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DUTTA ASSOCIATES PVT. LTD.
v.
INDO MERCHANTILES PVT. LTD. AND ORS.

NOVEMBER 18, 1996

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[B.P. JEEVAN REDDY AND SUHAS C. SEN, JJ.]

Tenders—Acceptance of tenders—Decision making process should be transparent, fair and open—Viability Range—Not specified in the tender—Determined after receiving the tenders—Lowest tenderer asked to raise his offer to be covered within the ‘Viability range’—Offer raised accordingly and tender accepted—Held: Entire process of acceptance of tender is vitiated being opposed to norms viz. transparency, fairness and openness—Abuse of power for extraneous reasons by the authorities would make them liable to appropriate punishment.

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Constitution of India, 1950—Articles 14, 298—Government contracts—Acceptance of tenders—Held, Principles of natural justice to be followed.

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The Commissioner, Excise, Assam invited tenders for wholesale supply of rectified spirit (Grade-I) for the period May 16, 1994 to May 15, 1996. Seventeen tenders were received and the rate quoted ranged from Rs. 9.20 to Rs. 16.55 Per LPL. Tenders of persons at serial No.1 and 2 were found ineligible and were excluded from consideration. The next lowest tender at serial No.3 was that of the appellant's. But instead of accepting his offer, a principle of ‘viability range’ was brought into play by the Government. The viability range was determined between Rs. 14.72 to Rs.15.71 per LPL allegedly keeping in view the prevailing price outside the State. The offer of the person at Serial No.11 was the lowest within the ‘viability range’ as he quoted Rs. 15.05 LPL. Instead of accepting his offer, the appellant was called to revise his offer, which he did by quoting Rs.15.71 which is maximum of the viability range and his bid was accepted. Respondent No.1, one of the tenderers, moved the High Court challenging the acceptance of the appellant's tender. The writ petition was dismissed by the single judge but the Division Bench allowed the appeal and set aside the acceptance of the appellant's tender and directed that fresh tenders should be invited. The appellant filed the present appeal. Dismissing the appeal, this Court.

HELD: 1.1. The entire process leading to the acceptance of the appellant's tender is vitiated. The procedure followed by the Government in accepting the tender of the appellant is unfair and opposed to the norms which the Government should follow in such matters viz., openness, transparency and fair dealing. [714-D, 717-B]

1.2. Fairness demanded that the authority should have notified in the tender notice itself the procedure which they purpose to adopt while accepting the tender. This was not done. The tender notice did not specify the 'Viability range' nor did it say that only the tenders coming within the 'viability range' would be considered. Nor did it mention that the Government would first determine the viability range and then they would call upon the lowest eligible tenderer to make a counter offer. All these things were not mentioned in the tender notice. [714-E-F]

1.3. The very concept of 'viability range' is not understandable, nor is it possible to appreciate the concept of 'viability range', its necessity or its real purpose. The very concept of so-called 'viability range' looks rather ridiculous. The appellant had been supplying the rectified spirit at the rate of Rs. 9.20 per LPL during the period of about more than two years, pending the writ petition and the writ appeal, though the rate obtaining during the period when tender was called was Rs. 11.05 per LPL. This fact clearly proves that there was no reason for the Government to prescribe a far higher viability range. [715 C,H 714-H]

1.4. The Government called upon only the appellant to make a counter offer to come within the 'viability range' and his revised offer at higher limit of the 'viability range' was accepted. No such opportunity to make counter offer to any other tenderer was given. This is equally a vitiating factor. [716-D]

1.5. Whatever procedure the Govt. proposes to follow in accepting the tender, must be clearly stated in the tender notice. The consideration of the tenders received and 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 any extraneous reason would expose the authorities concerned, to appropriate penalties. [717-B-C]

Shiv sagar Tiwari v. Union of India, [1996] 6 SCC 558; [1996] 6 SCC 599 relied on.

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 14603 of 1996.

