(2005) 11 DEL CK 0139

In the Delhi High Court

Case No : WP (C) No. 2834 of 2005

Aman Services APPELLANT

Vs

Commissioner of Police and Others RESPONDENT

Date of Decision : 07-11-2005

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2005) 2 CTLJ 349 : (2005) 125 DLT 177

Hon'ble Judges : Markandeya Katju, C.J;Madan B. Lokur, J

Bench : Division Bench

Advocate : R.M. Bagai and Shweta Singh, for the Appellant; Hima Kohli, for Respondents 1-2, K.S. Sidhu and Maldeep Sidhu, for respondent 3, for the Respondent

Final Decision : Dismissed

Judgement

Markandeya Katju, C.J.—This writ petition has been filed praying for a mandamus directing the respondent to accept the tender of the petitioner submitted on 2.2.2004 for supply of 100 vehicles (70 Ambassador cars and 30 Maruti Gypsies) on hire basis and award the contract to the petitioner.

2. We have heard learned counsel for the parties and perused the record.

3. It appears that the respondent Commissioner of Police, Delhi invited tenders in January,2004 from transporters/fleet owners for supply of about 100 petrol driven vehicles (70 Ambassador Cars and 30 Maruti Gypsies) for 24 hours operation for VIP security duty for a period of one year. The terms and conditions of the tender are contained in Annexure P-1 to the writ petition.

4. The tender was to be in two parts " the technical bid and the price bid. The technical bid consisted of earnest money deposit, bank guarantee, income tax clearance and registration certificate under the Delhi Works Contract Act. The price bid contained only rates as per condition No. 5 of the tender. Both these bids were to be put in separate envelopes and then put in a single envelope and

submitted to the DCP Security in the tender box kept outside the office of the DCP Security, Vinay Marg, New Delhi.

5. It was further provided that the rates should be quoted for (a) 24 hours up to 100 kilometres with all expenses, (b) Extra charges for per kilometer beyond 100 kilometres and (c) Extra charges for night halts outside Delhi.

6. In para 5 of the petition it is alleged that the petitioner as well as three other parties, Delhi Tours & Travels, Kuldip Tourist Taxi Service and Jay Pee & Company participated in the tender. Technical bids were opened on 4.2.2004 and two of the bidders did not meet the specifications mentioned in the tender conditions. Thus, only the petitioner with M/s Jay Pee & Company were left to be considered.

7. It is alleged by the petitioner that M/s Jay Pee & Company did not fulfill the conditions of the tender since as per Clause 59 of the terms and conditions a bank guarantee of Rs.35 Lakhs was required to be submitted which was not submitted by M/s Jay Pee & Company, while the petitioner submitted the same.

8. It is alleged that the petitioner''s rates were lower than those of the other tenderer, namely, M/s Jay Pee & Company in respect of three items, and the rates of M/s Jay Pee & Company were the lowest in respect of the other three items. The details are given in para 5 of the writ petition.

9. In paras 6 and 7 it is alleged that M/s Jay Pee & Company had defaulted on earlier occasions. Hence, it is alleged that the petitioner is the only qualified bidder and as such its tender ought to have been accepted.

10. It is alleged that as per Clause 48 of the terms and conditions of tender the rates have to be approved and there can be no negotiations. However, it is alleged that the respondent No. 1 has been negotiating with M/s Jay Pee & Company, who is a disqualified bidder.

11. It is alleged in para 11 of the petition that the petitioner is suffering grave and irreparable loss and injury as a huge amount of Rs. 55 Lakh is lying blocked since last one year with the respondent since the petitioner had in accordance with Clause 59 of the terms and conditions deposited a bank draft for Rs. 20 Lakh as earnest money deposit with a bank guarantee for Rs.35 Lakh. It is alleged that the petitioner is the only qualified tenderer who is legally entitled to the award of the contract and the respondents'' not awarding the same to the petitioner is illegal, arbitrary and malafide.

