(2012) 07 P&H CK 0162

In the Punjab And Haryana At Chandigarh

Case No : CWP No. 7689 of 2012

Diwan Chand and others	APPELLANT
Vs	
State of Punjab and others	RESPONDENT

Date of Decision : 17-07-2012

Acts Referred:
Constitution of India, 1950 — Article 226, 227

Citation : (2012) 07 P&H CK 0162

Hon'ble Judges : Gurmeet Singh Sandhawalia, J;Ajay Kumar Mittal, J

Bench : Division Bench

Advocate : Gurminder Singh, for the Appellant; Rakesh Gupta, Advocate for respondent no. 2 and Mr. Vivek Sharma, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

G. S. Sandhawalia, J.—The present writ petition has been filed under Articles 226/227 of the Constitution of India for issuance of a writ in the nature of Mandamus, Certiorari or any appropriate writ setting aside the award of the contract of carriage and labour cartage for Machhiwara Centre in District Ludhiana by respondent no.2 PUNGRAIN for the agencies of respondents no.2 to 7 as being illegal, arbitrary, malafide and against public policy and for issuance of a writ in the nature of Mandamus directing the respondent PUNGRAIN to invite the tenders afresh for the agencies of respondents no.2 to 7 and award the same after considering the competitive bids by all interested and eligible parties. The petitioners, who were initially three in number pleaded that respondent no.2 is the Nodal Agency for awarding of tenders for contract of carriage and labour cartage, and tender was floated for Machhiwara Centre in District Ludhiana wherein the tender forms were to be available in the office of PUNGRAIN from 27.2.2012 to 1.3.2012. The tender was to be submitted before 5.3.2012 and was to be opened on 13.3.2012. Petitioner No.1 Diwan Chand filed his tender form at the rate of 21% below basic rate which was filled physically as well as by E-tendering. However, the said tender was cancelled and for the same centre the fresh tenders were invited by extending the date, and the forms were to be available from 12.3.2012 to 13.3.2012 and the tenders were to be opened on 21.3.2012. It has been pleaded that the interested parties approached for sale of tender form but the same were not made available due to the pressure of labour unions and the tender was again cancelled without assigning any reason on 18.3.32012. Thereafter, tenders were again invited on 23.3.2012 wherein the tender forms were to be made available from 26.3.2012 to 27.3.2012 and the same were to be submitted by 28.3.2012 and were to be opened for District Ludhiana on 31.3.2012 but the petitioners were not provided the tender forms inspite of their best efforts. The date of the tender was again extended by way of a tender notice issued on 27.3.2012 extending the date of procurement of forms to 29.3.2012 and again the tender forms were not available to the petitioners and the date was again extended from 29.3.2012 to 31.3.2012. The tender forms were sold only to one party i.e. Satnam Singh son of Kalidas respondent no.8 and the petitioner no.3 by exerting great pressure also got the tender forms and respondent no.8 had ensured the non-availability of tender forms to any other party and further made it impossible to submit the tender forms by getting the labour union members to lay a siege to the office of the District Manager and there was a total anarchic situation and the petitioners no.1 and 2 made complaints by fax to the office of the Director Food and Supplies. They also furnished affidavits dated 3.4.2012 which are annexed as Annexures P-6 and P-7.

2. Petitioner no.3 also made a complaint to D.M., PUNGRAIN stating that a large number of parties were left out from filling their tender forms due to mismanagement and that loss of lacs of rupees would be caused to the State exchequer. It has been pleaded that respondent no.8 had filled his tender at 87% above basic rate which is far above the rates which have been filled for the same contract by the petitioners and this was clearly an effort to cause loss to the State exchequer and wrongful gain to respondent no.8. It has further been pleaded that with a view to mislead the petitioners another short term tender notice for labour and cartage for District Ludhiana was issued on 6.4.2012 wherein the tender forms were to be obtained upto 7.4.2012 and submitted on 9.4.2012 and the tender was to be opened on 10.4.2012. Petitioner no.3 had filled the tender form alongwith the required bank draft at 19% above basic rate but he had been told that the tender had been awarded to respondent no.8 at 25% above basic rate after negotiation. Accordingly, it was pleaded that respondent no.2 had acted in great haste and allowed respondent no.8 to join work at much exaggerated rates and in such circumstances, the writ petition has been filed.

