

(2008) 08 BOM CK 0171

In the Bombay High Court

Case No : Writ Petition (Lodging) No. 1601 of 2008

Ashok Sharma and Associates Pvt. Ltd. and Another	APPELLANT
Vs	
Sr. Divisional Commercial Manager and Others	RESPONDENT

Date of Decision : 14-08-2008

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2009) 1 BomCR 603

Hon'ble Judges : Sayed A.A., J;Khandeparkar R.M.S., J

Bench : Division Bench

Advocate : Aspi Chinoy and Suneep Sen, instructed by D.H. Law Associates, for the Appellant; Suresh Kumar, for respondents 2, for the Respondent

Final Decision : Dismissed

Judgement

Khandeparkar R.M.S., J.—Heard. Rule. Rule made returnable forthwith. The Advocate for the respondents waives service.

2. The petitioners by the present petition seek to quash and set aside the decision of the respondent No. 1 rejecting the offer of the petitioners in response to the tender for sole/bulk rights for commercial publicity over the suburban section of Mumbai Division, as also the decision to forfeit the earnest money deposited by the petitioners and for further direction to accept the licence fees from the petitioners only in respect of the area which is actually available for marketing on pro rata basis with reference to the entire area which is the subject-matter of the tender. 3. In or about November, 2007 the respondent No. 1 invited bids for awarding sole/bulk rights for commercial publicity over the entire suburban section of Mumbai Division between Churchgate and Dahanu Road Stations. At that time various advertising sites at various stations were already the subject-matter of different contracts, some of which were to expire in 2012. However, such contracts are not subject to renewals and the sites occupied by those contractors would be handed over to the successful bidder as and when the respective contracts would expire. The tender documents required the bid to

include the rent for the entire area in the sector, to be quoted on yearly basis, for the first year with annual increments as specified in the tender form. The petitioners offered their bid for the sole/bulk rights for the year which was to commence 120 days after the letter of acceptance and the contract was to remain in force for a period of five years with the increase of rent at the agreed percentage. The petitioners' bid was accepted by the respondents under the letter dated 31-3-2008 and the petitioners were called upon to pay six months' licence fees in advance after adjusting the earnest money deposited with the respondents. Under the letter dated 10-4-2008 the petitioners acknowledged the receipt of the letter dated 31-3-2008 but expressed their inability to enter into such contract on the ground that the letter was silent regarding the details of the space availability as on the date and that would be available during the current year. The petitioners also requested the respondents to provide information regarding the space availability as per the format which was given by the petitioner further informing that in the absence of such data, it would be difficult for the petitioners to go ahead with the project since there were too many contractors with simultaneous activities of commercial publicity at various sites over the entire suburban section covered in the said contract and that the contract involved huge investment for which advance data of availability of space was must for allocation of funds and marketing. In the letter it was specifically stated that:

we hereby place our inability to accept the same as an offer letter in terms of Clause 7.4 of the terms and conditions of the tender conditions of the said contract.

4. By letter dated 10-4-2008 the respondent No. 1 required the petitioners to pay six months' licence fees in advance after adjusting the earnest money within 15 days and thereafter to continue to pay the subsequent three monthly installments, further informing that E.M.D. in the form of TDR submitted by the petitioners would be adjusted against the annual license fee for the first six months and therefore the balance amount should be paid within 15 days and that the period of 15 days would expire on 15-4-2008.

5. On 15-4-2008 the respondent again reminded the petitioners about the acceptance of their bid and in particular the para 37 of the tender terms and conditions which stipulate that the date of commencement of the contract would be 120 days from the date of issuance of the allotment letter and in the case of the petitioners it was issued on 31 -3-2008. It was also brought to the notice of the petitioners that the amount quoted by the tenderer would be applicable for the total advertising area assessed by the railway or part thereof as has been reflected in para 7.9 of the terms and conditions of the tender.

6. On 30-4-2008 the respondent again addressed a letter to the petitioners requiring them to make the payment at the earliest as per the Clause 7.4 of the tender documents, further reiterating that the tender documents do not mention in any clause that the successful tenderer is liable to pay the license fee for the

limited area and space immediately available to them, besides reminding the petitioners that already 2,29,640.05 sq.ft. of the advertising area was being immediately available to them.

