

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

ITANAGAR PERMANENT BENCH

WP(C) 11(AP)/2018

M/S. T. GANGKAK ENTERPRISE ... Petitioner

-Versus-

THE STATE OF ARUNACHAL PRADESH & 5 ORS. ... Respondents

**BEFORE
HON'BLE MR. JUSTICE KALYAN RAI SURANA**

Advocates for the Petitioners	: Mr. Kento Jini, Mr. T.T. Tara, : Mr. T. Gadi, Mr. D. Loyi, M. Rime, : Mr. G. Bam, B. Pisa, Mr. J. Jini.
Advocates for the Respondents	: Mr. R.H. Nabam, Addl.AG, : Ms. Pubi Pangu (R-1 to R-5) : Mr. N. Ratan (R-6), : Ms. N. Danggen, Mr. O. Duggong, : O. Perme, D. Taggu, Y.Karga.
Date of hearing	: 10.05.2018.
Date of judgment and order	: 10.05.2018.

JUDGMENT AND ORDER

Heard Mr. K. Jini, the learned counsel for the petitioner. Also heard Mr. R.H. Nabam, the learned Addl. Advocate General for the State, assisted by Ms. Pubi Pangu, learned Government Advocate, appearing on behalf of the State respondents No. 1 to 5 as well as Mr. N. Ratan, the learned counsel appearing for the respondent No. 6.

2. By this writ petition under Article 226 of the Constitution of India, the petitioner has challenged the Notice Inviting Tender (NIT) No. SEA/AD/Tender/2017-218 dated 06.11.2017 for construction of Circuit

House in Aalo, West Siang District, Arunachal Pradesh (Phase-II: 1st Floor and completion of Basement and Ground Floor).

3. The learned counsel for the petitioner submits that the petitioner firm was awarded the tender for "Infrastructure Development of Aalo Township in West Siang District, A.P. (SH: RCC Triple-storied Circuit House with Administrative Block i/c. Landscaping, Compound Wall, Approach Road and Protection Wall (PH-I: Basement and Ground Floor and Landscaping)). After completion of all formalities, the petitioner and the concerned State respondent authority had entered into a Contract Agreement dated 30.03.2013 in respect of the said work. It is submitted that in course of work, the petitioner had to do some extra work and, as such, the petitioner was expecting that the competent authority would prepare a revised estimate for the extra work done by the petitioner by way of deviation. It is submitted that as per the joint verification report, the extra work done by the petitioner was acknowledged and admitted by the respondents No.1 to 5. It is stated that the said authorities have not cleared the bills of the petitioner, but all of the sudden the petitioner had come to know that without following the due procedure as prescribed in the Public Works Department Manual, the State respondents had floated a NIT for the same work, but projecting as if the work was under Phase-II, which clearly showed that there was a definite over lapping of the work that was within the scope of the tender awarded to the petitioner, which, according to the learned counsel for the petitioner was a gross irregularity and called for a due enquiry by this Court. It is submitted that aggrieved by various irregularities and anomalies, the petitioner served a legal notice to the respondent authorities and, as such, by realizing their mistake, the said tender was cancelled. However, once again without any information

to the petitioner, by once again flouting the requirements prescribed under the Public Works Department Manual, the respondents once again advertised another NIT for Phase-II, which was once again the overlapping of the work already allotted to the petitioner.

4. It is submitted that for inviting tender for work having estimated value of Rs.2.00 Crore or over, as per the Public Works Department Manual, a period of 14 days time is prescribed for sale of the tender papers. However, in the present case in hand, the NIT dated 06.11.2017 was published in newspaper on 07.11.2017 and the sale of tender papers was closed on 10.11.2017, because of which the petitioner was not aware of the said tender and the petitioner could not participate in the tender process. It is submitted that in the process, only two blue-eyed contractors had participated in the tender process and the private respondent No. 6 was chosen for the work. The learned counsel for the petitioner further submits that the petitioner came to know about the anomaly only some time in last part of December, 2017 as such, on 27.12.2017, he made a written complaint before the Executive Engineer concerned and also requested to cancel the tender process as his bill had remained outstanding and there was over lapping in the aforesaid work to cover up the extra work done by the petitioner.

