(2016) 08 KL CK 0055

In the High Court Of Kerala

Case No : Writ Petition (C). No. 23070 of 2014 (G)

Philip Mathew APPELLANT

Vs

Kerala Transport Development Finance Corporation Ltd. RESPONDENT

Date of Decision : 26-08-2016

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2016) 4 KerLJ 62 : (2016) 4 KLT 22

Hon'ble Judges : Mr. Shaji P. Chaly, J.

Bench : Single Bench

Advocate : Sri. Leo George, Advocate, for the Petitioner; Sri. K.R. Sunil, Advocate, for the Respondent Nos. 1 to 4; Sri. M. Gopikrishnan Nambiar, SC Dr. Thushara James, SC, Advocates, for the Respondent No. 5

Final Decision : Dismissed

Judgement

Mr. Shaji P. Chaly, J.—This writ petition is filed by the petitioner seeking to declare that petitioner is the highest bidder in respect of shop rooms bearing Code Nos. S-2 and T-2 respectively, in the Hi-tech KSRTC Bus Terminal Complex at Thiruvalla in the tender-cum-auction process held pursuant to Ext. P1, and that the petitioner is entitled to get allotment of the said shop rooms, and for other related reliefs. Relevant facts for the disposal of the writ petition are as follows:

2. Pursuant to Ext. P1 auction-cum-tender notice, petitioner submitted a tender for having an area of 494.42 sq. ft. having Code No. S-2 and an area of 480.17 sq.ft. at the second and third floor having Code No. T-2 respectively. Both the above tenders were submitted in separate sealed envelopes as per the stipulations contained under Ext. P1. Along with the applications, Demand Drafts towards application fee as well as Earnest Money Deposits together with selfattested copy of ID and address proof were submitted in a separate sealed envelope and duly filled up tender documents including form for financial bid, evident from Ext. P2 acknowledgement. Petitioner was present all along during

auction-cum-tender process at the K.S.R.T.C Bus Terminal Complex from 04.08.2014 onwards. The master covers submitted by the petitioner in respect of the shop rooms were opened and perused by the authority concerned and petitioner was found to be eligible to participate in the auction process. Petitioner bid shop room bearing Code No.S-2 at ten times the amount fixed at monthly rent for the said shop room. Likewise, shop room bearing Code No.T-2 at nine times the amount fixed as monthly rent for the said shop room. However, since there were no competitive bidders in the auction process, envelope No.2 submitted by the petitioner in respect of the shop rooms were opened and the bid of the petitioner at the auction process were found to be the highest by the authorities concerned. Though the petitioner is entitled to get the allotment of the shop rooms, respondents 2 and 3 did not allot the same for the reasons best known to them. Petitioner was also not intimated whether he was allotted the shop rooms, and whether his offer has been rejected, till 27.08.2014.

3. On 27.08.2014, petitioner received a communication dated 14.08.2014 from the 4th respondent stating that petitioner did not qualify in the tender-cumauction held on 04.08.2014, in respect of the aforesaid shop rooms, evident from Exts. P3 and P4 respectively. According to the petitioner, no reasons are assigned in Exts. P3 and P4, as to how the petitioner was not qualified in the auction.

4. Since in the counter affidavit filed by the 1st respondent it was stated that 1st respondent has fixed a ''Rock Bottom Rates of Security Deposit'' for each space and the same has been approved in the 127th meeting of its Board of Directors held on 11.12.2013, and that it was decided that the bids below the ''Rock Bottom Rates of Security Deposit'' would not be entertained, petitioner made respective amendment to the writ petition challenging the said action of the respondents. Therefore, in terms of the amendment, it is contended, no reserve price was fixed nor the ''Rock Bottom Rates of Security Deposit'' alleged to have been fixed by the 1st respondent has been divulged. It is also urged that, the said issue with respect to the Rock Bottom Rates was revealed only at the time of auction. It is also stated that, pursuant to Ext. P1 tender notification, petitioner has remitted a sum of Rs.2,100/- each towards application fee and VAT by way of two separate Demand Drafts for participating in the auction, in addition to deposit of Rs.25,000/- each towards Earnest Money, by way of separate Demand Drafts. Though petitioner received back the Demand Drafts referred to in Exts. P3 and P4, the same are not surrendered for encashment in view of the pendency of this writ petition. It is also contended that, if the petitioner was made known of fixing of Rock Bottom Rates of Security Deposit, he would not have participated in the tender process by submitting application fee and Earnest Money Deposit. It is in this background, this writ petition is filed seeking appropriate directions.

