(1996) 02 DEL CK 0031

In the Delhi High Court

Case No : C.W.P. No. 4939 of 1995

Intergrated Databases India Ltd. APPELLANT

Vs

Union of India and another RESPONDENT

Date of Decision : 14-02-1996

Acts Referred:

Citation : AIR 1996 Delhi 343

Hon'ble Judges : A.D. Singh, J

Bench : Single Bench

Advocate : Mukul Rohtagi, N.N. Aggarwal and Kuldeep Pabley, for the Appellant; E.X. Joseph , N. Amresh Kumar and Ms. Oommen, for the Respondent

Judgement

1.By this petition under Article 226 of the Constitution of India the petitioner seeks a writ for quashing of a condition in tender notice whereby the tenderer is required to have experience of printing, binding and supplying telephone directories to local telephone systems of at least 50,000 lines (Department of Telecommunications, Ministry of Communications, Government of India). The fact''s, insofar as they are relevant for the purpose of this petition are as under:

The second respondent. General Manager, Hyderabad Telecommunications, invited tenders on behalf of the President of India from competent agencies to "convert and compile the given directory data in the magnetic media and/or manuscript into directory format, print and bind the same by procuring the required paper, all works at the cost of the tenderer, and supply the telephone directories free of cost for the five consecutive issues, starting the first issue distribution during second week of June 1996". The Notice Inviting Tender (NIT) also called upon the prospective tenderers to indicate the royalty amount which would be payable to the General Manager, Hyderabad Telecommunications, for each issue and share the percentage of white page revenue with it. The NIT further provided that the successful tenderer will be permitted to procure his own classified advertisements and cover page advertisements. It further laid down the qualification for prospective tenderers as under:--

"The tenderer should have the experience in conversion and compilation of the given Directory data in magnetic media and/or manuscript, printing and binding the same by procuring required paper at the cost of the tenderer and supplied the Telephone Directories free of cost to a local telephone system of at least 50,000 lines (Department of Telecommunications, Ministry of Communications, Government of India).

As a proof of his qualification, the tenderer should submit copies of telephone directories, compiled after converting the given directory data in the magnetic media and/or manuscript into directory format, printed and bound at the cost of the tenderer upon paper procured by him at his cost and under his own name or Company''s name and supplied the required directories, on turnkey basis free of cost to the concerned local telephone systems in India of capacity of at least 50,000 lines along with his tender offer. FAILURE TO FURNISH THE PROOF OF QUALIFICATION, WILL DISQUALIFY THE TENDER FOR CONSIDERATION."

It also, inter alia, provided that the submission of tender shall be taken as acceptance of all terms and conditions of the tender documents. According to the NIT, the General Manager, Hyderabad Telecom District, reserved the right to reject any tender or tenders without assigning any reason including the one with highest bid.

2. "The petitioner-Company not having the local experience of supplying directories in respect of telephone system of at least 50,000 lines has felt aggrieved by the said condition in the NIT. It is stated in the petition that the petitioner-company is a joint venture company approved by the Government of India. It is asserted that 49% equity is owned by M/s. Integrated Information Pvt. Ltd. (IIPL), a wholly owned subsidiary of Singapore Telecommunications, which is said to be world leader in the field of printing and publishing of telephone directories and having experience of over 30 years in the field. The remaining 51% equity of the petitioner-company is allegedly held by M/s. Thomson Press (India) Ltd., M/s. Living Media India Ltd. and Mr. Arun Purie, Editor of India Today. It is the case of the petitioner that M/s. Thomson Press India Ltd. and Living Media India Ltd. have requisite facilities "for conversion and compilation of directory data in magnetic media and/or manuscript, print- ing and binding and marketing". It was asserted that the aforesaid companies had printed and bound telephone directories for the cities of Delhi, Bombay and Pune while working for other contractors of the Department of Telecommunications (DOT)/ MTNL. It is maintained that the directories were printed for a network of six lakh lines. According to the petitioner, it has special data base net work of computers with an integrated directory management specially developed by M/s. IIPL, Singapore, and the said system has been used in India exclusively by the petitioner-company for conversion and compilation of directories. It is also asserted that the petitioner-company has compiled directory data in both magnetic media and manuscript for Commercial and Industrial Guide, 1995, with a circulation of over 1,50,000 copies. For production of this guide the petitioner

is said to have used the Specialised integrated directory management system -- a system which is being used by the Singapore based company M/s. IIPL, which has produced directories for Singapore Telecommunications covering 6,50,000 households and over 2,00,000 business houses. In view of the aforesaid achievements of the petitioner, it is contended that the petitioner has sufficient experience in conversion and compilation of directory data in magnetic media and manuscript.

