

(2013) 07 BOM CK 0140

In the Bombay High Court

Case No : Writ Petition No. 2272 of 2013

M/s. S. Mohan Singh Bhatiya

APPELLANT

Vs

Rashtriya Chemicals and Fertilizers Limited, Chuna Bhatti,
Rashtriya Chemicals and Fertilizers Limited, Shankar Nagar
and E-Procurement Technologies Pvt. Ltd.

RESPONDENT

Date of Decision : 03-07-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10
Constitution of India, 1950 — Article 226

Citation : (2013) 5 ABR 677 : AIR 2013 Bom 172 : (2014) 2 ALLMR 113 :
(2014) 1 BC 444 : (2013) 5 BomCR 662

Hon'ble Judges : B.P. Dharmadhikari, J;A.S. Chandurkar, J

Bench : Division Bench

Advocate : R.S. Parsodkar with Mr. A.M. Balpande, for the Appellant; G.G. Modak, Advocate for Respondents No. 1 and 2 and Shri Anjan De, Advocate, for the Respondent

Judgement

B.P. Dharmadhikari, J.—Rule. Rule is made returnable forthwith and heard finally with the consent of Shri Parsodkar, learned counsel for the petitioner, Shri Modak, learned counsel for respondents No. 1 & 2 and Shri De, learned counsel for respondent No. 3. By this petition under Article 226 of the Constitution of India, the petitioner, a registered Partnership firm, seeks a direction against Respondents No. 1 & 2 to permit it to participate in e-Reverse Auction and to consider its tender along with other bidders in accordance with law. This Court on 22.04.2013 issued notices and on 26.04.2013 after hearing counsel for respondents No. 1 & 2, directed the parties to maintain status quo till 06.05.2013. On 10.05.2013, after hearing counsel for the respondents, the Court clarified that the status quo granted by it on 26.04.2013 enabled the petitioner to raise his bills at the rate calculated at Rs. 2,50,00,000/- proportionately. This order continues to operate even today.

2. Civil Application No. 1191 of 2013 has been moved by the petitioner to correct

the name of the advocate recorded in this order dated 26.04.2013. The error is only typographical and hence that prayer is granted.

3. Civil Application No. 1201 of 2013 is moved by one Tirath Singh Awatar Singh Bhatiya under Order 1, Rule 10 of Civil Procedure Code, seeking leave to be joined as party respondent. He has pointed out that being lowest bidder, he is entitled to get work order and same has been withheld because of interim orders of this Court. The application has been considered at the stage of final hearing on 28.06.2013. The petitioner has not joined said lowest bidder as party respondent and there is no amendment sought in either prayer clause or in the petition.

4. Shri Parsodkar, learned counsel appearing for the petitioner has pointed out that the tenders were invited by Respondents No. 1 & 2 for Rake handling and transport contract for fertilizers movement at Gondia. 27.02.2013 was the last date for submission of tenders which were opened immediately thereafter. Participation in e-Reverse Auction of tenderers, found eligible, was must. The petitioner satisfied pre-qualification bids and, therefore, on 20.03.2013, he was called upon to remain present on 23.03.2013 for opening of price bids. The qualified bidders were then to participate in e-Reverse Auction which was to be conducted on-line. To participate in it, a digital signature was necessary. The entire e-Reverse auction was entrusted to service provider-Respondent No. 3. The petitioner was called upon to deposit Rs. 4,500/- for a valid digital signature certificate to enable him to log-in by Respondent No. 3. The said amount was paid by the petitioner on 26.03.2013. On 10.04.2013 he received another e-mail from respondent No. 3 asking it to submit a form duly filled in and to deposit an amount of Rs. 5,620/- for registration. Accordingly, that amount was deposited on 10.04.2013. Respondent No. 3 then confirmed registration of the petitioner to participate in e-Reverse auction scheduled on 12.04.2013 between 12 Noon and 1.00 P.M. Respondent No. 3 then attempted to give training to the Manager/representative of the petitioner's firm on 11.04.2013 but due to technical snag, the petitioner could not log-in. On 11.04.2013, Respondent No. 3 sent two e-mails showing that administrator had approved the digital ID request of the petitioner. In this background, our attention has been invited to para 12 of writ petition. It is contended that the petitioner's Manager was continuously talking with Respondent No. 3 on his two mobile numbers but the digital signature could not be used to log-in because of technical snag. The petitioner recorded all efforts made in software known as Team Viewer which is a must for e-Reverse auction. After said software is activated, tenderer has to give ID and password, and thereafter the computer of the tenderer is controlled by a service provider like Respondent No. 3. On 11.04.2013, machine of the petitioner was controlled by Respondent No. 3 and Team Viewer log file for said date shows that because of technical snag, digital signature could not be used to log-in. The petitioner has produced a copy of said log file as Annexure. E-Reverse auction was to commence at 12 Noon on 12.04.2013 and hence the petitioner was continuously on inter-net but its digital signature could not log-in the site for E-reverse auction. The Manager was continuously in touch with Respondent No. 3,

