M/S. SORATH BUILDERS

V.

SHREEJIKRUPA BUILDCON LIMITED & ANR.

Civil Appeal No. 1127 of 2009

FEBRUARY 20, 2009

[DR. ARIJIT PASAYAT AND DR. MUKUNDAKAM SHARMA, JJ.]

Tender: Notice of tender for construction of Veterinary Construction Building – Requiring submission of documents within 6 days – Non-acceptance of bid sent three days after the last date of receiving the documents – Bid of lowest bidder sending documents in time accepted – Quashing of, sought on ground of insufficiency of time for submitting tender papers – Justification – Held: Not justified, as no prejudice was caused to anyone due to time schedule provided by University – Plea of unsuccessful bidder that he could not submit documents in time as he was undertaking various construction work and that he came to know about tender only on last day cannot be accepted as lapse was due to his own fault – There was no arbitrariness in decision of University in accepting bid of successful bidder as it was lowest, reasonable and valid – Plea of fresh tender process on ground of saving of public money, not tenable as delay in avoiding contract would only mean increase in cost of construction.

Administrative law: Interference with tender selection process by High Court – Scope of.

A tender notice was issued by the Respondent 2-University on 21.11.2008 inviting tenders for construction of Veterinary College Building. The tender notice was widely advertised in the largest local daily and also published on the internet. The notice required the bidders to send the pre-qualification documents by 27.11.2008 and 'online' submission of price bid by 28.11.2008.

A Three bids were received out of which one did not fulfil the requisite criteria. Out of the remaining two, the bid of appellant was the lowest. Since the bid of respondent 1 was sent on 1.12.2008 i.e. three days after the last date of receiving these documents by the B University, the bid of respondent 1 was not opened and was not taken into consideration.

Respondent 1 filed a writ petition before the High Court praying for quashing the decision of respondent 2-University by considering the respondent 1 as disqualified C from participating in the tender selection process.

The High Court held that the University acted arbitrarily in requiring the pre-qualification documents to be sent physically so as to reach the University by Speed D Post by 27.11.2008, inasmuch as it meant that the contractor had to send pre-qualification documents by the aforesaid mode by dispatching the same latest by 25.11.2008. Consequently, the writ petition was allowed and the decision of the respondent no. 2 - University accepting the bid of the appellant was quashed and set E aside with a further direction to the University to issue a fresh tender notice with the same terms and conditions but also provide seven days time for submitting the pre-qualification documents after the end date for downloading the bid documents. Aggrieved appellant filed F the present appeal.

Allowing the appeal, the Court

HELD: 1.1. So far as the issue with regard to stipulation that pre-qualification documents to be sent G latest by 27.11.2008 for the estimated contract value of Rs. 8.40 crores, was concerned, three parties applied and submitted their tenders and on scrutiny it was found that one out of the three did not satisfy the requirements, and therefore, his tender was rightly rejected by the parties. H So far as the tenders of the appellant and respondent no.

1 were concerned, on going through the record it is found that the respondent no. 1 never specifically raised the issue regarding paucity and shortage of time as one of the grounds for challenging the decision of the University. The only stand that was taken by respondent no. 1 for late submission of his pre-qualification documents was that he came to know about the tenders only on 27.11.2008 as he was undertaking various construction works, and therefore, could not submit all the required pre-qualification documents in time stipulated in the notice inviting tenders. Such a stand makes it crystal clear that respondent no. 1 was prevented in submitting the required documents in time due to his personal difficulty and not for the time schedule attached to the notice inviting tenders. That was also not one of his grounds taken specifically in the writ petition at any stage. [Para 9] [901-E; 902-A]

1.2. No other intending bidder came to the court on any such plea that they were deprived of an opportunity of submitting their tender due to paucity of time and that any prejudice is caused to anyone due to time schedule provided by the University. Only during the hearing stage, such a plea was raised which found favour with the High Court. The advertisement was issued on 21.11.2008 requiring the parties to submit their pre-qualification documents only by 27.11.2008. Therefore, sufficient time was provided to submit tender papers. The University also permitted pre-qualification documents to be submitted "On Line". Therefore, the contention that the time was too short for submission of pre-qualification documents by 27.11.2008 was without any merit. [Para 9] [902-C]

