

(2003) 01 GAU CK 0028

In the Gauhati High Court

Case No : Writ Appeal No. 561 of 2002 {in WP (C) No. 94 of 2001 (AB) /7239 of 2001 (Ghy) }

State of Mizoram and Another

APPELLANT

Vs

Vatech Escher Wiss Flovel Ltd.

RESPONDENT

Date of Decision : 17-01-2003

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2003) 2 GLR 660

Hon'ble Judges : D. Biswas, J; Amitava Roy, J

Bench : Division Bench

Advocate : P. Pathak, A.G. and A.K. Sarma, for the Appellant; S. Chakravorty and S. Bhuyan, for the Respondent

Final Decision : Dismissed

Judgement

Amitava Roy, J.—The State of Mizoram being aggrieved by the judgment and order dated 16.5.2002 passed in WP(C) No. 94/2001(AB) corresponding to WP(C) No 7239/2001 (Ghy) directing the official respondents therein to open and consider the financial bid submitted by the respondent-writ petitioner in connection with execution of the Hydro-Electrical Project involved in the proceedings, is in appeal;

2. We have heard, Mr. P. Pathak, learned Advocate General, Mizoram, for the appellants and Mr. S. Chakravorty, learned counsel for the respondent-writ petitioner.

3. Sans the details, the relevant facts need attention. In April, 2001, the State of Mizoram published a Notice Inviting Tenders No. 6/54/ 2001-CEPC/1 (for short "NIT") for design, manufacture, testing works, etc., of Maicham- II (2 x 1.5 MW) Small Hydro-Electric Project in the State. The intending bidders in terms of the NIT, were required to submit tenders in two separate sealed, covers (cover I to contain "techno commercial bid" and cover II "financial bid"). In techno

commercial bid, the tenderers were supposed to specify the technical bid whereas in the financial bid, the financial figures and/or price at which the tenderers were agreeable to undertake the job. The respondent-writ petitioner, in response to the said NIT submitted its tender on 28.6.2001. In all, there were five tenderers including M/s Jyoti Limited, The covers containing the techno commercial bids were opened on the same day and after scrutiny of the tender documents, the tenders of the respondent-writ petitioner and M/s Jyoti Limited only remained in the fray. Thereafter on 17.8.2001, the Chief Engineer (Power) & Electrical Department, Mizoram, intimated the respondent-writ petitioner that its bid did not comply with the requirements of the tender documents in some matters relating to techno commercial aspects. By the said letter, the respondent-writ petitioner was requested to communicate as to whether it could re-consider its offer in those aspects and comply with the terms of the tender document. The respondent-writ petitioner was instructed to submit its reply on or before 27.8.2001 as otherwise its bid documents would be rejected as non-responsive. The respondent-writ petitioner by communication dated 25.8.2001 conveyed its willingness to accept all the terms and conditions of the tender documents as referred to in the letter dated 17.8.2001. However, along with the said communication, the respondent-writ petitioner submitted a revised price bid consequential to the resultant changes made in the techno commercial offer, The revised price bid was submitted in cover II and it was clearly mentioned in the said letter that the original price offer stood void and superseded by the revised price bid. The case of the respondent-writ petitioner as put forward in the writ petition is that thereafter on 20.9.2001, it came to learn that the process of evaluation of the tenders had been completed without opening its price bid and the consideration was limited to the price bid of the other tenderer M/s Jyoti Limited. The respondent-writ petitioner thereafter submitted a representation on 20.9.2001 before the Chief Minister, State of Mizoram, protesting against the course of action taken in excluding it from the tender process. In the said representation it was, inter alia, contended that as per the tender norms relating to two parts bids, revision of price bid consequent upon modification of the commercial bid was always acceptable and, therefore, its revised bid should, be opened. It was, however, contended in the alternative, that in case, the department had any reservation in doing so, its original price bid should, therefore, be considered. The respondent-writ petitioner also submitted a representation on 21.9.2001 before the Chief Engineer (Power), Electrical. Department, Mizoram, in the same lines. As nothing was forth coming, the respondent-writ petitioner approached this Court.

