

Dda Builders Assoc. Vs. Dda

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Court : Delhi

Decided On : May-08-1996

Reported in : AIR1996Delhi364; ILR1996Delhi274b

Judge : M.S.A. Diddiqui, J.

Acts : [Constitution of India](#) - Articles 12, 14, 19, 226 and 299

Appeal No. : C.W.P. Nos. 394 and 770 of 1996

Appellant : Dda Builders Assoc.

Respondent : Dda

Advocate for Def. : Sumit Bansal, Adv.

Advocate for Pet/Ap. : Sandeep Sethi, Adv

Judgement :

ORDER

1. This order shall also govern the disposal of CWP No. 770/96 as both the petitions raise common questions of facts and law.

2. Brief facts leading to filing of these petitions are that pursuant to the directions given by the Supreme Court in W. P. (Civil) No. 4077/85 the respondent issued tender notices inviting tenders from experienced contractors for construction of sewerage pumping stations, command tanks : and sewerage treatment plants etc.

There is a term in all the NITs (Annexures P. 1/1 to P. 1/4) that the tenders will be issued to the contractors having experience in construction of similar work and have executed at least two works of similar nature each costing not less than Rs. 100.00 lakhs (Annexures P. 1/1 to P. 1/3). They also require to submit a certificate of satisfactory performance of two works of similar nature from the organisation to whom the works had been executed. The aforesaid conditions in the NITs, are being impugned in the petition.

3. According to the petitioners, they are registered contractors of Class I and as such they are entitled to tender for unlimited amount of work. Further, they are fully equipped to execute work of any magnitude besides being resourceful and technically sound but they are sought to be ousted from the competition of even submitting tenders by imposition of irrational or arbitrary conditions requiring them to produce certificates of having executed two works of 'similar nature' earlier of prescribed minimum value. The impugned conditions, according to the petitioner, being in defiance of Article 14 of the Constitution are also contrary to the classification by which the petitioners have been registered as Class I contractors by the respondent.

4. This court issued notices on 31st January, 1996 and further directed that the petitioners should be issued tender documents subject to further orders from this Court. The respondent DDA has filed its counter in this case. The same counter has been adopted for the purposes of CWP 770/96.

5. The principal submission of the respondent is that the works related to deep sewerage, peripheral water supply /command tank/sump wells and bridges are of specialised nature, and are to be executed in subsoil condition and as such these works require specialised equipments, which are not available with all the class-I contractors. It is further submitted that in W. P. (Civil) No. 4677/85, the Apex Court has directed the respondent to carry out these works at war footing and submit progress reports thereof to the Court. These works are to be executed with a great speed which all contractors are not in a position to generate. It is also submitted that the respondent had taken a conscious policy decision not to restrict the present contract only to the contractors registered with the respondent and in

order to get best person or best quotation, the tenders were made open to the contractors registered -with the CPWD, MES and P&T; in addition to the DDA. Since the petitioners do not have the required experience and expertise to execute the work, they are not entitled to apply for the tenders.

6. Learned Counsel for the petitioners have relied on decisions of this Court in M/s. Paragon Construction v. UOI(CWP 4528/93 decided on 18-10-1993); M/s. Unibros v. All India Radio (CWP 3426/94, decided on 7-2-1995) and M/s. Subhash Chander Gupta v. MCD (CWP 3686/95 decided on 7-3-1996), where similar pre qualifying/eligibility conditions have been struck down by this Court on the ground of arbitrariness and discrimination.

At the outset, I must make it clear that the essence of writ jurisdiction in matters of this nature lies in the scope of judicial review. Notes of caution have been sounded by the Supreme Court from time to time in regard to exercise of powers of judicial review. After analysing the various decisions, the Supreme Court in Tata Cellular v. Union of India AIR 1966 SC 11, has laid down the principles under which a judicial review can be had. According to the principles enumerated by Their Lordships only decision-making process and not the merits of the decision itself is reviewable as court does not sit as appellate Court while exercising powers of judicial review. It was also held that mere power to choose can't be termed as arbitrary and the Govt. has always got the power in selecting the best and Court's interference will come only, when use of such power is exercised for collateral purposes. The Supreme Court further held as follows (para 113 of AIR) :

'(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 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.'

