

V. Mohan Rao Vs. Implementation Secretariat and ors.

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Court : Andhra Pradesh

Decided On : Oct-03-2001

Reported in : 2001(6)ALD386; 2002(2)ALT822

Judge : S.R. Nayak and ;S. Ananda Reddy, JJ.

Acts : [Constitution of India](#) - Articles 12, 14 and 226

Appeal No. : WA No. 1481 of 2001

Appellant : V. Mohan Rao

Respondent : implementation Secretariat and ors.

Advocate for Def. : Advocate-General

Advocate for Pet/Ap. : K.V. Satyanarayana, Adv.

Disposition : Writ appeal dismissed

Judgement :

S.R. Nayak, J.

1. This writ appeal is directed against the order of the learned single Judge dated 3-9-2001 made in WP No. 17677 of 2001 dismissing the writ petition filed by the appellant herein.

2. The Implementation Secretariat represented by its Transaction Advisor, Public Enterprises Department, A.P. Secretariat, Hyderabad, the 1st respondent herein, invited tenders for sale of Sri Hanuman Co-operative Sugars Limited, assets and business at Seri Narasannapalem, Hanuman Junction. The last date for receipt of tenders was 2-7-2001. A pre-bid conference was held on 25-6-2001. Sixteen (16) parties registered their interest, but only three tenders were received on 2-7-2001. The technical and commercial bids were opened on 2-7-2001. Three tenders, including that of the petitioner-appellant and the 2nd respondent were qualified for further consideration. The financial and price bids were opened on 11-7-2001. The 2nd respondent, as allowed by clause (7) of Annexure II (Form of Price bid) of the tender form, proposed deferred payment of price as under:

1. We are agreeing to pay 25% of the finalised bid amount within fifteen days from the date of communication of the finalisation.
2. Second instalment of 25% will be paid after six months from the date of first payment. Here we agree the condition of nominal interest payable by us.
3. 20% after completion of the second season of the unit and agreeable to pay nominal interest on this amount.
4. Balance 30% (Final Payment) before completion of two years from the date of first payment.

3. In response to this offer of the 2nd respondent, the Transaction Adviser of the 1st respondent wrote a letter Ref. 018/ IS/TA/CSL-PB/2001-02, dated 17-8-2001 to the 2nd respondent. It reads-

'Please refer to your Bid cited above. As your proposal for payment of the purchase price in the manner stated in your bid is not in accordance with the provisions concerning deferred payments contained in the Information Memorandum and Bid Documents, you are requested to confirm that you are agreeable to make payment of the purchase price in the following manner:

- (i) 25% of the bid amount within one week from the date of our communication accepting your bid; and

(ii) The balance 75% of the Bid Amount payable at the time of handing over of the Assets i.e., before 31st August, 2001.

Your confirmation in this regard should reach us within 3 days from the receipt of this communication failing which your bid stands cancelled.

You are also requested to confirm your intention to receive the operations of the mill.'

4. The Managing Director of the 2nd respondent by his letter dated 18-8-2001 confirmed that the 2nd respondent was agreeable to make payment of the purchase price as per the terms and conditions set out in the letter of the 1st respondent dated 17-8-2001. The Managing Director has also stated that they would revive the operation of the sugar mills in the current season only. The Managing Director requested the 1st respondent to issue the letter by selecting the 2nd respondent as a preferred bidder. In response to the above letter of the 2nd respondent dated 18-8-2001, the Transaction Adviser of the 1st respondent wrote a letter to the 2nd respondent dated 20-8-2001. It reads-

'Vide reference (1) cited above, you were requested to confirm the terms of payment in connection with the purchase of Assets and Business of Sri Hanuman Co-op. Sugars Limited, Hanuman Junction.

Vide reference (2) cited above, you have confirmed that you were agreeable to make the payment of the purchase price in the manner cited in reference (1).

