

Ghanaram (Engineers and Contractors) Vs. State of M.P. and ors.

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Court : Madhya Pradesh

Decided On : Dec-15-2008

Reported in : 2009(4)MPHT57

Judge : Dipak Misra and; R.K. Gupta, JJ.

Appellant : Ghanaram (Engineers and Contractors)

Respondent : State of M.P. and ors.

Advocate for Def. : Mr. Shashank Shekhar

Advocate for Pet/Ap. : Mr. Tiwari

Disposition : Petition dismissed

Judgement :

ORDER

Dipak Misra, J.

1. In this intra-Court appeal preferred under Section 2 (1) of the M.P. Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 the defensibility of the order dated 12-8-2008 passed by the learned Single Judge in W.P. No. 5640/2008 is called in question.

2. The factual matrix which is imperative to be explicated for appreciating the controversy in issue is that the appellant as petitioner invoked the extra-ordinary jurisdiction of this Court under Article 226 of the Constitution of India questioning the sustainability of the action of the respondent-State and its functionaries as a consequence of which the tender submitted by the respondent No. 7 was accepted ignoring the lower rates quoted by the petitioner and brushing aside the rebate offered by him.

3. The Notice Inviting Tender (NIT)(Annexure P-I) was issued by the Competent Authority of the Water Resources Department on 30-10-2007 for construction of work of Concrete and Earthen Barrage including Deck Bridge Energy Dissipation and Head Regulator Work of Singhpur Barrage R.D. 0 to 4500 M, the value estimated cost of which was Rs. 6878.70 lacs. The earnest money was Rs. 34.40 lacs and the period for completing the construction was 30 months including the rainy season. As per the NIT, the time schedule was prescribed for submission of bids and opening of tender but subsequently, the same was amended and there was rescheduling of time frame. The tender documents were made available for sale upto 18-11-2007. The appellant submitted the tender after completing it in all respects. As per the time Schedule, the opening of tender was fixed on 31-6-2007. The tender, as set forth, was to be processed in two stages. The first stage involved technical evaluation and the second pertained to financial evaluation. In the first stage, 7 bidders participated and out of the said 7 bidders, 3 became eligible to participate in the second stage. As contended, the appellant had submitted his price list alongwith a rebate of 18%. The said letter has been brought on record as Annexure A-I to the writ appeal. The opening of the price bid and the financial valuation was to commence on 29-4-2008 at 3.00 p.m. The appellant was informed by Annexure P-4, dated 14-4-2004 to remain present at the time of the opening of the price bid. He alongwith two other contractors, Le., respondent No. 7 and M/s. Shiv Construction Limited, Hyderabad were found eligible for the financial-bid and they were also asked to remain present. When the price bid was opened, the respondent did not take note of the rebate letter for which the appellant protested. The appellant had quoted a price of Rs. 75.85 crores and gave a rebate of 18% in the letter enclosed and by virtue of the rebate, his bid came down to Rs. 62.03 crores whereas that of the respondent No. 7's was

Rs. 73.74 crores. The aforesaid action of the authorities was the subject-matter of attack in the Writ Court. It was contended before the learned Single Judge that the price bid of the writ petitioner was the lowest on consideration of the offer of rebate but in a malafide manner, the said document was not taken note of; that the Officers of the Department have acted in an extremely arbitrary manner with the exclusive intention to award the contract in favour of the respondent No. 7; that the stand of the authorities that the rebate letter was enclosed by the appellant-petitioner with the price bid is a concoction of fact and, more so, when it was stated that the said letter was thrown by the writ petitioner at the time of opening of the bid which was well nigh impossible when so many persons were sitting in the room around the table; that the respondent No. 7 was disqualified to participate in the tender process on the face of Clause 2.1.6 of the Terms and Conditions as engrafted in the tender notice inasmuch as certain contracts for restructuring and modernization of Devendra Nagar, Brijpur, Amkhera Nandgaon, Bhirata, Matagaon, Banda, Gakariya, Kamodpura, Panwari, Phutwari and Sidhsagar Tanks had been rescinded by order of termination dated 25-4-2008; action is taken for breach of contract; that the respondents have not been able to meet out the ground qua disqualification but have endeavoured to justify the action that they have not been blacklisted and hence, were entitled to participate in the tender; that at the time of opening of the tender form, furnishing of rebate letter is permissible in a high commercial transaction in view of the law laid down in *Kanhaiya Lal Agrawal v. Union of India* : AIR 2002 SC 2766; and that the disqualification goes to the very root of the matter warranting cancellation of the grant in favour of the respondent No. 7.

