
(2012) 12 CAL CK 0025
In the Calcutta High Court
Case No : Writ Petition No. 434 (W) of 2012

Kopex-shaft Sinking Company and Others	APPELLANT
Vs	
Hindustan Copper Limited and Another	RESPONDENT

Date of Decision : 13-12-2012

Acts Referred:

Citation : AIR 2013 Cal 34 : (2013) 2 CHN 88

Hon'ble Judges : Joymalya Bagchi, J

Bench : Single Bench

Advocate : Bimal Chatterjee, Raja Basu Choudhary and Sayantan Bose, for the Appellant; Arunava Ghosh, Biswaroop Bhattacharyya and Sourya Sadhan Bose, for the Respondent

Judgement

Joymalya Bagchi, J.—The petitioners have approached this Court challenging the action of Hindustan Copper Limited, respondent No. 1 herein, in not issuing Letter of Intent (LOI) in favour of the petitioners in spite of the fact that they were the lowest bidder in the tender. Respondent No. 1 Corporation had published an invitation to interested parties to participate in the tender process for the work of reopening, operation and expansion of Rakha Copper Mines at Indian Copper Complex, Jharkhand. The terms of the tender provided that the tender process involved participation in two stages. The first stage was described as "Request for Qualification" (RFQ) stage which involved pre-qualifying and short listing of interested parties on the basis of financial and technical eligibility criteria and the participants who were short listed in the first stage were entitled to participate in the second stage described as "Request for Proposal" (RFP) stage consisting of submissions of financial proposal by such short listed bidders.

2. It is the petitioners' case that they submitted RFQ documents. Respondent no. 1 Corporation intimated the petitioners that their RFQ documents were not in order and requested them to rectify the same within a stipulated time.

3. The petitioners duly complied with such request of respondent No. 1 Corporation and made the necessary rectification. In spite of the same,

respondent No. 1 Corporation informed the petitioners" consortium that they have not been short listed for participating in RFQ stage.

4. The petitioners challenged such decision before this Court in W.P. No. 8293 (W) of 2011. By an interim order dated 16th May, 2011 respondent No. 1 Corporation was restrained from taking any further steps with regard to the tendering process.

5. Respondent No. 1 Corporation preferred an appeal against the order dated 16th May, 2011. By an order dated 19th May, 2011, a Division Bench of this Court disposed of the appeal on consent that the petitioners" consortium would be entitled to proceed in the RFQ stage along with others in the tendering process.

6. Prior to the opening of the price bid in the RFQ stage, respondent No. 1 Corporation took out an application for modification of order dated 19th May, 2011. Such application was, however, not pressed and dismissed as withdrawn by order dated 28th July, 2011. The price bids were thereafter opened and the petitioners were found to be the lowest bidder and declared L-1 by respondent No. 1 Corporation in their own website subject to the qualification that the same was "subject to a Court judgment".

7. Respondent No. 1 Corporation thereafter preferred a SLP before the Apex Court challenging the aforesaid orders dated 19th May, 2011 and 28th July, 2011 passed by the Division Bench of this Court. During the pendency of the Special Leave Petition, the instant writ petition was preferred by the petitioners before this Court.

8. By order dated 13.01.2012, the SLP was dismissed by the Apex Court. In the said order, the Apex Court observed that the instant writ petition will be decided on its own merits.

9. Mr. Chatterjee, Sr. advocate appearing for the petitioners submitted that the action of respondent No. 1 Corporation in refusing to issue Letter of Intent in favour of the petitioners" consortium was mala fide and without any legal basis. He submitted that in view of the order dated 19th May, 2011 (which had been affirmed by the Apex Court) the question as to whether the petitioners had satisfied the RFQ qualification was no longer res integra. He submitted that the mala fide stance of respondent No. 1 Corporation was evident from the fact that although they were declared as "lowest bidder" (L-1) in the web site, the same was qualified with the observation "subject to Court judgment", although no litigation was pending by and between the parties on that date.

10. He further submitted that a contrary stance had been pleaded in the affidavit-in-opposition. Therein, the respondent No. 1 Corporation had raked up a foreclosed issue by claiming that the petitioners" consortium had not qualified in the RFQ bid and therefore there was no scope of considering their bid at the RFP stage although they were the lowest bidder in that stage. Without prejudice to

such submission, he submitted that such contention was also unfounded on merits. He submitted that there was no violation of pre-qualification conditions in the RFQ stage as the alleged defects were permitted to be rectified by respondent No. 1 Corporation within the stipulated time as provided by them.

11. Mr. Chatterjee in the course of argument, relied on pleadings submitted by the parties in the course of the appellate proceedings in connection with the earlier petition being W.P. No. 8293 (W) of 2011. A copy of the application for stay preferred by respondent No. 1 Corporation in the said appellate proceeding was filed before me and relied on by the petitioners.