3. Initially the written statements were filed by respondents no.2 and 8 on 8.5.2012 and the record was called for. On 21.5.2012, counsel for the petitioners submitted that petitioner No.3 did not want to pursue the writ petition and the writ petition was ordered to be dismissed as withdrawn qua petitioner no.3. The detailed affidavit was then filed on behalf of respondent no.8, copy thereof was given to the counsel for the petitioners. The case was ordered to be listed on

31.5.2012 on which date, it was reserved for orders after hearing the arguments in detail. An application was also filed by respondent no.8 to place on record relevant facts for proper adjudication of the case.

4. Accordingly both the replies submitted by respondent no.2 are being taken into consideration since more documents have been appended to support the affidavit.

5. The District Manager, PUNGRAIN, Ludhiana has pleaded that the policy of the Government of the State of Punjab for inviting tenders for labour and cartage was released on 17.2.2012 because the work of procurement of wheat was to start from 1.4.2012. Initially the tenders were invited for whole of the Ludhiana District within which the Machhiwara centre falls from 28.2.2012 to 5.3.2012 and the same were to be opened on 13.3.2012. However, a representation was received from All India Food and Allied Workers Union for extension of time for submission of tender forms and the labour union also sought waiver of the deposit of earnest money and security amount. Keeping in view the representation made by the labour union the date for submission of tender forms was extended upto 13.3.2012 and tender forms were to be opened on 21.3.2012. Thereafter, a large number of complaints were received from the whole of the Punjab with regard to boycotting of the tender allotment process by various labour unions and contractors and even at some purchase centres fights started taking place causing a huge amount of damage to the public and private property. Therefore, the Managing Director, PUNGRAIN had decided to cancel the tender allotment process by issuing a public notice. Reference was also made to the advertisement Annexure A-7 whereby the tenders of various districts invited for 14.3.2012 and 15.3.2012 were cancelled. It has been pleaded that after issuance of cancellation notice, petitioner no.1, who had submitted his tender form besides submitting tender by his son Ravi Kumar visited the District office of the Corporation and took back both the tender form in original on his behalf as well as his son and gave a due receipt of the same and the bank draft was returned to him.

6. Thereafter, some changes were proposed in the new policy framed for the year 2012-13 with regard to contract for labour and cartage and the new policy was issued on 22.3.2012 and in pursuance of new policy, fresh advertisement for inviting tenders was published in various newspapers for the labour and cartage for various purchase centres. The date for submission of tender forms for the Machiwara purchase Centre in Ludhiana District had been fixed as 28.3.2012 and the tender forms were to be opened on 31.3.2012. Thereafter, last date of submission of tender forms for the whole of the State of Punjab was extended upto 30.3.2012 and the tenders forms were to be opened on 3.4.2012 and further the date was extended till 5.4.2012. It has been averred that 10 forms were purchased from the District office of the Corporation by various tenderers. Four forms were purchased by petitioner no.3 on 27.3.2012 at serial Nos.46,47,48 and 49 and by All India Allied Food and Allied Workers Union which

