
(1994) 04 PAT CK 0042

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 2898 of 1994

Continental Pump and Motors Ltd.

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 28-04-1994

Acts Referred:

Citation : (1994) 04 PAT CK 0042

Final Decision : Dismissed

Judgement

B.P. Singh and I.P. Singh, JJ.—The Petitioner-Company, M/s Continental Pump and Motors Ltd., Gaziabad (U.P.), had filed the instant writ, application for issuance of a writ of mandamus or any other appropriate writ or direction commanding Respondent Nos. 1 to 3, the State of Bihar and its authorities, to award to it the contract for supply of submersible pump sets along with accessories and spare parts pursuant to the tender submitted by the Petitioner-Company in response to a tender notice. The Petitioner claims that the rates offered by it were the lowest so far as schedule-2 items were concerned, and the second lowest so far as schedule-1 items were concerned. Yet the contract was awarded to Respondent No. 4, M/s K.S.B. Pumps Ltd, for supply of schedule-1 items, and to Respondent No. 5, M/s International Pumps and Project (India) Ltd. for supply of schedule-2 items. It is contended that the Petitioner-Company fulfilled all the terms and conditions of the tender notice, and hence the Respondents-authorities have acted arbitrarily and malafide in awarding the contracts to Respondent No. 4 and 5.

2. All the Respondents have appeared at the stage of admission itself and filed counter-affidavit etc. Having regard to the urgency of the matter, we have heard the parties at length, and we now proceed to dispose of the writ petition by this order.

3. The Minor Irrigation Department, Tubewell Wing of the Government of Bihar issued tender notice for an international competitive bid for the supply of submersible pump sets, and other ancillary items, as contained in Schedules 1

and 2 of the tender document. In response to the notice inviting tenders, tenders were submitted on behalf of five parties including the Petitioner. Foreign bidders were also entitled to participate in the bid directly or through their agents in India, subject to fulfilling the eligibility criteria incorporated in the tender document. It is not necessary to refer to the various terms and conditions incorporated in the tender document which had to be fulfilled by the intending bidders. It is necessary only to refer to those conditions which the Petitioner failed to fulfil resulting in the rejection of its tender. Clause 29.3 of the tender document provides as follows:

29.3 To qualify for the award of this particular contract, the bidder

(a) Should be in the business of manufacture and supply of submersible pumpsets for a period not less than three years.

(b) Must have manufactured and supplied atleast 2,000 Nos. of submersible pumpsets (having not less than 150m³/hr. discharge against not less than 21 Mtr. head) in any one of the last three years.

(c) Must produce evidences or certificates for the satisfactory performance of the submersible pumpsets supplied to Govt. departments/Govt. undertakings for a period of not less than one year (Certificate should be from an officer of not less than the rank of Executive Engineer or equivalent)

NOTE: To qualify for more than one Schedule, the bidder must demonstrate having experience and resources sufficient to meet the aggregate of the above qualifying criteria for each schedule.

4. The Petitioner by its letter dated. 14th December, 1993, (Annex. 6) claimed that they had quoted for supply of "Aturia" brand submersible pumpsets, which were to be supplied by a joint venture factory in India of M/s Aturia Pumps S.P.A., Italy. They mentioned that the aforesaid foreign Company had collaborated with the Petitioner-Company in setting up a joint venture factory in India. The foreign collaborator has also equity participation in the joint venture set up in India. Counsel for the Petitioner stated that the foreign collaborator has acquired ten percent of the share holding in the Indian Company. The Petitioner has referred to the record of its foreign collaborator, and its experience in the manufacture of submersible pumpsets for the last more than 60 years. The Indian Company had acquired the complete manufacturing know-how, experience, design, drawings, specifications and quality control inspection procedure as per the standards of the foreign collaborator. The aforesaid foreign Company had supplied 14,000 pump sets in the year 1992, 12,250 pump sets in the year 1991 and 10,200 pumpsets in the year 1990. Annexure-6 refers to a letter written by the foreign Company to the Superintending Engineer dated 4th October, 1993, stating that the foreign company had manufactured and supplied more than 600 Nos. of submersible pump sets (having not less than 150M³/hr discharge against not less than 21 Mt head) in the year 1991-92. Annexure-6 also refers to the technical guarantee furnished by the Italian collaborator.

