
(2019) 12 GAU CK 0026
In the Gauhati High Court
Case No : Writ Petition (C) No. 560 Of 2019

M/S. Gajraj Enterprise

APPELLANT

Vs

State Of Assam And 3 Ors

RESPONDENT

Date of Decision : 11-12-2019

Acts Referred:

Citation : (2019) 12 GAU CK 0026

Hon'ble Judges : Michael Zothankhuma, J

Bench : Single Bench

Advocate : D J Mahanta

Final Decision : Dismissed

Judgement

1. Heard Mr. HRA Choudhury, learned senior counsel for the petitioner. Also heard Mr. B Gogoi, learned counsel appearing for respondent Nos. 1 to 3 as well as Mr. NJ Khataniar, learned counsel appearing for respondent No. 4.

2. The petitioner, the respondent No. 4 and one other tenderer had participated in the tender process for entering into a rate contract, for supply of spectacles with the office of the Mission Director, National Health Mission, Assam in pursuance to an e-Tender notice dated 08.08.2018. The respondent No. 4 being the lowest bidder was awarded the contract for supply of the spectacles.

3. Mr. HRA Choudhury, learned senior counsel for the petitioner has challenged the selection of the respondent No. 4 as the contractor for supply of spectacles on only one ground, that is, the respondent No. 4 has not fulfilled Clause-3D of the e-Tender notice dated 08.08.2018.

Clause 3D of the e-Tender notice dated 08.08.2018 states as follows:-

"D. Bidder shall have experience in supply of spectacles/similar optical items in the past 5 (five) financial years and total value of order for such items awarded by Govt. organization during the past 5 years 2012-13, 2013-14, 2014-15, 2015-16 and 2016-17 should not be less than Rs. 88 lakhs. The turnover from

such order's/agreements shall be given through a certificate from the chartered accountant as given in Annexure-IV."

It is also submitted that turnover of Rs. 88 lakhs for the past 5 years mentioned above, had been brought down to Rs. 44 lakhs, in a pre-bid meeting held between the suppliers and the State respondents

4. Mr. HRA. Choudhury, learned senior counsel for the petitioner further submits that the respondent No. 4 does not have the experience in supplying spectacles/similar optical items for the past 5 (five) financial years. Also the total value of the order for such items awarded by the respondent No. 3 during the past 5 (five) years had not been given by the respondent No. 4. Only the annual turnover for 2 (two) financial years, i.e., 2015-16 and 2016-17 had been given. He accordingly, submits that as the respondent No. 4 has not made the eligibility criteria required for being considered in the selection process, the State respondents could not have selected the respondent No. 4. The petitioner on the other hand, being the 2nd lowest tenderer, he should have been given the contracts as he fulfilled all the eligibility criteria required for the contract.

5. Mr. N.J Khataniar, learned counsel for the respondent No. 4 submits that the respondent No. 4 does not have the experience in supply of spectacles/similar optical items to the Government or Government organizations for the past 5 (five) years. He also submits that the requirement for showing the total annual turnover of the organization for the past 5 (five) years, i.e., 2012-13 to 2016-17 did not mean that the respondent No. 4 had to add up the annual turnover for all the 5 years. Even if the annual turnover of 2 (two) years met the required benchmark of Rs. 44 lakhs, the respondent No. 4 did not need to show or have any turnover in for the other years.

6. Mr. B. Gogoi, learned counsel for the respondent Nos. 1 to 3 submits that the tenderers had only to show that they had a total turnover of Rs 44 lakhs, within the outer limit of 5 years, i.e. from 2012-13 to 2016-17. It was not required for the tenderers to show their turnover for all the 5 (five) years. Even if the turnover for 2 (two) years, in between the outer limit of the 5 (five) years mentioned in the tender notice touched Rs. 44 lakhs, the respondent No. 3 would consider the tenderer to have the eligibility criteria for the purpose of Clause 3D of the e-Tender Notice. He also submits that the experience required of a bidder in relation to the supply of spectacles/similar optical items did not mean that a tenderer should have 5 (five) years experience in supply of spectacles or other similar items to Government organizations to be eligible to participate in the tender process.

7. The counsels for the respondents admit that as per the pre-bid meeting and consultation held between the parties, the turnover of Rs. 88 lakhs, which was a requirement for the bidders to have for the past 5 (five) financial years as per Clause 3D of the e-Tender was reduced to Rs. 44 lakhs.

8. I have heard the learned counsels for the parties.

9. The question that has to be decided is whether the respondent No. 4 had experience in the supply of spectacles/similar optical items in the past 5 (five) financial years and whether the total value of the order for such items awarded by the Government organizations during the past 5 (five) years from 2012-2013 to 2016-2017 was not less than Rs. 44 lakhs.

10. As per the submissions made by the learned counsels for the respondents and on perusal of the documents on record, it is apparently clear that the respondent No. 4 does not have experience in the supply of spectacles/similar optical items for the past 5 (five) financial years. In respect of the 2nd portion of clause 3D of the E-Tender Notice dated 08.08.2018, it is seen that though the respondent No. 4 had the required turnover of Rs. 44 lakhs, the said turnover is only in relation to 2 (two) financial years and not for 5 years. The above being said, the next question that has to be decided is whether the conditions enumerated in clause 3D are essentials conditions of eligibility or whether they are ancillary/subsidiary conditions to the main object to be achieved by the tender notice. The further question that arises is whether the employer has the inherent authority to deviate from a condition of tender and whether this Court can substitute the views of the employer, when the condition/term of the tender has been interpreted in the manner it has been done.

