(1998) 03 AP CK 0061

In the Andhra Pradesh High Court

Case No : Writ Petition No''s. 12975 of 1997 and Batch

Janakirama Veddara Labour Contract Co-operative Society, Nalgonda — APPELLANT

Vs

Executive Engineer, R and B, Nalgonda Dist. and Another — RESPONDENT

Date of Decision : 10-03-1998

Acts Referred:
Andhra Pradesh General Sales Tax Act, 1957 — Section 5
Constitution of India, 1950 — Article 14, 226
Income Tax Act, 1961 — Section 194

Citation : (1998) 3 ALD 699 : (1998) 3 ALT 808

Hon'ble Judges : G. Bikshapthy, J

Bench : Single Bench

Advocate : Mr. A. Prabhakar Reddy, for the Appellant; Government Pleader, for Roads and Buildings, for the Respondent

Judgement

1. In all these writ petitions common questions of law are involved and hence they are disposed of by a common order.

2. The petitioners in some of the writ petitions are the Labour Contract Cooperative Societies registered under the A.P. Cooperative Societies Act and some of the petitioners are individual contractors. In some of the petitions, the Circular issued by the Government dated 24-1-1996 directing the Departments to insist on tax clearance certificate from the commercial authorities is challenged.

3. Tender Notifications were issued by various departments who are arrayed as respondents in the writ petitions and while issuing tender notifications various conditions were stipulated. Some such conditions are that the applications for receipt of the tender schedules should be accompanied by clearance certificate by the Commercial Tax Department, Income Tax Department, Experience Certificate, deposit of Earnest Money Deposit (for short ''E.M.D''). As far as the Labour Contract Cooperative Societies arc concerned, it is their case that they

arc entitled for exemption from payment of E.M.D. in respect of certain works and therefore the E.M.D. need not be insisted upon for receipt of the Tender Schedules.

4. It is the case of the respondents that the tender conditions cannot be challenged in writ proceedings as it is purely administrative action not effecting anybody''s rights much less constitutional rights. That the tender conditions are fixed keeping in view the nature of work, the period of the work within which the work has to be completed, the financial, technical and other capabilities of the persons who would be eligible to execute the work etc. Therefore, insistence of such certificates or particulars before the tender schedules are issued, would be quite legal and valid and it would be in the interest of the Government to ensure that the works are completed within the scheduled time. It is also case of the respondents that the works which are floated by various departments cannot be executed by the societies and therefore it is only as and when the societies which are specifically permitted to participate in the works, their cases would be considered relaxing the conditions to the extent of benefits conferred by the respective departments or corporations. The conditions imposed for release of tender schedules cannot be said arbitrary or illegal and therefore the writ petitions are liable to be dismissed. On behalf of the Central Government and other corporations, it is stated that as far as the Labour Contract Cooperative Societies are concerned, the benefit which is extended to them in the matter of E.M.D. etc. under various subsisting orders are being continued and they cannot seek much more benefits or rights than what they were given to them under various orders. Therefore, for all these reasons, the respondents submit that the writ petitions are to be dismissed.

5. The issue that arises for consideration is whether fixing of tender conditions for release of tenders can be said to be illegal or arbitrary ?

6. In the instant case, as per the tender conditions, the application for tender schedule has to be accompanied by the clearance certificate by the Commercial Tax Department, Income Tax Department, Experience Certificate and E.M.D.

7. The learned Counsel for the petitioners submit that the insisting on clearance by the Commercial tax authorities income tax authorities is unwarranted as the A.P. General Sales Tax Act itself contains a specific provision u/s 5-h contemplating deduction at source. It says that notwithstanding anything contained in the Act, the Central Government or State Government or the Industrial, Commercial or trading undertaking of the Central Government or of the State Government or of a local authority or a statutory body shall deduct from out of the amounts payable by them to a dealer in respect of the works contract, all the works specified in Section 5-F and 5-g executed by them, the amount calculated @ 4% of the total turn out. Thus, it is submitted that when the tax itself is deducted at source while making payment, the insistence of clearance by the commercial authorities is arbitrary and unwarranted. Further, the memo was issued on 24-1-1996 and since the sub-sections 1 and 2 of