2.1. The tender submitted by the appellant was the lowest and the same was accepted as the same was found to be reasonable, tenable, plausible and valid. The High Court went beyond its jurisdiction in setting aside the decision of the University in accepting the bid of the appellant. There is no fault or arbitrariness in the decision

making process of the University. The said decision cannot be said to be in any manner arbitrary or unreasonable. The respondent no. 1 submitted his pre-qualification documents late for which he is only to be blamed. The University has taken a specific stand that the price settled for the tender is neither unreasonable nor excessive in comparison with the project. The main interest of the University is to get a good quality Veterinary College within the stipulated time because the grant out of which the payment of construction of the college is to be made would lapse on 31st March, 2009 and that the University has already started the process of admission to the batch of students for the coming academic year. Consequently a time bound completion of a good quality Veterinary College became a necessity. [Para 10] [902-F; 903-A]

2.2. There is definitely urgency in the said project, and therefore, the process of awarding the contract of construction should be expedited and the same should not be stalled in between. The project is time bound and money must be utilized by 31st March, 2009. The process of re-tendering and allotment of fresh tender would mean delay and would also be time consuming. [Para 11] [903-C]

Puravankara Projects Ltd. vs. Hotel Venus International and Others (2007) 10 SCC 33, Raunaq International Ltd. vs. I.V.R. Construction Ltd. and Others (1999) 1 SCC 492 – relied on.

2.3. The prime consideration on which the High Court set aside the award of contract in favour of the appellant is that if the bid of respondent no. 1 was considered in the tender process there would have been saving of public money. However, that would not in any manner justify in going through once again the same tender process, which is always time consuming. Any delay in awarding the contract would only mean increase in the cost of expenditure for cost of construction would go up with the passage of time.[Para 13] [905-D]

W.B. State Electricity Board v. Patel Engineering Co. Ltd. and Others (2001) 2 SCC 451 – relied on.

3. The respondent no. 1 was negligent and was not sincere in submitting his pre-qualification documents within the time schedule laid down despite the fact that he had information that there is a time schedule attached to the notice inviting tenders. Despite being aware of the said stipulation he did not submit the required documents within the stipulated date. Pre-qualification documents were received by the respondent no. 2 – University only after time schedule was over. The terms and conditions of the tender as held by the Supreme Court are required to be adhered to strictly, and therefore, the respondent no. 2 – University was justified in not opening the tender submitted by respondent no. 1 on 01.12.2008, which was late by three days. No grievance could also be made by the respondent no. 1 as lapse was due to his own fault. The High Court proceeded to interfere with the entire process as if acting as an appellate authority over the decision of the University which was beyond the jurisdiction of the Court. The High Court was not justified in accepting the contentions of respondent no. 1 and thereby upsetting the entire process of inviting tenders by interfering with the terms and conditions of inviting the tenders and by rescheduling and directing the process of re-tendering, which would only cause further delay and would increase the burden on the exchequer of the University. [Para 15] [906-C]

Case Law Reference

(2007) 10 SCC 33	relied on	Para 12
(1999) 1 SCC 492	relied on	Para 12
(2001) 2 SCC 451	relied on	Para 14

CIVIL APPELLATE JURISDICTION : Civil Appeal No 1127 of 2009

A From the Judgement and Order dated 29.12.2008 of the Hon'ble High Court of Gujarat at Ahmedabad in Special Civil Application 14592 of 2008.

D.A. Dave, Nikhil Goel, Shajid Marzook Bufaki, Sheela Goel, for the Appellants.

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Sanjay R. Hegde, Punet Jain, Bharat T. Rao, Archna Tiwari, Pratibha Jain, for the Respondent.

