

(1995) 11 RAJ CK 0048
In the Rajasthan High Court
Case No : Civil Special Appeal No. 770 of 1995

Deepak Builders

APPELLANT

Vs

The State of Rajasthan and Others

RESPONDENT

Date of Decision : 08-11-1995

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 299

Citation : AIR 1996 Raj 178 : (1996) 1 RLW 110 : (1996) 1 WLC 556

Hon'ble Judges : P.C. Jain, J;B.R. Arora, J

Bench : Division Bench

Advocate : Vineet Kothari, for the Appellant; B.C. Mehta and D.C. Mehta, for the Respondent

Final Decision : Dismissed

Judgement

B.R. Arora, J.—This appeal is directed against the judgment dated 19-10-1995, passed by the learned single Judge, by which the learned single Judge dismissed the writ petition filed by the petitioner-appellant and held that the decision taken by the respondents is only on the administrative side and involves technicalities of the matter and no vested rights of the petitioner stand infringed by the action of the respondents.

2. Bids for contract of pre-qualification were invited by the Irrigation Department of the Government of Rajasthan for earth-work of main Earthen Dam from RD 355 to 595-M including pitching and rock toe and the construction of Head outlet sluice of Mewara Minor Irrigation Project constructed across Majam river about 35 kilometres from Dungarpur near Mewara village (district Dungarpur). The parties interested in the contract were asked to apply for pre-qualification in the manner set-out in the Tender form. It was, also, mentioned in the Tender Form that the tender will be issued subsequently only to those parties selected by the competent authority as having necessary qualification/suitability to perform the contract(s) satisfactorily. The last date for submission of the pre-qualification tender documents was 7-10-1995 and 10-10-1995 was the date

fixed for taking decision for short-listing the tenderers. 19 tenderers including the petitioner-appellant participated in the Pre-qualification bid for this Project and submitted their pre-qualification tender documents. The Committee constituted for the assessment of the pre-qualification of the tenderers and for short-listing the applications, in its meeting held on 10-10-1995, assessed the qualification of all the 19 tenderers taking into consideration their comparative statement and examining the relevant documents of the individual party and found only ten tenderers as qualified tenderers and rejected the cases of the other nine tenderers. The case of the appellant-petitioner was also considered and the petitioner-appellant was found disqualified for want of sufficient experience in the work of similar nature. Since the appellant-petitioner did not qualify the pre-tender offer and was not found eligible for submitting the tender for the work, it, therefore, preferred the writ petition before this Court challenging the action of the respondents not allowing it to participate in submitting the tender. The writ petition, filed by the petitioner-appellant, was contested by the respondents and the same was dismissed by the learned single Judge by his judgment dated 19-10-1995. It is against this judgment that the petitioner-appellant has preferred this special appeal.

3. It is contended by the learned counsel for the appellant that (i) while inviting pre-qualification tender documents, there was no condition in the notice that the applicant must have to its credit five years' experience of the work of similar nature and, therefore, later on this condition cannot be applied while short listing the applications; (ii) the principles of natural justice have been flouted and the appellant was not given any opportunity to plead its case at the time of short-listing the bids for contract; and (iii) the respondents acted arbitrarily while short-listing the bids for contract and the petitioner-appellant has been discriminated and has not been allowed to participate in submitting the tenders for the work while M/s. B.D.S. Associates, which, also had no experience of five years to its credit in the line and which was found ineligible at the initial stage, has been permitted to participate in submitting the tender. This clearly shows that there is complete non-application of mind by the Committee while short-listing the tenderers. It has also been contended by the learned counsel for the appellant that in the contractual matter, where the administrative authority acts arbitrarily and unreasonably then their decisions are amenable to judicial review and the writ jurisdiction in such matter is not barred. In support of his contention, learned counsel for the appellant has placed reliance over *Mahabir Auto Stores and others Vs. Indian Oil Corporation and others*, *Vencil Pushpraj Vs. State of Rajasthan*, *Mangalore Chemicals and Fertilisers Ltd. Vs. Deputy Commissioner of Commercial Taxes and others*, *Bharat Construction & Co. v. State of Rajasthan* 1993 WLR (Raj) 765 and *LIC of India and Another Vs. Consumer Education and Research center and Others*, Learned counsel for the respondents, on the other hand, have supported the judgment passed by the learned single Judge and submitted that the judicial review under Article 226 of the Constitution of India cannot be converted into an appeal. Judicial review is not directed against the

