
(2005) 04 GAU CK 0028
In the Gauhati High Court

Pu Benjamin Lalrinawma

APPELLANT

Vs

State of Mizoram and Others

RESPONDENT

Date of Decision : 21-04-2005

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2007) 2 GLR 743 : (2005) 3 GLT 580

Hon'ble Judges : B.P. Katakey, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.P. Katakey, J.—The writ petitioner. Proprietor of M/s. Musicatto has filed the present writ petition challenging the report of the technical-committee (Annx. - F to the writ petition) recommending that the tenders submitted by Musicatto is invalid and for directing the respondents to ignore/waive the minor/trivial/ deviations, if necessary by allowing the petitioner to correct the same and to consider their rates before finalizing the tender process.

2. The brief fact leading to filing of the present writ petition is that the Secretary Government of Mizoram, Education and Human Resource Development (School Education) issued a tender notice dated 14.11.2003 inviting tender from reputed and bona fide manufacturer or authorized dealers for the supply of Laboratory Equipments and Chemical Apparatus for Higher Secondary and Government High School during 2003-04 fixing 8.1.2004 up to 12.30 PM as the last date and time for submission of the tender and 1 p.m. of the same date for opening of the quotations. An addendum dated 3.12.2003 was issued by the Under Secretary to the Government of Mizoram giving further terms and conditions to the NIT dated 14.11.2003. The petitioner submitted the tender pursuant to the said tender notice on 8.1.2004 along with 21 other tenderers, which were open on the same date at 1.00 PM. The technical committee constituted for the purpose of scrutinizing the tender papers submitted by all the tenderers including the writ petitioner scrutinized the same and found that tender submitted by the petitioner

was invalid as dealership certificate was not enclosed and the tender was not submitted in the prescribed form. The tender paper of another firm namely Steven Sons was also found to be invalid on the aforesaid grounds and also on the ground that the tribal certificate submitted by that firm was not issued in the name of the proprietor. The petitioner therefore, has filed the present writ petition challenging the decision of the technical committee in declaring the tender paper submitted as by the petitioner is invalid and also praying for allowing them to correct the tender papers and/or to ignore the mistakes.

3. I have heard Mr. M. Zothankhuma, learned Counsel for the petitioner and also the learned Advocate General assisted by Mr. N. Sailo, learned Government advocate appearing on behalf of the respondents.

4. Mr. M. Zothankhuma, learned Counsel for the petitioner submits that after publication of the tender notice dated 14.11.2003, the petitioner purchase the tender papers and submitted his tender in the form prepared by him which is exactly the prescribed form purchased by the petitioner from the department quoting the rates for the articles for which the tender was submitted. According to the learned Counsel, the petitioner could not submit the tender in that prescribed form purchased from the department, as the space given in the columns was not sufficient to quote the name of the manufacturing company and also detail specification of the equipments including software if any and also any other optional items etc., as required under" Clause II of the said tender notice. However, the petitioner has not change the format of the prescribed form and has only prepared the form by himself by giving more space in tender column so that every detail can be furnished in the tender is required by the NIT. The farther submission of the learned Counsel is that though he is the authorized distributor and agent of various manufacturing firm, products of which he has offered, due to oversight he did not enclosed the dealership certificate as required under Clause 9 of the NIT. According to the petitioner he having coming to know about the mistake committed by him immediately on the same date, i.e., on 8.1.2005 offered to submit distributorship or the dealership certificate but the authority did not accept the same. According to the learned Counsel condition stipulated in Clause 2 and 9 of the terms and conditions of the NIT requiring submission of the tender papers in prescribed form only and submission of authorize or distributorship or dealership certificate being non essential clause, violation thereof shall not make the tender paper submitted by the petitioner invalid. Therefore, the decision of the technical committee to the effect that the petitioners tender paper was invalid for non-submission of the tender papers in prescribed form and for not enclosing the distributorship or dealership certificate, is bad in law. The further submission of the learned Counsel is that public interest demands that the tender paper submitted by the petitioner is required to be considered by the government as it will give more option to the government to chose from and therefore the petitioner ought to have been allowed to file dealership certificate even after submission of the tender papers. Mr. Micheal in support of his contention has placed reliance in

India Telecom Ltd. and Ors. v. Union of India and Ors. AIR 1994 NOC , in Mukul Kumar Vs. Divisional Railway Manager, Northern Railway, Allahabad and others, Kirloskar Brothers Ltd. v. State of Tripura and Ors. 2000 (2) GLT 476, Arundhuti Cables, Agartala and Ors. v. State of Tripura and Ors. 2001 (1) GLT 295, Bikash Bora v. State of Assam and Ors. 2003 (2) GLT 485 , M/s. G. J. Fernandez Vs. State of Karnataka and others, , M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, and Tata Cellular v. Union of India (1994) 6 SCC 651.

