
(2008) 12 JH CK 0013
In the Jharkhand High Court

Anik Industries Limited

APPELLANT

Vs

Jharkhand State Housing Board and Others

RESPONDENT

Date of Decision : 18-12-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1

Citation : (2009) 2 JCR 382

Hon'ble Judges : Narendra Nath Tiwari, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Narendra Nath Tiwari, J.—The Jharkhand State Housing Board (hereinafter referred to as "the Board") decided to develop its property at Adityapur, Jamshedpur by way of joint venture with private developers. For the said purpose, Expression of Interest (EOI for short) was floated by the respondent-Board on 13.11.2005 for different plots, inviting offer in sealed cover from the interested companies having annual turn over of minimum ten crores or from Central/State Government Public Sector Undertakings etc.

2. The petitioner submitted its offer along with the requisite documents on 11.12.2005. Company's balance sheet of last three financial years was also submitted to show its financial status.

3. By letter dated 25.1.2006, the respondent-Board called the petitioner to attend the pre-bid discussion on 1.2.2006. The letters suggested that the petitioner is eligible and fulfils the essential requirements, as per terms of the EOI.

4. The petitioner's representative attended the office of the respondent-Board on 1.2.2006 and participated in pre-bid discussion.

5. By letter No. 503 dated 20.4.2006, the Superintending Engineering of respondent No. 1 invited proposal from the selected participants, including the

petitioner with quotation regarding the different plots.

6. The petitioner submitted his proposals with quotations in respect of eight plots out of the several plots mentioned in the notice dated 20.4.2006.

7. By letter dated 17th May, 2006, the respondent No. 2 took a decision to extend the last date of submission of proposals up to 6th June, 2006. The date was extended up to 14th June, 2006, by its letter No. 665 dated 3rd June, 2006.

8. By letter No. 708 dated 16.6.2006, issued by the respondent No. 2, bidders was asked to deposit earnest money in the form of Bank Draft by 29th June, 2006.

9. The petitioner submitted its offer along with the Bank Draft of the earnest money. The petitioner also submitted the proposed plan for development of the plot.

10. The petitioner was thereafter called to attend the office of respondent No. 2 on 8.8.2006 for negotiation. The said date was extended to 14.8.2006.

11. According to the petitioner, its representative attended the negotiation. The authorities of the respondent-Board found the petitioner to be the highest bidder in respect of plot No. 6.

12. By letter dated 24.8.2006, the respondent No. 2 asked the petitioner to submit a fresh offer in terms of money payable to the respondent No. 1 in respect of the plot earmarked for constructing hotel.

13. However, by another letter dated 24.8.2006, the respondent No. 2 informed the petitioner that its offer for plot No. 6 regarding construction of residential/commercial buildings was found to be highest. The petitioner was asked to show Its financial credibility to meet the expenses for such construction by 30th August, 2006.

14. The petitioner requested the Central Bank of India and I.D.B.I. Bank to issue financial credibility certificates. By letter dated 25.8.2006, Central Bank of India communicated sanction of term loan of Rs. 35 crores to the petitioner.

15. The petitioner submitted its solvency certificate and the papers showing sanction of term loan of Rs. 35 crores. It also submitted the balance sheet for the financial year 2004-05. The said documents were served on respondent No. 2 with covering letter dated 30.8.2006.

16. After submission of the said documents, there was no communication to the petitioner from the respondent-Board, regarding the allotment of plot No. 6.

17. According to the petitioner, after a long wait, it sent a letter dated 29.3.2006, requesting the respondent No. 2 to issue allotment letter in respect of plot No. 6.

18. But there was no response from the respondent.

19. The Senior General Manager of the petitioner-Company thereafter personally met the respondent No. 2 on 10.4.2007 and handed over the reminder with request to Issue allotment letter in respect of plot Nos. 4 and 6 for which its offers were found to be highest.

20. The petitioner claimed that the respondents had assured for issuing allotment letters after necessary process. But the petitioner did not receive any communication even after a long wait.

21. The General Manager of the petitioner-Company again approached the respondent No. 2 on 10th May, 2007 and requested to issue allotment letters.

22. On 18.5.2007, the petitioner received a letter being Memo No. 451 dated 25.4.2007, whereby the petitioner was informed that it was not selected for plot No. 6.

