

(2001) 12 RAJ CK 0013
In the Rajasthan High Court
Case No : Civil Writ Petition No. 4386 of 2001

Bharat Construction Company	Vs	APPELLANT
State of Rajasthan and Others		RESPONDENT

Date of Decision : 11-12-2001

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Penal Code, 1860 (IPC) — Section 302

Citation : AIR 2002 Raj 279 : (2002) 4 WLN 294

Hon'ble Judges : Bhagwati Prasad, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Bhagwati Prasad, J.—The present writ petition has been filed by the petitioner alleging that his rejection at the stage when the respondents were to judge the pre-qualification is not proper. The respondents considered the applications of the prospective tenderers at the pre-qualification stage. At that stage, tenderers were judged departmentally. The interested parties were not given any opportunity to establish their claims before the authority which decided the fate of those who deserved consideration.

2. According to the learned Counsel for the petitioner this is in gross violation of the principles of natural justice. Any decision making process which is in violation of the principles of natural justice is to be deprecated. He draws support for his contention on the basis of a decision of this Court reported in 1991 (2) WLC 361 (Shree Mahalaxmi Mingrate Marketing Service Private Limited v. The State of Rajasthan and Ors.) and has placed reliance on the paras 34, 35 and 36 which reads as under:

34. In the present case it is apparent from the perusal of the fact which has come on record that the respondent Federation had entered into negotiation and discussion for many months before deciding to appoint the petitioner as Selling Agent of its various products. A committee of 3 Senior Officers of the Federation

had negotiated terms and conditions with the petitioner Company. After due consideration of different factors and especially the interest of the Federation, the Committee made recommendation for appointment of the petitioner as Selling Agent. Board of Directors of the Federation also considered the matter in detail and thereafter approved the appointment of the petitioner as Selling Agent for the products of the Federation. For atleast 6 months the petitioner was given to understand that his offer has been accepted and he was being appointed as Selling Agent. The petitioner was directed to establish infrastructure for starting the work for the last week of June, 1990. It was asked to go ahead for making suitable arrangements for that purpose. Thereafter the letter of intent was issued to the petitioner on 1.6.1990. The petitioner had undertaken market survey, prepared marketing plan, established its office and took steps for appointment of distributors and engaging of staff. In the process the petitioner had incurred a lot of expenditure. Neither in the letter dated 1.6.1990 nor in any other communication sent to the petitioner, there was a stipulation that in case of failure of the petitioner to sign the agreement or to furnish bank guarantee or any other document, it intended to cancel the letter of intent. The notings of the Managing Director on 29.6.1990 and 30.6.1990 clearly indicate that the Hon''ble Minister of State for Dairy Development had asked the Federation not to take further action without his instructions. This is also corroborated by the statement made by the respondent No. 4 on the floor of the Legislative Assembly on 16.7.1990. The note recorded by the Managing Director on 29.6.1990 is very crucial. It clearly records the Dairy Minister has desired that no further action in the matter till the Government does not clear the case. Obviously, therefore, the plea of the respondent Federation that the petitioner had not signed the agreement on 12.6.1990 or any other date thereafter, cannot be accepted as correct. The sudden change stance of the Federation on 15.7.1990 is inexplicable. No reason is borne out from the reply of the Federation or from the record which has been placed for the perusal of the Court. There has been no application of mind on the considerations relating to the interest of the Federation or the public interest. There is re- examined the question of appointing the petitioner as Selling Agent and after a scrutiny of the matter had come to the conclusion that it would be contrary to public interest to finalise the agreement with the petitioner and therefore, it should be cancelled. On 16.7.1990 Hon''ble Minister for State Dairy Development had categorically stated on the floor of the Legislative Assembly that the action of the Federation in taking decision to appointment the petitioner as Selling Agent was perfectly in order. There was no political interference. No favouritism had been shown to the petitioner. However, in hot haste the authorities of the Federation took drastic action of cancellation of the letter of intent to the petitioner. In the absence of any material having been Wplaced on record the sudden decision of the Federation on the night of 16.7.1990 and total lack of application of mind on the considerations of public interest or the interse of Federation, it must be concluded that the two elements which must necessarily be found in every State action namely lack of arbitrariness and the action being in public interest are

