

(2023) 02 GAU CK 0064

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 4295, 4343 Of 2022

M/S North East Infrastructure

APPELLANT

Vs

Union Of India And 7 Ors.

RESPONDENT

Date of Decision : 21-02-2023

Acts Referred:

Constitution Of India, 1950 — Article 14

Citation : (2023) 02 GAU CK 0064

Hon'ble Judges : Sanjay Kumar Medhi, J

Bench : Single Bench

Advocate : Jyotirmoy Roy

Final Decision : Dismissed

Judgement

1. The grievance raised in these two writ petitions being similar and the petitioner being the same, both these writ petitions are taken up for analogous hearing and are being disposed of by this common judgment and order.
2. The issue which has arisen for determination is the legality and validity of the action of the respondent authorities in rejecting the bids of the petitioner on the technical stage itself which was offered pursuant to a Notice Inviting Tender (NIT).
3. The petitioner alleges that such rejection has been done arbitrarily and in a manner not authorized by law by which grave prejudice has been caused. The petitioner further alleges violation of Article 14 of the Constitution of India as well as the principles of natural justice.
4. Before going to the issue to be determined, the brief facts of the case of both the writ petitions can be narrated in the following manner.
5. The BSNL authorities had floated an NIT dated 15.03.2022 in respect of nine numbers of work, including the work of "laying of OFC by HDD machine and other associated works from Dhamalgaon existing MH to 14.00 km point

(towards Kulanjan end along NH-15) including Bogibeel bridge (S/S No.01)" which pertains to WP(C)/4295/2022, the second work of "laying of OFC by HDD machine and other associated works from End of S/S No-01 to Kulajan Tinali Main Route Joint (S/S No. 02)" is in respect of WP(C)/4343/2022.

6. It is the case of the petitioner, which is a Proprietorship Firm, is that in respect of the aforesaid two works, it had submitted its bids which were of a two bids system. The projected case of the petitioner is that in each of the works, three numbers of bids were submitted and it was the bids of the petitioner which were found to be the only valid bids and therefore, the petitioner was the lone tenderer. The petitioner further alleges that in spite of the fact that the petitioner had stood as the only valid bidder, its financial bids were opened on 19.05.2022 and thereafter rejected by citing the following:

"Single bidder has quoted rate on the higher side compared the recent tenders and a fair competition is expected on re-floating of the tender."

7. After the said rejection, the BSNL authorities had floated a new NIT for the aforesaid works. Being aggrieved by the aforesaid action of rejecting the bids of the petitioner as well as the decision to go ahead with the fresh tender for the same works, the present writ petitions have been filed.

8. I have heard Shri J Roy, learned Senior Counsel assisted by Ms. Eva Nath, learned counsel for the petitioner whereas the BSNL authorities are represented by Shri G Goswami, learned Standing Counsel.

9. Shri Roy, learned counsel for the petitioner has submitted that the technical bids of the petitioner having been found responsive, there was no scope in the terms and conditions of the NIT to reject the financial bids of the petitioner. It has further been submitted by the side of the petitioner that the rejection is not on account of being the sole bidder but on the ground that the price offered by the petitioner was not within the viable range. The learned Senior Counsel submits that if the rejection would have been on account of the single bid, the price bid of the petitioner should not have been opened and that being done, the rate of the petitioner has been exposed as a result of which, the petitioner would suffer prejudice in offering its rates in any ensuing tender process. Shri Roy further submits that the viability rate was also not within the ambit of the NIT and the same rate being accepted for some other contract in respect of works covered by the same NIT rejecting the bid of the petitioner is in violation of Article 14 of the Constitution of India, as it is most unreasonable and arbitrary. The learned Senior Counsel for the petitioner further contends that the ground is a flimsy one and has been taken only to reduce competition so that the work can be offered to a person to meet vested interest. It is further submitted on behalf of the petitioner that it is a fit case wherein this Court should interfere with the said decision taken to reject the financial bid of the petitioner and the petitioner being the sole bidder whose financial bid has been accepted, the works in question, should be allotted to the petitioner. Shri Roy submits that as a

consequence thereof, the subsequent action taken by issuing a fresh NIT is required to be set aside and quashed.

