
(1997) 03 AP CK 0049

In the Andhra Pradesh High Court

Case No : Writ Petition No. 2840 of 1997

Navyuga Engineering Co. Ltd. and Another

APPELLANT

Vs

Visakhapatnam Port Trust and Another

RESPONDENT

Date of Decision : 17-03-1997

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1)

Citation : (1997) 2 ALT 825 : (1998) 1 ARBLR 314

Hon'ble Judges : C.V.N. Sastri, J

Bench : Single Bench

Advocate : C.V. Mohan Reddy, for the Appellant; K. Srinivasa Murthy, for the Respondent

Judgement

C.V.N. Sastri, J.—The petitioner is an Engineering Contractors company which submitted its tender to the Visakhapatnam Port Trust for the construction of a multipurpose Berth response to the tender notification dated 16-3-1997 issued by the Port Trust. In this Writ petition petitioner seeks to assail the action of the respondent-Port Trust in deciding not to open or consider the price bid submitted by the petitioner view of the filing of an F.I.R. by the C.B.I. against the petitioner and others alleging the commission of certain offences in connection with a different work previously entrusted to the petitioner by the Visakhapatnam Port Trust. The said action is sought to be challenged on the ground that it amounts to blacklisting of the petitioner and that the same is arbitrary, illegal and violative of the Fundamental Rights guaranteed to the petitioner under Articles 14 and 19(1)(g) of the Constitution.

2. It is not in dispute that the petitioner was pre-qualified and the tender documents were issued to it. The tender documents consist of two parts, Part-1 consisting of techno-commercial bid and Part-2 price bid. Part-1 consisting of the techno-commercial bid was opened on 5-12-1996 in the presence of all the bidders including the petitioner. Thereafter all the bidders were called for discussions and certain modifications on the techno-commercial aspects of the

tenders were suggested by the respondent apart from requesting the bidders for withdrawal of certain condition. The petitioner also was called for the said negotiations and accordingly the petitioner agreed for the modifications suggested by the respondent. By letter dated 5-2-1997 the petitioner was asked by the respondent-Port Trust to submit a revised price bid in view of the changes made in the techno-commercial bid of the petitioner if it so wishes. The petitioner, by its letter dated 10-2-1997 informed the respondent that the revised price bid will be submitted on 15-2-1997. In the meantime the respondent issued the impugned letter dated 12-2-1997 informing the petitioner that it is proposed not to open the price bid submitted by the petitioner as the C.B.I., S.P.E., Visakhapatnam, have filed an F.I.R. dated 20-1-1997 in the Court of the Special Judge for C.B.I. cases, Visakapatnam. The petitioner was, therefore, requested to give its representation, if any, in this regard before 14-2-1997. Apprehending that the price bids submitted by the other tenderers may be opened and finalised without considering its own price bid, the petitioner immediately rushed to this court and filed the present writ petition on 13-2-1997 and sought for interim orders. This Court, by its order passed on 13-2-1997, directed the respondents to postpone the opening of the bids and finalisation of the same upto 21-2-1997. Meanwhile the petitioner was directed to make a representation which shall be considered by the Port Trust and appropriate orders be passed thereon. Pursuant to the said interim direction, the petitioner submitted a representation to the respondent on 14-2-1997. The same was considered and rejected by the respondent on 20-2-1997. Though no formal application for amendment of the prayer in the writ petition is filed by the petitioner in this behalf, the petitioner seeks to challenge the validity of the proceeding dated 20-2-1997 also whereby the respondent rejected the petitioner's representation.

3. Mr. C. V. Mohan Ready, the learned Counsel for the petitioner, contended that the impugned action clearly amounts to blacklisting and that it is arbitrary and violative of Articles 14 and 19 of the Constitution and the principles of natural justice. He also contended that allegations in the F.I.R. which is merely information of a preliminary nature, cannot form the basis for any punitive action and the petitioner cannot be deprived of its right to participate in the bid merely on the basis of the F.I.R. without any independent enquiry conducted by the respondent in regard to the alleged irregularities said to have been committed by the petitioner previously. He also submitted that the allegations contained in the F.I.R. are totally false and baseless as the work, which is the subject matter of the F.I.R., was duly completed by the petitioner more than two years ago and no whisper of any allegation has been made about the quality of the work and the F.I.R. is lodged after two years of the completion of the work. In the meantime, the petitioner was also awarded another work which clearly goes to show that the allegations in the F.I.R. are baseless. He further contended that even if it is taken on its face value, the F.I.R. does not disclose any offence and that the impugned action, which is based solely on the F.I.R. is manifestly arbitrary. He finally submitted that the investigation on the basis of the F.I.R. may take a long

time and meanwhile the petitioner cannot be excluded from consideration for any work and the consequences of the impugned action will be disastrous to the petitioner as the petitioner cannot bid for any other work in the Port Trust or in any other organization for that matter. In support of his contentions, the learned Counsel for the petitioner has placed reliance mainly on the decision of the Supreme Court *Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another*, , *Joseph Vilangandan Vs. The Executive Engineer, (Pwd), Ernakulam and Others*, , and *Liberty Oil Mills and Others Vs. Union of India (UOI) and Others*, .

