

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :-

The Hon'ble Justice Moushumi Bhattacharya.

W.P.A 20809 of 2022

Shyam Sunder

Vs.

Union of India & Ors.

For the petitioners	:	Mr. Utpal Bose, Adv. Mr. Pradyumna Sinha, Adv. Mr. Sannidhya Dutta, Adv.
For the respondent nos. 2 - 8	:	Mr. S.N. Mookherjee, Ld. AG. Mr. Jishnu Chowdhury, Sr. Adv Mr. Shounak Mitra, Adv. Mr. Zulfiqar Ali Alquaderi, Adv. Ms. Prerona Banerjee, Adv.
For the UOI	:	Ms. Renu Mukherjee, Adv.
Last Heard on	:	21.09.2022.
Delivered on	:	27.09.2022.

Moushumi Bhattacharya, J.

1. On 9.9.2022 the respondent no. 2 was restrained from proceeding any further in terms of the techno-commercial bid for a handling agent for the Warehouse of the respondent no. 2, on finding the conduct of the respondent no. 2, Steel Authority of India Limited (SAIL) to be arbitrary and lacking in transparency. The interim protection was given to the petitioner until the matter was heard out on affidavits.

2. The respondent no. 2 and the petitioner have now filed their respective affidavits. It has now to be seen whether the affidavit of the respondent no. 2 has disclosed documents which would persuade this Court to lift the restriction on the respondent no. 2 from proceeding with the tender.

3. From the affidavit of SAIL (respondent no. 2) it appears that the petitioner has allegedly indulged in unauthorised removal of steel material from the Ghaziabad warehouse of the respondent no. 2. This fact came to light on 26.2.2022. The respondent no. 2 issued a show-cause notice to the petitioner on 26.4.2022 and the petitioner gave a response to the same on 1.5.2022. A Departmental Committee was formed for looking into the matter on 10.4.2022 whereupon the Committee opined that the matter needs to be investigated by the Vigilance Department. A further investigation was conducted resulting in a recommendation of the Vigilance that there have been serious lapses on the

part of the petitioner as the handling contractor of the respondent no. 2. The aforesaid facts form part of the affidavit-in-opposition of the respondent no. 2.

4. The significant fact which emerges from the statements made in the affidavit and the documents forming part thereof is that all the facts relating to the alleged unauthorised removal of material from the particular warehouse by the petitioner came to light in February, 2022 which was followed up by the steps taken by the respondent no. 2 from 26.2.2022 – 26.4.2022. The Departmental Committee was formed on 10.4.2022 and the recommendation of the Vigilance Department was made some time thereafter (the date of which has not been disclosed) but presumably after April, 2022. It is hence curious that the petitioner was allowed to participate in the tender and the petitioner's bid was accepted on 16.4.2022. It can thus be assumed that the respondent no. 2 allowed the petitioner to participate in the tender even after the fact of pilferage of material came to its knowledge in February, 2022 and a Departmental Committee was formed on 10.4.2022.

5. The second significant fact is that the respondent no. 2 admits that the Report of the General Manager (Vigilance) which was made over to the Chief Vigilance Officer is pending approval as of present and that the Chief Vigilance Officer is yet to forward the final report to the Central Vigilance Commission for their noting and action. Hence, the recommendation made by the Vigilance Department of the respondent no. 2 has not reached finality as on date. The

petitioner, in the meantime, has been eliminated from the tender process based on the preliminary recommendations.

6. It is also noteworthy that the affidavit of the respondent no. 2 discloses a mail of 5.9.2022 stating that the petitioner's bid was rejected on the basis of the information of the Tender Committee in light of an adverse report received against the petitioner. This decision was however communicated to the petitioner only on 8.9.2022 and that too after the petitioner asked for the status of the tender by way of a communication dated 7.9.2022.

7. The above facts only buttress the view taken by the Court that the conduct of the respondent no. 2 lacks transparency which is to be expected from a public-sector enterprise.

8. Although learned counsel appearing for the respondent no. 2 has placed emphasis on the security lapses on the part of the petitioner and the removal of material from the Ghaziabad warehouse, the reply of the petitioner to the show-cause notice indicates that the petitioner denied the charges on the basis of specific facts and figures. There is no evidence on record to show that the respondent no. 2 dealt with the explanation offered by the petitioner before taking the impugned decision of rejecting the petitioner's bid. More important, the explanation given by the petitioner with regard to the allegation of pilferage, shows that the petitioner was entitled to be informed of the basis of the impugned action taken by the respondent no. 2 and the findings and

recommendations of the Vigilance Department in relation to the charge made against the petitioner. The petitioner however was kept in the dark in respect of the findings arrived at against the petitioner and made to bear the brunt of a unilateral decision taken against the petitioner. The affidavit contains several documents to show that the petitioner was not informed of the decisions and recommendations taken against him, although the petitioner was allowed to participate in the tender subsequent to the respondent no. 2 being aware of the charge of pilferage.

9. In failing to inform the petitioner of the reason for rejection of his bid, the respondent no. 2 caused a clear violation of the principles of natural justice.

10. The respondent no. 2 seeks to rely upon Clause 9 of the Tender Notice dated 17.8.2022 in that the Company (respondent no. 2) reserved the right to accept or reject any one or all the tenders without assigning any reason whatsoever. This Court is however of the view that the amended Clause 9.3 of the Purchase/Contract Procedure, 2020 dilutes Clause 9 of the Tender Notice by providing for a mechanism requiring recording of reasons and approval of the next higher authority in the event of any specific adverse report being received against a tenderer.

11. The petitioner was given interim protection by way of the order dated 9.9.2022 on the basis of the petitioner being denied an opportunity of presenting its case against adverse findings. This Court was also of the view

that the respondent no. 2 had not fulfilled the obligation of recording reasons under Clause 9.3 of the amended Purchase/Contract Procedure. The conduct of the respondent no. 2 was hence found to be arbitrary and unreasonable. The answering respondent has not brought any material before the Court by way of the affidavit to persuade the Court to take a different view of the matter. The statements made in the affidavit and the documents relied on in fact strengthen the view taken at the interim stage of the matter.

12. *N.G. Projects Limited vs. Vinod Kumar Jain; (2022) 6 SCC 127* has been cited for the point that even if a Writ Court finds a tender to be arbitrary, the Court should refrain from interfering in such matters and instead relegate the parties to seek damages. The facts before the Supreme Court were specifically different from those in the present matter. In *N.G. Projects*, the contract had already been awarded to the appellant and the appellant had completed a substantial portion of the work for which plants and machinery were also mobilised by the appellant. It is also relevant to state that the view of the Supreme Court was essentially based on the lack of knowledge and expertise of judges to adjudicate upon the specific terms and conditions of tenders involving economic activities of the State.

13. In view of the above reasons, the protection granted in favour of the petitioner remains. Since the petitioner's exclusion from the tender is found to be unreasonable and arbitrary, the respondent no. 2 cannot be permitted to

proceed with the tender. The respondent no. 2 is accordingly directed to call a fresh tender in relation to the work contemplated and invite fresh bids with regard to the same. The respondent no. 2 shall be at liberty of taking appropriate steps in accordance with the information at its disposal but in a fair and transparent manner.

14. WPA 20809 of 2022 is disposed of in terms of the above.

Urgent photostat, certified copies of this judgment, if applied for, be supplied to the respective parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)