
(2011) 02 OHC CK 0023
In the Orissa High Court
Case No : W. P. No. 19214 of 2010

Tapan Jena

APPELLANT

Vs

State of Orissa and Others

RESPONDENT

Date of Decision : 11-02-2011

Acts Referred:

Citation : AIR 2011 Ori 112

Hon'ble Judges : Kumari Sanju Panda, J;B.P. Das, J

Bench : Division Bench

Judgement

S. Panda, J.—Since all these writ petitions involve quite common questions, they were heard together and are being disposed of by this common judgment.

2. WP (C) No. 19214 of 2010 has been filed by Sri Tapan Jena, the proprietor of M/ s. Jasoda Road Lines challenging sub-clauses 19(a) & (b) and 26 of Clause XIX of the terms and conditions of the Tender Call Notice dated 25-10-2010 issued by the Managing Director of the Orissa State Civil Supplies Corporation, a State Government Undertaking, for transportation of rice and similar goods.

WP (C) No. 19215 of 2010 has been filed by M/s. Jasoda Road Lines through its proprietor Sri Tapan Jena challenging subclauses 17(a) and (b) and 23 of Clause XIX of the terms and conditions of the Tender Call Notice dated 31-10-2010 issued by the Managing Director of the Orissa State Civil Supplies Corporation for transportation of gunny bags and similar packaging materials.

WP (C) No. 19491 of 2010 has been filed by the petitioner challenging sub-clauses 19(a) and (b) of Clause XIX of the terms and conditions of the Tender Call Notice dated 25-10-2010 issued by the Managing Director of the Orissa State Civil Supplies Corporation for Earnest Money Deposit (in short, "EMD") of Rs. 10,00,000/- for each of the source districts, indicated at Ss. (i), (ii), (iii), (iv) & (viii) in paragraph "A" and security deposit of Rs. 50 lakhs for entire source districts.

WP (C) No. 19060 of 2010 has been filed by the petitioner, who is a storage agent challenging sub-clause 19(a) of Clause XIX of the terms and conditions of the Tender Call Notice dated 25-10-2010 issued by the Managing Director of the Orissa State Civil Supplies Corporation, vide Annexure-2."

In WP (C) Nos. 19552, 19804, 19805 and 19806 of 2010, the petitioners have challenged sub-clauses 19(a) and (b) of Clause XIX and Clauses 3, 4 and 5 of the terms and conditions of the Tender Call Notice dated 25-10-2010 issued by the Managing Director, Orissa State Civil Supplies Corporation Ltd., vide Annexure-1.

3. Learned counsel appearing for the petitioners submitted that the aforesaid clauses violate the fundamental rights of the petitioners guaranteed under Article 19(1)(g) read with Clause 6 of the Constitution of India. He further submitted that imposition of such restrictions/prohibitions not having been backed by law and there being no law in the field to put such restrictions/prohibitions, the terms and conditions of the impugned Tender Call Notices are arbitrary, unreasonable and violative of Article 300A of the Constitution of India within the expanded definition of property and right to do trade and business and the authorities keeping in mind to issue work order in favour of some specific persons published the impugned Tender Call Notices dated 25-10-2010 and 31-10-2010 which are totally different from the tender issued by the said authorities in the years 2008-2009 and 2009-2010.

4. In support of the aforesaid contentions, learned counsel for the petitioners cited an unreported decision of this Court in WP(C) No. 18496 of 2009 (Utkal Pharmaceuticals Manufacturers Association v. State of Orissa) disposed of on 20th December, 2010 and a decision of the Apex Court in the case of Union of India (UOI) and Another Vs. International Trading Co. and Another, .

5. Learned counsel for the petitioners also cited the decisions of the Apex Court in the cases of Lal Babu Prasad Vs. State of Bihar and Another, , Bishambhar Dayal Chandra Mohan and Others Vs. State of Uttar Pradesh and Others, , Udai Singh Dagar and Others Vs. Union of India (UOI) and Others, , Vij Resins Pvt. Ltd. and Others Vs. State of Jammu and Kashmir, , Meerut Development Authority Vs. Association of Management Studies and Another, , Kharak Singh Vs. The State of U.P. and Others, and Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others, .

