(2007) 08 GUJ CK 0028

In the Gujarat High Court

Case No : Spl. C.A. No. 19988 of 2007

Murliwala Agrotech Pvt. Ltd. and Others — APPELLANT

Vs

Gujarat Civil Supply Corpn. Ltd. and Another — RESPONDENT

Date of Decision : 24-08-2007

Acts Referred:
Constitution of India, 1950 — Article 14, 226, 301, 304

Citation : AIR 2008 Guj 6

Hon'ble Judges : M.S. Shah, J;K.A. Puj, J

Bench : Division Bench

Advocate : K.S. Nanavati and Ritesh K. Soni, for the Appellant; K.M. Patel and Varun K. Patel, for the Respondent

Final Decision : Dismissed

Judgement

M.S. Shah, J.—The petitioner, three in number, are engaged in the business of production and supply of supplementary nutrition food with manufacturing units in the State of Rajasthan at Kota, Jaipur and Udaipur. In these petitions under Article 226 of the Constitution, the petitioners (two Private Limited Companies and one partnership firm) challenge the decision of the respondent No. 1 "Gujarat Civil Supply Corporation Ltd. (hereinafter referred to as ''the Corporation'')" excluding the petitioners from further tender process after opening of technical bids.

2. The basic facts leading to filing of these petitions are not in dispute.

The Corporation issued tender notice dated 12-7-2007 inviting bids through e-tendering method from eligible flour millers for grinding of approx. 33,084 MT per annum quantity of wheat to get whole wheat flour and fortification of whole wheat flour with multiple micro nutrients as per the requirement of Integrated Child Development Scheme (ICDS) for distribution to Anganwadi centres in the State of Gujarat. Pursuant to that notice, respondent No. 1 Corporation received 7 tenders, before the stipulated day and time, including 3 tenders of the petitioners in the present group. The technical bids of the 7 tenders received before stipulated time were opened on 27-7-2007.

The technical bids of 7 tenders were pfaced before the Tender & Purchase Committee (T&PC) of respondent No. 1 Corporation in its meeting held on 30-7-2007 for scrutiny and for consideration as to whether their commercial bids should be opened or not. The said Committee consisted of:

(i) Chairman, Gujarat State Civil Supplies Corporation Limited and Principal Secretary, Food, Civil Supplies and Consumer Affairs Department, Government of Gujarat.

(ii) Principal Secretary, Expenditure, Finance Department, Government of Gujarat.

(iii) Director, Civil Supplies, Food and Civil Suppliers arid Consumer Affairs Department, Government of Gujarat.

(iv) Managing Director, Gujarat State Civil Supplies Corporation Ltd.

At the meeting of the Committee held on 30-7-2007, 3 out of 4 members aforesaid were present viz. Chairman, Managing Director and Secretary (Expenditure), State of Gujarat. One Mr. Mukesh Kumar, Director, ICDS (Integrated Child Development Scheme) attended the meeting of the Committee as invitee.

After the technical bids were opened, it was noticed that the manufacturing facilities of the petitioners herein are located in the State of Rajasthan. Petitioner ''Murliwala Agrotech Pvt. Ltd. has its manufacturing facility at Udaipur, M/s. JVS Foods Pvt. Ltd. has its manufacturing facility at Jaipur and M/s. Kota Dal Mill has its manufacturing facility at Kota in the State of Rajasthan.

3. The Committee considered that on account of the petitioners'' manufacturing facilities being located at far off places like Jaipur (578 kms from the nearest district place Himmatnagaf), Kota (458 kms.) and Udaipur (173 kms.), the petitioners'' tenders were not required to be considered on various grounds such as impact on the quality of fortified wheat flour to be delivered, the practical difficulties in inspection and monitoring of manufacturing facilities on regular basis and also on the ground that in case of irregularities, the Consumer Affairs Departments of the State Government cannot take any effective action. The Tender and Purchase Committee also relied on condition Nos. 5 and 23 of the tender document. The Corporation accordingly did not open the commercial bids of the petitioners.

4. The petitioners have challenged the aforesaid decision of the Corporation. After the parties were granted full opportunity to file their pleadings in the form of counter affidavit, rejoinder affidavit and sur-rejoinder also, the learned Counsel for the petitioners have been heard at length.

