

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No. 7987 of 2024

+

CAN 1 of 2024

+

CAN 2 of 2024

Siboram Bhatta

Vs.

State of West Bengal and others

For the petitioner : Mr. Utpal Bose, Sr. Advocate,
Mr. Chayan Gupta,
Mr. Ankan Rai,
Mr. Sayantan Chatterjee,
Mr. Ratnesh Kr. Rai,
Ms. Sakshi Kejriwal,
Ms. Priyanshi Bajaj

For the State : Mr. Anirban Roy,
Mr. Biswabrata Basu Mallick,
Mr. Tanoy Chakraborty,
Mr. Rezaul Hossain

For the respondent no.5: Mr. Rishav Banerjee,
Mr. Supriyo Gole,
Ms. Prerna Shaha

For the respondent no.6: Mr. Sakya Sen,
Mr. Sumanta Ganguly

For the respondent no.7: Mr. Abhrajit Mitra, Sr. Adv.,
Mr. Satadeep Bhattacharya,
Mr. Tanuj Kakrania,
Mr. S. R. Kakrania,

Hearing concluded on : 09.04.2024

Judgment on : 18.04.2024

Sabyasachi Bhattacharyya, J:-

1. The petitioner participated in a tender floated by the respondent-authorities for supply of medical gases in cylinders to various hospitals. It is contended by learned counsel for the petitioner that the rejection of the petitioner's technical bid was perverse. It is argued that Clause 3 of the eligibility criteria of the tender document required that the bidder must be a manufacturer and bulk filler of either medical oxygen or medical nitrous oxide and not manufacturers of all kinds of medical gases forming the subject-matter of the Notice Inviting Tender (NIT), being medical Oxygen, medical Nitrous Oxide and Carbon Dioxide. A bidder, according to the tender document, should only have the capability to supply all three gases but did not require a bidder to manufacture all three.
2. Clause 11 of the NIT stipulated that the bidders have to have at least three years' experience in the field of production and selling of medical gases and did not mandate such experience in each or all of the three medical gases. The petitioner, it is argued, had the requisite three years' experience in production and selling of medical Oxygen and as such qualified on the technical requirements.
3. Although the terms of the NIT did not require three years' experience in production of all medical gases, the petitioner also had requisite three years' experience in production and selling of medical Nitrous Oxide. The first ground of rejection is thus illegal, since the respondents relied on the petitioner not meeting the requirements of

medical Nitrous Oxide whereas it did meet the requirements for Oxygen.

4. Learned counsel also challenges the second ground of rejection regarding Cash Reserve Requirement. It is argued that the same was a non-essential criterion, which was evident from the conduct of the respondent-authorities, since the said condition was not insisted upon in the case of respondent no.6, one of the successful bidders at the technical stage. Learned counsel places much reliance on the non-fulfilment of MTC (India) Gases Private Limited, the respondent no.6, regarding cash reserve and argued that the said entity was on similar footing as the petitioner but the petitioner was discriminated against, thereby violating Article 14 of the Constitution of India.
5. The petitioner also challenges the arguments of respondent no.6 on such count. Although respondent no.6 contends that the zones for which it was qualified are different from those for which the petitioner's bid was rejected, the petitioner argues that the standards could not be different for the different zones, since the tender document contemplated uniform eligibility criteria for all the zones.
6. Learned counsel also seeks to distinguish the judgments cited by the respondents.
7. The respondents argue that the petitioner, not being a technically qualified bidder, has no *locus standi* to prefer the instant challenge. It is argued that all the Clauses including Cash Reserve were essential conditions of the tender.

8. Respondent no.6 controverts the allegation that it did not meet the cash reserve criterion. By placing reliance on the documents pertaining its declaration, the said respondent argues that a uniform short-fall notice was given to all the bidders who fell short on the technical qualifications, including the respondent no.6 and the petitioner. The petitioner participated at that stage and as such cannot now resile from the position by challenging the short-fall notice itself. After such notice, the minor errors which were there in the initial submission of bid were rectified by the respondent No.6.
9. Learned counsel for the respondent No.7 argues on similar lines and submits that Clause 5 of the tender document requires a subjective satisfaction of the tendering authority. It is argued that it is well-settled that the Tender Inviting Authorities are the final judge of the interpretation of the tender Clauses. Learned counsel for the respondents No.7 also argues that the petitioner seeks to apply the negative equality doctrine by arguing that since respondent No.6 did not meet the eligibility criteria but was technically qualified, the petitioner also has a similar right. However, such negative equality cannot be claimed in law. It is reiterated that in view of the petitioner, having failed to meet the eligibility criteria, was rightly turned down at the technical stage.
10. Learned counsel for the respondent No.5 places reliance on *Raunaq International Ltd. v. I.V.R. Construction Ltd. and others*, reported at (1999) 1 SCC 492 where the Supreme Court observed that the challenger to the tender itself did not fulfill the requisite criteria and

did not possess the prescribed experience qualification. Therefore, it was held, any judicial relief at the instance of a party which does not fulfill the requisite criteria seems to be misplaced.

11. Learned counsel next cites *S.S. & Company v. Orissa Mining Corporation Limited*, reported at (2008) 5 SCC 772 where it was held that it is axiomatic that the Corporation is the best judge of its interests and needs and it is always open to it to suitably modify or change the eligibility criteria so as to best serve its purposes.
12. Reliance is next placed on *Tata Motors Limited v. Brihan Mumbai Electric Supply & Transport Undertaking (BEST) and others*, reported at (2023) SCC OnLine SC 671 for the proposition that the court ordinarily should not interfere in matters relating to tender or contract, to set at naught the entire tender process at the stage when the contract is well underway, which would not be in public interest.
13. Learned counsel appearing for respondent no. 5 next cites *Reliance Telecom Limited and another v. Union of India and another*, reported at (2017) 4 SCC 269 for the proposition that the terms of the invitation to tender cannot be open to judicial scrutiny because it is in the realm of contract and the Government must be allowed to have a fair play in the joints as it is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. The owner or employer of a project, it was held, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. Thus, it is argued that the writ petition ought to be dismissed.

