(2010) 02 GAU CK 0024

In the Gauhati High Court

Case No : Writ Petition (C) No''s. 101 and 102 of 2009

Sh. Lalmunapuia APPELLANT

Vs

State of Mizoram and Others RESPONDENT

Date of Decision : 19-02-2010

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2006) 1 GLT 890

Hon'ble Judges : A.C. Upadhyay, J

Bench : Single Bench

Advocate : C. Lalramzauva, for the Appellant; N. Sailo and M. Zothankhuma, for the Respondent

Final Decision : Dismissed

Judgement

A.C. Upadhyay, J.—Both the aforenoted writ petitions which carry common question of law structured on almost identical factual matrix filed by the same person are taken up for analogous hearing and are being disposed of by this common judgment.

2. The writ Petitioner, who also unsuccessfully participated in the two of the bids for construction of roads under Pradhan Mantri Gram Sadak Yojana (PMGS Y), have challenged the legality of the selection process and allotment of contract work to the private Respondents.

3. I have heard Mr. C. Lalramzauva, learned Counsel appearing on behalf of the Petitioner and Mr. N. Sailo, Addl. Advocate General, Mizoram, for the State Respondents and Mr. Michael Zothankhuma, Advocate representing Respondent No. 4.

4. Facts which are common to both the writ petitions may be briefly stated as follows.

5. The Sate Respondents for the purpose of construction of 41 roads under the

Pradhan Mantri Gram Sadak Yojana (PMGS Y) had invited sealed tender vide NIT No. 1 SEL of 2009-2010, under Memo No. B 12026/63/ 07-SEL/83 dated 17.6.09. The last date for submission and opening of tenders was fixed on 8.6.09. However, the same was postponed to 23.06.09 to and the Technical Bids submitted by the Tenderers were accordingly opened.

6. In response to the NIT aforesaid dated 17.6.09, the Petitioner also had submitted his quotation for both Technical and Financial bids in respect of Work under SI. No. 8 of the NIT i.e. ''Leite-S. Mualthuam Road'' (Sh. F/C & Permanent Works MZ 05/713 ''B'') and the estimated costs of construction of the said road was Rs. 20,203,589.12 and the duration for completion of the same was 12 months. The aforesaid contract work allotted to the Respondent is the subject matter of WP(C) 102 of 2009.

In response to the NIT aforesaid dated 17.6.09, the Petitioner also had submitted his quotation for both Technical and Financial bids in respect of Work under SI. No. 14 of the NIX i.e. R. Mat-Lungmaui Road (Sh: F/C Vpumarent Works) package No. MZ 05/77 ''B'' for Rs. 21,617,301.95 p. and the duration for completion of the same was 12 months. The aforesaid contract work allotted to the Respondent is the subject matter of WP(C) 101 of 2009.

7. The Petitioner further stated that a Standard Bidding Document, for PMGSY was issued by the National Rural Road Development Agency (An Agency of the Ministry of Rural Development), Government of India by describing different terms and conditions by way of ''Instructions to the Bidders, which among them, have been indicated in ITB at Clause 4.4A and it reads as follows:

To qualify for award of the Contract, each bidder should have in the last 5 years:

(a) achieved in any one year a minimum financial turnover (as certified by Chartered Accountant, and at least 50% of which is from Civil Engineering Construction Works) equivalent to amount given below:

(i) 60% of amount put to bit, in case the amount put to bit is Rs. 200 lakhs and less.

(ii) 75% of amount put to bit, in case the amount put to bit is more than Rs. 200 lakhs but less than Rs. 1000 lakhs. The amount put to bid would not include maintenance cost for 5 years and the turnover will be indexed at the rate of 8% for a year.

If the bidder has executed road works under Pradhan Mantri Gram Sadak Yojana in originally stipulated completion period, the financial turn over achieved on account of execution of road works under PMGSY shall be counted as 120% for the purpose of this.

