

(2002) 09 DEL CK 0195

In the Delhi High Court

Case No : Civil Writ Petition No. 3917 of 2002

Keshav Security Service

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 04-09-2002

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2006) 2 CTLJ 101

Hon'ble Judges : Jiwan Dass Kapoor, J;B.A. Khan, J

Bench : Division Bench

Advocate : Manoj Swarup, for the Appellant; Harish Chander, Senior Advocate, Rajinder Nischal and Dinesh Agnani, for the Respondent

Final Decision : Dismissed

Judgement

Khan, J.—Petitioners are private security agencies providing security services to various establishments. They were doing so to Bharat Sanchar Nigam Limited (BSNL)'s establishments also but their run was cut short after the Government's directive to public sector undertakings to engaged contract security services from DGR (Directorate General Resettlement) approved security agencies only. This was first done through OM dated 1.2.1999 issued by the Department of Public Enterprises which was later followed by defense Ministry's circular dated 26.4.2001 and the BSNL Memorandum dated 3.4.2002 whereby all BSNL establishments were instructed to engage security personnel from DGR sponsored agencies only. They challenge this and also Clause 14(d) or BSNL Guidelines which stipulates a retired Gazetted Officer to be on the Board of Directors of private limited companies running these security agencies and which allegedly renders them ineligible to be on the BSNL panel.

2. Petitioner's case is that as per past practice, the BSNL was engaging security services through open tender in which both private agencies and those approved by the DGR would complete and of which the best and the lowest would be selected. They would also invariably make the grade through this competitive

process and obtain the BSNL contract. They would also deposit 10% of the security money of the tender amount to cover the loss/pilferage, if any, occurring in the BSNL premises due to any lapse of their personnel while executing the contract. But now BSNL had closed the door on them by discarding the open tender system and by deciding to draw from DGR approved agencies only. This according to them was vocative of Rule 28 of the General Financial Power and Procedure which provided that open tender system must be adopted as a general rule. It was also discriminatory and arbitrary infringing their rights under Article 14 of the Constitution. It also caused loss to public exchequer inasmuch as DGR approved agencies were not required to deposit 10% security cost and were otherwise turning out to be expensive as against private agencies. Clause 14(d) of the BSNL "Guidelines for Functioning of Security Agencies" was also no less reasonable as it excluded them from seeking equal treatment and rendered them ineligible to be on the BSNL panel.

3. Reliance for all this is placed by the petitioners on a host of Supreme Court judgments, more particularly M.P. Oil Extraction and Another Vs. State of M.P. and Others, Chairman and Managing Director, SIPCOT, and Madras and others Vs. Contromix Pvt. Ltd. by its Director (Finance) Seetharaman, Madras and another, , Tata Cellular Vs. Union of India, Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others, Union of India and Others Vs. Dinesh Engineering Corporation and Another etc., Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, to show that calling of open tenders was necessary and that the action of respondents was arbitrary, discriminatory and unreasonable offending Article 14 of the Constitution.

4. R1-2 have filed their counter/reply and so have respondents 3 to 8. Their common stand is that DGR had evolved a scheme to prevent exploitation of ex-servicemen by private agencies. As against this, DGR approved security agencies were run by ex-service officers. A specialised panel of retired service officers and other personnel was maintained by DGR which were being sponsored as per seniority and requirement. They were paid minimum wages and other benefits like DA, bonus, gratuity, EPF/ESI and other terminal benefits. The contract of these personnel was initially for two years and could last up to four years. Even DGR sponsored agencies had to furnish a contract performance guarantee equivalent to 5% of one month's wage bill. Under the scheme, employment opportunity was made available to about 60,000 ex-servicemen who retired at the age of 40-46 years and all this was being done to protect their interests, promote their welfare and save them from the clutches of private agencies.

5. All that remained to be seen in this backdrop was whether any obligation was cast on the respondents to report to open tender system only for engagement of security services and whether their action to discard this and to draw from DGR approved agencies was in any way arbitrary, discriminatory or unreasonable.

