(2007) 12 GAU CK 0017

In the Gauhati High Court

Rafique Ahmed Mazumder APPELLANT

Vs

Hindustan Paper Corpn. Ltd. and Another RESPONDENT

Date of Decision : 07-12-2007

Acts Referred:
Constitution of India, 1950 — Article 14, 226

Citation : AIR 2008 Guw 85

Hon'ble Judges : Jasti Chelameswar, C.J;Brojendra Prasad Katakey, J

Bench : Division Bench

Judgement

B.P. Katakey, J.—The appellant filed WP(C) No. 2120/2007 challenged the action of the respondent Corporation in not accepting the tender papers submitted by him pursuant to the Notice Inviting Tender (NIT) dated 26-3-2007, on the ground that the earnest money in terms of Clause 2.1.3.1 of the NIT by way of demand draft/call deposit receipts issued by any branches of State Bank of India or Canara Bank or Central Bank of India has not been deposited by him. The said writ petition was dismissed by the learned single Judge vide judgment and order dated 19-6-2007 on the ground that the appellant writ petitioner has violated the condition stipulated in the NIT. Hence, the present appeal.

2. The facts relevant for the purpose of the present appeal is that a NIT was floated by the respondent Corporation, which is a Government of India Enterprises, on 26-3-2007 inviting bids from reputed and experienced contractors for transportation, bundling and feeding of bamboo for the period up to 30-6-2009 to be submitted along with the earnest money in the form of bank drafts/call deposit receipts in favour of the respondent Corporation payable at SBI, Sonakuchi Branch or Canara Bank, Jagiroad with a further stipulation that the offer without the earnest money deposit was liable to be rejected. In the bid documents supplied to the appellant writ petitioner, a stipulation has been made regarding the manner of deposit of the earnest money. In Clause 2.1.3.1 thereof, it has been provided that the earnest money is to be deposited in the form of demand draft/call deposit receipt drawn in favour of the respondent Corporation

issued by any branches of State Bank of India or Canara Bank or Central Bank of India payable at SBI, Sonakuchi, Jagiroad with the further stipulation that the demand draft of any associated banks of the SBI shall not be accepted. The appellant writ petitioner submitted his bid in a sealed cover pursuant to such NIT enclosing therewith an A/c Payee Pay Order issued by Dena Bank, which is a nationalized bank, drawn in favour of the respondent Corporation for an amount of Rs. 5 lakhs dated 16-4-2007 as earnest money deposit. The bid submitted by the appellant writ petitioner however, has not been considered by the respondent Corporation on the ground that the earnest money deposited by the appellant writ petitioner was not in terms of Clause 2.1.3.1 of the bid documents as the Pay Order was not issued by any branches of State Bank of India or Canara Bank or Central Bank of India. The said action of the respondent Corporation was challenged by the appellant in the writ petition as aforesaid.

3. We have heard Mr. D.S. Choudhury, learned Counsel appearing on behalf of the appellant as well as Mr. A.K. Phookan, learned senior counsel for the respondent Corporation.

Mr. Choudhury, referring to the condition stipulated in the NIT dated 26-3-2007 as well as Clause 2.1.3.1 of the bid documents has submitted that there is no reasonable basis for stipulating that the demand draft/call deposit receipts issued only by any branches of State Bank of India or Canara Bank or Central Bank of India is to be accepted towards the earnest money deposit. Such a condition, according to the learned Counsel, has no just or reasonable relation to the object of the earnest money deposit. Mr. Choudhury has contended that such an unjust and unreasonable condition is against the mandate of Article 14 of the Constitution of India and hence, the action of the respondent Corporation in not considering the technical and price bid of the appellant on the ground that the earnest money deposit was made in the form of an A/C Payee Pay Order issued by another nationalized bank, namely Dena Bank, cannot be sustained in law. Mr. Choudhury has further contended that in any case, the condition stipulated in the bid documents relating to the deposit of earnest money by way of demand draft/ call deposit issued only, by any of the branches of State Bank of India or Canara Bank or Central Bank of India being not the essential condition but merely ancillary or subsidiary with the main object of earnest money deposit to be achieved by the condition, the A/c Payee Pay Order issued by another nationalized bank, namely Dena Bank cannot be treated as the violation of the condition relating to the earnest money deposit and as such, necessary directions are required to be issued to the respondent Corporation to open and consider the technical and price bid of the appellant writ petitioner in respect of the work tendered for.