6. Opposite parties 2 and 3 have filed counter affidavit taking a stand that subclause 19(b) of Clause XIX of the terms and conditions of the Tender Call Notice has been included to safeguard the interest of the Corporation from the mischief of a selected transport contractor who may have to transport Custom Milled Rice (CMR) to a district where he has his own mill or the mill owned by his family members or any person having commercial relationship with him or his family members. The Corporation is engaging millers of district for milling of procured paddy to derive CMR. The rice is delivered to Rice Receiving Centre (RRC). Besides delivery of CMR, the CMR transported through transport

contractor is also stored at RRC for utilization under Public Distribution System (PDS). To avoid any fictitious trade and recycling of CMR, the Corporation has included the mentioned clause to safeguard the interest of the Government and Public in general. The existing transport contractors of the Corporation were engaged during the Kharif Monsoon Session (KMS) 2008-2009 and were working on extension basis. During such period, the Corporation had procured 16,87,951 MTs rice, whereas for the session 2009-2010 it was increased to 21,99,105 MTs. The Corporation, expected that the said trend may continue or it may increase for the session 2010-2011.

6.1 Similarly, sub-clause 26 of Clause XIX of the Tender Call Notice stipulates that the Corporation reserves the right not to consider parties having any dispute with OSCSC Ltd. in order to protect its interest. The Corporation has imported the above condition from the tender documents adopted by FCI for appointment of H&T contractors. The aforesaid sub-clause 19(b) was incorporated in the Tender Call Notice because of the Government Guidelines for appointment of storage agent for the year 2007-2008 wherein sub-clause (3)(viii) of Clause V has been incorporated for disqualification of storage agent which reads as follows :

V. Eligibility Criterion, Norms of Selection etc.

(1) & (2) xxx

(3) Disqualification

(i) to (vii) xxx

(viii) In no case shall an owner of a rice mill, his family members or any persons having commercial relationship with him or his family members shall be considered for appointment as Storage Agent. Besides, any person who himself or whose family members have commercial relationship with another person having a separate trade/business of dealing in rice, wheat or sugar shall be ineligible to be appointed as storage agents.

The State Government has also taken a decision to abolish the system of storage agent in view of Wadha Commission Report. Therefore, there was no intention of the Corporation to debar any of the petitioners from participating in the bid.

6.2 So far as EMD and Security Deposit are concerned, the Corporation has clarified that there are five source districts, i.e., Bargarh, Subarnapur, Kalahandi, Sambalpur and Bhadrak. These districts are high procure districts during last KMS. The consumption of rice through PDS, the procurement and the surplus to be transported to other recipient districts of above five districts during last KMS are as under :

DISTRICT

Annual requirement of rice under PDS

Procured during KMS 2009-2010

Surplus transported

Bargarh

74809.26 MT

449512 MT

374703 MT

Subarnapur

47448 MT

153108 MT

105660 MT

Kalahandi

108600 MT

216797 MT

108197 MT

Sambalpur

53653:980 MT

162373 MT

108719 MT

Bhadrak

64603.500 MT

90781 MT

26178 MT

6.3 Considering the huge quantity of CMR, the EMD for the aforesaid districts has been fixed at Rs. 20 lakhs and in respect of the other districts, the EMD has been fixed at Rs. 5 lakhs.; So also keeping in view the quantity of procurement, the security deposit has been fixed around Rs. 50 lakhs as each of the transporters has to transport the rice whose price will be around Rs. 50 lakhs. Therefore, the quantity fixed in the Tender Call Notice is justified and there being no arbitrariness or illegality in the Tender Call Notice, these writ petitions are liable to be dismissed.

7. In support of his contention, learned counsel for the Corporation cited a decision of the Apex Court in the case of Meerut Development Authority Vs. Association of Management Studies and Another, .

