

CASE NO.:
Appeal (civil) 868 of 2010

PETITIONER:
Bharat Sanchar Nigam Ltd.

RESPONDENT:
Telephone Cables Ltd.

DATE OF JUDGMENT: 22/01/2010

BENCH:
R.V. Raveendran & K.S. Radhakrishnan

JUDGMENT:
JUDGMENT

2010 (3) SCR 291

The Order of the Court was delivered by

ORDER

R.V. RAVEENDRAN, J. 1. Leave granted. Heard the parties.

2. The appellant, by 'Notice Inviting Tenders' dated 27.3.2001, invited bids for supply of 441 LCKM of different sizes of Polythene Insulated Jelly Filled cables ('PIJF cables' for short). The tender procedure (vide clause 13 of Special Conditions of Contract) required an evaluation of the bids, so as to limit the number of bidders selected for placing orders against the tender, to two-third of the participating and eligible bidders in each group; and the bidders for placement of orders were to be selected from the list of technically and commercially responsive bidders in each group arranged in decreasing order of 'Vendor Rating' starting from the highest. The bidder with the highest Vendor Rating (V-1) was to be considered for placing the order for about 30% of the tendered quantity and the balance quantity was to be distributed among the remaining selected bidders in each group in direct ratio of their Vendor Rating. Thus the quantity for which a purchase order was to be placed by BSNL on a bidder depended upon the 'Vendor Rating' of such a bidder.

The first round of litigation

3. There were several bidders including the respondent and NICCO Corporation Ltd. BSNL awarded the highest vendor rating (V-1), to NICCO. The respondent claimed that on a proper evaluation of bidders, it should have been given the highest Vendor Rating (V-1) in regard to 10P x 0.5 (UA) size cable instead of NICCO; that if it had been adjudged as V-1, it would have secured a Purchase Order for a quantity of 5.842 LCKM from BSNL; that as NICCO was adjudged as V-1, the appellant treated the respondent as one of the 'other bidders' and consequently placed an order only for a quantity of 0.536 LCKM; and that resulted in a shortfall of 5.306 LCKM in the order placed on it. The respondent therefore filed Writ Petition [C] No.5808/2001 in the Delhi High Court on 18.9.2001 alleging that BSNL had arbitrarily adjudged NICCO as the person with the highest Vendor Rating thereby pushing it down to the category of 'other bidders' which adversely affected the size of its order. It prayed for the following reliefs :

(a) to quash the Advance Purchase Orders dated 11.9.2001 issued by BSNL to NICCO.

(b) to issue a direction to BSNL to issue fresh Advance Purchase Orders in terms of the Vendor Rating as on 22nd May, 2001 (date of the opening of the Tender) to it (respondent herein); and

(c) to quash the Revised Delivery Rating of NICCO as set out in the Internal Office memo dated 27.7.2001.

4. A Division Bench of the Delhi High Court allowed the said writ petition by order dated 29.4.2004 (reported in (2004) Delhi Law Times 112). It held that assessment of Vendor Rating done by BSNL in regard to NICCO was not proper. It therefore directed BSNL to redo the Vendor Rating by following the formulae laid down in the tender document, as indicated in the judgment. As the High Court was aware that by then contracts had already been awarded in respect of most of the tendered quantity and only a negligible quantity remained, it issued the following consequential direction :

"In this court's order dated 9.10.2002, it is recorded that there are some supplies which are to be made for which no orders have been placed. . If the petitioner is rated as V-1, then it shall be given the benefit in the balance supplies that are yet to be made."

The High Court then proceeded to make the following observation, even though there was no claim for compensation/damages in the writ petition :

"If after adjusting the balance amount the petitioner is still entitled to further supplies then it will be open to the petitioner to pursue its remedies against the respondents for compensation/damages that may be available to it in law."

The special leave petition filed by BSNL against the said judgment was dismissed by this court on 1.4.2005. The decision of the High Court thus attained finality.

The second round of litigation

5. By the time the said decision was rendered on 29.4.2004, BSNL, as per its policy, had already carried forward the balance quantity of the Tender dated 27.3.2001 to the next tender issued in 2002 and had even placed the purchase orders on the successful bidders against the said tender issued in 2002. (BSNL claimed that its counsel had erroneously submitted to the court during hearing of the first writ petition that some quantity still remained to be ordered. Be that as it may). Therefore, according to BSNL, no balance quantity was available and no order for any further quantity could be placed with the respondent, even if the respondent was to be given V-1 rating on a re-evaluation. The respondent was aggrieved that the BSNL did not adjudge it as V-1 and did not place orders for further quantities, as per the direction of the High Court. According to the respondent, on account of the failure on the part of BSNL to adjudge it with V-1 rating, and consequential failure to place a purchase order for 30% tendered quantity, it was denied the opportunity to manufacture and supply a quantity of 5.306 LCKM of cables, resulting in a loss of profit at the rate of Rs.200/- per CKM (or Rs.2 crores per LCKM) on the quantities for which it did not get an order; and therefore it was entitled to Rs.10,61,20,000/- as damages from BSNL.

