

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

Reserved on: 05.01.2023
Pronounced on: 11.01.2023

FMA 984 of 2022
With
CAN 1 of 2022
CAN 2 of 2023

Subir Ghosh

...Appellant

-Vs-

The State West Bengal and Others

...Respondents

With

MAT 865 of 2022
With
CAN 3 of 2022
CAN 4 of 2023

Subir Ghosh

...Appellant

-Vs-

The State West Bengal and Others

...Respondents

With

MAT 866 of 2022
With
CAN 2 of 2022
CAN 4 of 2023

Subir Ghosh

...Appellant

-Vs-

The State West Bengal and Others

...Respondents

Present:-

Mr. Kishore Datta, Sr. Advocate
Mr. Nilendu Bhattacharya,
Ms. Sumita Shaw,

Mr. Soumen Chatterjee, Advocates
... for the appellants

Mr. Samrat Sen, AAAG
Mr. Amitava Mitra,
Mr. Santanu Kr. Mitra,
Mr. Saikat Chatterjee, Advocates
... for the State

Mr. Saptansu Basu, Sr. Advocate
Mr. Swarup Paul,
Mr. Surya Maity, Advocates
... for the respondent Nos. 7 & 8

**Coram: THE HON'BLE JUSTICE PRAKASH SHRIVASTAVA,
CHIEF JUSTICE
THE HON'BLE JUSTICE RAJARSHI BHARADWAJ,
JUDGE**

Prakash Shrivastava, CJ:

1. These appeals are directed against the common order dated 12.04.2022 whereby learned Single Judge has disposed of W.P.A. 10598 of 2021, W.P.A. 15840 of 2019 and W.P.A. 15842 of 2019 on reaching to the conclusion that only two months were left for anybody to work under the NIT, therefore, no purpose would be served in directing the tender process to be completed. Appellant was the petitioner in W.P.A. 10598 of 2021 and is stated to be the respondent in other two petitions.

2. Facts in nutshell are that the appellant and other petitioners had submitted bid in response to the Notice Inviting e-Tender dated 8th of March, 2019 for providing supply of cooked diet for indoor patients admitted to the health facilities mentioned therein for a period of three years. The closing date for online bid submission was 01.04.2019. According to the appellant, he had participated in the tender process in respect of the hospitals i.e. (i) District Hospital, Nadia, (ii) Ranaghat S.D. Hospital, (iii) Thetta S.D. Hospital, (iv) Chakdaha S.G. Hospital,

(v) Santipur S.G. Hospital, (vi) Nabadwip S.G. Hospital, (vii) Dr. B.C. Roy Chest Sanatorium and (viii) Netaji Subhas Sanatorium. For some of the hospitals, more than one bidder had quoted same rates, therefore, the circular dated 13.01.2020 was issued for holding the draw of lots on 15.01.2020. According to the petitioner, in the draw of lots, he was found to be L1. Meanwhile, in W.P. 296(W) of 2020 the interim order dated 15th of January, 2020 was passed restraining the respondents from publishing the results of any lottery, held in the meantime as a part of the tender process, till January 21, 2020 or until further order, whichever was earlier. Thereafter, W.P. 296(W) of 2020 was heard along with W.P. 15842(W) of 2019 and W.P. 15840(W) of 2019 and learned Single Judge by order dated 2nd of March, 2020 had extended the interim order till 15th of April, 2020. Against the interlocutory order dated 15.01.2022 passed by the Single Judge, F.M.A. 910 of 2020 was preferred and the Division Bench by order dated 06.10.2020 had set aside the order dated 15th of January, 2020. The Division Bench had clearly ordered that nothing in the order of the Division Bench will be construed to be an approval of the terms and conditions of the tender document and in an appropriate challenge, the same may be considered in accordance with law. The W.P.A. 15842 of 2019 and W.P.A. 15840 of 2019 were subsequently tagged with W.P.A. 10598 of 2021 and have been decided by the impugned common order.

3. In W.P.A. 10598 of 2021, the appellant had raised the plea that the respondent Nos. 7 and 8 were not eligible participant in the process and the appellant being eligible was required to be issued work order and, therefore, a prayer in this regard was made.

4. Learned Single Judge has reached to the conclusion that only two months were left for working in terms of the contract under the NIT, therefore, no purpose would be served in directing the tender process to be completed. Thus, the petitions have been disposed of granting liberty to the official respondents to call for fresh tender for the entire district of Nadia and also permitting the currently operational tender of the existing supplier to continue in the meanwhile.

