

# RAJASTHAN HIGH COURT

Kesulal Mehta

Vs.

R. T. A. D. Co-op. Federation Ltd.

S.B. C.W. P. No. 1170 of 2004

(Sunil Kumar Garg, J.)

07.04.2004

## ORDER

**Sunil Kumar Garg, J.**

1. This writ petition under Article 226 of the Constitution of India has been filed by the petitioner against the respondents on 10-3-2004 with the prayer that by appropriate writ, order or direction, the record in relation to award of contract for transportation of food grains granted in favor of the respondent No. 2 Om Prakash Joshi be called for and after calling the record, the grant of tender in favor of the respondent No. 2 be quashed and set aside and the tender submitted by the respondent No. 2 be ordered to be rejected and the respondent No. 1 Rajasthan Tribal Areas Development Co-operative Federation Ltd. (for short "the Federation") be directed to accept the tender of the petitioner and issue the work order in his favor.

2. The case of the petitioner as put forward by him in this writ petition is as follows:-

The respondent No. 1 Federation through tender notice dated 9-2-2004, which was amended and revised through tender notice dated 16-2-2004 (Annex. R/1) invited tenders for the purpose of transportation of food grains for the period 2004-05. A copy of the tender document issued by the respondent No. 1 Federation is marked as Annex. 1.

According to the petitioner, conditions were appended with the said tender document Annex. 1 and as per condition No. 3 of the tender document Annex.1, tenderer should have at least one year experience of transportation of controlled food grains under door step delivery in the State of Rajasthan.

The further case of the petitioner is that he also filed his tender with the respondent

No. 1 Federation and as per the terms and conditions of the tender document Annex. 1, the tenders were to be opened on 25-2-2004 and they were opened on that day. According to the petitioner, his tender was lowest as he had proposed to carry out the transportation work at 21% below the rates indicated by the respondent No. 1 Federation.

However, according to the petitioner, there was another bidder respondent No. 2 Om Prakash Joshi, who had proposed to carry out the transportation work at 22% below the rates indicated by the respondent No. 1 Federation. But, on the date when the tenders were opened i.e. on 25-2-2004, the respondent No. 2 failed to enclose mandatory certificate of one year experience of transportation of controlled food-grains under door step delivery in the State of Rajasthan, as required by condition No. 3 of the tender document Annex. 1 and therefore, in absence of requisite experience certificate, the tender form of the respondent No. 2 should have been rejected by the respondent No. 1 Federation, but in disregard of the condition No. 3 of the tender document Annex. 1, the respondent No. 1 Federation granted time to the respondent No. 2 to submit the requisite experience certificate upto 3-3-2004 and thereafter, vide order dated 5-3-2004, the respondent No. 1 Federation had issued a letter in favor of the respondent No. 2 despite the fact that he had not fulfilled the condition No. 3 on the relevant date when the tenders were opened on 25-2-2004. Hence, this writ petition with the prayers as stated above.

In this writ petition, the main contention of the petitioner is that terms and conditions were appended to the tender document Annexure 1 and as per condition No. 3 of the tender document Annexure 1, the tenderer should have atleast one year experience of transportation of controlled food grains under door step delivery in the State of Rajasthan, but on the date when the tenders were opened on 25-2-2004, the respondent No. 2 failed to attach that experience certificate, as required by condition No. 3 of the tender document Annex. 1 and in absence of that, his tender should have been rejected, but the respondent No. 1 Federation in clear disregard of the condition No. 3 of the tender document Annex. 1 permitted the respondent No. 2 to submit the experience certificate upto 3-3-2004. According to the petitioner, the action of the respondent No. 1 Federation in asking the respondent No.2 to submit the requisite experience certificate as per condition No. 3 of the tender document Annex. 1 after opening of the tenders on 25-2-2004 and thereafter, awarding contract in favor of the respondent No. 2 is *ex facie* illegal and against the settled practice of awarding Government contracts and thus, liable to be quashed and set aside.

A reply to the writ petition was filed by the respondent No. 1 Federation and the respondent No. 2 Om Prakash Joshi separately and on condition No. 3 of the tender document Annex. 1, it was submitted by them that though experience certificate on the date when the tenders were opened on 25-2-2004 was not submitted by the respondent No. 2, but on his request a chance was given by the respondent No. 1 Federation to the respondent No. 2 to submit the requisite experience certificate as per condition No. 3 of the tender notice Annex. 1 upto 3-3-2004 and thereafter, on furnishing the requisite experience certificate within the stipulated time, respondent No. 1 Federation through order Annex. R-2/2 dated 24-3-2004, issued work order in favor of the respondent No. 2. The action of the respondent No. 1 Federation in granting time to the respondent No. 2 to submit the requisite certificate upto 3-3-2004 and thereafter, on his submitting requisite certificate within the stipulated time, issuing contract through order Annex. R-2/2 dated 24-3-2004 in favor of the respondent No. 2 was within the frame work of the law and no illegality or irregularity has been committed by the respondent No. 1 Federation in doing so.