is at serial no.233 and five forms were purchased by respondent no.8 Satnam Singh on 29.3.2012 at serial Nos.394 to 398 and only two tender forms were received for the Machhiwara Purchase Centre which were opened on 5.4.2012. One was submitted by respondent no.8 and other was invalidated form since no bank draft had been annexed therewith and no name was mentioned on the said tender form. The contract was awarded to respondent no.8 at 25% above basic rate after negotiation and the said tender forms were opened in the presence of 51 persons besides the District Manager in which the son of the petitioner no.1 was also present and none of the 51 persons present at that time raised any dispute with regard to the allotment of the tender to respondent no.8. The invalidated tender form bore number 233 dated 29.3.2012 and the record showed that the said form was sold to All India Food and Allied Workers Union and that it was not a forged and fabricated document. It has been further pleaded that petitioner no.3 had alleged that he had submitted tender form for Machhiwara Purchase Centre @ 19% above basic rate which was factually incorrect and a perusal of the said tender form showed that said tender form was sold on 7.4.2012 whereas the contract had already been awarded on 5.4.2012 and the short term tender notice was only for the remaining purchase centres and not for the Machhiwara purchase centre. It has accordingly been averred that the Corporation could not have invited tenders for the purchase centre for which the contract had already been awarded to respondent no.8 on 5.4.2012 and in the presence of son of petitioner no.1 Diwan Chand. The petitioner had tried to mislead this Court by placing wrong translation of tender notice Annexure P-9 and correct and true translation of the said tender notice was accordingly appended as Annexure A-18 to plead that the said notice was only for the remaining purchase centres and not for purchase centre of Machhiwara. It was accordingly replied that the petitioner no.3 had stated that he had submitted tender form for tender process to be undertaken on 5.4.2012 but such tender form had been received for the remaining purchase centres and not for purchase centre of Machhiwara as alleged by petitioner no.3. Petitioner no.3 had only placed on record the tender form for the purchase centre for tender allotment process to be undertaken on 10.4.2012 at 19% above basic rate.

7. Respondent no.8 in its written statement has pleaded that the petitioners, who belonged to Machhiwara had colluded with each other to put loss and they were under the wrong impression that nobody will give bid for the tender for the said work and subsequently they will take the said tender at their rate. It has been pleaded that petitioner no.3 had obtained the tender but did not submit the same and the tenders were floated from 26.3.2012 to 27.3.2012 and the date was extended till 31.3.2012 and more than five days were given to the parties to purchase the tender but the petitioners failed to purchase tender forms. The petitioners did not make any representation to any superior officer against not allowing them to purchase the tender form. The tender form had to be purchased from the District PUNGRAIN office wherein the police force was also available in the office hours and the petitioner no.3 was a truck union and was a bundle of

persons and it was not possible to believe that they had not been allowed to purchase the tender form. Accordingly, it has been pleaded that disputed question of facts have been raised. That answering respondent had filed Civil Writ petition no.7004 of 2012 praying for police protection from petitioner no.3 and the answering respondent had thereafter entered into a compromise with the petitioner no.3 and agreed to employ the trucks of petitioner no.3 at their rate and translated copy of compromise dated 22.4.2012 Annexure R/8/1 was relied upon. It has been further alleged that the respondent no.8 had negotiated with the official respondents to do the work at 25% above basic rate and the tender was awarded to the answering respondent and since then the answering respondent is doing the work satisfactorily and at this juncture cancelling of tender process will put the answering respondent to heavy loss. It has also been pleaded that the policy was changed all over the State of Punjab and it was not that the tender for Machhiwara Centre which was cancelled, rather in the entire State of Punjab tender was recalled and thereafter it was again advertised. It has further been alleged that petitioners were playing the game to get tenders recalled and negotiate the rate with the official respondents on their own terms and conditions and the affidavits submitted did not show as to whom any complaint was given and there were no complaints against the officials. In the application subsequently filed by respondent no.8 also similar pleadings have been made and also mentioned that the petitioner No.3 had already withdrawn his writ petition in view of the compromise effected and that tender had been awarded at Samrala at the rate of 69% above scheduled rate, Sahnewal at the rate of 75% above, Athur at the rate of 68% above, Raikot at the rate of 83% above and many contractors are doing working more than 25% above schedule rate.

