

GAHC010258292022



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WA/56/2023

SANJIT CHANDRA DAS
S/O JATIN DAS, R/O VILL-BALADMARI CHAR PART-I, P.S.-GOALPARA, P.O.-
BALADMARI, DIST-GOALPARA, PIN-783121, ASSAM.

VERSUS

ASSAM FISHERIES DEVELOPMENT CORPORATION LTD. AND 7 ORS.
REPRESENTED BY THE CHAIRMAN, VIP ROAD, CHACHAL, GUWAHATI-
781036.

2:THE MANAGING DIRECTOR
ASSAM FISHERIES DEVELOPMENT CORPORATION LTD.
VIP ROAD
CHACHAL
GUWAHATI-781036

3:PROJECT DIRECTOR
LOWER ASSAM DIVISION
ASSAM FISHERIES DEVELOPMENT CORPORATION LTD.
VIP ROAD
CHACHAL
GUWAHATI-781036

4:ARJUN MALO
S/O MAHABIR MALO
VILL-BHALUKDUBI
BIJOY NAGAR
P.O.-BHALUKDUBI
P.S.-GOALPARA
DIST-GOALPARA
PIN-783127
ASSAM

5:GAUTAM MALO
S/O ATAL MALO
VILL-GOBINDAPUR
P.O.-GOBINDAPUR
DIST-GOALPARA
PIN-783101 ASSAM

6:BHIM MALO
S/O MAHABIR MALO
VILL-BHLUKDUBI
BIJOY NAGAR
P.O.-BHALUKDUBI
P.S.-GOALPARA
DIST-GOALPARA
PIN-783127 ASSAM

7:JIBAN MALO
VILL-JYOTI NAGAR
P.O.-BHALUKDUBI
P.S.-GOALPARA
DIST-GOALPARA
PIN-783127 ASSAM

8:SANKAT BARMAN
C/O ASSAM FISHERIES DEVELOPMENT CORPORATION LTD.
VIP ROAD CHACHAL GUWAHATI-78103

– B E F O R E –

HON'BLE THE CHIEF JUSTICE

HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

For the appellant : Mr. D. Das, Senior Advocate
Assisted by Mr. S. Khound,
Mr. K. Mohammad, Advocates.

For the respondents : Mr. P. Sharmah,
Standing Counsel, AFDC.

: Mr. S.K. Goswami,
Mr. B.K. Goswami, Advocates for respondent
No.4.

Date of Hearing : 05.08.2023

Date of Judgment : **25.08.2023**

JUDGMENT & ORDER

S. Mehta, C.J.

The instant intra-Court writ appeal is directed against the judgment and final order dated 09.11.2022 rendered by learned Single Judge in WP(C) 6190/2022 whereby the petition filed by the writ petitioner (appellant herein) under Article 226 of the Constitution of India seeking a direction upon the respondents to favourably consider its technical bid as being responsive and consequently to accept its higher financial bid for settlement of a Beel Fishery, namely, Hashila Tinkona Meenmahal in Goalpara district under the administrative control of AFDC, was rejected.

2. Heard learned counsel appearing for the parties and perused the impugned judgment and the material placed on record.

3. Brief facts relevant and essential for disposal of this appeal are noted hereinbelow:-

The Assam Fisheries Development Corporation Ltd. (AFDC) issued a dual

bid tender (technical and financial bid) inviting interested SC individuals and registered societies of SC communities having actual fishermen for settlement of Hashila Tinkona Meenmahal in Goalpara district. As per the tender notice, amongst other documents required to be submitted along with the bid, it was essential for the bidders to furnish the Bakijai Clearance Certificate. It may be noted here that indisputably a Bakijai Certificate (in relation to government dues) has a validity period of 90 days from the date of issuance thereof. The appellant/writ petitioner, submitted their technical and financial bids in pursuance of the above NIT. When the technical bids were opened and evaluated, it came to the light that the Bakijai Clearance Certificate of the appellant/writ petitioner had expired and hence, his technical bid was declared to be non-responsive whereas the technical bid of the private respondent No.4 (respondent No.6 in the writ petition) was found to be technically viable. A notice to this effect was put up on 16.09.2022. The appellant/writ petitioner, on gaining knowledge about non-acceptance of its technical bid, submitted an application to the Managing Director of AFDCL requesting the latter to apprise as to why its bid had been rejected. The appellant claimed to have gained knowledge that reason for rejection of its bid was the non-submission of a valid/live Bakijai Clearance Certificate. Thereupon, the above mentioned writ petition came to be filed by the appellant/writ petitioner for challenging the

