

(2009) 02 GAU CK 0047**Gauhati High Court****Case No:** None

Ecos Engineers

APPELLANT

Vs

Numaligarh Refinery Ltd. and
Others

RESPONDENT

Date of Decision: Feb. 5, 2009**Acts Referred:**

- Constitution of India, 1950 - Article 226

Citation: (2009) 5 GLR 31 : (2009) 3 GLT 352**Hon'ble Judges:** I.A. Ansari, J**Bench:** Single Bench**Judgement**

I.A. Ansari, J.

Pursuant to the Notice Inviting Tender ("the NIT"), issued, on 23.2.2008, by the respondent No. 1, namely, Numaligarh Refinery Ltd. ("NRL"), for execution of works, which had been grouped as group I, namely, operation and maintenance of NRL owned cranes/equipments, and group II, namely, for operation and maintenance of 7T Grab Crane and Excavator, the petitioner,, who had been working as a contractor with the respondent No. 1, submitted its tender. The selection and allotment of the said contract works consisted of two-bid system, namely, (i) technical bid and (ii) price bid. The technical bids, which had been submitted in respect of the said contract works, were opened on 18.3.2008 and, in course of time, having found the petitioner herein and one more tenderer, namely, M/s. Nishant Enterprises, eligible in respect of works tendered under group I, and having also found the petitioner herein and two others, namely, M/s. Nishant Enterprises and M/s. B.K. Traders, eligible in respect of group II works, the respondent No. 1 fixed, 6.5.2008, as the date for opening of the price bids. The price bids were, however, not opened and instead, an NIT was published afresh, on 27.6.2008, fixing 10.7.2008 as the last date of submission for the bids.

2. By making this writ application under Article 226 of the Constitution of India, the petitioner has put to challenge the decision, taken by the NRL, not to open the price bids, which were to be opened on 6.5.2008, and also abandoning altogether the process of selection, which had been initiated by the NRL by the earlier NIT, dated 23.2.2008, and, instead, inviting fresh tender by publishing the NIT, dated 27.6.2008.

3.1 have heard Mr. K.N. Choudhury, learned senior Counsel, appearing on behalf of the petitioner, and Mr. RC. Deka, learned senior Counsel, appearing on behalf of respondents.

4. The principal questions, which fall for determination, in this writ petition, are:

(i) What was, or were, the reason(s) for the NRL's decision not to open the price bids on 6.5.2008 and abandoning altogether the entire process of selection pursuant to their NIT, dated 23.2.2008?

(ii) Whether the decision of the NRL not to open the price bids, in question, is sustainable in law? and

(iii) Whether the decision to retender is sustainable in the facts and circumstances of the present case?

5. In their affidavit-in-opposition, the respondents have assigned the reasons, which had led them to take the decision of not opening the price bids and to go for fresh tender. The relevant paragraphs of the affidavit-in-opposition, filed by the respondents, read as under:

8. That the answering respondents beg to give a brief factual history of the case, which culminated in the aforesaid note of the CVO dated 9.6.2006. In the year 2005, a similar contract for hiring of cranes, viz., "Hiring of Cranes during RTA-OS" was floated. The petitioner was the only bidder and had quoted a very high price. The competent authorities at NRL negotiated with the petitioner and asked them to justify the price quoted. Accordingly, the petitioner vide letter dated 17.3.2005 informed NRL that the high price was because of the fact that a particular type of crane, viz., "40 Te Tyre Mounted Hydraulic Crane" was not available in Assam and the same shall have to be procured from Mumbai, for which an additional cost of Rs. 9,50,000 (Rupees nine lakhs fifty thousand) only would have to be incurred. Accordingly work order dated 30.3.2005 was issued to the petitioner.

9. That the answering respondents state that the petitioner informed NRL that they had arranged for 2 cranes from M/s. Mallesh & Co., Mumbai and one such crane had reached NRL. But the petitioner thereafter informed NRL that the trailer of the 2nd crane had met with an accident near Bongaigaon on 27.3.2005 and when the aforesaid accident took place the said M/s. Nallesh & Co., Mumbai had asked the petitioner to contact M/s. Dewanchand Ramsaran, Sivasagar, who agreed to help the petitioner by providing a 40 Te Crane and accordingly the petitioner had paid a

sum of Rs. 3.25 lakhs to M/s. Dewanchand Ramsaran, Sivasagar for the 2nd crane. The petitioner further contented that the 1st being crane No. AP09 AN 5886 was being transported by M/s. Transport Corporation of India in trailer No. HR 38 J 3977 and the 2nd crane No. MH 04 B 8573 was being transported by M/s. Kalika Transport in trailer No. HR 38 D 0404. The 1st crane reached NRL and it was contended by the petitioner that the 2nd crane had met with an accident on 27.3.2005. To substantiate his claim, the petitioner submitted the challan I consignment note of M/s. Kalika Transport.

