

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(Appellate Side)

Reserved on: 06.01.2022
Pronounced on: 19.01.2022

MAT 1409 of 2021
IA NO: CAN 1 of 2021

(Through Video Conference)

Sri Subhasish Banerjee

...Appellant

-Vs-

State of West Bengal and Others

...Respondents

With

MAT 1410 of 2021
IA NO: CAN 1 of 2021

(Through Video Conference)

M/s. Classic

...Appellant

-Vs-

State of West Bengal and Others

...Respondents

With

MAT 1411 of 2021
IA NO: CAN 1 of 2021

(Through Video Conference)

Sri Subhendu Banerjee

...Appellant

-Vs-

State of West Bengal and Others

...Respondents

With

MAT 1412 of 2021
IA NO: CAN 1 of 2021

(Through Video Conference)

M/s. Classic and Others

...Appellants

-Vs-

State of West Bengal and Others

...Respondents

Present:-

Mr. Kalayan Kumar Bandopadhyay,
Mr. Kishore Datta,
Mr. Abhishek Halder,
Ms. Deboleena Ghosh,
Mr. Rahul Kumar Singh, Advocates
..for the appellants

Mr. Amitesh Banerjee,
Mr. Anirban Ray,
Mr. Raja Saha,
Mr. Biswabrata Basu Mullick, Advocates
..for the State

**Coram: THE HON'BLE JUSTICE PRAKASH SHRIVASTAVA,
CHIEF JUSTICE
THE HON'BLE JUSTICE KESANG DOMA BHUTIA,
JUDGE**

Prakash Shrivastava, CJ:

1. This order will govern the disposal of MAT 1409 of 2021, MAT 1410 of 2021, MAT 1411 of 2021 and MAT 1412 of 2021 as it is jointly submitted by the Counsel for the parties that all these appeals are in respect of same issue on identical fact situation.
2. For convenience facts have been taken out from MAT 1410 of 2021 which has been argued as lead appeal in this batch of matters.
3. The executive engineer, DPMU, Bankura had issued invitation of bids (IFB) for construction of Water Detention Structure in district Bankura under Matir Shristi Project. The construction work

was detailed in table of IFB. The successful bidder was to complete the work within the specified period. Clause 4.5 (A)(d) of the IFB provides that a bidder could participate in one bid i.e. in any one number of serial of Sl. No. 20 to 61 of bid reference number specified therein. The appellants being aggrieved with this clause restricting the bidder to participate only in one bid had filed the writ petition before the learned Single Judge which has been dismissed by the orders under challenge.

4. Submission of learned Counsel for the appellants is that executive engineer had no power to impose such a restrictive condition in the IFB. In support of his submission he has placed reliance upon Rule 47, 48, 177 and 184 of the West Bengal Financial Rules. He has further submitted that public policy is necessary, to have such restriction clause and clause is arbitrary, therefore, it cannot be sustained. He has also submitted that in respect of tender floated in other districts no restrictive clause has been incorporated.

5. Learned Counsel for the State supporting the order of the learned Single Judge and opposing the appeal has submitted that the object of the work is to irrigate barren land and the work is required to be completed before the monsoon, therefore, in order to avoid any delay in completion of work, the condition of one bid per bidder has been imposed and that the focus is on the dried districts where there is urgency, therefore, as per the prevailing circumstances, conditions have been imposed as per requirement in different districts. He has further submitted that the petitioner's first bid has been considered and they have even awarded the contract and the subsequent bids have been treated to be non-responsive and have not been considered. He

has also submitted that the criteria has been applied uniformly, therefore, there is no arbitrariness.

6. Having heard the learned Counsel for the parties and on the perusal of the records, we have noticed that the learned Single Judge has considered the issue in detail and has reached to the conclusion that the tender condition under challenge does not affect any basic and fundamental right and is in the nature of reasonable restriction which is an accepted exception to fundamental right. He has duly considered the stand of the State that it wanted to hedge and limit the fall out of failure of one person to fulfill many contracts. He has also considered that the appellants after participating in the tender process cannot turn around and challenge the tender condition. No absence of transparency and unfairness has been found by the learned Single Judge, hence the petition has been dismissed.

7. This Court by the previous order dated 30th of December, 2021 passed in MAT 1410 of 2021, after taking note on rival contention of the Counsel for the parties, had directed the respondents to file the report and justify as to why the embargo was incorporated in district Bankura and not in district Purulia and also to point out if there is any policy decision of the department of the Government in this regard.

