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**(2000) 07 GAU CK 0015**  
**In the Gauhati High Court**  
**Case No : Writ Petition (C) No. 85 of 2000**

Lalzawliana

APPELLANT

Vs

State of Mizoram and Others

RESPONDENT

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**Date of Decision :** 27-07-2000

**Acts Referred:**

Constitution of India, 1950 — Article 226

**Citation :** AIR 2001 Guw 23 : (2000) 3 GLT 102

**Hon'ble Judges :** P.C. Phukan, J

**Bench :** Single Bench

**Advocate :** Mr. G. Raju, for the Appellant; Mr. T. Vaiphei, AAG and Mr. Michael Zothankhuma, for the Respondent

**Final Decision :** Dismissed

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## Judgement

1. I have heard Mr. G. Raju and Mr. S. Sailo, learned counsel for the petitioner, Mr. T. Vaiphei, learned Asst. Advocate General for the State respondent Nos. 2, 3, 4 and 5 and Mr. Michael Zothankhuma, learned counsel for the private respondent No. 6.

2. By this application under Article 226 of the Constitution of India, the petitioner prays for issuance of an appropriate writ for quashing the decision of the respondent Government to accept the tender of the respondent No. 6 for Group 1 of the NIT No. 7/EE(PWD)/AD/ 1999-2000 issued by the respondent No. 5 the Executive Engineer, PWD, Airport Division, Mizoram, Aizawl and the further direction to the respondents to allot the said work to the petitioner, being the lowest tenders I have considered the writ petition with annexures thereto, the affidavit-in-opposition with annexures thereto filed on behalf of the State respondents and the affidavit-in-opposition with annexures thereto filed on behalf of the private respondent No. 6.

3. This Court by an interim order dated 28.6.2000 directed that no work order should be issued in respect of the said work.

4. The respondent No. 5 issued a notice inviting tenders under No. 7/EE/)(PWD)/AD/1999-2000 for various items of work connected with the construction of a State Referral Hospital at Falkawn in Aizawl District. The petitioner, the respondent No. 6 and others submitted tenders for Group 1 (Construction of Hospital Block "A" Building), the estimated cost of which was Rs. 4,37,19,705.51, and the rate quoted by the petitioner was Rs. 4,24,10,455.83 which is 2.95% below the estimated amount. The respondent No. 6 quoted Rs. 4,37,19,705.51 for the same work which is at par with the estimated cost. Copy of the NIT is annexed at Annexure-I to the writ petition. The petitioner states that the respondent No. 4 the Works Advisory Board, PWD, Govt. of Mizoram headed by the Chief Secretary to the Govt. of Mizoram With Secretary-cum-Chief Engineer, PWD, Finance Secretary and Law Secretary as members decided in its meeting held on 23.6.2000 that work for which the petitioner had submitted tender be allotted to the respondent No. 6 although the rate quoted by him is higher than that of the petitioner. It is submitted by the petitioner that such a decision is arbitrary and no specific reason has been given for rejecting the lowest tender of the petitioner causing loss of public exchequer to the tune of Rs. 13,09,245. The petitioner further states that the work in question was not allotted to him for reasons other than merit and eligibility.

5. In the affidavit-in-opposition filed on behalf of the State respondents it is stated that the petitioner does not have enough experience or financial capability to execute work contract of this magnitude worth over Rupees Four Crores. It is stated that the tender in question was floated on the basis of item rates by using Form No. 8 in terms of para 15.2.3 and not under Form No. 7 for percentage rate tender stipulated in para 15.2.2 of C.P.W.D. Manual Vol. II. It is further stated that the past experience have proved that whenever tenders for execution of works contract were floated, some contractors submitted very low rate or very high rates and that whenever such works were allotted to the lowest tenderer at low rates, such contractors could not execute the works according to the specification thereby resulting in sub-standard works. In the instant case the petitioner quoted rates below the low rate limit in respect of three major item shown in Sl. No. 7/31 (c), 8/36(c) and Sl. No. 9/35 in the Comparative Statement. On the other hand, the private respondent No. 6 had quoted rates in respect of these items within the range of the permissible market rates. These short listed tenders were placed before the Work Advisory Board comprising the Chief Secretary, Finance Secretary, Law Secretary and Secretary-cum-Engineer-in-Chief PWD. After carefully examining the rates quoted by the short listed tenderers and also other relevant factors such as their past experience reliability and soundness, the Advisory Board in the meeting held on 23.6.2000 recommended the private respondent No. 6 for allotment of the work in question. In affidavit-in-reply to the affidavit-in-opposition filed on behalf of the State respondents, the petitioner states that according to the norms of the department, all Class I Contractors should be able to undertake work of any value and it is only after satisfying about the capability of each contractor that

they are given the registration. Otherwise there is no point of classifying contractors into different classes. It is further stated that his rates are lowest only in three items of work and in all other items he quoted the rate at the market rate. It has further been pointed out that according to the provisions of 20.10.1 of the CPWD Manual Vol. II variation of rate upto 5% below or above the estimated cost is permissible. The petitioner also alleges that the decision making process of the respondents in deciding to allot the work in favour of the private respondent No. 6 is mala fide and suffer from the vice of legal malice; it is arbitrary, whimsical, unjust and unfair, and it was made on the basis of pick and choose.

