
(2003) 01 MP CK 0050

In the Madhya Pradesh High Court

Case No : Writ Petition No. 1586 of 2002

Man Industries (India) Ltd. and Another

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 06-01-2003

Acts Referred:

Citation : (2003) 2 MPHT 367

Hon'ble Judges : A.M. Sapre, J

Bench : Single Bench

Advocate : B.L. Pavecha and Sadhna Pathak, for the Appellant; S.S. Kemkar, Government Advocate for Respondent No. 1, C.M. Nair, for the Respondent Nos. 2 and 3, G.M. Chafekar and D.S. Kale, for the Respondent

Final Decision : Allowed

Judgement

A.M. Sapre, J.—The short question that arises for consideration in this writ is, whether respondent Nos. 2 and 3 were justified in holding that petitioner was not eligible for submitting tender pursuant to Notice Inviting Tender (for short "NIT") invited by them thereby depriving the petitioner to participate in tender process on merits alongwith other eligible tenderers ? Facts necessary for the disposal of the writ need mention in brief.

2. Narmada Valley Development Authority - the respondent No. 3 herein is an authority created by State of M.P. by virtue of a Notification, dated 16-7-1985 (Annexure P-3) issued by the State. Its main object is to plan, construct and maintain major and multipurpose projects in the Narmada Valley.

3. On 14-2-2002, the respondent No. 3 invited tenders by issuing NIT (Annexure P-3) for providing and laying M.S. Pipe Lines for underground rising mains from DC-1 to DC-2 and DC-3 to DC-4 of Kathora Lift Irrigation Scheme on left bank of river Narmada near Village Kathora, Tehsil Kasravad, District Khargone (M.P.). Clause 2 of the NIT provided method of applying whereas Appendix II attached to NIT provided minimum qualification criteria. Since these 2 clauses alone arc

material for the disposal of this writ, they need to be quoted verbatim :--

"2.4 If the application is made by a group of firms, the sponsoring firm shall submit complete information pertaining to such firm in the group and state in covering letter attached to the application as to which of the firm shall have the responsibility of applying for tender, submission of tender and for completion of the contract documents of the authority assigned to such firms on behalf of the group of firms for applying for tender, submission of tender and for completion of contract document. The full and satisfactory evidences pertaining to the participation and responsibility of each member of the group of the firm in the tender shall be furnished alongwith the pre-qualification document duly signed by each firm."

4. Perusal of Clause 2.4 would indicate that a tender could be submitted even jointly by 2 legal entities, i.e., in joint venture. In other words, Clause 2.4 permitted 2 independent legal entities such as 2 firms, or one firm and one company, or 2 companies, etc., to form their consortium and submit the tender. This clause then stipulated necessary compliances to be made by those tenderers who were desirous of submitting the tender in consortium, i.e., as joint venture or one may call "joint partners". In such cases, the firm submitting a tender was called as sponsoring firm. So far as clause relating to experience criteria contained in Appendix II was concerned, it provided that tenderer has to submit the proof showing that tenderer has successfully completed the work of providing and laying M.S. Pipe Lines for underground rising mains of the Pipes of 2 diameters :--

MINIMUM QUALIFICATION CRITERIA Physical & Financial turnover during any one of the last five year, i.e., 1996 to 2001

Physical Financial Rs. in lakhs

S. No. Particulars Providing and laying of M.S. Pipe line for underground rising mains

(1) (2) (3) (4)

1.

Providing and laying M.S. pipe lines for underground rising mains from DC-1 to DC-2 and DC-3 to DC-4 of Kalhora Lift Irrigation Scheme.

(i) 1200 mm 0 5500 RM and above (ii) 1100 mm 0 2100 RM and above 875 Lakhs

5. Petitioner, a limited company, desirous of accomplishing the work offered in NIT entered into a consortium agreement, i.e., joint venture with one firm by name M/s. N.V. Kharote, Pune (for short hereinafter referred to as "NVK"). A consortium agreement was accordingly executed between the petitioner and NVK on 4-7-2002 (Annexure P-4 page 31) for execution of the tender work. Clause 6 of agreement inter alia provided the manner of participation and working

whereas Clause 9 provided the acceptance of liability in equal as against the State in the event of tender being eventually accepted for execution of work in question. These 2 clauses need reproduction infra:--

"Participation and principle of joint working :

6. Each member of the consortium agrees to place at the disposal of the consortium, the benefits of all experience, technical knowledge and skill and shall in all respects bear its share of responsibilities and burden of completing the contract. MAN shall be responsible for manufacturing and supply of M.S. Pipeline and NVK shall be responsible for procurement of electro-mechanical equipment, all civil works and other works under the scope of this project. The financial stake of MAN shall be 70% and that of NVK shall be 30% of the total contract.

