(2023) 06 SHI CK 0059

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No.8271 Of 2022

Krishma Dhiman APPELLANT

Vs

Union Of India & Another RESPONDENT

Date of Decision : 27-06-2023

Acts Referred:
Constitution Of India, 1950 — Article 14, 226

Citation : (2023) 06 SHI CK 0059

Hon'ble Judges : M.S. Ramachandra Rao, CJ;Ajay Mohan Goel, J

Bench : Division Bench

Advocate : Divya Raj Singh, V.B. Verma, Anand Sharma, Karan Sharma

Final Decision : Allowed

Judgement

M.S. Ramachandra Rao, CJ

1. In this writ petition, the petitioner assails the action of the 2nd respondent demanding from the petitioner a sum in excess of the highest bid offered by the petitioner for purchase of premises MIG Flat No.886 (Type-B), Block No.43A, Sector-IV, Housing Board Colony, New Shimla, Himachal Pradesh, which was being sold through e-Auction bearing reference No.MSTC/NRO/REC LIMITED/9/GURGAON/22-23/18467.

2. In August 2022, the said auction notice was published on the official website of respondent for auction of the above property with a base price of Rs.38,45,500/- fixing Pre-Bid EMD as Rs.96,138/-.

3. The petitioner deposited the EMD as per the terms and conditions of the auction on 13.09.2022 through RTGS/NEFT.

4. She then participated in the on-line e-Auction and made the highest bid of Rs.44,95,500/-, which is more by Rs.6,50,000/- from the base price of Rs.38,45,500/-.

5. MSTC, which conducted the e-Auction on behalf of the 2nd respondent,

addressed Annexure P-4 email to the petitioner on 22.09.2022, informing the petitioner of this fact and also stated that the result of e-Auction was sent to the 2nd respondent.

6. The 2nd respondent then sent an email Annexure P-5 to the petitioner stating that though the petitioner had quoted Rs.44,95,500/- for the property, which was put to e-Auction, it will be sold to the petitioner only in case the petitioner is willing to match the earlier highest bid received in past e-Auction for the said property amounting to Rs.46,45,500/-.

7. The petitioner's husband then addressed an email Annexure P-6 on 06.10.2022 to respondent no.2 pointing out that the petitioner had complied with the terms and conditions which were mentioned in the official website, and there was no condition whatsoever which was mentioned in the official website of the nature contained in Annexure P-5 email. He also pointed out that the bid offered by the petitioner was Rs.6,50,000/- more than the base price and the whole objective of quoting base price of Rs.38,45,500/- would be defeated in such an event. He also sought for explanation as regards the objective of quoting the base price and contended that it would be colourable exercise of powers on behalf of the 2nd respondent.

8. Without replying to the said email, the 2nd respondent went ahead and issued a fresh e-Auction notice on 16.11.2022.

The instant Writ Petition

9. The petitioner then approached this Court by filing the instant writ petition contending that it is not permissible for the 2nd respondent to demand more money than the highest bid offered by her, and there is no valid reason for not accepting the offer of the petitioner when her quotation was Rs.6,50,000/- more than the base price. It was also pointed out that if in the previous e-Auction there was an offer of Rs.46,45,500/- then the property would have been sold, and in the subject auction the base price would not have been reduced to Rs.38,45,500/-. The petitioner contends that the impugned action of the respondents is illegal, arbitrary, whimsical and has to be set aside and the respondents are estopped from claiming more amount or issuing fresh e-Auction notice.

Events during the pendency of the writ petition

10. On 30.11.2022, this Court issued Notice to the respondents and granted an interim direction to the respondents not to open the bids in the fresh auction. This order was continued thereafter.

11. During the pendency of the writ petition on 05.12.2022, the petitioner's counsel made a statement that a fresh representation would be given to the 2nd respondent that the petitioner is ready and willing to pay Rs.46,45,500/-, as demanded by the respondents.

12. This Court then directed the 2nd respondent to decide the said representation within two weeks.

13. Thereafter, the 2nd respondent passed an order on 21.12.2022, rejecting the petitioner's representation.

14. In the said speaking order of 21.12.2022, it is contended that as per Clause 32(e) of the special terms and conditions of the e- Auction, the 2nd respondent had reserved the right to accept or reject any offer or bid, withdraw from sale the property offered prior to or after the acceptance of the bid without specifying any reasons therefor, and so the 2nd respondent had cancelled the e-Auction process exercising the rights under the tender document and this was informed to petitioner on 31.10.2022 by MSTC.

It is further stated that e-Auction notice was issued afresh and for reasons best known to the petitioner, the petitioner did not participate in the fresh e-Auction process held on 30.11.2022 and had instead filed the instant writ petition.

