

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION (Appellate Side)

MAT 1473 of 2022 With CAN 1 of 2022
Reserved on: 03.11.2022 Pronounced on: 10.11.2022

Bharatiya Reserve Bank Note Mudran (P) Limited and Others Appellants
-Vs
Shristi and Others Respondents

Mr. Anindya Mitra, Sr. Advocate Mr. D. Sen, Mr. S. Chatterjee, Ms. Suchismita Chatterjee, Mr. Malay K. Seal, Advocates for the appellants

Mr. Siddhartha Banerjee, Mr. Sudipta Kumar Das, Mr. Subir Banerjee, Advocates for the respondent Nos. 1 to 3

Coram: THE HON'BLE JUSTICE PRAKASH SHRIVASTAVA, CHIEF JUSTICE THE HON'BLE JUSTICE RAJARSHI BHARADWAJ, JUDGE

Prakash Shrivastava, CJ:

1. This intra-court appeal is at the instance of the respondents in the writ petition, challenging the order of the learned Single Judge dated 29th of August, 2022 allowing W.P.A. No. 18494 of 2022 which was filed by the respondent Nos. 1 to 3 herein (writ petitioners).

2. The respondent Nos. 1 to 3 had filed the writ petition with the plea that they were earlier awarded the contract for the management of the Health Care Services at Plant Hospital of the appellant No. 1 located at Salboni. On the expiry of the term, the appellant No. 1 had published the fresh tender notice inviting bids from interested persons on 26th of April, 2022. The respondent Nos. 1 to 3 (writ petitioners) had participated and submitted their bid in the prescribed form. According to the respondent Nos. 1 to 3, bid was opened on 27th of May, 2022, thereafter on or about 1st of August, 2022 they were refunded the security amount and they came to know that their technical bid was rejected. On the inquiry the respondent Nos. 1 to 3 were informed that the communication was sent through e-mail on June 16, 2022 requiring some further documents from them. According to the respondent Nos. 1 to 3, the said communication entirely slipped their attention. Further case of the respondent Nos. 1 to 3 was that vide letter dated 3rd of August, 2022 they had requested for a day's time to arrange for and submit documents and all such documents were submitted on 3rd of August, 2022. In this factual background, the respondent Nos. 1 to 3 (writ petitioners) had challenged the rejection of the technical bid and further prayed for a direction to consider the petitioners' financial bid.

3. Learned Single Judge by the impugned order has allowed the writ petition by holding that the appellants did not adhere to the mode of service stipulated in the tender document and in this regard learned Single Judge has relied upon clause 27 of the bid document.

4. Submission of the learned Counsel for the appellant is that the respondent Nos. 1 to 3 were given opportunity in terms of the clause 19 which is attracted in the matter, therefore, learned Single Judge has wrongly relied upon clause 27. Counsel for the appellant has submitted that since it was a pre-qualification stage, therefore, clause 19 will be attracted.

He further submits that due opportunity to file the document was given to the respondent Nos. 1 to 3 which they had not availed within time and it is not a case of minor infirmity. It is also submitted that the writ petition has been allowed by the learned Single Judge on the first date of hearing itself without giving opportunity to the appellants to file affidavit in opposition and that writ petition has not been filed by the bidder.

5. Per contra, submission of the learned Counsel for the respondent Nos. 1 to 3 (writ petitioners) is that it is a case where clause 27 is attracted which is relating to minor defects and that physical notice as required by clause 27 was not served. He has further submitted that the requisite documents were submitted on 3rd of August, 2022, but they were refused.

6. We have heard the learned Counsel for the parties and perused the record.

7. It is settled position of law that scope of interference in contractual matters is limited and this Court does not sit as a Court of appeal against the decision of the authorities in such matters. In the matter of Silppi Constructions Contractors Vs. Union of India and Another reported in (2020) 16 SCC 489 has held that:

"19. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters.

This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in Judges ' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give " fair play in the joints " to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted.

If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case. "

8. Thus, it is settled that every small mistake of tendering authority does not always furnish ground for interference. Microscopic examination of tender process to find out a ground for interference is not permissible.

