

(2006) 02 GAU CK 0072

In the Gauhati High Court

Case No : Writ Petition (C) No's. 9160 and 9619 of 2004

Ramij Uddin Mazumdar and Another

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 16-02-2006

Acts Referred:

Citation : (2006) 4 GLT 829

Hon'ble Judges : D. Biswas, J

Bench : Single Bench

Advocate : H.R.A. Choudhury, F.U. Borbhiuya and A.Y. Choudhury, for the Appellant; I. Choudhury, for the Respondent

Final Decision : Allowed

Judgement

D. Biswas, J.—By this common judgment, writ petitions W.P. (C) Nos. 9160 of 2004 and 9619 of 2004 are disposed of as they arise out of identical facts and circumstances.

2. The Petitioner in Writ Petition (C) No. 9610 of 2004 is engaged in the business of contract works. He had submitted tender papers in pursuance of the NIT dated 19.4.2003 issued by the Respondent No. 2 for construction of RCC Bridge No. 4/1 on SMD Road across River Amjur under REDF-VIII of NABARD at an estimated cost of Rs. 414.40 lakhs. It is an admitted fact that the Petitioner was the lowest eligible bidder and the department accordingly accepted the bid offered by him. By the letter dated 12.11.2004 (Annexure-6 to the writ petition), the Chief Engineer, PWD (ARIASP and RIDF), Assam informed him that the offer made by him has been accepted by the Department and he is required to submit performance security in terms of ITB Clause 33 within seven days from the date of issue of the letter of acceptance. The Petitioner's case is that neither he has received this letter nor he authorized anybody to receive the same on his behalf. He came to know that his offer was accepted only when the Department re-tendered the work vide NIT dated 17.12.2004 (Annexure-11 to the writ petition). After necessary enquiry, he came to know that the Chief Engineer by the letter

dated 12.11.2004 had already accepted his bid and directed him to furnish performance security. Having failed to obtain the letter of acceptance renewed, he has filed the petition for appropriate orders including an order directing the Respondents to issue the work order in his favour.

3. The Respondents No. 1, 2 and 3 in their affidavit-in-opposition admitted the above position and submitted that the letter of acceptance dated 12.11.2004 was received by a representative of the Petitioner, as is the normal practice. The Petitioner failed to furnish the performance security and to sign the contract. Thereafter, letter dated 13.12.2004 was written to the Commissioner and Special Secretary, PWD informing him that the Petitioner has failed to respond to the letter of acceptance. The Deputy Secretary by the letter dated 14.12.2004 directed the Respondent No. 2 to re-tender the work in question and for other ten other construction works. Accordingly, after cancellation of the previous orders, a fresh tender dated 17.12.2004 was issued.

4. In the affidavit-in-reply filed, the Petitioner reiterated that he had not received any letter of acceptance and denied that his representative, as alleged, has received the same on his behalf. According to him, he had neither signed the letter of acceptance in token of receipt thereof, nor he had authorized any person to receive the same on his behalf. The signature of receipt on the letter of acceptance is not his signature and the words "for Shri R.U. Mazumdar" is a subsequent insertion made by the Respondents.

5. This Court after having regard to the above fact situation passed the order dated 19.1.2005 which reads as follows:

As agreed to by the learned Counsel for the parties, the matter stands adjourned to 2.2.2005.

Meanwhile as suggested by Mr. K.N. Choudhury, learned Additional Advocate General, Assam, the Petitioner may approach the Commissioner and Special Secretary to the Government of Assam in the Public Works Department making appropriate representation within 25th January 2005 towards redressal of his grievance. In the event of making any such representation, the said Commissioner and Special Secretary shall pass appropriate order on or before 2.2.2005.

6. As ordered by this Court, the Commissioner and Special Secretary passed the order dated February 1, 2005. The Commissioner rejected the representation of the Petitioner wherefrom it is also clear that there is no dispute that the tender bid of the Petitioner was accepted. The reasons given by the Commissioner is that the Petitioner in the instant case failed to deposit the performance security money and had not turned up for accepting the contract agreement. Thereafter, the work has been retendered with approval of the Government. The representation has been rejected on the ground that he is in good relationship with the Department and has been constantly visiting the office of the Chief Engineer and, therefore, have had the knowledge that his tender was accepted.

The order further shows that the normal practice in the Department is to handover the letters of acceptance to the contractors in person. Further, any direction issued at this time for issuance of work in favour of the writ Petitioner would create a bad precedent for future.

