IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :-

The Hon'ble Justice Moushumi Bhattacharya

W.P.A 7456 of 2023

Ambey Mining Private Limited & Anr.
vs.
Eastern Coalfields Limited & Anr.

For the petitioners	:	Mr. Kishore Datta, Sr. Adv. Mr. Neelesh Choudhury, Adv. Ms. Anuradha Poddar, Adv. Mr. Shounak Mukhopadhyay, Adv.
For the respondent no.1	:	Mr. Tilak Bose, Sr. Adv. Mr. Saunak Sengupta, Adv. Mr. Pradipta Bose, Adv.
For the private respondent	:	Mr. Srijib Chakraborty, Adv. Mr. Sunny Nandy, Adv. Mr. Deeptangshu Kar, Adv.
Last Heard on	:	27.04.2023.
Delivered on	:	08.05.2023.

Moushumi Bhattacharya, J.

1. The petitioners participated in a Notice Inviting Tender (NIT) through electronic tender floated by the respondent Eastern Coalfields Limited (ECL) for development and operation of Itapara OCP through mine operator for excavation and delivery of coal. The NIT was issued on 21.12.2022 and the estimated Project cost was about 935.513 crores, for a duration of 18 years.

2. The petitioners seek an order in the nature of *mandamus* commanding the respondent no. 1 ECL to disqualify/reject the bid of the respondent no. 2 R.K. Transport and a further direction not to award the contract in favour of the respondent no.2. The petitioners have not challenged any decision taken by ECL, although a letter of ECL dated 15.3.2023 shows that ECL refused to accept the objection to the bid evaluation and proceeded to declare the respondent no. 2 as the successful bidder.

3. The petitioners' grievance relates to the respondent no. 2 not having the required eligibility for being awarded the tender and the work order. Learned counsel appearing for the petitioners submits that the documents furnished/uploaded by the respondent no. 2 are contrary to the clauses in the NIT. Counsel places clause 9.2(b) of the NIT in this context to submit that the respondent no. 2 does not fulfil the Financial Capacity criterion in the NIT.

4. Eastern Coalfields/respondent no. 1, through learned counsel, submits that the grounds raised in the writ petition are non-justifiable as the tender conditions would indicate that ECL reserved the right to reject any or all bids without giving any reason and further that assessment of the bidder's qualification would be entirely at the discretion of ECL. Counsel

raises a question on the timing of the petitioners' objection to the tender process as well as the filing of the present writ petition.

5. Learned counsel appearing for the successful bidder/respondent no. 2 places material to show that the documents furnished by the respondent no. 2 were strictly in accordance with the terms of the tender and that the documents indicate the Financial Capacity of the respondent no. 2 in the manner as required by clauses 9 and 10 of the NIT.

6. The facts relating to the tender floated by ECL are required to be stated before dealing with the contentious points. Two earlier auctions which were proposed to be held by ECL for the same work on 24.3.2022 and on 21.7.2022 were cancelled. No bidder participated in the first auction while the petitioner no. 1 was the only participant in the second auction with a price bid of Rs.1893/tonne which ECL found to be very high. The petitioner no. 1 reduced the bid to Rs.1840/tonne; the second tender was however cancelled. The tender which is the subject matter of dispute is the third tender which was dated 21.12.2022. Further, the respondent no. 2/L1 Bidder offered a price bid of Rs.1565/tonne as opposed to the petitioner who gave a price bid of Rs.1739/tonne whereas the third bidder gave a bid of Rs.2840/tonne. Hence the difference between the L1 (respondent no.2) and L2 (the petitioner) is Rs.800.748 crores calculated on an 18-year scale.

7. The above facts would hence show that ECL, as the tendering authority, settled for the lowest price bid which was offered by the private respondent since it was best-suited to ECL's requirements. This is also in accordance with clause 3.9.1 of section III of the Request for Bid (RFB)

which authorises the tendering authority to declare the most responsive bid furnished as the successful bidder for award of work, subject to the reasonableness of the L1 price and the viability of the Project.

8. The dispute as to the alleged ineligibility of the respondent no. 2/L1 Bidder involves the following factors. The NIT and the RFB contain detailed parameters for the evaluation of the successful bidder. The requirement of "Financial Capacity" is contained in clause 9.2 of the NIT. Clause 9.2(a) requires the Bidder to have a minimum net worth of Rs.200 crores at the close of the latest financial year among the 3 financial years chosen by the bidder. The term "Net Worth" has been defined in clause 9.2(a). Clause 9.2(b) requires that the average total income of the bidder in the 3 financial years chosen by the bidder shall not be less than Rs. 280,65,39,600/-. The term "Total Income" has been defined as the aggregate value of the realisation of amount made from the sale, supply or distribution of goods or on account of services rendered, or both, by the entity during a financial year. Clause 10 provides for the list of documents to be furnished by the Bidders online for substantiating the Financial Capacity of the Bidders. The requisite documents have been clearly described in clause 10. Clause 10(b) also requires the value of Total Income in the 3 financial years chosen by the Bidders to be submitted in the format provided at Annexure III of Appendix I of the RFB. Clause 12 provides for the evaluation of bid opening and refers to Section III of the RFB for this purpose.

