
(2007) 08 MP CK 0036
In the Madhya Pradesh High Court

Anoop Kumar Tiwari

APPELLANT

Vs

Bharat Sanchar Nigam Limited and Others

RESPONDENT

Date of Decision : 23-08-2007

Acts Referred:

Constitution of India, 1950 — Article 226, 227

Citation : (2007) 4 MPHT 55

Hon'ble Judges : Shantanu Kemkar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Shantanu Kemkar, J.—By this petition filed under Article 226/227 of the Constitution of India the petitioner who claims to be a B Class enlisted contractor by the first respondent, Bharat Sanchar Nigam Ltd. (for short "BSNL") is seeking following reliefs:

(i) To issue a writ in the nature of certiorari letter dated 12-4-2007 and 27-4-2007 be quashed.

(ii) To issue a writ in the nature at mandamus the respondents be directed to produce the record pertaining to the NIT date 7-4-2007 and further be directed to official respondents to issued fresh NIT.

(iii) That this Hon"ble Court may kindly be pleased to hold that the condition of tender form, i.e., the solvency certificate shall not be older than the date of issue of NIT may kindly be struck down on the ground of it being unreasonable.

(iv) Any other relief/reliefs, order/orders, direction/directions which this Hon"ble Court may deems fit and proper may kindly be granted to the petitioner including the cost of petition.

2. On 7-3-2007 the BSNL issued a Notice Inviting Tender (for short "NIT") in respect of four number of works. The petitioner obtained the tender form, filled and submitted it along with the documents in the office of BSNL. The technical

bid of the tenders received by the BSNL were opened on 5-4-2007. The Technical Evaluation Committee (for short TEC) of the BSNL after scrutinizing all the tenders disqualified the petitioner's technical bid on the ground that along with the tender form the petitioner did not submit certificate relating to registration of the firm and also on the ground that the solvency certificate submitted by him is older than the date of issuance of NIT. Accordingly, the TEC recommended the opening of the financial bids of remaining two bidders, viz., fourth respondent and one M/s. Pushpendra Singh vide order dated 12-4-2007 (Annexure P-I). Feeling aggrieved, the petitioner has filed this petition.

3. The petitioner contends that his disqualification on the ground that he has not submitted the certificate relating to registration of firm and also on the ground that the solvency certificate submitted by him is older than the issuance of the NIT is illegal and arbitrary. He submits that in the absence of any condition in the NIT requiring that the solvency certificate must not be older than the date of issuance of NIT, the TEC of the BSNL could not have disqualified him on this ground. He submits that he having produced the solvency certificate which was valid up to 23-11-2007 the BSNL ought to have accepted the same. He further contends that the fifth respondent did not himself fill up the tender form and he himself did not participate at the time of opening of the technical bid as well as the financial bid and the sixth respondent who attended the opening of the bids on behalf of the fifth respondent was not possessing authorization letter as per the requirement of the NIT. In the circumstances, the acceptance of bid of the fifth respondent is illegal. He also submits that rejection of his tender and acceptance of the tender of the fifth respondent is arbitrary and rejection of the petitioner's bid being based upon unreasonable condition of furnishing solvency certificate to be not older than the date of NIT, the impugned order dated 12-4-2007 deserves to be quashed and the BSNL be directed to issue fresh NIT.

4. The BSNL (respondent Nos. 1 to 4) filed reply and stated that the petitioner has filed this petition by misrepresenting the facts. He has not filed the complete tender documents, in which the conditions and requirements are clearly mentioned. According to the BSNL the terms and conditions of the NIT clearly provide that solvency certificate should not be older than the date of issuance of the NIT. The petitioner was fully aware of this condition and still he had submitted the solvency certificate valid from 23-11-2006 to 23-11-2007, which is older than the date of issue of NIT. In the circumstances, it is stated that the BSNL has committed no error in rejecting the petitioner's technical bid by excluding him from the tender process. It is further stated that as per Clause 7 of the Annexure IV of the NIT the bidders were required to furnish various documents including the solvency certificate from the banker of tenderer which shall not be older than the date of issue of NIT as per Clause 7(vi). Thus, the petitioner having not fulfilled the eligibility criteria as per the requirement shown in Annexure IV Clause 7(vi) of the tender document his bid has rightly been rejected.

