(2018) 04 GAU CK 0139

In the Gauhati High Court

Case No : Civil Wrti Petition No. 3 of 2018

Sh. R. Lalduhawma APPELLANT

Vs

State of Mizoram & 4 Ors RESPONDENT

Date of Decision : 13-04-2018

Acts Referred:

General Financial Rules (GFR), 2017 — Rule 170(i)
Constitution Of India, 1950 — Article 226

Citation : (2018) 04 GAU CK 0139

Hon'ble Judges : Nelson Sailo, J

Bench : Single Bench

Final Decision : Disposed Off

Judgement

1.Heard Mr. Lalfakawma, the learned counsel for the petitioner and Ms. Mary L.Khiangte, the learned Govt. Advocate appearing for the respondent

Nos. 1, 2 & 3. Also heard Ms. Dinari T.Azyu, the learned counsel, who appears on behalf of the respondent No. 5. None appears for the respondent

No. 4, despite notice.

2. The facts of the case in brief is that the respondent No. 3 issued a Short Quotation Notice on 10.11.2017, inviting a short quotation from authorized

Dealers/Agents duly registered in Mizoram for supply of Auto Rickshaw for implementation of New Land Use Policy (NLUP/NEDP Programme).

The quotation was to be submitted to the respondent No. 3 on or before 27.11.2017 at 12:00 noon and opened on 27.11.2017 at 3:00 PM. Alongwith

the short quotation notice, the terms and conditions governing the quotation was also provided.

3. The petitioner as well as the respondent No. 5 were the only ones to submit their quotation. As was scheduled, the quotation was opened on 27.

11.2017 in the presence of both the quotationers whereupon, the petitioner noticed that the respondent No. 5 had failed to mention the number of Auto

Rickshaws that he could supply in a month in terms of the Condition No. 19 appended to the Short Quotation Notice dated 10. 11.2017. He therefore

raised verbal objection and submitted a written complaint before the respondent No. 3 on the following day i.e., 28. 11.2017.

4. While the petitioner was expecting that a decision would be taken by the authorities concerned after addressing the complaint submitted by him, to

his surprise he received a communication dated 21.12.2017 (Annexure-4) from the respondent No. 3, wherein it was stated that the State Purchase

Advisory Board (SPAB) held its meeting on 14.12.2017 and found that the prescribed amount of earnest money of Rs. 5000/- to be submitted by the

quatationers was in violation of the relevant provisions of the General Financial Rules (GFR). Therefore, it was decided that a fresh restricted Tender

Notice should be issued by the Transport Department. That pursuant to the decision of the SPAB, fresh restricted/ Short Tender Notice was

therefore, invited for supply of 472 numbers of Auto Rickshaws and the willing bidders were to submit their tender on or before 2:00 PM of 5th

January 2018 and the tender would be opened at 3:00 PM on the same day. Accordingly, the restricted tender notice and the terms and conditions

were communicated to the petitioner by the said letter dated 21.12.2017.

5. The petitioner being aggrieved sought for information by filing an application under the RTI Act before the Transport Department seeking

information about the reason for cancellation of the Short Tender Notice dated 10.11.2017 and as to whether the complaint submitted by him on 28.

11.2017 has been considered. Besides this, the petitioner sought for a copy of the order cancelling the Short Tender Notice dated 10.11.2017 and a

copy of the meeting minutes of the SPAB wherein, a decision was taken to cancel the Short Tender Notice issued on 10.11.2017. However, the

petitioner having not received any response initiated the present writ petition before the Principal Seat of this Court.

6. The writ petition was filed on 02.01.2018 and was moved on 3. 01.2018, wherein notice of motion was issued returnable on 23. 01.2018. In the

interim, it was directed that the respondents may go ahead with the new tender process but should not finalized the same without leave of the Court.

The petitioner was also allowed to participate in the fresh tender process without prejudice to his rights and contention in his writ petition.

7. After the writ petition was transmitted to the Aizawl Bench, the interim order passed on 03.01.2018 was vacated vide Order dated 29. 01.2018 as

the petitioner remained unrepresented. However, it was restored again vide Order dated 01.02.2018 passed in I.A.(C) No. 4/2018 which was filed by

the writ petitioner. Subsequently on 03.04.2018, the State respondents filed I.A.(C) No. 29/2018 seeking vacation of the interim order passed on

01.02.2018. I.A.(C) No. 29/2018 was moved on 4. 04.2018, where the following order was passed. â??Heard Ms. Mary L. Khiangte, the learned

Govt. Advocate for the applicant, who submits that by filing this application, the applicant seeks vacation of the interim order passed by this Court on

01.02.2018 in I.A.(C) No. 4/2018 directing the State respondents not to finalize the undated and impugned Restricted Tender Notice without the leave

of the Court. The grounds mentioned in the application amongst others is that there is urgency in the implementation of the Flagship Programme of the

State i.e., New Land Use Policy (NLUP). The learned counsel, Mr. Lalfakawma appearing for the opposite parties/writ petitioner as well as Mrs.

