

(2015) 08 JH CK 0062

In the Jharkhand High Court

Case No : Writ Petition (C) No. 1192 of 2013

Chandra Sekhar Banerjee and Others

APPELLANT

Vs

Bharat Coking Coal Limited and Others

RESPONDENT

Date of Decision : 14-08-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2015) 4 AJR 770 : (2015) 3 JLJR 574

Hon'ble Judges : Prashant Kumar, J

Bench : Single Bench

Advocate : Shailesh, for the Appellant; Indrajit Sinha and Arpan Mishra,
Advocates for the Respondent

Final Decision : Dismissed

Judgement

Prashant Kumar, J—In this application, petitioners have prayed for following reliefs:

For issuance of an appropriate writ(s)/order(s) direction(s) upon the respondents to show cause as to the nexus/object behind the specific tender technical requirement in the recently floated global tender E/Global tender notice No. 43, PUR/53/112137(12-13) Mine Slope Stability Monitoring RADAR/Global/116, dated 24-01-2013 (as published in the Global website of BCCL) floated by M/s. Bharat Coking Coal Ltd., Dhanbad (meant for the purpose of supply of Mine Slope Stability Monitoring Radar with installation, Commissioning and Comprehensive Annual Maintenance Contract (CAMC) for 5 years with spares & consumables after warranty period. Qty-2 sets), wherein the technical specification only allows participation of Real Aperture Radar (RAR) and eliminates completely newer/far more advanced/cheaper/less polluting radar technology known as Synthetic Aperture Radar (SAR) that has successful installations worldwide and has wider acceptance due to better performance so as to meet the above objectives. Petitioners further prayed for an appropriate order directing the respondents to immediately and forthwith without any delay

that too, before completion of the tender process declare and decide the representation preferred by the petitioner before the appropriate authority (Respondent Nos. 2 & 3) seeking amendment in the recently floated global tender E-Global tender notice No. PUR/53/112137(12-13) Mine Slope Stability Monitoring RADAR/Global/116, dated 24-01-2013, as floated by M/s. Bharat Coking Coal Ltd., Dhanbad wherein the technical specification only allows participation of Real Aperture Radar and eliminates completely newer/far more advanced/cheaper/less polluting radar technology known as Synthetic Aperture Radar (SAR) that has successful installations world-wide and has wider acceptance due to better performance so as to meet the above objectives.

2. M/s. Bharat Coking Coal Ltd., Dhanbad (for short-B.C.C.L.), respondent No. 1, had issued Notice Inviting Tender, (Global) (hereinafter referred to as -NIT), on 18.01.2013 for supply of Mine Slope Stability Monitoring RADAR (MSSM-RADAR) as per the recommendation of Director General of Mines Safety (D.G.M.S.), Ministry of Labour and Employment, Govt. of India in the said NIT, respondent No. 2 mentioned technical specification and schedule of requirement. Petitioners, who are the manufacturers of MSSM-RADAR have grievance with respect to aforesaid technical specification and schedule of requirement. It is stated that the current technical specification was purposely prepared with the specific objective to eliminate SAR technology altogether by exclusively mentioning the Scan Angle of Real Aperture RADAR (for short-RAR) technology. Accordingly, it is submitted that the aforesaid technical specifications mentioned in the NIT with a view to favour the manufacturers of RAR and completely eliminating the manufacturers of Synthetic Aperture RADAR (for short-SAR). Thus, it is prayed that a suitable direction be given to respondent-BCCL for amending the technical specifications and schedule of requirement of the NIT.

3. A counter affidavit filed on behalf of respondent Nos. 2 and 3. In the said counter affidavit, it has been mentioned that technical specification mentioned in the NIT does not favour any particular kind of RADAR technology. The technical criteria furnished in the technical specification have been framed keeping in mind the field realities of the opencast mines of BCCL. It is further stated that the Scan Angle is a vital technical criteria of a RADAR technology, based on Slope Stability Monitoring Equipment. According to the respondent, the more the Scan Angle, the larger will be the area of mine covered in a single sweep of the antenna in its Circular, D.G.M.S. has also advocated for such a RADAR technology which has the ability to cover large areas on the surface for true two dimensional monitoring. The respondent further stated that Scan Angle should not be reduced as because in that case, for a single scan of large surface area, the equipment will have to be relocated and reinstalled several times, which may take hours and so will delay the time taken for detection of the impending failure of the Pit Slopes/Dump Slopes, which will not be in the interest of safety.

