
(2000) 04 MP CK 0015
In the Madhya Pradesh High Court
Case No : Writ Petition No.4223/99

Aristocraft International Pvt. Ltd.

APPELLANT

Vs

Union of India and others

RESPONDENT

Date of Decision : 03-04-2000

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227

Citation : AIR 2001 MP 99 : (2000) 2 JLJ 365 : (2001) 3 MPHT 45 : (2001) 1 MPLJ 129

Hon'ble Judges : Mr. C.K. Prasad, J

Bench : Single Bench

Advocate : Shri Vivek K. Tankha, for the Appellant; Shri R.S. Patel and Shri Ravindra Shrivastava, for the Respondent

Final Decision : Allowed

Judgement

C.K. Prasad, J.

In spite of voluminous pleading, facts relevant for decision lie in a narrow compass. The Government of India, Ministry of Finance, Department of Economic Affairs, Security Paper Mill, Hoshangabad floated global tender for supply of 40 M.Ts. of Polyester Base Vacuum Metalised Security Thread with negative demetalised transparent letters, fluorescing blue on both sides under Ultra-Violet light with firm bonding for manufacturing of Bank Note paper from manufacturers having in-house facility for the same or their authorised dealers. The notice further stated that the prescribed tender form showing detailed specification, terms and conditions can be obtained on payment of U.S. Dollars 25 by Overseas Suppliers or Rs. 1000/- by in-land suppliers in the form of demand draft or Indian Postal Order drawn in favour of the General Manager, Security Paper Mill, Hoshangabad. The completed documents with validity for 240 days were to be submitted upto 10.00 hrs. on 23-6-1999 in the office of the General Manager, Security Paper Mill, Hoshangabad. Tenders were to be opened on the same day at 16.00 hrs. in the presence of tenderers/ authorised

representatives. Clause 1.3 of the tender document inter-alia advised the tenderers to submit the tender based strictly on the terms and conditions and specification contained in the tender documents and not to stipulate any deviations. It further provided that if acceptance of the terms and conditions given in the tender document has any price implications, the same should be considered and included in the price part. However, this clause reserved the right of the Security Paper Mill to reject/accept tenders containing deviation to the terms and conditions and requirements stipulated in the tender documents. Clause 1.13 of the tender document further provided that the tenderers shall satisfy the purchasers that he possesses the necessary experience and qualification and that he has at his disposal suitable modern facilities and specialised employees to ensure that his work is of best quality and workmanship, according to the latest technology and engineering practices. Clause 12 of the tender document provides for completion of the contract within a period of 16 months from the date of issue of Letter of Intent.

Petitioner is a Private Limited Company, registered under the Indian Companies Act. In response to the tender notice, petitioner offered to supply 20 M.Ts. of Security Thread within the time limit of 16 months, as mentioned in the tender document. It is the assertion of the petitioner that respondent No. 3 made offer to supply 23 M.Ts. of Security Thread in 16 months. This assertion of the petitioner has been denied by the respondents and their stand is that the offer of respondent No. 3 was to supply 40 M.Ts. of Security Thread. Original records have been produced and from which it is apparent that respondent No. 3 had offered to supply only 25 M.Ts. of Security Thread within the delivery-schedule of 16 months. However, in the commercial bid, respondent No. 3 had actually offered to supply the entire quantity of 40 M.Ts., but with staggered delivery schedule. Thus, respondent No. 3 offered to supply 40 M.Ts. of Security Thread.

The capacity of respondent No. 3 to supply the Security Thread in terms of the tender notice was considered by the Committee, which in its Capacity Assessment Report opined that the firm as committed in the Tech-no-Commercial Tender, will be in a position to undertake the job, though the firm has no experience of registered slitting, but they have vast experience of 30 years of slitting polystyrene reels of various thickness. Further, to consider the offer of tenders, a special Tender Evaluation Committee was constituted consisting of the General Manager, Bank Note Press, as Chairman and one Deputy General Manager as also Financial Adviser-cum-Chief Accounts Officer, as its members. It took into consideration the various pros and cons of the offers of petitioner as also respondent No. 3 and ultimately recommended for splitting of the order on more than one firm at the rate offered by respondent No. 3. The Special Tender Evaluation Committee further found that the offer of respondent No. 3 is the lowest. The recommendation of Special Tender Evaluation Committee was considered by the Ministry of Finance and later decided that the entire tender quantity of 40 M.Ts. of Security Thread may be procured from respondent No. 3, but with a staggered delivery schedule.

