

(2014) 04 BOM CK 0136
In the Bombay High Court
Case No : Writ Petition No. 3196/2013

Aurangabad Electrical Contractors Association, Electrical Contractors Association of Maharashtra and Federation of Electrical Contractors Association of Maharashtra APPELLANT

Vs

The State of Maharashtra RESPONDENT

Date of Decision : 10-04-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)(g), 21

Citation : (2015) 1 MhLj 182

Hon'ble Judges : R.M. Borde, J;A.M. Badar, J

Bench : Division Bench

Advocate : Pradeep Deshmukh, Advocate h/f Shri H.A. Joshi, Advocate for the Appellant; K.G. Patil, AGP, Advocate for the Respondent

Judgement

A.M. Badar, J.—Heard learned counsel for the parties. Rule. Rule is made returnable forthwith and with consent of learned counsel for the parties, the petition is taken up for final hearing. By the instant petition, petitioners, who are associations of electrical contractors, are praying for setting aside Government resolution bearing No. CAT-1097/693/building-2 dated 27.1.2004 (Exhibit A) and Government circular No. CAT-03/11/CN/109/building-2 dated 24.3.2011 (Exhibit B) issued by Public Works Department of the respondent-State of Maharashtra.

2. By the impugned Government resolution dated 27.1.2004, the State Government has resolved that composite tender for civil and electrical work needs to be invited for construction of buildings costing Rs. 1/- crore or more and by circular dated 24.3.2011, the Public Works Department of the State, after noting that the provisions of Government resolution dated 27.1.2004 are not being followed by giving excuse that estimate of electrical work is not received in time, has directed the officers of the Public Works Department to follow the said Government resolution.

3. The learned counsel for petitioners vehemently argued that by issuing the

impugned Government resolution dated 27.1.2004, the State Government has violated the right of electrical contractors to compete and the Government resolution as well as the circular issued by the State is violative of the provisions of Articles 14 and 19(1)(g) of the Constitution of India. According to the learned counsel for petitioners, action of the State in issuing a single tender for civil as well as electrical work of the project has virtually reduced the electrical contractors to the position of mere subcontractor of the main civil contractor and such action is discriminatory. By such composite tender, there will not be proper competition for electrical part of the work and only limited number of electrical contractors are being involved in this method of issuing composite tender for both works. The learned counsel for the petitioners further pointed out judgment of the Kerala High Court in Writ Petition (Civil) Nos. 28113/2009-H and 30556/2009-L decided on 19.11.2010 by the learned Single Judge of that Court and contended that in similar situation, the Kerala High Court has held such an action of issuing composite tender for civil and electrical work together as violative of the provisions of Articles 14 and 19(1)(g) of the Constitution of India.

4. Per contra, according to the learned AGP, the State Government has taken a policy decision of issuing composite tender for getting civil as well as electrical work done in order to save time as well as cost of project. According to the learned AGP, such policy decision of the State cannot be branded as discriminatory or arbitrary as it is taken in the interest of getting the project work completed in a time bound frame.

5. Considering the rival submissions, it is necessary to examine the impugned Government resolution as well as circular in detail. Considering the response filed by the State in this case, it is not in dispute that the electrical contractors have been given the licence and registration by the Chief Engineer (Electrical) under the Public Works Department and the electrical wing of the Public Works Department decides the criteria for registration, qualification and eligibility of the electrical contractors. Similarly, it is not in dispute that prior to 2004, the State Government used to issue separate tenders for getting the electrical work as well as civil work of a project done through the registered contractors. It was from the year 2004, system of issuing composite tender for getting civil and electrical work of the project done from the concerned contractor is adopted by the State Government and the response filed by the respondent-State further shows that this system is adopted for saving time as well as cost. Careful perusal of the Government resolution dated 27.1.2004 shows that the State has adopted policy of issuing composite tender for civil and electrical work if the project is costing Rs. 1/- crore or more by assigning the reason that tendering of the civil and electrical work simultaneously and carrying the electrical work with the civil work of the project curtails delay in completion of the project. The object as reflected from the Government resolution seems to be avoidance of delay caused because of delay in execution of electrical work, breaking of constructed portion for electrical fittings and ducting etc. Clause (1) of this impugned Government resolution dated 27.1.2004 provides that generally the Executive Engineer (Civil)

