

RAJASTHAN HIGH COURT

Bharat Construction Co.

Vs.

State of Rajasthan

Civil Special Appeal Nos. 2 and 3 of 2002
(Rajesh Balia and O.P. Bishnoi, JJ.)

15.01.2002

JUDGEMENT

R. Balia, J.

1. Heard learned counsel for the parties.
2. These two appeals arise in identical circumstances at the instance of same petitioner in respect of his grievance against denial to him to participate in process of granting two separate contracts, for which offers were invited by two separate tender notices. The petitioner-appellant has been eliminated from participation in both cases, at pre-qualifying stage, finding him to be ineligible to enter the field.
3. The two petitions filed by him have been dismissed by learned single Judge on 11-12-2001. The detailed order has been made in S. B. Civil Writ Petition No. 4386/2001 out of which D. B. Civil Special Appeal No. 2/2002 had arisen. This relates to NIT No. 1 /2001-2002 issued by Addl. Chief Engineer, Irrigation Zone, *Kishore Bagh, Lal Sagar, Jodhpur* for execution of Earthwork, Pucca Structure and cement concrete lining with paver machine as per specification of Narmada Canal from 7.88 to 51.50 for estimated cost of Rs. 26 Crores.
4. The another Writ Petition No. 4387/2001 arise out of NIT No.2/2001-2002 issued by same authority inviting tenders for construction of Narmada Main Canal Syphoine at Luni River for an estimated cost of Rs. 1500 lacs (Rs. 15 crores). Appeal No. 3/2002 is result of dismissal of Writ Petition No. 4387/2001 on 11-12-2001 by the learned Judge following his decision in S. B. Civil Writ Petition No. 4386/2001 subject matter of Appeal No. 2/2002.

5. In the aforesaid circumstances, both these appeals are heard together and are being decided by this common order. For all the respondents Shri B. C. Mehta has put in appearance on caveat. The persons who have qualified to participate in tender proceedings have moved application to be impleaded intervention. Such applications have also been heard through their counsel Sri M. S. Singhvi.

6. The appellant is aggrieved with the orders passed by the learned single Judge rejecting his writ petitions. The writ petition has been filed by the petitioner challenged the procedure adopted by the respondents in refusing to supply him 'G' Schedule for the purpose of participating in final bid by rejecting his pre-qualification application for the two contractors. It is alleged that in the matter of grant of contract of the volume of over 30 crores and 15 crores respectively, a fair and just procedure has not been adopted and the respondents are acting arbitrarily and unreasonably in the matter of bestowing largesses on behalf of respondents to private individuals, as a matter of favor.

7. In the first instance, the petitioner has filed the writ petitions No. 4326/2001 and 4332/2001 which were disposed of by this Court on 9-11-2001 by giving direction to the respondent No.2 in the said writ petitions viz. the Addl. Chief Engineer, Irrigation Zone, Jodhpur to give an opportunity of hearing to the petitioners for consideration of their applications before proceedings further in the matter.

8. In pursuance of the common order dated 9-11-2001, a notice was given to the petitioner for appearing before the respondent No.2, who was also respondent No.2 in the previous writ petitions on 19-11-2001 for personal hearing.

9. In pursuance of said notice, the petitioner appeared before the Addl. Chief Engineer and was heard by him. He also submitted his representation in writing before him which is produced along with writ petitions. His representations were rejected by speaking order on 20-11-2001, giving reasons for finding the petitioner ineligible to participate in financial bid under both tender notices.

10. The petitioner filed the two writ petitions in forenoon of 20-11-2001 before service of order dated 20-11-2001, for a writ of prohibition for restraining the respondents

from holding the final negotiations and finalizing the bids without considering the pre-qualification application of the petitioner and also to give G-Schedule/form to the petitioner allowing him the right to participate in the bid process for the contract in question.

11. The petitions appear to have been listed on the same date in the afternoon with the permission of the Court and an interim order was granted to the petitioner in the following terms in Writ Petition No. 4386/2001 :

"Meanwhile, the bid shall not be finalized till 22-11-2001 with respect to NIT No. 1/2001-2002".

