(2009) 09 GAU CK 0024

In the Gauhati High Court

Case No : Writ Petition (C) No''s. 1990, 1997, 1998 and 1999 of 2009

Singhi Cables and Conductors Pvt. Ltd. and Another — APPELLANT

Vs

The Assam State Electricity Board and Others — RESPONDENT

Date of Decision : 23-09-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2010) 2 GLD 495 : (2011) 4 GLR 787 : (2010) 3 GLT 160

Hon'ble Judges : Anima Hazarika, J

Bench : Single Bench

Advocate : N. Dutta, I. Choudhary, R.S. Choudhury, P.N. Goswami, R. Goswami, for the Appellant; B.D. Das and H.K. Sharma for respondent Nos. 1, 2 and 3 and R.K. Bora, Addl. Sr. Govt. Advocate, for the Respondent

Final Decision : Allowed

Judgement

Anima Hazarika, J.—All these writ petitions which involved identical facts and raise same questions of law being heard at the request of the learned Counsel appearing for the parties analogously and are being disposed of by this common judgment and order.

2. Basic relevant admitted facts involved in these petitions may be summarised as hereinbelow:

In response to an Invitation to Bid (INV) dated 9.6.2008 published in the English Daily Newspaper "The Assam Tribune" in its issue dated 20.6.2008 by the respondent, Assam State Electricity Board (hereinafter referred to as the "ASEB") for issuing contract orders for Rural Electrification Works on Turnkey basis under "Rajib Gandhi Grameen Vidyutikaran Yojana (RGGVY) : Scheme for Rural Electricity Infrastructure and House Hold Electrification", the writ petitioners submitted their respective bids as follow:

(a) The petitioners in W.P. (C) No. 1990/2009 submitted their tenders with specification No. ASEB/CGM(RE)/RGGVY/NGN/2008 (package NGN. 3) for supply, construction of 11 KV lines, LT Lines and Installation of Distribution Transformers and providing Service Connection to BPL beneficiaries within Kalibor Revenue Circle of Nagaon District of Assam on Turnkey basis.

(b) The petitioners in WP(C) No. 1997/2009 submitted their tenders with specification No. ASEB/CGM(RE)/RGGVY/KAMRUP/2008 (package KAM-2) for supply, construction of 11 KV and LT lines, installation of Distribution Transformers and providing Service Connection to BPL beneficiaries within the Blocks; Bezera, Bihdia, Jagikona and Kamalpur under Kamrup district of Assam on Turnkey basis.

(c) The petitioners in WP(C) No. 1998/2009 submitted their tenders for construction and commissioning of 1 Number 1x2.5 MVA, 33/11 KV Sub-station at Ambagan within Laokhoa Block, 1 Number 2 x 2.5 MVA, 33/11 KV Sub-station at Juria within Juria Block, 1 Number 2 x 2.5 MVA, 33/11 KV Sub-station at Batadrava within Batadrava Block and 1 number 2 x 2.5 MVA, 33/11 KV Sub-station at Barhampur within Barhampur Block along with supply and construction of 33 KV and 11 KV associated lines under Nagaon district of Assam on Turnkey basis under RGGVY with specification No. ASEB/CGM/RGGVY/NGN/2008 (package: NGN-1).

(d) The petitioners in WP (C) No. 1999/2009 submitted their tenders with specification No. ASEB/CGM (RE)/RGGVY/NGN/2008 (package NGN-7) for supply, construction of 11 KV lines LT lines and installation of Distribution Transformers and providing Service Connections to BPL beneficiaries within Hojai and Lanka Revenue Circle of Nagaon district of Assam on Turnkey basis.

3. The tenders so submitted by the petitioners were accepted by the respondent-Board to be the best viable bids in their own judgments and consequently the respondent-Board issued Letters of Award (LOA) to the writ petitioners for supply of equipments, construction and installation of the transformers and providing service connections on turnkey basis. These Letters of Award were issued to the writ petitioners by the respondent-Board by various orders dated 30.1.2009. The further admitted position of facts emerging out of the pleadings are that the writ petitioners were required to furnish Contract Performance Guarantees, hereinafter referred to as "CPGs" in favour of the respondent-Board within 20 days from the date of issuance of LOA as per clause 41.0, Section INB and Clause 32.0, Section GCC of conditions of contract Volume 1 and 1A and also as per condition of Contract (supply) clause 1.1. and Clause 12.1 (Election Contract). According to the respondent-Board, LOAs having been issued on 30.1.2009, the writ petitioners were required to furnish the CPGs within 19.2.2009 i.e. within 20 days from the date of issuance of LOAs. It is further on record that on failure of the writ petitioners to furnish the CPGs within the stipulated period of 19.2.2009, they were asked by the Board to submit Agreement papers within 31.3.2009 and before signing the Agreement they were asked to submit the CPGs. Accordingly, the Contract Agreements were ultimately signed on 6.4.2009 after submission of CPGs by the respective writ petitioners by

