

CASE NO.:
Appeal (civil) 3032 of 2004

PETITIONER:
Jespar I. Slong

RESPONDENT:
State of Meghalaya & Ors.

DATE OF JUDGMENT: 07/05/2004

BENCH:
N Santosh Hegde & B P Singh.

JUDGMENT:
J U D G M E N T

(Arising out of SLP) No.5185 of 2003)

SANTOSH HEGDE, J.

Heard learned counsel for the parties.

Leave granted.

In this appeal the appellant questions the correctness and legality of the judgment of the High Court of Gauhati dated 28.1.2003 made in Writ Appeal No.710/2002 confirming the judgment dated 7.11.2002 made by the learned Single Judge of the same High Court at Shillong Bench in W.P.) No.355(SH)/2002. The facts necessary for the disposal of this appeal are as follows :

The State of Meghalaya owns a weigh bridge at Morkjniange which it had decided to lease out to contractors who were willing to take it on lease on yearly basis. For the said purpose it issued a Notice Inviting Tender (NIT) from interested persons for operating the said weigh bridge. Pursuant to the said notification number of tenderers offered their bids. On 11.2.2002, the respondent-State accepted the bid of one Smt. Nila Niangti, respondent No.5 herein, which was for a sum of Rs.1.21 crores and the contract was settled in her favour. One of the bidders who participated in the said tender challenged the said acceptance of the bid before the High Court in W.P. No.34(SH) of 2002, inter alia, on the ground that the said acceptance was contrary to the prescribed guidelines and the bid amount accepted was speculative and predatory in nature. The learned Single Judge who heard the said writ petition accepted the contention of the writ petitioner that the bid offered by the 5th respondent herein was speculative and predatory in nature. According to the learned Judge the approximate value of the contract would have been only Rs.40,29,600/-which figure the learned Judge arrived at by taking into consideration a report submitted by the enforcement staff of the Department of Transport. On the said basis while setting aside the acceptance of the bid of 5th respondent herein the court directed the respondent to call for fresh tenders and re-examine and re-assess the value of tender keeping in view the observations made in the said judgment. A further direction was given that a fresh tender should be called for and the exercise of acceptance of that tender should be made within a period of 45 days from the date of the said judgment.

In compliance of the directions issued by the High Court in the above said judgment, the Tender Approval Committee made a fresh assessment of the approximate value of the tender. While

doing so it took into consideration the above-mentioned report of the enforcement staff of the Department of Transport as also Traffic Census Data provided by the Public Works Department and came to the conclusion that the annual collection from the weigh bridge fees would be to the tune of Rs.2.11 crores and the said Committee evaluated the value of the tender at Rs.2 crores. This assessment was made by the said Tender Committee after considering the above two reports. In the meantime, it is to be noted that a fresh tender was called for and in the said tender 27 bids were received. The highest bid was for Rs.3,03,33,333 and the next highest bid was for Rs.2,53,60,333/-. These two bids were rejected by the Tender Committee because the said bid forms were not affixed with the necessary court fees stamp. The 3rd highest bid was of Mr.C.Yonbon for Rs.1,75,00,567/-. The 4th and 5th bids were for Rs.1,63,00,987/- and 1,35,00,867 which were withdrawn by the concerned tenderers. The 6th highest bid was for Rs.97,77,777 but the said tenderer has not pursued the matter any further for whatever reason. The 7th bidder who is the appellant now before us offered a bid for Rs.62,70,797/- the 8th, 9th and 10th bidders are respondents 5, 6 and 4 respectively in this appeal who offered identical bids of Rs.40,29,600/- each which was actually the figure identified by the learned Single Judge in his order dated 15.3.2002. It is not necessary for us to go into the particulars of the other bids for the purposes of disposal of this appeal, hence, we will not refer to those particulars.