totally missing in the present case. It is true that in every case reasons are not to be communicated to the party concerned but the requirement of fairness is implicit in every State action and reasons must be borne out from the record. Arbitrariness is writ large in the fact of the action taken by the Federation by way, cancellation the letter of intent through telegram. It is true that an elements of discretion vests with the Federation in such matters but the arbitrariness in the exercise in order to promote the object interest and not mere whims or caprice of individuals. Further persons which is invested with such power must bear in mind that the power is to be exercised fairly, reasonable and justly. The total absence of application of mind in the present case is clear proof of arbitrariness in the action of the Federation.

35. It is true that mere issuance of letter of intent may not be equated with a case where contract has been concluded between the parties but nonetheless on imperfect or inchoate right had been conferred on the petitioner. The peculiar facts of this case show that even before issuance of the letter of intent the petitioner had been asked to go ahead to prepare itself to start the work. The petitioner was made to part away with the substantial money in order to facilitate starting the marketing of the products. As already noticed, the letter of intent did not contain a stipulation that in case of failure of the petitioner to sign the agreement and to furnish bank guarantee, the Federation was going to cancel the letter of intent and to give it an opportunity of explanation or representation against the proposed action. The minimum requirement of principles of natural justice namely principle of audi alterum partem should have been followed looking to the facts of this case. Admittedly, there has been a non-compliance of this requirement of the principal of natural justice. Therefore, decision of the Federation to revoke letter of intent by telegraphic communication is liable to be declared as void.

36. I also find considerable force in the arguments of Shri B.S. Sharma, learned Counsel for the petitioner that the reasons given for cancellation of the letter of intent are non-existent and are irrelevant. The respondent Federation has made an attempt to shift the blame on the petitioner by alleging that the petitioner had failed to sign the agreement. The petitioner has been consistently asserting that its Managing Director has visited the office of the Federation, met the Managing Director and the General Manager (M & P) for signing the agreement but he was told every time that draft of the agreement was lying with the Legal Advisor. On the question of Bank Guarantee the Managing Director of the petitioner company had written that the Bank Guarantee will be furnished within 3 days of signing of the agreement. In fact, the petitioner would not have been in a position to lift the products without first furnishing, the bank guarantee. The petitioner's assertion that Shri Mohan Singh Raghav had met Dr. Hari Lal, General Manager (M & P) of the Federation had not been controverted for an affidavit of Dr. Hari Lal. However, the controversy sought to be created on behalf of the respondent No. 2 on the question as to which party has defaulted regarding the signing of the agreement, the notings of the Managing Director on 29.6.1990 as well as the

statement made by the respondent No. 4 on the floor of the Assembly on 16.7.1990 conclusively established that respondent No. 4 had instructed the authorities not to take further action in the matter of appointing Selling Agent and the further action certainly included signing of agreement. Whether it was justified or not for the Federation to have acted under the instructions of respondent No. 4 is not relevant for determination of the question as to whether the petitioner had defaulted in signing the agreement. On the question of fault of the petitioner the answer is very simple and this has to be in negative because the Federation itself had decided not to take further action as per the letter of intent of the petitioner is clearly erroneous and is untenable. Equally untenable is the second reason mentioned in the letter that the petitioner has failed to furnish the bank guarantee. The petitioner had written to the Federation on 26.6.1990 that it would furnish the Bank Guarantee within 3 days of signing of the agreement. No further communication was sent to the petitioner by the Federation stipulating that if he failed to furnish bank guarantee within specified time, the Federation would cancel its appointment as Selling Agent. Thus, the petitioner could very well rely on his request for furnishing bank guarantee within 3 days of the signing of the agreement. Moreover, as already mentioned hereinabove, the Federation had in deference of the desire of the respondent No. 4 decided not to take further action. There is nothing on record to show that after 30.6.1990 the Federation had sent any communication to the petitioner about fulfilment of the two conditions stipulated in letter dated 1.6.1990. Therefore, in my opinion both the reasons given by the respondent No. 2 for cancelling letter of intent are untenable and erroneous.

