IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side

Present:- **Hon'ble Mr. Justice I. P. Mukerji**
Hon'ble Mr. Justice Ajoy Kumar Mukherjee.

MAT 687 of 2022
in
CAN 1 of 2022

Plain Cargo Solution (OPC) Private Limited & Anr.
Vs.
Indian Oil Corporation Limited & Ors.

For the Appellants	:	**Mr. Debabrata Saha Roy,** **Mr. Pingal Bhattacharya,** **Mr. Subhankar Das,** **Mr. Neil Basu, Advocates.**
For the Respondents	:	**Mr. Jishnu Saha,** **Mr. Amit Kumar Nag,** **Mr. Abhishek Nag, Advocates.**
Judgment on	:	**18.07.2022.**

I. P. MUKERJI, J.-

This appeal arises out of a tender. The facts are unique. This case gives occasion to us to formulate some new principles of law.

First, some statements of the applicable law need to be noticed. One who is entrusted with considering bids or offers in response to an invitation to tender made by the government or a body akin to it, is obliged to strictly follow the tender rules and instructions. He cannot discard any such norm as "a pedantic approach or else it would encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our constitutional values". Otherwise, "the rule of law should be a casualty"……… "relaxation or waiver…..in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness" and promote "manipulation and "picking and choosing a bidder for awarding contracts....". This was stated by Justice Quadri delivering the judgment in **W.B. State Electricity Board vs. Patel Engineering Co. Ltd. and Ors.** reported in **(2001) 2 SCC 451**.

In **B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd. and Ors.** reported in **(2006) 11 SCC 548** Mr. Justice Satya Brata Sinha delivering the judgment of the highest court held that under the rules the employer should have the power to relax certain terms and conditions of the tender. Only then he could relax them and to the extent permitted only. If there was no power to relax them, the employer could not relax any term. The power to relax any term could also be derived from the practice followed in the past. If the power existed then it ought to be exercised in a "fair, reasonable and bonafide" manner.

Again in **Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd. and Anr.** reported in **(2016) 16 SCC 818**, Mr. Justice Lokur cautioned the courts against interference with the decision making process in a tender unless it was so arbitrary or irrational or perverse that the court could say that no responsible authority acting reasonably and lawfully would have taken the decision. The terms and conditions of a tender had to be strictly adhered to. The Supreme Court opined:-

> *"**13.** In other words, a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision.*
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> ***14.** We must reiterate the words of caution that this Court has stated right from the time when Ramana Dayaram Shetty v. International Airport Authority of India was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous — they must be given meaning and their necessary significance. In this context, the use of the word*

"metro" in Clause 4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked."

Now, the facts of the case in brief.

The appellants (hereinafter appellant) bought five tank trucks on 23rd March, 2021 and 9th April, 2021. On 15th June, 2021 the registering authority registered two of the tank trucks and on 17th September, 2021 registered the other three.

The respondent corporation (hereinafter respondent) on or about 25th August, 2021 made an invitation inviting offers from eligible persons to provide fifty two tank trucks of 16 MT and above weight to them for their Paradip terminal. The last date for submitting bids in terms of the tender was 1st November, 2021.

This litigation arises out of the following dispute. According to the terms and conditions of the tender as interpreted by the respondent, the appellant at the time of submission of the bid had to possess the registration certificates of tank trucks it had offered to provide to the respondent. They had to be furnished with the offer. Without it the tender would not be considered as valid and be liable to be rejected.

The appellant obtained the registration certificate or smart card only on 3rd December, 2021, although the tank trucks had been registered much earlier on 15th June, 2021 and 17th September, 2021. There was delay in the issuance of the smart card because of the effect of the Covid pandemic, according to the appellant. This assertion was not disputed by the respondent. The appellant's offer was rejected at the time of technical bid consideration by the respondent on the ground that the said certificate was not furnished with the offer. According to the appellant, a valid registration at the time of submission of bid was sufficient particularly in the Covid period when issuance of the registration certificate was delayed by the registering authority and not because of any fault of the respondent.