Apart from this, it was further submitted that it was the discretion of the respondent No. 1 Federation to be satisfied regarding the credentials of the person, who was going to be awarded the contract and the same cannot be challenged by the petitioner under Article 226 of the Constitution of India. Hence, no case for interference is made out and this writ petition deserves to be dismissed.

3. I have heard the learned counsel for the petitioner and the learned counsel for the respondents and gone through the materials available on record.

4. During the course of hearing, tender proceedings were produced by the learned counsel for the respondent No. 1 Federation and a bare perusal of the tender proceedings and other materials available on record reveals the following facts :-

(i) That the respondent No. 1 through tender notice dated 9-2-2004, which was amended and revised through tender notice dated 16-2-2004 (Annex. R/1), invited tenders for the purpose of transportation of food grains for the period 2004-05.

(ii) That terms and conditions were appended to the tender document Annex. 1 and as per condition No. 3 of the tender document Annex. 1, tenderer should have atleast one year experience of transportation of controlled food grains under door step delivery in the State of Rajasthan.

(iii) That the tenders were to be opened on 25-2-2004 and the same were opened on 25-2-2004.

(iv) That the tender, which was offered by the respondent No. 2 to carry out the transportation work at 22% below the rates indicated by the respondent No. 1 Federation, was found lowest one.

(v) That the tender of the petitioner offering to carry out the transportation work at 21% below the rates indicated by the Federation, was found next lowest one.

(vi) That at the time when the tenders were opened on 25-2-2004, experience certificate as required under condition No. 3 of the tender document Annex. 1 was not produced by the respondent No. 2. However, on his request, through letter dated 26-2-2004, the respondent No. 1 Federation granted time to the respondent No. 2 to submit the experience certificate as per condition No. 3 of the tender document Annex. 1 upto 3-3-2004 failing which his tender would not be considered and stand rejected.

(vii) That respondent No. 2 submitted the requisite experience certificate as required by condition No. 3 of the tender document Annex. 1 within the stipulated time.

(viii) That thereafter, the respondent No. 1 Federation through order dated 24-3-2004 (Annexure R-2/2) awarded contract in favour of the respondent No. 2 for the period 2004-05.

5. Thus there is no dispute on the point that when the tenders were opened on 25-2-2004, one year experience certificate as required by condition No. 3 of the tender document Annex. 1 was not produced by the respondent No.2 , but since his tender was found lowest one in comparison to the petitioner, therefore, on his request , the respondent No. 2 was given one chance to submit the requisite experience certificate up to 3-3-2004 and the respondent No. 2 submitted the requisite experience certificate within the stipulated time and thereafter, through order dated 24-3-2004 (Annexure R-2/2), the respondent No. 1 Federation awarded contract in favor of the respondent No. 2 for the period 2004-05.

6. The question for consideration is whether in the facts and circumstances just mentioned above, when the experience certificate as required by condition No. 3 of the tender document Annex. 1 was not produced by the respondent No. 2 at the time of opening tenders, the tender form of the respondent No. 2 should have been rejected

or whether the action of the respondent No. 1 Federation first relaxing condition No. 3 of the tender document Annex. 1 by granting time to the respondent No. 2 to submit the requisite certificate upto 3-3-2003 and thereafter, awarding contract through order Annexure R 2/2 dated 24-3-2004 in favor of the respondent No. 2 was arbitrary, illegal and without jurisdiction or not.

7. Before proceeding further, scope of judicial review in public contracts may be stated here.

Scope of Judicial Review in public contracts.

8. Judicial review will be concerned in reviewing not the merits of the decision made, but the decision making process itself. Neither is a Court equipped nor is it desirable for it to review the merits of the decision.

9. If the contract has been entered without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then the court cannot act as an appellate authority by substituting its opinion in respect of selection made for entering into the contract.

10. The grounds on which administrative action would be subject to control by judicial review could be classified as :-

(i) illegality (namely, failure to give effect to the law that regulates the decision making power);

(ii) irrationality, namely Wednesbury unreasonableness, the question whether or not they (the local authority) have taken into account matters which they ought not to have taken into account, or have refused to take into account or neglected to take into account matters which they ought to take into account (*Associated Provincial Picture House Ltd. v. Wednesbury Corpn.* <sup>1</sup>may be seen), and

(iii) procedural impropriety.

