
(2021) 04 GAU CK 0019
In the Gauhati High Court
Case No : Writ Appeal No. 126 Of 2021

Voith Hydro Private Limited	Vs	APPELLANT
Assam Power Generation Corporation Limited And Ors		RESPONDENT

Date of Decision : 20-04-2021

Acts Referred:

Citation : (2021) 04 GAU CK 0019

Hon'ble Judges : Sudhanshu Dhulia, CJ; Manash Ranjan Pathak, J

Bench : Division Bench

Advocate : G.N. Sahewalla, D Senapati, B.D. Das, P Bhowmick, Tp Sen

Final Decision : Dismissed

Judgement

1. Heard Mr. GN Sahewalla, learned senior counsel assisted by Mr. D Senapati, learned counsel for the appellant. Also heard Mr. BD Das, learned senior counsel assisted by Mr. P Bhowmick, learned counsel for respondent Nos.1 to 4 and Mr. TP Sen, learned counsel for respondent No.5.

2. The appellant is a company registered under the Companies Act, 1956 having its registered office in Delhi, and its parent company is Voith Hydro Holding GmbH & Co. KG which is engaged in the field of hydropower industry for last 150 years. The appellant/petitioner claims that it has installed more than 40,000 turbines and generators worldwide, and has vast experience and expertise in this field. The respondent No.1, namely, Assam Power Generation Corporation Limited ('APGCL' for short) invited through E-Procurement Notice plant, design and engineering, manufacturing, supply, erection, testing and commissioning of Electromechanical Equipment for 120 MW Lower Kopili Hydroelectric Project in Assam. The present writ appellant and the respondent No.5 were amongst the bidders who responded to the bid notice.

3. One of the essential conditions in the bid document was that a bidder must supply the entire details of its ongoing project to the employer. Admittedly, the petitioner/appellant failed to provide these details and instead the details which

were provided were the combined ongoing projects of the petitioner as well as of its parent company, i.e. Voith Hydro Holding GmbH & Co. KG. The appellant was then reminded that it should only provide the details of its own project and not of the appellant's parent company. The ongoing projects of the Petitioner Company were later supplied, yet the admitted fact is that even now the appellant/petitioner failed to supply the details of the entire ongoing projects and for more than 40% of the projects, details were not given, only the total cost of these 40% projects were given.

4. Again the employer, i.e. APGCL through its letter dated 06.02.2021 (sent by email), reminded the petitioner to provide these unfurnished details. The letter dated 06.02.2021 reads as under:

"Dear Sir,

In our earlier email as required by the bidding document for IFB No.APGCL/ADB/Tranche-3/P-3, APGCL requested M/s Voith Hydro Private Ltd. to provide FIN-3 and FIN-4 of the same company i.e. either of the Parent Company or of the bidder company to correctly demonstrate available financial resources. However, it is observed that the information given by you is not demonstrating what is actually required by the bidding document.

We appreciate that you have submitted your clarification promptly but it does not provide detailed information for verification of its actual monthly commitment. Therefore, once again AGPCL would like to request you to provide the information as requested in our earlier email i.e. "Please provide FIN-3 and FIN-4 of the same company (either of Parent Company or of bidder company) to correctly demonstrate available financial resources."

Please note that APGCL is requesting you to provide the details of each contract indicating all the information fulfilling the requirement of the bid i.e. FIN-4 of the bidding document. You are requested to provide the information as sought in the FIN-4 by 12:00 PM (IST) of 10.02.2021."

5. In spite of the above request, details were not supplied by the petitioner. The Form FIN-4 as referred in the above letter, is the column in which the financial requirement for the current contract commitment have to be given. Admittedly, the appellant/petitioner gave details of only 21 contracts and then stated in column 22 that there are various other contracts and the outstanding contract value of the remaining unspecified contracts is 1421.9 Million US Dollars. Since these details were not supplied in spite of requisition by the employer, the employer was of the view that under these circumstances, the bid of the petitioner would be Non-Responsive. Consequently after taking approval from Asian Development Bank (as it is a project of Asian Development Bank), it passed an order on 19.02.2021 communicating to the petitioner/appellant that its bid has been declared as Non-Responsive because the bidder could not demonstrate the actual financial resources available with the parent company through submitted Form FIN-4. The letter dated 19.02.2021 has three columns

i.e., Ref. Clause, Bid Stipulations and Bidder's Response. Although the exact reason for rejecting the bid is assigned in the third column, i.e. "Bidder's response and the reason assigned are that Bidder could not demonstrate the actual financial resources available with the parent Company through submitted Form FIN-4", but an appreciation of entire letter would demonstrate that what has not been done by the writ appellant/petitioner was that it had not furnished the entire detail as demanded in Form FIN-4, i.e. the details of its current contract commitment. The letter dated 19.02.2021 is reproduced below:

S No.