Mr. Debabrata Saha Roy, learned counsel appearing for the appellant submitted that his client was disqualified on the above ground in the technical evaluation on 1st February, 2022 and was not considered in the financial bid held on 19th February, 2022. After finalization of the bids and award of contracts, the respondent has taken only forty tank trucks out of the fifty two shown as required in the tender document and that they were in a position to take twelve more tank trucks. Hence, this court should direct the appellant to take the five tank trucks of his client. He also submitted that his client, belonging to the scheduled caste was running the appellant company as a single woman run micro enterprise and on that ground should have privilege.

He also referred to a communication of the Ministry of Road Transport and Highways (MVL Section), Government of India dated 26th March, 2021 to the Director General of Police, Principal Secretaries, Department of Transport and The Transport Commissioners of all the states and Union Territories.

> *"2. In view of the above, Ministry of Road Transport and Highways had issued advisories dated 30th March, 2020, 9th June, 2020, 24th August, 2020 and 27th December, 2020 to all States and Union Territories regarding extension of validity of the documents related to Motor Vehicles Act, 1988 and Central Motor Vehicle Rules, 1989. It was advised that with respect to the validity of Fitness, Permit (all types), Driving License, Registration or any other concerned document(s) whose extension of validity could not be, or was not likely to be, granted due to lock-down and which had expired since 1st of Feb, 2020, or would expire by 31st of March 2021, the same may be treated to be valid till 31st of March, 2021. Enforcement authorities were advised to treat such documents valid till 31st of March 2021."*

He argued that on the basis of this notification, the respondent was obliged to accept registration of the five tank trucks as fulfillment of the eligibility criteria and not insist on production of physical smart cards.

Mr. Saha Roy argued that under Clause 13 of the tender document keeping in line with the "public procurement policy for micro and small enterprises (MSEs) Order, 2018", 25% of the total quantity was required to be procured from micro and small enterprises out of which 16% (4 out of 25) should be earmarked for procurement from MSEs by scheduled caste and scheduled tribe enterprises and 12% or 3 out of 25 for procurement from such MSEs owned by woman entrepreneurs. In other words, out of fifty tank trucks, six should have been taken from the scheduled caste bidders.

He also showed us Clause IV(b) of the tender document where it was stated that tender could be made by scheduled caste bidders on the basis of booking documents for tank trucks.

He also argued that as per Clause 6, priority should have been given to new tank trucks.

Mr. Jishnu Saha, learned senior advocate, appearing for the respondent took us through the facts elaborately. He showed us the terms and conditions of the tender. First of all, he showed us Clauses (IV)(a) and 11 of the terms and conditions which stipulated that a bid for a tank truck owner by the bidder should be accompanied by the registration certificate. In the absence of the certificate, a bid could not be considered and was liable to be rejected at the technical bid evaluation stage. Since the bid of the appellant was not accompanied by registration certificates, they were disqualified at the technical bid stage. Learned counsel cited the authorities enumerated above, **W.B. State Electricity Board vs. Patel Engineering Co. Ltd. and Ors.** reported in **(2001) 2 SCC 451**, **B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd. and Ors.** reported in **(2006) 11 SCC 548**, **Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd. and Anr.** reported in **(2016) 16 SCC 818** to argue that the terms and conditions of the tender had to be scrupulously followed. The authority conducting the tender had no power to relax any term or condition of the tender, unless permitted to do so by the terms of the tender. He argued that a fair relaxation had been made for scheduled caste bidders to submit bids on the basis of booking documents. But it did not follow from it that a bid in respect of a purchased tank truck could be accepted without a registration certificate.

He said that the Central government notification had extended the time period for renewal of insurance, registration etc. The appellant had applied for initial or original registration and not for renewal of an existing registration.

Learned counsel also submitted that the appellant's case could not be considered in isolation because the bids of similarly placed bidders who had obtained registration but did not possess the registration certificate had not been considered. (Annexure P-13 Pg. 286 of the stay petition).

