

(2005) 02 CAL CK 0054

In the Calcutta High Court

Case No : G.A. No. 4101 of 2004, APOT No. 679 of 2004 and WP No. 1555 of 2004

Bharat Vanijya Eastern Private Ltd. and Another

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 11-02-2005

Acts Referred:

Public Works Department Code — Rule 217, 217(2), 220

Citation : (2005) 2 CHN 488 : (2005) 2 CTLJ 170

Hon'ble Judges : Soumitra Pal, J;D.K. Seth, J

Bench : Division Bench

Advocate : Kashi Kanta Moitra, B.K. Bachawat and D.C. Mitra, for the Appellant; Bikash Ranjan Bhattacharya, Sambuddha Chakraborty and Dibyendu Chatterjee for the respondent No. 5 and Shyamal Ganguly, for the Respondent

Final Decision : Dismissed

Judgement

D.K. Seth, J.—After having heard the learned Counsel for the respective parties, it appears that while addressing the Court on the question of grant of interim order the respective learned Counsel had addressed the Court on merit of the appeal itself. At the same time, any interim order that may be passed would affect the merit of the appeal. It is also undisputed that the project involves certain urgency for which the appeal is also required to be expedited. In the circumstances, by consent of the parties the appeal is treated as on day's list "for hearing" along with the application for interim order and are disposed of in the manner following.

Submission on behalf of the appellant:

2. This appeal has been preferred against the order of the learned Single Judge passed in Writ Petition No. 1555 of 2004 on 11th October, 2004 dismissing the writ petition. In the said writ petition, the issue of the work-order accepting the bid of the respondent No. 5 herein was challenged on the ground of certain infirmities in and infractions of the rules of tender. Mr. Bachawat, learned Senior

Counsel for the appellants, referred to Rules 217 and 220 of the Public Works Department Code (Vol. 1) [Rule 131 of West Bengal Works Departmental Manual] since alleged to have been infringed. Rule 217 prescribes that the lowest tender for the work is to be accepted as a rule, if for any reason, economical or otherwise, the lowest tender is not accepted, reference shall be made to the Government for orders as to which of the contractors the work should be given. Whereas Rule 220 prescribes the provision for re-tendering which directs that if there is no time for re-tendering, a bid on the spot of all the tenders would be the best method to distribute the work without loss of time and on a really competitive basis. "It will be within the competence of the competent Engineer Officer of the Directorate to accept the lowest bid in such cases without any further reference to the Government, provided that the lowest bid remains within the estimated amount of the work or within in excess of 5 per cent of the estimated amount." According to Mr. Bachawat, having regard to the facts, which are more or less admitted, no such step was taken and these rules were overlooked, ignored and violated. This was, in fact, done in violation of the accepted norms and principles of accepting tenders.

2.1. In support of his contention Mr. Bachawat relied upon the decisions in K.N. Guruswamy Vs. The State of Mysore and Others, ; Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. and Others, and contended that the procedure of tender and the method adopted for settling the matter in this case being behind the back of those interested and anxious to compete was unjustified and that in itself would affect the interest of the writ petitioner/ appellant. The action of the Government showed that this was done in dipper consideration. Such a step could not have been taken. In order to eliminate favouritism, nepotism and corruption, all those rules were formulated for the purpose of rooting out those evils and those guidelines have been laid down for avoiding all such ills, as was held in K.N. Guruswamy (supra).

2.2. He further contended relying on Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. and Others, , that the procedure followed in this case was unfair and opposed to norms which the Government should follow in such matters and that in offering the tender only to one person excluding the others obtaining a lower rate without offering the same to the writ petitioner/ appellant and other competitors appeared to be contrary to the rules and law, unfair and arbitrary and it was hit by more than one illegality by reason whereof the awarding of the contract should be set aside and equal opportunity should be given to all the tenderers. In case of urgency, it could be done by inviting all the tenderers and asking for offer on the spot.

Submission on behalf of the respondent No. 5 :

3. Mr. Bikash Ranjan Bhattacharya, learned Counsel for respondent No. 5, ably assisted by Mr. Chakraborty, on the other hand, contended that the respondent No. 5 was found to be the second lowest bidder. The first lowest bidder having been found to be ineligible, the second lowest bidder became the lowest bidder

and as such in terms of Rule 217, though respondent No. 5 was the second lowest bidder, but, by reason of ineligibility of the lowest bidder, he became the lowest bidder. Therefore, his offer was eligible for being accepted in view of Rule 217 even without the application of Sub-rule (2). He pointed out to the urgency of the project as well as the fact that the work order having been issued 50 per cent of the work is complete which is apparent from the record itself viz: a report by the competent authority submitted pursuant to an order passed by this Court. He submitted that the project is to be completed by 31st of March, 2005. At the same time, he also pointed out to the consequence of cancellation of the work order at this stage when his client had invested huge amount and had completed almost 50 per cent of the work. He had pointed out various other difficulties, which should be weighed with the Court on the question of intervention in such a matter, particularly, in relation to granting of interim order. He further contended that the question of considering grant of fresh tender would upset the entire situation. According to him, the tender was rightly accepted. There were earlier unsuccessful attempts to frustrate the grant of work-order in favour of the respondent No. 5 in two writ petitions. This writ petition is the third one in succession. He alleged collusion in between the respective writ petitioners in the three writ petitions. However, we do not want to go into those questions and altogether ignore the same and propose to consider the case on the merit of the case itself independent of the earlier attempt.