Accordingly you have been approved as the Preferred Bidder and your bid of Rs. 11,40,00,000/- (Rupees Eleven crores and forty lakhs only) has been accepted subject to the following terms.

a. 25% of the Bid amount payable within one week from the date of communication of the acceptance of the bid.

b. The balance 75% of the bid amount payable at the time of handing over of the Assets i.e., before 31st August, 2001.

c. Revival of the unit.

The payment shall be made by means of a crossed Demand Draft/Banker's cheque drawn in favour of the Implementation Secretariat payable at Hyderabad.

The process outlined in the Information Memorandum and Bid Documents continue and steps must now be taken immediately to finalise an agreement for the Sale and Purchase of Assets and Business of SHCSL.

You are requested to make available a fully authorised representative for finalisation of the sale and purchase agreement.

After payment of the total consideration, a Sale Deed will be executed by SHCSL in your favour, transferring the above assets. All expenses including stamp duty, registration charges etc., in connection with the execution of the Sale and Purchase Agreement/Sale Deed shall be borne by you'.

In response to the above letter, the Managing Director of the 2nd respondent wrote a letter dated 22-8-2001 enclosing Demand Drafts for Rs.2,75,00,000/- drawn in favour of the 1st respondent as advance including EMD of Rs.10,00,000/- for purchase of assets and business of Sri Hanuman Co-op. Sugars Limited (SHCS), Hanuman Junction. In the said letter it was also stated that the 2nd respondent would make arrangements to pay the balance of 75% of the purchase price. At that stage, WP No. 17677 of 2001 was filed in this Court on 23-8-2001 praying for the following relief:

'For the reasons stated in the accompanying affidavit, the petitioner prays that the Hon'ble Court may be pleased to issue a writ, order or direction more particularly one in the nature of writ of mandamus declaring the action of the 1st respondent in notifying the 2nd respondent as the preferred bidder and in selling the assets and business of Sri Hanuman Co-op. Sugars Ltd., Seri Narasannapalem, Hanuman Junction, Krishna District in favour of the 2nd respondent is arbitrary, illegal and discriminatory and be pleased to set aside the same and as consequence thereof directing the 1st respondent to consider the bid of the petitioner herein and to pass such other order or orders as this Hon'ble Court may deem fit and proper in the circumstances of the case'.

On 24-8-2001, the learned single Judge while issuing notice before admission passed an interim order directing maintenance of status-quo and that status quo order was in operation till the dismissal of the writ petition on 3-9-2001. The appellant/petitioner filed the writ appeal on 4-9-2001 along with an application to dispense with filing of the certified copy of the order of the learned single Judge. It is stated that on 7-9-2001 the agreement was executed between respondents 1 and 2 and balance 75% of the purchase price was also paid.

5. Before the learned single Judge, it was contended on behalf of the appellant/petitioner that the tender form submitted by the 2nd respondent does not refer to any exceptional circumstance which justified the offer of deferred payment and that the calculation arrived at on the basis of clause 6.20(1) of the Bid Documents does not bear any rationale and it is not in accordance with the terms and conditions stipulated in the Bid Documents. It was also contended on behalf of the appellant/petitioner that since the petitioner has offered down payment, his bid should have been considered as higher than the bid offered by the 2nd respondent. Lastly, it was contended that had the petitioner known that deferred payment is permitted, he would have quoted higher rate than that of the 2nd respondent. The learned single Judge rejected all those contentions as not well founded and came to the conclusion-

'Considering the entire factual matrix and the legal proposition laid down by the Apex Court, this Court does not find any irrational, capricious or arbitrariness on the part of the 1st respondent in awarding the contract to the 2nd respondent. I do not find any ground for exercising the jurisdiction of this Court under Article 226 of the [Constitution of India](#).....'

6. Sri K.V. Satyanarayana, learned Counsel for the appellant-petitioner would contend that in the absence of any exceptional circumstance, the bid submitted by the 2nd respondent on the basis of deferred payment should not have been taken into consideration. Secondly, the learned Counsel would contend that when the bidder himself is precluded from altering the terms in Sub-clause (j) of Clause 6.20 of the Bid Documents, it could not be asked by the 1st respondent to change its terms as has been done by the 1st respondent vide his letter dated 17-8-2001.

