

(1989) 10 MP CK 0009

Madhya Pradesh High Court

Case No: Miscellaneous Petition No. 3052 of 1989

Bhaiyalal Shukla

APPELLANT

Vs

Chairman Special Area
Development Authority Singrauli
Distt. Sidhi M.P. and Others

RESPONDENT

Date of Decision: Oct. 18, 1989

Acts Referred:

- Constitution of India, 1950 - Article 14, 300

Citation: AIR 1990 MP 365 : (1990) ILR (MP) 308 : (1990) JLJ 106 : (1990) MPJR 51

Hon'ble Judges: D.M. Dharmadhikari, J; B.C. Varma, J

Bench: Division Bench

Advocate: R.N. Singh, for the Appellant; Ravindra Shrivastava, for the Respondent

Final Decision: Allowed

Judgement

D.M. Dharmadhikari, J.

It is lamentable that even after trend-setting pronouncement of the Supreme Court in the famous "Airport" case in [Ramana Dayaram Shetty Vs. International Airport Authority of India and Others](#), the "State" and their authorities falling under Article 12 of the Constitution are still oblivious to their obligations under Article 14 of the Constitution. The legal position is now settled that the government no longer enjoys absolute discretion to enter into contract with anyone it likes. The State has to choose the party in a non-discriminatory manner. The State must act fairly and make a choice of the contracting party by affording equal opportunity to all contenders by examining their claims fairly. The present case is an instance where the respondent Special Area Development Authority, Singroli (hereinafter referred to as the "authority"), constituted under M. P. Nagar Tatha Gram Nivash Adhiniyam, 1973, can be said to be guilty of deviating with impunity from the standards it had laid down in its tender conditions and in exercise of its powers in giving benefits of

awarding contracts to the respondents Nos. 3 and 4 arbitrarily and in discriminatory manner excluding the petitioner as contractor.

The facts to justify the grievance of the petitioner, in necessary details may now be stated. The authority which is a local body and undoubtedly "State" within the definition of Article 12 of the Constitution of India issued a -tender notice (Annexure-A) dated 28-3-1989 by which the tenders were invited for construction of bituminous macadam road 7.00 Kms. with the assistance of automatic power unit. Two essential conditions of tender, relevant for the purpose of this petition, were that the construction of the road had to be done by automatic power unit and the conditional tenders could not be accepted. The estimated cost of the work was Rs. 78 lacs and 67 thousand. In pursuance of the above tender notice, tenders of the following contractors were received with rates offered shown against their names:

1. M/s. Bhaiyalal Shukla Rs. 109 lacs,
(petitioner)
2. M/s. Kamal Builders Rs. 140 lacs,
(respondent No. 3)
3. M/s. B. R. Arora and Rs. 141 lacs.
Associates (resp. No. 4)
4. M/s. Jawaharlal Jaiswal Rs. 120 lacs. Construction Company

The rates offered by the petitioner were lowest. Yet his tender was not accepted by the tender committee for reasons stated in the return of the authority respondents No. 1 and 2 as under:

"The petitioner was found to have no experience of road works, as he had experience of executing works mainly in Irrigation Department which consists of dams, canals etc. He did not possess experience of constructing bituminous macadam road. In addition he did not own and possess automatic plant and machineries as was mandatorily stipulated in the notice."

In paragraph 7 of the return of the authority, further reason for rejecting the tender of the petitioner has been stated as under :-

"The tender of the petitioner was however conditional, contrary to the terms of the tender notice. He demanded 5% mobilization advance as pre-requisite condition. He further demanded 90% of advance against costs of asphalt to be paid before the commencement of the work."

The return further states that the second lowest rate offered by M/s. Jawaharlal Jaiswal was also rejected by the tender committee as he also did not own and possess plant and machineries for the type of work which was required to be executed and also for the lack of experience in the work. The tender committee of the authority found only respondents No. 3 and 4 to be contractors of sufficient experience possessed with advanced automatic plant and machineries; hence

decided to prefer them and held negotiations with them. The respondents No. 3 and 4 were called for negotiations to persuade them to bring down their rates to reduce the cost of the work. The negotiations were held between the officers of the authority and the respondents No. 3 and 4 on 5-5-1989 in which the petitioner and M/s. Jaiswal Construction Company were not invited. The respondents No. 3 and 4 reduced their offer from 140 and 142 lacks, respectively to Rs. 124.25 lacs each and the tender committee decided to divide the work in two equal parts and awarded the same to respondents No. 3 and 4. The minutes of the meeting of the tender committee containing the above decision have been exhibited with the return as Annexure R-1/1. The offers of the respondents No. 3 and 4 having been accepted in the course of negotiations (Annexure R. 1/J), the work orders were issued in favour of respondents No. 3 and 4 on 16-5-1989 (Annexures R. 1/K and R. 1/L respectively).

