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In the Karnataka High Court

Case No : Writ Petition No. 106903 of 2014. (GM-TEN)

P.K. Shefi APPELLANT

Vs

Union of India and others RESPONDENT

Date of Decision : 22-04-2016

Acts Referred:

Constitution of India, 1950 — Article 14
Contract Act, 1872 — Section 10
Evidence Act, 1872 — Section 115

Citation : (2016) 3 AirKarR 6 : (2016) 4 KCCR 550

Hon'ble Judges : Ashok B. Hinchigeri, J.

Bench : Single Bench

Advocate : Vivek S. Reddy, Sr. Advocate, T.M. Nadaf and B.S. Jeevankumar, Advocates, for the Appellant; K.M. Nataraj. Additional Solicitor General, M.B. Kanavi and Ajay U. Patil, Advocates, for the Respondent

Final Decision : Dismissed

Judgement

Ashok B. Hinchigeri, J.—The petitioner, a caterer providing catering services on the trains, has raised the challenge to the fourth respondent?s notification, dated 4.7.2014 (Annexure-G) inviting the bids for providing the catering services on Rajadhani and Shatabdhi Express Trains. He has also sought directions to the fourth respondent to award the said contracts to the petitioner based on the earlier tender notification, dated 28.3.2013 and the proceedings pursuant thereto.

2. Sri. Vivek S. Reddy, the learned Senior Counsel appearing for Sri. T. M. Nadaf for the petitioner submits that it emerged, on the opening of the financial bids, that the petitioner was the only eligible tenderer. Further the petitioner had offered the price bids of Rs. 18.00 crores and Rs.6.00 crores for Rajadhani and Shatabdhi Express Trains respectively. He revised the said amounts upwards to Rs. 19.5 crores and Rs.6.13 crores for Rajadhani and Shatabdhi Express Trains respectively. The revised amounts are virtually 100% and 200% more than the

reserve price.

3. The learned Senior Counsel submits that the respondents were bound to accept the offer of the petitioner and award the catering contracts in question to him. He read out Clause 3.5.1(f) of Chapter 3 of the bid document (Annexure-C). It is as follows:-

"3.5.1(f) Highest Priced bid will be selected for award of contract."

4. He submits that the respondents have resorted to the issuance of the fresh tender notification overlooking the valuable rights accrued to the petitioner. When the tender is complete in all the respects, the respondents could not have discharged the tender to nullify the petitioner?s bid. According to the learned Senior Counsel, the respondents have issued the fresh tender notification basically to revise the reserve price.

5. He submits that Article 8 of the Master Licence Agreement provides for contingencies arising out of the changes in menu, tariff and duration of the trains. Therefore, even if there is a material change in the running of the train after the award of the contract, the financial interest of Railways would not be affected adversely.

6. He invokes the doctrines of legitimate expectation and promissory estoppel. Having been declared as a successful bidder and having entered into the upward negotiations with the authorities, the petitioner has legitimate expectation that the contracts in question would be given to him. In support of his submissions, he relies on the following authorities:-

(i) AIR 1993 SC 1601 - Food Corporation of India v. Kamadhenu Cattle Feed Industries.

(ii) (2010) 13 SCC 364 - Indian Railway Catering and Tourism Corporation Ltd., v. Doshion Veolia Water Solutions (P) Ltd.

(iii) (2003) 5 SCC 437 - Union of India and Another v. International Trading Company and others.

(iv) 2005 (1) SCC 625 - Bannari Amman Sugars Ltd. v. Commercial Tax Officer and others.

(v) (1993) 3 SCC 499 - Union of India v. Hindustan Development Corporation.

(vi)(1999) 4 SCC 727 - Punjab Communications Ltd. v. Union of India and Others.