23. The petitioner came to know about the allotment of the plot No. 6 to the respondent No. 4, later on, which was communicated to the said respondent by letter No. 265 dated 14.3.2007 (Annexure-17). By letter No. 579 dated 19.4.2007 (Annexure-18), the respondent No. 4 was asked to submit the programme enabling it to depute the engineers to assist in construction work. And by letter No. 47 dated 27.4.2007 (Annexure-19), the respondent No. 2 asked the respondent No. 4 to start work, such as, soil testing, construction of boundary wall, laying of deep tube well in the premises of plot No. 6.

24. In this writ petition, the petitioner has challenged the said letters, contained In Annexures-17, 18 & 19 and has prayed quashing of the same as also for direction on the respondents to allot the said plot No. 6 in favour of the petitioner in view of its selection vide letter dated 24.8.2006 (Annexure-10).

25. The Housing Board and its Officers-Respondent Nos. 1 to 3 as also M/s. Steadfast Commercial Company Limited-Respondent No. 4 contested the writ petition. In almost common grounds "in their counter affidavit-they have, inter alia, contended that: (i) the petitioner's writ petition challenging contractual decision is not maintainable; (ii) the writ petition is barred by principle of res judicata as well. The petitioner had earlier filed a writ petition being W.P.(C) No. 3021 of 2007 for similar reliefs, which was withdrawn by obtaining permission in I.A. No. 1940 of 2007. Though this Court had granted permission to withdraw the writ petition with liberty to challenge the order, if any, passed subsequently in the matter, the petitioner has not challenged any order issued by the respondent-Board after 10.07.07 or any order passed by the respondent-Board against the petitioner after 25.4.07.

(iii) The petitioner's claim that it was the highest bidder is baseless. The respondents had offered 30.25% of the entire constructed area, which Included residential as well as commercial area whereas the writ petitioner had offered 28% in residential area i.e. 28% of 60% or 16.8% of the total area and had quoted 33% in commercial area i.e. 33% of 40% or 13.2% of the total area. The

aggregate of the said areas comes to 30%. The respondent No. 4, having offered 30.25% of the total area, its offer was higher than that of the petitioner. The aggregate was to be calculated on the basis of percentage offered for residential and commercial area respectively.

(iv) However, by mistake of fact, the petitioner's offer was earlier wrongly calculated on the basis of 50% residential and 50% commercial area in place of stipulated 60% ; 40% respectively. No right can accrue to the petitioner on such wrong calculation. The basis for declaring the highest bidder was in terms of maximum share offered by the bidder to the Board in percentage of constructed area. It was neither based on the total value of the plot nor any other consideration. The respondent No. 4 was the highest bidder regarding the plot No. 6 and the same has been rightly allotted to the respondent No. 4.

(v) The petitioner's contention that Draft of earnest money deposit was revalidated and encashed by the respondent-Board indicating acceptance of the offer by it is misleading. The respondent-Board had taken decision to revalidate the Drafts of all H-1 and H-2 ("H" for highest bidder) of the respective plots advertised in the Notice Inviting Tender. The petitioner was the second highest bidder (H-2) in respect of Plot Nos. 6 and 3 and it was the highest bidder (H-1) in respect of Plot No. 4. Revalidation and encashment of the petitioner's Draft in respect of Plot No. 6 thus does not amount to any acceptance as the allotment was made to the highest bidder and not to the second highest bidder. The petitioner being the highest bidder in respect of Plot No. 4, got allotment of that plot. The petitioner has been allotted Plot No. 4 in the same process. The decision for allotment of tender in respect of various plots was taken after minutely examining the bids of the various contenders by a High Level Committee in its Meeting held on 15.02.2007. The Board of Director in its meeting dated 27.02.2007, thereafter, took decision for allotment of plots to the respective highest bidders calculated on the basis of maximum share offered in terms of the percentage of total constructed area. The petitioner was not invited for negotiation for Plot No. 6 as the respondent No. 4 was the highest bidder (H-1) of that plot and it was called for negotiation as per the decision of the High Level Committee dated 15.2.2007. The principle to consider the highest bid in terms of maximum share was followed consistently by the Board and only those bidders, who had offered maximum share in terms of the constructed area, were allotted the plot(s). The petitioner being the second highest bidder in respect of Plot Nos. 3 & 6 was not called for negotiation. The petitioner's claim that it should have been called for negotiation in terms of the decision of the High Level Committee is wholly without any basis.

