IN THE HIGH COURT AT CALCUTTA
CIRCUIT BENCH AT JALPAIGURI
CIVIL APPELLATE JURISIDCTION
APPELLATE SIDE

BEFORE:

The Hon'ble Justice Moushumi Bhattacharya
And
The Hon'ble Justice Siddhartha Roy Chowdhury

MAT 103 of 2022
With
CAN 1 of 2022

Goutam Ghosh
Vs.
The State of West Bengal & Ors.

For the Appellant	: Mr. Kalyan Kumar Bandyopadhyay, Sr. Adv. Mr. Amritam Mondal, Adv. Mr. Debasish Mukhopadhyay, Adv. Mr. Anirban Banerjee, Adv. Mr. Dilip Roy, Adv.
For the State	: Mr. Subir Kumar Saha, Adv. Mr. Bikramaditya Ghosh, Adv. Mr. Hirak Barman, Adv.
For the Respondent no. 4	: Mr. Jagriti Mishra, Adv., Mr. Subham Gupta, Adv. Mr. Debayan Goswami, Adv. Mr. Reshab Kumar, Adv.
Hearing concluded on	: 4th January, 2023
Judgment on	: 13th January, 2023

Siddhartha Roy Chowdhury, J.:

1. Aggrieved by and dissatisfied with the judgement and order passed on 6th December, 2022 in W.P.A. No. 3239 of 2022 (Goutam Ghosh vs. The State of West Bengal and Ors.) the appellant

(hereinafter referred to as 'petitioner') has filed this Intra Court appeal. By the impugned judgement and order learned Single Judge was pleased to dismiss the Writ Application.

2. In order to appreciate the appeal in its proper perspective we consider it expedient to indicate the facts in brief.

3. In the wake of notice by advertisement being NIT No. 4050/TN-2022, published in the official website of the Department of Correctional Administration, Directorate of Correctional Services, Government of West Bengal as issued by Inspector General of Correctional Services, West Bengal, regarding supply of dietary articles for the period from 1st October, 2022 to 31st March, 2023 for nine Correctional Homes of the State of West Bengal, the petitioner participated in the tender process and submitted required documents on 29th September, 2022. Though schedule date for opening of Technical bid document was 30th September, 2022, the concerned authority did not open such Technical bid. The participants were also not informed about the reason for delay. On 12th October, 2022 at about 11.43 a.m. the Technical bid was opened and it was found that in all 7 legal entity participated in the e-tender, except R.S. Bajaj Tea Company, the Technical bid of rest six participants were found to be proper by the authority, albeit the fact that the respondent nos. 4 and 5 did not have the requisite qualification to cross the threshold. The respondent no. 4 obtained UDYAM registration certificate by MSME

Department on 14th September, 2014 indicating with manufacturing as its major activity. The respondent no. 4 did not provide any trade license in support of such manufacturing activity in terms of Clause 6 Cover 4 of the Technical bid package but was given the benefit as provided in Clause 7 (g) (Evaluation of tenders) of an UDYAM certificate holder under MSME. Respondent no. 4 got undue exemption from depositing earnest money as well as benefit of 15% price preference in connection with rate of an article. Neither the respondent no. 4 nor respondent no. 5 was eligible to take part in the e-tender as food service contractor because manufacturing was the major activity of both of them at the relevant point of time. They could not have participated in the financial bid without depositing the earnest money. The petitioner became the second lowest bidder: Had there been proper assessment of tender documents, the respondent nos. 4 and 5 would have been declared disqualified and the petitioner would become eligible L1 bidder. According to petitioner, respondent nos. 4 and 5 became L1 bidder as the authority concerned overlooked with mala-fide intention and for extraneous consideration. Since respondent nos. 4 and 5 did not deposit the earnest money and necessary documents regarding manufacturing plant packaging unit, deployment of labours, their tender documents ought to have been rejected by the concerned authority. By filling the application under Article 226 of the Constitution the petitioner prayed for appropriate order towards cancellation and or revocation of financial bid dated 7th

November, 2022 and work order issued on 16th November, 2022 and also for revocation of the whole e-tender process among other relief.

4. Learned Single Judge having considered materials made available on record as well as submission of learned Counsel representing the parties to the proceeding was pleased to dismiss the Writ Application, however, without cost.