7. He submits that the relevant factors are eschewed from consideration and irrelevant factors are taken into consideration. He submits that the recommendations of the Tender Committee and of the Railway Board are overlooked. He submits that the Tender Accepting Authority had no right to reject the said recommendations. He complains of the presence of elements of irrationality, unreasonableness and arbitrariness in the impugned decision to call for fresh tenders. He relies upon the Hon''ble Supreme Court?s decision in the

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case of International Trading Company (AIR 2003 SC 3983) (supra) for advancing the submission that the basic requirement of Article 14 is fairness in action by the State. The State must act validly for discernible reason and not whimsically for ulterior purpose. Every State action must be notified by reason and an act un-in-formed by reason is per se arbitrary.

8. He also relies on the Apex Court?s decision in the case of Reliance Airport Developers v. Airport Authority of India and others reported in 2006 (10) SCC 1 wherein it is held that to arrive at a decision on ?reasonableness?, the Court has to find out if the administrator has left out the relevant factors and taken into account the irrelevant factors.

9. He complains of the breach of the rules of natural justice and abuse of power by the authorities. He relies on the Hon''ble Supreme Court?s decision in the case of M/s. Star Enterprises and others v. City And Industrial Development Corporation of Maharashtra Ltd. and others reported in 1990(3) SCC 280 wherein, it is held that the authorities must record the reasons and communicate the same to the concerned party.

10. He submits that after completing the negotiations, the authorities have issued the fresh tenders in a rash and abrupt manner. The petitioner is not even informed of the decision taken by the respondents. He submits that this is a case of pure bias and malice in law to fulfil the desire of other contractors by scuttling the earlier tender process.

11. Relying on the Apex Court?s judgment in the case of Dutta Associates Pvt. Ltd. v. Indo Merchantiles Pvt. Ltd. reported in 1997(1) SCC 53, the learned Senior Counsel submits that the consideration of the tenders received and the procedure to be followed in the matter of acceptance of a tender should be transparent, fair and open. The fairness demanded that the authorities should have notified in the tender notice itself the procedure, which they propose to adopt while examining the tender.

12. Sri. Vivek Reddy also relies on the Apex Court?s decision in the case of Smt. S.R. Venkataraman v. Union of India & another reported in (1979) 2 SCC 491. Paras 8 and 9 of the said decision, read out by him, are extracted herein below:-

"8. We are in agreement with this view. It is equally true that there will be an error of fact when a public body is prompted by a mistaken belief in the existence of a non existing fact or circumstance. This is so clearly unreasonable that what is done under such a mistaken belief might almost be said to have been done in bad faith; and in actual experience, and as things go these may well be said to run into one another.

9. The influence of extraneous mailers will be undoubted where the authority making the order has admitted their influence. It will therefore be a gross abuse of legal power to punish a person or destroy her service career in a manner not warranted by law by putting a rule which makes a useful provision for the

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premature retirement of Government servants only in the "public interest", to a purpose wholly unwarranted by it, and to arrive at quite a contradictory result. An administrative order which is based on reasons of fact which do not exist must therefore be held to be infected with an abuse of power."

13. Per contra, Sri. K.M. Nataraj, the learned Additional Solicitor General of India appearing for Sriyulhs M.B. Kanavi and Ajay U. Patil, the learned advocates for the respondent Nos. 1 to 4 has raised the preliminary objection to the very maintainability of this petition. He submits that the decision or discharging the tender was taken by recording the reasons by passing the comprehensive, speaking orders on 4.6.2014 (Annexure-R1) and 2.6.2014 (Annexure-R2) for Rajadhani Express and Shatabdhi Trains respectively. He submits that the petitioner has not challenged the said orders. As the petitioner has not challenged the said orders, pursuant to which the impugned tender notification is issued, the petitioner is not entitled to any relief.

14. He submits that there is no concluded contract between the petitioner and the respondents. Therefore, the petitioner cannot seek the enforcement of the contractual rights, if any, in the proceedings under Article 226 of the Constitution of India. He relies on the Apex Court?s judgment in the case of State of Gujarat and Ors. v. Meghji Pethraj Shah Charitable Trust reported in (1994) 3 SCC 552 wherein it is held that the writ petition challenging the termination of arrangement/agreement between a private party and the State Government is not maintainable.

