

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Before:

**The Hon'ble Justice Harish Tandon
and**

The Hon'ble Justice Hiranmay Bhattacharyya

MAT 533 OF 2020

With

CAN 1 OF 2020 (CAN 5825 OF 2020)

CAN 2 OF 2020 (CAN 5828 OF 2020)

Accord Advertising Pvt. Ltd. & Anr.

Vs.

State of West Bengal & Ors.

For the Appellants : Mr. Aniruddha Chatterjee,
Mr. Kushal Chatterjee,
Mr. Saptarshi Kumar Maladvocates

For the Respondents :Mr. Suddhasatva Banerjee,
Mr. Anirban Dutta
.....advocates
for the respondent nos. 3 & 5
Mr. Jishnu Chowdhury
.....For the respondent no. 7

Heard on : 29.09.2020

Judgment on : 27.11.2020

Hiranmay Bhattacharyya, J.:

The writ petitioners have preferred the instant appeal challenging the order dated August 24, 2020 passed by a learned Single Judge in WP No. 5932 (w) of 2020 whereby the writ petitioners' prayer for an interim order of injunction in connection with the work order issued pursuant to the tender floated by the zoological authority was refused.

The appellants claim to be a licensee for displaying advertisements at Zoological Garden at Alipore in terms of an agreement dated April 1, 2017. Prior to the end of the said agreement, the Director of Zoological garden published an advertisement inviting e-tender dated February 8, 2020 for displaying advertisement in the hording boards installed at the zoo premises. The appellants claim to have participated in the said tender dated February 8, 2020 and became the highest bidder.

The grievance of the appellant is that the zoological authority awarded the tender in favour of the second highest bidder that is the respondent number 7 thereby causing a loss to the public exchequer to the tune of Rs. 44, 71, 378.50. The appellants prayed for an order of injunction restraining the respondent authorities from acting in pursuance of the e-tender dated February 8, 2020 and/or acting in furtherance of the work order issued thereof.

The learned Single Judge after considering the materials on record and upon hearing the submissions of the Counsels of the

respective parties was pleased to refuse the appellants' prayer for injunction.

Mr. Chatterjee, the learned advocate for the appellants assails the order on the ground that the learned Single Judge failed to take note of the fact that the petitioner's bid was rejected by a one line order without assigning any reasons therefor. He submitted that the bid of the appellants is the highest and the respondent authority ought to have assigned reasons for not accepting the bid of the appellants. Mr. Chatterjee submitted that there is a difference of more than Rs. 44 lakhs between the tender amount of the appellants and the respondent no. 7. Thus, according to Mr. Chatterjee, rejection of the appellants' bid would amount to a substantial loss to the public exchequer. He further submitted that the Zoological authority is bound to act fairly, reasonably and its conduct is subject to scrutiny by writ court. Mr. Chatterjee also submitted that the terms and conditions of the e-tender is unconscionable as it gives the Zoological authority an unfettered right to reject a bid without assigning any reasons therefor.

By placing reliance on the judgment in the case of *Haryana Urban Development Authority and Others versus Orchid Infrastructure Developers Private Limited* reported at (2017) 4 SCC 243, Mr. Chatterjee submitted that recording of reasons for executive actions including cases of rejection of highest offers is necessary. He relied upon the judgment in the case of *Sant Lal Gupta and others versus Modern Cooperative Group Housing Society*

Limited and others reported at (2010) 13 SCC 336 and submitted that recording of reasons is the principle of natural justice and not only judicial orders but also administrative orders must be supported by reasons recorded in writing. He submitted that the absence of the reasons renders the order unsustainable particularly when the order is subject to challenge before a court of law. By referring to the decision of *Union of India and others versus Dinesh Engineering Corporation and another* reported at (2001) 8 SCC 491, Mr. Chatterjee submitted that though the respondent authority has the power to accept or reject the highest bid but merely because it has that power the authority cannot exercise such power arbitrarily. By relying upon the decision of *Indian Oil Corporation Limited versus Nilofer Siddiqui and others.* reported at (2015) 16 SCC 125, Mr. Chatterjee submitted that the zoological authority is bound to act fairly reasonably and its conduct is subject to scrutiny on the touchstone of Article 14 of the Constitution of India.

