SUPREME COURT OF INDIA

Rashmi Metaliks Ltd.

Vs.

Kolkata Metropolitan Development Authority

C.A.No.6772 of 2013

(T.S. Thakur and Vikramajit Sen JJ.)

11.09.2013

JUDGMENT

VIKRAMAJIT SEN, J.

1. We are called upon to decide the correctness of the impugned decision of the Division Bench of the High Court of Calcutta which in turn has upheld the appreciation of the law as also the facts of the case by a learned Single Judge of that Court. Thus, these courts have concurrently concluded that the Appellant-company had failed to comprehensively correspond to the essential terms of the tender and, therefore, its offer contained in the said tender was ineligible for consideration.

2. The two terms of the subject 'Invitation to Tender' which are germane to the case in hand are clauses (i) and (j) thereof, which read thus –

> "(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 Government Department/ Government Undertaking/ Statutory Body/ Municipality and of the like Government 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 cancelled summarily without assigning any reason whatsoever.
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> (j) Valid PAN No., VAT No., Copy of acknowledgement of latest Income Tax Return and Professional Tax Return."

3. It must immediately be clarified that so far as clause (i) is concerned, the learned Single Judge had thought it unnecessary to analyse its applicability and relevance, having come to the conclusion that a violation of clause (j) had been committed by the Appellant-company inasmuch as it had failed to file its latest Income Tax Return along with its bid. This position has continued to obtain even before the Division Bench as will be palpably clear from a perusal of the impugned judgment. The Division Bench, despite noting clause (j), has concerned itself only with the legal implications flowing from the alleged non-compliance of clause (i). The Division Bench has predicated its decision on W.B. State Electricity Board v. Patel Engineering Co. Ltd. (2001) 2 SCC 451 and has extracted, as we shall also do, the following paragraphs therefrom –

> "23. The mistakes/errors in question, it is stated, are unintentional and occurred due to the fault of computer termed as a "repetitive systematic computer typographical transmission failure". It is difficult to accept this contention. 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 Respondents 1 to 4 to correct the same before submission of the bid. Had they been vigilant in checking the bid documents before their submission, the mistakes would have been avoided. Further, correction of such mistakes after one-and-a-half months of opening of the bids will also be violative of clauses 24.1, 24.3 and 29.1 of the ITB.
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> 24. The controversy in this case has arisen at the threshold. It cannot be disputed that this is an international competitive bidding which postulates keen competition and high efficiency. The bidders have or should have assistance of technical experts. The degree of care required in such a bidding is greater than in ordinary local bids for small works. It is essential to maintain the sanctity and integrity of process of tender/bid and also award of a contract. The appellant, Respondents 1 to 4 and Respondents 10 and 11 are all bound by the ITB which should be complied with scrupulously. In a work of this nature and magnitude where bidders who fulfil prequalification alone are invited to bid, adherence to the instructions cannot be given a go-by 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 casualty. Relaxation or waiver of a rule or condition, unless so provided under the 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 the ITB or rules is the best principle to be followed, which is also in the best public interest."

4. The impugned judgment states that clause (j) cannot be viewed as a non-essential term and, therefore, should have been corrected before the submission of the tender. This seems to us to be chronologically or sequentially impossible; what was obviously meant was that failure to adhere to this term would render the bid non-compliant and, therefore, beyond the pale of consideration in toto. The Division Bench also opined that the Appellant-company could not be granted the indulgence to correct this error, as 'such facility was not available to other bidders.' In saying so, the Division Bench, it appears to us, has diluted its view that clause (j) is altogether inviolable.

5. The Respondents have endeavoured to raise the alleged violation of clause (i) before us, but we are in no manner of doubt that this effort should be roundly rejected. This is despite the fact that an explanation even in this context has been offered by Mr. K.V. Vishwanathan, learned senior counsel appearing for the Appellants. We shall desist from making any observations in regard to this clause (j) since it does not feature in the analysis of both the courts below. Dr. A.M. Singhvi, learned senior counsel for the Respondents has cited the following cases before us:

(i) W.B. State Electricity Board v. Patel Engineering Co. Ltd. (2001) 2 SCC 451 Para 23;

(ii) Kanhaiya Lal Agrawal v. Union of India (2002) 6 SCC 315 Paras 5 and 6;

(iii) Puravankara Projects Ltd. v. Hotel Venus International (2007) 10 SCC 33 Paras 28 to 30;

(iv) Sorath Builders v. Shreejikrupa Buildcon Ltd. (2009) 11 SCC 9 Paras 17 and 28; and

(v) Glodyne Technoserve Ltd. v. State of Madhya Pradesh (2011) 5 SCC 103 Para 47. Mr. Vishwanathan, learned senior counsel for the Appellants sought to rely on Poddar Steel Corporation v. Ganesh Engineering Works (1991) 3 SCC 273 and Kanhaiya Lal.

