(2021) 10 MAN CK 0012

In the Manipur High Court

Case No : Writ Appeal No. 39, 40, 41 Of 2021

M/s Nezone Pipes & Structures — APPELLANT

Vs

State Of Manipur & Ors — RESPONDENT

Date of Decision : 11-10-2021

Acts Referred:

Citation : (2021) 10 MAN CK 0012

Hon'ble Judges : KH. Nobin Singh, J;Ahanthem Bimol Singh, J

Bench : Division Bench

Advocate : Prashant Bhushan, I. Denning, Neha Rathi, H.S. Paonam, Pradip Tarafder, Rajiv Malik, N. Kumarjit

Final Decision : Dismissed

Judgement

KH. Nobin Singh, J

[1] Heard Shri Prashant Bhushan, learned Senior Advocate with Shri I. Denning, learned Advocate and Ms. Neha Rathi, learned Advocate appearing for the appellants; Shri H.S. Paonam, learned Senior Advocate with Shri Pradip Tarafder, learned Advocate appearing for the respondent, M/s BST Infratech Limited; Shri Rajiv Malik, learned Advocate appearing for the respondent, Vishal Pipes Limited and Shri N. Kumarjit, learned AG appearing for the State respondents.

[2] The above writ appeals are directed against the common judgment and order dated 16-08-2021 passed by the learned Single Judge of this Court and since they have arisen out of the said common judgment and order, the writ appeals are being disposed of by this Common judgment and order.

[3.1] The facts and circumstances as narrated therein, which have led to the filing of these writ appeals, are, in short, that an NIT dated 26-03-2021 was issued by the Chief Engineer, Public Health Engineering Department, Government of Manipur (hereinafter referred to as "the PHED") inviting bids for supply of G.I Pipes. The appellant being eligible for it, submitted its bids. The technical bids were opened on 21-04-2021, while financial bids were opened on 06-05-2021 but on 05-05-2021, a communication was sent to the appellant, through e-mail, informing that it was not qualified in the technical bid.

[3.2] On 06-05-2021 itself, the appellant submitted an application, via e-mail, to the authority concerned requesting him to clarify and provide the specific reason for rejecting its technical bid. As there was no response from the authority, the appellant approached this Court by way of a writ petition being WP(C) No.410 of 2021 wherein an interim order dated 18-05-2021 was passed directing that the respondents therein should communicate the reason why the appellant was found technically not qualified. In compliance with the said order, the Joint Secretary (PHE), Government of Manipur issued a letter dated 01-06-2021 to the appellant informing that it did not have the minimum average turnover in terms of the tender conditions. Questioning it, an application being MC(WP) No.113 of 2021 was filed but when the matter was listed on 08-06-2021 for consideration, this Court was of the opinion that it would be appropriate for the appellant to challenge it in a fresh writ petition.

[3.3] The writ petition being WP(C) No.427 of 2021 came to be filed by the appellant on 15-06-2021 challenging the validity and correctness of the letter dated 01-06-2021. On 15-07-2021 when the matter was listed for consideration, this Court passed an interim order and at the same time, it allowed the application for impleadment of the successful bidders as the private respondents. Although the respondent, M/S BST Infratech Limited did not file counter affidavit, the respondent No.1 to 3 and the respondent, M/S Vishal Pipes Limited did file their respective counter affidavits on 05-08-2021. Three applications were filed by the respondents praying for vacation of the interim order which remained pending for disposal. On 09-08-2021, the appellant filed its rejoinder affidavits to the said counter affidavits filed on behalf of the respondents as stated hereinabove.

[3.4] Immediately after WP(C) No.427 of 2021 having been filed, the appellant submitted an application dated 17-06-2021 under the provisions of RTI for furnishing information, followed by a legal notice for keeping the execution of work in abeyance. A representation dated 18-06-2021 was also submitted requesting the authority to furnish copies of the approval letter, letter of acceptance and supply order and in respect thereof, a writ petition being WP(C) No.446 of 2021 was filed before this Court but it was dismissed on 06-07-2021.

[3.5] The State respondents uploaded a letter dated 24-05-2021 addressed to the Chief Engineer, PHED, enclosing therewith a copy of the proceedings of the HTC, informing him to take up the necessary action as per the recommendation made therein. This letter dated 24-05-2021 came to be challenged by the appellant by way of WP(C) No.454 of 2021. While issuing notice to the respondents, this Court passed an order dated 15-07-2021 staying the execution of the work. The counter affidavits on behalf of the respondents were filed on 26-07-2021 and 05-08-2021 to which the rejoinder affidavits were filed by the appellant on 09-08-2021. As has been done in respect of WP(C) No.427 of 2021, some applications were filed by the respondents for vacating the stay order.

