

PETITIONER:
DUTTA ASSOCIATES PVT.LTD.

Vs.

RESPONDENT:
INDO MERCHATILES PVT.LTD & ORS.

DATE OF JUDGMENT: 18/11/1996

BENCH:
B.P. JEEVAN REDDY, SUHAS C. SEN

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

B.P.JEEVAN REDDY, J.

Leave granted.

Inexplicable indeed are the ways of the rulers on some occasions - and this is one such instance. The Commissioner of Excise, Assam called for tenders for wholesale supply of rectified spirit [Grade-1] to the Excise Warehouse at Tinsukia for the period May 16, 1994 to May 15, 1996. The tender was floated on May 28, 1993. As many as seventeen tenders mentioned below were received quoting the rate mentioned against each person's name:

1. M/s. Himangsu Enterprises RK Bardoloi Road, Dibrugarh	Rs. 9.20
2. Shri Jitendra Nath Saikia Chowkidinghee, Dibrugarh	Rs. 10.48
3. M/s. Dutta Associate Pvt. ltd. Chowkidinghee, Dibrugarh	Rs. 11.14
4. Shri Pradip Kumar Dutta Chowkidinghee, Dibrugarh	Rs. 11.75
5. M/s. Civiliyar Enterprises Rajgarh, Guwahati	Rs. 12.57
6. M/s Onash Enterprises GS Road, Guwahati	Rs. 13.20
7. Shri Umesh Chandra Bora Laukuli, Tinsukia	Rs. 13.69
8. M/s. North East Trade Agency Athgaon, Guwahati	Rs. 13.99
9. M/s. Aco Traders Rajgarh Road, Guwahati	Rs. 14.28
10. M/s. Noble Sales Agency GS Road, Dispur, Guwahati	Rs. 14.55
11. Shri Pranab Kumar Rajkhowa Coal Road, Jorhat	Rs. 15.05
12. M/s. United Assam Company Rupali Path, Jorhat	Rs. 15.55
13. M/s. Mercentiles Pvt. Ltd. Bishnu Market, Guwahati	Rs. 15.55
14. Shri Vijay Kumar Jasrasaria Guwahati	Rs. 16.05
15. Shri Dilip Rajkhowa, Tinsukia	Rs. 16.13

16. M/s. Pradip Kumar Khaitan
AT Road, Jorhat
17. M/s. New Ashish Enterprise
TR Phukan Road, Guwahati

Rs. 16.39

Rs. 16.55

It is stated that out of seventeen tenders received, tenders of persons mentioned at Sr. Nos.1 and 2 were found ineligible and were, therefore, excluded from consideration. If that were so, one would have expected the Commissioner to accept the offer of the person at Sr. No.3 [Dutta Associates Private Limited, the appellant herein], his being the lowest tender. He did not do so. He did not say that the offer of Dutta Associates was not a genuine offer or that he is not in a position to fulfil the terms of the contract, if entered into with him. On the other hand, the Commissioner and the Government entered upon an exercise of determining, what they call, "viability range". They determined the viability range between Rs. 14.72 to Rs. 15.71 per LPL. It is said that his viability range was arrived at keeping in view the prevailing prices outside the State inasmuch as most of the rectified spirit to be supplied under the contract had to be procured outside the State of Assam. If viability range was the relevant basis, then one would have expected the Commissioner and the Government of Assam to have accepted the tender at Sr. No.11 [Sri Pranab Kumar Rajkhowa], whose bid was the lowest within the viability range. They did not do this either. They called upon Dutta Associates [appellant herein] to revise his offer which he did by quoting Rs. 15.71 per LPL [which happens to be the maximum of the viability range]. His bid was accepted. Whereupon Indo Merchantiles Private Limited [first respondent herein] who is at Sr.No. 13 in the aforesaid list of tenders, filed a writ petition in the Gauhati High Court questioning the acceptance of appellant's tender. Indo Merchantiles submitted that not accepting his tender at Rs. 15.55 and accepting the tender of the appellant by making him revise his bid is contrary to law, unfair and arbitrary. The writ petition was dismissed by a learned Single Judge. The writ petition was dismissed by a learned Single Judge. On appeal, however, the Division Bench has allowed the writ appeal filed by Indo Merchantiles and has set aside the acceptance of the appellant's tender. The Division Bench found that the Commissioner and the Government have acted unfairly in calling upon the appellant, Dutta Associates, alone to submit a counter-offer while not giving a similar opportunity to other tenderers. The High Court accordingly directed that fresh tenders be called for awarding the contract. It has also made certain directions for the period until fresh tenders are called for and finalised.

