

(1995) 05 PAT CK 0026

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 10621 of 1993

Braj Kishore Singh and Company

APPELLANT

Vs

State of Bihar and Others

RESPONDENT

Date of Decision : 25-05-1995

Acts Referred:

Citation : (1995) 05 PAT CK 0026

Final Decision : Allowed

Judgement

Asok Kumar Ganguly, J.—The subject-matter of challenge in this writ petition is the award of a contract for annual repair of roads in National High Way Division, Gopalganj. The said tender was invited on the basis of an advertisement issued in a newspaper dated 16th July, 1993 and the date was extended to 15th September, 1993 and on that date the final bid took place.

2. It is not in dispute that the petitioner submitted its tenders only for Group No. I and in time and deposited the requisite amount of earnest money. Even though in this writ petition this Court is concerned with the award of tender only in respect of Group No. I, the facts relating to award of tender in other groups have also trickled in through the creeks and crevices, as it were, of the materials disclosed in the course of hearing.

3. The gravamen of the charge made in the writ petition is this that in respect of grant of tender for all the four groups one particular tenderer, namely, M/s. North Bihar Construction Corporation has been favoured by the respondent No. 5 Mr. Abhay Kant Sahay, Special Officer Communication, Road Construction Department, Patna who was then posted as Superintending Engineer, North Bihar Circle, Road Construction Department, Muzaffarpur and was also holding additional charge as Superintending Engineer, National Highway Circle, Muzaffarpur. The fact on which learned counsel for the petitioner has repeatedly harped is that the petitioner is the senior most local tenderer and as such in accordance with the government circular relating to awarding of tender, he should be preferred, every thing else being equal.

4. From the clauses of the tender notice, learned counsel for the petitioner wanted to satisfy this Court that it satisfies all the requirements and the same is also not disputed by the learned counsel for the respondents.

5. Here the factual position which has been stated in paragraph 11 of the detailed affidavit filed by the Superintending Engineer, National Highway Division, Gopalganj is that the petitioner is the Senior most local contractor and it has also submitted papers for the ownership of mini hot mix plant, roller and truck but the mini hot mix plant is not available at the site whereas in respect of M/s. North Bihar Construction Corporation it has been stated that it has also submitted papers for the machinery and its hot mix plant is also available at the site. As such the work was allotted to M/s. North Bihar Construction Corporation. It is the only justification offered by the respondents in support of its action in awarding the contract in favour of M/s. North Bihar Construction Corporation.

6. The requirement in the tender notice in respect of the aforesaid machinery is (i) ownership and (ii) availability of the said machinery. It is admittedly not the requirement of the tender notice that the said machinery must be kept at the site before the award of the contract.

7. In the course of submission, learned counsel for the respondents has very fairly stated with reference to the records of the case that before the matter could be finalise on 30th September, 1993, the petitioner had, apart from submitting ownership documents, filed a letter dated 29th September, 1993 to the effect that the petitioner's mini hot mix plant in respect of which it has filed the ownership document is in use in connection with its work at a different place and the same may be inspected. In the counter affidavit also it has not been stated either that the mini hot mix plant of the petitioner is not in a running condition or that the same cannot be put to use. The petitioner has asserted that the said plant is at Jadugora and the respondents have not disputed it.

8. Now the question is whether the necessity of keeping the hot mix plant physically at the site is a requirement under the tender notice or not.

9. Here the Court, after giving a very anxious and careful consideration of the facts of this case and the requirements under the tender notice, does not and cannot come to the conclusion that the tender notice postulates that mini hot mix plant must be kept at the site as a condition precedent for the award of the contract. The word "available" has been defined in the Chamber's English Dictionary as "Accessible, within reach, obtainable, to be had or drawn up". In Shorter Oxford English Dictionary Volume One the word "available" has been explained as "at one's disposal, within one's reach". In Webster Universal Dictionary, Unabridged International Edition, the word "Available" has been defined as "Capable of being used, handy".

10. The question which obviously crops in his situation and troubles the conscience of the Court is why a contractor of ordinary business acumen will consider it prudent to keep idle a mini hot mix plant at the work site in respect of

a tender which is merely at a consideration stage, and especially when the same is not a compulsion under the tender notice. The inevitable corollary of the aforesaid question which is further agitated in Court's mind is can a tenderer, for not adopting the aforesaid unnatural course, be excluded from a fair consideration of his tender even though he otherwise satisfies all requisite tender condition and being the senior most local contractor is entitled to a preferential treatment. The answer which the justice of the case effortlessly dictates is that his tender cannot be unfavourably considered for alleged non-compliance with a condition which is totally alien and outlandish to the terms of the tender notice.