5. The learned Advocate General supporting the decision of the technical committee declaring the tender submitted by the petitioner as invalid, has submitted that the NIT dated 14.11.2003 has clearly stipulated that the tender must be submitted in prescribed form only, to be obtained from the office of the Director, School Education, Mizoram, and authorized dealers submitting their tenders is required to attach authorization/distributorship/dealership certificate. The NIT has further stipulates that in the event any tenderer violates or fails to fulfilling any one of the clauses, such tender submitted by tenderer shall be summarily rejected at the time of the opening of the tender. The said condition being condition of the NIT any tenders submitted in violation of the condition of the tender is liable to be summarily rejected as stipulated in the NIT. The petitioner having not submitted the tender paper in the prescribed form and also having not enclosed the dealership certificate along with tender papers, the authority has rightly declared his tender papers is invalid. The further submission of the learned Advocate General is that had the authority accept the tender paper submitted by the petitioner as valid even in spite of violation of the tender condition containing Clause 2 and 9, the same would have amounting to showing favour to the petitioner and would have the discriminatory action as the tender submitted by other tenderers were also declared invalid on the ground on which the petitioner's tender was declared as invalid. The learned Advocate General has further submitted that this Court in exercise of power under Article 226 of the Constitution of India may not interfere with the decision or the tender committee. In support of his contention, the learned Advocate General placed reliance in Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, , M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, and Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others,

6. I have considered the submissions of the learned Counsel for the parties and also perused the pleadings of the parties including the records produce by the Government of Mizoram.

7. As stated above the Government of Mizoram issued the NIT dated 14.11.2003 stipulating therein certain terms and conditions. One of the conditions of the said tender notice is that the tenders should be submitted in prescribed form only to be obtain from the office of the Director, School Education, Mizoram, Aizawl on payment of Rs. 50. Another Condition of the said NIT was that authorized dealers

submitting the tenders should attached authorization or distributorship or dealership, as the case may be, certificates from the concerned manufacturers, photostat copies of which, however, should be duly attested by a Gazetted Officer or Notary. Original certificate should be produced at the time of opening, "if demanded. The further stipulations in the NIT to the effect is that if any tenderer fails to fulfill any of the clauses, such tender shall be rejected at the time of opening of the tender.

8. The petitioner admittedly submitted the tender not in the prescribed form purchase from the department but in the same format as in the prescribed form, Such format, according to the petitioner was prepared by him as the space given under different columns in the prescribed form was not sufficient to quote the different prices for tendered items and for giving detailed specification of the equipments, etc., as stipulated under Clause 11 of the terms and conditions of the NIT.

9. Upon perusal of the tender papers submitted by the petitioner it is seen that the petitioner has not changed the format of the prescribed form purchase from the Department but he has only printed the format exactly similar to the prescribed form by maintaining Sl. Nos. as well as different columns but by giving more space against each item and under each column so that he can conveniently quote the tender price for different items. Clause 11 of the NIT further stipulates that tenderer should enclosed detail specification and equipments including the soft incorporated, if any and also is required to indicate any other optional Items, facilities for upgradation, post-sale/installation service, warranty, etc. The same being one of the condition of the tender, if the petitioner does not fulfil the said condition his tender papers may have the risk of cancellation in view of Clause 14 of the NIT stipulating summary rejection of the tender papers in case of violation of any of the clauses. It is evident from the prescribed form that all such detailed satisfaction, as required under Clause 11, can not be made available in the space given in such prescribed form and therefore, the petitioner has to make out a form exactly similar to the prescribed form giving more space so that every thing in detail can be supplied. The petitioner by printing a format, which is exactly similar to the prescribed form, has not even changed any Sl. Nos. of different items and the different columns as reflected in the form purchase from the department. The said action of the petitioner shall in no case will amount to violation of the conditions containing in Clause 2 of the terms and condition of the NIT as the petitioner has maintain the prescribed format and on the other hand if the petitioner do not give the detailed specification as required under Clause 11 his tender paper would have been rejected on that ground.

10. The next ground of rejection of the tender paper submitted by the petitioner is that the dealership certificate has not been enclosed with the tender paper as required under Clause 9 of the terms and conditions of the NIT. According to the petitioner the said requirement is non essential requirement and therefore, the

violation thereof will not make his tender paper invalid.

