IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.349 of 2015

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Agarpara Jute Mills Limited, a Company incorporated under the provisions of the Companies Act, 1956 and having its registered office at 28, B.T. Road, P.O.-Kamarhati, Kolkata-700058 through its Director Jitendra Nath Coubey, son of Shri Dinanath Choubey, resident of House No.28, B.T. Road, P.O.-Kamarhati, Kolkata-700058 (West Bengal).

.... Petitioner

Versus

1. The State of Bihar through the Principal Secretary, Department of Agriculture, Government of Bihar, Patna.
2. The Bihar State Food & Civil Supplies Corporation Limited, a Government of Bihar Undertaking, having its office at 5th Floor, Sone Bhawan, Birchand Patel Marg, Patna-800001 through its Managing Director.
3. The Managing Director, the Bihar State Food & Civil Supplies Corporation Limited, a Government of Bihar Undertaking, having its office at 5th Floor, Sone Bhawan, Birchand Patel Marg, Patna-800001.
4. Union of India through the Secretary, Ministry of Textiles, Government of India, New Delhi.
5. The Secretary, Ministry of Textiles, Government of India having his office at Udyog Bhawan, New Delhi-110001.
6. Rameshwar Jute Mills, Muktapur, P.O.-Navranga, Samastipur, Bihar.

.... Respondents

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Appearance :

For the Petitioner	:	Mr. Chitranjan Sinha, Sr. Advocate
		Mr. Nikhil Kumar Agarwal, Advocate
		Mr. Santosh Mishra, Advocate
For the State	:	Mr. Ashok Kumar Keshari, AAG-11
		Mr. Ujjwal Kumar Sinha, AC to AAG-11.
For B.S.F.C.	:	Mr. Anjani Kumar, Sr. Advocate
		Mr. Shailendra Kumar Singh, Advocate
For respondent no.6	:	Mr. S.Pal, Sr. Advocate
		Mr. R.K. Agrawal, Advocate
		Mr. C.K. Jain, Advocate
		Mr. Kumar Ravish, Advocate
		Mr. Shive Kumar, Advocate

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CORAM: HONOURABLE DR. JUSTICE RAVI RANJAN

C.A.V. JUDGMENT

Date: 08-04-2016

I have heard parties and perused the records of this case.

Initially, this writ application was filed for quashing the tender dated 09.12.2014 issued by the Managing Director, Bihar State

Food & Civil Supplies Corporation Limited (hereinafter referred to as 'Corporation') as contained in Annexure-2, however, when the tender was finalized in favour of the respondent no.6, he was added as a party respondent vide order dated 21.01.2015 and notice was issued upon him. I.A. No.2296 of 2015 was also filed for amendment of the writ petition by introduction of relief mentioned in paragraph no.2 thereof, which was allowed on 06.04.2015. Thus, the petitioner also seeks quashing of the Agreement dated 20.01.2015 which has been entered after finalization of tender in favour of respondent no.6, i.e, Rameshwar Jute Mill, a Unit of M/S Winsome International Limited. The petitioner further seeks quashing of all the consequential orders issued by the respondent Corporation for supply of gunny bags.

