
(2012) 04 MP CK 0156

In the Madhya Pradesh High Court

Case No : Writ Petition No. 311 of 2012

Real Mazon India Ltd. (M/s.)

APPELLANT

Vs

State of M.P. and others

RESPONDENT

Date of Decision : 30-04-2012

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 226

Citation : (2012) 3 JLJ 200 : (2013) 1 MPHT 150

Hon'ble Judges : S.K. Gangele, J;Brij Kishore Dube, J

Bench : Division Bench

Advocate : Sunil Fernandez and Mahesh Goyal, for the Appellant; M.P.S. Raghuvanshi, Additional Advocate General for respondents No. 1 and 2, K.N. Gupta with Nitin Agrawal and R.S. Dhakad, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Gangele, J.—The petitioner has filed this petition against a direction/communication dated 4.1.2012 of the State of Madhya Pradesh, whereby, the petitioner-Company has been disqualified on the ground that the petitioner's Joint Venture Company did not satisfy the technical capacity criteria. On 7.10.2011, the State of Madhya Pradesh through Transport Department issued request for a proposal for implementtion of High Security Registration Plate (in short "HSRP") for vehicles registered in Madhya Pradesh from the interested bidders for the purpose of HSRP Scheme in the State of Madhya Pradesh. The petitioner-Company submitted its bid, thereafter, vide decision dated 4.1.2011, the bid of the petitioner-Company was rejected on the ground that it did not comply the minimum eligibility criteria for the captioned project, hence, the petitioner-Company was not short listed for further process. The petitioner-Company pleaded that the decision of the Transport Department is arbitrary and illegal and the petitioner-Company had fulfilled all the requisite technical criteria fixed for the purpose of grant of contract.

2. The Central Road Research Institute issued a certificate in regard to approval

for High Security Registration Plate Manufacturer to M/s. Real Industries Limited, 34, Rama Road, New Delhi. Photocopy of the certificate dated 22nd May, 2002 has been filed as Annexure P-2 along with the petition. Subsequently, an addendum was issued in the name of M/s. Real Mazon India Limited, New Delhi consequent to change in the name of M/s. Real Industries Limited, New Delhi. The aforesaid certificate was issued in regard to approval for High Security Registration Plate Manufacturer, photocopy of the certificate dated 10th January, 2003 has been filed as Annexure P-3.

3. M/s. Mazon BV of Netherlands formed a Joint Venture with M/s. CBM Industries Ltd. of New Delhi for catering to Indian High Security Registration Plates Market. The petitioner-Company submitted its bid as Joint Venture with M/s. CBM Industries Limited. A Joint Bidding Agreement along with the bid was also submitted. It was mentioned in the Joint Bidding Agreement that the first party i.e. M/s. CBM Industries Limited shall be the "Lead Member" of the Joint Venture and shall have the power of attorney from all parties for conducting all business and it would have 74% shareholding and the second party would have 26% shareholding in the Special Purpose Vehicle (in short "SPV").

4. In accordance the minimum eligibility criteria fixed by the Transport Department for the purpose of selection of a service provider for implementation of HSRP in the vehicles registered in the State of Madhya Pradesh, if a bidder is a Joint Venture, then the Lead Member shall attach copy of a valid type approval certificate and type of High Security Registration Plates from one of the Test Agencies. The relevant condition of clause 7.2.2 of eligibility criteria of Bidding Agreement in regard to technical capacity is as under :

7.2.2 A. Technical Capacity. -- For demonstrating technical capacity, the applicant shall have :

Obtained type approval certificate from the test agencies for the High Security Registration Plates as per the rule 126 of Central Motor Vehicles Rules, 1989 and the certificate must be valid as on Bid Due Date.

5. The bid submitted by the petitioner-Company was examined by CRISIL (Risk and Infrastructure Solutions Limited) for the purpose of selection of a service provider in regard to High Security Registration Plates for vehicles registered in State of Madhya Pradesh and CRISIL has recorded the following findings :

3.5 Read Mazon India Limited. -- The following table provides the details with respect to the Constitution and Composition of the Bidder :

Evaluation of responsiveness of Bid : The responsiveness of bid of M/s. Real Mazon India Limited was evaluated as per section 5.2 of the REP document. The table below provides the details of the responsiveness of the bid.