27.3.2009. The said CPGs were issued by the Union Bank of India. TF Gole Market, Shahid Bhagat Singh place, New Delhi-1. However, the writ petitioners came to learn that the Contract Performance Guarantees issued in the name of Union Bank of India were in fact fake and on coming to know of the fraud committed in this respect by a so-called service provider namely M/s. SS Capitals and Financial Services in collusion with some officers of the Union Bank of India, the writ petitioners immediately informed the respondent-Board on 23.4.2009 that the Bank Guarantees submitted by them were fake. It is further revealed that complaints were also lodged in this connection by the writ petitioners with the Deputy Commissioner of Police, Economic Offences Wing, New Delhi on 25.4.2009. Thereafter, the writ petitioners arranged fresh Bank Guarantees from Federal Bank Limited and submitted the same to the respondent-Board as a replacement of the earlier CPGs. The submission of the fresh bank guarantees by the writ petitioners from Federal Bank Limited is not disputed by the respondent-Board. However, on 24.4.2009, the respondent-Board issued show-cause notices to the writ petitioners asking them to show cause as to why the contract agreements executed with them should not be terminated and as to why they should not be debarred from future business with the respondent-Board in addition to further actions that might be taken against the writ petitioners. The responses of the writ petitioners were asked to be submitted to the Board within 7 days from the date of issue of the said notice. For better appreciation, the contents of the show-cause notices dated 24.4.2009 issued in respect of the writ petitioners in one of the writ petition viz. W.P. (C) 1990/2009, is reproduced herein below:

...with reference to the above, this is to inform you that the Contract Performance Guarantee furnished by you vide the Bank Guarantees (referred in 2.3.4 and 5) against RGGVY Nagaon District Package NGN-3 have been disowned by the Union Bank of India, Field General Managers Office, Shaheed Bhagat Singh Place, IIIrd floor, Bangla Sahib Marg, Gole Market, New Delhi-110001. This act of submission of fraudulent documents is against the interest of the Assam State Electricity Board.

Therefore, you are to show cause as to why the abovementined contract Agreements shall not. be terminated and you shall not be debarred from future business with Assam State Electricity Board in addition to any other action that may be taken against you. Your reply should reach the undersigned within 7 (seven) days from the date of issue of this notice...

Further reproduction of the portion of the show-cause notices in respect of the remaining three writ petitions is not required as they are identical in all relevant aspects.

4. The writ petitioners accordingly submitted their replies to the respondent-Board defending their position. Thereafter, the respondent-Board issued further notices summoning the writ petitioners for personal hearing and after affording such personal hearing impugned orders dated 13.5.2009 were communicated to

the writ petitioners inter alia rescinding the contracts given to the petitioners. In addition to rescinding the contracts the respondent-Board through its Chairman issued further orders in all four writ petitions separately as follows:

...as far as the request of the Union Bank of India with regard to filing of criminal case against the firm, as also decision of the issue as to whether the firm should be debarred from any further business with ASEB, the order will remain reserved till the outcome of the investigation being carried out by the Delhi Police. Chief General Manager (RE), ASEB will maintain correspondence with Delhi Police to get report from time to time so as to take a decision with regard to filing of criminal case and barring the firm from future business with ASEB and its successor companies.

5. The respondent-Board by filing affidavits-in-opposition in all the writ petitions had taken a preliminary objection to the maintainability of the writ petitions in view of the provisions of Arbitration Clause in the Letters of Award. The relevant Arbitration Clauses No. 19.1 are quoted herein below:

19.0-Settlement of Disputes and Arbitration.

19.1 All the differences or disputes arising out of this contract shall be settled through the process of "Settlement of Disputes" and "Arbitration" as per clause 47.0 and 48.0, Section GCC, Conditions of Contract Vol., 1 of the Bidding Documents. The Arbitration shall be conducted in accordance with the provisions of the Indian Arbitration Act, 1940 or any statutory modification thereof. The place of arbitration shall be Guwahati.

6. Although, initially objection was raised regarding maintainability of the writ petition by placing reliance on the arbitration clause, however, the same was neither argued nor pressed on behalf of the respondent-Board at the time of hearing of the writ petitions. This Court in order to satisfy itself had perused the relevant connected clauses 47 and 48 of the GCC pertaining to the settlement of disputes which specifically provides that the power of adjudication of disputes by way of arbitration is limited to the scope of "performance of works". Hence/the disputes involving the present nature is prima facie beyond the scope of the said process of settlement of disputes.

