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(1993) 05 PAT CK 0031

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 2755 of 1993

Chandra Prabhu Agency Private Limited — APPELLANT

Vs

Bihar Rajya Pul Nirman Nigam Limited and Another — RESPONDENT

Date of Decision : 10-05-1993

Acts Referred:

Constitution of India, 1950 — Article 14
Contract Act, 1872 — Section 8
Sales of Goods Act, 1930 — Section 64(2)
Tolls (Bihar Amendment) Rules, 1962 — Rule 27, 39, 40, 41, 48
Tolls Act, 1851 — Section 9

Citation : (1994) 1 PLJR 251

Hon'ble Judges : U.P. Singh, J;G.S. Sharma, J

Bench : Division Bench

Advocate : Shiva Kirti Singh and Binay Kirti Singh, for the Appellant; Ganga Prasad Roy and Sachchida Nand Singh, for the Respondent

Final Decision : Allowed

Judgement

U.P. Singh, J.—In this writ application under Articles 226 and 227 of the Constitution of India, the Petitioner has sought for a direction to be issued to the Respondents to execute the agreement in respect of collection of tolls relating to Phushro Bridge in the district of Giridih on account of the highest bid accepted in the public auction held on 4th February, 1993. He has further prayed for quashing of the order dated 4.2.1993 contained in Annexure 3.

2. In accordance with the provisions of the Bihar Tolls Rules, 1979, the Bihar Rajya Pul Nirman Nigam Ltd. (In short ''Nigam'') issued a notice on 17th December, 1992, published in the important newspapers calling for a public auction to be held on 4.2.1993 in respect of settlement of the right to collect tolls on several bridges in the State. (Annexure 1).

3. In exercise of the powers conferred by Section 9 of the Indian Tolls Act, 1815 as amended by the Indian Tolls (Bihar Amendment) Act, 1962 and rules framed

thereunder, the Government entrusted possession and management of the concerned bridges to the Nigam under the statutory scheme of collection of tolls. The Nigam is an undertaking owned and set up by the State of Bihar and is entrusted with the statutory duty in the matter of collection of tolls over the concerned bridges transferred to it.

4. In pursuance of the public notice (Annexure 1), the intending bidders were required to purchase auctioned documents by 1.2.1993 on payment of non-refundable amount of Rs. 1,000/ - per set of auctioned document. The earnest money, as indicated in the notice, along with certificates etc. were to be submitted by 4 P.M. on 1.2.1993 and the auction was scheduled for 4.2.1993 for settlement of right to collect tolls over the concerned bridges for a period of one year commencing from 1.4.1993 to 31.3.1994.

5. The Petitioner fulfilled all the requirements for participation in the public auction. He purchased the auctioned documents for the Phushro Bridge in the district of Giridih by paying rupees one thousand. He also submitted rupees two lacs by a Bank Draft, as the earnest money for the said bridge along with all necessary certificates, etc. After verification and proper checking, the Petitioner was issued an authority letter to participate in the auction for the said bridge.

6. As per Rule 27 of the Rules, the Petitioner participated in the public auction held on 4.2.1993. The auction started at 10.00 A.M. and it was publicly held and peacefully conducted in respect of the said Phushro bridge. After contest with other bidders, the Petitioner''s bid for rupees thirty-three lacs, being the highest bid for the said bridge, was declared and accepted as final. In terms of the auction notice and Rule 49 of the Rules, the Petitioner, being the highest bidder, was rightly treated as the approved bidder and was called upon to deposit 1/3rd of the highest bid amount. Accordingly, the Petitioner made further deposits against the duly issued receipt dated 4th February, 1993, and immediately after the close of the auction the amount of 1/3rd of the highest bid for the bridge was deposited (Annexure 2) Thus, the Petitioner was prepared to execute the agreement of the contract in accordance with Rule 53 of the Rules and to deposit the second instalment of further 1/3rd of his bid amount but, to his utter surprise and dismay, even though the auction for some of the bridges was continuing as per Annexure 1, Respondent No. 2, the Managing Director of the Nigam, issued a notice on 4th February, 1993 stating that for undisclosed reasons the auctions have been stayed and that next date for the auction will. be notified later. This impugned notice dated 4th February, 1993, contained in Annexure-3 has been challenged by the Petitioner for being quashed. The same has been challenged as arbitrary being violative of Article 14 of the Constitution as also in violation of the principles of natural justice.

