

(2001) 11 J&K CK 0025

In the Jammu And Kashmir High Court

Case No : O.W.P. No. 293/2001, C.M.P. Nos. 521/2001, 495/2001 & 607/2001

Reshi Construction Company

APPELLANT

Vs

State of Jammu and Kashmir

RESPONDENT

Date of Decision : 06-11-2001

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2002) KashLJ 38

Hon'ble Judges : Syed Bashir-Ud-Din, J

Bench : Single Bench

Advocate : M.H.Attar, H.I.Hussain, G.J.Balla, B.A.Bashir, Advocates appearing for the Parties

Judgement

1. Respondents through Executive Engineer Muffasil (R&B) Division Badgam/B, Respondent No. 3, invited tenders from the approved AAY class

P.W.D. Contractors/Firms for construction of Block 1st on existing RCC Pile foundation of three storeyed examination building for Board of

School Education at Bemina, Srinagar on terms and conditions given in NIT (Annexure P1). The writ petitioner's construction company through its

proprietor alongwith others has put in tender for the work. The estimated cost for the proposed building is Rs. 140.00 lacs. The petitioner and

respondents 2 and 3 entered in correspondence with regard to rebate, mobilization advance, use of material out of PWD stock or from market,

extension of spells of validity period of the contract etc. (Annexure P2to P11). The petitioner in reply to demand for withdrawal of precondition for

mobilisation advance conveyed to Chief Engineer, PWD (R&B) (Respondent No. 2) that in case there is commitment by the respondents for

execution of the balance work outside the tender with the petitioner, the

petitioner is willing to withdraw the advance bar and to give quoted rebate on the cost (Annexure P12). However, the Chief Engineer responded by advising petitioner to reconsider the withdraw condition of demanded commitment of giving the balance work to the coy and to convey the reply thereto since matter is to be placed before contract Committee for final decision (Annexure P13). The petitioner conveyed his willingness to waive off/ withdraw the condition of commitment by respondents for execution of balance work by petitioner, but at the same time reinforced/substituted it by conveying"" that when the execution stage of Phase III work will come, it should be offered first for the execution before assigned other agency"". (Annexure P14). The petitioner coy was called to attend the contract committee meeting for negotiations. The petitioner coy. finally agreed to withdraw the condition regarding commitment for respondents for execution of balance work by him, though insisted for offering of the work not covered by the tender in question first to him before it is assigned to other agency. He also agreed to give reduced rebate of 2.75 % instead of earlier rebate of 3.5 %. The Chief Engineer, respondent No. 2 recommended approval of fixation of contract with Reshi Construction Coy. at final negotiated rebate of 2.75 % for total cost of 99,91,188/ (Annexure PI 5).

2. The Chief Engineer, Respondent No. 2, addressed communication Annexure P15 to the Executive Engineer, respondent No. 3 conveying him that the Government pursuant to decision taken by the tender committee""... intends to allot the aforesaid work to M/s. Reshi Construction Co, prop. Mohamad Yasin Reshi.."" tenderer for the work. Besides, the Executive Engineer was asked to get the work started by the contractor within three days as per approved design and proposal after fulfillment of all prerequisite codal requirements. A copy was endorsed to the petitioner coy. and it was directed to start the work immediately within three days. The petitioner Reshi Construction Coy did not ""start the construction work as directed. However, he awoke to respond on 04.07.2001 and addressed a communication to Chief Engineer (Respondent No. 2) to say, ""... it is, therefore, requested to confirm that whether my request for execution of balance work has been accepted, if not then I am not ready to execute the work on the rates quoted by me before 9 months back and the rebate of 2.75

% is not applicable". (Annexure P16).

