

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

Before:

**The Hon'ble The Chief Justice T. S. Sivagnanam
and**

The Hon'ble Justice Hiranmay Bhattacharyya

**MAT/1392/2023
IA NO: CAN/1/2023, CAN/2/2023
MRT SIGNALS LIMITED
VS
TEXMACO RAIL AND ENGINEERING LIMITED AND ORS.
with
MAT/1393/2023
IA NO: CAN/1/2023, CAN/2/2023
MRT SIGNALS LIMITED
VS
TEXMACO RAIL AND ENGINEERING LTD. AND ORS.
with
MAT/1444/2023
IA NO: CAN/1/2023, CAN/2/2023
UNION OF INDIA AND ANR.
VS
TEXMACO RAIL AND ENGINEERING LTD AND ORS.
With
MAT/1455/2023
IA NO: CAN/1/2023, CAN/2/2023
SOUTH EASTERN RAILWAY
VS
TEXMACO RAIL AND ENGINEERING LTD AND ORS.**

For the Appellant in
MAT 1392 of 2023 and
MAT 1393 of 2023 and
for the Respondent in
MAT 1444 of 2023 and
MAT 1455 of 2023.

: Mr. Jayanta Mitra,
Mr. Abhrajit Mitra,
Ms. Rajshree Kajaria,
Mr. Sarvapriyo Mukherjee,
Mr. Uttam Sharmaadvocates

For the Appellants in
MAT 1444 of 2023 and
MAT 1455 of 2023
and for the Railways in
MAT 1392 of 2023 and
MAT 1393 of 2023

: Mr. Atarup Banerjee,
Ms. Sarda Sha ...advocates

For the Respondent
Nos.1 and 2

: Mr. Sabyasachi Chowdhury,
Mr. Rajarshi Dutta,
Mr. Shounak Mukhopadhyay,
Mr. Soorjya Ganguli,
Mr. Somdutta Bhattacharyya,
Ms. Devanshi Prasad,
Ms. Arti Bhattacharyya ...advocates

Reserved on : 05.10.2023

Judgment on : 13.12.2023

Hiranmay Bhattacharyya, J.:-

1. The judgment and order dated 07.07.2023, passed by a learned Single Judge in WPA No. 15369 of 2023 heard analogously with WPA No. 15370 of 2023 is under challenge in these intra court mandamus appeals, one at the instance of the Union of India and the South Eastern Railway being the tender inviting authority and the other at the instance of an entity which emerged as L1 bidder.
2. The orders of rejection of the Techno Commercial Bid of the writ petitioner/ respondent no. 1 herein were challenged in the writ petitions. By the impugned judgment and order, the orders of rejection of the technical bids of the respondent no. 1 herein were set aside and a direction was passed upon the tender inviting authority to conduct the tender process afresh from the stage of holding reverse auction by accepting the bids of the writ petitioner/respondent no. 1.
3. Facts giving rise to the writ petitions as well as these appeals may be summarised hereinunder as follows-

Kalindee Rail Nirman (Engineers) Limited (for short “Kalindee”) had been amalgamated with Texmaco Rail and Engineer Limited (for short “Texmaco”) i.e., the writ petitioner/respondent no. 1 herein pursuant to a scheme of amalgamation sanctioned by the Hon’ble High Court of Delhi. South Eastern Railway floated a tender for design supply, installation, testing and commissioning of automatic block signal system between Rajkharswan to Rourkela Section of Chakradharpur Division of South Eastern Railway. The advertised value of the said tender was Rs. 106, 70,01, 466.33.

4. As per the tender document, the tenderer can be said to have satisfied the technical eligibility criteria having successfully completed or substantially completed one similar work costing not less than the amount equal to 60% of the advertised value of the tender. Clause 7(E) of the tender document provides for clarification of bids in order to assist the railway authority in examination, evaluation & comparison and prequalification of the tender. The said tender document provides for holding reverse auction in case the number of successful participants at the techno commercial stage is at least three. Respondent no. 1 herein submitted its bid on 04.03.2023. On 24.06.2023, the respondent no. 1 was informed by the tender inviting authority through electronic mail that its techno commercial bid had been found technically unsuitable and the same was rejected.
5. It is the case of the writ petitioner/ respondent no. 1 herein that its predecessor-in-interest namely Kalindee completed a similar work as one of the members of the joint venture by the name and style of “M/s. GMR-Kalindee-TPL” in respect of a job awarded by Rail Vikas Nigam Limited (for short “RVNL”). The final work certificate dated 24.02.2022 issued by RVNL to the said joint venture and the subsequent corrigendum dated 10.03.2022 were produced by the respondent no. 1 as its credential.

