(2007) 06 JH CK 0022

In the Jharkhand High Court

Deoraj Singh Transport Contractor APPELLANT

Vs

The Central Coalfields Ltd. and Others RESPONDENT

Date of Decision : 22-06-2007

Acts Referred:

Citation : (2007) 4 JCR 169

Hon'ble Judges : Narendra Nath Tiwari, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Narendra Nath Tiwari, J.—In this writ petition, the petitioner has prayed for a direction on the respondents to open the Financial Bid of the petitioner and consider the same along with other bidders and in case, the petitioner is found successful, to allot the work to the petitioner for which he has submitted his tender in response of NIT No. CCL/CGM(T}/Kuju/2003-317 dated 12th December, 2006.

2. Petitioner''s case, in short, is that a notice Inviting Tender (in short ''NIT'') was published by the Central Coalfields Ltd. (in short ''CCL''), Ranchi, being NIT No. CCL/CGM(T)/Kuju/2003-317 dated 12th December, 2006 (Annexure-1) for the work, transfer of coal by Contractor''s Pay Loader into Contractor''s Tipping Trucks at Topa Reorganisation, O.C. Project, Surface Stock and Transportation to NR Siding after weighment at Ara Road Weighbridge and Siding Weighbridge. According to the NIT the tenders were to be received in the office till 2nd January, 2007 and to be opened at 11 a.m. on 4th January, 2007, in the office of Chief General Manager (Transportation), CCL. The petitioner, who has experience of similar nature of work since 1984 and is eligible in all respect, submitted his tender on 2nd January, 2007 in the office of the respondent No. 1 along with the certificate issued by Allahabad Bank, SSIFB, Ramgarh to Hazaribagh show the adequate working capital, the list of equipments Le. 30 numbers of Tipping Trucks, 4 numbers of Pay Loaders and other equipments, which were required, as per Clause 3.3(c) of the NIT, certificate relating to Financial Turn Over of Rs.

7,52,98,467.03/- for the Financial Year 2005-06 as also the certificate of the work completed during the previous year. He also submitted other required documents along with his Bid/Tender. The tender was to be submitted in two parts; (i) Technical Part and (ii) Financial (Price) Part, as per the requirement of the NIT. As per the schedule, Technical Bid was opened by the Tender Committee on 4th January, 2007 in the office of the Chief General Manager (Transport), CCL. The petitioner was found fulfilling all the terms and conditions required for Technical Bid. However, on the appointed date, the Financial Bid (Price Bid) of the petitioner was not opened. It was verbally communicated to him that he did not fulfill the criteria, as required in Clause 5(c) of the NIT and did not submit certificate of registration with Provident Fund Authorities and as such, his Financial Bid (Price Bid) was not opened. It has been stated that the petitioner is engaged in the work relating to transportation in colliery area under the respondents-authorities and he is depositing the employer''s share/contribution in the office of Coal Mines Provident Fund (in short ''CMPF'') through the Principal Employer, namely, Project Officer, Topa, Kuju Area, CCL, for which the certificate has also been issued by the Senior Personnel Manager, Topa Colliery, dated 26th December, 2006. It has been stated that the employees, who are eligible for the provident fund, their accounts have been opened in the office of the CMPF and account numbers have also been allotted to them. The contributions are being regularly deposited in the office of the CMPF. The certificate issued by the Colliery/Manager, Principal Employer, to that regard has been also submitted by the petitioner. The instant work is related to the same area and in the past, on the basis of similar certificate issued by the concerned Project Officer, the petitioner was allotted similar nature of work by the respondents. It has been stated the work related to the colliery area where the provisions of Coal Mines Provident Fund is applicable and there is no provision for registration with CMPF Authority. However, on coming to know about the objection raised, regarding non-submission of certificate of registration with the Provident Fund Organisation, the petitioner applied for registration also with the Employees Provident Fund Organisation, Jhiarkhand, Ranchi on 2nd January, 2007 and the certificate of registration was issued on 9th January, 2007 (Annexure-8). But, in spite of the compliance of the required terms for award of the contract, the petitioner''s Price Bid was not opened on the ground that he has not submitted the registration certificate issued by the Employees Provident Fund Organisation, Jharkhand. The petitioner, in order to meet the same, then submitted the certificate of registration issued by the Employees Provident Fund Organisation on 9th January, 2007, but even after submission of the said certificate, the petitioner''s Price Bid was not opened. It has been stated that as per Clause 5(b) of the NIT, in question, the bidders were required to submit Labour Licence. The petitioner has submitted Labour Licence, being Licence No. 29 dated 1st September, 2005, which is valid up to 31st August, 2007, (Annexure-11). Two other, bidders, namely, M/s. Rajiv Transport Coal Agency and M/s. Sainik Transport Pvt. Ltd. who applied for the same work, have not submitted their Labour Licence, as required under Clause 5(b) of the NIT, but their Financial Bids were opened by the respondents-authorities, whereas the petitioner''s Financial Bid was not opened on the ground of want of registration certification with Provident Fund Authority.

