(2001) 01 GAU CK 0036

In the Gauhati High Court

Case No : Writ Petition (C) No. 450 of 2000

Arundhuti Cables APPELLANT

Vs

State of Tripura and Others RESPONDENT

Date of Decision : 25-01-2001

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2001) 1 GLT 295

Hon'ble Judges : A.K. Patnaik, J

Bench : Single Bench

Advocate : Mr. S. Talapatra and Ms. P. Da, for the Appellant; Mr. U.B. Saha and J. Mazumdar, for the Respondent

Final Decision : Partly Allowed

Judgement

1. In this application under Article 226 of the Constitution of India, the petitioner has prayed for a direction on the respondents-1 and 2 to declare the tender of the respondent No. 3 as informal and to reject the same forthwith, and to direct the respondents-1 and 2 to issue supply order in favour of the petitioner-firm at the rate quoted by the petitioner-firm in respect of items for which Notice Inviting Tender No. 03/2000.01 was issued by the respondent No. 2.

2. The case of the petitioner is that it is a Small Scale Industrial Unit (for short, "SSI Unit") located in the State of Tripura. By a notification dated 10.8.2000, the Government of Tripura in the Industries & Commerce Deptt., laid down a policy administering/ allowing 15% price preference to local SSI Units as per Tripura Incentive Scheme, 1995, while making Government purchase programme. The petitioner-firm being an SSI Unit located in Tripura is entitled to the said 15% price preference as per Tripura Incentive Scheme, 1995 in all purchase made by the Government. A notice inviting tender No. 03/2000-01 was issued by the Executive Engineer, Electrical Stores Division, respondent No. 2, inviting tenders for supply of 4 mm2 and 2.5 mm2 PVC cable. The petitioner-firm which manufactures such PVC cable in the State of Tripura, submitted its tender. The

respondent No. 3 which also manufactures such PVC cable in the State of West Bengal also submitted its tender. The Tenders were processed at different stages and were finally considered by the Supply Advisory Board, (for short, "SAB"), and by Memorandum dated 22.7.2000, the SAB recommended that the entire quantity of 1000 km of 4 mm3 PVC cable be supplied by the respondent No. 3 at the rate of Rs. 3842.48 per km. and that 250 km of 2.5 mm2 PVC cable be also supplied by the said respondent No. 3 at the rate of Rs.2731.76 per km and 750 km of 2.5 mm2 PVC cable be supplied by the petitioner at the rate of Rs.3130.00 per km. Apprehending that the orders for supply of PVC cable will be placed on the respondent No. 3 on the basis of the said recommendations of the SAB, the petitioner has moved this court i the present writ petition under Article 226 of the Constitution for appropriate reliefs.

3. Mr. S. Talapatra, learned counsel appearing for the petitioner, submitted that the tenderers were required to quote/mention the excise duty payable in their tenders. The petitioner being an SS1 Unit was entitled to some exemption from excise duty and did not mention the same in the tender papers, but the respondent No. 3 though liable to pay excise duty did not mention the excise duty payable in the tender papers. But when the authorities considered the tenders submitted by the petitioner-firm and the respondent No. 3, excise duty (c) 16% was initially loaded on the rate quoted by the respondent No. 2 on presumptive basis by the Executive Engineer, but thereafter the said rate was reduced to 9.6% by the Additional Chief Engineer. According to Mr. Talapatra, this procedure adopted by the authorities to determine the excise duty payable by the respondent No. 3 when the respondent No. 3 had ''not mentioned the same in its tender papers was arbitrary, unreasonable and unfair. According to Mr. Talapatra, the tender submitted by the respondent No. 3 should have been out right rejected as it had not quoted the excise duty payable in its tender papers. He further submitted that under paragraph 2(vi) of the notification dated 10th August, 2000 of the Government of Tripura, Department of Industries & Commerce, if the capacity of the lowest quoting local SSI Unit to supply adequate quantities of tendered item within time-frame of supply is doubtful, 25% of the total quantity of the item concerned can be purchased from outside firms and not otherwise. The rate quoted by the petitioner-firm for 2.5 mm2 of PVC cable was the lowest after applying 15% price preference and the petitioner-firm had the capacity of supplying the entire 1000 km of PVC cable during the time-frame stipulated in the notice inviting tender. Hence, the SAB should have recommended for supply of the entire 100 km. of 2.5 mm2 PVC cable by the petitioner. But instead, the SAB recommended that 750 km of such -2.5 mm2 PVC cable be supplied by the petitioner-firm and the remaining 250 km of 2.5 mm2 PVC cable be supplied by the respondent No. 3 Mr. Talapatra cited the decision of the Supreme Court in Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, for the proposition that the court can examine the decision-making process in a case relating to award of contract and interfere If it is found vitiated by mala fide, unreasonableness and arbitrariness. According to Mr. Talapatra,

since the decision-making process in the present case is awarding. the contract for supply of PVC cable to the respondent No. 3 is vitiated by mala fide, unreasonableness and arbitrariness, this is a fit case in which the court should interfere with the recommendations of the SAB under Article 226 of the Constitution of India.

