
(2015) 11 MAN CK 0006
In the Manipur High Court
Case No : W.P.(C) No. 881 of 2015

R.B. Printing House

APPELLANT

Vs

The State of Manipur and Others

RESPONDENT

Date of Decision : 04-11-2015

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2015) 11 MAN CK 0006

Hon'ble Judges : N. Kotiswar Singh, J.

Bench : Single Bench

Advocate : N. Ibotombi, Sr. Advocate, for the Appellant; Y. Ashang, Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

N. Kotiswar Singh, J.—Heard Mr. N. Ibotombi, learned senior counsel for the petitioner and Mr. Y. Ashang, learned Government Advocate for the respondent Nos. 1, 2 and 3 as well as Mr. Athouba, learned counsel for the respondent No. 4.

2. When this matter was moved on 16.10.2015, this Court passed the following order:--

"Heard Mr. N. Ibotombi, learned senior counsel for the petitioner.

Issue notice, returnable on 28.10.2015.

Mr. Y. Ashang, learned Government Advocate accepts notice on behalf of the official respondents No. 1, 2 and 3.

Petitioner is to take steps for service of notice upon the respondent No. 4 by registered post with A/D card in addition to dasti service.

The petitioner states that in terms of the NIT for the work of Category A consisting of designing, printing, supply and installation of various items mentioned in the NIT for which a sum of Rs. 39 lakhs have been also allocated,

the petitioner had submitted his bid quoting a price of Rs. 31,77,471/-. On the other hand, the respondent No. 4 quoted an amount of Rs. 42 lakhs which however, was subsequently reduced to Rs. 38,66,000/- on negotiation with the authorities. Mr. N. Ibotombi, learned senior counsel submits that inspite of the said negotiation, still his rate is higher than the petitioner. In any event, negotiation with the bidder having higher price is also not permissible specially when the petitioner who had quoted lower price bid was not informed of such negotiation.. Accordingly, Mr. N. Ibotombi, learned senior counsel submits that the tender process adopted by the respondents authorities is not at all permissible and submits that an interim order may be passed staying the aforesaid work order issued on 8.10.2015.

The interim prayer will be considered after hearing of the parties in the next returnable date. Till then, the work order dated 8.10.2015 shall remain suspended.

List again on 28.10.2015."

3. The matter, thereafter, was listed on 28.10.2015 and 02.11.2015 and heard finally today as expeditious disposal of this writ petition is called for in view of the fact this matter relates to the organisation of the Sangai Festival of 2015 which is going to commence from the 21st November, 2015. In addition to the grounds raised by the learned senior counsel for the petitioner as reflected in the order dated 16.10.2015, the additional grounds raised are that the respondent No. 4 does not possess the work experience for a period of two years in the work item as stipulated in Para No. 3(A) of the General Information for Tenderers of the NIT and also did not submit VAT/Commercial or Service Tax registration number/certificate or Certificate or Service Tax registration required to be enclosed along with the tender documents as provided under Para 3(D).

The contentions of the petitioner thus may be summed up as follows:

"Firstly, since the respondent No. 4 had quoted Rs. 42 lakhs which is more than the stipulation of Rs. 39 lakhs as the worth of the work mentioned in the NIT, on that ground itself, the tender of the respondent No. 4 ought to have been rejected.

Secondly, that apart, the respondent No. 4 did not possess the work experience for two years mentioned in the item bid which being an essential requirement, cannot be ignored. On this ground also, the tender of the respondent No. 4 ought to have been rejected by the authorities.

Thirdly, the requirement of the submission of VAT/Commercial or Service Tax registration number/certificate or Certificate or Service Tax registration of the tenderers cannot be also considered to be not an essential requirement which the respondent No. 4 had failed to do."

Therefore, mainly because the respondent No. 4 was given a higher rating in the technical qualification, that itself cannot override the essential requirements of

the tender as mentioned above.

It has thus been submitted that the tender of the respondent No. 4, having not fulfilled the essential terms and conditions of the tender at least on three mandatory aspects mentioned above, cannot be accepted at all, much less awarded the contract and accordingly, has prayed for setting aside the said contract award and award the tender to one of the eligible tenderers.

