
(2004) 07 PAT CK 0072

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 5096 of 2004

Shree Gopal Bhagwan Das

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 05-07-2004

Acts Referred:

Citation : (2004) 07 PAT CK 0072

Final Decision : Allowed

Judgement

Radha Mohan Prasad, J.—In this writ petition, petitioner is aggrieved by the acceptance of bid of Hindustan Paper Corporation Ltd. (respondent No. 5) and later award of contract for supply of Mill Water Mark Cream Wove White Printing Papers and White Cover Paper, although they had not complied with the mandatory requirement of the condition with respect to deposit of earnest money, whereas the petitioner complied all the conditions including deposit of earnest money within time, and their price bid was lower than the respondent No. 5 as claimed.

2. In short, the case of the petitioner is that respondent-Bihar State Text Book Corporation, which is an instrumentality of the State Government and State within the meaning of Article 12 of the Constitution issued advertisement in February, 2004 in daily newspaper inviting sealed cover tender for supply of Mill Water Mark Cream Wove White Printing Paper vide Annexure-1. Petitioner, which is a partnership firm being interested approached the authority and obtained the tender form by paying a fee of Rs. 1,000/- and Submitted it in two different sealed cover i.e. technical bid in cover A (Form A) and financial bid in cover B (Form B) within the stipulated period along with other relevant documents and demand draft of Rs. three lacs as earnest money. According to the petitioner, there were only two bidders. On 20th March, 2004 the technical bid as well as financial bid was opened and the petitioner made objection that the respondent No. 5 had not deposited the earnest money of Rs. three lacs by demand draft, which was one of the eligibility condition for participating in the said tender. It is

alleged that the respondents ignored the objection raised by the petitioner and opened the technical bid as well as financial bid and after opening the financial bid it came to the light that the price quoted by the petitioner was much lower than the price quoted by respondent No. 5. Hence, they filed writ petition. Later, in supplementary affidavit the petitioner stated that the respondents have awarded the contract to respondent No. 5 ignoring all norms including deviating from the consistent stand of awarding contract to lowest bidder.

3. This Court considering the facts and circumstances on 12.5.2004 issued notice to respondent No. 5 for disposal of this writ petition making the Rule returnable within six weeks. It was made clear that if respondent No. 5 enters appearance before the expiry of the returnable date, the matter shall be listed immediately thereafter at the top of the supplementary list for final disposal. Till further orders, the respondents were restrained from accepting/making supply pursuant to the tender notice, contained in Annexure-1.

4. In the counter affidavit filed on behalf of respondent Nos. 3 and 4 it is admitted that one of the requirements as per the instruction to bidders for valid tender the eligibility and qualification was to submit the tender in the prescribed form and accompanied by earnest money of Rs. three lacs by demand draft in favour of the Managing Director of the Text Book Corporation. A comparative chart of the rates given by both the firms in separate sheets have been brought on record as Annexure-A. With reference to the said chart, it is stated that the rate quoted by respondent No. 5 for 130 GSM Cover appear is lower than the rate quoted by the petitioner. As regards text reel paper of 56 GSM, it is admitted that the rate quoted by the petitioner is lower than respondent No. 5. However, according to the said respondents, respondent No. 5 is Central Government undertaking whereas the petitioner is a private firm and as per the notification No. DPE/13/(1)/2002 FIN dated 14th June, 2002 (Annexure-B) issued by the Ministry of Heavy Industries and Public Enterprises, Department of Public Enterprises, New Delhi, 10% purchase preference is to be granted to respondent No. 5. As per the said instruction if 10% is added to the lowest price quoted by the petitioner, it would come within the ambit of lowest quoted rate by respondent No. 5, which, according to the respondents is more superior than the Mills quoted by the petitioner. Insofar as non-deposit of earnest money by respondent No. 5 along with their tender, a reference has been made to the letter issued by the Ministry of Heavy Industries and Public Enterprises, New Delhi dated 2nd December, 2003 (Annexure-C) in which there is provision that the Central Government Organisation are exempted from depositing the earnest money. According to the said respondents in the light of this provision, respondent No. 5 has been exempted from depositing of any earnest money. It is further stated that earlier also respondent No. 5 had supplied papers to the Text Book Corporation on credit basis and the Corporation has to pay Rs. five crores to them for supply of papers which they had already made. In paragraph 17, it is stated that the Tender Committee of the Corporation after taking into consideration, the instructions issue by the Ministry of Heavy Industries and