3. The question of hearing to the present petitioner was considered by this Court in a writ petition filed earlier. In this case while making order no detailed discussion was made. However, following orders was passed.

In the special facts and circumstances of the case, Shri B.S. Mehta was directed to take notice on behalf of the respondents. He was served with the copy of the petitions and was heard. Though Shri Kothari, learned Counsel appearing for the petitioners has raised various grievances yet in the facts and circumstances of the cases, I am not inclined to enter into merits of the cases.

Thus, both the petitions are disposed of finally with a direction to respondent No. 2 to give an opportunity of hearing to the petitioners for consideration of their applications before proceeding further in the matters. There shall be no order as to costs.

Pursuant to the directions contained in above order Annexure-1, the respondents claim that they have passed order Annexure-R/6, dated 20.11.2001. The learned Counsel for the petitioner has impugned the order passed by the respondents on 20.11.2001 on the ground that it has been passed by an authority not vested with the powers to decide the controversy.

4. According to the learned Counsel for the petitioner while Annexure-R/6 was

passed, he came to know about the process, When pre-qualification is judged. A committee has been constituted by the respondents and it is this committee which decides the fate of the tenders. In deciding the controversy by a sole officer i.e. the Addl. Chief Engineer, Irrigation Zone, Jodhpur violation of the internal rules of the respondents have been committed.

5. According to the learned Counsel for the petitioner the respondents should have come up before this Court and sought a clarification that in case they follow the orders of this Court, they will not be following their own departmental rules and thus will be infringing the procedures prescribed by them.

6. Learned Counsel for the petitioner submits that having not done so, the respondents have not followed their own departmental regulations. Thus, the order Annexure-6 is bad in the eye of law and deserves to be quashed.

7. The petitioner has taken a further step in moving this Court by an application for amending the earlier order Annexure- 1. In this application it has been prayed that the sole officer described in that order may be substituted by the committee. While deciding this application the learned Judge who decided the earlier writ petition has permitted the petitioner to raise all the grievances at the time of hearing of this writ petition. The grievance of the learned Counsel for the petitioner is that the respondents should have approached this Court for getting the order Annexure-1 amended.

8. Learned Counsel for the petitioner further submits that had the respondents got the matter decided by the committee, it would not have been infringement of the orders of this Court but it would only have been a fair procedure. He claims that fairness of the procedure is consistently been held to be pre-requisite in the decision making process. He supports his contention on the basis of the Supreme Court decision reported in 1993(1) SCC 554 (Sterling Computers Limited v. M.N. Publications Limited and Ors.) and 2001 (2) SCC 451 (W.B. State Electricity Board v. Patel Engineering Co. Ltd. and Ors.), and emphasised that the decision making process should be amendable to judicial review and should be judged on the envil of objective consideration even if it is without bias.

9. Per contra, the learned Counsel for the respondents have submitted that the assumption of the petitioner that principles of natural justice are involved at a stage when pre-qualification considerations are judged by the respondent-department is based on erroneous presumption. The whole exercise of deciding this matter at pre-qualification stage is done inter-departmentally. The petitioner being a AA Class Contractor with the respondent- department had been dealing with the department for a patty long time and he is expected to know that this is the practice. The petitioner could have also known about the meeting of the Committee. The notices of meeting were not of classified character. They were issued to as many as five departments i.e.

(1) Chief Engineer, Irrigation, Rajasthan, Jaipur.

- (2) Chief Engineer, Bisalpur Project, Jaipur.
- (3) Chief Engineer, Irrigation Design & Research, Jaipur.
- (4) Financial Advisor, Irrigation Department, Jaipur.
- (5) Addl. Chief Engineer, Irrigation Zone, Jodhpur.

It was a widely known fact and the contractors of the department would keep an eye on such meetings. A contractor of the standing like the petitioner will be dealing with the department off and on. He would not have been in dark about the scheduling of such a meetings. Contractors who operate at a level generally come to know of such meetings during the course of their dealings with the department.