Ref. Clause

Bid Stipulations

Bidder's Response

1

Form-FIN-4/Current Contract Commitment of Section-4

The Bidder must demonstrate that its financial resources defined in FIN-3, less its financial obligations for its current contract commitments defined in FIN-4, meet or exceed the total requirement for the Subject Contract of INR 200 million.

Bidder could not demonstrate the actual financial resources available with the parent Company through submitted Form FIN-4

6. Aggrieved, the petitioner filed writ petition being WP(C) 1373/2021 before this Court, which has been dismissed vide order dated 31.03.2021. The present writ appeal has been filed against the aforesaid order dated 31.03.2021.

7. The argument of the learned senior counsel for the appellant/petitioner, Mr. GN Sahewalla is that the financial capacity of the appellant/petitioner was much above the requirement of the project, yet finance or lack of finance are the reasons given for rejecting the bid of the petitioner.

8. The fact, however, is that the details of the other projects, valued at about 1421.9 Million US Dollars, were never supplied to the employer, even after reminders and request. The learned senior counsel for the appellant, however, would argue that the bid of the appellant/petitioner was declared Non-Responsive not because the details had not been furnished, but because of the fact that financial resources of the parent company of the appellant/petitioner were poor, which is factually not correct, and therefore the rejection of its bid is bad. This argument, however, is not acceptable, inasmuch as, the rejection order dated 19.02.2021, clearly states that the details as required under the head FIN 4 have not been given, which is a fact. FIN 4, as already referred to above, is a column in which the details of the entire ongoing projects and their costs have to be given. This, admittedly, has not been done. We find a purpose for the employer in examination of these details as with these details he can evaluate

both financial capacity and the ongoing commitment of the bidder. It is an extremely essential condition.

9. Mr. G.N. Sahewalla, learned senior counsel for the writ appellant would then argue that there are certain essential conditions and there are other conditions, which may not be essential and a distinction has to be made and it has to be seen as to which condition has not been strictly adhered to. The learned senior counsel has first placed reliance on a decision of the Hon'ble Apex Court in the case of *Rashmi Metaliks Limited & Anr. -Vs- Kolkata Metropolitan Development Authority & Ors.* (2013) 10 SCC 95. In the said case, the brief of the appellants before the Hon'ble Apex Court was rejected on grounds that it had not submitted its income tax return of a particular year. Both the learned Single Judge and the Division Bench of Calcutta High Court had rejected the writ petition of the petitioners/appellants as the Hon'ble Judges were of the opinion that the bid becomes non-responsive once a bidder does not furnish essential documents. The Hon'ble Apex Court was of the opinion that not furnishing the details of the income tax for a particular year was not essential and in any case, the tendering authority ought to have brought this discrepancy to the notice of the appellant company and if even thereafter no rectification had been carried out, then it would have been a different case. It is stated in Paragraph 18 of the judgment as follows:-

"18. We think that the income tax return would have assumed the character of an essential term if one of the qualifications was either the gross income or the net income on which tax was attracted. In many cases this is a salutary stipulation, since it is indicative of the commercial standing and reliability of the tendering entity. This feature being absent, we think that the filing of the latest income tax return was a collateral term, and accordingly the Tendering Authority ought to have brought this discrepancy to the notice of the appellant Company and if even thereafter no rectification had been carried out, the position may have been appreciably different. It has been asserted on behalf of the appellant Company, and not denied by the learned counsel for the respondent Authority, that the financial bid of the appellant Company is substantially lower than that of the others, and, therefore, pecuniarily preferable."

(emphasis provided)

10. We, however, find that the facts of the case cited above are entirely different from the present case. In the present case, the condition not fulfilled by the writ appellant was an essential condition, but more importantly before declaring its bid as non-responsive, enough opportunity was given by the employer (APGCL) to rectify this mistake unlike in the case cited above (*Rashmi Metaliks Limited & Anr. -Vs- Kolkata Metropolitan Development Authority & Ors.*). Therefore, this case would be of no help to the writ appellant.

