
(2002) 09 MP CK 0019

In the Madhya Pradesh High Court

Case No : Writ Petition No. 2264 of 2002

Seth Mohanlal Hiralal Construction Company

APPELLANT

Vs

State of M.P. and Others

RESPONDENT

Date of Decision : 17-09-2002

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2002) 5 MPHT 293

Hon'ble Judges : Arun Mishra, J

Bench : Single Bench

Advocate : R.C. Sobhani, for the Appellant; Hemant Shrivastava, Government Advocate, for the Respondent

Final Decision : Allowed

Judgement

Arun Mishra, J.—Petitioner in the instant writ petition challenges the decision of the respondents in disqualifying him for pre-qualification stage under the fresh advertisement issued on 6-2-2002 whereas for the same work petitioner was earlier qualified and was the lowest tenderer. A decision was taken to switch over for inviting the tender in Form A as per decision taken by the Tender Evaluation Committee on 28-1-2002.

2. The petitioner M/s. Seth Mohanlal Hiralal Construction Company, is a partnership firm. Petitioner is a registered A-5 class contractor with the Public Works Department of the State of Madhya Pradesh. The petitioner is working as contractor of the Bridge Zone since 20 years and have constructed four major Railways Over Bridges (hereinafter referred to as "ROB"). Petitioner claims to have constructed second Longest Bridge of the State of Madhya Pradesh on Tawa River S.H. 22 Bawai, Hoshangabad Road. Petitioner claims that he has got clean and superb past track record of skilful construction of the following Bridges - ROB, Itarsi 1100 meter long and 18 meter wide Rs. 424 lacs at 1986 level (Rs. 10 crores on 2001 level), Hoshangabad ROB amounting to Rs. 276 lacs at 1995 level (Rs. 450 lacs at 2001 level), 25 meter long PSC slabs and well sinking

foundation 15 meter depth. On many occasions the petitioner has been simultaneously awarded different contract works by the respondents totalling more than Rs. 10 crores. Details of which are in para 5.3 of the writ petition. The respondent No. 2 Chief Engineer, invited application for pre-qualification vide letter dated 5-9-2001 from contractors who are registered in A-5 class for inviting the tenders for the construction of Bridge across Narmada River in Km. 9/10 of Saikheda Jhikoli Road, at Narsinghpur District in Madhya Pradesh.

3. Initially the eligibility criteria fixed in letter P-3 is:--

(1) who have successfully completed similar works of major Bridges.

(2) Contractors/Firms who have executed an individual Bridge work costing to Rs. 300.00 lacs or more with sinking of wells beyond 15.00 M. and prestressed span of more than 25.00 M. length, along with total Bridge works of Rs. 10.00 crores during last three years.

4. In response to the letter P-3, the petitioner submitted application to respondent No. 2. Petitioner successfully pre-qualified, along with 7 other contractors registered in P.W.D. as A-5 class contractors. Petitioner was intimated as per letter P-5 dated 7-11-2001 of having qualified for submitting tender. Petitioner obtained the tender and submitted it as per offer made in P-5. The tenders were opened on 24-11-2001. Six tenderers offered their bids. Petitioner's offer was 10% less than SOR (Schedule of Rates), M/s. Uttam Construction Co., Raipur's offer was 4.56 less than SOR, M/s. Bhaiyalal Shukla, Rewa's offer was 8.10 more than SOR, M/s. S.K. Banerjee and Co., Nagpur's offer was 99.33 more than SOR, M/s. Sundrani Construction Co. Raipur's offer was 34.70 more than SOR and M/s. Banka Construction Co., Mumbai's offer was 60.97 more than SOR. The petitioner's tender was lowest and was 10% less than SOR. Chief Engineer recommended acceptance of the tender and sent it to the State Government for approval. The Tender Committee at the first instance also recommended petitioner's tender for approval and acceptance to respondent No. 1 as it was 10% below prevailing SOR rates and was 5% below from the rates received for similar works. The State Government had prequalified the petitioner for the work. The Chief Engineer, P.W.D. Bridge Zone, Bhopal recommended petitioner's tender for approval. Petitioner claims that the petitioner satisfied all the pre-requisites and his tender offer was found to be lowest. The State Level Tender Committee again met on 28-1-2002 for screening and evaluating the tenders. The petitioner is not aware as to what transpired in the aforesaid meeting, however, he was not informed about the fate of his tender. Suddenly on 6-2-2002 a notice appeared in the news paper wherein the respondent No. 2 had invited pre-qualifying selection applications from eligible contractors, in relation to the same work in which the petitioner was the lowest tenderer.

