(2009) 04 CAL CK 0023

In the Calcutta High Court

Case No : Writ Petition No. 5819 (W) of 2009

M/s. M.H. Trading Company APPELLANT

Vs

State of West Bengal and Others RESPONDENT

Date of Decision : 24-04-2009

Acts Referred:

Citation : (2010) 2 CALLT 63

Hon'ble Judges : Sanjib Banerjee, J

Bench : Single Bench

Advocate : Joy Saha, Avishek Sikdar and Rinku Pachhal, for the Appellant; Arindam Sinha, Sutapa Sanyal and Sumana Sinha for the Respondent No. 7, Dr. Sambuddha Chakraborti and Shampa Sarkar for the State, for the Respondent

Final Decision : Dismissed

Judgement

Sanjib Banerjee, J.—The petitioner firm complains of arbitrary conduct on the part of the State in arresting the writ petitioner''s due progress to the commercial leg of the bid following a notice inviting tender. The petitioner says that the petitioner was eminently eligible to enter the commercial stage as the petitioner met both the working capital and the bid capacity requirements that the tender documents called for.

2. It is the admitted position that the relevant forms that had been submitted by the petitioner were left blank in respect of the working capital and bid capacity figures. The petitioner, however, appended documents in support of its working capital credentials without specifying the extent of its working capital. The petitioner had also relied on bank documents in support of the bid and certificates issued by other organisations that had earlier availed of the petitioner''s services, to demonstrate that the petitioner had the requisite capacity to take up the work of such magnitude.

3. Upon receipt of the petitioner''s bid, the respondent authorities referred the petitioner''s papers to a chartered accountant and the chartered accountant was

of the opinion that the petitioner did not meet the eligibility criteria that had been specified in the tender documents. It is the opinion of the chartered accountant disclosed in the State''s affidavit that has been sought to be assailed.

4. On March 27, 2009 an interim order was passed restraining the respondents from issuing any work order. The order records that the material brought to Court gave an impression that the petitioner probably met the eligibility criteria. The pencil noting in the Court papers gives a little more insight into the basis for such prima facie view, but that is irrelevant. Though the interim order expired on April 21, 2009 and was not renewed since no prayer in such regard was made before it expired, it does not appear that the work order has been issued as yet.

5. The petitioner relies on Clause 5 of the tender terms and suggests that the two grounds on which the petitioner was found to be ineligible had, in fact, been met by the petitioner but the chartered accountant''s opinion was clearly flawed.

6. Sub-clauses (iv) and (v) of clause 5 of the tender terms provide as follows:-

"iv) The working capital shall not be less than 15(fifteen) percent of the amount put to tender out of which millenium 10% shall be of applicants'' own resource. (For Sl. No.1 to 6 & 8 to 11) only.

v) The available Bid Capacity (to be calculated on the basis of prescribed format) of the prospective applicant shall not be less than the amount put to tender. (For Sl. No 1 to 6 & 8 to 11) only."

The prescribed format for arriving at the bid capacity benchmark is a formula that is set out and explained at page 46 of the State''s affidavit:

"8.4 Bid Capacity:

[A.N.2 -B)

A = Maximum value of work done in a single year during last three years

B = Value at current price level of existing commitments and ongoing works to be completed in the next N years.

C = Time of completion of the work in years for which tender has been invited N.B. The Audited Balance Sheet and Profit & Loss Account with all the schedules and annexure forming part of the Balance Sheet and Profit & Loss Account for the last five years should be given. All these financial statements should be signed by a competent authority for the last five years."

7. It is the undisputed position that a person would have been eligible to make an offer and progress to the commercial stage if such person could demonstrate access to working capital to the extent of Rs. 40 lakh. It is also not in dispute that the threshold figure relevant for the purpose of bid capacity was Rs. 2,72,27,513/-.

8. Bid capacity was to be determined on the basis of the convoluted formula. The

bid capacity clause required the tenderer to demonstrate that the tenderer had completed work of value in excess of the estimated value of the proposed contract during any of the previous three financial years preceding the relevant year. The petitioner relied on a certificate issued by the "Haldia Development Authority" to the effect that petitioner had successfully completed a work of estimated cost of Rs. 2,71,34,109/-. The petitioner says that this is the figure that has to be reckoned to assess the petitioner''s bid capacity.

9. Though the initial value of the said tender was about As. 2.74 crores, it appears from a document appearing at page 58 of the State''s affidavit that the estimated cost was lowered to Rs. 2,72,37,513/-. The petitioner says that the chartered accountant was of the view that for a tenderer to be eligible such tenderer had to demonstrate a bid capacity in excess of Rs. 1.36 crore and it will be evident from the document appearing at page 58 of the State''s affidavit that the petitioner''s bid capacity was assessed at Rs. 138 lakh which was in excess of the floor limit of Rs. 1.36 crore.

10. It is, however, on another account that the matter has attained some significance. The petitioner had not specified in the papers that it tendered the extent of the working capital available with the petitioner. When final arguments in the matter opened yesterday, the petitioner referred to the certificate issued by the chartered accountant to the effect that the petitioner had available working capital of Rs. 10.41 lakh. Counsel representing the petitioner sought to rely on a bank statement of the petitioner that was included as part of the papers in support of its bid, appearing at pages 174-173 (the pages have been stitched in reverse order), to suggest that since the closing balance in the account would show that a sum of Rs. 29,12,694.36 was available, such sum should be added to the figure of Rs. 10.41 lakh that the chartered accountant found was available, thus taking the figure to Rs. 40 lakh or as close to Rs. 40 lakh that would make the petitioner eligible to participate in the commercial bid.

