
(2001) 09 JH CK 0025
In the Jharkhand High Court
Case No : LPA No. 571 of 2001

Surendra Prasad Singh

APPELLANT

Vs

State of Jharkhand and Others

RESPONDENT

Date of Decision : 11-09-2001

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2001) 09 JH CK 0025

Hon'ble Judges : Vinod Kumar Gupta, C.J.;D.N. Prasad, J

Bench : Division Bench

Advocate : S.B. Gadodia, Gopal Krishna Sinha and Awadhesh Pandey, for the Appellant; B.S. Lall, AAG, for the Respondent

Judgement

1. This appeal under Clause 10 of the Letters Patent is directed against the order dated 27.8.2001, passed by the learned Single Judge in CWJC No. 2136 of 2001, whereby the learned Single Judge has dismissed the writ application filed by the petitioner appellant.

2. The brief facts, leading to the filing of this appeal, may be summarised as under :--

A notice inviting tender was issued on 30.9.2000, which, inter alia, asked the intending tenderers to submit their offers with respect to various items of work. One of the items listed in this tender notice was the work relating to "Spill Way Group B" and the estimated cost of the work was mentioned at Rs. 7.70 lacs. The tender notice required that all the intending tenderers should deposit along with the tender documents, the earnest money as was mentioned in the notice inviting tender. Against the aforesaid work of Spill Way, the earnest money required to be deposited against Column No. 5 was Rs. 15,400/-.

3. It is the undisputed case of the respondents that the petitioner-appellant submitted his tender documents within the time fixed in the NIT. The tender documents were accompanied by the deposit of earnest money to the tune of Rs.

15,500/-. The tender submitted by the appellant, however, was rejected on the ground that the requisite prescribed amount of the earnest money was not deposited with the tender documents. According to the respondents, the petitioner appellant should have deposited a sum of Rs. 15,600/-, as the earnest money, and since he deposited only Rs. 15,500/-, his tender was liable to be rejected. After rejecting the tender of the petitioner-appellant, the work in question was awarded to respondent No. 6.

4. Yesterday, when the matter came up for consideration, on realising that vide the judgment under appeal passed by the learned Single Judge on 27.3.2001, because of the dismissal of the writ application, the interim stay order stood vacated, we were not sure whether the respondent No. 6 has started the contract work in question or not. Therefore, we called upon the respondent No. 3, Chief Engineer, Minor Irrigation Department, Ranchi, to file an affidavit informing as to whether the respondent No. 6 has started the work in question. An affidavit by respondent No. 3 has been filed today in which it has been stated that the respondent No. 6 has started the work. Because of the fact that the work has been started by respondent No. 6, we do not intend to disturb the present work because restoring the status quo ante shall be against the public interest. However, on our finding that the action of the respondents in rejecting the tender document of the appellant was illegal, unconstitutional and totally invalid, we will have no hesitation in compensating the appellant by awarding damages in this respect. We shall now find out whether the action of the respondent was constitutional and legally correct or not.

5. As already observed, the Notice Inviting Tender had itself clearly suggested that the estimated cost of the work in question was Rs. 7.70 lacs and that the requisite amount towards the earnest money deposit was Rs. 15,400/-. The NIT, however, contained a very interesting and unusual stipulation. The NIT is in Hindi. The English translation of this unusual and interesting stipulation, reads thus :--

"Estimated cost can decrease or increase. Correspondingly and accordingly the earnest money amount may also vary and depending upon the decrease and increase of the estimated cost of the work, the final figure of the earnest money alone shall be valid. For the special information of all concerned, they are advised to contact the office of the Executive Engineer or keep looking to the Notice Board."

6. It is the case of the respondents in the Writ Application and in this Appeal that they later revised the estimated cost of the work in question and increased it from Rs. 7.70 lacs to Rs. 7.75 lacs and correspondingly, therefore, the amount of earnest money required to be deposited by the tenderers also stood increased from Rs. 15,400/- to Rs. 15,600/-. According to the respondents, therefore, since the petitioner had defaulted in providing the earnest money deposit by a lesser amount of Rs. 100/-, his tender was rejected as being contrary to the terms and conditions contained in the NIT. For the reasons that we shall spell

out, this action of the respondents was wholly untenable, totally unconstitutional and patently illegal.

