

(2008) 07 CAL CK 0033
In the Calcutta High Court
Case No : MAT No. 283 of 2008

Nemchand Jain and Sons and Another	APPELLANT
Vs	
State of West Bengal and Others	RESPONDENT

Date of Decision : 22-07-2008

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 2008 Cal 262

Hon'ble Judges : S.S. Nijjar, C.J; Pinaki Chandra Ghose, J

Bench : Division Bench

Advocate : Abhijit Basu and Subhrajit Basu, for the Appellant; Amitava Chaudhuri, R.K. Khanna and Jay Saha, for the Respondent

Final Decision : Allowed

Judgement

Pinaki Chandra Ghose, J.—This appeal is directed against an order dated 9th April, 2008. The Hon''ble First Court was pleased to dismiss the writ petition and held that while preparing the comparative statement of the credentials of the intending bidders, the Authorities due to an inadvertent slip did not record the financial structure as disclosed by the private respondent No. 4 and for such inadvertent slipping, the private respondent No. 4 cannot be made to suffer.

2. The other point which has been urged before the Hon''ble First Court by the writ petitioner that the private respondent No. 4 did not fulfill the eligibility criteria mentioned in Clause 2.1 of the Tender document i.e. the intended bidders were required to furnish the annual turn over for the last 5 years was also negated by the Hon''ble First Court. It is urged that the private respondent No. 4 has come into existence only 3 to 5 years prior to the issuance of the Tender notice, therefore, unable to produce papers relating to annual turn over for the last 5 years.

3. The fact as has been noted that the representative of the writ petitioner signed the comparative statement upon perusal of its contents and no objections

were raised by the said representative of the writ petitioner that the private respondent No. 4 was not eligible to participate in the tender process in terms of the notified eligibility criteria. Therefore, the Hon'ble Court held that the writ petitioner stood on fence and took a chance and after becoming unsuccessful turned around and challenged the selection process.

4. In furtherance of such reason, the Court held that the larger public interest has to be kept in mind to decide whether an intervention is called for or not. In the instant case, since the offer of the private respondent No. 4 would yield additional revenue to the tune of Rs. 27 lacs and bolster the sagging spirits of cinchona plantation, the employees in the hills of Darjeeling held that interference is not called for and hence, the writ petition was dismissed.

5. The facts of the case briefly are as follows:

A tender was issued by the State of West Bengal being No. 1/2007-2008 in respect of sell of dry cinchona, lodgeriana bark containing 4,00% QAA (approximately), dry cinchona bark powder (old stock) having 3.5% QAA (approximately), dry ipecac roots having 2.5% total alkaloid calculated as emetine and dry dioscorea tuber having 2.5% dioscorea whereby the State, inter alia, invited sealed tenders therefore.

6. The last date of receiving and the date of opening of tenders were scheduled to be on 3rd and 4th October, 2007 respectively. Subsequently, the said dates were rescheduled on 1st November, 2007 and 2nd November, 2007 respectively. However, the tenders were opened on 3rd December, 2007.

7. The quantity proposed to be sold, the reserve price therefore were specifically mentioned in the said tender notice. The writ petitioner tried to ventilate their grievance challenging that the date of opening the tender in question was changed without incorporating any amendment or giving any information to the intended bidders including the writ petitioner. But, it appears from the fact that the said date was changed after the publication of proper notice in the newspaper. Hence, we cannot accept the said grievance of the writ petitioner.

8. The writ petitioner challenged the said tender on the ground that the private respondent No. 4 did not fulfill the eligibility criteria as mentioned in the said tender and further the earnest money so deposited was not in accordance with Clause 1.7 of the said tender notice.

9. Mr. Banerjee, Learned Senior Advocate appearing on behalf of the appellant pointed out before us that the Tenderers were required to deposit the earnest money at the rate of 1% of value of the materials of his bid and deviation therefrom would disallow a Tenderer even to consider his bid since it is in violation of Clause 1.7 of the said Tender Notice.

10. He drew our attention to the following clauses which are set out hereunder:

Clause 1.7 - The tenderers shall furnish earnest money bid security, hereinafter

referred to as the earnest money as part of his tender but in a separate sealed envelope subscribed accordingly i.e. Earnest Money deposited for purchase of materials @ 1% of the value of materials in equivalent Indian Currency (for any other freely convertible currency) and any of the acceptable forms as detailed elsewhere in these documents (Clause 2.6.1) duly endorsed/pleaded in favour of the Director of Cinchona & Other Medicinal Plants, West Bengal, Mungpoo, Darjeeling.

Clause 1.10 - All tenderers are hereby cautioned that conditional offers or deviations from the condition of contracts of other requirements stipulated in these tender documents shall summarily be rejected as non-responsive and not considered further in tender evaluation and acceptance.

Clause 2.1 - The eligibility of the bidders shall be determined on the basis of best qualification with respect to information furnished by them on the following which must be true and complete, any additional information shall be deemed to be included in the Tender documents.

- a. Structure and organisation.
- b. Financial structure.
- c. Information regarding current litigation, if any, debarring expelling of tender or abandonment of work by him.
- d. Annual turnover for the last five years.
- e. Affidavit.

