
(2018) 04 CAL CK 0126

In the Calcutta High Court

Case No : F.M.A.224 of 2017, CAN 8444, 8448 of 2016, MAT 1532 of 2016

Managing Director, West Bengal Dairy And Poultry Development Corporation ?LIMITED. Vs JAYANTI BOSE & ORS.

Date of Decision : 26-04-2018

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2018) 04 CAL CK 0126

Hon'ble Judges : NADIRA PATHERYA, J;RAJASEKHAR MANTHA, J

Bench : Division Bench

Advocate : Koushik Chatterjee, Nilanjan Adhikari, Priyanka Mukherjee, Achyut Basu, Rupchand Chakraborty, Punam Basu, Sonam Basu

Final Decision : Dismissed

Judgement

Rajasekhar Mantha, J.

1. The instant appeal arises against an order dated 8th May, 2015 passed in W.P.26296(W) of 2014 (Smt.Jayanti Bose Vs. State of West Bengal &

Ors.). By the said order the writ petition was disposed of, inter alia nullifying and cancelling the 4th tender process of the appellant. The Single Judge

also directed the appellant to consider and finalise the third tender in accordance with law. It was also held that the invalidation of the third tender

process on the ground of similar number and identity of tenderers could not be done. The Single Judge also directed the appellant to finalise the third

tender process within 3 weeks from the date of the order.

2. The impugned order was passed in the following factual background:-

3. The appellant is an undertaking under the control of the State and inter alia, engages, on a yearly basis contractors for supply of skilled and unskilled

workers for its various establishments. The respondent/writ petitioner was such a Contractor for 2 continuous years, prior to June, 2014.

4. An e-tender was floated by the appellant on the 17th of June, 2014 (1st tender) as the existing contract with the writ petitioner was due to expire in July, 2014.

5. Three bids including that of the writ petitioner were received under the said tender. The said first tender was withdrawn/cancelled by the appellant as minimum number of bids expected, was not received.

6. On the 2nd July, 2014 (Second tender) the appellant again floated another tender for the same work.

7. The bidders of the second tender were similar to the first e-tender. However as the 3 bids received were 234.45% higher than the approved rate for service charge, the said tender process was also abandoned, cancelled and withdrawn. On the 7th of August, 2014 (third tender) the appellant once again floated, a tender for the same work.

8. The third tender was also abandoned as the same three bidders who participated in the first two tenders submitted their quotes. The appellant decided to re-tender again. On the 28th August, 2014 (fourth tender) the said tender was floated again. The writ petitioner who participated in the first three tenders did not participate in the fourth tender.

9. The said 4th tender was awarded to the 4th respondent in the writ petition as he quoted rates lower than that of the other tenderers in the said process.

10. Without participating in the 4th tender, the respondent filed the writ petition under Article 226 of the Constitution of India inter alia contending that the 4th tender dated 28th August, 2014 could not have been issued without opening the third tender. Consequential reliefs were also sought.

11. Affidavits were exchanged by the parties. The successful tenderer did not participate in the litigation. Neither did the other two tenderers in the first three tender processes. The Honâ??ble Single Judge disposed of the writ petition with the following order:-

â??After going through the averments in the affidavit-inopposition there was sufficient justification for cancellation of the first and second tenders.

The reason advanced in the affidavit-in-opposition of the respondent no.2 for cancellation of the third tender is as follows:-

â??V) That Respondent No.2 states that the aforesaid etender was floated third time on 07th August, 2014 being ID-2014-ARD-22065-1. This e-

tender was also cancelled after opening the technical part as this time 3 bidders are same as in the first and second e-tender. There was no change

either in the number or the identity of the bidders. This deadlock in the numbers and identity forced the Corporation to decide that the tender was

floated for one more time to see whether any new bidder responds or not.??

That the number or identity of tenderers was the same was no ground to cancel the tender. In those circumstances, the fourth tender process is

hereby declared null and void and cancelled. This court directs the respondent Corporation to consider the third tender in accordance with law. All

aspects of consideration are open to them except that the tender cannot be invalidated on the ground of number of tenderers or identity of the

tenderers. The respondents will finalise this tender process within three weeks from the date of communication of this order. Till this tender process is

finalised and a new tender is awarded, the existing tenderer, being the private respondent will be allowed to continue. The private respondent has

never appeared in court either at the time of directions or thereafter. None appears for them even today. This writ application is, accordingly, disposed

of. Urgent certified photo copy of this order, if applied for, be given to the learned advocates for the parties upon compliance of all requisite

formalities.??