The acceptance of the tender :

9. If the consortium is pre-qualified and the tender jointly submitted by the consortium is accepted by the client it shall be jointly binding on the consortium. In the event, MAN being the leader of the consortium shall, for and on behalf of the consortium, enter in consultation with NVK, into a contract with the employer or to execute the works and the members of the consortium do hereby jointly and severally bind themselves to fulfil the contract and execute the works faithfully and perform and observe all the terms and conditions thereof both as to one another and to the employer."

6. Petitioner being a sponsoring firm as described in Clause 2.4 quoted supra accordingly submitted their tender. It is the case of petitioner that they fulfilled all requirement of tender conditions and in particular requirement relating to experience clause as mentioned in Appendix II. It is further the case of petitioner that they submitted the proof of experience indicating that they have requisite experience of laying and joining of 1200 mm and above and 1100 mm and above for the total distance of 13602 MTRS as against 7600 MTR, i.e., 5500 RM + 2100 RM respectively as required in terms of Appendix II In support of these figures, the petitioner submitted certificates duly issued by those concern for whom the petitioner had actually worked successfully. The petitioner, therefore, felt that since they have complied with all terms and conditions stipulated in tender conditions (Annexure P-3) and having furnished all necessary details, would be called for negotiations to enable them to participate in tender bid. According to petitioner rather to their surprise, their tender was not even opened by the respondents for being considered on merits but the tenders of others were opened and eventually the tender of respondent No, 4 was learnt to have been accepted for execution of work. It is against this action of the respondent Nos. 3 and 4, i.e., not considering the tender of petitioner on merits and accepting the tender of respondent No. 4, the petitioner has felt aggrieved and filed this writ after registering their protest with the respondent Nos. 2 and 3 which did not yield any result.

7. Notice of the writ was issued to respondents. They were served and

represented. The respondent Nos. 1 to 3 have filed one joint return whereas respondent No. 4 has filed their separate return.

8. The respondent Nos. 1 to 3 have disclosed in their return, the reason as to why the tender of petitioner was not found in order. According to respondents, the petitioner did not fulfil the minimum required experience of laying the pipes, i.e., 7600 MTR hence the tender of petitioner was not pursued further. It is contended that in terms of Clause 6 of consortium agreement, the petitioner was found to be responsible for manufacturing and supply of pipeline whereas other partner, i.e., (NVK) was found responsible for procurement of electromechanical equipment, executing all civil and other works. It is further contended that Clause 6 further provided that petitioner will have 70% financial stake whereas NVK 30% in execution of contract. It is on this basis, the respondents have contended that the experience issue had to be evaluated on the basis of same percentage ratio, i.e., 70% and 30% between petitioner and their copartner - NVK. Applying this principle, the respondent applied percentage of 30% to the total experience of 13602 MTR which was worked out to less than the minimum requirement of 7600 MTR. It was contended that ratio of 30% was taken to be the basis for determining the experience because the experience certificates submitted by the petitioner were in the name of NVK who has a financial stake to the extent of 30% in the contract in terms of consortium agreement and who alone was to undertake the task of laying down the pipes. This in substance was the basis for not treating the petitioner eligible because according to respondent Nos. 1 to 3, if a person has 30% stake in contract, then for determining his experience, only 30% will have to be regarded as his total experience disclosed in certificate and not the whole one, i.e., 13602 MTR.

9. So far as respondent No. 4 was concerned, they supported the stand taken by the respondent Nos. 1 to 3. In addition, it is contended on their behalf that they being lowest amongst those tenderers who were considered on merits, the decision to award contract to them is well justified. A plea of delay in approaching the Court by filing writ by the petitioner is also raised.

10. Heard Shri B.L. Pavcha, learned Senior Counsel with Smt. Sadhna Palhak for petitioners, Shri S.S. Kemkar, learned Government Advocate for respondent No. 1 - State, Shri C.M. Nair for respondent Nos. 2 and 3 and Shri G.M. Chafekar, learned Senior Counsel with Shri D.S. Kale, learned Counsel for the respondent No. 4.