12. On the other hand, Mr. Ghosh, learned advocate appearing for respondent No. 1 Corporation submitted that the prayers in the writ petition were not maintainable inasmuch as this Court could not issue a writ of mandamus directing issuance of Letter of Credit to the lowest bidder or a writ restraining respondent No. 1 Corporation from re-tendering the project.

13. He submitted that that petitioners' consortium had themselves accepted in Clause 7 of the cover letter submitted with RFP documents the right of respondent No. 1 Corporation to cancel the bidding process at any time and not to accept any application or invite any applicant to the bid. He further submitted that in terms of Clause 2.7.3 of the tender document, respondent No. 1 Corporation could at any time reject the bid of an applicant on the ground that the latter did not satisfy the requisite pre-qualification conditions. He further submitted such issue was not finally decided in the earlier litigation between the parties and the same was certainly *res integra* before this Court. He submitted that the scope of judicial review in spite of contractual matters was extremely limited.

14. Mr. Ghosh also submitted that initial application submitted by the petitioners' consortium was not in terms of the tender condition and the subsequent application with the necessary rectification tantamounted to re-submission of the tender beyond stipulated time, and therefore petitioners' consortium could not be said to have complied with the pre-qualification conditions as specified at the RFQ stage.

15. The principal issue which therefore falls for decision is whether the rejection of the bid of the petitioners' consortium who was found to be the lowest bidder in the RFP stage on the allegation that they have not satisfied the pre-qualification conditions as specified in the RFQ stage was justified or not.

16. It appears that in the earlier appellate proceeding, the Hon'ble Division Bench in its order dated 19.05.2011 recovered a concession on behalf of respondent No. 1 Corporation to the effect that the petitioners' consortium may be allowed to participate in the tender process and the authority shall consider their case in accordance with provision of the terms of the tender, On the basis of such concession and without deciding the issue as to whether the terms and conditions in the RFQ stage had been complied with or not, the Division Bench

permitted the petitioners to participate in the tendering process.

17. Subsequently an application for clarification/modification of the aforesaid order dated 19th May, 2011 was filed but the same was dismissed as withdrawn.

18. The SLP filed before the Apex Court against the aforesaid order was also dismissed. The Apex Court in the said order, however, observed that the instant writ petition would be decided on its own merits.

19. It has been argued on behalf of the petitioners' consortium that since respondent No. 1 Corporation had consented to their participation in the second phase of the tendering process i.e. RFP stage, the latter cannot resurrect the issue that the consortium had failed in complying with the pre-qualification conditions in the earlier stage. I find that the said concession as recorded in the said order was not an unqualified one but the same is coupled with the condition that the authority shall consider the case of the petitioners in accordance with terms of the tender. Furthermore, the tenor of the order of the Division Bench makes it clear that there was no adjudication on merits as to the issue whether the petitioners' consortium had satisfied the pre-qualification requirements in the RFQ stage.

20. Such qualified concession and the lack of a decision on merits on such score in the earlier proceeding in my opinion, cannot foreclose the issue as to whether the petitioners' consortium had satisfied the mandatory pre-qualification requirements in the RFQ stage. Therefore, I propose to consider on merits as to whether the petitioners had, in fact, satisfied such pre-qualification requirements at the RFQ stage or not.

21. The gist of the contention of respondent No. 1 Corporation is that the petitioners' consortium had violated the pre-qualification conditions at the RFQ stage by modifying their tender application after the last date of submission of such application which amounted to re-submission of bid beyond the stipulated date.

22. It appears, initially, the last date for submission of application by the bidders at RFQ stage was fixed on 30th November, 2010 and, thereafter, the same was extended till 25th January, 2011. The petitioners' consortium submitted its RFQ document on 20th January, 2011 i.e. within such extended date.

23. On 9th March, 2011, respondent No. 1 Corporation intimated the petitioners consortium that its RFQ documents were not in terms of Clause 2.1.3 of the RFQ conditions, inasmuch as the authorized signatory of the consortium in whose favour power-of-attorney was executed was not an employee of the "lead member of the consortium". It also pointed out that the power-of-attorney had not been legalized by the Indian Embassy and notarized in the jurisdiction where it had been executed.

24. Under such circumstances, the petitioners' consortium was called upon to authenticate their bid by 21st March, 2011 failing which the same would stand

disqualified.

25. By letter dated 9th March, 2011 the petitioners' consortium, though not agreeing with such contention of respondent No. 1 Corporation, without prejudice to their rights and contentions, requested respondent No. 1 Corporation be given them 20 business days from receipt of the letter to submit corrected documents.

26. In response thereto, respondent No. 1 Corporation by letter dated 18.03.2011, partially acceded to their prayer for extension of time to submit corrected RFQ documents and directed the consortium to submit their corrected bid on or before 28.03.2011 to enable them to consider their offer.

27. In response thereto on 28th March, 2011 the petitioners' consortium submitted their corrected bid with necessary rectifications as desired by respondent No. 1 Corporation.