11. In *Mukul Kumar (supra)* a division bench of Allahabad High Court interpreting the terms and conditions of the tender notice in question has held that the submission of the documents mentioned in the NIT along with the tender was not a condition precedent and non performance of which would make the tender immediately void ab initio and the documents were required to safe-guard the administration that the tenderer was reliable and was a sound party, The said interpretation was given in view of the clause containing in the tender notice to the effect that the documents if not supplied along with the tender, the tender paper was liable to be rejected and therefore, the authority may not reject the same and hence the said condition can not be treated as condition precedent for a valid tender. In *India Telecom Ltd. and Ors. v. Union of India and Ors. (supra)*, a division bench of the Delhi High Court, while considering a similar situation, that arose as in *Mukul Kumar's* case, came to the conclusion that the submission of compliance statement along with the tender is akin to a verification of pleadings and if there is a defect in the compliance statement and the department notices it before selection was made, it could asked the tenderer to rectify error and should not reject the tender altogether. A single bench of this court in *Mis. Arundhuti Cables, Agartala (supra)* has held that the conditions contained in the NIT can be deviated from, if the same does not result in discrimination. The petitioner in the said case sought rejection of the tender submitted by the respondent therein, on the ground that it did not mention the excise duty payable in the tender and on the other hand the petitioner also did not mention the sale tax payable in the tender. The authorities considering the tenders of the both the petitioners and respondents despite their laches considered the tender papers of both of them. The single bench of this Court on above situation of the case has held that as the authority has considered the tenders of both the petitioners and respondents, whose tenders were defective, no discrimination was made and as such the court has refused to interfere with the government's action in accepting tender of respondent therein. In *Kirloskar Brothers (supra)* a single bench of this Court has held that if the authority in wider public interest allow the tenderers to fulfilling the condition of the tenders subsequently, the court will not, in exercise of power under Article 226 of the Constitution of India, interfere with such decision unless there is overwhelming public interest in favour of quashing of the award of the contract to such tenderers.

12. A division bench of this Court in *Bikash Bora (supra)* relying on the decision of the Apex Court in *Monarch Infrastructure (P.) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation and Ors. (supra)* has held that a tender submitted by a tenderer can be rejected if it has failed to fulfill the different requirements for submission of a valid tender. It has further been held that it is not for the court to consider the rejection of the tender, if the conditions have not been fulfilled but it is the primary duty of the court to see that the Government, or other instrumentality of the State does not act arbitrarily in choosing any person

it likes for entering into relationship or to discriminate between the persons similarly situated. The court had further held that fulfillment of the tender conditions by the tenderer would ensure equality between the tenderers and deletion of any condition in favour of the any of the tenderers would result in discriminatory treatment amongst the tenderers. The terms on which the tender has to be submitted has to be followed unless there are valid reason, in which case the court may take a different view of the matter but depends on the factum of each case. In the said, case the division bench has held that the requirement of furnishing of loan clearance certificate as well as sale tax certificate is an essential condition for valid tender and in absence of said certificates the tenders could not have been accepted.

18. The Apex Court in *M/s. G. J. Fernandez Vs. State of Karnataka and others*, has held that the conditions of the notice inviting tender should be strictly observed by the instrumentality of the State, equally in cases of all the intending tenders, however, sufficiency of information/documents supplied or effect of delay in supply or non-supply thereof is required determination by the instrumentality of the State and any non-conformity with or relaxation of the prescribed standard allowed in case of any intending tenderer if not resulting in substantial prejudice or injustice to any of the parties or to public interest in general, would not be bad. In *M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others*, the Apex Court, dealing with a case wherein the requirement of the tender was of depositing earnest money with the tender either in cash or by demand draft drawn on State Bank of India, has held that the banker's cheque marked and certified by the Union Bank of India enclosed with the tender papers submitted by the highest tenderer will not make the tender of such tenderer invalid as that condition was clearly ancillary or subsidiary with the main object to be achieved, in as much as the certified cheque of Union Bank of India must be treated as sufficient for the purpose of achieving the object of the condition. The Apex Court in *Tata Cellular (supra)* has laid down the requisite of a valid tender which includes the requirement that it must be unconditional, must be made at the proper place, proper time, in proper form, must be concerned to the terms of obligation, the person by whom the tender is made must be able and willing to perform his obligation, there must be reasonable opportunity for inspection, must be made to the proper person and must be of full amount. The Apex Court has further held that the principles of judicial review would apply to the exercise of contractual powers of the Government bodies in order to prevent arbitrariness or favouritism.