The Tender Acceptance Committee recommended to the Minister of Transport for approval of the acceptance of tender of Mr.C.Yonbon whose bid was 1,75,00,567/- and who was otherwise qualified in all respects as per the tender regulation. However, the Minister disagreed with the recommendations made by the Tender Committee solely on the ground that the High Court as per its order dated 15.3.2002 had directed the respondent-State to take into consideration the report submitted by the Enforcement Inspector of the Department of Motor Vehicles as regards the average number of trucks loaded and unloaded plying from Jaintia Hills to Guwahati and vice-versa per day while making the re-tender, hence, any deviation from the above direction would amount to contempt of court and it would be contrary to the mandate of the said judgment to rely on any other source of information like the data supplied by the Public Works Department while making an assessment of the value of the tender. Therefore, he recommended that the tender of one of the persons amongst respondents 4, 5 and 6 who had offered Rs.40,29,600/- be accepted.

In view of the difference of opinion between the Tender Committee and the Minister, the matter was referred to the Chief Secretary, the Finance Department and the Law Department who were all of the opinion that the matter should be referred to the High Court as to whether the valuation made by the Tender Acceptance Committee can be relied upon or not. But when the file went to the Chief Minister he directed the acceptance of bid at the level of the Minister himself.

At this juncture, since the time stipulated for compliance by the High Court had expired, the respondent\026State made an application for extension of time before the High Court. In the said application the State had given the particulars of the bids received by it and the reasons for not finalising the tender. The Learned Single Judge while considering the said application for grant of extension of time on 22.7.2002 took a decision to do King Solomon's justice and passed the following order :

"i) The settlement of the weigh bridge at Mookyniang, Jaintia Hills be made to and in favour of three bidders who bidded the same amount in the following manner.

ii) For the first year, the settlement be made in favour of Smt. Nala Niangti,
iii) For the second year, the said weigh bridge be settled in favour of Shri Arvotki Sumer and
iv) For the third year, the weigh bridge be settled to and in favour of Shri Sophiker Pariat.
v) The aforesaid period of three years would start from the date of issuance of necessary orders by the competent authority for which three weeks time is granted to the said Applicants to do the needful for the ends of justice."

Being aggrieved by the said arrangement made by the learned Single Judge one of the aggrieved parties by name Mr. Sastian Dkhar preferred a writ appeal against the said order of the learned Single Judge. In the said appeal the Division Bench of the High Court set aside the order of the learned Single Judge dated 22.7.2002 holding that the learned Single Judge could not have exercised the power of settling this right by himself in an application filed by the Government for extension of time. It also held that positive directions issued by the learned Single Judge is contrary to the directions issued previously, therefore, while setting aside the order of the learned Single Judge, the Appellate Bench granted three weeks' further time to the respondent authorities for settling the matter in accordance with the directions issued by the High Court.

After the matter came back to the authorities, the authorities decided to accept the tender of the 4th respondent herein which was for a sum of Rs.40,29,600/- per annum on the ground that the said respondent had proved his financial capacity while the other two equivalent bidders had not done so.

Being aggrieved by the aforementioned order granting the lease in favour of the 4th respondent the other 2 tenderers who had offered identical amounts preferred two writ petitions before the said High Court. The main contention of the writ petitioners in the said petitions was that the acceptance of the bid of the 4th respondent which was identical with theirs solely on the ground of financial capacity was contrary to the guidelines.

Learned Single Judge by his judgment dated 7.11.2002 dismissed the said writ petition. The court held that the decision of the authorities to choose the 4th respondent on the ground that financial soundness is a relevant consideration for the purpose of assessing suitability of a tenderer for the settlement of the contract.

At this stage the appellant who had bid for Rs.62,70,797/- having come to know of the acceptance of the lesser bid of the 4th respondent filed a writ appeal against the judgment of the learned Single Judge dated 7.11.2002 whereby he had approved the acceptance of the offer of 4th respondent. It was the contention of the appellant in the appeal filed by him that after the ofference of the bids no intimation of the acceptance of the bid of any of the persons was made public and since his bid was higher than that of the 4th respondent and he being otherwise qualified, his bid ought to have been accepted since no other qualified and higher bidder had come forward making any such demand. The said appeal of the appellant was opposed by the 4th respondent and the State on the ground that the appellant not having challenged the acceptance of the bid of 4th respondent before the Single Judge cannot be permitted to challenge the same for the first time by way of a writ appeal, hence, his appeal being not maintainable, the same should be rejected. The Appellate Bench of the High Court rejected that objection as to the maintainability of appeal

by a person who had not filed a writ petition and decided the appeal on merit but upheld the judgment of the learned Single Judge whereby the challenge to the acceptance of the bid of the 4th respondent was rejected. It is against the said judgment of the Appellate Bench the appellant is now before us in this appeal.

