

(2016) 08 GAU CK 0054

In the Gauhati High Court

Case No : WP(C) No. 3440,3777, 3927, 4010, 3506, 3446, 3930, 3902 and 3866 of 2016

Nitul Das

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 31-08-2016

Acts Referred:

Citation : (2017) 1 GauLT 194

Hon'ble Judges : Mr. Arup Kumar Goswam, J.

Bench : Single Bench

Advocate : Mr. P.P. Baruah and Mr. B.K. Das, Advocates, for the Petitioners; Mr. N.N. Upadhyaya, GA and Mr. Y. Doloi, SC, for the Respondents

Final Decision : Dismissed

Judgement

Mr. Arup Kumar Goswam, J. - The Jorhat Municipal Board (for short, "the Board") invited tenders under the provisions of Sections 147/148/301 of the Assam Municipal Act, 1956 (for short, "the Act") from intending tenderers by a Notice Inviting Tender (for short, "NIT") dated 15.02.2016 for settlement of various markets/parking stands falling within the jurisdiction of the Board for the period 01.04.2016 to 31.03.2017. The last date and time for submission of the tenders was fixed on 21.03.2016 up to 2:00 PM. The said NIT was issued, in total, for 14(fourteen) numbers of markets/parking stands, which are as follows:

(1) Jorhat Chowk Bazar, (2) Pujadubi Bazar, (3) B.B. Hall Bazar, (4) Natun Bazar, (5) ASEB Bazar, (6) Tarajan Bazar, (7) Rickshaw Stand, (8) Auto Bikram Parking Stand, (9) Sagali Kasaikhana (slaughter house), (10) Truck Stand, (11) Cycle Stand No.1 (in front of Chowk Bazar), (12) Cycle Stand No.2 (near Newvil Road), (13) Public Bus Stand/Taxi Stand and (14) Two and Four Wheeler Parking.

2. Tender was to be submitted in 2(two) separate envelopes. The No.1 envelope is to contain the documents required to be enclosed along with the tender and the No.2 envelope is to contain only the tender form in which bid value is to be

quoted and both the envelopes are to be put in a single envelope and thereafter, to be dropped in the tender box. The envelope No.1 and the envelope No.2 are to be marked accordingly. The No.1 envelope containing the documents was to be opened first and after examining the documents, if found correct, then the price bid is to be considered by opening the envelope No.2.

3. Tenderers were required to submit copies of Pan Card and Income Tax Return Certificate and Court Fee of Rs.8.25 along with the tender and the tenders were to be opened during the office hours in presence of the tenderers or their authorized agents on 21.03.2016 itself. For each of the market/parking place, separate tenders were required to be submitted.

4. The documents which were required to be submitted along with the tender, are reproduced hereinbelow, essentially, from the translated version of the requirements under the heading "Certificate", as set out in WP(C) No. 3777/2016.

"Certificate

1) The tenderer must enclose along with the tender the security deposit in the form of a Draft/Call Deposit to be drawn at the Nationalised Bank within the jurisdiction of Municipal Board, Jorhat. For each of the bazaar/parking stand, separate security deposit and tender will required to be submitted.

2) If the tenderer belongs to SC/ST, he may deposit 50% of the security deposit. The caste certificate must be enclosed with the tender. Otherwise, the tender will be rejected.

3) The tenderer is required to enclose the following documents with the tender. Otherwise, tender will be rejected.

1) Income Tax Certificate- 2015-16 (I.T. Return),

2) Bakijai Clearance Certificate - 2015-16,

3) Municipal Tax Clearance Certificate (upto 31st March, 2016),

4) Affidavit affirming that the terms and conditions mentioned in the NIT will be a bided by and that the tenderer is not a defaulter on earlier occasion.

5) The tenderer belonging to Panchayat area are required to enclose with the tender a residential certificate from the President, Panchayat/Block Development Officer.

6) 3(three) copies of passport size photo of tenderer.

All the relevant documents must be attested by a Gazetted Officer."