5. Assailing the impugned judgement Mr. Kalyan Kumar Bandyopadhyay, learned Senior Counsel for the petitioner submits that learned Single Judge approached the entire issue with closed mind and expressed opinion that "there is nothing to suggest that the petitioner stands at a better footing than that of respondent nos. 4 and 5".

6. Drawing our attention to the provision of Sub-Section 1 of Section 7 of the Micro, Small and Medium Industries Development Act, 2006, Mr. Bandyopadhyay submits that a line of distinction has consciously been drawn by the legislature between the enterprises engaged in manufacturing or production of goods pertaining to any industry and enterprises engaged in providing or rendering of service. The certificate obtained by the petitioner from the MSME department unerringly indicates the type of the enterprise owned by the petitioner is Micro that renders Service while the certificate given to respondent nos. 4 and 5 demonstrate that the type of their enterprises are micro with major activity 'Manufacturing'. Therefore, the authority had no

reason to consider the respondent nos. 4 and 5 as successful bidder while considering the technical bid of the participants. Drawing our attention to the certificates issued by Ministry of Micro, Small and Medium Enterprises (enclosure page 93, 188 and 333), Mr. Bandyopadhyay submits that visibly the certificates issued by the Ministry in favour of the petitioner and the respondent nos. 4 and 5 are different. The petitioner was given certificate under the style UDYOG AADHAR while the respondent nos. 4 and 5 were given UDYAM registration certificate. UDYAM registration certificate is issued to the enterprises set up for manufacturing as major activity. Therefore, the concerned Correctional Home authority acted arbitrarily in considering technical bid as well as financial bid in the affirmative, in favour of the respondent nos. 4 and 5. The respondent nos. 4 and 5 were given the benefit of MSME unit, though they were not entitled to exemption as laid down in the tender document under column 5 (i). The action on the part of the concerned authority was but blatant manifestation of bias, tainted and arbitrary which learned Single Judge failed to appreciate.

7. Refuting such contention of Mr. Bandyopadhyay, Mr. Bikramaditya Ghosh submits that the e-tender document is eloquent enough on the requirement as well as eligibility criteria of the intending bidders. Drawing our attention to Clause 5, Mr. Ghosh submits that the bidders must be :

(a) Legal entity.

(b) Must have office in West Bengal.

(c) Must possess requisite and valid trade license regarding supply of dietary articles.

(d) Must have PAN card.

(e) GSTIN.

(f) Audited balance sheets for last three consecutive financial years.

(g) Must not have been convicted in any Court of law.

(h) Must have Professional Tax Enrolment Certificate along with deposit challans for last three years.

(i) In order to claim exemption from submission of earnest money, must have certificate from the competent authority regarding the matter failing which the tender would be liable to be rejected.

(j) Co-operative must have registration certificate. (k) Intending bidder must have list of articles along with brand name and rate on his authorized letter head.

(l) Must have credentials for Correctional Home supply/ supply into any government organization/ PSU or any other organization/ institute.

8. Nowhere in the tender document it was indicated that only the MSME enterprises engaged in providing or rendering of service would be eligible to have exemption from submission of earnest money. It was laid down in the document itself that the bidder intending to claim exemption from submission of earnest money has to have proper certificate from the competent authority and in column 7 under heading Evaluation of the tenders at Clause (g) it was indicated that

bidders possessing SSI registration certificate/U.A.M. enrolment certificate obtained from Ministry of Micro, Small and Medium Enterprises, Government of India on or before the date of publishing the tender notice, enrolled as manufacturing/wholesales of raw dietary articles/ food service contractor shall be exempted from depositing of earnest money and shall be considered to get 15% price preference. It was never restricted to the enterprises established for the purpose of providing or rendering services only. Therefore, there was no reason to disqualify the respondent nos. 4 and 5 who not only obtained registration certificate from Ministry of MSME, Government of India, they had requisite trade license issued by the competent authority to deal with food items, fish, dry fish, meat, sea food, milk and milk products etc. According to Mr. Ghosh the competent authority did not act arbitrarily or with bias of any kind; the present proceeding is vexatious and learned Single Judge was absolutely justified in dismissing the Writ Application.

9. Mr. Jagriti Mishra representing the respondent no. 4 submits that the petitioner is trying to create unnecessary confusion in giving undue importance to the apparent discrepancy in the certificates issued by Ministry of MSME, Government of India. The petitioner got his enterprise registered with MSME sometime in the month of July, 2019, while respondent no. 4 got his enterprise registered on 20th January, 2021, and respondent no. 5 got it registered on 4th December, 2020, subsequent to the issuance of notification no. S.O.