In *Sterling Computers Ltd. v. M. N. Publications*, : AIR 1996 SC51 , it has been held that 'by way of 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. Courts have inherent limitations on the scope of any such enquiry'. It is not possible for the Courts to question and adjudicate every decision taken by an authority. Under some special circumstances, a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly in accordance with the norms laid down by the courts, such decisions are upheld on the principles laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of 'play in the joints' to the executive. The decision in *Fasih Choudhary v. D. G. Doordarshan*, : AIR 1989 SC157 also is to the same effect. It is thus clear that 'fair play in the joints' is also a necessary concomitant for an administrative body functioning in the administrative field.

The question is whether the standard or norm of eligibility laid down by the respondent in NITs is vitiated by any legal infirmity. The petitioner's main grievance is that by imposing conditions of eligibility, which are arbitrary and

discriminatory, the petitioners have been excluded from consideration and, therefore, they have been denied the right to carry on trade or business, thus Art. 19(1)(g) of the Constitution has been violated. Learned Counsel for the respondent has contended that the standard or norm of eligibility laid down by the respondent in the NITs is neither arbitrary nor discriminatory and it formed a valid basis of classification bearing a just and reasonable relation to the object sought to be achieved by the contract, namely, effective and expeditious execution of the works specified in the NITs in the public interest. He further submitted that the respondent has right like any other private citizen to enter into contracts with any person it chooses and no person has a right fundamental or otherwise to insist that the Govt. must enter into contractual relations with it.

The DDA being an authority within the meaning of Article 12 of the Constitution its action is open to judicial review and would be liable to be quashed if it is found to be vitiated by bias or mala fide or is arbitrary to the extent of perversity. It is well settled that where the Govt. is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Govt. cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant. (New Horizons Ltd. v. Union of India, : (1995)1SCC478 ; Erusian Equipment and Chemicals Ltd. v. State of West Bengal, : [1975]2SCR674 .) The activities of the Govt. have a public element and, therefore, every action of the State or an instrumentality of the State must be formed by reason. It is a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority.

The requirements in a tender notice can be classified into two categories -- those which lay down the essential conditions of eligibility and others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In notices inviting tenders (Annexure P.1/1 to P-1/4) the respondent stipulated a condition of eligibility by providing that a person submitting a tender must have executed a certain magnitude of work of prescribed minimum value. This is a condition of eligibility to be satisfied by every person submitting a tender and if in a

case of any person, this condition was not satisfied; his tender was ineligible for being considered. It has been held in the case of New Horizon AIR 1995 SCW 275 (supra) that terms and conditions of a notice inviting tender have to be construed from the standpoint of a prudent businessman. When a businessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the person who is to be entrusted with the performance of the work. Such credentials are to be examined from a commercial point of view which means that if the contract is to be entered into with a company he will look into the background of the company and its capacity to execute the work. While keeping in view the past experience he would also take note of the present state of affairs and the equipment and resources at the disposal of the company. The same has to be the approach of the authorities while considering a tender received in response to the advertisement issued. By parity of reasoning, I would say that it is open to the Govt. to take every precaution at the initial stage to assure itself about the credentials of an intending tenderer and his ability to perform the work, to be entrusted. A private individual takes these and similar other factors into consideration while choosing his contractor. There is no reason why the State should not be allowed to take similar factors into consideration while choosing the person with whom it would enter into contract. As stated earlier, the work to be entrusted to a contractor is of specialised nature and some part of the work is to be executed in sub-soil condition and as such these works require improved technology and specialised equipments, which may not be available with all the Class I contractors. That apart, according to the direction of the Apex Court in W.P. No. 4677/85, these works are to be executed with a great speed which all contractors may not be in a position to generate. The obvious purpose of imposing conditions of eligibility is to attract best and efficient contractors, who are fully equipped and technically and financially sound to execute the work within a time schedule. The test of eligibility laid down in the NITs is an objective test and not a subjective one. What the condition of eligibility lays down is that the person submitting a tender must have past experience in construction of similar works and must have executed at least two works of similar nature each costing not less than Rs. 100 lacs, as this would ensure by an objective test that he was capable of executing the work within a time schedule. In my opinion, the standard or norm of

