Driplex Water Engineering and ors. Vs. Union of India Etc.

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Court : Delhi

Decided On : Apr-15-1983

Reported in : 1983(5)DRJ200

Judge : Rajindar Sachar and; D.R. Khanna, JJ.

Acts : Constitution of India - Article 226

Appeal No. : Civil Writ Appeal No. 471 of 1983

Appellant : Driplex Water Engineering and ors.

Respondent : Union of India Etc.

Advocate for Pet/Ap. : R.S. Narula,; P. Dayal,; K.K. Venugopal,;

Judgement :

Rajindar Sachar, J.

(1) We had heard the counsel for the petitioners and counsel for the respondents at length. At the end of the arguments we had announced that we were dismissing the petition but as there was no time left the judgment was not dictated in Court. We are now giving the reasons for dismissing the writ petition.

(2) This petition challenges the decision made by the Standing Committee of the Board of Directors of respondent No. 2 to award the contract for Water Treatment

for Captive Plant at Angul to respondent No. 3 at a firm price of Rs. 14.03 crores on turn-key basis.

(3) The petitioner is a private limited company engaged in the business of erection/installation and commissioning of water treatment plants and allied works. The petitioner is a small scale unit registered with National Small Scale Industries Corporation Limited. Respondent No. 2 is National Aluminium Company Ltd. (NALCO) which is a Government of India Undertaking. Respondent No. 3, M/s. Bharat Process & Mechanical Engineers Ltd. (BPMEL) was formerly known as Bird & Company Ltd. This company was nationalised and was -taken over by the Government of India in the year 1980. Respondent No. 2 is setting up an Aluminium Complex at Talchar with a Captive Power Plant in Orissa at a cost of Rs. 1200 crores. The project is being installed with French Collaboration and supported by French credits. The Water Treatment Plant is for the power plant. Tenders were invited in April, 1982 fo

(4) If the position of law was as it existed a few years back the petitioners might have been immediately out of court on the ground that even if an award of contract is given by the State it is not open to challenge in writ proceedings just as an award of contract by a private party would not be open to challenge under Article 226. Mr. Venugopal the learned counsel for the petitioner concedes that if the contract had been given by a private party the petitioner could not make a grievance under Article 226. He also concedes that if respondent No. 2 had decided to execute the installation of Water Treatment Plant itself, the petitioner could not have insisted that it should be associated with the work. His grievance, he says flows from the fact that when respondent No. 2 which is an instrumentality of State chooses to award contract it cannot be free from the fetters of reasonableness and public interest. Mr. Chitaley, the learned counsel for respondent No. 2 in all fairness did not challenge this proposition which now must be accepted as well settled. We will, thereforee, proceed on the basis that the State cannot Act as it pleases in the matter of giving largess..... ... . the Government is not free to act as it likes in granting the largess or contract for selling or leasing out its property. Similarly 'if the Government awards a contract or leases out or otherwise deals with its property or grants any other largess, it would

be liable to be tested for its validity on the touchstone of reasonableness and public interest a id if it fails to satisfy either test, it would be unconstitutional and invalid'. (See Kasturi Lal v. State of J&K-;, : [1980]3SCR1338). 'The Government is still the Government when it acts in the matter of granting largess an.l it cannot act arbitrarily. It do.;s not stand in the same position as a private individual'. (See Ramana v. I.4. Authority of India: : (1979)IILLJ217SC).