11. In *Tata Cellular v. Union of India* <sup>2</sup>the Hon'ble Supreme Court recognized the above principles as applicable in the judicial review of administrative action in contract matters and the Court also mentioned two more facets of irrationality being;

(a) a Court could review the decision makers' evaluation of facts and intervene where the facts taken as a whole could not logically warrant the conclusion of

the decision maker; and

(b) a decision would be unreasonable if it is impartial and unequal in its operation as between different classes.

12. In the contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution, in which non-arbitrariness is a significant facet. However, in contracts having commercial elements, some more discretion has to be conceded to authorities so that they can enter into contracts with persons, keeping an eye on the augmentation of revenue; they have the liberty to assess the overall situation for the purposes of deciding to whom the contract shall be awarded and on what terms; and the Court must grant a measure of freedom of 'play in the joints' to the executive. The award of contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. Decisions in such transactions are arrived at with commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender, and that is not open to judicial scrutiny. It can negotiate before deciding to accept the tender. It may not accept the offer even though it is the highest or the lowest. But it is bound to adhere to the norms, standards and procedures laid down by them, and cannot depart from them arbitrarily.

13. In the matters of contract, the Court can interfere in three categories of cases i.e. quasi-judicial matters, administrative matters like price-fixing, and award of contracts. Judicial review does not mean that the Court should take over the contracting powers. It can interfere in the matters which would be mala fide, biased, or so arbitrary to the extent of perversity. The standard of proof of bias is higher after the decision of awarding the contract is reached. There should be fair play in action, the action should be legitimate and fair and without any aversion, malice or affection. There should be no impression of favoritism or nepotism.

14. The cases in which power under Articles 226 or 14 of the Constitution of India can be exercised for breaches of alleged obligations of the State or its agents can be divided into four types:

(i) where a petitioner makes a grievance of breach of promise on the part of the State in cases where on assurance or promises made by the State, he has acted to his prejudice and predicament, but the agreement is short of a contract within the meaning of Article 299 of the Constitution;

(ii) where the contract entered into between the person aggrieved and the State is in exercise of a statutory power under certain Acts or Rules framed thereunder and the petitioner alleges a breach on the part of the State;

(iii) where the contract entered into between the State and the person aggrieved is non-statutory and purely contractual and the rights and liabilities of the parties are governed by the terms of the contract, and the petitioner complains about breach of such contract by the State, and

(iv) where the contract entered into between the State and the person aggrieved is non-statutory and purely contractual, but such a contract has been cancelled on a ground dehors any of the terms of the contract, and which is *per se* violative of Article 14 of the Constitution.

### Principles

15. The principles deduced by the Hon'ble Supreme Court in the case of Tata Cellular (supra) are:

(i) the modern trend points to judicial restraint in administrative action;

(ii) the Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made;

(iii) the Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted, it will be substituting its own decision without the necessary expertise which itself may be fallible;

(iv) the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by the process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts;

(v) the government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides;

(vi) quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

16. In *Asia Foundation and Construction Ltd. v. Trafalgar House Construction (I) Ltd.*<sup>3</sup> the Hon'ble Supreme Court held that judicial review of contractual transactions of public bodies was permissible to prevent arbitrariness, favoritism and use of power by collateral purposes and further where it would be detrimental in public interest to interfere. The later emphasis is on allowing certain flexibility in administrative decision-making; and a decision can be challenged on the Wednesbury principle of unreasonableness, i.e. the decision was so unreasonable that no sensible person would have arrived at it; else, it should not be disturbed; and that if a reasonable procedure had been followed, the decision should not be challenged except on the Wednesbury principle of unreasonableness.

17. Keeping the above principles in mind, the action of the respondent No. 1 Federation in awarding contract in favor of the respondent No. 2 is being examined.

18. Before proceeding further, it may be stated here that in the matters of contracts and tenders, the conditions, which are attached, may be precedent and subsequent. If one party submits a document or documents containing terms after the making of the contract, it would not affect the existence of the contract.

19. Where a condition of the tender is not complied with on the date of opening the tenders, it is open to the person concerned inviting tender to reject the same. In the present case, this has not happened, but on the contrary, the respondent No. 1 Federation gave time to the respondent No. 2 to produce the requisite experience certificate as required by condition No. 3 of the tender document Annex. 1 upto 3-3-2004. Not only this, if there any condition, that can be waived only by the concerned authority.

20. Apart from this, it may be stated here that if there is a condition in the tender notice requiring the tenderer to submit documents along with the tender, in my considered opinion, such type of condition cannot be termed as condition precedent, but it can be termed as condition subsequent. Since it is a condition subsequent, that can be relaxed by the concerned authority and tenderer can be asked to submit documents later on otherwise his offer would stand cancelled.

