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***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment delivered on: 06.09.2021

+ W.P.(C) 9179/2021 & CM APPL.28584-85/2021

SHIV AND SONS & ANR.

..... Petitioners

versus

INDIAN RAILWAY CATERING AND TOURISM
CORPORATION LTD (IRCTC)

..... Respondent

Advocates who appeared in this case:

For the Petitioner:

Mr. Jayant K. Mehta, Senior Advocate with Mr. Akshat Bajpai, Ms. Ishanee Sharma, Ms. Shreya Gupta and Mr. Srikar Pagadala, Advocates (through VC).

For the Respondent:

Mr. Mr. Nikhil Majithia, Standing Counsel, IRCTC with Mr. Piyush Gupta, Advocate.

CORAM:-

HON'BLE MR. JUSTICE SANJEEV SACHDEVA

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

1. Appellant seeks quashing of letter dated 17.08.2021 whereby respondent has directed the petitioners to abide by the tender conditions. Petitioner further impugns letters dated 29.07.2021, 19.08.2021, 20.08.2021 and 22.08.2021 whereby full license fee has been demanded from the petitioner. Petitioner further seeks relaxation in license fee as well as other benefits granted to the newly allotted

catering units by respondent in accordance with Clause 2.3.1 of the tender documents of the North Zone and South Zone.

2. E tenders were floated by the respondent in North, South, East and West zones for maintenance and provision of catering services in/through Jan Ahaars (kitchen unit) and refreshment room for a period of 5 years.

3. Tenders were floated on different dates and bids were submitted by the petitioners for several such units.

4. As per the two petitioners they have been successful in as many as 10 units (petitioner No.1 in 4 and petitioner No.2 in 6 units). It is contended that the tender submission dates were different and different letter of awards have been issued to the petitioners.

5. Petitioners have been found successful in bids submitted for the East and West zone.

6. Petitioners contend that they have been discriminated in so far as East and West zones are concerned. They submit that differential treatment is being given to the tenderers who have submitted bids in the North and South zones.

7. As per the petitioner, clause 2.3.1 of the tender document that talks of payment of license fee for refreshment room in East and West zone is discriminatory and it discriminates against the bidders for the

East and West zone and preferential treatment is being given to persons who have submitted their bids for the North and South zones.

8. It is contended by learned senior counsel for the petitioner that petitioners who have submitted their bids for the East and West zones should be accorded the same benefit as has been granted to the bidders of North and South zone.

9. It is contended by learned senior counsel for the petitioner that though the tender conditions of East and West zone on the one side and North and South zone on the other are different, however, the prevailing Covid conditions are identical across the country and as such same benefit should be granted to the bidders who have submitted their bids for the East and West zone as those in the North and South Zone.

10. Learned senior counsel submits that in of North and South zone there is reduction in license fee on pro rata basis till normalisation and till date letter of normalisation has not been issued by the competent authority but there is no such reduction in the East and West Zone.

11. Learned senior counsel submits that even in the matter of award of contract through bidding process there is no waiver of fundamental right and bidders are entitled to enforce their fundamental rights even though they may be contrary to the tender conditions.

12. Reliance is placed on the judgment dated 03.11.2008 of the Division Bench of this Court in *National Highways Builders Federation vs. The National Highways Authority of India & Ors in W.P(C) 566/2008* to contend that even though some bidders had participated in the tender they would still be entitled to challenge the constitutional validity of a tender condition on the ground that it violates Article 14 and 19(1)(g) of the Constitution of India.

13. Further reliance is placed on the decision of the Supreme Court in *M/s. Icomm Tele Ltd vs. Punjab State Water Supply & Sewerage Board & Anr dated 11.03.2019 in Civil Appeal No.2713/2019*.

14. At the outset it may be noticed that petitioner has not challenged any of the tender conditions of the tender or the bid document pursuant to which petitioners had submitted their bids.

15. Clause 2.3.1 which the petitioners contend is discriminatory is different in the Tender Documents for East and West Zone and the Tender Documents for the North and South Zone.

16. Clause 2.3.1 of the tender document in East and West zone reads as under:-

“2.3.1 Payment of LF for refreshment room

The quoted License fee for the Refreshment Room awarded to the Licensee shall be payable within 15 days from the date of issuance of LOA or as advised by

competent authority of IRCTC. Thereafter, the License fee due shall be paid one month prior to the completion of the first year and likewise in subsequent years. In case of delayed payment of license fees, notice will be issued and an interest of 12% shall be charged upto the date of payment. Termination proceedings shall be initiated treating it as event of default, if the payment is not made within notice period.”

17. On the other hand Clause 2.3.1 of the Tender Documents of North and South zone reads as under:-

“2.3.1 Payment of License fee for Jan Ahaar

The quoted License fee for the Jan Ahaar awarded to the Licensee shall be payable post normalization of COVID19 situation, i.e. within 07 days from the date of normalization/notice from IRCTC. Thereafter, the License fee due shall be paid one month prior to the completion of the first year and likewise in subsequent years. The unit may be operated with pro-rata reduced license fee as applicable till normalization of COVID-19 situation, duly completing the up-gradation/ renovation as per clause 17.1. Such period of operations shall be treated separately and not as part of the original contract.

