

(2013) 11 GAU CK 0010

In the Gauhati High Court

Case No : Writ Petition (C) No's. 890 of 2012 and 1646 of 2011

Poribohon Development Multipurpose Society and Another	APPELLANT
Vs	
Indian Oil Corporation Ltd. and Others	RESPONDENT

Date of Decision : 18-11-2013

Acts Referred:

Citation : (2014) 1 GLT 458

Hon'ble Judges : Ujjal Bhuyan, J

Bench : Single Bench

Advocate : P.J. Saikia and Mr. A.K. Gupta, for the Appellant; S.N. Sarma, S.C., I.O.C., for the Respondent

Judgement

Ujjal Bhuyan, J.—Heard Mr. P.J. Saikia, learned Counsel for the petitioners and Mr. S.N. Sarma, learned Senior Counsel for the respondents. Matter pertains to tender notice issued by the Indian Oil Corporation Limited (Assam Oil Division) (IOCL) for hiring of school buses. Petitioner is aggrieved by some of the conditions incorporated in the tender notice which they contend are unwarranted and have put the petitioners to a disadvantageous position.

2. Both the writ petitions raise identical issue and have been heard together. However, for easy reference, WP (C) No. 890/2012 is taken up as the reference case.

3. Petitioners have filed the above writ petition seeking the following relief's:--

(1) as to why the Letter Inviting Tender No. DRC0115234, DRC 0115235 and DRC 01115233 all dated 12.12.2011 shall not be set aside and as to why

(2) the incorporation of the clauses in the NIT/LIT published on 12.12.2011 requiring the tenderer/members of the petitioner No. 1 to comply with the provisions of various labour laws which have no application on the members of the petitioners or the persons engaged by them as driver and handymen in providing transport services to the respondent IOCL as illegal and further as to

why

(3) the respondent authorities shall not be directed not to incorporate any clauses requiring the tenderer to observe the provisions of various labour laws which have no application on the members of the petitioners or the persons engaged by them as driver and handymen in providing transport services to the respondent IOCL in the LIT/NIT those may be issued for the purpose from time to time.

4. As per the tender notice dated 12.12.2011, tenders were invited for hiring school buses with drivers and helpers for a period of 3 years on 12 hourly daily duty basis. As per Clause 15.5 of the bid document, the contractor would be responsible for payment of full wages regularly before 7th of each month to each worker employed by them in the work under the contract in accordance with the Contract Labour (Regulation and Abolition) Act, 1970. Clause 16.0 requires that the contractor shall enforce the provisions of ESI Act/Scheme with regard to the contract. The Contractor shall conduct employees contribution from the wages of each of the employees and shall deposit the same together with the employees contribution in their respective ESI Code.

5. Learned counsel for the petitioners submits that drivers and helpers engaged by the members of petitioner No. 1 are not contractual labour of the respondents but are engaged by the vehicle owners for providing smooth transport service. Likewise, various labour laws are not attracted in respect of the contractors. Insistence on the aforesaid conditions have put the vehicle owners, who are members of the petitioner No. 1, to great disadvantage.

6. In their affidavit-in-opposition, respondent Nos. 1, 2 and 3 have stated that terms and conditions incorporated in the tender notice, particularly those objected to by the petitioners, cannot be said to be arbitrary and unreasonable. Terms of invitation to tender cannot be open to judicial scrutiny as it is in the realm of contract. It is further stated that many tenderers had submitted tender including some members of the petitioner No. 1. The tenders were processed and thereafter work orders were issued to the successful tenderers.

7. On the basis of the aforesaid affidavit, Mr. Sarma, learned senior counsel for the respondents submits that the writ petition is not maintainable and should be dismissed. He submits that the fact that tenderers had complied with the conditions shows that those conditions cannot be said to be unworkable. Moreover, the successful tenderers who have been awarded the contract are not before the Court.

8. It is a settled law that the power of judicial review extends to scrutiny of award of contracts by the State or by its agencies including examination of the decision making process culminating in the award of contract to prevent arbitrariness or favouritism. However, the Courts have repeatedly stressed that the terms of invitation to tender are not open to judicial scrutiny because invitation to tender is in the realm of contract. In Directorate of Education and

Others Vs. Educomp Datamatics Ltd. and Others, the Hon'ble Supreme Court after referring to various decisions on this aspect, held as under:--

9. It is well settled now that the courts can scrutinize the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favouritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by this Court in Tata Cellular v. Union of India. After examining the entire case-law the following principles have been deduced

94. 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 to 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 fair play 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.

10. In Air India Ltd. v. Cochin International Airport Ltd. this Court observed:

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 procedure laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness.

11. This principle was again restated by this Court in *Monarch Infrastructure (P) Ltd. v. Commr. Ulhasnagar Municipal Corpn.* It was held that the terms and conditions in the tender are prescribed by the Government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is not for the courts to say whether the conditions prescribed in the tender under consideration were better than the ones prescribed in the earlier tender invitations.

12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

9. In *Meerut Development Authority Vs. Association of Management Studies and Another*, Hon"ble Supreme Court held that judicial scrutiny in matters of tenders and contract would always depend upon the contextual facts.

10. Keeping in mind the broad legal parameters relating to the scope of judicial review in matters of tenders and contract as noticed above, more particularly in so far terms and conditions of tender are concerned, Court is of the view that insistence on the above conditions by the tendering authority cannot be said to be arbitrary, unreasonable or irrational. Moreover, those conditions relate to labour laws concerning the welfare of workmen. Therefore, those cannot be said to be against public interest. It cannot also said to be unworkable as similarly placed contractors had fulfilled the required conditions and have been awarded the contract. The contractors who have been awarded the contract are also not before the Court.

11. In such circumstances, Court is of the considered view that no case for interference has been made out by the petitioners. Both the writ petitions are devoid of merit and are accordingly dismissed. There shall however be no order as to cost.