

(2005) 01 OHC CK 0050

In the Orissa High Court

Case No : Writ Petition (C) No. 13162 of 2003

Maa Chandi Stone Crushing

APPELLANT

Vs

The Chief Engineer (Con) - I, East Coast Railway, BBSR and Others

RESPONDENT

Date of Decision : 07-01-2005

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : AIR 2005 Ori 83 : (2005) 99 CLT 457 : (2005) OLR 433 Supp

Hon'ble Judges : A.K. Patnaik, J;A.K. Parichha, J

Bench : Division Bench

Advocate : Shyamananda Mohapatra, B. Rout, P. K. Panda, S.K. Mishra and C. Nayak, for the Appellant; Ashok K. Parija, S.P. Sarangi, B. Ch. Mohanty, Public Prosecutor Mohanty, D.K. Das, P.K. Dash and R.K. Tripathy for O.P. No. 4, Sanjit Mohanty, P.B. Sinha, N.K. Mohapatra and B. Misra for O.Ps. 1 to 3, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Patnaik, J.—By a notice dated 1.9.2003 the Chief Engineer (Con) - I East Coast Railway, Bhubaneswar invited tenders for "Supply and stacking of machine crushed hard stone ballast on top of formation or at toe of Bank or at suitable places between Km. 123.00 and Km. 135.50 including Sagadapata Station Yard of Tomka Banspani Rail Link Project". Clause 6.1 of the said notice dated 1.9.2003 provided that contractors prequalified in category 5 slab A under CE (E)-I, BBS or all CE(C)s of South Eastern Railway or tenderers who have satisfactorily completed supply of minimum 20,000 cum. of ballast in one agreement under any Government or Semi Government Organization during the last five years are eligible to participate in the tender. Pursuant to the said notice, the petitioner, Opp. Party No. 4 and Sri Durga Condev (P) Ltd. submitted their tenders quoting the value as per details given hereunder :

----- Sl. Name of Total

Value % above/ No. quoted below the tender value
----- 1. M/s. Maa Chandi
Stone Rs. 2,81,94,453/- 47% above Crushing (Petitioner)

2. M/s. ARSS Stones Rs. 2,83,86,252/- 48% above Pvt. Ltd. (O.P. No. 4)

3. M/s. Sri Durga Rs. 2,85,78,051/- 49% above Condev (P) Ltd.

----- The tender of the petitioner, though lowest, was rejected for the reason that the petitioner did not satisfactorily complete supply of minimum of 20,000 cum. of ballast in one agreement under any Government or Semi Government Organization during the last five years. Instead, the contract was awarded to the Opp. Party No. 4 at a value of Rs. 2,45,50,272/- by letter dated 25.11.2003 of the office of the Chief Engineer (Con) - I, East Coast Railway, Bhubaneswar. Aggrieved, the petitioner has filed this Writ Petition praying for quashing the said communication dated 25.11.2003 of the office of the Chief Engineer (Con) - I, East Coast Railway, Bhubaneswar in Annexure-6 to the Writ Petition and for directing the work to be allotted in favour of the petitioner.

2. On 23.12.2003 the Court while issuing notice in the Writ Petition W.P.(C) No. 13162 of 2003 passed an interim order in Misc. Case No. 12910 of 2003 directing that till the matter is again listed, execution of the agreement in favour of Opp. Party No. 4 pursuant to Annexure-6 to the Writ Petition shall remain stayed. Thereafter Misc. Case No. 6262 of 2004 has been filed by Opp. Party No. 4 and Misc. Case No. 7072 of 2004 was filed by Opp. Party Nos. 1 to 3 praying for vacating the said interim order dated 23.12.2003. The Writ Petition and all the said misc. cases were heard together on 6.10.2004.

3. At the hearing, Mr. Shyamanand Mohapatra, Learned Counsel for the petitioner, submitted that under Agreement No. 50 dated 18.6.2001 between the petitioner and the Railways, the petitioner had been awarded a contract for supply and delivery in stacks of machine crushed hard stone ballast of a quantity of 20,000 cum. and the said agreement provided that the quantity of stone ballast mentioned in the Schedule was approximate and tolerance of 5 percent on either side may be allowed. He submitted that in accordance with the said agreement, the petitioner supplied 19,961.47 cum. of ballast which was 0.19 percent less than 20,000 cum. of ballast and was therefore within the tolerance limit of 5 percent. He submitted that after the said supply of 19,961.47 cum. of ballast, the Divisional Engineer (North) East Coast Railway, Khurda Road, issued a certificate on 21.10.2003 that the petitioner successfully completed supply and loading of 20,000 cum. of ballast as per the agreement. He submitted that these documents had been furnished by the petitioner along with his tender and these documents would show that the petitioner satisfied the eligibility criteria in Clause 6.1 of the tender notice dated 1.9.2003 that a tenderer must have satisfactorily completed supply of minimum of 20,000 cum. of ballast in one agreement under any Government or Semi Government Organization during the last five years. He argued that the rejection of the tender of the petitioner on the

