

(2017) 03 KAR CK 0164
In the Karnataka High Court
Case No : 38613 of 2016 (GM-TEN)

NANDI AGRO VET A PROPRIETARY CONCERN, THROUGH ITS PROPRIETOR, MR.SUNDAR.S APPELLANT

Vs

THE STATE OF KARNATAKA BY ITS PRINCIPAL SECRETARY TO FINANCE DEPARTMENT, & ORS. RESPONDENT

Date of Decision : 07-03-2017

Acts Referred:

Constitution of India, Article 226 -
Karnataka Transparency in Public Procurement Act, 2000, Section 4B

Citation : (2017) 03 KAR CK 0164

Hon'ble Judges : A S Bopanna

Bench : SINGLE BENCH

Advocate : B V ACHARYA, SANDESH J CHOUTA, ADITYA SONDHI, PRATHIMA HONNAPURA

Final Decision : Disposed

Judgement

1. The petitioner is before this Court assailing the office order dated 22.04.2016 impugned at Annexure-A to the petition. In that light, the petitioner is seeking issue of mandamus to direct respondents NO.1 and 2 to consider the representation dated 01.07.2016 within a reasonable period.

2. The petitioner which is a proprietorship concern, as a small scale industry is engaged in the manufacture and marketing of products in the field of sericulture, horticulture and animal husbandry. The Karnataka Government in order to encourage the dairy farmers to improve the socio-economic status had formulated the beneficial schemes. In that regard Area Specific Mineral Mixture ("ASMM" for short) was encouraged to be used for live stock development. In view of the budget package the procurement of ASMM was undertaken and initially after providing exemption under Section 4B of the Karnataka Transparency in Public Procurement Act, 2000 ("KTPP" Act for short), the purchase order was placed on the petitioner. However, the same was cancelled so

as to provide opportunity to the other eligible manufacturers. In that view, a tender notification dated 07.01.2016 was floated by respondent No.3. The same included 12 separate products numbered as MMFS 01 to MMFS 12.

3. The petitioner participated in the tender process and submitted the offer for 6 of the products with the code numbers MMFS 1 to 4, 11 and 12. The offer of the petitioner was accepted in respect of the said products. As and when the funds were released the procurement was required to be made. On an amount of Rs.10 crores being released though other suppliers were placed with the orders insofar as the products bearing MMS Nos.1 to 4 which was to be supplied by the petitioner, the respondents issued the impugned communication dated 22.04.2016 informing the petitioner that the purchase order is kept in abeyance until further orders. Since the petitioner is singled out in such fashion and without being informed of the reasons, the petitioner made a representation dated 01.07.2016 seeking consideration to revoke the said communication and secure the products from the petitioner. Since no positive action was taken by the respondent, the petitioner is before this Court.

4. The respondents have filed the objection statement. They do not dispute the position that the petitioner and Karnataka Milk Federation (KMF) had participated in the tender process while the bid of KMF was rejected at the stage of EMD reconciliation. Thereafter the contract was entered into with the petitioner. The rate as quoted by the petitioner at Rs.81.67, Rs.82.17, Rs.84.15 and Rs.82.66 per kg in respect of MMFS 1 to 4 respectively is referred. It is contended that when this was the position the Director (Animal Husbandry), KMF addressed the letter dated 06.04.2016 informing that all the said 4 products would be supplied at the uniform rate of Rs.40/- per KG. In that view, taking note of the vast difference in the rate quoted by the petitioner and the rate for which the products could be secured, the action to keep the purchase order in abeyance was taken. It is their case that as per the tender conditions the supply under the contract in no event shall be more than the lowest price quoted at which the petitioners sell its products of identical description to any other person, State, Union territory, Corporation, Board etc. If the price is reduced, the same concession is to be passed-on to the respondents also. The chart at Annexure-R.11 is relied to contend that the petitioner has fixed the sale price of MMFS of the same description at less than the rate quoted by them in the tender document to be sold to others. Hence it is contended that the decision of keeping the tender contract with the petitioner in abeyance was in the interest of the public exchequer as the rates quoted by the petitioner are much higher than the rates offered by KMF and also the rate for which the petitioner is selling the same product. Though a meeting was called on 11.07.2016 the petitioner did not attend the meeting, the further opportunity for holding the meeting on 14.07.2016 was also not availed. In respect of the other two products i.e. MMFS 11 and 12 for which the petitioner had quoted, the purchase order amounting to Rs.1,44,39,413/- was placed. The respondents therefore in that context seek to justify their action and claim immunity under the relevant provisions of the KTPP

Act.

