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GLOBAL ENERGY LTD. AND ANR.

v.

M/S. ADANI EXPORTS LTD. AND ORS.

MAY 3, 2005

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[R.C. LAHOTI, C.J. AND G.P. MATHUR, J.]

Contract :

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Notice inviting tenders—Condition for depositing Earnest Money—State/Central Government and Public Sector Undertakings exempted from the condition—Party not holding requisite licence for the work challenged the condition of the tender—High Court by its interim order granted liberty to the party to participate in tender process with condition to deposit the Earnest money by furnishing Bank Guarantee or Bankers Cheque within 3 days of opening of tender—Order of Single Judge set aside by Division Bench of High Court—On appeal, held: Order of Single Judge was illegal and amounted to totally altering the notice inviting tenders—Terms of invitation to tender are not open to judicial scrutiny the same being in the realm of contract, unless they are wholly arbitrary, discriminatory or actuated with malice—Party also not holding requisite licence for the work—The exemption in favour of State/Central Government and Public Sector Undertakings is based on rationale criteria—Government is always treated as a separate class—Code of Civil Procedure, 1908—Order XXVII Rule 8A.

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State electricity Board issued notice inviting tenders for sale of its surplus power to different State Electricity Boards or Power Utilities through Power Trading Agencies. With every quotation Earnest Money was required to be paid. However, the Central/State Government Organisations and Public Sector Undertakings were exempted from submission of Earnest Money. The total unit of power intended to be traded by the electricity Board was 1471 million units. For trading over 1000 million units of power, licence of category 'F' was required. Appellant possessed an interim licence of category 'A' on the basis of order passed by High Court. Appellant-Company challenged the condition requiring submission of Earnest Money and prayed for direction to the Board to accept and evaluate their bid without deposit of Earnest Money.

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Single Judge of High Court passed interim order granting liberty to the appellant to participate in the tender process in response to the notice inviting tenders, subject to the condition of their depositing the earnest money by furnishing a Bank Guarantee or Bankers' cheque by a particular date (i.e. within 3 days after the tender was opened). Letters Patent appeals filed by respondent-Company was allowed by Division Bench of High Court.

In appeal to this Court, appellant contended that condition requiring deposit of Earnest Money by Power Utilities other than Central/State Government and Public Sector Undertakings was discriminatory and illegal; that its tender being higher than that of respondent-Company would bring more profit to the Electricity Board.

Respondent-Company contended that a clause regarding deposit of Earnest Money in the notice inviting tender cannot be altered or changed by Court, the said clause being in the realm of contract; and that appellant was not technically qualified to be awarded the contract for sale of electricity, in absence of possessing requisite licence.

Dismissing the appeals, the Court

HELD : 1. Single Judge of High Court has completely altered the notice inviting tenders in two ways. It allowed the appellants to participate in the tender process without depositing any earnest money. Secondly, once the tenders are opened, the relative position of each bidder is known and the appellants would have avoided depositing any earnest money, had they felt that their bid was not competitive and there was no chance of getting the contract. [1114-E-F]

2.1. Clause 5.1 of notice inviting tenders clearly provided that every quotation must accompany earnest money in the form of demand draft or pay order. Deposit of some amount of earnest money is a normal condition of tender. The object is that only such parties who are financially sound and are serious in getting the work or contract should make a bid. Normally, State/Central Government Organizations or Central or State Public Sector Undertakings would not make a bid unless they are serious in getting the work. The shareholding of the Government (State or Central) in any Public Sector Undertakings is always more than 50 per cent. They cannot be equated with a company whose net worth may be very small or may have a small shareholding. Therefore, the exemption

A granted in favour of State Government Organizations and Public Sector Undertakings from making deposit of earnest money was based upon a rational criteria and could not be faulted on any ground whatsoever.

