

(2006) 12 JH CK 0038
In the Jharkhand High Court

Ajay Buildcon Pvt. Ltd.

APPELLANT

Vs

The State of Jharkhand and Others

RESPONDENT

Date of Decision : 08-12-2006

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2007) 3 JCR 98

Hon'ble Judges : Permod Kohli, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Permod Kohli, J.—The dispute in this writ petition relates to allotment of work of the construction of two way bridge between chain No. 486/489 of Punsai Main Canal. Petitioner has challenged allotment of contract to the Respondent No. 6 vide Memo. No. 795 dated 11th March, 2006 and is also aggrieved of its non-allotment to him.

2. It is relevant to notice the factual background as emerge from the pleadings of the parties. Tenders were invited vide N.I.T. No. 1 of 2005-2006 for the construction of two way bridge between Chain No. 486/489. Last date for submission of Tenders was 30th August, 2005. Petitioner and Respondent No. 6 along with others also participated in the Tender Process. On the basis of the qualifications prescribed, three Tenders were short-listed including that of petitioner and Respondent No. 6. Incidentally, rates quoted by all the three tenderers were the same and all the three Tenderers were from the district of Deoghar. Petitioner has relied upon a Government Circular i.e. a Departmental Letter No. 375 dated 18th July, 2001 (Annexure-3), which, inter alia, provides that if the rates quoted by all the Tenderers are same, then the senior most among the Tenderers is to be allotted the work. Petitioner admittedly is the senior most, contractor amongst the three local Contractors. The Committee comprising of the Divisional Accountant, Executive Engineer, Superintending Engineer and Technical Secretary to the Chief Engineer, prepared a comparative

statement and recommended the allotment of work to the petitioner on the basis of his seniority. It is alleged that the Chief Engineer, Deoghar took 70 days to decide the allotment. It is further alleged that he was under transfer and hurriedly allotted the work to the Respondent No. 6 vide letter No. 2841 dated 21st November, 2005. Petitioner made representation to the Respondent No. 2 vide letter dated 23rd November, 2005. Respondent No. 3, i.e. the Engineer-in-Chief vide his letter No. 160 dated 25th November, 2005 asked the Respondent No. 4 to furnish the details of the work and also asked Respondent No. 4 to stay the signing of the Contract and issue of work order till the representation of the petitioner is decided. Respondent No. 4 submitted his reply vide letter No. 2926 dated 3rd December, 2005 stating, therein, that the work was allotted on comparative statement, which is said to be incorrect. Matter remained pending and petitioner claims to have made a representation to the Hon'ble Minister on 06th of December, 2005. It appears that the Respondent No. 3 vide his letter dated 22nd February, 2006 directed the Respondent No. 4 to examine various claims and decide the Tender in accordance with law. Respondent No. 4 vide his letter No. 571 dated 25th February, 2006, expressed his inability to decide the issue on the ground that earlier decision was taken by his predecessor and he being the Chief Engineer enjoying the same post, it would not be proper to review the matter. Respondent No. 3, however, issued another letter dated 9th March, 2006 asking Respondent No. 4 to comply the contents of letter No. 160 dated 25th November, 2006. Consequently, Respondent No. 4 allotted the work to Respondent No. 6 vide his memo No. 785 dated 11th March, 2006 upholding the earlier allotment made vide letter dated 25th November, 2006. Thereafter Respondent No. 4 directed the Superintending Engineer, to complete the process of allotment on the basis of earlier letter dated 21st November, 2005. On the basis of the aforesaid letter, work has been allotted to Respondent No. 6 vide allotment letter dated 13th March, 2006. It is alleged that not only the work was allotted on the same day but even the work order was issued and agreement executed on the same date. Petitioner has, accordingly, challenged the allotment of work to Respondent No. 6. This Court vide Interlocutory order dated 20th June, 2006 directed to maintain status quo with regard to the execution of work.

3. In the counter affidavit filed, the plea raised is that it is not enough for the accepting authority" to accept the offer of the senior most tenderer but the previous performance of the individual and firm tendering should be taken into consideration in addition to all other relevant factors. While admitting that the petitioner was a senior most contractor, it is stated that past performance of the petitioner between Channel 0 to 460 of Ajoy Main Canal was not up to the mark and the Chief Engineer was required to select the best tenderer. The work was allotted to Respondent No. 6, rejecting the Tender of the petitioner. While denying the allegation of delay in deciding the Tender, an attempt is made to explain the delay, which was attributed to holidays. It is further stated that different reports were received and on consideration, the Chief Engineer allotted the work to the Respondent No. 6.

