(1975) 04 OHC CK 0015

In the Orissa High Court

Case No : O.J.C. No. 173 of 1973

Indersons Construction and Another APPELLANT

Vs

State of Orissa and Others RESPONDENT

Date of Decision : 16-04-1975

Acts Referred:

Companies Act, 1956 — Section 617
Constitution of India, 1950 — Article 14, 19, 226, 227

Citation : (1975) 41 CLT 853

Hon'ble Judges : G.K. Misra, C.J;N.K. Das, J

Bench : Division Bench

Advocate : B.M. Patnaik, S.C. Roy and B.B. Mohanty, for the Appellant; Additional Government Advocate, for the Respondent

Final Decision : Dismissed

Judgement

G.K. Misra, C.J.—Shorn of irrelevant details, case of the Petitioner may be stated in brief. Petitioner No. 1 is a registered partnership firm constituted under a deed of partnership. Petitioner No. 2 is one of the partners carrying on business of civil engineering contract in the State of Orissa. Petidoners were A class contractor prior to 1971. That year they were registered as special class contractor under the P.W.D. Contractors Registration Rules. 1967. (hereinafter to be referred to as the Rures). They obtained a certificate of registration on 28-7-1971. They deposited a registration fee of Rs. 1,000/ - and made a fixed deposit of Rs. 1, 50. 000/ - with the Chief Engineer, Roads and Buidings,(opp. party No. 2). For construction of High Level Bridge over the Subarnarekha river, tenders were called for. Four tenders including that of the Petitioners were received. All of them were, however, cancelled by the Government on 21-7-1972. Fresh tenders for the same work were again invited., Three tenders were received. The Petitioners gave tender for. Rs. 65, 88. 000/ - while M/s. S.B. Joshi Co. and M/s. K.C. Moharty respectively submitted tenders for Rs. 85, 00.000/ - and Rs. 101. 00, 000/ -. The Orissa Construction Corporation Ltd. (O.C.C. Ltd.) (opposite party No. 4) did not submit any tender. The Petitioners were, therefore, the lowest tenderer. On 6-11-1972 while the tender committee was examining the matter objection was raised as to why tenders were at all invited instead of the work being given to opposite party No. 4 on the basis of negotiation. Ultimately ali tenders were rejected on 15-1-1973 and by order of the Government, the Chief Engineer gave the work order to opposite party No. 4 for Rs. 65,50, 000/ -. Petitioners filed the writ application under Articles 226 and 227 of the construction asking for a writ of certiorari to quash the orders of opposite parties 1 to 3 giving the work order to opposite parties 1 to 3 to issue the work order to the Petitioners. Several grounds had been taken. It was urged that rejection of the Petitioners'' tender with the object of granting the contract to opposite party No. 4 is hit by Article 14 and 19)(1)(g) of the Constitution, and that the Petitioners actually invested substantial sums to the tune of lakhs by way of establishment, vehicles, machinery, salary of the staff including engineers and designers to keep themselves in preparedness for undertaking contracts and specialised work if and when their tenders were accepted and rejection of tenders of such special class contractors on alien and irrelevant ground with the object of granting contracts to persons and companies who have not tendered works out great injustice and heardship and nullifies the assurance embodied in the Rules and the relevant provisions of the Orissa Public Works Department Code (hereinafter to be referred to as the Code''. The Petitioners having acted upon the assurance given by the Code and the Rules, opposite parties 1 to 3 were legally bound to accept the tender of the Petitioners and to issue the work order to them and are estopped from acting otherwise.

2. State of Orissa (opposite party No. 1), the Chief Engineer (opposite party No. 2) and the Executive Engineer (opposite party No. 3) filed one counter affidavit. The Orissa Construction Corporation Ltd. (opposite party No. 4) filed a separate center affidavit. They, however, traversed similar grounds. Facts in the writ application are not disputed. The grounds on which the writ application is assailed as without merits may be stated hereunder. The provisions in the Code are in the nature of administrative instructions and have no statutory force. They are meant for the guidance of the officers of the P.W.D. and are not justiciable, nor do they create or confer any right in favour of persons who gave tender. So were also the Rules. In the tender-call notice issued to the Petitioners on 8-9-1972 there was a clear stipulation in Clause (22) that the Department reserves the right to reject any or all the tenders received without assigning any reasons whatsoever.

Government made Resolution No. 1260/SPCO on 15-3-1972 which runs as follows:

The Departments of Government while entrusting works to the O.C.C. Ltd. upto the amount indicated against each should allot works of Rs. 10 lakhs or above to O.C.C. Ltd., on negotiation basis at the prevailing rates. In case negotiation fails, such works may be put to tender in which case the O.C.C. may also tender. The tender of O.C.C. Ltd. with other parties may be considered on merits.

Tenders had been invited without keeping this resolution in view. Hence negotiation was made. The O.C.C. Ltd. having agreed to do the work for the amount acceptable to Government, the work order was issued to it by opposite party No. 2 as ordered by Government. No assurance was given to the Petitioners by opposite parties 1 to 3 in any manner as pleaded in the writ application.

Opposite party No. 4 is a Government Company as defined in Section 617 of the Companies Act, 1956 and all its shares are in the names of the Governor of Orissa and some State Government officers. It is a fully state-owned corporation and is also registered as a special class contractor.

3. Though in the writ application challenge was based under Article 14 and 19(1)(g) of the Constitution, the same was not pressed by Mr. Patnaik at the time of hearing. The concession is well founded as the matter is concluded by C.K. Achuthan Vs. The State of Kerala and Others, and Purxotoma Ramanata Quenim Vs. Makan Kalyan Tandel and Others, . The choice of the person to fulfil a particular contract is left to the Government. A contract from the Government stands on no different footing from a (on tract held from a private party. The breach of the contract, if any, may entitle the person aggrieved to sue for damages or in appropriate cases even for specific performance. This is the view consistently taken by the Supreme Court.

