

**(1994) 11 DEL CK 0017**

**In the Delhi High Court**

**Case No :** Civil Writ Petition No. 16 and C.M. No's. 26 and 5394 of 1994

M/s. Babu Ram Gupta

APPELLANT

Vs

Mahanagar Telephone Nigam Ltd. and Another

RESPONDENT

---

**Date of Decision :** 30-11-1994

**Acts Referred:**

**Citation :** (1995) 1 AD 539 : AIR 1995 Delhi 223 : (1995) 2 ARBLR 543 : (1995) 58 DLT 659

**Hon'ble Judges :** N.G. Nandi, J;D.P Wadhwa, J

**Bench :** Division Bench

**Advocate :** M/s. Maninder Ahary, for the Appellant; Arun Jaitley and Arjun K. Sikri and Vikaram Dhokalia, for the Respondent

---

## **Judgement**

D. P. Wadhwa, J.—The petitioner, a contractor, has filed this petition under Art. 226 of the Constitution seeking a restraint on the respondent Mahanagar Telephone Nigam Limited (MTNL), a Government company, from awarding the contract for construction of telephone exchange building at Rohini to any other person except the petitioner who claims to be the lowest tenderer.

2. MTNL floated a tender for construction of its telephone exchange building in February 1993. Various parties responded to the tender notice. It is stated that the petitioner was the lowest tenderer and the second and third lowest tenderers were M/s. Rathan Construction, a private firm, and National Building Construction Corporation Ltd. (NBCC), another Government Company. It is stated that M/s. Rathan Construction thereafter withdrew and the contest was between the petitioner and the NBCC. It is stated that the petitioner's tender was lower by Rs. 11 lakhs than that tendered by the NBCC. The petitioner was first called for negotiations. The petitioner protested saying that the NBCC should have been called first for negotiations. This was not acceded to and ultimately the petitioner attended negotiations and reduced his bid by further Rs. 9.6 lakhs, thus, becoming almost Rs. 20 lakhs lower than the offer given by NBCC. Thereafter, NBCC was also called for negotiations who agreed to match the offer given by

the petitioner and further reduced the offer by Rs. 10,000/-. The petitioner thereafter filed this petition questioning the act of the respondent on two counts : (1) that NBCC should have been called first; and (2) purchase preference could not have been given to NBCC. His further contention was that after the offer had been lowered by NBCC he should have again been called for negotiations. In this connection he referred to para 9.3 of the Manual of Instructions issued by the Central Public Works Department which the petitioner claims is applicable to MTNL as well. This was not seriously disputed by Mr. Jaitley who appeared for MTNI. This para 9.3 is as under :--

"9.3 Negotiations should be conducted commencing with the lowest 2 or 3 tenderers. (Where technical deficiencies had been found in these tenders, the tenderer may be allowed to rectify them or offer confirmation as the need be). In conducting the negotiations the parties should be called one after another starting with the lowest tenderer and the original lowest tenderer may be given a second chance to give a considered further reduction, if he so chooses. The scope of negotiations need be extended to others only if the negotiations with the lowest 2 and 3 tenderers are unsuccessful and such extensions, if necessary, may be done in stages."

3. After coming to know of the lowering of the offer by NBCC the petitioner wrote a letter to the MTNL still lowering his offer by 1.5% of the total bid amount equivalent to Rs. 5.02 lakhs. In the ultimate analysis the offer given by NBCC was Rs. 3,29,47,452.41 and that by the petitioner Rs. 3,24,65,670.35. Ms. Acharya contended that in any case the petitioner was still lowest tenderer and was entitled to the award of the contract. This was countered by Mr. Jaitley. He said that after letter of the petitioner the matter was again put to NBCC for negotiations and by a subsequent letter NBCC also agreed to the same price as offered by the petitioner. Ms. Acharya then referred to the circular dated 13 January 1992 issued by the Department of Public Enterprises in the Ministry of Industry, Government of India , in the form of Office Memorandum, the subject being "Price/Purchase Preference for Production and Servicing of Public Enterprises." We may as well quote, this Office Memorandum in full:--

#### OFFICE MEMORANDUM

Subject : Price/Purchase Preference for Production and Servicing of Public Enterprises.

.....

Reference is invited to O. M. No. BPE/ GL-008-/80/23.1.80/BPE/MM dated 15-10-88 on the above subject (copy enclosed).

In the new environment of a liberalised Industrial Policy and the emphasis on performance improvement of public enterprises to function on commercial principles etc., further protection in the term of price/purchase preference is not quite relevant in the new competitive environment. The matter was reviewed by

the Govt. and the decision is as under:--

(a) Instead of granting price preference to public enterprises, Government may grant purchase preference to the Public enterprises.

(b) In all such cases, while the quoted prices of public enterprises is not within the 10% of the lowest valid price bid, such a price bid may be rejected without any further consideration.

Where the quoted price is within 10% of the lowest price, other things being equal, purchase preference may be granted to the public enterprise concerned, at the lowest valid price bid.