4. Both the parties have filed the additional pleadings. While Respondent No. 5 has filed a supplementary counter affidavit, petitioner filed rejoinder to the same. Respondent No. 5 has further filed rejoinder to the rejoinder of the petitioner. In the supplementary affidavit dated 09th August, 2006 filed by the Chief Engineer, it is further brought on record that enquiry was conducted in respect to the work of Ajoy Main Canal, allotted to the petitioner by the Engineer-in-Chief, Water Resources Department and the Enquiry revealed that the Single Lane Road between Ch. No. 2 to 460 of Ajoy Main Canal is damaged and in some places, there is no railing and the pitching work is not in accordance with specification. It is further stated that somewhere approach road is not maintained and directions were given to rectify the defects. It is, accordingly, stated that since earlier performance of the petitioner was not up to the mark and the defects in the earlier report were not rectified, keeping in view the past performance, which was not satisfactory, work was not allotted to the petitioner. Copy of the Report is also placed on record and in Para 18 and 19 of the Report, defects in the earlier work said to be allotted to the petitioner have been noticed. This Report is dated 4th June, 2005 and even there is another review Report prepared on the basis of the Inspection between period 19th November, 2005 to 21st November, 2005. In Para IV, of this report non removal of the defects has been noticed. In reply to this additional affidavit, petitioner has stated that no construction of roadwork was carried out by it. It only executed earthwork and there is no complaint against that. It is further stated that petitioner was never informed to remove any defects. Further reply was given to this affidavit, wherein details of the work executed by the petitioner between Ch. No. 2 to 460 of Ajoy Main Canal vide Agreement dated 12th November, 2003, are given. It is further stated that all payments were made to the petitioner and Security deposits also released. However, payments came under suspicion by sight inspection Report dated 12th April, 2005 of the Executive Engineer Planning and Monetary Division No. 2. Defects in the work were rectified, which resulted in extra expenditure of Rs. 23,87,270/- on earthwork in the Design Sections etc. Various correspondences have been mentioned to point out the performance of the petitioner in earlier work.

I had also asked for the record to show the manner of taking decision, accordingly, the record has been produced by the learned Advocate General. I have gone through the notings.

5. At Page 9 of the note sheet the Chief Engineer has recorded that inspection was conducted of work from Ch. No. 0 to 460 and the work was not found satisfactory. Hence, allotment of work to the petitioner will not be in the interest of the work. Accordingly, decision was taken to allot work to M/s. Baidyanath Constructions, Deoghar. At Page 17 of the note sheet, it is recorded that the Executive Engineer in his Report dated 22nd. December, 2005 has clarified the position. It is found that the work has not been executed as per specification and the Security deposit was not to be released. At Page 20, it is further recorded that on consideration, no valid ground is made out in respect to the earlier

decision and the earlier decision be maintained. Again from the record, it appears that certain enquiry was initiated against the petitioner in respect to the unsatisfactory execution of the earlier work and accordingly, the decision has been taken not to allot the work to the petitioner.

6. The only question arises whether this Court in exercise of jurisdiction under Article 226 of the Constitution of India is required to interfere in the allotment of work to Respondent No. 6 and non allotment of the contract to the petitioner though under norms, he was entitled to be allotted the work being the senior most contractor and rates being equal to Respondent No. 6. It is not in dispute that a Committee constituted made recommendation for allotment of work to the petitioner but the Chief Engineer on examination of the issue has decided to allot the work to the Respondent No. 6 in stead of petitioner on the basis of the facts mentioned above.

7. The Apex Court while examining the scope of judicial review in the matters of award of contracts, observed as follows in the case of *Tata Cellular v. Union of India*, reported in (3994) 6 SCC 651:

70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the gurdian of the finances of the State: It is expected to protect the financia interest of the State. The right to refuse the lowest or any other tender in always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

xxx xxx xxx 74. judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself.

xxx xxx xxx 77. The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers?
 2. Committed an error of law,
 3. committed a breach of the rules of natural justice,
 4. reached a decision which no reasonable tribunal would have reached or,
 5. abused its powers.
8. In view of the dictum of the aforesaid judgment, it is now a settled law that in

exercise of power of judicial review, court cannot sit as a Court of Appeal over the decisions or the administrative action of the executive so long the decision is not actuated by mala fides, bias and it does not contravene any law. Even if another view is possible, the writ Court should not exercise its power of judicial review if it finds that the view expressed by the decision-making body is one of the possible views. In exercise of power of judicial review, Court can only examine the manner of decision making and not the decision. Nothing has been brought on record, nor the records reveal that there is any arbitrariness in the decision making process. Who is the best person to execute the contract has to be seen by the competent authority. The Chief Engineer in his wisdom decided not to allot the work to the petitioner notwithstanding his seniority at a contractor on account of some aberrations in execution of his earlier contract and decided to allot the work to Respondent No. 6. The view expressed by Respondent No. 4 cannot be brushed aside. On the totality of the circumstances, I am not inclined to exercise power of judicial review in this case. This writ petition is, accordingly, dismissed. Original record is returned to the learned Counsel for the Respondents.