

(2016) 10 BOM CK 0104

In the Bombay High Court

Case No : Writ Petition No. 6116 of 2016

BEML Limited a Central Public Sector Undertaking	APPELLANT
Vs	
M/s. Nagpur Metro Rail Corporation Limited (NMRCL)	RESPONDENT

Date of Decision : 25-10-2016

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2017) 1 AIRBomR 103 : (2017) 3 ALLMR 105

Hon'ble Judges : B.R. Gavai and V.M. Deshpande, JJ.

Bench : Division Bench

Advocate : Mr. K.N. Shukul, Advocate, for the Petitioner; Mr. Sunil Manohar, Senior Counsel with Mr. Akshay Naik, Advocate, for the Respondent No. 2; Mr. S.K. Mishra, Senior Counsel with Mr. Kastubh Deogade, Advocate, for the Respondent No. 1

Final Decision : Dismissed

Judgement

B.R. Gavai, J. (Oral) - Rule. Rule is returnable forthwith. Heard finally by consent.

2. This petition challenges the decision of respondent no.1, dated 29th September, 2006 vide which the petitioner has been held to be disqualified by respondent no.1 in the tender for the work of design, manufacture, supply, testing, commissioning of Passenger Rolling Stock (Electrical Multiple Units) and Training of Personnel (hereinafter referred to as the "the said work" for short).

3. Respondent no.1/Nagpur Metro Rail Corporation Ltd. had issued tender notice on 25.1.2016 thereby inviting tenders for the said work.

4. In response to the said tender notice, three bidders had submitted their bids (i.e. petitioners herein). In the technical bid, the petitioner was found to be disqualified and as such, only Consortium of Titagarh Firema Adler S.P.A. and present respondent no.2 remained in the fray. In the financial bid opened on 29th September, 2016, respondent no.2 herein was found to have given a bid of Rs. 851 Crores; whereas Consortium of Titagarh Firema Adler S.P.A. had given a

bid of Rs. 852 Crores. Being aggrieved by the decision of respondent no.1/ Nagpur Metro Rail Corporation Ltd. to award contract to respondent no.2 herein/ CRRC Corporation Limited (China Railway Rolling Stock Corporation). Consortium of Titagarh Firema Adler S.P.A. had approached this Court by way of Writ Petition No.5818 of 2016. This Court, vide Judgment and Order dated 5.10.2016, declined to interfere with the decision taken by Tender Evaluation Committee and approved by the Director Level Tender Committee. Subsequent to dismissal of the said Writ Petition, respondent no.1 awarded contract to respondent no.2 and also issued work order on 5.10.2016.

5. Now the petitioner has approached this Court contending that the decision of respondent no.1 disqualifying it vide communication dated 29th September, 2016 is erroneous in law.

6. We have heard Mr. K.N. Shukul, learned Counsel for the petitioner, Mr. S.K. Mishra, learned Senior Counsel for respondent no.1 and Mr. Sunil Manohar, learned Senior Counsel for respondent no.2.

7. Mr. K.N. Shukul, learned Counsel for the petitioner has made two fold submissions. The first submission of the learned Counsel is that the requirement under clause 13 of "Filter of Applicants ? Checklist" regarding supply of equipments to minimum one country outside the country of origin/manufacture or in India is applicable only insofar as minimum five different contracts in the metros is concerned. He submits that the said condition does not require 500 cars to be supplied to one country outside the country of origin. Alternatively, the learned Counsel, on the basis of petitioner's reply to the query made by respondent no.1, submits that, as a matter of fact, the petitioner has supplied more than 500 cars. He submits that the total number of cars supplied by the petitioner is 512. To meet the communication of respondent no.1 that, out of the said cars, 363 cars are TRAMS, the learned Counsel submits that, in the understanding of respondent no.1 itself, the TRAM cars and LRTs (Light Rail Transit) are one and the same thing.

