(2007) 06 GAU CK 0053

In the Gauhati High Court

Rafique Ahmed Mazumder APPELLANT

Vs

Hindustan Paper Corpn. Ltd. and Another RESPONDENT

Date of Decision : 19-06-2007

Acts Referred:
Constitution of India, 1950 — Article 14

Citation : (2007) 3 GLT 939

Hon'ble Judges : Aftab Hussain Saikia, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Aftab Hussain Saikia, J.—Heard Mr. A.M. Mazumdar, learned Sr. counsel assisted by Ms. D. Borgohain, learned Counsel appearing for the petitioner. Also heard Mr. A.K. Phukan, learned Sr. counsel assisted by Mr. J. Roy, learned Counsel appearing for the Hindustan Paper Corporation Limited, (for short, ''the HPC'')/ respondents.

2. The short point that has been raised herein for resolution of this Court is as to whether Account Payee Pay Order issued from Dena Bank, Panbazar Branch, Guwahati submitted as earnest money enclosed with the tender paper pursuant to Notice Inviting Tender (for short, ''the NIT'') dated 26.3.2007 floated by the HPC for awarding the contract work for Transportation, Bundling and Feeding of Bamboo in violation of the terms and condition so stipulated in Clause 2.1.3.1. of the NIT which provides that ''Earnest Money as mentioned in the NIT is to be deposited in the form of Demand Draft/Call Deposit drawn in favour of Hindustan Paper Corporation Limited, Nagaon Paper Mill, Kagajnagar and issued from any branches of State Bank of India/Canara Bank/Central Bank of India and payable at State Bank of India Sonakukchi (HPC) (Code : 7699)/or Canara Bank, Jogiroad (code: 1436), with specific clause incorporated therein that ''Demand Drafts of any associated Banks of State Bank of India shall not be accepted'' can be accepted by the HPC.

3. The pleaded case of the petitioner is that inspite of deposit of Earnest Money as stipulated in the NIT as mentioned above, the petitioner''s tender paper has not been considered by the HPC and such act itself is in violation of Article 14 of the Constitution of India. It is contended that due to paucity of time, as averred in paragraph-6 of the writ petition, he could not get the Demand Draft from the State Bank of India Panchgram Branch and instead obtained an Account Payee Pay Order from Dena Bank, Panbazar Branch, Guwahati for an amount of Rs. 5,00,000.00 (Rupees five lakh) drawn in favour of HPC vide Pay Order No. 805825 dated 16.4.2007 and accordingly he deposited the same along with tender bid as Earnest Money. However, the HPC instead of accepting the same, has refused to open the tender paper on the ground of non deposit of Demand Draft/Call Deposit to be issued from those Banks as stipulated in the NIT noted above.

4. Challenging such attitude/action of the HPC/respondents refusing to open the tender paper accompanied by Earnest Money so deposited by the petitioner in the above form/mode, the learned Sr. Counsel Mr. Mazumdar has submitted that Earnest Money so deposited by way of Account Payee Pay Order is a valid deposit and acceptance of the same cannot be denied by the authority under the law and such action has apparently reflected arbitrariness, high handedness and nepotism on the part of the HPC. Under such factual premises, the HPC may be directed to accept and open the tender paper of the petitioner.

5. To bolster up his submission, learned Sr. Counsel has relied upon a decision of the Apex Court reported in M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, wherein, according to the learned Sr. Counsel, in a similar situation the deposit of Earnest Money by certified cheque drawn on Union Bank of India instead of stipulated terms for deposit of Earnest Money by Demand Draft issued by State Bank of India was rejected. The Supreme Court in paragraph 6 held that the authority should not insist upon on the strict literal compliance of the condition in appropriate cases and it must be open to the authority to deviate from such required condition in submission of tender paper. It was further observed that requirement in a tender notice could be classified in two categories-those which laid down essential conditions of eligibility and the others which were merely ancillary or subsidiary with the main object to be achieved by the condition.

6. According to Mr. Mazumdar, the submission of deposit of Earnest Money falls in the second category of above mentioned requirement in the tender notice. In other words according to him, the deposit of Earnest Money by Demand Draft/ Call Deposit as stipulated in the NIT is merely ancillary or subsidiary with the main object to be achieved by condition and that being so, in view of the above judicial pronouncement, the learned Sr. Counsel has forcefully argued that his Earnest Money deposited through the Dena Bank, Panbazar Branch, Guwahati by mode Account Payee Pay Order needs to be accepted by the authority as the same is valid in the eye of law. Be it noted that in the above referred case, the

Supreme Court directed that the certified cheque of the Union Bank of India must be treated as sufficient for achieving object of the condition of the NIT.

7. Discarding and refuting the submissions so made by the learned Sr. Counsel, by Mr. Mazumder on behalf of the petitioner, Mr. Phukan, learned Sr. Counsel appearing on behalf of the HPC/respondents, has strenuously submitted that the contract so floated by HPC itself is a commercial transaction and to carry out such commercial transaction, a duty has been cast upon the HPC to act judiciously, reasonably and fairly and to achieve such mandate, liberty must be given to them to put any such terms and conditions which are in the public interest and also not violative of Article 14 of the Constitution of India. In the instant case, according to Mr. Phukan, while incorporating the condition of deposit of Earnest Money by way of Demand Draft/ Call Deposit as already stated above the consequential condition has also been inserted thereto to the effect that Demand Draft if deposited from any other associate Bank other than the State Bank of India cannot be accepted and this specific term and condition has, therefore, become a mandatory provision and once it is accepted as a mandatory provision, no body can be permitted to violate such term and condition and as such compliance of the same is a must.

