
(2008) 04 GAU CK 0006
In the Gauhati High Court

S.B. Enterprise

APPELLANT

Vs

Hindustan Paper Corporation Ltd. and Others

RESPONDENT

Date of Decision : 01-04-2008

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2009) 3 GLR 455 : (2008) 3 GLT 787

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—All the writ petitions by and between the same parties pertaining to the same matter impugning the action consequential to one another, have been heard together and are being disposed of by this common judgment and order.

2. For convenience sake, the three writ petitions are described as first, second and third writ petition. The first writ petition was filed making a grievance against the cancellation of the tender process initiated for "supply and application of paints" initiated by the respondent Corporation. In response to Annexure-I NIT dated 09.12.06, the petitioner offered its bid. Being technically fit, it was invited for price negotiation and even after two rounds of negotiations when the desired result was not obtained, the respondent corporation by its impugned Annexure-3 letter dated 18.04.07 intimated the petitioner about the failure of the negotiation and as to how the rates offered by it were in the higher side. Upon such failure, the tender process was cancelled. After such cancellation, the respondent Corporation initiated limited tender process for supply and apply of paints vide Annexure- s7 limited tender dated 04.08.07. Being aggrieved, the petitioner filed the first writ petition.

3. While entertaining the writ petition by order dated 17.08.07 this Court directed to maintain the status quo with regard to the fresh tender process.

However, the interim order passed was vacated by order dated 14.09.07 noticing that the tender process initiated vide Annexure- 7 limited tender dated 04.08.07 was in respect of a different job. While vacating the interim order, it was, however, observed that the plea of the petitioner with regard to the validity of the impugned order of cancellation would be considered at the time of final hearing of the writ petition.

4. During the pendency of the first writ petition, occasion for the petitioner to file the second writ petition arose when the respondent Corporation floated Annexure-10 NIT dated 25.09.07 inviting the bids for the job "application of paints". Occasion for the petitioner to file third writ petition arose when the respondent Corporation floated Annexure-11 NIT dated 05.11.07 for the work "supply of various types of paints". In both the writ petitions the plea of the petitioner is that when the matter relating to cancellation of the earlier NIT was sub-judice in the first writ petition, the respondent Corporation could not have issued the impugned NITs frustrating the first writ petition. In both the writ petitions this Court passed interim order to the effect that while the respondent Corporation would be at liberty to proceed with the tender process pursuant to the impugned NITs, but would not finalise the same without the leave of the Court.

5. The respondent Corporation has filed their affidavits in opposition in all the three writ petitions. In the first writ petition their plea is that since the rates offered by the petitioner were in the higher side, its representative was called for negotiation and even after two rounds of negotiations when the petitioner failed to reduce the rates reasonably, the respondent Corporation had no option than to cancel the NIT. It has been stated in the affidavit that the rates offered by the petitioner was found to be higher side by 18.90% than the estimated rates and even after negotiation same remained in the higher side although there was some reduction on the part of the petitioner pursuant to the negotiation. The variation is stated to be between 15% to 16%.

6. In the other two writ petitions, the plea of the respondent Corporation is that after cancellation of the NTT in the first writ petition, the Corporation reverted back to its earlier policy of procuring the materials directly from the manufacturers and to get the job of application of paints done through the contractors unlike the NIT in the first writ petition by which both the jobs were sought to be done through tender process confining the same to contractors without involving the manufacturers. In this connection, learned Counsel appearing for the Corporation has produced the records.

7. I have heard Mr. K.K. Mahanta, learned Sr. Counsel for the petitioner as well as Mr. J. Roy, learned representing the respondent Corporation. Mr. Mahanta submits that the decision of the authority to cancel the first NTT is the reflection of arbitrary and colourable exercise of power. He submits that when on the basis of the negotiations the petitioner had reduced its rate by 6%, it was incumbent on the part of the respondent Corporation to award the contract to it. As regards

the impugned NITs in the second and third writ petition, he submits that the decision to issue fresh NITs on the purported revival of the old practice of procuring the materials directly from the manufacturers and to get the job done through tender process is nothing but a device to frustrate the legitimate claim of the petitioner. He has referred to the following decisions:

1. Navjyoti Coo-Group Housing Society etc. Vs. Union of India and Others,
2. Dutta Associates Pvt. Ltd. Vs. Indo Merchantiles Pvt. Ltd. and Others,
3. 2003 (3) GLT 202 : (2004) 2 GLR 283 (Sargous Tours & Travels and Anr. v. Union of India and Ors.)

8. Countering the above arguments of Mr. Mahanta, learned Sr. counsel for the petitioner, Mr. J. Roy, learned Counsel representing the Corporation submits that the Corporation was within its competence and jurisdiction to cancel the tender process upon failure of the negotiation with the petitioner. He submits that it is for the Corporation to decide as to on which rate the contract should be awarded to the contractor. According to him when it was found that the rates offered by the petitioner was much on the higher side and even after negotiations with the petitioner, it did not lower its rate to the Corporation's expectation, there was no option left than to cancel the entire tender process. According to him, the issue raised in the first writ petition has really become redundant in view of the subsequent NITs issued which are challenged in the second and third writ petitions. He submits that having faced with the practical realities and difficulties in getting the job relating to procurement and application of paints done through the contractors, the Corporation decided to revert back to its original policy of procuring the materials directly from the manufacturer and to get the job relating to application of paints done through the contractors.

