
(2019) 08 MAN CK 0020

In the Manipur High Court

Case No : Writ Petition (c) No. 216, 350 Of 2019

K.C Group And Others

APPELLANT

Vs

Union Of India And Ors

RESPONDENT

Date of Decision : 06-08-2019

Acts Referred:

Constitution Of India, 1950 — Article 14, 226
Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security
Interest Act, 2002 — Section 17

Citation : (2019) 08 MAN CK 0020

Hon'ble Judges : Kh. Nobin Singh, J

Bench : Single Bench

Advocate : Ajoy Pebam, Th. Manihar, N. Jotendro, H. Tarunkumar

Final Decision : Disposed Off

Judgement

Kh. Nobin Singh, J

[1] Heard Shri Ajoy Pebam, learned Advocate appearing for the petitioner in W.P. (C) No. 216 of 2019, Shri Th. Manihar, learned Advocate appearing for the petitioner in W.P. (C) No.350 of 2019; Shri N. Jotendro, learned Senior Advocate appearing for the private respondent No.5 and Shri H. Tarunkumar, learned Advocate appearing for FCI in both the writ petitions.

[2] Since both the writ petitions have arisen out of a similar set of facts, the same are being disposed of by this common judgment and order.

[3.1] By the instant writ petition, the petitioner firm has prayed for issuing a writ of mandamus or any other appropriate writ to direct the Official respondents to open its part-A (Technical Bid) and also to issue a writ of certiorari or any other appropriate writ to quash and set-aside the impugned letter dated 20.02.2019.

[3.2] Facts and circumstances as narrated in the writ petition, are that the petitioner is a registered partnership firm having its registered Office at Imphal, Manipur and has been registered under the GST being Registered No. 14

AQLPM9645E1ZL under the Government of India.

[3.3] The Deputy General Manager (R), Food Corporation of India issued a Notice Inviting Tender (NIT) dated 19.11.2018 for appointment of a contractor for handling of food-grains at FCI FSD, Sawombung and FSD Bishnupur, Manipur. The bidders were invited to submit their bids online through e-tender in two bid tendering system. The petitioner along with others participated in the tender and on 19.02.2019 the technical bid documents were opened wherein the petitioner had been declared as disqualified in the technical bid. The reason for disqualification of the petitioner, during technical evaluation, read as under:

"It can be seen from the above (Information at Sl.no.19 of Table-C) that the tenderer M/S K.C. Group has not uploaded the Schedule of Rates. As per MTF clause 8(g), tenders not accompanied by all the Schedules/Annexure intact and duly filled in and sign may be ignored. The Schedule of Rates is a document wherein all the rates for the various works to be executed by the handling contractor have been incorporated which is a vital competent of the tender document. Hence, considering the non-compliance of Clause 8(g), the committee is of the opinion that the tenderer viz, M/s K.C Group may be treated as technically disqualified. "

Thereafter, the official respondents opened the Price Bid for appointment of a contractor for handling of food-grains at FCI FSD Sawombung, Manipur on 21.02.2019 and the rate quoted by the private respondent No.5 is 110% ASOR, while the rate quoted by the petitioner in percentage is at 70% which is above the rate given in the schedule of rate for services and accordingly, the rate quoted by the petitioner is the lowest rate amongst the bidders and the suitable bidder for awarding the contract works. On 20.02.2019, the official respondents uploaded the impugned technical bid opening summary declaring that the respondent No.5 was accepted for financial bid opening. Being aggrieved by the action on the part of the official respondents, the instant writ petition has been filed by the petitioner.

[5.1] By the instant writ petition, the petitioner has prayed for issuing a writ of certiorari or any other appropriate writ to cancel and set-aside the order dated 27.03.2019 appointing respondent No.4 as the contractor for handling of food-grains.

[5.2] Facts and circumstances as narrated in the writ petition, are that the petitioner is a firm represented by Shri Gaikholung Panmei who is a citizen of India, having its office at Langol Tarung, Imphal.

[5.3] A Notice Inviting Tender (NIT) dated 19.11.2018 was published in the newspaper for appointment of a contractor for handling of food-grains at FCI FSD, Sawombung and FSD Bishnupur, Manipur and tenders were invited, from amongst the eligible contractors, to be submitted on online through e-tender in two bid tendering system. The petitioner participated in the tender by submitting his bid being Bid No.1434471 on 11.12.2018 in time, after having fulfilled all the

terms and conditions of Tender. On 25.02.2019 the tender summary report was issued wherein the petitioner's bid was shown to have been rejected on technical ground.

[5.4] Being aggrieved of the action on the part of the official respondents, the instant writ petition has been filed on inter-alia grounds that it was illegal and arbitrary being violative of Article 14 of the Constitution of India; that the official respondents had adopted a hidden criteria to oust the petitioner from being enlisted and that by such a irrational process, the respondent No.4 was selected for the works.

