(2014) 05 GAU CK 0003

In the Gauhati High Court

Case No : WA No. 115 of 2014

Prabin Kumar Mandal APPELLANT

Vs

The State of Assam and Others RESPONDENT

Date of Decision : 16-05-2014

Acts Referred:
Constitution of India, 1950 — Article 14

Citation : AIR 2014 Guw 149 : (2014) 4 BC 353 : (2015) 1 GLD 257 : (2014) 4 GLT 474 : (2014) 3 GLT 146

Hon'ble Judges : Abhay Manohar Sapre, C.J;Ujjal Bhuyan, J

Bench : Division Bench

Advocate : A. Sarma, Advocate for the Appellant; U. Rajbongshi, Mr. A.K. Bhuyan and Mr. R. Ali, Advocate for the Respondent

Final Decision : Allowed

Judgement

Abhay Manohar Sapre, C.J.—This is an intra-court appeal filed by the writ petitioner of WP(C) No. 806 of 2014 under Rule 2(3) of Chapter V-A of the Gauhati High Court Rules against the order dated 03.03.2014 passed by the Single Judge in abovementioned writ petition.

2. By impugned order, the learned Single Judge dismissed the appellant''s writ petition and declined to grant him the relief claimed in the writ petition.

3. So the short question which arises for consideration in this writ appeal is whether learned Single judge was justified in dismissing the appellant''s writ petition?

4. In order to appreciate the controversy involved in the writ petition and now in appeal, few relevant facts need mention herein below.

5. On 11.12.2013, the State (Executive Engineer, IWT, Division Guwahati) invited tenders for providing "Ferry Service" between the places called "Hohuwa-Sombaria-Bhogdia-Directory, II) Majortoop (Alikash) Bhagnamari, Nowbhaja,

Dekardiya, Kalartoop, Saralpara, Kalapani (Club Basis)" in Brahmaputra River. The tender was for a period of 2 consecutive years (2013-14 and 2014-2015).

6. Clause 5 of the tender condition provided that the tenderers were required to deposit earnest money in the form of Bank Draft amounting to 5% of the rates/ amount quoted by them in the tender whereas those who belong to SC/ST were required to deposit 2.50% of their quoted rates. Sub Clauses (a) (b) (c) and (d) of Clause 5 provided the mode and the manner as to how the earnest money required to be deposited by the tenderers along with their tender and it also provided that non compliance thereof would entail rejection of the tender. Clause 3 provided that bid value/rates should be quoted legibly both in words and figures. Clause 13 provided that no tender would be accepted for settlement of the ferry services if the tender amount is found less than the estimated amount as compared to the last year settlement value bid. There were other conditions in the tender documents but so far as this appeal is concerned, those conditions are not relevant.

7. The appellant (writ petitioner) and respondent no. 5(R-5) submitted their tenders along with 3 more tenderers. The details of their tender such as their bid value, amount deposited towards earnest money is as follows.

8. The authorities examined the tenders and found the tender of respondent no. 5 (Ismail Ali) to be higher (Rs. 21, 00,000) than the appellant (writ petitioner) whose bid value was Rs. 19, 00, 000. The Respondent no. 5''s tender was accordingly accepted. So far as another tenderer whose rate was Rs. 23,00,000/- he did not pursue his case. It is against this acceptance of the respondent no. 5''s tender and rejection of appellant''s tender, the appellant (writ petitioner) felt aggrieved and filed the writ petition out of which this appeal arises challenging the decision of the authorities.

9. It was the case of the appellant (writ petitioner) before the writ court and now before this court that since the respondent no 5 did not ensure compliance of clause 5 of the tender notice in as much as he failed to deposit 5% of his total bid value towards earnest money and hence his tender was liable to be rejected as being invalid. It was pointed out that in terms of clause 5 of the tender; every tenderer was required to deposit earnest amount of 5% of their total bid value which according to the rate quoted by the respondent No. 5 was Rs. 21,00,000/- and therefore he was required to deposit Rs. 1,15,000 being 5% of Rs. 21,00,000/-. It was pointed out that respondent no. 5 deposited only Rs. 58,057, as against Rs. 1,15,000. It was for this reason, his tender deserved rejection at the threshold.

10. It was further pointed out that so far as appellant was concerned, he had quoted Rs. 19,00,000 for two years and therefore, he deposited Rs. 47,500 towards earnest amount being 5 % of Rs. 19,00,000 (bid value). His tender should have been therefore accepted being the highest amongst the remaining valid tenderers in the field.

11. The case of the State authorities and also that of the respondent no. 5 was that since respondent no. 5 had quoted rate for one year (Rs. 10,50,000) and therefore he deposited Rs. 55,000 being 5 % of the rate quoted by him towards earnest money and which was according to him was as per clause 5 of the tender document.

12. The writ court found substance in the contention of the respondent no 5 coupled with the fact that respondent no 5''s rates were higher than the rate quoted by the appellant and hence finding no merit in the contention of the writ petitioner dismissed the writ petition which has given rise to filing of the writ appeal by the unsuccessful writ petitioner.

13. Learned counsel for the appellant (writ petitioner) reiterated his submissions which he had pressed in service before the writ court so also the respondents who supported the reasoning and the conclusion of the writ court which resulted in dismissal of the writ petition.

14. Having heard the learned counsel for the parties and on perusal of the record of the case, we are inclined to allow the writ appeal in part by setting aside the impugned order with directions in the form of mandamus for ensuring its compliance.