3. Counter affidavit has been filed on behalf of M/s. CCL justifying the denial of opening of the Financial Bid of the petitioner. It has been stated, inter alia, that the dispute raised by the petitioner is covered under Clause 32.1 of the instruction to the bidders and Clause 12 of the condition of the contract and that the petitioner has got remedy before the District Court and this writ petition is not maintainable. There was no illegality and arbitrariness on the part of the respondents. Financial Bid of the petitioners was not opened due to his failure to comply with the requirement and conditions of the NIT. The petitioner failed to submit the certificate of registration with Provident Fund Authority, which is required under Clause 5(c) of Parts-I and II, Section 2 of the Contractor''s Bid. Parts-I and II of the Tender were required to be submitted in one envelope up to 3.00 p.m. by 2nd January, 2007, Part-I of the Bid was to be opened on 4th January, 2007 at 11.00 a.m. in the office of the Chief General Manager (Transport), CCL Darbhanga House, Ranchi. The Management reserved right to accept or reject any or all the tenders wholly or partly without assigned any reason whatsoever. Petitioners'' Technical Bid was opened, but the Financial Bid was not found in proper order due to non-submission of the registration certificate with Provident Fund Authority, which was required as per Clause 5(c) of the NIT. Clause 24.3 of the tender document provides for rejection of the bid by the employer, if a bid is not found substantially responsive. As per Clause 26.3 of the NIT, the employer has right to accept or reject any variation or deviation and has also got unfettered right to accept or reject any bid wholly or partly, Clause 24.1 of the NIT providers for scrutiny of the bid and determination of responsiveness by the company. If the bidder does not comply with the terms and the bid is not substantially responsive to the requirements of the NIT, the same is liable to be rejected. In terms of Clause 27 of the NIT only that bid is acceptable which has been determined to be substantially responsive to the bidding documents and of the bidder who has offered the lowest evaluated bid price and who is eligible in accordance with the provision of Clause 2 and qualified in accordance with the provision of Clause 3, employer also got right to accept any bid, negotiate or reject any or all bids under Clause 28 of the NIT. It has been stated that the petitioner is an old contractor working under the respondents and he had been depositing the employer''s contribution towards CMPF of the workers, but that is not the due compliance of Clause 5(c) of the NIT. The requirement was the registration certificate with Provident Fund Authority and submission thereof with the tender papers. The petitioner has been depositing the contribution of two workers, as would be evident from Annexure-8. It has been stated that the Financial Bid was opened on 5th January, 2007 and by that time, the registration certificate with Provident Fund Authority was not submitted by the petitioner. The certificate was obtained subsequently on 9th January, 2007. The decision for not opening the petitioner''s Financial Bid (Price Bid), Part-II, was thus valid and legal and there is no

arbitrariness on the part of the respondents. No right of the petitioner has been infringed or violated. It has been stated that the petitioner is still working with the respondents and if the work is not awarded due to litigation, the Management shall be compelled to get the work executed by the petitioner even after expiry of the contract period. The respondents have denied the petitioner''s allegation that the Financial Bids of other two contractors are accepted without submission of Labour Licence. It has been submitted that the said contractors have submitted the required documents including the Labour Licence with their bids and the contrary allegation is baseless.