It is stated that in view of the order passed by this Court on 02.12.2022, the bidding process was stopped.

It is also stated that the property in question had been auctioned through e-auction portal www.mstcecommerce.com, through MSTC Ltd (a Govt.of India enterprise) and in terms of clause 22 of Genera terms and Conditions of e-auction, and on conclusion of e-auction at the scheduled time, the bidding of the particular lot is closed and it cannot be opened.

Stand of the respondent no.2 in it's reply

15. Reply was filed by the 2nd respondent initially on 28.12.2022 and an additional reply was filed later on 03.03.2023.

16. It is contended that the representation of the petitioner cannot be considered and has been rejected by giving valid reasons on 21.12.2022.

17. It is pointed out that persons, who participated in the fresh auction process initiated on 30.11.2022, would suffer and so the said tender process should be allowed to proceed.

18. It is further contended that there is also a remedy of arbitration contained in Clause 35 of the terms and conditions and so the writ petition should not be entertained.

19. An additional plea was also raised that the matter was purely contractual in nature and no interference should be called for in such matters in view of certain decisions rendered by the Supreme Court and this Court.

20. According to the 2nd respondent, since it is an instrumentality of the Central Government, the petitioner cannot claim fundamental right to enter into a contract with the Government and mere disagreement with the decision making process or the decision of the Administrative Authority cannot be a reason for

Constitutional Court to interfere.

21. It is stated that the MSTC bidding platform does not have an absolute right to confirm the sale to highest bidder and only the 2nd respondent has the right to do so.

22. It is stated that any bid offered, including the highest bid, is subject to it's approval as per the terms and conditions of Clause 25 of the special terms and conditions; that there was no confirmation of sale in favour of the petitioner; acceptance letter was not issued; and so the writ petition should be dismissed.

23. It is stated that the petitioner's highest bid was not accepted and the petitioner was informed of the same by email dt. 31.10.2022.

Consideration by the Court

24. We have noted the contentions of both sides.

25. We shall first deal with the preliminary contentions of the petitioner as to the maintainability of the writ petition in contractual matters and also where an arbitration is provided for in the contract.

26. The Supreme Court has not laid down the rule that there is bar for entertaining a Writ petition even if the same arises out of a contractual obligation.

27. In ABL International Ltd. & Anr. vs. Export Credit Guarantee Corporation of India Limited & Ors. (2004) 3 SCC 553 , the Supreme Court held that once the State or the instrumentality of State is a party to the contract, it has an obligation in law to act fairly, justly and reasonably which is the requirement of Article 14 of the Constitution of India. It is also held that if the action of the State or its instrumentality is arbitrary and unreasonable and violates Article 14 of the Constitution of India or if there are other valid or legitimate reasons, the High Court may exercise jurisdiction under Article 226 of the Constitution of India to issue prerogative writ.

28. This principle has been reiterated in State of Uttar Pradesh vs. Sudhir Kumar Singh(2021) 19 SCC 706, Popatrao Vyankatrao Patil vs The State of Maharashtra(2020) 19 SCC 241 , Unitech Limited vs. Telangana State Industrial Infrastructure Corporation & Others Civil Appeal No.317 of 2021, dt. 17.02.2021 , Tata Cellular vs. Union of India(1994) 6 SCC 651 , and State of Punjab & others vs. Mehar Din (2022) 5 SCC 648

29. Therefore, we reject the plea of the 2nd respondent that because the matter arises out of a contract, the Writ petition is not maintainable.

30. We may further point out that there are no disputed questions of fact involved in the matter warranting refusal of discretion to exercise jurisdiction under Article 226 of the Constitution of India and compelling the petitioner to approach the Civil Court.

31. As regards the plea raised by the 2nd respondent that the remedy of

arbitration having been provided in the terms and conditions the Writ petition cannot be entertained is concerned, we may point out that the Supreme Court has explained that the rule of exclusion of writ jurisdiction because of availability of an alternative remedy is a rule of discretion and not one of compulsion and the constitutional remedy by way of a writ petition is always available to an aggrieved party, and an arbitration clause in an agreement between the parties cannot ipso facto render a Writ petition not maintainable. This was held in the decision of Unitech Limited (4 Supra) and it was categorically held that the presence of an arbitration clause within a contract between a State instrumentality and a private party has not acted as an absolute bar to availing remedies under Article 226 if the State instrumentality violates the constitutional mandate under Article 14 to act fairly and reasonably.

32. Coming to the merits of the case, no doubt normally where public auctions are held by the State or instrumentality of the State, the acceptance of the highest bid is always subject to conditions holding public auction and the State or its instrumentality is not bound to accept the highest tender of bid.

