
(2016) 06 GAU CK 0049

In the Gauhati High Court

Case No : W.P(C) No. 76 of 2016. with I.A No. 32 of 2016

R. Lalduhawma

APPELLANT

Vs

State of Mizoram

RESPONDENT

Date of Decision : 28-06-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 6 GauLJ 711 : (2017) 1 GauLR 246

Hon'ble Judges : Michael Zothankhuma, J.

Bench : Single Bench

Advocate : Mr. Nelson Sailo, Sr. Advocate, for the Respondent No. 4; Mr. L.H. Lianhrima, Sr. Advocate, for the Respondent No. 3; Mr. A.K Rokhum, learned Addl. Advocate General, for the Respondent Nos. 1 & 2; Mr. Lalfakawma and Mr. Rosangzuala, Advocates, for the Pet

Final Decision : Disposed off

Judgement

Michael Zothankhuma, J. (CAV) - Heard Mr. Rosangzuala, learned counsel appearing for the petitioner. Also heard Mr. A.K Rokhum, learned Addl. Advocate General appearing for the respondent Nos. 1 & 2, Mr. L.H. Lianhrima, learned senior counsel appearing for the respondent No. 3 and Mr. Nelson Sailo, learned senior counsel appearing for the respondent No. 4.

2. The brief facts of the case is that in pursuance to a short quotation notice dated 17.11.2015 inviting quotations from manufacturers or other authorised dealers/agents for supply of auto-rickshaws for implementation of NLUP programmes, the petitioner and the respondent No. 3 submitted their quotations for the same.

3. The short quotation notice dated 17.11.2015 required the autorickshaws to be 2-stroke, at least - 150 CC, Electric start engine, mileage 35 Kms/liter under normal condition, 3 times Free Service- 1 yr warranty or 3600 Kms whichever occurs.

4. Thereafter, the Corrigendum dated 20.11.2015 was issued with regard to the quotation notice dated 17.11.2015 which stated that the name and specification of Auto-Rickshaw seen at sl. No. 3 in the ANNEXURE should be read as "- at least 2-stroke-150 CC, Electric start engine, mileage 35 Kms/litre under normal condition, 3 times Free Service, 1 yr warranty or 3600 Kms whichever occurs instead of Auto-Rickshaw 2 stroke, at least - 150 CC". The other conditions remained unchanged.

5. In the agenda note put up for consideration of the NLUP Input Purchase Board to be held on 17.02.2016, it was recorded that the bids of the petitioner and the respondent No. 3 were opened on 11.12.2015. However, as the petitioner's earnest money, which was to be deposited along with the quotation had been submitted to one of the staff members, the said earnest money of the petitioner was submitted to the team of officers at the time of opening of the quotations/bids. When the team of officers asked all the persons present in the room including the respondent No. 3, regarding their views in respect of the earnest money which was submitted separately, no response or complaint was received from any of the person present in the room at the time of opening the bids. Thus, the quotation was accepted as valid and all the quotationers thereafter left the room.

6. After acceptance of the petitioner's quotation as being valid, the proprietor of M.S Standard Motor Works i.e. respondent No. 3 went back into the room and made a complaint to the team of officers regarding the validity of the quotation submitted by the petitioner, which was to the effect that, the petitioner's bid should be declared invalid as his earnest money cheque had been submitted to the staff instead of being submitted along-with the quotation.

7. The NLUP Input Purchase Board held its meeting on 17.02.2016 and declared the petitioner's bid to be invalid on the ground that the earnest money was not enclosed along with the quotation in the sealed cover.

8. The petitioner's counsel submits that the respondent No. 3's autorickshaws do not have the 150cc specification, as stipulated in the short quotation notice. He also submits that the respondent No. 3 did not make any disclosure with regard to free service that would be available, while the short quotation notice requires that there should be free service 3 (three) times. He also submits that the deposit of the earnest money separately and through the staff of the concerned office does not prejudice the respondents. In this regard, he submits that the term and condition No. 4 of the short quotation notice states that over-writing, if any should be initialed with date, or otherwise the bid will be automatically invalid. The petitioner's counsel submits that this automatic invalidation of the bid is not incorporated in the term and condition No. 3 of the short quotation notice which states that all quotations must be accompanied by earnest money of Rs. 25,000/- in the form deposit at call in pledge of Director, Industries. The petitioner's counsel submits that the numbers of auto-rickshaws to be supplied by the selected tenderer to the Government is 293 numbers.