Accordingly, by the impugned communication dated 14th September, 1999 (Annexure P-12), the Government of India, Ministry of Finance, conveyed the sanction for procurement of 40 M.Ts. of Security Thread from respondent No. 3, subject to the condition that "the supply of initial quantity of 3 M.Ts. of Security Thread before the end of February, 2000, i.e. at the rate of 1 M.Ts. per month starting from December, 1999. The order for the balance quantity of 37 M.Ts. at the rate of 2 M.Ts. per month will be placed only after the successful trial production with the initial supply". It is this order of the Government of India which is challenged by the petitioner in this writ petition, filed under Articles 226 and 227 of the Constitution of India.

Mr. Vivck Tankha appears on behalf of the petitioner. Respondent Nos. 1 and 2 are represented by Shri R.S. Patel, Central Government Standing Counsel, whereas, respondent No. 3 is represented by Shri Ravindra Shrivastava.

Mr. Tankha, appearing on behalf of the petitioner submits that the petitioner Company has experience of supplying Security Thread for about 15 years to respondent No. 2 and respondent No. 3 having no previous experience, later ought not have chosen for award of the contract. It is the stand of the petitioner that not only it has experience for supplying security thread for last about 15 years to respondent No. 2 but in order to cater to the needs of respondent No. 2, it had made heavy investment for obtaining necessary plant and machinery for the purpose of manufacturing Security Thread as desired by respondent No. 2. Its stand further is that at no point of time, it has received any complaint from respondent No. 2 as regards the quality of the Security Thread supplied by it. In this connection, Shri Tankha has drawn my attention to Clause 1.13 of the tender document which inter alia contemplates that the tenderers shall satisfy the purchaser that he possesses the necessary experience and qualification and that he has at his disposal suitable modern facilities and specialised employees to ensure that his work is of best quality and workmanship according to the latest technology and engineering practices. He has also drawn my attention to the Capacity Assessment Report of respondent No. 3 and highlights that according to the said report itself, "respondent No. 3 has no experience" of registered slitting.

A perusal of the Capacity Assessment Report reveals that "the firm as committed in the Techno-Commercial Tender will be in a position to undertake the job". It further opined that "the firm has no experience of registered slitting, but they have vast experience of 30 years of slitting polyester reels of various thickness and width". In my opinion, the Capacity Assessment Report has to be read in totality and cannot be read in isolation. According to Clause 1.13 of the tender document, tenderer was required to satisfy the purchaser that he possesses the necessary experience and qualification to ensure that his work is of best quality according to the latest technology and engineering practices. The Capacity Assessment Report clearly gives certificate to respondent No. 3 that it has past experience of 30 years of slitting polyester reels of various thread and width. Its non-experience in registered slitting has also been taken note of in the Capacity

Assessment Report and taking into consideration its experience of 30 years of slitting polyester reels, the report clearly stated that respondent No. 3 will be in a position to undertake the job.

In view of what has been stated in the Capacity Assessment Report, which has been accepted by respondent Nos. 1 & 2, it cannot be said that respondent No. 3 has no experience and as such the impugned order does not call for interference on this ground. It is further relevant here to state that offer of the petitioner was not accepted on the ground that it has no experience but on the ground that respondent No. 3 satisfied the requirement of Clause 1.13 and its price offer is the lowest. It is well settled that this Court while exercising its power of judicial review does not enter into the intrinsic merit in relation to the offers of the tenderers in matter of grant of contract as a Court of Appeal. Respondent No. 3 has been found to be in a position to undertake the job in view of its past experience of 30 years of slitting polyester reels and in the facts of the present case, same cannot be substituted by this Court as the decision of respondent Nos. 1 & 2 on this question cannot be said to be arbitrary. In view of aforesaid, action of respondent Nos. 1 & 2 in awarding contract to respondent No. 3; notwithstanding the claim of the petitioner that it has vast experience and spotless conduct, shall not entitle it to get the award as a matter of right. I negative this submission of Shri Tankha.