Public Enterprises, New Delhi, and the quality of paper quoted by respondent No. 5 and also that they are supplying papers to the Corporation on credit basis + 16% excess exemption finally vide memo No. 1368 dated 8.4.2004 asked them to supply the required water mark text paper and cover paper.

5. Reiterating the contention raised by respondent Nos. 3 and 4, respondent No. 5 has also filed separate counter affidavit as well as I.A. No. 2785 of 2004 for vacating the order of stay granted vide order dated 12.5.2004. In the interlocutory application for vacating the order of stay, respondent No. 5 has stated that in response to the supply order, contained in Annexure-R/7 they submitted proforma invoice to the Managing Director of the Text Book Corporation vide Annexure-R/8 showing readiness to perform its part of the contract. As regards deposit of earnest money, the said respondent in the counter affidavit has reiterated that exemption was granted under the policy decision of the Government of India and further that the respondent had earlier supplied papers to the respondent-Text Book Corporation and about five crore rupees is still lying with them and, thus, it was well within the jurisdiction of the Corporation to realise the earnest money amount due with them. However, none of the respondents have referred to any such decision of the respondent-Text Book Corporation to exempt respondent No. 5 from depositing the earnest money as per the mandatory requirement of the tender notice.

6. In the rejoinder to the contention about the higher rate quoted by the petitioner for cover paper, it is stated that as per Clause 5 of the tender it would be evident that the requirement of text paper for printing of the books is 8000 Metric tonnes, whereas requirement for white cover paper is only 800 Metric tonnes and on comparison of the amount involved which has to be paid by the Text Book Corporation it would be evident that even when the price of the petitioner with regard to the cover paper is higher by Rs. 1702.70, the payment of the total amount by the Text Book Corporation to the petitioner which includes white printing paper and cover paper will be much lesser than the amount to be paid to respondent No. 5. According to the petitioner, the total amount payable to respondent No. 5 would be Rs. 27,02,60,000/- whereas the total amount at the rate quoted by the petitioner will be Rs. 26,15,02,968/-. It is, thus, contended that the Text Book Corporation by giving supply order to respondent No. 5 will be paying excess of a sum of Rs. 87,57,032/-. As regards the decision of Government of India, contained in Annexure-R/6, it is contended that it applies to the Central Government Public Sector Undertaking where Central Government or CPSE share is 51% or more and not to the Text Book Corporation where the Central Government or Central Government Public Undertaking is not having any share. As regards Annexure-C to the counter affidavit filed on behalf of respondent Nos. 3 and 4, which has been annexed as Annexure-R/1 to the counter affidavit filed by respondent No. 5, it is stated that this was a letter whereby the Department of HISPE has recommended to the Director, NCERT to exempt HPC from depositing earnest money against the tender for supply of 5000 M.T. of Maplitho paper to NCERT, New Delhi. Thus, according to the

petitioner, the said letter is of no help to the respondents and has been filed with oblique purpose to mislead this Court.