5. Submission of the learned Counsel for the appellant is that the appellant has been found to be L1 in the lottery, therefore, he is entitled for award of the contract. He has further submitted that period three years was to commence from the date of notification of the award of contract, therefore, learned Single Judge is not justified in holding that the three years period is over. He has also submitted that meanwhile fresh NIT has been issued, therefore, CAN 2 of 2023 has been filed seeking liberty to participate in the fresh tender without prejudice to his right and claim in the present appeal.

6. Learned Counsel for the State has opposed the appeal by submitting that period three years has passed after issuance of the tender, therefore, the tender process cannot be revived at this stage. He has further submitted that subsequently new policy with different conditions has been framed and fresh NIT has been issued and that no right had accrued to the appellant on the basis of the earlier NIT. He had also submitted that even if there was any right, the remedy available to the appellant is to claim the damages and in this regard he has placed reliance upon the judgment of Hon'ble Supreme Court in the matter of **Jagdish Mandal vs. State of Orissa and Others** reported in (2007) 14 SCC 517, **Silppi Constructions Contractors vs. Union of India and**

Another reported in **(2020) 16 SCC 489** and **N. G. Projects Limited vs. Vinod Kumar Jain and Others** reported in **(2022) 6 SCC 127**.

7. Learned Counsel for the private respondents (petitioners in W.P.A. 15840 of 2019 and W.P.A. 15842 of 2019) has submitted that the said petitioners also have right under the earlier NIT.

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

9. It is undisputed before this Court that, in pursuance to the NIT dated 8th of March, 2019, no contract has been awarded to the appellant. Though the appellant is claiming itself to be L1, but no document is on record to show that in the lottery, the appellant was found to be L1. After issuance of the NIT dated 8th of March, 2019, for one reason of the other the contract could not be awarded to any of the parties. It has been pointed out by learned Counsel for the State that initially the stay was granted, therefore, on account of COVID steps could not be taken. Subsequent development placed on record indicates that the decision has been taken by the State to issue fresh NIT with different conditions. It has been pointed out by learned Counsel for the State that the new NIT contains different conditions as per the fresh policy decision of the State. Accordingly, fresh NIT dated 21st of December, 2022 has been issued by the concerned authority of the State for supply of cooked diet for indoor patients of government hospital facilities. The online bid submission date is 11th of January, 2023.

10. In the aforesaid circumstances of the case, no direction can be issued to the official respondents to award contract in pursuance to the earlier NIT because no such enforceable legal right exists in favour of the appellant.

11. Even if the appellant had any claim under the first NIT, then also on account of the subsequent development noted above, the appellant has now the remedy to claim damages in view of the judgments in the matter of **Jagdish Mandal (supra)**, **Silppi Constructions Contractors (supra)** and **N. G. Projects Limited (supra)**.

12. So far as the judgment in the matter of **Harinder Singh Arora vs. Union of India and Others** reported in (1986) 3 SCC 247 relied upon by learned Counsel for the appellant is concerned, in that case the price quoted by the appellant was found to be lower than that of the respondent No. 4 but the tender of the respondent No. 4 was accepted and that of the appellant was rejected, therefore, the action was found to be arbitrary, but that is not so in the present case.

13. So far as the judgment in the matter of **M/s Prestress India Corporation vs. U.P. State Electricity Board and Others** reported in 1988 (Supp) SCC 716 relied upon by learned Counsel for the appellant is concerned, in that case the High Court had found that respondent Board had acted in an arbitrary and discriminatory manner in excluding the tender of the appellant from consideration and had given the direction for placing an order for supply of 50 per cent of the PCC Poles to the appellant, hence such a direction was found to be unwarranted and, therefore, the Hon'ble Supreme Court had issued requisite direction. Therefore, that judgment stands on an altogether different footing.

14. Learned Counsel for the private respondent Nos. 7 and 8 have placed reliance upon the judgment of Hon'ble Supreme Court in the matter of **Beg Raj Singh vs. State of U.P. and Others** reported in

(2003) 1 SCC 726 wherein it is held that the ordinary rule of litigation is that the rights of the parties stand crystallized on the date of commencement of litigation. In the present case, no legally enforceable right in favour of appellant has been found by this Court.

15. In the aforesaid circumstances, we find no ground to interfere in the order of the learned Single Judge. The appeals are accordingly dismissed.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

(RAJARSHI BHARADWAJ)
JUDGE

Kolkata
11.01.2023

PA(SS)

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