

(2003) 04 MAD CK 0201
In the Madras High Court
Case No : W.A. No. 901 of 2003

Liebherr Export AG

APPELLANT

Vs

Neyveli Lignite Corporation Limited and Promtractor, W.B.
Engineers International Pvt. Ltd.

RESPONDENT

Date of Decision : 30-04-2003

Acts Referred:

Citation : (2003) 2 MLJ 502

Hon'ble Judges : V.S. Sirpurkar, J;C. Nagappan, J

Bench : Division Bench

Advocate : A.L. Somayaji for Rangarajan and Prabhakaran, for the Appellant;
N.A.K. Sharma, for R1 and Vijay Narayan, for R2, for the Respondent

Final Decision : Dismissed

Judgement

V.S. Sirpurkar, J.—This appeal is directed against the judgment of the learned single Judge, dismissing the writ petition filed by the petitioner, appellant herein, wherein, the writ-petitioner had challenged the tender notice issued by the Neyveli Lignite Corporation, first respondent herein, dated 7-10-2002 and sought a direction to accept the tender by the petitioner in pursuance of the tender notice dated 14-8-2001 and award the contract.

2. Neyveli Lignite Corporation had required certain machinery and therefore floated a tender on 3-2-2001 for the supply of 6-Nos. of pipe layers. There was a specification that the concerned pipe layers should be equipped with Power Shift Transmission System (in short "PST System"). It seems that the second respondent responded to this tender notice and the petitioner could not since the petitioner, who is also a manufacturer of pipe layers, did not manufacture the pipe layers equipped with PST System. The pipe layers manufactured by the petitioner are equipped with Hydrostatic Drive Technology (in short HDT System) which, according to the petitioners, is a better and modern technology. The petitioner had enquired with the first respondent as to whether they could also offer the tender but was dissuaded as the petitioner were not able to supply the

pipe layers with PST system.

3. On 14-8-2001, the first respondent floated another tender. This time the tender was for the supply of 13-Nos. of pipe layers. However, this time, the requirement was slightly changed in the sense that the pipe layers could be either with PST System or with HDT System. Petitioner submitted tender.

4. The tenders were opened on 20-2-2002. It was found that the prices quoted by the petitioner were the lowest (in short L1) while the rates quoted by the second respondent was the third lowest (in short L3). Nothing was done substantially thereafter though the petitioner was invited for the further negotiations by the officials of the first respondent. However, suddenly on 23-9-2002 petitioner received a letter from the first respondent that for the administrative reasons, the tender dated 14-8-2002, for which the petitioner was L1, was not to be processed.

5. A representation was sent by the petitioners on 30-9-2002 to the Hon'ble Minister for Coal, Ministry of Coal with a copy thereof to the Joint Secretary against the communication dated 23-9-2002. Nothing was heard by the petitioner in respect of that. Instead, petitioner saw that on 7-10-2002 the first respondent had floated a third tender for 19-Nos. pipe layers. Again the manufacturers of pipe layers equipped with both systems, viz. PST System as well as HDT System could vie for this.

6. It seems that the petitioner took part in this tender also. Though initially the petitioner sought the extension of time for the tender, which extension was not given to them, the petitioner seems to have submitted the tender in time by filing its bid. Petitioner then filed a writ petition (W.P. No. 40533 of 2002) on 1-11-2002. The technical bids were opened in respect of the tenders including the petitioner's and the second respondent on 7-11-2002 on which day, the petitioner moved the learned single Judge of this Court and obtained an order of injunction, restraining the first respondent from proceeding further with the said tender notice. Ultimately the matter was heard by the learned single Judge and was dismissed on 20-12-2002. It is against this order, dismissing the writ petition, that the present writ appeal is directed.

7. Learned single Judge took the view that firstly the first respondent had the right to cancel the tender at any time. Learned Judge further took the view that since the scope of judicial review in such matters is extremely limited to examine only the "decision-making process" and not the "merits of the decision" and further since there was nothing arbitrary or unfair or illegal or contrary to the principles of *Wednesbury's* reasonableness, petitioner could not insist upon their tender dated 14-8-2002 being accepted. Learned single Judge also took the view that there was nothing wrong in floating the third tender notice on 7-10-2002 and that the first respondent had valid reasons and was perfectly within its rights to float the third tender notice and as such the petitioner was not entitled to any relief.

