29.02.2024
Ct. no.654
Sl. No.1
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IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION

WPA 5656 of 2024

Sandip Kuila
Vs.
Union of India & Ors.

Mr. Sukanta Chakraborty
Mr. Ahindya Halder
..for the petitioner

Mr. Rudra Jyoti Bhattacharjee
Ms. Debjani Ghosal
Mr. Sauradip Dutta Chowdhury
... for the Union of India

Mr. Amit Kr. Nag
Mr. Partha Banerjee
Ms. Ranjabati Roy
... for the respondent nos.2 to 8

Affidavit of service filed on behalf of the petitioner is taken on record.

The petitioner by this writ petition has sought to cancel, rescind and/or set aside tender bearing e-Tender Ref No.RCC/ERO/37/2023-24/PT-149 (e- Tender ID 2024_ERO_175164_1) floated by the Indian Oil Corporation Limited (hereinafter referred to as the 'IOCL') and also for consideration of the representation made by the petitioner dated 10th February, 2024 by the respondent-IOCL.

The respondent-IOCL on 7th February, 2024 floated Notice Inviting e-Tender (in short, 'NIT') for award of contract for transportation of Indane LPG Cylinders in vertical position on unit rate basis, ex-Kharagpur Bottling Plant for the purpose of distribution On being aggrieved by the terms and conditions contained in the said 'NIT' published by the respondent-IOCL, the petitioner made a representation on 10th February, 2024 raising certain grievances such as the estimated value of works does not provide item wise break up of expenses, appointment of Md. Irfan Alam as contact person (execution stage) violates the general guidelines and lack of transparency. Since the respondent-IOCL did not take appropriate measures/action on the basis of the aforementioned representation, hence this writ petition is preferred in order to cancel, rescind and/or set aside the said 'NIT' floated by the respondent-IOCL.

Mr. Sukanta Chakraborty, learned Advocate for the petitioner submits that the 'NIT' on the face of it smacks of nepotism and mala fide inasmuch as the contact person (at execution stage) namely, Md. Irfan Alam previously violating terms and conditions of that tender issued work order in favour of M/s Armann, a proprietorship firm of his wife Reshma Khatun. However, the selfsame person has once again been appointed as a contact person (at execution stage). Thus, there is every possibility that the said contact person may by illegal act have the bid in favour of his near relative or to his wife.

Further a tender of the present nature involves various works on the part of the bidder who gets the work order such as appointment of drivers, helpers for trucks, appointment of labours for loading and unloading cylinders etc. As per tender the IOCL reserves the right to deduct any extra-expenditure from the pending transportation bill and/or security deposit but it does not specify the amount. Therefore, it is essential to give the item wise break ups of expenses relating to tender estimation. However, the instant tender fails to declare such item wise break ups of expenses. Accordingly, the terms and conditions of the tender are vague. Moreover, referring to the decision of the Hon'ble Supreme Court in *Civil Appeal No.3824 of 2023 (Balban Service Station versus Sandip Kuils & Ors.),* he submits that the Hon'ble Supreme Court in a particular set of facts where there was deviation from 'NIT' directed to re-do the process from the stage of deviation.

Referring to the order dated 22nd December, 2022 passed in *WPA 28643 of 2022 (Shri Milan Dhibar versus Indian Oil Corporation Limited & ors.)* he submits that the bid document of all the participants is required to be uploaded in the *website* of the oil company for the sake of transparency in the process of selection. However, the subject tender of IOCL has not made any provision for publishing the bid documents furnished by all bidders and allow the bidders to have access to such documents.

Since there is arbitrariness, mala fide and vagueness manifest from the terms and conditions of tender the same cannot be sustained and should be set aside. In support of his contention, he relies on a decision of the Hon'ble Supreme Court passed in ***Tata Cellular versus Union of India*** reported in ***(1994) 6 SCC 651***.