Mr. R F Nariman, learned senior counsel appearing for the appellant submitted that the finding of the learned Single Judge that concept of predatory or speculative pricing applied to the contract in hand is wholly erroneous. It is the argument of the learned counsel that this is not a contract for supply of goods. He stated this contract also did not involve public distribution system or for that matter even supply of essential commodity. He submitted this contract had no effect on the pricing of the coal also which was the main good carried by the vehicles in this region, hence this contract had no public interest involved except the revenue of the State. He contends that this is a pure and simple contract of leasing out a weigh bridge which is the property of the State Government where one and the only criteria for consideration would be the interest of revenue of the State. He submitted the valuation made by the Transport Department is only one of the materials to be relied upon for the purpose of knowing the probable value of the lease and cannot be the sole basis when there are other reliable materials which showed that the volume of transport on the concerned route was much higher. It is also contended even otherwise from the material on record the Tender acceptance Committee was justified in coming to the conclusion that the value of the tender would be as much as Rs.2 crores. In such a situation the respondent-State could not have fixed the value of tender at Rs.40,29,600/- merely because the High Court in the earlier judgment considered the said value as reasonable value. It is the submission of the learned counsel that fixation of value of the contract is within the jurisdiction of the authorities concerned and the court ought not to have embarked upon the exercise of this nature with the limited material available to it. He also submitted that the Minister was wholly wrong in coming to the conclusion that the Government was bound by the figure of Rs.40,29,600/- merely because it was the opinion expressed by the court.

Mr. Vijay Hansaria, learned senior counsel appearing for the 4th respondent firstly contended that the appellant's appeal before the Division Bench was not maintainable inasmuch as he had not challenged the order of acceptance of the 4th respondent's bid by filing a writ petition and it is only when the writ petitions filed by 2 other bidders came to be rejected the appellant who was sitting on fence all the time chose to file an appeal for the first time as a speculative litigation. He further submitted that the learned Single Judge was justified in coming to the conclusion that the reasonable bid value of the contract was Rs.40,29,600 which was an amount arrived at by the learned Judge on the basis of the report of the Inspection Directorate of Motor Vehicles. He also justified the finding of the learned Single Judge that any amount over and above the said figure offered as a bid would be predatory and speculative in nature which would encourage bidders to form cartels to oust the other genuine bidders from offering their bids and would also amount to encouraging the monopolistic trade practice. He further submitted that accepting highly inflated bid would not be in public interest because to recover the such huge amount the successful bidders would indulge in malpractice of coercing the transporters to pay more fees for the weighment of their vehicles. He also submitted that the State while offering its largesse to public should not have monetary consideration as the sole criteria but should also bear in mind the interest of public at large. In the said view of the matter the learned counsel submitted that the acceptance of bid of the 4th respondent was justified.

From the arguments addressed by the learned counsel appearing for the parties, many issues arise for our consideration. In this process of consideration of the issues involved in this appeal, we will first consider whether the appeal filed before the Appellate Bench of Guwahati High Court was maintainable or not. It is an admitted fact that after the Single Judge by his order dated 15.3.2002 set aside the earlier acceptance of bid on the ground that the said bid was predatory or speculative in nature a fresh tender was called for and the appellant was one such person who offered his bid. It is also not disputed that between the appellant and respondents 4, 5 and 6 appellant's bid is very much higher. It is the case of the appellant which, of course, is disputed by the other side that he had no knowledge whatsoever of any one's bid being accepted much less his bid being rejected. Therefore, when he came to know of the acceptance of the bid of the 4th respondent for the first time after the disposal of the second round of litigation by the learned Single Judge, he approached the Appellate Bench of the High Court because rejection of his bid in preference to the bid of the 4th respondent was arbitrary and contrary to law. The Appellate Bench of the High Court has thought it fit to entertain the appeal of the appellant by rejecting the objections raised by the 4th respondent and the State. We find no reason to interfere with this finding as to the maintainability of the appeal because if really the bid of the appellant was rejected erroneously and the appellant had no knowledge of such acceptance or rejection, the appellant has every right to challenge the said rejection of his bid and also the acceptance of the 4th respondent's bid. And if it is a fact, which we think it is, that the appellant had no knowledge of the same till the disposal of the writ petitions of other two bidders, the appellant was justified in filing the appeal against that judgment because filing of another writ petition would only be an exercise in futility.

