(2020) 07 OHC CK 0005

In the Orissa High Court

Case No : Writ Petition (Civil) No. 28643 Of 2019

Maa Sarala Multipurpose Cooperative Limited Represented Through Its Secretary Nalini Kanta Dash	APPELLANT
Vs	
Steel Authority Of India And Another	RESPONDENT

Date of Decision : 20-07-2020

Acts Referred:
Constitution Of India, 1950 — Article 14, 19(1)(g)

Citation : (2020) 07 OHC CK 0005

Hon'ble Judges : Mohammad Rafiq, CJ;Debabrata Dash, J

Bench : Division Bench

Advocate : S.S. Rao, B.K.Mohanty, B.Dasmohapatra, B.N.Bhol, B.Moharana, S.Moharana, B.Mohanty

Judgement

Debabrata Dash, J

1. This writ application has been filed by M/s.Maa Sarala Multipurpose Cooperative Society Limited registered under the Odisha Cooperative Society

Act, 1962 with a prayer to issue writ of mandamus commanding the opposite parties to deliver the stock of 222.000 MT of Ammonium Sulphate as

per Annexure-2; with further prayer to direct the opposite party no.2 to consider and dispose of the petitionerâ??s representation dated 21.12.2019

under Annexure-5.

2. The Petitioner, a Registered Cooperative Society, carrying on the supply/sale of different such products including fertilizer to the farmers for their

agricultural activities, participated in the e-auction made by the Steel Authority of India Limited, Rourkela Steel Plant, the opposite party no.1 through

its service provider, i.e., Metal Junction Services Private Limited (for short, â??MJSPLâ?) for the purpose of sale of Ammonium Sulphate by depositing the required EMD of Rs.50,000/- The auction was finally conducted in respect of different quantities of Ammonium Sulphate in phased

manner. The petitionerâ??s name appeared in the bid- sheet under rank-1 being the sole bidder in respect of 220.000 MT of Ammonium Sulphate

under different phases as at Annexure-2.

It is stated that despite the fact that the petitioner was the successful bidder in respect of 222.000 MT of Ammonium Sulphate way back on

15.11.2019, there was no supply of the stock. When the matter stood thus, another open sale notice dated 19.12.2019 under Annexure-4 in respect of

7500.000 MT of Ammonium Sulphate was published by the opposite parties. Being apprehensive that in the open sale, the entire stock would be sold

wholly to the detriment of the petitioner; in the subsequent auction, bid was given by the petitioner for purchase of small quantity of Ammonium

Sulphate. It is further stated that the petitioner was all along ready and willing to lift the stock for purchase of which he was the successful bidder in

the first auction held on 15.11.2019 by complying all such formalities and is now also ready and willing for the same. The petitioner, being the

successful bidder in the first auction, has been unjustifiably deprived of enjoying the fruit of the same. The action of the opposite party in holding the

2nd auction is said to be arbitrary and illegal.

3. The opposite parties, in their counter affidavit, have admitted the fact that first auction for sale of Ammonium Sulphate of 620 Tonne (10T X 30 lots

and 20 T X 16 lots) had been held through the service provider MJSPL and the bid price was fixed at Rs.10,800/- per tonne. It has been further stated

that the participation in the said action conducted on 15.11.2019 through said service provider was such that there was no competition at all. The

present petitioner, through its Secretary Sri Nalini Kanta Dash and one M/s. Maa Sarala Agro Care of which said Secretary of the petitioner-

Cooperative Society is the proprietor, were the two participants. It is said that for each of the 46 lots of Ammonium Sulphate put to auction for sale,

single bid had been offered and the auction price did not go upward the fixed bid price of Rs.10,800/- per tonne. It is said that it was not a competitive

bidding of the lots and the price quoted by the petitioner as also by M/s.Maa Sarala Agro Care by its proprietor who happens to be the Secretary of

the petitioner-Cooperative Society for 400 T and 200 T respectively was the same, i.e, the fixed bid price.

The opposite parties received an order dated 14.11.2019 passed by this Court in W.P.(C) No.21630 of 2019 which had been filed by All Odisha

Fertilizer Wholesellers Association challenging the forward e-auction notice dated 7.11.2019 published by the opposite parties. That petitioner-

Association (intervenor in the present proceeding) therein had expressed the apprehension that there may be breach of clause-3 of the Fertilizer

(Inorganic, Organic or Mixed) Control Order, 1985 (in short, â??the Control Orderâ??) in that auction. This Court, while disposing the writ

application, upon consideration of the submission and on going though clause-3 of the Control Order, had disposed of the writ application with an

observation that the opposite parties would commit no breach of the said clause in any manner whatsoever.

