
(2015) 12 SHI CK 0010
In the High Court Of Himachal Pradesh
Case No : CWP No. 2929 of 2015

ELICO Ltd.

APPELLANT

Vs

State of Himachal Pradesh and Others

RESPONDENT

Date of Decision : 31-12-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2016) AIR (HP) 37

Hon'ble Judges : Mansoor Ahmad Mir, C.J. and Tarlok Singh Chauhan, J.

Bench : Division Bench

Advocate : Sanjeev Bhushan, Senior Advocate and Rajesh Kumar, Advocate, for the Appellant; Shrawan Dogra, Advocate General, V.S. Chauhan, Additional Advocate General, Vikram Thakur and J.K. Verma, Deputy Advocate Generals, for the Respondent

Final Decision : Dismissed

Judgement

Tarlok Singh Chauhan, J.—By means of present writ petition, the petitioner has called in question the purchase order placed by respondent No. 2 i.e. Director of Agriculture, Himachal Pradesh, for procurement of Mobile Soil Testing Lab (for short "MSTL") with respondent No. 3 i.e. Electronic Corporation of India Ltd.

2. The facts, in brief, are that pursuant to inter se communication between respondents No. 2 and 3 regarding the supply of "MSTL", respondent No. 2 without calling for any further tenders or quotations on 19.01.2015 placed an order with respondent No. 3 for supply of said "MSTL". On coming to know, the petitioner vide letter dated 22.01.2015 informed respondent No. 2 that it was also manufacturing such "MSTLs" and could offer the same at a comparatively less price. The petitioner further informed that it participated in the tenders invited by the State of Bihar at Patna and had infact received nine orders of "MSTLs".

3. The precise case of the petitioner is that once it was ready to offer the same "MSTLs" at a far less price, then there was no reason why respondent No. 2

should still insist on purchasing the same from respondent No. 3 that too without inviting tenders or resorting to any other legitimate or recognized mode of competitive bidding so as to ensure that it gets the best price. Since the petitioner has been denied the right of participation, therefore, the action of the respondents is illegal and arbitrary and deserves to be quashed and set aside.

4. All the respondents have filed their replies. Respondents No. 1 and 2 in their joint reply have specifically stated that their past experience with the petitioner has been far from satisfactory inasmuch as during the year 1999-2000, the department purchased two Atomic Absorption Spectrophotometer from the petitioner through open tender for its soil testing, but these instruments did not work smoothly and in spite of repeated requests, the engineers of the petitioner-company failed to rectify the problems. Resultantly, the work in these Labs suffered badly and finally these were disposed of through buyback offer to the petitioner.

5. Insofar as placing the order with respondent No. 3 is concerned, respondents No. 1 and 2 have stated that the Government of India, Ministry of Agriculture, Department of Agriculture and Cooperation, New Delhi, had launched a Central sponsored scheme on balance and integrated use of fertilizers in which strengthening of soil testing Labs was one of the components to be funded on a pattern of 75:25 assistance. The Expert Scientists of Ministry of Atomic Energy in a meeting held on 23.12.2008 expressed that respondent No. 3 had launched a composite "MSTLs" specially designed for vibration/shock free enclosure for glassware to avoid frequent breakage and in terms of such recommendations, the department was of the view that preference to full component unit may be procured from one single supplier instead of assembling the vehicle and fabricating it from the local fabricator. It was further averred that respondent No. 3 had given an undertaking of maintenance and, therefore, it placed its order with respondent No. 3 for which the petitioner could possibly have no objection.

6. Respondent No. 3 in its reply has taken various preliminary objections wherein it has accorded reasons as to why the costs of the "MSTL" to be supplied in Himachal were in excess to the one supplied in Bihar and it is stated that the final cost of the Lab is not Rs. 68,00,000/-, but is Rs. 60,68,500/-.

We have heard the learned counsel for the parties and have also gone through the records of the case.

7. By now it is well settled that principles of judicial review under Article 226 of the Constitution of India would apply to the exercise of contractual powers by the Government only in case the process adopted or decision making process of the authorities is wrong and illegal and in order to prevent arbitrariness or favoritism. The Government is the guardian of the finances of the State and is, therefore, expected to protect the financial interests of the State. The right to accept a low rate or refusal to accept a contract in its entirety is always available to the Government. Judicial review is concerned not with the decision, but with

the decision making process and unless that restriction on the power of the Court is observed, the Court under the guise of preventing the abuse of power would be itself guilty of usurping power.

