

(2014) 01 AP CK 0101

In the Andhra Pradesh High Court

Case No : Writ Petition No. 31216 of 2013

M/s. T.A. Infra Projects Ltd.

APPELLANT

Vs

Infrastructure Corporation of Andhra Pradesh Ltd. and
Another

RESPONDENT

Date of Decision : 02-01-2014

Acts Referred:

Constitution of India, 1950 — Article 14 226

Citation : AIR 2014 AP 38 : (2014) 3 ALD 45 : (2014) 2 ALT 132 : (2014) 2 BC 591

Hon'ble Judges : A. Rajasheker Reddy, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

A. Rajasheker Reddy, J.—This writ petition is filed seeking writ of mandamus declaring the action of the respondents in incorporating condition No. 14.2 (The bidder who have applied for corporate debt restructuring (CDR) in the last 2 financial years (2011-12 and 2012-13) shall not be considered for bid qualification. For this, certificate of Chartered Accountant by the bidder must be produced) of Notice Inviting Tenders issued pursuant to "Chittoor District Drinking Water Supply Project" pursuant to "e" NIT No. 1/Incap/D/CDDWSP/Tender Notice/608/2013, dated 11.10.2013 as illegal and arbitrary and consequently to set aside the same. The case of the petitioner is that he is a Special Class Contractor, registered with Government of Andhra Pradesh in terms of G.O.Ms. No. 94 dated 01.07.2013. The petitioner has vast experience in execution of various water works, irrigation works etc. He executed the works for Government of Andhra Pradesh, Tamilnadu etc. The respondents have issued "e" procurement notice vide "e" NIT No. 1/Incap/D/CDDWSP/Tender Notice/608/2013, dated 11.10.2013 in the daily news papers intimating that online tenders are invited under "e" procurement platform for 9 packages for pipeline works under LS mode of tendering of the work "Chittoor District Drinking Water Supply Project" in Chittoor District. The last date for submission of bids is

08.11.2013. The petitioner downloaded the tender documents for the following works which are packages III, VI and VII:

a) Manufacture, supply, lowering, laying, jointing, testing and commissioning of 2200 mm dia (clear opening after inlining) of MS water supply Raw water gravity trunk main from Ch. 25.00 (near Dakkili village) to 50.0 km (Vampalli Village)-Package III. The estimated contract value is Rs. 2,213,462,970/- Vide IFB No. 1/INCAP/D/CDDWSP/608/2013/3.

b) Manufacture, supply, lowering, laying, jointing, testing and commissioning of 1900 mm dia (clear opening after inlining) of MS water supply clear water pumping main from Water treatment plant at Vikruthamala to C. Mallavaram-Package VI, vide IFB No. No. 1/INCAP/D/CDDWSP/608/2013/4. The estimated contract value is Rs. 1,616,105,845/-.

c) Manufacture, supply, lowering, laying, jointing, testing and commissioning of 1200 mm dia (clear opening after inlining) of MS clear water pumping main from C. Mallavaram to Mamandur (Reach-1) and Manufacture, supply, lowering, laying, jointing, testing and commissioning of 1300 mm dia (clear opening after inlining) of MS clear water pumping main from Mamandur to Shankampalli (Reach-2)-Package VII, Vide IFB No. No. 1/INCAP/D/CDDWSP/608/2013/5.

The estimated contracted value is Rs. 1,490,170,567/-.

2. After downloading, the petitioner noticed that the respondents have inserted Condition No. 14.2 of Notice Inviting Tenders (for short "NIT"). It is stated that the above said condition has been put for the first time in government Contracts and hitherto the same was never made an eligibility criteria in respect of like works called by Government or its agencies. Except meeting the above condition, the petitioner satisfied all other eligibility criteria required for executing the above mentioned works. It is stated that making an application for CDR, by any stretch of imagination, cannot be viewed as a disqualification. The object of CDR has been evolved by the Government of India and Reserve Bank of India to ensure a timely and transparent mechanism for restructuring the corporate debts of viable corporate entities like petitioner, which are affected by external or internal factors, which are outside the purview of BIFR, DRT and other legal proceedings. Under said scheme, CDR empowered group has been constituted, which comprises representatives from IDBI, ICICI Bank Ltd., and SBI as standing members, in addition to the other members from the financial institutions having exposure towards the concerned Company. The individual cases of CDR shall be decided by CDR Empowered Group, whose decisions shall be final. CDR Empowered Group would have the discretion to allow the restructuring of the debt depending upon the factors projected by the applicant company and thus the said body shall formulate a satisfaction that the restructuring of the debt should be found viable and feasible and if it is not satisfied about the respective company's capacity to re-pay its debts, restructuring of the debt may be rejected and thus the creditors would be free to take necessary steps for

recovery of dues and/or liquidation or winding up of the company.

