

(2003) 03 MP CK 0038

Madhya Pradesh High Court

Case No: Letter Patent Appeal No. 697 of 2002

Union of India (UOI) and Others

APPELLANT

Vs

Anil Kumar Grover

RESPONDENT

Date of Decision: March 31, 2003

Acts Referred:

- Letters Patent Act, 1865 - Clause 10

Citation: (2003) 3 MPHT 534

Hon'ble Judges: Bhawani Singh, C.J; Sugandhi Lal Jain, J

Bench: Division Bench

Advocate: R.S. Patel, for the Appellant; R.N. Singh and Vikram Singh, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

S.L. Jain, J.

Being aggrieved by the order dated 19-9-2002 passed by the learned Single Judge in Writ Petition No. 3391/2002, the appellants have filed this appeal under Clause 10 of Letters Patent.

2. The brief resume of the facts required to be stated for disposal of this appeal is as follows :--

The respondent claims to be a reputed and recognized contractor in the field of construction besides being accredited with the skilful construction of monolithic structures. He has successfully executed a number of big works. It is put forth that he is equated with construction companies like M/s. Larsen & Toubro Ltd., M/s. Ircon International Ltd. and M/s. Simco Birla, Ltd. etc.

3. In the month of January, 2002, the appellant No. 3 through public notice invited applications from eligible contractors enlisted with MES, PWD and CPWD etc. for issue of tender forms in respect of two different works, viz., (1) Replacement/new

construction of EDK Magazines (Phase II) at Ordnance Factory, Khamaria and (2) Provision of 144 ORs OTM ACCN for 1 STC at Jabalpur. The aforesaid notices have been brought on record as Annexure P-1, Annexure P-1A and Annexure P-2. The respondent being an eligible engineer and registered contractor with the P.W.D. submitted an application to appellant No. 3 well within time for issue of tender forms in respect of both the aforesaid works. He also submitted various documents including the registration certificate, income tax clearance certificate and Banker's solvency certificate etc. before the appellant No. 3. The respondent was hopeful for issue of tender forms to him. But, the appellant No. 3 though issued tender forms to relatively inferior contractors as compared to the respondent, denied the same to him on totally flimsy grounds. Copies of the rejection orders in respect of issue of tender forms have been filed as An-nexures P-5 and P-6.

4. As the remedy of appeal was available to the petitioner, he availed the same by filing an appeal before appellant No. 2 against both the rejection orders. In the memo of appeal the respondent also gave details of his past track record, sound financial position and other relevant things. The appellant No. 2, however, rejected the appeals holding that respondent is not entitled to get the tender form.

5. It is put forth by the appellants that the tender forms were not issued to the respondent on the ground that the same were to be issued to the contractors enlisted in class SS of MES and adequate number of tenders had already been issued to enlisted contractors with the Department. No other firms were to be considered for issue of tender forms. The respondent was denied the tender forms as he was not enlisted with MES in SS class.

6. The aforesaid orders were challenged by way of writ petition (W.P. No. 3339/2002) before the High Court wherein the respondent submitted that the order of rejection of the application is illegal and arbitrary. Merely because adequate number of tender forms have been issued to MES contractors, the appellants could not have refused tender forms to the respondent, he being eligible and competent. Even otherwise, the tender in question being an open competitive tender, the same cannot be restricted to certain persons. The appellants are doing all this to avoid competitive rates so that their nearer and dearer can be favoured. The respondent also submitted that on an earlier occasion also appellants had refused to issue tender forms to the respondents, however, on the said action of the appellants being challenged by the respondent in W.P. No. 3434/2001, this Court vide order dated 20-8-2001, directed the appellants to issue tender form to the respondent.

7. The respondent further submitted that aforesaid order dated 20-8-2001 was challenged by the appellants in L.P.A. No. 249/2001, which this Court had dismissed by order dated 15-10- 2001. Even after the order of this Court the appellants took more than one month to issue tender forms to the respondent. The appellants, particularly the appellant No. 4 has acted illegally, arbitrarily and with ill-will and malice towards the respondent in refusing tender forms to him and that the

respondent has been discriminated. The respondent is registered with PWD as contractor without monetary limit. Most of the building contractors who have been issued tender forms by appellant No. 3 are much inferior and less resourceful in comparison to the respondent. In fact, non-issue of tender form to the respondent is an illegal act.