[3.6] From the application filed by M/S BST Infratech Limited and the affidavit-in-opposition filed by M/S Vishal Pipes Limited, the appellant learnt that the letters dated 31-05-2021 were sent to them by the Superintending Engineer, Planning and Monitoring Sell, PHED and in response thereto, they submitted their letters of acceptance dated 01-06-2021. Being aggrieved by the letters dated 31-05-2021 and the letters of acceptance dated 01-06-2021, the writ petition being WP(C) No.490 of 2021 came to be filed by the appellant.

[4] All the said writ petitions were heard together and were dismissed by the learned Single Judge vide its common judgment and order dated 16-08-2021. The main issue, involved therein, which was considered by the learned Single Judge, was as to whether the rejection of the technical bid of the appellant was arbitrary, illegal and discriminatory or not. Other ancillary issues were also considered by the learned Single Judge. All the issues were decided in favour of the respondents, in the sense that all the issues were answered in the negative. The relevant paragraph 27 of the judgment and order dated 16-08-2021 reads as under:

"27. A consideration of the Appendix-4 as furnished by the petitioner while submitting his bid would indicate that he has submitted the certificate indicating Total Turnover and the Galvanized Iron Pipes (G.I Pipes) turnover for the last (3) complete financial years. The turnover of GI Pipes (INR Crores) is indicated as 106.94 for the financial year 2017-18. For the financial year 2018-19, it is indicated as 114.96 and for the financial year 2019-20 it is indicated as 109.92. The audited financial reports submitted by the petitioner?s firm for the financial year 2017-18 to 2019-2020 clearly indicates that for the year 2017-18 there is no indication of turnover for GI Pipes under Schedule ?I? Sales. Again for the financial year 2018-19 there is no turnover indicated for GI Pipes under Schedule-?H? sales. However, for the financial year 2019-2020 the turnover for GI Pipes under Schedule-?H? Sales is indicated as 1,149,568.350 for the financial year ending 31.03.2019 and for the financial year ending 31.03.2020 it is indicated as 1,099,164.183.

At this stage, it would be pertinent to consider the impugned letter dated 1.6.2021 written by the Joint Secretary, PHED, Government of Manipur and addressed to the petitioner?s firm wherein the reason for rejecting the case of the petitioner?s firm is given and the same reads as under:

"The Auditor?s reports for the FY 2017-18 and FY 18-19 do not show turnover separately for the product under consideration of the Tender and whereas the Auditor?s report for FY 2019-20 shows the turnover from the produce under consideration as Rs.109.92 crore. Therefore, Average turnovers for three years is Rs.36.64 crore."

On a consideration of the reasons given as well as comparison of the audited financial report for the financial year 2017-18 to financial year 2019-20 as well as Appendix-4 submitted by the petitioner?s firm in the bid documents, it can be clearly assumed that the reasons given for rejecting the petitioner?s firm is on the basis of the documents furnished by the petitioner while submitting the tender bid."

[5] Being aggrieved by the common judgment of the learned Single Judge, the said writ appeals were preferred by the appellant on the main ground that the learned Single Judge failed to appreciate the fact that the appellant had complied with the terms and conditions under NIT dated 26-03-2021 particularly, Appendix-4 read together with Section 2-II, C 2 Sub Clause C 2.1 and Section-III A.1 Sl. 4. The other grounds are inter-alia that the learned Single Judge erred in not appreciating the fact that the appellant had shown a minimum average turnover for the product under consideration i.e. G.I. Pipes which is more than 40.00 crores. The findings and conclusions of the learned Single Judge made in the impugned judgment and order are erroneous and not sustainable in the eyes of law and need to be interfered with by this Division Bench. The learned Single Judge erred in not appreciating the fact that the appellant had submitted performance certificates with respect to the Appendix-6 and that the appellant had supplied more than Rs.40.00 crores for the last 5 financial years i.e. 2015-16 to 2019-20. The learned Single Judge erred in not appreciating the fact that for the financial year 2017-18 to 2019-20, the appellant had supplied/sold the product under consideration i.e. G.I. Pipes to Government Department which is more than 40.00 crores for the three financial year 2017-18 to 2019-20 and that the appellant had clearly shown that the average turnover for the product under consideration i.e. G.I. Pipes for the financial year 2017-18 to 2019-20 is above 40 crores. The finding and observation of the learned Single Judge is liable to be interfered with by this Court to provide justice to the appellant and to maintain the rule of law. The learned Single Judge failed to appreciate that the performance certificate (Appendix-6) of the respondent No 4 was not in the format or form with details as required under the terms and conditions of the NIT dated 26-03-2021 and that the respondent No.4 did not submit his audited financial statement for the last 3 (three) financial years i.e. 2017-18 to 2019-20. Thus, a non-responsive bidder was erroneously declared as successful bidder.