On 9.12.2014, the respondent no.2 published a tender for supply of 60,000 "B" Twill New Gunny Bales. The tender documents were to be supplied till 17.12.2014 and the last date for submission was 27.12.2014 up to 2.30 P.M. Tender was to be opened on the same day at 3.00 P.M. The petitioner claims to have obtained a copy of the tender document from the website of the respondent Corporation. It is alleged in the writ petition that tender was floated deviating from the normal procedure of procuring Jute Bags through the Director General of Supplies and Disposals, Government of India and without following the provisions of the Jute Control Order, 2001 as amended in the year 2002 notified under the Essential Commodities Act, 1955. It is also alleged that the tender does not allow part offer or offers in broken sections to be made. A tenderer was required to bid for the whole quantity and hence was bound to supply 25000 Bales per month for the first two months and 10000 Bales in the last month. Thus, the offer was made only for those Jute product manufacturers who could supply minimum of 25000 Jute Bags in a month. The petitioner has stated in paragraph no.23 of the writ petition that he has been able to ascertain from the office of Jute Commissioner, Kolkata that there is only one Jute Factory which could claim to have capacity to supply 25000 Bales of Jute Bags in a month. He has again stated in paragraph no.28 that the tender has been tailor-made to suit the interest of only one manufacturing unit who enjoys the special favour with those in charge of the Government in the State. Thus, it is alleged that tender process is vitiated with express bias. Similar statement has been made in paragraph 35 of the writ petition also. When the tender was finalized in favour of respondent no.6, I.A. No.265/2015 was filed for amendment of the relief directing the respondent Corporation to produce the order by which the tender has been awarded to Rameshwara Jute Mills, a Unit of Winsome International Limited (respondent no.6). In that Interlocutory Application, a categorical statement has been made that the Punjab Government has blacklisted some of the Jute Mills and one of them is Rameshwar Jute Mills in whose favour the tender has been finalized. The same stand has been taken in I.A. No.266 of 2015 also. An identical stand has again been taken by the petitioner in paragraph 14 of the rejoinder to the supplementary counter affidavit filed on behalf of respondent nos. 2 and 3 appending Annexure-6 to show the share pattern of Northbrook, SGS and that of Winsome International Limited. Lastly, it has been urged that even the agreement has been designed to grant flexibility to the respondent no.6 and, as such, the agreement itself is in deviation from the terms and conditions of the tender paper.

The respondent nos. 2 and 3 (the Corporation and its Managing Director) have filed a counter affidavit and a supplementary counter affidavit taking a categorical stand that the respondent no. 6 is not blacklisted by the Punjab Government as alleged by the petitioner. It is further stated that actually four parties have participated in tender process. One of them has not qualified in technical bid. Other three bidders have qualified in technical and financial bids. The respondent no.6 has been allotted the work due to the fact that he happens to be the lowest bidder. It has further been stated that as per Clause 3 (iii) of the terms and conditions, the two successful tenderers have submitted acceptance letters as both are ready to supply at the rate of lowest bidder. Thereafter, the competent authority has accepted both the tenderers in the light of clause 3 (iii) of the terms and conditions of tender notice on 30.01.2015.

A counter affidavit, supplementary counter affidavit, reply to I.A. No.2296/2015 and again a second supplementary counter affidavit have been filed on behalf of the respondent no.6. It has vehemently been contended on behalf of the respondent no.6 that the petitioner does not have any *locus standi* to file this writ petition as it has not even participated in the tender process and admittedly, it is not eligible as per the terms and conditions laid down in the tender paper. Secondly, it has been urged that the petitioner has not come with clean hands as it has made a false allegation against the respondent no.6 that it stands blacklisted by the Punjab Government and, as such, no work could have been awarded to it. It has further been stated that the petitioner all along has been changing its stand. At the first instance, the writ petition was filed on the ground that the terms and conditions of the tender have been tailor-made to suit one company or participant. Though the statements have been made on affidavit true to the knowledge of the petitioner, it was not disclosed in the writ petition as to who was such person or company for whom the tender papers have been tailor-made. Without disclosing the name of such person or company, such wild allegation was made. It is contended that subsequently, when the petitioner's bid was accepted then interlocutory applications were filed for impleading the respondent no.6 as party and also for direction to the authorities for producing the order by which the tender has been awarded to the respondent no.6 and thereafter to quash such order. Apart from the stand that the respondent no.6 stands disqualified in view of its blacklisting by the State of Punjab, it has been categorically stated in the interlocutory application that only two bids were received as against the tender notice, one of the Northbrook Company Limited and the second of Rameshwar Jute Mills (respondent no.6), a Unit of Winsome International Limited. Again a categorical stand was made that both the companies belong to one group of company only and, as such, it stands established that the terms and conditions were inlaid in the tender papers to suit only one person. It is stated that the petitioner has been changing its stand during the hearing of the writ application and, lastly, he sought quashing of the agreement between the respondent nos. 2 & 3 and respondent no.6.

The respondent no.6 has tried to defend its case by bringing on record the documents to show that it does not stand blacklisted after the necessary enquiry by the competent authority. That apart, even the order has been placed to it through the Directorate General of Supplies & Disposals, Government of India for supply of Gunny Bags to the State of Punjab itself. It has also brought on record the necessary certificate granted by the Government of India, Ministry of Textiles to show that Rameshwara Jute Mills, Winsome International Limited having its Jute Mill at Samastipur has a production capacity of sacking of 82 MT per day which comes to more than the eligibility criteria of 20000 MT per annum.

