

(2000) 11 AP CK 0048
In the Andhra Pradesh High Court
Case No : Writ Petition No. 15149 of 2000

Ahara Technology Group, Hyd.

APPELLANT

Vs

A.P. Meat, Poultry Development Corporation, Hyd. and
another

RESPONDENT

Date of Decision : 18-11-2000

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2000) 6 ALD 785 : (2001) 1 ALT 92

Hon'ble Judges : I. Venkatanarayana, J

Bench : Single Bench

Advocate : Mr. Vedula Srinivas, for the Appellant; Mr. J. Prabhakar and Mr. R. Raghunandan, for the Respondent

Judgement

1. The petitioner, who is a Technical Consultant, has invoked Article 226 of the Constitution of India questioning the order of the 1st respondent in awarding the contract in favour of the 2nd respondent in pursuance of Bid Notice No. 1/Meat/APMDC Ltd/2000, dated 17-4-2000 ignoring the claims of the petitioner. The factual matrix leading to the filing of the writ petition is set out as hereunder : The 1st respondent, which is a Government Undertaking, has constructed various abattoirs at various places in the State. It notified in Economic Times on 19-4-2000 calling for tenders from the eligible parties for rendering consultancy service for various components of its modern abattoir at Hyderabad. The petitioner submitted the tender before 3-5-2000 to the 1st respondent. The petitioner enclosed all the information pertaining to the projects executed by it earlier. The tenders were opened on 3-5-2000 in the office of the 1st respondent and it was found that five tenders were received totally. The writ petitioner quoted 2.7% of the value of the project towards the consultancy fees whereas the 2nd respondent quoted 1.8% of the value of the project towards consultancy fees. The tender of the second respondent is a mere civil consulting company having no experience in meat/food/dairy processing industries. The petitioner has got wide experience and has technical tie-ups with various firms in U.K. and

U.S.A. The writ petitioner brought to the notice of the 1st respondent all the aforementioned facts and also issued legal notice requesting the 1st respondent to award the work to him. The 1st respondent awarded the work to the 2nd respondent. Hence the present writ petition questioning the action of the 1st respondent in awarding the contract to the second respondent.

2. Sri Vedvla Srinivas, the learned Counsel for the petitioner contended that the petitioner is a reputed technical consultant and is more suitable as consultant than the second respondent. It is further contended that there is non-application of mind resulting in arbitrariness. The 2nd respondent has no eligibility for being awarded with the work since the petitioner has all the technical know-how and experience.

3. A detailed counter was filed on behalf of the 1st and 2nd respondents. Sri J. Prabhakar, the learned Counsel for the 1st respondent denied that the tender of the 2nd respondent has been accepted for extraneous considerations in an arbitrary manner and submitted that all the bids were made over to the Roads and Buildings Department for evaluation which submitted its evaluation report. Ultimately the Project Implementation Committee takes a decision based on the assessment of the competence of the firm. The Committee after evaluation found that the petitioner and the 2nd respondent got equal marks and the 2nd respondent has given lower bid price at 1.80% of the work estimated as against 2.70% quoted by the petitioner. Thus the 1st respondent stands to gain to the tune of Rs.5,40,000-00 and therefore the Committee decided to award the consultation work to the 2nd respondent.

4. Sri R. Raghunandan, the learned Counsel appearing for the 2nd respondent sought to support the decision of the 1st respondent in awarding the contract to the second respondent. It is submitted that the 2nd respondent has expertise and has an experience of 17 years in designing of buildings, factories, plants and that it was involved in the design and construction of plant of M/s. Herbochem which is a plant set up for the purpose of meat and liver solvent extraction and manufacture of various life saving drugs. The 2nd respondent was also involved in the design and setting up of various food processing units. The Project Implementation Committee took into consideration the afore-mentioned facts and awarded the contract to the 2nd respondent.

5. Taking into consideration the rival submissions made by the parties, the only question that falls for consideration in this writ petition is. whether there is fair play and transparency in State action in the matter of distributing the largesse. In the present case the 1st respondent on 19-4-2000 called for tenders from eligible parties for rendering consultancy services for various components of its modern abattoir coming up at Hyderabad. Both the writ petitioner and the 2nd respondent have submitted their tenders. The tenders were placed before the Project Implementation Committee of the Roads and Buildings Department. After evaluation, it was found that the petitioner and the respondent got equal marks. Technically both the petitioner and the 2nd respondent were on equal footing.

The second respondent has given a lower bid price at 1.80% of the work estimated as against 2.70% quoted by the petitioner. The 1st respondent stands to gain to the tune of Rs.5.4 lakhs and therefore it was given to the 2nd respondent. Assailing the action of the 1st respondent in awarding the contract to the 2nd respondent, the petitioner invoked Article 226 of the Constitution of India.

