28.06.2021.
Item no. 36.
Court No.13
ap

W.P.A. No. 9883 of 2021
With
CAN 1 of 2021
(Through Video Conference)

Pijus Kanti De
Versus
The State of West Bengal & Ors.

Mr. Kushal Chatterjee,
Mr. Subhasish Mitra.
...For the petitioner.
Ms. Sutapa Sanyal.
..For the State.

The writ petitioner is aggrieved by procedure adopted under a Notice inviting tenders dated 28th December, 2020 for "Temporary Toll Tax Collection from mineral carrying vehicles over road of M.M. Dey Road (South side) to embankment of Damodar river at Bajesalepur, mouza issued by the Burdwan-II Panchayat Samity".

In the said tender, the writ petitioner was ranked third highest having bid of Rs.66.50 lakhs. The first and second highest bids were at Rs.1,10,000,00/- and Rs.77,00,000/- each. After the two highest bidders failed to put in 60% of their bid amount as deposit of the petitioner put in 60% of his bid upon being asked by the employer.

By a letter dated 9th February, 2021, the respondents cancelled the entire tendering process and issued a second NIT on 22nd February, 2021.

A writ petition being WPA No. 5331 of 2021 was filed challenging the order dated 09.02.2021. A separate writ petition being WPA No. 5834 of 2021 was filed challenging the issuance of NIT dated 22nd February, 2021.

WPA No. 5331 of 2021 was disposed of on 17.03.2021 quashing the order dated 09.02.2021 and the respondents were directed to give reasons for cancellation of the previous tender.

WPA No. 5834 of 2021 was also disposed of on 17.03.2021 directing the respondents not to proceed with the fresh tender until compliance with the order in WPA 5331 of 2021.

The respondents in compliance with this Court's order gave reasons for cancellation of the 1st tender process on 09.04.2021.

It is argued by the Counsel for the petitioner that the reasons indicated are inadequate and more in the nature of formality. The same do not constitute any reasoning, according to the Counsel for the petitioner.

It is now well-settled that the sufficiency or otherwise of reasons cannot normally be gone into by a Writ Court unless, the reasons themselves are perverse or the same are not based on any facts on the record.

Mr. Chatterjee, learned Counsel for the petitioner would next argue that the respondents have purported to issue a third NIT on 7th June, 2021, without cancelling or withdrawing the second tender dated 22nd February, 2021.

The said argument is rather desperate. The Court could have entertained the argument on the writ petitioner if, he had participated in the 2nd NIT, without prejudice his rights under the pending writ petitions. Not having participated in the second tender process, the petitioner cannot challenge the same. Admittedly, the petitioner did not even participate in the third tender process.

Counsel for the petitioner submits that his client had put in a sum of Rs.39,90,000/-, upon the first two highest bidders, failing to put in their bid amount in terms of the tender, upon being invited by the respondents to do so. This therefore, according to the petitioner, estopped the respondents from refusing to issue the letter of intent/work order to the petitioner. The question of floating any further tender does not arise.

A Notice Inviting Tender is an invitation to offer. The unconditional acceptance of such offer would lead to contract.

Admittedly, in the instant case, there is only a genesis for a contract by reason of the petitioner being called upon to put in a sum of Rs.39,90,000/-. The formal contract could have emerged only when the work order is issued. There was therefore no clear concluded contract between the respondents and the petitioner.

No formal contract was otherwise ever drawn up or signed. There is therefore no bar in respondents floating a 2nd or 3rd NIT.

In the decisions of the Hon'ble Supreme Court of India in the case of **Tata Cellular Vs. Union of India & Ors.** reported in **(1994) 6 SCC 651** all the way up to **State of UP Vs. Sudhir Kumar Singh** reported in **2020 SCC Online SC 847**, the earlier principle that the State would be bound by any particular undertaking or contract or even a suggestion thereof has been diluted and discarded. The principle evolved by the Hon'ble Supreme Court of India is that 'Leverage' and/or 'Play in the Joints' must always be left for State issuing the Notice Inviting Tender. The relevant paragraph of the **Tata Cellular (supra**) is set out hereinbelow.

