

(2012) 09 OHC CK 0001

In the Orissa High Court

Case No : Writ Petition (C) No. 9084 of 2012

M/s. Rosmerta Technologies Pvt. Ltd.

APPELLANT

Vs

State of Orissa and others

RESPONDENT

Date of Decision : 04-09-2012

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : AIR 2013 Ori 35

Hon'ble Judges : V. Gopala Gowda, C.J;S.K. Mishra, J

Bench : Division Bench

Advocate : Bigyan Kumar Sharma, A.U. Senapati and B.B. Mishra, Sanjeeb Mohanty and J. Pal, for the Appellant; J. Pal, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Mishra, J.—The petitioner, in this case, challenges the order passed by the Opposite Party No. 2 on 5-5-2012 annulling the tender process for supply and affixation of High Security Registration Plate (HSRP) for the entire State. The petitioner claims that the Government of Orissa, in pursuance of the order of the Central Government, invited private participation and issued a notice inviting tender (NIT) to carry out the various functions of manufacture, distribution, sale and affixation of HSRP in the State of Orissa for the then estimated traffic population of 29 lakhs vehicles of the State.

The Invitation for Bidding document (IFB), inter alia, provided that all the participants to the bidding were to submit the proposal for evaluation in three parts, namely, Qualification Proposal, Implementation Proposal and Price Proposal. The tender document also provided a schedule of bidding process according to which the tender award process was to be completed by 4-10-2009.

On 06.08.2009, the petitioner submitted sealed signed and marked bidding proposal along with bid security deposit of Rs. 20,000,00/- in form of irrevocable Bank guarantee and other documents thereby fulfilling all conditions of the IFB

for the evaluation of the authorities. In total, eight prospective bidders had submitted their bid document. The petitioner-Company along with two other bidders found to be qualified both on the qualification and technical capabilities. The petitioner received a letter on 21.04.2010 from the Commerce and Transport Department informing him that an interim order has been passed by this Court staying the tender process of the HSRP Project. The letter stated that the proposal validity is expired, and thereby, requested the petitioner-company to extend the proposal validity and also requested him to tender fresh bid security by extending Bank guarantee document for another six months. The petitioner has complied with the same. The Department made similar request for extension of bid security and proposal validity from time to time on 4-5-2010, 27-7-2010, 14-1-2011 and 31-5-2011). The petitioner-company has complied with all the requests and duly extended the proposal validity and bid security.

2. In the meantime, the Hon'ble Supreme Court, in W.P.(C) No. 510 of 2005, took note of the stand taken by the State of Orissa with regard to status of implementation of HSRP project in Orissa, to the effect that the final decision of the award of contract shall be taken positively by 7-2-2012 and the scheme shall be implemented in the entire States by 30-4-2012.

3. The Transport Department, vide letter dated 1-3-2012, informed the petitioner that the opening of price proposal/financial bid, which was earlier planned to be done on 2-3-2012, was being postponed sine die since the evaluation of the implementation proposal requires more time. Fresh date for opening of price proposal was to be communicated in due time after conclusion of the evaluation of the submitted implementation proposals were completed. The Transport Commissioner, on 23.03.2012 sent a letter to the petitioner that the price proposal given by him was to be lowered, and therefore, the Department invoked Clause 2.9.2 of the bid document for the first time and invited a revised price proposal from the petitioner. The petitioner was to submit revised price proposal by 29.03.2012. The letter warned that in case the petitioner failed to submit revised proposal by due date and time, the original price proposal shall be taken as final by the Department.

