
(2014) 01 OHC CK 0037

In the Orissa High Court

Case No : Writ Petition (C) No. 18418 of 2013

M/s. Kalinga Order Supplier

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 17-01-2014

Acts Referred:

Constitution of India, 1950 — Article 14 226

Citation : (2014) 1 ILR 382

Hon'ble Judges : A.K. Goel, C.J;A.K. Rath, J

Bench : Division Bench

Advocate : R.K. Rath, Mr. Anjan Kr. Biswal, Mr. P.K. Rout and D. Das, for the Appellant; B.P. Tripathy, Standing Counsel (SME), for the Respondent

Final Decision : Dismissed

Judgement

A.K. Goel, C.J.—This petition seeks quashing of Tender Call Notice dated 2.8.2013 Annexure-3 and direction to give the work order to the petitioner. Vide Tender Call Notice dated 3..6.2013 sealed tenders were invited for transportation of food stuffs from FCI Depots to school points under Midday Meal Programme in Mayurbhanj district for the year 2013-2014. The Tender Notice mentions that bid will be opened and evaluated by the Tender Committee and its decision shall be final and binding on the tenderers. It was also mentioned that Tender Authority reserves the right to reject any or all the tender without assigning any reason.

2. The petitioner was one of the tenderers and out of three tenderers the technical bid of the petitioner alone was found eligible and financial bid was opened. The Committee decided to approve the bid of the petitioner subject to approval by the Tender Authority i.e. Collector. The matter was directed to be placed before the Collector. The Collector did not approve the bid of the petitioner on the ground that the petitioner was the only tenderer left and for transparency and fair play re-tender was ordered. Accordingly, the impugned fresh tender notice dated 2.8.2013 was issued inter alia mentioning the "ceiling price" to be Rs. 75/- per quintal, which was also the rate quoted by the

petitioner. The said ceiling price was also mentioned in the first tender notice.

3. Assailing the said decision to issue tender call notice, this petition has been preferred on the ground that the decision of the Tender Committee could not be interfered with by the Collector. There was no bar to the acceptance of the bid of the single tenderer which was found suitable by the Tender Committee. According to the petitioner, the decision to re-tender was arbitrary and violative of the principle of natural justice without giving the petitioner opportunity of hearing.

4. Counter affidavit has been filed on behalf of the opposite party submitting that the Collector was justified in disapproving the proceedings of the Tender Committee.

5. We have heard the learned counsel for the parties.

6. Mr. R.K. Rath, learned Senior Counsel appearing for the petitioner raised the following contentions:

(i) The Tender conditions laying down that the decision of the Tender Committee was final debarred the Collector from interfering with the decision of the Committee;

(ii) The bid of the petitioner having been opened, the petitioner will be prejudiced if the said bid was not accepted; and

(iii) Fresh tender will not serve any purpose as the rate quoted by the petitioner was within the ceiling limit. It should be presumed that the fresh tender is for giving benefit to some other tenderers who may quote the same rate which will be arbitrary and discriminatory. The bid of the petitioner has been rejected as the petitioner was not to the liking of the Collector.

7. Reliance has been placed on the following decisions:

(i) Ramana Dayaram Shetty Vs. International Airport Authority of India and Others,

(ii) Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries,

(iii) Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. and Others,

(iv) Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others,

(v) Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others,

(vi) Union of India and Others Vs. Dinesh Engineering Corporation and Another etc.,

(vii) Association of Registration Plates Vs. Union of India (UOI) and Others,

(viii) Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others,

8. In substance, the submission is that Tender Authority must act fairly and as per notified procedure. If a mechanical order is passed as in the present case, the same should be held to be arbitrary and denial of level playing field.

9. Mr. Tripathy, learned Standing Counsel for the School and Mass Education opposes the said submission and submits that the finding of the Collector is consistent with the Tender conditions and is fair. He further submits that the principles laid down in the judgments relied upon do not in any way vitiate the impugned order. The tender authority is entitled to its choice and though there may be no bar to the single tender being accepted, the Tender Authority is not bound to accept the same. There is no presumption of arbitrariness merely when the reason for the decision is of general nature. In absence of tangible material, inference of mala fides cannot be drawn. The fact that only single tenderer was eligible by itself was the circumstance and could be valid ground to go for re-tendering. If two views are possible, decision of the tender Authority should not be interfered with. Mere fact that single eligible financial bid was opened did not prejudice the bidder. The authority was not bound to accept the same even if the same was within the notified ceiling limit. The decision making process not being vitiated this Court ought not to sit in appeal over the decision on merits. It can also not be presumed that in fresh tender process more eligible bidders with more competitive bids will not participate. The petitioner is also free to participate in the fresh process.

