
(2019) 11 J&K CK 0039

In the Jammu And Kashmir High Court

Case No : Writ Petition (C) No. 3353 Of 2019, CM No. 6720 Of 2019

M/S Naseer Ahmad Bhat

APPELLANT

Vs

Union Territory Of Jammu And Kashmir & Ors

RESPONDENT

Date of Decision : 26-11-2019

Acts Referred:

Constitution Of India, 1950 — Article 14, 19, 226

Citation : (2019) 11 J&K CK 0039

Hon'ble Judges : Ali Mohammad Magrey, J

Bench : Single Bench

Advocate : Azhar-ul-Amin, B. A. Dar

Final Decision : Allowed/ Disposed Of

Judgement

Ali Mohammad Magrey, J

1. In this petition, the petitioner pleads that vide e-NIT bearing No. EE-PCD/ Prisons/73/2019-20 dated 25th of September, 2019, the respondents invited tenders on item rate basis from the approved and eligible contractors registered with J&K Government/ CPWD/ Railway and other State and Central Governments for construction of Residential block at Mishriwalla, Jammu (Correction Services and Reformation Training Institute) Structure Part only. It is stated that the bidding documents were required to be downloaded from the website-'jktenders.gov.in' from 25th of September, 2019 and that the bids were required to be deposited online in electronic format on the same website from 28th of September, 2019 to 9th of October, 2019. The e-NIT, as per the petitioner, also provided that the technical bids were to be opened online in the office of Executive Engineer, PCD, PHQ, Srinagar on 10th of October, 2019 at 1100 hours. The petitioner, being a qualified bidder, submitted his tender for the above quoted work at an estimated cost of Rs.199.90 lacs by uploading the same on the required address complete in all respects and conforming to the terms and conditions prescribed in the e-NIT. Thereafter, as stated, the technical bids were opened and the bids evaluated, however, the technical bid of the petitioner

firm was rejected on the ground that the petitioner firm has not followed the instructions as per General condition No.2-vi-vii and, thus, was declared as non-responsive for opening of price bid. This action of the respondents in declaring the bid of the petitioner firm as non-responsive has been assailed by the petitioner through the medium of the instant petition.

2. Mr Azhar-ul-Amin, the learned counsel for the petitioner, submits that the reasons for rejecting the bid of the petitioner firm on the ground of him not following the instruction as per the general condition No.2-vi-vii is factually incorrect and legally unsustainable as the petitioner firm has followed the instructions in letter and spirit by fulfilling all requisite conditions of the NIT. The learned counsel further submits that the petitioner firm has furnished the financial statements, viz. Balance Sheet, Profit and Loss Account duly vetted by the Chartered Accountant for last five years as well as the income tax returns of last five years before the concerned authorities and, thus, the decision of the respondents in declaring the bid of the petitioner firm as non-responsive is not only arbitrary, but also motivated by ulterior considerations. The learned counsel has proceeded to state that the respondents, in order to accommodate some of their blue-eyed person, have declared the petitioner firm non-responsive resulting in rejection of the bid of the petitioner. It is pleaded that any arbitrary action that goes into the decision-making process renders the decision itself as contrary and hostile to Article 14 of the Constitution of India and that the State is not absolved from the requirement of Article 14 of the Constitution of India in the process of allotting works or entering into contracts with the citizens.

3. Mr B. A. Dar, the learned Senior Additional Advocate General, submits that since the petitioner firm did not comply with the terms of the e-NIT by following the instructions as per General condition No.2-vi-vii, therefore, the petitioner firm was rightly declared as non-responsive. The learned Senior Additional Advocate General further submits that the terms of the NIT cannot be ignored as being redundant or superfluous and that they carry some meaning and necessary significance. The learned Senior Additional Advocate General has further proceeded to state that the term/ condition of the NIT is a decision taken by the Department which should be respected by all concerned at all costs. It is also submitted that the lawfulness of that decision can be questioned on very limited grounds, but the soundness of the decision cannot be questioned as otherwise this Court would be taking over the function of the tender issuing authority, which it cannot.

4. Heard the learned counsel for the parties, perused the record and considered the matter.

5. When this matter was taken up on motion hearing, i.e. on 19th of November, 2019, this Court, after hearing the learned counsel for the petitioner and in order to ascertain the genuineness or otherwise of the contentions raised by the petitioner, directed Mr Dar, the learned Senior Additional Advocate General, to appear in the matter on behalf of the respondents and produce the records

before this Court on 20th of November, 2019. On 20th of November, 2019, it was observed that the records were neither in tabulation form nor properly page marked and, therefore, the matter was directed to be listed on 21st of November, 2019, on which date, the counsel for the parties were heard and judgment was reserved.

