(2008) 10 BOM CK 0042

In the Bombay High Court

Case No : Writ Petition No. 787 of 2008

Premier Irrigation Equipment Ltd. and Another	APPELLANT
Vs	
Maharashtra Tourism Development Corporation Ltd. and Others	RESPONDENT

Date of Decision : 18-10-2008

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2009) 3 BomCR 464

Hon'ble Judges : Rebello F.I., J;Kumbhakoni A.A., J

Bench : Division Bench

Advocate : Virendra Tulzapurkar, Rahul Chitnis, Chakrapani Misra and Vishal Maheshwari, instructed by Khaitan and Co, for the Appellant; S.P. Bharti Advocate for Respondent Nos. 1 to 3, G.S. Hegde, C.M. Lokesh for Respondent 3, for the Respondent

Final Decision : Allowed

Judgement

Rebello F.I., J.—Rule. Heard forthwith.

2. Respondent No. 1-Maharashtra Tourism Development Corporation (M.T.D.C.) respondent No. 1 had issued a tender notice dated 1st October, 2007 inviting bids for setting up of Musical Dancing Fountains. The petitioners accordingly submitted their tender. According to the petitioners as they had complied with all the requirements their tender was found to be in order. The tender had to be submitted in two parts. The technical bid were scheduled to be opened on 2nd November, 2007. The petitioners were, however, informed over telephone that the bids will be opened on 19th November, 2007. Though Envelope B was to be opened only on the tenderer being found eligible after opening of Envelope-A, in the instant case, however, both Envelop A and Envelope B were opened on the same day. Respondent No. 5 had not submitted the CD. as per the tender documents. Respondent No. 5 in terms of the affidavit filed by Subodh Kinalekar for respondent No. 1, had on the last date of submitting the tenders requested

that they be permitted to submit the CD. on the next date. The respondent No. 1 extended the time for that purpose. Records produced before us, show that respondent No. 5 submitted the C.D. on the next day. Petitioners contend that as per the enquiries made by them both respondent Nos. 4 and 5 were not eligible.

3. Petitioners state that by letter of 10th December, 2007 the respondent Authorities invited the petitioners to attend a negotiation meeting scheduled on 13th December, 2007 at 2.30 p.m. The petitioners attended the meeting. The petitioner No. 1 was asked to submit a revised bid taking into consideration the fact that the bids of other tenderers were lower. The condition for revised financial bid was based on one year''s free maintenance including spares and there would be no requirement of giving performance guarantee for a period of 5 years and a warranty of 10 years. Accordingly, petitioner No. 1 submitted revised price bid and communicated the same by letter dated 14th December, 2007.

4. Thereafter by letter of 30th January, 2008, respondent No. 1 invited petitioner No. 1 to be present for discussion scheduled to be held on 1st February, 2008. The petitioners were represented. The petitioners'' representative attend the meeting, found that respondent Nos. 4 and 5 are not eligible and as such insisted on disclosure of the eligibility criteria of respondent Nos. 4 and 5. Certain documents were shown which disclosed that neither respondent No. 4 nor respondent No. 5 met the eligibility criteria. On this being pointed out according to the petitioners respondent No. 3 had assured that only petitioners would be considered. The petitioners were, however, asked to submit a revised bid as per the tender terms the. 5 years guarantee and 10 years warranty and no change in technical aspects. Respondent No. 3, however, insisted that opportunity be also given to respondent Nos. 4 and 5 to meet the eligibility criteria so that their revised offer should also be considered. The petitioners under these circumstances submitted revised bid. There is some reference to further correspondence which need not be adverted to. The petition was amended as in the meantime the petitioners were informed that the contract had been awarded to respondent No. 5 by letter dated 7th April, 2008. A copy of the said letter was handed over to Advocate for the petitioners on 22nd April, 2008 during the pendency of the petition before this Court.

5. On behalf of respondent Nos. 1 to 3 several replies have been filed by Subodh Kinalekar, Manager (Adventure Sports). As per the pleadings of these affidavits, pursuant to the advertisement they received three offers which were of petitioner No. 1, Respondent No. 4 and respondent No. 5. The technical bid was first opened and the tender committee found everything in order. Accordingly immediately thereafter the financial bids were opened. No objection was raised by any of the parties including the petitioner to this procedure. On opening of the financial bid, the bid of respondent No. 4 was found to be the lowest. The 5th respondent was the 2nd lowest and the petitioners'' was the highest. The parties had thereafter submitted their revised offer. The parties were then asked to offer their lowest competitive final price at which the petitioners and others filed their

revised offer.