5. At this stage, it will be appropriate to take note of the basic case presented by each of the petitioners and the response thereto by the Board.

(i) WP(C) No. 3440/2016.

The petitioner, namely, Shri Nitul Das, submitted his tender for Truck Stand. Because of imposition of Code of Conduct for the Assam Legislative Assembly Election, 2016, tenders received were not opened by the Board and the same were kept at the Treasury and finally tenders were opened on 29.04.2016. The petitioner's bid at Rs. 14,01,000/- was 3rd highest and one Achurjya Muktiar was the highest bidder with his bid value of Rs.16,92,500/- followed by Bishal Saikia with his bid amount of Rs.15,05,501/-. In Paragraph 4, it is stated that the 2(two) higher bidders had withdrawn their bids and thus, the petitioner became the highest tenderer. There was attempt from the very inception by some interested groups to frustrate the tender process. The petitioner was expecting to get settlement and as the grapevine had it that the Board was contemplating to give temporary settlement to the existing lessees, he made enquiries and in the process thereof, came to learn that the Chairman of the board, by a letter dated 30.04.2016, had intimated the existing lessee of the Truck Stand that as per the decision of the Board adopted in the 10th General Meeting, he was allowed to collect toll up to 30.06.2016. It was stated in the said letter that the said decision was taken due to irregularity that had occurred at the time of opening of tenders for settlement of markets/parking stands. The petitioner had requested to provide the Comparative Statement and the Resolution, if any, taken by the Board for cancellation of the tender process initiated vide NIT dated 15.02.2016 but the same was not given to him. Recourse taken by one of the tenderers by filing an application under the Right to Information Act, 2005 also did not yield any result. Due to non-finalization of the tender process, the petitioner approached this Court by filing WP(C) No.3249/2016. Subsequent thereto, proving the apprehension of the petitioner to be correct, the Board issued a fresh NIT dated 30.05.2016. The NIT issued on 30.05.2016 is almost identical with the earlier NIT dated 15.02.2016 with the exception that period had been reduced to 9(nine) months by keeping the minimum Government value same. Another change in the NIT is increase in the rates of fees/tolls to be realized from the various sources, which is about Rs.5/-. The Fresh NIT was issued without cancelling the earlier NIT. Prayer made in this writ petition is to set aside the tender notice dated 30.05.2016 and to direct the respondents to settle the Truck Stand with the petitioner.

In the affidavit filed, the stand taken by the Board is that the process of NIT was defective and, therefore, the Board resolved in its General Meeting to issue a fresh NIT. Most of the bidders could not give the required documents as per the NIT dated 15.02.2016 and thus, scope was given to the bidders to rectify the tenders and, therefore, the Board could not finalize the tender process. On examination by the Tender Evaluation Committee, tenders of all the tenderers were found to be defective so far as technical bid is concerned. The bid of the petitioner is exorbitant. 75% of tender documents submitted by the tenderers are found to be defective. NIT dated 15.02.2016 was cancelled as most of the tender documents were defective.

An additional affidavit was filed by the Board stating that for 15(fifteen) numbers

of markets/parking stands, 193 tenders of tender papers had been collected by intending tenderers out of which 166 numbers had been submitted. 90% to 95% tenders were defective/incorrect and not a single bidder was found suitable in respect of most of the markets/parking stands in connection with the said NIT. All the tenderers had submitted attested Xerox copies of affidavits and not a single bidder had mentioned in the affidavit about the markets/parking stands for which they intended to get settlement. Bidders/ tenderers quoted their rates upto 500% above the scheduled rates and thus, the rates were considered to be exorbitant. The petitioner had filed reply affidavit to the additional affidavit as well as to the affidavit-in-opposition.

