(1995) 07 CAL CK 0005

In the Calcutta High Court

Case No : C.O. No. 831 (W) of 1995

Md. Aslam APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 13-07-1995

Acts Referred:
Constitution of India, 1950 — Article 12, 226

Citation : 100 CWN 732

Hon'ble Judges : S.B. Sinha, J

Bench : Single Bench

Advocate : Sudipto Maitra and Subhasish Pachhal, for the Appellant; Narayan Bhattacharya, S. Talukdar and Ranjit Kumar Basu, for the Respondent

Final Decision : Dismissed

Judgement

S.B. Sinha, J.—In this application, the petitioner has, inter alia, prayed for issuance of a writ of or in the nature of Mandamus directing the respondents not to give any further effect to the tender submitted by the respondent No. 4. The fact of the matter lies in a very narrow compass. The Ministry of Defence floated a tender through the regional office of M.S.T.C. Limited. The petitioner participated in the said tender. In the said tender notice, 129 items were offered for sale. The petitioner submitted his tender only in respect of one item, namely, Vaiga Boat, which was at serial No. 81 of the schedule of the said notice of lender, and he quoted his price therefore at Rs. 46,000/-. According to the petitioner, he was declare to be the highest bidder, but when no letter of intent was issued to him he made an enquiry and came to learn that the tender of the respondent No. 4 in respect of the said item has been accepted although the respondent No. 4 did not participate in the tender. Further contention of the petitioner is that in view of the fact that the respondent No. 4 allegedly submitted a composite tender in violation of clause 8.0 of the Special Terms and Conditions of Tender acceptance of tender of the said respondent must be held to be bad in law.

2. Mr. Maitra appearing on behalf of the petitioner submits that in the writ application the petitioner has clearly stated that one Mr. Majumdar declared that the offer of the petitioner was the highest and the said statements have not been specifically denied, and as such, the respondent must be deemed to have accepted the same. Limited counsel submits that the respondents have acted illegally in accepting the tender of the respondent No. 4 and hereby the terms and conditions of tender have been violated. Reliance in this connection has been placed in the ease of State of Madhya Pradesh and Another Vs. Firm Gobardhan Dass Kailash Nath, as also on the decisions reported in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, and in the case of Harminder Singh Arora v. Union of India & Ors., reported in Harminder Singh Arora Vs. Union of India (UOI) and Others, .

3. Mr. Bhattacharya learned counsel appearing on behalf of the respondent No. 3. however, submits, that admittedly the respondent No. 4 offered a sum of Rs. 51,798/-, which was a higher after than the offer of the petitioner. He submits that the said respondent submitted a composite tender in respect of 4 items and deposited earnest money to the extent of Rs. 12,500/- in place of the requisite earnest money of Rs. 12,969,70. Learned counsel submits that as the tender of the said respondent was rejected in relation to two items, the respondent No. 3 was entitled to appropriate the earnest money in respect of the lots in question which was to the extent of Rs. 2500/- in terms of the clause of the Special Terms and Conditions of the Tender. According to the learned counsel, deposit of the earnest money cannot be said to be an essential term of the tender and thus a deviation therefrom does not vitiate the acceptance of the tender itself. Reliance in this connection has been placed in the case of B.D. Yadav and M.R. Meshram Engineers and Contractors Vs. Administrator of the City of Nagpur and Another, in the case of M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, and in the case of Tata Cellular Vs. Union of India,

4. Mr. Talukdar appearing on behalf of respondent No. 4 has drawn my attention to paragraph 10 of the affidavit in opposition, filed by the said respondent and submits that the petitioner having participated in the tender could not have turned around and contend that he had no knowledge of the offer made by the said respondent. It is further submitted that in fact the tender was accepted on 27.12.94 and the respondent No. 3 issued acceptance letter on that date itself. He deposited the necessary amount According to the learned counsel, this writ application having been filed thereafter for the reliefs sought for herein, must be held to be not maintainable. The only clause which requires cansideration in this application is clause 8 of the Special Terms and Conditions. Clause 8 reads thus :

The tender should be accompanied by EMD @ 5% of the total tender value of each lot by way of D.D/P.O. on any scheduled bank in favour of MSTC Ltd., payable of Calcutta. Preferably separate D.D./P.O. should be submitted towards earnest money for separate lots. However, in case any tenderer wishes to submit a single D.D./P.O. for the total earnest money becoming due against all the lots quoted for, he should furnish the break-up earnest money submitted against each lot quoted for in the appropriate space provided for this purpose in the schedule of rates. If the earnest money submitted for any lot is short than the offer for that lot will be rejected. In case the tenderer does not indicate the break-up of the earnest money against a single D.D/P.O. submitted as earnest money, then MSTC reserves the right to appropriate the earnest money in any manner. No interest will be payable on Earnest Money. Earnest "Money is payable only on the material value exclusive of taxes and duties. Earnest Money in any other form shall be liable for rejectional.

