(2018) 11 UK CK 0195

In the Uttarakhand High Court

Case No : CLMA Delay Condonation Application No. 15422 Of 2018 In Special Appeal No. 784 Of 2018

Uttarakhand Power Corporation And Others — APPELLANT

Vs

M/s Lardums Electricals Pvt. Ltd — RESPONDENT

Date of Decision : 20-11-2018

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2018) 11 UK CK 0195

Hon'ble Judges : Ramesh Ranganathan, CJ;Alok Singh, J

Bench : Division Bench

Advocate : D.S. Patni, B.D. Pandey

Final Decision : Disposed Off

Judgement

Ramesh Ranganathan, C.J.

1. The Application to condone the delay, in preferring the Appeal, is not opposed and is, therefore, ordered. This Appeal is preferred against the order passed by the learned Single Judge in Writ Petition (M/S) No. 1114 of 2015 dated 03.08.2018, whereby the order impugned in the writ petition dated 12.03.2015 was quashed.

2. The petitioner, along with others, submitted a bid for the subject work. On the ground that they had all indulged in pooling, and had all quoted the very same price in the bid submitted by them, a show cause notice was issued on 16.01.2015 calling upon them to show cause why they should not be debarred for one year from participating in the upcoming tenders of the Corporation. The respondent-writ petitioner submitted their reply on 27.01.2015 admitting that they had become the lowest tenderer as they had quoted the very same rates, so that they could all get the work, to benefit their unit and labour to survive. An administrative warning was issued to the respondent-writ petitioner by the order impugned in the writ petition, and their earnest money deposit was forfeited.

Questioning the said order, the respondent-writ petitioner invoked the jurisdiction of this Court.

3. In the order under Appeal dated 03.08.2018, the learned Single Judge observed that the appellants-respondents had not even considered the reply submitted by the respondent-writ petitioner, except for a bald assertion that the reply was considered; the petitioner was never put on notice as to why its earnest money should not be forfeited; they were only given an administrative warning as per the impugned order dated 12.03.2015; it was a case of non-application of mind, and there was violation of principles of natural justice; and action had been taken for which the respondent-writ petitioner was never put on notice. The writ petition was allowed, and the impugned order was quashed. Aggrieved thereby, the Corporation is in Appeal before us.

4. Sri D.S. Patni, learned counsel for the appellants, would draw our attention to the reply submitted by the petitioner to the show cause notice, and to the admission made by them therein, to contend that, since the petitioner had admitted to have indulged in pooling along with all other bidders, and that all of them had quoted the very same price in the bids submitted by all of them, it was evident that their endeavour was only to subvert the tender process; while the appellant would have been justified in debarring them for a period of one year, a lenient view was taken and an administrative warning was imposed; the tender conditions stipulated that the consequence of debarment was forfeiture of the earnest money deposit; and while the Corporation had taken a lenient view, in merely imposing an administrative warning on the bidders, the earnest money was forfeited in terms of Clause 4.5(B)(b)(viii) of the tender conditions.

5. On the other hand Sri B.D. Pandey, learned counsel for the respondent-writ petitioner, would submit that there is no provision in the tender conditions for an administrative warning to be issued to the tenderers; in any event the petitioner was not put on notice of the said action being proposed to be taken by the appellant-Corporation; clause 4.5(B)(b) (viii) would not apply to the facts of the present case; the said clause applies only to cases where there is a change of price post completion of the bid process, and not prior thereto; even if the respondent-writ petitioner is held to have indulged in pooling, and to have quoted the same price as all other bidders in the tender, that would not amount to violation of Clause 4.5(B)(b)(viii) of the tender conditions; and no interference is called for with the order under Appeal.

6. A show-cause notice was issued to the respondents-writ petitioners on 16.01.2015, referring to their offer made for execution of the subject work. It is stated therein that, after opening of the price bids of the tender, it was observed that they have quoted the same rates as that was of other bidders in the tender, from which it seemed that they had all pooled the tender; consequently, the appellants had to scrap the tender; because of this, the appellant may face problems in timely repairing of the damaged transformers; timely unavailability of transformers may result in poor service to the customers of the appellant;

and, thereby, the public image of the Corporation may get spoiled. The respondent-writ petitioner was called upon to show cause as to why they should not be debarred from participating in the upcoming tenders, and submit its reply within 15 days.