4. In their affidavit, the State respondents have taken a stand that on scrutiny of the techno commercial bids of the tenderers, only two bidders, i.e., respondent-writ petitioner and M/s Jyoti Limited, were found eligible. As some departure in their tenders, vis-a-vis, the terms and conditions of the NIT were noticed, they were intimated about the same by communication dated 17.8.2001 and they were also requested to intimate as to whether they were in a position to comply

with the terms and conditions of the tender documents with the caution that in case they failed to do so within 27.8.2001, their tenders would be rejected as non-responsive. The respondent-writ petitioner at first by letter dated 23.8.2001 tried to justify its techno commercial offer as originally made but subsequently by letter dated 25.8.2001 agreed to bring its offer in conformity with the terms and conditions of the NIT but offered a revised price bid. According to the State respondents, as by that time the date of submission of the bid was over, the respondent-writ petitioner had no right to revise its price bid as acceptance thereof would have exposed the department to the charge of discrimination and favouritism in the process. They contended that the department had no power under the NIT to relax or waive the terms and conditions thereof and the opportunity was granted to the respondent-writ petitioner and M/s Jyoti Limited only to bring their techno commercial offer in tune with the terms and conditions of the NIT. They mentioned that whereas the respondent-writ petitioner agreed to comply with the terms and conditions of the NIT, subject to its revised price bid the other tenderer, namely M/s Jyoti Limited unconditionally accepted all the terms and conditions of the NIT. The acceptance of the terms and conditions of the NIT by the respondent-writ petitioner was, therefore, a conditional one. In the said premises, the State officials treated the tender of the respondent-writ petitioner as non-responsive and, therefore, did not open its financial bid. On 17.9.2001, the financial bid offered by M/s Jyoti Limited the only eligible tenderer, was opened. As the respondent-writ petitioner submitted its representation after the opening of the financial bid, there was no scope in consider its price bid as the same, if done, would have violated the sanctity of the tender process. The State respondents further categorically asserted that even if the work was allotted to the sole surviving tenderer it would not prejudice the" commercial viability of the project as the department would exercise strict, supervision and control in all matters relating to the execution thereof.

5. The learned Single Judge after hearing the learned counsel for the parties and on a consideration of the competing claims, by the impugned judgment and order, has directed the State respondents to open the original financial bid of the respondent-writ petitioner within a period of 30 to 45 days from the date of the judgment and order. The learned Single Judge farther directed that the final decision should be taken by the concerned authority on a consideration of the offers of the two tenderers, i.e., respondent-writ petitioner and M/s Jyoti Limited, in association with the authorities as named in the order.

6. Mr. P. Pathak, learned Advocate General, Mizoram, has argued that the respondent-writ petitioner while agreeing to bring its techno commercial offer in line with the terms and conditions of the NIT, having offered a revised price bid, it amounted to a fresh offer which was neither contemplated by, the NIT nor in the communication dated 17.8.2001 by which clarifications were sought for from the respondent-writ petitioner and, therefore, the decision of the official respondents in not opening the price bid of the respondent-writ petitioner cannot be faulted with in any view of the matter. Referring to the communication dated

