

(2011) 05 RAJ CK 0176

In the Rajasthan High Court

Case No : Civil Writ Petition No. 2571 of 2010

Laxman Lal Dangi

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 26-05-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10
Constitution of India, 1950 — Article 14, 226

Citation : (2011) 4 RLW 2842

Hon'ble Judges : Vineet Kothari, J

Bench : Single Bench

Advocate : L.R. Mehta with Ramit Mehta, Ashok Chhangani and Manish Shishodia, for the Appellant; Anand Purohit and AAG with Pradhuman Singh, for the Respondent

Final Decision : Allowed

Judgement

Vineet Kothari, J.—Heard learned counsels for the parties. This writ petition has been filed by the petitioner, who is a successful bidder, being aggrieved by order Annex. 4 dated 9.3.2010 passed by the Director of Mines, Udaipur cancelling the provisional sanction of award of minor and mineral (Bajri) contract approved in favour of petitioner being the highest bidder at Rs. 2.51 crores in pursuance of tender opened on 17.2.2010 under the notice inviting tender published vide Annex. 1 dated 13.1.2010, in which the reserve price for the said contract for Tehsil Girwa and other areas in district Udaipur for the period 1.4.2010 to 31.3.2012 fixed at Rs. 2.10 crores.

2. The petitioner being found the highest bidder amongst the two bidders only who participated in the said tender process was provisionally selected for award of such contract and he also deposited 12.5% of the bid money of Rs. 2.51 crores as per Rule 35 (g)(v) of the Rajasthan Minor & Minerals Concession Rules, 1986 (for short, hereinafter referred to as "Rules of 1986") under the provisional sanction granted vide Annex. 3 dated 17.2.2010. Vide Annex. 4 order of Director

of Mines, Udaipur dated 9.3.2010, however, the said authority found that difference between two bids given was less and the reserve price was also not properly fixed at Rs. 2.10 crores and which further deserves to be increased, therefore, fresh tenders may be invited. This appears to have been done upon the recommendations of a Committee constituted by the Director comprising of Additional Director (Mines), Financial Controller and the Deputy Legal Adviser; and fresh NIT appears to have been issued vide Annex. 5 dated 10.3.2010 with the reserve price of Rs. 2.70 crores. The petitioner, therefore, preferred this writ petition on 11.3.2010 and an interim order was granted by a Coordinate Bench of this Court in his favour after hearing both the parties on 29.3.2010 staying the operation of impugned order Annex. 4 dated 9.3.2010.

3. Mr. L.R. Mehta, Advocate assisted by Mr. Ramit Mehta and Mr. Ashok Chhangani, learned counsels for the petitioner, vehemently submitted that sanctity of tender process cannot be tinkered with lightly; and that process having been undertaken by the respondents-authorities and bid of the petitioner having been found to be highest at Rs. 2.51 crores, on a second thought, the Director (Mines) could not constitute a Committee at the instance of a new applicant M/s. Graph Tech. Exim. Pvt. Ltd. as stated in the reply filed by the respondent to the writ petition and the tender process earlier finalized and provisional sanction having been granted in favour of the petitioner, the same could not be set at naught, and against this arbitrary withdrawal of tender process and issuance of fresh NIT, the present writ petition deserves to be allowed in support of his contentions, learned counsel for the petitioner replied upon decisions of Hon'ble Supreme Court in the cases of (i) Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , (ii) Tata Cellular Vs. Union of India, , (iii) Ridhi Sidhi Associates Vs. State of Raj. and Others, and (iv) M/s. Shiv Wines & Tolls Ltd. vs. State of Rajasthan & Ors. (DBSAW No. 382/2007, decided on 16.4.2007).