He further submits that the petitioner could not appear during the pre-bid meeting in order to ventilate his grievance, due to prevalence of an order passed against him by the Executive Magistrate under Section 144 of the Criminal Procedure Code.

In light of his aforesaid submissions, he prays for cancellation of the e-tender.

In reply to the contentions raised on behalf of the petitioner, Mr. Amit Kumar Nag, learned advocate for the respondent-IOCL at the outset submits that the objection to appointment of Md. Irfan Alam as a contact person (execution stage) is squarely based on assumption that there can be unfair practices adopted to grant the bid to a near relative of the said person. Be that as it may, the bidders are protected by the General Guidelines under '*Standard Tender Conditions for Contract of Vertical Transportation of LPG Cylinders by Road'* at page 46 (Clause 1.4) of the 'NIT' that near relatives of an employee responsible for award and execution of this contract in the corporation are not permitted to quote and if appointed/engaged is a violation of terms and conditions of 'NIT' and the Corporation reserves all the rights to make appropriate remedies.

The order passed in *Shri Milan Dhibar (supra)* by the Hon'ble Single Bench for uploading the bid document has been assailed in appeal and is *subjudice* before the Hon'ble Division Bench in MAT 2101 of 2022 *(IOCL versus Milan Dhibar)*. As on date there is no policy of the corporation to make public the bid document of all the bidders.

Moreover, 'NIT' has specified that the rates to be offered by the tenderer shall include cost under certain heads which has been spelt out in Clause 17 of General Instruction to Bidders (GITB) at page 27 of the 'NIT' as well as at clause no.8.0 of the '*Special Conditions for Vertical Transportation of LPG Cylinders by Road'* at pages 61 to 63 of the 'NIT'. Further, the bid having been invited for the purpose of transportation the Indane LPG Cylinder cannot be valued itemwise and therefore, the total estimated value of the work has been projected in the 'NIT'. The aforesaid aspect of item wise break up of costs has been discussed in the pre-bid meeting, the minutes of which has been uploaded in the official *website* of the Oil Corporation. He files a copy of minutes of pre-bid meeting, which is taken on record.

Referring to the decision of the Hon'ble Supreme Court in ***Afcons Infrastructure Limited versus Nagpur Metro Rail Corporation Limited and Another*** reported in ***(2016) 16 SCC 818*** he submits that mere disagreement with the decision making process or the decision of administrative authority is no reason for a constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitution court interferes with the decision-making process or the decision.

Relying on the decision of the Hon'ble Supreme Court in ***N. G. Projects Limited versus Vinod Kumar Jain and Others*** reported in ***(2022) 6 SCC 127***, he submits that the Court while deciding the matters relating to contract/tender does not sit as a Court of Appeal but merely reviews the manner in which the decision was made. In contract involving technical issues the Court should be reluctant to interfere.

So far as the decision of Hon'be Supreme Court in *Civil Appeal No. 3824 of 2023 (Bolbam Service Station versus Sandip Kuila & Ors.)* is concerned, he submits that it is factually different since the issue for consideration was with regard to the manner in which condition VA(d) of the tender was construed while considering the age of the vehicle for the purpose of ultimately considering the successful bidders on that aspect.

The decision in *Shri Milan Dhibar (supra)* is also factually different since the petitioner in the said writ petition challenged the letter of acceptance given by IOCL to private respondent and the Hon'ble Court passed direction for uploading the bid document only in respect of the particular bid and cannot be applied generally to all the bids.

In light of the aforesaid submission he prays for dismissal of the writ petition.

Mr. Sukanta Chakraborty, learned advocate for the petitioner submits that the decision of the Hon'ble Court cited on behalf of the respondent-IOCL is factually different. The representation of the petitioner had not been dealt with properly by the respondent-IOCL. The condition enumerated in the 'NIT' being vague should be set aside and rescinded.

Learned advocate for the respondent-Union of India leaves the matter to the discretion of the Court.

