

(2011) 10 GAU CK 0002
In the Gauhati High Court
Case No : Writ Petition (C) No. 3835 of 2011

Indra Marshal Power Pvt. Ltd.

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 20-10-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 19, 19(1)

Citation : (2012) 1 GLD 122

Hon'ble Judges : B.D. Agarwal, J

Bench : Single Bench

Advocate : M.L. Lahoty, Assisted by Mr. R. Dubey, Mr. J. Patowary and Mr. P.K. Garadia, for the Appellant; A.K. Saraf and Mr. S. Chamaria, Standing Counsel Agriculture, for the Respondent

Final Decision : Allowed

Judgement

B.D. Agarwal, J.—The writ petitioner is the manufacturer of pump sets, motors, high speed diesel engines and air compressors etc. The manufacturing unit was founded in the year 1968 and has adopted ISO: 9001 Standard in various products. The pump sets, manufactured by the petitioner is being accepted by various government departments. In 2008, the Agriculture Department of Assam had also purchased 10,000 STW pump sets for the year 2006-07. It was followed by another supply order of 8000 LLP pump sets. Against the second lot of supply of pump sets, a dispute arose regarding manufacturing defects in 3,876 number of pump sets. The matter was then referred to Arbitral Tribunal. Against the order of Tribunal dated 04.02.2011, the matter is still sub-judice before this High Court in an Arbitration Appeal. In subsequent years also, the writ petitioner submitted its offer to empanel them in the list of supplier of STW and LLP pump sets. However, the petitioner's company was not selected by the respondents. Hence, the writ petitioner had submitted two writ petitions before this High Court being WP(C) Nos. 1140 and 2875 of 2011. The first writ petition was disposed of by this Court on the statement by the learned counsel for the respondents that

the writ petitioner was not debarred from participating in any tender process that may be initiated by the Director of Agriculture.

2. In the second writ petition, certain clauses of " Floating of Enquiry" (FOE) issued by the Director of Agriculture, Government of Assam issued in the month of April 2011 and on 20.05.2011 were questioned. This writ petition was also disposed of on 06.06.2011 holding it to be premature on the ground that the petitioner was yet to submit his bid against the FOE dated 20.05.2011. Relevant parts of the order are hereby extracted below :

The petitioner is aggrieved by the condition put in the Floating of Enquiry (FOE) issued by the Director of Agriculture, government of Assam, one in the month of April, 2010 and another on 20th May, 2011. The condition by which the petitioner is aggrieved is that "the manufacturers/companies whose product was not found satisfactory in the past supplies to the department/farmers or whose quality/specification of the pump set is under dispute/under litigation may not be included in the short list." The contention of the petitioner is that such a clause amounts to black listing the petitioner.

Pursuant to the FOE issued in the month of April, 2011, the petitioner while submitted his bid, the petitioner is yet to submit the bid against the FOE dated 20th May, 2011, last date of which is fixed as 7th June, 2011. No decisions have been taken by the authority rejecting the claim of the petitioner in respect of the FOE issued in the month of April, 2011 and in respect of the FOE dated 20th May, 2011, the last date of submission of bid being 7th June, 2011, the stage has not come.

That being the position, I am not inclined to entertain the present petition at this stage, the same being premature and hence dismissed.

It would, however, not preclude the petitioner to approach this Court if their bid is rejected on the basis of the aforesaid condition put in the FOEs. The respondent authority, in case of rejection of technical bids, shall forthwith intimate the reason thereof.

3. In view of the aforesaid order, the petitioner submitted his bids, which were rejected by the respondents. On query being made on behalf of the petitioner, the Agriculture department communicated their decision vide letter dated 12.07.2011. Under the said letter, the comments of the Technical Committee were extracted, which were made the basis for not listing the petitioner as an approved supplier of pump sets. The observations made by the Technical committee are necessary to be looked into, hence, reproduced below :

The Committee made threadbare discussion on the past performance of the pump sets supplied by the manufacturer to the Department. The Committee felt that pump sets produced and supplied by the manufacturer were not found satisfactory due to following reason-

(a) As per report, the magnitude of defective pump sets found in their past

supply was very high.

