
(2005) 04 MP CK 0003
In the Madhya Pradesh High Court
Case No : Writ Petition No. 523 of 2005

Shiv Lal Yadav and Others

APPELLANT

Vs

State of M.P.

RESPONDENT

Date of Decision : 27-04-2005

Acts Referred:

Motor Vehicles Act, 1988 — Section 173

Citation : (2005) 1 MPJR 597

Hon'ble Judges : N.K. Modi, J

Bench : Single Bench

Advocate : G.M. Chaphekar, with Mr. Ajay Asudani, for the Appellant; A.S. Kutumbale, Advocate for respondents No. 2 to 4 and Mr. Satish Bagadia with Mr. G.S. Yadav, Advocate, for the Respondent

Judgement

N.K. Modi, J.

This order shall also govern the disposal of Writ petitions No. 506/2005 and 507/2005 in which counsel for petitioner is Shri Champalal Yadav and Writ Petition No. 5674/2005 in which counsel for the petitioner is Shri D.D. Vyas, Sr. Advocate.

Writ Petition Nos. 506/2005 and 523/2005 relates to Mandsaur District and Writ Petitions No. 507/2005 and 564/2005 relates to Neemuch district. All these petitions relates to grant of license of poppy straw in Mandsaur and Neemuch district.

The facts of the case are that the respondent No. 2 published a notification on 28th March, 2005 in the gazette inviting tenders for insurance of license of whole sale and retail sale of poppy straw for these two district in small groups at tahsil level in the concerned district for the year commencing from 6th April 2005 to 31st of March 2006. The tenders were required to be submitted on 05.04.2005 between 11.00 A.M. to 2.00 P.M. in two parts i.e. qualification and financial and were required to be finalised on the same day. Respondents No. 1 and 2

published terms and conditions for inviting tenders. At the place of bid, eligible tenderness were to be registered with a right to participate in the auction. Petitioners in W.P. Nos. 506/2005 and 523/ 2005 submitted tenders for Mandsaur district while petitioners in W.P. Nos. 507/2005 and 564/2005 submitted tenders for Neemuch district. During course of finalisation of bid, a decision was taken by respondent No. 3 to invite the tenderness for the entire district forming as a single group and the contract was finalised for both i.e. wholesale and retail in favour of respondent No.5 for district Mandsaur for Rs. 6,63,00,000/- and for Rs. 6,32,00,000/- for Neemuch district. This action of the Collector, Mandsaur and the Collector, Neemuch has been challenged in this petition.

A preliminary objection has been raised on behalf of respondent No. 5 by Shri Bagadia to the effect that as per Clause 17 of the NIT (Notice Inviting Tender), after completion of auction if the Excise Commissioner is of the opinion that any of the terms and conditions of the auction has been violated then he can re-auction within a period of seven days. Shri Bagadia, learned Senior Advocate, submits that since an efficacious remedy is available under Clause 17 of the Tender Notice itself, therefore, without approaching to the competent authority, the present petition is not maintainable. Another objection of Shri Bagadia is that license of poppy straw p.s. 2 and p.s. 3 are given under the poppy straw rules, which are part and parcel of M.P. Narcotic Drugs and Psychotropic Substances Act, 1985. It is further submitted that under chapter 4 Rule 38 of the Rules, an appeal lie from an original or appellate order of an. Excise Officer, therefore, this Court cannot entertain the petition. Learned Senior Counsel placed reliance on a decision reported in *Sadhana Lodh Vs. National Insurance Company Ltd. and Another*, wherein Apex Court has held that where a statute provides an appeal on limited grounds, the said grounds of challenge cannot be enhanced by filing a writ petition under Article 226/227 of the Constitution.

