
(2016) 08 BOM CK 0083
In the Bombay High Court
Case No : Writ Petition No. 538 of 2016

Shivram Enterprises

APPELLANT

Vs

State of Goa

RESPONDENT

Date of Decision : 30-08-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2016) 6 BCR 426 : (2016) 5 MhLJ 886

Hon'ble Judges : F.M. Reis and Nutan D. Sardesai, JJ.

Bench : Division Bench

Advocate : Mr. S. N. Joshi, Advocate, for the Petitioner; Mr. A. Gomes Pereira, Addl. Government Advocate, for the Respondent No.1; Mr. A. D. Bhobe, Advocate, for the Respondent no. 2

Final Decision : Dismissed

Judgement

F.M. Reis, J.— Heard Shri S.N. Joshi, learned Counsel appearing for the Petitioner, Mr. Gomes Pereira, learned Addl. Government Advocate appearing for the Respondent no. 1 and Mr. A.D. Bhobe, learned Counsel appearing for the Respondent No. 2.

2. The above Petition, inter alia, seeks for a declaration that the tender process under the second tender notice dated 20.02.2016 is bad, void ab initio and unconstitutional. It further seeks for a writ of mandamus or any other direction to the respondent no. 2 to award the tender to the Petitioner for the sale of scrap material and sale of non levy sugar under the tender process dated 20.04.2016 issued by the respondent no. 2.

3. Briefly, it is the case of the Petitioner that the respondent no. 2 published a tender notice dated 20.04.2016 for the sale of scrap material, sale of brown sugar (season 2014/15 and 2015-16 ? 1300 quintals, sale of non levy sugar (season 2014-15) ? 7295 quintals and the sale of "A" grade molasses ? 1500 metric tonnes. It is further their case that the Petitioner submitted its tender

process bids on 28.04.2016 within the scheduled time along with all the necessary documents together with the EMD to the tune of Rs. 2,80,000/- for all the four tenders. The price bids of all the parties including the petitioner were open and the Petitioner was the successful tenderer with its highest offer for the category of sale of non levy sugar and sale of scrap materials. But, however, despite the opening of the bids, the respondent no. 2 did not conduct the further process to award the tender. Subsequently, by a letter dated 13.05.2016, the Petitioner raised the issue of awarding the tender for the sale of non levy sugar with the respondent no. 2. But, however, the respondent no. 2 issued a second tender notice with regard to only the sale of brown sugar (2014-15 and 2015-16) and sale of non levy sugar (season 2014-15) on 20.05.2015. It is further the contention of the Petitioner that they made oral inquiries about the said second tender notice which disclosed that as regards the sale of scrap material and "A" grade materials, tenders were awarded under first tender notice to the respective successful tenderers. It is further their case that the Petitioner addressed another letter to the respondent no. 2 to issue the tender but with no success. Consequently, the Petitioner filed the above Petition for the aforesaid reliefs.

4. The Managing Director-respondent no. 2 filed an affidavit in reply. It is the contention of the said respondent that the subject tender dated 20.04.2016 was cancelled pursuant to the decision taken by the respondent no. 2 on 13.05.2016 and a further decision to re-tender, was taken on 16.05.2016. It is further their case that the Petitioner was aware about the cancellation of the tender dated 20.04.2016 on the date of his cancellation and at any rate, the Petitioner is bound to be aware of the cancellation of such tender. It is further their case that the Petitioner has not challenged the said cancellation in the present Petition. It is further their contention that the tender dated 20.05.2016 was issued on the date mentioned in the tender and the last date for the online submission of the tender was 01.06.2016. It is further their case that as the tender dated 20.04.2016 has been cancelled, it is submitted that the Petitioner will not be entitled to raise any issue with respect to such cancellation as a second tender process has already been initiated. It is further their case that pursuant to the opening of the tender dated 20.04.2016, the respondent no. 2 noticed a discrepancy in the amount quoted in the said tender process. It is further contended that after the opening of the tender dated 20.04.2016, negotiations were held with Bhagvati Enterprises who agreed to increase the amount quoted in its bid. It is further pointed out that the tender terms itself disclosed that the Managing Director has reserved its right to accept or reject all the bids fully or partially without assigning any reason. It is further contended that in order to maintain transparency and to avoid any sort of allegations from any party, the respondent no. 2 in the facts and circumstances, decided to cancel the tender dated 20.04.2016 and to re-tender the sale of the products. Accordingly, a decision was taken on 16.05.2016 and the tender dated 20.05.2016 was issued. It is further denied that the respondent no. 2 had taken steps to grant the tender in favour of Bhagvati Enterprises. It is further pointed out that as there was a