12. A counter affidavit has been filed by respondent No. 2 and we have perused the same. A preliminary objection has been taken therein that the writ petition is premature as the respondent is yet to award the contract in question and till the contract is awarded no cause of action arises in favor of the petitioner.

13. It is alleged in para 3 of the counter affidavit that one of the tenderers, namely, Shri Om Prakash Julka, owner of M/s Delhi Tours & Travels, who was disqualified in the technical bid had filed a writ petition being WP(C) No.

569-570/2004 on 13.1.2004. This Court directed that no contract shall be given till further orders vide order dated 23.2.2004. However, that writ petition was dismissed as not pressed vide order dated 15.12.2004.

14. Thereafter, the respondent processed the tenders for awarding the contract and as per the evaluation done by the committee comprising of six members, the rates quoted by M/s Jay Pee & Company and the petitioner in their bids were as under:-

S. Rates Ambassador Maruti M/s Jay M/s. Aman M/s Jay Pee M/s. Aman No. up to Car Gypsy Pee & Co. Services & Co. Services

1. For 24 hours Rs. 441.00 Rs. 689.00 Rs. 641.00 Rs. 689.00 up to 100 Kms 2. Extra Charges per Kms. Beyond 100 Km Rs. 5.71 Rs. 6.89 Rs. 8.70 Rs. 6.89 3. Extra Charges for night halts outside Delhi Rs. 150.00 Rs. 70.00 Rs. 150.00 Rs. 70.00 per night per night per night per night

15. It is alleged in para 5 of the counter affidavit that the committee considered the rates offered by M/s Jay Pee & Company and the petitioner collectively as a single tender was invited for 100 petrol driven vehicles (70 Ambassador Cars and 30 Maruti Gypsies). It is alleged that in respect of item No. 1 the rates offered by M/s Jay Pee & Company for both Ambassador Cars and Maruti Gypsies were lower than the rates offered by the petitioner. However, in respect of item No. 2 pertaining to extra charges per kilometer beyond 100 Kms, the rate offered by M/s Jay Pee & Company in respect of Maruti Gypsies was higher than that of the petitioner, while the rate quoted by the petitioner in respect of the Ambassador cars was higher than that of M/s Jay Pee & Company. In so far as item No. 3 is concerned, the rates quoted by the petitioner for night halts was lower than M/s Jay Pee & Company in respect of both the vehicles.

16. In para 6 of the counter affidavit it is alleged that the committee made deliberations and an analysis of the rates offered by both the tenderers by calculations of rates for plying Ambassador Cars and Maruti Gypsy up to 100 Kms for 24 hours, extra charges per kilometre beyond 100 Kms and charges for night halt. As prayed by the petitioner, analysis for plying Ambassador Cars and Maruti Gypsies up to 100 Kms for 24 hours and 150 extra kilometers have been prepared and are enclosed as Annexure R-3. Table-A reflects the analysis done for the vehicles up to 100 Kms. Table-B reflects the analysis up to 100 Kms as well as for an extra 150 Kms. The calculations done in Table-B clearly reflect that the rates offered by M/s Jay Pee & Company on the basis of over all average were lower than those offered by the petitioner. As regards extra charges for night halt, the respondent found from the past experience that the said situation only arises occasionally inasmuch as the cars hired for VIP security are largely confined to within the city and only occasionally for outside the city. Hence, the said item is not required to be given much weightage as compared to item Nos. 1 & 2.

17. In para 7 of the counter affidavit it is alleged that the rates offered by M/s

Jay Pee & Company were lowest and Therefore, after considering/examining all the facts on record, the Committee found M/s Jay Pee & Company as L-1. M/s Jay Pee & Company has also offered ?1/2 percent discount on all the rates given by it, but after finding its rates the lowest one, the Committee asked it to reduce the rates of extra charges per Km beyond 100 Kms for Gypsy from Rs. 8.70 per Km to Rs. 6.89 per Km and extra charges for night halts outside Delhi for Ambassador Car and Maruti Gypsy may also be reduced from Rs. 150 per night to Rs. 70 per night. M/s Jay Pee & Company agreed for the same in lieu of ?1/2 percent discount offered by it. Hence, it was permitted to withdraw the special discount of ?1/2 percent offered by it. The allegation of the petitioner that rates offered by it were lower than the rates offered by M/s Jay Pee & Company was, Therefore, not admitted.

