
(2000) 02 KL CK 0068
In the High Court Of Kerala
Case No : O.P. No. 23618 of 1999

Bridgeway Engg. Co.

APPELLANT

Vs

Southern Railway and Others

RESPONDENT

Date of Decision : 18-02-2000

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2000) 1 KLJ 765

Hon'ble Judges : M.R. Hariharan Nair, J

Bench : Single Bench

Advocate : T.P. Kelu Nambiar and P.C. Sasidharan, for the Appellant; M.C. Cherian, T.P.M. Ibrahim Khan and K.L. Varghese, for the Respondent

Final Decision : Dismissed

Judgement

M.R. Hariharan Nair

1. Pursuant to the commissioning of the prestigious project of the Indian Railways, namely, Kongan Railway, the Southern Railway took up the work of doubling of the Shoranur-Mangalore line. Ext.PI tender notification was issued by the Southern Railway on 26-6-1998 calling for tenders; inter alia; for the works covered by items 3(b) and 3(c), specifications of which are as follows:-

3(b) Construction of Bridge - 12 spans of 19.50 M and 7 Spans of 19.50 M PSC Girder with pile foundation between Vallikunnu and Kadalundi Stations opposite to the existing Br. No. 924 at Km.648/12-649/2 and Bridge No. 925 at Km. 649/9-12.

3(c) Construction of Bridge - 4 spans of 19.50 M PSC Girder with pile foundation between Kadalundi and Feroke Stations opposite to the existing Br. No. 935 at Km.652/11-12.

The petitioner, a private limited company engaged in Government contracts, submitted their tenders for both the works. Even though item No. 3(c) work was

awarded to the petitioner, the Railway did not allot the work as per item No. 3(b) to the petitioner. Instead, it was given over to the 3rd respondent for a sum of Rs. 6,64,00,420/-. The petitioners case is that in doing so, the legitimate claim of the petitioner was over looked in so far as it had quoted Rs. 5,94,01,276/- (wrongly stated in the O.P. as Rs. 5,72,68,000/-) as against the 3rd respondents quotation of Rs. 6,80,58,729/-. It is contended that the award as above is contrary to all principles governing award of contracts; illegal, arbitrary and unjustified and is liable to be interfered with by this court in exercise of its power of judicial review. The railways admit that the work was awarded to the 3rd respondent for Rs. 6,64,00,420/- and justifies their act by contending that the petitioner is a newly formed and inexperienced company which has not proved its competence for taking up such major projects. It is also contended that the rate quoted by it is too unrealistic and far below the estimate prepared by the railways, and that the grant of the work to the petitioner would have led to their leaving the work half way through and unfinished within the time schedule which would have led to difficulties for the railways and the travelling public and that it was bearing in mind the public interest involved, that a High Power Scrutiny Committee decided to recommend grant of the work to the third respondent in preference to the petitioner and that the final decision in the matter was taken by the General Manager of the Southern Railway with utmost bona fides.

2. The points that arise for consideration are: (1) Whether the grant of contract for item No. 3(b) of Ext. P1 to the third respondent is illegal, arbitrary and unjustified and (2) Whether this is a fit case where this Court would be justified in interfering with the award of the contract in exercise of the power of judicial review?

3. The law relating to the award of contracts for public works and the scope of interference by Court are well settled by judicial precedents. Both sides have cited a number of decisions governing the point and it will be sufficient to refer to the principles settled therein as that will enable brevity of judgment. These principles may be summarized as follows:-

4. In a writ petition 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. It is more so, if the dispute is purely between two tenderers, as it happens in this case. A mere difference in the prices offered by the two tenderers may not be decisive in finding whether any public interest is involved in such a commercial transaction. Court's intervention in such matters in favour of the petitioner may considerably delay the work which would lead to escalation in cost far more than the possible saving as a result of Court's intervention tilting the balance in favour of the petitioner. Unless the court is satisfied that there is a substantial amount of public interest, or that the transaction is entered into with mala fides, Courts should not intervene under Article 226 in disputes between two rival tenderers.

5. In commercial transactions, as it happens in the present case, commercial

decisions have perforce to be taken. This, in turn, will lead to commercial consideration the important elements of which will include the following:

- (1) The price at which the rival party is willing to do the work.
- (2) Whether the services offered are of the requisite specifications.
- (3) Whether the petitioner has the ability, financial and otherwise, to complete the work as per the specifications.,
- (4) Past experience of the tenderer and whether he has successfully completed similar works earlier.
- (5) The possibility of completion of the works by the petitioner in time.
- (6) The ability of the petitioner to take follow up action, rectify unintended and unexpected defects or to give post-contract services.
- (7) Whether the rules and guidelines issued by the Government have been followed.

