(1997) 07 AP CK 0082

In the Andhra Pradesh High Court

Case No : Writ Petition No. 9704 of 1997

Vijay Fire Protection Systems Ltd. APPELLANT

Vs

Visakhapatnam Port Trust and Another RESPONDENT

Date of Decision : 23-07-1997

Acts Referred:
Constitution of India, 1950 — Article 12, 14, 226

Citation : AIR 1998 AP 66

Hon'ble Judges : B. Sudershan Reddy, J

Bench : Single Bench

Advocate : M.V. Ramana Reddy and M. Ravindranath Reddy, for the Appellant; K. Sreenivasa Murthy, S.C., for the Respondent

Final Decision : Dismissed

Judgement

B. Sudershan Reddy, J.—The petitioner in the instant writ petition prays for issuance of a writ of Mandamus declaring tghe action of the respondents in termination Work-order dated : 28-12-1996 as arbitrary, illegal, malafide and unjust.

2. The petitioner is a Company registered under the Companies Act, 1956 and is engaged in the business of undertaking turnkey contracts of fire protection, detection systems. It claims to be one of the most reputed and highly regarded as a specialised fire engineering company in the country and stated to have executed several contracts with Companies such as, NTPC, BHEL, ONGC, ECIL, Bombay Port Trust and New Mangaldre Port Trust. It is stated to have commissioned systems worth about Rs. 200 crore successfully.

3. The Visakhapatnam Port Trust (for short ''VPT'') invited tenders through open news paper advertisements for design, manufacture, supply delivery; erection, testing and Commissioning of fire fighting facilities for proposed LPG Jetty at Visakhapatnam Outer Harbour at an estimated approximate cost of Rs. 4.8 crore. The petitioher-Company and two others submitted tenders pursuant to the said

invitation. It is clear from the record that tenders were issued to six firms, including the petitioner herein, who are pre-qualified as per the recommendations of the consultants M/s. Consulting Engineering Services (India) Pvt. Ltd., New Delhi for the work of design, manufacture, supply, delivery,erection, testing and commissioning of fire fighting facilities for the proposed LPG Jetty of VPT Outer Harbour. Out of the said six firms, only five firms have submitted their offers and the Cover-I (Technical bids) of the tenderers was opened on 29-2-1996.

4. The technical bids of the four firms, including that of the petitioner were sent to the consultants for evalution and comments. The consultants in their evaluation report dated : 25-6-1996 have stated that the petitioner''s offer requires to be clarified on some technical issues. After obtaining the clarifications, further discussions were held by the Tender Committee, assisted by the consultants, with the representatives of the firms, including the petitioner herein, on 23-7-1996 and 24-7-1996 to sort out their outstanding technical and commercial issues to bring the offers as per the respondents'' requirement. Further confirmation/ data furnished by the petitioner was examined by the Consultant. It is, at this stage, the petitioners herein represented in letter dated : 13-10-1996 and the Tender Committee found that the offer of the petitioner would be considered along with those of other two firms as the petitioners is (i) pre-qualified by the Consultants and (ii) for a better competition in the bids. Purusant to the requisition by the respondents, the petitioners herein furnished further clarification on the technical bids on the points raised by the Consultants. Thereafter, all the three firms, including the petitioner herein were requested to attend to a pre-bid meeting with the Tender Committee and Consultants for discussion on the outstanding technical issues on 11-10-1996 and 12-10-1996. The issues discussed in the presence of the Tender Committee were duly minuted and signed by all the authorised representatives of the firms, including the petitioner herein in token acceptance of the same.

5. It is clear from the record that the price bids were to be opened on 14-10-1996. After completion of the technical discussions, the petitioner was asked to purchase pumpsets from either of the three companies viz., .

(i) M/s. Worthington Pumps India Ltd.

(ii) M/s. Kirloskar Brothers Ltd.

(iii) M/s. Jyothi Limited.

