
(2004) 11 AP CK 0105

In the Andhra Pradesh High Court

Case No : Writ Petition No. 19577 of 2004

MIC Electronics Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 08-11-2004

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2004) 6 ALD 805 : (2005) 2 ALT 382

Hon'ble Judges : A. Gopal Reddy, J

Bench : Single Bench

Advocate : Nuty Ram Mohan Rao, for the Appellant; Arajashekar Reddy (SC for CG) for Respondent No. 1, Sukumar Pant Joshi, for R.S. Murthy, for Respondent Nos. 2 and 3 and Biswajeet Bhattachary, for Chakrapani, for the Respondent

Final Decision : Dismissed

Judgement

A. Gopal Reddy, J.—Bharat Sanchar Nigam Limited (BSNL) invited sealed tenders for supply of (1) WLL CDMA 2000 IX (PACKAGE-I) and (2) WLL CDMA 2000 DC INTEGRATED FWTs (PACKAGE-II) through Notice Inviting Tender No. MM/SW/072004/000277 dated 15-7-2004. The petitioner-company claiming to be a small scale industry manufacturing various electronics and telecommunication network systems registered with the National Small Industries Corporation Limited (NSIC) with a monetary limit of 703 lakhs under Ref. No. NSIC/ HYD/ GP/17(M-78)/2004/9398 dated 12-5-2004 responded to the Notice Inviting Tender (NIT) and submitted its tender claiming benefit of exemption from payment of bid security up to the amount equal to the monetary limit as certified by NSIC as per Clause 12 of Section-II (Instructions to Bidders) of NIT, which reads as under:

"12. BID SECURITY:

12.1(i). Pursuant to Clause 7, the bidder shall furnish, as part of his bid , a bid security for an amount of Rs.2,00,000,00/- (Rupees two crores) only for 10.5

lakh lines WLL CDMA 2000 IX (Package-I) and Rs.2,00,000,00/-(Rupees Two crores) for 10.5 lakh WLL CDMA 2000 IX Integrated FWTs (Package-II). The bidders (small scale units) who are registered with National Small Scale Industries Corporation UNDER SINGLE POINT REGISTRATION SCHEME are exempted from payment of bid security up to the amount equal to their monetary limit. In case, bidders having monetary limit as "No Limit", the exemption will be limited to Rs.50,00,000/- (Rupees fifty lakhs) only as per existing policy of BSNL. A proof reading current registration with NSIC for TENDERED ITEMS will have to be attached along with the bid."

Since the bid submitted by the petitioner-company was not accompanied with bid security as per clause 2.1 of Section IV of NIT, reading as under:

"2 (i). The bank guarantee for bid security and/or NSIC certificate for claiming exemption from submission of bank guarantee against bid security, as prescribed in Clauses 12.1 and 12.3, Section II of the bid document along with acknowledgment. From TEC for offering of the IFWT for type approval/validation (for Package-II) only) as envisaged in Clause 12.3 below shall be submitted along with the bids in a separate cover. The bank guarantee so submitted shall be on prescribed judicial paper with stamps of proper value and should contain full address of the issuing branch of the bank with its Telephone and Fax numbers. This cover should be subscribed as "BID SECURITY FOR TENDER No. MM/SW/ 072004/000277 dated 15-7-2004 and acknowledgement from TEC for offering of the IFWT (applicable for Package-II only) for type approval/validation.

(II) In case where the document of bid security and certificate are not submitted in the manner prescribed under Clause 2 (i) above, cover containing the commercial, technical and financial offers SHALL BE REJECTED AND RETURNED TO THE BIDDER UNOPENED."

