

**(2011) 03 GAU CK 0097**  
**In the Gauhati High Court**  
**Case No : Writ Appeal No. 52 of 2011**

Md Makrub Khan @ Md Junu Khan

APPELLANT

Vs

Manuj Kumar Sarmah, The State of Assam and The Sivasagar  
Municipal Board

RESPONDENT

**Date of Decision :** 01-03-2011

**Acts Referred:**

Constitution of India, 1950 — Article 226

**Citation :** (2011) 3 GLR 15

**Hon'ble Judges :** I.A. Ansari, J;A.K. Goswami, J

**Bench :** Division Bench

**Advocate :** G.N. Sahewala, Md. Aslam, D. Senapati, I. Bora and I. Kotaky, for the Appellant; G. Uzir and A.C. Buragohain, for the Respondent

**Final Decision :** Dismissed

## Judgement

A.K. Goswami, J.—This writ appeal is directed against the order dated 3.2.1022 passed by the learned single Judge allowing the writ petition and setting aside the order of settlement dated 14.5.2010 made in favour of the present Appellant by the Chairman, Sivasagar Municipal Board, Respondent No 4, settling the New Market of Station Chariali under Ward No 12 for the year 2010-2011, and directing the Sivasagar Municipal Board, (for short the "Board"), to issue a fresh process of settlement of the New Market by issuing fresh tender notice.

2. The case of the Respondent No 1 / writ Petitioner as projected in the writ petition is that a Notice Inviting Tender, (for short the "NIT"), was issued by the Respondent No 4, on 12.1.2010, inviting tenders from interested tenderers for settlement, amongst others, of New Market situated at Ward No 12 of Sivasagar Municipal Board, for the period from 1.4.2010 to 31.3.2011. The time for receiving sealed tenders was fixed upto 2.00 PM of 15.2.2010 and the tenders were to be opened at 3.00 PM on the same date. The terms and conditions for settlement were also indicated in the said NIT. It is also indicated in the said NIT that the authority was not bound to accept the highest or the lowest bid and

right of cancellation of all or any tender without any prior notice was reserved.

3. The writ Petitioner- Respondent No 1 participated in the said tender process and had submitted his valid tender offering an amount of Rs. 10,60,000.00. The tenders were opened on 2.3.2010 in presence of his representative and it was found that in all there were 5 tenderers and the writ Petitioner- Respondent No 1 had emerged as highest valid tenderer. The Appellant had offered an amount of Rs. 7,50,599.00 and he was the 4th highest tenderer. In between the bids of the Respondent No 1- writ Petitioner and the Appellant, there were two other tenderers who had offered - (1) Rs. 9,05,399.90 and (2) Rs. 8,60,000.00. The fifth tenderer had offered an amount of Rs. . 7,50,001.00. The Respondent No 1- writ Petitioner being the highest valid tenderer had submitted a representation on 5.3.2010 as the Board had not taken necessary action with regard to settlement of the New Market and apprehending foul play, the writ Petitioner approached this Court by filing an application under Article 226 of the Constitution of India, which was numbered as WP(C) No 1935/2010. Apparently, the writ petition was filed because of the delay in bringing the process of settlement to an end. Initially, this Court, by order dated 22.3.2010 had issued an interim order restraining the Board, not to issue settlement order without the leave of the Court. The said writ petition finally came to be disposed of on 7.5.2010 by directing the Board to finalize the settlement process for the New Market expeditiously and preferably by 14.5.2010. Subsequent thereto, a decision was taken on 14.5.2010 by the Board and the market in question was settled with the present Appellant at his offered rate of Rs. 7,50,599.00 for the period 15.5.2010 to 31.3.2011. The order of settlement was, consequently, communicated by an order dated 14.5.2010. The Respondent Board and the Chairman of the Board who were arrayed as Respondent Nos 2 and 3 had filed an affidavit stating that the highest tenderer, cannot, as a matter of right, get the settlement, inasmuch as, highest bid is not the only criteria; and that there are other factors, which are to be looked into, at the time of finalization of tenders. The affidavit also brought on record the reasons as to why the date of submission of tenders as well as opening of the same had to be deferred till 2.3.2010. The Board, while considering the tenders, found that the bid of the writ Petitioner / Respondent No. 1 to be exorbitant and speculative and the same was considered to be non-viable rate. In justification thereof, the Board had cited instance of settlement of Central Market for the period 2007 - 2008 when the Board had to suffer loss because of granting settlement to the highest bidder at an exorbitant rate of Rs. 39.10 lakhs. With regard to justification for settling the market with the Appellant, it was stated that his rate was viable and that he had proved to be a suitable lessee in his last tenure.