[6] It is not in dispute that the NIT dated 26-03-2021 was issued by the Chief Engineer, PHED, Government of Manipur inviting online rate quotation from amongst the reputed manufacturers of GI Pipes. The said NIT contains and lays down various conditions, of which condition 1 provides that the bidding documents shall be downloaded from the website; that condition 15 provides that the authority reserves the right to cancel any or all bids without assigning any reason and that condition 17 provide that the details can be seen from the bidding documents. Section-1 of the bidding documents provides for the preparation of bids and para C 2 thereof provides that the technical bid shall comprise the documents mentioned in C 2 1 (Part-I). Section-III of the bidding documents provides for the evaluation and qualification criteria, of which the Sl. No.3 & 4 of the technical criteria which are relevant for the present case, read as

under:

3

The manufacturer should have credential of supply for a minimum value of Rs.40.00 crore (Rupees forty crore) only in one year to any Government Department during the last five financial years from FY 2015-16 to FY 2019-20

Performance certificate issued by an officer not below the rank of Executive Engineer shall be submitted as per Appendix-6

4

The manufacturer should submit the audited financial statements for the last 3 (three) financial years from FY 2017-18 to FY 2019- 20 to demonstrate the current soundness of the bidders? financial position showing a minimum average turnover of not less that Rs.40.00 crore (Rupees forty crore) for the product under consideration in the tender

Audited Financial Statements for last 3 financial years along with Turnover Certificate issued by Chartered Accountant as per Appendix-4.

The wordings of these two technical criteria are plain and unambiguous which require no interpretation at all. The criteria as mentioned in Sl.No.4 can be divided into three conditions-one, the manufacturer should submit the audited financial statements for the last three financial years from the year, 2017-18 to 2019-20; two, they should show a minimum average turnover of not less than Rs.40.00 crore and three, they should be for the product under consideration in the tender. It may be noted in this regard that the documents which are required to be submitted by the bidders, are the audited financial statements along with the turnover certificate issued by the Chartered Accountant as per Appendix-4 which is nothing but a format of the certificate to be issued by a Chartered Accountant and only the requisite details are to be filled up therein. A careful reading of the said criteria makes it very clear that a minimum average turnover will have to be one which can be easily and conveniently ascertained from the audited financial statements for the aforesaid years. In other words, the audited financial statements to be submitted by the bidders ought to reflect the turnover of the product under consideration in the tender so that the authority could easily verify and identify the minimum average turnover as shown in the certificate issued by the Chartered Accountant as per Appendix-4.

[7] It has been submitted by Shri Prashant Bhushan, learned Senior Advocate appearing for the appellant that the appellant being eligible, submitted its bids and all documents as required under the terms and conditions laid down in the bidding documents, had been furnished and therefore, the rejection of its technical bid by the authority was absolutely illegal. Alternatively, it has been submitted by him that even if there was an ambiguity as regards the documents furnished by the appellant, the authority ought to have sought a clarification from the appellant by invoking the provisions of para D 2.1, as had been done by