5. The learned counsel for the petitioner submits that due to valid reasons, there was some delay in executing the works awarded to him and, as such, upon considering the genuineness of the causes shown, the competent authority had extended the time for completion of work. It is also submitted that due to non-payment of the bills, there was delay in the completion of the work. It is submitted that more than 80% of the

work has been completed by him as would be evident from the photographs annexed to this writ petition. It is submitted that neither the State respondents had not issued any completion certificate to the petitioner in respect of Phase-I tender works done by him, nor the petitioner had handed over the works site to the respondents, as such, the respondents could not have floated the second tender for similar work as there was huge over lapping of same work to cover up the excess works done by the petitioner by way of deviation as desired by the competent authority. Hence, it is submitted that if the second tender dated 06.11.2017 is allowed to proceed, the authorities with the connivance of the respondent No. 6 would be able to siphon-off huge public funds because the majority of the work has already been done by the petitioner firm.

6. It is also submitted that without terminating the contract with the petitioner, a second contract for the same work, because of the over lapping, could not have been advertised as majority of the works for which the second tender was issued was within his scope of work. In this connection, the learned counsel for the petitioner has produced and has referred to the "Detailed Project Report" (DPR for short), containing the "general abstract of cost- original estimate" as well as the "details of measurement" in respect of the contract of Phase-I and Phase-II to project the various items, which according to him, was over lapping with the scope of works of the petitioner. It is submitted that the petitioner has every right to complete his allotted work and if such right is taken away without due process of law, his rights under Article 300-A of the Constitution of India would be violated.

7. It is also submitted that as per the advertisement issued in respect of Phase-II work, there was no clause therein, which prohibited the petitioner from participating in the tender, but as the Public Works Department Manual, especially paragraph- 17.5(1)(iii) was violated, the petitioner was prevented from participating in the tender process. Hence, the learned counsel for the petitioner has prayed for setting aside the NIT dated 06.11.2017 in terms of the prayer made in the writ petition.

8. The learned Addl. Advocate General for the State has produced the records.

9. By referring to the two DPRs, learned Addl. Advocate General submits that while the work of Phase-I in respect of Basement, Ground Floor and Landscaping, the same was under "Head of Account - 4059 Public Works under SPA 2011-12" and that as per the design, scope and specification of the work contained therein, the following statement is made in the said DPR:

Design and scope:-

"The scope of the work in this estimate is provided for construction of RCC framed structure for Basement and ground floor as Phase-I with provisions for construction of successive floors in next phase. Due to limited resource, following scope have been left out to be taken up in next phase viz electrification, water supply, sanitary, finishing and decoration works. With the view to save the space/ area for car parking and other developments, the plinth area of the each floors/ stories have been reduced. The numbers of stories have been restricted to triple storied including basement.

Specification:-

The work shall be carried out as per the CPWD specification/ IRC/MoRT&H and revised guidelines for administration of SPA schemes."

10. It is also submitted that in respect of the Phase-II work of First Floor and Completion of Basement and Ground Floor, the said work was under the Head of Account - 4059 (SADA), which contained the following report:

"As such Rs.180.00 Lakhs was sanctioned vide SPWD/Petitioner-77/SPA/12-13/338 dated 09.03.2013 under SPA 2012-13 for taking up basement and ground floor as Ph-I (excluding the services item due to fund shortfall) against the total 3 (Three) storied circuit house building. The design of the building has been beautifully conceived which fits to the present site (most commanding site of Aalo) very well and has provision of accommodating good number of VVIP, high dignitaries at a time, site view of Alao township, parking space, and sound security facilities.

In view of financial constrain and to solve the accommodation problems early construction has been kept in phase wise manner as below:

<i>Sl no</i>	<i>Phasing</i>	<i>Scopes</i>	<i>Fund (In Lakhs) I/C 1% labour cess & 3% contingencies)</i>
<i>1</i>	<i>Phase-I</i>	<i>Site Development, Basement and Ground Floor excluding All services.</i>	<i>200.00</i>
<i>2</i>	<i>Phase-II</i>	<i>Basement, Ground Floor and 1st Floor-100%, including all services like water supply, electricity, parking, boundary wall Retaining wall, approach Road etc.</i>	<i>500.00</i>

The work under PH-I has been Completed expect the services which shall be taken up in PH-II. Hence, this project is initiated and all scopes covered are for construction of the circuit house.

