(2015) 10 KL CK 0134

In the High Court Of Kerala

Case No : WP(C) No. 26649 of 2015 (E)

Kei-Rsos Maritime Ltd. APPELLANT

Vs

Bharat Petroleum Corporation Ltd. and Others RESPONDENT

Date of Decision : 30-10-2015

Acts Referred:

Citation : (2015) 10 KL CK 0134

Hon'ble Judges : A. Muhamed Mustaque, J.

Bench : Single Bench

Advocate : R.D. Shenoy, Senior Advocate, Sathya Shreepriya and K. Lakshminarayanan, Advocates, for the Appellant; M. Gopikrishnan Nambiar, P. Gopinath, P. Benny Thomas, K. John Mathai, Joson Manavalan and Kuryan Thomas, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

A. Muhamed Mustaque, J.—The writ petition is filed by a limited company and a subsidiary of GOL Offshore, a public limited company to quash Exhibit P4 notice issued by the first respondent-Bharat Petroleum Corporation Limited inviting tender for contract of "operation and maintenance of Single Point Mooring (SPM) also directing the first respondent to permit the petitioner for extension of the contract of operation and maintenance of SPM for a period of 18 months from 01/11/2015.

2. The pre-qualification criteria for the bidders intending to participate in the tender has been prescribed as per Exhibit R1(a) produced by the first respondent. The financial criteria in the pre-qualification criteria is as follows:

"i. The annual turnover of the bidder shall not be less than Rs. 24 Crores in any one of the immediately preceding three financial years (2011-12, 2012-13, and 2013-14).

ii. The financial net worth of the bidder as per the latest audited annual report (2013-14) shall be positive."

3. The petitioner fulfilled first criteria in the financial aspect. Admittedly, they did not fulfill the second criteria. The Audited Annual Report of the petitioner for the financial year 2013-14 was negative. They were informed about non fulfillment of the criteria. Thereafter, they offered Parent Company Guarantee to fulfill the second criteria. Exhibit P7 is the Parent Company Guarantee. That was not acceptable to the first respondent. Accordingly, they have been disqualified for non-fulfillment of the above criteria.

4. The petitioner-Company have no challenge against rejection of tender. They are present SPM contractor. They seek the following reliefs:

"1. issue a writ of certiorari or any other appropriate writ, order or direction quashing Exhibit P4 notice issued by the 1st respondent inviting tenders for the contract of Operations and Maintenance of Single Point Mooring (SPM) and the subsequent proceedings thereon.

2. Issue a writ, order or direction declaring that the petitioner is entitled for extension of the contract of Operations and Maintenance of Single Point Mooring (SPM) for a period further period of 18 months from 01-11-2015.

3. Issue any other appropriate writ, order or direction in the interests of Justice that that this Honourable Court deems fit and proper in the facts and circumstances of the case."

5. Heard the learned Senior Counsel appearing for the petitioner Shri R.D. Shenoy who raised following grounds of challenge:

"i. The parent company offered guarantee, therefore, the purpose of the financial criteria is fulfilled.

ii. There were only three bidders and the two of the bidders were disqualified. Therefore, contract ought not have been awarded to a single bidder.

iii. There is a huge disparity of the amount quoted by the petitioner and the second respondent. This would show loss of public money by awarding contract to the second respondent.

iv. The second respondent obtained the contract by misrepresenting the fact that they have a support vessel ''Alliance'' for SPM operation and maintenance. The petitioner-Company is having the support vessel "Alliance" from ARC India Pvt. Limited, which was offered by them as a support vessel. The contract awarded to the second respondent is impossible to be performed."

6. Per contra, the learned Standing Counsel for the first respondent would submit that the petitioner having participated in tender pursuant to Exhibit P4 notice cannot turn around and challenge Exhibit P4. Further, it is argued that the petitioner has been disqualified as per the norms and pre-qualification criteria. It is also contended that the award of contract to the second respondent is based on the evaluation. It is further submitted that the parent company is a different entity and the parent company''s undertaking cannot be accepted.

