(1996) 11 MP CK 0045

In the Madhya Pradesh High Court

Case No : Writ Petition No. 3457 of 1996 (J)

Alok Tiwari	APPELLANT
Vs	
Madhya Pradesh Rajya Matsya Vikas Nigam	RESPONDENT

Date of Decision : 01-11-1996

Acts Referred:
Constitution of India, 1950 — Article 14, 226

Citation : (1997) 2 MPJR 338

Hon'ble Judges : C.K. Prasad, J

Bench : Single Bench

Advocate : R. Shrivastava, for the Appellant; R.N. Singh, for the Respondent

Final Decision : Allowed

Judgement

C.K. Prasad, J.

In the present writ petition, filed under Article 226 of the Constitution of India, initially the petitioner prayed for quashing of the auction notice dated 1.8.96, whereby respondent no. 1 M.P. Rajya Matsaya Vikas Nigam (hereinafter referred as the Nigam) has decided for settlement of fishing right and sale of fish in Gandhi Sagar reservoir uplo 15.6.2001 from the date of aggreement. The matter came up for consideration before this court on 19.8.% and by way of interim order this court directed that respondents may proceed with the auction but they shall not accept any body''s offer. By way of amendment the petitioner has further prayed for quashing of the auction held on 22.8.1996, in which the bid amount of respondent no. 2 was the highest.

Short facts, giving rise to the present petition are that the respondents ''Nigam published auction notice for fishing right and sale offish from Gandhi Sagar reservoir in various News Papers and in the said auction notice, various terms and conditions were laid. In the present petition the petitioner seeks to challenge conditions 1 and 2 of the auction notice which read as follows :-

Terms and Conditions of Auction:-

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1. Only those bidders will be eligible to participate in Auction who have experience of fishing in large reservoir. For this bidders will have to produce certificte from Competent Authority. He will also produce" no Dues Certificate" from the same competent Authority.

Only after fulfilling the above condition the person interested in bidding shall have to deposit earnest money of Rs. 72.60 lacs atleast one hour before the commencement of the auction. Unless and until bidder submits the appropriate certificates regarding condition no. 1 earnest money will not he deposited and hence he cannot take part in the auction Earnest money should be deposited by crossed Bank Draft payable to Managing Director. Madhya Pradesh Rajya Matsya Vikas Nigam, Bhopal and payable at Bhopal. Person who had deposited earnest money shall be entitled to enter the place of auction alongwith one person only after obtaining an entry pass by officer of Matsya Vikas Nigam. The entry pass so obtained shall have to be retained in person till the auction proceedings are completed.

According to the petitioner, he was keen to participate in the open auction for obtaining the finishing right and sale of fish and infact he attempted to participate in the open auction but in view of the aforesaid arbitrary condition he was not allowed to participate. In the auction so held. 2 persons including respondent no. 2 participated and his bid of Rs. 1,45.00. 101/- is the highest. It is relevant here to state that the bid amount of the same reservoir in the last year was Rs. One erore severty eight thousand and for the present setilcment, the upset price fixed by the respondents Nigam was. Rs. one crorc sixty five thousand.

It is the stand of the petitioner that the impunged terms and conditions of the auction notice, referred to above, seek to disqualify at the outset a large number of otherwise eligible and competent bidders and it is the submission of the petitioner that, requiring working experience in huge reservoir is ex-facie unjust, arbitrary and unreasonable and in that view of the matter, the auction notice is fit to be struck down on this ground alone. The stand of the petitioner further is that the respondents Nigam being on statutory authority is entitled to put only such condition of eligibility which bear reasonable nexus with the object sought to be achieved. It has been further stated on behalf of the petitioner that terms and condition laid in the auction notice is tailor made and the same restricts healthy competition. Avoidance of competition, in settlement of the largess, learned counsel contends, is perse arbitrary and violative of Art. 14 of the Constitution of India In the submission of the learned counsel for the petitioner, restricting the petitioner to participate in the open auction on the ground of such an arbitray condition, violates his fundamental right guaranteed under Art. 19 (l) (g) of the Constitution of India, which renders the auction notice vitiated in the eye of law learned counsel further contends that once it is held that the terms and conditions of the auction notice is arbitrary, necessary corollary of the same is that the auction held in pursuance of the said auction notice, is vitiated in the

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eye of law.

