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(2005) 03 OHC CK 0041

In the Orissa High Court

Case No : Writ Petition (C) No. 11551 of 2004

Pratap Chandra Mohanty APPELLANT

Vs

The Chief Engineer, Paradip Port Trust and Others RESPONDENT

Date of Decision : 14-03-2005

Acts Referred:
Constitution of India, 1950 — Article 14

Citation : AIR 2005 Ori 104 : (2006) 1 CTLJ 382 : (2005) OLR 680 Supp

Hon'ble Judges : Sujit Barman Roy, C.J;M.M. Das, J

Bench : Division Bench

Advocate : Amiya Kumar Mohanty A, R.K. Behera, R.C. Pradhan, S.P. Sadhu and D. Roy, for the Appellant; S.K. Padhi, B.K. Sahoo, D. Mohapatra, S.K. Mohapatra, D. Das and G. Mishra for Opposite Party 4 and D.K. Mohapatra and Satyajit Samal for Opposite Party 5, for the Respondent

Final Decision : Dismissed

Judgement

M.M. Das, J.—The Paradip Port Trust through its Executive Engineer, issued a tender call notice (Annexure-1) on 20-6-2004, inviting tenders from experienced and resourceful port enlisted contractors for construction of a cyclone shelter-cum-school at Baruria Palanda. One of the terms of the tender was that the tender may not be considered or is liable for rejection unless the tender is accompanied with a certified true copy of the up-to-date Income Tax and Sales Tax clearance certificates.

2. The petitioner, opp. party No. 5 and some others offered their tenders. The same being considered by the tender committee of the Paradip Port Trust held on 7-9-2004. it was decided to allot the work to the opp. party No. 5 who was the lowest tenderer. On negotiation, the said opp.party No. 5 also reduced his quoted amount by a further sum of more than Rs. 2.00 lakhs.

3. The petitioner, in the present writ application, calls in question the said action of the Paradip Port Trust in awarding the contract to the opp.party No. 5 on the ground, inter alia, that the opp. party No. 5 having not submitted his tender

paper along with required documents, such as, copies of up-to-date Income Tax and Sales Tax clearance certificates and experience certificate, as per the terms of the tender, his offer should have been rejected. The petitioner further states that he being the second lowest tenderer and eligible in all respect, the work should have been awarded to him. It has been further alleged in the writ application that on acceptance of the offer of opp. party No. 5 by the Port Authorities, the petitioner made several representations before the Deputy Chairman of the Paradip Port Trust, but the same were not considered. On the above allegation, the petitioner has prayed for issue of a writ of mandamus directing the opp. parties to issue work order with respect to the work in question in his favour after holding that the opp. party No. 5 was not eligible to be awarded with the said work. Counter affidavits have been filed by the Port Authorities-opposite parties 1 to 4 and the successful tenderer-opp. party No. 5, separately. The opp. parties 1 to 4, while denying the allegations made in the writ application have stated that the work has been allotted to the opp. party No. 5 keeping in mind the economic interest of the Paradip Port Trust and in view of the fact that the opp. party No. 5 being an enlisted ''A'' Class contractor was the lowest tenderer.

4. A rejoinder affidavit to the counter of the opp. parties 1 to 4 has been filed by the petitioner making new allegations therein that the action of the Port Authorities in awarding the work to the opp. party No. 5 is mala fide and on extraneous consideration of the Chief Engineer who was the Chairman of the tender committee, just before his retirement.

5. We have heard Mr. Mohanty, learned counsel for the petitioner, Mr. S.K. Padhi, learned counsel appearing for the Paradip Port Trust Authorities i.e. the opp. parties 1 to 4 and Mr. D. K. Mohapatra, learned counsel for the opp. party No. 5.

6. During course of hearing, Mr. Mohanty, learned counsel for the petitioner submitted that the selection of opp. party No. 5 is not only contrary to the terms and conditions of the tender paper but also illegal, arbitrary and mala fide. He contended that the opp. party No. 5 having not submitted up-to-date Income Tax and Sales Tax clearance certificates along with his tender, he was ineligible to be considered and as such, this Court by holding that the opp. party No. 5 was not eligible for being considered for execution of the work in question, should direct the opp. parties 1 to 4 to allot the work to the petitioner. He has relied upon the decisions of this Court in the cases of Nandighose Associates v. Orissa Small Industries Corporation 2001 (2) Ori LR 21, Nabadurga Constructions Pvt. Ltd. v. State of Orissa 2002 (2) Ori 628 and Subas Chandra Panda Vs. Superintending Engineer, Rural Works and Others, in support of his contention that the opp.party No. 5 having not satisfied the eligibility criteria was not eligible to be awarded with the work even though he was the lowest tenderer.

7. Mr. S. K. Padhi, learned counsel for the opp. parties 1 to 4, on the other hand, submitted that Clause 11 of the tender paper itself clearly gives discretion to the opp.parties i.e. the Port Authorities to consider the tender of an eligible

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contractor i.e. a contractor enlisted under the Port, having experience, even though he might not have submitted Income Tax and Sales Tax clearance certificates. The language of Clause-11 of the tender notice is quoted herein below :

"The tender may not be considered or is liable for rejection unless the tender is accompanied with a certified true copy of the Income Tax and Sales Tax clearance certificate."