The Judgement of the Court was delivered by

C **DR. MUKUNDAKAM SHARMA, J.**

1. Leave Granted.

2. In the present appeal what is under consideration is the construction of Veterinary College building at Navsari Agricultural University, Gujarat (hereinafter referred to as "University"). Since D construction of the aforesaid building was required to be done immediately, University released the grant which was going to lapse on 31.03.2009. The University issued a Tender Notice No. 20/2008-09 on 21.11.2008 inviting tenders for construction of Veterinary College building at Navsari Agricultural University, E Gujarat. The tender notice was widely advertised through publication in newspaper "Sandesh", being the largest local daily in the State of Gujarat. The tender notice was also published on the internet. The notice inviting tenders required the following from the bidders:

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a) Pre qualification documents had to be sent by 27.11.2008, failing which the tender would be liable for rejection and will not be opened;

i) "AA" Class certificate with minimum 80% of G the project cost turnover audited in the last financial year 2007-08;

ii) Bidding capacity value should be more than project cost;

H iii) II Building category registration and above.

All the above documents have to be readily available with any builder having continuous work for different authorities.

b) Last date of "On Line" submitting of "Price bid" was 28.11.2008.

c) Tender fees, Earnest Money Deposit (EMD) and other documents can be submitted by 04.12.2008.

3. Pursuant to the aforesaid advertisement three bids were received by the University out of which one was disqualified at the threshold for not having the requisite experience. Out of the remaining two, the bid of the appellant – M/s. Sorath Builders was the lowest. One of the terms and conditions of the bid was that pre-qualification documents were required to be sent by 27.11.2008. Since the bid of respondent no. 1, Shreejikrupa Buildcon Limited was sent on 01.12.2008 i.e. three days after the last date of receiving these documents by the University the bid of respondent no. 1 could not have been opened as it was received beyond the time stipulated and accordingly it was not taken into consideration.

4. The University considered the following stipulation in the tender:

"Late date of "On Line" submission of price bid is dated 28/11/2008 upto 18.00 hrs. All documents, tender fees, registration, bank solvency, bank guarantee and EMD etc. duly scan along with the tender documents should be submitted "On Line". Last date for submission of pre-qualification documents by R.P.A.D./Speed Post is 27/11/2008. Any violation in the above instructions, the tender will be liable for rejection and will not be opened".

In terms of and in accordance with the mandate of the tender notice the tender of respondent no. 1 - Shreejikrupa Buildcon Limited was not opened. Being so situated, the respondent no. 1 filed a writ petition before the High Court of Gujarat praying for quashing the decision of respondent

A no. 2 – University dated 8.12.2008 considering the respondent no. 1 as disqualified from participating in the tender selection process for the construction of Veterinary College building at Navsari Agricultural University, Gujarat.

B 5. The said writ petition was placed before the Division Bench and after looking into the records and after hearing the parties the Division Bench held that the University acted arbitrarily in requiring the pre qualification documents to be sent physically so as to reach the University by R.P.A.D./Speed Post by 27.11.2008, inasmuch as it meant that the contractor had to C send pre qualification documents by the aforesaid mode by dispatching the same latest by 25.11.2008. Consequently, the writ petition was allowed and the decision of the respondent no. 2 - University dated 10.12.2008 accepting the bid of the appellant was quashed and set aside with a further direction D that the University shall issue a fresh tender notice with the same terms and conditions but it would also provide seven days time for submitting the pre qualification documents after the end date for downloading the bid documents.

E 6. Being aggrieved by the aforesaid Judgment and Order the present appeal was filed in which several contentions were raised on behalf of the parties.

7. It is the case of the appellant before us that the High Court has wrongly set aside a settled contract pursuant to the F tender issued by respondent no. 2 – University on the ground that the terms of the tender were arbitrary. It was also argued that the High Court has not only interfered with the terms and conditions of the tender but has written the terms of the tender itself by directing the University to issue a fresh tender on the G terms and conditions suggested in the said order. It was also submitted that jurisdiction of the writ court to interfere in the terms of a contract is very limited and that even if two views are possible and the authorities granting tender takes a particular view, the courts should not interfere. It was also submitted by the counsel appearing for the appellant that the time period which was H

granted by the University cannot be said to be too short for it was possible for the respondent no. 1 to submit the bid after satisfying all the requirements. It was also pointed out that the respondent came to know about the tenders only on 27.11.2008 as he was undertaking various construction works, and therefore could not submit the required pre qualification documents in time within the stipulated date. It was also submitted that so placed and situated, the respondent no. 1 was not entitled to and competent to take up a plea that he did not receive sufficient time to submit the pre qualification documents.

