
(2010) 10 GUJ CK 0162

In the Gujarat High Court

Case No : Special Civil Application No. 9352 of 2010

Om Sainath Carting

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 28-10-2010

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2011) 2 BC 290

Hon'ble Judges : D.H. Waghela, J;Abhilasha Kumari, J

Bench : Division Bench

Advocate : Yatin Oza, for H.L. Patel, for the Appellant; Trusha K. Patel, Asstt. Government Pleader, for the Respondent

Final Decision : Allowed

Judgement

Abhilasha Kumari, J.—Rule. Ms. Trusha K.Patel, learned Assistant Government Pleader, waives service of notice of Rule on behalf of respondents. With the consent of the learned Counsel for the respective parties, the petition is being heard and finally decided today.

2. The challenge in this petition, preferred under Article 226 of the Constitution of India, is to decision dated 30.06.2010 of the State Government, for re-inviting tenders for Block No. R-9, on the basis of findings of an undated inquiry report of the Senior Geologist who was the Inquiry Officer.

3. The petitioner is a partnership firm engaged in the business of sand. By Government Resolution dated 30.07.2009, it was decided to award contracts in respect of eighteen Blocks for excavation of sand from the river Tapi, by holding a public auction. A public advertisement for purchase of the tender form and participation in the auction proceedings was issued by the respondents, in the month of October, 2009, and the date for purchasing the tender forms was 06.11.2009. The last date for submitting the tender form was 13.11.2009. Accordingly, the petitioner submitted its tender form, subject to various

conditions mentioned therein. Different upset prices were fixed by the respondents for each Block / plot, according to their peculiar conditions. The auction was held on 18.12.2009. The offer of the petitioner was the highest for Block No. R-9, and was accepted by the respondents by taking the signature of the proprietor of the petitioner-firm on the papers of the auction proceedings. By letter dated 31.12.2009, the Geologist, Surat, directed the petitioner to deposit 25% of the bid amount as per the terms of the tender. The petitioner deposited Rs. 10,12,500/- on 05.01.2010 in the Treasury Office. The petitioner also executed a surety bond and other necessary documents as per conditions of the tender. It is the case of the petitioner that as its bid was accepted and 25% of the bid amount was also deposited, the petitioner started creating necessary infrastructure for mining of sand, in anticipation of the execution of the formal agreement and receipt of the Work Order. Since the respondents did not execute an agreement/ contract with the petitioner or issue any Work Order, the petitioner wrote letter dated 06.01.2010 to respondent No. 2, requesting him to take further action in the matter. When nothing further was done, the petitioner approached this Court by filing Special Civil Application No. 3046 of 2010. On the direction of the Court, the respondents took decision dated 30.06.2010 and placed it on the record of the petition, which was disposed of by reserving liberty to the petitioner to file a fresh petition. Under these circumstances, the petitioner has filed the present petition, impugning decision dated 30.06.2010.

4. Mr. Yatin Oza, learned Senior Advocate appearing for the petitioner, has submitted that the impugned decision to reinvoke tenders for Block No. R-9 is arbitrary, unreasonable and perverse. According to the learned Senior Advocate, there is no material on record to lead to a conclusion that a cartel was formed by the bidders for Block No. R-9, due to which the bidding did not go beyond Rs. 40.50 lakhs offered by the petitioner. It is further submitted that the inquiry report, on the basis of which the impugned decision has been taken, is not based on any plausible material or evidence regarding formation of a cartel during auction proceedings, therefore, the decision to reinvoke tenders after the petitioner having deposited 25% of the bid amount, and incurring considerable expense, is absolutely arbitrary. It is further urged that the impugned decision is bad on the ground that the petitioner could have been called for renegotiation, but without hearing the petitioner, a decision has been taken to reinvoke tenders for the Block for which the petitioner's bid has been duly accepted, after six months of the auction proceedings. It is submitted that the impugned decision, being arbitrary and unreasonable, cannot stand the scrutiny of law and ought to be quashed and set aside.

5. Strongly opposing the submissions made by the learned Senior Advocate, Ms. Trusha Patel, learned Assistant Government Pleader, has submitted that complaints were filed in the name of one Shri Kalpesh Modi and Shri Arvind Solanki which, though disowned by the said two persons, had some truth in them. As per the say of Mr. Modi and Mr. Solanki, a cartel appeared to have been formed by the bidders, therefore, based on the statements of Shri Modi and Shri

Solanki, an inquiry was initiated by the respondents, wherein it has been found by the Senior Geologist, who was the inquiry officer, that a cartel was formed by the bidders, leading to taking the decision for reinviting the tenders. According to the learned Assistant Government Pleader, it is due to the formation of the cartel that the bidding for Block No. R-9 did not go beyond Rs. 40.50 lakhs offered by the petitioner even when the petitioner was himself ready to bid Rs. 5 to Rs. 6 lakhs more, had there been a higher bid. It is further submitted that one Mr. Ukani, who was also a bidder, has stated that the bidders were using mobile phones freely and were sending messages from the said mobile phones, which indicated that the procedure adopted at the auction was not proper. That Mr. Ukani has also stated that he heard some bidders talking about a cartel. It is, therefore, urged by the learned Assistant Government Pleader that the findings arrived at by the inquiry officer are based on sufficient evidence regarding formation of a cartel and the respondents are perfectly justified in taking the decision to reinvoke tenders.

