
(2012) 05 GAU CK 0069

In the Gauhati High Court

Case No : Writ Petition (C) No's. 471 and 472 of 2011

Shri Kamal Singh Dugar

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 02-05-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2012) 3 GLD 294

Hon'ble Judges : Arup Kumar Goswami, J

Bench : Single Bench

Advocate : I. Choudhury, Mr. R.M. Deka and Mr. N.J. Khataniar, for the Appellant; P. Chakravarty, SC, Education, Mr. R. Pathak, Mrs. P. Barman, Ms. S. Changkakoti, J.N. Gogoi, Ms. N. Gogoi, for R 3 and 4, Mr. P. Upadhyay, T. Bora and Ms. D. Sarma, for the Respondent No. 9, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Goswami, J.—W.P. (C) No. 471/2011 has been filed under Article 226 of the Constitution of India, praying for setting aside and quashing the decision of the respondent Nos. 3 to 6 to reject the tender of the Petitioner submitted pursuant to the short Notice Inviting Tender, for short, (NIT), dated 7.1.2011 for construction of the balance work of RCC Building (Part of Ground Floor of Block-B of Master Plan) of Arya Vidyapeeth College with a further prayer to direct the respondents to consider the tender of the petitioner. W.P. (C) No. 472/2011 is also an application under Article 226 of the Constitution of India, praying for similar relief, as prayed for in W.P. (C) No. 471/2011, in respect of construction of RCC Building Girls' Common Room Ground and First Floor of Arya Vidyapeeth College.

2. This Court in both the cases on 28.1.2011, while issuing notice of motion, as an interim measure, had directed that no work order without obtaining leave of the Court shall be placed by respondent/authorities concerned in respect of the works covered by the NIT dated 7.1.2011.

3. The respondent No. 4, the Principal, Arya Vidyapeeth College, had filed an application for vacation, modification and/or alteration of the order dated 28.1.2011 in both the cases and accordingly, MC 851/2011 and MC 127/2011 were registered in W.P. (C) 471/2011 and W.P. (C) 472/2011, respectively. Similarly, the respondent No. 9 had also filed an application for vacation of the interim order dated 28.1.2011 in both the cases and accordingly, M.C. 2047/2011 and MC 2048/2011 were registered in W.P. (C) 471/2011 and W.P. (C) 472/2011, respectively.

4. The learned counsel for the respondent Nos. 3 to 6, respondent No. 9 and the writ petitioner submitted that both writ petitions may be disposed of taking the applications filed for vacation of the interim order as the affidavit of the parties. The learned Standing Counsel, Education does not oppose the prayer. Accordingly on the request of the learned counsel for the parties, both the matters, as they raise common questions of law and facts, have been taken up for disposal together.

5. Facts necessary for disposal of the writ petitions are that the petitioner is a Class-I (A) Contractor under Public Works Department. Building (Electrical) Division. The respondent No. 4, who is the Principal of the respondent No. 3, i.e., Arya Vidyapeeth College, which is a Government Aided College, had issued an NIT on 5.2.2010 for construction of RCC Building (Part of Ground Floor of Block-B of Master Plan) of Arya Vidyapeeth College, the estimated value of the work being Rs. 87,25,000.00 approx. The petitioner had submitted his tender on 7.2.2010 quoting a bid of 9% above the estimated value of the NIT and his tender was found to be responsive and one of the lowest.

6. Coming to learn that the contract had been awarded to one M/s A.K.D. Construction at 19% above the estimated value, the petitioner filed a writ petition being W.P. (C) 2709/2010, challenging the said award of contract to A.K.D. Construction. An interim order was passed on 24.5.2010 directing the parties to maintain status quo in respect of the work and finally by judgment and order dated 29.7.2010, the learned Single Judge dismissed the writ petition. As against that, a writ appeal, being W.A. 340/2010 was preferred and this Court, by an order dated 11.10.2012, had allowed the writ appeal and had quashed the award of contract.

