

(2017) 04 UK CK 0008
In the Uttarakhand High Court
Case No : 321 of 2016

M/s SPX Dry Cooling Technologies Belgium.

APPELLANT

Vs

Bharat Heavy Electricals Limited & Anr.

RESPONDENT

Date of Decision : 07-04-2017

Acts Referred:

Constitution of India, Article 12 -
Application of Acts of Parliament and of the Legislature of the State of Assam to
autonomous districts and autonomous regions in the State of Assam

Citation : (2017) 04 UK CK 0008

Hon'ble Judges : K.M. Joseph, V.K. Bist

Bench : Division Bench

Advocate : Anurag Khanna, Sharad Sharma, Indu Sharma, Gunjan Jadwani,
Rakesh Thaplyal, I.P. Kohli

Judgement

1. Appellant is the writ petitioner. The writ petition was filed seeking the following reliefs: "I) Issue a writ, order or direction, in the nature of certiorari quashing the impugned orders publication dated 1.9.2016 as well as the impugned order dated 26.9.2016 issued by respondent no. 2 annexed as Annexure Nos. 10 & 14 to the writ petition.

II) Issue a writ, order or direction, in the nature of mandamus commanding the respondents to execute the contract as concluded in favor of the petitioner by its placement as L-1."

2. Briefly, put the case of the writ petitioner before the learned Single Judge is as follows: The respondent BHEL sought Expression of Interest for a technical collaboration agreement for "Air Cooled Condenser" on 27.04.2013. BHEL had multiple rounds of discussions with various prospective technology suppliers including the appellant. BHEL was one of the bidders for an EPC contract for 3 X 660 MW North Karanpura Power Project of NTPC. Document inviting bids was done on 29.10.2013 on its website. The approximate tender value was assessed to be `1000 crores. This V-1 enquiry did not contemplate a technical

collaboration agreement for licensing the Air Cooled Condenser Technology. V-1 tender enquiry was withdrawn on 02.07.2014 citing "unavoidable circumstances". Information of the appellant was that three bidders were short-listed including the appellant. Thereafter, in December, 2014, a new tender was called. Appellant submitted its tender and this was known as V- 2 enquiry and it included Technical Collaboration + Supply of Air Cooled Condensers for North Karanpura Project. The sealed bids were never opened in respect of V-2 and, thereafter, on 29.07.2015, a final revised enquiry was issued to the short-listed bidders. Appellant was placed at L-1. There is reference to negotiation and, later on, the impugned notification was issued on 01.09.2016, whereby it is alleged that the BHEL, by implication, has turned down assessment, which was V-2. Pleadings were exchanged. The learned Single Judge took the view that the appellant's claim was based on its being L-1 and that it did not acquire any right to be awarded the contract as such.

3. We heard Mr. Anurag Khanna & Mr. Sharad Sharma, learned Senior Counsel appearing for the appellant and also Mr. Rakesh Thapliyal, learned counsel appearing for the BHEL.

4. It is submitted on behalf of the appellant that this is a case, where actually the process started sometime in the year 1999. It was only, however, in 2014 that the matter was taken up, from where it was left for a long period of time. It is pointed out that, actually, BHEL is only a contractor. The work is to be done for the NTPC. BHEL did not have necessary technical expertise. BHEL actually entered into a fixed rate contract with NTPC (assessed Rs.1000 crores, according to the appellant, for installation of Air Cooled Condenser). There is a case projected by the learned Senior Counsel for the appellant that the contract was, in fact, bagged by the BHEL from the NTPC on the basis of the negotiation with the appellant. (We may at once notice that there is no such pleading in the writ petition). Thereafter, as BHEL did not have the technical expertise, it invited Expression of Interest from the parties and, thereafter, initially the V-1 was issued on 20.06.2014, where the estimated value was Rs.1000 crores. The scope of the work was supply of hardware, erection and commissioning. It was cancelled on 02.07.2014 and, on 08.12.2014, a fresh tender was floated, which was designated as V-2A. The scope of the work under V-2A included technical collaboration, hardware, supply, construction, installation and erection (according to Mr. Rakesh Thapliyal, learned counsel for the respondents, it is only erection and commissioning). He would submit that, however, even V-2A was not followed up to its logical culmination; instead V-2B was issued and tender was floated on 29.07.2015. There were three players. The scope of the said work was technical collaboration, supply of hardware and supervision of construction. The technical bid was opened on 19.10.2015 and financial bid was opened on 07.05.2016. On 23.05.2016, appellant, being the lowest tenderer, was invited for negotiation. On 29.06.2016, the bid was, in fact, revalidated. On 30.08.2016, the bid was about to expire. Appellant extended the offer till 15.09.2016. During the course of negotiation, the appellant offered to reduce the price from Rs. 995 crores to Rs.

