(2004) 06 OHC CK 0027

In the Orissa High Court

Case No : Writ Petition (C) No. 8034 of 2003

Sandhu Trailers APPELLANT

Vs

Orissa Small Industries Corporation Ltd. and Another RESPONDENT

Date of Decision : 18-06-2004

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2004) 4 BC 60 : (2004) 98 CLT 603 : (2004) 2 OLR 28

Hon'ble Judges : Sujit Barman Roy, C.J;A.S. Naidu, J

Bench : Division Bench

Advocate : R.K. Rath, for the Appellant; J.K. Mohapatra, Adv for the Opp. Party No. 1 and A.C. Mohapatra, A.K. Panda and Allam H. Khan for the Opp. Party No. 2, for the Respondent

Final Decision : Allowed

Judgement

A.S. Naidu, J.—The petitioner, a partnership firm carrying on transport business, seeks to assail the decision of opposite party No. 1-Corporation to award the work of transportation of industrial raw materials in favour of opposite party No. 2, and prays for commanding the said opposite party No. 1 -Corporation lo award the work in question in its favour.

2. Opposite party No. I is a State-owned Corporation. It issued a Notice inviting lenders from recognised and established transport carriers having branches preferably at Cullack, Bhubaneswar, Rourkela, Jatni, Calcutta and other places in the country for transportation of industrial raw materials such as Iron and Steel Materials, Bitumen (only inside the State). Aluminium Ingot, Aluminium Wire Rods, Paraffin Wax, Paper, Mineral Turpentine Oil, Plastics and Newsprint, and such other items dealt/to be dealt by the Corporation. The intending tenderers were required to enclose a Draft/Pay Order for Rs. 2,00,000.00 (two lakhs) to wards earnest money, drawn in favour of the opposite party No. 1-Corporation to take part in the tender. The last date of purchase of the tender documents was fixed as 11th July, 2003 and the last date of submission of tender was fixed as

14th July, 2003. The tender was divided into two parts, first is Pre-qualification Bid and the second is. Price Bid. Only those tenderers who were found suitable in the Pre-qualification Bid were required to submit their Price Bids. The instructions to tenderers specifically stipulated that the envelope marked No. 1, i.e. Pre-qualification Bid, would contain among other particulars a list of trucks owned by the tenderer attaching a copy of the registration certificates in "support of owning the vehicles". For the sake of brevity, Clause A(iii)(f) of the instructions to tenderer is quoted hereinbelow:

"(f) Tenderer to furnish list of trucks owned by him/them (Attach copy of Regn. Certificate in support of owning the vehicle). Also tenderer to furnish list of trailers owned or possessed on lease by him/them (Attach copy of regn. certificate and lease document in support of possessing the vehicle on lease)."

Clause I of the said instructions stipulated the minimum qualifying requirements and reads as follows:

"I: Minimum Qualifying Requirements--

Tenderers who intend to participate should meet the following requirements.

(a) Minimum of 3 (three) years'' experience in transportation of iron and steel, industrial raw-materials or other products.

(b) Should at least have one trailer owned or on leased basis and five trucks in his/ their firm/proprietor/partners name for the full period of this tender.

Quotation received from tenderers not meeting aforesaid requirements shall be rejected."

3, In response to the Tender Call Notice, the petitioner as well a opposite party No. 2 submitted their respective tenders. It is averred in the Writ Petition that though opposite party No. 2-firm submitted a list of seven trucks, out of that only three were in the name of the firm or its partners and the rest four neither belonged to the firm nor to any of its partners. In fact, two of the trucks belonged to some other concern from which lease had been obtained and submitted along with the tender papers. So far as the rest two trucks were concerned, a power of attorney had been obtained from a lady who was the owner thereof. The petitioner alleges that the owner of the said trucks was neither a partner of the firm nor was any way connected with opposite party No. 2 and she was only a relation of one of the partners of the opposite party No. 2-firm. On the other hand, it is stated, the petitioner-firm had submitted a list of seven trucks, one truck being owned by one of the partners of the firm and the rest six being on lease, documents in respect of which had been filed along with the tender papers. It is submitted by the petitioner that as opposite party No. 2 did not satisfy the requirements of Clause 1(b) of the instructions the opposite party No. 1-Corporation acted illegally and with material irregularity in entertaining the tender of opposite party No. 2 and deciding to award the tender work to opposite party No. 2 and therefore while annulling the said decision of opposite party No. 1-Corporation it should be directed to award the tender work in favour of the petitioner.

4. On receiving notice, a counter-affidavit has been filed by opposite party No. 1, It is averred that from the past experience of the Corporation it was found that the transporters having no truck of their own failed to execute the work in time for which the interest of the Corporation was substantially hampered. To avoid such eventuality, a decision had been taken to award the transportation work to a firm which owned at least five trucks. It is stated that admittedly the petitioner-firm owned only one truck and intended to obtain six trucks on lease from others; whereas the opposite party No. 2-firm owned three trucks in the names of its two partners and had produced a power for attorney by one Smt. Puspalata Sahu, wife of Samir Sahu, one of the partners of the firm, authorising him to operate her two trucks and as such the Corporation considered opposite party No. 2 better and more suitable than the petitioner, which owned only one truck and intended to take four other trucks on lease. It is further submitted that the decision of the Corporation was taken after considering all the tenders received and strictly on the basis of merit, and not by showing favour to anybody as alleged by the petitioner,

5. Opposite party No. 2 has also filed a separate counter affidavit almost reiterating the stand taken by opposite party No. 1. It emphatically stated that aforesaid Puspalata Sahu was the wife of Samir Sahu, one of the partners of the firm. It is submitted that Puspalata Sahu was the owner of two trucks and Samir Sahu being her husband was in fact operating the said two trucks. Added to that, Puspalata had also executed a power of attorney authorising Samir Sahu to operate the said two trucks. Thus, in toto opposite party No. 2 had five trucks and had satisfied the requirement of the Corporation, as per its tender instructions.