4. Respondent No. 4 (D.G.M.S.) has also filed a counter affidavit as per the direction of this Court. In the said counter affidavit, at paragraph-8, respondent

No. 4 stated that the operating mining companies alone will have to decide the requirement of appropriate make and type of slope monitoring system for their mines for initiating suitable actions for procurement and that D.G.M.S. has no role whatsoever in either deciding on the make and type of slope monitoring systems or their procurement by the mining companies.

5. It is submitted by Mr. Shailesh, learned counsel for the petitioners that respondent has stipulated Scan Angle in the technical specification, with a view to eliminate such companies, who are manufacturing MSSM-RADAR through SAR technology and favour such companies, who are manufacturing MSSM-RADAR through RAR technology. It is submitted by learned counsel for the petitioners that MSSM-RADAR which were manufactured through SAR technology is superior than MSSM-RADAR manufactured through RAR technology. It is submitted that by putting a clause in the technical specification, the respondent Nos. 2 and 3 have literally shut down those companies from participating in the Global tender, who are manufacturing MSSM-RADAR through SAR technology. Mr. Shailesh further submits that thus, the aforesaid action of the respondent is arbitrary and against the public interest. Therefore, a suitable direction may be issued for amendment in the aforesaid NIT.

6. On the other hand, Sri Indrajit Sinha, learned counsel for the respondents submits that it is well settled that in the matter of formulating of condition of a tender document and awarding a contract, the greater latitude is required to be given to the State authority, unless the action of tendering authority is found to be malicious and misuse of its statutory power. He further submits that fixation of value of tender as well as the technical specification is entirely within the purview of tendering authority. It is open to the tendering authority to decide the requirement of appropriate make and type of slope monitoring system for their mines. Any manufacturer has no fundamental right to carry on business with the Government. It is submitted that if the criteria fixed by the respondent-Company is reasonable and does not have smack of favouring some body, the same cannot be interfered by this Court under Article 226 of the Constitution of India. He further submits that in the counter affidavit respondents have stated the reasons for putting certain technical specifications in the NIT keeping in mind the field realities of opencast mines of BCCL. He further submits that the criteria of larger Scan Angle of MSSM-RADAR has been fixed with a view to monitor the larger area of the mines. He submits that if the Scan Angle will be reduced, then the RADAR is required to be relocated and reinstalled several times, which will take much time in detecting the impending failure of the Pit Slopes/Dump Slopes, which is not in the interest of safety. Sri Sinha further submits that the technical specification mentioned in the NIT taking in view the interest of safety of the mines as well as the miners working there. Accordingly, Sri Sinha submits that the criteria fixed by the respondent No. 2 is not unreasonable and arbitrary and/or mala-fide, thus, the same is not required to be interfered with by this Court.

7. Having heard the submissions, I have gone through the record of the case.

The D.G.M.S., after considering the facts of various opencast mining activities makes analysis of the accidents, which took place in the opencast mines, and found that the Slope failure or Dump failure is the main cause for such accidents. Accordingly, the D.G.M.S. recommended several ways to reduce the chances of surface ground control failures. One of such recommendations is installation of monitoring devices for advance warning of impending failures. It appears that on the aforesaid recommendations of D.G.M.S., the respondent No. 2 issued NIT on 18.01.2013 for supply of MSSM-RADAR. In the said NIT, the respondent No. 2 had mentioned technical specifications and schedule requirement. One of the standard feature is its Scan Angle. According to aforesaid specifications, the Scan Angle should be a minimum of 170° horizontal and 80° vertical.