During the joint meeting held on 13th December, 2007 queries were raised by representative of respondent No. 4. It was made clear by respondent No. 1 at its meeting, that respondent No. 1 would award the contract step by step i.e. in the beginning, contract in regard to musical fountain (category 21mm x 6mm) in view of the fact that it is the first project of the respondent No. 1 Corporation and respondent No. 1 thought it fit to take full precaution while parting with huge amounts of public money and after being satisfied about the performance of the successful bidder in regard to the functioning of 21mm x 6mm, to take decision for the remaining two categories. According to respondent No. 1 none of the representatives of the bidders including the petitioners raised any grievance nor took any objections at the meeting held on 13th December, 2007 or thereafter. Dealing with the final offer it is set out that respondent No. 1 had not asked for revised bids i.e. 5 years guarantee and 10 years warranty as the said requirement was only for the successful bidder. The same has been reiterated in the affidavit of 13th August, 2008. In the additional affidavit dated 2nd May, 2008 it has been placed on record that the contract in respect of 21mm x 6mm to respondent No. 5 had been awarded as they found respondent No. 5 the most suitable bidder and he was also the lowest. The last affidavit was of 13th September, 2008 where again it has been explained that 5th respondent had informed that they have misplaced the CD. while coming to the office of respondent No. 1 Corporation and requested that they be permitted to submit the same on the next day. This was permitted by respondent No. 1 Corporation and respondent 5 submitted the same on 20th November, 2007.

6. Respondent No. 5 though served and represented by Counsel has chosen not to file any reply. We may at this stage set out the three offers made by petitioner, respondent No. 4 and respondent No. 5 for the various fountains as can be seen as under:

Petitioners have specifically pleaded that the second offer was based on five years guarantee and one year warranty and the third and final offer was based on 15 years guarantee and 10 years warranty. This has not been denied by respondent No. 1. If the petitioners'' second offer is considered based on 5 years guarantee and one year warranty, the petitioners were the second lowest tenderer, Samarth Enterprise, the respondent No. 4 the lowest, has been disqualified. The bid of respondent No. 5 for the Musical Dancing Fountain of 21 m x 6 m to respondent No. 5 in the sum of Rs. 70,25,000/- was based on 15 years guarantee and ten years warranty. The offer letter dated 7th April, 2008 however, shows that the bid offer of Rs. 70,25,000/- is based on warranty for one year.

7. At the hearing of this petition on behalf of the petitioners their learned Counsel has submitted as under:

(i) Respondent No. 1, having invited a composite bid for 3 fountains could not have altered the terms of the offer by allotting only one of the fountains. In such an event as an essential term of the tender had been altered, the respondent No. 1 ought to have invited fresh bids, as apart from the petitioner and respondent Nos. 4 and 5, other parties were kept out of the bidding process,

(ii) Secondly considering the tender documents the respondent No. 5 was not eligible for being considered, as submitting the CD. was an essential term of the tender document. In terms of clause 12 of the tender notice the tenderer who did not fulfill all or any of the conditions or complete in all the conditions or incomplete in any respect were to be rejected. There was no power in the respondent No. 1 to extend the time for complying with the requirement of the tender documents. Further, in terms of the tender notice the performance guarantee was to be for a period of 3 years and warranty for 5 years.

Learned Counsel has relied on various judgments to contend that in these circumstances the tender awarded in favour of respondent No. 5 ought to be set aside.

8. On behalf of respondent No. 1 their learned Counsel submits that it was open to respondent No. 1 to extend the time to respondent No. 5 to submit the CD. This has not occasioned prejudice to the petitioners. Apart from that it is submitted that respondent No. 1 has already made known to the petitioners that the award would be awarded in stages for the successful bidder. At the first stage the successful tenderer would be asked to complete the tender offer for the 21 m x 6 m musical dancing fountain and if successful then the successful tenderer will be allowed to complete the two other projects. In other words what is submitted is that the lowest tender of all the three projects would be considered as the successful tenderer, but while awarding the work, the work would be done in three steps or stages. In the instant case it is submitted that therefore, the respondent No. 5 being the lowest bidder and otherwise eligible was awarded the contract. The learned Counsel has relied on judgments in support of his case to which we shall advert to.

9. The law on the subject may be restated as explained by the Supreme Court in B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others, :

66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarised as under:

(i) if there are essential conditions, the same must be adhered to;"

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the Court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction.

(v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

(vii) where a decision has been taken purely on public interest, the Court ordinarily should exercise judicial restraint.

10. What is amenable to challenge is not the decision to award, but the decision making process itself. The challenge by the petitioners, therefore, if the petitioner has to succeed is to establish that the decision making process itself is tainted.

11. We may now consider the judgments relied upon by the learned Counsel for the respondent No. 1. Our attention was invited to the judgment in the case of M/s. G. J. Fernandez Vs. State of Karnataka and others, . The issue before the Supreme Court was based on the contention that a successful tenderer did not meet the prequalifying requirements. The Supreme Court while considering the contention has been pleased to hold that the party issuing the tender has the right to punctiliously and rigidly enforce them. It cannot deviate from the tender conditions at all, but if any deviation is made it should not result in arbitrariness or discrimination. This rule comes in for application where the non-conformity with, or relaxation from, the prescribed standards results in some substantial prejudice, or injustice to any of the parties involved or to public interest in general. The fact that a document was belatedly entertained from one of the applicants will cause substantial prejudice to another party who wanted, likewise, an extension of time for filing a similar certificate or document but was declined the benefit. The Court noted that it is true that the relaxation of the time schedule in the case of one party does affect even such a person in the sense that he would otherwise have had one competitor less. The Court observed that the rule in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, case will be readily applied by courts to a case where a person complains that a departure from the qualifications has kept him out of the race, injustice is less apparent where the attempt of the applicant before Court is only

to gain immunity from competition.

In Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, the Supreme Court observed that the award of contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its Corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its Corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process, the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point.

12. On behalf of the petitioners learned Counsel has relied on the judgment in the case of M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, . In that case the High Court allowed the writ petitions, holding that the deletion of Clause 6(a) of the Tender Booklet took place after offers were received on March, 23, 2000 and the offers had been received on the basis of Clause 6(a) and Clause 6(b) which would define the conditions of eligibility. The Court held that the Municipal Corporation had acted arbitrarily in considering the bid and directed that the process should be carried out afresh to determine whether better or higher offers would be received upon the deletion of the same and that evidently having not been done, a restricted application of the modified tender conditions to only the existing bidders, the Municipal Corporation had been deprived of the opportunity which it could have had of obtaining higher or better bids. The Supreme Court affirmed the view taken by the High Court on the principle that if a term of the tender having been deleted after the players entered into the arena, it is like changing the rules of the game after it had began and, therefore, if the Government or the Municipal Corporation altered the conditions, fresh process of tender was the only alternative permissible.

On the other hand on behalf of the successful tenderer learned Counsel has placed reliance on the judgment in the case of Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, . In that case in awarding the contract the

Board had relaxed qualifying criteria which the Board contended it had a right to do under the terms of the document. The Court held that on the facts there it was not a case where any mala fides had been alleged against any member of the Board nor is there any allegation of any collateral motive for awarding the contract to M/s. Raunaq International Ltd. The only contention raised was that M/s. Raunaq International Ltd., did not fulfill the qualifying criterion. The Court then noted that in arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. The Court then observed that it is important to bear in mind that by Court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the Court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the Court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the Court should not intervene under Article 226 in disputes between two rival tenderers.

13. Considering the ratio of these decisions, to the facts of this case, we may now proceed to dispose of the contentions as urged.

The first contention as urged on behalf of the petitioners has been that respondent No. 1 has altered the conditions whilst awarding the tender in favour of respondent No. 5. The contention of respondent No. 1 is that it has awarded the contract to respondent No. 5 being otherwise eligible and the lowest tenderer. The reply filed on behalf of respondent No. 1 needs to be considered. It is their contention that the tenderers were informed that the respondent No. 1 would award the contract in steps i.e. in the beginning contract in regard to musical dancing fountain category 21 m x 6 m would be awarded. As it was the first project of respondent No. 1 Corporation, the respondent No. 1 thought it fit to take full precaution while parting with huge amounts of public money and after being satisfied about the performance of the successful bidder in regard to the functioning of 21 m x 6 m, to take decision for the remaining two fountain. The stand on behalf of the respondent No. 1 was that this is not the case of accepting the tender for only 21 m x 6 m fountain, but accepting the lowest tender of the eligible parties, but allowing the work to be completed in stages.

14. In our opinion if this was the submission the matter could have been looked in a different context. However, we find firstly that the letter of 7th April, 2008 while awarding the contract in favour of respondent No. 5 refers only to the musical dancing fountain of 21 m x 6 m. The warranty period is of 12 months, though in terms of the tender document the warranty had to be for a period of 5 years. The table which we have earlier set out would show that based on the one year warranty the petitioners were the lowest tenderer their total bid being for the sum of Rs. 1,56,54,546/- whereas that of respondent No. 5 was of Rs. 1,85,02,400/-. If it was the case of the respondent No. 1 that as this was their first contract and they wanted to be satisfied about the work done, one could appreciate if the fountain of 6.5 x 6.5 m was first allotted as that involved the

lowest amount of public money and that could have been the basis for awarding the other two contracts. Instead of that the 21 m x 6 m which involved the largest chunk of public money has been awarded. In our opinion the petitioners are right in contending that the respondent No. 1 had deviated from the tender norms. Firstly it did not award the contract in terms of the second bid to the lowest bidder. The petitioners have submitted that even while filing their third and final offer they were maintaining their bid in terms of the second offer. Though the price considered was based on 15 years guarantee and 10 years warranty, what has been offered is based on one year warranty where the respondent No. 5 had bid in the sum of Rs. 74,68,992/- whereas its bid for 10 years warranty is for Rs. 70,25,000/-. Thirdly the entire contract has not been awarded but what has been awarded is only the contract for 21 m x 6 m. In other words the respondent No. 1 has changed the Rules of the tender. It is possible that if only one tender was to be awarded the parties may have bid differently instead of offering bids for all three fountains. There could have been other bidders who could have applied. Under these circumstances in our opinion considering the law as explained earlier, the decision making process amounts to an arbitrary exercise of power. The petition on this count alone is liable to be allowed.

In so far as the second contention is concerned regarding failure by the respondent No. 5 to submit the required C.D., as we are allowing the petition, we see no reason to consider and answer the second contention.

15. In the light of our discussion the petition is allowed. The letter dated 7th April, 2008 awarding the contract in favour of respondent No. 5 is set aside. It will be open to the respondent No. 1 to invite fresh bids

