

Form No. J(2)
Item No.3

IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

HEARD ON : 02.07.2024
DELIVERED ON : 02.07.2024

CORAM:
THE HON'BLE JUSTICE SHAMPA SARKAR

WPA 16635 of 2024

M/s. Araha Hospitality Private Limited

vs.

**Indian Railway Catering and Tourism Corporation
Limited and others**

For the petitioner : Mr. Saptangshu Basu, Sr. Adv.
Mr. Priyankar Saha
Ms. Srijani Mukherjee
Mr. Lalratan Mondal

For the respondent no.1: Mr. Tushar Mehta, Id. Solicitor General of India
Mr. S. Agarwal
Mr. Anshuman Chowdhury
Mr. Sarosij Dasgupta
Mr. Sabyasachi De
Ms. Afreen Begum
Mr. Steven S. Biswas

For the respondent no.2: Mr. Jaydip Kar, Sr. Adv.
Mr. Aniruddha Chatterjee
Mr. Dyutiman Banerjee
Mr. Rishav Singh
Mr. Anurag Sharda

JUDGMENT

1. This writ petition arises out of award of license for Commissioning and Operation of Base Kitchens at several locations, and onboard catering services

in all trains of cluster no. SER/CLT-A-2, for a period of 5 years with a condition of the same being extendable up to 2 more years.

2. The tendering process started with an open E-tender bearing reference no. 2024/IRCTC/P&T/CLUSTER/FEB/SER/CLT-A-2. The tender was floated nationwide. The same was opened on March 3, 2024. Respondent no.2 was the successful bidder and was granted Letter of Award (LOA) on April 4, 2024. The tendering authority is the Indian Railway Catering and Tourism Corporation Limited (hereinafter referred to as 'IRCTC').

3. The petitioner approached the Group General Manager, IRCTC, on June 26, 2024, intimating the authority that the respondent no.2 was involved in the RAIL NEER Scam and the CBI had registered a case under Section 120B read with Section 420 of the Indian Penal Code as also under Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act on October 14, 2015. The CBI had also filed a charge-sheet in the said matter and the competent court had taken cognizance. The ECIR had also registered an FIR on the issue.

4. The petitioner alleges that Section 7 of the Integrity Pact was violated as the bidder did not disclose such transgression before the railway authorities/IRCTC, which impinged on the anti-corruption principle.

5. According to Mr. Basu, learned Senior Advocate, who appears on behalf of the petitioner, non-disclosure of the past criminal case was a transgression of the integrity pact. Such transgression directly affects the credibility of the bidder, who was involved in the scam of procurement and supply of packaged

drinking water to the passengers, other than RAIL NEER. The bid of such a participant should have been rejected and the bidder should have been debarred from participating in the tender, not only because of the non-disclosure, but also because the continuation of such a bidder in the entire bidding process would be a transgression and violation of the mandatory conditions of the Notice Inviting Tender (NIT). Credibility of the bidder includes past performance, experience, and honesty. Supply of food to the passengers, and at the stations, demands a high standard of integrity. The norms and specifications of the food and water to be served were to be strictly adhered to. The public element involved would require the highest form of reliability. A bidder who was facing a criminal case should not have been selected, especially when such fact was brought to the notice of the IRCTC by a letter dated June 26, 2024.

6. Relying on Section 7 of the Integrity Pact, Mr. Basu contends that if the IRCTC obtains knowledge that a bidder/contractor or sub-contractor or any employee or representative of the bidder, contractor or sub-contractor indulges in acts of corruption or if IRCTC has substantive suspicion in that regard, the IRCTC is required to inform the fact to the chief vigilance officer.

7. Mr. Mehta, learned Solicitor General of India, appearing for the respondent no.1/IRCTC submits that the letter of award was granted on April 4, 2024. The petitioner filed the objection after more than two months. This was an afterthought.

8. The standard bid documents provide a jurisdiction clause. Courts at New Delhi shall have exclusive jurisdiction to entertain any objection arising out of award of the contract.

9. It is next submitted that Section 2(g) of the Integrity Pact talks about the disclosure of any transgression with other companies that impinges on the anti-corruption principle. Section 2(g) read with Section 5(1) indicates that the bidder had to disclose that no transgression had occurred in the past 3 years with any other company in the country or with any other public sector enterprise in India.

10. According to Mr. Mehta, a combined reading of Section 2(g) and Section 5(1) do not require disclosure of cases/corruption charges relating to a period beyond three years from initiation of the tendering process. Moreover, emphasis should be put on the term “other” which indicates that cases relating to contracts with IRCTC were within the knowledge of the tendering authority. In this case, FIR was registered in 2015 which was nine years prior to the initiation of the tendering process.

11. Referring to Rule 151 of the General Financial Rules, 2017, it is submitted that a bidder can be debarred only when he is convicted of an offence either under the Prevention of Corruption Act, 1988 or the Indian Penal Code. Rule 151(iii) provides that the procuring entity may debar a bidder or any of its successors from participating in any procurement process undertaken by it, for a period not exceeding two years, if it determines that the bidder has

breached the code of integrity. Thus, the question of cancellation of the LOA or debarring the respondent no. 2 would not arise.

