

(1995) 09 DEL CK 0012

In the Delhi High Court

Case No : Civil Miscellaneous Appeal No's. 2999 and 4995 of 1995

N.J. Contractors and Engineers and Another	APPELLANT
Vs	
Mahanagar Telephone Nigam Ltd. and Others	RESPONDENT

Date of Decision : 11-09-1995

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 19

Citation : (1995) 2 ARBLR 495 : (1995) 60 DLT 457

Hon'ble Judges : R.C. Lahoti, J; Lokeshwar Prasad, J

Bench : Division Bench

Advocate : V.C. Rishi, Mukta Sharma and A.K. Sikri, for the Appellant;

Judgement

R.C. Lahoti, J.

(1) The petitioner is a contractor. He has entered into with, and performed several contracts under, the respondents. On 17.8.95 the petitioner

(2) On a special mention made on behalf of the petitioner, the matter was taken up for hearing on 17.8.95, late in the day. This Court directed a notice to be issued to the respondents. Interim relief was allowed to the petitioner by directing that no work order shall issue pursuant to the acceptance of any tender under challenge in the petition.

(3) The respondents have filed their counter and explained in details the facts and circumstances in which the tenders were invited by them. According to the respondents they had notified four works initially by inviting open tenders. In all 19 tenders were received. A high level Tender Evaluation Committee was constituted which opened the tenders on 30.5.95. Seven tenders were rejected for the reasons assigned on the file. The petitioner was one of the tenderers and his tender was rejected because earnest money was not deposited Along with the tender.

(4) On 22.6.95, a decision was taken cancelling all the tenders which were

received earlier. Instead it was decided to invite Limited Tenders in accordance with the purchase policy of M.T.N.L. dated 24th August, 1987. The policy provides inter alias as under:-

"2.Limited Tenders In Limited Tender, only the most likely and suitable sources are addressed. To bring in adequate competition, it is necessary that at least five sources are addressed. Where number of available sources of supply is less than five the number of suppliers to be addressed may be reduced at the discretion of the Competent Authority. Wherever available, evaluated vendor lists maintained by the Organisation will be used but in other cases the suppliers are to be addressed based on past experience. In either case, the choice of firms to be addressed should be carefully made by an officer specifically authorised for the purpose. As a rule only purchases ranging between Rs. 5,000.00 and Rs. 3 lakhs should be made by means of Limited Tender. However, even in cases involving purchases of more than Rs. 3 lakhs, if it is felt necessary to resort to limited tender due to urgency or any other valid reasons, then it would be open to the officer authorised for the purpose to record the reasons for resorting to Limited Tender in preference to Open Tender System and obtain approval of the Competent Authority."

(5) Eight sources/tenderness were identified as they were most likely and suitable sources, looking to the nature of the work which was required to be executed urgently. These works related to 5 Group Housing Societies. The decision to invite the limited tenders was as under:-

"(1)The number of cases where distribution cable laying has been proposed for Group Housing Societies will be identified. (2) Based on the distribution schemes issued by Planning and Survey of the area as regards the nature of the surface to be reinstated, a layout sketch shall be prepared with details, to form part of specification, for each case. (3) Technical specification will be based on the specification for the earlier tender. However, terms and conditions shall additionally include provision for pre-inspection by the bidder and condition to obtain a certificate from the unit officers and authorised representative of the Group Housing Societies for satisfactory completion of the reinstatement works to avoid future dispute. (4) Limited short-term tender shall be invited separately for each case by DGM(CCS)/DGM(CCN) respectively. (5) The tender shall be addressed to those parties who had submitted their bids in response to earlier open tender for the same work and also had fulfilled the requisite conditions. (6) The tender evaluation committee shall be constituted with Dgm (CCS), Cao and DE(Co-ord) of the unit concerned. (7) The committee will evaluate each case separately and forward the recommendation to GM(PM) of the unit concerned."

(6) While identifying the suitable sources/parties who were notified for submitting the limited tenders, the process of short listing the parties who had submitted the tenders in response to the public notice inviting tenders was undergone and those whose tenders were found to be valid they were chosen. Inasmuch as the petitioner's tender was not a valid tender, he was excluded.

(7) While submitting tender in response to the earlier public notice inviting tenders, the petitioner was required to furnish earnest money just as the other tenderers had done to satisfy the requirement of tender conditions. It was permissible to furnish bank guarantee in lieu of earnest money. Instead of furnishing the bank guarantee the petitioner had filed a photo copy of a bank guarantee Along with his tender documents. This is an admitted fact. The photo copy was refused to be accepted by the respondents as bank guarantee for earnest money and that is why his tender was rejected. .

(8) The question arising for decision is whether the action of the respondents in excluding the petitioner from participation in the process of Limited Tenders can be said to be arbitrary.

(9) Both the learned Counsel for the parties have relied on the law laid down by their Lordships of the Supreme Court in *Tata Cellular Vs. Union of India*, and *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, .

