(2020) 03 MAN CK 0002

In the Manipur High Court

Case No : Writ Petition (c) No. 974 Of 2019, 80, 151 Of 2020

Nezone Pipes And Structures APPELLANT

Vs

State Of Manipur And Anr RESPONDENT

Date of Decision : 06-03-2020

Acts Referred:
Constitution Of India, 1950 — Article 14, 226

Citation : (2020) 03 MAN CK 0002

Hon'ble Judges : Kh. Nobin Singh, J

Bench : Single Bench

Advocate : I. Denning, N. Kumarjit, P. Tamphamani

Final Decision : Dismissed

Judgement

[1] Heard Shri I. Denning, learned Advocate appearing for the petitioners and Shri N. Kumarjit, learned Advocate General assisted by Shri P.

Tamphamani, learned Advocate appearing for the State respondents.

[2] Since the above writ petitions have arisen out of a similar set of facts, the same are being disposed of by this common judgment and order.

[3.1] By the instant writ petition, the petitioner has prayed for issuing a writ of mandamus or any other appropriate writ to direct the respondents to

process, perform and conduct such tender as per the instructions, terms and conditions of the NIT dated 07-10-2019 and also, to issue a writ of

certiorari or any other appropriate writ to quash and set aside the minutes of the meeting of the Technical Evaluation Committee held on 16-11-2019.

[3.2] According to the petitioner, it is a partnership firm which is carrying on the business of manufacture, sale and supply of G.I. Pipes. The Chief

Engineer, PHED, Government of Manipur issued an NIT dated 07-10-2019 inviting rate quotations from amongst the reputed manufacturers of G.I.

Pipes for an estimated cost of Rs.25.00 crores (Rupees twenty five crores) mentioning therein the critical dates. Thereafter, a corrigendum dated 19-

10-2019 was issued amending the critical dates. The petitioner being eligible and qualified, applied for it and submitted its bids on 06-11-2019 which

was successfully accepted on the said date. The Technical bids were opened on 07-11-2019. The Technical Evaluation Committee held a meeting on

16-11-2019 at 11.00 a.m wherein the Commissioner, PHED who is the Chairman thereof, pointed out that the petitioner firmâ??s documents which

were submitted while applying for the tender, were to be re-verified comparing the certificates with that of the last year tender documents, as the

same were found to be doubtful and not clear. The relevant paragraph of the minutes of the meeting held on 16-11-2019 reads as under:-

â??Commissioner (PHE) has pointed out that the CA certificate submitted by a firm named Nezones Pipes Structures need to be re-verified

as the figures while comparing to their certificate submitted in the last year tender documents. She further points out that the clause

mentioned in the technical criteria is for the last 3 (three) years of annual financial positions showing a minimum turnover not less than Rs.

100.00 crore per year for the product under the consideration of the tender. While the CA certificate submitted by the Nezones Pipes and

Structures is doubtful and not clear.â??

In terms of the said minutes of the meeting, the Chief Engineer, PHED, Government of Manipur wrote a letter dated 16-11-2019 to the petitioner firm

thereby requesting it to submit the details which were mentioned therein in connection with the financial status of the petitioner firm for re-verification

and clarification and in response thereto, the petitioner firm wrote a letter dated 18-11-2019 to the Chief Engineer submitting the requisite documents

as desired by it for verification and clarification of the financial status of the petitioner firm. On 18-11-2019 itself and in continuation of its earlier letter

dated 16-11-2019, the Chief Engineer wrote another letter informing the petitioner firm to submit format 3CB and 3CF of Income tax within three

days which the petitioner firm did it on the same day.

[3.3] Being aggrieved by the actions of the respondents, the instant writ petition has been filed by the petitioner firm contending inter-alia that the

technical criteria as provided in Clause 4 of Section-III, has been wrongly interpreted in the meeting of the Technical Evaluation Committee held on

16-11-2019. In other words, as per the terms and conditions as provided in Clause 4, the bidders ought to submit the CA certificate for the last three

years to demonstrate the current soundness of the biddersâ?? financial position showing a minimum turnover of not less than Rs.100 crores for the

product under consideration under the tender but the Technical Evaluation Committee has acted beyond such terms and conditions by adding the

expression â??per yearâ?? just after Rs.100 crores. It has further been contended that the Technical Evaluation Committee has changed the terms and

conditions of the NIT dated 07-10-2019 to its own choice of bidder resulting in its action being impermissible, improper, illegal and unlawful and

therefore, the same deserves to be interfered by this Court. It has also been contended that the respondents, at their own sweet will, have acted

changing the technical criteria at the later stage of the tender process putting the petitioner firm in a disadvantages position and unfavourable

circumstances in the tender process at a belated stage and therefore, the actions of the respondents are bias, malafide, unjust, unreasonable and

unconstitutional.