decision declaring his technical bid non-responsive. By an interim order dated 20.09.2022, the learned Single Bench directed the AFDCL to open the price bid of the appellant/writ petitioner which was made subject to further orders as may be passed in the case. It was further directed that no final order of settlement would be issued till the next date fixed. The writ petition was finally heard by the learned Single Judge and came to be rejected by the order dated 09.11.2022 which is assailed in the present appeal.

4. Learned senior counsel Mr. D. Das representing the appellant, vehemently and fervently contended that the controversy involved in the instant writ appeal is squarely covered by a Division Bench judgment of this Court in the case of ***Abu Talib vs. The Assam Fisheries Development Corporation Ltd. and ors. (WA No.294/2011), decided on 29.09.2011.*** He urged that in the said judgment, the Hon'ble Division Bench categorically laid down that the requirement of submission of Bakijai Clearance Certificate could not be taken as inviolable requirement. Mr. Das also placed reliance on a subsequent Division Bench judgment of this Court in the case of ***Pub Goalpara Fishery Co-operative Society vs. The State of Assam and ors. (WA No.306/2021), decided on 27.04.2022,*** wherein the principles laid down in the case of *Abu Talib (supra)* were relied upon and reiterated. It was thus contended by Mr. Das that two Division Benches of this Court having concluded that submission of

Bakijai Clearance Certificate is not a mandatory requirement in a bid for claiming fishery settlement, the respondents were not justified in rejecting the technical bid of the appellant/writ petitioner on this hyper technical ground.

Mr. Das further submitted that the financial bid of the respondent No.4 was of Rs.56 lakhs odd whereas the financial bid of the appellant/writ petitioner upon being opened in furtherance of the order given by this Court on 20.09.2022 was found to be around Rs.65,80,000/- for the settlement period of seven years. He thus urged that the bid of the appellant/writ petitioner having been found to be significantly higher, rejection of the said bid on the hyper technical ground of invalid Bakijai Clearance Certificate was totally uncalled for, more so, when two Division Benches of this Court have conclusively laid down that submission of Bakijai Clearance Certificate is not a mandatory requirement.

On these grounds, Mr. Das, learned senior counsel representing the appellant implored the Court to accept the writ appeal and set aside the impugned order passed by the learned Single Judge; quash the settlement of the beel fishery made in favour of the respondent No.4 and direct the AFDCL to award the settlement of the beel fishery to the appellant herein.

5. *Per contra*, Mr. P. Sharmah, learned Standing Counsel, AFDCL and Mr. S.K. Goswami and Mr. B.K. Goswami representing the respondent No.4, the

successful bidder, emphatically controverted the submissions advanced by Mr. Das, learned senior counsel for the appellant. Mr. P. Sharma pointed out that the situation under consideration in the case of *Abu Talib (supra)* was totally different because that was a case of single bid, i.e. the technical bids and financial bids were to be opened simultaneously. In that situation, when the bids were opened and the difference in the offers of the bidders was found to be significant (Rs.59,200/-vis-à-vis Rs.1,00,300/-), the rejection of the bid on the ground of non-submission of Bakijai Clearance Certificate was held to be unjustified. He pointed out that in the present case, tenders were invited on the basis of dual bid criterion, i.e. technical bids and financial bids. The financial bids were required to be opened only if the bidders qualified on the technical criterion. In a dual bidding system, the bidder whose offer does not satisfy the requirement of technical qualification, cannot be permitted to proceed further in the evaluation process. He, thus, urged that the view taken by the Division Bench of this Court in the case of *Abu Talib (supra)* does not apply to the facts and circumstances prevailing in the case at hand. On these grounds, he sought dismissal of the writ appeal.

