
(2001) 04 OHC CK 0011

In the Orissa High Court

Case No : Original Jurisdiction Case No. 12918 of 2000

Bhagaban Mallik

APPELLANT

Vs

State of Orissa and others

RESPONDENT

Date of Decision : 13-04-2001

Acts Referred:

Citation : AIR 2001 Ori 143

Hon'ble Judges : P. K. Mohanty, J

Bench : Single Bench

Advocate : M/s. R. P. Mohapatra and Miss Deepali Mohapatra, for the Appellant;
M/s. Pradeep Mohapatra, D. Mohapatra and S. Mohanty, for the Respondent

Judgement

P. K. Mohanty, J.—The petitioner assails the action of opposite party No. 4, the Executive Engineer (R and S), Chankanal in leasing out free ferry service over river Brahmani at Nilakanthapur Ghat to opp. party No. 6 without following the procedure and calling for tender as required.

2. The contention of the petitioner is that in order to provide free ferry service over river Brahmani at Prachandepur each year, the Gram Panchayat conducts public auction and the highest bidder is given the operation of ferry ghat on lease basis for a period of six months. The rest six months, the opposite party No. 5 calls for tender and the lowest bidder is given the Ghat on lease to provide free ferry service to the general public and the vehicles. Copies of auction and tender notice are annexed as Annexures-1 and 2. It is alleged that for the present year 2000-2001, the petitioner being the highest bidder was given the lease to operate the ferry ghat from 1 -6-2000 to 31 -12-2000 and he operated the ferry for the said period on paying the agreed amount to the Gram Panchayat.

3. The opposite party No. 4 without following due procedure and the practice followed for past several years without calling for tender, illegally and arbitrarily has allowed the free ferry ghat service in favour of opposite party No. 6 on payment of Rs. 57,700/- for the period from 15-12-2000 to 15-6-2001. It is

alleged that as per practice and in terms of the C.P.W. D. Code, the free ferry service could be only settled with a person who becomes the lowest bidder. The petitioner was willing to take the free ferry ghat service at a cost of Rs. 25,000/-, whereas opp. parties 4 to 5 have settled the said service arbitrarily in favour of opp. party No. 5 at a cost of Rs. 57,700/-.

4. The opposite parties 4 to 5 have filed a counter-affidavit denying the allegations and claim of the petitioner. It is the case of these opposite parties that opposite party No. 6 is a diploma-holder "C class contractor. The Government in Works Department have provided some facilities to the degree-holder Engineer and diploma-holder Engineer contractors in their letter No. Codes R-37/90-292 dated 4-2-1992, a copy of which has been annexed as Annexure-A/4. It is stated that in accordance with the said letter, such graduate Engineers having "B" class licence and diploma-holder having "C class licence have to be awarded works up to 2 lakhs and Rs. 1 lakh respectively in a financial year at the current schedule of rate without calling for tender. Since opposite party No. 6 is a diploma-holder "C class contractor, he applied for awarding the work in his favour and accordingly, the Superintending Engineer, Cuttack B&C Circle forwarded the application and directed to award the work in his favour of current schedule rate, 1998 limiting the estimated cost within Rs. 1 lakh. The agreement was executed to carry out the work within a value of Rs. 57,700/- and, therefore, according to the opposite parties, no illegality has been committed. It is further stated that there is a missing link at Nilakhanthapur due to crossing of river Brahmani in between Manda and Nilakanthapur which is 1157 metres in length and this year fair-weather road for a length of 965 metres has been provided with free ferry service for a length of 192 metres. The Government in Works Department is providing free ferry service for six months from 15th December to 15th June every year for easy conveyance of public including whichever traffic and animals. Beyond 18th June till 15th December nothing is provided by the Works Department to cross the river since there is sufficient water in the river. The auction of Prachandapur Ghat by the Sarpanch, Kamspal (Mahulpal) Gram Panchayat is not within the knowledge of these opposite parties, inasmuch as, the Gram Panchayat has not been authorised by the Works Department to invite quotations for managing ferry service across the river Brahmani at Nilakanthapur Ghat or Mandar Ghat which is an unbridged crossing borne in the books of P.W. D. The auction made by the Gram Panchayat has been alleged to be unauthorised and arbitrary. It is further submitted that the petitioner had moved this Court in O.J.C. No. 4289 of 1989 and this Court by order dated 15-12-1989 while observing that there is no reason to restrain the Government from managing free ferry service by permitting the petitioner to continue the ferry, for which people will be put to inconvenience. The Court having declined to interfere, the writ petition was withdrawn.

