(1997) 09 CAL CK 0001

In the Calcutta High Court

Case No : Writ Petition No. 1579 of 1997

The Daily Tej Pvt. Ltd. APPELLANT

Vs

Union of India (UOI) RESPONDENT

Date of Decision : 30-09-1997

Acts Referred:

Citation : (1998) 1 ILR (Cal) 253

Hon'ble Judges : Bijitendra Mohan Mitra, J

Bench : Single Bench

Advocate : P.C. Sen, for the Appellant;Anindya Mitter, Jayanta Mitter, for the Respondent

Judgement

Bijitendra Mohan Mitra, J.—In this writ petition a prayer is made at the instance of the Petitioners of which Petitioner No. 1 is a Private Limited Company incorporated under The Companies Act by the name of The Daily Tej Pvt. Ltd. which has prayed for a Writ of Mandamus to cancel and/or to rescind the award of the said contract being given in favour of Respondent No. 6 namely Saraswati Press Ltd., a Company incorporated under The Companies Act. It has been averred in the original writ petition that by a tender Notice No. DCP/2006 dated February 14, 1997 the Respondent No. 3 invites bids for the printing and supplying of Calcutta Telephone Directory in english for the year 1997. Reference may be made to the stipulations contained in the said tender notice from which it appears that sealed tenders are invited by the Chief General Manager, Calcutta Telephones on behalf of the President of India from competent agencies for compilation of data, printing, binding and supply of specified number of Telephone Directories in english for one Annual issue. In the second paragraph of the prefix of the said tender notice, it has been mentioned that the directory shall conform to the technical specification given in the tender document. The tenderers should have experience in printing and supply of telephone Directories to the large telephone system with capacity of more than one lac lines or publication of similar nature. The tenderers will be required to substantiate the same with documentary proofs and also furnish credentials in the field. Subject to the fulfilment of the said pre-requisite conditions, a tender form is appended as an appendix to Annexure ''A'' and also in the concluding portion of para. 1, it has been stipulated that preference will be given to the parties having offices located in Calcutta. It has been also, inter alia, mentioned therein that the selected tenderer shall deposit/furnish for a sum of Rs. One crore or 10% of the cost of the work quoted in the tender, whichever is lower, either in cash or in the form of bank guarantee within 10 days from the date of acceptance of the tender as security for the due-performance of the contract. In Annexure ''A'' appended to the tender form and in Clause 5 thereof it was stipulated that the contractor should not assign or sublet the contract or any part thereof to any other party without obtaining the prior permission, in writing from the C.G.M. or any other Officer authorised by the said officer of Calcutta Telephones. In Annexure ''B'' appended thereto it has been insisted upon that in terms of Clause 6 quality of paper will be 48 gsm., cover with thick carton box or glazed on one side. In terms of Clause 4, number of copies has been insisted as 6,50,000 copies and in terms of Clause 5 thereof, it was provided approximately 1800 pages bound in two volumes. In terms of Clause 14 of Annexure ''B'' enclosed to the same, minimum lines to be printed per column shall be 125 lines, printing shall be in 4 column format. The records of the connected proceeding of the tender have been made available before this Court of which inspection was taken by all the parties.

2. This Court has also the occasion to deal with the concerned files and it has also gone through the same in order to appreciate and assess the records vis-a-vis the claims and contentions of the respective parties. It appears from the quotations given by the Petitioner that the Petitioner has quoted the rates and with a rider that the said rates are applicable for 1800 pages or less. Any additional pages over and above 1800 pages would be charged at pro-rata.

3. It has been stated before this Court that at the time of the order of tender being placed in favour of the concerned Respondent, namely, Respondent No. 6, the total number of pages has been reduced from 1800 to 1362.

4. The contention of the Petitioner before this Court is that any comperative scrutiny will reveal that they are the lowest tenderer and it has been also attempted to be submitted that if they would be known earlier point of time about the proposed change of the actual order being delivered from the original terms of the contract, then the Petitioner would not have quoted at the said rate. There are also manifold contentions and counter-contentions raised by the respective parties at the time of hearing of this petition.

5. At the time of hearing the major thrust which was made on behalf of the concerned official Respondents and according to the contentions of Sri Anindya Mitra, the learned Additional Solicitor General and he has laid down specific stress to the pre-conditions as contained in the tender form, and according to him the other conditions would come into play only when the basic pre-requisite condition is fulfilled. In order to substantiate the said contention, it has been

further pointed out that credentials also as furnished make room for doubt about the bonafides of the conduct of the participants and also the credentials as sought to be substantiated by them, though documentary proof appeared to be clouded under veil of enigma.