A copy of the general terms and conditions of contract containing above said clauses 47 and 48 has been annexed as Annexure ''P'' to the affidavits-in-reply filed by the petitioners in WP(C) No. 1990/2009 as well as in other writ petitions.

7. The respondent-Board has sought to justify its action contained in its impugned orders dated 13.5.2009 by taking a stand in the affidavits-in-opposition that the writ petitioners informed the Board on 23.4.2009 only regarding the fraud committed in respect of CPGs issued in the name of Union Bank of India only after receipt of letter from the bank authority and visit of the bank personnel to the office of the Board by which the matter has become known to all. Therefore, it has been contended that the petitioners might have delivered

the information of being defrauded with an intention to prove their innocence and ignorance about the fraud.

8. The respondent-Board has further taken a stand that the petitioner''s Company could have submitted earlier bank guarantees from their regular banker, i.e. Federal Bank Limited. But, in spite of being able to furnish the bank guarantee from their regular banker as per documents submitted with the bid, the petitioner approached the outside agency, i.e. M/s. S.S. Capital and Financial Service for acquiring bank guarantees without going through the authenticity of the firm. Thus from the conduct of the Petitioner''s Company, it appears that fake bank guarantees were submitted with an ulterior motive of deceiving the Assam State Electricity Board authorities and to make profit unscrupulously by the petitioner''s company.

Further stand of the Board as stated in Paragraph 20 of the affidavit in opposition in W.P. (C) No. 1990/2009, is quoted hereunder:

...it is the duty of the Petitioner Company to submit authentic Bank Guarantees by observing the formalities of the issuing Bank which is the normal practice of any Bank. The same having not been done, the action on the part of the petitioner''s company in securing Bank Guarantee worth of Rs. 33,51,27,531.00 against four works as reflected in W.P. (C) No. 1997/09, W.P. (C) No. 1998/09, W.P. (C) No. 1999/09 and in the present writ petition on payment of Rs. 98.90 lakhs to M/s. S.S. Capital and Financial Service who allegedly cheated the petitioner''s company is ex facie not tenable and the entire circumstances leads to only one conclusion that the petitioner company in collusion with M/s. S.S. Capital and Financial Service attempted to commit fraud on the Assam State Electricity Board and such fraudulent company is not entitled to do any work under Assam State Electricity Board...

Hence, the Board viewed the act of the writ petitioners in submitting fake bank guarantees with a view to deceive the Assam State Electricity Board authorities which has led to the cancellation of the letter of Awards and the agreements in reference and the impugned orders dated 13.5.2009 were passed after considering all the facts and materials on record and in public interest.

9. I have heard Mr. N. Dutta, learned Senior counsel assisted by Mr. Choudhury, learned Counsel appearing for the writ petitioners. Also heard Mr. B.D. Das, learned Standing Counsel, ASEB appearing for respondent Nos. 1.2 and 3 and Mr. R.K. Bora, learned Additional Senior Govt. Advocate Assam appearing for respondent No. 4.

10. Mr. Dutta, learned Senior counsel appearing on behalf of the petitioners would strenuously urge that the petitioners have been victims of fraud of immense proportion perpetuated on them under the circumstances contained in the pleadings. It is submitted that similar INVs were issued by Power Grid Corporation of India as well as Government of Nagaland and the petitioners were issued LOA by both of them. Bank Guarantees procured through the same

