

HIGH COURT OF CALCUTTA**Bench: Hon'ble Justice Sabyasachi Bhattacharyya****Date of Decision: 24th May 2024**

WPA No. 8752 of 2024

MRT Signals Limited and another ...PETITIONERS**VERSUS****Union of India and others ...RESPONDENTS****Legislation:**

Article 226 of the Constitution of India

Subject: Writ petition challenging the rejection of a technical bid for a railway signaling project tender, questioning territorial jurisdiction, applicability of tender amendments, and bid responsiveness criteria.

Headnotes:

Writ Jurisdiction – Territorial Jurisdiction of High Court under Article 226 – Validity of forum selection clause – High Court of Calcutta holds jurisdiction despite forum selection clause specifying courts in Bhopal – Constitutional provisions under Article 226 cannot be contracted out – Part of cause of action arose within territorial jurisdiction of Calcutta High Court – Petitioners received rejection communication at Kolkata, affecting their business – Court's jurisdiction under Article 226 not ousted by forum selection clause [Paras 4, 6-7, 22-39].

Tender Evaluation – Applicability of Amendment No. 5 to EPC Tender Document – Notification dated August 31, 2016, prohibits amendments during offer submission period – Amendment No. 5 issued within fifteen days prior to bid due date – Held inapplicable to petitioners’ tender – Petitioners ineligible without the amendment [Paras 9, 41-49].

Bid Submission Requirements – Non-uploading of Appendix-IB with Technical Bid – Bid rejected as non-responsive – Tender terms required Appendix-IB with technical bid – Petitioners’ submission of Appendix-IB with financial bid insufficient – Authority’s interpretation given primacy – Decision to reject technical bid upheld [Paras 10-15, 51-57].

Decision – Dismissal of Writ Petition – Held – Petition dismissed as the decision-making process of respondent authorities adhered to tender terms and natural justice – No arbitrariness or unreasonableness found in rejection of petitioners’ bid – Costs not awarded [Paras 58-60].

Referred Cases:

- A.B.C. Laminart Pvt. Ltd. And another v. A.P. Agencies, Salem, (1989) 2 SCC 163
- Agmatel India Private Limited v. Resoursys Telecom and others, (2022) 5 SCC 362
- Ashok Kumar Saboo (HUF) and another v. Hindusthan Paper Corporation Limited and others, (2007) 3 CHN 533
- Maharashtra Chess Association v. Union of India and others, (2020) 13 SCC 285

- Sri. Pankaj Panwar v. Lalit Kala Akademi and others, AIR 2015 Cal 67
Representing Advocates:

For the Petitioners: Mr. Jayanta Mitra, Id. Sr. Adv., Mr. Jishnu Saha, Id. Sr. Adv., Mr. Ratnanko Banerjee, Id. Sr. Adv., Ms. Rajshree Kajaria, Mr. Sarvapriya Mukherjee, Mr. Ishan Saha

For the Union of India: Mr. Pinaki Ranjan Chakraborti, Ms. Sumita Sarkar

For the Added Respondent: Mr. Jaydip Kar, Id. Sr. Adv., Mr. Srijib Chakraborty, Mr. Subhasis Chakraborty, Ms. Sushmita Kumari Singh, Mr. Amit Chowdhury

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Sabyasachi Bhattacharyya, J:-

1. The respondent no. 2 (West Central Railways), on August 31, 2023, issued a Notice Inviting Tender (NIT) for Automatic Block Signalling. The last date of submission of bids was October 16, 2023.
2. By Notification No. 2018/CE-I/CT/36-EPC Contract Policy Pt-I dated October 11, 2023, the Ministry of Railways, Government of India brought Amendment No. 5 to Standard Engineering Procurement Contract Tender Document (EPC) for single stage two packet system, thereby introducing certain amendments to the clauses regarding technical capacity. Admittedly, the petitioner no. 1 became eligible for participation in the tender only by virtue of such amendment. Accordingly, the petitioner no. 1 uploaded its technical and

financial bids on October 15, 2023, one day prior to the closing of the bid submissions.

