IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
(APPELLATE SIDE)

Present:
The Hon'ble Justice Rai Chattopadhyay

W.P.A No. 9047 of 2023

Quality Caterer & Anr.
Vs.
ESI PGIMSR & ESIC Medical College & ESIC Hospital & ODC (EZ) Joka & Ors.

For the Petitioner : Mr. Sirsanya Bondopadhyay, Ld. J.S.C.
: Mr. Arka Kr. Nag,
: Ms. Payal Mishra.

For the Respondent nos. 1 & 2 : Mr. Siv Chandra Prasad.

Heard on: **22/03/2024**

Judgment on: 22/03/2024

Rai Chattopadhyay, J.

(1) The writ petitioner has challenged the alleged lack of openness, transparency and fair dealing with it, by the respondents No.1 & 2 authorities, in a process of tender, whereas the respondent authorities' defence mainly consists of the fair process that was conducted and the alleged malfeasance of the writ petitioner, who they claim have come to court with unclear hands and is therefore not entitled to equitable relief. The writ petitioner has challenged the outcome of *Reverse Auction* in the tender process, being bid No. *GEM/2023/B/3140298.*

(2) The tender was invited by *ESIC Hospital & Medical Collage, Joka, Kolkata*, for the works *"Healthcare Kitchen & Diatary Services"*, for a contract period of two years. The bid opened on 16th February, 2023 at 13:38:37 hrs and ended on 3rd March, 2023 at 14:30:00 hrs. the bid opened on the portal of Government eMarket place (GeM – in short). Bid identification Number was *GEM/2023/B/3140298*.

(3) The writ petitioner participated along with the other bidders and submitted the earnest money deposit to the tune of Rs.6,00,000/-. The writ petitioner succeeded in technical evaluation and had emerged as the *"highest quoting bidder"*, in the technical bid. Till this time there would not be any reason for grievance of the petitioner, but not thereafter.

(4) For the *Reverse Auction*, that is, the financial bid, the bid identification number would change and henceforth be *GEM/2023/R/189254*. The very first grievance of the writ petitioner would be that he has never been notified as regards the said new bid identification number. Also, that the invitation to participate in the *Reverse Auction* would not mention any reference whatsoever, to the technical bid details, so that the said invitation may be found to be related with the same tender, in technical bid of which, the writ petitioner has emerged as the *"highest quoting bidder"*. Thus, the petitioner's first grievance is of misrepresentation and suppression of material details to it, leading to the unfairness of the process.

(5) The writ petitioner says that for the reasons as stated above, he had missed the opportunity to take part in the financial bid. Or in other words, he was misrepresented and misdirected leading to loss of his opportunity, to take part in the financial bid.

(6) The petitioner's further grievance is that in spite of its not participating in the financial bid, in the process, the *Reverse Auction* status would enlist its name as the *"L-3"*, with the quoted price of Rs.5,20,47,200/-.

(7) The writ petitioner alleges that the entire process of tender has been non-transparent, misleading and unfair and it seeks setting aside of the same from the stage of financial bid.

(8) The respondent authorities, that are, the respondent Nos. 1,2,6 and 7 have made out a case, in their affidavit-in-opposition regarding the writ petitioner having played a foul play, by intentionally not participating in the financial bid, in spite of being notified, allegedly in order to frustrate the entire tender process and thereby depriving a legitimate successful bidder from getting the work order. In the affidavit – in – opposition, the respondents have stated that in spite of quoting a price ofRs.5,20,47,200/-, the writ petitioner uploaded the supporting document being detailed expenditure of Rs.2,45,59,620.90/-, for one year, though the tender being floated for a quotation, for 2 years. Even, if the said quoted price, as per the annexed document by the writ petitioner would be considered, the respondents say, that the petitioner's bid price would come to Rs.4,91,19,241.80/-, which would be greater than the bid price of the other two tenderers. Thus, the respondents have stated that, by an absolutely transparent and fair process, the lowest bidder has been chosen for the works as indicated in the tender. The said respondents would say that there would not be any reason valid enough for this Court to interfere into the said process and that the writ petition being devoid of any merit would be liable to be dismissed.

