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N.E. Mercantile Vs Union of India (UOI) and Others

Writ Petition (C) No. 1295 of 1999

Court: Gauhati High Court

Date of Decision: April 9, 1999

Acts Referred:
Constitution of India, 1950 â€" Article 226

Citation: (1999) 1 GLT 569

Hon'ble Judges: D.N. Chowdhury, J

Bench: Single Bench

Advocate: A.K. Phukan, D.R. Gogoi and J. Maio, for the Appellant; K.K. Mahanta, Sr. C.G.S.C., for the Respondent

Judgement

D.N. Chowdhury, J.
The disputation calling for adjudication appertain to the area of discretion in awarding a contract by a Statutory

authority. Whether the decision maker considered materials outside the defined limit of law or acted in defiance of the accepted norms in

eliminating the Petitioner from the field of consideration, is the key question raised in this petition.

2. The Petitioner is a proprietorial firm engaged in civil work and is a registered first class Contractor under the Irrigation and the Flood Control

Department of the Govt. of Assam since 1994. Respondent No. 2, the Brahmaputra Board, is a Statutory authority set-up under the Brahmaputra

Board Act, 1980 - an act enacted for the establishment of a Board for the planning and integrated implementation of measures for the control of

floods and bank erosion in the Brahmaputra valley and for matters connected therewith. The Chief Engineer (I & W), Brahmaputra Board,

Respondent No. 3, by a Public Notification, invited sealed offers on behalf of the Chairman, Brahmaputra Board, for pre-qualification of bidders

as well as item-rate tenders (financial bid) in separate envelopes from contractors having valid registration of class IA category with Central/State

Govt./Railways etc. for carrying-out the work of cost as cited below:

The notice also indicated that the tender documents in two volumes separately for pre-qualification and item rate tender would be sold together

against payment of Rs. 500 in form of demand draft on a Scheduled Bank payable at Guwahati. The Notice also asked the tenderer to deposit

earnest money of Rs. 1.00 lakh in a Scheduled Bank guaranteed by the Reserve Bank of India/State Bank of India duly pledged to the Financial

Adviser of the Respondent No. 2, submitted with the item rate (financial bids) tenders.

3. The Petitioner obtained the tender papers which indicated the considerations those would be taken into account by the Evaluation Committee to

pre-qualify for the financial bids by the tenderers. The Petitioner accordingly submitted its tender papers alongwith all the connected documents.

While the Petitioner was expecting that it would cross through the pre-qualification stage and would be called for the financial bids, it was served

with the impugned notice bearing No. BB/CE (I & W) HR/DR-117/Pt-2/98-99/2665 dated 12.3.99, informing the Petitioner that it could not pre-

qualify for the financial bidding and advised it to collect its sealed Financial-Bid Envelope from the office of the Chief Engineer (I & W),

Brahmaputra Board. Hence this writ petition questioning the legality and validity of the impugned decision, as conveyed through the aforesaid

notice, as arbitrary, discriminatory and unfair.

4. The Respondents contested the case and submitted a joint affidavit on their behalf. The Respondents in its affidavit disputed the claim of the

Petitioner as regards its merit and capability. It was pointed out in the affidavit that the Respondents maintained complete transparency by detailing

information, instructions to the applicants/tenderers in the Pre-qualification document and disclosed the complete procedure for filling up the tender,

completion of relevant information in different formats, evaluation criteria and weightage given to various parameters asked for from tenderers. The

eligibility and minimum criteria for pre-qualification, general experience, bid capacity, evaluation of pre-qualification documents by Tender

Committee of the Board, maximum numerical marks allowable to various parameters alongwith the break-up of marks, which were enumerated in

the tender documents. It was open for the Petitioner to seek for any clarification from Respondent No. 3 as per the pre-qualification document

furnished to the Petitioner. The Notice Inviting Tender as well as the pre-qualification document specifically mentioned that the pre-qualification bid

would be opened first and those found eligible would be considered for opening the Financial bids subsequently. The tenders were to be evaluated

by a group of officers and not by any individual for the purpose of objective evaluation with a view to avoid opportunity for exercising discretion or

allowing favouritsm at any stage. The Board had also followed the rigorous method of evaluation through a duly constituted Tender Committee in

accordance with the Delegation of Power Rules, 1996 with the officers of the Board and the Tender Committee consisting of all highly experienced

technical persons and financial experts, scrutinized each and every document of the tenderers and asserted the respective merits of the parties and

thereafter adjudged the firms those who could pre-qualify and recommended for opening of their financial bids for further comparison of the rates.

