(2018) 06 CAL CK 0182

In the Calcutta High Court

Case No : Writ PetitionNo. 4882 (W) of 2018

Baba Loknath Traders APPELLANT

Vs

Kolkata Port Trust & Anr. RESPONDENT

Date of Decision : 21-06-2018

Acts Referred:

Major Port Trusts Act, 1963 — Section 5, 34, 133(2B)
Constitution of India, 1950 — Article 12, 14, 19(1)(g), 19(6), 226

Citation : (2018) 06 CAL CK 0182

Hon'ble Judges : PROTIK PRAKASH BANERJEE, J

Bench : Single Bench

Advocate : ParthaSarathi Bhattacharya, Pronit Bag, Kaushik Bhattacharya, Ashok Kumar Jenah

Final Decision : Allowed

Judgement

PROTIK PRAKASH BANERJEE, J.

1. This is a petition under Article 226 of the Constitution of India, which, but for the consequence of debarring the writ petitioner from obtaining the

benefit of a public law contract, and the process by which it was being granted unless he paid something not payable by him in terms of the notice

inviting tender, and but for the consequence of forfeiture visited upon him, would have been entertaining since it displays how little law the authorities

of the Port Trust and their financial professionals know of the law of the land.

2. The facts in brief need to be told. The writ petitioner is a sole proprietorship business. It runs on a name other than that of the proprietor who is

named in the cause title. The Respondents are the Kolkata Port Trust, more properly called the Board of Trustees for the Port of Kolkata and its

instrumentality. This entity began its journey as the Commissioners for the Port of Calcutta, under the provisions of the Calcutta Port Act, 1890 but

since 1975, after the provisions of Section 133(2B) of The Major Port Trusts Act, 1963 came into force, on applicability of the said statute to the

â??port of Calcuttaâ? it has continued as the Board of Trustees for the Port of Kolkata. It is now a statutory body corporate under Section 5 of the

said Act of 1963. Since statutory and public duties are imposed upon it, it is now no longer open to contend that it is not â??person or authorityâ?

within the meaning of Article 226 of the Constitution of India and â??Stateâ?? under the provisions of Article 12 of the Constitution of India.

3. The first respondent floated a tender. This was by for inviting bids from those eligible, inter alia for leasing land being Plot No. A51 at the Transport

Depot Road. The said land admittedly belongs to the respondent no. 1. The power to do is by a contract regulated by statute as appears from Section

34 of the Act of 1963. Therefore, any tender for entering into a contract within the meaning of Section 34 of the Act of 1963 would be the threshold

of formation of a public law contract, regulated by statute. In terms of clause (f) of the Schedule of Tender, appearing at page 22, the intending bidder

had to deposit both the earnest money as indicated as also the tender fee.

4. The General Instructions to the Bidders at page 35 of the writ petition, which is part of Annexure IV to the tender documents, and pertain to Part I,

being the Techno-Commercial Bid, indicates inter alia, the documents each bidder is to submit. Clause (xi) of these General Instructions are very

material, and hence I extract them below: -

â??Scanned copy of Certification by a Chartered Accountant/ Certified Public Accountant with his identity as well as his signature and stamp as to

the Net Worth of the bidder for the most recently ended financial year based on Audited Annual Accounts [Net Worth of the bidder should be more

than 3 times the reserve annual rent, excluding taxes]. Net worth of bidder at the end of the most recent financial year, certified by a chartered

Accountant, should be more than 3 times of reserve annual rent (excluding taxes).

If Net worth is lesser than this value, either the techno-commercial offer will be disqualified or the bidder will have to pay the lease rent on upfront

basis. The formula for calculation of Net Worth will be as follows: - [{proprietorâ??s capital (for proprietorship firms) / partnersâ?? capital (for partnership firms) / paid up capital (for companies) + free reserve} â?" intangible assets]â??

5. Therefore, it is quite clear, that the question of paying upfront full annual lease rental as a condition of eligibility for the techno-commercial bid,

failing which the techno-commercial bid will be disqualified, or even as a condition of being granted the lease would only arise, if the net worth of the

bidder at the end of the most recent financial year, as certified by the chartered accountant and based on the income tax returns of the bidder, is not

more than thrice the reserved annual rent.

