THE HON'BLE THE CHIEF JUSTICE
SHRI KALYAN JYOTI SENGUPTA
AND

HON'BLE SHRI JUSTICE SANJAY KUMAR

WRIT APPEAL NO.1765 OF 2013

DATED 1ST MAY, 2015

Between:

Soma-CGGC JV, a Joint Venture, having its office
at 2, Avenue 4 (Road No.10), Banjara Hills,
Hyderabad- 500034, rep. by its Authorized
Signatory, Mr. B. Bhaskara Rao

.. Appellant

and

The Government of Andhra Pradesh rep. by its
Chief Secretary, Secretariat Buildings,
Hyderabad and others

.. Respondents

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J U D G M E N T

(*Per* Hon'ble Shri Justice Sanjay Kumar)

Writ Petition Nos.32328 of 2012 and 7520 of 2013 were dismissed by a learned Judge of this Court by common order dated 11.09.2013. These writ petitions were filed by two unsuccessful bidders for award of a contract relating to execution of the head works of Indira Sagar Polavaram Project. The grievance of both the writ petitioners was as to the bid eligibility of the successful bidder, M/s. Transstroy-UES JV, the eighth respondent herein, and the award of the contract in its favour. Writ Appeal No.1768 of 2013 filed by the petitioner in W.P.No.7520 of 2013 was dismissed for non-prosecution on 09.12.2014. The present appeal was filed by the petitioner in W.P.No.32328 of 2012.

Heard Sri C.V.Mohan Reddy, learned senior counsel for the appellant, Sri S.Ravi, learned senior counsel for the eighth respondent, and the learned Advocate General for the State of Andhra Pradesh.

Initially, only two out of the six tenderers for the subject contract were found eligible, viz., the appellant and another bidder. Award of the contract was, in fact, recommended in favour of the appellant. However, upon a direction by this Court in W.P.No.22664 of 2012 and batch filed by the unsuccessful bidders, including the eighth respondent herein, a

High Power Committee (HPC) comprising senior officials of the State reconsidered the matter and five out of the six bidders were found eligible. Thereupon, the price bids of those bidders were opened on 01.10.2012 and the eighth respondent emerged the lowest tenderer (L-I). Significantly, the appellant slipped to the fourth position (L-IV). The HPC therefore recommended award of the contract to the eighth respondent and the said recommendation was accepted by the Government under Memo dated 26.10.2012. Award of the contract to the eighth respondent is stated to have resulted in a saving of Rs.663.00 crore to the public exchequer.

However, the appellant claims that the eighth respondent was not at all qualified to be considered for award of the contract in terms of the eligibility conditions prescribed in the tender notice dated 16.04.2012. More particularly, the thrust of the attack launched against the eighth respondent is: (1) that it failed to satisfy the requirement of registration with the Registrar of Companies under Clause 30(A)(4) of the tender conditions, (2) that it failed to satisfy the financial requirement as prescribed in Clause 30(C) of the tender conditions, (3) that it relied on forged and fraudulent experience certificates, and (4) that it failed to file a power of attorney in the prescribed format.

Award of a contract by the State is essentially a commercial transaction and in arriving at such a decision, considerations which are of paramount importance would also be commercial. Before interfering with the award of a contract by the State, the Court must be satisfied that there is some element of public interest involved. The Court cannot substitute its own decision for the decision of an expert evaluation committee. If any relaxation of the requirements prescribed by the tender conditions is granted for *bonafide* reasons and if such relaxation is permitted, the Court should hesitate to intervene if the decision is arrived at for legitimate reasons after fair consideration of all the offers (***RAUNAQ INTERNATIONAL LTD. V/s. I.V.R. CONSTRUCTION LTD.***[1]).

In ***TATA CELLULAR V/s. UNION OF INDIA***[2], the Supreme Court observed that the Government must have freedom of contract with a fair play in the joints as a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere and the Court would not sit as a Court of appeal but merely review the manner in which such a decision was made. Such decision must not only be tested by the application of the Wednesbury principle of reasonableness but must also be free from arbitrariness, bias and *malafides*.

This Court would therefore not sit in appeal over the re-evaluation of the bidders' eligibility by the HPC pursuant to the earlier direction of this Court. Only the decision making process would be subject to judicial scrutiny and even then, this Court would not initiate a nit-picking or roving enquiry into each and every aspect of the matter. If the tender permits relaxation of the requirements prescribed thereunder, it is for the tender evaluating authority to objectively assess the individual bids and exercise such power of relaxation, if warranted.

