

Pioneer Construction Vs State of West Bengal and Others

Court: Calcutta High Court

Date of Decision: July 15, 2011

Citation: AIR 2011 Cal 199

Hon'ble Judges: Soumen Sen, J; Pinaki Chandra Ghose, J

Bench: Division Bench

Advocate: Pratap Chatterjee, Amalesh Roy and Ms. Suman Sehanabis, for the Appellant; Arindam Mukherjee, Ms. Aparna Banerjee, Ashok Kumar Banerjee, Govt. Pleader, Subrata Mukherjee, Moinak Bose, for State, Sakya Sen, Priyanka Saha and T.K. Sengupta for Pam Development, for the Respondent

Judgement

1. Instead of taking the stay application, we have taken up the appeal itself for final hearing with the consent of the learned Advocates for the

parties by treating the same as on day's list.

2. This appeal is directed against an order passed by the trial Court on 24th February, 2011 in W.P. No. 2888 (W) of 2011 where the learned

Single Judge was pleased to admit the petition and further directed that all steps taken by the respondents shall be subject to the result of the writ

petition. It is also a fact that no interim order has been passed by His Lordship.

3. Hence, this appeal has been filed on the ground of refusal to pass an interim order in the said tender floated by the State of West Bengal.

4. The refusal to pass an interim order in a Government tender is subject-matter of challenge in this appeal.

5. The grievance of the petitioner is that although the writ petition was admitted but the learned single Judge has refused to stay the process of

tender and the same has caused serious prejudice.

6. The petitioner had submitted its offer in terms of the tender floated by the Government of West Bengal, Public Works Department, Northern

Circle, Jalpaiguri in relation to certain widening and strengthening of Road at Uttar and Dhakshin Dinajpur.

7. The writ petitioner questions the decision of the tender authority to defer the opening of bidding document (Volume-I) against the aforesaid

tender from 1st February, 2011 at 1 p.m. to 17th February, 2011 at 1 p.m.

8. When we admitted the appeal and granted the limited interim order, we directed the respondent authorities to produce the relevant record in

relation to the said tender. On the basis of such direction a compilation of certain papers in relation to the said tender were produced before us and

a copy thereof was also furnished to the other side. The appellant also had inspected the record.

9. From the record it appears that initial date as per the notice of invitation for submission of Bid was 28th January, 2011 and 1st February, 2011

was fixed for opening of technical Bids. Due to certain complaints received on 28th January, 2011 by the Superintending Engineer, P.W.D.

Northern Circle, Jalpaiguri that certain bidders were prevented and/or obstructed by certain persons from submitting such Bids, it appears that the

said date of opening of Bid was deferred from 1st February, 2011 to 17th February, 2011.

10. Before such period was extended a note sheet was prepared by the Superintending Engineer, Northern Circle, Jalpaiguri for consideration by

the Chief Engineer, Public Works Department, Government of West Bengal as to the steps that are to be taken in relation to the said tender having

regard to the several complaints received from various bidders regarding the obstruction faced by such bidders from submitting their Bids. The

nature of the complaints have been summarized in the Note Sheet, relevant portion whereof is reproduced herein below:

During the period of submission of Bids i.e. upto 3.00 p.m. the undersigned had received several calls on mobile phone from Rajpath

Contractors & Engineers Ltd. and one call from Pam Developments Pvt. Ltd. Their allegations were that their representatives were obstructed by

some persons preventing them submitting bids. They were advised by the undersigned to take help of Police personnel present in the offices. If the

happening was outside the office campus they were advised to take help of the local P.S.

By this time several complaints have been received from different angles.

1. Letter from Rajpath Contractors & Engineers Ltd. along with copy of diary at Balurghat P.S. (copies enclosed) - as per report obtained from

the P.S. (copy enclosed) the time of diary received was 16.12 hrs. Police personnel were posted in the office since 12.00 hrs after receiving a

telephonic call.

2. Letter from Pam Development Private Limited along with copy of diary at Kotwali P.S., Jalpaiguri copies enclosed - the local P.S. has been

written to send their report.

3. Letter from Manmatha Kundu & sons and from Subrata Kundu (copies enclosed) - They did not lodge diary to the P.S. but the allegation was

similar. They have submitted certificate from bank that they had obtained Drafts on 28th January, 2011 from State Bank of India Raiganj Branch

and cancelled those on 29th January, 2011 (copy enclosed). That may be subject to verification.

4. i) Letter in letter-head of Dakshin Dinajpur Contractors Association dated 28th January, 2011 (copy enclosed).

ii) Letter in letter head of Dakshin Dinajpur Contractors Association dated 31st January, 2011 (Copy enclosed).

