(2021) 12 CAL CK 0067

In the Calcutta High Court

Case No : Writ Petition No. 19365, 19842 Of 2021

Ganesh Movers & Logistics (P) Ltd. APPELLANT

Vs

Indian Oil Corporation Limited & Ors. RESPONDENT

Date of Decision : 20-12-2021

Acts Referred:

Constitution Of India, 1950 — Article 226
Motor Vehicles Act, 1988 — Section 41, 41(6)

Citation : (2021) 12 CAL CK 0067

Hon'ble Judges : Rajasekhar Mantha, J

Bench : Single Bench

Advocate : Kalyan Bandyopadhyay, Sirsanya Bandyopadhyay, Soham Kumar Roy, Deboleena Ghosh, Rahul Kumar Singh, Tapajit Das, Jishnu Chowdhury, Ratnesh Kumar Rai, Vipra Garg, Ankan Rai, Sankar Sarkar, Jaydip Kar, Amit Kumar Nag, M. Roy, Pantu Deb Roy, Aashutosh Bhattacharyya

Judgement

Rajasekhar Mantha, J

W.P.A. 19365 of 2021

Facts:

1. By a notice inviting tender sometime in May-June, 2021, the Indian Oil Corporation invited bids for road transportation of bulk petroleum products by Bottom Loading Tank Trucks from Jharsuguda Terminal. The writ petitioner submitted its bid on 25th July, 2021 offering 15 Tank Trucks.

2. In September, 2021 the IOCL sent diverse techno-commercial queries to and sought clarifications from the petitioner, inter alia, asking for documents like NOC for Tank Trucks already deployed for the benefit for IOC, PESO Certificate and a Board Resolutions. The petitioner supplied the said documents.

3. By an e-mail dated 2nd November, 2021 the petitioner was informed that its technical bid was accepted by the Technical Evaluation Committee. In a tender summary report published on 4th November, 2021, it was notified that the

petitioner's technical bid was accepted and was placed at serial No. 15. By a further communication dated 9th November, 2021 the petitioner was asked to participate in the financial part of the bid i.e. reverse auction for the Jharsuguda Terminal.

4. The petitioner duly participated in the said reverse auction on 12th November, 2021 and was awaiting a communication from the respondents. On the 19th November, 2021 the petitioner came to know that letters of acceptance have been sent to many transporters. The petitioner wrote to the respondents to ascertain its status. By a communication dated 22nd November, 2021 the petitioner was informed as follows:- "your tender was rejected during financial evaluation for the reason due to invalid RC book, 2 TTs got disqualified vide PQC. So, you had only 12 in LOT-I. Since there are more bidders with 15 TTs in LOT-I. No TTs would be allocated to the writ petitioner". In the financial bid however the petitioner was ranked L-I along with other bidders.

Arguments:

5. Mr. Kalyan Bandyopadhyay, learned Senior Advocate appearing for the petitioner submits that the rejection of the petitioner's bid is unfair, arbitrary and illegal and tainted with mala fides. The petitioner had offered 15 TTs of which two were new vehicles. The said two new vehicles, had permanent Registration Numbers being No. OD15T0149 and OD15T0297 issued by the RTO, Sambalpur, Odisha.

6. At the time when bids were submitted the Smart Cards being the formal registration document with electronic data, was not received and was available only on the 14th and 17th August, 2021 respectfully. The Registration Certificate produced along with the tender constituted sufficient compliance of the pre-qualification conditions (PQC) of the NIT. The respondent was, therefore, not justified in holding that Registration Certificate/RC book of the 2 TTs were not furnished along with the tender.

7. It is next argued that the petitioner's technical bid was already accepted by the respondents on 2nd November, 2021. It is only thereafter that the petitioner was allowed to participate in the financial part. Therefore, the rejection of the petitioner's technical bid from LOT-I category after technically disqualifying 2 TTs was illegal and arbitrary.