(b) Satisfactorily completed, as Prime Contractor, at least one similar work equal in value to one-third of the estimated cost of work (excluding maintenance cost for five years) for which the bid is invited, or such higher amount as may be specified in the Appendix to ITB. The value of work completed by the Bidder under Pradhan Mantri Gram Sadak Yojana in originally stipulated period of completion shall be treated 120% for the purpose of sub-clause.

8. Learned Counsel for the Petitioner contended that the Petitioner had submitted all necessary Bid Documents in terms of the requirement indicated in Para 4.4A, aforesaid and in so doing satisfied the mandatory requirements to qualify the award of the contract aforesaid. In addition to which, the Petitioner claimed that he was the only bidder, who had meticulously complied with all the mandatory requirements and thus qualified for award of the contract among the bidders, whereas the Respondent No. 4 and other two bidders could not produce the necessary documents required in terms of paragraph 4.4A of ITB.

9. Learned Counsel for the Petitioner submits that in WP(C) 101 of 2009 while submitting tender document, the Petitioner submitted his tender for the work with the estimated cost of Rs. 21,167,310.95 p. by adopting the item rate method as specified in the Appendix to ITB had quoted a sum of Rs. 20,108,936.86 p for the said work, which is 4.9999997% below the estimated cost. The Petitioner alleged that the Respondent No. 4 for the same work had quoted a sum of Rs. 20,108,936.85 p, which is calculated as 5.0000000197984% below the estimated cost, which is beyond permissible variation of 5% below the estimated cost.

Learned Counsel appearing for the Petitioner submits that in WP(C) 102 of 2009 the Petitioner maintained the superiority in the Financial Bid by quoting a sum of Rs. 19,193,409.67 p, for the work which is 4.9999997% below the estimated cost, whereas, the Respondent No. 4, who had also quoted a sum of Rs. 19,193,409.66 p, which is calculated as 5,0000000197984% below the estimated cost, which according to the Petitioner, is beyond the permissible variation of 5% below the estimated cost of the work, as indicated in the tender clause aforesaid.

10. The learned Counsel for the Petitioner submits that in spite of the superiority in the Technical Bid as well as the Financial Bid, the Petitioner was not awarded the said contract work, instead the Respondent No. 4, who did not qualify, was awarded the contract.

The Respondent State Government submitted affidavit denying the statement of facts made by the Petitioner in the writ petition and further clarified that the Petitioner was not the only tenderer, who had meticulously complied with the mandatory requirements of the ''Instructions to the Bidders''. On contrary on examination of the Bid documents by the ''Technical Bid Evaluation Committee,'' altogether three bidders were found to be eligible to take up the said work, who among them included the Petitioner and the private Respondent No. 4.

11. After selection and approval of the contractors as aforesaid by the Technical Bid Evaluation Committee, the Financial Bid quoted by the tenderers were opened for scrutiny by the Respondent authority. On evaluation of the Financial

Bid quoted by the Petitioner it was found that though the Petitioner had quoted Rs. 19,193,409.67 p which is below 5% of the tendered amount but on evaluation o f the price quoted it was found by the state Respondents that the Petitioner had quoted abnormally high/low rates on 8 items without giving any genuine justification for doing so.

12. In order to dispel the misgivings on the Technical Bid a id the Financial Bid made by the Petitioner the Respondents State Government also furnished all the relevant records, relating to the Technical Bid and the Financial Bid in respect of the PMGSY work relating to NIT No. 1 SEL of 2009-2010, for examination b; j the Petitioners as well as this Court.

13. The relevant file relating to the Technical Bid which has been made available for inspection of the Courts today by the learned Addl. Advocate General, Mizoram, reveals that in the Technical Bid out of 53 bidders, only the 3 bidders, namely, Lalmonpuia i.e. the Petitioner, Lawmauma, the private Respondent No. 4, Biakliana (not a party) respectively, were found qualified for the aforesaid work, by securing sufficient marks as assessed by the Technical Bid Evaluation Committee.

