
(2007) 08 CAL CK 0086

In the Calcutta High Court

Case No : MAT No. 2400 of 2007 with CAN No. 5800 of 2007

Hindustan Copper Limited

APPELLANT

Vs

Utkal Mouldings Private Limited and Others

RESPONDENT

Date of Decision : 02-08-2007

Acts Referred:

Constitution of India, 1950 — Article 12, 226, 227

Citation : (2007) 4 CHN 148

Hon'ble Judges : Rudrendra Nath Banerjee, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : P.K. Dutta, B. Bhattacharya, S. Sil and A. Dhar and A.K. Dhandhanian and A.K. Sur, for the Appellant; S.K. Kapoor and S.K. Mehata for respondent No. 1 and N. Ghosh Dostidar and Neha Mehata for respondent Nos. 3, 4 and 5, for the Respondent

Judgement

Bhaskar Bhattacharya, J.—These two mandamus appeals were heard together as those are interlinked and are directed against the self-same order dated June 22, 2007 passed by a learned Single Judge by which His Lordship refused to extend the interim order earlier granted on April 18, 2007 on the writ application filed by the respondent No. 1 wherein the selection of National Small Industries Corporation Limited (NSIC) as a supplier of materials was challenged.

2. Being dissatisfied, Hindustan Copper Limited, the Government company, who floated the process of tender, has preferred MAT No. 2400 of 2007 whereas the other appeal being MAT No. 2422 of 2007 has been filed by the NSIC.

3. We propose to take up the appeal preferred by the Hindustan Copper Ltd. at the first instance.

The following facts are not in dispute:

(a) The appellant is the company wholly owned by the Government of India. It is a buyer of various items including grinding media balls from small-scale industries. On January 22, 2007, the appellant advertised a tender for supply of

80/65 mm diameter C.I. Grinding Media Balls for its Malanjkhanda Copper Project, M.P. and Khetri Copper Complex, Rajasthan respectively. The notice of the tender was issued from the office of the appellant at Kolkata.

(b) Utkal Mouldings Private Limited, the writ petitioner, participated in the said tender offering supply of 2000 MT of 65 mm Balls for Malanjkhanda Project and 500 MT of 65 mm Balls to Khetri Project. The NSIC also participated in the process of tender and submitted its bids.

(c) The NSIC is admittedly not a manufacturer of any goods and it submitted its bid on behalf of a consortium of manufacturers but none of those manufacturers was individually qualified to participate in the process of tender.

(d) The condition of tender specified that the following criteria should be fulfilled by bidders:

(i) Should be a manufacturer of C.I. (Alloyed) Grinding Media Balls, 80 mm/65 mm dia.

(ii) Should have minimum annual turnover of Rs. 2.0 crore in any consecutive 12 months during preceding 60 months period (to provide documentary evidence)

(ii) Should have supplied minimum quantity of 1000 MT of Grinding Media Balls in any consecutive 12 months during preceding 60 months period (to provide documentary evidence).

(e) On the basis of the bids submitted by the parties, it appeared that the Utkal Moulders, the writ petitioner, became L-3 for both the projects whereas the NSIC was L-4 for the project in M.P. and L-5 for the project in Rajasthan. One Siddhi Vinayak Casting Pvt. Ltd., the respondent No. 3 in the writ application was the L-1 for the project in M.P. while one Siva Metal Industries, the respondent No. 4 in the writ application was found to be L-1 for the project of Rajasthan.

(f) The writ petitioner on being invited to match the lowest bid agreed to offer its price matching with L-1 in respect of both the projects. The Hindustan Copper Ltd., however, extended the benefit of Purchase Preference Policy in favour of the NSIC and placed the following order for procurement of 6000 MTs and 1300 MTs of the goods by passing the following order:

For 6000 MTs of 80 mm diameter On the respondent No. 3...4000 MT (L-1) On the NSIC, the respondent No. 2...2000 MT (L-4) For 1300 MTs of 65 mm diameter On the respondent No. 4...800 MTs (L-1) On the NSIC, the respondent No. 2...500 MTs (L-4)

(g) The Purchase Preference Policy is promulgated by the Government of India to give preference to the Government organisation but a joint-venture by a Government undertaking and a private undertaking is not "eligible to have the benefit of the policy and paragraph (iii) of the office memorandum dated July 18, 2005 clearly indicates that the Purchase Preference Policy would be applicable only to public sector enterprises and not to any joint-venture with private sector

partner. Further, the Purchase Preference Policy of the Government of India could be extended to a Government owned company when maximum value in addition of 20 per cent on the goods supplied is done by the Central Public Sector Enterprise by way of manufacturing and/or service. It is further provided therein that the other conditions are also required to be fulfilled by the Central Public Sector Enterprise. It is also indicated in the policy that if the Public Sector Enterprise does not to meet the minimum qualification, it would be subject to disqualification.