25.8.2001 made by the respondent-writ petitioner accepting the terms and conditions of the tender documents, vis-a-vis, its techno commercial offer, the learned Advocate General, Mizoram, urged that it was clear from the said communication that the original price bid of the respondent-writ petitioner stood superseded by the revised price bid which was clearly not permissible and, therefore, the official respondents rightly treated the tender of the respondent-writ petitioner to be non-responsive. According to him, it is abundantly clear from the communication dated 17.8.2001, seeking the clarifications, that the respondent-writ petitioner was supposed to convey its willingness to bring its techno commercial offer in conformity with the terms and conditions of the NIT and no opportunity was granted thereby to revise its price bid. He contended that if the respondent-writ petitioner was allowed to offer a revised price bid, it would have amounted to permitting it to make a fresh offer on both techno commercial and financial aspects thus vitiating the tender process by vice of unfairness, discrimination and non-transparency in State action. In such a case, according to the learned Advocate General, Mizoram, the process would have been dubbed and denounced, as violative of Article 14 of the Constitution, as a result, of a private negotiation with the respondent-writ petitioner. Moreover, the conduct of the respondent-writ petitioner clearly revealed that it was not consistent in its approach. After having offered its price bid, while furnishing the clarifications it offered a revised price bid making it clear that its original price bid stood superseded. In the representation dated 20.9.2001, it insisted that the revised price bid be opened contending that the offer was permissible as per the prevalent tender norms relating to two parts bids. However, in the alternative in the said representation, it was also contended that its original price bid should at least be considered. According, to learned Advocate General, Mizoram, apart from the fact that the representation was filed after the price bid of M/s Jyoti Limited was opened and considered on 17.9.2001, the conduct of the respondent-writ petitioner did not justify the course of action as suggested by it. Referring to the impugned judgment and order, the learned Advocate General, Mizoram, submitted that the learned Single Judge having concluded that there was no material to hold that the State respondents had acted irrationally by not allowing the respondent-writ petitioner to participate and that there was nothing to infer the presence of "unfair means or other purposes". The direction, issued to the State respondents to open the financial bid of the respondent-writ, petitioner was therefore not only inconsistent with the above conclusion but also was uncalled for in the facts and the circumstances of the case. He was also critical about the direction issued by the learned Single Judge resulting in change of the constitution of the Work Advisory Board for considering the tender of the respondent-writ petitioner and M/s Jyoti Limited. According to him, such a direction was beyond the scope of the controversy involved in the proceeding and the same is not only unwarranted but also not sustainable in law and on facts.

7. Mr. S. Chakravorty, learned counsel for the respondent-writ petitioner, while supporting the impugned judgment and order, has submitted in reply that the

action of the State respondents in not opening the financial bid of the respondent-writ petitioner and thus excluding it from the tender process was, *ex facie*, illegal, arbitrary and discriminatory and, therefore, the learned Single Judge after considering all relevant aspects of the matter had by the impugned judgment and order rightly directed the State respondents to open the financial bid of the respondents-writ petitioner and consider its tender along with that of M/s Jyoti Limited for settlement of the contract, relating to execution of the project. The learned counsel strenuously urged that as per the universally accepted, norms relating to two pails bids system any modification in the techno commercial offer was bound to have a bearing on the financial offer and, therefore, the revised price bid submitted by the respondent-writ petitioner consequent upon its decision to bring its techno commercial offer in tune with the terms and conditions of the NIT was perfectly in order and the State respondents were clearly in error in not opening its price bid. He contended that after the scrutiny of the techno commercial, offer only two tenderers, namely the respondent-writ petitioner and M/s Jyoti Limited remained in the field and by excluding the respondent-writ petitioner from the process on such irrelevant and unsustainable consideration, the State respondents committed themselves to settle the contract with the remaining tenderer without reserving any further bargaining power which apparently is prejudicial to the public interest. According to the learned counsel, therefore, the impugned action of the State respondents in the instant case is not only unfair, unreasonable and discriminatory but also smacks of mala fide and, therefore, the same being opposed to public interest, the learned Single Judge was fully justified in passing the impugned judgement and order. Without prejudice to the above submission, the learned counsel argued that in any case, the State respondents ought to have opened the original price bid quoted by the respondent-writ petitioner and as the same was lower than the rate quoted by M/s Jyoti Limited, they acted against the interest of finance of the State in excluding the respondent-writ petitioner's financial bid from consideration. According to him, the impugned judgment and order if read as a whole would clearly demonstrate that the learned Single Judge was satisfied that the State respondents were not justified in not opening the price bid of the respondent-writ petitioner and, therefore, the direction contained therein had been issued. He further contended that there was nothing wrong on the part of the learned Single Judge to have re-constituted the Work Advisory Board and he submitted on instructions that he has no objection even if the financial bid of the respondent-writ petitioner is opened and considered by the Board as constituted by the Government of Mizoram.