3.1. Mr. Chakraborty assisting Mr. Bhattacharya had referred to the decision in Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others, . He also relied on the decision in Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, and Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others, , in support of his contention that where high cost projects and time bound programmes are involved, the Court should take into consideration the prospect of re-bidding and consequence arising thereout. He contended further that the Court must weigh the consequences before granting interim orders. Relying on the decision in Directorate of Education (supra), wherein Tata Cellular Vs. Union of India, , was referred to and followed, he contended that the principles crystallized in Tata Cellular (supra) are required to be followed. The learned Single Judge, after following the said provisions, had passed the order appealed against, and rightly. Therefore, this Court should not interfere with the same.

Submission on behalf of the National Highway Authority :

4. Learned Counsel for the High Authorities, on the other hand, submitted that in terms of Rule 217(2), assuming but not admitting that the same applies in the present case, a reference was to be made to the Government. In this case, such a step was taken and a reference was made to the Government. The Government, on such reference, had decided to permit the grant of the work order in favour of the second lowest bidder as was pointed out in the affidavit-in-opposition filed on behalf of the National Highway Authorities. He produced the

reference. We have examined the same and found that the decision to refer to the Government was taken by the Tender Committee. The decision was forwarded to the State Government. The State Government conveyed its decision through its letter dated 16th July, 2004 being Memo No. T-6/689. He had also adopted the submissions made by Mr. Bhattacharya and Mr. Chakraborty and contended that there was no infraction either of Rule 217 or Rule 220 as alleged or at all. The tender of respondent No. 5 being found to be the eligible lowest tender was accepted and upon such acceptance of the tender, it was negotiated to lower down the rate. It was not a case, which falls within the scope and ambit of Sub-rule (2) of Rule 217.

Reply of the appellant:

5. In his reply Mr. Bachawat distinguished the decision cited by Mr. Chakraborty appearing on behalf of the respondent No. 5, the successful tenderer. Relying on the decision in *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, Mr. Bachawat pointed out from paragraph 15 that any relaxation could be granted only for bona fide reasons and in case where the tender condition permitted such relaxation. He pointed out that the tender condition in the present case did not permit such relaxation. He also pointed out relying on paragraph 15 thereof that such a decision could be arrived at for legitimate reasons only after a fair consideration of all the offers. According to him, in the present case, all the tenderers were not asked to lower down the rate and, therefore, all the offers were not considered. Therefore, it is permissible for the Court to intervene. Criticizing the decision in *Directorate of Education (supra)*, he submitted that this case has no manner of application in the facts and circumstances of the case.

Rule 217 : Lowest bid : Meaning of : Whether the bid of the respondent No. 5 was the lowest:

6. After having heard the learned Counsel for the parties, it appears to us that admittedly the respondent No. 5 was the second lowest bidder. It is on record, which has since been produced before us, that the tender of Builder and Supply was the lowest bid. But it was found that this tenderer was ineligible. This was so recorded in the note-sheet dated 1st July, 2004 after having verified the credentials of the said bidder from the Border Roads Organisation. If the lowest bid was eliminated by reason of its ineligibility, in that event, there would be no doubt about the fact that the bid of the respondent No. 5 was the lowest eligible bid. Rule 217 requires acceptance of the lowest bid. This is to be construed to mean the lowest eligible bid. Therefore, even without lowering the rate, the respondent No. 5 had acquired the right enforceable in law of being awarded the contract as the lowest eligible bidder. Even without lowering the rate, there was no alternative for the authority to accept the bid of the respondent No. 5. In case there was a negotiation with the person whose bid was acceptable to reduce the rate, it would not amount to infraction of any rule for acceptance of the lowest bid and/or bring the case within the ambit of Sub-rule (2) of Rule 217. We have

not been shown any reason economical or otherwise that the lowest tender could not be accepted. The tenderer Builders and Supply having been disqualified, its bid was non est and could not be held to be the lowest. The tender notice permitted quoting 5 per cent above the scheduled rate. The respondent No. 5 had offered 1 per cent above the scheduled rate. This does not exceed 5 per cent above the rate.

6.1. Therefore, it is not a case that his offer could not be accepted by any reason economic or otherwise. It was well-acceptable. Therefore, it did not satisfy the test for reference to the Government in terms of Sub-rule (2) of Rule 217. Even then from the records, it is clear that such a reference was made to the Government and the Government had conveyed its decision in the letter dated 16th July, 2004 directing the tender committee to accept the tender of the respondent No. 5 subject to its sanction.

6.2. The decision in K.N. Guruswamy (*supra*) does not apply in the present case since the attempt to get the rate reduced was not an action behind the screen neither it had prevented the appellant from competing. Inasmuch as the competition was over as soon the respondent No. 5 was found to be the lowest eligible bidder and it was decided to accept its bid as it appears from the minutes of the meeting of the Tender Committee.