15. Following recitals in the advertisement and clause 5 of the tender documents are relevant. They read as under:-

[advertisement]

The sealed tender affixing court fee stamp of Rs. 8.25 (Rupees eight and paise twenty five) only is hereby invited to lease out the following Govt. notified ferry service under I.W.T. Division, Guwahati-7 for 2 (two) consecutive years i.e. 2013-14 and 2014-15.

[clause 5]

5. Tenderers must have to deposit earnest money in the form of Bank Draft or deposit at call pledged in favour of Executive Engineer, Inland Water Transport Division, Guwahati/Dibrugarh/Silchar respectively amounting to 5% of the quoted amount.

(a) The Bank Draft/call deposit should be drawn from branch of the State Bank of India or any Nationalized bank of India showing deposit of the earnest money noted against each ferry pledged to the Executive Engineer, Inland Water Transport. Cash or money receipt of a previous tender if any and will not be considered as valid deposit for the present tender.

(b) Earnest money already released or old bank draft will not be accepted as earnest money.

(c) A tenderer belonging to SC or ST or other backward classes recognized by the State Govt. will be entitled to deposit 2.50% of earnest money of the quoted amount. He must mention in the tender the specific class to which he belongs along with certificate.

(d) The earnest money of the unsuccessful tender will not be released till the finalization of settlement of the ferry. Further, the earnest money of the successful tenderer would be retained till the lease period is over.

16. Reading the contents of the advertisement along with clause 5 would go to show that tenderer was expected to quote one rate for 2 years and not the rate for one year. Since the tender period was for two consecutive years (2013-14 and 2014-2015) and therefore, naturally the rates quoted had to be for two years. It was also for the reason that the advertisement did not mention that tenderer could quote rate year wise.

17. The appellant therefore rightly quoted his rate for two years and like him, one more tenderer-Manik Mondal also quoted rates for two years and accordingly deposited 5% earnest money of his quoted rates. So far as remaining three tenderers were concerned, (Sl. Nos. 3, 4 and 5 of the chart) they also quoted the rates like other two tenderers.

18. In our view, if the rates quoted by respondent no. 5 and other two tenderers appearing at item nos. 3 and 5 were taken to be for one year then the total bid value for 2 years would have been double. But since admittedly three tenderers deposited 5% of the earnest money of the bid amount mentioned in the tender, their tenders were liable to be rejected as being invalid for non compliance of requirement of clause 5 of the tender condition. In other words, their tender were liable to be rejected firstly for nonpayment of full earnest money i.e. 5% of their total bid value for 2 years as shown in the chart and secondly if their rates were for two years, then they were less than the rates quoted by the appellant.

19. In a situation like the one arising in the case, we are of the view, that appellant being the highest his tender was capable of being accepted subject to he ensuring other terms and conditions of the tender.

20. There was yet another error in the decision making process which vitiates the action.

21. If the authorities felt (though wrongly) that rate quoted by the respondent no. 5 were for one year and accordingly permitted the respondent No. 5 to amend his rates to make it double then such action on the part of the authorities was bad because it was taken behind the back of other tenderers and specially the appellant who did not get any opportunity to revise his original rates. There is nothing on record to show that when the authorities allowed the respondent no. 5 alone to amend his rates from Rs. 10,50,000 to Rs. 21,00,000.

22. It is a settled principle of law that once it is decided to allow the tenderer to revise the original rates, then every tenderer has to be afforded an opportunity to revise their rates in presence of their.

23. In this case, the authorities though allowed indulgence to respondent no. 5 to amend his original quoted rates from Rs. 10,50,000 to Rs. 21,00,000 but did not give similar opportunity to other tenderers including the appellant. Such action on the part of the State was arbitrary and against the principle of fair play attracting rigour of Article 14 of Constitution of India. It was apparently to extend undue favour to respondent no. 5.

24. In the light of foregoing discussion in normal course, we would have allowed the writ appeal in full by directing the State to straight away accept the appellant''s tender-he being the highest but having regard to the fact that the state had permitted one tenderer to revise his rates and secondly there was some ambiguity in the matter of quoting rates and thirdly to avoid further delay in finalizing tender process, the interest of justice will demand if opportunity is given to all the tenderers to revise their original rates in presence of all the tenderers.

25. We accordingly allow the appeal, set aside the impugned order, and in consequence allow the writ petition in part and while quashing the decision of the respondent (State) impugned in the writ petition, issue following writ of mandamus/directions against the State and its authorities for ensuring compliance.

1. The respondent nos. 1 to 4 (State and their authorities) would permit the tenderers appearing at item no 3, 4, and 5 in the chart mentioned above to deposit remaining balance amount of 2.50% towards earnest money as shown in column 3 of the chart within one month from the date of this order.

2. In case, if all or any one out of the three deposit, the balance earnest money within the time specified in clause 1, then the respondent nos. 1 to 4 would call/ invite all such tenderers including the appellant and also the tenderer at Sl. No. 2 to participate in negotiations process by giving everyone an equal opportunity to revise their original rates in presence of all and the one who would quote the highest, be awarded the contract subject to fulfillment of other conditions of the tender documents.

3. In case, if no earnest money is deposited by the tenderer then, it will not be necessary for the State to call such tenderer.

4. In case, if no one deposit the earnest money, then the contract would be awarded to the appellant at the same rate offered by the respondent no. 5 i.e. Rs. 21,00,000.

5. Let this process be over at the earliest to avoid any further delay.

6. The arrangement which is presently in operation would continue, but it will be subject to the outcome of the implementation of these directions and as soon as the contract is finalized, the present arrangement would discontinue.

26. No cost.