8. Shri A.L. Somayaji, learned senior counsel appearing on behalf of the appellant has painstakingly taken us through the whole records to show that the appellant was the lowest tenderer in so far as the second tender notice for the supply of 13-Nos. of pipe layers was concerned. Learned counsel firstly points out that the technology offered by the appellant was modern and better compared to the technology of PST system. Learned counsel then points out that the appellant had made all the preparations, including the furnishing of the bank guarantees etc. and all the formalities were completed by the appellant and it was only at the fag end that the first respondent took an arbitrary decision to float the third tender notice thereby giving an unfair advantage to the second respondent to know the price bids floated by the appellant. He further argues that there was no justification whatsoever for floating a third tender. Learned senior counsel further argues that being in the position of the lowest tenderer and having made all the preparations, completing all the formalities and having offered better technology, it was unreasonable on the part of the first respondent not to award the contract to the appellant and instead floating the third tender notice thereby showing a clear bias against the appellant and in favour of the second respondent.

9. As against this, Shri N.A.K. Sharma, learned counsel appearing on behalf of the first respondent Corporation defended the action by pointing out firstly that the appellant in this case has no bona fides. With reference to the dates, learned counsel points out that after the decision was made known not to proceed with the second tender on 23-9-2002, the appellant not only waited but also took their chance in the fresh tender floated on 7-10-2002. The appellant also participated in the said tender by offering it bid in the meantime and filed a writ petition only on the 1st November 2002 which was also moved only on 7th November 2002 when the bids were opened in pursuance of the tender notice dated 7-10-2002 in which the tenderers had put in their offers. Learned counsel points out that even after the dismissal of the writ petition on 20-12-2002 the appeal came to be filed only on 29-1-2003 and the copies of the memorandum of appeal and stay petition came to be served on 7-2-2003 and it was only after the price bids were opened on 10-2-2003 that ultimately the appellant moved for the stay before the appellate Bench on 5th March, 2003. Learned counsel, therefore, urges that from the dates, which speak for themselves, it is clear that the appellant has been waiting and only finding that it was not the lowest tenderer that the appellant has chosen to move the court.

10. As regards the so-called "unfair advantage", learned counsel points out that if the appellant's offer became known to the second respondent the same advantage was reaped by the appellant in its being able to know the bid offered by the second respondent and, therefore, there was no question of any party having any unfair advantage over the other. According to the learned counsel, the first respondent had every right to strike the better deal as it was apparent from the pleadings of the appellant itself that since the offer made by the appellant was not an acceptable offer and they were not in a position to compete

with the second respondent, they have chosen to approach the court. Learned counsel also justified and explained the necessity and the administrative reasons for floating the third tender and submitted that in the process, the first respondent would stand to save more than four crores of rupees. He pointed out that there was no question of any mala fides or unreasonableness in floating the fresh tender and everything was done in the interests of the first respondent Corporation. Learned counsel also pointed out that the whole process was transparent, fair and reasonable and, therefore, urged to dismiss the appeal.

11. On this backdrop, we have to examine the action on the part of the first respondent in not accepting the bid in the second tender notice dated 14-8-2001 and in floating a third tender notice on 7-10-2002.

12. As has been rightly held by the learned single Judge, there can be no right in the appellant in insisting upon the second tender being accepted and the contract awarded in pursuance thereto since it is an admitted position that the offer could be withdrawn in time. Again the law is trite that merely because the offer of a particular bidder is lowest, it does not create a right in such bidder for his offer being accepted. In various decisions, the Supreme Court has now resolved this question. The scope of judicial review in the matters of contracts even if they are non-statutory contracts is now limited to the examination of the "decision-making process" and the courts cannot re-appreciate the facts and examine the "decision on merits" firstly because that is not the task of the courts; and secondly because the courts are not equipped with the machinery to consider the technicalities involved in the matter. If this is so, the appellant cannot insist on a finding that its offer was bound to be accepted because it had offered a better and modern technology. It is entirely for the buyer to decide the kind of specifications as regards the technology in the equipment that they seek to purchase. Shri Somayaji had pointed out that it was admitted by the first respondent in their counter that the technology offered by the appellant was a modern and better technology. Learned counsel, therefore, harped that in the wake of this admission at least, it was totally unreasonable on the part of the first respondent to reject the offer in second tender and then to float the third tender notice.

