
(2000) 02 GAU CK 0027

In the Gauhati High Court

Case No : Writ Appeal No's. 22 and 23 of 2000 and W.P. (C) No's. 241 and 462 of 2000

Sailen Konwar Dutta and

APPELLANT

Vs

Satya Capital Services (P) Ltd., Guwahati and Others

RESPONDENT

Date of Decision : 25-02-2000

Acts Referred:

Constitution of India, 1950 — Article 14, 299

Citation : AIR 2000 Guw 152 : (2000) 1 GLT 657

Hon'ble Judges : Brijesh Kumar, C.J;A.K. Patnaik, J

Bench : Division Bench

Advocate : N. Dutta, S. Kataki, A.J. Das, A.K. Phookan, P.K. Kalita and M. Kataki, for the Appellant; Govt. Advocate, R.R. Gogai, G.N. Sahewalla, A.K. Goswami, P. Bora, S. Senapati, T. Baidya, O.P. Bhati and P.K. Poddar, for the Respondent

Final Decision : Allowed

Judgement

Brijesh Kumar, C.J.—The above noted four cases relate to the same subject matter involving same factual as well as legal controversies, hence all these cases have been heard together and they are being disposed of by this common order.

2. In Writ Appeal Nos. 22/2000 and 23/ 2000, judgment and orders passed by the learned Single Judge dated 15-10-99 in W.P.(C) No. 4725/99 and W.P.(C) No. 4724/ 99 have been challenged and by means of W.P. (C) No. 241/2000 and W.P. (C) No. 462/ 2000 opening of the tenders of M/s. Satya Capital Service (P) Ltd. and M/s. V. K. Jasrasaria & Sons has been challenged,

3. We have heard Shri N. Dutta, learned counsel for the appellants in the two appeals and for the petitioner in W.P. (C) No. 462/ 2000. Shri A. K. Phookan for the petitioner in W.P. (C) No. 241/2000, Shri R. Gogoi and Shri O. P. Bhati on behalf of the respondents as well as the State Counsel.

4. On 26-8-99 the Commissioner of Excise issued Tender Notice for supply of potable alcohol/ rectified spirit (Grade-I) for Jorhat Excise Warehouse. The tenders were to be received up to 1 P.M. on 10-9-99. Tenders were to be opened on 13-9-99 at 3 P.M. Appellant Sailen Konwar Dutta who is also the petitioner in W.P. (C) No. 462/2000 as well as Shri Jiban Borkakoty, petitioner in W.P. (CJ No. 241/2000 are said to have submitted their tenders within the time as specified in the Tender Notice. Their tenders were put in the tender box provided for the purpose along with some other tenders.

5. The case of the respondents, namely, M/s. V. K. Jasarasaria & Sons and M/s. Satya Capital Service (P) Ltd. is that their representatives had reached the office to submit the tender at 2 minutes to 1 P.M. At that time the Registrar of the office of the Commissioner of Excise was called to attend a telephone call in the adjoining room and on his return exactly at 1 P.M. their representatives gave their tenders to the Registrar, but he noted the time on the envelope as 1'05 PM consulting his own wrist watch and kept their tenders separately. The tenders, as given out in the Tender Notice, were opened in presence of the tenderers or their authorised representatives on 13-9-99. Only 9 tenders were found in the tender box which alone were opened by the authorities. The tenders of M/s Satya Capital Service (P) Ltd. and M/s. V. K. Jasarasaria were not opened. In the above circumstances M/s. Satya Capital Service (P) Ltd. filed W.P. (C) No. 4725/99 with averments as indicated above. The reply to the said allegations as indicated in the order of the learned Single Judge, is that the tender box was closed at 1 P.M. on 10-9-99 In accordance with the Tender Notice. It was not open to the authorities to accept any tender after the stipulated time. The other allegations made in the petition were also denied. M/s. V. K. Jasarasaria & Sons also filed its Writ Petition (C) No. 4724/99 with same allegations. M/s. Satya Capital Services (P) Ltd. and M/s. V. K. Jasarasaria & Sons in their respective petitions Indicated about the presence of representatives of each other, A similar reply of denial was submitted by the authorities in the petition filed by M/s. V. K. Jasarasaria & Sons also.