Section 5-h was inserted with effect from 1-8-1996, it would not be appropriate to insist for such certificate. Similar contentions were raised in respect of income tax also. Section 194(c) of the Income Tax Act also enjoins upon a persons responsible for paying any sum to any contractor for carrying out any work including the supply of labour for carrying out any work in pursuance of contract work between a Contractor and the Central Government or State Government or local authority or any corporation established under the State or Central or provincial Act or any Company or cooperative society or any authority etc. shall at the same time of crediting such sum to the account of the contractor deduct an amount equivalent to 1% in case of advertising and 20% in other cases on such sum as income tax. Therefore, in view of this categorical provision which enables the authorities to deduct the tax at source, the clearance certificate need not be insisted upon. It is also stated that the experience certificate is unwarranted as the works are executed by the respective societies/contractors and the details could be furnished instead of furnishing experience certificate. With regard to the payment of E.M.D. it is stated that the E.M.D. is only paid along with the submission of tender schedules, but it need not be insisted upon for applying for tender schedules. That causes considerable inconvenience to the contractors. As far as the Cooperative Societies are concerned, it is stated that they are not liable to pay any E.M.D. as per the notifications issued by the Government from time to time.

8. The issue that fells for consideration is whether such conditions can be imposed by the authorities and such an issue can be the subject-matter of a judicial review by the High Court under Article 226 of the Constitution of India.

9. It is a well settled rule of interpretation applicable alike to documents as to statutes, that, saves for compelling necessity, the Court should not be prompt to ascribe superfluity to the language of a document "and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use. To reject words as insensible should be the last resort of judicial interpretation, for it is an elementary rule based on common sense that no author of a formal document intended to be acted upon by the others should be presumed to use the words without a meaning. The Court must, as far as possible, avoid a construction which would render the words used by the author of the document meaningless and futile or reduce to silence any part of the document and make it altogether inapplicable Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, . It further held as follows :

"It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the Government cannot act arbitrarily as its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts quotas, licences etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

10. The Supreme Court in Star Enterprises v. City and Industrial Development Corporation, 1990 (2) JT 401, observed as follows :

"In recent times, judicial review of administrative action hag become expansive and is becoming wider day to day. The traditional limitations have been vanishing and the sphere of judicial scrutiny is being expanded. State activity too is becoming fast pervasive. As the State has descended into the commercial field and giant public sector undertakings have grown up, the stake of the public exchequer is also large justifying larger social audit, judicial control and review by opening of the public gaze; these necessitate recording of reasons for executive actions including cases of rejection of highest offers. That very often involves long stakes and availability of reasons for action on the record assures credibility to the action; disciplines public conduct and improves the culture of accountability. Looking for reasons in support of such action provides an opportunity for an objective review in appropriate cases both by the administrative superior and by the judicial process.''"

11. The Supreme Court in India Cement Ltd. etc. Vs. Union of India and others, held thus :

"The true position, therefore, is that any act of the repository of power, whether legislative or administrative or quasi- judicial, is open to challenge if it is in conflict with the Constitution or the governing Act or the general principles of the law of the Land or it is so arbitrary or unreasonable that no fair minded authority could ever have made it."

12. The latest decision on the judicial review can be traced in Tata Cellular Vs. Union of India, . The Supreme Court elaborately dealt the extent of applicability of judicial review to contractual powers exercised by Government Bodies. It held thus :

"It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State, It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review."

The Supreme Court further held that judicial review is concerned with the reviewing not the merits of the decisions in support of which the application of judicial review is made, but the decision making process itself. It held in para 93 as follows :

"The duty of the Court is to confine itself to the question of legality. Its concern should be :

1. Whether decision making authority exceeded its powers ?

2. committed an error of law.

3. committed a breach of rules of natural justice.

4. reached a decision which no reasonable tribunal would have reached or

5. abused its powers."

Finally, the Supreme Court after referring to the decisions in Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries, , Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, and Union of India and others Vs. Hindustan Development Corpn. and others, carved out the following principles :

"The principles deducible from the above are :

1. The modem trend points to judicial restraint in administrative action.

2. The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made.

3. The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

4. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract Normally speaking the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

5. The Government must have freedom of contract. In other words a faitplay in the joints is a necessary concomitant for an administrative body functioning in an

administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness but must be free from arbitrariness not affected by bias or actuated by mala fides.

6. Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

13. A similar issue was considered by me in Sri Shiva Shakthi Constructions (P) Ltd. v. Superintending Engineer, Roads and Buildings, Hyderabad. 1997 (2) ALD 772, wherein Roads and Buildings Department of the Government stipulated the following conditions for release of tender schedules :

"Proof of ownership of machinery required for road work such as earth work machinery i.e. excavation, loader grader, dozer and vibrator rollers and hot mix machinery such as electronic paver, drums, mix plant with electronic control and trunk mounted bitumenous sprayer of hand is to be furnished along with application, duly attested by the officer not below the rank of Executive Engineer.

