

(2012) 08 BOM CK 0236
In the Bombay High Court
Case No : Writ Petition No. 361 of 1997

M/s. B.G. Ahuja and Another

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 16-08-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2013) 2 ABR 1015 : (2013) 4 ALLMR 838

Hon'ble Judges : Shrihari P. Davare, J;A.S. Oka, J

Bench : Division Bench

Advocate : B.G. Ahuja, for the Appellant; A.D. Kango, AGP and Vijay Patil, for the Respondent

Judgement

A.S. Oka, J.—Heard submissions of the 2nd petitioner appearing-in-person. On the earlier date, we have also heard the submissions of the learned AGP appearing for the respondent Nos. 1 to 4 as well as learned counsel appearing for the 5th respondent-The Maharashtra Krishna Valley Development Corporation. With a view to appreciate the submissions made across the bar, it will be necessary to make a brief reference to the facts of the case. It is alleged that the 1st petitioner is a Partnership firm registered under the Indian Partnership Act, 1932 and the 2nd petitioner appearing in-person is the Managing Partner of the 1st petitioner. Reliance is placed on earlier Writ Petition No. 462 of 1983 filed by the petitioners. The case of the petitioners is that in August, 1982, tenders for construction of lining work in Kilometers 73 to 80 of Kukadi Left Bank Canal, Sirur, District-Pune were invited. The case of the petitioners is that they were eligible to compete and submit a tender. It appears that the petitioners submitted a tender. The tenders were opened and scrutinized on 2nd November, 1982. It is the case of the petitioners that the Superintending Engineer, Kukadi Project Circle, Pune opened all the tenders and informed the petitioners orally and declared in presence of others that the tender of the petitioners was the lowest amongst all the tenders received. However, the tender submitted by the petitioners was not accepted.

2. Being aggrieved by the said action, the petitioners filed the said earlier petition. In the said petition, this Court by Judgment and Order dated 29th October, 1990 held that the petitioners were wrongly deprived of the award of the contract. While disposing of this writ petition, this Court directed the petitioners to put forward their claim for grant of compensation to the Department and the Secretary of the concerned Department was directed to examine the claim and decide the same. This Court directed the State Government to pay costs of Rs. 5,000/- to the petitioners. At this stage, we may also note that the State Government filed a Review petition which was disposed of by the same Division Bench of this Court by an order dated 15th April, 1991 clarifying that the Secretary of the Irrigation Department will be entitled to consider all relevant material including what is set out in the Review petition and will decide whether any compensation is required to be paid to the petitioners or not. Thereafter, the order dated 18th July, 1991 which is impugned in the petition was passed by the Secretary to the Government of Maharashtra, Irrigation Department holding that the petitioners are not entitled to compensation. The petitioners being aggrieved by this order have filed the present petition. The petitioners have made a reference to the Contempt petition filed in this Court which was disposed of by observing that the appropriate remedy for the petitioners would be to file a writ petition. In the petition, the substantive prayer is that respondents be directed to pay compensation to the petitioners of Rs. 8,80,150/- being 15% of the amount of contract with interest thereon @ 16 1/2% p.a. from 31st July, 1991. There is a reply filed by the State Government as well as added respondents raising various contentions.

3. The 2nd petitioner appearing-in-person submitted that there is a categorical finding recorded by the Division Bench while disposing of the earlier writ petition holding that the State Government had wrongfully denied the contract to the petitioners though the 1st petitioner was eligible to submit the tender. He invited our attention to the judgment and order passed by the Division Bench disposing of the earlier writ petition and submitted that the only issue is to be decided by the Secretary was whether the petitioners were entitled to receive compensation. His submission is that the Secretary to the State Government has recorded the findings on factual aspects which are completely erroneous and directly contrary to the findings recorded by the Division Bench of this Court while deciding the earlier Writ Petition. He submitted that the Secretary could not have over ruled the Division Bench by holding that the petitioners were not eligible for submitting the tender. He submitted that the order of the Secretary is illegal. He placed reliance on various decisions including the decision of the Apex Court in the case of A.T. Brij Paul Singh and Others Vs. State of Gujarat, . He submitted that the Apex Court has adopted the formula, on the basis of which, the prayer in this petition is based. He submitted that the Apex Court held that 15% of the value of the works contract should be measured as damages.