The next question for our consideration is : whether the value of the contract fixed at Rs.40,29,600/- by the High Court as per its order dated 15.3.2002 was a final value or whether it was open to the State to have re-fixed that value of contract on the basis of fresh material available before it. Herein we must notice that while setting aside the contract in the first round of litigation the High Court in its order dated 15.3.2002 specifically directed thus :

"It is, however, made clear that the State-respondents shall take into consideration the report submitted by the Enforcement Inspectors regarding the average number of trucks loaded (including coal loaded trucks) and unloaded plying from Jaintia Hills to Guwahati and vice-versa, per day as seen in the document marked as Annexure-V to the writ petition while making the re-tender of the said tender. Liberty is also granted to the State-respondents to re-examine and reassess the value of the tender keeping in view the observations of this Court in this judgment." (emphasis supplied)

It is seen from the above directions issued by the Court that the High Court left open the question of re-assessing the value of the tender to the State Authorities. However, it directed them to take into consideration the report submitted by the Enforcement

Inspectors of Motor Vehicles Department. It did not prohibit the said authorities from taking into consideration any other material which was also available. Therefore, in our opinion, it was open to the authorities to rely upon such other material as was available to it while re-assessing the value of the tender but, of course, it also had to consider the report submitted by the Enforcement Inspectors. By its order the High Court had also not specifically held that the reasonable assessment of the tender value made by it at Rs.40,29,600/- was a conclusive value and the authorities were bound by the same, because if it was so then there was no need to give the direction to the State authorities to make a re-assessment on the material available to it. We think it is clear from the above judgment that the reasonable assessment of the tender value made by the High Court at Rs.40,29,600/- was only a tentative expression of opinion. That apart fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. From the above findings of ours, it is clear that the Tender Acceptance Committee had the necessary authority to re-assess the value of the tender which it did by fixing the value at Rs.2 crores. This value was fixed after taking into consideration the report submitted by the Enforcement Inspectors as also the report and data supplied by the PWD and if the said authorities thought it fit and safe to rely upon the data supplied by the PWD authorities we can find no fault with the same. In this context in our opinion, the Minister who disagreed with the recommendation of the Tender Acceptance Committee was in error in coming to the conclusion that the figure of Rs.40,29,600/- fixed by the learned Single Judge in his order was a final value and the State Authorities had no right to differ from the same.

The next question for our consideration is : does the principle of predatory pricing apply to the contract of the like involved in this appeal ? The learned Single Judge who applied this principle had obviously in mind the law laid down by this Court in the case of Union of India & Ors. vs. Hindustan Development Corporation and Ors. (1993 (3) SCC 499) wherein this court did discuss the principle of predatory pricing in the context of carteling or creating monopolistic rights. The facts involved in the said case pertain to formation of a cartel by some of the manufacturers and under pricing their products which on facts of that case was held to be amounting to unfair trade practice. In our opinion, principles discussed in the said case do not apply to the facts of this case.

It goes without saying that the Government while entering into contracts is expected not to act like a private individual but should act in conformity with certain healthy standards and norms. Such actions should not be arbitrary, irrational or irrelevant. The awarding of contracts by inviting tenders is considered to be one of the fair methods. If there are any reservations or restrictions then they should not be arbitrary and must be justifiable on the basis of some policy or valid principles which by themselves should be reasonable and not discriminatory. [See para 7 of Hindustan Development case (supra)]. The said judgment also states that any act which excluded competition from any part of the trade or commerce by forming cartels should not be permitted.

Probably from the above observations of this Court in the case of Hindustan Development (supra) the learned Single Judge in this case came to the conclusion that in the instant case any offer made which is over and above the realistic value of the contract would be predatory or speculative in nature. The question for our consideration is : Is there any factual basis for coming to this conclusion that the bids offered in this case were

either predatory or is the bid of a cartel. For this purpose, we will now examine what is the nature of contract involved in the present case.