6. From the submissions made by the learned Counsel for the respective parties, and from perusal of the contents of the inquiry report, it is amply clear that the findings regarding formation of a cartel appear to be based on the following three circumstances:

- (a) The statements of Shri Kalpesh Modi and Shri Arvind Solanki.
- (b) The statement of Shri Ukani and
- (c) The statement of the petitioner.

7. As regards the complaint filed in the name of Shri Kalpesh Modi and Shri Arvind Solanki, it is not disputed that both the said persons have totally denied having made the same or appending their signatures thereto. It is the case of the respondents themselves that the said complaints are bogus and some persons had made these complaints in the names of Shri Modi and Shri Solanki. Having said so, the inquiry report goes a step further by presuming that the inferences drawn by Shri Modi and Shri Solanki regarding formation of a cartel in the auction are required to be believed. Who the said two persons are and what authority they wield with the respondents that their inferences are taken to be gospel truth, remains unclarified. The only role of these two persons in the entire episode is that complaints were made in their names and have been disowned by them. The inquiry report does not reveal that any specific or detailed information has been revealed by these two persons, or that any proper investigation or inquiry has been made regarding the statements made by them. We fail to understand how, and in what manner, the inquiry officer has come to the conclusion regarding formation of a cartel, based on the vague, general and presumptive statements of Shri Kalpesh Modi and Shri Arvind Solanki. It appears that no attempts have been made to verify the contents of the statements which have been accepted in spite of being deficient in details.

8. As far as reliance placed upon the statement of Mr. Ukani is concerned, we

find that this person is an interested bidder and apart from stating that certain bidders were sending messages on their mobile phones and were also using their mobile phones freely, no other significant material emerges which could have been relied upon. There appears to be no verification of the contents of the statement made by Shri Ukani, which has been believed by the inquiry officer.

9. In his statement, the petitioner had stated that in the event that the other bidders would have offered a higher bid, he could have raised his bid by Rs. 4 to Rs. 6 lakhs, but as no higher bid was offered therefore his offer was duly accepted at Rs. 40.50 lakhs.

10. From this, an inference has been drawn by the inquiry officer that no higher bid has been offered as a result of a cartel having been formed by the bidders. On the basis of this inquiry, the impugned decision to reinstate tenders has been taken after six months of the auction, held on 18.12.2009. In the meantime, the petitioner has, by letter dated 31.12.2009, been called upon to pay 25% of the bid amount amounting to Rs. 10,12,500/- which has been duly deposited by it. The inquiry report itself appears to have been prepared at Rajkot and does not bear any date.

11. Some observations have been made in the said report regarding irregularities that purportedly took place at the auction. If that was the situation, it is not understood why the auction itself was not cancelled immediately, as the officers of the respondents were present and the auction has been concluded in their presence. On the contrary, not only was the bid of the petitioners accepted, he was also called upon to deposit 25% of the bid amount.

12. The learned Assistant Government Pleader has placed reliance upon a decision of the Supreme Court in B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others, in support of her submission that the petitioner and other bidders had formed a cartel, due to which the State has lost out financially as a higher bid was not forthcoming. In the facts of that particular case, there was a finding based on evidence. However, in the case on hand, apart from vague and general statements, there is no evidence regarding formation of cartel by the bidders, including the petitioner.

13. The Supreme Court in Union of India and others Vs. Hindustan Development Corpn. and others, in paragraph-14, has described `cartel' as under:

The cartel therefore is an association of producers who by agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly in any particular industry or commodity. Analysing the object of formation of a cartel in other words, it amounts to an unfair trade practice which is not in the public interest.

14. In the present case, the inquiry report is silent regarding the details of formation of a cartel and by whom. Even otherwise, the conclusions arrived at in the inquiry report are not based on any evidence worth the name.

15. In *Tata Cellular v. Union of India* (1994) 6 SCC 651, the Supreme Court has held that while exercising powers of judicial review, the Court is concerned with reviewing not the merits of decision in support of which the application for judicial review is made, but the decision-making process itself. The following principles have been culled out by the Supreme Court:

77. The duty of the court is to confine itself to the question of legality. Its concern should be:

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

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, 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 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. As a matter of fact, in *R. v. Secretary of State for the Home Department ex Brind* (1991) 1 AC 696, Lord Diplock refers specifically to one development namely, the possible recognition of the principle of proportionality. In all these cases 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

16. In the present case, tested on the anvil of the above principles of law, the decision arrived at by the respondents is found to be arbitrary and unreasonable as no authority acting reasonably could have reached such a decision, on irrational and unreasonable findings contained in the inquiry report. When the decision-making process is itself vitiated, the decision arrived at on its basis is bound to be arbitrary and unreasonable, as is the present case. Moreover, since the decision of the inquiry report itself does not inspire any confidence, the impugned decision based upon the findings arrived at by the inquiry officer, cannot be sustained.

17. For the aforestated reasons, the petition is allowed. The impugned decision dated 30.06.2010 is quashed and set aside, and the respondents are directed to execute the formal agreement pursuant to their communication dated 31.12.2009 and issue the work order for the same period of one year commencing from a prospective date, in terms of the conditions of the tender. Rule is made absolute, to the above extent. There shall be no orders as to costs.