5. So far as the rejection of the petitioner's tender on the ground that he did not submit the registration certificate, learned Counsel for the BSNL has fairly stated that the petitioner is enlisted B Class Contractor with the BSNL and

the rejection on this count was improper. However, he supported the rejection of the petitioner's technical bid on the ground that the solvency certificate submitted by the petitioner was not in tune of the requirement under Clause 7 (vi) of the tender document.

6. As regards the petitioner's contention that the acceptance of the tender of the fifth respondent to be illegal, it is stated that on due evaluation of the documents including the authorization letters and on finding that the fifth respondent has fulfilled all the requirements of eligibility criteria his tender was rightly accepted.

7. Respondent Nos. 5, 6 and 7 in their reply stated that the fifth respondent himself filled up the tender form and put his own signatures on it. On the subsequent occasions in order to attend the tender process the fifth respondent in terms of the provisions of NIT authorized the sixth respondent to attend the process of opening of the bids. In support of their contention that such authorization is permissible, reliance has been placed on Clause 16.1 of Annexure IV of the instruction to bidders, a document issued along with the tender documents.

8. Heard, learned Counsel for the parties and perused the original record pertaining to the impugned NIT produced by the BSNL.

9. On going through the tender document, I find that instruction to bidders Annexure IV is annexure and is a part of the tender document. Clause 7 of Annexure IV deals with Documents Establishing Bidders' Eligibility and Qualifications. Clause 7(vi) provides that solvency certificate shall not be older than the date of issue of NIT. Clause 16.1 provides that the department shall open the bids in the presence of bidders or his authorised representatives who choose to attend. It further provides that the bidder's representative who are present shall sign the attendance register and that the bidder shall submit authority letter to this effect before the representatives are allowed to participate in the bid opening. In the tender document the form of letter of authorization for attending bid of opening is provided as Annexure XIV.

10. The petitioner has approached this Court by asserting that in the NIT dated 7-3-2007 no terms and conditions in regard to solvency certificate were incorporated. However, the entire tender document which was supplied to the petitioner and filled up by the petitioner has not been filed by the petitioner. On perusal of the tender document it is clear that the condition of furnishing solvency certificate not older than the date of issue of NIT is existing in the NIT as pre-requisite conditions to be eligible for participating in the tender process. In view of this condition, the petitioner's contention that no such condition is in the NIT cannot be accepted. Thus, in the light of this condition of producing solvency certificate not older than the date of issue of NIT, the petitioner's

solvency certificate issued much prior to the date of NIT has rightly been treated to be not in conformity of the condition of the NIT and the TEC of the BSNL has rightly rejected the petitioner's bid.

11. The record of the TEC of the BSNL in respect of the impugned NIT, shows that two letters of authorization dated 3-4-2007 and 30-4-2007 issued by fifth respondent authorizing the sixth respondent to attend the opening of the technical and financial bids respectively are available. The said authorization letters are in conformity of the format prescribed under Annexure XIV of the tender document. Thus, the opening of bids was attended on behalf of the fifth respondent by the sixth respondent who was validly authorised for the same.

12. As regards the contention of the petitioner that the condition of furnishing solvency certificate not older than the date of issue of the NIT to be unreasonable, I am of the view that this condition cannot be said to be unreasonable, arbitrary, irrational or irrelevant so as to strike down the same. The petitioner could not point out as to how and in what manner the condition is unreasonable. In case of *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, , the Supreme Court has held that the award of contract whether it is by way of private party or by a public body or the State is essentially a commercial transaction. In arriving at a decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that it is not open to judicial scrutiny. In case of *Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others*, , the Supreme Court has observed that the terms of invitation of tenders are not open to judicial scrutiny, the same being in realm of contract. The Courts can scrutinize the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favouritism. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The Courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other term in the tender would have been fair, wiser or logical.

13. Having regard to the aforesaid, I find no illegality in the order of BSNL rejecting the petitioner's bid and allowing the bid of the fifth respondent.

14. The petitioner knowing fully well the conditions of the NIT, filed this petition stating that in the NIT no terms of solvency has been mentioned. Thus the petitioner has not approached this Court with clean hand.

15. Accordingly, the petition is dismissed with cost of Rs. 5000/-.