(1999) 11 AHC CK 0136

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 45350 of 1999

ABB,ABL Ltd. APPELLANT

Vs

National Thermal Power Corpn.Ltd. RESPONDENT

Date of Decision : 03-11-1999

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (1999) 11 AHC CK 0136

Hon'ble Judges : G.P.Mathur, J and Yatindra Singh, J

Final Decision : Dismissed

Judgement

1. This is a writ petition for a direction to| the National Thermal Power Corporation Limited (NTPC) to rescind the decision taken by it in awarding to contract of Steam Generator Package for Teacher Super Thermal Power Project to Bharat Heavy Electrical Limited (BHEL) and to consider the case of M/s. Combustion Engineering Inc., (CE Inc.) with ABB A1J5L Limited as the Indian assignee for granting of the said contract.

2. NTPC floated a global tender on 15th of December, 1997 for the supply and installation of (i)Steam Generator (SG) Package and (ii) Steam Turbine Generator (STG) Package as per the brief particulars specified in the bidding documents. In this writ petition, we are concerned with the supply and installation of Steam Generator (SG) Package only. There were three bidders and the bids were opened by NTPC on 2nd of December, 1998. Subsequently, all bidders were given an opportunity to rectify the inconsistencies and were asked to submit fresh bids. This time only two parties namely CE Inc. and BHEL submitted their bids. They are Respondent Nos. 4 and 5 in this writ petition. The bids were examined by a tender committee comprising of experts in the field. The bid of CE Inc. was found to be nonresponsive and decision was taken to award the contract to BHEL. A letter of intent was issued to BHEL on 9th August, 1999 with some conditions. BHEL was to give its acceptance by 31st August, 1999. We are informed that BHEL has given such consent.

3. CE Inc. is a foreign bidder. Under the special condition of contract, a foreign bidder was to propose an Indian assignee. ABB ABL Limited (petitioner No. 1) is its Indian assignee. Petitioners Nos. 2 to 6 are the registered trade unions of ABB ABL Limited. Petitioner Nos. 2 to 6 filed a writ Sedition in the Calcutta High Court on 1st August, 1999 against the decision of NTPC to award the contract to BHEL. In this writ petition initially ABB ABL Limited was a respondent but during the pendency of the same, ABB ABL Limited was transposed as a petitioner. The Calcutta High Court on the same day (3181999) granted an expane interim order maintaining status quo with regard to award of contract to BHEL. This interim order was continued and ultimately the learned Single Judge of the Calcutta High Court dismissed the writ petition on the ground that it did not have territorial jurisdiction but passed the following order:

"In view of that, this interim order which has been passed is vacated, however no order as to costs. Accordingly this writ petition is also dismissed. Stay of the operation of the order as asked for, is granted for three weeks. Xerox certified copy of this order if applied for by the parties be supplied expeditiously on usual terms."

4. The present writ petition was filed before the Allahabad High Court and was taken up before a Division Bench on 27th October, 1999. The Bench on that day heard Sri Shanti Bhusan learned Senior Counsel for the petitioner and on the request of Sri Sharad Verma learned Counsel for BHEL adjourned it to 29th October, 1999. On this date one of the members oil heBench fell ill and did not come to the Court. petitioners filed an application here Hon''ble the Chief Justice with a prayer consume a new Bench to hear the matter October, 1999 as the matter was ureic and required an interim order before October, 1999. On this application, Hon''ble the Chief Justice constituted the Bench to hear the case on 30th October. 1999. We had heard Sn Shanti Bhnsan, Senior Advocate for the petitioner, Sri Dinesh Dwivedi Counsel for NTPC and Sri J.C Seth and Sri Sharad Verrna Counsel ''or BHEL on that day.

5. Learned Counsel for the respondent have raised three preliminary objections for the maintainability of the writ petition. We will first deal with these preliminary objections. The first preliminary objection is about the jurisdiction of the Allahabad High Court. This objection is two fold : (i) The draft contact which was also circulated contains a condition that all dispute will be subject matter to Delhi Courts only. It is only the Delhi High Court which has jurisdiction to entertain this writ petition. (;; T 10 decision to award the com act to Bill,, was taken at Delhi and no action has arisen in Uttar Pradesh. Tae Allahabad High Court has no territorial jurisdiction to entertain this writ petition.

