(2007) 06 J&K CK 0005

In the Jammu And Kashmir High Court

Mahajan Roller Flour Mill and Another — APPELLANT

Vs

State and Others — RESPONDENT

Date of Decision : 05-06-2007

Acts Referred:
Constitution of India, 1950 — Article 14, 226

Citation : (2007) 3 JKJ 514

Hon'ble Judges : Nirmal Singh, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Nirmal Singh, J.—Petitioners in this petition have sought following reliefs:

Writ, direction or order quashing order of the respondent No. 2 bearing No. DCAPDJ/Adm/114-16/G dated 20.4.2007:

writ, direction or order of an appropriate nature commanding the respondent No. 2 to consider the tender submitted by the petitioners pursuant to

Notice Inviting Tenders vide No. DCA/PD/PA/M-3/350-72 dated 23.3.2007 and refrain from rejecting the same on the basis of stand taken by

the respondent No. 2 while passing order dated 20.4.2007;

Further writ, direction or order of an appropriate nature commanding the respondents to allot the contract of grinding wheat to the private flour

mills only after taking into consideration the financial bid and tender submitted by the petitioners.

2. Petitioner-firm is a registered Small Scale Industrial Unit and has set up a flour mill at Gangyal Jammu. The respondent State gets wheat supply

from the Food Corporation of India and thereafter the same is supplied to various Flour Mills in the State for grinding purposes by inviting tenders in this regard and after the wheat is grounded, then the Atta is distributed in the public distribution outlets. In terms of Order dt. 29th of May '2003,

passed by the Director, Consumer Affairs and Public Distribution, Jammu, the different mills operating in the State were given the grinding contract

in equal proportion at the rate of Rs. 8.00 per Qtl. For grinding of PDS wheat into whole mill Atta and Rs. 2.25 the cost of packing material often

kg. Pack as and when required by the department. This contract was valid for a period of one year subject to the other terms and conditions of the

agreement. As per this order, the differential cost of carriage of wheat from FCI godowns to the mills outside the Jammu city was to be borne by

the millers. Even though, the aforesaid order was valid for a period of one year, the respondent-State, however, continued with this process upto

year 2006 when a Notice Inviting tender was issued by the respondent-State bearing No. 4518-23/CAD/Acctt dt. 23rd of Jan 06, vide which

tenders from the mills having the grinding capacity of 5000 MT were invited. This NIT, however, was challenged by one M/s JK flour Mills by

filing a writ petition in this Court bearing OWP No. 94/2006, which was disposed of by this Court on 8th of March'06, with the following

directions:

1. Conditions No. 11 & 13 shall not be applied to tenderers who are Small Scale Industrial Units.

2. Respondents shall incorporate a suitable condition in the tender document in consonance with the Industrial Policy for Small Scale Industrial

Units.

3. Respondents shall invited fresh tenders with the above modification in the tender document providing opportunity to all the eligible Small Scale

Industrial Units to participate in the tendering process.

Respondent State impugned the aforesaid judgment in an appeal before the Division Bench but the judgment aforementioned so far as allotment of

the work by issuance of tendering process is concerned was upheld by the Division Bench.

3. The grievance of the petitioners in this petition is that despite the directions passed by this Court in the aforesaid writ petition which were upheld

by the Division Bench also, the respondent State entered into private negotiations with some of the millers without associating the petitioners in the said process and allotted the grinding contract to the selected millers only vide order dt. 2nd of Nov'06. The said order was challenged by the

petitioners in writ petition bearing OWP No. 112 of 2007 and this Court vide order dt. 22nd of Feb'07 has stayed the operation of order dt. 2nd

of Nov'06, passed by respondent State. The further grievance of the petitioners is that the State Government again issued a Notice Inviting Tender

dt. 24th of March'07 in which same clauses as were challenged in writ petition OWP NO. 94/06, were kept. The said NIT was again challenged

in OWP No. 799/06 which came to be disposed of along with other connected petitions vide judgment dt. 16th of April'07 and the respondent