5. Heard Sri B.V. Acharya, learned senior counsel and Sri Sandesh Chouta, learned counsel for the petitioner. Sri Aditya Sondhi, learned Addl. Advocate General and Ms. Prathima Honnapura, learned Government Advocate for the respondents. Perused the petition papers.

6. In the light of the contentions urged, the fact that the petitioners offer was the only bid for supply of MMFS 1 to 4, as KMF did not comply with the requirements relating to EMD is not in dispute. Accordingly the purchase order was to be placed on the petitioners for the said products as and when the funds were released as other products were also to be procured by the respondents. By the impugned communication, though the acceptance of the tender and the rate contract has remained intact, the same is kept in abeyance through the impugned communication. The issue therefore is as to whether such action of the respondents is justified. The impugned communication dated 22.04.2016 does not indicate the reasons for which the rate contract is kept in abeyance. Through the objection statement filed in this petition the respondents have put forth certain reasons as justification, which include the higher price at which the petitioners are seeking to supply the said products though it could be procured at a lesser price and the petitioners themselves are selling at a lesser price.

7. The learned counsel for the petitioners in that regard has relied on the decision in the case of Commissioner of Police, Bombay -vs- Govardhan Das Bhanji -AIR 1952 SC 16 and in the case of Mohinder Singh Gill and Another -vs- Chief Election Commissioner, New Delhi and Others (1978) 1 SCC 405 wherein it is held that the public orders, publicly made in exercise of a statutory authority cannot be construed in the light of explanation subsequently given by the officer making the order of what he meant or what was in his mind and as such, the reasons cannot be substituted by the affidavit that would be subsequently filed before the Court. Hence, it is contended that the unreasoned communication is not sustainable. On that proposition of law, there can be no quarrel. However what is required to be noticed in the instant case is with regard to the action or inaction in a contractual matter between the parties and a breach committed thereof by either giving reasons or not would provide the party claiming to be aggrieved of such action a redressal in accordance with law by following the appropriate procedure. It is in that background, the present action will have to be considered to come to a conclusion on that aspect of the matter by taking note of the contentions put forth by the respondents in this petition and the appropriate course to be followed from this stage will have to be considered.

8. In that view, the averment as made in the objection statement filed by the respondents and the contentions urged on their behalf would indicate that the respondents at this stage have only kept the rate contract in abeyance in view of certain developments that have occurred subsequent to the tender of the petitioners being accepted and the rate contract being entered. As such, the breach has not yet occurred. In this regard, the rate contract entered into for

supply of MMFS 1 to 4 is at Rs. 81.67, Rs.82.17, Rs. 84.15 and Rs. 82.66 per kg respectively. The respondents contend that they have taken the decision to keep the rate contract in abeyance since according to them KMF had agreed to supply the said products at the uniform rate of Rs.40 per kg. Thus noticing the vast difference in the price, keeping in view the public interest they have requested the petitioners to negotiate in this regard. Since according to the respondents the petitioners did not respond, the present action was inevitable.

9. Insofar as the KMF having responded to the tender notification and having not qualified in the process due to non-compliance of the terms, at this stage certainly cannot make an offer to supply the same. However, the further contention of the respondents with reference to the "Fall Clauses" contained in the tender notification dated 07.01.2016 and the contention raised in that regard cannot be ignored. The same provides that the rate quoted for MMFS supplied under the contract in no event shall be more than the lowest price quoted at which the contractor sells his products of identical description to any other persons or such other authorities which is mentioned therein, during the period of the currency of the contract. In that regard, the respondents contend that subsequent to the rate contract being entered the respondents have found that the petitioners have been selling the very same products in MMFS 1 to 4 at Rs. 66.96, Rs.66.97, Rs.68.95 and Rs.67.31 per kg in Government sector and at Rs. 67.34, Rs.68.21 and Rs.68.32 per kg for MMFS 1, 3 and 4 respectively in private/non-Government sector. It is therefore contended that in such circumstance this aspect of the matter required consideration and as such, a discussion was required for which purpose the purchase was kept under abeyance to enable a discussion and to arrive at a decision and the cancellation has not been made.