8. Having regard to the submissions of the learned counsel for the parties, the questions which emerge to be dealt with in these writ petitions are as follows :

(a) Whether there is any scope of judicial review in contractual matters ?

(b) Whether the decision of the authorities is vitiated by any arbitrariness, unreasonableness and therefore hit by Article 19(1)(g) read with sub-clause (6) of the Constitution of India ?

(c) Whether the decision is for the public interest ?

9. So far as the first question is concerned, law is well settled that any unfair action must be set right by judicial review and the Court can certainly examine whether the decision making process was reasonable, rational, not arbitrary and violative of fundamental rights enshrined in the Constitution of India. The Apex Court, in the case of *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, has held that by way of judicial review, the Court cannot examine the details of the terms of the contract which has been entered into by the public bodies or the State. Courts have interment limitations on the scope of any such enquiry. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then the Court cannot act as an appellate Court by substituting its opinion in respect of selection made for entering into such contract. But at the same time the Courts can certainly examine whether "decision making process" was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution of India.

10. The Apex Court in the case of *Tata Cellular Vs. Union of India*, has observed that Judicial quest in administrative matters is to strike the just balance between the administrative discretion to decide matters as per Government policy, and the need of fairness. Any unfair action must be set right by judicial review.

With the above touchstone, this Court can examine the terms and conditions of the Tender Call Notices in question.

11. Coming to the second question, we are now to examine whether sub-clauses 17(a) and (b) and 23 of Clause XIX of the Tender Call Notice dated 31-10-2010 which are similar to sub-clauses 19(a) and (b) and 26 of the Tender Call Notice dated 25-10-2010 are reasonable and whether the said clauses violate the fundamental rights enshrined in sub-clause (6) of Article 19(1)(g) of the Constitution of India.

12. For better appreciation, relevant Clauses of the Tender Call Notice dated 25-10-2010 are quoted below :

3. EARNEST MONEY DEPOSIT (EMD):

Each tender must be accompanied by an EMD of Rs. 10,00,000/- (Rupees Ten Lakhs) only for each of the source districts indicated at Sl. (i), (ii), (iii), (iv) &

(viii) in paragraph "A" of pages 1 & 2 (i.e. Baragarh, Subarnapur, Kalahandi, Sambalpur & Bhadrak districts) in form of crossed Demand Draft issued by any Nationalised Bank and drawn in favour of Managing Director, OSCSC Ltd., C/2, Nayapalli, Bhubaneswar, payable at Bhubaneswar. EMD of Rs. 5,00,000/- in above form shall be required to be furnished for each of source Districts mentioned at Sl. (v), (vi), (vii), (ix), (x), (xi), (xii), (xiii), (xiv), (xv), (xvi), (xvii) and (xviii) (i.e. Koraput, Malkangiri, Ganjam, Bolangir, Jharsuguda, Nuapada, Nayagarh, Balasore, Khurda, Puri, Jagatsinghpur, Kendrapada & Rayagada, District) Tenders not accompanied by EMD shall be summarily rejected.

Earnest money shall be forfeited in the event of the tenderers failure, (after the acceptance of his tender) to furnish the requisite security deposit by the due date to take up the work, without prejudice to any other rights and remedies of Corporation under the contract and law. The earnest money, shall be refunded to all unsuccessful tenderers, soon after decision on tender is finalized. No interest shall be payable on the amount of earnest money, under any circumstances. The EMD furnished by the successful tenderer can be adjusted towards Security Deposit if desired by him in writing.

Tenders not accompanied with, all the Schedules/Annexures, intact, and duly filled in and signed shall be liable for rejection.

4. Security Deposit:

(i) Each successful tenderer shall furnish, a security deposit of Rs. 50 lakhs for entire source districts.

(ii) The Security Deposit shall be in shape of a Bank Guarantee issued from any Nationalised Bank issued in favour of the Managing Director, OSCSC Ltd., C/2, Nayapalli, Bhubaneswar for such period as shall be decided by the Corporation.

