(2022) 12 GAU CK 0032

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 5189, 5193, 5905 Of 2021

M/S Bn Infraprojects Llp And 3 Ors. APPELLANT

Vs

Union Of India And 3 Ors RESPONDENT

Date of Decision : 22-12-2022

Acts Referred:

Citation : (2022) 12 GAU CK 0032

Hon'ble Judges : Sanjay Kumar Medhi, J

Bench : Single Bench

Advocate : M.K. Choudhury, M. Biswas, B. Sharma, G. Goswami

Final Decision : Allowed

Judgement

1. Imposition of conditions in a Notice Inviting Tender or the interpretation thereof are subject matters exclusively within the domain of the owner. Unless the aforesaid conditions are wholly opposed to public policy or are accentuated by malice so as to favour a vested interested party to the exclusion of other bidders, such conditions are not to be interfered with. That is the general interpretation of the law holding the field as held by the Hon’ble Supreme Court in a catena of decisions starting from Tata Cellular Vs. Union of India reported in (1994) 6 SCC 651 and reiterated in the latest cases of Michigan Rubber (India) Ltd. vs. State of Karnataka reported in (2012) 8 SCC 216, Central Coal Fields Limited vs. SLL-SML (Joint Venture Consortium & Ors.) reported in (2016) 8 SCC 622, Caretel Infotech Limited vs. Hindustan Petroleum Corporation Limited & Ors. reported in 2019 (6) SCALE 70 and Silppi Constructions Contractors vs. Union of India and Anr. reported in (2019) SCC Online 1133.

2. With that backdrop, the present issue is required to be examined. In fact a common issue has arisen in these three writ petitions which were taken up for an analogous hearing and being disposed of by this common judgment and order.

3. Before going to the issue involved which has called for adjudication, the brief facts of the cases may be noted in the following manner. The petitioners in all the

three cases are the same. While the petitioner no. 1 is a limited liability partnership firm, the other petitioners are the partners of the same. The petitioner no. 1 had submitted its bid in response to certain NIT's floated by the Railways involving three different works. However, the bid was rejected on the technical ground itself of not meeting the eligibility criteria. The petitioners contend that the rejection has been done by misinterpreting the tender conditions by holding the petitioner no. 1 to be ineligible for such bidding. The further case of the petitioners is that the price quoted by the petitioners is less than the price of the private respondent who was purported to be selected and therefore, the element of public interest also comes in.

4. As regards, the respondent no. 4 (private respondent), the Lawazima Court vide order dated 07.06.2022 has held that service is complete in spite of which the said respondent has chosen not to appear and contest the writ petition.

5. According to the petitioners, certain more facts would be necessary to bring home the case projected. The petitioner was earlier a sole proprietorship firm namely M/s Babul Nath and had carried out various construction works under the Railways for a long period of time. On 03.04.2017, an LLP agreement was executed between the petitioner no. 2 and the petitioner no. 3 and the same was incorporated on 09.04.2017. On 13.02.2020, the LLP was recognized by the Railways.

6. The issue on which the petitioner no. 1 has been held to be ineligible is mainly with regard to the past experience.

7. In these three writ petitions, three works are connected, the details of which are given below:

"(i) Earthwork in filling to form embankment including blanketing, construction of minor bridges (8 Nos.), RUB (11 Nos.), trolley refuges, drains, protection work, approach road, diversion road, toe wall and other ancillary works from field Ch. 50.60 Km to Ch. 58.50 Km between Kaliaganj and Bibiganj excluding Ch. 55.30 Km to 56.10 Km (Teragachh Halt) and approaches of major bridges (50m both sides) in connection with construction of new BG line from Arariya to Galgalia to N.F. Railway (Construction).

Tender value: Rs.61089963.60/-

Completion period: 15(Fifteen) months

(ii) Earthwork in filling to form embankment including blanketing, construction of minor bridges (10 Nos.), RUB (14 Nos.), trolley refuges, drain, protection work, approach road, diversion road, toe wall and other ancillary works from Ch. 39.10 Km to Ch. 49.60 Km between Bardha Halt and Kaliaganj Station excluding approaches of major bridges (50m both side) in connection with construction of new BG line from Arariya to Galgalia to N.F. Railway (Construction).

