

(1994) 05 OHC CK 0021
In the Orissa High Court
Case No : O.J.C. No. 9156 of 1993

Bharati Shipyard Pvt. Ltd.

APPELLANT

Vs

Paradeep Port Trust and Another

RESPONDENT

Date of Decision : 18-05-1994

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : AIR 1995 Ori 146 : (1994) 78 CLT 318

Hon'ble Judges : G.T. Nanavati, C.J.;P.C. Misra, J

Bench : Division Bench

Advocate : P. Palit, D. Mahanta, A. Das, B. Mohanty, S.K. Behera, B. Das and S.K. Nayak, for the Appellant; B.M. Patnaik, D. Mohanty, S.K. Padhi, L. Pangari and G. Rath, for the Respondent

Final Decision : Dismissed

Judgement

Nanavati, C.J.—Paradeep Port Trust floated a tender for construction and delivery of one 18-ton bollard pull tractor tug fitted with schettel propulsion system by publishing a notice dated 6-5-1993 in newspapers. Tenders were invited from experience and reputed ship-builders having built and delivered tractor tugs of 15-ton bollard pull. The last date for submission of tenders was 21-7-1993. In order to see that more parties submitted tenders, the last date for rolling (Giling) the tenders was extended to 30-7-1993 and for opening the tenders, it was extended to 20-8-1993. Tenders were to be submitted in two sealed envelopes, one containing technical bid and the other containing financial bid. On 20-8-1993, the technical bids were opened and thereafter on evaluation certain deficiencies/ differences were noticed in the technical specifications. The technical requirements were then modified and finalised and all the three tenderers who had submitted their tenders were advised to submit their revised price bid if that was found necessary by them. The date fixed for opening the revised price bid was declared as 13-9-1993. On that day, all the three tenderers were found and declared as technically qualified and the revised financial bids

submitted by them were also considered. The financial bid of the petitioner was the lowest, but in view of certain conditions imposed by it, it was called for negotiations on 13-10-1993. The other two parties were also called for negotiations on that day. It appears that Hooghly Dock & Port Engineers did not attend on 13-10-1993 and, therefore, the petitioner and M/s. Shalimar Works, the remaining two tenderers, were requested to submit their revised offers. It was also decided to give a similar chance to Hooghly Dock & Port Engineers, the third bidder. The said bids were to be opened on 27-10-1993 and intimation to that effect was given to all of them. The revised financial bids were scrutinised on 27-10-1993, 4-11-1993, 6-11-1993 and lastly on 10-11-1993. The Tender Committee appointed by the Port Trust unanimously decided to accept the tender of M/s. Shalimar Works. The said decision was approved by the Board of Trustees on 26-11-1993. The petitioner, feeling aggrieved by the said decision, presented this petition on 30-11-1993.

2. The grievance of the petitioner is that M/s. Shalimar Works is not eligible according to the eligibility criteria fixed by the Port Trust and, therefore, their tender should have been rejected outright at the initial stage of evaluating the technical bid and they should not have been given any opportunity to submit their revised financial bid. The Port Trust should not have considered the same on this ground and also on the ground that an assurance was given to the petitioner that if it matched the lower price offered by M/s. Shalimar Works, then the bid of the petitioner could be accepted. As the petitioner was willing to do so, its tender or bid should have been accepted, and in not doing so, the Port Trust has acted arbitrarily and, therefore, its said action should be regarded as violative of Article 14 of the Constitution. On the basis of such averments made in the petition, the petitioner desires this Court to quash the decision of the Board of Trustees and direct the Port Trust to give the contract for construction and delivery of the tug to it.

