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IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
ORIGINAL SIDE

APOT/328/2023
IA NO. GA/1/2023
RELIABLE FACILITY SERVICES PRIVATE LIMITED AND ANR.
VS.
GOVERNMENT OF WEST BENGAL, SERVICE THROUGH THE FOOD AND SUPPLIES DEPARTMENT AND ORS.
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BEFORE :
THE HON'BLE THE CHIEF JUSTICE T.S. SIVAGNANAM
AND
THE HON'BLE JUSTICE HIRANMAY BHATTACHARYYA
DATE : 11TH DECEMBER, 2023.

Appearance :
Mr. Utpal Bose, sr. Adv.
Mr. Soumabho Ghosh, Mr. Pushan Kar,
Mr. Sagnik Majumdar, Mr. Abhidipto Tarafdar,
Ms. Shreya Ghosh Dastidar, Ms. Dolan Saha, Advs.
...for appellants.

Mr. Sirsanya Bandopadhyay, Mr. Arka Kumar Nag, Advs.
...for respondents.

The Court :- This intra court appeal by the writ petitioner is directed against the judgment and order dated 6.9.2023 in WPO/1434/2023. The appellant participated in a tender called for by the department namely, The Food and Supplies Department of the Government of West Bengal for engagement of a contractor or agency for facility management services for Khadyashree Bhawan in the second floor of Old Khadya Bhawan and in Lake Garage. The appellant participated in the tender and it is not disputed that the bid submitted by the appellant was evaluated as L-1. The appellant was called for a meeting by the authorities on 24.5.2023 in the office of the respondent regarding a discussion pertaining to the financial bid evaluation and settling disputes, if any. The appellant participated in the said meeting. It appears that before the said meeting the appellant was informed by communication dated 6.4.2023 seeking justification of the price bid quoted by them as in the opinion of the Tender Inviting Authority the price bid was less than the estimated price in terms of the clause 8.9.5 of the Bid Conditions. Much earlier on 17.4.2023, the appellant was directed to demonstrate a sample of the work in presence of the Deputy Secretary of the respondent Department which they have performed and from the minutes of the tender committee dated 24.5.2023 it appears that there was some disputes with regard to the brand of glass cleaner which was to be used by the appellant in the cleaning process as and when tender being awarded to the appellant. We need not go into the said controversy as what we are concerned is as to whether the respondent Department was justified in canceling the bid submitted by the appellant forfeiting the earnest money deposit and also debarring the appellant from participating in future bids for five years. Elaborate submissions appear to have been made before the learned single Judge, who has upheld the decision of the respondent and aggrieved by the same the appellant has preferred this appeal. The entire dispute is in a very narrow campus involving interpretation of clause 8.9.5 of the Bid Conditions, which reads as follows :

> *"Clause 8.9.5: Additional Performance Security will be as per F.D.'s Notification No.4608-F[Y], dt.18.07.2018 when the bid price is 80% or less of the estimated price put to tender.*
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> *If the contractor quotes price below than 80% of the estimated price of the items other than Manpower Price, the contractor/agency will have to submit justification mathematically along with authenticated documents to support the low bid-price along with supportive documents, otherwise the client reserves the right that the bid may be cancelled and it may draw the forfeiture of the EMD amount along with other conditions to bar the said low bidder to take part in the future tender process of the Food and Supplies Department. "*

As could be seen from the above Condition, if a contractor quotes a price below than 80% of the estimated value price of the items other than Manpower price, the contractor/agency will have to submit justification mathematically along with authenticated documents to support the low bid-price along with supportive documents. The Condition also states that upon failure of the contractor/agency to submit justification mathematically along with authenticated documents to support the low bid-price the Condition empowers the respondent for reserving their right to cancel the bid and they may draw the forfeiture of the EMD amount along with other Conditions to bar the said low bidder to take part in the future tender process of the Food and Supplies Department. Admittedly, the bid submitted by the appellant is below the 80% of the estimated price of the items other than manpower. Hence, they were required to justify their low bid along with authenticated and supportive documents. This appears to have been done by the appellant as could be seen from their letter dated 12.4.2023 addressed to the Deputy Secretary of the respondent Department. In no uncertain terms they have stated that they get bulk quantity on the purchases and they are also in control of the material utilisation which enables them to offer a bid less than 80% of the estimated price. In the tentative monthly material list as found in Annexure A to the letter dated 12.4.2023 in serial no.4 the appellant has mentioned the product name of the glass cleaner as "Colin". The respondent Department has faulted the appellant for having quoted the said product by its product name since the appellant by a subsequent letter have withdrawn the same and stated that they will be using the product with product name R-3. In our considered view, this issue is of no significance, especially in the light of clause 4.1.19 of the Tender Conditions which only requires the agency to ensure supply all the best quality branded materials.