11. Therefore, the plea of the respondents that the mini hot mix plant of M/s. North Bihar Construction corporation is found standing at the site of the work cannot be treated to be a valid one for grant of award of the tender in its favour. In the facts of this case, this Court is constrained to come to the conclusion that the said requirement, namely, bringing the mini hot mix plant at the site of the work even at the stage of submission of the tender is not a requirement under the tender notice nor can the same be reasonably construed to be a requirement of the tender notice. The said requirement is palpably de hors the tender notice.

12. It is trite to state that in matters of awarding/granting of contract, the State must be governed by the principle of Article 14 of the Constitution of India inasmuch as at the time of entering into the threshold of contractual relationship with private parties, when the entire thing is at an embryonic stage, the State Government acts in exercise of its executive function and like all other executive functions here also the action of the State Government is inhibited by and governed under the principles of non-discrimination and non-arbitrariness which is the soul of the guarantee epitomised under Article 14 of the Constitution of India. But in this case, it is transparent from the stand taken by the respondents in its affidavit that the petitioner failed to get a fair consideration of its tender for adoption by the respondent of a "hidden criteria", as aforesaid, the petitioner has thus been excluded from entering into contractual relationship with the State Government on the basis of un-fair and un-reasonable treatment in the hands of the respondents. The exclusion of the petitioner, as has already been indicated, has been on a basis which is de hors the clauses in the tender notice. As such the decision of the respondents to exclude the petitioner from the arena of consideration and to award the contract in favour of M/s. North Bihar Construction Corporation is violative of the provisions contained in Article 14 of the Constitution.

13. Apart from the aforesaid unfair action of the respondents, the Court, in view of the fair disclosure of facts made by the learned counsel for the State, has been apprised of certain unsavoury facts, namely, (i) that the tender in respect of all the four groups have been awarded in four of one tenderer, namely, M/s. North Bihar Construction Corporation, (ii) The decision to grant all the said work in favour of the said North Bihar Construction Corporation was taken by respondent No. 5, who has been made here a party by name in his residence

much after office hours on 30th September, 1993. (Hi) But the letter being Memo No. 1487 dated 30th September, 1993, marked as Annexure-D to the counter-affidavit filed by respondent No. 5, was written to the Chief Engineer wherein he informed the Chief Engineer that all the four contracts have been awarded to one tenderer on the ground that he has his own mini hot mix plant, (iv) In the said letter the respondent No. 5 significantly omitted the fact that the petitioner's ownership of mini hot mix plant is not disputed, (v) The said letter must have been written by the respondent No. 5 to the Chief Engineer from his office and obviously not from his residence inasmuch as the same is an official letter, (vi) Therefore, the decision was taken before hand in respect of all the four tenders and not "at his residence in late hours" (vii) This shows that things have been done in unseemly haste and (viii). There is no earthly reason for deciding all the four tenders in his residence by the respondent No. 5, especially when he knew that he is under the orders of transfer from the next day i.e. from 1st October, 1993 and on which date another, incumbent, namely, Syed Hishamul Haeque took over.

14. This indecent haste on the part of the respondent No. 5 to finalise all the tenders in his residence at late hours on the eve of his departure and addressing a letter from his office before hand to the Chief Engineer informing him of his decision to finalise all the four tenders by giving different reason for awarding all the contracts in favour of the said M/s. North Bihar Construction Corporation does not and cannot indicate that the action of the said respondent No. 5 was fair and above board. The whole transaction reeks, if not with malice in fact but certainly with malice in law. I think that this Court will be failing in its duty if the said action of respondent No. 5 is not condemned in no uncertain term. This Court, therefore, declares that the respondent No. 5 has failed to maintain purity of administration in the office he holds. Even though the contract in question has been awarded and executed but the question raised in this petition has not become either stale or obsolete, namely, that in matters of consideration of various offers of the tenderers absolute fairness and impartiality must be maintained. Here there has been a singular failure of the respondent No. 5 on both the counts - he has neither been fair nor has been able to show his impartiality.