6. The documents submitted by the bidder, the writ petitioner, in this case, are not disputed by the respondents. They have however, disputed its

effect. Annexure â??P3â? at page 94 is the net-worth statement of the proprietor Shital Kumar Saha. It certifies the net worth of the said proprietor

as Rs.2,07,42,205/(Two crores, seven lakhs, forty-two thousand, two hundred and five Rupees only).

7. It is not in dispute that the writ petitioner paid Rs.5000/- as the tender fees and Rs.29,49,154/- as earnest money deposit. It is also not in dispute that

the respondents intimated, to the writ petitioner by the letter dated July 7, 2017 bearing no. Lnd.5805/17/2083 as in Annexure â??P/5â? at page 107 of

the writ petition, that the annual base rent was Rs.19 lakhs quoted by the petitioner. Therefore, the net worth of the proprietor of the business at more

than Rs.2 crores, 7 lakhs and change, was much more than thrice this annual base rent, or the lower, reserve rent of about Rs.17 lakhs odd.

Therefore, it was qualified to participate in the e-auction and the techno-commercial bid in the e-auction was completely in order and he was qualified

for that too.

8. Despite that, by a letter dated July 7, 2017, bearing No. Lnd.5805/17/2083, as in Annexure â??P/5â? to the writ petition, the respondents made it a

condition for grant of lease that the writ petitioner was to pay a onetime non-refundable and non-adjustable upfront premium of Rs.3,36,90,040/plus

applicable taxes and duties and thereafter it was to pay annual token ret of Rs.1/- per square meter. A default clause was also provided in it, to the

effect that if the writ petitioner did not communicate its acceptance of the said and other conditions mentioned in the said letter, within 21 days from

the date of the letter, the said offer letter (for the lease) would stand automatically cancelled and withdrawn.

9. The said letter itself shows that the offer of the writ petition in the e-tender was opened and the price bid was considered and only thereafter it was

decided as above. Clause 9 of the Evaluation Criteria for the Techno-commercial bids at page 51 of the writ petition clearly show that â??Price bides

of the technocommercially qualified bidders shall be opened after the e-auction is over.â? Once the price bid was opened, to see what was the rent

quoted by the writ petitioner in his price bid, it stood established that the writ petitioner was technocommercially qualified.

10. The reason given for imposing the condition of payment of upfront premium, as in paragraph 8 of this judgement was that allegedly net worth of

the bidder was not found to be equivalent to three yearsâ?? annual rent.

11. When I asked the Learned Advocate for the Port Trust, why it was so held by the authorities, he produced before me instructions dated June 6,

2018 sent to him on behalf of the respondents, signed on behalf of the Estate Manager (the respondent no. 2). I have kept it on record, after a copy

was given to the writ petitioner through its Learned Advocate, and I believe that before I quote the instructions, it would be instructive to consider the

document on the basis of which such instructions were given.

12. At page 95 of the writ petition, which is part of Annexure â??P/3â? the net worth statement gives particular of the movable assets of the

proprietor, Shital Kumar Saha. This is Annexure â??Iâ? to the net-worth statement. The last item on that page is â??investment in business M/s

Baba Loknath Traders. This is shown to be negative Rs.95,65,896/-.

13. The respondents apparently considered that this means the net-worth of the business of the proprietor in whose name he has submitted the bid, is

negative, and therefore it is not more than thrice the annual rent as aforesaid.

14. On this basis, the respondents have instructed their Learned Advocate to submit before this Court, and that too, by instructions in writing, as

follows: -

â??(i) Networth certificate of proprietor of the bidder as issued by the Chartered Accountant was at variance with that as per balance sheet of the

bidder where former was much more than required as per KoPTâ??s tender condition (i.e. more than 3 times Annual Reserve Rent while the latter indicated a negative figure. So, in this particular case, Tender committee considered the lower of the two, thereby disqualifying the bidder on the

parameter of networth and then allowing them to participate in the auction strictly on the condition of payment of rent on upfront basis only.