Technical and Financial Capability : The technical and financial capability of bid of M/s. Real. Mazon India Limited was evaluated as per section 7.2 of the REP document. The table below provides the details of the responsiveness of the bid.

* Figures in Rs. Crores. Note : Exchange rate is considered as 1 EURO = 68.9345 INR. The exchange rate on Bid Due Date, i.e. 26th December, 2011 has been adopted from RBI Reference Rate Archives provided at following website :

<http://www.rbi.org.in/scripts/referenceratearchive.aspx>.

Ground for Disqualification : The Bidder has formed the Joint Venture between M/s. CBM Industries Limited and M/s. Mazon B.V. The Lead Member underjoint Bidding Agreement, M/s. CBM Industries Limited, does not hold a Valid Type Approval Certificate. As stipulated in the REP document it is imperative for the Lead Member of the JV to produce a copy of type approval certificate in its name for meeting the technical qualification criteria. In addition, the networth of the JV, as mentioned in Appendix-3, is calculated incorrectly. The exchange rate assumed for conversion is inconsistent. The applicable Exchange Rate is 1 EURO = 68.9345 INR as on Bid Due Date, i.e., 26th December, 2011 as adopted from RBI Reference Rate Archives provided at following link : <http://www.rbi.org.in/scripts/referenceratearchive.aspx>. As per the applicable exchange rate, the JV does not meet the requirement of minimum networth of Rs. 30 crores.

Clarification : No clarification sought as the Bidder has been disqualified based upon minimum eligibility criteria.

Conclusion : The Bidder "M/s. Read Mazon India Limited" does not meet the technical and financial capability for meeting the requirement of the REP document, as stipulated in section 7.2. Hence, the Bidder is not qualified to participate in the next stage of the Bidding Process.

6. The CRISIL concluded that the petitioner-Company does not meet the technical and financial capability for meeting the requirement of the REP document, as stipulated in section 7.2 hence, the petitioner-Company is not qualified to participate in the next stage of the Bidding Process. The ground for disqualification mentioned by the CRISIL is that a type approval certificate is not in the name of Lead Member of Joint Venture and the networth of the Joint Venture as mentioned in Appendix-3 has been calculated incorrectly. On the basis of aforesaid technical evaluation by CRISIL, the Committee in its meeting rejected the petitioner-Company from participation in next stage of bidding process.

7. Learned counsel for the petitioner-Company has submitted that the decision of the respondents to the effect that the petitioner-Company did not have a certificate in the name of Lead Member is arbitrary and illegal. The bid of the petitioner-Company was lowest and in the event of Joint Venture, the experience of one Company cannot be brushed aside for the purpose of grant of contract. In support of his contentions, the learned counsel has relied on a judgment of Hon'ble Supreme Court passed in the case of New Horizons Limited and Another Vs. Union of India (UOI) and Others,

8. The Hon'ble Supreme Court in the case of New Horizons Limited (supra), has

considered the concept of Joint Venture in detail and held as under:

24. The expression "joint venture" is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. (Black's Law Dictionary; Sixth Edition, p.839). According to Words and Phrases, Permanent Edition, a joint venture is an association of two or more persons to carry out a single business enterprise for profit (p. 117, Vol. 23). A joint venture can take the form of a corporation wherein two or more persons or companies may join together. A joint venture corporation has been defined as a corporation which has joined with other individuals or corporations within the corporate framework in some specific undertaking commonly found in oil, chemicals, electronic, atomic fields, (Black's Law Dictionary; Sixth Edition, p. 342). Joint venture companies are now being increasingly formed in relation to projects requiring inflow of foreign capital or technical expertise in the fast developing countries in East Asia, viz., Japan, South Korea, Taiwan, China, etc. [See : Jacques Buhart : Joint Ventures in East Asia - Legal Issue (1991)]. There has been similar growth of joint ventures in our country wherein foreign companies join with Indian counter parts and contribute towards capital and technical knowhow for the success of the venture. The High Court has taken note of this connotation of the expression "joint venture" But the High Court has held that NHL is not a joint venture and that there is only a certain amount of equity participation by a foreign company in it. We are unable to agree with the said view of the High Court.

