

(2024) 02 GAU CK 0017

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 7070 Of 2022

Ruhul Amin

APPELLANT

Vs

State Of Assam And 2 Ors

RESPONDENT

Date of Decision : 13-02-2024

Acts Referred:

Assam Panchayat (Financial) Rules, 2002 — Rule 47(11), 47(13)

Citation : (2024) 02 GAU CK 0017

Hon'ble Judges : Michael Zothankhum, J

Bench : Single Bench

Advocate : D.A. Kaiyum, S. Dutta

Final Decision : Dismissed

Judgement

1. Heard Mr. D.A. Kaiyum, learned counsel for the petitioner as well as Mr. S. Dutta, learned Standing Counsel, P&RD Department.

2. The petitioner's case is that the petitioner took part in the tender process for settlement of the Balisatra Bi-Weekly Market for the year 2021-22 vide NIT dated 10.05.2021. The highest bidder withdrew his tender. The petitioner, who was the second highest bidder, was issued a letter dated 26.07.2021, directing him to submit the remaining documents in terms of Clause 10 of the tender notice within 3 days, as he had not submitted the required documents along with his quotation, in terms of Clause 10 of the NIT. Thus, the petitioner was to submit his documents (except Court fee and earnest money) within 3(three) days, as the market was to be settled with the petitioner in terms of Clause 10 of the NIT.

3. Clause 7 and Clause 10 of the NIT are re-produced hereinbelow as follows :

"7. It is mandatory to submit the required court fee and earnest money by the tenderer with tender. No tenderer shall be allowed to withdraw tender after submission of tender. On that occasion, or if any tenderer refuse to accept lease, their earnest money will be forfeited.

"10. The highest bidders would be considered for settlement of all the hats/ghat/fisheries. If the highest bidders did not submit (except court fee and earnest money) the required documents, those tenderers would be allowed three days time to submit those documents. If the tenderer could not submit those required documents within maximum 3(three) days time, on that occasion his tender will be rejected and the earnest money will be forfeited and settlement shall be made to the next highest bidder as per the aforesaid terms and conditions."

4. The petitioner could not submit his documents within 3 days and asked for further time to submit his documents. However, the respondents overlooked the tender of the petitioner, as he could not submit his tender documents within 3 days from the date of the respondents asking for the same in terms of Clause 10 and awarded the tender to another tenderer.

5. The petitioner is aggrieved by the refusal on the part of the respondents to return back his earnest money. The counsel for the petitioner submits that Clause 10 of the NIT dated 10.12.2021 cannot stand in the way of the respondents returning his earnest money, inasmuch as, the petitioner had not been selected for settlement of the market, in the absence of the required documents being furnished by him. Further, in terms of Rule 47(11) and 47(13) of the Assam Panchayat (Financial) Rules 2002, hereinafter referred to as the 2002 Rules, earnest money could be forfeited only on two conditions not being fulfilled, i.e., 1) if the tenderer failed to deposit 30% of the quoted amount within 7 days from the date of his selection and 2) In the event the authorities failed to provide the form of lease and stamp papers at the time of making the agreement. The petitioner's stand is that in the absence of the above conditions for forfeiting earnest money provided in Rule 47(11) of the 2002 Rules, Clause 10 of the NIT could not be applied for forfeiture of the earnest money and the same would have to be returned to the petitioner.

6. The stand of the respondents, on the other hand, is that the Clause 10 of the NIT is not in conflict with Rule 47(11) and 47(13) of the 2002 Rules. The counsel for the respondents submit that the respondents have the competency and the right to insert Clause 10 in the NIT regarding forfeiture of earnest money, in addition to the conditions enumerated in Rule 47(11) and 47(13) of the 2002 Rules. He further submits that the petitioner did not make a challenge to Clause 10 of the NIT prior to participating in the tender process. The counsel for the respondents further submit that the petitioner having prayed for extension of time for submitting documents in terms of Clause 10 of the NIT, the petitioner cannot turn around and say that Clause 10 would not be applicable to him after the tenders have been opened.

7. I have heard the learned counsels for the parties.

8. The petitioner had taken part in the tender process for settlement of the market pursuant to the NIT dated 10.05.2021. Though the respondents wanted to settle the market with the petitioner, the same could not be settled with the

petitioner, in view of the petitioner not being able to submit the required documents within 3 days, in terms of Clause 10 of the NIT. Though the petitioner prayed for some more time to submit the required documents, the same was not allowed.

9. Clause 7 of the NIT provides that no tenderers shall be allowed to withdraw their tenders after submission of the same and if any tenderer refuses to accept the settlement, the earnest money will be forfeited. Clause 10 of the NIT provides that if the highest bidder did not submit the required documents at the time of submission of tender, 3 (three) days time would be provided to submit those documents. If the tenderer is unable to do so, the tender will be rejected and earnest money would be forfeited.

