
(1994) 06 MP CK 0007
In the Madhya Pradesh High Court
Case No : M.P. No. 539 of 1994

Garg Electric Works	Vs	APPELLANT
State of Madhya Pradesh and Others		RESPONDENT

Date of Decision : 16-06-1994

Acts Referred:

Constitution of India, 1950 — Article 14, 226, 227

Citation : (1994) J LJ 639 : (1994) 1 MPJR 361 : (1995) 40 MPLJ 505 : (1995) MPLJ 505

Hon'ble Judges : Shacheendra Dwivedi, J

Bench : Single Bench

Advocate : K.K. Lahoti, for the Appellant; K.N. Gupta, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

Shacheendra Dwivedi, J.

In this petition, preferred under Articles 226/227 of the Constitution, a writ or a direction is sought by the petitioner against the respondents for doing justice in the matter. The circumstances and the facts leading to the filing of the petition may be briefly described.

Undisputedly, respondent No. 2 had issued Notice Inviting Tenders (NIT, for short, hereinafter), Annexure P-I for awarding work on contract of the electrification in concealed conduit pipes system in the newly constructed building of Polytechnic College, Morena. It was provided in condition No. 10 of the NIT that the cost of the pipes and the labour charges of the work carried out by the department till the acceptance of the tender shall be deductible from the bill of the contractor. It was also provided in the NTT that the other conditions and the informations about the work could be had from the office of respondent No. 2. In response to NIT only two tenders were received by the respondent.

The petitioner-firm through its partner Gopaldas contends that he had obtained

the tender form Annexure P-2 and was also in the race. Similarly, there may be many others desirous of participation in the bid. But due to the vagueness and ambiguity of NIT condition No. 10, it was not possible to take a decision. He had approached the respondent-Executive Engineer and his office several times but when the desired necessary information was not supplied, he made an application, Annexure P-3 well in advance, on 19th April, 1994 requesting for clarifying the condition and for furnishing necessary information. He was assured of early supply of clarification but again when respondent No. 2 and his office failed to furnish the information till 25th April, a reminder, Annexure P-4 was sent and the petitioner also represented to the higher authority i.e. Superintending Engineer, Gwalior under Annexure P-5, but this exercise was also in futility and thus the petitioner could not deposit the form and the last date for the submission of tender forms was made to expire by respondent.

It is further argued by the petitioner that from NIT or the tender form, due to the vagueness and uncertainty of the most material condition, no reasonable person could have made out his proposal for the work-contract. The information was intentionally withheld by respondent No. 2 in the NIT and also subsequently, in order to help his favourite, for vested reasons and to keep the other desirous participants away from the contest. The petitioner has also filed the copy of the tender form, Annexure P-2A to demonstrate that before the issuance of tender form it was not filled up nor was completed, for the petitioner, as was required of the respondent in clause No. 7 thereof and the petitioner was thus discriminated against. Clause-7 of tender form reads thus :-

"7. The memorandum of work tendered for, and the schedule of materials to be supplied by the Department and their issue rates be filled in and completed before the tender form is issued. If a form is issued to an intending tenderer without having been so filled in and completed he shall request the office to have this done before he completes and delivers of tender."

Being helpless, against such approach of the State and its instrumentalities, the petitioner has approached this Court for the suitable direction in the matter, as the action of respondent offends Article 14 of the Constitution.

Shri K. N. Gupta, Government Advocate, appeared for the respondents, but the counter was filed only for respondent No. 2. The respondent admitted to have received the application, the reminder and the representation, Annexures P-3, P-4 and P-5 respectively on the mentioned dates and also admitted to have sent no reply. But it is contended that the necessary information was supplied to the petitioner and the petitioner failed to submit the form as he does not possess the licence for doing the work.

The petitioner is a partnership firm and is represented through Gopaldas, its partner. One may join the partnership or may withdraw under the arrangements made in the partnership deed and the provisions of law in that regard. One Ramchandra Jain who holds "A" category licence from M. P. Licencing Board,

seeks to join the partnership and has filed his affidavit Annexure-A in this Court. He had also filed his affidavit before respondent No. 2 when tender form, Annexure P-2 was issued to the petitioner. A condition for the issuance of tender form as it appears in NIT as condition No. 3 was that the person must possess the said licence and respondents only on being satisfied on that count had issued the form to the petitioner.

