

**In The High Court at Calcutta
Constitutional Writ Jurisdiction
Original Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPO No. 281 of 2020

**Madho Das Mundhra
Vs.**

Railtel Corporation of India Limited and another

For the petitioner : Mr. Suddhasatva Banerjee,
Mr. S. Dasgupta

For the respondents : Mr. Vikas Baisya

Hearing concluded on : 22.11.2021

Judgment on : 20.12.2021

The Court:

1. The petitioner has challenged the Notice Inviting Tender (NIT) dated August 26, 2020, floated by the respondent-authorities for deployment of maintenance teams for maintenance of Optical Fibre Cable Network. The date stipulated for seeking clarification regarding NIT was September 4, 2020 (12 noon to 2.00 pm), the bid submission was to start on September 10, 2020 and end on September 24, 2020 at 2.00 pm.
2. Learned counsel for the petitioner, allegedly an intending bidder, contends that although the petitioner sought for certain clarifications regarding certain terms of the tender notice by a letter dated September 3, 2020, the reply thereto, given by the respondent-authorities, did not carry any such clarification worth the name.

Subsequently, the present writ petition was affirmed on September 18, 2020 and filed before the last date of submitting bids.

3. Learned counsel for the petitioner argues that the petitioner is entitled to challenge the NIT even without having participated in the tender process, since the petitioner, being a prospective bidder, has challenged the legality and constitutionality of several terms of the tender documents itself which, according to the petitioner, are unfair and illegal.
4. In further reply, the learned counsel distinguishes a judgment reported at *(2020) SCC OnLine (Cal) 2213 [Subir Ghosh Vs. State of West Bengal and others]*, which was cited by the respondents. Counsel contends that, in the said case, the online bid submission date was April 1, 2019, but the writ petition was filed in January, 2020. In such context, it was found that a person who has not participated in the bidding process at all cannot challenge the tender conditions on any ground whatsoever.
5. However, in the present case, the petitioner has affirmed and filed the writ petition before closure of the submission of bids.
6. While seeking to distinguish another judgment cited by the respondents, reported at *(2018) 8 SCC 243 [National Highways Authority of India Vs. Gwalior Jhansi Expressway Limited]*, learned counsel for the petitioner contends that the same is inapplicable to the facts of the present case. In the said judgment, the Apex Court held that, having failed to participate in the tender process, the

respondent in that matter could not contend similar rights as bidders who had participated in the process.

7. However, in the said decision, the Supreme Court considered the fact that the validity of the tender document itself had not been challenged before any competent forum, as opposed to the present case. It is argued that the petitioner does not complain of any breach or non-fulfilment of the terms and conditions of the tender but challenges the clauses of the tender itself.
8. As far as the other unreported judgment cited by the respondents, passed in *A.P.O.T. No.98 of 2021 [Madho Das Mundhra Vs. Railtel Corporation of India and another]* is concerned, learned counsel for the petitioner submits that no ratio was laid down therein and the same was an order passed in connection with an interlocutory application.
9. Learned counsel submits that, on the contrary, if the petitioner had participated in the tender process and then sought to challenge the terms of the tender, the petitioner would have been barred from doing so by the principle of estoppel.
10. In support of such contention, learned counsel for the petitioner cites *M/s. Opaque Infrastructure Private Limited Vs. Union of India and another*, reported at *MANU/DE/0964/2015, Poorvanchal Caterers & Anr. Vs. Indian Railway Catering and Tourism Corporation Limited & Ors.*, reported at 2009 SCC OnLine (Delhi) 1012 and the judgment of the Supreme Court rendered in *Tafcon Projects (I) (P) Ltd. Vs. Union of India and others*, reported at (2004) 13 SCC 788. Learned counsel submits that, as per the proposition laid down in the said judgments,

a bidder having participated in a tender process cannot challenge the tender terms on the ground of vagueness subsequently.