On the above facts the learned counsel for the petitioner strongly criticised the action of the authority in arbitrarily excluding the petitioner although his tender was the lowest and in accepting the offers of respondents Nos. 3 and 4 in the course of negotiations held behind the back of the petitioner. The counsel for the petitioner submits that the action of the officers of the authority and the members of the tender committee was prima facie unjust and discriminatory. The petitioner complains that he had experience of Civil construction work and there was no condition in the tender notice that only persons possessed of experience in road construction work would be preferred or were entitled to submit the tender. The petitioner also submitted that owning or possessing automatic power unit was not one of the eligibility conditions for submitting the tenders and that was no ground to eliminate the petitioner even for inviting him for negotiations. The petitioner pointed out that his tender could not be said to be conditional only on the ground that he asked for 90% advance. It was pointed out to us that if the petitioner's tender was said to be conditional, the tender submitted by M/s. B. R. Arora and Associates respondent No. 4 was also conditional, who amongst other conditions demanded 10% mobilization advance to be adjusted in five equal instalments after completing 25% of the work. (See proceedings of tender committee Annexure R. 1-L).

According to the petitioner, there was no justifiable reason for rejecting the lowest rate offered by him and for accepting the higher rates of respondents Nos. 3 and 4 by way of negotiations and in arbitrarily awarding the contract to them. The petitioner submitted that his experience in road construction work and his financial capacity would have definitely enabled him to execute the work by obtaining the required automatic plant and machineries although he may not be possessing the same at the time when the tender was submitted. The petitioner also submitted that had he been allowed to participate in the negotiations which were held by the tender committee, he would have satisfied the authorities; regarding his capacity and expertise to do the work on lower rates offered by him. The petitioners, therefore, criticises the action of the authority being neither fair nor just nor

reasonable.

Learned counsel for the respondents supported the action of the tender committee on the grounds set out in the return, the portions of which have been quoted above. The counsel for the authority submitted that negotiations were held and the petitioner as well as M/ s. Jawaharlal Jaiswal Construction Company were excluded on the ground that they did not possess experience in road construction work and also did not own or possess the required automatic power unit for executing the work. According to the respondents, after having invited the tenders it was open to the tender committee to select proper persons for awarding the contract and negotiate with them. There was neither any bias nor favouritism shown to any of the parties. The authority has exhibited the proceedings of the tender committee, but it may be mentioned that the files containing the tenders and other certificates and documents filed by the parties are said to have been lost in theft while the officers of the authority was said to have been travelling in a train for attending the Court work. The petitioner has filed a re-joinder stating therein that along with his tender he had filed a list of machineries available with him and he had an automatic machine costing roughly Rs. 38 lacks which was available with him and was being used in the said locality. In the return it is also suggested that the files containing tenders and other documents of the tenders are not being exhibited before this Court on false excuse of theft.

Having heard the counsel for both the parties and having gone through the return of the authority and also the proceedings of the tender committee, we are of the opinion, as stated by the outset, that this is a fit case where the Court should interfere and set aside the contracts awarded in favour of respondents Nos. 3 and 4 to grant fair and equal opportunities to all the tenderers to participate in the negotiations or in any other mode of awarding contracts of the work in question. From the tender conditions exhibited by the parties along with the petition and the return it is clear to us that there was no condition that the tenderer must possess experience of road construction work. There also was no condition in the tender notice that a tenderer possessing automatic power unit for doing tarring work alone was eligible to be considered.

We are not impressed with the argument of the learned counsel for the respondent authority that such a condition of experience and availability of automatic machineries should be read as a part of the tender conditions in the tender notice (Annexure-A). In the absence of clear declaration of such a condition in the tender notice, according to us, the petitioner as also the other tenderer, namely, Jawaharlal Jaiswal Construction Company could not have been outright excluded from consideration of their tenders and from calling them even for negotiations. We are inclined to agree with the submission of the learned counsel for the petitioner that it is a case where the authority has clearly departed from the declared mode of awarding contract by tender and awarded the same by negotiations. This action,

according to us, of the authority was clearly discriminatory, unjust and wholly unfair. If the mode of award of contract by tender had to be deviated or departed from, all the intending tenderers should have been called for negotiations to ascertain their ability for undertaking the work on the revised or lowest rates offered by them. There is sufficient force in the argument of the counsel for the petitioner that had he been called for negotiations, he would have satisfied the members of the tender committee, both regarding his expertise and financial capacity to do the work on the rates offered by him. There also is merit in the criticism of the petitioner that the tender of respondent No. 4 M/s. Arora Construction Company being conditional was liable to out-right rejection, but he was allowed to withdraw the condition and to take part in the negotiations for being selected for award of the work. The petitioner is also right in contending that the procedure of tender was given a clear go-by and the contract was divided in two parts to be given equally to the respondents Nos. 3 and 4 on the terms settled in the course of negotiations between the officers of the authority and the two tenderers.

