

(2019) 03 DEL CK 0188

In the Delhi High Court

Case No : Review Petition No. 87 Of 2019 In Civil Writ Petition No. 12018 Of 2018, Civil Miscellaneous Application No. 9368 Of 2019

Simplex-Aanav Jv Through: Manish Sachdeva

APPELLANT

Vs

South Delhi Municipal Corporation Through: Commissioner

RESPONDENT

Date of Decision : 26-03-2019

Acts Referred:

Constitution Of India, 1950 — Article 14, 19
Code Of Civil Procedure, 1908 — Order 47 Rule 1

Citation : (2019) 03 DEL CK 0188

Hon'ble Judges : S. Ravindra Bhat, J;Prateek Jalan, J

Bench : Division Bench

Advocate : S.D. Singh, Kartik Arora, Dhanesh Relan, Komal Soront, Rajeev Jha

Final Decision : Dismissed

Judgement

Prateek Jalan, J

1. Review of the judgment dated 20.11.2018 by which the writ petition was dismissed, is sought by this proceeding. The review petition has been filed pursuant to an order dated 18.02.2019 passed by the Supreme Court in SLP(C) No. 487/2019. The petitioner had challenged the judgment under review by way of the said Special Leave Petition, which was dismissed as withdrawn with the following observations:-

"Learned counsel appearing for the petitioner states that instead of challenging the tender condition, he seeks to go back to the High Court on an alternative plea viz., that he will procure approved original equipment only from the list of manufacturers given. With this observation, we permit the petitioner to withdraw the special leave petition and approach the High Court in a review within two weeks from today.

In the meanwhile, the tender will not be processed further.

The special leave petition stands dismissed as withdrawn."

2. The writ petition concerns a tender issued by the respondent South Delhi Municipal Corporation (hereinafter, "SDMC") dated 04.07.2018 for the construction, operation and maintenance of three automated multi-level car parks. The principal challenge urged before us at the time of hearing of the writ petition, as noted in the judgment under review, was with respect to the stipulation in the tender conditions by which certain components of the automated parking system were to be manufactured by seven named original equipment manufacturers (hereinafter, "OEMs"). The contention of the petitioner was that it also possessed technologies, systems and designs of multi-level car parks and had experience in the construction, operation and maintenance thereof. The petitioner sought a direction that it be permitted to participate in the tender de hors the aforesaid restrictions.

3. Upon a consideration of the tender condition in the context of the limited scope of judicial review in such cases, the writ petition was dismissed.

4. The Special Leave Petition filed by the petitioner before the Supreme Court has been placed on record with the review petition. It appears therefrom that the petitioner had reiterated the contentions urged before this Court in respect of the impugned tender conditions. However, the petitioner also placed certain additional documents before the Supreme Court and ultimately withdrew the Special Leave Petition, on its statement that it wished to urge an additional plea before this Court by way of a review petition viz., that it will procure approved original equipment only from the list of manufacturers given.

5. We may observe at the outset that the review petition is unfortunately not limited to the contention recorded in the order of the Supreme Court but seeks additionally to revisit the original challenge. This is evident inter alia from the following extracts of the review petition:-

"9. That in pursuance to the tender invited by the respondent which was challenged before this Hon'ble court only one bidder namely M/s Sotefin SA submitted its bid who is the one of the OEMs for fully automated robo-shuttle type automated car parking system. From this fact also it is clear that condition as challenged by the petitioner before this Hon'ble court is not conducive and is not in the interest of anybody including the bidders, respondent and public at large. It is also relevant to point out that no bidder is available to participate in the tender. It is relevant to point out that it would lead to be a limited tender. In view of the non availability of the bidders the earlier bid was cancelled by the Respondents and Respondents decided to call the fresh bid for car parking in question by adding one more car parking. The result of such unreasonable condition as challenged in the writ petition is apparent on the face of record. The respondent is totally unjustified in creating such situation that all the Indian bidders would be precluded from participation in the bid. The undue advantages are being caused to the OEMS unmindfully. The decision is shocking and unreasonable and it would reduce the scope of competition. The decision has been taken by over looking the facts that the best automated car parking can be

erected by using the three components manufactured by other manufacturer and as assembled by other manufacturers and bidders than the components manufactured by the OEMs.

