(2009) 02 DEL CK 0072

In the Delhi High Court

Case No : Writ Petition (Civil) No. 7865 of 2008

Arraycom (India) Ltd. APPELLANT

Vs

Union of India (UOI), All India Radio and BECIL RESPONDENT

Date of Decision : 02-02-2009

Acts Referred:

Citation : (2009) 157 DLT 659 : (2010) 8 RCR(Civil) 1412 : (2010) 29 VST 546

Hon'ble Judges : Siddharth Mridul, J;Madan B. Lokur, J

Bench : Division Bench

Advocate : Manoj Goel, Shuvodeep Roy and Wajeeh Shafiq, for the Appellant; P.P. Malhotra, ASG and Gaurav Liberhan, for Resp. 1, Raju Ramachandran V.K. Rao, Saket Sikri and Bhawna Gupta for Resp. 2 and Neeraj Malhotra, Harish Garg and Shohit Chaudhary for Resp. 3, for the Respondent

Judgement

This Judgment has been overruled by : BECIL Vs. Arraycom India Ltd. and Others, (2009) 13 JT 331 : (2010) 157 PLR 398 : (2010) 1 SCC 139 : (2009) 15 SCR 277 : (2010) 29 VST 555

Madan B. Lokur, J.

The two questions posed for an answer relate to the interpretation of the price bid made by the Petitioner (Arraycom) and the extent of judicial review in the event of a misinterpretation of its bid. We agree with Arraycom that its bid placed a ceiling on the price quoted and that a contrary interpretation by Prasar Bharati could invite judicial review.

2. Respondent No. 2 (Prasar Bharati) issued a Notice Inviting Tender (NIT) on 20th October, 2006 for the supply of two transmitters of 1000 KW (or 1 MW) each. The bidding was a two-stage process involving a technical bid and a financial bid. There is no dispute that the Petitioner (Arraycom) and Respondent No. 3 (BECIL) were both technically qualified.

3. In respect of the financial bid which was opened on 30th July, 2007, the quotation given by Arraycom was for a sum of Rs. 51.57 crores and it was stated

that:

1. Prices in INR including Custom Duty, Packaging, Forwarding, Freight and Insurance.

2. CST (Central Sales Tax) is inclusive in the above prices. AIR will have to give concessional forms C/D.

3. Billing will be done from our Noida office.

4. Validity of offer upto 120 days from the date of opening (i.e. up to 16.06.2007).

4. The quotation given by BECIL was for Rs. 47.35 crores and it was stated that:

1. Prices in INR. FOR destination, including Freight, Insurance and Custom Duty.

2. Sales Tax extra @ 4% against form C/D.

3. Sales Tax extra @ 12.5% in case form C/D is not provided.

4. Validity of offer upto 31.05.2007.

5. For the purposes of this decision, we are only concerned with the sales tax element in the price bid. We may note, as a matter of fact, that there is no dispute that Form C under the Central Sales Tax Act, 1956 is not relevant to the facts of the case and Form D under the Central Sales Tax Act, 1956 was abolished with effect from 1st April, 2007. There is also no dispute that the bids of Arraycom and BECIL were valid and subsisting at all material times.

6. Since the bid of Arraycom was inclusive of sales tax, while that of BECIL was not, Prasar Bharati reduced the bid of Arraycom by the amount of sales tax included therein. This was for bringing about parity in the bids so that they could be compared with each other. It appears that the sales tax element was 4% in the bid of Arraycom (there does not seem to be any doubt about this) and so this amount was reduced from its bid. Consequently, the basic price quoted by Arraycom came to Rs. 49.58 crores, which is more than the basic price quoted by BECIL that is Rs. 47.35 crores. So far so good.

7. Based on the above calculations, Prasar Bharati gave to us the following chart of quoted prices:

Arraycom BECIL

Basic price (in Rs.) 49,58,65,385 47,37,48,792

With 4% sales tax (in Rs.) 51,57,00,000 49, 24,90,743

With 12.5% sales tax (in Rs. 55,78,00,000 53,66,00,000

8. It is clear from the calculations given that BECIL''s bid was lower than the bid given by Arraycom. Therefore, according to Prasar Bharati the contract was liable to be awarded and was, in fact, awarded to BECIL.

9. According to Arraycom, the problem with the calculation worked out by Prasar Bharati lies in the third row in the above chart. According to Arraycom (and we agree) there was no necessity of calculating its quoted price with 12.5% tax.

10. Two questions immediately arise in this context. Firstly, how exactly is the sales tax liability to be determined in the two bids? The bid of Arraycom clearly mentioned: CST (Central Sales Tax) is inclusive in the above prices. AIR will have to give concessional forms C/D. In other words, the quoted price of Arraycom was Rs. 51.57 crores inclusive of sales tax. According to learned Counsel for Prasar Bharati the second sentence in the above text meant that the bid was inclusive of sales tax provided Arraycom was given the concessional C/D forms. This raises the second question: what if Arraycom was not given the concessional C/D forms? Learned Counsel for Arraycom submitted that if it were not given the C/D forms, even then Arraycom would have to supply the goods at Rs. 51.57 crores. In support of this submission, reliance was placed upon two clauses of the bid documents, which we will shortly deal with. Moreover, it was contended that if there was any doubt, surely Prasar Bharati could have obtained a clarification from Arraycom.