8. It is submitted that the two tank trucks disqualified by the IOC, had valid registration in terms of Section 41 (6) of the Motor Vehicles Act, 1988. Hence, the disqualification of the said TTs for alleged absence RC book is contrary to law unfair and arbitrary.

9. It is argued that the actions of the Indian Oil Corporation are bad for waiver, acquiescence and estoppel. The rejection of the petitioner's technical bid, after approving the same and allowing him to participate in the financial part of the tender process is for collateral purposes. It is aimed at depriving the petitioner of

the benefits of LOT-I thereby allowing unlawful gain to other tenderers.

10. In support of his argument Mr. Bandyopadhyay relied upon the following judgments. B. Yellaswamy Vs. South Central Railway, rep. its General Manager. Secunderabad & Ors. reported in 2007 SCC OnLine AP 29 at Paragraph 10 thereof, Reliance Energy Limited & Anr. Vs. Maharashtra State Road Development Corporation Limited & Ors. reported in (2007) 8 SCC 1 at Paragraphs 38 and 39, Krishna Bahadur Vs. Purna Theatre & Ors. reported in (2004) 8 SCC 229 at Paragraph 10 thereof, Vice Chairman & Managing Director, CIDCM Ltd. & Anr. Vs. Shishir Reality Pvt. Ltd. & Ors. reported in 2021 SCC OnLine SC 1141 at Paragraph 56 and IRCTC Ltd. & Anr. Vs. Doshion Veolia Water Solutions Pvt. Ltd. & Ors. reported in (2010) 13 SCC 364 at Paragraph 37 thereof.

11. Mr. Jaydip Kar, Senior Advocate, appearing for the IOC, would place reliance on Clause 1.3 under the heading PQC (Pre Qualification Criteria) of the NIT Sub-Clause 3 thereof is set out hereinbelow.

Sr.

Description

Unit

Requirement

3

Valid RTO registration and PESO license for ready TTs offered

legible copies need to be submitted. TTs offered without documents shall not be considered for evaluation.

12. Reference is then made to the document submitted by the writ petitioner issued by the Odisha Motor Vehicles Department for TT being No. OD15T0149 registered on 20th July, 2021 that had an endorsement at the bottom to the following effect "the document cannot be used an M.V. document in the vehicle". It is submitted that since the two TTs did not have Registration Certificate, to entitle the vehicle to ply on the roads, the certificate produced by the petitioner was invalid. The certificate would only be valid upon production of RC book therewith.

13. Mr. Kar thereafter places reliance upon the last paragraph of Clause 1.3 under PQC that is also set out hereinbelow.

"Notwithstanding any other condition/provision in the tender documents, bidders are required to submit complete documents pertaining to PQC along with their offer. Failure to meet the PQC will render the bid to be summarily rejected.

IOC reserves the right to complete the evaluation based on the details furnished by the bidder, with or without seeking any additional supporting documents/ clarifications."

14. It is, therefore, submitted that the IOC reserved its right to examine and reject any bid even after the technical qualification even in course of evaluation financial part of the bid.

15. It is stated that the entire bid of the petitioner was not rejected. The petitioner has only been disqualified from participating under LOT-I for falling short of 2 valid Tank Trucks. It was eligible to participate in LOT-II. The petitioner cannot be prejudiced and hence not entitled to relief in this proceeding.

16. It is submitted that the fulfilment or otherwise of technical qualifications in a tendering process must be left to the exclusive discretion of the employer. A writ Court should not impose its own view on the employer where two views are possible. It is argued that there is no flaw or infirmity pointed out by the petitioner in the decision making process. The scope of enquiry under Article 226 is restricted only to such decision making process. Hence the decision of the IOC to reject the petitioner's bid should not be interfered with. Reliance is placed on the decisions of the Hon'ble Supreme Court in Silppi Constructions Contractors Vs. UOI & Anr. reported in (2020) 16 SCC 489 at Paragraph 20 thereof and Afcons Infrastructure Limited Vs. Nagpur Metro Rail Corporation Limited & Anr. reported in (2016) 16 SCC 818 at Paragraphs 13 and 15 thereof. Mr. Kar also tried to distinguish the judgments cited by Mr. Bandyopadhyay. It is argued that the ratio in the decisions cited have no manner of the application in the facts of the instant case.