6. The private respondent No. 6 also has filed an affidavit-in-opposition, and it is submitted therein that the writ petitioner has deliberately failed to annex the second part of the notice inviting tender, para-9 of the which states that "the undersigned on behalf of the Governor of Mizoram reserves the right to reject any or all the tenders without assigning any reasons thereof and he does not bind himself for lowest or any tender." The respondent No. 6 has pointed out that the Office Memorandum dated 19.3.1999 (Annexure -11 to the writ petition) states that in no case work should be allotted to contractors at a rate lower than the prevailing market rates; and that the writ petitioner quoted the rate lower than the market rate. It is contended that the entire case of the writ petitioner is based on the wrong assumption that it was lump-sum contract though, in fact, it was a item rate contract ; that in one of the three items involving a market rate of approximately Rs. 10489521.77, the petitioner had quoted Rs. 9491792.31 which is 9.51% below the market rate. It is submitted that there is no whisper about mala fide, and no case of arbitrariness has been made out in the writ petition; that the only grievance of the petitioner is that he has quoted the lowest rate, and hence he should have been awarded the contract.

7. The State acts in its executive power under Article 298 of the Constitution in entering into contracts with individual parties. In case of non-statutory contracts, the right to choose the party with whom the Government would enter into contract vests in the Government, but in making the choice the Government cannot act arbitrarily. It is settled law that the Government is not bound to accept the lowest tender. If, however, the lowest tender is rejected, reasons for such rejection should be recorded. In the instant case this has been done. Mr. T. Vaiphei, learned Asst. Advocate General, Mizoram has produced minutes of the meeting of the Works Advisory Board held on 23.6.2000 along with the "Statement of the reasons for recommendation for selection of tender other than the lowest tender." On close scrutiny, I found nothing to question the adequacy of reasons so recorded.

8. The NIT dated 15.9.1999 (Annexure-I) invited "item rate sealed tenders". The Office Memorandum dated 19.3.1999 (Annexure-11) says, "in no case work should be allotted to contractors at a rate lower than the prevailing marker rates." In Para 3 of the affidavit-in-reply the petitioner himself admits, "my rates

are lowest only in three items of work and in all other items I have quoted my rate at the market rate." Thus, at least in three items she quoted rate lower than the prevailing market rates. The records including the comparative statement (Annexure-B/1 to the affidavit-in-opposition filed on behalf of the State respondents) reveal that these three items are major items; and in one of those three items involving a market rate of approximately Rs. 10489521.77, the petitioner has quoted Rs. 9491792.31 which is 9.5% below the market rate. This is beyond permissible limit of variation upto 5% in rates according to the provisions of para 20.10.1 of CPWD Manual Vol. II quoted by the petitioner himself in para 14 of his writ petition as under :

"Only variation upto 5% in rates received as a result of call of tenders and the rates prevailing in the market could be overlooked ... It is not enough for them (concerned authority) to accept the lowest tender."

9. Non-acceptance of the lowest tender submitted by the petitioner quoting rates lower than the prevailing market rates in the three major items, and in one of them beyond the permissible limit of variation upto 5% in rates cannot, therefore, be said to be arbitrary. It may not be out of place to mention that the petitioner himself was awarded work for construction of Type IV Quarters Block No. 5 for over rupees thirty lakhs vide order dated 14.6.2000 where he quoted the market rate after the authority rejected the lowest tender quoting rates below market rates. The petitioner cannot, therefore, be heard to say now that the lowest tender submitted by him quoting rates below the market rates should not have been rejected. In reply to submission of Mr. S. Sailo, learned counsel for the petitioner, that only those contractors who have connection with the ruling party can expect contracts for works under the PWD. of Govt. of Mizoram, Mr. Michael Zothankhuma, learned counsel for the private respondent, points out that recently besides the work for construction of Type IV Quarters, even of 49 work orders issued connected with the instant project of construction of State Referral Hospital, one work order has been issued to the petitioner. Mr. T. Vaiphei, learned Asst. Advocate General, strongly urges that the allegations of arbitrariness, discrimination and favoritism have not been substantiated at all. Then non-acceptance of lowest tender for the tenderer's lack of experience to execute contract of such magnitude worth over rupees four crores as averred by the State respondents in para 2 of their affidavit-in-opposition also cannot be said to be arbitrary.

10. Learned Asst. Advocate General Mr. Vaiphei contends that the contract belongs to the realm of private law and the scope judicial review in this regard is quite limited, and in support of his contention has placed reliance on the decision in *Tata Cellular Vs. Union of India*, wherein it has been held -

"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. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

The Principles deducible from the above are :

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the incitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not such decisions are made qualitatively by experts.
- (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
- (6) Quashing decision may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

11. Needless to say that the instant project of construction of a State Referral Hospital at Falkawn in Aizawl District is going to be completed by the State Government with public money for health care of the people of Mizoram in general and the poorer section thereof in particular who cannot afford to go outside the State for medical treatment, and any delay in the matter would invariably impose heavy financial burden on the Government leading to increased expenditure because of price escalation.

12. Having given my anxious consideration to the rival contentions of the learned counsel for the petitioner and the private respondent and learned Asst. Advocate General, Mizoram for the State respondents, I conclude that apart from claiming his entitlement to the work on the ground of being the lowest tenderer, which by itself is no ground for interference by this Court, the petitioner has failed to show

that the decision making process in the instant case suffers from any legal or constitutional infirmity. The Court cannot act on the unsubstantial allegations of favouritism, discrimination, arbitrariness, and mala fide. I am of considered opinion that this is not a fit case for interference by invoking writ jurisdiction of this Court under Article 226 of the Constitution. I have absolutely no hesitation to dismiss this writ appeal.

13. This Court's interim order dated 28.6.2000 that no work order should be issued in respect of Notice inviting Tenders (NIT) No. 7/ EE/(CPWD)/AD/1999-2000 (Annexure-1) stands vacated.

14. This writ petition is dismissed. No costs.