

(2016) 03 CAL CK 0024
In the Calcutta High Court
Case No : W.P. No. 7416 (W) of 2015

Tapas Kumar Ghosh

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 17-03-2016

Acts Referred:

Constitution of India, 1950 — Article 14, Article 19 (1)(g)

Citation : (2016) 4 WBLR 391

Hon'ble Judges : Sudip Ahluwalia, J.

Bench : Single Bench

Advocate : Kishore Dutta, B. Bhattacharjee and Santanu Das, for the Appellant;
A. Majumder and Y.M. Siddique, for the Respondent

Final Decision : Allowed

Judgement

Sudip Ahluwalia, J.—1. The petitioner and the private respondent were both rival bidders for a contract to supply food in a 325 bedded Hospital. Their price quotations were found to be equal and they were both granted the contract for half of the total duration on a rotational basis for six months each. The petitioner was granted the first rotational span of six months for the first half of 2015. Thereafter the private respondent supplied the food for the remaining six months. Now in 2016 the petitioner by rotation is again presently supplying the food.

2. However in the month of January 2015, during his first rotational period, the petitioner submitted a representation challenging the joint award of the contract by contending that the private respondent did not possess the requisite eligibility for supplying the cooked food, as was discovered from the documents, which could be downloaded by the petitioner subsequently. As no action was taken on his representation the petitioner approached this Court and has prayed for a writ in the nature of "Mandamus" to command the respondents to cancel, rescind, withdraw and/or forbear from giving any effect/further effect to the decision contained in the letter dated 31st of December, 2014 by virtue of which the

contract for supply of cooked food in the Jangipur Sub-Divisional Hospital was jointly awarded to the petitioner and the private respondent on a rotational basis for the three years, being 2015 to 2017.

3. Now according to the petitioner, he could access the tender documents submitted on behalf of the private respondent only after the impugned Work Order had already been issued, since the same were uploaded by the respondents on their website on that very date i.e., the 31st of December 2014. From those documents he was able to ascertain that the private respondent did not fulfil the requisite eligibility criteria since he had supplied cooked food in the past only to 100 bedded Hospitals, which was therefore far less than the quantum of 325 beds in the concerned Hospital in which the food was to be supplied.

4. The petitioner has also placed reliance on the Trade Licence of the private respondent and has alleged that the same as downloaded did not indicate that he was a "General Order Supplier" for supplying "Cooked Food". On the contrary, the Trade Licence annexed to the respondent's Affidavit-in-opposition goes to show that there is an endorsement regarding the respondent being a General Order supplier in relation to "Cooked Food". Here the petitioner has contended that such endorsement is a subsequent interpolation in the respondent's Trade Licence. This Court has verified from the records produced by the respondents representing the State/Hospital that there was no mention of "Cooked Food" in the private respondents' Trade Licence.

5. It is therefore the petitioner's contention that the private respondent was not eligible to supply the cooked food in view of the specific eligibility criteria laid down in the relevant E - Tender floated on the half of Respondents representing the State. In the relevant clause pertaining to the Eligibility/Qualifications of the bidders which is contained in item 3.1 of the said document it has been prescribed, "The bidder should have supplied cooked food for hospital patients at 3 (three) years prior to the date of tender invitation, meeting major specific parameters, which has/is functioning satisfactorily, preferably, in a government or corporate Medical College and Hospital/hospital of similar bed strength in India." It may be remembered that the Hospital in respect of which the bids were invited is a 325 bedded Hospital.

6. The case of the respondents, on the other hand, is that in the petitioner is not entitled to any relief as he is now trying to take an undue advantage of the situation. According to them, the contract was jointly awarded to both parties by mutual consent, as their price quotations were found identical. But after having got the first opportunity to supply the food on a rotational basis, he had an afterthought to oust the private respondent by way of this writ petition. It is also contended that while the petitioner has asserted about the ineligibility of the respondent on the basis of certain deficiencies allegedly detected from the documents submitted on his behalf, if the own documents of the petitioner were to be minutely scrutinised, the same would also throw up various deficiencies to

render the petitioner himself ineligible for award of the contract. The respondents representing the authorities have placed the original case records before this Court.

7. The same go to show that two meetings were held on the 26th and 29th of December, 2014 in which both the petitioner and the private respondent had participated. However, no minutes or details of what transpires during those meeting appear to have been officially recorded. But the impugned Work Order dated 31.12.2014 (Annexure "P-6") was issued. It goes to show that contracts for supply of cooked food diet were awarded not only in respect of the concerned Jangipur Sub-Divisional Hospital, but also three other Government Sub-Divisional Hospitals and a Mental Hospital, all in the District of Murshidabad. In this regard the contention raised on behalf of the respondents, particularly the State is that since the rates quoted by both the petitioner and the private respondents were the lowest but identical, so, the contracts were awarded to them jointly on a rotational basis by mutual agreement. In this manner after having accepted the terms of the Work Order by starting to supply the food in the Hospital immediately with effect from 01.01.2015, the petitioner cannot now be allowed to challenge the same in view of the position of law laid down in certain decisions of the Supreme Court.

