

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

Before: Honb'ble Justice Shampa Sarkar

WPA 16851 of 2021

Rabindranath Banua

Vs.

The State of West Bengal & Ors.

For the petitioner : Mr. Bhagbat Chowdhury,
Mr. Lal Ratan Mandal,
Mr. Avik Kumar Das,
Mr. Dilip Kumar Sadhu.

For the respondent : Mr. S. Ray,
no.8 Mr. Ritam Chowdhury.

For the State : Mr. Jahar Lal De,
Mr. Shamim-ul-Bari.

For the respondent : Mr. Prabhat Kumar Srivastava.
nos.9 to 15

Hearing concluded on: 08.04.2022

Judgment on: 18.05.2022

Shampa Sarkar, J.:-

1. The petitioner is aggrieved by the action of the Pradhan Saoraberia Jalpai-II Gram Panchayat in issuing four tender notices all dated September 29, 2021 upon cancellation of previously issued four tender notices dated July 20, 2021 for the same works.

2. The petitioner prayed for cancellation of the tender notices dated September 29, 2021 and all subsequent actions taken thereupon. Further prayer for a restrain upon the authority from proceeding in respect of the said tender notices by issuing work orders, has been made.

3. The case of the petitioner in a nutshell is that, the Saoraberia Jalpai II Gram Panchayat (hereinafter referred to of the said gram panchayat), published four tender notices under separate memo numbers inviting offers in sealed covers from experienced and successful bidders for execution of the works mentioned in the said tender notices. The tender notices were issued on July 20, 2021.

4. The tender forms were available from July 20, 2021 to July 28, 2021 on working days between 11.00 a.m. to 2.00 p.m. The last date for dropping the tender form in a sealed cover was July 29, 2021 up to 1.00 p.m. The date of opening of the tender was July 29, 2021 at 2.00 p.m.

5. The petitioner, accordingly submitted his application in a sealed cover for several works under the four tender notices. The petitioner expected to be the lowest bidder. As no communication was not received from the authorities after expiry of the last date, suspecting foul play, the petitioner made a representation before the Pradhan of the said gram panchayat on August 9, 2021 through his learned Advocate. A copy of the same was forwarded to the District Magistrate, Purba Midnapur, The Sub-Divisional Officer, Tamluk and the Block Development Officer, Nandakumar Block.

6. By a letter dated August 23, 2021, The District Panchayat and Rural Development Officer, Purba Medinipur asked the Block Development Officer, Nandakumar Block to make an inquiry and file a report. Such inquiry was not made. The petitioner then came to know that the Pradhan of the said gram panchayat had issued fresh tender notices for the same works which were notified earlier. Such notices were issued on September 21, 2021. Offers were invited in sealed covers from experienced and successful bidders for execution of the works mentioned in the tender notices. The date for issuance of the tender forms were on all working days, between September 21, 2022 to September 29, 2021 between 11 AM to 2.00 p.m. The last date for submission of the tenders was September 30, 2021 up to 1.00 p.m. The date of opening of the tender was September 30, 2021 at 2.00 p.m.

7. According to the petitioner, the authorities acted contrary to law in cancelling the earlier tender notices and by issuing the tender notices for the second time, without any intimation to the petitioner. Such action was mala fide and only to favour certain chosen persons of the Prahdan of the said gram panchayat. It was alleged that the said gram panchayat acted contrary to the West Bengal Panchayat (G.P. Account, Audit and Budget) Rules, 2007(hereinafter referred to as the said Rules). Tender papers filed by the petitioner in the earlier process should have been considered as the petitioners bid in the second tendering process, which was not done. Such lapse of the authority denied the right of the petitioner to participate in the second tender process.

8. On the date of admission of the writ petition, it was assured to the Court that the work orders would not be issued. Under such circumstances, directions for affidavits were given and the writ petition was kept for final hearing.

9. From the affidavit-in-opposition filed by the Pradhan of the said gram panchayat, it emerged that all the four tenders initiated by notice dated 20, 2021 were cancelled in terms of the Rules as the petitioner was the single bidder. Upon cancellation of the tenders, the Pradhan by a notice dated July 30, 2021, intimated all interested parties including the petitioner about the cancellation. The notice was marked to all relevant authorities and the petitioner. The copies had been annexed to the affidavit-in-opposition. At the back of the notice an endorsement had been made by one Gouranga Pramanik, the special messenger who was assigned the duty to deliver the notices, inter alia, stating that the petitioner had refused to accept the notice which was tendered to him.