4. Mr. UB Sana, learned Senior Government Advocate, Tripura, assisted by Mr. Jayanta Mazumdar, also relied on the aforesaid decision of the Supreme Court in the case of .Air India Ltd. v. Cochin International Airport Ltd. (supra) in support of his submission that even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 of the Constitution with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. He also relied on the decision of the Supreme Court in M/s. G. J. Fernandez Vs. State of Karnataka and others, for the proposition that if the authorities relax a particular condition in the tender notice in favour of one party but do not relax the condition in favour of another party then perhaps the court will interfere on the ground of discrimination and violation of Article 14 of the Constitution, but where the parties submitting tenders have been treated equally with regard to relaxation of condition in the notice inviting tender, the court will not interfere for the purpose of giving immunity to one party from competition. Mr. Saha submitted that in the present case while the respondent No. 3 did not mention the excise duty that was payable on the supply of PVC cable by it, the petitioner also did not mention the sales-tax that was payable on the supply of PVC cable by the petitioner-firm in the tender papers, and yet the case of the petitioner has been considered for supply of PVC cable and its tender has not be rejected. He further submitted relying on the averments in the counter-affidavit filed on behalf of respondents 1 and 2 that both the parties were asked whether they could reduce their quoted rates in their tenders, but the parties declined to reduce the quoted rates in their tenders In their letters dated 24.6.2000 and 23.6.2000. But the respondent No. 3 informed in his letter dated 23.6.2000 that the excise duty payable on the supply of PVC cable by the respondent No. 3 would be 9.6% on ex-factory price. According to Mr. Saha therefore the authorities have not rejected the tenders of either the petitioner or the respondent No. 3 for not mentioning the rate of sales-tax and the rate of excise duty and have treated them equally and tried to negotiate with the petitioner and the respondent No. 3, and it was at that stage of negotiation that the respondent No. 3 informed the authorities in its letter dated 23.6.2000 that the rate of excise duty payable on supply of PVC cable would be 9.6% on ex-works price. Mr Saha further submitted that it would be clear from the recommendations of the SAB in its Memorandum dated 22.7.2000, a copy of which has been annexed to the counter-affidavit of respondents-1 and n2 as Annexure-R/7, that the rate quoted by the respondent No.3 for supply of 4mm2 PVC cable was Rs. 3842.48 per km whereas the rate quoted by the petitioner-firm was Rs. 4473.00 per km and -the said rate offered by the petitioner-firm for 4 mm2 PVC cable was higher than that

of the respondent No. 3 even after allowing the price preference of 15% to the petitioner-firm. He explained that it was for this reason that the SAB has observed in its recommendation that the rate quoted by the petitioner-firm for 4 mm2 PVC cable outside the price preference zone, and for this reason the petitioner -firm has not been recommended for award of any supply of 4mm2 PVC cable. Mr Saha submitted that the petitioner-firm has been awarded the contract for supply of 75% of the total quantity of 1000 km of 2.5 mm2 PVC cable and this has been done keeping in mind various relevant factors. He further submitted that it would be clear from the recommendations of the SAB that the rate at which supply of 2.5 mm2 PVC cable has to be made by the respondent No. 3 is Rs. 2731.76 per km whereas the rate at which supply of 2.5 mm2 PVC cable has to be made by the petitioner-firm is Rs. 3130.00 per km. Hence, the authorities took into consideration the amount that the Department will save by supply of 2.5 mm2 PVC cable by the respondent No. 3. This was one of the relevant factors which was taken into consideration by the SAB. He further pointed out that in clause-29 of the notice inviting tender it was stipulated that the whole supply may be splitting up between two or more Contractors. According to Mr. Saha, since this clause-29 of the notice inviting tender has not been challenged by the petitioner, it is now not open for the petitioner to take a plea that the entire contract for supply of 2.5 mm2 PVC cable should be made by the petitioner-firm. Mr. Saha submitted that the facts of the present case would show that the authorities have acted in a fair and reasonable manner and in the public interest and this is not a fit case in which the court should interfere with the recommendations of the SAB under Article 226 of the Constitution. He cited the decision of the Supreme Court in Raunaq International Ltd. v. IVR Construction Ltd. AIR 1999 SC 292 , in which the Supreme Court has deprecated intervention by courts in contractual matters saying that such intervention causes considerable delay resulting in escalation of costs of the work in question. He also cited the decision of the Orissa High Court in NU Calcutta Construction Company Vs. National Aluminium Company Ltd. and Others, for his submission that there are inherent limitations in exercise of power of judicial review and while adjudicating the constitutional validity of an executive decision relating to economic matter certain measure of freedom or play in the ''joints'' to the executive should be allowed. He also relied on the decision of the Supreme Court in Tata Cellular Vs. Union of India, in support of his argument that a larger amount of freedom should be given to the administrative authority in the matter of award of contract and that a lowest tenderer is not entitled to award of contract as a matter of course.