Agency (M/s. S.S. Capital and Financial Services) were also furnished to Power Grid Corporation and the Government of Nagaland. After coming to know the fraud committed upon them the petitioners informed all about the fake Bank Guarantees. Thus the very actions of the writ petitioners in informing the respondent-Board, Power Grid Corporation of India as well as the Govt. of Nagaland immediately on coming to know of the said fraud as well as informing the police at Delhi without any delay prove the bona fide intentions of the writ petitioners. It is further argued on behalf of the writ petitioners that while the Show Cause notices dated 24.4.2009 served on writ petitioners charging them to the effect that the act of submission of fraudulent documents is against the interest of the Assam State Electricity Board, in the impugned orders dated 13.5.2009 the respondent-Board went ahead to hold the petitioners guilty of acts for which no charges were framed or communicated to them, inasmuch as, the petitioners were originally charged with the act of submitting fraudulent documents which was adequately explained by them in their reply. In the impugned orders dated 13.5.2009, petitioners have been held to be guilty of having believed the "the unscrupulous elements" and of "greed". Although, no specific finding of committing fraud has been recorded, clause 7 of the guidelines for procurement of goods and services for implementation of Rural Electrification Project relating to fraud and corruption has been relied on. At paragraph 12 of the affidavit-in-opposition filed in WP(C) No. 1990/2009 as well as in other writ petitions, the impugned action has been sought to be substantiated on grounds of avoiding their regular banker, i.e. Federal Bank Ltd. and submitting fake bank guarantees with an ulterior motive of "deceiving ASEB" and "to make profit unscrupulously". Again at paragraph 20 of the counter, it has been stated that "the entire circumstances lead to the only conclusion that the petitioners in collusion with M/s. S.S. Capitals and Financial Services attempted to commit fraud on the Assam State Electricity Board and such fraudulent company is not entitled to do any work under "Assam State Electricity Board." However, the petitioners were never charged with either avoiding the Federal Bank Ltd. or with committing fraud. Learned Counsel has, therefore, submitted that had there been a specific charge to such effect, the petitioners would have certainly produced the letter dated 3.3.2009, annexed as Annexure- R to the affidavit-in-reply filed by the petitioners in WP(C) No. 1990/2009 as well as in other writ petitions, letter dated 3.3.2009 sent to the writ petitioners by the authority of Federal Bank Ltd. in-forming the petitioners to the effect that "since you need the bank guarantees within 31st march, 2009, it will not be possible on our part to provide required bank guarantee until and unless sanction is accorded for the purposed limit from HO." In that case, the petitioners could have explained their position clearly regarding their innocence on the charge of fraud. But the documents on which the entire case of the ASEB has been built up were never made available to the petitioners. Thus, submitted Mr. Dutta that the principles to fairness and reasonableness which have been held to be important facets of Article 14 of the Constitution of India have been divorced from the entire decision making process. Mr. Dutta would further submit that discrimination nonapplication of mind and colourable exercise of powers are writ large on the face of the record. The established principles of natural justice have been violated with all impunity as has been amply demonstrated by the act of the authorities in support of the contentions advanced on behalf of the petitioners the following decisions have been relied upon:

(i) Laxmi Devi Sugar Mills Vs. Nand Kishore Singh,

(ii) Hindustan Sugar Mills Vs. State of Rajasthan and Others,

(iii) Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others,

(iv) Tarlochan Dev Sharma Vs. State of Punjab and Others,

11. Mr. Das, learned Standing Counsel, ASEB appearing to behalf of respondent Nos. 1, 2 and 3 has urged broadly on the following points:

(i) The action impugned in the instant case is in the realm of contract and hence the same is beyond the purview of power of judicial review under Article 226 of the Constitution of India.

(ii) Placing reliance in the case of Jagdish Mandal v. State of Orissa and Ors. reported in (2007) 14 SCC 517, it was argued that evaluation of tenders and awarding contracts being essentially commercial functions of the State, the principles of equity and natural justice stay at a distance in such matters.

(iii) Relying upon the case of Shri Jagannath Temple Puri Management Committee and Another Vs. Chintamani Khuntia and Others, submission has been advanced on behalf of the respondent that acceptance of the fresh bank guarantees under similar situations by the Power Grid Corporation of India and the Government of Nagaland do not entitle the writ petitioners the similar treatment at the hands of ASEB, inasmuch as, mistake committed in a given case also do not confer any right on the writ petitioners.

12. I have given my anxious consideration to the rival submissions made by the parties as well as the pleadings set forth and other documents on record.

13. It is apparent on the face of the record that the impugned orders of penalty as contained in the impugned orders dated 13.5.2009 has travelled far beyond the Show Cause notice dated 24.4.2009 by which the proceedings against the writ petitioners were set on motion. Findings have been recorded against the writ petitioners in the order dated 13.5.2009 for which the writ petitioners were never put to any notice or opportunity of defending themselves. This in itself is sufficient to vitiate the entire decision making process of the respondent-Board, more so, in view of the fact that the orders dated 13.5.2009 issued by the Board else than ordering cancellation of the contracts in question issued further orders virtually blacklisting the petitioners thereby debarring them from entering into future business with Assam State Electricity Board. It is a well settled proposition of law that higher degree of fairness in action should be adopted in cases involving blacklisting or imposition of penal consequences. The law laid down by

the Apex Court in the case of Jagdish Mandal, (supra) as contained in paragraph 22 of the citation itself is the best available authority at hand.