6. This Court, and even more so the High Court as well as the subordinate courts have to face lengthy arguments in each case because of the practice of citing innumerable decisions on a particular point of law. The correct approach is to predicate arguments on the decision which holds the field, which in the present case is Tata Cellular v. Union of India (1994) 6 SCC 651 rendered by a three-Judge Bench. The rule of precedence, which is an integral part of our jurisprudence, mandates that this exposition of law must be followed and applied even by co-ordinate or co-equal Benches and certainly by all smaller Benches and subordinate Courts. We hasten to clarify that if a co-ordinate Bench considers the ratio decidendi of the previous Bench to be of doubtful efficacy, it must comply with the discipline of requesting Hon'ble the Chief Justice to constitute a larger Bench. Furthermore there are some instances of decisions even of a Single Judge, which having withstood the onslaughts of time have metamorphosed into high authority demanding reverence and adherence because of its vintage and following in contradistinction of the strength of the Bench. This is a significant characteristic of the doctrine of stare decisis. Tata Cellular has been so ubiquitously followed, over decades, in almost every case concerning Government tenders and contracts that it has attained heights which dissuade digression by even a larger Bench. The law of precedence and of stare decisis is predicated on the wisdom and salubrity of providing a firmly founded law, without which uncertainty and ambiguity would cause consternation in society. It garners legal predictability, which simply stated, is an essential. Our research has revealed the existence of only one other three-Judge Bench decision which has dealt with this aspect of the law, namely, Siemens Public Communication Networks Private Limited v. Union of India (2008) 16 SCC 215, which is in actuality an anthology of all previous decisions including Tata Cellular. The sheer plethora of precedents makes it essential that this Court should abjure from discussing each and every decision which has dealt with a similar question of law. Failure to follow this discipline and regimen inexorably leads to prolixity in judgments which invariably is a consequence of lengthy arguments.

7. It is a capital exhaustion of Court time, lack of which has become critical. We shall, therefore, confine ourselves to Tata Cellular. We are mindful of the fact that it is a legitimate exercise, perfectly permissible for Benches to advance the law provided this exercise does not lead to a conclusion which is irreconcilable with a binding precedent. We also would clarify that the manner in which a Bench

appreciates the factual matrix before it can obviously be of value only if a subsequent case presents identical facts, which remains a rarity.

8. Tata Cellular states thus:

> "77. The duty of the court is to confine itself to the question of legality. Its concern should be:
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> 1. whether a decision-making authority exceeded its powers?
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> 2. committed an error of law,
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> 3. committed a breach of the rules of natural justice,
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> 4. reached a decision which no reasonable Tribunals would have reached or,
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> 5. abused its powers.
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> Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:
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> i) Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.
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> ii) Irrationality, namely, Wednesbury unreasonableness. iii) Procedural impropriety.
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> The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. v. Secretary of State for the Home Department, ex parte Brind, (1991) 1 AC 696, Lord Diplock refers specifically to one development namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the Court should, 'consider whether something has gone wrong of a, nature and degree which requires its intervention."

9. Since we have been deluged with decisions, we must now consider whether there have been any material additions to the law which per force are compatible with Tata Cellular. W.B. State Electricity Board reiterated the exposition of law contained in Tata Cellular, as it had to do. On facts it opined that 'once the unit rate and line item total are filled in by the bidder, they are unalterable though arithmetical errors can be rectified'. So far as the law is concerned the position remains the same significantly, as it must do; the facts bear no semblance to those in hand. The Court held that the private parties could not bind the Government by implication. Although Sorath Builders makes no reference to Tata Cellular but nevertheless is not incongruous to it; otherwise it would have been rendered per incuriam. It merely reiterates that while reasonableness in the Wednesbury mould is an integral part of administrative law it has no relevance in contractual law; on facts this Court held that since documents had not been despatched in accordance with the specified time schedule, the bid which had already been received on-line could correctly not be considered. Glodyne Technoserve also applies Tata Cellular; but on the factual matrix sounds a discordant note so far as the Respondents who rely on it are concerned, inasmuch as it recognises that it fell within the discretionary domain of the concerned Authority whether or not to consider the documents (in that case an ISO Certification) which had not been submitted as per tender stipulations. Kanhaiya Lal, relied upon by Shri Vishwanathan, talks in the same timbre in that it distinguishes between essential and collateral terms of a tender and in the latter case allows elbow room for exercise of discretion. Although it may be seen as a facet of Wednesbury reasonableness, this decision can be seen as adding another factor to Tata Cellular viz., the Court is empowered to separate the wheat from the chaff. In this exercise the Court can segregate the essential terms forming the bulwark of the compact, and whilst ensuring their strict adherence, can allow leniency towards the compliance of collateral clauses. This analysis of the cited case- law shows that there is little or no advantage to be gained from the manner in which the Court has responded to the factual matrix as other Courts may legitimately place emphasis on seemingly similar facts to arrive at a different conclusion. But the ratio decidendi has to be adhered to. Counsel must therefore exhibit circumspection in the number of cases they cite. The three-Judge Bench in Tata Cellular is more than sufficient to adumbrate the law pertaining to tenders; the later decision of the co-ordinate Bench in Siemens is in the nature of annals of previous decisions on the point.