The notice P-6, dated 6-2-2002 was issued. The State Level Tender Committee took a decision to call tender in Form-F instead of Form-A without disclosing any

reason for this change. Petitioner further submits that an amount of Rs. 12 lacs is wasted due to change of decision to invite tender in Form-F instead of Form-A. That was done without any rhyme or reason. Petitioner submits that decision to recall tender in Form-F is motivated, mala fide and to escape from liability of increased rates to the extent of more than 1 crore due to change in NIT condition from Form-A to Form-F. The only criteria for pre-qualification was who have successfully completed similar works of major bridges, The petitioner again applied for the pre-qualification pursuant to the application invited as per Notice P-6, but, to the utter surprise the Chief Engineer did not recommend this time the case of the petitioner for pre-qualification under the pressure of higher officials. The action of the respondent is arbitrary, illegal and unjustified. Certain documents have been filed by the petitioner along with the rejoinder to show that earlier the Chief Engineer had on 4-12-2001 recommended the petitioner's tender for acceptance to the State Government. The High Level Tender Committee consisting of CE, ENC, Secretary and Principal Secretary had also recommended the tender for acceptance to PWD Minister on 7-12-2001. But, the PWD Minister had returned the tender on pretext that the progress of the work of petitioner is not satisfactory vide his letter P-8, dated 10-1-2002. Though the petitioner was qualified the petitioner submits that the action on the part of the State Government on the instruction from Minister PWD to enquire about the progress of the work of the petitioner in spite of petitioner having been prequalified, is discriminatory and arbitrary. No such enquiry was made about other contractors. The High Level Tender Committee again recommended the petitioner's tender for acceptance on 28-1-2002 but the PWD Minister, in spite of petitioner's satisfactory report about work performed submitted by the Chief Engineer on 17-1-2002, rejected the tender on another false plea that tender be invited on Form-F since detailed design is not prepared. Minutes P-9 of the State Level Tender Committee dated 28-1-2002 discloses that the State Level Tender Committee had recommended on 7-12-2001 the acceptance of the tender of the petitioner being lowest rate which was 10% below SOR. The Minister PWD had sought report with respect to progress of the work in which connection the Chief Engineer (Bridge), Bhopal had sent the report that the tenderer is having the experience of construction of several bridges though the progress is slow, but, the work is satisfactory. Considering this note of Chief Engineer Tender Committee took decision to the following effect "Detailed design is not prepared, tender be called in Form "F" lumpsum. Petitioner submits that the ground that detailed drawings are not prepared of the Bridge is false. The Chief Engineer has already received detailed design/drawings of the Bridge from M/s. Decon Consultants, Bhopal. Extra costs of Rs. 12 lacs approximately is incurred as the State Government had decided not to invite the tender in Form-F in the beginning itself. The decision has been taken to invite the tender in Form-F, which is on extraneous reasons. The State Government having prequalified the petitioner, for the tender and then enquiring about progress of his works and after receiving satisfactory report from the High Level Tender Committee, even then rejecting his tender on another false pretext of inviting tender in Form-F is

malafide and arbitrary. Rejection of tender is illegal. Petitioner fulfilled the eligibility criteria in October, 2001 and how suddenly he lost the eligibility in March, 2002 is not understandable. The construction of Jhikoli Bridge requires progress of 6 crores in 3 years, while the petitioner had given proof of having executed work of Rs. 10 crores during 3 years, in the prequalification bid and accordingly the State Government PWD department of State of Madhya Pradesh had prequalified the petitioner for the said Jhikoli Bridge, vide his letter P-5, dated 7-11-2001. Petitioner further submits that ground of delay in work is also not permissible. No penalty has been levied upon the petitioner as per Clauses 2 and 3 of agreement by the PWD for any work awarded to the petitioner till now. The delay if any is owing to cause beyond his control and is attributable to the respondents/PWD department.