4. The writ petition has been vehemently opposed by the State respondents contending that this is not a normal tender. This tender relates to the organisation of Manipur Sangai Festival, 2015 which is due to start on 21st November, 2015 whose main purpose is to showcase the rich heritage of the State and since the respondent No. 4 was found to be far superior in technical aspects and as the authorities did not want to compromise with the quality of presentation and publicity, which is one of the most important parts of this Festival, the Government decided to lower the price bid of the respondent No. 4 and negotiated with the respondent No. 4 so as to bring within the tendered amount. As regards the work experience, it is on record that the respondent No. 4 had participated in the Manipur Sangai Festival in 2011 and accordingly he fulfills the requirement. As regard the requirement of the submission of VAT/ Commercial or Service Tax registration number/certificate or Certificate or Service Tax registration, the respondent No. 4 had submitted a Certificate supported by an affidavit stating that the respondent No. 4 is really a branch of "IFD Designing, Construction and Manufacturing" which is duly registered with the concerned authorities and as such, the respondent No. 4 being a part of the aforesaid "IFD Designing, Construction and Manufacturing", can be deemed to have submitted the relevant Registration Certificate as required under the NIT. Further, it has been submitted that because of paucity of time, if the tender process is interfered at this stage, the organisation of the Festival itself will suffer.

5. Mr. Athouba, learned counsel for the respondent No. 4 has also contended that the respondent No. 4 has been adjudged to be superior in the technical area than the rest of the tenderers and the respondent No. 4 had also participated in the Manipur Sangai Festival in 2011 and it gained experience of more than 2 years regarding which necessary certificate had been submitted along with the tender and as regards, VAT/Commercial or Service Tax registration number/certificate or Certificate or Service Tax registration, since the respondent No. 4 is a part of the IFD Designing, Construction and Manufacturing, whose registration certificate was submitted, it cannot be said that the respondent No. 4, namely, M/s. Tashi Interiors does not possess the necessary qualifications. Further, it has been contended by Mr. Athouba that after issuance of the contract in favour of the respondent No. 4, the respondent No. 4 had started the work and in fact, had completed more than 60% of the work and if the work is interfered at this stage, it will be a huge financial loss for him.

6. Mr. Y. Ashang, learned Government Advocate for the State respondents has also submitted that it cannot be said that the respondent No. 4 does not possess

these qualifications and even if, there be any irregularity or some technical defects, that ought not come in the way as the public interest is supreme and considering the peculiar facts and circumstances of the case, this Court may not intervene and relied on a decision of the Hon"ble Supreme Court rendered in the case of Siemens Aktiengesellschaft and S. Ltd. Vs. DMRC Ltd. and Others, . In the said, the Hon"ble Supreme Court observed as follows:--

"21. It is unnecessary and platitudinous for us to burden this judgment with reference to the decisions of this Court on the subject for the governing principles are so well known and well settled that any review of the law on the subject is bound to be simply repetitive without any meaningful contribution to the existing legal literature on the subject. We remain content by referring to only two of a plenitude of judicial pronouncements on the subject in which the legal position has been succinctly restated. One of these decisions was delivered in Jagdish Mandal Vs. State of Orissa and Others, , where too this Court was dealing with the exercise of power of judicial review in matters relating to tenders and award of contracts. This Court identified the special features that should be borne in mind while judicially reviewing award of contracts. We can do no better than extract the following observations of this Court in this regard:

"22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes."

(emphasis supplied)

22. More recently in Heinz India Pvt. Ltd. and Another Vs. State of U.P. and Others, , this Court speaking through one of us (Thakur, J.) examined the legal dimensions of judicial review and quoted with approval the following passage from Reid v. Secy. of State for Scotland; Reid v. Secy. of State for Scotland, (1999) 2 AC 512 : (1999) 2 WLR 28 : (1999) 1 All ER 481 (HL) which succinctly sums up the law: (Heinz India Pvt. Ltd. and Another Vs. State of U.P. and Others, , para 68)

"68. ..."Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the

tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence." (Reid case Reid v. Secy. of State for Scotland, (1999) 2 AC 512 : (1999) 2 WLR 28 : (1999) 1 All ER 481 (HL), AC pp. 541 F-H and 542 A)"

23. There is no gainsaying that in any challenge to the award of contract before the High Court and so also before this Court what is to be examined is the legality and regularity of the process leading to award of contract. What the Court has to constantly keep in mind is that it does not sit in appeal over the soundness of the decision. The Court can only examine whether the decision-making process was fair, reasonable and transparent. In cases involving award of contracts, the Court ought to exercise judicial restraint where the decision is bona fide with no perceptible injury to public interest."