Dinari T.Azyu, the learned counsel for the respondent No. 5 has also been heard. Considering the urgency expressed by the parties especially the

State, I am of the view that instead of finalizing the application for vacation of the interim order, the writ petition itself should be taken up for final

consideration. In view of above and as agreed upon, let the case be listed again on 10.04.2018 along with the connected main writ petition. The

learned counsel for the respondents shall make an endeavor to file their affidavit-in-opposition in the meantime so that an attempt can be made to final

and dispose of the case on the date fixed. Registry to list accordingly. A copy of this order be furnish to the learned Govt. Advocate as well as Mrs.

Dinari T. Azyu, the learned counsel for the respondent No. 5.â??

8. Thereafter, the case was listed on 10.04.2018, where the learned counsel for the respondent No. 5 submitted that an affidavit-in-opposition has

been filed by the respondent No. 5. However, the learned Govt. Advocate appearing for the respondent Nos. 1, 2 & 3 sought further time to file

affidavit-in-opposition. She also submitted that in the alternative, she may be allowed to produce the records. As was agreed to by the learned counsels for the rival parties, the case was therefore directed to be listed again on 11.04.2018. That is how, both the writ petition as well as the

Interlocutory Application came up for final consideration on 11.04.2018.

9. Appearing for the writ petitioner, Mr. Lalfakawma submits that as the respondent No. 5 submitted his quotation in violation of Condition No. 19 of

the terms and conditions prescribed in the Short Quotation Notice dated 10.11.2017, the petitioner submitted a complaint on 28.11.2017, which

however has not been considered and disposed of by the respondent authorities. He further submits that since the intending quotationers were asked

to submit a sum of Rs. 5000/- towards earnest money deposit in terms of the Condition No. 3 of the Tender Notice dated 10.11.2017, the tender notice

could not have been cancelled only on the ground of insufficiency of earnest money or violation of GFR norms. By referring to the impugned

communication dated 21.12.2017 as well as the Office Memorandum dated 25.07.2017 (Annexure-7), whereby the amendment of Rule 170(i) of the

GFR, 2017 has been issued, he submits that an earnest deposit is meant only for safeguarding withdrawal or alteration of bids during the validity period

of the bid. Depositing of 2% to 5% of the estimated value of the goods to be procured as bid security in terms of GFR cannot be insisted upon by the

respondent authorities at a subsequent stage when a sum of Rs. 5000/- was already accepted in terms of the condition No. 3 of the Short Quotation

Notice. Therefore, resorting to issuing of fresh restricted/Short Notice Tender by the respondent authorities concerned on the ground of violation of

the relevant provisions of the GFR is only biased, baseless and arbitrary. He also submits that no notice was issued to the petitioner prior to the

decision taken by the SPAB to cancel the Short Quotation Notice and issue a fresh restricted Tender Notice. In fact, the representation dated

28.11.2017 having not being considered, the principles of natural justice has clearly been violated.

10. The learned counsel for the petitioner in support of his submission has placed his reliance on the following cases:- (i) Global Energy Ltd. & Anr.

Vs. Adani Exports Ltd. & Ors. (2005) 4 SCC 435 (ii) Sorath Builders Vs. Ahreejikrupa Buildcon Limited & Anr. (2009) 11 SCC 9 (iii) Utkal

Galvanizers Ltd. Vs. State of Arunachal Pradesh & Ors. 2012 (5) GLT 775 (iv) Michigan Rubber (India) Limited Vs. State of Karnataka & Ors.

(2012) 8 SCC 216 (v) Maa Binda Express Carrier & Anr. Vs. North-East Frontier Railway & Ors. (2014) 3 SCC 760.

11. Appearing for the State respondents, Ms. Mary L. Khiangte, the learned Govt. Advocate submits that the SPAB held its meeting on 14. 12.2017

to consider the matter in connection with the selection and supply of Auto Rickshaw for implementation of the NLUP Programme, wherein all the

relevant materials including the complaint submitted by the petitioner was considered. In the said meeting, it was observed that the specification

regarding compliance of BS-IV, as per the direction of the Supreme Court was not mentioned in the Short Tender Notice. The earnest money of Rs.