(ii) The definition of the networth for proprietorship firm, as applicable in the instant case as per tender condition, necessarily meant the networth

employed by the proprietor in the firm, regardless of the quantum of total networth in possession of the proprietor. Since in the event of default of

payment by the bidder as lessee, KoPT would not be able to recover dues from the personal property of the proprietor, therefore KoPT did not take

cognizance of the personal networth of the proprietor in this case.â?? This was stated to be confirmed by the â??FA & CAO, KoPTâ??.

15. As I understand it, the writ petitionerâ??s income tax returns, his net worth, would include both properties he has purchased in the name of the

business as also anything else he owns in his individual capacity. It would include every income for which he is liable to pay tax and it would also

include every property and asset which he is liable to declare as his own. This would include the income from his business or businesses which he

owns as a sole proprietor and its or their assets. One just cannot divorce the proprietor from his sole proprietorship business. I find that even if I go by

the balance-sheets annexed to the petition on which the respondents have relied upon, still the income of the petitioner and his networth is not

otherwise than as certified by the chartered accountant.

16. It is thus an admitted position that the respondents chose not to accept the formula mentioned in their own instructions in the tender document, that

the networth of a proprietorship concern comprised the proprietorâ??s capital plus free reserve less intangible assets. This was clearly contrary to

the provisions of the tender, which bound both the respondents and every bidder. It was not mentioned that the respondents could choose, at their

discretion, whether to demand upfront full lease premium or to disqualify a bidder if he chose not to pay it, in the event that the networth of the

proprietorship concern according to the respondentsâ?? own formula, exceeded thrice the annual rent as aforesaid. A notice inviting tender, it is trite,

is a binding document since it constitutes a representation made to the public at large; that it could be departed from, in respect of any essential criterion, or the mode of its determination, has to be notified with equal publicity before it can be given effect to, and it is nobodyâ??s case that there

was any corrigendum published by the respondents that they had this discretion or could ignore their own formula for calculating the networth of a

proprietorship concern.

17. Therefore, in the eye of law, the proprietor is liable for every obligation which is incurred for the business and it can be enforced against any

property of the proprietor, including the assets formally in the name of the proprietorship business. Therefore, the proposition that the reason why the

tender committee of the respondents chose to demand and exact the full upfront premium of more than Rs.3 crores as specified in paragraph 8 above,

was that in the event of any â??default of payment by the bidder as lessee, KoPT would not be able to recover dues from the personal property of

the proprietor, therefore KoPT did not take cognizance of the personal networth of the proprietor in this caseâ? is not only fantastic, but shows

ignorance of law by the respondents, their officers and their financial officers and experts and the reason is absurd to the point of being arbitrary and

the said decision is one which no reasonable man on the face of the records, and considering all the relevant materials, would have taken. The effect

of the decision taken is that the writ petitioner is being unreasonably restricted from carrying on business in a warehouse which he was entitled to take

on lease, but was denied the opportunity at the stage of formation of the contract, unless he complied with an unconscionable and arbitrary condition,

not applicable in his case, and which the respondents did not have the jurisdiction to impose, in the above facts and circumstances of the case. Thus, it

is both in violation of Article 14 of the Constitution of India since it is arbitrary and of Article 19(1)(g) thereof, without being a reasonable restriction

within the meaning of Article 19(6) thereof, as well as perverse within the meaning of law. The said decision-making process is thus fatally flawed

beyond any chance of redemption. It must therefore fail, and with it, the consequential decision.

The next challenge is to the consequential decision of the respondent authorities to forfeit the earnest money deposited by the petitioner since he chose

not to accept the arbitrary decision as in Annexure â??P/5â?, referred to in paragraph 8 above. When the respondents made the arbitrary demand

and imposed the arbitrary condition as mentioned in Annexure â??P/5â? as above, stating that the writ petition had 21 days to accept the condition for

processing of the lease, the writ petitioner did not accept the stand. Protests were made, inter alia by a letter dated July 28, 2017, well within the said

period of 21 days briefly summarizing the facts constituting what I have held above and asking that the question of networth be revisited considering

the documents referred to in such letter. This is Annexure â??P/6â? to the writ petition. Instead of considering and disposing of the said

representation, or revisiting the decision as in Annexure â??P/5â?, the respondents wrote a laconic and unreasoned letter dated September 12, 2017

