
(2016) 04 CAL CK 0118
In the Calcutta High Court
Case No : W.P. No.3506 (W) of 2015

S.N. Bose & Co.

APPELLANT

Vs

Indian Oil Corporation

RESPONDENT

Date of Decision : 19-04-2016

Acts Referred:

Carriage by Road Act, 2007 — Section 4

Citation : (2017) 1 WBLR 109

Hon'ble Judges : Tapabrata Chakraborty, J.

Bench : Single Bench

Advocate : Mr. M.S. Yadav, Ms. Saswati Chatterjee, Advocates, for the IOC Ltd.; Mr. A.C. Kar, Mr. Swapan Kumar Majumder, Advocates, for the Petitioner; Mr. R.K. Pandey, Advocate, for the Respondent No. 2; Mr. Supratic Roy, Advocate, for the Respondent No. 3; Mr. Dyu

Final Decision : Dismissed

Judgement

Tapabrata Chakraborty, J. - The instant writ application has been preferred, inter alia, praying for issuance of necessary direction upon the respondents to allot the work order pertaining to the tender no. WBOP/POL/BULK ATF/SILIGURI/PT-10/2014 for road transportation of bulk petroleum products (ATF) from Siliguri terminal (hereinafter referred to as the said tender) floated by the Indian Oil Corporation Limited (hereinafter referred to as IOCL).

2. Responding to a notice inviting tender, the petitioner, a registered partnership firm, submitted tender documents online on 17th November, 2014. The tender was opened on 19th November, 2014 and by an e-mail communication dated 19th November, 2014, the petitioner was intimated that his bid has been admitted and he was asked to get in touch with the Tender Inviting Authority. By a further e-mail communication dated 6th January, 2015, the petitioner was intimated that his tender has been accepted during technical evaluation. The price bid of the tender was opened on 7th January, 2015 and the bidders who had qualified in credential bid evaluation were enumerated in the communication

received by the petitioner on 7th January, 2015. Along with the petitioner, five other bidders, being the respondent nos.3, 4, 5 and 6 herein and one M/s Joyguru qualified in the credential bid evaluation. Thereafter, as no Letter of Intent (LOI) was issued in favour of the petitioner, demand notices were issued on 19th January, 2015 and 27th January, 2015 but as the same were not attended to, the petitioner preferred the instant writ application on 30th January, 2015 and initially by an order dated 9th March, 2015 the successful tenderers were directed to be impleaded and thereafter by an order dated 31st March, 2015, this Court directed that "since the contract has already been awarded and it is executory, I will only observe that the performance of the contract will abide by the results of this writ. In the alternative the petitioner will be entitled to claim damages for loss of a real chance to be awarded the contract and earn the profits therefrom, in case the petitioner is successful in the writ". Pursuant to the said order dated 31st March, 2015, affidavits were exchanged by the parties.

3. Mr. Kar, learned senior counsel appearing for the petitioner submits that in terms of clause IV(9) in Part-A of the tender, it was mandatory for all the participants to have a certificate of registration in terms of the Carriage by Road Act, 2007 (hereinafter referred to as the said Act of 2007) for participation in the tender process. The said clause runs as follows :

"All transporters to be eligible to quote in tender should have a certificate of registration in line with Carriage by Road Act, 2007, released by Ministry of Law and Justice vide Gazette Notification of India dated 01.10.2007."

4. He further submits that along with the tender documents and in terms of the said clause, the petitioner filed the application for registration in Form-1 (Part-I) under Rule 3(1) of the Carriage by Road Rules, 2011 (hereinafter referred to as the said Rules of 2011) together with the requisite fees on 28th October, 2014. Save and except the petitioner no other tenderer submitted the tender documents along with a proper application for certificate of registration in terms of the provisions of the said Act of 2007 and the said Rules of 2011.

5. According to him, though the petitioner was the sole tenderer, who fulfilled all the requirements to avail the work order pertaining to the said tender, the respondent nos.1 and 2 illegally and arbitrarily ousted the petitioner from the tender process. The requirement to have a certificate of registration was a statutory requirement and such requirement could not have been waived or relaxed by the respondent nos.1 and 2 and as the petitioner was the sole tenderer, who had applied for such certificate in strict consonance with the statutory provisions, the petitioner ought to have been granted the work order.