4. The stance and stand of the writ petitioner was resisted by the State on the foundation that the claim put forth by the petitioner with regard to the submission of concessional rate in the form of 'rebate letter' is unacceptable;. that from a perusal of the rebate letter which was found underneath, the table it would be seen that it does not bear any mark showing it to be pinned or attached with the price bid and the envelope containing the price bid was open and no such rebate letter was found; when the appellant-petitioner protested and submitted that he had put an envelope/paper containing the 'rebate letter', then a search was made but no such envelope or paper was found and at that juncture, the appellant-petitioner pointed

out that some letter/paper is lying under the table; that a 'panchnama' was made of the so called letter and had the appellant really got an intention to grant any rebate or concession he could have mentioned so in the price bid and not attached the same by way of separate letter and that too without mentioning about enclosing of such letter with the tender document; that a closer scrutiny and deeper discerning of the letter would show that the figure of 18% had been incorporated to gain the advantage; and that an adroit effort has been made to get the contract on the basis of concessional rate which has no foundation; that the disqualification enshrined under Clause 2.1.6 is not attracted in the light of cancellation of contract made vide Annexures P-13, P-14, P-15 and P-17; that a reasonable view has been taken by the respondents in the award of the contract and hence there is no warrant of interference in the award of the contract in favour of the respondent No. 7; that the allegations of personal malafide is absolutely baseless and the same have been made without proper verification of the facts; and that the writ petition was devoid of substance and, therefore, did not require any interference by this Court.

5. On behalf of the awarder respondent No. 7, it was urged that enclosing of additional letter in the form of 'rebate letter' is prohibited under Clause 4.1.3, which pertained to the General Rules and Directions for the Guidance of the Contractors; that had the appellant desired to submit a rebate of 18%, he should have intimated the same in the price bid in Schedule G or by affixing a note thereof but nothing has been affixed; and the disqualification enshrined in Clause 2.1.6 is not attracted in view of the law laid down in the case of *Reliance Energy Limited and Anr. v. Maharashtra State Road Development Corporation Limited and Ors.* : (2007) 8 SCC 1.

6. The learned Single Judge addressed to the core issue, namely, whether the rebate letter making a concession of 18% of the bid offered by the appellant deserved to be considered and whether there has been actual refusal of such consideration and whether the respondent No. 7 was disqualified from participating in the process of tender in view of the language employed in Clause 2.1.6 of the tender document.

7. As is demonstrable from the order of the learned Single Judge, he has adverted to the factual matrix in detail to come to hold that it is very difficult to accept that a single paper attached has fallen or had fallen down and gone below the table when the entire scrutiny was being done on the big table where more than six persons were sitting and it seems that the stand putforth is an afterthought. It has been further held by the learned Single Judge that a mere glance at the letter indicates that the figure of 18% is filled up in the blank space and that a Panchnama, Annexure R-2, would go a long way to show that the 'rebate letter' was not inside the envelope and it was brought on record after the price bid was opened and hence, the decision rendered in *Kanhaiyalal Agrawal (supra)*, is not applicable.

8. As far as the disqualification facet is concerned, as is manifest, the learned Single Judge referred to the communications made vide Annexure P-13, P-14 & P-15 and the action taken section Annexure P-17 and expressed the opinion that the disqualification is not attracted to annul or nullify the award of contract.

