21.07.2022
Ct. 5
D/L 01
AK

WPA 16011 of 2022

Masti Health & Beauty Private Limited & Anr.
-Versus-
Airport Authority of India & Ors.

Mr. Anirban Roy,
Mr. Debraj Sahu,
Mr. Snehashis Sen,
Mr. Abhishek Banerjee,
Mr. Aditya Sarkar.

... for the petitioners.

Mr. Jishnu Chowdhury,
Ms. Pratik Shaw.

... for the Respondents.

The petitioners seek cancellation of a Notice Inviting e-Tender (NIeT) issued by the Airport Authority of India (AAI) for operating a Wellness Centre inside the Domestic Security Hold Area at the Netaji Subhash Chandra Bose Airport, Kolkata. According to the petitioners, the conditions of tender are arbitrary and the petitioners have been prevented from successfully participating in the said e-Tender. The tendering authority namely, Airport Authority of India, opposes the relief prayed for on the grounds which shall be mentioned after the relevant facts which have been brought to the notice of the Court.

The petitioners were allotted space inside the domestic security area at the Airport since about May

2019. The petitioners however could not operate the Wellness Centre in the allocated space due to various reasons including the Covid-19 pandemic. The petitioners were also prevented from carrying on business by an order of injunction dated 17.9.2020 of the Madras High Court by which the movable properties of the petitioners were attached. The remaining movables inside the petitioners' outlet were moved by the AAI to an alternative location inside the Airport. The AAI thereafter raised a demand on the petitioners by way of occupation charges and damages. The petitioners disputed the claim made by the AAI.

The petitioners filed an application for interim relief under section 9 of the Arbitration and Conciliation Act, 1996 before the Commercial Court at Rajarhat since the licence agreement between the petitioners and the AAI dated 28.5.2019 contains an arbitration clause. The said application was subsequently dismissed. The petitioners were however protected against dispossession from the subject property by a Division Bench order of this Court dated 13.01.2022 and was given the liberty of matching the highest bid in an earlier tender floated by the AAI. The earlier tender was later cancelled and withdrawn by the AAI. The parties did not refer the dispute to arbitration at any point of time thereafter.

The present petition relates to the terms of a new e-Tender floated by the AAI on 27.6.2022. The petitioners have participated in the new tender without prejudice to their rights and contentions but have approached this Court nonetheless on the apprehension that the petitioners' bid will be rejected by the AAI. The petitioners say that the tender conditions are arbitrary.

According to the AAI, there is no arbitrariness in the tender conditions since the earlier tender contained identical clauses.

The law with regard to the restricted scope of judicial review in tender matters is fairly well-settled. There are several decisions which advise the writ courts not to interfere in tender matters or in administrative decisions which have an element of public interest. *Michigan Rubber (India) Limited vs. State of Karnataka; (2012) 8 SCC 216* is a decision in support of the restricted arena of judicial review of administrative action. The Supreme Court was of the view that such interference may hold up public works for a considerable length of time and may result in increase of the project cost manifold. In the same decision however, the Supreme Court carved out an exception where administrative actions would be amenable to judicial review if the action is whimsical or for an ulterior purpose. The assessment of the tender terms will hence be restricted to the extent of determining whether the petitioners have been unfairly excluded from successfully participating in the tender.

Clause 10(A) of the NIe-T spells out the technical criteria and includes one year's continuous experience during last five years in operating outlet for Spa/Wellness Centre/Ayurveda Kendra business at airports or outside. There is no dispute with regard to this or the other technical criteria in the notice inviting e-Tender. Clause 12 lists the conditions where a party would be ineligible to participate in the tender and includes a private/public limited company/partnership firm or sole proprietor having outstanding dues payable to AAI. Clause 12(e) is clarified by stating that the disputed amount which is referred to arbitration by the Competent Authority shall not be considered as outstanding dues provided the agency has furnished an additional validated Security Deposit equivalent to 50% of the value of the disputed amount. Clause 15 provides that e-bids shall be submitted by way of a technical bid and a financial bid.