7. Thereafter, the respondent No. 4, on 7.1.2011, issued an NIT inviting tenders from reputed and experienced Civil Engineering First Class Contractors for (i) Construction of RCC Building (Part of Ground Floor of Block-B of Master Plan) of Arya Vidyapeeth College and (ii) Construction of RCC Building Girls' Common Room Ground & First Floor of Arya Vidyapeeth College, requiring that separate tenders are to be submitted by the contractor for each work. The date of receipt of tender was fixed on 22.1.2011 and the same were to be opened on the same date and hour in the presence of tenderers or their authorized representatives. The tenders were submitted on 22.1.2011 and at the time of opening the tenders, a representative of the petitioner was present. On opening of the

tenders it was found that though the tender papers contained in the envelope was for construction of the balance of work of RCC Building (Part of Ground Floor of Block-B of Master-Plan) of Arya Vidyapeeth College, the name of the work in the written as Construction of RCC Building Girls" Common Room Ground & First Floor of Arya Vidyapeeth College.

8. The petitioner had also submitted tender for construction of RCC Building Girls Common Room Ground & First Floor of Arya Vidyapeeth College. During opening of tenders, it was found that the tender papers in respect of the work was in an envelope where it was written as construction of balance work of RCC Building (Part of Ground Floor of Block-B of Master Plan) of Arya Vidyapeeth College. Both sets of tender papers in respect of both the works were opened and evaluated simultaneously by the same Committee on the same day. After evaluation of tenders, it was found that the petitioner had submitted complete and valid tender and in both the works, his bid was evaluated as the lowest bid.

9. In view of the mistake in not writing on the envelopes the correct description of works, a representation was submitted by the petitioner to the respondent No. 4 on 24.1.2011 with a request to consider his tender for both the works. Subsequently, he came to learn that his bid in both the works was rejected on the ground of wrong marking in the envelope.

10. The stated stand as disclosed in the application or the respondent No. 4 is that, in respect of both the works, 4 tenders were submitted and each of the tenderer had submitted 2 packets each and the packets were separated in 2 sets based on the works, the name of which was written on the sealed packets. At first, balance work of RCC building of (Part of Ground Floor of Block-B of Master Plan) of Arya Vidyapeeth College was taken up and the packets were opened one after another. When the last packet was opened, it was found that the papers were not related to the work for which the tender was submitted, and as such, the Construction Committee Members, Architects, Engineers present along with all the tenderers rejected the said tender which was submitted by the writ petitioner. Thereafter, the tender packages of the RCC Building Girls" Common Room Ground and First Floor were opened and out of 4 packets, one packet was found to be containing papers not related to the work in question, and therefore, the same was also rejected.

11. The Tender Committee took a decision on 24.1.2011 to finalize the work in question and on consideration of the tenders, the Construction Committee was of the opinion that the works in question may be allotted to the tenderer quoting 10% below, which is the lowest amount of tender, and accordingly, decided to allot the work to Respondent No. 9. Accordingly, Respondent No. 4 issued letter dated 27.1.2011 deciding to allot the work for construction of RCC Building (Part of Ground Floor of Block-B of Master Plan) of Arya Vidyapeeth College, at 10 % below estimated amount of Rs. 94,15,435.00 and the work for construction of RCC Building Girls" Common Room Ground and First Floor of Arya Vidyapeeth College at 10% below estimated amount of Rs. 42,35,078.00.

12. The Respondent No. 9, in his application (s) had stated that he had completed 20% work in respect of both the works. It is also stated that the representative of the petitioner had also accepted the decision of the Tender Committee by putting his signature in the written decision of the Tender Committee without any objection and protest. The tenders were opened one after another and after completion of the process of scrutiny in respect of the construction of balance work of RCC Building (Part of Ground Floor of Block-B of Master Plan) of Arya Vidyapeeth College, the tenders were opened in respect of the other work, namely, Construction of RCC Building Girls' Common Room Ground & First Floor of Arya Vidyapeeth College, and there was time gap of 40 minutes in between.