12. Like order was also passed in Writ Petition No. 4387/2001 relating to NIT No. 2/2001-2002.

13. The writ petitions were ultimately heard and decided on 11-12-2001 until which date the interim order was extended.

14. The contention of the petitioner that opportunity of hearing was not granted to the petitioner by the Standing Evaluation Committee which was deciding the question of pre-qualification, but was heard by Addl. Chief Engineer, who had no jurisdiction to decide the application and therefore, opportunity of hearing was offered to him in pursuance of direction of the Court was not hearing in the eye of law, was not accepted by the learned single Judge by holding that direction to be heard by respondent No.2 was sought by the petitioner himself, and the hearing has taken place by respondent No.2 the Addl. Chief Engineer in pursuance of direction given by this Court on 9-11-2001. Therefore, the Addl. Chief Engineer alone was to offer the opportunity of hearing. The plea contrary to direction of Court issued at the request of petitioner himself was not open to him.

15. The Court also made observation that the petitioner being player in the field of securing big contract must be aware about the internal procedure of evaluating the application and there cannot be presumption of ignorance about the same for the purpose of raising new arguments against the procedure adopted for grant of contract in question by probing into the matter on the allegation that unfair, unreasonable and

unjust procedure has been adopted by the respondents in laying the criteria at the back of the petitioner and without informing him about the same and without giving opportunity of explaining his case before the authority laying down such criterion.

16. Learned single Judge was also of the opinion that it is not necessary for this Court to go into the niceties of the award of the contract and matters are best left to the specialized persons who are with the department and the Court has insufficient acumen to venture into these areas.

17. With these findings, the writ petitions were dismissed, hence these appeals.

18. The same contentions have been raised before us for indicting the validity of hearing afforded by the Addl. Chief Engineer on 19-11-2001 and the order that followed.

19. So far as the observation made by learned single Judge about presumption of petitioner knowing the details of procedure of valuation , even without disclosure of such procedure is concerned, does not appear to be sound. We are also of the opinion that though it is true that this Court will not substitute itself to examine the comparative merit of bidders and act as a party approving the contract; nor would examine ordinary case of the breach of terms of agreement. However, the Court will not abdicate its jurisdiction and authority to examine the merit of allegation of arbitrariness leveled against the procedure adopted in the matter of awarding contract by keeping eligible persons out of context or by adopting a procedure to give someone an unfair advantage. However, the same does not affect the merit of the conclusion reached by learned single Judge otherwise.

20. From the material which has come before this Court, not only it is clearly made out that the petitioner was ineligible on the known criteria to participate in pre-qualification exercise, but it is also apparent that he has not disclosed the material facts known to him about the criterion made known to the petitioner and he did not fulfill the same and continued to misrepresent the facts about the said requirements.

21. In this context, it would be necessary to reproduce in its entirety Annexure-R6, which is the communication issued by the Addl. Chief engineer on 20-11-2001

rejecting the claim of the petitioner after hearing him on 19-11- 2001. It reads as under in the case of NIT No. 1/2001-2002:

GOVERNMENT OF RAJASTHAN
IRRIGATION DEPARTMENT

No. AS/NCP/CC...../11661
To
M/s Bharat Construction Co.
Class Government Contractor
Shiv shakti Vihar, Opp. 220 KV Power
House,
Jaipur Road,
Bikaner.

Sub : Tender for Narmada Main Canal Km. 7.88-51-50.

Ref : Your letter No. BCC/2001-2002/camp-1 dated 19-11-2001.

Sir,

In compliance to the order dated 9-11-2001 passed by the Hon'ble High Court, Jodhpur, the undersigned has fixed hearing on 12th Nov. 2001 and informed vide letter No. A/S 11388 dated 10-11-2001 by Fax.

On your request vide letter No. NIL dated 12-11-2001 by fax, the next date i.e. 19-11-2002 was fixed and you have been informed accordingly vide letter No. 11417-19 dated 12-11-2001 by fax.

Sri Ram Gopal Manda of your firm attended my office on 19-11-2001. First of all, the undersigned has briefed the selection criteria fixed by the Evaluation Committee constituted by Additional Secretary- cum-Chief Engineer, Irrigation, *Rajasthan, Jaipur* vide Dy. Secretary and T. A. to Chief Engineer, Irrigation, *Rajasthan, Jaipur* letter No. F. 2 (20) AS/I/Cell/2001/14233 dated 6-9-2001 for above work. The detailed criterion has already been dealt with in pre-qualification document and you have submitted the information accordingly. Your firm has been disqualified by virtue of following reasons:

S. No.	Criterion	Firm's submission duly Minimum requirement shown in prequalification document
1.	(a) Annual Turn Over in 10.00,crores one financial year of last crores (2000-2001)	8.00

five years.