Keeping in view the fact that in the said auction held on 15.11.2019, there was no competition and equitable distribution of the fertilizers to the

registered dealers in the State of Odisha in consonance with the terms and conditions of the tender as also the fixed bid money was the quoted offer,

the opposite parties finally cancelled the same and intimated said decision to the service provider through e- mail on 21.12.2019 under Annexure-C

with a direction to refund the EMD to the parties. In view of that, no letter of acceptance (LOA) was issued to the petitioner. It is also stated that

MJSPL had intimated the petitioner about cancellation of the said forward action held on 15.11.2019 with a request to seek the refund of EMD or

otherwise, the same would stood reverted to the virtual account of the petitioner. This intimation was given by MJSPL through email dated 21.19.2019

under Annexure-D. Thereafter, open sale notice bearing no.MKTG/OS/ AS/2020/406 dated 19.12.2019 under Annexure-E was issued for sale of 7500

MT of Ammonium Sulphate. In response to the same, one hundred and fifty-eight (158) applications were received from different registered fertilizer

dealers from different parts of the State intending to purchase desired quantities of Ammonium Sulphate at their respective quoted rate. So, from out

of the declared available quantity of Ammonium Sulphate, allotment was made to all the parties on pro rata basis against the applied quantity with

minimum allocation of 40 Tonne. The petitioner- Cooperative Society again by depositing EMD participated in the said auction held pursuant to the notice dated 19.12.2019 and it had applied for allocation of 100 Tonne of Ammonium Sulphate. Finally, the petitioner-Cooperative Society has been

allotted 40 Tonnes of Ammonium Sulphate at the rate of Rs.11,000/- per Tonne under that pro rata allotment to all the bidders. Said application dated

4.1.2020 made by the petitioner, in response to the sale notice dated 19.12.2019 has been placed at Annexure-E and the lists of purchasers and the

sale order dated 1.2.2020 issued in favour of different parties including the petitioner are placed at Annexure-F and G respectively.

When the matter was progressing further for delivery of stock to all those purchasers, the opposite parties received the interim order of stay of

operation of notice dated 19.12.2019 passed by this Court on 28.1.2020 for which the distribution as per the said allocation to different persons has

been put on hold.

4. The petitioner has also filed the rejoinder affidavit, which has been taken on record. The averments made therein are more or less repetitions of the

case projected by the petitioner in the writ application. It has been asserted all throughout that there was no justification to take a decision for

cancellation of the first auction wherein the petitioner was the participant and successful as none had then come forward to bid. The decision to

cancel the first auction on the ground as averred in the counter affidavit filed by the opposite parties is said to be arbitrary and illegal and thus the

second auction held is nonest in the eye of law.

5. Mr.B.K.Mohanty, learned counsel for the petitioner submitted that in the given facts and circumstances, it is a fit case for judicial review in

annulling the second auction and for restoration of the result of the first auction in which the petitioner was the sole participant-bidder and as such

successful. He further submitted that when no response has come towards the representation dated 19.12.2019 given by the petitioner, it is clear that

there was no prior intimation to this petitioner about the cancellation of the first auction process and had it been so, there was no reason to hold on the

representation without any reply to that effect. He further submitted that in W.P.(C) No.21630 of 2019, this Court had expressed the hope that there

would be no breach of the provision of clause-3 of the Control Order. But then nothing is now said as to how in the first auction held on 15.11.2019,

there was breach of the provisions contained in the said clause-3 of the Control

Order. He submitted that the reason assigned for the cancellation of

the first auction process is untenable in the eye of law and the cancellation of the first auction is arbitrary and illegal. He, therefore, contends that the

petitioner being the successful bidder in respect of 222.000 MT of Ammonium Sulphate is entitled to be delivered with the same upon compliance of

other required formalities which be accordingly, ordered.

