

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

MAT 1799 of 2022

With

CAN 1 of 2022

Reserved on: 23.11.2022

Pronounced on: 12.12.2022

Neelkanth Transport and Another

...Appellants

-Vs-

Durgapur Steel Plant and Others

...Respondents

Present:-

Mr. Atarup Banerjee,
Mr. Subrata Mukherjee,
Mr. Tapodip Gupta, Advocates

... for the appellants

Mr. Sauvik Nandy, Advocate

... for the SAIL/DSP

Ms. Vineeta Meharia,
Mr. Jaydeb Ghorai,
Mr. Diptesh Ghorai, Advocates

... for the respondent Nos. 4 and 5

Coram: THE HON'BLE JUSTICE PRAKASH SHRIVASTAVA,
CHIEF JUSTICE

THE HON'BLE JUSTICE RAJARSHI BHARADWAJ,
JUDGE

Prakash Shrivastava, CJ:

1. By way of this intra-court appeal writ petitioners have challenged the order of the learned Single Judge dated 10th of November, 2022 whereby W.P.A. 15129 of 2022 has been dismissed.
2. The appellants had approached writ Court with the plea that for the purpose of licensing of Mohan Kumar Mangalam (MKM) Park, the respondent authorities of DST had entrusted the respondent No. 4 and 5 with the job of e-auction. In response to the tender notice, the appellant No.1 had participated in the online tender process and had submitted the bid. According to the appellants, they were shown the hammer in the display screen from which they came to know that appellant No.1 had

become the highest bidder. Further case of the appellants was that prior to the closure of the bidding process the appellant No.1 was shown as H1, hence, the appellant had sent e-mail dated 01.07.2022 to the concerned authorities informing that he had become the highest bidder, but surprisingly on 02.07.2022, the appellant was informed by the representative of the respondent Nos. 4 and 5 that the appellant No.1 was not declared to be the auction winner. After submitting the representation, the appellants had filed the petition seeking a direction to the respondents to issue letter of intent in favour of the appellant No.1 being legally valid highest bidder.

3. Learned Single Judge has considered the twin arguments of the appellants. Firstly, the appellants were not given an additional 8 minutes from the closing time of auction, therefore, they were deprived of the chance to better the last bid put in by the H1 bidder and secondly appellant and H1 bidder had come to a tie at the same time on 14:57 hours. Learned Single Judge found that the reliance on clause 3.3 and 3.5 of the MSTC auction in respect of the claim of 8 minutes was misplaced and additional time of 3 minutes was to be given by the tendering authority and in fact 3 minutes and 1 second was given for the present auction.

4. Before this Court, submission of learned Counsel for the appellants is that from the screenshot of the laptop taken by the appellants, it was clear that the appellant No.1 was the H1 bidder till the closure of the auction. His submission is that the document at page 158 which is stated to be the bid report is a manipulated document.

5. As against this, submission of respondent Nos. 4 and 5 is that the appellant No.1 is not the highest bidder and that there was a

provision for proxy bid and proxy bidder was H1 and the report at page 158 is a system generated report, therefore, allegation of manipulation is unfounded. Further submission is that in spite of the request no screenshot showing hammer on submitting the bid of the appellant No.1 was furnished by the appellants.

6. Learned Counsel for the respondent Nos. 3, 6 and 7 has also opposed the appeal by submitting that after the proxy bidder was declared as H1, the letter of acceptance dated 12.11.2022 has been issued in his favour, in terms of the contract he has furnished bank guarantee on 16.11.2022, the agreement has been executed on 17.11.2022 and the possession has been handed over on 21.11.2022 but the successful bidder has not been impleaded, therefore, no interference in this case is required.

7. We have heard learned Counsel for the parties and perused the record.

8. Before entering into the merits of the controversy, it would be appropriate to take into account the legal position in respect of scope of interference in contractual matters. It is the settled position of law that the limited interference in exercise of the power of judicial review in tender matter is called for that too in cases where the approach of the tendering authority was arbitrary or mala fide or tendering authority had adopted procedure to favour someone. Technical evaluation or comparison by the Court is impermissible. It is also settled that the Court must realize their limitations and the havoc which needless interference in commercial matters can cause and the Courts must give fair play in joints to the Government and public sector undertakings in the matters of contract and should not sit like a Court of Appeal over

the decision of the appropriate authority and should not try to find fault in the process with the magnifying glass. Hon'ble Supreme Court in the matter of **Montecarlo Limited vs. National Thermal Power Corporation Limited** reported in **(2016) 15 SCC 272** has held that:

“26. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinised by the technical experts and sometimes third-party assistance from those unconnected with the owner's organization is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and

understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.”

9. Considering the scope of interference, Hon’ble Supreme Court in the matter of **Silppi Constructions Contractors vs. Union of India and Another** reported in (2020) 16 SCC 489 has held 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."