Shri Tankha, then, submits that according to Clause 12 of the tender document, the tenderers were required to complete the supply of Security Thread within a period of 16 months from the date of issue of letter of intent, but in deviation thereof, contract has been awarded to respondent No. 3. He points out that the offer of respondent No. 3 was never to supply Security Thread within the time stipulated in the tender document. Stand of Shri Patel and Shri Shrivastava representing respondent Nos. 1 & 2 and respondent No. 3 respectively is that according to Clause 1.3 of the tender document itself, Security Paper Mill had reserved the right to reject/accept tenders containing deviation in the terms and conditions and requirement stipulated in the tender document and in the light of same, tender of respondent No. 3 which contained deviation was accepted. In view of rival stand it is apt to reproduce the aforesaid clauses. They read as follows :--

"1.3. All amendments/revisions to tender documents issued by the Security Paper Mill, if any, must be signed and submitted alongwith the tender, the tender submitted by the tenderer shall take into account all such amendments/revisions. The tenderers are advised to submit the tender based strictly on the terms and conditions and specifications contained in the tender documents, and not to stipulate any deviations. If acceptance of the terms and conditions given in the tender document has any price implications the same should be considered and included in the price part. Security Paper Mill, Hoshangabad reserves the right to reject/accept tenders containing - deviation to the terms and conditions and requirements stipulated in the tender document." (Underlining mine)

"12. Completion Time : The completion time is the essence of the contract. The tenderers shall complete the supply of Security Thread within the period of 16 (sixteen) months from the date of issue of Letter of Intent."

It is not in controversy that respondent No. 3 has in its offer has given more time for completion of contract and has been given more time to supply Security Thread than what has been stipulated in the tender document by respondent Nos. 1 & 2. According to the Letter of Intent, respondent No. 3 was required to supply the initial quantity of 3 M.T. at the rate of 1 M.T. before the end of February, 2000 balance quantity of 37 M.Ts. is to be supplied at the rate of 2 M.Ts. per month after successful trial production with the initial supply.

Mr. Shrivastava contends that in view of Clause 1.3 of the tender document, notwithstanding the fact that offer of respondent No. 3 was in deviation of the terms and conditions of the tender document, still respondent Nos. 1 & 2 had the right to accept the same. He emphasises that clause in relation to the completion time in the tender document is a non-essential condition and its deviation shall not render the action of respondent Nos. 1 and 2 in awarding contract to respondent No. 3, illegal.

True it is that deviation in relation to non-essential terms and conditions in a tender document may not vitiate the award but the question is; what is essential or non-essential condition in the tender document. In my opinion, what are the essential or non-essential conditions cannot be defined in a straight jacket formula and no hard and fast rule can be led to ascertain the same. It shall depend upon the facts and circumstances of each case. Prescription of time in a case; viz construction of a Stadium may not be read as essential condition. However, in a case in which construction of a Stadium is being made for holding an international event, which is scheduled to be held on a fixed date, prescription of time can be said to be an essential condition. Prescription of time for supply of vehicles to the Armed forces during the peace period and in war, stand on different footing. In one case it may be said to be a non-essential condition, but on the other, it may be held to be an essential condition. How the terms in relation to time is couched in the tender document shall also go a long way to ascertain as to whether it is an essential condition or a non-essential condition.

Here in the present case, I find that the tender document in so many words has made it explicit that-- "the completion time is an essence of the contract". Supply of Security Thread is for the purpose of manufacturing Bank Note papers. Non-supply of Security Thread within the time stipulated may result into delay in manufacturing Bank Note Papers which ultimately affect printing of Bank Note in time. Consequence of non-supply of Security Thread in time is grave and serious. Respondent Nos. 1 and 2 floated global tender and naturally had expected offers from Overseas suppliers. In spite of declaration that the completion time is an essence of the contract, their contention that it is "non-essential condition" will give credence to cynics coming late to take the plea it is "Indian Standard Time". In view of the language implied in the tender document itself that the completion

time is the essence of the contract and taking into consideration factors enumerated above, I am not prepared to accept the submission of the respondents that prescription of time in the tender document is a non-essential condition. Tender of respondent No. 3 did not satisfy this essential condition. Once it is held so, the action of respondent Nos. 1 & 2 in awarding contract to respondent No. 3 is arbitrary. Reference in this connection can be made to a decision of the Supreme Court in the case at Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , wherein in Paragraph 34 of the judgment, the Apex Court held as follows :--

"34. If there was no acceptable tender from a person who satisfied the condition of eligibility, the 1st respondent could have rejected the tenders and invited fresh tenders on the basis of a less stringent standard or norm, but it could not depart from the standard or norm prescribed by it and arbitrarily accept the tender of the 4th respondents. When the 1st respondent entertained the tender of the 4th respondents even though they did not have 5 years" experience of running a IInd Class restaurant or hotel, it denied equality of opportunity to other similarly situate in the matter of tendering for the contract. There might have been other persons, in fact the appellant himself claimed to be one such person, who did not have 5 years" experience of running a Hnd Class restaurant, but who were otherwise competent to run such a restaurant and they might also have competed with the 4th respondents for obtaining the contract, but they were precluded from doing so by the condition of eligibility requiring five years" experience. The action of the 1st respondent in accepting the tender of the 4th respondents, even though they did not satisfy the prescribed condition of eligibility, was clearly discriminatory, since it excluded other persons similarly situate from tendering for the contract and it was also arbitrary and without reason. The acceptance of the tender of the 4th respondents was, in the circumstances invalid as being violative of the equality clause of the Constitution as also of the rule of administrative law inhibiting arbitrary action."