3. On March 19, 2024, an e-mail was sent to the petitioner no. 1 by respondent no. 3 intimating that the technical bid of the petitioner no. 1 was found technically unsuitable due to the same being nonresponsive as Appendix IB was not submitted and the Request For Proposal (RFP) Clause 2.2.2.1(ii) was not satisfied. Challenging the said rejection, the present writ petition has been filed.

4. At the outset, the respondents throw a challenge to the territorial jurisdiction of this Court to take up the writ petition. Learned counsel appearing for the added respondent no. 4 cites *A.B.C. Laminart Pvt. Ltd. and another Vs. A.P. Agencies, Salem*, reported at (1989) 2 SCC 163, where it was held that if several courts have jurisdiction, the parties can contract to choose to submit to the jurisdiction of a particular court among those. In the present case, the contract clauses specify the courts in Bhopal in the State of Madhya Pradesh to have jurisdiction.

5. Learned senior counsel for the respondent no. 4 also cites *Agmatel India Private Limited Vs. Resoursys Telecom and others*, reported at (2022) 5 SCC 362 to argue that the technical evaluation or comparison by the court is impermissible and even if the person inviting offers gives an interpretation to the tender document which is not acceptable to the Constitutional Court, that, by itself, would not be a reason for interfering with the interpretation given.

6. Learned senior counsel for the petitioner, while addressing the issue of territorial jurisdiction, cites *Ashok Kumar Saboo (HUF) and another Vs. Hindusthan Paper Corporation Limited and others*, reported at (2007) 3 CHN 533, for the proposition that the provisions under Article 226 of the Constitution cannot be contracted out by selecting one of the two competent

forums as there cannot be estoppel against any provision of Constitutional law.

- 7.** Learned senior counsel cites *Maharashtra Chess Association Vs. Union of India and others*, reported at (2020) 13 SCC 285 in support of the proposition that the role of the High Court under the Constitution is crucial to ensuring the rule of law throughout its territorial jurisdiction. The writ jurisdiction of a High Court cannot be completely excluded by a statute. The decision of the High Court to entertain or not entertain a particular action under its writ jurisdiction is fundamentally discretionary and limitations placed on the court's decision to exercise or refuse to exercise its writ jurisdiction are self-imposed.
- 8.** Learned senior counsel next cites a coordinate Bench judgment of this Court in *Sri. Pankaj Panwar Vs. Lalit Kala Akademi and others*, reported at AIR 2015 Cal 67, where, after consideration of different judgments, it was held that when the impugned act of the respondents takes effect within the territorial jurisdiction of a particular High Court, it may entertain the writ petition notwithstanding that the respondents have their offices or residences outside its territorial jurisdiction. To hold that service of an order or a notice on the addressee would never give rise to a cause of action to move the court within whose territorial limits the order/notice is received, may not be reasonably sound.
- 9.** Learned senior counsel next points out that Amendment No. 5 dated October 11, 2023, being intended to apply to tenders of the present nature, was squarely applicable to the present case. Since the Amendment was brought into force on October 11, 2023, prior to the last date of submission of the bids that is October 16, 2023, the petitioners have been rendered eligible to participate in the tender by virtue of such amendment.
- 10.** On merits, it is submitted by the petitioners that Appendix-IB was to be uploaded with the bid as per the relevant clauses of the tender document.

The petitioners precisely did so. Although the Appendix IB was to be uploaded with the technical bid packet, the same was clubbed with the financial bid. However, the terms of the tender required submission of Appendix-IB along with the bid documents which was done in the present case.

