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**(2011) 07 GAU CK 0005**

**In the Gauhati High Court**

**Case No : Writ Petition (Civil) No. 24(K) of 2011**

Nagaland Builders Pvt.Ltd.

APPELLANT

Vs

State of Nagaland & Ors.

RESPONDENT

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**Date of Decision : 07-07-2011**

**Acts Referred:**

Constitution of India, 1950 — Article 226, 226

**Citation : (2011) 5 GLT 467**

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

**Bench : Single Bench**

**Advocate :** Advocates appeared for the Petitioner: Mr. Kekhriengulie & Mr. L. Wapang, Advocate appeared for the Respondents: Mr. L.S Jamir, Addl. AG, Advocates appearing for Parties

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## **Judgement**

A.K. Goswami, J.—Heard Mr. Kekhriengulie, learned counsel for the petitioner as well as Mr. L.S. Jamir, learned Additional Advocate General, Nagaland for the State respondents.

2. On the basis of the orders dated 09.06.2001 and 22.06.2011, whereby, this court had indicated that an endeavour shall be made to dispose of the matter at the admission hearing, the learned counsel for the parties, on 05.07.2011, prayed that the matter may be taken up for disposal at the admission stage and, accordingly, the matter was taken up for disposal. The learned counsel for the parties had made their submissions. However, on the prayer of the learned Additional Advocate General, Nagaland, to obtain some further instructions, the matter got deferred and that is how the matter is being heard again today.

3. The case of the petitioner is that he is a Contractor by profession and in response to a notice inviting tender dated 10.11.2010 issued by the respondentNo.3 inviting tenders, amongst other, for construction of class room at Pfutsero College, he had submitted his valid tender. The tender papers were opened and scrutinized on 02.12.2010 in presence of the tenderers and it appeared that 3 (three) tenders were submitted in respect of the aforesaid work.

One of the tenders was found to be irregular and two other tenderers including the petitioner was left in the fray. The assessment of the technical bids of the valid tenderers were made and in such evaluation, the writ petitioner had secured 85 marks whereas the other valid tenderer was awarded 82 marks. The rates quoted by both the tenderers being as per NPWD SOR of Building, 2010, the petitioner, having emerged the most suitable tenderer, was awarded with a work order dated 16.12.2010.

4. It is also pleaded by the petitioner that after the work order was issued, the petitioner had started execution of the work by investing huge amount of money and while the work was in progress, suddenly an order dated 28.01.2011 was issued by respondent No.3 directing him not to proceed with the work till further orders. The aforesaid order dated 28.01.2011 was issued by the respondent No.3 on the basis of a letter dated 18.01.2011. The letter dated 18.01.2011 and the order dated 28.01.2011 are the subject matters of challenge in this Writ Petition.

5. The State respondents, namely, respondent Nos. 1,4,5 & 6 had filed an affidavit. The stand of the aforesaid respondents in the said affidavit is to the effect that the respondent No.3 had finalized the award of contract for 9 projects under the Department of Higher Education without consulting the user Department (Higher Education Department) and also without getting approval from the Government and that while no objections were received in respect of award of 7 contracts, complaints were received in respect of award of contract for construction of class room at Wangkhao College, Mon and at College, and it is in these circumstances, the Department had issued the letter dated 18.01.2011 to keep in abeyance the work orders in respect of Wangkhao College, Mon and College, Ptutsero and to furnish the tender papers to the Government for review.

6. It has also been stated that though the respondent No.3 may have followed all the prescribed codal formalities before awarding the work order to the petitioner, the respondent No.3 had not taken the mandatory approval of the user Department/Government before finalizing the award of contract work to the petitioner. In the affidavit, it has also been averred that the performance of the writ petitioner in execution of works in other projects were not satisfactory and to substantiate unsatisfactory performance of the petitioner, three instances, namely, construction of PukhungriAvangkhu Road under Roads and Bridges, construction of Tourist Complex at Pfutsero and Viewing Spot at Glory Peak, Piutsero, were cited. The affidavit also highlighted that there was objection from the land owners against the grant of contract work to the writ petitioner and that it was also taken into consideration while issuing the letter dated 18.01.2011,

7. By filing an affidavit in reply as well as an additional affidavit, the writ petitioner had pleaded that the respondent No.3 has been vested with the power to give technical sanction and issue work order to the most suitable contractor/bidder in the matter of contract and there are no Rules or Guidelines suggesting requirement of approval of the user Department before issuance of any work order. It is also stated that the complaint had been lodged at the behest of

aggrieved party who could not qualify in the tender process. It is also stated that one of the land owners had submitted representation dated 26.05.2011 explaining the position to the Director, Higher Education Department, Nagaland, Kohima. The petitioner had also denied the allegation made by respondents in their affidavit in opposition regarding alleged nonperformance of the petitioner in respect of the construction works in question and had sought to explain the alleged deficiencies.