11. Relying upon the law laid down by the Supreme Court in the case of Tata Cellular v. Union of India (1994) 6 SCC 651, learned Counsel for the petitioner in principal made one submission. According to learned Counsel the so-called criteria evolved by the respondent Nos. 2 and 3 in determining the experience of petitioner in the relevant field is per se arbitrary, irrational, and unreasonable. It was his submission that firstly it was nowhere disclosed in any of the clauses of the tender, secondly, once Clause 2.4 provided for submission of tender in joint venture, there arise no occasion for the respondent to bifurcate the issue of

experience much less on the basis of percentage between the 2 joint partners for the simple reason that for execution of the work in question, the joint partners are and is in fact regarded as one entity as against the State. Learned Counsel further contended that percentage of the stake is in fact an internal issue inter se joint partners and has nothing to do with the experience. It was further urged that respondents had to proceed on the basis that it is the petitioner, i.e., joint venturer who have the requisite experience of laying pipes of 13602 MTR and not one of its joint partner (NVK). Referring to Clause 9 of consortium agreement, learned Counsel urged that so far as liability of joint venturer qua state in execution of contract was concerned, the same being joint and several, the respondent Nos. 2 and 3 had to treat the petitioner and NVK to be in fact one tenderer for execution of tender. It is on the basis of these submissions, learned Counsel contended that decision taken by the respondent Nos. 2 and 3 in excluding the petitioner from the zone of consideration on the ground of not possessing minimum required experience as per Appendix II, is arbitrary hence, need to be quashed.

12. In reply, learned Counsel for the respondent Nos. 2 and 3 reiterated the stand taken in the return and urged for its upholding. In substance, his submission was that such being a practise adopted and applied uniformly to all tenderers, the same should be upheld. Learned Counsel urged that in order to ensure whether petitioner has a requisite experience as required in terms of tender notice, the respondent Nos. 2 and 3 have full rights to examine the issue from all angles hence, method applied to determine the experience of petitioner can not be said to be arbitrary. Learned Counsel for respondent No. 4 also supported the stand taken by the respondent Nos. 2 and 3 in principal and elaborating those submissions in more detail, urged for upholding the decision. He also placed reliance on *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, .

13. Having heard the learned Counsel for the parties at length and having perused the record of the case, I am inclined to allow the writ and quash the impugned action of the respondent No. 2 which resulted in not considering the tender of petitioner and accepting the tender of respondent No. 4.

14. In my considered opinion the law in relation to interference in the cases relating to tender is almost settled after the authoritative pronouncement of Supreme Court in the case of *Tata Cellular (supra)*. What varies is only its application to the facts of each case. It is now atleast a settled view that Courts are possessed of power to interfere, if the decision taken by the State and/or its agency is found to be arbitrary, irrational and/or is such that no judicial man can ever reach to such conclusion. At the same, this Court has not to act as an Appellate Court to sit over the decision of State and substitute its own decision.

15. Keeping in mind these broad principle in forefront if one examine the criteria evolved and applied by the respondent Nos. 2 and 3 for finding out whether petitioner has requisite experience in laying pipes then I am of the view that it

does exhibit arbitrariness on its face. In any event, it is neither reasonable, nor capable of being sustained on admitted facts.

16. As rightly urged by the learned Counsel for the petitioner there does not appear to be any basis much less rational and/or reasonable basis to evolve the criteria of percentage basis for determining the experience of those tenderers who have submitted the tender in joint venture. Firstly, the so-called criteria was never disclosed by the respondent Nos. 2 and 3 to any of the tenderer either by mentioning in terms and conditions of the NIT or otherwise made known to tenderers. Had this been done, the tenderer could have submitted the experience certificates in that manner. In other words, since the so-called formula/criteria was essentially meant for observance by the tenderers, nothing prevented the respondent Nos. 2 and 3 to have disclosed it in proper way by way of a specific term in the NIT itself. Indeed, such disclosure would have benefitted several tenderers as well or tenderer would have been able to submit the tender keeping in view the criteria prescribed. Secondly, it has no relevance for the reason that it nullifies the concept of joint venture consortium. When the NIT allowed 2 legal entities to form a joint venture and submit a tender, then in such circumstances, experience of either of them should have been regarded as experience of joint venture as such. Thirdly, percentage of financial stake was an internal matter of joint venturers inter se and it had nothing to do, nor it could have any relevance so far as experience criteria was concerned. When 2 persons having expertise on different fields join hands to accomplish some project, no distinction should be made and that too on percentage basis for evaluating each person's expertise in the field atleast, so long as they are made aware of the same. Fourthly, when joint venture agreement itself provides that both the parties forming joint venture have jointly agreed to abide by liabilities arising out of the tender if accepted by State in equal share, the issue in relation to their stake in business sharing was of no consequences as far as State was concerned and lastly admittedly, the petitioner having submitted the experience certificates of doing the work of laying pipes for 13602 MTR length which was more than the minimum of 7600 MTR prescribed in NIT, the petitioner had fulfilled the experience criteria thereby entitling them for being considered on merits alongwith other eligible tenderers.