10. The specific contention of the respondent no. 8/Pradhan was that the bids were opened on September 30, 2021 and work orders were issued to the successful tenderers on October 1, 2021. That the learned advocate for the respondent no. 8 had committed an error by assuring the Court that work orders would not be issued. The said mistake was due to a miscommunication between the respondent no. 8 and the learned advocate. It was further stated that in view of the pending proceeding and the order passed by this court, the authorities did not proceed further after issuance of the work orders.

11. This court directed that the successful bidders should be added as respondents. Such addition was done. Copies of the writ petition were served upon the added respondents and opportunity was also given to them to file their affidavit in opposition. The respondent No. 15 filed his opposition on behalf of the added respondents.

12. It was contended by the respondent no.5, that the petitioner did not have any locus to challenge the subsequent tender notices. The petitioner intentionally did not participate in the subsequent tender process. That the writ petition should be dismissed as the infrastructural work could not be stopped in view of the specific bar incorporated in Section 41(ha) of the Specific Relief Act, 1963.

13. The court proceeds to deal with the allegations of the petitioner. The first contention of the writ petitioner was that the tender notices dated July 20, 2021 were cancelled without any authority of law. The second contention was that the tenders were cancelled only to deprive the petitioner and to favour persons close to the respondent No.8. The final contention of the petitioner was that the said Rules mandated that the authorities must consider the bid documents submitted by the petitioner in the first tendering process as the petitioner's bid in the second invitation, without expecting the petitioner to participate in the second process, all over again.

14. The Court does not accept the first contention of the petitioner as the Sub-Rule (10) of Rule 17 of West Bengal Panchayat (G.P. Account, Audit and

Budget) Rules, 2007 (hereinafter referred to of the said Rules) specifically states that normally a single bid should not be accepted. The Rule is as follows:-

“17(10). A single tender shall not normally be accepted on the first invitation to the tender. On such occasion, the Pradhan shall invite second tender in the manner laid down in sub-rule (5) without opening the tender paper received on first invitation. The single tenderer may in response submit that the tender paper earlier submitted may be considered as his tender paper on second invitation. If on second occasion also, single tender is received, the same may be accepted by the Gram Panchayat in a meeting if the rate is either below or at par with the scheduled rate antecedents of the tenderer are considered satisfactory and the tender paper is considered as favourable. But if the tender received on second invitation is not found reasonable and the rate quoted therein is above the scheduled rate, fresh tender shall be invited”

15. In this case, it is not in dispute, that the petitioner was a single tenderer in respect of the works mentioned in the tender notices dated July 20, 2021. Thus the authority did not act beyond jurisdiction in cancelling the tender notices dated July 20, 2021.

16. With regard to the allegation that the petitioner ought to have been informed about the said cancellation, this Court is of the view, that a notice was issued by the Pradhan on July 30, 2021 cancelling the tender processes initiated by the tender notices dated July 20, 2021. The reasons for cancellation had also been mentioned in the said notice. The notice was marked to all the relevant authorities and the petitioner. A special messenger was assigned the job of delivering the notices to the relevant authorities and the petitioner. The petitioner was attempted to be served through the special

messenger. It was the specific contention of the special messenger that the petitioner refused to accept the notice. These averments are available in the affidavit-in-opposition. To such specific allegation, the petitioner has made an omnibus denial, that the petitioner was not informed about the cancellation.

17. Thus, this Court does not accept the second contention of the petitioner that the petitioner did not know about the cancellation. From the pleadings in paragraph 6 of the writ petition, it is evident that the petitioner had a reason to believe that the earlier tenders were cancelled. Noting prevented the petitioner from approaching the Pradhan in order to ascertain the fate of the tenders, once the final date for opening the tenders had expired. The petitioner did not approach the Pradhan. Instead, on August 9, 2021, a representation was made before the Pradhan through the learned Advocate. By that time, the earlier tenders had already been cancelled and notices to that effect were circulated and served upon all the respondent authorities. The petitioner refused to accept such notice.

18. The averments made in the writ petition clearly indicate that the petitioner had apprehended that the earlier tender notices must have been cancelled, as the petitioner was the only bidder.

