

(2016) 01 CAL CK 0077

In the Calcutta High Court

Case No : F.M.A. 3532 of 2015 with CAN No. 7531 of 2015.

Railtel Corporation of India Ltd. and Others

APPELLANT

Vs

S.P. Telecom

RESPONDENT

Date of Decision : 13-01-2016

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2016) AIR(Calcutta) 219 : (2016) 3 BC 672 : (2016) 6 RAJ 687 :
(2016) 3 WBLR 560

Hon'ble Judges : Manjula Chellur, C.J.; Joymalya Bagchi, J.

Bench : Division Bench

Advocate : Kishore Dutta, Sr. Advocate, V. Baisya and N. Banerjee, Advocates, for the Appellant; Manju Agarwal and Bajrang Manot, Advocates, for the Respondent

Final Decision : Allowed

Judgement

1. Heard. Mr. Dutta, learned senior counsel arguing for the appellants and so also Ms. Agarwal, learned counsel arguing for private respondent.

2. The subject matter of the writ petition was a tender invited by the appellant/corporation for "deployment of maintenance teams for maintenance of OFC cable network and upkeep of associated gears for a period of 3 years and extendable by one year". It is not in dispute the respondent/writ petitioner was rendering service in several sections in the eastern region and so far as the dispute which led to the rejection of tender application of the respondent/writ petitioner it pertains to one section, southern region. The present tenders numbering 39 are in the eastern region.

3. The contention of the writ petitioner is with regard to Clause 29.3 of the tender conditions which reads as follows:-

"29.3 Contractors defaulting in one section and having their contract terminated will not be allowed to participate in Railtel's next O and M tender for a period of

3 years in any of it's regions".

4. According to the respondent/writ petitioner, this Clause 29.3 in the tender application virtually amounts to blacklisting the writ petitioner and such arbitrary condition is nothing but in violation of principles of natural justice as there was no opportunity of being heard to the writ petitioner before implementing the condition no.29.3. It is brought to our notice that in both the technical and financial bid the writ petitioner was the lowest bidder in 11 sections.

5. To support her submission she relied upon a judgment of the Apex Court in the case of Ramana Dayaram Shetty v. The International Airport Authority of India and others reported in All India Reporter 1979 Supreme Court 1628.

6. According to the appellant/corporation, condition no.29.3 of the tender condition may lead to prejudice so far as the rights of the writ petitioner to participate in the tender process but it cannot be considered or equated with blacklisting since other existing works carried on by the writ petitioner in other sections will not be stopped except not allowing the applicant to participate in future tenders for a period of three years. Therefore, according to them such condition at Clause 29.3 is a pre-cautionary measure taken by the authorities to see that the project undertaken by the successful tenderer is carried on smoothly and they have no occasion of termination of their contracts. It is further argued that even in earlier tender applications such condition was prescribed and in such tender process the writ petitioner having participated and being successful now cannot turn around and complain that said clause is arbitrary and prejudicial to the interest of the writ petitioner.

7. It is not in dispute that technical bid and financial bid are the two limbs of a tender process. During the course of arguments it was pointed out that in spite of termination of one of the contracts which became the bone of contention in terms of Clause 29.3 of the tender conditions, the writ petitioner did not challenge the same though an application was belatedly filed before the authorities after the issuance of the impugned NIT. The learned Judge directed the case of termination of the petitioner to be considered by the authority before proceeding with the further tender process. Admittedly, there was no such prayer to set aside the impugned termination in the writ petition.

8. Learned counsel for the respondent / writ petitioner submits that now the writ petitioner is intending to challenge the said termination of contract which had come in the way of present tender process so far as the writ petitioner is concerned.

9. Be that as it may, we have to consider whether imposing a condition like Clause 29.3 is arbitrary and therefore the writ petitioner is entitled to be heard on the same as directed by the learned Single Judge.

10. According to the writ petitioner after it had withdrawn from the contract for non-payment of bills way back on 12.06.2014, on 23.06.2014 a termination

notice was sent to them and therefore it cannot be termed as termination on default as the writ petitioner had been compelled to withdraw from the work. Whether it was an withdrawal of contract by the writ petitioner on the account of latches on the part of the appellant/corporation or in fact termination of contract for default on behalf of the appellant/corporation is not subject matter in the present writ petition. We fail to understand why such termination was not challenged by the writ petitioner prior to the issuance of NIT or even till date. Even in the present writ petition such challenge was not raised except alleging in the body of the writ petition that there was illegal termination of contract and rather it was a withdrawal and not a termination of contract.

11. It is not uncommon for the authority or agency to impose pre-cautionary conditions in a tender process as terms and conditions since such project would not only involve huge financial burden so far as the authority is concerned but the public interest and public money would be blocked or get frustrated if the process of tender or participation of tenderers with dubious or ill-reputed participants take part in the tender process. Therefore, condition has been imposed so as to ensure that the participant not only has the experience in a particular type of project but also has proper financial resources to complete the project within the time frame so as to give the public the benefit which has to flow from the project. In order to ensure completion of the project within a proper time with proper quality of work, several conditions are put in the tender process. We do come across such conditions with regard to blacklisted contractors in several applications declaring that if any of the applicants are blacklisted in any other part of the country or a particular region so far as a particular kind of project, they will not be allowed to take part in the tender process.

12. We are therefore of the opinion such condition is neither uncommon in tendering process of public authorities or per se illegal. If the writ petitioner was aggrieved by the termination of the earlier work order which was a product of an earlier tendering process containing the same condition, it was open to the writ petitioner to challenge the same which it has chosen not to do till date and now since such condition is coming in the way of the writ petitioner almost one year later, petitioner is thinking of challenging that too after pointed out by the Court during the course of argument.

13. In the light of above observation and discussion, we are of the opinion that condition at Clause 29.3 is a reasonable term of tender which cannot be called into question in judicial review. It is only a precautionary measure taken by the authorities to ensure that the project goes to well-reputed hands and would be completed within the time frame.

14. In the light of such observations by us, we are of the opinion that hearing the writ petitioner before completing the tender process does not arise. It is nothing but enlarging the scope of the present writ petition and belatedly allowing the writ petitioner to challenge the termination which is altogether a different cause

of action and had not ever been prayed in the writ petition.

15. Therefore, we set aside the order of learned Single Judge by allowing the appeal and the appellants are at liberty to proceed with the tender process.