6. In works of the present nature, the public would be directly interested in the timely fulfillment of the contract and hence the services should become available to the public expeditiously. This is more so in the case of the Railways, because it is the backbone of the country which caters to the needs of the public of the entire nation. The public would also be interested in the quality of the work undertaken as poor quality of the work can lead to calamities, disastrous consequences, and enormous hardship to the public. Delay in the commissioning of the project would lead to chain reactions and retardation of industrial and economic growth and development of the country. Possible cost escalation in the case of an alternative arrangement is yet another factor which should enter the mind of the Court.

7. Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, is authority for the proposition that price need not always be the criterion for awarding a contract. The expertise of the committee which evaluates the grant of contract is of utmost importance. Their special knowledge plays a decisive role in deciding which, in given circumstances, is the best offer. The past performance record of the tenderers, the quality of the goods or services which are offered, the market reputation of the tenderers play an important role in deciding to whom the contract should be awarded. At times, a higher price for a much better quality of work, can be legitimately paid in order to secure proper performance of the contract and to ensure good quality of work which is as such in public interest as a low price. The court should substitute its own decision for the decision of an expert evaluation committee.

8. The principles of judicial review, no doubt, would apply to the field of contract as well, if the State is involved. Arbitrariness and favouritism have certainly to be discouraged. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters and the need to

remedy and unfairness. *Tata Cellular Vs. Union of India*, lays down that the court should not sit as a court of appeal in such matters; but can only review the manner in which it was made. It is not the decision as such; but the manner in which it was arrived at that assumes importance. Since the court does not have the expertise to arrive at a proper decision in technical matters, the opinion of the expert committee must prevail unless there are very strong reasons to find fault with it. The terms of the invitation to tender will not be open to judicial scrutiny as the "invitation to tender" is in the realm of contract. The court cannot usurp or abdicate; and the parameters of judicial review must be clearly defined and never exceeded. The court cannot, as a super-auditor, take the committee which makes the selection to task. The court's function is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness and to see whether the authority has substantially complied with the norms of procedure set for it by rules of public administration.

9. The decision, however, should be free from arbitrariness; not affected by bias or actuated by mala fides. Unless the decision is so unreasonable that no sensible person would have arrived at such a decision, it should not be upset. If a reasonable procedure, has been followed and an honest decision taken, the decision has to be upheld. A proper balancing of competing interests should be made by the court and only when there is an overwhelming public interest for interference as against the public detriment which may be caused in consequence of interference such interference will be justified. The Court has to satisfy itself that the public interest in holding up the project to save money far outweighs the public interest in carrying it out within the time fixed in the tender notification. Of course, the cost involved should also be taken into account.

10. In *Kaikkara Construction Co. v. Govt., of Kerala* (1999 (1) KLT 254), a Division Bench of this Court held that the court cannot interfere with the decision of government bodies in awarding contract to a particular individual or body unless there are vitiating circumstances like malice, favoritism etc. The allegations of mala fides have to be specifically pleaded and the person or the authority against whom mala fides is alleged shall be told of such specific instances. Strict proof of allegations is necessary to hold that the exercise of power has been vitiated by mala fides and mala fides will not be easily presumed.

11. The legal principles aforementioned have been reiterated in the latest decision of the apex court in *Air India Ltd. v. Cochin International Air Port Ltd. & Others* (Civil Appeal No. 3641/98) rendered on 31-1-2000. The right of the State to enter into negotiations before finally deciding to accept one of the offers made to it was upheld in that decision. It was also cautioned that the Courts must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making of a legal point, the said decision is also authority for the proposition that once the competent authority takes a tentative decision to deny the grant of contract to the lowest tenderer for valid reasons, there is no need to call him thereafter for

negotiations.

12. The award of the contract for a sum of Rs. 6,64,00,420/- as against the sum of 5,94,01,272/- quoted by the petitioner may now be considered bearing in mind the legal principles aforementioned. This is a case where there is no specific allegation of mala fides raised against any particular member of the high power committee which decided to grant the contract to the 3rd respondent. The committee consisted of the following members:-

1. The Chief Administrative (Construction) Officer Southern Railway.

2. The Chief Accounts Officer, Southern Railway.

3. The Chief Mechanical Engineer, Southern Railway, The decision of the committee was also considered by the final authority, none other than the General Manager of the Southern Railway; who took the tentative decision to reject the lowest offer and directed that the matter must be negotiated with the third respondent, so that the amount could be brought down still further. This was done and the amount was reduced by Rs. 19,20,508/-.

13. The petitioner has a case that the negotiation should have been only with the lowest tenderer, namely, the petitioner himself, in view of Ext. P12 guidelines issued by the Government. It is to be remembered that after the extension of the period of validity of the tender vide Ext. P9 dated 30-6-1999, it was only the petitioner and the 3rd respondent, who were in the fray with their respective rates. The decision in Air India Ltd.'s case aforementioned justifies the action of the General Manager in not inviting the petitioner for negotiations albeit his tender was the lowest. The justification for the tentative decision of the General Manager in this regard can be found on the following facts and circumstances.

