

IN THE HIGH COURT AT CALCUTTA

**Civil Appellate Jurisdiction
(Appellate Side)**

M.A.T. 880 of 2023

Pathak Engineering Corporation & Anr.

v.

The State of West Bengal & Ors.

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M.A.T. 878 of 2023

Pathak Engineering Corporation & Anr.

v.

The State of West Bengal & Ors.

With

I.A. No. CAN/1/2023

Before: The Hon'ble Justice Arijit Banerjee

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The Hon'ble Justice Apurba Sinha Ray

For the Appellants : Mr. Jayanta Kumar Mitra, Sr. Adv.
Mr. Ranajit Chatterjee, Adv.
Mr. Aniruddha Mitra, Adv.

For the KMC : Mr. Biswajit Mukherjee, Adv.
Mr. Gopal Chandra Das, Adv.

For the State in (MAT : Mr. Jaharlal De, Adv.
878 of 2023) Mr. Rudranil De, Adv.

For the Respondent : Ms. Noelle Banerjee, Adv.
No. 6 Mr. Ritoban Sarkar, Adv.
Mr. Vivek Murarka, Adv.
Ms. Shreya Ghosh Dastidar, Adv.
Mr. Mainak Biswas, Adv.
Ms. Sakshi Jha, Adv.

For the Respondent no. : Mr. Biswaroop Bhattacharya, Adv.

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For the Respondent : Mr. Srijib Chakraborty, Adv.

no.8

Judgment on : 23.11.2023

Arijit Banerjee, J.:

1. These two appeals are directed against a common judgment and order dated May 11, 2023, whereby two writ petitions being W.P.A. 11199 of 2023 and WPA 10017 of 2023, both filed by the appellants herein challenging a tender process, were dismissed by a learned Judge of this Court.

2. The material facts of the case, briefly stated, are as follows.

3. A tender was floated by Kolkata Municipal Corporation (in short "KMC") for supply and delivery of liquid chlorine from proven and reputed manufacturers by their authorised agents. The tender pertained to the financial year 2023-24. The estimated tender value was Rs. 4,22,50,158/-. The eligibility criteria for participation in the tender were mentioned as follows:-

"4. Eligibility criteria for participation in the tender

All intending tenderers should qualify eligibility criteria for the purpose of **TENDER FOR LIQUID CHLORINE**. If any of the participating tenderer fails to qualify in any of the terms &

conditions mentioned below, the particular tender will be declared informal/non-responsive.

I) Tenderer should produce valid PAN issued by IT Department, Govt. of India, valid 15-digit Goods and Services taxpayer Identification Number (GSTIN) under GST Act, 2017, latest Professional Tax returns copy and certificate. Trade license will be mandatory for those whose unit is located within the jurisdiction of KMC.

II) a) Intending tenderers should produce credentials of a similar nature of completed work of the minimum value of 40% (Forty per cent) of the estimated amount put to tender during 5(five) years prior to the date of issue of the tender notice;

Or,

b) Intending tenderers should produce credentials of 2(two) similar nature of completed work, each of the minimum value of 30% (Thirty per cent) of the estimated amount put to tender during 5 (five) years prior to the date of issue of the tender notice;

Or,

C) Intending tenderers should produce credentials of one single running work of similar nature which has been completed to the extent of 80% (Eighty per cent) or more and value of which is not less than the desired value at (a) above;

In case of running works, only those tenderers who will submit the certificate of satisfactory running work from the

concerned Executive Engineer, or equivalent competent authority will be eligible for the tender. In the required certificate it should be clearly stated that the work is in progress satisfactorily and also that no penal action has been initiated against the executing agency, i.e., the tenderer.

- Similar nature of work includes supply of any materials.
- Completed work-Completed single or multiple purchase order issued from a single tender.
- Payment certificate will not be treated as credential;
- Credential certificate issued by Executive engineer or equivalent or competent authority of a State/Central Government, State/Central Government undertaking, Statutory/Autonomous bodies constituted under the Central/State statute, on the executed value of completed/running work will be taken as credential.
- **The bidder should have valid explosive license at the time of opening of the bid, L1 bidder should submit the authorization certificate from the manufacturer whose material it is going to supply.**
- **If L1 bidder failed to submit the authorization certificate from the manufacturer within seven days, then the EMD of L1 bidder will be forfeited and will be debarred from participating in all future tenders up to 3 years.”**

4. The notice inviting tender (in short NIT) mentioned about a pre-bid meeting which any interested party having any query or requiring any information, could attend.

