(2002) 2 RCR(Civil) 401

High Court Of Punjab And Haryana At Chandigarh

Case No: Civil Writ Petition No. 8691 of 2001

Ess Kay Builder	APPELLANT
Vs	
Punjab Police Housing Corporation Limited and Others	RESPONDENT

Date of Decision: Aug. 30, 2001

Acts Referred:

- Constitution of India, 1950 - Article 226, 227

Citation: (2002) 2 RCR(Civil) 401

Hon'ble Judges: Swatanter Kumar, J; A.S. Gill, J

Bench: Division Bench

Advocate: R.S. Mittal and Sudhir Mittal, for the Appellant; A.R. Takkar, for the Respondent

Final Decision: Dismissed

Judgement

Swatanter Kumar, J.

Punjab Police Housing Corporation Limited (hereinafter referred to as the Corporation), an instrumentality of the State, invited tenders, vide advertisement dated 14.4.2001, amongst other for awarding the contract in relation to construction of 96 houses at Punjab Armed Police Lines, Jalandhar. 4.5.2001 was the date fixed for opening of the tenders. The petitioner-firm, which are carrying on the business of civil contracts, engineers and fabricators, responded to the above tender inquiry and submitted its tenders in regard to the above work. The tenders were opened on 4.5.2001. The petitioner-firm was declared to be the lowest tenderer. According to the petitioner, the firm was called for negotiations on 10.5.2001 by the Corporation. The petitioner firm offered to give 2% rebate on electrical portion only. However, they were again called for negotiation and respondent No. 4 desired that petitioner should reduce the price further. In the meeting held on 30th May, 2001, the petitioner as a matter of goodwill agreed to give further rebate of Rs. 11,000/- in all and expressed their inability to reduce any further the rates of tender. The Chief Engineer-respondent No. 4 recommended the case of the petitioner to respondent

No. 2 for issuance of appropriate order, as a result of acceptance of the tender.

2. The petitioner, who appears to be well informed of the progress of the file and noting on the office file, has stated in the writ petition that on 7.6.2001, the file was put up to respondent No. 2, who made the noting "put up the case with NIT". After perusal of the entire matter on 8.6.2001, the respondent No. 2 passed the following order:-

"No. Being competent authority, I invoke condition No. 5 of NIT and reject the tenders, re-invite. Release the Earnest Money."

3. In furtherance to the order dated 8.6.2001, the Corporation issued a letter to the petitioner-firm in the above terms and further it was ordered that fresh tenders be invited. On 12.6.2001, the earnest money deposited by the petitioner was returned and fresh advertisement was released in the newspaper, copy of which is annexed to the petition was Annexure P/7 inviting fresh tenders by 29th June, 2001. On these facts, the petitioner has challenged the orders passed by respondent No. 1 dated 8.6.2001 and returned of his earnest money dated 12th June, 2001.

4. According to the petitioner, the order dated 8th June, 2001 has not been passed by the competent authority, is an arbitrary exercise of powers and he petitioner being the lowest tenderer, has a vested right to be awarded the tender work.

5. Upon notice, the respondents filed a detailed reply. According to the respondents, the facts are hardly in dispute. It is stated that the rate quoted by the petitioner in the tender was highly excessive and therefore, in the interest of the Corporation, the respondent No. 1 had passed the order rejecting all the tenders received in pursuance to the first advertisement and, therefore, necessity arose for re-inviting the tenders. According to the respondents, in furtherance to the 2nd notice inviting the tenders, the tenders have already been received and tender stand awarded at a much lower rate than quoted by the petitioner and, as such, the present petition has become infructuous and no relief can be granted to the petitioner. In addition to this, it is also contended that the terms of the contract falls purely in the field of contractual obligation simplicitor and the petitioner cannot be permitted to invoke the writ jurisdiction of this court.

6. At the very outset, we must notice that no allegation of mala fide or bias in exercise of its power has either been stated in the petition or even otherwise attributed on the part of any of the respondents. In absence of any mala fide or mal-practice alleged to have been adopted by the respondents, this court at best can examine this petition within a very limited compass i.e. whether the respondents have exercised the powers vested in them and, if so, such exercise of powers is so colourable or arbitrary exercise that it would offend the basic concept of fair play in its business, by a State or its instrumentality?

7. In order to examine the element and extent of arbitrariness in the action of the respondents, the court must refer to the stand taken by the respondents before the court on the basis of the record maintained by the Corporation in its regular course of business.