The respondent-State owns a weigh bridge at Morkjniange. The income from this weigh bridge is received from the fees charged for weighment of trucks which pass through route in which this weigh bridge is situated. We are told that these trucks mostly carry coal from Jaintia Hills to Guwahati. As per the notification the person operating the weigh bridge can only charge a sum of Rs.30/- for a loaded truck and Rs.10/- for an unloaded truck. Therefore, the fee to be collected from the transporters for weighment of their vehicles is fixed and it does not vary with the amount of bid offered by the contractor. This is not a contract of supply where a contractor by manipulating the price may cause loss to public at large. This is not a contract which would have any effect on the price of coal, since weighment charges are fixed by the Government and the contractor has no right to increase the same. Payment of bid amount is purely a matter between the contractor and the State. As a matter of fact obtaining higher revenue by accepting the eligible highest bid would only be in public interest because State stands to gain more revenue. The offering of the bid after knowing the commercial value of the contract is a matter left to the business acumen or prudence of the tenderer. No third party's interest is involved in such contract. Therefore, in our opinion, application of principle of predatory pricing is wholly alien to this type of contract. Mere offer of a fancy or high bid by itself does not make the bid a predatory bid in this type of contract. If the State decides to give its largesse to public it has an obligation to see that it fetches the best possible value for the same, provided otherwise it does not in any manner affects the rights of other citizens. No bidder has any right in law to demand the State to give away its largesse for an amount which he considers to be reasonable even when there are bidders willing to pay more for it. Principal of monopoly also does not come into play in these types of contracts.

Therefore, in our opinion, the High Court was in error in coming to the conclusion that because it felt the fair value of the contract is Rs.40,29,600/- any bid over and above that would be predatory.

Learned counsel for the 4th respondent had contended that acceptance of speculative bid can lead to abandonment of the contract by such speculative bidders which would cause loss to the State. On facts, this argument has no legs to stand. We find from the terms of the contract that the successful bidder has to deposit, apart from security amount, 6 months equivalent of monthly lease amount in advance and the balance term of the contract will be permitted only if the said contractor deposits in advance the sum equivalent to the next six months lease amount in advance. Hence the possibility of the contractor defaulting in payment of lease amount is remote. Be that as it may State may consider obtaining an indemnity bond from the successful bidder to indemnify the State Government from any loss that it may suffer because of the act of the contractor apart from the advance amount payable as per the terms of the contract.

Therefore, we are of the opinion that the rejection of the bid of the appellant or for that matter other bids which were more than 4th respondent's bid, is unsustainable so also the judgment of the two courts below which have upheld the same.

It is seen from the records that pursuant to the acceptance of the bid of the 4th respondent on 19.9.2002 the 4th respondent has been operating the weigh bridge, and the tenure of the contract is to come to an end in the normal course on 18.9.2004. Since the

acceptance of the 4th respondent's bid is held to be illegal by us the same has to be set aside but we will not issue directions to the respondent State Government to accept the bid of the appellant because in our opinion it is in the interest of justice that a fresh tender should be called for and based on the bids received pursuant thereto, and in accordance with the guidelines, a fresh contract will have to be entered into by the State Government in regard to this weigh bridge. At the same time since this process is likely to take sometime we do not want to create a void by directing the 4th respondent to hand over possession of the weigh bridge to the Government at this stage more so because of the fact under the guidelines applicable the 4th respondent must have paid the lease amount upto the period of 18.9.2004. Therefore we direct the respondent State to call for fresh tenders and take a decision in regard to acceptance of a fresh bid and grant new contract on or before 1.7.2004. Till such time the 4th respondent will be permitted to operate the weigh bridge and on the acceptance of the tender by 1.7.2004 new contractor whose bid is accepted shall be entitled to run the same for the period agreed therein. On the effective termination of the contract of the 4th respondent w.e.f. 30.6.2004 if any excess amount is paid by the 4th respondent the same shall be refundable to him by the respondent Government.

For the reasons stated above this appeal succeeds. The impugned orders of the courts below are set aside as also the contract awarded to the 4th respondent by the respondent-State as per its order dated 19.9.2002. The appeal is allowed.