8. The case of respondent no. 1 on the other hand was that by providing arbitrary time limit to submit pre qualification documents the University tried to shut out competition and permitted only two eligible parties to enter the fray. It was also submitted that the price bid offered by respondent no. 1 was much lower than the appellant, being only 6.38% above the estimated contract value while bid offer of appellant was 21.21% above the estimated contract value, which would mean that the University would be unnecessarily spending public money to the tune of more than Rs. 1 crore.

9. We have carefully considered the aforesaid submissions of the counsel appearing for the parties. So far as the issue with regard to stipulation that pre qualification documents to be sent latest by 27.11.2008 for the estimated contract value of Rs. 8.40 crores, is concerned, three parties applied and submitted their tenders and on scrutiny it was found that one out of the three did not satisfy the requirements, and therefore, his tender was rightly rejected by the parties. So far as the tenders of the appellant and respondent no. 1 are concerned, on going through the record we find that the respondent no. 1 never specifically raised the issue regarding paucity and shortage of time as one of the grounds for challenging the decision of the University. The only stand that was taken by respondent no. 1 for late submission of his pre qualification documents is that he came to know about the tenders only on 27.11.2008 as he was undertaking various

A construction works, and therefore, could not submit all the required pre qualification documents in time stipulated in the notice inviting tenders. The aforesaid stand makes it crystal clear that respondent no. 1 was prevented in submitting the required documents in time due to his personal difficulty and not for the B time schedule attached to the notice inviting tenders. That was also not one of his grounds taken specifically in the writ petition at any stage. But only during the course of hearing such a contention seems to have been raised which found favour with the High Court. No other intending bidder came to the court on C any such plea that they were deprived of an opportunity of submitting their tender due to paucity of time and that any prejudice is caused to anyone due to time schedule provided by the University. It appears that only during the hearing stage a plea was raised which found favour with the High Court but as D stated above the aforesaid plea is without any merit for the advertisement was issued on 21.11.2008 requiring the parties to submit their pre qualification documents only by 27.11.2008. Therefore, sufficient time was provided to submit tender papers. The University also permitted pre qualification documents to be submitted "On Line". Therefore, the contention that the time E was too short for submission of pre qualification documents by 27.11.2008 is without any merit.

10. We also find on record that the tender submitted by the appellant was the lowest and the same was accepted as F the same was found to be reasonable, tenable, plausible and valid. The High Court went beyond its jurisdiction in setting aside the decision of the University in accepting the bid of the appellant. We are of the opinion that there is no fault or arbitrariness in the decision making process of the University. The said decision G cannot be said to be in any manner arbitrary or unreasonable. The respondent no. 1 submitted his pre qualification documents late for which he is only to be blamed. The University has taken a specific stand before us that the price settled for the tender is neither unreasonable nor excessive in comparison with the project. It was also stated before us that the main interest of the H

University is to get a good quality Veterinary College within the stipulated time because the grant out of which the payment of construction of the college is to be made would lapse on 31st March, 2009 and that the University has already started the process of admission to the batch of students for the coming academic year. Consequently we feel that a time bound completion of a good quality Veterinary College has become a necessity.

11. We are of the considered opinion that there is definitely urgency in the aforesaid project, and therefore, the process of awarding the contract of construction should be expedited and the same should not be stalled in between. The process which is suggested by the High Court in its Judgment and Order if allowed to be gone through the same would mean prolonged delay in the completion of the project. The project is time bound and money must be utilized by 31st March, 2009. The process of re-tendering and allotment of fresh tender would mean delay and would also be time consuming.