From the perusal of Annexure P-2A it is apparent that it was issued without complying with its Clause-7. The non-compliance supports the petitioner's allegation that the material information was withheld deliberately from him by respondent No. 2. The petitioner's application, Annexure P-3, reminder Annexure P-4 and the representation Annexure P-5 went unheeded with no response at all. The NIT was itself kept ambiguous and uncertain. The tender form Annexure P-2A supplied to petitioner was unfilled and incomplete, without complying its Clause-7. From the above circumstances and from the conduct of the respondent No. 2 for withholding the information an adverse inference can be drawn against him.

The respondent, in his counter, para 2, has now only stated the cost and the labour charges which are to be deducted from the contractor's bill, but that could well be specified in NIT itself, if it was available at that stage. The approximate quantum or the percentage of work done departmentally has not yet been disclosed. The NIT appears to have been kept conspicuously silent on the most vital part. The cost and profit in such work depend much on the volume of work, but the information in that regard has been withheld and was not even submitted nor clarified in Court, may be, it is clear to the respondent and was also made clear to others. Not even the approximate amount or percentage of the work carried out departmentally till a particular date is disclosed.

The NIT is expected to inform mainly the nature and the quantum of work, its, estimated cost, closing and opening dates and time, the deposits, and the time fixed for the completion of the work. It may also provide the other conditions. But if the most vital information which could effect the invitation of tenders, is withheld, it would be no invitation and merely a bare formality in the name of NIT. The NIT should, therefore, be specific, clear and unambiguous on the main issues, if offers are to be bona fide sought on the advertised proposals, particularly in public contracts. NIT is the base on which the subsequent shape of contract rests.

But, NIT is only an invitation extended to the contractors for making offers and it does not amount to an offer or proposal. It cannot be alleged to confer any rights. It is only the acceptance of any of those offers or proposals, by the person calling for the tenders, that it becomes a promise or takes the shape of an agreement, yet when an action involves public fund then it is the duty of a public servant to act fairly, reasonably and impartially.

The very purpose of issuance of NIT is to have a healthy competition for the

benefit of public fund, held by the State in trust, particularly in a democratic set up. Any departure from the fair and reasonable norms without rational explanation is likely to arouse allegations which may be well founded on record or from circumstances. In public contracts the State and its instrumentalities cannot deal like a private individual, who can pick and choose the person with whom it desires to deal. In a democracy there must be equality and fairness and the absence of arbitrariness and discrimination even in pre-transactional procedure.

For enabling healthy competition, the NIT is required to be clear and unambiguous for making the offers by prospective tenderers. If NIT is vague, ambiguous, unclear and uncertain on the material condition, it cannot be said to be fair and cannot be responded well and would frustrate its very purpose. The bare explanation that the details of work could not be given even in Annexure R-I due to the continuity of work does not sound rational. Firstly, the document bears no date. Secondly, it does not contain details nor specifies the part of the building where such conduit was laid and thirdly, it does not specify even the approximate percentage of work carried out departmentally till the document was prepared. Lastly, it does not show the approximate amount to be deducted from the bill of the contractor. The respondent has stated nothing further in his return in this regard, except that the departmental work was still being carried out and giving the details was not possible. It could be good only with regard to the exact measurements but the suppression of even approximate measurements and the aggregate work speaks volumes of the conduct of respondent and supports the petitioner's allegations described above.

Now, adverting to a very crucial question, it is to be examined whether the petitioner has any assertable right and whether he is entitled to any relief from this Court ? The issuance of NIT is a procedural safeguard for protecting the funds and for soliciting the competitive offers. It is to be adhered to when it comes to public contract involving the substantial amounts. A duty is cast on public functionaries to be duty conscious. One may have civil remedies in contractual matters but when it comes to pre-contractual procedural obligations where public money is involved, the State and its instrumentalities cannot act arbitrarily and unfairly. In a democracy in such situations a public spirited individual gets concerned and has a vested right of keeping a vigil on Government actions so that the public money is not squandered away by a public authority. Even technically, if no right had accrued to the petitioner in his individual capacity, he still gets a right as a citizen to protect the larger public interest and to highlight the State action which may appear to be against the public interest and it would be liable to scrutiny by the Court under Article 226 of the Constitution.