The above purchase preference may be made operable for a period of 3 years as transition within which public enterprises should adjust themselves to the new environment of competitiveness and efficiency so that the entire policy of price/purchase preference may be withdrawn within the next 3 years, from the date of issue of this O. M.

Sd/-(T. S. Narasimhan)

Joint Secretary (F)"

4. Ms. Acharya then said that this circular would also not be applicable in view of subsequent one dated 7 December 1992 again issued by the Department of Public Enterprises. Again we may set out this Office Memorandum in full:--

#### OFFICE MEMORANDUM

Subject : Price/Purchase Preference for Production and Servicing of Public Enterprises.

....

As the Administrative Ministries/Departments are aware, a scheme of purchase/price preference for the goods and services of public enterprises in competition within those of the private sector in the matter of purchase by Government Departments and other PSEs was in operation since June 1971. The underlying objective behind this scheme was that the capacity created in the public sector should be fully utilised. The scheme provided for price preference not exceeding 10% to the public sector enterprises.

2. The policy of giving purchase/price preference to public enterprises has been recently reviewed by the Government in the light of the New Industrial Policy Statement made in July, 1991 which laid emphasis on giving greater thrust to performance improvement. In the context of liberalisation and opening of many areas to the private sector it is necessary that public enterprises function on commercial principles in an environment of competition. Thus, the protection so far provided to the public sector in the form of price/purchase preference is no more relevant in the present environment. Considering all these changes, the Government has since decided to do away with the scheme of giving price

preference to public enterprises. A copy of the order issued vide DPE O. M. No. DPE/13(19)/91-Fin. dated 13th January, 1992 to this effect is enclosed.

3. It has, however, come to notice that in spite of withdrawal of the facility of price preference so far enjoyed by the public enterprises, there are still instances wherein some of the enterprises are pressing the Administrative Ministry to get them price preference from Government Departments. This approach is against the new policy and needs to be curbed. The public enterprises are now expected to function on commercial principles.

4. Ministries/Departments of Govt. of India are requested once again to ensure that the latest policy described above is strictly followed.

Sd/- (T. S. Narasimhan)

Joint Secretary to the

Government of India"

5. The relevant portion of the office memorandum dated 7 May 1992 we have underlined. From reading of both the circulars it would appear that earlier circular dated 13 January 1992 has not been given a complete go by. This would be only as regards price preference. First circular regarding purchase preference would still remain to be applicable. That being so, the contract could be awarded to NBCC on the basis of two prices which we have noted above. In any case, now since that NBCC has also agreed to execute the contract on the price given by the petitioner, this argument loses much of its significance. Lastly, Ms. Acharya said that fact that any purchase preference would be given to a public enterprise was not a condition in the tender document. This again would not appear to be correct as in the very first para of notice inviting tenders it has been mentioned that "the Central/State Government Undertakings shall also be eligible to tender under usual terms and conditions applicable to them from time to time." Both the circulars/office memoranda dated 13 January 1992 and 7 May 1992 are still, Therefore, applicable in the present case. In this view of the matter, judgment of the Supreme Court in Harinder Singh Arora Vs. Union of India (UOI) and Others, referred to by the petitioner would not have any application.

6. We may also note that yet another Office Memorandum dated 14 February 1994 was issued by the Department of Public Enterprises stating that the facility of purchase preference as per earlier office memorandum was applicable to Central Government Public Enterprises only and not to State Government Public Sector Enterprises. This memorandum may again be quoted in full, though for our purpose this Office Memorandum may not be relevant:--

#### OFFICE MEMORANDUM

Subject : Price/Purchase preference for production and Servicing Public Enterprises.

.....

Reference is invited to OM No. DPE/13 (19)/91-Fin dated 13th January 1992 from the Department of Public Enterprise (copy enclosed) on the above mentioned subject.

2. The above order withdrawing the price preference and continuing the purchase preference was issued after taking into consideration the liberalised policies enunciated, in the industrial policy statement of July. The order was thus in suppression of all previous orders on this subject. It may please be noted that even this facility of purchase preference is applicable to Central Government Public Enterprises only and not to State Government Public Sector Enterprises.

3. The Ministries/Departments may please suitably advise the Central Government Public Enterprises under their control.

Sd/- (T. S. Narasimhan)

Joint Secretary (Finance)"

7. Mr. Jaitley said that in any case the present petition was premature inasmuch as no final decision has been taken to award the contract to NBCC. That may be so at the time when the petition was filed, but now it appears that a decision has been taken to award the contract to NBCC. We, Therefore, hold that the petitioner could have no grievance that he was called first for negotiations. That would be as per the Manual of Instructions. Then he should certainly have been given a second chance after the offer was lowered by the NBCC. Here again he cannot have any grievance as he himself by his letter further reduced the offer given by him which was taken note of by the MTNL. At this point itself offer of NBCC could have been accepted as per the two office memoranda which permit purchase preference for a public sector undertaking as its offer was within 10% of the lowest offer of the petitioner.

8. Considering all the circumstances we find no error in the action of the respondent MTNL for us to interfere in this writ jurisdiction. This petition, Therefore, fails and is dismissed.

9. Petition dismissed.