
(2019) 06 GAU CK 0013
In the Gauhati High Court
Case No : Writ Appeal No. 140 Of 2019

N.T. Agency

APPELLANT

Vs

State Of Arunachal Pradesh And Ors

RESPONDENT

Date of Decision : 07-06-2019

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2019) 06 GAU CK 0013

Hon'ble Judges : A.K. Goswami, J; Manish Choudhury, J

Bench : Division Bench

Advocate : I. Choudhury, S. Biswakarma, A. Chandran, S.S. Dey, D.J. Kapil

Final Decision : Dismissed

Judgement

A.K. Goswami, J

1. Heard Mr. I. Choudhury, learned senior counsel for the appellant. Also heard Mr. A. Chandran, learned Government Advocate, Arunachal Pradesh, appearing for the respondent Nos.1 to 5 and Mr. S.S. Dey, learned senior counsel, appearing for the respondent No.6.

2. Challenge in this intra-Court appeal is to an order dated 21.05.2019 passed by the learned Single Judge in WP(C) No.68(AP)/2019 dismissing the writ petition filed by the appellant.

3. A Notice Inviting Tender (NIT) dated 12.09.2018 was issued by the Executive Engineer, Yazali Division, PWD, Arunachal Pradesh, inviting online bids on 2(two) Bid System in respect of 3(three) works. The work in question in the writ petition relates to C/o Road from Yazali Mengio Road to Sito via Tepi Village. The estimated cost for the said work was projected at ` 12,50,00,000/-. 7(seven) number of tenderers, including the appellant and the respondent No.6, had submitted their tenders and thereafter, on consideration of the technical bids, the tenders of 3(three) tenderers, including the appellant and the respondent No.6, were found to be responsive. Though financial bids were to be opened on

05.11.2018, finally it came to be opened on 08.11.2018. The bid of the respondent No.6 was found to be lowest and accordingly, a recommendation was made on 14.11.2018 for allotment of the work in its favour. The appellant, projecting that there are number of anomalies in the tender of the respondent No.6, filed a representation on 14.11.2018, i.e. the very date on which the recommendation was made. Thereafter also representations were made on 19.11.2018, 20.11.2018 and 27.11.2018. As all these representations failed to evoke any response, the appellant filed a writ petition, which was numbered as WP(C) No.629(AP)/ 2018. The said writ petition came to be disposed of by an order passed on 12.12.2018, whereby the State respondents were directed to dispose of the representation dated 27. 11.2018 within a period of 15(fifteen) days from the date of receipt of a certified copy of that order. It was further provided that no further action shall be taken on the recommendation dated 14.11.2018 till the representation was disposed of, making it clear that once the representation is disposed of, the interim order will spend its force.

4. On the basis of a reply given to the appellant in an application filed under the provisions of the Right to Information Act, 2005, the appellant having come to learn that letter to proceed had been issued, the appellant instituted the second writ application, which was numbered as WP(C) No.32(AP)/2019 challenging the letter to proceed dated 06.12.2018. Side by side, alleging wilful and/or deliberate violation of the order dated 12.12.2018, a contempt application came to be filed, which was registered and numbered as Cont. Case (C) No.3/2019.

5. During the course of hearing of the said writ petition, an order dated 06.02.2019 passed by the Commissioner (PWD) disposing of the representation dated 27.11.2018 having been produced, the writ petition came to be closed by an order dated 07.02.2019, reserving liberty to the appellant to assail the said order dated 06.02.2019. The learned single Judge also disposed of the contempt petition observing that there is no material on record to proceed further in the contempt case.

6. The appellant, thereafter, instituted WP(C) No.68(AP)/2019 challenging, amongst others, the recommendation dated 14.11.2018, letter to proceed dated 06.12.2018 and the order dated 06.02.2019. A writ of mandamus was also prayed for directing the respondents to award the work to the appellant and in the alternative, to issue a fresh NIT. A perusal of the order dated 21.05.2019 goes to show that the learned Single Judge took a view that there being no arbitrariness in the decision making process, interference in exercise of power under Article 226 of the Constitution of India, is not warranted. The contention advanced on behalf of the appellant that financial bid of the appellant had been altered behind his back and that the tender of the respondent No.6 having contained numerous anomalies, the same could not have been accepted, were repelled. With regard to the first ground, the learned Single Judge took a view that there was no appropriate pleading to that effect and that apart, the figure eventually arrived at by the Department was based on simple arithmetic. So far

as the second ground is concerned, while doing so, the learned Single Judge relied on Clause 10 of the bid document and also noted that the work had progressed in the meantime.