The respondents have stated their entire stand in a concise form in paragraphs 3 & 4 of the written statement, which reads as under:-

"... It is important and relevant to bring to the kind notice of this Hon''ble Court that in the recent past similar Civil works in and around Jalandhar have been allotted at rates which were quite lower than CSR rates. Some of the examples are as under:-

i) The allotment offender for the construction of 64 number houses at Taran Taran Police Lines had been done at the price which is 7.93% below the CSR/CP/Market Rate.

ii) The allotment of tender for the construction of 40 number houses at P.S. Banga has been done at the price which is 9.54% lower than the CSR/CP/Market Rate,

iii) The allotment of tender for the construction of 64 number houses at P.A.P. Line, Jalandhar has been done at the price which is 8.24% lower than the CSR/CP/Market Rate.

iv) The allotment offender for the construction of 32 number houses at P.S. Patti has been done at the price which is 8.03% lower than the CSR/CP/Market Rate.

v) The allotment of tender for the construction of 8 number houses at Civil Line, Amritsar has been done at the price which is 8.92% lower than the CSR/CP/Market Rate.

It is submitted that the price quoted by the petitioner firm as was only 2.5% lower than CSR/CP/Market Rate, it was not in the interest of the Corporation to accept this bid and re-tendering was required in order to have more competitive offers and to rule out the possibility of any cartel. The respondent No. 2, thus invoking condition No. 5 of the notice inviting tenders thus passed the following order:-

According to condition No. 5 of NIT, undersigned i.e. the M.D. has reserved the right to accept or reject any or all tenders without assigning any reason. I hereby invoke this clause and reject all the tenders. Earnest money be refunded to all the parties. Tenders may be re-invited."

4. That accordingly tenders were reinvited vide advertisement dated 21.6.2001 and 5 number parties submitted their tenders. The petitioner firm also purchased a tender form by depositing Rs. 300/- but did not choose to submit the same. On opening the tenders received, it was found that the tenders submitted by M/s Dhandi Builders Ltd. was lowest for Rs. 2,18,15,726.61, which was Rs. 23,99,785.49 lower than the CSR/CP/Market Rate i.e. 9.91% below the CSR/CP/Market Rate and further as compared to the tenders submitted by the petitioner firm earlier, it was Rs. 18,89,459.39 lower."

8. The bare reading of the above portion of the reply clearly shows that the respondents have not acted arbitrarily. In, fact, the action of the Corporation is intended to save its own money to the extent of more than 18 lacs. Moreover, a private, individual, public

undertaking or a government company is under greater obligation to save public money. It intends to economise its expenditure and still to get the possible best work executed, which cannot be termed as colourable exercise of authority or power and more particularly when it does not offend the principle of fair play.

9. Learned counsel for the petitioner placed reliance upon the cases of Harminder Singh Arora Vs. Union of India (UOI) and Others, , Dai-Ichi Karkaria Ltd. Vs. Union of India and Others, , and Star Enterprises and Others Vs. City and Industrial Development Corporation of Maharashtra Ltd. and Others, , to contend that the tender of the petitioner ought to have been accepted by the respondents and they ought to have acted in consonance with the rule of law, while dealing with the tenders.

10. As far as proposition of law, as enunciated by the Hon''ble Apex Court in the above said cases, is concerned, there can hardly be any dispute The material question that arises for consideration is in regard to the application of such principle to the facts of present case. The Corporation has acted in accordance with law and in consonance with the principle of fair play in regard to is business affairs. The court cannot sit as a appellate court over the administrative decision taken by the authority more particularly when such decision at the face of it is plausible and reasonable. In absence of allegations of mala fide or patent arbitrariness, the petitioner, in any case, would have no case for invoking the writ jurisdiction of this court.

11. Learned counsel for the respondents relied upon the cases State of Gujarat and Others Vs. Meghji Pethraj Shah Charitable Trust and Others, , State of Himachal Pradesh Vs. Raja Mahendra Pal and Others, and Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others, , to contend that the remedy to the petitioner, if any, is available under the common law and not by filing the present writ petition, as the matter entirely falls in the domain of contractual obligation simplicitor. The Hon''ble Apex Court in the afore-referred decisions have held that depending on the facts and circumstances of the case, a writ is maintainable even in regard to the contractual matter where the State or its instrumentality have acted in utter disregard to the rule of law, principle of fair play and with patent arbitrariness.

12. Another contention, which has been impressed before us by the learned counsel for the respondents is that the tender of the petitioner was never accepted and, as such, the petitioner, in any case, has no assailable right much less a legal right to file the present writ petition. In this regard, he relied upon the cases of Laxmikant and others Vs. Satyawan and others, and Union of India (UOI) and Others Vs. Bhim Sen Walaiti Ram, .

