
(1998) 04 AP CK 0014

In the Andhra Pradesh High Court

Case No : Writ Petition No. 5021 of 1998

Navayuga Exports Ltd., Hyd.

APPELLANT

Vs

A.P. Mineral Development Corpn. Ltd.

RESPONDENT

Date of Decision : 24-04-1998

Acts Referred:

Constitution of India, 1950 — Article 14, 19(1), 226, 227

Foreign Trade (Development and Regulation) Act, 1992 — Section 7

Citation : AIR 1998 AP 391 : (1998) 3 ALD 460 : (1998) 4 ALT 196

Hon'ble Judges : B.S. Raikote, J

Bench : Single Bench

Advocate : Mr. V.S. Raju, for the Appellant; Advocate-General and Mr. A. Sudershan Reddy, for the Respondent

Judgement

1. This writ petition is filed questioning the conditions in tender notification No.M&S-9/BAR-A.Gr/98, published in the Economic Times, Hyderabad on 30-1-1998, issued by the Andhra Pradesh Mineral Development Corporation Limited, Hyderabad (hereinafter referred to as "the Corporation"), as arbitrary, unreasonable and violative of Articles 14 and 19(1)(g) of the Constitution of India.

2. The learned Counsel for the petitioner contended that the petitioner is a Company incorporated under the Companies Act, 1956 in the year 1993 and engaged in the line of export. The petitioner has got the status of Export House, as per the certificate issued by the Director-General of Foreign Trade, Ministry of Commerce, Government of India. The respondent-Corporation invited tenders for export of 7,00,000 MTs. processed A Grade Barytes Ore for a period of one year and accordingly, the petitioner-Company submitted its tender. It is further stated that the condition stipulated in the tender notification that the bidder should have a minimum export turnover of Rs.10 crores per annum on an average during the period 1992-93 to 1996-97 i.e., for a period of five years, of the non-metallic minerals from India is illegal and arbitrary. It is further contended that

even the other condition, which provides that the bidders having no valid Export House Certificate would be eligible if they are willing to export in the name of Corporation as per the terms and conditions of the Corporation, provided, they comply with the condition Nos. 1 and 2 also is bad. It is further submitted that these conditions are provided in the tender notification only to eliminate the other persons and to accept the tenders of few individuals, who fulfil these conditions. It is further stated that the other condition that the persons having no valid Export House Certificate could export in the name of the Corporation subject to the terms and conditions imposed by the Corporation also is included with mala fide intention to favour few bidders. The Corporation also reserved the power to itself either to accept the tender in part or split the tender and award the same for more than one bidder and in such a case, the question of fixing minimum average turnover of Rs.10 crores would not be necessary and such a condition leads to arbitrary action and this condition is made to favour certain parties, who were already entrenched in the trade. The learned Counsel for the petitioner further elaborating his arguments contended that the condition imposed in clause 3 of Annexure-I regarding the eligibility, providing that one should have minimum turnover of Rs.10 crores per annum on an average for a period of five years would be only a directory and not mandatory, in view of Clause 12 of Annexure-II and as such, the contention of the respondent in the counter that petitioner was not eligible, because he had not achieved the minimum export turnover of Rs. 10 crores per annum on an average, for a period of five years is untenable. He further submitted that Clause 8 of Annexure-I, which provides that the Corporation reserves to itself the right to accept any tender in part or split the tender and award to more than one bidder is not specified in the advertisement calling for the tenders. The said advertisement also does not specify the clause 2(i) of General Terms and Conditions, vide Annexure-III, according to which the estimated supply of barytes in the contract period of one year is 7,00,000 Mts. and the bidders could quote for the quantity as per their requirement also is not made part of the advertisement. If these clauses were made part of the advertisement, not only the petitioner, but other bidders could also offer their bids, since the quantity that could be exported would be less than 7,00,000 Mts. by each bidder and accordingly, there would have been more number of persons who could compete and as a result, the Corporation could have got better offers. Therefore, the non-inclusion of these clauses in the advertisement calling for tenders is also arbitrary and violative of Article 14 of the Constitution. He further submitted that at any rate these conditions are vague and they enable the Corporation to oblige the persons of their choice. Moreover, there is variation between clause 3(i) of Annexure-I and clause 12 of Annexure-II and these variations can be reconciled only by reading clause 3 of Annexure-I as directory, but not mandatory. He also cited number of judgments in support of his contentions, which I will be referring in the course of this judgment.