From the Judgment and Order dated 10.7.96 of the Gauhati High Court in W.A. No. 424/95.

B Mr. Kapil Sibal, M.L. Lahoty, Himanshu Shekhar, Pawan Sharma and Ms. Sangeeta Pandey for the Appellant.

H.N. Salve and S.M. Chaudhary, Sunil Kumar Jain, Jatinder Kumar Bhatia, Manish Kumara and Shakil Ahmed Syed for the Respondents.

C The Judgment of the Court was delivered by

B.P. JEEVAN REDDY, J. Leave granted.

D 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:

E	1.	M/s. Himangsu Enterprises RK Bardoloi Road, Dibrugarh.	Rs.9.20
	2.	Shri Jitendra Nath Saikia Chowkidinghee, Dibrugarh.	Rs.10.48
F	3.	M/s. Dutta Associates Pvt. Ltd. Chowkidinghee, Dibrugarh.	Rs.11.14
	4.	Shri Pradip Kumar Datta Chowkidinghee, Dibrugarh.	Rs. 11.75
G	5.	M/s. Civiliyar Enterprises Rajgarh, Guwahati.	Rs.12.57
	6.	M/s. Onash Enterprises GS Road, Guwahati.	Rs.13.20
H	7.	Shri Umesh Chandra Bora Laukuli, Tinsukia.	Rs.13.69

8.	M/s. North East Trade Agency Athgaon, Guwahati.	Rs. 13.99	A
9.	M/s. Aco Traders Rajgarh Guwahati.	Rs. 14.28	
10.	M/s. Noble Sales Agency GS Road, Dispur, Guwahati.	Rs. 14.55	B
11.	Shri Pranab Kumar Rajkhowa Coal Road, Tinsukia.	Rs. 15.05	
12.	M/s. United Assam Company Rupali Path, Jorhat.	Rs. 15.55	C
13.	M/s. Indo Mercantiles 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	D
16.	M/s. Pradip Kumar Khaitan AT Road, Jorhat	Rs. 16.39	
17.	M/s. New Ashish Enterprise TR Phukan Road, Guwahati	Rs. 16.55.	E

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 and 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 this viability range was arrived at keeping in view the prevailing prices outside the States 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 Rajkhowal], whose bid was the lowest within the viability range. They

- A 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 [firsts 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.
- B 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. 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 is calling upon the appellant,
- C 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.
- D 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
- E 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
- F to adopt while accepting the tender. They did nothing of that sort. *Secondly*, we have not been able to understand the very 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 us. 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
- G viability range was determined keeping in view (i) distillery cost price; (2) export pass fees; (3) central sales tax; (4) transportation charges; (5) transit wastage @ 1% and; (6) warehouse operational wastage @ 11/2%—vide the counter—affidavit filed by the Secretary to Excise Department, Government of Assam pursuant to this Court's orders. Sri
- H Sibal further explained that because of the possibility of the fluctuation,

the tender notice contains clause (16) which reserves to the Government A
 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 B
 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 C
 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 D
 at the said rate. Indo Mercantiles, the respondent herein, filed the writ
 petition and asked for an interim order. The learned Single Judge directed
 [vide order dated June 2, 1994] that while Dutta Associates [appellant
 herein] shall 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 E
 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.9.20 per LPL since June 1994 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 F
 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. G
 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 H

- A 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
- B 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
- C or appreciate 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]
- D was accepted. The Division Bench has stressed that no such opportunity to make a counter-offer was given to any other tenderer including the first respondent. As the Division Bench has rightly pointed out, this is equally a vitiating factor.

E 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 Nos.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.

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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 a tender at a high rate does not affect 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

G and we see no logic in government paying higher rate at a substantive

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figure and realising sales tax at a smaller figure.

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In the circumstances, we affirm the judgment of the Division Bench in writ appeal on the grounds stated above the 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 or 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 hands 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].

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We further direct that pending the finalisation 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 Order 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.

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

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H.K.

Appeal dismissed.