11. The other case cited by the learned senior counsel for the appellant is *Poddar Steel Corporation -Vs- Ganesh Engineering Works & Ors.* (1991) 3 SCC 273. In

this case, the bid was rejected on ground that the earnest money, which was to be deposited by the bidder, was through a banker's cheque of Union Bank of India, whereas the requirement was that it should be from State Bank of India. The Hon'ble Apex Court was of the view that the cheque given on Union Bank of India should have been treated as sufficient condition for the purposes of achieving the object of the condition of the tender and merely because a cheque has been drawn on another Bank should not have been rejected. We, however, again find that this will not help the case of the writ appellant as in the present case the condition which has not been fulfilled by the writ appellant is much more than drawing a cheque of a different Bank. As already observed by this Court, supplying the details of all the ongoing projects was an essential condition, which admittedly was not fulfilled by the writ appellant.

12. Mr. B.D. Das, learned senior counsel appearing for the APGCL has relied upon the case of Central Coalfields Limited & Anr. -Vs- SLL-SML (Joint Venture Consortium) & Ors. (2016) 8 SCC 622 In this case also, one of the essential conditions was that the bank guarantee has to be given by a particular Bank and when it was not given by a particular Bank that was held to be a deviation from the essential conditions as the employer himself had not relaxed or deviated from that essential conditions. It was held in Paragraph 55 as under:-

"55. On the basis of the available case law, we are of the view that since CCL had not relaxed or deviated from the requirement of furnishing a bank guarantee in the prescribed format, insofar as the present appeals are concerned every bidder was obliged to adhere to the prescribed format of the bank guarantee. Consequently, the failure of JVC to furnish the bank guarantee in the prescribed format was sufficient reason for CCL to reject its bid."

13. In a recent judgment of the Hon'ble Apex Court in the case of Utkal Suppliers -Vs- Maa Kanak Durga Enterprises & Ors. 2021 SCC OnLine SC 301, in which case, one of the essential conditions for a bidder was to supply a valid licence of the labour department and the licence supplied by a bidder under the Contract Labour (Regulation and Abolition) Act, 1970 was considered to be sufficient compliance by the High Court. Referring to the decisions of Hon'ble Apex Court in Tata Cellular -Vs- Union of India (1994) 6 SCC 65, the Hon'ble Apex Court held as under:-

"15. This Court has repeatedly held that judicial review in these matters is equivalent to judicial restraint in these matters. What is reviewed is not the decision itself but the manner in which it was made. The writ court does not have the expertise to correct such decisions by substituting its own decision for the decision of the authority."

14. We may now revert to the principles laid down by the Hon'ble Apex Court in the case of Tata Cellular -Vs- Union of India, and as referred in the above case (Utkal Suppliers -Vs- Maa Kanak Durga Enterprises & Ors) are as under:-

"94. The principles deducible from the above are:

- (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. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (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 (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
- (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

xxx xxx xxx"

15. Apart from adopting the submissions of Mr. B.D. Das, learned senior counsel appearing for the APGCL, Mr. T.P. Sen, learned counsel appearing for the respondent No.5 has submitted that the writ appellant has admittedly not supplied the conditions which were essential to the contract. In addition to the case laws relied upon by Mr. B.D. Das, learned senior counsel appearing for the APGCL, he has also placed before this Court another judgment of the Hon'ble Apex Court in the case of Jagdish Mandal -Vs- State of Orissa & Ors. (2007) 14 SCC 517, where in matters of the contract, which are purely commercial in nature, the powers of the judicial review of the High Court had been held to be extremely limited.

16. Having heard in detail the rival submissions of the parties and taking into consideration the legal as well as the factual aspects of the case, we are of the considered view that the writ appellant had admittedly not supplied the essential conditions, which it was required to furnish as per the bid conditions, and it failed to do that in spite of the warning and reminders. Having failed to furnish the details its bid has been held to be non-responsive and in our view, rightly so.

17. We, therefore, find scope to interfere with the findings of the learned Single Judge in his order dated 31.03.2021 passed in WP(C) No.1373/2021. The appeal is accordingly dismissed.