Lastly, the learned Counsel would contend that the letter written by the Transaction Adviser of the 1st respondent on 17-8-2001 to the 2nd respondent tantamounts to a counter-proposal by the 1st respondent to the 2nd respondent and this action of the Transaction Adviser is invalid firstly for the reason that the Transaction Adviser has no power to put forth counter-proposal; and secondly for the reason that if it is held that the Transaction Adviser has the power to put forth counter proposal, he should have offered such counter-proposal not only to the 2nd respondent alone but to all bidders and since the Transaction Adviser did not offer the revised proposal to all the bidders, the action is tainted with arbitrariness and unreasonableness, and violative of Article 14 of the [Constitution of India](#), and thirdly for the reason that had the petitioner known that deferred payment is permitted, he would have quoted higher rate than that of the 2nd respondent. The learned Counsel for the appellant would further contend that the appellant has offered counter-offer of Rs. 11,40,00,000/- by way of down payment and, therefore, acceptance of its offer would be in public interest. The learned Counsel would conclude that a case is made out for interfering with the order of the learned single Judge.

7. The learned Advocate-General appearing for the 1st respondent while countering the contentions of the learned Counsel for the appellant as untenable would point out that Sub-clause (k) read with Sub-clause (h) of Sub-clause (VII) of Clause 6.20 of the Bid Documents itself grants discretion to the 1st respondent to accept the bid involving deferred payments in exceptional circumstances and the discretion exercised by the 1st respondent in accepting the bid of the 2nd respondent involving deferred payment in the fact-situation of this case could not be condemned as arbitrary or unreasonable. The learned Advocate-General would maintain that the letter written by the 1st respondent dated 17-8-2001 to the 2nd respondent is only clarificatory in nature and it cannot be said that the Transaction Adviser made a counter proposal. The learned Advocate-General would also highlight about the limited scope of judicial review in the field of Government contracts.

8. Sri E. Manohar, learned senior Counsel appearing for the 2nd respondent while adopting the submission of the learned Advocate-General would maintain that the

1st respondent has not committed any irregularity or illegality in the matter of accepting the bid of the 2nd respondent involving deferred payments and the bid offered by the 2nd respondent is undoubtedly beneficial to the 1st respondent and, therefore, in the public interest. The learned senior Counsel would maintain that the counter offer of Rs.11,40,00,000/- made by the appellant/petitioner by way of down payment is not honest and that offer was made for the first time in the reply affidavit dated 30-8-2001.

9. In the light of the rival contentions of the learned Counsel for the parties, the only point that arises for our consideration and decision is whether the acceptance of the bid offered by the 2nd respondent involving deferred payment is justified and legal?

10. The law relating to award of contracts by the State, instrumentalities of the State, statutory bodies and other authorities which could be treated as 'State' within the meaning of Article 12 of the Constitution has been well settled by a catena of decisions of the Supreme Court and this Court and to mention few are the decisions in R.D. Shelly v. International Airport Authority, (1979) 3 SCC 488, Fertilizer Corporation Kamgar Union v. Union of India, : (1981)ILLJ193SC , Central Excise v. Dunlop India Limited, : 1985ECR4(SC) , Tola Cellular v. Union of India, (1994) 6 SCC 651, Ramniklal N. Bhutta v. State of Maharashtra, (1977) 1 SCC 134, Raunaq International Limited v. IVR Construction Limited, : AIR 1999 SC393 and Monarch Infrastructure Pvt. Ltd. v. Commissioner, Ulhasnagar Municipal Corporation and others, : AIR 2000 SC2272 . The Supreme Court in Air India Limited v. Cochin Int., Airport Ltd and others, 2000(1) Scale 346, has summarised the principles governing award of contracts in the following words-

'The award of a contract, whether it is by a private party or by a public body or the State, is essentially, a commercial transaction. In arriving at a commercial decision consideration which are of paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that it is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any

relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms; standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.'