10. That the answering respondents state that on scrutiny by the Vigilance - Cell of NRL, of the challan of M/s. Kalika Transport, which was submitted by the petitioner, it was found that the consignment note No. 101 was dated 25.2.2005, i.e., prior to the date of Award of the Contract to the petitioner which was on 30.3.2005. The challan also showed that the trailer had crossed Dalkhola Check post, Barovisha Check Post (West Bengal) on 22.3.2005 and the Sri Rampur Check Post, Assam. The discrepancy in the dates raised some doubt in the mind of the authorities and accordingly the officers of the vigilance cell NRL visited the aforesaid check posts on 7.6.2006 and 8.6.2006.

11. That the answering respondents state that the challan of M/s. Kalika Transport (consignment note No. 101) dated 25.2.2005 bearing the signature of one Shri Debasis Bagchi, Assistant Commercial Tax Officer, Barovisha Check Post dated 22.3.2005 was shown to the officials in the office of the Sales Tax Officer Barovisha check post. West Bengal for verification. After detailed verification, Shri Alok Kumar Sen and Shri Gopinath Shaw, both Sales Tax officers confirmed that no such vehicle bearing registration No. HR 38 D 0404 had passed through the Barovisha check post towards Assam on 22.3.2005. They also confirmed that Shri Debasis Bagchi, Assistant Commercial Tax Officer, Barovisha who had allegedly signed the challan as per the seal mark, was not posted at that time in their office. They also showed copy of movement order dated 3.11.2004 in respect of Shri Debasis Bagchi. Thereafter, Shri Alok Kumar Sen, Sales Tax Officer, Barovisha check post vide letter dated 7.6.2006 gave a written confirmation to this effect enclosing an attested copy of the movement order of Shri Debasis Bagchi dated 3.11.2004.

A copy of the letter dated 7.6.2006 along with the order dated 3.11.2004 is annexed hereto and marked as Annexure I.

12. That the answering respondents state that thereafter an enquiry was made with the Sri Rampur check post, Assam and Shri T. Saikia, Superintendent of Taxes, Damra check post, Sri Ram Pur after verification of records informed that no vehicle bearing registration No. HR 38 D 0404 had crossed their gate towards Assam from 22.3.2005 to 28.3.2005. The said officer also gave a written confirmation to this effect.

A copy of the letter dated 7.6.2006 is annexed hereto and marked as Annexure II.

13. That the answering respondents state that thereafter the vigilance cell enquired into the contention of the petitioners that the vehicle I trailer in which the crane was being brought had met with an accident near Bongaigaon on 27.3.2005. The records of the Bongaigaon Police Station were verified and the Sub-Inspector (SI) Shri T. Rahman, Bongaigaon Police Station informed that there was no record of any accident case on 27.3.2005 reported at their Police Station. The said Shri T. Rahman, SI, Bongaigaon Police Station also gave a written confirmation to that effect.

A copy of the communication dated 8.6.06 is annexed hereto and marked as Annexure III.

14. That the answering respondents state that thereafter the vigilance cell, NRL, in June 2006, made a phone call to the number (098921 - 57668) as printed on the challan of M/s. Kalika Transport. The phone was answered by one Shri Ashok Salvi of Mumbai who informed that this was his mobile number and he does not know anything about M/s. Kalika Transport and is not associated with them. Attempt was also made to contact M/s. Mallesh & Co. through the phone numbers printed on their quotation submitted by petitioners in support of their higher rates but no one could be contacted.

15. That the answering respondents state that a report of investigation was submitted by the Senior Manager (Vigilance), NRL and all the aforesaid facts appear from the said report of the Senior Manager (Vigilance), NRL. Based on that report, the CVO, NRL vide note dated 9.6.2006 to the Managing Director, M/s. Numaligarh Refinery Ltd. recommended initiation of criminal proceedings against the petitioner and also for recovery of the excess amount, fraudulently appropriated by the petitioner.