9. Mr. J. Roy, learned Counsel for the Corporation referred to certain decisions which are as follows:

1. Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others,
2. Global Energy Ltd. and Another Vs. Adani Exports Ltd. and Others,
3. Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others,
10. I have considered the submissions made by the learned Counsel for the parties and the materials on record. I have also gone through the records produced by the learned Counsel for the Corporation.

11. As noted above, the interim order passed in the first writ was subsequently vacated enabling the respondent Corporation to go ahead with the impugned tender process. It was noted that the impugned NIT in the first writ petition was in respect of different job unconnected with the one for which the petitioner was interested. In view of such vacation of interim order, there was no bar on the part of the respondent Corporation to initiate fresh tender process. However, it is not the case of the respondent Corporation that such tender process is similar to

that of the earlier tender process which was subsequently cancelled. If it is held that the subsequent tender process impugned in the second and the third writ petitions is because of the change of the policy decision of the Corporation, the matter will have to be decided in the touchstone of such policy decision. Irrespective of upholding or otherwise of the policy decision, the ground on which the first writ petition is projected, will naturally fall through.

12. Even otherwise also the ground of cancellation of the first tender process cannot be said to be arbitrary, illogical and illegal. From the materials on record, it appears that the petitioner was invited for negotiation which resulted in failure. The authorities of the Corporation was within its domain, competence and jurisdiction to arrive at particular deal applying various yardsticks and parameters. In the affidavit in opposition it has been reflected that even after negotiations the rates offered by the petitioner remained much on the higher side. Upon such finding arrived at by the authorities of the Corporation, it was decided to cancel the tender process. Such cancellation of tender process cannot be said to be illegal. The writ Court cannot issue any mandamus to the respondent Corporation to act in a particular manner unless it is shown that their action towards cancellation of the tender process was in fact, founded on malafide and colourable exercise of power. The records produced by the Corporation do not indicate any such exercise of power. Consequently, I do not find any infirmity in the decision towards canceling the tender process. Situated thus, the first writ petition must fail. Consequently, the writ petition is dismissed.

13. This now leads us to the second and third writ petitions. Once it is held that the decision to cancel the first NIT does not suffer from any infirmity, it will have to be held that the subsequent action on the part of the Corporation towards inviting fresh tenders is legally valid. However, the matter is on a different footing. The competent authority of the Corporation having regard to the facts and circumstances involved in the matter, made a suggestion to revert back to the original procedure of procuring the materials (paints) from the manufacturers instead of procuring through the contractors. So far as the application of paints is concerned, same was to be done through contractors for which the impugned NIT was issued. It is on record that prior to 2005 the respondent Corporation used to procure the materials inviting bids from the manufacturer. Once the materials were procured, the application part was materialized through the contractors. This is precisely the reasons as to why the impugned NITs were issued one after another.

14. The impugned NIT in the third writ petition is confined to the reputed and experienced manufacturers unlike the earlier practice of inviting tenders from the contractors. Such practice was prevalent prior to 2005. After having experienced the difficulties in getting the job done after procuring the materials, a suggestion was made by the competent authority of the Corporation to revert back to the original system. Such a suggestion was accepted and consequent thereto the impugned NITs involved in the second and the third writ petition were issued.

This Court permitted the respondent Corporation to proceed with the tender process but restricted issuance of final order.

15. The decision on which Mr. Mahanta, learned Sr. counsel for the petitioner has placed reliance are on the principles relating to primary requirement of the tender process such as intending tenderers must be notified of the procedure that the authorities propose to follow in accepting the tender, transparency, fairness and openness in Government Contract and legitimate expectation. The ratio in any decision will have to be understood in the background of the fact situation involved in the case. In the instant case, it is not the case of arbitrary rejection of the tender of the petitioner. In fact, its the technical bid was accepted and it was invited for negotiation as regards the price bids. Even after negotiating twice the respondent Corporation found that the rates offered by the petitioner were on the higher side. Situated thus, the Corporation decided to cancel the NIT. The principles enunciated in the said decision will have to be understood and applied in that context.

16. On the other hand, the decision on which Mr. Roy, learned Counsel for the Corporation emphasized are on the scope and ambit of the judicial review in the matter of tender process and awarding of contract. The State is empowered to choose its one method in the realm of awarding contract, subject, however, to the compliance with the norms, standard and procedure. Unless it is shown that the action taken by the authority is wholly arbitrary, discriminatory or actuated by malice, the parameters of tender notice and/or the process of tender cannot be faulted with. It is not for the writ Court to interfere with the tender process even if it is found that some other parameters would have been more preferable.

17. In the instant case, the Corporation decided to revert back to its original method of procuring materials directly from the manufacturers and to award the contract of application of paint through tender system. Such policy decision adopted by the respondent Corporation and/or reversion to its earlier policy decision abandoning the present system of procuring and application of paints through tender process cannot be said to be arbitrary exercise of power warranting interference of this Court exercising the power of judicial review under Article 226 of the Constitution of India.

18. For the aforesaid reasons, I am of the considered opinion that no interference is called for to the impugned NITS. Consequently, the second and third writ petitions are also dismissed. The respondent Corporation will no proceed with the tender process towards its logical end.

All the writ petition are dismissed leaving the parties to bear their own costs.