[1114-G-H; 115-A-C]

B 2.2. Order XXVII Rule 8A CPC provides that no such security as is mentioned in rules 5 and 6 of Order XLI shall be required from the Government or, where the Government has undertaken any defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity. This provision shows that Government is always treated as a separate class. Even assuming for the sake of argument that the exemption from depositing earnest money made in favour of Central/State Government Organisations and Public Sector Undertakings was illegal, it could only result in such exemption being struck down. This could lead to a result where the condition in the NIT requiring deposit of money itself being set aside. [1115-C-E]

C *Tata Cellular v. Union of India*, AIR (1996) SC 11; *Air India Ltd. v. Cochin International Airport Ltd.*, [2000] 2 SCC 617 and *Directorate of Education v. Educomp Datamatics Ltd.*, [2004] 4 SCC 19, relied on.

D 3. The terms of the invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice. This being the position of law, the order of the Single Judge was wholly illegal and was, therefore, rightly set aside by the Division Bench. [1116-E-G]

E 4. The appellant has a licence of category 'A' and the said licence is subsisting in its favour on the basis of an interim order passed by the High Court. Under the regulations of Central Electricity Regulatory Commission, a holder of category 'F' licence is entitled to trade in over 1000 million units of power in a year. The total power intended to be traded by the Electricity Board is 1471 million units for which appellant-Company does not possess the requisite licence. Having regard to these facts, no ground has been made out by the appellants, which may warrant interference by this Court with the decision taken by the Electricity Board in not awarding the contract to the appellant-Company as price offered cannot be the sole criteria in the matter of trading of power where holding of relevant licence is mandatory under the Regulations of Central Electricity Regulatory Commission. [1117-G-H; 117-A-B]

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2988 of 2005. A

From the Judgment and Order dated 21.3.2005 of the Calcutta High Court in M.A.T. No. 1061 of 2005.

WITH

C.A. No. 2989 of 2005. B

Mukul Rohtagi, Sanjay Jain with him for the Appellants.

Harish N. Salve, Vikram Nanakani, Tarun Gulati, Ejaz Maqbool, Abhimeet Sinha and Ms. Minakshi Nag with him for the Respondent No. 1 in C.A. No. 2988/2005. C

R.F. Rohington, K.V. Vishwanathan, Ashish Dolakia, Sumanto Basu, Amit Nayak and Ms. Sumita Hazarika for the Respondent No. 1 in C.A. No. 2989/2005. D

V.R. Reddy, H.K. Puri, Ujjwal Banerjee, S.K. Puri, Shiv Gupta, V.M. Chauhan and Mrs. Priya Puri with him for the Respondent Nos. 2-4. D

The Judgment of the Court was delivered by

G.P. MATHUR, J. Leave granted. E

2. These appeals have been preferred against the judgment and order dated 21.3.2005 of a Division Bench of Calcutta High Court by which the appeals preferred against the interim order passed by a learned Single Judge on 15.3.2005 were allowed and the interim directions contained in the said order were set aside. F

3. The West Bengal State Electricity Board (for short 'Electricity Board') issued a notice on 8.3.2005 inviting tenders (for short NIT) for sale of its surplus power to different State Electricity Boards or Power Utilities on short term basis through Power Trading Agencies. Paragraphs 1 and 5 of the notice, which are relevant for the decision of controversy in hand, are being reproduced below : G

"1. Sealed tenders are invited by the Chief Engineer, Central Commercial Department, West Bengal State Electricity Board, Viduyat Bhawan, 8th Floor, Block-A, Bidhannagar, Kolkata - 700 091 from experienced and interested Traders and Business Enterprises having H

A Power Trading License or Clearance from the Central Electricity Regulatory Commission for export of *following approximate quantum* of power.

5. Mode of deposit of Earnest Money :

B 5.1. Every quotation must accompany 'Earnest Money' in the form of Demand Draft or Pay Order drawn on any Scheduled Bank of India in favour of West Bengal State Electricity Board payable at Kolkata amounting to Rs. 30,00,000.00 (Rupees thirty lakh) only. The Central/State Government Organization(s) and CPSU(s)/PSU(s) are exempted from submission of Earnest Money.

C 5.2. Earnest Money shall be refunded to the successful bidder only after opening of irrevocable and revolving LC by the successful bidder and commencement of supply as per Payment Security Mechanism Clause. Earnest Money shall be refunded to the unsuccessful bidder after finalization of Tender.