(vi) There being no element of public interest in the case, the decision of the Board is not opened for judicial review by this Court in exercise of power under Article 226.

(vii) The petitioner had filed this writ petition belatedly when the agreement in respect of Plot No. 6 has been executed in favour of respondent No. 4. The

petitioner has not challenged the said Agreement dated 21.6.07. This writ petition is also not maintainable on that ground.

(viii) The joint survey has already been undertaken by the respondent No. 4 and the Board. The Board by its letter dated 25.4.2007 asked the respondent No. 4 to start the work of soil testing, construction of boundary wall and installation deep tube well boring. A Power of Attorney has been executed and notarized by the Board in favour of respondent No. 4. The respondent No. 4 has thereafter submitted schematic drawings and the project scheme to the Board for approval and they have changed their position and completed various steps by making huge monetary investment.

26. In course of hearing of this writ petition, both the parties have referred to and relied upon various case laws in support of their respective contentions and submissions.

27. Learned Counsel appearing on behalf of the petitioner relied on the following decisions:

- (i) Ram and Shyam Company Vs. State of Haryana and Others, .
- (ii) Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. and Others, .
- (iii) The D.F.O. South Kheri and Ors. v. Ram Sanahi Singh U.J. 1970 (S.C.) 290.
- (iv) Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, .
- (v) Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another, .
- (vi) ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, .
- (vii) Smt. Gunwant Kaur and Others Vs. Municipal Committee, Bhatinda and Others, .
- (viii) Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another, .
- (ix) Indira Kaur and Ors Vs. Sheo Lal Kapoor, .

28. On the other hand, the respondents placed reliance on the following decisions:

- (i) Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others, .
- (ii) Rajasthan Housing Board and Another Vs. G.S. Investments and Another, .
- (iii) Master Marine Services Pvt. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and Another, .

(iv) Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, .

(v) Vividh Marbles Pvt. Ltd. Vs. Commercial Tax Officer, .

(vi) Union of India (UOI) and Others Vs. Ashok Kumar and Others, .

(vii) Chairman and M.D., B.P.L. Ltd. Vs. S.P. Gururaja and Others, .

29. In Ram & Shyam Co. and Dutta Associates Pvt. Ltd.(supra), it has been held by the Supreme Court that if opportunity is given to one for negotiations and raising the price, it must be given to others, otherwise such action would be arbitrary and violative of Article 14 of the Constitution.

30. In The DFO, South Kheri and Ors. and Sterling Computers (supra), the Supreme Court has ruled that the decision taken by public authority in commercial/contractual transactions of State or its instrumentality is open to judicial review.

31. In Kasturi Lal Lakshmi Reddy (supra), it has been held that it is duty of the State to be fair, reasonable and equitable.

32. ABL International (supra) is elaborate judgment in which the Supreme Court has dealt with the related issue and has held that the Court can look into the legality of approach on the part of the authorities in the filed of contract under Article 226 of the Constitution. It has been further held that the Court will not become just a spectator, if illegalities are brought at the surface and the relief in the writ jurisdiction cannot be denied only because certain facts are in dispute.

33. Similar view has been taken in Gunwant Kaur and Ors. and Century Spinning & Manufacturing Co. Ltd. cases (supra).

34. In Smt. Indira Kaur and Ors. (supra), it has been held that the Court cannot hold its hands on the technicalities when illegality is surfaced. It can render justice, if the Illegalities are brought to its notice. Justice cannot be thwarted on technicalities.

35. In Sarguja Transport Service (supra), the Supreme Court has held that the principle underlying under Order 23 Rule 1 of the CPC shall apply in the writ jurisdiction also under Articles 226 and 227. Where the petitioner withdraws a petition filed by him in the High Court under Articles 226/227, without permission to file a fresh petition, remedy under Articles 226/227 should be deemed to have been abandoned by the petitioner in respect of the same cause of action.

36. In Rajasthan Housing Board and Anr. (supra), the Apex Court has examined number of earlier judgments and has held that the powers of judicial review in contractual matter under Article 226 should be exercised only in furtherance of Public Interest.

37. Master Marine Services (P) Ltd. and Raunaq International Ltd. (supra) were the earlier cases in which the Supreme Court held that the contracts entered into

by the Government are commercial transactions and the Courts should not interfere with the tender, if the dispute is only between two tenderers. The Courts must see that the element of public interest is involved.

