
(2001) 04 MP CK 0060

In the Madhya Pradesh High Court

Case No : Writ Petition No. 1309 of 2001

B.D. Bhanot and Sons and another

APPELLANT

Vs

M.P. State Mining Corporation, Bhopal

RESPONDENT

Date of Decision : 20-04-2001

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2001) 3 MPLJ 264

Hon'ble Judges : Dipak Misra, J

Bench : Single Bench

Advocate : R.N. Singh, with Arpan Pawar, for the Appellant; N.S. Kale, with Greeshm Jain, for the Respondent

Final Decision : Dismissed

Judgement

Dipak Misra, J.

Invoking the extraordinary jurisdiction of this Court the petitioners have prayed for issue of a writ of certiorari for quashment of the Notice Inviting Tender (in short "NIT") dated 4-3-2001, Annexure P/6, published by the respondent and further to restrain the said respondent from operating new sand mines shown in Annexure P/7 and from allocating the same to any other person, firm or company. There is also a prayer to command the respondent to allot the new sand mines in favour of the petitioners.

The facts as have been undraped are that the petitioner No. 1 is a partnership firm and is primarily engaged in the business of extraction of minor minerals from State owned mines and the petitioner No. 2 is one of its partners. The respondent, the M.P. State Mining Corporation (hereinafter referred to as "the Corporation") owns various mines all over the State. In the month of October, 2000 the respondent invited tenders in sealed cover for extraction of sand from the mines owned by it in the district of Jabalpur. The petitioner-firm purchased a tender form and upon perusal of the same got attracted by Clause 15 of the

tender conditions. Being persuaded by the said stipulation the petitioner-firm submitted its tender and eventually became the successful tenderer. The tender was finalised in favour of the petitioner-firm and the respondent issued a demand letter to it on 1-11-2000 wherein a sum of Rs. 43,87,993:75 was required to be deposited towards security and instalment! The petitioner-firm made the deposit as required and its contract commenced from 8-11 -2000 for a period of one year i.e. upto 7-11 -2001. The work order issued by the respondent in favour of the petitioner has been brought on record as Annexure P-2. After issuance of the work order the petitioner-firm started operating the sand mines allotted to it by the respondent. Thereafter the petitioner came to know that certain new mines situate near the mines of the petitioners were lying unoperated. Invoking the stipulation enshrined in Clause 15 of the tender conditions the petitioners applied to the respondent to include the new sand mines in the group which had already been allotted to the petitioner. It is put forth in the petition that in the agreement executed between the firm and the respondent Clause 15 of the tender conditions has been included in entirety. While operating the sand mines the petitioner faced number of difficulties and represented to the respondent for resolving the same and also to consider the proposal of merger of the new sand mines with the sand mines which had already been granted in favour of the petitioner. It is set forth that instead of considering the representation of the petitioner, respondent in complete disregard and contravention of Clause 15 of the tender conditions and agreement started operating new sand mines by its own means and machinery as a result of which the business of the petitioner-firm was affected. It is pleaded that all the new sand mines are situated near Jabalpur and Sehora Road, and the sand mines of the petitioner-firm from S. No. 43 to 59 are also situated near the new sand mines. Without paying any heed to the representation of the petitioners the respondent issued a NIT on 4-3-2001 which has been published in the daily "Nav-Bharat" on 4-3-2001, Annexure P-6. The petitioners purchased the tender form to verify whether if the said sand mines shown in the NIT are the same. As per NIT tender forms were to be opened on 13-3-2001. It has been averred that 5 out of 6 new sand mines have become operative from 9-2-2001 during the contract period of the petitioner-firm but instead of settling the same with the petitioner steps have been taken by the respondent to grant them inviting tenders, which is violative of the terms and conditions of the agreement. It has also been averred that the Corporation should have decided the representation of the petitioners before publishing the NIT. It is set forth that new sand mines, as shown in the tender form, Annexure P/7, are all situated near the sand mines of the petitioner-firm and, therefore, the petitioner is entitled to get them as per the conditions of the tender as well as the agreement and the action of the Corporation, being de hors the tender conditions, is unsustainable. With the aforesaid averments prayer has been made as has been indicated hereinabove.