11. However, it is pertinent to notice that since the guarantee of equal protection enshrined in Article 14 of the Constitution embraces the entire domain of 'State action', it would extend not only when an individual is discriminated in the manner of exercise of his rights or in the matter of imposing liabilities upon him, but also in the manner of granting privileges, e.g., granting licenses for entering into any business, inviting tenders for entering into a contract relating to Government business, or issuing quotas, giving jobs and in all these cases, the principle is that there should be no discrimination between one person and another if their position or circumstances is the same. In other words, the State's action must not be arbitrary but must be based on some valid principle which itself must not be irrational or discriminatory. A Division Bench of this Court of which one of us (SRN, J) was a member, in *Giridhari Lal Constructions Pvt. Ltd. v. Union of India*, : 2000(4)ALD510, has opined 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 action in violation of them. It is true that every activity of the Government has the public element in it and must, therefore, be informed with reason and fair play in action and guided by public interest. It is also true if the Government awards contracts or

otherwise deals with its property or grants any other largesse, it would be liable to be tested for its validity on the touchstone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid. The public authority cannot exercise its discretion arbitrarily in the matter of giving contracts to a party on its sweet will and pleasure and at the peril of public interest.

12. In the premise of the above noticed well-settled principles governing judicial review of 'State action' in award of contracts, let us proceed to consider the contentions of the learned Counsel for the petitioner. Before doing it, it is beneficial to notice the relevant provisions of the Bid Documents. Clause 6 of part II Bid Documents deals with the bid procedures. Clause 6.20 deals with evaluation and criteria, of which sub-clauses III, VII(h) to (n) are relevant, which are as follows:

'III. A deficiency, informality or other irregularity in any Bid may be waived during the evaluation by the IS, if the substance of the Bid is not affected, or the matter is subsidiary or ancillary to the main aims of the Bid Process or the object to be achieved by the procedures, terms or conditions or requirement concerned.

VII. (h) The IS reserves the right in its sole and absolute discretion to waive any deficiency, informality or other irregularity in any Bid that does not affect the substance of the Bid.

(i) In no circumstance shall be a Bidder or Bidders change their bid or payment terms and the offer should not be subject to any conditions or circumstances.

(k) The IS has a strong preference that the price offered for the Assets is to be paid in cash in full or completion of the sale and purchase. The IS will not, except in exceptional circumstances, which must be set out in full by the Bidder, consider any bid involving deferred payments. Should the exceptional circumstances put forward by the Bidder be deemed by the IS to warrant deferred payments the sum deferred shall not be more than 30% of the purchase price and no deferred payment shall extend beyond the second anniversary of signing the sale and purchase agreement.

(l) Deferred payment will be discounted and converted into a present value for comparison purposes.

(m) Any deferred payment must be secured by a guarantee from a reputable bank acceptable to IS which may in addition consider, where appropriate, taking security over the assets or other form of security until full payment is received.

(n) Interest will be charged on deferred payments'

A combined reading of the abovesaid clauses and Sub-clauses makes it very clear that the 1st respondent has undoubtedly discretion to accept the bid of the 2nd respondent involving deferred payments in exceptional circumstances. Although the 1st respondent allowed deferred payment in the instant case, however, he did not agree for the deferred payment as proposed by the 2nd respondent. By letter dated 17-8-2001, the 1st respondent informed the 2nd respondent that the proposal for payment of the purchase price in the manner set out in the bid was not in accordance with the provisions concerning deferred payments and the 2nd respondent was requested to confirm within 3 days whether it is agreeable to make payment of the purchase price in the manner set out in the said letter. By reply letter dated 18-8-2001, the 2nd respondent agreed for the same and also informed the 1st respondent that the operation of the sugar mills would be revived in that season only. Therefore, we do not find any merit in the contention of the learned Counsel for the appellant-petitioner that the action of the 1st respondent in accepting the bid of the 2nd respondent is illegal and unauthorised. Similarly, we do not find any merit in the other contention of the learned Counsel for the appellant-petitioner that the acceptance of the bid of the 2nd respondent is not in public interest. It is pointed out in the counter-affidavit filed by the 2nd respondent that if the interest at 16% per annum is added to the bid amount proposed by the petitioner, the price would be only Rs.11,12,30,000/- i.e., lesser than the bid offered by the 2nd respondent. It falsifies the allegation of the petitioner-appellant that the bid offered by the 2nd respondent is less than the bid offered by the petitioner. Sub-clause (VII)(i) provides that deferred payment would be discounted and converted into present value for comparison purposes. The deferred payment offered by the 2nd respondent if converted into present value for comparison