The stand of the respondents however, is that the condition of the experience of working in large reservoir has been incorporated in the auction notice, as the said experience obtained by a person implies techincal under standing about the movement of fishes their response to a particular fisting net and its size and mesh. It is their stand that an experience contractor understands the need of fishermen regarding nets and boats and fish being a highly perishable commodity, it require transportation in a proper form to the principal market and an experienced person, can have better knowledge in these fields. It is the stand of the respondents that in case reservoir is settled to an in-experienced person, this shall jeopardise the interest and livelihood of fishermen as they cannot manage the fishing operation and transportation efficiently such an in-experienced contractor may not pay the fishermen the agreed wage, respondents contend.

It is further stand of the respondents that experience person can provide work to the fishermen for more number of days, which is not expected from an in-experienced person. The respondents submits that primary object of the respondents Nigam is not to generate revenue but the same is to be balanced with that of the welfare of the fishermen. According to their stand the moment reservoir, is settled with an in-experienced contractor, the fishermen shall be given work for less number of days than that of the experience contractor. It is emphasised by the respondent Nigam that after settlement it is not absolved of its responsibility to look after the welfare of the fishermen and as the fishermen are also paid wages, besides 20 percent of the fish catched, it has to see that the contract is given to an experience contractor, so that the fishermen not only get the wage for a long period but also get catch of the fish. Therefore, the object sought to be achieved by putting a condition of experience in large reservoir, has a nexus with the object sought to be achieved.

It is no doubt that no person has aright to enter into contract with a statutory corporation, and the statutory corporation, like any other private individual, has the absolute right to enter into contract with any one it pleases but at the same lime one has to bear in mind that a statutory authority is not like a private individual who can pick and choose person with whom it will deal. The stautoty authority, in matters of grant of contract or administering largess cannot, without adequate reason exclude any person from dealing with it. Statutory authority is still the statutory authority when it enters in the field of granting largess and cannot act arbitrary. It does not stand in the same position as a private individual. The discretion of the salutary authority, the 3rd arm of the Government, is not unlimited and it cannot give largess in arbitrary manner or on its own sweet will.

In my opinion, in matters of grant of largess the acitivity of the statutory must have public element in it and it must therefore, be informed by reason and guided by public interest. It has to he tested on touch stone of reasonableness

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and public interest and if fails to satisfy either test, it would be unconstitutional and invalid. Bearing in mind, the aforesaid principle of law, I proceed to consider the rival submission.

Putting the condition of experience for participation in the auction for the settlement of the largess, as a rule, cannot be said to be perse arbitrary. It shall depend upon the facts and circumstances of each case. Requirement of experience for settlement of largess, consisting obnoxious or dangerous material or for that matter, contract of work requiring special knowledge or expertise, may not be arbitrary or unreasonable. However, in a case where settlement is made on outright basis, pertaining to article which is not obnoxious, offensive or dangerous, putting condition of experience limiting the disposal of largess to limited number of people leads to avoidance of healthy competition, affecting the revenue and depriving the other persons to participate in sharing the wealth of motion. In my opinion it shall be arbitrary.