(ii) WP(C) No.3777/2016

In this writ petition, the petitioner, namely, Shri Biman Saikia, did not state for which market/stand he had submitted his tender but from the statements made in Paragraph 10 of the writ petition, it appears that he was granted settlement of B.B. Hall Bazar vide order dated 26.03.2013 for the year 2013-14 and in terms of the decision of the Board dated 29.04.2016, he was allowed to continue till 30.06.2016. It is pleaded that the decision to cancel the tender and to issue the NIT dated 30.05.2016 is on extraneous consideration at the behest of certain individuals and to accommodate the defective tenderers, steps were taken to issue the fresh NIT. Prayer made in this writ petition is for setting aside the NIT dated 30.05.2016 and for making settlement pursuant to the earlier NIT dated 15.02.2016.

The stand taken by the Board in the affidavit is more or less same as taken in the affidavits filed in WP(C) No.3440/2016. In the affidavit filed in this writ petition, the Board has also not indicated the rate quoted by the petitioner and also the highest bid in respect of B.B. Hall Bazar but it appears from the Comparative Statement that the petitioner is the 6th highest bidder. In the affidavit filed by the Board, nothing specific about the tender of the petitioner is stated. Only allegation against the petitioner can be taken to be included in the statement that not a single bidder had mentioned in the affidavit about the markets/stands/parking lots for which they intended to give settlement.

No reply affidavit was filed by the petitioner against the said affidavit filed by the Board.

(iii) WP(C) No.3927/2016

In this case also, the petitioner, namely, Shri Jayanta Saikia, has not indicated in response to which market/parking stand, he had submitted his tender or what was the rate offered by him. The case is structured more or less on the same premises as WP(C) No.3777/2016. The petitioner herein was also granted settlement vide order dated 26.03.2013 and being the existing lessee was allowed to continue till 30.06.2016 in respect of Rickshaw stand.

The stand taken by the Board in the affidavit is more or less same as the stand

taken in the affidavit filed in WP(C) No.3440/2016. It appears from the Comparative Statement that the petitioner is the 10th highest bidder. The petitioner has not filed any reply affidavit against the affidavit filed by the Board.

(iv) WP(C) No.4010/2016

The petitioner, namely, Sumadhur Saikia, participated in the tender process initiated vide NIT dated 15.02.2016 for parking stand for two wheelers and four wheelers. The factual matrix of the case is more or less in the same lines as that of WP(C) No.3440/2016. The petitioner's bid at Rs.8,86,200/- is the 4th highest bid.

One Nabajyoti Das, who had offered Rs.10,55,999/- was the highest tenderer and one Sanjeeb Das was the 2nd highest tenderer with his bid amount of Rs. 9,77,999/-. The 3rd highest bidder is one Sushil Dutta, at Rs. 9,49,500/-. In Paragraph 5, it is stated that the higher bidders had withdrawn their bids and accordingly, the petitioner had emerged as the highest valid tenderer. The Comparative Statement reproduced by him at Paragraph 4 shows that Rishabh Kr. Bora quoted Rs.67,07,700/- and Nitul Das quoted Rs.81,10,001/-, which are apparently incorrect figures.

The affidavit filed by the Board in the instant case is also in tune with the affidavit filed in WP(C) No.3440/2016. It was stated that Sanjib Das and the petitioner had not mentioned the name of the market in the affidavit submitted along with the tender paper. Paragraph 8 of the affidavit, however, deals with Chowk Bazar, which is not the subject matter of the writ petition. It appears that the petitioner being an existing lessee was also allowed to continue up to 30.06.2016.

(v) WP(C) No.3506/2016

The petitioner, namely, Shri Suchitra Das, had submitted his tender for Public Bus Stand and this petition is structured in the same line as that of WP(C) No.3777/2016. The petitioner with his bid amount of Rs.7,90,500/- is the 3rd highest tenderer behind Achinta Das, who submitted tender for Rs.9,50,000/- and Raja Bora, who submitted bid amount of Rs.8,21,551/-. It is pleaded in Paragraph 5 that the higher bidders had withdrawn their bids and, therefore, the petitioner is the highest bidder.

The affidavit filed in this case by the Board is more or less similar to WP(C) No.3440/2016. No reply affidavit was filed by the petitioner against the said affidavit.