15. He read out a portion of para-24 from the Hon''ble Supreme Court?s decision in the case of Rishi Kiran Logistics v. Board of Trustes, Kandla Port (S.L.P. (Civil) No. 7301/ 2011). The same is extracted herein below:-

"24 In other words, when there is a contractual dispute with a public law element and a party chooses the public law remedy by way of a writ petition instead of a private law remedy of a suit, he will not get a full fledged adjudication of his contractual rights, but only a judicial review of the administrative action. The requisition whether there was a contract and whether there was a breach may, however, be examined incidentally while considering the reasonableness of the administrative action. But where the question whether there was a contract, is seriously disputed, the High Court cannot assume that there was a valid contract and on that basis, examine the validity of the administrative action......"

16. He brings to my notice the provisions contained in Clauses 2.1.12, 2.2.5 of Chapter 2 and Clause 4.4.1 of Chapter 4 of the bid document (Annexure-C). They read as follows:-

"2.1.12 - Railway reserves the rights not to proceed with the Bidding Process at any time without notice or liability and to reject any or all Bid(s) without assigning any reasons.

2.2.5 - Railway reserves the right to accept or reject any Bid, to cancel or modify

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the process or any part thereof or to vary any of the terms and conditions, and/ or to annul the Bidding Process and reject all Bids at any time during the Bidding Process, without thereby incurring any liability to the affected Bidder(s) or any obligation to inform the affected Bidder(s) of the grounds Railway?s action.

4.4.1 - Railway in its whole discretion without incurring any obligation or liability, reserves the right, at any time:

(a) Suspend and/or cancel the Bidding Process and/or amend and/or supplement the Bidding Process or modify the dates or other terms and conditions relating thereto.

17. He submits that having offered his bid in response to the afore-extracted terms and conditions of the bid, the petitioner is estopped from arguing contrary to what the said clauses provide for.

18. He submits that the Apex Court in the case of U.P. Avas Evam Vikas Parishad & Ors. v. Om Prakash Sharma reported in 2013 AIR SCW 2484 has held that the highest bidder does not acquire any vested right to have the auction concluded in his favour. He submits that the Government is the best guardian of the finances of the State and that therefore it is expected to protect the financial interests of the State. When the Government decides as to whether the price offered in an auction sale is adequate or not, its conclusion is not open to judicial review.

19. He has also relied on the decision of the Madras High Court in the case of M. Ravichandran v. Managing Director reported in 2005 Writ LR 205 (Mad), wherein also it is held that even the highest bidder has no absolute indefeasible right to get the contract.

20. The learned Additional Solicitor General submits that calling the petitioner for negotiations does not amount to making any promise.

21. He has also relied on the Division Bench?s judgment of the High Court of Judicature, Madras in the case of Chokkani International Ltd. v. The Board of Trustees of Port Trust of Madras reported in 1987 Writ L.R. 529, wherein it is held that the clause reserving the power to reject all offers in a tender without assigning any reason is held to be not arbitrary and not violative of Article 14.

22. He has also relied on the Hon''ble Supreme Court?s decision in the case of Asstt. Excise Commissioner v. Issac Peter reported in (1994) 4 SCC 104 to contend that in case of contracts freely entered into with the State, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In the contracts like the present ones, the State is entitled to its money under the contract.

23. He has also relied on the Apex Court?s decision in the case of Siemens Public Communication Pvt. Ltd. and another v. Union of India and others reported in

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AIR 2009 SC 1204 (1), wherein it is held that the exercise of judicial review is intended only to prevent the arbitrariness or favouritism; judicial review is to be exercised in the larger public interest. It is further held in the said case that if the decision relating to award of contract is bona fide and is in public interest, the courts will not exercise the judicial review and interfere, even if it is accepted for the sake of argument that there is a procedural lacuna.