15. Learned counsel for the respondents has tried to salvage the position in favour of the respondent No. 5 by submitting that subsequently the respondent No. 5 has allotted in favour of the petitioner various other contracts involving much higher amount. Be that as it may, those actions of the respondent No. 5 which are not at issue here, cannot and do not in any way dilute the effect of his patent unfair action in respect of the grant of tender which is at issue between the parties in this writ petition.

16. Learned counsel for the petitioner has relied on several decisions of the Supreme Court which have reiterated the principles governing the exercise of discretion by public authorities in various fields. Those decisions are:

- i) Bangalore Medical Trust Vs. B.S. Muddappa and others, .
- ii) Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries, .
- iii) Consumer Education and Research center and others Vs. Union of India and others, .
- iv) Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, .

The principles enunciated in those decisions are not in dispute and since this case stands on its peculiar facts noted above, the ratio of those decisions need not be considered here.

17. Learned counsel for the respondents has, however, placed reliance on the decisions, one is in the case of Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, of the said judgment has been relied upon in aid of the submission that while entering into contracts, the authorities concerned must enjoy the same liberty as they do in matters of framing policies. But the Court has cautioned that the said liberty cannot be equated with "unfettered discretion", as has been pointed out, in the said paragraph itself. In the said paragraph 12 at page 15 of the report it has been stated "if the decisions have been taken in bona fide manner. The authorities may enjoy the freedom of "play in the joints". But the said freedom cannot degenerate into the licence of discarding a valid tender on the basis of some undisclosed criteria. The contract which is the subject-matter of the writ petition is not a contract having "commercial elements" which calls for arming the executive with more discretion. The contract in question is a routine one for annual road repair which is done every year in respect of the National Highway and thus the requirement of "free play at the joints" is not so much a necessity in the facts of this case. Therefore, in my view, this case is governed by the principles enumerated in paragraph 13 of the said report in the case of Sterling Computers Limited (supra). Relevant extracts from the said paragraph are set out below : --

"But in normal course some rules must exist to regulate the selection of persons for awarding contracts. In such matters always a defence cannot be entertained that contract has been awarded without observing the well settled norms and rules prescribed on basis of the doctrine of "executive necessity". The norms and procedures prescribed by the Government and indicated by Courts have to be more strictly followed while awarding contracts which have along with a commercial element a public purpose as in the present case."

18. The other decision cited is one in the case of Gopal Narayan Singh (Government and Railway Contractor) Vs. The State of Bihar and Others, , In the said case from paragraph 11 of the judgment, it is clear that the contract was rejected on three grounds, namely, that the petitioner in that case did not own a road roller, sales tax clearance certificate was not up-to-date and the labour licence submitted by him was also not up-to-date. Of these three grounds, the Court found, in paragraph 11 of the said judgment that "at least two of the

documents filed by the petitioner was not according to the requirement of tender notice. As such it cannot be said that the authorities have acted arbitrarily in rejecting the claim of the petitioner." Therefore, the decision in the case of M/s. Gopal Narain Singh (supra) stands on a different factual mould which does not fit in with the admitted facts of the present case and as such the said decision is of no assistance to the respondents in the present case.

19. In the instant case of course the work has been awarded and has also been completed by M/s. North Bihar Construction Corporation and the said position has been admitted by the petitioner in the writ petition but the writ petition has been filed by the petitioner only for the purpose of exposing discrimination and unfair treatment of the State authorities in matters of awarding contracts. This Court has entertained this petition on the ground that this Court does not function, merely for the purpose of resolution of disputes between the parties inter se but it also has a higher function to discharge. As a Court of justice and equity it must see that adherence to the Rule of law is ensured and not flouted in the hands of the executives, like the respondent No. 5, who "dressed in little brief authority" and by subtle provisions of discretion, cripple the constitutional guarantee of fairness and reasonableness and convert it to a farce fraud and a facade. The Court must stem this rot and which it tries to do in this judgment.

20. This Court, therefore, declares that the action of the respondents in rejecting the petitioner's claim has been unfair, unreasonable and violative of the provisions contained in Article 14 of the Constitution of India. It is expected that the respondents authorities while dealing with similar situation of awarding of contract will not act in such an unreasonable manner as aforesaid.

21. Before this Court parts with the record of this case one thing must be noted that it would not have been possible for this Court to arrive at these findings but for the fair disclosure of the materials in affidavits and by production of records by the learned counsel for the State respondents in this case. The Court, therefore, records its appreciation for the assistance it received from the learned counsel appearing for the respondents in this matter.

22. This writ petition is thus allowed to the extent indicated above. There will be, however, no Order as to costs.