5. First respondent has field a counter affidavit contending that it has undertaken the construction of KSRTC Bus Terminal Complex at Thiruvalla on BOT basis as

per the Government Order dated 23.01.2010, evident from Ext. R1(a). The total agreed PAC for the said project was Rs.41.38 Crores. As per Ext. R1(a) notification, 1st respondent had to raise the entire funds for the project being the BOT operator and thereafter to recover the total project cost with interest from the tenants of the commercial space of the project, after payment of annuity to KSRTC in the manner mentioned therein. It is also stated that, 1st respondent has been exclusively utilising its own funds for the construction of the above mentioned complex and such funds are mainly received by way of fixed deposits from general public all over India. Hence the amounts spent by the 1st respondent for construction of the Terminal Complex are to be recovered promptly by the operation and management of the said building on BOT basis, as the fixed deposits mobilised are to be repaid with applicable interest to the depositors promptly.

6. So much so, after the project was materialized, sealed tenders for commercial space in the project under tender-cum-auction method as per Ext. P1 were invited. Rent for each space was fixed by the KTDFC, same was published in Ext. P1 notice, and tender was invited for offering highest interest free security deposit for each space. It was categorically specified in Ext. P1, each space will be allotted to the tenderers who quoted the maximum interest free security deposit in the tender document or during the auction, as the case may be, if and only the amounts so offered is satisfactory to the 1st respondent. Therefore, the petitioner cannot demand as a matter of right the allotment of the shop rooms on the ground that he offered the maximum during the tender process for the said spaces. The amount offered by the petitioner was not satisfiable to the 1st respondent and it was rejected accordingly. It is also contended that, as tender is purely an ''invitation to offer'', petitioner''s position in the tender process is that of an offerer who is making a proposal to the 1st respondent and it is for the 1st respondent to decide whether to accept his proposal or not. According to the 1st respondent, the proposal made has not become a ''promise'' since the tender submitted by the petitioner was never accepted.

7. It is also stated, 1st respondent prepared the rates of rent for each space as well as Rock Bottom Rates of Security Deposit to be considered as satisfiable during tender for each space, on the basis of the viability report of the Project prepared at the time of sanction of the project, as well as on the basis of an internal market study conducted by the Company. Thereafter, the said rates of rent and Rock Bottom Rates of Security Deposit for each space were approved in the 127th meeting of the Board of Directors of the 1st respondent held on 11.12.2013 vide Agenda Item No.18/127. Accordingly, fixed rates of rent were published in Ext. P1 auction-cum-tender notice so as to enable the interested tenderers to quote the maximum interest free security deposit. ''Rock Bottom Rates of Security Deposit'' means the minimum amount of deposit to be offered in tender that the 1st respondent can consider as satisfactory amount for allotment of each space in the tender. If it is not satisfactory, as provided under Ext. P1, 1st respondent was at liberty to reject the tenders forwarded by the

bidders. It is also stated that, even though it is not necessary to disclose the said ''Rock Bottom Rates of Security Deposit'' fixed internally, at the time of auction, same was disclosed at the auction hall on the date of auction of each space including that of the petitioner, enabling the tenderers to offer above the Rock Bottom Rates of Security Deposit.