4. Mr. Phookan, learned senior counsel, per contra has submitted that it is being specifically made known to the intending bidders that the earnest money in the form of bank draft/call deposit issued only from any branches of State Bank of India or Canara Bank or Central Bank of India is to be accepted and there being

a specific stipulation that the demand draft of any associated banks of SBI shall not be accepted and any bid submitted by any tenderer in violation of such stipulation is liable to be rejected, hence, the action on the part of the respondent Corporation in not considering the technical and price bid of the appellant writ petitioner cannot be termed as illegal and arbitrary, as the authority is bond to adhere to the conditions stipulated in the NIT. Mr. Phookan has, however, submitted that the respondent Corporation in the subsequent NITs issued for other jobs has done away with such conditions relating to the requirement of depositing the earnest money in the form of bank draft/call deposit only from certain banks. Mr. Phookan has further submitted that no relief can be granted to the appellant writ petitioner in the present appeal as pursuant to the NIT dated 26-3-2007 the contract has already been awarded to another person who is executing the said work and awarding of contract to such person has not been challenged by the appellant writ petitioner either in this appeal or by filing any other writ petition and such a contractor is also not a party to the proceeding.

5. The question which arises for considering in the present proceeding is whether stipulation of the condition of making earnest money deposit by way of bank draft/call deposit only from certain banks unjust and unreasonable and it is a step towards achieving the object of earnest money deposit. The respondent Corporation, in Clause 2.1.3.1 of the bid documents has stipulated the manner in which the earnest money is to be deposited. For better appreciation, Clause 2.1.3.1 is quoted below:

2.1.3.1. Earnest Money as mentioned in the NIT is to be deposited in the form of a 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, Sonakuchi (HPC) (Code: 7699)/Or Canara Bank, Jagiroad (Code: 1436). Demand Drafts of any associated Banks of State Bank of India shall not be accepted.

6. Admittedly, the appellant writ petitioner submitted his bid pursuant to the NIT dated 26-3-2007 enclosing therewith an A/c Payee Pay Order drawn in favour of Hindustan Paper Corporation Ltd. for Rs. 5 lakhs issued by a nationalized bank, namely Dena Bank, Panbazar Branch at Guwahati. The appellant writ petitioner''s bid was classified as defective for not making the earnest money deposit in the form of an A/c Payee Pay Order issued by any branches of State Bank of India/ Canara Bank/Central Bank of India as stipulated in Clause 2.1.3.1 as above. It is the pleaded case of the respondent Corporation that only because such A/c Payee Pay Order was not issued from the said classified banks the tender papers submitted by the appellant writ petitioner was found to be defective and not for any other reason. The award of a contract whether by a private party or a public body or the State though essentially a commercial transaction and the authority can fix its own terms of invitation to tender, the State, its corporations,

instrumentalities and agencies cannot put an unreasonable, unjust and arbitrary condition in the tender as they have the public duty to be fair to all concerned. The Writ Court in exercise of its power under Article 226 of the Constitution of India though is required to exercise such power with great caution and in public interest, can strike down an unjust, unreasonable or arbitrary condition in the NIT.

7. In the instant case, the stipulation relating to the earnest money as quoted above is that the bank draft/call deposit issued only from any branches of SBI or Canara Bank or Central Bank of India is to be accepted. The respondent authority has I not been able to show any justification or I reasonableness in making such stipulation in the bid document and in exclusion of other nationalized banks. We also find no reason whatsoever for making such classification. Further, there is no stipulation either in the NIT or in the bid documents that the demand draft/call deposit issued by any other nationalized bank, except mentioning that such draft/ call deposit issued by any associated banks of SBI, shall not be accepted. The object of making the earnest money deposit being that only such parties who are financially sound or are sincere and serious in getting and executing the work participate in the tender process, the conditions stipulated in the NIT as well as the bid documents stipulating that the bank draft/call deposit issued only by certain banks to the exclusion of other nationalized banks would be accepted towards earnest money deposit, cannot be treated to be a step forward to achieve the object of making such deposit. Such condition has, in our opinion, no reasonable basis. Hence, such condition is violative of Article 14 of the Constitution of India.

8. The respondent Corporation, as submitted by Mr. Phookan, has in fact done away with such stipulation in the NIT relating to the earnest money deposit in its subsequent NITs issued for awarding different contracts.

Having held so, the normal consequence would have been to direct the respondent Corporation to consider the technical and price bid of the appellant writ petitioner submitted by him pursuant to the NIT dated 26-3-2007, but in the instant case, such a direction cannot be issued in view of the fact that the writ appellant did not challenge such condition before submitting his tender papers. He has in fact knowing fully well such requirement submitted his bid enclosing therewith a call deposit from a bank other than the banks mentioned in the NIT/ bid document. That apart, during pendency of the proceeding before this Court the contract has been awarded to another person pursuant to the said NIT, as submitted by the learned senior counsel for the respondent Corporation, which has also been accepted by the learned Counsel appearing on behalf of the appellant writ petitioner. The person in whose favour the contract has been awarded has also not been made a party either in the writ petition or in this appeal. For these reasons, we have not dealt with the question as to whether such condition relating to deposit of earnest money is an essential condition for a valid lender.

9. That being the position, no direction can be issued to the respondent Corporation to consider the technical and the price bid of the appellant writ petitioner and hence the decision of the learned single Judge refusing to issue such direction cannot be interfered with. The writ appeal is accordingly disposed of. No costs.