17. Counsel for the RTO Sambalpur, Orissa has produced a certificate dated 4th December, 2021 and annexing therewith documents indicating that the registration documents of the 2 TTs are true and correct.

WPA 19842 of 2021

Facts:

18. WPA 19842 of 2021 (M/s. Ajay Pal Singh Vs. Indian Oil Corporation Limited & Ors.) has been filed in respect of the same NIT. The facts are similar. The petitioner's bid was also similarly rejected as the Ganesh bid. The only difference is that the technical queries addressed to the writ petitioner herein were that the partnership deed of the petitioner dated 3rd December, 2014 is not registered. The names of all partners have not been mentioned in the tender forms. The compliance certificate of laws of other countries sharing the land border of India has not been furnished. The petitioner did furnish the documents and it was communicated that he was also technically qualified. He was allowed to participate in the financial part of the bid. All 15 TTs of the petitioner were, however, disqualified after participating in the financial bid for not satisfying the PQC. The registration document was deemed insufficient since no Smart Card was produced. The IOC relied upon the endorsement at the bottom of the produced registration certificate which is as follows:-

"Please Note : This Document is NOT VALID unless accompanied with a valid

SMART CARD Certificate of Registration."

Arguments:

19. Mr. Jishnu Chowdhury, Counsel for the petitioner adopted the submissions of Mr. Kalyan Bandyopadhyay and added as follows. The 15 TTs quoted in his client's tender were already in use for the IOC after verification of all documents. It is, therefore, ridiculous to disqualify his client for absence of Smart Card along with tender.

20. The IOCL was entitled to ask for documents and did so three times in course of the technical evaluation. The respondents could easily have asked for copies of Smart Card. They did not do so. Therefore, the presumption is that the IOC was satisfied with the registration documents supplied by his client along with the bid. It is also argued that the IOCL is estopped from asking for the said Smart Card, not having asked for the same in the technical evaluation. No Objection Certificates were obtained from the respondents for offering the same Tank Trucks that are already being used by the IOCL. It is, therefore, irrational for the respondents to reject his client's bid for absence of Smart Card. In reply thereto Mr. Amit Kumar Nag, Counsel appearing for the IOCL, adopted the submissions of Mr. Jaydip Kar.

Analysis:

21. This Court has carefully considered the rival contentions and the arguments of the counsel for respective parties. A plain reading of Clause 1.3.3 of the PQC, set out hereinabove would indicate that the IOC required submission of documents only showing a valid RTO registration. The petitioner Ganesh has submitted the Registration Certificates of both the vehicles which contained a permanent serial registration number. The requirement of submission of the RC book and/or Registration Certificate, Smart Card cannot be read into the said Clause.

22. It is an admitted position that the delivery of Smart Card takes a month or two after issuance of the Registration Certificate. The Registration Certificate produced by the petitioner constitutes sufficient compliance of Section 41 of the M.V. Act, 1988. The rejection of the petitioner's bid for alleged non-production of registration Smart Card is illegal, arbitrary and not sustainable in law.

23. In the supplementary affidavit used by the petitioner the copies of the Smart Card have been produced. The date and registration number of the Smart Card is the same as the date and registration of the certificate produced by the petitioner. The endorsement at the bottom of the Registration Certificate that it is "not valid in a motor vehicle without Smart Card", cannot invalidate the petitioner's tender. In any event, the petitioner has received the Smart Card on 14th and 17th August, 2021, after the submission of tender and much before the certification of valid technical bid and as on the date of the participation in the financial process. The petitioner has, therefore, been penalised by the

respondent for no fault on its part.