11. The Apex Court in the case of in the case of Central Coalfields Limited & Anr. -vs- SLL-SML (Joint Venture Consortium & Ors.), reported in (2016) 8 SCC 622, has held that the issue of acceptance or rejection of a bid should be looked at, not only from the point of view of the unsuccessful party but also from the point of view of the employer. It has also held that the decision of the employer with regard to whether a term/condition of the tender is an essential condition or not, should be respected and the Court should not take over the decision making function of the employer and make a distinction between the essential and non essential terms of the tender, contrary to the intention of the employer and thereby re-write the arrangement. It further held that the lawfulness of the decision made by the employer can be questioned on very limited grounds, which are:- (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone or whether the process adopted or decision made is so arbitrary and irrational that the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached. (ii) Whether public interest is affected.

12. Paragraphs 43, 47, 48 & 49 of the Apex Court judgment in the case of Central Coalfields Limited & Anr. -vs- SLL-SML (Joint Venture Consortium & Ors.), reported in (2016) 8 SCC 622, is reproduced below:-

"43. Continuing in the vein of accepting the inherent authority of an employer to deviate from the terms and conditions of an NIT, and reintroducing the privilege-of-participation principle and the level playing field concept, this Court laid emphasis on the decision-making process, particularly in respect of a commercial contract. One of the more significant cases on the subject is the three-Judge

decision in *Tata Cellular v. Union of India* [*Tata Cellular v. Union of India*, (1994) 6 SCC 651] which gave importance to the lawfulness of a decision and not its soundness. If an administrative decision, such as a deviation in the terms of NIT is not arbitrary, irrational, unreasonable, mala fide or biased, the courts will not judicially review the decision taken. Similarly, the courts will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation. This was quite clearly stated by this Court (following *Tata Cellular* [*Tata Cellular v. Union of India*, (1994) 6 SCC 651]) in *Jagdish Mandal v. State of Orissa* [*Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517] in the following words: (SCC p. 531, para 22)

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold."

This Court then laid down the questions that ought to be asked in such a situation. It was said: (*Jagdish Mandal* case [*Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517] , SCC p. 531, para 22)

"22. ... Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226."

47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in *Ramana Dayaram Shetty* [*Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489] the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in *Tata Cellular* [*Tata Cellular v. Union of India*, (1994) 6 SCC 651] there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in *Jagdish Mandal* [*Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517] followed in *Michigan Rubber* [*Michigan Rubber*].

48. Therefore, whether a term of NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in *Ramana Dayaram Shetty* [*Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489]. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot.

49. Again, looked at from the point of view of the employer if the courts take over the decision-making function of the employer and make a distinction between essential and non-essential terms contrary to the intention of the employer and thereby rewrite the arrangement, it could lead to all sorts of problems including the one that we are grappling with. For example, the GTC that we are concerned with specifically states in Clause 15.2 that "Any bid not accompanied by an acceptable Bid Security/EMD shall be rejected by the employer as non-responsive". Surely, CCL ex facie intended this term to be mandatory, yet the High Court held that the bank guarantee in a format not prescribed by it ought to be accepted since that requirement was a non-essential term of the GTC. From the point of view of CCL, the GTC has been impermissibly rewritten by the High Court."

13. In the present case, the stand taken by the State respondents clearly shows that even if clause 3D of the E-Tender Notice dated 08.08.2018 is taken to be an essential condition of contract, the State respondents have interpreted the same to mean that a tenderer need only to have experience within the past five years in the supply of spectacles/similar optical items and that a tenderer would have crossed the eligibility criteria, if the turnover for any year/s within the past 5 financial years in the supply of spectacles/similar optical items met the required amount of Rs. 44 lakhs. As such, keeping in view the judgment of the Apex Court in Central Coalfields Limited & Anr. (supra), it would not be proper for this Court to substitute its views to that taken by the Government. Further, as the Apex Court has allowed an employer to deviate from an essential condition of contract and assuming that the interpretation of the State respondents is a deviation from an essential condition of the tender, the said deviation can be questioned only under the grounds mentioned in para 22 of the judgment of the Apex Court in Jagdish Mandal v. State of Orissa (supra), which are: (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; (ii) Whether public interest is affected.

14. Besides the above, the bids of the petitioner and the respondent No. 4 in respect of supply of spectacles are as follows:-

PARTIES

RATE OF SPECTACLES FOR SCHOOL CHILDREN

RATE OF SPECTACLES FOR OLD PERSONS

Petitioner

Rs. 322

Rs. 296

Respondent No. 4

Rs. 164.64

Rs. 59.56

15. A perusal of the above clearly shows that the quoted rates of the petitioner are much higher than that quoted by the respondent No. 4. There is nothing in the writ petition to show that the quality of spectacles to be supplied by the respondent No. 4 is inferior to the spectacles to be supplied by the petitioner. However, as per the rates quoted above, the interest of the Public Exchequer and the General Public would be best served by the rates quoted by the respondent No. 4. In that view of the matter, this Court holds that the answers to the questions laid down in para 22 of the judgment of the Apex Court in Jagdish

Mandal v. State of Orissa (supra) would have to be answered in the negative.

16. In view of the reasons stated above, this Court is not inclined to exercise its discretion in the present case. The Writ petition is accordingly dismissed.