[4] On 28-11-2019 when the above writ petition was listed before this Court for consideration, this Court, while issuing notice to the respondents,

directed the respondents to decide the issue relating to the allegation made by the petitioner firm and observed that no financial bids should be opened

without the leave of this Court.

[5] An affidavit-in-opposition has been filed on behalf of the respondent Nos.1 and 2 stating that the firms/ manufacturers are to submit the financial

statement for three years separately and year wise. The Department has nowhere mentioned in the relevant clause for the financial cumulative

turnover for the last three years. The employerâ??s request for clarification and the response shall be in writing and no change including any

voluntary increase or decrease in the price or substance of the bid shall be sought, offered or permitted. The terms and conditions laid down in the

NIT do not mention the expression â??cumulative turnoverâ? and the condition clearly states that the CA certificate shall be for the last three years

turnover which is always calculated for financial year wise. The documents submitted by the petitioner firm are not clear and doubtful as it has submitted the annual turnover for the whole firm and not for the product under consideration. In the economic terminology also, it is common

knowledge that the turnover is calculated financial year wise.

[6.1] During the pendency of WP(C) No.974 of 2019, the State Government wrote a letter dated 28-01-2020 which was received by the petitioner

firm via e-mail informing that the bid submitted by the petitioner firm has been rejected by the Technical Evaluation Committee on the ground that it

did not full the technical criteria. Challenging it, the petitioner firm filed a writ petition being WP(C) No.20 of 2020. On 04-02-2020 when it was listed

for consideration, this Court was pleased to issue notice to the respondents and it was also directed that the letter dated 28-01-2020 should remain

suspended. The said writ petition was further directed to be listed along with WP(C) No.974 of 2019.

[6.2] An affidavit-in-opposition was filed on behalf of the respondent Nos.1 & 2 taking a similar stand as has been taken in WP(C) No.974 of 2019

and therefore, the same are not repeated here for the sake of brevity. In addition thereto, it has been stated that the NIT relates to supply/ purchase of

GI Pipes for execution of the project of water supply to every household under Jal Jeevan Mission for the year, 2019-2020, for which Rs.25 crores

was allocated as the first installment which is to be utilized on or before 31-03-2020. If the State Government is unable to show the utilization thereof

in time, the Government of India is not going to release the 2nd installment which may render the public being deprived of the benefits. The

Government of India, Ministry of Jal Shakti, Department of Drinking Water and Sanitation vide its letter dated 24-01-2020 directed all the State

Governments to expedite the pace of implementation of Jal Jeevan Mission. The petitioner firm is trying to obstruct the process by seeking remedy

from this Court without disclosing the true facts of the case.

[6.3] While filing the above affidavit-in-opposition, the petitioner firm was apprised of the order dated 10-01-2020 issued by the Commissioner (PHE),

Government of Manipur which was received by it along with the said affidavit. It has been contended by the petitioner firm that a copy of the said

order dated 10-01-2020 was sent to the petitioner firm by speed post on 21-02-2020 which was received by it on 24-02-2020. Therefore, the petitioner

firm was not aware of it earlier at all. Being aggrieved by it, the writ petition being WP(C) No.151 of 2020 was filed by the petitioner firm challenging

its validity and correctness.

[7] It has been submitted by Shri I. Denning, learned counsel appearing for the petitioner that the manner in which the provisions of Clause 4 have

been interpreted by the Technical Evaluation Committee, is absolutely unreasonable and illegal. In Clause 4 of Section-III, it is nowhere mentioned that

the turnover for which the certificate of the CA is to be produced for three years, shall not be year-wise and that it shall be the average turnover of

the said three years as is evident from the Appendixâ?"4. In support of his contention, he has relied upon the decisions rendered by the Honâ??ble

Supreme Court. The first decision being the one rendered in Bakshi Security and Personnel Services Private Limited Vs. Devkishan Computed

Private Limited & ors., (2016) 8 SCC 446 wherein the subject matter in issue relates to the tender being floated by the Commissioner of Transport,