D 5.3. No interest shall be paid by WBSEB on Earnest Money."

E 4.. Global Energy Ltd. and H. Dhaul, the appellants herein, filed a writ petition in the Calcutta High Court on 14.3.2005, where the principal relief claimed was that the Electricity Board be restrained from enforcing the condition requiring deposit of Rs. 30 lakhs as earnest money in respect of the aforesaid tender and an injunction may be issued directing the Electricity Board to accept and evaluate their bid without requiring deposit of Rs. 30 lakhs as earnest money. The plea taken in the writ petition was that the impugned condition for deposit of earnest money of Rs. 30 lakhs by licensed traders and not by Central/State Government Organizations and Public Sector Undertakings showed undue favour to them. It was further pleaded that the said condition was not only discriminatory but was also contrary to express mandate of Electricity Act, 2003 and, therefore, the same was liable to be struck down. The writ petition was taken up for admission hearing by a learned Single Judge on 15.3.2005 and the following order was passed on the same day:

H "The petitioners herein have challenged the action of the respondent authorities regarding publication of the notice inviting tender and also the condition regarding deposit of earnest money by

the intending tenderers on various grounds mentioned in the writ petition. A

According to the petitioners, the respondent authorities hereto have shown undue favour to the public sector undertakings by granting exemption from submitting the earnest money. B

Having heard the learned counsel appearing on behalf of the parties and considering the facts and circumstances of this case, I am of the view that this petition should be decided only after filing of affidavits. C

Accordingly, respondents are directed to file affidavit-in-opposition within three weeks from date. Reply thereto, if any, be filed within a week thereafter and let this matter be listed for hearing four weeks hence. D

Let there also be an interim order by granting liberty to the petitioners to participate in the tender process in response to the notice inviting tender being Annexure 'P-1' to the writ petition subject to the condition that the said petitioners will deposit the earnest money by furnishing a Bank Guarantee or Bankers' Cheque in favour of the respondent No. 2 within 18th March, 2005. E

The petitioners will, however, comply with the other tender conditions as mentioned in the notice inviting tender." F

5. Feeling aggrieved by the aforesaid order, M/s Adani Exports Ltd. and M/s PTC India Ltd. filed two separate Letters Patent Appeals which were allowed by the Division Bench on 21.3.2005 and the direction contained in the order under challenge, permitting the writ petitioners (appellants herein) to deposit the earnest money by furnishing a bank guarantee or bankers' cheque in favour of the Electricity Board by 18.3.2005 was set aside. G

6. Learned counsel for the appellants has submitted that the condition requiring deposit of Rs. 30 lakhs as earnest money by Power Utilities other than Central/State Government Organizations and Public Sector Undertakings is discriminatory and illegal. He has further submitted that the notice inviting tenders (NIT) was published on 8.3.2005 which required that every quotation must accompany earnest money in the form of a demand draft or pay order in favour of the Electricity Board amounting to Rs. 30 lakhs and the last date fixed for submission of the tender was 14.30 hrs. on 15.3.2005. A very short H

- A notice had been given by the Electricity Board in which it was difficult for the appellants to make arrangement for the amount of Rs. 30 lakhs. In these circumstances, the learned Single Judge was perfectly justified in issuing an interim direction, whereby the appellants were permitted to deposit the earnest money by furnishing a bank guarantee or bankers' cheque by 18.3.2005.
- B Learned counsel for M/s Adani Exports Ltd. and M/s PTC India Ltd., who are respondents in the appeals, have submitted that an important clause regarding deposit of earnest money in a NIT cannot be altered or changed by Court as the said clause has to be strictly complied with, being in the realm of contract. The learned single Judge, therefore, committed manifest error of law in issuing the interim direction on 15.3.2005 right on the first day of admission hearing of the writ petition, which was rightly set aside by the Division Bench.
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7. Before examining the contention raised it is important to understand the real import of the order passed by the learned Single Judge on 15.3.2005. Though, apparently the order looks innocuous in the sense that it has permitted the appellants (writ petitioners) to deposit the money by furnishing a bank guarantee or a bankers' cheque by 18.3.2005, but in reality it completely altered the NIT in two ways. It allowed the appellants to participate in the tender process without depositing any earnest money as the tenders/offers were to be opened at 15.00 hrs. on 15.3.2005 and thus the appellants' tender was directed to be considered even though the same was not accompanied with the earnest money. Secondly, once the tenders are opened, the relative position of each bidder is known and the appellants would have avoided depositing any earnest money, had they felt that their bid was not competitive and there was no chance of getting the contract. It is averred in the counter affidavit that the appellants adopted a similar device while making bid for purchase of power in Orissa where they obtained a somewhat similar order of not making the deposit of earnest money by the date fixed. When after opening the tenders it was revealed that their bid was not competitive and they had no chance of getting the contract they did not at all deposit the earnest money, which was a mandatory condition of NIT.

