
(2015) 07 JH CK 0019

In the Jharkhand High Court

Case No : W.P.(C) Nos. 1968 and 1969 of 2015

Ajay Rastogi

APPELLANT

Vs

State of Jharkhand and Others

RESPONDENT

Date of Decision : 10-07-2015

Acts Referred:

Jharkhand Panchayat Raj Act, 2001 — Section 10, 73, 75
Mines and Minerals (Development and Regulation) Act, 1957 — Section 15, 15(1-A)
(d), 15(1-A)(o)

Citation : (2015) 5 FLT 860

Hon'ble Judges : S. Chandrashekhar, J.

Bench : Single Bench

Advocate : Indrajit Sinha, for the Appellant; Ajit Kumar, for the Respondent

Final Decision : Dismissed

Judgement

S. Chandrashekhar, J.—Challenging condition contained in Clause 16 of auction notice dated 15.4.2015, both the writ petitions have been filed. Mr. Indrajit Sinha, the learned Counsel for the petitioner states that issues involved in both the writ petitions are common. In both the writ petitions validity of Clause 16 in auction notice has been challenged. It is stated that facts in both the cases are also similar. Mr. Indrajit Sinha, the learned Counsel for the petitioner advanced his arguments referring to facts in W.P.(C) No. 1969 of 2015. Briefly stated, the facts of the case are that, the petitioner who intended to offer bids in response to notice dated 15.4.2015 for settlement of Sand Ghats in Ranchi district got 17 demand drafts prepared from HDFC Bank, Banka Branch. A bidder was required to deposit 10% of the reserve price as earnest money deposit and the intending bidder was also required to obtain and submit "no objection certificate" from Gram Sabha/Mukhia/Gram Panchayat/Authorized Officer. The petitioner approached Mukhia/Gram Pradhan of respective Gram Panchayats however, they declined to grant "no objection certificate" to the petitioner, as a consequence of which the petitioner was debarred from participating in the auction. It is stated that several intending bidders were also prevented from participating in the

auction only because they could not obtain "no objection certificate" from Gram Sabha/Mukhia/Gram Panchayat/Authorised Officer.

2. The learned Counsel for the petitioner has submitted that, Clause 16 creates a disqualification for a bidder who may be otherwise qualified still, he would not be permitted to participate in auction if he fails to produce "no objection certificate". The learned Counsel for the respondents has referred to Rule 11 and Rule 34(4) of the amended Rules and submitted that, besides Rule 5(4) the aforesaid Rules also make it mandatory that "no objection certificate" of Gram Sabha must be obtained. Before dealing with the rival contentions, Rule 5(4) of the Jharkhand Minor Mineral Concessions Rules, 2004 needs to be noticed. The unamended Rule 5(4) of Jharkhand Minor Mineral Concession Rules, 2004 reads as under:

(English translation of Rule 5(4) of Jharkhand Minor Mineral Concession Rules, 2004)

"No permission for mining lease or prospecting license for Minor Mineral shall be issued, in the Schedule areas without prior approval from the concerned Gram Sabha or at appropriate Panchayat level."