6. Mr. S.K. Goswami, learned counsel representing the private respondent No.4 urged that pursuant to the rejection of the writ petition, the fishery in question has already been settled in favour of the respondent No.4, who is

operating the same satisfactorily. He further urged that the best authority to make the technical evaluation is the tendering authority, which in the present case would be the AFDCL. The Court while exercising the extra-ordinary writ jurisdiction cannot indulge in evaluation or comparison of the technical and financial bids of the contesting bidders.

In support of his contentions, Mr. Goswami placed reliance on the judgment rendered by Hon'ble the Supreme Court in the case of ***Agmatel India Private Limited vs. Resoursys Telecom and others***, reported in ***(2022) 5 SCC 362***. He urged that the tendering authority objectively considered and evaluated the technical bids and found that the appellant herein did not qualify because of his Bakijai Certificate being invalid and thus, the Writ Court cannot indulge in a roving enquiry for giving its own interpretation over and above that made by the tendering authority. He thus implored the Court to dismiss the writ appeal and affirm the judgment rendered by the learned Single Judge.

7. We have given our thoughtful consideration to the submissions advanced at Bar and have gone through the material placed on record. We have also perused the judgment rendered by learned Single Bench. The only contention advanced by Mr. Das, learned senior counsel representing the appellant for

questioning the decision of the tendering authority in disqualifying the appellant on technical bid evaluation was that Abu Talib's judgment works in favour of the appellant and the decision to disqualify the appellant as his Bakijai Clearance Certificate had expired is illegal. In this regard, our attention is drawn to the Single Bench judgment in the case of ***Mosieur Rahman vs. The Assam Fisheries Development Corporation Ltd. and ors, [WP(C) No.5545/2010] decided on 29.08.2011***, which was subjected to challenge in WA No.294/2011 (Abu Talib's case). On a perusal of the said judgment, it is discernible that the said was a case of single bid, i.e. the technical bids and financial bids were to be opened simultaneously. After opening the bids, the tendering authority found that the financial bid of Abu Talib was significantly higher. However, his Bakijai Certificate had expired. Thus, in the public interest, a decision was taken to give time to Abu Talib for removing the deficiency while accepting his bid. The said decision of the tendering authority was challenged by Mosieur Rahman by filing the writ petition (supra), which was accepted by the learned Single Judge holding that the highest bidder Abu Talib could not have been given opportunity to remove the deficiency in the technical bid. The said view of the learned Single Judge was reversed by the Division Bench in WA 294/2011 (supra) by accepting the appeal filed by Abu Talib. Since the case of Abu Talib dealt with a single bid NIT, the ratio thereof has to be restricted to

that specific fact scenario. In the present case, there is no dispute that the tenders were invited through a dual bidding system, i.e. to say technical bid and financial bid. We are of the firm opinion that in a dual bid process, each bidder must satisfy the conditions of technical qualification. In the extant tender process, submission of a valid Bakijai Clearance Certificate was an inviolable requirement. The Bakijai Clearance Certificate is demanded to ensure the financial stability of the bidders. The appellant cannot be allowed to take a plea of ignorance of this mandatory technical criterion after having participated in the tender process. The Bakijai Clearance Certificate filed by the appellant had admittedly expired and thus, he cannot be allowed to retrace his steps and claim that requirement of furnishing the Bakijai Clearance Certificate was not mandatory as per the tender conditions. If at all, the appellant/writ petitioner was aggrieved by the said condition existing in the NIT, the same could have been challenged before participating in the tender process. The law is well settled that a party having participated in the tender process cannot be allowed to retrace its steps and take a u-turn and claim that the conditions of the NIT are illegal or unjustified after the process is over.

8. In the present case, the tender process was based on a dual bidding system and thus, a strict evaluation of the technical bids so as to ensure compliance of the criterion laid down therein, which included the submission of

a valid Bakijai Clearance Certificate, was inviolable. The tendering authority upon evaluation of the technical bids found that the appellant's Bakijai Clearance Certificate had expired and thus, there was no option with the authority but to disqualify the appellant on the technical criterion. Level playing field was provided to the prospective bidders and thus, after opening of the technical bids, none of the bidders can be allowed to claim indulgence of relaxation in the technical criterion, which precisely is the prayer of the appellant herein.

