

(2007) 07 OHC CK 0083
In the Orissa High Court

S.S. and Company

APPELLANT

Vs

Orissa Mining Corporation Ltd.

RESPONDENT

Date of Decision : 12-07-2007

Acts Referred:

Constitution of India, 1950 — Article 14, 19
Mines and Minerals (Development and Regulation) Act, 1957 — Section 3

Citation : AIR 2007 Ori 185 : (2007) 2 OLR 500 Supp

Hon'ble Judges : A.K. Ganguly, C.J.; Inderajeet Mahanty, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

A.K. Ganguly, C.J.—This writ petition has been filed by M/s. S.S. & Company challenging the legality of Clause 8(i) of Tender Notice No. 85 dated 25-5-2007 issued by the Orissa Mining Corporation Limited under Annexure-1 to the writ petition. By the impugned Clause 8(i), the conditions relating to eligibility criteria have been inserted in the Tender Notice. The said Clause is set out below:

8. The eligibility criteria of the tenders shall be as follows:

(i) Only such tenders who fulfil the following eligibility criteria shall participate in the tender. The agency must have successfully executed similar work (as mentioned in NIT /raising work(s) of ore/minerals excluding Minor Mineral) for a minimum amount of 30% in case of a single work or 50% in the case of two works of the value of work shown in column No. 5 of SI. No. 2 of NIT in any one financial year during the last three years including 2006-07.

2. The grievance of the petitioner is that the said Clause has been inserted for the first time in the present Tender Notice. Previously for the same work two tenders were invited by the Orissa Mining Corporation Ltd., (hereinafter referred to as the "Corporation") vide Tender Notice Nos. 65 and 75, but such an eligibility clause was not there. The petitioner's case is that with an intention to exclude it from participating in the tendering process this clause has been Inserted. The

case of the petitioner is that pursuant to the previous Tender Notice Nos. 65 and 75, the petitioner submitted its tender but it was disqualified on frivolous grounds. Challenging such rejection of the petitioner's tender, this Court was moved and during pendency of the writ petition the tendering process was withdrawn and therefore the writ petition became infructuous. It has been urged that in order to exclude the petitioner from participating in the present tender the aforesaid clause has been inserted as the petitioner does not have any experience in major minerals. But the petitioner has experience in extracting minor minor minerals

3. According to the petitioner, an experience in raising minor minerals is sufficient experience for raising major minerals and the eligibility condition to the contrary is arbitrary and violative of Articles 14 and 19(1g) of the Constitution and the same should be struck down. In paragraph 17 of the writ petition there are some allegations that the opposite party wants to favour and award the tender to one M/s. Arun Udyog Limited. Since M/s. Arun Udyog Limited is not impleaded in this writ petition the allegations against it cannot be taken into account. It may be noted in this connection that M/s. Faridabad Guragaon (petitioner No. ,W. P. (C) No. I 7002 of 2007) has challenged another clause of the eligibility condition in the Tender Notice. It is not in dispute that the petitioner in this case is the father of the petitioner in the other case.

4. Be that as it may, the main challenge of the petitioner is to the aforesaid Clause mainly on two grounds, one of which has been indicated above and the other ground is that under the provisions of Mines and Minerals (Development and Regulation) Act, 1957, there is no distinction between major minerals and minor minerals and as such experience in minor minerals can also include as experience in major minerals. Further it has been stated that the said Clause has been withdrawn from future Tenders and it has been decided by the OMC Board that such Clause will not be there. It was "urged that the said Clause was inserted without the approval of the Board.

5. Learned Counsel for the Corporation on the other hand has urged that the Tender Notice No. 85 dated 25-5-2007 has been issued inviting offer from various agencies having adequate earth moving equipments and having experience in raising of ore/minerals excluding minor minerals. It has been stated that the scope of work as mentioned in the Tender document is for raising of iron ore and transportation thereof from Daitari Iron Ore Mines and for better execution of work of raising iron ore and transportation thereof the eligibility condition of having experience in major minerals has been prescribed.

6. It has further been stated that undisputedly iron ore is not a minor mineral and hence the experience in raising minor minerals for work of raising iron ore and transportation thereof was considered to be not adequate. It has been stated that iron ore is a solid material and raising and extraction of iron ore from an iron ore mine is different from that of raising of minor minerals like sand from a sand quarry. As such the said condition has been imposed keeping in mind the

requirement and the scope of the work. In the affidavit the petitioner's allegation about past Tender Notices which were issued by the Corporation have also been dealt with. It was stated that in the earlier Tender Notice Nos. 65 and 75 the experience of minor minerals was never included. But in the present Tender Notice it has been explicitly stated that the persons having experience in minor minerals will not be considered since this is a Ten-Tier for extraction of major minerals.

7. Learned Counsel for the petitioner has also drawn the attention of this Court to a general description and the scope of work as it appears in the Tender Notice No. 85 dated 25-5-2007. The scope of work indicated therein is as follows:

3. (ii) The agency either proprietor/partner/company should have his/its own experience in raising of ore and minerals. Experience of any sister concern will not be taken into consideration for fulfilling the eligibility criteria.