11. Mr. Banerjee specifically pointed out that the petitioner has failed to give the annual turn over for the last 5 years and also drew our attention to the document disclosed in these proceedings that the respondent M/s. Chemi Homeo Laboratory Pvt. Ltd. they themselves gave their annual turn over for the last 5 years as follows:

2004-05 ... Rs. 5 lacs. 2005-06 ... Rs. 6 lacs. 2006-07 ... Rs. 8 lacs. 2007-08 ... Rs. 500 lacs.

12. Therefore, Mr. Banerjee pointed out that the Private Respondent No. 4 failed to comply with the eligibility criteria and under Clause 1.10, the respondent authority had no right to consider the offer of the said tenders.

13. He urged that the financial structures were not also disclosed by the said private respondent No. 4. He tried to point out that the earnest money, as stated in Clause 1.7 of the said condition of contract of the Tender has specifically stated that earnest money to be deposited for purchase of the materials which would be 1% of the value of materials in equivalent to Indian Currency.

14. Mr. Banerjee contended that the reserve price which has been mentioned in Clause 1.7 only represent that no bid should be accepted by the Authorities, less than the reserve price stated therein. Therefore, if any person gives his bid, he

has to give his bid equal to the reserve price and thereby he has to deposit 1% of the reserve price of the value of the materials. But if any person wants to give more than the reserve price then he has to deposit 1% of the value of materials of his bid. Therefore, he submits that there cannot be two interpretation of the said Clause. Hence, he submits that it was the duty of the private respondent No. 4 to deposit 1% of the value of materials of his offer (i.e. his bid).

15. Therefore, according to him, 1% of the bid money has to be deposited by way of earnest money. Admittedly, the private respondent No. 4 has failed to deposit the said amount. Hence, on the first ground, the private respondent No. 4 did not fulfill the eligibility criteria mentioned therein the terms of Clause 1.7 which would be evident from the records.

16. His further contention is that if the authority thought that the said earnest money would be the same in respect of all the Tenderers and in that case, there was no necessity of the Authorities to specifically mention in the said Clause that the earnest money of tender must be sent in a separate sealed envelope subscribed as "earnest deposit for purchase of materials at the rate of 1% of the value of materials in equivalent Indian Currency". This protection was taken by the said Authorities only to make a safeguard in respect of the offers of the tenderers.

17. Mr. Banerjee further contended that the petitioner also did not fulfill the eligibility criteria in respect of Clause 2.1(d), admittedly the annual turnover for the last 5 years were not disclosed by the private respondent No. 4 and in fact the annual return disclosed by the private respondent No. 4 only for three or four years. Therefore, according to him, the private respondent No. 4 could not have been considered even by the respondent authorities, since it did not fulfill the eligibility criteria. Therefore, the steps taken by the respondent authorities would show that the respondent authorities only to favour the private respondent No. 4. accepted the said tender document and allotted the tender in favour of the said respondent.

18. He further pointed out that there is no authority in the Tender Notice which can give a power to the respondent authorities to relax the eligibility criteria. Therefore, such act on the part of the authorities are illegal, mala fide and arbitrator. Hence, on that ground alone, the selection process is bad and would vitiate.

19. On the other hand, Mr. Khanna, Learned Counsel appearing on behalf of the private respondent No. 4 drew our attention to the dictionary meaning of the word, "earnest" and relied upon a decision, reported in Shri Hanuman Cotton Mills and Others Vs. Tata Air Craft Limited, and submitted that the earnest money should be deposited after the contract is being concluded between the parties. So, according to him. after the contract is being concluded or the offer of the offerer is accepted then and then only the question arises for depositing the earnest money.

20. Therefore, if there is a shortfall of the money given with the offer by the offerer, it cannot be a ground to reject the offer for such shortfall. He further pointed out that the financial structures were specifically furnished which was not recorded by the Authorities wrongly and the said fact was also accepted by the Hon"ble First Court. The said fact has also been accepted by the respondent authorities, therefore, there cannot be any bar with regard to the financial structure.

21. In respect of the annual turn over for the last 5 years, Mr. Khanna submitted that the Authorities had the right to accept the tender and since there is a difference of Rs. 27 lacs the Authority accepted the tender of the private respondent No. 4.

22. He further contended that the Court must exercise its discretionary powers under Article 226 of the Constitution of India with care, and should exercise it only in furtherance of public interests not merely on the making out of a legal point and relied upon the decisions reported in Master Marine Services Pvt. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and Another, Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others,) and submitted that the State can choose its own method to arrive at a decision and it can fix its own decision and that is not open to judicial scrutiny and it can enter into negotiations before final decision to accept one of the offers made to it.

23. His further contention was that the writ petition should have been dismissed on the ground of delay since the petitioner/ appellant although filed the petition before the Court on 15th January, 2008 but the said application was moved only on 18th January, 2008. In fact, the matter was first heard out before the Court only on 25th February, 2008 and the Court after hearing the parties came to the conclusion and did not grant any interim order. Subsequently, the matter was heard out and disposed of by the Court on 9th April, 2008 dismissing the writ petition and in between there was no interim order and no step was taken by the petitioner/appellant.