6. There is no dispute that it all started with the OM No. 6/22 dated 1.2.1999 issued by the Department of Public Enterprises requiring public sector

undertaking to obtain contract security services from DGR approved security agencies without engaging private agencies on contract through open tender. This was followed by defense Ministry's circular dated 26.4.2000 on the subject matter reiterating this requirement and wanting the public sector undertakings including the BSNL to implement the directive. The BSNL thereafter issued memo dated 3.4.2000 directing all its establishments to restrain from engaging security personnel by awarding contracts through open tenders. whether all this would be assailed for being vocative of any rule or statute or Article 14 or even a judicial precedent for the matter is the question.

7. Petitioners have pressed in service Clause 28 of General Financial Power & Procedures, besides some Supreme Court judgments in M.P. Oil Extraction and Chairman, Sipcot cases and so on to urge that respondents were under an obligation to follow the open tender system. They have placed on record an extract of Clause 28 which provides:-

"The open tender system i.e. invitation to tender by public advertisements should be used as a general rule and must be adopted subject to the exception noted under paragraph 36 in all cases in which the estimated value of demand is Rs. 2 lacs and above."

8. It is nowhere indicated by petitioners that this clause regulates all actions of respondents including engagement of security service also. Nor is its context made known. The rule embodied by it also seems subject to some exceptions which have not been brought to our notice. Even if its terms were taken on its face value, it only stipulated resort to open tender system in cases where estimated value of the demand was Rs. 2 lacs or more. This by no logic can be taken to suggest that it was obligatory for respondents to take to open tender system for engagement of private security services.

9. It is true that calling of open tenders or public auction are recognised methods in action related to allotment and distribution of State largesse to ensure fairness in State action, to save the public exchequer from loss and to secure larger public interest. But these are not to be necessarily adopted in all events and circumstances unless some law or rule mandates so.

10. It is also not the case that calling of tenders in all cases is dictated by any judicial precedent much less by the Supreme Court judgment in M.P. Oil Extraction or Chairman, Sipcot prescribing resort to open tender system for all purposes. It is noteworthy that the court in these cases was seized of either sale of public property or destruction of State largesse and it was in that context that it had observed that resort to open tender or public auction in such cases was desirable. It had said so in *United India Periodicals v. M & N Publicity* (1993) 1 SCC 446

"For securing the public interest one of the methods recognised is to invite tenders affording opportunity to submit offers for consideration in an objective manner. However, there may be cases where in the special facts and

circumstances and due to compelling reasons which must stand the test on Article 14, departure of the aforesaid rule can be made.

11. In *Union v. Dinesh Engineering Corporation*, the court was dealing with purchases by Railways and it was in that context it observed:-

"In the instant case, we have noticed that apart from rejecting the offer of the writ petitioner arbitrarily, the writ petitioner has now been virtually debarred from competing with EDC in the supply of spare parts to be used in the locomotives by the Railways, ever since the year 1992, and during all this while, we are told the Railways are making purchases without any tender on a proprietary basis only from EDC which, in our opinion, is in flagrant violation of the constitutional mandate of Article 14. We are also of the opinion that the so-called policy of the Board creating monopoly of EDC suffers from the vice of non-application of mind, hence, it has to be quashed as has been done by the High Court."

12. But from all this, it can't be concluded that resort to open tender system or public auction was commanded by any Supreme Court judgment. We are, Therefore, unable to hold that respondents were obliged to adopt the open tender system necessarily to engage the security services or that they had committed any illegality or material irregularity or impropriety in doing so.

13. That leaves us with the second question whether respondents' action in discarding the open tender system and in limiting its choice to engage security services from DGR approved agencies was in any way arbitrary, discriminatory, unfair or unreasonable thus violative of petitioners' rights under Article 14.

14. It is elementary that Article 14 embodies the doctrine of equal protection which indeed extends to the State action also. It prohibits any discrimination between similarly situated and circumstanced. This does not, however, mean that every law made or every action taken by the State or its agency or instrumentality must have a universal application to all and sundry. Article 14 prohibits a discrimination among equals but it at the same time permits a differential treatment amongst unequals. The State enjoys the right and power to take a reasonable decision subject to its satisfying the twin test of (i) being founded on intelligible differentia which in turn (ii) must have rational relation to the object sought to be achieved.

