

(2019) 03 MP CK 0096

In the Madhya Pradesh High Court

Case No : Writ Petition No. 25737 Of 2018

Studio "Shree", Katni

APPELLANT

Vs

Election Commissioner, Madhya Pradesh, Bhopal & Ors

RESPONDENT

Date of Decision : 19-03-2019

Acts Referred:

Constitution Of India, 1950 — Article 14, 226

Citation : (2019) 03 MP CK 0096

Hon'ble Judges : S.K. Seth, CJ;Vijay Kumar Shukla, J

Bench : Division Bench

Advocate : Dr. Anuvad Shrivastava, Siddhrath Seth, Satyendra Prasad Dubey

Final Decision : Disposed Off

Judgement

Vijay Kumar Shukla, J

1. Invoking writ jurisdiction under Article 226 of the Constitution of India the petitioner has prayed for quashing of the order dated 16-10-2018 issued by the respondent No. 2, whereby tender of respondent No.4 of videography during election has been accepted.

2. Shorn of unnecessary details : the factual expose of the present case lies in a narrow compass. The Election Commission of India has issued instructions for use of videography and digital cameras during course of forthcoming elections. It provided that in the matter of selection of videographers and their deployment, private videographers have to be hired after thorough screening in respect of their professional competence, track record, financial viability and other adjunct factors.

3. In compliance to the aforesaid instructions, the Collector/District Election Officer, Katni, respondent No.2 issued General Conditions for Tender (annexed at page No.35 of the writ petition). Clause 4 of the conditions stipulates that a tenderer must have three years experience of videography in a Government Office/Undertaking or public establishment. The tenderer shall file a certificate in

this regard which would bear the name of the officer, post, phone number etc. of the said government office/undertaking or public establishment which has issued the experience certificate. It is further provided that preference would be given to the tenderers having experience in election works. According to the writ petitioner along with this NIT a tender Form (A), Part-1 was provided. In column No.8 of the tender form, there was requirement of three years experience and an experience certificate in that behalf has to be annexed by the tenderer. The tenderer was further required to attach three years income tax returns as per column No.9. This Form was a part of tender conditions issued by the respondent No.2.

4. Pursuant to the said directions a Notice Inviting Tender (NIT) was issued inviting tenders from private videographers through Jila Nazir, Katni. Initially, NITs were issued on 4-8-2018 and 9-8-2018 which were subsequently modified and a revised NIT was issued on 31-8-2018. The present petitioner, respondent No.4 and others submitted tender forms for allotment of videography work in the General Election 2018. It is submitted that the respondent No.4 was disqualified in the technical bid itself as he was neither having requisite experience of three years nor possessing three years income tax returns. The petitioner gathered certain informations under the RTI and found that despite the fact that the respondent No.4 was disqualified in the technical bid, financial bid was opened and with collusion of the respondent No.3, in order to award contract in favour of the respondent No.4, a new NIT was invited and in the said NIT, the condition of requirement of three years experience in videography was omitted. Pursuant to the new NIT, the videography work has been awarded in favour of the respondent No.4 by order dated 16-10-2018.

5. The respondent Nos.1 to 3 have filed joint reply including respondent No.3 - Deputy Election Officer, who was impleaded as a respondent in private capacity. They submitted that pursuant to the tender notice dated 31-8-02018, five bids were received and amongst them, the respondent No.4 was found to be the lowest bidder. However, a decision was taken to invite a fresh tender, so that more competitive rates are invited. It is further submitted that the respondent No.2 had taken a decision to omit the requirement of experience of three years in the second tender notice, as the said requirement was not considered to be mandatory by the respondent No.2. It is further submitted that in pursuant to the second tender notice dated 01-10-2018, fresh bids were invited and 4 bidders submitted their bids including the respondent No.4. The respondent No.4 was found to be the lowest bidder and the work was allotted to him. It is contended that the respondents have adopted highly transparent and legal process in finalisation of tender in question.

6. The respondent No.4 in whose favour the work has been awarded, submitted that there is no illegality in the award of work of videography in his favour. It is further canvassed that after the letter of award of work he had deposited requisite earnest money and security deposit etc. and he has already completed

the videography work in the General Assembly elections.

