

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(Appellate Side)

MAT 1731 of 2022

With

CAN 1 of 2022

Reserved on: 14.12.2022

Pronounced on: 18.01.2023

Steel Authority of India Limited

...Appellant

-Vs-

Shyam Sunder & Ors.

...Respondents

Present:-

Mr. Jishnu Chowdhury,
Mr. Shounak Mitra,
Ms. V. Pandey,
Ms. P. Banerjee, Advocates

... for the appellant

Mr. Utpal Bose,
Mr. P. Sinha,
Mr. Sannidhya Datta, Advocates

... for the respondent No. 1

Ms. Chandreyi Alam,
Ms. Runu Mukherjee, Advocates

... for the Union of India

Coram: THE HON'BLE JUSTICE PRAKASH SHRIVASTAVA,
CHIEF JUSTICE

THE HON'BLE JUSTICE RAJARSHI BHARADWAJ,
JUDGE

Prakash Shrivastava, CJ:

1. In this intra-court appeal, judgment of the learned Single Judge dated 27th of September, 2022 passed in W.P.A. 20809 of 2022 is under challenge whereby learned Single Judge has disposed of the petition directing the appellant to call for a fresh tender and invite bids afresh in relation to the work contemplated.

2. The facts in nutshell are that the appellant had published the Notice Inviting Tender dated 16th of April, 2022 for the purpose of appointing contractor for handling iron and steel materials at warehouse,

Durgapur. The writ petitioner was already performing similar contract at Ghaziabad, Kanpur, Faridabad and Bokaro. The writ petitioner had submitted the bid in response to the NIT dated 16th of April, 2022 and had emerged as L1, but the bid was rejected on the ground of unworkable rates quoted by him as well as the adverse report against him. The writ petitioner had earlier filed WPA No. 19327 of 2022 wherein by order dated 26th of August, 2022 learned Single Judge instead of granting the interim relief had left it open to the writ petitioner to participate in the fresh tender process without prejudice to his rights in the writ petition.

3. Meanwhile appellant had cancelled the NIT dated 16th of April, 2022 and had issued a fresh NIT on 17th of August, 2022 for the same work. The bid submitted by the writ petitioner in response to the above NIT was rejected on 05.09.2022 in the light of the adverse report relying upon clause 9.3 of the PCP 2020. Aggrieved with the same, Writ Petition No. 20809 of 2022 was filed by the respondent writ petitioner, in which learned Single Judge had initially passed the interim order dated 09.09.2022 restraining the appellant from proceeding any further in terms of the tender, thereafter by the impugned order, the writ petition has been disposed of continuing the protection granted earlier and directing the appellant to invite fresh tender.

4. Submission of learned Counsel for the appellant is that the reasons given by the learned Single Judge while allowing the writ petition are unsustainable. He submits that while rejecting the bid in response to the first tender, the adverse report was taken note of and that the allegation of theft is in respect of contract related to Ghaziabad, therefore, its finality is not necessary and that clause 9.3 of the PCP

operates in interregnum. He submits that there was no delay in informing the petitioner about rejection of the bid. He further submits that all the conditions of clause 9.3 of PCP have been satisfied and in fact no reasons for rejection were required to be conveyed. He has further submitted that the appellant has discretion not to award contract to a party against whom there is allegation of theft and that meanwhile Ghaziabad contract has also been terminated against which a writ petition was filed by the petitioner before the Allahabad High Court which has refused to interfere by permitting the writ petitioner to avail the remedy of arbitration.

5. Submission of learned Counsel for the respondent writ petitioner is that learned Single Judge has assigned due and cogent reasons for allowing the writ petition and, therefore, no case for interference is made out. His further submission is that nothing was disclosed to the petitioner about the action in Ghaziabad contract and in respect of Ghaziabad contract FRT has already been submitted. He submits that theft by the writ petitioner has not yet been proved, therefore, it cannot be the basis for rejection of the bid and the action of the appellant is in denial of the principles of natural justice of the parties.

6. We have heard learned Counsel for the parties and perused the record.

7. Before entering into the merits of the matter, it would be proper to take note of the legal position in respect of scope of interference in contractual matters.