8. In pursuance to the said directions, learned Counsel for the State has submitted the report which discloses that similar kind of restriction was imposed in other different divisions/circulars also. It has been disclosed that tender notice of Purba Midnapur DPMU – District Purba Midnapore, Paschim Midnapur DPMU – District Paschim Midnapore, Jhargram DPMU – District Jhargram, contain the

identical clause. The IFB of Paschim Midnapur (AI) Division – District Paschim Midnapore, Midnapur (AM) Division – District Paschim Mindapore, Bankura (AI) circle – Districts of Paschim Midnapore, Purba Midnapore, Jhargram and Bankura etc. also contains somewhat similar restrictions. In respect of district Purulia also there was restriction on the bidders participating in more than one bid, in respect of credential requirement for second bid. The report discloses that according to the requirement of the division and district and keeping in view the object of completing the project within the stipulated time, authority inviting tender has imposed requisite conditions. As regards the policy decision of the department, it has been disclosed that the tender inviting authority has been made solely responsible to get the work executed under his control including the framing of terms and conditions for the same and he is the only answerable authority to the Government for field execution of all and any type of tender job. The report further discloses that the contract has already been awarded and the work at the site has started as it is a time bound project for giving irrigation to the field in the arid zone.

9. The Hon'ble Supreme Court in the matter of **Tata Cellular vs. Union of India, (1994) 6 SCC 651** has clearly held that the Court cannot interfere with the Government's freedom of contract, invitation of tender and refusal of any tender which pertains to policy matter, but it can interfere if the decision is vitiated by arbitrariness, unfairness, illegality, irrationality or wednesbury unreasonableness. The interference can be on the grounds of illegality or irrationality or procedural impropriety. It has been very clearly held that terms of the invitation to tender cannot be open to judicial scrutiny because the

invitation to tender is in the realm of contract. The Government must have freedom of contract and in such matters and that a fair-play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere.

10. In recent decision in the matter of **Silppi Constructions Contractors vs. Union of India and Another, (2020) 16 SCC 489**, Hon'ble Supreme Court has considered its earlier decisions on the point and has held that Court should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters and it should give way to the opinion of experts unless the decision is totally arbitrary or unreasonable. The Court should not use a magnifying glass while scanning tenders and make every small mistake appear like a big blunder. The Court must realize that an authority floating the tender is the best judge of its requirements, 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. The Court does not seat as Court of appeal in such matters

11. Examining the present matter in the light of the limited scope of interference we find that the decision to restrict the bidders to one bid in the district in question has been taken keeping in view of the nature, requirement, urgency and prevailing circumstances therein. The impugned IFB condition has been uniformly applied to all the bidders. Nothing has been pointed out to show that the condition was incorporated to favour any particular party or bidder. No malafides in incorporating such a condition have been shown. Therefore, the condition cannot be held to be arbitrary or unreasonable.

12. Learned Counsel for the appellants has referred to Rule 47, 48, 177 and 184 of the West Bengal Financial Rules but none of these rules prohibit incorporation of such a condition by the authority empowered to float the tender.

13. So far as the reliance of the Counsel for the petitioner in the judgment in the matter of **Indian Oil Corporation Limited and Others vs. Shashi Prabha Shukla and Another, (2018) 12 SCC 85** is concerned, it has been held therein that the decision of the State to give largesse or licenses or to confer benefit must be founded on a discernible and well-defined policy. Present is a case of awarding contract on the basis of IFB wherein based on the prevailing circumstances the clause in question has been incorporated, hence the said judgment is of no help. He has also placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of **Asha Sharma vs. Chandigarh Administration and Others, (2010) 10 SCC 86** wherein dealing with an issue relating to a service matter, it has been held that action of the State has to be fair and in consonance with statutory provisions and rules but in the present case neither the decision of the State is unfair nor any violation of statutory provision has been pointed out. So far as the reliance of Counsel for the appellant on the Supreme Court judgment in the matter of **Tata Cellular (supra)** is concerned, this Court has already found that the present case does not fall within the limited scope of interference laid down in that case. So far as the reliance of the Counsel for the appellant in the matter of **Nar Singh Pal vs. Union of India and Others, (2000) 3 SCC 588** is concerned that was a case of termination of service wherein it was held that mere acceptance of the

retrenchment compensation will not mean the employee concerned had surrendered all his constitutional rights in favour of the respondents. Such a decision is not attracted in the facts of the present case.

14. It is worth noting that the first bid of all the petitioners have been considered and in appropriate cases they have been awarded the contract and in pursuant to uniform policy decision, their subsequent bids have been treated to be non-responsive. This criteria has been uniformly applied to all the bidders.

15. In these circumstances, we do not find any error in the order of the learned Single Judge. No case for interference in these appeals is made out. Appeals are accordingly dismissed.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

(KESANG DOMA BHUTIA)
JUDGE

Kolkata
19.01.2022

PA(SS)