- 11.** The challenge to the tender terms and conditions was necessarily required to be made prior to participation. For the proposition that the petitioner would have been precluded from challenging the clauses of the tender after participation, learned counsel for the petitioner also cites *New Bihar Biri Leaves Co. And others Vs. State of Bihar and others*, reported at (1981) 1 SCC 537.
- 12.** Learned counsel for the petitioner next argues that in the instant case, the tender conditions are vague and uncertain and, as such, deny the petitioner a level playing field with the other operators who had participated in the tender process, many of whom had previous experience of working on earlier identical projects of the Railways and thus privy to many information regarding the ground realities and conditions of the optical fibres-in-question. This, the petitioner argues, violates Articles 14 and 19(1)(g) of the Constitution of India.
- 13.** Clause 11 of the NIT, it is argued, reserves right unto the respondents to add or delete any maintenance section, which made the tender process extremely uncertain. Several particulars were supposed to be furnished by the bidders along with other bids, which could only be ascertained on the basis of such maintenance sections. In the absence of relevant particulars being furnished, the intended bids would be treated as incomplete. Learned counsel argues that the right so reserved by Clause 11 of the NIT affects the commercial viability of the work itself and would tantamount to reserving unto the

respondents the right to change the rules of the game after the game has commenced, which is impermissible in law. There could not be any effective participation in the tender process without knowing the exact contours off the maintenance clause.

- 14.** The NIT further required a contractor to accept the site on 'as is where is' basis, as per Clause 1.1.1 of Chapter V of the NIT. The said Clause also mandates that the awardee would be fully responsible for the end-to-end performance between two nodes in the entire jurisdiction of the team's reach. However, no provision was given in the NIT allowing the intending tenderers to survey the routes and/or test the quality and condition of the existing fibre. Without such survey, it was not possible to commercially arrive at an amount by way of estimate for the purpose of bid. Optical Time-Domain Reflectometer (OTDR) is a fibre optic instrument used to test detailed information regarding overall condition of the fibre. It is evident from the NIT conditions that all the other participating bidders were privy to such OTDR test reports and the exact condition of the fibre, having been engaged on previous occasions for work in respect of the same sections.
- 15.** Withholding such information was deliberate, it is argued, to ensure favouritism and encourage cartelization, which is contrary to Article 14 of the Constitution of India.
- 16.** Learned counsel for the petitioner further argues that it has been consistently held by various High Courts in exercise of their powers under Article 226 of the Constitution of India that, in a tender process

pertaining to State resources and/or contract, the endeavour is to fetch the best possible price, to be secured through maximum participation of intending bidders.

- 17.** Such opportunity was denied to the petitioner and others who are on the same footing by dint of the prior special knowledge of most of the other bidders, which amounts to violation of Articles 14, 19(1)(g) and 21 of the Constitution of India.
- 18.** On the other hand, learned counsel appearing for the respondent-authorities submits that the tender document was approved by the Competent Authority and the entire contents of the terms thereof are uniform throughout all regions of India – East, West, North and South. The discretion given to the corporate office is extremely limited in respect of the discretion to vary the terms.
- 19.** In this case, the respondent-authorities, it is argued, had given sufficient reply to the petitioner's query.
- 20.** Fifteen different sections are covered by the NIT and the technical and financial criterion are to be met separately for each of the sections of the total length of fibre for an appropriate evaluation of the bid. Keeping in view past experience and considering the imperative aspect, since the work related to a public interest and involved expenditure of public money, the tender process, it is submitted, ought not to be interfered with.
- 21.** Learned counsel for the respondent-authorities next contends that there were total 100 participants, within whom 80 were existing

contractors and 20 new contractors who participated in 15 different sections.

- 22.** In view of the extreme urgency of the work covered by the NIT, which plays a pivotal role in the signalling system of railways, since the respondent-authorities are technology (ICT) infrastructure providers, the entire work could not be stopped and, therefore, the work orders were issued even during pendency of the writ petition.
- 23.** In another writ petition, bearing WPO No.71 of 2021, between the same parties, the petitioner has also challenged the NIT Clauses pertaining to five different sections
- 24.** Learned counsel for the respondent next argues that the petitioner does not have the *locus standi* to file the application under Article 226 of the Constitution of India, since the petitioner did not participate in the tender process at all.
- 25.** In such context, the respondents place reliance on the following judgments:-
 - (i) *2020 SCC OnLine Cal 2213 (Subir Ghosh Vs. State of West Bengal & Ors.);*
 - (ii) *(2018) 8 SCC 243 (National Highway Authority of India Vs. Gwalior Jhansi Expressway Limited); and*
 - (iii) *A.P.O.T. No.98 of 2021 (Madho Das Mundhra Vs. Railtel Corporation of India & Anr.*
- 26.** The respondent-authorities cites the abovementioned judgments to clinch the issue as regards the absence of *locus standi* of the petitioner to prefer the instant challenge, in view of having not participated in the tender process intentionally. It is reiterated by

learned counsel that the interest of the public at large cannot be put at stake at the whims of the petitioner, since the work relates to the controlling of the signalling system of the Railways.

