

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

WRIT PETITION NO.6777/2015

Virtual Galaxy Infotech Pvt. Ltd., Nagpur – 15 through its Managing Director
...Versus...
Union of India, through Principal Secretary, Department of Agriculture and
Cooperation, Ministry of Agriculture, Co-operation and Farmers Welfare
Government of India, New Delhi – 01 and others

Office Notes, Office Memoranda of Coram,
appearances, Court's orders of directions
and Registrar's orders

Court's or Judge's orders

Shri S.P. Dharmadhikari, Sr. Adv. with Shri C.S. Dharmadhikari, Adv. for petitioner
Shri Rohit Deo, ASGI with Mrs. Mugdha, Chandurkar, Adv. for respondent nos.1 & 2
Shri Anand Parchure, Advocate for respondent no.3

CORAM : SMT. VASANTI A NAIK AND
KUM. INDIRA JAIN, JJ.

DATE : 15.09.2016

The Small Farmers Agribusiness Consortium, through the Department of Agriculture and Cooperation, Government of India had floated a request for proposal on 6.10.2015 with a view to hire a strategic partner for implementing the National Agriculture Market Project (hereinafter referred to as the 'NAM project' for the sake of brevity). As per the request for proposal, a selected bidder was required to develop and maintain the software for the NAM project and work out the same as per the requirements of the Market Committees that would integrate with the NAM. The petitioner is engaged in the business of software

development and has its head office at Nagpur. The petitioner desired to participate in the process initiated in terms of the request for proposal, dated 6.10.2015. According to the petitioner, since some of the conditions of the request for proposal were arbitrary and unreasonable, the petitioner has challenged the conditions, by filing this writ petition on 14.12.2015. As the letter of award was issued in favour of the respondent no.3 – Company before the writ petition was heard for admission, by amending the writ petition, the award of contract in favour of the respondent no.3 is challenged.

The respondent nos.1 and 2 have raised a preliminary objection to the tenability of the writ petition. It is stated that as per Clause 5.1 of the request for proposal, the Courts at Delhi would have exclusive jurisdiction over all disputes arising under, pursuant to and/or in connection with the selection process. It is submitted that the writ petition cannot be instituted in the Nagpur Bench of the Bombay High Court, in view of Clause 5.1. of the request for proposal. It is stated that the challenge to the conditions in the request for proposal, dated 6.10.2015, that relate to the eligibility would be connected with the selection process and only the Courts at Delhi would have exclusive jurisdiction over all disputes arising in connection with the selection process, as per Clause 5.1 of the request for proposal. It is stated that the selection process would not be referable only to the preparation of the selection list as it would commence from the issuance of advertisement and culminate in the award of the contract. It is stated that in view of this, a challenge to the conditions in the request for proposal, dated 6.10.2015 would lie

only in the Courts at Delhi. To substantiate the submission, the learned Assistant Solicitor General of India has relied on the judgment of the Hon'ble Supreme Court, reported in **(1990) 2 SCC 669**. It is submitted that since the petitioner is desirous of participating in the selection process, it would be bound by Clause 5.1 of the request for proposal. It is submitted that the petition is liable to be dismissed at the threshold as, as per the request for proposal, dated 6.10.2015 the last date for submission of the tender-application was 10.11.2015 and though the objection raised by the petitioner to the conditions, that are sought to be challenged in this writ petition, was decided by the concerned Committee on 20.10.2015, the petitioner did not challenge the conditions by filing a writ petition and sought for the extension of the last date for submission of the bid vide communications, dated 6.11.2015 and 20.11.2015, as the petitioner was not in a position to submit the bid in the absence of staff during Diwali festival. It is submitted that the petitioner had unconditionally sought the extension of the last date for submission of bid by its communications, dated 6.11.2015 and 20.11.2015 and the request made by the petitioner vide communication dated 6.11.2015 was considered favourably and the last date for submission of the bid was extended till 23.11.2015. It is stated that three days before the expiry of the extended last date, the petitioner again sought for extension of the last date for submission of the bid by three more weeks. The learned ASGI has relied on the communications, dated 6.11.2015 and 20.11.2015 to submit that the petitioner had no grievance about the decision of the respondent nos.1 and 2, dated

20.10.2015 on the objection of the petitioner to the conditions in the request for proposal. It is submitted that the writ petition is belatedly filed on 14.12.2015, after the technical bids and financial bids were opened on 23.11.2015 and 2.12.2015 respectively though it should have been filed immediately after the objection was decided on 20.10.2015. It is stated that the time is the essence of NAM project and the belated challenge to the conditions in the request for proposal, dated 6.10.2015 is frivolous.

