

Sriramegowda Vs. the Housing and Urban Development Department, Bangaluru and Others

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Court : Karnataka

Decided On : Apr-19-2011

Judge : The Honourable Chief Justice Mr. J.S. Khehar & a.S. Bopanna

Appeal No. : Writ Petition No.247 of 2006

Appellant : Sriramegowda

Respondent : The Housing and Urban Development Department, Bangaluru and Others

Advocate for Pet/Ap. : For the Petitioner: Vardhaman V. Gunjal, Advocate. For the Respondents: Basavaraj Kareddy, Principal Govt. Adv. for R. Subramanya, Ashok Harnahalli, Sr. Adv. S. Subhash for M/s. Kumar and Kumar, Advocates.

Judgement :

J.S. Khehar, C.J.

1. Respondent No.4 addressed a letter dated 26.06.2004 to the Bangalore Mahanagara Palike (hereinafter called as 'BMP'), offering to construct 10 "foot over-bridges". The issue came to be discussed by the Standing Committee of the BMP, on 23.08.2004, whereupon the matter was placed for the approval of the Urban Planning and Development Standing Committee. The said Committee approved the construction of the "foot over-bridges", on 23.08.2004. Thereafter, in

terms of the norms of the BMP, the issue was placed for consideration before the Taxation and Financial Standing Committee, which also accorded its approval on 06.09.2004. Eventually, the matter came to be considered in a meeting of the BMP itself on 14.10.2004 wherein, the Mayor of the BMP placed the matter for its approval. The issue was put to vote. The matter came to be approved at the meeting of the BMP on 14.10.2004.

2. A public notice inviting an expression of interest for construction of “sky walks” was issued on 12.10.2004. A relevant extract of the same (which has been placed on the record of this case, by the learned counsel representing respondent No.4 through a memo dated 19.04.2011) is being reproduced hereunder:

“Invitation for Expression of Interest for Construction of Sky Walks on FOMT Basis.

Bangalore Mahanagara Palike proposes to construct Sky Walks at different places in Bangalore Mahanagara Palike area with a private sector participation in a long/short term concession under Finance Own-Maintain Transfer (FOMT) basis.

Open competitive bidding with selection, with pre-specified experienced, technical and financial criteria would be used to select the private sector partner.

Initially BMP invites EOI for the project from interested parties who can subsequently bid for construction of Sky Walks.

Interested firms who have experienced and expertise in the above fields may submit the “Expression of Interest (EOI)” for the above project after obtaining the information from the undersigned in two sets.

Last date for submission of Expression of Interest November 16th, 2004 upto 1600 hours IST.”

3. Even though the last date for receipt of applications in the advertisement dated 12.10.2004 was mentioned as 16.11.2004, it is the contention of the learned counsel for the petitioner, that the decision in favour of respondent No.4 was taken in the meeting of the BMP on 14.10.2004 itself. It is apparent from the

determination rendered by the authorities through an agreement executed on 20.11.2004, that as against 10 “foot over-bridges”, which respondent No.4 offered to construct, he was awarded an agreement to execute 7 “foot over-bridges”.

4. The determination rendered by the BMP in favour of respondent No.4 is the subject-matter of challenge through the instant writ petition filed as a cause in public interest.

5. It is the contention of the learned counsel for the petitioner, that in cases as the one in hand, where there may be substantial financial gains, it was imperative for the BMP to invite tenders in respect of the sites where “foot over-bridges” were to be constructed. It is also the contention of the learned counsel for the petitioner, that the provisions of the Karnataka Transparency in Public Procurements Act, 1999; and Sections 172 and 176 of the Karnataka Municipal Corporations Act, 1976 were violated at the time of award of the contract to respondent No.4. It is the submission of the learned counsel for the petitioner, that the contract awarded to respondent No.4 was for a trivial amount of Rs.10,000/- per annum for each “foot over-bridges”, whereas, the gains at the hands of respondent No.4 are proportionately much higher.