9. In the case of *Abu Talib (supra)* on which reliance was heavily placed by Mr. Das, learned senior counsel for the appellant, the prevailing facts were that the tender process was based on a single bid system wherein the technical bids and the financial bids were opened simultaneously. On opening of the bids, it was found that the technical bid of the appellant Abu Talib was deficient on the aspect of Bakijai Clearance Certificate, however, the financial bid of Abu Talib was almost double that of the bidder who qualified on technical aspect. In those peculiar circumstances, Division Bench of this Court ruled in favour of acceptability of the higher bid offered by Abu Talib rather than allowing the respondents to accept the significantly lower bid of the successful bidder. Furthermore, in the case of Abu Talib, the deficient bid had been accepted by the authorities and on opening the bids, it was found that the bid offered by

Abu Talib was the highest bid offering Rs.1,00,300/- as compared to the other three bidders whose bids were rated at Rs.59,200/-, Rs.52,000/- and Rs.60,200/-, respectively, and thus, a conscious decision was taken in the interest of the public exchequer and the highest bidder Abu Talib was given time to submit the latest Bakijai Clearance Certificate. Manifestly, in the said case, the tendering authority interpreted the conditions of the NIT and ruled in favour of the highest bidder even though there were some technical shortcomings in his bid. Thus, Abu Talib's case travels on its own peculiar facts and circumstances and would have no application in a dual bid scenario.

10. In the present case, the tendering authority objectively evaluated the bids of the bidders and finding the appellant herein to be technically disqualified, his bid was not processed. In wake of the above discussion, we are of the firm view that the controversy at hand is squarely covered by the following observations made by the Hon'ble Supreme Court in the case of *Agmatel India Private Limited (supra)*:-

“23. We have given thoughtful consideration to the rival submissions and have examined the record with reference to the law applicable.

Interpretation of tender document : Relevant principles

24. The scope of judicial review in contractual matters, and particularly in relation to the process of interpretation of tender document, has been the subject-matter of discussion in various decisions of this Court. We need

not multiply the authorities on the subject, as suffice it would be refer to the three-Judge Bench decision of this Court in Galaxy Transport Agencies [Galaxy Transport Agencies v. New J.K. Roadways, Fleet Owners & Transport Contractors, (2021) 16 SCC 808 : 2020 SCC OnLine SC 1035] wherein, among others, the said decision in Afcons Infrastructure [Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818] has also been considered; and this Court has disapproved the interference by the High Court in the interpretation by the tender inviting authority of the eligibility term relating to the category of vehicles required to be held by the bidders, in the tender floated for supply of vehicles for the carriage of troops and equipment.

25. *This Court referred to various decisions on the subject and stated the legal principles as follows: (Galaxy Transport Agencies case [Galaxy Transport Agencies v. New J.K. Roadways, Fleet Owners & Transport Contractors, (2021) 16 SCC 808 : 2020 SCC OnLine SC 1035] , SCC paras 14-20)*

“14. In a series of judgments, this Court has held that the authority that authors the tender document is the best person to understand and appreciate its requirements, and thus, its interpretation should not be second-guessed by a court in judicial review proceedings. In Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd. [Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818] , this Court held : (SCC p. 825, para 15)

‘15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is

possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.'

15. In the judgment in *Bharat Coking Coal Ltd. v. AMR Dev Prabha* [*Bharat Coking Coal Ltd. v. AMR Dev Prabha*, (2020) 16 SCC 759] , under the heading "Deference to authority's interpretation", this Court stated : (SCC p. 776, paras 50-52)

'50. Lastly, we deem it necessary to deal with another fundamental problem. It is obvious that Respondent 1 seeks to only enforce terms of NIT. Inherent in such exercise is interpretation of contractual terms. However, it must be noted that judicial interpretation of contracts in the sphere of commerce stands on a distinct footing than while interpreting statutes.