4. On the other hand, Mr. Anand Purohit, Sr. Advocate and Additional Advocate General vehemently submitted that in the interest of Government revenue since the Committee re-considered the matter and the reserve price was found to be fixed earlier at lower figure of Rs. 2.10 crores and only a provisional sanction was given for awarding of contract in favour of petitioner, no vested right accrued in favour of petitioner and before final approval, the Committee had recommended that higher reserve price of Rs. 2.70 crores to be fixed and accordingly fresh NIT was issued and fresh tenders were called; and therefore for fetching the increased revenue, the decision of the Director of Mines vide Annex. 4 dated 9.3.2010 cannot be said to be illegal or arbitrary and same deserves to be upheld. He further submitted that mere depositing of 12.5% of the bid money by the petitioner in terms of Rule 35(g)(v) of the Rules of 1986 does not automatically result into award of contract in his favour and since only two bidders participated on earlier occasion and the difference between two bids was also minimal, therefore, the decision was taken to issue fresh tenders. He, therefore, prayed for dismissal of writ petition. In support of his contentions,

learned AAG placed reliance upon the judgments of Hon''ble Supreme Court in the case of (i) Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, , (ii) Rajasthan Housing Board and Another Vs. G.S. Investments and Another, and (iii) Tata Cellular Vs. Union of India, .

5. I have given my thoughtful consideration to the rival submissions advanced by the respective parties at bar and carefully gone through the various authorities cited before me.

6. The Hon''ble Supreme Court in the case of Ramana Dayaram Shetty (supra), in a leading decision on tenders by the Government authorities, held that an executive authority must be rigorously held to the standards by which it professes its actions. Reiterating the Rule enunciated by Justice Frankfurter, the Hon''ble Supreme Court observed in para 10 as under:-

10. Now, there can be no doubt that what para (1) of the notice prescribed was a condition of eligibility which was required to be satisfied by every person submitting a tender. The condition of eligibility was that the person submitting a tender must be conducting or running a registered IInd Class Hotel or restaurant and he must have at least 5 years" experience as such and if he did not satisfy this condition of eligibility, his tender would not be eligible for consideration. This was the standard or norm of eligibility laid down by the 1st respondent and since the 4th respondents did not satisfy this standard or norm, it was not competent to the 1st respondent to entertain the tender of the 4th respondents. It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them. This rule was enunciated by Mr. Justice Frankfurter in *Viteralli v. Saton*, 359 US 535; where the learned Judge said:

An executive agency must be rigorously held to the standards by which it professes its action to be judged... Accordingly, if dismissal from employment is based on a defined procedure, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed.This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword.

This Court accepted the rule as valid and applicable in India in *Dr. Amarjit Singh Ahluwalia Vs. The State of Punjab and Others*, and in subsequent decision given in *Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, , Mathew, J.* quoted the above-referred observations of Mr. Justice Frankfurter with approval. It may be noted that this rule, though supportable also as emanating from Article 14, does not rest merely on that article. It has an independent existence apart from Article 14. It is a rule of administrative law which has been

judicially evolved as a check against exercise of arbitrary power by the executive authority. If we turn to the judgment of Mr. Justice Frankfurter and examine it, we find that he has not sought to draw support for the rule from the equality clause of the United States Constitution but evolved it purely as a rule of administrative law. Even in England, the recent trend in administrative law is in that direction as is evidence from what is stated at pages 540-41 in Prof. Wade's Administrative Law 4th Edition. There is no reason why we should hesitate to adopt this rule as a part of our continually expanding administrative law. Today with tremendous expansion of welfare and social service functions increasing control of material and economic resources and large scale assumption of industrial and commercial activities by the State, the power of the executive Government to affect the lives of the people is steadily growing. The attainment of socio-economic justice being a conscious end of State policy, there is a vast and inevitable increase in the frequent with which ordinary citizens comes into relationship of direct encounter with State power-holders. This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise. Whatever be the concept of the rule of law, whether it be the meaning given by Dicey in his. "The Law of Constitution" or the definition given by Hayek in his "Road to Serfdom" and "Constitution of liberty" or the exposition set forth by Herry Jones in his. "The Rule of Law and the Welfare State", there is, as pointed out by Mathew, J., in his article on. "The Welfare State, Rule of Law and Natural Justice" in Democracy, Equality and Freedom "substantial agreement in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found." It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affection of some right or denial of some privilege.

7. In the case of Tata Cellular (supra), the Hon'ble Supreme Court reiterated that while 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. The relevant portion from paras 70 and 71 are quoted herein below for ready reference:

70. It cannot be denied that 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.

71. 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.

