

IN THE HIGH COURT AT CALCUTTA

Constitutional Writ Jurisdiction

(Appellate Side)

MAT 722 of 2023

With

IA CAN 1 of 2023

Rishikesh Chem & Anr.

-Versus-

The State of West Bengal & Ors.

Before: The Hon'ble Justice Arijit Banerjee

&

The Hon'ble Justice Apurba Sinha Ray

For the Appellants : Mr. Biswaroop Bhattacharya, Adv.
Mr. Pratik Majumdar, Adv.

For the KMC : Mr. Biswajit Mukherjee, Adv.
Mr. Gopal Chandra Das, Adv.

For the respondent no.9
Ms. Noelle Banerjee, Adv.,
Mr. Ritoban Sarkar, Adv.
Ms. Sakshi Jha, Adv.
Ms. Shreya Ghosh Dastidar, Adv.
Mr. Vivek Murarka, Adv.

CAV On : 26.04.2023

Judgment On : 01.05.2023

Arijit Banerjee, J. :-

1. This appeal is directed against a judgment and order dated April 24, 2023, whereby, the writ petition of the appellants being W.P.A. 9529 of 2023 was dismissed.

2. A tender has been floated by Kolkata Municipal Corporation (in short 'KMC') for supply and delivery of liquid chlorine from proven and reputed manufacturers/their authorized agents. The tender pertains to the financial year 2023-24. The estimated tender value is Rs. 4,22,50,158/-. The eligibility criteria for participation in the tender is mentioned as follows:-

“4. Eligibility criteria for participation in the tender

All intending tenderers should qualify eligibility criteria for the purpose of **TENDER FOR LIQUID CHLORINE**. If any of the participating tenderer fails to qualify in any of the terms & conditions mentioned below, the particular tender will be declared informal/non-responsive.

I) Tenderer should produce valid PAN issued by IT Department, Govt. of India, valid 15-digit Goods and Services taxpayer Identification Number (GSTIN) under GST Act, 2017, latest Professional Tax returns copy and certificate. Trade license will be mandatory for those whose unit is located within the jurisdiction of KMC.

II) a) Intending tenderers should produce credentials of a similar nature of completed work of the minimum value of

40% (Forty per cent) of the estimated amount put to tender during 5(five) years prior to the date of issue of the tender notice;

Or,

b) Intending tenderers should produce credentials of 2(two) similar nature of completed work, each of the minimum value of 30% (Thirty per cent) of the estimated amount put to tender during 5 (five) years prior to the date of issue of the tender notice;

Or,

C) Intending tenderers should produce credentials of one single running work of similar nature which has been completed to the extent of 80% (Eighty per cent) or more and value of which is not less than the desired value at (a) above;

In case of running works, only those tenderers who will submit the certificate of satisfactory running work from the concerned Executive Engineer, or equivalent competent authority will be eligible for the tender. In the required certificate it should be clearly stated that the work is in progress satisfactorily and also that no penal action has been initiated against the executing agency, i.e., the tenderer.

- Similar nature of work includes supply of any materials.
- Completed work-Completed single or multiple purchase order issued from a single tender.

- Payment certificate will not be treated as credential;
- Credential certificate issued by Executive engineer or equivalent or competent authority of a State/Central Government, State/Central Government undertaking, Statutory/Autonomous bodies constituted under the Central/State statute, on the executed value of completed/running work will be taken as credential.
- **The bidder should have valid explosive license at the time of opening of the bid, L1 bidder should submit the authorization certificate from the manufacturer whose material it is going to supply.**
- **If L1 bidder failed to submit the authorization certificate from the manufacturer within seven days, then the EMD of L1 bidder will be forfeited and will be debarred from participating in all future tenders up to 3 years.”**

3. The notice inviting tender mentions about a pre-bid meeting which any interested party having any query or requiring any information, could attend.

4. The Appellant no. 1, a partnership firm and the Respondent no. 9 along with another party participated in the tender process. The Respondent no. 9 was found to have quoted the lowest price and emerged as L1 bidder. The work order has not yet been issued.

5. After the Respondent no. 9 became the successful bidder, the appellants approached the learned Single Judge challenging the tender process. Before the learned Single Judge it was primarily argued that in similar tenders for the last few years, “similar nature of work” was defined as including supply of any water treatment chemical. In particular, notice inviting tenders for the financial years 2020-2021 and 2021-2022 were referred to. However, in the notice inviting tender for the current financial year “similar nature of work” has been defined as including supply of any materials. According to the writ petitioners, this change was made to favour the Respondent no. 9 which does not have any experience with regard to supply of liquid chlorine.

6. The contemplated pre-bid meeting never took place and as such the writ petitioners did not have the opportunity to raise the issue with regard to the eligibility of the Respondent no. 9 to participate in the tender process.

