
(2004) 02 GAU CK 0063

In the Gauhati High Court

Case No : Writ Petition (C) No. 311 (SH) of 2003

Eastern Commercial Enterprise

APPELLANT

Vs

North Eastern Electric Power Corporation and Another

RESPONDENT

Date of Decision : 13-02-2004

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 226(3)

Citation : (2004) 1 GLT 485

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : H.S. Thangkiew, for the Appellant; V.K. Jindal, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—The grievance made in this writ petition is in respect of issuance of a NIT confining the same only to the reputed/experienced and resourceful contractors of Arunachal Pradesh for the work in question which according to the Petitioner is violative of Article 14 and 19(1)(g) of the Constitution of India. The Petitioner has challenged the legality and validity of the NIT in question dated 16.9.2003 issued by the Respondent inviting sealed tender under two bid system only from the aforesaid categories of contractors of Arunachal Pradesh. The work in question related mainly to the Earth work, jungle clearance, alignment survey etc. The Petitioner who has years of outstanding experienced in the field of civil works and who has executed many prestigious work in the Eastern part of India wanted to participate in the said tender process, but could not do so as the tender documents were refused on the ground that the Petitioner was not from Arunachal Pradesh. The Petitioner made representation making a request thereby to issue tender documents and to allow them to participate in the tender process, however the same did not yield any result. Hence, this writ petition challenging the legality and validity of the aforesaid NIT dated 16.9.2003.

2. This Court while entertaining the writ petition was pleased to pass an interim

order on 7.11.2003 providing that till the next returnable date i.e. 13.11.2003, the process of the impugned NIT would remain suspended. In the meantime, the Respondent-authority filed an application praying for vacation of the interim order which was registered and numbered as Misc. Case No. 200(SH)2003. By an order dated 13.11.2003, this Court on being apprised by the Respondents that the tenders for the first bid were already opened provided that till the next date, the Respondents would not open the second bid. The case was ordered to be listed in the first week of December, 2003. The matter was taken up on 9.12.2003 and the learned Counsel appearing for the Petitioner prayed for listing of the case on 11.12.2003. However, there was no prayer for extension of the interim order dated 13.11.2003. The matter was again listed for order on 28.1.2004 and again on the prayer of the learned Counsel for the Petitioner was adjourned to 30.1.2004. On 30.1.2004, the matter was argued at length and the learned Counsel for the parties agreed for disposal of the writ petition itself. However, by an order dated 30.1.2004 it was observed that by operation of the provision of the Article 226(3) of the Constitution of India and in view of the fact that there was no extension of the interim order passed earlier, there was no interim order in the writ petition.

3. Along with the said Misc. Application, the Respondents, also filed their affidavit-in-opposition controverting the stand of the Petitioner in the writ petition. As against the case of the Petitioner that the impugned NIT confined the same only to the contractors of Arunachal Pradesh is violative of Article 14 and 19(1)(g) of the Constitution of India, the Respondent in their counter affidavit supported the action of the Respondent. According to the averments made in the affidavit, the Government of India has approved setting up of a Hydro-Electric Project at Kameng in the West Kameng District of Arunachal Pradesh under the name and style of a scheme called "Kameng Hydro Electric Project" consisting of a power station with 4 X150 MW Hydro Turbine for which techno economic clearance was accorded by the Central Electric Authority. In order to set up and execute the said Power Project in the State of Arunachal Pradesh, the Respondent entered into a Memorandum of Understanding (MOU) with the Govt., of Arunachal Pradesh on 31.3.1999 and the said MOU amongst other terms and conditions provides under Clause No. 6(I)(IV) as follows:

(iv) That except for the Major and Special Type of works, as will be determined by NEEPCO, all other works will be kept open for the local contractors of Arunachal Pradesh, subject to their fulfilling the eligibility criteria for execution as per norms of the Corporation and a competitive bidding.

