

* IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **W.P.(C) 5802/2008**

Date of decision: 12.05.2009

IN THE MATTER OF :

KALESHWAR BUILDERS & DEVELOPERS (P) LTD Petitioner
Through: Mr. Rajiv Bajaj, Advocate

versus

M.C.D & ANR Respondents
Through: Mr. Nalin Tripathi, Advocate for MCD.

CORAM

*** HON'BLE MS.JUSTICE HIMA KOHLI**

1. Whether Reporters of Local papers may be allowed to see the Judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

HIMA KOHLI, J. (ORAL)

1. The present writ petition is filed by the petitioner praying *inter alia* for directions to the respondent/MCD to issue a letter of allotment and possession in favour of the petitioner in respect of property being a dormitory at AG Block, Sanjay Gandhi Transport Nagar, Delhi, measuring 650 sq. mtrs. with a building comprising of the ground floor and the first floor. The petitioner also seeks quashing of the order dated 07.12.2007 issued by the respondent cancelling the bid of the petitioner on account of

its failure to honour the same in accordance with the terms and conditions of the tender dated 09.08.2005 and forfeiting the earnest money deposited by the petitioner by invoking Clause 9 of the tender documents.

2. Briefly stated, the facts of the case are that the respondent/MCD floated a tender on 09.08.2005, inviting quotations for built-up properties having locations at Sanjay Gandhi Transport Nagar. The last date fixed for receiving the tender forms was 12.09.2005. The petitioner participated in the aforesaid tender by depositing 25% of the bid money amounting to Rs.17,56,000/- alongwith the tender documents. As per the terms and conditions of the tender, the bidder was required to deposit balance 75% of the bid amount in terms of Clause 9 thereof, which is reproduced hereinbelow for ready reference:-

“Clause 9: Every sealed tender will have to be deposited in the tender box kept in the office of Director, Sanjay Gandhi Transport Nagar, Badli, Delhi-110042. The tender submitted after 10:45 AM on the last date of Tender shall not be accepted in any circumstances. The time shown by the Watch of SGTN Office or the officer authorized for the purpose will be treated as final. The tenderers should reach there well before the time fixed to avoid last minute rush. The list of documents should be attached with the offer form. The details of application form will be held valid and final for the purpose of tendering and no change can be made after depositing the tenders. The tenders will not be accepted by post. As far as possible, the tenders will be opened by the Director, SGTN at 11:00 AM on the date fixed, in the office of Director, Sanjay Gandhi Transport Nagar, A Block, Badli, Delhi-42. Only tenderers or their authorized representatives will be allowed to remain present

when the tenders are opened. Thereafter the Corporation in due course will consider these tenders and if any of these tenders is accepted, the acceptance offer shall be issued within the maximum time of three months. The amount of lease premium as worked out for the area of the plot reduced by the amount of earnest money deposited as required to be paid in two months from the date of issue of letter of acceptance of offer positively. However, on the written request/representation of the applicant, the Commissioner may in his absolute discretion, accept the offered amount of bid upto 3 months within @ 15% p.a. and beyond 3 months upto a maximum period of one year with interest @ 18% p.a. In case the highest offerer fails to pay the amount offered within two months of the date of offer the Commissioner may cancel the allotment in question and forfeit the earnest money deposited."

3. The petitioner was declared a successful bidder by the respondent, at Rs.75,01,000/-, vide letter dated 02.05.2006. As per the terms and conditions contained in the tender form, the petitioner was requested to deposit the balance 75% of the bid money amounting to Rs.56,01,000/-, within a period of three months from the date of issue of the letter, so that possession of the dormitory be handed over to the petitioner.

4. Counsel for the petitioner states that the petitioner deposited the aforesaid amount of Rs.56,01,000/- with the respondent on 30.04.2007, by mode of a cheque, but the respondent failed to hand over possession of the dormitory and instead, issued a notice to show cause dated 14.11.2007 calling upon the petitioner to show cause as to why the allotment made in its

favour should not be cancelled and the earnest money forfeited on account of failure to pay 75% of the bid amount within the stipulated period as contained in the tender documents. On receipt of the aforesaid show cause notice, the petitioner replied thereto vide letter dated 17.11.2007 stating inter alia that as per the terms and conditions of the tender, the last date for depositing the said amount was 29.04.2007, but since 28.04.2007 and 29.04.2007 fell on a Saturday and Sunday respectively, and the office of the respondent was closed being holidays, the balance 75% of the bid amount was deposited on 30.04.2007. It was further stated that at best, the respondent could impose reasonable interest on the petitioner for late payment by one day, but the allotment made could not be cancelled.

5. After considering the aforesaid reply of the petitioner, the respondent issued the impugned order dated 07.12.2007. It was noted in the said order that as per the terms and conditions of the tender document, any extension in depositing the balance amount beyond a period of two months was subject to a written request by the bidder in that regard subject to an approval of the Commissioner in his absolute discretion. However, no request had been received from the petitioner for extension of time beyond two months for depositing the balance bid amount and therefore, the cheque dated 30.04.2007 could not be accepted. As a result, the highest bid of the petitioner was cancelled and the earnest money deposited by the petitioner was forfeited by the respondent. Aggrieved by the impugned order of

cancellation and forfeiture, the petitioner has preferred the present petition.