3. After the receipt of the above communication, showing petitioner's disinterestedness to undertake the work unless execution of balance work

(beyond tender) by him is accepted and that petitioner coy. is not willing and ready to execute the work on rates quoted by it nine months back

and that the offered rebate of 2.75 % too stood withdraw, respondents appear to have made up their mind not to get the work executed through

the petitioner Coy. The Board of School Education, respondent No. 4, which employed PWD (R&B) for execution of the work decided to call it

off with PWD Agency for the inordinate delay caused in putting work in place and in falling to execute the work promptly. But expecting petitioner

who it believed backed out from the tender offer and failed to execute the work, to stall the progress of the construction work by launching a legal

process, filed a .caveat through counsel in the court of District Judge at Srinagar. On receipt of the Caveat dated 20.07.2001, petitioner came

forward and filed this writ petition on grounds that petitioner's right of execution of the work on terms and conditions of the NIT have been

violated. The correspondence on record coupled with the deposit in the form of CDR, with the respondents has given petitioner right to execute

the work. Petitioner claims that he could not execute work for the respondent's failed to provide the blue print/plans to the petitioner.

Notwithstanding, all this the petitioner has spent sizeable sum in taking steps to start and execute work. The petitioner has legitimate expectations

and cannot be denied the contract. The contract cannot be snatched away from the petitioner and given to some other agency. There is underhand

dealing in allotting the contract afresh and delaying the formal allotment of this work. The petitioner accordingly prays for restraining the

retendering/reallotting, of the work and for taking steps required for execution of work by the petitionercoy, in addition to evoking a commitment

from the respondents of allotment of the balance work to petitioner. However, during pendency of the writ, respondent No. 4 (Chairman State

Board of School Education) decided to take away the work in question from PWD (R&B) department, the executing agency employed by it for

construction of the work and instead employ Srinagar Development Authority (Respondent No. 5) for carrying forward and completing the

execution of the work. For the purpose, Srinagar Development Authority issued fresh NIT 19 of 2001 inviting tenders for construction of the work

Block I on exiting RCC Pile foundation, on terms and conditions provided therein. The petitioner on amending his writ petition also challenged this

NIT has prayed for quashment on ground as stated above, besides that the respondent No. 5 has no powers to issue the fresh NIT to the

prejudice of the petitionerCoy, and at the cost of the public exchequer.

4. The respondents have filed reply. While acknowledging the correspondence/ communications annexures to the writ petition, respondents have

contended that the petitionercoy has been insisting rather is adamant that unless execution of the balance work (Phase III) outside the NIT, is given

to it or in any case offered to it first before being given to any agency, the petitionerCoy is not to execute the work in question. After the

respondents exhausted all the avenues to get the work executed by the petitioner's Coy, and stand of the coy that unless the commitment is given

to it or it being offered first, the balance work before assigning it to any other agency, it would not execute the work has propelled the State Board

of School Education to decide to assign work to SDA as executing agency and did not agree further to its execution by PWD (R&B). Petitioner at

no stage accepted the condition of commitment to offer petitioner Coy the balance work before giving it to some other agency. The petitioner's last

communication, P16 referred above, wherein the petitioner Coy. conveyed that it is not ready to execute the work on the rates quoted by it nine

months before the offered rebate to is not also applicable, left the respondents with no choice but to find an alternative mode to get the

construction started and the work completed. The petitioner at no stage showed his willingness to start the execution of the work. He even

declined to attend the meeting arranged to start out the matter. On the failure of the petitioner it was finally decided by the boarder to give the job

of execution of the work to SDA. The SDA accordingly issued the NIT 19/2001. No legal or fundamental right of the petitioner has been violated.

The alleged grounds of challenge are baseless and without substance. Despite being given ample opportunities, petitionercoy, has chosen not to

start, execute and complete the work. Petitioner was not interested to execute the work. No contract was entered and executed with petitioner.

The deposit of CDR while tendering is a routine affair. Offering tender for a work has its own procedure. There is nothing special about deposit of

CDR in terms and conditions of NIT. Petitioner can take steps for release of the CDR. The conditional offer was never accepted by the

petitionerCoy. No legal, contractual or any other right of petitioner is violated. The writ petitioner merits dismissal.