- 11.** That apart, for abundant caution, a hardcopy of the document was also submitted subsequently to the respondents and a softcopy thereof was sent to a functionary of the respondent-Authorities. Thus, the petitioners argue that the rejection of their bid was *de hors* the provisions of the tender document and ought to be set aside.
- 12.** Learned senior counsel appearing for respondent no. 4 primarily relies on the fact that Appendix-IB was not submitted along with the technical bid but with the financial bid. It is argued that in terms of the tender clauses, particularly Clause 3.1.6(a), the technical bid was to be considered responsive only if it was as per format, inclusive of Appendix-IB.
- 13.** As per Clause 2.11.1(h) of the tender document, Appendix-IB was to be filed with the technical bid.
- 14.** Clauses 3.1.9 and 3.3 provide that only technically responsive bids would be opened.
- 15.** Further, technical and financial bids were only to be filed online on the concerned portal and no other mode was recognized. Thus, the WhatsApp communication to an officer of the tender inviting authority or physical submission of hardcopy of Appendix IB subsequently would not suffice.
- 16.** The respondents also argue that as per the Railway Board Circular dated August 31, 2016 *vide* Memo No. 2015/CE-1/CT/5/1, Amendment No. 5 could not be incorporated, since it was issued within fifteen days prior to the bid due date. Hence, the petitioner no. 1 was not eligible to participate in the contract in the first place.

17. It is reiterated by the respondents that the writ petition is not maintainable due to lack of territorial jurisdiction of this Court, since the respondents have their offices in Madhya Pradesh, the work contemplated in the tender is to be done in the State of Madhya Pradesh and the documents were partially to be submitted physically also at Jabalpur in Madhya Pradesh. Nothing has been shown by the petitioners to the effect that the petitioners' business would be affected in Kolkata, since the work was for the Bhopal-NishatpuraBina Section of Bhopal division of the West Central Railway, which is beyond the territorial jurisdiction of this Court.

18. Thus, the respondents argue that the writ petition ought to be dismissed on the ground of territorial jurisdiction as well as on merits.

19. Thus, three issues fall for consideration in the present case, which are as follows:

i) Whether this Court has territorial jurisdiction to entertain and decide the writ petition.

ii) Whether Amendment No. 5 would be applicable to the petitioners.

iii) Whether non-uploading of Appendix-IB with the technical bid packet would render the petitioners technically ineligible in the tender.

20. The above issues are decided in the following manner:

21. *Decision:*

i) Whether this Court has territorial jurisdiction to entertain and decide the writ petition.

22. The terms of the tender are contained in the RFP document. Clause 24.3.18 of the same stipulates that the contract shall be governed by the law for the time being in force in the Republic of India. In case of any disputes

and differences resulting in court cases between Contractor and Authority, the jurisdiction shall be of Courts at Bhopal only.

- 23.** Clause 25.1 provides that the said agreement shall be construed and interpreted in accordance with and governed by the Laws of India and the Courts at Bhopal shall have exclusive jurisdiction over matters arising out of or relating to the agreement.
- 24.** Insofar as the first Clause is concerned, no contract has been entered into as yet between the parties since the matter is still at the tender evaluation stage. Thus, there is no scope of any dispute or difference between „contractor“ and „authority“. Hence, Clause 24.3.18 does not apply.
- 25.** Clause 25.1 stipulates that Courts at Bhopal shall have exclusive jurisdiction over “matters arising out of or relating to the agreement”. However, the present allegations pertain to the authorities having acted *de hors* the agreement itself.
- 26.** More importantly, the disputes envisaged therein are, as per the said Clause, to be resolved in „Courts“ in Bhopal. However, the plenary powers conferred by Article 226 of the Constitution of India are not circumscribed by territorial jurisdiction as contemplated in statutes which derive power from the Constitution, including the Code of Civil Procedure, Sections 15 to 20 of which lay down the road-map in respect of jurisdiction.
- 27.** In *Maharashtra Chess Association (supra)*, the Supreme Court observed that although parties, by agreement, may confer jurisdiction on one of the courts having jurisdiction, the role of the High Court under the Constitution is crucial to ensuring the rule of law throughout its territorial jurisdiction and in order to achieve these transcendental goals, the powers of the High Court under its writ jurisdiction are necessarily broad. The Supreme Court reiterated that no limitation can be placed on the powers of the High Court in exercise of its writ jurisdiction. Two clear principles were laid down