decision but is confined to the examination of the decision-making process. The decision making process, in the present case, cannot be said to be, in any way, arbitrary and the matter was decided on the basis of the information supplied by the appellant-petitioner and the other applicants. It is only on the basis of the information supplied by the tenderers in their pre-qualification tender documents that the matter has been considered and decided and the High Court, under Article 226 of the Constitution of India is not expected to interfere in the matters based on economic criteria and commercial contracts. It is further submitted by the learned counsel for the respondents that no opportunity of hearing is required to be given to the tenderers while considering their eligibility for short-listing and as such no principle of natural justice has been flouted. It has, also, been contended by the learned counsel for the respondents that as the appellant was not found qualified in the pre-qualification assessment, it is not entitled to fill the tender form and the case of the appellant has rightly been rejected as it was not having the requisite experience of five years. It has; also, been contended by the learned counsel for the respondents that there is no discrimination in allowing M/s. B.D.S. Associates to submit the final tender as initially, due to oversight, the work experience of B.D.S. Associates could not be taken note-of and when a grievance was made by this firm, the work experience certificate enclosed with the pre-qualification tender documents filed by this firm, was considered and it was found having the requisite experience and, therefore, permitted to submit the tender form. In support of their contention, learned counsel for the respondents have placed reliance over: State of Uttar Pradesh and Others Vs. Maharaja Dharmander Prasad Singh and Others, and Jagan Singh Vs. State Transport Appellate Tribunal, Rajasthan and Another,

4. We have considered the submissions made by the learned counsel for the parties.

5. The first question, which requires consideration, is regarding the scope of judicial review in contractual matters. The State and its functionaries, in a decision making process, is obliged to act fairly and with justice and not arbitrarily. It has to apply its mind to all the relevant consideration without any bias and the irrelevant consideration must not form the basis of the decision. If the decision taken by the administrative authority even in the contractual matters is arbitrary or capricious or based on irrelevant consideration then their decisions are amenable to the judicial review because that would amount to violation of Article 14 of the Constitution of India. The State or its "functionaries cannot be relieved from its obligation to comply with the basic requirement of Article 14 of the Constitution of India to act justly and fairly on the pretext that the dispute falls within the domain of contractual obligations. The administrative decision, given in contractual matters, can be impeached if it is arbitrary or violative of Article 14. The law discernible from the various judgments of the Supreme Court including the judgments on which reliance has been placed by the learned counsel for the appellant, is that the judicial review is not barred in contractual matters. The requirement of Article 14 and contractual matters are

not alien concepts. They can exit together. The duty to act fairly is a part of fair procedure envisaged under Article 14 of the Constitution of India. Every activity of the State or its instrumentality must be informed by reasons. Its action must be based on some rational and relevant consideration and must not be susceptible to the vice of arbitrariness because arbitrariness is the negation of Rule of Law. The Constitution of India does not envisage or permit unfairness or arbitrariness in State action in any sphere of activity. Merely because the dispute falls within the domain of contractual obligation, it will not relieve the State or its instrumentality of its obligation to act fairly and justly. It would be difficult and unrealistic to exclude the State actions in contractual matters from the judicial review. Administrative decision even in contractual matters cannot be impeached if it is arbitrary, unreasonable, irrational, mala fide or violative of Article 14 of the Constitution of India.