6. Insofar as the issue agitated at the hands of the learned counsel for the petitioner is concerned, we have been informed by the learned counsel for the respondents, that in the advertisement dated 12.10.2004 despite the invitation of expression of interest having been issued by the BMP, not a single response was received by the BMP. Thereafter, another advertisement was issued on 27.12.2007, inviting the same expression of interest for construction of 56 “sky walks”. Yet again, not a single response was received by the BMP. Thereafter, another advertisement was issued by the Bruhath Bangalore Mahanagara Palike (hereinafter referred to as the ‘BBMP’) on 3.12.2009. On this occasion, 13 responses were received by the BBMP for construction of Sky Walks. On this occasion, the advertisement dated 3.12.2009 had invited applications for 30 “sky walks”.

7. Insofar as the subject-matter in the instant controversy is concerned, our attention was also invited by the learned counsel for the respondents to a

communication dated 05.07.2005 addressed by the Commissioner, BMP to the Principal Secretary to the Government, Urban Development Department. The aforesaid letter dated 05.07.2005 is of extreme relevance to the present controversy and it is accordingly being extracted hereunder:

“Please refer to your letter dated 6.6.2005 regarding the proposed construction of foot over bridges. The issue of construction of foot over bridges was taken up by the BMP at the request of the Bangalore Traffic Police who have identified 105 junctions for providing subways considering the increasing traffic and safety of pedestrians. After final review 34 locations were identified to be taken up. Construction of underground subway involve considerable time, disruption of traffic and unknown utilities. Hence, after discussing with the Indian Institute of Science (IISc.), it was decided to provide steel foot over bridges. In this connection a copy of letter addressed to Government in UD by Commissioner of Police and reply sent are enclosed. Copy of proceedings of meeting held in the Chambers of Principal Secretary to Government in UD on 23.09.2004 is also enclosed.

The Bangalore Mahanagara Palike had separately called for tenders to construct of foot over bridges on west of chord road opposite the ISKCON temple on 27.09.2003, as there was no response to this tender, it was re-rendered on 10.05.2004, since there was no response to this tender also, it was decided to call for tenders for both construction of the bridge as well as through the Build Own Transfer (BOT) option. Two responders one for construction (Rs.1.39 lakhs) and another for BOT were received.

BMP's previous experience in creating public convenience, such as bus shelters, traffic gantries, Nirmala Bangalore pay and use toilets, development of road medians, etc., is that BOT partners, usually advertisers, normally propose projects based upon exclusive advertising rights for them against their investments on creation of public assets. The BMP, apart from savings on capital expenditure, also receives ground rent and annual advertisement tax. The period of concession is worked out based upon the investment and calculation of rate of return. As these are projects proposed by BOT partners, the first concession is given to them and thereafter, after a period of operation, during which the usefulness of the

project is assessed (apart from issues of design, construction and public acceptability), the pilot project is scaled up through a tender-cum-auction process in which interested advertisement firms are invited to participate. As the project is developed by BOT partners, no tenders for pilot projects have so far been called. The pilot project for foot over bridges has also been developed in this approach. For this reason, BMP has found it desirable to try a pilot scheme involving a new concept rather than start all identified ones at a time.

The development of projects under the Public-Private Partnership (PPP) model requires the associations of the BOT partner in the development of the model. This also requires the model to be commercially viable for the BOT partner. The overage cost of one foot over-bridge is Rs.50 lakhs. The BOT partner had requested for ten foot over-bridges. After a series of negotiations during which the economies of the project was discussed in details, it was felt that at best seven locations can be offered. The locations are as per the list furnished by the Traffic Police and have the clearance of other agencies such as Metro Rail.

The BMP has constituted a Project Management Group (PMG) which considers projects and proposals and makes recommendations. Under Section 4(b) of the KTCP Act, the BMP has also constituted a 3-Member Expert Committee which examines proposals of a proprietary nature. This committee meets as frequently as required. This committee also considered this case. the design for foot over bridges was developed in association with the Indian Institute of Science (IISc.), Bangalore and three designs were short listed after several rounds of discussions with the IISc. The design approved is a metal frame structure that is easy to erect, without disruption of traffic and provides for flexibility for steps, escalators and/or elevators and the work is to be executed under the supervision of the Indian Institute of Science.