11. As far as the bid of BECIL is concerned, the sales tax liability was mentioned in the following words:

Sales Tax extra @ 4% against form C/D.

Sales Tax extra @ 12.5% in case form C/D is not provided.

12. Undoubtedly, as far as BECIL is concerned, if it were provided Forms C/D, then it would load 4% to the basic price. Admittedly, since Form C is not relevant to the facts of the case and Form D was abolished with effect from 1st April, 2007 the basic price of BECIL would necessarily have to be loaded with 12.5% sales tax making its bid Rs. 53.66 crores. This is as against the bid of Arraycom of Rs. 51.57 crores. Looked at from this point of view, clearly the quoted price of Arraycom is lower than the quoted price of BECIL, making its bid lower by Rs. 2 crores and, therefore, entitling Arraycom to the award of the contract.

13. Is the interpretation given to the bid of Arraycom by its learned Counsel correct or not - meaning thereby that would it be correct to say that under all circumstances, Arraycom''s bid could not be more than the quoted price of Rs. 51.57 crores'' The answer to this is in the affirmative.

14. Clause 4.2 of the NIT states as follows:

The statutory charges which will not be borne by the bidder must be indicated failing which this Organization will not be liable for payment of any such charges.

It is pretty clear from the words used that the bidder must specify what statutory charges it will not bear. In the absence of any specification, the Organization (Prasar Bharati) would not be liable to bear the charges. By default, therefore, the bidder would be liable to bear the charges. Consequently, if Arraycom has failed to specify what would happen if the concessional forms C/D are not supplied, the default clause makes it clear that Arraycom would have to bear the burden of the unspecified statutory charges. In our opinion, there is no ambiguity in this at all.

15. Assuming there is some doubt in the interpretation of Clause 4.2 of the NIT, in view if the words used by Arraycom, then Prasar Bharati could certainly have asked it to submit a clarification. Prasar Bharati failed to do this and so it must live with its silence and bear the consequences of it.

16. Of course, it was submitted before us that Prasar Bharati had no doubt about the interpretation of the bid given by Arraycom and so there was no need to obtain any clarification. If that be so, then our simple answer is this: Prasar Bharati did not correctly appreciate the bid of Arraycom in its proper perspective and also failed to correctly appreciate the import of Clause 4.2 of the NIT. To put it another way, Prasar Bharati completely misunderstood the bid of Arraycom and this erroneous interpretation resulted in Prasar Bharati having awarded the contract to BECIL for an amount of more than Rs. 2 crores over and above the bid of Arraycom. This is totally unacceptable and demonstrates a gross error in the decision making process.

17. Learned Counsel for Arraycom placed reliance on Clause 9.II of Form DGSandD?230 being Instructions to Tenderers Quoting Against Tender Enquiries Issued by DGSandD and its Regional Offices. In paragraph 8 of the writ petition, it is stated by Arraycom that DGSandD-229 (Booklet) is ''expressly applied in the present NIT''. In this context, our attention was drawn to Clause 13 of the NIT containing important instructions to the effect that,

The contract will also be governed by the conditions set out in DGSandD 68 (Revised) relating to conditions applicable to the contract placed by the Central Purchase organization of the Govt. of India and DGSandD-229 relating to special conditions for imported stores, as amended up to date in so far as they are applicable and not inconsistent with the conditions mentioned in the tender document.

18. A bare reading of this does not explain how Clause 9.II of Form DGSandD?230 being Instructions to Tenderers Quoting Against Tender Enquiries Issued by DGSandD and its Regional Offices is ''expressly applicable'' to the NIT. Nor did learned Counsel for Arraycom explain to us how this would be applicable to the NIT that we are dealing with. We, therefore, decline to entertain the submission based on Clause 9.II of Form DGSandD?230.

19. The alternative submission of learned Counsel for Arraycom was that if the bid of his client has to be read and understood in the manner suggested by learned Counsel for Prasar Bharati, then and only then would the question of the amount of sales tax to be added to the bid of Arraycom arise. It may be recalled that learned Counsel for Prasar Bharati suggested that the sales tax element in the bid of Arraycom, which reads as CST (Central Sales Tax) is inclusive in the

above prices. AIR will have to give concessional forms C/D ought to be read as CST (Central Sales Tax) is inclusive in the above prices [provided] AIR gives concessional forms C/D. The contention of learned Counsel for Prasar Bharati was that since Form C was not relevant and Form D had been abolished, concessional forms could not be given to Arraycom. In their absence, therefore, the maximum rate of sales tax would be applicable (that is 12.5%) and this would have to be loaded to the price bid of Arraycom.