In this regard, it would be for the authority concerned to determine as to which of the tender conditions are essential and ordinarily, deviation from non-essential conditions would not warrant invalidation unless such deviation is shown to be patently arbitrary or discriminatory (***G.J. FERNANDEZ V/s. STATE OF KARNATAKA***[3] and ***PODDAR STEEL CORPORATION V/s. GANESH ENGINEERING WORKS***[4]).

In the present case, Clause 34(28) of the tender conditions empowered the State to relax the conditions for eligibility of a bidder in public interest. It is a matter of record that the HPC ultimately determined the eligibility of five of the six bidders after extending to them various relaxations of the tender conditions, categorized as non-essential. The appellant was also the beneficiary of such relaxation in connection with the solvency certificate furnished by it.

Coming to the first ground of attack, Clause 30(A)(4) of the tender conditions states as under:

> 'In case of Foreign Agencies/Firms/Company to be eligible for participation in bids, they should have Registered their name in India as a Agency/Company with the Registrar of Companies as per Company Act of India as on the date of submission of bids. Proof to that effect should be enclosed to the tender.'

The clear language of this clause indicates that it applied to foreign agencies, firms and companies which wished to participate in the bid. Such entities were required to register their names in India with the Registrar of Companies. The eighth respondent is however a joint venture floated by a foreign company with an Indian company. It therefore did not fall within the ambit of Clause 30(A)(4). However, in response to queries raised by the bidders as regards Clause 30(A)(4), it appears that a clarification was issued by the State on 11.05.2012 to the effect that registration with the Registrar of Companies was mandatory for a foreign company intending to participate in the bid either individually or as a joint venture partner. This clarification clearly went beyond the literal import of the tender condition set out *supra*. The learned single Judge was therefore of the opinion that the plain language of Clause 30(A)(4) was unambiguous and it only applied to a foreign company bidding on its own and not when it participated as a partner in a joint venture. The learned Judge further opined that the clarification issued thereafter could not have an overriding effect.

Interestingly, the eighth respondent did get registered under the Companies Act, 1956 and Certificate of Incorporation dated 04.05.2012 was produced by it. No doubt, this certificate was not accepted by the primary authority, the State Level Standing Committee (SLSC), on the ground that there was a difference in the names of the participants in the joint venture and as the object of incorporation was only for carrying out the works of Singareni Thermal Power Project but did not include irrigation projects, etc. It is however not in dispute that the objects of incorporation were amended thereafter to include irrigation projects, construction of dams, excavation, etc.

In any event, the HPC found that the procedural deficiency as regards compliance with this clause did not, in any way, reflect upon the technical and financial capacity of the eighth respondent and the requirement was held to be only an administrative one for ensuring accountability. In effect, it was treated as a non-essential tender condition. It may also be noticed that the HPC found fault with the SLSC for its failings, as noted in para 91 of its Minutes, and recommended disciplinary action against its members. Given the above facts, we see no reason to interfere on this ground. Relaxation of the requirement under Clause 30(A)(4) of the tender conditions, even if warranted *apropos* the clarification dated 11.05.2012, was extended to the eighth respondent in public interest as the HPC was of the opinion that such requirement did not impact its eligibility in terms of its technical and financial capacity. This ground of attack must therefore fail.

As regards the second ground of challenge, Clause 30(C) of the tender required the bidder to demonstrate a minimum annual financial turnover in civil engineering and hydro-mechanical works of a value not less than Rs.1800.00 crore in any one year during the last ten years (2002-03 to 2011-12), updated by giving 10% simple weightage per year to bring it to 2012-13 price level. As the foreign partner in the eighth respondent joint venture owned 86.9% share therein, it was required to have a turnover of Rs.1564.00 crore out of the stipulated Rs.1800.00 crore. The SLSC found that the foreign partner could demonstrate an annual turnover of Rs.955.92 crore and therefore found it to be ineligible. However, the HPC, upon assessment of this aspect, concluded that the eighth respondent complied with the financial requirement as the foreign partner of this joint venture had proved a work turnover of Rs.1592.28 crore for 2005-06 updated to Rs.2706.876 crore and a turnover of Rs.2182.3 crore during the financial year 2006-07 updated to Rs.3491.68 crore. The HPC found that the SLSC did not dispute these turnovers. Though Sri C.V. Mohan Reddy, learned senior counsel, would question the figures recorded by the HPC, it is not for this Court, in exercise of writ jurisdiction, to sit in appeal over such factual findings of an expert evaluation committee. Further, it is clear from the Minutes of the HPC that the tender documents submitted by the appellant itself, which were found to be responsive by the SLSC, did not furnish the break-up of the items comprised in the turnover. This lapse therefore could not weigh against the eighth respondent alone.