5. Three parties, viz, Universal Mineral Corporation (in short Universal), Rishikesh Chem (in short Rishikesh) and SSS Enterprises (in short SSS) participated in the tender process. The appellants did not offer any bid. Universal emerged as L1 bidder. At that stage Rishikesh approached a learned Single Judge by filing WPA 9259 of 2023, challenging the tender process. The learned Judge dismissed the writ petition by a judgment and order dated April, 24, 2023. Rishikesh carried such order in appeal by filing MAT 722 of 2023. By a judgment and order dated May 1, 2023, this Division Bench dismissed the appeal.

6. Thereafter KMC issued the work order in favour of Universal. After issuance of the work order in favour of Universal, the appellants herein approached the learned Single Judge by filing the present writ petitions challenging the same tender process which Rishikesh had challenged unsuccessfully. The learned Judge by the judgment and order impugned in these appeals dismissed the two writ petitions. Hence these two appeals.

7. Appearing for the appellants, Mr. Jayanta Kumar Mitra, learned Senior Advocate, submitted that none of the 3 participants qualified at the technical bid stage. Two of them did not qualify for non-submission of statutory documents. He referred to a notification of the Finance Department of the Government of West Bengal dated April 24, 2014, inter alia, to the effect that

in case of a tender under two bid systems, if the number of tenderers/bidders qualifying in the technical bid is less than 3, fresh tender should be invited.

8. Referring to a comparative chart at page 141 of the stay petition Mr. Mitra tried to point out the various documents that the bidders had not submitted. He submitted that these were statutory documents and a clause in the NIT required rejection of a bid if the required statutory documents were not submitted.

9. Mr. Mitra finally submitted that if the appellants knew that KMC would relax the conditions of NIT, the appellants could have participated hence there has been a violation of Article 14 of the Constitution of India.

10. Learned Senior Counsel relied on the following 3 decisions of the Hon'ble Supreme Court on the point as to the circumstances in which the Court may interfere in a tender process:-

(i) Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation and Ors., reported at (2000) 5 SCC 287.

(ii) W.B. State Electricity Board v. Patel Engineering Co. Ltd. & Ors., reported at (2001) 2 SCC 451.

(iii) Ramana Dayaram Shetty v. International Airport Authority of India & Ors., reported at (1979) 3 SCC 489.

11. Appearing for KMC, Mr. Biswajit Mukherjee, learned Advocate submitted that there was no irregularity in the tender process. The contention of the appellants that SSS did not have valid trade licence is not correct. As

on the date of opening of the bid, the trade licence of SSS granted by Shirampur Municipality was valid.

12. Learned Counsel further submitted that the present appellants have been set up by SSS and Rishikesh after Rishikesh unsuccessfully challenged the tender process.

13. Mr. Mukherjee submitted that the appellants have no locus standi to maintain the writ petition. In this connection learned Advocate relied on the following decisions:-

(i) Subir Ghosh v. State of West Bengal & Ors., reported at 2020 SCC OnLine Cal 2213.

(ii) Mahalakshmi Engineering Works & Ors. v. Bangalore Electricity Supply Company Limited., reported at MANU/KA/5925/2022.

(iii) Praxair India Private Limited v. Central Vigilance Commissioner & Ors., reported at 2022 SCC OnLine Cal 466.

(iv) Sri Durga Enterprises v. The Chief Commissioner, Bruhath Bengaluru Mahanagara Palika & Ors., reported at MANU/KA/1162/2022.

14. Relying on the aforesaid judgments Mr. Mukherjee submitted that since the appellants did not participate in the tender process, they are not entitled to challenge the same. Mr. Mukherjee further submitted that the work order

was issued in favour of the successful bidder, namely, Universal and Universal has already performed a substantial part of the contract.

15. Appearing for Universal, Ms. Noel Banerjee, learned Advocate, also challenged the locus standi of the appellants to maintain the present writ petition. Learned Advocate relied on the following decisions:-

(i) National Highways Authority of India v. Gwalior Jhansi Expressway Limited Through Director, reported at (2018) 8 SCC 243.

(ii) A.M. Yusuf v. Mumbai Municipal Corporation & Ors. reported at 2008 SCC OnLine Bom 1186.