4. The Board had also indicated in their affidavit the settlement figures of the New Market from the year 2005 - 2006 to 2009 - 2010 to show that in all these years the offered rate was in the vicinity of about Rs. 5,00,000.00 to Rs. 6,00,000.00.

6. A reply affidavit was also filed by the Respondent Nos 2 and 3 questioning the authority of the deponent of the affidavit-in-reply to swear such an affidavit, he being a stranger to the proceedings. The Board also took the plea of public interest in its defence for making the settlement with the Appellant.

7. We have heard Mr GN Sahewala, learned senior counsel appearing for the Appellant. We have also heard Mr G Uzir, learned Counsel appearing for the Respondent No 1, Mr AC Buragohain, learned Counsel for the Respondent Nos 2 and 3 and the learned Government Advocate, Assam.

8. Mr GN Sahewala, learned senior counsel, appearing for the Appellant, submitted that the learned single Judge fell into error in setting aside the order of settlement made in favour of the Appellant although the materials on record demonstrate that the bid of the highest bidder / writ Petitioner was exorbitant and speculative and that grant of settlement to such a bidder would have affected public interest, inasmuch as, the poor vendors would have to bear the brunt for the lessee to realize the amount of the tender. He has also submitted that it is amply borne from the records that in the past last 5 years settlement had been affected in the range of Rs. 5,00,000.00 to Rs. 6,00,000.00 and there is a sudden jump of 75% over the last year's bid. He submitted that the Board having taken into consideration the relevant factors, there is no illegality in the order of settlement or in the process culminating in the issuance of the order of settlement. He also submitted that when the settlement is coming to an end on 31.3.2010, there is no justification for interfering with the order of settlement at the fag end of the period. It was also his contention that though the learned single Judge has permitted the Appellant to continue with the running of the market till fresh settlement is made or 7.3.2011, whichever is earlier, he should be allowed to continue till 31.3.2011.

9. Mr AC Buragohain, learned Counsel appearing for the Respondent Nos 2 and 3, has emphatically urged that the Board having reserved its right not to accept the highest tender, it was within the competence of the Board to select a tenderer, which according to the Board, is more suitable. Primarily adopting the stand reflected in the affidavit filed, the learned Counsel contends that apart from the bid offered, there are many other considerations, which are to be taken note of at the time of granting settlement. Such considerations, according to the learned Counsel, are past performance of a tenderer, public interest and above all, whether the rate quoted is speculative or excessive or otherwise viable and guided by such considerations, it was considered expedient by the Board not to consider the tender of the writ Petitioner- Respondent and furthermore, such considerations persuaded the Board to take a view that the present Appellant is suitable and his rates are viable.

10. Per contra, Mr Uzir, appearing for the writ Petitioner / Respondent No 1, has submitted that the order of settlement made in favour of the Appellant cannot be sustained as it militates against the fundamental principles of distribution of state largess by a public body. It is his contention that the Board had followed a

hidden criteria and the procedure adopted by the Board was not fair and transparent and the same has vitiated the decision making process. He, accordingly, submitted that there is no scope for interference in this appeal and the learned single Judge had correctly applied the law relating to settlement by tender process in the facts of the case. Mr Uzir also submitted that whatever conditions are laid down in the NIT the same cannot be deviated and fairness demanded that the authority should state in the NIT itself, the procedure, which would be adopted in accepting the tenders. In support of his submissions, he placed reliance on a decision of then Apex Court in Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. and Others,