6. The learned Single Judge observing that the petitions were filed challenging the arbitrary action of the authorities In refusing to open the tenders of the petitioners on the plea of five minutes delay in submitting the tenders, considered it to be in the interest of justice that the tenders of the two petitioners should be opened, hence issued direction to that effect. It is to be noted that none of those whose tenders were opened after being taken out of the tender box on 13-9-99 had been impleaded in the writ petitions filed by M/s. Satya Capital Services (P) Ltd. and M/s. V. K. Jasarasaria & Sons. In the above situation, Jiban Barkakoty filed Writ Petition No. (C) No. 241 of 2000 making a prayer that a direction be issued that the tender of M/s. Satya Capital Services (P) Ltd. may not be accepted as recommended as it was not submitted within the time stipulated In the Tender Notice. A similar petition was filed by the appellant Sailen Konwar Dutta raising similar grievance and the learned single Judge passed an order on both the above noted writ petitions that they may be placed

and listed along with the Writ Appeals arising out of the order passed by the learned Single Judge dated 15-10-99 ordering for opening of the tenders of M/s Satya Capital Services (P) Ltd. and M/s. V. K. Jasarasaria & Sons.

7. On behalf of the appellant, namely, Sailen Konwar Dutta it is vehemently urged that the tender conditions have to be strictly complied. Undisputedly M/s. Satya Capital Services (P) Ltd. and M/s. V. K. Jasarasaria & Sons had submitted their tenders after the stipulated time. It is further submitted that on the allegations made by M/s. Satya Capital Services (P) Ltd. and M/s. V. K. Jasarasaria & Sons in their writ petitions that they had reached two minutes prior to 1 P.M. and they had submitted their tenders at 1 P.M., but the time 1"05 P.M. was wrongly written by the Officer, no finding has been recorded by the learned Single Judge about the correctness of these averments. It is further indicated that such averments have been denied in the affidavit-in-opposition. Learned counsel for the appellants submits that no reason has been indicated as to why the said two tenders should be accepted in case they were not submitted within the time stipulated. The tenders filed by other tenderers, nine in number, they were found in the tender box. Therefore, it is submitted that there was no occasion to issue a direction for opening of the tenders submitted in violation of the conditions of the Tender Notice and in absence of those whose tenders were filed within the time stipulated in the Tender Notice and their tenders having already been opened on 13-9-99.

Yet another submission which has been made is that according to the Tender Condition No. 26, "The tenderers or their authorised representative may be present if they so desire, at the time of opening of tenders". It is further indicated that according to the tender Condition No. 27, tenders which will not satisfy the above mentioned conditions is subject to rejection. The tenders of M/s. Satya Capital Services (P) Ltd. and M/s. V. K. Jasarasaria & Sons were opened on 20-11-99 at 2 P.M. Notice about opening of these tenders were given to M/s. V. K. Jasarasaria & Sons and M/s. Satya Capital Service (P) Ltd. No such notice was given to the tenderers whose tenders had already been opened on 13-9-99. According to the Endorsement No. 5 of the Notice of opening of tenders on 20-11-99, the notice was put on the Notice Board also, but it seems to have been sent only to the two tenderers and to no one else. It is submitted that at the time of opening of the tenders all the tenderers have a right to be present even in accordance with the condition of the Tender Notice. It is submitted that significance of this condition is that all tenderers must have an opportunity to be present at the time of opening of the tenders of all the tenderers and no tender of any tenderer is opened behind ones back, So far the tenders which were originally to be opened on 13-9-99, the Tender Notice itself had Indicated the date and time. Therefore, all the tenderers who had submitted their tenders knew about the same. But it is not true about the date of opening of the tenders of two tenderers, namely, M/s. Satya Capital Services (P) Ltd. and M/s. V. K. Jasarasaria & Sons as the date and time was not intimated to other tenderers whose tenders had already been opened on 13-9-99. In this connection, it is

submitted that averments have been made in paragraph 15A in Writ Petition No. 462/2000.