10. With this brief analysis of the decisions cited at the Bar, we shall now return to the essential factors that shall determine our decision. The two clauses that have been debated before us have already been reproduced by us above. The learned

Single Judge had returned the finding that the Appellant-company's tender did not correspond to the essential term of the 'Invitation to Tender' in two respects:

a) The alleged blacklisting of the Appellant-company as postulated in clause (i); and

b) The Appellant-company's failure to furnish/forward the latest Income Tax Return, as envisaged in clause (j).

11. The letter rejecting the Appellant-company's offer reads thus : "Subject: KMDA: Disqualify for Tender No.:01/ KMDA / MAT / CE/2013-2014

Date : Mon, 22 Jul 2013 18:13:22 +0530 (IST)

From: tender tender@eternderwizard.com

To: sales.marketingdomestic@rashmigroup.com

Dear RASHI METALIKS LIMITED,

Important Notice:

This is to inform that your bid has been disqualified for the tender invited by KMDA

Tender No.: 01 / KMDA / MAT / CE / 2013-2014

Line No.: 01

Name of Work : SUPPLY and DELIVERY OF DIFFERENT DIAMETERS OF DISS K 7 and K 9 PIPES AT DIFFERENT LOCATION WITHIN KOLKATA METROPOLITAN AREA

Reason for Disqualification : company not having submitted its latest income tax return along with its Bid.

With regards

Tendering Authority"

12. So far as the first point is concerned, it needs to be dealt with short shrift for the reason that the Courts below have not thought it relevant for discussion, having, in their wisdom, considered it sufficient to non-suit the Appellant-company for its failure on the second count. It has, however, been explained by Mr. Vishwanathan, learned Senior Counsel for the Appellant-company that at the material time there was no blacklisting or delisting of the Appellant-company and that in those circumstances it was not relevant to make any disclosure in this regard. The very fact that the Tendering Authority, in terms of its communication dated 22nd July 2013 had not adverted to this ground at all, lends credence to the contention that a valid argument had been proffered had this ground been raised. Regardless of the weight, pithiness or sufficiency of the explanation given by the Appellant-company in this regard, this issue in its entirety has become irrelevant for our cogitation for the reason that it does not feature as a reason for the impugned rejection. This ground should have been articulated at the very inception itself, and now it is not forensically fair or permissible for the Authority or any of the Respondents to adopt this ground for the first time in this second salvo of litigation by way of a side wind. The impugned Judgment is indubitably a cryptic one and does not contain the reasons on which the decision is predicated. Since reasons are not contained in the impugned Judgment itself, it must be set aside on the short ground that a party cannot be permitted to travel beyond the stand adopted and expressed by it in its earlier decision. The following observations found in the celebrated decision in Mohinder Singh Gill vs. The Chief Election Commissioner, New Delhi, AIR 1978 SC 851 are relevant to this question:

> "8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Gordhandas Bhanji (AIR 1952 SC 16) (at p.18):
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> "Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming better as they grow order."

13. So far as clause (j) of the detailed notice inviting E-tender No.01/KMDA/MAT/CE/2013-2014 dated 10.5.2013 emanating from the office of the Chief Engineer is concerned, it seems to us that contrary to the conclusion in the impugned judgment, the clause is not an essential element or ingredient or concomitant of the subject NIT. In the course of hearing, the Income Tax Return has been filed by the Appellant-company and scrutinized by us. For the Assessment Year 2011-2012, the gross income of the Appellant- company was Rs.15,34,05,627, although, for the succeeding Assessment Year 2012-2013, the income tax was NIL, but substantial tax had been deposited. 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.

14. In this analysis, we find that the Appeal is well founded and is allowed. The impugned judgment is accordingly set aside. The disqualification of the Appellant-company on the ground of it having failed to submit its latest Income Tax Return along with its bid is not sufficient reason for disregarding its offer/bid. The Respondents are directed, therefore, to proceed further in the matter on this predication. The parties shall bear their respective costs.