Tender value: Rs.693160701.75/-

Completion period: 12(Twelve) months

(iii) Earthwork in formation for making Railway embankment, construction of minor bridge, blanketing work as per RDSO's specification and construction of substructure and superstructure of Major bridges on pile foundation: Bride No. 513 (6x12.2m PSC slab), 516 (5x12.2m PSC slab), 517 (2x9.15+3x6.1m PSC slab), 518 (2x12.2m PSC slab), 519 (2x12.2m PSC slab), 520 (3x6.10m PSC slab),521 (4x30.5m OWT+ 2x6.1m PSC slab), 523 (2x9.15m PSC slab), 524 (1x12.2m PSC slab), 525 (9.15m+12.2m+9.15m PSC slab), 527 (3x12.2m PSC slab), 531 (3x12.2m PSC slab) and 532 (2x12.2m PSC slab) including steel girder launching of Bridge No. 521 (4x30.5m OWT) and all ancillary works in between station Rangiya to Agthori Km 362/0 to Km 395/0 in connection with double line work of New Bongaigaon –Agthori project.

Tender value: Rs.1682769366.67/-

Completion period: 18(Eighteen) months"

8. The eligibility criteria were to be under Technical Criteria, Financial Criteria and Bid Capacity. It is only after being technically qualified, the Financial Bid of the tenderer would be open.

9. The present dispute is with regard to the Eligibility Criteria concerning the Bid Capacity. The relevant parts of tender document are extracted herein below for proper appreciation of the issue involved.

"(C) Bid Capacity:

(i) The tender / technical bid will be evaluated based on bid capacity formula detailed as Annexure VI and proforma-II failing which offer shall be considered as incomplete and will be rejected summarily. (Applicable for works consting more than Rs. 20.00 crore).

3. In case of newly formed partnership firm, the credentials of individual partners from previous propriety firm(s) or dissolved previous partnership firm(s) or split previous partnership firm(s), shall be considered only to the extent of their share in previous entity on the date of dissolution / split and their share in newly formed partnership firm. For example, a partner A had 30% share in previous entity and his share in present partnership firm is 20%. In the present tender under consideration, the credentials of partner A will be considered to the extent of 0.3*0.2* value of the work done in the previous entity. For this purpose, the tenderer shall submit along with his bid all the relevant documents which include copy of previous partnership deed(s), dissolution deed(s) and proof of surrender of PAN No.(s) in case of dissolution of partnership firm(s) etc.

9. In a partnership firm "AB" and A&B partners, in case A also works as propriety firm "P" or partner in some other partnership firm "AX", credentials of A in propriety firm "P" or in other partnership firm "AX" earned after the date of becoming a partner of the firm AB shall not be added in partnership firm AB.

10. In case a tenderer is LLP, the credentials of tenderer shall be worked out on above lines similar to a partnership firm.”

10. The mode of calculation was as per Annexure-6 and proforma-II. As per Clause 2 (c) such capacity was to be evaluated. In Clause 3, it has been explained that for newly formed partnership firm, the credentials of the individual partners from previous proprietory firms or dissolved previous partnership firm etc shall be considered only to the extent of their share in previous entity on the date of dissolution / split and their share in the newly formed partnership, an example has also been cited in the said Clause. In Clause 9, a further illustration has been given in case of a partnership firm and Clause 10 clarifies that the same criteria would also be applicable for a tenderer which is a LLP.

11. As stated above, while evaluating the Bid Capacity, according to the petitioners, the evaluation has not been done in a proper manner as a result of which, the bid of the petitioner no. 1 has been found to be ineligible. It is this decision which is the subject matter of challenge in these writ petitions.

