
(2006) 03 P&H CK 0062
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 138 of 2006

Ashok Kumar

APPELLANT

Vs

Food Corporation of India and Another

RESPONDENT

Date of Decision : 02-03-2006

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2006) 143 PLR 698 : (2006) 2 RCR(Civil) 633

Hon'ble Judges : D.K. Jain, C.J.;Surya Kant, J

Bench : Division Bench

Advocate : Gurminder Singh, for the Appellant; H.S. Dhandi and P.S. Patwalia and Vivek Sharma, for the Respondent

Final Decision : Dismissed

Judgement

D.K. Jain, C.J.—Rule DB,

2. Having regard to the nature of the controversy, involved in the petition, we have taken up the matter for final disposal at the motion hearing stage itself.

3. In these proceedings, under Article 226 of the Constitution of India, the petitioner questions the tender process and the award of contract of handling and transport of the stocks of the Food Corporation of India (for short, "the FCI) at Balachaur, in District Nawanshehar, for the years 2005-2007 to respondent N.o.2. The petitioner has prayed for issuance of a writ in the nature of certiorari quashing the said action with direction to the FCI to consider petitioner's bid and award the said contract in his favour.

4. Some time in the month of October, 2005, the FCI issued a Notice Inviting Tender (for short, "the NIT") for the aforementioned work. The tendering was to be through two bid process, namely, the technical bid and the price bid. As per Clause 7(g) of the tender document, the technical bid was to be opened first in the presence of the tenders on the specified date and time. The price bid of only those tenderer was to be opened, whose technical bid was found to be

acceptable. The time and date of opening of the price bid was to be fixed later. Pursuant to the NIT, the petitioner submitted his bid. The technical bids were opened on 13.10.2005, when the petitioner and two other tenderers, including respondent No. 2, were declared as qualified. Consequently, the three price bids were opened on 25.12.2005. In the final list, the petitioner emerged as the second lowest bidder. Respondent No. 2 was adjudged as the lowest bidder. However, on 27.12.2005, the petitioner made a representation to the FCI objecting to the opening of the price bid of respondent No. 1 on the ground that his earnest money in respect of the earlier contract for the year 2003-2005 having been forfeited, as per the conditions stipulated in the NIT, he was to be disqualified at the threshold. It was thus claimed that the petitioner, being the lowest qualified bidder, the contract had to be awarded to him. However, the representation of the petitioner did not find favour with the FCI. Resultantly, the same was rejected on 29.12.2005, whereupon a legal notice on behalf of the petitioner was issued to the FCI, but it also did not evoke any response. Hence, the present writ petition.

5. On notice of motion being issued, returns have been filed on behalf of both the respondents. In the written statement, filed on behalf of the FCI, it is stated that since in the year 2003-2005, there was only single bid system and in that tender document, there was no stipulation in regard to the debarring of a bidder from participating in tendering in future on account of forfeiture of earnest money, respondent No. 2 could not be disqualified on that score. It is pleaded that the representation, made by the petitioner, was duly considered before accepting the tender, submitted by respondent No. 2, who otherwise was the lowest tenderer in the present tender enquiry.

6. In the written statement filed on behalf of respondent No. 2 the successful tenderer, certain preliminary objections to the maintainability of the writ petition have been raised. It is alleged that the writ petitioner is a resident, of Dubai for the last more than 8 months and has no personal interest in the tender the technical bid opened on 13.10.2005, but the petitioner did not raise any objection till the price bids were opened on 25.12.2005 and, therefore, having taken a calculated chance, he is now estopped from raising such an objection. It is explained that insofar as the tender for the year 2003 was concerned, in spite of the fact that the said respondent was not the lowest tenderer, yet the tender was likely to be awarded to him, but before it could actually be offered to him, he withdrew his bid. It is thus, pleaded that it was not a case of forfeiture of earnest money by the FCI after the award of the contract falling within the ambit of the tender conditions. It is also stated that the respondent has already commenced work under the contract on 3.1.2006.

7. Mr. Gurminder Singh, learned Counsel appearing for the petitioner making a frontal attack on the impugned decision has submitted that all the tender conditions including the note appended thereto, constituted a binding norm between the parties and the FCI had no option but to adhere to these conditions

scrupulously. It is submitted that in view of the note appended to the terms and conditions of the NIT, respondent No. 2 had to be disqualified at threshold as the earnest money deposited by him had been forfeited by the FCI during the award of contract for the year 2003-05. Learned counsel has argued that respondent No. 2, being disqualified on that count, being the second lowest tender the contract ought to have been awarded to the petitioner. Learned counsel has strenuously urged that in awarding the tender in favour of respondent No. 2 the FCI has acted arbitrarily and capriciously and, therefore, its decision deserves to be set aside.

