(2003) 07 CHH CK 0005

In the Chhattisgarh High Court

Case No : Writ Petition No. 1784 of 2003

Sharda Flour Pvt. Ltd. APPELLANT

Vs

State of Chhattisgarh and Others RESPONDENT

Date of Decision : 25-07-2003

Acts Referred:

Constitution of India, 1950 — Article 299
Contract Act, 1872 — Section 9

Citation : AIR 2005 Chh 12 : (2003) 2 CGLJ 119 : (2004) 2 MPJR 67

Hon'ble Judges : L.C. Bhadoo, J

Bench : Division Bench

Advocate : P. Diwakar, for the Appellant; Sanjay K. Agrawal, Dy. A.G. and Kishore Bhaduri, for the Respondent

Final Decision : Dismissed

Judgement

L.C. Bhadoo, J.—The main grievance of the petitioner in this writ petition under Articles 226 and 227 of the Constitution of India, is against condition No. 20 (a) of the notice inviting tenders issued by respondent No. 3 by which along with other conditions a condition has been prescribed in order to become eligible for submitting the tender in response to the notice inviting tenders.

2. Condition No. 20 (a) of the notice inviting tenders lays down that the intending tenderer''s firm must submit a certificate, along with the tender form, of an Officer of the Government Department/Institution/Undertaking, showing their experience and execution of an order regarding supply of the substitute nutritious food of the value equivalent to 30% of the tender item which comes to Rs. 80,00,000/-, in one year during the last three preceding years.

3. petitioner/Company has filed this petition with the averments that the petitioner namely, M/s. Sharda Flour Pvt. Ltd., is one of the most reputed roller flour mills of the State of Chhattisgarh and is having all the latest modern machinery. The present petition has been filed through the Managing Director of the firm namely, Dinesh Kumar Bhootda. Respondent Nos. 2 and 3 have invited

tenders for supply of substitute nutritious food and as per the tender programme, the tender was required to be submitted on 6-6-2003 before 2 p.m. and the same was to be opened at 4 p.m. on the same day before the District Purchase Committee. By the tender, supply of Dalia was required and certain conditions were also fixed. The notice inviting tenders and the tender form are Annexures P-l and P-2. The petitioner has the experience of producing the best product and the firm is well equipped with the latest modern machinery. The quality of the product which is being produced by the petitioner is incomparable and to the utmost satisfaction of its buyers. The turnover of the petitioner for the year ending 31st March, 2002 was Rs. 14,09,33,275/- which has increased substantially in the year 2003 and has gone to the extent of Rs. 20,64,35,593/-. A copy of the certificate dated 5-6-2003 issued by the Chartered Accountants of the petitioner is filed herewith. In the notice inviting tenders, one of the conditions has been imposed by the respondents in an arbitrary manner to favour some of the groups. The condition has been put in such a manner to reduce the competition and to ensure that choiced persons be awarded with the contract. As per condition No. 20 (a), unless a person is having an experience certificate of supplying the substitute nutritious food to the tune of Rs. 80,00,000/- in any one year during the last three preceding years, he can not be permitted to compete. The imposition of the condition is absolutely illegal and arbitrary and the same has been put with a motive to favour some particular person. This condition has been incorporated in order to narrow down the competition and in view of this condition, new person will never get entry in the competition. The very object of the Government is to ensure supply of quality material and to ensure that the same may be fulfilled as agreed by the tenderer. For ensuring supply, the Government can take proper security which the Government is already doing. As per the information available to the petitioner, even his case has not been forwarded to the final stage only on the ground that the petitioner is unable to fulfill condition No. 20 (a) of the tender item. The petitioner quoted a very competitive rates probably the lowest, whereas in those cases which have been forwarded to the higher authorities, the rates are more as compared to the rates of the petitioner. On account of such a condition, the competition will be among only 3 or 4 persons at it will become the monopoly of certain groups. Therefore, the petitioner is challenging the arbitrary and malafide approach of the respondents. As per condition No. 23 of the document (Annexure P-l), it was mentioned that if the unit is having a certificate of ISO-9000, the same would be given preference as compared to other units. The petitioner has already applied for the ISO Certificate on 12th June, 2003. Respondent No. 2 and 3 have sought the information of Food License & Licensee under the Factory Act. Both these licenses are presently in possession of the petitioner and at the time of the filing of the tender form & renewal order is pending before the competent authority. Therefore, the respondents be directed to consider his case on the basis of the rates so quoted and on the basis of the supply of the sample subject to the final approval of the same by the competent authority. It is therefore, prayed that the respondents be directed to consider the case of the petitioner on merits by excluding condition No. 20 (a) and respondents be directed to forward the sample of the petitioner to the laboratory at Mumbai.