Shri Dharmadhikari, the learned Senior Counsel appearing for the petitioner submitted that though the conditions in the request for proposal are challenged, as there is no agreement between the parties, Clause 5.1 – of the request for proposal would not be binding on the petitioner in the absence of mutuality. It is stated that a plaintiff or a petitioner would be the *dominus litis* and would be entitled to institute the proceedings in any one of the Courts where a part of cause of action would arise. It is stated that since there is no agreement between the parties in regard to the conferment of jurisdiction on only one of the Courts within whose jurisdiction, a part of cause of action arises, the petitioner would be entitled to file the writ petition in this Court. It is stated that in the 'disclaimer' clause in the request for proposal, dated 6.10.2015 it is clearly mentioned that the request for proposal is not an agreement or offer or invitation by the respondent – authority to the prospective bidders or any other person and it is clear from the 'disclaimer' clause that as the request for proposal is not an agreement, there can be no mutuality between the parties and hence, the petitioner would

not be governed or bound by Clause 5.1. The learned Senior Counsel relied on the judgments, reported in *(1989) 2 SCC 163*, *2002 (1) M.P.L.J. 446*, *(2002) 9 SCC 613*, *(2009) 3 SCC 107*, *(2004) 4 SCC 671* and *(2004) 7 SCC 447* to substantiate his submission that an ouster clause could prevent a party from filing the proceedings in one of the Courts within whose jurisdiction the cause of action arises, only when the ouster clause is provided in an agreement between the parties and the same is clear and unambiguous. It is submitted that Clause 5.1 refers to the disputes connected with the selection process and a challenge to the conditions in the request for proposal cannot be said to be connected with the selection.

Shri Parchure, the learned Counsel for the respondent no.3 states that the letter of award was issued in favour of the respondent no.3 on 15.12.2015 and in the absence of any stay or interim order in favour of the petitioner, the respondent no.3 has developed the software and performed a major part of the work. It is submitted that the respondent no.3 has already installed the software for testing, in several market committees in about eight States and nearly 200 market committees would join in the programme by 30.9.2016. It is stated that the cause for filing the writ petition is rendered infructuous, in view of the subsequent development.

We are inclined to uphold the preliminary objection raised on behalf of the respondent nos.1 and 2. Though the petitioner has challenged some of the conditions in the request for proposal by filing this writ petition, Condition no.5.1 pertaining to the jurisdiction clause, is not challenged. If the petitioner had

any grievance about the jurisdiction clause, the petitioner ought to have challenged the same along with the challenge to the other conditions in the request for proposal. It is rightly submitted on behalf of the respondents that the petitioner ought to have filed the proceedings in the Courts at Delhi in view of Clause 5.1 of the request for proposal. Clause 5.1 of the request for proposal reads thus :-

“5.1 The Selection Process shall be governed by and construed in accordance with the laws of India and the Courts at Delhi shall have exclusive jurisdiction over all disputes arising under, pursuant to and/or in connection with the Selection Process.”

On a reading of Clause 5.1, it appears that a challenge to the conditions in the advertisement would have a connection with the selection process. Connection with the selection process would mean relationship with the selection process. The clause “in connection with the selection process” is extremely wide and inclusive. Clause 5.1 is not challenged in this writ petition. It is not the petitioner's case that the petitioner was not aware of this clause that restricted the jurisdiction exclusively to the Courts at Delhi. In view of the knowledge of the existence of the said clause in the request for proposal and in the absence of a challenge to the same, the petitioner cannot be heard to say that the dispute in regard to the challenge to the conditions in the request for proposal would not be in connection with the selection process. A selection process would commence with the

issuance of the tender notice or advertisement or request for proposal and would culminate in the award of the contract or the work order in favour of the selected bidder. It is held by the Hon'ble Supreme Court in the judgment, reported in **(1990) 2 SCC 669** and relied on by the learned Counsel for the respondent nos.1 and 2 that it would be unreasonable to construe the word "selection" only as the factum of preparation of select list. It is held by the Hon'ble Supreme Court in the said reported judgment that there are different steps in the process of selection and in a matter pertaining to the appointment of candidates in pursuance of the selection by the Public Service Commission, the process of selection begins with the issuance of advertisement and ends with the preparation of select list. In this case, Clause 5.1 – the jurisdiction clause is wide and would embrace within its ambit, a challenge to the conditions in the request for proposal as the challenge to the conditions would have a connection with the selection process. As per Clause 5.1, the Courts at Delhi would have exclusive jurisdiction over all disputes that have a connection with the selection process, though great or small. The petitioner may have had a better case had the petitioner challenged Clause 5.1 of the request for proposal along with the other clauses, that are challenged in this writ petition. It is rightly submitted on behalf of the respondent nos.1 and 2 that as the petitioner desired to participate in the selection process, it would be governed by the jurisdiction clause, more so, when it has not challenged the same along with the other clauses that are challenged in this writ petition. Merely because it is stated in the clause for 'disclaimer' that the request for proposal is not an

agreement, an offer or invitation, it cannot be said that the petitioner would not be bound by Clause 5.1, though the same is not challenged, on the ground that there is no mutuality between the parties. In the circumstances of the case, we are not inclined to entertain the writ petition.