The technical bid part requires certain documents under Clause 3 of the General Information/Guidelines to be submitted. Clause 3 requires several documents as specified in the said clause to be submitted by the tenderer with the authorisation as specified. One of the requirements is for a No Dues Certificate which requires a party either to self declare the details of disputed and undisputed dues or to obtain a No Dues Certificate from AAI upto 31.03.2022 and further requires that the No Dues Certificate shall be a signed certificate of AAI.

The undisputed facts which have been stated above show that the AAI made a demand on the petitioners on 9.03.2022 of 15.77 lacs. The petitioners disputed and consequently did not pay this amount. Hence, the petitioners fall within Clause 12 of the NIe-T and are not saved by the clarification as the AAI did not take steps to refer the dispute to arbitration. The petitioners also fall within the prohibition of Clause 3 of the General Information which require the petitioners to obtain a No Dues Certificate from AAI [3(h)(ii)]. AAI has admittedly not given a No Dues Certificate to the petitioners. AAI has also not given a reply to the petitioners' letter of 13.07.2022. The fact that the present tender conditions were also there in the earlier tender is of little consequence since AAI withdrew the earlier tender even though the petitioners were given liberty of matching the highest bid in the order passed by a Division Bench of this Court on 13.01.2022.

The undeniable fact in the present case is that AAI has taken advantage of the claim made against the petitioners and used the same with reference to the tender conditions. Several actions and/or failure to take actions by AAI have come together to unfairly exclude the petitioners from the tender process. The AAI has kept the claim pending and not issued a No Dues Certificate; the AAI has also not referred the dispute to arbitration despite the outstanding claim from the petitioners. These actions /inaction have put the petitioners squarely into the stranglehold of Clause 12 of the NIeT and 3(h) of the General Information which is part of the e-Tender conditions.

The second issue which persuades this Court to accept the contention of the petitioners is the inclusion of mandatory conditions in the form of No Dues Certificate in the technical bid component. The requirement of the petitioner to submit a No Dues Certificate, that too a signed certificate from the AAI, creates a barrier for the petitioners in the first stage of the tender itself. Since the petitioners are not in a position to furnish the No Dues Certificate the petitioners are prevented from graduating to the next level of the financial bid. In *Poddar Steel Corporation vs. Ganesh Engineering Works; (1991) 3 SCC 273,* the Supreme Court dealt with this very aspect and held that the requirement in a tender notice can be classified into two categories; those which lay down the essential conditions of eligibility and those which are ancillary to the main object to be achieved by the condition. The requirement of a No Dues Certificate has been included as an essential condition of eligibility in the technical bid and has resulted in effectively putting the petitioners out of the race. Even though the petitioners have put in their bid, the result is a foregone conclusion.

This Court is also inclined to hold that the tender conditions have the effect of coercing the petitioners to make payment of the disputed amount in exchange for the petitioners being allowed to fully participate in the e-Tender.

The combined effect of the admitted facts and the tender conditions gives rise to a presumption that the tender conditions have been tailor-made to oust the petitioners from successfully participating in the e-Tender. In other words, the petitioners have been denied a level-playing field compared to the other participants by reason of certain actions taken by the AAI and AAI's failure to act in terms of the arbitration clause in the licence agreement.

This Court is therefore inclined to interfere in the e-Tender process. WPA 16011 of 2022 is accordingly disposed of with an order cancelling Notice Inviting e-Tender and all subsequent steps taken thereto by the Airport Authority of India. The AAI shall however be at liberty of calling for a fresh e-Tender on terms and conditions which are equitable to all the participants including the petitioners herein.

Urgent Photostat certified copy of this order, if applied for, be supplied to the parties after fulfillment of the requisite formalities.

(Moushumi Bhattacharya, J.)