(2004) 06 GAU CK 0037

In the Gauhati High Court

Case No : Writ Petition (C) No. 7197 of 2003

Assam Conductors and Cables Manufacturers'' Association and Others	APPELLANT
Vs	
Assam State Electricity Board and Others	RESPONDENT

Date of Decision : 18-06-2004

Acts Referred:
Constitution of India, 1950 — Article 12
Electricity Act, 2003 — Section 108, 2, 82, 82(1), 83

Citation : (2005) 3 GLR 772 : (2005) GLT 757 Supp

Hon'ble Judges : P.G. Agarwal, J

Bench : Single Bench

Advocate : S.P. Roy, D. Nandi, N. Alam, K. Rajbongshi and B.R. Das, for the Appellant; B.D. Das and H. Roy, for the Respondent

Final Decision : Dismissed

Judgement

P.G. Agarwal, J.—The petitioner, Assam Conductors & Cables Manufacturers Association, is a registered Society under the Societies Registration Act, and the members of the Association are the manufacturers of Conductors and Cables, transformers, PSC Poles in the State of Assam. The petitioner has challenged the Tender Notice No. 171/02 dated 2.10.2002, issued by the Chief Engineer (M), ASEB for alleged violation of the provision of the Assam Preferential Stores Purchase Act, 1989, for short ''the 1989 Act''.

2. The case of the petitioners, in brief, is that under the 1989 Act, PSC poles, cables, conductors, distribution transformers are reserved items for S.S.I, units of Assam and 23 members of the Association are involved in the manufacturing of the said items. The respondent - ASEB, vide Tender Notice No. 171/02 dated 2.10.2002, invited tenders from the Turn Key Conductors for implementation of the work packages, mentioned therein, which are meant for Accelerated Power Development, and Reform Programme (hereinafter referred to as "APDRP'') under the Ministry of Power, Government of India. The entire fund is made

available by the Union of India and ASEB is the implementing authority. The issuance of the said Tender Notice was challenged by the petitioners in W.P.(C) 8095 OF 2002 and the said case was disposed of by this Court, vide order dated 17.12.2002, and the relevant portion of the order reads as follows :

Mr. Das, the learned Counsel for the Board submitted that the Board has no contemplation to place any order in respect, of the above 4 (four) items as well as other items as per provisions of the Act of 1989 with any supplier other than the small scale industries registered in the Stale of Assam. Mr. Das further clarified that the Board will undertake purchase strictly in accordance with the provisions of the Assam Preferential Stores Purchase Act, 1989. Mr. Das further pointed out that this has also been stipulated in Clause 3.6 of the NIT (Annexure-44).

The writ petition is disposed, of with the direction, that the respondent Board shall make no deviation from the provisions of the aforesaid Act while making purchase of specified items mentioned before and all orders with regard to such items be placed with the small scale industrial units registered, in the State of Assam only.

3. The case of the petitioners is that after the said order, the respondent ASEB recalled the earlier tender and issued fresh tender for getting the work done on turn key basis and this according to the petitioners, is violative of the direction of this Court and the provisions of the 1989 Act. The petitioners have, therefore, prayed for cancellation of the NIT/ for excluding the 4 (four) items, PSC poles, PVC cables, conductors and destitution transformers from the turn key package works. It is submitted by Sri "Roy learned Counsel for the petitioners that the petitioners. Association shall have no grievance if these items are reserved for S.S.I. Units to be purchased by the ASEB against the said Turn Key Work and the payment is released to them by the ASEB.

4. The respondent-ASEB has filed an affidavit-in-opposition staling, inter aha, that the APDRP was approved by the Govt. of India, Ministry of Power, for renovation, modernisation, up gradation, extension of old Power plants and strengthening of sub-transmission & distribution network, including energy billing process and meter leading, with a concession of 90% as grant and 10% as loan for implementing the project in the State of Assam. M/s. National Productivity Council was appointed as Adviser-cum-Consultant and M/s. Powergrid Corporation India Ltd. as Supervisory Consultant and, thereafter, an agreement was signed on 26.7.2002 between the Govt. of India and the ASEB. It is stated that in the matter of APDRP work the respondent-ASEB has been directed to adopt turn-key basis. concept and, as such, the turn-key tenders were floated. This was disputed by the petitioners and they have referred to Clause 6.1(h) wherein it is provided that for APDRP and non-APDRP works to be taken up, the Beneficiary (in this case, ASEB) may adopt turnkey packaging concept or shall evolve a rate contract system for equipments of repetitive nature, adopting the standard specifications, so that the circles CEOs are able to operate the rate

contract for procurement of above equipments to meet the respective project implementation schedules. Learned Standing Counsel for the respondent-ASEB, on the other hand, has referred to subsequent office Memorandum dated 11th June, 2003, issued by the Govt. of India, Ministry of Power, wherein it has been state :

Implementation: SEBs/State Utilities shall implement projects sanctioned under this programme on turnkey basis through pre-qualified turnkey contractors selected on a completive basis to ensure quality and expeditious implementation.

