
(2001) 12 MP CK 0022
In the Madhya Pradesh High Court
Case No : Writ Petition No. 5412 of 2001

Anil Kumar Grover

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 13-12-2001

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2002) 1 MPHT 490 : (2002) 2 MPLJ 178

Hon'ble Judges : Dipak Misra, J

Bench : Single Bench

Advocate : R.N. Singh and A. Pawar, for the Appellant; Indira Nair, Addl. Standing Advocate, for the Respondent

Final Decision : Allowed

Judgement

Dipak Misra, J.

Invoking the extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India the petitioner has prayed for issue of a writ of certiorari for quashment of order dated 5-10-2001, Annexure P-5, passed by the Executive Engineer Civil Construction Unit Ministry of Environment and Forest, the respondent No. 4, and further to command the respondents to permit the petitioner to participate in the tender proceeding relating to public notice dated 30-9-2001, Annexure P-6, published in newspaper. In addition to the aforesaid prayer reliefs have been sought directing the respondents not to discriminate or victimize the petitioner and to grant such other reliefs as may be deemed fit and proper in the facts and circumstances of the case.

Sans unnecessary details the facts as have been depicted in the writ petition are that the petitioner is a reputed Engineer and a recognised contractor. He is registered with the Public Works Department as a Contractor of Super Special Class (SS). In the year 1994-95 the petitioner was awarded three separate contract works for construction of certain residential quarters and a Institute

Building for the Tropical Forest Research Institute at Jabalpur. He started the work as per the schedule but due to various reasons beyond his control the work could not be completed within the stipulated time. The respondents being dissatisfied with the progress of work required the petitioner to show cause why he should not be debarred from future tender on account of the slow progress of the works executed by him at Jabalpur. On receipt of the notice to show-cause the petitioner submitted his explanation and thereafter the respondents did not take any action against him. The petitioner successfully completed all the works awarded to him and certificate of successful completion of works were issued in favour of the petitioner as per Annexures P-4-A and P-4-B. When the matter stood thus, suddenly by order dated 5-10-2001 the petitioner was debarred from entering into any future contract with the construction unit of the Ministry of Environment and Forest. The reason mentioned in the aforesaid order is that the petitioner had delayed in carrying out the work awarded to him in the year 1996.

It is averred in the writ petition that no opportunity of hearing was granted to the petitioner. It is also note worthy to state that the tender notice has been published in "Nav Bharat" Newspaper on 30-9-2001 for construction of certain buildings for Zoological Survey of India at Jabalpur. But the petitioner has been debarred from participating in view of the order contained in Annexure P-5. The Petitioner has pleaded about his ability in this petition in which I need not state in detail. It is urged that the action of the respondent is illegal and unjustified as he has been debarred from purchasing the tender papers and participating in the tender without any justification.

A return has been filed by the answering respondents contending, inter alia, that this Court does not have the jurisdiction as per Clause 36.99 of CPWD Manual as the said clause stipulates that the Courts of place from where the tender acceptance letter has been issued shall have the jurisdiction to decide any dispute arising out of or in respect of contract. It is putforth that tender has been issued from Delhi, and therefore, Delhi High Court would have the jurisdiction with regard to the controversy in issue. It is further putforth that the petitioner was awarded certain works but there was abnormal delay in execution of the same. Certain aspects have been highlighted in the return to show that the delay has been caused because of the inefficiency of the petitioner. On the said basis it has been pointed out that the department has every right for denying the documents to the petitioner. The quality of the work executed by the petitioner is also questioned. It has been highlighted that because of the manner of functioning of the petitioner the Chief Engineer, Head of the Department, has decided not to issue tender documents to him for future work. Various averments have been made by relying on the CPWD Manual to show that supply of tender documents could be stopped on justifiable grounds.

A rejoinder affidavit has been filed by the petitioner to the counter affidavit filed by the respondents. In the said rejoinder affidavit it has been clarified that there was no fault of the petitioner alone as the respondents are also responsible for

delay caused and the same has been caused due to natural calamity, the devastating earthquake, which had shaken Jabalpur. It is putforth that the delay caused in respect of the works is solely attributed to the respondents. It is also stated that the respondent could have terminated any of the contract but they granted extension of time as they very well knew that the petitioner was not responsible for the delay caused. The use of sub-standard material by the petitioner has also been disputed. It is also putforth that the respondents deducted only 1% as penalty as they could have deducted 10% from the payment of the petitioner.

An additional return has been filed by the respondents highlighting that as per the agreement certain amount of delay could be condoned if the same was reasonable and the delay which could not be condoned and which was beyond the terms of the agreement is termed as abnormal delay. Each time while deciding the question of extension the authority has taken into consideration the reasonableness of delay and after issue of show-cause notice and after considering the reply the penalty was imposed. It has also been stated that the petitioner did not deposit the amount of penalty imposed and the same was deducted from his dues. It is also urged that the petitioner has been levied compensation for delay under Clause 2 of the agreement. Other aspects which had already been stated earlier has been reiterated.

An additional rejoinder has been filed by the petitioner clarifying that the petitioner has not used sub-standard material in the construction work. It is also putforth that the Chief Technical Examiner examines the construction with a critical eye and in normal course also the defects as have been pointed out are found in the works executed by any of the contractor and the petitioner has made good all the defects pointed out by the Chief Technical Examiner as per Annexure R-4. Other aspects have been putforth to show that the petitioner was not at fault.

