

S.L 1
Item
No. 1

08.08.2022
PA(RB)

MAT 1169 of 2022
With
CAN 1 of 2022
And
CAN 2 of 2022

Bharti Airtel Ltd.
Vs.
The State of West Bengal and Anr.

Mr. Saptansu Basu, Ld. Sr. Adv.
Mr. Aniruddha Chatterjee
Mr. Arindam Chandra
Mr. Atish Ghosh
Ms. Sumana Biswas
... for the appellant

Mr. Samrat Sen, Ld. AAAG
Mr. Nilotpall Chatterjee
Mr. Debraj Saha
... for the State

Mr. Supriya Ranjan Saha
Mr. Suman Kumar Mukherjee
Ms. Priyanka Das
... for the respondent no. 2

By this intra-court appeal, writ petitioner has challenged the order of the learned Single Judge dated 7th of July, 2022 whereby WPA 14255 of 2022 has been disposed of with certain observations.

Appellant had submitted the bid in response to the NIT dated 13th of December, 2021 and the appellant was L1, but by email dated 3rd of June, 2022, the appellant was informed that the NIT was cancelled. Hence, the appellant had filed the writ petition praying for the cancellation of the communication dated 3rd of

June, 2022 as also the subsequent fresh tender dated 17th of June, 2022 and had prayed for issuing the work order to the appellant being L1.

Learned Single Judge has disposed of the writ petition granting liberty to the appellant to participate in the fresh tender and also directing the respondents to keep the financial bid, put in by the appellant, in abeyance till the opening of the fresh bid.

Submission of learned counsel for the appellant is that the tender has been cancelled without assigning any reason and that no justifiable reason is disclosed for the cancellation of tender and that fresh tender also contain the same terms and cancellation of tender has caused prejudice to the appellant as his financial bid has been disclosed.

Learned counsel for the respondents has submitted that the tender was cancelled because the appellant had applied with DSC credential in a different name and the respondents have right of rejection of bid or withdrawal of NIT and even otherwise, the tender could have been cancelled without assigning any reasons.

We have heard the learned counsel for the parties and have perused the record. Clause 40 of the tendered document gives the respondent WTL right to reject any or all bids and provides as under:

“40. WTL’S RIGHT TO REJECT ANY OR ALL BIDS

WTL reserves the right to reject any bid and to annul the bidding process and reject all bids at any time prior to award of Contract, without thereby any liability and without giving any reason thereof for the same to the affected bidder(s) or any obligation to inform the affected bidder(s) of the grounds for such decision”

Clause 54(f) of the document gives right to the respondent WTL to withdraw the tender in full or in part without assigning any reason and provides as under:

“54(f) WTL reserved the right to reject or accept or withdraw the tender in full or part as the case may be without assigning the reasons thereof. No dispute of any kind can be raised the right of buyer in any court of law or elsewhere.”

The Hon’ble Supreme Court in the matter of **Silppi Constructions Contractors vs. Union of India and Another** reported in **(2020) 16 SCC 489**, while considering the issue of cancellation of tender without assigning reason, has held that:

“**25.** That brings us to the most contentious issue as to whether the learned Single Judge of the High Court was right in holding that the appellate orders were bad since they were without reasons. We must remember that we are dealing with purely administrative decisions. These are in the realm of contract. While rejecting the tender the person or authority inviting the tenders is not required to give reasons even if it be a State within the meaning of Article 12 of the Constitution. These decisions are neither judicial nor quasi-judicial. If reasons are to be given at every stage, then the commercial activities of the State would come to a grinding halt. The State must be given sufficient leeway in this regard. Respondents 1 and 2 were entitled to give reasons in the counter to the writ petition which they have

done.”

In the present case also, learned counsel for the respondent no. 2 has pointed out that in terms of Section-G of the document, each bidder was required to obtain Digital Signature Certificate (DSC) and to submit the tender using the DSC. He has produced a copy of the communication dated 6th of May, 2022 issued by the State to the respondent no. 2 pointing out that the appellant “M/s Bharti Airtel Limited” had applied with the DSC credential of “M/s Bharti Airtel Services Limited” which was a deviation and therefore, the Finance Department, Government of West Bengal had expressed for inviting fresh tender incorporating similar clauses in bid document to avoid any further future complications. Accordingly, the State had directed the respondent no. 2 to float a fresh tender. Thus, adequate reasons have been placed on record for cancelling the earlier NIT and floating the fresh tender. Learned counsel for the appellant does not dispute that the above reasons were disclosed to the appellant but referring to paragraph 5 of the petition, he submits that it was replied by the appellant. Mere reply of the appellant does not wipe off the ground for cancellation.

Hon’ble Supreme Court in the matter of **Maa Binda Express Carrier and Another vs. North-East Frontier Railway and Others** reported in **(2014) 3 SCC**

760 in this regard has held that:

“**8.** The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.”

So far as the judgment of the Hon’ble Supreme Court in the matter of **Rajasthan Cooperative Dairy Federation Ltd. vs. Maha Laxmi Mingrate Marketing Service Pvt. Ltd. and Others** reported in **(1996) 10 SCC 405** relied upon by the learned counsel for the petitioner is concerned, in that case, the Court had

found that the reasons for the cancellation were set out in the cancellation letter and the reasons were germane to the decision, therefore, the extraneous circumstances could not make the decision mala fide. Similarly, reliance has been placed by the learned counsel for the appellant upon the judgment of the Hon'ble Supreme Court in the matter of **Union of India and Others vs. Dinesh Engineering Corporation and Another** reported in **(2001) 8 SCC 491** wherein the Hon'ble Supreme Court has held that the power to reject any tender offer without assigning any reason or to accept or not to accept the last offer could be exercised within the scope of the object of the relevant clause and not arbitrarily.

In the present case, the above analysis reveals that while cancelling the tender, the power has not been exercised by the respondents arbitrarily. So far as the plea of the appellant that his financial bid has been disclosed, we find that the NIT has been withdrawn/cancelled on account of the mistake committed by the appellant in submitting the different DSC credentials which could have even resulted into rejection of only appellant's bid but acting fairly, the entire NIT has been cancelled by the respondent and now, the appellant has the opportunity to participate in the fresh tender. Hence, no prejudice has been caused to the appellant and the ground that financial bid has been

disclosed is found to be without any merit. That apart, the order of the learned Single Judge contains the adequate safeguard.

Hence, we find no ground to interfere in the order of the learned Single Judge.

Appeal is accordingly, dismissed.

(Prakash Shrivastava, C.J.)

(Rajarshi Bharadwaj, J.)