7. In reply thereto the respondent-writ petitioner, vide letter dated 27.01.2015, informed the appellant that they were a micro scale unit, entirely dependent upon the appellant; as per the procurement policy, only the second lowest tenderer can be offered the rates of L1; in these circumstances only two firms can work, and all other Uttarakhand based firms would be out of job; in order to become L-1 they had quoted the same rates so that all of them could get the work for their unit and labour to survive; the pooling was done only for higher gain but, in the present tender, they had all quoted the lowest rate considering the market, and to secure the work from the appellant, very similar to the previous contract rates; being a micro scale unit they were not in a dominant position to dictate terms, and do pooling for higher gain; on the tender being cancelled, they were already at a loss because their bank guarantee would be of no use; and to avoid loss being caused to the appellant, they were ready to work and to repair the transformers at the same rates, terms and conditions, as was prescribed in the previous contract.

8. Pursuant thereto the appellant, in their letter dated 12.03.2015, observed that, after opening of the price bid of the tenders, it was observed that they had quoted the same rates as that of other bidders of the tender, from which it was considered that they had pooled the tender; consequently, as per the approval of the competent authority, the tender was scrapped, and 15 days' notice was issued to them calling upon them to show cause why they should not be debarred for one year from participating in the upcoming tenders; their reply was received and the following decision had been taken after approval from the competent authority:

(i) The Earnest Money Deposit (EMD) submitted by the respondent-writ petitioner against the tender was forfeited; and

(ii) Regarding debarment, a warning was issued to the effect that, in case any pooling was done by them in future, then they may be debarred from participating in the tender of the appellant-Corporation.

9. The tender specifications prescribed pre-qualifying requirements/conditions. Clause 4.5 related to Tender Bid Part-1 (Earnest Money, Validity, Technical Commercial and others terms). Clause 4.5 B related to earnest money deposit (EMD)/security or performance security, and clause 4.5(B)(b) stipulated that a bank guarantee, from a scheduled bank in India, shall be submitted in the specified proforma appended in Form 'B', and the validity of the bank guarantee should not be less than 180 days from the date of tender opening plus claim period of 45 days. Clause 4.5(B)(b) (viii) reads thus:

"Any action on the part of the bidders to revise the price/prices and/or change the structure of price(s) at his own interest after the opening of the tender may result in rejection of the tender and/or debarring the bidder from participation in purchase by the UPCL for one year in the first instance. In such cases, the earnest money submitted in Part-1 shall also be forfeited."

10. Clause 4.5(B)(b) (viii) confers power on the appellants to debar a bidder from participating in the tender with the appellants for a period of one year. The consequence, of such debarment, is forfeiture of the earnest money deposit. In the present case the appellant, instead of debarring the respondent-writ petitioner from participating in the tender process for a period of one year, has chosen to take a lenient view and to impose merely a warning asking them to desist from indulging in pooling in future tenders of the appellant-Corporation. They, however, forfeited the earnest money deposit submitted by the respondent-writ petitioner. It is difficult to accept the submission of Sri B.D. Pande, learned counsel for the respondent-writ petitioner, that the power to debar a tenderer from participating in the tender of the Corporation for a period of one year, would not bring within its ambit the lesser punishment of an administrative warning. Even if we were to presume that the submission of the learned counsel is valid, the only consequence would be that, while affirming the order of the learned Single Judge, the appellant must be given liberty to pass an order afresh in accordance with Clause 4.5(B)(b) (viii) of the tender conditions.

11. We asked Sri B.D. Pande, learned counsel for the respondent-writ petitioner, whether passing of such an order would not adversely affect the respondent-writ petitioners interest, as it would be open to the appellant to pass a fresh order debarring them for a period of one year, in the place of the present order whereby an administrative warning was imposed on them. Sri B.D. Pande, learned counsel for the respondent-writ petitioner, however, submitted that, since the said clause does not enable the appellant-Corporation to impose an administrative warning, the learned Single Judge was justified in setting aside the order.

