

HIGH COURT OF MEGHALAYA
AT SHILLONG

WA No.28/2020 with
WA No.29/2020

Date of Order: 25.02.2022

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| M/s Pes Installation Pvt. Ltd. | Vs. | M/s Benson Medical Equipment Pvt. Ltd. & anr |
| North Eastern Indira Gandhi Regional Institute of Health and Medical Sciences & ors | Vs. | M/s Benson Medical Equipment Pvt. Ltd. & anr |

Coram:

Hon'ble Mr. Justice Sanjib Banerjee, Chief Justice
Hon'ble Mr. Justice W. Diengdoh, Judge

Appearance:

WA No.28 of 2020

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| For the Petitioner/Appellant(s) | : Mr. S Jindal, Adv |
| For the Respondent(s) | : Mr. D Borah, Adv for R/1 Mr. K Paul, Sr.Adv with Mr. S Thapa, Adv for R/2 |

WA No.29 of 2020

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| For the Petitioner/Appellant(s) | : Mr. K Paul, Sr.Adv with Mr. S Thapa, Adv |
| For the Respondent(s) | : Mr. D Borah, Adv for R/1 Mr. S Jindal, Adv for R/2 |

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| i) Whether approved for reporting in Law journals etc.: | Yes |
| ii) Whether approved for publication in press: | Yes/No |
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JUDGMENT: (per the Hon'ble, the Chief Justice) (Oral)

The appeal is directed against a judgment and order of February 13, 2020 by which the first respondent's writ petition has been partly allowed upon substantial costs being awarded and the first respondent has been given leave to pursue a claim in damages by way of a civil suit.

2. The matter pertains to a notice calling for online bids for supplying, commissioning, installing and maintaining on a turnkey basis, oxygen at the North Eastern Indira Gandhi Regional Institute of Health and

Medical Sciences (NEIGRIHMS). The earnest money deposit was indicated in the relevant notice of August 25, 2015 to be Rs.30 lakh.

3. It appears that the first respondent was immediately found not to be qualified to be awarded the contract. An initial petition under Article 226 of the Constitution was filed by the first respondent challenging the apparently unreasoned order of disqualification. The first respondent succeeded at such stage to the extent that the employer was required to indicate reasons as to why it perceived the first respondent not to be qualified to participate in the process or be awarded the contract.

4. The employer passed a speaking order, in compliance with the order passed on the first writ petition; but it appears that such reasoned order was made without reference to the first respondent herein. This resulted in the second round of proceedings being initiated. The second writ petition, again, succeeded partially inasmuch as the second respondent employer was directed to afford the first respondent herein an opportunity of hearing before deciding whether the first respondent would be disqualified. The necessary exercise in terms of the order on the second writ petition was completed and it culminated in WP (C) No.238 of 2018 being filed, on which the judgment and order impugned came to be passed. The additional grounds that were taken, apart from the fact that a perfunctory hearing was afforded to the first respondent and its submission was not taken into consideration, were that the appellant herein was disqualified, but such disability was overlooked, and, within days of the rejection of the first respondent's bid on June 11, 2018, the contract came to be awarded in favour of the appellant herein.

5. The writ court noticed, in great detail, the submission of the parties and concluded that there appeared to be some wrongdoing on the part of the employer not only in disqualifying the first respondent herein but also in awarding the contract to the appellant. The judgment, quite naturally, deals more with the appellant's disqualification under the original tender terms; but, since the contract was awarded and the work thereunder substantially completed, the writ court did not annul the contract but held that the writ petitioner was unfairly excluded and, as such, entitled to the profits that it would have made if it had bagged the contract. The leave to institute the civil suit is to assess the quantum.

6. In particular, paragraphs 39 and 41 of the impugned judgment have been placed on behalf of the appellant as the reasons for the writ court imposing costs, jointly on the appellant and the employer, of Rs.2 lakh and granting further liberty to the first respondent to institute appropriate civil proceedings "to make the (*appellant*) disgorge a portion of the profits of the contract ...". The key paragraphs from the judgment at its business end, paragraphs 39 and 41, are set out:

"39. Another glaring aspect is the amendment of clause 8 of the tender document to remove the automatic disqualification clause as evident from the extract reproduced below of the Tender Corrigendum/Addendum dated 07.10.2015.

