(2012) 09 KAR CK 0290

In the Karnataka High Court

Case No : Writ Petition No''s. 7926-7927 of 2012 (GM-TEN)

Gupta Coal (India) Limited and Sical Logistics Limited APPELLANT

Vs

KIOCL Limited and M/s. Sarat Chatterjee and Co. RESPONDENT

Date of Decision : 11-09-2012

Acts Referred:

Citation : (2012) 09 KAR CK 0290

Hon'ble Judges : Mohan Shantanagoudar, J

Bench : Single Bench

Advocate : Udaya Holla, for Amarchand, for the Appellant; Y.K. Narayana Sharma, for R1 and Sri N. Khetty, for R2, for the Respondent

Judgement

Mohan Shantanagoudar

1. The Respondent No. 1 - KIOCL Limited (formerly Kudremukh Iron Ore Company Limited) is a wholly owned Government of India Enterprise established for the development of mines and plant facilities to produce iron ore etc., KIOCL floated an invitation to Tender dated 12.1.2012 and invited offers from interested parties for providing end to end logistics solution for transportation of 15,00,000 tones of iron ore from NMDC Mines at Kirandul and Bacheli (10/11A deposit) to the KIOCL Pellet Plant stock yard at Mangalore via Kakinada Deep Water Port and New Mangalore Port by rail cum sea route over a period of one year. As per the terms of the Tender, 1st respondent permitted the bidder to either make a bid individually or through a consortium. The petitioners 1 and 2 entered into a consortium agreement inter-se for the purpose of submission of the bid. Thereafter the consortium consisting of 1st and 2nd petitioners submitted their Techno-Commercial Bid on 24.2.2012 alongwith the necessary deposit/fee as well as certain supporting documents. After receipt of the Techno-Commercial bid, the 1st respondent acknowledged the receipt of the same by way of an email dated 2.3.2012 as per Annexure-K. The 1st respondent sought for certain clarifications as well as additional documents in respect of Techno-Commercial Bid submitted by the petitioners, which are as under:

(a) As per eligibility criteria in Annexure-2, Clause-(e) the consortium members have to submit acknowledged copy of the income tax returns filed for the financial year 2010-11 (assessment year 2011-12) from the income tax authority. In the case of the lead member, Gupta Coal India Limited, it is observed that they have submitted acknowledged copy of income tax return for the year 2009-10 (assessment year 2010-11). It is requested the acknowledged copy of the income tax return filed for the financial year 2010-11 (assessment year 2010-11) from the income tax authority may please be furnished to our office immediately i.e. latest by 14.00 hrs on March 02, 2012.

(b) Further, in the Consortium Agreement at Clause 2.1 (c) it is mentioned that the Agreement will expire after the validity of the period of the Tender. It is requested a suitable amendment to be incorporated in the agreement to take care of the situation if the validity period is extended.

2. Pursuant to the e.mail received from KIOCL, the 1st petitioner addressed a letter on 3.3.2012 bringing to the notice of the 1st respondent that as per Section 139(4) of the Income Tax Act, the petitioners have got opportunity to submit the Returns before the Income Tax Authority at any time before the expiry of one year from the end of the relevant assessment year. It is relevant to note that as on that date, the 1st petitioner i.e. one of the consortium members did not possess the acknowledged copy of the Income Tax Returns filed for the financial year 2010-11 from the Income Tax Authority. It was mandatory on the part of both the members of the consortium to submit the acknowledged copy of the Income Tax Returns filed for the financial year 2010-11 from the Income Tax Authority. Since the 1st petitioner did not possess the duly acknowledged copy of the Income Tax Returns filed for the said year, 1st petitioner informed the 1st respondent that the petitioners have got opportunity to furnish the Return at any time before the expiry of one year from the end of the relevant assessment year u/s 139(4) of the Income Tax Act. However, according to the petitioners, the 1st respondent intimated the 1st petitioner by an oral communication that the time to file the acknowledged copy of the Income Tax Returns for the financial year 2010-11 is extended up to 6th March 2012 in order to facilitate the 1st petitioner to submit the same. According to the petitioners, the acknowledged copy of the Income Tax Returns for the financial year 2010-11 was furnished before the 1st respondent by the petitioner No. 1 on 6.3.2012. However, the same was delayed by a few hours. Copy of the said Income Tax Returns submitted by petitioner No. 1 to the 1st respondent is produced at Annexure-N to the writ petitions.