10. In the present matter, the bid process document provides for submission of proxy bid in advance and also manner of submission of proxy bid and its consideration as under:

“What is Proxy Bid:

Proxy bid is a facility given to you through which you can give **your best bid** that you want to offer for a lot **in advance**.

After you place your proxy bid for the lot, system will bid on your behalf and revise your bid in increments every time your competitor tries to revise and give a better bid than yours. This will continue till such time the Proxy Bid Value is reached and you will be continuously shown a hammer on your screen. In case the hammer disappears from the screen it implies that your competitor has finally bettered his bid compared to your

proxy bid and you are no longer leading in the lot. You have to revise your bid again within the stipulated time to remain in competition. It may also be noted that the system will continue to revise your bid so long it receives a revised bid from your competitor. In case it does not receive any and the lot run time ends, you will be the H1 for that lot at the market price prevalent at the time of closure of the lot.

Note: *Your Proxy bid value is neither known to your competitors nor MJ. It remains undisclosed at the back end of the system.*

To place a Proxy bid:

- 1) Insert the proxy bid price in “**MY BID**” column against the lot in which you want to place the proxy bid price.
- 2) Select the check box under Proxy column & then Select column beside the lot in which you are interested to place bid.

What is Proxy Bid: cont.

- 1) If there is already a Proxy bid in the lot (placed by any of your competitor) and then if you try to place a bid which is lesser or equal to the Proxy Bid existing in that lot at that time, you will be shown an “**Out Bid**” message under Bid Result column and by putting the cursor on “Out Bid message”, you will be able to view the reason for the same. You have to then again revise your bid to stay in the competition.

Note : suppose your competitor places a Proxy bid of Rs.X and you also place a normal/proxy bid of the same value i.e. Rs.X after your competitor places the bid, and the lot gets closed at that instant. Then system will declare your competitor as the H1 bidder because he had placed the bid earlier than yours.”

11. The above clause reveals that on submission of proxy bid the system on behalf of the proxy bidder revises the bid in increments every time the better bid is submitted by the competitor. When the competitor places the bid equal to the proxy bid, he is shown “Out Bid” message under bid column and can view by putting cursor on that message the

reason for the same and then he has option to revise the bid. The clause also provides for showing of hammer on the screen of the successful bidder.

12. The entire argument of the appellant is based upon the screenshot of the laptop of the appellant at page 82 of CAN 1 of 2022. The 4th column from right mentions bid of the appellant as “my last bid” and 2nd last column mentions “H1” bid. It is a case where proxy bid of 6,56,000/- was submitted by one Rang Construction whereas appellant had submitted the equal bid of 6,56,000/- and had not submitted any bid higher than the proxy bid, therefore, in terms of the clause quoted above, proxy bid being placed earlier, same was accepted.

13. Learned Single Judge has already found that additional 3 minutes time was given by the tendering authority in the present case. There is nothing on record to show that the appellant had put any bid higher than the proxy bid within the specified time. The appellant is claiming that in the screenshot on page 82 “H1” bid shown in last column of Rs. 6,56,000/- was the bid of the appellant but it has been clarified by the respondent Nos. 4 and 5 that H1 bid was the bid of the proxy bidder who has been found to be successful. That apart, the screenshot at page 82 itself was taken after 5 minutes which clearly mentions “No LOTS/Catalogs have been launched in last 5 minutes”. Thus, contention of the appellant is found to be devoid of any merit. That apart, such minute examination of the tender process with the magnifying glass is not permissible by this Court. There is no material on record to doubt the stand of the respondent Nos. 4 and 5 that the proxy bid was the highest bid.

14. Details of the bids have been placed on record in the form of system generated bid report on page 158 of the report of the respondent Nos. 4 and 5 which also supports the stand of the said respondents. No cogent material has been placed on record by the appellant to substantiate the plea that this report is a manipulated report.

15. That apart, learned Counsel for the respondent Nos. 1 to 3 has pointed out that proxy bidder one Rang Construction with the bid value of Rs. 6,56,000/- was the highest bidder and the said highest bidder has been awarded the contract by issuing letter of acceptance dated 12.11.2022. It has also furnished the requisite bank guarantee on 16.11.2022, the license agreement dated 17.11.2022 has been executed with successful bidder M/s. Rang Construction and the possession has been handed over on 21.11.2022. The successful bidder has not been impleaded in the present petition.

16. In view of the aforesaid factual and legal position, we find no error in the order of the learned Single Judge in dismissing the writ petition. Hence, no ground for interference in this appeal is made out which is accordingly dismissed.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

(RAJARSHI BHARADWAJ)
JUDGE

Kolkata
12.12.2022

PA(SS)

(A.F.R. / N.A.F.R.)