(2023) 05 CAL CK 0005

In the Calcutta High Court

Case No : W.P.A No. 26117, 27405 Of 2022

BLA Projects Private Limited APPELLANT

Vs

Damodar Valley Corporation & Ors. RESPONDENT

Date of Decision : 02-05-2023

Acts Referred:

Constitution Of India, 1950 — Article 226
Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2023) 05 CAL CK 0005

Hon'ble Judges : Moushumi Bhattacharya, J

Bench : Single Bench

Advocate : Kishore Datta, Amitesh P. Ray, Barnik Ghosh, Shaunak Ghosh, Purabi Saha (Das), Anirban Ray, Swarajit Dey, Riddhi Jain, Purabi Saha (Das)

Final Decision : Disposed Of

Judgement

Moushumi Bhattacharya, J

1. The facts in both the writ petitions are identical and the dispute is between the same parties. The contentions of learned counsel are admittedly the same in both the cases. Both the writ petitions are hence being disposed of by this judgment.

2. The petitioner is aggrieved by the rejection of the petitioner’s technical bid in a tender floated by the respondent Damodar Valley Corporation (DVC) for empanelment of transportation agencies for evacuation of ash from the ash ponds of DVC and disposal of the same in abandoned open cast mines. The petitioner’s technical bid was rejected on 15.11.2022 on “Administrative Ground”. The petitioner sought for the reasons of rejection by a letter dated 16.11.2022. The reply of the respondent dated 24.11.2022 is part of the supplementary affidavit filed by the petitioner. The reasons furnished relate to the alleged pilferage of DVC’s transported good quality coal and registration of an FIR by DVC on 9.6.2018 in relation to the alleged fraudulent practice.

3. One of the other reasons stated in this letter is the petitioner's transgression of section 3 of the Integrity Pact which was treated as a part of the tender documents.

4. The petitioner, through learned counsel, says that the impugned rejection of the petitioner's technical bid should be quashed as the reasons subsequently furnished by DVC on 24.11.2022 do not conform to the tender documents and particularly section 3 of the Integrity Pact taken along with the other sections of the said document. Counsel relies on the "Policy for withholding and Banning of Business Dealings" as only being applicable to a bidder subject to the bidder being convicted under The Prevention of Corruption Act, 1988 or The Indian Penal Code, 1860. Counsel also seeks to dispute the allegation of pilferage by relying on an Award passed by an arbitrator in favour of the petitioner on 14.8.2021.

5. Learned counsel appearing for the respondent DVC relies on the fact of the petitioner's Managing Director being charge-sheeted on 24.10.2019 under several provisions of the Indian Penal Code and the registration of an FIR before that on 9.6.2018. Counsel submits that the petitioner has transgressed section 3 of the Integrity Pact by suppressing the fact of the FIR. Counsel submits that DVC, as the Tendering Authority is authorised to interpret the terms of the tender in a manner which would safeguard the interest of the DVC. Counsel further submits that a judgment passed by this Court in an earlier matter in WPA 23775 of 2022 was set aside by the Division Bench and hence the issues raised by the petitioner should be treated as settled and binding on the parties. Counsel submits that the first rejection was an auto-generated mail which was clarified by the DVC in the later communication of 24.11.2022. Counsel submits that the petitioner had suppressed the facts of the FIR and the charge-sheet in 14 other tenders floated by DVC which authorises the DVC to reject the petitioner's technical bid. Counsel relies on several decisions of the Supreme Court which have held that Courts must not interfere in commercial matters since that would have harmful repercussions on commerce and the economy at large.

6. The controversy in the present matter relates to the rejection by DVC of the petitioner's technical bid by way of a letter dated 24.11.2022. The reasons for rejection of the petitioner's technical bid as stated in the letter, are as follows:

i) Fraudulent practices relating to pilferage of DVC's transported good quality coal which according to the DVC was proved on 1.6.2018 and an FIR was registered on 9.6.2018. A charge sheet was filed on 24.10.2019.

ii) Suppression of the charges of pilferage and fraudulent practices.

iii) Transgression of section 3 of the Integrity Pact.