12. In terms of the said impugned order the appellant reconsidered the third tender and the three bids thereunder. It was found that the rate quoted by

the Respondent, in the 3rd tender was 7.99% higher than the estimated rate. The said tender was thus cancelled. 13. However on an application for

contempt of the impugned order filed by the respondent against the Managing Director of the appellant the Honâ??ble Single Judge found as

follows:-

â??The quotation of the writ petitioner in the third tender was Rs.7,94,104/-. The alleged contemnors were directed to consider the third tender

according to law. They have cancelled the third tender on the ground that the rate of the petitioner was 7.99% higher than the estimated rate. They

are following the existing contractor M/s. Mondal Insulation to continue work. Their quoted rate in 2014 was Rs.7,72,118/-. There is not much

difference between Rs.7,72 lacs and 7.94 Lacs and especially when there is an order of this Court to consider the tender. If necessary the petitioner

ought to have been asked to reduce his offer to Rs.7,72,118/-.

Prima facie the alleged contemnors have acted mala fide. An opportunity is given to the alleged contemnors to reverse their action, which, prima facie

amounts to contempt of Court. Otherwise the Court will have no other option but to proceed with this contempt application. Let this application for

further consideration on 29th July, 2016.â??

14. The instant appeal was thereafter filed.

15. A separate appeal being MAT No.1532 of 2016 has been filed by the Managing Director of the Appellant herein against the aforesaid order dated

15th July, 2016, passed in CPAN 1135 of 2015 in W.P.26296 (W) of 2014. The appeal has been numbered MAT 1532 of 2016.

16. The said appeal was heard along with the instant appeal.

17. The following points were urged by the appellant in support of the appeal.

(a) The writ petition itself was barred in view of an Arbitration Clause in the Notice Inviting Tenders.

(b) The decision to abandon the third tender process and re-tender for the 4th time was a policy decision and cannot be interfered with by the Writ

Court.

(c) The discretion to re-tender for the 4th time after cancelling third tender was occasioned by the reason of three similar persons participating in the

first three processes and also that they were only three tenderers at all stages.

18. In the context of the first argument, the Arbitration Clause in the NIT is as follows: -

â??Arbitration : In case of dispute or difference arising out of this tender the matter will be settled bilaterally under the sole arbitration of the

Honâ??ble Chairman of this Corporation or his authorized nominee in Kolkata.â??

19. To address the argument of the appellant useful reference may be made to the decision of the Honâ??ble Supreme Court in the case of Dresser

Rand S.A. Vs. Bindal Agro Chem Ltd reported in (2006) 1 SCC 751 at Paragraphs 27 & 32. The Honâ??ble Supreme Court stated as follows :-

â??27. The tender document or the invitation to bid of BINDAL (containing the â??instructions to biddersâ? and the â??general conditions of

purchaseâ?), by itself, is neither an agreement nor a contract. The instructions to bidders informed the intending bidders how the bid should be made

and laid down the procedure for consideration and acceptance of the bid. The process of bidding or submission of tenders would result in a contract

when a bid or offer is made by a prospective supplier and such bid or offer is accepted by BINDAL. The second part of the Invitation to Bid consists

of the 'General Conditions of Purchase', that is, the conditions subject to which the purchase order will be placed or offer will be accepted. The

'General Conditions of Purchase' were made available as a part of the Invitation to bid, so as to enable the prospective suppliers to ascertain their

obligations and formulate their offers suitably.

32. Parties agreeing upon the terms subject to which a contract will be governed, when made, is not the same as entering into the contract itself.

Similarly, agreeing upon the terms which will govern a purchase when a purchase order is placed is not the same as placing a purchase order. A

prelude to a contract should not be confused with the contract itself. The purpose of Revision No. 4 dated 10.6.1991 was that if and when a purchase

order was placed by BINDAL, that would be governed by the 'general conditions of purchase' of BINDAL, as modified by Revision No. 4. But

when no purchase order was placed, neither the 'general conditions of purchase' nor the arbitration clause in the 'General Conditions of Purchase'

became effective or enforceable.