(b) There are huge number of complaints received from the farmers against the pump sets supplied by the manufacturer in past.

(c) As per IIT test report, the manufacturer used substandard material in their product and also violated basic specifications laid down in the bidding document.

(d) The manufacturer supplied products are highly in dispute.

Hence, the committee did not recommend this brand of pump sets.

3.1. The aforesaid decision of the respondents is under challenge in the present writ petition.

4. Heard Mr. M.L. Lahoti, learned senior counsel for the writ petitioner assisted by Mr. R. Dubey, Advocate. Also heard Dr. A.K. Saraf, learned senior counsel and Mr. S. Chamaria, learned Standing Counsel for the respondents. I have also perused the pleadings of both the parties as well as the documents annexed there with.

5. Although there is no specific challenge to Clause 1.10.3 of the FOE dated 20.05.2011 but the subject matter of the writ petition centers round the justifiability and constitutionality of the said clause, since the impugned decision of the respondents is based on the aforesaid clause. Besides this, the present writ petition is continuation of the earlier writ proceedings, wherein the legality of clause-1.10.3 of the FOE dated 20.05.2011 was specifically challenged, as could be gathered from Order dated 06.06.2011 passed in WP (C) No. 2875 of 2011. Hence, it is necessary to extract Clause 1.10.3 of the FOE, which is as under :

1.10.3-The Manufacturers/companies whose product was not found satisfactory in the past supplies to the department/farmers or whose quality/ specification of the Pump set is under dispute/under litigation may not be included in the short list

5.1. It may be mentioned herein that identical stipulation also existed in FOE published in the month of April 2011 under the Clause 12.

6. The learned counsel for the writ petitioner argued that pendency of litigation in respect to certain dispute of previous supply cannot be a ground to debar the petitioner from being considered as an approved supplier of pump sets. According to the learned counsel, the earlier dispute was referred to arbitral tribunal by the petitioner for illegally withholding of payment. In other words, as contended by the learned counsel, the dispute was not referred to the tribunal by the Government for alleged defect in the product. The learned counsel also contended that consecutive rejection of the bids of the writ petitioner on the ground of certain complaints against supply of pump sets in the past amounts to "blacklisting" the petitioner, which is untenable in law. To buttress his argument that if there is any clause in an NIT to summarily reject an offer on the ground of pending dispute amounts to black-listing the firm the learned counsel for the petitioner referred to certain judgments from the Hon"ble Supreme Court. The

authorities are:-

Erusian Equipment and Chemicals Ltd. Vs. State of West Bengal and Another, ,
Ramana Dayaram Shetty Vs. International Airport Authority of India and
Others, , M/s. Southern Painters Vs. Fertilizers and Chemicals Travancore Ltd.
and another, .

7. Per contra, Dr. Saraf, learned senior counsel for the respondents submitted that the writ petitioner was neither discriminated nor his exclusion from the panel of supply of pump sets was arbitrary. The learned counsel argued that in the matter of contract, the Government is at par with private firms and individuals in choosing a firm to supply goods. The learned counsel defended the impugned order on the premise that the petitioner cannot insist to include it in the list of firms despite there being large number of complaints from the agriculturist against the pump sets supplied by the petitioner. According to the learned counsel, the stipulation under Clause 1.10.3 has been put in the FOE to keep away the unscrupulous traders for government largesse and if such firms are shortlisted for supplying pump sets, it would amount to approving corruption by way of accepting inferior quality of pump sets and other machineries. The learned counsel also submitted that the authorities relied upon by the learned counsel for the petitioner are distinguishable on facts.

8. Dr. Saraf, learned counsel for the respondents further submitted that the petitioner's firm has not been blacklisted but has been kept away from short listing on the ground of supplying poor quality pump sets in the past. In fact, in the order dated 13.05.2011, passed by this Court in WP (C) No. 1140 of 2011, a similar statement was made by the learned counsel for the respondents that there is no impediment on the part of the petitioner to participate in any tender process. In the affidavit of the respondents also, the following statements have been made :

That in reference to the para 2 of the writ petition, it is pertinent to mention that at no point of time the writ petitioner was debarred from participating the FOE. More so, the respondents Deptt. never blacklisted the writ petitioner, therefore this allegation of blacklisting the writ petitioner is denied hereto.