Learned counsel for the petitioner submits that there is no order which is under challenge. Even the State has not filed any order along with the return against which the appeal can be filed. It is submitted that the provision of appeal is provided under Rule 38 of the M.P. NDPS Rules against the original or appellate order. Since, there is no order, therefore, question of availability of alternative remedy does not arise. It is further submitted that so far as the decision taken by the Hon'ble Supreme Court is concerned, it is relating to an award passed by the Motor Accident Claims Tribunal wherein instead of filing an appeal u/s 173 of the Motor Vehicles Act, the writ petition was filed and in those circumstances it was held that it is not open to the Court to entertain a petition under Article 227 of the Constitution of India.

Learned counsel for the petitioner placed reliance on a decision reported in *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others*, , *Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai*, wherein Hon'ble Supreme Court has held that jurisdiction of the High Court in entertaining a petition under Article 226 of the Constitution inspire of the alternative statutory

remedy is not affected specially in a case where the authority against whom the writ is filed is shown to have had no jurisdiction or had purported to usurp jurisdiction without any legal foundation.

In the present case, the action of the respondents is under challenged and looking to the gravity of the matter, the petitions cannot be dismissed on the ground that the petitioners are having the alternative remedy. Hence, the objection is rejected.

It is submitted that tenders were invited for p.s.2 and p.s.3 license which denotes for wholesale and retail. It is also submitted that the auctions were required to be made separately or at the most upto tahsil level. The jurisdiction was rested with the Collector to take decision in the interest of revenue. It is further submitted that as per Clause 6 of the NIT if the Collector is of the view that if the group is to be constituted larger than the tahsil, then Collector was required to obtain consent in advance from the Excise Commissioner. It is submitted that there were 44 persons who participated in the auction at Mandsaur district and 11 in Neemuch district. Learned counsel for the petitioner submits that as per the rules tenders were required to be accepted between 11.00 A.M. to 2.00 P.M. and bid was to continue from 2.00 P.M. to 5.00 P.M. and as per Rule 4 of the Rules in no case the procedure for auction could be closed before 5.00 P.M. It is submitted that without any prior information all of a sudden a decision was taken by respondent No. 3 to auction for license for the entire district, i.e. before 5.00 P.M. It is submitted that action of respondent No.3 was in connivance with respondent No. 3 in contravention of terms and conditions of NIT.

The State has submitted a return wherein allegations made against the State were denied. It is alleged that as per Clause 6 of the NIT (Annexure A/4) in the interest of revenue, it is permissible to the Collector to form a bigger group of district level after taking prior sanction from the Excise Commissioner. It is further submitted that proceedings of tenders commenced from 11.00 A.M. to 2.00 P.M. and at that time 41 tenders were received for Neemuch district. It is further alleged that respondent no. 5 submitted the tender within the prescribed time and had opted for the entire district. The tender (part-II) which relates to financial bid was kept in sealed cover and participants were allowed to take part in the oral bid. So far as constituting the group at district level is concerned, the Collector of the concerned district was not satisfied with the offers, therefore, in exercise of power conferred upon him under Clause 6 of the NIT after totaling the entire amount of tenderness invited tenders for bidding for district level wherein only one person put his bid. Thereafter the Collector of the concerned district took the permission from the Excise Commissioner telephonically and opened the tender submitted by respondent no.5 in which it was mentioned that respondent No. 5 is ready to accept the license for Rs. 6,63,00,000/- for Mandsaur district and Rs. 6,32,00,000/- for Neemuch district. It is alleged that for the entire district there was one more bidder, Sardar Pritam Singh who

submitted oral bid of Rs. 5,26,00,000/- for district Mandsaur and one Anil Jain who submitted bid for Rs. 3,21,51,500/- for Neemuch district. It is alleged that since the offer of respondent No.5 was the highest therefore the same was accepted.

