S. Shivaraj Reddy Vs. Engineer-in-chief, (Randb) Administration and Externally, Hyderabad and Another

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Court : Andhra Pradesh

Decided On : Sep-10-1999

Reported in : 1999(6)ALD42; 1999(6)ALT517

Judge : V. Eswaraiah, J.

Acts : Constitution of India - Articles 14 and 19(1)

Appeal No. : WP No. 11028 of 1999

Appellant : S. Shivaraj Reddy

Respondent : Engineer-in-chief, (Randb) Administration and Externally, Hyderabad and Another

Advocate for Def. : Mr. D. Prakash Reddy and ;Mr. T. Jagadish, Advs.

Advocate for Pet/Ap. : Mr. M. Chandra Sekhar Reddy, Adv.

Judgement :

1. Heard Sri M. Chandra Sekhar Reddy, learned Counsel for the petitioner and Sri D. Prakash Reddy, learned Additional Advocate General appearing for the 1st respondent and Sri T. Jagdish, learned Counsel appearing for the 2nd respondent. At the request of all the Counsel, the writ petition is taken up for final hearing at the

interlocutory stage.

2. The writ petition is filed to issue of writ of mandamus declaring clause 4.5.A of Section 1: Instructions to Bidders of the bid document relating to the work 'Heavy periodic maintenance and making up of deficiencies of intermediate Ring road from KM 1/700 to KM 11/000' in package No.RBERP-IRR.a-33 of the bid notice No.2/ NCB/APERP dated 27-11-1998 issued by the Engineer-in-Chief (R&B;), Administration and Externally Aided Projects, Erramanzil, Hyderabad, which specifies that the bidder should have achieved the minimum financial turnover in any one financial year in the last five financial years i.e., from 1993-94 to 1997-98 as illegal and arbitrary and to direct the 1st respondent to consider that the bid offered by the petitioner in respect of the above work by taking into consideration of the minimum financial turnover achieved by the petitioner within a period of 12 months commencing from 1st July, 1997 to 30th June, 1998 and award the said work to the petitioner as he is the lowest bidder.

3. As per the qualification criteria stipulated in 4.5.A to qualify for award of the contract, a bidder should have achieved a minimum annual financial turnover of Rs.521 lakhs in any one financial year and the petitioner admittedly agrees that he does not possess the said qualification and submits that if the period of 12 months commencing from I st July, 1997 to 30th June, 1998 is taken into account, he gets the qualification of achieving the minimum annual financial turnover as stipulated in the said clause.

4. Admittedly, the petitioner does not have the qualification to qualify for award of the contract as he has not achieved a minimum annual financial turnover in any one of the financial years from 1993-94 to 1997-98 as defined in the financial year from 1st April to 31st March of the next year, and therefore, the petitioner questioned the said clause 4.5.A relating to the qualification of a contractor entitling him for the award of the contract and to suit for his experience, the petitioner wants to take the qualification criteria achieved by him within 12 months commencing from 1-7-1997 to 30-6-1998. The last cut off-date of the financial year as fixed in the bid document is 31-3-1998 and the petitioner wants to extend the cut-off date to 30-6-1998 by taking the financial year as financial year covering 12

months period from 1st July, 1997 to 30th June, 1998.

5. The petitioner submits that only to eliminate the petitioner, the financial year commencing from 1st April to 31st March of next year is introduced for the first time in clause 4.5.A of the present bid document and except the said clause, the petitioner satisfies all other requirements. The specification of the financial year which eliminates the petitioner from qualifying for the work is illegal, arbitrary, irrational and contrary to Articles 14 and 19(1)(g) of the Constitution of India.