the authority in respect of the respondent, M/S BST Infratech Limited. The failure on the part of the authority in not doing that, was highly unreasonable, unfair and discriminatory. Combating his submissions, it has been submitted by Shri N. Kumarjit Singh, learned Advocate General that the appellant did not have the minimum average turnover as required under Sl. No.4 of the A.1-Technical Criteria. The appellant did not furnish the certificate of the Chartered Account strictly in tune with the Appendix-4 and on top of that, the minimum average turnover for the said three financial years as mentioned in the certificate of the Chartered Accountant, is not substantiated by the audited financial statements submitted by the appellant for the said three financial years. In other words, the audited financial statements for the years from 2017-18 and 2018-19 did not reflect the turnover of the product under consideration at all. Therefore, on the basis of the documents submitted by the appellant, the appellant was found by the authority to be unqualified in the technical bid. As the submissions of Shri H.S Paonam, learned Senior Advocate appearing for the respondent, M/S BST Infratech Limited are similar to that of the learned Advocate General and moreover, since he had adopted them, the same are not repeated here for the sake of brevity. It has further been submitted by him that since the letters of acceptance had not been challenged and they had already started supplying the G.I Pipes, there is not point of entertaining the instant writ appeals. The fact that the clarification was not sought for from the appellant, cannot not be said to have rendered the inaction on the part of the authority, unreasonable and discriminatory. It is the appellant who committed the mistake of not submitting the requisite documents in terms of the bidding documents, cannot take the advantage of its own mistake. It has further been submitted by him that a similar issue pertaining to the appellant had been decided by this Court in WP(C) No.974 of 2019 & ors. Shri Rajiv Mallik, learned Advocate appearing for the M/S. Vishal Pipes Limited submitted that there was no plea against it and in other words, there was no ground advanced against it except the allegation that although it had been blacklisted, a false affidavit was filed and that it did not qualify to be considered in the technical bid. It has further been submitted by him that as its blacklisting was for a period upto 31-03-2016, the contention that its technical bid should have been rejected, is misconceived.

[8] The average turnover certificate as per Apepndix-4 submitted by the appellant is on record and on perusal thereof, it is seen that the contention of the learned Advocate General that it is not strictly in terms of the Appendix-4, appears to be correct to that extent. As has been observed hereinabove, the Appendix-4 is nothing but a format of the certificate to be submitted by all the bidders, after the same being filled up with the requisite details/information. It is beyond our comprehension as to why the appellant being a partnership firm carrying on such a big business, could not submit its bids in the manner prescribed in the bidding documents and in particular, the certificate as per Appendix-4. Be that as it may, the turnovers for the financial years, 2017-18; 2018-19 and 2019-20 as shown in the certificate submitted by the appellant read

as under:

Financial year

Total Turnover (INR Crores)

Turnover of G.I. Pipes (INR Crores)

2017-18

279.66

106.94

2018-19

363.75

114.96

2019-20

322.42

109.92

The said certificate will have to be given by the Chartered Accountant on the basis of the audited financial reports for profit/Loss Account and Balance Sheets. The audited financial statements of the appellant for the financial years, 2017-18, 2018-19 and 2019-20 on the basis of which the certificate was given by the Chartered Accountant, are on record. The relevant portion of the auditor's report dated 31-07-2018 for the financial year, 2017-18 reads as under:

YEAR ENDED

YEAR ENDED

31-03-2018

31-03-2017

____

(Rs.)

____

(Rs.)

SCHEDULE 'I' SALES

Finished goods

2,70,70,85,367

1,72,96,54,690

By products

5,46,05,596

3, 27,97,608

HR Coll/Slitt Sale

3,45,74,106

10,29,482

____

____

Total

2,79,63,65,069

1,76,34,81,780

____

____

The relevant portion of the auditor's report dated 26-06-2019 for the financial year, 2018-19 reads as under:

YEAR ENDED

YEAR ENDED

31-03-2019

31-03-2018

____

(Rs.)

____

(Rs.)

SCHEDULE 'H' SALES

Finished goods

3,519,801,645

2,707,085,367

By products

70,288,736

54,605,596

HR Coll/Slitt Sale

33,902,188

34,674,106

____

3,623,992,569

____

2,796,365,069

____

____

Job work charges received

220,712

211,862

Freight recovered

12,677,935

Inspection fee recovered

617,402

____

____

Total

3,637,508,618

2,796,576,931

____

____

The relevant portion of the auditor's report dated 17-10-2020 for the financial year, 2019-20 reads as under:

YEAR ENDED

31-03-2020

YEAR ENDED

31-03-2020

____

____

(Rs.)

(Rs.)

SCHEDULE ?H? SALES

Finished goods

MS Black Pipes

1,640,321,371

1,823,311,876

Galvanised Iron Pipes

1,099,164,183

1,149,568,350

Steel Tibular Poles

284,743,054

478,904,230

Steel Scafolding

65,582,791

44,146,302

Steel structures

3,890,700

1,927,869

Metal Crash Barriers

24,867,378

21,943,018

____

____

3,118,569,477

3,519,801,645

By products

66,112,939

70,288,736

HR Coll/Slitt Sale

37,405,919

33,902,188

____

____

3,222,088,335

3,623,992,569

____

____

Job work charges received

345,549

220,712

Freight recovered

294,949

12,677,935

Inspection fee recovered

1,504,220

617,402

____

____

Total

3,224,233,053

3,637,508,618

____

____

[9] From the perusal of the auditor's reports for the financial years, 2017-18 and 2018-19 and in particular, the relevant portions thereof as reproduced hereinabove, it is clearly seen that the turnovers of the product under consideration are not reflected separately at all. But the Chartered Accountant, in his certificate, has shown the turnovers of the product under consideration for the said years but the basis on which the turnovers for the financial years, 2017-18 and 2018-19 have been shown in the certificate, is not disclosed and in