8. Distinguishing Poddar Steel Corporation''s case (supra), it is submitted by the learned Sr. Counsel, Mr. Phukan, that in the cited case no such clause indicating the consequence to have the effect of cancellation/rejection of the tender, was incorporated in acceptance of cheques from other Bank instead the State Bank of India in terms of Clause 6 of the Tender Notice. However in the case in hand, specific consequential condition has been laid down in NIT itself. His case is that the Supreme Court in paragraphs 6 and 8 ruled that the certified cheque of the Union Bank of India so deposited by the appellant must be treated as sufficient for the purpose of achieving the object of the condition. In the instant case the Clause 2.1.3.1. specifically and categorically contemplates that Earnest Money has to be deposited in the form of Demand Draft/Call Deposit issued from any Branch of State Bank of India, Central Bank of India with consequence that Demand Draft from any associated Banks of State Bank of India shall not be accepted. That being so, the term and condition of the NIT in the instant case in hand is clear and unambiguous. But the petitioner instead of complying the same, has fallen back upon on an Account Payee Pay Order drawn on Dena Bank, Panbazar Branch and the same is, according to him, is a clear deviation from the stipulated term and condition.

9. The extensive arguments canvassed on behalf of the contesting parties have been carefully considered. Also meticulously examined the materials made available before the Court including the pleadings.

10. It is accepted that the contract so floated by the NIT is a commercial transaction and it is within the exclusive domain of the authority concerned to choose his own method to arrive at a decision. The State/authority can fix its own terms and conditions in inviting tenders and the same cannot be brought

within the parameter of judicial review. It is upon the authority to get their any deposit secured and for that purpose any condition of such nature so put cannot be subject to judicial scrutiny.

11. In Poddar''s case (supra), it appears, no such condition as regards consequence in the related NIT was laid down and as such it was permissible on the part of the authority to deviate from their stipulated condition. In the instant case, the stipulated consequential condition is known to be petitioner and it is, therefore, incumbent on him to satisfy those terms and conditions while submitting the tender paper. Moreover by insertion of the consequential clause to the term condition in question, the same has made itself a mandatory provision.

12. In Global Energy Ltd. and Another Vs. Adani Exports Ltd. and Others, in paragraph-8 the Supreme Court opined that the deposit of some amount of earnest money was a normal condition of tender. The object was that only such parties who were financially sound and were serious in getting work of contract should make a bid otherwise any number of person who having so capacity financial or other wise would like to take a chance by making a bid.

13. In G.B. Mahajan and others Vs. The Jalgaon Municipal Council and others, while discussing the scope of reasonableness in the administrative law, the Apex Court quoting the observation from a case of Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation reported in 1948 1 KB-223 equivalent to 1947 (2) All ER 680, distinguished the nature of reasonableness into two parts i.e., proper use and improper abuse of power. In the instant case relying on this decision, it is argued that the action taken by the authority for asking earnest money through the mode of payment from a Nationalized Bank was done in exercise of proper use of power and the same action was absolutely made in bonafide. It is strenuously argued that nowhere in the pleadings in the instant case the petitioners have ever alleged any malafide or colourable exercise of power.

14. In a case of Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, , in paragraph-7 the Supreme Court held as under:

7. The law relating to award of a contract by the State, its corporates and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in Ramana Dayaram Shetty v. International Airport Authority of India, Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India, CCE v. Dunlop India Ltd. Tata Cellular v. Union of India Ramniklal N. Bhutta v. State of Maharashtra and Raunag International Ltd. v. I.V.R. Construction Ltd. The award of a 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 paramount are commercial consideration. 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 criteria 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 though it happens to be the highest or the lowest. But the State, its corporation, 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 on furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.

15. The Apex Court in a case B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others, categorically underlined the parameters and scope of judicial review in a contractual matter in paragraph 68 as under:

68. We are also not shutting our eyes to words 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 summarized 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 to made in resolution to all the parties in regard to any of such conditions, ordinarily against 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 of 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 tender, public interest would be given priority.

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

16. Be it also noted herein that in the instant case, the specific consequential condition to the effect that "Demand Draft of any associated Banks of State Bank of India shall not be accepted" has been known to the tenderers including the petitioners and notwithstanding such condition, the petitioner, being well aware of the same, has submitted the Account Payee Pay Order issued from the Dena Bank in clear violation of the term and condition as stipulated in the NIT.

17. In view of the above, this Court is of the firm opinion that the condition so stipulated in the NIT has been violated by the petitioner and as such, the tender submitted by the petitioner would be liable to be rejected. The impugned action of the HPC, is, therefore, not interfered with.

18. In view of what has been stated, discussed and observed above, this Court finds that this writ petition is devoid of any merit and the same stands dismissed.

However, there shall be no order as to costs.

