

(1991) 08 CAL CK 0002

Calcutta High Court

Case No: C.O. No. 3117 (W) of 1991

Gouranga Lal Chatterjee

APPELLANT

Vs

Chief Engineer and Others

RESPONDENT

Date of Decision: Aug. 13, 1991**Acts Referred:**

- Constitution of India, 1950 - Article 226

Citation: (1991) 2 CALLT 259**Hon'ble Judges:** Susanta Chatterji, J**Bench:** Single Bench

Advocate: Anindya Mitra, Bhaskar Sen, Asoke Banerjee, Amit Chakraborty and Ashoke Biswas, Saktinath Mukherjee, Pratap Chatterjee, A.N. Mukherjee and S.K. Bose, for the Appellant; P.K. Das and Amal Baran Chatterjee, for the Respondent

Judgement

Susanta Chatterji, J.

The writ petition was moved on 4th of February, 1991 before N. K. Mitra J. and an ad interim order as prayed for was granted for a period of 2 (two) weeks. The matter subsequently appeared before this Bench on 10th of April, 1991 and the interim order of status quo as on that date was allowed to continue. The matter further appeared on 29.4.91 and this Court made it clear that the respondents may take all effective steps but there will be no issuance of the work order without the leave of the Court. It was further made clear that any step that would be taken by the respondents besides taking steps for issuance of the work order, will abide by the result of the writ petition. An application for addition of party was made by Messrs Larsen & Toubro Limited (ECC Construction Group) and prayed for vacating the interim order.

2. The writ petitioner has prayed for a writ of Mandamus to command the respondents to rescind the impugned decision as not to award contract in respect of Packages-VII in favour of the petitioner and further to command the respondents to

act in accordance with the result of the tender submitted by the petitioner. It is stated in detail that the petitioner is a Government Contractor having various experiences in global tender and big project. On 2nd April, 1990, an advertisement was published in the "Statesman" that the Chief Engineer, Durgapur Express Way, P.W.D. (Roads) Directorate inviting tenders for execution of works of Indian National Highway Project with regard to the balance of work of road contract packages-

(i) ... III (18 K.M. to 30 K.M.)

(ii) ... IV (30 K.M. to 40 K.M.)

(iii) ... V (45 K.M. to 59 KM. of Calcutta-Durgapur Expressway, a two lane at Grade Highway Calcutta-Plasit Section.)

3. It is placed on record that according to tender, every tenderer was required to inspect the Bidding documents from the Office of the Superintending Engineer (Construction Circle), National Highway Durgapur Expressway at Purta Bhavan, Salt Lake City and obtained a complete set of Bidding documents upon payment of a non-refundable fee of Rs. 6,000/-between 17th April, 1990 and 31st May, 1990. It is stated that the National Highway Project (World Bank Aid India) had published Booklets being Volume No. 1 to Volume No. V. In Volume No. I of the said Booklets of the National Highway Project, it was mentioned that the tender will be decided on the basis of the post-qualification of the tenderers with respect of information furnished by the tenderers. Volume V of the said Booklets deals with the Schedule for post-qualifications of Contractors. The petitioner filed his tender and besides the petitioner there were other tenderers viz. Messrs Larsen & Toubro (L & T), Ansal Properties, Bridge & Roof, Central Concrete and Allied Products Private Limited, Asian Technician, Tantia, Oriental Structural India Limited and Recondo. The quotations of all the tenderers regarding Package Nos. III, IV and V have been filed in a Tabular Form. According to the petitioner firm, they fulfil all the eligibility criteria and they have unblemished records of having complied with all the post-qualification requirements. The respondents are alleged to have taken a whimsical decision to award the contract in favour of the petitioner. Their decision is challenged as whimsical, arbitrary, mala fide and made in colourable exercise of power. Elaborating all these points, the petitioner firm has come to this Court to seek reliefs on the ground that the impugned decision on the part of the respondents to ignore the petitioner's lowest tender in respect of Package Nos. IV-V is neither fair nor honest. The decision of the respondents in depriving the petitioner's right to obtain the contract is unjust and unfair. The writ petition was entertained and an interim order was made and subsequently modified as indicated above.