5. Thus, we find that at the time of agreement, the Govt. of India gave an option to the ASEB to implement the project either by way of turnkey concept or by the rate contract system but subsequently, on the advice, the ASEB was asked to go for turn-key basis for better implementation. The petitioners Association, however, prays that the concept of turnkey should be avoided and the ASEB should adopt the rate contract basis. It is also submitted that in case of rural electrification, the ASEB has adopted rate contract basis and hence, the same uniform system should be adopted for other works also. The petitioners'' Association, representing several S.S.I. Units, manufacturing some of the items required for the project, can not impose their will or choice as to how a particular project is to be implemented or not. The Ministry of Power, which has funded the entire project has given the choice to the ASEB and subsequently advised them to go for turn-key system. Hence, the decision was to be taken by the ASEB and not by the S.S.I. Units. Once the ASEB has taken decision that ASEB shall complete the work on turn-key basis in some sector and rate contract basis in other sectors, no fault can be found in such a decision and no interference is called for.

6. Mr. Roy, learned Counsel for the petitioner has also submitted that in this case the ASEB has deviated from the direction of the Government of Assam by not implementing the direction issued by the Minister, Power etc., Government of Assam, dated 15th February, 2003, Annexure-16, which reads as follows :

I am forwarding to you a representation to the Government by the Assam Conductor Manufacturer''s Association and the Assam Transformer Manufacturer''s Association enclosing various Tender Notices of ASEB and the Hon''ble High Court''s pre-emptory direction to ASEB to purchase specified items from local manufacturers only as per provisions of the APSP Act, as those have been so reserved by the Government of Assam under the said Act. It is the laid down policy of the Government of Assam and the ASEB in no case can deviate from this statutorily mandated Government policy. In view of the clear and positive order of the Hon''ble High Court dated 17.12.2002 together with other valid fiscal points raised in the representation, you are hereby required and directed immediately to modify/amend the Tender Notice No. 171/02 and 173/02 suitably and take action for purchasing of the four reserved items by the Board as per the APSP Act and make over those items to the would be Turn-key Contractors.

Completion of compliance of action by you in this regard may be intimated to my office.

7. Learned counsel has drawn our attention to Section 108 of the Electricity act, 2003 to submit that the Board is bound to follow the direction by the State Government Section 108 of the Electricity Act, 2003 reads as follows :

108. Directions by State Government.-- (1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.

(2) If any question arises as to whether any such direction relates to a matter of policy involving public interest, the decision of the State Government thereon shares al be final."

The ''State Commission'', mention in Section 108 of the Electricity Act, 2003, has been defined under Clause (64) of Section 2 of the said Act, which reads as follows :

"State Commissions" means the State Electricity Regulatory Commission constituted under Sub-section (1) of Section 82 and includes a Joint Commission constituted under Sub-section (1) of Section 83.

8. Thus, we find that Section 108 does not a apply to the Board. Moreover, from the reading of Annexure-46, as quoted above, it does not amount to direction of the Government as per the Assam Rules of Executive Business, 1968.

9. In view of the materials available on record, we are of the view that whether a particular work or project is to be implemented or carried out as per turn-key system or work-contract system, the decision is to be taken by the Assam State Electricity Board only in accordance with the rules, regulations and guidelines and as per the Government of India circulars, directives, if any, and for the vested interest of the ASEB. The grievance of the petitioners against getting the work executed on turn-key system is regarding the alleged violation of the 1989 Act, which provides safeguard to the S.S.I. Units manufacturing those items. So far the implementation of the projects are concerned, learned Standing Counsel for the respondent - ASEB has submitted that whenever any of these reserved items are purchased by the ASEB, they fully comply with the provisions of 1989 Act and the assurance given by the Counsel in the earlier writ petition, re-iterated in other writ, petitions, have never been violated. The learned Counsel for the petitioners has also not alleged any violation on the part of ASEB in the matter of purchases under the rate contract system. So far the purchases under the turn-key basis is concerned, it is submitted by Shri B.D. Das, learned Counsel appearing for the ASEB that the provisions of the 1989 Act regarding preferential store purchases does not apply to the turn key basis projects of ASEB, as the purchaser is not the ASEB. Accordingly, in the works executed through the turnkey basis, it is the Contractors who is to make all purchases and execute the works. Learned counsel for the respondent - ASEB has also referred to a decision

of this Court dated 27.6.2003 passed in W.P.(C) 4933/ 2003, wherein in the writ petition, against the respondent, it was held that the respondent - ASEB shall not deviate from the provisions of the Asam Preferential Stores Purchase Act, 1989, while making the . purchases except in respect of turn key job. Thus, the turn-key job are not covered by the 1989 Act. This is mainly the reason for which the petitioners'' Association is pressing that all works under the ASEB be executed under the rate contract basis.

