

(1995) 05 KL CK 0007
In the High Court Of Kerala
Case No : W.A. No. 384 of 1995-C

Ananda Engineering Works Pvt. Ltd.

APPELLANT

Vs

Kerala Minerals and Metals Ltd. and Others

RESPONDENT

Date of Decision : 05-05-1995

Acts Referred:

Citation : AIR 1995 Ker 302 : (1995) 3 ILR (Ker) 145

Hon'ble Judges : P.V. Narayanan Nambiar, J;K. Sreedharan, J

Bench : Division Bench

Advocate : G. Janardana Kurup, for the Appellant; U.K. Ramakrishnan, K.S. Radhakrishna Panicker and S. Vijayan Nair, G.P., for the Respondent

Final Decision : Dismissed

Judgement

Narayanan Nambiar, J.—The first respondent, Kerala Minerals and Metals Limited, a Government of Kerala undertaking, issued Ext.P1 tender notice dated 21-11-1994 inviting tenders from experienced contractors for construction of additional polishing pond for the Effluent Treatment System. The appellant, the fourth respondent and three others submitted tenders. The tenders thus received were scrutinised by the Consultant of the first respondent-Company and thereafter he submitted a report on 27-12-1994. The tenders received were also considered by the Tender Committee consisting of General Manager (Technical), Deputy General Manager (Technical), Senior Manager (Internal Audit), Accounts Officer and Sri T. K. Chandy, Consultant of the first respondent who had also supervised in the past the construction of the existing settling and polishing ponds attached to the first respondent-company. The tenders submitted by all others except the appellant and the fourth respondent were rejected as they have quoted very high rates and they have no experience in executing similar works.

2. Along with the tender, the appellant produced Exts.P2 and P3 certificates which show that he had previous experience in executing similar works in F. A.C.T. and also in Cochin Refineries Limited (C.R.L.). The nature and details of

the work undertaken by him are not seen mentioned in Exts. P2 and P3. The Committee members, therefore felt that further details in this regard are essential in order to see whether the work undertaken by the appellant are identical to the one tendered for and thus to satisfy themselves as to the appellant's experience in similar works. Accordingly, the Committee decided to depute the Deputy General Manager (Technical) and Sri T. K. Chandy, the Consultant, to visit F.A.C.T. and C.R.L. and to enquire about the nature and performance of the work of the appellant. The enquiry revealed that the nature of works undertaken by the appellant for F.A.C.T. and C.R.L. were not identical to the work tendered for by the first respondent-company. It is also revealed that the appellant had also inordinately delayed the completion of the work awarded by the F.A.C.T. After enquiry, the two members submitted a report on 4-1-1995. The members of the Committee considered the pros and cons of the matter including the notes dated 27-12-1994 and 4-1-1995. The appellant and the fourth respondent were called for a discussion on 12-1-1995. Ext.P4 is the record notes of the discussions. During the discussion, the appellant was requested to clarify about the two aspects works mentioned by them in support of past experience of similar works done. It was clarified by the appellant that the nature of work which he had undertaken in F.A.C.T. and C.R.L. was RCC type. The appellant agreed to furnish photocopies of the orders showing his experience in similar works in other undertakings. Clause 14 of Ext.P4 also shows that the rates mentioned by the appellant against items 11 and 12 are for supplying and laying of LDP films. Out of the rate, 20% relates to labour for laying and spreading of films and the balance 80% for cost of LDP films. From the discussion, according to the first respondent-Company, it has come out that the appellant has not studied the scope of work and the specification and the rates quoted are not as per tender conditions. Rate analysis given by the appellant strengthened their conclusions.

3. The Committee, after considering all the matters, found that the experience claimed by the appellant on the basis of Exts. P2 and P3 cannot be considered as similar experience in the construction of polishing pond tendered for, that the appellant has not studied the specification and worked out the actual requirements of materials required for execution of the work and the rates quoted by the appellant are not workable. The Committee, after considering the relevant aspects, thus found that the appellant is not suitable for carrying out the work tendered for.

4. The Committee also found during the discussion held with fourth respondent on 12-1-1995 that the fourth respondent has got relevant experience in execution of the work identical to the one tendered for and that he has got the necessary infrastructural facilities for execution of the work and that he will be able to complete the work in time. It was also noticed by the Committee that the fourth respondent has executed the work of construction of polishing pond in the Company and had completed the work well within the time without creating any problem. Thus, the Committee after taking into account all the relevant aspects,

enquired with the fourth respondent whether he is willing to reduce the quoted rates. The fourth respondent expressed his willingness to reduce the rates by 6.5%. The amount quoted by the appellant was Rs. 77,77,843/-. Though initially the fourth respondent quoted Rs. 85,38,611.90, he was prepared to come down to Rs. 79,83,354/-. The Committee, accordingly, recommended for the acceptance of the tender submitted by the fourth respondent. Accepting the recommendations of the Tender Committee and on the recommendation of the General Manager (Technical) the work was awarded to the fourth respondent rejecting the tender of the appellant.