6. The respondent issued a notice dated 26.10.2005 calling upon the appellant to pay the said amount as compensation. The demand was reiterated on 28.4.2006. BSNL rejected the claim by its reply dated 10.7.2006. The respondent therefore filed a second writ petition (WP [C] No.18393/2006) on 27.9.2006 seeking a direction to the appellant to comply with the decision rendered on 29.4.2004 by paying a sum of Rs.10,61,20,000/- with interest from the date of demand (26.10.2005) till the date of payment, with costs of Rs.20,000/-. The said writ petition came up for consideration on 11.12.2006 before a learned Single Judge of the High Court and arguments were heard for some time. When the respondent found that it would not be possible for it to get a direction for payment of compensation in the writ petition, it sought to withdraw the petition, with liberty to take appropriate civil remedies. The second writ petition was therefore

dismissed as withdrawn reserving liberty as prayed.

The third round of litigation

7. Thereafter, the respondent issued a notice dated 30.6.2007 through counsel, to BSNL suggesting that the disputes between them (for payment of Rs.10,61,20,000/- as damages to respondent) be referred to arbitration. BSNL by its reply dated 17.7.2007 rejected the request for arbitration. The respondent therefore filed an application under section 11(6) of the Arbitration and Conciliation Act, 1996 ('the Act' for short) in Arbitration Petition No. 461/2007 for appointment of an Arbitrator to decide its claim for Rs.10,61,21,000/-. The appellant resisted the said petition on the ground that there could be no arbitration in regard to the said claim. A learned Single Judge of the Delhi High Court, by the impugned order dated 1.8.2008, has allowed the said application and appointed a retired Judge of the Delhi High Court as an Arbitrator.

Questions for consideration

8. On the contentions urged, two questions arise for consideration:

- (i) Whether there exists an arbitration agreement between the parties ?
- (ii) Even if there is an arbitration agreement, whether the respondent, having availed the public law remedy in regard to its grievance, will be entitled to again seek remedy by way of arbitration?

Relevant provisions of the bid documents

9. The Bid Documents in regard to the tender issued on 27.3.2001 consisted of twelve sections. Section I consisted of Notice Inviting Tenders. Section II consisted of Instructions to Bidders. Section III consisted of General Conditions of Contract. Section IV consisted of Special Conditions of Contract. Sections V and VI consisted of Schedule of Requirements and Technical Specifications. Schedule VII consisted of Bid Form and Price Schedules. Schedule XI contained the Price Variation Table. Sections VIII, IX, X and XII contained formats of Bid Security form, Performance security bond, Bidder's Authorization Letter and Declaration.

10. Definition clause 1(f) of Instructions to Bidders defined 'Purchase Order' as meaning "the order placed by the Purchaser on the Supplier, signed by the Purchaser including all attachments and appendices thereto and all documents incorporated by reference therein. The purchase order shall be deemed as 'Contract' appearing in the document." Clause 28 of Instructions to Bidders clarified that the issue of purchase order shall constitute the award of contract on the bidder. Clause 26 of Instructions to bidders made it clear that BSNL could reject any or all bids. The said clause is extracted below:

"The Purchaser reserves the right to accept or reject any bid, and to annul the bidding process and reject all bids, at any time prior to award of contract without assigning any reason whatsoever and without thereby incurring any liability to the affected bidder or bidders on the grounds of purchaser's action."

Clause 30 of the Instructions to bidders related to jurisdiction and the same is extracted below :

"COURT JURISDICTION: The contract shall be governed by Indian laws and courts at Delhi/New Delhi will have jurisdiction to entertain any dispute or claim arising out of this tender till issue of authorization letters to Circles for placement of Purchaser Orders(P.O.s)"

(emphasis supplied)

11. Section III (General Conditions of Contract) started with the preamble (in clause 1) that the General Conditions shall apply to contracts made by BSNL for the procurement of goods. Clause 20 of the General Conditions of Contract provided for arbitration and relevant portion thereof is extracted below :

"20. ARBITRATION:

(20.1.) In the event of any question, dispute or difference arising under this agreement or in connection therewith except as to the matters, the decision of which is specifically provided under this agreement, the same shall be referred to sole arbitration of the CMD, BSNL, New Delhi or in case his designation is changed or his office is abolished then in such case to the sole arbitration of the officer for the time being entrusted (whether in addition to his own duties or otherwise) with the functions of the CMD, BSNL or by whatever designation such an officer may be called (hereinafter referred to as the said officer), and if the CMD, BSNL or the said officer is unable or unwilling to act as such, then to the sole arbitration of some other person appointed by the CMD, BSNL or the said officer. The agreement to appoint an arbitrator will be in accordance with the Arbitration and Conciliation Act, 1996.... "

The first question

12. At the outset, what should be noticed is that there was no contract or agreement between the parties (except in regard to the contracted quantity of 0.536 LCKM for which an order was placed by BSNL, but which is not the subject matter of the present dispute). Bid documents did not constitute a contract, or an agreement or an agreement to enter into a contract. It was merely an invitation to make an offer. It informed the prospective bidders, how they should make their bids; how the bids would be processed by BSNL; how contracts would be entered by placing purchase orders; and what terms would govern the contracts, if purchase orders were placed. Some sections of the bid documents governed the tender process which preceded the placing of purchase orders. Some sections contained the forms in which the bid should be made by the bidder. Other sections of bid documents contained provisions which would govern the contracts, when purchase orders were placed by BSNL by accepting the bid. For example, Section I (Notice Inviting Tenders) and Section II (Instructions to bidders) had nothing to do with the performance of the contract. They relate to the pre-contract process of bidding, that is who would be eligible to make bids and how the bids should be made. On the other hand, Section III had nothing to do with the bidding process or selection of suppliers, but contained provisions which would govern the performance - that is the terms and conditions of the contract - if and when contracts were entered by placing purchase orders. The arbitration clause (clause 20) is a part of Section III of the Bid documents.

13. As per the scheme of Bid documents, there is a clear division of the terms that will govern the tender process, and the terms that will govern the contract, when the bids are accepted. One part regulated the tender process that led to placing of purchase orders. That part contained a provision as to what should be the forum of dispute resolution, if there was a dispute at the tender or bidding stage. The other part stipulated the terms and conditions which will govern the contract, if and when purchase orders were placed. That part also contained a provision as to what should be the forum if there was a dispute after the contract was entered. Clause 30 of Instructions to Bidders makes it clear that in regard to tender-stage disputes, the forum will be Civil Courts. Clause 20 of General Conditions on the other hand was intended to operate when contracts were made and it specified that if disputes arose in regard to the contracts, the forum for dispute resolution will be the Arbitral Tribunal.

14. Clause 1 of the General Conditions of Contract (Section III) makes it clear that the General Conditions of Contract contained in Section III of

the document shall apply in contracts made by the purchaser for the procurement of goods. Clause 20 of Section III, that is the arbitration clause makes it clear that arbitration is available in regard to 'any question, dispute or difference arising under this agreement or in connection therewith'. Therefore, it is evident that the General Conditions of Contract (Section III) and clause 20 therein providing for arbitration, will not apply in regard to any dispute in regard to the tender or bid, or non-placing of a purchase order, but will apply only in regard to any contract awarded by BSNL by placing a purchase order. A contract is entered in pursuance of the bid, when a purchase order is placed by BSNL on a bidder (vide clauses 1(f) and 28 of Section II - Instructions to Bidders). When a purchase order is not placed, there is no contract or agreement and if there is no contract or agreement, the terms of General Conditions including the arbitration clause do not come into existence. In other words there is no arbitration agreement at all. BSNL intended to have arbitrations only where it had entered into contracts and there were disputes relating to such contracts. It did not intend to have arbitrations in regard to tender stage disputes or pre-contract differences, at a stage when there was no privity of contract.

15. It is also very significant that Section II (Instructions to Bidders) and Section IV (Special Conditions) which are relevant at the bid stage do not contain any arbitration clause providing that if there is any dispute between BSNL and a bidder in regard to the bid/tender process, the dispute will be settled by arbitration. On the other hand, the Instruction to Bidders contains a specific provision that if there is a dispute or claim arising out of the tender till (issue of authorization for) placement of the purchase order, only courts will have jurisdiction. Of course, as and when appellant placed a purchase order on a bidder, the purchase order contained a term that the General conditions of contract, forming part of the bid documents would be a part of the contract documents, and consequently the arbitration clause applied to the contracts entered between BSNL and the bidders.

