LAKMINI PRINTERS (PRIVATE) LIMITED
v.
DHARMARATNE AND OTHERS

SUPREME COURT
FERNANDO, J.
ISMAIL, J., AND
YAPA, J.
SC (FR) 129/2002
18TH NOVEMBER 2002

Fundamental Rights – Article 12(1) of the Constitution – Tenders for supply of stamped envelopes to the Postal Department-Arrangement to supply envelopes printed in India by an Indian Printer for the successful tenderer – Validity of the tender.

The petitioner tendered for the supply of stamped envelopes to the Postal Department. The 1st and 2nd respondents carrying on business in partnership as "Spot International" also tendered for the same service. The petitioner's tender was around Rs. 2000/- above that of "Spot International". The petitioner's product was out of local paper and to be printed locally whilst "Spot International" had arranged to have the envelopes printed in India by Madras Security Printers. The tender was awarded to "Spot International".

Held :

The failure to award the tender to the petitioner was arbitrary, unreasonable and unlawful in violation of Article 12(1) of the Constitution in that:

(i) The arrangement by "Spot International" amounted to a sub-letting in breach of condition 18 of the tender conditions in the absence of a suggestion that the prior written consent of the Post Master General had been sought and obtained.

(ii) Condition 11 prohibits printing in India, and

(iii) Under Financial Regulation 697(3) locally manufactured articles are entitled to a preference of 20 percent over the lowest rate quoted for the supply of the imported articles. No reason was given for the denial of that preference to the petitioner, despite specific requests.

APPLICATION for relief for infringement of fundamental rights

Case referred to :

(1) *Ceylon Paper Sacks Ltd v JEDB* SC 220/92A SCM 2.7.93

M.A. Sumanthiran with *Buddike Illnagatillake* for petitioner.

A.H.H. Perera for 1st and 2nd respondents.

Harsha Fernando, State Counsel for 3rd to 8th respondents.

Cur.adv.vult

December 9, 2002

FERNANDO, J.

The Petitioner Company ("the Petitioner") complains that its fundamental right under Article 12(1) was infringed by reason of the failure to award to the Petitioner a tender for the "supply and delivery" of 18 million stamped envelopes for the Postal Department. That tender was instead awarded on 25.10.2001 to the 1st and 2nd Respondents carrying on business in partnership as "Spot International", and the stamped envelopes were printed by an Indian firm and supplied by Spot International to the Postal Department.

The "General Conditions" for that tender specified:

> "11 (a) The plate for printing the stamp-head shall be supplied by the Department of Posts and will always remain in the custody of the Department.
>
> (b) The printing machine with the stamp-head shall always be used under the supervision of an officer of the Department....
>
> 18. The contractor shall not assign or sub-let the contract or any part thereof or any benefit or interest therein without the prior written consent of the Post-Master General...."

The 7th Respondent, who assumed office as Secretary to the Ministry concerned on 20.12.2001, submitted an affidavit which he stated was based on the files and documents available. He stated that along with the Spot International bid dated 10.10.2001 there was submitted a letter dated 10.10.2001 from Madras Security

Printers undertaking to print and deliver 18 million stamped envelopes "on behalf of" Spot International if they are successful in getting the above tender, and confirming that all specifications as per the tender documents would be met by them; that the 1st and 2nd Respondents at the point of submitting their tender had stated that performance of the contract would be jointly with Madras Security Printers; and that the Spot International tender was the lower of the two as the following comparison shows:

Petitioner's Prices		**Spot International Prices**	
With ads	Without ads	With ads	Without ads
14,800,000	14,059,980	12,829,500	12,330,000

It was clear from the outset that Spot International had no intention of printing the stamped envelopes in Sri Lanka, and was throughout intending to have them printed outside Sri Lanka by Madras Security Printers.

If the contract was treated as one for the *printing* of envelopes, then it was necessary that the successful tenderer should itself have printed the envelopes: getting Madras Security Printers to print them amounted to assignment or sub-letting in breach of condition 18 (there being no suggestion that the prior written consent of the Postmaster-General had been sought and obtained). Besides, the envelopes could not have been printed outside Sri Lanka in view of condition 11, and there was no power to waive that condition. If the Postal Department was willing to waive that condition, that should have been made known to the Petitioner so that the Petitioner too would have had the opportunity of submitting (possibly lower) tenders on the basis that the work would be done abroad.

Alternatively, the contract could reasonably have been treated as permitting the import and supply of envelopes, in which even import from Madras Security Printers was permissible. But even then condition 11 would have precluded printing in India.

Whether the contract was treated as one for printing or for import, quite apart from the breach of tender conditions 11 and 18, an important question of evaluation arose. The Petitioner averred that its product was manufactured locally, entirely with locally manufactured paper, whereas Spot International was supplying an imported product. According to Financial Regulation No. 697(3):

> "When locally manufactured articles are offered in competition with imported articles, the former should be given a preference of 20 percent over the lowest rate quoted for the supply of the imported articles. In the evaluation of tenders, this preference should be given by deducting 20 percent from the rates quoted for locally manufactured articles."

That was reiterated in guideline No. 126 of the Guidelines on Government Tender Procedure. This preference is dictated not by sentiment but by sound economic considerations. As I noted in *Ceylon Paper Sacks Ltd v J.E.D.B.,*[(1)] such preference results in benefits to the national economy in respect of employment, tax revenues, a lower outflow of foreign exchange, etc, as well as long-term benefits in regard to industrialization. Had the stipulated preference been given the Petitioner's bids would have had to be reduced, for the purpose of comparison, by Rs. 2,960,000 and Rs. 2,811,996 respectively, to Rs. 11,840,000 and Rs. 11,247,984 – making them substantially lower than the bids of Spot International. No reason has been given for denying the Petitioner this preference, despite specific requests.

For all these reasons, I hold that the failure to award the tender to the Petitioner was arbitrary, unreasonable and unlawful in violation of Article 12(1).

The Petitioner has submitted some particulars as to the profits made from previous tenders, and I am of the opinion that a tenderer could reasonably have expected to make a profit of not less than 10% on a contract like this. I therefore award the Petitioner a sum of Rs. 1,500,000 as compensation payable by the State, and a sum of Rs. 75,000 as costs payable by Spot International, on or before 31.1.2003.

ISMAIL, J. - I agree.

YAPA, J. - I agree.

Relief granted.