6.3. After having decided to accept the bid of respondent No. 5 the Tender Committee had attempted to negotiate to reduce the bid further. Therefore, it was not a case that a fresh bid was necessary. Nothing has been shown to us and from the records we are satisfied that there was neither any scope for corruption nor other evil action in the process. Inasmuch as the Tender Committee made a recommendation on the basis of the records available, which, as it seems to us, was justified and it was referred to the State Government, which had occasion to consider the materials placed before it and take a decision. It is impossible that all these organs attending this process were involved in any evil design or corruption. On the other hand, it appears, as was held in the decision in Raunaq International Ltd. (*supra*), that for legitimate and bona fide reasons an attempt was made to reduce the rate through negotiations with the respondent No. 5, even though in law and under the rules his tender was acceptable.

6.4. From the record, it does not appear that there was any relaxation of the rules in order to accommodate the respondent No. 5. On the other hand, the National Highway Authority had taken the liberty to ask the respondent No. 5 to further reduce his rates though he could insist that he being the lowest eligible tenderer, the Government was bound to accept the same unless there were compelling reasons for non-acceptance. From the records, we do not find that there was any other compelling reason for which tender could have been withdrawn and the entire process and re-tender could have been attempted to. At the same time, as pointed out by Mr. Chakraborty from the decision in Asia Foundation & Construction Ltd. (*supra*) that these being a very high cost time

bound project is to be finished within the time schedule, required an urgency to be observed and we do not think that there was sufficient time to undertake fresh exercise of tender.

6.5. As rightly observed by the learned Single Judge relying upon the principles enunciated in Dutta Associates Pvt. Ltd. (supra) quoting from the decision in Tata Cellular (supra), we take the same view and hold that some freedom and a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative or quasi-administrative sphere. The decisions are to be tested applying the "Wednesbury Principle" of reasonableness and must be free from arbitrariness not affected by bias or actuated by mala fides. As observed hereinbefore, there was no lack of reasonableness as laid down in terms of "Wednesbury Principle". We do not find any arbitrariness nor it appears to be actuated by mala fides or affected by bias as was sought to be contended on behalf of the appellant. The negotiation was not for accepting the tender, but the negotiation was made at reducing the rate of the acceptable tender. It was a case where the tender of the respondent No. 5 was eligible to be accepted even without reduction of the rates and an attempt to reduce the said rate would not hit the "Wednesbury Principle" of reasonableness or the arbitrariness or the mala fides. The decision in the case of Dutta Associates (supra) is clearly distinguishable. Inasmuch as there the rate offered by a person other than that quoted and higher than the rate whose acceptance was objected to through a "viability range" of norm, not indicated in the tendered document was accepted. But such is not the case here. The decision in K. N. Guruswamy (supra) as we have already observed also does not apply in the facts and circumstances of the case as distinguished hereinbefore.

Conclusion :

7. From the discussion above, we do not think that there was any infraction of Rule 217 or 220 as sought to be urged. We do not find any infraction of the "Wednesbury Principle" of reasonableness. There seem to be no infirmity in the order of the learned Single Judge. The order conforms to the principles enunciated in Tata Cellular (supra). Therefore, we are not inclined to interfere with the order appealed against.

7.1. For all these reasons, we do not find any infirmity in the order passed by the learned Single Judge. Having regard to the facts and circumstances of the case and the materials placed before us, we are inclined to dismiss the appeal and affirm the order dated 11th October, 2004 passed by the learned Single Judge.

Order:

8. In the result, the appeal fails and is hereby dismissed and the application is rejected. The order appealed against is hereby affirmed. The interim order granted is hereby vacated.

8.1. At this stage Mr. Chakraborty submitted that in such a case where his client

has suffered loss at the rate of Rs. 1.47 lakhs per day and at the same time the public interest is being suffered by reason of the order obtained by the appellant, the Court should think of granting adequate cost for attempting to forestall a project as a compensation for public sufferance or a deterrence to prevent such attempt. He prayed that adequate cost should be imposed on the appellant. We think that there are some justifications in the contention of Mr. Chakraborty supported by the decision in the case of Raunaq International Ltd. (supra). However, having regard to the facts and circumstances of the case, we are not in favour of granting any cost.

8.2. Xerox copies of these documents being note-sheet dated 1st of July, 2004, the minutes of the meeting of the Tender Committee dated 16th July, 2004 and the decision of the State Government conveyed through letter dated 16th July, 2004 be kept with the records.

8.3. Mr. Bachawat prayed for stay of this order. In fact, we have used rule of thumb to deny the cost as prayed for on behalf of the respondent No. 5. Having regard to the facts and circumstances of the case, it appears to us and we are clear in our mind that there is no scope for the appellant to challenge the same and the entire attempt seems to forestall a very urgent and imminent high cost time bound project to be finished within 31st March, 2005 that does not brook a single day's delay. Therefore, we decline to grant the prayer for stay of the order passed today.

9. Xerox signed copy of the operative part of the judgment be made available to the parties on the usual undertakings.

Soumitra Pal, J.

10. I agree.