Shri A.S. Kutumbale, Additional Advocate General placed reliance on a decision reported in *State of Orissa and Others Vs. Harinarayan Jaiswal and Others*, wherein the Hon''ble Supreme Court of India has held that The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. It is expected to protect the financial interest of the State. Hence quite naturally, the Legislature has empowered the Government to decide whether the price offered in an auction sale is adequate. While accepting or rejecting a bid, it is merely performing an executive function. The correctness of its conclusion is not open to judicial review. Shri A.S. Kutumbale further placed reliance on a decision reported in *Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others*, wherein the Hon''ble Supreme Court has held as under:

There is no fundamental right to do trade or business in intoxicants. The State, under its regulatory power, has the right to prohibit absolutely every form of activity in relation to intoxicants - its manufacture, storage, export, import, sale and possession. In all their manifestations, these rights are vested in the State and indeed without such vesting there can be no effective regulation of various forms of activities in relation to intoxicants.

Learned counsel for the respondent submits that since the Collector was empowered to take decision as per clause 6 of the NIT, therefore, after obtaining permission from the Excise Commissioner, the powers were exercised for auctioning for the entire district as a group.

Shri C.L. Yadav, learned counsel for the petitioner submits that there are various irregularities infirmities on the part of respondent No. 3 in conducting the auction of poppy-straw at districts Mandsour and Neemuch. Learned counsel submits that as per Clause 6 of NIT auction of PS-2 and PS-3 which indicates for wholesale licence and retail licence were required to be conducted separately. It is submitted that as per Clause 10 (2) of NIT minimum price of poppy-straw which is payable to the agriculturist is fixed at Rs. 12/- per kg. An agriculturist has to sell the poppy straw before a particular date because after expiry of that date, keeping stock of poppy-straw becomes an offence under the NDPS Act. The purpose of conducting a separate auction for the license of wholesale and retail sale and the purpose of constituting small groups at Tahsil level was that there must be various license holders so that the agriculturist who is the producer of the poppy-straw should get the best price.

Learned counsel submits that respondent No. 3 published the NIT by constituting small groups at the Tahsil level. It is submitted that there are six tahsils at Mandsour and three tahsils at Neemuch. Therefore, the auction was required to

be done group-wise. It was further submitted that Clause 6 of the NIT empowers respondent No. 3 to conduct auction by constituting larger group upto tahsil level and also upto district level, but for constituting a group at district level it was the duty of respondent No. 3 to obtain prior permission from the Excise Commissioner. Learned counsel submits that the reason behind obtaining the prior permission is that respondent No. 3 was required to state the reasons why it is not possible to auction the license at small group level within tahsil and why it has become necessary to auction at the district level. On the recommendation of respondent No.3, respondent No.2 was required to apply his brain to ascertain whether it is necessary in the interest of revenue to auction at the district level instead in small groups at tahsil level.

It was submitted that respondent No. 2 has given its consent permitting the respondent No. 3 to auction the license by constituting a group at district level but the letter by which the permission is sought is not filed. A copy of the letter was filed by the petitioner which is the letter dated 05.04.2005 written by respondent No.3 to respondent No. 2 for obtaining the permission for constituting the group at district level. It is submitted that in the letter it is mentioned that at the time when auction was going on in smaller group at tahsil level, respondent No. 3 took a decision for auction at district level, which was opposed and objected by all the participants who were present. Learned counsel submits that this letter indicates two things, firstly, the decision was taken by respondent No. 3 himself and at that time when the decision was taken he was not having prior permission of respondent No. 2, which is against the intention of clause 6 of the NIT. Secondly, from clause (3) (i) of NIT the timings for accepting the tender were 11.00 A.M. to 2.00 P.M. and as per clause (4) the timings for conducting the auction was from 2.00 P.M. to 5.00 P.M. and in no event the auction could be concluded before 5.00 P.M. From perusal of the letter it is submitted that prior to 5.00 P.M. decision was taken by respondent No.3 to conduct the auction by making a group at district level which is also against the intention of NIT because respondent No. 3 could not have stopped the auction of smaller group at tahsil level prior to 5.00 P.M. because of the negative condition laid down in the NIT.