On opening of the technical bid on 14.10.2004, bid of the petitioner-company was returned as non-responsive. Questioning the same, the present writ petition has been filed contending that the petitioner-company is not required to furnish separately bid security by way of bank guarantee, which is less than Rs.703 lakhs and petitioner-company can claim exemption of furnishing bid security by way of bank guarantee limited to the extent of monetary limit under Clause 12 referred to above, and proceeding with the rest of the bids for opening of commercial and price bids without supplying minutes of the bids opened, as demanded by the petitioner, is arbitrary and illegal. BSNL being a Government of India enterprise is bound to follow the policy decisions of the first respondent and it is their duty to encourage indigenous small-scale industries by exempting bid security. By its participation, it has got an equal chance to supply the equipment to the BSNL on a price considered as most reasonable by it. The petitioner-company has been successfully prevented from manufacturing and supplying the equipment worth several crores of rupees. If the petitioner's bid is accepted, it would have secured at least an offer to supply three lakhs units to BSNL provided the price offered by the BSNL is acceptable by the petitioner-company. By

rejecting the bid of the petitioner-company at the threshold itself, the very participation is denied which is in violation of fundamental rights guaranteed under Articles 14 and 19 of the Constitution of India. The Committee constituted by BSNL had acted in an arbitrary manner in returning the tender as non-responsive. The reasoning that maximum amount of waiver of bid security is confined to Rs.50 lakhs and BSNL is not required to waive the bid security amount altogether is contrary to Clause 12 and the same is liable to be set-aside, consequently respondents shall be directed to accept the bid of the petitioner-company and to be considered along with the rest of the bidders who are found to be responsive to the NIT.

2. The second respondent-BSNL filed a detailed counter-affidavit raising a preliminary objection with regard to jurisdiction of this Court to entertain the writ petition stating that neither any of the cause of action had arisen within the jurisdiction of this Court nor any of the respondents is located within the jurisdiction of this Court; the NIT was issued at New Delhi; clarifications were issued at New Delhi, demand draft was deposited in favour of AO (cash) BSNL, at New Delhi, the bids were submitted and were opened at New Delhi, the original bid of the petitioner-company was returned to and received by the representative of the petitioner-company at New Delhi. At no point of time, any cause of action arose within the jurisdiction of this Court; therefore, the writ petition is not maintainable. It is further stated that clause on which the petitioner relying has been incorporated since last more than ten years and a plain reading of Clause 12.1 of Section-II of NIT makes it clear that the maximum limit of exemption is Rs.50 lakhs. Even if NSIC certificate provides no limit, the exemption will be restricted to Rs.50 lakhs. Before starting the process at 12 Noon on 14-10-2004, the procedure to be adopted was announced in the presence of the representatives of the participating bidders. The petitioner was aware of the fact that concession in submission of bid security was available to it only up to a maximum of Rs.50 lakhs and in fact the petitioner has participated earlier in similar tenders floated. Although provision exists for seeking clarification on bid documents (clause 5.1 of Section-II of NIT), the petitioner-company did not seek any clarification on applicability of concession to SSI units registered with NSIC. During the bid opening process on 14-10-2004, provisions of the tenders and NSIC clauses in detail were explained. The representative of the petitioner-company who was present accepted the return of bid and in token thereof put his signature on the relevant document. The petitioner-company has not submitted any representation to the BSNL either during the bid opening or at any stage thereafter till date. The purpose behind the filing of the writ petition is only to delay in finalization of procurement of IFWTs. Since telephone connections based on CDMA technology are very much in demand in India and all the private telecom operators have already gone ahead in installing their equipments and are providing their services, BSNL is only PSU telecom operator providing services throughout India (except Delhi and Mumbai which are served by MTNL) has planned to cover the maximum part of India and to provide telephone

services to rural and uncovered areas and floated tenders to procure IFWTs, which are required to be supplied and installed and provide telephone service in the States of -Assam, Bihar, Chattisgarh, Gujarat, Haryana, Himachal Pradesh, Jammu and Kashmir, Jharkhand, Madhya Pradesh, NE-1 and NE-II, Orissa, Punjab, Rajasthan Uttaranchal, Uttar Pradesh (E), Uttar Pradesh (W), West Bengal and Kolkatta. Any delay in finalization of procurement of IFWTs will seriously hamper the targeted development of all the States and will result in serious disadvantage to the ordinary citizens of the country. On return of the petitioner's bid, financial bids of eligible bidders were opened on 14-10-2004 and reached the stage of finality. Since the financial bids are made known to the petitioner, the petitioner's tender cannot be considered at this stage. The sanctity of the tender process will be eroded if the bid of the petitioner is directed to be considered at this stage. The writ petition is not maintainable as successful tenderers have not been impleaded to the writ petition and the same is liable to be dismissed for non-joinder of necessary parties.