7. On 3-5-2008 the petitioners addressed a letter to the respondents calling upon the latter to re-examine the matter to enable the petitioners to make the payment of licence fee on the basis of the actual space available to the petitioners and not on the basis of the entire area. In response, the respondents by letter dated 12-5-2008 reminded the petitioners that as per Clause 4.9 of the tender conditions, the amount quoted by the tenderer would be applicable for the total advertising area assessed by the railways or any part thereof and the Clause 7.3 requires the successful bidder to pay the licence fee on that basis and the Clause 7.4 requires the payment of six months' licence fee in advance. Further that Clause 7.11 would be attracted only after the agreement is entered into between the parties. It was also reiterated that the payment being received from the existing contracts was duly addressed to and taken care of while fixing the reserve price under the tender and was actually reduced accordingly and in that regard attention was drawn to Clause 4.2 of the tender conditions. It was also stated that the contract is a comprehensive package offering to the tenderer an exclusive right and the opportunity to exploit the unharnessed huge potential of advertising earning from new sites in addition to already available existing sites, but only on pro rata extra amount as detailed in the second para of Clause 4.9.

8. The petitioners, however, by their letter dated 21-5-2008 sought to contend that the tender documents did not contain anywhere anything about the contentions sought to be raised by the respondents. The respondents, however, under the letter dated 26-5-2008 informed the petitioners that their tender, opened on 20-12-2007, was rejected due to noncompliance of Clause 7.4 of the tender terms and conditions and the earnest money deposited was liable to be forfeited as per Clause 5.6 of tender terms.

9. Under the letter dated 2-6-2008 the petitioners sought to reiterate their contentions and again requested the respondents to consider the same and withdraw the letter dated 26-5-2008. As there was no response from the respondents to the said letter, the petitioners served Advocate's notice dated 10-6-2008 upon the respondents requiring the respondents to withdraw the order of rejection of offer of the petitioners within 72 hours of the receipt of the notice. As despite the said notice, there was no response from the respondents, the petitioners have filed the present petition.

10. According to the petitioners, the term of the contract is for a period of 5 years from the date of commencement of the contract and such date has to be on expiry of 120 days from the date of issuance of allotment letter or from the date of display, whichever is earlier. Admittedly, as per the terms of the contract, the publicity rights of the exact sites of the existing contract would pass on to the contractor for display of commercial advertisement only after the expiry of the

subsisting tenure of the contracts in relation to the already occupied sites. However, by their illegal demand, the respondents are in fact seeking to gain illegally the profit by collecting rent from the petitioners in respect of the sites for which it has already been receiving the rents from the existing contractors and are seeking to collect charges from the petitioners in respect of the same area without making it available to the petitioners. It is the case of the petitioners that out of the total advertising area of 6,04,134.50 sq.mtrs. assessed by the respondents, the marketing rights for an area to the extent of 3,74,494 have already been awarded to various contractors and the said area would not be available for marketing by the petitioners and yet the respondents are seeking to demand money even for such an area. The respondents being a public body are duty bound to act in a fair and just manner and not to demand money in respect of such area which would not be made available to the petitioners as the same would virtually result in unjustly enriching the respondents by resorting to illegal profitcing in illegal manner. The action on the part of the respondents in rejecting the offer of the petitioners is in arbitrary exercise of powers by the respondents and therefore the same needs to be quashed and set aside.

11. On the other hand, it is the case of the respondents that the acceptance letter dated 31-3-2008 by the respondents was in terms of the tender bid given by the petitioners. It is their case that the arbitration clause in the agreement can be invoked by the petitioners and since alternative efficacious remedy being available, besides, considering the law laid down by the Apex Court in *State of Bihar and Others Vs. Jain Plastics and Chemicals Ltd.*, , and in the case of *State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd.*, , the petitioners are not entitled to seek any relief in writ jurisdiction as the matter involves disputed questions of facts. The word "pro rata" used in Clause 4.11 is required to be read with Clause 4.9 of the tender documents and if so read, it would be clear that the same is used in respect of extra sites and over and above the assessed area and in case the contractor requests for such extra area than the assessed area as provided in Section V of the tender documents, than the rate of extra area would be calculated on pro rata basis. The tender documents nowhere discloses holding of any pre-bid meeting and the allegations regarding pre-bid meeting are totally false. It is also their case that the calculations showing fixation of the reserve price would reveal that the prospective revenue which would have been earned from the existing contractors was subtracted while fixing the reserve price. It is also stated that this fact was reiterated by the respondents in their letter dated 12-5-2008. It has also been pointed out in the affidavit in reply that though the reserve price was Rs. 52.21 crores, the unconditional bid offer of the petitioners was Rs. 55.54 crores.