8. The shop rooms at 2nd floor was fixed with a rent of Rs.50/- per sq. ft. with a minimum security deposit of 75 times of monthly rent. So also, the rent for the 3rd floor shop rooms was fixed at Rs.40/- per sq. ft. with expected minimum security deposit of 70 times of monthly rent. However, the security deposit quoted by the petitioner was only 10 times and 9 times respectively. It is also contended that, the above rock bottom rates were disclosed during auction to the petitioner, and the petitioner was the single tenderer to the shop rooms in question. Petitioner was also informed that the minimum rates i.e. satisfiable to the 1st respondent would be 75 times and 70 times interest free fixed deposits of the monthly rent fixed. It is also stated that the petitioner has not quoted any amount in the financial bid of Ext. P1 tender.

9. That, the whole process was video-graphed for maintaining transparency. As the petitioner refused to offer above the minimum acceptable rates of security deposit even after the disclosure of satisfactory rates of security deposit as mentioned above, his tenders were rejected and the Earnest Money Deposit amounts were accordingly returned as per Exts. P3 and P4 letters. Therefore, it is the contention of the 1st respondent that, there is no manner of arbitrariness, unreasonableness, unfair practise or any other illegality, enabling the petitioner to secure any relief from this Court by invoking the extraordinary jurisdiction conferred under Article 226 of the Constitution of India.

10. Petitioner has also filed a reply affidavit reiterating the stand adopted in the writ petition and making further contentions with respect to the non-disclosure of Rock Bottom Rates of Security Deposit.

11. Heard learned counsel for the petitioner and the respective counsel appearing for the respondents, perused the documents on record and the pleadings.

12. The prime contention advanced by learned counsel for the petitioner is with respect to non-disclosure of the Rock Bottom Rates of Security Deposit in Ext.P1 auction-cum-tender notice, so as to enable the interested tenderers to quote the maximum interest free security deposit. According to the petitioner, even though the said aspect was pointed out at the time of auction, it was a surprise to the bidders, and if such an eventuality was put forth in Ext. P1 auction-cum-tender notice, petitioner would not have participated at all in the auction. Therefore, according to the learned counsel, the said act of the 1st respondent is totally illegal and arbitrary, warranting interference of this Court.

13. Per contra, learned Standing Counsel for the 1st respondent contended that, the auction and opening of tenders is very well stipulated in Ext. P1, and has

specifically invited my attention to the stipulation contained with respect to auction and opening of tenders, wherein it is stated that, after completing the auction process of each space, the Envelope-2 of the applicants will be opened and the amount offered as security deposit in clause 4 of ''Tender Form for Financial Bid'' will be noted down. Thereafter, the amounts offered as security deposit in the auction process and in the tender forms will be examined and the space will be allotted by the 1st respondent to the party who offered the maximum amount as Interest Free Security Deposit, subject to the consideration that the amount offered shall be satisfiable to KTDFC. So also, learned counsel has invited my attention to paragraph 4 of the terms and conditions of the tender, which read thus:

"4. KTDFC reserves to itself the right to reject any or all the Tenders without assigning any reason thereof and/or to call for any other details or information from any of the applicants. The decision of the Managing Director, KTDFC shall be final and binding on the tenderers."

14. Therefore, it is the contention of the learned Standing Counsel for the 1st respondent that, going by the said provisions contained in Ext. P1 tender-cum-auction notice, it is categoric and clear that merely because petitioner has forwarded a tender in proper format, that by itself will not suffice the situation in accordance with the terms of Ext. P1. It is also contended that, the 1st respondent is always left with liberty to reject a tender if the security deposit offered by the bidder is not satisfactory to the 1st respondent. Moreover, it is also contended that the Rock Bottom Rates of Security Deposit was announced in the auction hall while each and every shop rooms were put in auction after opening of the tender forms. In fact the said contention put forth by the 1st respondent is admitted by the petitioner. However, the contention of the petitioner is that, the same having not disclosed in Ext. P1, the action of the 1st respondent disclosing the same at the auction hall is arbitrary and with malafide motives and intentions.