9. The documents furnished by the respondent no. 2 online indicate that the documents are in the format as required under clauses 9.2 and 10 of the NIT. There is nothing to suggest that the respondent no. 2 uploaded

documents which did not fulfil the requirements under these two clauses. The format given in Annexure III of Appendix I minimises the possibility of error or a misconstruction of the requirements as to Financial Capacity.

10. Although the petitioners have raised the point of the Chartered Accountant Certificate of the respondent no. 2 not disclosing the system of accounting followed by the said respondent in maintaining its account, there is nothing in clause 10(c) and in clause 9.2 to substantiate this allegation. The related allegation of the respondent no. 2 being disqualified for following a system of accounting which is contrary to section 9.2(b) of the NIT is equally vague since clause 9.2(b) does not refer to any standard of accounting which is to be followed by a Bidder to indicate Financial Capacity. Therefore, the material on record negatives the doubts raised by the petitioner on the respondent no. 2's Financial Capacity or its eligibility to be declared as the L1 Bidder.

11. Even otherwise, the NIT/RFB contains several clauses including 15, 16 and 3.9.5 respectively, which give the "Authority" (ECL) the right to be the sole presiding judge for accepting or rejecting a bid. Clause 16 gives ECL the right to reject a bid assessment while clause 3.9.5 of Section III of the RFB makes it clear that the assessment of qualification of Bidders shall entirely be at the discretion of the Authority. The petitioners participated in the bid being fully aware of these conditions and the challenge now to the selection of the L1 Bidder is hence found to be non-justiciable. Reference in this context may be made to *Agmatel India Private Limited v. Resoursys Telecom; (2022) 5 SCC 362* where the Supreme Court, relying on *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.; (2016) 16 SCC 818*,

disapproved the interference of the High Courts in the interpretation of the eligibility terms of a tender document. A similar note of caution was sounded in *N.G. Projects Limited v. Vinod Kumar Jain; (2022) 6 SCC 127* where Courts were advised to be reluctant to interfere with contracts involving technical issues. In *G.J. Fernandez v. State of Karnataka; (1990) 2 SCC 488*, it was held that while a person can have a legitimate complaint against a departure from the qualifications to keep him out, the attempt of an applicant to gain immunity from competition rests altogether on a different plane.

12. The facts of this case fall within the curtailment of *G.J. Fernandez* as the prayer is to keep the respondent no. 2 out of the zone of consideration. The unreported decision of the Supreme Court in *Jai Bholenath Construction v. The Chief Executive Officer, Zilla Parishad, Nanded; Civil Appeal No. 4140 of 2022* was not a case of disqualification and the Supreme Court came to a specific finding that there was a flagrant violation of principles of natural justice.

13. The timing of the petitioners' protest is also significant. The averments in the writ petition disclose that Part I of the bids were opened on 15.2.2023 where 3 Bidders including the petitioner no. 1 were found to have qualified. The petitioner thereafter allegedly received information from an unsuccessful Bidder namely Elite Enterprise of an alleged misrepresentation being made by the respondent no. 2. The writ petitioner wrote a protest letter to ECL on 13.3.2023. The relevant documents would show that Part II of the price bids were opened at 1.15 p.m. on 13.3.2023 and ECL received the petitioners' protest letter at 2.25 p.m. on the same day. The minimal

time between opening of the price bid and ECL receiving the petitioners' objection would raise a presumption that the petitioners waited for the disclosure of the respondent no. 2's price bid to launch a challenge to the selection process.

14. Therefore, the totality of the facts would indicate that the petitioners' challenge is restricted to the selection of the respondent no. 2 as the successful Bidder and not on any arbitrariness or mala fides on the part of ECL in selecting the respondent no. 2 as the successful Bidder. The difference of Rs.800.748 crores in the price bids over the 18-year period would justify the selection and nullify any charge of discrimination or absence of fair play.

15. The above reasons lead to the inescapable conclusion that the petitioners have not been able to make out a case for ousting the respondent no. 2 from the race. WPA 7456 of 2023 lacks merit and is accordingly dismissed without any order as to costs.

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

(**Moushumi Bhattacharya, J.**)