(2015) 05 JH CK 0036

In the Jharkhand High Court

Case No : L.P.A. No. 266 of 2015

Wave Industries Private Limited APPELLANT

Vs

The State of Jharkhand and Others RESPONDENT

Date of Decision : 19-05-2015

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2015) 05 JH CK 0036

Hon'ble Judges : Virender Singh, C.J;P.P. Bhatt, J

Bench : Division Bench

Advocate : Anil Kumar Sinha, Senior Advocate, Chandrajit Mukherjee, Anjani Kumar and Shruti Shestha, for the Appellant; Rajesh Shankar, G.A., Advocates for the Respondent

Final Decision : Dismissed

Judgement

1. The present Letters Patent Appeal is preferred against the impugned order dated 07th May, 2015, passed by the learned Single Judge in W.P.(C) No. 1445 of 2015, whereby the writ petition has been dismissed.

2. Heard Mr. Anil Kumar Sinha, learned senior counsel appearing for the appellant as well as Mr. Rajesh Shankar, learned Government Advocate appearing for the Respondent-State Government.

3. Perused the impugned order delivered by the learned Single Judge in W.P.(C) No. 1895 of 2013 and other relevant materials placed on record.

4. The brief facts giving rise to the present appeal are as under:-

The appellant-Company pursuant to e-Tender notice dated 04th March, 2015, submitted its bid. The date for opening the technical bid was 27th March, 2015 and the financial bid was to be opened on 30th March, 2015. The Tender Committee found the petitioner-Company disqualified in the technical bid on the ground that the certificate issued by the Pollution Control Board was valid only up to 31st December, 2014. Aggrieved by the decision of the Tender Committee dated 30th March, 2015, the appellant approached this Court by way of filing W.P. (C) No. 1445 of 2015 and the said writ petition was dismissed vide order dated 07th May, 2015. Hence, this appeal.

5. Mr. Anil Kumar Sinha, learned senior counsel appearing for the appellant submits that the appellant-Company disqualified in the technical bid on the ground that the valid Pollution Control Certificate issued by the Pollution Control Board, was valid only up to 31st December, 2014. It is submitted that it was not an eligibility condition for the tenderer as it was not a mandatory requirement. According to Mr. Sinha it was director in nature and therefore, at the time when technical bid was opened, the Tender Committee could have asked the appellant to produce valid Pollution Control Certificate.

The learned counsel for the appellant, in support of his submissions, has referred to and relied upon the following three decisions:-

(i) K. Vinod Kumar Vs. S. Palanisamy and Others, AIR 2003 SC 3171 : (2004) 1 CTLJ 436 : (2003) 8 JT 100 : (2003) 6 SCALE 753 : (2003) 10 SCC 681 : (2003) 2 UJ 1480 : (2004) AIRSCW 4260 : (2003) AIRSCW 4519 : (2004) 2 Supreme 589 : (2003) 6 Supreme 471

(ii) Tejas Constructions and Infrastructure Pvt. Ltd. Vs. Municipal Council, Sendhwa and Another, (2012) 3 BC 74 : (2012) 5 SCALE 113 : (2012) 6 SCC 464

(iii) Rashmi Metaliks Ltd. and Another Vs. Kolkata Metropolitan Development Authority and Others, (2013) 4 BC 244 : (2013) 11 SCALE 248 : (2013) 10 SCC 95 : (2013) 2 SCC(L&S) 858

6. Mr. Rajesh Shankar, learned Government Advocate appearing for the respondent-State of Jharkhand while opposing the Letters Patent Appeal submitted that the Tender Committee found that the appellant-Company was not eligible on the date when the technical bid was opened and, therefore, it has rightly been declared disqualified in the technical evaluation. The learned counsel for the Respondent-State further submitted that even the financial bid has also been opened and the contract is awarded to the qualifying bidder. Thus, a third party interest has also been created in this case and for this reason also, the appellant at this stage is not entitled for any relief.

7. Considering the aforesaid rival submissions and having regard to the facts and circumstances of the present appeal, it appears that the check-list of technical bid discloses that the bidder should have valid Pollution Control Certificate, issued by the Pollution Control Board of the State. It appears that the appellant submitted Pollution Control Certificate, which was valid only till 31st December, 2014 and, therefore, as per the terms of the technical bid, the appellant was not having a valid Pollution Control Certificate.