5000/- given in the tender notice did not conform to the standing orders of the Finance Department in connection with the GFR since the prescribed

rate for earnest money ranged from 2% to 5% depending upon the nature of the work and also there was no mentioned about the time framed for

completion of supply of the Auto Rickshaws in the tender notice. Therefore, it was decided that a fresh tender notice in the form of restricted tender

by endorsing a copy of the tender notice to both the firms be issued giving them 7 days time from the date of issuance of the notice to submit their

respective tender. She therefore submits that pursuant to the decision taken by the SPAB on 14.12.2017, a fresh restricted tender notice was issued to

both the petitioner as well as the respondent No. 5 asking them to submit their respective tender. Consequently, in response to the issuance of the

fresh restricted tender notice, both the parties have submitted their respective tenders and therefore, the respondent authority concerned may be

permitted to finalize the tender process.

12. Mrs. Dinari T.Azyu, the learned counsel appearing for the respondent No. 5 by referring to the Short Quotation Notice dated 10. 11.2017 submits

that there was no mentioned about how many Auto Rickshaws were to be supplied and therefore, there was no occasion for the respondent No. 5 to

mention as to how many Auto Rickshaws could be supplied in a month. By referring to Condition No. 19 given in the Short Quotation Notice dated

10.11.2017, she submits that all that the quotationer was required to quote the capacity to supply Auto Rickshaw per month and in this connection, the

respondent No. 5 had submitted the capacity to supply Auto Rickshaws by indicating the market share of Bajaj Auto Rickshaw for the years 2016 to

2018 in the communication dated 25.11.2017 (Annexure-1 of the affidavit-in-opposition filed by the respondent No. 5). She submits that in fact for the

year 2017 to 2018, the market share of Bajaj Company was 89.8% and therefore, the respondent No. 5 being a Dealer in Bajaj Auto Rickshaw clearly

had the capacity to supply Auto Rickshaws as may be required. She further submits that in so far as earnest money is concerned, the respondent No.

5 as well as the petitioner deposited the amount that was stipulated by the tender notice and therefore, no forth can be attributed to them. However,

since the respondent authorities have decided to issue a fresh restricted tender notice by inviting tender from the respondent No. 5 as well as the

petitioner and they having participated in the fresh tender process, the same may be permitted to be finalized by this Court.

13. I have heard the submissions advanced by the learned counsels for the rival parties and I have perused the materials available on records including

the record of the tender proceeding produced by the learned Govt. Advocate. The Short Quotation Notice was invited on 10.11.2017 prescribed in

certain terms and conditions to be fulfilled by the intending quotationers. As many as 20 numbers of terms and conditions have been stipulated in the

Short Quotation Notice. Since the dispute is mainly with regard to terms and conditions No. 3 and No. 19, it will only be apposite to refer to the two

conditions. As can be seen Condition No. 3 stipulates that the quotationer should submit his quotation in a sealed envelope accompanied by earnest

money in the form of deposit/Bank Guarantee in favour of Director, Transport. That, no amount of money has been stipulated by the said condition.

However, both the writ petitioners as well as the respondent No. 5 contend that they were asked to submit a sum of Rs. 5000/- as earnest money.

Since the same is an admitted position, deliberation in the matter will not be required. In so far as Condition No. 19 is concerned, it has been provided

that the quotationer should quoted his/her capacity to supply Auto Rickshaws per month. While, the respondent No. 5 did not quantify the number of

Auto Rickshaws he could supply within a month in his quotation, the petitioner quoted his capacity to supply 200 numbers of Auto Rickshaws per

month. On the date of opening of the quotation on 27.11.2017, it was noticed by the writ petitioner that the respondent No. 5 did not specify as to how

many Auto Rickshaws he could supply in a month in terms of the Condition No. 19 of the tender notice and therefore, after making an oral objection, he submitted a written complain on 28.11.2017. The SPAB meeting is contended by the learned Govt. Advocate took into consideration all the aspects

of the tender process including the complaint of the petitioner in its meeting held on 14.12.2017 and therefore, upon such deliberation and

consideration, it was ultimately decided that a fresh restricted tender be issued to both the petitioner as well as the private respondent No. 5. In order

to appreciate the contention of the rival parties, the records pertaining to the tender process as produced by the learned Govt. Advocate has been

perused. Firstly, it is seen that Short Quotation Notice dated 10.11.2017 against terms and conditions provides for a sum of Rs. 5000/- to be deposited

towards earnest money in the hand written form. The records further reveal that a comparative statement showing the rates quoted by the petitioner

as well as the respondent No. 5 has been prepared. Against column No. 10 of the comparative statement, which requires the probable capacity to

supply Auto Rickshaw per month to be entered, 200 vehicles per month had been indicated against the quotation made by the petitioner. However, in

respect of the respondent No. 5, there is no indication about the number of vehicles which could be supplied per month by the respondent No. 5.