[6] An affidavit on behalf of the official respondent has been filed wherein preliminary objection as regards the maintainability of the writ petitions was raised on the ground that the terms and conditions of the Modern Tender Format (MTF) had not been complied with. In the case of dispute arising out of or touching upon the contract, the same will have to be referred to the dispute/ Grievances/ redressal committee constituted by the official respondents. The petitioner ought to have approached the said dispute/ Grievances/ redressal committee before approaching this Court. The discretionary jurisdiction of this Court under Article 226 of constitution is not absolute but ought to be exercised judicially in the given facts of a case in accordance with law. The normal rule is that the writ petition under Article 226 ought not to be entertained, if alternative and statutory remedies are available except in cases falling within the well defined exceptions. In addition, it has been stated that the official respondents have followed the tender procedure while rejecting the bids of the petitioners in the two tenders under due consideration in the technical violation stage. The instructions and guidelines given in the NIT are brief in nature and the details of the tender were given in the MTF. The terms and conditions as enumerated in the MTF shall prevail during the process of the tender enquiry. An affidavit-in-opposition has been filed by the private respondent and the averments made therein are similar to that of the FCI but in addition thereto, it has been submitted that the bids of the petitioners were not submitted in terms of the tender documents and that the official respondents having reserved its right to reject them, had rejected them. After the private respondent having been appointed as the contractor for handing of foodgrains/allied materials vide orders dated 27-03-2019 and 28-03-2019 in respect of both the FSD, Sawombung and Bishnupur, he had started discharging his duties. Since there was no illegality in the tender process, there was no need of directing the official respondents to redo the process of tender.

[7] It has been submitted by Shri H. Tarunkumar, the learned Advocate appearing for the official respondents that the instant writ petitions are not maintainable for the reason that in terms of Clause XVIII of Model Tender Form (MTF), the dispute shall be referred to the Dispute/ Grievances Redressal Committee constituted by the official respondents and functioning at the zonal officer of the IOC with a view to settle the dispute and that in case any dispute

remains unresolved, the same shall be settled by the Court of law having jurisdiction. Before approaching this Court under Article 226 of the Constitution of India, the petitioners ought to have approached the appropriate forum as provided under the Model Tender Form. The petitioners, agreeing with the terms and conditions of the tender documents, submitted their bids and therefore, they would be governed by the said terms and conditions. In order to support his contention, he has relied upon the decision rendered by the Hon'ble Supreme Court in *Authorised Officer, State Bank of Travancore & anr. Vs. Mathew KC*, Civil Appeal No.1281 of 2018 on 30-01-2018. On the other hand, Shri Ajay Pebam and Shri Th. Manihar, the learned counsel appearing for the petitioner have submitted that the Clause XVIII of the MTF is applicable to a case where the contract had been entered into between the FCI and the contractor and since no such contract had been entered into between the petitioners and the FCI, the petitioners were not required to approach the Disputes/ Grievance Redressal Committee. Moreover, according to their knowledge, there is no permanent Disputes/ Grievance Redressal Committee. The official respondents have failed to produce any document to show that the Disputes/ Grievance Redressal Committee has been constituted at the zonal office. Some time may be taken by the higher authorities of the FCI while constituting it and in view of the urgency involved herein, it was not possible for them to wait for constitution of a committee. Reliance has been placed in the decision rendered by the Hon'ble Supreme Court in *Maharashtra Chess Association Vs. Union of India & ors.*, Civil Appeal No.5654 of 2019 @ SLP No.29040 of 2018 on 29-07-2019.

[8] Before examining the preliminary issue relating to the maintainability of the writ petitions, it may be proper and appropriate for this Court to examine the decisions rendered by the Hon'ble Supreme Court in the cases cited above and relied upon by the counsel appearing for the parties. The *Authorised Officer, State Bank of Travancore Vs. Mathew KC* case (supra) arose out of a proceeding initiated under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act (hereinafter referred to as "the SARFAESI Act"). The High Court vide its interim order dated 24-04-2015 stayed the proceedings at the stage of notice under Section 13(4) of the SARFAESI Act on deposit of Rs.3,50,000/-. The remedy was available with the respondent therein under Section 17 of the SARFAESI Act but before approaching the High Court, the respondent failed to exhaust it before the Debt Recovery Tribunal. The Hon'ble Supreme Court held that the writ petition ought not to have been entertained and the interim order granted for the mere asking without assigning special reasons and that too, without even granting opportunity to the appellant to contest the maintainability of the writ petition and failure to notice the subsequent developments in the interregnum. The Hon'ble Supreme Court further observed that the proceedings under the Recovery of debts due to Banks and Financial Institutions Act, 1993 with passage of time, had become synonymous with those before the regular courts affecting expeditious adjudication and all these aspects have not been kept in mind and considered

