

GAHC010162692018



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

**Case No. : WA 217/2018**

1:M/S TRIDENT ENTERPRISES  
CLASS - I GOVERNMENT REGD. CONTRACTOR, REGD NO. NPW/CLASS I/  
158  
REPRESENTED BY ITS PROPRIETOR SHRI IMTY AO  
R/O LOWER AGRI COLONY, KOHIMA, NAGALAND  
H/NO 741

VERSUS

1:THE STATE OF NAGALAND AND 4 ORS  
REPRESENTED THROUGH THE CHIEF SECRETARY TO THE GOVERNMENT  
OF NAGALAND

2:THE COMMISSIONER AND SECRETARY  
TO THE GOVERNMENT OF NAGALAND  
DEPARTMENT OF WORK AND HOUSING  
NAGALAND  
KOHIMA

3:THE ENGINEER IN CHIEF  
NAGALAND PUBLIC WORKS DEPARTMENT NAGALAND KOHIMA

4:THE CHIEF ENGINEER  
PWD (R AND B) NAGALAND  
KOHIMA

5:M/S NAGALAND STEEL ENGINEERING WORKS  
NPWD/CLASS-I/138  
KHERMAHAL  
DIMAPUR  
NAGALAND

C/O THE CHIEF ENGINEER  
PWD(R AND B) NAGALAND  
KOHIM

**:: BEFORE ::**

**HON'BLE THE CHIEF JUSTICE MR. AJIT SINGH**  
**HON'BLE MR. JUSTICE MANOJIT BHUYAN**

For the Appellant	:	Mr. K.N. Choudhury, Senior Advocate. Mr. S. Bharali, Advocate.
For the Respondent No.1, 2, 3 & 4	:	Ms. T. Khro, Sr. Government Advocate, Nagaland.
For the Respondent No.5	:	Mr. N. Deka, Advocate.

**O R D E R**

**30.08.2018**

**(Manojit Bhuyan, J)**

Heard Mr. K.N. Choudhury, learned Senior Counsel assisted by Mr. S. Bharali, learned counsel for the appellant as well as Ms. T. Khro, learned Senior Government Advocate, Nagaland representing Respondent Nos.1, 2, 3 and 4. Also heard Mr. N. Deka, learned counsel representing Respondent No.5.

2. This intra-Court appeal is directed against the judgment and order dated 30.06.2018 passed in WP(C) 320(K)/2017, dismissing the writ petition filed by the present appellant.

3. Matter pertains to dispute over allotment of construction work of road from Capital T-01 to Kanjang under Package No.NG0502012, covering a distance of 38 kilometres under the Pradhan Mantri Gram Sadak Yojana (PMGSY). This package falls at Sl No.17 of the Notice Inviting Tender (NIT) dated 22.08.2017 which lists out total 19 packages. Time being of

essence, the total duration for completing the works is 18 months. The bidders were required to submit percentage rate tenders, that is, the Schedule of Rates (SoR). Both the appellant M/s. Trident Enterprises and Respondent No.5 M/s. Nagaland Steel Engineering Works quoted the same rate i.e. "as per SoR 2017". The Tender Committee framed criteria for technical evaluation, complying with the Standard Bidding documents for PMGSY works. Whereas the technical evaluation at page 49 of the appeal memo shows the Respondent No.5 scoring over the appellant, a reverse position is shown at page 73 of the appeal memo. On 31.10.2017, the Chief Engineer, PWD (R&B) issued letter showing the appellant to be the qualified bidder, as adjudged by the Tender Committee, in respect of the aforesaid work under Sl. No.17 along with 3 other works. The Government of Nagaland in the Works and Housing Department, however, issued letter dated 13.11.2017 directing the Chief Engineer PWD (R&B) to maintain the list enclosed to the said letter 13.11.2017 for finalisation of PMGSY tenders. In the said list, the Respondent No.5 was shown as approved for allotment of work under Sl. No.17. Pursuant thereto, the Notice to Proceed with the work for construction of road from T-01 to Kanjang under Sl. No.17 of the NIT was issued in favour of the Respondent No.5 vide work order dated 21.11.2017. Aggrieved, the appellant instituted the related WP(C) 320(K)/2017, which was dismissed by judgment and order dated 30.06.2018, prompting institution of the present appeal.

4. The basis of challenge to the allotment letter dated 21.11.2017 in favour of Respondent No.5 are that the Tender Committee having recommended the appellant for work under Sl. No.17 after due evaluation, the same was required to be complied with, more so because in the list of qualified bidders recommended by the Tender Committee, the name of the Respondent No.5 was not even shown as a qualified tenderer. Further, the stand taken by the respondent State to justify issuance of work order in favour of Respondent No.5 instead of the appellant, being that three other works have already been approved in favour of the appellant, the same cannot stand the scrutiny of law. Submission made is that there are other contractors/bidders which had responded to the NIT dated 22.08.2017 and had been allotted more than 3 (three) works from amongst the 19 packages. To name, reference is made to one Vilelie Khamo & Sons which has been allotted works under Sl. No.2, 8, 15 and

19, and another North East Enterprises, which has been allotted works under Sl. No.3, 6, 7 and 13. Reliance is placed in *Dutta Associates Pvt. Ltd. vs. Indo Merchantiles Pvt. Ltd. and Ors.*, reported in (1997) 1 SCC 53, for the proposition that whatever procedure the Government proposes to follow in accepting the tender, the same must be clearly stated in the Tender Notice. Applying the law laid down by the Supreme Court, it is contended that the NIT in question was without any stipulation that a party would not be offered more than 3 works out of the total 19 packages, which is the ground for refusing allotment of work to the appellant under Sl. No.17. Assuming that the State respondents have the discretion to deny and decline the fourth work to the appellant, it is contended that the said decision is inherently flawed, inasmuch as, no such embargo was placed in respect of the two firms aforementioned i.e. Vilelie Khamo & Sons and North East Enterprises.