A return has been filed by the respondent contending, inter alia, that the writ petition is liable to be dismissed on the ground of alternative remedy inasmuch

as the Clause 18 of the agreement makes a provision for adjudication of dispute by arbitration as per the Arbitration and Conciliation Act, 1996. It is pleaded that in respect of the same mines in question a tender notice was invited on 14-10-2000 and one Anand Khanuja was allotted the said sand mines. Being aggrieved by certain action of the respondent the said Anand Khanuja filed a writ petition No. 6758/2000 and this Court by order dated 28-11-2000 passed an order of status-quo and thereafter by order dated 12-12-2000 directed the said Anand Khanuja, the petitioner therein, to deposit an amount of Rs. 21,73,750/-, but as he failed to deposit the said amount this Court by order dated 16-1-2001 vacated the order of status quo. Under these circumstances the respondent invited fresh tender for grant of lease in respect of the said mines. It is put forth that the petitioner does not have any preferential right on the basis of the agreement. The stand of the petitioner that existing mines of Group No. I are nearer to the mines which are to be settled by the tender has also been refuted. It is put forth that the distance between the two mines is 20 kms. The map showing the distance has been brought on record as Annexure R-2. It is also set forth that the Petitioner has no right to claim allotment of the said sand mines and the Corporation has the full discretion and prerogative to settle the said sand mines with anyone. It has been further pleaded that the petitioner purchased the tender form for the new sand mines (which are called Group II mines) on 9-3-2001 but chose not to participate in the tender proceedings. There is allegation that the petitioner intends to have a monopoly in his favour which is not permissible.

A rejoinder affidavit has been filed by the petitioner highlighting that the respondent being an instrumentality of State cannot conduct itself in an arbitrary manner. It is put forth that the order passed in the writ petition No. 6758/2000 does not render any assistance to the respondent. The distance between the mines has been categorically disputed. It is put forth that the nearest mine is situated at a distance of 5 kms. It has been put forth in the rejoinder affidavit that the respondent has received only a singular offer in respect of the Group II sand mines from one Naval Singh and the same is likely to be accepted. It is set forth that the respondent cannot escape from the commitment made in Clause 15 of the agreement in question.

I have heard Mr. R.N. Singh, learned senior counsel along with Mr. Arpan Pawar learned counsel for the petitioners and Mr. N.S. Kale, learned senior counsel along with Mr. Greeshm Jain, learned counsel for the respondent. It is submitted by Mr. Singh that if Clause 15 is appreciated in proper perspective it would become graphically clear that the petitioner has a right to be allotted nearby mines situated near the mines settled with the petitioner and the Corporation cannot offer to play fast and loose. It is further canvassed by him that because of the incorporation of the said clause in the tender notice the petitioners made the offer and they have a legitimate expectation that the Corporation would act in accordance with the terms and conditions of the agreement and at this juncture the Corporation cannot be allowed to scuttle the legitimate expectation of the

petitioners. It is also submitted by them that the action of the Corporation is not appreciable inasmuch as the Corporation is bent upon accepting the singular tender and the said aspect has not been mentioned in the return to keep this Court in dark.

Resisting the aforesaid submissions it is putforth by Mr. Kale, learned senior counsel for the respondent that Clause 15 of the tender does not confer any absolute right on the petitioners and the contract being not a statutory one, the petitioner cannot approach this Court in a writ petition. It is further putforth by him that as per Clause 18 of the tender the petitioners can invoke the arbitration clause and seek remedy of their grievance. In support of his submission he has placed reliance on the decisions rendered in the cases of Noida Entrepreneurs Association v. U.P. Financial Corporation and Anr., and State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd., .