It is submitted that under no circumstances the respondent is justified in insisting for the tie up of the bidder with the approved OEMs as a pre condition to participate in the bid. It is submitted that without prejudice to what-so-ever stated above that any bidder who fulfils technical eligibility criteria except the condition of having tie up with the OEMs, will have right to participate in the bid and such bidder will have liberty to procure all the three components from approved OEMs."

xxxx xxxx xxxx

Grounds

That this Hon?ble Court ought to have appreciated and non-appreciation of the facts as mentioned in the present application, in the form of grounds would certainly lead to the error apparent on the face of record, warranting the exercise of jurisdiction under Order 47 Rule 1 CPC. These grounds are being mentioned herein below independently and even those grounds were incorporated in the Special Leave Petition, therefore it would be necessary that this Hon?ble Court may kindly be pleased to consider those grounds in the present petition and pass the appropriate order by setting aside the impugned order as it has been directed by the Hon?ble Supreme Court:-

A. That the petitioner submits that the respondents authority are totally unjustified in confining the purchase of the 3 equipments namely "Robo parker", "Elevator" and "shuttle" from 7 OEMs as giving in the NIT Document particularly when as per the respondents the bidder who does not have association and Tie-up with the any of the OEMs, cannot participate in the bid.

Consequently the rights of the petitioner being one of the best persons to construct the automated car parking or puzzle car parking, get adversely affected and opportunity to submit the bid and participate in the tender would be taken away. Therefore the right as guaranteed under article 19 of the constitution of the India are taken away due to the total unreasonable decision of the Respondent. Accordingly the action of the respondents is unconstitutional and is required to be struck out.

B. That this Hon?ble Court may appreciated that the petitioner herein had executed and constructed several Automated Car Parkings successfully, by the using the best quality of the 3 equipments and as such there was no justification for the respondents to incorporate such unreasonable conditions that the aforesaid 3 equipments/components would be purchased from 7 OEMs, but the respondents authorities for extraneous reasons took the arbitrary decision to incorporate such impugned conditions. Therefore the writ petition as filed by the petitioner should have been allowed. It is also submitted that there is a clear

error in the impugned order while dismissing the writ petition.

XXXX XXXX XXXX

"F. That it is submitted that clause 29 of the NIT provides a right in favour of the successful bidder to engage the specialised agencies for completion of the works awarded and if the impugned condition is permitted to remain, it would make the aforesaid clause redundant and the said clause would be superfluous. Accordingly the incorporation of the impugned condition is unreasonable and required to be set aside, particularly no prejudice would be caused to the respondents and the projects in question.

G. That the respondents could not be able to controvert the various facts as mentioned in the Writ Petition to the effect that the Petitioner herein has executed several projects by providing the equipments as required to construct the automated multilevel car parking and the quality of the project would completely be maintained particularly when all the projects completed by the Petitioner are functioning upto the mark and accepted by all the authorities. It is further submitted that the car parkings constructed by the Petitioner are functioning well. Therefore, there is no justification for the Respondents herein to confine the scope of the bid by issuing the impugned condition in the NIT Documents.

H. That the Petitioner most respectfully submits that there was no justification and rational for fixing the list of approved OEMs particularly when such acts led to the favouritism to those manufacturers and would deprive the Petitioner and other similarly situated persons to get an opportunity to participate in the bid for the purpose of getting the works awarded and for execution thereof.

I. That the action of the Respondents is totally led to the favouritisms to the OEMs and it has created a kind of monopoly for those manufacturers and even the scope of competition got reduced. Therefore, the reduction in the scope of the competition is totally unjustified and would not in the interest of the public at large and the Respondents. It is submitted that there are specifications and standard prescribed for each and every equipments for construction of the project. Therefore, there was no justification for the Respondents to confine the approved OEM as has been done in the present matter. It is further submitted that the action of the Respondents is violative of the mandate of equality as enshrined under Article 14 of the Constitution of India."

XXXX XXXX XXXX

"S. That in pursuance to the tender invited by the respondent which was challenged before this Hon'ble Court only one bidder namely M/s Sotefin SA submitted its bid who is the one of the OEMs for fully automated robo-shuttle type automated car parking system. From this fact also it is clear that condition as challenged by the petitioner before this Hon'ble Court is not conducive and is not in the interest of anybody including the bidders, respondent and public at

large. It is also relevant to point out that no bidder is available to participate in the tender. It is relevant to point out that it would lead to be a limited tender. In view of the non availability of the bidders the earlier bid was cancelled by the Respondents and Respondents decided to call the fresh bid for car parking in question by adding one more car parking. The result of such unreasonable condition as challenged in the writ petition is apparent on the face of record. The respondent is totally unjustified in creating such situation that all the Indian Bidders would be precluded from participation in the bid. The undue advantages are being caused to the OEMs unmindfully. The decision is shocking and unreasonable and it would reduce the scope of competition. The decision has been taken by over looking the facts that the best automated car parking can be erected by using the three components manufactured by other manufacturer and as assembled by other manufacturers and bidders than the components manufactured by the OEMs.