The Hon'ble Supreme Court in the case of New Horizons Limited (supra), further observed as under in regard to experience of a Joint Venture:

38. Seeing through the veil covering the face of NHL it will be found that as a result of reorganisation in 1992 the company is functioning as a joint venture wherein the Indian group (TPI, LMI and WML) and Mr. Aroon Purie hold 60% share and the Singapore based company (IIPL) holds 40% shares. Both the groups have contributed towards the resources of the joint venture in the form of machines, equipment and expertise in the field. The company is in the nature of a partnership between the Indian group of companies and the Singapore based company who have jointly undertaken this commercial enterprise wherein they will contribute to the assets and share the risks. In respect of such a joint venture company the experience of the company can only mean the experience of the constituents of the joint venture, i.e., the Indian Groups of Companies (TPI, LMI and WML) and the Singapore based company (IIPL).

39. On behalf of the respondents reliance has been placed on the decision of the Delhi High Court in Paharpur Cooling Towers Limited and another Vs. Bangaigaon

Refinery and PetroChemicals Limited and others, wherein it has been held that the expression "tenderer should possess such experience" would mean the experience of the tenderer itself and not that of its collaborator. It has been pointed out that SLP(C) No. 1484 of 1994 filed against the said judgment has been dismissed by this Court by order dated January 28, 1994. It has been urged that on the same logic the experience of a shareholder would not be included within the expression experience of the tenderer". We fail to appreciate the relevance of this judgment. There can be no comparison between a collaborator who has no stake in the business of the company and a constituent of a company, such as NHL, constituted as a joint venture, wherein the constituents in the joint venture have a substantial stake in the success of the venture.

40. Thus, the approach from the legal standpoint also leads to the conclusion that for the purpose of considering whether NHL has the experience as contemplated by the advertisement for inviting tenders dated April 22, 1993, the experience of the constituents of NHL, i.e., the Indian Group of Companies (TPI, LMI and WML) and the Singapore based company (IIPL) has to be taken into consideration. As per the tender of NHL, one of its Indian constituents (LMI) had printed and bound the telephone directories of Delhi and Bombay, for the years 1992 and its Singapore based constituent (IIPL) has 25 years experience in printing the telephone directories with "yellow pages" in Singapore. The said experience has been ignored by the Tender Evaluation Committee on an erroneous view that the said experience was not in the name of NHL and that NHL did not fulfil the conditions about eligibility for the award of the contract. In proceeding on that basis the Tender Evaluation Committee has misguided itself about the true legal position as well as the terms and conditions prescribed for submission of tenders contained in the notice for inviting tenders dated April 26, 1993. The non-consideration of the tender submitted by NHL has resulted in acceptance of the tender of respondent No. 4. The total amount of royalty offered by respondent No. 4 for three years was Rs. 95 lacs whereas NHL had offered Rs. 459.90 lacs, i.e., nearly five times the amount offered by respondent No. 4. Having regard to large margin in the amount of royalty offered by NHL and that offered by respondent No. 4, it must be held that decision of the Tender Evaluation Committee to refuse to consider the tender of NHL and to accept the tender of respondent No. 4 suffers from the vice of arbitrariness and irrationality and is liable to be quashed.

9. From the aforesaid judgment of Hon"ble Supreme Court, it is clear that the experience of Singapore based Company a constituent of the Joint Venture was ignored by the Tender Evaluation Committee which was erroneously viewed that the said experience was not in the name of NHL, however, the facts of the present case are quite different. In the present case, in the bid document, it was a condition that if the applicant is a Joint Venture, then the type approval certificate must be in the name of Lead Member of Joint Venture. Admittedly, the certificate submitted by the petitioner-Company was not in the name of Lead Member i.e. M/s. CBM Industries Limited of Joint Venture. The CRISIL evaluated

the technical bid of the petitioner-Company and rejected it. In our opinion, the decision taken by the Department cannot be said to be arbitrary, illegal or mala fide. Contrary to this, the decision is based on the basis of findings recorded by the CRISIL, an agency which has expertise in this field and also it is in conformity with the terms and conditions of tender document.

10. The Hon"ble Supreme Court in the case of Coal India Limited and Others, Vs. Alok Fuels (P) Ltd., th. Director, etc. etc., has held as under in regard to interference by the High Court under Article 226 of the Constitution in contractual matters :

25. It is settled by a series of decisions of this Court starting from Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, that even in the domain of contractual matters, the High Court can entertain a writ petition on the ground of violation of Article 14 of the Constitution when the impugned act of the State or its instrumentality is arbitrary, unfair or unreasonable or in breach of obligations under public law.