DVC gave the above reasons to supplement the communication dated 15.11.2022 which showed that the petitioner's technical bid was rejected on "administrative ground".

7. The question which is required to be answered is whether the impugned rejection of the petitioner's technical bid falls within section 3 of the Integrity Pact or any of the other relevant clauses which have been referred to by the parties in the course of hearing. The Integrity Pact is part of the tender documents which was circulated to the bidders and is a set of guidelines for governing the selection process in the tender for preserving transparency and fairness in the selection of the bidders. Section 3 relates to the disqualification of bidders and their exclusion from future contracts. Section 3 of the Integrity Pact is set out below:

"If the Bidder(s)/Contractor(s), before or during execution has committed a transgression through a violation of section-II above, or in any other form such as to put his reliability or credibility in question, the Principal is entitled to disqualify such Bidder(s)/Contractor(s) from the tender process or to terminate the contract, if already signed and to take action as per the procedure of "Banning of business dealings" of the Principal."

8. Section 3 contemplates a transgression through a violation of section 2 or in any other form so as to cast a shadow on the reliability of the bidder. Section 2 lays down a set of measures which are to be observed by the bidders during participation in the tender process and the execution of the contract and essentially relates to commission of offences under the Indian Penal Code, 1860 or The Prevention of Corruption Act, 1988. Significantly, violation of section 3 of the Integrity Pact is the only section referred to in DVC's reply of 24.11.2022. The letter does not specify the violation or how the petitioner has committed transgression of section 3. Section 5 of the Integrity Pact which covers 'previous transgression' assumes relevance in view of the allegation of transgression made by the DVC. Section 5 is set out below:

(1) "The Bidder declares that no previous transgressions occurred in the last three years with any other Company in any country conforming to the anti-corruption approach or with any Public Sector Enterprise in India that could justify his exclusion from the tender process."

(2) "If the Bidder makes incorrect statement on this subject, he can be disqualified from the tender process or action can be taken as per the procedure of "Banning of business dealings" of the Principal."

9. It is important to note that the occurrence of past transgressions has been restricted to 3 years prior the date of Tender or the date of furnishing of documents of the bidder. Section 5 therefore limits the period (time) of transgression to a finite period.

10. Section 5 also becomes relevant when seen against the first ground stated in DVC's letter dated 24.11.2022 which mentions fraudulent practice and pilferage. The first ground however specifies that the alleged offence was proved on 1.6.2018 and an FIR was registered on 9.6.2018 followed by a charge sheet on 24.10.2019. These dates are significant since proving of the offence on 1.6.2018

would naturally mean that the alleged offence was committed by the petitioner at least before June, 2018. Although, the word "transgression" has not been defined in the Integrity Pact, even if it is assumed that the petitioner was guilty of fraudulent practices / pilferage, the said transgression falls beyond the 3 year window under section 5 of the Integrity Pact. The Tender was issued by DVC on 7.9.2022. Three years had therefore clearly passed even if the FIR is taken as the starting point. It is also significant that section 5(2) authorises the Principal / Tendering Authority to disqualify a bidder from the tender process or ban the bidder from future business dealings only if the bidder makes incorrect statements on the subject of past transgressions under section 5(1).

11. Although the letter of DVC dated 24.11.2022 does not mention any other section of the Integrity Pact, counsel appearing for the parties have referred to other clauses of the tender documents which the Court also proposes to deal with.

12. Clause 2.3 of the "Policy for withholding and Banning of Business Dealings" provides for an obligation on the part of the bidder to make pro-active disclosures. Clause 2.3(ii) requires the bidder to declare previous transgressions, whether asked or not in a bid document, during the last 3 years or of being debarred by any other procuring entity. Clause 2.3(iii) relaxes the obligations to the extent of stating that a declaration of transgression made by a bidder under clause 2.3(ii) committed during the last 3 years or debarment would not lead to automatic disqualification but may be evaluated and mitigation steps may be taken. Clause 2.3(iii) also provides for keeping an alert watch on the bidders' actions.