should issue a composite tender notice for inviting quotation for undertaking civil and electrical works of the project. As per this condition, if electrical work is major component of the project of a nature of installation of centralized air-conditioning system or installation of elevators, then the tender notice may be issued by the electrical department of the PWD. According to Clause (5) of this Government resolution, while submitting quotations, if concerned civil contractor is not having registration as electrical contractor, then in such a case, such civil contractor/tenderer can enter in joint venture with the electrical contractor of that class or he can get the work done through the registered electrical contractor by engaging such electrical contractor as his sub-contractor. This Clause (5) of the impugned Government resolution makes it clear that the civil contractor shall be responsible for completion of civil as well as electrical work of the concerned project. Even Clause (8) of the impugned Government resolution demonstrates that the main contractor shall be responsible for all electrical work including obtaining of supply of electricity, permissions or no objection certificates from the Municipal Corporations or Electric Supply Companies, etc.

6. Now let us consider the impugned Government circular dated 24.3.2011 issued by the Public Works Department. After noting that the Government resolution dated 27.1.2004 is not followed by the Department with an excuse that estimate for electrical work of the project is not received in time, the Public Works Department has categorically directed all its officers to issue composite tender for civil and electrical work as directed by the Government resolution dated 27.1.2004. It is further directed in the said circular that the officers of the Public Works Department should intimate about the project to be tendered to the Electrical Department at least a month in advance so as to enable the Electrical Department to give estimate of the electrical work. The said circular further provides that if estimate is not received from the Electrical Department, then the Superintending Engineer or the Executive Engineer of the PWD should get the estimate prepared from private electrical consultant and names of defaulting officers of the Electrical Department be informed to the Chief Engineer (Electrical) of the PWD.

7. The main challenge to the Government resolution and circular is that the issuance of composite tender for getting the civil as well as electrical work for the project done from the successful contractor will result in monopoly of civil contractors to the exclusion of electrical contractors. Exactly identical situation arose in State of Kerala where the State Government by issuing circular had proposed that all building works when the estimate amount exceeds Rs. 1/- crore, both civil and electrical work be tendered together as a single tender. This action of State of Kerala of tendering all civil works and electrical works simultaneously was subject matter of challenge in Writ Petition (Civil) Nos. 28113/2009-H and 30556/2009-L and the learned Single Judge of Kerala High Court while allowing those writ petitions by judgment dated 19.11.2010 has held thus in paragraph no. 18 of the said judgment as under:-

Judged in the light of the above principles, the question to be considered herein is whether the circulars Exts. P3, P6 and P8 provide any level playing field for any electrical contractors. The system of inviting tender only through the civil contractor will effectively deny any opportunity to submit tender for electrical contractors independently. The civil contractor will have to name the electrical contractor, going by Ext. P8 circular. It is therefore entirely upto the civil contractor to quote the rates for execution of the work and name the electrical contractors. The chance of the electrical contractor getting any work entirely depends upon the volition of the civil contractor. The same will result in absence of any competition from among electrical contractors, as the contractors will not be able to compete for the work on their own by submitting the tender. Therefore, the prospect of civil contractors getting monopoly in the field is writ large. They can on their own whims and fancies, join along with any of the electrical contractors whom they name, in the tenders. Even though it is provided that registration of electrical contractor/electrician will be a precondition for carrying out the electrical works in PWD, that alone will not help the electrical contractors to participate in the tender, as pointed out already. Thus, the same violates the concept of level playing field resulting in violation of Article 19(1)(g) of the Constitution, as held in Reliance Energy's case (supra). Article 14 will be attracted while testing the validity of a Government policy. On both counts the circulars are invalid and arbitrary and discriminatory.

We are informed by the learned counsel appearing for both the parties that this judgment of the Kerala High Court has attained finality as it is not carried in appeal by the State of Kerala.