9. Be it noted, as the personal allegations were against the respondent Nos. 8,9 and 10, the Writ Court, keeping in view the order passed on 23-6-2008 and analyzing the facts, expressed the opinion that the respondent No. 9, Shri P.C. Mahobia, was not posted in the present place of posting and as far as the role of respondent Nos. 8 and 10 is concerned, the allegations against them are vague without being founded on any cogent material; the Committee consisting of Secretary, Project Control Division, three Chief Engineers, Secretary, Water Resources Department, Secretary, Finance Department and Principal Secretary, Water Resources Department were present and hence, the allegations were not supportable. Being of this view, the learned Single Judge opined that the said respondents have been dragged into the litigation without any justification and the allegations have miserably failed and, therefore, the appellant was liable to compensate cost to the said respondents and accordingly, assessed the cost at Rs. 10,000/- and directed that the appellant shall pay Rs. 10,000/- to each of the aforesaid respondents, namely, respondent Nos. 8, 9 and 10. The inevitable result of the writ petition was dismissal with costs.

10. We have heard Mr. Rajendra Tiwari, learned Senior Counsel alongwith Mr. R.S. Verma and Mr. Parag Shrivastava, Advocates, Mr. P.N. Dubey, learned Deputy Advocate General for the respondent Nos. 1 to 6 and 8 to 10 and Mr. Shashank Shekhar, learned Counsel for the respondent No. 7.

11. Mr. Rajendra Tiwari, learned Senior Counsel appearing for the appellant, has raised the following proponements:

(i) The order of the learned Single Judge suffers from serious infirmity inasmuch as he has not accepted the stand that the envelope containing the 'rebate letter' formed a part of the tender form and it was obligatory on the part of the Department to take into consideration the same in view of the law laid down in the case of Kanhaiyalal Agrawal (supra).

(ii) The interpretation placed by the learned Single Judge on Clause 2.1.6 of the tender document which relates to the aspect of disqualification is incorrect and had the correct interpretation been placed, the respondent No. 7 would have been out of the fray of competition.

(iii) The analysis made by the learned Single Judge as regards the judicial review pertaining to the grant of State largesse is inapposite, more so, when substantial pre-condition as stipulated in the tender form which are substantial in nature were not fulfilled.

(iv) When the decision making process goes to the very root of the matter, the same invites the judicial review in its conceptual essentiality and an arbitrary action by the functionaries of the State cannot be allowed to stand.

12. The learned Counsel for the respondents, combatting the aforesaid submissions, contended as follows:

(a) The analysis made by the learned Single Judge as regards the non-incorporation of the envelope relating to rebate is impeccable being based on detailed scrutiny of facts and hence, does not warrant interference in this intra-Court appeal.

(b) The disqualification as envisaged under Section 2.1.6 has been correctly understood and appreciated by the learned Single Judge and hence, no fault can be found with the same.

(c) Once the disqualification facet melts away and the tall claim of rebate fades away, the application of the principle of judicial review relating to the decision making process has to be held as totally flawless.

13. First we shall deal with the facet with regard to the incorporation/ inclusion of an envelope relating to rebate. It is worth nothing that a colossal complaint was made that there had been interpolation of the document to exclude the rebate facet so that the rate of the appellant is not less than others, though as an actual, fact, when the rebate is taken note of, it comes down to a greater extent. To appreciate the same, we had also called for the record. Be it noted, the learned Single Judge has also perused the record. Before we enter into the factual stand and stance whether in actuality a rebate letter was offered, it is obligatory on our part to refer to the decision in the field which deals with rebate. In *Kanhaiyalal Agrawal (supra)*, on which heavy reliance has been placed by the appellant, it has been held that the concession or rebate given is an additional inducement to accept the offer expeditiously to have a proper return on the investment made by the tenderer in the equipment and not keeping the labour idle for long periods which is a part of commercial prudence. The commercial aspect of each one of the offers made by the parties will have to be ascertained and, thereafter, a decision be taken to accept or reject a tender. In the said case, Their Lordships have further held that rebate or concession offered at the time of offering of tender was a part of tender itself. The offer of rebate or concession was made separately and much later was not accepted.