8. No replication has been filed to the said written statement and additional affidavit.

9. Counsel for the petitioners firstly has vehemently argued that initially there was a provision of E-tendering and the petitioner No.1 had applied in pursuance of that at 21% below basic rate and respondents had malafidely cancelled the said tender process and fresh tender was called whereby requirement of E-tendering had been dispensed with and, thus, caused loss by accepting the rates offered by respondent no.8 at 25% above basic rate. Counsel for the petitioner secondly argued that tender forms were not made available to the petitioners at the instance of respondent no.8 and the official respondents had floated a short term tender to confuse the petitioners whereas they had already awarded the main contract to respondent no.8. It was further contended that it was impossible to believe that nobody would apply for the said tender and only one more tender had been received which was incomplete as it did not have any name of the person filled in it though there was a bank draft of Rs.60,000/- which was attached with it.

10. On the contrary, counsel for the respondents had contended that there was a

policy change in pursuance of the representations received from the various labour unions and in such circumstances initial guidelines dated 17.2.2012 had been done away with and the initial advertisement whereby the tenders were to be opened on 13.3.2012 were cancelled by a decision dated 18.3.2012 and the amount received from the persons in pursuance of the said advertisement had been returned. This exercise was done all over the State and there was no malafide against the petitioners for Machhiwara centre. It was also submitted that the fresh tenders were invited for and the petitioners did not apply in pursuance of the same and they had been opened on 5.4.2012 and therefore, once the petitioners themselves had not applied for the said tender and submitted their bids they could not contend that the award of contract for one year in favour of respondent no.8 was illegal in any manner.

11. The submission made by the petitioners that there was malafide action by the respondents is not sustainable firstly in view of the fact that no official has been impleaded by name in person to allege specific malafides by which the policy was changed. The amended/revised policy of the State of Punjab is not the subject matter of the challenge before this Court and admittedly the said policy was not only for one centre but for all over the State, therefore, submission of the counsel that E-tendering was done away with the purpose to only grant the contract to respondent no.8 cannot be accepted.

12. In pursuance of the fresh policy an advertisement was issued whereby tenders forms were available from 26.3.2012 to 27.3.2012 initially and the date for submitting of the tender forms was 28.3.2012 and the tender was to be opened on 31.3.2012. The date of purchase of tender form was extended from 27.3.2012 to 29.3.2012 which was subsequently further extended upto 30.3.2012 and the opening of the same was on 3.4.2012. Thereafter, vide Annexure P-5 tender form could be purchased till 31.3.2012 and the earlier tender form purchased was to remain valid. The time for deposit of the tender was extended till 2.4.2012, which was to be opened on 5.4.2012. Thus, it is patently clear that it was open to the petitioners No.1 and 2 to purchase the forms from 26.3.2012 till 31.3.2012 the extended date but they failed to do so for the reasons best known to them and the respondents have processed the tender of respondent No.8 and after negotiation awarded the contract on 5.4.2012. The petitioners have approached this Court on 26.4.2012 by alleging that tender form was received from one party i.e. Respondent no.8 and the respondents have justified their action and validly defended that four forms were purchased by petitioner no.3 on 27.3.2012 at serial Nos.46,47,48 and 49 and by All India Allied Food and Allied Workers Union which is at serial no.233. Similarly five forms were purchased by respondent no.8 Satnam Singh on 29.3.2012 at serial Nos.394 to 398 and only two tender forms were received for the Machhiwara Purchase Centre which were opened on 5.4.2012 in the presence of 51 persons in which the son of petitioner no.1 was also present besides District Manager and no objection was raised to allotment of tender to respondent no.8. On account of inaction on the part of the petitioners in not purchasing the tender