13. There is substance in the submission made on behalf of the respondents. It is an admitted fact that the tender submitted by the petitioner was not accepted at any point of time. On the contrary, the petitioner was called for negotiations which indicates that the respondents were desirous of awarding the contract to the petitioner but at a lower rate. The petitioner upon exercise of due diligence and as wise businessman gave some

concession to the Corporation and thereafter declined to reduce the tender rates any further. Having taken this decision, the petitioner cannot be permitted to alter his position now, particularly in view of the fact that freshly invited tender gives benefits to the Corporation of more than 18 lacs. This fact would ever stare the petitioner in face and the petitioner can hardly be heard to argue that the petitioner has been vested with any indefeasible right for awarding contract. The action of the Corporation is certainly justifiable by applying the basic business principles and the concept of fair play. In fact, in the case of Laxmikant (supra), the Hon''ble Supreme Court specifically held that the highest bidder does not get any right to the property despite the fact that he has deposited the earnest money in terms of the contract. The said principle is squarely applicable 10 the present case and the petitioner gets no indefeasible right merely because he was called for negotiations being the lowest tenderer.

14. In a very recent judgment, the Hon''ble Supreme Court, in the case of Life Insurance Corporation of India and Ors. v. Asha Goel and Anr. 2001 (1) S.C. 10, broadly mentioned the kind of cases where the Hon''ble High Court should or should not exercise jurisdiction under Article 226 of the Constitution of India for enforcing liability arising out of the policy/contract. The Hon''ble Supreme Court held as under: -

''The High Court should not entertain a writ petition filed under Article 226 of the Constitution for mere enforcement of a claim under a contract of insurance. Where an insurer has repudiated the claim, in case such a writ petition is filed the High Court has to consider the facts and circumstances of the case, the nature of the dispute raised and the nature of the inquiry necessary to be made for determination of the questions raised and other relevant factors before taking a decision whether it should entertain the writ petition or reject it as not maintainable.''

15. Lastly, we must deal with the contention of the petitioner whether the competent authority has passed the order dated 8.6.2001 arbitrarily and also refer to the conduct of the petitioner.

16. Under the terms and conditions of the advertisement dated 14.4.2001, it was clearly stated that detailed notice inviting tenders, conditions and other particulars can be seen in the office of the Executive Engineer concerned on any working day during office hours. As per condition 5 of the advertisement, the Managing Director reserves the right to accept or reject any or all the tenders without assigning any reason. In the specified general terms and conditions, notice inviting tenders, under condition No. 5, the Executive Engineer shall have the right to reject any or all the tenders. Apparently, the order dated 8.6.2001 has been passed by the Managing Director of the Corporation, even though the Executive Engineer had the authority to reject the tenders. These conditions per se do not offends any protection much less constitutional protection available to the petitioner in law. Exercise of authority under these terms would be arbitrary or discriminatory only, if it is repugnant to the basic rule of law and is a decision which is palpably erroneous or untenable. We have already held that the order dated 8.6.2001 was passed by the

competent authority and for reasonable cause and in the larger interest of the Corporation. The Managing Director has taken a decision on first business principle and the said decision does not suffer from lack of inherent authority and is not liable to be interfered with by this court in a petition under Article 226/227 of the Constitution of India.

17. Now, we revert to the conduct of the petitioner before filing the writ petition. The petitioner admittedly was the lowest tenderer but the rates quoted by him were exorbitantly high. There was no scope for deduction, is not even disputed by the petitioner. The petitioner deposited the earnest money but during the negotiation he did not reduce the price to the extent requested by the Corporation. The petitioner, in fact, in furtherance to 2nd advertisement even purchased the tender document by depositing fee of Rs. 3,00/- but did not choose to submit the same. When learned counsel for the petitioner was confronted with this situation, the only argument advanced was that participation for the second time would have prejudicially affected the interest of the petitioner. We see no substance in this submission. The petitioner could always participate without prejudice to his rights in this writ petition as by that time he had already filed the writ petition. The third party interest have already set in. The person to whom contract has been awarded, has already started work at the site. Thus, the conduct of the petitioner and the intervening events are no way favourable to the petitioner for grant of any relief by this court. The petitioner responded to the tender inquiry and as a prudent business man declined to reduce the tender rates any further than afore-mentioned. The petitioner was fully conscious and aware of the general as well as special terms and conditions for inviting tenders. Exercising its power within the specific terms and conditions, the Corporation cancelled the earlier invited tenders. But inevitable result of which was to re-invite the tenders.

18. Thus, at this stage, it would be impermissible to permit the petitioner to challenge the validity of the same terms and conditions. In this regard reference can be made to the judgment of the Hon''ble Supreme Court in the case of State of Orissa and others Vs. Narain Prasad and others, etc. etc., .

19. The cumulative effect of the above discussions is that the order dated 8.6.2001 neither suffers from the defect of inherent lack of authority nor is arbitrary. The order dated 12.6.2001 is a mere consequential order. The conduct of the petitioner further disentitles him from claiming any relief in equity or otherwise, particularly within the limited scope of jurisdiction exercisable by this court under Articles 226/227 of the Constitution of India.

Resultantly, the writ petition is dismissed, bower, without any order as to costs.

Sd/- A.S.Gill, J.