8. In the impugned judgment we find that a few paragraphs of the two petitions, making some allegations about arrival of the representatives of the petitioners two minutes before 1 PM, the officer entertaining the tender was called to attend a telephone call and by his watch he noted time as 1"05 PM and the tender forms were not put in the tender box but were kept separately even though according to the averments made It was just 1 PM and not 1"05 PM, have been quoted. Thereafter we find that a few paragraphs of the affidavit-in-opposition have been quoted in the judgment. The allegations made by the petitioner-respondents had been denied. The merits of the counter versions of the parties have not been gone into, nor any finding either way has been recorded in the judgments. After nothing the above facts the Court took the view that it will be more in the interest of justice that the tenders of the petitioner-respondents are opened and issued a direction to that effect impliedly taking the fact that the petitioner-respondents had submitted their tenders at 1"05 PM.

9. The precise question which emerges for consideration is as to whether a tender submitted after the time fixed for the purpose would be or not a valid tender for being accepted for consideration. In case it is not accepted for consideration having been submitted after expiry of the time, would it amount to an arbitrary decision of the administrative authority in not entertaining such tenders. Yet another question which requires consideration is as to whether the administrative authority could relax the time limit and entertain a tender submitted beyond time.

10. Learned counsel for the appellants has vehemently urged that there was no justification for the Court to issue a direction to the State authorities to open the tender submitted by the petitioner-respondents more particularly when no finding was recorded by the learned Single Judge on disputed facts as alleged by the petitioners that their representatives had arrived two minutes before 1 PM and at the time their tenders were handed over to the Officer it was 1 PM and not 1"05 PM. A grievance has also been raised that the conduct of the petitioner-respondents has not been fair in not impleading the appellants as party to the writ petitions filed by them and in obtaining the directions behind their back. It is submitted that the tenders which were placed in the tender box had been opened as scheduled on 13-9-99 at 3"30 P.M. All those persons whose tenders were opened were known to the petitioner-respondents, therefore, there was no occasion of their non-impleadment.

11. Learned counsel appearing for the respondents have, on the other hand, submitted that in case no prejudice is caused in relaxing the time limit fixed for submission of the tender, it will be justified to direct the authorities to open the tender submitted even after the time fixed for the purpose. The submission is that there are certain essential parts of the tender notice, non-compliance of which would render the tender disentitled for its acceptance for consideration,

but there may be other conditions which may be relaxable and by such relaxation, no prejudice may be caused to the other tenderers. It is submitted that in the present case the tenders were to be opened on 13-9-99. The petitioner-respondents had submitted their tenders, even if it is taken to be late, but on the same date on which the appellants and other tenderers had submitted their tenders, but before opening of the tenders submitted by other tenderers. Therefore, it caused no prejudice as the petitioner-respondents could not know the rates of other tenderers. Therefore, the order passed by the learned Single Judge is justified and does not call for any interference.

So far the impleadment of parties is concerned, it is submitted that other tenderers would not be necessary to be there before the Court for the purpose of redressal of the grievance or decision of the petitioner. The relief was sought only against the State authorities since they had not opened the tenders of the petitioner-respondents on the date fixed, namely, 13-9-99 when the tenders of others had been opened by them.

12. Learned counsel for the appellants has placed reliance on a Division Bench decision of this Court reported in 1995 (1) GauLT 458 (S. Ali v. Union of India). In this case tender accepted after the time had expired was held to be invalid. Learned counsel appearing for the respondents has, however, rightly pointed out that on facts the case is distinguishable since the tender was accepted late after the tenders submitted within time had already been opened. In those circumstances the Court held that the whole purpose of inviting sealed cover tender was frustrated.