38. In *Vividh Marbles (P) Ltd.* (supra), it has been held by the Supreme Court that if any mistake is committed by the authorities, they are entitled to rectify the same. When the mistakes are apparent at the fact of record, even no opportunity of hearing is required to be given to the parties.

39. In *Union of India and Ors.* (supra), the decision has been referred to show that the burden of establishing malafide is very heavy on the person, who alleges it. It has been observed that the malafide is the last refuge of a losing litigant.

40. In *Chairman & Md. BPL Ltd.* (supra), the Supreme Court held that showing undue haste cannot be a ground for exercise of the power of judicial review unless it is held to be malicious.

41. I have heard learned Counsel appearing for the parties at length and considered the facts and material on record. Though number of decisions, as aforementioned, were referred to, in course of hearing, there was no clash between the parties on the settled legal principles laid down by the Apex Court.

42. In this case, dispute is mainly on the propriety of the Board's decision in allotting plot No. 6 to respondent No. 4 and scope of interference with the decision of the High Level Expert Committee, by this Court in exercise of its writ jurisdiction.

43. On scrutiny of the documents on record, it is evident that Clause(X) of Annexure-2 stipulates that the share of Board would be in terms of percentage of Total Plinth area of all floor of the residential/commercial units. In the notice dated 20.4.2006 inviting proposal with quotation, it has been clearly mentioned in para-8 that the participants have to quote the ratio of constructed area to be given to the Board in percentage (Annexure-6). By Circular dated 3.6.2006(Annexure-24), the earnest money was to be deposited @ 5/- per sft. of constructed area on the assumption of 2.5 FAR.

44. The respondent No. 4, In its offer quoted 30.25% of the total constructed area and 0.75% if FAR is below 2.5 (Annexure-R;-4/B). On 29.6.2006, the tender was opened in presence of the parties. The respondent No. 4 was found to be the highest bidder among four contenders having quoted 30.25%. The Board, however, sent a letter to the petitioner dated 24.8.2006 mentioning that its quoted rate is the highest and asked the petitioner to submit financial credibility papers by 30.8.2006 (Annexure-10).

45. It is the clear stand of the Board that the offer of the respondent No. 4 was the highest and the letter dated 24.8.06 (Annexure-10) addressed to the petitioner was issued by mistake. The said statement has been made in paragraphs- 23 & 24 of the counter affidavit filed by the respondent-Board and in its rejoinder in paragraphs-7 and 26. Though the petitioner had claimed that it

had forwarded financial credibility papers on 30.8.2006(Annexure-11), the Board had disputed the same and denied to have received any such letter in paragraphs- 26 & 30 of its counter affidavit.

46. It is evident from the decision dated 15.2.2007(Annexure-R-1/C) that the Board had unanimously resolved that the plot shall be allotted to the firms giving maximum share in constructed area so that the Board may receive more revenue. The Committee recommended that the negotiation will be made with such firms and scheme shall be prepared for approval of the Board. By another letter dated 15.2.2007, the Board asked the respondent No. 4 to attend their office on 19.2.2007 for deciding the terms and conditions (Annexure-R-4/C). It is evident from Annexure-R-1/G that identical letters were issued to all other successful bidders of different plots. In the meeting dated 19.2.2007, the respondent No. 4 was informed that it was the highest bidder for Plot No. 6 and was asked to furnish financial competence certificate from its bankers. The respondent No. 4 on its own increased the share of the Board by further 1% on the commercial portion. Respondent No. 4, thereafter, forwarded the financial competence certificate from HDFC Bank on 22.2.2007 (R-4/D). The decision of the High Level Committee along with the offers of the highest bidder in respect of different plots was placed before the Board for approval. The said decision was approved by the Board. The petitioner in the same process was selected for plot No. 4 on the basis of its highest bid for that plot. The respondent No. 4, on the said basis, was selected for Plot No. 6 vide Board's letter dated 14.3.2007. The petitioner did not raise any grievance against the said negotiations/selection, though it had attended the same and was all along In touch of the process of selection as aforementioned.

47. On getting the letter dated 14.3.2007 regarding its selection for plot No. 6, respondent No. 4 by its letter requested the Board for joint physical survey of the plot and for preparing conceptual plan and scheme. Joint survey was completed. The Board was informed by letter dated 29.3.2007(Annexure-R-4/F) regarding completion of joint survey. Request was made for taking further steps in the matter.