16. That the answering respondents state that from a narration of the facts as above it is crystal clear that the petitioner, in their earlier contract with the answering respondent No. 1 quoted a very high price and to justify the same, contended that 30 140 Te cranes were not available in Assam and were to be brought from Mumbai at an additional transportation cost of Rs. 9,50,000 (Rupees nine lakhs fifty thousand) only per crane. Accordingly, the petitioner brought one such crane (No. AP 09 AN 5886) from Mumbai from one M/s. Mallesh & Co. and brought the other crane from M/s. Dewanchand Ramcharan in Sivasagar but claimed the same price for the 2nd crane also. Further, the petitioner contended that in fact the 2nd crane was being brought from Mumbai but the trailer met with an accident near Bongaigaon. But, on verification of the documents submitted by the petitioner to show that the 2nd crane was also being brought from Mumbai, it was found that no such trailer had come to Assam and no accident had occurred at Bongaigaon. Thus, no second crane was brought or ever intended to be brought by the petitioner from Mumbai and yet by submitting false and fabricated documents, the petitioner had tried to M/s. appropriate a huge sum of money from NRL.

17. That the answering respondents state that on the recommendation of the CVO, NRL, the competent authorities of NRL withheld a sum of Rs. 9,50,000 (Rupees nine lakhs fifty thousand) only from the bills of the petitioner. The petitioner thereafter raised an arbitration and the sole arbitrator, vide Award dated 16.7.2008 has decided against the petitioner and has awarded a sum of Rs. 9,50,000 (Rupees nine lakhs fifty thousand) only in favour of NRL, along with cost of the proceedings.

18. That the answering respondents state that the evo is not an officer of M/s. Numaligarh Refinery Ltd. and is an officer of the rank of Inspector General of Police of the Assam Police Service, who is on deputation to NRL. Without the clearance of the Vigilance Department, no tender can be proceeded with. Thus, when the evo, NRL insisted on whether action had been taken against the petitioner or not, the competent authorities of NRL decided not to open the bid of the petitioner and reject the same, accordingly, in group I of the tender, only one bidder, viz., M/s. Nishan Enterprise was left and in group II, 2 bidders, viz., M/s. Nishan Enterprise and M/s. B.K. Traders were left in the fray. Under such circumstances, the management of NRL decided to retender the job and relax certain qualifying criteria, with a view to introduce better competition. While retendering, the management of NRL also took note of the fact that a large number of bids were disqualified in the technical evaluation due to some stringent prequalification criteria in the NIT, which were introduced in the present NIT only and were not there in earlier NITs for similar work. Therefore, it was decided to retender the work and relax certain pre-qualifying criteria and bring the tender in line with the tender, for similar works in earlier years. The decision to retender the work in question was taken in the aforesaid factual background of the case as the management could not proceed any further with the NIT dated 23.2.2008 in view of the report from the evo, NRL, Under these circumstances the letter dated 13.5.2008 of the petitioner could not be replied to. It may further be stated that the mandatory conditions, which have been introduced in the present tender is not only for this tender but for all works in NRL.

6. From the above explanation, given by the respondents in order to justify their decision of not opening the price bids, what clearly transpires is that the NRL decided not to open the price bids on the ground that the petitioner's tender could not have been proceeded with by the respondents without clearance from the Vigilance Department of the NRL. Hence, it was on account of the questions, raised by the Chief Vigilance Officer, NRL, that the respondents decided not to open the price bids. Thus, the reason for not opening the price bids was that the petitioner's past conduct did not make him suitable for consideration for allotment of the contract works, in question. In effect, thus, the decision, not to open the price bids, was tantamount to blacklisting the petitioner, for, if this decision remains on record, the petitioner would not only be disqualified from being considered in respect of the NIT, dated 23.2.2008, but his disqualification would continue also in respect of the NIT, dated 27.6.2008, too, which, now, stands impugned in this writ petition. When

the petitioner's past conduct was found to be not conducive for allotment of work, there is no question of the petitioner becoming suitable for consideration for selection in the subsequent tender processes, which may be initiated by the respondents. Thus, the decision not to open the price bids amounts to permanently restraining the petitioner from participating in any tender process under the respondents. However, such a momentous decision has, admittedly, not preceded by any notice of show cause to the petitioner.