8. The controversy thus turns on the question as to whether the State officials ought to have considered the price bid of the respondent-writ petitioner in face of the revised price bid submitted by it along with the clarifications furnished in response to the communication dated 17.8.2001 referred to above. The answer to this controversy would largely depend on the nature of the clarifications sought for by the State. A bare reading of the communication dated 17.8.2001

suggests that no liberty was granted to the respondent-writ petitioner to revise its price bid while providing the clarifications sought for. On the other hand, it clearly indicated that unless its offer was in tune with the requirements of the tender documents its financial bid would not be opened to be considered. It can, therefore, be construed that the clarifications sought for, related only to the techno commercial offer of the respondent-writ petitioner. It was, therefore, not open for the respondent-writ petitioner to offer a revised price bid though, may be consequential, upon the alterations it had to make in its original techno commercial offer. The offer of the respondent-writ petitioner as submitted by its letter dated 25.8.2001 bringing its techno commercial bid in conformity with the terms and conditions of the tender documents with revised price bid in our opinion, therefore, amounted to a fresh offer both on techno commercial and financial aspects. While the learned counsel for the respondent-writ petitioner may be right in contending that any alternation/modification of the techno commercial bid in a two parts bid system would likely to have bearing on the financial offer, considering the nature of the clarifications sought for in the instant case, we are not in a position to concur with the submission that in the facts and circumstances of the case, it was obligatory on the part of the State official to open the revised price bid of the respondent-writ petitioner or at least its original price bid. Admittedly, by the time the clarifications were furnished by the respondent-writ petitioner, the date of submission of the tenders pursuant to the NIT was over and, therefore, it was not permissible on the part of the State officials to allow the respondent-writ petition to submit a fresh bid both on techno commercial and financial aspects. It may be relevant to notice that other tenderer M/s Jyoti Limited while agreeing to conform to the terms and conditions, adhered to the original price bid. In any view of the matter, the respondent-writ petitioner by its letter dated 25.8.2001 had thus conveyed only a conditional acceptance of the terms and conditions of the NIT. No such condition was imposed by the other tenderer. Admittedly on 17.9.2001 when the price bid of M/s Jyoti Limited was opened, the offer of the revised price bid of the respondent-writ petitioner was on record. As the State officials construed the acceptance of the terms and conditions of NIT by the respondent-writ petitioner as a conditional one in view of its revised price bid, they did not consider the same. In the attending facts and circumstances, we do not consider that the approach of the State officials can be adjudged as unfair, unreasonable and/or outrageous in defiance of logic warranting interference by this Court in exercise of its power under Article 226 of the Constitution. The State officials having short listed the tenderers, it was not permissible on their part to allow one of them to submit a fresh tender, as otherwise the same would have vitiated the process by the vice of unfairness and discrimination resulting from private negotiation.

9. Another aspect of the matter cannot also be lost sight of. The conduct of the respondent-writ petitioner in first offering a price bid and then revising the same and again in the alternative requesting the State officials to consider its original price bid indicates its vacillating mind in making its offer. In any case, on.

17.9.2001 when the price bid of M/s Jyoti Limited was opened, the respondent-writ petitioner had not withdrawn its revised price bid and even its alternative offer was not made in the communication dated 25.8.2001. We are, therefore, unable to persuade ourselves to conclude that in the above facts and circumstances, the decision of the State officials not to open the price bid of the respondent-writ petitioner suffers from any illegality, arbitrariness or unfairness vitiating the same.

10. The learned Single Judge while rendering the impugned judgment and order had observed while accepting the submission made on behalf of the State in that regard that allowing the respondent-writ petitioner to submit a revised price bid, would have amounted to writing the NIT creating complications. It was further held that only because the revised price bid was not accepted "unfair means or other purposes" could not be inferred and that the right to resubmit the price bid must not be deemed to be a crucial part of the two part tender process and that there was no case of absence of benevolent interpretation. The learned Single Judge, however, was of the opinion that when two parts tender was invited there was no reason for not considering one bid offered by one of the tenderers and that to that extent the action of the authority concerned was not fair and reasonable. It, therefore, concluded that the original financial bid of the respondent-writ petitioner should have been considered before rejecting its tender as non-responsive.

