

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7537/2023

SARR FREIGHTS CORPORATION ..APPELLANT(S)

VERSUS

CJDARCL LOGISTICS LTD. & ORS. ..RESPONDENT(S)

O R D E R

In view of the change in the composition of the Bench, the matter is discharged from part heard and taken up by the newly constituted Bench.

A tender was floated on 30.08.2021 by respondent No. 2, M/s. RITES Ltd. by e-tender process for transport of 34 railway coaches to Mozambique (Africa). The appellant before us as well as the original petitioner before the High Court (respondent No. 1 herein) submitted the bids for the tender. The appellant was awarded the work order by respondent No. 2 as L-1 on 06.09.2021. We may note that bid of respondent No. 1 was found to be not qualified.

On 10.09.2021, respondent No. 1 made a representation to respondent No. 2 stating that the appellant was ineligible in view of the existing two

banning orders preventing them from tendering for the bid. In view of this representation, respondent No. 2 called upon the appellant to furnish its comments vide its letter dated 14.09.2021. However, on 15.09.2021 itself, respondent No. 1 filed Writ Petition (Civil) No. 10369/2021 before the Delhi High Court seeking to assail the tender awarded to the appellant. On 16.09.2021, the High Court issued a notice directing status quo to be maintained with regard to the award of contract and the work to be done thereunder.

The appellant replied to respondent No. 2 on 17.02.2021 informing them that the two banning orders issued against the appellant were *sub judice* and interim orders had been passed in respect of the banning orders. The details of these interim orders are as under:

| Details of Banning orders | Action taken by the petitioner | Interim order passed by the Hon'ble Courts |
|---------------------------|--|---|
| 09.02.2021 by MOD | Challenged before the Delhi High Court in WP(C) No. 5347/2021 | Vide order dated 25.05.2021, the Hon'ble High Court stayed the effect and operation of the banning order dated 09.02.2011 |
| 19.07.2021 by FCI | Challenged before the High Court of AP In WP No. 15378/2021 | Vide order dated 30.07.2021, the Petitioner was permitted to participate in all other tenders except by FCI |

Respondent No. 2 filed a counter affidavit on 20.09.2021, opining that the appellant was not disqualified from tendering as the banning orders were not "in force" on account of the interim orders and thus had been found eligible. In order to appreciate the aforesaid controversy, it would be relevant to reproduce the relevant clause of the tender which reads as under:

"2. Disqualification on Certain Grounds

Even though the Bidders may meet the above qualification criteria, they are subject to be disqualified if they have

(d) their business banned or suspended by any Central/State Government Department/Public Undertaking or Enterprise of Central/State Government and such ban is in force."

(emphasis supplied)

Thus the stand of the tenderer and respondent No. 2 was that in view of the interim order, the ban was not in force.

In view of the delays in implementation of the contract, respondent No. 2 moved the High Court for vacation of the interim order dated 16.09.2021 directing the status quo and that interim order was vacated vide order dated 28.09.2021.

It is not in issue that the contract stood performed before the judgment delivered by the High Court. However, the High Court, in terms of the impugned judgment dated 01.06.2022/03.06.2022 opined that the factum of the stay order would not efface the banning orders and thus the appellant would have been disqualified. It proceeded on a path of disgorging the profit which would have been earned by the appellant from the award of the tender, to the extent of 10% of the expected returns on the contract. The appeal before us assailed this aspect of the order seeking to get the profit of the appellant.

We may note that a number of judicial pronouncements have been referred to by the High Court for applying the principle of disgorging of the profit. It is not necessary for us to go into those aspects as if in the factual scenario disgorging of the profit was required, we would not have entertained the appeal. The question really is whether there is a requirement of disgorging of profit on account of any mis-declaration by the appellant in respect of the contract in question.

The first plea of the appellant is based on the disqualification of the original petitioner/respondent No. 1 before us, as he was

found to be ineligible bidder. There is some substance in this plea. The said respondent No. 1 has now disappeared from the scene and has not even put in appearance before us. Obviously his intent was to procure the tender by seeking disqualification of the appellant and thus he did not assail his own disqualification. We are of the view that actually the petition could have been dismissed on this short ground itself as this is not a PIL.

We may also note that having brought this to the attention of respondent No.2, the tendering authority, the allegation of the appellant not being qualified, the matter should have ended as respondent NO. 2 found that the appellant was not disqualified.