State has again been directed to issue ""either a corrigendum to the NIT dt. 24th of March'07 or a fresh Tender notice incorporating such clauses in

the Tender documents which would suit the requirements of the official respondents and would ensure fair, transparent and reasonable competition

amongst the wheat grinding Mill owners of Jammu province and shall fix dates for receipt of response to the Tender Notice so issued and date of

opening of tenders."" It has been further observed that ""the State Government shall consider deleting or suitably modifying Clause 13 in the existing

Tender Notice document of 2007, keeping in view the judgment of this Court in OWP 94/2006. It is stated that the petitioners made a

representation to the respondent authorities and submitted that they are willing to undertake the grinding work at a lower rate than the rate which

was being give to other units. It is submitted that the representation of the petitioners has been rejected vide impugned order. It is this order, which

as indicated above, is the subject matter of challenge in this petition.

On notice, respondents have filed objections in which it has been pleaded that they used to invited tenders for the process of grinding of wheat and

tenders in this regard were floated for the year 2003-04. As a controversy arose after the opening of tenders relating to lowest rates, the millers

who participated in the tender process were given the grinding contract to a common rate of Rs. 8/- per quintal. It is stated that the petitioner mill

along with other 16 millers were engaged for the purpose of grinding of wheat on the offered rate. It is stated that the petitioner, however did not

return the entire quantity and there was an outstanding against the petitioner. A physical verification was made by the officer concerned on 21st of

April'06 and it was reported that the mill was locked and the stocks were not available. It is further stated that the Assistant Director of the

Department vide its letter dt. 5th of May'06 asked the petitioner mill to make available the outstanding quantity of the wheat and wheat bran and

the petitioner mill deposited the cost of 2299 bags of wheat bran but it was only after filing of previous writ petition by the petitioners bearing

OWP No. 125/07. It is also stated that the petitioner mill is not functioning for the last about one year and has not engaged any labour or milling

staff. It has further been pleaded that on 5th of April'07, on the request made by the petitioners, the department allotted two vehicle; for lifting

180.50 Qtls of PDS Atta but on inspection on the next date, it was found that the Atta loaded in the said vehicles did not belong to the CAPD

department and it was only a Resultant Atta which was brought by the mill owner from outside the mill and only PDS marking on the bags of Atta

was made inside the mill of the petitioners. It is thus pleaded that the petitioner firm has played fraud with the department and therefore, not entitled

to any relief.

4. I have heard learned Counsel for the parties and perused the record.

Petition shall stand admitted.

5. Petitioners earlier filed a writ petition bearing OWP No. 125/07 titled M/s Mahajan Roller Flour Mills and Anr. v. State of Jammu and Kashmir

and Ors., seeking quashing of communication dt. 2nd of Nov'06, issued by the Director, Consumer Affairs and Public Distribution Department,

Jammu, with a further to respondents to allot contract for wheat grinding only after adopting fair, transparent and equitable tendering process. The

said writ petition along with other connected petitions was disposed of by this Court vide order dt. 161h of April'07, with the observations already

noticed above. It has further been observed by this Court in the said order that:

In view of the above arrangement and the assurance of the State Government functionaries to ensure a fair deal to all the eligible competitors for

award of contract for grinding of wheat for Public Distribution System, and the culmination of these proceedings, I do not find any justification to

keep alive contempt petition (W) No. 1 1/2007. This petition shall accordingly stand disposed of.

6. In pursuance to the judgment dt.l6th of April'07 passed by this Court in the

aforementioned writ petition along with connected petitions, the

petitioners filed a representation to the respondent No. 2 on 181h of April'07. The said representation filed by the petitioner-mill has been rejected

vide order impugned dated 20th of April'07, which is the subject matter of challenge in the present writ petition.

7. The respondents in the impugned order have taken a specific stand that the petitioner mill as per the decision taken by the competent authority

as also allotted the grinding work along with other millers. The petitioner mill had taken sufficient stock of PDS wheat for grinding as per the

contract but the mill remained closed for the last about one year and some stocks of PDS wheat/Atta has remained with the mill. It has thus been

stated in the impugned order that PDS wheat being an essential commodity and in order to safeguard the larger interest of the Government and to

run the PDS smoothly as the PDS Atta is to be supplied to the public on day to day basis and the petitioner mill being a defaulter, it would not be

proper to allot the grinding work to it.