8. The Division Bench of this Court in the case of *M/s. Shiva Wines & Tolls Ltd.* (supra) also held on Page 19 of the judgment that where the challenge is made to the tender process for grant of contract and where the applicant was not prevented or misled, he cannot challenge the grant if he did not submit tender of his own and participate in the process. The relevant portion of the judgment is quoted below for ready reference:

We are of the view that where the person is prevented from filing tender or is misled by the terms of tender notice and therefore does not file tender, he may challenge the tender process for grant of contract, but where he is not prevented or so misled, he cannot challenge the grant if he did not submit tender of his own and participate in the process in the premises set forth above, it would follow that the appellants are not competent to challenge the grant of contract in favour of the respondent.

9. Similarly, another Division Bench of this Court shared by me in the case of *Ridhi Sidhi Associates (M/s.)* (supra) held that sanctity of process of granting contract specially by Government or public body has to be maintained and the very faith in such process shall be shaken if it were to be lightly interfered with or set at naught at the instance of frivolous and frolic writ petitioners. The relevant para 16 of the said judgment is reproduced herein below:

16. Therefore, we are satisfied that neither the petitioner was prevented by any sufficient cause as alleged by him in submitting the tender on the prescribed date and time nor the contract finalized and concluded in favour of the present appellant can be set aside at the instance of writ petitioners as neither any such fraud has been alleged, much less established, nor the price offered by him is so substantially higher than the price at which the State Government has concluded the contract in favour of present appellants. It would be very easy to make such marginally higher offer for any body, once the tenders of other persons are opened and their bids are known to one and all. Therefore, unless the subsequent offer was genuine, there was no reason for the Court to interfere with the contractual process under Article 226 of the Constitution of India. Sanctity of process of granting contract specially by Government or public bodies

has to be maintained and the very faith in such process shall be shaken if the were to be lightly interfered with or set at naught at the instance of such frivolous and frolic writ petitioners. We are, therefore, unable to agree with the learned Single Judge and great respects, there was no occasion for directing the Principal Secretary of Mines of State of Rajasthan to renegotiate after hearing the writ petitioners and take a fresh decision in the matter. In our considered opinion, a concluded contract came into being between the State Govt. and present appellant M/s. Ridhi Sidhi Associates atleast on 16.2.2009 after the highest bid of the appellant was found on the opening of tenders on 4.2.2009, when the Directorate of Mines and Geology found that the appellant fulfilled all the conditions of deposit of security deposit etc. sent such provisional approval for final approval of said contract and the said process could not be reversed and set at naught at the instance of the writ petitioners. Both the writ petition deserves to be dismissed.

10. On the other hand, in the judgment relied upon by the learned AAG in the case of AIR India Ltd. vs. Cochin International Airport Ltd. & Ors. (supra), the Hon"ble Apex Court has held that decision is not amenable to judicial review, and the court can examine the decision-making process on the ground of malafides, unreasonableness or arbitrariness. The Apex Court thus has held that fresh negotiation with Air India even after taking of tentative decision to award contract to a private company known as Cambatta could not be said a decision making process vitiated by arbitrariness or illegality, hence, Court"s interference was not called for. The relevant para 7 is reproduced herein below:-

The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bonafide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. "The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest

requires interference, the court should intervene.

This judgment is of little help to the respondents in the present case but rather helps the petitioner. No such overwhelming public interest has been shown in changing the reserve price from the highest bid of Rs. 2.51 crores to Rs. 2.70 crores with a marginal increase of Rs. 10 lacs only, so also, when the same appears to have been done at the instance of a third party, who admittedly never participated in the tender process; and simply walked in the scene or rather stalked in at a later stage with higher offer of Rs. 2.70 crores.

11. Similarly, in the case of Rajasthan Housing Board (supra) relied upon by learned AAG, Mr. Anand Purohit, the Hon''ble Supreme Court upheld the decision of the State Government which disapproved the earlier auction held of plots by the Rajasthan Housing Board where it was found that in the past the plots in the said area have fetched a price of Rs. 10,000/- per square meter whereas the highest bid made by the respondent was only nearly half i.e. Rs. 5750/- per square meter. The auction in his favour could not be approved and therefore, fresh auction was permitted. The relevant portion of para 11 is reproduced herein below:

The sale of plots by the Rajasthan Housing Board by means of an auction is essentially a commercial transaction. Even if some defect was found in the ultimate decision resulting in cancellation of the auction, the Court should exercise its discretionary power under Article 226 of the Constitution with great care and caution and should exercise it only in furtherance of public interest. The Court should always keep the larger public interest in mind in order to decide whether it should interfere with the decision of the authority. In the present case, there was enough material before the State Government to show that in the past plots in the area had fetched a price of Rs. 10,000 per square metre and the highest bid made by the respondent in the present case was nearly half i.e. 5750 per square meter, which clearly indicated that the auction had not been conducted in a fair manner. If in such a case the State Government took a decision to disapprove the auction held and issued a direction for holding of a fresh auction, obviously the said decision was taken in larger public interest. In these circumstances, there was absolutely no occasion for the High Court to entertain the writ petition and issue any direction in favour of the contesting respondent i.e. the highest bidder.