Here, in the present ease, the terms and conditions of experience has been laid in relation to fishing operation. The same in my opinion, cannot be considered to be either dangerous obnoxious or offensive. The respondents seek to justify the incorporation of experience cluase on the ground that an experienced person will necessarily possess infra structure on that the same can be employed by the fishermen leading to catch of large amount of fish, which shall give engagement of fishermen for more number of days. The object sought to be achieved by the respondents if laudable. However, in my considered opinion, merely putting experience clause in the auction notice shall not achieve the object. In the last year settlement was made in favour of an experienced person but the record of the Nigam shows that the total catch was reduced from 3424.33 MT to 2986.51 I.M.T. In my opinion, the respondent can have very well said in the terms and conditions of the auction notice itself that only those contractors who undertake to give employment to the fishermen for a fixed number of days and possessing all necessary infra structure the details whereof could have been given in the auction notice itself like, equipment for fishing, preservation, storage and transportation, can only be eligible to participate in the auction. An experience person may have knowledge of the application of tools of fishing, the requirement and technique of preservation and the needs of transportation but there is no guarantee that the experience person do all infra structure for the same. As held earlier, the object which the corporation projects to achieve may be loudable by putting the experience clause in the auction notice, the same cannot be achieved.

In my opiniuon, it can be achieved only by giving in detail the equipment necessary for efficient fishing operation and all other incidental things. Experience caluse itself cannot achieve the object which the respondents seek to achieve and as such, providing experience clause in the terms and condition of the auction notice as a condition of eligibility is arbitrary. Once it is held so, the same is violative of Article 14 of the Constitution of India, and fit to be struck

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down on this ground alone.

While resisting the prayer of the petitioner the respondents contend that incorporation of experience clause in the auction notice is in the realm of policy and is it for the respondents Nigam to decide the same and it is not for the court to direct and sermonize the Nigam to adopt a particular policy decisions which the court feels to he proper. In the submission of the learned counsel for the respondents, the court cannot strike down a policy decision because it feels that another policy decision would have been fairer, wiser or more scientific or logical. I have my own doubt, about the stand of the respondents that eligibility condition in the auction notice conies in the realm of policy decision but for the purpose of this case, I proceed on the assumption that it is so, even then the same is not beyond the scope of judicial review. In my opinion, the court can interfere if the policy decision is petently arbitrary, discrinatory, unreasonable of malafide.

Here in the present case. I have held that the condition of experience is arbitrary and even if it construed as policy decision, the same is fit to be interfered with by this court. Reference in this connection can be made to a decision of this Court in case of Adarsh Matsyodog Sakhari Sanstha Ltd. Vs. M. P. Rajya Matsya Vikas Nigam and others 1995 J.L.J. 682, wherein this court held as follows:-

15. Having given my anxious consideration to the points raised, I do not have the slightest hesitation in holding it, as a general rule, a Court cannot interfere with the administrative policy of the Government or the Statutory Corporation or the Authorities which are State within the meaning of Art. 12 of the Constitution of India but the exceptions to the aforesaid general rule have been recognised by the Courts viz. where the fundamental right of an individual is affected or some constitutional provision is violated, or where the policy is against public interest or the same is arbitrary or unreasonable, to quote a few. In such a situation judicial review of even policy decision is permissible.

In my opinion, the condition of experience in the acution notice is also discriminatory, and consequently the petitioner is deprived of his fundamental right to trade and business. In the present case, the settlement is restricted only to experienced person. For the settlement like the present one, the experience has no nexus to the object sought to be achieved. In fact respondents do not contend that ''experience" itself shall achieve the object but it seeks to explain the experience person shall necessarily have infra structure and attending equipments for efficient fishing and transportation. I fail to understand why the Nigam seeks to depend upon hypothesis than to lay down the condition precisely which it considers necessary to achieve the desired object. In my opinion, the object sought to be achieved, can be very well achieved by prescribing, in detail, the requirement with precision.

It is stated that in the year 1994-95 the total weight of fish catch was 3424.35 M.T. whereas in the year 1995-96 it was 2986-511 M.T. The figure referred to

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above exposes the case of respondents. In the year 1995-96 the settlement was made with an experienced contractor and the same led to reduction in total catch by about 440 M.T. Thus, limiting only experienced person to participate in the acution did not guarantee achieving the object which the respondents Nigam projected to achieve.