6. He further submits that in the alternative, the illegal denial of the respondents to issue the work order, entitles the petitioner to damages and such right also stands protected by the interim order passed on 31st March, 2015 and that the claim for such damages does not involve disputed questions of fact since the profit stands quantified to be of Rs.128633441/-, as would be explicit from the

document at page 24 of the affidavit-in-opposition filed by the respondent Nos.1 and 2. In support of such contention reliance has been placed upon a judgment delivered in the case of Anil Kumar Chakraborty and Another v. M/s Saraswatipur Tea Company Limited and Others, reported in (1982) 2 SCC 328.

7. Per contra, Mr. Yadav, learned advocate appearing for IOCL submits that the subject e-tender was opened by the competent committee (hereinafter referred to as TCC) on 19th November, 2014 and it was observed that there are seven bidders who uploaded their tender documents in the e-portal and upon going through the tender documents uploaded by the bidders pertaining to the credential bid submitted by them, a detailed statement covering all parameters was prepared and vetted for further action in the matter. The certificate of registration in line with the said Act of 2007 was not available with any bidder. It was further ascertained that the concerned certificate was/is yet to be issued by any Regional Transport Authority in West Bengal and as such it was taken note of as to whether the bidders did apply to avail such certificate from the competent authority. In the backdrop of such circumstances and in exercise of the authority of relaxation as conferred upon TCC under clause (VI)(3) of Part-A of the tender, a decision was adopted on 16th February, 2015 to accept the applications for registration certificate in line with Carriage by Road Act, 2007 since at the said juncture the registration process as a "Common Carrier" had not been started by the competent authority throughout West Bengal and as the cancellation of the e-tender would cost considerable public money and time as well.

8. Mr. Yadav further submits that the TCC also waived the Anti-Lock Braking System as incorporated under clause IV(10) of Part-A of the tender since none of the tenderers fulfilled such condition.

9. Placing reliance upon the averments made in the affidavit-in-opposition, Mr. Yadav submits that in all 35 number of TT's were offered/quoted by seven bidders, each having 5 TT's against the notice inviting tender requirement of 19 TT's. M/S Sikha Deb was eliminated for submitting erroneous documents and as a result out of the balance 30 TT's belonging to six bidders, 11 TT's were required to be eliminated to obtain the tender need of 19 TT's. Ranking was done in respect of six successful bidders out of which two were from SC/ST category and four were from general category. As per the tender condition only one SC/ST bidder can be selected. As per the ranking two bidders, one M/s S. N. Bose & Co., the petitioner herein, from general category and M/s Joyguru Transport from SC/ST category were eliminated as the average age of their offered vehicles was higher than the others. As per the tender requirement of 19 TT's one more TT was required to be eliminated as such one TT of Reshma Carriers being WB 73C 8844 was eliminated as being old. In support of such contention, Mr. Yadav drew the attention of this Court to a comparative statement on successful bidders depicting the detailed particulars of the offered vehicles as annexed to the affidavit-in-opposition.

10. Mr. Yadav further submits that in respect of a tender being WBOP/POL/

BULKMH/Siliguri/07/PT-14/2014/37 the petitioner was issued work order in relaxation of a requirement identical to clause IV(9) of Part-A of the present tender and thus having taken the benefit of such relaxation in one tender the petitioner cannot take a different stand in the present tender process.

11. He further submits that the contention of Mr. Kar to the effect that there exists no disputed questions of fact pertaining to the damages claimed by the petitioner is not acceptable inasmuch as the amount stated in page 24 of the affidavit-in-opposition is the estimated financial implication of IOCL which cannot be construed as the profit to have been earned by the petitioner in the event of allotment of the work. Furthermore, the said amount is nothing but an estimate and the actual amount can only be determined upon a full-fledged enquiry upon appreciation of oral and documentary evidence between the parties before a competent forum having jurisdiction to entertain such issue.