7. Accordingly, it has been submitted, relying on the aforesaid decision, that while examining issues relating to award of contract, the Court has to be primarily concerned with the decision making process and ought not enter into the nitty-gritty of the merit of the case and if the decision making process was fair, reasonable and transparent, the Court ought not interfere in such tender process. It has been submitted by Mr. Y. Ashang, learned Government Advocate that in the present case, it cannot be said that the decision making process was unfair or unreasonable or was not transparent. The authorities took all the factors into consideration and gave appropriate opportunities to all the parties before coming to a decision and hence, this Court may not interfere.

8. On the other hand, Mr. N. Ibotombi, learned senior counsel submits that though interference of the Court may be limited, yet, there are certain fundamental aspects of a tender which cannot be compromised which had been so compromised in the instant case. In this connection, Mr. N. Ibotombi, learned senior counsel relied on the decision of the Hon'ble Supreme Court in the case of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, and has submitted that if eligibility conditions are not fulfilled by the tenderer, question of considering such tender does not arise as considering an ineligible tenderer would be plainly arbitrary, discriminatory and violation of

Article 14 of the Constitution. Further, he also relied on the decision of the Hon'ble Supreme Court reported in Ram Gajadhar Nishad v. State of U.P. & ors., (1990) 2 SCC 486 in which the Hon'ble Supreme Court has specifically held that non-compliance of the mandatory conditions of the tender process would render any such tender liable to be rejected. Accordingly, it has been submitted that non-fulfillment of fundamental and mandatory conditions would render the tender of the respondent No. 4 to be defective and liable to be rejected.

9. Heard the learned counsel for the parties and perused the materials on record.

True, in the tender process, the Court ought not to examine the matter as if sitting on appeal by appreciating the evidence or materials and weighing the different parameters with a microscopic mind. It will suffice if the tender process is found to be fair, transparent and reasonable and this Court ought not interfere merely because of certain defects/irregularities committed in the tender process. Therefore, the crucial issue which arises for consideration in this case is whether the defects as pointed out by the learned senior counsel for the petitioner can be said to be minor or mere technical irregularity which could be ignored by the authorities while issuing the tender as has been done. If not, and if these are fundamental requirements or mandatory requirements which could not be relaxed, this Court would have no other option but to interfere.

10. As regards the contention raised by the petitioner that though the tender work was mentioned to be of Rs. 39 lakhs in the NIT, the respondent No. 4 quoted Rs. 42 lakhs and as such, disqualifying himself as a tenderer, cannot be said to be without any force. All the tenderers were very much well aware that the work has to be confined within the estimates set by the authorities themselves i.e. Rs. 39 lakhs. Therefore, any tenderer, could have, at best, quoted the price equal to Rs. 39 lakhs if not less. If the tenderer consciously/ knowingly quotes a rate higher than the price as a limit by the authorities, he himself invites disqualification because the authorities are not expected at all to consider such tender which has quoted more than the stipulated rate. By laying down the terms and conditions in the NIT, the authorities declare the parameters to the public of the Tender which the tenderers are expected to adhere to. By setting Rs. 39 lakhs as the estimated cost, the authority also makes known its intention that they will not accept any rate which is above the said amount. In the present case, the authorities had not denied that the respondent No. 4 had quoted a price which is much higher than the tender cost of Rs. 39 lakhs. On that ground itself, the tender of the respondent No. 4 ought to have been rejected at the first round, which, however, has not been done in the present case as evident from the records. The contention of the respondents that the respondent No. 4 was rated best in technical area could be of no avail inasmuch as the requirement was not only of quality but also of the financial implications and the State had clearly indicated in the NIT that it was not willing to spend more than Rs. 39 lakhs on that work. Therefore, the authorities had to look for a tenderer who was willing to work within the specified budgetary limitations. If the

technical requirement was the prime concern and that other conditions could be modified or adjusted, that could have been mentioned in the tender itself, which is not the case. There could have been many other tenderers who though very well qualified in the technical field were not willing to execute the work because of the price quoted by the State and hence, did not apply for the tendered work. Therefore, this Court is not inclined to accept the contention of the respondent authorities that the tender of the respondent No. 4 though had quoted higher, was considered because of his technical qualification.