20. The aforesaid decision was cited with approval in B.S.N.L. Vs. Telephone Cables Ltd reported in A.I.R. 2010 Supreme Court 2671. At paragraph

18. the Hon'ble Supreme Court held as follows:

18. The respondent: contended that BSNL has entered into a contract with it in respect of a quantity (0.536 LCKM), and as the dispute raised was

whether the contract quantity should be more, the arbitration clause was in force and available. The contention has no merit. The arbitration

agreement was available in regard to the contract for 0.536 LCKM. But in the absence of any purchase order in respect of 5.306 LCKM by BSNL

on the respondent, respondent cannot seek recourse to the arbitration agreement contained in clause 20 of Section III of the bid document, in regard to

a dispute relating to that quantity for which order was not placed. It is not sufficient to show that there was an arbitration agreement in regard to some

contract between the parties. To constitute an arbitration agreement for the purpose of Sections 7 and 11 of the Act, two requirements should be

satisfied. The first is that there should be an arbitration agreement between the parties to the dispute. The second is that it should relate to or be

applicable to the dispute in regard to which appointment of Arbitrator is sought (See *Yogi Agarwal v. Inspiration Clothes and U*, 2009 (1) SCC 362) :

(AIR 2009 SC 1098 : 2009 AIR SCW 261). For the foregoing reasons, we hold that in the absence of an arbitration agreement, the application under

section 11 of the Act was not maintainable.

21. Applying the above dicta to the instant case, on a first glance at the Arbitration Clause, it would seem that the same applies to the process of

tendering. However on a purposive interpretation of the same, one has to conclude that it would come into force only after a work order being issued

and a contract being entered into with a successful tenderer. Such interpretation is also necessary to avoid absurdness.

22. At the tendering stage rival parties compete for a commercial contract. The process of tendering and distribution of state largess is therefore

amenable to and guided by the principles of Administrative law. Such principles are inter alia, Natural Justice, fairness, reasonableness and equal

opportunity bearing in mind the specific objects of the "State" in requiring outsourcing.

23. The expression "in relation to the tender", in the Arbitration Clause set out at paragraph 18 hereinabove must be "read down" to give an

appropriate place for the said Clause in the context. Such reading down is permissible as the same does not militate against the other clauses of the

tender documents read as a whole. [*Sec C.B.Gautam Vs. Union of India* (1993) 1 SCC Page 78 Para 36.].

24. The said clause therefore cannot be a bar to seek a Public Law Remedy under Article 226 of the Constitution of India. In any event jurisdiction of

Article 226 cannot be barred where the ground for remedy has public law element, and violation of fundamental rights. Therefore, the expression

"in relation to the tender" must be understood in the facts of the case to mean the actual contract. The first argument of the appellant therefore

fails and is answered in the negative.

25. The next question is whether the decision to cancel three tendering processes and floating a fourth one, is founded on good reason. The undisputed

facts indicate the respondent writ petitioner was an existing contractor for two

years prior to the first tendering process. There were only three bidders in each of the first three tender processes. The same bidders participated in all the three processes. In each of the said three tenders, the respondent writ petitioner was the lowest. The other two bidders in the three tenders were not aggrieved by the cancellation of the 3 tenders. The said other two bidders also did not approach the Court in connection with the tender process at any point of time. They also did not seek to intervene in the instant proceeding. The decision of the appellant Corporation based on which the three tender processes were cancelled can therefore cannot be completely baseless.

26. Reference in this regard is made to the case of *Tata Cellular Vs. Union of India* reported in (1994)6SCC651. At Page 687, the Honâ??ble

Supreme Court has summarized the law regarding judicial review of tender processes as follows:-

â??(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be

substituting its own decision, without the necessary expertise, which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body

functioning in an administrative or quasi-administrative sphere. However, the decision can be tested by the application of the â??Wednesbury

principleâ?? of reasonableness and the decision should be free from arbitrariness, not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.â??

27. In *Raunaq International Ltd Vs. IVR Construction Limited* reported in (1999) 1SCC 492, the Honâ??ble Supreme Court held that the

Administrative Authority has discretion and must be allowed play in the joints in the process of Tendering.

28. In *Michigan Rubber (India) Ltd. Vs. State of Karnataka* reported in (2012)8 SCC 2016, the Honâ??ble Supreme Court laid down as follows:-

â??19. From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play.

These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any

ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for

striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy

standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State

authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not

warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to

successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very

restrictive since no person can claim fundamental right to carry on business with the Government.

20. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following

questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or

decision made is so arbitrary and irrational that the court can say: â??the decision is such that no responsible authority acting reasonably and in

accordance with relevant law could have reachedâ?; and (ii) Whether the public

interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226.â?? (emphasis supplied).

29. The above decisions were referred to with approval by the Honâ??ble Apex Court in Maa Binda Express Carrier and Another Versus North-

East Frontier Railway and Others reported in (2014) 3 Supreme Court Cases 760, relied upon by the appellant.