4. According to the Respondents, pursuant to the said MOU, Kameng Hydro Electric Project" was allowed to be set up in the State of Arunachal Pradesh subject to a clear understanding between the Respondent-corporation and the Govt. of Arunachal Pradesh that except for all major and special type of works, as will be determined by the Respondent-corporation, all other works will be kept open for the local contractors of Arunachal Pradesh, subject, however, to their

fulfilling the eligibility criteria for execution as per norms of the Respondent corporation. It is the further stand of the Respondents in their affidavit that for smooth execution and operation of the said Power Project, there is a requirement of the construction of road from Tenga Dam site to Buragaon site at Kameng Hydro Electric Project and for construction of the said road, there is a requirement for the formation and cutting of approach road from Buragaon towards Tenga Dam from Ch. 00 km. to Ch. 6.00 km and the work in question related mainly to earth work, jungle clearance, alignment survey etc. and thus is not a major or any special type of work. Since the Respondent-corporation has already entered into the aforesaid MOU with the Government of Arunachal Pradesh to keep open such works for the local contractors of Arunachal Pradesh and in order to avail the full working season for the construction of the road in question and as well as considering the nature of work, the Respondent-corporation decided to keep open the work in question to the local capable contractors of Arunachal Pradesh. It was further decided to call the tenders under two bids system i.e. calling the tender by the process of evaluation of technical bids and price bids to determine the suitability of the local contractors of Arunachal Pradesh and to publish the tender in the local newspaper of Arunachal Pradesh only. The stand in the affidavit is that in the event of making the tender open on all India basis, it would not only be opposed to the said MOU, but will also have negative effect as such action may jeopardise the project work. The Respondent-corporation being within its rights to reserve certain categories of works for certain categories of contractors and limit the competition among them only the action towards issuance of NIT in question cannot be said to be discriminatory or violative of any fundamental rights of the Petitioner as alleged.

5. The Respondents in their affidavit have further stated that in response to the NIT, seventeen (17) numbers of local contractors of Arunachal Pradesh purchased the tender documents and ten (10) out of the seventeen (17) contractors have already submitted their tender documents. The bids relating to the Technical suitability were opened on 23.10.2003. However, the Price Bids are yet to be opened. According to the Respondents, the opening of the technical bids shows that there are number of suitable local contractors available in the State of Arunachal Pradesh who are qualified for opening of the Price Bids and for allotment of the work in question.

6. I have heard Mr. H.S. Thangkhiew, learned Counsel appearing for the Petitioner who submitted that the action of the Respondent in issuing the NIT in question confining the same only to the contractors of Arunachal Pradesh is violative of Article 14 and 19(1)(g) of the Constitution of India. According to him in a democratic country, it is the right of all to participate in the tender process and the criteria fixed by the Respondents resulted in trampling upon the rights as guaranteed under the Constitution of India. Moreover to secure the best offer, tender must be open to all.

7. On the other hand Mr. V.K. Jindal, learned senior Counsel appearing for the Respondents in his usual persuasive pursuits argued that the action having been taken pursuant to the MOU comes within the limits of reasonable restrictions as provided for under the constitutional scheme. Referring to the MOU and Clause 6(I)(iv) of the same. Mr. Jindal argued that the decision to call tenders only from the reputed and experienced contractors of Arunachal Pradesh cannot be branded as discriminatory or violative of any fundamental rights. Limiting the tender only to the contractor of Arunachal Pradesh which is admittedly a backward State, both socially and economically has not resulted in any discrimination and the clause in the MOU referred to above was incorporated which would go a long way towards uplifting the economy and social condition of the State of Arunachal Pradesh. He further submitted that the Petitioner does not have any absolute right to participate in the tender process which is always subject to reasonable restrictions which may be imposed by the Respondent-corporation in the best interest of the project. He further submitted that in a Welfare State, the action of the State cannot always be just from the point of view of securing the best offer in a tender process by making it open to all on all India basis, but the same are also required to be viewed from the point of view of the welfare and upliftment of the local contractors of economically and socially backward State like that of Arunachal Pradesh. Keeping in view, all these factors, if the tender in question is limited and confined to the local contractor of Arunachal Pradesh only, no fault could be attributed to the Respondent-corporation.