4. An application for addition of party has since been filed by Messrs Larsen & Toubro Limited and the said prayer was allowed on 5th of June, 1991. There is a prayer for vacating the interim order. All the parties have filed their affidavits

placing on record their objections. It is disclosed by the Executive Engineer (Construction), Division No. 1, Durgapur Expressway that National Highways are arterial routes connecting different State capitals, major ports, highways of neighbouring countries, large industrial and tourist centres etc. Ministry of Surface Transport controls National Highways. Construction and maintenance of such roads are funded by the said Ministry and executed through the concerned State Governments as agents. Calcutta-Durgapur Expressway is a high speed facility starting from National High-way-2 by-pass near Dankuni and meeting National Highway-2 near Burdwan having a length of 65 kilometres. The Expressway will have no level crossing in the entire length and the distance from Calcutta to Burdwan will be reduced by 19 kilometres. There will be considerable savings in journey as well as saving in fuel consumption in comparison to the existing National Highway between Calcutta-Burdwan. The project was taken up in 1965 by the Government of West Bengal but was subsequently abandoned for paucity of fund after partial work of embankment and some cross drainage works. The Ministry of Surface Transport declared the alignment National Highway in 1975. In 1986, the Ministry sanctioned the project as a modern Expressway at an estimated cost of Rs. 54 Crores as a World Bank Aided Project. The work is being executed by the Public Works (Roads) Department, Government of West Bengal as executing agent of the Ministry with specified agency charge. It is asserted that Expressway though a National Highway, is different from the conventional National Highway and Expressway is a term used in International standard. As per the requirement of World Bank Financial Assistance, the project has some special features:-

(i) This is a high speed facility ensuring high safety standard for which access control is obligatory.

(ii) Selection of contractors are to be done through International competitive Bidding system for which special tender papers and procedures have been made binding as per World Bank guidelines.

(iii) Specification of work is finalised on the basis of International standard and mechanised construction procedure for achieving specified quality of work.

(iv) This is a time bound project of work and as such any delay in completion of the project would mean delay in offering the facility to the user involving heavy financial impact in view of big investment for high quality special nature of work.

5. It is submitted that tenders were originally invited in 1986 and work orders were issued in 1987. Contractors for packages-III, IV and V failed miserably in their performances and they were expelled in terms of Clause 63 Tender Agreement. It is highlighted that in respect of the subject matter of the tender document, tenders were invited for execution of balance quantity of work-in July, 1990. These tender documents have been completed in five volumes. As per pre-condition of World Bank Loan Assistance Programme, all works shall have to be done through

pre-qualified contractors. In the present case, in order to save time, World Bank agreed to post-qualification procedure to assess the eligibility of intending tenderers. Documents showing that World Bank agreed to post-qualification procedure to assess the eligibility have been collectively annexed to the affidavit-in-opposition. The screening and scrutiny through a Committee was necessary since the work required high technical expertise, experience in similar nature of mechanised road construction system, but high financial soundness, capacity for management of such time bound project work. The members of the Committee are eminent Highway engineers of the country having aptitude and experience to analyse and justify the data submitted by the tenderers. Ministry of Surface Transport, Government of India constituted a Committee to assess the post-qualification and eligibility of tenderers on the basis of data supplied by the tenderers in Volume 5 of Tender Documents. The Committee is allegedly comprised of Additional Director General (Roads), Additional Director General (Project), Chief Engineer of particular State where the work is to be executed and the Chief Engineer of another State to be decided by the Ministry of Surface Transport. Committee members are appointed by their designation. Recommendation of the Committee is sent to the State Government and the decision of the employer as defined in the Tender Document regarding post-qualification of Bidders is final. It is submitted that although the writ petitioner quoted lowest rates in Contract Package Nos. IV and V but for such vital project work for which the working agency is selected on the basis of global tender, it is more important that the Bidder fulfils all the criteria for eligibility and post-qualification as clarified in Clause 2.2.1(4) and Clause 2.2.1(5). In fact, the writ petitioner has not fulfilled the criteria mentioned in Clause 2.2.1(4) and (5). The claim of the petitioner is alleged to be misconceived and if this World Bank Aid Project is sought to be stalled for an indefinite period, and unless the interim order is vacated, there will be serious national loss and there will be serious complications as there is a trend of price escalation and the project will, suffer due to delay resulting irreparable loss and injury.

