(1989) 09 MP CK 0017

In the Madhya Pradesh High Court

Case No : M.P. No. 4004 of 1989

Navranglal Mittal APPELLANT

Vs

National Thermal Power Corporation Ltd. and Another RESPONDENT

Date of Decision : 26-09-1989

Acts Referred:
Constitution of India, 1950 — Article 12, 14

Citation : (1990) ILR (MP) 299 : (1990) 35 MPLJ 126 : (1990) MPLJ 126

Hon'ble Judges : D.M. Dharmadhikari, J;B.C. Varma, J

Bench : Division Bench

Advocate : R.P. Verma, for the Appellant; P.S. Nair, for the Respondent

Final Decision : Allowed

Judgement

D.M. Dharmadhikari, J.

The order in the present petition shall also govern the disposal of Miscellaneous Petition No. 3842/1989 (Mis. Swastik Steels, Gwalior and Anr. v. National Thermal Power Corporation Ltd., Korba and Anr.) which is on the same subject matter and raises similar facts and questions of law.

The petitioners in the two cases are business concerns. They are aggrieved by the alleged hostile discriminatory treatment meted out to them in the matter of sale of conveyor belts of various types and sizes by the respondent - National Thermal Power Corp. Ltd. which admittedly being an undertaking of Government of India is ''State'' for the purpose of Article 12 of the Constitution. The petitioners complain that they have been arbitrarily excluded in the matter of due consideration of their tenders for the purpose of the disposal of the above goods, by the National Thermal Power Corp. Ltd. (shortly referred as N.T.P.C.) in selecting and accepting tender of the respondent No. 2 vide document Annexure R/1 dated 4/5-7-1989 by relaxing the terms and conditions of the tender-notice (Annexure-P/1). The relevant facts leading to the petitioners'' grievances may now be stated: The N.T.P.C. vide Annexure-P/1 invited tender upto 25-4-1989 for disposal of amongst other items Nylon Conveyor Belt of length more than 3 meters in quantity of 101 M.T. The relevant terms and conditions of the tender on which the petitioners place reliance are contained in clause 9 of the notice as Annexure-A. Clause 9 of the notice inviting tenders on which the petitioners place heavy reliance reads as under:

09) Parties should strictly quote "as per our terms and conditions" and no deviations to our terms and conditions will be allowed.

The terms and conditions of the tender in clauses 7 and 18 which are sheet anchor of the arguments of the petitioners, read as under:

"7. On acceptance of the tender, the purchaser will be intimated/notified by a sale order. This sale order will indicate full particulars of the material, quantity, place of availability, sale value, sales tax and any other tax if available. The purchaser shall make the payment within 15 days from the date of sale order in the form of Demand Draft endorsed in favour of M/s. N.T.P.C. Ltd., Korba payable at S.B.I., West Korba branch. In the event of failure on the part of the purchaser, M/s. N.T.P.C. Ltd., reserves the right to cancel the sale order and forfeit the earnest money. M/s. N.T.P.C. Ltd., shall also have the right to recover any loss suffered in consequence thereof."

"18. Conditional tenders will be rejected."

The petitioners in the two cases as also the respondent No. 2 submitted their tenders. The petitioners submit before us that the condition No. 7 read with the condition No. 18 reproduced above clearly held out a declaration to the intending tenderers that they should have entire price money ready with them for payment within 15 days of the acceptance of the tender and the sale order and any conditional tender offering less than full payment within the time fixed would not be accepted.

The respondent No. 2, whose tender has been accepted by the N.T.P.C. had submitted a tender exhibited by the respondents as Annexure-R/3 in Misc. Petition No. 3842 of 1989 which was, according to the petitioners, a conditional tender in which the following specific terms and conditions were proposed as the offer of the party (respondent No. 2):

"We will purchase the materials in two instalments. We will deposit the earnest money at your end. At the receiving of the delivery order we will deposit the cost of 50.5 M/T Material. Balance 50.5 M/T cost of the material we will pay within 30 days. We will get our earnest money after the receiving of the materials as per tender. We are agree with your all terms and conditions of supply."