3. The petitioner also alludes to the fact that on an earlier occasion the second respondent had invited tenders for printing, binding and supply of three annual issues of the directory commencing from 1993. The petitioner, which was then known as New Horizons Ltd., also submitted its tender. It was one of the requirements of the tender document that the successful tender will submit copies of telephone directories printed and supplied by it to the telephone systems of capacity of more than 50,000 lines as proof of the past experience. The tender of the New Horizons (Petitioner), though highest, was rejected on the ground that it was not able to show that it had similar experience as mentioned in the tender document and the contract was allotted to M/s. M. & N. Publications Ltd., Bangalore. The New Horizons Ltd. filed a writ petition (CWP No. 3837/93) in the Delhi High Court seeking a writ in the nature of certiorari for quashing the award of the contract to M/s. M & N Publications Ltd. In the counter-affidavit filed in that writ petition, the second respondent stated that the offer of the petitioner was not considered because the petitioner did not submit any proof of having undertaken compiling, printing and supply of telephone directories for large telephone systems with capacity of more than 50,000 lines. This writ petition was dismissed by the Delhi High Court (see M/s. New Horizons Limited and another Vs. Union of India and others,). Thereafter, the matter was carried to the Supreme Court by way of a Special Leave Petition. The Supreme Court granted the leave and consequently heard the appeal of the New Horizons. While accepting the appeal the Supreme Court in terms held that experience of one of the constituent joint venture, namely, Integrated Information Pvt. Ltd. (IIPL), a wholly owned subsidiary of Singapore Telecom, which had a long experience in publishing the Singapore Directory with yellow pages and other directories, should have been taken into consideration (see New Horizons Limited and Another Vs. Union of India (UOI) and Others,). The experience of IIPL which had pooled its resources with the other constituents would be available to the petitioner. It further observed that once it is held that New Horizons Ltd. is a joint venture, as claimed by it in the tender, the experience of its various constituents including IIPL had to be taken into consideration by the Tender Evaluation Committee, and the tender could not be rejected on the ground that a company is a legal entity distinct from its members. The Apex Court pointed out that there had been inroads in the doctrine of corporate personality propounded in the decision of the leading case of Salomon v. Salomon & Co. 1897 App Case 22. Having regard to the various judicial pronouncements, the Supreme Court, ignoring the corporate veil covering the face of New Horizons Ltd., found that the

company was functioning as a joint venture wherein the Indian group held 60% shares and the Singapore based company IIPL held 40% share, and both groups had contributed towards resources of the joint venture in the form of machines, equipments and expertise in the field. In the circumstances, Therefore, the company was held to be in the nature of a partnership between Indian group of companies and the Singapore based company who had jointly undertaken the commercial enterprise. It was held that in respect of such a joint venture company the experience of the company can only mean the experience of the constituent of the joint venture. In the result, the order of the Delhi High Court dated October 15, 1993, in CWP No. 3837/93, was set aside. As per the petitioner after the judgment of the Supreme Court there has been reconstitution of the company and now the Integrated Information Pvt. Ltd. (IIPL), wholly owned subsidiary of Singapore Telecom, has pooled in 49% of equity whereas the Indian constituent has pooled in 51% equity. The company has also been rechristened as Integrated Databases India Ltd.

4. According to the petitioner, requirement of local experience for a prospective tenderer has been incorporated in the NIT to exclude the experience of the foreign constituent of the joint venture. Learned Counsel appearing for the petitioner submitted that the requirement of local experience was '' wholly arbitrary and irrational. He contended that the new requirement was laid down with a view to somehow get over the decision of the Supreme Court in New Horizons case (supra).