11. Same principle has been reiterated by the Hon"ble Supreme Court in the case of Sushila Chemicals Pvt. Ltd. and Another Vs. Bharat Coking Coal Ltd. and Others,

12. The Hon"ble Supreme Court in the case of M.D., H.S.I.D.C. and Others Vs. Hari Om Enterprises and Another, , has further held as under in regard to power of the Court under Article 226 to grant relief in contractual matters :

30. A law for less a contract does not warrant compliance of the contractual or statutory obligations where it is otherwise impossible to do. An entrepreneur may start raising constructions over a plot only when the physical possession thereof is handed over and/or plan for construction of the building is approved. A State cannot ignore the aforementioned relevant factors.

31. It may be true that ordinarily in a matter of enforcement of a contract qua contract, a writ Court shall not exercise its jurisdiction under Article 226 of the Constitution of India. But, it is also trite that where the action of a State is violative of Article 14 of the Constitution of India as being wholly unfair and unreasonable, the writ Court would not hesitate to grant relief in favour of a person, where both law and equity demands that such relief should be granted.

32. The appellant being a "State" within the meaning of Article 12 of the Constitution of India, it without a justification cannot make any discrimination when the parties are similarly situated. {See Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, . Moreover, the act on the part of the appellant must be a reasonable one. {See Bharat Petroleum Corpn. Ltd. Vs. Maddula Ratnavalli and Others,

33. This Court in ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, laid down the law in the following terms :

28. However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the Court should bear in mind the fact that the power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. (See *Whitepool Corporation v. Registrar of Trade Marks*). And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction." (AIR 1998 SCW 3345).

{See also *Mrs. Sanjana M. Wig Vs. Hindustan Petro Corporation Ltd., and Noble Resources Ltd. Vs. State of Orissa and Another*,

34. In *Kumari Shrilekha Vidyarthi and Others Vs. State of U.P. and Others*, this Court opined that even in contractual matters the State cannot act arbitrarily, starting (AIR 1993 SCW 77) :

31.... This decision clearly shows that no doubt was entertained about the applicability of Article 14 of the Constitution to an action of the State or its instrumentality, even where the action was taken under the terms of a contract of tenancy which alone applied by virtue of the exemption granted under the Rent Act excluding the applicability of the provisions thereof.

Referring to *Dwarkadas Marfatia and Sons Vs. Board of Trustees of the Port of Bombay*, this Court held: (AIR 1989 SC 1642).

24. The field of letting and eviction of tenants is normally governed by the Rent Act. The Port Trust is statutorily exempted from the operation of the Rent Act on the basis of its public/governmental character. The legislative assumption or expectation as noted in the observations of Chagla, C.J. in *Rampratap Jaidayal* case cannot make such conduct a matter of contract pure and simple. These Corporations must act in accordance with certain constitutional conscience and whether they have so acted, must be discernible from the conduct of such Corporations. In this connection, reference may be made on the observations of this Court in *Som Prakash Rekhi v. Union of India*, reiterated in *M.C. Mehta and another Vs. Union of India and others*,

It is dangerous to exonerate Corporations from the need to have constitutional conscience; and so, that interpretation, language permitting, which makes governmental agencies, whatever their mien, amenable to constitutional limitations must be adopted by the Court as against the alternative of permitting them to flourish as an imperium in imperio.

25. Therefore, Mr. Chinai was right in contending that every action/ activity of

the Bombay Port Trust which constituted "State" within Article 12 of the Constitution, in respect of any right conferred or privilege granted by any statute is subject to Article 14 and must be reasonable and taken only upon lawful and relevant grounds of public interest.

13. From the aforesaid decision of Hon"ble Supreme Court it is clear that the interference in contractual matters can only be called for, if the action of the State or instrumentality of the State is arbitrary, illegal or mala fide. In our opinion, in the facts of the present case, the action is neither arbitrary nor mala fide. Hence, there is no merit in this petition.

14. The learned Additional Advocate General also raised a point about the maintainability of the petition on the ground that the petitioner has not challenged issuance of intent and execution of contract in favour of respondent No. 3. In our opinion, it is not necessary to decide the aforesaid point because we have considered the case of the petitioner on merits and vide order dated 5.3.2012 this Court observed that award of contract in favour of respondent No. 3 shall be subject to final decision of the petition. The petition is dismissed accordingly. No order as to costs.