3. The committee constituted by Respondent No. 1 for selecting the eligible bidders rejected the Techno-Commercial Bid submitted by the petitioners on the ground that the 1st petitioner did not submit the acknowledged copy of the Income Tax Returns filed for the financial year 2010-11 within time and recommended the names of six eligible bidders for participating in the online bidding cum reverse auction process. Pursuant thereto, the names of eligible bidders were published on the website of the 1st respondent on 9.3.2012.

Thereafter, on the same day the online bidding cum reverse auction process was completed and the 2nd respondent was announced as the successful bidder.

4. These writ petitions are filed praying for a direction to the 1st respondent to accept the Techno-Commercial Bid submitted by the petitioners and to permit them to participate in the online bidding cum reverse auction process. Further direction is sought against the 1st respondent to consider all bids afresh including Techno-commercial bid submitted by the petitioners and to conduct the online bidding cum reverse auction process afresh permitting the petitioners to participate in the said auction. In the alternative, the petitioners have sought for quashing the tender notification dated 12.1.2012 vide Annexure-A issued by the 1st respondent.

5. Sri Udaya Holla, learned senior advocate appearing on behalf of the petitioners submits that the 1st respondent has acted arbitrarily and contrary to law in rejecting the techno-commercial bid of the petitioners; The petitioners, as a consortium, have submitted all crucial documents at the stage of consideration of Techno-Commercial Bids and have satisfied all the essential requirements and preconditions specified in the invitation to Tender issued by the 1st respondent; The petitioners jointly have the necessary experience, expertise and resources to undertake the work; The 1st respondent has failed to appreciate that the delay on the part of the petitioner No. 1 in submitting the Income Tax Returns for the financial year 2010-11 is a mere procedural delay, for which specific exception has been provided under the provisions of Section 139 of the Income Tax Act, 1961; The delay on the part of the 1st petitioner is neither intentional nor a deliberate breach of fulfillment of the conditions set out in the Tender documents; Condition (e) of Annexure-2 of the tender document relating to submission of acknowledged copy of the Income Tax returns filed for the financial year 2010-11 is not an essential condition inasmuch as it does not in any manner affect the eligibility or competence of the petitioners to participate in the online bidding process; The audited accounts duly certified by the Chartered Accountant were produced by the petitioners alongwith their Techno-Commercial bid and it was open for the 1st respondent to accept the same in lieu of the acknowledged copy of the Income Tax returns filed for the financial year 2010-11 from the income tax authority; The Tender Accepting Authority ought to have relaxed eligibility criteria in case of deserving bidders such as petitioners, who would otherwise satisfy all other parameters of eligibility; The very conduct of Respondent No. 1 in accepting the additional documents after the expiry of last date by extending the time till 3.3.2012 is a conclusive evidence of the fact that the terms and conditions stated therein are not strictly adhered to and necessary relaxation is permitted wherever necessary and desired; Since the petitioners have filed the Income Tax Returns as required and produced the acknowledgment after submission of the Techno-Commercial bid within the extended time, 1st respondent ought not to have rejected the Techno-commercial bid of the petitioners on the mere ground of technicality and delay. On these and other grounds, he prayed for allowing these writ petitions.