4. The petitioner submitted the price revised proposal on 29.03.2012 and the financial bid was opened on the same time. The petitioner reduced the price in the bid proposal and he emerged as the lowest bidder, in both original as well as revised price proposal, amongst the bidding companies namely, M/s. Agro Impex and M/s. Celex Technology. On 05.04.2012, the petitioner was declared as preferred bidder as per Clause 2.7.2 of the bid document as the price quoted was found to be lowest of the submitted price proposal by the other bidders. However, the Department invoked the renegotiation Clause, i.e. Clause 2.7.4 of the bid document and the petitioner was thereby invited for a meeting on 09.04.2012 for negotiations with the Department in Bhubaneswar. The reason stated by the Department was that the prices of similar work in other States in India were much lower than even the revised price proposal of the petitioner. The

petitioner communicated the Department on 9-4-2012 and explained in detail that the conditions of contract in Orissa were completely different from that of other States where the tender conditions were more favourable to the contractors and that the petitioner's have already reduced the price by 25% of the originally quoted price. The petitioner highlighted the circumstances and terms of contract of Orissa to be different from the other States. The Department disregarded the reasons cited in the letter of 9-4-2012, and instead of accepting the second price proposal of the petitioner, made a counter-offer bearing a price which is approximately half of the contract price offered by the petitioner. The Department officials, further, insisted that the petitioner should accept counter-offer within a very short span of time.

On 12.04.2012, the Department sent a letter to the petitioner demanding a written revised price proposal for the second time though the petitioner has been declared as a preferred bidder by the opposite parties. Pursuant thereto, on 16.04.2012, the petitioner submitted 3rd revised price proposal. Thereafter, the Government of Orissa annulled the tender process for supply and affixation of HSRP. Being aggrieved by such annulment, the petitioner has filed the present writ petition seeking a direction for quashing of letter dated 05.05.2012 whereby the tender process has been annulled.

5. The State of Orissa has filed a preliminary counter affidavit, inter alia, submitting that the matter relating to complete implementation of HSRP scheme in the State was adjudicated by the Hon"ble Supreme Court of India in W.P. (C) No. 510 of 2005. which was disposed of on 07.02.2012. It was submitted that in compliance of the direction of the Hon"ble Supreme Court on 07.02.2012, the price proposal of lowest bidder was opened on 29.03.2012 with an intention to finalise the tender process and implementation of HSRP scheme in the State of Orissa. After opening price proposal it revealed that the price quoted by the petitioner was much higher compared to rates finalized in some other States where tender process has been completed. The petitioner was also called for negotiation of reasonable price offered by the tender committee, which was not accepted by the bidder. As a result, the negotiation was closed and the tender could not be finalized.

The Tender Committee deliberated the issue and found that the price offered by the petitioner is considerably higher than the prices offered by the Tender Committee considering constraints of the bidder as well as price prevailed in some other States. If the price of the HSRP offered by lowest bidder is accepted, the people of Orissa will pay higher price for affixation of HSRP, compared to other States and it will be detrimental to the public interest. Therefore, it is pleaded that the State Government decided to annul the tender process and go for fresh tender, which is in the public interest.

The opposite parties plead that the Government of Orissa reserves the right to summarily accept or reject any or all of the proposals without assigning any reason and to take any measure as it may deem fit including the annulment

bidding process at any time prior to the execution of the contract without liability or any objection for such acceptance, rejection or annulment pursuant to the Clause-2.9.1 of the bid document. The State Government, further, pleaded that the State being the purchaser of HSRP it is prerogative of the State to decide the price of HSRP keeping in view the public interest in general. In the counter affidavit, they have demonstrated that the price quoted by the bidder of HSRP project in Punjab is Rs. 100.00 and in Jharkhand Rs. 106.48. However, the price finally submitted by the present petitioner in Orissa is Rs. 216.00. Thus, the opposite parties plead that the annulment of the tender process has rightly done and there is no necessity of interfering with the same.

6. In this case, thus, the following questions arose for determination:-

(i) whether the opposite parties were right in annulling the tender process in pursuance of Clause 2.9.1 of the bid document ?

(ii) whether this Court in exercise of its power of judicial review should interfere with the same?

7. In the case of Tata Cellular Vs. Union of India, the Hon''ble Supreme Court has dealt with the matters of tender floated by the State and the principles applicable to the same. The Hon''ble Supreme Court has held 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, they are inherent limitation in exercise of the power of judicial review. Government is the guardian of the finances of the State. The Hon''ble Supreme Court, further, held that 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 of India have to be kept in view while accepting or refusing 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 arbitrary. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

8. In the aforesaid case, the Hon''ble Supreme Court, further, held that judicial quest in administrative matters have been to find the right balance between administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such unfairness is set right by judicial review. The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. The Hon''ble Supreme Court, further added that one is the ambit of judicial intervention; the other covers the scope of the court's ability to quash an administrative decision on its merit. These restraints bear the hallmarks of judicial control over administrative action. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but

the decision making process itself.