- 27.** That apart, it is argued that the tender terms are in the realm of contract and cannot be altered and/or amended, since the same has been drafted upon considering every aspect regarding the interest and safety of the public at large and are uniform in respect of all zones of India.
- 28.** As such, it is contended that the writ petition ought to be dismissed.
- 29.** As regards maintainability of the writ petition and the petitioner's *locus standi* to file the writ petition, despite having abstained from participating in the tender process, the Division Bench judgment of this Court in *Subir Ghosh* (supra) lays down the ratio that it is possible that a prospective bidder finds the terms of the tender documents to be unfair or illegal and challenges the same; but such challenge has to be before the time to put in the bids is closed. In the present case, the petitioner did precisely that and, as such, the said ratio cannot be held to go against the petitioner. Albeit, it was further observed by the Division Bench that if a bid is made and thrown out on an illegal or unfair ground contained in the tender document, even then a challenge can be fashioned, but a person who has not participated in the bidding process at all cannot challenge the tender conditions on any ground whatsoever, such subsequent observation was qualified by the preceding phrase in paragraph no.5 of the said judgment which says that a challenge against unfair or illegal terms of

the tender document is maintainable before the closure of the submission of the bids.

- 30.** As far as *National Highways Authority of India* (supra) is concerned, although in the context of the case the challenge against the tender was refused on the ground on non-participation of the tenderer, the Supreme Court clearly held in paragraph no.18 of the said judgment that the tenor of the terms of the documents made it obligatory for the respondent to so participate to be considered as a responsive bidder along with others. Such perspective is further reflected in Clause 30.5 of the tender document in the said case, where it was provided that, notwithstanding anything to the contrary, for the purposes of eligibility and qualification of the BOT-Annuity Concessionaire, if it has participated in the bidding process it shall be deemed to fulfil all the requirements of Clauses 3 and 6 of the RFP, being the existing concessionaire of the Four-Lane Project. Similar provisions found place in several other clauses of the tender as well, including Clauses 3.2(f), 26.9 and 27.6 of the said tender document, as quoted in paragraph no.8 of the cited report.
- 31.** As such, the proposition laid down in the said case was in the limited factual context which arose therein, which are clearly distinguishable from the present case insofar as there is no participation clause in the NIT of the present case.
- 32.** As far as *Madho Das Mundhra* (supra) is concerned, with utmost respect, the said judgment does not lay down any proposition of law but merely records the facts and circumstances of the case, in which

context the judgment was passed. Hence, the said Division Bench judgment does not help the objection raised by the respondents on the *locus standi* of the petitioner.

- 33.** On the other hand, in *M/s. Opaque Infrastructure Private Limited* (supra), which is cited by the petitioner, the contrary proposition was upheld and it was found that the bidder would be barred by the principle of estoppel from challenging the tender process if it had participated in the process and thereafter sought to challenge the same. It was categorically laid down that the law precludes a person from challenging the tender terms after having participated in the same. The same proposition of law was followed in *Poorvanchal Caterers* (supra) by the Delhi High Court and in *Tafcon Projects (I) (P) Ltd.* (supra) by the Supreme Court. As such, the issue of maintainability is held in favour of the petitioner and against the respondents, as the present writ petition is held maintainable at the instance of the petitioner.
- 34.** The cardinal premise of challenge of the petitioner in the writ petition is that the tender conditions are vague and uncertain and deny the petitioner a level playing field.
- 35.** In that context, several issues have been raised by the petitioner which pertain to various facets of the tender document.
- 36.** To address such issues, a perusal of the NIT itself and its annexures is essential.

- 37.** It is seen from the entire tender document that the work was divided into several specific units, for each of which separate tenders with separate criteria were to be filed by the prospective bidders.
- 38.** The different maintenance sections are clearly indicated in a chart given in Annexure-A of Section 1, Chapter 1 of the tender document, which is exhaustive in nature.
- 39.** Immediately after the chart, a pre-bid meeting was mentioned as scheduled to be held on September 4, 2020 at 12.00 hours. Even the venue of the meeting was clearly indicated.
- 40.** Thus, there was ample scope for the petitioner to approach the tender-issuing authorities for necessary clarifications and raise their objections by participating in the said meeting. However, for unexplained reasons, the petitioner did not avail of such opportunity.
- 41.** The respective scope of work in the various sections is also reflected, even to a layman, from a complete reading of the tender terms. For example, another chart is given in Annexure C in Chapter 7 of the NIT indicating in detail the jurisdiction of the OFC maintenance sections. The length and bi-monthly cumulative repair time allowed were clearly indicated against each of the fifteen sections.
- 42.** That apart, the right reserved by the Railtel, to add or delete any maintenance section, was clearly coupled with the rider that payment would be made as covered in the preamble. It is specifically stated in the NIT (Section 1, Chapter 1, Annexure-A) that evaluation shall be done section-wise. If interpreted literally, in the absence of any

ambiguity, the terms of the tender document were clear enough to indicate that the reserved right of the Railtel did not pertain to addition or deletion *to* any section, on any yardstick whatsoever, but the addition or deletion *of* entire maintenance sections to the work of a particular contractor.