8. It appears that the petitioner is aggrieved by aforesaid standard feature of MSSM-RADAR. According to the petitioner, if the said feature will not be removed then all the manufacturers of MSSM-RADAR through SAR technology will be debarred from participating in the "Global" tender issued by respondent No. 2, therefore, the petitioner prayed that the NIT be amended and such criteria be removed from it, because the same has a flavour of favouring to such manufacturers, who manufactures MSSM-RADAR through RAR technology, which is arbitrary and discriminatory and mala fide.

9. The Hon'ble Supreme Court in *Tata Cellular Vs. Union of India*, AIR 1996 SC 11 : AIR 1994 SC 11 : (1994) 4 JT 532 : (1994) 6 SCC 651 : (1994) 2 SCR 122 Supp has held as under:

"94. The principles deducible from the above are:

- (1) The modern trend points to judicial restraint in administrative action.
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.
- (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
- (5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of *Wednesbury* principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure"

10. The Hon"ble Supreme Court in Jagdish Mandal Vs. State of Orissa and Others, (2008) 2 CTLJ 538 : (2007) 14 SCC 517 : (2006) 10 SCR 606 Supp has held that-

"Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached";

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226"

11. In Michigan Rubber (India) Ltd. Vs. The State of Karnataka and Others, AIR 2012 SC 2915 : (2012) 4 BC 177 : (2012) 7 JT 446 : (2013) 1 RCR(Civil) 202 : (2012) 7 SCALE 414 : (2012) 8 SCC 216 : (2012) AIRSCW 4727 , the Hon"ble Supreme Court has held as follows:

23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to

ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) 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."

12. Keeping in view the aforesaid laws laid down by the Hon"ble Supreme Court, I am proceeding to consider as to whether the action of the respondent No. 2 in putting certain conditions for supply of MSSM-RADAR is arbitrary, irrational or intended to favour some manufacturers?

13. The main allegation of the petitioner that the mentioning of Scan Angle specification has been done with an intention to favour manufacturers of MSSM-RADAR through RAR technology and with an objective to eliminate manufacturers of aforesaid RADAR through SAR technology.

14. It is worth mentioning that the petitioners stated that they filed a representation before the Chairman-cum-Managing Director of BCCL and prayed for changing the Scan Angle to minimum 80° horizontal and 60° vertical and copy of the said letter was sent to Justice Ashok Kumar Chakraborty (Retired), the Independent External Monitor. It appears that the learned Independent External Monitor gave hearing to the petitioners as well as the BCCL and ultimately rejected the prayer of the petitioners.

15. It further appears that BCCL in its counter affidavit has stated that the technical specification of the NIT does not favour any particular kind of RADAR technology. The technical criteria furnished in the technical specification have been framed, keeping in mind the field realities of the opencast mines of BCCL. It is further stated that Scan Angle is a vital technology criteria of RADAR technology based on Slope Stability Monitoring Equipment. The more the Scan Angle, the larger will be the area of mine covered in a single sweep of the antenna of the equipment. D.G.M.S. in its circular has also advocated for such a RADAR technology, which has the ability to cover large areas on the surface for true two dimensional monitoring. It is further stated that the Scan Angle should not be reduced as because in that case, the equipment is required to be relocated and reinstalled several times, which may take hours and so will delay the detection of the impending failure of the Pit Slopes/Dump Slopes, which will not be in the interest of safety.

16. Thus, respondent No. 2 BCCL has given enough reason for stipulating such technical specification in the NIT, which from no angle appears to be unreasonable and arbitrary. It also does not show that the same has been stipulated with a view to favour some manufacturers, rather it is stated in the counter affidavit that such criteria has been stipulated keeping in view the interest of safety of the mines and workmen working there.

17. In view of the aforesaid reasoning given by the respondent No. 2, I find that

the same are reasonable, fair and in the public interest. In that view of the matter, no direction can be given to the respondent No. 2 to change the aforesaid criteria from NIT.

For the reasons stated hereinabove, I find no merit in this application, accordingly, the same is dismissed.