ground that the petitioner had not satisfied the eligibility criteria in Clause 6.1 of the agreement was therefore arbitrary and illegal and violative of the right of the petitioner under Article 14 of the Constitution. Mr. Mohapatra argued that before the rejection of the tender of the petitioner an opportunity of hearing should have been given to the petitioner and in support of this argument, he cited the decision of the Supreme Court in AIR 2002 SC 2423. He also relied on the decision of the Supreme Court in Continental Construction Ltd. Vs. Tehri Hydro Development Corpn. Ltd. and Another, wherein the Supreme Court has held that if there are materials to show that a tender satisfied the pre-qualification requirements, the High Court was not justified in interfering with the decision of the authority under Article 226 of the Constitution.

4. Mr. Sanjit Mohanty, Learned Counsel appearing for the East Coast Railway, on the other hand, submitted relying on the averments in the counter affidavit filed by the Opp. Parties No. 1 to 3 that the petitioner furnished a completion certificate for having supplied ballast under Agreement No. 50 dated 18.6.2001 and the said certificate was sent to the Divisional Engineer (North), East Coast Railway, Khurda Road, for verification and the Divisional Engineer (North), East Coast Railway, Khurda Road, verified and reported that the petitioner had supplied 19,961.47 cum. against the work of supply and loading of 20,000 cum. of ballast at Jakhapura Depot. He submitted that the petitioner did not submit any other document to show that he had supplied minimum 20,000 cum. of ballast in one agreement or that he was a contractor pre-qualified in category-5 slab-A under the Chief Engineer (Con), Bhubaneswar or All Chief Engineers of South Eastern Railway and hence the petitioner did not fulfil the eligibility criteria as prescribed in Clause 6.1 of the tender notice. He produced the records to show that the tender committee opined that the petitioner though the lowest tenderer did not fulfil the eligibility criteria and in the circumstances, the next lowest offer of the Opp. Party No. 4 has to be considered. Mr. Mohanty further submitted that though the tender of the Opp. Party No. 4 was for Rs. 2,83,86,252/- but after negotiation with the Opp. Party No. 4 the contract was awarded to the Opp. Party No. 4 at Rs. 2,45,50,272/- which was lower than the tender of the petitioner at Rs. 2,81,94,453/-. Mr. Mohanty submitted that these facts would show that the tender committee has no discretion but to reject the tender of the petitioner as the petitioner did not fulfil the eligibility criteria and that the contract has been awarded in the public interest in favour of Opp. Party No. 4 at a value lower than the value at which the petitioner had submitted its tender.

5. Mr. Mohanty, cited the decision of the Supreme Court in M/s. G. J. Fernandez Vs. State of Karnataka and others, wherein it has been held that the party issuing the tender has the right to punctiliously and rigidly enforce the conditions and stipulations in a tender notice and if a party does not strictly comply, with the requirements of the tender notice and the party issuing tender declines to consider the party for such contract, the Court will decline relief if the party who has not been considered approaches the Court. He argued that since the petitioner in this case did not satisfy the terms and conditions of the tender

notice and the tender committee has refused to consider the petitioner on this ground, the Court should decline relief in this Writ Petition in accordance with the said decision of the Supreme Court in the case of G.J. Fernandez v. State of Karnataka and Ors. (supra).

6. Mr. Mohanty, also cited the decision of the Supreme Court in M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, for the proposition that whereas essential conditions of eligibility in a tender notice cannot be related, ancillary or subsidiary conditions in a tender notice can be relaxed. He submitted that since Clause 6.1 of the tender notice laid down a condition that a contractor must be a pre-qualified in category 5, Slab-A under the Chief Engineer (Con) - I Bhubaneswar or all C.Es of South Eastern Railways or a tenderer must have satisfactorily completed supply of minimum 20,000 cum. of ballast in one agreement in any Government or Semi-Government organization during the last five years to be eligible to participate in the tender, these conditions are the essential conditions which could not be relaxed and the tender committee could not possibly consider the tender of the petitioner as it did not satisfy these essential conditions.