5. It is now well known that this court in exercise its jurisdiction under Article 226 of the Constitution of India cannot normally interfere with a matter relating to acceptance of tender and the parameter of the courts jurisdiction is very limited. In Tata Cellular''s case (Supra) the Supreme Court upon taking into consideration various judgments observed:

The duty of the court is to confine itself to the question of legality. Its concern should be :

1. Whether a decision-making authority exceeded its powers?

2. Committed an error of law,

3. Committed a breach of the rules of natural justice.

4. Reached a decision which no reasonable tribunal would have reached or,

5. Abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under :

(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. v. Secretary of State for the Home Department, ex Brind. Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality in all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention". The Supreme Court further held:

The principles deducible from the above are :

(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 expartise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expartise which itself may be fallible.

(4) The terms of the invitation to tender cannot be opening to judicial scrutiny because the invitation to tender is in realm of contract. Normally speaking the decision to accept the tender or award the contract is reached by process negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(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 sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from bitrariness not affected by his or actuated by malafides.

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

6. Keeping in view the aforementioned dictum of the Supreme Court, the question which is to be posed and answered in this writ application is as to whether deposit of earnest money is an essential condition, of the tender. In my opinion, it is not. A basic term of a tender for an eligibility clause which goes to the very root of the matter cannot be deviated from, but a peripenal clause or a clause which does not go to the root of the matter, can be deviated from unless it is held that arbitrariness has been committed by the respondents. In the case of Shree Nathji International v. Bharat Aluminium Co. Ltd. & Ors., reported in 1995(1) Cal LT 286, I have considered various decisions of the Supreme Court of India, including the decisions cited by Mr. Bhattacharya and tool the

7. In M/s. B.D. Yadav & Mr. Meshram case (Supra), a Devision Bench of the Bombay High Court, inter alia, observed that non-compliance of ancillary and subsidiary matters of the tender can be ignored and cannot interfere with consideration of such a tender. Such a tender, Bombay High Court States, can be taken into consideration. It is further well known that the respondents should be given well known that the respondents should be given some play in the joint function. Admittedly the offer of the respondent No. 4 was much higher than the petitioner. The respondent No. 3 being a State within the meaning of Article 12 of the Constitution of India, although in law is not bound to accept the highest tender, its effort should be to make an endeavour to obtain as much high price for the said goods as possible. Clause 8 of the Special Terms and Conditions of

the Tender is in 3 parts. The first part relates to the manner in which earnest money deposit should be made. The second part postulates that in case of composite tender, the break-up of earnest money should be submitted against each lot the third part clearly stipulates that in case the tenderer does not indicate the break-up of the earnest money against a single D.D./P.O. submitted as earnest money, then MSTC reserved their right to appropriate the earnest money in any manner. It is, therefore, futile to argue that the second part of clause 8 is mandatory in nature and non-compliance thereof would vitiate the acceptance of tender. As is well known, a document has to be read as a whole. The intent and purport of the maker of a document must be gathered upon taking into consideration the entire document and not a part thereof. The third part of the aforementioned clause 8 of the trender clearly confers'' a right upon the respondent No. 3 to appropriate the earnest money in any manner. The word ''appropriate'' means to take possession of or to take to one-self. In this view of the matter, the respondent No. 3, in my opinion, was within its right to appropriate a sum of Rs. 2500/- out of Rs, 12,500/- deposited by the respondent No. 4 while accepting the tender of the respondent No. 4 in relation to the aforementioned lot No. 81. This aspect of the matter has been considered by me in grant details in a recent decision in the case of the Indian Hotels Company Ltd. & Anr. v. Calcutta Municipal Corporation & Ors., disposed of on February 27, 1995. However, on the facts of that case this court noticed:

In M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, the Supreme Court has held :

It is true that in submitted its tender accompanied by a cheque of the Union Bank of India and not of the State Bank clause 6 of the tender notice was not obeyed liberally, but the question is as to whether the said non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories - those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the Condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases.

In the case at M/s. G. J. Fernandez Vs. State of Karnataka and others, law is stated in the following terms :

Thirdly, the conditions and stipulations in a tender notice like this have two types of consequences. The first is that the party issuing the tender has the right to puncelliously and rigidly enforce them. Thus if a party does not strictly comply with the requirements of para III, V or VI of the NTT, it is open to the KPC to decline to consider the party for the contract and if a party comes to court saying that the KPC should be stopped from doing so, the Court will decline relief.

