(2009) 09 MP CK 0007

In the Madhya Pradesh High Court

Case No : Writ Petition No. 7574 of 2009

Ami Art Creations and Offset Printers — APPELLANT

Vs

Board of Secondary Education and Another — RESPONDENT

Date of Decision : 16-09-2009

Acts Referred:
Constitution of India, 1950 — Article 12, 14, 226, 227

Citation : (2009) 4 MPJR 293

Hon'ble Judges : P.K. Jaiswal, J;Krishn Kumar Lahoti, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

P.K. Jaiswal, J.

In these two writ petitions under Article: 226/227 of the Constitution of India, the petitioners are praying for issuance of writ of certiorari to quash the notice inviting tender dated 7.7.2009 (Annexure-P/1) and also prayed for a writ of mandamus directing the respondents to issue work order to them in pursuance to the notice inviting tender dated 11.6.2009 (Annexure-P/2). Both these writ petitions can be dealt with by a common judgment since one and the same issue requires to be decided.

For the sake of convenience the brief history for disposal of these writ petitions are taken form W.P. No. 7574/2009.

A notice inviting tender dated 11.6.2009 was issued by respondent No. 2 for printing of answer books in (i) reel papers and (ii) sheet papers.

The petitioner purchased the tender form on 22.6.2009 and submitted his tender on 3.7.2009 for reel printing 24 pages and sheet printing 24, 32 and 40 pages respectively. As per terms of Notice Inviting Tender (for short "NIT"), the technical bid was opened on 3.7.2009. The petitioner qualified in the said technical bid. Thereafter commercial bid was opened on 9.7.2009 wherein the petitioner was found to be the lowest bidder (L1) for reel printing 24 pages and sheet printing 24,32 and 40 pages respectively. In spite of the petitioner being lowest, no work order was issued to him. Later on it came to the knowledge of the petitioner that the respondents instead of awarding that contract to the petitioner decided to issue fresh NIT with certain modifications/amendments of the earlier NIT and invited offer by issuing NIT on 7.7.2009. The said NIT dated 7.7.2009 was restricted only to "Security Printers" as against the "General Printers" in the earlier NIT. Further conditions were also stipulated in the second NIT to purchase and transport the papers with a further rider of enhancement of security deposit of Rs. 5 lacs and an additional condition in the tender form that person submitting tender should have carried out the said work in the last financial year for a value of Rs. five crores whereas in tender dated 11.6.2009 there was no such condition. The petitioners made a representation to the respondents challenging the incorporation of the above condition on the ground that such conditions are arbitrary, mala fide and violative of fundamental rights. Thereafter the petitioner filed the present writ petition challenging the said action of the respondents on the ground that the above conditions have been incorporated in NIT dated 7.7.2009 only to extend illegal favouritism to the blue eyed person i.e. special class of person engaged in the printing business at the cost of depriving the rights of the petitioner without cancelling the earlier tender process dated 3.7.2009. It is also contended that the impugned NIT dated 7.7.2009 is illegal, arbitrary and smacks mala fide as subsequent condition has been incorporated in the NIT in order to practice favouritism to certain class of person and just to oust the petitioner to submit his offer and participate in the tender proceedings. In Pursuance to the first NIT dated 11.6.2009, the petitioner submitted his offer which was lowest but no work order has been issued in his favour and without cancelling earlier tender process, the second NIT issued on 7.7.2009 is contrary to clause 8 (a) of M.P. Financial Code. It is also contended that because of these conditions, the other intended bidders were excluded.

The respondents filed their return, inter-alia, denying the allegations made by the petitioner and submitted that since long back they had been purchasing the papers from the Govt. Press or from the open market by inviting tender. The papers were then used for printing answer books and thereafter they were transported to various Divisional Offices of the respondents. Earlier the entire process was divided into three parts (a) to purchase papers (b) to get it printed and (c) to transport it to the Divisional Offices. The said process was earlier followed and the NIT was issued on 11.6.2009 for printing of examination copies/ answer sheets. After inviting NIT on 11.6.2009, they received letter from the Controller of Government Printing Press and Stationery of M.P., by which Govt. Printing Press refused to supply papers to the respondents. Looking to the urgency of the need, shortage of time and the huge number of printing of answering books, (1.40 crores), the respondent invited a fresh NIT for supply of printed answer books including the transportation to various district places in the entire State.

The NIT dated 7.7.2009 was published in National newspapers ''Hindustan Times'' and also two daily newspapers and the ''Rojgar Nirman Journal'' (Annexure-R/2) which were widely published and circulated and as many as nine intended bidders purchased NIT form. In the meantime in presence of the representatives of the petitioners on 9.7.2009 the earlier bid was cancelled. The said decision was recorded in the proceedings (Annexure-R/3), thereafter the petitioner appended their signatures in the proceedings dated 9.7.2009 by which earlier bid was cancelled. Fresh NIT dated 7.7.2009 will curtail the expenses and making of correspondence will be with only one person instead of three agencies and supply of answer books will be made to the lowest possible unit i.e. district in the entire State. It is also contended that previously, the respondents used to purchase papers and give it for printing purposes to the printers. As per NIT dated 11.6.2009 2% excess papers were also to be supplied to the bidder and there was every chance of printing answer books in excess from waste papers and then it could have been easily misused. In order to maintain confidentiality and secrecy in the sacred process of conducting the examination, the condition of security printers were added. In the printing of security papers, there cannot be any possibility of printing excess answer books and of being misused. The incorporation of the condition of the security printers is meant for maintaining confidentiality, security and sacredness of the examination and it has not been incorporated to help any particular bidder or a person of choice of the Board.