5. In the return and additional return filed by the respondents, it contended that the construction work in question of submersible bridge across Narmada river in Km. 9/10 of Saikheda Jhikoli Road at District Narsinghpur is a major bridge work sanctioned under the Rural Infrastructure Development Fund-V (RIDF) programme of State Government and the funds have been obtained from the National Bank for Agriculture and Rural Development (NABARD). The probable amount of contract is Rs. 622.00 lacs, according the current schedule of rate applicable w.e.f. 15-2-2001, issued by the Engineer-in-Chief, Public Works Department, Bhopal. Applications for prequalification were invited from amongst contractors registered in A-5 category with the Engineer-in-chief Public Works Department. Earlier to it in the prequalification process 8 contractors were qualified to participate in the tender process. The prequalified contractors were informed about the successful prequalifications vide memo dated 7-11-2001 issued by respondent No. 2 and offers were called from all the prequalified contractors. The last date of obtaining tender document was 20-11-2001. The last date of submission of tender document duly filled was 23-11-2001. Six contractors submitted their offers including the petitioner. The rates quoted by the petitioner were not accepted by the State Level Tender Committee because the Committee was of the opinion that looking to the nature of work the tenders should be called in Form-F and not in Form-A for the bridges the value of which is more than one crore rupees. In the same meeting, which was held on 28-1-2002 it was decided that all the contractors, specially in case of bridge cost amount comes in the range of one crore or above, tender should be called in Form-F, i.e., payment would be made in lumpsum as per amount quoted by the contractor. This was vastly different and in the interest of revenue as the contractors would not be able to claim any price escalation on account of unreasonable delay in completion of the work for the raised price of material and labour. Furthermore in tender Form-F there is also provision for rebate for reduction of work from the scope of the contract, meaning thereby that in the case the contractor could not execute certain works which were required to be executed by him under the contract, the State Government would obtain rebate from the contractors for such incomplete work. Besides this whereas in a tender

called in Form-A design, and drawing are supplied by the department. In tender Form-F the contractor has the option of applying his own design and drawing which would be more economical and, therefore, in the interest of revenue. Thus, the Tender Committee in its meeting held on 28-1-2002 decided to reject the tender called in Form-A. Notice was published on 6-2-2002. Tenderers pre-qualifications applications were to be submitted on or before 25-2-2002. The process of pre-qualification was given wide publicity through Local/State/National level newspapers. Looking to the nature of work, the cost as well as time factor as also in view of the past track record of the petitioner he was rightly disqualified at the prequalification stage in the second tender process. In the first tender process no acceptance of offer was made to the petitioner. No case is made out to make an interference in the writ petition.

6. In the additional return, it is further contended that the allegations against PWD Minister are denied. PWD Minister is only one of the six members of the Tender Evaluation Committee. There is no sufficient material to allege bias. Decision is not motivated.

7. Learned Counsel for the petitioner has urged that the petitioner is qualified as per condition of eligibility. When he was qualified for the same work when tenders were invited in Form-A Petitioner has been wrongfully deprived of from participating in the tender process in Form-F. There is no change in the condition of eligibility rather they have been diluted. As compared to the eligibility condition mentioned previously in Document P-3 they have been diluted while inviting the fresh pre-qualification applications. Petitioner is having vast experience. His work is certified to be satisfactory. Earlier for the same work his tender was lowest and recommended for acceptance. Certain query was made by the Hon'ble Minister, on which reply was submitted by the Chief Engineer that the work of the petitioner was satisfactory and petitioner is having vast experience. Thus, decision taken disqualifying the petitioner for the same work is illegal, and smack of arbitrariness and bad in law. He has further submitted that the designs were already prepared and were available. No reasons have been assigned in P-9 to invite the tender in Form-F lumpsum. The device has been adopted to oust the petitioner from fray and reject his lowest tender. Though petitioner offer was lowest, but, tender was not accepted. In any view of the matter he submits that decision to disqualify the petitioner is bad in law, in the facts and circumstances of the case and violative of Article 14 of the Constitution of India.