11. In our opinion, in the background of the facts of the case it cannot be concluded that the State officials in not considering the price bid of the respondent-writ petitioner had acted in a manner which can be said to be unfair or unreasonable. The course of action, taken by the State official is one of the legally permissible ones and cannot be considered to be absurd or preposterous.

12. Having held so and considering the view that we have taken on the merits of the contentions of the parties, we are not inclined to deal with the aspect of re-constitution of the Work Advisory Board and we leave it at that.

13. The respondent-writ petitioner had approached this Court seeking to invoke, its power of judicial review for redressing its grievances. The parameters of judicial review have by now been well delineated. The same is not an appeal from a decision but involves only a review of the manner in which the decision was made. In the realm of contract, the State officials have the right, to choose. They have also the right to refuse the lowest tender or any other tender. But their action has to be fair, non-arbitrary and transparent. If two views are possible in a fact situation and the view taken by the authorities concerned is a plausible one, this Court in exercise of its power of judicial review would not interfere with the same and substitute its view in place of the one taken by the authorities. The law permits some free play in the joints to the authorities functioning in an administrative or quasi-administrative sphere and unless the decision taken is one not logically warranted in the prevalent facts interference by way of judicial review is not contemplated.

14. The Apex Court in *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, paragraph 7 whereof has been extracted in its extenso by the learned Single Judge had, inter alia, observed that the State can choose its own method to arrive, at a decision and can fix its own terms of invitation of tender and that is not open to judicial scrutiny. Price need not always be the sole criterion for awarding the contract and the Court can examine the decision making process and interfere if it is found vitiated by mala fide, unreasonableness and arbitrariness. Even when some defect is found in the decision making process, the Court must exercise its discretionary power under Article 226 of the Constitution with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point.

15. Dealing with the obligation of the administrative authorities to act fairly, the Apex Court in its recent decision of *Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another*, held as hereunder :

"10. The obligation to act fairly on the part of the administrative authorities was evolved to ensure the rule of law and to prevent failure of justice. This doctrine is complimentary to the principles of natural justice which the quasi-judicial authorities are bound to observe. It is true that the distinction between quasi-judicial and administrative action has become thin, as pointed out by this Court as far back as 1970 in *A.K. Karipak v. Union of India*. Even so the extent of judicial scrutiny/judicial review, in the case of administrative action cannot be larger than in the case of quasi-judicial action. If the High Court cannot sit as an Appellate Authority over the decisions and orders of quasi-judicial authorities, it follows equally that it cannot do so in the case of administrative authorities. In the matter of administrative action, it is well known, more than one choice is available to the administrative authorities ; they have a certain amount of discretion available to them. They have "a right to choose between more than one possible course of action on which there is room for reasonable people to hold differing opinions as to which is to be preferred" (as per Lord Diplock in *Secy, of State for Education and Science v. Metropolitan Borough Council of Tameside*, All ER at p. 6951). The Court cannot substitute its judgment for the judgment of administrative authorities in such cases. Only when the action of the administrative authority is so unfair or unreasonable that no reasonable person would have taken that action, can the court intervene. To quote the classic passage from the judgment of Lord Greene, M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* All ER pp. 682H-683A).

"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with the discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He

must exclude from his consideration, matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority".

16. No such arbitrariness, unfairness, mala fide or non-transparency in the impugned action of the State officials is discernable in the instant case. The State has taken a categorical stand that the public interest would not suffer and that strict vigil would be maintained in course of the execution of the project. There is nothing on records to the contrary.

In the light of the above discussion, we are of the view that the appellants have been able to make out a case calling for interference with the impugned judgment and order. The appeal is thus allowed and the impugned judgment and order dated 16.5.2002 passed by the learned Single Judge in WP(C) No. 94/200KAB) corresponding to WP(C) No. 7239/200.1 (Ghy) is set aside. The writ petition WP(C) No. 94/2001 (AB) corresponding to WP(C) No. 7239/2001 (Ghy) is dismissed. No costs.