The Tender Committee also identified parties who could not pre-qualify and gave their reasons for the decision and since the Petitioner/firm was

also amongst those who were not adjudged to have pre-qualified at the first stage, was accordingly informed by the impugned notice dated

12.3.99. The Respondents in their affidavit gave the reason for not qualifying the Petitioner at the prequalifying stage, which reads as under:

(i) The Petitioner did not have successful experience in completing at least one contract on Water Resources Projects (Irrigation and Drainage,

Water Supply and Sewerage and Flood Control Works etc.) costing minimum Rs. 50 lakhs. The value of the work executed by him has not been

certified by the engineer in-charge and who, on the other hand, stated that this firm has not been paid any bill.

The Petitioner did not fully complete even one such project as it also evident from the documents (Enclosure 1 to this Affidavit).

The certificate issued by the Engineer in-Charge as submitted to the Board is enclosed and marked as Enclosure-2.

(ii) The Petitioner did not have the experience of executing construction works with total updated cost more than one crore in North Eastern

Region during last 5 years. The statement of works executed by him shows cost of work as Rs. 154.27 lakhs in 1994-95 but it was not supported

by a certificate from the owner/project authorities. Without such a proof the claims of the Petitioner could not be accepted as valid.

A copy of the Financial Statement submitted by the writ Petitioner is enclosed here as Enclosure-3.

(iii) The Petitioner did not have the experience in construction of embankment, roads, railway tracks etc. requiring compaction as per our

specification with 8 to 10 tones capacity rollers, the certificate produced by the Petitioner from Executive Engineer, Dhansiri Project Weir Division

(Irrigation) Bhairab Kunda does not indicate that the embankment was compacted with 8 to 10 tones capacity rollers as required in Respondent''s

tender specification.

(iv) The Petitioner has fallen short of required equipments like rollers (8 to 10 tones capacity) and bull dozer. He did not own any of them.

(v) The Petitioner''s annual average turnover as given by him in financial statement (En-closure-IV, paragraph 3 II) brought to correct price level

for last 5 years is only 44 lakhs and as per evaluation criteria, the minimum average annual turnover to be considered for giving mark is Rs. 50

lakhs.

(vi) The Petitioner''s Bid capacity calculated in accordance with the formula given u/s II para 2.31 c of the pre-qualification document Enclosure-II

(bid capacity = AXNX 3.00-B) is less than Rs 3.00 crores. Therefore, he could not score marks in this attribute as well.

(vii) The Petitioner did not produce supporting documents from a recognised bank for enjoying bank guarantee for more than Rs. 10 lakhs,

therefore could not score any mark. The Petitioner did not submit debt equity ratio, so no marks were given.

(viii) The Petitioner did not produce any document showing completion of earlier works in stipulated time and therefore could not score any mark.

5. It was stated that the Petitioner was given enough opportunity to prove its competence and capability by adequate materials, but the Petitioner

failed to furnish any valid supporting documents and failed to obtain the qualifying marks and accordingly, its case was not considered for the final

bid. The Respondents stated that at all relevant times, the Board acted bonafide and after considering all the aspects of the matter and following a

lawful and reasonable decision making process, reached its conclusion.

6. Mr. A.K. Phukan, the learned senior counsel appearing on behalf of the Petitioner, submitted that under Article 226 of the Constitution of India,

power of judicial review is conferred on the Courts to prevent arbitrariness and unreasoanbleness in the action of the Public authorities. In the

matter of awarding of contract or distribution of public largesse, whether it is the Government of the Statutory authority or public body, it is to

exercise the discretion lawfully, justly, fairly and with transparency. Mr. Phukan, the learned Senior counsel, submitted that the provisions

introduced for awarding marks and the marking system are per se arbitrary as the same conferred powers on the members of the Tender

Committee to act as per its own sweet will without any guidelines. That" it was not legally permissible on the part of the Tender Committee to

award marks in the arbitrary fashion that provided scope for favouritsm. The learned senior counsel, referring to the affidavit filed by the

Respondents, submitted that the authority acted in a most illegal fashion in deciding the tenders without allowing the tenderers to participate in the

process to enable the parties to make their position clear.

7. Mr. K.K. Mahanta, the learned Sr. CGSC, appearing on behalf of the Respondents, submitted that the Respondents all throughout acted within

the permissible limits. The Respondents considered all the tenders received and followed the procedures prescribed by law. The Respondents all

throughout maintained transparency and indicated in the Notice Inviting Tender as well as the Pre-qualification document about the methodology to

be adopted by the Evaluation Committee and the procedure for evaluation. The markings were given for adjudging respective merits, like general

experience as a contractor, specific experience for the work, personal capability, equipment adequacy, financial adequacy, past records and

numerous other factors to ascertain and adjudge the quality of the contractor and to ascertain as to whether the firm/person concerned would be

suitable for the work undertaken by the Board.