With regard to its own experience it is stated that the Petitioner-Company is a reputed manufacturer of various types off Pumps and Motors since 1978 and are among the largest manufacturer and exporter of large size Vertical Turbine Pumps in India upto 24" Size and 1600 M3/hr discharge. It has supplied 5443 Nos. V.T. Pumps of similar capacity valued at Rs. 17.25 crores to U.P. Irrigation Department till date. The Company has also exported 9550 Nos. V.T. Pumps of higher capacity valued at Rs. 30 crores to Bangladesh Government. The Petitioner has further claimed that it has supplied 100 Nos. Submersible pumps to U.P. Nalkoop Nigam Ltd. of 18 MI. head and 1.50 M/hr discharge.

5. The tenders submitted by the parties were examined and analysed by the concerned Department, and a Purchase Memorandum was prepared, which is Annexure 2-A to the writ petition. The tender submitted by the Petitioner-Company has been dealt with in paragraph No. 12 of the Purchase Memorandum. It has been mentioned in the Memorandum that the Petitioner-Company has submitted a copy of the Registration Certificate issued by the Directorate of Industries, Govt. of U.P. for manufacturing of V.T. Pumps and submersible pumps, but has not indicated the capacity of production of submersible pump sets. The firm has not enclosed the quantitative details regarding manufacture and supply of submersible pump sets (having not less than 150 M /hour discharge against not less than 21 Meier head) in any one year of the previous three years as required-vide Clause 29.3(b) of the bid. However, the bidder has stated that their foreign Collaborators M/s Aturia pumps S.P.A, Italy had manufactured and supplied more than 600 Nos. of pumps, The Memorandum also notes the fact that the production capacity of the bidder has not been indicated in the bid. The firm has stated that their foreign Collaborators M/s Aturia Pumps S.PA. Italy has manufactured and sup-plied large quantities of pumps during the last three years. The firm, although a domestic bidder claims benefit of the experience and expertise of its foreign Collaborator. It has been concluded that the firm has not indicated its production capacity and experience in India, as required by Clause 29.3.

6. From what has been noted above, it cannot be disputed that Clause 29.3 of the tender document stipulated that to qualify for the award of the contract the bidder (a) should, be in the business of manufacture and supply of submersible pumpsets for a period not less than three years, and (b) must have manufactured and supplied at least 600 (earlier 2000 Nos.) of submersible pump sets having not less than 150 m3hr discharge against not less than 21 mtr. head in any one of the last three years.

So far as the experience as manufacturer and supplier of submersible pump sets is concerned, the Petitioner-Company has not claimed that it has been in the business of manufacture and supply of submersible pump sets for a period not less than three years. It has, however, claimed that it has set up a plant for the manufacture of submersible pump sets in India and its foreign Collaborator, which has 10 percent equity share in the Company, has the requisite experience.

Counsel for the Petitioner contends that having regard to the experience and expertise of its foreign Collaborator, the Petitioner-Company should have been considered eligible for award of the contract. In our view, the submission has no merit. It is not in dispute that the tender was submitted on behalf of the Petitioner-Company, which is an Indian Company. So far as M/s Aturia Pumps S.P.A. Italy is concerned, it is separate and distinct Company, and has a separate and distinct business in the manufacture and supply of submersible pump sets. Obviously, therefore, the experience and expertise of the Italian Company can be of no avail to the Petitioner-Company. The mere fact that the foreign Company has collaborated with the Indian Company, and has made available to the Indian Company its technical know-how, is no ground for holding that the Indian Company which has recently commenced business in the manufacture of submersible pump sets, can claim the benefit of the experience and expertise of its Collaborator. The fact that the foreign Company holds 10 percent of the share capital of the Indian Company does not advance the case of the Indian Company any further. The Petitioner, being the Indian Company, therefore, cannot claim any benefit on the basis of the experience and expertise of M/s Aturia Pumps, S.P.A., Italy. In our view, the fact that the Petitioner has offered to supply Aturia pumps is of no consequence. The claim therefore based on the experience and expertise of its foreign collaborator must be rejected. It was faintly submitted that in connection with some other contracts, the benefit of experience was given to a firm which did not have the requisite experience, but which was extended the benefit of experience of one of the firms which had merged with it. It may be that if two manufacturing units are merged into one, and one of them has the requisite experience and expertise, the benefit thereof may be given to the new entity which comes into existence after the merger. If the authority considers the experience of one of the merging units to be satisfactory. The benefit thereof can reasonably be extended to the unit which comes into existence after the merger, because that unit continues to involve itself with the manufacturing process. The instant case is not a case of merger of more than one manufacturing units, with one of them having the requisite qualification in terms of manufacturing capacity and experience. Moreover, the experience of a foreign Company in a foreign" land cannot be said to be the experience of the Petitioner-Company with which there is merely a collaboration agreement. We are, therefore, satisfied that the Petitioner did not qualify for the award of the contract for non-fulfilment of the conditions laid down in Clause 29.3(a).