6. It is further submitted that as per the Memo No.10307/AE.11/TA.VI/NH.III/ 91-A dated 25-6-1998 of the Government in respect of National High Way works, it was specified that the contractors, who have satisfactorily completed the requisite quantity of work in any one year (in any continuous 12 months) in the last five years, are eligible for tender for National High Way works and in support of his contention, several tender notices have been filed wherein the condition of having satisfactorily completed the works of the stipulated quantity in one year (in any continuous 12 months in thelast five years) are annexed in the material papers. It is further contended by the petitioner that the terms and conditions as specified in the standard bidding document released by the World Bank, Washington, did not specify the financial year. But in deviation of the said document, clause 4.5.A is incorporated stating that the financial year means 1st April to 31st March of the next year. The petitioner also relied upon the judgments of the Supreme Court in E.C. Royappa v. State of Tamil Nadu, : (1974)ILLJ172SC , Ramana v. International Airports Authority of India, : (1979)IILLJ217SC , Maneka Gandhi v. Union of India, : [1978]2SCR621 and Ajay Hasia and Ors v. Khalid Mujib, : (1981)ILLJ103SC and submits that the impugned provision of stipulating the qualification criteria in clause 4.5.A offends Article 14 and also Article 19(1)(g) of the Constitution of India. The petitioner also relied upon two more judgments of this Court in M. Sivaramaiah v. Superintending Engineer, : 1993(1)ALT137 and Shri Shiva Shakthi Constructions Pvt. Ltd. v. Superintending Engineer (R & B) National Highways Circle, Hyderabad, : 1997(1)ALT247 and contends that the action of the 1 st respondent is not fair and reasonable in stipulating the financial year from 1st April to 31st March of the next year.

7. Sri D. Prakash Reddy, learned Additional Advocate General, appearing for the 1st respondent contends that the Government of Andhra Pradesh secured loan from the World Bank vide World Bank's loan No.4360-IN, Credit No.3103-IN for APERP. The present work in question is sought to be executed under the said loan. The bids were invited from 7-12-1998 to 1-1-1999 and the petitioner is one of the bidders but the petitioner was not found satisfying the qualification criteria stipulated under clause 4.5. A (a), and therefore, his bid was not considered for acceptance. It is further submitted that the terms and conditions in the bid document variesfrom project to project and the clauses of this Bid Document are approved and finalised by the World Bank only and the financial year was specifically included to avoid the litigation at a subsequent stage and it is not correct to state that this is specifically included for this package alone since for all 21 works under APREP, the same condition is mentioned. The terms and conditions in the document are approved and finalised by the World Bank authorities, and therefore, there is no truth in any of the contentions of the petitioner. The petitioner cannot suggest to take up the experience criteria to suit the individual case. It is further submitted that when there was a pre-bid meeting held on 24-12-1998 to clarify and answer the questions on any matter that may arise by the bidders as stated in clause 9.2 of the 'Instructions to the Bidders' of the bid document, the petitioner neither attended nor raised any of the issues prior to the submission of the bid, and therefore, the petitioner cannot question the said clause after submitting the bid and it shall be deemed that the petitioner has accepted, all clauses once he submits the bid. He further submits that the norms stipulated in the qualification criteria under clause 4.5.A. cannot be deviated for the benefit of any individual. It is only to avoid arbitrary selection of the period and to have common standard period for certainty, the financial year i.e., 1st April to 31st March of the next year is prescribed by the World Bank and the same cannot be termed arbitrary or discriminatory.

8. It is further submitted that the bids were evaluated and after acceptance by Implementation-Cum-Tender Committee, it was submitted to the World Bank to give no objection to award the work vide letter of the 1st respondent dated 25-5-1999 and the World Bank communicated no objection to the proposal of the Government of Andhra Pradesh vide their fax dated 31-5-1999, and accordingly,

the contractwas awarded to the 2nd respondent and the 2nd respondent also furnished the Bank Guarantee, but for the interim orders dated 10-6-1999 to maintain status quo, the work could not be commenced.

