G. J. Fernandez

Vs

State of Mysore & Ors.

Civil Appeal No. 218 of 1967

(CJI K. N. Wanchoo, G. K. Mitter, V. B. Eradi JJ)

14.04.1967

JUDGMENT

WANCHOO, C.J.

This is an appeal on a certificate granted by the Mysore High Court and arises in the following circumstances. Tenders were called for construction of the right bank masonary dam called "Hidkal Dam" by the Public Works Department, Irrigation Projects, of the State of Mysore. The tenders were to be submitted to the Chief Engineer of the department. Among the tenderers was the appellant. Another tenderer was respondent No. 3 before us. Eventually the contract was granted by the Major Irrigation Projects Control Board (hereinafter referred to as the Board) on November 5, 1966 to the respondent No. 3. The appellant challenged the grant of contract to respondent No. 3 and prayed for quashing the resolution of the Board mainly on two grounds, namely, (i) that the rules in the Mysore Public Works Department Code (hereinafter referred to as the Code) were not followed, and (ii) that there was unequal treatment between the various tenderers which was in violation of Art. 14 of the Constitution.

Most of the facts are not in dispute and we shall narrate them in some detail as they are necessary for the purpose of determining whether there was any breach of Art. 14 of the Constitution. A notification was issued on April 4, 1966 for the contract on question calling for sealed tenders the estimated of the contract being 23044 lakhs. The estimated quantities of several items of work were stated in the tender documents and tenderers were required to quote their rates for various items of work and the amount for each item on the basis of the said estimated quantities. The notification also said that conditional tenders were liable to be rejected at the discretion of the competent authority without assigning any reason therefore. The notification further said that the competent authority reserved the power to reject all or any of the tenders without assigning any reason therefore.

Nine sealed tenders were received in response to this notification and they were opened on July 30, 1966 in the presence of the tenderers or their representatives. The appellant's tender was unconditional and was for a total sum of Rs. 2,22,72 lakhs, this being 3.64 per cent below the estimated cost. Respondent No. 3 made a tender for Rs. 214.58 lakhs i.e. 7.16 per cent below the estimated cost but he had stipulated certain conditions and his rates for excavating soft and hard rock were rather strange. Another tenderer was the National Projects Construction Corporation Limited (hereinafter referred to as the Corporation) and it submitted the tender for Rs. 229.34 lakhs i.e. 0.7773 per cent below the estimated cost. The Corporation however did not furnish the earnest money demanded and prayed for exemption from such deposit, presumably on the ground that it was a public corporation entirely owned by the Central Government and State Governments. The

corporation also made certain conditions to which it is unnecessary to refer. We also do not think it necessary to refer to other six tenderers in detail. It is enough to say that five of them had made unconditional tenders while the sixth had made a conditional tender, but the amounts tendered by them were much above the amounts tendered by these tenderers.

Soon thereafter on August 6, 1966 the appellant addressed a letter to the Chief Engineer saying that his was the lowest unconditional tender and therefore the contract should be granted to him. The appellant also pointed out in this letter that the tender of respondent No. 3 was conditional and the rates quoted for excavation of soft rock and hard rock were speculative, and therefore, that tender, though it was the lowest in amount should be rejected. None of these tenders was however accepted. On August 10, 1966. the Chief Engineer addressed letters to all the nine tenderers enquiring from all them (except respondent No. 3) if they would be agreeable to undertake the work for the lowest amount tendered, namely, Rs. 214.58 lakhs. They were requested to send their replies within a week and to keep their tenders open till the end of November 1966. It was also made clear in this letter that if no reply was received in time it would be understood that the tenderer was not prepared to do the work at the rate indicated. The letter to respondent No. 3 was however different inasmuch as his was the lowest tender and he was merely asked whether he was prepared to withdraw the conditions he had attached to the tender.