(vi) WP(C) No.3446/2016

In this writ petition, the petitioner, namely, Shri Champalal Das, submitted tender for Chowk Bazar (written as Chock Bazar in the writ petition). The petitioner is the 3rd highest bidder at his bid value of Rs.36,22,555/- behind Shri Luku Das, who quoted Rs.51,51,552/- and Shri Champak Mazumdar, who quoted

Rs.38,21,000/-. It is stated in Paragraph 5 of the writ petition that Luku Das and Champak Mazumdar had withdrawn their bids and, therefore, the petitioner became the highest tenderer.

The stand taken by the Board in the affidavit is more or less same as the stand taken in the affidavit filed in WP(C) No.3440/2016. No reply affidavit was filed by the petitioner against the affidavit filed by the Board.

(vii) WP(C) No.3930/2016

In this writ petition, the petitioner, namely, Shri Dipak Saikia, is the sitting lessee of Auto Bikram Parking Stand. It appears that he submitted tender for Auto Bikram Parking Stand and was allowed to continue upto 30.06.2016. This case is also structured more or less on the same line as that of WP(C) No.3777/2016. In the writ petition, the petitioner has not indicated the rate quoted by him.

In the affidavit filed by the Board, it was pleaded that the writ petitioner had withdrawn his deposit and has also participated in the fresh tender and accordingly, it is pleaded that the writ petition is not maintainable. In the affidavit, the Board has neither indicated the rate quoted by the petitioner nor his position in the Comparative Statement. However, it appears from the Comparative Statement produced before the Court, that the petitioner is the 13th highest tenderer. No reply affidavit was filed by the petitioner against the affidavit filed by the Board.

(viii) WP(C) No.3902/2016

In this writ petition, the petitioner, namely, Md. Mukibur Rahman, submitted his tender for Slaughter House. The petitioner is the 2nd highest bidder at his bid value of Rs.2,10,000/- after Azad Choudhury, who quoted Rs.3,21,000/-. It is stated in paragraph 5 of the writ petition that the highest tenderer had withdrawn his bid subsequently and, therefore, the petitioner became the highest bidder. The writ petition is more or less in similar lines as in WP(C) No.3440/2016.

In Paragraph 7 of the affidavit, reference is made to "Chock Bazar", though the case pertains to Slaughter House. No reply affidavit was filed by the petitioner against the affidavit filed by the Board.

(ix) WP(C) No.3866/2016

The petitioner, namely, Shri Achurjya Muktiar, submitted tender for Natun Bazar. The petitioner is the 2nd highest bidder at his bid value of Rs.4,78,000/- after Shri Minku Hazarika, who was the 1st highest bidder at his bid value of Rs.5,00,499/-. The petition is structured more or less in the same lines as in WP(C) No.3440/2016. In paragraph 5 of the writ petition, it is stated that the highest tenderer had withdrawn his bid subsequently and, therefore, the petitioner had emerged as the highest tenderer. The stand taken by the Board in the affidavit is more or less same as the stand taken in the affidavit filed in