8. In "New Bihar Biri Leaves Company, AIR 1981 SC 679) it was held inter alia -

"48. While accepting the highest Tender of rates per standard bag or the highest bid, it is not possible to classify the purchasers whose offers/bids have been accepted into "honest" purchasers and "dishonest" purchasers. Everybody whose offer or bid is accepted, is assumed to be honest.

51. The aforesaid inhibitory principle squarely applies to the cases of those petitioners who had by offering highest bids at public auctions or by Tenders, accepted and worked out the contracts in the past but are now resisting the demands or other action, arising out of the impugned condition 13 on the ground that this condition is violative of Articles 19 (1)(g) and 14 of the Constitution. In this connection, it will bear repetition, here, that the impugned conditions though bear a statutory complexion, retain their basic contractual character, also. It is true that a person cannot be debarred from enforcing his fundamental rights on the ground of estoppel or waiver. But the aforesaid principle which prohibits a party to a transaction from approbating a part of its conditions and reprobating the rest, is different from the doctrine of estoppel or waiver.

52. For the foregoing reasons, the challenge to the impugned Condition, No. 13, on the ground of Article 14, also, is unsustainable and is rejected."

9. The above decision was followed by the Supreme Court in "Shyam Telelink Limited now Sistema Shyam Teleservices Limited v. Union of India" reported in , (2010) 10 SCC 165 wherein, in dismissing the appeal it was observed -

"22. Although the appellant had sought waiver of the liquidated damages yet

upon rejection of that request it had made the payment of the amount demanded which signified a clear acceptance on its part of the obligation to pay. If the appellant proposed to continue with its challenge to demand, nothing prevented it from taking recourse to appropriate proceedings and taking the adjudication process to its logical conclusion before exercising its option. Far from doing so, the appellant gave up the plea of waiver and deposited the amount which clearly indicates acceptance on its part of its liability to pay especially when it was only upon such payment that it could be permitted to avail of the migration package. Allowing the appellant at this stage to question the demand raised under the migration package would amount to permitting the appellant to accept what was favourable to it and reject what was not. The appellant cannot approbate and reprobate.

23. The maxim *qui approbat non reprobatur* (one who approbates cannot reprobate) is firmly embodied in English common law and often applied by courts in this country. It is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an instrument which both grants a benefit and imposes a burden cannot take the former without complying with the latter. A person cannot approbate and reprobate or accept and reject the same instrument.

24. In *Ambu Nair v. Kelu Nair* the doctrine was explained thus: (IA p.271)

"Having thus, almost in terms, offered to be redeemed under the usufructuary mortgage in order to get payment of the other mortgage debt, the appellant, Their Lordships think, cannot now turn round and say that redemption under the usufructuary mortgage had been barred nearly seventeen years before he so obtained payment. It is a well-accepted principle that a party cannot both approbate and reprobate. He cannot, to use the words of Honyman, J. in *Smith v Baker* LR at p. 357:

"....at the same time blow hot and cold. He cannot say at one time that the transaction is valid, and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and at another time say it is void for the purpose of securing some further advantage." "

25. The view taken in the above decision has been reiterated by this Court in *City Montessori School v. State of U.P.* To the same effect is the decision of this Court said: (*New Bihar Case*, SCC p.558, para 48)

"48. It is a fundamental principle of general application that if a person of his own accord, accepts a contract on certain terms and works out the contract which proved advantageous to him and repudiates the other terms of the same contract which might be disadvantageous to him. The maxim is *qui approbat non reprobatur* (one who approbates cannot reprobate). This principle, though originally borrowed from Scots law, is now firmly embodied in English common law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. That is to

say, no party can accept and reject the same instrument or transaction (per Scrutton, L.J., *Verschures Creameries Ltd. V. Hull & Netherlands Steamship Co. Ltd.,....*)"

10. However the contention of the petitioner is that firstly there was no mutually accepted agreement as alleged, and that in any case, the respondents representing the State had no authority to deviate from the binding eligibility criteria, even assuming the rates quoted by the rival parties were identical. In fine, the contention of the petitioner is that the restriction against "approbation and reprobation", as stressed on behalf of the respondents does not apply in the matter of illegal acts, as done in the present case. To support this contention the petitioner has drawn attention of this Court to the eligibility conditions prescribed in the E-tender floated by the State, as laid down in Clause 3 to SECTION VI pertaining to the eligibility and qualifications of bidders in the "GENERAL CONDITIONS OF CONTRACT", which is set out as under-

"3.1 The bidder should have supplied cooked diet for hospital patients at least 3 (three) years prior to the date of tender invitation, meeting major specification parameters, which has/is functioning satisfactorily, preferably, in a government or corporate Medical College and Hospital/hospital of similar bed strength in India."

11. Again in the "Basic Principle" set out under the heading "Scrutiny and Evaluation of Bids", in Item No. 19 of the E-tender, it has been mentioned-

"SCRUTINY AND EVALUATION OF BIDS"

19. Basic Principle

19.1 Bids will be evaluated on the basis of the terms and conditions already incorporated in the e-tender document, based on which bids have been received and the terms, conditions etc. mentioned by the bidders in their bids. No new condition will be brought in while scrutinizing and evaluating the bids.