28. However, presently the case of respondent No. 1 Corporation is that submission of such corrected bid in terms of the request of the respondent No. 1 Corporation on 28th March, 2011 constitutes re-submission of the tender documents beyond the stipulated period as per the RFQ conditions. Therefore, their bid is liable to be rejected.

29. I am unable to accept such contention on behalf of respondent No. 1 Corporation.

30. Clause 2.16.3 of the RFQ condition read as follows:

2.16.3: Any alteration/modification in the application or additional information supplied subsequent to the Application Due Date, unless the same has been expressly sought by H.C.L., shall be disregarded.

31. A plain reading of such tender condition, inter alia, provides that alteration/modification or additional information can be made or supplied to an application beyond stipulated time only when it is expressly sought for by HCL, that is, respondent No. 1 Corporation herein.

32. It is evident from the aforesaid decision that the necessary modifications/rectifications in the tender document in the instant case were made upon an express request from the respondent No. 1 Corporation and that too within the extended time as provided by them.

33. I am, therefore, unable to accept the contention of the respondent No. 1 Corporation that the submission of such rectified RFQ documents as per the express request of respondent No. 1 Corporation itself can tantamount to re-submission of tender document beyond the application due date in violation of RFQ conditions. Such act of the petitioners' consortium in submitting documents with necessary rectifications as per the express request of the said Corporation within the extended time as stipulated by the said respondent No. 1 Corporation cannot by any stretch of imagination be said to be a violation of an essential RFQ condition so as to disqualify the petitioners' consortium at the RFP stage.

34. Moreover, the qualification recorded in respondent No. 1 Corporation's website that the petitioners' consortium was the lowest (L-1) bidder "subject to a Court judgment" is also without any basis as there was no pending litigation between the parties on the date of such publication.

35. Such prevaricating and baseless stances taken by the respondent No. 1 Corporation speaks volumes of its desperate effort to exclude the bid of the petitioners at any cost.

36. For the aforesaid reasons, I hold that that non-acceptance of the lowest (L-1) bid of the petitioners' consortium is dehors the terms of the tender and is arbitrary, unreasonable, without any basis whatsoever and such decision is therefore liable to be quashed.

37. Mr. Ghosh has relied on a number of decisions in support of the proposition that the judicial review of discretion in contractual matters is limited and that the Court cannot modify terms of tender or sit for an appeal over the decision of the authority in such cases. I relied on Meerut Development Authority Vs. Association of Management Studies and Another, Meerut Development Authority Vs. Association of Management Studies and Another, ; Master Marine Services Pvt. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and Another, ; B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others, and Jagdish Mandal Vs. State of Orissa and Others,

38. However, in the facts of the instant case I am of the opinion that the lowest bid of the petitioners' consortium has been rejected dehors the terms of the tender and the reason given in support of such action in the affidavit-in-opposition of the respondents is dehors the terms of the tender and wholly unsustainable in law. Such decision of the respondent "No. 1 Corporation is therefore illegal, arbitrary and whimsical and is patently amenable to judicial review by this Court. None of the decisions cited by Mr. Ghosh militates against such proposition of law and therefore are distinguishable on the facts of this case.

39. Mr. Ghosh also argued that respondent No. 1 Corporation has the right not to proceed with the bidding process at any time without notice and to reject all or any application without assigning any reason. In support of his contention he relied on Clause 2.17.6 of the RFQ conditions.

Clause 2.17.6 reads as follows:-

2.17.6:-- HCL reserves the right not to proceed with the Bidding Process at any time without notice or liability and to reject any or all application(s) without assigning any reasons.

40. It is nobody's case that the respondent No. 1 Corporation has cancelled the bidding process in its entirety and rejected all applications. No supervening public interest or change of policy has also been pleaded in support of the respondent No. 1 Corporation's action to reject the bid of the petitioners' consortium dehors the terms of the tender. On the other hand, grounds pleaded in the affidavit-in-

opposition of the respondent No. 1 Corporation have been found to be wholly untenable.

41. The action of the State, whether in the commercial field or otherwise, must always be a just and fair one and in the event the State chooses to exercise its powers in an arbitrary and whimsical manner to reject the application of a particular bidder dehors the terms of the tender, such action of the State would clearly be amenable to judicial review under writ jurisdiction.

42. It is also settled law that the Writ Court may mould reliefs to suit the factual exigencies of a particular case.

43. For the aforesaid reasons, I dispose of the writ petition by holding as follows:-

(a) Decision of respondent No. 1 Corporation to reject the lowest bid (L-1) of the petitioners' consortium is dehors the terms of the tender and is arbitrary, unjust, whimsical and is quashed.

(b) In the event, respondent No. 1 Corporation proceeds to issue Letter of Intent in respect of the instant tendering process the petitioners' consortium as the lowest tenderer shall be considered in accordance with law.

With the aforesaid directions, the writ petition is disposed of.

There shall be no order as to costs.