16. We may in this behalf usefully refer to the decision in Dresser Rand S.A. vs. Bindal Agro Chem.Ltd (2006) 1 SCC 751 wherein this Court held:

"27. The tender document or the invitation to bid of BINDAL (containing the "instructions to bidders" and the "general conditions of purchase"), by itself, is neither an agreement nor a contract. The instructions to bidders informed the intending bidders how the bid should be made and laid down the procedure for consideration and acceptance of the bid. The process of bidding or submission of tenders would result in a contract when a bid or offer is made by a prospective supplier and such bid or offer is accepted by BINDAL. The second part of the Invitation to Bid consists of the 'General Conditions of Purchase', that is, the conditions subject to which the purchase order will be placed or offer will be accepted. The 'General Conditions of Purchase' were made available as a part of the Invitation to bid, so as to enable the prospective suppliers to ascertain their obligations and formulate their offers suitably."

"32. Parties agreeing upon the terms subject to which a contract will be governed, when made, is not the same as entering into the contract itself. Similarly, agreeing upon the terms which will govern a purchase when a purchase order is placed is not the same as placing a purchase order. A prelude to a contract should not be confused with the contract itself. The purpose of Revision No. 4 dated 10.6.1991 was that if and when a purchase order was placed by BINDAL, that would be governed by the "general conditions of purchase" of BINDAL, as modified by Revision No. 4. But when no purchase order was placed, neither the 'general conditions of purchase' nor the arbitration clause in the 'General Conditions of Purchase' became effective or enforceable."

17. Therefore, only when a purchase order was placed, a 'contract' would be entered; and only when a contract was entered, the General Conditions of

Contract including the arbitration clause would become a part of the contract. If a purchase order was not placed, and consequently the general conditions of contract (Section III) did not become a part of the contract, the conditions in Section III which included the arbitration agreement, would not at all come into existence or operation. In other words, the arbitration clause in Section III was not an arbitration agreement in praesenti, during the bidding process, but a provision that was to come into existence in future, if a purchase order was placed. In this case, the dispute raised is in regard to a claim for Rs.10,61,28,000/- as damages on account of BSNL not placing a purchase order, that is loss of profit @ Rs.200/- per CKM for a quantity of 5.306 LCKM. Obviously the respondent cannot invoke the arbitration clause in regard to that dispute as the arbitration agreement was non-existent in the absence of a purchase order.

18. The respondent contended that BSNL has entered into a contract with it in respect of a quantity (0.536 LCKM), and as the dispute raised was whether the contract quantity should be more, the arbitration clause was in force and available. The contention has no merit. The arbitration agreement was available in regard to the contract for 0.536 LCKM. But in the absence of any purchase order in respect of 5.306 LCKM by BSNL on the respondent, respondent cannot seek recourse to the arbitration agreement contained in clause 20 of Section III of the bid document, in regard to a dispute relating to that quantity for which order was not placed. It is not sufficient to show that there was an arbitration agreement in regard to some contract between the parties. To constitute an arbitration agreement for the purpose of Sections 7 and 11 of the Act, two requirements should be satisfied. The first is that there should be an arbitration agreement between the parties to the dispute. The second is that it should relate to or be applicable to the dispute in regard to which appointment of Arbitrator is sought (See *Yogi Agarwal v. Inspiration Clothes & U* - 2009 (1) SCC 362). For the foregoing reasons, we hold that in the absence of an arbitration agreement, the application under section 11 of the Act was not maintainable.

Some collateral issues

19. This case makes it necessary to refer to two areas of concern. The first relates to misuse by litigants, of routine observations made by courts reserving liberty to a litigant to seek further remedy, while disposing the matters, to claim non-existent rights and remedies. Second relates to the unenviable position to which public undertakings are reduced, for lack of freedom and unnecessary litigation.

Misuse of liberty reserved for further action

20. In the first writ petition filed by the respondent, the issue was whether the BSNL while evaluating the bidders had committed an error in adjudging NICCO as V-1 (vendor with the highest rating). The assessment of vendor rating (VR) was governed by the following formula : $VR = 0.6PR + 0.3DR + 0.1QR$ (PR, DR and QR referring to price rating, delivery rating and quality rating). The formula for arriving at PR was simple. QR did not involve any formula. But the formula prescribed to arrive at DR was complicated. The High Court found that the delivery rating (DR) of NICCO was modified by BSNL on a representation by NICCO, which led to NICCO, being adjudged as V-1. The High Court found that the modification of Delivery Rating was not warranted and consequently held that the vendor rating of NICCO was not proper. But it did hold that there was any malafides, bias or arbitrariness in the process of assessment of vendor rating by BSNL. In other words, the rating of NICCO as V-1 was apparently on account of a bonafide error in assessment or wrong understanding of the principles relating to assessment of Vendor Rating. The High Court directed correction of that error. The High Court was also aware that by the time it decided the writ petition, BSNL had completed the process of placing of purchase orders and only a very small quantity remained unallotted (In fact according to BSNL even this quantity had been transferred to next year's

tender). Consequently, the High Court while disposing of the first writ petition directed the BSNL to reassess the vendor rating, and if as a result the respondent secured V-1 rating, to allot to it, any unallotted quantity of cables. So far so good.