8. Mr. Kekhriengulie, learned counsel for the petitioner, submits that three tender notices were issued by the respondent No.3 in respect of 9 works with the same terms and conditions. Two tender notices were issued on 10.11.2010 for 3 and 4 works, respectively, and one tender notice was issued on 16.11.2010 for 2 works. After following the same procedure, the respondent No.3 had issued work orders in respect of the successful tenderers in respect of all the works in question. The petitioner being also the most suitable tenderer, by order dated 16.12.2010, the work order was issued in his favour for construction of class room at College, Pfutsero. Inviting attention of the court to the letter dated 08.11.2010 (Annexure E to the writ petition), the learned counsel submits that, earlier, nine persons were hand picked by the Government to allot them work in respect of the nine works in question. However, by the said letter dated 08.11.2010, the respondent No.3 was requested to initiate codal formalities for timely execution of the work. According to him, by the said letter, the request for allotting the work to the nine specific individuals were withdrawn. He has submitted that there is no requirement under the law and there is no guidelines requiring respondent No.3 to obtain the approval of the user Department before the work order is issued and it is wholly within the jurisdiction and competence of the Chief Engineer to award contract work without referring the matter back to the user Department. With regard to the allegation of nonperformance, the learned counsel for the petitioner submits that assessment of technical bids would indicate that the petitioner had obtained highest marks. It has been further submitted that at no point of time, the petitioner has been black listed or even warned about any such unsatisfactory performance and the respondent had taken the ground of alleged unsatisfactory performance of the petitioner only for the purpose of this case and, that too, on the basis of a complaint lodged by interested persons. He submits that the reasons for delay in completion/not completing the works in question have been satisfactorily explained in detail in the affidavit in reply. The learned counsel submits that in the matter of allotment of work, the land owners cannot have any say and, at any rate, in the instant case, the alleged objection of the land owners is also wholly unfounded. Accordingly, he submits that decision to keep in abeyance the work order of Pfutsero College is arbitrary and based on extraneous and irrelevant consideration, requiring interference of the court.

9. Mr. L.S. Jamir, learned Additional Advocate General, Nagaland, on the other hand, submits that the respondent No.3, without obtaining the administrative approval of the Department and without approval of the user Department/

Government, issued the work order to the petitioner, which is an infraction of the established procedure and to fortify his point, the learned Additional Advocate General, Nagaland draws the attention of the court to the provision of Clause 202 of the PWD Code. The learned Additional Advocate General, Nagaland, further submits that there was complaint against the petitioner and the land owners had also objected to the work being allotted to the writ petitioner. He further contends that these valid grounds were taken into consideration while issuing the letter dated 18.01.2010.

10. The projects in question, nine in number, are being funded under Special Plan Assistance and Negotiated Loan during 201011. On the basis of the materials on record and upon hearing the parties, it has become clear that the respondent No.3 had followed the same procedure in respect of all the nine works in question. No statements have been made by respondent Nos. 1,4,5, & 6 to the effect that in respect of seven works other than Wangkhao College, Mon and College, the Chief Engineer had followed the prescribed procedure as is being argued by the learned Additional Advocate General, Nagaland. It is not known why the Government had not taken any action with regard to the said seven works if it was mandatory to obtain approval from the user Department before issuing the contract work to the successful tenderers. The other seven works were allowed to be continued despite the fact that the same procedure had been followed by the respondent No.3 as in the instant case. The query of the court to the learned Additional Advocate General, Nagaland, as to why such works, though no approval of the user Department was obtained, were allowed to be continued, was met with stoic silence.

11. I have also perused the provision of Clause 202 of the PWD Code which provides that it is necessary to obtain the concurrence of the Department concerned to the proposal before technical sanction can be accorded. The formal acceptance by the Department concerned is termed as administrative approval. After the tenders have been issued and comparative assessments have been made, there is no requirement in Clause 202 of the PWD Code for the Chief Engineer to send back the tender papers to the user Department. A perusal of the letter dated 08.11.2010 would indicate that the Government had accorded approval for the 9 works to be taken up during 201011 vide letter dated 31.08.2010. In the affidavit of the respondent Nos. 1,4, 5 and 6 also, it has been stated at paragraph 4 (a) that after preparation of the Detailed Project Report (DPR) in respect of the 9 projects in question, technical approval and administrative approval of the DPRs were accorded by the Chief Engineer (H) and the Department of Higher and Technical Education, respectively. It belies the contention of the learned Additional Advocate General, Nagaland, that there was no administrative approval of the Department.

12. The State respondents have not produced the aforesaid letter dated 31.08.2010. Reading of the letter dated 08.11.2010 would also go to show that there was also an approval to allow the works to be allotted in respect of nine

persons. It is not the case of the respondents that a decision was taken to cancel or abandon all the nine works and, therefore, it would not be unreasonable to take a view that the letter dated 08.11.2010 had indicated that the proposal for allotment of works to nine persons have been withdrawn. The said letter dated 08.11.2010 also requested the respondent No.3 to "necessitate" " codal formalities for timely execution of the work. To make sense, it must be construed that the respondent No.3 was requested to initiate formalities for timely execution of the work. It was after the issuance of the letter dated 08.11.2010, the tender notices dated 10.11.2010 and 16.11.2010 were issued.