Proof of ownership of electronic hot plant having all attachment in its conforming to the Ministry of Surface Transport specification No.504, 3, 4 located within 70 k.ms. radius from the work spot and other ancillary machinery such as paver, vibrator roller etc., the certificate issued by the Executive Engineer, N.H. Division, Hyderabad to this effect shall be furnished along with the application for tender schedules."

After considering the various judgments on the subject and keeping in view the nature of work floated in the notification it was held that such conditions cannot said to be illegal or arbitrary.

14. In Writ Appeal No.75/1996 dated 3-4-1996 the Division Bench of this Court while considering certain condition in the tender notifications, held that the Government or the Department has got the power to prescribe the qualifications and experience in respect of the work for which it is invited tenders and accordingly held that the conditions were valid.

15. Thus, it is crystal clear that even in the matter of entering into contract, the State cannot be treated on same par with that of a private person who is entitled to enter into contract with any person of his choice. Hence in matters awarding of contracts, the State has to satisfy the mandate of Article 14 of the Constitution of India. The golden thread that passes through the acts of the State and its instrumentalities is that it has to act fairly and reasonably without showing preference or bias towards any person. Thus, this Court will only interfere with the award of contract or conditions of offer or contract (tender) if they are wholly arbitrary, unreasonable and opposed to public interest.

16. It is now to be considered whether the conditions prescribed for release offenders are valid ?

17. The learned Counsels for the petitioners submit that imposing conditions at the threshold itself is illegal and arbitrary and such conditions if at all could be imposed at the time of submitting the tenders. Even otherwise, it is submitted that the conditions are invalid and arbitrary. I am unable to agree with the contention of the learned Counsel that these conditions need not be imposed at the time of releasing the tender schedules. If the said conditions are to be insisted at the time of filing the tenders, there is no reason why the said conditions could not be imposed at the time of release of the tender schedules itself. This saves considerable time of the tender deciding authority. Hence, insisting on such conditions cannot be said to be arbitrary. But, the question remains for consideration is whether insistence on clearance certificate from Commercial tax and Income tax authorities is valid ?

18. Admittedly, various works are notified by the Government or its agencies or instrumentalities of the State, Registration of the Societies/individuals with the Commercial tax and Income tax authorities is not only requirement of the statute, but it is also in public interest. A clearance certificate from the authorities would only ensure that they arc the born fide persons, having been registered with the concerned departments and that they were not in any arrears in respect of any tax to the Government. Similarly insistence on experience certificate also cannot be said to be arbitrary, inasmuch as it enables the authorities to scrutinise the tenders without causing inordinate delay. Moreover, these are the matters which are exclusive preserve of the authorities in administrative spheres unless they are found to be arbitrary or lack bona fide. The test of eligibility for release of tenders as laid down in the notifications was the objective test and it was not left to the subjective direction of the authorities. Therefore, I have to necessarily hold that the insistence by the respondents for clearance certificate by Commercial Tax Department and Income Tax Department and also the experience certificate wherever such conditions are stipulated, cannot be said to be illegal, arbitrary or irrational.

19. Coming to the payment of E.M.D. I do not find any logic in the arguments advanced by the learned Counsel appearing for the petitioners. It is their case that the E.M.D. can be paid only at the time of submission of the tenders, but E.M.D. cannot be insisted for receiving the tender schedules. I do not think that this process makes any difference. If a person is determined to file tender, he is bound to deposit the E.M.D. and if he has to file tender, he is bound to purchase tender schedules. No person can purchase the tender schedules for the sake of record purpose. Therefore, when a person is required to pay the E.M.D. along with submission of tenders, there is no reason why he should not pay the same at the time of receiving the tender schedules. This process would only avoid horse trading and speculations in the process and allows only bona fide tenderers in the field of consideration. The Supreme Court in M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, said that "an authority inviting tenders, it cannot be said, is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical

irregularity of little or no significance. The requirements in a tender notice can be classified into two categories-those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the conditions. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. Thus, although the earnest money, under the terms of tender notice was permitted to be deposited only by cash or by demand draft drawn on the State Bank of India, the payment of earnest money by certified cheque of the Union Bank of India drawn on its own Branch could be treated as sufficient compliance of the term. It could not be said that the authority inviting the tenders could not waive the literal compliance of such a condition and accept the tenders especially when it was in its interest not to reject the bid which was the highest," but payment of E.M.D. and the relevant certificates cannot be said to be ancillary request, but they are essential conditions. Moreover these conditions are prescribed by the authorities keeping in view various factors so as to eliminate the persons at the time of release of tender schedules itself. In M.V. Krishna Reddy v. The Commissioner, Cammissionerate of Tenders, Govt. of AP (1995 (1) ALR 161) P. Ramakrishnam Raju, J. held that the tender forms cannot be supplied to all and sundry unless the application for tender forms is in order i.e. in accordance with the tender notice. Therefore, supply of tender forms, forms integral part of the whole procedure prescribed for accepting the tenders.