18. As regards the allegation that M/s Jay Pee & Company did not submit a bank guarantee for Rs. 35 Lakh, the respondent has referred to Clause 18 of the terms and conditions which states:-

"The firm whose tender is accepted will have to deposit a sum of Rs. 35 Lakh as security money in the form of Bank Draft/Bank Guarantee drawn in favor of DCP/ Sec. within one week failing which earnest money deposited will be forfeited. Bank guarantee would have to be retained in the personal custody of DCP/ Security so as to encash the same as and when the terms of contract are found violated. Besides, suitable action will be taken against the firm. The contract documents will be signed only after security money is deposited.

19. The petitioner has no doubt placed reliance on Clause 59 of the tender terms and conditions which states:-

"The tender will be two-bid system i.e. technical bid and price bid. The technical bid will consist of EMD, Bank Guarantee, Income Tax Clearance Certificate and Regn. Certificate under Delhi Works Contract Act,1999. The price bid will contain only rates as per term 5. Both the bids envelopes will then be put in a single envelope and sent to the undersigned as per term-1.

20. However, it is alleged that Clause 59 has to be read along with Clause 18 and not in isolation. Only the party whose tender has been accepted has to deposit the security money in the form of Bank Draft/Bank Guarantee within a week. It is also stated in the counter affidavit that the petitioner''s allegation that a sum of Rs. 55 Lakh is lying blocked for the last one year is factually incorrect since a bare perusal of the Bank Guarantee offered by the petitioner (vide Annexure P-1A to the petition) shows that it was valid only up to 29.4.2004 and it was never renewed.

21. It is denied that the respondent acted mala fide. The committee followed the procedure, compared rates of both the parties and found M/s Jay Pee & Company to be the lowest tenderer. It is denied that there was any arbitrariness, illegality or bias.

22. A counter affidavit is also filed by respondent No. 3, M/s Jay Pee & Company and we have perused the same. In para 5 of the said counter affidavit it is alleged that the deponent of the affidavit in support of the writ petition, Ms. Aman Marwah is the wife of Mr. Opinder Singh, proprietor of M/s Kuldeep Tourist & Taxi Services, which is one of the disqualified parties. This fact has been concealed in the writ petition. The petitioner is only acting benami for M/s Kuldeep Tourist & Taxi Services and this material fact has been suppressed.

23. It is alleged that a letter of intent dated 4.8.2005 has been issued to respondent No. 3 (vide Annexure R-3). Originally respondent No. 3 was deliberately not imp leaded , but it was imp leaded only in compliance with the directions of this Court.

24. It is denied that respondent No. 3 ever defaulted. The dispute between respondent No. 3 and M/s Kuldeep Tourist & Taxi Services had nothing to do with the contract signed by M/s Kuldeep Tourist & Taxi Services with respondent Nos. 1 & 2. It is denied that respondent No. 3 had given any list to the police authorities or there were private arrangements between the parties. It is denied that cars were not supplied to the petitioner by respondent No. 3 on two occasions when its payments were delayed by over six months by M/s Kuldeep Tourist & Taxi Services.

25. Respondent No. 3 has annexed as Annexure R-2 containing copies of the registration certificates which show the vehicles now transferred in the name of the petitioner, are the vehicles of her husband, who is a disqualified contractor, who would if the petitioner had succeeded, operated under cover of his wife''s name.

26. Rejoinder affidavit has also been filed and we have perused the same. It is alleged in para 5 thereof that the rates offered by the petitioner are lowest as per the analysis worked out and enclosed as Annexure P-6. It is alleged that the respondents have not undertaken detailed analysis in the matter and had a detailed analysis been done, the respondents would have found that the rates offered by the petitioner were the lowest.