In the instant case, the petitioner, as discussed above, was even supplied with unfilled form and the most material information was withheld from him. The action offends Article 14 of the Constitution and the petitioner has a cause of

grievance and an assertable right.

If there is a conflict between an individual's right and the public interest, the former must yield to the latter. It is fair and just to adhere to normal procedural safeguards and any departure would be unfair, unreasonable and arbitrary, depending on the facts and circumstances of each case. As observed by their Lordships of Supreme Court in *Mahesh Chandra Vs. Regional Manager, U.P. Financial Corporation and others*,

"That which is not fair and just is unreasonable. And what is unreasonable is arbitrary. An arbitrary action is ultra vires. It does not become bona fide and in good faith merely because no personal gain or benefit to the person exercising discretion should be established. An action is mala fide if it is contrary to the purpose for which it was authorised to be exercised. Dishonesty in discharge of duty vitiates the action without anything more. An action is bad even without proof of motive of dishonesty, if the authority is found to have acted contrary to reason."

Every action of the State or its instrumentalities having the public element or dealing with public largess in the form of giving jobs, entering into contracts or issuing quotas, must conform with the standard which is not irrational, irrelevant and arbitrary. The standard must be applied equally and the material information regarding a work contract must not be withheld for one and supplied to another. Their Lordships in this regard, dealing with Article 14 of the Constitution held long back in the year 1979 in *Ramana Dayaram Shetty v. The International Airport Authority of India and Ors.* AIR 1979 SC 1623, that :-

"It is now well settled as a result of the decisions of this Court in *E.P. Royappa Vs. State of Tamil Nadu and Another*, and *Maneka Gandhi v. Union of India* (1978) 1 SCC 243 : AIR 1978 SC 597 ,that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non-discriminatory : it must not be guided by any extraneous or irrelevant consideration, because that would be denial of equality."

It was held by the Apex Court in *Mahabir Auto Stores and others Vs. Indian Oil Corporation and others*, that :-

"If a Government action even in the matters of entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. In this connection reference may be made to *E.P. Royappa Vs. State of Tamil Nadu and Another*, , *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, , *Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others*, ; *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, and also *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, It appears to us that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice are part of the rule of law applicable in situation or action by State Instrumentality in dealing with citizens in a situation like the present

one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case."

The Supreme Court by several authorities have ruled that in the matter of contracts the action of Government and its instrumentalities should satisfy the triple test i.e. non-arbitrariness, action supported by reason and the action in public interest.

Government Advocate, Shri Gupta, has placed reliance on a Division Bench authority of this Court, *Mrs. Maneka Gandhi Vs. Union of India (UOI) and Another*, but the facts of the authority were substantially different. In the cited authority, the clarifications were sought as ambiguity was only on certain technical and commercial points and not on the most material points. Many of the points were also clarified by respondents, but in the present case, the respondent did not even respond to Annexures P-3, P-4 and P-5 and observed vested silence. Further, it was observed by this Court in the cited authority that :-

"If an advertisement for bids is so defective, in respect of the specifications, as to exclude competition, it will be a ground for making no award thereon."

In the instant case, the petitioner has been shabbily treated by an officer of the State, respondent No. 2, the Executive Engineer and the most material information has been withheld from him. The NIT was itself vague and uncertain. The number of tenders which were received by the respondent were opened by him and out of only two, one has been recommended for acceptance, also go to support the allegation of withholding the information by respondent No. 2. It is well settled that the authority issuing NIT once, may again invite tenders in the larger public interest if, the NIT was not responded well and it excluded competition.

It was not reasonable to keep the NIT vague, indefinite, uncertain and lacking in the most material information. The defects rendered the NIT ineffective and incapable of catering the public interest. In such circumstances where the action of the State or its instrumentalities is not reasonable and in public interest, the Supreme Court held in *Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another*, that :-

"Where any governmental action fails to satisfy the test of reasonableness and public interest discussed above and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid."

On the foregoing discussions, the petition succeeds. The Notice Inviting "tenders (Annexure P-I) is quashed. In the facts and circumstances there shall be no order

as to the costs.