It is further alleged that the Gram Panchayat has leased out the ferry without following the norm prescribed by the Government.

5. Opposite party No. 6 has filed a comprehensive counter-affidavit denying the allegations made and more or less supporting the stand taken by the State Government. It is re-emphasised that in terms of the Government decision as in Annexure-A/4 dated 4-1-1997, the petitioner being an unemployed diploma Engineer having "C class contractor licence had applied to opposite party No. 4 to allot the ferry in terms of the Government order, the ferry ghat in question has been settled in his favour at a rate of Rs. 57,700/-. He has already made necessary infrastructure to ply the ferry and the ferry is operating since 15th October, 2000. It is further reiterated that in view of the Government order, question of inviting any tender does not arise, a rejoinder affidavit has been filed by the petitioner reiterating the stand taken in the writ petition. Opposite parties 4 and 5 have filed an additional affidavit and it is stated that providing free ferry services across different rivers on P. W. roads is a civil work. The boatman with boats is crossing the river from one Civil Engineering platform to another Engineering platform with passengers, animals and other goods, so also in the Chaps, the boatman crossing river with light and heavy vehicles. In both the cases, the structural safety of the boats is required to be inspected by the Engineering personnel as the boats are carrying life and goods.

6. It is further stated that in the scheduled rates prescribed by the Works Department in 1994 rise the schedule of rate for hire charges of dog out boat with one boatman, and hire charges of boats excluding boatman of different sizes are also prescribed. A copy of the schedule of rates is annexed as Annexure-C/4. It is reiterated that the nature of service being a civil work, the same has been entrusted by the Department in accordance with Annexure-B/4 and an illegality has been committed.

7. In view of the pleadings of the parties, the moot question that needs determination is as to whether, the work providing free ferry service by boat can be construed as "original civil work" as contemplated under the Government letter dated 4-1-1992 under Annexure-A/6 and as such, the said work could be awarded to a graduate Engineer having "B" class licence or a diploma-holder having "C class licence like opposite party No. 6 of value of work up to Rs. 2 lakhs and Rs. 1 lakh respectively at the current schedule of rates without calling for tenders. The relevant portion of the letter dated 4-1-1991 may be quoted hereunder :

"Sir,

I am directed to invite a reference to this Department Office Memorandum No. 23647 dated 5-11-1990 on the above subject and to pay that as envisaged therein tenders for 25% of all original works of Civil P.H. and electrical casting Rs. 4 lakhs each may be invited only from Engineer Contractors. Further as per this Department Office Memorandum No. 23750 dt. 6-11-1990 and letter No. 11898 dated 21-5-1991, each Graduate Engineer having "B" class licence and Diploma-holder having "C class licence maybe awarded works up to Rs. 2.00 lakhs and Rs. 1.00 lakh respectively in a financial year at the current schedule of

rates without calling for tenders.

2. Some Engineer Contractors have represented that the above facilities are not being made available to them.

3. It is, therefore, reiterated that the facilities provided in aforementioned circulars may be made available to the Engineer Contractors without any deviation. This may please be assured and the cases of the defaulting Executive Engineers if any reported to this Department for necessary disciplinary action.

Yours faithfully,

Sd/-

F.A.-cum-Joint Secretary to Govt."

8. It is not disputed that "under the Orissa Public Works Department Code" (in short called "O.P.W. D. Code") under CI. 3.5, the recognised system of carrying out work otherwise than by implementing daily or periodical labour of Departmental machinery is by entering into contracts. Clause 3.5. 9 provides that tenders should invariably be invited publicly in the manner prescribed in Appendix IX to the Code. The procedure of entering into a contract calling for tender and the procedure thereof have been prescribed under CI. 3.5 of the O.P.W. D. Code. Clause 3, 4 provides for preparation of estimates and CI. 3-4-11 relates to original works.