14. In the case at hand, though a categorical stand has been taken that the rebate letter was enclosed, the same, as found by the learned Single Judge, was really not enclosed. The learned Single Judge has discussed that had the letter been attached to the price bid, it would have been done either by pinning it, stappling, tagging it, or affixing it by some tape or other material, but nothing of that sort was done. A 'panchnama' (Annexure R-2) indicates that when the price bid of the

appellant was opened, no such letter was found. All of a sudden, a representative pointed out that a letter was lying under the table. It was the appellant's representative who picked up the letter and gave it to the representative of the Department. The said 'panchnama' has been prepared by Shri L.J.S. Chourasiya in the presence of P.K. Mody, Superintending Engineer, B.B. Tripathi, Executive Engineer, J.L. Namdeo, Assistant in the Office of Chief Engineer, B. Subbarangaih, Senior Vice President, Southern Engineering Works, Hyderabad and representative of one of the tenderers, Ashish Jai, representative of respondent No. 7 and Vishan Singh, representative of the appellant. The said 'panchnama' indicates the circumstances as to how the rebate letter was found. As is patent from the order of the learned Single Judge the entire documents were checked and no such letter was found. The 'panchnama' clearly speaks about picking of paper from the floor in the presence of members present in the room. There is no mention regarding the rebate letter in the price bid. In the statement made by the appellant, he does say about the rebate letter in the price bid but does not say about picking up of paper from below the table by his representative and handing over the same to the Departmental representative. That apart, the learned Single Judge has opined that on a bare perusal of the rebate letter, it is seen that the figure of 18% is filled up in the blank place which was left when the letter was originally prepared. On a perusal of the document, we also concur with the same. In view of the aforesaid, we have no scintilla of doubt that the rebate letter was not incorporated alongwith the tender bid and, therefore, it cannot be taken into consideration. We are disposed to think so as the petitioner has not been able to establish that there was really a rebate letter enclosed alongwith the tender document and in the absence of proof, the same cannot be accepted on a mere bald allegation, however tall it may be, by the appellant.

15. The next aspect which required to be adverted to is whether the respondent No. 7 was disqualified as per Clause 2.1.6 of the tender document. The said clause reads as under:

2.1.6. Disqualification.- Even though the Tenderers (bidders) meet the qualifying criteria in Annexure 1, they are subject to be disqualified if they have made untrue and false representation in the forms, statement and attachments submitted in

proof of the qualification requirement and/or record and poor performance such as abandoning the works, not properly completing the contract, inordinate delay in completion or financial failure, litigation history, etc.

16. It is submitted by Mr. Rajendra Tiwari, learned Senior Counsel for the appellant, that the respondent No. 7 was disqualified because of the cancellation of his tenders and the action taken against him as per Annexures P-13, P-14, P-15 and P-17 respectively. On a perusal of the disqualification clause, it is manifest that though the tenderer meets the qualification criteria as prescribed in Annexure P-I, yet he is liable to be disqualified if he makes untrue and false representation in the forms, statements and attachment submitted in proof of the qualification requirement and/or record and poor performance such as abandoning the works, not properly completing the contract, inordinate delay in completion, or financial failure, litigation history, etc. The said clause can be segregated into two compartments. As far as first limb is concerned the respondent No. 7 has submitted the bid on 19-12-2007 by which date none of the action was initiated or any document pertaining to the termination of certain contracts had been issued inasmuch as the termination of contracts came into existence on 25-4-2008 after the tender documents were submitted. Not a single letter was issued on the date of submission of the tender and, therefore, it can be held with certitude that the respondent No. 7 had not made any false statement or not disclosed anything which would amount to false statement.