12. The learned Senior Counsel appearing for the petitioners, drawing our attention to Clause 7.11 of the tender conditions, submitted that it invariably discloses that any dispute regarding the total area or the data of availability of sites would be settled as per the pro rata rate. This, according to the Senior Counsel, reveal that the respondents were fully aware that major portion of the

area offered under the tender was not available for immediate utilisation by the tenderer and therefore though the rent amount was required to be quoted on the total area basis, the actual charges payable to the respondents would be with reference to the actual area made available to such tenderer and the said charges would go on increasing on pro rata basis as and when additional area will be available to the tenderer. According to the learned Senior Counsel, it is absurd to presume that the tenderer was required to pay the rent amount for the entire area when all the area was not available. Besides, such rent amount quoted on the basis of the whole area would go on increasing every year in fixed percentage. If the contention of the respondents is accepted, it would result in compelling the tenderer to pay the rent amount for the area which is already occupied by others and for which already rent is collected by the respondents. The respondents being a public body, it cannot indulge in profiteering business in illegal manner and considering the same, the sensible interpretation of the provisions of the conditions in the tender document would be that a tenderer would be liable to pay the charges in proportion to the area which is made available to him and not in relation to the area which is not made available to him. As regards the availability of the alternative remedy in the form of arbitration, it is the contention of the Senior Counsel that the said term would come into play only after execution of the agreement and not before that and in any case, any demand without any authority can always be challenged in writ petition and in that connection reliance is placed in the decision in the matter of ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, .

13. The learned Advocate appearing for the respondents, on the other hand, placing reliance in the decisions in the matters of Maharshi Dayanand University and Another Vs. Anand Coop. L/C Society Ltd. and Another, , and Bridge & Roof Company (India) Ltd. {supra} submitted that the tender documents clearly disclose the actual area which would be immediately available as also the remaining area which would be available from time to time to the tenderer and with the full knowledge about the same, the tenderers were required to disclose the actual rent payable by them. The rent so quoted would obviously apply to the entire area as well as in part thereof in view of the fact that the some part of the area is already under occupation of the earlier contractors and it would be made available to the successful bidder as and when the earlier contract expires. Drawing attention to the various clauses including the Clause No. 4 of the tender documents, as well as Clause 7 and Section V thereof, the learned Advocate for the respondents submitted that the petitioners knowing well the terms and conditions of the tender documents had submitted their bid and at no point of time prior to submission of the bid any such doubt was expressed as is sought to be contended now in the petition. The petitioners cannot submit the bid with attached conditions. The same was required to be offered unconditionally in accordance with the terms and conditions specified in the tender documents. Once the tenderer was fully aware that the entire area would not be available in

the first year itself and knowing well the same, he had offered the bid, it is too late for the petitioners to contend that the terms are either harsh or that there is any illegality on the part of the respondents in demanding the annual rent in accordance with the bid amount specified by the petitioners in the tender documents. The contentions which are sought to be raised on behalf of the petitioners are clearly after-thought.

14. Perusal of the tender documents discloses that under Clause 4, it had elaborately described the scope of the work. The Clause 4 states that:

It is clarified that the word "Bulk Rights" has been incorporated to avoid any litigation. After award of even bulk right contract, Railways will not enter into any new contract with any other party. However, the existing contracts will continue till its scheduled date of expiry, after which these sites will automatically be transferred to the successful bidder.

The very first part of Clause 4, therefore, clearly informs the tenderer that though the tender is for bulk rights for the entire area, there are already existing contracts in relation to some parts of the said area and the sites already occupied under those contracts would be made available to the successful bidder as and when the same would fall vacant consequent to the expiry of the contractual period in relation to those sites with the existing contractors. It is further pertinent to note that the specific area which is already under contract as well as the area which is open and immediately available for utilisation by the successful bidder has been explained in detail in Section V. The Section V pertains to the area assessed by the railway administration for advertisement purpose under the present tender. It gives details regarding the area which is actually available and the area which is already occupied. It further states that the tenderers are expected to visit the area and familiarise themselves with the earning capacity of the advertisements before submitting their tenders.