therein. First, the decision of the High Court to entertain or not entertain a particular action under its writ jurisdiction is fundamentally discretionary and secondly, limitations placed on the court's decision to exercise or refuse to exercise its writ jurisdiction are self-imposed. Writ jurisdiction of High Courts, it was held, cannot be completely excluded by statute.

- 28.** In *Pankaj Panwar (supra)*, a coordinate Bench of this Court, while considering the proposition that it has to be construed from the pleadings as to whether the facts constitute essential, integral or material facts so as to constitute a part of cause of action, held that when the impugned act of the respondents takes effect within the territorial jurisdiction of a particular High Court, it may entertain the writ petition of the person aggrieved notwithstanding that the respondents have their offices or residences outside its territorial jurisdiction. Where an order has been made by an authority or person at a place beyond the territorial limits of a particular High Court but the same is given effect to against the petitioner within the said High Court's jurisdiction, at least a part of the cause of action arises where the impugned order is implemented. It was held that when an order becomes effective only when it is communicated or served, the service of the order or receipt of a notice thereof would form part of cause of action for filing a writ petition.
- 29.** In the case under consideration by the Learned Single Judge, a public notice which was published beyond the territorial jurisdiction was being considered. In such context, however, the learned Single Judge observed that to hold that service of an order or a notice on an addressee would never give rise to a cause of action to move the court within whose territorial limits the orders/notices is received, may not be reasonably sound.
- 30.** In *Ashok Kumar Saboo (HUF) (supra)*, a Division Bench of this Court was considering the termination of a contract where there was an agreement of forum selection, stipulating courts situated in the State of Assam to have such

jurisdiction. It was held by the Division Bench that it is impossible to think that the provision under Article 226 can be contracted out by selecting one of the two competent forums as there cannot be an estoppel as against a provision of Constitutional law. The forum selection clause, it was held, does not envisage recognition and acceptance of contracting out of the provision of Article 226 of the Constitution of India.

- 31.** Thus, merely by virtue of the forum selection clause in the tender document, it cannot be said that the jurisdiction of this Court is ousted in the present case.
- 32.** The petitioner has also cited an unreported judgment in *CESC Limited (supra)*, wherein a similar context, this Court held that at least a part of cause of action arises within the jurisdiction of this Court, considering the provision of Article 226(2) of the Constitution of India which empowers any High Court exercising jurisdiction in relation to territories within which the cause of action, wholly or part, arises, notwithstanding that the seat of such authority is not within those territories, to exercise the powers of the territorial High Court as envisaged in Article 226(1).
- 33.** Learned counsel for respondent no. 4 has cited *A.B.C. Laminart (supra)* where it was held that so long as the parties to a contract do not oust the jurisdiction of all courts which would otherwise have jurisdiction to decide the cause of action under the law, it cannot be said that the parties have by their contract ousted the jurisdiction of the court. If several courts have jurisdiction in the law and the parties have agreed to submit to one of those and not to the other, it cannot be said that there is total ouster of jurisdiction.
- 34.** The ratio which can be deduced from the above judgments, is that although parties can, by agreement, confer jurisdiction on one of the courts having jurisdiction in law, the said contract cannot affect the power of judicial review under Article 226 of the Constitution of India.