Discussion:-

It is an admitted position that the appellant is the owner of five new tank trucks, bought by them on 23rd March, 2021 and 9th April, 2021. All five have been registered with the registering authority on 15th June, 2021 and 17th September, 2021. Due to the raging covid pandemic during that period, issuance of the physical registration certificate (RC) was delayed by the registering authority and could not be made available for submission before the last date for submission of the tender i.e. 1st November, 2021. The smart card was available to the appellant on 3rd December, 2021 which was notified by them to the respondent. Apart from this, there was no flaw in the application form submitted by the appellant. At that time, the respondent had not started the technical bid. It was undertaken in February, 2022. The tender of the appellant was not considered on the ground that the registration certificate had not been submitted with the form. So, no question of the appellant's bid being considered at the "financial bid" stage on 19th February, 2022. Was the appellant entitled to consideration? Or was the respondent's rejection of the appellant's tender most arbitrary and unreasonable?

Mr. Saha Roy, learned senior counsel appearing for the appellant pointed out from the terms and conditions of the tender that ownership and possession of the tank truck or of the registration certificate were not mandatory before making a bid by the bidder. An application by a scheduled caste bidder could be made on the basis of a booking order for the vehicle. However, in the case of bidders who had already acquired the vehicle physical registration certificate had to be furnished. Therefore, according to Mr. Saha Roy, the registration certificate along with the application was not such an essential term of the terms and conditions that it could not be dispensed with.

We look at it from another angle. The terms and conditions of tender stipulated that the owner of a tank truck making the bid would have to submit the registration certificate. A scheduled caste bidder, who had entered into an agreement for sale of the vehicle but had not obtained ownership or possession of it could apply with the booking document.

What follows from this is that two types of situations were contemplated by the framers of the tender. Any other was unforeseen. It occurred because of the Covid onset. Registration was granted but the physical certificate could not be made available by the registering authority to the appellant. If for this reason the certificate could not be submitted by them before the date of closure for receiving applications but could be produced before consideration of the technical bid, could the bidder be disqualified and his application rejected?

In my opinion, a statutory authority is enjoined with a duty to act lawfully, fairly, reasonably and without arbitrariness.

This situation was in nobody's contemplation when the tender terms were drafted. The authority conducting the tender process is not supposed to fold his hands and plead helplessness to tackle a situation like this arising out of an unforeseen circumstance.

It is to be read into the terms and conditions of any tender that in an extraordinary situation, the authority conducting the tender process has an implied power to take a decision to tackle it and complete the tender process. It is required to do so by suitably modifying or relaxing the terms and conditions of the tender, without changing its essential terms and conditions as held by the Supreme Court in **W.B. State Electricity Board vs. Patel Engineering Co. Ltd. and Ors.** reported in **(2001) 2 SCC 451**, **B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd. and Ors.** reported in **(2006) 11 SCC 548**, **Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd. and Anr.** reported in **(2016) 16 SCC 818**. The action of the authority in such a situation should be fair and reasonable and strictly addressed towards dealing with the unforeseen situation.

The tender was concluded by acceptance of forty tank trucks.

According to the tender documents, the respondent could still take twelve tank trucks.

I think the ends of justice would be subserved if notionally the tender is reopened and reconsidered by including the five tank trucks offered by the appellant along with other applications at Annexure P-13 at page 286 of the stay petition which were similarly not considered as pointed out by Mr. Jishnu Saha.

Notionally, the financial bid of the tender should be reopened and reconsidered strictly according to the terms and conditions of the tender. The bids already accepted are not to be interfered with. Then, it is to be seen whether the five tank trucks offered by the appellant or which of them have qualified in the financial bid without disturbing the bids already accepted.

Those tank trucks of the appellant which qualify may be accepted and a letter of acceptance issued to the appellant. This exercise is to be completed within two months of communication of this order. The impugned judgment and order dated 19th April, 2022 is set aside.

The appeal is disposed of accordingly.

The connected application (CAN 1 of 2022) is disposed of accordingly.

Certified photocopy of this order, if applied for, be supplied to the parties upon compliance with all requisite formalities.

I agree.

(AJOY KUMAR MUKHERJEE, J.) **(I. P. MUKERJI, J.)**