15. Taking into account the rival submissions made across the Bar, the question to be considered is whether the petitioner is entitled to get the reliefs sought for in the writ petition. From the foregoing discussion, it is categoric and clear, 1st respondent has ventured in a commercial transaction by spending money received from public all over India by way of fixed deposits which are utilised for the purpose of construction of the Hi-tec Shopping Complexes. Only by successfully giving the shop rooms and other Office spaces for appropriate rent and security deposit, the money spent can be recouped by the 1st respondent. In the counter affidavit, it is stated that, 1st respondent has spent more than Rs.40 Crores for construction of the Complex. The same is constructed on BOT basis and after the principal amount with interest is released the building is to be transferred to the 5th respondent, Kerala State Road Transport Corporation.

16. That apart, on a reading of Ext. P1 tender-cumauction notice, it is categoric and clear that the tender offered by the bidder should have been satisfiable to

the 1st respondent Corporation. Moreover, the terms and conditions of the tender also show that 1st respondent was at liberty to reject any tender without assigning any reason thereof. Though the contention of the petitioner is that, in Exts. P3 and P4 no reasons are assigned, on perusal of the same, it is clear, petitioner was not qualified in the tender-cum-auction held on 04.08.2014. Therefore, the said reason assigned thereunder is to be co-related to the provisions contained in Ext. P1.

17. As discussed above, 1st respondent was at liberty to reject any tender, if the offer of security deposit is not satisfiable to the 1st respondent. Moreover, the 1st respondent was at liberty to reject any tender without assigning any reason, which thus means, petitioner participated in the auction fully knowing well the terms and conditions in Ext. P1. In my considered opinion, that by itself, are sufficient reasons to arrive at a finding that petitioner cannot turn around later on, and say that the conditions in the tender-cum-auction notice are arbitrary and illegal. Moreover, even according to the petitioner, at the time of auction, the Rock Bottom Rates with respect to the Security Deposit was announced. If the petitioner was not interested to participate in the auction, petitioner had every opportunity to withdraw. It is also well settled, in contractual matters, unless and until patent illegality and arbitrariness interfering with the fundamental rights guaranteed to a citizen, interference of writ courts will be very slow. Petitioner participated in the tender process fully knowing the terms and conditions of the same. Moreover, the offer made by the petitioner was never accepted by the 1st respondent, so as to transform the offer as a concluded contract. An offer by itself is not binding on the 1st respondent. In such circumstances, I do not find any illegality, arbitrariness or irrationality in Exts. P3 and P4, enabling the petitioner to secure any relief as sought for in the writ petition.

18. In this regard, a reference to the judgment of the Apex Court in ''C.J. Fernandez v. State of Karnataka'' (1990) 2 SCC 488 and the judgment of the Orissa High Court in ''EMCO Ltd. v. Grid Corporation of Orissa Ltd.'' AIR 2003 Ori. 168 would be worthwhile. There, almost in similar circumstances held, fresh qualifications can be added to the eligibility conditions introduced before submission of tenders. Where, in order to make amendments to the bidding documents prior to the submission of bids, a pre-bid Conference was held and all bidders were issued t he proposed amendments and no objections were raised to the proposed amendments, it was held that the amendments to the bid documents prior to submission of bids were permissible. It was further held that having participated in the bid, without any murmur, the bidder could not turn around to contend that the decision making process was erroneous because of the introduction of new qualifications by way of amendments prior to the submission of the bids. If at all the petitioner has suffered with any financial consequences or other damages, the remedy of the petitioner lies elsewhere, and not invoking the extra-ordinary jurisdiction conferred on this Court under Article 226 of the Constitution of India.

19. Resultantly, writ petition fails, accordingly it is dismissed.