

D/L. 9.
January 29, 2024.
MNS.

WPA No. 1932 of 2024

Shri Sanjay Kumar Chel
Vs.
The State of West Bengal and others

Mr. Swarup Paul,
Mr. Guru Saday Dutta,
Mr. Anish Roy

... for the petitioner.

Sk. Md. Galib,
Ms. Tanwishree Mukherjee

...for the State.

1. Affidavit-of-service filed in Court today be kept on record.
2. The petitioner's challenge is against a particular clause of a Notice Inviting Tender (NIT) floated by the respondent authorities, that is, the Indpur Panchayat Samiti through its Executive Officer. In the said Clause, that is, Clause 2, it has been stipulated that the past experience has to be in respect of a tender issued not below the rank of the Executive Officer/Block Development Officer. It is submitted that the petitioner is equipped with exactly similar sought of work done previously for the same Panchayat Samiti, but

the certificate was issued by the Nirman Sahayak.

3. It is argued that the Clause-in-question is restrictive, discriminative and arbitrary. It is contended that in other similar tenders floated for the Panchayat Samiti, there is no such restriction regarding the tender having been floated by the Executive Officer/Block Development Officer. Hence, the impugned clause should be set aside on the ground of being discriminative and arbitrary.
4. Learned counsel places reliance on a co-ordinate Bench judgment rendered in *M/s. Rupa Enterprises Vs. The State of West Bengal and others (WPA 27778 of 2022)*, where the tender restricted the scope of past experience particularly to ESI hospitals which, it was observed, had narrowed down the field of participation and was restrictive and arbitrary, a clause which raises a presumption of collateral purpose.
5. The scrutiny, it is submitted, of a writ court is limited to the act of restricting competition only to particular classes of persons, which is satisfied in the present case as well.

6. Learned counsel appearing for the respondent authorities submits that it is well within the discretion of the Tender Issuing Authorities to interpret the clauses of the tender and to take a call on the exact requirements of the tender for the proposed work.
7. It is submitted that the Tender Issuing Authority has to have a play in the joints.
8. It is further argued that the tender-in-question was floated for a type of work which has a three-tier hierarchy. The lowest rung of the hierarchy is the Panchayat, for which tenders are generally floated and certificates issued at the level of the Nirman Sahayak. The second (higher) rung is the Panchayat Samiti, where the Executive Officer/Block Development Officer is the concerned Tender Issuing Authority. In the third and highest rung, that is, the Zilla Parishad, the Executive Engineer floats the tender and issues the certificates.
9. It is contended, by placing reliance on a set of instructions filed in Court today, that the Tender Committee comprised of the concerned personnel took a unanimous decision of including the said impugned clause.

10. That apart, it is argued that in a previous tender issued by the Zilla Parishad as well, a similar clause regarding restricting the past experience to tenders issued not below the rank of Executive Engineer or equivalent was introduced.

11. Hence, the discretion of the Tender Issuing Authority should not be disturbed.

12. Heard learned counsel.

13. An acid test with regard to the validity and reasonableness of a tender clause is, *inter alia*, whether there is nexus between the said clause and the purpose sought to be achieved by the tender.

14. In the present case, the tender-in-question contemplates fifteen isolated individual works for particular individual locations. The work regarding which the petitioner is concerned is the construction of solar skylight at Chakoltore Hari Mandir under Indpur Gram Panchayat.

15. Hence, looking at the nature of the isolated and independent stand-alone jobs sought to be achieved by the tender, the area-wise magnitude of work is not a relevant factor insofar as the number of locations at which the work is to be done simultaneously.

16.If the work was of such a nature that it had to be done simultaneously in respect of several locations, undoubtedly hierarchy would become relevant. This is because a Panchayat is comprised of lesser area than that covered by a Panchayat Samiti. Same applies to a Zilla Parishad which engulfs the areas covered by the Panchayat Samiti and the lesser area covered by a Panchayat.

17.However, in the present case, an isolated work is contemplated under the tender and as such physical area is not relevant factor or determinant. Thus, the magnitude does not depend on the area but of the type of experience.

18.The only consideration which is relevant is whether the participant bidder has similar job experience on a previous occasion as stipulated in the tender clause.

19.The fact that the tender was floated by an Executive Officer/Block Development Officer is also irrelevant since several other similar tenders which are contemporaneous were also floated for work to be done for the Panchayat Samiti as in the present case,

which are devoid of the restrictive clause which has been challenged herein.

20. Thus, the present tender stands on a similar footing as the other tenders for the Panchayat Samiti. The present restrictive clause would only curtail competition and be discriminative insofar as the bidders in the other tenders similarly placed as the petitioner are concerned.

21. Another important cardinal yardstick of any tender is to ensure the widest possible participation. Such very purpose would be frustrated if the Tender Issuing Authority for past experience is restricted to Executive Officer/Block Development officer, whereas similar tenders floated for the same Panchayat Samiti / other Panchayat Samitis in respect of other similar works do not contain such a restrictive clause.

22. Thus, the impugned clause does not have any nexus with the purpose sought to be achieved by the tender and hence is arbitrary and discriminative and liable to be quashed.

23. Accordingly, WPA No. 1932 of 2024 is allowed on contest, thereby setting aside the condition in Clause 2 of the impugned tender

document which restricts the previous job experience of the participant bidders only to tenders issued by persons not below the rank of the Executive Officer/Block Development Officer. The tender-in-question shall be deemed to exclude the said condition for all practical purposes from now on.

24. It is made clear that all the other conditions in the said tender document remain intact and nothing in this order shall have any bearing on those. Proceeding on such premise, the respondents shall continue with the tender process and ensure that the same reaches its logical culmination.

25. Since, due to the restrictive clause, the petitioner and the other similarly placed persons could not participate in the impugned tender process, the respondents shall issue appropriate notification extending the last date for filing of tenders by excluding the impugned clause for a further seven days from the date of such notice. Such notice shall be issued within 48 hours from now.

26. All the subsequent dates for opening of tender etc. and the schedule following therefrom shall also be accordingly extended keeping in view

the original time gaps left for the tender process.

27. There will be no order as to costs.

28. Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)