(2007) 09 BOM CK 0039

In the Bombay High Court

Case No : Writ Petition (Lodg.) No. 1938 of 2007

KEC International Ltd. APPELLANT

Vs

State of Maharashtra and Others RESPONDENT

Date of Decision : 17-09-2007

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2008) 2 MhLj 426

Hon'ble Judges : Swatanter Kumar, C.J;D.Y. Chandrachud, J

Bench : Division Bench

Advocate : Janak Dwarkadas and M.P.S. Rao, instructed by Legasis Partners, for the Appellant; Pradeep Jadhav, AGP for respondent No. 1 and P.P. Chavan, instructed by Little and Co. for respondent Nos. 2 and 3, for the Respondent

Final Decision : Dismissed

Judgement

Swatanter Kumar, C.J.—Rule.

2. Learned Counsel appearing for the respective respondents waive service. By consent, Rule made returnable forthwith and taken up for final hearing.

3. The petitioner is a Company registered under the provisions of the Companies Act, 1956. According to the petitioner, it is one of the largest Power Transmission EPC companies in the world. The respondent No. 3 on 2nd July, 2007 issued notice inviting tenders being Tender No. CE/DSPC/GFSS-D-T-1/07-08 in respect of Gaothan Feeder Separation Scheme - II to be implemented in seven zones and consequently they invited the bids. The petitioner responded and submitted its tender to the said respondent together with demand drafts towards bid security as contemplated under the terms and conditions of the tender. On 28th August, 2007, respondent No. 3 wrote a letter to the petitioner seeking certain clarification from the petitioner in relation to certain lacuna in compliance to the conditions of the tender. On 30th August, 2003, respondent No. 3 addressed a letter to the petitioner asking for tender fees of Rs. 25,000/- per lot, in cash, and

informed the petitioner that the demand drafts submitted by the petitioner by way of tender fees when presented for payment to the concerned Bank were returned unpaid by the bankers. Taking a note of this, on 3rd September, 2007 the petitioner deposited the said amount and also submitted further clarification. The representative of the petitioner along with the Banker''s representative met respondent No. 2 and provided all requisite clarifications along with supporting documents on 5th / 6th September, 2007 and even made payment of tender fees in cash which was accepted by the said respondent. However, on 8th July, 2007 the petitioner received the following letter:

To,

M/s KEC International Ltd., Mumbai. Email - jainsk''kecrpg.com Kind Attn: Mr. S.K. Jain, General Manager (Distribution)

Sub: Gaothan Feeder Separation Scheme - II (GFSS-II) - Our Tender No. CE/DSPC/GFSS -II/T-1/07-08 advertised on July 2, 2007. Dear Sirs,

We regret to inform you that the offers submitted by you for all the 7 lots against our subject tender were not found technically responsive by MSEDCL.

Thanking you,

4. Aggrieved from the said order dated 8th September, 2007, the petitioner has challenged the correctness and legality thereof in the present petition under Article 226 of the Constitution of India primarily on three grounds. Firstly, that the order is cryptic one and does not specify any reason for rejecting the technical bid of the petitioner and reliance is placed upon the judgment of the Supreme Court in the case of Ramchandra Murarilal Bhattad and Others Vs. State of Maharashtra and Others, . Secondly, the defects pointed out are so immaterial and hardly of any significance so as to disentitle the petitioner from consideration of the technical bid and permitting petitioner to participate. Lastly, the certificates in original were submitted and as such there was no material irregularity in submission of the tender which could justify passing of the order dated 8th September, 2007. Reliance in this behalf was placed on the judgment of the Supreme Court in M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, . Learned Counsel appearing for the respondents, while relying upon the judgment of the Supreme Court in Ram Gajadhar Nishad v. State of U.P., (1990) 2 SCC 486 , contended that there was non-compliance of mandatory conditions spelled out in the notice inviting tenders and the action of the respondents in rejecting the technical bid having been found non-responsive, can hardly be questioned under Article 226 of the Constitution of India.