11. The supporting documents which are the alleged complaints would reveal that the FIR was lodged on 28th January, 2011 by Pam

Developments Private Limited and the same was forwarded to the Chief Engineer, Public Works Department under cover of the letter dated

31st January, 2011. The said letter along with a copy of the FIR was received by the department on 1st February, 2011. It would further show

that two other persons, namely, Manmatha Kundu and Subrata Kundu did not lodge any FIR, although, made some allegations. It would further

appear that they claimed to obtain bank drafts on 28th January, 2011 for submitting the same along with the tender but the same was cancelled on

29th January, 2011.

12. It would further appear that Rajnath Contractors and Engineers Ltd. by a letter dated 28th January, 2011 complained that when their

representative Sri Chandan Samanta went to submit the above said tender at Balurghat about 2.30 p.m., he was prevented by miscreants from

submitting the same. The respondents were further informed that Rajnath had also lodged FIR with the Balurghat Police Station. The said letter

dated 28th January, 2011 was received by the concerned department on the same date.

13. After considering the matter in detail, the said Superintending Engineer suggested to take any one of the following steps:

1. Second call may be done on short notice by retaining the bids received in first call valid.

2. The bidders who have purchased bidding documents and procured earnest money on or before 28th January, 2011 may be allowed to submit

bid by extending the period of submission. For the case where the bidding documents have been snatched away, that may be re-issued on

cancellation of previous.

By these two ways time will be saved and for those who have already submitted bids have already made a good expenditure and arranged many

documents and declarations usually required for such bidding process. Amount of earnest money is huge of about 30(thirty) lac. Those deserve

getting honored.

3. Fresh bids may be invited on cancellation of this process. In such case decision about those already submitted is to be taken.

4. The present bidding process may be continued ignoring all allegations.

14. From the list of events made available to us by the respondent authorities, it appears that on 31st January, 2011, a decision was taken for

deferment of the date of the opening of technical bids although the report of the Superintending Engineer was dated 2nd February, 2011.

Moreover, it appears that the Chief Engineer has adopted step 2 as suggested by the Superintending Engineering disregarding the fact that

Manmatha Kundu and Subrata Kundu have already withdrawn their bank drafts and accordingly they could not have considered for the said

tender any further.

15. Mr. Pratap Chatterjee, learned Senior Advocate appearing on behalf of the appellant has relied upon various decisions of the Hon"ble

Supreme Court for the proposition that the tender committee cannot relax the essential conditions of a tender. In order to appreciate the said

argument, it is necessary for us to quote the relevant clause giving the power of relaxation to the tendering authority, namely, D.3 of N.I.T. which is

reproduced herein below:

D.3 The tender inviting authority may extend the deadline for submission of Bids by issuing an amendment without changing all rights and

obligations of the Tender Inviting & Accepting Authority and the Bidders.

16. It appears that under the said N.I.T., the tendering authority has the right to extend the deadline for submission of Bids by issuing an

amendment without changing all rights or obligations of the Tender Inviting and Accepting Authority of the Bidders. The power to relax by a

Government authority has been considered by the Hon"ble Supreme Court in detail in the judgment reported in B.S.N. Joshi and Sons Ltd. Vs.

Nair Coal Services Ltd. and Others, the relevant portion whereof is reproduced herein below:

(iii) If there is no power of general relaxation of tender conditions, ordinarily the same shall not be exercised and the principle of strict compliance

would be applied where it is possible for all the parties to comply with all such conditions fully. Whether an employer has power of relaxation must

be found out not only from the terms of the notice inviting tender but also the general practice prevailing in India. For the said purpose, the Court

may consider the practice prevailing in the past. Keeping in view a particular object, if in effect and substance it is found that the offer made by one

of the bidders substantially satisfies the requirements of the conditions of notice inviting tender, the employer may be said to have a general power

of relaxation in that behalf. Once such a power is exercised, one of the questions which would arise for consideration by the superior courts would

be as to whether exercise of such power was fair, reasonable and bona fide. If the answer thereto is not in the negative, save and except for

sufficient and cogent reasons, the writ courts would be well advised to refrain themselves in exercise of their discretionary jurisdiction.

(iv) If there is no general power of relaxation of tender conditions, and if, however, a deviation is made in relation to all the parties in regard to any

of such tender conditions, ordinarily again a power of relaxation may be held to be existing. The parties who have taken the benefit of such

relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when

he was also not in a position to comply with all the conditions of tender fully, unless the Court otherwise finds relaxation of a condition which being

essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction.

(v) When a decision is taken by the appropriate authority upon due consideration of the tender documents submitted by all the tenders on their

own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential

conditions were laid down, the same may not ordinarily be interfered with.

17. The echo of the said decision also found place in subsequent decisions reported in Sorath Builders Vs. Shreejikrupa Buildcon Limited and

Another, . and Glodyne Technoserve Ltd. Vs. State of M.P. and Others,

18. The other two decisions cited by West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others, : AIR 2001 SC 682) Asia

Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others, Asia Foundation & Construction Ltd. v. Trafalgar House

Construction (I) Ltd. & Ors. does not seem to support his contention.