33. However, exception to this rule is that if the State or instrumentality of the State acts in totally arbitrary and unreasonable manner, judicial review is permissible to prevent arbitrariness, irrationality, bias, mala-fides or perversity.

34. In the instant case admittedly in the e-Auction held on 14.09.2022, the petitioner became the highest bidder and had quoted Rs.44,95,000/- and MSTC has informed the petitioner that her bid was the highest bid.

35. Strangely, the 2nd respondent informed the petitioner that the petitioner should pay Rs.46,45,500/- since that was the highest bid received in the past auction for the same property and insisted on the petitioner giving consent for the same in order to finalize the auction process.

36. Clause 25 of the terms and conditions of the auction states that acceptance/ rejection of the highest bid received in the e-Auction will be subject to the reserve price fixed by the 2nd respondent. So when the bid of the petitioner is higher than the reserve price normally it ought to have been accepted by 2nd respondent.

37. Clause 26 of the terms and conditions of the auction states that if the status of H1 is accepted, the Pre-Bid EMD shall be converted into security deposit and an acceptance letter will be issued by MSTC. The successful bidder would be required to deposit the balance bid/sale value within sixty days from the date of issue of acceptance letter of MSTC.

38. Clause 32(e) of the terms and conditions no doubt states that the 2nd respondent reserves the right to accept/reject any offer/bid, withdraw from sale, the property offered for sale prior to or after the acceptance of the bid without specifying any reason thereof.

39. In the instant case, after the petitioner became the highest bidder, it is open

to the 2nd respondent to either accept or reject the petitioner's bid as per Clause 32(e).

40. But there is no provision therein to compel the petitioner to offer more amount, by way of a counter offer, whatever be the reason.

41. Learned counsel for the 2nd respondent is unable to point out any provision in the terms and conditions which entitles the 2nd respondent to demand more than what was offered by way of a counter offer and compel the highest bidder like the petitioner to accept it.

42. The whole purpose of fixing a base price is defeated if in spite of the highest bidder offering more than the base price, the 2nd respondent can reject it by giving totally whimsical reasons.

43. The petitioner had sent e-mails to 2nd respondent on 6.10.2022, 17.10.2022 and 25.11.2022 seeking response from 2nd respondent but it chose to remain silent and never replied to the emails.

44. Therefore the non-acceptance of the petitioner's highest bid by the 2nd respondent is arbitrary and unreasonable and violated Art.14 of the Constitution of India.

45. The cancellation of the petitioner's bid was allegedly only informed to the petitioner, according to the 2nd respondent, on 31.10.2022, but even the copy of such rejection has not been placed on record by the 2nd respondent.

46. We may point out that in it's email Annexure P-5, the respondent no.2 while demanding Rs.46,45,500/- from the petitioner stated :

"Request your early return email confirming your consent for matching Rs.46,45,500/- for REC flat No.886, Shimla in order to finalise the auction process" Thus the 2nd respondent had not fixed any specific time for the petitioner to accept the counter offer made by it. It merely said 'early return mail'.

47. So when the petitioner came forward to pay the said amount on 2.12.2022, the 2nd respondent cannot refuse to transfer the property to petitioner giving the reason that the MSTC portal was closed or that the petitioner had filed the instant Writ or that it had commenced a fresh bidding process. This conduct of 2nd respondent is also arbitrary, unreasonable and violative of Art.14 of the Constitution of India. Moreso, when it had delayed the communication of cancellation of the process of e-Auction dt. 14.09.2022 (in which the petitioner was highest bidder) till 31.10.2022 and did not reply to the several emails sent by the petitioner.

48. The 2nd respondent cannot compel the petitioner to participate in the fresh bidding process on 19.11.2022 and penalize the petitioner for refusing to do so.

49. We are of the opinion that the 2nd respondent, without there being any

provision in the terms and conditions, firstly had no right to demand more than the highest bid; and it had also acted arbitrarily and unreasonably by refusing to accept when the petitioner offered to pay sum of Rs.46,45,500/- on 05.12.2022 as sought by the 2nd respondent.

50. Therefore, the writ petition is allowed; petitioner is directed to deposit Rs.46,45,500/- within two weeks with the 2nd respondent; the 2nd respondent shall then, within one week thereafter, inform the petitioner about the amount payable by the petitioner towards stamp duty, registration and other charges for transferring the subject property to the petitioner; and the petitioner shall make available the said amount within one week thereafter; and then subject property is directed to be transferred to the petitioner by the 2nd respondent. The fresh e-Auction process initiated by the 2nd respondent on 30.11.2022 is set aside.

51. Pending application(s), if any, shall also stand disposed of. No costs.