

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate side

PRESENT:

HON'BLE JUSTICE CHITTA RANJAN DASH
AND
HON'BLE JUSTICE ANIRUDDHA ROY

MAT 1013 OF 2021
with
I.A. No.: CAN 1 OF 2021

Biswanath Saha
vs.
The State of West Bengal & Ors.

For the Appellant	:	Mr. Debabrata Saha Roy, Adv. Mr. Pingal Bhattacharya, Adv. Mr. Subhankar Das, Adv. Mr. Neil Basu, Adv.
For the State	:	Mr. Sirsanya Bandyopadhyay, Adv. Mr. Suddadev Adak, Adv. Ms. Ipsita Banerjee, Adv. Mr. Arka Kumar Nag, Adv.
For the Respondent No. 10	:	Mr. Sagar Bandyopadhyay, Adv. Ms. Soma Kar Ghosh, Adv.
Heard on	:	20.06.2022 and 27.06.2022.
Judgment on	:	15.07.2022.

CHITTA RANJAN DASH, J.:-

1. The order passed by the Hon'ble Single Judge on 09.09.2021 in WPA No. 13839 of 2021 is impugned in this appeal by the Writ Petitioner as he has suffered dismissal of his Writ Petition.
2. Facts relevant for disposal of this appeal are as follows:
 - (i) On 04.06.2021, a notice inviting tender ("NIT" for short) was issued by the Block Development Officer, Burwan, Murshidabad for engagement of Carrying-cum-Storing Agent under Mid-day Meal Scheme ("MDM Scheme" for short) of Burwan Block. In response to the aforesaid NIT 5 (five) persons including the present appellant and present respondent no. 10 filed tender. At 4:30 p.m. on 17.06.2021, the tender box was opened in presence of some bidders including the present appellant and a list was prepared, in which present appellant was shown against serial No. 1 and present Respondent no. 10 was shown against serial No. 2.
 - (ii) However, the bid pursuant to NIT dated 04.06.2021 was cancelled and second notice inviting tender was published on 11.08.2021 in the daily newspaper "Pratidin" for the aforesaid purpose of engaging Carrying-cum-Storing Agent for Burwan block. In response to the aforesaid second NIT dated 11.08.2021, present Respondent no. 10 and another

person submitted bid and the bid was knocked in favour of the present Respondent No. 10.

- (iii) The present Appellant came to know about such development on 17.08.2021 and represented before the District Magistrate, Murshidabad on 19.08.2021 and 23.08.2021. Thereafter he filed the Writ Petition, order of which has been impugned in this appeal.

3. From the impugned order it is found that it was asserted by the present appellant before the Writ Court that in fact he was the lowest bidder in the first bid pursuant to NIT dated 04.06.2021 and present Respondent No. 10 had quoted rate of 0.24 paise above 121 km. which had been struck down by pen, subsequently to 0.23 paise. As both the parties were found to have offered the same bid after the striking down of rate as aforesaid was taken into consideration, both may be stated to have quoted similar price in their bid or the Petitioner should have been taken to have offered the lowest bid. The cancellation of the aforesaid bid had been challenged before the Writ Court on the grounds thus:

- (i) The reason for cancellation of the first bid was not communicated to the Petitioner-Appellant though he was a successful bidder.
- (ii) The Petitioner-Appellant being the successful bidder in the first bid should have been informed personally regarding the second bid.
- (iii) The Petitioner-Appellant ought to be given another chance to participate in the tender process.

4. The contentions raised by the petitioner-appellant before the Writ Court was oppugned by the State as well as by the private Respondent on the following grounds:

- (i) The Department had the authority to cancel the first bid.
- (ii) There was no necessity of intimation to the petitioner regarding the second bid as wide publicity was given to the second bid in the newspaper and notice boards of different offices including the office of the Block Development Officer, Burwan, Murshidabad.
- (iii) The cancellation of the first tender process in no way affected any vested right of the Petitioner and such cancellation cannot be termed as unreasonable.

5. Upon hearing the learned Counsel for the parties, Hon'ble Single Judge dismissed the Writ Petition by recording the findings thus:

- (i) The act of cancellation of the first bid by the Department cannot be termed to be either discriminatory or *mala fide* or illegal.
- (ii) The BDO, Burwan proceeded to publish second notice inviting tender and any person who is and was interested to participate in the tender ought to have been vigilant and should have gone through the details which were made available in public domain and the website of the District Administration.
- (iii) The Petitioner having approached the Court after the process of second tender is over, he has no vested right.