8. Combating the allegations made by the respondent in the petition, the appellants denied all the allegations. They submitted that as per departmental policy for enlistment in SS class of MES the firm should have completed at least one work of Rs. 7.5 crores or two works each of 4.5 crores. The annual turnover of the firm for the last three years should not have been less than Rs. 4.5 crores. The respondent firm does not meet the eligibility criteria for the enlistment in SS class of MES. Hence, as per the Notice Inviting Tenders the respondent is not eligible for getting the tender forms for the subject work in question. The biggest project completed by respondent till date is of mere Rs. 3.12 crores and his annual turnover for the last three years does not meet the criteria of Rs. 4.5 crores. Appellants also denied the allegations of the respondent that tenders have been issued to relatively inferior contractors.

9. The appellants further submitted that the decision of non-issue of tender forms to the respondent was taken by the competent authority as per Notice Inviting Tenders and the appeal of the respondent has been disposed of by reasoned and speaking order after its consideration on merit. The order of the appellate authority is final and binding under the law.

10. Learned Single Judge by the impugned order allowed the petition holding that the applications were invited even from the contractors enlisted with PWD, CPWD and railways having capacity to perform the work for unlimited value and from those who were enlisted with the MES. Condition of enlistment in SS class with MES cannot be read for enlistment condition for PWD, CPWD and railways. Once having framed the conditions of inviting the applications from the contractors enlisted with other departments, it was not open to impose the condition of the experience required for enlistment as "SS" class contractor which was not mentioned in the notice. Hence, the decision of appellants not to issue tender documents to the respondent is bad in law. The decision of the appellants shows arbitrariness and cannot be allowed to stand. The appellants were directed to proceed in accordance with law. It is against this order of learned Single Judge that the appellants have come up in this appeal.

11. We have heard Shri R.S. Patel, learned Senior Standing Council appearing for the Union of India and Shri R.N. Singh, Senior Counsel with Shri Vikram Singh, Advocate, appearing for respondent.

12. First contention of the learned Counsel for appellant is that the decision of not to issue the tender form to the respondent is in conformity with his capability,

experience and financial capacity. The same has been taken into consideration for the reason that the respondent is not capable to execute the work under reference as earlier he has not completed any work of significant value. It is submitted that the respondent/firm has not completed a single work of Rs. 100 lacs in last three years. Issuing the tender forms to such a contractor will be the total dilution of the criteria fixed by the department. The work in question is of Rs. 900 lacs. The criteria fixed for issuing tender forms is that it will be issued to only those firms who had completed at least two works each of Rs. 4.5 crores or a single work costing Rs. 7.5 crores with annual turnover of Rs. 4.5 crores for the last three years. The learned Counsel also submitted that the construction work of Government Women's Polytechnic Institute at Indore and Polytechnic Complex at Vidisha was completed by the respondent after a long delay. Since the respondent has not completed any work of significant value the firm is incapable to execute the work under reference. The respondent has not completed a single work of Rs. 100 lacs or more in last three years. The construction work of Additional Court rooms in M.P. High Court Building at Jabalpur and residential quarters for Sanjay Gandhi Memorial Hospital have not been completed by the respondent even after six years, therefore, the firm is not capable of executing the work of Rs. 900 lacs.

13. The contention cannot be accepted. Decision of the meeting of the Tender Selection Committee dated 30th November, 2002 indicates that the respondent was not issued the tender form only on the ground that there were sufficient enlisted firms of eligible class of SS with MES. Firms not enlisted with MES were not considered for issue of tenders. The committee fixed the criteria as under:--

"Firm of "SS" Class having completed at least two works each of Rs. 4.5 crores or single work costing Rs. 7 crores and annual turn over of Rs. 4.5 crores during the last three years."