We find from the list of materials only three of the products have got a brand name namely, "'Harpic, Room freshener [Air] and Odonil'. The products are all described by the product name and not by the brand name. Therefore, even assuming that the appellant had offered to use Colin brand glass cleaner, all that the department could have done is to examine whether R-3 glass cleaner is equally efficient and if not appropriate advice could have been given to the appellant. In any event, the Tender Condition does not stipulate the product 'Colin' to be used. Therefore, we are of the view that the said issue being of trivial nature has been blown out of proportion for reasons best known. Be that as it may, what we are required to consider in the facts and circumstances is the correctness of the decision of the respondent in ordering forfeiture of EMD and also blacklisting the appellant for a period of five years from participating in any tender of the Food and Supplies Department. In the order of cancellation of the bid submitted by the appellant dated 30.6.2023 there is a passing reference that the earnest money deposit given by the appellant which is being forfeited and they are also barred from participating in future bids for five years. As seen from clause 8.9.5 of the Tender Condition it no doubt gives the power to the Tender Inviting Authority to forfeit the EMD along with other Conditions to bar the lower bidder from taking part in future tender process. The earlier part of clause 8.9.5 would also be relevant since a bidder, who quotes less than 80% of the estimated price is not automatically disqualified but he has given an opportunity to justify their low price by mathematical calculation and authenticated documents. Therefore, the respondents have reserved their liberty and their discretion to decide as to whether a person who has offered less than 80% of the estimated price can be awarded the contract. Therefore, an offer which is less than 80% of the estimated price would not result in automatic rejection of a tender. Thus, there is discretion vested with the appellant at that stage as well.

The second limb of clause 8.9.5 empowers the respondent Department to do one or both of the actions proposed therein. The use of the expression 'may' is very relevant which clearly indicates that there is discretion vested with the appellant to forfeit EMD along with other Conditions to bar the bidder from taking part in future tender process of the said Department. Thus, clause 8.9.5

gives the discretion to the authority and it cannot be right to state that merely because a bidder has offered less than 80% of the estimated price his bid will automatically be rejected and this will automatically result in forfeiture of EMD and as well as debarring the bidder from participating in the future tenders. The law is well settled that blacklisting of a contractor would tantamount to a civil death and since blacklisting results in serious civil consequence. It has been held that prior to taking such a drastic step an opportunity should be granted to the concerned person and such opportunity should be an effective opportunity and not a mere eye wash. That apart, the opportunity which has been held to be necessary in this aspect pre-supposes that the bidder/contractor is informed by a notice in writing which should clearly state as to how in the opinion of the Tender Inviting Authority, they are of the prima facie view that the earnest money paid by them is liable for forfeiture and that blacklisting should also be resorted to. Admittedly, in the facts and circumstances no such notice was given to the appellant. The reasoning given by the learned single Bench in this regard is not acceptable as we have found that clause 8.9.5 of the Tender Condition does not result in automatic cancellation of the bid and automatic forfeiture of the EMD or automatic blacklisting. That apart, on perusal of the resolution of the Tender Committee dated 24.5.2023 we find that nothing adverse has been recorded by the respondent Department except to state that the appellant had forwarded a legal notice alleging bias and arbitrary action on the part of the Food and Supplies Department and they have also stated that they are not willing to serve the department. This can hardy be a reason to blacklist the appellant for a period of five years and also simultaneously forfeit the earnest money deposit. Furthermore, we note that the entire tender has been cancelled and subsequently fresh tender appears to have been invited and third party has been awarded the contract.

Thus, for all the above reasons, we are of the view that the forfeiture of earnest money deposit of the appellant and blacklisting the appellant for a period of five years from participating in any tender process of the respondent Food and Supplies Department is arbitrary, illegal and not sustainable in law apart from being grossly disproportionate to the allegations made against the appellant.

Thus, for all the above reasons, the appeal is allowed.

The order passed by the learned single Bench is set aside. Consequently, the writ petition is allowed and the order impugned in the writ petition dated 30.6.2023 is quashed and the respondent Department are directed to refund the earnest money deposit which was forfeited within a period of fifteen days from the date of receipt of the server copy of this order.

Consequently, the application, IA NO. GA/1/2023 stands closed.

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(T.S. SIVAGNANAM)
CHIEF JUSTICE

(HIRANMAY BHATTACHARYYA,J.)

pkd/S.Das.