7. It is relevant to state that the last year''s departmental collection after deduction of the expenses was only rupees twenty-seven lacs thirty five thousand. The Petitioner''s highest bid amount was much more than what the Nigam has been getting from departmental collection in the past. Since the

introduction of the departmental collection over several bridges in the past, many employees of the Nigam (Respondent No. 1) have developed vested interest and they exert political and other influences to thwart any attempt by the Respondents to obtain higher returns by way of settlement through public auction which is the normal mode under the rules. In the year 1990 as well, although the notice for holding public auction was issued by the Respondents but for undisclosed reasons the public auctions were postponed indefinitely. Thereafter the present notice (Annexure 1) was issued for holding public auction but again the same has been interfered with although the Respondents had approved the highest bid of the Petitioner. Since the proposed period of settlement is only for one year commencing from Ist April, 1993, therefore, the Petitioner has expressed reasonable apprehension and bona fide belief that deliberate delay is being caused by the Respondents to defeat the right of the Petitioner.

8. The stand taken in the counter-affidavit is that at the time of auction it was found that there was no healthy competition and peaceful atmosphere at the time of the auction. There was interference/intimidation at the time of auction by certain outsiders. It was stated that to achieve the object of the year 1993-94, the Nigam fixed the target/reserved amount for the bridge under the control and superintendence of the Nigam keeping in view the 1991-92 target plus increase in transportation. It is further stated that, at the time of issuance of the impugned notice contained in Annexure 3, the auction in respect of eight bridges took place out of twenty-two bridges, although the notice under Annexure 3 was issued in respect of twenty two bridges. The target amount fixed for the year 1993-94 for the bridge in question is stated to be Rs. 54,71,240. Therefore, under the direction of the Chairman, further auction for settlement was suspended.

Reliance was placed on Clause (6) of the notice on the basis of which the auction was held (Annexure-1) stating that the Nigam reserved its right to cancel any auction or all the auctions without giving any reasons.

9. In reply, the Petitioner has refuted the allegations. The allegation that there was no healthy competition and peaceful atmosphere at the time of the auction has been denied as factually false and incorrect. This is an afterthought. The allegations are not supported by any reports or contemporaneous document and it cannot be permitted to be added subsequently to the record. It is relevant to notice that at the time of holding of the bid no such report or complaint whatsoever was made to any authority concerned and the same cannot be substituted for the first time in the counter affidavit. The other allegation that the bid amount was lower than the estimated reserved amount also appears to be an afterthought. The alleged estimated amounts appear to be arbitrary and contrary to the rules. The alleged target amount/reserved amount was not mentioned in the notice nor were they brought to the notice of the bidders. The consideration amounts do not require approval of the State Government nor any such approval

was actually taken. The amount alleged to have been fixed as target amount is mala fide and arbitrary. From the record, it appears that the departmental collection of the last year after deduction of the expenses was only Rs. 27,35,000/ -. As against that, the highest bid of the Petitioner in the current year is Rs. 33,00,000/ -. Such an imaginary so called target amount is contrary to Rules 39 and 40 which provide statutory method of calculating the consideration amount for bridges for which lease agreement as well as departmental collection has been made in the past. Admittedly, the bridges in question fall under this category and in their case Rule 41 cannot be legally applied. Only as an afterthought and in order to defeat their claims, the so-called reserved amount has been arbitrarily pointed out for the first time in the counter-affidavit based on neither calculation required to be made in accordance with Rules 39 and 40 of the Rules nor was the same consistent with the collection of the previous year. The alleged amount termed as reserved amount is merely for guidance of the Respondents before finally accepting the highest bid by fall of hammer as per Rule 48 and having accepted the highest bid, the deposit of 1/3rd amount of the highest bid under Rule 49 was accepted. These facts are admitted and, in accordance with Section 64(2) of the Sale of Goods Act and Section 8 of the Contract Act, the sale is complete. Properly construing Clause (6) of the auction notice contained in Annexure-1, the right reserved to the Nigam for cancellation is of the auction bid at the time when the said bid is held but Clause (6) does not give a right to cancel the auction bid after the highest bid has been accepted on the fall of the hammer. Once the highest bid is accepted on the fall of the hammer and one-third amount of the highest bid is accepted then for cancelling the same, reasons will have to be stated and the auction bidder would be confronted with those reasons. Therefore, the stand taken by the Respondents in cancelling the highest bid on the strength of Clause (6) of the auction notice is uncalled for and unjustified.