8. From the Minutes of the meeting of the Tender Committee in connection with pre-qualification of contractors, held on 19.2.99, the office of the

Chief Engineer (I&W), it appears, received seven tenders. The tender Committee consisting of the Vice-Chairman, the Financial Adviser, the

Chief Engineer (P&D) and the Supdtg. Engineer (I & W) representing the Chief Engineer (I & W), on opening the main envelopes, segregated the

pre-qualification and financial bids. The Financial Bid envelops were kept separately in safe custody and only the pre-qualification bids were

opened in presence of the representatives of all the seven contractors/firms after displaying to them that all the main envelopes were intact.

Signatures of all the members of the Tender Committee were as well as the representatives of the contractors/firms were obtained in the file/folder.

Out of the seven pre-qualification tenders, six were submitted in envelopes and one in loose form. The tender (prequalification) were initiated by

the Tender Committee and handed over to the Supdt. Engineer (I & W) for examination in context with the terms and conditions stipulated in the

Pre-qualification Document. The representatives of the contractors/firms were informed that after evaluation of pre-qualification offers, the qualified

contractors/firms would be informed separately through Telephone/Fax/letters for their presence at the time of opening of the Financial Bids at a

later date giving them reasonable time to attend the Board"s office. The Tender Committee again met on 9.3.99. Out of the seven firms whose pre-

qualification documents were examined with respect to the terms and conditions as laid down in the Tender Document, marks were awarded to

each of the seven tenderers out of a total of 100 marks. Out of the seven forms, only four firms could pre-qualify and the Tender Committee

recommended for opening of the Financial Bids of those who qualified in the prequalification stage; the Tender Committee also opined that the

Financial Bids of those who could not qualify, including that of the Petitioner, need not be opened and the same may be returned along with their

Earnest Money. The marks obtained by each of the firms as per evaluation criteria, were signed by the members of the Tender Committee. From

the records, it appears that the Petitioner/firm was awarded forty two marks and the other two which could not pre-qualify, were awarded 21.5

and 25.5; whereas the other four firms obtained marks ranging from 69 to 85 out of hundred.

9. From the facts narrated above, it appears that the Tender Committee fairly considered the respective tenders and reached its own conclusion.

Judicial review is intended to prevent arbitrariness and unlawfulness. Judicial review is also permissible in the contractual field when it is brought to

the notice of the Court that the power of awarding contracts has been exercised unreasonably or for purposes other than that defined. A contract

by State or a Public Authority, undoubtedly, can be scrutinized injudicial review; albeit - such a review is exercisable when the Court reaches a

conclusion that use of such power to award contract is vitiated by illegality, irrationality and/or suffers from the vice of unfairness. A decision

making process may be faulted due to bad faith or when the authority in the decision making process reaches its conclusion overlooking the

relevant considerations and takes into account extraneous or irrelevant considerations. Judicial review is also permissible when a decision is so

irrational or so arbitrary that no sensible person can arrive at such a decision.

10. Administrative discretion envisions a right to choose between numerous choices open before the authority and can have its free choice within

its area. In the words of Lord Diplock in Secy. of State for Education and Science v. Tameside Metropolitan Borough County (1976) 3 All ER

665:

The very concept of administrative discretion involves a right to choose between more than one possible course of action upon which there is room

for reasonable people to hold differing opinions as to which is to be preferred.

In its own field of choice, the Administrative Authority is to be given a larger ""margin of appreciation"" as construed by the European Courts of

Human Rights. In an application under Article 226 of the Constitution, the Courts have the power to interfere by way of judicial review if the

decision under challenge is irrational or perverse; but at the same time, it must be remembered that the Courts are not to substitute its ""own views

for the informed view"" of the Administrative Authority words used by Lord Templeman in Brind and Ors. v. Secretary of State of Home

Department (1991)1 All ER 720.

11. As mentioned above, the authorities took into consideration all the relevant aspects/factors and thereafter found that the Petitioner did not fulfil

the requirements of the Respondent/Board. The decision making process of the Respondents cannot be said to be unreasonable; nor is there any

scope to conclude that the Respondents have abused or exceeded its power in any way in not allowing the Petitioner to participate in the Financial

Bids. The reasons assigned by the Respondents cannot, therefore, be faulted as illegal or otherwise as being vitiated by procedural improprieties

requiring interference from this Court.

12. The writ petition is thus liable to be dismissed and accordingly, the same is dismissed. There shall, however, be no order as to costs.

13. The interim order passed by this Court on 18th March, 1999 stands vacated.