7. In the circumstances as indicated above, the reference made by Mr. K.N. Choudhury, learned senior Counsel, to the decision of the Apex Court, in Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another, is not misplaced inasmuch as the Apex Court, in Erusian Equipment & Chemicals Ltd. (supra), has clearly laid down that blacklisting has the effect of preventing a person from the advantage of entering into any lawful relationship with the (Government for the purpose of gains and, since blacklisting creates disability, fair play demands that the person, who is sought to be blacklisted, is given an opportunity to represent his case before he is blacklisted. The relevant portion of the observations made by the Apex Court in the case aforementioned read as under:

20. Black listing has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purposes of gains. The fact that a disability is created by the order of blacklisting indicates that the relevant authority is to have an objective satisfaction. Fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist.

8. What logically follows from the above discussion is that the petitioner stands virtually blacklisted and disqualified from participating not only in the tender process, which was initiated with the publication of the NIT, dated 23.2.2008, and also the subsequent NIT, dated 27.6.2008. It further follows from the above discussion that the petitioner has been permanently condemned without being heard. It is trite that in contractual matters, particularly, when the contract is of commercial nature, a High Court, in exercise of its powers, will not interfere with the decision taken by the State or its instrumentality as regards the allotment of contract; but the judicial review of the decision-making process cannot be out of the purview of the High Court's power under Article 226. The decision, reached by the NRL, treating the petitioner as disqualified or unsuitable for allotment of contract works may, in course of time, be found to be correct; but, at this stage, it is clear that the price bids were not opened at all, because the petitioner was held to be unsuitable for being considered for selection for allotment of the works, in question, though no opportunity, as already indicated above, was ever provided to the petitioner to have its say in the matter. Thus, the decision, taken by the NRL, not to open the price bids, which were scheduled to be opened on 6.5.2008, cannot be sustained.

9. Turning to the question as to whether the decision to re-tender was correct, it needs to be pointed out that according to the affidavit filed by the respondents, they found that if the petitioner's tender was rejected; as they ought to have had, then, it would leave, in the fray, a lone tenderer, namely, M/s. Nishant Enterprises, in respect of the group I works, and two bidders, other than the petitioner, in respect of the group II works. The respondents also submit that having floated the tender, on 23.2.2008, they realized, in course of time, that the pre-qualification criteria, in their NIT, which led to rejection of the technical bids of many tenderers, were stringent and needed to be relaxed so that more and more persons could participate in the process of selection, which the NRL decided to resort to. The reasons, assigned by the respondents, for issuing the subsequent NIT, dated 27.6.2008, may be laudable; but, in the face of the fact that the NRL's decision, not to open the price bids, which were scheduled to be opened on 6.5.2008, has been held by this Court to be not sustainable, the question of allowing the subsequent tender, dated 27.6.2008, to survive, does not arise at all. This apart, since the petitioner was treated as not qualified due to the respondents' Vigilance Department's reaction in the matter, the same situation will prevail so far as the second NIT, dated 27.6.2008, is concerned. In such circumstances, the petitioner may not be allowed by the respondents to participate in the subsequent tender process, which has been initiated by publication of the NIT, dated 27.6.2008, and, even if the petitioner is, now, allowed to submit tender pursuant to the NIT, dated 27.6.2008, the NRL would not be able to hold the petitioner suitable for allotment of contract works so long as their decision, not to open the price bids, in question, due to the petitioner's alleged past misconduct, remains on record. Viewed from this angle also, the second NIT, dated 27.6.2008, cannot be sustained.

10. Because of what have been discussed and pointed out above, the impugned NIT, dated 27.6.2008, is hereby set aside and quashed. The respondents are, however, left at liberty to take a decision afresh on the question of opening of the price bids, which had been received by the respondents pursuant to their NIT, dated 23.2.2008.

11. However, before parting with this writ petition, it needs to be pointed out that this Court has consciously refrained from expressing any opinion on the allegations made by the petitioner against respondent No. 6 and/or the other respondents. This decision must, therefore, be treated to have been rendered without expressing any opinion with regard to the veracity or correctness of the accusations, made by the petitioner against the respondent No. 6 as well as other respondents, nor does this Court express any opinion with regard to the veracity or the truthfulness of the allegations, which the respondents have made against the petitioner.

12. With the above observations and directions, this writ petition shall stand disposed of.

13. No order as to cost.