12. I have heard Shri M.K. Choudhury, learned Senior Counsel for the petitioners assisted by Shri M. Biswas and Ms. M. Das, the learned counsel. I have also heard Shri B. Sharma, learned Standing Counsel, Railways who appears for the contesting respondents in WP(C)/5189/2021 and 5193/2021 whereas in WP(C)/5905/2021, the Railways are represented by Shri G. Goswami. In WP(C)/5189/2021 and WP(C)/5193/2021, the Railways have also filed IAs for vacating the interim order directing maintenance of status quo.

13. Shri M.K. Choudhury, learned Senior Counsel for the petitioners has submitted that though it was the prerogative of the employer to interpret the various clauses of the Notice Inviting Tender, such interpretation has to be reasonable and with proper application of mind. The learned Senior Counsel submits that the Clauses of the tender document which have been laid down for evaluation has to be done so as to achieve the objective and not to defeat the same. In the instant case, the issue centers around the evaluation of Bid Capacity. According to the petitioners, there are two glaring errors committed by the Railways in evaluation of the bids of the petitioner no. 1. Firstly, while applying Clause 3 to evaluate the Bid Capacity, the Railways lost sight of the fact that the petitioner no. 1 which is a LLP was earlier a sole proprietorship firm known as M/s Babul Nath of which Shri Babul Nath (the petitioner no. 2) was the sole proprietor. The aforesaid proprietorship firm has now constituted a LLP with the petitioner nos. 2, 3 & 4. In the example cited is that of a partner “A” who had 30% share in the previous entity and 20% share in the present partnership firm. The credentials of partner-A will be considered to the extent 0. 3*0.2*. According to the learned Senior Counsel, the evaluation in this regard has been wrongly done.

14. Secondly, the date of taking the credentials is also wrongly done by which prejudice has been caused to the petitioner no. 1. It is contended on behalf of

the petitioners that though there is no dispute that the date of incorporation of the LLP is 09.04.2017, the recognition of the LLP by the Railways is on 13.02.2020, the learned Senior counsel accordingly submits that while interpreting Clause 9, instead of treating 13.02.2020 as the effective date, the date of incorporation of 09.04.2017 has been taken and in the meantime from 09.04.2017 and 13.02.2020, M/s Babul Nath, the sole proprietorship firm had executed a number of other works with the Railways which are necessarily required to be taken into consideration for evaluating the Bid Capacity. That apart, the learned Senior Counsel submits that so far as another work is concerned namely the work pertaining to Nalbari, Kaithalkuchi, Tihu and Nizsariha, with the same credentials, the petitioner no. 1 was granted Letter of Acceptance on 31.03.2021 and therefore, the impugned decision is wholly inconsistent and requires intervention.

15. In support of the submissions, the petitioner had relied upon the following case laws:-

1. Satya Jain vs Anis Ahmed Rushdie & Ors. [(2013) 8 SCC 131)]

2. Central Inland water transport Ltd vs. Brojo Nath Ganguly [(1986) 3 SCC 156]

3. Mahavir Auto Stores & Ors. vs. Indian Oil Corporation & Ors. [(1990) 3 SCC 752]

4. LIC of India & Anr vs. Consumer Education & Research Centre [(1995) 5 SCC 482]

5. Balmer Lawrie & Company Ltd & Ors. vs. Partha Sarathi Sen Roy & Ors. [(2013) 8 SCC 345]

6. Ashok Transport Agency vs. Awadhesh Kumar [(1998) 5 SCC 567]

7. Jai Bholenath Construction vs. The Chief Executive Officer Zilla Parishad, nanded & Ors.

16. The case of Satya Jain (supra) has been cited to bring in the theory of business efficacy in interpreting clauses of contract.

17. The cases of Brojo Nath Ganguly (supra), Mahavir Auto Stores (supra), LIC of India (supra) and Balmer Lawrie (supra) have been cited to highlight the situation of unconscionable / unfair / unreasonable clauses in a contract where there is unequal bargaining power.

18. The case of Ashok Transport (supra) has been cited to explain that a proprietory concern and proprietor are not separate entity.