On the aforestated facts, we see no reason to discredit the finding of the HPC as to the eighth respondent demonstrating compliance with the financial requirement as stipulated in the tender conditions.

The next ground is as regards the experience claimed by the eighth respondent which was an essential requirement to determine its eligibility as per the tender conditions. This attack centers around three certificates relied upon by the eighth respondent in proof of its earlier performance and experience. The case of the appellant is that the eighth respondent produced forged and fraudulent documents in this regard.

It is however to be noticed that the appellant raised this issue for the first time only on 05.10.2012, after opening of the price bids on 01.10.2012, and the issue was not raised at the time of the deliberations by the HPC. Significantly, the appellant was a party to the earlier round of litigation in W.P.No.22664 of 2012 and batch, which was disposed of by order dated 31.07.2012 requiring the HPC to undertake re-evaluation of the tenders of the unsuccessful bidders who had approached this Court. It was therefore for the appellant to raise this issue at the appropriate point of time so that the HPC could have gone into it.

Copious arguments were advanced by Sri C.V. Mohan Reddy, learned senior counsel, in support of the alleged fraud but we have no intention of undertaking such an enquiry in exercise of writ jurisdiction. The learned single Judge also recognized this aspect of the matter but nevertheless embarked on an analysis on the merits of the allegation.

We are of the opinion that such examination was not at all warranted. Commission of fraud necessarily has to be proved by way of evidence adduced through a full-fledged trial and such a finding cannot be rendered on the basis of a mere exchange of affidavits. Further, as stated hereinabove, the failure on the part of the appellant to raise this issue at the relevant time is fatal.

In any event, it appears that the allegations leveled by the appellant as regards the fraud said to have been committed by the eighth respondent were not ignored and were examined in great detail by the State. A team of engineers was constituted under G.O.Rt.No.32, Irrigation and C.A.D. (PW-M&MI CA-II) Department, dated 15.01.2013 to undertake verification of the works claimed to have been executed by the eighth respondent in Russia. A sum of Rs.12.00 lakh was sanctioned towards the expenditure to be incurred by this team. It was only after consideration of this team's report dated 18.02.2013 that the HPC recommended award of the contract to the eighth respondent. The report dated 18.02.2013 submitted by this team in favour of the eighth respondent was however sought to be attacked by the appellant on the ground that the members thereof received the hospitality extended by the eighth respondent. However, the only fact cited by the appellant in support of its allegation of bias was that the eighth respondent undertook the hotel reservations of the team members in Moscow. As rightly held by the learned single Judge, this lone aspect would not be sufficient to infer bias on the part of the team as there is no proof of any hospitality having been extended to the members thereof by the eighth respondent. As stated earlier, the members of the team were sanctioned sufficient amount by the State to meet their expenditure and merely because the eighth respondent made their reservations, there can be no inference that it also met their hotel bill.

Lastly, though the appellant contended that the eighth respondent failed to submit a power of attorney as per Form B-21, the eighth respondent specifically stated in its counter that it had submitted the power of attorney, along with Board resolutions, duly certified by the Indian Embassy at Moscow and that the same was accepted by the authorities. Perusal of the Minutes of the HPC reflects that this aspect of the matter was duly considered. The HPC noted that there was no analysis on this issue by the SLSC and no finding had been rendered thereupon. This issue did not even figure for consideration before the SLSC at its meeting held on 20.07.2012 and no objection in this regard had ever been addressed to the eighth respondent for eliciting its response. The HPC therefore opined that raising this objection at the last minute without clarifying the position or making a recommendation for disqualification demonstrated a stance on behalf of the SLSC of ‘being willing to strike but being afraid to wound’. On this ground, the HPC resolved to disregard the comment made by the SLSC on the submission of the power of attorney by the eighth respondent. We are therefore not inclined to attach any importance to this ground of attack raised by the appellant.

Reliance on precedents by Sri C.V. Mohan Reddy, learned senior counsel, on various aspects of the matter does not need replication as the legal position on the scope of judicial review in matters of this nature is well settled. We therefore do not wish to burden this judgment with unnecessary reference to or extraction from more case law.

Given all the aforestated reasons, we see no ground made out to interfere with the order under appeal. The writ appeal is therefore dismissed. Pending miscellaneous petitions, if any, shall also stand dismissed. No order as to costs.

K.J. SENGUPTA, CJ

SANJAY KUMAR, J

1ST MAY, 2015

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[1] (1999) 1 SCC 492

[2] AIR 1996 SUPREME COURT 11(1)

[3] (1990) 2 SCC 488

[4] (1991) 3 SCC 273 = AIR 1991 SC 1579