3. By filing the counter, the respondent has denied the allegations made by the

petitioner. The learned Advocate-General appearing for the respondent-Corporation contended that the petitioner has no locus standi to maintain this writ petition, because having already filed his tender in pursuance of the notification dated 30-1-1998 and when the tenders were about to be opened, he has filed this writ petition, only with a mala fide intention. He further submitted that the Baryets Ore in question is available only in two villages in Cuddapah District and the Ore in question is used only by the Gulf countries, since it is the raw material used in oil drilling industry. He further submitted that India could export only 10 per cent of the world market and the country intends to increase its export in a competitive field and for that purpose very competent contractors are required to achieve the target in export. Therefore, as per the tender schedule, the respondent has provided two stages in the tender notification by providing that the prospective bidder shall submit the eligibility tender bid and commercial bid and the eligibility bid would be opened first, and if a person is found eligible, then only the commercial bid would be considered. He stated that the commercial bid consists of all the offers made by the bidders regarding the rates; since a large quantity of 7,00,000 Mts. of Baryets Ore is to be exported, the respondent intends to have contractors of proven ability and it is only for this purpose the respondent has provided pre bid qualifications that the individual or the firm should have a minimum export turnover of Rs.10 crores per annum on an average, for a period of five years from 1992-93 to 1996-97. This condition is stipulated to see that very experienced and capable contractor is selected for the purpose of export. He further stated that the eligibility that such a prospective bidder should have an export turnover of minimum Rs.10 crores of non-metallic minerals, is provided only to see that he is a person having full experience in exporting non-metallic minerals. He further submitted that the Baryets Ore in question being a non-metallic mineral is required in a very few specialised fields and such person should have necessary experience in exporting non-metallic minerals. He elaborated by stating that a person exporting metallic minerals like iron, copper etc., may not be able to cater to the needs of the foreign buyers, having regard to the nature of the mineral, that is used in specialised fields like oil drilling etc. Therefore, he submitted that the conditions imposed cannot be said to be arbitrary or unreasonable. He further stated that clause 3 of Annexure-I provides the eligibility and clause 12 of Annexure-H is intended to collect additional information, in order to find out the suitability of the persons and it cannot be said to be inconsistent to clause 3 of Annexure-I and these clauses go together. He further submitted that at any rate clause 12 of Annexure-II does not relax the conditions imposed by Annexure-I regarding the eligibility and suitability of such bidders. He further submitted that clause 8 of Annexure-I, which reserves the right to the Corporation to accept any tender or split the tender and award to more than one bidder also does not relax clause 3 of Annexure-I. Such accepting a part of the tender or splitting the tender and awarding the same to more than one bidder is amongst the eligible bidders, who have an export turnover of minimum Rs.10 crores on an average for a period of five years. This condition continues to exist even under clause 8 of Annexure-I.

This clause enables the respondent to accept the tender in part or split the tender only to see that there would be effective export of the mineral and the same was not required to be advertised. This clause is contemplated, to meet all situations in view of the fact that a large quantity of 7,00,000 Mts. is intended to be exported, and in any case if the Corporation thinks that the export contract would be better achieved by accepting the tender in part or splitting the tender into two. Thus it is a matter of details regarding the modalities and as such it cannot be said to be in variation to the eligibility criteria fixed in Annexure-I of the tender schedule. He submitted that these modalities contemplated by the tender notification and tender schedule are only to see that there would be effective export of the barytes in the world market competing with other countries like China, so as to see that our export quantity exceeds more than 10 per cent of the world market. He further submitted that the petitioner has no locus standi to challenge the same. He stated that as per the tender notification published in the Economic Times on 30-1-1998 and after having submitted the tender, and it is only when the tenders were about to be opened, the petitioner has filed this writ petition only with a mala fide intention. At any rate, he is not eligible bidder in terms of clause 3 of Annexure-I, since he has not achieved the minimum export turnover of Rs. 10 crores on an average for a period of five years of non-metallic mineral and as such he has no locus standi to maintain this writ petition. He stated that the petitioner exported shrimp and granite of about 45,000 tonnes in the preceding year, as an assignee of the contractor, and as an assignee also he did not export the minimum quantity required and as such there are absolutely no merits in the writ petition and the same is liable to be dismissed.