17. Submission of learned Counsel for the respondents was that in order to determine the experience, of a particular tenderer, it is necessary to see his stakes in the contract such as in the present case, where the NVK (another partner) who was having all experience certificates in their name had only 30% stake in the contract. I do not agree to this submission. The same has already been dealt with expressly supra, and repelled being arbitrary and exhibiting no rational basis behind it. As observed supra, concept of joint venture once permitted for submission of tender, it must be treated as if submitted by one tenderer, i.e., by one legal entity so far as experience criteria of tenderer is concerned. It is only when by a specific condition the tenderers are made aware of the manner in- which the experience criteria will be determined, the same can

be applied provided it satisfies the test of reasonableness. Such does not appear to be a case in this case.

18. Learned Counsel for the respondents then urged that it being a policy matter and secondly involving technical issues relating to experience, the Court should not interfere in this field. The submission, is not acceptable. Even this submission has been dealt with supra and negated. As observed supra, if the Court finds that the action of State while dealing with citizen is arbitrary, irrational or unreasonable having no justifiable basis to the object sought to be achieved, the Court is entitled to set it aside. The issue was examined on these lines and found arbitrary in nature.

19. Learned Counsel for the respondents then urged that delay in filing the writ is fatal and hence, no interference is called for. I do not agree. In my opinion, there was no delay in approaching the Writ Court. Even according to parties, the contract in question came to be awarded to respondent No. 4 after the petition was filed. Secondly, this Court while considering the issue of grant of ad interim writ had observed that all actions taken by the respondents pending writ shall be subject to the final order that may be passed in the writ. In view of this, I do not find any merit in this submission too.

20. In my opinion, the impugned action if sustained, results in exclusion of one of the tenderers for being considered on merits. Exclusion at the threshold results in unhealthy competition. It is the case of petitioner that against the total value of the tender amounting to Rs. 13,59,26,000/- the petitioner had quoted Rs. 13,05,88,589/-. In other words, the submission of petitioner was that they were the lowest in the zone of consideration and there was every likelihood of the petitioner being awarded a contract because of they being the lowest. It is pointed out that the respondent No. 4 was the second lowest whose tender was eventually accepted for Rs. 13,46,62,140/- thereby putting the State to incur a loss of about Rs. 46,00,000/-. It is further contended that if the tender of petitioner had been considered on merits treating the same to have been validly submitted, then in such event, the State would have been able to save Rs. 46,00,000/-. I do not wish to go into this issue as it is not for the Court to decide whose tender should be accepted and if so, on what basis? It is essentially for the State to decide on merits after evaluating all pros and cons of each tenderer as to which tender is best in all respects and conceived in the best interest of State - the interest of State being the upper most in such cases. No doubt, price factor is one of the relevant factors to be taken note of in deciding to award contract but that alone can never be the basis in awarding the contract.

21. Once I hold that the action of respondent Nos. 2 and 3 in not considering the tender of petitioner is arbitrary, it follows as a consequence that action in awarding contract to respondent No. 4 becomes bad in law. It then becomes a case where the award of contract to respondent No. 4 was given without properly considering the case of petitioner. Such an action can not be held to be satisfying the principle of fair play and equality. The petitioner was equally entitled to

participate in tender process as one of the eligible tenderer alongwith respondent No. 4 and also those whose tenders were being considered for award of contract. This, therefore, results in quashing of contract, awarded to respondent No. 4.

22. In view of aforesaid discussion, the petition succeeds and is allowed. Impugned decision taken by the respondent Nos. 2 and 3 in not considering the petitioner to be an eligible tenderer on the ground of they not fulfilling the condition relating to experience in terms of Appendix II attached to NIT and granting contract in favour of respondent No. 4 to the exclusion of petitioner is quashed by issuance of writ of certiorari. In view of writ of certiorari having been issued resulting in quashing of the contract awarded in favour of respondent No. 4, it is now for the respondent Nos. 1 to 3 to decide whether to again reconsider the tenders already received pursuant to NIT (Annexure P-4) or to issue fresh NIT. This being the exclusive domain of the State, the Courts have no role to play in such administrative decisions. In case, however, the State decide to reconsider the tenders already received pursuant to NIT (Annexure P-4) then in such event, the tender of petitioner will be considered on its merits alongwith ail those whose tenders are found to be in order and in conformity with the terms of NIT. It is made clear that this Court has only examined the issue of experience in the context of terms/conditions hence, while considering the case of petitioner, the Stale and its authorities will not in any way be influenced by any of the observations made in this order and the issue of grant of tender will be decided strictly on its merits keeping in view the interest of State to be the uppermost. No costs.