8. Mr. Thangkiew, learned Counsel for the Petitioner pressed into service, two decisions of the Apex Court as reported in (2001) 2 SCC 451 *West Bengal State Electricity Board v. Patel Engineering Co. and Union of India and Others Vs. Dinesh Engineering Corporation and Another etc.*, . In the first case, the Apex Court reiterated and emphasised the need to adhere to the sound principles of rule of law and constitutional values in the matter of awarding of contract. In the said decision it has also been emphasised that an adherence to the principle of protection of public interest is the best principle to be followed in the public interest. In the second case tender was confined only to a particular party on the assumption that there was no other party to carry out the works with the requisite degree of sophistication, complexity and precisions. The policy decision taken by the Railways in that case was held to have suffered from non-application of mind and arbitrariness. In the said case, the policy decision was taken by the Railways to confine the tender only to a particular party on the hypothesis that there was no other supplier competent enough to supply the materials required without taking into consideration the fact that the writ Petitioner in that case had been supplying the materials for the last over 17 years. The decision of the Railways was held to have suffered from the vice of non-application of mind.

9. On the other hand Mr. Jindal, learned senior Counsel appearing for the Respondents placed reliance of the following decisions:

- i) Krishnan Kakkanth Vs. Government of Kerala and others,
- ii) Sterling Computers Limited and Others Vs. M and N Publications Limited and Others,
- iii) Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others,
- iv) Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others,

10. In the case of Krishnan Kakkanth (supra) the Apex Court indicated that although a citizen has a fundamental right to carry on a trade or business, he has, no fundamental right to insist upon the Government or any other individual for doing business with him. Any Government or individual has got right to enter into a contract with a particular person or to determine a person or persons with whom he or it will deal.

11. In the case of Sterling Computers Ltd (supra), the Apex Court held that the public authorities must have the same liberty as they have in framing the policies, even while entering into contracts because many contracts amount to implementation or projection of policies of the Government. In contracts having commercial element some more discretion has to be conceded to the authorities giving them liberty to assess the over-all situation for purpose of taking a decision as to whom a contract be awarded and at what terms, so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. It has been held that it is not possible for Courts to question and adjudicate every decision taken by an authority. Even while taking decision in respect of commercial transaction a public authority must be guided by relevant consideration and not by irrelevant one's. By way of judicial review, the Court is not expected to act as a Court of appeal while examining an administrative decision and to record a finding whether such decision could have been taken otherwise in the facts and circumstances of the case.

12. In the case of Asia Foundation (supra), the Apex Court while recognising that though the principle of judicial review cannot be denied so far as exercise of contractual powers of Government bodies are concerned, but it is intended to prevent arbitrariness or favouritism it is exercised in the larger public interest or if it is brought to the notice of the Court that in the matter of award of a contract power has been exercised for any collateral purpose.

13. In the case of Raunaq International (supra), the Apex Court emphasised the need for a cautious approach in the matter of passing any interim order while entertaining a writ petition. The Court must carefully weigh conflicting public interest and only when it comes to the conclusion that there is an overwhelming public interest in entertaining the petition, the Court should intervene.

14. I have considered the rival submissions made on behalf of the parties and have also considered the aforesaid decisions pressed into service to buttress the respective arguments. I have also considered the materials placed on records.

The only question to be decided is as to whether the confinement of the NIT in question only to the experienced and reputed contractors of Arunachal Pradesh has resulted in violation of the equality clauses in the Constitution of India. According to the Petitioner such a restriction imposed is opposed to the equality clauses of the Constitution of India and cannot be said to be a reasonable classification. On the other hand as alluded to above it is the case of the Respondent that such a classification is a reasonable classification and permissible within the exception provided by the Constitution itself under the equality clauses. The Respondent-corporation has entered into the aforesaid MOU providing execution of the contract works through the local contractors of Arunachal Pradesh except for the major and special types of works which is again subject to their fulfilling the eligibility criteria for execution as per norms of the Respondent-corporation and a competitive bidding. The Respondents have explained in their affidavit as to the necessity of going for such an exception. The work in question related mainly to the earth-work, jungle clearance, alignment survey etc. and thus is not a major or special type of work. Such a clause is incorporated in the MOU keeping in mind the economic and social condition of the State of Arunachal Pradesh. Execution of the work in question through the local contractors is in the interest of power project of the Respondent-corporation. It is not the case of the Petitioner that a particular contractor belonging to the State of Arunachal Pradesh has been picked up ignoring others. As reflected in the affidavit-in-opposition as many as 17 contractors responded to the NIT and on completion of the first round of the tender process 10 contractors are in the fray.