After hearing the parties, we are of the opinion that the entire process leading to the acceptance of the appellant's tender is vitiated by more than one illegality. Firstly, the tender notice did not specify the 'viability range' nor did it say that only the tenders coming within the viability range will be considered. More significantly, the tender notice did not even say that after receiving the tenders, the Commissioner/Government would first determine the 'viability range' and would then call upon the lowest eligible tenderer to make a counter-offer. The exercise of determining the viability range and calling upon Dutta Associates to make a counter-offer on the alleged ground that he was the lowest tenderer among the eligible tenderers is outside the tender notice. Fairness demanded that the authority should have notified in the tender notice itself the procedure which they proposed to adopt while accepting

the tender. They did nothing of that sort. Secondly, we have concept of 'viability range' though Sri Kapil Sibal, learned counsel for the appellant, and the learned counsel for the State of Assam tried to explain it to use. Learned counsel stated that because of the de-control of molasses, the price of rectified spirit fluctuates from time to time in the market and that, therefore, the viability range was determined keeping in view (1) distillery cost price; (2) export pass fees; (3) central sales tax; (4) transportation charges; (5) transit wastage @ 1 1/2% - vide the counter-affidavit filed by the Secretary to Excise Department, Government of Assam pursuant to this Court's orders. Sri Sibal further explained that because of the possibility of the fluctuation, the tender notice contains clause (16) which reserves to the Government the power to reduce or increase the contract rate depending upon the escalation or deceleration of the market price in the exporting States. We are still not able to understand. Clause (16) deals with post-contract situation, i.e., the situation during the currency of the contract and not with a situation at the inception of the contract. The tenderers are all hard-headed businessmen. They know their interest better. If they are prepared to supply rectified spirit at Rs. 11.14 per LPL or so, it is inexplicable why should the Government think that they would not be able to do so and still prescribe a far higher viability range. Not only the rate obtaining during the period when the tenders were called was Rs.11.05 per LPL, the more significant feature is that during the period of about more than two years pending the writ petition and writ appeal, the appellant has been supplying rectified spirit @ Rs. 9.20 per LPL. If it was not possible for anyone to supply rectified spirit at a rate lower than Rs. 14.72 [the lower figure of the viability range], how could the appellant have been supplying the same at such a low rate as Rs.9.20 for such a long period. It may be relevant to note at this stage the circumstances in which the appellant volunteered to supply at the said rate. Indo Mercantiles, the respondent herein, filed the writ petition and asked for and interim order. The learned Single Judge directed [vide order dated June 2, 1994] not be given the contract, he "shall be allowed to execute the contract at the lowest quoted rate which is stated to be 9.20 by the writ petitioner. The respondent No.3 [Dutta Associates] states that the lowest quoted rate is 11.14. If the lowest quoted rate is 9.20, it is that rate at which the contract shall be given to the respondent No.3" It is pursuant to the said order that the appellant-Dutta Associates has been supplying rectified spirit @ Rs. 9.2. per LPL since June 1996 till October 1996. The said order did not compel the appellant [Respondent No.3 in the writ petition] to supply at the rate of Rs.9.20p. If that rate was not feasible or economic, he could well have said, "sorry". He did not say so but agreed to and has been supplying at that rate, till October, 1996. It is equally significant to note that pursuant to the interim orders of this Court [which directed the Government to implement the orders of the Gauhati High Court with respect to interim arrangement] negotiations were held with both the appellant and the first respondent herein; both offered to supply at Rs.9.20p. The Commissioner, of course, chose the first respondent, Indo Mercantiles, Over the appellant, for reason given by him in his order dated October 14, 1996. The rate, however, remains Rs.9.20p. and the appellant's counsel has been making a grievance of the Commissioner not accepting the appellant's offer. All these facts make the so-called 'viability range' and the very