Again said judgment is quite distinguishable on facts and there is no such substantial difference in the present case in price so as to permit re-tender process.

12. Coming back to the facts of the case, it appears from the reply filed by the State Government that a new Committee was constituted only upon a private company, namely, M/s. Graph Tech Exim Pvt. Ltd. entered the scene after the bid in favour of petitioner was provisionally accepted vide Annex. 3 on 17.2.2010. The relevant portion from the reply of the State Government is quoted below:

...It was also found that Graph Tech. Exim Pvt. Limited company has given a representation while offering Rs. 2,70,00,000 p.a. to the Director for this tender instead of highest bidder Rs. 2,51,51,551 p.a. The said company had also submitted Bankers cheque of Rs. 21,00,000 in favour of the department that was the reason to constitute committee for examining at the level of Director. In these circumstances the competent authority decided to re-invite the tender.

13. The said companies who also now filed applications in the name of M/s. Parth Network P. Ltd., before this Court through Mr. Manish Shishodia, Advocate seeking impleadment in the present writ petition and learned counsel for the applicant, Mr. Manish Shishodia has also submitted that if the application is not entertained, the respondent Mining Department may be directed to refund its earnest money of Rs. 21 lacs, which request was opposed by learned Addl. Advocate General Mr. Anand Purohit. The said company entered the scene only to upset and vitiate the tender process which resulted in provisional sanction of award of contract in favour of present petitioner. It is well settled that sanctity of tender process has to be maintained and it cannot be lightly interfered with in exercise of jurisdiction under Article 226 of the Constitution of India, more so, at the instance of a person, who walks into the scene at a later stage when the bids opened by the Department are already known to everybody. If such unending process were to be allowed, no Finality can be attached to the tender process. In the present case, admittedly the reserve price now fixed vide Annex. 5 in re-tender process is only marginally higher at Rs. 2.70 crores, whereas the highest bid given by the petitioner at Rs. 2.51 crores is already available with the Department. Upon provisional sanction, the petitioner also paid 12.5% of the bid money, which is lying deposited with them. On a second thought or a review at the instance of a third party, who never participated in the tender process, a decision to constitute a Committee and jack up further the reserve price to Rs. 2.70 crores was taken in the present case. This Court does not and any cogent reason behind such cancellation of the earlier process and re-initiation of tender process again merely because with the lapse of some more time a higher price can be fetched by the Department. It cannot be a ground to undo the earlier tender process. The earlier process cannot be set at naught in view of the facts available in the present case and such re-tender process appears to have been initiated only at the instance of the third party, who chose to walk into scene with a marginally offer of Rs. 2.70 crores and that is why the Committee recommended inviting of fresh tenders. No fairness or reasonableness in the said decision making process of the respondent-Department is found. On the hand, the decision to re-constitute a Committee and invite fresh tenders appears to be tainted with extraneous reasons at the instance of a third party. The applications filed by the applicants, namely, Parth Network (P) Ltd. Being (IA No. 625/11) and applicant, namely, Moti Lal Dangi being (IA No. 858/11) are found to be merit less under Order 1 Rule 10 CPC and accordingly the same are rejected in view of disposal of the writ petition itself. Consequently, this writ petition deserves acceptance and the same is accordingly allowed and the impugned order Annex.

4 dated 9.3.2010 as well as the notification Annex. 5 inviting fresh tenders Annex. 5 dated 10.3.2010 are quashed. The respondents are directed to proceed with the matter and award final sanction for contract in favour of petitioner. Laxman Lal Dangi in pursuance of provisional sanction vide Annex. 3 dated 17.2.2010 and execute the contract in favour of petitioner for said minor (Bajri) minerals for a period of two years. No costs.