20. In view of the above, I do not find fault with the insistence of payment of E.M.D. in advance along with the application for supply of tender schedules. However, it is the case of the petitioners that if the tender schedules are obtained on payment of E.M.D. in advance and if the petitioners were not inclined to submit tenders for a particular work for their own reasons, their E.M.D. will be unnecessarily blocked and thereby they will be put to loss. As already observed by me that contingency may not happen as the persons, who wants to file their tenders has to necessarily deposit the E.M.D. save in exceptional cases. Therefore, in such of those cases, where the persons do not file the tenders having obtained tender schedules by payment of E.M.D. those persons shall be refunded with the E.M.D. on giving a requisition to the authority that they are not interested to file the tender and that their E.M.D. may be returned. On such requisition, whether the tenders are finalised or not, the authority shall refund the same within a period of one week from the date of requisition from the concerned persons or society.

21. Let us now consider the benefits that are made available to the Labour Contract Cooperative Societies. It is not in dispute that certain concessions were made available to the Labour Contract Cooperative Societies by the State Government and the Central Government with regard to the E.M.D. etc.

22. It is the case of the Cooperative Societies that Irrigation and Command Area

Development Department of the Government issued G.O.Ms.No.275, dated 27-9-1995 revised orders for entrustment of works belonging to Irrigation and Command Area Development and Project Wings of the Cooperative Societies and individuals belonging to S.Cs, S.Ts. and Wadderas as detailed below :

"(i) Registered Societies belonging to Scheduled Castes, Schedules Tribes, Wadderas shall be exempted from payment of Earnest Money Deposit for works costing upto Rs.20.00 lakhs (Rupees twenty lakhs only)

(ii) Individuals belonging to Scheduled Castes, Scheduled Tribes and Wadderas shall be exempted from payment of Earnest Money Deposit for works costing upto Rs.20.00 lakhs (Rupees Twenty lakhs only)

(iii) Works shall be let out to the Societies/ Individuals belonging to SCs and STs and Wadderas on nomination basis upto a limit of Rs.25,000/- by the Executive Engineers upto a limit of Rs.50,000/-by the Superintending Engineers. The powers of Chief Engineers in entrustment of works on nomination basis shall be limited to Rs.5.00 lakhs (Rupees five lakhs only). In the case of Societies belonging to Scheduled Casts, Scheduled Tribes, and Wadderas and Rs.2.00 lakhs (Rupees two lakhs only) in the case of individuals."

Housing and Municipal Administration and Urban Development Department had issued a G.O.Ms.No.475, MA dated 28-8-1989 giving certain concessions in respect of the works such as recognising them as class-II contractors not to insist for solvency certificate, not to insist for E.M.D. to certain extent and to reserve atleast 15% of works notified by the said department to S.Cs., S.Ts. and Wadderas to the Labour Contract Cooperative Societies and also to the persons belonging to S.Cs., S.Ts. and Wadderas and also unemployed persons belonging to S.Cs., S.Ts. and Wadderas including retrenched Engineers. In G.O.Ms. No.398, dated 5-9-1990, the Irrigation and Command Area Development Department allowed concessions to S.Cs., S.Ts. from payment of E.M.D. amount. In case of R&B Department, G.O. was issued in G.O.Ms.NO.290, dated 20-4-1977 allowing concessions from payment of E.M.D. for one lakh rupees in case of individuals and in case of societies Rs.5 lakhs. It was further amended by G.O.Ms.No.440, dated 12-8-1994 wherein the concessions given to the societies was enhanced to Rs.10 lakhs. In G.O.Ms.No.85, dated 20-3-1987 it is stated that the E.M.D. should be collected at the time of application for release of tender schedules. But, however, a clarification was issued by the Irrigation Department on 30-9-1993 that the concessions already sanctioned in G.O.Ms.No.398, dated 5-9-1990 shall continue. In receipt of the R&B Department, it is not made applicable and it is awaiting orders of the Government. G.O.Ms.No.16, dated 6-7-1994 conferred certain benefits which are not applicable to R&B Department and the R&B Department had constituted a Committee as to which the items which could be entrusted to the S.Cs., S.Ts. and Wadderas Labour Contract Cooperative Societies.