9. Sri T. Jagdish, learned Counsel appearing for the 2nd respondent contends that admittedly the petitioner is not qualified to offer the bid in view of the fact that the petitioner does not possess the requisite qualification of having completed or carried out the works worth Rs.521 lakhs in any one financial year in the past five years as stipulated in clause 4.5.A. (a) and the petitioner cannot be permitted to question the pre-qualifications criteria fixed in the tender document particularly when the petitioner has not raised any objection in the pre-bid meeting and the said clause do not offend either Article 14 or Article 19(1)(g) of the Constitution of India.

10. I have heard extensively the contentions of all the Counsel and perused the records. The petitioner offered his bid price at Rs.5,68,26,408/- and the 2nd respondent offered his bid price at Rs.5,32,89,864/-. The petitioner is the lowest tenderer, but he does not fulfill the post-qualification criteria for the particular contract package of 33 as stipulated in clause 4.5.A(a) of ITB (Instructions to Bidders). In the common invitation for the bids for total works of 21 packages, tenders were called for and the work in question relates to one of the packages No.33. As the petitioner did not satisfy the minimum qualification criteria as required in clause 4.5.A(a) as he has not achieved the annual financial turnover ofRs.521 lakhs in any one of the past five financial years, the bid of the petitioner was not accepted, and therefore, the tender of the 2nd respondent herein has been accepted.

11. The learned Counsel for the petitioner states that if the tender of thesecond lowest tender is accepted, there is a huge monetary loss to the Government and it is in the public interest to relax pre-qnalification criteria. I have perused the comparative statement of 21 packages and the excess percentage of bids offered in respect thereof. For the Package No.33, the excess bid amount of the petitioner is 12.5% and the 2nd respondent's bid is 15.4% which is excess over the estimated value. 15.4% excess is not much on high side or exorbitant when

compared to the other package Nos.14, 15, 16, 22, 34, 35 and 38, In all the said packages, the excess bid amount over the estimated cost value is 17.3%, 16.84%, 17.83%, 15.59%, 15.89%, 15.34% and 22.87% respectively. When compared to the aforesaid excess bid amount over the estimated cost value, the second lowest bid of the 2nd respondent is reasonable. I have adjourned the matter for negotiations with the second lowest tenderer to know whether there is any possibility for the negotiation of the quotation of the 2nd respondent, and the learned Additional Advocate General stated that as per the norms stipulated by the World Bank, in Procurement Notes at clause Nos. 15 and 18, there shall not be any negotiation and no preference to any bidder or class of bidders either in price or any other terms and conditions, who do not fulfill the qualification criteria. As negotiations are not permitted and the bid of the 2nd respondent is already accepted and notified the award of the contract and it is not possible to have negotiations with the 2nd lowest tenderer.

12. I consider that the bid of the second lowest tender is not much on high side, when compared to other packages, and the rates quoted by the second lowest tender is not on high side or arbitrary.

13. The learned Additional Advocate General also fairly submitted that as a matter of fact as suggested by the Court they have already exercised their discretion andrecommended the case of the petitioner for acceptance of the lowest bid by relaxing the pre-qualification criteria, but the World Bank thrice rejected their case, and therefore, in the interest of the public and for an early execution of work, the Implementation-Cum-Tender Committee has rightly accepted the tender of the second lowest tender of the 2nd respondent herein and the World Bank issued its no objection and the work is awarded to the substantially responsive bidder who is the 2nd respondent herein. It is further submitted that the notification of the award will constitute the formation of the contract subject to only furnishing of a performance security and as a matter of fact, the 2nd respondent also furnished the performance security and there is no justification for the petitioner to question the action of the 1st respondent at the belated stage.

14. The cases cited by the learnedCounsel for the petitioner in the cases of Ramana Dayaram Shetty v. The International Airports Authority of India, E.C. Royappa v. State of Tamil Nadu, Maneka Gandhi v. Union of India and Ajay Hasia v. Khalid Mujib, (supra), have no application to the facts of the present case and the question relates in this case is whether the requirement of fixing the pre-qualification criteria is justifiable or arbitrary or violative of Article 14 of the Constitution of India. The other two judgments of this Court in M. Sivaramaiah v. Superintending Engineer, : 1993(1)ALT137 (supra), and Shri Shiva Shakti Constructions Pvt. Ltd v. Superintending Engineer (R&B;), National Highways Circle, Hyderabad, : 1997(1)ALT247 (supra), are also have no application to the facts of the present case.

