(2003) 12 CAL CK 0061

In the Calcutta High Court

Case No : Writ Petition No. 143 of 2003

Riyaz Khan and Others APPELLANT

Vs

Lieutenant Governor and Others RESPONDENT

Date of Decision : 22-12-2003

Acts Referred:

Constitution of India, 1950 — Article 14
Merchant Shipping Act, 1958 — Section 435(2)

Citation : AIR 2004 Cal 83 : (2004) 2 CHN 165 : 108 CWN 126

Hon'ble Judges : Subhro Kamal Mukherjee, J

Bench : Single Bench

Advocate : Haradhan Banerjee and K. Vijay Kumar, for the Appellant;Anjili Nag, for the Respondent

Final Decision : Dismissed

Judgement

Subhro Kamal Mukherjee, J.—This is an application under Article 226 of the Constitution of India by 12 (twelve) vessel owners, inter alia, challenging the circular dated July 28, 2003, issued with the approval of the competent authority, under the signature of Assistant Secretary (Shipping), Andaman and Nicobar Administration, permitting all M.S. class cargo vessels above 50 tons possessing valid MMO certificates to undertake transportation/ shipments of Government cargo on monthly lowest bid basis.

2. In the writ petition the said petitioners, also, challenged all consequential notifications/tenders and allotment and acceptance of the offers of the ship owners on the basis of the said circular dated July, 28, 2003.

3. Mr. Haradhan Banerjee, learned advocate, appearing in support of the writ petition, attacks the said circular and all consequential actions of the administration on three counts. Mr. Banerjee submits that the administration arbitrarily and without any bona fide reason excluded the cargo vessels below 50 tons undertaking transportation/ shipment of Government cargo on monthly lowest bid basis. He submits that such exclusion is unreasonable. All cargo vessel

owners are entitled to undertake transportation/shipment of the Government cargo, but due to such exclusion of the cargo vessels below 50 tons, the owners of such vessels loose the chance to undertake transportation/shipment of Government cargo. He suggests that the aforementioned exclusion is to show undue advantage to big cargo vessel owners. Mr. Banerjee draws my attention to Sub-section (j) of Section 435(2) of the Merchant Shipping Act, 1958 and submits that only the Central Government is empowered to fix the rate of freight, which may be charged by sailing the vessels for specified goods or for any class of goods in relation to the coasting trade of India. It is suggested that the Andaman and Nicobar Administration, particularly, the lieutenant Governor, has no power to fix freight charges as it is within the domain of the Central Government. Mr. Banerjee draws my attention on the Seventh Schedule to the Constitution of India, particularly, Item No. 89 of the Union List and submits that legislation on terminal taxes on goods or passengers, carried by railway, sea or air, taxes on railway fares and freights are within the domain of the Central Government. Mr. Banerjee submits that the Central Government is following ''the Indian Coastal Conference Rates'' and, therefore, the Andaman & Nicobar Administration should follow the said rates giving chances to all the vessel owners to undertake transportation/shipment of the Government cargos at the said rates. Lastly, Mr. Banerjee submits that the policy adopted by the Andaman and Nicobar Administration to engage private vessels to undertake transportation/ shipment of Government cargo on monthly lowest bid basis creates a monopolistic position for the vessel owner, whose bid is accepted by the administration inasmuch as other vessel owners are excluded from undertaking transportation/ shipment of the Government cargo for that particular month. Mr. Banerjee in support of his contentions cited the decisions in the cases of Rashbihari Panda etc. Vs. State of Orissa, , Shri Sachidanand Pandey and Another Vs. The State of West Bengal and Others, , and New Horizons Limited and Another Vs. Union of India (UOI) and Others, .

4. The position of Andaman & Nicobar archipelago is unique in nature. There are number of islands some of them are moderately populated, some of them are thinly populated and some of them are dense forests. The administration maintains various offices including police posts and forest guard offices because of strategic position of the islands. The Andaman and Nicobar Administration are required to ship and transport various items to augment the various works and to take care of the consumption needs of the local population to various islands Port Blair to outer ports/islands and vice versa, Admittedly, the vessels of the Andaman and Nicobar Administration are not sufficient to meet the requirements of the various departments of the administration for transportation and shipment of the Government cargo. The prevalent system, prior to the said circular dated July 20, 2003, was that that department concerned before engaging a private vessel had to obtain no objection certificate from the Directorate of Shipping Services and, therefore, the department concerned used to engage private vessels for transportation and shipment of the cargo to various islands/outer

ports. The result was that there was no uniform rate and taking advantage of the situation, the private ship owners started demanding high rates. The private ship owners used to get allotment of works from the departments at very high rates and even during the availability of the Government vessels. It is, also, suggested that on several occasions the freight charges used to be two to three times higher than the cost of cargo.