6. It is the case of the petitioner that the respondents having summoned all the three tenderers including the petitioner herein on 14-10-1996 forced all of them to give an undertaking on the respondents'' letter-pad that Kiroloskar make Pumpsets would only be considered by them while furnishing price bid at 3-30 p.m. on 14-10-1996. After receipt of the letter dated : 27-11-1996 from the respondents, the petitioner by its letter dated 9-12-1996 requested the respondents to consider ''Worthington'' pumpsets as they meet ail full technical

requirements of the tender. The petitioner addressed this letter to the respondents as the Kirloskar brothers enhanced rates of pumpsets by Rs. 75,00,000-00 more than the price quoted by it prior to 14-10-1996. Inspite of such abnormal increase in the prices of pumpsets of Kirloskar Brothers, the respondents are insisting to purchase only Kirloskar Pumpsets for the reasons best known to them, though the other pumpsets of M/s. Worthington, Flow Way and Peerless are cheaper and best suited for the purpose. In such circumstances, according to the petitioner, the action of the respondents in insisting to purchase only Kirloskar Pumpsets is absolutely arbitrary and unfair. If the respondents compel the petitioner to purchase Kirloskar Pumpsets only, it would result in enormous loss to it as the Kirloskar Brothers have increased the prices of the pumpsets very steeply.

7. Be that as it may, the respondents by letter dated : 28-12-1996 issued final work-order confirming the prices quoted by the petitioner and also asked the petitioner to supply spares also worth Rs. 7,62,750-00 in addition to the bid price. The respondents through letter dated :

31-12-1990 made it absolutely clear that it would hot be possible for them to accept Worthington make pumpsets and the petitioners was reminded of its undertaking given to the respondents on 14-10-1996, wherein it was categorically agreed that the petitioner would purchase Kirloskar Pumpsets only.

8. The respondents through letter dated : 9-1-1997 sent a draft agreement for approval and execution, requesting the petitioner herein to comply with all the formalities, including the execution of the agreement. The petitioner through letter dated : 21-1-1997 raised some disputes once again requesting the respondents to permit the petitioner to purchase pumpsets from Worthington (India) Ltd. According to the petitioners, these pumpsets are far better than the pumpsets manufactured by Kirloskar brothers. The fact remains that the respondents have refused to accept the same and insisted that the petitioner should purchase and use Kirloskar Pumpsets only, through their letter dated : 14-2-1997.

9. The respondents through another letter dated : 8-3-1997 issued show-cause notice to the petitioner herein asking to show cause as to why the work-order should not be cancelled. The petitioner has submitted a detailed explanation to the said show-cause notice. The respondents through letter dated : 16-4-1997 cancelled the work-order dated : 28-12-1996. Hence this writ petition.

10. It is clear from the record that all the three successful tenderers, including the petitioner herein offered to purchase pumpsets of different makes, such as Kirloskar, Jyothi and Worthington etc. During the discussion with the Tender Committee the tenderers were asked to submit proof of satisfactory performance and application in marine conditions and the requisite performance characteristics conforming to those specified in the tender specifications and by the tender committee during the discussions. It is true that the petitioner herein

offered Worthington Pumpsets for consideration and even before opening price bids, the petitioner was asked to submit the proof of their performance characteristics etc. The petitioner failed to do so. So also the other two firms could not produce proof of the suitability of the pumps offered by them as per specifications. The Tender Committee after elaborate consideration of the matter and keeping in view the satisfactory performance of the pumps decided that except the pumps of Kirloskar make, none of the alternative makes offered by any of the tenderers is acceptable technically. Hence, it was made clear to all the three tenderers that only pumps of Kirloskar make with MOC and performance characteristics specified in the tender notice will only be acceptable and requested the firms to quote accordingly.