10. The learned Senior Counsel for the petitioner has submitted that the scope and ambit of a Court exercising powers under Article 226 of the Constitution of India is limited to the decision making process and may not extend to the decision itself. Shri Roy, learned Senior Counsel submits that in the instant case, the decision making process is erroneous and flawed, as irrelevant and extraneous factors have been taken into consideration and relevant factors have been ignored and overlooked. He further submits that while taking the decision, the public interest has not been taken into consideration, as the work in question are to be executed in a time bound frame and delay in execution would adversely affect the public interest. It is, accordingly submitted on behalf of the petitioner that taking into consideration these factors, the present writ petitions deserve to be allowed.

To substantiate his argument that the rejection of its bids is only on the ground of being the sole bidder, Shri Roy has referred to the averments made in the affidavit-in-opposition dated 28.06.2022 in paragraph 4 by the respondent authorities. As regards, the averment that the financial bids have been opened, the learned Senior Counsel has drawn the attention of this Court to Annexure-4 of the said affidavit-in-opposition dated 28.06.2022 which contains a comparative Chart which shows that the bidders whose bids were found to be 3% below were also allotted the works of similar nature and therefore, the treatment meted out to the petitioner is not uniform. It is submitted that the BSNL being an instrumentality of the State which comes within the ambit of Article 13 of the Constitution of India is bound to act fairly and in a reasonable manner without causing prejudice to any person.

11. On the ground taken regarding maintaining an uniform practice, the learned Senior Counsel has also referred to an earlier instance where the same petitioner had submitted its bid pursuant to an NIT in which the bid was found to be 11.99% above and vide a communication dated 16.03.2022, the petitioner was called for negotiation and ultimately, the work was allotted at a rate of 9.5% above. Shri Roy, accordingly shows that rejecting the bids of the petitioner in the present case on the ground that it is minus 2.11% is absolutely arbitrary and calls for intervention.

12. Per contra, Shri Goswami, learned Standing Counsel, BSNL has strenuously opposed the prayer of the writ petitioner. He firstly submits that under the agreed terms and conditions of the contract, the writ petition itself may not be maintainable, as there are agreed clauses which empower the BSNL authorities to reject any bid without assigning any reason thereof. In this connection, the attention of this Court has been drawn to Clause 7 of the guidelines to intending contractors/bidders which reads as follows:

"7. The undersigned reserves the right to refuse to allow participation of any

bidder on valid ground or reject any or all the tenders without assigning any reason whatsoever and he is not bound to accept the lowest tender.”

13. Shri Goswami, learned Standing Counsel submits that a similar clause also exists in the tender document being Clause 18.0 which is also extracted hereinbelow:

“18.0 BSNL’s Right to accept any bid & to reject any or all bids.

18.1 BSNL reserves the right to accept or reject any bid and to annul the bidding process or administrative or technical reasons and to reject all bids at any time prior to award of contract without assigning any reason whatsoever and without thereby incurring any liability to the effected bidder(s).”

14. It is, accordingly submitted on behalf of the respondents-BSNL that the foundation of the case, as projected by the petitioner, is not correct. Shri Goswami submits that rejection of the bids of the petitioner is not only on the ground that the petitioner was found to be the sole bidder and the rejection is as per the guidelines laid down by the Central Vigilance Commission (CVC). By drawing the attention of this Court to the affidavit-in-opposition filed on 28.06.2022, Shri Goswami, learned Standing Counsel has referred to the averments made in paragraph 4 thereof, relevant of part of which is extracted hereinbelow:

“Further as per the Central Vigilance Commission guidelines issued by the Chief Technical Examiner’s Organization at paragraph 15.0 regarding reasonableness of prices, it is stated that “it has been noticed that the purchases are being made by some of the organizations in an adhoc and arbitrary manner without satisfying the prime requirement of establishing the reasonableness of rates in relation to the estimated rates, last purchased price or prevailing market rates.....

