

(2019) 11 DEL CK 0253

In the Delhi High Court

Case No : Civil Writ Petition No. 4088 Of 2019

M/S RVJ Musical Private Ltd

APPELLANT

Vs

Union Of India & Anr.

RESPONDENT

Date of Decision : 06-11-2019

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2019) 11 DEL CK 0253

Hon'ble Judges : G.S. Sistani, J;Anup Jairam Bhambhani, J

Bench : Division Bench

Advocate : Anoj Kumar Singh, Manish Mohan, Abhishek Kr.Choudhary, B.Kumar, Meenakshi Arora, Mala Narayan, Rahul Narayan, Neha Dawar, Shashwat Goel, Digvijay D.M.

Final Decision : Dismissed

Judgement

G.S.Sistani, J

1. This petition has been filed by the petitioner under Article 226 of the Constitution of India seeking a writ of mandamus against the respondents to quash decision dated 26.03.2019 of respondent No.2, whereby it is contended that the technical bid of the petitioner was rejected without giving any justifiable reasons and with the sole motive of favouring another bidder.

2. Some necessary facts which are required to be noticed for disposal of this writ petition are that on 11.07.2018, a notice was issued by respondent No. 2 inviting E-tender for setting-up new LPG Bottling facilities at 60 different locations from private bottlers having ready built plant/willing to construct new LPG bottling facility.

3. Accordingly, a common tender for all 60 identified locations was floated. The object was that the successful bidder should be able to create adequate plant and infrastructural facilities and possess competence to engage in the activities required for handling of the LPG bottling operations with caution and safety.

4. The petitioner claims to be a registered company dealing in LPG products and having a sound financial track record to carry-out the work of refilling LPG cylinders by establishing new bottling plants.
5. The petitioner company participated in the E-tender issued by respondent No. 2 for the location at Gaya (Bihar) and submitted all the required documents.
6. After evaluation of the pre-qualification criteria, eligibility criteria and technical bid documents, the petitioner was found eligible for Round II; and was called for interview on 25.01.2019, along with all the original documents as digitally submitted earlier on the e-portal.
7. After being successful at the interview, a committee as constituted by respondent No. 2 conducted Round III i.e. Inspection of Site/facilities on 25.02.2019.
8. The complaint of the petitioner is that respondent No.2 rejected the technical bid of the petitioner without giving any cogent reason and awarded the tender to a favoured applicant, who, according to the petitioner, does not even qualify for the tender on merits.
9. Learned counsel for the petitioner submits that respondent No. 2 did not officially communicate the reasons for disqualifying the petitioner in Round III and hurriedly fixed the time for opening of financial bid on 27.03.2019 at 4.10 p.m. within 24 hours of rejection of the petitioner's technical bid. Learned counsel further submits that the rejection of the tender by the respondents is baseless, mala fide and arbitrary and with a view only to accommodate a particular party, which is now the successful tenderer/bidder.
10. Learned counsel submits that the decision of respondent No.2 to reject the petitioner's bid is that the names of the owners of the land offered by the petitioner as appearing in the land revenue records are different from the names that find mention in the lease deed submitted by the petitioner. It is submitted that as per the lease deed the name of the lessor is 'Shashi Bhushan Sharma', whereas the land revenue receipt shows the name of the owner as 'Shashi Bhushan Singh'. Learned counsel submits that vide e-mail dated 02.04.2019 the petitioner clarified to respondent No.2 that Shashi Bhushan Singh and Shashi Bhushan Sharma are one and the same person; and an affidavit in support of the clarification has also been provided by the owner and only the surname has erroneously been recorded in the revenue records as 'Singh' instead of 'Sharma'.
11. Learned counsel for the petitioner submits that the objection which has been taken is completely mala fide since by reason a typographical error in the revenue receipt, the name has been shown as Shashi Bhushan Singh instead of Shashi Bhushan Sharma, although the father's name remains the same; and that this is an irrelevant and inconsequential error, which cannot be the basis of rejecting the petitioner's bid. Additionally, learned counsel has relied upon one of the conditions of the tender documents which we reproduce below:

"Despite, the above in case of any shortfall in the documents, the bidder shall be provided with only ONE opportunity provided with only 01 (One) and final chance to submit any shortfall of documents which will be communicated to them on the e-portal within a time bound period of 7 (seven) days. It will be the bidder's responsibility to access the e-tendering portal on a daily basis to check communication in this regard. In case the bidder fails to submit any documents or submits incomplete documents within the given time, the bid will be rejected."

12. Learned counsel contends however that the objection as regards the surname was neither brought to the notice of the petitioner nor seven days' time was given to furnish any explanation for the same. Accordingly, the writ petition should be allowed.

13. Learned counsel also contends that the second reason for rejection viz, that the site offered is not freely accessible by an all-weather motorable road was also not brought to the notice of the petitioner as is evident from the communication which was received from respondent No.1 on 28.03.2019 in which the only objection was with regard to the discrepancy in the names appearing on the lease deed and the land revenue receipt. For the above two reasons, it is urged that the action of respondent No.2 is mala fide and the order of rejection is liable to be quashed.