(10) It is well settled that even in the field of contracts the State cannot afford to act arbitrarily. Its action is open to judicial review and must satisfy the test of reasonableness. Arbitrariness, caprice, whim and favoritism would vitiate the governmental action even in the field of contracts. 460

(11) In *Tata Cellular* case (supra) their Lordships have held:- "The principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. However, there are inherent limitations in exercise of that power of judicial review. The principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision making process itself. It is thus different from an appeal. When hearing an appeal, the Court is concerned with the merits of the decision under appeal. Since the power of judicial review is not an appeal from the decision, the Court cannot substitute its own decision. Apart from the fact that the Court is hardly equipped to do so, it would not be desirable either. Where the selection or rejection is arbitrary, certainly the Court would interfere. It is not the function of a Judge to act as a super board or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator. The duty of the Court is thus to confine itself to the question of legality. Its concern should be: 1. Whether a decision-making authority exceeded its powers? 2. Committed an error of law, 3. Committed a breach of the rules of natural justice 4. Reached a decision which no reasonable Tribunal would have reached, or 5. Abused its powers."

(12) In *Sterling Computers* case, their Lordships of the Supreme Court have held :- "Public authorities must have the same liberty as they have in framing the policies, even while entering into contracts because many contracts amount to implementation or projection of policies of the Government. In contracts having commercial element, some more discretion has to be conceded to the authorities giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms, so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. It is not possible for Courts to question and adjudicate every decision taken by an authority, because many of the Government. Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. But even in such matters they have to follow the norms recognised by Courts while dealing with public property, though the decisions taken in bona fide manner although not strictly following the norms laid down by the Courts, are upheld on the principle laid down by Justice Holmes, that Courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive." Unlike policies, contracts are legally binding commitments and they commit the authority which may be held to be a State within the meaning of Article 12 in many cases for years. Public authorities are essentially different from those of private persons. Even while taking decision in respect of commercial transactions a public authority must be guided by relevant considerations and not by irrelevant ones. If such decision is influenced by extraneous considerations, which ought not to have taken into account, the ultimate decision is bound to be vitiated, even if it is established that such decision had been taken without bias. By way of judicial review the Court is not expected to act as a Court of appeal while examining an administrative decision and to record a finding whether such decision could have been taken otherwise in the facts and circumstances of the case. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the "decision making process". By way of judicial review the Court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the state and the public, then Court cannot act as an Appellate Authority by substituting its opinion in respect of selection made for entering into such contracts. But at the same time the Courts can certainly examine whether "decision making process" was reasonable, rational not arbitrary and violative of Article 14. Once the procedure adopted by an authority for purpose of entering into a contract is held to be against the mandate of Article 14, the Courts cannot ignore such action saying that the authorities

concerned must. have some latitude or liberty in contractual matters and any interference by Court amounts to encroachment on the exclusive right of the executive to take such decision."

(13) It is pertinent to note that the decision of the respondents cancelling all the tenders received by them in response to public notice inviting tenders is not under challenge. The petitioner has also not challenged the decision of the respondents to resort to Limited Tenders. It is very much apparent that the petitioner's tender having been cancelled and he having become aware of the respondents having invited Limited Tenders made an effort at joining and participation in the Limited Tenderers. The petitioner would have had no grievance if the Limited Tender forms would have been issued to him and the Limited Tender submitted by him was also taken up for consideration. We have, Therefore, only to examine and test if the petitioner has been unreasonably and arbitrarily excluded from such participation.

(14) The respondents have decided to invite Limited Tenders only in respect of the work relating to Group Housing Societies in view of the urgency involved therein. The work value of the Limited Tenders so invited does not exceed the financial limits laid down by the policy. The respondents have adopted a reasonable criterion for short-listing the eligible parties/sources to whom the invitation for submitting Limited Tenders was left open. The criterion so adopted is one which could have been reasonably adopted. It cannot be said that the respondents have acted arbitrarily or capriciously in adopting such criterion. There is no material available on record to hold that the respondents have deliberately manipulated the criterion so as to exclude the petitioner or to show favor to any one of the parties whose tender has been accepted.

(15) Though it was submitted at one stage by learned Counsel for the petitioner during the course of hearing that the way in which the respondents have short listed the tendering parties would have the effect of excluding the petitioner for all times to come from submitting tenders and that would offend his fundamental right to trade and earn livelihood guaranteed under Article 19 of the Constitution, but we have found no merit in this contention. They were these very works in respect of which tenders were invited publicly earlier and those parties or tenderers whose tenders were found to be not acceptable at that stage have been excluded from Limited Tenders invited at a later stage. The right of the petitioner to submit tenders in respect of other works undertaken by the respondents either by public notice inviting open tenders or by inviting Limited Tenders is not taken away. In fact this position was made clear by learned Counsel for the respondents also during the course of hearing.

(16) For the foregoing reasons, we find the petition without any merit and liable to be dismissed. It is dismissed accordingly, though without any order as to the costs.