Government of Gujarat, the Honâ??ble Supreme Court held:

â??19. It is also well to remember the admonition given by this Court in Michigan Rubber (India) Ltd. v. State of Karnataka in cases like

the present, as under: (SCC p. 228, para 21)

â??21. In Jagdish Mandal v. State of Orissa, the following conclusion is relevant: (SCC p. 531, para 22)

â??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 â??lawfullyâ? and not to check whether choice or decision is â??soundâ?. 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. 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: â??the decision is such that no

responsible authority acting reasonably and in accordance with relevant law could have reachedâ??;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal

consequences on a tenderer/ contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and

franchises) stand on a different footing as they may require a higher degree of fairness in action.â??

Secondly, in Afcons Infrastructure Limited Vs. Nagpur Metro Rail Corporation Limited & anr., (2016) 16 SCC 81, 8the controversy was as regards

the eligibility of GYT-TPL JV in view of Clause 4.2(a) of Section-III of the tender conditions. The Honâ??ble Supreme Court held:

â??16. In the present appeals, although there does not appear to be any ambiguity or doubt about the interpretation given by NMRCL to

the tender conditions, we are of the view that even if there was such an ambiguity or doubt, the High Court ought to have refrained from

giving its own interpretation unless it had come to a clear conclusion that the interpretation given by NMRCL was perverse or mala fide or

intended to favour one of the bidders. This was certainly not the case either before the High Court or before this Court.â??

On the other hand, it has been submitted by the learned Advocate General that there is nothing wrong in the finding of the Technical Evaluation

Committee that the petitioner firm did not fulfill the technical criteria for the reason that the turnover is to be calculated year wise and not the average

of three years as contended by the petitioner firm. In economic terminology, it is common knowledge that the turnover is to be calculated financial

year wise. Reliance has been placed by him in the decision of the Honâ??ble Supreme Court rendered in Michigan Rubber (India) Ltd. Vs. State of

Karnataka, (2012) 8 SCC 216 wherein the Karnataka State Road Transport Corporation floated a tender for supply of tyres, tubes and flaps

specifying certain pre-qualification criteria which came to be challenged and thereafter, the pre-qualification criteria were modified. The said pre-

qualification criteria were challenged in the High Court which dismissed it. When the matter was carried to the Honâ??ble Supreme Court, it laid

down the principles. Paragraph 23 and 35 read as under:

â??23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of

fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not

whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration

the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this

process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in

conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the

interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the

State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources

to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is

very restrictive since no person can claim a fundamental right to carry on business with the Government.

35. As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by

the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and

beyond the pale of discrimination or unreasonable. We are satisfied that to have the best of the equipment for the vehicles, which ply on

road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high

standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender.

As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is

arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of the tender

prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. In the case on

hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, CMG

consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail

and for specifying these two conditions regarding pre-qualification criteria and the evaluation criteria. On perusal of all the materials, we

are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide.â??

In Afcons Infrastructure Ltd Vs. Nagpur Rail Corporation Ltd, (2016) 16 SCC 818, the Honâ??ble Supreme Court held:

â??15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand

and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of

the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the

tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not

acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.â??

In Montecarlo Limited Vs. National Thermal Power Corporation Ltd, (2016) 15 SCC 272 wherein the issue was as to whether the appellant meets the

qualification criteria as provided under the heading technical criteria that occurs in clauses 7.1 and 7.2 of QR. Referring to it earlier decisions including

that of Afcons Infrastructure limited, the Honâ??ble Supreme Court held:

â??26. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated

and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the

purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting

tenders are scrutinised by the technical experts and sometimes third-party assistance from those unconnected with the ownerâ??s

organisation is taken. This ensures objectivity. Bidderâ??s expertise and technical capability and capacity must be assessed by the experts.

In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the

financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature.

The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not

comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different.

Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will

escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or

procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. But

where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the

tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible.

The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated

differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner

should be allowed to carry out the purpose and there has to be allowance of free play in the joints.â??