7. Mr. Mohanty, also relied on the decision of the Supreme Court in Tata Cellular v. Union of India, AIR 1996 SC 11 for the proposition that in contractual matters a wide latitude has to be given to the administrative authorities and the Court will not interfere with the decision of the administrative authorities in such matters except on the ground of illegality, irrationality or procedural impropriety. He submitted that if the view taken by the tender committee that the petitioner was not eligible as per the eligibility criteria laid down in Clause 6.1 of the tender notice was a possible view, the Court will not interfere merely because the Court takes a different view than that of the tender committee as the Court while exercising the power of judicial review, the Court cannot sit in appeal over the decision of the tender committee.

8. Mr. Mohanty, also cited the decision of the Supreme Court in Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, in which the Supreme Court has cautioned that intervention by the Court in contractual matters may lead to considerable delay in execution of a project and consequential escalation of cost and therefore unless there is a substantial amount of public interest or the transaction is entered into mala fide, the Court should not intervene under Article 226 of the Constitution in disputes between two rival tenderers. He also cited the decision of the Supreme Court in Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others, and the decision of a Division Bench of this Court in Maa Barunei Enterprisers Vs. Union of India (UOI) and Others, in support of his aforesaid submissions.

9. Finally, Mr. Mohanty, submitted that if the Court intervenes in this matter and quashes the award in favour of the Opp. Party No. 4 the whole project of a very important railway link will be delayed and the Railways may also, suffer escalation of cost.

10. Mr. Ashok Parija, Learned Counsel appearing for Opp. Party No. 4 reiterated the aforesaid contentions of Mr. Mohanty and further submitted that Opp. Party No. 4 being the lowest tenderer was called for negotiation and even though Opp. Party No. 4 quoted Rs. 2,83,86,252/- in his tender, it agreed to execute the work for Rs. 2,45,50,272/- on such negotiation and an acceptance letter was issued by the Railway in favour of Opp. Party No. 4 on 25.11.2003 and the Opp. Party No. 4 was directed to deposit Rs. 2.50 lakhs towards initial security deposit and the Opp. Party No. 4 was informed that the time for completion of the work was stated to be fifteen months from the date of issue of the acceptance letter. He submitted that on 27.11.2003 the Opp. Party No. 4 was shown the land for initial supply of ballast and the Opp. Party No. 4 was requested by the Railways to level the site before supply of the ballast and on 1.12.2003, the Opp. Party No. 4 was requested by the Railways to mobilize men, machinery and install crusher for the work. He further submitted that pursuant to the said request of the Railways, on 15.12.2003 the Opp. Party No. 4 installed two numbers of crushers at the site of the Railways and on 19.12.2003 supplied 100 cum. of ballast as per acceptance letter condition and requested the Railways to collect sample for testing. He submitted that it was only after all this was done that the interim order was passed by the Court on 23.12.2003 directing that the work order issued in favour of the Opp. Party No. 4 pursuant to the work order shall remain stayed. He vehemently argued that Opp. Party No. 4 has already invested Rs. 1,47,30,000/- by mobilizing men, machinery and installing the crusher units and doing other work and at this stage if the court quashes the award in favour of the Opp. Party No. 4 substantial prejudice and loss will be suffered by the Opp. Party No. 4.

11. Mr. Parija, submitted relying on the decision of the Supreme Court in *Raunaq International Ltd., v. I.V.R. Construction Ltd., and Ors.* (supra) that judicial review at the instance of a party who does not fulfil the eligibility criteria is misplaced. He also relied on the decision of the Supreme Court in *Poddar Steel Corporation v. Ganesh Engineering Works and Ors.* (supra) for the proposition that essential conditions of tender notice regarding eligibility cannot be relaxed while ancillary and subsidiary conditions can be so relaxed. He submitted that since the eligibility criteria in this case have not been fulfilled by the petitioner, no relaxation can be granted in favour of the petitioner and the tender of the petitioner cannot be considered. He also relied on the decision of the Supreme Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, in which the Supreme Court has held that relaxation of eligibility criteria would result in denying equal opportunity to others similarly situated in the matter of tendering of contract. He submitted that in the case of *Ramana Dayaram Shetty v. The International Airport Authority of India and Ors.* (supra) the Supreme Court refused to set aside the tender awarded in favour of the opposite party in that case because the opposite party had made investments and started the work and had altered its position after the award of work.

