

(2002) 09 DEL CK 0144
In the Delhi High Court
Case No : C.W.P. No. 4718 of 2002

Priya Enterprises and Another	Vs	APPELLANT
Commissioner of Police and Another		RESPONDENT

Date of Decision : 26-09-2002

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2003) 102 DLT 529

Hon'ble Judges : Dr. Arijit Pasayat, C.J; A.K. Sikri, J

Bench : Division Bench

Advocate : R.M. Bagai, for the Appellant; V.K. Shali, for the Respondent

Judgement

A.K. Sikri, J. 1. The respondents, Delhi Police, had invited tenders for supply of tents and other allied items on hire basis in August, 2001. The petitioners Along with some others submitted their bid. The tenders were opened on 6th September, 2001 and the bid of the petitioners was found to be lowest. The difference between their bid and the second lowest, namely, M/s. Punjabi Tent House was to the extent of 40 per cent. The petitioners were, however, not favored with award of the contract immediately. Instead two officials of the respondents visited the godown of the petitioners with a view to check the stock position. It is the allegation of the petitioners that they gave false and baseless report indicating that the petitioners have only 50 tents in their stock while as a matter of fact more than 500 tents were lying there at that time. It is also alleged that this false inspection report was submitted at the instance of the petitioners competitor. In these circumstances, the petitioners made a complaint on 25th October, 2001 to the respondents. Some other person had also made a complaint. This led to the constitution of a fresh purchase committee headed by a Joint Commissioner of Police and three officers of the rank of Deputy Commissioner of Police. This committee inspected the matter thoroughly and recommended that the petitioners be awarded the contract. Still, the contract was not awarded and this forced the petitioners to file CWP No. 3762/ 2002 in

this Court and on 7th June, 2002, show cause notice was issued by the Vacation Bench. However, when the matter was listed on 23rd July, 2002 it was informed that the respondents had started re-tendering process. The petitioners, in these circumstances, withdrew the said writ petition with liberty to file fresh petition questioning the same. Granting this liberty to the petitioners, the said writ petition was dismissed.

2. The petitioners have now filed the present writ petition questioning the action of the respondents in cancelling the earlier contract and re-tendering the same. The prayers made in the writ petition are to the following effect:

(i) issue writ of mandamus directing the respondents to award the contract for tents and other items to the petitioners for a period of one year from the date of award of the contract on the terms and conditions of the year 2001;

(ii) issue the writ of certiorari for quashing entire process of re-tendering issued on 15th July, 2002;

(iii) to issue proper writs and directions for getting the entire matter probed by independent agency i.e. Central Vigilance Commission who may be directed to fix the responsibility for the serious lapses committed by some officials of the respondents;

(iv) to issue writs and directions for inflicting severe punishment and penalty on the officials of respondents found guilty of such gross misconduct and dereliction of duty;

(v) to issue such other writs and directions for compensating the petitioner for the loss, pain and agony suffered by them.

3. It is alleged in the writ petition that even after high level purchase committee consisting of Joint Commissioner of Police and three Deputy Commissioners of Police recommended the award of contract to the petitioners, the respondents had acted at the behest of M/s. Punjabi Tent House in mala fide and arbitrary manner. It is further alleged that in the fresh notice inviting tender issued on 15th July, 2002, certain terms and conditions have been changed with the sole objective to oust the petitioners from even responding to the said notice inviting tender. In this respect it is contended that the following terms are changed/ added arbitrarily:

(a) Earnest money has been increased from Rs. 60,000/- to Rs. 10,50,000/-.

(b) The condition of past performance of the last three years with various Government departments has been imposed.

(c) New condition of banning collaboration with other parties is introduced.

4. In the counter affidavit filed on behalf of the respondents, it is not denied that pursuant to earlier notice inviting tender issued in August, 2001 the rates quoted by the petitioners in their tender were the lowest to the extent of 40 per cent