12. With regards the contention of Sri B.D. Pande, learned counsel for the respondent-writ petitioner, that the act of the respondent-writ petitioner in indulging in pooling is an event prior to opening of the bid, and it is only a revision in price by the bidder to further his own interest subsequent to the bid, which attracted Clause 4.5(B)(b)(viii) of the tender conditions, it is evident from the admission of the respondent-writ petitioner, in the reply filed by them to the show-cause notice, that all bidders had indulged in pooling (i.e. cartelization). They had all agreed among themselves to quote, and had quoted, the very same price which had resulted in the entire tender process being vitiated, the tender being cancelled, and bids being invited afresh. Such an act on the part of the respondent-writ petitioner is, as is admitted by them in their reply to show-cause notice, only in furtherance of their own interest to ensure that all of them are awarded the work. Their concerted act of submitting a uniform bid is, evidently, to derail the tender process since the very object of a competitive price bidding is

to ensure that the appellant is able to have the work executed at the lowest possible price, and thereby maximise its revenues.

13. A hyper-technical reading of sub-clause viii of Clause 4.5(B)(b) would defeat the very object of the tendering process, as that would mean that any revision in price by the bidders, or their concerted effort to submit a uniform price as their bid, (which is but another form of cartelization), prior to submission of their bids would not justify any action being taken against them, though the appellant has suffered substantial injury as a result thereof, in having to cancel the tender process and to invite bids afresh. In this context, it must be borne in mind that exercise of jurisdiction, under Article 226 of the Constitution of India, is discretionary, and a Writ is not issued as of right or as a matter of course. (C.R. Reddy Law College Employees' Association, Eluru W.G. District vs. Bar Council of India, New Delhi, reported in 2004 (5) ALD 180). The jurisdiction of this Court is exercised only in furtherance of the interest of justice and in larger public interest, and not merely on a legal point being made out. The interest of justice and the public interest coalesce. They are very often one and the same. The Court has to weigh public interest vis-à-vis private interest while exercising its discretionary powers. (Ramniklal N. Bhutta v. State of Maharashtra reported in AIR 1997 SC 1236; Manohar Lal v. Ugrasen & others reported in (2010) 11 SCC 557; Master Marine Services Pvt. Ltd v. Metcalfe and Hodgkison Pvt. Ltd reported in (2005) 6 SCC 138; Air India Ltd. v. Cochin International Airport Ltd. reported in (2000) 2 SCC 617). This Court would refrain from interference save larger public interest. A writ of mandamus and a writ of certiorari are discretionary, unlike a writ of habeas corpus which can be sought as a matter of right. One of the principles inherent is that the exercise of discretionary power should be for the sake of justice and, if interference would result in greater harm to society, then this Court may refrain from exercising the power. (State of Maharashtra v. Prabhu reported in (1994) 2 SCC 481). Even if a legal flaw might be electronically detected, this Court would not interfere save manifest injustice or unless a substantial question of public importance is involved. (Rashpal Malhotra v. Mrs. Saya Rajput reported in AIR 1987 SC 2235 and Council of Scientific and Industrial Research v. K.G.S. Bhatt reported in AIR 1989 SC 1972). Even when some defect is found in the decision-making process, this Court would exercise its discretion with great caution and only in furtherance of public interest, and not merely on the making out of a legal point. Only when it comes to the conclusion that overwhelming public interest requires interference, should it intervene. (Air India Ltd. v. Cochin International Airport Ltd. reported in (2000) 2 SCC 617). One of the limitations imposed by this Court, on itself, is that it would not exercise jurisdiction unless substantial injustice has ensued or is likely to ensue. It would not allow itself to be turned into a Court of appeal to set right supposed errors of law which do not occasion injustice. (Sangram Singh v. Election Tribunal, Kotah reported in AIR 1955 SC 425)

14. The respondent-writ petitioner, having admitted to have indulged in pooling (cartelization), cannot be heard to contend that their act of pooling would not

justify any action being taken by the appellants against them. Further, this contention has not even been examined by the learned Single Judge in the order under appeal. In any view of the matter, we see no reason to accept this contention urged by Sri B.D. Pande, learned counsel appearing on behalf of the respondent-writ petitioner. Suffice it therefore, while affirming the order of the learned Single Judge on the short ground that the respondent-writ petitioner was only put on notice calling upon them to show cause why they should not be debarred and not for imposing an administrative warning, we leave it open to the appellants to pass an order afresh, on the basis of the reply already submitted by the respondent-writ petitioner to the show-cause notice, in accordance with the tender conditions.

15. The Special Appeal is disposed of accordingly. No costs.