5. Before we proceed to deal with the merits of these contentions, we may precisely notice the stand taken by the respondents, in reply affidavit filed by them before this Court, which reads thus:

1. However, in order to give a fair chance to the petitioner and the other bidders who had not submitted certain documents or failed to submit the requisite

details, the respondent No. 1 vide e-mail dated August 28, 2007 called them to submit requisite documents or details. The petitioners were called upon to submit:

a) Valid Electrical Contractor''s License Certificate;

b) The Bank''s comfort letter in accordance with Clause 5.1(i) of Section I Volume I in the required format.

The said e-mail further requested the petitioner to submit these details by August 29, 2007 and produce the original certificates in respect of General experience and Specific experience by August 31, 2007 for verification by the main Project Management Consultant (PMC) and the Employer (MSEDCL). I say that the copy of the said e-mail has been Annexed as Exhibit "A" to the above petition. I say that a perusal of the said Exhibit "A" reveals that the e-mail was sent on August 28, 2007 at 1.15 P.M. I say that similar e-mails were issued to the other bidders.

2. I further say that as pointed out earlier the bidders were required to submit a demand draft of Rs. 25,000/- towards tender fees in respect of each bid. Since, petitioner had submitted bid for all seven lots/zones the petitioner had submitted seven drafts of Rs. 25,000/- each, for total sum of Rs. 1,75,000/-. I say that when the said Demand Drafts were deposited in the bank the same were dishonoured on the ground that the payments against the said seven drafts have been stopped. In view of this position mail dated August 29, 2007 was sent to the petitioner with a request to submit their clarification about the same by August 31, 2007. However, the said e-mail was not delivered due to error in address. Thereafter, a letter dated August 30, 2007 was issued to the petitioner detailing the fact of dishonour of the Demand Draft on the ground of stoppage of payment the said letter was sent by fax to the petitioners. The said letter also called upon the petitioner to make the payment in cash against all seven lots/ zones on or before September 1, 2007. The said letter is annexed as Exhibit "B" to the above petition. However, the petitioner failed to deposit the said amount in cash by September 1, 2007.1 say that the petitioner forwarded their explanation for dishonour of Demand Draft by letter dated September 3, 2007 stating therein that the petitioner had not issued any such instruction for stoppage of payment to their bankers. The petitioner also offer to deposit the said amount on the same day i.e. September 3, 2007. However, the same was not accepted by the Office of respondent No. 2 being offered after September 1, 2007. Thereafter, the petitioner also produced letter dated September 4, 2007 from ICICI bank that the said Demand Drafts were returned erroneously due to technical processing error and not due to reason of stop payment instructions by the petitioners the respondent No. 3 also received a letter dated September 5, 2007 from ICICI bank reiterating the aforesaid position. In view of this, respondent No. 2 accepted the payment in cash from the petitioner on September 5, 2007.

3. I say that though the petitioner was called upon to furnish the copies of valid

Electrical Contractor''s License and Bank''s Comfort letter by August 29, 2007 and produce the original copies of certificates in respect of General experience and Special experience for verification by the main PMC and the employer by August 31, 2007, the petitioner failed to produce the same by August 31, 2007, which was the last date for production of original copies in respect of General experience and specific experience. Since August 31, 2007 was the last date, in respect of every bidder, the same was adhered to by all the bidders by submitting the requisite documents and by producing the originals for perusal by main PMC and employer. However, the petitioner failed to adhere to the said dead line. I say that petitioner forwarded the said documents vide letter dated September 4, 2007 which was received by the office of respondent No. 2 on September 5, 2007. Thus, the petitioner could comply with the mandatory requirement detailed in Clause 5.1(e) and 5.1(i) and also produced the originals in respect of General experience and Specific experience only on September 5, 2007 i.e. after August 31, 2007 which was the last date for submission of the same.