5. The appellant, Ananda Engineering Works Pvt. Ltd., filed the Original Petition challenging the decision of the first respondent-company in awarding the contract to the fourth respondent in preference to him. According to him, the decision of the first respondent-Company is arbitrary, mala fide and due to extraneous reasons. The fourth respondent was preferred for no valid reason. He prayed for cancellation of the contract awarded to the fourth respondent and sought for awarding of the contract in his favour.

6. Learned single Judge, after considering the pleadings and hearing counsel appearing for both sides, dismissed the Original Petition by judgment dated 14-3-1995. Learned single Judge considered all the relevant aspects of the matter and agreed with the first respondent-Company that the petitioner did not have sufficient experience to do the work for which the tender was invited. Learned single Judge also found that the fourth respondent has got sufficient experience in the construction of similar works. The case of arbitrariness and mala fides alleged against the first respondent-Company was rejected by the learned Judge. The decision making process of the first respondent-Company on the basis of the recommendation of the expert and also the Tender Committee was found acceptable to the learned Judge. Considering all these aspects, the learned Judge dismissed the Original Petition. It is challenging the order of the learned Judge, this Writ Appeal is filed.

7. Detailed arguments were advanced by counsel for the appellant, first respondent and the fourth respondent. The file regarding the tender is also made available to us for our perusal.

8. Before going to the merits of the case, we may caution ourselves regarding the powers of the Court to have judicial review in contractual matters.

9. After analysing the various decisions, the Supreme Court, in the decision reported in *Tata Celluler v. Union of India* 1994 6 SCC 651 has laid down the principles under which a judicial review can be had. Going by the above principles, only the decision making process and not the merits of the decision itself is reviewable as court does not sit as appellate court while exercising powers of-review. While court cannot interfere with Government's freedom of contract, invitation of tender and refusal of any tender which pertain to policy matter, the court can always review whether the decision is vitiated by

arbitrariness and unfairness, illegality, irrationality or "Wednesbury unreasonableness", i.e., when decision is such as no reasonable person on proper application of mind could take. The courts will not substitute its own finding for that of the experts. It was also held in the very same decision that mere power to choose cannot be termed as arbitrary and the Government has always got the power in selecting the best and courts interference will come only when use of such power is exercised for collateral purposes. The Supreme Court further held as follows:

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

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

(c) 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.

(d) 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.

(e) The Government must have freedom to contract. In other words, a fair play 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.

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

10. The decision of the Supreme Court in *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, also can be profitably considered here. The Supreme Court has held that discretion has to be conceded to the authorities who have to enter into contract, giving them liberty to assess the overall situation for the purpose of taking a decision as to whom the contract be awarded and at what terms. If the decision was taken in bona fide manner although not strictly following the norms laid down by courts, such decisions are upheld on the principles laid down by Justice Holmes that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive.

11. The decision in *Fasih Chaudhary Vs. Director General, Doordarshan and Others*, also is to the same effect. The Supreme Court has held therein that while fair play is an essential requirement in accepting and in awarding a contract, similarly "free play in the joints" is also a necessary concomitant for an

administrative body functioning in an administrative sphere or quasi-administrative sphere. If all the tenders were considered fairly, reasonably, objectively and without any malice or illwill, the decision of the administrative authority will be found acceptable to the court and the court in exercise of the powers of judicial review will not interfere with such decisions.

12. The decision in Union of India and others Vs. Hindustan Development Corpn. and others, was also brought to our notice to canvass for the proposition that when there is a condition in the tender notice that the Government had right to either accept or reject the lowest offer and when that was done on the basis of a policy, in the absence of any irrationality and unreasonableness, such a decision on the part of the Government cannot be challenged.