than the next tenderer. However, it is stated that the petitioners' firm was new and it was decided by the purchase committee to verify the infrastructure, financial status, existing capability/viability of the firm. In these circumstances, Sh. B.S. Sobti, ACP conducted a thorough study and found that the petitioners did not have sufficient infrastructure and financial status of the petitioners' firm was "also very weak. He also observed that the firm is not capable to honour the huge requirement of store tents, EP/IP tents and Chhouldaries required by the Delhi Police for providing tented accommodation to the outside forces requisitioned by Delhi Police to maintain law and order in the capital. He also visited the office/godown of the firm and noticed that the firm is not having any infrastructure/godown but had entered into a memo of understanding with one Mr. Jitender Kohli and intended to carry out the contract with his support. It is also submitted that while the matter for award of contract was still under examination, some of the complaints raising various issues relating with tender were received. A similar complaint was also from the proprietor of the petitioner alleging that in spite of lowest rates for the supply of store tents, EP/IP tents and Chhouldaries as he has not been awarded the contract. Though as per verification conducted by Mr. Sobti found that the firm was not capable/financially sound to fulfill the terms and conditions of the contract, yet a fresh enquiry was conducted through DCP/Vigilance to ensure proper justification. The DCP/ Vigilance got conducted a detailed /secret enquiry in the matter and had submitted his detailed reply. After going through all the relevant documents/instructions, enquiry conducted by Mr. Sobti and Vigilance Branch/PHQ, it was found that the firm is not capable to honour the contract, if awarded. But as the petitioners and other complainants had raised various issues, instead of awarding contract to next eligible firm, it was decided to invite fresh tenders from the eligible contractors. Accordingly, the DCP/P&L vide letter No. 4523/CSA/(Q-111)/DCP-P&L dated 10th July, 2002 invited fresh tenders. It is further stated that lacunae left in the earlier tender were sought to be plugged by changing certain vital conditions of the contract in order to ensure that the contract is awarded only to eligible contractor with sufficient infrastructure/financial back-up as the annual contract is worth Rs. 2,10,00,000/- approximately. For this reason, the earnest money was raised to Rs. 10,50,000/-, past performance of List three years was insisted upon and collaboration with other parties was banned to ensure that the concerned tenderer is able to stand on his own legs and able to supply the material without depending upon any other person.

5. There is no denial of the legal position that even after examining the tenders submitted pursuant to the notice inviting tender, the department may refuse to award the work to any of the tenderers and initiate fresh exercise if valid reasons existed for such a course of action. It is the discretion of the department and the department is the best Judge to undertake this exercise and to decide as to whether bid of any tenderer at all is to be accepted or not. However in taking such administrative action, it goes without saying, the fairness therein has to be shown by the authority taking such a decision The legal position in this respect is

well settled by the catena of Supreme Court decisions. It would be sufficient to refer to the case of *Tata Cellular Vs. Union of India*, which is elaborate and lucid commentary relating to law on this subject and the Supreme Court, after a detailed discussion, summarised the law in the following terms:

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

(2) The Court does not sit as a Court of 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 review of the administrative decision is permitted it will be substituting its own decision, without the 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, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of *Wednesbury* principle of reasonableness (including its other facts 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 same judgment, the Supreme Court also observed:

"The principles of judicial review would apply to the exercises of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. However, there are inherent limitations in exercise of that powers of judicial review, Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But 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."

6. The aforesaid observations were recently echoed in the case of *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, wherein it was held :

"It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the

offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permits, such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its Corporation, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala-fides, unreasonableness and arbitrariness. The State, its Corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power 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 its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference the Court should intervene."

7. Therefore, applying the aforesaid principles in the present case, what is to be examined is as to whether the decisions of the respondents can be actuated with any mala-fides, arbitrariness or it was fair and just decision taken by the respondents. The judicial review, after all, is limited to procedural impropriety, irrationality and arbitrariness.

8. Learned Counsel for the petitioners made a passionate and fervent plea in support of the petitioners' allegation that the entire exercise of cancelling the contract and re-tendering was actuated with mala-fides. His submission was that after the purchase committee had examined the matter in detail and decided to recommend the award of the contract to the petitioners, there was no reason to do any fresh exercise thereby probing into the question of capability and competency of the petitioners to undertake the contract. It was submitted that this exercise was done at the instance of M/s. Punjabi Tent House who was to gain thereby inasmuch as because of the delay in award of the contract, this contractor who was continued to make supplies, could influence the decision making process. It was further argued that the respondents were not acting in public interest in not awarding the contract to the petitioners whose rates were significantly lower than the rates quoted by M/s. Punjabi Tent House and only with this and with a view the terms of second tender were changed with sole motive to oust the petitioners.

9. As already pointed out above, before accepting the bid of a bidder and awarding the contract to him, it is for the department to adjudge the suitability or competence of the prospective award. For this purpose it is also open for the department to make necessary enquiries before an opinion is formed on this aspect of the matter. The respondents have stated in the counter affidavit that on an enquiry conducted by Mr. B.S. Sobti, ACP, he reported that the petitioners

were not capable/financially sound to fulfill the terms and conditions of the contract. Even thereafter, another enquiry was conducted through the DCP/ Vigilance who also opined the same and even pointed out the lacunae in the entire process and tender conditions which led to cancellation of the earlier contract and decision to re-tender. However, what is to be seen is as to whether such an enquiry was conducted by the respondents only because the respondents had not satisfied themselves about the competence of the petitioners earlier or it was actuated with mala-fides as alleged by the petitioners. For this purpose we summoned the record.