6. Counsel for the petitioner submits that as the petitioner deposited the amount on or before 30.04.2007 and the respondent accepted the same and retained the cheque of the petitioner till passing of the impugned order, there is deemed extension of time granted to the petitioner. In support of his contention, he seeks to rely upon the notice to show cause dated 14.11.2007 wherein, the respondent mentioned that the bidder had failed to deposit the required amount upto 29.04.2007.

7. The aforesaid contention of the learned counsel for the petitioner is misconceived as the show cause notice has to be examined in its entirety and not in a piecemeal fashion. A perusal of the show cause notice dated 14.11.2007 shows that the respondent had taken note of the fact that 75% of the bid amount was required to be paid within the stipulated period as specified in the tender documents. It is an undisputed position that the terms and conditions of the tender documents required a party seeking extension of time, to approach the competent authority by way of a written request/representation in that regard and that it was in the absolute discretion of the competent authority to accept the offered amount of bid upto 3 months @ 15% per annum and beyond 3 months upto a maximum period of one year with interest @ 18% per annum. No document has been filed on the record by the petitioner to show that the aforesaid clause was invoked by it and extension of time sought from the Commissioner, MCD.

Counsel for the petitioner seeks to rely upon a letter dated 23.06.2008 issued by the petitioner to the respondent wherein an explanation was sought to be given for the delay in payment and a reference has been made to a letter dated 01.08.2006 stated to have been addressed by the petitioner to the respondent seeking extension of time. It is pertinent to note that the letter dated 01.08.2006 has not been placed on the record by the petitioner. The original file was summoned from the respondent on the last date of hearing and has been duly produced and perused by the counsel for the petitioner as also by the Court. The records do not find mention of any letter dated 01.08.2006 claimed to have been issued by the petitioner. Therefore, it has to be assumed that no such letter for extension of time was forwarded by the petitioner to the respondent.

8. The second plea raised on behalf of the petitioner is that being a matter relating to land, time was not an essence of the contract and the petitioner could have claimed for extension of time without any risk as sought to be imposed by the respondent by ordering cancellation of the bid and forfeiture of amount. The aforesaid submission is taken note of only to be rejected. This is not a case where a civil proceeding in the nature of a suit for specific performance has been instituted by the petitioner against the respondent. Rather, it is a case of tender, where time is always the essence of contract, unless established otherwise. In the present case, the terms and conditions of the tender stipulate specific dates for floating of tender, for

accepting of bids, for opening of bids, as also for making payments in terms of the documents. Thus, the aforesaid submission of the petitioner flies in the face of the stipulations contained in the tender documents and is rejected, being devoid of merits.

9. The last submission made by the learned counsel for the petitioner is that the petitioner was always ready and willing to pay interest for the delayed period. The aforesaid submission of the petitioner needs to be examined in the light of the letter dated 30.04.2007 issued by the petitioner to the respondent, which forms a part of the original records. A perusal of the said letter shows that while forwarding the cheque dated 30.04.2007 for Rs.56,01,000/-, the petitioner only made a reference to its readiness to pay interest, "if any demand for the same was raised by the respondent". The aforesaid offer of the petitioner, does not demonstrate that the petitioner was at any time ready to pay interest. The bona fides of the petitioner could have been established had the petitioner offered a separate cheque towards the interest factor at the relevant time and sought extension of time from the Commissioner, MCD. In these circumstances, the submission of the petitioner that it was ready and willing to pay interest to the respondent for the delayed period, cannot be accepted.

10. The request of the petitioner that in equity, the Court can interfere and call upon the respondent to accept the bid of the petitioner and quash the impugned order dated 07.12.2007 is unacceptable for the reason

that from the facts on record, this Court does not find that the petitioner has made out a case in equity in its favour. That apart, in the present proceedings of Article 226 of the Constitution of India, the Court is required to examine the legality and validity of the impugned order dated 07.12.2007, by testing it on the anvil of arbitrariness, illegality or perversity. None of the aforesaid grounds is made out by the counsel for the petitioner.

11. It was observed by the Court in the case of Tata Cellular Vs. Union of India **(1994) 6 SCC 651** that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. It has been held in Air India Ltd. Vs. Cochin Int. Airport Ltd. & Ors. **(2000) 2 SCC 617** that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. Also, in a recent judgment in the case of Siemens Public Communication Networks Pvt. Ltd. & Anr. Vs. Union of India & Ors. reported as **155 (2008) DLT 621 (SC)**, the Supreme Court observed as below:-

"34. When the power of judicial review is invoked in the matters relating to tenders or award of contracts, certain special features have to be considered. A contract is a commercial transaction and evaluating tenders and awarding contracts are essentially commercial functions. In such cases, principles of equity and natural justice stay at a distance."

12. In the present case, there is no illegality or arbitrariness in the impugned order dated 07.12.2007 by which, the bid of the petitioner has been cancelled. Rather, the cancellation of the bid is in consonance with Clause 9 of the tender document.

13. For the aforesaid reasons, this Court declines to exercise its power of judicial review in favour of the petitioner in the present case. The writ petition is dismissed as devoid of merits, with no orders as to costs.

MAY 12, 2009
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HIMA KOHLI,J