It is submitted that under no circumstances the respondent is justified in insisting for the tie up of the bidder with the approved OEMs as a pre condition to participate in the bid. It is submitted that without prejudice to what-so-ever stated above that any bidder who fulfils technical eligibility criteria except the condition of having tie up with the OEMs, will have right to participate in the bid and such bidder will have liberty to procure all the three components from approved OEMs."

(Emphasis supplied)

6. In our view, the aforesaid facts and grounds do not disclose any error apparent on the face of the record which would justify a review of our judgment dated 20.11.2018. The very same arguments have been considered therein, and no statutory provision or binding judgment which was originally overlooked has been cited in support of the application for review. We also do not read the order of the Supreme Court dated 18.02.2019 as requiring reconsideration of the same arguments which were dealt with in the judgment under review; to the contrary, the Supreme Court has recorded the petitioner's contention that it wished to approach this Court on "an alternative plea".

7. Mr. S.D.Singh, learned counsel for the petitioner submitted that the alternative plea that he wished to urge before us was that a bidder ought not to be required to have a prior arrangement or understanding with any of the approved OEMs. His contention was that the petitioner ought to be permitted to participate in the tender without such an arrangement or understanding and would, if successful, procure the equipment from one of the approved OEMs.

8. We are unable to grant relief to the petitioner, even on this alternative plea. Once it is accepted that the equipment must be provided from an approved OEM, there is nothing arbitrary or unreasonable in requiring a bidder to demonstrate its preparedness to do so, particularly when the equipment is specialized and custom- made, as in this case. As discussed in the judgment under review, the

scope of challenge to tender conditions is relatively limited, and we do not find this ground sufficiently compelling to return a finding of manifest arbitrariness. We are also of the opinion that public interest would not be served by interdicting a tender process in the circumstances made out by the petitioner.

9. A consideration of the eligibility conditions in the tender also demonstrate that the petitioner is not entitled to the relief claimed. The tender which was the subject matter of the writ petition contained various eligibility conditions and qualifications in Clause 11. The experience criteria contained in Clause 11.1.3 provided separately for technical qualification and financial qualification. The criteria provided for technical qualification, which are relevant for the purpose of this case, are as follows:-

"11.1.3 Experience: Wherever mentioned and as required in 11.2 and 11.3, the bidder(s) shall meet the conditions of Similar/ relevant works and submit the required documents alongwith in respect to corresponding mentioned fields. For different modes of bidding (i.e. as individual or in group) the required experience for meeting criteria are specified as below to be read in correspondence with the matching eligibility conditions in 11.2 and 11.3 respectively:

For technical Qualification (as in 11.2)

(a) Bidder/ s must have minimum experience defined for similar works in the following and under as:

i. Minimum experience in similar works in respect to Civil Works of at least:

One completed work of Construction of Multi-level structures in RCC & steel or RCC (including Automated or conventional Multi-level Car parking), either over-ground or underground, including finishing, MEP services, firefighting installations.

ii. Minimum experience in similar works in respect to Car parking systems of (at least):

One completed works as OEM of 80 ECS during the last seven years.

OR

Two completed separate works as OEM of 60 ECS during the last seven years.

OR

Three completed separate works as OEM of 60 ECS during the last seven years.

Note: Original Equipment Manufacturer (OEM): provision of technology, installation, testing and commissioning of Automated Car parking systems as per the technology requirements of the project in compliance with the EN NORMS. (Including its engineering & system design, specifications & logistics) of minimum three systems in India/Ten systems world over. The concerned must have an experience of operating and maintaining the system of comparable

technology for 2 years (at least) totaling of 100 ECS."

10. "The minimum eligibility conditions" referred to in the above Clause were further elaborated in Clause 11.2 in the following terms:-

"11.2 Minimum Eligibility Conditions

(a) In complete independent capacity, Bidder can be Indian registered or foreign registered individual firm meeting with minimum experience criteria of in similar works in respect to BOTH civil works and parking systems.

(b) Bidder (s) bidding individually, but in MoU with an OEM for parking systems must:

i. Bidders should have had experience of similar works in respect to civil works with any Govt organisation in India/with multinational/listed company/semi government.

ii. Such Bidders are only eligible, if they have agreement with a parking system counterpart who meet minimum experience criteria in Similar works in respect to parking Systems [manufactured/supplied parking system should comply the specifications mentioned in the tender document as per EN NORMS].