13. In this behalf, it will have to be seen that it is not for this court to decide as to which technology is a better technology. The court is simply not equipped to do that. The first tender was floated only for the supply of 6-Nos. pipe layers with PST System. Thereafter, as explained by the learned counsel for the first respondent, the first respondent felt the need for more number of pipe layers but wanted to invite more offers and, therefore, floated the tender notice for the supply of 13-Nos. of pipe layers giving opportunity to the manufacturers of pipe layers involving both the technologies. Shri Sharma then rightly pointed out that the first tender was never cancelled and then if the first tender as well as the second tender had been accepted as they stood, the first respondent would have been required to purchase 6-Nos. pipe layers equipped with one technology and

13-Nos. pipe layers of different technology whereby even there could not have been a proper comparison of the prices offered and it was because of this difficulty that a fresh collective offer was made by floating the third tender notice for 19-Nos. pipe layers in all wherein again equal opportunity was given to the manufacturers of the pipe layers by the aforementioned two technologies. Learned counsel pointed out that though the HDT system was admitted to be a modern technology, it did not mean that PST system was an outdated technology and the learned counsel was at pains to point out that there was no material on record to suggest that PST system is old and outdated technology. Indeed, we did not have anything in terms of the experts' report to suggest that PST system is an outdated technology and, therefore, could not have been insisted upon by the first respondent in preference to the HDT system.

14. The fact remains that the appellant is not in a position to offer the pipe layers with PST system and that too at the competitive price which is clear from the price bids opened after the dismissal of the writ petition. Mr. Sharma pointed out that the offers made pursuant to the third tender notice show that the first respondent would be benefited by about more than four crores of rupees if they were to accept the offer of the second respondent. This, in our opinion, is a very relevant factor though this factor was not available to the learned single Judge.

15. Shri Sharma then pointed out that in the first tender the offer was with the "recommended spare-parts" meaning thereby, that the spare-parts, which would be required for using the machinery, would be purchased from the manufacturers whose tender was accepted at the price quoted by them. He pointed out that the second and the third tender notices, however, specifically provided that those offers would be with the guaranteed spare-parts whereby the value of the spare-parts would be included in the tender value only. According to the learned single Judge it would have been obviously advantageous for the first respondent to get an offer for all the 19 pipe layers with guaranteed spare-parts, the price of which would be included in the offer whereas, if the second tender of the appellant were to be accepted the first respondent would not have such guaranteed spare-parts in respect of all the 19 pipe layers that they required. They would have had those spare-parts only for 13 pipe layers whereas they would have been still required to purchase the spare-parts in respect of the six pipe layers wherein there was no guarantee about the spare-parts and wherein the value of the spare-parts was also not included. If this was so, according to the learned single Judge, there was nothing wrong in floating a consolidated tender for the supply of 19-Nos. pipe layers with the guaranteed spare-parts irrespective of the mechanism - PST system or HDT system. The learned single Judge has rightly pointed out that in floating the third tender the first respondent would be avoiding the botheration regarding the spare-parts for pipe layers equipped with PST system which it would have been required to face had the first two tenders been accepted. We agree with the learned single Judge in so far as this aspect is concerned and hold that in doing so, the first respondent has not acted unreasonable and that there were good and valid reasons in floating the third

tender notice in the terms that it was floated.

16. Learned counsel for the appellant tried to suggest that the reasons given by the first respondent for floating the third tender notice could at the most be alleged for cancelling the first tender floated on 3-2-2001. Learned counsel says that in the second tender notice the first respondent was getting all the advantages of the guaranteed spare-parts; they were also getting a modern and better technology and if they did not want to purchase the pipe layers of both the technologies, the first tender alone could have been rejected.