6. The first objection about territorial jurisdiction relates to a term in the drat contract. No contract has been entered into by the parties. The Counsel for the respondents concede that there was no clause in the advertisement limiting the dispute to Delhi Courts only. The term in the draft contract will govern the paties after the contract is entered into and any dispute arising thereafter. The dispute

in the present writ petition is wither the contract should be awarded to BHEL or not? The term in the draft eontract cannot oust the jurisdiction of this Court. The Allahabad High Court will have jurisdiction to entertain this writ petition if a part of cause of action has arisen in Uttar Pradesh. Let us consider whether any part of cause of action has arisen in Uttar Pradesh or not.

7. The global tender was issued by NTPC on 15th December, 1997 (Annexure 2 to the writ petition). Paragraphs 3 and 6 of the same are relevant and are quoted below:

8. The second preliminary objection is that the writ petition is premature as merely a letter of intent has been issued and as no contract has been entered into with BHEL. The petitioners have annexed bidding documents for the project (part or Annexure 3 to the writ petition). This is divided into different sections. Section 1 of this document is ''Invitation for bids'' (IFB). Section 2 of this document is ''Instruction to bidders'' (ITB). Subsection (E) of ITB gives details of ''Bid opening and evaluation.'' Paragraph 22 prescribes ''Preliminary Examination of Bids'', paragraph 23 details ''Conversion to single currency'', paragraph 24 prescribes Technical evaluation'' and paragraph 25 talks about ''Commercial evaluation'' of the bid.

After evaluation of the bids contract is to he awarded and this is mentioned in subsection (F) of namely Award of Contract''. The paragraph 29 of the subsection (F) talks about Award Criteria'' and states that Employer will award a contract to successful bidder whose bid has been determined to be substantially responsive. The Counsel for the respondents have admitted that bids of the parties have been evaluated by the experts under these provisions. They have submitted a report on 481999. The bid of the CE Inc. was found to be nonresponsive. This report was approved by the Chairman of the NTPC on 6th August, 1999 and by the Board of Directors on 9th August, 1999 and then the letter of intent has been issued to BHEL online same day. Once the bid of CE Inc. was found to be nonresponsive Le. to say it was rejected and it was decided to award the contract to BHEL; a letter of intent was issued on 9th August, 1999 with some conditions seeking their acceptance and BHEL has given its consent then writ petition cannot be termed as premature. The INTPC has taken a. decision not to award the contract to and to award it to BHEL. The writ petition is not premature, it cannot be rejected on this ground.

9. The third preliminary objection is that the petitioners do not have.any legal right to maintain this writ petition. If there is any right, it is only with CE Erne. (Respondent No. 4) and not with the petitioners. In order to understand this preliminary objection it is necessary to consider the ''Special condition of the ''contract'''' (part of Annexure 3 to the writ petition) mentioned at serial No. 30.1 to 30.4:

. 30.1. The Contracts to be entered into with the successful bidder shall be as under: for Foreign Headier First Contract'' for CIB/CIP supply of all off shore equipments and materials including mandatory spares Second Contract'' for Exworks supply of all equipments and materials including mandatory spares of Indian origin and for providing all services i.e. port handling and clearance for the imported goods, further loading and inland transportation for delivery at site, unloading, storage, handling at site, installation, testing and commissioning including performance ''Icsting in respect of all the equipment supplied under both the Contracts and any other services specified in the Contract Documents. First Contract'' for Exworks supply and C1F/CIP supply, if any, of all equipment and materials including mandatory spares identifying separagraphtcly the CTF/ CIP and Hxworks components of the supply..

30.2 The award of two Contract shall not in any way dilute the responsibility of the Contractor for the successful completion of the Facilities as per Specifications and a breach in one Contract shall automatically be construed as a breach of the other Contract which will confer a right on the Employer to terminate the other Contract also at the risk and the cost of the Contractor.