particularly Mr. Nitin and Mr. Kishor in the office of Respondent No. 3, who were also trying to help the petitioner to log-in but the efforts could not succeed. Time period meant for said auction was getting over and hence Manager Shri Rajiv Sharma of Respondent No. 3 told the petitioner that time would be extended up to 3.00 P.M. The efforts to log-in were continuing. Phone call by the petitioner's Manager made at about 2.17 P.M., to Respondent No. 3 was answered by said Rajiv Sharma. The digital signature of the petitioner could log-in only at 2.43 P.M. but then, according to petitioner, Respondent No. 3 malafidely refused its participation therein on the ground that scheduled time was already over. The petitioner has submitted that immediately thereafter he sent emails to Respondents No. 1 & 2 and to service provider and lodged its protest. It is urged that the petitioner being existing contractor for the year 2012-13 for same work with Respondents No. 1 & 2 with past track record and without any adverse remarks, the denial of e-Reverse participation has resulted in injustice. It is further stated that for Wadsa, a similar e-Reverse auction was conducted and on 12.04.2013, the petitioner could log-in the site of Respondent No. 3-Service Provider at about 5.35 P.M., permitted participation of the petitioner and this e-Reverse auction was then followed by negotiation which took place on 13.04.2013. The petitioner contends that thus for Gondia Rake point, Respondent No. 3-service provider played mischief. The petitioner has in para 20 further stated that till new tenderer is finalized by Respondents No. 1 & 2 for the year 2013-14, the petitioner is ready to work at rates approved by Respondents No. 1 & 2 for the year 2012-13. A communication was accordingly sent by the petitioner to said respondents on 19.04.2013.

5. Shri Parsodkar, learned counsel points out that insofar as importance of Team Viewer software is concerned, Respondent No. 3 has not denied it and has not produced any records to counter the same. He, therefore, requests the Court to permit the petitioner further participation in tender process. He has taken the court through various e-mails exchanged between the parties for said purpose.

6. Shri Modak, learned counsel for respondents No. 1 & 2 has pointed out that after the orders of this Court on 10.05.2013, Respondents No. 1 & 2 have started consequential necessary exercise and after completion of that exercise, said interim order will be obeyed. The allegations in petition are against Respondent No. 3 and Respondents No. 1 & 2 had also outsourced the function of issuance of a valid digital signature certificate to Respondent No. 3. The contentions of the petitioner show that there was some technical fault on the part of said respondent which prevented the petitioner's participation in e-Reverse auction. Those allegations are stated to be not proved. The support is being taken from the documents sent by Respondent No. 3 to Respondents No. 1 & 2. It is contended that the petitioner was using wrong Windows Operating System and did not follow guidelines. Attention is invited to the communication dated 09.04.2013 sent by Respondent No. 3 to the petitioner to show that e-Reverse auction required Windows XP (SP-III Application) while the petitioner was using a lower version. Shri Modak, learned counsel submits that Respondent No. 3 had

loaded the new version on the machine of the petitioner on 11.04.2013 and offered to train its representative/officer twice but the petitioner did not utilize that opportunity. The allegations of malafides by the petitioner are against Respondent No. 3 and not against Respondents No. 1 & 2. It is submitted that Respondents No. 1 & 2 were dependent upon Respondent No. 3 and they cannot be made to suffer for any fault on the part of Respondent No. 3 or on the part of the petitioner. Lastly, he submits that whether Personal Computer (P.C.) of the petitioner was properly functioning and whether the petitioner could not log-in or there was any other fault, are all disputed questions which can be satisfactorily answered in a civil suit only. He, therefore, prays for dismissal of the petition.

