

(2002) 03 DEL CK 0129

In the Delhi High Court

Case No : CW 465 of 2001 and CM 790 of 2001

Shri Ayub Ali

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 04-03-2002

Acts Referred:

Citation : (2002) 03 DEL CK 0129

Hon'ble Judges : Mukul Mudgal, J

Bench : Single Bench

Advocate : G. Lal, for the Appellant; Nemo, for the Respondent

Judgement

Mukul Mudgal, J.—This writ petition is filed by Shri Ayub Ali, the petitioner, against the Union of India, respondent No. 1 and the Director General (Works), CPWD, respondent No. 2 seeking a writ of mandamus directing the respondents to revalidate original enlistment in Class II (B & R) category of contractors in accordance with the order dated 18th May 1998 (annexure G) for the period of five years and accordingly further directing the respondents to issue tender documents with imposing any geographical restrictions on the petitioner.

2. On 11th July 1984, the respondent No.2 registered the petitioner in the category of class II contractors (B&R) as operation the O.M. No. C/14-II (B&R) dated 11th July 1984. This registration enable the petitioner to submit the tenders for the whole of the country. On 18th September 1995 vide office order No. 10(1)/91-A&C (NDZ-III)/299-A, the petitioner's aforesaid enlistment was revalidated for a period of 5 years with effect from 1st October 1995. However, the area of operation was reduced from All India basis to North Zone only which comprises of State of Punjab, Himachal Pradesh, Uttar Pradesh, Rajasthan, J & K, Haryana, Chandigarh and Delhi. On 17th April 2000 the petitioner again applied for revalidation for 5 years in accordance with the rules. On 19th June 2000 the petitioner made representation against the reduction of the working area of operation. The request was reiterated by the letter dated 15th September 2000 by the petitioner. On 27th September 2000 the respondents vide letter No.

C-14-00-File/II/B&R/300 revalidated the enlistment of the petitioner only for a period of three months i.e. up to 31st December 2000 instead of five years and also restricted the jurisdiction of the tenders by the petitioner to Delhi Region only. ON 5th January 2001 the petitioner applied for issuance of the tender documents but these documents were refused to the petitioner on the ground that the revalidation of enlistment beyond 31st December 2000 had not been enclosed by the petitioner. On 5th January 2001 the petitioner submitted a representation against the restricted revalidation of the petitioner's enlistment only up to 31st December 2000. The petitioner also sought to challenge the denial of enlistment for 5 years revalidation as according to him as per annexure R 1, office Memo dated 1st July 1994, for fresh enlistment in class II category three works of Rs. 25 lacs are required and as per annexure R 1 for evaluation also works for Rs. 25 lacs during the last 5 years is required. Reliance has also been placed upon the memo No. DGW/Con/83 dated 27th June 1995, annexure R 3, which stated that the revalidation of the contractor's enlistment will be done if the contractor secures 35 or more marks in the over all grading and such grading shall be applicable for a period of five years from the date of issue. The petitioner submitted that the evaluation of the contractor's performance is to be done as per the following table:

I.A. Time over Run (tor)

Stipulated time = ST

Actual time = AT

Marks are determined as under :-

(i) If actual completion time is the same as time allowed [AT]

[-- =1] = 50 marks

[ST]

(ii) If the Contractor takes double time than stipulated/allowed [AT] [-- =2] = 40 Marks [ST]

(iii) If he takes, 3 times the time than stipulated/ allowed [AT]

-- = 3] = 20 Marks ST]

(iv) If the time taken is more than thrice the time allowed, then = O

A. Compensation levied for delay in completion = C

Estimated cost put to tender = E

Formula = $C \times 100/E = B$

It means : If compensation is Zero

B would be + 0 and then 10 Marks.

2. Quality - 20 maximum Marks

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A. If quality is very good - 20 Marks If quality is good - 15 Marks If quality is Satisfactory - 5 Marks If quality is Poor - 0 Marks.

B. If no reduced rate items = Full 10 Marks. 3. General behavior: It has been lined to arbitration:

(i) If contractor has not gone in arbitration - 10 Marks.

(ii) If gone in arbitration and amount of claims are less than 25% of tendered amount. - 4 marks

(iii) If amount of claim is more than 25% of tenders amount - 0 marks

3. The petitioner while making the application for revalidation furnished the details of two works completed by him. It is further submitted that as per rules for revalidation only one work of Rs. 25 lacs was required and the work mentioned at Serial No. 1 is much more than Rs. 25 lacs and the quality and the speed in respect of this work was labelled as "poor" and hence revalidation of enlistment was refused by the respondent on this ground.