10. A perusal of the record shows that the purchase committee consisting of a Joint Commissioner of Police as the Chairman and three officers of the rank of the Deputy Commissioner of Police as members of the committee constituted for this purpose had examined the matter and submitted report. It had in no uncertain terms, in its report dated 23rd January, 2002 observed that the petitioners being the lowest bidder in view of instructions received from Central Vigilance Commission/ and Therefore, contract should be awarded to the petitioners. The relevant portion of this report is as under:

"The brief facts of the case are that tenders were invited by P&L Unit for the above purpose vide notice dated 6.9.2001. Offers were received from seven firms and a copy of the comparative statement is enclosed at Annexure-1. M/ s. Priya Enterprises quoted the lowest rates, which are approximately 40% lower than rates quoted by M/s. Punjabi Tent House, which has been supplying tents to the Delhi Police for several years. A verification was got conducted through ACP/ MT and Inspector Clothing from P&L. The verification report indicated that M/s. Priya Enterprises did not have the capability to meet the requirements of tents of Delhi Police. In the meantime a pseudonymous complaint was received. The purchase committee subsequently sent the file Along with all facts and the complaint to PHQ for suggestion and opinion. Accordingly the present committee has been constituted to look into the matter. This committee has carefully considered the whole issue. The latest instructions issued by CVC clearly stipulate that the contract should always be awarded to the firm quoting the lowest rates. These instructions also further prohibit negotiations with any other firm but the firm, which has quoted the lowest rates. In these kinds of contracts where financial and logistic boundaries of the bidders are verified apart from checking/verifying their ITCC, STC, WCC etc. the technical and price bids in separate sealed envelopers may be asked at NIT stage itself observing the same GFR recommended specific procedure for technical contracts. In the first instance only the technical bids are opened to assess the suitability of the tenderer. The price bids of the firms, which are not found suitable, are not opened at all and only the bids of technically capable firms are opened. This procedure was not adopted in the instant case. The committee feels that once the price bids have been opened, we have no other option but to award the contract to the lowest bidder.

As specified in PHQ order No. 23184-87/Admn. (V)/PHQ, dated 9.11.2001/ field enquiries were also got conducted through DCP/North District, regarding capability of various firms. The report indicates that M/s. Priya Enterprises has since procured a large number of tents. The verification report of DCP, North District is enclosed at Annexure-II.

The committee after careful deliberation recommends that the claims of M/ s. Priya Enterprises, the lowest bidder cannot be ignored in view of the instructions received from CVC. It is, however, a fact that at the time of submitting the tender, the firm did not have the physical capability to supply the tents, which the firm now claims to have acquired. Whether or not the firm can actually satisfactorily meet the demand of the Delhi Police can be known only after the firm is given a chance. As the rates quoted by this firm are about 40% lower than rates quoted by M/s. Punjabi Tent House, Delhi Police tents to gain substantially by awarding the contract to this firm. The committee also recommends that in future in all cases, where the capability of the firm is material to the award of contract separate sealed technical and price bids should be obtained and in the first instance only the technical bids should be opened. In case any verification is needed, it should be completed before opening the price bids, the date of which should be separately intimated to the firms found technically competent. The bids of firms found technically unfit should be retained in sealed envelopes. Once the price bids are opened, the contract has to be awarded to the lowest bidder."

11. This report makes an interesting reading. It shows that after the opening of the tender, complaints were received and only because of that the committee was constituted. The committee was also conscious of the fact that the better option could have been to invite bids in two parts; technical and price bids and technical bids be opened in the first instance. Only those who were technical found suitable, their bids be opened which process was not adopted in the instant case. However, it still felt that once the price bids had been opened, it had no option but to award the contract to the lowest bidder. It quoted the instructions of CVC on this subject. Not only this report further specifies that if the enquiries were also got conducted regarding the capability of various firms and the report indicates that the petitioners have since procured a larger number of tents, the committee also observed that whether or not the firm can actually satisfactorily meet the demand of the Delhi Police can be known if the firm is given a chance and recommended the award of contract. Thus, the committee had considered all the aspects of the matter including capability and competency of the petitioners before recommending the award of contract.

12. However, the record further shows that immediately after this report dated 23rd January, 2002 was given by the committee, on 4th February, 2002, M/s. Punjabi Tent House submitted its complaint alleging that favor was shown to the petitioners. This amply demonstrates that this complainant had the access to the department and was informed of the progress taking place in the evaluation of

tenders. The fresh enquiry conducted by Mr. B.S. Sobti and thereafter DCP/ Vigilance were also initiated on the complaint of M/s. Punjabi Tent House. It was not done by the officer higher in rank than those who were the members of earlier committee.