30.3. If the foreign bidder has proposed as Assignee in his bid to execute the Second Contract and as also furnished written unequivocal consent of the proposed Assignee to work as independent Contractor on the terms offered by the bidder and the Employer is satisfied with experience, qualification of the proposed Assignee, the Employer will enter into the Second Contract with the said Assignee. Further, the. said Assignee in addition to the Contract Performance Security to be provided by the Contractor for ten per cent (10%) of the value of both Contracts Le. First Contract and Second Contract, shall provide within twenty eight (28) days of the Notification of Award a Contract Performance Security equivalent to ten per cent (10%) of the value of Second Contract for the due performance of Contract with a validity upto sixty (60) days beyond the Defect Liability Period It is expressly understood and agreed that the both the Contracts shall contain the aforesaid cross fall breach clause..

30.4 It is further expressly understood and agreed that in case the opinion is not exercised by the Bidder or the Assignee fails to enter into the Second Contract with the Employer or if the Employer in its judgment does not find acceptance of the proposed Assignee as.its Contractor, then the Bidder shall he obliged so enter into and execute both the Contracts with the Employer and both Contracts shall contain the aforesaid cross fall breach clause."

The Special Conditions of the Contract (30.1) envisage two Contracts first Contract is for supply of all off shore equipment and materials including mandatory.spares and the Second Contract is for Exworks supply of all equipment and materials including mandatory spares of Indian Original. The bidder, CE Inc., is a company based in USA it is a foreign bidder. A foreign bidder (30.3) is also entitled to propose an Indian Assignee to execute the Second contract. This Indian assignee is subject to satisfaction of NTPC. ABB ABL Ltd. (petitioner No. 1) is proposed as a Indian assignee of CE Inc. it is not a bidder. It has no existence and all the bid of CE Inc. is accepted and even then it is subject to the satisfaction of NTPC. If by not awarding the contract to CE Inc., the NTPC has acted unfairly or arbitrarily, then rights if any of CEInc.are violated "and not of ABB ABL Ltd. (petitioner No. 1). As a matter of fact under the special conditions of contract (30.3 and 30.4) even if bid of CE Inc. is accepted, NTPC is not bound to accept the proposed assignee. ABB ABL Ltd. would have come into existence ifthe contract was awarded to CE Inc. and the NTPC had approved the ABB ABL Ltd., an Indian Assignee. Neither ABB ABL Ltd,, has made any bid nor any of its rights have been violated, no writ petition at its instance is maintainable. Petitioner Nos. 2 to 6 are merely Registered trade unions with ABB ABL Ltd., none of their rights are being violated. They are also not entitled to maintain this writ petition.

10. Sri Shanti Bhusan Senior Counsel for the petitioners has argued that CE Inc. could not file this writ petition due to shortage of time and merely for this reason,this writ petition should not be thrown out. CE Inc. was a party before the Calcutta High Court and had engaged a Counsel before the Calcutta High Court, supporting the case of the petitioner. There is no reason as to why it could not file a writ petition is this Court if it considers that it was wrongly dealt wish. Petitioner No. 1 cannot proxy for CE Inc.

11. Sri Shanti Bhusan further argued that position of ABB ABL Limited is similar to the position of a joint bidder and if there was a joint bidder then it would doubted be entitled to maintain this petition. The petitioner have also annexed the Bidding Documents for the Project (Part of Annexure 3 to the writ petition). Section 3 of the Bidding Documents is BID DATA SHEET (BDS). Item No. 8 of BDS refers to ''Instruction to Bidder'' (ITB) clause, Reference No. 9.3 (c) & (e). The part II of the same (at page 109 of the writ petition) states that the joint ventures are not permitted. There cannot be any joint bidder ABB ABL Ltd., was neither a joint bidder, nor under the Bidding Documents it could be a joint bidder. It is an assignee who is yet to come into existence.

12. We have upheld the third preliminary objection of the respondents. It is sufficient to dismiss this writ petition. But this writ petition is for installation of Steam Generator costing more than thousand crores of rupees and relates to priority sector of power. The entire controversy relating to the award of contract should be decided at an early date. The learned Counselor the petitioner has also addressed us on the merit of the writ petition. In view of aforesaid, we consider it proper to express our view on the merits of award of contract to BHEL.