3. It is stated that petitioner made an application to Corporate Debt Restructuring (CDR) Cell for restructuring its payment schedules for clearance of its debts to the financial institutions. State Bank of India has filed a report before the CDR Empowered Group positively recommending the case of the petitioner for restructuring of its debts. In terms of Clause 14.2 of NIT, the petitioner would not be in the one of consideration despite the fact that the petitioner's vast experience in executing the subject works and restructuring of its debts, which evidences its financial credibility. Hence, the writ petition.

4. Sri S.R. Ashok, learned Senior Counsel appearing for the petitioner contends that the clause 14.2 of NIT is irrational and arbitrary and would not achieve any purpose except excluding competition, which would not be in the public interest. He further contends that there are 9 contractors, who are competent to execute the subject works i.e. Thus, by virtue of clause 14.2, the petitioner, Gammon India Ltd., and Hindustan Construction Company would become ineligible. Thus, by virtue of the same, there would be only six contractors available for the 9 packages and thus there is every likelihood of the remaining players forming cartel and the respondents would not be in a position to get the competitive price thereby prejudicing the public interest. He also contends that the said clause has been inserted only at the behest of the vested interest so as to wield control over the bidding process and thus ensuring that their preferred contractors get benefited. He further contended that the said clause is a tailor made clause to benefit few and exclude many who are competent to do the work. He further contends that the CDR Empowered Group comprising representatives from State Bank of India, State Bank of Hyderabad, ICICI Bank Ltd., have extensively gone through the reasons sought for restructuring, including the final report of the State Bank of India and accordingly, in the meeting held on 15.02.2013 restructured the petitioner's debts and the same cannot be disqualification for participating in the tender process. He further contends that there is an avowed object behind this CDR scheme in the interest of the company and also its creditors and therefore, cannot be viewed in negative perspective more so when the CDR empowered group has approved the restructuring. He would further contend that the CDR is a regular phenomenon for the companies whose turnover runs into thousands of crores and in the present day context, it cannot be viewed as disqualification for bidding for the contracts. He contends that the companies who applied for corporate restructuring debt were disqualified, but companies under BIFR, DRT have not been disqualified and there is no rationale for the same and that the petitioner paid demand draft for Rs. 2,70,47,700/-. He also contends that one of the condition for participation in the tender is that company should have liquid assets and/or credit facilities not less than Rs. 45,07,93,378/- and the solvency certificate shall not be earlier than 21.10.2012.

5. He also contends that the petitioner went for CDR as the petitioner was not paid monies for the work done including the state of Andhra Pradesh and that

cannot be put against the petitioner and the Government of Andhra Pradesh is responsible for the petitioner's making an application for CDR scheme as the same failed to pay its bills for the works done by the petitioner in time. He further submits that clause 14.2 of NIT has to be struck down.

6. On the other hand, learned Advocate General submits that the project is for Rs. 1000 crores in respect of CDDWSP scheme and estimated value of the tender is Rs. 270,47,60,266/- to Chittoor District and it is a time bound programme, which has to be completed in 18 months. As such, the Government has taken all the precautions and wanted to select robust companies which have not gone into CDR to see that the work is completed without any delay within the stipulated time as it is very urgent work pertaining to supply of drinking water. He also submits that amended clause 14.2 was further modified as per the letter dated 16.11.2013 companies under BIFR and DRT have also been disqualified and he has produced a copy of memo dated 16.11.2013 which is as follows:

Companies under BIFR, companies under DRT and companies who have applied for CDR in last two financial years (2011-12 and 2012-13) shall not be considered for bid qualification. For this a certificate of Chartered Accountant by the bidder must be produced.