12. Clause 6.1 of the tender notice on which the Learned Counsel for the parties have placed reliance is quoted herein below :

"6.1. Contractors pre-qualified in category 5 Slab A under CE(E)-I, BBS or all CE(C)s of South Eastern Railway or tenderers those who have satisfactorily completed supply of minimum 20,000 cum of ballast in one agreement under any Government or Semi Government Organization during last 5 (five) years are eligible to participate in the tender."

Thus as per the aforesaid Clause 6.1 of the tender notice, contractors prequalified in Category 5 Slab A under CE(E)-I, Bhubaneswar or CE(C)s of South Eastern Railway or tenders those who have satisfactorily completed supply of minimum 20,000 cum. of ballast in one agreement under any Government or Semi Government Organization during the last five years are eligible to participate in the tender. The petitioner does not claim to be a contractor prequalified in Category 5 Slab A under Chief Engineer (Con) - I, Bhubaneswar or all Chief Engineers (Con) of South Eastern Railways but claims to be a tenderer who has satisfactorily completed supply of minimum 20,000 cum. of ballast in one agreement under the Railways during last five years, namely, Agreement No. 50 dated 18.6.2001. The records indicate that the petitioner furnished along with its tender a certificate dated 21.10.2003 issued by the Divisional Engineer (North), E.Co. Railway, Khurda Road, certifying that the petitioner executed and completed three works and one of the works indicated therein related to Agreement No. 50 dated 18.6.2001 for supply and loading of 20,000 cum. of ballast at Jkpr Depot. The said certificate dated 21.10.2003 is extracted herein below:

"EAST COAST RAILWAY NO. ENGG/A/CREDENTIALS/DEN(N)/SPT KURDA ROAD :
DATE : 21.10.2003 TO WHOM IT MAY SO EVER CONCERN :

Certified that Maa Chandi Stone Crushing Contractor, At/Po : Ranibandi, Chandikhole, Dist : Jajpur (Orissa), has executed and completed following works the amount paid against each are furnished below:

Name	of	Amount	Remarks	No.	No.	Sl. Agt. Date
						work Paid
Supply & spreading		Rs. 5548590/-	Work of of 10000 cum. completed machine crushed and S.D. ballast between Released. JJKR-NGMP.	2.	50	18.6.01
& loading of		Rs. 10898963/-	-do- 20000 cum of ballast at JKPR Depot.	3.	16	17,4.02
Supply & loading of		Rs. 8066935/-	Work 15000 cum. machine completed crushed ballast at JKPR Depot.			

----- Their

performance is satisfactory.

Sd./- 21.10.2003 Divisional Engineer (North) E.Co. Railway, Khurda Road, for & on behalf of the President of India." The records, however, further indicate that against the Agreement No. 50 dated 18.6.2001 the actual quantity of ballast supplied by the petitioner is not 20,000 cum. of ballast but 19,961.47 cum. of ballast. For this reason, the tender committee in its meeting held on 18.11.2003

took a view that the petitioner did not fulfil the stipulated eligibility criteria laid down in Clause 6.1 of the tender notice quoted above because it had not satisfactorily completed supply of minimum 20,000 cum. of ballast in one agreement. This view taken by the tender committee is a very rigid and strict view of Clause 6.1 of the tender notice quoted above because it had not satisfactorily completed supply of minimum 20,000 cum. of ballast in one agreement. This view taken by the tender committee is a very rigid and strict view of Clause 6.1 of the tender notice but in *G. J. Fernandez v. State of Karnataka and Ors.* (supra) in Para 16 at Page 967 of the AIR the Supreme Court has held that if a party does not strictly comply with the requirements of the tender notice, it is open to the party who has invited the tender to decline to consider the party for the contract and if a party who has not been considered comes to the Court for relief, the Court will decline relief.