8. The scope, ambit and nature of jurisdiction exercised by the Court in matters of awarding a contract has repeatedly come up before the Hon'ble Supreme Court. In this context in order to avoid repetition, we may only refer to a recent decision in *Maa Binda Express Carrier and Another Vs. Northeast Frontier Railway and Others*, wherein it was held that award of contract by the State is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that the terms subject to which tenders are invited are not open to judicial scrutiny unless it is found that the same has been tailor-made to benefit a particular tenderer or class of tenderers. So, also the authority inviting tenders can enter into negotiations or grant relaxation for bonafide and cogent reasons provided such relaxation is permissible under the terms governing the tender process. It was further held that the Government and its agencies have to act reasonably and fairly at all points of time. To that extent, the tenderer has an enforceable right in the Court which is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest. It was held that:--

"8. The scope of judicial review in matters relating to award of contract by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognize that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well-settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor made to benefit any particular tenderer or class of tenderers. So also the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.

9. Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the Court who is competent to examine

whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest. (See: Meerut Development Authority Vs. Association of Management Studies and Another, and Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, .

10. The scope of judicial review in contractual matters was further examined by this Court in Tata Cellular Vs. Union of India, , Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, and in Jagdish Mandal Vs. State of Orissa and Others, besides several other decisions to which we need not refer.

11. In Michigan Rubber (India) Ltd. Vs. The State of Karnataka and Others, the legal position on the subject was summed up after a comprehensive review and principles of law applicable to the process for judicial review identified in the following words: (SCC p.229, paras 23-24)

"23. From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

24. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such

that no responsible authority acting reasonably and in accordance with relevant law could have reached"? and

(ii) Whether the public interest is affected.

If the answers to the above questions are in negative, then there should be no interference under Article 226 ."

(emphasis supplied)

9. Similar reiteration is found in a number of judgments of the Hon''ble Supreme Court as also the judgments rendered by this Court in CWP No. 765/2014, titled as Namit Gupta versus State of Himachal Pradesh and others, decided on 27.03.2014, CWP No. 9337/2013, titled as Ashok Thakur versus State of Himachal Pradesh and others, decided on 06.05.2014, CWP No. 4112/2014 titled as Minil Laboratories Pvt. Ltd. versus State of Himachal Pradesh and another, decided on 15.07.2014, CWP No. 4897/2014 titled as Mahalaxmi Oxyplants Pvt. Ltd. versus State of Himachal Pradesh and another, decided on 10.09.2014, CWP No. 6953/2014 titled as M/s. Kausal Air Products versus State of Himachal Pradesh and others, decided on 05.11.2014, CWP No. 1007/2015 titled as Sandeep Bhardwaj versus State of Himachal Pradesh and others, decided on 01.09.2015.

10. It is vehemently argued by the learned Senior counsel for the petitioner that the action of respondent No. 2 in placing the order of "MSTL" with respondent No. 3 lacks transparency and is in contravention to the Order No. 23/7/07 issued by the Central Vigilance Commission on 5th July, 2007 on the subject Transparency in Works/Purchase/Consultancy contracts awarded on nomination basis. He further contended that the only reason which weighed with respondent No. 2 for purchasing the "MSTL" from respondent No. 3 was that it was a full component unit and would not require to be assembled or fabricated. Whereas, the "MSTL" being supplied by respondent No. 3 was not a fabricated unit and even the major components of the unit were being procured from the petitioner, who were the pioneers and national award winners in manufacturing of such "MSTL" and its components. It is lastly argued that respondents No. 2 and 3 were unnecessarily trying to justify the difference in the rates offered by respondent No. 3 in State of Bihar vis-?-vis respondent No. 2 when the sum total of the additional components is hardly Rs. 3,63,246/- for which an additional whopping amount of Rs. 9,00,000/- is being charged.

11. At the outset, it may be observed that no person has a right to insist that the State Government must enter into a contract with him. It is not in dispute that respondent No. 3 itself is a hundred percent government undertaking and, resultantly, the funds in this case would be going from one pocket of the Government to the other and, therefore, in such circumstances, there can be no hanky-panky as suggested by the petitioner nor can the action of the respondents be said to be lacking bonafides or an act of favouritism.

12. The learned Senior counsel for the petitioner has taken us through the guidelines issued by the Central Vigilance Commission on 5th July, 2007 on the subject Transparency in Works/Purchase/Consultancy contracts awarded on nomination basis, more particularly, clause-3, which reads thus:--

"3. It is needless to state that tendering process or public auction is a basic requirements for the award of contract by any Government agency as any other method, especially award of contract on nomination basis, would amount to a breach of Article 14 of the Constitution guaranteeing right to equality, which implies right to equality to all interested parties."

