
(2016) 08 CAL CK 0082
In the Calcutta High Court
Case No : W.P. 6231 (W) of 2016

Bharat Earth Movers

APPELLANT

Vs

Eastern Coalfields

RESPONDENT

Date of Decision : 23-08-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2017) 1 WBLR 22

Hon'ble Judges : Mr. Joymalya Bagchi, J.

Bench : Single Bench

Advocate : Mr. Ritzu Ghosal, Advocate and Mr. Sourav Chakraborty, Advocates, for the Added Respondent; Mr. Tilok Kr. Bose, Sr. Advocate Mr. Aniruddha Mitra, Advocate Mr. Partha Bose, Advocate and Mr. Nikhil Kr. Roy, Advocates, for the ECL; Mr. Kishore Datta, Sr. Adv

Final Decision : Dismissed

Judgement

Joymalya Bagchi, J. - The petitioner has assailed the decision of the respondent-corporation in awarding the tender in favour of the added respondent Pinaki Halder pursuant to an e-tender conducted on its behalf with regard to transportation of sand from Tirat Ghat of Damodar River.

2. It is the contention of the petitioner that due to an error in the server the bids submitted by him in course of reverse tender were not reflected in the system of the tendering authority and according to the terms of the tender there ought to be a re-tender of the aforesaid work.

3. Mr. Datta, learned senior counsel for the petitioner submitted that although his client had put in the bid which was lower than that of the successful tenderer due to technical snag the said bid was not reflected in the e-auction portal and that complaints in that regard had been promptly lodged with the tendering authority. Ignoring such complaints the tendering authority illegally decided to award the work to the added respondent. Drawing my attention to clause-20 of the notice inviting tender he submitted that under such circumstances the tendering

authority ought to have resorted to re-tender of the work.

4. On the other hand, Mr. Bose, learned senior counsel for the respondent corporation submitted that pursuant to the complaint of the petitioner inquiries were made from the appropriate authority, namely, NIC who submitted expert report wherefrom it appears that there was no snag in the server at the end of the respondent-corporation or with the internet service provider and that the petitioner had during the e-auction had closed his browser for sometime and thereafter had remained online and downloaded various other documents he had chosen not to place bid in the e-auction portal according to the procedure. On the strength of such report it was submitted that no case for re-tender in terms of clause (20) of the tender conditions. The added respondent was found to be the lowest bidder and, therefore, decision was taken to award the work order in his favour. He relied on (2001) 2 SCC 451 (para 31 and (2007) 14 SCC 517 (para 21) in support of his contentions.

5. Mr. Ghosal, learned counsel for the added respondent has supported the contention of the respondent-corporation.

6. In reply, Mr. Dutta challenged the findings of the report of NIC as arbitrary and inconsistent. He reiterated that holding of re-tender would be beneficial to public interest as his client's proposed bid was lower than that of the added respondent.

7. The issue which falls for consideration is whether the petitioner had been prevented from transmitting his purported bid in the e-auction portal due to disruption at the end of service provider or a technical snag/system failure at the server end of the tendering authority or not. In order to appreciate the aforesaid issue relevant terms of the tender which require consideration are set out herein below :

"12.....

ii. It is the bidder's responsibility to comply with the system requirement i.e. hardware, software and internet connectivity at bidder's premises to access the e-tender website. Under any circumstances, ECL shall not be liable to the bidders for any direct/indirect loss or damages incurred by them arising out of incorrect use of the e-tender system or internet connectivity failures."

"13.....

i) The log details of the entire reverse auction process will be generated by the system once in the process of reverse auction is completed.

k) Server time shall be the basis of Start time & Closing time for bidding and shall be binding for all. This would be visible to all concerned.

n) All electronic bids submitted during the reverse auction process shall be legally binding on the bidder. The chronologically last bid submitted by the bidder till the end of the auction will be considered as the valid price bid offered by that bidder and acceptance of the same by ECL will form a binding contract between

ECL and the bidder for entering into a contract. Any bid submitted earlier by the bidder prior to submission of his last bid will not be considered as the valid price bid.

s) In case of disruption of service at the service provider's end while the RAP is online, due to any technical snag or otherwise attributable to the system failure at the server end, the RAP process will start all over again. In such a situation, the last recorded lowest price of prematurely ended RAP, will be the "Start Bid" price for the restarted RAP. The prices quoted in the prematurely ended RAP will be binding on all the bidders for consideration, if the restarted RAP does not trigger within the stipulated time."