4. The return has been filed on behalf of the respondents in which they have mentioned that the petitioner has not filed the certificate as enumerated in condition No. 20 of the notice inviting tenders and also he did not fulfill pre-tender condition laid down in Para 20 of the notice inviting tenders. The petitioner has failed to file the valid license issued under the Factory Act as per condition No. 20 (b). He has also failed to produce no objection certificate obtained from the Pollution Control Board, as per condition No. 20 (c). He has also failed to file living and valid license from the Food and Drugs Department. Since the petitioner did not fulfill the criteria (a), (b), (c) and (d) of condition No. 20, therefore, he was not eligible to compete with others and his tender form was not considered further. The tender has been finalized on 25th June, 2003 and the contract for supply of substitute nutritious food (Dalia) has been given to the qualified firm. It is submitted that seven tender forms were received, out of the seven forms, the names of three firms were considered and out of the three firms one firm has been given the contract after following the due procedure to a qualified firm who fulfill all the terms and conditions given in the notice inviting tenders. The petitioner has filed this petition without any rhyme or reason, as he does not qualify the terms and conditions of condition No. 20 and made frivolous and bald allegations against the State and its authorities. It is denied that respondent Nos. 2 and 3 have imposed some arbitrary conditions in the notice inviting tenders so as to ensure that one particular person get the tender and the honest person like the petitioner is deprived from getting the tender. The petitioner has been registered as a manufacturer of Dalia on 29-5-2003 at Bilaspur in the District Industrial Trade Center, Bilaspur, which is evident from the permanent registration of the District Industrial Trade Center, Bilaspur dated 29-5-2003, to the effect that the production has been started from 20th May, 2003. Therefore, it can not be said that the petitioner is a reputed manufacturer and supplier of Dalia. The petitioner has no experience in supply of the proposed food "Dalia" in any Government Department/Institute/Undertaking in any one year during the last three years. It is also denied that condition No. 20 has been imposed in an arbitrary manner and to favour some of the groups. Dalia is being supplied for children, pregnant women and lactating mothers belonging to weaker sections of the society, who are most vulnerable sections of the society and suffering from mal nourishment, in compliance of the Hon''ble Supreme Court''s direction. The petitioner had no certificate of ISO 9000 on the date of submission of the tender form. Therefore, the petition of the petitioner is liable to be dismissed.

5. M/s. J.D. Food Products Pvt. Ltd., Vinoba Nagar, Bilaspur, through its Director Smt. J. Saluja, has filed an intervention application and supported the stand of the respondents.

6. I have heard the learned Counsel for the parties.

7. Mr. P. Diwakar, learned Counsel for the petitioner argued that condition No. 20 (a) imposed by respondent Nos. 2 and 3 is arbitrary and the same amounts to debarring the petitioner to file the tender and it also amounts to creating monopoly in favour of limited persons. He further submitted that last year also, similar condition No. 17 was imposed and there is no rationale behind the imposition of this condition. Therefore, this action of respondent Nos. 2 and 3 is illegal and arbitrary. The learned Counsel further submitted that the law on the point is that in the matter of contract which is entered by the State Government with the private parties, if it is arbitrary and illegal then such actions are subject to the judicial review of the Courts.

8. In support of his argument, the learned Counsel relied upon the judgment of the Hon''ble Apex Court in the case of Rashbihari Panda etc. Vs. State of Orissa, , in which the Hon''ble Apex Court held, that the action of the Government amounts to monopoly. Government inviting offers for advanced purchase only from purchasers during previous year, who had carried out their obligations to the satisfaction of the Government in preference to open competition.

9. In my considered opinion, on facts, this authority of the Hon''ble Apex Court is of no help to the petitioner as in the present case by the impugned clause in the notice inviting tenders no monopoly has been created in favour of any person rather it is an open tender. Only eligibility criteria has been laid down as per condition No. 20 (a) of the notice inviting tenders by which certain limit has been fixed in order to select the competent contractor who has experience in the field of supplying of Dalia to various Government Departments/Institutions/ Undertakings. The other authority relied upon by the learned Counsel for the petitioner is in the case of West Bengal State Electricity Board v. Patel Engineering Co. Ltd. and Ors., reported in (2001) 2 SCC 451 . The other decision relied upon by the learned Counsel for the petitioner is in case of Common Cause, A Registered Society Vs. Union of India and Others, .

10. On the other hand, the learned Counsel for the respondents argued that condition No. 20 (a) was incorporated in order to select experienced and competent firms as the supply of Dalia which is meant for children, women and lactating mothers who belongs to weaker sections of the society and also who are suffering from mal nourishment. Therefore, in order to ensure that only the experienced firm can supply the Dalia of a required quality, this condition is laid down. The respondents were within their right to prescribe the minimum eligibility criteria for the intending tenderers. Therefore, the action of-the respondents does not suffer from any vice of arbitrariness or irrational. The learned Counsel further submitted that apart from condition No. 20 (a), the petitioner on the given date was not fulfilling the other conditions of the notice inviting tenders which are enumerated in Clauses 20 (b), 20 (c) and 20 (d) and even the petitioner firm was not having the certificate of ISO 9000 and the petitioner firm was totally inexperienced in the matter of supplying. Dalia as they started production only on 20th May, 2003.

11. The learned Counsel for the respondents relied upon the decision of the Hon''ble Apex Court in the case of M/s. G. J. Fernandez Vs. State of Karnataka and others, and other decision in the case of Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, and also other decision in the case of Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, .