Shri C.L. Yadav, Shri G.M. Chafekar, Sr. Advocate and Shri D.D. Vyas, Sr. Advocate, who are appearing on behalf of petitioners submit that in case re-auction takes place then they undertake that the State will fetch at least 20% additional revenue. An undertaking was also given on behalf of them that the amount which were deposited by the petitioners shall remain deposited with respondent No. 3 and a further amount shall also be deposited by the petitioners for keeping a balance of 10% of the amount which has been offered by the petitioners for obtaining the license for the year 2005-06.

Learned counsel further submits that the petitioner was one of the participants who was ready to participate in the auction of a smaller group at tahsil level. Since, there was no prior notice about the fact that respondent no. 3 can on spot

decide to conduct the auction at district level also, therefore, the petitioners of all the petitions were not in a position to participate in the auction for district level.

Shri A.S. Garg, learned counsel for respondent No. 5 submits that since the auction has been finalised and respondent No. 5 was the highest bidder, therefore, at this juncture proposition of re-auction cannot be considered on the ground that re-auction may fetch better price as it would frustrate the very purpose of auction. It is submitted that one of the petitioners also submitted the bid for the entire district and since the bid of the respondent No. 5 was highest, therefore, the bid was knocked down in favour of respondent No. 5.

On behalf of the petitioner, reliance was placed on a decision rendered in the case of M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others, wherein the Hon''ble Supreme Court has held as under:

Judicial decisions in the matters of tender process and award of contract show that while public interest is paramount there should be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated alike. The legal position can be summed up as thus :

(i) The Government is free to enter into any contract with citizens but the Court may interfere where it acts arbitrarily or contrary to public interest.

(ii) The Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate.

(iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons.

It was further observed that:

If we bear these principles in mind, the High Court is justified in setting aside the award of contract in favour of Monarch Infrastructure (P) Ltd. Because it had not fulfilled the conditions relating to clause 6 (a) of the Tender Notice but the same was deleted subsequent to the last date of acceptance of the tenders. If that is so, the arguments advanced on behalf of Konark Infrastructure (P) Ltd. In regard to the allegation of mala fides of the Commissioner of the Municipal Corporation in showing special favour to Monarch Infrastructure (P) Ltd. or the other contentions raised in the High Court and reiterated before us are insignificant because the High Court had set aside the award made in favour of Monarch Infrastructure (P) Ltd. The only question therefore remaining is whether any contract should have been awarded in favour of Konark Infrastructure (P) Ltd. The High Court had taken the view that if a term of the tender having been deleted after the players entered into the arena it is like changing the rules of the game after it had begun and, therefore, if the Government or the Municipal Corporation was free to alter the conditions fresh process of tender was the only alternative permissible. Further reliance is placed on a decision reported in 1996

(8) SCC 203, Dutta Associates Pvt. Ltd. v. Indo Merchantiles Pvt. Ltd. wherein the Hon"ble Supreme Court has held that - whatever procedure the Government proposes to follow in accepting the tender must be clearly stated in tender notice. The procedure to be followed in the matter of acceptance of a tender should be transparent, fair and open. Any abuse of power for extraneous reasons would expose authorities concerned whether it is the Minister for Excise or Commissioner of Excise, to appropriate penalties at the hands of Courts. It was also observed that Fairness demanded that the authority should have notified in the tender notice itself the procedure which they proposed to adopt while accepting the tender.

Learned counsel for the petitioner further placed reliance on a decision of this Court reported in Vyapari Sangh Vs. State of M.P. and Others, wherein this Court after taking into consideration all the various case laws has held that acceptance of tender of the respondent No. 3 on the foundation that it was highest offer is neither in public interest nor is based on well advised and appropriate commercial principle. The court should not require to substitute the commercial principles but in the present case, there has been no wide publicity which is outstanding important fact, and the petitioner has come with an offer which is more than the 100% amount than has been quoted by respondent No. 3 and the facts are tell take which leads to the irresistible conclusion that decision making process smacks of unreasonableness. Therefore, it has to be struck down and accordingly the acceptance of tender of respondent No. 3 is annulled.