4. Keeping in view all the pleadings on both sides and also their respective arguments, the following points arise for my consideration:

1. Whether the eligibility criteria provided under clause 3(i) of Annexure-I is directory in view of clause -12 of Annexure-II, as contended by the petitioner's Counsel or it is mandatory as contended by the respondent's Counsel ?
2. Whether relaxation of condition 3(ii) under the note provided in the clause 3 of Annexure-I would be violative of Section 7 of the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter referred to as "Foreign Trade Act") as contended by the petitioner's Counsel ?
3. Whether not specifying clause 8 of Annexure-I and clause 2(i) of Annexure-III in the advertisement is discriminatory and violative of Article 14 of the Constitution of India and also violative of principles of natural justice?
4. Whether the petitioner is entitled for the relief as prayed for ?

Taking up the first point, I have to find out whether clause 3(i) of Annexure-I is directory or mandatory. In order to appreciate the arguments on both sides, I am extracting the said clause as under :

"3(i) Bidder should have achieved a minimum export turnover of Rs.10 crores per annum on an average during the period 1992-93 to 1996-97 on export of non-metallic minerals from India. Bidder should submit a certificate from the Chartered Accountant in original to this effect indicating year wise export turnover in India Rupees ally."

From the reading of the above clause it is clear that the bidder should have achieved a minimum export turnover of Rs.10 crores per annum on an average during the period of five years from 1992-93 to 1996-97. This clause does not provide any exception. However, it is contended by the learned Counsel for the petitioner that the clause 12 of Annexure-n and clause 3(i) of Annexure-I if both the clauses are read together, it would not only reduce the inconsistency, but it further indicates that clause 3 (i) of Annexurc-I is only directory. In order to appreciate this argument, I am extracting clause 12 of Annexure-II as under :

"12. The bidder shall also indicate:

1. Business name and constitution of tendering firm.
2. Details of the other activities if any in addition to export of Barytcs.
3. Annual Turnover for last 5 years from 1992-93 to 1996-97 (Enclose Chartered Accountant's Certificate).
4. Sales Tax Registration No. if any.,
5. Central Sales Tax Registration if any.""

Clause 12 of Annexure-II has a heading to the effect "the bidder shall also indicate", in other words, the bidder shall also provide this additional information after fulfilling clause 3(i) of Annexure-I. From reading of clause 12 of Annexure-II, it is clear that such a bidder shall furnish the business name and the constitution of the firm offering the bid. It should give the other details of other activities, if any, in addition to export of barytes, and it shall also include a Chartered Accountant Certificate showing such export of other minerals for the last five years from 1992-93 to 1996-97. All the clauses go together, requiring the bidder to furnish such additional information. As submitted by the learned Advocate-General, such additional information is sought only to have the overall assessment of the ability of such a bidder, whether he can effectively export the mineral in question. This additional information sought under clause 12 of Annexure-II, cannot be understood to have made clause 3(i) of Annexure-I as directory. In other words, every such bidder shall necessarily fulfil his eligibility under clause 3(i) and he shall also furnish certain other information required under clause 12 of Armexure-II. The petitioner, therefore, in order to be eligible shall necessarily fulfil clause 3(i) of Annexure-I. In this view of the matter, the first contention is liable to be rejected. There is no variation, as such, between the conditions stipulated under clause 3(i) of Annexure-I and clause 12 of Annexure-II, and the eligibility condition provided under clause 3(i) of Annexurc-I is intended to ascertain the most competent contractor, who can effectively

