(2006) 05 OHC CK 0044

In the Orissa High Court

Case No : Writ Petition (Civil) No. 153 of 2006

Akbar Mohammed APPELLANT

Vs

State of Orissa and Others RESPONDENT

Date of Decision : 17-05-2006

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 2006 Ori 156 : (2006) 2 OLR 24

Hon'ble Judges : S.B. Roy, C.J;M.M. Das, J

Bench : Division Bench

Advocate : Millan Kanungo, D. Pradhan, Y. Mohanty, S.K. Mishra, B.B. Panda and B.P. Pattnaik, for the Appellant; A.G.A. for O.Ps. 1 to 4, R.K. Sahoo, for 0.P. 6 and S.K. Das, M.K. Das, A. Mohanty, B.C. Pradhan and K. Pattnaik for O.P. No. 7, for the Respondent

Final Decision : Allowed

Judgement

M.M. Das, J.—Notice Inviting Tender (in short ''NIT'') dated 9.11.2004 issued by opp. party No. 4, Executive Engineer, Right Canal Division No.II, Junagarh as per Annexure-1 was published in the newspaper. The writ petitioner offered his tender in response to the said NIT with respect to the works mentioned in SL. Nos. 4 and 5 of the said NIT. For the work in SL. No. 4, the petitioner quoted Rs. 1,02,72,296/-, which was 27% less than the scheduled rate and for the work in SL. No. 5, the petitioner quoted Rs. 1,34,72,608/-, which was 23,97% less than the scheduled rate prescribed for the said work.

2. The petitioner admittedly was the lowest tenderer. Under the letter dated 16.12.2004 (Annexure-2), the petitioner was intimated by the Executive Engineer as follows:

Your quoted rates stands at First lowest rate being (-) 23.97% less over the amount put to tender.

In view of this, you are therefore requested to give justification of rates with analysis for execution of the work within 5 days after issue of this letter.

This may be treated as URGENT.

Being the lowest tenderer, the petitioner''s offer along with other documents submitted by the petitioner was forwarded by the Executive Engineer, R.C. Division No.II, Junagarh to the Chief Engineer, UIIP, Khatiguda under the letter dated 30.3.2004 (Annexure-3) to the writ petition. By letter 24.2.2005 under Annexure-4 to the writ petition, the Executive Engineer, R.C.D. No.II, Junagarh asked the petitioner to produce up-to-date valid sales tax clearance certificate as desired by the Chief Engineer, UIIP-opp. party No. 2 for necessary action. The petitioner''s case is that pursuant to the said letter under Annexure-4, he applied again for a sales tax clearance certificate in Form-X and obtained the same on 29.3.2005 which was submitted as requested by the Chief Engineer. The petitioner claims to have also submitted a certificate granted by the Sales Tax Officer, Kalahandi Office, Bhawanipatna, a copy of which has been annexed as Annexure-6, along with the sales tax clearance certificate. The said certificate under Annexure-6 is to the following effect:

TO WHOM SO EVER IT MAY CONCERN

Certified that the Sales Tax Clearance Certificate issued vide memo No. 9421 dt. 17.12.03. favour of the Akbar Mohammed Proprietor of M/s. Akbar Construction of Bhawanipatna bearing O.S.T.R.C. No. 1865 is valid for the financial year 2003-2004. Further it is clarified that there was no dues outstanding against the said dealer-contractor from 17.12.2003 to 17.12.2004.

Sd/- Sales Tax Officer, Kalahandi Office, Bhawanipatna

3. The letter dated 31.12.2005 under Annexure-8 was issued by opp.party No. 3, O.S.D. cum-Deputy Secretary to Government, Department of Water Resources to the Chief Engineer, Upper Indravati Irrigation Project-opp. party No. 2 indicating therein that the bid of the petitioner cannot be accepted without sales tax clearance certificate and negotiation may be held with the next lowest bidder to match the price quoted by the petitioner. The petitioner being aggrieved bv the said letter under Annexure-8 has approached this Court under Article 226 of the Constitution of India with a prayer to quash the said letter under Annexure-8 and further to direct the opp. parties 2 and 4 to accept the petitioner''s tender in respect of the works mentioned in SI, Nos. 4 and 5 of the NIT.

4. Separate counter affidavits have been filed by the State and its functionaries, i.e. opp. parties 1 to 4 and the private opp.party No. 7, namely, Lachhman Sharma.

