(2015) 06 SIK CK 0006

In the Sikkim High Court

Case No : Writ Petition (C) Nos. 26 and 27 of 2015

Asian Enterprise and Others APPELLANT

Vs

The State of Sikkim and Others RESPONDENT

Date of Decision : 11-06-2015

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2015) 06 SIK CK 0006

Hon'ble Judges : Sunil Kumar Sinha, C.J

Bench : Single Bench

Advocate : A.K. Upadhyaya, Senior Advocate, Binita Chhetri and Aruna Chhetri, for the Appellant; J.B. Pradhan, A.A.G, S.K. Chettri and Pollin Rai, Asstt. Govt. Advocates, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Sunil Kumar Sinha, C.J.

Facts of the cases:

1. Respondent No. 2 published a Notice Inviting Tenders (NIT) No. TENDEREFP/SFML/TNDR/15-16/148 for supply of raw materials (food grains) and packaging materials for manufacture of ''Poustik Aahaar" for supply under the supplementary nutrition programme. The period of supply was from 16.04.2015 to 31.03.2017. This was a call for on-line tenders. The tenderers had to submit their technical bids and financial bids. The NIT was published on 09.03.2015 at 01.30 PM. The bids opening date was 11.04.2015 at 10.30 AM. The bid submission start date was 11.03.2015 at 02.00 PM and the bid submission end date was 11.04.2015 at 10.00 AM. The bids were to be offered through e-tendering process and the date and time for submission of hard copies was fixed at 10.00 AM on 11.04.2015. The bids were to be opened on the same day i.e. on 11.04.2015 at 10.30 AM.

2. The Petitioner in W.P.(C) No. 27 of 2015 and Respondents 3, 4 and 5 (common

Respondents in both the writ petitions) offered their on-line bids. According to NIT, they had to submit hard copies of the documents for evaluation of their technical bids till 10.30 AM on 11.04.2015. No representative of the above Petitioner reached to the concerned office till 10.30 AM, therefore, hard copies of the documents up-loaded along with its on-line bid could not be produced. The Tender Committee, then opened the technical bids of three Respondents only and after their evaluation, their financial bids were opened. It was found that M/s. Extruder Food Processing (P) Ltd. (R-3) was L-1 in all items except the Bengal Gram, for which M/s. Kailash Roller Flour Mills (P) Ltd. (R-5) was L-1. R-5 had subsequently denied to supply single item vide its letter dated 14.04.2015, therefore, the lowest bidder (R-3) was called for negotiation and on its agreement to supply on some lower rate, the Tender Committee, comprising of seven members, recommended for awarding the contract to R-3.

3. Case of the Petitioner in W.P.(C) No. 27/2015 is that as the representative of the Petitioner was detained in traffic jam at Lall Bazar, Deorali near Tadong College, he could not reach the office of the State-Respondents 1 and 2 in time to submit the hard copies and was delayed by few minutes. The Respondents, therefore, were not justifying in not accepting the hard copies after the time fixed. The action of the Respondents 1 and 2 was unreasonable, arbitrary and illegal. According to the Petitioner, he was fulfilling the entire criteria for opening of its financial bid.

4. Case of the Petitioner in W.P.(C) No. 26/2015 is that it was fulfilling all the criteria except the procurement order for the similar type of supply. As this criteria was not fulfilled by the Petitioner, the Petitioner could not submit its bid. However, it came to know that Respondent No. 4 was also not fulfilling the said criteria, but its financial bid was opened. Thus, it was a case of discrimination.

Re.: W.P.(C) No. 27/2015

5. Mr. A.K. Upadhyaya, learned Senior Counsel, appearing on behalf of the Petitioners, firstly argued on W.P.(C) No. 27/2015. He submitted that the representative of the Petitioner could not reach in time due to traffic jam, therefore, the Petitioner''s documents (hard copies) should have been accepted by the Tender Committee even after the time fixed for the same.