11. Price bids of the three tenderers were opened on 14-10-1996 in the presence of the consultants and evaluated the cost of the price bids of the three firms, which is as follows :

(1) M/s. Hydro Tec Engineers (I)(P) Ltd. Rs. 8,21,77,594/- (2) M/s. Technofab Engg. Ltd. Rs. 6,20,46,299/- (3) M/s. C.F.P.S. (Petitioner) Rs. 4,38,64,866/-

12. Since the petitioner''s offer is the lowest among the three, the Tender Committee recommended the case of the petitioner for award of the Work-Order for Rs. 4.38 crore, which is 8.6% less than the estimated amount of Rs. 4.8 crore put to tender. Accordingly the work was awarded to the lowest tenderer (the petitioner herein) through the letter dated : 28-12-1996. The petitioner was required to commence the work within fifteen days from the date of issue of the Work-order and it has to submit Bank-guarantee for a sum of Rs. 21,93,245/- being 5% value of the work within ten days from the date of receipt of the Work-order and it has to deposit within thirty days the balance amount of Rs. 9,15,690/-. The petitioner herein has complied with none of the above conditions and also not commenced the work as per the tender conditions; but, started correspondence on the issue. The respondents reminded the petitioner of its obligation to commence the work in accordance with the terms and conditions. Since the petitioner has failed to comply with the terms and conditions of the contract, show-cause notice dated : 8-3-1997 was issued directing the petitioner to submit explanation, which the petitioner did through reply dated : 22-3-1997. After consideration of the entire issue, the impunged order terminating the Work-order was passed by the respondents on 15-4-1997.

13. It is urged by the learned senior counsel, Sri M. V. Ramana Reddy, appearing on behalf of the petitioner that the action of the''respondents in cancelling the work-order is totally illegal, arbitrary and unfair. The action of the respondents in instisting that the petitioner should purchase Kirloskar pumps is vitiated by malafides. The respondents want to support and advance the business interest of Kirloskar brothers by insisting the petitioner to purchase only Kirloskar pumps for the purpose of completing the project.

14. The learned senior counsel relied upon the well known decisions of the Apex

Court in support of his submission that even in the matter of awarding contract the State and its instrumentalities are required to act fairly and their action is required to be free from arbitrariness. They have no absolute right as in the case of a private individual to choose contractors of their own choice. They are bound by the terms and conditions of the tender notification and are required to take decision in the public interest. The learned senior counsel placed particular reliance upon the decisions in Tata Cellular Vs. Union of India, ; Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, and Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others, . There is no need to multiply and refer to all the decisions on the subject. The law is well settled and not res integra. It is true that the action of the State and its instrumentalities is required to be fair, reasonable even in the matter of awarding contract. But, at the same time, the Apex Court, itself, in Tata Cellular case (supra) observed that "there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. The right to refuse the lowest or any other tender is always available to the Government. There can be no question of infringement of Article 14, if the Government tries to get the best person or best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down." In Sterling Computer''s case (supra), the Apex Court observed that "by way of judicial review the Court cannot act as a Court of appeal, while examining an administrative decision and to record a finding whether such a decision could have been taken otherwise in the facts and circumstances of the case. By judicial review the Court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Court have inherent limitations on the scope of any such enquiry." The law on the subject it succinctly summarised by the Apex Court in Asia Foundation & Construction''s Case (supra) and the Apex Court observed that "it is not for the Court to determine whether a particular policy or particular decision taken in fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken, The extent of the duty to act fairly will vary from case to case. Though the principle of judicial review cannot be denied so far as exercise of contractual powers of Government bodies are concerned, but it is intended to prevent arbitrariness or favouritism an it is exercised in the larger public interest or if it is brought to the notice of the Court that in the matter of award of contract power has been exercised for any collateral purpose." (emphasis of mine). But, the question is as to what is the arbitrariness that is being complained in this petition ?