Further reliance was placed on a decision reported in Shivram Enterprises Vs. State of M.P. and Others, wherein a Division Bench in the similar circumstances held that highest bidder does not acquire any right of license because of his highest bid only.

Learned counsel for the petitioner submits that apart from Neemuch and Mandsaur district, for Ratlam district also the tenders were invited for grant of license for poppy straw in various groups upto Tahsil level but since it was found that a bigger group is required to be constituted, therefore, after obtaining permission from the Excise Commissioner as per clause 6 of the NIT fresh advertisement was made and tenders were invited. It is further submitted that since the tenders were invited for the smaller group, therefore, all the participants were not in a position to participate for the auction of district level group.

From perusal of the letter dated 05.04.2005 which was written by Collector Mandsaur to Excise Commissioner, it appears that when it was decided by the Collector to auction for the district as a group, at that time all the tenderers objected. It is mentioned in the letter itself that inspite of objection and opposition of the tenderers, he started the auction for district level and the highest bid was for Rs. 5,26,00,000/- by one tenderer only From perusal of notification dated 24.03.2005, it is evident that for wholesale and retail license separate auction was required to take place and that was also in to the groups

upto tahsil level.

Rule 7 of the NIT which lays down the procedure for auction, it is evident that the tenders could have been submitted upto 2.00 P.M. and auction was required to be continued upto 5.00 P.M. and in any case procedure could not be completed prior to it. Therefore, there was no occasion for respondent No.3 to take decision to close the auction prior to 5.00 P.M. and to invite offers for the group upto the district level instead of smaller group as proposed earlier.

I have minutely examined the terms and conditions of the notice inviting tenders which is annexed with the petition. It is specifically mentioned therein that smaller group will be made for auction of poppy-straw at the tahsil level. The maximum power given to respondent No. 3 was to constitute the group upto tahsil level. Clause 6 further lays down that the Collector of the concerned district was free to take the decision for constituting a group upto district level but in that case the respondent No. 3 was required to obtain prior permission.

It is surprising that inspite of repeated demands the letter which was written by the Collectors Mandsour and Neemuch for obtaining permission from Excise commissioner was not placed on record. No record is placed to show that at what point of time the decision was taken by the Collector to auction by constituting a group at district level.

From perusal of the letter for permission it is evident that no reasons have been assigned as to why the decision was taken to auction the license at district level. If we go through the copy of the letter dated 05.04.2005 written by respondent No. 3 to respondent No. 2 for obtaining permission for auctioning the license by constituting group at district level, it is clear that the decision was taken somewhere between 2.00 P.M. to 5.00 P.M. when the time was fixed for auction upto tahsil level which is against the mandate of the NIT. It is also clear from the letter that not only the auction was made by constituting the group at district level but auction of PS-2 and PS-3 were also made simultaneously and knocked down in favour of one person which is also against the intention of the NIT.

From perusal of the letter it is also evident that no reason has been assigned by respondent No. 3 which compelled him to take decision to auction the license at the district level instead of in small groups at tahsil level. It is also not clear that why the proceedings and the letter written by respondent No. 3 to respondent No. 2 has not been placed on record. Shri A.S. Kutumbale, Additional Advocate General, is not in a position to inform this Court at what time the letter was sent by respondent No.3 to respondent No. 2 by fax and at what time respondent No. 2 sent his consent to respondent No. 3 which is material for the just disposal of these petitions. It is evident that the Collector Mandsour sent a special messenger for physical verification about the whereabouts of respondent No. 5 and it was found that no person with name of respondent No. 5 is residing at that place, which creates doubt about genuineness of the person in whose favour the license is proposed to be given.