3. Telecom Equipment Manufacturers Association of India (TEMA), which is officially recognized by the Government of India as the apex body representing equipment manufacturers both in public and private sector, to which petitioner-company is a member, filed WPMP No. 26466/2004 along with counter-affidavit, to implead itself in the writ petition, which is allowed today. In its counter-affidavit, it is stated that Clause 12 was incorporated as a result of series of consultations and negotiations held by TEMA with the Government of India, Ministry of Communications and IT, BSNL at various levels spread over for a period of about six months, which resulted in releasing Procurement Manual of BSNL in June, 2003. The said clause, as a matter of fact, is in use for the last 10 years. Clause 12 makes it clear that even if the monetary limit is mentioned as "no limit" in the certificate of NSIC, the exemption from payment of bid security is limited to the maximum of Rs.50 lakhs, which was rightly understood by all the manufacturers who are the members of the TEMA. In fact in the present tender process, one of other Small Scale Industry, namely, M/s. KMR Industries Limited participated with NSCI certificate. Even though certificate issued in its favour mentioning the limit as Rs.397 lakhs, bidding company submitted the bank guarantee for Rs.1.50 crores after availing the exemption of Rs.50 lakhs. At no occasion so far any equipment manufacturer or any Small Scale Industry has raised any doubt on the fact that the maximum exemption limit is only Rs.50 lakhs. The petitioner having realized its folly in making a non-conforming bid accepted the return of bid on 14-10-2004 as withdrawn, no cause of action survives in favour of the petitioner-company at all. At no point of time or even till date, the petitioner-company has neither represented to BSNL nor to the Ministry of Communication nor to TEMA either asking for clarifications or confirmation of the interpretation or redressal of any grievance.

4. Sri Nooty Ram Mohan Rao, learned Counsel appearing for the petitioner-company while dealing with the preliminary objection raised by the respondents to entertain the writ petition by this Court submits that NSCI issued certificate

recognizing the petitioner-company as small scale unit with a monetary limit, of Rs.703 lakhs at Hyderabad. As per clause 2 of Section-II of NIT the eligible bidders should offer their WLL terminals to regional Telecom Engineering Center (TEC) for type approval/validation by at least one day before the date of opening of tender and acknowledgment from TEC regarding offer of WLL terminals for type approval/ validation shall form part of bid, which has to be furnished in accordance with Clause 12 as per clause 7(b) of Section II of NIT, clearly show that a part of cause of action had arisen at Hyderabad since test equipment will be undertaken at Hyderabad and test fee of Rs. 1,40,0000/-paid to TEC at Hyderabad on 13-10-2004 for issuing type approval certificate for enabling the petitioner-company to produce the same before the tendering authority on the date of its opening, which form integral part of bidding. Since a part of action had arisen at Hyderabad, this Court will have jurisdiction to entertain the writ petition, and placed reliance on the recent judgment of the Apex Court in Kusum Ingots and Alloys Ltd. Vs. Union of India (UOI) and Another, . He further submits that clause 12 of Section-II of NIT shall be read in dis-conj unction since it contains two parts, one that the bidders who are registered with NSCI under single point registration scheme are exempted from payment of bid security up to the amount equal to the monetary limit and other is bidders having monetary limit as "No limit", the exemption will be limited to Rs.50 lakhs only. As the petitioner's case falls under first category, it is not under an obligation to furnish bid security for over and above Rs.50 lakhs as contended by the respondents.