The other case which has been referred is Tata Cellular Vs. Union of India, Our attention has been particularly drawn to paragraph 69 (of SCC) : (Para 84 of AIR) which indicates the requisites of a valid tender and one of the requisites indicated is that it must be made at the proper time. On this basis it is submitted by the learned Counsel for the appellants that one of the requisites of a valid tender is missing in the present case since it was not submitted at the proper time.

The other case which has been relied upon by both the sides is reported In M/s. G. J. Fernandez Vs. State of Karnataka and others, Paragraph 15 (of SCC) (Para 16 of AIR) of the judgment has been referred to on behalf of both the parties. It is observed that the conditions and stipulations in a tender have two types of consequences. It is further observed that the 1st is that party issuing the tender has the right to punctiliously and rigidly enforce the conditions. It was held that if the party does not strictly comply with the requirements of certain formalities of the NIT, in that case it would be open to the Committee to decline the party for consideration and in case the party comes to the Court against the Committee that it should be stopped from doing so, the Court would decline to grant the relief. On the basis of above obser- vation it is submitted on behalf of the appellants that if the authorities had chosen not to open the tenders of the petitioner-respondents on 13-9-99 and they were strictly adhering to the

conditions of the Tender Notice regarding time of submission of the tender, no direction could be issued by the Court compelling the party issuing the tender notice to deviate from the time schedule as fixed by the Tender Notice. We find that the Hon"ble Supreme Court has further observed that the second consequence is, not that the Committee in no case could deviate from the guidelines, but the deviations may not result in discrimination and it should also not be arbitrary. On facts of the case it was found that some changes in time schedule were made by the Committee. These changes affected all intending applicants alike and were not objectionable. Similarly relaxation in other directions would not be objectionable unless benefits of those relaxation were extended to some but denied to others. It is further observed that in case relaxation is made available to one, it may give cause to another party who can show that had it been known that the condition would be relaxed he could also submit his tender which he refrained from doing because of the condition concerned. The Court then considered the question of prejudice and observed thus (para 16 of AIR) :--

".....The question, then, is whether the course adopted by the KPC has caused any real prejudice to the appellant and other parties who had already supplied all the documents in time and sought no extension at all? It is true that the relaxation of the time schedule in the ease of one party does affect even such a person in the sense that he would otherwise have had one competitor less. But, we are inclined to agree with the respondent's contention that while the rule in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, will be readily applied by Courts to a case where a person complains that a departure from the qualifications had kept him out of the race, injustice is less apparent where the attempt of the applicant before Court is only to gain immunity from competition."

The Court refused to interfere in the matter as the Committee had only allowed one relevant document to be furnished to a qualified tenderer. It is to be noticed that It was the Committee itself which had taken a decision to permit a party to submit a document. According to the observations made by the Court, as indicated above, it was within the rights of the person inviting tenders to rigidly adhere to the time schedule. In case any deviation was made, the Court could examine the matter as to whether it resulted in the discrimination or involved any arbitrary decision on its part. The Court would not require the authority to deviate from the time schedule unless, of course, it would amount to discrimination on the part of the authority concerned in not deviating from the time schedule. But this is not the case here.

In the case of *Tata Cellular Vs. Union of India*, the Court has deduced certain principles as quoted below :

"(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 term 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 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."

By applying the above principles also it appears that if an administrative decision was taken or administratively the authorities acted in a particular manner, namely, in this case by not opening the tenders submitted by the petitioner-respondents, it would not be open for the Court to sit over that administrative action or non-action on the part of the authorities, unless it suffered from the vice of discrimination or arbitrariness. Such a decision, it appears would better be left to the administrative discretion fairly exercised by the administrative authorities and in case the authorities are in favour of strictly adhering to the conditions of tender notice with rigidity, it would not be for the Courts to review such a decision of the authorities. Except for compelling and strong reasons normally the Court would not intervene and direct the party inviting tenders to deviate from its time schedule, It will be a matter in the realm of discretion of the party inviting tenders. The question of prejudice etc. would arise if the party chooses to make deviation from professed condition of tender notice.