TENDER CORRIGENDUM/ADDENDUM

| Page No./Clause No./Point no | Existing Specification/Sentence | To be read as |
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| Section V, Clause No.-8 | 8. Companies/Firms/Bidders who have been/are indulged in illegal bid rigging and cartelization during the last 3 years and have been penalized by any Government agencies such as Competition Commission of India (CCI), will not be entertained. | 8. Companies/Firms/Bidders alleged to be involved in bid rigging or cartelization during the process/finalization of tender, may be recommended for inquiry to Government agencies such as Competition Commission of India (CCI) etc, in exercise of powers vested under section 19 of the Act and provisions of section 3 of the relevant Act. |
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The submissions of the petitioner in this regard has weightage as the respondent No.4, admittedly, and on record had been blacklisted from participating in any tender process with any Government Hospital or Health Institution of the Government of Delhi in respect of Medical Oxygen Supply for a period of eighteen months w.e.f. 04.02.2013 and also the Competition Commission of India had found the respondent No. 4 to be involved in bid-rigging and cartelization and was also imposed a penalty. The amendment of clause 8 negated the stipulation which would have rendered the respondent No. 4 ineligible, though arguments have been advanced by the counsel for the respondent No. 4 that the amendment had no impact on the eligibility of the respondent No. 4.”

“41. However, in spite of the clouds that give rise to serious doubts about the transparency and fairness of the entire tender process, a fact that has been brought on record and cannot be overlooked, is the assertion of the respondents that even in course of the proceedings of the writ appeal before this Court in the Division bench, the petitioner did not disclose the fact that they had been rendered ineligible to perform the contract even if selected as they were no longer the authorized distributor of Medical Gas Pipelines Products w.e.f. October, 2017 from the U.S. Manufacturer, which fact stood unrefuted by the petitioner. Further, the fact that the writ petitioner never challenged the amendments in the earlier rounds of litigation also worked against the interest of the petitioner. These factors, in effect have seriously dampened the prospects of the petitioner for obtaining any relief, coupled with the fact that the contract has neared completion, if not already completed. These subsequent events however, cannot take the attention of the Court away from flagging the manner the entire tender process by the respondents was conducted, which is replete with commissions and omissions.”

7. It is submitted on behalf of the appellant that what weighed with the writ court was the fact that the rules of the game had been changed midstream to remove a disability that the appellant was perceived to suffer

from and to pave the way for the employer to award the contract to the appellant herein. The appellant contends that on a meaningful reading of clause 8 of the special conditions of the contract, as it stood prior to its amendment and as has been quoted at paragraph 39 of the impugned judgment, it would be evident that such stipulation did not affect the appellant and did not prohibit the appellant from participating in the process or being found eligible to be awarded the contract. In such connection, the appellant relies on an order passed by the Delhi government on February 4, 2013 and another order passed by the Competition Commission of India on April 16, 2012.

8. Without seeking to justify its actions or conduct that culminated in the aforesaid two orders, the appellant urges the Court to proceed by accepting the orders of February 4, 2013 and April 16, 2012 at face value. The appellant places the Delhi order of February 4, 2013 to show that the matter therein pertained to the faulty operation of the oxygen system and had nothing to do with illegal bid rigging or cartelisation. The appellant next places the CCI order of April 16, 2012 to demonstrate that it pertains to an incident prior to April 16, 2012. The appellant asserts that since the Delhi order of February 4, 2013 had nothing to do with the illegal bid rigging or cartelisation and the CCI order of April 16, 2012 pertained to an incident of more than three years prior to the notice inviting bids issued by the second respondent herein on August 25, 2015, the original clause 8 of the special conditions that has been set out at paragraph 39 of the impugned judgment, would not have come into play. The unamended clause 8 may not have been happily worded but had several ingredients: the first condition under such clause was that the bidder ought to have been found involved in illegal bid

rigging or cartelisation; the second condition was that it should have been penalised on such count by some government agency such as the Competition Commission of India; and, most importantly, the third condition was that the incident of bid rigging or cartelisation ought to have been “during the last 3 years ...” The appellant submits that all three conditions would have to be met for the disqualification to fasten onto the bidder and, in this case, since the relevant order of the Delhi government was not in respect of bid rigging or cartelisation and the CCI order pertained to an incident that preceded the date of the notice inviting bids by more than three years, the appellant herein suffered from no disability under unamended clause 8 of the aforesaid special conditions.

9. It is evident from the impugned judgment that the writ court perceived that the appellant herein stood disqualified by virtue of clause 8 of the special conditions and, as such, to remove such disability at a belated stage, the employer resorted to amending the relevant stipulation to facilitate the award of the contract in favour of the appellant. If such had actually been the case, the inference was obvious. However, as it transpires, all three conditions in the disability clause had to be complied with. The Delhi order was not in respect of bid rigging or cartelisation and a period of more than three years had elapsed since the incident covered by the CCI order. As such, as rightly canvassed by the appellant, the appellant could not be seen to have been disqualified by the relevant clause contained in the unamended special conditions.