12. The Supreme Court in number of decisions has held that there is a vital distinction between administrative and contractual law. In ***Puravankara Projects Ltd.*** *vs.* ***Hotel Venus International and Others***, reported in (2007) 10 SCC 33, in which one of us, namely, Justice Arijit Pasayat was a party, it was held as follows:

> "tender terms are contractual and it is the privilege of the Government which invites its tenders and courts do not have jurisdiction to judge as to how the tender terms should be framed. By observing that there was an implied term which was not there in the tender, and postponing the time by which the bank guarantee had to be furnished, in essence the High Court directed modification of a vital term of the contract".

It further held that

> "the statutory parameters have to be kept in view and the

A High Court can never alter or amend a contract entered into between the parties".

In ***Raunaq International Ltd. vs. I.V.R. Construction Ltd. and Others***, reported in (1999) 1 SCC 492, this Court had occasion to dispose of a case of paramount importance of B Government contract. In the said decision this Court has observed as follows:

"where rational non-discriminatory norms have been laid down for granting of tenders, a departure from such norms can only be made on valid principles. The award of contract C cannot be by stopping the performance of the contract so awarded, there is a major detriment to the public because the construction of two thermal power units is held up on account of the dispute".

D The court further held:

"the award of a contract, whether it by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are E commercial considerations, and the same would be:

(1) The price at which the other side is willing to do the work;

(2) Whether the goods or services offered are of the requisite specifications;

F (3) Whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements G of the job is also important;

(4) The ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;

(5) Past experience of the tenderer and whether he has H successfully completed similar work earlier;

(6) Time which will be taken to deliver the goods or services; and often

(7) The ability of the tenderer to take follow-up action, rectify defects or to give post-contract services".

It was also held in the said decision:

"the public would also be interested in the quality of the work undertaken or goods supplied by the tenderer for poor quality of goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in re-doing the entire work – thus involving larger outlays of public money and delaying the availability of services, facilities or goods".

13. The prime consideration on which the High Court set aside the award of contract in favour of the appellant is that if the bid of respondent no. 1 was considered in the tender process there would have been saving of public money. However, that would not in any manner justify in going through once again the same tender process, which is always time consuming. Any delay in awarding the contract would only mean increase in the cost of expenditure for cost of construction would go up with the passage of time.

14. In ***W.B. State Electricity Board*** vs. ***Patel Engineering Co. Ltd. and Others***, reported in (2001) 2 SCC 451, this Court while considering the issue with regard to the process of tender held:

"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 constitutional values".

It was also held:

"the very purpose of issuing rules/instructions is to ensure their enforcement lest the rule of law should be a casualty".

A It was further held:

"the contract is awarded, normally, to the lowest tenderer which is in public interest and that it is equally in public interest to adhere to the rules and conditions subject to which bids are invited".

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15. Following the aforesaid legal principles laid down by this Court, we are of the considered opinion that the respondent no. 1 was negligent and was not sincere in submitting his pre qualification documents within the time schedule laid down despite the fact that he had information that there is a time schedule attached to the notice inviting tenders. Despite being aware of the said stipulation he did not submit the required documents within the stipulated date. Pre-qualification documents were received by the respondent no. 2 – University only after time schedule was over. The terms and conditions of the tender as held by the Supreme Court are required to be adhered to strictly, and therefore, the respondent no. 2 – University was justified in not opening the tender submitted by respondent no. 1 on 01.12.2008, which was late by three days. According to us no grievance could also be made by the respondent no. 1 as lapse was due to his own fault. The High Court proceeded to interfere with the entire process as if acting as an appellate authority over the decision of the University which was beyond the jurisdiction of the Court. The High Court was not justified in accepting the contentions of respondent no. 1 and thereby upsetting the entire process of inviting tenders by interfering with the terms and conditions of inviting the tenders and by rescheduling and directing the process of re-tendering, which would only cause further delay and would increase the burden on the exchequer of the University.

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G 16. In that view of the matter, we set aside the Judgment and Order of the High Court and upheld the decision of the University in awarding the contract in favour of appellant. Accordingly, the appeal stands allowed.

J.G. Appeal allowed.