> "**94.** The principles deducible from the above are:
> (1) The modern trend points to judicial restraint in administrative action.
> (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
> (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
> (4) The terms of *the invitation to tender* cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
> (5) The Government must have freedom of contract. In other words, <u>a fair play in the joints is a necessary concomitant for an administrative</u>

> body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.
>
> (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.
>
> Based on these principles we will examine the facts of this case since they commend to us as the correct principles."
>
> (emphasis added)

Let us consider the public interest involved in the process of cancelling the petitioner bid and retendering done by the respondents. The petitioner's bid in the first tender with which he seeks to bind the respondents was Rs.66.50 lakhs. The highest bid received in the third tender was Rs.1.03 crores. A difference of nearly Rs.40,00,000/- has huge financial implications on a Panchayat Society. Such Panchayat Societies undertakes a large amount of rural infrastructural work and implements schemes of the Government. They are therefore required to obtain highest available price for State largess to benefit the public at large. There is therefore public interest in retendering in the instant case.

Since no rights can accrue to any party, merely by a Notice Inviting Tender, the State is always at liberty to cancel and withdraw a tendering process at any stage, if it is deemed so in public interest.

Useful reference may be made hereto Paragraph 8 of the decision of the Supreme Court in **Food Corporation of India v. Kamdhenu Cattle**

Feed Industries reported in **(1993) 1 SCC 71** as set out hereinbelow.

> "8. The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. <u>Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny</u>. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."
>
> (emphasis added)

Counsel for the petitioner would rely upon two decisions of the Hon'ble Supreme Court of India. First one being in the case of **Bihar State Housing Board & Ors. Vs. Radha Ballabh Health Care & Research Institute Pvt. Ltd.** reported in **(2019) 10 SCC 483**. In the said decision, the Hon'ble Supreme Court has held that once a price is fixed for allotment of Housing plots, the State Housing Board cannot unilaterally increase or alter such price. The State also cannot compel a successful allottee to pay more after execution of a contract. The facts of the said case are substantially different from the instant. A letter of allotment was already issued after the allottee was declared as successful and a contract came into existence.

It is in that context that the Hon'ble Supreme Court had held that the allottee for Housing Units cannot be asked to pay more than the originally allotted amount since the right already accrued to the allottee thereat. The said decision is not only distinguishable in the facts but is also quite different from the instant tender process for allotment of highway toll collection.

The next decision relied upon by Mr. Chatterjee, learned Counsel for the petitioner, is **Indsil Hydro Power & Manganese Ltd. Vs. State of Kerala & Ors.** reported in **(2020)16 SCC 276**. The facts of the said case are that a concession was afforded to private power generators by the Karnataka State Electricity Board, upon supply of a certain amount of power. The object and purpose for such a Scheme was to promote power generation amongst private stakeholders and players. The petitioner therein was denied the benefit of being graded as a Category-I Power Supplier since it could not supply power for the entire stipulated period or meet the load thereof for agitation by locals and public disturbance.

The Karnataka State Electricity Board had downgraded the status of the petitioner therein which was interfered with by the Hon'ble Supreme Court. The intervention of public disturbance which prevented the petitioner therein from supplying adequate power was considered sufficient reason to condone the omission of the petitioner therein. It is in that context, it is held that the State was estopped from deviating from undertaking already given i.e. the incentive to private participation in the Power Sector. In the instant case, the aforesaid decision cannot in any way come to the aid of the petitioner.

For the reasons stated hereinabove, this Court cannot find fault with the third tendering process and the same may be proceeded with, concluded and completed in accordance with law and the Rules prescribed thereof.

The instant writ petition must fail and is hereby dismissed.

In view of the dismissal of the above writ application, the connected application being CAN 1 of 2021 is also dismissed.

There will be no order as to costs.

All parties are directed to act on a server copy of this order on usual undertakings.

(*Rajasekhar Mantha*, J.)