(Such bidder (as mention in 2.1b)) must have an agreement with a OEM for parking systems as Memorandum of Understanding [MoU] with relevant documents for MINIMUM EXPERIENCE for evaluation, substantiating the TECHNICAL criteria in respect of supply/installations, manufacture and logistics support to the said bidder prior to submission of bid proposal).

OR

i. Bidders should have had experience of similar works in respect to parking Systems (manufactured/supplied parking system should comply the specifications mentioned in the tender document as per EN NORMS).

ii. Such Bidders are only eligible, if they have agreement with an eligible bidder who meets minimum experience criteria in similar works in respect to civil works with any Govt. organization in India/with multinational/listed company/semi government.

(Such bidder (as mention in 2.1 (b)) must have can agreement with a civil works counterpart as Memorandum of Understanding [MoU] with relevant documents for MINIMUM EXPERIENCE in for evaluation, substantiating the TECHNICAL AND FINANCIAL, criteria in respect of parking systems.

11.2.1 Bidders applying in form of a (group) JV/Consortium, each member of such a consortium or JV must hold a minimum participation percentage (including equivalent stake in legal and financial modalities) as agreed with the members of the group. The lead member must commit to hold a minimum equity stake not less than 51% of the aggregate shareholding of the Consortium for Construction and Operation & maintenance Period. Any group should, within its

constitution, must fulfil the following:

h) At least one member of the group should compulsorily be a parking system/supplier. Such member should meet the minimum experience criteria in respect to similar works for parking systems.

(Evaluation / consideration of completion certificate / credentials of projects fulfilling the above criteria will be only taken into account).

i) At least one member should be experienced in civil construction. Such member should meet the minimum experience criteria in respect to similar works for civil works. (Evaluation/consideration of completion certificate/credentials of projects fulfilling the above criteria will be only taken into account.)"

11. Clause 11.1.3 also refers to the "list of approved OEMs in RFP Vol-II". The list provided and referred to in the experience criteria as follows:-

"LIST OF APPROVED ORIGINAL EQUIPMENT MANUFACTURERS

(For Equipment detailed as per put 5, 6 and 7 of heading D of specification of car parking systems)

"S.No.

Name of OEM

Description

1

Dongyang Systems

OEM for Fully Automated Robo-Shuttle type Automated Car Parking system

2

Sotefin SA

OEM for Fully Automated Robo-Shuttle type Automated Car Parking System

3

Schenzhen Yeefung

OEM for Fully Automated Robo-Shuttle type Automated Car Parking System

4

Klauss Parking Systems

OEM for Fully Automated Robo-Shuttle type Automated Car Parking System

5

Wohr Parking System

OEM for Fully Automated Robo-Shuttle type Automated Car Parking System

6

MPS system

OEM for Fully Automated Robo-Shuttle type Automated Car Parking System

7

Simmatec International

OEM for Fully Automated Robo-Shuttle type Automated Car Parking System

12. It will be seen from the above that the prior experience required of a tenderer was also referable to working with the equipment supplied by the approved OEMs. The petitioner has, neither in the writ petition nor in review, averred that it has the requisite experience in terms of the technical qualifications stipulated. The original contention of the petitioner was based on its assertion that it possessed the requisite experience in parking systems - but of its own design and technology, and not of the approved OEMs. Having given up that challenge before the Supreme Court and accepted expressly that it would procure approved original equipment only from the list of manufacturers given, the petitioner cannot be permitted to bypass the experience criteria stipulated in the tender document. In the context of the present tender, it is neither arbitrary nor unreasonable to require a bidder's experience to be in respect of the particular equipment sought to be purchased. No material has been placed on record which would justify such a conclusion. It follows that the petitioner does not possess the requisite experience to satisfy the eligibility conditions of the tender in question, and therefore cannot be permitted to participate in the tender, whether with or without the requirement of a prior arrangement or understanding with one of the approved OEMs.

13. In the Special Leave Petition, as well as the Review Petition, the petitioner has also placed on record a subsequent tender dated 30.01.2019 issued by SDMC inter alia for the very same work which was the subject matter of tender in question. It appears therefore that the writ petition has been rendered infructuous on this score as well. Be that as it may, we have considered the alternative plea urged by the petitioner and do not find any ground to review our judgment dated 20.11.2018.

14. For the reasons aforesaid, the review petition is dismissed.