discrepancy in between the amount quoted and the amount towards the taxes as also the subsequent offer made by Bhagvati Enterprises in the negotiations held on 11.05.2016, the respondent no. 2 in order to maintain transparency decided to cancel the tender and re-tender the subject materials. It is further pointed out that though the new tenders have been opened, a final decision has not yet been taken. It is as such pointed out that the Petition be rejected.

5. The Petitioners filed a rejoinder and pointed out that the Respondents have suppressed the earlier tender notice as the tender notice dated 20.04.2016 was issued during the pendency of the previous tender notice without cancellation of the earlier tender. It is further pointed out that the Petitioner was not informed about the cancellation of the tender and that the EMD has not been refunded which, according to the Petitioner, shows that the second tender process was initiated without cancelling the first tender process. It is further pointed out that in the absence of any decision conveyed by the respondent no. 2 as regards the cancellation of the tender based on the tender notice dated 20.04.2016, there is no question of any new tender being issued. It is further pointed out that the respondent no. 2 desires to award the bid in favour of Bhagvati Enterprises and that the respondent no. 2 could not award the tender to such enterprise in view of the letter dated 13.05.2016 submitted by the Petitioner to the Managing Director. It is further pointed out that the Petitioner has not been informed by the respondent no. 2 as to whether the bid is accepted or not. It is further pointed out that the respondent no. 2 is not entitled to cancel the tender for any reasons not disclosed in the tender notice. It is further pointed out that as such the entire tender process having been followed by the respondent no. 2, the new tender process is illegal, arbitrary, unreasonable and irrational.

6. Shri S. N. Joshi, learned Counsel appearing for the Petitioner has pointed out that the Petitioners submitted its tender bid on 28.04.2016 along with the EMD for a tender of Rs. 2,80,000/- for all the four tender units. It is further pointed out that on the date of the opening of the tender the Petitioner was the highest tenderer for the category of sale of scrap materials and sale of non levy sugar and that though the Petitioner was the successful tenderer, the respondent no. 2 did not initiate any process for allotting the bid in favour of the Petitioner. The learned Counsel further pointed out that the price quoted by the Petitioner for the sale of non levy sugar is Rs. 2561/- per quintal which is excluding the Excise Duty payable by the tenderer to the Government as it was stipulated in the terms and conditions that the excise duty and other applicable Government dues were to be paid by the bidder. It is further pointed out that the Excise Duty payable for non levy sugar is Rs. 195/- per Quintal and the amount quoted by the Petitioner did not include the Excise Duty component. Learned Counsel further pointed out that Bhagvati Enterprises had quoted the price of Rs. Rs. 2,611/- including the Excise Duty component and, consequently, after deducting the excise duty, the price quoted by Bhagvati Enterprises was to be considered as Rs. 2,416/-. The learned Counsel further pointed out that exercise by Bhagvati Enterprises was to create confusion in the minds of the tenderers. It is

further pointed out that as such the bid of Bhagvati Enterprises had to be rejected for including the Excise Duty payable which was not contemplated in the tender terms. Learned Counsel has thereafter taken us through the records to point out that only because the respondent no. 2 desired to favour the said M/s. Bhagvati Enterprises, the respondent no. 2 resorted to a mala fide expedition to cancel the tender process and start a new tender process. It is further pointed out by the learned Counsel that the act of the respondent no. 2 is absolutely unconstitutional and smacks favouritism and nepotism which deserves to be quashed and set aside. Learned Counsel further pointed out that the Petitioner was a successful bidder in the non levy sugar and sale of scrap materials and, as such, was entitled to be awarded the bid. It is further pointed out that the process could not be cancelled unilaterally as per the whims and fancies of the respondent no. 2. Learned Counsel has thereafter taken us through the letter dated 25.05.2016 addressed by M/s. Bhagvati Enterprise to point out that they have informed the respondent no. 2 that they are not interested in the tender and conveyed their withdrawal thereof. Learned Counsel as such pointed out that the whole exercise on the part of the Petitioner is mala fide, discriminatory and deserves to be quashed and set aside.