15. In a welfare State like ours, the action of the State cannot always be judged only, from the point of view of securing the best offer in a tender process by making it open to all on all India basis, but the same are also required to be viewed from the point of view of the welfare and upliftment of an economically and socially backward State like that of Arunachal Pradesh. While there is no denial on the proposition laid down by the Apex Court in the two decisions relied upon on behalf of the Petitioner the impugned decision and the NIT will have to be viewed from the angle of arbitrariness, principle opposed to the public policy and as to whether there is any malafide exercise of power on the part of the Respondent-corporation.

16. In the case of West Bengal State Electricity Board (supra), the Supreme Courts has emphasised the need for protection of public interest and adherence to the rule in the public interest. In the instant case, the Respondent-corporation has highlighted its policy decision based on public interest to award the contract from amongst the local contractors.

17. In the case of Dinesh Engineering Corporation (supra), the Apex Court interfered with the contract in question which was confined only to a particular contractor only on the assumption that there was no other suitable contractor. The Apex Court noticed that the writ Petitioner therein had been making the

supply in question for long 17 years and having regard to such a factual situation it was held that the decision of the Railways in that case was arbitrary and violative of Article 14 of the Constitution of India. Same is not the case here. It is not a case of picking up a particular contractor to carry out the work in question. By the impugned NIT which has been issued pursuant to a policy decision and the signing of MOU, the work in question has been confined only to the local contractors. On the face of it the work involved is in the nature of minor works and does not require any expertise.

18. Having regard to the difficult terrain, social and backward condition of the State of Arunachal Pradesh, if the minor works like earth cutting, jungle clearance and alignment survey etc. is given to the local contractors, no fault could be attributed to the Respondents and the same cannot be branded to be founded on any arbitrariness, unreasonableness and malafide exercise of power has been attributed to the Respondents in the writ petition.

19. The power of judicial review although cannot be denied in the area of exercises of contractual powers of Government bodies, but it is only intended to prevent arbitrariness or favouritism and is exercised in the larger public interest or if it is brought to the notice of the Court that in the matter of award of a contract, power has been exercised for any collateral purpose. Same is not the case in hand. Upon examination of the facts and circumstances of the present case and on going through the records, I am of the considered opinion that none of the criterias has been satisfied justifying Court's interference in the matter. As has been pointed out by the Apex Court upteen number of times, by way of judicial review, the Court is not expected to act as a Court of appeal while examining an administrative decision and to record a finding where such decision could have been taken otherwise in the facts and circumstances of the case. Needless to reiterate that while exercising the power of judicial review in respect of contracts entered into on behalf of the State, the Court is purely concerned as to whether there has been any infirmity in the decision making process. I do not find that the decision making process as reflected in the instant case is unreasonable, irrational, arbitrary or violative of Article 14 and 19(1)(g) of the Constitution of India. The Respondent-corporation must have some liberty as they have in framing the policies, even when entering into contract in question because the same amounts to implementation or projection of the policy adopted by the aforesaid MOU. A discretion has to be conceded to the Respondents-corporation giving them liberty to assess the overall situation for the purpose of taking a decision as to how and in what manner the contract should be awarded.

20. The situation leading to the issuance of the impugned NIT pursuant to the aforesaid MOU has been well explained in the affidavit-in-opposition and I do not find any infirmity in the same and for that matter in the decision making process. There is always presumption that the Government action is reasonable and in public interest and it is for the party challenging its validity to show that it is wanting in reasonableness or is not founded on public interest. The burden lies

with the party who alleges such un-reasonableness. It cannot be lightly assumed that the action of the Respondent-corporation is unreasonableness or without any public interest. The consideration which weighted the minds of the Respondent-corporation in formulating its policy leading to the particular action cannot be said to be unreasonable and opposed to public interest.

21. The wider concept of equality before the law and the equal protection of laws is that there shall be equality among equals. Even among equals there can be unequal treatment based on an intelligible differentia having a rational relation to the object sought to be achieved. As has already been held, the Respondent-corporation has explained the factors leading to taking the impugned decision and issuance of the NIT which cannot be said to be wanting in intelligible differentia having a rational relation to the object sought to be achieved.

22. In view of the above, I do not find any merit in the writ petition and accordingly, the same is dismissed. No order as to cost.