14. By the time the decision was taken by the General Manager on 19-8-1999 vide Ext. P10 the petitioner had already proceeded with the item of work awarded to it, namely, that under item 3(c) which was to be completed in 12 months from 16-10-1998 and had performed it for a period of 9 months. As the time for completion of the work under item 3(c) was 12 months, it is obvious that by the time the tender committee dealt with the tenders for item 3(b), which is in controversy here, the petitioner was supposed to complete 75% of the work undertaken by him. At the same time, it is established that the work actually performed was only 26%. That was a strong indication that the petitioner, who took up even a smaller work could not deliver the goods in time. That short performance undoubtedly threw a serious doubt with regard to the possibility of a larger work like that in item 3(b) being finished by the petitioner, if that was also awarded to it. It is pertinent in this regard that the petitioner is a newly formed company and the work under item 3(c) was the first awarded to him by the Railways. On the other hand, the 3rd respondent is a Railway Contractor of long standing and high reputation. He had finished similar multi crore projects earlier within due time. The contention of the Railways that the committee had reason for confidence in the 3rd respondent as against the

petitioner in the circumstances, it well founded. It is also pertinent in this regard that the estimate for the work under item 3(b) prepared by the Southern Railway was Rs. 6,83,21,000/- and that the quotation given by the petitioner was for an amount of less than Rs. 6 crores indicating that it was an unreal and unworkable tender. No doubt, Ext. P12 lays down that the negotiation should be with the lowest tenderer; but, in the circumstances aforementioned, it only means that it should be with the lowest acceptable tenderer, namely, the third respondent.

15. Though the petitioner has a case that the slow progress in the completion of the work under item 3(b) was in consequence of some laches on the part of the railways, the circumstances established in this case do not justify such a conclusion. The petitioner had mentioned on 23-9-1999 that certain item of work has to be carried on by the Railways to facilitate the performance of the work undertaken in Clause 3(b) at a particular stretch. In Ext. R1(O) letter dated 25-9-1999 the railways made alternative suggestions and referred the petitioner to the signal department of the railways. The affected portion is only very little and there was nothing which prevented the petitioner from carrying on the work in the other places. It is pertinent in this regard that in the last paragraph of Ext. P7 letter the petitioner himself had mentioned that the particular work would be completed by 15-5-1999. Ext. P11 letter appears to have been written by the railways suo motu. Difficulty arising from non-shifting of the telephone post appears to have been pointed out by the petitioner only on 23-9-1999 through Ext. R1 (N) letter and there was prompt response from the railways through Ext. R1(O) letter dated 25-9-1999. This shows that there is not much merit in the contention of the petitioner that the delay on the part of the railways in facilitating the work was the real cause of the delay in the progress of the work under item 3(c).

16. Yet another reason pointed out by the railways- for not awarding item 3(b) work to the petitioner is the fact that the consent for extension of the period of validity of the tender made by the petitioner was conditional or qualified. In Ext. P7, the petitioner agreed for extension of validity of the tender upto 30-6-1999 as demanded in Ext. P6; but added that it was "preferably with 12% enhancement". It is to be remembered here that the tender was not finalized pursuant to Ext. P7. After the said period had run out, the Railways had sought concurrence of the petitioner for further extension of the tender period upto 30-8-1999, vide Ext. P8. While giving such consent through Ext. P9, the petitioner did not specifically mention about the enhancement of 12%, even though the earlier letter was also cited therein. In these circumstances, I am not convinced that the mention of 12% excess as a preference" in Ext. P7 or the reference to Ext. P7 in Ext. P9 was the real reason for turning down the lowest offer of the petitioner, especially when such a reason was not communicate to the petitioner at any time before filing the Original Petition and the contention is raised for the first time in the counter-affidavit filed in the case. The circumstances pointed out in the counter-affidavit of the respondents 1 and 2 especially the past performance of the petitioner, shows that the High Power

Evaluation Committee has approached the matter with an open mind and that the decision to grant the contract to the third respondent albeit its rates were slightly higher, was in the best interests of the organization. I am, therefore, not satisfied that this is a fit case where the decision of the committee which was accepted by the General Manager should be interfered with. It is to be remembered here that the General Manager applied his mind to the report of the committee; found that atleast the rate for one of the items of work could be reduced further and accordingly directed that the matter be negotiated with the 3rd respondent which even further reduced the amount payable to him for the work by Rs. 16,58,309 from the tender rate of Rs. 6,80,58,729.

In these circumstances, I find no merit in this Original Petition and it is accordingly dismissed.