13. With the above principles in mind, we will approach to the facts of the present case.

14. It is true that the appellant has quoted the lowest rate. As already stated, the rate quoted by him is Rs. 77,77,643/-. The rate quoted by the fourth respondent is Rupees 85,38,611.90, though subsequently he has reduced it to Rs. 79,83,654/ -. In Ext. P1 itself it is stated that tenders are invited from "experienced contractors". It is also stated in Ext.P1 that the experience certificates are to be produced along with the tenders. Ext. P1 also cautions for the timely completion of the work. Pursuant to Ext.P1 tender notice, the appellant as well as the fourth respondent tendered (we are not concerned with other tenderers). The file relating to the tender produced before us shows that the tenders were scrutinised by the Consultant of the first respondent-Company, who submitted his report on 27-12-1994 and the Tender Committee consisting of high ranked officials also considered the tenders as well as the remarks of the Consultant. Prima facie, they found that the appellant lacked sufficient experience in the nature of work tendered for. Though Exts. P2 and P3 were produced, those do not contain the nature and details of the work undertaken by the appellant. So, the Committee felt that further details in this regard are necessary. Persons were deputed to visit F.A.C.T. and C.R.L. and the enquiry revealed that the nature of work undertaken by the appellant was of different type (RCC type) and not identical to the work tendered for by the first respondent-Company. It was also revealed that the appellant was inordinately delaying the completion of the work awarded by the F.A.C.T. The discussion made with the appellant on 12-1-1995 also revealed that he has not studied the scope of the work and the specifications and the rates quoted by him are not as per tender conditions. The rate analysis given by the appellant confirmed this conclusion. He did not produce documents showing similar experience in construction of polishing ponds tendered for. Ext.P5, which was relied on by the appellant, is a covering letter for forwarding a detailed schedule of rates for works undertaken by him. Even along with Ext.P5, the appellant did not submit the documents showing his experience in similar work tendered as per Ext.P1. Though Annexure I is produced along with the Writ Appeal, the same also is not

much of a consequence. Annexure I though shows that the appellant has got some experience in executing similar work in 1989, the same was not produced before the first respondent before the award of the contract in favour of the fourth respondent.

15. The experience of the fourth respondent in executing similar work, was also considered by the Tender Committee. He, on the previous occasion, had undertaken the work of the company and completed the same satisfactorily. The expert as well as the Tender Committee found that he is more competent to execute the work due to his previous experience in similar line. On the basis of the discussion, he was also prepared to reduce his rates by 6.5%. Considering all these aspects, the first respondent-Company decided to reject the tender of the appellant and accept the one submitted by the fourth respondent. The decision was taken for valid reasons. The right of the first respondent-Company in arriving at such a decision on the basis of valid reasons cannot be challenged in a petition under Article 226 of the Constitution of India. If only the decision was taken on extraneous or other irrelevant considerations, the same will be subjected to judicial review.

16. Having considered the entire matter and the facts revealed from the file, we are of the view that valid reasons are assigned by the first respondent-Company in rejecting the tender of the appellant and accepting that of the fourth respondent. In the interest of the Company, the experience in similar lines weighed much and that the first respondent-Company found that it cannot take risk in the construction of the additional polishing pond for Effluent treatment System by engaging the appellant, who has no experience at all in similar work. The said decision of the Company cannot be said to be unreasonable or arbitrary.

17. Though there are vague allegations of mala fides and arbitrariness raised in the Original Petition, none of these allegations are substantiated before us. Relevant details which would help us in arriving at a decision on arbitrariness, unreasonableness and mala fides also are not shown. As such, we are not inclined to accept the case of the appellant that the decision making process is vitiated by arbitrariness and mala fides.

18. Counsel for the appellnat also argued that Ext. R1(a) letter of intent was issued to the fourth respondent before the approval of the Board of Directors regarding acceptance of the tender. It is conceded before us that the Board of Directors has ratified the decision regarding acceptance of the tender of the fourth respondent after the letter of intent was issued to him, But it is a fact that the Board of Directors has accorded sanction to the work during the meeting held on 19-11-1994 and in pursuance to this only, Ext. P1 tender notice was issued. Due to shortage of time, the decision to award the work in favour of the fourth respondent was being circulated among the Directors for approval and at the time when notice in the Original Petition was received, five of the Directors have already accorded sanction. Whatever it be, as sanction has already been given by the Board of Directors, we do not find any illegality on this count which invites

interference by this court.

19. Counsel for the appellant brought to our notice the decision reported in Har minder Singh Arora Vs. Union of India (UOI) and Others, and canvassed that the person who quoted the lowest amount should be awarded the contract. We are afraid that there is nothing in the judgment to come to such a conclusion. In the case referred to above, the Supreme Court found that there was no valid reason for rejecting the lowest tender and the reasons assigned were quite unreasonable. It is in that circumstance the Supreme Court held that the Government cannot arbitrarily and capriciously accept the bid of the tenderer although it was much higher and to the detriment of the State and consequently quashed the decision of the Government and directed the award of the contract in favour of the lowest tenderer. The facts in that decision are not identical with the one on hand.

20. It was also brought to our notice that the work in question is to be completed before 31-5-1995 and the fourth respondent has carried out 40% of the work and has invested huge amounts for the timely completion of the work.

21. Learned single Judge has considered in detail the entire aspects of the matter and we do not find any reason to come to a different conclusion.

22. From what is stated above, the appeal deserves to be rejected and accordingly we dismiss the same confirming the judgment of the learned single Judge. There will be no order of to costs.