Mr. Suddhasatva Banerjee, the learned advocate appearing on behalf of the respondent zoological authorities submitted that the appellants are habitual defaulters in payment of dues. He submitted that clause 8 of the tender condition reserves the right of the authorities to accept or reject an offer without assigning any reason. He also submitted that respondent no. 7 was awarded the tender sometimes in July 2020 and the work commenced in August 2020 and a substantial portion of the said work has since been completed. Mr. Banerjee submitted that the authorities have the right to fix the terms and conditions of the tender. The authorities

also have the right to reject the highest bid. The authority has the right to reject or decide whether to accept a bid and the court cannot act as a court of appeal against such decision of the authority. He also submitted that the court cannot rewrite a contract. Mr. Banerjee relied upon the following judgments in support of his aforesaid submissions – (1) *Global Energy Ltd. & another versus M/S Adani Exports Ltd. & others* reported at AIR 2005 SC 2653 (2) *Laxmikant and others versus Satyawandan and others* reported at (1996) 4 SCC 208 (3) *Haryana State Agricultural Marketing Board and others versus Sadhu Ram* reported at (2008) 16 SCC 405 (4) *Jagdish Mondal versus State of Orissa and others* reported at (2007) 14 SCC 517 (5) *Siemens Public Communication Pvt. Ltd. & Anr. versus Union of India & Ors.* reported at AIR 2009 SC 1204 (6) *Barleilly Development Authority & Another versus Ajai Pal Singh & others* reported at (1989) 2 SCC 116.

Mr. Jishnu Chowdhury, the learned advocate appearing on behalf of the respondent no. 7 submitted that work order has been issued in favour of the respondent no. 7 and the said respondent has already commenced work in terms of the work order and a substantial portion of the said work has been completed.

The scope of the instant appeal is very limited inasmuch as the instant appeal arises from an order refusing to pass an interim order of injunction. The learned Single Judge directed exchange of affidavits by the parties for the purpose of resolving the dispute involved in the instant writ petition. Though the learned advocates

of the respective parties advanced arguments on the merits of the writ petition, yet we refrain ourselves from making any comment on the merits of the writ petition at this stage since the writ petition is still pending for final adjudication before the learned Single Judge.

It is not in dispute that the work order was issued in favour of the respondent no. 7 sometime in the month of July, 2020 and the said respondent has completed a substantial portion of the work. The authority has the power to fix its own terms of invitation to tender. The terms and conditions of the tender empowers the zoological authority to accept or reject any bid without assigning any reason.

The Hon'ble Supreme Court of India in the case of *Jagadish (supra)* recognised the power of the authority to accept or reject the highest bid. It was further held therein that the power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a Civil Court.

The appellant participated in the tender being fully aware of the terms and conditions of the tender. It is not open for the appellants herein to allege that the terms and conditions of the tender is unconscionable as has been held by the Hon'ble Supreme Court of India in *Laxmikant (supra)*.

The Hon'ble Supreme Court of India in the case of *Siemons (supra)* held that in case of evaluating tenders and awarding contracts the principles of equity and natural justice stay at a distance. The Hon'ble Supreme Court has held thus –

“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. If the decision relating to award of contracts is bona fide and is in public interest, Courts will not exercise the power of judicial review and interfere even if it is accepted for the sake of argument that there is a procedural lacuna.”

The Hon'ble Supreme Court in *Sant Lal Gupta (supra)* while deciding an issue relating to expulsion of a member of a housing co-operative society held that while deciding an issue, the Court is bound to give reasons for its conclusions. But the facts of the said reported case is entirely different as in the instant case we are concerned with the power of an authority inviting tender in evaluating tenders and awarding contracts. The judgment in the case of *Siemons (supra)* delivered by three judges of the Hon'ble Supreme Court of India is squarely applicable to the facts of the instant case and at this stage we are not at all impressed by the submission of Mr. Chatterjee that the decision of the respondent authority rejecting the bid of the appellant should be set aside only

on the ground of non disclosure of reasons in the letter communicating the decision of non acceptance of the appellants' bid.

There is no dispute to the law laid down in *Dinesh Engineering (supra)* that the power of the authority to reject any offer without assigning any reasons as well as the power to accept or not to accept the lowest offer does not give the authority an arbitrary power to reject the bid merely because it has that power. However, it cannot be disputed that such power can be exercised by the authority provided the same is within the realm of the object for which such clause was incorporated.

The contentions of Mr. Chatterjee that the zoological authorities exercised the power arbitrarily while rejecting the appellant's bid and also that the said authorities have failed to act reasonably, fairly and in public interest in awarding the contract can be decided only after exchange of affidavits by the parties.

In the instant case the dispute is between the two tenderers. In such a case the Court must be 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 not necessarily imply that public interest is involved therein.

The respondent zoological authorities cannot be said to have acted mala fide and against public interest merely because it has

rejected the highest bid and accepted the bid of the respondent no. 7.

The Learned Single Judge assigned cogent reasons for refusing to pass a restraint order. The Learned Single Judge has also applied the correct legal tests while refusing to pass a restraint order.

For the reasons as aforesaid we find no reason to interfere with the order impugned. Accordingly, MAT 533 of 2020 is dismissed without, however, any order as to costs. With the dismissal of the instant appeal the connected applications have become infructuous and the same are also disposed of accordingly. We, however, make it clear that the parties shall be entitled to raise all the points including the points raised before us at the time of hearing of the instant writ petition before the learned Single Judge.

Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties on priority basis.

I agree.

(Harish Tandon, J.)

(Hiranmay Bhattacharyya, J.)