The Tender Selection Committee decided not to issue tender only on "the ground that there are sufficiently enlisted firms of eligible class SS with MES. The authorities cannot act arbitrarily. If the contractor was qualified in terms of Notice Inviting Tenders and the applications were invited from the contractors enlisted with PWD, CPWD and railways of appropriate class also they could not have been rejected at the threshold only on the ground that sufficient applications have been received from the contractors enlisted/registered with the MES. Once a contractor who was eligible had submitted his application, the same could not have been rejected on a criterion not mentioned in Notice Inviting Tenders. It was not a condition in the Notice Inviting Tenders that if sufficient number of contractors enlisted with MES will apply the remaining applications will not be considered. In the Notice Inviting Tenders, applications were invited from the SS class of contractors with MES but relaxing the condition "S" class of contractors with MES were also considered. This has been done in contravention of terms of notice. Thus, those who were covered under the Notice Inviting Tenders, were refused application forms and those who

were not falling under the categories described in the Notice Inviting Tenders were given tender forms. In the matter of grant of contracts, parameter of reasonableness has to be followed. It was obligatory for the appellants to conduct themselves in a just, fair and reasonable manner. The Court can interfere where the administrative body functions in unreasonable and arbitrary manner. A fairplay is necessary concomitant for an administrative body functioning in administrative sphere. When the respondent was satisfying the essential conditions of eligibility, it was not open for the appellants to deviate from the terms of Notice Inviting Tenders. Therefore, the respondent was eligible to receive the tender form and as such the contention of the appellant to the contrary cannot be accepted.

14. Shri Patel next contended that the respondent is not enlisted with the PWD. The person enlisted with the PWD is Anil Kumar Grover and not M/s. Anil Kumar Grover, therefore, the respondent is not entitled to have the tender form, such a contention was not raised before the learned Single Judge. Even while rejecting the application of respondent this ground was not mentioned in the order of rejection.

15. The learned Counsel for appellants further submitted that the Government must have freedom of contract and decision of the appellants cannot be open to judicial scrutiny because jurisdiction relating to tender is in the realm of contract. Looking to the experience and financial capability of the respondent if the tender is given to the respondent, it will result in non-completion or poor quality of work and time and cost will over run and the department will suffer.

16. The contention is hypothetical. When the respondent is satisfying the requirements described in the Notice Inviting Tenders, the appellants are not justified in refusing the supply of tender forms to the respondent. Shri Patel also submits that the criteria that the tender forms will be issued to only those firms who had completed at least two works of Rs. 4.5 crores each or single work costing Rs. 7 crores and annual turnover of whose is Rs. 4.5 crores for the last three years cannot be said to be arbitrary but we find that this term was not mentioned in the Notice Inviting Tenders. When the respondent was satisfying all the requirements as per Notice Inviting Tenders the appellants could not have fixed a new criteria.

17. Learned Counsel also submitted that the order impugned may impose heavy administrative burden on the administration and will lead to delay in construction work. This contention was also not raised before the Single Judge.

18. Where previously also the respondent had to file Writ Petition No. 3434/2001 for obtaining tender documents in respect of work of Rs. 2.85 crores and the writ petition was allowed and the LPA filed against the order of Single Judge was dismissed, we find some force in the contention of learned counsel for respondent that the respondent has been continuously harassed by the appellants. The action of the appellants if examined on the touchstone of reasonableness, cannot be approved to be free from arbitrariness or bias. It appears to be fascinated by

malafides. When the contractor meets the requisite eligibility criteria as per Notice Inviting Tenders there is no justification on the part of the appellants not to supply him tender forms. Notice Inviting Tenders did not provide any condition with regard to particular amount of work to have been done by the contractor within the specified period and in the absence of such a condition the same cannot be acted upon for refusing to supply tender forms to the respondent.

19. Learned Counsel lastly submitted that the Courts should be very slow in the matter of interference in the matter relating to tenders. Such decisions are made by a committee of experts. A Court does not sit as a Court of Appeal but merely reviews the matter in which the decision was made. But the present factual matrix stands on a different footing. The supply of tender forms to the respondent does not confer a right to him to get the work. It is open to the appellants to have a comparative merit to choose the best. This is the prerogative of the appellants. As far as the present relief is concerned, it is only with regard to the supply of tender forms and the view taken by the learned Single Judge is absolutely justified. When the respondent is satisfying all the requirements, stipulated in the Notice Inviting Tenders, he cannot be deprived of receiving tender forms, therefore, learned Single Judge was right in directing the appellants to supply tender forms to the respondent.

20. For the foregoing reasons, we do not find any merit in this appeal and accordingly, it is dismissed at the admission stage.