19. Insofar as West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others, , there was a negligent mistake in the Bid

documents and the Hon"ble Supreme Court held that the same cannot be permitted to be corrected on the basis of equity where the 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.

20. Insofar as the Trafalgar case is concerned, the Hon"ble Supreme Court held that in absence of exercise of power for collateral purpose,

ulterior motive, favoritism, malice or mala fides, the Court would not interfere with the award of contract and the Courts must keep in mind cost

escalation of the project as a result of delay that would be caused by its interference.

21. In this case, it is not in dispute that the intending bidders did purchase their required documents including bank drafts prior to submission but

they alleged that due to some obstruction they would not submit such bid documents. Although we have noticed that approval by the Chief

Engineer to the steps suggested by Superintending Engineer was on 9th February, 2011 but the notice of the Superintending Engineer was issued

on 31st January, 2011 fixing a date as 17th February, 2011 at 1 p.m. and thereby altering the date already fixed earlier in terms of the N.I.T. i.e.

1st February, 2011 does not seem to us sufficient to interfere with the discretion exercised by the Chief Engineer. There are materials on record

which would justify such extension.

22. Although it appears that the Superintending Engineer on 31st January, 2010 deferred the opening of the Bid from 1st February, 2011 to 17th

February, 2011, before the approval came from the Chief Engineer that itself may not be a ground to cause the entire tender process. The

Superintending Engineer in the note sheet, the telephonic complaints received from Rajnath Contractors & Engineers Ltd. and Pam Developments

Pvt. Ltd. Ultimately, the Chief Engineer had taken a decision on 9th February, 2011 in terms of step 2 suggested by the Superintending Engineer.

As discussed above only Rajnath and Pam would be eligible since other two complainants have already cancelled their bank drafts. It is not in

dispute that the Rajnath and Pam had purchased the required documents and bank drafts prior to 28th January, 2011. Having regard to the fact

that public exchequer is involved in such tender process and having regard to the law laid down by the Hon"ble Supreme Court in Trafalgar and

the other decisions referred to above would be just and proper to allow Rajnath and Pam to participate in the said tender process in relation to the

others who had already submitted their Bid on 28th January, 2011. The same cannot prejudice the right of the writ petitioner since it is only at the

stage of opening of Bid and the terms and conditions of the tender are not being varied, excepting an extension of time to submit the Bid for only

those bidders who could not deposit their Bid on 28th January, 2011 for cogent reasons mentioned hereinabove.

23. In view thereof we direct the respondent authorities to accordingly extend the time for opening of the Bids in terms of step 2 as suggested by

the Superintending Engineer and the other deadlines are required to be accordingly extended for the purpose of finalization of the tender. We are

not inclined to accept the submission of Mr. Chatterjee that Pam and from Rajnath Contractors & Engineers Ltd. should not be allowed. No right

has accrued in favor of the petitioner as yet since the tender is yet to be opened and it may be found that Mr. Chatterjee's client may be the

successful tendered. Moreover, there has been no variation of essential terms of tender.

24. There is no reason to speculate at this stage as to who would get the tender and also there is no reason for Mr. Chatterjee's client to

apprehend that his client would be victimized. No legal right has accrued to Mr. Chatterjee's client at this stage to challenge the said decision to

extend the time. In fact, the only challenge to the writ petition was the power of the Government to relax the time which we have answered in the

affirmative.

25. In view of that we direct the respondent authorities accordingly to extend the time to open the bids in terms of steps as suggested by the

Superintending Engineer and to extend the deadline for submissions of bids for the purpose of finalization of the tender. We further do not incline to

accept the submissions made on behalf of the writ petitioner by Mr. Chatterjee, learned Senior Advocate on behalf of the appellant that Pam

Developments Private Limited and from Rajnath Contractors & Engineers Ltd. should not be allowed. Since it appears to us no right has yet been

accrued in favor of the writ petitioner and the tender is yet to be opened, there is no reason to appreciate in the matter in any manner whatsoever

by Mr. Chatterjee's client. The fate has not yet been decided. Therefore, there is no reason to speculate at this stage. Hence, we only come to the

conclusion that the challenge thrown by the writ petitioner with regard to power of the State authorities to relax the time must be answered in the

affirmative.

26. In our considered opinion, the authorities have acted within the four corners of the tender document and the terms mentioned therein and

therefore, cannot call for any interference by this Court.

27. In view thereof, the appeal is disposed of on the terms mentioned hereinabove.

28. Since the appeal is disposed of, the connected application for stay (being C.A.N. 5624 of 2011) has become in fruituous and the same is

disposed of on the above terms.

29. By consent of the parties the writ petition being W. P. No. 2888 (W) of 2011 is also disposed of since we have dealt with the matter

extensively and issue involved in the writ petition has been decided by us.