(Annexure P7) by which they merely extended the time to pay the said unconscionable sum, id est, to comply with the said arbitrarily imposed

condition, and when the writ petitioner did not accede to the same, the respondents by a letter dated October 3, 2017, (Annexure P/8 to the writ

petition) intimated that the offer letter as in Annexure â??P/5â? stood cancelled and withdrawn and the earnest money as referred to above, stood

forfeited. The petitioner made a further representation which is at Annexure P/9 to the writ petition, which too has not been considered and disposed

of by the respondents. Before dealing with the effect of the facts mentioned above, including the non-consideration of the representation against the

condition imposed as above, and the failure of the respondents to communicate a reasoned order on such representation, let me try and find out the

power of the respondents from the tender documents to forfeit the earnest money.

21. In this connection, clauses 14 and 15 of Annexure V to the Tender Document, being Part I, General Information to Bidders in case of Techno-

Commercial Bid, are to be examined: â??14. Earnest Money:

a. The Earnest Money against the plot of land/structure/property for which the bidder intends to submit the offer, shall be remitted in the manner

stated above before submission of offer.

b. The amount of Earnest Money will be refunded to the unsuccessful bidders without interest after the selection of succession bidder, subject to the

conditions of forfeiture of EMD, as mentioned hereunder, and in the case of successful bidders, this amount will be adjusted against the Security

Deposit payable.

c. Mere resubmission of offer will not mean that the offer will be automatically considered qualified and bid will be entertained.

15. Forfeiture of Earnest Money:

i) The Earnest Money shall be forfeited if the bidder withdraws the offerduring the interval between the last date and time of submission of the offer

or any extension thereof and expiration of the validity period of the offer including extension thereof.

ii) The successful bidder shall have to accept the terms and conditions ofthe offer of licence and remit requisite annual licence fee for 1st year,

Security Deposit, post datedcheques for payable amounts in the subsequent years etc. within a period as specified in this tender document, failing

which the offer shall stand cancelled and the Earnest Money deposited by the bidder shall stand forfeited.

iii.) In case, if it is found that the Tender fee and EMD of requisite amount have not been remitted by the bidder for each of the plots for which

offer(s) has/have been submitted by the said bidder, the offer submitted by that particular bidder for the plot(s) concerned shall be cancelled and EMD

amount deposited by that bidder alongwith the offer(s) for the said plot(s) shall be forfeited.

iv) The documents submitted by bidder(s) will be scrutinized. In case, anyof the information furnished by the bidder is found to be false during

scrutiny. EMD of defaulting bidder(s) will be forfeited. Punitive action including suspension and banning of business with KoPT can also be taken

against defaulting bidders.

v) Non-acceptance of offer letter in any manner, as detailed in clauseNo.25. vi) Non-implementation of the usage of the allotted plot of land as per

tender terms. vii) Withdrawing of offer within the period of validity. viii) Subsequently deviating from the terms of validity.

ix) Furnishing of any of the following in the tender â?" incorrect/incomplete information/ tampered document to deliberately mislead KoPT.â??

22. Analyzing the said provisions, I find that in the instant case the writ petitioner did not withdraw his bid or offer. This is not a case of licence, so

clause 15(ii) does not apply. Neither is it alleged that any document or information submitted by the writ petitioner was found to be false or incomplete,

incorrect or tampered with, whether to deliberately mislead the respondents or otherwise. The tender fee and the earnest money deposits were duly

done. There was no deviation by the petitioner, subsequently or otherwise, from the terms of the tender. The question of non-implementation of the

usage of the allotted plot of land as per tender terms does not arise, since possession was not handed over to the petitioner. So, the only grounds can

be non-acceptance of offer letter.

23. In this connection, it ought to be noted, that there is a difference between non-acceptance of an offer letter, within a period of its validity, and a

case like this, where the successful bidder protests against the offer letter, within the period of its validity, for imposition of a condition which does not

apply to him on the face of the records and the law of the land by a decision which was taken subsequent to his submitting a bid, where such condition

was one, which could not have been imposed on him, under the notice inviting tender. In this second case, it cannot be called non-acceptance of the

offer letter, since the petitioner/successful bidder had made a representation to the respondents for redressing his above grievances, and without

rejecting such representation by a speaking order and without communicating the decision of rejection to the petitioner, the respondents cancelled the

offer letter. Because of this difference, even the other provisions of Clause 15 as aforesaid, would not apply in this case.