As a general rule, person having experience, and having no experience may constitute different class and different treatment can be meted out to them but for the settlement of the nature in question, the classification is unreasonable and therefore, the petitioner''s right to perticipatc in the auction results into hostile discrimination. Reference in this connection can be made to judgment of the Apex Court in the case of Rashihari Pande etc. Vs. State of Orissa AIR 1969 S.C. 1001, where it has been held as follows:

19. The scheme adopted by the Government first of offering to enter into contracts with certain named licensees, and later inviting tenders from licensees who had in the previous year carried out their contracts satisfactorily is liable to be adjudged void on the ground that it unreasonably excludes traders in Kendu leaves from carrying on their business. The scheme of selling Kendu leaves to selected purchasers or of accepting lenders only from a specified class of purchasers was not intergrally and essentially'' connected with the creation of the monopoly was not on the view taken by this Court in Akadasi Padhan Vs. State of Orissa, protected by Article 19(6)(ii): it had therefore to satisfy the requirement of reasonableness under the first part of Article 19(6). No attempt was made to support the scheme on the ground that it imposed reasonable restrictions on the fundamental rights of the traders to carry on business in Kendu leaves. The High Court also did not consider whether the restrictions imposed upon person excluded from the benefit of trading satisfied the test of reasonableness under the first part of Article 19(6).

It is worth mentioning here that the bid amount for the same reservoir for the year 1995-96 was Rs. 1.78 crore where as in the present year it has been reduced to 1.45 crore. The upset price fixed by the respondents Nigam is Rs. 1.64 crore. According to the petitioner it has resulted into no competition at all, leading to loss of revenue. It is the stand of the petitioner that respondent no. 2 the highest bidder and another bidder are employer and employee and inspite of the fact that the settlement is for 5 years the bid amount has been reduced by about more than 30 lacs from the last year. It is contended by the petitioner that had the Nigam injected competition, the bid amount could have been higher. Shri Sexena, counsel for respondent no. 2 seeks to explain the same on the ground that catch of the fish was less in the year 1995-96 and taking that into consideration bid amount of respondents no. 2 was lower.

Shri Singh, appearing on behalf of respondents no. 1 however, submits that the Nigam has, till dale not accepted the offer of respondents no. 2 and as such. It would be futile on pari of this court to go into the question of bid amount. True it is that the Nigam has the right to reject the bid of respondent No. 2 but certainly

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that can be taken into consideration to determine as to whether the object which the Nigam sought to achieve has been achieved. Limiting only experienced person to participate in the bid has definately led to avoidance of competition. This, as held earlier is discriminatory and arbitrary. According, the impugned condition of experience is fit to be struck down.

Once it is held that the terms and condition of the auction notice is arbitrary the petitioner fundamental right of trade and business, as guaranteed under Art. 19 (1) (g) of the Constitution of India, plainly violated. The Apex Court had the occassion to consider this question in a converse situation in the case of Hans Raj Kehar and Others Vs. State of Uttar Pradesh and Others, wherein it has been held as follows:-

8. The fact that some others have also been enabled to obtain permits for running buses cannot constitute a violation of the appellants right under the above two clauses of Article 19 of the Constitution. The above provisions are not intended to grant a kind of monopoly to a few bus operates to the exclusion of other eligible persons. No right is guaranteed to any private party by Article 19 of the Constitution of carrying on trade and business without competition from other eligible persons. Clause (g) of Article 19(1) gives a right to all citizens subject to Article 19(6) to practise any provision or to carry on any occupation, trade or business. It is an enabling provision and does not confer a right on those already practising a profession or carrying on any occupation, trade or business to exclude and debar fresh eligible entrants from practising that profession or from carrying on the occupation trade or business. The said provision is not intended to make any profession, business or trade the exlcusive preserve of a few persons. We, therefore find no valid basis for holding that the impugned provisions are violative of Article 19.

