Item No.4
18.05.2023
Court. No. 19
GB

WPA 12225 of 2023

Minhajuddin Biswas
Vs
The State of West Bengal & Ors.

Mr. Mrityunjoy Chatterjee,
Mr. Debapriya Majumder
... for the Petitioner.

Mr. Lalit Mohan Mahata,
Mr. Prasanta Behari Mahata
... for the State.

Mr. Sakya Sen,
Mr. Sunil Gupta,
Mr. Hasibul Islam
... for the Murshidabad Zilla Parishad.

The petitioner has challenged the notice inviting e-auction no.1465/ZP dated April 17, 2023, which was the '7th call' for e-auction of Tejraipur Ferry Ghat under Lalgola and Sagardighi Block, District-Murshidabad. The base price was for Rs.12,00,000/- and the period was for one year.

Mr. Chattrjee, learned advocate for the petitioner has challenged Clause-11 of the said notice inviting e-auction on the ground that the requirement for uploading a two years experience certificate was introduced at the 7th call which amounted to changing the rule of the game after the game had started.

Mr. Chatterjee submits that on six occasions the authority failed to select a proper agency to operate the ferry ghat. The 7th call, that is the notice inviting e-auction dated April 17, 2023 was a continuation of the original e-auction process and hence, the introduction of the requirement of a two years experience by any participant, would amount to indirectly rejecting the other eligible participants who had been participating in the process from the beginning.

Mr. Sen, learned advocate appearing on behalf of the Zilla Parishad submits that as a policy decision, the tender selection committee of the Murshidabad Zilla Parishad had decided to introduce the requirement that the participants must have at least two years experience. This was an additional clause in the notice inviting e-auction dated April 17, 2023. Next, it is submitted that the very idea that the 7th call was a continuation of the bids of the previous participants, was incorrect. Pointing out to the relevant provisions of the notice inviting e-auction, Mr. Sen submits that the same is a fresh process upon cancellation of each and every earlier e-auction notices. E-auctions were invited six times prior to April 17, 2023. The cancellations were for non-availability of adequate participants.

Reliance has been placed on a notification of the State of West Bengal dated June 25, 2012 which deals with the procedure for grant of tenders. Note-1 of the notification, inter alia, provides that for high-value purchases exceeding 10 lakhs or for purchasing plant, machinery, etc., of complex and technical nature, bids may be invited in two parts under the two-bid system laid down in Rule 47C. According to the said note, selection of the agency should be made on the basis of at least three tenders, which shall be opened in presence of willing agents. If the number of tenders received is less than three, tender should be invited afresh.

Stressing on the expression 'afresh', Mr. Sen submits that colloquially the e-auction notice may have mentioned '7^{th} call' just to indicate that on six earlier occasions the e-auction had failed, but mere inclusion of the expression '7^{th} call' would not *ipso facto* amount to continuation of the earlier processes. If that was the idea, then the participants would not have been asked to resubmit each and every document including the earnest money.

Documents have been placed before the Court to show that at the time of 5^{th} and 6^{th} call, one or two participants failed to submit the earnest money deposit as per the e-auction notices and their participation was cancelled, although the said participants may have nurtured the idea that the earnest money deposited earlier would be carried forward.

However, the tender selection committee accepted each and every bid, in each and every e-auction process, whatever call the same may had been, 'afresh'. As per the terms and conditions of the said notice every document and earnest money etc. had to be deposited *de novo*. The question of carrying forward the document and the EMD did not arise. Every e-auction notice required fresh purchase of tender documents, fresh deposit of bid documents, fresh deposit of earnest money and payment of the cost of the tender papers.

The petitioner's argument that at the time of 7^{th} call the rules were changed, is thus, not accepted by the Court in view of the notification of the Finance Department which mandates that in the absence of three participants, the tender should be cancelled and invited afresh. Secondly, as per the provisions of the West Bengal Panchayat (Zilla Parishad and Panchayat Samiti) Accounts and Finance Rules, 2003, for procurement of materials by way of tender, the tender selection committee was entitled to look into the past performance of any tenderer as also the reputation in the market. The tender inviting authority could judge whether the operator had the capacity to operate the ferry ghat.

There is no reason why such policy cannot be applied in case of e-auction of ferry ghats as ferries are operated over large areas of water bodies covering two or three blocks or even districts and the public regularly use the same. The value of the e-auction is also above Rs.10 lakhs and relatively high. The policy decision adopted by the tender committee to include the experience clause, thus, cannot be said to be arbitrary. In every tender process, the basic qualifying condition for the technical evaluation is 'past experience'. When the Zilla Parishad had taken a policy to include an experience clause in the fresh e-auction notice which was published on April 17, 2023, after six e-auctions had failed the writ Court cannot cancel such clause. Neither is the clause unreasonable, nor arbitrary nor tailor-made, only to suit certain existing operators in the field. The Finance Rules also indicate that fresh tenders have to be called.

The notice inviting e-auction dated March 17, 2023 is a fresh e-auction notice after the six previous auctions had failed. The petitioner has not been able to show that either the documents which were deposited by the petitioner in the 5th and 6th call or the earnest money had been carried forward. The clauses in the e-auction notice also do not indicate that the notice dated April 17, 2023 was a continuation of the earlier e-auction notices. The expression '7th call' has been used only to indicate that on the previous six rounds of e-auction, the auction had failed on account of inadequate participation.

Unless there are instances of glaring mala fide, favouritism or procedural lapse, this writ court should not interfere with the e-auction notice.

The court refers to some observations of the Hon'ble Supreme Court in this regard.

In Silppi Constructions Contractors v. Union of India, 2019 SCC OnLine SC 1133, the Hon'ble Supreme Court held as follows:

> "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 realise 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 the matter of Airport Authority of India v. Centre for Aviation Policy, Safety & Research (CAPSR), reported in 2022 SCC OnLine SC 1334, the Hon'ble Apex Court held as follows:-

> "27. Even otherwise, even on merits also, the High Court has erred in quashing and setting aside the eligibility criteria/tender conditions mentioned in the respective RFPs, while exercising the powers under Article 226 of the Constitution of India. As per the settled position of law, the terms and conditions of the Invitation to Tender are within the domain of the tenderer/tender making authority and are not open to judicial scrutiny, unless they are arbitrary, discriminatory or mala fide. As per the settled position of law, the terms of the Invitation to Tender are not open to judicial scrutiny, the same being in the realm of contract. The Government/tenderer/tender making authority must have a free hand in setting the terms of the tender.
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> 28. While considering the scope and ambit of the High Court under Article 226 of the Constitution of India with respect to judicial scrutiny of the eligibility criteria/tender conditions, few decisions of this Court are required to be referred to, which are as under:
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> 29. In the case of Maa Binda Express Carrier (supra), in paragraph 8, this Court observed and held as under:
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> "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 ***Michigan Rubber (India) Ltd. v. State of Karnataka,*** reported in ***(2012) 8 SCC 216***, the Hon'ble Supreme Court observed as follows:-

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is

> required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;
>
> (d) <u>Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and</u>
>
> (e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government."

Thus, the writ petition is dismissed. The tender process will continue in accordance with law.

However, there will be no order as to costs.

Let plain copy of this order duly countersigned by the Assistant Registrar (Court) be given to the petitioner on usual undertakings.

(Shampa Sarkar, J.)