The appellant in his reply on August 16, 1966 contended that his tender was the lowest as the tender of respondent No. 3 was liable to be rejected on the ground that it was conditional and that there was no question therefore of asking him to reduce the amount tendered by him to Rs. 214.58 lakhs. Thereupon he received a letter from the Chief Engineer requesting him again to give a categorical reply whether he was prepared to reduce the Chief Engineer by August 31, 1966. Respondent No. 3 received the letter of the Chief Engineer on August 19, 1966 and he should have replied by August 26, 1966 but actually he sent the reply on August 31, 1966 informing the Chief Engineer that he had withdraw his conditions and requesting that the work might be entrusted to him. The appellant's reply to the letter of August 25, 1966 was not received by August 31, 1966. It was received on September 10, 1966, and the appellant stated therein that he was not prepared to reduce the amount tendered by him. We may indicate here that one of the arguments before us is that there was discrimination inasmuch as the Chief Engineer accepted the reply of respondent No. 3 on August 31, 1966 even though it did not come within 7 days as required. It may be added that this point was not apparently taken up before the High Court in this form.

On September 12, 1966, respondent No. 3 wrote a letter to the Chief Engineer saying that he should be paid rupees seven lakhs more above his tender in view of the fact that the requisite quality of sand was not available at the site and had to be brought from some distance. On September 21, 1966, a meeting of the Board was held and the Board directed that fresh negotiations with all the tenderers should be made to arrive at the rate most favourable to Government. In consequence of this, letters were addressed to all the nine tenderers by the Chief Engineer on September 27, 1966. In this letter, the Chief Engineer suggested to the nine tenderers whether they were prepared to accept one of two alternatives namely-(i) to limit the overall cost of tender to Rs. 214.58 lakhs and so arrange the internal item rates that they should not be too speculative, i.e., too far above or below the estimated rates in the tender documents, or (ii) to confirm in writing whether the tenderer was prepared to reduce his overall rates by 7.16 per cent below the estimated rates pro rata on all items and thus bring the tendered amount down to Rs. 214.58 lakhs. The tenderers were also requested to indicate (in case they were not prepared to reduce the tendered rate by 7.16 per cent) the highest figure by which they would be prepared to reduce the rate below the estimated cost. Finally tenderers were requested to submit sealed tenders by October 12, 1966. On October 4, 1966 the

tenderers were informed that sealed would be opened on October 15, 1966.

The appellant did not send revised quotations and protested against the negotiations sought to be carried on by the Chief Engineer with the tenderers and accused the Chief Engineer of trying to favour respondent No. 3. In that connection the appellant addressed letters to the Chief Minister, the Minister for Public Works, the Chief Secretary to Government and the Secretary to the Government, Public Works Department, complaining that the Chief Engineer was acting contrary to rules and illegally with regard to the appellant's tender and starting negotiations with the tenderers. On October 12, 1966, respondent No. 3 replied that it was extremely difficult for him to re-arrange the internal item rates or to reduce overall rates by a certain percentage, as suggested in the circular letter, and pleaded that his tender coupled with the withdrawal of conditions might be accepted without modification.

We now come to what happened on October 15, 1966 for the main plank of the appellant in support of his case for contravention of Art. 14 is based thereon. The appellant's case is that after the tenders had been opened on October 15, 1966, the Chief Engineer carried on secret negotiations with respondent No. 3 whom he was favouring and accepted from him a letter secretly on that date by which respondent No. 3 quoted an overall reduction of 4 per cent below the estimated rates. The suggestion of the appellant is that this was done to bring down the reduction by respondent No. 3 to a little above 3.64 per cent below the estimated cost which was what he had tendered from the very beginning and thus the Chief Engineer helped respondent No. 3 to quote rates which became lowest by a paltry amount and eventually succeeded in getting them approved by the Technical Sub Committee and the Board. It may be mentioned that before the Board considers any matter there is a Technical Sub Committee which consider that matter and makes recommendation to the Board which is the final accepting authority subject to confirmation by Government. It may also be mentioned that at one state in September 1966, the Technical Sub Committee had accepted the tender of the Corporation, but on September 22, 1966 the Board had turned down that tender as it was unduly high and ordered fresh negotiations. On November 2, 1966 the Chief Engineer made a report which was placed before the Technical Sub Committee on November 3, 1966. Eventually the Board accepted the tender of respondent No. 3 at 4 per cent below the estimated cost.

