
(2009) 03 OHC CK 0059
In the Orissa High Court

Sree Osiya Trading Corporation

APPELLANT

Vs

Cuttack Development Authority and Others

RESPONDENT

Date of Decision : 04-03-2009

Acts Referred:

Constitution of India, 1950 — Article 14

Citation : (2009) 107 CLT 823 : (2009) 1 OLR 908

Hon'ble Judges : B.P. Ray, J;B.P. Das, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

B.P. Das, J.—The petitioner M/s. Sree Osiya Trading Corporation being an unsuccessful bidder in a tender challenges the terms of the tender alleging mala fide and irregularity in the said tender process.

2. The brief facts leading to the writ petitioner are as follows:

O.P.1 - Cuttack Development Authority (CDA) by Auction Sale Notice dated 26.9.2008, which was published in the Oriya daily, "The Samaj" dated 28.9.2008, vide Annexure-3, invited sealed quotations for disposal of commercial and office space available in Netaji Subhas Chandra Bose Arcade at the Old Jail premises, Cuttack as per the terms and conditions contained in the Brochure issued therefore. The salient features of the terms and conditions contained in the Brochure are as follows :—"

(a) Registration amount of Rs. 1,00,000/- by way of Demand Draft/Banker's cheque from Orissa State Cooperative Bank, Link Road Branch, Cuttack was fixed to be accompanied with the Bid and the same was non-refundable.

(b) The application along with the E.M.D. " 10% of the total bid amount by way of Demand Drafts/Banker's cheque from the said Orissa State Cooperative Bank, Link Road Branch, Cuttack and registration money was to be submitted on or before 20.10.2008.

(c) The Bid was to be opened on 21.6.2008.

(d) The shop/commercial space and office space would be allotted in bulk on long term lease basis.

(e) Application not covering all the 75 shops/office space in bulk would be summarily rejected.

(f) The highest bid amount means the total amount offered for all shops, commercial office space would be taken together.

Pursuant to the Auction Sale Notice in Annexure-3, the petitioner submitted its offer on 17.10.2008 complying with all terms and conditions embodied in the Brochure. It deposited Rs. 1.00 lakh towards registration amount by way of Demand Draft and Rs. 41,91,330/- as EMD " 10% of the bid amount, the total offer being Rs. 4,29,13,300/-. In terms of the notice, it appeared before the CDA on 3.12.2008 and learnt that O.P.2- M/s. Associate Developers was the highest bidder having offered a sum of Rs. 4,42,95,250/-, which had been accepted by O.P.1.

3. According to the petitioner, it immediately offered to pay Rs. 4,50,00,000/- to take the said shops and office premises on lease but O.P.1 did not accept the same. The petitioner has alleged that in the meantime it learnt that the Officials of the C.D.A. and the Officers of Orissa State Cooperative Bank and O.P.2 were hands in glove. The fact of deposit of EMD by the petitioner had been disclosed to O.P.2 because of which O.P.2 quoted the bid amount just higher than that of the petitioner and could become the highest bidder. According to the petitioner, O.P.1 had not maintained secrecy of the tender and selected only one bank for the purpose of depositing E.M.D., which was illegal and arbitrary. The further arbitrariness on the part of O.P.1, according to the petitioner, was that the C.D.A. had not negotiated with the petitioner while it offered a sum of Rs. 4.50 lakhs on the spot. It is further stated that given a chance the petitioner is ready and willing to offer Rs. 4.50 Crores or more than that.

4. A preliminary counter affidavit has been filed by O.P.1-CDA denying all the aforesaid allegations of the petitioner and further taking a stand that the petitioner having participated in the tender and being unsuccessful in the bid cannot challenge the conditions of the Brochure. This O.P. also refuted the allegations made as regards the collusion between the Bank authorities and O.P.2.

5. It is worthwhile to mention here that the petitioner was also an intervenor in W.P.(C) No. 14789/2008, in which the selfsame tender was challenged by another person and the said writ petition was disposed of by this Court on 4.2.2009.

6. The sum and substance of the argument of Mr. Rath, learned Counsel for the petitioner, was that O.P.-1 CDA had appointed a single bank, which was arbitrary. Secondly, the E.M.D. " 10% of the total bid amount was disclosed to O.P.2 by the bank, for which O.P.2 could know the bid of the petitioner and accordingly quoted

a bid which was higher than that of the petitioner.

7. The petitioner has also filed an affidavit stating therein that it is ready and willing to pay Rs. 4,75,00,000/- for long term lease of shops/office in the Netaji Subash Chandra Bose Arcade. Thereafter, another affidavit has been filed that the petitioner is ready and willing to pay Rs. 5.00 Crores as against the offer of Rs. 4,42,00,250/- by O.P.2.

8. Mr. Rath, learned Counsel for the petitioner, relying upon the decision of the apex Court in Ram and Shyam Company Vs. State of Haryana and Others, , makes a prayer to put the property in question to auction in Court itself for a fair deal, which may be beneficial to C.D.A. and the C.D.A. may get more money.