- G 8. Clause 5.1 of NIT clearly provided that every quotation must accompany earnest money amounting to Rupees thirty lakhs in the form of demand draft or pay order drawn on any Scheduled Bank of India in favour of West Bengal State Electricity Board payable at Kolkata. However, the learned Single Judge in his order dated 15.3.2004 also gave an option to the appellants to furnish a bank guarantee of the said amount. Deposit of some
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amount of earnest money is a normal condition of tender. The object is that only such parties who are financially sound and are serious in getting the work or contract, should make a bid. Otherwise any number of persons who have no capacity, financial or otherwise, would like to take a chance by making a bid. Normally, State/Central Government Organizations or Central or State Public Sector Undertakings would not make a bid unless they are serious in getting the work. The shareholding of the Government (State or Central) in any Public Sector Undertakings is always more than 50 per cent. They cannot be equated with a company whose net worth may be very small or may have a small shareholding. Therefore, the exemption granted in favour of State Government Organizations and Public Sector Undertakings from making deposit of earnest money of Rs. 30 lakhs was based upon a rational criteria and could not be faulted on any ground whatsoever. Order XXVII Rule 8A CPC provides that no such security as is mentioned in rules 5 and 6 of Order XLI shall be required from the Government or, where the Government has undertaken any defence of the suit, from any public officer sued in respect of an act alleged to be done by him in his official capacity. This provision shows that Government is always treated as a separate class. Even assuming for the sake of argument that the exemption from depositing earnest money made in favour of Central/State Government Organizations and Public Sector Undertakings was illegal, it could only result in such exemption being struck down. This could not lead to a result where the condition in the NIT requiring deposit of earnest money itself being set aside.

9. In *Tata Cellular v. Union of India*, AIR (1996) SC 11, a Three Judge Bench has explained what is a tender and what are the requisites of a valid tender. It has been held that the tender must be unconditional and must conform to the terms of the obligation and further the person by whom the tender is made must be able and willing to perform his obligations. It has been further held that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. In *Air India Ltd. v. Cochin International Airport Ltd.*, [2000] 2 SCC 617 the same view was reiterated that the State can fix its own terms of invitation of tender and that it is not open to judicial scrutiny. Whether and in what conditions the terms of a notice inviting tenders can be a subject matter of judicial scrutiny, has been examined in considerable detail in *Directorate of Education v. Educomp Datamatics Ltd.*, [2004] 4 SCC 19. The Directorate of Education, Government of National Capital Territory of Delhi had taken a decision to establish computer laboratories in all Government schools in NCT area and tenders were invited to provide hardware for this purpose. For

A the final phase of 2002-03, tenders were called for 748 schools and the cost of project was approx. Rs. 100 crores. In view of the difficulty faced in the earlier years where the lowest tenderers were not able to implement the entire project, a decision was taken to invite tenders from firms having a turnover of Rs. 20 crores or more for the last three financial years ending with 31.3.2002, as it was felt that it would be easier for the department to deal with one company which is well managed and not with several companies. Some of the firms filed writ petitions in Delhi High Court challenging the clause of the NIT whereby a condition was put that only such firms which had a turnover of Rs. 20 crores or more for the last three financial years would be eligible. It was contended before the High Court that the aforesaid condition had been incorporated solely with an intent to deprive a large number of companies imparting computer education from bidding and monopolize the same for big companies. The writ petition was allowed and the clause was struck down as being arbitrary and irrational. In appeal, this Court reversed the judgment of the High Court basically on the ground that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract and the Government must have a free hand in settling the terms of the tender. The courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. It was further held that while exercising the power of judicial review of the terms of the tender notice, the Court cannot order change in them.