10. The first respondent retorts by referring to the previous clause from the special conditions that required every bidder to faithfully report any case having been discovered of anything wrong done by the bidder or of any

case against the bidder having been instituted or remaining pending or any penalty having been suffered by the bidder. However, the wording of the relevant clause does not make the discovery of any wrongdoing or the pendency of any case against the bidder to be the ground for disqualification thereunder; nor does it make the suffering of a punishment pursuant to an order of any government agency a ground for disqualification. The second sentence in the relevant clause only makes an erroneous declaration in such regard to be a ground for disqualification. In other words, upon the necessary information as sought being provided, it would be a relevant consideration for the employer to decide whether it was prudent to award the contract to such bidder; but the fact that a bidder may have been involved in any wrongdoing or may have had a case instituted by any government against it or the fact that the bidder may have suffered a previous punishment at the hands of any government agency, would not, ipso facto, disqualify the bidder.

11. At any rate, clause 7 of the special conditions of the contract does not find any mention or consideration in the impugned judgment and it did not weigh with the Court that in this case the appellant had been found to have been involved in bid rigging or cartelisation or had been penalised therefor by the CCI or that the criminal proceedings in such regard were pending against the appellant.

12. In a broad sense, the case carried by the first respondent to the writ court was that the first respondent had been arbitrarily found not to be eligible and the employer had wrongfully facilitated the award of the contract in favour of the appellant herein by amending a key condition of the contract after having received the bids. The underlying suggestion in the

writ petition was that the first respondent herein ought rightfully to have been awarded the contract upon the appellant herein being found to be disqualified or undesirable.

13. When a case of such kind is brought to a writ court, it may succeed upon it being apparent on the face of the records that a disqualified party had been chosen ahead of another who may have been qualified or, at any rate, upon the mendacity of the grounds on which a party was awarded the contract and another was not being apparent from a plain reading of the records. Writ petitions are decided in a summary manner on affidavit evidence and without calling for any oral evidence. When favouritism or malice in fact is alleged and the same is established from the records, the exercise is simple and the writ court may order accordingly. But when the allegations call for a degree of inquiry, which may not be possible in how petitions under Article 226 of the Constitution are heard and addressed, even if the writ court perceives an element of wrongdoing or suspects the same, the complainant before the Court is relegated to a civil action to work out the remedies before the civil forum. In the present case, the writ court faced the same difficulties: of conclusively deciding the matters in issue to give the relief that may have been due to the first respondent-writ petitioner. As such, in the operative part of the impugned judgment, based on the inference summarised at paragraphs 39 and 41 of the judgment, the writ court proceeded to impose costs of Rs.2 lakh jointly on the employer and the contractor and left the first respondent free to knock the doors of the civil court to obtain the monetary compensation to offset the first respondent being denied the award of the contract.

14. Indeed, if the fulcrum on which the conclusion of the impugned judgment rests is removed, the award of costs, which is the only element of prejudice thus far suffered by the appellant, may have no legs to stand on. Since it is evident, on a plain reading of unamended clause 8 of the special conditions, that the appellant herein may not have suffered any disability thereunder for the employer to have any motive to alter such condition for the exclusive benefit of the appellant herein, the main plank of the reasoning in the judgment is lost.

15. As a consequence, it is the direction to relegate the writ petitioner to a suit contained in the later part of paragraph 47 of the judgment which is upheld and the award of costs indicated earlier in the paragraph is set aside.

16. WA No.28 of 2020 succeeds accordingly.

17. It is recorded that both the appellant herein and the second respondent employer have agreed not to raise the issue of limitation in the event the first respondent herein institutes a suit in respect of the perceived denial of the relevant contract within a period of three months from date. It will also be open to the first respondent to invoke Section 14 of the Limitation Act, 1963 and urge before the appropriate civil court that the writ court may not have been the proper forum for its underlying claim in damages to be made.

18. It goes without saying that if such civil suit is instituted by the first respondent within the time indicated, the suit court will proceed with the matter uninfluenced by the findings and observations in the impugned judgment and order.

19. As a consequence, WA No.29 of 2020, which has been filed by the second respondent employer, also succeeds to the same extent.

20. There will be no order as to costs.

(W. Diengdoh)
Judge

(Sanjib Banerjee)
Chief Justice

Meghalaya
25.02.2022
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