10. The learned counsel for the petitioner would however contend that when the tender process has been completed and the rate contract was entered, the respondents cannot resort to such action. Reliance is placed on the decision in the case of *The Karnal Distillery Co. (P) Ltd. -vs- Union of India* (AIR 1977 SC 509) wherein it is held that the bilateral contract and its terms cannot be changed according to the will of one party. The decision of the Patna High Court in the case of *Mandar Madhusudhan Bahudhandhi Swablambi Sahkari Sammittee Ltd. and Another*

-vs- *State* (AIR 2007 Patna 94) is also relied on. In that decision also it is held that an agreement legally entered into is binding on the parties and the same cannot be unsettled unilaterally. State cannot walk out of a binding arrangement merely because it is economical to do so. The learned counsel has further relied on the decisions in the case of *M/s. Motilal Padampat Sugar Mills Co. Ltd. -vs- State of Uttar Pradesh and Others* [(1979) 2 SCC 409] to contend that in order to invoke promissory estoppel the detriment need not be shown. The decision in the case of *Joshi Technologies International Inc. -vs- Union of India* [(2015) 7 SCC 728] is referred to contend that a writ can be issued where the executive action is not supported by law.

11. The learned Additional Advocate General on the other hand has relied on the decision in the case of Himachal Pradesh Housing and Urban Development Authority -vs- Universal Estate and Another [(2014) 14 SCC 253] wherein it is held that the scope of judicial review is only confined to the decision making process and even if some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution only in furtherance of public interest and not merely on making out a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene. Further the case in Poulad Deochand Patil - vs- Samasta Aher Nhavi Panch Trust (1992 Mh. L.J.

412) wherein it is held that in certain situations ex post facto hearing can be a substitute as it is a well recognised method of complying with the principles of natural justice is also referred.

12. In the light of the above, if the facts in the instant case are kept in view, the rate contract entered into between the parties has not yet been terminated but is only kept in abeyance for the reasons noticed above. It is no doubt true that one of the unsuccessful tenderer, not having gone through the competition cannot now make an offer to supply at half the cost without basis for such offer, as otherwise the very sanctity of going through the tender process and landing a contract will be defeated. But at the same time the contractor who deals with the Government is also required to be fair as any purchase for the Government is by spending from the public exchequer and element of public interest is involved and it cannot be considered as purely commercial transaction between two businessmen. If that be the position, even if the offer of KMF cannot be the basis, the aspect relating to "Fall Clause" contained in the tender document cannot be ignored.

13. In that circumstance if the respondents are able to establish their contention that the petitioner is selling the same product at a lower price to the other customers than the price which is quoted to the respondents, during the currency of the contract period, certainly they can act in terms of the contract and arrive at a decision in the matter, but at this stage it is only at the stage of keeping in abeyance. The respondents have along with the memo dated 08.02.2017 produced the documents relating to the effort made to resolve the issue by holding a meeting and also stating about the non-cooperative attitude of the petitioner. That apart a tabulated statement is filed at Annexure-R11 as referred above to indicate that the same products are being sold at a lesser price to others. The petitioner in response has through the memo dated 27.02.2017 produced the cash receipts dated 21.03.2016 to point out that the products are in fact being sold at a higher price. The learned Government however made an attempt to point out that they are not the very same products. The disputes of such nature cannot be decided in a writ petition that too in a matter relating to

contract. The meeting arranged by this Court in the course of the proceedings also has not been conclusive and no final decision has been taken by the respondents as the petitioner has been non-responsive.

14. In the above background, though this Court would not intervene in a contractual matter, the examination of the decision making process within the limited power will disclose that the respondents through the impugned letter dated 22.04.2016 without disclosing any reasons has kept the rate contract in abeyance and the representation dated 01.07.2016 has not resulted in a final conclusion. The contract cannot be kept in suspended animation indefinitely to the detriment of one party. Hence, this Court deems it necessary to direct the respondents to grant an opportunity of hearing to the petitioner by putting forth all the adverse material to the petitioner in invocation of the "Fall Clause" and take a final decision in the matter so that the party committing the breach could be proceeded against by the other in accordance with law.

15. To enable such consideration, it is not necessary to quash the impugned communication dated 22.04.2016 at this stage as reasons are now disclosed. However, it is necessary to direct consideration of the representation dated 01.07.2016 by providing an opportunity of hearing and pass orders in accordance with law within a time frame so as to avoid uncertainty.

16. In the result, the following:

ORDER

i) The respondents are directed to consider the representation dated 01.07.2016 and all additional materials and take a decision in the matter in accordance with law within four weeks from the date of receipt of a copy of this order.

ii) The petition is disposed of accordingly. No costs.