before passing the order. In Maharashtra Chess Association case (supra), a private agreement was entered into between the appellant and the second respondent and Clause 21 of the Constitution and Bye Laws of the second respondent provide that any suit/ legal action against the second respondent shall be instituted in the courts at Chennai where its registered office is situated. A writ petition was filed before the Bombay High Court impleading the second respondent as a party respondent which raised an objection that the Bombay High Court did not have any jurisdiction to entertain it. The Bombay High Court held that the Clause 21 ousted the jurisdiction of all other courts except the Courts at Chennai. Before deciding the issue involved therein, the Hon'ble Supreme Court examined the scope of Article 226 of the Constitution of India and held as under:

"15. The powers of the High Court in exercise of its writ jurisdiction cannot be circumscribed by strict legal principles so as to hobble the High Court in fulfilling its mandate to uphold the rule of law.

16. While the powers the High Court may exercise under its writ jurisdiction are not subject to strict legal principles, two clear principles emerge with respect to when a High Court's writ jurisdiction may be engaged. First, the decision of the High Court to entertain or not entertain a particular action under its writ jurisdiction is fundamentally discretionary. Secondly, limitations placed on the court's decision to exercise or refuse to exercise its writ jurisdiction are self-imposed. It is a well settled principle that the writ jurisdiction of a High Court cannot be completely excluded by statute. If a High Court is tasked with being the final recourse to upholding the rule of law within its territorial jurisdiction, it must necessarily have the power to examine any case before it and make a determination of whether or not its writ jurisdiction is engaged. Judicial review under Article 226 is an intrinsic feature of the basic structure of the Constitution."

The Hon'ble Supreme Court, while examining the issue as to whether, even in the absence of Clause 21, the existence of an alternative remedy would create a bar on the Bombay High Court entertaining the appellant's writ petition, held:

"22. This argument of the second Respondent is misconceived. The existence of an alternate remedy, whether adequate or not, does not alter the fundamentally discretionary nature of the High Court's writ jurisdiction and therefore does not create an absolute legal bar on the exercise of the writ jurisdiction by a High Court. The decision whether or not to entertain an action under its writ jurisdiction remains a decision to be taken by the High Court on an examination of the facts and circumstances of a particular case.

25. The mere existence of alternate forums where the aggrieved party may secure relief does not create a legal bar on the High Court to exercise its writ jurisdiction. It is a factor to be taken into consideration by the High Court amongst several factors. Thus, the mere fact that the High Court at Madras is capable of granting adequate relief to the Appellant does not create a legal bar

on the Bombay High Court exercising its writ jurisdiction in the present matter."

On the facts of the said case and in particular, the effect of Clause 21, the Hon'ble Supreme Court held:

"26. This brings us to the question of whether Clause 21 itself creates a legal bar on the Bombay High Court exercising its writ jurisdiction. As discussed above, the writ jurisdiction of the High Court is fundamentally discretionary. Even the existence of an alternative adequate remedy is merely an additional factor to be taken into consideration by the High Court in deciding whether or not to exercise its writ jurisdiction. This is in marked contradistinction to the jurisdiction of a civil court which is governed by statute. In exercising its discretion to entertain a particular case under Article 226, a High Court may take into consideration various factors including the nature of the injustice that is alleged by the petitioner, whether or not an alternate remedy exists, or whether the facts raise a question of constitutional interpretation. These factors are not exhaustive and we do not propose to enumerate what factors should or should not be taken into consideration. It is sufficient for the present purposes to say that the High Court must take a holistic view of the facts as submitted in the writ petition and make a determination on the facts and circumstances of each unique case.

29. In the present case, the Bombay High Court has relied solely on Clause 21 of the Constitution and Bye Laws to hold that its own writ jurisdiction is ousted. The Bombay High Court has failed to examine the case holistically and make a considered determination as to whether or not it should, in its discretion, exercise its powers under Article 226. The scrutiny to be applied to every writ petition under Article 226 by the High Court is a crucial safeguard of the rule of law under the Constitution in the relevant territorial jurisdiction. It is not open to a High Court to abdicate this responsibility merely due to the existence of a privately negotiated document ousting its jurisdiction.

