

S B Construction and Ors. Vs. State of West Bengal and Ors.

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Court : Kolkata

Decided On : May-05-2015

Judge : Bench

Appellant : S B Construction and Ors.

Respondent : State of West Bengal and Ors.

Judgement :

APO172of 2015 G.A.1325 of 2015 W.P.365 of 2015 IN THE HIGH COURT AT CALCUTTA Civil Appellate Jurisdiction Original Side S B CONSTRUCTION & ORS.Versus STATE OF WEST BENGAL & ORS.BEFORE: The Hon'ble CHIEF JUSTICE MRS.MANJULA CHELLUR The Hon'ble JUSTICE JOYMALYA BAGCHI
Date : 5th May, 2015.

For the Appellants : Mr.Mr.Mr.Mr.Anindya Kumar Mitra Sr.Advocate Saptangshu Basu, Sr.Advocate Ayan Banerjee and Arijit Bhowmik, Advocates For the Respondents: Mr.Shaktinath Mukherjee, Sr.Advocate Mr.D.Saha Roy, Advocate For the State Respondent: Mr.Billawadal Bhattacharyya, Advocate The Court: This appeal is directed against the order dated 30.3.2015, at the instance of the third party respondent.

The dispute is with reference to tenders invited for strengthening 15 KMs.of a byelane road in the District of Birbhum.

Admittedly, so far as the initial tender, only one person came forward, hence the same was cancelled.

The dispute before us is in respect of second tender which came to be floated. Apparently, respondent in both, the the submitted month of appellants their tender February, and the 2015.

party application in response to the invitation.

The last date for both the submission of tender was 27.2.2015.

The respondent tenderers on the authority ground disqualified that plant and machinery required for the performance of the tender work were `engaged elsewhere.

The writ petitioner, one of the tendereRs. approached this Court in the above writ petition contending Contractor, that Millennium situation, was given in the case Construction, a concession, in of another a similar that is, the consideration was whether the plant and machinery was available as on the date of actual execution of work and not on the date of submission of the tender document.

Learned Judge after referring to the case of Millennium Construction was of the opinion that there has to be a purposeful construction of terms of the contract, that is, the tender document.

The consideration must be whether the contractor was able to keep the plant and machinery ready at the site at the time of actual execution of the work and not at the time Ultimately, of submission Learned Judge of the opined tender that document.

disqualified writ petitioner must be given a chance, consequently decision to disqualify the writ petitioner was set aside.

So far as the decision to call fresh tender, (third) was also set aside.

Since one Mr.Mohanlal Jain, the appellant herein had suffered similar fate, he was also respondent given a authorities chance.

were In the directed result, to the reconsider the two offers received, that is, that of the writ petitioner-respondent and the present appellant.

Aggrieved by the same, Mohanlal Jain the other tenderer who did not approach the Court questioning the order of disqualifying him by the respondent authority is before us.

According to the appellant, in response to the third invitation, he has already submitted his tender document by withdrawing deposit of earnest money in respect of the second tender, the subject matter of this appeal.

It is pertinent to mention that State has not appealed against the impugned judgment.

This appellant was not a party to the writ proceedings.

As against this, learned Senior Counsel Mr.Saktinath Mukherjee appearing for the writ petitioner took us through various clauses of the tender document and also other annexures filed along with the writ petition.

The writ petitioner seems to be satisfied with the direction of the learned Single Judge, that is, reconsideration of both the applications by the respondent.

He further submits that the appellant by no means will be prejudiced with the direction given by the learned Single Judge since appellants application will also be re- considered.

In response to this stand of the appellant, learned Senior counsel Mr.Anindya Mitra submits that earnest money respect of Counsel, deposit the Mr.was subject Saktinath already tender.

Mukherjee withdrawn Learned very in Senior gracefully admitted that the offer of the appellant could be reconsidered provided earnest money deposit is returned to the department or the earnest money deposit made with respect to third tender could be considered as deposit for the second tender.

So far as this aspect, learned Government advocate raises no objection.

Further, learned Government advocate submits that in the light of already three tenders being floated for the same work, the entire process may be directed to be under the supervision of the Chief Engineer concerned and they would abide by the direction of the Court.

According to learned Senior Counsel Mr. Anindya Mitra, comparison of the case of the writ petitioner with that of Millennium Construction itself was wrong as terms and conditions pertaining to the present tender on relevant That the to apart, factual consider situation the according offers to him alone of the the would be tendereRs. deficits in the tender application of the writ petitioner was never taken into consideration by the Department and the writ petition ought not to have been entertained as the writ petitioner has not approached this Court with clean hands.

To fortify his argument, he took us through page 71 of the stay application to contend that this material was not placed before the learned single Judge and the contents would clearly reflect falsity in the statement of the writ petitioner so far as status of the machinery, whether it was engaged or idle.

He also took us through format B attached to the tender document, which is at page 73 of the petition inviting our attention that there was no certification by the authority where the plant and machinery of the indicating when writ exactly petitioner the plant was and engaged machinery required for the present work would be released from the other work.

In other words, according to the appellant, it was self-certification by the appellant which is not in the required format and this ground alone is sufficient to reject the tender of the writ petitioner.

He also contended that the writ petitioner has not disclosed floating of the third tender when he approached this Court.

We have taken into consideration these arguments based on the submission of learned Senior Counsel Mr. Saktinath Mukherjee.

So far as fiRs. contention with regard to page 71, we note that page 71 is part of tender documents before the Tender Committee.

According to learned senior counsel, Mr.Saktinath Mukherjee, petition, perused, (pages would 73-74 clearly pages of 64-65 of the stay the writ petition) if indicate that there no was concealment of any of the fact.

According to him, the plant and machinery required for the present tender either was engaged in another project under the very same respondent authority or remained idle without any work for the last 10 months.