6. Mr. P. P. Baruah, learned counsel appearing for some of the petitioners submits that the price bid of the petitioners having been opened, having regard to the tender condition that price bids are to be opened only when documents in envelope No.1 are found to be correct, the same necessarily means that the tender documents of the petitioners are found to be correct and valid. With regard to the plea taken by the Board that the petitioners had not submitted original affidavit along with the tender documents, Mr. Baruah submits that the petitioners had submitted photocopy of the affidavit, duly attested by Gazetted Officer. According to him, this could not have afforded the Board a ground for rejecting the tender of the petitioners. Admitting that the affidavits submitted by the petitioners along with the tender documents were in photocopy form, Mr. Baruah submits that the only way the petitioners could have complied with the terms and conditions of the tender, in respect of affidavit, was by way of submitting photocopies of the affidavit attested by Gazetted Officer. As original affidavit could not have been attested by Gazetted Officer, the petitioners had to take recourse to make photocopies of the original affidavit and get them attested by Gazetted Officer. It is further submitted in response to the stand of the Board that the bids of the petitioners are abnormally high and if the bids were accepted the same would have caused harassment to the people, Mr. Baruah submits that whatever tolls are to be collected are specified and notified and it cannot be countenanced that the Board has no means to enforce the rates fixed by it and, therefore, the plea taken that the bids of the petitioners had to be rejected due to the extreme high rates quoted by them has to be rejected at the threshold. In support of his submission, Mr. Baruah has placed reliance on the decision of the Supreme Court in the case of *Jespar I. Slong v. State of Meghalaya & Ors.*, reported in (2004) 11 SCC 485, wherein the Apex Court held that if the State decides to give its largess to the public, it has an obligation to see that it fetches the best possible value for the same, provided that it does not in any manner affect the rights of other citizens. He has also submitted that the Board has taken inconsistent views in different affidavits filed by it with regard to the percentage of tenders supposedly not fulfilling the terms and conditions of the NIT. In one affidavit it has been stated that 90-95% tenders were defective, whereas in another affidavit it has been stated that 70-75% tenders were defective. Even if 90-95% tenders were invalid, then also the remaining were valid tenders and, therefore, the recourse taken for issuing a fresh NIT has to be annulled. Mr. Baruah has also drawn the attention of the Court to the resolution taken by the Board whereby the decision was taken to issue fresh NIT. According to him, the decision to go for a fresh NIT was taken only to accommodate the Board's favourite persons. There was no discussion on the alleged defects in the tenders submitted by the petitioners. He strenuously argued that the respondent Board had not controverted the statements of the petitioners that the higher bidders having withdrawn their bids, the petitioners had emerged the highest valid tenderers in respect of the markets/parking stands etc. where they had

submitted their tenders and, therefore, a writ of mandamus may be issued to settle the markets/parking stands in their favour.

7. Supplementing the arguments advanced by Mr. Baruah, Mr. B.K. Das, learned counsel, who appears for the rest of the petitioners, has submitted that the grounds taken by the Board to disqualify the petitioners are unfounded inasmuch as the price bids had already been opened and the rates came to be known. He submits that some legitimacy could have been attached to the impugned action of the Board if the decision had been taken prior to opening of the price bids. Mr. Das has placed reliance on the decision of the Apex Court in the case of *M/s Kasturi Lal Laxmi Reddy & Ors. v. State of Jammu & Kashmir*, reported in (1980) 4 SCC 1, to contend that though there is no obligation on the Government to deal with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure and where the Government is dealing with public by way of entering into contracts or other forms of largess, the Government cannot act arbitrarily at its sweet will. He has further submitted that the writ petitioner in WP(C) No.3930/2016 having withdrawn the earnest money deposit pursuant to the NIT dated 15.02.2016, the writ petition has become infructuous.

8. The learned counsel for the petitioners has submitted that the writ petitioners in WP(C) No.3777/2016, WP(C) No.3927/2016, WP(C) No.3930/2016 and WP(C) No.4010/2016 are still continuing to operate the market on the strength of extension order though initially extension order was passed up to 30.06.2016.

9. Mr. Y. Doloi, learned counsel appearing for the Board, with reference to the resolution of the Board annexed with WP(C) No.4010/2016, submits that because of the large-scale defects in the tenders submitted by the tenderers as well as serious defect in the process of opening of tenders, the Board decided to go for a fresh NIT in public interest and he has also highlighted that the petitioners had also participated in the fresh NIT. Therefore, the petitioners have no locus standi to maintain these writ petitions. It is submitted by him that envelope No.2 ought not to have been opened by the Board without satisfying and verifying the documents enclosed in envelope No.1. He has further submitted that in the attending facts and circumstances of the cases, the writ petitions lack merit and, therefore, the same are liable to be dismissed and the Board may be permitted to proceed with finalisation of the fresh NIT dated 30.05.2016.

10. I have considered the submissions of the learned counsel appearing for the parties and have perused the materials on record.