Having heard the learned advocates for the respective parties following issues have been fallen for consideration.

Firstly, whether appointment of Md. Irfan Alam as contact person (at execution stage) is mala fide;

Secondly, whether the tender is vague for the reason of lack of item wise break ups of expenses relating to tender estimation.

Lastly, whether the absence of provision for uploading the bid document of all the bidders in the official *website* of the Corporation makes the 'NIT' bad in law.

With regard to first issue challenge has been thrown to the subject tender on the ground of appointment of Md. Irfan Alam as contact person (at execution stage). It is the contention of the petitioner that the contact person (at execution stage) namely, Md. Irfan Alam previously violating terms and conditions of that tender issued work order in favour of M/s Armann, a proprietorship firm of his wife Reshma Khatun. However, the selfsame person has once again been appointed as a contact person (at execution stage). Thus, there is every possibility that the said contact person may by illegal act have the bid in favour of his near relative or to his wife.

On perusal of the 'NIT' it appears that said Md. Irfan Alam is a contact person (execution stage). The contention of the petitioner that the wife of the contact person (at execution stage) may be accepted as a successful bidder, is a mere apprehension at this stage. Be that as it may, the 'NIT' in Clause 1.4 of the General Guidelines under *'Standard Tender Conditions for Contract of Vertical Transportation of LPG Cylinders by Road'* at page 46 provides as hereunder:-

> *"1.4. Near relatives (as per list enclosed) of an employee responsible for award and execution of this contract in the Corporation are NOT PERMITTED to quote. Bidder shall be obliged to intimate Corporation the names of persons who are near relatives of any employee of Corporation and who are working with the bidder in their employment or are subsequently employed by them. Any violation of this condition, even if detected subsequent to the*

> *award of contract, would amount to breach of contract on bidder's part entitling the corporation to all rights and remedies available thereof."*

Thus, even if for the sake of argument the contention of the petitioner is assumed to be correct, the 'NIT' under the aforesaid clause has protected the right of the bidders by providing that the near relatives of the employee responsible for award and execution of the contract are not permitted to quote and any violation of the condition even if detected subsequently would amount to breach on bidder's part and corporation has every the rights and remedies available thereof. Therefore, the apprehension of the petitioner that the bid may be illegally given to a near relative of the contact person (at execution stage) does not hold good, since the 'NIT' protects the bidders from such illegal action.

Coming to the next issue whether the tender is vague for the reason of lack of item wise break ups of expenses relating to tender estimation. The 'NIT' has quoted the estimated value of work at Rs.1,15,65,19,993/- (Incl. GST @5%) for five years. The estimated value of work as quoted has been challenged on the ground that it does not contain item wise break up of expenses relating to tender estimation. This Court is not oblivious to the fact that the 'NIT' has been floated for contract of transportation of Indane LPG Cylinder. The 'NIT' under General Instructions to Bidders (GITB) in Clause 17 at page 27 provides as hereunder:-

> *"17. The rate offered by the tenderer shall include all cost towards operation of their trucks including unloading and loading of cylinders at Bottling Plant as well as at distributors premises, cost of vehicle and their maintenance, cost of fuel, lubricants, tyres including driver/helper and other statutory costs like insurance, registration and fitness, road tax and other applicable levies etc. excluding GST & toll charges. Toll charges, as applicable, shall be reimbursed as per the Govt. notified rates against each trip through IOC approved routes."*

The 'NIT' further under '*Standard Tender Conditions for Contract of Vertical Transportation of LPG Cylinders by Road'* specifies rates in Clauses 8.1 to 8.9 at page 61 to 63. Moreover, the eventuality of extra-deduction from transportation bills/security deposition has been clearly spelt out in clause 10.7 at page 67 of the 'NIT' in General Instruction under *'Special Conditions for Vertical Transportation of LPG Cylinders by Road'*. Further the extra deduction is in respect of a future happening which cannot be assessed on the date of 'NIT'. Therefore, the contention of the petitioner that rates have not been duly specified is short of merit.