(9) Mr. Bandyopadhyay has appeared on behalf of the writ petitioners, being assisted by Mr. Nag and Ms. Mishra. He would submit firstly that the writ petitioner is a wellknown and well reputed concern, operating in the field of service, required by the tendering authority. Accordingly, it has put in stake the amount of earnest money deposit to the tune of Rs.6,00,000/-, in order to participate in the tender process. In the first round, it has emerged as the *"highest quoting bidder"*, in the technical bids. That, it had expected and waited for the financial bid to open, so that it could participate and compete. According to Mr. Bandyopadhyay, this opportunity has, however, been denied to his client and that too, unfairly. The allegation of lack of transparency in the process has been raised by Mr. Bandyopadhyay, on the ground that the writ petitioner has never been notified with the information of change of bid identification number after completion of the process of technical bid. He says that the same has prejudiced his client immensely and irreparably. He indicates that the invitation by the concerned authority, inviting the successful technical bidders to participate in the financial bid would bear a new identification number, that too without any reference to any of the details of the previous part of the process, that is the technical bid part. According to Mr. Bandyopadhyay this has been the most unjust and unfair process, in so far as the respondent authorities have deprived his client, a successful technical bidder, from participating in the final round of the tender process that is a financial bid, by suppressing vital and relevant information from it. According to Mr. Bandyopadhyay, sudden unnotified change in the bid identification number, would lead to uncertainty which is counter productive of a fair and transparent tender process. On this, he has referred to a judgment of the Hon'ble Supreme Court, wherein while deciding the issues involved the court has deprecated any uncertainty to be existent in the tender process. The court held that in such a case the process would suffer with lack of transparency and gross unfairness. It is a judgment reported in ***(1997) 1 Supreme Court Cases 53 (Dutta Associates Pvt Ltd. Vs Indo Merchantiles Pvt Ltd & Others).***

(10) Mr. Bandyopadhyay would further refer to *'clause 8'* of the bid document. The same says as follows:

> ***"8. Reverse Auction would be conducted amongst all the technically qualified bidders except the Highest quoting bidder. The technically qualified Highest Quoting bidder will not be allowed to participate in a RA. However, H-1 will also be allowed to participate in RA in the following cases.***
> ***i. If number of technically qualified bidders are only 2 or 3.***
> **** ** ** ** **"**

(11) According to him, enlistment of the writ petitioner in the *Reverse Auction* status is only fallacious as the writ petitioner has not even been able to participate in the *Reverse Auction,* due to the malafide exercised by the respondent authorities by suppressing the fact and not letting it to be disclosed in due course of time. He says that there has also been violation of the above noted *'clause 8'* of the bid document, in view of the fact that his client being the highest technical bidder, should have been allowed to participate in the financial bid, as the number of technically qualified bidder in this case was *3*. He says that his client's case would have lawfully come under the provision of *'sub clause – i'* of *'clause 8'* of the bid document, as mentioned above.

(12) According to Mr. Bandyopadhyay, in this case there has also been substantial violation with respect to the provisions under Rule 167 of the General Financial Rules, 2017, the said provision lays down as follows:

> ***"Rule 167 – Electronic Reverse Auction***
> *** ** ** ***
> ***(iii) a procedure for electronic reverse auction shall include the following, namely:***
> ***(a) the procuring entity shall solicit bids through an invitation to the electronic reverse auction to be published or communicated in accordance with the provisions similar to e- procurement; and***
> ***(b) the invitation shall, in addition to the information as specified in e-procurement, include details relating to access to and registration for the auction, opening and closing of the option and Norms for conduct of the auction."***