5. The matter is taken up for final disposal and is heard finally at this stage on submissions in unison of the counsel for the parties.

6. Admitted, Record Perused.

7. The broad principles in exercise of writ jurisdiction in the contractual field may now be taken note of.

8. In *Raunaq International Ltd. vs. IVR. Construction Ltd. and ors.* (AIR 1999 S.C. 393), it is observed:

11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the state, the court must be satisfied

that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tender, the

court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the

two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is

important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost for more than any

saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore,

unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not

intervene under Article 226 in disputes between two rival tenders.

9. The scope of judicial review in case of tenders offered by public authority for carrying out certain work, the Apex Court observed that the

principles of judicial review is to apply to exercise of contractual powers by Government bodies with a view to prevent arbitrariness or favouritism.

The right to choose a contractor cannot be per se considered as an arbitrary power. Some flexibility is needed in administrative decision making,

though such decision can be challenged on the "Wednesbury's principles of

unreasonable ness"". See i) Tata Cellular vs. Union of India (1994 AIR SC W 3344). ii) Aisha Foundation Construction Ltd. vs. Trafal Gar House Construction Ltd (1997 I SCC 738) & III). New Horison Ltd. vs. Union of India (1995) 1 SCC 478; 1995 AIR SCW 275).

10. In Delhi Science Forum vs. Union of India (1996) 2 SCC 405 : (1996 AIR SCW 953), The Apex Court again observed that if a reasonable procedure has been followed that decision should not be challenged except on the Wednesbury principle of unreasonableness.

11. In TATA Cellular vs. Union of India, (AIR 1996 SC II) what the Supreme Court had to say in the matter is quoted as follows:

85. It cannot be denied that the principles of Judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power 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 of 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"".

12. The court further culled following principles for observance in the matter of judicial review.

(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 fair play in the joints is 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 pointed out above) but must be free from arbitrariness not affected by bias or

actuated by malafidies.

(6). Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

13. In the contractual sphere the action taken by the respondent have to confirm to Article 14 of the Constitution. Non arbitrariness is prominent

facet of this constitutional provision. The powers are to be exercised for public good, and thereby, a duty is cast on the State and its

instrumentalities to act fairly and to adopt the procedure which is fair play in action. Normally speaking the decision to accept the tender or offered

contract though usually reached by process of negotiations, are made by experts. The invitation offender by PWD (R&B) for construction of 2nd

Phase of construction of Block 1st on existing RCC Pile foundation of three storeyed Examination building for Board of School Education at

Bemina, Srinagar and response of the tenderers is a matter for the Engineering Wing of the PWD (R&B) to consider. The contract for work in this

case is not finalized with the petitionercoy, notwithstanding that the petitioner offered the tender and got in communications/correspondences with

the department. This can in sense be stated to be part of process of clarifications/ negotiations. However, petitioner put a precondition to finalization

of the contract in terms that the coy be given the balance work or in any case a commitment to offer the balance work first to the coy., before

being offered to any other agency. This aspect of the matter has not been accepted by the R&B. Department. The department clearly conveyed

that such a commitment is not acceptable to it and advised petitioner coy to withdraw the same. A meeting was convened with petitionercoy.

Having been called to attend the meeting, petitioner failed to do so, even then petitioner Coy, was asked to execute the work within three days