13. Shri Shanti Bhusan has challenged the award of contract to BHEL on four main grounds : (i) This contract was awarded to BHEL at the behest of Hon''ble Sri P. Kumarmanglam, Cabinet Minister for Power and is for extraneous considerations, (ii) The bid of CE Inc. was the lowest and ought to have been accepted by the NPTC (iii) The Central Vigilance Commissioner has issued guidelines on 18th November, 1998 for improving vigilance administration/The NTPC has acted contrary to the guidelines and have entered into post tender negotiations with persons other than lowest tender viz. BHEL. (iv) BHEL has

contacted NTPC and has thus breached paragraph 27 of the instruction to the bidders and its bid ought to have been rejected. We now deal with these submission son the merits of the case.

14. The first submission on merits relates to mala fides alleged against matter relating to construction and installation of Steam Generator for a Super Thermal Power Project involving huge investment the cost alone cannot be the sole criteria and various technical aspects of the project have also to be taken into consideration. In any case the bid of the CE Inc. was found to be nonresponsive. In such a matter it is difficult for the Court to examine the merits of the bids submitted by the bidder, they being highly technical in nature. The bids have to undergo commercial and technical evaluation as detailed in the Bidding Documents. The bid of CE Inc. was found to be nonresponsive. We have briefly mentioned the detailed procedure in paragraph 8 of the judgment. The Courts do not have expertise to go into technical and commercial evaluation of the bids and in view of the fact no mala fide apart from the one already dealt with (paragraph 14 of the judgment) have been alleged we see no reason to interfere with the decision taken by the NTPC in this regard. Hon''ble Sri P. Kumarmanglam, Cabinet Minister for Power. In this regard, Sri Shanti Bhusan invited our attention to paragraph 9 and ground No. A to the writ petition. In this paragraph it is mentioned that Hon''ble Sri Kumarmanglam announced in a public meeting held on 8th August, 1999 that Board of Directors will award the contract to BHEL on 9th August, 1999. According to him the only factory of BHEli which will gel benefit is the Trichy Plant which was in his constituency and decision was taken at his behest. In support of this allegation, he also referred to various newspapers reports which are annexed as Annexure7 to the writ petition. We do not find any merit in the submission for more than one reason. Firstly Hon''ble Sri P. Kumarmanglam is not made a party in the writ petition and no allegation of personal mala fide can be entertained without impleading him also a party. Secondly it is settled law that newspaper reports are not admissible. (Sed Nageshwar Rao v. State of A.P., AIR 1959 SC 1376 at 1382 ; Laxmi Raj Shetty v. Staif of Tamil Nadu, AIR 1988 SC 1274 and Qamnd Islam v. S.K. Kanta, AIR 1994 SC 1733). Thirdly, any statement made by Hon''ble Sri P. Kumarmanglam does mot vitiates the decision taken by NTPCi on the basis of the report of the experts on the evaluation of their bids. Some of the newspaper reports merely slates that Hon''ble Sri P.K. Kumarmanglam had refuted the charge that he has shown favours lo multinationals. Even if this statement is correct it does not show any pressure by him in NTPC in awarding the contract to BHEL.

15. Sri Shtinti Bhusan in support of his second submission urged that the bid made by CE Inc. was for Rs. 1304 crores while the bid of BHEL was for Rs. 1382 crores and the bid of CE Inc. being lower the NTPC should have awarded the contract to it. It is note worthy that the corral has been awarded to BHEL after evaluation by the experts of NTPC who had examined the technical aspect of the bids made by the parties. The technical and financial valuation of the bids had been clone by the experts at several stages and after taking into consideration

the deviation and variation of the price factor, the contract was awarded to BHEL.

16. The Clause 30.1 of the Bid Document regales to Employers right either 10 accept or reject any bid and it reads as follows:

"30.1. The Employer reserves the right to accept or reject any bid and to annul the bidding process and reject all bids at any time prior to award of contract, without thereby incurring any liability to the affected Bidder or Bidders or any obligation to inform the affected Bidder or Bidders of the grounds for the Employer''s action."

The aforesaid clause in the Bid Document clearly shows that the NTPC has the absolute right not lo accept the lowest tender. A similar clause came into consideration in PR. Quenim v. U.K. Tandel, AIR 1974 SC 651 and in paragraph 12 of the report it was held as under:

"A clause in tender for lease of distillery by which the Government reserves the right to select any tender or reject all tenders without assi0.iing any reason there for is not voltaic of Article 14. Thus, the Government is not bound to accept the tender of the person who offers the highest amount."