7. Learned counsel for the petitioner has, thus, contended that as per Clause 5(c) no tender can be considered valid if it is not submitted in prescribed form and not accompanied with earnest money of Rs. three lacs by demand draft in favour of Managing Director of the respondent-Text Book Corporation. It is contended that as admittedly tender filed by respondent No. 5 did not accompany with earnest money of Rs. three lacs the same was not a valid tender, and, thus, liable to be rejected at the out set. According to the learned counsel for the petitioner, the plea that respondent-Text Book Corporation owe about five crore rupees to respondent No. 5, and as such, they were exempted from depositing of earnest money is not born out from the records not it is at all tenable in view of the fact that the tender of respondent No. 5 was invalid on account of non-deposit of earnest money along with tender as per the requirement and could not have been considered for "participating in the bid nor even eligible to take part in the negotiation as has been held in numerous decisions and also in the recent decision of this Court in the case of Shivam Sugar Product Vs. The Food Corporation of India and Others, . He contended that neither the authority was competent to grant, any such exemption in view of the mandatory requirement in the tender notice nor even any such decision has been brought by them on the record. According to the learned counsel for the petitioner, the respondents have tried to justify their action by bringing such facts by way of affidavit, which is not permissible in view of the law settled by the Apex Court in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, . As regards the rate, learned counsel submitted that the instructions of the Government of India relied upon by the respondents have nothing to do with the present case, moreso, when respondent No. 5 did. not fulfil even the eligibility criteria for consideration of their case pursuant to the tender notice. Moreover, according to the learned counsel for the petitioner, purchaser preference for products and services of Central Government Public Enterprises given by Government of India vide Annexure R/6 was extended for two more years i.e. only up to 31.3.2004, whereas the order for supply has been given to respondent No. 5 on 8.4.2004, and, thus, also the plea of the respondents on placing order with respondent No. 5 at a higher rate is not at all tenable.

8. Learned counsel for the respondents have submitted that no error has been committed by the respondent-Text Book Corporation in considering the case of respondent No. 5 which is Government of India Organization and is governed by different Rules/Conditions/Standard. It has been submitted by the learned counsel for the respondents that considering the facts that the respondent-Text Book Corporation owe five crores rupees to respondent No. 5 and also that respondent No. 5 is Government of India undertaking and were ready to supply papers to the Corporation on credit basis placed order to them for supply of the required water mark text paper and cover paper by exempting them from

depositing the earnest money. It has further been contended by them that the petitioner did not indicate in the tender paper about the supply on credit basis which was one of the essential requirements as per the terms and conditions of supply contained in Clause 4 of Annexure-2. Further, it has been contended by them that tender of the petitioner was not found worth consideration as the rates of the products quoted by them was more than one paper mills/units which is in violation of Sub-clause (e) of Clause 5 of the eligibility criteria.

9. In reply, learned counsel for the petitioner submitted that there is no substance in the submissions of learned counsel for the respondents. Once respondent No. 5 did not fulfil the eligibility criteria under Clause 5(c) of the terms and conditions on violation of which their tender itself was not valid for consideration, the order given to them for supply of the papers pursuant to the tender notice is wholly illegal, arbitrary and mala fide. With respect to the objection of the respondents on account of which tender of the petitioner was not found worth consideration, learned counsel submitted that there is no substance in it at all. In fact, the financial bid (Form B) submitted by the petitioner, contained in Annexure-2 itself would show that they had offered for supply by allowing cash discounts of 3.5% against L/C (Letter of Credit) or advance draft. Moreover, that was not the mandatory requirement on account of which their tender can be said to be invalid. With respect to the restriction for quoting rates of products of more than one paper mills/units, learned counsel submitted that the contention of the respondents is wholly untenable as the rates of the products quoted by them for each item is not of more than one paper mills/units as would be evident from Annexure-2 itself. For the supply of water mark paper the petitioner quoted only from one unit i.e. "CP Unit" and for white cover paper they quoted "APPM" Unit for different reel/sheet.

10. I find substance in the submission of the learned counsel for the petitioner. It is well settled that non-compliance of mandatory requirement/eligibility criteria invalidates the very tender submitted by the participant and in the present case Clause 5(c) of the terms and conditions clearly provides that not tender shall be considered valid if it is not submitted in prescribed form and not accompanied with earnest money of Rupees three lacs by demand draft in favour of the Managing Director, B.S.T.B.P. Corporation, Patna payable at Patna. This having not been complied by respondent No. 5, the tender itself was invalid and could not have been considered on any account whatsoever. Moreover, the plea of the respondents for grant of exemption as per Government of India's instruction to the Director, NCERT, contained in Annexure-C is wholly untenable as it is simply a recommendation and that to the Director, NCERT and not to any other organisation especially over which the Government of India has no control. In any view of the matter, if at all the respondent-Text Book Corporation wanted to apply the same in the present case then it should have been made clear in the tender notice itself, but, this having not been done, in my opinion, such plea taken by the respondents is wholly untenable and fit to be rejected.