48. The petitioner remained dormant till then. Suddenly on 29.3.2007, he sent a letter (Annexure-12) to the Board demanding allotment letter in respect of Plot No. 6 on the basis of the letter dated 24.8.2006. The petitioner claimed that its General Manager had again approached the Board on 10.4.2007 and requested for allotment letter. But the Board has emphatically denied receipt of any such request on 10.4.2007.

49. The petitioner's letter dated 29.3.2007 was replied to by the Board by letter dated 25.4.2007 (Annexure-15) informing the petitioner that it failed to furnish the credibility certificate in the office of the Board and it was not selected in respect of Plot No. 6. The petitioner has not challenged the said letter In the writ petition.

50. In the meanwhile, by letter dated 25.4.2007, the respondent No. 4 requested the Board to formalize the possession of the plot for butting and raising boundary, carrying out soil testing and installing deep tube well and for taking other required steps for the development of the plot. The Board in its reply dated 27.4.2007 (Annexure-R-4/F) instructed the respondent No. 4 to start soil testing, construction of boundary wall and laying deep tube well boring.

51. The petitioner at this stage filed an application dated 10.5.2007 (Annexure-25) under the "Right to Information Act" seeking detail regarding the process of allotment of Plot No. 6.

52. The petitioner, thereafter, filed writ petition being W.P.(C) No. 3021 of 2007 challenging the letter dated 25.4.2007 issued by the Board in reply to the letter dated 29.3.2007, as also seeking direction to Issue allotment letter.

53. On 10.7.2007, the petitioner filed an application (I.A. No. 1940 of 2007) seeking withdrawal of the said writ petition in view of the subsequent development. The Court allowed the petitioner to withdraw the said writ petition, giving liberty to challenge the order, if any, passed subsequently in the matter.

54. In the meanwhile, on 21.6.2007(Annexure-R-1/C), Development Agreement was executed by and between the Board and respondent No. 4. The same has also not been challenged in the writ petition.

55. A power of attorney dated 27.6.2007 has been executed and notarized by the Board in favour of respondent No. 4 in accordance with the Development Agreement.

56. The schematic drawings and the project scheme has been submitted by the respondent No. 4 to the Board for approval long ago on 14.9.2007.

57. The petitioner has mainly based its claim on the letter of the Board dated 24.8.2007(Annexure-10), whereby the Board had informed the petitioner that it had quoted the highest rate and directed the petitioner to furnish its financial credibility papers by 30.8.2006.

58. As stated hereinabove, the Board has categorically clarified in paragraphs-23 & 24 of the counter affidavit that the respondent No. 4 is the highest bidder in respect of plot No. 6 and the letter(Annexure-10) addressed to the petitioner was issued by mistake. The Board has also denied to have received the financial credibility papers dated 30.8.2006 allegedly sent by the petitioner. By letter dated 25.4.2007, which was sent by the Board in reply to the petitioner's letter dated 29.3.2007, the Board clearly stated that the petitioner had not sent the credibility certificate in the office of the Board and it was not selected in respect of Plot No. 6. The said letter has also not been challenged.

59. Those assertions by the petitioner and denial by the Board give rise to the disputed issues of fact. No apparent illegality has been brought on surface making out any cogent ground for interference of this Court in a contractual

matter in exercise of its writ jurisdiction. Further, in view of Board's assertion that the letter dated 24.8.2006 (Annexure-10) was issued by mistake, no right can be said to have accrued to the petitioner, as the mistake does not create any right. Reference can be also made to the decision of the Hon''ble Apex Court in Vividh Marbles case (supra).

60. The petitioner has also not been able to furnish satisfactory explanation for its long silence and apathy over the matter from 24.8.2006 to 29.3.2007. The petitioner being very much active in respect of Plot No. 4, which was allotted to him in the same process, its plea of ignorance regarding the development in respect of plot No. 6 is not convincing.

61. A negligent and lethargic litigant does not deserve discretionary relief by invoking extraordinary writ jurisdiction.

62. The petitioner has, thus, failed to make out any solid ground for dismantling the entire decisional process and upsetting the allotment of plot No. 6, already finalized in favour of respondent No. 4.

63. In the result, this writ petition fails and, is accordingly, dismissed.

There is no order as to costs.