9. First of all, let us examine whether while certain procedures were prescribed, different procedures were adopted, as alleged. The action of O.P. 1 in selecting a particular bank to accept the E.M.D. could not be said to be discriminatory. In order to examine the correctness in the allegation of the petitioner that secrecy of bids having not been maintained, O.P.2 after knowing the petitioner's bid amount from O.P.3-bank offered a bid, which was higher than that of the petitioner. The petitioner subsequently added the concerned Bank as a party making allegation that the authorities of the Bank and O.P.2 were hands in glove and the Bank had disclosed the bid amount of the petitioner to O.P.2. Being aware of the limited jurisdiction of the Court in a tender matter, while looking at the nature of allegations, we called for the records from O.P.1 pertaining to tender of the aforesaid shops/office premises. Having gone through the comparative statement chart at page-150 of the aforesaid records, we found that O.P.2 had obtained seven pay orders for depositing the E.M.D. amounting to Rs. 44,29,525/- on 16.10.2008, while the petitioner obtained six Bank Drafts for a tune of Rs. 42,91,330/-, i.e., 10% of the total bid amount on 17.10.2008, i.e., one day after O.P.2 obtained the Bank Drafts. Hence, the allegation of the petitioner that the Bank authorities and O.P.2 were hands in glove and that the E.M.D. of the petitioner had been disclosed to O.P.2 is blatantly false. There was every chance of the petitioner knowing the E.M.D. of O.P.2, who had obtained the pay orders one day earlier than the petitioner, vice versa being not possible. The writ petition is liable to be dismissed on this score alone as the petitioner has made false averments on affidavit.

10. Mr. Rath for the petitioner further argued the case basing upon the decision in Olga Tellis and Others Vs. Bombay Municipal Corporation and Others, , wherein it is indicated that when there is a violation of Article 14, there can be estoppel against the Constitution. According to Mr. Rath, even if the petitioner participated in the tender, it can now very well challenge the tender notice as well as the process of tender. He also drew our attention to the decisions in Dr. Sidhartha Das and Others Vs. State of Orissa and Another, and Noble Resources Ltd. Vs. State of Orissa and Another, . Relying upon the decision in AIR 2006 SC 265 (in paragraph-22) he contended that there could not be different procedures for different applicants. That apart, Mr. Rath relied upon the principles laid down in

Ramana Dayaram Shetty Vs. International Airport Authority of India and Others, .

11. We do not disagree with the proposition of Mr. Rath that where there is a violation of Article 14, a petitioner can very well approach a writ Court. So, there can be no estoppel against the Constitution. But we have indicated above that the writ petition is based on averments, which are not borne out on record and found to be incorrect. In this regard, we may refer to a decision of the apex Court in *Tafcon Projects (I) (P) Ltd. v. Union of India and Ors.* reported in (2004) 13 SCC 788. In paragraph-17 thereof it is held that a bidder can not take advantage of any alleged vagueness in the tender notice and the successful bidder cannot be denied the benefit, which it would have got, had the writ petition not been filed. No right of the petitioner has been infringed. As there is no violation of Article 14 of the Constitution, the petitioner cannot maintain the writ petition and there was also no infirmity in the process of tender. The decision in *Ram and Shyam (supra)*, which has been heavily relied upon by Mr. Rath to pursue this Court to hold fresh auction in Court itself, does not any way help the petitioner because in the said case, it was held that no opportunity was given to the highest bidder and the arbitrariness was the ground to make the grant invalid. This is not in the case at hand. Rather the petitioner tried to deprive O.P.2 of the benefit of the tender by filing this writ petition.

In the aforesaid background, we may refer to the oft-quoted decision of the apex Court in *Tata Cellular Vs. Union of India*, . In paragraph-93 thereof, the Court held as follows:

93. The duty of the Court is to confine itself to the question of legality. Its concern should be:

1. whether a decision-making authority exceeded its powers?
2. committed an error of law.
3. committed a breach of the rules of natural justice.
4. reached a decision which no reasonable Tribunal would have reached or.
5. abused its powers.

It was further held in paragraph-113 as follows:

113. The principles deducible from the above are:

- (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 terms 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 a 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.

Basing upon the aforesaid principles and examining the records, we find that the tender process did not suffer from any of the infirmities, as indicated above. That apart, the same was also the view taken in the decision in Jagdish Mandal v. State of Orissa, in which the apex Court while examining the scope of interference in judicial review of tender processes and award of contracts, observed as follows:

Para 19 : Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, Courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil Court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills or some technical/procedural violation or some prejudice to self, and persuade Courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a Court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is malafide or

intended to favour someone.

OR

Whether the process adopted or decision made is so arbitrary and irrational that the Court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached."

(ii) Whether public interest is affected.

A similar view was also taken in the decision of the apex Court in Reliance Airport Developers Pvt. Ltd. Vs. Airports Authority of India and Others, .

12. Now the question arises, whether the highest offer can be accepted. Admittedly, this offer was made after all the tender papers were opened and bids were made public. As we have indicated above, we do not find any infirmity in the tender process and the writ petition contains distorted facts and wild allegations, which were contrary to the records and have found baseless.

In view of the aforesaid facts and circumstances, the prayer of the petitioner for a direction to re-tender or to accept the higher bid than that of O.P.2 offered during the course of hearing, cannot be accepted. Accordingly, the writ petition is dismissed. As some false facts were filed on oath, we impose a cost of Rs. 10,000/- (rupees ten thousand) on the petitioner.

B.P. Ray, J.

13. I agree.