2119 (E) by the Ministry of Micro, Small and Medium Enterprises on 26th June, 2020. By the said notification some changes were incorporated or introduced in the classification of enterprises and in the procedure of "becoming a micro, small or medium enterprise". Clause 2 (3) of the notification enunciates:- "An e-tender certificate namely, 'UDYAM registration certificate' shall be issued on completion of registration process." These certificates submitted by the respondent nos. 4 and 5 since were issued subsequent to the issuance of notification no. S.O. 2119 (E) dated 26th June, 2020 both the respondents were given UDYAM registration certificate instead of UDYOG AADHAR given to the petitioner prior to the issuance of notification and in terms of Clause 6 (7) of the said notification no enterprise shall file more than one UDYAM registration; any number of activities including the manufacturing or services or both may be specified or added in one UDYAM registration, which is why the certificates issued to respondent nos. 4 and 5 are indicating manufacturing as the major activity of the concerned enterprise and the enterprise was authorized to render or provide service as well.

10. Joining issue, Mr. Bandyopadhyay, learned Senior Counsel submits that the notification no. 2119E dated 26th June, 2020 being piece of subordinate legislation cannot override the statutory provision as laid down under Section 7 of the Micro, Small and Medium Enterprise Development Act.

11. It goes without saying that notification no. S.O. 2119 (E) dated 26th June, 2020 is subordinate legislation issued in exercise of the power conferred under Sub-Section 1 read with Sub-Section 9 of Section 7 together with other provisions laid down in the said Act. Sub-Section 9 of Section 7 enunciates:-

> *"Section 7 Classification of enterprises*
> *(1) xxxxxx*
> *(2) xxxxxx*
> *(3) xxxxxx*
> *(4) xxxxxx*
> *(5) xxxxxx*
> *(6) xxxxxx*
> *(7) xxxxxx*
> *(8) xxxxxx*
> *(9) Notwithstanding anything contained in section 11B of the Industries (Development and Regulation) Act, 1951 (65 of 1951) and clause (h) of section 2 of the Khadi and Village Industries Commission Act, 1956 (61 of 1956), the Central Government may, while classifying any class or classes of enterprises under sub-section (1), vary, from time to time, the criterion of investment and also consider criteria or standards in respect of employment or turnover of the enterprises and include in such classification the micro or tiny enterprises or the village enterprises, as part of small enterprises."*

12. Therefore, we do not find any reason to imbibe ourselves with the view catered by Mr. Bandyopadhyay, learned Senior Counsel, regarding the validity or applicability of the said notification based on which the Ministry of MSME, Government of India brought certain

changes towards classification of enterprise, registration of enterprises, composite criteria, investment, calculation of investment, process of registration etc.

13. The notification no. S.O. 2119 (E) dated 26th June, 2020 since has been issued in consonance with the statutory mandate as laid down under Sub-Section 9 of Section 7 of the Act, the concerned authority was absolutely justified in considering respondent nos. 4 and 5 eligible to have all benefits of MSME unit so declared in the NIT.

14. Even if it is assumed that enterprise with manufacturing as major activity cannot be treated at par with enterprise with service as major activity, then also selection of respondent nos. 4 and 5 cannot be held to be arbitrary, coloured with malafide or done in violation of natural justice. It was never declared as an essential condition in the NIT. Taking into consideration the well settled principle of judicial restraint, as well as facts and circumstances of the case, we do not find any reason to interfere with the process of selection or rejection of participant enterprises.

15. In ***Poddar Steel Corporation vs. Ganesh Engineering Works*** reported in **AIR 1991 SC 1579** Hon'ble Supreme Court held:-

> *"As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be*

> *classified into two categories those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases."*

16. Thus we do not find any reason to disagree with the view expressed by learned Single Judge. The appeal is devoid of any merit and is dismissed, however, without cost. With disposal of appeal CAN 1 of 2022 stands disposed of.

17. Urgent Photostat certified copy of this judgement, if applied for, should be made available to the parties upon compliance with the requisite formalities.

I agree

(Siddhartha Roy Chowdhury, J.)

(Moushumi Bhattacharya, J.)