4. Learned AGP as well as the learned counsel appearing for the added respondent invited our attention to the order passed in the Review petition by

this Court. The learned counsel appealing for the added respondent pointed out that a copy of the Review petition is on record of this petition and various factual grounds were raised therein to show that the petitioners were not eligible to submit the tender. His submission is that by virtue of the order passed in Review petition, the issue of the eligibility of the first petitioner was kept open by the Division Bench. He pointed out that on the basis of the grounds urged in the Review petition, the Secretary of the State Government has correctly recorded the finding of fact that the petitioners were never eligible to submit the tender. He submitted that the Secretary was entitled to deal with the question of the petitioners' eligibility in the light of the order passed in the Review petition. Learned AGP relied upon the various decisions in support of his submission that the petitioners were not eligible to submit the tender.

5. We have given careful consideration to the submissions. We have perused the affidavits filed in the petition. It will be necessary to make a reference to the Judgment and Order dated 29th October, 1990 passed by the Division Bench of this Court in Writ Petition No. 462 of 1983. Perusal of the said judgment and order shows that the State Government had raised the contention that by virtue of the Government Resolution dated 6th September, 1982, the petitioners have been reclassified and have been put in the category IV whereby their limit for contracts of construction work was brought down to Rs. 50 lakhs. It was contended by the respondents in the said writ petition that considering the said categorisation of the petitioners, they were not eligible for consideration as the cost of the tender work was slightly in excess of Rs. 58 lakhs. It is necessary to make a reference to what is held in paragraph 5 in the judgment. The said paragraph 5 reads thus:--

5. In our judgment, we are unable to accept the contention of the respondents and we are constrained to conclude that the act of rejection of the petitioners' tender was arbitrary and unacceptable. As stated earlier, by their corrigendum of 25th September, 1982 the respondents had very clearly specified that the contractors belonging to B + category were eligible for submitting their tenders as far as the present contract is concerned. It may further be noted that the decision to invite tenders, as far as the present contract was concerned, was taken by the respondents in the last week of August, 1982 as per their averments in their own affidavits. The resolution of the Government regarding reclassification is dated 6th September, 1982, which resolution is of a later date, that is, of date subsequent to the date on which the tenders had been invited from different contractors. The respondents themselves admit in their affidavit-in-reply that even as late as on 25th September, 1982 i.e. long after the publication of Government Resolution of 6th September, 1982 they still used the classification of B + because admittedly the majority of the contractors had not yet been reclassified. Under these circumstances, the defence of the respondents that the petitioners' tender came to be rejected on the solitary ground that they had been reclassified in Class IV is unacceptable. It is worthwhile mentioning that the Resolution dated 6th September, 1982 could only be given prospective

effect and could not in any manner affect the rights of the parties in respect of offers that were earlier invited from them,. It is worthwhile mentioning that class B+ as it originally stood prescribed a limit of Rs. 60 lacs, in which case the petitioners were clearly eligible. Furthermore, when the tenders came to be opened on 1st November, 1982, if the defence of the respondents were to be accepted, the tender submitted by the petitioners would have been rejected on the ground that they were ineligible. Neither in the correspondence nor in the affidavits-in-reply is this the case set out by the respondents and we are, therefore, constrained to observe that the rejection of the petitioners' tender was arbitrary and unacceptable.

(Underlines supplied)

6. In paragraph 6 of the judgment, the Division Bench noted that the contract was awarded to the respondent No. 4 in the said writ petition which was already executed. In the concluding portion of paragraph 6, the Division Bench observed that there was no ground on which the petitioner could have been disqualified except the weak defence put up by the respondents which is wholly unsustainable. It will be interesting to note what is held by the Division Bench in paragraph 8, which reads thus:--

8. The irresistible conclusion, therefore, is that the petitioner was wrongly deprived of the award of the contract which, under normal circumstances, should have been done since his offer was the lowest and he was otherwise qualified. In these circumstances, the illegal and unfair treatment meted out to a professional is something which was downright improper. Mr. Ahuja has drawn our attention to the judgment of the Supreme Court, reported in AIR 1976 Supreme Court 49, in the case of Rameshwar and others v. Jot Ram and others. On the basis of the observations of the Supreme Court, the relevant portions of which we shall reproduce, Mr. Ahuja has submitted that the contract ought to have been awarded to him under normal circumstances in the year 1982 but for the wrongful act on the part of the respondents. Consequently, he would have, in the normal circumstances, executed the work and would have been entitled to his normal profits on execution of that contract. Consequently, he submitted that merely because the petition is heard after the lapse of several years, and the contract cannot now be awarded to him that he cannot be deprived of a relief which he would have been entitled to in the year 1983 had the dispute been adjudicated at that point of time.