30. It follows from the above that policy decisions of public authorities are generally not interfered with under Article 226 of the Constitution of India.

Interference is called for only when any vested rights and benefits are sought to be deprived by such policy or change thereof. In the instant case the

respondent/writ petitioner had no vested right to be awarded the contract merely because he was the lowest bidder. In any event no other bidder was

awarded any contract in the first three tendering processes in which the respondent/writ petitioner participated. There is nothing that prevented the

respondent from participating in the 4th tender process. A mere cancellation of a tender and an order directing the re-tender could not have been

interfered with by the Writ Court.

31. The respondent thus cannot claim, as a matter of right, to be awarded a contract merely because he is the lowest bidder. The Appellant Authority

has every right to cancel the tender and or retender in the event there are reasons to believe that the bidders are not acting bonafide or that there is

â??cartellingâ??.

32. In Union of India Vs. Hindusthan Development Corporation reported in (1993) 3 SCC 499 at Paragraphs 14, 15 and 16 the Apex Court discussed

the scope of the expressions â??cartellingâ?? and â??predatory actionsâ?? by bidders in Government tenders. After explaining the application of the

aforesaid two expressions, at Paragraph 17, the Supreme Court held as follows:

17. Therefore, whether in a given case, there was formation of a cartel by some of the manufacturers which amounts to an unfair trade practice,

depends upon the available evidence and the surrounding circumstances. In the instant case, initially the Tender Committee formed the opinion that the

three big manufacturers formed a cartel on the ground that the price initially quoted by them was identical and was only a cartel price. This, in our

view, was only a suspicion which of course got strengthened by post-tender

attitude of the said manufacturers who quoted a much lesser price. As noticed above it can not positively be concluded on the basis of these two circumstances alone. In the past these three big manufacturers also offered their own quotations and they were allotted quantities on the basis of the existing practice. However a mere quotation of identical price and an offer of further reduction by themselves would not entitle them automatically to corner the entire market by way of monopoly since the final allotment of quantities vested in the authorities who in their discretion can distribute the same to all the manufacturers including these three big manufacturers on certain basis. No doubt there was an apprehension that if such predatory price has to be accepted the smaller manufacturers will not be in a position to compete and may result in elimination of free competition. But there again the authorities reserved a right to reject such lower price. Under these circumstances though the attitude of these three big manufacturers gave rise to a suspicion that they formed a cartel but there is not enough of material to conclude that in fact there was such formation of a cartel. However, such an opinion entertained by the concerned authorities including the Minister was not malicious nor was actuated by any extraneous considerations. They entertained a reasonable suspicion based on the record and other surrounding circumstances and only acted in a bonafide manner in taking the stand that the three big manufacturers formed a cartel.

33. Applying the aforesaid principles in the instant case, the reasons for cancellation of first three tenders, hereinabove are most definitely something more than mere suspicion on the part of the appellant. The only three bidders in the first three tendering processes were all identical. In each of three tendering processes, the writ petitioner respondent emerged marginally lower than the others. The writ petitioner was already enjoying the contract for two consecutive years prior to three tendering processes. Equally strange is the fact that two other tenderers who purportedly competed three consecutive times with the respondent/writ petitioner chose to remain silent and were not aggrieved by the decision of the appellant to issue a tender for the fourth time. The aforesaid facts speak for themselves and a reasonable man can definitely come to a conclusion that the respondent/writ petitioner may be involved in some predatory measures for wresting the contract in her favour. For the reasons above the floating of the 4th tender by

the appellant in the facts of the case cannot be faulted and should not have been interfered with.

34. The order dated 15th July 2016 passed in the contempt application is unacceptable. The Court below sought to compare the respondent's bid

in the third tender with that of the successful bidder in the 4th tender. This could not have been done. The respondent did not in fact participate in the

4th tender process. A writ Court also cannot direct award of a contract under a tendering process in favour of any particular individual. This is what is

found to have been done in the order impugned. A direction to consider and finalize a tender process must be deemed to include a right to cancel the

same for valid reasons. The appellant could not have been faulted for the same. The Court below has substituted its own view on that of the Appellant

authority and that too without assigning any reason whatsoever.

35. For the reasons aforesaid, the appeal being FMA No.224 of 2017 and MAT No. 1532 of 2016 is hereby allowed and the order dated 8th May,

2015 impugned herein is set aside. No order need be passed in CAN Nos. 8444 of 2016 and 8448 of 2016 and the same are rendered infructuous and

dismissed as infructuous.

36. There shall be no order as to costs.

37. Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of all requisite formalities.