6. Opposite party No. 1 has further submitted that the petitioner itself having been disqualified having owned only one truck, had no locus standi to challenge the propriety or otherwise of the decision taken by the Corporation.

7. On 13.8.2003 this Court in Misc. Case No. 7756 of 2003 had directed that the contract/works covered by Annexure-1 might not be settled with anybody without leave of this Court. In fact the petitioner has not sought any relief to quash the order/decision of the Corporation settling the tender in favour of opposite party No. 2.

8. Mr. R.K. Rath, learned Counsel for the petitioner, forcefully submitted that in consonance with the terms of the Tender Call Notice, a tenderer had to furnish a list of trucks owned by him/them and at least five trucks must stand in the name of the firm/person submitting the tender, or in the name of the partners of the firm. He submitted that opposite party No. 2 admittedly did not own five trucks and the firm or its partners owned two trucks only. Thus the Corporation acted illegally and with material irregularity in accepting the power-of-attorney said to

have been executed by the wife of one of the partners of the said firm. It is submitted that such term was not there in the tender instructions and as such the Corporation traversed beyond the terms embodied in the Tender Call Notice and the decision of the Corporation is therefore not sustainable in law. It is further submitted that if such a clause would have been there in the tender instructions, the petitioner could also have furnished similar power-of-attorney in its favour. Absence of such a clause in the tender instruction in fact prevented the petitioner from doing so. Mr. Rath also submitted that the Corporation cannot exempt or change the tender terms in favour of one tenderer without extending similar opportunity so far as other tenderers were concerned and as such the decision to award the tender work in favour of opposite party No. 2 is vulnerable.

9. The Supreme Court have rendered several decisions on the question of tender process vis-a-vis the award of contract and evolved several principles in regard to the same. Ultimately what prevails with the Courts in these matters is that public interest being paramount, there should be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated alike. The legal position may be summed up as follows:

(i) The Government is free to enter into any contract with citizens but the Court may interfere where it acts arbitrarily or contrary to public interest;

(ii) The Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate;

(iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons.

The Courts generally do not interfere with the matter of administrative action or changes made therein unless the Government''s action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is mala fide. The Supreme Court in the case of M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, observed as follows:

"If a term of tender is deleted after the players entered into the arena it is like changing the rules of the game after it had begun and, therefore, if the Government or the Municipal Corporation was free to alter the conditions fresh process of tender was the only alternative permissible. By reason of deletion of a particular condition the wider net will be permissible and a larger participation or more attractive bids could be offered."

10. While dealing with complete bidding and where bidders who fulfil the pre-qualifications alone are invited to bid, adherence to the instructions to the bidders should not be given a go-bye, inasmuch as if such procedure is encouraged, it would provide a scope for discrimination, arbitrariness and favouritism which are totally opposed to the rule of law and our Constitutional

values. The very purpose of issuing tender instructions is to ensure their enforcement, lest the rule of law should be a casualty. Relaxation or waiver of a rule or stipulation, unless so provided in the ''tender instruction'' in favour of one of the bidders would create justifiable doubt in the minds of other bidders and would impair the rule of transparency and fairness and provide room for manipulation to suit the whims of the Stale agencies in picking and choosing a bidder for awarding contracts as in the case of distributing bounty or charity. Such approach, as has been observed by the Supreme Court in the case of West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others, should be avoided. Adherence to rules is the best principle to be followed, which is also in the best public interest.

11. Considering the present case in the touchstone of the discussions made in the preceding paragraph, we find that submission of power-of-attorney in favour of one of the partners of the firm was not stipulated in the tender instructions. At the other hand, the tender instructions specifically and unambiguously stipulated that the tenderer should at least have one trailer owned or on lease basis and five trucks in his/their firm/partners, names for the full period of the tender.

12. It is pertinent to mention here that so far as trailer was concerned, the instructions stipulated that it should be owned or obtained on lease basis, but then so far as five trucks were concerned the instructions strictly emphasised that the same should be in the name of the firm/proprietor/partner. Deviation of such specific instruction and/or alteration or modification for the same would amount to breach of the rules and cannot be sustained. Even otherwise the Tender Call Notice. Annexure-I, reveals that the term of the tender was till July, 2004. Less than one month is now left. This Court, as staled earlier, by an interim order had directed not to settle the work with anybody without the leave of this Court. No party has sought for any leave. The petitioner having owned only one truck also did not satisfy the qualification stipulated in Clause 1 of the tender instructions.

13. In the result, we allow the writ petition and direct opposite party No. 1 - Corporation not to award the tender work, to opposite party No. 2, but to issue a fresh Tender Call Notice if the work still subsists and award the said work-to the party fulfilling all the terms and conditions of the Tender Call Notice adhering to the rules in the best public interest. Liberty is also given to the opposite party No. 1-Corporation to recast the eligibility criteria stipulated in the tender instructions, if it so desires.