6. On the other hand, learned counsel for the Respondents opposed this argument. Mr. A. Moulik, learned Senior Counsel appearing on behalf of private Respondents, relied on the decision of Sorath Builders Vs. Shreejikrupa Buildcon Limited and Another, (2009) 2 JT 673 : (2009) 4 SCALE 1 : (2009) 11 SCC 9 : (2009) 2 SCR 893 : (2009) 3 UJ 1426 .

7. In Sorath Builders (supra), one of the terms and conditions of the bid was that pre-qualification documents were required to be sent by 27.11.2008, whereas the bid of Respondent No. 1 was sent on 01.12.2008, i.e. three days after the last date of receiving these documents. It is for these reasons, the said bid was not opened and ultimately the work was awarded to other bidder, whose bid was

received in time and who was found fit in all respects. The Division Bench of the High Court held that the above action was arbitrary and set aside the decision. The Supreme Court held that Respondent No. 1 was prevented from submitting the required documents in time due to his personal difficulty and not for the time schedule attached to the NIT. Respondent No. 1 submitted his pre-qualification documents late, for which only he is to be blamed. It was held that Respondent No. 1 was negligent and was not sincere in submitting his pre-qualification documents within the time schedule laid down despite the fact that he had information that there is a time schedule attached to the NIT. Relying on various judgments, the Supreme Court held that the terms and conditions of the tender are required to be adhered to strictly, and therefore, the University concerned was fully justified in not opening the tender documents submitted by Respondent No. 1, which was late by three days.

8. In the instant case, as I have already stated, the representative of the Petitioner reached the venue at 11.30 AM and when he reached the table of the Committee members it was already 12.00 Noon. The time fixed for submission of the hard copies was from the very beginning and there was no change in time by the Tender Committee. If the cut-off date and time fixed in any tender process is not strictly adhered to, the process itself would become endless and unworkable. The Tender Committee has strictly adhered to the time schedule. Therefore, no arbitrariness or illegality can be attributed to the Committee, when it did not accept the documents of the Petitioner after expiry of the said time.

9. That apart, we noted from the documents of the Petitioner that the Petitioner was lacking in three essential conditions. According to the essential conditions of the NIT, a bidder had to deposit EMD/FDR/TDR of Rs. 9,45,000/- as ''Performance Security''. ''Performance Security'' has been defined in clause 6.10 of the NIT, which means the security amount stated as per schedule indicated in the bid document to provide protection to the authority or department for the proper implementation of the contract. The ''period'' of the contract has also been defined in clause 6.11, which means that the entire term of ''the Contract''. Thus, a bidder was required to furnish EMD/FDR/TDR of Rs. 9,45,000/- as per Section II clause 2.3 of the NIT, which should have been for a period of 24 months i.e. the entire period of contract. Here the Petitioner has submitted the FDR of Rs. 9,45,000/- for a period of 12 months only, which is clear from its own documents. Therefore, the Petitioner did not fulfill the above essential condition of the NIT. The second essential condition was that the turnover of the bidders must be Rs. 2.00 crores per annum for three consecutive years. This condition was also not fulfilled by the Petitioner because the turnover of the Petitioner for the financial year 2011-2012 was Rs. 60,06,910/-; for the financial year 2012-2013 was Rs. 72,34,621/-; and for the financial year 2013-2014 it was Rs. 2,36,60,459/-. Thus, in two financial years the turnover of the Petitioner was below Rs. 2.00 crores. Therefore, even if the bid of the Petitioner would have been opened, the Petitioner, on his own online information given by him and the documents produced in the writ petition, would not have been qualified.

10. Mr. Upadhyaya has argued that the Petitioner was having turnover of Rs. 2,36,60,459/- in the last financial year, therefore, it was sufficient to accept the technical bid. The argument does not appear to be correct in view of the essential conditions of the NIT, which require a turnover of Rs. 2.00 crores per annum for three consecutive years and not for only one year. Thus, even if the hard copies of the documents of the Petitioner would have been accepted, this Petitioner could not have been qualified in the technical bid.