19. Thus, even if it is assumed that the notice of cancellation dated July 30, 2021 was not delivered to the petitioner, had the petitioner been diligent, the petitioner would have approached the Pradhan to find out the fate of the earlier tenders and would have kept himself informed about the next steps which

would have to be taken by him in order to participate in the second tendering process.

20. The petitioner who claims to be a contractor with experience in such tender matters, was expected to know the rules of the game and should have kept himself updated with the situation and ought to have participated in the second invitation.

21. Thus, the allegation that the cancellation was not informed to anyone and the same was done in a hush hush manner, behind the back of the petitioner, only to deprive the petitioner and favour the men of the respondent no. 8, is not accepted. Such allegations are unsubstantiated.

22. With regard to the allegations of mala fide and favouritism, this court does not find from the records that there is an iota of evidence in support of such allegations.

23. Between July 20, 2021 to the date of issuance of the second tender notices dated September 21, 2021, the petitioner had ample time to approach the Pradhan and also participate in the second tender process or ask the respondent no.8 to consider his bid documents which had been filed earlier as his offer in the second tendering process. There is no reason to believe that the Pradhan would treat the petitioner differently, when the petitioner had already participated in the earlier tendering process, without any resistance.

24. There are neither any pleadings nor any instances narrated in the writ petition, which would lead the court to believe that the respondent No.8 had intentionally cancelled the earlier tender processes just to deprive the

petitioner. Malice in law and malice in fact have to be specifically pleaded and proved. The allegation is not backed by supporting documents. The work orders have been issued to different persons who have all been added in the proceeding and there does not seem to be any similarity or connection between these persons, which would persuade the court to doubt the bona fide of the respondent No. 8/Pradhan and accept the allegation of favoritism levelled against the said respondent.

25. With regard to the interpretation of a portion of Section sub-rule 17 (10) of the said Rules which reads as follows:-

“The single tenderer may in response submit that the tender paper earlier submitted may be considered as his tender paper on second invitation”,

this court is of the view that it was up to the petitioner to respond to the second invitation by asking the respondent No.8 to consider his tender papers filed earlier. The rule does not mandate that the Pradhan was under a duty or an obligation to automatically transfer the documents submitted by the petitioner in the first tendering process to the second process, without waiting for a request from the petitioner.

26. Thus, the allegation of violation of the provision of the said Rules as quoted above and consequent failure on the part of the authority to act in accordance with law, is baseless. The onus was on the petitioner to submit before the authority that his tender papers, already submitted earlier, must be considered in the second invitation.

27. The petitioner did not accept the notice of cancellation. He did not approach the authority to know the fate of the earlier tender process and also did not avail of the opportunity to ask the authority to consider the bids already filed in the first tendering process as his bid in the second process. The writ petition is based on baseless and frivolous allegations which are not supported by proper pleadings and evidence.

28. The other allegation of the petitioner that minimum 15 days time should have been granted between the date of publication of the tender notices and submission of the tender documents, are not dealt with as they are not part of the writ petition. The scope of the writ petition cannot be enlarged by submissions from the bar. Moreover, the first tender process in which the petitioner participated also, did not provide the gap of 15 days either. The petitioner cannot approbate and reprobate. Overall, the court does not find any blatant illegality or arbitrariness on the part of the respondent no.8. The writ court must be slow to interfere with any tender process involving public projects.

29. In the matter of ***M/S. N.G. Projects limited vs. M/S. Vinod Kumar Jain & Ors.*** reported in **2020 SCC Online SC 336**, The Hon'ble Apex Court held that, the approach of the Court should be not to find fault with a magnifying glass in its hands, rather the Court should examine as to whether the decision-making process was in compliance with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain

from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work.

30. In the matter of *Tata Cellular v. Union of India*, reported in **(1994) 6 SCC 651**, the Hon'ble Apex Court laid down the following principles with regard to judicial review of tender processes:-

- (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, a fair play in the joints is a necessary concomitant for an administrative 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.

33. Under such circumstances the writ petition is dismissed. The work orders which have been issued shall take effect in accordance with the terms and condition of the tender notices and all consequences will follow. The time for completion shall be extended accordingly.

34. All parties are to act on the basis of the server copy of this order

(Shampa Sarkar, J.)