On consideration of rival contentions, following issues have emerged for consideration :

(i) *Whether the terms and conditions have been tailor-made to suit one participant especially respondent no.6?*

(ii) *Whether the respondent no.6 stood disqualified in view of the blacklisting by the State of Punjab?*

(iii) *Whether two of the participants, namely, M/S Winsome International Limited as well as Northbrook Jute Company Limited belong to the same group of shareholders and owners of the companies are the same?*

(iv) *Whether there has been relaxation in the agreement to give flexibility to the respondent no.6?*

Since all the issues are intertwined, they are being considered together.

The petitioner has stated in the writ petition that it is well known name in the field of manufacturing jute products and it has 289 Hessian Looms, 200 Sacking Looms and 44 other Looms installed in its factory and it has a capacity to manufacture 4500 bags per month but the certain terms and conditions have been inducted in the tender to suit a particular Company or Mill and to oust the petitioner and others from the picture. The petitioner has placed reliance upon several decisions of the Apex Court for the said purpose to establish that even though it could not participate in the tender process, in view of the terms and conditions of the tender, which was arbitrary, it has a right to challenge the same. The petitioner has also placed reliance upon certain decisions that there cannot be any deviation or relaxation from the eligibility laid down in the notice inviting tender.

In ***Kamana Dayaram Shetty Vs. International Airport Authority of India and Ors (1979 3 Supreme Court Cases 489)***, the Apex Court has held that standard of eligibility laid down in the notice for tenders cannot be departed from arbitrarily and such departure from the standard would amount to denial of equality of opportunity to those who felt bound by the standard of eligibility and therefore did not submit their tenders.

In ***Poddar Steel Corporation Vs. Ganesh Engineering Works and Others reported in (1991) 3 Supreme Court Cases 273***, it has been held that minor technical irregularity can be waived as a deviation from the non-essential or ancillary/subsidiary requirement but there cannot be any major deviation.

In ***Tata Cellular Vs. Union of India reported in (1994) 6 Supreme Court Cases 651***, it has been held that only the decision making process and not the merit of the decision itself is reviewable as the Court does not sit as appellate court while exercising power of review. While the Court cannot interfere with Government's freedom of contract, invitation of tender and refusal of any tender which pertain to policy matter but if the decision/action is vitiated by arbitrariness, unfairness, illegality, irrationality or 'Wednesbury unreasonableness' i.e. when decision is such as no reasonable person on proper application of mind could take or procedural impropriety then that can be looked into by the Court. Test would be whether wrong is of such a nature as to require intervention. If so Court would set right the decision-making process but it would not substitute its own opinion for that of experts.

For reaching to a just and proper conclusion, the terms and conditions laid down in the tender documents itself have to be examined. The tender document has been brought on record as Annexure-2 to the writ petition which disclosed that the tender is for purchases of 50 KG 'B' Twill New Bale of Gunnies within certain period as under :

January, 2015 - 25000 Bales
February, 2015 – 25000 Bales
March, 2015 - 10000 Bales

Total quantity proposed to be purchased is 60000 Bales. However, it has been stated in clear terms that the tender is for supply of 60000 Bales of 50 KG. 'B' Twill New Bale of Gunny Bags as per BIS specification for the packing of food-grains to be delivered from 1st January, 2015 to March, 2015 at various districts of Bihar in Corporation's godowns/purchase centers but it has also been stated in clear terms that the production capacity of the tenderer should be a minimum of 20000 MT of Jute Bags per annum and in support of that documentary evidence is required to be filed and also that minimum quantity quoted by the tenderer should not be less than 60000 Bales.