5. On the other hand, learned Counsel for the respondent submitted that the laying down of the impugned condition in the tender notice was a policy matter which does not warrant any interference under Article 226 of the Constitution. He contended that the respondent was entitled to deal with the tenderers who had the experience of similar work in India as that would give some sort of an assurance to the respondent that it will be able to get the directories in time. It was further canvassed that the Government has freedom of contract and the scope of judicial review in such matters was of a limited nature. Learned Counsel, while controverting the allegation of the petitioner regarding mala fides, submitted that the respondent did not prescribe the condition of local experience to keep out the petitioner. He also raised a preliminary objection about the maintainability of the writ petition. His contention was that since no cause of action or part thereof has arisen within the territorial jurisdiction of this Court, the writ petition was liable to be dismissed on that score alone.

6. I have considered the submissions of the learned counsel for the parties. It is well settled that generally courts do not interfere with the policy decisions of the State or its authorities. They are also loath to interfere with the State''s freedom of contract including the laying down of the conditions of the tender notice and the notice inviting tenders. But where the action or the policy decision of the Government is vitiated by arbitrariness, unfairness, illegality and irrationality the High Court can interfere in its writ jurisdiction. Similarly, the exercise of

contractual power by the Government or its authority is subject to judicial review for being tested by the application of Wednesbury Principle of reasonableness, and for ensuring that it is free from arbitrariness, favouritism, irrationality, illegality, etc. At the same time the Court should not be unmindful of the fact that it does not sit in appeal over the administrative decision/ action but merely reviews the same. It should also bear in mind that it does not have the necessary and requisite expertise of the administrative matters and for that reason it is not to substitute its own opinion for the opinion of the administrative authority. On the other hand, for administrative authorities it is essential to keep in its view the principles of Article 14 of the Constitution while taking a policy decision or accepting or refusing a tender or laying down conditions or qualifications for the prospective tenderers.

7. There is a long catena of decisions of the Supreme Court that the Government cannot act arbitrarily or at its sweet will or at its whim or caprice while giving public employment, entering into contracts, granting licences, quotas and other forms of largesse. The action must be in keeping with the standards or norms which are not arbitrary, irrelevant and irrational.

8. In Council of Civil Service Unions v. Minister for the Civil Service (H.L. (E)) (1985) 1 App Case 374 , Lord Diplock laid down the grounds on which the administrative action is subject to judicial control. He classified these grounds under three heads, namely, illegality, irrationality and procedural impropriety.

9. Before testing the legality of the condition imposed by the second respondent it will be advantageous to refer to the decision of the Supreme Court in New Horizons Limited and Another Vs. Union of India (UOI) and Others, , for the purpose of noticing certain facts. In that case there were five tenderers. The royalty amount offered by each of them was as under:--

Name of Tenderer Agreed amount Offered 1993 issue 1994 issue (in lakhs) 1995 issue

SESA SEAT INFORMATION SYSTEMS LTD., PUNE-1. 41 121 151

M & N PUBLICATIONS LTD., BANGALORE-52 20 30 45

NEW HORIZONS LTD., NEW DELHI-1. 39 129.30 291.60

HYPER MEDIA INFORMATION SERVICES PVT. LTD., BANGALORE-10. 6 45 72

KALJOTHI PROCESS PVT. LTD., HYDERABAD-20, 102 138 160

It would be seen that though the tender of the New Horisons Ltd. was to the extent of Rs. 459.90 lakhs for the issues of the directory for three years being 1993, 1994 and 1995, which was the highest, the tender submitted by M. N. Publications Ltd. which had offered Rs. 95 lakhs, was accepted. The offer of the New Horizons was not considered on the ground that it did not have the requisite experience as a separate and distinct corporate entity though, as noticed by the Supreme Court in the aforesaid judgment, the foreign constituent (IIPL), as per the tender submitted by New Horizons Ltd., had wide experience in the line of printing, compiling and supplying of telephone directories. In this regard it will be advantageous to refer to an extract from the decision of the Supreme Court in New Horizons Limited and Another Vs. Union of India (UOI) and Others, :--

"It would thus appear that the Indian group of companies (TPI, LMI and WML) and the Singapore-based company (IIPI.) have pooled together their resources in the sense that TPI, LMI and WML have made available their equipment and organisation at various places in the country while IIPL has made available its wide experience in the field as well as the expertise of its managerial staff. All the constituents of NHL have thus contributed to the resources of the Company (HHL). This shows that NHL is an association of companies jointly undertaking a commercial enterprise wherein they will all contribute assets and will share risks and have a community of interest. We are, Therefore, of the view that NHL has been constituted as a joint venture by the group of Indian companies and IIPL, the Singapore-based Company and it would not be correct to say that IIPL which has substantial stake in the success of the venture, having 40% of shareholding, is a mere shareholder in NHL.