export the barytes in question. The fact that lie should have exported non-metallic mineral worth Rs.10 crores on an average within a period of five years would not only indicate his financial ability, but also it would indicate his experience in exporting non-metallic minerals to the countries where it is required for certain specified purposes. However, the learned Counsel for the petitioner relied upon the judgment of the Supreme Court reported in *New Horizons Limited and Another Vs. Union of India (UOI) and Others*, , contending that prescribing past experience is not warranted. But the facts of that case are distinguishable from the facts of this case. In the said judgment, the Hon''ble Supreme Court pointed out that the conditions stipulated in the said tender form do not warrant such an inference that the experience of that type should be insisted upon, as was done by the authorities. The Supreme Court observed that'' "the decision of the Tender Evaluation Committee to exclude the tender of NHL from consideration was therefore not warranted by the terms and conditions for submission of tender as contained in the notice for inviting sealed tenders dated 26-4-1993." Thus, their Lordships pointed out that the conditions stipulated in the notice inviting sealed tenders dated 26-4-1993 did not contemplate such an experience that was insisted upon by the Tender Evaluation Committee. But in the instant case, clause 3(i) of Annexure I insists on such an experience of having exported non-metallic mineral of the turnover of Rs.10 crores per annum, as a necessary condition. Therefore, the said judgment is not applicable to the facts of this case. However, the learned Counsel for the petitioner contended that the bidders can quote for the quantity as per their requirement in terms of clause 2(i) of Annexure-III, therefore, the fulfilment of this condition is directory. But this argument is not acceptable, because every tenderer should necessarily fulfil condition in clause 3(i) of Annexure-I in order to be eligible for consideration of his tender, and such an eligible person can state that he could quote for the quantity as per the requirement, which would be less than 7,00,000 Mts. per annum. Thus Clause 2(i) of Annexure-III does not effect the eligibility condition prescribed under clause 3 of Annexure-I that a person should have an export turnover of not less than Rs.10 crores per annum. From a reading of the clause 3(ii) of Annexure-I it is clear that the bidder-firm should be recognised by the Government of India as Export House/Trade House/Star Trading House and under clause 3(iii), he should submit an E.M.D. for Rs. 10,00,000/- by crossed Demand Draft drawn in favour of respondent-Corporation. The note appended at the end of clause 3 of Annexure-I further provides that the bidders who have complied with conditions in clause 3(i) and 3(iii), but having no valid Export/Trading/Star Trading House Certificate could submit their tender, if they are willing to export in the name of the Corporation as per the terms and conditions of the Corporation. Relying on this note, the learned Counsel for the petitioner contended that such a bidder is permitted to export without valid Trade House Certificate contemplated u/s 7 of the Foreign Trade Act, therefore, this condition is illegal. This argument merits only for rejection for the simple reason that, what is contemplated u/s 7 of the Foreign Trade Act is that such an exporter or importer should necessarily get a code

number assigned by the Government of India and it does not provide for Export House Certificate. In other words, even a person having Export House Certificate also should get a code number assigned by the Government of India before importing or exporting any material. It is not in dispute that the respondent-Corporation in question has got assigned a code number and if that is so, it can take the assistance of any such bidder if he is willing to export in the name of the Corporation as per the terms and conditions. In other words, in terms of the said note, in effect it is the Corporation that is exporting, but not the bidder, but under the effective control of the Corporation. This note appended to clause 3 of Annexure-I does not violate Section 7 of Foreign Trade Act. Accordingly, point No.2 is answered.

5. Now taking up point No.3, I have to see whether not satisfying the condition in clause 8 of Annexure-I and the condition in clause 2(i) of Annexure-in of the advertisement is violative of Article 14 of the Constitution or the principles of natural justice. The learned Counsel for the petitioner contended that if this condition were to be made known in the advertisement, more number of persons could have offered their bids by proposing to export lesser quantity as per their requirement in terms of clause 2(1) of annexure-III, and the Corporation could also accept the tender in part or split the tender and award to more than one bidder in terms of its power under clause 8 of Annexure-I. On the other hand, the learned Advocate-General for the respondent-Corporation contended that under clause 2(i) of Annexure-III, the person should be eligible in terms of clause 3(i) of Annexure-I, having an export turnover of Rs. 10 crores per annum and he may quote for a quantity as per his requirement. But, however he should submit E.M.D. for Rs.10,00,000/- irrespective of the quantity and price. He further submitted that this is matter of modalities and methodology, the Corporation could follow in appropriate cases. He submitted that in terms of clause 8 of Annexure-I, the Corporation in appropriate cases could accept any tender in part or split the tender and award the same to more than one bidder, in order to see that there is maximum export of barytes in a particular year, having regard to the financial ability and experience of the contractor. These conditions have given the Corporation a discretion to see that the largesse of the State are protected effectively by entrusting such export of barytes to a competent person so that there could be maximum export, in a particular year, and in appropriate cases, it can accept a part of the tender or award the tender to more than one person. These clauses are the matters of details and need not be part of the advertisement. As per the advertisement notification a person has to receive the tender along with all these annexures and submit the tender accordingly. He submitted that in these circumstances, it cannot be said that there is any violation of Article 14 of the Constitution of India or any violation of principles of natural justice. He further submitted that the intendment of these terms and conditions, is to see that the Corporation get a contractor who is financially sound and at the same time equally experienced. The intendment of these terms and conditions is not to have large number of contractors of less financial

capacity with less experience. He also submitted that in the world of Multi National Companies, India is required to have very competent exporter, so that he could compete with other Multi National Companies of other countries like America and China.