Sri Y.K. Narayana Sharma, learned advocate appearing on behalf of the 1st respondent opposed the writ petitions by filing the statement of objections. He draws the attention of the Court to Annexure-R1 dated 12.1.2012 to contend that the terms and conditions and the requirements to be met etc., are incorporated in the tender notification and it is made clear that compliance of all the terms and conditions mentioned therein is a pre-requisite for considering the tenderer for qualifying for price biding -online biding cum reverse auction process; Annexure-R1 is the true copy of the first four pages of the invitation to tender forms with the heading "VERY IMPORTANT NOTE (VIN)" showing the three stages of the process for ready reference; Annexure-R2 produced alongwith the statement of objections deals with pre-qualification requirement & eligibility criteria; Relying upon Annexure-R2, he submits that furnishing of an acknowledged copy of the Income tax returns filed for the financial year 2010-11 from the income tax authority and copy of PAN card alongwith the tender is a must for all the consortium members and such documents shall be furnished alongwith the techno-commercial bid; The due date for submission of tender was 24.2.2012 at 2 p.m.; The time to furnish acknowledged copy of the Income tax Returns for the financial year 2010-11 is however extended up to 2 p.m. of 3.3.2012 as is clear from Annexure-R6; It is further made clear in Annexure-R6 that in case if the said document does not reach within the aforementioned period, the offer will not be considered for further processing; Though the time was extended up to 3.3.2012 for submitting acknowledged copy of the Income Tax Returns filed for the financial year 2010-11, the same was not submitted by the 1st petitioner to the 1st respondent even within the said time; Subsequently on 5.3.2012, the committee of the 1st respondent finalised the list of eligible bidders and even within that time the said document was not produced by the petitioners; The petitioners produced the said document after the closure of the office hours on 6.3.2012 and the same was rightly looked into by the 1st respondent on 7.3.2012 immediately after commencement of the office hours; Since the said document was submitted by the petitioners after 3.3.2012, the 1st respondent did not take cognisance of the same inasmuch as the scrutiny of papers and finalization of the list of eligible bidders was already done by them on 5.3.2012; The entire process has been open, fair and reasonable; Had the 1st respondent permitted the petitioner No. 1 to produce acknowledged copy of the Income Tax Returns filed for the financial year 2010-11 belatedly, then definitely the other bidders would have raised objection for the same; the communication to the petitioner by the service provider of the 1st respondent informing the petitioners to participate in the online bidding cum reverse auction process was an error and consequently the said communication sent at 9.40 a.m. on 9.3.2012 to the petitioners was immediately withdrawn at 10.20 a.m. on the very day as soon as the same came to the knowledge of the respondent No. 1; The representative of the petitioners was very much present on 5.3.2012 in the office of Respondent No. 1 at the time of scrutiny of documents and selection of eligible bidders and therefore it is not open for the petitioners to contend that one more opportunity should have been given to the petitioners to submit the aforementioned documents by extending further time. On these and other grounds, it prayed for dismissal of the writ petitions.

Sri N. Khetty, learned advocate appearing on behalf of the 2nd respondent - the successful bidder also supported the contentions of the 1st respondent and prayed for dismissal of the writ petitions. He has submitted that the petitioners are estopped from contending that the condition requiring the bidder to submit the acknowledged copy of the Income Tax Returns filed for the financial year 2010-11 is not an essential condition inasmuch as the petitioners did not raise the said question before the pre-bid meet. The mere filing of Solvency Certificate and the audited accounts by the Chartered Accountant will not take away the requirement of submission of the acknowledged copy of the Income Tax Returns for the financial year 2010-11. The Solvency Certificate vide Annexure-H itself makes it clear that the same is issued without any guarantee or responsibility on the part of the bank. He also submitted that the condition requiring the bidder to submit the acknowledged copy of the Income Tax Returns filed for the financial year 2010-11 is mandatory and the same is not directory.

6. It is not in dispute that the petitioners'' consortium have participated in the tender process and submitted the bid documents alongwith all the necessary documents except the acknowledged copy of the Income Tax Returns filed for the financial year 2010-11 issued from the Income Tax authority. On the said ground, the petitioners'' techno-commercial bid was rejected and consequently the petitioners'' consortium was not invited to participate in the online bidding cum reverse auction process inasmuch as the petitioners'' consortium was not held to be the qualified bidder for the said purpose. The relevant eligibility criteria and pre-qualification requirement reads thus:

(e) the bidder must furnish an acknowledged copy of the Income tax returns filed for the financial year 2010-11 from the income tax authority and copy of PAN card alongwith the tender. In case of proprietary or partnership firm it will be necessary to produce the aforesaid documents for the proprietor, firm and/or its partners as applicable. These documents shall be furnished along with the techno-commercial bid.

In case the bid is by consortium, all the consortium members shall furnish the above document, individually.

