

# Calcutta High Court

HON'BLE WDJG(S): PRAKASH SHRIVASTAVA, C.J. AND RAJARSHI BHARADWAJ, J

## AINUL HOQUE V. MANDEEPA ENTERPRISES

MAT No.- 1247 of 2021,, decided on 13/12/2021

**Constitution of India , Art.14- Tender -Allowing bidder to rectify its technical bid – Validity - Respondent allowed to rectify application in consonance with pro forma attached to notice inviting electronic bid - Plea of appellant that technical bid of respondent suffers from error as pro forma prescribed for application in Section-B Form-I not properly filled up - Memorandum Dt.15.1.2019 of State Govt. itself permits correction of such mistake - Discrepancies in application form were minor in nature - Single Judge taking note of memorandum permitted correction of said minor errors - Alleged typographical error in application Form-I has no effect on merits of technical bid - Rectification, valid. WPA No. 17814 of 2021 *DI-11.11.2021* (Cal), Affirmed. AIR 2001 SC 682 and AIR 1996 SC 11, Distinguished.**

(Para 11, 12, 13, 14)

### Case Referred :

AIROnline 2021 SC 1043  
(2021)WPANo.17814of2021,Dt. 11-11-2021 (Cal)(Affirmed)  
AIROnline 2013 SC 578  
AIROnline 2006 SC 645  
AIR 2001 SC 682: 2001 AIR SCW 322 (Distg.)  
AIR 1996 SC 11 : 1994 AIR SCW 3344 (Distg.)

### Chronological Paras

Para No.( 3, 14)  
Para No.( 1)  
Para No.(  
10)  
Para No.( 3, 13)  
Para No.( 3, 12)  
Para No.( 3, 13)

## **Name of Advocates**

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Kishore Datta, Kallol Basu, Rita Patra, Anand Farmina, Nilanjan Pal, Mirza Firoj Ahmed Begg, for Petitioner; Amitesh Banerjee, Md. T. M. Siddiqui, Nilotpal Chatterjee, Phiroze Edulji, Sandip Kumar De, Abhijit Sarkar, Soumyo Majumdar, Anirban Dutta, for Respondents.

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1. **PRAKASH SHRIVASTAVA, C.J.**:-This appeal is directed against the order of the learned single Judge dated 11 November, 2021 whereby WPA No. 17814 of 2021 filed by the respondent No. 1 herein has been disposed of with a direction to the respondent authorities to permit the respondent No. 1 to file a rectified application in consonance with the proforma attached to the notice inviting electronic bid dated 20 October, 2021. Further directing that if such a rectification application is submitted, the respondent authorities will upon due scrutiny, consider the same as valid, subject to compliance with the formalities as appearing from the Notice Inviting Tender (for short 'NIT') and its annexures and treat the respondent No. 1's bid as technically correct thereby entitling him to participate in the tender process.

2. **The** brief facts in narrow compass are that the Notice Inviting Electronic Bid (for short 'NIEB') was floated by the respondent No. 3 for collection of toll tax on Ajay Bridge over river Ajay at Ilambazar in the district of Birbhum dated 08 October, 2021. The parties including the appellant and respondent No. 1 had submitted their bids and the respondent No. 1 was informed by communication dated 09 November, 2021 about rejection of his technical bid. Since no opportunity to submit certificate was given before rejection therefore, same day the reply was sent by respondent No. 1. The respondent No. 1 had approached the Writ Court raising the grievance that the technical bid was illegally rejected and that the procedure prescribed was not followed.

The learned single Judge has found that the procedure as prescribed in the memorandum dated 15 June, 2019 was not followed and also considering the minor nature of discrepancies which crept in while filling up the Form, has disposed of the petition with the direction as noted above.

3. Submission of the learned Counsel for the appellant is that the technical bid of the respondent No. 1 suffers from error in as much as the proforma prescribed for the application in Section - B Form - I was not properly filled up by the respondent No. 1 and there were mistakes therein. He further submits that Clause B (v) relating to bid evaluation does not permits such kind of correction and the mistakes which were noticed in the form submitted by the respondent No. I are also not covered by the memorandum dated 15 January, 2019. In support of his submission, he has relied upon the judgment of the Hon'ble Supreme Court in West Bengal State Electricity Board v. Patel Engineering Co. Ltd. and others (2001) 2 SCC 451 : **(AIR 2001 SC 682)** and in Tata Cellular v. Union of India (1994) 6 SCC 651 : **(AIR 1996 SC 11)**. He has also submitted that the scope of judicial review in such matters is limited and has relied upon the judgment of the Hon'ble Supreme Court in the matter of Jagdish Mandal v. State of Orissa and others (2007) 14 SCC 517 : **(AIR Online 2006 SC 645)** in support of his submission and has also submitted that the concession given by the Advocate is not binding contrary to law and in this regard he has placed reliance upon the judgment of the Hon'ble Supreme Court in the matter of Union of India v. Manraj Enterprises (2021) SCC OnLine SC 1081 : **(AIR Online 2021 SC 1043)**.

4. Learned Counsel for the respondent No. 1 opposing the appeal and supporting the order of the learned single Judge has submitted that since certain minor mistakes had taken place in the application form, therefore, in view of the memorandum dated 15 January, 2019 and clause B(v) of the NIT, correction has rightly been allowed.

5. Learned Counsel for the State has submitted that the concession give

by the Counsel for the State before the Writ Court was only in respect of consideration of bid and that the technical bid was defective, hence, it has rightly been rejected.

6. We have heard the learned Counsel for the parties and perused the record. The technical bid of the respondent No. 1 was rejected by order dated 09 November, 2021 on the ground that the application was not in order. The format of the application is contained in Section - B Form I of NIT. A perusal of the application submitted by the respondent No. 1 reveals that certain typographical error had occurred in respect of the person to whom the application was addressed and in reference clause.