Having considered all aspects of the case, we are clearly of the opinion that the authority after receiving the tenders has given a go-by to the mode of award of contract by tender and had resorted to the mode of granting the contract by negotiations. In such a situation, fair opportunity to all the tenderers should have been given to participate in the negotiations. We may usefully quote the following passage of the Supreme Court in some what similar situation in the case of [K.N. Guruswamy Vs. The State of Mysore and Others](#),

"(20) The next question is whether the appellant can complain of this by way of a writ. In our opinion, he could have done so in an ordinary case. The appellant is interested in these contracts and has a right under the laws of the State to receive the same treatment and be given the same chance as anybody else. Here we have Thimnappa, who was present at the auction and who did not bid not that it would make any difference if he had, for the fact remains that he made no attempt to outbid the appellant. If he had done so it is evident that the appellant would have raised his own bid.

The procedure of tender was not open here because there was no notification and the furtive method adopted of settling a matter of this moment behind the backs of those interested and anxious to complete is unjustified. Apart from all else, that in itself would in this case have resulted in a loss to the State because, as we have said, the mere fact that the appellant has pursued this writ with such vigour shows that he would have bid higher. But deeper considerations are also at stake, namely the elimination of favouritism and nepotism and corruption; not that we suggest that occurred here,

I.A. reference may also be made of the following observations of the Supreme Court in the case of [Shri Sachidanand Pandey and Another Vs. The State of West Bengal and Others](#), at p. 1133:

"State-owned or public-owned property is not to be dealt with at the absolute discretion of the execution. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism."

The law laid down by the Supreme Court in its earlier cases with regard to the ambit of Article 14 of the Constitution of India as had been re-inforced and enlarged in the [Ramana Dayaram Shetty Vs. International Airport Authority of India and Others](#), and has been reiterated in the latest decision of the Supreme Court in the case of [Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay](#), as under:

"25. Therefore, Mr. Chinai was right in contending that every action/activity of the Bombay Port Trust which constituted "State" within Article 12 of the Constitution in respect of any right conferred or privilege granted by any statute is subject to Article 14 and must be reasonable and taken only upon lawful and relevant grounds of public interest. Reliance may be placed on the observations of the Court in [E.P. Royappa Vs. State of Tamil Nadu and Another](#), ; [Mrs. Maneka Gandhi Vs. Union of India \(UOI\) and Another](#), , [Ramana Dayaram Shetty Vs. International Airport Authority of India and Others](#), , [Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another](#), and [Ajay Hasia and Others Vs. Khalid Mujib Sehravardi and Others](#), , where there is arbitrariness in state action, Article 14 springs in and judicial review strikes such an action down. Every action of the Executive authority must be subject to rule of law and must be informed by reason. So, whatever be activity of the public-authority, it should meet the test of Article 14. The observations in paras 101 and 102 of the [Life Insurance Corporation of India Vs. Escorts Ltd. and Others](#), read properly do not detract from the aforesaid principles."

Thus, testing, the action of the authority on the touch stone of Article 14 we are clearly of the opinion that the authority acted unfairly and in a discriminatory manner in awarding the contract in two parts to the respondents No. 3 and 4 and in excluding the petitioner from participating in negotiations and disregarding the fact that his tender was the lowest.

For the above reasons, we hereby allow the petition and set aside the contracts granted in favour of respondents No. 3 and 4 and consequently quash the decision of the tender committee (Annexure Rule 1.J) and the work orders issued in favour of respondents No. 3 and 4. (Annexures Rule 1.K. and Rule 1.L). The officers of the

authority are directed to consider the tenders submitted by all the four tenderers afresh, treating them in due conformity with the conditions in the tender notice (Annexure-A) and thereafter take a final decision for awarding contract, if necessary by negotiations by inviting all of them and by affording full and equal opportunity to all the four tenderers. The petitioner shall get the costs of this petition. Counsel's fee Rs. 500/- (Rs. Five Hundred), if certified.