11.05.2023
Sl. No.2(DL)
srm

W.P.A. No. 11395 of 2022

Bijay Mondal @ Bijoy Mondal

Versus

The State of West Bengal & Ors.

Mr. Subhrajyoti Ghosh
....for the Petitioner.

Mr. Raja Saha,
Mr. S.P. Lahiri
...for the State-respondents.

Mr. Debabrata Mondal,
Ms. Sreetama Neogi
...for the Respondent No.4.

Affidavit-of-service is taken on record.

The writ petition has been filed challenging a decision of the Nandapur GramPanchayat, Nadia, which is annexure P-4 at page 30 of the writ petition.

The petitioner submitted his bid in an e-tender process being e-Tender No.01/15TH CFC(TIED)/2023-24 bearing Memo No.NAN/99/2023 dated April 10, 2023. The petitioner participated in the scheme, namely, construction of Sajaldhara with solar panel at Moktarpur Primary School at Mahishakhola S 13. The time for completion of the said scheme was 50 days. In the technical evaluation, the petitioner qualified. Thereafter, the financial bid was opened and the petitioner was found to be the lowest bidder, amongst the three bidders.. However, as the amount quoted by the petitioner was found to be 32.32% lower than the base price, the petitioner was asked to submit proper rate analysis to satisfy the authority about the justifiability of such a low rate. Such letter was issued to the petitioner on April 27, 2023, which was received by the petitioner on April 28, 2023 at 11.30 a.m. The petitioner was asked to submit the rate analysis within 24 hours from the receipt of the letter. The rate analysis was sent by the petitioner, via e-mail to the panchayat authorities on May 2, 2023 at 5.04 p.m.

The authority rejected the rate analysis on the following grounds:

(a) The rate analysis was without any signature from a registered civil engineer.

(b) Although, the rate analysis mentioned that the same was prepared on the market rate, the said contention was not found to be satisfactory as neither any market survey report nor any quotation had been taken from the market in support of such rates.

Thus, the tender committee rejected the financial bid of the petitioner, which was allegedly found to be low and the second lowest bidder who had given a rate 3.28% lower than the base price was treated to be the successful bidder. A decision was taken that the work order would be issued to the second lowest bidder.

The learned Advocates for the State-respondents as also the Pradhan have produced the work order dated May 3, 2023 which was issued in favour of the Mondal Enterprise, Goas, Nadia, for execution of the work.

The petitioner claims that further time may be allowed to the petitioner so that the defects in the rate analysis as pointed out by the authorities could be rectified. According to the petitioner, 24 hours time to supply all information in support of the rate analysis was inadequate. Hence, this writ petition has been filed for an extension of time to file proper documents (rate analysis) and for stay of the work order.

Mr. Lahiri, learned Advocate for the State-respondents submits that the rejection of the financial bid was not on the ground that the petitioner had filed the rate analysis, belatedly. The authorities applied their minds and came to the conclusion that in the absence of a proper market survey with supporting quotations, the rate analysis could not be accepted. Moreover, the rate analysis was not signed by a registered civil engineer. The rate of the petitioner was rather low was not found to be either reasonable or convincing.

The learned Advocate for the Pradhan submits that once the work order had been issued and the work had commenced, any order staying the process would amount to stalling a public project. The law in this regard was well-settled that such projects should not be stalled by any interim order of injunction.

Heard the parties. The scope for judicial review of a tender process is very limited. Unless the same involves blatant illegality, arbitrariness, favouritism or procedural irregularity, a writ court should stay its hands and refrain from passing any orders which would amount to interference with the execution of the work. The work order had already been issued in favour of the successful bidder.

In ***Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited & Anr*** reported in ***(2016) 16 SCC 818***, the Apex Court held that the owner or the employer of a project, having authored the tender documents, was the best person to understand and appreciate its requirements and interpret its documents. It was held as under:-

> "**13.** In other words, a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a

constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision.

xx xx xx

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."

In ***Silppi Constructions Contractors v. Union of India and Ors***. reported in ***2019 SCC OnLine SC 1133,*** the Hon'ble Apex Court held as follows:-

"**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 realize 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 realize 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."

In ***National High Speed Rail Corpn. Ltd. v. Montecarlo Ltd.*** reported in ***2022 SCC OnLine SC 111,*** the Hon'ble Apex Court held as follows:-

"**95.** Even while entertaining the writ petition and/or granting the stay which ultimately may delay the execution of the Mega projects, it must be remembered that it may seriously impede the

> execution of the projects of public importance and disables the State and/or its agencies/instrumentalities from discharging the constitutional and legal obligation towards the citizens. <u>Therefore, the High Courts should be extremely careful and circumspect in exercise of its discretion while entertaining such petitions and/or while granting stay in such matters</u>. Even in a case where the High Court is of the prima facie opinion that the decision is as such perverse and/or arbitrary and/or suffers from mala fides and/or favouritism, while entertaining such writ petition and/or pass any appropriate interim order, High Court may put to the writ petitioner's notice that in case the petitioner loses and there is a delay in execution of the project due to such proceedings initiated by him/it, he/they may be saddled with the damages caused for delay in execution of such projects, which may be due to such frivolous litigations initiated by him/it. With these words of caution and advise, we rest the matter there and leave it to the wisdom of the concerned Court(s), which ultimately may look to the larger public interest and the national interest involved."

Secondly, as the petitioner's quotation was found to be abnormally low, the petitioner was given an opportunity to supply the rate analysis thereof. The petitioner could not satisfy the authority with proper documents and with cogent reasons. The authorities/tender committee who are experts in the field, found that the bid of the petitioner could not be accepted as the rate analysis was neither based on market survey nor was the same certified by an engineer. No quotations from the market had been annexed with the analysis.

These technical assessments are beyond the scope of judicial review.

In ***Maa Binda Express Carrier v. North-East Frontier Railway*** reported in ***(2014) 3 SCC 760,*** the Hon'ble Apex Court held as follows:-

> **"8.** The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process."

In ***Tata Cellular v. Union of India*** reported in ***(1994) 6 SCC 651,*** the Hon'ble Apex Court held as follows:-

> **"70.** It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. <u>Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State.</u> <u>The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power.</u> Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down."

The tendering authority has the right to determine and analyze the quotations, documents and eligibility of the participants. If the authority found that the petitioner's rates were neither feasible nor viable, the experts had the right to reject the bid and offer the bid to the second lowest bidder. This is not a case of bias or *mala fide* or arbitrariness. There is nothing on record which would indicate that the authorities had acted contrary to law. No such averments have been made in the writ petition casting any aspersion either on the authorities or in the process followed by the said authorities. Moreover, third party rights have been created and the second lowest bidder has been given the work order. It is also true that the petitioner was allowed to explain his rates. The petitioner received the notice on April 28, 2023 at 11.30 a.m. and answered to the same by e-mail on May 2, 2023. He had adequate time to prepare his documents. His explanation was not found to be satisfactory.

The Court does not think that any opportunity need be given to the petitioner to rectify the defects and obtain the documents which were not ready at the relevant time.

The work shall be executed as per the work order.

The writ petition is accordingly dismissed.

There shall be no order as to costs.

Parties are to act on the basis of the server copy of this order.

(Shampa Sarkar, J.)