It is also contended that a large number of answer books of about 1.40 crores are to be printed. The total cost-would run to more than four crores of rupees. The time period is limited because urgency of conducting examination including supply of the answer books at the various district levels, therefore, condition of yearly turn over of Rs. Five crores was imposed so that the answer books could be supplied in time and only those bidders who have experience of doing the said work can only submit their offer for the said work. It is lastly contended that the total cost of the work is approximately 4-5 crores and looking to the risk involved the amount of security deposit has been enhanced to Rs. five lacs. The conditions imposed in NIT dated 7.7.2009 are most reasonable and have been incorporated with the object of finishing this colossal task in time.

In respect of vide circulation and publication of NIT dated 7.7.2009 it is contended that NIT was published in National and local newspapers. Total nine tender forms were sold by the respondents. Out of which four persons were found eligible under the conditions of fresh NIT dated 7.7.2009. On 9.7.2009 when the decision of cancellation of earlier offer was taken, the same was informed to all the bidders including the petitioner and petitioner had appended his signature and acknowledged the same. The earnest money of all the bidders were returned to them vide letter dated 13.7.2009. As the petitioners did not submit any bid in response to second NIT dated 7.7.2009, therefore, they have no right to challenge the second NIT.

It is submitted by learned counsel for the petitioner that the process for cancelling the earlier offer and inviting the second NIT, in corporating various conditions to exclude the petitioner and other similarly situated persons is mala fide, arbitrary and violative of Article 14 of the Constitution of India. It is submitted that the entire process for inviting second NIT may be cancelled and the respondents be directed to consider the earlier offer dated 3.7.2009 of the petitioner.

Shri T.S. Ruprah, learned senior counsel, appearing on behalf of the respondents, refuted the aforesaid allegations made by the petitioner and would submit that the condition imposed by the respondents are reasonable. He would further submit that the award of a contract, whether it is by a private party or by a public body or by a State, is essentially a commercial transaction. It can choose, its own method to arrive at a decision and it is free to impose any condition for bona fide reasons and even when some defect was found in the decision, the same cannot be challenged. The Court should act with great caution and should intervene it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, then the court should interfere. With above submissions he prayed for dismissal of the writ petitions.

We have heard learned counsel for the parties perused the original record of the case.

The law relating to award of contract by the State and Public Corporations was reviewed by the Apex Court in the case of Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when same defect is found in the decision-making process, the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere.

In the present case, first NIT was issued on 11.6.2009. The committee of the respondents authorities in presence of the petitioner and other representatives of the intended bidders intimated them the decision of cancellation of their offer and after stipulating certain conditions, second NIT was issued on 7.7.2009. This decision was conveyed to the petitioner and other intended bidders on 97.2009. In view of these conditions in NIT dated 7.7.2009 it is obvious that a person who had made the lowest offer in the tender did not acquire any right to have the offer concluded in his favour until the authorities had passed an order to that effect. It is not in dispute that the earlier offer was neither finalised nor final acceptance of a bid had been passed by the competent authority of respondents, the petitioner whose offer was lowest, acquired no vested right to have the tender concluded in his favour and the tenter could always be cancelled which has been done in the present case. What are the rights of an auction bidder has been considered in several decisions of the Apex Court. However, we will refer to only one decision viz Laxmikant and others Vs. Satyawan and others, . Para-4 of the said decision is relevant which reads as under:

From a bare reference to the aforesaid conditions, it is apparent and explicit that even if the public auction had been completed and the respondent was the highest bidder, no right had accrued to him till the confirmation letter had been issued to him. The conditions of the auction clearly conceived and contemplated that the acceptance of the highest bid by the Board of Trustees was a must and the Trust reserved the right to itself to reject the highest or any bid. This Court has examined the right of the highest bidder at public auctions in Trilochan Mishra V. Bhim Orissa, State of Orissa V. Harinarayan Jaiswal, Union of India V. Bhim Sen Walaiti Ram and State of U.P. vs. Vijay Bahadur Singh. It has been repeatedly pointed out that State or the authority which can be held to be State within the meaning of Article 12 of the Constitution is not bound to accept the highest tender or bid. The acceptance of the highest bid is subject to the conditions of holding the public auction and the right of the highest bidder has to be examined in context with the different conditions under which such auction has been held. In the present case no right had accrued to the respondent either on the basis of the statutory provision under Rule 4 (3) or under the conditions of the sale which had been notified before the public auction was held.

This being the settled legal preposition, the petitioner acquired no right to claim that the contract in pursuance to notice inviting tender dated 11.6.2009 be concluded in its favour.