6. In support of the said contentions elaborate attention has been drawn to the specifications as given by the Petitioner and it appears that a testimonial in the form of certificate has been annexed as a part of the bunch of annexures which relate to a certificate issued by the Divisional Engineer (Computer), Madras Telephone in favour of M & N Publications Ltd. and not in favour of the writ Petitioner, namely, The Daily Tej Private Ltd. Further attention has been drawn to the brochure which also forms part of the bulk of documents filed along with tender applications and therefore, this Court comes across the brochure where a caption of Tej Bahadur Group from which it appears that a group of companies have been functioning in this sphere either in the business of printing or in the domain of publishing and the same management seem to be interested in two different companies which are different distinct juristic entitity but they form part and parcel of the same group of companies. In the light of the same, the documents relating to M & N Publications Ltd. as appended therein has been referred to and there this Court finds almost self-same set of documents including that of the same brochure and both the brochures as appended to the documents annexed to the tender form seem to be prototype each other. Self-same brochure is annexed in the form of application of tenders by the Petitioner, namely. The Daily Tej Pvt. Ltd. and M & N Publications Ltd.

7. So far as the infrastructure and credentials are concerned, it appears from the enclosed annextures of Daily Tej Private Limited which caption ''Details of Staff and Accommodation'' and (a) to (d) as incorporated under the same heading of the two companies appear to be absolutely similar so far as description is concerned.

8. So far as list of equipment is concerned in respect of printing, binding and finishing, pre-press D.T.P. equipment and delivery schedule also appear to be identical. It is not known as to whether M & N Publications is the separate owner of the self-same items of the infractructure as indicated in the documents enclosed as part and parcel of the tender applications. The similarity appears to be of striking significance and there is no iota of departure which can be deciphered from the comparative scrutiny. Coupled with the same, it appears that though Daily Tej Private Limited is a separate company which is not a joint venture company, has chosen to participate in the tender with separate quotation and the quotation that has been given by M & N Publications Limited appears to be higher, but they seem to be possessing the self-same infrastructure, It is well nigh impossible to differentiate the infrastructure and it is not possible to get any glimpse as to whether Daily Tej Private Limited is the separate owner of the items mentioned from those of the self-same items of M & N Publications Limited. It also appears from the rejection report, on being asked the concerned

Officer of the Calcutta Telephone Authorities has produced the report of the Evaluation Committee from which it appears that number of reasons have been referred to in the form of salient points, namely of which in terms of importance and priority & Clause 3. Only a reference has been made that as credentials the company has submitted the certificate issued to M/s. M & N Publications Limited who have also bid separately. As regards the other reasons, as enumerated, this Court finds that credentials of the Daily Tej Private Limited, same doubt has been arisen. So far as M/s. M & N Publications is concerned, in column 2 it has been mentioned that the address, phone number, fax number and infrastructure mentioned by the company are same as that of Daily Tej, the another bidder. It is salient to refer back to the comments made in Clause 4 of Daily Tej where it has been mentioned also that the address, phone number, fax number and infrastructure mentioned are the same as/that of M/s. M & N Publications, another bidder. From the enclosed documents, at the first blush it may appear that similar particulars are given in respect of the two companies and it is difficult to differentiate the same. As such, the telephone authorities or the tender committee have drawn an adverse inference about the credibility of the Petitioner so far as the credentials are concerned. After giving a detailed mentioning of the same, Mr. Mitter, the learned Additional Solicitor General, has also pointed out that it has also been remarked that an unfair trade practice has been attempted to be followed because two constituents of the same group of companies having the same infrastructure, appear to have participated in the bid in response to an invitation of tender and different quotations are given. According to Mr. Mitter, the learned Additional Solicitor General, the entire bonafides of the Petitioner, so far as his credentials are concerned, seem to be clouded. In the backdrop of the same, once again reference was made to the tender notice itself and it has been pointed out that in view of the insistence of substantiating of the claim of a tenderer, they should do it with documentary proof and credentials in the field. Documentary proofs, so far as the present Petitioner and M & N Publications Limited are concerned, some documents seem to be used with regard to the infrastructure of two different companies. There is no assertion anywhere nor the scrutineer can decipher as to whether the documentary credentials as enclosed are the separate species of items belonging to two different companies having different juristic entities. It has been submitted that there is ample scope of confusion and both the tenderers seem to have projected a confusing picture. Therefore, it has been contended that on that ground alone, for want of such enunciation of the credentials with documentary proof, the authorities concerned are well within their bounds to reject the application for tender at the instance of the tenderer. The said submission of Additional Solicitor General has also been reciprocated by Mr. Jayanta Mitra, learned Counsel appearing on behalf of the Respondent No. 6. Mr. P.C. Sen, learned Counsel appearing for the Petitioner, has sought to join issue with the aforesaid contentions. According to Mr. Sen that so far as excepting one document is concerned, that is the certificate given in favour of M & N Publications Limited, there is no other document enclosed which does not stand in favour of anyone other than that of the Petitioner of Daily Tej. Mr. Sen appears to be alike to the difference in law about the locus standi of a joint venture company and the so called group of companies. But Mr. Sen has also pointed out that from the list enclosed, there is no material before the authorities to draw an inference that the Petitioner is not the owner of the infrastructure as they have delineated by way of documents with regard to the details of staff and accommodation, list of equipments, binding and finishing, and also other equipments as laid down in separate columns.