15. It is absolutely clear from the proceedings of the Tender Committee where the representative of the bidders, including the petitioner herein were present on 14-10-1996 and that all the bidders of the three tenders were informed that only Kirloskar make pumps which satisfy the NIT and specifications are acceptable and they should submit their quotations accordingly. The representatives of alt

the three firms were informed at that time that if any one of them require more time to submit price bids, they will be given time upto 3.30 p.m. on the same day and final price bids will be opened only after 3.30 p.m. and further scrutiny will be carried. This is even before the opening of the price bids. The successful tenderers, including the petitioner herein were informed in categorical terms that only Kirloskar pumps are technically acceptable. There was no protest whatsoever from any of the tenderers and in fact they were given opportunity to even vary the price bids. The contention that only Kirloskar pumps would be acceptable to the respondents was not only made clear in the tender committee, but the petitioner in token of acceptance of the said contention has signed the note on 14-10-1996, itself, before opening of the price bids. In such view of the matter, it cannot be said that the petitioner was not aware of purchasing and using only Kirloskar pumps for the purpose. May be the prices of Kirloskar pumps are subsequently increased for which the respondents cannot be held responsible. None prevented the petitioner from revising the prices on coming to know that only Kirloskar pumps would be acceptable to the respondents. In such view of the matter it cannot be said that the action of the respondents is arbitrary.

16. It is not possible for this Court to express any opinion on the question as to whether it is the Kirloskar pumps which would be more useful for the purpose or any other pumps. It is for the respondents to consider the same and having regard to the facts and circumstances the respondents have decided that it is Kirloskar Pumps which is required to be used in the completion of the project in question. How can the Court substitute its view and decide that it is some other pumps which would be more useful for the purpose ? The petitioner having accepted the contract with eyes wide open cannot turn round and complain the action of the respondents as arbitrary. The concept of arbitrariness and unreasonableness has no application in such a situation. It is the respondents, who have to decide for itself as to which pump would be required to be used by a successful tenderer in completion of the project.

17. An important aspect, as rightly pointed by Mr. K. Srcenivasa Murthy is required to be noticed. That in the tender conditions it was specified as to which is the pump that is required to be used. The matter was finalised by the tender committee before the price bids were opened and an opportunity was given to the tenderers to revise their price bids, if they feel to do so by keeping in view that only Kirloskar pumps would be acceptable to the respondents. It is a policy decision taken by the respondents having regard to variety of factors and experience. The Court cannot substitute its view and compel the respondents to use some other pumps. It is for the petitioners to decide for itself as to proceed further in the matter or not, if the condition that Kirloskar pumps alone are required to be purchased by it. is not acceptable to it.

18. In Krishnan Kakkanth Vs. Government of Kerala and ohters, the Apex Court held that "the Circular issued by the Government of Keralathat for distribution of

pumpsets to farmers the Corporation would arrange supply of pumpsets in the northern Districts of Kerala by purchasing pumpsets only from the approved dealers of the Government does not infirnge the fundamenal right of other dealers in pumpsets, nor is violative of Article 14. The direction contained in the circular cannot be said to be vitiated being arbitrary, capricious or unreasonable". It is observed by the Apex Court that "the State Government on considering of such facts and circumstances and to ensure genuine sale of pumpsets at proper price with effective after-sales service has felt that farmers covered by the financial assistance scheme should be fastened with an obligation to purchase pumpsets only from approved dealers in a region where according to State Government there is a felt need of purchase from such approved dealers, it cannot be held that such action of the State Government lies in its ipse dixit without being informed by the reason." Here also in this case the respondents in view of their previous experience and having regard to the host of other circumstances came to the conclusion that Kirloskar Pumps suit the requirement and no other pump-set. The Court cannot interfere with such decision nor the successful tenderer can be allowed to insist that he would purchase some other pump for the purpose of completing the project by asserting that such pumps are very useful, cheaper and effective compared to Kirloskars. It is for the petitioner to assert as to which pumpset is required to be used. It is not as if the respondents are going back on the conditions of the tender. In fact, the petitioner had agreed and its representative signed the MOM on 14-10-1996 and subscribed to the view before the Tender Committee that it would be Kirlosakar pumps that are required to be used for the purpose.

19. The allegation that such a decision was taken only to further the business interest of Kirloskar''s is totally mis-conceived. There is nothing on record to suggest that the respondents have taken the decision in an arbitrary manner to suit the financial interest of Kirloskar''s except the self serving statement of the petitioner in the affidavit filed in support of the petition. On the other hand, it is stated in the counter affidavit such decision was taken by respondents in view of its previous experience. There in nothing on record to doubt the statement of the respondents.