forms, they have no locus standi to file the present petition. Further, the submission of the petitioners that petitioners no.1 and 2 were not allowed to purchase the tender form cannot be accepted for the reason that the petitioner no.3 had purchased five tender forms and subsequently withdrawn the present writ petition after entering into a compromise with respondent no.8. It is a specific case of respondent no.8 that they had filed writ petition No.7004 of 2012 praying for police protection from petitioner no.3 who threatened him that he would not be allowed to carry out the work which has been dismissed as withdrawn on 30.4.2012. Respondent no.8 has been carrying out the work since 5.4.2012 and this Court has not been approached till 26.4.2012 and even on this account the petitioners are not entitled for any relief. The respondents have specifically alleged that the short term tender was advertised vide Annexure P-9 and the correct translated copy thereof is Annexure A-18 which was for the remaining centres. No replication has been filed to counter the said pleadings and accordingly, the submission of the petitioners that the said advertisement has been issued only to confuse the petitioners is without any basis.

13. The next submission of the counsel that they had submitted complaints against the non supply of tender forms to the Director, Food & Supplies by sending FAX messages and reference to affidavits Annexures P-6 and P-7 are also of no avail since a perusal of the said affidavits shows that petitioners No.1 and 2 themselves have deposed that earlier tenders had been cancelled as per instructions of the Punjab Government and that the date for sale of tender forms was fixed for 21.3.2012 and they were unable to purchase the tender forms due to protest of the labour in the district office of the PUNGRAIN and they had forwarded the complaint to the Director at Chandigarh regarding this through fax. In the said affidavits they themselves deposed that the date of opening of tenders which was fixed for 5.4.2012 had to be cancelled and refixed after making some police arrangements. The said affidavits are dated 3.4.2012 and have been allegedly faxed to the office of the Director, Food & Supplies, Punjab and admittedly as per Annexure P-5, the last date for deposit was 2.4.2012 and the sale of tender form had been open since 26.3.2012 for purchase but no complaint was filed prior to that point of time. In the said affidavits, no allegations have been made against the official respondents that the tender forms are not being supplied on account of any bias and on account of influence of respondent no.8 as now has been alleged in para 5 of the writ petition. It is also admitted that petitioner no.3 had got the tender form and had filled in the tender form at 19% above basic rate. This fact is, however, hotly contested by respondents who had mentioned that this tender of 19% above basic rate is pertaining to the allotment of remaining purchase centres and not for the initial allotment since the tenders had already been opened on 5.4.2012. The representation of petitioner no.3 (Annexure P-8) to the District Manager, PUNGRAIN regarding non deposit of tender also pales into insignificance once petitioner no.3 himself had withdrawn from the writ petition having entered compromise with respondent no.8 especially when petitioner no.3 had purchased

four tender forms at Sr. No.46,47,48 and 49.

14. Counsel for the petitioners has relied upon the judgment of the Hon''ble Supreme Court in Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, to contend that the commercial transactions of the State have to be fair. Reliance has also been placed upon M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, and Nagar Nigam, Meerut Vs. Al Faheem Meat Exports Pvt. Ltd and Others,

15. The judgment of the Raunaq International Ltd.''s case pertained to the facts wherein interim order had been granted by the High Court and the operation of letter of intent had been stayed. The said interim order was later on set aside. In Monarch Infrastructure (P) Ltd.''s case (supra), the Apex Court held that rejection of tender form for non fulfillment of terms and conditions was justified as photocopies of the draft duly notarized could not be sufficient to make good the mandatory conditions. Similarly in Nagar Nigam, Meerut''s case (supra), the Apex Court had observed that there has to be transparency in the acceptance of the bid and had set aside the contract in favour of the private respondents wherein the High Court had directed that the writ petitioner, respondent no.1 would be allowed to run slaughter house on terms and conditions stipulated in the judgment. The said direction was held to be totally uncalled for under Articles 226/227 of the Constitution of India. The Apex Court in Tata Cellular Vs. Union of India, held as under:-

(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.

In view of the above principles laid down by the Apex Court, there is no scope for interference in the action of the respondents which they have justified and the writ petition is accordingly dismissed with no orders to costs.