8. Mr Johal, learned Counsel for the petitioners submitted that the petitioner null has not been given any notice before passing the order impugned

by the respondents and the petitioners have been declared as defaulter and are not being allowed to participate in the tendering process without

giving them an opportunity of being heard.

9. I have considered this submission of the learned Counsel for the petitioner but find the same without any substance. Respondents in their

objections lave specifically pleaded that the petitioner mill was given certain quantity of wheat for grinding purposes along with other millers but the

petitioner mill did not return the entire quantity and there was outstanding against the petitioners. It has been stated that on physical verification

done by the concerned officer on 21st of April'06, the mill was found to be locked and the stocks were not available. A copy of the report in this

regard has been placed on the record as Annexure R.I with the object ions. As per the report, 2299 bags (toras) of Wheat bran were outstanding

against the petitioner mill. In the report, it has further been mentioned as under:

1. The Mill was found locked. However, as per report of Supervisor of/M/s Mahajan Flour Mill (copy enclosed), the stocks as per books an not

available in the Mill.

10. On 12th of Aug' 06, the Assistant Director (Mills), CAPD, Jammu, wrote a letter to the petitioner mill. The said letter has been placed on

record r-.s Annexure R.2. As per the same, following stocks were outstanding against the petitioner-mill:

Wheat : 195.20.280 Qtls.

2 Atta 5.00.00 Qtls

3 Bran 2299 Bags of 40 Kgs gross weight

11. The petitioner mill vide aforesaid letter written by the Assistant Director was requested to resolve the dispute amicably and physically make

available the above quantity lying outstanding against him or deposit he landed cost of the above products before 25th of Aug'06. A perusal of the

said communication made to the petitioner mills shows that the mill, has not returned the quantity as supplied to it for grinding purpose and the

department concerned has suffered a loss due to the fact that the atta being an essential commodity was to be distributed to the public a large on

day to day basis but the same could not be done due to the fault on the part of the petitioner mill.

12. It be further noticed that as per Clause 15 of the Revised/modified terms and conditions of Tender Notice No. 2 dated 23rd of March'07, only

those millers have been allowed to participate in the contract who are not defaulters. The said clause reads as under:

15. The participating Miller/s can however, make a consortium of Miller/s to obtain a contract for a particular sector subject to the condition that

the participant miller/s are not defaulters.

13. A per the impugned order, it is clear that the petitioner mill has remain defaulter as it has not returned the stocks of PDS wheat for grinding as

per the contract and some of the stocks have remained with the mill

14. It is pertinent to mention here that a petitioner has executed an irrevocable power of attorney in favour of Ram Sahai, s/o Sh Devi Dayal, R/o

Trikuta Nagar, Jammu. As per this irrevocable power of attorney, the said attorney can negotiate, agree to sell, dispose of, lease, mortgage or

transfer in any mode the aforesaid property of mill. Clauses 3 and 4 of the said power of attorney are relevant and are being reproduced below:

3. That the attorney referred to above shall be competent to negotiate, agree and to sell, dispose of, lease, mortgage, or transfer in any mode the

said property for an on behalf of the executants.

4. That 1 e said Attorney shall be competent to run the Flour Mill, referred to c above and operate all the bank accounts of the said Flour Mill. Fie

shall also be competent to sell, mortgage, lease, or transfer in any mode whatsoever the plant, machinery, land, fixtures/furniture, building etc. He

shall also be competent to negotiate with anybody including the workers and to take all the decisions regarding the management of said Flour mill in

any manner whatsoever he deemed proper and the executant shall not in any manner whatsoever interfere in the working of the Attorney Holder

and also shall not be competent to challenge the legality and validity of the decisions taken and the deeds done by the Attorney Holder.

15. Therefore, the present petitioners who were earlier the partners of M/s Mahajan Flour Mills have surrendered all their rights in favour of the

attorney namely Ram Sahai.