15. The Clause 4.2 of the tender conditions provides that the publicity rights of the exact sites of the existing contracts would pass on to the contractor for display of commercial advertisement only after the expiry of the existing term of the contract and the contractor will have no locus standi on the advertisement displayed by existing contractor till the expiry of their contract and further the list of those pre-existing contracts with the expiry date of each contract has been enumerated in section V.

16. The Clause 4.9 provides that:

The amount quoted by the tenderer will be applicable for total advertising area assessed by the railway or part thereof. The total assessed area is indicated in Section V of the tender documents. The contractor will be allotted extra sites over and above the assessed area on his request, only after getting the technical and aesthetical feasibility of the sites from the Railway Administration. However, for this purpose, the contractor will have to pay to Railway Pro Rata extra amount that will be calculated for the relevant year and subsequent years based

on total amount quoted for first year and worked out for the subsequent years as per formula given in Packet "B" of the Tender Documents.

This Clause, therefore, clearly specifies that the amount which was required to be quoted for the first year should relate to the entire area though the available area would be in accordance with Section V of the tender documents. It also provides that in case the contractor requests for additional and extra area, it could be made available to him on the same terms and conditions but on payment of extra amount on pro rata basis.

17. The Clause 5 refers to the subject of earnest money. The Clause 5.1 states that the tenderer shall be required to deposit a sum of Rs. 1,04,42,000/- as earnest money deposit i.e. 2% of the reserve price along with the tender form. The earnest money of the unsuccessful tenderers would be refunded. This clause, therefore, clearly discloses that the earnest money which were required to be deposited were at 2% of the reserve price. Based on the reserve price fixed by the respondents, the tenderers were required to deposit Rs. 1,04,42,000/ -. Undoubtedly and undisputedly the reserve price was fixed for the entire area after taking into consideration the non-available area for the period specified in section V. It is, therefore, apparent that the reserve price which related to the annual rental amount referred to the entire area, including the area which is not available for immediate utilisation by the successful bidder. At the same time, it has been clearly clarified by the respondents that while fixing such reserve price, the income which is derived from the already occupied area has been taken into consideration. In other words, the contention that there is illegal profiteering business by the respondents by expecting the tenderer to pay even for the area already occupied by someone else and not made available to the tenderer is totally devoid of substance. In this regard, it is to be noted that the respondents in their affidavit in reply have clearly stated that while fixing the reserve price of Rs. 52.21 crores for the first year, the respondents had taken into account the revenue which would be earned from the existing piece-meal contracts. It has been further clarified that the reserve price was arrived on the following basis:

Further, the Exhibit-A reveals the calculations showing the fixation of reserve price and the revenue accrued by prospective earnings of the existing piece-meal contracts. The said Exhibit-A reads thus:

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18. The Clause 5.6 provides that the earnest money of the successful tenderer will be liable to be forfeited if he does not fulfill any of the following conditions:

(a) Furnishing of security deposit equivalent to 10% of the license fee for the relevant year by the tenderer, in the form of FDR/ Irrevocable Bank Guarantee issued by a Scheduled Commercial Bank for a period of two years in favour of Sr. Divisional Finance Manager, Western Railway, Mumbai Central.

(b) Execution of the agreement within 1 month of the receipt of award letter.

(c) Payment of last six months license fees in advance.

The above clauses clearly informs the tenderer that he has to furnish 10% of the license fee as the security. Further, he is required to pay six months" license fee in advance. The clause nowhere speaks about any pro rata reduction on the basis of non-availability of any area of the total area for which the tenderer was required to disclose the annual rental. This obviously discloses that while calculating the annual rental which was required to be offered by the tenderer for the entire area, the tenderer ought to have taken into consideration the actual area which would be available from time to time during the contractual period of five years, and all the necessary information in that regard was available in Section V of the tender documents and based on such calculation was required to make the offer in relation to the first year rental amount.

19. The Clause 7 of the tender documents speaks of the period of contract and the payment details. The Clause 7.1 provides that the contract will be for a period of five years. The Clause 7.2 provides that the date of commencement of the contract will be 120 days from the date of issue of the allotment letter or from the date of first display whichever is earlier. The Clause 7.3 provides that the reserve price for the first year is Rs. 52,21,00,000/- and the tenderers are expected to quote in Packet "B", their financial bid for the first year. It further provides that the contract will be awarded for a period of five years subject to an enhancement of 10% for the second year, 15% for the third year, 20% for the fourth year and 25% for the fifth year over the previous year"s license fee. The Clause 7.4 provides that the successful tenderer will have to pay the six months" license fees in advance after adjusting the earnest money within 15 days of award of contract and thereafter the payments for subsequent three months" period shall be made on completion of three months" from award of contract and so on, every quarter. The Clauses 7.3 and 7.4, therefore, clearly informs the tenderers that the reserve price for the first year to be Rs. 52.21 crores and the same would be enhanced every year as mentioned in the said clauses. The clauses nowhere discuss any pro rata reduction with reference to the non-availability of area on account of existing contracts in respect of such areas.