In the light of the above, with regard to the specific queries raised in the letter under reference, it is stated as under:

(i) For the reasons stated above, a pilot project cannot be treated on par with normal procurement; however, provisions of the KTCP Act with regard to examination of proprietary items by a 3 Member Expert Committee have been

followed.

(ii) Revocation of agreement already entered into does not arise for the reasons given above.

(iii) In view of the above, there has been no violation of the KTTP Act and therefore there is no need to initiate any action.

It is also further pointed out that these FOBs, are being proposed at the instance of the Police Department who have desired the constructions of 34 such structures. As the cost of each structure is estimated to cost Rs.50.00 lakhs, it is not possible for BMP to take up construction with its scarce funds. A possible option of the PPP route has therefore, been explored. The High Powered Task Force on Traffic, headed by the ACS and Home Commissioner has also desired that work be expedited. The design is developed through the IISC and a BOT partner identified after considerable time and effort to develop a pilot project. The town planning and taxation and finance committees of the BMP and the Council have also considered and approved the proposal. If, however, Government desires BMP to desist from proceeding further, this may kindly be intimated in writing enable us to inform the Tax Force and the Police Department.

8. At the present juncture, we are informed by the learned counsel for the respondents, that of the 7 “foot over-bridges” allotted to respondent No.4, all 7 have since been constructed. One of them was constructed as far back as in 2005, whilst five of them were constructed in the year 2006, the last “foot over-bridge” was constructed in 2011. In the aforesaid construction, respondent No.4 claims to have spent a sum of Rs.4,14,42,445/-. He claims to have paid ground rent as prescribed by the BBMP in the first instance at the rate of Rs.10,000/- per annum per bridge, and thereafter, from January, 2010, at the rate of Rs.12,000/- per annum per bridge. Respondent No.4 also claims to have deposited advertisement tax on an annual basis, the total sum whereof, paid by respondent No.4 is stated to be Rs.11,89,638/-.

9. Based on the aforesaid factual position, learned counsel for the respondents vehemently contend that open advertisements were issued from time to time

inviting applications for construction of “sky walks”. It is only when no response was received by the BMP, that it was decided by the Commissioner of the BMP based on a decision taken by the BMP itself dated 14.10.2004, to award a contract in favour of respondent No.4, as there was no rival claim or higher bidder. It is submitted, that the provisions of the Karnataka Transparency in Public Procurements Act, 1999 and Sections 172 and 176 of the Karnataka Municipal Corporations Act, 1976 relied upon by the learned counsel for the petitioner cannot be deemed to have been infringed. Our pointed attention was also invited to the letter addressed by the Commissioner of the BMP dated 05.07.2005 to the Principal Secretary to the government, Urban Development Department, taking note of the circumstances which had prompted the BMP to award contract in favour of respondent No.4.

10. Having examined the rival contentions advanced at the hands of the learned counsel for the parties, we are of the view, that contract awarded in favour of respondent No.4 cannot be held as unacceptable in the facts and circumstances of the present case. It has been noticed hereinabove, that various advertisements came to be issued by the BMP in the years 2004, 2007 and finally in 2009. For the first time, desirous individuals responded to the last of the aforesaid advertisements issued on 3.12.2009. Prior thereto, none of the advertisements issued by the BMP received any response. It is therefore, clear, that in the facts and circumstances of this case, at the juncture when the contract was awarded to respondent No.4, there was no better offer available to the BBMP, either insofar as the terms and conditions of the contractual obligations were concerned, or in terms of the ground rent and other like conditions. At the present juncture, all 7 bridges awarded to respondent No.4 in furtherance of the agreement dated 20.11.2004 have been duly constructed. What has been commissioned cannot be reversed. The residents of the city of Bangalore have been benefited from the 7 “foot over-bridges” constructed by respondent No.4. In the facts and circumstances of this case, we are satisfied, that no action is called for insofar as the award of contract to respondent No.4 is concerned, and/or the terms and conditions at which the aforesaid contract was awarded.

In view of the above, we find no merit in the petition and the same is accordingly dismissed.

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