(2001) 02 AHC CK 0138

In the Allahabad High Court

Case No : C.M.W.P. No. 52172 of 1999

Gaya Prasad Upadhyay — APPELLANT

Vs

State of U.P. and Others — RESPONDENT

Date of Decision : 02-02-2001

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (2001) 2 AWC 945 : (2001) 2 UPLBEC 1096

Hon'ble Judges : G.P. Mathur, J;Bhagwan Din, J

Bench : Division Bench

Advocate : Sanjay Kumar, for the Appellant; S.C. and S.K. Pandey and R.G. Padia, for the Respondent

Final Decision : Allowed

Judgement

G.P. Mathur, J.—This writ petition under Article 226 of the Constitution has been filed praying that the order dated 8.10.1999 passed by the Commissioner, Allahabad Division, Allahabad, awarding contract of collection of toll over Kara pantoon bridge/ferry over river Ganga in district Pratapgarh to Vinod Kumar Pandey Respondent No. 4. may be quashed.

The main ground on which the contract awarded to Respondent No. 4 has been assailed is that the same was done, without any advertisement and without inviting any tender, and on the basis of the private negotiations. The facts averred in the writ petition are not clear and are confusing. The complete facts have been given in the counter-affidavit and supplementary counter-affidavit sworn by Vinod Kumar Singhal, Assistant Engineer, Construction Division, Public Works Department (hereinafter referred to as the P.W.D.), Pratapgarh, which have been filed on behalf of Respondent No. 3, Since these are the only affidavits filed on behalf of the State agencies, namely, Respondent Nos. 1 to 3, and no facts to the contrary have been stated in the counter-affidavit filed by Vinod Kumar Pandey, Respondent No. 4, we will decide the writ petition on the basis of the facts stated therein.

2. The P.W.D. makes arrangement for a pontoon bridge/ferry over river Ganga at Kara Ghat in district Pratapgarh. The right to realise toll over the said bridge/ ferry is let out in accordance with the Northern India Ferries Act, 1878 (in short, the Act). An advertisement was published on 2.8.1997 inviting tenders for realisation of toll over the aforesaid pontoon bridge/ferry for a period of three years. In pursuance to the advertisement, 5 tenders were submitted. However, 4 tenders were not found to be in order. The tender submitted by Sri Sarvesh Kumar Misra alone was found to be in order and the Executive Engineer, P.W.D., Pratapgarh, forwarded the papers to the Commissioner Allahabad Division, for his sanction. The Commissioner vide his order dated 4.11.1997 held that as there was only one tender, it would not be proper to award the contract on its basis. He accordingly directed that fresh tenders be invited. This order was challenged by Sarvesh Kumar Misra by filing CM. Writ Petition No. 688 of 1998, in which the State was directed to file counter-affidavit. On the application for grant of interim relief, it was directed that any step taken by the Respondents in pursuance to the order of the Commissioner dated 4.11.1997, will be subject to the result of the writ petition. In pursuance to the order of the Commissioner, fresh advertisement was issued in three newspapers inviting tenders upto 3 p.m. on 13.1.1998, which were to be opened at 3.30 p.m. in presence of the tenderers. This time also there was only one valid tender which was submitted by Vinod Kumar Pandey, Respondent No. 4, and he had made an offer of Rs. 7 lakhs per year (Rs. 21,00,000 for three years). It is averred in paragraph 9 of the counter-affidavit that the papers were not forwarded to the Commissioner as there was only one tender and the amount offered by him was less than the amount of Rs. 7.5 lakhs offered in the earlier advertisement. Subsequently Respondent No. 4 enhanced his offer to Rs. 8 lakhs and then the Executive Engineer vide his letter dated 31.5.1999 forwarded the papers with his recommendation to the Commissioner and the same was accepted by him by his order dated 5.10.1999 and the contract was awarded to Respondent No. 4.