10. The principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice. This being the position of law, settled by a catena of decisions of this Court, it is rather surprising that the learned Single Judge passed an interim direction on the very first day of admission hearing of the writ petition and allowed the appellants to deposit the earnest money by furnishing a bank guarantee or a bankers' cheque till three days after the actual date of opening of the tender. The order of the learned Single Judge being wholly illegal, was, therefore, rightly set aside by the Division Bench.

11. Learned counsel for the appellants has submitted that the appellant M/s Global Energy Ltd. had submitted a tender for Rs. 436 crores while M/s Adani Exports India Ltd. had submitted a tender for Rs. 396 crores and as the tender of the appellants was Rs. 40 crores more than that of respondent

No. 1 the Electricity Board would gain the said amount if the contract is awarded to the appellant. Learned counsel for the contesting respondents have submitted that appellant no.1 is not technically qualified to be awarded the contract for the sale of electricity as it does not possess the requisite license for the said purpose. The appellant no.1 applied for grant of license for interstate trading in electricity in all the five electricity regions in the country for trading of 100 million units in a year to the Central Electricity Regulatory Commission. The Commission vide its order dated 6.9.2004 granted an interim license for category 'A'. The appellant no.1 challenged the said order before the Delhi High Court in which initially an order was passed on 26.10.2004 and the interim license granted to it was extended till the next date of hearing. This order was extended and finally on 3.2.2005, the High Court directed that the interim license granted to appellant no.1 shall be extended till further orders. It is, therefore, clear that appellant no.1 is having an interim license of category 'A' in its favour on the basis of the order passed by the High Court. It is averred in the counter affidavit filed by the Electricity Board that the total units of power intended to be traded are 1471 million units. For trading over 1000 million units of power in any year the license required is that of category 'F'. The computer website of Central Electricity Regulatory Commission, as on 14.3.2005, contains the names of 12 licensed electricity traders, but the name of the appellant no.1, M/s Global Energy Ltd. does not find mention therein. It is also averred in the counter affidavit that the Electricity Board had been selling surplus power to electricity traders since 1st April, 2003. In the course of such negotiations, the Electricity Board came to be associated with appellant no.1 for entering into power purchase agreement for the period March to June 2004. However, the appellant no.1, after accepting the terms and conditions offered by the Electricity Board and after issuance of letters of awards, failed at the last moment to open the letter of credit for requisite amount and submitted unacceptable letter of credit making the Electricity Board as a second beneficiary. Due to this reason, the power purchase agreement failed to materialize at the last moment, due to which the Electricity Board could not sell surplus power resulting in a loss of revenue to the extent of about Rs. 10.86 crores. In view of these facts, the contract was not awarded to appellant no.1.

12. The fact that M/s Global Energy Ltd. has a license of category 'A' and that the said licence is subsisting in its favour on the basis of an interim order passed by the High Court is not in dispute. Under the regulations of Central Electricity Regulatory Commission, a holder of category 'F' license is entitled to trade in over 1000 million units of power in a year. The total

A power intended to be traded by the Electricity Board is 1471 million units for which appellant no.1 does not possess the requisite license. Having regard to these facts, we are clearly of the opinion that no ground has been made out by the appellants, which may warrant interference by this Court with the decision taken by the West Bengal State Electricity Board in not awarding the contract to the appellant No. 1 as price offered cannot be the sole criteria

B in the matter of trading of power where holding of relevant licence is mandatory under the Regulations of Central Electricity Regulatory Commission.

C 13. The appeals lack merit and are hereby dismissed with costs, which we quantify as Rs. 25,000. The cost shall be paid by the appellants to the West Bengal State Electricity Board (respondent no.2).

K.K.T.

Appeal dismissed.