6. It is the specific contention of the respondent no. 1 that the (S&T) work which was executed by Kalindee is a similar work as per the tender document and the value of such work was much above the minimum stipulation of 60% of the advertised value of the present tender and therefore, the respondent no. 1 duly satisfied the technical eligibility criteria.
7. The learned Judge after considering the final work certificate issued by RVNL arrived at a finding that Kalindee, as one of the members of a joint venture, having completed a work of similar nature of a value more than 60% of the total advertised value for the present contract have complied with the eligibility condition and, therefore, the rejection of the bid of the writ petitioner was improper.
8. Mr. Banerjee, learned Advocate appearing for the appellants in MAT 1444 of 2023 contended that the value of a completed work done by a member in an earlier joint venture shall be reckoned only to the extent of the concerned member's share in that joint venture in view of note (b) of Para 17.15.1 of the General Conditions of Contract (GCC)-2022. By drawing the attention of the Court to the joint venture agreement between M/s. GMR infrastructure Ltd. (for short "GMR"), M/s. Kalindee Rail Nirman (Engineers) Ltd. (for short "Kalindee") and M/s. Tata Project Ltd. (for short "TPL"), Mr. Banerjee contended that the share of Kalindee in the said joint venture was only 29% and therefore, the value of a similar work which is alleged to have been completed by Kalindee in the work allotted by RVNL has to be reckoned only to the extent of share of Kalindee in the said joint venture (i.e., 29%). He further submitted that the tender inviting authority while evaluating the bid of the writ petitioner found that the writ petitioner did not satisfy the eligibility criteria and accordingly rejected its bid. He submitted that it is now well settled that in tender matters technical evaluation or comparison by the court is impermissible. In support of such contention he placed reliance upon

the decision of the Hon'ble Supreme Court in the case of **Montecarlo Ltd. vs. National Thermal Power Corporation Limited** reported at **(2016) 15 SCC 272** and **Silppi Constructions Contractors vs. Union of India and Anr.** reported at **(2020) 16 SCC 489**.

9. Mr. Mitra learned Senior Counsel appearing for the appellants in MAT 1392 of 2023 contended that the original contract value as indicated in the final work certificate issued by RVNL is Rs. 145,33,45,266 and since Kalindee only had 29% share in the joint venture, the value of the completed work done by a member in joint venture shall be determined to the extent of such member's share in the earlier joint venture.
10. Mr. Mitra contended that the author of the tender document is the best person to understand and appreciate its requirement and interpret its documents and the constitutional courts should refrain from interfering with the decision of the administrative authority on such aspect. In support of such contention, Mr. Mitra, placed reliance upon the decisions of the Hon'ble Supreme Court in the case of **Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited and Anr.** reported at **(2016) 16 SCC 818** and **Agmatel India Private Limited vs. Resoursys Telecom and ors.** reported at **(2022) 5 SCC 362**. Mr. Mitra submitted that a heavy burden is cast upon the person alleging mala fide to prove such allegation. He further submitted that specific pleadings in this regard are absent in the writ petition. He placed reliance upon the decision of the Hon'ble Supreme Court in the case of **Rishi Kiran Logistics Private Limited vs. Board Trustees of Kandla Port Trust and Ors.** reported at **(2015) 13 SCC 233** and **Ratnagiri Gas and Power Private Limited vs. RDS Projects Limited and ors.** reported at **(2013) 1 SCC 524** in support of his contention that it is obligatory upon the person making allegation as to mala fide to furnish particulars that would prove mala fides on the part of the decision maker.