In the case of M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, , it was held by the Apex Court that the terms and conditions in the tender are prescribed by the Government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is not for the courts to say whether the conditions prescribed in the tender under consideration were better than the ones prescribed in the earlier tender invitations.

In the present case, the respondents had invited open tender with prescribed eligibility criteria in general terms and conditions under tender documents providing there that the tenders are invited from firms having a turn over of Rs. five crores for the last year. The total cost of the contract is more than four crores. The respondents introduced the criteria of Rs. Five crores to enable the firm with real competence having financial stability and capacity to participate in the tender, particulary in view of the past experience. As a matter of policy the respondents took a conscious decision to deal with one firm having financial capacity to take up such a big work which is a relevant consideration while awarding such a big contract. Moreover, it was for the authority to set the terms of the tender. The Courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. While exercising the power of judicial review of the terms of the tender notice the Court cannot say that the terms of the tender notice would serve the purpose sought to be achieved better than the terms of tender notice under consideration and order change in them, unless it is of the opinion that the terms were either arbitrary or discriminatory or actuated by malice. The provision of the terms inviting tenders from firms having a turnover of more than five crores has not been shown to be either arbitrary or discriminatory or actuated by malice.

The Apex Court in the case of Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others, , held that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. The Courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. Considering the law laid down by the Court in the case of Directorate of Education and others (supra), we are of the considered view that the conditions of past experience of work of Rs. Five crores in the last financial year is just and proper and it cannot be said that the said condition is arbitrary or discriminatory or actuated by malice or the same has been incorporated just to exclude the petitioner or other similarly situated persons.

In the case of Puravankara Projects Ltd. Vs. Hotel Venus International and Others, , wherein it was held by the Apex Court that tender terms are contractual and it is the privilege of the Government which invites its tenders and courts do not have jurisdiction to judge as to how the tender terms should be framed.

In the case of Meerut Devlopment Authority V. Association of Management Studies and another, AIR 2009 SCW 4623, the Apex Court considered the rights of the tenderer participating in tender process and held in para-17 which reads as under:

17. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of

competitive bids offered by interested persons in response to notice inviting tenders in the transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above-stated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the Authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.

Here in the present case earlier NIT dated 11.6.2009 was cancelled by the respondents on the ground that the State Government had refused to supply the papers for printing of answer sheets and the entire basis for flowing tender was lost and, therefore, the authority cancelled the first NIT for printing of the answer sheets and invited fresh NIT for supply of answer script for paper printing and transportation to destination by imposing conditions that offer will be restricted only to "security printers" as against the "general printers" because in security printers there cannot be any possibility of printing answer books in excess and of being misused. Nor there will be any chance of pilferage of the answer books from the site of the printers and in order to maintain confidentiality and secrecy in the sacred process of conducting the examination, the said condition of security printers were added which cannot be said to be malicious and misuse of its statutory powers.

In the case in hand, the explanation submitted by the respondents is that only genuine and capable persons will participate in the process and for this purpose the condition so imposed in NIT dated 7.7.2009 appears to be just and reasonable. It cannot be said that the conditions by which the respondents restricted only to the "Security Printers" as against the "General Printers", enhanced the earnest money to Rs. Five lacs and the criteria of turnover of five crores in the last financial year are just to exclude the petitioners as we have said earlier that the volume of the work is more than four crores and for this purpose if such a condition is imposed, it cannot be said to be arbitrary or erroneous or the same has been imposed with a mala fide intention to exclude the petitioner and other similarly situated bidders.

On examining the facts and circumstances of the present case, we are of the view that none of the criteria has been satisfied justifying Court''s interference in grant of contract in favour of the petitioners. When the power of judicial review is invoked in the matters relating to tender or award of contract, certain special features have to be considered. A contract is a commercial transaction and evaluating tenders and awarding contract are essentially commercial functions. In such cases the principles of equity and natural justice stay at distance. If the decision relating to cancellation of earlier bid is bona fide and is in public interest, Courts will not exercise the power of judicial review and interfere even if it is accepted for the sake of argument that there is a procedural lacuna.

In such circumstances, no such public interest was involved which may warrant interference by this Court in exercise of its extraordinary jurisdiction under

Article 226 of the Constitution of India while undertaking judicial review of administrative decisions relating to award of contract. We are, therefore, clearly of the opinion that the respondents have not committed any legal error in stipulating the additional condition in NIT dated 7.7.2009 neither they committed any error in rejecting all the offers including the offer of the petitioner, received in pursuance to NIT dated 11.6.2009 and retuning the earnest money to the petitioner and other intended bidders vide letter dated 13.7.2009 nor we can hold that the process adopted or decision made by the respondents is so arbitrary or irrational that no responsible authority acting reasonably or in accordance with the relevant law could not have taken such a decision.

Both the writ petitions have no merit and are, accordingly dismissed, but without any order as to costs. The respondents are at liberty to proceed further in awarding the contract on the basis of the offer received in pursuance to NIT dated 7.7.2009.

In the result, both these writ petitions are dismissed.