21. But the High Court did not stop there. It proceeded to observe at the end of the order that after giving effect of balance supply, if the respondent was entitled to further supplies, it will be open to the respondent to pursue its remedies against the appellant for compensation/damages that may be available to it in law.

22. Where the terms of the bid documents barred any claim being made on account of the rejection or non-acceptance of any bid, the bid inviter would not incur any liability to any aggrieved bidder, and the bidder would not have any cause of action in private law. But as the bids were invited by BSNL, which is 'state' for the purpose of Article 12, a writ petition was entertained, when respondent alleged arbitrariness in the process of assigning vendor-rating. In the absence of a finding in regard to arbitrariness, bias or malafides in the decision but only a mere error in assessment, the High Court ought not to have interfered in the tender process. In fact, it did not set aside the contract awarded to NICCO. But the High Court chose to issue a direction for re-assessment of the vendor rating and if respondent was found to have V-1 rating, then place a purchase order for the quantity that remained over after all the purchase orders. This was unobjectionable as a public law remedy. Having done so, there was no justification for the High Court to make any observation regarding compensation, as that was impermissible on the facts and circumstances, either in public law or private law. In fact, it was not based on any prayer. That unwarranted observation while disposing of the first writ petition, though it did not cast any liability on BSNL, was sufficient to persuade the designate of the Chief Justice while exercising jurisdiction under section 11 of the Act to assume that the High Court in the order dated 29.4.2004 had ordered the respondent to pursue the remedy against the appellant for compensation/damages and therefore, an arbitrator should be appointed to decide the claim.

23. Instances abound where observations of the court reserving liberty to a litigant to further litigate have been misused by litigants to pursue remedies which were wholly barred by time or to revive stale claims or create rights or remedies where there were none. It is needless to say that courts should take care to ensure that reservation of liberty is made only where it is necessary, such reservation should always be subject to a remedy being available in law, and subject to remedy being sought in accordance with law.

Position of public undertakings

24. The second issue relates to the vulnerable position of public undertakings. More and more they are subjected to vexatious litigations and other travails which their competitors in the private sector do not normally face. When public undertakings used to have monopoly and discharged public duties, control by the government and legislature and judicial review by the Judiciary was an absolute necessity to safeguard public interest and ensure transparency and accountability. But when public undertakings are required to compete with private sector, in commercial areas, controls by the executive and legislature (sometimes referred to as political bondage) and judicial review of their action, became a handicap which impedes their progress. A public undertaking is required to ensure fairness, non-discrimination and non-arbitrariness in their dealings and decision making process. Their action is open to judicial review and scrutiny under the Right to Information Act, 2005. They are required to take out advertisements and undergo elaborate and time-consuming selection processes, whether it is purchase of materials or engaging of contractors or making appointments. Just to ensure that everyone is given a fair and equal opportunity, public undertakings are required to spend huge amounts

and enormous time in elaborate tender processes. A proposal for a purchase of the value of Rupees Ten lakhs may involve a 'material procurement expenditure' of Rupees Two Lakhs in advertisements and tender evaluation cost, and a total tender process period ranging from three to six months. A competing private undertaking can go straight into market and negotiate directly and get the same material for Rupees five lakhs without any expenditure in a week. Public undertakings to avoid being accused of malafides, bias or arbitrariness spend most of their time and energy in covering their back rather than in achieving development and progress. When courts grant stay, the entire projects or business ventures stand still or get delayed. Even if ultimately the stay is vacated and the complaint is rejected as false, the damage is done as there is enormous loss to the public undertaking in terms of time and increase in costs. The private sector is not open to such scrutiny by courts. When the public sector is tied down by litigations and controls, the private sector quietly steals a march, many a time at the cost of the public sector. We are not advocating less of judicial review. We are only pointing out that if the public sector has to survive and thrive, they should be provided a level playing field. How and when and by whom is the question for which answers have to be found. Be that as it may.

Conclusion :

25. In view of our finding on the first issue, the second question does not survive for consideration.

26. Therefore, we allow this appeal, set aside the order and dismiss the application under Section 11 of the Arbitration Act.