8. Reverting to the case in hand, let us consider whether the action of the State in Public Works Department in issuing impugned Government resolution and circular for tendering civil work and electrical work of the project simultaneously by issuing composite tender is sustainable in the eyes of law. It hardly needs to mention that Article 14 of the Constitution embodies the principle of non-discrimination whereas Article 21 refers to right to life and it includes fair opportunity. Article 19(1)(g) confers fundamental right to carry on business. By now it is well settled that the principle of "judicial review" cannot be denied even in contractual matters in which the Government exercises its contractual power in order to prevent arbitrariness in State action. The action of the State in the matter of awarding contract must be free from arbitrariness and it must be non-discriminatory. If tested on this touch-stone, then it is revealed that condition no. 5 of the impugned Government resolution dated 27.1.2004 cannot be said to be non-discriminatory, fair or non-arbitrary. The condition no. 5 of the impugned Government resolution demonstrates that when composite tender for civil work and electrical work is invited, only civil contractors are eligible to apply and they are entitled to enter into joint venture with the registered electrical contractor or they can appoint registered electrical contractor as sub-contractor for getting the electrical part of the tendered work done. It needs to mention here that as per PWD Manual, electrical contractors have been given the licence and registration

by the electrical wing of the Public Works Department. Thus, with implementation of the impugned Government resolution, electrical contractors who are independent and distinct class in themselves are deprived to enter into contract with the Government independently. It is a matter of common knowledge that civil work is always a major component in building construction and awarding absolute discretion to the civil contractor to select the electrical contractor for undertaking electrical portion of the work results in preventing open and fair competition amongst the registered electrical contractors. By inviting composite tender for a project work, valuable right of registered electrical contractors to participate in the tender process is lost as the main civil contract would have absolute right and authority to dictate terms to the electrical contractors.

9. Perusal of the impugned circular dated 24.3.2011 issued by the Public Works Department further makes it clear that the electrical contractors are reduced to position of sub-contractors of the main civil contractor. This circular which provides that the Public Works Department (Civil) should intimate about the project work which is to be tendered to the electrical wing for preparation of estimate of electrical work, at least one month in advance and in case of failure of the electrical wing of the PWD to submit such estimate, then such estimate may be procured by engaging private consultant; refers electrical contractor as sub-contractor of the main civil contractor. What is intended by the Public Works Department by issuing impugned Government resolution and circular is that the quotation in respect of the tendered work should be submitted by the main civil contractor by engaging registered electrical contractor as his sub-contractor for performing electrical work of the project. Thus, virtually the registered electrical contractors with the Public Works Department (Electrical) are prevented from competing in the tender process as generally in all building projects, the civil work undoubtedly cost much more than the cost of electrical work. In this way, the impugned Government resolution and circular is creating monopoly of civil contractors to the exclusion of electrical contractors.

10. The learned counsel for the petitioners has argued that "level playing field" is being denied and fair competition amongst the registered electrical contractors is prevented to the advantage of the civil contractors while awarding contracts by the Public Works Department of the State. Therefore, at this juncture, it is apposite to quote observations of the Hon"ble Apex Court in the matter of Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others, . In paragraph no. 36 of this judgment, the Hon"ble Supreme Court has explained the concept of "level playing field" and has held thus:

..."Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing

field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalisation, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. "This is because the said doctrine provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest. "Globalisation", in essence, is liberalisation of trade. Today India has dismantled licence raj. The economic reforms introduced after 1992 have brought in the concept of "globalisation". Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforesaid doctrine of "level playing field". According to Lord Goldsmith, commitment to the "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional.

Undoubtedly, the impugned Government resolution dated 27.1.2004 issued by the Public Works Department denies "level playing field" to the electrical contractors inasmuch as entire discretion is conferred upon the civil contractors to choose electrical contractor for entering in joint venture or for appointment as sub-contractor for getting the electrical work of the project executed through him. Such action is obviously unjust, unfair and arbitrary. The impugned Government resolution and circular exclude almost all electrical contractors from carrying on their business by entering in fair competition by participating in tender process for a project of the respondent-State and, therefore, such action as contemplated in the impugned Government resolution and circular is liable to be adjudicated as void. As the electrical contractors are virtually prevented from getting any electrical work of the tender project unless they are allowed by the civil contractors to join in composite tender, by agreeing with the view taken by the learned Single Judge of Kerala High Court, we hold that the impugned Government resolution and circular are violative of the provisions of Articles 14, 19(1)(g) and 21 of the Constitution of India and, therefore, they are liable to be quashed and set aside. We accordingly order so. It is made clear that quashing of the impugned Government resolution and circular will not affect the works already tendered during the pendency of present writ petition. Rule is made absolute in above terms. No order as to costs.