8. Shri Hemant Shrivastava, learned Government Advocate appearing for the respondents submitted that the decision to invite tenders in Form-F has been taken in the meeting of Tender Evaluation Committee as per resolution P-9 dated 28-1-2002. Petitioner has been disqualified considering the past record at pre-qualification. Such decision has not been taken illegally, in arbitrary manner or under the influence of the Minister concerned or any higher officials. No interference is called in the writ jurisdiction of this Court.

9. The only question for consideration is whether the petitioner has been rightly disqualified at the pre-qualification stage by the respondents ?

10. Pre-qualification conditions are mentioned in P-3 when the process was first initiated on 5-9-2001. Note No. 1 of the P-3 indicates that the contractors/firms who have executed an individual bridge work costing to Rs. 300.00 lakhs or more with sinking of wells beyond 15.00 M. and prestressed span of more than 25.00 M. length, alongwith total bridge works of Rs. 10.00 crores during last three years only need to apply for prequalification. In letter P-6, dated 6-2-2002 by which pre-qualification applications have been again invited, details of the work executed during the last 5 years is to be in the format at Annexure-3. Details of bridge works in hand is to be in the format at Annexure-4. In case of limited company the balance sheets of previous three years. Details of key personnel already employed or to be employed are to be given. The main conditions which were mentioned earlier in note quoted above in P-3, have not been mentioned in letter P-6, dated 6-2-2002 inviting pre-qualification applications. It is not in dispute at bar and it has not been disputed in the return and additional return filed also by the respondents that the petitioner is having the requisite experience and has done major construction work of the bridges in the State of Madhya Pradesh. This fact is also not disputed that the petitioner was qualified to submit tender for the same work in question and made best offer L-1 when applications were invited on 5-9-2001. The communication P-5 dated 7-11-2001 was sent to the petitioner requiring him to submit the tender pursuant to his being qualified for submitting the tender. Petitioner duly submitted the tender. This fact is also not disputed that the petitioner was the lowest tenderer. It passes comprehension that after having found the petitioner to be pre-qualified for the same work in question by mere change of process of inviting the tender in Form-F, how petitioner could be disqualified by the respondents in spite of possessing requisite experience. There is ring of truth in the various allegations made by the petitioner that the respondents were bent upon to get rid of the petitioner's tender as reflected in resolution P-9, though the petitioner was pre-qualified, his tender was not accepted, the information was called for on 10-1-2002 with respect to progress of the work made by the petitioner. Petitioner was picked out for the purpose of calling such an information. If it was not to deprive the petitioner and reject the petitioners' tender such information ought to have been called with respect to all the six tenderers, who had submitted their tenders, but, it was not so done, the information sent by Chief Engineer was still in favour of the petitioner and the State Level Committee had also decided on 7-12-2001 that the tender submitted by the petitioner be accepted as it was lowest 10% below SOR. The decision P-9 was simply to get rid of the entire tender process "detailed design is not prepared, tender be called in Form-F lumpsum". No discussion in detail has been made and it appears that though the decision was taken to call the tender in Form-F, but, no reasons have been mentioned by the Tender Committee for adopting that process. Be that as it may, the reasons are mentioned in the return that it was considered to be in the