19. In Jai Bholenath Construction, the Hon’ble Supreme Court has itself carved out an exception to the case of M/s N.G. Projects Ltd. vs. M/s Vinod Kumar Jain reported in 2022 (5) SCALE 105.

20. Per contra, both Shri B. Sharma and Shri G. Goswami, learned Standing

Counsel, Railways have strenuously opposed the writ petitions. From the side of the Railways, it is submitted that the petitioners participated in the process by submitting the bid knowing fully well the terms and conditions. Having submitted the bid, it is not available for the petitioner to challenge any condition on the allegation that the same has caused prejudice to them.

21. It is further submitted that the interpretation sought to be given on clause - C regarding evaluation of Bid Capacity by the petitioners is not correct as such interpretation has to be left to the Railways as they are the owner of the document. As regards, the date regarding taking into account the earlier credentials, both the Counsel for the Railways submits that it is the date of incorporation of the LLP which is crucial and not the date of recognition by the Railways. It is clarified that the LLP agreement was signed on 03.04.2017 and the LLP was incorporated on 09.04.2017 which should be the crucial date.

Therefore, according to the Railways, any works done after 09.04.2017 by the proprietorship firm of M/s Babul Nath will not be taken into account while evaluating the credentials of the LLP. It is further submitted that on 13.02.2020, only the change of name of the petitioner no. 1 was recognized. It is further submitted that though orders of status quo have been passed in WP(C)/5189/2021 and WP(C)/5193/2021, in the meantime, the work was already handed over to the private respondents who is continuing and is rather pressing for urgent release of the bills for the works done.

22. Shri G. Goswami, learned Counsel for the Railways however submits that in so far as WP(C)/5905/2021 is concerned pertaining to the Rangia Sector, there is no kind of any interim order operating and the work is proceeding through a third party.

23. Both the learned counsel for the Railways submit that the works in question are of immense public importance and therefore, the same be permitted to be done by dismissing the writ petitions. It is further submitted that in absence of allegation of any mala fide action in treating the bid of the petitioner no. 1, the scope for interference would be absolutely limited.

24. In support of their submission, the Railways have placed reliance upon the following case laws:

1. The Silppi Constructions Contractors vs. Union of India and Anr. reported in(2019) SCC Online 1133.

2. National High Speed Rail Corporation Limited vs Montecarlo Limited & Anr. reported in 2022 0 SC 76.

3. The Bharat Coking Coal Ltd. & Ors. vs. AMR Dev Prabha & Ors. reported in (2020) 16 SCC 759.

25. The case of Silppi Constructions (supra) has been cited to bring home the argument that in contracts involving technical issues, the Court should be more

reluctant as it involves necessary expertise which is beyond the scope of judicial review. The Hon'ble Supreme Court had also reiterated that the authority which floats the contract or tender and has authored the tender documents is the best judge as to how the same should be interpreted.

26. In the case of Montecarlo Limited (supra), the Hon'ble Supreme Court has given an embargo of passing interim orders in matters of public importance. It has been reiterated that there should be judicial restraint as a Court does not sit as a Court of appeal and merely reviews the matter regarding the decision making process.

27. In the case of Bharat Coking Coal interfering with contractual matters have (supra) the restraint to be followed in been reiterated. It has been stated that conscious restrain is also necessary because judicial intervention by itself has effects of time and money which if unchecked, would have problematic ramifications on the administrative system.

28. The rival contentions advanced on behalf of the contesting parties have been duly considered and the materials placed before this Court have been carefully examined. The parameters laid down by various judicial pronouncements in entering into a contractual dispute have already been observed above. Under those restricted parameters of scrutinizing the decision making process in contractual matters, the present dispute is required to be adjudicated and the issues arising are required to be answered.