8. Per contra, Mr. P.S. Patwalia, learned senior counsel appearing for the successful tenderer, has submitted that there being no question of forfeiture of the earnest money, deposited by respondent No. 2 against the bid in respect of the earlier year, the stipulation in the note appended to the NIT was not attracted. Learned senior counsel has been at pains to explain that the term "forfeiture" implies something more than mere retention of money, which was the case here. In support of the proposition, learned senior counsel has placed reliance on a decision of the Supreme Court in *R.S. Joshi, Sales Tax Officer, Gujarat and Others Vs. Ajit Mills Limited and Another*, . Learned senior counsel would also urge that having failed to raise any objection about the eligibility of respondent No. 2 at the time of opening of the technical bid in the presence of all the bidders on 13.10.2005, the petitioner is now estopped from raising the controversy after opening of the price bid when the bid of respondent no.2 had been adjudged as the lowest. In support of the proposition, reliance is placed on *Madcm Lal v. State of Jammu & Kashmir 1995(2) S.C.T. 880 J&K*.

9. Mr. Dhandi, learned Counsel appearing for the FC1 has also urged that the stipulation in the NIT, pressed into service by the petitioner, would apply prospectively and not in respect of those tenderers, who had committed some default in the earlier bidding process.

10. In the re-joinder, Mr. Gurminder Singh has submitted that like in the earlier NIT, there was no clause for retention of any money, it had to be only a forfeiture. In support of the proposition that there is no estoppel against the statute, reliance is placed on a decision of the Supreme Court in *Union Territory, Chandigarh Admn. and others Vs. Managing Society, Goswami, GDSDC*,

11. Before we advert to the rival submissions it would be necessary to notice a few broad parameters which may be borne in mind while exercising the power of judicial review of an administrative decision particularly in the award of contracts. It has been repeatedly laid down in several decisions that award of contract, by a State agency, is essentially a commercial transaction and the mode of entering into contract can be chosen by such State agency by fixing such terms of invitation to tender as are appropriate. This freedom to contract presupposes a certain "free play in the joints". It is only the decision-making process culminating in the award of contract, however, which is subject to judicial scrutiny, where Courts can interdict the action of the State agency, if it is found

to be vitiated by illegality mala fides, unreasonableness or arbitrariness. (See, Tata Cellular v. Union of India (1994) 6 S.C.C. 651.

12. It is true that in Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, taking note of various earlier decisions, including Tata Cellular Case (supra), their Lordships of the Supreme Court have observed that the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. (Also see Union of India and Others Vs. Dinesh Engineering Corporation and Another etc., , Similarly, in West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others, the Supreme Court reiterated that in order to maintain the sanctity and integrity of process of tender/bid and also award of a contract, adherence to the instructions cannot be given a go-bye by branding it as a pedantic approach, otherwise it will encourage and provide scope for discrimination, arbitrariness and favouritism, which are totally opposed to the rule of law and our constitutional values. Nevertheless, very recently in Master Marine Services Pvt. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and Another, , the Apex Court, while observing that the principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism, has cautioned that there are inherent limitations in exercise of that power of judicial review. The modern trend points to judicial restraint in reviewing administrative action, the State must have freedom of contract. A fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. Even when some defect is found in the decision making process the Court must exercise its discretionary powers under Articles 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out a legal point. The administrative decision must not only be tested by the application of "Wednesbury principles" of reasonableness but must be free from arbitrariness not affected by bias or actuated by mala fides.

13. Thus, the prime question, which arises for consideration is as to whether or not the decision of the FCI to award the contract to respondent No. 2, could be said to be arbitrary or unreasonable, warranting interference in judicial review on the touch-stone of the aforementioned broad principles?

14. In order to answer the question, it would be necessary to briefly notice the relevant terms and conditions in the NIT, which have been the subject-matter of arguments in these proceedings. These are as under:

2. Whether your firm/company is blacklisted by FCI or any other Public Sector/ Govt./Quasi-Govt. Organization/any other client. Yes/No

3. Whether your contract was terminated before expiry of contract period or Security Deposit/EMD forfeited by FCI or any other public sector/Govt.quasi-Govt. Organization/any other client Yes/No.

4. Whether proprietor/partner/Director (as applicable) has been prosecuted by

any judicial court for any criminal breach of trust. Yes/No

5. DETAILS OF SISTER CONCERNS

(a) Name & Address.

(b) Activities engaged in by Sister Concern

(c) Names, address & Telephone Nos. of Proprietors/Directors/Partners of Sister Concern.

Note: (i) The Blacklisted parties by FCI or Govt/Quasi Govt. Organizations will not be qualified.

(ii) The parties whose EMD is forfeited by FCI will not be qualified.

(iii) FCI reserves the right not to consider parties having any dispute with FCI in order to protect its interest.