8. It is well settled law that the terms of contract must be given a plain and literal meaning and bidder must fulfill all the conditions of the Tender. It also

appears that before the Writ Court, supplementary affidavit was filed by the petitioner/appellant to bring on record the Pollution Control Certificate, issued to the petitioner on 05.05.2015, which is valid with effect from 01.01.2015. It has been argued that since the Pollution Control Certificate has been issued in favour of the petitioner on 05.05.2015, it would cover the period when e-Tender under notice was issued and accordingly, the appellant may be declared qualified in technical bid.

9. On perusal of the tender document, it becomes clear that a bidder must have valid Pollution Certificate and, therefore, when the Tender notice was issued on 04th March, 2015 and when the technical bid was opened on 27th March, 2014, the appellant was not having valid Pollution Control Certificate, as it reveals from the record that the same was issued on 05.05.2015.

10. We have perused the decisions referred to and relied upon by the learned senior counsel for the appellant. The said decisions were also cited before the learned Writ Court. But in our view the appellant cannot derive any benefit from the same.

11. In the case of Tejas Constructions and Infrastructure Pvt. Ltd. Vs. Municipal Council, Sendhwa and Another, (2012) 3 BC 74 : (2012) 5 SCALE 113 : (2012) 6 SCC 464 cited by Mr. Sinha, the Hon''ble Apex Court has discussed about the power of judicial review in respect of contracts/administrative action. The relevant abstract is reproduced hereinbelow:-

17. In Raunaq International Ltd. v. I.V.R. Construction Ltd. this Court reiterated the principle governing the process of judicial review and held that the writ court would not be justified in interfering with commercial transactions in which the State is one of the parties to the same except where there is substantial public interest involved and in cases where the transaction is mala fide. The Court observed: (SCC pp. 500-01, paras 10-11)

"10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work--thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g., a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

11. When a writ petition is filed in the High Court challenging the award of a

contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest involved, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers."

19. Reference may also be made to Sterling Computers Ltd. v. M and N Publications Ltd. where this Court held that the power of judicial review in respect of contracts entered into on behalf of the State primarily involves examination of the question whether there was any infirmity in the decision-making process, and if such process was reasonable, rational and non-arbitrary, the Court would not interfere with the decision.

20. In Air India Ltd. v. Cochin International Airport Ltd. this Court held that the award of contract was essential in commercial transactions which involves commercial consideration and results in commercial decision. While taking such decision the State can choose its own method on terms of invitation to tender and enter into negotiations. The following passage from the decision is apposite: (SCC pp. 623-24, para 7)

"7....The award of contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness.... Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

21. To the same effect is the decision of this Court in Master Marine Services (P) Ltd. v. Metcalfe and Hodgkinson (P) Ltd. and Jagdish Mandal v. State of Orissa where this Court laid down the following tests for judicial interference in exercise of power of judicial review of administrative action: (Jagdish Mandal case, SCC p. 531, para 22)

"22....Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: ''the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached''.

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226."

12. Vimal Kumar''s case (supra) and Rashmi Metalik''s case (supra) are also distinguishable on facts.

13. In view of the detailed discussion made by the learned Writ Court in paras.4 to 7, we find that there is no infirmity in the decision taken by the learned Writ Court. It is well-settled law that the terms of contract must be given a plain and literal meaning. It is also well-settled principle that a bidder must fulfill all conditions of the tender and it is not open to Tender Committee to relax the condition in favour of one tenderer. The contract is to be interpreted, giving an actual meaning to the words contained in the contract and it is not permissible for the Court to make a new contract, as held in the case of The Rajasthan State Industrial Development and Investment Corporation and Another Vs. Diamond and Gem Development Corporation Ltd. and Another, (2013) 3 AD 73 : AIR 2013 SC 1241 : (2013) 3 JT 417 : (2013) 3 JT 409 : (2013) 2 SCALE 452 : (2013) 5 SCC 470 : (2013) AIRSCW 1244 .

14. Moreover, it also appears that the financial bid has also been opened and the contract is awarded to the qualifying bidder. Thus, a third party interest has also been created in this case and for this reason also, the petitioner at this stage is not entitled for any relief.

15. As a sequel to the aforesaid discussion, we do not find any reason to

interfere with the well reasoned judgment of learned Writ Court. Resultantly, the instant appeal merits dismissal at this stage itself.

16. Ordered accordingly.