(Underlines added)

7. Thereafter, the Division Bench proceeded to consider the decision cited before it. The final direction is issued by the Division Bench in paragraph 10, which reads thus:--

10. In the light of these observations, we are of the view that the petitioner ought not to be deprived of equitable relief as such deprivation would compound the injustice perpetrated by the respondents, and possibly encourage its officers to

continue functioning in this highly unsatisfactory manner. It is all the more regrettable that a professional is at the receiving end in this case which casts an even higher duty on the Court to ensure that he is not frustrated in his efforts. Mr. Ahuja has submitted before us that his right to recover damages which he proposes to enforce against the respondents through an appropriate suit should be kept alive. We do not propose to make any observations with regard to any remedies open to the petitioner because the forum before which the petitioner adopts such measures is the right authority to adjudicate the issues before it after hearing the respective parties. At this point of time, it is unfortunate that the petitioner has not placed any adequate material before us on the basis of which, instead of driving the petitioner to a further litigation, this Court would have awarded him adequate compensation at this stage itself. He is directed to put forward his claim to the Department with supporting material on the basis of which the Secretary shall examine and decide the same. We are only directing the Head of the Department to carry out what ought to have been done by him several years earlier.

(Underlines added)

Thereafter, the Division Bench proceeded to award costs quantified at Rs. 5,000/- to the petitioner.

8. The findings recorded by the Division Bench can be summarised as under:--

(a) The act of rejection of the petitioners' tender was arbitrary and unacceptable.

(b) The contention of the respondents that the petitioners' tender came to be rejected on the ground that they have been reclassified in category IV was unacceptable and that the petitioners were eligible.

(c) The petitioners were wrongly deprived of the award of the contract which, under normal circumstances, could have been awarded to them as the petitioners were the lowest bidders.

(d) The Division Bench noted the submission of the 2nd petitioner that he has proposed to file suit for damages. However, the Division Bench observed that it was unfortunate that the petitioner has not placed any adequate material on the basis of which, instead of driving the petitioner to face further litigation, this Court could have awarded adequate compensation to the petitioners.

9. Thus, we find that after holding that the action of the concerned respondents of declaring the petitioners as ineligible was unsustainable and that the compensation could not be granted to the petitioners as they had not placed adequate material before the Court, a direction was given to the petitioner to make a claim before the State Government which claim was to be examined and decided by the concerned Secretary of the State Government.

10. The very basis of issuing the said direction is the categorical findings recorded by the Division Bench in paragraph 5 and first part of the paragraph 8

of the judgment. Paragraph 5 clearly holds that the petitioners were eligible to submit the tender. The paragraph 8 clearly holds that the petitioners were wrongly deprived of the award of the contract which, under normal circumstances, should have been allotted to them. The question of directing the petitioners to approach the Secretary for determination of the compensation amount arose only because this Court found that the petitioners were wrongly found to be ineligible to submit the tender.

11. At this stage, we must make a reference to the order passed by this Court on 15th April, 1991 in Civil Application No. 453 of 1991 which was filed for the Review of the Judgment passed in the Writ Petition No. 462 of 1983. The perusal of the Civil Application (Review Petition) shows that certain factual contentions were raised regarding the eligibility of the present petitioners to submit the tender. The argument canvassed before us is that even the finding that the petitioners were eligible has been set aside while disposing of Review petition and the issue as to the eligibility of the petitioners has been kept open to be decided by the Secretary. The order passed on Review petition reads thus :--

It is clarified that the Secretary, Irrigation Department will be entitled to consider all relevant material including what is set out in the Review petition and will decide whether any compensation requires to be paid to the original petitioner or not, and if it requires to be paid, what should be the amount. The matter shall be disposed of, as far as possible, before the end of July, 1991.

Review Petition disposed of accordingly.

12. We have already pointed out that the very basis for issuing the direction to the Secretary to make adjudication as regards payment of compensation was that it was erroneously held that the petitioners were ineligible to submit the tender and the action of rejection of their tender was arbitrary and was unacceptable. If the intention of this Court while deciding the Review petition was to set aside or nullify the finding that the petitioners were eligible, there was no occasion for the Division Bench to maintain the order directing the Secretary to hold an enquiry and decide whether the petitioners were entitled to compensation. We find that the order passed in the Review petition cannot be read to mean that the categorical findings recorded in paragraph 5 of the judgment in the writ petition were modified or set aside by the Division Bench. On plain reading of the order in the Review Petition, we find that the effect of the order passed in the Review Petition is that the issue whether the petitioners were entitled to the award of contract was reopened by the order in the Review Petition. The effect of the order in the Review Petition is that the Secretary was empowered to decide whether the petitioners would have been in all probability granted the contract. The finding in paragraph 5 of the judgment in the Writ Petition is that the petitioners could not have been treated as ineligible or disqualified to submit the tender. This finding was not disturbed in the order passed in the Review Petition.