6. Mr. Debabrata Saha Roy, learned Counsel for the Appellant brings under challenge the impugned Judgment on the following grounds:

- (i) Rate quoted by the Writ Petitioner-Appellant and the private Respondent No. 10 in the first bid being at par, the authority should have divided the area of operation of Burwan block in two parts to give advantage to both the Petitioner-Appellant and respondent No. 10.
- (ii) The cancellation order dated 06.08.2021 of the first bid being without reasons is against law.
- (iii) The declaration of the second bid behind the back of the Petitioner-Appellant without intimation to him is a nullity in the eye of law.
- (iv) In the second bid Respondent No. 10 did not quote any rates at any stages of transportation and in the duly filled in prescribed application in the columns for quoting rates, he recorded "AT PAR" in all columns and such a fashion of filing bid is contrary to tender condition and cannot be accepted.

7. Learned Counsel for the State supports the impugned order and reasoning supplied therein.

8. Mr Bandyopadhyay, learned Counsel for the Respondent No. 10 submits that the rates quoted by the Writ Petitioner-Appellant and the Respondent no. 10 in the first bid were found to be identical and this fact is evident from the affidavit filed on behalf of the State to the stay application. In this respect, he drew our attention to Sub-Para 3(b) and 3(c) at page 69 of the Paper Book and Annexure-R2 at pages 83 and 84 of the Paper Book. It is also submitted by him that the

Appellant has also unequivocally admitted such position in the Affidavit-in-Reply as evident from Paragraph 7 at page 104 of the Paper Book.

9. Our attention is drawn to 'Note-I' under sub-Rule 8 of Rule 47 of the West Bengal Financial Rules where direction has been issued for fresh tender if the qualified bidders in the technical bid is less than three but this embargo does not apply to second bid. To substantiate the impugned order and its reasoning Mr. Bandyopadhyay, learned Counsel for the Respondent No. 10 relies on the case of Maa Binda Express Carrier Vs. North-East Frontier Railway in (2014) 3 SCC 760, State of Jharkhand Vs. CWE-Soma Consortium in (2016) 14 SCC 172 and State of Uttar Pradesh Vs. AL Faheem Meetex Pvt. Ltd. (2016) 4 SCC 716.

10. Most forceful argument by Mr. Saha Roy, learned Counsel for the Appellant is that there was tampering of rates in the comparative sheet of rate evaluation prepared by the Tender Committee so far as rate quoted by respondent No. 10 is concerned.

11. After going through the assertions made in paragraph 4(c) of the Affidavit-in-Opposition on behalf of respondent Nos. 1 to 9, we are not in a position to accept such argument of Mr. Saha Roy to be sustainable in as much as the comparative sheet of rate evaluation was made in presence of the present Petitioner and he has put his signature on that sheet. In each tender document both the present Petitioner-Appellant and present Respondent No. 10 had quoted the same rate but while preparing the comparative sheet of rate evaluation there was some typographical mistake in reflecting the rate quoted by Respondent No. 10 at 0.24 paise in the column of distance category 121 k.m. That typographical error was

corrected in presence of three bidders who were present at the time of opening of the bid including the present Appellant Petitioner and present Respondent No. 10. Two bidders were, however, absent and all bidders present have put their signature on the comparative sheet of rate evaluation. It is also not the case of the Appellant Petitioner that there was any tampering in the tender document filed by the Respondent No. 10 as found from paragraphs 83 and 84 of the Paper Book.

12. Even otherwise the first bid having been cancelled in the meantime by the competent authority the question of tampering etc. in that bid cannot be gone into at this stage when bid has been knocked in favour of the Respondent No. 10 pursuant to the second NIT. This contention of Mr. Debabrata Saha Roy must therefore fail.

13. Coming to the second limb of argument Mr. Saha Roy, learned Counsel for the Appellant. He has tried to canvass an alternative in favour of the Appellant Petitioner. It is argued with vehemence that when both the appellant petitioner and Respondent No. 10 had quoted the same rate, the authority should have divided the area of operation of Burwan block into two parts to give advantage to both the Appellant petitioner and Respondent No. 10.