15. It is note (ii) which is at the center stage of the entire controversy in the case. It contemplates that if the earnest money deposited by a party has been forfeited by the FCI then that party will not qualify for consideration. It is manifestly clear from the said clause, read with the requirement of furnishing of information against column (3) of the tender document that forfeiture of the earnest money has to be in relation to the past dealings of a party with the FCI and not in connection with the future conduct of the bidder under the present NIT, as is sought to be pleaded by learned Counsel for the FCI. Admittedly, in the instant case, earnest money deposited by respondent No. 2 in respect of the last tender was forfeited by the FCI. In these proceedings, we cannot go into the question whether the retention, the expression used by learned Counsel for respondent No. 2, of earnest money by the FCI deposited by respondent No. 2 against an earlier tender enquiry, tantamount to "forfeiture" within the meaning of the aforeappended note in the NIT, a proposition vehemently urged by learned senior counsel for respondent No. 2. The symbolic logic for this view is that in these proceedings, there is no lies between the FCI and respondent No. 2 insofar as the earlier tender conditions are concerned. Therefore, we have no option but to proceed on the basis that the earnest money deposited by respondent No. 2 was forfeited by the FCI and that being so, the inescapable conclusion would be that note (ii) above stood attracted insofar as the bid of respondent No. 2 was concerned. Consequently, we reject the stand of the respondents in this behalf.

16. Having come to the conclusion, the next question for consideration is as to whether under the given circumstances, the decision of the FCI not to disqualify respondent No. 2, in terms of the note, could be characterized as arbitrary or irrational warranting interdiction and cancellation of the subject-tender awarded in his favour?

17. To the question, it would be necessary to examine the "decision making process" and the manner in which petitioner's representation, dated 25.12.2005, was dealt with. In deference to our orders the original file has been produced by

the FCI. The following two notings in the file are relevant and for the sake of ready reference, these are extracted hereunder:

Noting dated 29.12.2005.

Before the acceptance is conveyed, it is submitted that Sh. Nand Lal son of Sh. Lachhman Dass, attorney of tenderer - Ashok Kumar son of Sh. Nand Lal made a complaint dated 27.12.05 (placed below) against Sh. Dharam Chand son of Sh. Ram Lal stating that the concerned party has earlier resiled and his earnest money stands forfeited as such cannot participate in the TE by requesting to forfeit his EM.

In this connection, it is stated that the position has been checked from the record wherein it is observed that during the TE for HTC HSP in 2003 when a single bid system was existing, the said party has resiled from his offer and his EM stands forfeited. But there is no such clause in the old tender form (F/X) in the para (EM) that the parties who resile from the contract cannot participate in future TE. In view of the forgoing position, no action on the complaint is required at this stage since the TE under finalization is having two bid system and we may issue acceptance telegram to Sh. Dharam Chand son of Sh. Ram Lal being the lowest tenderer in the interest of corpn., as duly approved vide note para 51 and 52/ ante.

Noting dated 3.1.2006.

The complaint is nothing more than an attempt to monopolize the centres to get a higher rate for TC/HTC work. By this way, the attorney of the second lowest tenderer Sh. Nand Lal is trying to ensure that no new tenderer should participate in the tender inquiry and there should not be any competition as his chosen center.

While getting an opportunity to quote the rate, the complainant has quoted an exorbitant rate of 223% ASOR with a percentage increase of 32.9% and 39.2% over the outgoing rate for handling and transportation work respectively while the lowest tenderer has quoted the rate of 148% ASOR with a percentage increase of 2.06% and 5.96% over the outgoing rate for handling and transportation respectively. Therefore, keeping in view the above facts, we should not give any cognizance to this complaint and should issue the acceptance letter to the lowest tenderer Sh. Dharam Chand for his quoted rate of 148% ASOR as proposed by the Operating Division at Note Para 53.

18. Having examined the matter in the light of the aforementioned notings, we are of the view that although the FCI has failed to scrupulously adhere to the conditions stipulated in note (ii) of the NIT, yet its decision not to disqualify respondent No. 2 and award the contract in his favour cannot be said to be arbitrary or capricious warranting our interference in exercise of the power of judicial review. Though in the light of our view on the scope of afore-extracted note (ii), the stand of the FCI as reflected in office note dated 29.12.2005 may not be very so

sound, nevertheless, we find it difficult to hold that the impugned decision is " so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it" and thus, it suffers from Wednesbury unreasonableness, as analyzed by Lord Diplock in Council of Civil Service Union v. Minister for the Civil Service 1984(3) All.E.R. 935, warranting interference in judicial review. We may, however, hasten to add that our opinion on the construction of note (ii) above is purely incidental for the purpose of this writ petition and shall not work against respondent No. 2 in any other tender enquiry and his bid, if any, shall be evaluated strictly in accordance with the terms and conditions of that NIT, uninfluenced by any observation in this judgment.

19. For the view we have taken above, we deem it unnecessary to go into the merits of the preliminary objections raised on behalf of respondent No. 2 in regard to the maintainability of the writ petition.

20. For the foregoing reasons, we are of the considered view that though the FCI has failed to strictly adhere to the tender conditions, yet its decision to award contract to respondent No. 2 goes beyond the scope of judicial review, as elucidated in the aforementioned decision of the Apex Court. In the final analysis, therefore, we do not find any merit in the writ petition and the same is dismissed accordingly. Rule is discharged. However, on the facts and in the circumstances of the case, there shall be no order as to costs.