The petitioner is aggrieved by the aforesaid conditions/eligibility criteria which have been laid down in the tender paper that the production capacity of the tenderer should be a minimum of 20000 MT. It has been contended that this criteria has been tailor-made to suit one Jute Mill or Company, however, it did not disclose the name of such beneficiary. Thus, in my view, this was a sort of wild allegation which was being made without disclosing the name of such beneficiary. In support of the statement, Annexure-1 has been appended by the petitioner to the writ petition to show that only one person would be benefited. The name of respondent no.6 is at sl.no. 58 but at sl.no. 32 there is one 'Hukumchand' which has been shown to be of the highest capacity, therefore, from Annexure-1, it cannot be understood that the conditions were inlaid in the tender documents to suit the respondent no.6 only. It is an admitted position that the Bihar State Food & Civil Supplies Corporation Limited has first time invited open bid for supply of the Gunny Bags. In such a situation also, it cannot be understood without any sound foundation that the conditions were tailor-made to suit one Mill or Company. The Corporation has a right to ensure that the supplies would be made within the time period as specified maintaining the quantity of products and for that purpose it has inducted the terms and conditions that the participants should be having a production capacity of a minimum of 20000 MT per annum. Thus, that can be held to be unreasonable or arbitrary especially when such type of conditions are regularly being inducted by other States also for procurement of gunny bags through the open bid. A chart showing the aforesaid fact is available in paragraph 7 of the second supplementary counter affidavit filed on behalf of the respondent no.6. It appears that Punjab State had laid down criteria of minimum manufacturing capacity of 1000 M.T. per annum in the tender opened on 9.01.2015. Similarly, in its earlier tender opened on 17.08.2012, the minimum manufacturing capacity required was of 20000 M.T. per annum. In Madhya Pradesh, such criteria was not there but in Tamil Nadu, the minimum manufacturing capacity of 5000 M.T. per annum. There is no denial of aforesaid paragraph no.7 of the second supplementary counter affidavit by the petitioner. Thus, it can safely be construed that it is not the first time that such condition has been inducted by the authority concerned and the petitioner without ascertaining the fact appears to have made wild statement that only two tenders were received, whereas, the fact is that four tender papers were received. One was rejected on technical ground and three of them have been declared successful in technical as well as financial bid. Out of them, since the petitioner was the lowest bidder, his tender paper was accepted.

The Apex Court in ***Tata Cellular Vs. Union of India (supra)*** has held in clear terms that unless there is arbitrariness, unfairness, illegality, irrationality or 'Wednesbury unreasonableness', the Court should not interfere with Government's freedom of contract, invitation of tender and refusal of any tender which pertain to policy matter.

A Division Bench of Aurangabad Bench of Bombay High Court in ***M/s Mega Enterprises and etc. Vs. State of Maharashtra & Ors (AIR 2007 Bombay 156)*** has held that the competent authority having complete freedom to incorporate any conditions cannot be struck down unless it suffers from vice of malafide or arbitrariness. That apart, in most of the decisions cited by the petitioner, the issue was of relaxation in the terms and conditions for acceptance of any tender, however, in the present case, there has been no such relaxation at the time of acceptance of the tender papers as the terms and conditions of the tender has been adhered to and followed strictly. In fact condition laid down in the tender itself is under challenge in the proceeding in hand.

The respondent no.6 has appended Annexure-G to its second supplementary counter affidavit to show that its production is more than the eligibility criteria and such certificate granted by the competent authority could not be questioned by the petitioner after it was brought on record.

The second question is regarding relaxation of the terms and conditions in the agreement as it is contended by the petitioner that the minimum quantity quoted was 60000 Bales but the agreement which has been brought on record as Annexure-D by the respondent nos. 2 and 3 requires that 60000 Bales would be required to be delivered in small lots as and when required deviating from the delivery schedule which has been shown in the tender paper.

It is true that a delivery schedule has been given in the tender paper that 25000 Bales have to be supplied in January, 2015, then again 25000 Bales in February and remaining 10000 Bales in March, 2015 but at the same time in the tender paper itself in another clause it has been stated that the Managing Director reserves the right to vary the quantity at the time of final order against the requirement indicated in the tender documents. Such condition laid down in tender document in Clause 16 (iii) and (v) is extracted as under :-

> i. xxxxxxxxxxx
>
> ii. xxxxxxxxxxx
>
> iii. The Bihar State Food & Civil Supplies Corporation Ltd. reserves right to modify the Delivery schedule either before placing orders or during currency of the supply period depending upon the arrival of the paddy which will be binding on the supplier.
>
> iv. xxxxxxxxxx
>
> v. Bihar State Food & Civil Supplies Corporation Ltd. reserves the right to reduce or increase the quantity of bales to be supplied during the period of the contract.