7. The writ petitioners relied on the following three decisions before the learned Single Judge.

“a) Dr. (Major) Meeta Sahai vs State of Bihar & Ors. reported in (2019) 20 SCC 17.

b) Chhanda Koley vs Bharat Petroleum Corporation Ltd. & Ors. reported in 2018 SCC Online Cal 16849.

c) Meerut Development Authority vs Association of Management Studies & Anr. reported in (2009) 6 SCC 171.”

8. The writ petitioners prayed for either setting aside of the entire tender process or setting aside of the bid of the Respondent no. 9 and issuance of work order in their favour.

9. The Respondent no. 9 argued before the learned Single Judge that the Writ Petitioner no. 1 with full knowledge of the eligibility criteria participated in the tender process. At no point of time the writ petitioners objected to the eligibility criteria. Having participated in the tender process and having been unsuccessful, the writ petitioners cannot turn around and challenge the eligibility criteria. The private respondent relied on the following decisions:-

“a) Silppi Constructions Contractors vs Union of India & Anr. reported in (2020) 16 SCC 489.

b) Tafcon Projects (I) (P) Ltd. vs Union of India & Ors. reported in (2004) 13 SCC 788.

c) Opaque Infrastructure Pvt. Ltd. vs Union of India & Ors. reported in MANU/DE/0964/2015.”

10. Learned Advocate for KMC argued that a participant in a tender process cannot dictate the terms/conditions of tender. It is for the concerned authority floating the tender to fix the eligibility criteria. The writ petitioners had sufficient opportunity to raise the issue at the pre-bid stage. After declaration of the final result, the objection of the writ petitioner regarding the eligibility criteria mentioned in the notice inviting tender cannot be considered.

11. KMC further submitted that the change in the definition of “similar nature of work” was necessitated to give opportunity to suppliers of other materials so that there is good competition and the best candidate may be selected at the best available rate. No manufacturer of chlorine has ever participated in any tender process floated by the Corporation, not being

eligible to participate. Only middle men who are the suppliers having explosive license are eligible to participate. There being very few number of suppliers, a cartel is often formed by them to raise the bid amount. Wider participation in the tender process allows KMC to exercise better choice. In connection with the present tender, by reason of having widened the horizon of participants, KMC has saved approximately Rs. 80,00,000/- of public money which can be used for other public projects. The suppliers of liquid chlorine are not required to have any special expertise. It is only a question of buying from the manufacturer and delivering to KMC.

12. Having duly recorded the arguments of the respective parties, the learned Judge observed that there was no acceptable explanation for the writ petitioners not to raise their objection as regards the eligibility criteria at the pre-bid stage. It is also not the case of the writ petitioners that the eligibility clause was changed after the tender process started. KMC is the best authority to decide as to what is required from the participants. KMC felt the need to expand the scope of participation and accordingly opened the field for suppliers of all or any type of material to participate in the tender process, subject to they satisfying the other conditions specified in the notice inviting tender. Had the writ petitioners been successful in quoting the lowest rate, the present litigation would not have seen the light of the day. It is only because the writ petitioners failed to qualify in the financial bid that they have come up with the allegation of the eligibility criteria having been changed to accommodate the Respondent no. 9.

13. The learned Judge observed that the Hon'ble Supreme Court has clearly held that the scope of judicial review in tender matters is extremely limited. The learned Judge discussed the three decisions relied upon by the writ petitioners and distinguished the same. The learned Judge dismissed the writ petition with *inter alia* the following observations:-

“.....

Here, instead of restricting the zone of consideration amongst a select few, the Corporation has extended the zone of consideration to include others. The petitioners ought not to be prejudiced if the area of selection increases. The petitioners cannot oppose competition from others.

.....

In the present case, it does not appear that the alteration in the eligibility clause from the previous years' tender documents is arbitrary, irrational or perverse. Apart from the fact that the petitioners had to face stiff competition from the other bidders, it does not appear that there is any arbitrariness or illegality warranting interference in the present matter.

.....

Here, the petitioners have not raised any other issues regarding unfair treatment or bias in the selection process. The only grievance is that the pool of consideration has been widened to increase participation resulting in stiff competition which is not to the liking of the petitioners. It is evident that the petitioners at the

initial stage took the risk and participated in the tender process; and after becoming unsuccessful in the last stage, is crying foul.

The submission of the petitioners that they missed to notice the change in the eligibility criteria after the bidding was over is irrelevant. The same hardly makes any difference to the merits of the case. It is not expected that a bidder, unaware of the conditions mentioned in the tender document, participates in the same and thereafter being unsuccessful grunts over the same.

The Learned Advocate representing the private respondent insists that the pre bid meeting took place as scheduled. As none of the participants had any query or any objection with regard to the terms and conditions of the notice inviting tender, accordingly, the minutes of the meeting was not required to be recorded separately. Learned Advocate for the Corporation also submits that the notice inviting tender specified the date of the pre bid meeting. If the petitioner had any grievance with regard to the tender condition, it ought to have been pointed out on the said date. The petitioners never raised any objection with regard to the eligibility clause mentioned in the notice inviting tender.”

