

(2009) 01 BOM CK 0074

In the Bombay High Court

Case No : Writ Petition (Lodging) No. 2904 of 2008

Nine Paradise Hotels Pvt. Ltd. and Mr. Rajan Chourse

APPELLANT

Vs

National Textile Corporation Ltd., (Western Region) (Finally Mills) and Union of India (UOI)

RESPONDENT

Date of Decision : 15-01-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2009) 01 BOM CK 0074

Hon'ble Judges : Swatanter Kumar, C.J;S.A. Bobde, J

Bench : Division Bench

Advocate : I.M. Chagla and C.S. Balsara, instructed by Negandhi Shah and Himayatullah, for the Appellant; R.M. Kadam, General and M.H. Doshi and D.A. Athavale and D.A. Dubey, for the Respondent

Final Decision : Dismissed

Judgement

Swatanter Kumar, C.J.—National Textile Corporation Limited (hereinafter referred to as "the Corporation") published a tender notice inviting tenders for sale of free hold land with structures and plant and machinery thereon on outright basis of Finlay Mills, Dr S.S. Rao Road, Mumbai on 12th November 2008. In response to this invitation to submit tenders, the Petitioners submitted their tender bid on 12th December 2008. As per the terms and conditions of the tender, the Petitioners also furnished a Bank Guarantee for a sum of Rs. 150 crores issued by the Syndicate Bank along with other documents, bidding for an amount of Rs. 405 crores. The bids were opened by the Corporation on 12th December 2008 itself at 3.45 p.m. and the bidder and the respective amounts submitted by them reads as under:

2. On the same day, the Corporation called upon all the bidders to collect their Earnest Money Deposit as it was not accepting any of the bids. The Petitioners and others, as claimed by the Petitioners, requested the Corporation to disclose the reserved price. In spite of the request, no disclosure of the reserve price was

made. However, it was stated that terms and conditions of the tender would be honoured by the Corporation. The Chairman of the Corporation then is stated to have taken the decision not to accept any of the bids, which was also reported in the Times of India on 13th December 2008, as the bids were much below the reserved price. Vide letter dated 12th December 2008 written by the Corporation to the Petitioners, the Earnest Money Deposit submitted by the Petitioners was returned but the letter, however, did not state any further reasons for rejection of the bid. Aggrieved by this action of the Respondent Corporation, the Petitioners have approached this Court under Article 226 of the Constitution of India praying for issuance of a writ directing the Respondent Corporation to comply with the terms and conditions of the tender and accept the bid of Petitioner No. 1 of Rs. 405 crores and to complete the transaction in favour of the Petitioners. The Petitioners have further prayed that pending the hearing interim order restraining the Respondent Corporation from cancelling the tender and issuing any fresh tender or re-inviting tender be passed.

3. The Respondents have appeared at the admission stage itself, accepted the notice, argued the matter, however, without filing any reply. In view of the urgency of the case as well as with the consent of the learned Counsel appearing for the parties, the Petition was heard finally at the admission stage itself. Hence Rule. Rule made returnable forthwith.

4. It was argued on behalf of the Respondent Corporation that the bids submitted by the respective parties were opened and considered by the competent authority. Keeping in view the fact that even the bid of the highest bidder was 40% less than the reserved price, the authorities had decided to cancel the entire process. Thus, according to the Corporation, its action was neither arbitrary nor discriminatory. In fact, it was based upon business principles and interest of the Corporation being the primary object, could not accept such a bid.

5. On this premise, it was argued on behalf of the Petitioners that:

(i) Submission of the bid by the Petitioners along with a Bank Guarantee of Rs. 150 crores had vested a right in the Petitioners and the Corporation could not cancel the tender process arbitrarily, that too without any justification;

(ii) the prescribed procedure under the terms and conditions inviting the tender bids had not been followed and the rejection could be done only by a Committee i.e. Assets Sale Committee and not any other person. Thus, the decision which has resulted in issuance of the letter dated 12th December 2008 is without authority of law.

6. While relying upon the dictum of the Supreme Court in paragraph 70 in the case of Tata Cellular Vs. Union of India, , it is argued that the action being arbitrary and power being exercised for collateral purpose was liable to be struck down. Reliance is also placed on the judgment of the Supreme Court in the case of Union of India and Others Vs. Dinesh Engineering Corporation and Another etc., .

7. As is clear from the above narrated facts, vide letter dated 12th December 2008, the Corporation returned the Bank Guarantee in original to the Petitioners and also stated that the offer had not been accepted. This decision of the Corporation has been termed as arbitrary and contrary to the prescribed procedure. In terms of Clause 2.7(iii) of the Tender Document which relates to the procedure for selecting successful tenderer, the Asset Sale Committee (ASC) would give valid tenderer an opportunity to improve upon their offers in the event the highest valid offer was found to be lower than the reserved price. This offer was to be submitted within fifteen days of the opening of the original tenders and placed before the Member Secretary of the ASC and had to be further considered in terms thereof. The Asset Sale Committee is a body required to perform certain administrative and valuation functions. It is not spelled out in the terms and conditions as to which of the officers/representatives would constitute the Asset Sale Committee. It is not in dispute before us that the Chairman of the Corporation is the highest authority relating to the administration and business interests of the Corporation. The decision of 12th December 2008 has been taken by the competent authority i.e. the Chairman, however, has been communicated by the General Manager (Asset Sale) of the Corporation. Even for the sake of argument it is assumed that Asset Sale Committee alone was competent to take such a decision and the said decision was taken by an authority higher than the Committee, even then we do not think that this would vitiate the decision of the Corporation. The decision has been taken on commercial principles that the bid offer was 40% less than the reserved price and the Corporation cannot be compelled to expose itself to any financial losses in face of the fact that it had already fixed the reserved price. The Corporation is stated to have taken a decision to cancel the entire tender process and take a fresh look. No serious prejudice would be caused to any of the parties including the Petitioners as they can always participate in the fresh tender process.