9. The petitioner's counsel submits that however, the Director of Industries issued letter dated 04.04.2016 to the respondent No. 3 requesting him to supply 270 numbers of Bajaj RE Auto-rickshaw 2 stroke @ Rs. 1,27,695/-.

10. The petitioner's counsel thus prays that the meeting minutes of the NLUP Input Purchase Committee dated 17.02.2016 pertaining to the supply of Auto-rickshaws and the impugned letter dated 04.04.2016 should be set aside.

11. Mr. A.K Rokhum, learned Addl. Advocate General appearing for the respondent Nos. 1 & 2, Mr. L.H. Lianhima, learned senior counsel appearing for the respondent No. 3 and Mr. Nelson Sailo, learned senior counsel appearing for the respondent No. 4 submit that the petitioner has violated the term and condition No. 3 of the short quotation notice dated 17.11.2015 as the earnest money was not deposited inside the envelope along with the petitioner's quotation, but had been submitted separately to a staff of the concerned office. The counsels for the respondents thus submit that in view of the above, the NLUP Input Purchase Board Committee in its meeting minutes dated 17.02.2016 had declared the petitioner's quotation as invalid. They also submit that in view of the above, the petitioner has no locus standi to file the present Writ petition. The respondents' counsels also submit that the respondents are not required to select the lowest tender. The respondents counsels also submit that an amount of Rs. 1,72,38,825/-/-, which is 50% of the cost price of the 270 Auto-rickshaws has already been paid by the State Government to the respondent No. 3.

12. The counsel for the respondent No. 3 submits that the respondent No. 3 had clearly reflected in the papers given to the State respondent the fact that the respondent No. 3 was going to give 8 (eight) free services and as such, the respondent No. 3 has complied with the short quotation requiring the tenderer to give 3 (three) free services. The counsel for the respondent No. 3 also submits the short quotation notice requiring the tenderers to give their tenders for "at least 2-Stroke" engine is ludicrous inasmuch as, there is no 1-Stroke engine. The counsel for the respondent No. 3 also submits that in the automobile industry, the cc of a vehicle are rounded off to the nearest figure as no manufacturer provides the exact round off cc as stipulated in the short quotation notice. The counsel for the respondent No. 3 submits that the vehicle's cc is a combination of bore and stroke length. He submits that Honda Jazz car which is purportedly advertised of having 1.2 litres Petrol engine will have the actual engine cc of 1198cc and not 1200 cc. Similar is the case with other vehicles. The counsel for the respondent No. 3 thus submits that the respondents have committed no illegality in selecting the respondent No. 3 as the Auto-rickshaw to be supplied by the respondent No. 3 is having a cc of 147.5, which when rounded off should be read as 150cc. He also submits that 65 Auto-rickshaws have been supplied by the respondent No. 3 to the State Government till date.

13. The counsels for the respondents thus submit that the Writ petition being devoid of merit should be dismissed.

14. I have heard the learned counsels for the parties and I have perused the records.

15. The basic question to be decided in this case is whether the submission of the earnest money by the petitioner should have been done in the same envelope in which the quotation had been submitted. The further question is whether the petitioner's bid, which had been earlier declared as valid, could be declared as invalid without giving any notice to the petitioner. The third question is whether the State respondents should have adhered to the conditions incorporated in the short quotation notice and whether the stipulation of 150cc was an essential condition of contract.

16. As can be seen from the records, the team of officers that had opened the bids for supply of Auto-rickshaws had accepted the petitioner's bid as valid as no person including the respondent No. 3 had voiced any complaint on the earnest money being given to the team of officers through a member of the staff and without it being inside the envelope containing the petitioner's bid. The team of officers had also made a comparative statement of the petitioner's and the respondent No. 3's bid. The extract of the comparative statement is reproduced below:

Name of Trade : AUTO RICKSHAW

Sl. No

Name of firm

Brand name/Company

Description/Detail of Machine Quoted

Rate quoted in Rs.

After Sale Service/Warranty

1

2

10

12

1.