13. It must be noted that in the affidavit filed by respondent Nos. 1, 4, 5 & 6, it is indirectly admitted in paragraph No.4 (b) that the respondent No.3 had followed all the prescribed codal formalities. However, what is meant by codal formalities has not been brought on record by any of the parties. Be that as it may, it would appear that the petitioner was awarded 85 % marks in the technical bid assessment compared to 82 % marks awarded to the other valid tenderer. It would also appear from the letter dated 18.01.2011, issued by respondent No.3 to the respondent No. 1 (Annexure D to the writ petition) that award of contract work has been given to tenderers who had secured 70 % marks also. "The notification dated 27.06.2006 brought on record by the writ petitioner indicates that the Chief Engineer has got full power to give technical sanction to original works and special repairs (exclusive of Departmental charges) and also full power to accept tender, subject to the availability of clear budget provision and allocation of fund for the purpose and that the actual expenditure/commitment must be restricted, during any financial year, to the budget provision clearly allocated for the purpose. This notification dated 27.06.2006 was issued in pursuance of Clause (3) of Article 166 of the Constitution of India to make amendment to the Delegation of Financial and Cognate Power Rules, 1964. The learned Additional Advocate General, Nagaland, except drawing attention to Clause 202 of the PWD Code, has not placed any material before the Court to persuade the court to take a view, as has been suggested by him, that it is mandatory for the Chief Engineer to take approval of user Department/Government before finalizing the contract work. In view of the aforesaid, first ground on the basis of which the letter dated 18.01.2011 was issued, is without any basis.

14. With regard to the 2nd ground, namely, that past performance of the petitioner was not taken into consideration before construction was awarded to the petitioner, it is to be noted that no materials have been brought on record by the State respondents to show that the writ petitioner was debarred from participating in any tender process. For the assessment of technical bids, 40 marks were assigned for performance of works divided into four categories, namely, (i) works completed within stipulated time (30 marks) (ii) compensation levied for delay in completion (iii) substandard work and (iv) quality of work done in completed/work in progress. Correspondingly, marks were also assigned in respect of (i) and (iv) above and, therefore, it cannot be said that performance

of the writ petitioner in respect of the works undertaken by him was not taken into consideration. It further appears that Tourism Department awarded eight contracts in and around Pfutsero to the petitioner in the year 2005. It has been brought on record that all the works except the construction of Tourist Complex were completed by December, 2007 and the Executive Engineer of Tourism Department, who was the then incharge, had also issued certificate of performance, varying from very good to satisfactory. The construction of Tourist Complex at Pfutsero is also, according to the petitioner, is complete and the petitioner had submitted that the delay in completion of the work was occasioned due to entrustment of extra work. It would also appear from the affidavit in reply that Department had also taken up the matter with Ministry of Development for NE Region for revised estimate of PhukungriAvangkhu Road. The complaint was lodged by Nagaland Contractor and Suppliers Union, Phek Unit and therefore, they are interested parties. In view of the facts and circumstances of the case, I am of the considered opinion that issuance of the letter dated 18.01.2011 on the ground of unsatisfactory performance of the petitioner cannot be sustained.

15. The objection of the land owners for granting of work to the writ petitioner and their support for the other tenderer as reflected in the objection dated 08.02.2011, in the considered opinion of the court, is not a relevant consideration and that could not have formed the basis of the decision of the Government to keep in abeyance the work order already granted in pursuance of notice inviting tender. It is also brought on record by writ petitioner that one of the objectors in such objection dated 08.02.2011, had distanced himself by writing a letter dated 26.05.2011 to the respondent No.5. In the considered opinion of the court, taking into consideration of the alleged objection of the contract work to the writ petitioner by land owners, has also vitiated the issuance of the letter dated 18.01.2011.

16. Mr. L.S. Jamir, has submitted during the course of argument that the writ petitioner had not executed the contract agreement as is required for execution of work in terms of the work order dated 16.12.2010 and, therefore, the plea of the writ petitioner that it had started executing the work is a misleading statement before this court. The writ petitioner, in the additional affidavit, filed on 13.06.2011 had stated that the writ petitioner had signed the agreement with the concerned authority. Mr. Kekhriengulie, learned counsel for the petitioner, makes a statement at the Bar, that such agreement was entered into on 21.12.2010.

17. In view of the aforesaid discussions, the letter dated 18.01.2011 issued by respondent No.4 and the consequential order dated 28.01.2011 issued by respondent No.3 are not sustainable in law and, as such, are hereby set aside and quashed.

18. The writ petition is allowed.

19. No costs.