14. On the other hand, Ms. Meenakshi Arora, learned senior counsel appearing for the respondent has placed strong reliance on Clause 8(ii) of the tender documents in support of her contention that the proposed location is required to be freely accessible through all-weather motorable approach road for smooth movement of heavy vehicles/LPG bulk tankers (18-21 MT payload capacity). Learned counsel further submits that the approach road to the land granted by the petitioner has a narrow width of only 3.5 meters, with several sharp turns and it also passes through a densely populated village.

15. Ms. Arora also places reliance on the photographs taken by the committee members during site inspection, copies whereof have been filed along with the counter affidavit. It is submitted that the counter affidavit was filed as far back as on 06.07.2019 and the petitioner has not filed a rejoinder providing any explanation to the second ground of rejection. She further submits that inspection was carried out in the presence of the petitioner and/or his representative and the width of the road cannot be widened.

16. We have heard learned counsels for the parties.

17. For convenience we reproduce Clause 8 (ii) as well as two other relevant conditions of the tender documents as under:

"8. ADDITIONAL ELIGIBILITY CRITERIA:

(ii) The Ready Built Plant and/or Offered Land shall have adequate road connectivity for Bulk as well as packed trucks which shall be plying to/from the plant. The proposed location should be freely accessible through all-weather

motorable approach road for smooth movement of heavy vehicles/ LPG bulk tankers (18/21 MT payload capacity), The ready built plant should have motorable road inside the plant for smooth movement of heavy vehicles/ LPG Bulk Tankers (18/21 MT payload capacity)."

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Despite, the above in case of any shortfall in the documents, the bidder shall be provided with only ONE opportunity provided with only 01 (One) and final chance to submit any shortfall of documents which will be communicated to them on the e-portal within a time bound period of 7 (seven) days. It will be the bidder's responsibility to access the e-tendering portal on a daily basis to check communication in this regard. In case the bidder fails to submit any documents or submits incomplete documents within the given time, the bid will be rejected.

xxxxx xxxxx xxxxx

Note:

a. Parties/Bidders should submit only those documents for credentials which can clearly demonstrate the credentials of the party. The onus of submitting all such documents required for credentials/ prequalification shall lie on the party and OMC shall not correspond directly with any firm, installation, any office for getting the required documents. All such documents shall be uploaded on portal before the due date and time of closing of the tender.

18. Ms. Arora has relied upon the terms of the tender documents, which we have reproduced above, to submit that one opportunity was granted to the petitioner to cure any shortfall in the documents furnished and 7 days' period was also provided for the same; whereas learned counsel for the petitioner contends that this condition has not been complied with by the respondents.

19. Upon considering the rival submissions, we are satisfied with the explanation rendered by Ms. Arora that the above condition of affording opportunity to remedy or explain any deficiency or discrepancy will only be available at the time of preliminary scrutiny of documents. It has been explained that mismatch or error in the title documents, though apparent on the face of the documents, can only be verified at the last stage i.e. at the time of inspection; and at that stage, if an opportunity is granted to every bidder to offer explanations, the process would become unending.

20. In our view, the error as regards the surname may be minor; however, a reading of the Clause(a) of the note as extracted above makes it clear that parties were required to submit documents which would clearly demonstrate their credentials. The tender document also clarifies that the onus of submitting documents required for verification of the credentials/pre-qualification was on the party and the Oil Marketing Company (OMC) was not required to correspond directly with any firm, installation or any office for getting the required documents. In our view, the petitioner should have been careful and in case of

any mismatch in the title documents, clarification should have been provided at the time of submission of the bid itself.

21. Although, learned counsel for the petitioner is correct in saying that the second ground of rejection, namely the issue with the width of the approach road, was not communicated to the petitioner, we find that no benefit can accrue to the petitioner at this stage since this ground is stated in the counter affidavit, to which neither any rejoinder has been filed nor is there any explanation to say that the road is in the control of the petitioner or that he can widen the same. Therefore, the explanation rendered by the petitioner even now is not convincing.

22. We have also examined the inspection report and find no infirmity in the same especially in the light of Clause 8(ii) of the tender documents. We agree with respondent No.2 that having regard to the movement of LPG bulk tankers, it is extremely important that the width and contours of the road should be such that there is no obstruction or impediment, lest there should be a mishap.

23. Moreover, the law mandates only a limited scope of interference by the Court under Article 226 of the Constitution of India in the decision-making process in rejecting or accepting a tender. The Courts interference is warranted only when the decision of rejection or acceptance of tender is mala fide or evidently aimed at favoring a particular party. It would be useful to refer to the observations of the Supreme Court in *Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited and Another*, (2016) 16 SCC 818, more particularly paras 11, 15, and 16, which read as under:

"11. Recently, in *Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)* [Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99] it was held by this Court, relying on a host of decisions that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us.

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15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of

a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.

16. In the present appeals, although there does not appear to be any ambiguity or doubt about the interpretation given by NMRCL to the tender conditions, we are of the view that even if there was such an ambiguity or doubt, the High Court ought to have refrained from giving its own interpretation unless it had come to a clear conclusion that the interpretation given by NMRCL was perverse or mala fide or intended to favour one of the bidders. This was certainly not the case either before the High Court or before this Court."

16. In view of the above discussion, we are of the view that the writ petition is devoid of any merit. The same is accordingly dismissed.

CM APPL.18424/2019 (stay)

24. In view of the order passed in the writ petition, the application also stands dismissed.