15. Article 14 requires all State actions to be fair, reasonable and just. These must be guided and informed by reason and not by whim, caprice or personal predilections of those who are vested with power to be exercised for public good. If the action is found arbitrary, discriminatory and unreasonable or dictated by extraneous irrelevant or mala fide considerations, it is to be struck down as unconstitutional. This position is so well established by plethora of Supreme Court judgments that it becomes unnecessary to quote from these to prove the obvious.

16. It also goes without saying that requirements of Article 14 apply to contractual matters of the State also though the scope of judicial review in this is very limited. Normally courts do not examine the wisdom of Government's policy nor explore the desirability of any alternatives to it. But wherever it is found that the action is hit by illegality, irrationality or procedural impropriety, the courts do not hesitate to intervene and quash it. This is how the Supreme Court viewed it in the International Airport Authority case:-

" A State need not enter into the contract with anyone but if it does, it must do so fairly, without discrimination and without adopting any unfair procedure."

17. With this preface, it all comes to whether respondents' action could be held to be arbitrary, discriminatory, unreasonable or irrational in the facts and circumstances of the case.

18. Before testing this, it appears to us that petitioners' case was rather misdirected. They mistakenly believe that discarding of open tender system by respondents and their engagement of security services from DGR sponsored agencies was either analogous to or tantamount to sale and distribution of State largesse. A wholly wrong premise indeed. Because respondents' action was neither related to sale of public property nor distribution of public largesse. They were not, Therefore, required to observe such requirements which are applicable to action related to sale of public property or distribution of State largesse. The requirement of giving public and ensuring transparency and wide participation in these actions is insisted upon to subserve the cause of large public interest by avoiding any loss to public exchequer. But this question does not arise in the present case. Here respondents' action was not to confer any largesse or any undue benefit on DGR which was likely to cause any harm or prejudice to public interest. It was only to draw from DGR approved security agencies, which could also be a matter of their choice. It is also not that petitioners were shut out by any act of hostile discrimination. Their allegation that engagement of security services from DGR approved agencies would cost the BSNL more is also irrelevant. Because even if it was so assumed, it was not directed to confer any undue benefit or largesse on any one. We accordingly find nothing arbitrary or discriminatory in this, more so because the action was based on a scheme which was evolved for the benefit and welfare of ex-servicemen. So long as the object of this scheme was to prevent exploitation of ex-servicemen and to provide them better benefits, the action of the BSNL was well found and classification made by it had nexus with the object sought to be achieved.

19. We are also not impressed by the submission that Clause 14(d) of the BSNL "Guidelines for functioning of Security Agencies" was in any way violative of Article 14 of the Constitution. The relevant guideline provides:-

"(d) The allocation of quota of Security Agencies is as follows:-

(i) individual proprietary concern 50 guards

(ii) Pvt. Ltd. Companies with:-

(aa) One officer and two 50 guards JCP Directors

(ab) Two officers and one 100 guards JCO Director

(ac) Three office Directors 150 guards"

20. These guidelines deal with the allocation of quota to the security agencies and also stipulate the requirements of composition of Board of Directors in case of private limited companies running such agencies.

21. Petitioners, on their own showing, are registered under Punjab Ex-servicemen Corporation Act 1978. They have not indicated whether they are registered as partnership firm or a society or a cooperative society under this Act which does not, however, provide for registration of private limited companies. Therefore, requirement of this clause does not affect them either way, least of all making them ineligible for being registered by the DGR. If they are not a private limited company, they are not supposed to meet the requirement under this clause. It's a different matter if they fail to fit the bill for inclusion in the panel of DGR agencies for some other reason.

22. We accordingly hold that it was not obligatory for respondents to resort to open tender system for engagement of security services and their action of drawing from DGR sponsored agencies was neither arbitrary nor discriminatory or unreasonable to attract violation of Article 14. Nor could Clause 14(d) of the relevant guidelines be held to be violative of this Article at their instance.

23. This petition accordingly fails and is dismissed.