9. Despite repeated assertion that the petitioner's firm has not been blacklisted, its tender has been rejected consecutively for two years on the sole ground that large number of pump sets, supplied by it in the past, were found to be defective and it did not fulfill the specifications, laid down in the contract agreement.

10. In the case of M/s. Erusian Equipment & Chemicals Ltd. (supra), the Hon"ble Supreme Court has discussed the consequences of "blacklisting" a firm and the precautions necessary before any such decision is taken by the authority. For ready reference, some of the observations need to be reproduced, which are as below:

The Government is Government of laws and not of men. It is true that neither

the petitioners nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others who offer tender or quotations for the purchase of the goods. This privilege arises because it is the Government which is trading with the public and the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions. Hohfeld treats privileges as a form of liberty as opposed to a duty. The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with any one but if it does so, it must do so fairly without discrimination and without unfair procedure. Reputation is a part of a person's character and personality. Blacklisting tarnishes one's reputation.

Exclusion of a member of the public from dealing with a State in sales transactions had the effect of preventing him from purchasing and doing a lawful trade in the goods in discriminating against him in favour of other people. The State can impose reasonable conditions regarding rejection and acceptance of bids or qualifications of bidders. Just as exclusion of the lowest tender will be arbitrary, similarly exclusion of a person who offers the highest price from participating at a public auction would also have the same aspect of arbitrariness.

11. In the case of *R.D. Shetty (supra)*, the Apex Court reiterated that there is a distinction between the Government and an individual in selecting recipient of its largesse. In the said judgment, the Hon'ble Supreme Court approved the minority view taken by the Kerala High Court, in the case of *V. Punnen Thomas Vs. State of Kerala*, laying down a higher yardstick in selecting the contractor/supplier of government bids. The views expressed by Kerala High Court are as under :

The Government is not and should not be as free as an individual in selecting the recipients for its largesse. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal.

12. In the aforesaid case, the Apex Court also approved the ratio of law laid down in the case of *M/s. Erusian Equipment & Chemicals Ltd. (supra)* and held that the State cannot act arbitrarily in entering into relationship directly or otherwise with a third party, but its action must conform to some standard or norm, which is rational and non-discriminatory.

13. In the case of *Rashbihari Panda etc. Vs. State of Orissa*, the scheme conceived by the State of Orissa to purchase Kendu leaves only from those individuals who had carried out contracts in the previous year without default and to the satisfaction of the Government was challenged. The stipulation was assailed on the premise that it is violative of Articles 14 and 19(1)(g) of the Constitution inasmuch as it ousted/excluded large number of persons from selling Kendu leaves to the Government agency. Although, the writ petition was

dismissed by the High Court, the challenge of the writ petitioner was upheld by the Apex Court observing that the scheme had arbitrarily excluded many persons interested in the trade and the pre-condition laid down in the scheme was objectionable. The Hon"ble Supreme Court held that the stipulation was ex-facie discriminatory and it imposed unreasonable restrictions upon the right of persons, other than the existing contractors to carry on business.

14. In the case of Southern Painter (supra), the Apex Court affirmed that before a person is put on the "blacklist", he is entitled to an opportunity of hearing in consonance with the principle of natural justice. In this case, minority view taken by the Kerala High Court in the case of V. Punnen Thomas (quoted in this judgment) was again followed.

15. It is true that in the case of M/s. Erusian Equipment & Chemicals Ltd. (supra), the petitioner's company was blacklisted for indulging in malpractice and violating the provisions of Foreign Exchange Regulatory Act (FERA) and it was not a case of blacklisting a firm for supplying defective goods but the principles and the precaution laid down for blacklisting a firm would remain the same. Similarly, the facts in other cases were also not identical to the case in hand but the law laid down by the Apex Court to maintain high degree of transparency and reasonableness and fairness in government largesse have to be taken note of.