6. Messrs Larsen & Toubro, the added party has placed on record that the work under the tender consisted of 3 (three) packages viz. Package Nos. III, IV and V. In the notice inviting tender, it is specifically provided :-

"1.4. Award of tenders will be decided on the basis of post-qualification of bidders. The employer will first evaluate all the tenders as far as responsiveness of the tender bids followed by evaluation of price bids. Qualification of the Bidder, whose bid has been evaluated the lowest will then be determined with respect to criteria for eligibility and post-qualification set-forth in the instructions to tender (Section II of the Tender Documents). If the lowest tenderer does not need with the requirements, his tender will be rejected. In such event, the employer will make a similar determination for the next lowest evaluated tenderers. The tenderers are, therefore, advised in their own interest to study the tender documents carefully submission of bids to make sure that they will be eligible for tendering."

7. The added party allegedly became a successful tenderer and its offer has been accepted. For execution of the said tender, the added party has allegedly invested huge sum of money in furnishing performance security by way of bank guarantees on which interest charges are payable. That apart, the added party has already incurred expenses by engaging engineers and other personnel for planning of resources and completing all formalities as per the Letter of Acceptance. The order of injunction is causing harsh and unless the same is vacated the added party is likely to suffer severe loss and injury.

8. Upon perusal of the materials on record, and considering the lengthy submission made on behalf of the respective parties, this Court finds that the respondent authorities have taken up the impugned decision to Award the contract in favour of the added party. The work order has not been issued in terms of order of injunction passed by this Court. It appears clearly that for being qualified the tenderers must meet with all the criteria as laid down in Sub-clause 2.2.1(4) and 2.2.1(5). The criteria for eligibility and post-qualifications have been set-forth in the instructions to the tenderers. It transpires there from as follows :-

"2.2.1 (1) The eligibility of bidders shall be determined on the basis of post qualification with respect to information furnished by them in the following Schedules given in Vol. 5 of tender documents which must be complete and true. Any additional information and/or extension of the schedule shall be complied by tenderer and named as "Appendix to Vol. 5, which shall be deemed to be included in Vol. 5 of the Tender Documents".

2.2.1 (4) Eligibility Criteria-

(i) The tenderer or its partners must be from Member countries of the bank.

(ii) The Tenderer should not sub-contract more than 50 per cent of the work.

(iii) The tenderer or its constituents should in the last 5 years have neither abandoned any contract nor been expelled nor any of their contract should have been rescinded for any reason.

(iv) The tenderer must be able to deploy the minimum key personnel for the work, as given in Annexure I in Vol. 5 of Tender Documents.

(v) The tenderer must be able to deploy the equipment on the work as given in Annexure II in Vol. 5 of Tender Documents.

2.2.1 (5) Post qualification criteria-

(i) Liquid assets augmented with suitably documented cash resources, bank loans, lines of credit specific to the contract package (s) being tendered should be at least equal to 10 per cent of the estimated value of the contract package(s).

(ii) The average annual turnover (including enhancement factors) of the tenderer, for the last five years, multiplied by a factor of 2.5 should not be less than the value of contract package(s).

(iii) The tenderer will be considered to possess minimum experience if either of the following conditions are satisfied :

(a) Total completed works of similar nature equal 1.OA and other civil engineering works equal 1.OA.

(b) Total completed works of similar nature equal 2.OA.