9. Having examined the present case in the light of aforesaid judicial pronouncement, it is noticed that the appellant is contending that clause 19 is attracted in the matter whereas the reliance of the Counsel for the respondents/writ petitioners is upon clause 27. Therefore, the relevant clause of the bid document needs to be looked into. Clause 6 of the bid document requires the tenderer to submit the complete bid in all respect and provides as under:

"6. Tenderers shall ensure that their tenders, duly sealed and signed, complete in all respects as per instructions contained in the Tender Documents, are dropped in the tender box located at the address given on or before the closing date and time indicated in the Para 1 above, failing which the tenders will be treated as late and rejected. "

10. Clause 19 stipulates grant of one opportunity in case of incomplete document to meet the pre-qualification criteria and reads as under:

"19. Submission of authentic documents in time is the prime responsibility of the bidder. In case of ambiguity or incomplete documents pertaining to bid submitted, bidders may be given only one opportunity with a fixed deadline after bid opening to provide complete and unambiguous documents in support of meeting the Pre-Qualification Criteria.

In case the bidder fails to submit any document or submits incomplete documents within the given time, the bidder's tender will be rejected. "

11. Clause 27 which falls in Section II of the bid document relating to General Instructions to Tenderer (GIT) and under the sub-heading ' F Scrutiny and Evaluation of Tenders ' and relates to minor infirmity reads as under:

"27. Minor Infirmity/Irregularity/Non-Conformity If during the preliminary examination, BRBNMPL find any minor infirmity and/or irregularity and/or non-conformity in a tender, BRBNMPL may waive the same provided it does not constitute any material deviation and financial impact and, also, does not prejudice or affect the ranking order of the tenderers. Wherever necessary, BRBNMPL will convey its observation on such ' minor ' issues to the tenderer by registered/speed post etc. asking the tenderer to respond by a specified date. If the tenderer does not reply by the specified date or gives evasive reply without clarifying the point at issue in clear terms, that tender will be liable to be ignored. "

12. In the present case, on prima facie evaluation of the bid, shortfall of several documents and information was noticed. Therefore, e-mail dated 16th of June, 2022 was sent by the appellant to the respondent bidder which reads as under:

"Sub: Clarification regarding shortfall documents against Tender No. TE-007/SAL/PUR/2022-23, dated 26/04/2022 for ' Management of Health Care Services at Plant Hospital, BRBNMPL Salboni at Paschim Midnapore '.

Ref:(i) Your Technical Bid Ref No. Nil, Dated:26/05/2022

This has reference to the above, regarding the bid/documents submitted along with your technical offer. During scrutiny/prima-facie evaluation of your bids/papers, some of the details are found to have not been submitted as per Tender requirements. A list of the short-fall documents/information is as follows:

1. Duly signed & stamped Copy of ESIC & PF Registration certificates are to be submitted.
2. To provide the details of Point No. 15 of Annexure-II – “ The Summary of Hospital ”
3. An authenticated copy of the document which authorizes the signatory to commit on behalf of the firm shall accompany the offer as per clause No. 20.1 of GIT to be submitted.
4. CA certified copy of Financial Statement for the Year FY:2020-21 is to be submitted with self-certify & stamped.
5. Annexure – B (Confidentiality Statement) is to be re-submitted with properly filled and sealed.
6. Bidders to specify the details of MD doctors (Name, qualification certificate, Experience certificate) to be deployed at BRBNMPL, Salboni Plant Hospital).
7. Supporting documents towards " The tenderer must be operating a Hospital of at least 100 beds in the same building or its Annex within its premises " to be provided.
8. Documentary Proof of Purchase/Service Orders executed by the firm or the certificate issued by the customers to that effect against past experience as per tender requirement to be provided.
9. Audited Financial Statement of M/s. Green View Clinic Pvt. Ltd., Howrah to be submitted for FY 2018-19; 2019-20 & 2020-21
10. You have submitted ' PAN ' & ' GST ' details in the name of M/s. ' SHRISTI '. Please provide the PAN & GST details in the name of M/s. Green View Clinic Pvt. Ltd., Howrah
11. Valid Documentary proof of License to run 100 bedded hospital, Fire License, Trade License, Canteen Facility & proof of Multispecialty Facility Hospital as well as having Critical care Unit with ICU, HDU, etc. to be provided.
12. All the above documents should be submitted with counter signature of the Authorised signatory of the bidder firm.”
13. It has not been disputed during the course of argument that the documents required to be submitted by the aforesaid e-mail were as per requirement of the NIT.
14. Undisputedly the above e-mail was received by the respondent bidder but in the writ petition a plea was taken that the said e-mail entirely slipped the attention of the respondent bidder. The e-mail does not refer to clause 27 and even does not mention that the shortfall/infirmities mentioned in the e-mail were minor in nature. No document has been pointed out to show that it was a case of minor infirmity. No clear finding has been recorded by the learned Single Judge in favour of the respondent Nos. 1 to 3 in this regard while attracting clause 27. Clause 6 clearly stipulates submission of tender complete in all respect before the closing date and provides for consequences of rejection on failure. In terms of clause 19, respondent bidder was given opportunity by sending the e-mail to provide complete and unambiguous document for meeting the pre-qualification criteria after opening of the bid. It is also noticed that on account of non-submission of document

within time the technical bid of the respondent was rejected and, thereafter the financial bid has also been opened on 29.07.2022. It is worth noting that though Counsel for the appellant had advanced an argument about applicability of clause 19 and the same has been taken note of by learned Single Judge, but it has not been dealt with in the impugned order.

15. That apart, undisputedly the writ petition itself has been heard and decided on the first date of hearing. No opportunity was given to the appellants to place their stand on record by filing affidavit in opposition. It has also been pointed out that the bid was submitted by the respondent No. 7, Green View Clinic Private Limited whereas Green View was not the writ petitioner but the writ petition was at the instance of the respondent Nos. 1 to 3 who were said to be operating Green View.

16. Hon'ble Supreme Court in the matter of W.B. State Electricity Board Vs. Patel Engineering Co. Ltd. and Others reported in (2001) 2 SCC 451 has taken the view that negligent mistakes in the bid document cannot be permitted to be corrected on the basis of equity where facts indicate that (i) it was not beyond the control of bidder to correct the error before submission of bid, (ii) that he was not vigilant, and (iii) that he did not seek to make corrections at the earliest opportunity. In such circumstances, it has been held that such bidder cannot be permitted to correct his bid documents afterwards. It has further been held that correction of errors in bid documents not permissible under the rules governing the process of tender does not fall within the scope of judicial review. In the present case, no correction was done within time by doing the needful as required by e-mail.

17. In the matter Sorath Builders Vs. Shreejirupa Buildcon Limited and Another reported in (2009) 11 SCC 9 Hon'ble Supreme Court has held that terms and conditions of a tender are required to be adhered to strictly. In that case, pre-qualification documents were received by the concerned respondent only after the time schedule was over, therefore, the Hon'ble Court took the view that the said respondent was justified in not opening the tender.

In the present case also pre qualification documents were not submitted within time.

18. Counsel for the writ petitioners has place reliance upon paragraph 10 of the judgment of the Hon'ble Supreme Court in the matter of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others reported in (1979) 3 SCC489. There is no dispute to the proposition that an executive authority must be rigorously held to the standards by which it professes its action to be judged and it must scrupulously observe those standards on the pain of invalidation of an act in violation of them. But in the present case, no such violation on the part of the appellant has been found.

19. In view of above analysis, we find that appellant had not committed any error in rejecting the technical bid of the respondent bidder. It is not a fit case for exercise of jurisdiction under Article 226 of the Constitution and interfere in the decision of the appellant. Hence, we are unable to uphold the judgment of the learned Single Judge. Thus, the appeal is allowed and judgment of the learned Single Judge is set aside.

(PRAKASH SHRIVASTAVA) CHIEF JUSTICE

(RAJARSHI BHARADWAJ) JUDGE

Kolkata 10.11.2022