3. Vide notification dated 30.5.2014 published in Jharkhand Gazette, Rule 5(4) was amended to the extent that expression "prior approval" has been substituted by "no objection certificate". In my opinion, the amendment in Rule 5(4) does not change the prohibition contained under the said Rule. Rule 5(4) mandates that no mining lease or prospecting license for Minor Mineral in the schedule area would be issued without "no objection certificate" of the concerned Gram Sabha or appropriate Panchayat authority. Clause 16 provides that a bidder would not be permitted to participate in auction if "no objection certificate" from Gram Sabha/Mukhia/Gram Panchayat/Authorized Officer is not obtained. In my opinion, the prohibition contained in Rule 5(4), which mandates prior approval/"no objection certificate" from Gram Sabha/Mukhia/Gram Panchayat/Authorised Officer, has been mistaken by the petitioner as a disqualification to an intending tenderer. In view of specific prohibition contained under various provisions of 2004 Rules, Clause 16 has been incorporated in auction notice dated 15.4.2015. A bare reading of Clause 16 would indicate that Gram Sabha/Mukhia/Gram Panchayat/Authorised Officer is not required to assess the eligibility of an intending tenderer rather, in view of the bar imposed by 2004 Rules, a condition to obtain "no objection certificate" has been incorporated in Clause 16. Though, at the first glance condition incorporated under Clause 16 may give an impression of a disqualification however, when viewed in the context of bar under Jharkhand Minor Mineral Concession Rules, 2004, Clause 16 cannot be construed as a disqualification. Moreover, the terms of tender are not open to judicial scrutiny, the same being in the realm of contract. The Government must have a free hand in setting the terms of tender. In Jagdish Mandal Vs. State of Orissa and Others, , the Hon'ble Supreme Court has observed, "evaluating tenders and awarding contracts are essentially commercial functions."

4. It is submitted that, the auction notice dated 15.4.2015 has been issued under Rule 12(2) of the Jharkhand Minor Mineral Concession Rules, 2004 and in terms of the guidelines dated 17.3.2015 for settlement of Sand Ghats however, Rule 12(2) of the Jharkhand Minor Mineral Concession Rules, 2004 has already been amended. Guidelines issued on 17.3.2015 has been challenged on the ground that it has no statutory force inasmuch as, it has not been issued by the order of the Governor, State of Jharkhand. Referring to decision in Global Energy Ltd. and Another Vs. Central Electricity Regulatory Commission, , the learned Counsel for the petitioner submits that, power to provide qualification or disqualification is essentially a legislative function and such legislative function cannot be delegated. It is further submitted that, neither the Jharkhand Minor Mineral Concession Rules, 2014 (as amended upto 2014) nor any other law, creates a disqualification to an intending tenderer who fails to submit "no objection certificate" and thus, Clause 16 of auction notice dated 15.4.2015 is ultra-vires to 2004 Rules. The power to impose restriction or condition which creates a disqualification must be provided specifically in the statute and a right to participate in tender cannot be taken away by an administrative action. It is further submitted that, by executive order substantive Rule cannot be supplanted and thus, no disqualification can be prescribed by an executive instruction. The learned Counsel for the petitioner has relied on judgments in Manohar Lal Sharma Vs. The Principal Secretary, and Gulf Goans Hotels Company Ltd. Vs. Union of India (UOI)--> .

5. Section 15 of the Mines and Minerals (Development and Regulation) Act, 1957 confers power upon the State Governments to make Rules in respect of Minor Minerals. Section 15(1-A)(d) provides that the State Government may make Rules providing the terms on which, and the conditions subject to which and the authority by which quarry leases, mining leases or other mineral concessions may be granted or renewed. Section 15(1-A)(o) confers further power on the State Governments for making Rules on any other matter which is to be, or may be prescribed. As noticed above, Rule 5(4) of the Jharkhand Minor Mineral Concession Rules, 2004 imposes a restriction on settlement of Sand Ghats and, accordingly Clause 16 has been inserted in auction notice dated 15.4.2015. It is well settled that as long as power in the authority is traceable mere absence of the provision or mention of a wrong provision would not be a ground on which action taken by the authority can be questioned. The Deputy Commissioner of the district is authorised to issue auction notices and the Deputy Commissioner is the person under whose control auction is conducted. Neither under the M.M.D.R. Act, 1957 nor under the Jharkhand Minor Mineral Concession Rules, 2004 an authority has been prescribed to conduct auction for Minor Minerals and thus, if by executive instruction, the Deputy Commissioner has been authorised to conduct auction and Mukhiya, Gram Sabha etc. have been authorised to issue "no objection certificate", the said execution instructions cannot be said to supplant the statutory provision. The learned Counsel has referred to sections 10 , 73 and 75 of the Jharkhand Panchayati Raj Act, 2001 to demonstrate that

function of Mukhia, Gram Panchayat etc. does not contemplate issuing "no objection certificate". The learned Counsel referred to section 4 of the Panchayat (Extension of Schedule Area) Act, 1996 to submit that, it is an enabling provision, in terms thereof Rule 11 of the Jharkhand Minor Mineral Concession Rules, 2004 has been amended however, the said provision also does not prescribe production of "no objection certificate" as a condition precedent for participating in the auction.