21. In the present case, a bare perusal of the condition No. 3 of the tender document Annex. 1 reveals that it simply says that tenderer should have one year experience of

transportation of controlled food-grains under door step delivery in the State of Rajasthan and it does not contain more than this.

22. Thus, the condition No. 3 of the tender document Annex. 1 cannot be said to be a condition precedent before accepting the tender, but it can be termed as condition subsequent and in such a situation, if the respondent No. 1 Federation, on request of the respondent No. 2, had asked him to submit the requisite experience certificate as per condition No. 3 of the tender document Annex. 1, it had committed no illegality nor exceeded its jurisdiction in doing so, but on the contrary, it had the power to relax such type of condition of production of document.

23. Furthermore, such type of condition can only be relaxed in favour of such person whose tender was found lowest and valid in all respect. In this case, as per the tender proceedings, the tender of the respondent No. 2 was found lowest one and it was valid in all respect except experience certificate as required by condition No. 3 of the tender document Annex. 1 was not produced for which time was sought by the respondent No. 2 and the same was granted by the respondent No. 1 up to 3-3-2004 by relaxing the condition No. 3 and thereafter, on submitting requisite experience certificate, the respondent No. 1 Federation through order dated 24-3-2004 (Annex. R-2/2) awarded contract in favour of the respondent No. 2 and in doing so, no illegality or irregularity has been committed by the respondent No. 1 Federation. Had the tender of the respondent No. 2 would have not been lowest one, the position would have been different.

24. Thus, for the reasons stated above and taking into consideration the principles just narrated above that the modern trend points to judicial restraint in administrative action and that the condition No. 3 of the tender document Annex. 1 was condition subsequent and respondent No. 1 Federation can relax such type of condition subsequent, in my considered opinion, the action of the respondent No. 1 Federation first in relaxing the condition No. 3 of the tender document Annex. 1 in favor of the respondent No. 2, whose tender was found lowest one, by way of granting him time to submit the requisite experience certificate upto 3-3-2004 and thereafter, on his furnishing the requisite certificate within the stipulated time, in awarding contract in favor of the respondent No. 2 through order dated 24-3-2004 (Annex. R-2/2) cannot be said to be arbitrary, unreasonable, illegal and without jurisdiction and on the contrary, it appears that the action of the respondent No. 1 Federation was within the framework of law and it does not suffer any illegality, arbitrariness, favoritism, biasness, irrationality and procedural impropriety. Therefore, in these circumstances, this Court

would not interfere with the discretion and decision taken by the respondent No. 1 Federation in first granting time to the respondent No. 2 to submit the requisite experience certificate as required by condition No. 3 of tender document Annex. 1 and thereafter, in awarding contract in favor of the respondent No. 2, whose tender was found lowest one. Apart from this, this Court does not sit or act as an appellate authority over the actions and decisions of the subordinate authorities and thus, this Court would not substitute its own decision under Article 226 of the Constitution of India.

25. The learned counsel for the petitioner has placed reliance on the decision of the Hon'ble Supreme Court in *W.B. State Electricity Board v. Patel Engineering Co. Ltd.* <sup>4</sup>where it was observed that in cases of tenders, rules and instructions must be complied with scrupulously in order to avoid discrimination, arbitrariness and favoritism, which are contrary to rule of law and unconstitutional values and relaxation by State or its agencies of a rule or condition in favor of a particular bidder was held not permissible unless expressly provided for in the rules.

26. In my considered opinion, the above observations would not be applicable to the facts of the present case. As already stated above, the tender of the respondent No. 2 was found lowest one and the condition No. 3 of the tender document Annex. 1 cannot be termed as condition precedent, but it was held to be condition subsequent and not only this, a chance was given to the respondent No. 2 to furnish the requisite experience certificate as per condition No. 3 of the tender document Annex. 1 and on his furnishing requisite experience certificate, the contract was awarded in favor of the respondent No. 2 through order Annexure R-2/2 dated 24-3-2004. In these circumstances, the above ruling of the Hon'ble Supreme Court would not be helpful to the petitioner.

27. For the reasons stated above, there is no merit in this writ petition and the same deserves to be dismissed.

Accordingly, this writ petition filed by the petitioner is dismissed. No order as to costs.

Petition dismissed.

Cases Referred.

1. ((1947) 2 All England Reporter 680)
2. AIR 1996 SC 11

3. (1997) 1 SCC 738

4. (2001) 2 SCC 451: (AIR 2001 SC 682)