5. Per contra, Mr. Sukumar Pant Joshi, learned Counsel appearing for R-2 and R-3 would contend that getting a certificate from TEC is not a relevant factor and it is only an eligibility condition for consideration of bids of the bidders. To facilitate the participants, tenderers were called upon to obtain the certificate from the respective TECs, who accepts the terminals and the same will not give rise to cause of action at Hyderabad since NTT was issued at New Delhi, petitioner-company submitted its tender document at New Delhi, demand draft was deposited in favour of AO (Cash) at New Delhi, bid was returned and accepted by the representative of the petitioner-company at New Delhi. Since no part of cause of action had arisen within the jurisdiction of this Court, this Court lacks territorial jurisdiction, therefore, it cannot entertain the writ petition. In support of his submission, he relied upon the decision of the Supreme Court in Oil and Natural Gas Commission Vs. Utpal Kumar Basu and Others, , for the proposition that the jurisdiction to entertain the writ petition shall be decided taking into consideration the cause of action as pleaded in the writ petition, as accepted by the Supreme Court in its recent judgment in the case of Kusum Ingots and Alloys Limited (supra) wherein the Supreme Court upheld the dismissal of the writ petition by the Delhi High Court on the ground that it lacks jurisdiction. It was further contended by him that in the absence of any representation by the petitioner-company to the respondents on return of the tender, no mandamus can be issued as filing of the present writ petition is an attempt to delay the procurement of terminals, which helps the private telecom operators. Clause 12

has to be read in conjunction but not in disjunction and maximum limit of exemption is Rs.50 lakhs subject to monetary limit, whichever is less.

6. Sri Biswajeet Bhattachary representing Sri Chelvapani, learned Counsel appearing for the fourth respondent-TEMA while adopting the arguments advanced by the learned Counsel for the Respondents 2 and 3 contended that the petitioner-company, who is a member of the fourth,respondent knew about the clause, which was in existence since last 10 years and it has to be read in conjunction as both are mutually exclusive. It was further contended that the dispute relating to the terms of offer cannot be agitated under Article 226 of the Constitution of India as held by the Apex Court in National Highway Authority of India Vs. Ganga Enterprises and Another, . He further submitted that the petitioner-company is not entitled to challenge the selection of the rival tenderer unless public interest is adversely affected and mala fides are attributed in rejecting the tender of the petitioner-company as held by the Supreme Court in Rounaq International Limited v. IVR Construction Limited, 1999 (2) Rajasthan 136 (SC). He further contends that Clause 12 has to be read in conjunction only and if the Clause 12 is read in conjunction, the exemption granted will be only Rs.50 lakhs. Since Clause 5 contemplates getting a clarification on the bid document and on such clarification second respondent shall respond in writing to any request for clarification of the bid document, the petitioner without seeking such clarification before submitting the tender cannot take shelter that it don't want to furnish bid security.

7. In the light of the submissions made by the Counsel, two points emerge for consideration:

1. Whether this Court will have territorial jurisdiction to entertain the writ petition?

2. If the first point is answered in affirmative, whether the petitioner-company is entitled to exemption to the extent of monetary limit in furnishing bid security?

8. It is convenient to consider the first submission in the context of two cases i.e., (1) Oil and Natural Gas Commission v. Utpal Kumar Basu and Ors. (supra); and (2) Union of India and Others Vs. Adani Exports Ltd. and Another, , At this stage, I can touch lightly on the facts and decisions in those cases.

9. In the case of Oil and Natural Gas Commission (supra), the facts are that Oil and Natural Gas Commission (ONGC) has a Gas Processing Plant at Hazira in the State of Gujarat. Engineers India Limited (EIL) acting as consultant for ONGC issued an advertisement dated 36-7-1991 {sic 31-7-1991) in the leading newspapers of the country including those in circulation in West Bengal calling for tenders for setting up of a Kerosene Recovery Processing Unit at Hazira complex in Gujarath. As per the said advertisement, tenders containing offers were to be communicated to EIL at New Delhi. NICCO, having its registered office in Calcutta, read and became aware of the tender notice printed in the Times of India circulated within the jurisdiction of Calcutta High Court, submitted