7. From the above, it is clear that the bidder must furnish an acknowledged copy of the Income tax returns filed for the financial year 2010-11 from the income tax authority and copy of the PAN card alongwith the tender. It is also made mandatory that these documents shall be furnished alongwith the techno-commercial bid. In case the bid is by consortium, all the consortium members shall furnish the aforementioned documents individually. Thus it is mandatory on the part of both the petitioners who are members of the consortium to furnish the aforementioned documents individually. Though the petitioner No. 2 had furnished the acknowledged copy of the Income Tax Returns filed for the financial

year 2010-11, the petitioner No. 1, who is the lead member of the consortium did not submit the said document alongwith the tender. However, Respondent No. 1 permitted the petitioners to submit the acknowledged copy of the Income Tax Returns filed for the financial year 2010-11 latest by 2 p.m. on 3.3.2012 as is clear from Annexure-R6. Annexure-R6 further makes it clear that in case such document does not reach the 1st respondent before 2 p.m. on 3.3.2012, the offer of the petitioners would not be considered for further processing. Undisputedly, the petitioners did not produce the said document before 2 p.m. on 3.3.2012.

8. Having no othergo, the 1st respondent proceeded further on 5.3.2012 to finalise the bid of eligible tenderers. As aforementioned, though the 2nd petitioner has produced acknowledged copy of the Income Tax Returns filed for the financial year 2010-11, the 1st petitioner has not submitted the same. Consequently, the petitioners'' consortium is not considered to be qualified for further processing and the petitioners were not invited for participating in online bidding cum reverse auction process (price bidding) inasmuch as the tender was incomplete.

The concerned committee formed by the 1st respondent to deal with the matter met on 5.3.2012 and rejected the tender application submitted by the petitioners and recommended six other eligible persons for participating in online bidding cum reverse auction process. On the date of processing and selection i.e. 5.3.2012, the petitioners'' representative viz., P. Paul representing M/s Sical Logistics Limited (petitioner No. 2) came to the office of the 1st respondent at 3 p.m. and he was there up to 6 p.m. The copy of the extract of the list of visitors on 5.3.2012 maintained by the 1st respondent and the copy of the Visitor''s pass issued by the 1st respondent to the said representative are produced at Annexure-R9 and R-10 respectively. Thus the petitioners were very much aware on 5.3.2012 itself, of the fact that they are not selected for online bidding cum reverse auction process (price bidding) in respect of the tender in question. The finalized list of eligible persons was published in the website of the 1st respondent company on 9.3.2012 itself. On the very date i.e. 9.3.2012 online bidding cum reverse auction process was completed and the 2nd respondent has been selected.

9. According to the 1st respondent, petitioners furnished the acknowledgement for having filed the Income Tax returns with the department after the finalization of the list of eligible bidders i.e. after 5.3.2012. Even according to the petitioners, they have submitted the said document before the 1st respondent on 6.3.2012 at 5.50 p.m. through e.mail vide Annexure-N. Thus it is clear that the submission of acknowledged copy of the Income Tax Returns filed for the financial year 2010-11 was made only after the closure of the office hours of the 1st respondent on 6.3.2012 and not prior thereto and the selection of the six eligible bidders was over on 5.3.2012 itself.

10. It is specifically denied by the 1st respondent that it has agreed to extend

time up to 6.3.2012 to submit the acknowledged copy of the Income Tax returns filed for the financial years 2010-11. There is nothing on record to support the contention of the petitioners that the 1st respondent has permitted the petitioners to submit the said document within 6.3.2012. Even according to the petitioners, they were orally informed by the 1st respondent regarding extension of time up to 6.3.2012. Such a contention of the petitioners regarding oral permission cannot be accepted in the absence of any supporting document. As aforementioned, the tenders were scrutinised on 5.3.2012 itself by the 1st respondent and on the very day at the relevant time, the petitioners representative was present in the office of the 1st respondent and consequently, the petitioners very well knew about the rejection of their tender.