24. In the course of rejoinder, Sri. Vivek Reddy, the learned Senior Counsel appearing on behalf of the petitioner submits that not challenging the Annexures-R1 and R2 cannot militate against the petitioner. He submits that Annexures-R1 and R2 are only the internal notes; they have not culminated in the executive orders. He submits that the said Annexures are not publicized, much less communicated to the petitioner. He relies on the Apex Court?s judgments in the case of M.D., U.P. Land Development Corporation and another v. Amar Singh and others reported in (2003) 5 SCC 388 and in the case of Sethi Auto Service Station v. Delhi Development Authority reported in (2009) 1 SCC 180, wherein it is held that the nothings in the departmental files do not have the sanction of law to be an effective order.

25. The submissions of the learned counsel have received my thoughtful consideration. The first question that falls for my consideration is whether any rights have accrued to the petitioner on account of his bids being eligible and on account of his being called for negotiations for revising the amounts upwards? As held in Rishi Kiran Logistics?s case (AIR 2014 SC 3358) (supra), the bidders participating in the tender process have no other right except to the right to equality and fair treatment in the matter of evaluation of the competent bids offered by them in response to the notice inviting tenders in a transparent manner. In the case of Maa Binda Express Carrier v. Northeast Frontier Railway reported in (2014) 3 SCC 760, the Apex Court has held that the award of a contract is essentially a commercial transaction, which must be determined on the basis of consideration that are relevant to such commercial decision.

26. In the case of Siemens Public Communication (AIR 2009 SC 1204) (supra), the Apex Court has observed that if the contract is in the nature of commercial transaction, the principles of equity and natural justice stay at a distance. It is all the more so, when there is no procedural lacuna.

27. The Apex Court?s judgment in the case of U.P. Avas Evam Vikas Parishad (2013 AIR SCW 2484) (supra) is of immense guidance for deciding this issue. It is held therein that it is for the Government to decide whether the price offered in an auction sale is adequate or not. That conclusion itself would be on the basis of the Government?s expectations. The Government?s conclusions are not open to judicial review.

28. In the case of Maa Binda Express Carrier (AIR 2014 SC 390) (supra), the Apex Court has reiterated the position that the bidders participating in the process cannot insist that their tender should be accepted simply because the

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given tender is the highest or lowest. There is no legal right accrued in favour of the petitioner in the absence of a concluded contract. In the absence of acceptance of the bid offered by the petitioner to the competent authority, there is no concluded contract.

29. The petitioner has sought to draw support from Clause 3.5.1(f). The said Clause does not state that the highest bidder ?shall be selected? it only says he will be selected. What it means is that under the normal circumstances, the lower bidders cannot be selected overlooking the highest bidder. But the Tender Accepting Authority, for justifiable reasons, may not award the contract to the highest bidder; it may reject all the tenders and float a fresh tender. I therefore answer the first question in the negative.

30. There is yet another angle from which this petition can be examined. The conclusion reached by the Railways does not affect the petitioner''s right to take part in the fresh tender proceedings. Neither the cancellation of earlier tender process violates the petitioner?s fundamental rights nor the issuance of the fresh tender can be termed as unreasonable warranting any interference from this Court.

31. The second question that falls for my consideration is whether rejecting the tenders received pursuant to the notification, dated 28.03.2013 is illegal? To answer this question the advertence may have to be made to the relevant terms and conditions of the notification, dated 28.03.2013. Clause 2.1.12 of Chapter 2 of the bid document reserves the power to the Railways to reject all the bids without assigning any reasons. Clause 2.2.5 reserves the power to the Railways to cancel or modify the tender process or any part thereof. Further, the said Clause makes it limpid that the Railways can annul the bidding process and reject all the bids at any time. Clause 4.4.1 of Chapter 4 of the said bid document reserves the right to the Railways to suspend, cancel, amend and/or supplement the bidding process. Having taken part in the bidding process, governed by the said terms and conditions, the petitioner cannot turn around and state that his bids could not have been rejected or discharged.