7. Equally, the Petitioner-Company does not fulfil the condition laid down in Clause 29.3(b). It is not the case of the Petitioner that it has manufactured and supplied at least 600 Nos. of submersible pump sets of the specification mentioned therein. At the most it claims to have supplied 100 submersible pump sets of 18 Mt. head and 150 M³/hr. discharge. Apart from the number of pump sets supplied, even the specification of the pump sets supplied is not the same as required by Clause 29.3(b), because admittedly the submersible pump sets supplied by the Petitioner-Company are of 18 MI. head as against 21 Mt. head

required under Clause 29.3(b). Again the Petitioner contends that the pump sets manufactured and supplied by its Collaborator should be taken into account. For the same reasons this submission should also be rejected. We, therefore, have no hesitation in coming to the conclusion that the tender submitted by the Petitioner-Company was rightly rejected, since the Petitioner-Company did not have the requisite experience nor had it supplied the requisite number of pumps, namely, 600 submersible pumps of the specification mentioned in the tender document in any one of the three preceding years.

8. It was then submitted that the tenders submitted by others bidders, namely, Respondent No. 4 and 5 should have been rejected. The ground urged in support of this plea is that Respondent No. 5 had furnished the security amount required to be furnished under the tender document by furnishing Bank guarantee payable to Superintending Engineer, Minor Irrigation Department, whereas the same should have been executed in favour of Superintending Engineer (Purchase and Store Unit), Tubewell Wing, Minor Irrigation Department, Patna. The argument is based solely on Annexure-2 which is the check list of responsiveness prepared in the office of the purchaser. The document is not reliable enough on the basis of which a finding can be recorded. It is in the form of a note, and whereas in the case of Respondent No. 5 it is stated that the Bank guarantees have been furnished payable to Superintending Engineer, Minor Irrigation Department and addressed to Superintending Engineer, Purchase and Store Unit, Tubewell Wing, Minor Irrigation Department, Patna. In the case of the Petitioner as also in the case of Respondent No. 4 it is not even mentioned in whose favour the Bank guarantees have been executed. We, therefore do not, find it safe to rely upon Annexure-3 for recording a conclusion that the earnest money in the shape of Bank guarantee was not properly furnished. No objection was taken by Respondent No. 1 to 3 on the ground that the earnest money was not duly furnished. Moreover, no such specific plea was raised in the writ application, and all that is stated in paragraph No. 34 of the writ petition is that the Bank guarantee submitted by Respondent No. 4 was not in accordance with the terms incorporated in Clauses 5 and 15, 15.1 and 15.2. It is not contended in the writ petition, as was general before us, that the Bank guarantee was not executed in favour of the person in whose favour it should have been executed. Since a general allegation was made in the writ petition, Respondent No. 4 in paragraph No. 32 of its counter-affidavit has denied the allegation, and has stated that the statement made in paragraph No. 34 is absolutely wrong. We have, therefore, come to the conclusion that no reliable material has been placed before us on the basis of which we can hold that Respondent No. 4 had not furnished the earnest money in the manner required.

9. It was then submitted that the purchaser had issued a letter dated 9-12-1993 requiring all bidders to provide an analysis of ex-factory rate of submersible pump sets and accessories indicating the break up of cost of (sic) material, Store and spares, cost of production (including labour cost), administrative expenses, selling and distribution expenses, profit etc. The Petitioner-Company had