9. This Court, after having perused the documents, is of the view that the manner in which the documents have been appended to the tender form as enclosure to both Daily Tej Private Limited and M & N Publications Limited, there is scope of confusion and an authority may very well be misled to separately identify as to how far and to what extent the items of infrastructure as specified belong to different tenderers or bidders in the bid for tender. The appreciation of evidence, namely of scrutiny of documents enclosed, which may impel this Court to opine that inference should be left open to be in favour of the Evaluation Committee of the tenders, and unless a specific allegation in unambiguous term is not levelled that the authorities are actuated by premeditated prejudice in favour of the Petitioner and in the absence of making out a prima facie case against the bonafides of the conduct of the authorities concerned, the discretion exercised by way of inferential process of the concerned authority should not be open to be challenged. It has been stated that even assuming for. the sake of argument though not admitted that the authorities because of confusion having crept in the applications of respective claims offenders of the two tenderers prompts the authority to reject the same on the ground of their want of credentials. How far the writ Court can interfere with regard to the fact finding scrutiny about the expert body in the absence of any positive allegation that some members of the Evaluation Committee have pre-conceived prejudice and malice against the Petitioner and unless it can be said that the premises are taken up as wrong premises, not due to inferential process but due to clouding of vision of the Evaluation Committee, the same should not be open to be assailed before the court of writ jurisdiction. If it appears that the Petitioner has failed to satisfy the authorities about their locus standi with regard to their credentials are concerned, and unless they are beyond any shadow of doubt, the plea of discretion should be with the authorities.

10. In this context, the respective counsels have relied on the decision of Tata Cellular Vs. Union of India, and this Court can draw inspiration from the germane of the visions made in the said judgment in some of the relevant paragraphs, the extracts of which are not required to be reproduced in extenso. This Court, for its purpose of formation of opinion, wants to refer to some cryptic lines which by themselves express the idea which has been sought to be propelled by the Apex Court. This Court can make reference to para 70 of the said decision of Tata Cellular Vs. Union of India, as referred to above, and it has been observed that ''the right to choose cannot be considered to be an arbitrary power. Of course, if

the said power is exercised for any collateral purpose, the exercise of that power will be struck down''. The same has been followed by a reminder of caution by the Apex Court and it has observed in unhesitating terms that ''judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.'' Here, in this case, the point which looms large for consideration is as to whether the discretion of the evaluation committee arrived at on scrutiny of documents on the face of their similarity and the inference so drawn is how far justiciable in nature.

11. Even an observation has been quoted by the Apex Court from the 2nd Edition of Administrative Law, page 584, by Bernard Schwartz, which has been relied upon by the Apex Court where it has been observed that ''if the scope of review is too broad, agencies are turned into little more than media for the transmission of cases to the courts. That would destroy the values of agencies created to secure the benefit of special knowledge acquired through continuous administration in complicated fields''. Here, this Court also does, not lean to destroy the value of the agency of the expert eyes, namely the tender evaluation committee, to draw its inference about credentials on scrutiny and comparison of the documentary annextures annexed to the enclosed tender applications. In para. 94 of the case of Tata Cellular, as referred to above, the principles have been deduced from analysis of catching up cases which can be quoted as hereunder:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be substituting its own decision without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness, but it must be free from arbitrariness not affected by bias or actuated by malafides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Based on these principles, the court has laid down the criteria to be adhered to and applied for in order to test the veracity of a challenge being say, with regard to the result of a selection process by tender.

12. This Court has tried to apply those tests as indicated above and it appears to this Court that it cannot sit as a Court of Appeal when it proposes to make review about the decision of the tender evaluation committee. If such review of the decision is permitted with regard to the inference drawn about the infrastructure of the claimants about their credentials in the light of documentary proofs, this Court does not feel that it is a case which is open to be assailed by way of judicial review about such inferential process as a result of which a decision is arrived at by the concerned authority. This Court does not feel inspired to overturn the primary assessment made about the locus standi of the Petitioner with regard to its infrastructure in the light of documentary proofs as arrived at by the tender evaluation committee.