There is an additional reason for the dismissal of the writ petition at this stage. The request for proposal was floated on 6.10.2015 and the last date of submission of the bids was 10.11.2015. The petitioner had raised objection to certain conditions in the request for proposal within the time frame and the objections were decided by the concerned committee on 20.10.2015. The petitioner did not challenge the decision or the conditions in the request for proposal immediately after the decision in the objections was rendered on 20.10.2015. The petitioner made no grievance about the decision, dated 20.10.2015 and decided to submit the bid. The said fact could be fortified by the communication issued by the petitioner to the respondent nos.1 and 2, dated 6.11.2015. In the communication, dated 6.11.2015 the petitioner stated thus : -

“Respected Sir,

With reference to the subject matter, we hereby wish to draw your kind attention to the fact that the Bid due date (BDD) for submission of Tender Documents against your tender floated for implementation of National Agriculture Market (NAM) is on 10th November, 2015. The BDD is between the festive season of “Deepavali”, the biggest festival of India. Most of

the staff is on leave for this festival and it is difficult to complete the tender documentation work in their absence.

Hence, we humbly request you to consider the above fact and facilitate by extending the BDD by atleast 15-20 days.

In anticipation of your prompt and positive response.

Thanking you.”

By acceding to the request made by the petitioner vide communication, dated 6.11.2015, the respondent nos.1 and 2 extended the last date for submission of the bid till 11:00 a.m. on 23.11.2015. Just three days before the last date, the petitioner again wrote to the respondent nos.1 and 2 on 20.11.2015 that the last date for submission of the bid may be further extended by three weeks. The contents of the communication, dated 20.11.2015 read thus :-

“Respected Sir,

With reference to the subject matter, we hereby wish to draw your kind attention to the fact that the Bid Due Date (BDD) for the submission of tender documents against your tender floated for implementation of National Agriculture Market (NAM) is on 23rd November, 2015. The Bid Due Date is after the Festive Season of “Deepavali” the biggest festival of India. Most of the staff is on leave for this festival and yet to resume their work hence it is very difficult to complete the tender documentation work in their

absence.

Hence, we humbly request you to consider the above fact and facilitate by extending the BDD by atleast three weeks time.

In anticipation of your prompt and positive response.

Thanking you.”

There is not a word about the objection to the clauses in the request for proposal in the communications, dated 6.11.2015 or 20.11.2015. It is clear from these communications that the petitioner had no grievance whatsoever about the decision of the Committee, dated 20.10.2015, on the objections of the petitioner. The petitioner had unconditionally sought the extension of the last date for the submission of the bid by the two aforesaid communications and the respondent nos.1 and 2 had extended the last date in pursuance of the first communication dated 6.11.2015 till 23.11.2015. The petitioner is, therefore, estopped from challenging the conditions in the request for proposal. The petitioner had unconditionally sought the extension of the last date for the submission of the bid solely on the ground that most of the staff was on leave during Diwali festival and hence, it was difficult for the petitioner to complete the tender documentation work in the absence of the staff. We do not appreciate the conduct on the part of the petitioner of requesting the respondents to unconditionally extend the date for submission of the bid vide communications dated 6.11.2015 and 20.11.2015, wait till the technical bids and the financial bids are opened and then belatedly file the writ petition on 14.12.2015, challenging

the conditions in the request for proposal. After the objection of the petitioner were decided on 20.10.2015, it was necessary for the petitioner to have challenged the tender conditions by filing appropriate proceedings. The petitioner, however, without raising any objection to the decision on its objections, dated 20.11.2015, requested the respondents to extend the last date for submission of the bids only because it was not possible for the petitioner to complete the tender documentation work in the absence of the staff during the Diwali festival. In our view, the challenge to the conditions in the request for proposal is not *bona fide* and we are inclined to dismiss the writ petition in view of the same. The judgments, reported in **(1989) 2 SCC 163**, **2002 (1) M.P.L.J. 446**, **(2002) 9 SCC 613**, **(2009) 3 SCC 107**, **(2004) 4 SCC 671** and **(2004) 7 SCC 447** and relied on by the learned Senior Counsel for the petitioner cannot have any applicability to the case in hand. We have perused the judgments and have found that in almost all the cases in the judgments, an agreement was executed between the parties concerned in regard to the supply of goods, cold-drinks, transformer oil, lease of bus etc. and by considering the clause pertaining to jurisdiction in the agreements executed between the concerned parties, the Court had held that the parties could restrict the jurisdiction to only one of the Courts within whose jurisdiction a part of cause of action arises and that there could be an exclusion of, or ouster of other Courts but one, only if the jurisdiction clause is clear and unambiguous. The aforesaid judgments would not be helpful to the petitioner for overruling the preliminary objection raised on behalf of the respondent nos.1 and 2 in regard to the tenability of the writ

petition in this Court, in view of Clause 5.1 of the request for proposal.

For the reasons aforesaid, we decline to entertain the writ petition and dismiss the same with no order as to costs.

JUDGE

JUDGE

Wadkar

CERTIFICATE

I certify that this order uploaded is a true and correct copy of original signed order.

Uploaded by : S.S. Wadkar, P.S.

Uploaded on : 20/09/2016