30. It is certainly open to the High Court to take into consideration the fact that the Appellant and the second Respondent consented to resolve all their legal disputes before the Courts at Chennai. However, this can be a factor within the broader factual matrix of the case. The High Court may decline to exercise jurisdiction under Article 226 invoking the principle of forum non conveniens in an appropriate case. The High Court must look at the case of the Appellant holistically and make a determination as to whether it would be proper to exercise its writ jurisdiction. We do not express an opinion as to what factors should be considered by the High Court in the present case, nor the corresponding gravity that should be accorded to such factors. Such principles are well known to the High Court and it is not for this Court to interfere in the discretion of the High Court in determining when to engage its writ jurisdiction unless exercised arbitrarily or erroneously. The sole and absolute reliance by the Bombay High Court on Clause 21 of the Constitution and the Bye Laws to determine that its jurisdiction under Article 226 is ousted is however one such instance."

[9] From the aforesaid decisions, it is seen that the mere existence of alternative forums where the aggrieved party may secure relief, does not create a legal bar on a High Court to exercise its jurisdiction. It is a factor to be taken into consideration by the High Court amongst several factors. The decision whether or not to entertain an action under its jurisdiction remains a decision to be taken by the High Court on an examination of the facts and circumstances of a particular case. In the present cases, the stand of the FCI or for that matter, the official respondents is that while evaluating the technical bids of all the bidders, only the private respondent was found qualified and others including the petitioners, were found unqualified and therefore, as per the summary of technical evaluation, the price bid of only the private respondent was to be opened. Being aggrieved by the technical evaluation summary dated 29-02-2019, the same is being sought to be challenged in the writ petitions, to which the official respondents raised an objection of maintainability on the ground that in terms of Clause XVIII of the bidding documents, the petitioners ought to approach the Disputes/ Grievances Redressal Committee. Clause XVIII is a part of the terms and conditions governing contracts for transport, unloading/ loading of foodgrains etc. which form the Annexure-I of the Part-A of the bidding documents relating to technical bid. On perusal of the terms and conditions as contained in Annexure-I of Part-A, they would appear to be followed by the contractor after its appointment. This is what has been contended by the counsel appearing for the petitioners. But it may be noted that the bidding documents are divided into two-Part-A [Technical Bid] and Part-B [Price Bid] and in particular, the instructions for online bid submission which provides the manner as to how the bid was to be submitted and the tender documents including Part-A and Part-B should be uploaded. While preparing the bids, the bidder was required to go through the tender advertisement and the tender documents carefully to understand the documents required to be submitted as part of the bids. Clause 20 of the instructions for online bid submission specifically provides that the instructions given therein are brief in nature and for the detailed terms and conditions, the MTF applicable may be referred to by the bidders.

[10] The fact remains that the petitioners after going through the tender documents carefully, submitted their bids which include Part-A and Part-B and participated in the tender process without raising any objection. They were bound by the terms and conditions of the tender or for that matter, the tender documents and therefore, they cannot now contend that the Clause XVIII is a part of the terms and conditions which would apply only to the contractor who would be appointed by the official respondents, after the tender process was over. Moreover, the process of tender through online is a technical one involving technical expertise. In the present case, the stand of the official respondents is that the petitioners had not uploaded the schedule of rates and their tenders were not accompanied by all the Schedules/ Annexure intact and duly filled in and that the schedule of rates is a document wherein all the rates for the various works to be executed by the handling contractor have been incorporated which is

a vital component of the tender documents. On the other hand, the stand of the petitioners is that they have uploaded the schedule of rates while uploading the Part-B [price bid]. To decide the controversy between the parties, this court would need the help of an expert or a person who is well conversant with the online tender process and instead of doing that, this Court is of the opinion that in the facts and circumstances of the cases, it may be better and appropriate for the petitioners to approach the Disputes/ Grievances Redressal Committee consisting of experts in the field and in case they feel aggrieved by any decision of the said Committee, they may approach this court again and by then, this Court would have the opportunity of seeing the decision of the Committee containing reasons thereof. The said Committee will be in a better position to decide the issue in a short time. In other words, this Court is not fully and technically equipped to deal with the peculiar facts and circumstances of the cases. This Court might take some time while disposing of the writ petitions. Moreover, the contractor appointed by the official respondent vide its order dated 27-03-2019, appears to have started executing the work and there is no Court's order of staying it except that the same shall be subject to the outcome of the writ petitions.

[11] In view of the above, the instant writ petitions are disposed of with the following directions:

- (a) The petitioners shall submit an application/ complaint to the Disputes/ Grievances Redressal Committee at the zonal office, FCI for redressal of their grievances within fifteen days from today;
- (b) In the event of such an application/ complaint being submitted by the petitioner, the Disputes/ Grievances Redressal Committee at the zonal office, FCI shall consider it and issue a speaking order in respect thereof within thirty days from the date of receipt of the application/ complaint;
- (c) The petitioners shall be given an opportunity of being heard before any order is issued by the Disputes/ Grievances Redressal Committee.