5. Mr. K.S. Nanavati, learned Counsel for the petitioners made the following submissions:

(i) The petitioners satisfy the eligibility criteria prescribed in the tender documents. None of the eligibility criteria required the party to have manufacturing facilities within the State of Gujarat. Hence, exclusion of the petitioners at the time of the scrutiny of technical bids was illegal.

(ii) The petitioners have excellent manufacturing facilities and the question of geographical distance of the flour mill from the FCI godowns and Anganwadi centers in Gujarat is of no significance in the present days of faster modes of transport.

(iii) The petitioners have already been awarded by the State Government similar contracts for delivering ready-to-eat foods. Under the said contracts also, the petitioners have to take delivery of foodgrains from the FCI godowns in the State of Gujarat and then prepare ready to eat food and deliver them within the State of Gujarat. If the State Government itself has found no difficulty in awarding such contracts to the petitioners, there is no reason why respondent No. 1, which is a limb of the State Government, should exclude the petitioners from consideration.

(iv) The condition of giving regional preference in the matter of consideration of the technical bids is even otherwise arbitrary and violative of the petitioners'' right under Articles 14, 301 and 304 of the Constitution.

(v) In any case, Clause 5 of the tender condition could be taken into consideration only at the time of consideration of the price bids and not at the time of scrutiny of technical bids.

(vi) Strong reliance has been placed on the decisions of the Apex Court in M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, , Indian Cement and Others Vs. State of Andhra Pradesh and Others, Bhargav Bhushan Press Vs. Bihar State Text Book Publication Corporation and Others, and the decisions of this Court in 2000 (3) GLR 2730 and Krishna Communication (Outdoor) Vs. Gujarat State Road Transport Corporation and Another,

6. On the other hand, Mr. K.M. Patel, learned Counsel for the respondent Corporation has made the following submissions:

a As per the criteria for judicial review laid down by the Apex Court in Tata Cellular Vs. Union of India, the scope of judicial review in such matters is limited. The State instrumentalities have to be given a free play in the joint in order to deal with practical situations and practical difficulties.

b The petitioners'' manufacturing facilities are located at Jaipur, Kota and Udaipur which are at a distance of 578 kms, 458 kms, and 173 Kms. respectively from the nearest District Place--Himmatnagar in the State of Gujarat. This long distance would make the petitioners unsuitable for being awarded the contracts in question for the reasons that the contract is for fortification of the whole wheat flour with multiple malnutrients as per the requirement of the Integrated Child

Development Scheme for distribution at Anganwadi centres in the State of Gujarat because the long distances will have significant bearing on the issue of quality of fortified wheat flour at the time of delivery to the Anganwadis, and also on the question of inspection and monitoring of the manufacturing facilities.

c The tender condition Nos. 5 and 23 confer sufficient discretion on the Corporation to take into consideration the practical difficulties which discretion is available at the time of scrutiny of technical bids also.

d The contract awarded by the State Government to the petitioners is in the matter of preparation of ready-to-eat foods, where the shelf life of the products is four months i.e. 120 days as against the shelf life of only 45 days of the wheat flour to be fortified and supplied under the contract in question. The nature of the process for preparing ready to eat food is also different.

e The Corporation has also rejected the tender of Gujarat Roller Flour Mills'' Association based in Gujarat on some other ground and, therefore, exclusion of the pe-titioners after the scrutiny of technical bids is not to discriminate against parties from outside the State of Gujarat.

f Ultimately after the price bids were opened it was found that the party at L1 Flour Mills Trust has, as disclosed in its technical bid, manufacturing facilities at 17 different places in the State of Gujarat located in all the parts and corners of the State being Sanand, Ahmedabad, Moraiya, Prantij (near Himmatnagar), Salal, Kalol, Gandhinagar, Mehsana, Kadi, Bhavnagar, Surat, Rajkot and Baroda.