6. At the very outset, what requires to be stated is that the decision to allot the works or enter into contract with citizens has to be rational, non-arbitrary and reasonable. The decision-making process of the Government or Government agencies in contractual matters as well as has to be reasonable and conforming to the requirements of fundamental rights of the petitioner guaranteed under Articles 14 and 19 of the Constitution of India. In the case on hand, the official respondents have declared the petitioner firm as non-responsive on the ground that the petitioner firm has not followed the instructions as per general condition Nos. 2-vi-vii provided in the tender notice. The conditions aforesaid provide that the contractor/ firm shall be required to submit the financial statements, viz. Balance Sheet, Profit & Loss Account duly vetted by the Chartered Accountant for the last five years and Income Tax Returns of the last five years. The records, as produced by the respondents before this Court, reveal that the petitioner firm has, in fact, submitted the requisite financial statements in the shape of Balance Sheet, Profit & Loss Account duly vetted by the Chartered Accountant for the last five years as well as the Income Tax Returns of the last five years before the authorities concerned. The records also bring it to fore that the actual reason for declaring the petitioner firm as non-responsive is that the petitioner firm has not attached the 'computation statement' with his tender document so as to enable the respondents to ascertain the difference between the Profit & Loss Account and the Income Tax Returns. It is not understandable as to how the respondents have rejected the bid of the petitioner firm on the ground of non-furnishing of the so called computation statement on the part of the petitioner firm when, in the tender notice, it is nowhere mentioned that the contractors/ firms shall attach the computation statement with their tenders. In this backdrop and after perusing the record, the only conclusion that can be reached at is that the petitioner firm has, in fact, complied with all the terms and conditions prescribed in the tender notice, but, seemingly, his bid has been rejected arbitrarily on a ground which was not prescribed in the tender notice, i.e. non-furnishing of computation statement.

7. Law is no more *res integra* to the effect that there must be judicial restraint in interfering with the administrative action, particularly in the matters of tender or contract and that, ordinarily, the soundness of the decision taken by the tender issuing authority ought not to be questioned, but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned, firstly, if the decision made is so arbitrary and irrational that the Court can say that the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached or, second, if the process adopted or decision made by the authority is *malafide* or intended to

favour someone or, third, if the public interest is affected. In the instant case, when the petitioner firm has complied with all the terms and conditions prescribed in the tender notice and has furnished all the requisite documents, in such eventuality, the decision of the official respondents to declare the petitioner firm as non-responsive amounts to such action where they have acted in a manner in which no responsible authority acting reasonably and in accordance with the relevant law would have acted.

8. The contention of the learned Senior Additional Advocate General, representing the respondents, that in contract matters, a writ petition is not maintainable, in the facts and circumstances of the present case, is not only misconceived but also misdirected as well. This is so because it is settled legal position that if a State acts in an arbitrary matter even in a matter of contract, an aggrieved party can approach the Court by way of Writ under Article 226 of the Constitution and that the Court, depending on the facts of the said case, is empowered to grant the relief. Although, ordinarily, a superior Court, in exercise of its Writ jurisdiction, would not enforce the terms of a contract qua contract, it is trite that when an action of the State is arbitrary or discriminatory and, thus, violative of Article 14 of the Constitution of India, a Writ petition would be maintainable. There cannot be any doubt whatsoever that a 'Writ of Mandamus' can be issued only when there exists a legal right in the Writ petition and a corresponding legal duty on the part of the State, but then if any action on the part of the State is wholly unfair or arbitrary, the superior Courts are not powerless. The same view has been held by Hon'ble the Supreme Court in case titled 'Karnataka State Forest Industries Corporation v. Indian Rocks', reported as 'AIR 2009 SC 684'.

9. Again, the Apex Court of the country, while dealing with a similar issue, in case titled 'Zonal Manager, Central Bank of India v. Devi Ispat Ltd. & Ors.', reported as '(2010) 11 Supreme Court Cases 186' has, at paragraph No.25, provided as under:

".....

It is clear from the above observations of this Court in the said case, though a writ was not issued on the facts on that case, this Court has held that on a given set of facts if a State acts in an arbitrary manner even in a matter of contract, an aggrieved party can approach the Court by way of writ under Article 226 of the Constitution and the court depending on facts of the said case is empowered to grant the relief. This judgment in K.N. Guruswamy v. State of Mysore (AIR 1954 SC 592) was followed subsequently by this Court in DFO v. Ram Sanahi Singh [(1971) 3 SCC 864] wherein this Court held:

"4. By that order he has deprived the respondent of a valuable right. We are unable to hold that merely because the course of the right which the respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not

to a petition by way of writ. In view of the judgment of this Court in K.N. Gueruswamy case there can be no doubt that the petition was maintainable, even if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority invested with statutory power."

10. For the foregoing reasons, coupled with the enunciations of law discussed hereinabove, this writ petition is allowed and the communication dated 11th of November, 2019 is quashed. The respondents, by a 'Writ of Mandamus', are directed to treat the petitioner firm as having qualified for evaluation of price bid; evaluate the tender of the petitioner firm; consider the petitioner firm, alongwith all eligible firms, for allotment of work in question; and, accordingly, allot the said work in favour of the lowest bidder strictly in accordance with the terms and conditions prescribed in the tender notice as well as the rules governing the subject.

11. Writ petition disposed of on the above terms, alongwith the connected CM.

12. Bench Secretary of this Court to return the records to Mr Dar, the learned Senior Additional Advocate General, against proper receipt.