8. Learned Counsel for the petitioner also Urged that the technical bid of the petitioner was considered pursuant to the interim order passed by this Hon'ble Court and it was found that the petitioner has submitted experience certificate for working in Yamuna sand quarry in the district of Faridabad and other minor minerals including handling in the Plant. Since the same falls within the category of minor minerals, the petitioner is ineligible. Apart from that it was found the turnover as shown is not at par with the requirement in the NIT. The turnover of the petitioner was shown as 1203.65 lakhs for the year 2005-06 whereas the requirement of turnover is that the agency must have successfully executed similar work as mentioned in the NIT for a minimum amount of 30% in case of a single work or 50% in case of two works of the value of work shown in column No. 5 in any one financial year during the last three years including the works of 2006-07. It appears that the approximate value of the work is Rs. 1769.40 lakhs and the petitioner's turnover was Rs. 1203.65 lakhs for the year 2005-06. Learned Counsel for the petitioner submits that the petitioner's turnover for 2005-06 may not be matching the requirements of the NIT, but its turnover for some other financial year would be matching the requirement under the NIT.

9. This Court is unable to appreciate the "said argument in view of the fact that since the petitioner is not coming within the required qualification of having handling the work in major mineral, its turnover in handling minor minerals will not be of any consequence assuming but not admitting that the petitioner's turnover for 2006-07 is matching the required turnover under the NIT.

10. Insofar as the non-approval of the eligibility condition by the OMC Board is concerned, a subsequent affidavit has been filed on behalf of the Corporation on 5-7-2007. In that affidavit it has been stated that Notices Inviting Tender and Tender Schedule are not normally placed before the OMC Board for approval. The Managing Director approves the terms and conditions of NIT Tender Schedule depending on the varying nature of the work tendered for. The Managing Director being Chief Executive Officer of the Corporation approves the NIT/Tender

Schedule. This practice is being followed in the Corporation from its inception in 1956. The broad guidelines which are to be followed in respect of the terms and conditions of different tenders are approved by the OMC Board. In paragraph 6 of the said affidavit, it has been made clear that the eligibility criteria which has been inserted and which is being impugned in the writ petition has been incorporated considering that the iron ore is too hard and for its drilling and blasting strict quality control measures are required and a person having experience in minor minerals would not be adequate for the job.

11. Another affidavit dated 2-7-2007 was also filed by the Additional General Manager (Mining) of the Corporation. It has been stated therein that the Corporation in a year floats about 120 Nos. of tenders to undertake mining and related activities in different minerals with widely varying conditions and the Board of Directors lays down the general guideline for preparing the special terms and conditions for different types of works. In this connection, the broad guidelines of special terms and conditions were approved by the Board of Directors on 11-6-2007. It has been stated in the said affidavit that the same is general guidelines and incorporation of any other condition appropriate for different work can be made. It has also been stated in the said affidavit that in future in the eligibility criteria the word "excluding minor mineral" will be included while floating NIT if the nature of work demands for the same. It was also stated in the affidavit filed by the Managing Director that Tender Notice No. 85 dated 25-5-2007 was issued after its clauses were recommended by the Managing Director of the Corporation vide notes dated 15-5-2007 were duly approved by the Chairman of OMC.

12. In this connection learned Counsel for the Corporation has produced certain terms and conditions which were approved by the Board and towards end of the said document it has been mentioned very clearly that the said document would be a general guideline for preparing the terms and conditions for different types of work and items enumerated are not exhaustive and depending on future requirement an addition or alteration can be made. We have also looked into the file. We are of the view that the impugned eligibility condition which was inserted in the NIT in question was approved by the appropriate authority of the Board and the same was not inserted in a manner which is contrary to the directions of the Board. Apart from that, this Court is satisfied from the two affidavits, one filed by the Managing Director of the Corporation dated 5-7-2007 and the other one filed by the Additional General Manager (Mining) of the Corporation dated 2-7-2007 that similar condition which have been impugned by the petitioner in this case will be incorporated-in the future NITs to be issued by the Board depending upon the nature and requirement of work

13. However, the learned Counsel for the petitioner in support of his argument relied on certain judgments of the Supreme Court. First reliance was placed on a judgment of the Supreme Court in the case of Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, . Reliance was placed on paragraph 12 in

order to contend that the principles of Article 14 are even attracted at a stage when the State decides whether to enter into or not to enter into a contract. Reliance was also placed by the learned Counsel for the petitioner on another judgment of the Supreme Court in the case of *State of U.P. and Another Vs. Johri Mal*, . In paragraph 30 of the said judgment, the learned Judges of the Supreme Court held that while exercising the power of judicial review if it becomes inevitable for the Court to appreciate the facts of a given case for testing the grounds of illegality, irrationality or procedural impropriety, the Court can reappraise the finding of facts depending on the ground of judicial review. If the Court finds that the decision under challenge is irrational, then it would be impossible to record a finding whether a decision is rational or irrational without first evaluating the facts of the case and coming to a plausible conclusion and then testing the decision of the authority on the touchstone of the tests laid down by the Court with special reference to a given case.