13. It could have been a different matter if on the report of the committee, the Competent Authority would have opined that further probe was required before accepting the said report and to ascertain as to whether the petitioners would be in a position to fulfill the contractual obligation if the contract is awarded. However, the clear impression which one gathers from the record is that fresh exercise was initiated at the instance of M/s. Punjabi Tent House. Therefore, there is a possibility in the genuineness of the allegations made by the petitioners that the reports are thereafter procured from the officers. It is also to become in mind that the inspection done subsequently are by officers at the level of ACP whereas the earlier committee comprises of very senior officers, namely, Joint Commissioner of Police and three Deputy Commissioner of Police. In the latter reports, the petitioners were not even associated and it was not participative in that sense. It may also be mentioned that the decision to cancel the earlier contract and re-tender was taken at the level of the JCP/P&L.

14. In *Bal Kalyani and others Vs. State of Maharashtra and others*, , it was held:

"Against, the plea of mala fides has been made in a pointed manner. The heavy burden in establishing mala fides is certainly to be reckoned by Courts in that connection. Helpful guides are available from leading judgments of the Apex Court. We do bear in mind that top administrators are often required to do acts which affect others adversely but which are necessary in the execution of their duties. Care is Therefore taken, as cautioned by the Supreme Court, that dubious inferences are not drawn from incomplete facts [See: *E.P. Royappa Vs. State of Tamil Nadu and Another*, We also note that the charge of mala fides is more easily made than made out [See : *Kedar Nath Bahl Vs. The State of Punjab and Others*, It is to be ensured that the plea of mala fides is not made "the last refuge of a losing litigation", as indicated in *Gulam Mustafa and Others Vs. The State of Maharashtra and Others*,

While evaluating a plea of mala fide, quite often, the Government files would give helpful clues, about objective facts. A party, totally strange to the nothings in the file and the proceeding of the papers, would not be in a position effectively to mention with precision the events which twisted a given trend of opinion. The files, Therefore, would throw such light when the Court is confronted with allegations of one party and denial of the other. The Supreme Court has indicated that while moving along the track of Government's decision making process, the Court should not be unduly swayed either by a feature like excessive speed or a flash pointed expeditious action. The following observations of Chandrachud, J. speaking for the Supreme Court in *K. Nagaraj and Others Vs. State of Andhra Pradesh and Another*, , are appropriate:

"The reasonableness of a decision, in any jurisdiction, does not depend upon the time which it takes. A delayed decision of the executive can also be had as offending against the provisions of the Constitution and it can be no defense to the charge of unconstitutionality that the decision was taken after the lapse of a long time. Conversely, decisions which are taken promptly, cannot be assumed to be bad because they are taken promptly. Every decision has to be examined on its own merits in order to determine whether it is arbitrary or unreasonable".

15. In *Akhileshwar Mishra Vs. State of Bihar and Others* the Division Bench of the Patna High Court agreed with the aforesaid observations. We are also in respectful agreement with the same.

16. As there is a lurking doubt about the fairness in action, which appears to have been taken at the behest of M/s. Punjabi Tent House, we are of the opinion that the entire matter be re-examined by the Commissioner of Police himself. He should, if necessary, undertake fresh exercise in order to ascertain the capacity/capability and potentialities of the petitioners to undertake such a contract.

17. We may state here that the kind of conditions which have been introduced in the new tender may not be so irrational to attract the *Wednesbury's* principle of unreasonableness. In a contract of this magnitude it is to be left to the discretion of the department to finalise such terms and conditions. If it is found that there were defects in the earlier tenders, the department is fully authorised to remove those defects by cancelling the earlier tenders and re-tender after incorporating such conditions and removing those defects.

18. In normal course, such an action would be faulted with having regard to the mandate of *Tata Cellular (supra)*. Even this Court upheld such an action of the All India Institute of Medical Sciences which was challenged in the case of *M/s. PES Installation (Pvt.) Ltd. v. The All India Institute of Medical Sciences and Anr.*, (CWP No. 1300/2001), vide judgment dated 19th August, 2002. However, on facts in that case, it was found that such an action was taken in larger public interest and did not lack fairness. In the present case, the allegation of the petitioners is that terms and conditions are changed only with a view to oust the petitioners from competition. Viewed independently, there may not be anything wrong in incorporating such conditions. However, as pointed out above, the record reveals that this was done only after the complaint was received from M/s. Punjabi Tent House. Therefore, it would be appropriate for the Police Commissioner to look into this aspect independently as to whether the change in conditions is in the interest of the department or such changes were introduced with a purpose to oust the petitioners. However, once we have ordered the Commissioner of Police to enquire into the matter, it would be appropriate for him to consider this aspect of the matter as well, namely, whether the introduction of these conditions is tainted with mala fides with sole motive to oust the petitioners.

19. It would be appropriate if the Commissioner of Police takes the decision,

after getting necessary investigation done, as expeditiously as possible and, in any case, within a period of two months from the date of this order. Till that time the contract pursuant to the tender dated 15th July, 2002 shall not be finalised.

20. This writ petition is disposed of in the aforesaid terms.

21. There shall be no order as to costs.