supplied the requisite information, but the same was not supplied by Respondent No. 4 and 5 who took the stand that supply of such particulars would result in disclosure of trade (sic). The Petitioner submits that Clause 11.2 provides that prices indicated on the price schedule shall be entered separately in the manner as laid down in that clause. It was, therefore, incumbent on the bidders to supply the particulars required by the purchaser. Respondent Nos. 4 and 5 have submitted that they have responded to the letter issued to them, but they had not supplied all particulars asked for. The State in its counter-affidavit has submitted that the, replies and explanation submitted by Respondent No. 5 were reviewed by the Departmental Purchase-cum tender Committee. It is not the case of the Petitioner that: Respondent No. 4 and 5 did not fulfil the conditions of Clause 11.2 of the tender document. According to it, some more particulars were required to be furnished, which Respondent Nos. 4 and 5 did not furnish on the pretext that that would amount to disclosing trade secrets. The Purchase Committee having considered the explanations furnished by Respondent Nos. 4 and 5 has awarded the contracts to them. If the conditions laid down in Clause 11.2 of the tender document were fulfilled, the tender submitted by Respondent Nos. 4 and 5 could not be rejected, on the ground of non-fulfilment of any condition. The mere fact that Respondent Nos. 4 and 5 did not furnish some more particulars in response to a letter issued to them did not have the result of making their bids non-responsive, particularly when the purchase Committee considered their explanations" and qualifications and they were satisfied with the explanations furnished by them. The purchase Committee being a technical Committee consisting of experts, has the requisite knowledge and experience to appreciate the explanations furnished by the private Respondents. If the Committee was satisfied that the prices quoted were reasonable and the bidders fulfilled all the necessary pre-conditions and post-conditions, as contained in the notice inviting tender, this Court would not normally substitute its judgment for the judgment of the Committee, if the same has been arrived at bonafide after following a fair procedure.

10. Counsel for the Petitioner faintly alleged malafide against Respondent No. 3, Project Coordinator. In the supplementary affidavit filed on behalf of the Petitioner it has been stated that in the year 1992-93 Respondent Nos. 2, 4 and 5 had made supplies which were found to be defective and Sri Amod Ranjan Sinha, the Project Coordinator, had directed the concerned Executive Engineer to withhold their security money as their supplies were found to be defective. In these circumstances, it was submitted that the fact that Respondent, Nos. 4 and 5 had made defective supplies in the past was within the knowledge of Coordinator (Respondent No. 3) and, therefore, the contract should not have been awarded in favour of Respondent Nos. 4 and 5. The submission has no force. The contract has been awarded by the Committee consisting of several experts and not by Respondent No. 3 alone. No malafide has been alleged as against other members of the Committee. Moreover, from the documents (Annexure-8 to the supplementary affidavit) it appears that some defect was

found as a result of which column pipe was not filling properly. He had therefore, instructed the Executive Engineer that he should satisfy himself before releasing the balance 10 percent amount to the supplier. In our view, when large scale supplies are made and some defects crop up in filling and running the machines supplied, the same had to be rectified by the Contractor to the full satisfaction of the purchaser. Some minor defects arose from time to time and they were duly rectified by the supplier. That by itself; does not disqualify the supplier from making further supplies if it fulfils the requisite conditions. We are therefore, satisfied that the allegation of malafide against Respondent No. 3 is ill-founded and in any event is of no consequence. We are; therefore, satisfied that none of the arguments advanced on behalf of the Petitioner has any merit.

11. We do not wish to consider the objection raised on behalf of Respondent No. 5 that the instant writ application was not maintainable in view of the fact that the World Bank has not been made a party Respondent. The objection proceeds on the basis that the contract could not be awarded without the approval of the World Bank. In the instant case it was only after the approval of the World Bank (Annexure-D) that the contract was awarded despite the objection of the Petitioner to the World Bank. It was, therefore, contended that no adjudication should be entertained in the absence of the World Bank Counsel for Respondent No. 5 also referred various decisions of the Supreme Court, and submitted that in the instant case there was no allegation of personal malafide. The Committee which scrutinised the tenders, and which ultimately took a decision to award the contracts in favour of the private Respondent, was an expert body fully qualified to deal with such matters. There was nothing to establish that they had either followed an unfair procedure or that they had acted (sic) or with malice. In these circumstances, if the Court came to the conclusion that the Committee had acted fairly and bonafide, the Court should not exercise its writ jurisdiction to quash the decision taken by such a Committee. He has referred to the decisions in the cases of Union of India and others Vs. Hindustan Development Corpn. and others, , Om Prakash Poplai and Rajesh Kumar Maheshwari Vs. Delhi Stock Exchange Association Ltd. and Others and Union of India (UOI) and Others, , K. Vasudevan Nair and others Vs. Union of India and others, , and G.B. Mahajan and others Vs. The Jalgaon Municipal Council and others, . The law is fairly well-settled and it is not necessary for us to say anything more since we are satisfied that the Committee has acted fairly and bonafide, and the tender submitted by the Petitioner-Company was rightly rejected on account of non-fulfilment of Condition Nos. 29.3(a) and (b) of the Conditions.

11. In the result, this writ petition fails and is dismissed.