- 43.** Hence, the allegation of the petitioner, that the rules of the game were kept open to be changed after the game has started, has no basis whatsoever. Not only were the specific areas of the respective maintenance sections and other specifications clearly mentioned in the NIT, Chapter 8, Annexure-D thereof clearly mentioned in detail the minimum manpower and machine/equipment required to be engaged under one maintenance team. Each detail of such requirement was specifically laid down under the said head.
- 44.** That apart, Clause 16 of the General Conditions mentioned in the tender document clearly provided that, before quoting, the tenderers were advised to ascertain the nature of work involved and *invariably* undertake a site inspection. Thus, the allegation that the prospective bidders were denied the right to examine the existing optical fibres before submitting their bid does not hold water.
- 45.** It was further mentioned in Clause 3.2 of Chapter 5 of the NIT that, before quoting, it was advisable that the prospective tenderers should make themselves fully conversant with the locations, OFC routes and types of jobs in details to be carried out therein as per the tender requirement, so that they can clearly understand the scope of work

and assess the requirement of resources to complete the work in a scheduled time.

- 46.** The nature of the work to be done was clearly elaborated in several clauses of the tender document.
- 47.** It was merely for the petitioner to approach the tendering authority for the purpose of getting a clear picture of the existing condition and the dimensions of the existing optical fibre cables, as provided galore in the several terms and conditions of the NIT itself. Hence, the petitioner's objection, that there was no such scope to pre-assess the conditions and parameter of the existing cables and routes, is belied by the provisions of the NIT itself.
- 48.** As regards the further allegations of the petitioner that, as per the NIT, the list of personnel for maintenance was to be submitted with the bid, financial and technical criterion to be met separately for each section and that the number of personnel was to be given, which was allegedly not possible within the scope of the NIT, it is evident from the NIT terms that amply opportunity was given to the prospective bidders to assess the scope and ambit of the work to be done. The petitioner, of his own choice, failed to avail such option.
- 49.** Hence, although it was stipulated in the NIT that the contractor has to do the work on 'as is where is' basis, in view of the right of prior inspection given in the tender document itself, as discussed above, there was no hindrance to the petitioner taking adequate inspection to ascertain the existing scenario in terms of the NIT itself and thereafter to submit their bid.

- 50.** Hence, in the present case, the allegations of vagueness and favouritism, levelled by the petitioner, are falsified by the terms and conditions of the tender document itself. To any *bona fide* bidder, there could not have been any difficulty in having an inspection and to ascertain, prior to the bid, the exact nature of the work to be done and the extent thereof.
- 51.** That apart, since specific date, time and venue were fixed for the pre-bid meeting, it was always open to the petitioner to participate in the said meeting for the purpose of further elucidation of doubts, if any. Instead of doing so, the petitioner preferred to take out the writ petition prior to the last date of submission of dues, which would unnecessarily stall the work envisaged by the tender.
- 52.** Since the work contemplated in the tender is of a public nature and concerns the safety and security of the public at large and public utility in general, there is no justification in setting aside the entire tender process merely because of the perceived inconvenience of the petitioner.
- 53.** There cannot arise any question of favouritism or arbitrariness on the part of the tendering authority in view of the clear contours of the contemplated work being provided in the tender document itself.
- 54.** It is well-settled that a tender process is set aside by courts only in exceptional circumstances and certainly not because the terms of the tender do not suit an individual prospective bidder. In the present case, several bidders participated and many got selected on the same terms and conditions which are complained of by the petitioner.

- 55.** Moreover, the petitioner has not denied the respondents' specific contention that the terms of the tender document are uniform for all similar tenders floated by the Railways throughout the country. As such, picking and choosing certain clauses or altering them merely because it would convenience the petitioner does not even come within the zone of consideration for maintaining a writ petition.
- 56.** In view of the above, WPO No. 281 of 2020, being devoid of merits, is dismissed on contest.
- 57.** There will be no order as to costs.
- 58.** Urgent certified copies of this order shall be supplied to the parties applying for the same, upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)