(b) Total Turnover of last five financial years	20.00 crores	15.99 crores
2. Construction cash flow for six months	5.00 crores	4.02 crores
	Working Capital -	51.73 Lacs
	Demand Loan -	200.00 Lacs
	Cash Credit -	50.00 Lacs
	Bank Guarantee -	100.00 Lacs
		401.73 Lacs

From above, it is evident that your firm does not fulfil the selection criteria fixed by standing Evaluation Committee, thus not qualified for the above work.

Sd/-

Addl. Chief Engineer
Irrigation Zone, Jodhpur

22. It may be pertinent to notice that the communication said in no uncertain terms that detailed criterion about eligibility has been disclosed in pre-qualification documents, and that he has submitted required information accordingly. By referring to so disclosed criterion, it was pointed out which of the criterion the petitioner did not fulfil as per his own information.

23. The communication further details reasons for refusing his application for grant of G-Schedule/form for including him in the final arena of competitors. The criterions disclosed, necessary for the purpose of considering the applications, were that the applicant must have annual turnover in any one financial year of last five years of 10 crores, whereas the petitioner's maximum turnover in one of the last five financial years was 8 crores only, for financial year 2000-2001; another criterion which was necessary for participation was that applicant must have total turnover of Rs. 20 crores or more in last five financial years which in the case of petitioner was found to be Rs. 15.99 crores only. Lastly, it was stated that applicant's estimated cash flow for six months should be 5 crores which was found to be 4.02 crores only.

24. It was sought to be explained by the learned counsel for petitioner that the

requisite criterion of one year's turnover was notified to be only Rs. 5 crore in the notice inviting tenders and the financial criterions have been jacked up, without notice to participants to eliminate the petitioner from the competition and confer favor on someone.

25. Since the communication dated 20-11-2001 referred to pre-requirement document which contained requisite information, we queried about the fact. The pre-qualification document was given to every applicant. This fact is not in dispute. But the said document has not been filed along with the writ petition, nor notice inviting tender was filed along with the writ petition in the first instance. It was explained that notice and pre-qualification document had been filed in previous writ petitions; but not in this petition. It was stated that in fact required limit of turnover in last 5 years was only Rs. 5 crores as per the Tender Notice, which has been jacked up to Rs. 10 crores without notice to applicants to eliminate the petitioner.

26. We are not able to accept this explanation which is contrary to record. The pre-qualification form was not produced by the petitioner, even with rejoinder filed after on his own assertion he was served with the communication dated 20-11-2001. The correctness of statement in the said communication that detailed requirements for pre-qualification were already contained in the form, was not denied. Nor the correctness of figures shown in the said communication have been disputed. The relevant qualifications have been quoted in reply to writ petition.

27. We are unable to find any assertion by which the facts about the criterions laid for as minimum requirement for pre-qualification consideration and the correctness of petitioner's figures stated in order dated 20-11-2001 has been denied anywhere, in his writ petition or rejoinder-affidavit.

28. The relevant part of tender notice is as under:

To earn qualification for participation in bid, contractor should fulfill following criteria in addition to criteria specified in pre-qualification document :

1. Contractor/firm should have completed at least one work of similar nature costing not less than Rs. 500 lacs in one financial year.
2. Contractor/firm should have executed such type of work in any one financial year during last 5 years and should submit certificate from the employer.

3. Conditional tenders are liable to be rejected.

29. The aforesaid tender notice makes out clearly that the condition mentioned at Nos.1 and 2 above are in addition to criteria specified in pre-qualification document and not the sole criterion on the basis of which pre-qualification is to be judged. Moreover, condition No.1 only refers to execution of at least one work of similar type, for which tender is floated, costing not less than 500 lacs (Rs. 5 crores) by the applicant and secondly that he should have executed such type of work in any one financial year during last 5 years and should submit certificate from the employer.

30. These two conditions obviously refer to experience of execution of similar kind of contract costing not less than 5 crores in any one of last five years but has no reference to conditions referred to in the pre-qualification form, for adjudging financial viability of any aspirants to participate in tender approval. The conditions referred to in the order which the petitioner did not fulfill as per Annexure-R1, are not related to the experience in field of same type of work during last five years, but related to financial viability of the applicant requiring a minimum amount of turnover of business of the prospective bidder. It was clearly made out in the tender notice and was also stated in the communication dated 20th November, 2001 that the conditions which are detailed in the pre-qualification document has to be fulfilled primarily by the prospective bidder. The pre-qualification document, which form has also not been produced before us until asked for and about which no reference has been made, was made available only when called upon to be made available to the Court during the hearing of this appeal. The excerpt of conditions had been reproduced in reply. In that document, we find that the minimum requirement stated in Column 3 of the table reproduced from Annexure- R6, is very much there in para 3 titled 'QUALIFICATION'. Paras 3.2 and 3.5 lay down criterion which are relevant for our purposes, read as under:

3.2. GENERAL EXPERIENCE

The applicant should meet the following criteria:

- (a) Annual turnover in any one financial year should be Rs. 10 crores during the last five financial years. In addition to this the total turnover for the last five financial years should not be less than Rs. 20 crores.
- (b)

31. The Condition 3.5 lays down criterion for assessing FINANCIAL POSITION. It

reads as under:

"That the applicant should demonstrate that he has access to, or has available, liquid assets, unencumbered real assets, lines of credit and other financial means sufficient to meet the construction cash flow for a period of six months estimated as Rs. 5 crores net of the applicant's commitments for other contracts."

32. At the altar of above two criterions the petitioner fails demonstrably vide communication Annexure-R6, correctness of which figures have not been disputed.

33. The irresistible conclusion is that the petitioner was ineligible to his knowledge from the beginning even to apply for a pre-qualification scrutiny on the criterion detailed in that Form. Yet the petitioner did not refer to these criterions at all at any stage, nor he has challenged the figures in that regard as disclosed by the Addl. Chief Engineer to be erroneous in any manner so as to need any further enquiry about his exclusion.

About NIT No.2/2001-2002 :

34. Likewise in Appeal No. 3/2002 arising out of writ petition No. 4387/2001 the position is no different except that in that case petitioner has been found ineligible on different count, on the basis of not fulfilling the condition of pre-qualification as per Tender Notice. We have noticed that in Tender Notice certain requirement about work experience has been prescribed in addition to criterion detailed in pre-qualification document. It required that the applicant ought to have executed one contract of similar type within last 5 years costing not less than 5 crores. But the petitioner was found to have not executed any work of similar type.

35. In these circumstances, we are constrained to draw inference that the petitioner was not only ineligible to qualify in the pre-qualification exercise, but has also not deliberately disclosed these material facts to the Court in his pursuit to invoke extraordinary jurisdiction. This alone is sufficient to disentitle him to any relief.

36. The main contention raised by the petitioner to sustain this petition is that Addl. Chief Engineer had no jurisdiction to decide his eligibility and it ought to have been decided by Evaluation Committee, which laid down the criterion. It was on the

premise that Evaluation Committee had laid down criterion for scrutiny of pre-qualification application and it alone could have heard and decided petitioner's objection. This again is a vexatious plea. Firstly, the petitioner himself has sought hearing by Addl. Chief Engineer through earlier writ petition. The Court without examining the merit, granted such mandamus at the behest of the petitioner. After that specific direction to Addl. Chief Engineer, respondent No.2 in previous writ petition, he alone could have heard and decided the objections. Said Authority did offer opportunity of hearing to petitioner, which was availed by him without objection, is not in dispute. However, having had his opportunity, perhaps knowing the clear fate, the petitioner filed the present petition without waiting even for 24 hours to get the order and asked for hearing in hot haste to get a favorable order without disclosing true state of affairs. It does not stand to reason, if the petitioner did not know the result of hearing on the existing facts, what made him to file writ petition on the very next date and get it listed on that very day to secure an interim order restraining respondents from further proceeding with the proceedings, when the exercise of financial bid had not even started. Not only this, he appears to have deliberately sought to raise dispute on facts which to his knowledge was not true; by asserting that Evaluation Committee has laid down the criterion in camera without notice to participants to impress upon the Court that forms were scrutinized on undisclosed criterion by some other authority when the criteria for consideration were made known to him through Tender Notices as well pre-qualification forms containing all details.

37. The entire gamut appears to be with an oblique motive to exert pressure on other bidder to negotiate with petitioner who on known criterion was not eligible. Secondly, it is demonstrably established that the petitioner from the beginning was aware about the criterion for eligibility and his ineligibility on that anvil. From the representation submitted to Addl. Chief Engineer, it is apparent that knowing his ineligibility he was only trying to 'impress that he may still be considered a financially viable candidate for permitting him to bid. In these circumstances this litigation cannot be considered to be *bona fide* at its inception.

38. In view of the aforesaid conclusion, we do not deem necessary to deal with other contentions that have been raised in the grounds of appeal by the learned counsel for the appellant.

39. Accordingly, these two appeals are hereby dismissed with cost which is quantified

at Rs. 20,000/- in each case.

Appeals dismissed.