

(1995) 03 DEL CK 0060

In the Delhi High Court

Case No : Civil Writ Petition No. 200 of 1995 and Civil Miscellaneous Appeal No. 355 of 1995

Arphi Electronics Pvt. Ltd.

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 22-03-1995

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 1995 Delhi 388 : (1995) 58 DLT 181 : (1995) 33 DRJ 486

Hon'ble Judges : Dr. M.K. Sharma, J; Arun Kumar, J

Bench : Division Bench

Advocate : Arun Jaitley, Jayshree Wad, V.K. Shall, Hari Shankar, for the Appellant;

Judgement

M.K. Sharma, J.

(1) By the present writ petition the petitioners are challenging the illegal and arbitrary action on the part of the first respondent in not making proper and wide publicity of and posting to them the tender notice issued by the Ministry of Welfare inviting tenders from manufacturers/companies of hearing aids for purchase by voluntary organizations/registered societies etc. under the Government of India scheme of assistance to disabled persons for purchase/lifting of aids/appliances. The said tender notice was issued on 2.9.1994 with the information that the tenders should reach the office by 12.00 noon of 10.10.1994.

(2) Briefly stated, the facts of the present writ petition are that the first petitioner are in the business of manufacturing hearing aids for the last about 40 years and are pioneers in the said industry and is the holder of 70% of the market share for the said product. Under the scheme of assistance to disabled persons, the Ministry of Welfare purchases fittings of aids/appliances which include walking sticks for the blind, tricycles for physically handicapped, artificial limbs for physically disabled persons as well as hearing aids for the deaf. For making aforesaid purchases the Ministry of Welfare invites yearly tenders for a

rate contract and the practice followed by the Ministry of Welfare in that regard since 1987 is to advertise the invitation to tender in newspapers as well as to communicate by individual letters addressed to the manufacturers which are not more than 6 in number including the petitioners. It is stated that the normal practice of the first respondent was to mail the tender notices and also to publicise the tender notices in the newspapers. Accordingly the petitioners were expecting to receive the tender call notice in the normal course by May for the year 1985-86. However, the petitioners did not hear from the first respondent and subsequently came to learn that the first respondent had contrary to their usual practice advertised in the newspapers and had mailed tender call notices to some of the manufacturers only excluding the petitioners. Thereafter on coming to know about the aforesaid advertisement when the representative of the first petitioner on 10.10.1994 went to the office of the first respondent to lodge a protest against the alleged arbitrary practice of the first respondent of not inviting it to tender, the said representative was not allowed to participate in the proceedings. Hence the present writ petition has been filed.

(3) Both the respondents No.1 & 2 have contested the present writ petition by filing the counter affidavit, wherein it has been stated that for the financial year 1995-96 commencing on 1.4.1995 the Directorate of Audio and Visual Publicity (Ministry of Information and Broadcasting) Government of India were requested to publish an open advertisement of the tender notice and the said advertisement was accordingly published in 12 leading newspapers of the country in English, Hindi, Oriya and Marathi languages. Besides the six manufacturers including the petitioners were also informed about the publishing of tender notice through the letter dated 2.9.1994 which were posted to the petitioners by ordinary process as in the previous years about the tender notice. It is further stated that the petitioner No.1 is maintaining a branch office in Delhi which is in geographical proximity of respondent No.1 and even otherwise the petitioner being fully conversant with the procedure should have kept themselves informed of the developments which are an annual feature. Accordingly, it was stated in both the counter affidavits that there are no reasonable grounds for seeking relief under Article 226 of the Constitution of India as no fundamental or statutory right of the petitioners has been violated.

(4) Mr. Arun Jaitley, the learned counsel appearing for the petitioner submitted before us that it was the usual practice of the respondent No.1 to send tender notices to the petitioners since 1987 but for reasons best known to the respondents for the present year they sought to issue advertisement only in such newspapers which almost had no circulation in Bombay where the principal office of the petitioner No.1 is located. He further submitted that for this year individual communication was also not sent to the petitioners as was done in the earlier years about the publication. According to him, it is thus apparent that the aforesaid actions on the part of the first respondent is to keep out, exclude and isolate the petitioners from the competition with the sole intention of avoiding competitive bidding and competitive tendering by the manufacturers. The

learned counsel for the petitioner has further drawn our attention to Annexures A & B to the writ petition in order to substantiate his submissions that such individual intimation was sent to the petitioners for the earlier years and on the basis thereof further submitted before us that the dates of the said letters would prove and establish that the notice inviting tender was although an annual feature but not at a uniform or fixed timing.

(5) The learned counsel for the respondents on the other hand submitted that since the advertisements have been widely published in the 12 leading newspapers it could well be presumed that the petitioners had knowledge about the aforesaid notice inviting tender, apart from the fact that individual intimation was also sent to the petitioner requesting for their participation for the present year. The learned counsel for the respondents have further drawn our attention to the ratio of the decision in the case of Tata Cellular Vs. Union of India, .

(6) We have carefully considered the rival submissions of the learned counsel for the parties. So far as the publication of the notice inviting tender in the newspapers is concerned we find that the said publication was made in 12 newspapers. However, but so far as Bombay is concerned, where the office of petitioner No.1 is situate it was published only in Free Press Journals Bombay Edition which only has a limited circulation. We further find that although such notice was published in the Indian Express in different city editions but surprisingly the same was not published in the Bombay edition of the Indian Express. On the other hand the individual intimation which was stated to have been sent to the petitioners on 2.9.1994 appears to have been sent by ordinary post as against which the definite allegations of the petitioners are that they have not received any such individual intimation from the respondent No.1. Since admittedly, the aforesaid individual intimation was sent only by ordinary post there was no scope for drawing any presumption in law about service of such letters on the petitioners, which could have been possible if the said letters were sent to the petitioners by registered post. When a particular process is followed and pursued by the respondent No.1, it was also their obligation to see that the process has the logical and effective end. In view of the aforesaid, we also cannot infer the factum of knowledge of the petitioners in respect of the publication of the tender notice, although they were intending tenderers. We also see no reason as to why the petitioners, particularly the petitioner No.1, being the holder of 70% of the market share of the said product would not have submitted his tender as against the aforesaid tender notice if he had the knowledge of issuance/publication of such notice inviting tender. We are of the opinion that in case the petitioners had the knowledge about such invitation to tender they would not have ventured to take a commercially suicidal risk by not submitting their tender inspire of their knowledge.

(7) In Tata Cellular case (supra.) the Apex Court has held that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism and that the judicial review

is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made but the decision making process itself.

(8) As the manner in which the tender call notice was published without giving proper and wide publicity and the individual intimation sent to the manufacturers having not been proved to have been served on the petitioners, we are of the opinion that the procedure followed in awarding the contract was not in accordance with law and Therefore invalid.

(9) Accordingly, we allow this petition and set aside the tender call notices issued on 2.9.1994 and direct the respondent No.1 to issue a fresh tender cal notice and also issue individual invitations to all the manufacturers as was done for the earlier years through registered post and thereafter to proceed to award the contract in accordance with law. We make it clear that during the interim period the respondent No.1 shall be free to award the contract to the lowest tenderer for this year or to the petitioner who has a subsisting contract for supply of such hearing aids for the current year ending on 31.3.1995. With the aforesaid observations this writ petition is allowed. No costs. Copies of this order may be given to the counsel for the parties dusty.