LD Enterprise

TVS King

4-Stroke, Petrol, Electric Start, 35 Kms/Lit. mileage, 199.26cc, twin head lamp, no 2-t oil required

122,000

7-free service and 1 yr warranty or 36,000 kms whichever occurs earlier.

2.

Standard Motor Works

Bajaj Auto RE

2-Stroke, 147.5cc, Petrol engine, 6.60 kW @ 3300 rpm Torque 15.5 NM @ 3300 rpm

127,695

1 yr warranty after sale service throughout Mizoram.

17. A perusal of the comparative statement goes to shows that the petitioner (L.D. Enterprise) has quoted Rs. 122,000/- while the respondent No. 3's quoted rate is Rs. 1,27,695/-. The description of the machine/engine shows that the petitioner's machine is 199.26cc as compared to the respondent No. 3's engine, which is 147.5cc.

18. The petitioner's bid having been treated to be valid at the time of opening of the bid by the team of officers, the role of the NLUP Input Purchase Committee should have been only to evaluate the bids of the petitioner and the respondent No. 3. They had no role to play with respect to the validity or invalidity of the petitioner's bid after the bid was declared valid by the team of officers. Even if it is assumed that the NLUP Input Purchase Committee could have decided the issue of the validity of the petitioner's bid, then the petitioner should have been put to notice by the NLUP Input Purchase Committee before coming to a decision that the petitioner's bid was invalid. Even if no notice was issued to the petitioner by the NLUP Input Purchase Committee before coming to a finding that the petitioner's bid was invalid, the petitioner should have been given a reasonable opportunity of being heard. The absence of notice and the non-giving of reasonable opportunity of being heard to the petitioner is fatal, as the invalidation of his bid, after being declared valid by the team of officers, is prejudicial to his case.

19. It is a settled principle of law that the terms of the tender Notice are not open to judicial scrutiny. The question in this case is whether the submission of the earnest money by the petitioner should have been in the same envelope in which the quotation had been submitted and whether the same is in consonance with the terms of the Tender Notice. The short term quotation notice dated 17.11.2015 states that all quotations must be accompanied by earnest money. The petitioner's earnest money was not in the envelope along with his bid documents. However, the earnest money had been submitted to a staff of the office and the same was submitted by the staff to the team of officers at the time of opening of the bids. The requirement of the quotation being accompanied by earnest money to my mind does not have to have a strict literal meaning that it should be in the same envelope in which the bid documents are put. In the

present case, the earnest money was with the team of officers at the time of opening the bids and as there was no complaint from the respondent No. 3 or the other persons in the room, the petitioner's bid had been declared as valid.

20. The absence of the earnest money in the envelope containing the petitioner's bid, but which was present at the time of opening of the bids, to my mind does not cause any prejudice to the respondents. Further, a perusal of the terms and conditions of the short quotation notice shows that, over writings in the bid documents without initials, would make the bids automatically invalid. This stipulation is however not present in respect of deposit of earnest money. In the case of *Global Energy Limited And Another v. Adani Exports Limited And Others* reported in 2005 4SCC 435, the Apex Court has held that deposit of some amount of earnest money is a normal condition of tender. The object is that only such parties who are financially sound and are serious in getting the work or contract, should make a bid. Otherwise, any number of persons who have no capacity, financial or otherwise, would like to take a chance by making a bid.

21. In the present case, once the tender of the petitioner and the respondent No. 3 are opened, the relative position of each bidder is known to the persons who are in the room. There may be a feeling that a person's bid was not competitive enough and there was less chance of getting a contract. It may be due to the above that the respondent No. 3 had again requested the team of officers to invalidate the petitioner's bid after they had declared the same to be valid. In this case, the question is not with regard to whittling down the terms of the tender but as to whether the petitioner's bid was in violation of the terms of the tender. A hyper technical view should not be taken. This court finds that the submission of the petitioner's earnest money by way of call deposit has to be deemed to be accompanying his quotation, even though it might not be in the same envelope as the bid/quotation documents.