14. The learned Counsel for the petitioner also relied on a decision of the Supreme Court in the case of *Noble Resources Ltd. Vs. State of Orissa and Another*, . Reliance was placed on paragraph 15 of the said judgment where their Lordships have held that the contractual matters are not beyond the scope of judicial scrutiny. After saying so, the learned Judges have held the distinction has to be made between a matter which is at the threshold of a contract and a breach of contract. In the former case the Court's scrutiny would be more intrusive, but in the latter case the Court may not ordinarily exercise its discretionary jurisdiction of judicial review, unless it is found to be violative of Article

15. The learned Counsel also relied on the judgment of the Supreme Court in the case of *Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others*, wherein the Hon"ble Supreme Court has held that the terms of the invitation of a tender are not normally open to judicial scrutiny. The learned Counsel also relied on the definition of "minerals" in Section 3(a) of the Mines and Minerals (Development and Regulation) Act, 1957. u/s 3(a) "minerals" include all minerals except mineral oils and u/s 3(e) "minor minerals" have been defined as follows:

(e) "minor minerals" means building stones, gravel, ordinary clay, ordinary sand other than sand used for prescribed purposes, and any other mineral which the Central Government may, by notification in the Official Gazette, declare to be a minor mineral;

16. The learned Counsel for petitioner also relied on a decision of the Supreme Court in the case of *D. K. Trivedi and Sons and State of Gujarat and Ors.* reported in AIR 1986 SC 1323. Learned Counsel for petitioner submits that since minerals will include all minerals the requirement contained in the impugned clause in the Notice Inviting Tender cannot be sustained inasmuch as by the said clause the experience of minor minerals has been excluded.

17. Learned Counsel for the Corporation While defending such Clause in the Notice Inviting Tender has pointed out before the Court that since the work of extraction of mineral in question is in respect of the iron ore which is a major mineral the experience of lifting minor minerals has been excluded and this exclusion has been made on the basis of past experience. Learned Counsel has also explained as noted above that this clause has been inserted with the approval of the appropriate authority and in all future tenders wherever the matter relating to extraction of major mineral will be tendered similar clause will be included. The learned Counsel also submitted that the distinction of minerals and minor minerals as contained in Section 3(a) and Section 3(e) of the said Act is not decisive in this case.

18. The learned Counsel for the Corporation distinguished the judgment in D.K. Trivedi's case (supra) by saying that in page 1343 of the said judgment the minor minerals are treated differently from minerals other than minor minerals. The learned Judges of the Supreme Court have pointed out that from the definition given in Clause" (e) of Section 3 it is clear that minor miner" also are mostly used in local areas and for local purposes while minerals other than minor minerals are those which are necessary for industrial development on a national scale and for the economy of the country. That is why matters relating to minor minerals have been left by Parliament to the State Governments while reserving matters relating to minerals other than minor mineral to the central government.

19. Referring to the aforesaid observations of the learned Judges in paragraph 33 at page 1343 of the report, the learned Counsel for the Corporation submitted that it. is fallacious to argue that the minor minerals and minerals other than minor minerals fall within the same category. Both of them fall in distinct and different categories and they have been, treated differently under the Act as has been pointed out by the Supreme Court. Since the minor minerals and minerals other than minor minerals fall into two different categories and since in the instant case the extraction is in connection with major minerals, namely, iron ore, the eligibility condition in the Notice Inviting Tender has been inserted on the basis of reasonable differentia. Learned Counsel and the same has submitted relying on a decision of the Supreme Court in the case of Kasturi Lal Lakshmi Reddy, Represented by its Partner Shri Kasturi Lal, Jammu and Others Vs. State of Jammu and Kashmir and Another, that when Government and its authority have taken a decision the Court cannot lightly assume that decision taken by the Government as unreasonable or without public interest. The learned Counsel pointed out the observations made in the said judgment to the effect that there are large number of policy considerations which must necessarily weigh with the Government in taking action. Therefore, the Court would not strike down the Governmental action as invalid unless it is clearly satisfied that the action is unreasonable or not in public interest. The Court in Kasturi Lal also held that the burden of proving unreasonableness is on the petitioner and said burden will have to be discharged by proper and adequate materials.

20. Relying on the aforesaid guidelines in Kasturi Lal, as we must, we cannot hold that insertion of the eligibility criteria in Clause 8(i) in the Notice Investing Tender is unreasonable in the facts and circumstances of the case which have been discussed above. Apart from that about the terms of eligibility in the Notice Inviting Tender, the Court's power of scrutiny is very limited. This aspect of the matter has been elaborately discussed by us in our judgment in W. P. (C) No. 7002 of 2007 and we do not like to repeat the reasons which have been given in that case. This Court is of the opinion that it is sufficient to say that going by the reasons discussed in W. P. (C) No. 7002 of 2007, this Court cannot come to any conclusion that in the instant case there is any unreasonableness in prescribing the aforesaid eligibility criteria in the Notice Inviting Tender.

21. For the reasons aforesaid, this Court does not find any merit in this writ petition which is accordingly dismissed, All the interim orders are vacted.

Mahanty, J.

22. I agree.