The Apex Court in the case of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, tender of a person who does not fulfil the requisite qualification laid down in the tender notice cannot be accepted. The relevant extract from the aforementioned decision are quoted hereinbefore :

"It is, therefore obvious that both having regard to the constitutional mandate of Article 14 as also the judicially evolved rule of administrative law, the 1st respondent was not entitled to act arbitrarily in accepting the tender of the 4th respondents, but was bound to conform to the standard or norm laid down in paragraph 1 of the notice inviting tenders which required that only a person running a registered IInd Class hotel or restaurant and having at least 5 years" experience as such should be eligible to tender.....Admittedly the standard or norm was reasonable and non-discriminatory and once such a standard or norm for running a IInd class restaurant should be awarded was laid down, the Ist respondent was not entitled to depart from it and to award the contract to the 4th respondents who did not satisfy the condition of eligibility prescribed by the standard or norm.....The action of the Ist respondent in accepting the tender of the 4th respondents, even though they did not satisfy the prescribed condition of eligibility, was clearly discriminatory, since it excluded other persons similarly situate from tendering for the contract and it was also arbitrary and without reason. The acceptance of the tender of the 4th respondent was, in the circumstances invalid as being violative of the equality clause of the Constitution as also of the rule of administrative law inhibiting arbitrary action."

11. With respect to the objection of the respondents on account of which tender of the petitioner was not found worth consideration, this Court finds substance in the submission of the learned counsel for the petitioner. Annexure-2 itself would show that the petitioner had offered for supply by allowing cash discount of 3.5% against L/C (letter of credit). Moreover, that was not mandatory requirement on account of which the tender can be said to be invalid. Further, this Court finds from the letter of the Managing Director of the respondent-Text Book Corporation to the Assistant Manager of M/s. Hindustan Paper Corporation Limited (respondent No. 5) (Annexure-D to the counter affidavit of respondent Nos. 3 and 4) that the Corporation has offered advance payment against proforma invoice for supply of papers by respondent No. 5, whereas such untenable plea that the petitioner did not offer to supply the papers on credit basis has been taken on behalf of respondent-Text Book Corporation. As regards alleged quotation of rates of products of more than one paper mills/units by the petitioner in violation of requirements of- the terms and conditions, this Court finds substance in the submission of the learned counsel for the petitioner that it is wholly untenable as, the rates of the products quoted by them for each item is not more than of one paper mills/unit as is evident from Annexure-2 itself. For the supply of Water Mark Paper the petitioner quoted the rate of one unit i.e. CP Unit and for the White Cover Paper they quoted the rate for APPM Unit for different reel/sheet and not that the rates quoted by them for each item is of more than one paper mills/units.

12. Moreover, the plea of the respondents for giving purchase preference in the matter of rates under Government of India office memorandum (Annexure-R/6) is also not at all tenable as it relates to only for supply of such organisation to the Ministries/Departments/CPSEs and Autonomous body under Central Government and cannot have any binding effect on the State or its Agencies. Moreover, bare perusal of the office memorandum (Annexure-R/6) shows that purchase preference policy has been extended for two years i.e. only up to 31.3.2004 whereas the supply order in the present case has admittedly been issued after its expiry i.e. on 8.4.2004.

13. Under such circumstances, this Court finds the action of the respondent-Text Book Corporation in giving purchase order for supply under the tender notice (Annexure-1) to respondent No. 5 and denial of the same to the petitioner wholly illegal, arbitrary and mala fide particularly when the tender submitted by respondent No. 5 is not even eligible for consideration, whereas there is nothing wrong with the tender submitted by the petitioner and their tender was only valid for consideration.

14. In the result, writ application is allowed. The order for supply given to respondent No. 5 pursuant to the tender notice, contained in Annexure-1 is held to be bad and is hereby quashed. The respondents are directed to consider the tender of the petitioner in accordance with law.