27.02.2023
Sl. No.6(DL)
srm

W.P.A. No. 23346 of 2022

Md. Iyakub Mia

Versus

The State of West Bengal & Ors.

Mr. Bikram Banerjee,
Mr. Arka Nandi,
Mr. Saikat Sutradhur,
Mr. Sondwip Sutradhar
….for the Petitioner.

Ms. Chaital Bhattacharya,
Mr. Kartik Chandra Kapas
…for the State-respondents.

Mr. Sunil Gupta,
Mr. Hasibul Islam
…for the Respondent No.2.

The petitioner has challenged the order dated September 30, 2022 passed by the Block Development Officer, Raghunathganj-II Development Block, Murshidabad. By the said order, the authority assigned the reasons for rejection of the petitioner's bid. The grounds for rejection as per the authority are quoted below:

"(1) As per tender Notice clause no.4 he could not submit the P. Tax Challan for the year of 2021-2022. He has submitted the P.Tax Challan for the year of 2022-2023.
(2) The amount in P. Tax Challan differs with the P.Tax certificate.
(3) His name in various document like PAN Card, P.Tax Payment certificate, I.T. return differs."

The impugned order was passed by the authority upon hearing the petitioner. Such order was passed pursuant to the direction of this Court dated September 29, 2022 passed in WPA No.22685 of 2022. The Court had directed as follows:

> "As this court is in seisin of the matter, it would not be possible for the petitioner to approach the authority by 5 pm today. Thus, such time is extended upto 1.00 pm of September 30, 2022. The petitioner shall approach the concerned authority with all relevant documents in support of his contentions.
> The authority shall peruse the same and issue necessary directions in this regard.
> The correctness of the allegations made by the petitioner, is not gone into. The authority shall decide the issues independently, upon granting an opportunity of hearing to the petitioner.
> The documents to be submitted by the petitioner which form part of the bid documents, shall also be checked. If the authority is satisfied with the petitioner's explanation/clarification and/or removal of defects if any, the petitioner shall be allowed to participate in the financial bidding round.
> After deciding the issue, the tendering process shall be proceeded with from the stage of opening of the financial bid.
> This writ petition is disposed of."

The issues relevant for adjudication in this writ petition are whether the authority rightly rejected the bid of the petitioner on the ground of non-furnishing of the professional tax receipt challan for the year 2021-22. Whether the discrepancies in the amount paid by way of professional tax in the certificate and in the challan were justifiable grounds for rejection of the bid.

In the earlier round of litigation, this Court was of the, *prima facie,* view that clerical and technical errors could have been rectified, had the petitioner been given an opportunity to correct the same. On such understanding, the authority was directed to grant a hearing to the petitioner. The petitioner was also allowed to produce relevant documents in support of his contentions.

From the order impugned, it appears that the professional tax challan for the year 2021-22 was neither uploaded nor produced before the authority. There were also discrepancies in the name of the petitioner in the various documents of identification submitted with the bid documents. The professional tax certificate which has been relied upon by the petitioner was valid upto July, 2022. The tender was floated in August, 2022 and the petitioner was required to upload valid documents including the updated professional tax receipt challan for the year 2021-22 within September 6, 2022. The subsequent certificate showing payment of all professional tax for the preceding year was e-generated on September 26, 2022. Admittedly, the said document was not available when the petitioner submitted his bid documents. The bid documents were uploaded between August 27, 2022 to September 6, 2022.

Non-furnishing of the professional tax challan for the year 2021-22 struck at the very root of the eligibility of the petitioner to participate as a bidder. Moreover, the petitioner has not yet furnished the challan for the year 2021-22 indicating that the same was available during process or even now. The petitioner has also not been able to justify the reasons for the discrepancies in his name in the documents, namely, PAN card, professional tax payment certificate, IT return, etc.

The Finance Rules of 2003 relied upon by the petitioner to press the point that the rules provide that up to date documents would be sufficient proof of the credibility of the petitioner is not applicable in this case. Moreover, the fact remains that at the time of uploading the bid documents the professional tax receipt challan of 21-22 had not been uploaded and the same was one of the eligibility criteria which was not fulfilled by the petitioner.

Under such circumstances, the writ court cannot rewrite or interpret the eligibility criteria which the tender inviting authority had framed. It is for the authorities to prescribe their criteria and interpret the same. They have a right to cancel the tender if the criteria are not fulfilled. The notice inviting tender is a document prepared by experts and this Court does not find that any of the provisions to be either *mala fide*, discriminatory or tailor made only to favour some intending participants.

In the absence of the allegation of *mala fide*, favourtism, contravention of law, etc. the Court does not think it fit to pass necessary orders in this writ petition.

In the matter of Kanhaiya Lal Agarwal vs. Union of India & Ors. reported in 2002 (4) MPLJ 311 the Hon'ble Apex Court laid down that if an essential condition of the tender is not complied with, it would be open to the person inviting tender, to reject the same.

In the matter of Gorakhnath Upadhyaya vs. State of U.P. & Ors. reported in AIR 1994 Allahabad 283, the Court held that the authority inviting tender should insist on strict compliance of essential conditions.

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.

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:

29. In the case of Maa Binda Express Carrier (supra), in paragraph 8, this Court observed and held as under:

"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."

30. In the case of Michigan Rubber (India) Ltd. (supra), after considering the law on the judicial scrutiny with respect to tender conditions, ultimately it is concluded in paragraph 23 as under:

"23. From the above decisions, the following principles emerge:

(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) 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

(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."

> 31. In the aforesaid decision, it is further observed that the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. It is further observed that the courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical."

Moreover, a second opportunity was also given to the petitioner to substantiate his case. He failed before the authority.

The work order has already been issued but not delivered to the successful bidders in view of the pendency of the litigation. The authority now can proceed in accordance with law.

The writ petition is, thus, disposed of without any relief to the petitioner.

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.)