24. Therefore, Mr. Khanna submitted that on the ground of delay, this writ petition should be dismissed and he relied upon a case, reported in NICCO Corporation Ltd. Vs. Cable Corporation of India Limited and Others, in support of his contention.

25. He further submitted that the writ petitioner is not entitled to get any benefit and there is no violation has been made by the authorities in respect of the eligibility criteria.

26. After considering the decisions cited before us and the materials on record placed before us, in our opinion, the earnest money as stipulated in the tender to be furnished by the intending bidders should be 1% of the value of materials equated with the offer of the bidders.

27. The meaning of reserve price is nothing but a "price" which is fixed by the

seller and the seller would not sale the property less than the amount fixed by them as the reserve price for the said goods. Therefore, in case of a tender, it is always to be taken note of that the value of materials cannot be equated with the offer/bid of the intending bidders and, in other words, the earnest money cannot be equated with the reserve price when the bidder is giving his bid more than the said reserve price for the said goods.

28. It is true that an intending bidder can give his bid equal to the reserve price, then certainly the value of materials of the said intending bidder would be equivalent to 1% of the reserve price but from the document as it appears that the intending bidder gave his offer and the value of the materials quoted by the bidder is more than the said reserve price then it has to be noted that it is the duty of the said tenderer to deposit the earnest money equivalent to 1% of the said value so quoted by him/bidder. Therefore, it cannot be equated with 1% of the reserve price.

29. In this case, the private respondent No. 4 gave his offer more than the reserve price fixed in the tender. Therefore, It cannot be said that he intended to give the value of the materials same as reserve price. Hence, in this case, there cannot be any other interpretation than the interpretation to be given that it was the duty of the private respondent No. 4 to deposit 1% of its offer as an earnest money. There is also no reason to accept the same because it would be absolutely clear from the bid given by private respondent No. 4. The value of the materials quoted by a tenderer and 1% of the said value can be said to be the earnest money.

30. Therefore, in our considered opinion, we hold that it is the duty of the intending bidder to deposit 1% of the bid money in respect of the goods in question and hence, we are of the opinion that there cannot be any second interpretation of the said Clause 1.7 of the said tender in question which can grant a relief to the private respondent No. 4 equating the same 1% of the value of materials so offered by it.

31. We, accordingly, have to come to the conclusion that the submission of Mr. Khanna cannot be accepted on that ground and with utmost respect to His Lordships, we hold that there cannot be two meaning or two interpretations of the said Clause 1.7 in respect of depositing earnest money.

32. Hence, we hold that there is some substance on such ground of Mr. Banerjee and we hold that the private respondent No. 4 did not comply with the said Clause 1.7 in giving his bid.

33. The other Clause as it appears as specifically stated that the private respondent No. 4 did not fulfill the criteria mentioned in Clause 2.1(d) whereby it was the duty of the private respondent No. 4 to furnish the annual turnover for the last 5 years and it is clear and also accepted by Mr. Khanna that they have only started functioning for last 3 to 5 years. Therefore, it would show that private respondent No. 4 also did not fulfill the eligibility criteria as specified in

Clause 2.1(d) of the Tender Notice.

34. With reference to Mr. Banerjee's further objection with regard to the financial structure, it appears that the private respondent No. 4 duly furnished the same and we are accepting the opinion expressed by the Hon'ble First Court that there was only an inadvertent slip by the Authorities while preparing the comparative statement of the credentials of the intending bidders. Therefore, we do not find that there is any reason for us to deal with the said objection as raised by Mr. Banerjee.

35. In the decision reported in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, the Hon'ble Supreme Court held that when a State entertain the tender of a party even though it does not have the requisite experience, it denies equal opportunity to others similarly situated in the matter of tendering for the contract and there may have been many others who were precluded from participating in the tender as a result of conditions of eligibility mentioned in the advertisement of contract.

36. Therefore, in our opinion, the case of the appellant falls within the ambit of this decision and, furthermore, the decisions cited by Master Marine Services Pvt. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and Another, which has been specifically held that the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons but at the same time it has been specifically held by the Hon'ble Supreme Court that the tender condition must permit the authorities to grant such relaxation.

37. We have also found out that there is no such clause in the said tender which can give authority to relax the same. Furthermore, under Clause 1.10 also the authority should have rejected the bid of the private respondent No. 4.

38. Hence, we do not find that the respondent authorities have any right to relax the eligibility criteria mentioned in the said tender notice. Hence, we hold that the selection process suffers from defects in granting the tender in favour of the private respondent No. 4 relaxing the said Clause 2.1(d) and Clause 1.7 respectively. Therefore, the selection process is bad in law.

Hence, we quash the said selection process granting liberty to the respondent authorities to take steps to float a fresh tender immediately.

39. For the reasons stated hereinabove, the appeal is allowed and the order so passed by the Hon'ble First Court is set aside.

Surinder Singh Nijjar, C.J.

40. I agree.

LATER

Urgent xerox certified copy of this judgment duly countersigned by Assistant Registrar (Court) be given to the parties, if applied for, on the usual undertakings.