7. Clause 6B of the NIT relates to the bid evaluation and sub-clause (v) thereof provides for summoning of the bids and seeking clarification/information, etc. at the stage of evaluation. Sub-clause (v) reads as follows:

"(v) While evaluation of the Notice Inviting Authority may summon of the bids and seek clarification/information or additional supporting documents or original hard copies against any of the documents only, which are already submitted/uploaded in the web portal and if these are not produced by the intending Bidders within the stipulated time frame (within only 48 hours), their proposals will be liable for rejection."

8. Since procurement of contract was done through e-Procurement system, therefore, in order to make a bid examination process transparent, the government had issued the memorandum dated 15 January, 2019 providing for giving an opportunity to the bidder whose technical suffer from minor clerical/rectifiable deficiencies to explain their position within a time bound period. The memorandum dated 15 January, 2019, in clear terms provides that:

"It has been observed that in the bidding process and system of

Qualifying/Disqualifying the bids based on bidding documents uploaded by the bidder in e-portal some tenders are being rejected in pre-qualification stage due to minor clerical/rectifiable deficiencies in the uploaded documentations of bidders, which do not made any material difference in the technical/financial capacity of bidder. It has also been noted that authorities reject these tender/bids without giving any opportunity to the bidders.

In order to make the whole bid examination process transparent, all authorities implementing the work on behalf of the Public Works Department, Govt. of West Bengal are hereby directed to give an opportunity to the bidders whose technical bids are found defective to explain their position within seven working days either through e-mail or sending hard copy through any messenger. After receiving the clarification on deficiency, the authorities would be justified in taking appropriate decision on the admission/rejection of the bid considering the merit of each case."

9. **In** the present case, the discrepancies in the application form were minor in nature. Therefore, learned single Judge taking note of the memorandum dated 15 January, 2019 has permitted correction of the said minor errors. Nothing has been pointed out to show that those minor typographical errors in Form I would in any manner affect the merits of the bid. In this background, before the learned single Judge, Counsel for the State had also accepted the proposal for correction of the said error in the application by furnishing fresh application with an explanation as regards minor error.

10. **In** somewhat similar circumstances, the Hon'ble Supreme Court in the matter of Rashmi Metaliks Limited and another v. Kolkata Metropolitan Development Authority and others (2013) 10 SCC 95 :

(AIROnline 2013 SC 578) in a case where the appellant was disqualified on the ground of failure to submit its latest income tax report along with a bid has taken the view that the Tendering Authority ought to have brought this discrepancy to the notice of the tenderer as filing of the latest income tax return was a collateral term and that disqualification of the appellant company on the ground of its failure to submit its latest income tax return along with a bid was not a sufficient reason for disregarding the bid/offer. The Hon'ble Supreme Court in the case of Rashmi Metaliks Limited (Supra) held that:

"18. We think that the income tax return would have assumed the character of an essential term if one of the qualifications was either the gross income or the net income on which tax was attracted. In many cases this is a salutary stipulation, since it is indicative of the commercial standing and reliability of the tendering entity. This feature being absent, we think that the filing of the latest income tax return was a collateral term, and accordingly the Tendering Authority ought to have brought this discrepancy to the notice of the appellant Company and if even thereafter no rectification had been carried out, the position may have been appreciably different. It has been asserted on behalf of the appellant Company, and not denied by the learned counsel for the respondent Authority, that the financial bid of the appellant Company is substantially lower than that of the others, and, therefore, pecuniarily preferable."

**11.** In the present case also, the alleged typographical error in the application Form I has no effect on the merits of the technical bid. Hence, this case also stands on the same footing.

12. There is no dispute that the scope of interference in the tender

matters is limited and the mistake in the bid document cannot be permitted to be corrected on the basis of equity but in the present case, the memorandum of the State Government dated 15 January, 2019 itself permits correction of such mistake. Hence, the appellant is not entitled to the benefit of the judgment of the Hon'ble Supreme Court in the case of West Bengal State Electricity Board (Supra).

13. Reliance has also been placed by the learned Counsel for the appellant in the judgment of the Hon'ble Supreme Court in the case of Tata Cellular (Supra) wherein it has been held that judicial review of only the decision making process and not the merits of the decision itself is permissible as the Court do not sit as Appellate Court while exercising the power. In this case, the error in the decision making process itself is in respect of non-compliance of the procedure prescribed in the memorandum of the State dated 15 January, 2019. Hence, the appellant is not entitled to the benefit said judgment. Counsel for the appellant has also placed reliance upon the judgment of the Hon'ble Supreme Court in the case of Jagdish Manda! (Supra) wherein it has been held that evaluation of the tenders and awarding of contract are essential commercial functions and principle of equity and natural justice stay at a distance in such matter and if the decision relating to award of contract is bona fide and is in public interest, Court will not interfere by exercising power of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer is made out. In the present case, the financial bid has not yet been opened it is only the technical bid which has been opened and in that process also, respondents have not followed the prescribed procedure. Hence, keeping in view the object of transparency in the process, we are of the opinion that the appellant is not entitled to the benefit of the judgment in the case of Jagdish Mandal (supra).

14. Counsel for the appellant has also placed reliance upon the judgment in the case of Manraj Enterprises (supra) wherein it has been held that the concession if made by the Counsel contrary to the law laid down by the Hon'ble Supreme Court will not be binding on the parties but in this case, nothing has been pointed out to show that the concession made by the Counsel for the State was contrary to the law.

**15. Hence,** we are of the opinion that the order of the learned single Judge does not require any interference.

**16.** The appeal is accordingly dismissed.

**Order Accordingly**