(2002) 09 GAU CK 0052

In the Gauhati High Court

Case No : Writ Petition (C) No''s. 7206 of 2000 and 1564 of 2001

Prasanta Bhagawati APPELLANT

Vs

State of Assam and Others RESPONDENT

Date of Decision : 16-09-2002

Acts Referred:

Assam Excise Rules, 1945 — Rule 93
Constitution of India, 1950 — Article 226

Citation : (2003) 1 ARBLR 570 : (2003) 1 GLT 73

Hon'ble Judges : D. Biswas, J

Bench : Single Bench

Advocate : C. Baruah, P.J. Saikia and S. Keot, for the Appellant; M. Bhagawati and S. Katakey, for the Respondent

Final Decision : Allowed

Judgement

D. Biswas, J.—By this common judgment both the writ petitions are disposed of as the cause of action in both the petitions and the reliefs claimed are one and identical.

2. The respondent No. 3 issued a notice inviting tender on 6th July, 2000 for supply of Potable Alcohol/Rectified Spirit Grade-I to the North Lakhimpur Excise Ware House for a period of three years with effect from 15.9.2000 or from the date of settlement as the case may be. The petitioner was one of the participants and he has filed this petition challenging the report of the respondent No. 3, Commissioner of Excise, laying down the criteria of workable rate and suggesting settlement of the contract with the respondent No. 4.

3. The Commissioner of Excise, Assam issued the tender notice dated 6th July, 2002 (Annexure-A) inviting tenders for supply of rectified spirit/ potable alcohol Grade-I. The tenders were opened on 25.7.2000 in presence of all the six tenderers and their representatives. The six tenderers who had participated offered the rates per LPL as shown below :

"(1) Woonmilon Rs. 8.24 per L.P.L. (2) Chavalier Enterprise Rs. 8.28 per L.P.L. (3) Network Rs. 8.53 per L.P.L. (4) Santanu Saikia Rs. 10.23 per L.P.L. (5) Prasanta Bhagawati Rs. 19.95 per B.L. (i.e. Rs. 12.09 per L.P.L.) (6) Pulin Hazarika Rs. 22.03 per L.P.L."

4. The above rate is inclusive of the cost price, Central Sales Tax etc. as indicated in Clause (4) of the tender notice. The Commissioner in his report of evaluation of tender documents worked out the viable and workable rate of cost price at Rs. 14.00 per L.P.L. The relevant part of the report is quoted hereinbelow :

"A viable and workable rate of cost price of Country Spirit is calculated as below :

Cost Price

(i) Distillery cost price = Rs. 13.28 per BL Rs. 140.00 per BL (S-C.I. India Ltd.)

(ii) Export pass fee = Rs. 2.25 per BL

(iii) CS.T. @ 4% on (1 + 2) Above = Rs. 0.62 per BL Rs. 11.35 per BL (Saraya Distillery, U.P.)

(iv) Transportation charges = Rs. 2.00 per BL

(v) Transit Wastage (1%) = Rs. 0.18 per BL Rs. 14.50 per BL (Daurala Sugr Works, Delhi)

(vi) Charges for establishment Rent etc. = Rs. 035 per BL

(vii) Warehouse operational wastage etc. (11/2%) = Rs. 0.27 per BL Rs. 3.85-3

(viii) Licence fee etc. = Rs. 0.41 per BL Rs. 1328 per BL

Rs. 1936 per BL

Costing per LPL Rs. 19.36 - 1.65 = Rs. 11.73 per LPL

+ Profit margin 15% = Rs. 1.76 per LPL

Total = Rs. 13.49 per LPL (Say Rs. 14.00 per LPL)."