6. It has to be examined whether the 1st respondent acted fairly and whether there is transparency in awarding the contract to the second respondent. It is well-settled law where the "State" is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or granting any form of largesse, the State cannot act arbitrarily but its action must be in conformity with the stands or norms which are not arbitrary and transparent. Dealing with the scope of judicial review the Apex Court in *M.P. Oil Extraction and Another Vs. State of M.P. and Others*, , held as follows:

"The executive authority of the State must be held to be within its competence to frame a policy for the administration of the State. Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with any statutory provision, the Court cannot and should not out-step its limit and tinker with the policy decision of the executive functionary of the State. Policy decision is in the domain of the executive authority of the State and the Court should not embark on the uncharted ocean of public policy and should not question the efficacy or otherwise of such policy so long the same does not offend any provision of the Statute or the Constitution of India. The supremacy of each of the three organs of the State i.e., Legislature, executive and judiciary in their respective fields of operation needs to be emphasised. The power of judicial review of the executive and legislative action must be kept within the bounds of constitutional scheme so that there must not be any occasion to entertain misgivings about the role of judiciary in out-stepping its limit by unwarranted judicial activism. The democratic set up to which the policy is so deeply committed cannot function properly unless each of the three organs appreciate the need for mutual respect and supremacy in their respective fields."

Thus the Apex Court has drawn a line and indicated the extent to which the Court can interfere in the matter of distribution of largesse. In the matter of grant of largesse the State certainly has discretion but it should be open, fair and honest and completely above board. Considering the question of doctrine of fairness and reasonableness in the contracts to which the State is a party the Supreme Court has held in *Assistant Excise Commissioner and Others Vs. Issac Peter and Others*, , as follows:-

"Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensue the rule of law and to prevent

failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so even if the contract is governed by statutory provisions, i.e., where it is a statutory contract or rather more so. In case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contract (which may be statutory in some cases) and the laws relating to contracts. When, as in the present case, the contracts are entered into pursuant to public auction, floating of tenders or by negotiation, there is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts. The State does not guarantee profit to the licensees in such contracts. There is no warranty against incurring losses. It is a business for the licensees. Whether they make profit or incur loss is no concern of the State. In law, it is entitled to its money under the contract. It is not as if the licensees are going to pay more to the State in case they make substantial profits. However, no opinion need be expressed on the question as to what would be the position in the case of contracts entered into otherwise than by public auction, floating of tenders or negotiation."

Hence the scope of judicial review in the matter of distribution of largesse is limited and there is a spectrum of discretion available to the State as long as the State is not burdened with financial loss. In a case where there is unbridled exercise of power and conferring favouritism the Supreme Court has come down heavily on the conduct of the State, *The Apex Court in Common Cause, A Registered Society v. Union of India* (1996) 6 SCC 530, which is a public interest writ petition, has held while dealing with the case of allotment of retail outlet of petroleum products under discretionary quota that it was arbitrary and discriminatory and the public servant should be held personally responsible. The Supreme Court has held as follows:

"It is high time that the public servants should be held personally responsible for their mala fide acts in the discharge of their functions as public servants. The Supreme Court in *Lucknow Development Authority* case approved "Misfeasance in public offices" as a part of the law of Tort. Public servants may be liable in damages for malicious, deliberate or injurious wrongdoing. With the change in socio-economic outlooks, the public servants are being entrusted with more and more the discretionary powers even in the field of distribution of Government wealth in various forms. If a public servant abuses his office either by an act of omission or commission, and the consequence of that is injury to an individual or loss of public property, an action may be maintained against such public servant.

No public servant can say "You may set aside an order on the ground of mala fide but you cannot hold me personally liable". No public servant can arrogate to himself the power to act in a manner which is arbitrary."

As indicated above, the Courts would certainly interfere where there is a mala fide and arbitrary and unreasonable exercise of power keeping the larger public interest in mind. The Court while exercising the power of judicial review under Article 226 of the Constitution of India has to see whether the State has treated all the tenderers fairly and the conduct of the State was free from bias. The State while awarding the contracts is free to choose its own method to arrive at a decision. In a recent decision report in AIR India v. Cochin International Airport Ltd 2000 (1) Scale 346, the Apex. Court has held as follows:

"The award of a contract, whether it is by a private parry or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene."

Hence it has to be held that a citizen has no fundamental right to insist on "State" or its authorities to do business with him. The State is entitled to enter into business with any person or class of persons to the exclusion of others as long as State does not prohibit others to carry on their business. The Supreme Court in Krishnan Kakkanth Vs. Government of Kerala and ohters, , the Apex Court has held:

"Unless the Government policy is demonstrably arbitrary, capricious, irrational, discriminatory or violative of Constitutional or statutory provisions, it cannot be struck down by the Court."