The same view has been taken by the Bombay High Court in B.D. Yadav and M.R. Meshram Engineers and Contractors Vs. Administrator of the City of Nagpur and Another, in the following terms :

We think that there is a clear distinction between conditions which are essential to the performance of the work involved and undertaken and those which are ancillary, subordinate and subsidiary to it.

8. I had further noticed that in Electronic Enterprises Vs. Karnataka Power Corporation Ltd, a learned single Judge of Karnataka High Court upon taking into consideration the decisions in Sterling Computers Ltd., M/s. G.J. Fernandez, M/s, Poddar Steel corporation and M/s. B.D. Yadav''s cases (Supra) as also the decision of the Allahabad High Court in M/s. Artee Minerals Faridabad v State of Uttar Pradesh & Ors. (AIR 1983 all. 416) took the same view. The learned Judge observed :

16. Primary approach is to examine the "decision taking" process is awarding the contract. If the procedure basis in nature is not ignored and there was objective consideration of different options available, court cannot act as an appellate authority and substitute its own opinion. Certain basic procedure to make it ''fair play in action and objective consideration of all relevant facts to ensure unarbitrariness are always insisted upon, while tending the process as involved in entering into contracts by the State, to accept one or the other options available, when it is clear that under the particular set of circumstances, reasonably more than one option is available as to course of action to be taken and arrive at a decision. In the background of the entire facts and material on record, if it is shown that deviations from the normal rule and wrong application of new or a few norms did not affect adversely, the public interest, court may decline to interfere with the decision taken. The strictness required in the matter of following the rules and applying the norms may not be insisted upon always by the court if it is a case of permitting a wider competition and the complaint is that, in the decision taking process. State did not prevent a person from competing with the complaint on the ground of alleged ineligibility.

9. In the aforementioned decision, this court had also considered the jurisdiction of this court to interfere in such matter and noticed that Tata Cellular''s case (Supra) has also been followed by the Supreme Court subsequently in 1995(1) SCC 651 and this court further considered latest decision of the Supreme Court of India in U.P. Financial Corporation v. M/s. Nayer Oxygen & Acetelene Gas Ltd., reported in JT 1994 (7) SCC 551 wherein the Apex Court laid down the law in the following terms:

However we cannot lose right of the fact that the corporation is an independent autonomous statutory body having its own constitution and rules to abide by and functions and obligationsto discharge. As such, in the discharge of its functions, it is free to act according to its own light. The views it forms and the decision it takes are on the basis of the information in its possession and advice it receives and according to its own perspective and calculations. Unless its action is mala fide even a wrong decision taken by it is not open to challenge. It is for the Courts or a third party to substitute its decision, however not prudent, commercial or business-like, it may be, for the decision of the corporation., Hence, whatever the wisdom (or the lack of it) of the conduct of the corporation, the same cannot be assailed for making the Corporation liable.

10. In the case of State of Madhya Pradesh and Another Vs. Firm Gobardhan Dass Kailash Nath, there has been a failure on the part of the concerned firm t make initial deposit. Such initial deposit of 25% of the purchase price was held to be an essential condition, and in that context, the supreme Court held that non-deposit of the said amount vitiated the tender. In International Airport Authority''s case (Supra), (1979 SC 1628) the Supreme Court again reiterated the distinction between an essential term and a non-essential term. In that judgment it was held that as in the advertisement it was stated that tenders from Class I contractor would be accepted, the same being an eligible clause, the International Airport Authority of India could not have accepted the contract from a Class I contractor. In Harminder Sigh Arora''s case (Supra), the most suitable offer of a private contractor was rejected in contravention of the terms of the tender. In that case, the tender of the respondent No. 4 before the Supreme Court was accepted for supplying pasteurised milk instead of fresh buffalo or cow milk, as specified in the tender notice. In that situation, it was held that while doing so, the essential conditions of the terms were violated. The aforementioned decisions upon which Mr. Maitra relied upon, have no application to the facts of this case.

11. Moreover, keeping in view the fact that the respondent No. 4 has already been issued the acceptance letter and has deposited the entire amount as far back on 27.12.94. in my opinion, it is not a fit case in which this court should exercise its discretionary jurisdiction furthermore the petitioner has not been able to show that the respondent No. 3 has committed any illegality, irrationality or procedural impropriety in accepting the tender of the respondent No. 4 nor any case has been made out for interference with the acceptance of tender of the respondent No. 4 by the respondent No. 3 in view the decision of the Supreme Court as referred to hereinbefore.

12. For the reasons aforementioned, there is no merit in this application which is accordingly dismissed, but in the facts and circumstances of this case, there will be no order as to costs. Prayer for stay of operation of this order made on behalf of the petitioner is refused.