27. In the facts and circumstances of this case, we find no merit in this petition. In the counter affidavit of respondent No. 2 the computation has been shown as Annexure R-3 and we have perused the same. A perusal of the same shows that the tender of respondent No. 3, M/s Jay Pee & Company is lower than that of the petitioner, M/s Aman Services. If the petitioner wishes to raise a factual controversy about the figures shown in Annexure R-3, then it is open to it to file a civil suit, but writ jurisdiction is not the proper forum for raising disputed questions of fact. Respondent No. 2 has clearly stated that the offer of M/s Jay Pee & Company was the lowest and even if the petitioner raises disputed questions of fact, this Court cannot go into the disputes questions of fact in writ jurisdiction, as it will require detailed analysis of the questions of fact and this Court has no expertise in this matter.

28. As regards the allegation that respondent No. 3 did not submit a bank guarantee along with the tender, it has been clearly stated in para 9 of the counter affidavit of respondent No. 2 that only such firm whose tender has been accepted has to furnish a bank guarantee in terms of Clause 18 of the terms and conditions of the tender. We fully agree with learned counsel for respondent No. 3 that Clause 59 cannot be read in isolation and it has to be read along with Clause 18. It is also in accordance with common sense that only after a tender is accepted should there be a need for furnishing a bank guarantee to take care of any non-performance or violation of the contract. The requirement of furnishing of a bank guarantee even before acceptance of a tender would, in our opinion, be meaningless.

29. Learned counsel for respondent No. 3 submitted that respondent No. 3 again approached respondent No. 3 to award him the contract pursuant to letter of intent dated 4.8.2005 and that respondent No. 3 was prepared to deposit Rs. 35 Lakh within one week of acceptance of the tender. However, respondents 1 & 2 did not accept the plea on the ground that there was an interim order of the High Court not to act in this connection.

30. It is well settled that the modern trend points to judicial restraint in administrative matters vide Master Maine Services Pvt Ltd v. Metcalfe & Hodgkinsons (P) Ltd 2005 (6) SCC 136. Only when it comes to a conclusion that overwhelming public interest requires it should the Court interfere in Government contracts/tenders. The Court does not sit as a Court of Appeal over the authority granting the contract, but merely reviews the manner in which the decision was made. The Court does not have expertise to correct administrative decisions, and the Government must have freedom of contract. Fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere. The decision of such an administrative body can only be tested on application of Wednesbury principles.

31. It was also held in the above decision that the Court must exercise its powers under Article 226 with great caution and should exercise them only in furtherance of public interest and not merely on the making out of a legal point. Only when it comes to the conclusion that overwhelming public interest requires it, should the Court interfere in such matters. A similar view had been taken by the Supreme Court in Tata Cellular Vs. Union of India,

32. In Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, , the Supreme Court observed:-

"11. When a writ petition is filed in the High court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favor of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers."

33. In the present case it is alleged by respondent No. 2 that the rates offered by respondent No. 3 were the lowest. This has been disputed by the petitioner. It is not for us to go into a detailed analysis of this matter in writ jurisdiction as the Court does not have expertise in such a matter. The decision was taken by a committee of six members, who had expertise in the matter and ordinarily this Court has to defer to the opinion of the experts and cannot sit in appeal over their decision.

34. The principles applied in judicial review of administrative decisions relating to acceptance of the terms and conditions set out in the contract have been considered by the Supreme Court in Tata Cellular Vs. Union of India, and the same are as follows:-

"(1) The modern trend points to judicial restraint in administrative action.

(2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have free flow of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. "

35. In Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, the Supreme Court observed as follows:-

"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, "

36. In M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, it was held by the Supreme Court:-

"Broadly stated, the courts would not interfere with the matter of administrative action, or changes made therein, unless the Government''s action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is mala fide."

37. In Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, the Supreme Court held as follows:-

"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."

38. The aforesaid two decisions have been approved by the Supreme Court in Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others,

39. In view of the above, there is no merit in this petition and it is accordingly dismissed.