13. In light of this, now the impugned order passed by the Secretary to the Government will have to be considered. We have perused the said order. Upto paragraph 16.0, the Secretary refers to the submissions made by the parties. In paragraph 17.0, he observed that in view of the order on Review Application, he was entitled to consider all the relevant material including what is set out in the Review Application. Ultimately, in paragraph 22.0, the Secretary purported to record a finding that the petitioners were not holding the registration in B + category and they were not eligible to quote for the entire work which was of a sum of Rs. 58 lakhs. Thus, the finding of the Secretary is that the petitioners were not at all eligible to submit the tender. The reason for denying compensation is that the petitioners were ineligible to submit the tender. In our considered view, the said finding recorded by the Secretary is directly contrary to what is specifically held in paragraph 5 of the judgment which is neither disturbed nor modified while deciding Review Petition.

14. We reiterate that the order on the Review Petition does not re-open the issue whether the petitioners were eligible to submit tender. We have already held that the order in Review Petition did not disturb the finding on the eligibility of the petitioner to submit the tender recorded in paragraph 5 of the judgment in Writ Petition. The effect of the order in Review, was that the issue whether the petitioners were in all probability entitled to award of contract was kept open. We find that the entire exercise done by the Secretary is completely uncalled for. The scope of enquiry before him was confined to the entitlement of the petitioners to receive compensation. The Secretary ought not to have entered the arena of the qualification of the petitioners to submit the tender as the said issue was already concluded by this Court.

15. The prayer in this petition is for fixing the quantum of compensation at an amount quantified at 15% of the contract value.

16. As far as issues of entitlement of the petitioners to receive compensation and the quantum of compensation are concerned, the same cannot be decided in the writ petition as the decision on the said issues will involve an adjudication on factual aspects which normally cannot be done in exercise of power of this Court under Article 226 of the Constitution of India. Whether the petitioners were entitled to 15% of the contract value is a matter which requires adjudication on various factual aspects. Therefore, even though we find that the order dated 18th July, 1991 is completely erroneous and contrary to the judgment of this Court in Writ Petition and the order passed on Review Petition, we cannot grant the prayer made by the petitioners of issuing writ directing the respondents to pay the compensation as prayed. We have no option but to remit the matter to the Secretary to the Government of Maharashtra with a direction to him to make factual adjudication on the said issue.

17. The net result of this exercise is that the petitioners will be relegated to the same position in which they were when the Division Bench decided the earlier petition on 29th October, 1990. Unfortunately, the present petition of the year

1997 reached in the year 2012. This situation has arisen because of the erroneous view taken by the Secretary to the State Government. While remitting the matter to the Secretary to the State Government, the State Government will have to be directed to pay a reasonable amount to the petitioners towards costs quantified at Rs. 20,000/-. Hence, we dispose of the Writ Petition by passing the following order:--

ORDER

- 1) The impugned judgment and order dated 18th July, 1991 passed by the Secretary to the Government of Maharashtra, Irrigation Department is quashed and set aside;
- 2) We direct the Secretary to the State Government, Irrigation Department, Mantralaya, Mumbai to comply with the Judgment and Order dated 29th October, 1990 passed in Writ Petition No. 462 of 1983 read with the order passed on Review Petition by passing an appropriate order after considering the representation of the petitioners and after giving an opportunity of being heard to the second petitioner and the added respondent No. 5;
- 3) We make it clear that the issue of eligibility of the petitioners to submit the tender has been finally concluded by the Judgment and Order dated 29th October, 1990 in Writ Petition No. 462 of 1983 and that the said issue shall not remain open for consideration by the Secretary to the State Government;
- 4) We direct that a fresh order shall be passed by the Secretary as expeditiously as possible and in any case within a period of three months from the date on which an authenticated copy of this order is received by the Secretary;
- 5) We direct that the 1st respondent-State of Maharashtra to pay costs to the petitioners quantified at Rs. 20,000/-. The amount of costs shall be either directly paid to the 2nd petitioner or deposited in this Court within a period of eight weeks from today;
- 6) Rule is made partly absolute on above terms;
- 7) Parties concerned to act on an authenticated copy of this judgment and order;
- 8) Civil Application Stamp No. 21216 of 1996 does not survive and the same is disposed of.