When the auction for Neemuch and Mandsour took place on that very day, the auction took place at Ratlam. Collector, Ratlam found that it is not practicable to auction the license by constituting smaller group at tahsil level then Collector, Ratlam obtained permission from Excise Commissioner, Gwalior for auctioning the license by constituting larger group at district level and after publishing the notice inviting tenders wherein it was clearly stated that auction will take place by constituting a group at district level. There is no justification on the part of the respondent No. 2 for using different yardsticks in the similar circumstances.

From the transaction which has taken place on 05.04.2005, it is also clear that license of PS-2 and PS-3 at Mandsour and Ratlam has been given to one person which may create a monopoly which is against the intention of the policy and on that account the small former who has to move the goods before a particular date for saving him from the offence under the provisions of NDPS Act may not get fair price of his produce because he has no alternate except to sell on the price and terms given by the license. It is true that the auction at Mandsour has taken place for Rs. 6,63,00,000/- and at Ratlam for Rs. 6,32,00,000/-, totaling Rs. 12,95,00,000/-. It is submitted on behalf of respondent No. 5 that even if there is some mistake on the part of respondent No. 3 in conducting the auction then respondent no. 5 cannot be allowed to suffer because he was a bonafide bidder.

From the perusal of the facts and circumstances of the case the following irregularities are apparent:

- (i) Respondent No. 3 was not having any prior permission of respondent No. 2 for constituting group at district level.
- (ii) There was no publication of notice that the auction may take place by constituting a bigger group at district level also.
- (iii) Respondent No. 5 submitted the bid but he did not participate in oral bid.
- (iv) The bid of the group at district level took place prior to 5.00 P.M. which was in violation of terms and conditions of the NIT.
- (v) There was only one bidder who participated in oral bidding at district level.
- (vi) Respondent No. 5 was the only person who submitted the amount of bid in writing while the bids were not invited for district level.

In view of various case laws submitted by the parties it is clear that Hon"ble the Supreme Court is of the settled view that the rules of the game cannot be changed when once the play has begun. There should be transparency and fairness in the matter of public auctions and all the parties who intends to participate should have given opportunity to participate in the auction. In view of this the petition filed by the petitioner stands allowed with the following directions -

- (1) The auction of license of poppy-straw at Mandsour and Neemach district

which took place on 05.04.2005 shall be kept in abeyance.

(2) Petitioners in all the petitions shall not withdraw the amount deposited by them and shall further deposit sufficient amount which should be equivalent to 10% of the amount which they have offered for obtaining the license for the year 2005-06.

(3) Respondent No. 3 shall obtain prior permission from respondent No. 2 for auction the license by constituting group at district level. For this purpose a well reasoned letter shall be sent by respondent No. 3 and respondent No. 2 shall after taking into consideration of those facts shall take decision for auction at district level and shall take in to consideration whether it will be in the interest of farmers, small businessmen who are involved in the trade of poppy-straw and the State revenue.

(4) The respondent No. 3 shall publish the NIT after obtaining permission from respondent No. 2 for auctioning PS-2 and PS-3 at districts Mandsour and Neemuch by constituting a group at district level clearly stating all the terms and conditions.

(5) Respondent No. 3 shall invite the tenders in both the district for PS-2 and PS-3 license in small groups as well as in a group upto district level.

(6) Whole process shall be completed by respondents No. 2 and 3 within a period of two to three weeks.

(7) If the petitioners fails to deposit the amount as indicated above prior to 3rd of May 2005 or in case bid goes lesser then 20% above the bid which is already received by the State then the amount deposited by all the petitioners shall stand forfeited and the auction which has taken place in favour of respondent No. 5 shall stand confirmed.

(8) If in the auction which will take place under the directions of this Court fetches more than 20% value of the amount which has received in auction which took place on 05.04.2005 then the State government shall pay a sum of Rs. 2,50,000.00 to respondent No. 5 for the license of district Mandsour and Rs. 2,50,000.00 for the district Neemuch as respondent No. 5 was not at fault at any point of time.

With the aforesaid directions these petitions are disposed of. No orders as to costs.

Certified copy to all the petitioners as per rules.