(5) Reference was made by Mr. Venugopal to Om Parka-h v. State of J&K; : [1981]2SCR841 . In that case the State of Jammu and Kashmir had allotted resin, to certain number of manufacturers while denying the same to the petitioner. The Court held as a matter of fact that there was no reasonable basis for making that allotments in favor of new allottees while denying the allotment to the petitioners. That is way it quashed certain allotments made to those and directed a reconsideration of the matter. Though this prir.ciple was not disputed by Dr. Chitley he nevertheless urged that this does not mean that the Court will substitute its own judgment for that of the authorities concerned and on a comparative evaluation of the 203 respective merits of the petitioner and respondent No. 3 decide as to whom the contract should have been awarded. He maintains that unless it could be held that the decision to award the contract to respondent No. 3 was plainly and manifestly unreasonable and hostile it would be impermissible for this court to try to evaluate the respective merits of the petitioners and respondent No. 3 in the matter of award of contracts. He relies on the caution in this regard which was given in Fertilizer Corp.i. Kamigar Union v. Union of India AIR 1981 Sc 344. In that case the legality of the sale of certain plants and equipments was challenged on the ground that the adequacy of the amount was not proper. Chandrachud, C.J. speaking for the Court held that neither the decision to sell nor the sale proceedings were unreasonable, unjust or unfair. It however, cautioned that though one cannot exclude the possibility that a better price may have been realised in such public auction but such possibilities cannot vitiate the sale or justify the allegations of malafide. Krishna Iyer. J. who wrote a separate but concurring judgment though agreeing that the Court has undoubted power to see that the policing of the corridors of power is carried out by the Court until some other ombudsman arrangement emerges, however, accepted that 'judicial interference with the Administration cannot be meticulous in our Montesquieu

system of separation of powers. The Court cannot usurp or abdicate, and the parameters of judicial review must be clearly defined and never exceeded. If the Directorate of a Governme.it company has acted fairly, even if it has faltered in its wisdom, the court cannot, as a super-auditor, take the Board of Directors to task. This function is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness and has substantially complied with the norms of procedure set for it by rules of public administration ' (Vide Fertilizer Corpn. case (supra) para 36). It is in the light of these accepted principles that we must examine the argument made by counsel for the parties.

(6) The first objection raised is that the petitioners were the lowest tenderers and they had a right to be awarded this contract unless compelling reasons were given to the contrary. There is no merit in this. There was a specific clause in the tender documents which goes contrary to such an assumption Clause 17 reads as follows :- ' 17.0-Award of Contract The purchaser does not pledge to accept the lowest or any bid and reserves the right of accepting the whole or any portion of any bid as he may think fit without assigning any reason. No bid shall be deemed to have been accepted unless such acceptance is notified in writing to the bidder by the purchaser.' In that context the Government had a right not to accept the lowest bid but even a higher one. 'There may be variety of good and sufficient reasons that the Government should not accept the lowest bid'. (See State of U.P. and Others v. Vijay Bahadur Singh & Others : AIR 1982 SC1234).

(7) The next objection raised is that the Government of India had laid down certain guidelines for the award of contracts and these atleast acted as fetters on respondent No. 2. The result being that if those guidelines are violated it must be held that the respondent No. 2 has acted arbitrarily.

(8) Now in the considerations for grant of the contract to respondent No. 3 it was undoubtedly noticed by the Standing Committee that the reduced price quoted by Bpmel, a public sector undertaking at 6% above the lowest level is within the price preference of 10/o to which they are entitled under the Government guidelines. These guidelines referred to by respondents are contained in the Government of India circular dated 15-10-1980. Counsel for the petitioner urged that reliance on

this circular was inadmissible and irrelevant. It is contended that this circular relates to the purchase of requirements from public enterprises and could not be made applicable to a construction contract like the present one. This was however, controverter by the respondents by filing Along with their reply a clarification of 17-6-1981 issued by the Government of India wherein it was clarified that the circular of 15-10-1980 is also applicable to construction and service enterprises. This plea of the petitioners was based on incomplete information and has no force.

