**(2012) 06 SHI CK 0132**

**In the High Court Of Himachal Pradesh**

**Case No :** CWP. No. 10430 of 2011

M/s Summer India APPELLANT

Vs

H.P. State Cooperative Wool Procurement and Marketing Federation Ltd. and M/s Kamdhenu Feeds RESPONDENT

**Date of Decision :** 14-06-2012

**Acts Referred:**
Constitution of India, 1950 — Article 12, 14, 226

**Citation :** (2012) 06 SHI CK 0132

**Hon'ble Judges :** Dev Darshan Sood, J

**Bench :** Single Bench

**Advocate :** Atul Jhingan, for the Appellant; T.S. Chauhan, Advocate For the respondent-1 and Mr. Deepak Kaushal, Advocate for the respondent-2, for the Respondent

**Final Decision :** Allowed

## Judgement

Dev Darshan Sud, J.—This writ petition has been filed by the petitioner challenging their exclusion from participation in the tender/Expression of Interest floated by respondent No.2. I need not notice the facts in detail save and except that up to the point of submission of the tender forms, everything was accepted by respondent No.1 as being in order. It was at the time of subsequent negotiations that the petitioner has been excluded on the grounds that the petitioner was guilty of suppression of facts by not disclosing that the certificate issued by the Bureau of Indian Standard (which was necessary for being considered for participation in the tender process) was withdrawn on 20.9.2011 on the basis of inspection dated 15.9..2011 when according to the Bureau certain deficiencies were found in the manufacturing unit of the petitioner herein. It is pleaded that this certificate remained suspended till 10.10.2011 and was renewed again with retrospective effect from 1.10.2011. While considering the tender for supply of veterinary medicines and drugs, the reason stated for rejection was:

 

The party (Summer India) did not attend the negotiations. Instead sent a fax (Annexure:28) explaining the reasons as to why they cannot reduce the rates. In view of the fact that the party did not agree to reduce the rates, the rates quoted in the original tender considered as final.

The Federation has received a complaint against the party (Annexure-29) stating that the license is under stop marking from the Bureau of Indian Standards (BIS). The verification in this regard was made from the BIS Website (licenses under stop marking) and the allegation has been found to be true as on 24.9.2011. The ISI marking is a pre requisite for the supply of the product as per the terms of the tender. Since the party is now no more authorized to mark the product as ISI, the same cannot be considered and hence rejected. The party has deliberately kept the Federation in dark.

2. It is in these circumstances that the petition has been preferred by the petitioner herein alleging that the exclusion has been unfair as at the time when the tender was submitted and subsequent thereto, the petitioner had a valid certification from the Bureau of Indian Standards but later because of some minor technical deficiencies which were not mandatory, the accreditation was withdrawn for a very short period which was subsequently restored. It is submitted by the learned counsel on behalf of the petitioner that on 15.9.2011 when inspection was carried out by the Bureau of Indian Standards pointing out some deficiencies. Order (Annexure:P8) was issued by the Bureau calling upon the petitioner herein to stop marking the products showing the approval of the Bureau. This was confirmed by communication dated 26.9.2011 (Annexure:P9).

Learned counsel submits that by a communication dated 21.9.2011 (Annexure:P7), the petitioner pointed out that all the deficiencies have been removed immediately and the petitioner was complying with all the regulations of BIS. By another communication dated 10th October, 2011 (Annexure:P10), the Bureau writes:

Our Ref: LBO/L-9550484 Dated:10 Oct.2011 Subjct: Renewal of Certification Marks Licence No. CM/L-9550484 As per IS 1664:2002 M/s Summer India E-5228, Sector-11, Rajajipuram, Distt: Lucknow Uttar Pradesh, 226017

Dear Sir,

With reference to your application dated nil for renewal of the above mentioned Certification Marks Licence, we are pleased to inform you that it has been renewed from 01/10/2011 to 30/09/2012 with resumption of marking with immediate effect.

It may please be noted that your licence shall expire at the end of the above mentioned period. You are, therefore, requested to send your application for its renewal at least two months before the expiry of the licence.