7. We have heard the learned counsel appearing for the parties. Before we proceed to examine the validity of award of work in favour of the respondent No.4, it is apposite to mention that during course of proceedings of the present petition, we inquired from the counsel for the respondents No.1 to 3 that whether in the ensuing Lok Sabha election, the respondent No.4 will be continued for videography work or a fresh NIT will be issued for the same. It is stated at the bar on behalf of the respondents No.1 to 3 that as per decision of the respondents, the same contractor, i.e., respondent No.4 will continue for videography work in the ensuing Lok Sabha Election 2019 as well, after completing the videography work of the State Assembly election. Therefore, we think it apt to examine the validity of the award of contract of videography in favour of the respondent No.4.

8. The Election Commission of India has issued Compendium Instructions, Annexure-P/9 for pre-poll arrangements. Instruction No.6 deals with use of videography and digital cameras during elections. In regard to this the Election Commission of India issued a letter No.447/2007-PLN-IV addressed to the Chief Secretaries and all Chief Electoral Officers of All States and Union Territories for use of videography and digital cameras during elections. Clause 6 of the Instructions being useful in the present context, is reproduced hereunder:

"6. The Commission has issued the following instructions in the matter of selection of videographers and their deployment:

6.1. The private videographers to be hired shall be screened thoroughly as to their professional competence, track record, financial viability and other related factors.

6.2. The videographers should not belong to any political party and should not be known sympathizers or supporters or close relatives of any of the contesting candidates or any of the leaders of any political party or should not have been hired by any political party or contesting candidates.

6.3. The Returning Officer is required to provide tea, snacks food etc. to the videographers and they shall not be left to fend for themselves while on duty. It shall be ensured that the videographers DO NOT accept the hospitality of any contesting candidates or political party of their workers.

6.4. Video teams should be under the personal supervision and guidance of a senior election related officer.

6.5. As and when required the video teams may be asked to accompany the General/Election Expenditure Observers so that all critical events observed by them may also be videotaped.

6.6. The videographers shall be impressed that the principle behind the scheme is to record and videotape critical events only which are likely to vitiate the poll

and not to just videotape all events in a routine manner in order to fill the cassette."

(Emphasis supplied)

9. Thus, as per clause 6.1 of the Instructions issued by the Election Commission of India, private videographers have to be hired after screening thoroughly their professional competence, track record, financial viability and other related factors.

10. Pursuant to the aforesaid Instructions of the Election Commission of India, the respondent No.2, District Election Officer/Collector, Katni issued general conditions of tender for award of work of videography. The condition No.4 being relevant for the present purpose is reproduced :

"4. निविदाकर्ता को किसी प्वासकीय कार्यालय/उपक्रम या सार्वजनिक प्रतिष्ठान में उक्त कार्य का न्यूनतम 03 वर्ष का अनुभव होना चाहिए । जिस हेतु वह प्रमाण प्रस्तुत करेगा तथा उस संस्थान का प्रमाणन करने वाले अधिकारी का नाम, पद व फोन नम्बर इत्यादि का उल्लंख होना चाहिए । (निर्वाचन कार्य में अनुभव हो प्राथमिकता दी जावेगी)"

11. As per this condition, the tenderer must have three years experience of videography in a Government Office/Undertaking or a public establishment. He shall also file a certificate in this regard which would bear - name of the officer, post and phone number etc. of the said Office/Undertaking or public establishment which has issued the experience certificate. It is further provided that preference would be given to the tenderers having experience of videography in election works. Along with these instructions forming a part of the NIT, Form (A) was prescribed which was to be filled in by the tenderer. In the form condition No.8 was relating to minimum three years experience in the videography and condition No.9 was in relation to filing of three years income tax returns. Copy of the documents in this regard were to be annexed. The relevant clause of Form (A), forming a part of the first NIT is reproduced hereunder :

"कार्यालय कलेक्टर जिला कटनी

भाग-1

फार्म (अ)

निविदा प्रपत्र

निविदाकर्ता के व्यवसाय का ब्योरा (निविदाकर्ता द्वारा भरा जाये)

(महत्वपूर्ण घटनाओं की वीडियोग्राफी हेतु)

1.

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3.

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4.

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5.

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6.