(9) Another objection was then raised by contending that in fact the price preference which is being given to respondent No. 3 is not 6% as is now made out, but in fact is 1l/o and the same is beyond the limit of 10/o mentioned in circular of 15-10-1980. Now how 11% increase is worked out is interesting. The petitioner claims that it is registered as a small scale unit and is entitled to 15/o price preference, which means that small scale sector is permitted to get 5/o price preference over the public sector (a reference is made to the answer given in Lok Sabha in this regard). We cannot see how this answer helps the petitioner. The counsel however, says that as after the reduction of quotation by respondent No. 3 the price preference is only 6% but to this must be added another 5'/o because of the 15o price preference in favor of the small scale unit like the petitioner, and it will, thereforee, amount to 11%. We cannot agree. This raising of 6/o increase to 11/o by a circuitous method is unwarranted This argument arises from mis-appreciation of the circulars and clarifications that when there is competition both the public sector and small sector will be given the price preferences respectively. All that it means is that where a small scale unit and a public sector quote for the same store the small scale unit would have a price preference of 5% over the public sector. This means that if any party other than the petitioner or respondent No. 3 had given the lowest tender, say at a figure of 1) crores then in calculating and comparing the quotation of the petitioner and respondent No. 3 a price preference of 15% and 10% would have to be given to each one of them i.e. to say that in comparing the price quoted by the petitioners with regard to the lowest tender he would be within rights to say that if his bid was within 15/o he should be preferred while a public sector company would be able to claim only preference if it was within 10o price range. But here no such question of price preference with respect to the petitioner can arise. The petitioner has given the lowest tender. But

as by itself it does not entitle it to get the contract, other relevant considerations have necessarily to be taken into account. But as price is undoubtedly one of the considerations the respondent No. 2 had to determine the price difference between the quotation given by the petitioner and the reduced bid now given by respondent No. 3. In that context there is no question of reducing the bid of the petitioner by 5o, and thus raising the price difference to 11% as claimed by the petitioner. The final quoted price by the petitioner was Rs. 13.58 crores as against Bpmel (the later being 6% higher). If the contract was given to the petitioner, they would have to be paid the said amount. There would be no question of reducing that figure by 5%. So when price difference has to be worked out, it must be done from the base of Rs. 13.58 crores; it is not disputed that so worked, the price preference in favor of respondent No. 3 works out only up to about 6%. The whole concept of 10% preference for public sector is with reference to the lowest tender. The amount of tender quoted by a party does not get reduced because it happens to be a small scale unit. It can claim 15% preference only if some other party had given the lowest tender. The plea of violation of guidelines laid down by the Government in the matter of price preference is, thereforee, untenable and is repelled.

IT was next contended that the respondent No. 3 had not been found fit by the consultant to do this job and entrusting such an important project to it could not be in the interest of public or the project. This is factually incorrect. No doubt the Consultant had recommended that the contract be given to the petitioners, but the reason was that the offer of the petitioner was the lowest. As a matter of fact the Consultant gave a positive finding that offers of all the three bidders (including the respondent No. 3) are 'generally in line with the specifications, requirements and considered technically at par and acceptable'. The Consultants have also noted that Bpmel, originally known as Bird and Company must be 'deemed to have adequate experience and they have also received orders for semi automatic Dm plant for the Fertilizer Plant of Rashtriya Chemicals & Fertilizers Ltd., Thal. On the other hand it did notice that the petitioner was a relatively new entrant in the field of Water Treatment though it observed that it had shown a large growth in recent years. The Tender Committee had merely endorsed the recommendation of the Consultant. It is not, thereforee, correct to say that either of them had found

respondent No. 3 incompetent or technically not up to the mark to do the job. It is however, significant to observe that with regard to note under completion period Consultant noted that respondent No. 3 had indicated a period of 20 months for completion of the entire plant as per specification whereas the petitioner had indicated that only one stream will be completed to supply water within a period of 20 months and the entire plant will be completed in 25 months. Of course the Consultant stated that Commissioning of one stream would meet the requirement. But this difference in the completion schedule cannot be said to be not a relevant consideration which could prevail with respondent No. 2 in ultimately granting the contract to respondent No. 3.