7. He also contends that the Government has taken all the precautions and incorporated clause 14.2 and the same was amended which is as a measure of further safeguard, which cannot be faulted. He also contended that the issuance of tender is in the realm of contract and it is open for the Government to incorporate the conditions for proper performance of the contract and the same cannot be interfered with by this Court by exercising Article 226 of the Constitution of India. He also contends that 23 bidders have participated in the bid and he has also furnished a copy of the list of all the 23 contractors who participated in the bid as on 19.11.2013 in pursuance to tender notification. As such, it cannot be said that the said condition is a tailor made to suit some contractors. In view of the magnitude of the contract, the impugned condition was inserted for ensuring completion of the contract work within the time stipulated. He also contends that there is purpose in introducing the above clause which has rationale to the object sought to be achieved i.e., for the purpose of completion of the contract within the stipulated time.

8. Learned Advocate General also produced a copy of the tender notice issued by the Government of Gujarat stating that similar condition was imposed in the said tender. He also contends that the scope of judicial review in respect of reviewing tender conditions, which are in the realm of contract is very limited. In support of his contention, the learned Advocate General has relied on the judgments reported in *Tata Cellular Vs. Union of India*, *Michigan Rubber (India) Ltd. Vs. The State of Karnataka and Others*, and *Tejas Constructions and Infrastructure Pvt. Ltd. Vs. Municipal Council, Sendhwa and Another*, .

9. In this case, the respondents issued notification inviting tenders dated

11.10.2013 for is CDDWSP and the nature of the work is manufacture, supply, lowering, laying, jointing, testing and commissioning of 2200 mm dia (clear opening after inlining) of MS water supply Raw water gravity trunk main from Ch. 25.00 (near Dakkili village) to 50.0 km (Vampalli Village)-Package III. The estimated contract value is Rs. 270,47,66,266/- and the period of completion is 18 months and the EMD to be paid in the shape of Demand Draft in favour of the respondent is Rs. 2,70,47,700/-, which the petitioner has paid.

10. The Government has also introduced clause 14.2 of NIT as one of the qualifications for participating in the tender process and the same emanated and reads as follows:

The Bidder who have applied for corporate debt restructuring (CDR) in the last 2 financial years (2011-12 and 2012-13) shall not be considered for bid qualification. For this certificate of Chartered Accountant by the bidder must be produced.

11. But still the Government intends to introduce clause 14.2 because the Government wanted that in any event that project should be completed within the stipulated time and the Government wanted robust company which has not gone under CDR. The object behind laying that clause as contended by the learned Advocate General is that only healthy companies which have not gone under CDR alone should participate to see the financial viability. The object with which the same is introduced cannot be said to be irrational. It is introduced with the purpose as pointed out by the learned Advocate General for ensuring that the project should be completed within the time and to see that the contractor has capacity and the resources to successfully execute the work. On that premise it cannot be said that the said clause is irrational or arbitrary or it is against public interest.

12. In *Tata Cellular v. Union of India* (supra), it is held that

94. The principles deducible from the above are: (1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play

in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

13. In *Michigan Rubber (India) Limited v. State of Karnataka and others* (supra) it is observed as follows:

20) In *Reliance Airport Developers (P) Ltd. vs. Airports Authority of India*, this Court held that while judicial review cannot be denied in contractual matters or matters in which the Government exercises its contractual powers, such review is intended to prevent arbitrariness and must be exercised in larger public interest.

21) In *Jagdish Mandal Vs. State of Orissa and Others*, , the following conclusion is relevant:

22) Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that

the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

23) From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

It is observed by the Supreme Court in the above decisions that the Government must have freedom of contract. In other words, a fair play in the joints is necessary concomitant for an administrative body functioning in an administrative sphere. Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

It is also held in the above decisions that in the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be

conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted. Certain pre-conditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work and if the State or its instrumentalities are reasonably fair and acts in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

Therefore, a court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and (ii) Whether the public interest is affected and if the Court comes to negative conclusion, then there should not be any interference under Article 226 of the Constitution of India. In this case already 23 contractors have participated in the bid and it cannot be said that impugned clause 14.2 in the NIT is tailor made. In view of above discussion and the law laid down by the Apex Court in the above decisions, I do not find that introduction of clause 14.2 in the NIT dated 11.10.2013 is irrational, unreasonable or arbitrary or it is against public interest and it cannot be said that it will not serve any purpose.

In view of the above discussion, the petitioner has not made out any case for quashing clause 14.2 of the NIT by exercising jurisdiction under Article 226 of the Constitution of India.

Hence, the writ petition is dismissed. There shall be no order as to costs. As a sequel thereto, miscellaneous petitions, if any, pending in this writ petition, shall stand closed.