10. Learned Counsel for the respondent has further relied on a Division Bench decision of this Court reported in *Deepak Builders Vs. The State of Rajasthan and Others*, and has placed relied upon Para No. 8, which reads as under:

8. The next contention, raised by the learned Counsel for the appellant is that before short-listing, the appellant- petitioner was not given any opportunity of hearing and, thus, the principles of natural justice have been flouted and the decision taken by the Committee in not finding the appellant- petitioner eligible for participating in the tenders, therefore, deserves to be quashed and set-aside as it has been passed in violation of Article 14 of the Constitution of India. We see no merits in the arguments raised by the learned Counsel for the appellant. The principles of natural justice have various facets and acting fairly is one of those facets. The principles of natural justice require that the persons, whose rights are being affected by any administrative decision, they should be given adequate notice so that they may make their representation or if necessary, they may be heard. The only obligation on the Committee, while considering the applications and exercising its powers to take a decision, is to act fairly. Consideration of the applications on the basis of the material supplied by the tenders in the fair and just manner would be sufficient to meet-out the requirements of principles of natural justice. The principle of natural justice has no fixed context and it varies with the facts and circumstance of each case. Where the proceedings do not involve any legal right and the consideration has been made on the basis of the material supplied by the tenders themselves, the principle of audi alteram partem, which is one of the facets of natural justice, thus, cannot be invoked. There is no procedural impropriety in the present case and the Committee has acted fairly while considering the cases of various tenders for short-listing. The matter has been considered by the Committee on the basis of the information and the material supplied by the tenders as such there was no necessity of giving personal hearing to each of the tenderer at the stage of short-listing and judging the pre-qualification. There is, therefore, violation of principles of natural justice. The contention, raised by the learned Counsel for the appellant, is, therefore, bereft of any substance.

11. He emphasised that in inter-department consideration hearing is not granted in the manner as claimed by the petitioner. This is not for the first time that the petitioner has not been given personal hearing by the department. In the award of contracts in past the petitioner had participated. There had been no occasion when the petitioner was heard.

12. Learned Counsel for the respondent has also placed reliance on the Supreme Court decision reported in Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, relied upon Para Nos. 11, 12 and 13, which reads as under:

11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the Court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the Court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by Court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the Court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the Court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the Court should not intervene under Article 226 in disputes between two rival tenderers.

12. When a petition is filed as a public interest litigation challenging the award of a contract by the State or any public body to a particular tenderer, the Court must satisfy itself that the party which has brought the litigation is litigating bona fide for public good, the public interest litigation should not be merely a cloak for attaining private ends of a third party or of the party bringing the petition. The Court can examine the previous record of public service rendered by the organisation bringing public interest litigation. Even when a public interest litigation is entertained the Court must be careful to weigh conflicting public interests before intervening. Intervention by the Court may ultimately result in delay in the execution of the project. The obvious consequence of such delay is price escalation. If any retendering is prescribed, cost of the project can escalate substantially. What is more important, ultimately the public would have to pay a much higher price in the form of delay in the commissioning of the project and the consequent delay in the contemplated public service becoming available to the public. If it is a power project which is thus delayed, the public may lose substantially because of shortage in electric supply and the consequent obstruction in industrial development. If the project is for the construction of a road, or an irrigation canal, the delay in the transportation facility becoming available or the delay in water supply for agriculture being available can be a substantial set back to the country's economic development. Where the decision has been taken bona fide and a choice has been exercised on legitimate

consideration and not exercised on legitimate considerations and not arbitrarily, there is no reason why the Court should entertain a petition under Article 226.

13. Hence before entertaining a writ petition and passing any interim orders in such petitions, the Court must carefully weigh conflicting public interests. Only when it comes to a conclusion that there is an overwhelming public interest in entertaining the petition, the Court should intervene.