(10) Counsel for the petitioner then urged that the reasons which persuaded in not awarding the contract to respondent No. 3 were not germane and were non-existent. Now one of the reasons mentioned in counter affidavit is stated to be that Consultants of respondent No. 2 had expressed doubts regarding the qualification of the petitioners at the pre-qualification stage. Mr. Venugopal says that this was a non-existent fact and at no stage was any doubt expressed. But a reference to the report of Consultant contains an admission that it had in its report clearly mentioned that as indicated to Nalco the petitioner's name was included in the short list of pre-qualified bidders in view of their potentiality but a note was made during pre-qualification that their performance will have to be looked into during bid evaluation and that a review has been made of their job evaluation. The comment that at pre-qualification stage the petitioner's name was sent provisionally is fully supported on record.

(11) Another reason mentioned was that the Consultants M/s. Engineers India Lti. had not considered the performance of petitioners as satisfactory to be pre-qualified. This reason is characterised in the rejoinder not only as non-existent but a false statement. Annexure-G, has been given which purports to be a vendors' list (of 31-3-1982), in which petitioner's name is included as one being considered capable of manufacturing similar equipment, (the list also includes respondent No. 3, also possessing similar capacity). It was also maintained that the petitioner had been given some order for work of water treatment plant at Orissa. The counsel for the respondents, Dr. Chitaley, had however, shown us a letter from Eil dated 7-12-

1982 in which there was a note that petitioners had not been short listed for the work of permanent water supply scheme for Alumina plant at Damanjodi, in Orissa State, since reports on their performance on the latest O.N.G.C. jobs executed by them were not satisfactory. It was not immediately clear whether this note by the Eil was for a project for civil construction or also for the setting up of a water treatment plant. During the course of Explanationns and counter Explanationns the petitioner stated that it had applied in response to a June advertisement for a civil construction project and may be this remark related to project which was of a civil construction. Mr. Mathur who also appeared for respondent No. 2 stated that he would have to check up full facts and file an additional affidavit. The petitioner did not however, say that the statement of not short listing it for that tender was false (though he underplayed its importance). Even if this certificate relates to a civil construction contract. and not for the setting up of a water treatment plant, it is not irrelevant. It is significant to note that the present project is a combined one including setting up of a water treatment plant and also civil construction project and this information would certainly be relevant. Mr. Mathur who had taken time has since filed an affidavit of General Manager (Finance) of respondent No. 2 explaining the position in detail. No further affidavit has been filed by the petitioners. In this affidavit of the General Manager (Finance) of respondent No. 2 it is stated that the advertisement for enlistment of contractors for works contract was issued in the Newspapers on 4-6 1981, The petitioners had applied for enlistment as contractors. The said advertisement and the application for enlistment related to the Water Treatment Plant for the Alumina Plaint, referred to in the letter of 7-12-l-.82 (this is the letter mentioned during the hearing before us). In enclosure to that the Eil had stated as follows :- '(iv) Performance : As per available information/reports, the agencies whose performance was not observed to be satisfactory were not considered. Specifically, M/s. Driplex Water Engg. were not short listed since reports on their performance on the latest Ongc jobs executed by them, were not satisfactory.' The petitioners' letter of June 29, 1981 has been attached as R-2/C. In this application the petitioners had specifically mentioned in the category of work interested in enlistment the following :- 207 'Category of Work Interested in Enlistment : - Group I-Civil Structural & Architectural work for :- (a) Waste Water Treatment Plant. (b) Water Treatment