interest of revenue so that contractor may not be able to claim the escalation in the price for any delay made in the completion of work. Even if this part of the decision is held to be a proper consideration for taking a decision to invite the tender in Form-F, but, no good reasons have been mentioned by the respondents in their return to disqualify the petitioner when fresh pre-qualification applications were invited as per P-6 and when the same petitioner was fit and was lowest tenderer in the tender process for the same work, how he has been disqualified at the pre-qualification stage. No special reason is coming forth. The only reason which has been mentioned by the Chief Engineer is on the same terms on which the query was made by the Minister as per letter P-8. No details have been given how progress of the work undertaken by the petitioner has been termed to be slow. No penalty has been imposed on the petitioner, is the categorical statement made in the rejoinder filed by the petitioner. This fact has not been traversed in the additional return. Petitioner had submitted that his work is satisfactory and he has been ousted illegally from the tender process by disqualifying him at the pre-qualification stage. Considering the fact that earlier the State Level Tender Committee has found the petitioner fit for the same work and no fresh material is shown to exist to disqualify the petitioner for the same work, even otherwise the condition of pre-qualification has been diluted in P-6 as compared to P-3 the petitioner fulfils the conditions is not in dispute, the only ground on which the petitioner has been disqualified is that progress is slow in the work undertaken by the petitioner, how it is slow is not coming forth. Thus, in totality of the facts and circumstances of the instant case, it is borne out from the material on record particularly P-8, P-9 communication P-10, dated 27-10-2001 and Annexure P-12, dated 2-11-2000 that decision to disqualifying the petitioner is illegal and is based on extraneous consideration. He has been wrongfully deprived of putting forth his tender for the same work, particularly when he was a lowest tenderer and his tender was earlier recommended for acceptance and was prequalified for same work.

11. Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , the Apex Court laid down the following principles to be observed by the Government while entering into contract:--

"(1) Now, there can be no doubt that what para (1) of the notice prescribed was a condition of eligibility which was required to be satisfied by every person submitting a tender.

(2) It is a well settled rule of administrative law that an executive authority must be rigorously held to the standards by which it professes its actions to be judged and it must scrupulously observe those standards on pain of invalidation of an act in violation of them.

(3) It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very

essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the power involves affectation of some right or denial of some privilege.

(4) Large majority of privileges are extended. But on that account, can it be said that they do not enjoy and legal protection ? Can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure ? Is the position of the Government in this respect the same as that of a private giver ? We do not think so. The law has not been slow to recognise the importance of this new kind of wealth and the need to protect individual interest in it and with that end in view, it has developed new forms of protection.

(5) Some interests in Government largess, formerly regarded as privileges, have been recognised as rights while others have been given legal protection not only by forging procedural safeguards but also by confining/structuring and checking Government direction in the matter of grant off such largess.

(6) The Government cannot be permitted to say that it will give jobs orienter into contracts or issue quotas or licences only in favour of those having grey hair or belonging to a particular political party or professing a particular religious faith. The Government is still the Government when it acts in the matter of granting largess and it cannot act arbitrarily. It does not stand in the same position as a private individual.

(7) The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure.

(8) Its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant.

(9) Equality of opportunity should apply to matter of public contracts. The State has the right to trade. The Government cannot choose to exclude persons by discrimination."

12. In *Tata Cellular Vs. Union of India*, , the Apex Court held the Government cannot act with arbitrariness or favouritism. Article 14 has to be kept in mind while accepting or refusing tender. Right to choose cannot be considered to be an arbitrary power. If the said powers are exercised for any collateral purpose the exercise of that power will be struck down. Court has to balance between the administrative discretion to decide matters. Unfairness is set right by judicial review. The judicial power of review is exercised to rein, in any unbridled executive functioning. The Apex Court laid down the following principles :--

"113. The principles deducible from the above are :--

(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 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 pointed out above) but must be free from arbitrariness not affected by bias or actuated by malafides;

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

The Court has to strike on the illegality or irrationality, namely, Wednesbury unreasonableness, procedural impropriety. The action is arbitrary and illegal in view of the principles laid down by the Apex Court.

13. Learned Counsel for the petitioner has not pressed for quashing the decision taken on 28-1-2002 as per P-9, as such this question is not considered whether decision taken to invite the applications in Form-F instead of Form-A is based on valid reasons and was not an arbitrary decision.

12. For the reasons aforesaid, the writ petition is allowed. The decision taken by the respondents to disqualify the petitioner at the pre-qualification stage is held to be bad in law. As it is stated at the bar that tenders have not been finalized by the respondents, the respondents are directed to proceed in accordance with law allowing the participation of the petitioner in the process of tender. Costs on parties.