7. There is no dispute about the fact that the petitioners'' manufacturing facilities are at far away places like Jaipur, Kota and Udaipur which are at a distance of 578 kms., 458 kms., and 173 kms. respectively from Himmatnagar which is the nearest District place in Gujarat from the petitioners'' flour mills. The shelf life of wheat flour is only 45 days. The contractor has to get wheat grains from the depots in Gujarat, transport them to their flour mills, grind them and fortify it with micronutrients, pack them as per the requirements and deliver such packs at the Anganwadi centres. All these processes will take a number of days. Thereafter the remaining shelf life of the wheat flour would be only a few days during which the fortified wheat flour must be converted by the Anganwadis into cooked food to be distributed to the children at the Anganwadi centres. Some margin will have to be kept for the Anganwadis to receive such fortified wheat flour, to store it and to use it as per its requirements. The life of fortified wheat flour is 45 days. The work of taking delivery of wheat from FCI godowns, transportation, process of making wheat flour, fortification, packing as per requirement and delivery at Anganwadi centres is to be carried out within thirty (30) days from the date of issue of wheat. Hence, the time to be taken by the miller for taking delivery from the FCI godowns in Gujarat, complete the entire process as aforesaid and finally delivering the fortified wheat flour at Anganwadi centres in Gujarat would have some impact on the quality of the fortified wheat flour to be delivered to the children at the Anganwadi centres under the

Integrated Child Development Scheme.

8. Preparation of fortified wheat flour requires inspection and monitoring of manufacturing facilities on regular basis. The Corporation has its offices at all District headquarters as well as Taluka (Tehsil) headquarters. Similarly, ICDS has its officers at all District levels and Taluka levels. The work of preparing fortified wheat flour requires monitoring on regular basis which would not be practicable and effectively feasible in cases, like the petitioners'', where the manufacturing facilities are located at far off places like Jaipur (578 kms. from the nearest District place Himmatnagar), Kota (458 kms.) and Udaipur (173 kms.).

9. Even otherwise, the Consumer Affairs Departments of the Gujarat State cannot take any effective action in case of irregularities by the units like those of the petitioners and the only option would be to take action under the tender conditions. On the other hand, in case of tenderers with manufacturing facilities within the State of Gujarat, on account of the Corporation as well as the State Government having its officers at all District headquarters as well as Taluka headquarters, there will be practical difficulties for monitoring and inspection of the flour mills. The aforesaid practical difficulties would definitely be there if the contract were to be awarded to the units having manufacturing facilities in far away places outside the State of Gujarat.

10. In view of the above practical aspects, the Corporation is justified in relying upon condition No. 5 of the tender conditions which confers upon it a right to accept or reject any bid considering the practical situation. Clauses 5 and 23 of the tender documents relied upon by the corporation read as under:

5. Price Basis

The price of the goods shall be quoted on F.O.R. Door delivery at Anganwadi Centres of ICDS basis for the district i.e. shall be inclusive of transportation and labour of wheat from FCI depot in Gujarat or GSCSC godown entire to mill, unloading of wheat at mill, cleaning and grinding charge of wheat, cost of micronutrient premix (Vitamins and Minerals) as per specifications, packing material as per specification, packing and forwarding charges, loading of FWWF at mill, transportation up to Anganwadi Centres, unloading of FWWF at Anganwadi Centres, inclusive of present all Govt. duties and taxes as applicable, freight, transit insurance, public liability insurance and incidentals for delivering the consignment at designated place (s).

The bidder shall indicate the rates/amounts of Excise Duty, Sales Tax (VAT), Octori, Chungi, Service Tax applicable, separately also.

Prices quoted by the bidder shall be firm and fixed during the bidder''s performance of the Contract and not subject to variation on any account, whatsoever. A bid submitted with an adjustable price basis will be treated as non responsive and rejected.

The bidder may submit its offer for the nearest or nearby district location from the bidder''s plant/mill location. GSCSC reserves right to accept the offer depending upon the practical situation at the time of award of the contract. The lists of FCI depots and GSCSC depots in Gujarat are given at Appendix-C and Appendix-D respectively.

23. Right to accept any bid and to reject any or all bids.

The purchaser reserves the right to accept or reject any bid and to annul the bidding process and reject all bids at any time prior to award of Contract, without thereby incurring any liability to the affected bidder or bidders or any obligation to inform the affected bidder or bidders of the grounds for the purchaser''s action.

11. Even apart from any such clauses, the Hon''ble Supreme Court has held in Tata Cellular case AIR 1996 SC 11, that the authorities have to be given some ''free play in the joints'' and that in matters of awarding contracts, the decision cannot be taken merely on the basis of the price quoted by the bidders. The Apex Court also laid down the following principle in the above case:

In all these cases (of judicial review of administrative decisions in tender matters) 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".