4. Mr. A.K. Sinha, learned senior counsel, appearing on behalf of the petitioner submitted that the petitioner has been executing and doing the similar nature of work since 1984. He fulfilled all the terms and conditions laid down in the NIT (Annexure-1). The essential qualification for award of work is mentioned in Clause 3.3 of the NIT. The petitioner fulfilled all the essential conditions and is qualified for the bid. The certificate of registration with Provident Fund Authority was not required for awarding the contract, as per Clause 3.3. of the NIT. The award criteria has been specifically mentioned in Clause 27 of the NIT. According to Clause 27.1, the employer has to award the contract to the bidders, whose bid has been determined to be substantial responsive to the bidding document and who has offered the lowest evaluated bid price. Eligibility criteria for the bidder is provided in Clause 2, while qualification for awarding the contract is provided in Clause 3. The petitioner is eligible in accordance with the provision of Clause 2 and is qualified in accordance with the provision of Clause 3, but the respondents have arbitrarily denied to open Financial Bid of the petitioner only on the ground that the petitioner has not produced the certificate of registration with Provident Fund Authority, as mentioned in Clause 5(c) of the NIT, which is not an essential condition for awarding the work. Criteria for awarding the work does not include submission of the certificate of registration with the Provident Fund Authority with the tender. It has not been mentioned any where in the tender document that the bid will be rejected for non-fulfilment of the condition, mentioned in Clause 5(c) of the NIT. The certificate of registration with the Provident Fund Authority is not required at that stage. In view Clause 11 of the NIT, which, inter alia, provides that the contractor shall make payment of the provident fund for the workmen, employed by him, for the work as per the laws prevailing under the provisions of CMPF and Allied Miscellaneous Provisions Act, 1952. The work, in question, is related with coalmines and the provision of Coal Mines Provident Fund Act is applicable and not the provision of Employees Provident Fund Act, 1958. The petitioner has been working with the respondents and has been depositing his contribution i.e. employer''s share in the office of CMPF through the Principal Employer, M/s. CCL. The Senior Personal Manager has issued the certificate to that effect (Annexure-5). The petitioner submitted the certificate of registration with Provident Fund Authority dated 9th January, 2007 (Annexure-8) before the decision of the Tender Committee dated 3rd February, 2007. The petitioner was earlier awarded work on 13th March, 2007 (Annexure-7) on the

ground that he has been depositing the provident fund amount in the office of CMPF, as there is no provision of registration of contractor in the office of CMPF and the amount of provident fund relating to the employees is deposited through the Principal Employer, namely, CCL.

5. Learned Counsel referred to the decision of the Supreme Court in the case of B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and Ors. reported in 2006 AIR SCW 5834and submitted that now it is settled that the employer has general power for relaxation of the requirement of the conditions, if the essential conditions have been substantially complied with. Submission of the registration certification with Provident Fund Authority is not an essential condition for awarding work as per Clause 3 of the NIT. The respondents, thus, cannot take the said ground for not opening the Financial Bid or not awarding the work. Submission of the registration certificate with Provident Fund Authority not being the essential condition of eligibility and for awarding work, the respondents cannot have insist upon the same and cannot refuse to open the Financial Bid (Price Bid) of the petitioner and as such, the action of the respondents is wholly arbitrary and illegal.