..... It is important to establish the reasonableness of prices on the basis of estimated rates, prevailing market rates, last purchase price, economic indices of the raw materials/labour, other input costs and intrinsic value etc., before award of contract.”

15. The guidelines of the CVC have also been annexed to the affidavit-in-opposition as Annexure-1 which include Clause 15 on reasonableness of prices. The learned Standing Counsel, BSNL submits that as per the said guidelines, the authorities are empowered to make a comparison with the last purchase price or prevailing market price so as to establish the reasonableness of the prices, as these are held to be relevant factors to be taken into consideration before award of a contract.

16. As regards the allegation of discrimination, the learned Standing Counsel has referred to the additional-affidavit filed on behalf of the respondent no. 5 on 11.11.2022. He submits that it is not only the case of the petitioner but other contractors who were dealt in a similar manner whose bids were found to be on the higher side. Specific reference has been made to five numbers of works

which have been put in a chart in Annexure-4 which had gone for re-tender, as initially the rate was found to be unreasonable. Shri Goswami, learned Standing Counsel clarifies that under the present NIT, the bids of the petitioner were found to be technically responsive for the two works at Guwahati which concerns the present writ petitions and two works at Itanagar. Since a similar decision has been taken in all the four works, apart from these two writ petitions, the petitioner has also instituted two writ petitions in the Itanagar Bench of this High Court which are pending disposal.

17. Shri Goswami, learned counsel for the respondent-BSNL submits that apart from the fact that there is no allegation of any mala fide, decisions of the BSNL are taken absolutely on a bona fide consideration and by following the guidelines of the CVC wherein, interest of public is taken to be of paramount importance. It is submitted that even ignoring the aspect of absolute right being vested upon the authorities to reject the bids without assigning any reasons, he submits that the decision is supported by reasons which are not only cogent but also acceptable to a prudent mind. As indicated above, the learned counsel for the respondent has also submitted that the allegation of violation of Article 14 of the Constitution is also belied by the fact that similarly situated persons were given the same treatment by going for re-tender of five numbers of works which finds mention in the chart annexed to the additional affidavit-in-opposition.

18. In support of his submission, Shri Goswami, learned Standing Counsel for the BSNL places reliance upon the following case law:

- i) Tata Cellular Vs. Union of India, (1994) 6 SCC 651;
- ii) South Delhi Municipal Corporation Vs. Ravinder Kumar & Ors., (1994) 6 SCC 651 and
- iii) State of Jharkhand & Ors. Vs. Cwe-Soma Consortium, (1994) 6 SCC 651.

19. In the landmark case of Tata Cellular (supra), the Hon'ble Supreme Court has laid down the inherent limitations in exercise of powers of judicial review which should be confined to only to the decision making process and unless, such decision is absolutely unreasonable, arbitrary or palpably erroneous, a writ court should refrain from interfering with the decision of the authorities, as they are the best judges.

20. In the case of South Delhi Municipal Corporation (supra), the Hon'ble Supreme Court has laid down that referring to CVC guidelines is permissible in any matters concerning distribution of State largesse. It has also been laid down that a High Court, in exercise of powers under judicial review, will not act as an Appellate Court and would only look into the factors taken into consideration at the time of the decision making process.

21. In the case of State of Jharkhand & Ors. (supra), the Hon'ble Supreme Court has reiterated that a Court in exercise of powers of judicial review is not an Appellate Court sitting over the decision of the authorities but merely reviews the

manner in which the decision was taken. The Hon'ble Supreme Court referred the cases of Tata Cellular (supra) and also the case of Master Marine Services (P) Ltd. Vs. Metcalfe & Hodgkinson (P) Ltd., reported in (2005) 6 SCC 138.