(iii) Security Deposit furnished by the tenderer shall be subject to the terms and conditions contained in this tender document and the Corporation shall not be liable for payment of any interest on the security deposit or any depreciation thereof, whatsoever.

(iv) If the successful tenderer had previously held any contract and furnished security deposit with the Corporation, the same shall not be adjusted against this tender and a fresh security deposit shall be made to make the contract valid.

5. Requirement of Vehicles :

a. The tenderer shall work but the minimum requirement of truck, depending upon volume of work/specific godowns taking into consideration the distance to transport and shall ensure that he owns at least 20% of the required number of truck and, rest can be taken on hire for effecting timely & smooth transport. A statement to this effect with documentary proof is required to be submitted, along with Tender Paper.

XIX. Duties and Responsibilities of the Contractor

19. (a) The tenderer shall also furnish an affidavit to the effect that he is neither a trader, in CMR nor associated in any manner in any trading of food grains. He shall also furnish an affidavit to the effect that he is neither a custom miller nor a storage Agent or a retailer of PDS commodities in the State of Orissa.

(b) The owner of a rice mill, his family members or any persons having commercial relationship with him or his family members shall not be considered for appointment as transport contractor for CMR.

23. The tenderer shall be duty bound to enclose an affidavit duly sworn before an Executive Magistrate to the effect that he has not been black listed/ debarred by any Government, Central or State PSU for any work undertaken by him.

26. The OSCSC Ltd. reserves the right not to consider parties having any dispute with OSCSC Ltd. in order to protect its interest.

13. In the said Tender Call Notice, "family members and commercial relationship" have been defined as follows :

The owner of a rice mill, his family members or any persons having commercial relationship with him or his family members shall not be considered for appointment as transport contractor for CMR.

14. So far as sub-clause 19(a) is concerned, learned counsel for the Corporation submitted that the State Government has taken a decision to abolish the system of storage agent in view of Wadha Commission Report and since the petitioner in WPC No. 19060 of 2010 by virtue of an interim order has participated in the bidding, the said clause, so far as storage agent is concerned, need not be further scrutinized by this Court.

15. So far as sub-clause 17(b) of the Tender Call Notice dated 31-10-2010 which is similar to clause 19(b) of the Tender Call Notice dated 25-10-2010 is concerned, in order to examine whether there is any reasonableness in inserting the said sub-clause and what is its nexus with the tender, at the cost of repetition, sub-clause 19(b) of Clause XIX of the Tender Call Notice dated 25-10-2010 is quoted below :

XIX. Duties and Responsibilities of the Contractor/Tenderer.

19. (a) xxx

(b) The owner of a rice mill, his family members or any persons having commercial relationship with him or his family members shall not be considered for appointment as transport contractor for CMR.

16. However, so far as custom miller and retailer of Public Distribution of Essential commodities in the State of Orissa are concerned, nothing has been stated in the counter-affidavit as to how the State is going to be prejudiced and how the interest of the public is going to be affected if the petitioners will be engaged in transporting the rice or supplying the gunny bags. There are specific

guidelines of the Corporation how the goods are to be supplied through transport vehicles. Therefore, it is the duty of the Officers, who are in charge, to see at the time of loading and unloading that goods of the specified quality and quantity have reached from one point to another and they can also fix responsibility if they find any irregularity.

17. Article 19 of the Constitution of India provides for protection of certain rights regarding freedom of speech, etc. Sub-clause (g) of clause (1) of Article 19 confers a fundamental right to protect any profession or to carry on any occupation, trade or business. Clause 66 of Article 19 of the Constitution of India reads as under :

19. Protection of certain rights regarding freedom of speech, etc.

(1) to (5) xxx

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law insofar as it relates to, or prevent the State from making any law relating to,--

(i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or

(ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

18. The Apex Court in the case of Udai Singh Dagar and Others Vs. Union of India (UOI) and Others, has held as follows :

29. The above provision is in two parts. It empowers Parliament and the State Legislature to impose reasonable restrictions on the exercise of the right conferred by the subclause (g) of clause (1) of Article 19 of the Constitution of India in the interest of the general public. The second part of the said provision provides that in particular nothing therein shall affect the operation of an existing law insofar as it relates to or prevents the State from making any law inter alia relating to the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business. By reason of a statute -- law, therefore, undoubtedly, qualifications can be laid down inter alia for practising any profession or carry on any occupation.