3. What is contended by Mr. Palit, learned counsel for the petitioner, is that as disclosed by the notice and also the tender documents, only experienced and reputed ship-builders who have built and delivered tugs of 15-ton bollard pull and above are to be considered as eligible for awarding the contract. The petitioner does satisfy that condition, but M/s. Shalimar Works does not satisfy that eligibility criteria inasmuch as it has not so far delivered a tug having 15-ton bollard pull and above. He submitted that the important words in the advertisement and the tender documents are "built" and "delivered". By the time the bid of M/s. Shalimar Works was accepted, they had not delivered a tug of that description. The documents show that they had till then built and delivered tugs of 13-ton capacity only. Thus, though they were building one tug of higher capacity for the Vishakhapatnam Port Trust and two tugs of higher capacity for the Cochin Port Trust, they cannot be said to have built and delivered tugs of 15-ton capacity and above. He further submitted that the word "delivered" has been purposely and significantly used, because it is only on delivery of a tug that its performance can be evaluated and it can be found out

whether the performance of the tug which has been built is satisfactory or not. The said eligibility criteria having been fixed not only keeping in mind the building experience but also the performance of the tugs built, it could not have been relaxed without either cancelling the tenders and inviting fresh tenders or without making it known publicly to all concerned and giving an opportunity to those who did not participate earlier but would have liked to participate as a result of relaxation of that eligibility criteria. In support of his contention that such an eligibility criteria cannot be relaxed, he relied upon the following observations of the Supreme Court in paragraphs 7 and 10 in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, . He particularly referred to the following observations made in those paragraphs (at page 1633) :--

. Now it is clear from paragraph (1) of the notice that tenders were invited only from "registered IInd Class hoteliers having at least 5 years" experience that he could on the terms of paragraph(I) of the notice, submit a tender. Paragraph (1) of the notice prescribed a condition of eligibility which had to be satisfied by every person submitting a tender and if, in a given case, a person submitting a tender did not satisfy this condition, his tender was not eligible to be considered.....

It is well settled rule of interpretation applicable alike to documents as to statutes that. save for compelling necessity, the court should not prompt to ascribe superfluity to the language of a document "and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use. To reject words as insensible should be the last resort of judicial interpretation, for it is an elementary rule based on common-sense that no author of a formal document intended to be acted upon by the others should be presumed to use words without a meaning. The court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable. Now, here the expression used in paragraph(I) of the notice was "registered IInd Class hotelier" and there can be no doubt that by using this expression the 1st respondent intended to delineate a certain category of persons who alone should be eligible to submit a tender. The 1st respondent was not acting aimlessly or insensibly in insisting upon this requirement nor was it indulging in a meaningless and futile exercise. It had a definite purpose in view when it laid down this condition of eligibility in paragraph(I) of the notice The 4th respondent were, accordingly, not eligible for submitting a tender and the action of the 1st respondent in accepting their tender was in contravention of paragraph (1) of the notice.

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10..... It is a well settled rule of administrative law that an executive

authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe these standards on pain of invalidation of an act in violation of them.....It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affection of some right or denial of some privilege."

He also relied upon the decision of the Supreme Court in *Harjinder Singh Arora Vs. Union of India (UOI) and Others*, wherein the Supreme Court has held that if the tender form submitted by any party is not in conformity with the norms of the tender notice, then the same cannot be accepted and if the authority concerned accepts such a tender, it should be held that the authority has acted arbitrarily. In that case, the instrumentalities of the State invited tenders for supply of fresh buffalo and cow milk and there was no question of any policy in that behalf. Therefore, while observing that it was open to the State to adopt a policy different from the one in question, if the authority or the State Government chose to invite tenders, then it was bound to abide by the result of the tender and could not have arbitrarily and capriciously accepted the bid of a tenderer, which was much higher. The contract of supply of milk was to be given to the lowest bidder under the terms of the tender notice and, therefore, it should have been given to the lowest bidder.

The learned counsel also relied upon another decision of the Supreme Court in *M/s. G. J. Fernandez Vs. State of Karnataka and others*, wherein the Supreme Court has pointed out that when an authority inviting tenders makes changes or relaxations that would not be unobjectionable if the benefit of those changes or relaxations are extended to all, but would be objectionable if they are extended to some and denied to others. But if a departure is made from the qualifications and if one complains that he was kept out of "the race, then the rule laid down in *International Airport Authority (supra)* would be applicable. Relying upon this decision, it was contended that as the eligibility criteria consisting of qualifications came to be relaxed in this case, this Court, following the rule laid down by the Supreme Court in *International Airport Authority's case (supra)* should hold the action of the Port Trust as arbitrary and bad irrespective of whether prejudice has been caused or not to others, i.e., the other tenderers and those who did not submit their tenders believing that their tenders would not be considered.