10. In the supplementary counter-affidavit, the Respondents have not brought on record any subsequent events which took place after filing of the first counter-affidavit nor the same is by way of any clarification or correction. The whole purpose of the supplementary counter-affidavit appears to be introduction of new facts and exaggeration. The revision of rates admittedly, took place from 15.11.1993 and thereafter departmental collection over the bridges has been made by the Respondents for fifteen clear months. The requirement of Rule 40 for the purpose of fixing the consideration amount is collection of figure only for one year and, therefore, there would be absolutely no difficulty in determining the consideration money in accordance with Rule 40 of the Rules. In so far as the statement that toll tax since 15.11.1991 is double of what was enforced earlier is also misleading because on many bridges where there are other means of crossing the river or avoiding that bridge, a large part of traffic is discouraged when there is unprecedented hike in toll tax. Therefore, doubling the rate of tax does not necessarily mean more revenue or double of the earlier revenue. Thus, the rule provides for basing the consideration amount on the basis of the actual

collection made. Admittedly, the figures for one year, i.e., 12 months, on the basis of the new rates are available with the Respondents. They have purposely avoided to give a categorical reply to the figure of last year''s collection which would have clearly shown that the net receipt from the bridge concerned, i.e., the total collection after deduction of the expenses for the last year was less by Rs. 3,60,000/ - in comparison to the net receipt which the Nigam will get this year, in view of the highest bid of the Petitioner. The Respondents have avoided to give a direct and specific reply to this issue and they also avoided direct answer to the queries made by this Court on 6.4.1993 as to what, according to the Respondents, was the figure of previous year''s collection and expenses, it is surprising that the Respondents do not have the figures for the month of March, 1993. However, the Nigam has the figures for more than 12 months which they ought to have used for calculating the consideration amount as per Rule 40 of the Rules. Even if the collection figures for 12 months on the basis of the average are accepted to be correct, i.e., only the gross receipt to the Nigam even then the net income would be definitely less than the figure of Rs. 33,00,000/ - given by the Petitioner because on an average the total expenses in collecting the toll taxes for a year usually comes to about 10% of the gross receipt. The Respondents must have the figures of expenses involved but they have purposely not furnished the same. The Respondents have given various figures on the basis of 10% increase and on the basis of 20% increase without any explanation or reasons as to why such imaginary percentage is being added when there is no such provision under Rule 40 of the Rules for the purpose of determining the consideration amount. Even if for administrative purposes certain target amount may be fixed by any officer of the Nigam at his own whims but, such figures cannot have any relevancy on the face of the statutory rules, such as, Rule 40 of the Rules. Different figures given by the Respondents by sometimes adding 10% and sometimes by adding 20% goes to show that the Respondents have no clear figures as to what was the consideration amount for the bridge in question.

11. It is relevant to point out that in the year 1991, the target amount seems to have been fixed on a reasonable basis and the highest bid was made in that year as well and the departmental collection was continued to be made.

12. The fact remains that there was no Order for cancellation of the auction already held and completed. There is no reason mentioned as to why the further auction with regard to the bridges for which auction was held and completed, was sought to be stopped. No such order of the State Government or of the Nigam was produced to justify such action or to show the reasons therefore Admittedly, while taking such action, no opportunity of hearing was afforded to the highest bidder. Reference of approval not being given by the competent authority as yet is quite misleading since in the case of highest bidder whose bids had been proclaimed as the highest and from whom one-third of the highest bid amount had been accepted, there was no question of any approval by any other competent authority because there is no such stipulation of such approval

mentioned either in the notice (Annexure 1) or in the detailed terms and conditions of the auction supplied to the bidders along with the auctioned documents, nor the rules contained any such provision for approval in the aforesaid situation. Once by falling of the hammer and by acceptance of the stipulated consideration amount (one-third of the bid amount) the offer of the Petitioner was accepted in the eye of law a contract was complete and no person natural or juristic - could be permitted to take defence that it would be absolved of its liabilities because it has acted contrary to its internal procedures and instructions. The finality of the auction cannot be at two different stages - one at the time of the bid and Anr. at the time of approval. There was no such stipulation that the auction would be final only after the approval by some authority. Drawing and signing of the formal agreement was a formality which must follow as a necessary consequence of acceptance of the Petitioner''s highest bid and refusal of such right of the Petitioner is illegal and arbitrary.

13. In the result, the stay order contained in Annexure 3 dated 4.2.1993 in so far as Phushro Bridge in question is concerned is quashed and the Respondents are directed to execute the contract for the lease of right to collect tolls on the said bridge in favour of the Petitioner on the basis of the highest bid accepted in public auction held on 4.2.1993 and follow other legal procedures in executing the provisional agreement and parwana with a view to authorise the Petitioner to collect tolls over the concerned bridge after accepting the second instalment of one-third of the highest bid and perform all other formalities in accordance with law. Since the period of the settlement was to commence from 1.4.1993 and is for one year ending 31st March, 1994, the Petitioner shall be given extension of the period from which he would have been authorised to be entitled to collect the tolls in question.

14. In this view, Annexure 3 dated 4.3.1993 is only in respect of the bridge in question quashed and this writ application is allowed with the directions indicated above but there shall be no order as to costs.

Guru Sharan Sharma, J.

15. I agree.