6. In my opinion, there is substance in the argument of the learned Advocate-General. These clauses, clause 8 of Annexure-I and clause 2(i) of Annexure-III are only an exception to the general rule. Only in appropriate cases, if the Corporation so thinks that it would be in the interest of the Country, it can resort to clause 8 of Annexure-I and accept a part of the tender or split the tender between two bidders and it can also accept the offer made by one of the eligible tenderers to export barytes as per his required quantity, provided he submits E.M.D. for Rs. 10,00,000/- . In such matters, it is very difficult to have the rigid rules for protecting the largesse of the State. In appropriate cases, the CorporauDfl needs to have discretion to accept the tender in part or in whole or split the tender into two parts, in order to sec that there is maximum export of barytes. In the decision reported in Tata Cellular Vs. Union of India, , the Hon"blc Supreme Court pointed that Government and other statutory authorities should have freedom of contract and they should have enough freedom as a necessary concomitant as an administrative body functioning in an administrative sphere. It further pointed out that such discretion should not be exercised arbitrarily and it shall not be effected by bias or mala fides. ,

7. The instant case is at the stage of opening tenders. The discretion conferred under the above two clauses is not yet exercised in favour of one bidder as against the other. Therefore, it is premature to contend that such discretion has been exercised arbitrarily. As pointed out by Hon"ble Supreme Court that "a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere." However, the learned Counsel appearing for the petitioner relied upon Ihe judgment of the Supreme Court reported in Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, , contending that clause 8 of Annexure 1 and clause 2(i) of Annexure-III provided an unfair procedure and violative of Article 14 of the Constitution of India. But from the reading of the said judgment, it is clear, that the Supreme Court held that prescribing a condition as to experience of five years by the tender notification should be fulfilled and accepting the tenders of persons having experience less than five years was illegal. In other words, the procedure of accepting a tender of a person having less than five years experience, was found fault with by the Supreme Court. Thus, the facts of that case are distinguishable from this case. The teamed Counsel for the petitioner relied upon another judgment of the Supreme Court reported in Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries, , contending that the authorities should be fair to all the tenderers and calling for one of the tenderer for negotiations and not calling for the person who is the highest tenderer for negotiations was unfair on the part of the authorities. Thus, the facts of this judgment per se clearly indicate that the said judgment does not

apply to the instant case. Likewise, even the judgment reported in Ram and Shyam Company Vs. State of Haryana and Others, , relied upon by the learned Counsel for the petitioner also does not apply to the facts of this case. That was also a case in which no opportunity was given to the highest bidder and in those circumstances, the Supreme Court found fault with the authorities. As I have already stated above, the present case is still at the stage of opening the tenders. The Corporation has not exercised its discretion in one way or the other and as such the above judgments do not apply to the facts of this case. As contended by the learned Advocate-General, the authority should have discretion and exercise of such discretion could be found fault with only when such discretions as exercised arbitrarily and contrary to the principles of natural justice, in fact, I find that the Hon'ble Supreme Court in the judgment referred to 2 supra further held that in such matters, the Court does not sit as a Court of appeal and the Government or other authorities should have freedom of contract. It would be proper for me to extract paragraph 113 of the said judgment in which the principles are deduced from various judgments of the Supreme Court referred to in that judgment. The said paragraph 113 reads as under :--

"113. 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 of 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 fairplay 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."

In view of the law laid down by the Supreme Court in the above judgment, it is clear that the Courts normally do not have expertise to correct administrative decision, and the terms of invitation of tender cannot be open to judicial scrutiny, since such invitation of tenders is in the realm of contract and the Government

and other authorities must have freedom of contract. Such a freedom is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi administrative sphere. But such discretion shall not be exercised arbitrarily or with bias or actuated by mala fides. In other words, unless it is established that such a discretion was exercised arbitrarily or it was actuated by mala fides, it would not be a case for interference under Articles 226 and 227 of the Constitution of India. At the cost of repetition, I have to note that the instant case is one, which is at the stage of still opening the tenders and it is not a case in which discretion has already been exercised either arbitrarily or with any mala fides. Therefore, I do not find any merits in the writ petition. As I have already stated above, none of the impugned clauses could be found fault with, as violating Article 14 of the Constitution. Accordingly, I answer point No.3 and hold that the petitioner is not entitled to any relief in this writ petition.

7. For the above reasons, I dismiss the writ petition, but in the circumstances without costs.