11. In Dutta Associates Pvt Ltd (supra), out of 17 tenders received, the tender placed at SI Nos 1 and 2 were found ineligible and, therefore, they were excluded from consideration. The offer of the tenderer placed at SI No 3, namely Dutta Associates Pvt Ltd, which was lowest tenderer amongst the eligible was not accepted. The officials worked out what they called "viability range" keeping in view the prevalent prices of rectified spirit outside the State as most of the rectified spirit to be supplied under the contract had to be procured from outside the State. The tenderer at SI No 11 was the lowest within the said "viability range". The State Respondents did not allot the work to the tenderer at SI 11 and instead, they called Dutta Associates Pvt Ltd to revise its offer, which it did and its revised bid was, thereafter, accepted. This was challenged before this Court and ultimately against the decision of the Division Bench, the matter was carried to the Apex Court. The Apex Court while considering the matter of permissibility or otherwise of the "viability range" laid down as follows:

firstly, the tender notice did not specify the "viability range" nor did it say that only the tenders coming within the viability range will be considered. More significantly, the tender notice did not even say that after receiving the tenders, the Commissioner/government would first determine the "viability range" and would then call upon the lowest eligible tenderer to make counter-offer. The exercise of determining the viability range and calling upon Dutta Associates to make a counter-offer on the alleged ground that he was the lowest tenderer among the eligible tenderers is outside the tender notice. Fairness demanded that the authority should have notified in the tender notice itself the procedure which they proposed to adopt which accepting the tender. They did nothing of that sort. Secondly, we have not been able to understand the very concept of "viability range". . . The tenderers are all hard-headed businessmen. They know their interest better. If they are prepared to supply rectified spirit at Rs. . 11. 14 per LPL or so. it is inexplicable why should the Government think that they would not be able to do so and still prescribe a far higher viability range. . . Thirdly, the Division Bench states repeatedly in its judgment that having determined the "viability range", the government called upon only the Appellant-Dutta Associates (third Respondent in the Writ Petition/Writ Appeal) to make a counter-offer to come within the "viability range" and that his revised offer at the higher limit of "viability range" ( Rs. . 15. 71) was accepted. This Division Bench has

stretched that no such opportunity to make a counter-offer was given to any other tendered including the first Respondent. As the Division Bench has been rightly pointed out, this equally a vitiating factor. It is thus clear that the entire procedure followed by the Commissioner and the Government of Assam in accepting the tender of Dutta Associates (Appellant herein) is unfair and opposed to the norms which the government should follow in such matters viz. . openness, transparency and fair dealing. The grounds 1 and 2. which we have indicated hereinabove are more fundamental than the third ground upon which the High Court has allowed the Writ Appeal.

12. A reading of the aforesaid observation of the Apex Court would indicate that out of 3 grounds mentioned rendering acceptance of the tender unsustainable, ground Nos 1 and 2 are imperative and must be followed in every tender process and omission to follow the law laid down in ground Nos 1 and 2 will vitiate acceptance of tender. Logically, therefore, it would follow that every NIT must disclose the procedure, which would be followed in the matter of acceptance or rejection of tender so that the entire tender process becomes transparent, fair and open.

13. We take the aforesaid view from the following observation made in the case of Dutta Associates Pvt Ltd:

we reiterate that whatever procedure the government proposes to follow in accepting the tender must be clearly stated in the tender notice. The consideration of the tenders received and the procedure to be followed in the matter of acceptance of a tender should be transparent, fair and open. While a bona fide error or error of judgment would not certainly matter, any abuse of power for extraneous reasons, it is obvious, would expose the authorities concerned, whether it is the Minister for Excise or the Commissioner of Excise, to appropriate penalties at the hands of the Courts, following the law laid down by this Court in Shivsagar Tiwari Vs. Union of India (UOI) and Others, (In Re, Capt. Satish Sharma and Sheila Kaul ).