7. Shri De, learned counsel for respondent No. 3-Service Provider relies upon the reply affidavit filed by the said respondent. He submits that the contention of the petitioner that it could not log on 11.04.2013 due to technical snag is incorrect. The representative of Respondent No. 3 had called upon the petitioner for configuration and training at 4.00 P.M. but then the petitioner intimated that it would call back Respondent No. 3. For installation of D.S.C., Respondent No. 3 had updated operating system of the petitioner from SP-II to SP-III. At 9.30 P.M. on 11.04.2013, representative of respondent No. 3 received call from the petitioner about successful installation of digital certificate and logging-in. The said respondent had done all configuration and at 9.30 P.M. on 11.04.2013, the petitioner confirmed that it was able to see the digital signature into the system.

8. On 12.04.2013, Respondent No. 4 gave a call to the petitioner at about 10.30 A.M. but then the representative of the petitioner was not in the office and message was given to Respondent No. 3 that the petitioner would call back. Around 11.30 A.M., Respondent No. 3 received call from the petitioner that it was not able to log-in. Respondent No. 3 found that the petitioner was using Window XP SP-II. Respondent No. 3 submits that the petitioner had changed the system again and there was no technical snag because other participating bidders had logged in and had participated in e-Reverse auction. Shri De, learned counsel points out that on 09.04.2013 and 10.04.2013, the need of using SP-III version was communicated to all, including the petitioner and they were informed that secured socket layer certificate for e-programme was being generated on a new algorithm, S.H.A. 2. The digital certificate applicable for this platforms was, therefore, required to be S.H.A. 2 algorithm compliance. The website for such updating was also intimated. As the petitioner could log-in successfully on 11.04.2013, it is apparent that the petitioner changed the operating system thereafter and was using Windows XP SP-II on 12.04.2013 at about 11.30 A.M. It is specifically urged that contention of the petitioner that on said date at about 12 Noon, the petitioner was using Windows XP SP-III version is incorrect and false. It is further asserted that Mr. Rajiv Sharma or any other person did not communicate to the petitioner that time for e-Reverse auction would be extended up to 3.00 P.M. After getting call at about 11.30 A.M. on said date, the respondent guided the petitioner to update its system to SP-III. The updation requires minimum one to two hours. The system was updated at 2.17 P.M. and

then the petitioner gave a call which was picked up by Mr. Rajiv Sharma. All browser settings of the system of the petitioner was then done but in the meanwhile time period expired and auction was closed. Respondent No. 3 sent e-mail accordingly to Respondent No. 1 and the petitioner on 13.04.2013. Respondent No. 3, therefore, blames the petitioner in the matter. It is also pointed out that a bidder with valid digital certificate could only participate in e-Reverse auction and for that such bidder required valid digital signature certificate. The amount of Rs. 5,620/- demanded by Respondent No. 3 was for the optional services for ABC Procure registration and other business leads, intimation and information service. Two of the bidders did not pay these charges as they did not opt for such other services offered by Respondent No. 3-Company.

9. Shri Parchure, learned counsel, on the part of intervenor submitted that the applicant, though a necessary party, has not been joined. He has also invited attention to business rules which regulated e-Reverse auction to submit that the respondents have already warned the petitioner that they shall not be responsible for unforeseen circumstances. He has also pointed out that clause 30 of the General Terms and Conditions of contract dealing with settlement of disputes speaks of Arbitration. In this situation, according to him, the petition is misconceived and grievance needs to be looked into by sole Arbitrator to be nominated by the General Manager (Marketing) of the Company.

10. Shri Parsodkar, learned counsel, in reply, emphasises the fact that though Team Viewer log file could have been produced by Respondent No. 3 to counter the assertions of the petitioner, that has not been done.

11. There is no decision by the Respondents 1 & 2 finalizing intervenor as a lowest bidder, in the interest of justice & as we have already heard Adv. Parchure, we allow the CA 1201 of 2013 and add said applicant as intervenor only. This Court has to appreciate that the petitioner did file its counter affidavit after receipt of reply of Respondent No. 3. The said counter affidavit denies the fact that on 11.04.2013, the petitioner could log-in. It is submitted that as digital signature could not be logged-in, no training could be provided. Attention has been invited to e-mail sent on 11.04.2013 whereby the petitioner was called upon to update to Windows XP SP-III version and said updation was carried at 4.30 P.M. on said date. It is submitted that digital signature was not provided even thereafter. Story of logging-in at 9.30 P.M. on 11.4.2013 or of a alleged phone call from the petitioner in this respect is stated to be false. The contention that Respondent No. 3 had done all configurations in the system of the petitioner and hence at 9.30 P.M. on 11.04.2013, the petitioner was able to see digital signature in the system is also stated to be totally false. Reference is given to telephone numbers and it is disclosed that the petitioner has accordingly communicated its failure to log-in on those numbers. The updation to Windows XP SP-III on 11.04.2013 is recorded in Team Viewer software on the computer of the petitioner and its reiterated that on 11.04.2013 the system was controlled by Respondent No. 3 and it revealed that upgraded version SP-III was being used.