23. Thus, it is seen that various departments of the Government have been

granting different concessions to the S.Cs., S.Ts. and Wadderas Labour Contract Cooperative Societies and Individuals. There is no consistency in grant of benefits in respect of E.M.D. etc. However, the Department which issued the notification granting certain benefits to the societies should be restricted to the works notified by or under that Department only, and it cannot be said that similar benefits should be extended by the other Department also in the absence of any G.O.

24. As already pointed out above, there is no uniformity of giving benefits to the societies in all the works under the Government. Therefore, it is necessary that the Government should compile benefits and issue a consolidated G.O. so as not to cause any concision in the minds of the authorities or the beneficiary societies or individuals. However, pending consolidated instructions with regard to the benefits to be conferred on these societies or individuals it is only open for the petitioners to claim the benefits which are extended by the respective departments. Until and unless such benefits are conferred specifically on the societies, they cannot claim as of right. Inasmuch as, R&B Department, has not exempted the Cooperative Societies and others from payment of E.M.D. beyond the limits under G.Os.290 and 440 the petitioners cannot claim to contend that they are exempted from payment of E.M.D. The petitioners have not been able to place any document before this Court establishing that they are entitled for exemption. Under these circumstances, it has to be held that the petitioners societies/ individuals falling under S.Cs., S.Ts. and Wadderas category are entitled to the benefits as extended to them under various G.Os. If exemption of E.M.D. is granted by G.Os. to those societies, limiting quantum of exemption to that extent only they should not be insisted for payment of E.M.D. However, with regard to production of certificates, such as experience certificate, clearance by the commercial and income tax department (as and when such a condition is fixed in the notification), the society has to follow the same on par with the other contractors except the benefit of E.M.D. wherever prescribed.

25. It is also noticed that in most of the writ petitions, the petitioners have sought for release of tender schedules without particular reference to any tender notification. The relief was sought in a very vague and general terms praying for release of tender schedules without insisting of E.M.D. etc. for the works that may be notified on or after so and so date. Such a relief can never be granted. No cause of action can be said to arise in the absence of a specific notification calling for the tenders and if the tender schedules are not being released in respect of that particular work or works mentioned in the notification even though they are eligible. They cannot seek the relief in respect of the works which arc likely to be notified. In fact the Registry ought not to have registered such writ petitions, and this may be taken note of by the Registry in respect of cases that may arise in future. But, since the writ petitions were already admitted, I am not inclined to dismiss on that ground and accordingly, I have decided on merits.

26. For the foregoing reasons, I record my findings as follows :

(i) The conditions stipulated for release of tender schedules by the authorities that the applications for release of tender schedules should be accompanied by the clearance certificate from Commercial Tax Department, Income Tax Department, Experience Certificate (wherever notified) are not violation of Article 14 of the Constitution of India and accordingly held valid.

(ii) The condition of payment of E.M.D. along with the application for release of tender schedules is also held valid. However, wherever the exemption is granted by the concerned departments or the authorities to the Labour Contract Cooperative Societies or the individuals as the case may be to the extent of such exemption only, the payment of E.M.D. need not be insisted upon either at the time of release of tender schedules or at the time of receiving the tenders depending on the conditions in the tender notice. This exemption is confined to the extent of G.Os. issued by the Department in respect of the works notified and falling under the departments only. Such of those persons who having obtained tender schedules by depositing E.M.D. decided not to file tenders, they should intimate the same in writing to the tender receiving authority well in advance to the last date of receiving the tenders and such authority shall refund the E.M.D. within one week of receipt of the written intimation without reference to the finalisation offenders.

(iii) The Government of Andhra Pradesh is directed to consolidate the orders issued by various departments regarding the concessions extended to Labour Contract Cooperative Societies and unemployed individuals belonging to S.Cs., S.Ts. and Waddera Caste etc. and issue revised guidelines clearly defining the benefits to the above societies or individuals in respect of various works.

(iv) In case the contracts are already awarded in pursuance of the interim orders to various persons/societies/ individuals, the said contracts shall not be disturbed consequent on the final orders passed in these wit petitions.

27. Subject to the above observations, the writ petitions are dismissed.