13. Having gone through the aforesaid provisions, we find nothing therein to indicate that there is any kind of prohibition for one government department in placing a direct order with another government department. While awarding contracts, the State and its agencies can always be treated as a separate class as held by the Hon"ble Supreme Court Global Energy Ltd. and Another Vs. Adani Exports Ltd. and Others, .

14. Even if, it is assumed without conceding that the petitioner is ready to supply the "MSTL" at a far cheaper rate, it is not the price alone which would be single determinative factor as it is even the confidence and trust built up over a period of time which would normally determine any contract. Price in itself need not always be the sole criteria for awarding a contract. At times, even the past records of the tenderers/applicants, the quality of the goods or services which they offered, assessing such quality on the basis of the past performance, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded. This legal position has been succinctly dealt with by the Hon"ble Supreme Court in Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, , wherein it was held as under:--

"15. Where the decision-making process has been structured and the tender conditions set out the requirements, the court is entitled to examine whether these requirements have been considered. However, if any relaxation is granted for bona fide reasons, the tender conditions permit such relaxation and the decisions is arrived at for legitimate reasons after a fair consideration of all offers, the court should hesitate to intervene.

16. It is also necessary to remember that price may not always be the sole criterion for awarding a contract. Often when an evaluation committee of experts is appointed to evaluate offers, the expert committee"s special knowledge plays a decisive role in deciding which is the best offer. Price offered is only one of the criteria. The past record of the tenderers, the quality of the goods or services which are offered, assessing such quality on the basis of the past performance of the tenderer, its market reputation and so on, all 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 good quality of work-which is as much in public

interest as a low price. The court should not substitute its own decision for the decision of an expert evaluation committee.

17. Normally before such a project is undertaken, a detailed consideration of the need, viability, financing and cost, effectiveness of the proposed project and offers received takes place at various levels in the Government. If there is a good reason why the project should not be undertaken, then the time to object is at the time when the same is under consideration and before a final decision is taken to undertake the project. If breach of law in the execution of the project is apprehended, then it is at the stage when the viability of the project is being considered that the objection before the appropriate authorities including the Court must be raised. We would expect that if such objection or material is placed before the Government the same would be considered before a final decision is taken. It is common experience that considerable time is spent by the authorities concerned before a final decision is taken regarding the execution of a public project. This is the appropriate time when all aspects and all objections should be considered. It is only when valid objections are not taken into account or ignored that the court may intervene, Even so, the Court should be moved at the earliest possible opportunity. Belated petitions should not be entertained.

18. The same considerations must weigh with the court when interim orders are passed in such petitions. The party at whose instance interim orders are obtained has to be made accountable for the consequences of the interim order. The interim order could delay the project, jettison finely worked financial arrangements and escalate costs. Hence the petitioner asking for interim orders, in appropriate cases should be asked to provide security for any increase in cost as a result of such delay, or any damages suffered by the opposite party in consequence of an interim order. Otherwise public detriment may outweigh public benefit in granting such interim orders. Stay order or injunction order, if issued, must be moulded to provide for restitution.

19. A somewhat different approach may be required in the cases of award of a contract by the Government for the purchase of times for its use. Judicial review would be permissible only on the established grounds for such review including mala fides, arbitrariness or unreasonableness of the Wednesbury variety. Balance of convenience would play a major role in moulding interim relief."

15. As observed earlier, the past experience of respondent No. 2 with the petitioner has admittedly been far from good. Whereas, on the other hand, respondent No. 2 has specifically stated that it had procured two Mobile Soil Testing Labs for Hamirpur and Kangra Districts through respondent No. 3 and the same are working satisfactorily alongwith instruments. Apart from that, respondent No. 3 has also been providing annual maintenance service and repair regularly as and when required by respondent No. 2.

16. That apart, this Court cannot sit in appeal over the soundness of the decision and can only examine whether the decision making process was fair, reasonable

and transparent. Unfortunately, the petitioner has not even questioned the same.

17. Thus, judged on the parameters of the limited scope of judicial review of this Court under Article 226 of the Constitution of India in the contractual matters, it cannot be said that respondent No. 2 by placing the order with respondent No. 3 has caused any perceptible injury to the public interest or that its decision is not bonafide. After-all, respondent No. 2 must have freedom of contract and there has to be fair play in the joints as a necessary concomitant for an administrative body functioning in an administrative sphere.

18. Having said so, we find no merit in this petition and accordingly the same is dismissed, leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of. Interim directions also stand vacated.