8. The learned Counsel for the petitioner submits that the decision of respondent no.1 in not taking into consideration the experience of TRAM car on par with LRT experience is not sustainable in law and is totally arbitrary. The learned Counsel relies on various documents including the document at page no.67 to contend that the LRT and the TRAM are one and the same thing.

9. For considering the rival submissions, it will be appropriate to refer to clause (13) of Filter of Applicants Checklist wherein various points have been culled out to find out as to whether a bidder is technically qualified or not.

10. Clause 13 of Filter of Applicants ? Checklist reads thus :

" Propulsion System :

Does any member of the Consortium/Joint Venture individually or its Parent Company or its group companies have cumulative experience of minimum ten

(10) years in the Design and Manufacturing of Propulsion Equipments (Traction Converter Inverter, Auxillary Converter Inverter and Traction Motor) for metro rolling stock AND do the propulsion equipment supplied have been in satisfactory revenue operation for at least five (5) years in minimum aggregate 500 cars comprising of both powered and non-powered cars, supplied against minimum five (5) different contracts in the metros (i.e. MRT, LRT, Suburban Railways or High Speed Railways) of minimum one country outside the country of origin/manufacture or in India. "

11. A plain and simple interpretation of clause 13 would reveal that a person must have a cumulative experience of minimum 10 years in the Design and Manufacturing of Propulsion Equipments (Traction Converter Inverter, Auxillary Converter Inverter and Traction Motor) for metro rolling stock. The said clause would further reveal that the said person must satisfy that the propulsion equipment supplied have been in satisfactory revenue operation for at least five years in minimum. It further provides that aggregate 500 cars comprising of both powered and nonpowered cars must be supplied against minimum five different contracts in the metros (i.e. MRT, LRT, Suburban Railways or High Speed Railways) of minimum one country outside the country of origin/manufacture or in India.

12. If we read clause 13 harmoniously, it will be clear that the bidder must have an experience of supplying minimum aggregate 500 cars comprising of both powered and non-powered cars and they should be in satisfactory revenue operation for at least five years. Not only that, the simple and plain interpretation would reveal that those 500 cars must be supplied against minimum five different contracts in the metros (i.e. MRT, LRT, Suburban Railways or High Speed Railways) of minimum one country outside the country of origin/manufacture or in India.

13. In any case, that is the interpretation placed on the said clause by the employer. If we accept the contention of the petitioner, then we will be doing the same thing which the Division Bench of this Court had done while deciding Writ Petition No.4273 of 2016, M/s. GYTPL Joint Venture, by its authorised Signatory Shaibai Roy v. Nagpur Metro Rail Corporation Ltd., Nagpur. The said decision was challenged before the Hon"ble Apex Court. The Hon"ble Apex Court, while allowing the two appeals (Civil Appeal No. 90789079 of 2016 and Civil Appeal No. 90809081 of 2016) filed by respondent no.1 herein and one of the bidders, has observed thus :

"15.We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its document. The Constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not

acceptable to the Constitutional Courts but that by itself is not a reason for interfering with the interpretation given."

"16. In the present appeals, although there does not appear to be any ambiguity or doubt about the interpretation given by NMRCL to the tender conditions, we are of the view that even if there was such an ambiguity or doubt, the High Court ought to have refrained from giving its own interpretation unless it had come to a clear conclusion that the interpretation given by NMRCL was perverse or mala fide or intended to favour one of the bidders. This was certainly not the case either before the High Court or before this Court. "

(emphasis supplied).

14. It could thus be seen that Their Lordships have in unequivocal terms held that this Court should refrain from giving its own interpretation unless it is found that the interpretation given by the employer is perverse, mala fide or intended to favour one of the bidders.

15. It will also be appropriate to refer to the earlier Judgment of the Apex Court in the case of Central Coalfields Limited v. SLL ? SML (Joint Venture Consortium) reported in 2016 (8) Scale 99, wherein Their Lordships have held thus :

"47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in *Ramana Dayaram Shetty*, (AIR 1979 SC 1628), the terms of the NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in *Tata Cellular*, (AIR 1996 SC 11) there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in *Jagdish Mandal* followed in *Michigan Rubber*, (AIR 2012 SC 2915)."