6. Mr. G. Mustafa, learned Counsel, appearing on behalf of the respondents, on the other hand, submitted that the petitioner has not complied with the terms of the NIT, which is required as per Clause 5(c), and as such, the petitioner''s Financial Bid was not fit to be opened. Learned Counsel submitted that as per Clause 2.2 of the NIT, the bid had to comprise of all the information and documents, which includes the requirement of registration certificate with Provident (sic) Authority, as required under Clause 5(c) of the NIT. In absence of the said certificate, the bid did not conform to the terms and conditions and specification of the bidding documents and as such the petitioner''s bid was not substantially responsive in terms of Clause 24 of the NIT. Learned Counsel submitted that Clause 24.3 of the NIT provides for rejection of such bid, which is not substantially responsive by the employer. Clause 27 of the NIT provides for award criteria, which requires that the bid has to be determined, as substantial responsive to the bidding documents, and with the lowest evaluated bid price. The petitioner was required to submit not only the documents, as per Clause 3.3, rather all the documents required, to be accompanied with Part-I of the bid. The petitioner failed to comply with Clause 5(c), Part-I, Section 2 of the tender document and as such he is not entitled for opening his Price Bid.

7. It has been submitted that, the petitioner has sought interference in contract decision, exercised by the respondents, which does not come with the purview of judicial review, as has been held by the Apex Court in the case of Tata Cellular Vs. Union of India, . Learned Counsel submitted that while reviewing the decision of the employer in contractual matter, the Court does not sit as a Court of appeal, but has to merely review the manner in which the decision was taken. The Court does not have the expertise to correct the administrative decision and it could not substitute its own decision. Learned Counsel appearing for the

respondents has referred to a decision of the Supreme Court in the case of Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, , and submitted that the writ petition filed by the petitioner, who is unsuccessful tenderer, cannot be interfered with unless substantial public interest is involved or grant of tender is mala fide. The petitioner could not bring anything on record to show any mala fide or any public interest in the instant case. Learned Counsel submitted that the Supreme Court in its decision in Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, , has held that the Court is concerned primarily to see, whether there has been any infirmity in the decision making process. The Court cannot examine the details of the terms of the contract, which have been entered into by the public bodies or the ''State''. Learned Counsel has also referred to some other judgments in support of the aforesaid principles, discussion of which would be simply repetition and multiplication of the judicial decisions reiterating the same principles.

8. It is well settled that the scope and extent of judicial review in the contractual matters by the Government Bodies is confined in the cases of arbitrariness, mala fide, error of law, breach of principle of natural justice, unreasonableness in reaching on decision and abuse of power by the employer. The Court is only concerned with the manner in which the decision has been taken by the respondents. In Tata Cellular (supra), the Supreme Court broadly approved the grounds of illegality, irrationally and procedural impropriety in decision making process, as the grounds for judicial review. In State of N.C.T. of Delhi and Another Vs. Sanjeev @ Bittoo, , the same principle for judicial review has been reiterated. The Apex Court, on discussion of the earlier decisions, has summarized the principles and scope of judicial review in the contract matter in its decision in B.S.N. Joshi & Sons Ltd. (supra) in Paragraph 68 of the judgment, which is quoted herein below:

68. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarized as under:

(i) If there are essential conditions, the same must adhered to;

(ii) If there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) If, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) The parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance of another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the Court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) When a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(vi) The contractors cannot form a cartel, if despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

(vii) When a decision has been taken purely on public interest the Court ordinarily should exercise judicial restraint.

The aforesaid judgment almost includes the principles enunciated by the Apex Court in its earlier decisions in the cases of Tata Cellular (supra), Raunaq International Ltd. (supra), Sterling Computers Ltd. (supra) and in the other decisions referred to and relied upon by learned Counsel for the respondents.