14. To meet this argument of Mr. Saha Roy, it would suffice to say that submission of a bid/tender in response to a notice inviting tenders is only an offer by the bidders which State or its agencies are under no obligation to accept. As argued by learned Counsel for the State, as only two bidders came out successful in the bid pursuant to the first NIT, the authority thought it proper to go for a second NIT with a hope to get competitive and responsive bid. Such wisdom on the

part of the State or its agencies to go for a second NIT cannot be questioned on any ground and the Court does not have scope of judicial review over such wisdom of the State or its agencies. The question of cancellation of a bid for whatsoever reason cannot be questioned in the Court of law unless there is *mala fide* on the part of the State or its agencies or the process of decision making is otherwise bad in law. Any bidder cannot question the wisdom of the State or its agencies that his bids/tenders should have been accepted simply because his bid is highest or lowest or he cannot suggest the Government to divide a particular area to give advantage to two persons who have quoted same rate. He can question the bidding process if he has been denied participation. If he has participated and the bid has been cancelled subsequently that is the domain of the State or its agency and there is no scope of judicial review in that event unless there is *mala fide* or otherwise.

15. The 3rd limb of argument of Mr. Saha Roy, learned Counsel for the Appellant is that the cancellation order dated 06.08.2021 so far as the first NIT is concerned is against law being without reasons. In view our discussion in the preceding paragraph, we do not deem it expedient to reiterate the same again. We simply say that in each and every case State or its authority is not required to give reasons for cancellation of a bid. In this matter in course of hearing, however, reason has been supplied to the effect that in order to get more competitive and responsive bids the respondents proceeded ahead with the second NIT.

16. The 4th limb of argument of Mr. Saha Roy is that the second NIT was issued behind the back of the Appellant-Petitioner and the Appellant Petitioner should

have been intimated about the second bid. So far as this argument is concerned it would suffice to say that the first bid was cancelled. In the bid pursuant to first NIT, the bid of the Appellant-Petitioner had never been accepted. Had the case been that, consideration would have been different. From the submissions of the learned Counsel for the State and from the records, it is found that wide publicity was given to the second NIT. It was published in notice boards of almost all the Government offices. It was published in the newspaper. It was published in the website of the District Magistrate, Murshidabad and all these aforesaid means were taken to give wide publicity to the second NIT to make it more competitive. However, in response to the second NIT, two persons filed their bid; bid of one was rejected and the bid of the present respondent No. 10 was accepted. So far as the tender papers are concerned as to how the rates were quoted by respondent No. 10 and how the Tender Committee accepted that rate is not a matter to be challenged by the appellant petitioner as he had not participated in the second tender process at all.

17. So far as notice as claimed by the appellant petitioner before the second NIT is concerned, it is not a sustainable argument in view of decision of the Hon'ble Supreme Court in the case of State of Jharkhand & Ors. Vs. CWE Soma Consortium (2016) 14 SCC 172.

18. It has been held by the Hon'ble Supreme Court in the aforesaid case that decision of State to invite fresh tenders cannot be interfered with by High Court in exercise of its power under Article 226 of the Constitution of India unless found to be *mala fide* and arbitrary. While exercising power of judicial review in matter of

Government contracts, primary concern of Court is to see whether there is any infirmity in decision making process or whether it is vitiated by *mala fides*, unreasonableness or arbitrariness. In absence of any plea of *mala fide*, decisions of Tender Committee ought not to be interfered with by High Court. In the aforesaid decision it is also held that there is no obligation on the part of authority issuing tender notice to accept any tenders or even lowest tender. If on perusing tenders, it is found that there is no competition then the authority issuing tender may decide not to enter into contract and thereby cancel the tender.

19. In view of the discussion *supra* in fine we hold that the submissions advanced by Mr. Saha Roy, learned Counsel for the appellant petitioner cannot be sustained as we find no infirmity in the impugned order passed by the Hon'ble Single Judge.

20. The claims, now made by the Appellant-Petitioner are also hit by equitable principle of "*vigilantibus, non dormientibus jura subveniunt*" which means delay defeats equity and equity aids the vigilant and not the indolent. This is what Hon'ble Single Judge has observed in the impugned order. Though the 2nd NIT was given wide publicity, the Appellant-Petitioner chose to remain indolent and came forward to challenge the second bid after it was knocked in favour of present Respondent No. 10 when a right had already accrued to him. Had he been vigilant, he could have very well participated in the second tender process.

21. Accordingly, the appeal stands dismissed.

22. In view of dismissal of the appeal, the I.A., being numbered CAN 1 of 2021 also stands dismissed.

23. There is no order as to costs.

I agree.

(Aniruddha Roy, J.)

(Chitta Ranjan Dash, J.)