15. Admittedly, the petitioner does not fulfill the pre-qualification criteria as fixed in clause 4.5.A(a) and in the similar context, the Supreme Court in the case of Raunaq International Limited v. I.V.R. ConstructionsLtd., : AIR 1999 SC393 , it was held that what is more relevant that who have challenged the award of the tender themselves do not fulfill the requisite criteria and when they do not possess the prescribed experience qualification, there cannot be any judicial relief at the instance of a party which does not fulfill the requisite criteria. The Supreme Court further held that when such a stay order is obtained at the instance of a party, any interim order which stops the project from proceeding further, must provide for the reimbursement of costs to the public in case ultimately the litigation started by such an individual or body fails. Public must be compensated both for the delay in implementation of the project and the cost escalation resulting on such delay.

16. The petitioner cannot question the pre-qualification criteria as fixed in bid document as held in catena of decisions of this Court and Supreme Court when particularly the pre-qualification criteria for award of the contract in fixing the achievement of a minimum annual financial turnover is not arbitrary, irrational or against Articles 14 or 19(1)(g) of the Constitution of India and I am of the considered opinion that the said clause 4.5.A is fair and reasonable and not discriminatory.

17. I have also had an occasion to deal with similar contentions of prescribing a financial year starting from 1st April to 31 st March of the next year. In the case of B. Siva Prasad v. Government of A. P., : 1999(5)ALD158 , wherein also a similar clause 4.5.(c) to qualify for the award of the contract, the qualification should be taken into account in respect of the financial year and I have held in Paras 10 and 11 that financial year means 1st April to 31st March of next year and the Department rightly taken the quantities executed by the contractor in respect of the financial year alone to assess the qualification for awarding the work.

18. I am of the considered view that to suit for the convenience of the petitioner, he cannot be permitted to question the qualification criteria as stipulated in clause 4.5.A(a) of the Instructions to Bidders to bid document. Any deviation as defined in clause 4.5.A(a) and any relaxation may lead to arbitrariness and confusion, unless a cut-off date is fixed, it may not be possible to conclude or settle the issue. As stated by the learned Additional Advocate General that not only in respect of the work in question but all other 60 works the same condition of the financial year is stipulated. The case in which I had an occasion to deal with the works National Highways in the case of B. Siva Prasad v. Government of Andhra Pradesh (supra) was also the financial year from 1st April to 31st March of next year is fixed and prescribed for the purpose of experience of the bidder. Therefore, it is incorrect to state that for the first time the Government has introduced such a clause to eliminate the petitioner. Admittedly, the petitioner has not fulfilled the qualification criteria and no mala fides have been attributed and I do not see any justification in the contention of the learned Counsel for the petitioner to hold that the qualification criteria prescribed in clause 4.5.A in taking experience in a particular financial year leads to arbitrary or violative of Article 14 of the Constitution of India. I am of the considered view that the condition prescribed in clause 4.5.A. is just and reasonable and this Court under exercise of its powers under Judicial Review will not substitute any new clause which is fair and reasonable to suit to the qualification criteria of the petitioner. Clause 4.5.A. in prescribing minimum financial annual turnover and defining the financial year from 1st April to 31st March of the next near is not arbitrary or irrational or discriminatory and though the petitioner is the lowest bidder, his bid is not substantially is the lowest bidder, his bid is not substantially responsive as he has not fulfilled the special qualification

criteriaand the Government has rightly accepted the substantially responsive bid of the 2nd respondent.

19. For the foregoing reasons, I do not see any merits in the writ petition and the interim order of status quo granted by the Court on 10-6-1999 is vacated and the writ petition is dismissed. No costs.