3. A copy of the advertisement by which tenders were invited upto 13.1.1998 has been filed as Annexure-C.A. 4 to the counter-affidavit. Condition Nos. 2 and 3 of the advertisement provide that the tenderer will have to give security of Rs. 1 lakh in the form of Fixed Deposit Receipts of a Nationalised Bank or National Savings Certificate pledged in favour of the Executive Engineer and the period of validity of the tender was three months only. The copies of the two letters sent by the Executive Engineer, P.W.D., Pratapgarh, to the Commissioner, Allahabad Division, Allahabad, on 31.5.1999 and 27.9.1999 have been filed as Annexures-C.A.6 and C.A.7 to the counter-affidavit. It is mentioned therein that as there was only one valid tender which was of Respondent No. 4 and he had made an offer of Rs. 7 lakhs only, which was less than the offer of Rs. 7.5 lakhs made in pursuance of the earlier advertisement dated 2.8.1997, the papers had not been forwarded for approval, It is also mentioned that Respondent No. 4 had taken back the Fixed Deposit Receipts which had been submitted by him by way of security in September, 1998, but he had again submitted the same on 27.5.1999

and, consequently, prior to the said date, it was not possible to make any recommendation in his favour. However, as he had submitted the Fixed Deposit Receipts on 27.5.1999 and had also agreed to enhance the amount of offer to Rs. 8 lakhs per year, the papers were being forwarded for approval. It appears that thereafter, the Commissioner, Allahabad Division, passed an order on 5.10.1999 for awarding the contract to Respondent No. 4. The case of the Petitioner that he had submitted a tender offering Rs. 10 lakhs per year is denied in paragraph 5 of the supplementary counter-affidavit. It is also stated therein that after the tender had been opened, the Petitioner moved an application on the next day, i.e., on 14.1.1998 offering Rs. 10,16,670 per year (Rs. 30,50,000 for 3 years).

4. As stated earlier, condition No. 2 of the advertisement notice clearly provided that a tenderer shall have to furnish a security of Rs. 1 lakh by way of Fixed Deposit Receipts of a Nationalised Bank or National Savings Certificates pledged in favour of the Executive Engineer and in absence of such a security the tender shall not be taken into consideration. In condition No. 3 it was mentioned that the period of validity of the tender shall be three months. The facts mentioned above show that Respondent No. 4 submitted the tender on 13.1.1998 and, therefore, its validity expired on 13.4.1998. He also withdrew the Fixed Deposit Receipts of Rs. 1 lakh which had been submitted by way of security on 3.9.1998. Therefore, in the eyes of law, there was no valid tender in existence after 13.4.1998 and after withdrawal of security on 3.9.1998, there was no tender at all by Respondent No. 4 which could be taken into consideration. A very curious procedure was adopted here by the Executive Engineer and Respondent No. 4 was permitted to furnish security again after about 9 months, i.e., on 27.5.1999. There appears to have been private negotiations between the Executive Engineer and Respondent No. 4 and he seems to have enhanced his offer to Rs. 8 lakhs. Thereafter, a letter was sent by the Executive Engineer to the Commissioner, Allahabad Division, on 27.9.1999 recommending that the tender of Respondent No. 4 be accepted, which was actually done by the Commissioner vide his order dated 5.10.1999. The Respondent No. 4 having withdrawn his security on 3.9.1998, his tender, which was merely an offer to take the contract, came to an end and there was no question of revival of the same after 8 months. No decision was taken on the tender made by Respondent No. 4 within the period of three months, which was the period of validity of tender. After he had withdrawn his security on 3.9.1998, the tender made by him also stood withdrawn and ceased to be a valid tender. The authorities acted wholly illegally in thereafter, entering into private negotiations with Respondent No. 4, giving him an opportunity to furnish security again and in accepting the fresh offer made by him. The only proper course after 3.9.1998 was to issue a fresh advertisement. The award of contract to Respondent No. 4 on these facts will clearly amount to grant of contract by way of private negotiations and without any advertisement.

5. It is noteworthy that the Executive Engineer himself has written in his letter dated 27.9.1999 that as Respondent No. 4 had withdrawn his security, it was not

possible to make any recommendation in his favour and forward the papers till such time he again furnished the security. Soon after fresh security had been furnished by Respondent No. 4 on 27.5.1999, the Executive Engineer forwarded the papers to Commissioner on 31.5.1999. Another reason given in this forwarding letter is that from April, 1998 to March, 1999, the tolls had been realised by the department itself and the income had been only Rs. 4,02,040, and now Respondent No. 4 had made an offer of Rs. 8 lakhs. This can hardly be a ground to award contract to Respondent No. 4. If the employees of the department had not discharged their duty properly or had misappropriated the amount realized or they were handicapped on account of some reasons, it can be no ground to award contract to Respondent No. 4 by way of private settlement. It is the own case of the Respondents (paragraph 5 of the supplementary counter-affidavit of the Assistant Engineer) that the Petitioner sent an application on the very next day, i.e., on 14.1.1998 offering Rs. 10,01,667 per year (Rs. 30,50,000 for three years). The offer made by the Petitioner was obviously much higher than the offer mad: by Respondent No. 4, and if the amount offered was the sole criteria, there was no reason why an opportunity was not given to the Petitioner to fulfil the other requirements of the advertisement. it may be noted here that the case of the Petitioner is that he could not submit a tender on 13.1.1998 as he was forcibly prevented by criminal elements to submit tender and he sent the copy of the tender on the same day through Fax and had moved an application on the very next day.