13. Reference was made to the case of New Horizons Limited and Another Vs. Union of India (UOI) and Others, where the Supreme Court had the occasion to deal with the claim of a joint venture corporation or company and it has opined that the document relied on by one of the constituents of the joint venture corporation can be referred and can be applied for in respect of another company. The same is not applicable according to the opinion of this Court with regard to our common experience of group of companies because group of companies do not stand on the same parity or footing with that of joint venture corporation. As such, on the first count itself, this Court feels that the Petitioner cannot have any claim or grievance if they, according to the assessment of the tender evaluation committee, fulfil the basic prerequisite condition. If the same is not fulfilled, then the applicants go out of the zone of consideration in a fray of competition and as such this Court cannot answer the claim in favour of the Petitioner on this count alone.

14. In the backdrop of the same, the other contentions which have been sought to be raised, lose their pivotal significance. It has been submitted on behalf of the Petitioner that the terms have been sought to be changed, namely by way of conversion of insistence on pre-requisite condition of furnishing, bank guarantee or equivalent security to that of an indemnity bond. In respect of the same, reference was drawn to the fact that it is a State Government undertaking and as such it cannot relax the same in favour of the State Government undertaking and the same has been done after the tender is accepted. So far as the price quotation is concerned, one of the major grievances of the Petitioner is centered around on the point that had they known it before that the number of pages would have been reduced quite substantially from 1800 pages to 1362 pages, then they would not have given the same quotation.

15. Mr. Mitter, the learned Additional Solicitor General has stated and pointed out that it is significant to point out that the price as quoted by the Petitioner is at a heavy rate and it has been specifically stipulated that if there is further rise in the total number of pages, price would be escalated at pro-rata basis and vice-

versa. According to Mr. Mitter, the price as quoted by Saraswati Press reflects a vice-versa trend and therefore according to Mr. Mitter the same should not be taken too seriously in the backdrop of their elimination at the point of threshold for want of their credentials. Mr. Jayanta Mitter, the learned Counsel appearing on behalf of the said Respondent No. 6 has also contended before this Court that so far as his past experience is concerned, it has been printing the telephone directory of Calcutta Telephones for pretty long time and it has a systemetic record of background in printing of Calcutta Telephone Directories. In view of the association of the said Respondent with the type of work to be rendered in favour of Calcutta Telephone authorities, the authorities have every reason to have found confidence about known parties and after considering the pros and cons of it, it has awarded the contract in favour of the said Respondent. Mr. Jayanta Mitter has further submitted before this Court that as it is a time bound contract, the time is the essence of execution of the said contract and the time cannot be allowed to run out. It has been further stated by Mr. Mitter that his client has already got itself involved in incurring heavy expenditure to go ahead with the execution of the work and it has gone substantially in making preparation of the same. Mr. Mitter further stated that the Petitioner initially moved the Delhi High Court, namely, before a wrong forum which is not the court of appropriate jurisdiction and the writ petition having been withdrawn they have come-to this Court. According to Mr. Mitra, the conduct of prosecution of litigation also does not reflect absolute diligence with utmost promtitude so that the rights which are given in favour of the party do not ripe into the same such rights which will involve the said Respondent either with liability or with accrual of interest in the matter. Mr. Mitter has further stated that at this juncture his client is disentitled to go ahead which will not only create a deadlock but will expose to the risk of irreparable injury. This Court though it has applied its mind to the statements and contentions of Mr. Mitter but it does not propose to go on for any in depth analysis of the said contention and counter-contention which cannot but to relegate into the background in view of the answer of this Court that the Petitioner has failed to prove its credentials before the tender evaluation committee in terms of the documents. It also appears that the tender evaluation committee had drawn an adverse inference about the two sets of companies namely The Daily Tej Pvt. Ltd. and M & N Publications Ltd. participating in the same: tender and giving quotations at different rates. This is also according to Mr. Mitter, the learned Additional Solicitor General has tarnished the image of the Petitioner before the tender evaluation committee and this entitled to draw its own inference for the same. This Court records its appreciation in the endeavour of Mr. Sen to assist this Court on the other points for which there may be food for thought but pivotal point which permit the range of controversy is about their bonafidies and about the credentials which are to be borne out from the documentary evidence.

16. The Petitioner having failed to persuade the tender evaluation committee and it does not want to upset its views as it tends to rely on the relevant paragraph

of Tata Cellular Supra as mentioned hereinabove and the deducable indecia of the said cited decision which has been catering of same to be set at rest if properly applied the controversy relating to the report of the tender evaluation committee.

17. For these reasons this Court is constrained to dismiss the writ petition on a contested hearing. The interim order, if any, will stand vacated.

18. Xerox certified copy of this judgment, if applied for by either of the parties, be made available to the parties at the earliest.