20. Revocation of Tender Process: There may be situation when the decision of Tender Committee may have to be changed subsequently on account of a Court's verdict. Also, there may be circumstances when online evaluation of tender is not done correctly due to mistake by the Evaluator or due to technical error in the system, which may lead to cancellation of tender.

In order to avoid the cancellation of tender in such cases, the tender process needs be reverted back to appropriate stage (i.e. bid Opening stage etc.) to comply with the Court's verdict or to rectify the error committed by the Evaluator. This provision in the e-Procurement system has been introduced with an objective to abide by the Court's verdict or to ensure that the tender process should not suffer due to any mistake committed by an individual or due to any technical error in the system.

Revocation of Tender process back to Technical-bid opening stage or Price-bid opening stage from an advanced stage shall be done under the following circumstances:

- a. To comply with the directives of Hon"ble Court of Law.
- b. If the Evaluator makes a mistake in online evaluation of tender, which is not in line with the Tender Committee decision?
- c. If there is an error in the online evaluation of tender due to technical error in the system."

8. Consideration of the aforesaid clauses make it clear that the tendering authority is not responsible for system failures in hardware/software internet connectivity at the end of the bidder. However, if there is disruption of service at the service provider's end or a technical snag/system failure at the sever end of the tendering authority it would justify a decision to go for revocation of the tender process and re-tender in terms of clause-20 of the notice inviting tender.

9. The grievance of the petitioner is that he had participated in reverse bid which was conducted by the respondent-corporation between 13:45:12 hrs to 15:45:09 hrs. on 28.03.2016 and in spite of making online bids the same were not reflected in the e-auction portal. It may be pertinent to note that with regard to

such complaint lodged by the petitioner an enquiry was made at the behest of the tendering authority and a report from the appropriate authority, namely, NIC had been obtained wherein it has, inter alia, been stated that the server at the end of the tendering authority was up and running for the entire day. Hence, it cannot be said that the alleged failure for logging the online bids of the petitioner was due to technical snag or system failure at the end of the server maintained by the agency conducting the e-auction.

10. On the other hand, the report further provided that the petitioner had remained logged on to the e-auction portal during the reverse bid itself but had suddenly closed his browser on or after 12:02:12 hrs and thereafter again had switched on his downloaded browser unequivocally various documents online from other sites between 14:32:39 hrs. to 16:05:54 hrs. These facts show that the petitioner had voluntarily gone off line by switching off his browser for sometime and thereafter between 14:32:39 hrs and 16:05:54 hrs. had again gone online and downloaded various documents but had not logged any bid to the e-auction portal. Hence, it cannot be said there was any deficiency of service at the service provider's end which had prevented the petitioner from accessing the e-auction portal in the instant case.

11. It has been strenuously argued that the report submitted by NIC is mutually contradictory. I am however unable to accept such contention on behalf of the petitioner. From the aforesaid report it is clear that there was no disruption at the end of the service provider or the server end of the tendering authority conducting e-auction portal which prevented the petitioner from logging his bid to the e-auction portal. Hence, no case for invocation of clause 20 of the tender conditions has been made out by the petitioner. I further find that the petitioner, in fact, had been online during 14:32:39 hrs to 16:05:54 hrs and downloaded various documents while the reverse auction was in progress. This gives rise to the irresistible conclusion that the petitioner had not logged his bid on the e-auction portal at the relevant time and, therefore, had created a ruse that his bid had not been reflected in the e-auction portal due to circumstances beyond his control. As discussed earlier, the petitioner's plea of technical snag at the server's end or disruption of service provider was found to be incorrect.

12. It is trite law rights of the parties in an auction are to be governed strictly in terms of the conditions engrafted in the notice inviting tender and the Court cannot re-write the conditions in the notice inviting tender on equitable considerations or otherwise. Reliance in this regard has rightly been made to (2007) 14 SCC 517 paragraph 22 (Jagdish Mandal v. State of Orissa & Ors.). When the so-called lower bid of the petitioner had not been validly made in course of reverse auction, the plea to hold re-tender on such issue is wholly misconceived and untenable in law

13. Hence, I am of the opinion that the action of the respondent corporation cannot be said to be unjust, arbitrary or contrary to the conditions in the notice inviting tender so as to interfere in exercise of judicial review.

14. The writ petition is accordingly dismissed. Interim order, if any, shall stand vacated.