

01 09.08.2023
 RP Ct. No. 01
 AN

MAT 19 of 2021
 with
 IA No. CAN 1 of 2021
 CAN 2 of 2021
 CAN 3 of 2023

Dilip Jana
 Vs.
 United Order And Supply Co-operative Society Ltd. & Ors.

Mr. Sagar Bandopadhyay
 Mr. Arabinda Pathak
 Ms. Soma Kar Ghosh
 ... For the Appellant

Mr. Samrat Sen, learned senior advocate
 Ms. Manali Ali
 ... For the State

Mr. Satrajit Sinha Roy
 Ms. Amrita Maji
 ... For the KMC

1. This intra-Court appeal by a third party to WPA 10800 of 2020 challenges an order passed by the learned Single Bench dated 5th January, 2021 allowing the writ petition filed by the first respondent herein, which is a cooperative society. The appellant was awarded a contract for supply of cooked diets to the indoor patients of ESI Hospitals and an agreement was entered into on 8th December, 2020 and the period of supply was for two years from the date of signing of agreement. The terms and conditions of the tender also provides for an extension for one year on expiry of the schedule time at interval of six month each provided the agency agreed to comply the extension order maintaining same quality and quantity of the diet with the same terms and conditions. In terms of

the tender on which the agreement/contract was signed, the appellant was entitled to continue to supply cooked diet for a period of two years which was to come to an end on 7th December, 2022. Prior to signing of the agreement a letter of acceptance was issued by the department in favour of the appellant in the name of his proprietorship firm, namely, G.S. Enterprise. In response to the said letter of acceptance the appellant proceeded to deposit the security money to the tune of Rs.3,50,000/-. It is thereafter supplies are said to have been commenced by the appellant and a writ petition was filed by the first respondent/cooperative society challenging the said award of tender and seeking for declaration that the writ petitioner has to be awarded the tender as he is the single qualified bidder in the tender process. The appellant had sought for leave from this Hon'ble Division Bench to file an appeal since the appellant was not impleaded as a respondent in the writ petition. Thus, has to be seen as to whether the learned writ Court was right in allowing the writ petition by holding that the award of the tender in favour of the appellant was incorrect and that the writ petitioner was entitled to be awarded the tender.

2. After we have elaborately heard the learned advocates for the parties we are unable to persuade ourselves to accept the finding recorded by the learned Single Bench that the appellant need not be heard in the matter. The effect of that order passed in the writ petition is that the tender awarded in favour of the appellant has

been interdicted and has the effect of canceling the tender. Thus, the rules of principles of natural justice mandated that the appellant should have been heard. Therefore, the findings of the learned Single Bench that non-impleading the proper and necessary parties does not hinder disposal of the writ petition is a finding which requires to be set aside and, accordingly, it is set aside.

3. Reverting back to the facts of the case we need to consider as to whether the learned writ Court was justified in arriving at a conclusion that the first respondent/writ petitioner was the sole tenderer who had satisfied all the terms and conditions of the tender. The tender notification contains the terms and conditions for supply of cooked diet and service of the said items and Clause 4 of the terms and conditions deals with the technical bids and it contains nine sub-clauses. There are total seventeen entities/persons, who had participated in the tender process and technical bid submitted by the seventeen entities which included the appellant and the first respondent/writ petitioner and others. The technical bids were scrutinized after it was opened on 10.09.2020. After it was opened the Tender Evaluation Committee consisting of a Medical Superintendent of Durgapur ESI Hospital, two general duty medical officers of Durgapur ESI Hospital and two officials of administration formed the Tender Scrutinizing Committee. The documents which were furnished by the tenderers were scrutinized and during the scrutiny process it was found that out of seventeen bidders

16 of them had not furnished the requisite information called for in sub-clause (viii) and clause 4 of the terms and conditions of the tender. The said condition is to produce the copy of the proof of residence, photocopies of the telephone bill, electric bill, bank passbook and have an office/working unit within the district of the concerned hospital. In the opinion of the Tender Scrutiny Committee these conditions were non-essential conditions and, therefore, in their discretion they thought fit to afford one more opportunity to all the sixteen tenderers to furnish documents to satisfy the requirement under Clause 4(viii) of the terms and conditions of the tender. Accordingly, the notice dated 10.11.2020 as mentioned earlier the writ petitioner was not included the said notice as it appears that the writ petitioner had fulfilled the requirements mentioned in Clause 4(viii) of the terms and conditions of the tender. Pursuant to the notice issued calling for shortfall documents dated 10.11.2020, several of the bidders have submitted their documents which included the appellant. Thereafter, the Tender Scrutiny Committee evaluated all the documents and on 26.11.2020 a list of eligible tenderes, who are found to be qualified among them were the first respondent/writ petitioner, the appellant and three others. This list was drawn and notified showing that the five entities are qualified in the tender and since all the five entities had quoted the same bid and all of them ranked as L1 it became necessary that the Tender Scrutiny Committee to resort to the procedure stipulated in the terms