other words, there is no material on record which would clearly demonstrate the separate turnovers of the product under consideration. Moreover, in the auditor's report for the year, 2019-20, the relevant portion of which is reproduced hereinabove, the turnover of the product under consideration for the financial year, 2018-19 is reflected, even though the auditor's report for the same financial year, 2018-19 is silent about it. The turnovers as shown in the certificate issued by the Chartered Accountant and that of the auditor's reports as mentioned above, do not tally each other. If that be the case, the correctness of the certificate issued by the Chartered Accountant is doubtful and it was not correctly accepted and relied upon by the authority at its wisdom. The learned counsel appearing for the appellant made an endeavour to contend that since the appellant being a partnership firm, the turnover was not given separately for the product under consideration and therefore, the minimum average turnover could be ascertained by reading all the documents as a whole and in particular, the performance certificates. His contention has no merit and substance for the reason that the performance certificates will have to be submitted as per Appendix-6, while the average turnover certificate will have to be submitted as per Appendix-4. Both the certificates are not one and the same. They are different conditions to be fulfilled by the bidders while submitting their bids. It may further be noted that the documents to be furnished by the bidders must be plain and clear for the reason that they ought to speak for themselves so that the authority could verify the minimum average turnover without any effort being made for it. In fact, the bidding documents are made known to the bidders well in advance and all that the authority will have to do, is to see that the documents are submitted in terms of the bidding documents and the authority cannot be expected to examine the documents furnished by the bidders by interpreting them to understand their meaning. If the documents are not submitted in terms of the bidding documents or for that matter, they are not in proper order, the authority has the right to reject it. This is what has been done by the respondents herein in the present case and there is nothing wrong in it. In a tender, the submission of bids is an offer and the authority has a right to reject it, provided the bidder has failed to fulfill the terms and conditions of the tender. The only safeguard in a tender process is that the authority being an institution, ought to act fairly and reasonably. It is the appellant who is to be blamed for its own mistake. Having considered the circumstances as aforesaid, the authority has rightly rejected the technical bid of the appellant.

[10] The other point which the learned counsel appearing for the appellant has emphasized during the course of hearing, is that the appellant was not given an opportunity to clarify the doubt on the part of the authority, although such an opportunity had been given to the respondent, M/S BST Infratech Limited. It has been vehemently submitted by him that such inaction on the part of the authority is unreasonable and discriminatory being violative of the provisions of Article 14 of the Constitution of India. It is no doubt true that under para 2.1 of Section-II, the authority is empowered with a discretion to seek clarification from

the bidder. But it is nowhere provided therein that all the bidders should be asked for clarification. It is for the authority to decide whether a clarification is required to be sought from a bidder or from all the bidders depending upon the circumstances and the requirement. In the present case, the authority appears to have felt that there was no need of seeking a clarification from the appellant, as the appellant was found to be unqualified in the technical bid on the ground that it did not have a minimum average turnover of the product under consideration. Merely because the appellant was not given an opportunity to give a clarification as regards the minimum average turnover, it cannot be said that the inaction on the part of the authority was unfair and unreasonable. Even assuming that the appellant was given the opportunity, it could not have improved or modified the audited financial statements for the years, 2017-18 and 2018-19 for the reason that they had formed part of the records of the Income Tax Department. The facts and circumstances of the writ petition being WP(C) No.974 of 2019 are not exactly the same as that of the present appeals. In other words, the issues involved in both the cases are not exactly the same. But the only observation made by this Court in WP(C) No.974 of 2019 which is relevant for the present appeals, is that the average turnover as furnished by the appellant in that case as per Appendix-4, was found to be of overall turnover and not of product under consideration. In the present case, the basis of the minimum average turnover as shown in the certificate of the Chartered Accountant is not there at all in the audited financial statements for the years, 2017-18 and 2018-19, because of which the authority had no option but to reject the technical bid of the appellant.

[11] In view of the above, we are of the considered view that there is no infirmity in the judgment and order dated 16-08-2021 passed by the learned Single Judge and accordingly, the instant writ appeals are dismissed with no order as to costs.