5. I am not impressed with the submission of Mr. Tralapatra, learned counsel for the petitioner, that the tender of the respondent No. 3 should have been rejected out-right by the authorities as the respondent No. 3 had not mentioned the excise duty payable in its tender. If the respondent No. 3 had not mentioned the excise duty payable in its tender, the petitioner had also not mentioned the sales-tax payable in its tender, and yet the authorities have considered not only the

tender of the respondent No. 3 but also the tender of the petitioner-firm. In GJ Fernandez v. State of Karnataka (supra), the Supreme Court has held that it is not that the authority cannot deviate from conditions in the tender notice at all in any situation, but that any deviation, if made, should not result in arbitrariness or discrimination. In the said decision, the Supreme Court has further held that the rule laid down by the Supreme Court in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, would be readily applied by courts to a case where a person complains that a departure from the qualifications has kept him out of the race, but cannot be applied to a case where a person approaches the court only to gain immunity from competition. In the instant case, it is not the case of the petitioner that it has been kept out of consideration at all by the authorities while the respondent No.3 has been kept for consideration by the authorities as it appears from the recommendations of the SAB, as discussed above, that the tenders of the petitioner-firm and the respondent No.3 have been considered by the authorities, the petitioner therefore cannot complain of discriminatory, unfair and unreasonable treatment by the authorities with regard -to award of contract in question. On the other hand, it appears that only the petitioner and the respondent No. 3 have been considered for award of contract for supply of PVC cable. The petitioner''s attempt in this writ petition is more or less an attempt to exclude the only other tenderer, respondent No. 3 from consideration and to gain immunity from competition. This is what exactly the court will not allow in a writ petition under Article 226 of the Constitution as has been held by the Apex Court in the said case of GJ Fernandez v. State of Karnataka (supra).

6. That apart in the decision of the Supreme Court in Air India Ltd. v. Cochin Internationa! Airport Ltd. (supra), on which great reliance has been placed by Mr. Talapatra, it has been held that even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Supreme Court in particular observed that the court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not and only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene. In the instant case, so far as supply of 4 mm2 PVC cable is concerned, the rate quoted by the respondent No.3 was Rs. 3842.48 per km, and the rate quoted by the petitioner-firm was Rs. 4473.00 per km, and the said rate quoted by the petitioner-firm was 16.4% above the rate quoted by the respondent No.3 and, therefore, was more than 15% of the price preference allowed to the petitioner-firm as an SS1 Unit of the State of Tripura under the notification dated 10th August, 2000 of the Department of Industries & Commerce, Govt. of Triprua. The recommendations of the SAB to award the entire contract for supply of 4 mm2 PVC cable in favour of respondent No. 3, therefore, can be held to be one made in the public interest, and the court cannot interfere with the said recommendations under Article 226 of the

Constitution even assuming that there was any defect in the decision-making process as contended by Mr Talapatra.

7. Coming now to supply of 2.5 mm2 PVC cable, after allowing the price preference to the petitioner-firm, there is no dispute over the fact that the price quoted by the petitioner-firm was lower than that of respondent No. 3. In fact, the SAB has observed that the rate offered by the local SSI Unit, namely, the petitioner-firm for supply of 2.5 mm2 PVC cable was (+) 14.6% higher over the lowest outside rate quoted by the respondent No. 3 and was within the price preference zone. In paragraph-2(vi) of the notification dated 10th August, 2000 of the Government of Triprua In the Department of Industries & Commerce, It is stipulated;

"Local SSI Units whose rates have been approved should be given orders as per their capacity to produce. In case, the rate quoted by firms from outside the State are iower than the rate quoted by local SSI Units (before applying 15% price preference). 25% of the total quantity may be purchased from outside firms and 75% from SSI Units whose rates are approved after applying 15% price preference and applying other conditions like quality, capacity, etc."