13. Therefore, clause 2.3(ii) and (iii) read together indicates that a bidder is required to disclose previous transgressions committed in the last 3 years and further that the disclosure made would not result in automatic disqualification. The voluntary disclosure is for the purpose of monitoring the bidder's activities. The contention of DVC that the petitioner failed to disclose the commission of fraudulent activities/pilferage and hence violated section 3 of the Integrity Pact must be read strictly in accordance with the specific requirements of section 2, section 3, and section 5 of the Integrity Pact as well as clause 2.3 of the Policy for withholding and Banning of Business Dealings.

14. From a conjoint reading of all these conditions, it is clear that the obligation on the part of the petitioner was to disclose past transgressions which occurred in the 3 years prior to the date of the tender and would hence not cover the alleged fraudulent activities which occurred before June, 2018 which is the specific case stated by DVC in the letter of 24.11.2022.

15. The issue which emerges is whether the Tender condition read with the Integrity Pact structured by DVC contemplates excluding of a bidder by reason of transgression under the sections of the Integrity Pact where the transgression has taken place beyond the 3 year reckoning. The scheme of the terms and

conditions makes it clear that the culpability with regard to violation of any of the sections resulting in transgression must relate to a fraudulent practice which is limited to the 3 years preceding the Tender. The sharpness of the penalty has somewhat been blunted by Clause 2.3 (iii) of the Policy for withholding and Banning of Business Dealings in the manner stated above. Hence, the argument that the petitioner committed violation of section 3 of the Integrity Pact by failing to disclose the FIR and Charge Sheet of 2018 and 2019 and hence transgressed the integrity of the process is inconsistent both with the Policy of Banning as well as the Integrity Pact.

16. Equity demands that no one can be made to suffer the consequences of an offence for all times to come unless the law prescribes such. Every man has a legitimate expectation of redemption. In this context it is further significant that the allegation of fraudulent practice stated in the letter of 24.112022 was the subject matter of an arbitration proceeding, which resulted in a specific finding in favour of the petitioner, namely, that the allegations were false. The learned Arbitrator passed an Award on 14.8.2021 in favour of the petitioner for damages of Rs. 15.41 crores. DVC is not willing to give any credence to this Award on the ground that the Award has been challenged under section 34 of The Arbitration and Conciliation Act, 1996.

17. This Court is however of the view that the challenge cannot dilute the admitted position that the petitioner was exonerated from the allegations of pilferage and fraudulent activities which was the state of affairs on the date of the petitioner's participation in the bid. DVC's stand reflects the mindset of making the petitioner pay for the alleged offence for all times to come. The allegation that the petitioner has suppressed the fact of the FIR and Charge Sheet in 14 other tenders must also be read in context of sections 2, 3 and 5 of the Integrity Pact which limits the culpability to 3 years immediately preceding the Tender. The same reasoning would also apply to the allegation that the petitioner had an obligation to make a frank and voluntary disclosure of the facts while participating in the Tender.

18. The law with regard to interference of a Writ Court in matters of Tender has been laid down by the Supreme Court in several decisions. Tenders floated by Government must be imbued with transparency and must not create conditions and circumstances which favour a particular bidder to the exclusion of the rest. The Supreme Court has repeatedly discouraged invoking the jurisdiction of the High Court under Article 226 of the Constitution of India for testing the case brought by an unsuccessful bidder since that would amount to evaluating the terms of a Tender which is best suited for the Tendering Authority. The general consensus is that the aggrieved party should seek damages in a Civil Court and the decision of the Tendering Authority should not be interfered with.

19. This is the consistent view in N.G. Projects Limited v. Vinod Kumar Jain; (2022) 6 SCC 127, Agmatel India Private Limited v. Resoursys Telecom; (2022) 5 SCC 362, Uflex Limited v. Government of Tamil Nadu; (2022) 1 SCC 165, Galaxy

Transport Agencies, Contractors, Traders, Transports and Suppliers v. New J.K. Roadways, Fleet Owners and Transport Contractors; 2020 SCC OnLine SC 1035, and Central Coalfields Limited v. SLL-SML (Joint Venture Consortium); (2016) 8 SCC 622, Silppi Constructions Contractors v. Union of India; (2020) 16 SCC 489. These decisions reinforce the view that the author of the tender document is the best judge to understand the requirements of the Tender and the Court should not disturb the interpretation given by the Tendering Authority.