4. The importance of the rule that an executive authority must be vigorously held to the standards by which it professes its action to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them cannot be over-looked. But it does not follow therefore that the

executive authority cannot at all deviate from or relax the standards. That would depend upon the nature of the act, the necessity for making the deviation or relaxation and the effects which that deviation or relaxation is likely to cause. As pointed out by the Supreme Court in the case of G. J. Fernandez (supra), an authority inviting tenders can make changes or relaxation and it would not be regarded as objectionable if the benefit of those changes or relaxation is extended to all. In our opinion, the Supreme Court has not laid down the proposition of law in such wide terms, as contended by the learned counsel for the petitioner. After all, what is required in the action or performance of the State and of the public bodies is fairness and transparency in order to avoid any arbitrariness. If for a just cause or a valid reason the executive authority decides to deviate from or relax even the eligibility criteria, it would not be proper to invalidate its action even where no arbitrariness can be pointed out either in making the deviation or relaxation or in the treatment to all concerned, If it can be shown that the relaxation in the eligibility criteria contained in the tender was made for a valid reason, like having more competitors, to avoid exploitation by a cartel, it is difficult to appreciate how relaxation even of an eligibility criteria should by itself be treated as sufficient for invalidating the action, even though such relaxation has not resulted in unfairness. To apply the rule as contended by the learned counsel for the petitioner would amount to mechanical application of the same. If the relaxation is, as stated earlier, for a valid reason or on a good ground and if it is done in a transparent manner in public interest, it is difficult to appreciate what useful purpose will be served by striking down the same only on the ground that there has been some relaxation in the eligibility criteria and thus the executive authority did not hold on vigorously to the standards by which it initially professed to act. Even in case of such non-adherence, it would be a question of fact whether the departure was arbitrarily made or that such departure or relaxation has resulted in unfair treatment or affection of some right or denial of some privilege. As rightly contended by Mr. Patnaik for opposite party No. 1. the following observations made by the Supreme Court in G. J. Fernandez (supra) are equally important and significant (at page 967): --

"16.....The second consequence, indicated by this Court in earlier decisions, is not that the KPC cannot deviate from those guidelines at all in any situation but that any deviation, if made, should not result in arbitrariness or discrimination. It comes in for application where the non-conformity with, or relaxation from, the prescribed standards results in substantial prejudice or injustice to any of the parties involved or to public interest in general.....The fact that a document was belatedly entertained from one of the applicants will cause substantial prejudice to another party who wanted, likewise, an extension of time for filing a similar certificate or document but was declined the benefit. It may perhaps be said to cause prejudice also to a party which can show that it had refrained from applying for the tender documents only because it thought it would not be able to produce the document by the time stipulated but would have applied had it known that the rule was

likely to be relaxed.....The question, then, is whether the course adopted by the KPC has caused any real prejudice to the appellant and other parties who had already supplied all the documents in time and sought no extension at all? It is true that the relaxation of time schedule in the case of one party does affect even such a person in the sense that he would otherwise have had one competitor less. But, we are inclined to agree with the respondent's contention that while the rule in Ramana's case AIR 1979 SC 1629 (supra) will be readily applied by Courts to a case where a person complains that a departure from the qualifications has kept him out of the race, injustice is less apparent where the attempt of the applicant before Court is only to gain immunity from competition. Assuming for purposes of argument that there has been a slight deviation from the terms of the NIT, it has not deprived the appellant of its right to be considered for the contract; on the other hand, its tender has received due and full consideration.....The appellant had no doubt also urged that the MCC had no experience in this line of work and that the appellant was much better qualified for the, contract. The comparative merits of the appellant vis-a-vis MCC are, "however, a matter for the KPC (counselled by the TCE) to decide and not for the Courts....."