.....

In respect of such a joint venture company the experience of the company can only mean the experience of the constituents of the joint venture, i.e., the Indian group of companies.."

10. The Supreme Court in the aforesaid decision also made observations for judging the credentials of a tenderer which are as follows :--

"The terms and conditions of such a document have to be construed from the standpoint of a prudent businessman. When a businessman enters into a contract where under some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of the same and their capacity to execute the work. He would go not by the name of the company but by the persons behind the company. While keeping in view the past experience he would also take note of the present state of affairs and the equipment and resources at the disposal of the company.

11. From the above observations of the Supreme Court it is clear that for judging the credentials of a person for purposes of considering a contractual relationship, past experience of that person will have to be considered along with the present state of equipment and resources available with him. Even the past experience may not be of much help if the machinery and equipment is outdated, and conversely lack of experience may be made good by improved technology and better equipment. These observations of the Supreme Court have not been kept in view by the second respondent while issuing the NIT. The next question is

whet her prescribing the condition of local experience meets the requirement of rationality. In the present context of liberalisation for securing technology, experience and finances from abroad, the aforesaid eligibility criteria appears to be irrational and arbitrary. However, I hasten to add that where the policy seeks to protect indigenous industry, foreign entrepreneurs can be excluded. It seems to me that such a policy will not be vocative of Article 14 and could not be called in question on the basis of the same being arbitrary, irrational, unfair and unreason able. After all in certain areas indigenous industry needs, protection from foreign competition. But, in the instant case exclusion of the petitioner from the arena is not being based on such a policy of the second respondent. According to the counter-affidavit, the aforesaid condition of eligibility is sought to be justified on the following grounds:--

"While encouraging healthy competition, this condition ensures comparatively timely supply of Telephone Directories. It does not tend to be monopolistic nor does it cause loss to the Exchequer. The predominant purpose of getting the Telephone Directories Printing within a reasonable time frame* is in the interest of the General Public."

12. As is apparent from above, the eligibility criteria has been kept only to cut delay in the supply of telephone directories. It appears to me that the justification offered by the second respondent in excluding companies like the petitioner from submitting their tenders is irrational and irrelevant. After all, the petitioner is an Indian company in which 51% equity is held by the Indian constituent and is also located in India. It is not as if the second respondent cannot exercise any control over the petitioner in the matter of printing, binding and supply of telephone directories. In case the second respondent felt that delay in supply of telephone directories has to be obviated, it could adopt suitable measure to achieve the said purpose and, at the same time, could have allowed the petitioner to tender for the work in question. One of the methods for ensuring timely delivery of telephone directories could be by asking the tenderer to furnish a performance guarantee, or a guarantee stipulating that in the event of the tenderer not supplying the telephone directories in lime, the second respondent would be entitled to encash the bank guarantee. The amount of the bank guarantee could be fixed by the second respondent having regard to the risk involved by failure of a party to supply the telephone directories in time.

13. Undoubtedly, a condition requiring past experience of a party for a similar type of work, cannot be said to be arbitrary. The rationale behind this condition is that it lends some assurance to the principle that work would be performed efficiently and effectively. A prognosis is made on the basis of the past credentials of the tenderer. But to say that the condition requiring the tenderer to have local experience will ensure timely delivery of the directories while experience outside the local area will not achieve the same result is difficult to appreciate. The impugned condition is not fair and reasonable. The experience of a tenderer is to be judged from the work which he may have executed not only

locally but elsewhere. Condition restricting past experience to the local experience of a tenderer is affected by arbitrariness and irrationality. While judging the suitability, the resources and the state of equipment and technology of the tenderer have also to be considered [See New Horizons Limited and Another Vs. Union of India (UOI) and Others,]. But no such conditions are mentioned in the N.I.T. It is the contention of the learned counsel for the petitioner that the impugned condition has been deliberately incorporated by the second respondent to exclude the experience of the constituent of the petitioner, which is a joint venture, despite the fact that the Supreme Court in New Horizons Limited and Another Vs. Union of India (UOI) and Others, had held that the experience of the IIPL should have been taken into consideration by the tender committee.