14. The Technical Bid Evaluation Committee, in re spect of Package No. MZ-05/77 ''B'', consequently having found the Petitioner, the private Respondents and another competent and qualified in Technical Bid, decided to open their respective Financial Bid documents. On opening the Financial Bid documents the following observation was made by the committee against the tendered amount indicate by the bidders, which reads as follows:

WP(C)No. 101/09

Name of work: Construction of R. Mat-Lungmawi Road.

(4.00 - 9.090 Kmp) Sh F/c & Permanent works. Package No. MZ-05/77''B''

All the three Bidders were found responsive as decided by the Technical evaluation committee meeting held in the office chamber of the Chief Engineer PWD, Road on 13th July, 2009 and conveyed vide letter No. B-17025/CS/ LC/CE-R/06/PW/Pt/3 Dated 14.07.2009. They are: 1/3 C. Lawmawma Pangzawl, 2/3 Biakliana Missionveng Aizawl and No. 3/3 Lalmuanpuia Venghlui Aizawl.

Observation made after scrutiny of their Bid are:

Bidder No. 1/3.C. Lawmawma: This Bidder has quoted at a total amount of Rs. 201,08,936.85 against the Tender amount of Rs. 211,67,301.95, that is exactly at 5% below the tender amount and it is the least permissible amount for award of work as per Govt''s notification No. D-24011/2/05-PWE Dated 24th August 2007. He is First lowest.

Bidder No. 2/3. Biakliana: Initially, the quoted amount of this Bidder is Rs. 201,08,936.85. However, after careful scrutiny his quoted amount has come to Rs. 201,08,937.01 against the Tender amount of Rs. 211,67,301.95, this is at

4,999999% below the tender amount and it is within the permissible amount for award of work as per Govt. Notification No. D. 25011/2/2005-PWE Dt. 31st August 2005 and No. D-24011/2/ 05-PWE Dt. 24th August 2007. He is second lowest.

Bidder No. 3/3. Lalmuanpui: The quoted amount of this Bidder after careful scrutiny is Rs. 179,60,899.32. This amount is well outside the permissible range for ward of work as indicated by Govt. Notification mentioned above. He had several abnormally high and low rates; the items are:- (1) Item No. 9, which is 23.19% below, (2) Item No. 10, which is 25.09% below, (3) Item No. 11, which is 60.08% below, (4) Item No. 12, which is 26.97% below, (5) Item No. 14, which is 18.77% below, (6) Item No. 16, which is 22.80% below, (7) Item No. 17, which is 28.96% below, (8) Item No. 19 which is 13.42% below, (9) Item No. 20 which is 55.38% below, and (10) Item No. 22, which is 18.77% below. Hence, this Rate/Amount is unworkable.

Sd/- (Pazawna) Sd/- (Zd. Laltlanzova) Engineering Asstt. Asstt. Engineer, PWD For Superintending Lunglei Circle, Lunglei Engineer, PWD Lunglei Circle Lunglei

The first lowest C. Lalmawma, Tangzawl may be awarded at his quoted rate.

L.A. may be processed. Sd/-S.E. PWD Lunglei Circle Lunglei.

The Technical Bid Evaluation Committee, in respect of Package No. MZ-05/713 ''B'' consequently having found the Petitioner, the private Respondents and another competent and qualified in Technical Bid, decided to open their respective Financial Bid documents. On opening the Financial Bid documents, the following observation was made by the committee against the tendered amount indicated by the bidders, which reads as follows:

WP(C)No. 102/09. MZ05/713 ''B''

Name of work: Construction of Leite-S. Mualthuam Road

(15.00-20 Kmp) Sh: FC & Permanent works.