24. The respondents raised queries and obtained documents, inter alia, in the nature of Board resolution, PESO Certificates and other documents, after submission of the bid. The said documents appear to be as basic and fundamental as the registration document of a vehicle. The respondents did not feel the need to ask the petitioner Ajay Pal Singh, to produce the Smart Card in course of such queries. It can, therefore, be presumed that the respondents have never found any deficiency in the Registration Certificate or documents in respect of any of the TTs produced by either petitioners. The disqualification of the petitioner for absence of Registration Certificate Smart Card is, therefore, indeed arbitrary and illegal.

25. Since after raising all queries the petitioners were informed that they are technically qualified and deemed eligible for participating in the financial bidding process. The petitioners, in fact, also participated in the reverse auction being the financial bidding process. The petitioners were L-I along with 37 other bidders. The 2 new TTs of the petitioner Ganesh would be eligible for priority allotment and engagement as it has been specified in the NIT that newer vehicles would be given priority for deployment. The rejection of the petitioner's bid thereafter would unlawfully benefit other tenderers. The Court's mind is not free from doubt that the petitioner's bid was rejected for collateral purposes.

26. As held in paragraph 10 of the B. Yellaswamy decision (supra), the respondents should have clearly specified the requirement of RC book and/or Smart Card in addition to Registration Certificate in the NIT.

27. The observation of the Hon'ble Supreme Court in the Reliance Energy Decision (supra) at Paragraphs 38 and 39, must be applied in the facts of the case. The said paragraphs are set out hereinbelow.

"38. When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. If there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field".

39. In Reliance Airport Developers (P) Ltd. v. Airports Authority of India [(2006) 10 SCC 1] the Division Bench of this Court has held that in matters of judicial review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself. This means that the decision-maker must understand correctly the law that regulates his decision-making power and he must give effect to it otherwise it may result in illegality. The principle of "judicial review" cannot be denied even in contractual matters or matters in which the Government exercises its contractual powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest. Expression of different views and opinions in exercise of contractual powers may be there, however, such difference of opinion must be based on

specified norms. Those norms may be legal norms or accounting norms. As long as the norms are clear and properly understood by the decision-maker and the bidders and other stakeholders, uncertainty and thereby breach of the rule of law will not arise. The grounds upon which administrative action is subjected to control by judicial review are classifiable broadly under three heads, namely, illegality, irrationality and procedural impropriety. In the said judgment it has been held that all errors of law are jurisdictional errors. One of the important principles laid down in the aforesaid judgment is that whenever a norm/ benchmark is prescribed in the tender process in order to provide certainty that norm/standard should be clear. As stated above "certainty" is an important aspect of the rule of law. In Reliance Airport Developers [(2006) 10 SCC 1] the scoring system formed part of the evaluation process. The object of that system was to provide identification of factors, allocation of marks of each of the said factors and giving of marks at different stages. Objectivity was thus provided."

28. The principles of waiver, acquiescence and estoppel must also be applied against the respondents. The RC book and/or Smart Card, in the case of Ganesh and Smart Card is only in respect of M/s. Ajay Pal Singh were not found wanting during technical evaluation. After communicating to them that they are technically qualified and allowing them to participate in the financial bidding process, the respondents are barred by the principle of waiver and acquiescence to deny technical eligibility. Estoppel also applies against the respondents.

29. Useful reference may be made to Paragraph 37 of the decision of the Supreme Court in the IRCTC Ltd. decision (supra). The relevant paragraph of the said decision is set out hereinbelow.

"37. These observations made by this Court in W.B. SEB v. Patel Engg. Co. Ltd. [(2001) 2 SCC 451] rather come to the aid of Ion Exchange in this case. Since Irctc did not clearly stipulate in the instructions to bidders or in the special terms and conditions or in the prescribed price schedule or in any other part of the tender documents that a tenderer will not offer any discount on the prices quoted by him and if any such discount is offered the tender will be rejected, the offer of discount on the price made by Ion Exchange cannot be treated to be in breach of the essential terms or conditions of the tender documents. To hold that the State or its agencies can reject a tender for breach of a term or condition in the tender document, which is not explicit in the tender documents, is to give room to the State or its agencies to arbitrarily reject tenders even where the clear terms or conditions of the tender documents are complied with."