51. In the present facts, it is clear that BCCL and C1-India have laid recourse to clauses of NIT, whether it be to justify condonation of delay of Respondent 6 in submitting performance bank guarantees or their decision to resume auction on grounds of technical failure. BCCL having authored these documents, is better placed to appreciate their requirements and interpret them. [Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818]

52. The High Court ought to have deferred to this understanding, unless it was patently perverse or mala fide. Given how BCCL's interpretation of these clauses was plausible and not absurd, solely differences in opinion of contractual interpretation ought not to have been grounds for the High Court to come to a finding that the appellant committed illegality.'

16. Further, in the recent judgment in *Silppi Constructions Contractors v. Union of India* [*Silppi Constructions Contractors v. Union of*

India, (2020) 16 SCC 489] , this Court held as follows : (SCC pp. 501-02, para 20)

‘20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.’

17. In accordance with these judgments and noting that the interpretation of the tendering authority in this case cannot be said to be a perverse one, the Division Bench ought not to have interfered with it by giving its own interpretation and not giving proper credence to the word “both” appearing in Condition No. 31 of the NIT For this reason, the Division Bench's conclusion [New JK Roadways v. State (UT of J&K), 2020 SCC OnLine J&K 733] that JK Roadways was wrongly declared to be ineligible, is set aside.

18. Insofar as Condition No. 27 of the NIT prescribing work experience of at least 5 years of not less than the value of Rs 2 crores is concerned, suffice it to say that the expert body, being the Tender Opening Committee, consisting of four members, clearly found that this eligibility

condition had been satisfied by the appellant before us. **Without therefore going into the assessment of the documents that have been supplied to this Court, it is well settled that unless arbitrariness or mala fide on the part of the tendering authority is alleged, the expert evaluation of a particular tender, particularly when it comes to technical evaluation, is not to be second-guessed by a writ court.** Thus, in *Jagdish Mandal v. State of Orissa* [*Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517] , this Court noted : (SCC pp. 531-32, para 22)

‘22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such

interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. "Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

19. Similarly, in *Montecarlo Ltd. v. NTPC Ltd.* [*Montecarlo Ltd. v. NTPC Ltd.*, (2016) 15 SCC 272], this Court stated as follows : (SCC p. 288, para 26)

'26. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinised by the technical experts and sometimes third-party assistance from those unconnected with the

owner's organisation is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. **But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the Court should follow the principle of restraint. Technical evaluation or comparison by the Court would be impermissible.** The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.'

20. This being the case, we are unable to fathom how the Division Bench, on its own appraisal, arrived at the conclusion that the appellant held

work experience of only 1 year, substituting the appraisal of the expert four-member Tender Opening Committee with its own.”

(italicised matter emphasised in the original; emphasis in bold italics supplied)

26. *The abovementioned statements of law make it amply clear that the author of the tender document is taken to be the best person to understand and appreciate its requirements; and if its interpretation is manifestly in consonance with the language of the tender document or subserving the purchase of the tender, the Court would prefer to keep restraint. Further to that, the technical evaluation or comparison by the Court is impermissible; and even if the interpretation given to the tender document by the person inviting offers is not as such acceptable to the constitutional court, that, by itself, would not be a reason for interfering with the interpretation given.”*

11. The ratio of the above judgment as discernible from the paragraphs reproduced above is that the interpretation of the terms of the tender document is best left to the tendering authority and if the interpretation so made is manifestly in consonance with the language of the tender document, the Court should follow the principle of restraint.

12. Applying the ratio of the above judgment to the facts of the present case, we are of the firm view that the appellant herein was rightly disqualified in the technical evaluation process. As a consequence, the learned Single Judge was perfectly justified in dismissing the writ petition preferred by the writ

petitioner/appellant and affirming the decision of the tendering authority in accepting the bid of the private respondent No.4. The impugned judgment dated 09.11.2022 passed by the learned Single Judge in WP(C) 6190/2022 does not suffer from any infirmity warranting interference and hence, the writ appeal fails and is hereby dismissed.

No order as to cost.

JUDGE

CHIEF JUSTICE

Comparing Assistant