(13) He says that in the process of *Reverse Auction*, no such open invitation has ever been floated by the procuring entity/respondents, in this case. Thus, the process suffers from the statutory violation also, rendering it to be a nullity in the eyes of law. He says further that the 'Level playing field' being an important concept of article 19 (1)(g) of the Constitution of India and the 'Right to life', as per Article21 of the same, having included an "opportunity" too, such vital constitutional rights of his client has been seriously jeopardised by the purported action of the respondent authorities, not maintaining transparency and fairness into the entire process of tender. He says that this would entail the entire process to be vitiated. On this, Mr. Bandyopadhyay has relied on another judgment of the Hon'ble Supreme Court reported in ***(2007) 8 Supreme Court Cases 1 (Reliance Energy Ltd and Another vs Maharashtra State Road Development Corporation Limited and Others).***

(14) Mr. Bandyopadhyay has sought relief of the writ petitioner, in terms of its prayers made in this writ petition.

(15) Mr. Prasad is representing the said respondents. His first contention would be that in an electronic portal, where the buyers and the sellers meet and transactions are made only through electronic media auction, there would not be any scope for exercise of any malpractice, defeating the portal programming. Accordingly, he has outrightly denied all the allegations made by the writ petitioner against his clients, that is, the procuring respondent authorities. Respondent's specific case is that the writ petitioner, inspite of having knowledge of the *Reverse Auction,* has intentionally refrained from participating therein. Having opted not to participate, the writ petitioner should not be granted opportunity, any further, defeating thereby the valid right accrued in favour of the successful bidder, in the financial bid.

(16) Mr. Prashad would further submit that the writ petitioner has not come before the court to seek an equitable relief, with clean hands. He says that the petitioner's contentions suffered with untruthfulness and misrepresentation. Whereas on the other hand, according to Mr. Prashad, the entire tender process being conducted through electronic media, has been left with least or no scope for any manipulation as alleged.

(17) Mr. Prashad has relied on two Supreme Court Cases, in his support, that are,

(i) ***Vivek Narayan Sharma & Ors.-vs-Union of India & Ors*** reported in ***(2023) 3 SCC 1***,

(ii) ***Tata Cellular vs Union of India*** reported in ***AIR 1996 SC 11***.

(18) The writ petitioner is the highest bidder, in the tender process, at the first round of technical bid and evaluation. According to *'clause 8'* of the bid document, as mentioned above, therefore the writ petitioner would not have been allowed to take part in the subsequent stage of the process, that is, the *Reverse Auction*/financial bid. But, according to the respondents, he was allowed to take part in the financial bid/ *Reverse Auction*, as the number of technically successful bidder reduced from 4 to 3, due to ineligibility otherwise of one of the technically successful bidder. Therefore, as per the provision in the bid document, the writ petitioner could not have been eligible to take part in the *Reverse Auction*, under normal circumstances. Had there been any change in such circumstances, as it happened in this case, that the number of successful technical bidders was reduced from 4 to 3, such a change in circumstances ought to have been informed to the writ petitioner beforehand, along with the information of his eligibility to participate in the *Reverse Auction* process.

(19) An unbiased and transparent disposition of public procurement is the essence of a fair tender process, to achieve the highest goal of affording equal opportunity to the bonafide bidders, with the terms and conditions which are no way ambiguous, which allow equal opportunity to all and equal treatment of the bidders. The trait is that the decision–making process and actions pursuant thereto should be unbiased and there should be no preferential treatment (to individuals or firms) given that public procurement activities are undertaken with public funds. Transparency and fairness is expected at all the stages of the process, be it before, at the time of continuance and also at the time of termination of such a process undertaken. There are some basic principles of the tendering process that makes it one of the most effective and beneficial long-term opportunities for a business. In India, government eProcurement has come a long way. From manual paper-based tendering, the process today has moved online, to keep tendering fair, competitive, and transparent.