Learned Counsel in support of his submission has relied upon the Judgment of the Apex Court reported in (1979) 3 SCC 489 in the case of Ramana Dayaram Shetty v. International Airport Authority of India and Ors., and (1990) 3 SCC 752 in the case of Mahabir Auto Stores & Ors v. Indian Oil Corporation & Ors. Learned Counsel as such points out that the second tender process be quashed and set aside and the tender be allotted to the Petitioner.

7. On the other hand, Shri A. D. Bhohe, learned Counsel appearing for the respondent no. 2, has pointed out that as there was a discrepancy with regard to the rates submitted by the tenderers in respect of the inclusion of the Excise Duty and their rates, the respondent no. 2 decided to cancel the tender process in order that there should be transparency in the bidding. Learned Counsel further pointed out that it is the endeavour of the respondent no. 2 to get the best price for the materials tendered and, as such, as the Respondents too found that there was a discrepancy in the prices offered, a decision was taken to cancel the tender and re-tender the material. Learned Counsel further pointed out that in terms of the tender conditions, the right to cancel the tender was reserved to the Managing Director which has been duly exercised. Learned Counsel further pointed out that M/s. Bhagvati Enterprises during the negotiations, had offered the best offer to the Petitioners but to maintain transparency, the respondent no. 2 decided to cancel the process and re-tender the goods. The learned Counsel further pointed out that the Petitioner have even induced M/s. Bhagvati Enterprises to withdraw their bid as noted in the subsequent letter produced by the Petitioner which itself discloses that the Petitioners are using illegal means to get a tender from the Respondents. Learned Counsel has further pointed out that in the second tender process, the prices offered are much higher than the one offered by the Petitioner and in fact pointed out that if the Petitioners are

prepared to match the offer of such highest bidder and enter into negotiations, the Respondents would take a decision in that regard.

Learned Counsel in support of his submissions has relied upon the Judgments of the Apex Court reported in (2009) 6 SCC 171 in the case of Meerut Development Authority & anr v. Association of Management Studies & anr. and (2015)13 SCC 233 in the case of Rishi Kiran Logistics Private Limited v. Board of Trustees of Kandla Port Trust and Ors. Learned Counsel as such pointed out that considering the commercial decision taken by the respondent no. 2, no interference is called for in the tender process.

8. Shri S. N. Joshi, learned Counsel appearing for the Petitioners, in answer to the said submissions points out that the Petitioner is not inclined to accept the offer of the respondent no. 2 to match the price offered by the highest tenderer in the second tender process.

9. We have considered the submissions of the learned Counsel and we have also gone through the records. Before we examine the rival contentions, we shall keep in mind the principles well settled in connection with the interference in writ jurisdiction in Government contracts and tender process. The Apex Court in the Judgment reported in 2014(3) SCC 760 in the case of Maa Binda Express Carrier & anr v. North East Frontier Railway & Ors., has noted that while it is clearly recognised that the power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that the participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. Award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. The judicial scrutiny of such process would not arise unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. Whilst examining the said aspect, the Apex Court has observed at paras 8 and 9 thus :

"8. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether

the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.

9. Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the court which is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest. (See *Meerut Development Authority v. Assn of Management Studies and Air India Ltd v. Cochin International Airport Ltd.*)

10. The dispute in the present case is with regard to the tender submitted by the Petitioner for the sale of non levy sugar. On a perusal of the terms and conditions of the tender notice dated 20.04.2016, we find that one of the terms therein stipulates that the parties should pay all the Excise Duty and other applicable Government taxes. The Petitioner, no doubt, submitted his bid excluding such payments but, however, M/s. Bhagvati Enterprises submitted an amount inclusive of taxes. When M/s. Bhagvati Enterprises were called for negotiations, they agreed to match the price submitted by the Petitioners. But, however, considering the price quoted by the bidders, the respondent no. 2 took a decision to cancel the tender process and re-tender as there were no other competitive bidders. Though Mr. S. N. Joshi, learned Counsel appearing for the Petitioner has pointed out that there was no decision taken by the respondent no. 2 to cancel the tender process, the learned Counsel appearing for the respondent no. 2 produced the records and on verifying such records, we find that in fact the tender process was cancelled on 11.05.2016. It is not disputed that the right to cancel the tender process was reserved in favour of the Managing Director. In the present case, considering that there were no other tenderers and there was a discrepancy created by M/s. Bhagvati Enterprises whilst submitting the bid, the action of the respondent no. 2 in cancelling the tenders cannot be said to be arbitrary, unreasonable or discriminatory. After all, sale of the subject materials is a commercial transaction and it is pointed out by Mr. A. D. Bhole, learned Counsel appearing for the respondent no. 2 that at the subsequent tender process, the price offered was much higher by the tenderers.

11. In another Judgment dealing with the issue of cancellation of a tender process wherein the right to cancel was reserved, the Apex Court has in a Judgment reported in (2016) 4 SCC 716 in the case of *State of U.P. v. Al Faheem*

Meetex (P) Ltd., has observed at Paras 14 and 15 thus :

"14. We find force in the aforesaid argument of the learned counsel for the appellants. In the first instance, it is to be noted that BEC is only a recommendatory authority. It is the competent authority which is to ultimately decide as to whether the recommendation of BEC is to be accepted or not. We are not entering into the discussion as to whether this competent authority is the State Government or the Municipal Corporation. The fact remains that there is no approval by either of them. Matter has not even reached the competent authority and no final decision was taken to accept the bid of respondent 1 herein. Much before that, when BEC was informed that there were only two valid bids before it when it made its recommendation on 8-9-2010 and as per the Financial Rules there must be three or more bids to ensure that bidding process becomes competitive, BEC realised its mistake and recalled its recommendation dated 8-9-2010. It cannot be said that such a decision was unfair, mala fide or based on irrelevant considerations. This, coupled with the fact that the authority has right to accept or reject any bid and even to annul the whole bidding process, the High Court was not justified in interfering with such a decision of BEC.

15. The High Court has also gone wrong in finding fault with the decision of BEC by holding that such a subsequent decision could not have been taken by BEC without notice to or in the absence of the appellant. When the decision making process had not reached any finality and was still in embryo and there was no acceptance of the bid of respondent 1 by the competent authority, no right (much less enforceable right) accrued to respondent 1. In such a situation, there was no question of giving any notice or hearing to respondent 1.

12. Taking note of the said observations, the action of the respondent no. 2 in cancelling the tender process so that the bidding process becomes more competitive cannot be said to be unfair, malafide or based on irrelevant considerations. In case the contention of the Petitioner is accepted, there would be no competitive bidders in the tender process. The conduct of the Petitioners in getting hold of a letter dated 27.05.2016 from the said Bhagvati Enterprises, would be very significant as it discloses that the Petitioner is attempting to influence the bidders to withdraw from the subject tender process. The letter shows that the said Enterprises has withdrawn all online bids and requested to cancel all bids so that the bids can be allotted to any other party. In such circumstances, we find that the contention of the Petitioners that the whole exercise on the part of the respondent no. 2 was to favour said M/s. Bhagvati Enterprises is totally misplaced and does not at all survive.