14. Being aggrieved the writ petitioners are before us by way of this appeal.

15. Essentially the same arguments as were advanced on behalf of the parties before the learned Single Judge, have also been made before us.

16. To start with, it is now well established that the scope of interfering with a tender matter in exercise of jurisdiction under Article 226 of the Constitution of India, is extremely limited. A tenderer cannot challenge a term/ condition of the tender just because it does not suit him. The Government and its undertakings as well as statutory bodies like KMC must have a free hand in settling the terms of a tender. The Court cannot interfere just because it feels that some other tender term would have been fairer, wiser or more logical. Generally speaking, the Court must exercise judicial restraint in administrative actions. The writ Court does not sit like a Court of Appeal over the concerned authority which has floated the tender and which is the best judge of its requirements. The Court's interference should be minimal and it must exercise restraint and caution. The Government must have freedom of contract and is in the best position to understand and appreciate its requirements.

17. In this connection one may refer to the following decisions:-

(i) Tata Cellular v. Union of India, reported at (1994) 6 SCC 651.

(ii) Balaji Ventures Pvt. Ltd. v. Maharashtra State power Generation Company Ltd. and Ors., reported at MANU/SC/0740/2022.

(iii) Airport Authority of India v. Centre for Aviation Policy, Safety & Research (CAPSR) and Ors., reported at (2022) SCC OnLine SC 1334.

18. Courts must exercise restraint in interfering in tender matters. The parties are governed by the principles of commercial prudence and to that extent, principles of equity and natural justice have to stay at a distance. (Please see ***Uflex Limited v. Government of Tamil Nadu, (2022) 1 SCC 165***).

19. The rights of a bidder participating in the tender process have been stated by the Hon'ble Supreme Court in the case of ***Meerut Development Authority v. Association of Management Studies & Anr. (2009) 6 SCC 171***. At paragraphs 26 to 29 of the reported judgment, the Hon'ble Apex Court has held as follows:-

“26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.

27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in

response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above stated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.

28. It is so well-settled in law and needs no restatement at our hands that disposal of the public property by the State or its instrumentalities partakes the character of a trust. The methods to be adopted for disposal of public property must be fair and transparent providing an opportunity to all the interested persons to participate in the process.

29. The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons, such as, the highest bid not representing the market price but there cannot be any doubt that the Authority's action in accepting or refusing the bid must be free from arbitrariness or favouritism.”

20. In my considered opinion, no legal right of the appellants has been infringed in the present case which would call for intervention of the writ Court. KMC changed the definition of “work of the similar nature” to enable more intending parties to participate in the tender process. This would not

only result in the lowest rates being obtained by the public authority but a larger participation in a selection or tender process is always more desirable. The result of changing the definition of “work of similar nature”, has been that the appellants have had to face more competition than it would have otherwise faced. About this, the appellants cannot make any legitimate grievance.

21. Before us, learned Counsel for the appellants, on instruction, submitted that the appellants are now willing to offer a rate which is lower than that of the respondent no 9. I note that the appellant had quoted Rs.16,500/- per metric ton of liquid chlorine whereas the private respondent had quoted Rs. 13,570/-. I am not inclined to permit the appellants to conduct an auction before this Court once the tender process is complete by unsettling the same.

22. The learned Judge has dealt with the judicial precedents relied upon by the appellants/writ petitioners and have rightly distinguished the same. I have also gone through the decisions. None of the decisions advances the case of the appellants.

23. It was submitted that “similar nature of work” cannot include “supply of any materials”. The two are inconsistent. “Similar nature of work” must necessarily mean supply of any water treatment chemical as was the definition of “similar nature of work” in the notices inviting tender for the last three years.

This argument does not appeal to me. The job is to supply a commodity, namely, liquid chlorine. To purchase the same from the manufacturer and to deliver it to KMC does not require any special skill or expertise. What the supplier is required to do is to act as a trader or a middle man, collect the liquid chlorine from the manufacturer and make it over to KMC. Hence it was perfectly justified for KMC to define the 'similar nature of work' as including 'supply of any material' with a view to opening up the door for a greater number of participants in the tender process.

24. I do not find any infirmity, illegality or procedural impropriety in the learned Single Judge's approach or the final decision. There is no irregularity in the decision making process undertaken by KMC. It is well settled that judicial review is concerned, not with the merits of the decision arrived at by an authority but the manner in which the decision has been arrived at. The learned Single Judge has rightly declined to intervene.

25. M.A.T. No. 722 of 2023 with I.A. No. CAN 1 of 2023 is accordingly dismissed. There will be no order as to costs.

26. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

I agree.

(APURBA SINHA RAY, J.)

(ARIJIT BANERJEE, J.)