11. Mr. Chowdhury, learned Senior Counsel representing the writ petitioner/ respondent no. 1 would contend that since the signaling and Telecommunication (S&T) works were only within the scope of Kalindee and not any other member of the Joint Venture and also that the value of such works exceeds 60% of advertised value of the subject tender, the Tender Inviting Authority acted illegally and mala fide by rejecting the Techno Commercial Bid on technical and financial eligibility criteria, bid capacity and improper information.
12. Heard the learned advocates for the parties and perused the materials placed.
13. Writ petitioner/ respondent no. 1 submitted the certificate issued by Rail Vikas Nigam Limited (RVNL) as credential certificate in respect of the subject tender. It is not in dispute that the work in respect of which RVNL issued the Final Works Certificate dated 10.03.2022 was allotted in favour of “M/s. GMR-Kalindee-TPL” which is a Joint Venture Company. It is also not in dispute that the lead partner of the said Joint Venture was M/s. GMR Infrastructure Limited. It is evident from Clause 4 of the Memorandum of Understanding (MOU) entered into between M/s. GMR Infrastructure Limited, M/s. Kalindee Rail Nirman (Engineer) Limited and M/s. Tata Projects Ltd. that the parties have resolved that the distribution of share between GMR, Kalindee and TPL is 51%, 29% and 20% respectively.
14. The Final Works Certificate dated 10.03.2022 recorded that as per the joint venture agreement, the entire indoor S&T and the outdoor signaling works are within the scope of M/s. Kalindee Rail Nirman (Engineers) Ltd. and indoor and outdoor works physically completed and commissioned by the Joint Venture.
15. The short point that falls for consideration in these appeals is what should be the basis for determining the cost of work done by a member of a Joint Venture for such member to have satisfied the

Technical Eligibility Criteria of the subject tender. Whether it is the cost of the work that falls within the scope of a member of the Joint Venture or the share of such member in the earlier Joint Venture.

16. The learned Single Judge held that the value of the work completed by M/s. Kalindee shall be the determinant factor for evaluating the Technical Eligibility criteria. These intra court appeals have been filed for testing the propriety or correctness of such decision.
17. Note (b) of Clause 17.15.1 of the Standard General conditions of Contract (for short "GCC") throws some light for deciding as to how the cost of work done by an entity as a member of the earlier Joint Venture shall be reckoned and the same may be relevant for deciding the aforesaid issue for which the same is extracted hereinbelow.

"Note (b)

Value of a completed work done by a Member in an earlier JV shall be reckoned only to the extent of the concerned member's share in that JV for the purpose of satisfying his/her compliance to the above mentioned technical eligibility criteria in the tender under consideration."

18. Mr. Chowdhury would contend that clause 17 of the GCC is applicable only when the bidder is itself a Joint Venture and not otherwise and, therefore, according to him, Note (b) to clause 17.15.1 could not have been applied to the case on hand.
19. Clause 17.15 of the tender document deals with credentials and qualifying criteria. Clause 17.15.1 speaks about technical eligibility criteria. Clause 17.15.1 contains two notes (a) and (b). Note (b) states as to how the value of a completed work done by a member in an earlier joint venture shall be reckoned for the purpose of satisfying his/her compliance to the technical eligibility criteria in the tender under consideration. The said note starts with the expression "Value of a completed work done by a Member in an earlier JV". Such

expression undoubtedly refers to the credential of a Member who completed work as a member of an earlier Joint Venture as the expression “Joint Venture” is qualified by the word “earlier”. From a bare reading of the said Note it is evident that for the purpose of satisfying the technical eligibility criteria in the tender under consideration, the value of a completed work done by a Member in an earlier Joint Venture shall be reckoned only to the extent of concerned member’s share in that Joint Venture i.e., the earlier Joint Venture. The expression “his/her compliance” refers to the credential of such member in order to satisfy the technical eligibility criteria of the subject tender. After reading Clause 17.15.1 together with the note appended thereto, this Court is of the considered view that in the event a work done by a member in an earlier joint venture is relied upon by such member as a credential, then for the purpose of satisfying compliance of the technical eligibility criteria in the subject tender by such member, the value of the completed work done by such member in the said earlier joint venture shall have to be computed in the manner laid down in note (b) to Clause 17.15.1 of the tender document.