It is clear from the aforesaid stipulation in the said notification that in case the rates quoted by firms outside the State are lower than the rates quoted by local SSI Units, before applying 15% price preference, 25% of the total quantify may be purchased from outside firms and 75% from SSI Units whose rates are approved after applying 15% price preference and applying other conditions like quality, capacity, etc. Hence, capacity of local SSI Unit is to be considered before taking a decision to place order for 25% of the total quantity to the outside firms even where the rates quoted by firms outside the State are lower than the rates quoted by local SSI Units before applying 15% price preference. From the recommendations of the SAB in the Memorandum dated 22.7.2000 and from the counter-affidavit filed on behalf of respondents 1 and 2, it appears that the capacity of the petitioner-firm for supply of 2.5 mma PVC cable has not been taken into consideration by the authorities while recommending purchase of 25% of the total quantity of the said 2.5 mm2 PVC cable in favour of respondent No. 3 which was an outside firm. Mr. Saha, however, submitted relying on the averments in the counter-affidavit filed by the respondents 1 and 2 that one of the relevant factors which was taken into consideration was the fact that the respondent No. 3 had quoted a lower rate than the petitioner firm for supply of 2.5 mm2 PVC cable, and hence it was in the public interest that 25% of the supply was recommended to be made by the respondent No. 3. According to Mr Saha, in paragraph-2(vi) of the aforesaid notification the stipulation ''other conditions like quality, capacity, etc.'' was to be taken Into consideration by the authorities, and the word ''etc.'' will take within its sweep factors such as lower rate quoted, by outside firms for the purpose of reducing the expenses of public exchequer. I am unable to accept the said submission of Mr. Saha. The notification dated 10th August, 2000 issued by the Government of Tripura, Department of Industries & Commerce for allowing 15% price preference to local SSI Units obviously has been issued in the public interest because the Government of Tripura was of the view that the SSI Units in the State of Tripura should be encouraged by allowing 15% price preference in the public interest. It is true as has been submitted by Mr. Saha that saving of expenditure on any purchase by the Government is in the public interest, but saving of expenditure from the public exchequer is not the only public interest considered by the Government while laying down its policy. It is clear from the notification dated 10th August, 2000, that the Government has considered for providing incentives to promote/encourage establishment of local SSI Units in the State of Tripura as part of public interest and has for this reason allowed 15% price preference to the local SSI Units while making Government purchase. Further, a reading of the aforesaid paragraph- 2 (vi) of he said notification quoted above would show that 25% of the total quantity may be purchased from outside firms if their rates are lower than the rates quoted by local SSI Units before applying 15% price preference, and applying other conditions like quality, capacity, etc. Lower rate quoted by outside firms has been taken care of in the first limb of the aforesaid paragraph 2(vi) of the notification and the said paragraph-2(vi) of the notification makes it abundantly clear that even where the rates quoted by the firms outside the State are lower than the rates quoted by local SSI Units before applying 15% price preference, other conditions like quality, capacity, etc. are to be taken Into consideration. ''Therefore, the word "etc." will not take within its sweep the lower rate quoted by the firms outside the State but may include other factors including quality and capacity of the local SSI Units.

8. In the result, I quash the recommendation of the SAB in so far as award of contract for supply of 250 km of 2.5 mm2 PVC cable in favour of respondent No. 3 is concerned, but I am not inclined to interfere with the other recommendations of the SAB. Since a fresh decision on the award of 25% of the total quantity of 2.5 mm2 PVC cable, i.e., 250 km will involve an interpretation of the policy of the Government of Tripura in the notification dated 10.8.2000 of the Department of Industries & Commerce of the Government of Tripura which is not the purchasing Department, I direct that the Secretary, Power Department, Government of Tripura, will within 15 days of the receipt of a certified copy of this judgment and order from the petitioner place the matter before the Chief Secretary, Government of Tripura, who will decide the matter afresh after taking into consideration the policy laid down by the Government in the notification dated 10.8.2000, and in particular paragraph-2(vi) thereof, and after taking into consideration all relevant factors including the capacity of the SS1 Unit of the petitioner. Such fresh decision be taken by the Chief Secretary within one month from the date the file is placed before him by the Power Department.

9. With the aforesaid observations and direction, the writ petition is allowed to the extent indicated above. Interim order passed by this court on 25.9.2000 stands vacated. Considering however the entire facts and circumstances of the case, 1 leave the parties to bear their respective costs.