5. Mr. Kanungo, learned Counsel for the petitioner produced before us the decision of the Government making amendments to the O.P.W.D. Code which was issued by the F.A.-cum-Joint Secretary to the Government, to all Engineers-in-Chief and other officials of the Government. Relying upon the same, Mr. Kanungo submitted that after the amendment of the O.P.W.D. Code, the tenders relating

to the work above Rs. 1.00 crore and up to Rs. 3.00 crores shall be finalized by the Chief Engineer. Basing on the same, he submitted that there was no occasion for the Government to issue the letter under Annexure-8 declining to accept the offer of the petitioner. He further submitted that the petitioner''s offer could have been rejected as non-responsive at the initial stage of scrutiny for not having filed up-to-date sales tax clearance certificate, but since, as would be evident from the Government of Orissa, Finance Department''s Memo dated 5.9.1995 annexed to the counter affidavit filed by the State as Annexure/B/4, sales tax clearance certificates were required to be submitted along with the tender so as to prevent such persons who have defaulted in making payment of their sales tax dues in receiving the financial benefit from the Government in shape of contracts, licence etc. He, therefore, submitted that the petitioner having submitted a sales tax clearance certificate, his tender was not rejected but being the lowest, he was asked to produce up-to-date sales tax clearance certificate by the Executive Engineer in order to show that he was not a defaulter in paying sales tax dues and on production of the same, his case was recommended by the Executive Engineer to the Chief Engineer who under the O.P.W.D. Code is the officer authorized to accept the offer in relation to the works valued up to Rs. 3.00 crores. He further submitted that the Chief Engineer being authorized under the Code to finalize the acceptance of the tender, there was no occasion for the O.S.D.-cum-Deputy Secretary to Government to deal with the tender process and issue the letter under Annexure-9 directing that the bids of the petitioner without sales tax clearance certificate cannot be accepted. He further submitted that the said letter under Annexure-8 appears to have solely biased on a representation made by one Prabir Kumar Pradhan describing himself to be an Advocate of this Court, alleging that the sales tax clearance certificate submitted by the petitioner is invalid, which according to Mr. Kanungo goes to show that the. action of issuance of the letter under Annexure-8 is not only without authority but also arbitrary and improper as well as consequence of bias and non-application of mind. Mr. Kanungo further urged that the petitioner having not been given any opportunity to rebut/controvert the allegations made against the petitioner in the representation of said Prabir Kumar Pradhan, who admittedly is a rank outsider to the tender process, the O.S.D.-cum-Deputy Secretary to the Government ousted with impropriety in solely relying upon the said representation for issuing the letter under Annexure-8.

6. In the counter affidavit filed on behalf of the opp. parties 1 to 4, the only ground agitated in support of the letter under Annexure-8 is that the bid of the petitioner was non-responsive and there is no illegality committed in negotiating with the second lowest tenderers with the respect to the works mentioned in SL. Nos. 4 and 5 of the NIT.

7. Learned counsel appearing for opp. party No. 6 as well as the learned Counsel appearing for opp. party 7 submitted that Clause-12 of the detailed Tender Call Notice which has been annexed as Annexure-A/4 to the counter affidavit of the State, stipulates that each tenderer should furnish valid ITCC/STCC along with

the tender, failing which the tender is liable for rejection. Learned counsel, therefore, submitted that the sales tax clearance certificate submitted by the petitioner being not valid, his offer was liable to be rejected at the out-set and therefore, no illegality has been committed by the State in issuing the letter under Annexure-8. Learned counsel relied upon the decisions in the case of Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, and in the case of M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, and submitted that the Supreme Court in the case of Raunaq International (supra) has clearly held that any judicial review at the instance of the party which does not fulfil the requisite criteria would be misplaced. Learned counsel further submitted that in the case of M/s. Monarch Infrastructure (P) Ltd. (supra) the Supreme Court has laid down the following guidelines:

xxx xxx xxx (i) The Government is free to enter into any contract with citizens but the Court may interfere where it acts arbitrarily or contrary to public interest;

(ii) The Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate;

(iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons.

xxx xxx xxx

Learned counsel for opp. parties 6 and 7, therefore, submitted that applying the above principles of law, no fault can be found with the State of Orissa in issuing the letter under Annexure-8 to the writ petition and in declining to accept the tender of the petitioner.

8. Mr. Kanungo, learned Counsel for the petitioner, on the contrary, placing strong reliance on the decision in the case of M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, submitted that even conceding for the sake of argument but not admitting that the tender submitted by the petitioner did not adhere to the condition of the tender paper requiring the tenderers tp submit income tax clearance certificate and sales tax clearance certificate, but applying the ratio of the aforementioned decision in the case of M/s. Poddar Steel Corporation (supra), it would be clear that the said condition for submission of sales tax clearance certificate is not one which can be categorized as an essential condition of eligibility but is merely ancillary to the main object to be achieved by the other conditions. He further submitted that had the petitioner''s tender been unacceptable, it could have been treated as non-responsive at the threshold, but in the facts of the present case, the meeting of the Project Level Committee held on 24.3.2005 while verifying the documents of the petitioner who was the lowest bidder for the above noted two works it was found that the validity of the sales tax clearance certificate furnished by the petitioner has expired on the date of opening of the tender and, hence, the said