19.2 The Purchaser will examine the bids to determine whether they are complete, whether any computational errors have been made, whether required sureties have been furnished, whether the documents have been properly signed, stamped and whether the bids are generally in order. The bids, which do not meet the basic requirements, are liable to be treated as non-responsive and will be summarily ignored.

19.3 Prior to the detailed evaluation of price bids, the Purchaser will determine the substantial responsiveness of each bid to the e-tender document. For purpose of this clause, a substantially responsive bid is one, which conforms to all the terms and conditions of the e-tender document without material deviations. Deviations from, or objections or reservations to critical provisions such as those concerning Performance Security, Terms and Mode of Payment; Variation, Delay in the Contractor's Performance, Liquidated Damages, Termination of Contract, Force Majeure, Resolution of Disputes, Applicable law

etc. will be deemed to be material deviations. The Purchaser's determination of a bid's responsiveness is to be based on the contents of the bid itself without recourse to extrinsic evidence."

12. Hence according to the petitioner, there is no scope for any discretion for the State respondent to deviate from the essential eligibility criteria prescribed. Admittedly the petitioner had earlier supplied cooked food in the District of Murshidabad in 325 bedded Hospitals for three years being 2006-07, 2010-11 and 2011-12 as is verified from the document pertaining to his "Proforma for Performance Statements", which was placed before this Court by the State respondent themselves.

13. On the other hand the similar proforma for performance statement concerning the private respondent goes to show that he had supplied the cooked food for three years i.e., "2011-12 to 2013-14" in a 100 bedded Hospital. He would therefore clearly not appear to be eligible in preference to the petitioner in view of the eligibility criteria specified in the relevant Clause No. 3 already quoted on above.

14. It has however been argued on behalf of the respondents that the private respondent had supplied the food in a 100 bedded Hospital in the immediately preceding three years before awarding of the Work Order, whereas the performance of the petitioner was in relation to three years in the past, but not immediately preceding the period for which the bids were tendered. But to counter this contention the petitioner has placed on record a copy of the Memo No. HF/O/MS/1136/W-67/2014 dated 12.12.2014 issued by the Government of West Bengal Department of Health & Family Welfare in which it was specifically clarified in relation to the eligibility of the bidders as to last three years experience that in stead of the requirement thatThe bidder should have supplied cooked diet for hospital patients in last 3(three) years from the date of tender invitation, meeting major specification parameters", It is "To be read as "The bidder should have supplied cooked diet for hospital patients at least for 3 (three) years prior to the date of tender invitation.....",

15. In this view of the matter, award of the Work Order to the private respondent jointly along with the petitioner clearly is not in accordance with the eligibility criteria prescribed. Even if the rates quoted by both the contesting bidders were identical, it was incumbent upon the authorities to consider who amongst the two bidders satisfied the eligibility criteria for being awarded the contract. But the same was not done and no reasons at all, even including the unsubstantiated plea of "Mutual Agreement", was recorded before issuing the impugned Work Order. This is of course not to say that such plea, if actually mentioned as the reason for award of the Work Order jointly, would have legitimised the favour extended to the private respondent whose eligibility was certainly not comparable with that of the petitioner according to the documents submitted. The doctrine of "Approbate and Reprobate" raised on the half of the respondents in contesting the writ petition is therefore found to be untenable as firstly there

is no material to indicate that the petitioner had actually agreed at any stage to joint award of the contract between himself and the private respondent, and secondly because in the given facts and circumstances, the State authorities themselves had no scope to deviate from the prescribed eligibility conditions in their own E-Tender. They ought to have awarded the contract in favour of the particular bidder whose qualifications matched the eligibility criteria in preference to the other bidder whose quoted rate was equal, but who lacked the relevant qualifications and experience as specifically provided in the Tender form. The two decisions relied upon by the respondents therefore also do not apply to the particular facts of the present case.

16. The respondents have also challenged the writ petition by asserting that it was filed at a late stage on 24 March 2015, which is almost three months after the date of the Work Order (31.12.14) and commencement of the Food supply by the petitioner on 1st January 2015. But it is verified from the record that before filing the writ petition in the petitioner had submitted/delivered his representation in this regard to the Chief Medical Officer (Respondent No. 4) on 20th January, 2015. In that representation (Annexure P-8) he had specifically requested to be declare the private respondent as a disqualified tender on the same grounds. But no action was taken upon the representation. The petitioner therefore filed this writ petition two months later. In the circumstances there is no justification to hold that he has filed the writ petition at a belated stage.

17. For the aforesaid reasons clearly there is merit in the petitioner's claim. The Writ Petition is therefore allowed and the Work Order dated 31.12.2014 (Annexure "P-6") issued by the respondent No. 4 is partially quashed. The rotational award of work to the private respondent as specified therein is struck down, and it is directed that the petitioner shall continue to supply the cooked food items in the hospital in an interrupted manner till the scheduled date of termination.