29. The dispute, as have been elaborated above hinges upon the evaluation of Bid Capacity by interpretation of Clause 2 (C) (i), 3, 9 & 10. The formula which has been adopted for making the said evaluation is not under challenge and perhaps cannot be a matter of challenge also as it is within the exclusive domain of the owner. However, the application of the facts and circumstances on the said formula can be looked into as it forms a part of the decision making process and more so, when in the instant case the specific allegation is of an incorrect application. For the same, the veil will have to be lifted. Clause 3 makes it clear that in case of a newly formed entity, the credentials of one of the constituents in an earlier entity would be to the extent of his share on the date of dissolution and his share in the newly formed entity. In the instant case, however the earlier entity was M/s Babul Nath which was a proprietorship firm and there is no manner of dispute that the sole proprietor is one Shri Babul Nath. It is the said individual who had later formed the LLP which is the petitioner no. 1 - bidder in the instant cases is an LLP of which M/s Babul Nath, the proprietorship firm is one of the constituents. In that view of the matter, so far as the credentials of M/s Babul Nath is concerned, there being only one proprietor, the entire credentials till forming of the LLP has to be taken into consideration along with its share in the newly formed LLP.

30. The second dispute is with regard to the date of taking the credentials while interpreting Clauses 9 & 10. As per the said clauses, credentials of the earlier

entity attained after formation of the new entity which is the bidder shall not be taken into consideration. To resolve the dispute, certain dates are crucial namely the date of signing of the LLP which is 03.04.2017, incorporation of the LLP which is 09.04.2017 and recognition of the LLP by the Railways which is 13.02.2020. Though the learned counsel for the Railways may be right in contending that the crucial date is the date of incorporation i.e. 09.04.2017, what is of relevance is the date when the LLP was recognized by the Railways and there is no manner of doubt that it is only by the communication dated 13.02.2020 that the LLP was recognized and the change in the name and style was sanctioned. It is absolutely clear that prior to such sanction, the LLP as an entity could not have bided for any tender floated by the Railways.

31. The question which arises is as to whether the credentials achieved by M/s Babul Nath as a proprietorship firm prior to 13.02.2020 has to be taken into consideration or prior to 09.04.2017, i.e. the date of incorporation of the LLP. Though the LLP became a legal entity on the date of incorporation i.e. 09.04.2017, unless the sanction was granted on 13.02.2020, the LLP could not have submitted its bid in the Railways. Therefore, if the credentials achieved in the interregnum between 09.04.2017 till 13.02.2020 is ignored / over looked, immense prejudice would be caused to the party and there would be no justification for the same. Therefore, interest of justice would demand that the credentials of the proprietorship firm has to be taken into consideration till 13.02.2020 when the LLP was recognized by sanction of its name by the Railways. Further, a bare perusal of the communication dated 13.02.2020 would show that copies were marked to all the relevant sections connected with the work contracts to be floated by the Railways including the petitioner no. 1.

32. The contention of the petitioners is that the rejection of the petitioners in the technical evaluation is only because in the bid evaluation, incorrect parameters of the earlier entity have been taken to make the assessment. The petitioners have also submitted that the prices offered by the petitioners are much less than the prices which have been offered by the private respondents. Further, holding the petitioner no. 1 eligible in another similar work in which LOA dated 31.03.2021 was granted in favour of the petitioner no. 1 is also a relevant fact.

33. In view of the aforesaid facts and circumstances and also taking into account the public interest involved, the instant writ petitions are allowed by directing the respondent - Railways to redo the exercise of evaluation of the bid capacity of the petitioner no. 1 in the manner indicated above and by taking the antecedents of the proprietorship firm properly and till 13.02.2020. Since it is contended by the petitioners that in such a case, the petitioner no. 1 would meet the Bid Capacity, if the aforesaid contention turns out to be correct, the work /remaining part of the same be handed over to the petitioner No. 1 in accordance with law, if the price quoted by the petitioner no. 1 is found to be lesser.

34. It is made clear that since the cases are pending coupled with the fact that the private respondents have chosen not to contest the same, the question of

affording further opportunity before formally offloading the work from the private respondents would not arise.

35. No order as to cost.