12. IRCTC being a Government of India enterprise was aware of the pending criminal case of 2015. The disclosure with regard to any transgression was restricted to the previous three years from the date of participation in the tendering process. Any other transgression or any case relating to corruption beyond three years, was not required to be disclosed.

13. Mr. Kar, learned Senior Advocate, appears on behalf of the respondent no.2/successful bidder. Mr. Kar submits that Section 2(g) read with Section 5(1) indicates that the disclosure clause pertains to the cases registered in the past three years. The case of 2015, which has now been stayed by the Hon'ble Apex Court, was not required to be disclosed as per the integrity pact.

14. Mr. Kar has laid emphasis on the jurisdiction of this court and submits that the definition clause at page 60 of the tender document provides that award of licence will be governed by the jurisdiction of courts situated in the State of Delhi only. According to Mr. Kar, the cause of action arises at Delhi, from where the tender documents were floated. LOA was issued from Delhi. The Calcutta High Court cannot assume jurisdiction only because the trains originate at Howrah.

15. Admittedly, the writ petition arises out of award of licence to the respondent no.2. The definition clause talks about the jurisdiction of Delhi courts. No part of the cause of action with regard to the award of this contract has arisen within the jurisdiction of the Calcutta High Court. If a bidder

participates in an open E-tender from his residence at Kolkata or deposits the money at any nationalized bank at Kolkata, which operates through a core banking system, the same would not give rise to a cause of action within the jurisdiction of this court, in respect of award of the tender. Moreover, in view of the specific ouster of jurisdiction of all courts other than courts at Delhi, as provided in the tender document, the jurisdiction of this court has been wrongly invoked.

16. However, even with regard to the merit of the questions raised by the petitioner, I find that the tendering authority i.e. IRCTC has categorically expressed a view by interpreting the clauses of the tender document. The tendering authority interprets the integrity pact as the requirement for disclosure of corruption cases registered against a bidder in respect of any other company or public sector undertaking, in the last three years. The interpretation is a plausible one. The authors of the document in their wisdom have laid down certain clauses, which a bidder is required to fulfill to be successful in any tendering process. The author has the domain knowledge. Interpretation of the terms should be left to the tendering authority. If the authority is of the view that Section 2(g) read with Section 5(1) of the Integrity Pact require disclosure of any transgression with "other" companies or "other" public sector undertakings and the period has been restricted to the previous three years from participation in the bidding process, the writ court, sitting in judicial review, should not attempt to interpret the clauses by giving them a meaning which the authors did not intend to.

17. Secondly, all the parties participated in the bidding process. The very idea of having a bidding process for award of contracts, is generation of maximum revenue. It is informed to the court that the respondent no.2 offered almost Rs.3 crores more than the petitioner.

18. The tender has already been awarded. All through the bidding process the petitioner did not raise any objection. The contract was awarded on April 4, 2024. An unsuccessful tenderer has challenged the award of tender after two months by writing a letter to the General Manager, IRCTC on June 26, 2024, pointing out the alleged transgressions by the respondent no.2. The authority is yet to respond to such letter and the authority is at liberty to intimate the reasons why the bid of the respondent no.2 was found to be eligible.

19. The Hon'ble Apex Court in Jagdish Mandal v. State of Orissa, reported in (2007) 14 SCC 517 held that "A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. 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. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

or

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226.”

20. The Hon’ble Apex Court in *Maa Binda Express Carrier v North East Frontier Railway*, reported (2014)3 SCC 760 held inter alia that “...This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent

reasons provided such relaxation is permissible under the terms governing the tender process.”

21. The petitioner has not been able to satisfy that the action of the authority suffers from arbitrariness, perversity or favouritism. The court should not normally interfere with the policy of the tendering authority. If the petitioners or the court think that charges of corruption prior to three years should be a relevant factor in the decision making process, such opinion cannot be a reason for exercise of power of judicial review. When technically qualified and experienced people have formulated the terms and conditions of the tender, the court should not interfere because the court feels that a more stringent interpretation of the terms would be wiser or more logical or fair. All participating bidders are entitled to a fair, equal and non-discriminatory treatment in the matter of evaluation. The petitioner was also successful in the technical round. The reason why the petitioner was not selected ultimately, was that the respondent no.2 offered Rs.3 crores more than the petitioner.

22. Furthermore, the Hon'ble Apex Court, in *Michigan Rubber (India) Ltd. v. State of Karnataka*, reported in (2012) 8 SCC 216 held inter alia that “the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities.” Moreover, the Court held that the Government and their undertakings must have a free hand in setting terms of the tender.

23. Thus, this court does not choose to interfere with the decision of the IRCTC in awarding tender to the respondent no.2, for the reasons mentioned hereinabove.

24. The writ petition stands disposed of.

25. All the parties are directed to act on the basis of the server copy of the order.

(Shampa Sarkar, J.)