- 35.** In the facts of the instant case, although the respondents have made out a strong case on territorial jurisdiction on the ground that the proposed work under the tender is to be done outside the jurisdiction of this Court, certain other factors are also to be taken into consideration. The petitioners have pleaded in the writ petition that they have business throughout India and outside. Thus, the rejection of its bid in the subject tender would affect their business throughout India.
- 36.** Insofar as the particular work is concerned, and/or working with the particular respondents in the present case is concerned, undoubtedly, the petitioner would be affected outside territorial jurisdiction of this Court. However, the implications of rejection of a tender document are not confined to the particular tender inviting authority alone but all similar contracts floated by authorities invariably contain a clause demanding disclosure as to whether there was any previous rejection of a participant's bid in any previous tender, which affects the eligibility of the bidder in such tenders. Moreover, the respondent no. 2 is a part of the Indian Railways and the rejection of the petitioner's bid on the ground of not being technically qualified would definitely affect future business of the petitioner no. 1 and its participation in other contracts for the Indian Railways throughout the country, including in the State of West Bengal.
- 37.** In the present case, as in *Pankaj Panwar (supra)*, the effect of the rejection, which took place in Madhya Pradesh, was given when the petitioners received the communication from their office in Kolkata. Even if the decision of rejection of the petitioner's bid was taken in Madhya Pradesh, which falls outside the jurisdiction of this Court, the fact remains that the cause of action of the instant writ arose when the petitioners learnt about such rejection at Kolkata. Thus, at least a part of the cause of action arose within the territorial jurisdiction of this Court.

- 38.** The argument that some of the bid documents were to be submitted physically in Madhya Pradesh does not cut ice since the primary tender documents relating both to technical and financial bids were to be submitted online which the petitioners did from their Kolkata office. Hence, merely because the respondents have their offices outside the jurisdiction of this Court, it does not automatically signify that the territorial jurisdiction of this Court under Article 226(2), read with Article 226(1) of the Constitution of India is ousted.
- 39.** At least a part of the cause of action arose here, as evident from the above discussions. Accordingly, the first issue is decided in favour of the petitioners by holding that this Court does have territorial jurisdiction to entertain and decide the writ petition, as at least a part of the cause of action arose within its territorial limits.
- 40. *Decision:***
- ii) Whether Amendment No. 5 would be applicable to the petitioners.*
- 41.** The petitioners have argued that Amendment No. 5 to standard EPC documents for single stage two packet systems applies in the present case. The said Amendment was notified on October 11, 2023, barely five days before the closing date of submission of tenders in the present RFP that is October 16, 2023.
- 42.** To construe the effect of the same, Notification No. 2015/CEI/CT/5/1 dated August 31, 2016 issued by the Ministry of Railways, Government of India through the Railway Board is relevant.

- 43.** In no uncertain terms, it stipulates that issue of corrigendum notice is permitted *as an exception only during advertisement period and no corrigendum is permitted during offersubmission period* and cases requiring corrigendum during offer submission period shall be retendered.
- 44.** The expression “Advertisement period” has been defined in Clause (ii) (a) of the Notification as “Time during which all information pertaining to tender shall be available but offers cannot be submitted”. On the other hand, the term “Offer submission period” has been defined in Clause (ii) (b) as “Fifteen days prior to opening of tender, during which tenderers can submit their offer”.
- 45.** As per the time schedule in the subject tender, the last date for receiving queries was September 14, 2021, the first pre-bid meeting was scheduled on September 15, 2023, the authority’s response to queries latest by September 29, 2023 and the last date of request for bid document as well as bid due date was October 16, 2023, although physical submission of documents listed in Clause 2.11.2 was to be permitted till October 25, 2023. The technical bids were to be opened on October 2023.
- 46.** Thus, the time-lines indicate that the bid due date for online submission was October 16, 2023, beyond which bids could not be submitted.
- 47.** Since in the present case, the corrigendum in the form of amendment came into effect barely five days before the bid submission closing date, it clearly falls within the excluded zone as contemplated in the Notification dated August 31, 2016 and as such, cannot be given effect to in respect of the present tender.
- 48.** The jugglery of words in distinguishing between an „amendment” and „corrigendum” is not relevant, since the terms are interchangeable in the present context, as amendments may very well come in the form of corrigenda and viceversa.