13. Work Order dated 22.1.2011 was issued with prior approval of the Governing Body and the set of the work orders were handed over to him on that day itself. The formal letter of acceptance and F-2 form were submitted to the Principal on 29.1.2011. It is also stated that the Work Orders issued to him are similar to the Work Order dated 5.1.2010, which order was considered by this Court in W.P. (C) No. 2709/10.

14. I have heard the learned counsel for the parties and also perused the materials on record. Perusal of the records indicates that the letter of the petitioner dated 24.1.2011 was placed before the Governing Body of the College on 24.1.2011 and the same was rejected on the same very day by the Governing Body by Resolution Part-II. By Resolution Part-I, the Governing Body, after considering the recommendations of the Construction Committee, had resolved to allot the works to the Respondent No. 9.

15. Mr. I. Choudhury, the learned counsel for the petitioner submits that the decision of the Construction Committee to reject tenders of the petitioner for the mere failure and omission to correctly inscribe the name of the work in the envelope is palpably illegal and cannot be sustained. He had submitted that as both sets of tender papers in respect of both the works were opened and evaluated simultaneously by the same Committee on the same day, the mistake committed is insignificant and do not merit rejection. More so, the petitioner's bid was otherwise the lowest.

16. The learned counsel submits that the authorities had attempted to over-reach the interim order passed by this Court by projecting that the letter dated 27.1.2011 is the Work Order, though, in reality, the same was only a letter of intent. The interim order of this Court dated 28.1.2011 directing that no Work Order in respect of the works in question covered by the NIT dated 7.1.2011 would be placed without leave of the Court was brought to the notice of the authorities concerned. The learned counsel submits that, in any case, the mistake of the petitioner was a clerical mistake and ought to have been condoned by the authorities. Mr. Choudhury also pointed out that even the application for vacating the interim order filed by the Respondent No. 9 contains typographical errors, inasmuch as, in the cause title of Misc. Case No.

2047/2011, which was filed in W.P(C) No. 471/2011, the application was stated to be filed for vacation of the interim order dated 28.1.2011 passed in W.P. (C) 471/11.

17. Mrs. P. Barman submits that the representative of the petitioner did not also raise any objection when the tender of the petitioner was rejected and he had also signed in the proceedings whereby the tenders in question were decided to be rejected. It is also submitted by her that the writ petitioner had taken recourse to falsehood in the writ petition by stating that after evaluation of his tenders, it was found that the petitioner had submitted complete and valid tender and his bids were evaluated as the lowest bid.

18. In view of the aforesaid, according to her, the writ petitioner now cannot come up with a plea that the tenders of the writ petitioner was rejected arbitrarily. It has also been submitted by her that the work orders were already issued on 27.12.2012. The learned counsel submits that there is no illegality in either rejecting the tenders of the petitioner and in issuing the Work Orders in favour of the Respondent No. 9.

19. Mr. Upadhyay, learned counsel for the Respondent No. 9, on the, other hand, submits that in absence of any challenge to the Work Orders issued in favour of Respondent No. 9, the writ, applications are liable to be dismissed. He had submitted that the Work Order dated 5.1.2010 was considered. In W.P. (C) No. 2709/10 and In WA No. 240/2010 and the order dated 5.1.2010 was considered to be the Work Order or allotment of work in favour of the Respondent No. 7 in the said cases. He submitted that the authority had rightly rejected the tenders of the petitioner and the Respondent No. 9 being the lowest valid tenderer, the Work Orders were issued to him.

20. The learned counsel places reliance in the decision of the Apex Court in the case of B.R. Ramabhadriah Vs. Secretary, Food and Agriculture Department, Andhra Pradesh and others, , in the case of Pasupuleti Venkateswarlu Vs. The Motor and General Traders, , and in the case of Rameshwar and Others Vs. Jot Ram and Another, .

21. In reply, Mr. Choudhury had submitted that the format of the Work Order was not an issue in the earlier round of litigation, and therefore, the submissions advanced by the learned counsel of the Respondent No. 9 is wholly not tenable in law. If the bid of Respondent No. 9 is qualified in terms of money, the same would amount to Rs. 84,73,907.00 in respect of construction of balance work of RCC Building (Part of Ground Floor of Block-B Master Plan) of Arya Vidyapeeth College and Rs. 37,21,570.20 in respect of the other work while the petitioner's bids are Rs. 83,79,753.10 and Rs. 36,80,219.50, respectively, in respect of the same works in question.