committee wanted the tenderer (petitioner) to produce valid sales tax clearance certificate within 7 days for placement before the said committee and kept the cases pending for the next meeting vide Annexure-D/4. On the same day, pursuant to the said resolution, the Executive Engineer in the letter dated 24.3.2005 under Annexure-4 required the petitioner to produce up-to-date sales tax clearance certificate as desired by the Chief Engineer UIIP to take further necessary action. The petitioner, thereafter, submitted the up-to-date sales tax clearance certificate along with a certificate of the Sales Tax Officer certifying that there were no dues outstanding against the petitioner from 17.12.2003 to 17.12.2004. The contents of the said certificate have been extracted in paragraph-2 above. Mr. Kanungo further submitted that since as per the O.P.W.D. Code a work within the range of Rs. 1.00 crore to Rs. 3.00 crores is to be finalized by the Chief Engineer, there was no occasion for the Government to take a decision in the letter dated 31.12.2005 under Annexure-8 directing not to accept the tender of the petitioner though he was the lowest and to proceed with negotiation with the second lowest bidders to match the price of the petitioner. In the case of Raunaq International Ltd. (supra), the Supreme Court was considering a case where a tender call for design engineering manufacturer, supply, erection and Commissioning of large diameter pipes and steel tanks with all accessories and auxiliaries as prescribed in the bid documents for its Thermal Power Station to be installed by the Electricity Board, was floated. The qualifying requirements of bidders were specified in the tender but the board was given the power to relax the qualifying requirements looking to the expertise of a tenderer and his past experience although it did not exactly tally with the prescribed criteria. In such circumstances, the Electricity Board decided to grant the contract to such a person who according to the Board was eligible to execute the work. The said award was challenged by another tenderer who himself did not fulfil the requisite criteria fixed for the tenderers and whose offer was much higher. In that context, the Supreme Court held that any judicial relief at the instance of a party which does not fulfil the requisite criteria would be misplaced. We are, therefore, of the view that the said was arrived at, by the Supreme Court, on a set of facts, which is completely different from the present case. In the instant case, the concerned authority finding the petitioner''s tender to be the lowest afforded him with an opportunity to produce a sales tax clearance certificate showing that the petitioner had no outstanding dues to be paid towards sales tax. We also find that the works in question being in the range of Rs. 1.00 crore to Rs. 3.00 crores, as per the O.P.W.D. Code it was for the Chief Engineer to finalize the matter and there was no occasion for the State Government to issue a letter under Annexure-8 holding that he sales tax clearance certificate produced by the petitioner cannot be accepted and directing negotiation with the next lowest tenderers. In the case of M/s. Poddar Steel Corporation (supra), the Supreme Court has clearly laid down that the requirements in a tender notice can be classified into two categories, namely, those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. The Supreme Court has further held that in the first case, the authority issuing the tender may be required to enforce them rigidly. But in the other cases, it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases.

9. The Supreme Court in the case of M/s. G. J. Fernandez Vs. State of Karnataka and others, laid down that it is not that the authority inviting tenders cannot deviate or relax the prescribed standard in any situation. But any deviation, if made, should not result in arbitrariness or discrimination where it results in arbitrariness or discrimination, the law as laid down by the Supreme Court in the case of Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, comes in for application.

10. In the case of Raunaq International Ltd. (supra), the Supreme Court has cautioned that intervention by the Court in contractual matters may lead to considerable delay in execution of the project and consequent escalation of cost and, therefore, unless there is a substantial amount of public interest or the transaction is entered into mala fide, the Court should not intervene under Article 226 of the Constitution in disputes between two rival tenderers.

11. Applying the above principles of law to the facts of the present case, we find that a sales tax clearance certificate is required to be produced by a tenderer in order to see that he is not a defaulter in paying the dues of the State as, in the event, he is a defaulter, granting the works in his favour will amount to a defaulter receiving financial benefit from the Government. We, therefore, find that the condition of the tender with regard to filing of a sales tax clearance certificate along with the tender cannot be construed to be an essential condition of eligibility but is merely an ancillary or subsidiary condition for the purpose of achieving the main object. It being the case of none of the parties that any other tender offered pursuant to the NIT was rejected on the ground of non filing of up to date sales tax clearance certificate, we find that no prejudice could have been caused if the tender of the petitioner would have been considered for allotment of the works in question.

12. We are well aware that in a dispute with regard to a contractual matter and selection of a tenderer by the State Government, the Court should restrain themselves from entering into the merits of the respective cases and from assessing them for the purpose of selection, like an appellate authority but should only confine the matter to illegality or arbitrariness or otherwise of the process of selection.

13. It is stated at the Bar that negotiation was held with the second lowest tenderers who have matched the offer of the petitioner. But, as we find that the award of the works in question under the O.P.W.D. Code were required to be finalized by the Chief Engineer, the letter impugned in this writ petition under Annexure-8 issued by the State Government cannot be sustained.

14. We are, therefore, of the view that for the larger public interest, the

appropriate authority of the Government should negotiate with both the petitioner as well as the opp. parties 6 and 7 and take a final decision In the matter with regard to award of the works in question, keeping the State''s paramount interest in view.

15. In the result, the impugned letter dated 31.12.2005 under Annexure-8 is quashed. The opposite party No. 2 is directed to commence negotiation with the petitioner as well as opposite parties 6 and 7 and make selection from out of them for awarding the works in question keeping the State''s interest in view. This exercise shall be completed within a period of six weeks from the date of communication of this order,

16. The writ petition is allowed but in the circumstances without any costs.

S.B. Roy, C.J.

17. I agree.