
(2023) 01 CAL CK 0034

In the Calcutta High Court

Case No : MAT No. 1932 Of 2022, CAN 1 Of 2022

Damodar Valley Corporation & Ors

APPELLANT

Vs

BLA Projects Private Limited & Anr.

RESPONDENT

Date of Decision : 20-01-2023

Acts Referred:

Constitution Of India, 1950 — Article 14, 19(1)(g)
Arbitration and Conciliation Act, 1996 — Section 34

Citation : (2023) 01 CAL CK 0034

Hon'ble Judges : Prakash Shrivastava, CJ;Rajarshi Bharadwaj, J

Bench : Division Bench

Advocate : Anirban Ray, Swarajit Dey, Riddhi Jain, Jaydip Kar, Amitesh P. Ray

Final Decision : Allowed

Judgement

Rajarshi Bharadwaj, J

1. By this appeal, the correctness of the judgement of the Learned Single Judge dated 02.12.2022 passed in W.P.A. No 23775 of 2022 (BLA Project Private Limited-versus-Damodar Valley Corporation & Ors.) has been questioned by the appellant/respondent No.1.

2. The facts of the case in a nutshell are that the appellant No. 1 herein the Damodar Valley Corporation (hereinafter referred to as "DVC") had floated a notice inviting tender (hereinafter referred to as "NIT") No. DVC/Tender/Head Quarter/Fuel/CMM/Works and Service/00020 dated 08.09.2022 for the work of lifting coal from collieries in Talcher, Odisha and supplying to the thermal plants in RCR mode. The NIT required the intending bidders to upload Envelope 1 containing hardcopy of the documents, Envelope 2, being the Technical Bid and Envelope 3 being the Financial Bid online by 19.09.2022. Seven intending bidders participated in the tender and submitted their bids and the writ petitioner herein i.e. respondent No.1 in the instant appeal being one of them. The writ petitioner/respondent No.1 submitted Envelope 1, Envelope 2 and Envelope 3 on

16.09.2022 and duly submitted a bank guarantee in lieu of earnest money deposit on 15.09.2022.

3. The writ petitioner, BLA Projects Private Limited and the appellant No. 1 entered into an Integrity Pact, a set of organisational procedures to ensure fairness and transparency in the tender process. Section 2 of the Pact provides for the commitments of the bidders/ contractors towards the Principal. In order to prevent corruption, the bidders/ contractors must not enter into any undisclosed agreement or understanding with other bidders, must not commit offences under the Indian Penal Code or Prevention of Corruption Act and must not improperly use or pass on to other any information, document provided by the Principal as part of the business relationship for the purpose of competition and personal gain. Section 3 of the Pact provides for disqualification of a bidder/ contractor by the Principal from tender process, if the bidder has violated the provisions of Section 2 before the award or during the execution or in any other form such as to put his integrity in question. Section 5 of the Integrity Pact covers previous transgressions but restricts the requirement of declaration of such past transgressions to 3 years preceding the Integrity Pact which forms part of the tender documents of September 2022. Moreover, a bidder is disqualified from the tender process and banned from business dealings on the ground of incorrect declaration of previous transgressions.

4. The appellant No. 1, out of the 7 bidders rejected 2 bidders including respondent No's. 1 bid on October 31, 2022 for "Techno Commercial not compliant" under Envelope 2. A subsequent letter to the respondent No. 1 dated November 05, 2022 stated that the rejection of the technical bid was based upon an FIR of 09.06.2018 and a Charge sheet of 24.10.2019 made against respondent No. 1 violating section 3 of the Integrity Pact. Aggrieved by the termination of the bid, respondent No.1 sought reference of disputes to arbitration wherein damages were awarded to the respondent No.1.

5. The writ petitioner/respondent No.1 thereafter filed a writ petition wherein the Learned Single Judge was pleased to pass an order in favour of the writ petitioner/respondent No.1 stating that the writ petitioner had fulfilled each of the qualifying criteria in the tender document and the invitation for bids, yet was disqualified by the appellant No.1 on the grounds as mentioned in the letter dated 05.11.2022 that the writ petitioner had indulged in fraudulent practices which resulted in an FIR being registered on 09.06.2018 and a charge sheet of 24.10.2019. It was, however, held by the Learned Single Judge that the charge of pilferage and fraudulent practices do not form part of the commitments under section 2 of the Integrity Pact since the impugned disqualification was grounded on transgression of section 3 which in turn is confined to a violation of section 2 of the Integrity Pact. Thus, section 3 does not refer to any past transgression.