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11. While arguing W.P.(C) No. 26/2015, Mr. Upadhyaya submitted that the Government-Respondents have deviated from the condition of experience of supply of similar food grains. He referred to the case of the fourth Respondent. According to him, the fourth Respondent was not fulfilling the said criteria, even then its financial bid was opened. He referred to the decision of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, AIR 1979 SC 1628 : (1979) 2 LLJ 217 : (1979) 3 SCC 489 : (1979) 3 SCR 1014 .

12. It is an admitted position that the Petitioner of W.P.(C) No. 26/2015 had not offered the bids. It is also an admitted position that the Tender Committee has not recommended the fourth Respondent. Even then if we examine the case of fourth Respondent on the admitted documents, it would appear that the fourth Respondent was engaged in trade of Grocery, Food grains, Provisional and Manihari items, etc. since more than 17 years. It was also a Government registered Fair Price Shop Dealer since the year 2000. The turnover of the fourth Respondent was to the tune of Rs. 3,62,32,321.14 in the financial year 2011-2012; Rs. 3,02,62,787/- in the financial year 2012-2013; and Rs. 3,52,88,120.60 in the financial year 2013-2014. The trade licence was issued to the fourth Respondent on 21.07.2011 and was renewed on 02.04.2015. Contents of the trade licence would further show that it was permitted to deal in cold drinks, cosmetics and toiletries, grocery (except controlled items) wholesale, manihari-wholesale and provisional goods (retail). Further, it has a licence under the Food Safety and Standards Act, 2006 in ''Form-C'' for the kind of business of Grocery, Manihari and Provision. The said licence was renewed from time to time for these items and is still in force. Thus, it does not appear to be a case of relaxation in favour of the said Respondent as argued by Mr. Upadhyaya.

13. I may reiterate that the tender was not finalized in favour of the fourth Respondent against whom the learned counsel for the Petitioner has made such allegations. Here the tender was finalized in favour of the third Respondent. Mr. Upadhyaya could not point out any illegality regarding non-fulfillment of experience criteria or any other criteria by the third Respondent. In Ramana (supra), the Respondent in whose favour the tender was finalized, was not fulfilling the experience criteria of 5 years experience of running a second class hotel or restaurant. Here, in the instant case, the facts are different. Neither the tender has been finalized in favour of the fourth Respondent nor there appears to be a case in which it can be said that it was not having experience relating to

supply of similar food grains.

14. As far as the Petitioner is concerned, as per its own documents, the trade licence was issued to it on 02.12.2014, which was renewed on 16.04.2015. Contents of the licence would show that it was issued for the business of General Order and Government Supplies-(Class-I). The Petitioner has simply stated in the writ petition that it was fulfilling the other criteria except that of experience of supply of similar kind of goods. But nothing has been brought on record by the Petitioner to show that other criteria like turnover of Rs. 2.00 crores per year in the last three financial years, etc. were being fulfilled by it. When the trade licence itself was issued on 02.12.2014, how the above criteria for the last three financial years could be fulfilled by the Petitioner.

Broad Principles:

15. In B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others, AIR 2007 SC 437 : (2006) 2 CTLJ 247 : (2006) 10 JT 131 : (2006) 11 SCALE 526 : (2006) 11 SCC 548 : (2006) 8 SCR 11 Supp , while summarizing the principles of judicial review, it was laid down, amongst others, that when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with.

16. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

"(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. (Vide Jagdish Mandal Vs. State of Orissa and Others, (2008) 2 CTLJ 538 : (2007) 14 SCC 517 : (2006) 10 SCR 606 Supp)."

Conclusion:

17. I have examined the case of both the Petitioners and I do not find any illegality or infirmity in the decision taken by the Tender Committee to award the contract in favour of the third Respondent. The decision does not appear to be arbitrary, irrational, unfair, biased or mala fide. The decision has been taken upon due consideration of the tender documents and, thereafter, upon negotiation in the manner indicated in paragraph 2 (supra).

18. For all these reasons, I do not find any substance in the writ petitions. They are accordingly dismissed.

19. The interim order granted in W.P.(C) No. 27/2015 on 25.05.2015 shall stand vacated.

20. No orders as to cost(s).