20. We are unable to appreciate this sequitor. First of all, we have already held that Clause 4.2 of the NIT would be operative in a situation such as the present and so, the ''additional'' burden of sales tax would have to be borne by Arraycom. Secondly, the bid of Arraycom was an inclusive bid, meaning thereby that the sales tax component was included in the price bid. There is, therefore, no question of loading the bid of Arraycom with any further sales tax - and even if there is, that burden would fall on Arraycom as per its bid read with Clause 4.2 of the NIT and not on Prasar Bharati. Every which way the issue is looked at, it is crystal clear that the bid of Arraycom cannot be read to mean anything above the figure of Rs. 51.57 crores, whatever be the rate of sales tax - 12.5% or even more.

21. Contrast this with the bid of BECIL. It is explicit in its choice of words. If Form C/D are provided then 4% sales tax would have to be loaded to the basic price quoted by it. If Forms C/D are not available, then 12.5% sales tax would have to be loaded to its basic quoted price. Admittedly, Forms C and D are not applicable to the facts of the case. Hence, the basic price quoted by BECIL would have to be loaded by 12.5% sales tax. If this is done, then the bid of BECIL is more than Rs. 2 crores higher than the bid of Arraycom.

22. Can the incorrect interpretation of Arraycom''s bid by Prasar Bharati invite judicial review'' Could it not be said that the Court has virtually sat in appeal over the interpretation given to the bid by Prasar Bharati'' In our opinion, we would not be exceeding the power of judicial review if we were to correct the wrong interpretation given by Prasar Bharati to the bid of Arraycom. In coming to this conclusion, we may refer to paragraph 83 of the decision of the Supreme Court in Tata Cellular Vs. Union of India, . It is stated therein as follows:

A modern comprehensive statement about judicial review by Lord Denning is very apposite; it is perhaps worthwhile noting that he stresses the supervisory nature of the jurisdiction:

Parliament often entrusts the decision of a matter to a specified person or body, without providing for any appeal. It may be a judicial decision, or a quasi-judicial decision, or an administrative decision. Sometimes Parliament says its decision is to be final. At other times it says nothing about it. In all these cases the courts will not themselves take the place of the body to whom Parliament has entrusted the decision. The courts will not themselves embark on a rehearing of the matter. See Healey v. Minister of Health (1954) 3 All ER 449. But nevertheless, the courts will, if called upon, act in a supervisory capacity. They will see that the decision-making body acts fairly. See H.K. (an infant) Re: (1967) 1 All ER 226, and R. v. Gaming Board for Great Britain, ex p Benaim and Khaida (1970) 2 All ER 528. The courts will ensure that the body acts in accordance with the law. If a question arises on the interpretation of words, the courts will decide it by declaring what is the correct interpretation. See Punton v. Ministry of Pensions and National Insurance (1963) 1 All ER 275. And if the decision-making body has gone wrong in its interpretation they can set its order aside. See Ashbridge Investments Ltd. v. Minister of Housing and Local Government (1965) 3 All ER 371. (I know of some expressions to the contrary but they are not correct). If the decision- making body is influenced by considerations which ought not to influence it; or fails to take into account matters which it ought to take into account, the court will interfere. See Padfield v. Minister of Agriculture, Fisheries and Food 1968 AC 997. If the decision-making body comes to its decision on no evidence or comes to an unreasonable finding ''so unreasonable that a reasonable person would not have come to it'' then again the courts will interfere. See Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation (1947) 2 All ER 680. If the decision-making body goes outside its powers or misconstrues the extent of its powers, then, too the courts can interfere. See Anisminic Ltd. v. Foreign Compensation Commission (1969) 1 All ER 208. And, of course, if the body acts in bad faith or for an ulterior object, which is not authorised by law, its decision will be set aside. See Sydney Municipal Council v. Campbell 1924 All ER 930. In exercising these powers, the courts will take into account any reasons which the body may give for its decisions. If it gives no reasons - in a case when it may reasonably be expected to do so, the courts may infer that it has no good reason for reaching its conclusion, and act accordingly. See Padfield case (as AC pp. - 1007, 1061).

23. In our opinion, Prasar Bharati acted completely arbitrarily in loading the bid of Arraycom with an amount that was not at all justified. The result of the loading is that the bid of Arraycom got unnaturally inflated and became higher than the bid of BECIL. This was clearly wrong on the part of Prasar Bharati and we can correct that error which has a serious and material consequence. The award of the contract to BECIL, on this basis, was clearly erroneous and it deserves to be set aside.

24. On 7th November, 2008 it was ordered that if any action is taken pursuant to the award of the tender, it will be subject to further orders of this Court. On 19th December, 2008 it was ordered that status quo obtaining as on date would be maintained.

25. Since we have concluded that the bid of Arraycom was lower than the bid of BECIL, we set aside the award of the contract in favour of BECIL and allow the writ petition. Since there is no other bidder in the fray, we direct Prasar Bharati to award the contract to the lowest bidder, that is, Arraycom at its bid price of Rs. 51.57 crores.

26. Arraycom will be entitled to costs of Rs. 50,000/- payable by Prasar Bharati. We direct Prasar Bharati to deposit the amount by means of a cheque drawn in favour of the registrar General of this Court within four weeks from today.

27. List for compliance on 6th March, 2009.