The endorsement sheet regarding renewal of licence is enclosed. This may be annexed to the original licence document available with you. You are also requested to subscribe to our monthly Technical Journal ''Standards India'' and also make use to publicize your product through advertisement. The details of the advertisement charges and subscription rates are available in our website www.bis.org.in

Thanking you.

Yours faithfully Sd/- (Kamal Johri), Director

3. The net effect of these communications was that the petitioner was stopped from marking the goods for only a short period of ten days.

4. On the other aspect that the petitioner refused to participate in the negotiation, it is submitted by the learned counsel appearing for the petitioner that a very short notice was sent to the petitioner to attend negotiations. Learned counsel refers to the communication Annexure:P5 which states that the letter calling upon them to attend negotiations was sent on 22.9.2011. The petitioner was asked to attend the negotiation at Shimla on 24.9.2011 at 11 A.M. In order to comply with this communication, the representative of the petitioner had to leave Lucknow on 22nd September, 2011 itself which was impossible as he could not get reservation in railways etc. He, however, explains that the doubts regarding the rates have been clarified in the best possible way and then concludes that if any query remains this could be answered. By communication dated 26.11.2009 (Annexure:P6), the petitioner writes:

The C.E.O., H.P.State Cooperative Wool Procurement and Marketing Federation Ltd, Kasumpti, Shimla (H.P.). Sub: Negotiation

Sir,

This is in continuance of our letter No. 353/SI/2011-2012 dt. 26.9.2011 we would further like to inform you that we are ready to further lower our rates and we are ready to supply our product @ 30.40 per kg.

Kindly approve our rates as per the above negotiated rates and if you want any clarification on any subject matter relating to us then please do feel free to contact us and I will surely be there in no time to clarify all your doubts.

Sd/- (Rana Bhatnagar) Auth. Signatory

5. This in a nutshell is the case bereft of the bulky pleadings on the record. Respondent No.2, was impleaded as party, has contested the eligibility of the petitioner herein to participate in the tender process.

6. What is not in doubt is that on 24.9.2011, negotiations were held by respondent No.1. On that date, the petitioner had been restrained from marking his product conforming to BIS Standards. This was only for short duration of ten days where after it was restored retrospectively. I do not find that the reasons advanced by respondent No.1 for exclusion of the petitioner, are valid in law. It is well settled that judicial review in governmental contracts is limited. The law on

 

this point is now well settled in Meerut Development Authority Vs. Association of Management Studies and Another, the Supreme Court holds:-

33. ... The terms and conditions of tender were expressly clear by which the authority as well as the bidders were bound and such conditions are not open to judicial scrutiny unless the action of the tendering authority is found to be malicious and misuse of its statutory powers. (See: Tata Cellular Vs. Union of India, Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, , Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others, Association of Registration Plates Vs. Union of India (UOI) and Others, , Global Energy Ltd. and Another Vs. Adani Exports Ltd. and Others, and Puravankara Projects Ltd. Vs. Hotel Venus International and Others,

Adverting further, the Court holds:-

35. In Tata Cellular Vs. Union of India, this Court observed that: ( SCC p.675, para 71)

Judicial quest in administrative matters is to strike the just balance between the administrative discretion to decide matters as per government policy, and the need of fairness. Any unfair action must be set right by judicial review.

36. In Chief Constable of the North Wales Police v. Evans, (1982)1 WLR 1155, Lord Hailsham stated: (WLR p.1161 A-B)

The underlying object of judicial review is to ensure that the authority does not abuse its power and the individual receives just and fair treatment and not to ensure that the authority reaches a conclusion which is correct in the eyes of the court.