N.B.I. "A" is the estimated value of the contract package. To evaluate the eligibility of the contractors for award of more than one package, "A" will be taken as the combined value of the concerned packages.

2. Experience of similar works means experience on highways and airfield works involving earthworks, cross drainage structures and surface pavements.

3. The total experience will be calculated as addition of all works, costing Rs. 10 million or above individually (including enhancement factor), for the last six years. This would also include the completed portion of work in progress, if the work has been carried out as partner in a joint venture".

9. Considering this aspect of the matter, this Court finds that there are 3 (three) grounds for disqualifying the writ petitioner in the matter of awarding the job. The tenders were opened on 17th July 1990. The petitioner's bids were the lowest in respect of package Nos. IV and V which were Rs. 47,62,102/- for Package-IV and Rs. 21,87,800/- for Package-V (together Rs. 69,49,902/-) lower than the that of the next lowest tenderer i.e. Larsen & Toubro. The petitioner's-main grievance is that the tender receiving Register as well as the comparative statement of the respondent authorities would reveal what was the offer on the last date, i.e. date of opening the tenders and would also reveal how and in what manner the tender value of Messrs Larsen & Toubro in respect of contract package no. IV and V have been appreciated. The respondents, however, controverted the allegations and have placed on record that there are sufficient reasons for not accepting the tender of the petitioner. They have mainly stressed upon 3, (three) points viz. location of equipment, required annual turnover and the required experience as pre-requisites and/or as essential conditions to be eligible to become successful bidder. There is a reference of plan and equipment as noted in the Volume V of the Tender Documents. The petitioner is found to be lacking with the equipments which are compulsorily required. There is a reference of absence of Motor Grader, Vibratory Roller, Paver Finisher, Bitumen Sprayer, Tandem Roller etc.

10. Secondly, the average turnover of the writ petitioner during the last five years is not correct as sought to be done. The relevant calculations have been set out in the affidavits filed by the contesting State respondents. The experiences of work with

regard to road building during the last six years, the petitioner has not fulfilled the eligibility criteria. The comparative charts have been made and this Court in prima facie satisfied that there is no unfair and unjust treatment in making scrutiny and screening the tenders in terms of the Tender Documents.

11. This Writ Court is not certainly sitting in appeal upon the decision of the State Authorities. The Writ Court has essentially to consider the decision making process as reported in [State of Uttar Pradesh and Others Vs. Maharaja Dharmander Prasad Singh and Others,](#)

12. This Court further finds that there is no allegation of bias and the question of mala fide does not arise in view of all the records placed before this Court, The conditions of tender have got to be complied with. In a recent decision reported in [M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others,](#) The Hon'ble Supreme Court has considered the Tender conditions, deviation from essential or ancillary/subsidiary requirement. If the essential conditions have not been fulfilled, the tenderers cannot make any grievance by coming to the Writ Court and to challenge the decision of the authorities concerned.

13. With great anxiety, this Court has taken up the main matter of hearing simultaneously with the application for vacating and/or modifying the interim order. Considering further, this Court is of the view that the matter requires in depth and consideration of further details to adjudicate the claim and counter-claim of both sides. But this Court is prima facie satisfied that any order of injunction should not stand in the way to assume the work: of the project. Upon due consideration of all the factors mainly the prima facie case, the case of irreparable injury and the balance of convenience and inconvenience, it is held that more injury is likely to be caused by continuing the order of injunction than vacating the same.

14. For the aforesaid reasons, this Court is of the view that the matter should be finally heard expeditiously and for the said reason the final hearing of the case remains heard-in-part and it will be listed for hearing 4 (four) weeks hence. All the original records be placed before the Court. This Court, is, however, convinced that there is sufficient merit in the contention of the contesting respondents and added parties that the interim order is causing hardship and accordingly the interim order restraining the issuance of the work signal is vacated. The application for vacating interim order is thus disposed. There will be no order as to costs. It is also made clear that all the steps to be taken by the respondents will be subject to the final result of the writ petition.