8. Mr. Padhi has submitted that the words "the tender may not be considered" gives sufficient flex in the joint, for the port authorities to consider a tender offered by an eligible contractor even if he has not submitted up-to-date Income Tax and Sales Tax clearance certificates. According to him, this discretion has been reserved by the port authorities for selecting an eligible contractor even if he has not submitted the above certificates, if it is felt so necessary for the interest of the Port Trust. Accordingly, he submits that finding the opp. party No. 5 to be the lowest tenderer and also an enlisted contractor having experience, the opp. party No. 5 has been rightly selected for executing the said work. He vehemently argued that question of extraneous consideration on the part of the Executive Engineer does not arise at all in the facts of this case as selection of the opp. party No. 5 was done by a competent selection committee constituted for that purpose by the Port authorities.

9. Mr. Mohapatra, learned counsel for the opp. party No. 5, relying upon the counter filed by the opp. party No. 5 submitted that the opp. party No. 5, as a matter of fact, obtained a Sales Tax clearance certificate much prior to issuance of the tender call notice and is also an Income Tax assessee having a PAN No. He further contended that the opp. party No. 5 being an enlisted ''A'' Class contractor under the Port Trust and is executing different works under the said Port Trust, the authorities of the Port Trust were well aware of the fact that he possesses a clearance certificate from the Commercial Tax Department to the effect that he is not an assessee to any sales tax and the said certificate given in Form No. II is valid up to 31-3-2005.

10. Learned counsel for the petitioner has drawn our attention to the decided cases cited by him as stated above. We find from the said decisions that in the fact situation of those cases, finding that prejudice was to be caused to the petitioners therein, by discriminating them, which is contrary to Article 14 of the Constitution of India, this Court has held that the tender should strictly be in accordance with the terms and conditions mentioned in the tender call notice.

11. From the rival contentions of the parties, the points which arise for determination in this writ application are (i) whether the action of the Port authorities in awarding the work to opp. party No. 5 suffers from mala fide and (ii) whether the offer of opp. party No. 5 having been accepted by the Port authorities even though he did not submit up-to-date Sales Tax and Income Tax clearance certificates as per Clause 11 of the tender paper, it should be held that

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accepting the tender of opp. party No. 5 is illegal and contrary to the terms of the tender and therefore, the Port authorities are liable to be directed to issue the work order in respect of the work in question, to the petitioner.

12. With regard to the question of mala fide, time and again it has been held by the Apex Court that no inference can be drawn that an action is mala fide basing on mere allegations. For this purpose, we may profitably refer to the judgment of the Supreme Court in E.P. Royappa Vs. State of Tamil Nadu and Another, . In the said decision, the Supreme Court has- categorically held as follows :

"Secondly, we must not also overlook that the burden of establishing mala fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility.

xxx xxx xxx

In this context, it may be noted that top administrators are often required to do acts which affect others adversely but which are necessary in the execution of their duties. These acts may lend themselves to misconstruction and suspicion as to the bona fides of their author when the full facts and surrounding circumstances are not known. The Court would, therefore, be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility In the administration."

13. Applying the above principles to the facts of the present case, we find that except some vague allegations made in the rejoinder affidavit by the petitioner, there is no other material on record for us to conclude that the action of the Port Trust authorities in awarding the contract to the opp. party No. 5 was an outcome of mala fide.

14. With regard to the question as to whether accepting the tender of the opp. party No. 5 by the authorities of the Port Trust, even though he did not submit copies of up-to-date Sales Tax and Income Tax clearance certificates along with his tender, should be held to be illegal, we find from Clause-11 of the tender paper as quoted earlier, that the word ''may'' in the said clause gives discretion to the tender committee to waive the said condition. In the case of M/s. G. J. Fernandez Vs. State of Karnataka and others, the Supreme Court while considering the question regarding pre-qualification of a tenderer, has held thus :

"The second consequence, indicated by this Court in earlier decisions, is not that the KPC cannot deviate from these guidelines at all in any situation but that any deviation, if made, should not result in arbitrariness or discrimination. It comes in for application where the non-conformity with, or relaxation from, the prescribed standards results in some substantial prejudice or Injustice to any of the parties involved or to public Interest in general."

15. Considering the present facts in the light of the above decision of the

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Supreme Court, we find that the petitioner has utterly failed to make out a case that the authorities of the Port Trust having accepted the tender of opp. party No. 5 have discriminated the petitioner in any manner, thereby violating the right of the petitioner under Article 14 of the Constitution of India. We further find that the Port authorities in considering, accepting and negotiating with the opp. party No. 5 for execution of the work in question, have in no way deprived the petitioner of his right to be considered for the contract, as we find from the record that the tender submitted by the petitioner received due and full consideration of the tender committee constituted by the Paradip Port Trust.

16. In view of the above conclusion, we do not find any merit in this writ application, which is accordingly dismissed, but in the circumstances without costs.

S.B. Roy, C.J.

17. I agree.

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