4. Mr. K. Srinivasa Murthy, the learned Counsel for the respondent-Port Trust, has, on the other hand, contended that the decision taken by the respondent not to consider the bid of the petitioner is a bona fide decision taken in public interest, that the work in question, namely, construction of multi-purpose berth in the port is a work of national importance and is of the value of thirty crore rupees, that the public interest alone is the paramount consideration, that private interest does not come into picture at all, that the action of the Port Trust cannot be challenged in the absence of mala fide and unless it is shown to be so arbitrary or shocking that no reasonable man can come to such conclusion. Even if two views are possible, it cannot be a ground for interference. He further contended that there is no blacklisting, here as the petitioner is not debarred or prohibited from submitting any tender and that the petitioner who is under a cloud and against whom serious allegation are made, cannot insist on being allowed to participate. He also submitted that the F.I.R. is a relevant piece of information on the basis of which action is taken and there is no need for independent or parallel enquiry by the respondent which may be time consuming. Any delay in the execution of work or postponement of the same till the completion of the enquiry will not be in public interest. It is not practicable or feasible to hold such a parallel enquiry and complete it before opening the price bids. In support of his submissions, the learned Counsel for the respondent has placed reliance on the judgments of the Supreme Court reported in *Tata Cellular Vs. Union of India*, and *Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others*, .

5. The short question for consideration in this case is whether the action of the respondent in refusing to consider the price bid of the petitioner is justified or not and whether there are any valid grounds for interference by this court under Article 226 of the Constitution.

6. The principles with regard to the scope and extent of judicial review are well settled and well-known. The Apex Court in *Tata Cellulars v. Union of India* (supra), on an exhaustive review of the entire case law on the subject, has summarised the principles in para 113 of its judgment which are as follows :

"(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court 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 view of the administrative decision is permitted it will be substituting its own decision, without 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, sub-decisions are made qualitatively by expert.

(5) The Government must have freedom of the contract. In other words, a fair play in the joints is a necessary concomitant for a administrative body functioning in any administrative sphere or quasi-administrative sphere. However, the decision must not be tested by the application of Wednesbury principle of reasonableness (including the 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."

In the latest judgment in *A.F. & Constructions Ltd. v. Trafalgar House Construction (I) Ltd.*, (supra) the Supreme Court, while reiterating the said principles, has pointed out that it was not permissible for a court of law to interfere in grant of contract where there is no allegation of malice or ulterior motive or mala fides. The Supreme Court further held in the said decision that the directions of the High Court for re-bidding is not in public interest as it is bound to result in escalation of cost on account of the delay.

7. The sheet anchor of the arguments of the learned Counsel for the petitioner is the judgment of the Supreme Court in *E.E. & C. Ltd. v. State of W.B.*, (supra) where the Supreme Court held that blacklisting has the effect of preventing a person from the privilege and advantage of entering into lawful relationship with the Government for purpose of gains and fundamentals of fair play require that the person concerned should be given an opportunity to represent his case before he is put on the blacklist.

8. I am prepared to assume that the impugned action in this case amounts to a sort of blacklisting as it has been decided by the respondent not to open or consider the bid of the petitioner. The question for consideration, therefore, is whether the petitioner has been given a reasonable opportunity of making its representation or not. By the impugned letter dated 12-2-1997 the petitioner was called upon to give its representation, if any, in the matter before 14-2-1997. Without doing so, the petitioner chose to rush to this court. By the interim order dated 13-2-1997 this court directed the petitioner to make its representation and the Port Trust was directed to consider the same and pass final orders. Pursuant to the said direction of this court, the petitioner submitted