their offer or bid in response to the tender notice, which were to be scrutinized by the Tender Committee and final decision was to be taken by a Steering Committee at New Delhi presided over by the Chairman of ONGC. The tenders were scrutinized by EIL at New Delhi. EIL rejected the NICCO's bid on the ground that it did not fulfil the requisite experience criteria stipulated in the tender. After considering the recommendations made by EIL, Tender Committee expressed the view that NICCO satisfied the experience criteria and they too should be called for the clariflcatory meeting proposed to be held by EIL at New Delhi. Consequently, the said meeting was held by EIL with various bidders including NICCO and after such meeting, EIL once again reiterated that NICCO lacked experience criteria. The Tender Committee after examining the view of EIL agreed with the same and accordingly NICCO was not recommended for shortlisting by the Tender Committee. After deliberations, final decision was taken by the Steering Committee at New Delhi to award the contract to M/s. CIMMCO Ltd. Thereupon, NICCO filed writ petition before the High Court of Calcutta, which was disposed of by the High Court directing the respondents to consider the offer of the NICCO along with the others and in the event NICCO's offer is otherwise found to be valid and lowest and in the event NICCO otherwise complies with the formalities, it should be accepted by the respondent authorities. Against the said order, ONGC filed an appeal before the Supreme Court raising several contentions including that Calcutta High Court lacks territorial jurisdiction to entertain the writ petition. The Supreme Court while considering the jurisdiction of the Calcutta High Court in the light of clause 2 of Article 226 of the Constitution of India, where High Court can exercise the power to issue direction, if the cause of action, wholly or in part, had arisen within the territories in relation to which it exercises jurisdiction, held that the cause of action means bundle of facts which the petitioner must prove, if traversed to entitle him to a judgment in his favour by the Court. In determining the cause of action, what all the facts to be taken into consideration, has been stated by the Supreme Court in its judgment at Para 6 as under:

"Therefore, in determining the objection of lack of territorial jurisdiction the Court must take all the facts pleaded in support of the cause of action into consideration albeit without embarking upon an enquiry as to the correctness or otherwise of the said facts. In other words the question whether a High Court has territorial jurisdiction to entertain a writ petition must be answered on the basis of the averments made in the petition, the truth or otherwise whereof being immaterial. To put it differently, the question of territorial jurisdiction must be decided on the facts pleaded in the petition. Therefore, the question whether in the instant case the Calcutta High Court had jurisdiction to entertain an decide the writ petition in question even on the facts alleged must depend upon whether the averments made in Paragraphs 5, 7, 18, 22, 26 and 43 are sufficient in law to establish that a part of the cause of action had arisen within the jurisdiction of the Calcutta High Court.."

The Supreme Court after extracting the facts pleaded and arguments advanced

on such facts, held at Para 8 as under:

"From the facts pleaded in the writ petition, it is clear that NICCO invoked the jurisdiction of the Calcutta High Court on the plea that a part of the cause of action had arisen within its territorial jurisdiction. According to NICCO, it became aware of the contract proposed to be given by ONGC on reading the advertisement, which appeared in the Times of India at Calcutta. In response thereto, it submitted its bid or tender from its Calcutta office and revised the rates subsequently. When it learnt that it was considered ineligible it sent representations, including fax messages, to EIL, ONGC, etc., at New Delhi, demanding justice. As stated earlier, the Steering Committee finally rejected the offer of NICCO and awarded the contract to CIMMCO at New Delhi on 27-1-1993. Therefore, broadly speaking, NICCO claims that a part of the cause of action arose within the jurisdiction of the Calcutta High Court because it became aware of the advertisement in Calcutta, it submitted its bid or tender from Calcutta and made representations demanding justice from Calcutta on learning about the rejection of its offer. The advertisement itself mentioned that the tenders should be submitted to EIL at New Delhi; that those would be scrutinized at New Delhi and that a final decision whether or not to award the contract to the tenderer would be taken at New Delhi. Of course, the execution of the contract work was to be carried out at Hazira in Gujarat. Therefore, merely because it read the advertisement at Calcutta and submitted the offer from Calcutta and made representations from Calcutta would not, in our opinion, constitute facts forming an integral part of the cause of action. So also the mere fact that it sent fax messages from Calcutta and received a reply thereto at Calcutta would not constitute an integral part of the cause of action. Besides the fax message of 15-1-1993, cannot be construed as conveying rejection of the offer as that fact occurred on 27-1-1993. We are, therefore, of the opinion that even if the averments in the writ petition are taken as true, it cannot be said that a part of the cause of action arose within the jurisdiction of the Calcutta High Court.