10. We have given due consideration to the rival submissions. Question that falls for consideration is whether in the facts and circumstances, the decision of the Collector to re-tender, declining to accept the recommendation of the Tender Committee, is liable to be quashed?

11. This Court is of the opinion that the answer to the question is to be in the negative and against the petitioner.

It is now well settled that there can be judicial review even of exercise of discretionary powers to give a contract. The extent of exercise of power of judicial review depends on the nature of decision taken. A public authority must act fairly but it is entitled to its choice in accepting or not accepting the bid. Such choice cannot be held to be arbitrary unless the power is exercised for a collateral purpose. The Court does not sit in appeal over the decision but only reviews the decision making process. Free play in joints is necessary in administrative functioning, subject to the decision maker acting honestly and rationally. Reasonableness and fairness are essential attributes of exercise of any public power. Transparency and level playing field are hallmark of fairness. It is only when lack of fairness or denial of level playing is shown, power of judicial review may be invoked. Power of judicial review has to be exercised with great caution to promote public interest. Unless unfairness or mala fides can be clearly demonstrated, the Court does not interfere with the decision of a Tender Authority. It is not for the court to take decision on merits but for the Tender Authority. The Court may interfere only to check the abuse of power or illegality.

Mere fact that a single bid can also be accepted or lowest bid has to be generally accepted is no ground to interfere if it does not happen. Abuse of power or illegality has to be clearly shown by tangible material. The same cannot be presumed. It has to be clearly established that there is denial of fairness in decision making. This is the substance of all the decisions cited by the petitioner. It is unnecessary to refer to the said decisions individually.

12. We may refer to a later decision reviewing the earlier decisions. In Siemens Public Communication Networks Pvt. Ltd. and Another Vs. Union of India (UOI) and Others, it was observed:

20. In Master Marine Services Pvt. Ltd. Vs. Metcalfe and Hodgkinson Pvt. Ltd. and Another, , it was observed as follows:

11. The principles which have to be applied in judicial review of administrative decisions, especially those relating to acceptance of tender and award of contract, have been considered in great detail by a three-Judge Bench in Tata Cellular v. Union of India. It was observed 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 be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down....

12. After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. 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. The Government must have freedom of contract. In other words, 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 principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure....

13. In *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, it was held as under:

18. 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 bodies or the State. Courts 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, not arbitrary and violative of Article 14 of the Constitution.

19. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature 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 contract.

14. In *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, it was observed that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations, which would include, inter alia, the price at which the party is willing to work, whether the goods or services offered are of the requisite specifications and whether the person tendering is of the ability to deliver the goods or services as per specifications.

15. The law relating to award of contract by the State and public sector corporations was reviewed in *V 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 bona fide 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 *B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others*, while summarising the scope of judicial review and the interference of superior courts in the award of contracts, it was observed as under:

65. We are not oblivious of the expansive role of the superior courts in judicial review.

66. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarised as under:

- (i) if there are essential conditions, the same must be adhered to;
- (ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;
- (iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing;
- (iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;
- (v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;
- (vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;
- (vii) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.

22. In *Reliance Airport Developers Pvt. Ltd. Vs. Airports Authority of India and Others*, it was observed as follows:

56. One of the points that falls for determination is the scope for judicial interference in matters of administrative decisions. Administrative action is stated to be referable to broad area of governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial nature. It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary (see *State of U.P. and Others Vs. Renusagar Power Co. and Others*, . At one time, the traditional view in England was that the executive was not answerable where its action was attributable to the exercise of prerogative power. Professor De Smith in his classic work *Judicial Review of Administrative Action*, 4th Edn. at pp.

285-87 states the legal position in his own terse language that the relevant principles formulated by the courts may be broadly summarised as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. These several principles can conveniently be grouped in two main categories: (i) failure to exercise a discretion, and (ii) excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts *ultra vires*.