17. Shri Sharma, learned counsel for the first respondent, however, pointed out that the need was for 19-Nos. pipe layers and not for 13-Nos. pipe layers and that was the main reason why the first respondent did not merely cancelled the first tender by accepting the second tender. Indeed, there can be no dispute that the third tender notice is for the supply of 19-Nos. pipe layers. Therefore, this argument of the learned counsel for the appellant that the reasons given for floating the third tender were good only as against the first tender cannot be accepted.

18. It was tried to be suggested that the first respondent took unduly long time of seven months for the cancellation and that it had no power to do so that. In fact, in our opinion, this is wholly incorrect because firstly it was an admitted position that the first respondent could cancel the tenders at any time. It is in fact an accepted principle; secondly, the power to withdraw the tender has been presumed and admitted by the appellants before the learned single Judge. We, therefore, need not dilate on that issue as regards the seven months' time. No prejudice on that account has been shown and since the first respondent has given good reasons for not proceeding with the second tender and for floating the third tender notice, to which we have made a reference above, we do not think that even this argument may not be available to the appellants.

19. Shri Somayaji also tried to argue that the offer made in pursuance of the second tender notice was approved by the technical officials of the first respondent and, therefore, it should not have been interfered with. Shri Sharma however points out that the approval of that offer could not be said to be final and it did not divest the first respondent of its power not to accept the offer. The argument is quite right.

20. Learned counsel for the appellant further argued that directions had been issued by the Chief Vigilance Commissioner that where the negotiations are to be made, the negotiations should be made only with the lowest tenderer and as such, since the appellant was the lowest tenderer in the second tender, there should have been negotiations with the appellant alone. The argument is quite untenable. We have already found that the first respondent was within its powers to call for the third tender in the peculiar factual circumstances pleaded and proved by it. Therefore, the question of negotiations with the appellant becomes secondary. At any rate, we would have appreciated this argument had the first

respondent in reality negotiated the tender with the party who was not the lowest tenderer and awarded the contract. That is not the factual situation. This argument also, therefore, must be rejected.

21. Shri Somayaji suggested that in the whole affair, right from floating of the first tender till the last step, the first respondent showed a tilt in favour of the second respondent and biased against the appellant. Considering all the aspects and the facts which have been pleaded before us, we do not think that can be the case. On the other hand, the whole process appears to be reasonable, transparent and justifiable.

22. On all these factual background, again we must come back to the first submission of Shri Sharma that in fact the appellant itself was being more opportunistic even in the matter of filing the writ petition as also the writ appeal, after having taken active part in the process of the third tender notice by quoting its price bid to come to this court with a prayer for awarding the second tender with a well calculated stance. The same stance was continued by the appellant even at the time of moving the appeal before us. We may not be understood to mean that this by itself is sufficient to throw the appellant out of Court. However, in the totality of the circumstances, which we have considered above, we cannot but make a reference to it.

23. Shri Somayaji relied on the two celebrated decisions of the Supreme Court in Dutta Associates Pvt. Ltd. Vs. Indo Merchantes Pvt. Ltd. and Others, and Tata Cellular Vs. Union of India, . In so far as the case of Dutta Associates is concerned, there can be no dispute about the principles laid down by the Supreme Court. However, on the peculiar factual circumstances of the present case, we cannot hold that the entire process leading to the floating of the third tender is in any way opposed to the established norms, viz. transparency, fairness, and openness. That was a finding of the Supreme Court in that case before invalidating the accepted tender. We find good and justifiable reasons for the same as has been found by the learned single Judge.

24. As regards the celebrated decision in Tata Cellular case, in our opinion, the reported decision is more helpful to the first respondent than the appellant. All the five questions asked in paragraph 77 regarding the duty of the courts must be answered in favour of the first respondent and against the appellant. So also it cannot be held that there was any illegality, irrationality or procedural impropriety in calling the third tender. In that view, we are of the clear opinion that this case also does not help the appellant.

25. For all these reasons, we are of the clear opinion that the order passed by the learned single Judge is perfectly valid and has to be confirmed. There is no merit in the appeal. The appeal is dismissed. Connected W.A.M.P. Nos. 1109 and 1110 of 2003 are closed.