We may indicate here the second ground in support of the contention that there was discrimination and this is based on what happened on October 15, 1966 after the sealed tenders were opened at 4 p.m. The case of the appellant was that thereafter the Chief Engineer carried on secret negotiations with respondent No. 3 and managed to get from him the letter reducing the rates by 4 per cent below the estimated cost so that his became the lowest tender and that no such opportunity was given to other tenderers. The case of the State on the other hand was that the Chief Engineers called a meeting of all the tenderers at 7 p.m. on October 15, 1966, as in his opinion the offers made in the second tenders were in no way advantageous to Government and had not shown any substantial improvement over the earlier tenders. At that meeting the Chief Engineer asked all the tenderers if they wanted to make any further reductions or withdraw any conditions, if so they should immediately give it in writing. Thereupon only two tenderers, namely, the Corporation and one other, said that they would write again while the appellant and five others said that they had no further reduction to make. Respondent No. 3 immediately thereafter wrote the letter which was received that very evening stating that he would be prepared to take the contract unconditionally at 4 per cent below the estimated cost. The Chief Engineer also denied that there were any secret negotiations, opened by him with respondent No. 3 on October 15 1966 or that he was favouring respondent No. 3 or that he had not invited all the tenderers to make the reduction if they could.

The grievance of the appellant was that he would have been equally prepared to reduce his tender by the paltry percentage of 36 per cent and to take the contract at 4 per cent below the estimated cost if that was all that was required. But the contended that things were so manipulated in favour of respondents no. 3 that he was eventually granted the tender at only a little less what the appellant had offered and much above what the respondent No. 3 had originally offered. So on November, 14, 1966 the appellant filed the writ petition in the High Court based on the two points already indicated. The State repudiated both the contentions. The High Court dismissed the petition holding firstly that there was no breach of the conditions of tender contained in the Code, and secondly that there was on discrimination which attracted the application of Art 14.

The same two contentions have been urged on behalf of the appellant before us. The first is that the way in which tenders were dealt with from July, 30, 1966 right up to October, 15, 1966 showed that the rules contained in the Code relating to tenders were not followed. Secondly, it is urged that is any case there was discrimination between the appellant and respondent No. 3.

Taking first the contention with respect to the code not being followed in the matter of tenders, the question that arises is whether this Code consists of statutory rules or not. The High Court has observed that the so-called rules in the Code are not framed either under any statutory enactment or under any provision of the constitution. They are merely in the nature of administrative instructions for the guidance of the department and have been issued under the executive power of the State. Even after having said so, the High Court, has considered whether the instructions in the Code were followed in the present case or not. Before however we consider the question whether instructions in the Code have been followed or not, we have to decide whether these instructions have no statutory force. If they have no statutory force, they confer no right on any body and a tenderer cannot claim any rights on the basis of these administrative instructions. If these are mere administrative instructions it may be open to Government to take disciplinary action against its servants who do not follow these instructions but non-observance of such administrative instructions does not in our opinion confer any right on any member of the public like a tenderer to ask for a writ against Government by a petition under Art. 226. The matter may be different if the instructions contained in the Code, are statutory rules. Learned counsel for the appellant is unable to point out any statute under which these instructions in the code were framed. He also admits that they are administrative instructions by government to its servants relating to the public works department. But this contention is that they are rules issued under Art. 162 of the Constitution. Now art. 162 provides that "executive power of a state shall extend to the matters with respect to which the legislature of the State has power to make laws". This Article in our opinion merely indicates the scope of the executive power of the State, it does not confer any power on the State Government to issue rules there under. As a matter of fact wherever the Constitution envisages issue of rules it has so provided in specific terms. We may for example refer to Art, 309 the proviso to which lays down in specific terms that the President or the Governor of a State may make rules regulating the recruitment and the conditions of service of persons appointed to services and posts under the Union or the State. We are therefore of opinion that Art. 162 does not confer any power on the State Government to frame rules and it only indicates the scope of the executive power of the State. Of Course, under such executive power, the State can give administrative instructions to its servants how to act in certain circumstances; but that will not make such instructions rules which are justifiable in certain circumstances. In order that such executive instructions have the force of statutory rules it must be shown that they have been issued either under the authority conferred on the State Government by some statute or under some provision of the Constitution providing therefore. It is not is dispute that there is no statute which confers any authority on the State Government to issue rules in matters with which the Code is concerned nor has any provision of the Constitution been pointed out to us