37. A large numbers of authorities have been cited before us in support of the submission that even in contractual matters the State or "other authorities" are bound to act, within the legal limits and their actions are required to be free from arbitrariness and favoritism. The proposition that a decision even in the matter of awarding or refusing a contract must be arrived at after taking into account all relevant considerations, eschewing all irrelevant considerations cannot for a moment be doubted. The powers of the State and other authorities are essentially different from those of private persons. The action or the procedure adopted by the authorities which can be held to be State within the meaning of Article 12, while awarding contracts in respect of properties belonging to the State, can be judged and tested in the light of Article 14. Once the State decides to grant any right or privilege to others, then there is no escape from the rigour of Article 14. These principles are settled by the judgments of this Court in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another, Ram and Shyam Company Vs. State of Haryana and Others, , Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, , Sterling Computers Limited and Others Vs. M

 

and N Publications Limited and Others, and ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others,

38. The Executive does not have an absolute discretion, certain principles have to be followed, the public interest being the paramount consideration. It has been stated by this Court in Kasturi Lal case: (SCC p.13, para 14)

14. ... It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State, such an action would be both unreasonable and contrary to pubic interest. The Government, therefore, cannot, for example, give a contract or sale or lease out its property for a consideration less than the highest that can be obtained from it, unless of course, there are other considerations which render it reasonable and in public interest to do so.

(Emphasis Supplied)

(pp.183-185)

7. These principles have been reaffirmed in Himachal Pradesh Housing and Urban Development Authority Vs. Universal Estate and Another, Thereafter, the Court considered the principles on which public contracts are to be executed. The Court holds:-

23. In Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, the Court while dealing with a matter involving award of contract, made it clear that the public authority is free not to accept the highest or the lowest offer and the scope of judicial review is confined to the scrutiny of decision making process, which can be annulled if the same is found to be vitiated by malafides, arbitrariness or total unreasonableness. Some of the observations made in the judgment are extracted below: (SCC pp.623- 24, para 7)

7. ...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 paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decisionmaking process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. 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 power 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 intervene.

(Emphasis supplied)

24. In Jagdish Mandal v.State of Orissa, (2007)4 SCC 517, a two- Judge Bench, after taking note of the propositions laid down in Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, , Tata Cellular Vs. Union of India, , Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, and B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others, observed: (Jagdish Mandal case2, SCC pp.531-32, para 22)

22.Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. 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. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: `the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached'';

 

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

25. ...

26. This Court in Meerut Development Authority case allowed the appeal and reversed the order of the High Court insofar as it related to the respondent and observed that the decision taken by the appellant was neither arbitrary nor vitiated due to mala fides and the respondent did not have any right to be allotted land. The Bench relied on the principles laid down in several decisions and reiterated the following observations in Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another,

14... It must follow as a necessary corollary from this proposition that the Government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. The Government, therefore, cannot, for example, give a contract or sell or lease out its property for a consideration less than the highest that can be obtained for it, unless of course there are other considerations which render it reasonable and in public interest to do so.

(pp.262-265)

8. I need not multiply precedent any further. What I find in the present case is that though on the date when the negotiation took place, the petitioner, of course, did not have any accreditation of the Bureau of Indian Standards but at the same time, the communication sent to the petitioner did not provide ample time to attend negotiations at Shimla. The remarks recorded by respondent No.1 that the Federation has received a complaint which is marked as Annexue:29 on the record that the petitioner has been restrained by the Bureau from marking its goods/products as being approved by the BIS. This fact was confirmed from the website. Though an elaborate inquiry was not required but surely the petitioner should have been asked as to why this action had been taken. There has been no such exercise which has been undertaken. An elaborate inquiry was not required but even the barest minimum compliance to the principles of natural justice has been given a go by. The respondents did not put the petitioner to explain as to how and under what circumstances the accreditation granted by the Bureau of Indian Standard has been withdrawn. The time granted to the petitioner to attend the negotiations was also very short. In these circumstances, it cannot be said that an adequate opportunity had been granted to the petitioner to explain his case or to participate in the negotiations. Surely, the petitioner should and ought to have been granted the barest minimum ample time to reach Shimla to

 

explain its position and to participate in negotiations. I find the action of respondent No.1 is violative of the provisions of Article 14. It is not for this Court to award contract to one or the other party but surely everybody must be given a fair chance of participation. In these circumstances, this writ petition is allowed. The impugned order is quashed and set aside. A direction is issued to the respondent to re-consider the case of the petitioner afresh. In case the orders pursuant to the contract have already been awarded to respondent No.2, they shall not be disturbed. If the petitioner is found eligible, respondent No.1 will consider awarding parallel rate contract to the petitioner herein.