The detailed estimated amounting to Rs.480.00 Lakhs excluding all the cent ages has been framed vide sanction no. SPWD/PE-01/AC/206-17/04 dated 17.03.2017 Itanagar. Hence, this detail estimate for construction of Circuit House in Aalo, West Siang (AP) has been prepared obtaining necessary Technical Sanction from the competent authority.

Design & Scope:-

The following provisions have been kept in this estimate:

- 1. Basement, Ground floor and 1st Floor 100% completed etc.*
- 2. Boundary Wall*
- 3. Security Gate*
- 4. Approach Road*
- 5. Bore well & RCC over head Tank*
- 6. Electrification*
- 7. Parking*
- 8. RCC Retaining Wall.*
- 9. CC Drain*
- 10. Leveling*
- 11. DG Set*
- 12. Consultancy charge.*

Specification:-

The work shall be carried out as per CPWD specification 1997 Vol. I & II with up to date correction slip and IRC/MOST specification."

11. Therefore, according to the learned Addl. Advocate General, although it appears that both contract works under Phase-I and Phase-II work was in respect of the same building, but the scope of both works were different and that at the initial stage when the DPR was prepared in respect of Phase-I work, the petitioner was aware that there would be Phase-II work, which could not be tendered together because of the stringent financial constraints faced by the State, which was distinctively mentioned in the DPR for Phase-I.

12. It is submitted by the learned Addl. Advocate General that when the NIT for Phase-I work was floated, there was no bar for the petitioner to participate in the tender. However, when the second tender was floated in respect of Phase-II work, the Arunachal Pradesh District Based Entrepreneurs and Professionals (Incentives, Development and

Promotional) Act, 2015 had been enacted and that as per the said Act, the respondent No. 6 who is Registered Class-II Contractor, domiciled within the territorial jurisdiction of 30-Aalo West Assembly Constituency within West Siang District was eligible to participate. However, the petitioner, who was only a Registered Class-I Contractor, and who was not domiciled within the area specified under the said 2015 Act was not eligible to participate in the tender process and, as such, the petitioner cannot challenge the present tender owing to his disqualification to participate in tender process. It is also submitted that as instructed, the State respondent authorities have paid the lawful dues to which the petitioner was entitled to and, as such, it was not open to the petitioner to dictate any terms to the State respondents in respect of the proposed Phase-II work.

13. The learned counsel for the respondent No. 6 has reiterated the submissions made by the learned Addl. Advocate General and by referring to the case of *Zimomi Traders (M/s) Vs. Food Corporation of India & Ors., 2018 (1) GLT (MN) 800*, it is submitted that the petitioner, being disqualified to participate in the second tender in respect of Phase-II work, had no right to challenge the present tender process. Moreover, by referring to the scope of work in both the tenders, it is submitted that the scope of work were totally different as the Phase-II work was essentially for the finishing part including flooring, water supply, electricity, parking, boundary wall, etc. as was already demonstrated by the learned Addl. Advocate General.

14. As mentioned herein before, the learned counsel for the petitioner had produced photocopy of 2 (two) DPRs. On comparing the

same with copy of the DPR, as produced by the learned Addl. Advocate General, it appears that save and except few missing pages and few unreadable parts in copy produced by the learned Counsel for the petitioner, the document produced by the petitioner and the learned Addl. Advocate General are same.