The matter however does not rest at this as there has been an examination of the clauses of the contract to determine whether the appellant was not eligible in terms of the qualification criteria. The relevant clause 2 (d) has been reproduced hereinabove. The phraseology used in the contract is "and such ban is in force". This phraseology is significant. If that was the intent, merely banning a tender would suffice, then the use of the aforesaid phraseology would be superfluous. The

obvious intent was that if that particular ban, having been imposed, but not in force, it would not disqualify a tender.

In respect of the aforesaid, if we look to the protective orders passed in favour of the appellant, the first one passed by the Delhi High Court had stayed the effect and operation of the banning orders. It was certainly thus not a ban in force. The second one passed by the Andhra Pradesh High Court specifically permitted the appellant to participate in all tenders except of the FCI. The tender in question is not of FCI.

We may also note the submission of the learned counsel for the appellant that the e-tender process was resorted to and it was not possible for the appellant to add or subtract from the responses required to be given and that answer to the relevant clause in the form would have been in the affirmative or negative. Since there was no subsisting ban, naturally the appellant answered it in the negative. In this behalf, he has drawn our attention to Clause 10.1 which reads as under:

"10.1 - The Tenderers shall submit offers which comply strictly with the requirements of the Tender Document as amended from time to time as indicated in Clause 6.0 above. Alternatives or any modifications by the tenderer shall render the Tender invalid."

We are thus of the view that it cannot be said that the appellant had suppressed the banning orders or the interim order, as opined by the High Court. This is so as there was no option in this regard for the appellant. To submit a valid bid, the appellant in the relevant column, could not have disclosed the aspect of two banning orders which had been stayed.

We have already noticed that the interpretation of a tendering authority must prevail unless there is any mala fides alleged or proved [See :Jagdish Mandal vs. State of Orrisa & Ors.]¹ That is not even the case of respondent No. 1 before the High Court. The tendering authority/respondent No. 2 examined the complaint of respondent No. 1 qua the appellant and came to the conclusion that since the banning orders were not in force the appellant was not disqualified.

The aforesaid brings us to the question whether the imposition of penalty of Rs. 12.5 crores based on 10% of the profit expected from the contract value was justified. As stated aforesaid, if there was valid disclosure and if the bid of the

1 (2007) 14 SCC 517

appellant was a qualified one, there could not be any question of disgorging the profits of the appellant. We would not like to go into the issue of what percentage it ought to have been.

The result of the aforesaid is the impugned judgment of the High Court dated 01.06.2022/03.06.2022 is set aside and the writ petition filed before the High Court by respondent No. 1 will stand dismissed.

The appeal is, accordingly, allowed, leaving the parties to bear their own costs.

.....J.
[SANJAY KISHAN KAUL]

.....J.
[SUDHANSHU DHULIA]

.....J.
[AHSANUDDIN AMANULLAH]

NEW DELHI,
NOVEMBER 08, 2023.

ITEM NO.116

COURT NO.2

SECTION XIV-A

S U P R E M E C O U R T O F I N D I A
R E C O R D O F P R O C E E D I N G S

Civil Appeal No(s). 7537/2023

SARR FREIGHTS CORPORATION

Appellant(s)

VERSUS

CJDARCL LOGISTICS LTD. & ORS.

Respondent(s)

([PART-HEARD AND TO BE HEARD BY : HON'BLE SANJAY KISHAN KAUL AND
HON'BLE SUDHANSHU DHULIA, JJ.] [TO BE TAKEN UP BEFORE ITEM NO. 101
I.E. C.A. No. 4718/2023 ETC.])

Date : 08-11-2023 This appeal was called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE SUDHANSHU DHULIA
HON'BLE MR. JUSTICE AHSANUDDIN AMANULLAH

For Appellant(s) Mr. Parag P. Tripathi, Sr. Adv.
Mr. Mahesh Agarwal, Adv.
Mr. Rishi Agrawala, Adv.
Mr. Karan Luthra, Adv.
Mr. Pranjit Bhattacharya, Adv.
Mr. E. C. Agrawala, AOR

For Respondent(s) Mr. G.S. Chaturvedi, Adv.
Mr. Shantanu Chaturvedi, Adv.
Ms. Priyanka Tyagi, Adv.
Mr. Surya Kant, AOR

UPON hearing the counsel the Court made the following
O R D E R

In view of the change in the composition of the
Bench, the matter is discharged from part heard and

taken up by the newly constituted Bench.

The appeal is allowed, leaving the parties to bear their own costs.

[CHARANJEET KAUR]
ASTT. REGISTRAR-cum-PS

[POONAM VAID]
COURT MASTER (NSH)

[Signed order is placed on the file]