To appreciate the rival submissions raised at the Bar, I have carefully perused the notice inviting tender, contained in Annexure P/I, It is not disputed at the Bar that same holds the field. Clauses 15 and 18 of the tender notice read as under:--

Submission of Mr. Singh is that as per Clause 15 the petitioners had the legitimate expectation to get the new sand mines allotted in their favour. It is his submission that the Corporation is bound to offer the new sand mines to the petitioners first and on their refusal it has the right to allot the same to someone else. Per contra, it is contended by Mr. Kale that the dispute in question relates to realm of private contract and not in the sphere of statutory contract and, therefore, this Court should be slow to interfere. The learned counsel in this regard has placed reliance on the case of Bridge and Proof Company (India) Ltd., (supra). In the aforesaid case the Bridge and Proof Company (India) Ltd., a public sector Corporation, had entered into a works contract with the Government of U.P. for rehabilitation and improvement of certain stretch of road in Uttar Pradesh. The dispute arose in respect of certain payments. The respondent/company filed a writ petition before the Allahabad High Court with a prayer to issue a writ in the nature of mandamus commanding the Superintending Engineer restraining him from deducting particular sum from certain bills". It was putforth before the Allahabad High Court that the Government may deduct 1% and leave the rest to the respondent and the Sales Tax Authorities. The stand of the company was disputed by the Government raising several contentions and justifying the retention. The High Court did not deal with the contentions but disposed of the writ petition observing that as the Commissioner in his order had accepted the prayer for composition as requested by the petitioner and had directed the deduction of 1% in lieu of 4%, the said amount was to be deducted from the amount required to be paid to the writ petitioner under the bills in question. Feeling aggrieved the State of U. P. had approached the Apex Court. Certain contentions were raised before the Apex Court by the State of U.P. It was submitted by the company that the Government was not concerned with the Sales Tax liability of the respondent as that was a

matter between the respondent and the Sales Tax Department. It was put forth that the obligation of the Government under the contract was only to deduct 4% from the amount payable to the respondent under the contract. It was also stated as the said obligation to deduct has been reduced from 4% to 1% by an order made under the proviso to section 8-D(1) of the U. P. Sales Tax Act, 1948, the Government should deduct only at the rate of 1% and pay the balance of the contract amount to the respondent. After noting down the contentions of the respective counsel the Apex Court in paragraphs 15 and 16 held as under:--

15. In our opinion, the very remedy adopted by the respondent is misconceived. It is not entitled to any relief in these proceedings, i.e. in the writ petition filed by it. The High. Court appears to be right in not pronouncing upon any of the several contentions raised in the writ petition by both the parties and in merely reiterating the effect of the order of the Deputy Commissioner made under the proviso to Section 8-D(1).

Firstly, the contract between the parties is a contract in the realm of private law. It is not a statutory contract, it is governed by the provisions of the Contract Act or, may be, also by certain provisions of the Sale of Goods Act. Any dispute relating to interpretation of the terms and conditions of such a contract cannot be agitated, and could not have been agitated, in a writ petition. That is a matter either for arbitration as provided by the contract or for the Civil Court, as the case may be. Whether any amount is due to the respondent from the appellant-Government under the contract and, if so, how much and the further question whether retention or refusal to pay any amount by the Government is justified, or not, are all matters which cannot be agitated in or adjudicated upon in a writ petition. The prayer in the writ petition, viz. to restrain the Government from deducting a particular amount from the writ petitioner's bill (s) was not a prayer Which could be granted by the High Court under Article 226. Indeed, the High Court has not granted the said prayer.

It is also apposite to state here that their Lordships noted that there was Clause 67 of the contract which provided for settlement of disputes by reference to arbitration. After taking note of the same their Lordships proceeded to lay down as under:--

21. There is yet another substantial reason for not entertaining the writ petition. The contract in question contains a clause providing inter alia for settlement of disputes by reference to arbitration (clause 67 of the contract.) The arbitrators can decide both questions of fact as well as questions of law. When the contract itself provides for a mode of settlement of disputes arising from the contract, there is no reason why the parties should not follow and adopt that remedy and invoke the extraordinary jurisdiction of the High Court under Article 226. The existence of an effective alternative remedy in this case, provided in the contract itself-is a good ground for the Court to decline to exercise its extraordinary jurisdiction of the High Court under Article 226. The said article was not meant to supplant the existing remedies at law but only to supplant them in certain well-

recognised situations. As pointed out above, the prayer for issuance of a writ of mandamus was wholly misconceived in this case since the respondent was not seeking to enforce any statutory right of theirs nor was it seeking to enforce any statutory obligation cast upon the appellants. Indeed, the very resort to Article 226 whether for issuance of mandamus or any other writ, order or direction Wfts, misconceived for the reasons mentioned supra.