It has been stated on behalf of the respondent no.6 that the eligibility criteria and performance of the contract are entirely different matters as has been stated by the respondent nos. 2 and 3. Placing of orders would be depending upon the procurement of quantity of food-grains which would vary on the conditions of the crops in the State of Bihar. If poor crops are there, the requirement may be less and if the crops are good then arrival of paddy would be more and requirement of gunny bags would also be more.

Such flexibility given in the agreement, in my considered opinion, cannot be held to be arbitrary or unfair as it is not the respondent no.6 who is shirking from delivering the required quantity rather such relaxation has been given with a view that requirement would depend upon arrival of paddy which is exercise in consonance with the conditions laid down in the tender document itself which has been quoted above.

The Apex Court in ***B.S.N. Joshi & Sons Ltd. Vs. Nair Coal Services Ltd. and Ors. [(2006) 11 Supreme Court Cases 548]*** has laid down legal principles that the conditions laid down in a tender notice can be classified into two categories: those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary to the main object to be achieved. If there is no power of general relaxation of tender conditions, ordinarily the same shall not exercised but in the case in hand, such power has been inlaid in the tender document itself, therefore, the same cannot be held to be unreasonable or arbitrariness.

The petitioner by changing stands has also tried to impress upon this Court that all the tenderers are of same company but the document which has been brought on record by the respondent no.6 shows that the companies are different and are being managed by different Board of Directors. Even if it is assumed that some of the Directors overlap in two companies that would not mean that all the companies are governed by the same Board of Directors. Thus, this issue raised by the petitioner has also to be rejected.

So far as the blacklisting of the respondent no.6 by the State of Punjab is concerned, that allegation also appears to have been made without any foundation and proper verification as it is apparent from the Annexure-A appended with the counter affidavit filed on behalf of respondent no.6 issued by the Government of India, Ministry of Commerce & Industries dated 17.10.2014 clearly exonerating the respondent no.6. Not only that, the Directorate of Supplies and Disposals has placed order for supply of Jute Bags to the respondent no.6 for Punjab State Grains Procurement Corporation which would be evident from Annexure-E appended with the supplementary counter affidavit filed on behalf of the respondent no.6. Therefore, obviously a wild allegation has been made without any foundation by the petitioner which, in my view, was being done for somehow obtaining interim or final relief in the writ petition.

The Apex Court in ***K.D. Sharma Vs. Steel Authority of India Limited and Others [(2008) 12 Supreme Court Cases 481]*** has held in clear terms that where the petitioner makes false statement or conceals material facts or misleads the Court, in such a case, the Court may dismiss the petition at the threshold without considering the merits of the claim. Petitioner in such a case is also required to be dealt with for contempt of court for abusing the process of the Court.

In the present case also, the petitioner does not appear to have come with clean hands as while making allegation that the certain terms and conditions were being led in tender document to suit a person or company but it did not dare to disclose the name in the writ petition till the tender was finalized in favour of respondent no.6. Therefore, it can be safely construed that the allegations was wild and without any foundation. Secondly, another wild allegation has been made that the respondent no.6 has been blacklisted, whereas, at the time of filing of this writ petition itself, the petitioner did not stood blacklisted as would be apparent from Annexure-A discussed above. Thus, either the allegations were made deliberately with malafide intention or the same were made without making necessary enquiry in that regard.

By way of last resort, allegation has been made by the petitioner that the respondent nos. 2 and 3 have deviated from the normal procedure of procuring Jute Bags through the Directorate of Supplies and Disposals and contrary to it, it has gone for open bid. The respondent no.6 has brought on record a copy of letter dated 16th July, 2002 appended as Annexure-C to the counter affidavit issued by the Government of India, Ministry of Textiles in favour of Jute Commissioner, Kolkata clearly stating in clause 1 (b) that the Government Agencies will have the option to purchase jute bags through National Competitive Bidding (open tender) provided that the purchase price of jute bags through such tender does not exceed the prices fixed by Jute Commissioner on the basis of Tariff Commission Formula as indicated in the said letter. There is no answer by the petitioner to this statement. Thus, it can be safely construed that such statement was also made wildly.

Hence, all the issues are decided against the petitioner and in favour of the respondents.

As a result, this writ application fails and is dismissed.

(Dr. Ravi Ranjan, J)

V.K. Pandey/-

A.F.R.

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