(2009) 07 MP CK 0010

In the Madhya Pradesh High Court

Case No : Writ Petition No. 6091 of 2009

Rakesh Kumar Naik APPELLANT

Vs

State of M.P. and Another RESPONDENT

Date of Decision : 02-07-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 19

Citation : (2009) ILR (MP) 2576 : (2009) 3 MPJR 83

Hon'ble Judges : Krishn Kumar Lahoti, J;K.S. Chauhan, J

Bench : Division Bench

Judgement

Krishna Kumar Lahoti, J.

The petitioner has sought following reliefs:

(i) The Hon''ble Court may be pleased to call for the relevant record pertaining to Ann.P/1, for kind perusal of this Hon''ble Court.

(ii) To quash the impugned tender notice Ann.P/1 i.e., the condition of turn over of 10 crore for last 3 years imposed for the desired tenderer with direction to issue afresh permitting the petitioner to participate in the tender by issuing an appropriate writ order and direction.

(iii) Any other relief which this Hon''ble Court deems fit and proper may also be passed together with cost of petition.

The case of petitioner is that he was intending to submit his offer to tender issued by respondent No. 2 for production/excavation and sale of Diaspore and Pyrophilie ores, but he could not submit his tender because as per the terms of advertisement Annexure P-1, he was not having turnover of minimum Rs.10 crores in the last 3 years of major mineral. The respondent No. 2 just to extend benefit to the person of choice has intentionally put this condition for the first time this year. Because of this condition the other intending bidders were excluded. Apart from this, the respondent has put minimum bid price per tonne for Pyrophilie @ Rs.1,721/- and for crude Diaspore @ Rs.3,5007- while this rate was achieved last year and aforesaid mineral ought to have been sold for higher amount. It was submitted that imposing condition of turnover in last 3 years for Rs.10 crore in major mineral, is arbitrary, malafide and against the fundamental rights of petitioner to participate in the tender process. Apart from this it is against the policy of Government to uplift small industry.

This petition was filed on 22.06.2009. The last date of submitting tender was 22.06.2009 itself and on 23.06.2009 the tender was to be opened in the head office of respondent No. 1 at Bhopal. The respondents were noticed. They submitted reply. In nutshell the reply filed by respondents is as under:

A. That the tender for sale of 1000 tonnes crude Diaspore and 30,000 tonnes Pyrophilie mineral which is to be lifted in 2 years, the minimum off set price was fixed @ Rs.1,721/- per ton for Pyrophilie and Rs.3,500/- for crude Diaspore. This price was in accordance with the price, on which the minerals were sold in last tender. The minimum price of Pyrophilie as per rate fixed in the; tender would come to Rs.5.1 crores and Diaspore Rs.35 lakhs. Looking to the magnitude of work involved and the investment required a condition was imposed in the tender that the person submitting the tender should have carried out the mining work in major mineral during the period of 3 years for a value of Rs.10 crores. The condition was imposed with the intention, that the persons who are capable, possessing experience and necessary funds for the tender should come forward and submit the tender. This condition was imposed to invite genuine persons, who are financially sound experienced and serious in getting the work should submit their tender. It was also intention of respondents that fake and undesirable persons not having sound financial capacity and experience in the business of sale of mineral may be excluded. The condition imposed by the respondents was neither unreasonable nor arbitrary or irrational.

B. That the petitioner alleged to be a proprietor of ''M/s Krishna Mineral and Handicraft'', he has not disclosed how a person dealing in handicraft is interested in the business in question. In the petition the petitioner has not disclosed whether he was carrying out any mineral business of the magnitude of tender.

The petitioner after filing of the reply submitted that on 22.06.2009 because of condition imposed by the respondents only 1 person submitted his tender which shows that most of the persons were excluded and only person of choice of respondents participated in the tender, while in the last tender several persons participated in the tender process and there was a fair and competitive participation in the tender.

In reply to the aforesaid contention, it was submitted by Shri Jaiswal, learned Sr. Advocate that though 3 persons purchased the tender forms, but only one submitted the tender.

In oral submission, learned counsel for petitioner submitted that the entire process is malafide, arbitrary and violative of Article 14 of the Constitution of

India. It was submitted by Shri Asati that just to exclude small contractors, this condition was imposed which was beneficial to affluent persons. He has also drawn attention of the Court that because of fair process in earlier years the mineral could achieve more profitable price, while in this year only 1 person has participated and has enhanced meager price, to the off set price. It was submitted that the entire tender may be cancelled and fresh NIT may be directed. He placed reliance to the Apex Court judgment in Rashbihari Panda etc. Vs. State of Orissa, para 18 and submitted that this petition be allowed.

Shri M.L. Jaiswal, learned Sr. Adv. opposed the aforesaid contention and submitted that the condition imposed by the respondents is reasonable. It is neither arbitrary nor irrational. He supported his contention by placing reliance to the Supreme Court judgment in Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others, , Anil Kumar Srivastava Vs. State of U.P. and Another, and submitted that this petition may be dismissed.