- - - - -
7.

- - - - -
8

न्यूनतम 3 वर्ष का अनुभव (प्रति संलग्न करें)

9.

तीन वर्ष का आयकर रिटर्न (प्रति संलग्न करें)"

12. Thus, from the aforesaid documents it is vivid that in pursuant to the Instructions of the Election Commission of India, in order to examine professional competence, track record and financial viability of a tenderer for videography, the respondent No.2/District Election Officer/Collector has also prescribed the conditions of three years experience and filing of three years income tax returns, as mandatory.

13. As per the conditions of the contract issued by the respondent No.2, a tenderer was required to submit his tender form in three duly sealed separate envelopes. The first envelop pertained to security amount and others were for technical and financial bids. The respondents have stated in para 2.2 of the reply that in pursuant to the tender notice, dated 31-8-2018, five bids were received and amongst them the respondent No.4 was found to be the lowest bidder. Copy of the running note-sheet has been annexed as Annexure-R/2 with the return. At this juncture, it is useful to reproduce para 2.2 of the return filed by the respondents No.1 to 3. It reads thus :

"2.2. That, pursuant to tender notice, dated 31-8-2018, five bids were received and amongst them the respondent No.4 was found to be the lowest bidder. The running note-sheet, dated 24-9-2018 (Annexure-R/2) is being filed to demonstrate that due process of law was undertaken while scrutinizing the tender keeping in mind the best interest of Election Commission of India and the public exchequer. A bare perusal of note-sheet will also reflect the reason for issuing fresh tender. The reason for issuing a fresh tender was that more competitive rates should be invited so that the public exchequer is not burdened with higher rates and at the same time more qualified videographers can

participate. It is to be noted that even in the first tender scrutiny, respondent No.4 was found to be the lowest bidder and that the petitioner has erred in stating that the respondent No.4 was not found suitable in first tender process, whereas not only the respondent No.4 was found qualified but was also the lowest bidder in the first round of tender process."

14. Regard being had to the submissions advanced and upon perusal of the record, we find that the proceedings of the first tender were in tabular form wherein the names of five tenderes along with their technical documents were mentioned, viz. : Shree Creation, Katni; Studio Shree, Katni; Shri Rakesh Vishwakarma, Katni; Shree S. Video Creation, Katni; and Shri Saket Video Digital, Betul.

Whereas in the table, in handwriting the name of respondent No.4 was shown as "Jai Maa Studio" which was not in the table. Upon perusal of the said table, we also note that in the technical bid, in respect of minimum three years experience in election works, initially in the last column, where name of the respondent No.4, Jai Maa Studio was added and a cross mark (X) was put in, because he was not having the requisite three years experience in the election works. However, it is luminescent that the same was made a tick mark (?) by overwriting.

15. Despite repeated query having been made by this Court during course of hearing, the respondents could not explain satisfactorily about the aforesaid interpolation of the record. Respondent No.3 chose not to file any specific denial by filing separate reply and affidavit to the allegations levelled against him in personal capacity by the writ petitioner, being in collusion with the respondent No.4 malafide and bias.

16. In para 2.2 of the reply the respondents submitted that in pursuant to the decision taken by the Committee, a fresh tender was invited. Upon perusal of the tender proceedings at page No.14 of the reply filed by the respondents, it is noted that a fresh tender was invited on the same terms and conditions. Then how the respondents could have deleted/omitted the requirement of three years experience which was prescribed by the Election Commission of India, vide its communication addressed to all the Chief Secretaries of the State of M.P. and all the District Elections Officers. The respondents have also not disclosed that in absence of experience, how professional competence and track record could have been evaluated by them. Further, from the Income Tax returns filed by the respondent No.4, it is perceptible that he had not paid any income tax for three consecutive years, then how the respondents could have assessed and evaluated the financial viability of the respondent No.4.

