

9th June,
2023
(AK)
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W.P.A 13404 of 2023

Shiba Prosad Banerjee
Vs.
The State of West Bengal and others

Mr. Swarup Paul
Mr. Surya Maity
Mr. Anirban Chakraborty
Mr. Gurusaday Dutta
Mr. Anish Roy
...for the petitioner.

Mr. Santanu Kr. Mitra
Mr. Prantik Garai
...for the State.

Mr. N.C. Bihani
Mr. P.B. Bihani
...for the West Bengal Pollution Control
Board.

The petitioner has challenged a tender document primarily on the ground of arbitrariness and that particular clauses of the same are tailor-made to suit certain particular operators.

Learned counsel for the petitioner contends that the tender, which is floated for the purpose of house-keeping job under the West Bengal Pollution Control Board, stipulates that such house-keeping jobs would be for nine offices of the Board.

Such offices are distributed all over West Bengal.

However, in Serial No.7 of the eligibility criteria, the tender document provides that the office location of the bidder must be in Kolkata, West Bengal.

The exact phrase used is “the bidder must have an office in Kolkata, West Bengal”.

It is further argued that in Serial No. 2 of the said criteria, the credential of the bidders have been stipulated to be three numbers of credential/contract for last three years regarding similar type of work for at least twenty five number of sweeping personnel deployed under one organization like Central Government/State Government/Autonomous Body/PSU.

It is argued that one person may very well have the requisite strength of personnel for deployment in the several offices for which the tender is floated and it is not necessary that the person has to have credentials regarding three separate similar types of works, that too under the same organization.

Learned counsel for the petitioner places reliance on an unreported coordinate Bench judgment dated May 12, 2023 passed in WPA 11519 of 2023 (*M/s Rupa Enterprises vs. State of West Bengal*).

In the said judgment, the learned Single Judge, while dealing with a similar clause, was pleased to set aside the tender on the ground of the clause being unreasonable.

Learned counsel appearing for the respondent nos.2 to 4 controverts the contentions of the petitioner and places reliance on *Silppi Constructions Contractors Vs. Union of India* reported at (2020) 16 SCC 489. In the said judgment, it was held, inter-alia, that the court is duty bound to interfere when there is arbitrariness, irrationality, *mala fides* and bias.

However, the court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or *mala fides* etc. is made out.

It is also submitted that there must be a public element involved and that the courts have to give a fair play in the joints to the Government and Public Sector undertakings in matters of contract.

It is submitted that the Supreme Court went on to observe that the essence of law laid down in judgments referred therein is that the exercise of restraint and caution is essential and the need for overwhelming public interest is required to justify judicial intervention.

In similar context, learned counsel for the respondent nos.2 to 4 cites *Michigan Rubber (India) Limited Vs. State of Karnataka* reported at (2012) 8 SCC 216 and a Division Bench judgment of this court rendered in *Renesco India Pvt. Ltd. Vs. Eastern Coalfields Limited and others*.

On the other hand, learned counsel for the State cites the judgments reported at (2022) 6 SCC 127 (*N.G.*

Projects Limited vs. Vinod Kumar Jain and others and (2022) 5 SCC 362 (Agmatel India Private Limited vs. Resoursys Telecom and others).

It is contended by learned counsel for the State that the bidder cannot dictate the terms of the tender. What is an essential term in the contract is to be left to the decision of the employer.

Mere technical violations, in the absence of any patent arbitrariness or intended *mala fides*, cannot call for judicial interference, it is argued.

Upon hearing learned counsel for the parties, a scrutiny of the relevant clauses gains vital importance.

Insofar as serial no.7 of the tender document is concerned, the office location of the bidder has been stipulated to be in Kolkata, West Bengal. The clause provides that the bidder “must” have an office in Kolkata, West Bengal.

Such a clause defeats logic from all perspectives.

First, the work contemplated in the tender pertains to nine offices of the West Bengal Pollution Control Board. Out of the said offices, only two are situated in proper Kolkata.

Although learned counsel for the respondent nos.2 to 4 is justified in submitting that some of the other officers are also in the vicinity of Kolkata, even otherwise, the offices at Barrackpore, Siliguri, Haldia, Hooghly,

Asansol and Durgapur cannot be said to be within or very near the territory of Kolkata.

That apart, the said clause has no direct nexus with the purpose of the contract, which is to provide personnel for the purpose of house-keeping activities.

It may very well be that a particular prospective bidder does not have any office in Kolkata but has sufficient manpower to provide such personnel for the purpose of deployment in all the nine offices as stipulated in the Notice Inviting Tender (NIT). Such a person would not even be eligible to participate in the tender and is shut out at the initial stage.

Moreover, there is a wider perspective to be considered. In the event the bidder is restricted to having an office in Kolkata even for the purposes of eligibility criteria, several people placed on an equal footing as persons having office in Kolkata, spread over in the Districts of West Bengal, shall be precluded at the outset from participating in the contract, thereby depriving the Tender Issuing Authorities, who are Government functionaries and public authorities, from having a much wider and varied participation in the tender.

As held by the learned Single Judge in *M/s Rupa Enterprises vs. State of West Bengal* in WPA 11519 of 2023, the competition ought not to be narrowed down by introducing an unreasonable clause in the participation process itself.

The court further held that the restriction introduced in a particular clause of the relevant tender therein, restricting participation to bidders having physical office in the vicinity of 10 kms, was unreasonable and arbitrary.