4. Mr. Patnaik, however, contended that when tenders were invited from special class contractors, an assurance was given by the Code and the Rules and acting on that assurance the Petitioners made a fixed deposit of Rs. 1. 50, 000/ -, paid a registration fee of Rs. 1000/ - and incurred other expenses to get prepared for doing the work as and when the work order would be given, and that by such acting upon opposite parties 1 to 3 were estopped from not considering the tender and settle the work by negotiation with opposite party No. 4. Reliance is placed on Union of India v. Anglo. Afghan Agencies AIR 1968 S.C. 718 and Century Spinning and Manufacturing Company Ltd. and Another Vs. The Ulhasnagar Municipal Council and Another,

5. In our view the case is concluded by Nilgiri Contractors'' Society v. State AIR 1957 Ori 33. In the case also tenders were invited, but ultimately Government entered into a negotiation with the Orissa Forest Corporation and granted the same in its favour. The facts are identical. This Court made the following observation:

Admittedly, no approval had been given by the Chief Conservator of Forests and no formal agreement was executed. Consequently no rights have been created in favour of the Petitioner on the basis of the highest bid given by him which was provisionally accepted by the D.F.O. The highest bid at the auction not having culminated into a binding contract between the parties the Petitioner has no enforceable right to challenge the settlement made in favour of the Corporation. It is quite open to the Government not to accept the highest bid and settle the coupe on the Corporation in any manner It choose

In that case also reliance had been placed on Union of India v. Anglo Afghan AIR 1968 S.C. 718. It was observed therein that the principle of estoppel referred to in the Supreme Court decision or u/s 115 of the Evidence Act had no application to cases of this nature.

The relevant passage is as follows:

The deposit of the security money is a preliminary condition for the highest bid being accepted. If the security money had not been deposited the question of acceptance of the bid would not arise. Thus, no right at all was created in favour of the Petitioner and the principle of estoppel whether u/s 115 of the Evidence Act or otherwise had no application to this case.

6. Unless the Petitioners would have got themselves registered as special contractor by obtaining registration certificate on payment of Rs. 1000/ - and made a fixed deposit of Rs. 1.50,000/ -. it would not have been open to them to offer tenders. By doing those acts no assurance was given to them by opposite parties 1 to 3 or by the Code and the Rules.

It would be pertinent to extract Annexure-3.

x x x x

ORDER

As per Government order contained in Works Department Resolution No. 22647 dated 16-10-1969 Indersons Construction, BBS-1. Orissa "Special" Class Contractor has deposited with the Chief. Engineer (R and B), Orissa sum of Rs. 1, 50, 000/ - (Rupees one lakh fifty thousand) only in shape of Government loan bonds, Postal savings account etc. duly pledged to Government of Orissa and executed the bond in prescribed form on 26-4-1972 to seek exemption for payment of earnest money and initial security deposit in each individual case.

Accordingly the said Indersons Construction is not required to pay usual earnest money and initial security deposit for any work tendered by him as per Works Department Resolution No. 22647 dated 16-10-1969. Five percent security deposit will however be deducted from the running accounts bills for works executed by him.

Sd/ For Chief Engineer (R and B) Orissa.

x x x

It is quite clear from Annexure-3 that no assurance was given to the Petitioners while a fixed deposit of Rs. 1, 50, 000/ - was made. They deposited the amount to seek exemption for payment of earnest money and initial security deposit in each individual case. Unless these preliminaries are done, no tender is acceptable. There is therefore no question of any assurance nor acting upon that assurance. The fact that the Petitioners incurred expenditure to prepare plan and drawings made consultation with experts to give tenders does not constitute any assurance by opposite parties 1 to 3. Whenever any tender is to be made, these preliminaries are to be done and any person giving the tender has the risk of losing that money in case the tender is not accepted. Those expenditures are incidental to Government tenders. It has been made clear in the Code and the notices inviting tenders that opposite parties 1 to 3 are not bound to accept the highest tender or even any tender. That repels the argument that assurance was given and the same was acted upon when expenditures were incurred in connection with giving the tenders.

7. Shri Raghunandan Panda Vs. State of Orissa and Others, , it was clearly laid down that generally speaking administrative orders confer no justiciable right. This rule is, however, subject to exception. Where the administrative orders confer rights and impose duties, then alone they are justiciable.

In this case the administrative instructions issued under the Code and the Rules do not create any rights in the tenders until the tender is accepted and completed contracts are made.

8. The resolution of the Government dated 15-3-1972 clearly shows that in respect of any work of Rs. 10, 00,000/ - and above, first negotiation would be made with the O.C.C. Ltd. If the Corporation does not accept the work on the basis of negotiation, then alone tenders would be called for. In such a case the O.C.C. Ltd. itself also may give a tender and all the tenders would be considered on their own merits for acceptance. The tenders invited by opposite party No. 2 were wholly without jurisdiction inasmuch as they contravened the clear prohibition in the resolution. There was no prior negotiation with the O.C.C. Ltd. Before the tender committee the defect was pointed out and accordingly the Chief Engineer was directed to carry on negotiation with the O.C.C. Ltd. which was ultimately agreeable to do the work. In view of the Government resolution the calling for of the tenders was without jurisdiction and the tenders are not entitled to any consideration once the negotiation with the O.C.C. Ltd. was successful.

9. The writ application is without any substance and is accordingly dismissed with costs. Hearing fee of Rs. 300/ - (three hundred).

N.K. Das, J.

10. I agree.