16. Ms. Banerjee then submitted that as regards submission of relevant documents along with the bid, whether the bidders submitted such documents or KMC obtained such documents from elsewhere, including its past records, is irrelevant. Further, Clause 3 of the tender documents says that disqualification of a bidder will be only for non-submission of statutory documents. The documents that the appellants allege were not submitted by the bidders are non-statutory documents. The tender itself defines statutory documents.

17. Referring to Clause 3(d) of the Notification dated June 7, 2022, issued by the Finance Department of the Government of West Bengal, Ms. Banerjee submitted that the said clause provides that if there is deficiency in documents submitted by a bidder, then he will be given a chance to explain the deficiency and rectify the same. That Notification also provided that in

case of number of bidders being less than three fresh tender would be issued. No such occasion arose in the facts of the present case.

18. Ms. Banerjee then submitted, with reference to Clause 3 of the NIT, that the final authority to decide whether or not a bidder is qualified is KMC. In the present case KMC was satisfied with the documents submitted by the bidders.

19. Ms. Banerjee finally referred to the decision of the Hon'ble Supreme Court in the case of ***Uflex Limited v. Government of Tamil Nadu & Ors.*** reported at (2022) 1 SCC 165 and in particular on paragraphs 1, 2, 3 and 49 of the reported judgment which read as follows:-

“1. The enlarged role of the Government in economic activity and its corresponding ability to give economic ‘largesse’ was the bedrock of creating what is commonly called the ‘tender jurisdiction’. The objective was to have greater transparency and the consequent right of an aggrieved party to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India (hereinafter referred to as the ‘Constitution’), beyond the issue of strict enforcement of contractual rights under the civil jurisdiction. However, the ground reality today is that almost no tender remains unchallenged. Unsuccessful parties or parties not even participating in the tender seek to invoke the jurisdiction of the High Court under Article 226 of the Constitution. The Public Interest Litigation (‘PIL’) jurisdiction is also invoked towards the same objective, an aspect

normally deterred by the Court because this causes proxy litigation in purely contractual matters.

2. The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fide. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance.

3. We cannot lose sight of the fact that a tenderer or contractor with a grievance can always seek damages in a civil court and thus, “attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted.

49. Now coming to the issue of the requirement of three bidders or more than three bidders, the factual position is that there were three bidders and that one of them met the technical specifications but did not succeed further on financial issues and turnover under Part 4 of the NIT. The same cannot be used to nullify the whole tendering process. We are dealing with a tender of a nature where there cannot be a vacuum. If there is less participation than

necessary, it cannot be said that ipso facto the terms and conditions of tender have followed a DOSA, and to somehow give the tender to one of the parties. Similar terms have been set out in many tenders of different States and there have been varying succeeding parties. No doubt, the success rate of the two successful parties before us is definitely higher but we fail to appreciate how that can form the basis to come to a conclusion that something must be done to let other people get a tender. If one may say, it will then become a DOSA to see that the most competitive party does not succeed in the tender but that other parties who keep approaching the Court must get some share of the pie. This cannot be the objective.”

20. Finally Ms. Banerjee submitted that if the appellants had any issue as regards any term of the tender documents, they could have got the same clarified at the pre-bid meeting. Such meeting was duly held in terms of Clause 28 of the NIT which was to the effect that pre-bid meeting will be conducted at the chamber of Controller of Stores & Purchase on 03.04.2023 at 1 PM and all the interested participants are requested to attend the meeting for any query or information. If any major query/information is there, the same is to be submitted in writing during pre-bid meeting. However, the appellants did not attend such meeting.

21. I have given my anxious consideration to the rival contentions of the parties.

22. To start with, the scope of interference by the Court in exercise of writ jurisdiction in tender matters, is extremely limited. The writ Court would not

sit on judgment as to whether or not the terms and conditions of a tender are proper. It is up to the Authority floating the tender to decide the terms and conditions in its wisdom and commercial prudence. However, the terms and conditions cannot be such as to favour a particular party. Generally speaking, the Government is free to enter into contracts with the citizens. However, the Government cannot act arbitrarily or contrary to public interest. It also cannot discriminate between persons who are similarly situated. As observed by the Hon'ble Supreme Court in the case of **Monarch Infrastructure (P) Ltd., supra**, it is open to the Government to reject even the highest bid in a tender where such rejection is not arbitrary or unreasonable or is in public interest for valid and good reasons. In a nutshell, the courts would not interfere with matters of administrative action of the Government or a public Authority unless such action is arbitrary or discriminatory or the policy adopted has no nexus with the object which it seeks to achieve or is mala fide.