The same logic applies to the present case as well. The stress sought to be laid by learned counsel for the Pollution Control Board on the number of kilometres mentioned by the learned Single Judge does not hold any relevance in the context of the ratio of the said judgment. The principle laid down therein is in consonance with the above observations of this Court as well.

Insofar as the judgment rendered by the Supreme Court in *Silppi Construction (supra)*, the Supreme Court observed that the court can only interfere in cases of arbitrariness, irrationality, *mala fides* and bias.

Although, in the present case, no specific *mala fides* has been made out by the petitioners, at least *prima facie*, there undoubtedly is arbitrariness and irrationality in the clause-in-question, since the mandatory pre-participation restriction of the bidders to have an office within the territory of Kolkata frustrates the entire purpose of seeking a wide participation from all corners of the State for the purpose of manning housing keeping jobs.

Merely having an office within the periphery of Kolkata does not have any relevance or nexus with the

purpose of the tender, which is to supply manpower for the purpose of manning nine offices of the pollution control board, spread over different parts of West Bengal.

This unwarranted bias towards people having offices in Kolkata, which is the main seat of administration of the State, is unjust, irrational and has no nexus with the purpose of the tender.

Insofar as the judgment of *Michigan Rubber (supra)* is concerned, in the said case the Supreme Court laid down certain principles which cannot be disputed.

The Supreme Court, inter alia, stressed on the basic requirement of Article 14 and observed that 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 malicious and in misuse of the statutory powers.

Certain preconditions or qualifications for tenders were held mandatorily to be laid down to ensure that the contractor has the requisite capacity and resources.

Applying the same test to the present case, the resources and/or the competence of the contractors have no connection whatsoever with the contractor having an office within Kolkata.

Having an office in Kolkata is not such a haloed proposition which will sanctify the incompetence, otherwise, of certain bidders, in the event they failed on

the crucial score of supplying adequate personnel to man the offices of the Pollution Control Board.

The Division Bench, in the judgment of *Renesco India Pvt. Ltd.* (supra), also stipulated certain yardsticks of interference by the court. It was held that the court does not have the expertise to correct an administrative decision. If review of an administrative decision is permitted, it was observed that it will amount to substituting the court's decision without the necessary expertise.

However, in the present case, no particular expertise is required to see through the patent violation of Article 14 of the Constitution of India as well as Article 19 of the Constitution, inasmuch as people not having an office in Kolkata and not centered in Kolkata, even if otherwise competent and located or based in the other parts of the State, would be deprived at the outset from participating in the tender process.

Hence, there is a patent ingredient of violation of the said Articles implicit in the impugned clause no.7.

Insofar as the judgment cited by the State is concerned, this is not a case where the tenderer is seeking to dictate terms.

The essentiality of a particular clause definitely has to be decided by the employer.

However, serial no. 7, which pertains to the office location, cannot, by any stretch of imagination, be an essential clause from anybody's perception.

In fact, the said clause has no nexus with the purpose of contract as reiterated above and, hence, does not stand the scrutiny of a reasonable person or even the Wednesbury principle harped on by the respondent nos. 2 to 4.

However, insofar as the serial no. 2 regarding credentials complained of by the petitioner is concerned, the same, in all fairness to the authorities, does not stand the test of the Wednesbury principle.

The Tender Issuing Authority, in its wisdom, required that the prospective bidders have the credentials regarding contract for the last three years, which is a reasonable period, for at least 1/3rd of the number of personnel required, for three similar types of work, totalling to 75 numbers of personnel.

Moreover, under the said clause, the employer seeks that the previous experience must be confined to three different types of work under the same organization.

The same yardsticks are applicable to the present tender as well, since all the nine offices involved belong to the West Bengal Pollution Control Board, that is, the same employer, and the workers will be deployed to different places at the same time.

A simultaneous co-ordination between the said personnel by the same bidder is a necessary prerequisite for the purpose of such deployment.

It may very well be that a particular contractor has several personnel under his care but is unable to coordinate and deploy such personnel in different places in West Bengal simultaneously.

Hence, the authorities cannot be faulted on the ground of the credentials sought at serial no.2 as an eligibility criterion in the NIT.

However, on the score of introduction of an irrational clause by way of the office location being stipulated to be in Kolkata, the said clause has to be set aside.

In such view of the matter, the petitioner has made out a strong *prima facie* case for the writ petition to be heard on merits.

Hence, the petitioner is entitled to the interim order as prayed for in the writ petition.

However, applying judicial prudence, it is evident that in the event the tender process is stayed outright and/or set aside at this final stage, the same will involve much further expenditure of public money.

That apart, in view of the nature of the urgency of the job sought to be achieved by the tender, a blanket setting aside and/or stay of the tender process would enure to nobody's benefit.

Hence, since no specific prayer for filing affidavits has been made by the respondents and in view of the present adjudication being limited to the legality and Constitutionality of the clause concerned, there is no need to keep the matter pending further unnecessarily.

Accordingly, WPA No. 13404 of 2023 is disposed of by restraining the respondent-authorities from proceeding further with the impugned tender in its present form.

However, it will be open to the respondent-authorities to issue a corrigendum deleting serial no. 7 and any other corresponding clause, if any, from the eligibility criteria of the impugned NIT and thereafter, to proceed with the tender with the rest of its clauses intact, by extending the schedule of dates given in the tender in appropriate manner.

It is made clear that in the event such corrigendum is issued by the respondent-authorities, the respondent-authorities can proceed on the basis of such corrigendum, merely by extending the dates from the bid submission closing dates onwards and the subsequent calendar of dates appearing in the NIT accordingly.

There will be no order as to costs.

Urgent photostat copies of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)