13. The next point which has been urged by the appellants about opening of the tenders of the respondents on 20-11-99 without individual notice to the other tenderers, it is submitted, is against the law. In this connection. Condition No. 26 of the Tender Notice has been referred to as referred to earlier also to indicate that tenderers have a right to be present at the time of opening of the tenders. On this point also the appellants placed reliance upon the observations made in the case of M/s. S. Ali 1995 (1) GauLT 458 (supra)) where this Court has observed that opening of tenders in presence of the tenderers is a protection for the tenderers so that subsequently rates quoted by each tenderer cannot be changed. In the present case we find that the tenders of petitioner-respondents were opened subsequently. In paragraph 15A of the Writ Petition filed by Sailen

Konwar Dutta, allegations about genuine apprehension of mischief in opening the tenders in absence of other tenderers have been made. In this connection it has been submitted that the tenderers who had submitted their tenders in time were not impleaded as parties in the writ petitions filed by the respondents. It is submitted that it was a deliberate omission. The appellants, therefore, did not know of the order passed by this Court for opening of the tenders of the petitioner-respondents. In pursuance of Condition No. 26 of the Tender Notice, it was incumbent upon the authorities to send individual notice to all the tenderers to be present, if they so chose at the time of opening of the tenders of the petitioner-respondents. Instead of doing so, the authorities chose, according to their own averments, to indicate the date of opening of the tenders of petitioner-respondents on the Notice Board. It is submitted that neither any tenderer was aware of such a notice said to be published on the Notice Board, nor any of them was present. On the other hand, individual notice was sent to the petitioner-respondents about the date and time of opening of their tenders. The same procedure should have been adopted for notifying the date and time of opening of their tenders in respect of all tenderers. There was no reason to choose only the petitioner-respondents for a different mode of notice, namely, by sending them individual notice and for the rest adopting the procedure of Notice Board. It is submitted that this fact assumes importance in the background that the petitioner-respondents had not impleaded the other tenderers as parties in their writ petitions. The whole thing was sought to be done in a clandestine manner in which collusion of machinery of the respondents could not be excluded. It is thus submitted that opening of the tenders of the petitioner-respondents in absence of other tenderers is also bad in law and in violation of condition of tender notice.

14. Learned counsel for the respondents submits that in case the first ground urged by the appellants is accepted there would be no occasion to decide the writ petition filed by the appellants. The position would be, no doubt, the same as indicated on behalf of the respondents. However, the fact remains that apparently there seems to be some hide and seek in an effort to get the tenders of the respondents opened.

15. Considering all the facts and circumstances of the cases, we are of the view that once the authorities did not open the tenders submitted late and they preferred to adhere to the time schedule with rigidity, it was not open for the Court to issue a Mandamus to deviate from the time schedule and open the tenders of those who submitted their tenders after expiry of the time, unless it was the case of the petitioner-respondents that by such a decision of the administrative authorities, they are being discriminated against or there was an element of arbitrariness in their action or inaction. Therefore, the question of prejudice would not arise in the present case, nor the question as to whether by permitting the tenders of late comers to be opened, the number of competitors would be increased and whether it would increase the number of bidders and to what effect. Such question of prejudice may arise for consideration where the authorities have taken a decision to deviate from the proclaimed conditions of

the Tender Notice. In our view, it is not a case of such an exceptional nature nor there existed such strong reasons that a direction was required to be given to open the tenders of respondents.

16. In view of the discussions held above, both the appeals are allowed and the order of the learned Single Judge is set aside as well as further action of the authorities in pursuance of the direction to open the tenders of the petitioner-respondents. Since the appeals have been allowed, the writ petitions filed by Jiban Barkakory and Sallen Konwar Dutta are rendered infructuous. They stand disposed of as such.

There would, however, be no order as to costs.