Package No. MZ-05/713 ''B''

All the four Bidders were found responsive as decided by the Technical Evaluation Committee meeting held in the office chamber of the Chief Engineer PWD, Road on 13th July 2009 and conveyed vide letter No. B-1 7025/CS/LC/CE-R/06/PW/ PI/3 Dated 14.07.2009. They are : 74 C. Lalhmingliana Chanmari, Lunglei, 2/4 Lalthangmawii Chaltlang Dawrkawn Aizawl, 3/4 Malsawmkima Chawnpui Aizawl and 4/4 Lalmuanpui Venghlui Aizawl.

After careful scrutiny and evaluation of their bid documents it is found that Bidder No. 1/4, 2/4 & 3/4 had quoted at a total amount of Rs. 191,93,409.66 each as against the Tender amount of Rs. 202,03,589.12, which is exactly at 5% below the tender amount and it is the least permissible amount for award of work as per Govt''s Notification No. D-24011 /2/05-PWE dated 24th August

2007. They are First Lowest. Bidder No. 4/4 Lalmuanpuia had quoted Rs. 191,93,409.67. This is valid and is Second Lowest. However, bidder No. 4/4 Lalmuanpuia had several abnormally high/low rates; the items are :- (1) Item No. 9, which is 15.91 % below, (2) Item No. 11, which is 57.19% below, (3) Item No. 12, which is 12.84% below, (4) Item No. 14, which is 11.34% below, (5) Item No. 16, which is 15.47% below, (6) Item No. 19, which is 22.04% above, (7) Item No. 20, which is 52.42% below, and (8) Item No. 22, which is 11.34% below. Therefore, these abnormally low/high rates cannot be considered for award of work.

The Bid Documents and Comparative statement are attached herewith for seen and further necessary action.

Sd/-(Pazawna) Sd/-(Zd. Laltlanzova) Engineering Asstt. Asstt. Engineer, PWD For Superintending Lunglei Circle, Lunglei Engineer, PWD Lunglei Circle, Lunglei

The first lowest C. Lalthmingliana, Chandmari, Lunglei may be awarded at his quoted rate.

L.A. may be processed. Sd/-S.E. PWD Lunglei Circle Lunglei.

15. Learned Counsel for the Petitioner though disputed that the Respondent No. 4 did not submit the copy of annual accounts duly audited by the Chartered Accountant, but when the copy of annual account of the private Respondent No. 4 audited by a Chartered Accountant was produced by the State Respondents from the relevant file of the Department, the learned Counsel for the Respondent raised an objection that such audit of the account was carried out by the State Government''s Chartered Accountant, therefore, is not acceptable. However, the learned Counsel for the Petitioner could not and law or rule to establish such an objection regarding unacceptability of the audited account by a Chartered Accountant hired by State Government.

Consequently, I do not find any reason to stretch this discussion regarding non-acceptability of the account submitted on behalf of the Respondent No. 4 of audited by Chartered Accountant, in terms of the contract. Therefore, on the face of it the plea of the Respondent being better than others is not sustainable in law as well as on facts.

16. Learned oounsel for the Petitioner relying on the decision of the Hon''ble Supreme Court reported in (2001) 2 SCC 45 W.B. State Electricity Board v. Patel Engineering Co. Ltd. and Ors. submitted that a work of this nature and magnitude where bidders who fulfill pre qualification alone are invited to bid, adherence to the instructions cannot be giver a goby otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism, which are totally opposed to the rule or law and our constitutional values held as follows:

24. The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of

technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid at d also award of a contract. The Appellant, Respondents 1 to 4 and Respondents 10 and 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfill pre qualification alone are invited to bid, adherence to the instructions cannot be given a goby by branding it as a pedantic approach, otherwise it with encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule or law and our constitutional values. The very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty. Relaxation or waiver of a rule or condition, unless so provided under the ITB, by the State of its agencies (the Appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the rules, it has to be done strictly in compliance with the rules. We have, therefore, no hesitation in concluding that adherence to the ITB or rules is the best principle to be followed which is also in the best public interest.