20. However, an argument is sought to be raised by the petitioner stating that Clause 10 of the Addendum dated : 13-2-1996 issued to the General Conditions to Tender is violated by the respondents. According to the petitioner, Kirloskar pumps would not be meeting the requirement of condition laid down in Clause 10 of the Addendum dated : 13-2-1996. It is only an after thought on the part of the petitioner to raise such a plea in the reply affidavit to which the respondent has no opportunity to explain the same. The whole problem appears to have been arisen on account of the subsequent price rise by the Kirloskars, with regard to its pumps. The Respondents are not under obligation to ensure any profits to the successful tenderer. Profits and losses in the business depend on variety of factors and no business man can claim that he enters into contract only with an assurance to make profits. No contractor can insist that the

Government and its instrumentalities are bound to see that the tenderers make profit out of the business. In that manner the rights are to be worked out in view of the subsequent price rise is a matter to be resolved by the parties to the contract and such a dispute cannot be adjudicated in the judicial review proceedings under Article 226 of the Constitution of India.

21. The dispute in the instant writ petition arises out of the concluded commercial contract between the petitioner and the respondents. The terms and conditions of the contract and the work-order are not traceable to any statute or statutory instrument and the dispute arises in the realm of pure private law. The respondent may be an authority for the purpose of Articles 12 and 226 of the Constitution of India; but, it is not as if. its every action is amenable to be corrected in a judicial review proceedings by this Court.

22. The law on the subject is succinctly summarised by the Apex Court in State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., and it reads as under at Page 3519-3520; of AIR :

"In pur opinion, the very remedy adopted by the respondent is misconceived. It is not entitled to any relief in these proceedings., i.e., in the writ petition filed by it. The High Court appears to be right in not pronouncing upon any of the several contentions raised in the writ petition by both the parties and in merely reiterating the effect of the order of the Deputy Commissioner made under the proviso to Section 8-D(1).

Firstly, the contract between the parties is a contract in realm of private law. It is not a statutory contract. It is governed by the provisions of the Contract Act or, may be, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a Contract cannot be agitated and could not have been agitated, in a writ petition. Thatiis a matter either for arbitration as provided by the contract or for Civil Court, as the case may be. Whether any amount is due to the respondent from the appellant-Government under the Contract and, if so, how much, and the further question whether retention or refusal to pay any amount by the Govenment is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition viz., to restrain the Government from deducting particular amount from the writ petitioner''s bill (s) was nota prayer which could be granted by the High Court under Article 226. Indeed, the High Court has not granted the said prayer.

Secondly, whether there has been a reduction in the statutory liability on account of a change in law within the meaning of Sub-clause (4) of Clause 70 of the Contract i s again not matter to be agitated in the writ petition. That is again a matter relating to interpretation of a term of the contract and should be agitated before the arbitrator or the Civil Court, as the case may be. If any amount is wrongly withheld by the Government, the remedy of the respondent is to raise a dispute as provided by the contract or to approach the Civil Court, as the case may be, according to law. Similarly if the Government says that any over-payment has been been made to the respondent, its remedy also is the same.

Accordingly, it must be held that the writ petition filed by the respondent for the issuance of a writ of Mandamus restraining the Government from deducting or with-holding a particular sum, which according to the respondent is payable to it under the contract, was wholly misconceived by and was not maintainable in law. (See the decision of this Court in Assistant Excise Commissioner v. Issac\\Peter 1994 (4) SCC : (1994 AIR SC 2616), where the law on the subject has been discussed fully.) The writ petition ought to have been dismissed on this ground alone."

23. The ratio of the said judgment would apply to the facts on hand. It is not a case where this Court would issue a writ of Mandamus declaring the impugned order as void. The action of the respondents cannot be said to be arbitrary. If the petitioner yet feels aggrieved, he has his remedy elsewhere.

24. For the aforesaid reasons, I do not find any merit in the writ petition and the same is accordingly dismissed. No costs.