17. The submission of Mr. Tiwari, learned Counsel for the appellant, is that the issuance of letters contained in Annexures P-13, P-14, P-15 and P-17 would disentitle the respondent No. 7 to be considered as the same amount to poor performance. As far as Annexure P-17 is concerned, no coercive action, termination on, penalty has been imposed by virtue of the said document and the work is under progress and executed to the entire satisfaction of the Department and a letter has been issued vide Annexure R-7/1 on 31-8-2008. So far as the other works are concerned, it is submitted that every tender has a clause for natural calamities and non-execution due to the same. In the case of Annexures P-13, P-14 and P-15, the works were in the nature of maintenance work and not fresh construction of any kind. The works are related to dams and canal

maintenance and the work is only executable during the summer season and the work relates to certain districts where there has been shortfall of rain. It is put forth that arbitration proceedings are in progress and the liability of delay is yet to be decided. The letters contained in Annexures R-7/2, R-7/3 and R-7/4 have been brought on record in support of their stand. It is also urged that one of the works undertaken by the appellant was also rescinded and the security deposit was forfeited. In addition, the recovery was also effected against the appellant. It is also highlighted that the petitioner is the third lowest bidder and is not entitled to grant of any relief. It is also put forth by him that the work order has been issued in favour of the respondents.

18. The question that arises for consideration is whether the rules of the game have been violated or the owner has the right to have a free play of the joints. In this context, we may refer with profit to the decision rendered in *Tata Cellular v. Union of India* (1994) 6 SCC 651 : 1995 A.T.L.R. 1 (SC). In the said case, the Apex Court has dealt with the power of judicial review. In Paragraph 94, Their Lordships have held as under:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made.
- (3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an Administrative Body functioning in an

administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury Principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

19. Keeping in view the aforesaid principles, the present factual matrix is to be scrutinized. The fulcrum of the matter is whether the administrative decision awarding the contract in favour of the respondent No. 7 warrants review of the manner in which the decision has been made. The submission of Mr. Tiwari, learned Senior Counsel, is that the decision making process is fundamentally erroneous as the functionaries of the State have acted in an arbitrary manner by accepting the financial bid of the respondent No. 7 when there is ample proof of poor performance and termination of contract. In *B.S.N. Joshi and Sons Ltd. v. Nair Coal Services Ltd. and Ors.* : (2006) 11 SCC 548, the appellant's contract was accepted. The said acceptance was challenged by the aggrieved parties on the ground that the appellant therein had not fulfilled the essential qualification as contained in condition Nos. 1.5 (ii), 1.5 (v) and 1.5 (vii) of the Notice Inviting Tender. Their Lordships took note of the fact that the tender documents were in two parts (a) the technical bid; and (b) the financial bid. Nine conditions mentioned therein were required to be fulfilled by the bidders before their respective financial bids could be opened. The condition No. 1.5 (vii) stipulated that the bidder should not be declared defaulter from Electricity Board/Government/Semi-Government/Public Power Utility Companies during last 3 (three) years. A stand was put forth that the appellant was never declared as defaulter but certain disputes were pending between the appellant and the M.P. Electricity Board and some recovery proceedings were initiated and same would be declared defaulter. Their Lordships took note of the fact that the appellant had made a counter-claim and has raised a dispute. In Paragraph 66, Their Lordships adverted to the issue of judicial review which is reproduced below:

66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarised as under:

(i) if there are essential conditions, the same must be adhered

(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

(iii) if, however, a deviation is made in relation to all the parties in regard to any. of such conditions, ordinarily again a power of relaxation may be held to be existing;

(iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the Court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

(v) when a decision is taken by the Appropriate Authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the support and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority; (vii) where a decision has been taken purely on public interest, the Court ordinarily should exercise judicial restraint.