10. In Adani Exports Limited (supra) case, the facts are that Adani Exports filed Special Civil Application before Gujarat High Court claiming the benefit of Passbook Scheme found in Para 54 of the Import Export Policy introduced in relation to certain credits to be given on export of shrimps. The designated authority who is competent person in respect of the matter concerning to passbooks under the Scheme stationed at Chennai. On non-granting and denial of utilization of the credit in the passbook as per the Import Export Policy would affect the respondent's business carried at Ahmedabad, Adani Exports Limited filed writ petition which was allowed by the High Court of Gujarat. On appeal being filed by the Union of India, the Supreme Court after considering the observations of the Supreme Court made in the case of Oil and Natural Gas Company (supra) and pleadings set apart in Para 16 of the Special Leave Application, which are found in favour with the High Court of Gujarat for issuing writ, held at Para 17 as under:

"It is seen from the above that in order to confer jurisdiction on a High Court to entertain a writ petition or a special civil application as in this case, the High Court must be satisfied from the entire facts pleaded in support of the cause of action that those facts do constitute a cause so as to empower the Court to decide a dispute which has, at least in-part, arisen within its jurisdiction. It is clear from the above judgment that each and every fact pleaded by the respondents in their application does not ipso facto lead to the conclusion that those facts give rise to a cause of action within the Court's territorial jurisdiction unless those facts pleaded are such which have a nexus or relevance with the issue that is involved in the case. Facts which have no bearing with the issue or the dispute involved in the case, do not give rise to a cause of action so as to confer territorial jurisdiction on the Court concerned. If we apply this principle then we see that none of the facts pleaded in Paragraph 16 of the petition, in our opinion, fall into the category of bundle of facts which would constitute a cause of action giving rise to a dispute which could confer territorial jurisdiction on the Courts at Ahmedabad."

11. The Supreme Court in its recent judgment in *Kusum Ingots and Alloys Limited (supra)*, on which both Counsel laid much reliance, after considering the principles of law laid down by the Supreme Court in the above two decisions, namely (1) *Oil and Natural Gas Commission v. Utpal Kumar Basu and others (supra)*; and (2) *Union of India v. Adani Exports Limited (supra)* upheld the dismissal of writ petition by the Delhi High Court holding that it had no jurisdiction. In Para 18 of its judgment, the Supreme Court held as under:

"The facts pleaded in the writ petition must have a nexus on the basis whereof a prayer can be granted. Those facts which have nothing to do with the prayer made therein cannot be said to give rise to a cause of action which would confer jurisdiction on the Court."

12. In the light of the law declared above, in the entire pleadings, it is nowhere pleaded that cause of action has arisen within the territorial jurisdiction of this Court, except stating that petitioner-company was registered with NSCI under single point registration scheme. It was contended by the learned Counsel for the petitioner-company that issuance of certificate by NSIC recognizing the petitioner-company as small scale unit entitles the petitioner-company to claim benefit of exemption up to monetary limit in furnishing the bid security and bidders should also offer their WLL terminals to regional TEC for type approval/validation by at least one day before the date of opening of tender and acknowledgment from TEC will constitute integral part of bidding. It is not in dispute the tender is floated from second respondent's office, which is located at New Delhi, clarifications were issued at New Delhi, petitioner-company submitted its tender at New Delhi and tenders were opened at New Delhi and tenders of the petitioner-company was returned at New Delhi and accepted by the representative of the petitioner-company at New Delhi. None of the facts would constitute a cause of action giving rise to a dispute which could confer territorial

jurisdiction on this Court. Registering with NSCI will entitle the petitioner to claim benefit of exemption from payment of bid security and eligible bidders should offer their WLL terminals to regional TEC for type approval/validation is only a condition, which makes eligible for consideration of the bid of the petitioner. Admittedly, the tender was not returned for non issuing the certificate by TEC or not enclosing the registration certificate issued by NSCI for claiming benefit of exemption from payment of bid security and the said facts have no nexus on the basis whereof a prayer can be granted in favour of the petitioner. The said facts which have nothing to do with the rejection of the tender or for granting relief claimed by the petitioner cannot be said to give rise to a cause of action which would confer jurisdiction on this Court as interpreted by the Apex Court in *Kusum Ingots and Alloys Limited (supra)*. Point No. 1 is answered affirmatively.

13. Since the writ petition is liable to be dismissed on the ground that this Court lacks territorial jurisdiction to entertain the writ petition, it is unnecessary to answer the 2nd point.

14. The writ petition is accordingly dismissed. No costs.