6. Mr.B.Dasmohapatra, learned Counsel for the opposite parties submitted that the present case is not one where judicial review is permissible. He

highlighted that the scope of writ jurisdiction in contractual dealings of the State or its instrumentality is extremely limited, and deference to commercial

wisdom of the executive ought to be the norm. The decision making process was shown as not being illegal as there is no allegation of consideration of

any extraneous matter or violation of any statute; nor irrational. The decision of cancellation of the first auction process and the resumption of the

auction process afresh that too within a reasonable period is to have the equitable distribution of Ammonium Sulphate used as fertilizers by the farmers

amongst the maximum number of registered fertilizer dealers of the State running their business in different places of the State so as to achieve the

ultimate goal that the fertilizers reach to the maximum number of farmers all over the State in meeting their need, besides fetching better price for the

opposite parties. The reasons are not such which would offend the sensibilities of a reasonable person; nor can be termed as arbitrary as substantial

discretion on that score is allowed by the terms of the tender notice. The petitionerâ??s participation in the tender process post cancellation of the

first tender was contended to bind him from advancing any further judicial challenge to the said cancellation of the first auction and now its restoration

at their instance is not permitted in law as the conduct and representation of the petitioner through said participation in the subsequent auction estopps

the petitioner. He further contended that the very participation of 158 numbers of registered dealers in the second auction as against the participation

of one person, i.e, the petitioner-Cooperative Society in the first auction for the part block clearly demonstrates that, had the first auction been upheld;

there would have not at all been the equitable distribution of the fertilizers as amongst the registered fertilizer dealer in the State to cater the need of

farmers all over the State and rather, there would have been the creation of â??

Monopoly Rajâ?? which is prohibited in law. He submitted that the

first auction was not at all competitive and had not fetched the price as it ought to have been in public interest and that the element of equitable

distribution of the fertilizers (Ammonium Sulphate) through out of the State amongst the registered dealers for being ultimately available for utilization

by the farmers was clearly lacking. He further highlighted that in the first auction, the petitioner was the only participant and he had applied for the

quantity as per its demand quoting the fixed bid price and similarly for some more stock, the proprietorship concern of the very Secretary of the

petitioner- Cooperative Society was the participant. In the given facts and circumstances; in the backdrops of the provisions contained in the relevant

clauses of the Control Order, giving emphasis upon the fact that acceptance of the result of the first auction, would certainly stand on the way of

achievement of one of the important object of equitable distribution of Ammonium Sulphate (fertilizers) to the registered dealers for the entire State for

being available to the large number of farmers, he contended that the cancellation of the first tender is just and proper. The decision to cancel the

same is well in order in public interest and cannot come within the purview of judicial review.

7. Mr.B.Moharana, learned counsel for the intervenor adopted the submission advanced by the learned counsel for the opposite party nos.1 and 2.

8. In reply, Mr. Mohanty, learned counsel for the petitioner contended that the petitioner having participated in the second auction in view of the strong

apprehension that it may be totally kept out of the field, that conduct and representation would not operate as estoppel to challenge the cancellation of

the first tender which is ex-facie illegal.

9. In order to address the above rival submission, it would be apposite to take note of the principles of law governing the field as have been explored in

depth by the Apex Court in catena of decisions.

It is settled that constitutional courts are concerned only with the lawfulness of a decision, and not its soundness. Central Coal Field Ltd v. SLL-SML

(JV Consortium)(2016) 8 SCC 622 To place it differently, courts ought not to sit in appeal over the decisions of the executive authorities or

instrumentalities and plausible decision need not be overturned, and latitude ought to be granted to the State in exercise of executive power so that the constitutional separation of powers is not encroached upon. Air India Ltd v. Cochin International Airport Ltd. (2002) 2 SCC 617 Notice must be kept

of the impact of overturning an executive decision and its impact on the larger public interest in the form. Caution, however, stands that the allegations

of illegality, irrationality and procedural impropriety be not completely overlooked to assume jurisdiction and remedy such ills. Thus, it would only be

the decision making process which would be the subject of enquiry, and not the and result; save as may be necessary to guide determination of the

former.

10. The position of law has been succinctly summed up in Tata Cellular V. Union of India (1994) 6 SCC 651 wherein it has been stated that:

â??77â?¦. Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It

is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly

put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

i) Illegality : This means the decision- maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesday unreasonableness.

(iii) Procedural impropriety.

In case of Jagdish Mandal V. State of Orissa (2007) 14 SCC 517.

â??22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to

check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is

invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction.

Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the

decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a

procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked

to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek

damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of

molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review,

should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions

and may increase the project cost manifold.â??

11. Such conscious restraint is so necessary because judicial intervention by itself may affect in a manner leading to frustrate the very objective,

besides time and money, which if unchecked would have problematic ramifications on many fronts. However, it is not desirable or practicable for

courts to review the thousands of auctions conducted by executive authorities every day. Courts, therefore, are cognizant that often-a-times the

private interest of a few can clash with public interest of the masses, and hence a requirement to demonstrate effect on â??public interestâ?? has

been evolved by the Court.

It is, therefore, imperative that in addition to arbitrariness, illegality or discrimination under Article 14 or encroachment of freedom under Article 19(1)

(g), public interest too must necessarily be demonstrated in seeking the remedy.

12. Adverting to the case in hand, admittedly in the first auction, the petitioner was the only participant for purchase of Ammonium Sulphate put for

sale and for some other part, the concern owned by the Secretary of this petitioner- Cooperative Society was the sole participant. After the first

auction, as it appears within a reasonable time, the opposite parties have taken the decision to cancel the same taking into account the views as to lack

of competition, inequitable distribution and the bided price to be just the same as the fixed bid price as per the tender notice. The second auction then

being ordered has also taken place and there has been participation of 158 persons including the petitioner in that and they are all the registered

dealers having different areas of operations in different places of the State. The petitioner-Cooperative Society as well as the other proprietorship

concern, both have their registered office in the district of Cuttack. While disposing W.P.(C) No.21630 of 2019, by order dated 14.11.2019, this Court

had taken note of the provisions contained in caluse-3 of the Control Order.

Given a reading to the said provision, makes it clear that the factor of

equitable distribution of the fertilizers making its availability at fair price with a cap for the maximum for being sold by the dealers is of paramount

importance.

We are thus not persuaded to take a view that there is a certain public interest at stake in the decision of cancellation of the first auction. Furthermore,

the petitioner in the case has failed to demonstrate which public law right, it was claiming in support of the claim of annulment of the second auction.

The main thrust of the case of the petitioner has been on the fact that it was the successful bidder in the first auction, but the fact also remains that the

petitioner was the sole participant. The purpose of holding the auction by fixing the opening bid price was to provide a platform to maximum number of

registered fertilizer dealers in giving the opportunity to purchase the fertilizer for their onward sale to farmers all over the State. However, being the

sole participant in an auction does not bestow upon any entity, a public law entitlement in asserting the right of being so rewarded with.

13. In case of Maa Binda Express Carrier V. North-East Frontier Railway, (2014) 3 SCC 760 it has been authoritatively said that:-

â??8. The scope of judicial review in matters relating to award of contract by the State and its instrumentalities is settled by a long line of decisions of

this Court. While these decisions clearly recognize that power exercised by the Government and its instrumentalities in regard to allotment of contract

is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than

making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore,

insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of

public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-

discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well-settled that award of a contract is essentially a commercial

transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to

which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor made to benefit any particular tenderer

or class of tenderers. So also the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided

such relaxation is permissible under the terms governing the tender process.â??

Thus, in the instant case, it is clear that there was neither any public law right of the petitioner which was affected nor there was any public interest

sought to be furthered for grant of the prayer as advanced in the writ application.

14. Lastly, we deem it necessary to deal with another fundamental hurdle standing on the way of the petitioner in assailing that the cancellation of the

first auction by the opposite parties as arbitrary and illegal. The petitioner having participated in the first auction by depositing the required EMD, has

again participated in the second auction by depositing the EMD as ordained therein. In view of that it cannot be said that the decision as to the

cancellation of the first auction was not known to the petitioner as has been so averred in the writ application and strenuously argued by the learned

counsel for the petitioner. At the same time, the averment of the petitioner that lest it would be totally out of scenario from purchasing the Ammonium

Sulphate from the opposite parties; he was compelled to go for purchase of lesser quantity in the second auction, clearly contradicts the assertion of

the petitioner that it was ignorant about the cancellation of the first auction. So, in our view, the petitioner is estopped by its conduct and representation

from questioning the validity/legality of the cancellation of the first auction.

15. In the light of above discussion, the writ application is dismissed. No order as to cost.

Consequentially, the interim order dated 28.01.2020 passed in I.A. No.18349 of 2019 does no more survive for operation in the field.