7. Article 14 of the Constitution strikes at inequality and arbitrariness. It protects everyone against any executive action which is either arbitrary or motivated or actuated by such considerations which are unfair, unreasonable or capricious. Viewed thus, when one looks at the aforesaid impugned stipulations in the NIT, one finds that the respondents by reserving to themselves the unreasonable, whimsical and arbitrary exercise of power of increasing or decreasing the estimated cost of the work made the tendering process non-workable and exposed it to ridicule and arbitrary exercise of whimsical executive power. For as small an item of work as the construction of a Spill Way, when the NIT was issued, it was expected that the respondents would have worked out the estimated cost of the work and, therefore, they actually specified it as Rs. 7.70 lacs. Thus, also they specified the amount of earnest money at Rs. 15,400/-. How much was the construction, how much it was going to cost and what were the expenditures involved were all known to respondents before the NIT was issued. Thus, keeping a stipulation that the estimated cost could increase was not at all warranted. This is borne out from a very plain and simple fact. The fact is that ultimately the cost was shown to have increased by Rs. 5,000/-. Imagine the ridiculous nature of the transaction when the respondents claimed that the cost has increased from Rs. 7.70 lacs to Rs. 7.75 lacs : The increase is less than 1%. If this is not the arbitrary exercise of power, what else could be termed as arbitrary exercise of power is hardly to be reiterated. This is one aspect of the matter.

8. The second aspect and more important is why they kept the earnest money amount subject to fluctuation. Whether the estimated cost of the work increased or decreased, why did not they fix the amount of earnest money at a particular sum. If the amount was specified at Rs. 15,400/- why have it subject to change and that too by a couple of hundred rupees, again a fluctuation of less than 1%. As it turned out, the increase was just Rs. 100/- and that too because of the arbitrary increase in the estimated cost of the work. Both these stipulations, therefore, were totally unreasonable, arbitrary and capricious.

9. Even though the stipulation in the NIT did say that the increase or decrease shall be notified at the Office Board and the intending tenderers should keep visiting the office every day for such notification, it is not the case of the respondents either in the writ application or in this appeal that they ever notified any such increase either in the estimated cost of the work or in the amount of the earnest money.

10. The aforesaid act of respondents was nothing but a patently arbitrary exercise of executive power, perhaps, with a motive to exclude the public at large and to favour someone of their choice. This again was reasonable and totally opposed to public policy and appears to be culpable in nature. Had the increase in the estimated cost of the contract work ultimately turned out to be somewhere

in the realm of 50% or thereabout, or even at a lower scale, say, 30%. 20% or even 10%, perhaps, still one could have considered the genuineness of the stipulation. But as noticed above, it ultimately turned out to be less than even 1%. This increase of Rs. 5,000/- (less than one %) appears also to have been artificially created to shut out the genuine tenderers. The impugned stipulation, therefore, both with respect to the increase/decrease in the estimated cost of the work and the corresponding fluctuation in the amount of the earnest money can easily be termed as ridiculous and sham, apart from being totally unreasonable and wholly arbitrary. It bordered on absurdity of the worst unreasonable kind. This apart, it did appear to be culpable in nature. The end-result, that is, the mere increase of Rs. 5,000/- left no-one in any doubt, if there was any, to begin with.

11. Based on the aforesaid facts and circumstances, therefore, in normal course, we should have set aside the entire tendering process and the award of contract to respondent No. 6, but looking to the fact that respondent No. 6 has now started the work, public interest demands that we should not set at naught the entire process and order restoration of status quo ante. But the fact remains that for the aforesaid culpable action of the respondents and because of their arbitrary and unreasonable exercise of executive power, the petitioner/appellant has been deprived of his chance to bid successfully in the tendering process. He is to be compensated for this, because had he succeeded in the tendering process and got awarded the contract work, he could have expected to earn some profit.

12. Mr. S.B. Gadodia, learned Senior Counsel appearing for the petitioner/appellant suggests that we should compensate the appellant by awarding him damages at the rate of 15% of the total contract value. We, however, feel that in the facts and circumstances of this case, it shall not be desirable to compensate the appellant by awarding damages based on any percentage of the expected or anticipated profit. We are saying so because the entire transaction is loaded with imponderables and contingencies of such type and would, perhaps, not speculate to any degree of certainty that the appellant first of all would have been awarded the contract and secondly he would have in all circumstances made profit out of this venture. According to us, the best way to compensate the appellant would be to award costs to him of a fixed amount.

13. In the result, the appeal is allowed. The judgment of the learned Single Judge is set aside. The appellant is awarded costs assessed at Rs. 25,000/- (twenty five thousand) which the respondents would pay to him within six weeks from today.

14. We direct that a copy of this judgment be sent to the Chief Secretary of Jharkhand Government. We leave it to the Govt. to decide whether it would like to hold an enquiry into the matter and fix the responsibility upon the person concerned for such arbitrary, whimsical and capricious exercise of executive power by incorporating the aforesaid stipulations in the NIT. If the Government of

Jharkhand decides to do so and ultimately fixes the responsibility, it shall be at absolute liberty, after fixing such responsibility, to direct that the aforesaid amount of Rs. 25,000/- shall be recovered from the salary of the person or persons held responsible. Such an action, if taken by the Government, shall be in total conformity with the spirit and ratio of this judgment.

15. Appeal is disposed of accordingly.