(h) As the NSIC is not in the business of dealing in goods and it had no occasion to make any value addition as it only provides services and consideration of service charges of one per cent, it does not meet with the requirement of three conditions for invoking Purchase Preference Policy.

4. The writ petitioners, therefore, challenged the action of the Hindustan Copper Limited in granting the work order in favour of NSIC by superseding the claim of the writ petitioner who was a higher bidder in comparison to NSIC. At the time of moving the writ application, the writ petitioner prayed for interim order when the learned Single Judge of this Court by order dated April 18, 2007 passed the following interim order after passing a direction upon the respondents to file affidavit-in-opposition within 16th May, 2007 and fixing the matter for hearing on top on 7th June, 2007:

Accordingly, it is directed that the Hindustan Copper Ltd. shall not receive from the Corporation more than 160 MT of 65 mm Grinding Media Balls without obtaining leave from this Court. This appears to be the quantity which is required to be supplied by the Corporation to the Hindustan Copper Limited in terms of the supply order dated 2nd April, 2007 to June, 2007.

5. There is no dispute that neither of the parties preferred any appeal against the aforesaid order passed by His Lordship and at the same time, the appellants before us did not care to file their affidavit-in-opposition with the time fixed by His Lordship, as a result, the matter could not be made ready on June 7, 2007 fixed by the Court. Subsequently, on June 22, 2007 the learned Advocate appearing on behalf of the Hindustan Copper Ltd. prayed before the learned Single Judge for modification of the interim order dated April 18, 2007 thereby submitting that further direction might be given permitting his client to accept the materials from NSCI for further two months. The said prayer was opposed by the writ petitioner and the learned Single Judge by the order impugned herein has refused to modify the earlier order dated 2nd April, 2007 to June, 2007."

6. Being dissatisfied, the Hindustan Copper Ltd. has come up with the present mandamus appeal.

7. Mr. Dutt, the learned Advocate appearing on behalf of the appellant has vehemently contended before us that for the refusal on the part of the learned Single Judge to vary the interim order dated April 18, 2007 is causing immense hardship to his client inasmuch as they are unable to manufacture the copper

unless the materials in question are supplied to it by the NSIC. According to Mr. Dutta, by obtaining an interim order, the writ petitioner has virtually stopped the business of the appellant. Mr. Dutt further contends that in a similar situation like the present one, the Madhya Pradesh High Court has held that the benefit of the Purchase Preference Policy can be conferred upon the Corporation like NSIC notwithstanding the fact that the Corporation is not a manufacturer of goods. Mr. Dutt, therefore, prays for setting aside the order passed by the learned Single Judge and for permitting his client to accept further materials in accordance with the work order issued by his client.

8. Mr. Kapoor, the learned senior Advocate appearing on behalf of the writ petitioner, has, on the other hand, opposed the aforesaid contentions advanced by Mr. Dutt and has contended that the initial order dated April 18, 2007 having attained finality, the appellants before us could not pray for variation of such order on the basis of oral prayer made before the learned Single Judge. Mr. Kapoor, therefore, submits that the present appeal should be dismissed as not maintainable.

9. Even on merit, Mr. Kapoor contends that his client has made out a strong prima facie case to have an interim order and accordingly the learned Trial Judge did not commit any illegality in restraining the present appellant from further receiving the materials pursuant to the work-order issued by it. Mr. Kapoor points out that the appellant has not come with clean hand as would appear from the fact that it did not comply with the order passed by the learned Single Judge by filing affidavit-in-opposition within the time fixed by the learned Single Judge, the main matter could be disposed of by this time. Mr. Kapoor, therefore, prays for dismissal of the appeal.

10. Mr. Dhandhaniya, the learned Advocate appearing on behalf of NSIC, has adopted the argument advanced by Mr. Dutt and has contended that in view of the decision of the High Court at Madhya Pradesh, his clients are entitled to the benefit of the Purchase Preference Policy and notwithstanding the fact that his clients are not the manufacturer of the goods, they are entitled to participate in the process of tender with the help of other members of the consortium who are manufacturers. Mr. Dhandhaniya, therefore, prays for setting aside the order passed by the learned Single Judge and for permitting his clients to supply goods in accordance with the order impugned in the writ application.

11. Therefore, the only question that falls for determination in this mandamus appeal is whether the learned Single Judge, in the facts of the present case was justified in modifying the interim order by not permitting the NSIC to supply goods in terms of the work-order granted by the Hindustan Copper Limited.

12. After hearing the learned Counsel for the parties and after going through the materials on record, we find that the writ petitioner challenged the action of the Hindustan Copper Limited in granting the benefit of Purchase Preference Policy in favour of the NSIC. The bid of the writ petitioner was L-3 and as such, there was

no scope of placing the work-order in favour of the writ petitioner. The respondent Nos. 3 and 4 being the L-I in the two projects, were given the responsibility to supply the major portion of the materials involved in the process of tender and the NSIC, being a public sector enterprise was given the benefit of Purchase Preference Policy and consequently, a smaller part of the materials were decided to be taken from NSIC.