concept of 'viability range' look rather ridiculous - and we are not very far from the end of the three year period for which the tenders were called for. Neither the interlocutory order of the learned Single Judge dated June 2, 1994 aforesaid nor does the order of the Commissioner dated October 14, 1996 passed pursuant to the interim orders of this court provide for any fluctuation in the rate of supply depending upon the fluctuation in the market rate in the exporting States, as provided by clause (16) of the Tender Conditions, which too appears rather unusual. The order of the learned Single Judge aforesaid does not also say that the rate specified therein is tentative and that it shall be subject to revision at the final hearing of the writ petition. As a matter of fact, no such revision was made either by the learned Single Judge or by the Division Bench. It is in these circumstances that, we said, we have not been able to understand or appreciated the concept of 'viability range', its necessity and/or its real purpose. Thirdly, the Division Bench states repeatedly in its judgment that having determined the 'viability range', the Government called upon only the appellant-Dutta Associates [third respondent in the writ petition/writ appeal] to make a counter-offer to come within the 'viability range' and that his revised offer at the higher limit of the 'viability range' [Rs.15.71] was accepted. The Divisions Bench has stressed that no such opportunity to made a counter-offer was given to nay other tenderer including the first respondent. As the Division Bench has rightly pointed out, this is equally a vitiating factor.

It is thus clear that the entire procedure followed by the Commissioner and the Government of Assam in accepting the tender of Dutta Associates [appellant herein] is unfair and opposed to the norms which the Government should follow in such matters, viz., openness, transparency and fair dealing. The Grounds No.1 and 2, which we have indicated hereinabove, are more fundamental than the third ground upon which the High Court has allowed the writ appeal.

Before parting with this matter, we must also say that we have not been able to appreciate a particular observation of the Division Bench. In Para-12 of its judgment, it said: " In matter like supply of spirit to warehouse, offer of low or high rate does not affect the government revenue. The more the profit earned by the supplier, the more sales tax can be levied by the government". We find it difficult to understand how the acceptance of tender at high rate does not effect the government revenue. Secondly, we find it yet more difficult to understand the observation that more profit the supplier earns, the more sales tax will the government realise. Sales tax is not linked with the profit. it is linked to the sale price and we see no logic in government paying higher rate at a substantive figure and realising sales tax at a smaller figure.

In the circumstances, we affirm the judgment of the Division Bench in writ appeal on the grounds stated above and direct that fresh tenders may be floated in the light of the observations made in this judgment. We reiterate that whatever procedure the Government proposes to follow in accepting the tender must be clearly stated in the tender notice, The consideration of the tenders received and the procedure to be followed in the matter of acceptance of a tender should be transparent, fair and open. While a bonafide error of judgment would not certainly matter, any abuse of power for extraneous reasons, it is obvious, would expose the authorities concerned, whether it is the Minister for Excise or the Commissioner of Excise, to appropriate

penalties at the hand of the courts, following the law laid down by this court in Shiv Sagar Tiwari v. Union of India (re.: Capt. Satish Sharma and Smt. Sheila Kaul) [Writ Petition No. 585 of 1995].

We further direct that pending the finalisation of the contract pursuant to the tenders to be floated hereinafter pursuant to the directions made herein, the present temporary arrangement shall continue. Though Sri Sibal has questioned the correctness of the Commissioner's Orders dated October 14, 1996 awarding the contract for the interim period to Indo Merchantiles, we are not prepared to accept the criticism. In our opinion, the Commissioner has given valid reasons for preferring Indo Merchantiles over the appellant when both were prepared to supply at the same rate of Rs.9.20 per LPL. We further direct that fresh tenders should be floated within two months from today and the entire process finalised within four months from today.

The appeal is accordingly dismissed subject to the above observations. No costs.