4. It is further submitted by the petitioner that it were the respondent who were responsible for the delay. According to him the work at Serial No. 1 for Rs. 77.64 lacs was to be completed in 5 months starting from 13th February 1998 and ought to have been completed by 12th July 1998. The respondents have accepted the delay on their part for 579 days whereas the petitioner completed the work only in 530 days. The respondents as pre the petitioner's plea submitted the following factors for the delay:

(a) permission of fly ash was obtained on 17th July 1998, after the date of competition as per annexure R;

(b) the design of layers given by the respondents on 15th July 1998 well after the date of completion of work, as per annexure R;

(c) 49 trees hindered the road construction due to alignment of the road and the petition had applied for permission for cutting of the trees, as per annexure U;

(d) the permission for cutting 49 trees was received only on 12th January 1999, as per annexure V;

(e) hindrance was registered with the respondents and the respondents acknowledged and admitted in the hinderance register to be 579 days;

It is recommended by the Engineer-in-charge, the Superintending Engineer has granted extension of time without levy of compensation, annexure Y.

The notional delay was thus averred to be only 530 days and reliance was placed the extension of time was recommended without levy of compensation; and the

Executive Engineer also granted extension of time as per annexure Z.

5. The learned counsel for the petitioner further submitted that the above facts clearly demonstrated that the delay was not on behalf of the petitioner and in any case the work was completed even in the lesser time than stipulated for the completion. According to the petitioner it was wrongly claimed by the respondents in their counter affidavit that the quality of the work of the petitioner was poor and this is demonstrated by the following.

(i) Annexure AA (rejoinder) is the copy of the 6th running bill; while releasing the payment for the bill, Certificate No. 5 states;

"The work has been carried out as per terms and condition of the agreement."

(ii) Annexure BB - copy of 7th and final bill on page 160 (bottom), Certificate No. 3 states:

"Work has been carried out as per terms and conditions of the agreement."

(iii) Annexure CC - while forwarding the application of the petitioner for revalidation, the Executive Engineer Certificate that quality of the work as "satisfactory" on page 164.

(iv) Annexure DD - The Executive Engineer, in respect of the work in question certified that:

"This is to be certified that Shri Ayub Ali (petitioner) 12-B, West Laxmi Market, P.O. Krishna Nagar, Delhi-51 has completed the following work satisfactorily and their performance found good."

(iv) Annexure EE - The concerned Superintending Engineer declared that work complete statingI find that the work has been carried out generally to specification and has been completed satisfactorily....."

6. The running bill clearly records while releasing the payment by certificate No. 5 that the work has been carried out as per terms and conditions of the agreement. Similarly in annexure BB which is a copy of the final bill, certificate No. 3 states that the work has been carried out as per terms and conditions of the agreement. In annexure CC while forwarding the application of the petitioner for revalidation, the Executive Engineer certified that the quality of the work was "satisfactory". In fact the Executive Engineer in respect of the work in question certified that the petitioner had completed the work satisfactorily and the performance had been found to be good. Similarly in annexure EE the concerned Executive Engineer had declared that the work was completed by the petitioner and further certified that the work has been carried out generally to specifications and has been completed satisfactorily.

7. Thus it is submitted by the learned counsel for the petitioner that the work of the petitioner was totally satisfactory. The petitioner further submits that he was entitled to full revalidation and is entitled to full marks as the delay was

admitted by the respondents for 579 days where the petitioner took only 530 days for completion of the work and since in view of the deferment the time taken was less than the time allowed the petitioner was entitled for full 50 marks. It is further submitted that it is clear the petitioner was not responsible for the delay and accordingly he was entitled to 10 marks. Furthermore the quality of the petitioner's work was found to be satisfactory and the petitioner was entitled for 5 marks out of 20 for quality of work; since nor reduced rated items were sanctioned against the petitioner, the petitioner was also entitled for further 10 marks. Insofar as general behavior of the petitioner is concerned, the petitioner has gone in arbitration and the amount of claims are more than 25% of the tendered amount, Therefore, the petitioner did not deny that he was not entitled to any marks on this count. Consequently as per the above evaluation the petitioner claimed to be entitled to get 75 marks out of 100 marks. It is further submitted by the petitioner that as per the requisite Rule a contractor has to get only 35 marks out of 100 for becoming eligible for 5 years revalidation whereas the petitioner should have got 75 marks which clearly demonstrated that he was fully eligible for getting revalidation of his enlistment in class II category as per previous revalidation for a period of 5 years.