10. Rule 47(11) and Rule 47(13) of the 2002 Rules provides as follows :

"47[11] On acceptance of the tender, the Panchayat concerned shall inform the selected tenderers concerned requiring the tenderers to submit within seven days from the date of issuing the acceptance letter to –

[i] Deposit with the Panchayat concerned not less than thirty percent of his quoted amount in his tender as security. The amount of security shall be recorded in the Register in Form No. 12 and accept a duly stamped lease in a Form as specified in Annexure-8 of the Schedule of these rules; [ii] The Panchayat concerned shall provide the Form of lease and stamps papers at the concerned lessee's cost.

47[13] Failure of the tenderer to comply with the condition set forth in sub-clause [11] [i], [ii] shall result in forfeiture of his earnest money deposited in concerned Panchayat's Fund."

11. A conjoint reading of Rule 47(11) and Rule 47(13) of the 2002 Rules shows that once a tender has been accepted, the Panchayat is to inform the selected tenderer to submit within 7 (seven) days from the date of issue of the acceptance letter, 30% of the quoted tender amount as security. Thereafter a Lease Deed is to be executed on the form of lease and stamp papers to be provided by the Panchayat. Failure to comply with Rule 47(11) would result in the forfeiture of earnest money in terms of Rule 47(13).

12. The provisions of Rule 47(11) and Rule 47(13) of the 2002 Rules cannot be a bar for the State respondents, for making further grounds for forfeiture of earnest money in the NIT, inasmuch as, the terms and conditions put by the owner or the author of the tender documents, regarding submission of and forfeiture of earnest/security money, is to ensure that a contract comes into existence and that tenderers show their sincerity to enter into a contract, while making their offer. There can be a myriad of reasons for a tenderer to suddenly withdraw his bid from the tender process, which can scupper a tender process. It is not unknown for cartels to come up, to ensure that the competitiveness of a tender/auction process is compromised. Further, in the case of Ridley Life Service

Pvt. Ltd. vs. State of Assam & Another, reported in 2020 (1) GLT 273, this Court has held that the State can choose its own terms and it is the best judge. Keeping the above in view, this Court does not find any bar for the State respondents to have inserted Clause 10 in the NIT, to ensure that the bidder was serious with his offer for entering into a contract, knowing fully well the consequences of not complying with the terms and conditions of the tender notice.

13. In the case of National Highways Authority of India vs. Ganga Enterprises and Another, reported in (2003) 7 SCC 410, the Supreme Court has held that a person may have a right to withdraw his offer, but if he has made his offer on a condition that some earnest money will be forfeited for not entering into a contract or if some act is not performed, then even though he may have a right to withdraw his offer, he has no right to claim that the earnest/security be returned to him. Forfeiture of such earnest/security, in no way, affects any statutory right under the Indian Contract Act. Such earnest/security is given and taken to ensure that a contract comes into existence. The Supreme Court further held that it would be an anomalous situation that a person who, by his own conduct, precludes the coming into existence of the contract, is then given advantage or benefit of his own wrong by not allowing forfeiture. It must be remembered that, particularly in government contracts, such a term is always included in order to ensure that only a genuine party makes a bid. If such a term was not there, even a person who does not have the capacity or a person who has no intention of entering into the contract, will make a bid. The whole purpose of such a clause, i.e. to see that only genuine bids are received, would be lost if forfeiture was not permitted.

14. In the present case, the petitioner having submitted his tender on the basis of the NIT dated 10.05.2021, without making any challenge to Clause 10 of the NIT, he cannot be allowed to now turn around and make a challenge to the terms and conditions of the NIT, after he was given an opportunity to submit his documents in terms of Clause 10 of the NIT. Further, the petitioner in paragraph-6 of the writ petition has stated that despite his best efforts to arrange the documents in time, he failed to do so. Also, he made a request for some more time to submit the required documents, which was not allowed. However, the petitioner is now making a challenge to the same Clause 10, by which the State respondents and the petitioner were trying to enter into a contract earlier. The same cannot be allowed. This is in line with the decision of the Division Bench in WA No.395/2022 (Sibaram Deka vs. The State of Assam & 7 Others), wherein it has held that when a tenderer participates in a tender process without objection and is subsequently found to be not successful, a challenge to the process is precluded. Such a tenderer cannot be allowed to turn around and contend that the process was unfair by virtue of existence of a Clause in the NIT.

15. In view of the reasons stated above, this Court finds no merit in the petition.

This writ petition is accordingly dismissed.