11. That apart, the requirement of having experience of two years cannot be said to be a minor or something which would be over-looked. The work experience specifically mentioned in the NIT is the requirement of two years and it is not the case of the respondents that the work experience of the respondent No. 4 falls short by a few days or months. Nothing is mentioned in the pleading nor supported by any document to show that the respondent No. 4 indeed had experience about two years. The only document relied on by the respondent No. 4 in support of his case which was accepted by the authorities is a certificate issued by the Organising Committee of the Manipur Sangai Festival held in 2011 that the respondent No. 4 had "achieved highest standard of excellence in service contributed in organising the Manipur Sangai Festival of 2011" but the said Certificate does not mention in which area the respondent No. 4 had contributed. It is a fact that the Manipur Sangai Festival is a composite festival consisting of various aspects of the cultures of Manipur. The said Certificate does not indicate in which area the respondent No. 4 had contributed. Therefore, in absence of the specific certificate that the respondent No. 4 had contributed in respect of the bid item mentioned in the NIT, that Certificate is too vague to be relied upon. Apart from that, it does not also mention that the experience is for about two years. It simply mentions of his experience in the Sangai Festival of 2011 without indicating the period of experience. In that view of the matter, this Court is also inclined to accept that the respondent No. 4 does not fulfil the requirement of work experience of two years which is a mandatory/fundamental requirement which could not be overlooked by the authorities.

As regards the third defect pointed out by the petitioner, this Court is of the view that it may not be necessary any further to examine it in view of the fact that on two important mandatory requirements of the tender, the respondent No. 4 has failed to qualify.

12. The matter could have been otherwise if all the tenderers were not qualified in which event the authorities could have invited a tenderer whom it considers to be best technically qualified and who was willing to work within the permissible budgetary allocation. However, it is not the case that there are no other eligible candidates who had quoted within the permissible budgetary limit and they were technically unfit and were considered not suitable for the work required because of which their cases could be ignored. It is not the case of the respondent authorities that the technical expertises of the remaining tenderers were not at

all suitable for execution of the work. There is always an element of discretion to the authorities to choose the tenderer to execute the work but that choice must be within the qualified ones who fulfilled the mandatory requirements. There was no such observation by the authority while selecting the tender of the respondent No. 4. Any deviation from the mandatory requirement would invite censure of this Court on the anvil and the touchstone of Article 14 of the Constitution of India.

The fact that these conditions are essential and cannot be overlooked is also quite evident from the fact that in respect of many other tender items, many tenderers had been disqualified for not fulfilling the conditions mentioned in the tender, as reflected in the Tender Committee Report annexed in the affidavit-in-opposition of the State respondents. Therefore, if tenders in respect of other tenderers could be rejected on the ground of non-fulfilment of conditions stipulated in the NIT, this Court fails to understand how the same principle could not be adopted in the present case in dealing with the tender of the respondent No. 4 who does not possess some of these requirement/qualifications mentioned in the NIT.

13. Of course, the contention of the respondent No. 4 that setting aside of the contract awarded in favour of the respondent No. 4 at this stage, would entail serious financial inconvenience and in organising the festival, is of course a matter of serious concern but the fact remains that these are defects which could have been easily identified by the authorities themselves at the very initial stage of the opening of the tenders as these defects were very much evident and too obvious to be ignored at the initial stage itself. Therefore, this Court cannot but observe that this complicity/inconvenience which has been caused is at the own invitation of the authorities. The defects pointed out by the petitioners are not something which were not evident earlier and which could be ascertained only through a minute examination, but which are too glaringly visible to be ignored. If the authorities choose to ignore certain clearly visible defects, they did so at their own peril. The respondent No. 4 also fully knowing the terms and conditions of the Tender took a calculated risk in offering a price beyond the estimated cost mentioned in the NIT. Hence, the respondent No. 4 must be ready to face the consequences of such risk taken. Thus, the inconvenience created by themselves have to be sorted out by themselves. This Court observes that the decision of the State Government may not be a malafide and its action may have been dictated by the desire to maintain the quality of work. Yet, absence of malafide cannot be a ground to accept the action of the State, if it does not conform to the law of the land.

This Court had, at the instance of the petitioner, passed an interim order on 16.10.2015 and has taken up this matter at right earnest for speedy disposal. Since there are only about 10 days left for the festival to start, the authorities may adopt such process for executing the said work in their wisdom in accordance with law and eligible and valid tenderers cannot be ignored by the

authorities while executing of the said work.

14. In the result, the writ petition succeeds. The work order issued in favour of the respondent No. 4 vide order dated 8th October, 2015 is set aside for the reasons discussed above and the authorities would be at liberty to proceed with the execution of the said work considering the case of the petitioner and other eligible and qualified tenderers in accordance with law.