Plant. (c) Demineralised Water Treatment Plant. The petitioners cannot complain that the reference of remarks of Eil were not germane to the issue in hand, because it clearly was for short listing for water treatment plant. It is also explained that Annexure-'G' (to the Rejoinder; filed by the petitioner does not relate to the subject matter of Engineers India Ltd. dated 7-12-1982 (of which a reference was made during the hearing and which relates to the advertisement of June, 1981). It is clarified that Annexure-G is the preparation of a vendors list prepared by Eil, in response to the advertisement issued by it in August 24, 1981. With regard to Annexure G to the rejoinder the petitioner had sought to suggest that Eil had short listed it for water treatment unit. This fact has been repudiated in this affidavit. It is explained that Annexure-G is the vendor list prepared by Eil on 31-3-1982, which was superceded by a subsequent vendors list prepared on 9-8-1982. The petitioner had filed Annexurc-G which had been superceded by list of August 1982 (as is clear from the R-2/F and R-2/G, the later shows than. no contractor was short listed for water treatment unit, as it is stated to be tender cell item. Of course even in the final vendors list of 9-8-1982 the petitioner was classified in A Group for D.M. Water Plant, which is only one of the plants of Water Treatment Plant, whereas the water treatment plant consists of 4 plants (one of them of course being the D.M. Plant). The list also includes respondent No. 3 in A group, so the petitioner cannot claim any outstanding position on this account. We may emphasise that we had on consideration of the various aspects of the matter announced the dismissal of the writ petition after the hearing, but yet had insisted on affidavit being filed by respondent No. 2 because it was openly being suggested that false statements had been made on behalf of respondents We wanted to satisfy ourselves that no such unfortunate effort had been made. We are satisfied that there was no misrepresentation or any false claims put forth by the respondents. We may not have permitted the respondents to do this after the hearing, but for the fact that the rejoinder had covered ground and had mentioned new facts. The rejoinder was filed in court on April, 4, 1983, while the hearing took place on 5th April, 1983 and evidently the counsel for the respondents had objected that they could not be expected to have filed further affidavit to the rejoinder in such a short period. The position remains the same as was told to us by the counsel for respondents at the time of hearing, only we have the details

filled in by various documents. Objection is also taken to the reference to smaller jobs done by the petitioner, on the ground that business the present was the biggest contract there obviously could not be an occasion for bidding for a comparative tender and this could not be held against the petitioner. But the reference to the smaller job was to evaluate their competence for such a big and critical job and it cannot be said that the availability of alternative tender of a party with longer experience like respondent No. 3 was an irrelevant consideration.

(12) The petitioner's main brunt of argument really hinges on trying to persuade us to hold that respondent No. 3 does not have the requisite experience and capability and does not possess the latest technical know how and entrusting such a huge time bound project to respondent No. 3 would be against public interest and a disastrous financial decision. It is important to note that no malafide of fact has been alleged. It is not suggested that any of the persons taking a decision were actuated by a hostile motive against the petitioner or had any extraneous or improper motive to favor respondent No. 3. The charge of not having requisite know how or latest technology is repudiated by the respondents. Rather it is maintained that respondent No. 3 possesses the latest technical know how and has full field experience. As a matter of fact it was stated that the latest technical know how was available with them. It was averred that the Standing Committee before making the final decision had got an assurance from the Ministry of Heavy Industries which had stated that the Collaboration agreement with Delta Engineering, Holland was in advanced stage and respondent No. 3 expects that the collaboration could be effective very soon and that immediately back to back support for NALCO's project would be available. As a matter of fact (we hope not because of the writ petition) the urgency of making this collaboration effective is shown by the information given that even a delegation of the concerned officers is being sent abroad next week to finalise the arrangements for foreign collaboration (whether the sending of team was an absolute necessity and the deal could not have been finalised without having to go abroad is not a matter which concerns us. All that we need note is that statement of getting the latest technology has basis in fact). We should hope that the result of the speed and expedition shown will result in concrete results. The counsel for the petitioner took us through various technical details of the contract, the alleged backlog of the work pending with respondent