4. Since the petitioner failed to comply with the mandatory requirements of Clause 5.1(e) and 5.1(0 of the tender conditions and failed to produce the original certificates within the stipulated time, the petitioner''s tender was not considered as the same was found to be technically not responsive. I say that August 31, 2007 was the last date for submission of the document or production of original certificates for all the bidders and there was no question of extending the date to favour any particular bidder over the others. I say that respondent No. 2 did not extend the said dead line beyond August 31, 2007 in respect of the petitioner as it would have amounted to giving a special or favourable treatment to the petitioner which all the other bidders have duly adhered to the said dead line of August 31, 2007 by submitting the documents as well as producing the original certificates for perusal of main PMC and employer. The decision making Authority cannot act unilaterally in favour of any one bidder so as to give special treatment to such bidder or amend the tender conditions to suit any one bidder. The bid documents itself clearly detailed the minimum qualifying criteria and the petitioner should have annexed the requisite documents to it''s bid document.

However, in order to give fair chance to every bidder to comply with the requisite requirements, the decision making authority gave time till August 31, 2007 to all the bidders to comply with the said requirements. The decision making Authority has not made any exception in favour of any particular bidder by extending the said time limit. I say that since the petitioner failed to adhere to the said time limit of August 31, 2007 the petitioner''s bid was not considered on the ground that it was technically non-responsive.

6. From the above stand taken by the respondents, it is clear that there was non-compliance of the mandatory conditions of the terms and conditions of the tender. These conditions have also been referred to in the reply affidavit. The reasons for non-consideration of technical bid and consequently non-participation

of the petitioner in the tender have been given in great detail in the reply affidavit. The Court cannot come to a conclusion that the order dated 8th September, 2007 is without any justification or has been passed in any arbitrary manner. During the course of hearing, the learned Counsel appearing for the respondents brought to our notice the number of other letters, which are written on the same day i.e. 28th August, 2007, to various participants pointing out their shortfall or short-coming in compliance with the mandatory conditions and calling upon all of them to submit their papers by 31st August, 2007. The bids of the parties, who did not comply with those conditions within the stipulated time, were found to be non-responsive and consequently rejected.

7. Of course, there is no dispute before us that some Officers of the respondents accepted tender fees on 5th/6th September, 2007 from the petitioner but that would not per se condone the delay and bind the respondents. Once the respondents have acted fairly and complied with their time limitation i.e. 31st August, 2007 uniformly in considering the bid of the bidders, in that event action of the respondents cannot be termed as either arbitrary or discriminatory. The 18 bidders qualified the scrutiny of the technical bid and they are being considered for opening of a technical bid. This itself would show that the intent of the respondents was never to exclude the petitioner from participation in an arbitrary manner or in a discriminatory exercise of power, but to analyse the cause, the petitioner failed to submit requisite documents by cut-off date i.e. 31st August, 2007. The Judgment in the case of Poddar Steel Corporation (supra) relied upon by the petitioner is of no assistance as the Supreme Court was concerned only with the fact that submission of a pay order in place of bank draft was substantial compliance in terms of the tender and on that ground alone the same could not be rejected. The question of cut-off date or non-submission of original certificates did not even fall for being considered by the Supreme Court in that case. By their letter dated 28th August, 2007, the respondents had informed the petitioner that even the Electrical Contractor''s Licence Certificate was not valid and the Bank''s Comfort letter was not in accordance with the prescribed form. All this was besides the fact that the Bankers had returned the Demand Drafts for nonpayment. That might have been the mistake of the bankers but fact of the matter remains that even the tender fees were not deposited within the stipulated time.

8. The contention raised on behalf of the petitioner that the administrative order dated 8th September, 2007 is not a reasoned order also needs to be rejected. The reply affidavit filed on behalf of the respondents and the photocopy of the letters shown to us in Court today, clearly show that there is application of mind by the respondents and every administrative order is not required to be a reasoned one like a judgment of the Court. The conclusion arrived at by the respondents can be supported by the record of the respondents. The order cannot be faulted with, particularly, when it relates to commercial transaction, within the ambit and scope of Article 226 of the Constitution of India. Within the limited jurisdiction vested in this Court in exercise of its extra ordinary

jurisdiction under Article 226 of the Constitution of India, we are of the view that no substantial errors on the part of the respondents have been brought to the notice of the Court which would justify judicial intervention in acceptance of the tender by the respondents.

9. For the reasons aforestated, we find no merit in this writ petition, which is hereby dismissed. Rule stands discharged.

Both the parties are left to bear their own costs.