32. The doctrines of promissory estoppel and legitimate expectation are not attracted to the facts of this case. The decisions assiduously cited by Sri. Vivek Reddy do not come to the rescue of the petitioner in any way. My perusal of the orders, dated 04.06.2014 and 102.06.2014 (Annexures R1 and R2) reveals that the fourth respondent has considered not only the relevant factors but has also discussed the various options open to the Railways. Under the prevailing circumstances, the fourth respondent has shown disinclination to make the counter offer to the petitioner or to call him for negotiations. He has exercised the option of discharging the earlier tender and the floating of a fresh tender. The fourth respondent has taken a well-informed decision which is also reflective of his commercial perception. This Court does not propose to substitute its wisdom for the wisdom of the executive.

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33. The Railways may have put in place its own mechanism and machinery for evaluating the tenders. If some Committees of the Railways or of its Board have indeed recommended the acceptance of the bids, it is not obligatory or mandatory for the Tender Accepting Authority to award the contract to the petitioner. The evaluation or judging of the tenders takes place at different tiers and levels.

34. Thus viewed from any angle, the decision-maker can not be found to be at fault for rejecting the petitioner?s bids. The second question is answered accordingly.

35. Whether there is any substance in the allegation of mala fides? Apart from the bald averments, there are no pleadings and there is not even a suggestion as to how the impugned decision was actuated by mala fides and on whose part. The fresh tender process is in no way discriminatory and mala fide. The facts and circumstances of the case are such that no credence can be given to the allegations such as irrationality, unreasonableness, malice in law, irrelevant considerations, etc. The petitioner?s reliance on the Master Licence Agreement is also of no consequence, because it comes into force only after the awarding of the contract, which stage is not reached in the instant case.

36. It is profitable to refer to the Apex Court?s judgment in the case of Pathan Mohammed Suleman Rehmatkhan v. State of Gujarat and others reported in (2014) 4 SCC 156, wherein it is held that it is open to the State and the authorities to take economic and management decisions depending upon the exigencies of the situation guided by appropriate financial policy notified in public interest. If every decision taken by the State is tested by a microscopic and suspicious eye, the administration will come to a standstill and the decision-makers will lose all their initiative and enthusiasm.

37. It is also profitable to see what the Apex Court has said in para 46 of its decision in the case of Arun Kumar Agrawal v. Union of India and others reported in (2013) 7 SCC 1. It is extracted herein below:

"46. In Villianur Iyarkkai Padukappu Maiyam v. Union of India (2009) 7 SCC 561, this Court held as follows:

169. It is neither within the domain of the courts nor the scope of judicial review to embark upon an enquiry as to whether a particular public policy is wise or whether better public policy can be evolved. Nor are the courts inclined to strike down a policy at the behest of a petitioner merely because it has been urged that a different policy would have been fairer or wiser or more scientific or more logical. Wisdom and advisability of economic policy are ordinarily not amenable to judicial review. In matters relating to economic issues the Government has, while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within the limits of the authority. For testing the correctness of a policy, the appropriate forum is Parliament and not the courts."

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38. While reviewing the law related to award of contracts by the State and its agencies in the case of M/s. Master Marine Services Pvt. Ltd. v. Metcalfe & Hodgkinson Pvt. Ltd. and another reported in AIR 2005 SC 2299, the Apex Court has expressed the considered view that when some defect is found in the decision-making process, the Court must exercise its discretion under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether in called for or not. Only when it comes to the conclusion that the overwhelming public interest requires interference, the Court should interfere.

39. In the case of Jagdish Mandal v. State of Orissa and others reported in (2007) 14 SCC 517 the Apex Court has held that the purpose of judicial review is to check whether the decision is made lawfully and not to check whether the decision is sound. The power of judicial review will not be permitted to be invoked to protect the private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court.

40. In the result, this writ petition is dismissed. No order as to costs.

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