16. At the hearing, it was not disputed by the learned Counsel for the petitioners that the irrevocable power of attorney has not been executed by

the partners including Raj Kumar Nargotra through whom the present writ petition has been filed and who was one of the partner. As per Clause 1

of the revised/modified terms and conditions of tender Notice dt. 23th March'07, referred to above, the miller(s) have to keep at their own

expense the efficient and proper running of the mill and have also to keep the mill in working order. This clause is being reproduced below:

1. The millers shall provide at his expenses for the efficient and proper running of the mill and to keep the mill in working order without interruption

for carrying out the Grinding (As per the requirement of the department of wheat including proper and sufficient provisions for the staff and

technical persons essential to run the Mill efficiently.

17. The petitioner Raj Kumar Nargotra, earlier being one of the partner and having executed the irrevocable power of attorney in favour of Ram

Sahai, is not eligible to participate in the tendering process. Moreover, as per Clause 15 of the revised tender notice, which stands reproduced

above, the petitioner mill who has been declared as defaulter cannot be allowed to participate in the tendering process as it is not within the domain

of this Court while exercising power under Article 226 of the Constitution of India read with Sec. 103 of the State Constitution to sit as an appellate authority over an administrative action in contractual matters. This view has been taken by this Court in OWP No. 771 and other

connected petitions, which came to be disposed of vide order dt. 16th of March'07. What was said n the aforesaid case is being reproduced

below:

It is se led proposition of law that while exercising power under Article 226 of the Constitution of India read with Section 103 of the State

Constitution, this Court does not sit as an appellate authority over an administrative action in contractual matters. However, the guidelines have

been laid down by the Apex Court in the case of Tata Cellular Vs. Union of India, , when the courts can review the action of an administrative

authority in contractual matters. In paragraph 85 of the said judgment, their Lordships of the Supreme Court have held as under:

It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to

prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review.

Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or

any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while

accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best

quotation. The right to choose cannot be considered to bean arbitrar power. Of course, if the said power is exercised for any collateral purpose of

the exercise of that power will be struck down.

18. In paragraph 113 of the aforesaid judgment, it was further held as under:

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 crutiny 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 be experts.

(5) The Government must have freedom of contract. In other words, a/airplay 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 he 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 malafides.

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

19. In Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, , it has been held as under:

While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to

whether there has been any infirmity in the 'decision making process'. By way of judicial review the Court cannot examine the details of the terms

of the contract which have been entered into by the public bodes or the State. Court have inherent limitations on the scope of any such enquiry.

But at the same time the courts can certainly examine whether decision making process was reasonable, rational, nor arbitrary and violative of

Article 14 of the Constitution. If the contract has been entered into without ignoring the procedure which can be said to be basic innature and after

an objective consideration of different options available taking into account the interest of the State and the public, then Court cannot-act as an

appellate authority by substituting its opinion in respect of selection made for entering into such contractâ?¦.

20. In Master Marine Services Pvt. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and Another, , the Supreme Court has held as under:

The law relating to award of contract by State and public sector corporation was reviewed in Air India Ltd. Vs. Cochin Int., Airport Ltd. and

Others, and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose

its own method to arrive at a decision and it is free to grant any relaxation for bonafide reasons. If the tender conditions permit such a relaxation. It

was further held that the State, its corporations: instrumentalities and agencies have the public duty to be fair to all concerned. Even when some

defect is found in the decision making process, the Court must exercise its discretionary powers under Article 226 with great caution and should

exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court Should always keep the larger public

interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest

requires interference, the Court should interfere.

21. In the present cases, as per Clause 15 of the revised NIT, a mill who has been declared defaulter cannot be allowed to participate in the

tendering process. As noticed above, the petitioner mill has been remained defaulter and therefore, it has not been allowed to participate in the

tendering process. The said action on the part of official respondents has been taken keeping view the public interest. The respondent-State after

taking into consideration the conduct of the petitioner mill has rightly not allowed the grinding work to the petitioner.

22. Therefore, this action of the respondent-state cannot be termed as illegal.

23. For the reasons mentioned above, this petition is found to be without merit and is dismissed. Parties to bear their own cost.