8. Hon'ble Supreme Court in the matter of **N.G Projects Limited vs. Vinod Kumar Jain and Others** reported in (2022) 6 SCC 127 has

held that Writ Court should refrain itself from imposing its decision over the authority on the issue of acceptance or non-acceptance of the bid of a tenderer and that even if the Court finds there is total arbitrariness or that the tender has been granted in a malafide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for wrongful exclusion rather than to injunct the execution of the contract. The view taken by the Hon'ble Supreme Court in the above judgment is as under:

“23. In view of the above judgments of this Court, the writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present day Governments are expected to work.”

9. In the matter of **Silppi Constructions Contractors vs. Union of India and Another** reported in (2020) 16 SCC 489, Hon'ble Supreme Court has reiterated that the Courts should exercise lot of restraint while exercising their powers of judicial review in contractual or commercial matters and loathe to interfere in such matter unless a clear case of arbitrariness, malafides, bias or irrationality is made out. A "fair play in the joints" is required to be given to the government and public undertakings in such matters. Hon'ble Supreme Court in the matter of **Silppi Constructions Contractors (supra)** has held that:

"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 realise 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 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.”

10. The Division Bench of this Court earlier by the order dated 08.08.2022 passed in MAT 1218 of 2022 in the matter of Basirhat Food Supply Mohila Co-Operative Society Ltd & Another vs. State of West Bengal and Others by taking note of the above judgments has held that the scope of interference in tender process is limited and the Court does not sit as a Court of Appeal and is not expected to find fault in the tender process with the magnifying glass.

11. Examining the present case in the light of the above settled position, it is noticed that in the NIT dated 17th of August, 2022 the appellant had reserved the right to reject the tender by incorporating clause 9 as under:

“9. The company reserves the right to accept or reject any one or all the tenders without assigning any reason whatsoever.”

12. Applicability of the Purchase/Contract Procedure 2020 (PCP 2020) is not disputed. It applies to all the contracts floated by the appellant. The amended PCP 2020 contains clause 9.3 to the following effect:

“In case any specific adverse report is received against a tenderer, as an information or upon enquiry made by SAIL, in respect of capabilities and performance of the tenderer, after receipt of tender but before the opening of the Price Bids, the quotation/ tender submitted by such tenderer is liable to be rejected on the basis of recorded reasons and with the approval of the Next Higher Authority/ Director In-charge of the Plant/ Chief Executive of the Unit. If such report is received after opening of the price bids, then also the quotation/ tender of that tenderer is liable to be rejected after recording the reasons and with the approval of the Next Higher Authority/ Director In-charge of the Plant/ Chief Executive Officer of the Plant/ Chief Executive of the Unit.”

13. In terms of the above, in the case of receipt of adverse report against the tenderer, the tender is liable to be rejected on recording reasons with the approval of the next higher authority.

14. In the present case, the record reflects that writ petitioner was performing Ghaziabad contract since before and in respect of that contract concerning handling of warehouse situated at Ghaziabad, there was complaint and the show cause notice dated 26.04.2022 was issued to the writ petitioner alleging theft of certain steel materials causing loss to the appellant. It was mentioned therein that in the CCTV camera the writ petitioner's trailer exiting from the premises was seen to be loaded

with the steel material without any valid document. Hence, it was expressed that the writ petitioner was involved with its employees in theft and misappropriation of the company's products. By way of show cause notice, opportunity was given to the petitioner. The petitioner had submitted reply to the show cause notice dated 01.05.2022 and a committee was set up to examine the issue.

15. The record further reflects that on the ground of unauthorized and improper removal of steel materials from Ghaziabad warehouse without documentation, the departmental committee had opined about the need of further investigation by the Vigilance Department and in the investigation, General Manager (Vigilance) had noted serious lapse on the part of security agency of the writ petitioner.

16. Record also reflects that the bid submitted by the petitioner in pursuance to the NIT dated 17.08.2022 along with the other bidders was considered by the Tender Committee which on 5th of September, 2022 had opined to reject the bid in the light of the adverse report received against the writ petitioner during the finalization of the previous tender in line with the clause 9.3 of the PCP 2020. The Committee had recommended the rejection of the bid of the petitioner by mentioning the reasons for the same. The Committee's recommendation was considered by the higher authorities and was approved on 6th of September, 2022.