23. The appellant has sought to assail the subject tender process on several grounds. The question is, whether the appellants, who did not participate in the tender process, should be permitted to challenge such process? The answer must be in the negative. The law in this regard is well settled.

24. In the case of **Subir Ghosh v. State of West Bengal & Ors., supra**, a learned Judge of this Court had allowed a writ petition challenging a tender process although the writ petitioner was not a participant in such process. The matter being carried in appeal, a Coordinate Bench held as follows:-

“5. It is possible that a prospective bidder finds the terms of the tender documents to be unfair or illegal and challenges the same; but such challenge

has to be before the time to put in the bids is closed. At any rate, if a bid is made and the bid is thrown out on an illegal or unfair ground contained in the tender documents, even then, a challenge can be fashioned. **But a person who has not participated in the bidding process at all cannot challenge the tender conditions on any ground whatsoever.** This admitted aspect of the matter escaped the attention of the Single Bench while passing the impugned order of January 15, 2020.” [The emphasis is mine]

25. In the case of ***Praxair India Private Limited, supra***, a learned Single Judge of this Court, followed the decision in the case of ***Subir Ghosh*** referred to above and the decision of the Hon’ble Supreme Court in the case of ***National Highways Authority of India, supra***, and came to the same conclusion that a party who did not even put in his bid in response to a notice inviting tender, has no *locus standi* to challenge such tender process. In the case of ***Mahalakshmi Engineering Works & Ors. v. Bangalore Electricity Supply Company Limited, Supra***, a learned Judge of the Karnataka High Court, after referring to the Supreme Court’s decision in ***National Highways Authority of India, supra***, and the decision of a Division Bench of this Court in ***Subir Ghosh, supra***, held that “only a participant can question the tender, the challenge raised by the petitioners who are not the participants in the subject tender, would thus tumble down.”

26. In the case of ***National Highways Authority of India, supra***, it was argued on behalf of the appellant before the Hon’ble Supreme Court that a person or entity who stands out of the tender process or fails to comply with the terms and conditions of the tender documents cannot acquire any right or interest much less, actionable claim, in respect of such tender process.

Accepting such plea, while allowing the appeal, the Hon'ble Supreme Court observed in paragraph 20 of the reported judgment, as follows:-

“20. While considering the relief claimed by the respondent (claimant), the same should have been tested on the touchstone of the principle governing the tender process, especially when the validity of the tender document has not been put in issue or challenged before any competent forum. Going by the terms and conditions in the tender documents, as already alluded to in paragraph 10 above, there is no title of doubt that the right of the claimant (respondent) to match the bid of L-1 or to exercise ROFR would come into play only if the respondent was to participate in the tender process pursuant to the notice inviting tenders from the interested parties. The objective of tender process is not only to adhere to a transparent mechanism but to encourage competition and give equal opportunity to all tenderers with the end result of getting a fair offer or value for money. The plain wording of the eligibility clause in the tender documents and the incidental stipulations make it explicit that the respondent was required to participate in the tender process by submitting its sealed bid (technical and financial). The fact that a deeming clause has been provided in the tender document that if the respondent was to participate in the bidding process, it shall be deemed to fulfil all the requirements of the tender Clauses 3 to 6 of the RFP, being the existing concessionaire of the Project, does not exempt the respondent from participating in the tender process; rather the

tenor of the terms of the documents made it obligatory for the respondent to participate in the tender process to be considered as a responsive bidder, along with others. **Having failed to participate in the tender process and, more so, despite the express terms in the tender documents, validity whereof has not been challenged, the respondent cannot be heard to contend that it had acquired any right whatsoever. Only the entities who participate in the tender process pursuant to a tender notice can be allowed to make grievances about the non-fulfilment or breach of any of the terms and conditions of the tender documents concerned. The respondent, who chose to stay away from the tender process, cannot be heard to whittle down, in any manner, the rights of the eligible bidders who had participated in the tender process on the basis of the written and express terms and conditions.** At the culmination of the tender process, if the respondent had not participated, in law, the offer submitted by the eligible bidders is required to be considered on the basis of the stated terms and conditions. Thus, if the claim of the respondent was to be strictly adjudged on the basis of the terms and conditions specified in the subject tender document, the respondent has no case whatsoever.”(Emphasis is mine.)