8. In reply the respondents have contended that the revalidation of the enlistment is done as per the guidelines issued by the DG(W) CWPWD No. DGW/CON 71 dated 1st July 1994. It is also stated that the contractor's enlistment is revalidation on its financial capacity and performance for over all period of last 5 years. As per the laid down procedure the petitioner was only entitled for provisional extension got by the petitioner which was purely temporary and subject to his fitness being evaluated. Insofar as the relevant period of last 5 years is concerned it is submitted that only one work above Rs. 25 lacs for which the petitioner's performance was poor with respect to the speed and quality. The other work was for the sum of Rs. 22.92 lacs and, Therefore, also the performance of the petitioner was found to be poor.

9. The respondent inter alia, pleaded in its counter affidavit as under:

a) Revalidation of enlistment is as per guidelines dated 1st July 1994, annexure R 1, 3rd December 1994, annexure R 2 and 27th June 1995, annexure R 3;

b) The petitioner had mentioned 2 works done in his application (i) for Rs. 82.07 lakhs and (ii) Rs. 22.92 lakhs; Work mentioned at Serial No. (ii) does not merit consideration as it is below Rs. 25 lakhs and as far as work mentioned at Serial No. 1 is concerned, the performance of the petitioner was found to be poor qua speed and quality;

c) Period and jurisdiction of enlistment has been upheld by this Court in CWP No. 2592 of 1994 and CWP Nos. 4491 & 7468 of 1995.

10. The petitioner has stated in the rejoinder that he was entitled to revalidation having applied well in time 6 months in advance and yet in respect of granting the extension for five years as per the rules, the registration was revalued only

for a period of 3 months i.e. up to 31st December 2000. It is also submitted that the petitioner being the President of the Indian Contractors and Builders (CPWD/ PWD) Association had been singled out for hostile treatment for exposing corrupt practices against the respondents. The petitioner had in fact filed CWP No. 3363 of 2000 in this Court bringing out the irregularities in the respondent's department. The petitioner has further submitted that short term revalidation such as 3 months, 6 months or one year only encourage corruption and does not serve any public interest. Insofar as the revalidation under Class II is concerned the petitioner was only required to complete work for Rs. 25 lacs or more during the last 5 years and reliance was wrongly placed by the respondent on 2 works got executed by the petitioner. In fact in the last five years beginning from 1994-95 to 1999-2000 the petitioner had executed work to the tune of Rs. 2,85,02,038.00 but had given only details of 2 works as required under the rules. It is also denied that the performance of the petitioner for the relevant contract of more than Rs. 25 lacs was poor with respect of speed and quality. The petitioner had relied upon the following details to contend that the aforesaid plea of the petitioner's work being wrongly evaluated as poor with regard to the speed and quality is demonstrable from the following chart:

(i) Estimated Cost Rs. 85.81 lakhs

(ii) Tendered Cost Rs. 77.64 lakhs

aq (iii) Total value of work executed till completion Rs. 96,76,646.00

(iv) Amount paid in final bill Rs. 83,33,7,92.00; Rs. 7,42,854.00 was deducted from final bill, (though has been paid in pre-final bill) for want of approval of extra item No. 1 & 2 - Copy of final bill annexed here to and marked Annexure-M.

(v) Stipulated date of start 13.02.98

(vi) Completion of time allowed = 5 months

(vii) Stipulated date of completion 12.07.98

(viii) Actual date of completion 23.12.99 as recorded by the Respondent.

(ix) Total delay 530 days

11. The petitioner further submitted that he was not responsible of the delay of 530 days which was due to the respondents' conduct as is evident from the fact that the petitioner could not start the work for for initial period of 4 months due to non availability of design of layers, permission from DESU for lifting the fly Ash from Indraprastha Power Station site and non arranging of source earth within one km. These hindrances were intimated to the respondents regularly by the petitioner as evident from the following letters.

a) Petitioners letter No. 26 20.6.1998 Annexure N.

b) Reply of the respondent letter dated 10.07.98 Annexure O.

- c) Petitioner's letter dated 13.07.98 Annexure P.
- d) Permission of fly Ash received on 17.7.1998 Annexure Q.
- e) The design of layers given on 15.7.98 Annexure R.
- f) Work held up due to trees falling in the alignment (49 trees)
- g) Letter dated 1.2.99 Annexure S.
- h) Cater Pillar machine impounded permission by the forest department on 15.9.1998 Annexure T.
- i) Respondent's applied or permission for removal of trees on 11.8.99 Annexure U.
- j) Permission granted 12.01.99 Annexure V.