7. I have considered the reasons given by the Chief Engineer. It would appear that nowhere they insisted that the Petitioner himself received the letter of acceptance. Their case is that his representative had accepted the letter of acceptance. But no letter of authority could be produced by them along with their affidavit-in-opposition. On being asked by the Court, Mr. I. Choudhury, learned Counsel for the Department submitted that the authority was not in writing, but given verbally. Official functions, particularly one of the like nature cannot be allowed to be performed verbally. The affidavit filed by the Respondents does not reveal the identity of the person authorized by the Petitioner to receive the letter of acceptance. This is a silly plea taken by the Department to frustrate the legitimate expectations of the writ Petitioner. The letter of acceptance ought to have been sent to the Petitioner by registered post. The plea of normal practice may be relevant to petty shopkeepers, but certainly not to a major development department of the State Government, Mr. Choudhury, learned Counsel argued that the impugned tender process may be allowed to be pursued as the Department is interested in speedy completion of the project sanctioned in public interest. On this submission, Mr. Choudhury was asked to obtain instructions as to whether the authority would be inclined to issue the work order in favour of the writ Petitioner at this stage. Mr. Choudhury submitted that it would not be possible because this will create a bad precedent for future and all the contractors will be indulging in taking this plea in the future cases. I am unable to appreciate the submission of Mr. Choudhury. If they are at all interested in early completion of the project, they should have handed over the letter of acceptance to the Petitioner giving him a few days time to furnish the performance security. It appears that they are not. The inevitable conclusion in the given circumstances is that a Writ of Mandamus has to be issued to the Respondents to act upon the letter of acceptance dated 12.11.2004 (Annexure-6) so as to enable the Petitioner to furnish the performance security within a time frame. Consequently, the letter dated 12.12.2004 (Annexure-9), cancellation Notice dated 16.12.2004 (Annexure-10), NIT dated 17.12.2004 (Annexure-11) and the order dated 1.2.2005 (Annexure-13) are required to be set aside.

8. Before the petition is disposed of, we may refer to the decisions in H.B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority, Karnal and Ors. v. Gopi Nath and Sons and Ors. reported in 1992 (2) SCC 312 ; Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, and in Sumedha Nagpal Vs. State of Delhi and Others, relied upon by Mr. I. Choudhury, learned Counsel for the Respondents. The ratio available in these judgments are totally irrelevant in the facts and circumstances of the case.

9. In *H.B. Gandhi (supra)*, the Supreme Court dealt with the nature and scope of the powers of judicial review which obviously permits a review of the decision making process and not of decision itself. In the instant case the decision making process has been in flagrant violation of the established procedure and practice of administration vis-a-vis the principles of natural justice. This decision under no circumstances is of any assistance to the Respondents. The decision in *Air India Ltd. (supra)*, the Supreme Court dealt with the powers of the authority awarding a contract. It is held that the State can choose its own method to arrive at a decision, it can fix own terms of invitation to tender and this is not open to judicial scrutiny. It is further held that the State can enter into negotiation before deciding to accept one of the offers, price not being the sole criterion for awarding a contract etc. The issue at hand is beyond the purview of the above criterion. Therefore, the decision in *Air India Ltd. (supra)* is irrelevant to the dispute at hand. In *Sumedha Nagpal (supra)*, it has been held that the writ proceedings are summary in nature and the Courts cannot address disputed question of fact. In the instant case, the question is whether the letter of acceptance was received by the authorized representative of the Petitioner. The Department has failed to prove that any such authority was ever given. It is also not the case of the department that the Petitioner accepted the letter by putting his signature. I fail to discern any dispute with regard to this position. The decision in *Sumedha Nagpal (supra)* is, therefore, distinguishable on the factual matrix of the case at hand. Here, we may conveniently take note of the decision of the Supreme Court in *ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others*, the Supreme Court held as follows:

27. From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claims is also maintainable.

10. Going by the judgment in *ABL International Ltd. (supra)* and the factual background of this case, I am not inclined to reject the petition on the ground of maintainability. The discussion made hereinbefore made herein above make this position very clear. There is in-fact no dispute with regard to the facts set in the writ petition and the affidavit in opposition in so far it relates to the question of handing over of letter of acceptance. The plea of verbal authorization has been rejected for reasons above.

11. In the result, the writ petition is allowed. The Respondent authority is

directed to act upon the letter of acceptance giving a few days time to the Petitioner to furnish performance security and to execute the contract, failing which the authority may proceed with the tender process as per impugned NIT dated 17.12.2004. If the Petitioner complies with the direction that may be issued by the authority in pursuance of this judgment, the impugned letter dated 12.12.2004 (Annexure-9), cancellation Notice dated 16.12.2004 (Annexure-10), NIT dated 17.12.2004 (Annexure-11) and the order dated 1.2.2005 (Annexure-13) shall stand set aside.

12. Writ Petition (C) No. 9619 of 2004 has also been heard along with this writ petition. This writ petition is based on identical facts and circumstances with identical prayer. For reasons above, this writ petition is also allowed. The letter dated 14.12.2004 (Annexure-6), cancellation Notice dated 16.12.2004 (Annexure-7), NIT dated 17.12.2004 (Annexure-8) and the order dated 1.2.2005 (Annexure-10) shall stand quashed if the Petitioner of this petition fails to furnish performance security and execute the contract within the given time. Failing which the Respondent authority may act upon the NIT dated 17.12.2004.

13. Both the writ petitions are accordingly stand disposed. No costs.