13. Therefore, for giving such benefit of Purchase Preference Policy to NSIC, the writ petitioner has not been prejudiced in any way. It was the respondent No. 3 and the respondent No. 4, who were L-I in the two projects, were really affected as their quotas of allotment were curtailed and were given to NSIC although the NSIC was L-5 and L-4 respectively in the two projects covered by the process of tender. It is, therefore, apparent that prima facie, the writ application was not maintainable at the instance of the writ petitioner as it was not entitled to get the benefit of the Purchase Preference Policy and consequently, conferment of benefit of Purchase Preference Policy to NSIC, even if the same was granted illegally, cannot be challenged at its instance. The position would have been different, if the writ petitioner was eligible to claim the said benefit and in such a situation, it could reasonably contend that instead of NSIC, it was entitled to such benefit. But the writ petitioner, not being a public sector enterprise, cannot maintain a writ application challenging the entitlement of the NSIC under the scheme of Purchase Preference Policy. Even the respondent Nos. 3 and 4 being the L-1 in the two projects, could challenge the benefit conferred upon the NSIC on the ground that for granting such undue benefit their quotas have been improperly curtailed but such plea is not available to the writ petitioner.

14. It is now settled law that even if any illegal order is passed by a State within the meaning of Article 12 of the Constitution of India, such illegal order can be challenged only by a party whose right has been infringed by such order. In the case before us, even if it is ultimately proved that the NSIC was not entitled to the benefit of Purchase Preference Policy, the quota allotted to it pursuant to such policy cannot be given to the writ petitioner as its bid figured as L-3 and at the same time, admittedly it is not entitled to the benefit of the Purchase Preference Policy.

15. At this stage, it may not be out of place to mention here that under Article 227 of the Constitution of India, a High Court is vested with authority to have power of superintendence over all Courts and Tribunals situated within its territorial limit and in exercise of such power, a High Court can even suo motu interfere with any improper decision of those Courts and Tribunals for preventing miscarriage of justice and keeping those Courts and Tribunals within their limits specified by law. But so far as the power under Article 226 of the Constitution is concerned such power cannot be exercised suo motu but can be resorted to only at the instance of an aggrieved person whose fundamental or legal right has been infringed by the action or the inaction of a State within the meaning of Article 12 of the Constitution. The exception to the aforesaid rule is only in case

of issue of a writ in the nature of habeas corpus, quo warranto or in Public Interest Litigation where in spite of the fact that the petitioner is not affected personally, he can maintain a writ application. (See The State of Orissa Vs. Madan Gopal Rungta, ; The Calcutta Gas Company (Proprietary) Ltd. Vs. The State of West Bengal and Others, ; Ram Umeshwari Suthoo v. Member, Board of Revenue Orissa 1967(1) SCA 413; Godde Venkateswara Rao Vs. Government of Andhra Pradesh and Others, ; State of Orissa and Others Vs. Rajasaheb Chandanmull Indrakumar (P) Ltd. and Others, ; Dr. Satyanarayana Sinha Vs. S. Lal and Company (P) Ltd.,]. The present case does not fall under any of the aforesaid three categories.

16. We, therefore, find that the learned Single Judge should have modified the interim order earlier granted when the Hindustan Copper Corporation by virtue of the leave granted by the learned Single Judge prayed for modification of the earlier order.

17. We find no substance in the contention of Mr. Kapoor, the learned Senior Advocate appearing on behalf of the writ petitioner/respondent, that the Hindustan Copper Corporation had no right to pray for variation of the original interim order passed on April 18, 2007, as it had not preferred any appeal against such order. It is apparent from the order dated April 18, 2007 passed by the learned Single Judge that such interim order was not conclusive but leave was granted to the Hindustan Copper Corporation to pray for modification of the said interim order for the purpose of accepting materials from NSIC after June, 2007. Therefore, so far as the supply of materials for April and May, 2007 were concerned although those attained finality for not preferring appeal, specific leave having been given to the parties for supply of materials beyond those two months, the same was variable at the instance of the appellant notwithstanding the fact that it did not prefer any appeal against the initial order.

18. We, therefore, set aside the order passed by the learned Single Judge and hold that the writ petitioner having failed to prove prima facie case should not be favoured with any interim order in the present writ application. The subsequent order dated June 22, 2007 by which the learned Single Judge refused to grant leave to the Hindustan Copper Corporation even after June, 2007, is set aside.

19. In view of our order passed above, the other appeal preferred by the NSIC has practically become infructuous, as it already had got relief by virtue of the present order.

20. Both the appeals are, therefore, disposed of with the aforesaid observations. In the facts and circumstances there will be, however, no order as to costs.

Rudrendra Nath Banerjee, J.

21. I agree.