920 crores. It is submitted that, in violation of the purchase policy applicable to the BHEL, under which it was obliged to pass written order, bringing the curtains down on the tender. There was no such written communication; instead it proceeded to issue the impugned tender on 01.09.2016. Learned Senior Counsel would submit that, actually, there is no loss, which would be caused to the exchequer, as is sought to be projected. The matter has been lingering on from 1999 onwards. This reflected lack of urgency. He would point out that there would be no public interest and there would be no substantial cost cutting. He would further complain that this is a case where the conduct of the BHEL was such that it attracted the vice of arbitrariness. It was also impugned as being mala fide. This argument is expatiated and it is submitted that, actually, at the V-2B stage, the scope of the work included provision of technical collaboration, which included providing designs. Appellant provided the designs. It is submitted that, when the impugned notification was issued, a perusal of the same would show that the BHEL had actually used the design of the appellant, which it provided at the V-2B stage. It is, thereby, that the argument is sought to be made good that it is, consequently, that the cost has come down. V- 2B process was, in fact, not brought to the legal and logical culmination, as contemplated in the Purchase Policy and the written order comes only on the representation submitted and, that too, after issuance of the impugned tender on 02.09.2016. He would remind us that Court may bear in mind that BHEL was merely subcontracting the work, which it had bagged from NTPC under the fixed rate contract. He would submit that, therefore, any reduction in the price offered by the player would not be passed on to NTPC. On the other hand, it would go into the kitty of BHEL. He would complain that the conduct of BHEL may not be countenanced, as if this manner of using of design is permitted, it will lead to undermining the confidence of international players in the fair-play displayed by public bodies in India. Learned Senior Counsel, in fact, would submit that there are circumstances indicated in the Purchase Policy that there are conditions for rejecting, which includes failure of negotiation, which has to be in writing. Learned Senior Counsel for the appellant would submit that, though the price was reduced by the appellant from Rs. 995 crores to Rs. 920 crores, the respondents did not indicate any particular price for which it was agreed and also the matter was kept pending for a quite sometime. It is the case of the appellant that since BHEL did not have the technical know-how, how they could have got the design.

5. Per contra, Mr. Rakesh Thapliyal learned counsel for the respondents would submit that there is no case made out. He would point out that, at the V-2B stage, they opened the financial bid of the appellant at the V-2A stage. It was found that they quoted at the rate of Rs. 787 crores; but, at the V-2B stage price originally quoted was Rs. 995 crores. He would submit that, therefore, for Technical Collaboration + supply + supervision of erection and commissioning, the appellant had quoted Rs. 787 crores in the V-2A stage; whereas, for the same work, they increased the price to Rs. 995 crores at the V-2B stage. It was

decided that to go in for a global tender and global tender was floated by uploading it besides on the BHEL website and Government website also by publishing in the Financial Times, Global Edition, Economic Times and Business Standard. Apart from the original three short-listed players, there were two other players also who bid. Appellant offered the price of Rs. 834 crores (it may be noted that, after filing of writ petition, an interim order was passed, by which the appellant was also permitted to participate in the V-3 tender process without prejudice to its contentions and it is thereby that appellant quoted Rs. 834 crores). The appellant turned out to be the second lowest tenderer; whereas, L-1 was a Chinese Company, namely, Harbin, which originally quoted Rs. 749 crores; but, after negotiation, they have quoted Rs. 738 crores.