22. It is not the case of the petitioner that, even though his representative had protested and objected to rejection of the petitioner's tenders when they were opened on 22.1.2011, the tenders came to be rejected. He had also not, as it

appears, pointed out the mistakes when the tenders were opened. The records produced reveal that the Construction Committee had rejected the tenders and there was a gap of about 45 minutes in the opening of tenders of the two works in question. It also does not appear from the pleadings that the representative requested and/or pleaded to overlook the defect and to consider the tenders on merits. The representative of the petitioner went along with the decision of Construction Committee to reject the tenders of the petitioner without any demur and had signed along with other tenderers and the members of the Construction Committee whereby decision to reject the tenders were made known. Further, statements made in the writ petition to the effect that his tenders were found valid and complete in all respects and his tenders were evaluated to be the lowest are not borne out of records. The bids of the petitioner was rejected on 22/1/2011 and in the comparative statement prepared on 22/1/2011, the tenders of the petitioner were not reflected.

23. This Court will not hazard a guess as to how the authorities would have responded, in case the authorities were pointed out the mistakes in the envelope and a prayer was made to correct the same. It is also not necessary for this Court to comment and reflect in this proceeding how the authorities should have reacted in case a request of that kind was made. In the facts and circumstances of the case it, cannot be said that the decision to reject the tenders of the petitioner cannot be said to be arbitrary or illegal when, admittedly, the tenders submitted were not found to be in connection with the work.

24. In WA No. 24/2010, the Division Bench had proceeded on the basis that by an order dated 5.4.2010, the work was allotted, to respondent No. 7 in that case. It also appears from the perusal of the said judgment, that the said letter dated 5.4.2010 was also treated to be allotment of the work by the learned counsel for the appellant, and the award of contract in favour of the Respondent No. 7 was set aside by this Court. The operative portion of the judgment dated 11/10/2010 in W.A. No. 24/2010 reads as follows :

Under the circumstances, we set aside the order under appeal passed by the learned single Judge and allow this appeal as well as the writ petition filed by the appellant. The award of contract in favour of respondent No. 7 granted by respondent Nos. 3 to 5 is quashed. The parties are left to bear their own costs.

The writ petitioner, in the affidavit filed to the application of the Respondent No. 9 for vacating the interim order does not deny the statement of Respondent No. 9 that the Work Order dated 27.1.2011 was similar to the Work Order dated 5.4.2010 and had only stated that the format of the Work Order was not an issue in the earlier writ proceedings. This Court finds that letters dated 5.4.2010 and 27.1.2011 are similar.

25. On the consideration of the materials on record, this Court is of the considered opinion that the order dated 27.1.2011 is the work order by which allotment of work was awarded to the Respondent No. 9 and that the same is not

a letter of intent, as argued by Mr. I. Choudhury. The Work Order was issued on 27.1.2011 and the petitions were filed on 27.1.2011 with an assertion at para 20 of the writ petitions that no final decision had been taken to allot the work by issuing the Work Order. Even after the said Work Orders were brought on record by the respondents in their applications for vacating the interim order, no relief was sought against the said Work Orders dated 27.1.2011 by appropriate amendments of the writ applications and the decision making process culminating in the issuance of the Work Orders dated 27.1.2011, remained unchallenged. In the absence of any challenge to Work Orders dated 27.1.2011, even otherwise, no relief could be granted to the petitioner for consideration of his tenders even if it was held that rejection of the tenders of the petitioner was not justified. The cases cited by Mr. Upadhaya lays down that Courts, In exceptional circumstances, can mould the relief by taking note of subsequent events. The present cases do not present any exceptional circumstances.

26. In view of the aforesaid discussions, this Court finds no merit in the writ petitions and accordingly, the writ petitions stand dismissed. No costs.