14. In the present case, there is no dispute that NIT did not contain any condition that the authorities would consider the viability or suitability of the tenderer in accepting the tender for settlement. Further, it would appear that only after opening of the tenders, in the comparative statement of tenders, it was commented that the bid of the writ Petitioner / Respondent No 1 is exorbitant and speculative and found to be more than 75% of the last year's bid. The materials on record also do not demonstrate that any prior decision before opening of the tenders was taken with regard to what, according to the Board, is viable and suitable rate. We express no opinion as to whether such a course would have been permissible or not, as such an issue has not fallen for our consideration while deciding the present appeal.

15. Permitting to adopt a hidden criteria in the matter of settlement of contract is fraught with grave danger and the same is an anathema to the concept of

transparency, openness and fairness, which had to be scrupulously observed in the matter of distribution of State largess.

16. Mr Sahewala submitted that in *State of Assam and Anr. v. Abhinandan Trading (P) Ltd and Ors.* reported in (2007) 11 SCC 704, *Dutta Associates Pvt Ltd (supra)* had been considered and the Apex Court had observed that although doubts were expressed by the Apex Court in *Dutta Associates Pvt Ltd (supra)* regarding concept of "viability range", it had indicated that unless it can be shown that the said procedure has been misused to favour any particular individual, it would not be proper to express any opinion as to the procedure the government should adopt except to say that whatever procedure is adopted should be open, fair and transparent. In *Abhinandan Trading (P) Ltd (supra)*, Clause 28 of the NIT had specified that the contract would be given to the tenderer found suitable from the "viability range", which was to be determined on the basis of analysis of the cost price, export duty and transport duty by the Commissioner of Excise, Assam, which clause, incidentally, was not there in *Dutta Associates Pvt Ltd (supra)*.

17. In our considered opinion, the case of *Abhinandan Trading (P) Ltd (supra)* only reiterates what has been stated in *Dutta Associates Pvt Ltd (supra)* and the Apex Court has emphatically expressed opinion that whatever procedure the government would adopt should be open, fair and transparent. In paragraph- 35 of the judgment, the Apex Court observed as follows:

35. Before we part with this matter, having particular regard to the doubts expressed by this Court in *Dutta Associates*<sup>2</sup> we merely express the view that in order to avoid future controversy, the Government of Assam may adopt some other procedure for granting similar contracts in future which is open and transparent and will not give rise to controversies of the instant nature in future.

18. In *Sargous Tours and Travels and Another Vs. Union of India (UOI) and Others*, one of us (Ansari,J), had opined that the law laid down in *Dutta Associates Pvt Ltd (supra)* is bound to be followed in every tender process and the primary requirement of the tender process to remain valid is that NIT must notify the intending tenderers the procedure that the authority concerned proposes to follow in accepting the tender and that omission to mention about the concept and working in the NIT is fatal. We agree with the principles laid down in *Sargous Tours (supra)*.

19. Further submission of the learned Counsel appearing for the Board as well as the Appellant that the bid of the writ Petitioner- Respondent No 1 was exorbitant and speculative, need not detain us any further. This issue is intrinsically linked with the broader issue of viable rate. Further, merely because there was 75% increase in the bid of the writ Petitioner / Respondent No 1 over the rate offered in the last year, it cannot be said that the bid is speculative and excessive. There is a toll list in place and if any coercive measure is adopted by the lessee to extract toll from the vendors other than what is prescribed, the Board may certainly not be powerless to set at right the wrong committed.

20. Permitting to continue the Appellant to run the market till 31.3.2011 would be self defeating, inasmuch as, the Appellant has already enjoyed the benefit of the settlement on the basis of a settlement order, which is, wholly not sustainable in law. Mr Buragohain, appearing for the Board, has submitted during the course of hearing that the Board would collect toll on its own after 7.3.2011, in case the appeal is found to be without any merit.

21. In view of what has been stated above, we see no reason to take a view contrary to the one taken by the learned single Judge. We find no merit in this appeal and, accordingly, the same is dismissed.

22. No costs.