22. The rival contentions made by the learned counsel for the parties have been duly considered and the materials placed before this Court have been carefully examined. The primary contention of the petitioner is that the rejection of its financial bids is not in accordance with law after it was found to be technically responsive. The further contention is that such rejection is unreasonable and the same has to be tested with the terms and conditions of the tender document and the law prevalent. The power to reject is not disputed and what is required that it should be on valid grounds. Though Clause 7 and Clause 18 of the tender documents give the absolute right, that right has to be read in a manner that it needs to be backed by reasons, as reasons are the only links to the decision which has been taken and in absence thereof, any decision can be termed to be an arbitrary one. In the instant case, the decision to reject the bids of the petitioner has been cited. The reason, as indicated, is extracted hereinbelow:

"Reason

Rejected by the competent authority for the reason - single bidder has quoted rate on the higher side compared to the recent tenders and a fair competition is expected on re floating of the tender."

23. The said reason would reveal that in spite of the fact that the bids of the petitioner was found to be the single one, whether rejecting the same after opening of its financial bids is fair to the petitioner or not. To examine that issue, the ground cited by the authorities needs to be examined. The authorities have relied upon the guidelines of the CVC and this fact has been categorically stated in paragraph 4 of the affidavit-in-opposition filed on 28.06.2022, the relevant part of which has already been quoted above. The guidelines itself which have been annexed to the said affidavit-in-opposition empower the authorities to examine the reasonableness of prices on the basis of estimated rates and prevailing market price, last purchase price, economic indices. In the present case, however it is seen that in terms of such leverage given by the CVC guidelines, the lone financial bid of the petitioner for each of the works was opened and was found to be deviating from the last purchase price. Whether the figures quoted would be reasonable or not would be a factor which would be within the exclusive domain of the BSNL authorities and this Court would ordinarily not embark upon such an arena which would require certain expertise. It is also a settled law that this Court in exercise of writ jurisdiction may not go to the sufficiency of reasons, if, in the opinion of this Court, the reasons which have been assigned are prima facie good reasons and taken bona fide.

24. The prevailing trend of the law relating to distribution of State largesse is that maximum leverage should be given to the authorities, as they are the best judges to decide as to how and by whom the works are to be executed. This

Court, of course, will not overlook if the authority acts in a manner which is arbitrary, unreasonable or irrational or in a manner which is vitiated by mala fide.

25. In the landmark case of Tata Cellular (supra), the Hon'ble Supreme Court while referring to an earlier case of Fasih Chaudhary Vs. Director General, Doordarshan & Ors., reported in AIR 1989 SC 157 has observed that just as fair play has to be maintained, the authorities should also have a "free play in the joints" and unless, such decision is vitiated by mala fide, a writ court should be loath in interfering with such decision. The Court also finds force in the submission of Shri Goswami, learned Standing Counsel that the treatment meted out to the petitioner is not an isolated one, as similarly situated bidders whose bids have been found to be unviable in terms of the CVC guidelines have been rejected and the works in question have been re-tendered. Shri Goswami also has rightly contended that there would be no restriction upon the petitioner to apply or participate in the new tender in which case, its bid will be considered fairly and at par with any other bidder. Under the aforesaid circumstances, this Court is of the considered view that no case for interference is made out and accordingly, the writ petitions are dismissed.

26. The interim order passed earlier stands vacated.

27. At this stage, Shri Roy, learned Senior Counsel submits that since there was an interim order, his client on advice, did not submit its bid in the new tender. However, since the challenge has been negated, he seeks a liberty to allow the petitioner to participate in the new tender. However, Shri Goswami, learned Standing Counsel submits that the embargo was only not to finalise and the process has, in the meantime, gone ahead and only the last stage is remaining to finalize the same.

28. Be that as it may, the petitioner may approach the authorities with a prayer to accept its bids and if the financial bids are yet to be opened, the bid of the petitioner may be taken into consideration. The aforesaid decision is given only in the public interest that in case the petitioner's financial bids is a competitive one, the interest of public would demand such consideration.

29. The liberty granted to the petitioner to approach the authorities would exhaust within a period of 3 (three) weeks from today.