In case of delayed payment of license fees, notice will be issued and an interest of 12% shall be charged upto the date of payment. Termination proceedings shall be initiated treating it as an event of default, if the payment is not made within notice period.”

18. It is not in dispute that that both the tender documents were available at the time when the petitioners submitted their bids.

19. The tender condition contained in East and West zone does not grant any pro rata reduction in payment of license fee on the ground of Covid 19. On the other hand the relevant clause in the tender document in North and South zone clearly stipulates pro rata reduction till the issue of a normalization/notice from the respondent.

20. It is not the case of the petitioners that they were not aware of the tender conditions as contained in the Tender Documents of North and South zones prior to submitting their bids for the tenders in East and West zone.

21. Clearly, petitioners who were aware of the different tender conditions submitted their bids with open eyes and after fully understanding the tender conditions of East and West zone.

22. In case Petitioners were aggrieved, they should have impugned the said tender conditions prior to submitting their bids or could have chosen not to submit any bid in the East and West zone.

23. Tender Conditions are contractual terms and normally a Court would not interfere in the tender conditions specifically when the language of the tender document is unambiguous and clear.

24. Petitioners having not challenged the tender condition and submitting their bids cannot now after participating and being declared successful, seek variation of the tender condition on the

ground that preferential treatment is being given to another zone which is covered by a different Tender Document.

25. It would have been a different situation in case some bidders in East and West zone, who were similarly situated to the petitioners, were being given a preferential treatment or a benefit which was not being given to the petitioners.

26. Clearly petitioners have not made out a case that petitioners are being singled out or put to prejudice vis-à-vis other tenderers or bidders in the East and West zone.

27. Petitioners have clearly participated with open eyes and submitted their bids. They now seek to resile from the same after having been found successful.

28. It is pointed out by learned counsel for the respondent that respondents had received several representations and keeping in view the specific tender condition they have decided that, as the tender conditions are sacrosanct, no relaxation from the terms and conditions of the contract/tender document is called for.

29. It is further submitted out that since the clause as contained in the Tender Documents of North and South zone is not the same as in the Tender Document of East and West zone, similar benefit cannot be accorded to any of the tenderers. It is submitted that in view of the

representations received, respondents had decided that since bidders might have misunderstood the tender condition or quoted the rates in a presumption that benefit will be extended, Respondents have decided to permit the successful bidders to honourably exit from the contract.

30. Learned counsel for the respondent submits that honourable exit would mean no coercive action would be taken against the bidder, who even after having been declared successful seeks to exit from the contract.

31. Since the petitioners had submitted their bids with open eyes and after fully appreciating the tender conditions, I am of the view that petitioners cannot claim parity with the bidders of the North and South Zone or seek alteration of a contractual term, which stands concluded by the respondents accepting the bids of the petitioners.

32. Reliance placed by learned senior counsel for the petitioner on the decision in *National Highways Builders Federation (Supra)* is misplaced in as much as in the said case there was a challenge to a tender condition whereby short listing of applicants was being done even after the bidders were declared to be technically qualified.

33. In the present case as noticed above there is no challenge to any of the tender condition. Further it may be noticed that in *National Highways Builders Federation* even though the Division Bench has held that the bidders would be entitled to challenge the Constitutional

validity of a clause on the ground that it is violative of Articles 14 & 19(1)(g) of the Constitution, the Division Bench has subsequently dismissed the challenge.

34. As held hereinabove, there is no discrimination being meted out by the respondents, vis-à-vis similarly situated persons i.e. bidders of East and West zone who have participated in the tender process based on the same tender documents. Petitioners cannot claim discrimination vis-à-vis a tender document which contains different clauses.

35. Further the judgment in *M/s. Icomm Tele Ltd (Supra)*, relied upon by learned senior counsel for the petitioner is not applicable to the facts of the present case.

36. In the said case the tender condition under challenge stipulated deposit of 10% of the amount claimed in an arbitration as “*deposit-at-call*” which was required to be deposited by the party invoking arbitration and which was liable to be forfeited in case the claimant was unsuccessful.

37. It was in these circumstances that the Supreme Court held that such a condition would render the entire clause arbitrary, excessive and disproportionate and leading to wholly unjust result for a party who had lost in arbitration.

38. The Supreme Court further held that that requiring a party to an arbitration invoking the alternative dispute resolution process to make a pre-deposit of 10%, would discourage arbitration and would be contrary to the object of de-clogging the Court system and would render the arbitral process ineffective and expensive.

39. It was in these circumstances that the Supreme Court permitted a challenge to the tender clause even after the bid was accepted and set aside the said clause.

40. Clearly the said judgments are not applicable in the facts of the present case.

41. As noticed hereinabove the Tender Documents of the East and West Zone on the one side and the North and South Zone on the other contain different clauses and as such there is no question of the Petitioners seeking equality with the bidders of the North and South Zone or raise the issue of discrimination.

42. In view of the above, I find no merit in the petition. The petition is accordingly dismissed.

SANJEEV SACHDEVA, J.

SEPTEMBER 6, 2021
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