eligibility laid down by the respondent formed a valid basis of classification bearing a just and reasonable relation to the object sought to be achieved by inviting tenders, namely, to award the contract to a sufficiently experienced person who would be able to execute the contract within a time schedule. Moreover imposition of the said condition of eligibility was dictated by the exigencies of the situation. Reference may in this connection, be made to the decision in *Ramana Dayaram Shetty v. IAAI*, : (1979) IILLJ217SC . In the said case, the tender notice stated in clear terms 'sealed tenders in the prescribed forms are hereby invited from registered second class hoteliers having at least five years' experience for putting up and running a second class hotel'. The validity of the said condition was challenged and Their Lordships held that by using the expression 'registered II Class hotelier' the respondent intended to delineate a certain category of persons who alone should be eligible to submit a tender. Upholding the validity of the said condition of eligibility, Their Lordships further observed that the respondent was not acting aimlessly or insensibly in insisting upon this requirement nor was indulging in a meaningless and futile exercise. It had a definite purpose in laying down this condition of eligibility.

It has been stated in the counter-affidavit filed on behalf of the respondent that the work related to deep sewerage, peripheral water supply/command tank/sump wells and bridges are of specialised nature, and are to be executed in sub-soil condition. The work required special tools and plants for pumping out continuous inflow of the water. The work in respect of sewerage pumping station is to be executed 50 ft. below the ground level i.e. approximately 30 ft. below water level. The work relating to storm water drains is also required to be executed in sub-soil water level, which requires a special knowledge and expertise for the same. It has further been stated in the counter-affidavit that if the said work is not done in a particular and specialised manner, it may prove fatal to the labourers engaged for the said work. According to the respondent all the Class I contractors do not have the requisite and sufficient tools, plant and machinery and/or any technical know-how required to execute and complete the contract work in question within the time schedule. Needless to add that laying of sewer lines normally involves deep excavation, heavy dewatering, if the line is laid below sub-soil water level. Similarly, sewage pumping stations also involve deep excavation and heavy

dewatering but major work comprises of casting water-tight reinforcement concrete floors, walls and roofing making a totally buried building complex under the sub-soil water. A person who is trained in producing dense concrete with water-tight form work can alone deliver the quality that is needed in such structures. Any slackness in quality 'may cause immense damage to the sewage pumping stations. Having regard to the specialised nature of the work to be entrusted and the time schedule within which the same has to be executed, I am of the opinion that the respondent was perfectly justified in laying down the standard or norm of eligibility with regard to the past experience, technical competence and financial capacity of an intending tenderer for awarding the contract. The NITs further clarify that tenders will be issued only to those who comply with the prequalifying conditions. The introduction of such conditions and stipulations in a tender notice like this has two consequences. The first is that the party issuing the tender has the right to punctiliously and rigidly enforce them. The second is that the party inviting the tender cannot deviate from the standard or norm laid down by itself in the tender notice. The elimination of arbitrariness is thus ensured.

It would not be out of place to mention here that it has been laid down by the Apex Court in *Tata Cellular : AIR 1996 SC11 (supra)* that the parameters for interference in such matters would be-- (a) mala fide; (b) bias and (c) arbitrariness to the extent of perversity. Thus, the Court would be entitled to interfere only when it comes to the conclusion that the standard or norm of eligibility laid down by the respondent in the NITs is vitiated by bias or mala fide or is arbitrary to the extent of perversity. There is nothing on the record to show that the said condition of eligibility is vitiated by mala fide or bias. It is also difficult to see how the standard or norm of eligibility laid down by the respondent could be said to be arbitrary to the extent of perversity warranting an interference by this Court under Article 226 of the Constitution. The standard or norm of eligibility does not exclude other persons similarly situate from tendering for the contract. I fail to see how the plea of contravention of Art. 19(1)(g) or Art. 14 can be raised in this case.