5. From the available materials and the records of the case produced in original, it is seen that on 08.11.2017 a meeting took place comprising of the Minister, PWD (R&B), the Commissioner and Secretary to the Government of Nagaland in the Works and Housing Department and the Chief Engineer, PWD (R&B) in respect of finalization of the PMGSY projects. The Minutes of the meeting dated 08.11.2017 records discussion and decision to the effect that if M/s. Trident Enterprises is given all four projects under Item Nos.1, 9, 16 and 17, the works would cover a distance of 83.00 kilometres. Further, considering the machineries, manpower and resources that would be required to carry out the works, it would not be possible for M/s. Trident Enterprises to complete all the four projects within the stipulated 18 months period. Decision for allotting the project under Item No.17 to M/s. Nagaland Steel Engineering Works was taken for timely completion of works. The records in original also contains the letter dated 13.11.2017, issued by the Under Secretary to the Government of Nagaland, Works and Housing Department, informing the Chief Engineer, PWD (R&B) of the recommendation made in favour of Respondent No.5 as regards the project work under Item No.17.

6. It is true that the NIT 22.08.2017 makes no mention of any embargo in the allotment of works beyond three works. Rather, as many as four works out of the total 19 projects had

been allotted in favour of two other firms. While deciding the *bona fide* of the State respondents in denying the fourth work to the appellant, it is to be seen if the State acted in public interest. As illustrations have been made in respect of the two firms who were granted four project works each, it is seen from the records that whereas the total four works in favour of Vilelie Khamo & Sons covers 57.70 kilometres, the four works allotted in favour of North East Enterprises covers 33.20 kilometres. The fourth work, if awarded to the appellant, would cover a total length of 83.00 kilometres, which the tendering authority opined that it would not be possible for the appellant to complete all the four projects within 18 months period, having regard to the machineries, manpower and resources that has to be deployed in the execution of the works.

7. In *Tata Cellular vs. Union of India*, (1994) 6 SCC 651, the Supreme Court emphasised that under the power of judicial review the Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made. It was also emphasised that the Government must have freedom of contract and a fair play in the joints is a necessary concomitant which, however, must not be affected by bias or actuated by *mala fides*. In *Raunaq International Ltd. vs. I.V.R. Construction Ltd.*, (1999) 1 SCC 492, the Supreme Court held that the Court must be satisfied as to the existence of public interest while entertaining a writ petition where challenge is made to the award of a contract by a State authority. A mere difference in the prices offered by two tenderers may or may not be decisive while deciding whether any public interest is involved warranting intervention in such a commercial transaction. Intervention would be possible if the Court is satisfied that overwhelming public interest requires interference and/or that the transaction smacks of arbitrariness and *mala fide*. The discretionary power under Article 226 must be exercised with great caution in furtherance of public interest and not merely on the making out of a legal point or because some defect is found in the decision-making process.

8. Applying the yardsticks above, it is seen that the primary reason guiding the State respondents in the present case was to ensure timely completion of the works, which is shown to be of urgent nature. Whether the appellant was more technically qualified than the

Respondent No.5, no conclusive decision is made possible in view of the contradictory positions reflected at page 49 and 73 of the appeal memo. What is not in dispute is that both the appellant and the Respondent No.5 emerged as qualified bidders and both had offered the same rate i.e. "as per SoR 2017". On our asking, the State Counsel has also furnished written instructions to show that until the period ending August 2018, the Respondent No.5 have completed 34.05 percentage of the project work under Sl. No.17.

9. From the available records we are satisfied that the road construction works in question assumes great importance. Timely completion of the works in question, undoubtedly, caters to public interest and any interference at this stage would unnecessarily delay the execution of the works, thereby affecting larger public interest. Also, the decision of the State respondents not to allot the project work under Sl. No.17 to the appellant, which would have been the fourth allotment, do not suffer from any arbitrariness or *mala fide*, having regard to the reasons appearing from the records of the case. In this context, we are of the considered opinion that the four numbers of works allotted to Vilelie Khamo & Sons and North East Enterprises respectively, cannot be flagged as illustrations to allege discrimination on the part of the State respondents. The appellant has also not been able to make out a case involving overwhelming public interest calling for interference in the allotment of the work to the Respondent No.5. The decision in awarding the contract under Sl. No.17 to Respondent No.5 is *bona fide* and is in public interest. We, therefore, in exercise of power of judicial review, will not interfere even if there be a procedural aberration, having regard to the public interest at stake.

10. For the discussion and reasons aforesaid, we find no merit in the present appeal. Accordingly, this appeal is dismissed and the judgment under appeal stands affirmed. No cost.

**JUDGE**

Comparing Assistant

**CHIEF JUSTICE**