On 11.04.2013 in the midnight at about 12.50 i.e. 00.50 A.M. on 12.04.2013, the petitioner sent a e-mail to Rajiv Sharma to provide digital signature. Rajiv Sharma in turn forwarded the same to his subordinates through Ketan and Nitin on 12.04.2013 in the morning. We find that these e-mails are also annexed along with the petition. If the petitioner had already logged-in and digital signature was already provided, there was no question of Rajiv Sharma forwarding said e-mail to its subordinates on 12.04.2013. The contention of Respondent No. 3 that on 12.04.2013 the petitioner was using Windows XP SP-II version is also not borne out from the record. There is no explanation as to why the petitioner firm already having a contract for the year 2012-13 would revert back to SP-II after up-gradation to SP-III.

12. The assertions of the petitioner on oath about importance of Team Viewer software are not denied by any of the respondents. In fact, the same have not been dealt with by them. E-mail sent by Respondent No. 3 to Respondents No. 1 & 2 after 12.04.2013 are of no use in this background. The assertions of the petitioner in the counter affidavit dated 18.06.2013 are again not denied by any of the respondents.

13. Respondents No. 1 & 2 have no doubt outsourced the conduct of e-Reverse auction to Respondent No. 3 but then all acts and omissions of Respondent No. 3 in that capacity need to be viewed in law as acts and omissions of Respondents No. 1 & 2. The facts clearly establish that the petitioner could not participate in e-Reverse auction.

14. The respondents have stated that disputed questions of fact arise because determination of person at fault is necessary. Up-gradation of the petitioner's system to SP-III on 11.04.2013 itself is not in dispute. The petitioner has relied upon log file of Team Viewer for dated 11.04.2013 to show that it could not log in on that date. Respondent No. 3 has relied upon alleged call by the petitioner to Respondent No. 3 on 11.04.2013 at about 9.30 P.M. in which according to said respondents, the petitioner confirmed to Respondent No. 3 that it was able to see the digital signature into the system. Respondent No. 3 has only pleaded that its representative received such a call from the petitioner. The name of that representative or then details of call are not mentioned. On the other hand in its submission Respondent No. 3 accepts that on 12.04.2013 the petitioner was unable to log-in. They are making efforts to blame the petitioner in this respect. They have inferred that on 12.04.2013 at about 11.30 A.M., the petitioner had changed the operating system and was using old SP-II version. Respondent No. 3 being service provider selected by Respondents No. 1 & 2, ought to have maintained necessary records to substantiate all these contentions. There is no justification for not maintaining Team Viewer log file by Respondent No. 3 for business transacted on 11.04.2013 and 12.04.2013. Mere plea that other participants could log-in & hence, petitioner must be presumed to be at fault, is not sufficient in present facts to overlook omission of the Respondents to preserve vital records. Respondents No. 1 & 2 as also Respondent No. 3 are

aware that the tenders are technical matters which always form subject of legal challenges and hence, should have also foreseen requirement of preserving the records. Respondent No. 3 as also Respondents No. 1 & 2 were aware of inability of the petitioner to log-in on 12.04.2013 itself. They, therefore, were duty bound to produce & ought to have preserved their team-viewer records to falsify the petitioner & to establish its credentials. The present petition has been filed before this Court on 22.04.2013 and Respondents No. 1 & 2 have appeared before this Court on 26.04.2013. In this situation, inability of the respondents to counter assertions of the petitioner in paras 12 and 13 of his petition and omission of Respondent No. 3 to produce the records of Team Viewer log file, necessitates drawing of an adverse inference against the said respondents.

