

(2010) 05 SHI CK 0159
In the High Court Of Himachal Pradesh

Om Prakash Sharma	Vs	APPELLANT
H.P.T.D.C. and Others		RESPONDENT

Date of Decision : 19-05-2010

Acts Referred:

Citation : (2010) 05 SHI CK 0159

Hon'ble Judges : Dev Darshan Sud, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Dev Darshan Sud, J.—The petitioner challenges the tendering process by the Himachal Pradesh Tourism Development Corporation - respondent No. 1. In nutshell, the case made out by the petitioner is that he had submitted his tender in terms of the advertisement in the newspaper (Annexure: R-1) issued by respondent No. 1. However, the tender was returned to him on 19th January, 2010 on the ground that it had been received after the time fixed for receipt of tenders.

2. At this juncture, two conditions of the tender as contained in Annexure: R-1 may be extracted:

1. The tender documents can be collected from the office of the Project Officer, HPTDC on any working day between 10.00 A.M. to 5.00 P.M. from 18.11.2009 to 27.11.2009 in the shape of demand draft drawn on a scheduled or nationalized bank and pledged in favour of the Managing Director, HPTDC, Shimla payable at Shimla must accompany each tender. The tender shall be receive on 30.11.2009 up to 3.30 P.M. in the office of the Project Officer, HPTDC, Shimla and the same shall be opened on 2.12.2009 at 11.30 A.M....

10. In case of holiday on 2.12.2009 the tender shall be received and opened on next working day.

3. Submission made by the learned Counsel appearing on behalf of the Himachal

Pradesh Tourism Development Corporation is that the petitioner was in violation of Clause 1 of the condition of tender which was mandatory and, therefore, his tender could not be accepted. Learned Counsel appearing for respondent No. 3 submits that clause No. 1 is mandatory and had to be complied with in letter and spirit. According to him, clause No. 10 could not have been incorporated in the conditions as 2nd December, 2009 was not holiday. At best this clause was a surplusage and could not whittle down the essential condition of Clause 1.

4. Sh. J.S. Bhogal, learned senior Advocate also submits that the fact that the tender was submitted late is corroborated by the letters of protest lodged by not only respondent No. 3 but the other participants also. He has also pointed out to the decision of the Tender Opening Committee (Annexure: R-2/1) and particularly to the noting which reads:

Out of four number bidders as mentioned above, only three number participants have submitted their offer within the schedule time of 3.30 PM. The contractor mentioned at Sr. No. 4, Sh. Om Parkash Sharma did not submit his tender within the stipulated time. He has submitted his offer/tender at 3.40 PM, hence, the Committee so constituted for opening of tender vide this office order dated 2.12.2009 has not considered his tender.

5. I have heard learned Counsel for the parties.

6. There is no material on record to establish that any record was maintained by the Corporation to show the particular time at which the tenders were received. No register or writing in the office record has been produced before this Court. The observations made by the Tender Opening Committee also cannot be accepted as they are not based on any contemporary record. So far as the protests by other participants are concerned, they can hardly be taken to be authentic of the fact as to whether the tender itself was submitted at a late point of time as business rivalry is common.

7. Looking at the case from another point of view, the two clauses reproduced in the notice inviting tenders are mutually destructive of the fact that Clause No. 1 was mandatory in so far as the time for receipt was concerned. If the tenders had to be received by 30th of November, 2009, there was no need to add Clause No. 10. When both these clauses are read conjointly, it is but evident that the conditions of the time and date were not essential otherwise clause No. 10 could not have been and should not have been inserted in the conditions inviting tenders. There is no contemporary record to establish that the tender of the petitioner was, in fact, received late. I do not see any reason not to grant relief to the petitioner.

8. Sh. J.S. Bhogal, learned senior Advocate relies upon the decision of the Supreme Court in B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others, holding:

68 We are also not shutting our eyes to wards the new principles of judicial

review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarized as under:

- (i) If there are essential conditions, the same must be adhered to;
- (ii) if there is no power of general relaxation , ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;
- (iii) If, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing.
- (iv) The parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance of another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction.
- (v) When a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderer on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with.
- (vi) The contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority.
- (vii) Where a decision has been taken purely on public interest, the Court ordinarily should exercise judicial restraint.

This decision is not attracted to the facts in the present case. I hold that the conditions of the date and time were not mandatory as both clause Nos. 1 and 10 did not in any manner impose the time limit as urged by the respondents. In fact the Corporation insists on compliance of a condition which is not mandatory. According to clause No. 10 receipt of tenders could be by the 2nd of December, 2009. This writ petition is accordingly allowed. The respondent Corporation is prohibited for allotting the work on the basis of tenders so received pursuant to Annexure: R-1. The Corporation will be free to re-tender for the work in accordance with law. There shall be no order as to costs. All miscellaneous applications are disposed of. All interim orders are vacated.