its representation on 14-2-1997. After considering the same the Port Trust rejected it on 20-2-1997. The learned Counsel for the petitioner has submitted that giving an opportunity to make a representation was only an empty formality and it is no opportunity in the real sense as the petitioner was not made aware of the allegations contained in the F.I.R. and even the copy of the F.I.R. was not supplied to it. The learned Counsel for the respondent, on the other hand, countered by saying that the petitioner was fully aware of the allegations contained in the F.I.R. and the same is borne out by the very averments made in para 5 of the writ affidavit. What is stated in para 5 of the writ affidavit is that the petitioner understands and believes the same to be true that on the basis of certain complaints the C.B.I. had undertaken an investigation into awarding of contract of construction of EQ 7 to the petitioner in the year 1992. This by itself cannot be treated as an admission by the petitioner that it was aware of the contents of the F.I.R. as it is stated in the self-made para of the affidavit that it is totally in dark as to the proceedings initiated by the C.B.I. Be that as it may, when I put it to the learned Counsel for the petitioner now that the petitioner is supplied with the copy of the F.I.R. whether it wished to make any further representation in the matter, the learned counsel for the petitioner has submitted that no useful purpose will be served by making any further representation at this stage since the respondent has already come to a decision in the matter. He, therefore, invited me to consider the matter on merits and pronounce orders. Even on the authority of the decision *E.E. & C. Ltd. v. State of W.B.*, (supra) what is required is that an opportunity should be given to the petitioner to make a representation before taking any action against it in the nature of blacklisting.

9. It is well settled that the principles of natural justice cannot be put into a straitjacket formula and there is no hard and fast rule as to the manner in which opportunity should be given. The authority is not bound to follow any rigid or hide bound procedure. What is required is that the procedure must be fair having regard to the facts and circumstances of the case. (See *Liberty Oil Mills v. Union of India* (supra)). In the instant case there are no allegations of mala fides or favouritism or any other improper motive attributed to the Port Trust. The allegations in the F.I.R. may or may not be correct. But the same cannot be said to be totally irrelevant in considering the question whether the petitioner should be allowed to participate in the price bid or not. The allegations, if true, are quite serious in nature and they have certainly some bearing on the question of desirability of considering the petitioner for the award of an important work of this nature. The very fact that the petitioner was pre-qualified and its techno-commercial bid was also accepted after calling the petitioner for negotiations alongwith other bidders shows that the respondent had not bias against the petitioner and it acted in good faith. At this stage the F.I.R. came to be registered by the C.B.I. against the petitioner and some other officers of the Port Trust. When this fact came to its notice, the respondent felt that it was not desirable to open the price bid of the petitioner for the new contract under consideration. Accordingly it issued the impugned letter dated 12-2-1997 calling upon the

petitioner to make its representation. After duly considering the representation, the respondent came to the conclusion that it was not in public interest to allow the petitioner to participate in the bid and that the price bid submitted by the petitioner should not be opened. Under the circumstances, it is difficult to hold that the said action of the respondent is either arbitrary or that it is biased or vitiated by any extraneous considerations. I am not persuaded to accept the submission of the learned Counsel for the petitioner that it is not open to the respondent to base its action entirely on the F.I.R. without conducting an independent parallel enquiry regarding the allegations contained in the F.I.R. Any such enquiry is bound to be time consuming and it is likely to delay the execution of the work which is not in public interest. It is true that by reason of the impugned action there is bound to be some prejudice caused to the petitioner. But when it is a question of public interest against private interest, private interest must yield to public interest. It is not as if the petitioner has got any vested right to get the contract awarded to it and even if the price bid of the petitioner is opened, there is no guarantee that ultimately the contract would be awarded to the petitioner.

10. The learned Counsel for the petitioner has submitted that there is no harm if the bid submitted by the petitioner is also taken into consideration by the respondent and it will be open to the respondent, after such consideration either to reject or accept the bid of the petitioner. I am, however, of the view that this is a matter which has to be left for the decision of the respondent, a decision which has to be taken bona fide and in public interest. When several other qualified bidders, without any allegations against them, are available, the respondent might have felt that it is not desirable in public interest to consider the bid of the petitioner against whom a premier investigating agency like the C.B.I. has registered a case and the investigation in that behalf is pending. It cannot be said that such a conclusion is so perverse or shocking that no reasonable person would have come to such conclusion. On an overall view of the matter, I am not persuaded to agree with the contention of the learned Counsel for the petitioner that the impugned action suffers from the vice of arbitrariness or discrimination.

11. For the foregoing reasons, I do not find any merit in this writ petition and it is accordingly dismissed. It is, however, made clear that this will not preclude the petitioner from sub-mitting any other tenders either to the respondent-Port Trust or any other organisation and any such tender submitted by the petitioner will have to be considered on its own merits.

12. There will be no order as to costs.

13. After the order was pronounced, Mr. C. V. Mohan Reddy, the learned Counsel for the petitioner, made a request for suspending the operation of the judgment for a period of one week from today so as to enable him to file a writ appeal and obtain necessary orders. Accordingly, the operation of the order is suspended for one week from today.

14. Petition dismissed.