17. In reply, the learned Counsel appearing for the Respondents relied on the following decision reported in Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, , wherein the Hon''ble Supreme Court held as follows:

When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the Court must be satisfied that there is some element of public interest involved in entertaining such petition. If, for example, the dispute is purely between two tenderers, the Court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by two tenderers may or many not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by Court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the Court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the Court is satisfied that there is a substantial amount of public interest, or the transaction is entered into malafide, the Court should not intervene under Article 226 in disputes between two rival tenderers.

18. In awarding of a contract work, it would not be justified for a writ Court to venture a roving inquiry in respect of evaluation of the Financial bid and the Technical, which are purely technical in nature that require expertise and proficiency in the particular field of knowledge.

19. In Uncle''s Shop and Ors. v. Biva Hazarika and Ors. 2002 (1) GLT 109 the learned Single Bench of this Court restating the limits of judicial review and relying on the decision of the Court in Purbottar Trade and Marketing Co-operative Society Ltd. Vs. State of Assam and Others, held that Court should not interfere unless the substantial public interest involved or grant of the contract itself is malafide.

(14) Learned Counsel for the Petitioner has placed reliance on a decision of this Court in the case of Purbottar Trade and Marketing Co-operative Society Ltd. Vs. State of Assam and Others, wherein this Court had the occasion to examine the matter of supply of contract awarded by the public authority. This Court in para-32 observed:

32. The power of the Court to interfere in the field of contract by Government or instrumentality of State has crystallized. The Court does not act as a Court of appeal but merely reviews the manner in which the decision was made, particularly as the Court does not have the expertise to correct the administrative decision. If a review of the administrative action is permitted, it will be substituting its own decision which itself may be fallible. The duty of the Court is to confine itself to the question of legality. Its concern should be -- (i) whether the decision making authority exceeded its powers, (ii) committed an error of law in decision making process, (iii) committed a breach of the rules of natural justice, (iv) reached a decision which no reasonable man could not have reached, (v) abused its powers see Mansukhlal Vithaldas Chauhan Vs. State of Gujarat, In Wednesbury case it was pointed out that the decision could be one of many choice open to the authority, but it was for that authority to decide upon the choice and not for the Court to substitute its view. To characterise on administrative decision as irrational the Court has to hold on materials, that it is a decision so out agcous as to be in total defiance of logic or moral standards. The Supreme Court in Union of India and another Vs. G. Ganayutham (Dead) by LRs., pointed out that in India the position of administrative law where no fundamental right is involved is that Courts will only play a secondary role while the primary judgment as to reasonableness will remain with the executive or administrative authority. The secondary judgment of the Court is to be based on Wednesbury and C.C.S.U. principles as stated by Lord Diplock (reported in Para 13 of the judgment) respectively to find if the executive or administrative authority has reasonably arrived at its decision as the primary authority. The Supreme Court in Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others, lays down that though the principle of judicial review cannot be denied so far as exercise of contractual powers of Government bodies are concerned. But it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the Court that in the matter of award of a contract power has been exercised for collateral purpose. It is not within the permissible limits of the Court of law, particularly when there has been no allegation of malice or ulterior motive and particularly when Court has not found any malafide or favouritism in the grant of

contract in favour of a successful bidder.

The Court further observed in Para-35: "35. It is further the law to establish malafide exercise of power it must be shown by the Petitioner that the power was exercised with an ulterior motive and with an object of to defeat the claim of the person interested. But when valid reason/ ground can be discerned in the action of the authority from the materials it shall not be malafide exercise. A decision must not be the rules of thumb. If it can be gathered or demonstrated that the foundation of the decision is for wrong motives or on irrelevant grounds or arbitrary or unreasonable the Court may exercise the power. Regarding reasons to be recorded/stated I quote below a passage from Administrative Law by Wade 7th Edn. page 402 "reasonableness does not require reasons to be stated. The only significance of withholding reasons is that if the facts point overwhelmingly to one conclusion, the decision maker cannot complain if he is held to have had no rational reason for deciding differently and in the absence of reason he is in danger of being held to have acted arbitrarily.