5. We would at once concede that the case of the petitioner is stronger than that of the appellant in G. J. Fernandez, because in that case there was delay in filing one of the relevant documents by the MCC. It was permitted to file the same after making some change in the time-frame originally prescribed, and it was then considered qualified to tender. What has happened in this case is that even though the last date for selling the tenders was extended to 30-7-1993 and for opening the same it was extended to 20-8-1993, only four tenders were received. One tenderer, namely, Temba Engineering Pvt. Ltd., Madras did not deposit the earnest money and for that reason its tender, was summarily rejected. The technical offers submitted by the remaining three firms were gone in detail by the Technical Department of the Port Trust, as can be seen from the note dated 31-1-1993, Annexure-D/1. Various deficiencies were found in the technical offers of all the three tenderers and they were informed about the same. It further appears from the letter dated 1-11-1993 of the petitioner to the Deputy Conservator of Paradeep Port Trust that as a result of the discussion with the tenderers it was found necessary to make certain technical changes. The tenderers were asked to submit their clarifications and furnish revised financial bids in view of the said changes. On 13-9-1993 the Special Tender Committee evaluated the technical bids of all the three tenderers. Meanwhile, on the basis of the information supplied in the tender by M/s. Sbalimar Works that they have collaboration with (sic) Shipyard, an internationally reputed shipbuilders of Netherlands and that they are building tugs of higher size and capacity for the Visakhapatnam Port Trust and the Cochin Port Trust, enquiries were made with those two Port Trusts and it was reported by them that the work undertaken by M/s. Shalimar Works was progressing as per schedule. For this reason, in the presence of all the tenderers, the Special Tender Committee found and declared

M/s. Shalimar Works as technically qualified. Thereafter, the financial bids were taken-up for consideration on 13-10-1993 by the Special Tender Committee. For certain reasons which we will refer hereafter, all the three tenderers were directed to submit their revised financial bids by 27-10-1993. On a request made by the petitioner, the said date was extended to 4-11-1993. The Special Tender Committee then sat on 4-11-1993, 6-11-1993 and 10-11-1993. On 10-11-1993 a unanimous decision was taken by the Tender Committee with respect to the financial bids.

6. From what is stated above it becomes clear that in spite of extension of the last date for receiving the tenders, only four parties submitted their tenders. One tenderer had not furnished the earnest money along with the tender and, therefore, its tender was rejected outright. Deficiencies were found in the technical bids submitted by all the three tenderers. It was, therefore, found necessary to make certain technical changes as regards the tug that was to be constructed and supplied, and for that reason certain clarifications and acceptance of the changes were sought for and the tenderers were permitted to submit their revised financial bids. M/s. Shalimar Works was declared technically qualified on 13-9-1993. Neither on 13-9-1993 nor till 2-11-1993 any grievance was made by the petitioner that M/s. Shalimar Works should not be considered as it was not technically qualified. The grievance in this behalf appears to have been made for the first time in this petition filed on 30-11-1993. Though in paragraph 9 of the petition the petitioner has stated that on 20-8-1993, the date fixed for opening the tenders, they were shocked and surprised to find the representative of M/s. Shalimar Works in the office of the Deputy Conservator of Paradeep Port Trust and immediately lodged an oral protest on the ground that M/s. Shalimar Works was not eligible, that averment does not appear to be correct. It also becomes clear from what is stated in paragraph 10 of the petition. In that paragraph the petitioner has stated that after it had registered the protest, the envelopes containing the technical bids of all the tenderers were opened. It is not stated whether the petitioner had any prior knowledge regarding the experience of M/s. Shalimar Works. It is, therefore, difficult to appreciate how they could lodge a protest, before the tender documents were opened. It is also difficult to believe that the petitioner would have remained satisfied with an oral protest only and would not have put the same in writing at any stage thereafter, even though they had registered some protest with respect to the financial bid on 2-11-1993. After taking into consideration all the conditions put forward by the petitioner in their tender as regards the price of the spares, sales tax and other duties to be paid, the price escalation clause and foreign exchange fluctuations, the tender offered by M/s. Shalimar Works was found to be the lowest and not that of the petitioner.