7. Mr. Choudhury, learned senior counsel for the appellant has submitted that the decision making process culminating in issuance of the letter to proceed is not transparent and devoid of any rational inasmuch as the authorities had most arbitrarily increased, without any opportunity being granted to the appellant, the bid value of the appellant to ` 14,32,88,547.83, from ` 11,87,51,250.00, quoted by the appellant. At the same time, the respondent authorities changed the Bill of Quantities (BoQ) reflected in the tender of the respondent No.6 and also worked out the rates despite there being difference in the rate quoted by the appellant in figures and words. In this connection, Mr. Choudhury has drawn the attention of the Court by way of illustration to serial No.4(c), wherein figure was quoted as "` 500/-" and in words, it was written as "five hundred and fifty". There are number of instances of this kind, he contends. With regard to the BoQ, he has drawn the attention of the Court to one particular "Head", namely, "Formation Cutting", by way of illustration. He contends that BoQ shown in the NIT in respect of "Formation Cutting" is not the same as quoted by the appellant. According to him, the tender of the respondent No.6 ought not to have been entertained in view of grave anomalies and by accepting the bid of the respondent No.6, the appellant had been discriminated. It is submitted by him that these alterations etc. was possible to be done only because of the fact that in derogation of the professed stand of the Government of Arunachal Pradesh that all e-tenders would be conducted by the department itself, for reasons not known, the instant NIT was outsourced to private entity, called Nexttenders (India) Private Limited (for short, "Nexttenders"), which did not upload the various stages of evaluation of the tenders. It is further submitted by him that though the State respondents and the respondent No.6 submitted before the learned Single Judge that considerable progress of the work had taken place, but in reality, the same had not taken place. It is further submitted by him that because of the interim order passed by the learned Single Judge, at the most, maximum 20(twenty) days time was available for the respondent No.6 to do any substantial work. Accordingly, he tries to impress upon the Court that the progress of work should not persuade this Court to take a view that it will not be a public interest to interfere with the work allotted to the respondent No.6.

8. Per contra, Mr. Dey has submitted that the respondent authorities and, more particularly, the Tender Evaluation Committee had totalled up the figures quoted by the appellant under different heads beginning from A to M and on simple addition, it is found that the bid of the respondent No.6 in total was not as projected by the appellant, but is completely a different figure. It is not a fit case where any alteration of the bid of the appellant had been done as is sought to be made out by Mr. Choudhury and that the same could not have been done in absence of the appellant. He has pointed out that the Government of Arunachal Pradesh follows CPWD Works Manual, 2014 and in terms of Clause 20.4.3.2

thereof, if a tenderer gives a bid, which is more than 10% of the estimated cost, the same results as an invalid tender and appellant having actually quoted a rate, which is 14.63% above the projected cost, the tender of the appellant is, on the face of it, is an invalid tender and, therefore, at its instance, at any rate, a writ petition is not maintainable. Dealing with the anomalies cited by Mr. Choudhury, Mr. Dey has drawn the attention of the Court to Clause 10, which was also taken note by the learned Single Judge, to contend that if there is a mismatch of the figures and words in respect of the rates, the authority is to ascertain whether the total indicated tallies with either the rate in figure or in words, quantity being constant. Taking the very same instance which Mr. Choudhury has cited, he has pointed out that the quantity in respect of the rate was indicated as "500/-" in figure and in words "five hundred and fifty". The quantity was 20(twenty) and the amount in respect of that head was given as "10,000/-". 10,000/- is the total when the rate is taken as 500/- and, therefore, "rupees five hundred fifty" written in words will not have any consequence. This is precisely what was done by the respondent authorities and, therefore, no fault can be attributed in accepting the tender of the respondent No.6.

9. The BoQ, where there is stated to be discrepancy, is not of any consequence and the same being very negligible, the respondent authorities took note of the quantity as was mentioned in the NIT. Any rate, the appellant could not have altered the BoQ on its own. Mr. Dey has contended that in none of the representations, the appellant had made any grievance with respect to induction of "Nexttenders" by the respondent authorities as the service provider and at any rate, the appellant having participated in the NIT, such a plea cannot be entertained at this stage. He also contends that the order of status quo did not impede or put any embargo on the respondent No.6 to carry on with the work inasmuch as by the time the order dated 12.12.2018 was passed in WP(C) No.629(AP)/2018, notice to proceed to work having been issued on 06.12.2018. There being no order restraining the respondent No.6 from proceeding further, the work had commenced in right earnest. It is submitted by him that the contention advanced by Mr. Choudhury that only 20(twenty) days were available for the respondent No.6 to do any work is wholly misconceived.

10. Mr. Chandran has submitted that on due consideration, the respondent authorities, finding that the appellant is the lowest tenderer, had issued the work order and work has substantially progressed. It is also submitted by him that help of an outside service provider was necessary to be taken as the State is not yet fully equipped as of today to undertake such e-tender on its own in respect of all e-tenders.