12. Now, coming to the law laid down by the Hon''ble Apex Court in the matter of contracts which are entered by the Government with the private persons, the Hon''ble Apex Court in the matter of West Bengal State Electricity Board (supra), has held that rules and instructions must be complied with scrupulously in order to avoid discrimination, arbitrariness and favouritism which are contrary to rule of law and constitutional values. The relaxation by a State or its agencies of a rule or condition in favour of a particular bidder, held, not permissible unless expressly provided for in the rules. Adherence to the rules, held, is the best principle to be followed in the public interest.

13. In the matter of Common Cause (supra), it has been held by the Hon''ble Apex Court that the Government''s decisions regarding award of contract are always open to the judicial review and if the decision making process is shown to be negotiated by arbitrariness, unreasonableness and illegality then the Court can strike down the decision making process as also the award of the contract based on the decision.

14. The Hon''ble Apex Court in the case of Tata Cellular Vs. Union of India, held that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. However, there are inherent limitations in exercise of that power of judicial review. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The duty of the Court is to confine itself to the question of legality. Its concern should be : (a) whether a decision-making authority exceeded its powers ? (b) committed an error of law; (c) committed to breach of the rules of natural justice; (d) reached a decision which no reasonable Tribunal would have reached; or (e) abused its powers. The grounds upon which an administrative action is subject to control by judicial review can be classified as under:-

(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness,

(iii) Procedural impropriety.

The Hon''ble Apex Court further held that the principles deductible relating to scope of judicial review of administrative decisions and exercise of contractual powers by Government bodies are :-

(a) The modern trend points to judicial restraint in administrative action.

(b) The Court does sit as a Court of appeal but merely review the manner in which the decision was made.

(c) The Court does not have the expertise to correct the administrative decision by substituting its own decision, without the necessary expertise which itself may be fallible.

(d) The terms of the invitation to tender can not be open to judicial scrutiny because the invitations to tender are in the realm of contract.

(e) The Government must have freedom of contract.

(f) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

15. In the matter of Common Cause (supra), the Hon''ble Apex Court has relied upon the principles laid down in Tata Cellular''s case. In the case of Sterling Computers Ltd. (supra) the Court held that while exercising the judicial review in the matter of the Government Contracts the Court can not act as an. appellate authority or examine the details of terms of the contract. The primary concern of the Court is to see whether there is any infirmity in the decision making process. In the case of Raunaq International Ltd. (supra) the Hon''ble Apex Court held that in arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. These would be:-

(i) The price at which the other side is willing to do the work;

(ii) Whether the goods or services offered are of the requisite specifications;

(iii) Whether the person tendering has the ability to deliver the goods or services as per specifications;

(iv) The ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;

(v) Past experience of the tenderer and whether he has successfully completed similar work earlier; (vi) Time which will be taken to deliver the goods or services; and often

(vii) The ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.

16. In the case of M/s. G.J. Fernandez (supra) the Hon''ble Apex Court held that the experience certificate given by the prospective tenderer about his work experience sufficiency to be decided by authority calling the tenders not by the Court. Tenderers are required to supply inter alia documents supporting their work experience and financial position along with the application for tender book. Tender can be excluded for consideration in failure to supply the required documents.

17. Therefore, in view of the law laid down by the Hon''ble Apex Court in the

above decisions, the Government is at liberty to fix the pre-qualification of the tenderer based on their experience, financial position. As held in the case of Raunaq International Ltd. (supra), the Government can also take into consideration and fix pre-qualifications whether the intending tenderers can deliver the goods of the requisite specifications whether the tenderer is able to deliver the goods. Past experience of the tenderer and whether he has successfully completed similar work earlier and the ability of the tenderer to take up follow action. As per the decision in the case of Tata Cellular (supra), the terms of the invitation to tender can not be opened to judicial scrutiny because the invitations to lender is in the realm of contract.

18. In view of the above law, condition No. 20 (a) fixed by the respondents is not arbitrary in any manner, because the respondents have specifically stated that in pursuance of the Supreme Court''s directions the respondents were required to supply Dalia of a requisite quality and standard to the children, women, lactating mother who belongs to weaker sections of the society and are suffering from mal nourishment. Therefore, the respondents fixed the past experience eligibility criteria as also the financial capacity of the intending tenderers and the Government was within its right to fix this criteria looking to the requirement and as per the law laid down by the Hon''ble Apex Court in the cases of Tata Cellular, Raunaq International Ltd. and M/s. GJ. Fernandez (supra). Not only this, the petitioner was not even eligible to file the tender because apart from condition No. 20 (a), at the time of filing of the tender documents, he was not even qualifying the other conditions namely, condition Nos. 20 (b), 20 (c) and 20 (d). He started producing Dalia recently, Le., from 20th May, 2003.

19. Therefore, the decision of respondent Nos. 2 and 3 does not suffer from any vice of arbitrariness and the petitioner has not been able to prove his stand that the eligibility criteria as enumerated in condition No. 20 of the notice inviting tenders is arbitrary or irrational.

20. In the result, this petition has no force. The same is liable to be dismissed and it is accordingly, dismissed.