15. On a perusal of both DPRs and on comparing the itemized details of measurement, which is contained in the copy of the DPR for the work of Phase-I and Phase-II, it is observed that contrary to the allegations made by the petitioner, the scope of both the works are totally different. Just for the sake of an example, while in Phase-I, the extent of "*Earth work in excavation in foundation and trenches*" was for column No. C1, C2, C3, C4, C5, C6, retaining wall, outer walls, inner walls and toilet was for the quantity of 461.22 Cum, in the Phase-II work, "*Earth work in excavation in foundation and trenches*" was for columns C61, C62 and S/tank for the quantity of 76.16 Cum. Similarly, the work of "*Centring and shuttering including strutting, propping, etc.*", in Phase-I, the said work was for (i) outer walls, inner walls, stone buttresses was for the quantity of 304.30 sqm., (ii) stairs excluding landing except spiral stair case, beam for steps, steps ramp and sunshade was for the quantity of 72.60 sqm., but in respect of Phase-II work, the same work was for (i) foundation and plinth including column S/tank cover, Sqr. footing, trapz. Section C1 to C60 was for the quantity of 400.79 sqm., (ii) walls of toilet, back side RCC plinth wall, road side RCC plinth wall was for the quantity of 242.56 sqm., (ii) columns, pillars and piers C61, C62 was for the quantity of 12.48 sqm., (iii) lintels, beams, graders, brassumers and cantilevers, etc. was for 23.04 sqm., (iv) suspended floors, roofs, landings shelves and their supports, balconies and chajjas (3.5 m height) was for the quantity of 125.84 sqm.

In the aforesaid manner, there are 37 items in respect of which the details of measurement are given in the DPR of Phase-I work. This court finds that scope of none of such work is found to be over lapping in respect of any of the 13 items and several sub-items thereunder, covering the scope of work of Phase-II NIT. Hence, this Court does not desire to burden this order with such intricate details as mentioned in respect of two items above, which is voluminous and comparison of all items are found to be unnecessary because the learned Counsel for the petitioner has not been able to successfully sustain his allegations of over-lapping of items of work. Hence, this Court has no hesitation at all to hold that although nomenclature of certain works appear to be common, but the scope of work in both the phases are totally different and this Court is unable to hold that there is any substance in allegation made by the petitioner that there was any over lapping in the scope of work covered by the Phase-II NIT dated 06.11.2017 vis-à-vis the Phase-I work, which was awarded to the petitioner.

16. As per the NIT dated 06.11.2017 (annexed in the affidavit-in-reply filed by the petitioner against the affidavit- in-opposition filed by the respondent No. 5), the Phase-II NIT was open for bidding by Class-II contractors. Except for his oral submissions, the learned counsel for the petitioner has not been able to show that Class-I contractor was eligible to bid for NIT open for bidding by Class-II contractors. Therefore, this Court is not inclined to accept that the petitioner could have participated in Phase-II NIT. Moreover, on a perusal of the writ petition, this Court could not find any averment by the petitioner as to the class of contractor to which the petitioner belongs to. Only from a perusal of the Power of Attorney, annexed as Annexure-3 to the writ petition, it is seen that it has

been mentioned therein that the petitioner is a Class-I contractor. Moreover, as pointed out by the learned Addl. Advocate General as well as the learned counsel for respondent No. 6 that even otherwise, the petitioner, not being domiciled in the area in which work was to be done, the petitioner is found to be ineligible under the Arunachal Pradesh District Based Entrepreneurs and Professionals (Incentives, Development and Promotional) Act, 2015 to participate in the NIT dated 06.11.2017. Hence, this Court is inclined to hold that being statutorily ineligible, the petitioner has no *locus-standi* to challenge the said NIT dated 06.11.2017 on the alleged ground that the petitioner did not get sufficient time to participate in the said tender and that the said tender was in violation of paragraph-17.5(1)(iii) of the Public Works Department Manual.

17. The other issue raised by the petitioner is that as his bills are pending, as such, the tender process dated 06.1.2017 should be stayed. In this connection, this Court is of the considered view that the petitioner cannot hold-up developmental works on the pretext that payment against his bills were still outstanding and, as such, this Court deprecates the use of extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India to be used as a coercive tool to settle financial dispute, if there be any.

18. Therefore, viewed from all angles, none of the issues raised by the learned counsel for the petitioner are found sustainable to maintain the challenge made in this writ petition. Hence, this Court does not find any merit in this writ petition, rather the writ petition is not found to be bona fide. Hence, this writ petition stands dismissed. The interim order passed on 17.01.2018, as extended from time to time stands vacated.

19. There shall be no order as to cost.

20. Let the records produced by the learned Addl. Advocate General be returned back.

JUDGE

Mkumar.