20. Their Lordships in the aforesaid case further opined thus:

68. The employer concededly is not bound to accept a bid only because it is the lowest. It must take into consideration not only the viability but also the fact that the contractor would be able to discharge its contractual obligations. It must not forget the ground realities....

21. In the said case, it has been further held in Paragraph 69 as under:

69. While saying so, however, we would like to observe that having regard to the fact that huge public money is involved, a public sector undertaking in view of the principles of good corporate governance may accept such tenders which are economically beneficial to it. It may be true that essential terms of the contract were required to be fulfilled. If a party failed and/or neglected to comply with the requisite conditions which were essential for consideration of its case by the employer, it cannot supply the details at a later stage or quote a lower rate upon ascertaining the rate quoted by others. Whether an employer has power of relaxation must be found out not only from the terms of the notice inviting tender but also the general practice prevailing in India. For the said purpose, the Court may consider the practice prevailing in the past. Keeping in view a particular object, if in effect and substance it is found that the offer made by one of the bidders substantially satisfies the requirements of the conditions of Notice Inviting Tender, the employer may be said to have a general power of relaxation in that behalf. Once such a power is exercised, one of the questions which would arise for consideration by the Superior Courts would be as to whether exercise of such power was fair, reasonable and bonafide. If the answer thereto is not in the negative, save and except for sufficient and cogent reasons, the Writ Courts would be well advised to refrain themselves in exercise of their discretionary jurisdiction.

22. If the present factual matrix is tested on the touchstone of the aforesaid parameters, the question that would arise for consideration is whether the decision making process is vitiated. As we have indicated earlier, the first limb of disqualification is not attracted as there has been no untrue or false representation in the forms, statement and attachments submitted in proof of the qualification requirement and/or record. As far as the second limb of disqualification is concerned, documents have been filed that there exists a dispute between the

parties. A committee consisting of 10 members who were experts in the field have opined that the tender of the respondent No. 7 deserved acceptance. This is an expert body and they have considered, as is manifest, the technical and financial prospectus. There can be no iota of doubt that Article 14 of the Constitution requires the functionaries of the State to act in fairness and their action must show non-arbitrariness in its basic essentiality. The State is required to act validly and not give weight to whims and fancy. While entering into contract there has to be free play in the joints. True it is, free play in the joints cannot be absolute. It must have the characteristic of absence of arbitrariness and must satisfy reasonably the test of reasonableness. A decision maker must understand its responsibility and an administrative action is to be controlled by judicial review under three heads, illegality, irrationality and procedural impropriety. In a tender process the public interest has to be seen as an acceptable bench mark. Regard being had to the same, as we find, a bonafide dispute being there and regard being had to the fact that an expert body has taken a decision and the documents available on record indicate that there has been deliberation on the same, we do not think it proper to interfere in the award of the work order. We may note in the passing that the appellant is the third lowest tenderer and further he had made wild allegations against the persons and tried to gain benefit by putting forth a stand that rebate letter was incorporated alongwith the tender document. In the matter of this nature, the conduct is also to be taken into consideration. The learned Single Judge, as is perceptible, in Paragraph 26 directed that the appellant shall pay Rs. 10,000/-each to the respondent Nos. 8 to 10. As is manifest, the appellant has endeavoured to gain advantage and has made wild allegations against certain officers without any base or foundation. In fact, the allegations were made in respect of one of the officers who was not posted at the place in question. A litigant invoking the inherent and equitable jurisdiction of a Writ Court cannot be allowed to put such kind of stand in a non-challant manner ad escape. The majesty of law does not countenance the same. It is not a place where malafides are alleged for building an edifice to substantiate one's case on baseless foundation. It would not be an over emphasis to say that this kind of litigation pollutes the atmosphere of the temple of justice. Regard being had to the aforesaid, we are disposed to think that the learned Single Judge has correctly imposed the costs and we concur with the

same.

23. Ex consequently the writ appeal, being sans substance, deserves to be dismissed and accordingly, we so direct. There shall be no order as to costs.

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