The writ Court must guard and give protection to citizen against transgression made by the executive. But the Court must be prudently cautious in such a matter, in the garb of affording such protection, the Court must not take the virtual control of the administration. For each and every infraction the Court must not step into set at naught an administrative action arrived at by due deliberation and proper application of mind, such a decision though may not be perfect yet it does not call for interference if otherwise it is not arbitrary and absurd. It is that yardstick/measuring rod which I have applied n the matters and I find that the decision making process does not suffer from a vice which cal for interference at the hand of the Court. In this connection, I quote a passage from the Book Freedom under the Law by Lord Denning (page 102) "one of the most important tasks of the Courts is to see that the powers of the executive ire properly used, that is used honestly and reasonably for the purposes authorised by Parliament and not for any ulterior motive" in the case in hand the Purchase Board had to select a larger numbers of items for its Police Force and it did so by looking at the samples submitted with the tender according to quality and durability. The exercise was honest and reasonable. A person not given/ bestowed a benefit by the authority may always approach a forum and advance hair splitting arguments to establish/demonstrate some mistake/deviation in the decision making process, but that itself is not adequate/sufficient to strike down the process, there must be something more, it must lead to injustice in general. A malafide exercise of power does not necessarily imp y any moral turpitude as a matter of law. It only means that the power is exercised for purposes foreign to those for which it is intended/vested. In other words the power vested has beer utilized/used for some indirect purpose not connected with the purpose or object. It must be such exercise from which law will imply evil intent. The exercise of power must be without just cause or excuse or for want of reasonable or probable cause. The Courts may declare administrative acts to be invalid for manifest unreasoableness.

20. Learned Addl. A.G. Mizoram, relied on the decision -eported in B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others, submitted that normally Court should not interfere unless illegality or arbitrariness on the part of the employer is apparent on the face of the record. The Hon''ble Supreme Court in this case held as follows:

56. It may be true that a contract need not be given to the lowest tenderer but it is equally true that the employer is the best judge therefore; the same ordinarily being within its domain. Court''s interference in such matter should be minimal. The High Court''s jurisdiction in such matters being limited in a case of this nature, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record.

21. Upon evaluating the rival submissions advanced by the learned Counsel appearing for the Petitioner as well as the Respondents, further taking into account the contents of the tender documents laid before this Court I am of the considered view that grant of the contract to the private Respondent is not malafide and irregular. More so it is equally acceptable proposition that the subject matter of the contract being within its own field of requirement and obligation the State Respondent is the best judge to evaluate the bids submitted by the tenderers and Court''s interference in such matter is not called for.

The reports of the Technical Bid Evaluation Committee and Financial Bid Evaluation Committee do not give any scope to allege discrimination, arbitrariness and favouritism on the part of the Respondent authority. On the top of it, the learned Counsel at the Bar has informed this Court that the Contract work allotted to the private Respondent is on the verge of completion. Bearing in mind the decision of the Hon''ble Supreme Court in B.S.N. Joshi and Sons. Ltd. v. Nair Coal Services Ltd. and Ors. (supra) I am of the considered opinion that this Court should normally exercise judicial restraint in interfering with award of contract in the absence of illegality or arbitrariness on the part of the state Respondents. The decision of the Tender Committee in accepting the bidders and awarding the tender to the private Respondents by rejecting the tender of the Petitioner in both the afore noted cases, do not reflect illegality or arbitrariness on the part of the state Respondents. Accordingly the impugned orders accepting the bidders do not call for interference by this Court.

Consequently, both the writ petitions stand dismissed. In the facts and circumstances of this case I pass no order as to costs.