Shri Singh appearing on behalf of respondent no. 1 submits that in view of the terms and condition of the auction notice settlement has to be made in favour of the specified individual and the same is permissible. In support thereof he placed reliance in the Judgment of the Apex Court in the case of Madhya Pradesh Ration Vikreta Sangh Society and Others Vs. State of Madhya Pradesh and Another, . My attention has been drawn to the following passage of the said Judgment which reads as under :-

7. As already stated, the court has found in the Sarkari Sasta Anaj Vikreta Sangh case (supra) the entire system of distribution of food stuffs had collapsed and had become wholly unworkable due to flagrant violations of the provisions of the Control Order by the retail dealers. The action of the State Government in entrusting the distribution of foodstuffs to consumers'' co-operative socieites, though drastic, was an inevitable step taken in the interests of the general public. The State Government was not bound to give the fair price shops to the retail dealers under a Government scheme. The Governmental action in giving preference to consumers co-operative societies cannot be construed to be arbitrary, irrational or irrelevant. The impugned scheme does not confer arbitrary

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or unanalyzed power on the Collector in the matter of grant of refusal of application for appointment as agent for the purpose of running fair price shops.

In the aforesaid case the retail dealers were not exuded from consideration and the Supreme Court, itself cautioned that the position would have been different if there was a monopoly created in favour of the latter. The scheme only envisages a rule of preference. The formulation of the scheme does not exclude the retail dealers from making an application for appointment as agents". However in the present case the settlement is canalised to experience person. In that view of the matter the authority relied on by the learned counsel is clearly distinguishable. The said authority is further distinguishable on the ground that the preference given to the co-operative societies for distribution of food stuffs was not considered to be arbitrary, wherein the present case I have hold it be so.

Here in the present case, largess is to be settled in terms of the auction notice in favour of the specified individual, i.e. person having experience in a large reservoir. Canalization of a particular business in favour of specified individuals can be held as reasonable, when wider interest of the community is concerned viz. distribution of essential commodities affected by black marketing, profiteering, hoarding or if the business affects, economy of a country but where there is nothing obnoxious in the nature of business itself, granting of largess to an specified individual, cannot be held to be reasonable. Reference in tin''s connection can be made to a constitution Bench decision of the Apex Court in the case of Rashid Ahmed vs. The Municipal Board. Kairana 1950 SCR 571. My attention has been drawn to the following passage of the Judgment which reads as under:-

Acting upon that provision, the respondent Board has granted monopoly to Habib Ahmad and has put it out of its power to grant alicense to the petitioner to carry on wholesale business in vegetables either at the fixed market place or any other place with in the municipal limits of Kairana. This certainly is much more than reasonable restricitions on the petitioner as are contemplated by clause (6) of article 19".

Shri Singh then contend that it is permissible for respondent no. 1 to make settlement of the largess in favour of the experience person and in support thereof he placed reliance on a Judgment of the Apex Court in the case of State of M.P. and Others Vs. Nandlal Jaiswal and Others, , as also in the case of Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another, . My attention has been drawn to the following passage from State of M.P. (supra) which reads as follows:-

37. We may also point out that when the State Government is granting licence for putting up a new industry, it is not at all necessary that it should advertise and invite offers for putting up such industry. The State Government is entitled to negotiate with those who have come up with an offer to set up such industry.

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My attention has also been drawn to the following passage from the judgment in the case of Ms. Kasturilal (Supra) which reads as under:-

22. But so long as the State action is bona fide and reasonable, the Court will not interfere merely on the ground that no advertisement was given or publicity made or tenders invited. Here, the 2nd respondents approached the State for the purpose of setting up a modern factory for manufacture of resin, furpentine oil and other derivatics and asked for allocation of resin and the State, with a view of offering an incentive to the 2nd respondents to set up the factory, made the impugned order awarding the tapping contract in respect of these blazes to the 2nd respondents as a part of a package deal. We have already pointed out and we need not repeat again, the impugned Order was reasonable and in the interest of the State and in the circumstances, were are clearly of the view that it cannot be assailed as invalid merely becuase no advertisements were issued inviting offers for setting up a factory and taking the tapping contract as an intergral part of the transaction.