11. The submission made on behalf of the petitioners that the condition requiring the tenderer to submit the acknowledged copy of the Income Tax Returns filed for the financial year 2010-11 is not an essential condition, cannot be accepted. The tender accepting authority need to know as to what is the financial status of the particular tenderer, particularly having regard to the quantum and nature of work to be entrusted to the selected tenderers. Such an important condition requiring the tenderer to submit the acknowledged copy of the Income Tax Returns filed for the financial year 2010-11 cannot be considered as a nonessential condition. Since the successful bidder is expected to transport fifteen lakh tonnes of iron ore from far off places by rail cum sea route over a period of one year, it is but natural for the tender inviting/accepting authority to satisfy themselves as to whether the successful tenderer would be in a position to manage such huge quantity of work by employing men and material continuously for a period of one year. Since the work to be carried is worth crores of rupees, it is but natural for the 1st respondent to satisfy itself about the capacity, financial position and financial stability of the tenderer. In order to find out the financial stability of the intending bidders, the Tender Inviting Authority has imposed the aforementioned condition relating to submission of acknowledged copy of Income Tax Returns filed for the financial year 2010-11.

12. The contention of the petitioners that audited balance sheet produced by them alongwith the tender document ought to have been taken into consideration by the 1st respondent in lieu of acknowledged copy of the Income Tax returns filed for the financial year 2010-11 cannot be accepted. It is no doubt true that the audited balance sheet was produced, but the same was not submitted before the Income Tax Department for further action. Moreover, according to the 1st respondent, there was no request by the petitioners to accept the balance sheet at the pre-bid meeting. On the other hand, the petitioners have not raised any objection regarding submission of acknowledged copy of the Income Tax returns filed for the financial year 2010-11 in the pre-bid meeting in which they participated. In the said meeting, the petitioners have accepted all the terms and conditions of the tender notification and submitted their tender also. Merely because the Solvency Certificate and the accounts audited by the Chartered Accountant are submitted by the petitioners, the

requirement of furnishing acknowledged copy of the Income Tax Returns filed for the financial year 2010-11 cannot be given go-bye. The 1st respondent has imposed such a condition with a particular object as mentioned supra. Merely because it is open for petitioner No. 1 to submit the income tax returns before the concerned Income Tax Authority within one year as per Section 139(4) of the Income Tax Act, the respondent No. 1 is not expected to wait for one more year by deviating from the tender conditions. The tenderer is expected to fulfil all the requisite conditions of tender document to qualify for getting the contract. When the tender document specifies particular procedure to be followed by all the tenderers, it is incumbent on each of the tenderer to follow such procedure. It is not open for the petitioners to request or demand to treat them differently. Moreover, this Court will not sit as an appellate authority in the said decision of the 1st respondent - tender inviting authority to conclude that such a requirement was unnecessary or was non-essential, under the facts and circumstances of this case.

13. The petitioners were fully aware of the requirement of submission of the documents as listed in the tender document. As a matter of fact, the 2nd petitioner has submitted all the documents including the acknowledged copy of the Income Tax Returns filed for the financial year 2010-11. However, the 1st petitioner has failed to do so. In this view of the matter, it is not open for the petitioners to contend that such a condition need not be complied with insofar as the petitioner No. 1 is concerned. The petitioners are estopped from raising such a plea after submission of the tender. At one point of time, lenience was shown to the 1st petitioner by extending time up to 3.3.2012. Had the said condition not been mandatory, the 1st respondent would not have extended the time. Merely because there was an extension of time once by the 1st respondent as aforementioned, it is not open for the petitioners to contend that further extension should have been granted once again in favour of the petitioners. Had the techno-commercial bid of the petitioners been considered without there being the relevant document, the other tenderers would have definitely objected for the same by contending that the 1st respondent is not acting in transparent manner, but is acting in biased manner to help the 1st petitioner. This court on careful consideration of the entire material on record finds that the whole process of the 1st respondent is open and transparent and consequently the 1st respondent could not have shown leniency in favour of the 1st petitioner by treating the petitioners differently.

14. Sri Udaya Holla, learned senior advocate appearing for the petitioners relying upon the judgment in the case of M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, submitted that literal compliance of term can be waived and tender ought to have been accepted inasmuch petitioners have complied with all the conditions substantially.

The facts of aforementioned case differ from the facts of this case. In the said matter, the highest bidder though was supposed to deposit the EMD by depositing of cash or Demand Draft, had deposited EMD by certified cheque of the Union Bank. In that context, the Supreme Court has held that there is sufficient compliance. There cannot be any dispute that certified cheque of the bank is almost akin to the Demand Draft inasmuch as the encashment of such certified cheque issued by the bank is certain.