In the aforesaid case (supra), the Hon''ble Supreme Court, further, held that the duty of the court is to confine itself to the question of legality. Its concern should be:

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

The Hon''ble Supreme Court, further, added that, therefore, it is not for the court to determine whether 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 duty to act fairly will vary from case to case. Shortly put, the Hon''ble Supreme Court, further held that 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. After taking into consideration a number of cases, the Hon''ble Supreme Court, held that the principle of deductible (sic) relating to scope of judicial review of administrative decisions and exercise of contractual powers by Government bodies 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 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.

9. The Supreme Court in *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, has held that while exercising the power of judicial review, in respect of contracts entered into on behalf of the State, 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 contract which have been entered into by the public body or State. The Court has inherent limitations on the scope of any such enquiry. But at the same time, the Court can certainly examine the decision making process or reasonable rational and not arbitrary and not 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 in nature and after an objective consideration of different options available taking into consideration 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. But once the procedure adopted by an authority for the purpose of entering into a contract is held to be against the mandate of Article 14 of the Constitution, the Court cannot ignore such action saying that the authority concerned must have some latitude or liberty in contractual matters and interference by Court amounts to encroachment on the exclusive right of the executive to take such decision.

10. In applying the aforesaid principle to the case in hand, it is seen that the bid document, at Clause-2.9.1. provides right for the Government of Orissa to accept or reject proposal. It reads as follows:-

2.9.1. GoO reserves the right to summarily accept or reject any or all of the Proposals without assigning any reason and to take any measure as it may deem fit, including annulment of the bidding process, at any time prior to execution of the contract, without liability or any obligation for such acceptable, rejection or annulment.

This document has been accepted by the petitioner, and therefore, the Government of Orissa has the right to annul the contract at any point of time if it is in public interest.

11. The Tender Committee for High Security Registration Plate in its meeting dated 20.04.2012 after due deliberations, has resolved that:-

the rates of Odisha were very high compared to other States and the people of Odisha could not be burdened by asking them to pay the rates which would be applicable around the year 2027, in the initial years of contract. Tender committee was also of the view that the bidder could not be allowed to avail windfall profit during the initial years of the contract at the expense of the people of Odisha on the ground of absence of price escalation clause. It had been held by the tender committee that since the tender for HSRP in Odisha had been invited in 2009 and after that many States have finalised the tender by including some progressive clauses such as the periodical price revision clause, shorter period of contract etc. it would not be in public interest to deny the people of Odisha the benefit of this clause and such similar clauses and ask them to pay rates substantially higher than that paid by people of neighbouring States. Since information from Punjab was based on telephonic conversation, Tender Committee had not put too much reliance on it while forming its opinion. Hence, the Tender Committee had no reason to change its opinion with regard to its recommendations made by it in the proceedings communicated to Government vide letter No. 5388 dated 19.04.2012. It was also decided that this proceedings should be made a part of the Tender Committee Proceedings submitted to Government vide letter No. 5388 dated 19.04.2012.

12. Thus, it is seen from the above that the State of Orissa while considering the tender matter very consistently has taken into consideration the fact that the price quoted by the petitioner is much higher as compared to the bid finalized in different States, and therefore, it has come to the conclusion that if the bid of the petitioner is accepted, it will burden people of Orissa extensively and they have to pay more than their counter parts in other States. Such being the consideration, the Tender Committee has come to a just and proper conclusion of annulling the contract for floating fresh tender process.

In that view of the matter, this Court comes to the conclusion that the decision making process adopted by the State does not suffer from any infirmity nor it can be termed as arbitrary. Since we are not sitting in appeal over the decision taken by executive, the order passed annulling the tender process cannot be interfered with.

With the said observations and reasons, the writ petition is found to be devoid of any merit and the same is dismissed. No costs.

V. Gopala Gowda, C.J.

I agree.