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39. We, therefore, are of the opinion that even in the matter of laying down of qualification by a statute, the restriction imposed as envisaged under second part of Clause (6) of Article 19 of the Constitution of India must be construed being in consonance with the interest of the general public. The tests laid down, in our

opinion, stand satisfied. We may, however, notice that clause (6) of Article 19 of the Constitution of India stands on a higher footing vis-a-vis clause (5) thereof. We say so in view of the celebrated decision of this Court in *State of Madras Vs. V.G. Row*, wherein it was stated :

15. It is important in this context to bear in mind that the test of reasonableness, wherever prescribed, should be applied to each individual statute impugned, and no abstract standard or general pattern, of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied, thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict. In evaluating such elusive factors and forming their own conception of what is reasonable, in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the elected representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable.

40. The tests laid down therein, viz., the test of reasonableness as also general public interest, however, may not ipso facto apply in a case involving clause (6) of Article 19 of the Constitution of India.

41. Here we may deal with the extent of judicial review permissible under Article 19(6). It was observed in *Saghir Ahmad Vs. The State of U.P. and Others*, by Mukherjea, J. at P. 739 in the following terms: The new clause in Article 19(6) has no doubt been introduced with a view to provide that a State can create a monopoly in its own favour in respect of any trade or business; but the amendment does not make the establishment of such monopoly a reasonable restriction within the meaning of the first clause of Article 19(6). The result of the amendment is that the State would not have to justify such action as reasonable at all in a Court of law, and no objection could be taken to it on the ground that it is an infringement of the rights guaranteed under Article 19(1)(g) of the Constitution.

19. In the case of *Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others*, it has been held by the Apex Court that "legal certainty" is an important aspect of the rule of law which is the heart of parliamentary democracy. If there is vagueness or subjectivity in the norms specified it may result in unequal and discriminatory treatment and violate the doctrine of "level playing field". Expression of difference of opinion, if any, in exercise of contractual powers by the State must be based on specified norms. Those norms may be legal or accounting norms. As long as the norms are clear and properly understood by the decision-maker and the bidders and other

stakeholders, uncertainty and thereby breach of the rule of law will not arise. In order to provide certainty, the norms/standards specified should be clear.

20. In view of the above pronouncements of the Apex Court, we are of the view that there is no reason to insert sub-clauses 19(a) and (b), 23 and 26 of clause XIX of the Tender Call Notice dated 25-10-2010 and subclauses 17(a) and (b) and 23 of Clause XIX of the Tender Call Notice dated 31-10-2010 as the said clauses violate the fundamental rights enshrined in Article 19(1)(g) of the Constitution of India.

21. So far as EMD and security deposits are concerned, since the transporters are dealing with huge amount, there is no arbitrariness in fixing the said amount by the Corporation. It is within their domain and they can fix the amount which the petitioners cannot question. But, as regards the condition of requirement of vehicles, the authority should have clearly mentioned the total number of vehicles and how many vehicles out of the said total vehicles are required to be owned by the tenderer.

22. Coming to the last question, neither it has been stated in the counter-affidavit nor has it been explained at the time of argument as to how the terms and conditions incorporated in the Tender Call Notices are for the public interest. So, the said question need not be examined by this Court.

23. Therefore, this Court, while not interfering with the terms and conditions of EMD and Security Deposits, is of the view that the condition of requirement of vehicles needs clarification.

24. Hence, we set aside the Tender Call Notices dated 25-10-2010 and 31-10-2010 issued by the Managing Director of the Orissa State Civil Supplies Corporation and remit the matter back to the Corporation for fresh consideration.

The writ petitions are accordingly disposed of.