14. According to the learned counsel for the petitioner, the Supreme Court in New Horizons Limited and Another Vs. Union of India (UOI) and Others, expressed its satisfaction about the experience and credentials of III''L. He submits that it is apparent that despite the judgment of the Supreme Court the second respondent is not ready to consider the experience of 11 PL. In this regard he has invited my attention to para 8 of the counter affidavit filed on behalf of the respondent on January 12, 1996, where it is stated as follows:--

"The department is not ready to accept collateral experience in a prospective tenderer."

15. From the stand taken by the respondent in the counter-affidavit it appears that there is some justification for the criticism leveled by the petitioner to the effect that after the Supreme Court expressed its opinion that the experience of IIPL should be considered as the experience of the company, the second respondent came out with the impugned condition.

16. Having regard to the aforesaid discussion I am of the view that the condition of eligibility is vitiated by arbitrariness and irrationality.

17. Learned counsel for the second respondent however, submitted that such a condition was also incorporated in the notice of the General Manager, Pune Telecommunications, dated May 17, 1995 (Page 66 of the record) whereby tenders were invited for compiling, printing and supply of telephone directories with yellow pages of telephone system with the capacity of more than 50,000 lines for Pune Telecom District, and the petitioner had filed a writ petition in the Bombay High Court impugning the said condition, but the same was dismissed by the Bombay High Court in liming and then subsequently a SLP was also dismissed by the Apex Court.

18. 1 have considered the submission of the learned counsel for the second respondent but I find the same to be wholly untenable. According to the aforesaid notice, the condition of eligibility was that, the tenderer should have experience in compiling, printing and supplying of telephone directories with yellow pages of telephone directories with the capacity of more than 50,000

lines. This condition is different from the condition with which we are faced in the instant petition. In the Pune case there was no condition requiring local experience. Moreover, the writ petition was dismissed in liming by the Bombay High Court on October 10, 1995, inter alia, on the ground that the petition raised disputed questions of fact. Resides, the petition was found to be belated. It was also found that the decision of the Tender Evaluation Committee, was just and fair. It was in these circumstances that the writ petition was dismissed in limine. The Pune case, Therefore, is of no assistance to the learned counsel for the second respondent.

19. Other submission of the learned-counsel for the respondent is that the petition is not maintainable as no cause of action has arisen in the territorial jurisdiction of this Court. This submission of the learned counsel for the respondent has to be rejected in view of the decision of the Division Bench of this Court in New Horizons Limited and Another Vs. Union of India (UOI) and Others, as similar contention was raised by the respondents in that writ petition but it was rejected on the ground that the office of the General Manager, Telecom District Hyderabad, was a department of the Central Government in the Ministry of Communications. While rejecting the submission the Division Bench observed as follows :--

"The third respondent is the General Manager, Telecom District, Hyderabad, a department of the Central Government in the Ministry of Communications. We find this Court will, Therefore, have jurisdiction in the matter. We could certainly have directed the petitioners to approach the Andhra Pradesh High Court which also has jurisdiction in the matter since the telephone directories were required for Hyderabad Telecom (District and the contract was to be entered there and the records were also maintained there in Hyderabad. We could decline to exercise jurisdiction under Article 226 of the Constitution in such a matter in spite of the fact of our having jurisdiction in the matter. However, since the arguments were addressed at length we do not think any useful purpose will be served by sending the petitioners to Hyderabad."

20. As already pointed out that the writ petition was dismissed by the Delhi High Court on merits and the order of the Delhi High Court was set aside by the Supreme Court in appeal. It is noteworthy that the Apex Court did not throw out the case of the petitioner on the ground that the Delhi High Court did not have jurisdiction in the matter. For the aforesaid reasons, the preliminary objection of the second respondent is also rejected.

21. Having regard to the aforesaid discussion, the writ petition succeeds and the rule is made absolute. The condition requiring a tenderer to have local experience of compiling, printing and supplying of telephone directories for telephone systems with the capacity of 50,000 lines is hereby quashed.

22. Petition allowed.