14. In *M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others*, the Apex Court has held that where tender notice required the earnest money deposit to be made in the form of crossed demand draft/pay order or case, tender accompanied by merely a photocopy of, and not the original demand draft would not be a valid tender. The Apex Court in *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, has held asunder:

7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in *Ramana Dayaram Shetty v. International Airport Authority of India*, *Fertiliser Corporation Kamgar Union (Regd.) v. Union of India*, *CCE v. Dunlop India Ltd.*, *Tata Cellular v. Union of India*, *Ramniklal v. N. Bhutta v. State of Maharashtra* and *Raunaq International Ltd. v. I.V.R. Construction Ltd.* The award of a contract, whether it is a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if tender conditions permit such a relaxation. It may not accept an offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The state, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.

15. The Apex Court in *Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others*, has held that the court can scrutinize the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favoritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. While dealing with the extent of judicial review permissible in contractual matters, the Apex Court, relying on the decisions in *Tata Cellular v. Union of India* AIR India Ltd. v. *Cochin International Airport Ltd. and Ors.* and *Monarch Infrastructure (P.) Ltd. v. Commissioner Ulhasnagar Municipal Corporation and Ors.*, has reiterated that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract and the Government must have, freedom of contract. However, the Court would definitely interfere with the decision if it is arbitrary, discriminatory, mala fide or actuated by bias.

16. In the present case it is to be seen whether the requirement of submission of the tender in the prescribed form and also requirement of furnishing dealership

certificate along with tender paper are the essential conditions of tender and whether non-fulfilling of such condition will make the tender submitted by the petitioner invalid.

17. As stated above there is a stipulation in Clause 2 of the NIT dated 14.11.2003 that the tender paper has to be submitted in the prescribed form purchase from the department only. As already discussed above it appears from the tender paper that the tenderers are required to quote tender prices against one item and the space allotted for quoting such prices are not sufficient. Clause 11 of the tender notice also requires furnishing of detail specification of the equipment etc. which is not possible to be furnished in the space made available in the prescribed tender form supplied by the department. Clause 2 of the NIT though stipulates that tender should be submitted in prescribed form only, it does not mean that the petitioner can not make out the same format by giving more space so that full details can be mentioned in the tender paper and submit his tender in the said format which is exactly similar to the prescribed form. The said conditions in the NIT is, therefore, cannot be treated as essential condition. The petitioner having submitted the tender paper exactly in the same format as that of the prescribed form, has fulfilled the condition for the purpose of achieving the object of the condition and therefore declaration of the petitioner's tender as invalid on the ground of non-submission of tender in the prescribed form obtained from the department, is not sustainable in law.

18. The next ground on which the tender paper submitted petitioner was declared to be invalid is that the petitioner has failed to submit the dealership certificate along with tender papers. Clause 9 of the NIT has specifically provided that the dealership/distributorship certificate has to be enclosed along with tender papers and non submission of the same resulted in summarary rejection of the tender papers. The purpose behind the requirement for furnishing the dealership/distributorship certificate is that when the tenderer submit the tenderer by offering the articles belonging to other manufacturer, it must furnish such certificate so that the Government can sufficiently be assured the supply of the materials, for which the tender is submitted, in the event the tender of such tenderer is accepted. Therefore, it cannot be said that the requirement of furnishing dealership/distributorship certificate is a non essential clause of the tender. More over, when the NIT specially stipulates that such certificate has to be attached along with tender paper and non fulfillment of such conditions provides for summary rejection of the tender paper, the tenderer has to submit the tender fulfilling those conditions. The authority is bound by the terms and conditions of the tender and can not deviate from the conditions stipulated therein, as in that case, it will amount to showing favour to a tenderer who has not fulfill such conditions and it will also amounting to discrimination.

19. The technical committee has in fact rejected the tender of other tenderer on the same ground on which the petitioner's tender papers were rejected. Had the authority accepted the, tender paper of the petitioner it would have amounting to

discrimination and favoritism. The petitioner having failed to fulfill the condition of the NIT, namely having failed to furnish the dealer/distributorship certificate along with the tender paper has violated that essential clause of the NIT and, therefore, the authority has rightly declared the tender paper submitted by the petitioner as invalid. Moreover, it is apparent from the statements made in the writ petition that the petitioner knew that the condition for supply of the such certificate was an essential condition and therefore, has prayed for directing the respondent to waive such condition or to allow him to furnish such certificate.

20. In view of the above I do not find any merit in the writ petition and hence it is dismissed. No cost.