There is no or can be no any dispute between the parties as regards the law laid down by the Honâ??ble Supreme Court in the above decisions and it

is seen there from that in matter relating to formulating conditions of tender document and awarding a contract, greater latitude is required to be given

to the State authorities. In other words, it is the State authorities which have to lay down the terms and conditions for the reason that no one has

fundamental right to do business with the State Government. The only requirement is that the terms and conditions shall be reasonable and in public

interest. Even if there was such an ambiguity or doubt, the Court ought to have refrained from giving its own interpretation unless it had come to a

clear conclusion that the interpretation given by the authority was perverse or mala fide or intended to favour one of the bidders. The basic

requirement of Article 14 is fairness in action by the State and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions

are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior

purpose.

[8] The subject matter in issue relates to the interpretation of the provisions of Clause 4 of Section-III which reads as under:-

â??4. The manufacturer should submit the CA certificate for the last 3 (three) years to demonstrate the current soundness of the

bidderâ??s financial position showing a minimum turnover not less than Rs.

100.00 crore for the product under consideration under the

tender.â??

In order to apply the above provisions, three conditions are required to be fulfilled-one, the manufacturer should submit the CA certificate for the last

three years showing a minimum turnover; two, the turnover shall be not less than R.100.00 crore and three, the turnover shall be in respect of the

product under consideration under the tender.

[9] The main contention of the learned counsel appearing for the petitioner is that as regards the first and second conditions as aforesaid, the

Technical Evaluation Committee has given wrong interpretation and the expression â??year wiseâ? which is not there at all in Clause 4 of Section-III,

has been read into it. According to the Technical Evaluation Committee, the rationale behind it, appears to be that the turnover of a company/ firm is

calculated every financial year. On a careful reading of Clause 4 of Section-III reproduced hereinabove, the contention of the learned counsel

appearing for the petitioner firm to the extent that the expression â??year wiseâ? is not there at all in Clause 4 of Section-III, has merit and substance

and the said expression cannot be read into it. An attempt has been made by the respondents in their affidavit to justify their stand which is not

acceptable to this Court for the reason that a document speaks for itself and it cannot be explained in the affidavit, as has been held by the

Honâ??ble Supreme Court in a catena of decisions. Moreover, the stand of the respondents is belied by the fact that the requisite documents in

respect of the bids and in particular, the technical bid, consists of many documents, of which one being the average turnover for 3 financial years to be

furnished by the bidders in the form of Appendix-4. The terms and conditions of the tender are to be read as a whole and one of them cannot be read

in isolation. Appendix-4 is a part of the bidding documents and on perusal thereof, it is seen that the information to be furnished by the bidders is as

regards the average turnover for 3 financial years and in other words, the average turnover for 3 financial years shall be not less than Rs.100 crore

and not year wise as contended by the respondents. If the contention of the respondents is accepted by this Court, Appendix-4 will be rendered

meaningless and will be of no use at all. On top of that, it will be difficult for the bidders to understand the bidding documents. It is the State

Government which has laid down the pre-conditions or qualifications for the tender and it cannot take advantage of its own mistake. Nothing

prevented the State Government from lying down the clear and unambiguous pre-conditions or qualifications of the tender. Moreover, the State

Government could have issued a corrigendum clarifying it before the process of tender being initiated by it but it has failed to do so. The manner in

which Clause 4 of Section-III has been interpreted by the Technical Evaluation Committee while evaluating the technical bids, can be said to have

done it to make the petitioner firm ineligible which itself is unfair and unreasonable warranting interference by this Court. Article 14 strikes at the root

of arbitrariness and therefore, the State Government ought to act fairly and reasonably. This Court would not have interfered, had there been no

wrong interpretation so as to oust the petitioner firm from being the eligible bidder on this count.

[10] One aspect which needs to be considered by this Court, is that even though this Court finds the contention of the counsel appearing for the

petitioner as regards the first and second conditions, to be acceptable, it will not help the petitioner firm at all for the reason that it did not fulfill the

third condition. A specific plea has been taken by the respondents that the documents submitted by the petitioner firm are not clear and doubtful as it

has submitted the CA certificate towards the annual turnover of the firm as a whole irrespective of the products and not for the product under

consideration. Thus, the average turnover for 3 financial years as furnished in Appendix-4 by the petitioner firm appears to be its overall turnover.

What is required under the third condition, is the turnover of the petitioner firm only in respect of the product under consideration under the tender

which means the turnover in respect of the GI pipes only. Considering the submissions of the counsels appearing for the parties and after having

perused the materials on record, this Court is of the view that the instant writ petitions are devoid of any merit and are liable to be dismissed by this

Court.

[11] In view of the above, the above writ petitions fail and are accordingly dismissed with no order as to costs.