(20) In ***Uflex Ltd. v. Government of T.N.*** reported in ***(2012) 1 Supreme Court Cases 165***, the Supreme Court stated that the enlarged role of the Government in economic activity and its corresponding ability to give economic "largesse" was the bedrock of creating what is commonly called the "tender jurisdiction". The objective was to have greater transparency and the consequent right of an aggrieved party to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India beyond the issue of strict enforcement of contractual rights under the civil jurisdiction. The requirement to maintain a transparent, fair and open process has been upheld by the said Court in the judgment of ***Dutta Associates Private Limited (supra)***, in the following words:

> **"7. ** ** ****
> ***We reiterate that whatever procedure the Government proposes to follow in accepting the tender must be clearly stated in the tender notice. The consideration of the tenders received and the***

> ***procedure to be followed in the matter of acceptance of a tender should be transparent, fair and open. While a bona fide error or error of judgment would not certainly matter, any abuse of power for extraneous reasons, it is obvious, would expose the authorities concerned, whether it is the Minister for Excise or the Commissioner of Excise, to appropriate penalties at the hands of the courts, following the law laid down by this Court in Shiv Sagar Tiwari v. Union of India [(1996) 6 SCC 558 and (1996) 6 SCC 599] (In re, Capt. Satish Sharma and Sheila Kaul).”***

(21) Therefore, in case of a manifest bias or abuse of power to result into unfairness of the process undertaken, the Court is authorised to exercise its power of judicial review, to look into the propriety of the process and in a fit case interfere into the same. The most important principle of tendering is to assess all tender applications fairly without any bias. Once the tender evaluation process commences, it is carried out in two main steps:

- Technical assessment: Where the application is evaluated on technical aspects such as design, infrastructure, production capacity, skill set, business expertise and experience, etc.
- Financial assessment: Where only applications that fulfil the technical requirements are evaluated, to assess the financial aspects.

Though applications are tagged as L1, L2, L3 (L1 being the lowest bidder), it is not the deciding factor. The tender is usually awarded to the bidder who offers the most value-for-money (i.e., quality products, acceptable delivery timelines, and competitive pricing).

(22) Coming back to the facts of the present case, one can find that in the technical bids, the respondents have found the writ petitioner, to be the highest bidder, quoted price of whom has been the highest amongst all the bidders. Accordingly, in terms of *'clause 8'* of the bid document, it was to be left out to take part in the financial bid. There happened two changes in the meantime. The identification number of the bid, had changed at this stage. Also, one of the successful technical bidder was dropped and disallowed, to take part in the financial bid, due to his disqualifications. An email sent to the writ petitioner on 6th April, 2023, would show an information to have been communicated to the writ petitioner thereby, that the tender number *GEM/2023/B/3140298* (that is the previous number), has moved to the financial bid evaluation stage. There has not been an information regarding change of the bid identification number. Under such circumstances, the submissions on behalf of the writ petitioner that it was incapacitated to follow up the subsequent invitation to participate in the *Reverse Auction,* identified by a different identification number, that is, *GEM/2023/R/189254,* against the same bid, inspires confidence. Whereas, the change of identification number in the two stages of the tender process may be natural, there should have been due information about the same, extended to all participants, in due time. The fairness of the process would have been justified in this way. However, in absence of the same there would be question marks and sufficient scope for doubt regarding the process adopted by the service procuring authority.

(23) Both the writ petitioner and the respondents have claimed that the writ petitioner had not taken part in the financial bid/*Reverse Auction*. The reasons however, being differently stated, the fact of its not having participated in the reverse auction, is undisputed. The natural corollary would have been its exclusion from the *"List of Sellers Qualified Financially"*, as the *"L-3"*. However, it is otherwise, when the writ petitioner is seen to have found place at No. 3, in the said list as "L-3" bidder.