No. 3, the shortage of manpower with them, all naturally to convince us that the decision to award contract to respondent No. 3 was most inapt and the counsel even characterised it as against national interest. We deem it unnecessary to refer to these various detai's. Because all said and done the only purpose of this exercise is to ask us to reassess for ourselves the comparative merits of the petitioner and respondent No. 3. This argument in fact invites the court to substitute itself for the Standing Committee in evaluating the respective merits of petitioner and respondent No. 3. We must strongly decline this invitation for the obvious reason that this court does not possess the expertise, technical competence and all the facts necessary to evaluate the respective merits between these two parties, nor is it the function of this court to scrutinise these details as if it had been appointed a Consultant or as an auditor. This function has been entrusted to experts and is within the province of the decision making of respondent No. 2. All that this court has to make certain is that there is no favoritism or arbitrariness in the action of the respondent No. 2, an instrumentality of State. Once this Court is satisfied, as we are, that there is no force in any such objection, this court must exercise self-restraint, and there can be no scope for interference. 208 In the present case it will be seen that the matter has not been rushed through in the first meeting of the Standing Committee of the Board of Directors which was held on December 31, 1982. In that meeting the recommendation sent by the Dcpl with regard to each of the tenderers was considered; it was realised that the price originally quoted by respondent No. 3 was beyond the 10% price preference and it was considered that if respondentNo. 3 were to match the price of the lowest bidder their claim could be worth considering. That is why the talks were held with the parties including the petitioner and respondent No. 3. Number of meetings were held in January and February when the matter was discussed in great detail and various clarifications obtained. The Committee had also got the assurance from respondent No. 3 that it would be able to complete the.job in time and that collaboration with a foreign company would be available within the timeschedule. The committee was conscious of the critical importance and value of the job in hand. It will thus he seen that the Standing Committee of the Board of Respondent No. 2 took into account all the various aspects of the matter and it was only thereafter that it

decided to award this contract of water treatment plant to respondent No. 3. The Committee consists of very high and senior officers like Chairman, and Directors of respondent No. 2. The meeting of 9-3-1983 at which the decision was taken to award the contract was attended by the Chairman and other Directors of respondent No. 2 and was also attended by the General Manager (Finance), the Chief Engineers. In the absence of any malafide against such high officers and no suggestion even that any of them were in any way biased against the petitioner it would be impermissible for this court not to accept the views of respondent No. 2 that it had taken into consideration various aspects of the matter and it was only thereafter that it decided to award the contract to respondent No.

(13) It should be appreciated that respondent No. 2 is owned Government undertaking: no private interests are served and, thereforee, the presumption of bonafide normally attaching to official action is still more heightened. After all the contract has to be overseen by respondent No. 2 it cannot be done by the court, as was the effort by the petitioner in trying to persuade us to look into the various details. We are prepared to accept that public sector is as accountable as private sector. We accept what was said by one of us (Sachar, J.) in The Indore Malwa United Mills Ltd. & others v. Union of India & others(1974) 1 Delhi 311), 'this is because the requirement of profitability, economy and efficiency as well as accountability which is applicable to privately run undertakings equally apply to public run undertakings. It may be readily conceded that the yard stick must be the same in both cases i.e. whether the management is in private hands or in the hands of the Government.' But that does not mean that the court should arrogate to itself the functions which necessarily belong to administrative agencies. We fully subscribe to the suggestion of the petitioner that work of such prime importance must not suffer delay, or handling by incompetent hands. But we must accept that respondent No. 2, has also the same sense of responsibility and the interest of the public at heart when it made the decision to award the contract to respondent No. 2. We also cannot ignore that the decision of respondent No. 2, if found faulty or unjustified later on will not go uncensured or unnoticed. The action of respondent No. 2 is subject to the constant supervision of the Government and various other State agencies. Such a project as this will also be under constant scrutiny by Parliament and public opinion, a certain check on any executive excesses. We

must take it that the respondent No. 2 was conscious of all these limitations and the serious consequences that may follow if any time it transpires that its decision was vitiated even by rashness and negligence, aspects which could not be looked into by the courts. We feel that such constraints are a sufficient safeguard against the apprehension expressed by the petitioner.

(14) For all the persuasion of the petitioner's counsel we are unable to find any such situation or legal infirmity in the award of contract to respondent No. 3 as to call for interference. The petition is, thereforee, dismissed in liming. Interim stay given earlier will naturally stand vacated, and is hereby vacated.