6. It was further held by the Learned Single Judge that section 5 of the Integrity Pact covers previous transgressions to 3 years preceding the Integrity Pact which forms part of the tender document of September, 2022. However, more than 3

years had passed from both the FIR and the Charge-sheet. Moreover, the impugned letter of rejection amounts to blacklisting of the petitioner without providing an opportunity of being heard is a colourable exercise of power which is contrary to Article 14 and 19(1) (g) of the Constitution of India. Thus, being aggrieved by the impugned order passed by the Learned Single Judge the instant appeal has been preferred by the appellant No.1.

7. Submissions of the Learned Counsel appearing for the appellant are that Learned Single Judge has not appreciated the scope of the Integrity Pact. The technical bid of the respondent No.1 was rejected for violation of section 3 and not section 5 of the said Pact. Section 3 of the Integrity Pact clearly states that the transgression can be said to be omitted through violation of section 2 or in any other form. It is in specific cases, that section 3 of the Integrity Pact permits the appellant to reject a bid if the appellant doubts the reliability and credibility of a bidder. In the present circumstance, more than 3 years had not passed from the date of the Charge-Sheet dated 24.10.2019 and the respondent No.1 participated in the tender in September, 2022 thereby suppressing the FIR and the Charge-Sheet. The reliability and credibility of the respondent No.1 has been doubted in view of the fact that the respondent No.1 has committed an illegal act punishable under the Indian Penal Code and suppressed the fact that a Charge Sheet had been issued against the managing Director of the respondent No.1 while participating in the subject tender.

8. Learned Counsel appearing for the writ petitioner/respondent No.1 submits that the writ petitioner fulfilled each of the qualifying criteria in the tender documents and the writ petitioner was not given any opportunity of hearing to answer the letters dated 05th September, 2022 and 31st October, 2022. It is also submitted that the writ petitioner/respondent No.1 was not convicted in any criminal case and that mere pendency of a criminal case cannot act as a bar on participating or succeeding in the tender. The respondent No.1 was absolved of the allegations of fraudulent activities by the learned Arbitral Tribunal and has allowed execution of an award/damages which is under challenge under section 34 of The Arbitration and Conciliation Act, 1996.

9. Having heard the learned counsel for the parties and on perusal of the records this Court finds that the Learned Single Judge erred in asking DVC to cancel the communication made to the writ petitioner/respondent No. 1 by letters dated 31.10.2022 and 5.11.2022 rejecting the respondent No.1's bid and to permit the petitioner to participate in the tender and evaluate the technical bid put in by the petitioner. The Courts must realise their limitations and the havoc which needless interference in commercial matters could cause. The authority which floats the contract or tender and has authored the tender documents is the best judge as to how the documents have to be interpreted, as long as there are no malafide/arbitrariness etc. Thus, the terms of invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

10. This Court in an unreported judgement dated 09.09.2022 passed in MAT No.

1184 of 2022 (Airport Authority of India v. Masti Health and Beauty Private Limited and others) held that the satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. The writ court should refrain itself from imposing its decision over the decision of the employer/principal as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present-day economic activities of the State. Courts should be even more reluctant in interfering with the contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for wrongful exclusion rather than to injunct the execution of contract. Therefore, it is the discretion of DVC to reject or accept the tender of the writ petitioner by way of interpreting the Integrity Pact which was not in compliance with the terms of the NIT. Moreover, the rejection of technical bid has been made by the tender committee for reasons supplied by the Chief Engineer, C&M. Hence, such a decision has been complied with the procedure contemplated in the tender conditions.

11. The above analysis clearly leads to the conclusion that on a combined consideration of the facts of this case as also the tender condition, if reasons are to be given at every stage of the tender procedure then the commercial activities of the State would come to a grinding halt. The State must be given sufficient leeway in this regard. Moreover, the facts of the case also do not indicate that the condition was tailor-made to oust the respondent No. 1/writ petitioner. Owing to such limited scope of jurisdiction of judicial review, the Learned Single Judge ought not to have quashed the letters of rejection by appellant No.1 and permit respondent No. 1/writ petitioner to participate in the tender process. Hence, we are unable to sustain the judgment of the Learned Single Judge.

12. For the forgoing reasons, the order of the Learned Single Judge dated 02nd December, 2022 is set aside and the the appeal is allowed. All pending applications are also accordingly disposed of.