6. As far as the contention of the appellant that the design provided by the appellant at the V-2B stage was used at the V-3 stage, he would submit that this aspect has been denied in paragraph no. 45 of the counter affidavit. Paragraph no. 44 of the writ petition reads as under: "44. That to fortify the aforesaid fact the petitioner is annexing herewith the copy of the proposed design submitted by the petitioner in the bid submitted in pursuance to the invitation of bid dated 29.7.2016, and the incorporation of its contents in the publication dated 1.9.2016 in V-3 process. The true copy of the designs which has been borrowed from V-3 assessment is being annexed as Annexure No.12 to the writ petition."

Paragraph no. 45 of the counter affidavit reads as follows:

"45. That the contents of para 44 are denied. It is incorrect that the respondents have used petitioner's design in the V-3 tender. It is submitted that what has been placed at Annexure 12 of the writ petition is some internal correspondence within the petitioner company and not what has been mentioned in para 44."

7. He would submit that there has been considerable saving of nearly Rs. 200 crores for the BHEL and the appellant, being L-1, did not have a legal right to bag the contract. He would also submit that the written communication was issued on 02.09.2016.

8. We are dealing with the case where BHEL, which is also State under Article 12 of the Constitution of India, has decided to go in for a commercial transaction. There can be no matter of doubt that authorities, falling under Article 12, are obliged under the Constitution to act fairly. No action of the State is immune from invalidation, if the action is found to be arbitrary. As to what is arbitrary is a matter to be decided in the context in which the issue arises. In a contractual matter, it is equally well settled that considerable free play in the joints is available to the State. At the time when the State decides to enter into a contract, it was always settled that the State is obliged to act in a fair manner. The principle has been extended further, even to the stage when the contract is being worked out, and, in appropriate cases, Courts do step in and grant relief on the score that action of the State is arbitrary; but, here we dealing with the case where matter relates to the award of a contract or entering into a contract by the

State.

9. We may refer to the recent pronouncement of the Hon^{ble} Apex Court in the matter of "Bakshi Security and Personnel Services Private Limited Vs. Devkishan Computed Private Limited and Others", reported in (2016) 8 SCC 446. The Hon^{ble} Apex Court, therein, inter alia, held as follows: "Purpose of judicial review is to check whether decision or choice was made lawfully and not to check whether choice or decision is sound - Evaluation of tenders and award of contracts are commercial transactions and principles of natural justice and equity stay at distance - If decision is bona fide and is in public interest, courts will not exercise power of judicial review even if there is some procedural aberration or error of assessment or prejudice to tenderer - Judicial review cannot be invoked to protect private interest over public interest or to decide contractual disputes ? Aggrieved tenderer or contractor can always seek damages - Judicial interference may hold up public works or delay relief or burden exchequer and increase costs manifold - Courts need to pose themselves questions (i) (a) whether process adopted or decision made is mala fide or intended to favour someone; or (b) whether process adopted or decision made is so arbitrary and irrational that no responsible authority acting reasonably in accordance with law could have reached or (ii) whether public interest is affected -If answer is negative then there should be no interference."

10. Therefore, the principle enunciated is that unless public interest is affected or where process adopted or decision is malafide or intended to favour someone or where the process adopted or decision made is so arbitrary & irrational that no responsible authority, acting reasonably in accordance with law, could have reached the Court would not interfere in such a matter. The Court is concerned more with public interest than with the injury that a private party may suffer. Bearing in mind these principles if we appreciate the contention raised, we would think that no case at all has been made out for interference in the matter.

11. We have noticed that originally V-1 was floated and it was abandoned and then V-2A was floated in December, 2014 and that was also abandoned. When it came to V-2B, the appellant turned out to be the lowest tenderer. However, the lowest tender price originally quoted was Rs. 995 crores, as against the estimated price of Rs. 1000 crores. Negotiations took place, as appellant was placed at L-1. Appellant brought down the price to Rs. 920 crores. At this juncture, we must address the issue, as to whether the absence of a written order, bringing the curtains down on the process, is fatal to the respondents in issuing the impugned tender. It is here that we must bear in mind the principle, which is being enunciated by the Hon^{ble} Apex Court, that unless and until the action is so arbitrary, it may not be open to the Courts to interfere. It's not every irregularity or even illegality that would entitle the Court to interfere in a contractual matter. While, it is true that a State even when it is acting in the field of contract, cannot shake off the mantle of State and act like a purely private player or rather certainly it is expected to act fairly at all stages, we must also

realize that much free-play is vouchsafed to the State in contractual matters. A balanced view is called for. Therefore, the mere fact that a written order was not passed, as such, before the issuance of the latest tender, in our view, is clearly insufficient for the Court to interfere. We also may notice that, immediately after the issuance of the impugned tender, on the very next day, on the representation, a written order was passed, rejecting the representation of the writ-petitioner.