6. There is no dispute that Panchayat (Extension to Schedule Area) Act, 1996 is a Central Legislation and Jharkhand Minor Mineral Concession Rules, 2004 has been enacted by the State Government in exercise of power under section 15 of M.M.D.R. Act, 1957. In the present proceeding the petitioner has not made a specific challenge to validity of Rule 5(4) and only during the course of argument the learned Counsel for the petitioner has made serious attempts to challenge the validity of Rule 5(4) on the ground that it is ultra vires M.M.D.R. Act, 1957. In Doiwala Sehkari Shram Samvida Samiti Ltd. Vs. State of Uttaranchal and Others, it has been held by the Hon"ble Supreme Court that in so far as Minor Minerals are concerned, section 15 confers power upon the State Government to make Rules. The contention raised on behalf of the petitioner that disqualification on the ground of "no objection certificate" must find place in M.M.D.R. Act, 1957 is fallacious. The State Government is competent to frame Rules for regulation of Minor Minerals.

7. The learned Counsel for the petitioner submits that, in so far as, requirement for submitting "no objection certificate" is concerned, it is applicable only in the districts of Ranchi, Khunti, Seraikella Kharsawan, Simdega, Gumla and East Singhbhum whereas, in 14 other districts no such requirement has been laid down. Referring to office order dated 5.5.2015, the learned Counsel further submits that, authorization to Block Development Officer and Assistant Mining Officer to issue "no objection certificate" is confined to few districts only. The respondent State of Jharkhand has not taken a policy decision authorizing Block Development Officer and Assistant Mining Officers to issue "no objection certificate" to intending tenderers for settlement of Sand Ghats rather, only few Deputy Commissioners have issued office orders similar to office order dated 5.5.2015 issued by the Deputy Commissioner, Ranchi. The learned Counsel for the petitioner submits that, procedure adopted for settlement of Sand Ghats is arbitrary, unguided and intended at favouring a handful of tenderers.

8. In so far as, contention that the concerned Mukhiya arbitrarily refused to issue "no objection certificate" is concerned, I find that as a temporary measure the Deputy Commissioner has issued office order dated 5.5.2015, authorizing the Block Development Officer and the Assistant Mining Officer to issue "no objection certificate". By authorizing two other officers of the State Government, the possibility of arbitrary refusal by Gram Sabha/Mukhia/Gram Panchayat/ Authorized Officer has been sought to be minimised. The auction notice was issued on 15.4.2015 and the petitioner allegedly approached the Block

Development Officer on 5.5.2015 and the Assistant Mining Officer on 6.5.2014. The petitioner has alleged that the concerned Gram Sabha/Mukhia/Gram Panchayat has arbitrarily refused to issue "no objection certificate" to him however, no detail has been provided in the writ petition. When and to whom the petitioner approached for "no objection certificate" have not been pleaded in the writ petition. Petitioner had 20 days after auction notice dated 15.4.2015 was published, to obtain "no objection certificate" however, he made a complain to the Deputy Commissioner only on 6.5.2015. The fact that the petitioner approached the Block Development Officer on 5.5.2015 would go to show that the petitioner had the knowledge of office order dated 5.5.2015. Merely because office order dated 5.5.2015 was not given wide publicity, it cannot be presumed that it was intended at favouring a few. No doubt, all participating tenderers are entitled to a fair, equal and non discriminatory treatment in the matter of evaluation of their bids however, a condition cannot be struck down on mere allegation that the same was tailor made to benefit a particular tenders or class of tenderers. In *Michigan Rubber (India) Ltd. Vs. The State of Karnataka and Others*, , it has been held that, "if the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim a fundamental right to carry on business with the Government." The petitioner has failed to name a tenderer who was benefited by office order dated 5.5.2015. In the auction as many as, 58 persons have participated and if few have been left out due to lack of knowledge of office order dated 5.5.2015, on this ground entire tender process cannot be cancelled. The petitioner has failed to challenge exercise of power by Deputy Commissioner on the ground of mala fide. The person holding the charge of Deputy Commissioner has not been made party respondent in his personal capacity. The petitioner has also failed to indicate how public interest would suffer if the finalisation of tender pursuant to tender notice dated 15.4.2015 is not cancelled.