20. Therefore, for the purpose of evaluating the technical eligibility of a bidder who relies upon a work completed by such bidder as a member in an earlier Joint Venture as a credential in the subject tender, what is relevant is only the value of a completed work done by such bidder restricted to the extent of such bidder’s share in the earlier Joint Venture. It follows, therefrom that the entire cost of work completed/ done by a bidder as a member of an earlier JV cannot be taken into consideration for evaluating the technical eligibility.
21. This Court, therefore, holds that the value of the completed work done by Kalindee as a Member of “M/s. GMR Kalindee-TPL”, a Joint Venture to the extent of the share of Kalindee in the Joint Venture shall be reckoned for the purpose of evaluating the technical eligibility

of Kalindee in the subject tender. The said issue is accordingly answered in favour of the appellants and against the writ petitioner/respondent.

22. It is not in dispute that the extent of share of Kalindee in the Joint Venture of M/s GMR-Kalindee-TPL is 29%. It is also not the case of the writ petitioner that the value of the completed work done by Kalindee as a member of the said Joint Venture to the extent of its share in that JV i.e., 29% is not less than the amount equal to 60% of the advertised value of the subject tender. This Court, therefore, holds that the writ petitioner/respondent failed to satisfy the eligibility criteria. To the mind of this Court, the order of rejection of the bid of the writ petitioner/ respondent herein cannot be said to be arbitrary, mala fide and de hors the terms of the tender.
23. That apart, the Hon'ble Supreme Court in the case of **Agmatel India Private Limited** (supra) after taking into consideration various decisions including **Afcons** (supra), **Silppi Constructions** (supra) and **Montecarlo** (supra) held that the author of the tender document is the best person to understand and appreciate its requirement and if its interpretation is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the Court should follow the principle of restraint. It was further observed that even if the interpretation given to the tender document by the person inviting offers is not acceptable to the constitutional court, that by itself would not be a reason for interfering with the interpretation given.
24. By applying the aforesaid well settled proposition of law, this Court is not inclined to accept the argument of Mr. Chowdhury that the interpretation of the tender inviting authority is not in consonance with the language of the tender document. The learned Single Judge, in the case on hand, ought to have followed the principle of judicial restraint.

25. By referring to the clarification clause being Clause 7E in the tender document, Mr. Chowdhury would contend that the tender inviting authority failed and neglected to invoke the said clause. After going through Clause 7E, this Court is of the considered view that the tender inviting authority has been vested with the discretion to resort to the clarification clause and the tenderer does not have any right to compel the tender inviting authority to invoke the said clause. The learned Single Judge was right in rejecting the argument of the writ petitioners/ respondents in this regard.
26. As rightly argued by Mr. Mitra, that apart from bald averments there are no specific pleadings as to how the decision of the tender inviting authority can be said to be actuated with mala fides. The Hon'ble Supreme Court **in Rishi Kiran Logistics** (supra) and **Ratnagiri Gas** (supra) held that it is obligatory for the persons alleging malice in fact to furnish particulars that would provide mala fides on the part of the decision maker and vague and general allegations unsupported by the requisite particulars do not provided a sound basis for the court to conduct an enquiry into their veracity. Merely because of the fact that bids were opened on a Saturday, that by itself cannot be a ground to hold that the decision of the tender inviting authority was actuated with mala fides.
27. For the reasons as aforesaid this Court holds that the tender inviting authority was justified in rejecting the technical bids of the respondent no. 1 herein. In view thereof, the direction passed by the learned Single Judge upon the tender inviting authority to conduct the tender processes afresh from the stage of holding reverse auction by treating the writ petitioner to have succeeded at the techno commercial stage by acceptance of its bids calls for interference. The appeals accordingly stand allowed. The impugned judgment and order dated 07.07.2023 stands set aside. Consequently, the orders of rejection of the bids of the respondent no. 1 stand restored. All

connected applications stand disposed of accordingly. The tender inviting authority is left free to proceed in accordance with law. There shall be, however, no order as to costs.

28. Urgent Photostat certified copies, if applied for, be supplied to the parties upon compliance of all formalities.

I agree.

(T.S. Sivagnanam, CJ.)

(Hiranmay Bhattacharyya, J.)

(P.A.-Sanchita)