Mr. Patel as also Mr. Shrivastava submit that in the absence of malafide, larger public interest demands that award of contract to respondent No. 3 may not be interfered by this Court. In this connection, my attention has been drawn to a judgment of the Supreme Court in the case of Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others, .

"10. Therefore, though the principle of judicial review cannot be denied so far as exercise of contractual powers of Government bodies are concerned, but it is intended to prevent arbitrariness of favouritism and it is exercised in the larger public interest or if it is brought to the notice of the Court that in the matter of award of a contract power has been exercised for any collateral purpose. But on examining the facts and circumstances of the present case and on going through the records we are of the considered opinion that none of the criteria has been satisfied justifying Court's interference in the grant of contract in favour of the appellant.

Learned counsels of both the sides have further placed reliance on the decision of the Supreme Court in the case of *Tata Cellular Vs. Union of India*, , in support of their respective plea. In the said case, it has been held as follows :--

"85. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power or judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of the power will be struck down."

"86. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

Here I have found that award of contract to respondent No. 3 is in teeth of the essential condition of the tender document. From what has been held in *Asia Foundation & Construction Ltd*, (supra) and *Tata Cellular* (supra), I have no manner of doubt that the principle of judicial review would apply to the exercise of contractual power by Government bodies in order to prevent arbitrariness or favouritism. While granting contract, the Government bodies are required to adhere to the principles laid down under Article 14 of the Constitution. As held in the case of *Ramanna Dayaram Shetty* (supra), acceptance of a tender of a person not conforming to the requirement in the tender document is discriminatory and violative of Article 14 of the Constitution of India. In that view of the matter, I am of the opinion that this Court cannot shut its door and decline to exercise the power of judicial review. Action which is arbitrary and in the teeth of Article 14 of the Constitution of India cannot be said to be in larger public interest and cannot be allowed to stand on the purported ground of larger public interest. The view which I have taken finds support from a judgment of this Court in case of *M.K.S. Engineering Pvt. Ltd. Vs. State of M.P.* 2000 MPLJ 44.

Mr. Ravindra Shrivastava appearing on behalf of respondent No. 3 points out that in pursuance of the award of contract to respondent No. 3, it has already made supply of one M.T. of Security Thread and as such, at such a distance of time, any interference by this Court shall seriously jeopardise the interest of the respondents. He submits that in the case of *Ramanna Dayaram Shetty* (supra), the Supreme Court after holding that the action of the Authority was discriminatory, did not interfere with the award of the contract. From a close

reading of the judgment of the Supreme Court, referred to above, it is apparent that the Supreme Court did not interfere with the award of contract on the ground that the petitioner of the said case approached the Court more than 5 months after acceptance of the tender of the successful respondent and during the said period, the successful respondent incurred considerable expenditure. However, in the said case, itself, the Supreme Court sounded a note of caution. In the words of the Supreme Court "the position would have been different if the appellant had filed the writ petition immediately after the acceptance of the tender of the 4th respondent, but the appellant allowed a period of over 5 months to elapse during which the 4th respondent altered their position."

Here in the present case, the petitioner has approached this Court on 15-9-1999 whereas the tender of respondent No. 3 was accepted vide impugned letter dated 14-9-1999. True, it is, that disposal of the writ petition has taken some time, but delay in disposal of the case cannot be attributed to the petitioner. It is a systemic delay. Where a case stands over for arguments on account of multiplicity of business in the Court, the party cannot be allowed to be prejudiced by that delay. *Actus Curiae Neminem Gravabit*, i.e., "the act of the Court shall prejudice no man" is the maxim which guides or discretion. Hence, I am not inclined to decline the relief of the petitioner on this ground. The view which I have taken finds support from the judgment of this Court in case of *M.K.S. Engineering Ltd.* (supra).

In the result, this petition is allowed. Award of contract to respondent No. 3 is quashed. In the facts and circumstances of the case, there shall be no order as to cost.

Writ Petition allowed.