30. Even assuming for the sake of argument that the requirement of a Smart Card or Registration Certificate could be read into Clause 1.3.3 of the NIT, the non-furnishing thereof cannot amount to violation of any essential condition of NIT in the facts of the case.

31. Both the petitioners have produced Registration Certificates. The Smart Card of the vehicles of M/s. Ganesh was already available in August, 2021. This is only

a formality which cannot invalidate the entire bid. Similarly, in the case of M/s. Ajay Pal Singh, the respondents already had the registration documents and Smart cards of the TTs since they were being used by the IOCL. The NOCs issued by the IOCL confirms the same. Reference in this regard is made the Paragraph 56 in the case of Vice Chairman & Managing Director, CIDCM Ltd. decision (supra). Paragraph 56 of the said decision is set out below.

"56. The third aspect which needs to be considered is the legality of sub-division of plots and subsequent transfer of rights. It has been contended that the terms of the tender and letter of allotment do not allow such transfer. However, on perusal of the aforementioned Clause 16 of the General Terms and Conditions and the corresponding Condition 21 of the allotment letter, it is clearly revealed that the allottee was permitted to transfer or assign his rights, interests or benefits with prior written permission of the Corporation and on payment of such transfer charges as may be prescribed by the Corporation. Both the clause and the condition have further stipulated that such permission could be granted only after the agreed lease premium has been paid in full and after execution of agreement to lease. In the present case, agreed lease premium was paid in full. However, agreement to lease was made on the very next day, i.e. on 30.03.2010. In our view, merely because the agreement to lease was executed on the very next day, the assignment and transfer would not be invalidated. Such breach cannot in itself be termed as a fundamental to annul the tender, especially after receiving the lease amount, CIDCO cannot question the subsequent transfer. We can only state that such clause can be construed as a warranty alone rather than a condition, in light of the circumstances. The CIDCO, being a public body, had a duty to act fairly. Having acquiescence of the facts and allowing such transfer, they ought not to have taken such a hyper-technical view on contractual interpretation. In light of the aforesaid reasoning, we do not find any substantial reason sought to be adduced by the CIDCO to differ from the High Court."

32. Mr. Jaydip Kar, by reference to Silppi decision (supra) at Paragraph 20 thereof, would argue that the view as to whether the RC requirement should be read into Clause 1.3.3, is a subjective decision. An element of subjectivity must be read into every administrative decision. If two views are possible the Court should not impose the other view in the instant case. The argument may not at all be applicable in the facts. The interpretation of this Court and counsel for the petitioners is the view adopted by the respondents, from the very inception of the NIT. The view is that a Registration Certificate would be sufficient compliance of Clause 1.3.3. This resulted in the certification that the petitioners' bids were technically qualified. The said view continued all the way until the petitioners were allowed to participate in the financial bidding process and were ranked L-I in LOT No. 1. It is only thereafter that the IOC purported to take another view of the interpretation of Clause 1.3.3. Apart from the absence of bona fides for such contrary view, this Court is satisfied that at no point of time were there, two views as regards interpretation of Clause 1.3.3. There is in fact no second view in

the facts of the case.

33. The observations of Supreme Court in paragraphs 13 and 14 in the Afcons decision (supra) are also inapplicable reasons for hereinabove.

Conslusion:

34. For the reasons stated hereinabove the writ petitions succeed. The impugned orders dated 22nd November, 2021 in respect of both writ petitioners shall stand set aside. The tender summary report and the order disqualifying M/s. Ajay Pal Singh and M/s. Ganesh Movers and Logistics (P) Ltd. at Sl. No. 15 and Sl. No. 26 shall stand quashed and set aside. The two writ petitioners shall be entitled to be selected under the tender.

35. The writ petitions shall stand disposed of.

36. There shall be no order as to costs.

37. All parties are directed to act on a server copy of this order duly downloaded from the official website of this Court.

