

S.L. 2 08.08.2022
Item (PA-RB)
No. 1

MAT 1218 of 2022
With
CAN 1 of 2022

Basirhat Food Supply Mohila Co-Operative
Society Ltd & Another.

Vs.
State of West Bengal and Others

Mr. Saptansu Basu, Ld. Sr. Adv.
Mr. Swarup Pal
Mr. Guru Saday Dutta
... for the appellants

Mr. Samrat Sen
Mr. Debasish Ghosh
Ms. Amrita Panja Moulick
... for the State

By this intra-court appeal, the writ petitioner has challenged the order of the learned Single Judge dated 29th of July, 2022 whereby WPA 16461 of 2022 has been dismissed.

Appellant had filed the writ petition with the plea that the respondent no. 6 had floated the NIT dated 2nd of June, 2022 inviting bid for competent and experienced contractor/agency/agencies for providing security services for hospitals/NTS. The appellant was one of the bidder and in the financial bid, there were four successful bidders and more than one L1. According to the petitioner, there was as many as three L1, hence, as

per notice dated 24th of June, 2022, the respondent authority was supposed to draw lottery amongst the successful financial bidders and even otherwise, was required to select the candidate on the basis of the memorandum dated 29th of October, 2021. Hence, in the writ petition, a writ of mandamus was prayed seeking a direction to the respondents to select successful bidder in terms of the memorandum dated 29th of October, 2021 and not to select the successful bidder in terms of the memorandum dated 7th of June, 2022.

Learned Single Judge after examining the matter has reached to the conclusion that the condition of tender as existed on 2nd of June, 2022, on the basis of which appellant had participated, did not contain any condition for draw of lots for selecting the successful bidders amongst the competing L1 bidders. It has further been noted that this was brought into effect only on 24th of June, 2022 when the petitioner was selected as one of the L1 bidder. In view of this, the argument relating to change in rule of the game after the game started has been rejected. It has further been noted that the memorandum dated 7th of June, 2021 was already in place when the petitioner was selected as one of the L1 and that apprehension of the petitioner of losing out if assessed by credentials may be speculative.

Submission of learned counsel for the appellant is

that the memorandum dated 29th of October, 2021 should be made applicable and that even if the memorandum dated 7th of June, 2022 applies, then the procedure prescribed therein for inviting the sealed bids from amongst the bidding L1s has not been followed and therefore, the respondents are not justified in requesting performance statement (credential) vide communication dated 25th of July, 2022. He submits that the clauses contained in the memorandum dated 7th of June, 2022 are tailor-made.

As against this, learned counsel for the respondent has submitted that the due procedure which is prescribed in the memorandum dated 7th of June, 2022, which was applicable at the time of opening of the bid, has been followed and that there is no arbitrariness in the process and the work order has already been issued.

Having heard the learned counsel for the parties and on perusal of the record, it is noticed that the scope of interference in the tender process is limited and this Court does not sit as a Court of Appeal and is not expected to find fault in tender process with magnifying glass. The Hon'ble Supreme Court in the matter of **M/s. N.G. Projects Limited vs. M/s. Vinod Kumar Jain & Ors.** reported in **(2022) LiveLaw (SC) 302** in this regard has held that:

“23. In view of the above judgments of this

Court, the Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the presentday economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying 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 malafide 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.”

The Hon’ble Supreme Court in the matter of

Silppi Constructions Contractors vs. Union of India

and Another reported in **(2020) 16 SCC 489** has also

laid down that:

“19. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must

remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give “fair play in the joints” to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.”

Examining the present matter, in the light of the aforesaid limited scope of judicial review, it is noticed that the learned Single Judge has not committed any

error in reaching to the conclusion that conditions of tender as existing on 2nd of June, 2022 does not contain the clause of draw of lot for selection of successful bidder among the competing L1 bidders. The petitioner is placing reliance upon the memorandum dated 29th of October, 2021 whereas the financial bid was opened on 15th of July, 2022 when three bidders were found L1. On that date, memorandum dated 29th of October, 2021 was already superseded by the memorandum dated 7th of June, 2022, prescribing the procedure in case of tie bid. Situation III clause B of memorandum dated 7th of June, 2022 relates to indivisible item and provides for selection of bidder with higher credential in case of tie. It is pointed out by learned counsel for the respondent that the present tender was indivisible in nature, hence, we do not find any arbitrariness in the action of the respondents in proceeding on the basis of the said clause and issuing the notice dated 25th of July, 2022 requesting for performance statement/credentials. The memorandum dated 7th of June, 2022 lays down the comprehensive procedure and guidelines for accepting the bids under different situation covering all the aspects of the tendered documents. That apart, learned counsel for the appellant has failed to point out that the procedure prescribed in the memorandum dated 7th of June, 2022 was to benefit any particular bidder, hence,

we find no substance in the argument of learned counsel for the appellant that the procedure prescribed in the memorandum dated 7th of June, 2022 was tailor-made. Hence, no benefit can be extended to the appellant on the basis of the Division Bench order of this Court dated 2nd of September, 2010 in MAT 1030 of 2010.

Learned counsel for the appellant has also placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of **Meerut Development Authority vs. Association of Management Studies and Another** reported in **JT (2009) 6 SC 169** but in that case also, it has been held that the bidder has no other right except the right to equality and fair treatment and that he has no right to challenge the terms and conditions of tender unless they are tailor-made so as to suit the particular person. In the present case, none of these grounds exist. Learned counsel for the appellant has also placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of **K. Manjusree vs. State of Andhra Pradesh and Another** reported in **(2008) 3 SCC 512** which is a case relating to change of criteria in recruitment process in a service matter wherein it has been held that the rules of game cannot be changed after the game was played but in the present case, learned Single Judge has duly examined this aspect of the matter and has found that there is no change in the

rules of game and the circulars have been rightly applied.

In view of the above, we do not find any error in the order of the learned Single Judge and no case for interference is made out.

That apart, the work order has also been issued and the successful bidder has not been joined.

In the aforesaid circumstances of the case, we do not find any error in the order of the learned Single Judge and no case for interference in this appeal is made out. The appeal is accordingly dismissed.

(Prakash Shrivastava, C.J.)

(Rajarshi Bharadwaj, J.)