5. Consequently, the Andaman and Nicobar Administration decided to do away with the said system of obtaining no objection certificate from the Directorate of Shipping Services and decided to issue public notice to call for the rates from the owners/ transporters by last Monday of every month and to hold open before the said bidders to arrive at the rate quoted lowest by the shippers. It has, further, been decided that the quoted rates are to be displayed every month on the notice boards of the Port Management Boards, Directorate of Shipping Services and the Secretariat for information of all the departments and the shippers. If possible, there would be publication in the news daily, namely, The Daily Telegrams, by the Chief Port Administrator, Port Management Board, for information. All the departments are, therefore, directed to follow the rates declared by the Chief Port Administrator by entering into an agreement with the shippers for transportation/shipment of the cargo to various outer posts/islands. The present procedure has been adopted considering the same to be economical and cost effective. All the departments are asked not to float any tender or to enter into any agreement separately for shipment of cargo of the department.

6. The writ petitioners are owners of the vessels. They have no fundamental right to undertake transportation/shipment of Government cargo. The Government cargos are to be transported through the ships of the Government and only in absence of the Government ships, the private ships can be engaged. The administration has assessed its requirement and, thereafter, decided to negotiate with the vessel owners possessing vessels above 50 tons. Such decisions have been taken by the administration not to show any undue advantage to big ship owners or to exclude the smaller ship owners, but after assessing the requirements of the administration.

7. By adopting the aforesaid policy decision, the administration has not fixed the freight charges, but decided to enter into an agreement with vessel owners possessing above 50 ton vessels after floating public tender. While refusing to enter into a contract with the vessel owners having vessels below 50 tons the administration did not flout any statutory provision or duty.

8. Mr. Banerjee has failed to show that the aforesaid policy decision of the administration is unreasonable, capricious or mala fide and as such the writ petitioners are not entitled to assail a purely administrative decision by filing a writ petition.

9. The administration is free to evolve any method for execution of its works so long as the method is within the constitutional and legal limits. The Government

must have freedom of contract. The Government decided, in order to avoid financial loss, to float a tender amongst the eligible vessel owners and, thereafter, to accept the bid of the lowest bidder. The wisdom of such policy decision of the administration is not justiciable when such policy decision is neither arbitrary nor whimsical nor offends any constitutional or statutory provision. The administration decided to adopt a particular policy keeping in mind the constraint based on its resources. It will be dangerous to permit the petitioners to challenge the utility or the beneficial effect of such policy decision unless any breach of constitutional or statutory provisions is established.

10. Mr. Banerjee''s reliance on Rashbihari Panda etc. Vs. State of Orissa, is wholly misplaced. In the said case the Government offered the option to purchase kendu leaves to certain old contractors on the same terms as in the previous years. Therefore, the invitation was restricted to those individuals, who had carried out the contracts in the previous years to the satisfaction of the Government. In such a situation, it was held that the right to make offers has been restricted to a limited class of persons and, thus, it effectively shut out all other persons carrying on trade and, also, shut out new entrants into that business. It has, therefore, been held that such decision has been discriminatory and unreasonable restrictions upon the right of persons other than existing contractors to carry on business. In New Horizons Ltd. (AIR 1995 SCW 275) (supra) it was held that the State did not stand on the same footing as a private person, who was free to enter into a contract with any person he liked. The State, in exercise of its various functions, must follow the mandate of Article 14 of the Constitution of India, and as such, the State must act fairly and reasonably. Nevertheless, it has, also, been recognised in the said decision that certain measure of Tree play in the joints" has been necessary for an administrative body functioning in an administrative sphere.

11. After careful perusal of the materials on record, I am unable to hold that in the present ease the administration, in issuing the said circular, either acted unreasonably or unfairly.

12. In Tata Cellular Vs. Union of India, the Apex Court had occasion to examine the scope of judicial review in the field of exercise of contractual powers by Government bodies and has laid down the following principles--

"(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 tier. 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."

13. The Apex Court in Krishnan Kakkanth Vs. Government of Kerala and ohters, observed, "it may be indicated that although a citizen has a fundamental right to carry on a trade or business, he has no fundamental right to insist upon the Government or any other individual for doing business with him. Any Government or an individual has got a right to enter into contract with a particular person or to determine a person or persons with whom he or it will deal."

14. I, therefore, hold that the impugned circular does not offend Article 14 of the Constitution of India. There is no unreasonableness or arbitrariness on the part of the administration in adopting such decision. It cannot be said that when the administration selects a ship owner as the approved ship owner for the month, the administration is encouraging monopolistic position. It is not that all other ship owners are restrained from operating their ships, but they will not to undertake transportation/shipment of the government cargo for the particular month as they failed to match the bid.

15. The writ petition is, thus, rejected.

16. I make no order as to costs.

17. The urgent xerox certified copies of this order are to be made available to the parties on urgent basis, if applied for.