relied upon the law laid down in Poddar Steel Corporation''s case (supra).

21. The judicial authorities so relied upon by the learned Additional Advocate General, Assam need consideration.

22. In G.B. Mahajan and others Vs. The Jalgaon Municipal Council and others, in Paragraph 43 while discussing the scope of reasonableness in the administrative law, the Apex Court quoting the observation from a case of Associated Provincial

Picture Houses Ltd. v. Wednesbury Corporation reported in 1948 1 KB 223 equivalent to 1947 2 All ER 680 distinguished the nature of reasonableness into two parts i.e. proper use and improper abuse of power. In the instant case relying on this decision, it is argued that the action taken by the authority for asking earnest money through the mode of payment from a Nationalized Bank was done in exercise of proper use of power and the same action was absolutely made in bona fide. It is strenuously argued that nowhere in the pleadings in the instant case the petitioners have ever alleged any mala fide or colourable exercise of power.

23. So far as the Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, is concerned, in Paragraph 7 the Supreme Court held as under:

7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in Ramana Dayaram Shetty v. International Airport Authority of India; Fertilizer Corporation Kamgar Union (Regd.) v. Union of India; CCE v. Dunlop India Ltd.; Tata Cellular v. Union of India, Ramniklal N. Bhutta v. State of Maharashtra and Raunaq International Ltd. v. I.V.R. Construction Ltd. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial consideration. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to render and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criteria for awarding a contract. It is free to grant any relaxation for bona fide reasons. If the tender conditions permit such a relaxation. It may not accept the offer though it happens to be the highest or the lowest. But the State, its corporation, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only on furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.

24. It is accepted that the contract so floated by the NIT is a commercial transaction and it is Within the exclusive domain of the authority concerned to choose its own method to arrive at a decision. The State/ authority can fix its

own terms and conditions in inviting tenders and the same cannot be brought within the parameter of judicial review.

25. The Apex Court in B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others, categorically underlined the parameters and scope of judicial review in a contractual matter in paragraph 68 as under:

68. We are also not shutting our eyes towards the new principles of judicial review which are being developed: but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarized as under:

(i) If there are essential conditions, the same must be adhered to;

(ii) If there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) If, however a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) The parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance of another part of tender contract particularly when he was also not in a position to comply with all the conditions of tender fully, unless the Court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) When a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with.

(vi) The contractors cannot form a cartel, if despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tender, public interest would be given priority;

(vii) Where a decision has been taken purely on public interest, the Court ordinarily should exercised judicial restraint.

26. Be it also noted herein that in the instant case, the specific consequential condition to the effect that "no other form of remittance except the ones mentioned in Clause 2(j) will be acceptable as earnest money" has been known to the tenderers including the petitioners and notwithstanding such condition, they, being well aware of the same, submitted the "Call Deposits" and that too not from a Nationalized Bank but from the Guwahati Urban Co-operative Bank in clear violation of the terms and conditions as stipulated in the NIT. The fact-situation so narrated in this writ petition, in the opinion of this Court, is

absolutely separate and different from the facts and circumstances of those cases so relied upon by the learned Counsel for the petitioners and the ratio of those judicial pronouncements cannot be made applicable in the case in hand.

27. In view of the above, this Court is of the firm opinion that the condition so stipulated in the NIT has been violated by the petitioners and as such, the tenders submitted by the petitioners would be liable to be rejected. The impugned order is, therefore, not interfered with.

28. In view of what has been stated, discussed and observed above, this Court finds that this writ petition is devoid of any merit and the same stands dismissed. No costs.