Therefore, if entire document is perused (at pages 64-65) it would clearly indicate that the machinery was disclosed to be engaged but not being put to use at the other work site.

So far as the concealment of the third tender, on perusal of paragraph 18 of the writ petition, the writ petitioner did refer to the intention of the respondent authorities to float another tender.

Paragraph 18 reflects contemplation of fresh tender in respect of the very same work.

Therefore, immediate intervention of the Court was sought.

It is not necessary for us to make a roving inquiry whether the writ petitioner was aware of the factum of floating of the third tender already by the time he had filed the writ petition.

But definitely he has not concealed their apprehension of the intention of the respondent authority to float fresh tender.

So far as Millennium Construction vis--vis writ petitioner, it is needless to say that the writ petitioner has to succeed or fail based on the merits of his stand vis--vis terms of the tender documents.

Learned Judge might have referred to the concession shown pertaining to the other contractor in respect of another tender just to indicate that one has to see the practicality vis--vis availability of the plant and execution machinery of the as work on and the not date on of the actual date of submission of the application.

As a matter of fact, learned Judge did refer to clause 4 of the tender document.

We are of the opinion, case of the writ petitioner availability has to be tested and with machinery terms of the tender documents.

the actual vis--vis the Page 76 of the stay application indicates the reasons for disqualifying both the applications which reads as under: Tender ID Name of work 2015_SH_35449_1 Strengthening & improvement of existing two lane carriageway of Nalhati-Rajgram road (SH-7) from 0.00 kmp.(Nalhati) 15.00 kmp.

(Murarai) under Birbhum Highway Division-I in the District of Birbhum (2nd Call) Ch to: West Bengal Compensatory Entry Tax Fund Tender Evaluation Committee evaluated the Technical Bid of the Bidders as : 1.

S.B.Constructions & Co.Non-eligible.

Hot Batch type Hot Mix plant is engaged.

2. Non-eligible.

He is being awarded work vide this office e.NT No.57 of 2014-15.

So his proposed batch type Hot Mix plant will be engaged.

M/s.Mohanlal Jain Clause 4A (a),(b) and (c) of the tender document reads as under:

4) Plant & Machineries:A) Primary Machineries a) During following actual execution primary plant of & the work, machineries (minimum) are to be deployed by the bidder.

b) The requisite primary plant & machineries may be in possession/ownership of the bidder upto the date of submission this bid.

Authentic documents in support of such ownership in favour of the bidder are to be submitted.

c) The interested bidder may also make advance payment of at least 25% (twenty five percent) against the delivery cost of primary plant & machineries.

Batch Type Hot Mix Plant of minimum capacity 100-120 TPH with ancillaries (vide Sl.No.1) & Pneumatic Type Roller (PTR) (vide Sl.No.5) to the authenticated manufacturers upto the date of submission of bid.

Authenticated documents in support of such advance payment are to be submitted.

The postal address, email etc.of the manufacturers whom advance payments are being made are also to be in case of necessity verification submitted for arises.

Scanned copies of such documents are to be uploaded (on line) along with bid within specified time schedule. Reading of the above clause clearly indicate that as on the date of submitting offer, if the interested bidder had made advance payment of at least 25% of the cost of plant and machinery, he was entitled to be considered for the contract.

If that be the situation, the person who is in possession or owning the machinery would certainly be in a better position than the person who is proposing to purchase the plant and machinery.

Mere possession/ownership of the plant and machinery on the date of submission of the tender will not lead to any conclusion so far as public work is concerned unless it was available.

All these conditions are set out in the tender document only to see that the contract or the work undertaken by the contractor is completed within a scheduled time since it pertains to re-construction/repairing of road and such re-construction or repairing are very imminent before monsoon public of roads commences.

The entire work would have been over if the things had moved properly in the right direction.

Unfortunately it is not so in this case.

Before the commencement of monsoon we are still at the stage of finalisation of litigation between the parties.

This is not at all in the right direction.

We are also not satisfied with the steps taken by the Department in floating the third tender on 193-2015 after disqualifying the applicants on 18-32015.

Written submitted objections within 48 of hours writ as petitioner was procedure but per outcome of the same is yet to be seen.

Both the applicants were entitled to submit tender documents and they could not have been disqualified on mere non-possession/ownership of the plant and machinery as on the date of submission of the tender document.

Decision was not an outcome of a process after proper application of mind by the respondent authorities.

Each case ought to be seen or considered properly vis--vis the terms and conditions.

In the light of explanation given by the writ petitioner and also the reasoning of the learned Single Judge, we are of the opinion, there was no application of mind so far as the case of the writ petitioner is concerned with reference to clause 4 of the tender documents.

Similarly such consideration has now to be made with reference to the decision of the Committee appointed by the authority.

We cannot persuade ourselves to sit in the chair of Tender Committee and analyse who is right or who is wrong.

It is for the Tender Committee to apply its mind and decide which of the applicants would be entitled to have the contract.

Since appellant being sole competitor to the writ petitioner, will also be re-considered as per direction of the learned Single Judge.

No prejudice of any nature is being caused to the interest of the appellant warranting interference with the present impugned order.

The earnest deposit amount withdrawn by the appellant could be set right either by redepositing the said amount or utilising the earnest money deposit pertaining to third tender for the second tender.

If there is any deficit so far as the amount of earnest money deposit, the same has to be rectified by the appellant within a week from date.

The respondent authorities shall re-consider the applications of both the writ petitioner and the appellant in the light of our observations and the entire exercise has to be completed within three weeks from today under the supervision of the Chief Engineer of the department concerned.

Both the appeal and the application disposed of accordingly.

(MANJULA CHELLUR, C.J.) (JOYMALYA BAGCHI, J.) Rs.AR(CR) are

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