12. Having heard the learned Counsel at length, we find considerable substance in the submissions made by the learned Counsel on behalf of the respondent Corporation that the decision of the Corporation not to open the petitioners'' price bids for awarding the contract in question cannot be considered as arbitrary, unreasonable or discriminatory. In view of the above discussion, it is clear that the location of the petitioners'' manufacturing facilities at far away places outside the State of Gujarat does have a bearing not only on the question of maintaining quality of the fortified wheat flour which has limited shelf life, but also on the question of inspection and monitoring of the flour mills in the matter of fortification of the wheat flour with nutrients in accordance with the standards laid down under the Integrated Child Development Scheme. This part of the Scheme has been floated for providing nutritious food to the children in the Anganwadis. In the facts and circumstances of this case, it cannot, therefore, be said that something has gone wrong. The Corporation has accepted the double bid system. Merely because the petitioners have good manufacturing facilities, as contended by them, that by itself does not confer upon them the right to be included within the zone of consideration. If the petitioners were to be include in the zone of consideration, then the price may become a decisive factor and the entire purpose of applying proper parameters with a view to maintaining quality of fortified wheat flour till it is actually used by the Anganwadis for making food for the children and also ensuring proper monitoring of fortification process, may not be achieved. This Court is, therefore, definitely of the view that it cannot be said that anything has gone wrong of a nature and degree which would require the intervention of this Court.

13. As regards the petitioners'' contention that they have been also awarded similar contracts by the State Government, we do not find any substance in this plea also, because the other contracts pertain to preparation of ready-to-eat food where the shelf life of the product is 120 days against the shelf life of the only 45 days for wheat flour.

14. We also find that the Corporation has not only rejected the technical bids of the petitioner, but also of a local tenderer called Gujarat Roller Flour Mills Association and, therefore, it cannot be said that the Corporation has excluded the petitioners'' tenders only on the ground that the petitioner are from outside the State of Gujarat.

15. Reliance placed on the decisions of the Apex Court in Indian Cement and Others Vs. State of Andhra Pradesh and Others, and Shri Digvijay Cement Co. v. State of Rajasthan (1997) 5 SCC 406 : AIR 1997 SC 2609 is also misconceived. Those cases were concerned about the reduced rate of sales tax in respect of sales made by indigenous cement manufacturers to manufacturers of cement product within the State and the benefit of reduced rate was not given to the manufacturers of cement outside the State. The Court held that such discrimination was violative of Article 301 of the Constitution. That was purely in the realm of tax relief and had nothing to do with the issues involved in the present petitions.

16. In Bhargav Bhushan Press Vs. Bihar State Text Book Publication Corporation and Others, the State Government had framed Bihar Purchase Preference Rules, under which the Government provided for giving certain concessions on. the purchases made by the Government departments and Corporations from the industries situated in Bihar. On the basis of the above Rules, the Bihar State Text Book Publication Corporation decided not to give printing orders to the printing press situated outside the State of Bihar. The petition filed by the appellant was dismissed by the High Court. The Apex Court reversed that decision after holding that the Corporation was to supply paper to the printing presses when the work of printing textbooks was given to them. They would print on the paper supplied to them and return the textabooks to the respondent Corporation and they were paid only the printing charges. The Apex Court, therefore, held that it cannot be said that the Corporation was purchasing the textbooks from the printing presses to whom the printing work is given, but there was neither an element of sale nor an element of purchase in the transaction between the parties. The Apex Court accordingly held that the Bihar Purchase Preference Rules, 1975 were not applicable to the transaction in question and, therefore, set aside the instructions of the Government and the decision of the Corporation not to give printing orders to the printing presses situated outside the State of Bihar based upon the said Rules.

It will be clear from the facts of that case and the reasoning that there was no question of any quality of printing being adversely affected by the time likely to be taken in taking the paper from the Corporation and delivering it back, nor was there any question of monitoring to be done by the Corporation when the printing presses would be printing the textbooks on the paper supplied by the Corporation.