5. It appears that the Commissioner worked out the viable rate of cost price after the tenders have been received. Shri Barua, learned counsel for the petitioner, submitted that the terms and conditions in the NIT do not incorporate any clause empowering the Commissioner of Excise to work out a viable rate after receipt of the tender documents and hence the exercise undertaken by the Commissioner of Excise is not only beyond the terms and conditions of the NIT, but also contrary to the decision of the Hon''ble Supreme Court in Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. and Others,

6. There is no dispute that the NIT do not contain any clause empowering the authority, namely, the Commissioner of Excise of undertake such an exercise after receipt of the tender documents. The Hon''ble Supreme Court in Dutta Associates (supra), dealt with a similar matter arising out of an NIT issued by the

Government of Assam in the Excise Departent. The Hon''ble Supreme Court deprecated the acceptance of the appellant''s tender on the ground that the tender notice did not specify the "viability range" nor did it say that the tenders coming within the "viability range" will be considered. It was further observed that tender notice also did not mention that the Commissioner/Government will first determine the "viability range" and would then call upon the eligible tenderer to make a counter offer. According to the Hon''ble Supreme Court, fairness demand that the authorities should have notified in the tender notice the procedure which they proposed to adopt. With regard to viability range, the Supreme Court held that the tenderers are all hard-headed businessmen and they know their interest better. If they are prepared to supply rectified spirit at a particular rate, it is inexplicable why should the Government think that they would not be able to do so and still prescribe a far higher "viability range". Observing thus, the Supreme Court in paragraphs 5 and 7 held as follows :

"(5) It is thus Clear that the entire procedure followed by the Commissioner and the Government of Assam in accepting the tender of Dutta Associates (appellant herein) is unfair and opposted to the norms which the Government should follow in such matters, viz., openness, transparency and fair dealing. The Grounds 1 and 2, which we have indicated hereinabove, are more fundamental than the third ground upon which the High Court has allowed the writ appeal.

(7) In the circumstances, we affirm the judgment of the Division Bench in writ appeal on the grounds stated above and direct that fresh tenders may be floated in the light of the observations made in this judgment. We reiterate that whatever procedure the Government proposes to follow in accepting the tender must be clearly stated in the tender notice. The consideration of the tenders received and the procedure to be followed in the matter of acceptance of tender should be transparent, fair and open. While a bona fide error or error of judgment would not certainly matter, any abuse of power for extraneous reasons, it is obvious, would expose the authorities concerned, whether it is the Minister of Excise or the Commissioner of Excise to appropriate penalties at the hands of the Courts, following the law laid down by this Court in Shiv Sagar Tiwari v. Union of India (In re, Capt. Satish Sharma and Sheila Kaul)."

7. Following the ratio available in the above judgment, the report submitted by the Commissioner of Excise has to be deprecated. The Commissioner of Excise should take note of the warning above.

8. The situation emerges above render the suggestion given by the Commissioner of Excise for settlement of supply order with respondent No. 4 redundant. Clause 27(B) of the NIT provides the mode of settlement. It reads :

"27(B) The settlement of contract is subject to the fulfilment of the terms and conditions as mentioned above. In case if the lowest tenderer do not accept or refuse to accept the contract within 24 hours of offer, his tender shall stand cancelled and the earnest money will be forfeited. Thereafter, the contract will be offered to next higher tenderer at the lowest rate and if he also fails to accept or refuse within the time as specified above offer will be made to next higher quoted tenderer. If he also fails to accept or refuse the lowest offered rate within the specified time in that events, the Govt. reserves the right to grant the licence (contract) under Rule 93 of Assam Excise Rules, 1945."

9. It is, therefore, clear that the Commissioner of Excise will have to re-evaluate afresh the tender documents of all the tenderers and the lowest amongst the valid tenders has to be accepted and offered the contract. In case of refusal, the next higher tender has to be considered and so on.

10. In the result, the writ petition is allowed. The report of the Commissioner and the recommendation made therein are hereby set aside. The matter is remitted back to the Commissioner of Excise for evaluation afresh in the light of the directions given above. Alternately, the State Government, in their discretion, may like to go for re-tender because of the delay in awarding the contract.

11. No costs.