Similar view was taken in State of II. P. v. Vijay Bahadur Singh, AIR 1982 SC 234 ; Union of India v. Hindustan Development Corporation, AIR 1994 SC 998 and Tata Cellular v. Union of India, AIR 1996 SC 11.(paragraphs 85 and 112). The same principle was reiterated in a recent decision rendered in Raunaq International Ltd. v. I. V.R. Construction Ltd., 1999 (1) SCC 493, wherein in paragraph 16, it was observed as under:

"It is also necessary to remember that price may not always be the sole criterion Cora warding a contract. Often when an evaluation committee of experts is appointed lo evaluate offers, the expert committee''s special knowledge plays a decisive role in deciding which is the best offer price offered is only one of the criteria. The past record of the tenderers, the quality of the goods or services which are offered, assessing such quality on the basis of the past performance of the tenderer, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded. At times, a higher price for a much better quality of work can be legitimately paid in order to secure proper performance of the contract and good quality of work which is as much in public interest as a low price. The Court should not substitute its own decision for the decision of an expert evaluation committee. Therefore, the award of the contract to BHEL cannot be struck down merely on the ground that CE Inc. had made a bid for a lesser amount.

17. Sri Shanti Bhusan in support of his third submission has urged that after the old had been made by BHEL the NTPC entered into negotiations with it and such a course of action was illegal. In view of the direction issued by the Central Vigilance Commission on 18th November, 1998. In this direction, it is mentioned that in order to avoid corruption. Post tender negotiations are banned with

immediate effect except in the case of negotiations with LI (i.e. lowest tendered). The aforesaid direction purports lo have been issued under Section 8 (l)(h) of Central Vigilance Commission Ordinance, 1998 which reads as under:

"Exercise superintendence over the vigilance administration of the various Ministries of the Central Government or Corporation established by or under any Central Act, Government Companies, Societies and Local authorities owned or controlled by the Government In our opinion, Section 8 (l)(h) of the Ordinance does not confer the jurisdiction upon the Central Vigilance Commission to issue binding direction. It is merely a guidelines and docs not have any statutory force and in this case the bid of CE Inc. was rejected as being nonresponsive leaving BHEL as the only bidder. The award of contract to BHEL cannot be nullified on the ground of violation of the guidelines issued by the Central Vigilance Commission especially in view of the fact that neither any illegal financial gratification has been alleged not perhaps can be any when both companies are held by Central Government.

18. Sri Shanti Bhusan in support of his fourth submission has pointed out paragraphs 27.1 and 27.2 of the instruction to bidders (page 97 of the writ petition) which prohibits a bidder from contacting the employer on any matter relating to its bids from the time of the opening of bids to the time the contract is awarded. He also pointed out paragraph 6 of the writ petition where it is stated that BHEL have given some secret undertaking on 3051999 that they are willing to match the price of the lowest bidder. According to him, the bid the BHEL should have been rejected as it has contacted NTPC.

19. Sri J.C. Seth learned Counsel for the BHEL has submitted that alter the first bid was opened on 2nd December, 1998. NTPC sent letters dated 20th April, 1999 asking the parties to file revised bids complying with the NTPC documents. Thereafter, the BHEL made a fresh bid and also wrote a letter on 30th May, 1999 wherein an offer was made that in case any other bidder quotes a lower price, they should first be given an opportunity to match the price taking into account domestic price preference as provided in the tender for domestic bidders. A copy of this letter was produced before us by the contesting respondents and was also shown to the learned Counsel for the petitioners. This shows that BHEL did not breach paragraphs 27.1 and 27.2 of the Instructions to the bidders.

20. The petitioners nave assailed the award of contract to BHEL by means of the present writ petition under Article 226 of the Constitution. The award of the contract is purely administrative matter. The principles and the scope of enquiry in judicial review of an administrative action have been considered in Tata Cellular case (supra) and it has been observed that (he modern trend points to judicial restraint while reviewing administrative decision relating to contractual power of Government. Having given our careful consideration to the submissions made by the learned Counsel for the parties, we do not find that there has been any error in the decision making process relating to grant of contract by NTPC in favour of BHEL.

21. There is no merit in this petition, is hereby dismissed. The interim order dated 3010999 directing the parties to maintain status is vacated