12. The above hindrances were accepted by the respondents and account for 579 days delay as per the hindrance register and the concerned Executive Engineer had accepted the delay by letter dated 22nd January 2000 while recommending the extension of time to the Superintendent Engineer without levy of compensation. This clearly demonstrates that out of total 579 days delay the Executive Engineer had accepted that the petitioner had taken only 530 days even though he would have been justified in taking 579 days. The petitioner, Therefore, was not responsible even for one day's delay and the classification of the petitioner's timing of construction as poor is totally uncalled for. Insofar as the quality of work is concerned, the petitioner has submitted that the petitioner was paid in toto a sum of Rs. 89,33,792.00 for the work executed by him as per the agreement rates through six running bills and the 7th and final bill was paid on 18th July 2000 and the Assistant Engineer in charge of the work had certified that "the work has been carried out as per terms and conditions of the agreement". The petitioner has also sought to rely upon the copies of the 6th and 7th bill (extract of abstract and measurement book. The petitioner, Therefore, contends that the quality of work of the petitioner was not poor. The petitioner further submitted that while applying for revalidation he had submitted the details of his work. The Executive Engineer, who was the Engineer in charge, sent his report declaring the quality of work as satisfactory. In fact letter No. 54 (472)/PWD-23/A-4/51 dated 17.03.2001 certified the petitioner's performance as follows:

"This is to certify that Shri Ayub Ali, 12 B West Laxmi Market, P.O. Krishna Nagar, Delhi-51 has completed the following work satisfactorily and their performance found good."

13. In view of the above circumstances the petitioner seeks a mandamus against the respondents to mandate the original enlistment of the petitioner in Class II (B&R) category of contractors for 5 years and further seeks consequent direction to the respondents to issue the requisite tender documents as per the above enlistment.

14. After consider the respective pleas of the parties, the following conclusions emerge:

It is evident that the Engineer-in-Chief i.e. the Executive Engineer by his letter dated 22nd January 2000 clearly admitted that as per the hindrance register total days came to 579 though in actual fact it comes to only 530 days and the extension of time has been recommended without penalty to the petitioner. Secondly, this clearly shows that any penalty said to have been imposed on the petitioner on the ground of delay is totally unjustified. Insofar as the question of quality of work is concerned, the respondents have stated that the quality was poor and this is the reason why the petitioner was not given the requisite marks while evaluating his performance. The respondents own documents such as the certificate No. 5 states that the work was carried out as per the terms and conditions of the agreement. Similar is the statement in certificate No. 3. While forwarding the application of the petitioner for revalidation a certificate had been granted by the Executive Engineer finding the work of the petitioner to be satisfactory and upon finding that insofar as the work in question is concerned the Executive Engineer concerned had certified in the register that the work had been completed satisfactorily and performance found good. Similarly in the certificate dated 29th May 2000, the Superintending Engineer had certified the work has according to the specification and completed satisfactorily. The petitioner is, Therefore, entitled to 50 marks as the delay was not on the part of the petitioner as found above. As no penalty was levied on the petitioner for the delay, the petitioner is entitled to 10 marks more; Insofar as the quality of the work is concerned, the petitioner is entitled to secure 5 marks out of 20; and since no reduced rate items were sanctioned against the petitioner, he was entitled to 10 more marks and lastly the petitioner has gone in arbitration and the amount of claims is more than 25 per cent of the tendered amount hence he was not entitled to get any marks on this count. Therefore, upon the aggregate of the above evaluation, the petitioner was entitled to get 75 marks out of 100. Thus, the petitioner's plea that he was wrongly under evaluated for denying him the revalidation under the order dated 18th May 1998 annexure "G" as he fulfilled all the qualifications set out in the said order is fully found to be justified. Accordingly the petitioner having become entitled to secure 75 marks out of 100 count not be denied the revalidation as per the respondents' own guidelines dated 1st July, 3rd December 1994 and 27th June 1995. The petitioner, Therefore, fulfills the requirements of revalidation set out in annexure G. Insofar as the plea of the respondents that the period and jurisdiction of enlistment having been upheld by this Court in CWP 2592 of 1994 and CWP Nos. 4491 and 7568 of 1995 is concerned, no such judgment was shown to this Court at the time of arguments nor was this plea urged before this Court.

13. I, Therefore, allow the petition and direct the respondents to revalidate the registration of the petitioner in Class II (B&R) category of contractors for a period of five years from the date of the expiry of the petitioner's earlier enlistment.

Accordingly the writ petition stands disposed of with no order as to costs.