13. It has been emphasised that when the decision making process is of public contracts, it should not be lightly interfered with by the Courts. He has also placed reliance on a decision of the Supreme Court reported in 1989 Suppl. (2) SCC 107 (Chandrakant Somnath Kudale and Anr. v. State of Maharashtra) and has relied upon para 6, which reads as under:

6. Mr. T.S. Arora, learned Counsel for the appellants sought to contend that the view taken by the Sessions Judge is a plausible view and as such the High Court should not have altered the conviction of the appellants to one u/s 302 I.P.C. We find no merit in the argument because the view taken by the Sessions Judge regarding the nature of the offence committed by the appellants is in flagrant violation of the evidence adduced in the case and the Sessions Judge has acted on a theory evolved by him on his own surmises and conjectures. The High Court was, therefore, fully justified in allowing the appeal and accordingly dismiss it. The appellants who are on bail shall surrender themselves to custody for serving out the sentence failing which they shall be arrested and placed in custody.

14. I have heard the learned Counsel for the parties and have considered the submissions made at the Bar and have given my thoughtful consideration.

15. The decision making process of the department, as alleged by the petitioner, that it came up to his notice for the first time, when reply was filed in this writ petition that the pre-qualification applications are judged by a committee, is a proposition which is hard to swell. The decision making process was not in isolation or to the exclusion of every body or in secrecy. For the decision making departmental notices were issued. The issuance of the notices and holding of department meetings for considering the tenders is a fact which gains currency in the department. Everybody in the department comes to know of the holding of such meeting. A contractor who has dealings with the department cannot be permitted to say that he had no knowledge that such a decision was taken in a meeting.

16. This Court at the request of the petitioner ordered in its order dated 9.11.2001 that hearing should be given to the petitioner by the Additional Chief Engineer. When the petitioner himself has asked for an order of hearing by the Additional Chief Engineer, then the petitioner cannot be heard to say that such a hearing was unauthorised. After the petitioner had come to this Court, this Court directed for hearing. This hearing was conducted and concluded by the authority as directed by this Court. After this hearing Annex. 6 order has been passed.

17. Learned Counsel for the petitioner has contended that notwithstanding the orders of this Court, the Additional Chief Engineer alone should not have heard him. It would have been proper if the hearing was given by the Authority constituted by the Department i.e. Committee. This argument of learned Counsel for the petitioner is fallacious. It would not be proper appreciation of the orders of this Court. This Court had passed the orders at the request of the petitioner. As far as respondent Department was concerned, it had already passed the orders after consideration by the Committee. If the petitioner felt that he requires hearing by the Committee, he could have made a request in that direction. No such request was made by the petitioner then. The prayer of the petitioner was granted by this Court. In this background, it is not open to the petitioner to raise any grievance. The petitioner's case was considered by the responsible officer in the light of the guidelines laid down by the Department. Therefore also, it cannot be conceived that any interference is called for at the instance of the petitioner at this stage. Except that of the alleged procedure irregularity, nothing has been pointed out by the counsel for the petitioner which vitiates the result.

18. Learned Counsel for the petitioner has tried to make out a point that respondents have only produced a partial comparative chart. The respondents have not filed the complete chart of the entire consideration. It is thus suggested that these documents have been withheld from this Court. There are no allegations in the petition which show that the committee which considered the pre-qualification tenders had committed any error. The only defect pointed out by the learned Counsel for the petitioner is that the petitioner was not heard before pre-qualification documents were considered.

19. The decision making process is administrative in character. In such administrative matters if hearing is granted as a rule, then it would be difficult for the Department to function. The law relied upon by the learned Counsel for the petitioner is *Shree Mahalaxmi (supra)* is at a stage where a definite opinion was expressed by the department and Letter of Intent was given. That Letter of Intent had conferred some actionable right in this petitioner. Here no right can be seen in the petitioner unless right to consideration was determined by the committee. It was not the petitioner alone and inasmuch as 24 persons were excluded. It cannot be said that it was a case of solitary isolation. No-one else has raised any grievance. Thus, also it cannot be said that the decision making process was either arbitrary or unfair.

20. In the aforesaid background it is considered that it would not be necessary to go into the niceties of the award of the contract. These matters are better left to the specialised persons who are there with the department and the Court who has insufficient accumen to handle such technical matters should not venture into these areas. Any attempt may be hazardous. In view thereof, the writ petition is dismissed.