To appreciate the rival contention of the parties, factual position in the case may be looked into. The allegation are only in respect of imposition of condition of having turn over of last 3 years for Rs.10 crores or more in major mineral, which is under challenge in this petition. It is also not in dispute that in the last tender this condition was not there and for the first time this condition has been imposed in Annexure P-1. It is also not in dispute that on 22.06.2009 only 1 person submitted his tender, while 3 persons had purchased tender forms. In the light of aforesaid factual position, the legal position may be looked into. The Apex Court in Rasbihari Panda (supra) held that the classification based on circumstances, with certain existing contractors had carried out their obligations in the previous year regularly and to the satisfaction of the Government is not based on any real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved i.e., effective execution of the monopoly in the public interest. Exclusion of all persons interested in the trade, who were not in the previous year licensees is exfacie arbitrary: if had no direct relation to the object of preventing exploitation of pluckers and growers of kendu leaves, nor had it any just or reasonable relation to securing of the full benefit from the trade, to the State.

The Apex Court further held that, the plea that action of Government was bonafide could not be an effective answer to a claim made by a citizen that his fundamental rights were infringed by the action of the Government, nor could the claim of the petitioner be defeated on the plea that the Government in adopting the scheme committed an error of judgment. The Apex Court directed that accepting of tenders of such excluded persons would be in the interest of general public and not of any class of traders so that in the following season the State might get the entire benefit of the monopoly in the trade of Kendu leaves and no disproportionate share thereof might be diverted to any private agency.

The question before the Apex Court was in respect of inviting of offers for advance purchase only from purchasers during previous year, who had carried out their obligations to the satisfaction of Government in preference to open competition. The Apex Court found that the action of Government was violative of Article 14 and 19 of the Constitution of India.

In this case in the last year there was no condition of any experience of business or having turn over of major mineral of any volume and for the first time this condition has been imposed vide Annexure P-1. Recently the Apex Court in EDUCOMP Datamatics Ltd. (supra) considered the question. The question before the Apex Court was in respect of inviting open tender with prescribed eligible criteria in general terms and conditions under tender document for leasing of supply, installation and commissioning of computer systems, peripherals and provision of computer education services in various government/government-aided senior secondary, secondary and middle schools under the Directorate of Education. The issue was imparting computer education to the schools. The total expenditure involved per annum was to the tune of Rs.100 crores. The competent authority took a decision after consulting the Technical Advisory Committee for finalization of the terms and conditions of the tender documents providing therein that tenders be invited from firms having a turnover of more than Rs.20 crores over the last 3 years. This condition was under challenge before the Apex Court. The Apex Court considering this aspect in para 13 of the judgment held that it was for the authority to set the terms of the tender. The Courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. While exercising the power of judicial review of the terms of the tender notice the court cannot say that the terms of the earlier tender notice would serve the purpose sought to be achieved better than the terms of tender notice under consideration and order change in them, unless it is of the opinion that the terms were either arbitrary or discriminatory or actuated by malice. Considering the aforesaid legal position the Apex Court held that the provision of terms inviting tenders from firms having a turnover of more than Rs.20 crores has not been shown to be either arbitrary or discriminatory or actuated by malice. Laying down the aforesaid law the Apex Court dismissed the writ petition filed by EDUCOMP Datamatics Ltd., challenging the aforesaid condition in the tender.

In Anil Kumar Srivastava (supra) the Apex Court considered the question of fixing a reserve price in the tender held that until and unless there is material to show that the reserve price was fixed improperly and there was loss of exchequer, such condition cannot be interfered. However the bid of higher than reserve price can be challenged on other grounds.

In this case the main contention of petitioner is in respect of inserting the aforesaid condition on the ground of arbitrariness and malafide. The ground of the petitioner before this Court is that in earlier years there was no such condition and by imposing the aforesaid condition the respondent has excluded others to participate in the tender process. The Apex Court in Tata Cellular Vs. Union of India, after examining the entire case law deduced the following principles:

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 falliable.

(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, as 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.

The Apex Court in Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others, held in para 7 thus :

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.

In this case the explanation submitted by the respondents is that only genuine and capable persons should participate in the tender process and for this purpose the condition so imposed appears to be just and reasonable.The petitioner who has not disclosed whether in earlier years he was having some experience of mineral or is an actual bonafide tenderer or not. If the tenderer is not having experience of Rs.10 crores in the last 3 years, which comes to Rs.3.33 crores per annum, excluding him by this terms appears to be reasonable. In this case the volume of work is more than Rs.5 crores in 2 years and for this purpose if such a condition is imposed it cannot be said to be arbitrary or erroneous. The off-set price which has been fixed by the respondents is apparently on the basis of price as achieved in the last year and the bidder has to submit his tender/offer for higher price. So far as the contention of petitioner that only 1 person has submitted his tender is concerned, it is to the respondents to look into whether they are getting adequate price for the material or not and if in the opinion of respondents, a fresh tender is required, they are always free to do so, but so far as imposing of condition of turn over of last 3 years is concerned, it cannot be said to be arbitrary or malafide. It is not the case of the petitioner that there are no person except the previous tenderer having turnover of Rs.10 crores. In absence of such averments in the petition, the imposition of condition cannot be said to be arbitrary.

In view of aforesaid, we are of the opinion that the condition imposed by the respondents is not arbitrary, malafide or violative of Article 14 and 16 of the Constitution of India. This petition is found without any merit and is dismissed, but with no order as to costs. While dismissing this petition we observe that the respondents are free to consider the tender which they received on 22.06.2009 and to consider the merits of the aforesaid tender and to decide whether they are intending to award the contract to such sole tenderer or to invite afresh tender for achieving the best price of the mineral.