17. A specific query was made by this Court to the learned counsel appearing for the respondents, representing the Election Commission of India as well as respondents No.2 and 3, that whether the condition of experience and Income Tax returns was omitted or deleted in any of the district of the State of M.P.,

while inviting tenders for award of videography contract for the elections, counsel for the respondents could not make any statement in this regard, except a bald statement that the respondent No.2, District Election Officer considered that the requirement of three years experience is not a mandatory condition. Apart from this, we have also perused the so called experience certificate filed by the respondent No.4, as Annexure-P/12, wherein respondent No.4 himself certified his work of experience that he had got five years experience through Jai Maa Studio in the M.P. Housing Board. The Housing Board has supplied the information under the RTI Act, vide communication dated 26-9-2018, that they had never issued any experience certificate of videography in favour of the respondent No.4.

18. We have bestowed our anxious consideration to the arguments advanced by the learned counsel for the parties. We find that the conditions issued by the Election Commission of India, vide Instruction No.6 regarding use of videography and video digital cameras during elections, was a mandatory condition, as the Commission has made it clear that the private videographers to be hired, shall be screened thoroughly as to their professional competence, track record, financial viability and other auxiliary factors and by omission of the said condition of experience of three years, in the second NIT the respondents could not justify that as to how the professional competence and track record of a tenderer could have been evaluated. The aforesaid condition was made a part of the Instructions issued by the District Election Officer, Katni and also the Form annexed along with NIT.

19. The proceedings produced before us clearly show that as well as reply filed by the respondents No.1 to 3 in para 2.2. five bids were received in pursuant to the first NIT. However, in the record by handwritten column the name of the respondent No.4 was included. Cross mark (X) was placed initially against experience column, but later the same has been changed by overwriting to tick mark (?). Learned counsel for the respondents could not clarify that whether the condition imposed by the Election Commission of India regarding three years experience in videography for award of contract was omitted in any of the district in the State of Madhya Pradesh by any District Election Officer.

20. We are not oblivious of the scope of interference in contractual matters under Article 226 of the Constitution of India. The enunciation of law made by the Apex Court in the cases of Tata Cellular vs. Union of India, (1994) 6 SCC 651; A.B.L. International Ltd. and another vs. Export Credit Guarantee Corporation of India Ltd. and others, (2004) 3 SCC 553; and Noble Resources Ltd. vs. State of Orissa and another, (2006) 10 SCC 236 are taken note of.

21. The Apex Court after surveying its various judgments dealing with different situations/aspects relating to contract entered into by the State/public authority with private parties ruled that there is no absolute bar to the maintainability of the writ petition, even in the contractual matters. At this juncture, it is profitable to reproduce para 15 of the judgment rendered in the case of Noble Resources

Ltd. (supra) :

"15. It is trite that if an action on the part of the State is violative of the equality clause contained in Article 14 of the Constitution of India, a writ petition would be maintainable even in the contractual field. A distinction indisputably must be made between a matter which is at the threshold of a contract and a breach of contract; whereas in the former the court's scrutiny would be more intrusive, in the latter the Court may not ordinarily exercise its discretionary jurisdiction of judicial review, unless it is found to be violative of Article 14 of the Constitution. While exercising contractual powers also, the government bodies may be subjected to judicial review in order to prevent arbitrariness or favouritism on their part. Indisputably, inherent limitations exist, but it would be correct to opine that under no circumstances a writ will lie only because it involves a contractual matter."

22. After taking into consideration the facts and documents of the present case, we find that the entire decision making process in pursuant to the first NIT and thereafter second NIT, suffer from patent illegality and arbitrariness and vice of malice. The allegations of malafide having not been refuted by the respondent No.3, we find that decision making process of the first NIT; omission of mandatory condition of requirement of three years experience in the second NIT; and then award of NIT in favour of the respondent No.4, was illegal and arbitrary. We hereby quash the order dated 16-10-2018 awarding tender for videography work in favour of the respondent No.4 and direct the respondents to issue a fresh NIT, incorporating the condition of three years working experience and filing of Income Tax returns, for the purpose of tender of videography in the forthcoming Lok Sabha election, as prescribed by the Election Commission of India, within 10 days from the date of communication of the order passed today, and complete the entire process expeditiously, preferably within a fortnight therefrom.

23. We put on record our unequivocal condemnation on the conduct and the manner in which NIT proceedings have been conducted by the respondents No.2 and 3 and make a note of caution for future NITs.

24. With the aforesaid observation and directions, the present writ petition stands disposed of. In the facts and circumstances of the case, there shall be no order as to costs.