purposes, it would clearly show that the offer of the 2nd respondent is higher than the offer made by the petitioner. There is also no merit in the contention of the appellant/petitioner that the letter of the 1st respondent dated 17-8-2001 tantamounts to counter-proposal by the 1st respondent to the 2nd respondent. As already pointed out that under Sub-clause (k) of Clause VII of Clause 6.20 of the Bid Documents, the 1st respondent has undoubtedly power to accept the tender involving deferred payments in exceptional circumstances. Nevertheless and despite that position, the 1st respondent did not agree to the terms of deferred payment made by the 2nd respondent and the 2nd respondent was called upon to agree to the terms specified by the 1st respondent in its letter dated 17-8-2001.

13. Besides all these things, we do not find any justification to interfere with the impugned action of the 1st respondent because we find serious laches on the part of the petitioner-appellant. In the counter-affidavit filed by the 1st respondent, it is stated that during the pre-bid conference held on 25-6-2001, necessary clarifications were provided and that at that stage itself it was made clear that preference would be given to prices offered to be paid in cash in full on the completion of the sale and handing over of assets. It is also stated that at the same time it was also indicated that in exceptional circumstances, bids involving deferred payments would also be considered. It is relevant to notice that technical and commercial bids were opened on 2-7-2001 as pointed out supra and three tenderers including the petitioner-appellant and the 2nd respondent were qualified for consideration and subsequently the financial and price bids were opened on 11-7-2001. It is trite that at that point of time all the three bidders became aware of the details of the other bids. In other words, the petitioner-appellant was aware at that time itself of the features of the 2nd respondent's bid regarding which he has made complaints in the present writ petition. The appellant/petitioner having known about the features of the bid of the 2nd respondent, for the reasons best known to it, remained silent and did not take any objection to the bid of the 2nd respondent at the earliest point of time and it was sitting on the fence anticipating a chance award of the contract. It is also relevant to notice that at that point of time, the petitioner/ appellant did not come forward to offer the bid at the enhanced rate on par with or higher than the bid offered by the 2nd respondent. The counter-bid of Rs.11,40,00,000/- was made by the petitioner for the first time in the reply

affidavit dated 30-8-2001 filed by it. Therefore, this belated offer during the pendency of the writ petition cannot be treated as a bona fide offer. After hearing the learned Counsel for the parties and on perusing the materials placed before us, we are satisfied that no State interest or public interest suffer on account of the award of the contract in favour of the 2nd respondent. We are also satisfied that the impugned action of the 1st respondent does not suffer from vice of arbitrariness, irrationality or injury to public interest.

14. Since we have held that the contents of the letter dated 17-8-2001 of the 1st respondent do not constitute a counter proposal, there is no necessity for us to consider the decision of the Kerala High Court in *Moolji Jaitha & Co. v. Seth Kirdimal*, : AIR1961 Ker21 and the decision of this Court in *P. Vasu v. General Manager, Telecom District, Vijayawada*, : 1998(2)ALD427 , cited by the learned Counsel for the petitioner inasmuch as they do not have any bearing on the decision making in this case. Similarly, since we have held that the offer made by the petitioner when the writ petition was pending in this Court in the reply affidavit is not bona fide, applying the principle enunciated by the Supreme Court in *M/s. Monarch Infrastructure Pvt. Ltd. case (supra)* would also not arise. We, therefore, do not see any substantive or weighty ground to interfere with the order of the learned single Judge.

15. In the result and for the foregoing reasons, we dismiss the writ appeal with no order as to costs.