8. Merely because the Respondents have taken a decision not to invite any of the parties for negotiation does not render their action arbitrary. On any prudent commercial principle it would hardly be expected of a party to raise their bid 40% more and even more than the offer made by them in their tender. Even if that be accepted to be correct for the sake of argument, then this itself would reflect that the bids submitted by all the bidders including the Petitioners were not fair commercial transactions in the larger interest of the Corporation and the public.

9. These are commercial decisions taken by the Competent Authority in their wisdom. Unless and until such decision making process was patently arbitrary or so unreasonable as to vitiate the basic rights or protection available to a citizen while dealing with the State or its instrumentalities in commercial transactions, the Court will not interfere in such matters. We are unable to accept that the decision of the Respondent Corporation is patently without authority or is arbitrary.

10. It will be useful to refer to a recent judgment of the Supreme Court in the case of Ramchandra Murarilal Bhattad and Others Vs. State of Maharashtra and Others, , where the authority MMRDA had cancelled all the bids called for development of a project while such power was required to be exercised by the Executive Committee. The Executive Committee was to accept or reject the tenders submitted by the parties. The Supreme Court rejected both the contentions i.e. the power of the Executive Committee being a special power prevailed over the general power vested in the authority as well as that it did not amount to change of policy and even if there was change in policy decision, the same will not be vitiated once it is taken for good reasons. The Court held as under:

36. The Executive Committee is a statutory functionary. The powers and functions of the authority and the respective committees concededly are governed by the provisions of the statute, but, then the jurisdiction of the Executive Committee is limited. It was confined to rejection or acceptance of the tender. The Authority exercises a larger power. For the said purpose we would assume that the Authority had no incidental or ancillary power, but there cannot be any doubt or dispute that the Executive Committee could not cancel the entire tender. It could not have gone into the working of the project. It also could not have gone into the question as to whether the project would be financially viable if the method of calculation is changed.

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40. Jurisdiction of the Authority being larger, and the power to cancel the tender being not vested in the Executive committee, the action on the part of the former was neither illegal nor without jurisdiction.

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43. It was furthermore contended that the Executive Committee had a special power which would prevail over general power vested in the Authority. In The J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. The State of Uttar Pradesh and Others, , this Court applied the rule of construction that general provisions yield to special provisions, but, the said rule has no application in the facts and circumstances of the present case. Executive Committee does not exercise any special power. The jurisdictions of both the authorities are separate and distinct.

11. On the above principles and the fact that the scope of judicial review in such cases is a limited one, we hardly see any reason to interfere with the order of the authorities to cancel the entire tender process it being financially inviable and unprofitable and not in the interest of the Corporation.

12. In the present case, no mala fides have been pleaded or argue. Except making a reference to the expression of "mala fide" in ground (C) of the Writ Petition, no proper averments much less facts have been stated in the Writ Petition to show mala fides and in any case the decision of the Respondents can

hardly be termed as mala fide. The decision of the authorities cannot be termed as unfair only because some other decision could possibly be taken with reference to the terms and conditions of the tender. Unless the Petitioners could demonstrate that the decision is totally arbitrary without appropriate reasons and is a colourable exercise of power, the Court would hardly be clothed with the power of judicial review in such administrative decisions. See *W.B. Housing Board and Others Vs. Brijendra Prasad Gupta and Others*, .

13. Even in the case of *Tata Cellular (supra)* which has been relied upon by the Petitioners, the Supreme Court in paragraphs 69 and 70 stated the pre-requisites of a valid tender and unambiguously stated the principle that judicial review would apply to the contractual power by the Government bodies in order to prevent arbitrariness or favouritism. While noticing the inherent limitation in exercise of that power, the Court noticed that the Government is the guardian of the finances of the State and it is expected to protect the interest of the State. The right to refuse lowest or any other tender is always available to the Government, but the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing the tender.

14. Even in the case of *Dinesh Engineering Corporation (supra)*, all that the Court noticed is that the power is vested in the State and the Railways could reject any tender offer but for valid reasons and this power cannot be exercised arbitrarily merely because the authority has the power to do so. The power could be exercised on the existence of certain conditions which in the opinion of the Railways were in the interest of Railways to accept or reject the tender.

15. Both these principles are well settled and have been reiterated by the Supreme Court and followed by various High Courts. The facts of the present case examined in light of these principles do not persuade us to grant the prayers made by the Petitioners which even otherwise may not be tenable. It will be hardly open to a Petitioner to argue before the Court in the Petition under Article 226 of the Constitution to restrain the authorities from canceling the tender and from issuing fresh tenders. Merely because the Petitioners had submitted a tender which happened to be the highest and had furnished a Bank Guarantee of Rs. 150 crores per se does not render the decision of the Respondent Corporation to cancel the tender process arbitrary. As already noticed, there is a valid reason for canceling the tender process which is based on commercial principles i.e. the highest tenderer being 40% lower than the reserved price. Inviting tenders is merely an invitation to offer and does not vest any indefeasible or legal right in the applicant-bidder to claim that he alone should be awarded the contract. There is no concluded contract between the parties as the Respondents had taken a decision at the threshold itself upon opening of the financial bid to cancel the tender process. The action of the Respondent Corporation thus does not suffer from the vice of arbitrariness or discrimination and, therefore, does not offend the canons of Article 14 of the Constitution.

16. We find no merit. Writ Petition dismissed. Rule discharged. No order as to costs.