17. Hence, the rejection of the bid of the writ petitioner was in consonance with clause 9.3 of the PCP 2020. The writ petitioner had sent the email dated 7th of September, 2022 at 5 P.M. making a request to provide techno-commercial bid status. The reply was sent by the appellant on 8th of September, 2022 at 10.26 A.M. informing that the

bid of the writ petitioner did not qualify for further evaluation as per the policy procedure of the company in vogue. The writ petitioner thereafter had demanded the grounds on which the bid was not considered as also the policy and procedure of the company and had filed the writ petition on and about 8th of September, 2022 without waiting for the reply.

18. It is also worth noting that the contract of the writ petitioner in respect of Ghaziabad warehouse itself was terminated, hence petitioner had filed Writ - C No. - 36924 of 2022 before the Allahabad High Court and the Division Bench by the order dated 08.12.2022 had dismissed the petition taking note of the arbitration clause and leaving it open to the petitioner to avail such remedy as may be available to him under law.

19. Learned Single Judge has allowed the writ petition by assigning the reason that the appellant had allowed the writ petitioner to participate in the first tender even after the fact of pilferage of material had come to the knowledge of the appellant in February, 2022 and Departmental Committee was formed on 10.04.2022. In this regard, the record reflects that while rejecting the bid in response to the first NIT on 25.07.2022 not only unworkable rates quoted by the writ petitioners were noted but when the matter was sent to the higher authorities for approval of the recommendation of the Tender Committee, the higher officials had taken note of the adverse report and clause 9.3 of the PCP 2020, therefore, there was no such waiver at the stage of first tender.

20. Learned Single Judge has also taken the view that the recommendation made by the Vigilance Department against the writ petitioner had not reached finality and the writ petitioner was eliminated from the tender process based on the preliminary recommendation. In this regard, a perusal of clause 9.3 of the PCP reveals that adverse report

received as information forms the basis for rejection of bid. Learned Counsel for the appellant has pointed out that clause 9.3 of the PCP 2020 operates in interregnum before any decision is taken to blacklist on the final conclusion of the inquiry.

21. Learned Single Judge has also taken the view that the action of the appellant lacks transparency by mentioning about communication of decision after request by the petitioner. But the facts noted above clearly reveal that there was no delay in communicating the decision of rejection of bid, hence such an action of the appellant cannot be held to be non-transparent.

22. So far as the reasons assigned by learned Single Judge that the appellant did not take note of the explanation of the writ petitioner in response to the show cause notice while rejecting the bid, it appears to have escaped the attention of the learned Single Judge that the show cause notice and the reply was in respect of a different contract relating to Ghaziabad warehouse. Clause 9.3 of the PCP 2020 also does not require any such consideration of reply to show cause notice but only adverse report is required to be considered. It is also worth noting that the facts noted above indicate that even Ghaziabad contract was terminated and the relief before Allahabad High Court has been declined to the writ petitioner.

23. So far as the observation of the learned Single Judge about violation of principles of natural justice is concerned, the NIT does not provide and the law does not require an opportunity of hearing to the bidder before rejection of the bid.

24. Learned Counsel for the respondent writ petitioner has placed reliance upon the judgment of the Hon'ble Supreme Court in the matter

of **M/s. Erusian Equipment & Chemicals Ltd. vs. State of West Bengal and Another** reported in **(1975) 1 SCC 70**, but that was a case relating to opportunity of hearing in the cases of blacklisting, but present is not a case of blacklisting.

25. Learned Single Judge has also taken the view that clause 9.3 of the PCP 2020 dilutes clause 9 of the tender notice. The two clauses operate in different fields. Clause 9.3 of the PCP operates in the cases where adverse report is submitted whereas clause 9 is general in nature.

26. Learned Counsel for the appellant has also pointed out that though the learned Single Judge has disposed of the petition by directing the appellant to invite fresh bids but the earlier NIT dated 17.08.2022 has not been set aside or interfered with, therefore, the same still stands.

27. Having regard to the above analysis, we are of the opinion that the rejection of bid of the writ petitioner was in consonance with clause 9.3 of the PCP 2020 and it did not suffer from any arbitrariness or unreasonableness or malafides. Hence, the order of the learned Single Judge cannot stand and is hereby set aside and the writ petition is accordingly dismissed by allowing the appeal.

(PRAKASH SHRIVASTAVA)
CHIEF JUSTICE

(RAJARSHI BHARADWAJ)
JUDGE

Kolkata
18.01.2023

PA(SS)

(A.F.R. / N.A.F.R.)