20. The only clause which is sought to be referred to claim pro rata payment in relation to the rental is Clause 4.11 which neither relates to the rental amount nor to the period of contract nor to the earnest money. The said clause is specifically with relation to the dispute which may arise in relation to the availability of the sites, as described u/s V of the contract. In other words, inspite of being clarified in Section V that a particular site at a particular location would be available either at the time of entering into the contract or thereafter on expiry of the existing contract, and if such site is not made available at the specified location on the day specified in the Schedule V, and any different area is made available or any area of different dimensions or location is sought to be allotted, or no area is allotted, then in that case, depending upon the circumstances, the respondents would be liable to make the necessary

adjustment on pro rata basis in relation to the rental amount. The clause does not provide anything beyond it.

21. Once the petitioners knowing well the terms and conditions of the tender and without making any grievance about the same had offered their bid and participated in the tender process without raising any doubt or reservation about any of the terms and conditions of the tender, nor had sought any explanation prior to submission of the tender, it is too late for the petitioners to raise hue and cry about the rental amount at this late stage. It is apparently designed to wriggle out of the petitioners' obligations under the tender conditions and to find an excuse to defy the provisions relating to their obligation regarding the payment of rental amount and, therefore, the petitioners do not deserve any indulgence in the discretionary writ jurisdiction.

22. Non-availability of the entire area during the first year of the contract was well-known to the petitioners much prior to submission of their bid. The tender document was very clear in that regard. The fact that the rental amount would be increased every year on percentage basis was also known to the petitioners much prior to the submission of their bid. To what extent the area out of the total area under the contract would not be available was also fully disclosed in the Section V and nothing was suppressed by the respondents in that regard. Knowing well the conditions and the circumstances under which the contract will have to be performed, the petitioners having offered their bid, it is too late for the petitioners to raise unsustainable doubts and to avoid the performance of their obligations on one pretext or other and to delay the payment of the rental amount. In such a situation if the respondents have exercised their right to revoke the acceptance of the petitioners' bid, no fault can be found with such a decision.

23. In ABL International's case (supra) the Apex Court clearly held that when an instrumentality of the State acts contrary to the public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to the constitutional guarantee found in Article 14 of the Constitution and, therefore, once the State or an instrumentality of the State is a party, it has an obligation in law to act fairly, justly and reasonably to a contract which is the requirement of Article 14 of the Constitution, and the Writ Court without any hesitation can issue suitable directions to set right the arbitrary actions of such instrumentality of the State. However, unless arbitrariness or Unfairness or unreasonableness in the action on the part of the respondents is disclosed by the petitioners, the question of exercise of writ jurisdiction does not arise.

24. The Apex Court in Bridge & Roof Company's case held that when the contract itself provides for a mode of settlement of disputes arising from the contract, the party should follow and adopt that remedy and should not invoke the extra-ordinary jurisdiction of the High Court under Article 226 of the Constitution of India.

25. In Maharshi Dayanand University's case (supra), it was held that when the parties during negotiations contemplate execution of a formal agreement incorporating the terms of the bargain, so long as a formal agreement has not been entered into, it may be open to contend that there was no concluded contract between the parties. In a case where the tender submitted is accepted, its acceptance is conveyed and the time for completing the work is stipulated to start from such acceptance, and the work was to commence on the basis of such acceptance but no payment is made until a formal contract is signed, it would all depend upon the facts and circumstances under which all such acts are done and would assist the adjudicating authority to arrive at a definite finding on the point as to whether there has been a concluded contract in the peculiar facts and circumstances or not.

26. For the reasons stated above, therefore, none of the decisions cited above by either of the parties are of any help to the parties to the proceedings. In the facts and circumstances stated above, we do not find any merit in the contention sought to be raised on behalf of the petitioners and on that count itself, the petition is liable to be dismissed. For the reasons stated above, therefore, the petition fails and is hereby dismissed with costs.