6. The next contention, raised by the learned counsel for the appellant is that while inviting the bid for contract of pre-qualification, the condition of five years' experience was not mentioned, and, therefore, this condition in short-listing the applicants cannot be pressed into service. The applicant-petitioner has placed on record Annexure-2 the Tender Form/pre-qualification documents for work in question. Condition No. 11 of Part I of this document (at page 28 of the petition) states that all those tenderers who qualify the pre-qualification offer, will be eligible for submitting the tenders for the work and the tender forms to all such contractors will be issued from the Office of the Executive Engineer, Irrigation Division, Dungarpur, from 10-10-1995 to 12-10-1995. In the II Part of this document Annexure 2, Condition No. 1, at page 31, relating to the pre-qualification document, is, also, to the same effect and provides that "the tender form will be issued only to those parties selected by the competent authority as having the necessary qualification/suitability to perform the contract(s) satisfactorily." Condition No. 9 of Part II deals with the instructions to the applicants. Condition No. 9.1 of this Part provides that a contractor may be pre-qualified for this contract depending upon his resources, capability, technical know-how etc. Condition No. 9.15(c) (See page No. 38 of the petition) requires the applicant to furnish the details of the experience and past performance of the tenderer of the work of similar nature within past five years and the details of the current work in hand and other contractual commitments. Condition No. 9 and its sub-conditions, deal with the necessary conditions which the applicant/tenderer has to fulfil to clear the pre-qualifications test and one of such conditions is five years' experience of the work of similar nature. On the recommendation of the Committee constituted by the State Government, this pre-qualification procedure was adopted for inviting tenders for all the work in the Irrigation Department, the established cost of which exceeds rupees one crore. The pre-qualification procedure provided by the irrigation Department for inviting tenders for the work, the cost of which exceeds rupees one crore, cannot be said to be, in any way, arbitrary, unjust or improper.

7. So far as the short-listing of the tenderers is concerned, looking to the huge

amount involved in the work, the magnitude and the nature of the work which require special skill, if a decision has been taken to get the work done only from these persons who have expertise in the work and have experience of five years with similar work then the decision cannot be said to be arbitrary, unreasonable or unjust. In the notice inviting bids for contract of pre-qualifications for the work, all these informations, including the information regarding the experience of five years, were called and were submitted by all the tenderers including the appellant-petitioner. It is, therefore, wrong to say that at the time of inviting the bids for pre-qualification test, the condition of five years' experience was not mentioned. The test of short-listing of the tenderers on the basis that the applicant must have five years' experience in the similar nature of the work, cannot be said to be, in any way, illegal or arbitrary. The principle applied for the short-listing is perfectly just and proper looking to the magnitude and the special nature of the work which requires special skill.

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 tenderers 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 circumstances 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 tenderers 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 tenderers for short-listing. The matter has been considered by the Committee on the basis of the information and the material supplied by the tenderers 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, no violation of principles of natural justice. The contention, raised by the learned counsel for the appellant, is, therefore, bereft of any substance.

9. The last contention, raised by the learned counsel for the appellant, is that the respondents, while considering the cases for short-listing, acted arbitrarily and in

a discriminatory manner and allowed the similarly situated applicant M/s. B.D.S. Associates to participate in the tenders though it had no experience of five years to its credit. Initially the committee did not find M/s. B.D.S. Associates as eligible in the pre-qualification test and its application was rejected; but later on its case was re-considered. The appellant-petitioner has neither challenged the inclusion of M/s. B.D.S. Associates in the list of eligible tenderers nor has made this firm as a party to the writ-petition and, therefore, the action of the respondents to this effect cannot be considered and decided in the absence of the party concerned. But merely because ineligible persons have been allowed to file tenders, the appellant cannot be allowed to participate in the tenders, particularly when it was not eligible for the same as per the conditions laid down by the Screening Committee for pre-qualification test because that will amount to perpetuate an illegality and to do injustice to the other seven persons whose applications have, also, been rejected by the Committee as they were not fulfilling this condition of five years' experience in the similar work. The appellant-petitioner was having only one year's experience in the similar work while as per the condition laid down in the tender, the parties competing in the bids have to their credit five years' experience in the similar work. However, it is expected, that the concerned authority will allow only those persons to participate in the tenders who are eligible. The contention, raised by the learned counsel for the appellant, is, therefore, devoid of any force and the same is rejected.

10. The learned single Judge has considered the case of the petitioner-appellant in the right perspective and rightly held that there is no arbitrariness or mala fide on the part of the respondents in short-listing the tenderers. The authority always can lay down the guide-lines for the pre-qualification test for competing the tenderers looking to the nature of the work to be accomplished. The judgment, passed by the learned single Judge, therefore, does not require any interference.

11. In the result, we do not find any merit in this special appeal and the same is hereby dismissed with cost. We assess the cost at Rs. 2200/- (Rupees two thousand two hundred only).