The petitioners complain that the tender of the respondent No. 2 with offering payment for materials in two instalments was a conditional offer whicn deserved outright rejection in terms of expresed condition No. 18 quoted above. The N.T.P.C. wrongly accepted this conditional tender vide their impugned communication dated 4/5-7-1989 (Annexure-R/1) and extended the facility of payment of price for the material in two instalments by acknowledging receipt of 50% of the price money vide their communication dated 31-7-1989 (Annexure-R/2). The grievance of the petitioners is that this action of the N.T.P.C. was clearly deviation from its own terms and conditions given out to the intending tenderers and thus there was arbitrariness and favouritism shown to respondent No. 2. The petitioners submit that soon after it had come to know the intention of N.T.P.C. to relax the condition of lump-sum payment of the total value of the material within 15 days under condition No. 7 of the tender the petitioner immediately made a fresh offer vide his letter dt. 5-5-1989 (Annexure-P/2) and in his fresh offer he quoted rate of Rs. 49,050/- per M/T for the total material and the price payble in two instalments in an interval of one calendar month. The offer of the petitioner was higher than the offer of the respondent No. 2 which has been accepted at the rate of Rs. 46,188/- per M/T on similar terms and conditions of payment in two instalments and interval of one month.

The petitioner No. 1, M/s. Swastik Steels, Gwalior in M.P. No. 3842 of 1989, had submitted his tender at the rate of Rs. 46,798/- per M/T keeping in view the clear condition that the entire price had to be paid in lump-sum within 15 days of the receipt of the sale order. The difference between the price of the petitioner No. 1 and the respdt. No. 2 which has been accepted comes to only Rs. 9,000/-. The petitioner, therefore, submits that had he known the facility of payment of price money in two instalments could be given, he would have quoted price more than that of the respondent No. 2 and of other tenderers. The petitioner No. 1, M/s. Swastik Steels, also after coming to know that the N.T.P.C. Ltd. is relaxing the terms regarding full lump-sum payment, sent a telegram and a detailed letter (Annex.P/2) requesting for extending similar facility to the present tenderers. The petitioner No. 2 in Misc. Petn. No. 3842/89 complains that keeping in view the onerous condition in the tender notice of full payment of the material within 15 days of the sale order the petitioner No. 2 could not submit his tender for want of ready money but it is stated that he could have also submitted tender had he known that the price money could be paid in two instalments. Learned counsel appearing for the petitioners Shri R. P. Verma and Shri N. C. Jain placed reliance on the decision of the Supreme Court in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, and in K.N. Guruswamy Vs. The State of Mysore and Others, , and contended that the N.T.P.C. in deviating from the terms and conditions contained in the notice and in accepting the conditional tender of the respondent No. 2 offering payment of price in two instalments, has acted in an unfair and discriminatory manner in violation of Article 14 of the Constitution of India.

Shri P. S. Nair, counsel appearing for the N.T.P.C. and Smt. Indira Nair, for the respondent No. 2, supported the action as being fair and non-discriminatory. According to them, there was in fact no deviation from the tender conditions and the offers made by the petitioner were for a lesser price. Hence, the N.T.P.C. was within its powers in accepting the tender of the respondent No. 2 and giving the party facility of lifting material in two instalments as lifting the same in one lot was found to be impracticable. Learned counsel stated that the tender committee in accepting the tender of the respondent No. 2 was not actuated by malice or favouritism and it acted in the best interest of the Corporation and in the interest of the revenue. The respondent No. 2 also took a stand that the sale order having been issued in its favour on 31st of July, 1989 vide Annexure-R/2 there is a complete sale of material in favour of successful tenderer and the remedy of the petitioners lies in making a claim for damages for alleged breach of contract in the Civil Court.

Shri P. S. Nair, appearing for the N.T.P.C. also took some legal pleas and challenges the justiciability of the action in Writ Petition under Article 226 of the Constitution. Attention of the court was invited by the respondent No. 1, N.T.P.C. to the following terms and conditions of the tender:

"TERMS AND CONDITIONS

4. The tender will be submitted on the prescribed bid form enclosed along with the terms and conditions. The tenderer shall affix his signature on the each page of the tender (including terms and conditions). The offer should remain valid for a period of 120 days from the date of opening the tender.