At this juncture I may also refer to the decision rendered in the case of Noida Entrepreneurs Association (supra) wherein a dispute was raised with regard to charging of interest at a higher rate by the U.P. Financial Corporation, contrary to the guidelines issued by the Industrial Development Bank of India. After noting down the facts the Apex Court observed as under:--

4. We have heard learned counsel for the appellant. He has taken us through the judgment of the High Court and the other material on record. The High Court declined to exercise its jurisdiction under Article 226 of the Constitution of India on the short ground that the appellant-petitioner was disputing the contractual obligations entered into by the parties under the ordinary law or the contract.

The view taken by the High Court was approved.

The present factual matrix is to be tested on the anvil of the aforesaid enunciation of law. There is no scintilla of doubt that the contract entered into between the parties is not a statutory contract. The petitioner is also not seeking to enforce any statutory obligation. That apart, on a perusal of the Clause 18 it is luminously clear that dispute between the parties can be adjudicated by taking recourse to arbitration. Such a remedy having been provided for in the contract itself, I am of the considered opinion that the, law laid down in the case of Bridge and Proof Company (India) Limited (supra) is squarely applicable. True it is the Apex Court has also observed that a remedy under Article 226 of the Constitution is not meant to supplant the existing remedy of law but only to supplement them on certain well recognised situations, but the present case, in my considered view, does not come under any of those recognised situations. The case at hand is purely for implementing the contractual obligation. Hence, I am not inclined to interfere in exercise of extraordinary jurisdiction of this Court.

At this juncture, I think apposite to advert to another aspect which transpired in course of bearing. In the return filed by the Corporation a silence has been maintained what exactly happened to the notice inviting tender in respect of Group 11 sand mines. From the rejoinder it appears that a singular tender has been received. True it is the petitioner had not submitted his tender though he purchased the tender form. If the petitioner intended to participate in the tender it was obligatory on his part to submit his offer. When a query was made by this Court whether the Corporation should accept a singular bid. it was submitted by Mr. N.S. Kale, learned senior counsel appearing for the Corporation that it is open to the Corporation to accept the singular bid. At this juncture Mr. R.N. Singh, learned senior counsel has submitted that the petitioner has come to learn that

the bid is likely to be accepted by the Corporation to grant a favour in respect of the said tenderer. Mr. Kale took exception to the aforesaid submission and contended that a person while not participating in the tender cannot come to the Court to complain about the act of the Corporation or even make a better offer. The aforesaid submission of Mr. Kale has its justification under certain circumstances. In addition to this it was also put forth by Mr. Kale that this Court should not monitor the functioning of the Corporation and allow the Corporation to run its own business as the authorities of the Corporation are best Judges in this regard. It is not rare that largess of the State and the instrumentality of the State are given for a song. On many occasions it has been noticed that properties worth crores are given at lesser price. True it is this Court should be slow to interfere in the matter of grant of largess unless it is hit by well recognised principles but the contention that the Corporation should be allowed to run its business as it pleases is not acceptable in absolute terms. The Corporation is a public undertaking and if it comes to the knowledge of this Court in a particular case that properties of the Corporation are settled for a song the Court cannot be a silent spectator. Interference at that level would not tantamount to monitoring the affairs of the Corporation. Hence, I find the aforesaid submission of Mr. Kale to be absolutely misconceived. However, at this stage, I am not inclined to exercise the extraordinary jurisdiction as the same tender is not under challenge on that score. However, it is observed that the Corporation while considering the offer and the singular tender would keep in mind whether the Corporation by accepting the said offer would be benefited or if a fresh tender is called. There is possibility of getting better offers. I may repeat at the cost of repetition that the Corporation is the best judge in this matter but while exercising the power the Corporation cannot be oblivious of the public interest which includes in its sweep the augmentation of revenue. This Court expects that Corporation shall be well guided and act as per law and would not function in a capricious manner harbouring the misconception that it can function as it pleases and distribute its largesse as it suits it. It is expected that the Corporation shall act rationally and non-arbitrarily keeping the public interest as a paramount factor.

Resultantly, the writ petition is dismissed without any order as to costs.