11. We have considered the submissions advanced by the learned counsel appearing for the parties and have perused the materials on record.

12. So far as the plea taken by Mr. Choudhury regarding involvement of "Nexttenders" is concerned, we notice that in all the representations beginning

from the representation dated 14.11.2018, such a plea was not taken by the appellant, though such a plea was taken in the writ petition. It is also not demonstrated in what manner involvement of the respondent No.6 had derailed the process of the NIT and how because of their engagement, the appellant had been prejudiced. In that view of the matter, we find no force in the submission of Mr. Choudhury in respect of engagement of "Nexttenders".

13. The sum total as given by the appellant in its tender from A to M (A+B+C+D+E+ F+G+H+I+J+K+L+M) was ` 11,87,51,250.00. "A to M" are different heads such as jungle clearance, formation cutting, etc. A submission was made by Mr. Choudhury that in arriving at the figure of ` 11,87,51,250.00, the amount in respect to M, being ` 11,62,271.494, was not taken into account and in terms of Clause 10, the appellant was entitled to waive that amount. The argument is fallacious inasmuch as even if we exclude the sum of ` 11,62,271.494, the figure that is arrived at is ` 14,18,22,809.474. It is also seen that total of A+B+C+D+E+ F+G+H+I+J+K+L+M works out to ` 14,32,88,547.774. We find that it is not a case where the Department had imported some figures and added up to the financial bid of the appellant. If that was the case, contention of Mr. Choudhury that before doing so, an opportunity to the appellant to explain the position should have been granted, perhaps, merited consideration but not in the factual matrix of the present nature. If the figure of ` 14,18,22,809.474 is taken into account, then it is 13.45% above the estimated cost. If the total of ` 14,32,88,547.774 is taken into account, it will be 14.63% above the estimated value of the tender. Clause 20.4.3.2 of the CPWD Works Manual, 2014 clearly indicates that variation up to 10% only may be allowed for peculiar situations and in special circumstances, that too, with reasons for doing so, and that tenders above the above limit should not be accepted. This position is not disputed by Mr. Choudhury. On the facts that have emerged, clearly, the tender of the appellant could not have been considered.

14. Clause 10 of the bidding document reads as follows:-

"10. In the case of Item rate Tenders, only rates quoted shall be considered. Any tender containing percentage below/above the rates quoted is liable to be rejected. Rates quoted by the contractor in item rate tender in figures and words shall be accurately filled in so that there is no discrepancy in the rates written in figures and words. However, if a discrepancy is found, the rate which correspond with the amount worked out by the contractor shall unless otherwise proved be taken as correct. If the amount of an item is not worked out by the contractor or it does not correspond with the rates written either in figures or in words then the rates quoted by the contractor in words shall be taken in taken as correct. Where the rates quoted by the contractor in figures and in words tally but the amount is not worked out correctly, the rate quoted by the contractor will unless otherwise proved be taken as correct and not amount. In event no rate has been quoted for any item(s), leaving space both in figure(s), words and amount blank, it will be presumed that the contractor has included the cost of this/these item(s)

in other items and rate for such item(s) will be considered as zero and work will be required to be executed accordingly.

15. A perusal of the above Clause 10 would indicate that course of action adopted by the respondent authorities in reconciling the amount quoted by the respondent No.6 cannot be faulted. The respondent authorities had taken the amount in total under various heads indicated by the respondent No.6 as such amount tallied with the quantity multiplied by either the rate in words or in figures. The discrepancy referred to by Mr. Choudhury as an instance regarding change of BoQ in connection with formation cutting, when taken note of, goes to show that the respondent No.6 had quoted 438723 Cum while in the BoQ, as notified by the State respondents, it is 438723.08 Cum. The discrepancy is very insignificant. It is also noticed that while making the comparative statement, the total amount in respect of the same was reflected as ` 61,42,123.20, which was the amount quoted by the respondent No.6 but at the same time, the BoQ was reflected as was indicated in the NIT. Variation of BoQ in respect of other instances is also negligible and the same has been appropriately addressed by the respondents. In totality of the facts and circumstances, we are of the opinion that the same will not materially alter the tender submitted by the respondent No.6.

16. On the basis of the materials on record, we do not find that the process adopted and the decision made by the State respondents is malafide or arbitrary or that it was intended to favour the respondent No.6. We are further of the opinion that the State respondents acted reasonably and fairly and public interest is not compromised.

17. In view of the above discussions, we are of the opinion that the learned Single Judge was wholly justified in passing the order dated 21.05.2019. In view of the above determination, it is not really necessary for us to go into the question as to whether the respondent No.6 had made substantial progress with the work or not.

18. Resultantly, the writ appeal stands dismissed. No cost.