after fulfilling the prerequisite codal requirements, as the petitioner Coy, was conveyed that the tendering committee ""intends to allow the aforesaid work"" to the petitioner coy. Even then petitionerCoy, dragged its feet and did not come forward to execute the work or to take any steps to fulfill any prerequisite codal requirements. There has been no formal allotment order of the work. Obviously, this could not be so, as the petitionerCoy, at last on 04.07.2001 conveyed to the Chief Engineer PWD (R&B),""... it is therefore, requested to confirm that whether my request for execution of balance work has been accepted. If not when I am not ready to execute the work on the rates quoted by me before 9 months back and the rebate of 2.75 % is not applicable."" The respondents at no stage accepted this conditional offer of petitioner and tendering coy. No contract is formalized. At the most, it appears a case of executatory contract, as opposed to executed contract. The tender notice has been floated on behalf of the Government of Jammu and Kashmir State. It seems the requirement of law for finalizing the contract have not been complied so far, obviously for the reason that the contract has not been finalized, because of the conditions appended/attached to the tender offered by the petitionercoy. No fundamental or legal right of petitionerCoy has been violated. The story of petitioner having spent on mobilization and collection of material appears not based on facts. Here saying so, would barely suffice. It is also seen that no right whatsoever is acquired by the petitioner to execute the work. Petitioner's failure to execute the work and drag on his feet in the matter and to attach counter conditions at every stage of the communications has led the Board not only to change the contractor, but also executing agency and to allege that a ""deep route conspiracy is hatched by the respondents to damage interest of the petitioner"", is to sweeping and that too without any factual basis. Merely deposit has been made in the form of CDR for offering a tender is no ground to conclude, even in conjunction with the communication on record, that the work is at any stage allotted to the petitionerCoy. Intention of the Contract Committee to allot the work is not same thing as allotment of work as a final act. Even such, intention in this case depends on starting of work promptly which has not been done. Instead further conditions have been attached to the execution of the work after a long time and it is plainly stated by the petitionerCoy that in case the condition of offer of the balance work

outside the NIT to petitioner is not acceptable to other side, then the petitioner is not ready and willing to execute the work on the rates quoted by

him in the NIT and the rebate offered by him is also not applicable, (is withdrawn).

14. Once the petitionerCoy nailed the offer and refused to execute the work except on the conditions set by the petitionerCoy, how does it lie in

the mouth of the petitionerCoy, to say that the petitionercoy has acquired indefeasible rights to execute the work. Petitioner's concern for public

interests and public exchequers are nothing but a pretence to drag on the matter in the hip of getting the work allotted and executed by him on the

terms and conditions set out by the coy. The litigative persistence on misconceived submissions can hardly put petitionercoy in a win position. No

legal contractual or fundamental rights of petitioner are violated. The respondents are not obligated and are not under a legal duty to allot and get

the work executed by petitionerCoy, therefore, in the above tell tale fact situation and circumstances of the case, the decision of the Board of

School Education, who are constructing the building and providing the money has not done any thing illegal or wrong, if it has decided to change

the executing agency and switch over to SDA as executing agency instead of PWD (R&B). It is within its rights to construct and complete the

work in the mode and manner it likes after keeping in view the public interests and on consideration of beneficial aspects of the matter. Floating of

NIT by the SDA Srinagar in the facts and circumstances of the case cannot be taken exception to and branded as illegal or vitiated. The decision is

in the normal course.

15. The Writ petition is accordingly dismissed. However, before parting with the judgement, observations of the Supreme Court in *Sterling*

Computers Ltd. vs. M/s M&N Publications Ltd. (AIR 1996 SC: 51 (61), on the aspect of increased and unbudgeted expenditure occasioned by

entertainment of the writ petition in the matter of affording of contracts for the judicial review, need to be taken note of as follows:

31. Before we part with the Judgement we shall like to strike a note of caution. It is a matter of common experience that whenever applications

regarding to awarding of contracts are entertained for judicial review of the administrative action, such applications remain pending for months and

in some cases for years. Because of the interim orders passed in such applications, the very execution of the contracts, are kept in abeyance. The cost of different projects keep on escalating with passage of time apart from the fact that the completion of the project itself is deferred. This process not only affects the public exchequer but even the public in general who are deprived of availing the facilities under different projects. As such, it need to be impressed that while exercising the power of judicial review in connection with contractual obligations, Courts should be conscious of the urgency of the disposal of such matters. Otherwise, the power which is to be exercised in the interest of the public and for public good in some cases become counter productive by causing injury to the public in general.

16. Disposed of alongwith connected

CMPs, as above.