I have heard Mr. R.N. Singh, learned senior counsel alongwith Mr. A. Pawar for the petitioner and Mrs. Indira Nair, learned Additional Standing Counsel for the Union of India.

It is submitted by Mr. R.N. Singh that the order passed vide Annexure P-5 by implication amounts to black listing and an order of black listing can not be passed without affording an opportunity of hearing. It is also putforth by him that the petitioner was never asked to show cause why he should not be debarred from the participating in tendering for future works. The learned senior counsel has urged that if the petitioner is not ineligible in law to receive the tender form the same can not be denied to him and as the same has happened in the obtaining factual matrix the action taken by the respondents is unsustainable.

Mrs. Nair, learned senior counsel appearing for the respondents very fairly stated that the respondent had not passed the order black listing the petitioner. It is her

submission that though the Annexure P-5 has been passed indicating that the decision has been taken not to issue tender for future work in civil construction but the petitioner is debarred to participate only in respect of the tender issued vide Annexure P-6. The learned senior counsel for the respondents submitted that if the petitioner would participate in the tender and give an offer the respondent may be compelled to accept his offer and to curb that present action has been taken.

As the learned counsel for the respondents has fairly stated that Annexure P-5 does not denote any kind of black listing I need not have to advert to the same. The learned senior counsel for the respondents would like this Court to construe the Annexure P-5 as an office order debarring the petitioner for the work for which the advertisement has been issued. In this factual backdrop the submission of Mr. Singh is that if the petitioner has not been black listed, an action can not be taken to debar him from tendering in respect of the work.

The core question that falls for consideration is whether the petitioner should be deprived from getting the tender form if he is eligible. Mrs. Nair has expressed her apprehension about future consequences. She has drawn the attention of this Court to the decision rendered in the case of Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others, . She has laid immense emphasis on Paragraph 9 of the said decision. It is note-worthy to mention here that in the said decision the Apex Court referred to its earlier decision rendered in the case of Tata Cellular v. Union of India and Ors. (1994) 6 SCC 651 : 1995 A.T.L.R. 1 and came to hold that principle of judicial review can not be denied so far as the exercise of conferral of power of State largess is concerned. It is brought to the notice of the Court that in the matter of award of contract it is to be seen whether the power has been exercised for any collateral purpose. Mrs. Nair has also commended me to the decision rendered in the case of Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, . The learned senior counsel has laid immense emphasis on Paragraph 9 which is reproduced below:--

"9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. These would be :

- (1) the price at which the other side is willing to do the work;
- (2) whether the goods or services offered are of the requisite specifications;
- (3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;
- (4) the ability of the tenderer to deliver goods or services or to do the work of

the requisite standard and quality;

(5) past experience of the tenderer and whether he has successfully completed similar work earlier;

(6) time which will be taken to deliver the goods or services; and often

(7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction."

The learned senior counsel has also referred to Paragraph 22 where in the Apex Court referred to the case of Tata Cellular (supra) and quoted Paragraph 71 of the said judgment and thereafter gave emphasis on the allowance of the certain flexibility in taking of administrative decision and on the concept of fair play on the joints. I have referred to those decisions solely for the reason that Mrs. Nair submitted that the owner is entitled to refuse to award the contract in favour of a person if his past experience is bad and in the case at hand the past experience of the respondents with the petitioner is far from being satisfactory and hence, the respondent thought it wise not to let him into fray than to allow him and not to consider his case. The aforesaid submission of Mrs. Nair does not stand to reason inasmuch if a person is eligible or entitled to receive the tender form and participate in the tendering process he cannot be deprived of the said right. If the same is not done the whole action would be arbitrary and would be hit by the equality clause as envisaged under Article 14 of the Constitution of India. Debarring a person at the very threshold because of the possibility of his ultimate rejection is not only unreasonable but an anathema to the conscience of Article 14 of the Constitution of India. The owner may incorporate certain terms and conditions at the time of inviting of tender and if such incorporation does not violate the basic essence of Article 14 of the Constitution of India, not arbitrary and reasonable, the Courts would not interfere in that arena. But in absence of such an incorporation when an intending tenderer satisfies the eligibility criteria, it would be against the concept of fair play, equality and good conscience to deny him the privilege to participate. It has to be borne in mind that supply of tender form and grant of permission to some one to participate in the tender does not necessarily mean that he will be awarded the work. The award of work by an instrumentality of the State is governed by the law laid down by the Apex Court in the decisions referred to above. The action of the instrumentalities of the State is subject to judicial review on the ground of illegality, irrationality and procedural impropriety as has been laid down by the Apex Court in the case Tata Cellular (supra). That apart the concept of public interest has also a role to play.

In view of this the submission of Mrs. Nair that the petitioner can claim the award of contract as a matter of right on certain premises is neither correct nor sound and in fact in my considered opinion is based on unwarranted apprehension.

In view of my preceding analysis, the writ petition is allowed and the order passed vide Annexure P-5 is quashed and it is directed that the tender form shall be supplied to the petitioner if he satisfies the eligibility criteria and his offer shall be considered keeping in view the law laid down by the Apex Court in the cases of Tata Cellular (supra), Asia Foundation and Construction (supra) and Raunaq International (supra). However, in the peculiar facts and circumstances of the case, there shall be no order as to costs.