49. Thus, the second issue is decided against the petitioners, holding that Amendment No. 5 dated October 11, 2023 does not apply to the present tender.

50. *Decision:*

iii) Whether non-uploading of Appendix-IB with the technical bid packet would render the petitioners technically ineligible in the tender.

51. Prior to entering into this issue on merits, it is to be noted that the petitioners have admitted during arguments that it is only by virtue of Amendment No. 5 that they became eligible to participate in the bid; otherwise, they do not qualify as eligible bidders as per the tender terms. Thus, in view of the second issue being decided against the petitioners, the petitioners were admittedly not eligible to participate in the tender at all, hence, nipping their attempt at the bud.

52. However, for the sake of completion, the other important facet of eligibility, which is a sticking point in the present *lis*, is also taken up for consideration. Clause 2.11.1(h) stipulates that Appendix-IB (letter comprising the financial bid) shall be submitted online through eprocurement portal on or before October 16, 2023. Clause 3.1.6.1, pertaining to evaluation of technical bids, provides that as a first step towards evaluation of technical bids, the authority shall determine whether each technical bid is responsive to the requirements of the RFP. A technical bid, it is further provided, shall be considered responsive *only if* the conditions given thereafter are satisfied. The very first such condition, comprised in Clause (a), is that the bid is received online as per the format at Appendix-IB including Annexures – I, II, III, IV, V, VII and Appendix-IB.

53. Clause 3.1.6.2 stipulates that the authority reserves the right to reject any technical bid which is non-responsive and no request for alteration, modification, substitution or withdrawal shall be entertained by the authority in respect of such bid. In view of the said clause, submission of Appendix IB with the technical bid cannot but be construed to be one of the essential terms of the tender. Even otherwise, the declaration intended to be incorporated in Appendix IB, being the letter comprising the financial bid, also contains agreement by the bidder to several other essential terms of eligibility to participate in the tender. Thus, the said document is an essential and integral part of the eligibility criteria.

54. Thus, online submission of the said document along with the technical bid is a *sine qua non* of the bid being eligible at the technical stage.

55. In terms of the scheme of the tender document, a bid is only considered eligible for the financial stage if it crosses the hurdle of the technical stage. If a bid is rejected at the technical stage as unresponsive, no question arises of the financial bid being opened at all. Thus, the petitioners' insistence that they had submitted Appendix-IB along with the financial bid packet, seen in the context of the above clauses, does not cut ice. „Submission“, for the purpose of eligibility, has to be in consonance with the terms of the contract. Unless Appendix IB is uploaded along with the technical bid packet, there would not arise any occasion for the authorities even to open the financial bid. In the present case, Appendix IB was admittedly included in the financial bid packet and did not accompany the technical bid and as such, the authorities were well within their power, in particular as conferred under Clause 3.1.6.2, to reject the technical bid of the petitioners as non-responsive on such ground alone.

- 56.** That apart, the ratio laid down in *Agmatel (supra)* is also attracted to the instant case. In consonance therewith, the interpretation lent to the tender terms by the tender inviting authority has to be given primacy.
- 57.** Hence, the last issue is also decided against the petitioners. The nonuploading of Appendix-IB with the technical bid rendered the petitioners ineligible in the tender, since their bid was “nonresponsive” under the terms of the contract, which entails rejection of the bid at the technical stage.
- 58. Conclusion:**
- 59.** In view of the above discussions, this Court is unable to find any arbitrariness, unreasonableness or irregularity in the refusal of the petitioners’ bid by the respondent-Authorities. The decision-making process of the respondents was perfectly in tune with the terms and conditions of the tender document and the principles of Natural Justice and as such, there is no scope of interference with the said decision.
- 60.** Accordingly, WPA No. 8752 of 2024 is dismissed on contest without, however, any order as to costs.
- 61.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.