9. Conscious of the said established principles of law and limited scope of judicial review, I have carefully considered the facts and materials brought on record as also the submission made by learned Counsel for the parties. On perusal of the NIT, it is clear that Clause 3 of the terms and conditions provides essential qualification for awarding the contract. The said Clause does not mention submission of certificate of registration as an essential condition for awarding the contract. The award criteria mentioned in Clause 27 of the NIT requires the bid "to be substantial responsive to the bidding documents,..." which includes eligibility in accordance with the provision of Clause 2 and qualified in accordance with the provision of Clause 3 of the NIT. It is true that there are number of other terms and conditions in the NIT document providing for several other requirements. However, the requirements described in the NIT can be classified into two categories - (i) those laying down the essential condition of eligibility and (ii) those which are merely ancillary or subsidiary. The requirement of certificate of registration with the Provident Fund Authority, as mentioned in Clause 5(c) of the NIT, does not come within the first category i.e. within the category of essential condition for award of contract, which is evident from Clause 3.3, which runs thus:

3.3 To qualify for award of the contract:

(a) The intending tender must have in its name as a prime contractor experience of having successfully executed works of similar nature (such as Transportation, Removal of coal/Overburden/Shale/Extraneous materials/Sand etc.) valuing 65% of the annualized value of the work out of tender in any year during last 7 (seven) years ending last day of month previous to the one in which bid applications are invited.

(b) Evidence of possessing adequate working capital (at least 20% of the annualized value of the work) inclusive of access to lines of credit and availability of other financial resources to meet the requirement.

(c) Ownership of fleet of minimum 1/3rd of the tipping trucks/trucks and equipment required for the annualized work.

(d) Financial turn over and cost of completed works of previous works shall be given a weightage of 5% per year (average annual rate of inflation to bring them at current price level).

The qualification catena shown above are to be considered as a standard of normal works.

(emphasis supplied)

10. The said Clause 5(c) is also not an essential condition under award criteria, as mentioned in Clause 27 of the NIT, which is quoted herein below:

27. AWARD CRITERIA

27.1. Subject to Clause 28, the employer will award the contract to the bidder whose bid has been determined to be substantially responsive to the bidding documents and who has offered the lowest evaluated bid price, provided that such bidder has been determined to be:

(a) eligible in accordance with the provisions of Clause 2; and

(b) qualified in accordance with the provisions of Clause 3.

11. It is an admitted position that, earlier, the petitioner has been allotted similar nature of work and he is still working with the respondents and depositing the employer''s contribution of the labourers, as required under the provisions of the Coal Mines Provident Fund Act. The nature of the work in the instant NIT has been admitted to be the similar i.e. the work is related to colliery where the provisions of Coal Mines Provident Fund and Miscellaneous Provision Act, 1948 is applicable. The petitioner has taken specific point that no such registration certificate is issued under provision of Coal Mines Provident Fund Act, 1948. The respondents could not show any provision under the said Act of 1948 to refute the petitioner''s stand.

12. In view of the above discussion and consideration, I am of the view that the requirement of Clause 5(c) is not an essential condition precedent for award of the contract/nature of work in the instant case. The same is one of the ancillary conditions mentioned in the NIT, which is not even applicable for allotment of the contract in view of the admitted nature of work related to colliery which is covered by the provisions of CMPF Act. Since submission of certificate of registration is not an essential condition precedent for award of the contract/ work, denial of the Bid on the said ground, cannot be said to be a fair, just and rational decision. It is an arbitrariness on the part of the respondents to refuse to

open the petitioner''s Price Bid on the ground of non-submission of the certificate of registration with Provident Fund Authority though the nature of the works is covered by the provisions of the CMPF Act, under which no such certificate of registration is issued. The said decision making process of the respondents is not only contrary to the terms of Clause 3.3 of the NIT, but the same is arbitrary, irrational and mala fide in law. The said decision of the respondents is not worthy of judicial approval. This Court is, thus constrained to allow this writ petition and direct the respondents to open the petitioner''s Financial Bid and consider the same along with the other qualified/eligible bids, in accordance with law. However, there is no order as to costs.