"48. Therefore, whether a term of the NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in *Ramana Dayaram Shetty*. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot."

16. It could thus be seen that if we accept the arguments of the learned Counsel for the petitioner to interpret the clause in his own manner and contrary to the interpretation placed by the employer, we will be committing the same mistake which has been corrected by the Hon"ble Apex Court in the aforesaid two Judgments.

17. In any case, we find that, even otherwise, the interpretation as placed by the employer on clause no.13 cannot be in any way said to be incorrect, leave aside perverse. If we accept the contention of the petitioner, then the words used in clause no.13 "MRT, LRT, Suburban Railways or High Speed Railways" will have to be totally ignored. If the employer wanted to include experience of the TRAMS also, then nothing precluded the employer to make such addition after the words therein.

18. Apart from that, it will be appropriate to refer to definition of "Metro Railway" as is found in clause (i) of Section 2 of the Metro Railways (Operation and Maintenance) Act, 2002, which is as under :

"metro railway" means rail-guided mass rapid transit system having dedicated right of way, with steel wheel or rubber-tyred wheel coaches, but excluding tramways, for carriage of passengers, and includes -

(A) all land within the boundary marks indicating the limits of the land appurtenant to a metro railway.

(B) all rail tracks, sidings, yards or branches worked over for the purposes of, or in connection with, a metro railway.

(C) all stations, offices, ventilation shafts and ducts, warehouses, workshops, manufactories, fixed plants and machineries, sheds, depots and other works constructed for the purpose of, or in connection with, a metro railway."

19. The definition would clearly reveal that the tramways have been specifically excluded from the definition of Metro Railway.

20. In that view of the matter, we are of the considered view that the interpretation as placed by the employer cannot be said to be perverse.

21. Another ground on which interference would be warranted is mala fides. However, no person against whom mala fides are alleged nor any specific averment in that regard are to be found in the petition. In that view of the matter, the challenge on the said ground is also not sustainable in law.

22. Insofar as the contention of the petitioner that respondent no.1 itself considering the TRAM to be similar to LRT and reliance on certain documents is concerned, perusal of the record would reveal that the document on which petitioner relies are not of respondent no.1, but of the other Authorities. One of such document is DPR prepared by the Delhi Metro Rail Corporation Ltd. As such, in our view, the contention in that regard is without substance.

23. It is further to be noted that the petitioner was found to be disqualified on 29th September, 2016. The petitioner was very well aware that the decision of respondent no.1 to award contract to respondent no.2 was under challenge before this Court and the said challenge was decided on 5.10.2016. The petitioner was also aware that the work order was issued on 5.10.2016. Thereafter, the petition was filed on 15.10.2016. The petition was under objection till 17.10.2016. The matter was circulated on 18.10.2016 and on that day, notice was issued by this Court for today.

24. We find that the conduct of the petitioner is also additional ground to be taken into consideration for not entertaining the petition.

25. We find that any interference at this stage would delay the project which is very important for easing out the traffic problem in the City of Nagpur. In this respect, it will be further relevant to refer to the observations of the Apex Court in the case of Central Coalfields Limited (supra), which are thus :

" In this context, and in the present times, it is important to note that the World Bank has ranked India extremely low in matters relating to enforcement of contracts and ease of doing business. Out of 189 countries worldwide, India is ranked 178 in the matter of enforcement of contracts and 130 in the matter of ease of doing business. One of the possible reasons for this extremely low ranking given to our country is the failure of all parties concerned in strictly adhering to the terms of documents such as the NIT and the GTC. Insofar as the present case is concerned, the NIT was floated on 5th August, 2015 and one year later, we are still struggling with the issue of acceptance of a bank guarantee for a contract of about Rs. 2000 crores certainly not a small sum. "

26. In that view of the matter, no case is made out for interference. Hence, the Writ Petition is dismissed. No order as to costs.