Though heavy reliance has been placed in the case of Jagdish Mandal, (supra) on behalf of respondent-Board, in my considered opinion the same is not applicable in the case in hand, rather the decision helps the petitioners. The said decision clearly relates in the case of evaluation of tenders and the choice of the authorities in allotting a contract. Paragraph 22 of the said judgment makes the position crystal clear and infact clearly draws a distinction between the two different stages in the contract. At paragraph 22 of the said judgment the Hon''ble Supreme Court though has held that "Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance." But in the same paragraph, infact the last sentence thereof makes it clear that "cases involving blacklisting or imposition of penal consequence...stand on a different footing as they may require a higher degree of fairness in action." Moreover, the last sentence of paragraph 24 leaves no room for any doubt that in the case before the Hon''ble Supreme Court, particularly Clause 3.5.18 of the Code in question itself dispensed with the requirement of issuing a show-cause notice before rejecting a tender. On the other hand, in the instant case, on being found to be the most responsive bidder, the contracts in question were allotted to the petitioners by issuance of Letters of Award and consequently agreements were executed. The issue involved in the instant case is termination of subsisting contracts having ''penal consequences'' unlike the case before the Apex Court. The settled position of law itself requires issuance of show-cause notice and the ASEB authorities infact did so. Hence, in the facts of the instant case there is a clear requirement of ''higher degree of fairness in action'' as has been held by the Apex Court at paragraph 22 of the said judgment itself. As such, the decision rendered by the Hon''ble Apex Court in Jagdish Mandal, (supra) is clearly distinguishable on facts and consequently not applicable to the instant case.

14. Relying upon the case of Shri Jagannath Temple, (supra), it is contended on behalf of the respondents that a mistake does not confer any right. The said decision has been relied upon by the respondent to substantiate the point urged by them that acceptance of the fresh Bank Guarantees by Power Grid Corporation of India and the Government of Nagaland does not entitle them to a similar treatment at the hands of the ASEB. The said judgment relied upon, itself makes it clear that it is a ''mistake'' that does not confer any right. However, the respondents have entirely failed to substantiate as to on what basis the action of the Power Grid Corporation of India and the Government of Nagaland is a ''mistake''. Hence, the decision of Shri Jagannath Temple, (supra) has also no applicability in the instant case.

15. The respondents have sought to justify the passing of the orders dated 13.5.2009 by way of statements and averments made in their affidavits-in-opposition. The statements made in paragraphs 10 and 20 of their affidavits-in-

opposition attempts to improve upon and support the grounds for passing the impugned orders dated 13.5.2009 and the grounds contained therein. This is clearly not permissible in view of the settled position of law laid down by the Apex Court and relied upon on behalf of the petitioners in the cases of Commissioner of Police, Bombay Vs. Gordhandas Bhanji, and Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, wherein it was held that Public orders, publicly made in exercise of a statutory authority can not be construed in the light of explanations subsequently adduced by the authority making the order. The orders made by the authority will be judged by the reasons and ground so mentioned in the orders itself and the same can not be supplemented or judged on the basis of reasons freshly adduced by affidavit or otherwise.

16. The cases in hand are not purely in the realm of contract or evaluation of the contract awarding process. Rather these are cases where contracts once granted to the writ petitioners after being adjudged to be the best bidders were cancelled by the respondents with further penal consequences of blacklisting. Apart from the discussions and decisions referred to hereinabove, I am of the further view that the conduct of the writ petitioners in immediately informing the Board regarding the fraud committed in respect of the original CPGs as well as lodging of the complaints before the police abundantly eliminates any reasonable suggestion of their involvement in the fraud. The available materials on record do not justify the decision of the Board that the writ petitioner''s defence was "too good to believe" or that "it was the greed of these firms that compelled them to be led through the garden path". Equally the invocation and reliance made on Clause 7 of the guidelines for procurement of goods and services for implementation of Rural Electrification Project as circulated by the Rural Electrification Corporation Ltd. New Delhi and the satisfaction of the Board that there was no justification for the write petitioners'' firm to have submitted completely forged documents to ASEB are utterly misplaced and not based on any sound reasoning or fair decision making process. There is no material to conclude, far less a conclusion that the fraud was committed by the writ petitioners themselves. Consequently, the writ petitioners can not be penalisd for an offence not proved to have been committed by them.

17. In view of the above, the impugned orders dated 13.5.2009 passed by the Chairman of the respondent-Board in WP(C) Nos. 1990/2009, 1997/2009, 1998/2009 and 1999/2009 cannot be sustained and are consequently liable to be set aside and quashed which hereby do.

18. The writ petitions are allowed. However considering the facts and circumstances of the case, there shall be no order as to cost. Interim orders passed earlier made absolute.

