(2013) 07 CAL CK 0059

Calcutta High Court

Case No: M.A.T. No. 1031 of 2013 and Can 6918 of 2013

Rashmi Metaliks Ltd. and Another — APPELLANT

Vs

K.M.D.A. and Others — RESPONDENT

Date of Decision: July 11, 2013

Hon'ble Judges: Arun Mishra, C.J; Joymalya Bagchi, J

Bench: Division Bench

Advocate: Jishnu Chowdhury, Mr. Arif Ali and Mr. Pravat Kr. Srivastava, for the Appellant;Partha Sarathi Basu and Mr. Satyajit Talukdar for Respondent Nos. 1 and 2, Mr. Jayanta Kr. Mitra, Anirban Ray, Shoutrik Mitra and Mr. Vivek Jhunjhunwala, for the Respondent

Final Decision: Dismissed

Judgement

Joymalya Bagchi, J.
The appellants are aggrieved by the judgment and order dated 2nd July, 2013 whereby the learned Single Judge refused to adjudicate on the validity of the eligibility criteria, namely Clause (i) therein, in the tender documents pertaining to notice dated 10th May, 2013 on the ground that the appellants were disqualified for non-submission of latest income tax returns as contained in Clause (j) of the tender notice. The appellants had, inter alia, challenged Clause (i) of the tender notice which reads as follows:

(i) A declaration in the form of Affidavit in a non judicial stamp paper should be submitted stating clearly that the applicant is not barred/delisted/blacklisted by any Govt. Deptt./Govt. undertaking/Statutory Body/Municipality and of the like Govt. Bodies in DI Pipe-supply tender during last five years and if any such incident is found at any point of time, the tender will be cancel summarily without assigning any reason what so ever.

2. At the interim stage, the learned Single Judge by order dated 17th June, 2013 directed commercial bids to be open by KMDA. Such order was modified by the appellate Court and the learned Single Judge was directed to hear and dispose of the writ petition on merits.

3. The case made out by the appellants was that there has been spate of litigation by and between the parties as the respondent authorities are resorting to various subterfuges in order to keep out the appellants from participating in the tender. In respect of the present bid, the appellants had disqualified for non-submission of the latest income tax returns as required in terms of Clause (j) of the tender notice apart from failing to qualify in terms of Clause (i) as quoted above. It was further contended that Clause (i) in the tender documents was arbitrarily incorporated with the oblique motive of keeping out the appellants from the bidding process.

4. Clause (j) of the tender notice reads as follows:

(j) Valid PAN No., VAT No., Copy of acknowledgement of latest Income Tax Return and Professional Tax Return.

5. Admittedly, the appellants had failed to submit its latest income tax returns for the assessment year 2012-2013 along with its bid in terms of the aforesaid Clause.

6. Learned Single Judge held that Clause (j) was an essential term of tender notice and failure to comply with the same would disqualify the appellants from the tender process and therefore there is no scope for adjudicating the validity of Clause (i) of the tender notice at the behest of such disqualified bidder. This order has been challenged before us in the instant appeal.

7. Mr. Chowdhury, learned advocate appearing for the appellants submitted that the failure to submit the latest income tax returns was a bonafide mistake on the part of the appellants and not an incurable deficiency. There is no dispute that the appellants had substantial income and had filed returns for the last year. He submitted that non-compliance of Clause (j) being unintentional and bonafide, the same ought to be permitted to be rectified. He further submitted that in view of the demons ratable bias against the appellants, it is patently clearly that the appellants were kept out from the tendering process without any justifiable reason. He also submitted that Clause (i) was per se illegal and therefore ought to be set aside and his client be permitted to participate in the bid.

8. Mr. Basu, learned advocate appearing for the KMDA submitted that non-submission of latest income tax returns in violation of Clause (j) of the tender notice cannot be attributed to any bias of the respondent authorities. Failure to do so, which undoubtedly is an essential condition of the tender notice, was due to fault of the appellants and blame for such infraction cannot be attributable to the respondent authorities. Non-compliance of such essential condition renders the appellants disqualified and therefore the learned Single Judge rightly threw out their challenge to other terms of the tender notice.

9. Mr. Mitra, learned advocate appearing for the successful bidder supported the case of the respondent KMDA

10. We have considered the submissions of the parties.

11. Clause (j) which requires a bidder to submit the latest income tax returns cannot be said to be a non-essential part of the contract. Purpose of the said Clause is to ensure adequate economic and the financial viability of a bidder. Admittedly, such condition has not been complied with. It is true that non-compliance of such condition is due to mistake on the part of the appellants. However, it was wholly within the domain of the appellants to correct such mistake before submission of tender documents. Having failed to do so, the appellants cannot claim any equity in its favour and seek to correct its error subsequently.

12. Learned counsel for the appellants has failed to show to us any term in the tender notice which enables a bidder to correct bonafide mistake subsequent to the submission of tender documents.

13. It is settled law that in the matter of tender process non-compliance of an essential term of the tender though bonafide would operate to the prejudice to the bidder and he cannot claim any equity in that regard.

14. In West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others, the apex Court refuted the claim of a bidder who had been disqualified for committing a bonafide mistake, in the following words:

23...A mistake may be unilateral or mutual but it is always unintentional. If it is intentional it ceases to be a mistake. Here the mistakes may be unintentional but it was not beyond the control of respondent Nos. 1 to 4 to correct the same before submission of the bid. Had they been vigil in checking the bid documents before their submission, the mistakes would have been avoided...

15. The apex Court further held as follows:-

24. ...In a work of this nature and magnitude where bidders who fulfil pre-qualification alone are invited to bid, adherence to the instructions cannot be given a go-bye by branding it as a pedantic approach otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism which are totally opposed to the Rule of law and our Constitutional values. The very purpose of issuing Rules/instructions is to ensure their enforcement lest the Rule of law should be a causality. Relaxation or waiver of a rule or condition, unless so provided under ITB, by the State or its agencies (the appellant) in favour of one bidder would create justifiable doubts in the minds of other bidders, would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the State agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. In our view such approach should always be avoided. Where power to relax or waive a rule or a condition exists under the Rules, it has to be done strictly in compliance with the Rules. We have, therefore, no hesitation in concluding that adherence to ITB or Rules is the best principle to be followed, which is

also in the best public interest.

16. We are, therefore, not persuaded to accept the argument on behalf of the appellants that they ought to have been permitted to correct their error and participate in the tender. If such facility was not available to other bidders under the tender notice, the same cannot be extended to the appellants. To do so, would be to advance an unjust advantage to a bidder which is not available to others.

17. We are, therefore, in agreement with the learned Single Judge that as the appellants were otherwise disqualified they do not have requisite locus to challenge the other condition, namely, Clause (i) of the tender notice and the writ petition has been rightly dismissed.

18. We find no reason to interfere with the order under challenge. The appeal and all connected applications are accordingly dismissed.