9. Chapter 3 of the O.P.W. D. Code is with regard to works and Chapter 3.1 is with regard to classification of the operations of the Departments-in-charge of public works. Clauses 3.1.2(a) contemplates original works to come up new construction including extension and improvement (or addition and alteration) to the existing work except as thereafter provided. Clause 3.1.2(b) however provides that when a portion of existing structure or other works not being a road surface, roadbridges, causeway, embankment, ferry approach protective or training work in connection with a road, is to be replaced or remodelled, as the case may be, should be classified as "original work," whereas CI. 3.1.2(c) indicates that when an existing portion of a road, road bridge, causeway, embankment, ferry approach, protection or training work in connection with a road is to be replaced or remodelled etc. and the change represents an appreciable increase in the value of the property, the whole cost of replacement or remodelling as the case may be should be classified as "new work."

10. In view of the specific provisions in the Orissa Public Works Department Code (O.P.W. D. Code) discussed earlier there can be no manner of doubt that the recognised system of carrying out works, otherwise than deployment of daily or periodical labour or departmental machinery, is by entering into a contract after inviting tenders in accordance with the Code. However, the State Government appears to have given a concession/relaxation to the aforesaid procedure in case of graduate Engineers having "B" class and diploma-holder Engineer with "C" class contractors licence by Public Works Department Office Memorandum No.

23750 dated 6-11-1990 and letter No. 11868 dated 21-5-1991, as indicated in Annexure A/6 and they are made eligible to be awarded with work costing up to Rs. 2 lakhs and Rs. 1 lakh respectively in one financial year at the current schedule of rates without calling for tenders.

11. The basic question that calls for determination is as to whether entrustment of a "free ferry service" comes under the purview of an original work of Civil, P.H. and electrical nature. The work in question is claimed to be of original civil work. The "original work" has been defined under CI. 3-1 -2(a) and (b) to mean all new constructions including the existing and improvement to the existing work except when a portion of existing work like ferry approach and protective in connection with a road is to be replaced or remodelled. Thus, a ferry service does not and cannot come within the scope and ambit of an original work of civil nature as claimed. The schedule of rates 1994. of the works department which is relied upon by the opposite parties indicates at Serial Nos. 74 and 75 that the hire charges of dog out boat with one boatman and hire charges of boats excluding boatman both small and big have been prescribed. In the premises, what the contractor like the opposite party No. 6 was required to do is to give the boat and boatman on hire by providing ferry service to commuters free of cost. In other words the department hired the boat and the boatman for the purpose. In this context, the intention behind and the purpose for which the Government extended the special facilities to the contractors having engineering degree or diploma was to be gathered and obviously the purpose could be to encourage the unemployed engineers, self-employment and utilise their engineering skill and expertise in the work to achieve quality work while undertaking original work. In my considered opinion, providing boats with boatman on hire, does not require or call for any engineering skill so as to afford a special facility in entrusting the work without inviting tenders, which is the established procedure under the P.W. D. Code. The work in question in my considered opinion being not of the nature of an original Civil, P.H. or electrical work as contemplated in the Government letter in Annexure A/6, the concession thereunder could not be given to the opposite party No. 6 in entrusting the work without inviting tenders. The departmental authorities thereafter were obliged under law to invite for tenders for the said work and entrust the same to the successful party. In that view of the matter, the action of opposite parties No. 4 and 5 in entrusting the work to opposite party No. 6 on schedule of rates cannot be sustained in law and has to be held illegal and arbitrary.

12. However, the next question that arises for consideration is as to whether at this stage, the exercise of inviting tenders and then entrusting the work of free ferry service to the commuters is to be made and the opposite party No. 6 is entrusted with the service till 15th of June, 2001. The process of inviting tenders, consideration of the tenders on their receipt and awarding of work in terms of the C.P.W. D. Code, requires a considerable time say approximately not less than six to eight weeks now we are at the third week of April and, therefore, by the time the process is completed, the term the contractor opposite party No. 6

would be almost over. The ferry service in the river cannot be and should not be disrupted causing immense inconvenience to the public, who are utilising the said service. In the peculiar fact situation of the case, even if the award/entrustment of the work in favour of the opposite party No. 6 is held to be illegal and contrary to the O.P.W. D. Code, the opposite party No. 6 has to be allowed to continue the service till expiry of the period of contract i.e. till 15th of June, 2001. But in view of the findings, the opposite parties 1 to 5 are directed to scrupulously observe and follow the procedure laid down in the Q.P.W. D. Code and the observations made herein while awarding/entrusting the free ferry service in subsequent years.

The writ application is disposed of in the aforesaid terms but there shall be no order as to cost.