14. The meeting minutes of the SPAB held on 14.12.2017 indicates that the complaint submitted by the petitioner with regard to non-compliance of

Serial No. 19 of the terms and conditions of the Short Quotation Notice dated 10.11.2017 was one of the issue taken up for consideration. However,

no decision has been taken as to whether the same should be accepted or rejected. Instead, the SPAB observed that the BS-IV specification, the rate

of earnest money as prescribed by the GFR, the requirement of submitting Bank Guarantee as security and the time frame for completion of the

supply was not mentioned in the Short Quotation Notice. It was therefore decided that the respondent No. 3 should issue fresh tender notice in the

form of restricted tender by endorsing a copy of the same to the two contenders i.e., the petitioner and the respondent No.5. It is further noticed that

pursuant to the decision taken by the SPAB in its meeting held on 14.12.2017, the approval of the Government to the decision was obtained and the

same was communicated to the respondent No. 3 by the Deputy Secretary to the Government of Mizoram, Transport Department on 20.12.2017.

Pursuant to the approval of the Government, the restricted tender notice was communicated to the petitioner on 21.12.2017 as well as to the respondent No. 5. What can be seen from the record is that there is no cancellation of the initial Short Tender Notice that was issued on 10.11.2017.

At the same time, it may be noticed that both the writ petitioner as well as the respondent No. 5 have responded to the short tender notice and it is

only on account of the interim order passed by this Court that the same has not been finalized. It may also be noticed that while passing the interim

order dated 03.01.2018, this Court had also observed that the participation of the petitioner in the fresh restricted tender would be without any

prejudice to his rights and contention in the writ petition.

15. Adverting to the issue regarding the amount of earnest money, it may be seen that the Apex Court in Global Energy Ltd. & Anr. (Supra) had

observed that the 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 the bid. It was further observed that it is a well settled position in law that the terms

of invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tender as they are in the realm of contract

unless they are wholly arbitrary, discriminatory or actuated by malice. The Apex Court again in the case of Michigan Rubber (India) Limited (Supra)

has held that a court before interfering in tender or contractual matters, in exercise of powers of judicial review, should pose to itself the following

questions:- (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process

adopted by the decision made is so arbitrary and irrational that the Court can say: â??the decision is such that no responsible authority acting

reasonably and in accordance with relevant law could have reachedâ?? and (ii) Whether the public interest is affected? If the answers to the above

questions are in the negative, then there should be no interference under Article 226. The Division Bench of this Court in Utkal Galvanizers Ltd.

(Supra) had also held that the decision of the Apex Court in Air India Limited Vs. Cochin International Airport Limited 2000 2 SCC 617 was taken

into consideration, wherein it was held that the State, its corporation, instrumentalities and agencies are bound to adhere to the norms, standards and

procedure laid down by them and cannot be part from them arbitrarily. Though that decision is not maintainable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by malice, unreasonableness and arbitrariness. The Court should also keep the

larger public interest in mind in order to decide whether its invention is called for or not.

16. In the present case, it may be seen that the respondent authorities found it appropriate to fix the earnest money at Rs. 5000/- and the same was

complied with by both the writ petitioner as well as the respondent No.5. Therefore, they cannot at a subsequent stage, come up with an opinion that

the same was insufficient on account of the GFR guidelines. The conditions stipulated at Serial No. 19 of the terms and conditions require the

quotationer to submit the number of Auto Rickshaws which can be supplied per month. Though the writ petitioner submitted a complaint on 28.

11.2017, the same has not been considered by the SPAB in its meeting held on 14.12.2017. Furthermore, while taking a decision to go for fresh

restricted tender, the earlier Short Tender Notice issued on 10.11.2017 has not been cancelled. In that view of the matter, upon considering the case in

its entirety as well as the judicial pronouncements by the Apex Court as well as this Court, I am of the considered view that the respondent authorities

should take a fresh decision on the tender process in terms of the Short Tender Notice dated 10.11.2017 by taking into account all the relevant

materials including the complaint submitted by the petitioner within a period of ten days from the date of receipt of a certified copy of this order.

17. It is ordered accordingly.

18. The communication dated 21.12.2017 (Annexure-4) is hereby set aside and the meeting minutes dated 14.12.2017 as well as 09.02.2018 and the

restricted tender notice shall not be acted upon by the respondents.

19. With the above observations and directions, the writ petition as well as I.A. (C) No. 29/2018 stands disposed of. No cost.