57. The present trend of judicial opinion is to restrict the doctrine of immunity from judicial review to those class of cases which relate to deployment of troops, entering into international treaties, etc. The distinctive features of some of these recent cases signify the willingness of the courts to assert their power to scrutinise the factual basis upon which discretionary powers have been exercised. One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is "illegality", the second "irrationality", and the third "procedural impropriety". These principles were highlighted by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service*, 1985 AC 374 : (1984) 3 WLR 1174 : (1984) 3 All ER 935 (HL) (commonly known as CCSU case). If the power has been exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated. (See *CIT v. Mahindra and Mahindra Ltd.*) The effect of several decisions on the question of jurisdiction have been summed up by Grahame Aldous and John Alder in their book *Applications for Judicial Review, Law and Practice* thus:

There is a general presumption against ousting the jurisdiction of the courts, so that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of governmental activity, national security being the paradigm, which the courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the Government's claim is *bona fide*. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited. It has also been said that powers conferred by the

Royal Prerogative are inherently unreviewable but since the speeches of the House of Lords in *Council of Civil Service Unions v. Minister for the Civil Service*, 1985 AC 374 : (1984) 3 WLR 1174 : (1984) 3 All ER 935 (HL), this is doubtful. Lords Diplock, Scarman and Roskill appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial review can be limited by the subject-matter of a particular power, in that case national security. Many prerogative powers are in fact concerned with sensitive, non-justiciable areas, for example, foreign affairs, but some are reviewable in principle, including the prerogatives relating to the civil service where national security is not involved. Another non-justiciable power is the Attorney General's prerogative to decide whether to institute legal proceedings on behalf of the public interest.

77. Expression of different views and discussions in different meetings really lead to a transparent process and transparency in the decision-making process. In the realms of contract, various choices were available. Comparison of the respective merits, offers of choice and whether that choice has been properly exercised are the deciding factors in the judicial review.

(emphasis supplied)

While arriving at the aforesaid conclusions, this Court took note of the illustrious case of *Tata Cellular Vs. Union of India*, wherein at paras 77 and 94, it was noted as follows:

77. The duty of the court is to confine itself to the question of legality. Its concern should be:

- (1) whether a decision-making authority exceeded its powers?
- (2) committed an error of law,
- (3) committed a breach of the rules of natural justice,
- (4) reached a decision which no reasonable tribunal would have reached, or
- (5) abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment 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, Wednesbury unreasonableness.**

(iii) **Procedural impropriety.**

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in *R. v. Secy. of State for the Home Deptt., ex p Brind*, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

* * *

94. 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 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.

23. In *Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others*, it was held as follows:

10. Therefore, though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the court that in the matter of award of a contract power has been exercised for any collateral purpose. But on examining the facts and circumstances of the present case and on going through the records we are of the considered opinion that none of the criteria has been satisfied justifying Court's interference in the grant of contract in favour of the appellant. We are not entering into the controversy raised by Mr. Parasaran, learned Senior Counsel that the High Court committed a factual error in coming

to the conclusion that Respondent 1 was the lowest bidder and the alleged mistake committed by the consultant in the matter of bid evaluation in not taking into account the customs duty and the contention of Mr. Sorabjee, learned Senior Counsel that it has been conceded by all parties concerned before the High Court that on corrections being made Respondent 1 was the lowest bidder. As in our view in the matter of a tender a lowest bidder may not claim an enforceable right to get the contract though ordinarily the authorities concerned should accept the lowest bid. Further, we find from the letter dated 12-7-1996 that Paradip Port Trust itself has come to the following conclusion:

The technical capability of any of the three bidders to undertake the works is not in question. Two of the bids are very similar in price. If additional commercial information which has now been provided by bidders through Paradip Port Trust, had been available at the time of assessment, the outcome would appear to favour the award to AFCONS.

13. We have examined the record with reference to the above parameters and are unable to hold that the Collector had no authority to overrule the recommendation of the Tender Committee or that the decision of the Collector was in any manner illegal, arbitrary or mala fide. It may be difficult to infer, at this stage, that the Collector has rejected the bid of the petitioner as it was not to the liking of the Collector or the purpose is to give contract to someone else at the same rate. Certainly, if this can be shown from any tangible material, it may be abuse of power and arbitrary, but there can be no such presumption in the present case. As submitted on behalf of the opp. parties, there is every chance of better competitiveness in the fresh process, which may result in benefit to the public revenue. Inference of arbitrariness cannot be drawn merely because the Tender Committee recommended acceptance of bid of the petitioner. The Collector had every authority to disagree with the recommendation. No opportunity of hearing was required to be given to the petitioner nor a detailed order was required to be passed. The fact that the petitioner was the only eligible bidder could not be ignored. Rate quoted, though up to ceiling limit, did not rule out possibility of substantially lesser rate being quoted in fresh tender process. All these illusive factors have to be weighed by the tender authority and an informed decision on such issues cannot be held to be arbitrary or denial of level playing field merely on a presumption. No personal mala fide has been alleged nor there is anything to show that the decision is not bona fide or actuated by any extraneous considerations. Thus, no ground for interference has been made out.

The petition is dismissed.