24. Therefore, on the face of it, the respondentsâ?? cancellation and withdrawal of the offer letter is wholly without jurisdiction and a nullity on the

face of the records and so the consequent forfeiture, which itself was a consequence of the arbitrary decision as in Annexure â??P/5â?, was equally

without jurisdiction. The effect of a nullity can only be a nullity. Therefore, Annexure P9 is also a nullity.

25. That apart, once a representation is made to an authority protesting against such a condition as stated above, within the period of validity of the

offer, this is a matter which relates to vital rights of a citizen under Articles 14 and 19(1)(g) of the Constitution of India and that too, at the threshold of

formation of the contract. The respondents are therefore under a duty at least to reject it by a speaking order, however brief, and communicating it to

the petitioner so that he knows where he stands and how his objections based on records and the settled law were dealt with by the respondents

before visiting him with consequences prejudicial to him. This duty is to be read into the acts of the Respondents, at the threshold of entering into a

contract at public law, since they are â??Stateâ? within the meaning of Article 12 and â??person or authorityâ? within the meaning of Article 226 of

the Constitution of India and violation of this amounts to gross violation of the basic principles of natural justice which itself is a violation of Article 14

of the Constitution of India, a right guaranteed under Part III thereof. This makes the entire decision process, once again, a nullity. The resultant

cancellation and the consequential forfeiture as in Annexure â??P/8â?? is a consequence of a nullity and thus cannot be anything but a nullity.

26. It was faintly argued by the respondents, that that this Court under Article 226 of the Constitution of India cannot entertain by way of judicial

review the process of selection of the person with whom the State or person or authority shall enter into a contract having public law elements, if not

contract whose terms and conditions regulated by statute, then I am fortified by a Bench decision of this Court in the case of Maple

Technologiesâ?"vâ?"State of West Bengal and Others reported in (2007) 3 Calcutta High Court Notes 807.

27. In this case too, writ petition has been filed challenging the acts of the respondents at the stage where the respondents are at the threshold of

entering into the contract by deciding to whom to offer the contract, and have chosen to impose an arbitrary condition, not applicable to the case, after

the price bid of the writ petitioner was opened, that is to say, without holding that the petitioner, the highest bidder was disqualified on his techno-

commercial bid. Therefore, I hold that the writ petition is maintainable and this court can exercise jurisdiction by way of judicial review in the matter.

28. As a result of the above discussions, and the reasons assigned by me above, inter alia at paragraphs 18 to 25, apart from the facts referred to

above, I quash the impugned Annexures â??P/5â?, â??P/7â? and â??P/8â? to the writ petition. I direct the respondents to consider and dispose of

the representation as in Annexure â??P/6â? to the writ petition afresh, without considering any of the grounds mentioned in either the written

instructions or the offer letter as in Annexure â??P5â??, in the light of my above observations in this judgement relating to the position of a proprietor in

respect of his proprietorship firm, and thereafter take a fresh reasoned decision strictly in accordance with law and the terms of the notice inviting tender and the tender documents, on the bid submitted by the writ petitioner, and subject to such decision, if the representation as in Annexure

â??P/6â? is allowed, to issue a fresh offer letter for Lot No. A-51 for which the writ petitioner was declared to be the successful/highest bidder,

without insisting on upfront lease premium, on considering the net-worth of the writ petitioner as that of the proprietor of the sole proprietorship

business in whose name the bid was submitted. The writ petitioner shall be given an opportunity of being heard. The entire process shall be completed

within 4 weeks from the date of communication of the order and the reasoned decision shall be communicated to the writ petitioner within seven days

therefrom. Till such decision is communicated to the writ petitioner, the respondents shall neither offer nor allot or part with the possession of the

concerned Lot A-51 to anyone else, nor float any further tender in respect thereof.

29. Since the facts of the case were not in dispute, but only their interpretation in the eye of law was involved, I have not called for affidavits. This

does not mean that anything which does not appear from the face of the records referred to by me and as interpreted by me above, stand admitted.

30. The writ petition is thus allowed. There shall be, however, no order as to costs.