The Apex Court has also held that in the matter of distribution of State largesse, State can depart from the set norm in favour of a particular group of persons provided the same is not irrational, unreasonable, discriminatory or arbitrary. The State while granting largesse must confine itself to rational, relevant and non-discriminatory standards or norms. The Supreme Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, , has held as follows:

"We agree "with the observations of Mathew, J in *V. Punnen Thomas Vs. State of Kerala*, that: The Government is not and should not be as free as an individual in selecting the recipients for its largesse. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal". The same point was made by this Court in *Erusian Equipment and Chemicals Ltd. v. State of West Bengal* (1975) 2 SCR 647) where the question was whether black-listing of a person without giving him an opportunity to be heard was bad? Ray, CJ., speaking on behalf of himself and his colleagues on the Bench pointed out that black-listing of a person not only affects his reputation which is, in Poundian terms, an interest both of personality and substance, but also denies him equality in the matter of entering into contract with the Government and it cannot, therefore, be supported without fair hearing. It was argued for the Government that no person has a right to enter into contractual relationship with the Government and the Government, like any other private individual, has the absolute right to enter into contract with any one it pleases. But the Court, speaking through the learned Chief Justice, responded that the Government is not like a private individual who can pick and choose the person with whom it will deal, but the Government is still a Government when it enters into contract or when it is administering largesse and it cannot, without adequate reason, exclude any person from dealing with it or take away largesse arbitrarily. The learned Chief Justice said that when the Government is trading with the public, "the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions. The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure". This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licenses or granting other forms of largesse, the Government cannot act arbitrarily at its sweet Will and like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas,

licences etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory".

In another important judgment reported in *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, , the Supreme Court had an occasion to consider the scope of judicial review and held that the Court is not expected as Court of appeal while examining an administrative decision. The Supreme Court observed as follows:

"By way of judicial review the Court is not expected to act as a Court of appeal while examining an administrative decision and to record a finding whether such decision could have been taken otherwise in the facts and circumstances of the case. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the "decision making process". By way of judicial review the Court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and public, then Court cannot act an appellate authority by substituting its opinion in respect of selection made for entering into such contract. But at the same time the Courts can certainly examine whether "decision making process" was reasonable, rational, not arbitrary and violative of Article 14. Once the procedure adopted by an authority for purpose of entering into a contract is held to be against the mandate of Article 14, the Court cannot ignore such action saying that the authorities concerned must have some latitude or liberty in contractual matters and any interference by Court amounts to encroachment on the exclusive right of the executive to take such decision."

The Courts would be reluctant to interfere with the administrative decision in awarding licences and contracts unless the party aggrieved satisfies the Court that the ultimate decision is vitiated. In *Delhi Science Forum and others Vs. Union of India and another*, , the Supreme Court held as follows:

"The question of awarding licences and contracts does not depend merely on the competitive rates offered, several factors have to be taken into consideration by an expert body which is more familiar with the intricacies of that particular trade. While granting licences a statutory authority or the body so constituted should have latitude to select the best offers on terms and conditions to be prescribed taking into account the economic and social interest of the nation. Unless any party aggrieved satisfies the Court that the ultimate decision in respect of the

selection has been vitiated, normally Courts should be reluctant to interfere with the same."

7. The afore mentioned legal principle has been affirmed by the Supreme Court in a decision reported in TVL Sundaram Granites Vs. Imperial Granities Ltd and Others, . The Court has categorically laid down that the grant of largesse is at the discretion of the State and the action should be open, fair and honest and completely above board.

8. In circumspection of the entire case law laid down by the Apex Court, the legal principle that would emerge is that the "State" has some extent of spectrum of discretion and as long as such power of discretion is not manifestly arbitrary, capricious, irrational, discriminatory or violative of the constitutional or statutory provisions, the Court will not ordinarily exercise its power of judicial review under the Constitution.

9. In the present writ petition the 1st respondent on receipt of the tenders have taken decision to evaluate the bids through the Projects Implementation Committee. Accordingly the bids were evaluated and assessed by the Committee. The Committee, after evaluation, found that the petitioner and 2nd respondent secured equal marks and both the writ petitioner and the 2nd respondent were on equal footing. However, the 2nd respondent has given a lower bid price at 1.80% of the work estimated as against 2.70% quoted by the petitioner. On this basis the 1st respondent stands to gain to the tune of Rs.5.40 lakhs. Hence it was decided by the Project implementation Committee to award the Consultancy work to the 2nd respondent. I have gone through the entire record relating to the contract and did not find any extraneous considerations that weighed with the 1st respondent as contended by the petitioner.

10. Taking into consideration the entire facts and circumstances of the case I find that there is nothing irrational, capricious or arbitrariness in awarding the consultancy work to the 2nd respondent, I do not find any ground for invoking Article 226 of the Constitution of India for exercising the power of judicial review in this case. The writ petition is devoid of merits and is accordingly dismissed. There will be no order as to costs.