It is well settled that statutory corporation can decide for canalization of a particular business in favour of specified individuals but the same has to be limited in case where vital interests of the community are concerned. As held earlier putting an experience clause without anything more in the auction notice in no way serves the interest of the community, which was not the situation in the case of Kasturilal (supra) and this fact makes the authority clearly distinguishable.

Shri Singh then submits that in matter of grant of largess the decision of the authority has primary importance and the same is not subject to judicial review. In support of the aforesaid submission, learned counsel has placed on the judgment of the Supreme Court in the case of Tata Cellular Vs. Union of India, and my attention has been drawn to the following passage which reads as under:-

85. It cannot be denied that the principles of judicial review would apply to the exerise of contractual powers by Government bodies in order to prvent arbitrariness or favoritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article if the Government tries to gel the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exerise of that power will be struck down.

Yet another decision on which learned counsel has placed reliance is the Judgment of the Apex Court in the case of Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, and my attention has been

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drawn to the following passage which reads as under :-

20. But once the procedure adopted by an authority for purpose of entering into a contract is held to be against the mandate of Art. 14 of the Constitution the Courts cannot ignore such action saying that the authorities concerned must have some latitude or liberty in contractual matters and any interference by this Court amounts to encroachment on the exlucsive right of the executive to take such decision.

In the present case, as I have held earlier, the terms of the auction notice has been found to be arbitrary and discriminatory and accordingly the power of judicial review is not excluded. The authority of the Apex Court referred to above itself has said that if the selection or rejection is arbitrary, the Court can interfere, the judgment relied on in no way excludes judicial review in matter of terms of the tender which is either arbitrary, discriminatory or against public interest. Thus, the authority relied on by the learned counsel is clearly distinguishable.

True that in matter of grant of largess the decision of an authority desrves due weight but they are not the final arbiter in the matter. In case the decision of the authority is found to he unreasonable discriminatory or arbitrary, the same is subject to judicial review. As 1 have held earlier the terms or experience is patently arbitrary and discriminatory and threfore same is subject to judicial review and fit to be intercourse by this Court in its writ jurisdiction.

As a last straw the respondents, seek to resist the prayer of the petitioner on the ground that it is not a bona fide writ petition. It is submitted that the petitioner financial health does not permit expenditure of such a huge amount for settlement. To put the record straight, it is stated by the petitioner that he is prepared to take the settlement for Rs. 1.92 crore which is 47 lakhs more than offered by respondent no. 2. In support of the assertion of respondents that petitioner financial health does not permit expenditure of such a huge amount. Income tax returns filed by the petitioner has been shown to me. The respondents in the auction notice has put a condition of deposit of Rs. 72.60 lakhs as earnest money. If the petitioner financial health did not permit investment of a huge amount he ought not to have deposited the said amount but whether he could or could not have deposited the earnest money or the bid money is in the realm of surmises and conjecture and once, it is held that terms and condition of experience is arbitrary the writ petition cannot be dismissed on the ground urged by the respondents.

The aforesaid discussion, leads me to conclude that the terms and conditions of the auction notice requiring experience in fishing is arbitrary and discriminatory and the same is fit to be struck down. I do it accordingly. Condition no. 1 of the auction notice being arbitrary, second condition that after fulfilling the condition of experience, one can deposit the earnest money, consequently falls to ground.

In the result, the petition is allowed and the terms and conditions of auction

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notice, referred to above, are quashed. The declared auction held on the basis of such an illegal tender notice is consequently vitiated. However, in the facts and circumstances of the case there shall be no order as to cost.

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