22. NLUP stands for New Land Use Policy, a scheme made by the State Government for upliftment of the poor people of the State of Mizoram by giving them sustainable means of livelihood. In this case, the Auto-rickshaws that are to be purchased by the State Government is going to be given away to a select few people, chosen under the NLUP Scheme. This being a distribution of State largesse, it was in the interest of the Public Exchequer and the State Government to select the successful bidder at the most competitive price available. This would not only be in the interest of public but also the Public Exchequer. The Government would have been able to get the best possible price if there was fair competition. However, in the present case, there is no competition at all, inasmuch as, the NLUP Input Purchase Committee has declared the petitioner's bid as invalid, thus leaving the State Government with no other option but to purchase the Auto-rickshaws from the sole surviving bidder. It should be kept in mind that the State largesse cannot be squandered away and efforts should be made to the effect that the Public Exchequer does not suffer any unnecessary loss.

23. In the case of *Tata Cellular v. Union of India* reported in 1994 6SCC 651, the Apex Court has held that para 70 as follows :-

"70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down."

24. A perusal of the comparative statement as contained in the official records shows that the respondent No. 3's bid is with regard to a machine having 147.5cc which is below the 150cc stipulated in the terms of the tender notice. Without going into the question of whether 147.5cc machines should be considered to be 150cc machines, this Court would like to refer to a decision of the Apex Court in the case of *Harinder Singh Arora v. Union of India and Others*, reported in 1986 3SCC 247, in which the Apex Court has stated that the Government may enter into a contract with any person but in doing so, the State or its instrumentalities cannot act arbitrarily. If the authority or the State chooses to invite tenders, then it must abide by the conditions laid down in the tender notice.

25. The short quotation notice dated 17.11.2015 requires that the engine should be at least 150cc. However, the Corrigendum of the short quotation notice dated 20.11.2015 requires that the engine should be at least 2-Stroke-150cc. In this regard, the records produced do not show the reason as to why the private respondent's Auto-rickshaw has been chosen, even though it does not conform to the specifications required. There is no document available to show that the NLUP Input Purchase Committee had come to a finding that there are no Auto-rickshaws available in the market having 150cc. On the other hand, the petitioner's engine has engine capacity beyond 150cc. The question of choosing one of the two bids by the NLUP Input Purchase Committee will have to be based on some technical data, as the same does not conform to the specifications shown in the short quotation notice. The interest of the beneficiary, who is going to use the Auto-rickshaw and the purpose for giving the same to the beneficiary should also be looked into by the NLUP Input Purchase Committee, while coming to a decision as to which would be more cost effective. There should be a finding by the NLUP Input Purchase Committee that there are no 150cc Auto-rickshaws available on the basis of some reliable data before choosing the engine which is not as per specifications.

26. In view of the reasons state above, this Court holds that the declaration of the petitioner's bid as invalid by the NLUP Input Purchase Committee is in violation of the principles of natural justice and is accordingly set aside. The comparative statement having been furnished with regard to the bids of the petitioner and the respondent No. 3, the NLUP Input Purchase Committee shall have a review meeting and make a selection of the tenderer for supply of Auto-rickshaws in pursuance to the short quotation notice dated 17.11.2015. However, in view of the fact that Rs. 1,72,38,825/- has already been given by the State Government to the respondent No. 3 as 50% of the cost price for 270 Auto-rickshaws to be purchased in pursuance to the letter dated 04.04.2016 issued by the Director of Industries, this Court feels that as the said amount of Rs. 1,72,38,825/- is the cost price of 135 Auto-rickshaws, the supply of 135 Auto-rickshaws out of 270, by the respondent No. 3 to the State Government shall not be disturbed and the State Government can take delivery of the said 135 Auto-rickshaws from the respondent No. 3. However, with regard to the supply for the remaining 135 Auto-rickshaws to be made in pursuance to the letter dated 04.04.2016, this Court holds that NLUP Input Purchase Committee shall consider the bid of the petitioner and the respondent No. 3 for purchase of the remaining 135 Auto-rickshaws. The NLUP Input Purchase Committee shall have a review meeting for consideration for the supply of the remaining 135 Auto-rickshaws within a period of 6 (six) weeks from the date of receipt of the copy of this Order. Consequently, the decision of the NLUP Input Purchase Committee Meeting Minutes dated 17.02.2016 with regard to declaring the petitioner's bid as invalid is hereby set aside. The letter dated 04.04.2016 issued by the Director of Industries for supply of 270 Autorickshaws by the respondent No. 3 is also set aside to the extent that it would apply for supply of only 135 out of 270 Auto-rickshaws by the respondent No. 3.

27. With the above observations and directions, the Writ petition is accordingly disposed of.