11. The accounts at pages 174-173 begin with an opening balance of Rs. 16,12,720.36. Divers debit entries are indicated thereafter and despite there being more debit entries than credit entries reflected in the statement (both in number and in value); the final closing balance appears to be in excess of the opening balance. It occurred that the balance that Counsel representing the petitioner sought to rely on as a credit balance which ought to be added to the petitioner''s available working capital assessed by the chartered accountant engaged by the respondent authorities may, indeed, be a debit balance. The matter was adjourned yesterday at the petitioner''s request upon a query in such regard being posed by Court for Counsel to take instructions.

12. It is submitted in Court today that the bank statement appearing at pages 174-173 of the petition is in respect of an account in which the petitioner is permitted to overdraw to the extent of Rs. 25 lakh and 1he balance of Rs. 29,12,634.36 is a debit balance that is reflected in the statement. Counsel has apologised for giving the Court an erroneous impression and falls back on the

bank''s certificate at the preceding page as testimony to the working capital potential of the petitioner.

13. A subjective assessment by a bank official of the working capital available to a constituent is hardly the material that the tender terms required a prospective bidder to furnish in support of its credentials. Even ignoring that no firm figure as to the available working capital was specified in the certificate which suggested that the petitioner had enough accessible funds to execute a contract more than double the value of the present, such certificates come with a disclaimer even if unwritten. And, such testimonials in this country have to be taken more with a ladleful of salt than a pinch. If the bank statement that the petitioner had hitherto before proudly brandished is no longer available to it, the bank certificate cannot be used as the pole to vault over the working capital threshold.

14. Irrespective of whether the petitioner had the requisite qualification to meet the eligibility criterion relating to bidding capacity, since on the petitioner''s showing that the petitioner does not meet the working capital figure required under the tender terms, it should be the end of the matter. For, a bidder has to pass all the eligibility norms and the failure to meet any essential criterion would disqualify such bidder or render him ineligible to progress to the commercial stage. The petitioner does not insist that the working capital clause was not one of the indispensable eligibility measures. As the petitioner is unable to flaunt the bank statement to shore up its working capital resource, there is nothing else that the petitioner has brought save the questionable bank certificate to detract from the chartered accountant''s assessment of the petitioner''s working capital at Rs. 10.41 lakh. It is apparent that the petitioner had failed to meet at least one of the eligibility criteria that had been set in the tender documents.

15. In such circumstances it is not necessary to appraise as to whether the petitioner had crossed the threshold limit set on account of bid capacity as no assessment in such matter would make any difference to the outcome in the present proceedings. It matters little in the context that there may be some apparent contradiction in the eligibility figure that finds mention in the document appended as page 58 of the State''s affidavit. Whatever may be the reason for setting the eligibility threshold at half the estimated value of the proposed contract in such document, Clause 5 (v) of the tender terms required bidding capacity to "not be less than the amount put to tender." The petitioner cites the estimated cost of the project that it completed for Haldia Development Authority as the password to get across the bidding capacity threshold. Such figure is lower by a few thousand of rupees than the estimated value of the subject road development work. This, by itself, leaves the petitioner short on a plain reading of Clause 5 (v) of the tender terms. Even if the formula at page 46 of the State''s affidavit is applied, the petitioner fares no better as the petitioner says that it has no work of similar nature at hand and the value of B in the formula would be zero. Since it is agreed across the board that the value of N would be 0.5 (as the estimated time of completion of the subject work is six months) and thus the bid

capacity eligibility threshold for the petitioner in accordance with the formula would be the estimated value of the proposed contract, it is apparent that the petitioner came up short as its Haldia project cost less than the estimated value of this work.

16. It is the other matter of concern that has engaged Court more than the merits of the petition. A submission was made to Court that a sum of Rs. 29 lakh and odd appearing at page 173 should be added to the working capital figure of the petitioner as assessed by the chartered accountant engaged by the respondent authorities. This1 as is now admitted by the petitioner, was clearly wrong. Oftentimes Courts rely on submission, especially when they are made on facts based on documents, relying on Counsel rather than looking suspiciously to the documents. Though it is more than likely that Counsel representing the State and the private respondent, who have not been called upon, may have risen to demonstrate that the much-vaunted statement reflected of a debit balance rather than a credit balance in the petitioner''s account, the conduct of Counsel representing the petitioner is unacceptable. Even in the adversarial system and at a contested hearing, there is a minimum expectation from Counsel which has been belied here. Without embarking on a moral or ethical harangue as to whether the noble profession of yore is now only a business of getting an order by any and whatever means, the recklessness cannot be allowed to pass unnoticed, however painful a duty it may be to dwell on it. The institution demands that it not be glossed over, for the malaise cannot be wished away by looking the other way; if it is not addressed and treated, the system may be beyond repair. Deserving suitors languish and shrivel at the end of the queue as the unworthy riding on questionable crutches catapult themselves to the top of the line. Sentimental and anachronistic attachment to a sense of morality apart, this petitioner has wasted valuable Court time in a docket-fatigued system and has set back a public project (never mind that the road leads to Mandarmani by a month.

17. The petitioner was ineligible to start with. The petitioner did not file its bid in the appropriate format for the respondent authorities to be able to easily assess it. The respondent authorities engaged a chartered accountant to evaluate the petitioner''s credentials. The chartered accountant gave an opinion which was based on the documents that had been filed on behalf of the petitioner. The petitioner sought to challenge the opinion on the basis of a document by interpreting the document otherwise than could be reasonably expected of Counsel representing the petitioner. The petitioner''s endeavour cannot be permitted to go unnoticed.

18. W.P. 5819(W) 012009 is dismissed. For its efforts, the petitioner will pay costs assessed at Rs. 3 lakh to the State.