13. The Apex Court in the said Judgment in the case of Rishi Kiran Logistics Private Limited v. Board of Trustees of Kandla Port Trust & Ors (supra), has observed at Para 29 thus :

"29. Again, we clarify at the outset that even the principle of PROMISSORY estoppel is in the field of administrative law and while entertaining the

arguments and discussion on this issue, the question as to whether there was a concluded contract or not has to be kept aside. Precisely, this was done in Kisan Sahkari Chini Mills case. The Court dealt with the issue of legitimate expectation, etc. separating it from the issue pertaining to concluded contract and made the following pertinent observation in the process: (SCC pp. 512-13, paras 23-24)

"23. If the dispute was considered as purely one relating to existence of an agreement, that is, whether there was a concluded contract and whether the cancellation and consequential non-supply amounted to breach of such contract, the first respondent ought to have approached the civil court for damages. On the other hand, when a writ petition was filed in regard to the said contractual dispute, the issue was whether the Secretary (Sugar), had acted arbitrarily or unreasonably in staying the operation of the allotment letter dated 26-3-2004 or subsequently cancelling the allotment letter. In a civil suit, the emphasis is on the contractual right. In a writ petition, the focus shifts to the exercise of power by the authority, that is, whether the order of cancellation dated 24-4-2004 passed by the Secretary (Sugar), was arbitrary or unreasonable. The issue whether there was a concluded contract and breach thereof becomes secondary. In exercising writ jurisdiction, if the High Court found that the exercise of power in passing an order of cancellation was not arbitrary and unreasonable, it should normally desist from giving any finding on disputed or complicated questions of fact as to whether there was a contract, and relegate the petitioner to the remedy of a civil suit. Even in cases where the High Court finds that there is a valid contract, if the impugned administrative action by which the contract is cancelled, is not unreasonable or arbitrary, it should still refuse to interfere with the same, leaving the aggrieved party to work out his remedies in a civil court. In other words, when there is a contractual dispute with a public law element, and a party chooses the public law remedy by way of a writ petition instead of a private law remedy of a suit, he will not get a full-fledged adjudication of his contractual rights, but only a judicial review of the administrative action. The question whether there was a contract and whether there was a breach may, however, be examined incidentally while considering the reasonableness of the administrative action. But where the question whether there was a contract, is seriously disputed, the High Court cannot assume that there was a valid contract and on that basis, examine the validity of the administrative action.

24. In this case, the question that arose for consideration in the writ petition was whether the order dated 24-4-2004 passed by the Secretary (Sugar), cancelling the allotment letter dated 26-3-2004 was arbitrary and irrational or violative of any administrative law principles. The question whether there was a concluded contract or not, was only incidental to the question as to whether cancellation order dated 24-4-2004 by the Secretary (Sugar), was justified. As the case involved several disputed questions in regard to the existence of the contract itself, the High Court ought to have referred the first respondent to a civil court. But the High Court in exercise of its writ jurisdiction, proceeded as if it was dealing with a pure and simple civil suit relating to breach of contract."

14. The Judgment in the case of Ramana Dayaram Shetty v. International Airport Authority of India and Ors., (supra) as well as the Judgment in the case of Mahabir Auto Stores & Ors v. Indian Oil Corporation & Ors. (supra) relied upon by Mr. S.N. Joshi, learned Counsel appearing for the Petitioners, are not applicable to the facts of the present case as in the present case, all the bids have been rejected and a fresh tender process has been initiated by the respondent no. 2. As pointed out herein above, as the whole tender process has been rejected, would itself show that the contention of the Petitioners that the respondent no. 2 has acted arbitrarily is not at all justified. Even the offer given by Mr. A. D. Bhobe, learned Counsel appearing for the respondent no. 2, to match the successful bid of the second tender process, has been rejected by the Petitioner which itself suggests that even the subsequent proposal of Mr. A. D. Bhobe, learned Counsel, has not been accepted by the Petitioners and considering the correspondence exchanged between the Petitioners and M/s. Bhagvati Enterprises as reflected by the said letter referred to herein above, the bonafides of the Petitioners are prima facie seriously in doubt.

15. In view of the above, we find that considering that the whole subject tender process itself has been cancelled as otherwise there would be no competition in the process of tendering the subject materials as the Petitioners would be the only bidders remaining, we find that the action of respondent no. 2 in cancelling the subject tender cannot be faulted.

16. In view of the above, we find no merit in the above Petition which stands accordingly rejected.