The decisions relied on by learned Counsel for the petitioners may now be noticed. *M/s. Paragaon Constructions case (supra)* was one where the petitioner, admittedly a Class-I B&R; Contractor of CPWD and eligible to submit tenders for

building and roads without any limit in the whole of the Indian Union was proposing to submit tenders in response to NIT involving work of residential/ non-residential buildings. In that context, the learned Chief Justice, speaking for the Division Bench, has held :--

'The respondents declare only a limited class of contractors as Class-I contractors who otherwise have proven ability, capability and financial soundness and have capacity of executing the work. These contractors can take up the work of any amount. Once this clarification has been made by the respondent and the petitioner has been listed, as Class-I contractor by CPWD vide office memo dated 24-1-1979, then the petitioners cannot be made ineligible by imposing a condition. The impugned condition in the notice inviting tender dated 31-8-1993 of completion of three works of RCC framed structure residential/ non-residential of the value of rupees 3 crores each during the last five years, for the said work of multi-storeyed complex building as untenable and arbitrary.'

The above said decision was followed by another Division Bench in M/s. Unbros case (supra).

In both the cases it will be seen that the petitioners were registered Class-I B&R; Contractors of PWD and eligible to bid tenders for unlimited amount and the work forming subject matter of NIT was also relatable to buildings. In those facts it was held that the petitioners therein could not be excluded from bidding tenders by laying down additional eligibility conditions.

The above said two decisions were cited before a Third Division Bench in M/s. Subhash Chander Gupta's case : AIR 1996 SC51 (supra). The Division Bench though followed the earlier two Division Bench decisions but had the following observations to make vide paras 18 and 19 of the judgment -

'18. In the case before us also the respondent has not brought on record any intelligible data or reasonable basis based whereon the respondent might have taken a decision for introducing the impugned term in the NITs.

19. It may make a difference if the respondent may revise its policy of registration and issuing NITs. It may have further classifications. It might be reasonable to pose a question to oneself if a contractor who has had to his credit successful completion of works up to Rs. 25 lakhs only, can he be depended on for entrusting works of the magnitude of crores? The experts in CPWD, or in MCD for the matter of that, building and roads needs to be further sub-categorized or fresh categories are required to be devised, if they may feel that a contractor having an experience of building and roads merely -- in the senses in which the words building and roads are commonly understood - deserves to be placed in a class or category apart from the contractors experienced in bridge and sub-way works.'

The above observations show that the Division Bench deciding M/s. Subhash Chander Gupta's case has not considered it arbitrary or unreasonable if additional eligibility qualifications by reference to financial capability or the nature of work were introduced after deliberation and thinking.

In the case at hand it has already been noticed in the earlier part of the judgment that the works relate to deep sewerage/peripheral water supply/command tank /sump wells and bridges and are of specialised nature, to be executed in sub-soil condition and as such require specialised equipment which are not available with all the Class-I contractors.

The additional eligibility conditions introduced by the respondent in the NITs have therefore a reasonable basis on which they are founded and have an object sought to be achieved with which they have a reasonable nexus. Such was not the case before the three Division Benches deciding the cases relied on by the learned counsel for the petitioner. The three cases are distinguishable on facts. Moreover in taking the view which I have done, I have placed reliance on the law laid down by the Supreme Court in the recent decisions in Tata Cellular's case : AIR 1996 SC11 (supra) and Sterling Computers case : AIR 1996 SC51 (supra), both rendered subsequent to the decision in M/s. Paragaons case (supra).

For the foregoing reasons, I am not inclined to interfere in the matter in exercise of extraordinary jurisdiction under Article 226 of the Constitution. Consequently, both the writ petitions are dismissed but without any order as to costs.

7. Petition dismissed.

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