27. In the case of **A. M. Yusuf, supra**, a Division Bench of the Bombay High Court, in paragraphs 15 and 16 of the reported judgment, observed as follows:-

“15. The doctrine of Locus Standi is well established in administrative law, law of contract and other allied laws. A person prejudicially affected would have a cause of action while in the specified class of cases a third party may be able to bring an action in public interest despite the fact that he may not have personal interest. But in the cases of present kind, the cause of action would be personal to the aggrieved party and not a cause of action in rem. Even if *Litmus Test Principle* is not strictly applied keeping in view the developing law, still it is difficult for us to hold that the Petitioner without being an applicant to the tender process could maintain the present writ petition, in the peculiar facts and circumstances of the case. As such an approach would neither subserve the public interest and would also hold in avoidance of public mischief.

16. Examined from the view of public interest, we see no infirmity. The Corporation has admitted to protect the larger interest by raising E.M.D. deposit. The Petitioner having opted of his own accord not to participate in the tender process can hardly be permitted to challenge the said process now at this stage. It is expected of every vigilant litigant or whose rights are effected to approach the Court at an appropriate time. Firstly, there is no indefeasible right vested in the applicant and secondly, even if right of participation/consideration was available to the Petitioner, the Petitioner has voluntarily given up such right by his conduct. No reason whatsoever has been stated as to why the applicant did not participate in the tender process or raise protest at an appropriate

stage. Despite the fact that the concept of locus standi has since undergone a substantial change, still the basic rule that the person aggrieved or a person directly affected is the person who has right to invoke jurisdiction of the Court under Article 226 of the Constitution holds good. The impugned action normally should produce a change in the Petitioner's legal right and more particularly adversely. We have already discussed that the variation effected by Corrigendum dated 11th November, 2008 has no way prejudicially effected any of the applicants and it provided a fair and equal opportunity to the applicants to participate in the tender process. The Petitioner having lost that opportunity of his own accord can hardly be permitted to raise a grievance now.”

28. I have also extracted the relevant portions of the judgment of the Hon'ble Supreme Court in the case of ***Uflex Limited, supra***, wherein the Hon'ble Court has emphasized the need to exercise restraint in interfering with tender matters.

29. In view of the above, I am of the considered opinion that the present writ petition is not maintainable. Although the point of lack of *locus standi* of the appellants to maintain the writ petition was not urged before the learned Single Judge who dismissed the writ petition on merits, it is essentially a point of law and we have permitted the respondents to urge that point before us, which they have done successfully. I am of the opinion that not having participated in the subject tender process, the appellants did not have the *locus standi* or the right in law to assail the tender process.

30. As regards the merits of the case, although it is not necessary for me to make any observation, yet, since the learned Judge has dismissed the writ petition on merits, I wish to add a few words. The learned Judge negated the contentions of the writ petitioners that all the documents that were required to be submitted by the tenderers, were not uploaded by them. The learned Judge observed that the Corporation already maintains a database of the documents submitted by the bidders. As the documents of successful bidders in respect of other tenders of the Corporation were already available on record, the Corporation relied upon those documents in connection with the subject tender.

31. The appellants/writ petitioners also argued that since at least three eligible bidders were not there, therefore a fresh tender should have been floated. We must keep in mind the tender was for supply of chlorine for purification of water to be supplied to the citizen's households. In other words, the notice inviting tender was issued in connection with rendering a very important public utility service by KMC. Even assuming that there were less than three tenderers who satisfied the technical eligibility criteria, that per se, should not be a ground for nullifying the entire tender process, as was held by the Hon'ble Supreme Court in the case of ***Uflex Limited, supra***. The tender process was required to be completed with expedition. KMC, which floated the tender, was satisfied with the technical and financial eligibility and credentials of Universal. Accordingly, the contract was awarded to Universal. I do not find any irregularity or procedural impropriety in such decision of KMC. No case of relaxation of any term/condition of the tender after the last date for submission of tender, so as to benefit Universal, has been made out.

None of the established grounds for challenging a tender process is available to the appellants.

32. The appeals and the connected application are accordingly dismissed with costs assessed at Rs. 20,000/-.

33. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

I agree.

(Apurba Sinha Ray, J.)

(Arijit Banerjee, J.)