14. Upon hearing learned counsel, what acquires relevance is that the petitioner himself did not qualify at the technical stage. Admittedly, the cash reserve requirement was not met by the petitioner. The petitioner seeks to slip past such deficiency by arguing that cash reserve ratio was not a necessary eligibility criterion and as such could be waived. It is also argued that the conduct of the respondents in waiving similar deficiency of respondent No.6 itself relegates the cash reserve condition to a non-essential one.
15. To examine such argument, the tender document dated November 24, 2023 is required to be looked into. Annexure-A thereof stipulates eligibility criteria for participating in the tender. As rightly pointed out by learned counsel for the respondent No.5, the very first sentence of the said Annexure states that all the criteria are *essential and must be met* for being successful in the technical bid, thus making the said criteria essential ones for eligibility.
16. The argument of the petitioner, that the conduct of the respondents-authorities rendered the cash reserve condition non-essential, is defeated on two counts. First, the respondents have shown from the document annexed to the writ petition that the respondent No.6 did actually meet the cash reserve criterion after the short-fall notice was uniformly given to all deficient bidders. Having taken advantage of the short-fall notice and having not challenged the same at the relevant juncture, the petitioner cannot now argue that the said opportunity was beyond the tender terms.

- 17.** Apart from the respondent No.6 having met the cash reserve criterion, the petitioner seeks to assert a negative equality which is not permissible in law. It is cliché and proverbial that “two wrongs do not make a right”. Even if it were the case that one of the bidders had been permitted to commit an illegality, the same does not automatically clothe another deficient bidder with a right to have the same unlawful advantage given to him. Hence, on both the above counts, the petitioner’s argument fails.
- 18.** The ratio laid down in *Raunaq Internation (supra)* is apt in the context. As held therein, any judicial relief at the instance of a party which does not itself fulfil the requisite criterion is misplaced. Hence, the petitioner does not have the right, being itself ineligible, to open up for scrutiny the exercise under the tender document.
- 19.** Insofar as the other ground of the petitioner is concerned, the petitioner does not qualify on the said count as well. The reasons for the petitioner’s bid being rejected were clearly given in the bid summary notice dated February 19, 2024. The same was supplemented by the e-mail communication dated February 28, 2024. The respondent authorities complied with all norms of natural justice and went a step ahead in considering in detail the request of the petitioner for re-evaluation of its technical bid. By the e-mail dated February 28, 2024, elaborate reasons, which are not even required in an administrative action, were given for the rejection. Coupled together, the said two sets of reasons suffice to justify the rejection of the petitioner’s bid. It is seen from the rejection that not only was the

petitioner deficient on past experience in respect of Nitrous Oxide, having a mismatch on the three years' experience criterion in its document, no document for production for three years was also furnished by the petitioner.

- 20.** Over and above, even regarding medical Oxygen, the refilling sought to be substantiated by the petitioner, as per the rejection reasons, were beyond those approved by the terms and conditions of the earlier tender. Hence, the petitioner was deficient on the yardstick of past experience as well as per the terms and conditions of the present tender.
- 21.** Non-supply/irregular supply of medical oxygen in the previous tender was also a valid ground for rejection of the petitioner's bid, since it vitiated the petitioner's past experience in such field. Thus, the petitioner's deficiency not only touched medical Oxygen production, manufacturing, filling and bulk supply, it also pertained to medical Nitrous Oxide, hence vitiating the entire bid of the petitioner.
- 22.** As held earlier, the petitioner admittedly failed on the Cash Reserve criterion even after its attempt to rectify the same subsequent to the short-fall notice. There was a mismatch in the Cash Reserve documents submitted by the petitioner, which was never explained by the petitioner at any point of time. The defence of the petitioner against such mismatch was a negative equality argument which has been turned down above.
- 23.** Furthermore, since the petitioner itself was deficient, it could not be said to have the right to challenge the tender process further, as even

if the challenge succeeded, the petitioner would not have any cause of action, since it was itself deficient on several counts and never qualified at the technical stage itself.

- 24.** In any event, the respondent No.6 has been held to fulfill the criteria and it is the perception of the Tender Inviting Authorities, in the absence of any *mala fides* or unreasonableness or arbitrariness, which has primacy over the Court's notions.
- 25.** Accordingly, the present challenge fails on all counts.
- 26.** This Court does not find any unreasonableness, arbitrariness or perversity in the decision-making process of the Tender Inviting Authorities, who were at liberty to interpret the terms of the tender documents. In fact, the interpretations advanced by the Tender Inviting Authorities are not found to be deficient or unreasonable but are in consonance with the tender document itself.
- 27.** The respondent-authorities went a step ahead in assigning specific and clear reasons/clarifications for the refusal of the petitioner's bid upon a re-consideration of the petitioner's rejection. Such re-considered reasons are elaborate and cannot be faulted on any count whatsoever.
- 28.** In view of the above discussions, the petitioner does not have any valid ground or the right to challenge the tender process. No fault can be found with the decision-making process of the Tender Inviting Authorities.
- 29.** Accordingly, WPA No. 7987 of 2024 is dismissed on contest.

30. Consequentially, CAN 1 of 2024 and CAN 2 of 2024 also stand disposed of.
31. There will be no order as to costs.
32. Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(**Sabyasachi Bhattacharyya, J.**)