9. In so far as, contention that Clause 16 confers unguided and arbitrary power on Gram Sabha/Mukhia/Gram Panchayat/Authorised Officer to issue "no objection certificate" is concerned, I find considerable force in the contention however, at this stage I am not inclined to adjudicate the issue. Challenge to Clause 16 of auction notice dated 15.4.2015 is interlinked with the prayer of the petitioner to direct the respondents to permit him to participate in auction for settlement of Sand Ghats. Though, the delay in challenging Clause 16 may not be a ground for refusing relief to the petitioner however, the Court is required to see the motive behind the challenge, at such belated stage. Moreover, the petitioner has failed to establish arbitrary exercise of power by Gram Sabha/Mukhia/Gram Panchayat/Authorised Officer in not issuing "no objection certificate" to him. The petitioner has given description of demand drafts prepared for 20 Sand Ghats, however, "when" those demand drafts were prepared has not been disclosed by the petitioner. Considering the aforesaid facts and the totality of circumstances, I am not inclined to interfere in the matter and

accordingly, the writ petition fails. However, to avoid litigation of the nature like the present one founded on arbitrary exercise of power by the authority in granting or not granting "no objection certificate", I am of the opinion that it is desirable that the respondent-State of Jharkhand formulates necessary guidelines in this regard. I find that respondents' counter affidavit is conveniently silent on this issue. The "possibility" of arbitrary exercise of power by Gram Sabha/Mukhia/Gram Panchayat/Authorised Officer has not been denied by the respondent-State of Jharkhand. It is submitted that office order dated 5.5.2015 issued by Deputy Commissioner, Ranchi leaves no room for doubt that several intending bidders were deprived of an opportunity to participate in the tender because Gram Sabha/Mukhia/Gram Panchayat arbitrarily declined to issue "no objection certificate" to them. In *In Re: Special Reference No. 1 of 2012*, , the Hon'ble Supreme Court has held that, the question of unfettered discretion in an executive authority, just does not arise. It has been mandated thus,

184. ".....The fetters on discretion are clear, transparent and objective criteria or procedure which promotes public interest, public purpose and public good. A public authority is ordained, therefore to act, reasonably and in good faith and upon lawful and relevant grounds of public interest."

10. Mr. Indrajit Sinha, the learned Counsel for the petitioner has suggested that the requirement of proceeding "no objection certificate" by individual intending tenderer is, infact, unnecessary and it can be avoided if before issuing tender notice, the State Government itself seeks opinion of the concerned Gram Sabha/Mukhia/Gram Panchayat and takes their permission. The learned Counsel has urged that till the time necessary guidelines are issued, a direction may be issued to the respondent-State of Jharkhand not to conduct further auction for settlement of Sand Ghats. Without commenting upon the suggestion of the learned Counsel for the petitioner, I hereby direct the Registry to transmit a copy of the order to the Chief Secretary, Government of Jharkhand so that, the Government may take appropriate decision in the matter. I.A. Nos. 2788 of 2015 and 3324 of 2015 in W.P.(C) No. 1968 of 2015 and I.A. Nos. 2787 of 2015, 3323 of 2015 and 3326 of 2015 in W.P.(C) No. 1969 of 2015 stand dismissed.