The last issue is whether the absence of provision for uploading the bid document of all the bidders in the official *website* of the Corporation makes the 'NIT' bad in law. Mr. Sukanta Chakraborty, learned advocate for the petitioner referring to a decision of this Court in *Shri Milan Dhibar (supra)* has urged that the bid document of the bidders should be uploaded for the sake of transparency in selection. It is informed by the learned Advocate for the respondent-IOCL that the said order passed in *Shri Milan Dhibar (supra)* is *subjudice* in appeal being MAT 2101 of 2022. That apart, the fact of the case was that the petitioner challenged the letter of acceptance given by IOCL to the private respondent. In such backdrop, the Court directed for uploading of the bid document. Reverting to the present case the pre-bid meeting minutes shows that the matter of uploading the bid documents of all the bidders was discussed and it is stated therein that till date no policy has been taken by the corporation for making the bid document furnished by the bidders to make it public. Since the matter of uploading of bid document in *Shri Milan Dhibar (supra)* is *subjudice* before the Division Bench, this Court recuse from making any observation in this regard of uploading the bid document. Be that as it may, the absence of provision for uploading the bid document of all the bidders in the official *website* of the Corporation does not altogether make the 'NIT' arbitrary.

The decision of Hon'ble Supreme Court cited on behalf of the petitioner in Court in *Civil Appeal No.3824 of 2023 (Balban Service Station versus Sandip Kuils & Ors.)* is factually different inasmuch as the issue before the Hon'ble Court was with regard to manner in which the condition VA(d) of the 'NIT' was construed while considering the age of the vehicle for the purpose of ultimately considering the successful bidder on that aspect. The Supreme Court taking into consideration the entire facts directed to re-do the process from the stage at which the deviation had occurred.

It has been urged on behalf of the petitioner that he could not appear during pre-bid meeting for the reason of prevalence of order under Section 144 of Criminal Procedure Code passed by Executive Magistrate against him and his grievance as to the 'NIT' has remained unanswered. It is pertinent to note that respondent-IOCL has made replies to the queries raised by the petitioner through his letter dated 10th February, 2024.

The Hon'ble Supreme Court in *Tata Cellular (supra)* has laid down the following principle of judicial review and its scope while dealing with Government contract and tender.

> *"**94.** The principles deducible from the above are:*
>
> *(1) The modern trend points to judicial restraint in administrative action.*
>
> *(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
>
> *(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.*
>
> *(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.*

(5) *The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.*

(6) *Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.*"

The Hon'ble Supreme Court in *Afcons Infrastructure Limited (supra)* observed as follows:-

*"**13.** In other words, a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision.*

x x x

***15.** We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."*

In *N.G. Projects Limited (supra)* the Hon'ble Supreme Court has considered the principle laid down in *Tata Cellular (supra)* as well as *Afcons Infrastructure Limited (supra)* and observed as follows:

> "***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."*

From the aforesaid principles, it manifest the decision to accept the tender or award the contract can be tested not only by the application of principles of reasonableness but must be free from arbitrariness not affected by bias or actuated by malafides. The facts pleaded and grounds advanced in the present writ petition do not make out any case of arbitrariness, biasness or malafides or unreasonableness calling for interference by this Court.

In view of the above discussion and bearing in mind the principles as laid down by the Hon'ble Supreme Court in the aforesaid decisions the present writ petition falls short of merit.

Accordingly, the writ petition being **WPA 5656 of 2024** is dismissed.

All connected applications, if any, stand dismissed.

There will be, however, no order as to costs.

Interim order, if any, stands vacated.

All concerned parties shall act in terms of the copy of the order duly downloaded from the official website of this Court.

Urgent photostat copy of this order, if applied for, be given to the parties upon compliance of necessary legal formalities.

(Bivas Pattanayak, J.)