In the event of any dispute or difference of opinion between the N.T.P.C. and the purchaser as to the respective rights and obligations of the parties hereunder or as to the true intent and meaning of these presents or any article or condition thereof, such disputes or differences of opinion (except the matter regarding which the decision has been especially provided for in the terms and conditions) shall be referred to the sole arbitration of an officer of the N.T.P.C. Ltd. who shall be nominated for the purposes for the time being and his decision shall be final, conclusive and binding on the parties. For the purpose of the contract, the General Manager of the N.T.P.C. Ltd., will appoint the arbitrator.

M/s. N.T.P.C. Ltd., reserves the right to accept or reject any or all the offers without assining any reason whatsoever and without financial implications to either party."

Basing his argument on the above condition No. 19 learned counsel for the N.T.P.C. contended that a right was reserved to reject or accept a tender without assigning any reason.

In respect of the above ground it is enough to say that the constitutional mandate contained in Article 14 of the Constitution cannot be got over or circumvented by putting such an arbitrary term in a contract by State or an instrumentality of ''State'' under Article 12 of the Constitution. If such arbitrary power or right is allowed to ''State'' falling under Article 12, the right of equality under Article 14 of the Constitution to a citizen can be easily snatched by introducing a self serving term in a contract as mentioned above. In our view, putting term 19 in the contract and arrogating to itself power to accept or reject a tender without assigning any reason, the Corporation which is State under

Article 12 of the Constitution, cannot wriggle out of its obligation under Article 14 of the Constitution, where its action is found to be not in conformity with fairness and non-discriminatory attitude.

Counsel for the N.T.P.C. next contended that the tenders submitted by the petitioners were also conditional tenders and the tender of the petitioner No. 1 in Misc. Petition No. 3842 of 1989 was open only for 30 days and not for 120 days as contempleted in condition No. 4 of the tender. The prices quoted by them were also lower than that of the respondent No. 2. The counsel contended that the price money was taken in two instalments because of the practical difficulty in offering the material in one lot by the N.T.P.C. The acceptance of price in two instalments, according to the counsel for the N.T.P.C, cannot be said to be any serious deviation of the terms of the tender because this was the practical solution found after acceptance of the tender. The counsel also contended that the action of the N.T.P.C. is not amenable to writ jurisdiction of this Hon''ble Court as it has demonstrated from its return and proceedings of the tender committee that the acceptance of offer of the respondent No. 1 was neither mala fide nor an act of favouritism. The petitioner also raised a preliminary objection that in the face of arbitration clause 16 in the tender conditions, the remedy of the petitioner was to resort to the remedy of arbitration and not to invoke the writ jurisdiction of this Court.

Before we deal with the contentions of the parties on the question of justiciability of the action of the N.T.P.C. in the matter of accepting tender of the respondent No. 2, we would dispose of the objection based on alternative remedy of arbitration. It is settled that alternative remedy is not an absolute bar to the maintainability of the writ petition. We find from reading of arbitration clause 16 that the sole arbitrator is to be an officer of the N.T.P.C. Ltd. There is, thus, no independent forum for getting decisions on the controversial issues. It is also doubtful whether disputes and differences arising between the tenderers concerning matters prior to acceptance of tender are within the purview of the arbitration clause. Even if we hold that the arbitration clause is attracted to the controversy in question, we are not inclined te drive the parties to the arbitration forum when we have heard the parties at length and the controversy is such which can be decided on papers without necessity of any oral evidence in these writ proceedings. The preliminary objection, therefore, based on the plea of alternative remedy of arbitration is rejected. So far as the justiciability of the action of the N.T.P.C. in the proceedings under Article 226 of the Constitution is concerned we do not think that the cases cited by the respondents in C.K. Achuthan Vs. The State of Kerala and Others, , G.J. Fernandez Vs. State of Mysore and Others, , Life Insurance Corporation of India Vs. Escorts Ltd. and Others, , E. Venkatkrishna v. The Indian Oil Corpn. Ltd., Bombay, AIR 1989 Karnataka 35, B. B. Sambaiah Vs. Lakshmi Venkateswara Devasthanam and Others, and Gujarat University Vs. N.U. Rajguru and Others, , are of any assistance to them. The law laid down by the Constitutional Bench of the Supreme Court in the case of Ramana Dayaram Shetty (supra) relied by the petitioner has not been whittled down or deviated by the Supreme Court in any of its later decisions. We find that it still holds the field in the branch of administrative law in extending protection of Article 14 of the Constitution to citizens in all State action. This is evident by the latest decision of the Supreme Court reported in Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay, , wherein the R.D. Shetty''s case (supra) has been referred and relied in para 25 to reiterate the ambit and scope of Article 14 of the Constitution as under:

"Where there is arbitrariness in State action, Article 14 springs in and judicial review strikes such an action down. Every action of the Executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public authority, it should meet the test of Article 14."