16. In the case of Chintaman Rao Vs. The State of Madhya Pradesh, , the Hon"ble Supreme Court had the occasion to examine the contours of Article 19(1) (g) of the Constitution and observed that a proper balance has to be struck between "right to trade" as enshrined under Article 19 and also the social control permitted under clause (6) of the said article. The relevant observations of the Hon"ble Apex Court can be fruitfully extracted below :

The word "reasonable" implies intelligent care and deliberation, that is, the choice of a course which reason dictates. Legislation which arbitrarily or excessively invades the right cannot be said to contain the quality of reasonableness and unless it strikes a proper balance between the freedom guaranteed in Article 19(1) (g) and the social control permitted by clause (6) of Article 19, it must be held to be wanting in that quality.

17. Yet again, in the case of State of Madras Vs. V.G. Row, , the Hon"ble Supreme Court observed that there can be no general principle or standard to test reasonableness of a restriction on a particular trade and each case has to be judged on the basis of the facts and circumstances of the case in the following words :

The test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the

disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.

18. It is to be noted that Article 19 has been included in Part-III of the Constitution of India which deals with various fundamental rights of its citizens. Basically, it is an extension of Article 14 which provides equality before law and equal protection of the laws. At the same time, Article 19 (1) (g) does not give unfettered right in the matter of profession, trade or business. Under Clauses (2) to (6) of Article 19 of the Constitution, Government has every right to impose reasonable restrictions. In other words, clauses (2) to (6) are exceptions to the fundamental rights of free trade and business and as such the reasonableness of the restrictions has to be examined keeping in mind the interest of the general public vis-a-vis objective behind imposing restrictions.

19. In the case at hand, Clause 1.10.3 of the FOE appears to be a blanket ban upon the past suppliers, whose product was not found satisfactory. In the same FOE, Clause 1.6 prescribes inspection and test of products before being handed over to the department. A detail procedure for such pre-delivery inspection has been set out. Besides this, under Clause 1.7 of the FOE, the supplier has to give 12 months warranty against its products. In this way, there are inbuilt safeguards to keep away the firms and individuals from supplying defective goods. In the backdrop of these precautionary measures how far it is justifiable to debar a person from submitting his bid out rightly at the threshold of a bidding process under Clause-1.10.3. I am also of the view that just because some complaints were received against the working of pump sets supplied by the writ petitioner, the bid of the petitioner should not have been rejected summarily, provided the pump sets of the petitioner meet the specifications laid down by the department. Nowhere in the Technical Committee report, it has been mentioned that the pump sets being manufactured by the writ petitioner did not meet the requirement or the specifications lay down by the Government. At best, a more stringent condition can be inserted in the FOE that selected firms and individuals may be required to demonstrate the performance of their products before their final selection, in addition to warranty clause.

20. Be that as it may, Clause 1.10.3 has been couched in such a language that a manufacturer or a supplier, whose products were found to be defective in the past cannot be considered at all for shortlisting. Since the said clause has been repeatedly put in FOEs an inference can be drawn that one particular category of manufacturers have been permanently debarred to be selected. Although, the language employed in Clause 1.10.3 in FOE is in the nature of a discretion but the way the tenders of the petitioner have been rejected, it appears to me that the clause is being interpreted as a mandatory condition that there should be no complaint, whatsoever, about the products of manufacturer. I have already observed hereinabove that there are sufficient safeguard to check supply of defective machinery and as such, the stipulation under clause 1.10.3 is just superfluous. In my opinion, incorporation of such a stringent condition in the FOE

has given a blanket power to reject the tender of a manufacturer summarily, whose products are found to be defective in the past supply and it amount to unreasonable restriction in the settlement of Government largesse. Consequently, clause 1.10.3 of the FOE is declared to be violative of Article 14 of the Constitution of India. Resultantly, the same is struck off from the FOE.

21. In view of the striking-out of clause 1.10.3 of the FOE, the impugned letter dated 12.07.2011 issued by the Agriculture department, Government of Assam, rejecting the petitioner's tender is also hereby set aside. However, I am not inclined to give a direction to the respondents to automatically include the petitioner in the panel of suppliers of pump sets for the current year. In other words, the petitioner shall be eligible for participating in future tender process and if any such tender is submitted, the same shall be considered on its own merit. In the result, the writ petition stands allowed. However, in the facts and circumstances of the case, no cost is awarded in favour of the petitioner.