
(2014) 02 CAL CK 0117
In the Calcutta High Court
Case No : W.P. No. 014 of 2014

Pankaj Kesera

APPELLANT

Vs

The Andaman and Nicobar Administration

RESPONDENT

Date of Decision : 21-02-2014

Acts Referred:

Citation : (2014) 4 BC 628 : (2014) 2 CALLT 569

Hon'ble Judges : I.P. Mukerji, J

Bench : Single Bench

Advocate : Malay Kumar Ray and Krishna Rao, Advocate for the Appellant; N.A. Khan, Advocate for the Respondent

Final Decision : Disposed Off

Judgement

I.P. Mukerji, J.—In 2013, the Andaman & Nicobar Administration decided to purchase 4800 metric tonnes of sugar from the open market. On 7th August, 2013 the Administration invited bids by public notification. It was notified on the website on 7th August, 2013 and through newspapers, all over the country on 10th August, 2013. Five offers were received from the following firms:

1) M/s. Shree Ganesh Khand Udyog Sahakari Mandali Ltd., Vataria.

2) M/s. Sadashiva Sugar Ltd. Bangalore.

3) M/s. Kendriya Bhandar, Beharbari, (Guwahati)

4) M/s. Shree Balaji Sugar Company, Delhi.

5) M/s. S.G.S. Commodity Pvt. Ltd. New Delhi.

2. Four of the bidders, including the petitioner qualified on 29th October, 2013 at the technical bid stage. Kendriya Bhandar, the fifth offer was disqualified for non-furnishing of the earnest money deposit.

3. Before proceeding further with this order, it is poignant to mention that the

invitation to tender documents required the bidders to furnish inter alia, two documents, the AGMARK certificate for sugar and a trade licence for the commodity.

4. Mr. Ray, learned advocate for the petitioner very carefully placed before me the notifications/orders at pages 24, 31, 32 and 34 of the affidavit-in-reply. There is no point in discussing these notifications in this judgment because it is quite undisputed that neither a trade licence nor an AGMARK registration certificate was required for any of the offerers to carry on business as a trader of sugar. In fact, none of the five firms making the offers submitted these documents. This would appear from the admission of the department in various notesheets appended to the affidavit in opposition from pages 12 to 17 thereof dated between 13th November, 2013 and 20th November, 2013.

5. The financial bid was considered by the Bid Evaluation Committee on 7th November, 2013. The petitioner's bid was found to be the lowest by the Directorate of Civil Supplies and Consumer Affairs.

6. It clearly appears from the notesheet dated 13th November, 2013 which starts from paragraph 12 of the affidavit in opposition that the bid of the writ petitioner for Rs. 43,750/- per MT was the lowest and accepted by the Directorate.

7. Thereafter the matter was sent to the Finance Department for concurrence.

8. This department invoked Rule 160(x) of the General financial Rules 2005. It said that the conditions of tender had been altered by the department deciding not to rely upon the requirement in the tender document for production of the above registration certificate and trade licence. The bids were to be evaluated, according to the above, financial rules, subject to the conditions incorporated in the tender document and not otherwise.

9. The notesheets reveal that there was initially a difference of opinion between the Directorate of Civil Supplies and Consumer Affairs and the Finance Department.

10. Ultimately, the Directorate of Civil Supplies and Consumer Affairs gave in and by a communication dated 20th December, 2013, which is at page 53 of the writ petition and widely circulated the tender was cancelled "for administrative reasons".

11. Mr. N.A. Khan learned Advocate opposed this application whole heartedly but was fair in his submissions. He argued that the initial conditions were changed and justified the new tender. He said that the new tender would bring new and better offers. Further, the writ petitioner had accepted return of the earnest money.

12. The Hon'ble Supreme Court, in the case of M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, cited by Mr. Ray, very lucidly opined that "... As a matter of general proposition it cannot be held that an authority

inviting tenders is bound to give effect to every term mentioned, in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be, open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases".

13. Now, when production of the AGMARK certificate for sugar and a trade licence for the commodity was not a requirement at all under the law to carry on the business or trade in sugar, or for entering into a contractual obligation for supplying the commodity to the government, the insertion of that provision in the terms and conditions of the tender document was, in my opinion, erroneous. If those documents were not relevant at all, the provision in the tender documents for production of those documents was non est in the eye of law. It was a nullity. No one could have been asked to act upon it.

14. Therefore, such a condition was not even a subsidiary or ancillary condition as identified by the highest Court in the above case. Hence, in my opinion, the second respondent was absolutely correct in not insisting upon it, and not treating this decision as changing any condition of the tender. They appear to have been correct in their approach to proceed with the processing of the financial bid.

15. The opinion of the Finance Department as contained in the note-sheet appears to be very unfortunate and wrong.

16. However, a note-sheet is the decision making process of the department. The contents of a natesheet cannot be taken as the final decision of the government but it only shows the process of movement of proposals and ideas towards a final decision.

17. Therefore, to take 100% cognizance of these note-sheets, (though a substantial number of them has been annexed to the affidavit in opposition) and taking a final decision in the matter would not be prudent on the part of this Court.

18. But on the existing evidence the cancellation of tender communication dated 20th December, 2013 at page 53 of the petition cannot stand. It cannot stand also for the reason that it is bereft of any reason or ground whatsoever. Even disappointed tenderers are entitled to know why at the final stage a tender has been cancelled.

19. For these reasons, the communication of the second respondent dated 20th December, 2013 at page 53 of the writ petition is quashed and set aside.

20. I think in the facts and circumstances of this case the decision with regard to

the subject tender for purchase of 4800 MT tonnes of sugar by the Administration should be taken by the Chief Secretary, Andaman and Nicobar Administration, Port Blair. Moreso, as about Rs. 21 crores are involved.

21. The Chief Secretary will take a decision in the matter, considering the above observations of this Court within a period of four weeks from the date of communication of this order. No hearing need be given to the petitioner or any other party.

22. For a period of six weeks from date, or till the time the Chief Secretary makes his decision there will be status quo regarding the above tender as well as the new tender which has been invited by the government.

23. The tender process for the purchase of 4800 MT of sugar will abide by the decision of the Chief Secretary.

24. Pending consideration by the Chief Secretary, the writ petitioner will re-deposit the earnest money with the second respondent by way of demand draft within five working days from now. It is noted that when the petitioner's tender was cancelled the earnest money was refunded to them by the second respondent.

25. This writ application is thus disposed of. Let a plain photocopy of this order duly countersigned by the Assistant Registrar (Court) be made available to the learned counsel for the parties upon usual undertakings.