7. Learned counsel for the second respondent Shri Sujay Kantawala would argue that this is an important project and the offer made by the disqualified entity has no relevance for comparison with the offer made by the second respondent. The learned Counsel also referred to various documents to pin point the importance of the projects as well as the capacity of the second respondent.

8. In this matter, another Company who offered bid pursuant to Exhibit P4 notice got impleaded as an additional third respondent. According to the additional third respondent, the second respondent was a single bidder and therefore, a fresh tender has to be made.

9. The petitioner has been disqualified based on pre-qualification criteria. Admittedly, the audit report would show that the financial net worth of the petitioner for the year 2013-14 was negative. The petitioner offered parent company guarantee. The argument of the learned Senior Counsel is that the guarantee offered by the parent company has to be appreciated in the light of the criteria fixed. The learned Senior Counsel referred to Tata Cellular Vs. Union of India, to contend that the rejection was on a ground which is irrelevant for the purpose of awarding contract.

10. It is to be noted that there is no challenge against rejection of the petitioner''s tender. Even assuming that there is a challenge, this Court cannot substitute the terms and conditions in a tender notification, by directing the first respondent to accept the parent company''s guarantee. It is for the first respondent to satisfy with the financial statement of the bidders. There may be many situations where the disqualified persons may be able to satisfy the first respondent, with other methods to fulfill the criteria of eligibility. The theory of substantial compliance cannot be pressed into service in contractual matters by referring to a method which is not prescribed in the tender notification. The petitioner has taken part in the tender process knowing that the financial statement is negative and without challenging the conditions in the notification. Therefore, the petitioner is estopped from challenging the decision of the first respondent when bid is rejected. Therefore, this Court cannot exercise the power of judicial review to unsettle the decision of the first respondent.

11. The petitioner''s case is that the contract cannot be awarded to a single bidder. It is to be noted that the petitioner has approached this Court as an aggrieved being disqualified from the tender. There were three bidders. The second respondent was not a single bidder. The restriction placed for a single bidder as per the guidelines of the Central Vigilance Commission would not apply in this matter. Assuming that it would apply, in a private interest litigation, this Court cannot extend its scope by extending its enquiry based on a public interest. The restriction of the Central Vigilance Commission was to ensure transparency in awarding public contract. The petitioner cannot extend the scope of the writ jurisdiction based on its locus standi to the realm of public interest.

12. The petitioner cannot claim extension as the contract has already been

awarded to the second respondent. The petitioner has no right to demand extension.

13. The question of disparity in the amount quoted by the petitioner and the second respondent cannot be a subject matter of judicial review at the instance of a disqualified bidder. It is only when the petitioner''s tender is accepted, a comparison would arise for consideration. Therefore, in the absence of creating a possibility for evaluation, the comparison of the amount offered by the petitioner with the amount offered by the second respondent has no relevance. As has been already noted, the scope of private litigation cannot be extended to make an enquiry of public interest litigation. The existence of a legal right based on a private interest cannot be enlarged as of public interest available to a member of the public for the enforcement of public interest in which the public have larger interest. In law, there is a subtle distinction between the private injury and the public injury. The petitioner''s attempt to project the issues based on public interest is rather to protect his own interest.

14. The last part argued by the senior counsel is regarding performance of contract. This is purely a hypothetical argument. Performance of a contract is a matter governing terms and conditions between the first respondent and the second respondent. This Court cannot preempt the award of the contract by the first respondent to the second respondent on a clause referable to performance. If the second respondent fails to perform the contract, the first respondent is free to take action under law. But that cannot be a ground for an unsuccessful bidder to seek a judicial review of the award of the contract to the successful bidder. Therefore, the writ petition fails and it is dismissed.

After pronouncement of the judgment, the learned counsel for the petitioner sought retention of status quo for a period of one month. Considering the nature of the issues involved, the request sought for is declined.