10. At this stage, Mr. Das has submitted that the Board took note of the various representations made by the petitioners'' Association and it was provided in the turn-key contract work that the above mentioned four items shall be purchased by the Contractors from the S.S.I. Units manufacturing these items in the State of Assam and as a matter of fact, the Contractors have been granted an additional amount of 5 1/2% on these items, if they are purchased from the S.S.I. Units of Assam, which goes to show that the Board has agreed to incur additional expenditure to the tune of 5 1/2% to facilitate the purchase of these items through the local manufacturers.

11. Shri Roy, however, submits that the petitioners'' Association desires that these reserved items may be purchased by the ASEB and handed over to the turn-key Contractors and the payment may be released by the ASEB. It is apprehended that if the goods are supplied directly to those Contractors, manufacturers may not get the payment or the manufacturers may be ditched. This has been controverted by Mr. Das, learned Standing counsel for the ASEB, who has stated that the ASEB is ready and willing to guarantee the payment, as it is ASEB, who will be releasing the contract amount and they can ensure that the payment to the manufacturers is made by these turn-key Contractors. From the trend of argument, we find that the petitioners'' Association is not apprehensive of the bad debt, but they want to take the benefit of the provisions of the Payment of Interest on Delayed Payment Act, which is applicable in case of purchases made by the ASEB, but which is not applicable in case of purchases made by the turn-key job Contractors. In these days of perfect competitive market, the State Electricity Board, which is deemed to be a State, under Article 12 of the Constitution of India, cannot be saddled with such unwarranted liabilities, merely, because it happen to be a State functionary. The money, they are handling, is a public money and is meant for the benefits of everyone.

12. The other apprehension of the petitioners'' Association is that there are, as many as, 23 manufacturers and whenever articles are purchased by the ASEB on rate contract basis, orders are placed to all these manufacturers equally/on the basis of their capacity, but if the choice is left to the turn-key Contractors, they may not place the orders with al the S.S.I, manufacturers. The private purchaser cannot be forced to purchase goods from a certain shop; they are at liberty to choose the quality, price and all other factors, which dictates the matter, when the purchaser goes to market.

13. In a recent case of Directorate of Education and Others Vs. Educomp

Datamatics Ltd. and Others, the appellant-petitioner has held :

The point as to the extent to judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by this Court in Tata Cellular v. Union of India (1994 (6) SCC 651). After examining the entire case law the following principles have been reduced.

94. The principles deducible from the above are :

(1) The modern trend points to judicial restraint in administrative action.

(2) The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision. Without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract., normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

10. In Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, , this Court observed :

The award of a contract, whether it is by a private party or by a public body or the State, it is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract, It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But 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. Though that decision is not amenable to judicial review, the Court can examine the decision-making process and interference if it is bound (sic) vitiated by mala fides, unreasonableness and arbitrariness.

11. This principle was again re-stated by this Court in M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, It was held that the terms and conditions in the tender are prescribed by the Government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to-prescribe the terms and conditions of the tender. It is not for the Courts to say whether the conditions prescribed in the tender under considerations were better than the one prescribed in the earlier tender invitations.

12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The Courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The Courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The Courts can interfered only if the policy decision is arbitrary, discriminatory or mala fide."

13. As a matter of policy Government took a conscious decision to deal with one firm having financial capacity to take up such a big project instead of dealing with multiple small companies which is a relevant consideration while awarding such a big project. Moreover, it was for the authority to set the terms of the tender. The Courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. While exercising the power of judicial review of the terms of the tender notice the Court cannot say that the terms of the earlier tender notice would serve the purpose sought to be achieved better than the terms of tender notice under consideration and order change in them, unless it is of the opinion that the terms were either arbitrary or discriminatory or actuated by malice. The provision of the terms inviting tenders from firms having a turnover of more than Rs. 20 crores (sic) has not been shown to be either arbitrary or discriminatory or actuated by malice.

14. In view of the foregoing discussions of the relevant principles of law, governing the matter, we hold that there is no merit in this writ petition and the writ petition is liable to be dismissed, which we do hereby. The petitioners'' Association is, however, at liberty to approach the acquire to safeguard their interests, in case they have supplied goods to the Contractors executing the turn-key jobs under the ASEB.

The writ petition stand dismissed.