12. In support of his arguments, Mr. Yadav has relied upon the following judgments :

1. B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and Others, reported in 2006 (11) SCC 548;

2. K.A. Nagamani v. Indian Airlines and Others, reported in 2009 (5) SCC 515;

3. Tejas Constructions and Infrastructure Private Limited v. Municipal Council, Sendhwa and Another, reported in 2012 (6) SCC 464;

4. Sanjay Kumar Shukla v. Bharat Petroleum Corporation Limited and Others, reported in 2014 (3) SCC 493.

13. Mr. Gupta, learned advocate appearing for the respondent no.5 submits that having failed to emerge to be successful as regards the condition prescribed under clause B(9) of the tender terms & conditions pertaining to the average age of the vehicles, the petitioner cannot turn back and challenge the tender process.

14. He further submits that the respondent no.5 applied for obtaining requisite license under the said Act of 2007 and the said application was duly received as would be explicit from the stamp as affixed but till date the said license has not been made over to the answering respondent. All the applications made under the said Act for issuance of certificate are pending and the authorities permit the carriers to ply their vehicles with such receipted copy of the application as has been the case for the petitioner as well.

15. Drawing the attention of this Court to Section 4 of the said Act of 2007, Mr. Gupta submits that in the backdrop of the facts that the said respondent no.5 did file an application for certificate of registration and that no order of refusal having been communicated by the competent authority within 60 days from the date of application and that no order of refusal having been issued by the registering authority upon granting an opportunity of hearing within 60 days from the date of application and that the authority thereafter having not granted

the certificate within 30 days, it needs to be construed that there was a deemed sanction and that there has been a substantial compliance of the statutory provisions by the respondent no.5.

16. In reply, Mr. Kar submits that the judgments relied upon by Mr. Yadav are distinguishable on facts and the same have no manner of application in the instant case. According to him IOCL could not have waived or relaxed the statutory requirement and such relaxation maligns the entire tender process.

17. He further submits that the other tenderers were barred at the threshold having not been able to substantiate the fact that the applications made by them for certificate of registration were in the prescribed format accompanied with the fees as prescribed. He further adds that during pendency of writ application the petitioner has been issued the certificate of registration by the registering authority, Darjeeling and that as such there can be no hindrance towards allotment of the remaining work pertaining to the tender.

18. I have heard the learned advocates appearing for the respective parties and I have considered the materials on record.

19. The argument of Mr. Kar to the effect that the respondent nos.1 and 2 have waived a statutory requirement while conducting the tender process, is not acceptable to this Court. Admittedly, on the date of submission of tender papers none of the tenderers were having certificates of registration and as such, in exercise of its authority of relaxation of the terms of the tender as provided under clause (VI)(3) of Part-A of the tender, the competent committee, upon ascertainment of the fact that the registration as a "common carrier" had not been started by the competent authority throughout West Bengal, rightly decided to accept the applications made by the tenderers in line with the said Act of 2007 and as uploaded by all the tenderers, on the basis of the reasoning that the cancellation of the tender would cost considerable public money and time. Furthermore, at that juncture it was an impossibility for the TCC to scrutinize as to whether the said applications were made in the manner prescribed under the said Rules of 2011. Ascertainment of validity of such application also does not come within the domain of consideration of the TCC. As such, in my opinion, there was no infirmity in the decision making process and no discrimination was practised by the TCC.

20. Admittedly, in respect of average age of the vehicles offered as per clause B(9) of the terms & conditions, the petitioner could not come within the zone of consideration upon competing with the other tenderers and that as such, having failed to fulfil the competitive terms of contract, the petitioner cannot contend that he had been arbitrarily ousted from the tender process.

21. The petitioner having availed the benefits of relaxation pertaining to production of certification of registration in terms of the said Act of 2007 in another tender process cannot take a different stand in the present tender process. The facts do not reveal any unreasonable, unfair and arbitrary exercise

of power by IOCL.

22. The amount stated in page 24 of the affidavit-in-opposition was the estimated financial implication of IOCL which cannot be construed as the profit to have been earned by the petitioner in the event of allotment of the work. The petitioner's alternative claim for damages hinges upon determination of disputed questions of fact which cannot be settled without a fullfledged enquiry upon appreciation of oral and documentary evidence between the parties before a competent forum having jurisdiction to entertain such issue and that the writ Court cannot take upon itself an investigative mantle to decide the said issue.

23. For the reasons as discussed, no interference is called for and the writ application is dismissed. There shall, however, be no order as to costs.

Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.