13. In *Tata Cellular v. Union of India* (supra) the Supreme Court considered at length the scope of judicial review in matters relating to award of contracts and in Para 113 of the said decision as reported in the AIR held inter alia that the Court does not sit as a Court of appeal but merely reviews the matter in which the decision was made. In the said decision, the Supreme Court further held that the Government must have freedom of contract and must be allowed a fair play in joints and its decision must be tested by application of Wednesbury principle of reasonableness and the Court must ensure that the decision must be free from arbitrariness not affected by bias or actuated by mala fides. In the said decision, the Supreme Court further observed that quashing decisions of the administrative authorities in contractual matters may impose heavy burden on the administration and lead to an increased and unbudgeted expenditure. In *Raunaq International Ltd., v. I. V. R. Construction Ltd.* (supra) the Supreme Court held that it is important to bear in mind that by Court intervention a proposed project may be considerably delayed thus escalating the cost far more than any saving which the Court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer and therefore unless the Court is satisfied that there is substantial amount of public interest or that the transaction is entered into mala fide, the Court should not intervene under Article 226 of the Constitution in disputes between two rival tenderers.

14. Applying the aforesaid tests laid down by the Apex Court regarding interference by the Court under Article 226 of the Constitution in matters relating to award of contracts, we find that in this case the tender committee has taken a view that the petitioner has not satisfactorily completed supply of minimum 20,000 cum. of ballast in one agreement under any Government or Semi Government Organization during last five years and was therefore not eligible to participate in the tender in accordance with Clause 6.1 of the tender notice. Such a view though rigid and strict cannot be held to be a totally mala fide, arbitrary or irrational view considering the fact that the petitioner had actually supplied 19,961.47 cum. of ballast under Agreement No. 50 dated 18.6.2001 with the Railways. Further although the petitioner tendered Rs. 2,81,94,453/- for the

work, the work has been awarded to Opp. Party No. 4 at Rs. 2,45,50,272/-. Pursuant to the said award of the contract, Opp. Party No. 4 has also gone ahead and has made substantial investment by way of mobilization of men and machinery and installation of crusher units. Any interference at this stage with the award or the contract in favour of Opp. Party No. 4 may result in delay in execution of the Tomka-Banspani Rail Link Project and also escalation of cost which may require fresh sanction of an unbudgeted expenditure. For all these reasons, even if we take a view different than that of the tender committee and hold that the petitioner satisfied the eligibility criteria as prescribed in Clause 6.1 of the tender notice for the work in question, we cannot not interfere in the award of the contract in favour of the Opp. Party No. 4 because we cannot sit in appeal over the decision of the tender committee while exercising the power of judicial review and we should not interfere with the award of the contract in favour of the Opp. Party No. 4 because such interference will affect public interest and may lead to escalation of costs and delay in execution of an important Railway project.

15. In *Haji Abdul Shakoor and Co., v. Union of India and Ors.* (supra) cited by Mr. Mohapatra, Learned Counsel for the petitioner, the Supreme Court held in Para 7 of the judgment as reported in the AIR :

"It is not in dispute that the appellant is a Class "A" Contractor with the second respondent who transferred the contract carrying capacity of the appellant limited to 6.50 corers to the Headquarter, Western Command Respondent No. 3. This was accepted by the third respondent as evidenced by letter dated December 14, 2000. This fact was re-affirmed by the letter of the second respondent issued on December 21, 2000. The net result of the exercise is that the appellant became eligible to complete as a Class "A" Contractor up to the limit of Rs. 6.50 corers. This is a civil right of the appellant which cannot be taken away or even curtailed except in accordance with law. Admittedly before passing the impugned order no opportunity of being heard was afforded to the appellant by the third respondent as such the impugned order suffers from the vice of violation of the principles of natural justice and such an order cannot but be an arbitrary order...."

Thus, in the aforesaid case of *Haji Abdul Shakoor and Co., v. Union of India and Ors.* (supra) the Supreme Court took a view that a civil right of the appellant to compete as a Class "A" Contractor upto the limits of Rs. 6.50 corers has been taken away by the impugned order without any opportunity of hearing being afforded to the appellant and therefore the impugned order was in violation of the principles of natural justice and was arbitrary. But in this case, no civil right had accrued to the petitioner to considered and awarded the contract in question even if he did not satisfy the eligibility criteria as prescribed in Clause 6.1 of the tender notice. Law therefore did not require that before rejecting the tender of the petitioner, the authorities were to afford an opportunity of, hearing to the petitioner. Hence, the decision of the Supreme Court in *Haji Abdul Shakoor and*

Co., v. Union of India and Ors. (supra) is of no assistance to the petitioner.

16. In the result, this Writ Petition is dismissed and the interim order passed by this Court on 23.12.2003 is vacated. Considering, however, the facts and circumstances of the case, parties shall bear their own costs.

A.K. Parichha, J.

17. I agree.