under which these instructions can be issued as statutory rules except Art. 162. But as we have already indicated, Art. 162 does not confer any authority on the State Government to issue statutory rules. It only provides for the extent and scope of the executive power of the State Government and that coincides with the legislative. Thus under Art. 162 the State Government can take executive action in all matters in which the legislature of the State can pass laws. But Art. 162 itself does not confer any rule making power on the State Government in the behalf. We are therefore of opinion that instructions contained in the Code are mere administrative instructions and are not statutory rules. Therefore events if there has been any breach of such executive instructions that does not confer any rule making power on the State Government in that behalf. We are therefore of opinion that instructions contained in the Code are mare administrative instructions and are not statutory rules. Therefore even if there has been any breach of such executive instructions that does not confer any right on the appellant to apply to the court for quashing orders in breach of such instructions. It is unnecessary for as to decide whether there has been in fact a branch there has been any breach that is matter between the State Government and its servants and the State Government may take disciplinary action against the servant concerned who disobeyed these instructions. But such disobedience did not confer any right on a person like the appellant, to come to court for any relief based on the breach of these instructions. It is for this reason that we are not referring to the Code, though the High Court did consider whether there was any breach of these administrative instructions and came to the conclusion that there was no breach. In the view we take it is unnecessary for us to consider this, for we are of opinion that no claim for any relief before a court of law can be founded by a member of the public, like the appellant, on the breach of mere administrative instructions.

Coming now to the argument under Art. 14, the first contention is that though seven days' time had expired on August 26, 1966, the Chief Engineer took into account the letter of respondent No. 3 which came to him on August 31, 1966 and that this is discriminatory. We have already indicated that no such argument was apparently put forward in the High Court; nor do we think that there is any substance therein. The seven days period given is not a period of limitation and it cannot be said that it was not open to the Chief Engineer to take into account a letter which came a few days later. There might have been some case of discrimination if at that stage i.e. on August 31, 1966, the Chief Engineer had rejected any other tenderers reply on the ground that it was beyond seven days or if some one's conditional tender was rejected on the ground that it was not made unconditional by August 31, 1966. But no such thing happened and therefore there can be no question of discrimination on the ground that the letter of August 31, 1966 written by respondent No. 3 was acted upon by the Chief Engineer. Besides, it appears that in a letter dated August 25, 1966 the appellant was asked to reply by August 31, 1966 and so it seems that the seven days time fixed by the Chief Engineer for replay was not absolutely rigid and that explains why he wrote to the appellant also to send a final reply by August 31, 1966. We are therefore of opinion that the fact that the Chief Engineer acted on the letter of respondent No. 3 which came to him on August 31, 1966 cannot be said to amount to discrimination.

The other discrimination alleged is about what happened on October 15, 1966. The case of the appellant is that some negotiations were carried on by the Chief Engineer with respondent No. 3 alone after sealed tenders were opened at 4. p.m. on October 15, 1966. But the Chief Engineer has clearly denied that and his case is that all the tenderers were called by him at 7 p.m. and he asked them all whether they were prepared to make any further reduction. His case further is that six of them were not prepared to make any change while two said that they would send a reply later. His case further is that respondent No. 3 sent a letter the same day reducing the rates 4 per cent below the estimated cost. The High Court has accepted the Chief engineer's version. The appellant does

not deny that there was a meeting with the Chief Engineer after the tenders were opened at 4 p.m. on October 15, 1966. His first affidavit on this point was vague and it was only in the reply affidavit that he stated that the chief Engineer had not asked all the tenders whether they would be prepared to reduce rates further or withdraw conditions. Nothing has been brought to our notice which would induce us to disagree with the view taken by the High Court namely, that the Chief Engineer's assertion that he asked all the tenderers whether they were prepared to make any further reductions or withdraw any condition is correct. If that is so and we have no difficulty in accepting the Chief Engineer's assertion in that behalf-there is no question of discrimination in connection with what happened on October 15, 1966.

The appeal therefore fails and is hereby dismissed with costs.

V. P. S. Appeal dismissed

</html