In the case of R. D. Shetty (supra) the Supreme Court held the State to be bound by mandate of Article 14 even while acting in its purely administrative capacity and even in contractual field. The Court observed in para 10 of R.D. Shetty''s case (supra) as under:

"It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them."

Reference may also be made in the above connection to the much older decision of the Supreme Court in Guruswamy''s case (supra) wherein in para. 19 it was commented in the matter of an excise contract granted to a party on higher offer after the bidding was over, who had not participated in the auction, as under:

"But that apart, this would, in our opinion, run counter to the policy of the legislature which is that matters of such consequence to the State revenue cannot be dealt with arbitrarily and in the secrecy of an office. Whatever is done must be done either under the Rules or under a Notification which would receive like publicity and have like force, and of which the people at large would have like notice. Arbitrary improvisation of an ''ad hoc'' procedure to meet the exigencies of a particular case is ruled out. The grant of the contract to Thimmappa was therefore wrong."

Judging therefore the action of the N.T.P.C. on the touch stone of Article 14 of the Constitution as explained in the above decisions of the Supreme Court in its application in the administrative and contractual field, we are of the opinion that in accepting the conditional offer of the respondent No. 2 by giving him facility of payment of price in two instalments, the N.T.P.C. cannot be said to have acted without discrimination and in a fair and just manner. The contention of the petitioners has great force that had they known that the price of material could be paid in two or more instalments they would have definitely come out with offers higher than those of the respondent No. 2. The respondent No. 1, in our opinion, clearly acted in an arbitrary manner in relaxing the condition of payment of full price within 15 days of the sale order and in extending facility of two instalments to the respondent No. 2, and thus accepted his conditional offer. It may be that the counsel for the respondents is right in contending that in deviating from the condition the N.T.P.C. was actuated by no extraneous circumstances but by the practical aspect of the matter as the material could not be offered in one lot. But, in any case, if there was a deviation to be made from the tender conditions even at a later stage, the N.T.P.C. was expected to retender the material so as to afford equal opportunity to all to participate and make fresh offers for the material on competitive basis.

We have already held that the self serving clause reserving to the Corporation the right to accept or reject the tender without assigning any reason is not a just clause as to relieve them of the obligations or mandate of Article 14 of the Constitution which has overpowering influence and controls all contractual action of a public body/authority falling within the definition of ''State'' under Article 12 of the Constitution. We are also not impressed with the argument of the N.T.P.C. that the offers of the petitioners were also conditional and lower to the respondent No. 2. We have already explained that the rates quoted would have materially differed had all the parties known before submitting tender that the price could be paid in two instalments within 30 days. The petitioners informed us that for conveyor belts the market is ready and after lifting one lot on payment of half price it would have been possible for all the parties to raise money for the second lot. That would have definitely affected the offer of the price in the tenders.

The action of the respondent No. 1, N.T.P.C, therefore, does not satisfy the test of fairness and non-discriminatory treatment in the matter of grant of right to purchase, its disposals by way of tender.

For all the above reasons the petition is allowed and acceptance of tender of the respondent No. 2 vide communication dt. 4/5-7-1989 (Annexure-R/1) is hereby quashed with a direction in the nature of mandamus to the respondent No. 1, N.T.P.C. to invite fresh tenders for the material in question i.e. Nylon Conveyor Belts and to afford opportunity to all including the petitioners to submit their tenders in accordance with tender conditions contained in Annexure P/1 or those revised for providing facility and payment of price in one or more instalments. The petitioners shall get costs of this petition from the respondent No. 1, N.T.P.C. Counsel fee Rs. 500/- if certified.