and conditions of the tender, namely, in Clause 33(c) which states that in case of tie of rates the successful bidder will be decided by the draw of lots. This intimation of draw of lots was intimated to all the five bidders who are all being declared as L1 bidder and in the draw of lots the appellant was declared as successful tenderer and the contract was awarded to the appellant. To be noted that the first respondent/writ petitioner did not participate in the draw of lots.

4. The argument of the learned counsel for the first respondent/writ petitioner is that the condition mentioned in the clause 4(vii) of the terms and conditions of the tender cannot be relaxed and has been done for certain collateral purposes. We are not inclined to accept such submission since it has been held in several decisions that the Tender Evaluating Authority or the Tender Inviting Authority is the person who knows who is the best suited contractor to cater to their needs. That is the reason that the said authorities have been given a play in their joints while finalizing the tender process. Courts have further held that it is not for the Court exercising jurisdiction under Article 226 of the Constitution of India to interpret the terms and conditions of the contract in a particular fashion which does not suit the requirement of the Tender Inviting Authority. In this regard, it will be beneficial to refer to the decision of the Hon'ble Supreme Court in the case of *AGMATEL INDIA PRIVATE LIMITED VS. RESOURSYS TELECOM AND OTHERS* reported in (2022) 5 *Supreme*

Court Cases 362 wherein the Hon'ble Supreme Court referring to several decisions rendered earlier held that the authority that authors the tender document is the best person to understand and appreciated its requirement and, thus, its interpretation should not be rejected outright by a Court in judicial review proceedings. It has been further held in the case of AGMATEL (supra) that if the interpretation given to the tender documents by the person inviting offers is not as such acceptable to the Constitutional Court, that by itself, would not be a reason for interfering with the interpretation given. In the opinion of the Tender Scrutiny Committee, the requirement to produce copy of proof of residence and to have an office/working unit within the district of concerned hospital was not an essential condition. In the light of the fact that already the other requirements, such as, catering license, GST registration, PAN card number, professional tax registration, experience certificate, EPF account and ESIC fund account and income tax clearance etc. are all essential conditions. Precisely, for those reasons, not for one of the bidders but for sixteen bidders the opportunity was granted. Therefore, we find that there was no attempt on the part of the Department to cover up any alleged illegality or to favour any particular individual. This is manifested from the fact that upon evaluation after receipt of the shortfall documents five bidders were declared as L1 and one among them was the first respondent/writ petitioner themselves. Thus, we find the process adopted by the respondent

department finalizing the bid and declaring five bidders as L1 and thereafter resorting to Clause 33(iii) of the Tender Conditions and drawing of lots have for selecting the successful tenderer cannot be faulted. Insofar as to how a condition of a tender has to be interpreted, beneficial reference can be made to the decision of the Hon'ble Supreme Court in *PODDAR STEEL CORPORATION VS. GANESH ENGINEERING WORKS AND OTHERS* reported in *(1991) 3 SCC 273* wherein the Hon'ble Supreme Court held that the requirement in the tender notice can be classified into two categories, those which lay down in the essential condition of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly and insofar as the ancillary and subsidiary it is open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. In the case on hand the Tender Scrutiny Committee did not dispense with the requirement under Clause 4(vii) of the tender condition but directed the documents to be supplied which were not supplied by the sixteen tenderers. Merely because the writ petitioner had supplied the documents they cannot come to the conclusion that the writ petitioner has been declared as the sole successful bidder as because the Tender Scrutiny Committee had finalized the bids only on 26.11.2020. Therefore, certain factual errors also crept in while deciding the writ petition.

5. Thus, for the above reasons, we are fully convinced that the order passed in the writ petition calls for interference. Accordingly, the appeal stands **allowed** and the order passed in the writ petition is set aside and the writ petition is dismissed. The appellant shall be permitted to commence supply of the items for which the tender was awarded in his favour and the period of tender shall be computed from the date from which the supplies are directed to be effected after deducting the period of one month for which the appellant had effected supply.

6. Consequently, all the connected applications stand disposed of.

(T. S. Sivagnanam)
Chief Justice

(Hiranmay Bhattacharyya, J.)