11. Perusal of the averments made in the writ petitions as well as the Comparative Statements go to show that none of the petitioners are highest bidders. Writ petitioners in WP(C) No.3440/2016, WP(C) No.3777/2016, WP(C) No.3927/2016, WP(C) No.4010/2016, WP(C) No.3506/2016, WP(C) No.3446/2016, WP(C) No.3902/2016 and WP(C) No.3930/2016 are 3rd, 6th, 10th, 4th, 3rd, 3rd, 2nd and 2nd highest bidders, respectively. Therefore, on the

general principle that the highest tenderer shall be awarded settlement, the petitioners could not have legitimately expected that the settlement orders would have been issued in their favour. It is also not their case that the higher bidders had submitted defective tenders. What is argued by the learned counsel for the petitioners is that higher tenderers having withdrawn their tenders and such statement of the petitioners having not been controverted by the respondent Board, it must be held that the petitioners are the highest tenderers and as the alleged ground of inadequacy in their tenders is wholly untenable, issuance of fresh tender had greatly prejudiced them as they would, otherwise, be entitled to settlement.

12. It is not correct that in each and every writ petition, averments are made that the higher tenderers had withdrawn their bids as a result of which the petitioners had emerged as the highest valid tenderers. There are no such statements regarding withdrawal of tenders by higher bidders in WP(C) No.3777/2016 and WP(C) No.3927/2016. Statements regarding withdrawal of higher bids are made in Paragraph 4, 5, 5, 5, 5 and 5 in WP(C) No.3440/2016, WP(C) No.3446/2016, WP(C) No.4010/2016, WP(C) No.3506/2016, WP(C) No.3902/2016 and WP(C) No.3930/2016, respectively. It is true that the statements relating to withdrawal of bids by higher bidders are not dealt with and controverted by the Board. But that will not take the case of the petitioners further. The petitioner(s) have sworn the statements made in paragraph 4, 5, 5, 5, 5 and 5 as true to their knowledge. It is not based on any records of the Board. There is no endorsement in the Comparative Statements or in the records produced by the Board evidencing withdrawal of the bids by any higher tenderer. In the normal course, it will be difficult to presume that competitors in the tendering process will share their tender related issues with their rival competitors. Merely because the Board did not traverse the statements, when the petitioners had sworn the statements to be true to their knowledge, will not make them highest bidders. The higher bidders are also not made parties to the proceedings. The upshot of this discussion is that the petitioners could not have legitimately expected settlement in their favour pursuant to the NIT dated 15.02.2016.

13. A striking feature in respect of settlements involved in the present writ petitions is that none of the highest tenderers had approached this Court challenging the decision of the Board to go for a fresh NIT and subsequent issuance of the NIT dated 30.05.2016. The allegations made in the writ petitions that in order to sub-serve the interest of the blue eyed boys of the Board, earlier NIT was not taken to its logical conclusion and a fresh NIT was issued, is difficult to accept when such a plea is raised by persons such as petitioners, who would not have been otherwise eligible to get settlement, they being not the highest tenderers. With regard to the submission of the learned counsel for the petitioners that their price bids having been opened, it must be held tenders of the petitioners must be treated to be valid, it is worth remembering that price bid of all the tenderers were opened and if the argument of the petitioners is

accepted, tenders of all tenderers are to be considered as valid and if that be so, then also the petitioners, on the general principles of distribution of state largess, could not have legitimately expected settlements in their favour. When there are comments made with regard to shortcomings of the tenders submitted by tenderers, which according to the tendering authority, make the tenders not conforming to tender conditions, question of opening the price bid of such tenderers could not have arisen. The procedure adopted in processing the tender is faulty from the stage of opening of the envelopes itself. It appears that the persons entrusted to process the tenders had discharged their obligations very perfunctorily.

14. It is not disputed that in all 166 tenders were submitted. When it is noticed that prescribed procedure in opening of the tenders was not followed, I am of the considered opinion that the decision to go for fresh tender as well as issuance of the NIT dated 30.05.2016 cannot be interdicted at the instance of the writ petitioners, who do not suffer any prejudice because of the aforesaid actions taken by the Board.

15. Resultantly, the writ petitions are dismissed. No costs.