15. He further relies upon the judgment of the Supreme Court in the case of M/s. G. J. Fernandez Vs. State of Karnataka and others, wherein it is held that the authority may deviate or relax the prescribed standard in certain situation; But any such deviation, if made, should not result in arbitrariness or discrimination.

In the matter on hand, if the 1st respondent were to deviate from considering the techno-commercial bid of the petitioners without there being acknowledged copy of the Income Tax returns filed for the financial year 2010-11, it would have resulted in arbitrariness or discrimination. Moreover in the matter on hand, the terms and conditions of the tender notification are certain and there is no ambiguity or vagueness. Had there been vagueness or ambiguity in the said norms, the same would have resulted in unequal or discriminatory treatment. In the matter on hand, the terms and conditions are specific and certain. There is no vagueness or ambiguity. As could be seen from the tender notification, it is clear and unambiguous that every tenderer should furnish acknowledged copy of the Income Tax returns filed for the financial year 2010-11 alongwith the tender.

16. Sri N. Khetty, learned counsel for Respondent No. 2 relied upon the judgment of the Apex Court in the case of Glodyne Technoserve Ltd. Vs. State of M.P. and Others, wherein it is observed thus:

46. The above provision obliges a tenderer to produce along with the bid document a copy of the quality certificate which is valid and active on the date of submission of the bid and it does not enable a bidder to withhold the copy of such quality certificate. Where the quality certificate will be expiring shortly and is due for renewal, the bidder is also obliged to produce the renewed certificate at the time of signing of the contract. The appellant claimed to have a valid and active ISO 9001:2000 certificate at the time of submission of the bid, but did not produce a copy of the said certificate along with the bid document.

47. The submissions made on behalf of the appellant proceeds on the basis that it was entitled, almost as a matter of right, not to submit the documents required to be submitted along with the bid documents on the supposition that, even if such documents were valid and active, they could be submitted at the time of signing of the memorandum of understanding. The appellant had a valid and active ISO 9001:2000 certification which it did not submit along with the bid documents, may be due to inadvertence, but whether such explanation was to be accepted or not lay within the discretionary powers of the authority inviting the bids. The decision taken to reject the technical bid of the appellant cannot be said to be perverse or arbitrary. We need not refer to the decisions cited by the learned Attorney General or the appellant in this regard, as the principles

enunciated therein are well established.

(Emphasis supplied)

The aforementioned observations aptly apply to the present case. In this matter also, though it was open for the petitioners to produce the relevant documents alongwith the tender, the petitioners have not done so. Moreover, in the matter on hand, the returns were not even submitted before the department as on 3.3.2012 i.e. as on the last date prescribed for submission of the acknowledged copy of the Income Tax returns filed for the financial year 2010-11. Sri Y.K.N. Sharma, learned counsel for Respondent No. 1 is justified in submitting that while invoking power of judicial review in matters as to tenders or award of contracts, certain special features should be borne in mind that evaluation of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters. Tenderer or contractor with a grievance can always seek damages in a Civil Court. Interference in tender or contractual matters in exercise of power of judicial review is permissible only if: (i) the process adopted or decision made is mala fide or intended to favour someone, or (ii) the same is so arbitrary and irrational that no responsible authority acting under law could have arrived at it, or (iii) it affected the public interest. Same is the dictum laid down by the Apex Court in catena of judgments including in the case of Jagdish Mandal Vs. State of Orissa and Others,

In the matter on hand, none of the aforementioned circumstances are existing. This Court does not find that the decision is taken on malafides or that the petitioners are kept out in order to favour some one. The decision of the 1st respondent in rejecting the tender of the petitioners cannot be said to be arbitrary or irrational under the facts and circumstances of the case.

In view of the above, this Court does not find any ground to grant prayers as sought for in these writ petitions. Accordingly, the writ petitions fail and the same stand dismissed. It is needless to observe that further proceedings shall take place by assigning the work in favour of the successful bidder and the time spent before this Court should not be the ground to deny the entrustment of work in favour of the successful bidder.