15. Clause 30 of the General Terms and Conditions of the contract speaks of all disputes and questions, claims, rights, matters or things whatsoever in any way arising out of or relating to the contract are to be referred to the Sole Arbitrator. Thus, said clause contemplates the disputes between the parties to the contract and arising out of or relating to such contract. Here, dispute before us has arisen at a stage prior to entering of the contract. Admittedly, there is no contract between the petitioner and Respondents No. 1 & 2 for the year 2013-14 & as such, these general terms and conditions of contract are not applicable and there is no question of the petitioner being asked to present the dispute of this nature to Sole Arbitrator to be nominated by the General Manager (Marketing) of Respondents No. 1 & 2.

16. Part B of clause 42 prescribes business rules for e-Reverse auction. As per said sub-clause (1), inter-net connectivity and other paraphernalia requirements shall have to be ensured by the tenderers themselves. In order to ward off such contingent situation like internet connectivity failure, power failure etc., tenderers have been called upon to make necessary alternate arrangements. Said clause also declares that Respondents No. 1 & 2 or Respondent No. 3-Service Provider is not responsible for these unforeseen circumstances.

17. Inability to log-in cannot be viewed as such unforeseen circumstances. It is no doubt true that the replies on record disclose offer made by Respondent No. 3 twice to train the petitioner but then that by itself is not sufficient to find the petitioner at fault in the matter. Had respondent No. 3 shown that the petitioner was successful in logging-in by using the digital signature certificate, the situation would have been otherwise. We, therefore, find that at least on this count, no disputed questions of fact can be said to arise.

18. The petitioner has received copy of Civil Application No. 1201 of 2013 on 06.05.2013. That application is moved by Tirath Singh Awtar Singh Bhatiya under Order 1, Rule 10 of the Code of Civil Procedure, pointing out that after e-Reverse auction, he has emerged as lowest tenderer. This fact is not denied by the petitioner. The petitioner thereafter has filed its counter affidavit on 07.05.2013. In affidavit filed on 07.05.2013, the petitioner stated that though Window XP SP-III Version was installed, digital signature was not provided. They

have stated that in the night between 11.04.2013 and 12.04.2013, the petitioner sent a e-mail to Rajiv Sharma complaining about digital signature and said Rajiv Sharma, in turn, forwarded it to Ketan and Nitin on 12.04.2013. Annexure A-1 placed before the Court by intervenor shows e-mail by Nitin Patel on behalf of Respondent No. 3 which contains a statement that at 9.30 P.M. his colleague Raju Sharma had successfully installed digital certificate and logged in successfully also. This shows two mutually inconsistent stories being put forth by Respondent 3 itself. The last counter affidavit is filed by the petitioner on 18.06.2013 but then the petitioner has not taken any steps to join the lowest tenderer (intervenor) as party respondent.

19. Shri Parchure, learned counsel, appearing for the said lowest tenderer has made a grievance that though the petitioner was aware of this fact, he deliberately avoided to join a necessary party. There is no reply to this argument by the petitioner. But then Respondent 1 & 2 have not taken any decision either to issue or have not issued any work-order to intervenor & thus no legal right has accrued to said intervenor. Moreover, we have also heard his Counsel on his defence and considered it. His defence, in any case, can not exceed the defences available to the Respondents. In this background, we also note that Respondents No. 1 & 2 have also a right to conduct negotiation, if required, with lowest bidder after e-auction event. This option is reserved by them vide sub-clause 17 of clause 4 prescribing procedure for e-Reverse auction contained in Part B dealing with business rules for e-Reverse auction.

20. It is equally important to note that transparency and for that purpose, retaining all records to permit critical appreciation of entire process was/is a vital ingredient. Petitioner has been denied a level playing field by the Respondents 1 to 3. They have not allowed judicial review of the conduct of E reverse auction. The auction as held, therefore, can not be said to be conducted to further public interest. In this situation, we find that interest of justice can be met with by continuing the interim order already passed on 10.05.2013 and by directing Respondents No. 1 & 2 to hold negotiations with the petitioner and intervenor before taking any decision on the question of issuance of work order, as we do not find any fault on the part of the said intervenor in the matter.

21. Accordingly, we direct Respondents No. 1 & 2 to hold negotiations to find out lowest bidder between present petitioner and Tirath Singh Awtar Singh Bhatiya. The negotiations should be completed within a period of two weeks from today and the person emerging successful may be issued work order by Respondents No. 1 & 2 in accordance with law for the year 2013-14 as per their tender invitation. Till such person gets work order and starts functioning, interim order passed by this Court on 10th May 2013 shall continue. Writ Petition is thus partly allowed. Rule is made absolute in above terms. However, in the facts and circumstances of the case, there shall be no order as to costs.