17. As regards the decisions cited on the petitioners, none of them is applicable in the facts of the present case. The decision of this Court in Murti Enterprises v. State of Gujarat 2000 (3) GLR 2730 was in respect of contract for supply of hand pumps to Gujarat Water Supply and Sewerage Board. There the quality of the product would be judged on its own merits as and when received in the State of Gujarat and there will be no question of limited shelf life of such product as against the limited shelf life of only 45 days of the wheat flour, which the petitioners are required to collect in the form of wheat grains, grind thern, fortify the wheat flour, pack it and deliver it to the Anganwadis at long distances.

18. In Harminder Singh Arora Vs. Union of India (UOI) and Others, the tenders were invited for supply of fresh buffalo and cow milk to Military Farm of Pimpri. The appellant was eligible and had been supplying milk and was also on approved list. The General Manager, Government Milk Scheme (respondent No.3) also submitted tender but it was in respect of pasteurized milk and not fresh milk. The milk supplied by respondent No. 3 also required re-pasteurization which entailed an additional cost. The appellant''s tender was the lowest but the tender of respondent No. 3 was accepted. The Apex Court held that the contract of supply of fresh milk was to be given to the lowest bidder under the terms of the tender notice and the appellant being the lowest bidder he should have been granted the contract of supply, especially, when he had been doing so for the last so many years.

19. The Apex Court noted that the tender notice demand supply of fresh buffalo milk or fresh cow milk, but respondent No. 3 submitted, tenders for pasteurized milk. If the authorities wished to alter the terms of invitation of the tender, it was obligatory and mandatory for them to call the appellant for negotiations before rejecting its tender and accepting the tender of respondent No.3, as the appellant also did have a pasteurization plant. The authorities also admitted that even the pasteurized milk to be supplied by the Government Milk Scheme Would have to be re-pasteurized because delivery timings of units in the stations were different and the Military Farm had its own pasteurization unit. The report of the concerned authority indicated that the authorities would be put to substantial loss to the tune of about Rs. 10 lacs by accepting the tender of respondent No. 3. Even then the tender of respondent No. 3 was accepted by giving 10 per cent price preference to it without any such concession or preference provided under the terms and conditionns of the tender. Since the pasteurized milk to be supplied by respondent No. 3 would have to be re-pasteurized, the cost of 0.50 paise had to be added even to the price of milk to be supplied by respondent No. 3. The Apex Court took into consideration all such factors and held that the failure on the part of the respondent authorities to act fairly and justly gave a right to the appellant to move the Court.

A perusal of the above relevant factors, which were found by the Apex Court as not taken into consideration, clearly makes the decision distinguishable on facts. Even otherwise, this decision will have to be read in light of the subsequent Larger Bench decision of the Apex Court in Tata Cellular Vs. Union of India,

20. The decision in M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, dealt with a case where after publication of the notice inviting tenders for appointment of agents for collection of octroi subject to the terms and conditions stated therein, one of the conditions of eligibility was deleted after expiry of the time limit for submission of tenders but before opening the tender. The Court, therefore, held that in such circumstances, award of contract to a tenderer who at the time of submission of tender did not satisfy the said condition was rightly set aside by the High Court as arbitrary and the Apex Court confirmed that decision. The controversy in the present has nothing to do with deletion of any of the tender conditions.

21. The decision of this Court in Krishna Communication (Outdoor) Vs. Gujarat State Road Transport Corporation and Another, is not applicable in the facts of the present case. In that case, the respondent Corporation issued tender notices on four occasions and all the four occasions the petitioner was found to be the highest bidder, but the respondent Corporation decided to discharge the tender notices. When the fifth tender notice was issued, the highest party was some other party and that party only was called for negotiation and not the petitioner. The Court examined the petitioner''s grievance that on the fifth occasion the Corporation ought to have mentioned in the tender notice that only the highest bidder will be called for negotiation and that there will be no inter se bidding amongst the tenderers. That is not the controversy in the instant case.

22. In view of the above discussion, we find no merit in these petitions. The petitions are, therefore, dismissed.

At this stage, Mr. Nanavati for the petitioners prays for stay against awarding contract in respect of the tender work in question.

Mr. Patel for the Corporation opposes the request.

23. In the facts and circumstances of the case, we decline the request because the contract is to be awarded for grinding wheat to get whole Wheat Flour and fortification of Whole Wheat Flour with multiple micronutrients as per the requirement of Integrated Child Development Scheme (ICDS) for the distribution to Anganwadi Centres.