20. All the decisions however preserve the window for arbitrariness and a mala fide Award or rejection of a Tender, including for extraneous considerations. Any factor which would sully the purity of the selection can always be brought to the Writ Court. Silppi Constructions took into account this very proposition to hold that the Court, being the guardian of fundamental rights, is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. Sanchit Bansal vs. Joint Admission Board; (2012) 1 SCC 157 explained an arbitrary action as being capricious, one that defies logic and is subjective to the point of being irrational. The action is whimsical and lacks reasonable explanation. Union of India v. G. Ganayutham; (1997) 7 SCC 463, relates to an earlier decision of the Supreme Court in State of A.P. v. McDowell & Co.; (1996) 3 SCC 709 to hold that the scope of judicial review is limited to unreasonableness, illegality and procedural impropriety. In Jagdish Mandal v. State of Orissa; (2007) 14 SCC 517, the Supreme Court came to a similar view and held that judicial review of administrative action is to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides.

21. In the present case, disqualifying the petitioner for the reasons stated in the letter dated 24.11.2022, namely transgression of section 3 of the Integrity Pact and fraudulent activities which were considered and proved on 1.6.2018 was more than 4 years before the Tender was floated in September, 2022. The decision to exclude the petitioner is hence arbitrary, unreasonable and one that would call for interference of the Writ Court. This is not a matter of interpretation of the terms of the Tender or the sections of the Integrity Pact. The tender terms and the Integrity Pact lead to only one conclusion; that of limiting the transgression to 3 years immediately preceding the Tender. DVC cannot construe the Tender terms or the Integrity Pact in a manner which would disqualify the petitioner for reasons extraneous to the Tender terms and the Integrity Pact. The reasons given by DVC breach the bounds of reasonableness.

22. It is also the contention of DVC that the findings of the Division Bench in its judgment pronounced on 20.1.2023 in MAT 1932 of 2022 are binding on this Court since it set aside the judgment of this Court in an earlier proceeding between the same parties on similar facts. The Division Bench judgment was challenged by the petitioner and is now before the Supreme Court. The orders passed by the Supreme Court on various dates make it clear that the matter is under consideration. The orders show that the matter has been listed for final hearing at the admission stage and the respondent / DVC was directed to file

their detailed counter-affidavit. The fact that the earlier writ petition / WPA 23775 of 2022 and the present writ petition are factually similar would also be evident from both the petitioner as well as DVC relying upon the documents in the Special Leave Petition pending before the Supreme Court.

23. It is relevant to state that DVC had challenged an interim order passed by this Court on 12.12.2022 which was extended from time to time thereafter. Although, DVC was apparently aggrieved by the interim order, there was no application for vacating of the said order. DVC filed an appeal before the Division Bench challenging the interim order; the appeal was dismissed on 31.3.2023.

24. The impugned order of rejection of the petitioner's bid also amounts to virtually blacklisting the petitioner without giving the petitioner any opportunity of hearing. DVC is also accountable for breach of the principles of natural justice. DVC as a Tendering Authority must act within the bounds of fairness and transparency and ensure that the rejection of a bidder conforms to the Tender conditions designed by DVC. The impugned rejection of the petitioner does not satisfy this benchmark and is hence arbitrary, unreasonable and calls for interference.

25. The impugned letters of 15.11.2022 and 24.11.2022 are accordingly quashed. The respondent DVC shall evaluate the technical bid of the petitioner and allow the petitioner to participate in the Tender.

26. WPA 26117 of 2022 and W.P.A 27405 of 2022 are disposed of in terms of this judgment.

27. Learned counsel appearing for the DVC prays for stay of the judgment. Considering the facts and circumstances of the tender as stated in the judgment, the prayer for stay is considered and refused.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