6. The advertisement provided that the tenders would be opened on 13.1.1998 and the period of validity of tender would be three months. The recommendation in favour of Respondent No. 4 has been made by the Executive Engineer to the Commissioner for the first time on 31.5.1999 and, then again on 27.9.1999 and the order in his favour has been passed by the Commissioner on 5.10.1999 long after the expiry of the period of validity of the tender. Respondent No. 4 having withdrawn his security on 3.9.1998, his tender could not be taken into consideration in view of clear stipulation to the effect in condition No. 2 of the advertisement. In the opening part of the advertisement, it was mentioned that a defective, conditional or incomplete tender shall not be considered. After withdrawal of security the offer made by Respondent No. 4 came to an end, and whatever has been done subsequent thereto, was a case of a fresh offer by Respondent No. 4. All proceedings taken after 3.9.1998 have obviously been done by way of private negotiations, and they cannot be treated to have been done in pursuance of the advertisement which had been issued. It is well-settled that where the State is awarding contracts, it should be done only after an advertisement, so that public at large gets an opportunity to participate and there is fair competition. In Fertilizer Corporation Kamagar Union v. Union of India AIR 1981 SC 344 a Constitution Bench observed as follows:

...We want to make it clear that we do not doubt the bona fides of the authorities, but as far as possible, sales of public property when the intention is to get the best price, ought to take place publicly. The vendors are not necessarily bound to accept the highest or any other offer, but the public at least gets the satisfaction that the Government has put all its cards on the table.

7. In State of Uttar Pradesh Vs. Shiv Charan Sharma and Others, , the dispute was with regard to grant of lease for excavating sand and minor minerals. It was observed that the State should sell the right by public auction and not on application of a party as public auction with open participation and a reserved price guarantees public interest being fully subserved. In Khilodhar v. Addl. District Magistrate (R.A.), Allahabad and Ors. 1987 ALJ 590, a Division Bench of this Court, speaking through K.J. Shetty, C.J. (as his lordship then was) held as follows with regard to grant of fisheries rights:

When the statute prescribes particular procedure for disposing of certain rights the authorities should not be permitted to circumvent that procedure. The disposal of any right by public auction is a wholesome procedure. It is advisable to follow that procedure even if it has not been specifically prescribed but when prescribed it must be faithfully followed. It must not be disregarded.

8. In Union of India and others Vs. Hindustan Development Corpn. and others, , it was observed that the Government while entering into contracts or issuing quotas is expected not to act like a private individual but should act in conformity with certain healthy standards and norms. An action should not be arbitrary irrational or irrelevant. It was further held that in the matter of awarding contracts inviting tender is considered to be one of the fair ways. Thus, it is well-settled by a catena of decisions that while entering into contracts or granting other form of largesse, the Government cannot act arbitrarily at its sweet-will and it cannot chose to deal with any person as it pleases. An open auction guarantees fairness as everyone gets a chance to participate and the Government gets the best price for its goods.

9. The facts of the case in hand clearly show that the authorities of the State have gone out of their way to help Respondent No. 4 in the matter and have awarded contract to him in a wholly illegal manner. The order of the Commissioner dated 5.10.1999 awarding the contract to Respondent No. 4 cannot, therefore be sustained and is liable to be set aside.

10. In the result, the writ petition succeeds and is hereby allowed. The order dated 5.10.1999 passed by the Commissioner, Allahabad Division, awarding the contract to Respondent No. 4 to realise the toll on Kara Ghat in district Pratapgarh is hereby quashed. The authorities are directed to issue a fresh advertisement and proceed in accordance with law expeditiously, preferably within one month from today, for awarding the contract to realise the toll in question on Kara Ghat in district Pratapgarh. In order to avoid any public hardship and loss to public exchequer, it is further directed that Respondent No. 4 shall be permitted to continue to realise toll on the ghat in question till a fresh arrangement is made. He shall pay the amount for the period for which he will collect the toll which shall be calculated on the basis of Rs. 8 lakhs per year.