(24) According to the bid document, *Reverse Auction* is meant to assess the competitive value of the respective bidder, in terms of the financial offers. A fair competition and fair opportunity for all – is what has to be maintained. Admittedly, at the first instance the writ petitioner could not have been considered as eligible to participate in the *Reverse Auction*, being the highest quoting bidder, in the technical bid. It became eligible only after one of the selected bidder had subsequently become ineligible to participate in the 2nd round. This would necessitate, more particularly in its case, that its participation be ensured with utmost care and diligence, to maintain the transparency and effectiveness in the process. It has already been found in this case that the writ petitioner was not informed beforehand about the changed bid number, at the *Reverse Auction* stage, incapacitating him to track, even the invitation for participating there. Had he not participated, his quote should not have found place in the *Reverse Auction* status. But its quotation was considered and evaluated, that too, without its knowledge. Lack of communication or in other words, suppression of material information to the writ petitioner, in the process of tendering, is manifest in this case. This would not only result into lack of transparency but also be tainted with unfairness of the process undertaken by the requisitioning authority. It has been held by the Supreme Court in the case of ***Reliance Energy Ltd (supra)*** that Article 21 refers to "right to life" and the same includes "opportunity" too. Also that, when Article 19(1)(g) of the Constitution confers fundamental right to carry on business, a business house/company would be entitled to invoke the doctrine of *"level playing field"*, as enshrined under the said Article.

(25) Let a portion of the judgment of the ***Reliance Energy Ltd. (supra)*** be extracted herein below:-

> ***"36.*** ******** ***The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest. "Globalisation", in essence, is liberalisation of trade. Today India has dismantled licence raj. The economic reforms introduced after 1992 have brought in the concept of "globalisation". Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforestated doctrine of "level playing field". According to Lord Goldsmith, commitment to the "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional."***

Therefore, any action to the detriment of the petitioner, so far as grant of equal opportunity or a level playing field having been afforded to it, the petitioner appears to be at the receiving end of an unfair treatment mated out to it in the process. Access to and registration for the e-auction, opening and closing of the auction, a well defined norms for conduct of the auction, would be the prerequisite of the *Reverse Auction* in terms of Rule 167 (iii) of the General Financial Rules, 2017, which also is seen to have been not complied with by the respondent, in case of the writ petitioner.

(26) The case of ***Vivek Narayan Sharma (supra)*** as relied on by the respondent, is with regard to demonetisation and challenge to the vires of the Section 26 (2) of the RBI Act. The same shall have no manner of application in this case.

So far as the judgment of ***Tata Cellular (supra)*** is concerned, as it is relied on by the respondents, the law settled therein, still holds the field that, the right to choose the bidders by the tenderer, in a tender, cannot be considered to be an arbitrary power. Acceptance of one and rejection of the other should be prompted by assessment of the true value, as to the service, to be provided.

However, the same would also not be applicable, in so far as the question involved in this case is not with regard to any right or wrong choice of bidder, but about the illegality, impropriety, lack of transparency and lack of certainty of the entire process undertaken by the respondent authority, in choosing or selecting the successful bidder.

(27) On the discussion as above, this Court is of the opinion that the writ petitioner has put forth a valid cause of action of discrimination, unfair treatment, for which this Court in exercise of powers under article 226 of the Constitution is required to interfere into the process of tender undertaken by the respondent authority.

(28) Hence this writ petition is allowed and disposed of, with the following directions;

i) The process of tender, (being No. *GEM/2023/B/3140298*) by the respondents No.1 and 2, for the work description as mentioned above, is hereby set aside from the stage of *Reverse Auction*;

ii) No effect/further effect shall be given to the outcome of *Reverse Auction,* now set aside;

iii) The respondents No.1 and 2 shall hold *Reverse Auction* afresh, in tender No. *GEM/2023/B/3140298,* according to the rules applicable and within a period of four weeks from the date of service of copy of this order.

(29) Urgent Photostat certified copy of this judgment, if applied for, be given to the parties upon compliance of all formalities

(Rai Chattopadhyay, J.)

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