7. With this as the factual background, we have to consider whether the Port Trust acted arbitrarily in relaxing the eligibility criteria and considering M/s. Shalimar Works as technically qualified. Again, in this context we have to consider whether because of the relaxation in the eligibility criteria, the action of

the Port Trust deserves to be invalidated. As pointed out earlier, there were only three tenderers and the desire of the Port Trust was to have more tenderers so that it could get the tug at a lesser price. It decided to relax the eligibility criteria, because it had found M/s. Shalimar Works otherwise technically sound. Technical deficiencies were found even in the tender of the petitioner and that of M/s. Hooghly Dock & Port Engineers. Technical changes were found to be necessary. All this was made known to all the three tenderers. Therefore, in our opinion, it cannot be said in this case that the eligibility criteria was relaxed arbitrarily. Except that initially seven parties had purchased the tenders, there is nothing to show that if relaxation of the eligibility criteria had been publicised, some other parties would have come forward to offer their bids. Tenders were invited for a highly specialised item and only from those parties which had constructed such tugs. Therefore, it is difficult to believe that many more parties would have come forward to give their bids if they had been made aware of the relaxation which came to be made. No such party has thought it fit to challenge the action of the Port Trust on the ground of deprivation of such an opportunity. It is, therefore, not possible to accept the contention that by relaxation of the condition in favour of M/s. Shalimar Works the Port Trust acted arbitrarily or in a discriminatory manner. Moreover, as pointed out above, the petitioner had not raised any objection as regards the technical eligibility of M/s. Shalimar Works till the tender of the latter came to be accepted, if not till the filing of the petition. It appears that having failed to obtain the contract, it has thought it fit now to raise a grievance in that behalf. If the objection raised by the petitioner in this behalf is accepted, then the whole action of considering the tenders of all the three parties by the Port Trust will have to be invalidated. That would result in heavy financial loss to the Port Trust. For all these reasons we do not think it proper to invalidate the action of the Port Trust, more so at the instance of the petitioner.

8. It was next contended by the learned counsel for the petitioner that the financial bids submitted by the petitioner was the lowest and, therefore, their bids should have been accepted without calling the parties for negotiation. He submitted that the decision to call the parties for negotiation was an excuse for favouring M/s. Shalimar Works. He also submitted that even after negotiations, there was no need to call for revised bids and the decision should have been taken on 13-10-1993 itself. He further submitted that the petitioner's tender should have been accepted as an assurance was given that if it was found that some other participant became the lowest tenderer and if the petitioner was prepared to snatch that price, then the petitioner's tender would be accepted.

9. As pointed out by the Port Trust in its reply affidavit, the first revised financial bid was called for in view of the technical changes made and with respect to which no party had any grievance at any stage. After the financial bids were opened on 13-9-1993, the parties were called for negotiation and the petitioner had put forward certain conditions, and it was also found necessary to have clarifications regarding certain items like payment of sales tax, cost of spares, price escalation clause and the effect of fluctuations in foreign exchange. Thus,

calling the parties for negotiation cannot be regarded as an excuse, as contended by the learned counsel for the petitioner. There is absolutely nothing to show that that was done with a view to favour M/ s. Shalimar Works. The fact that the petitioner had put certain conditions and clarifications were necessary is not in dispute. It was under these circumstances that revised price bids were called for.

10. As regards the petitioner's contention that even after the submission of the revised price bids their tender was the lowest, what the Port Trust has stated in its reply affidavit is that according to the revised price bid, M/s. Shalimar Works had quoted Rs. 419.99 lakhs inclusive of all taxes, surveys, transport charges and insurance spares etc. whereas M/s. Hooghly Dock & Port Engineers Ltd. submitted tender for Rs. 421 lakhs plus sales tax. The petitioner did not give any new offer and refused to revise the price quoted in its earlier offer dated 14-10-1993 wherein they had quoted Rs. 437.76 lakhs with escalation clause. Therefore, they considered the tender of M/s. Shalimar Works as the lowest tender and not that of the petitioner. The contention of the learned counsel for the petitioner that even after the revised bid their tender was the lowest cannot, therefore, be accepted. The decision taken by the Tender Committee and subsequently approved by the Board of Trustees appears to have been bona fide and, therefore, cannot be said to have been arbitrarily taken to favour M/s. Shalimar Works.

11. As we do not find any substance in any of the two contentions raised on behalf of the petitioner, this petition fails and is dismissed.

P.C. Misra,J.

12. I agree.