12. The next argument is that BHEL is a mere contractor. BHEL has sub contracted the work. It is assured of being given the contractual sum of Rs. 1000 crores by NTPC. So any reduction in the price by the players, pursuant to the tender, would not reach the coffers of NTPC is the argument of the appellant. We are completely unimpressed by the same, when we bear in mind the fact that BHEL is also a public sector unit. BHEL would stand accused of arbitrariness, if it did not attempt to secure the best price. If BHEL had not negotiated with the appellant for instance in the V-2B stage when it had originally quoted Rs. 995 crores, a private party would have gained the contract at a cost of Rs. 75 crores more, as it ultimately turned down, when the appellant brought down the price from Rs. 995 crores to Rs. 920 crores. Therefore, there is absolutely nothing wrong in a public sector unit attempting to bring down the cost, as we must assume that every rupee gained by it will ultimately be a welcome addition to the exchequer as resources are scarce and it is the duty of all public bodies to save money. Every saving made by it will ultimately enure to the benefit of the public. This aspect is sufficient to deal with the argument that there is no public interest, as there is public interest involved in a public sector unit, like, BHEL, making all efforts to reduce the cost of project.

13. The argument, which remains is the argument based on the using of the design of the appellant, which it got from it during the V-2B stage. We notice from the pleading that this is denied by the BHEL. Courts do not ordinarily resolve disputed questions of fact. Though, the learned Senior Counsel for the appellant would, in fact, point out that it is indeed true that design was made use of as the design of the appellant with all its errors have been employed during the V-3 stage. We will assume that indeed such a thing took place; but, we must at once pose a question whether that is sufficient to award the work to the appellant and this is to be most important question of all, which is whether a tenderer, who has given the lowest tender, is entitled in law to compel the employer to award the contract. It is well settled that L-1 is not entitled to the award of the contract. It is always open to the employer when the figure quoted by L-1 is found to be exorbitant or high, to reject it and employer has a freedom to go in for a fresh tender. In no case, can the lowest tenderer compel the employer to award the contract to the lowest tenderer. It is entirely the prerogative of the employer to decide whether the lowest tender should be accepted or not.

14. In this connection, we have already noticed the amount, which is quoted by

the appellant at the V-3 stage, is Rs. 834 crores. The lowest tenderer was Rs. 749 crores originally and, on negotiation, it came down to Rs. 738 crores.

15. Therefore, this is a case where we can summarize as follows: The estimated value of contract was Rs. 1000 crores. In V-2B tender, appellant was the lowest bidder at Rs. 995 crores and it brought down the figure from Rs. 995 crores to Rs. 920 crores. The impugned tender has seen the reduction in the lowest tenderer to Rs. 749 crores and, after negotiation, the figure stand at Rs. 738 crores. Therefore, there is a saving of nearly Rs. 200 crores effected through the V-3 process of tendering, which is what the appellant impugns. We are of the clear view that, in such a situation, we can neither call it so arbitrary nor can we say that this is a case where the action of the State is against the public interest. We cannot interfere in public interest. The plea of malafides and arbitrariness, associated with the alleged using of the designs, is what remains. We have already stated that this is disputed and, at any rate, we would think that appellant cannot on that score alone claim a right to be awarded the contract to it or even the right to maintain the challenge the decision by which BHEL has decided to go in for re-tender.

16. Therefore, no case is made out for interference. Consequently, the Appeal is dismissed.

17. There will be no order as to costs.

18. We make it clear that this will not prejudice the right of the appellant, if so advised, to call in question the award of work made during the pendency of the appeal.