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(2023) 01 SHI CK 0034

In the High Court Of Himachal Pradesh

Case No : Civil Writ Petition No. 7816 Of 2021

Tejinder Goyal — APPELLANT

Vs

Union Of India & Ors — RESPONDENT

Date of Decision : 05-01-2023

Acts Referred:

Citation : (2023) 01 SHI CK 0034

Hon'ble Judges : A.A. Sayed, CJ;Jyotsna Rewal Dua, J

Bench : Division Bench

Advocate : R.K.Gautam, Sahil Dixit, Balram Sharma, Bipin C. Negi, Nitin Thakur

Final Decision : Allowed

Judgement

Jyotsna Rewal Dua, J

1. Petitioner was declared successful in the selection process undertaken by respondent Nos.2 and 3 the Oil Marketing company for appointment of Service Provider in a Corporation Owned and Corporation Operated retail outlet. The Letter of Intent was issued to the petitioner. He completed all the formalities required at his end in terms of the Letter of Intent. Despite this, the Letter of Appointment was not issued to him, hence, the petition.

2. Facts: -

2(i) Respondent Nos.2 and 3-The Hindustan Petroleum Corporation Limited (HPCL) issued an advertisement on 12.08.2020 for engagement of Service Provider for its Corporation Owned and Corporation Operated (COCO) Retail Outlet at Nalagargh, District Solan, H.P. The selection and appointment was to be made in terms of guidelines/brochure dated 31.03.2020 (Annexure P-2) being followed by all Oil Marketing Companies (OMCs). The petitioner applied for COCO Retail Outlet on 10.09.2020. He qualified for the interview. The interview letter was issued to him on 16.02.2021 (Annexure P-3). Interview was held on 05.03.2021. The result was declared the same day vide Annexure P-4, wherein

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the petitioner scored highest marks. On 08.03.2021 (Annexure P-5), respondents declared the petitioner selected as Service Provider for the location in question. The Letter of Intent (LOI) (proposed award of contract) as Service Provider for COCO Retail Outlet at Nalagarh, District Solan, was issued to the petitioner on 05.07.2021 (Annexure P-6). Petitioner completed the formalities at his end required in terms of the LOI. He furnished bank guarantee of Rs.70,00,000/- on 03.08.2021 (Annexure P-10). He also applied and got himself a GST registration number on 05.08.2021 (Annexure P-11). The petitioner also informed the respondents on 18.08.2021 (Annexure P-13) that apart from furnishing the bank guarantee and obtaining the GST registration certificate, he had also arranged requisite manpower for running the Retail Outlet.

2(ii) The petitioner sent communications to the respondents on 18.08.2021 and 06.10.2021, requesting them to complete the formalities at their end to enable him to commence the retail outlet operations as he had statedly started incurring revenue losses. Respondent OMC through its response dated 22.02.2021 (Annexure P-18), informed that "in the cases where LOI is issued but LOA and Agreement is not yet signed with COCO Service Provider, in such cases OMCs have decided to put on hold the selection process of COCO Service Provider……." The decision of the respondents to put on hold petitioner's selection as COCO Service Provider prompted him to institute the present petition on 09.12.2021, seeking directions to the respondents to hand him over the COCO Retail Outlet mentioned in the LOI.

Contentions & Analysis

3. Heard learned counsel for the respective parties and gone through the case record.

4. The facts mentioned in para-2 above are not in dispute. In response to the advertisement issued by the respondent-HPCL on 12. 08.2020, the petitioner participated in the selection process. He was interviewed on 05.03.2021. The result was declared on 08.03.2021. The petitioner was declared selected as Service Provider for COCO Retail Outlet Nalagarh, District Solan, H.P. The first contention of respondent Nos.2 and 3 is that mere declaration of petitioner's selection as Service Provider for the COCO Retail Outlet at Nalagarh, would not bestow any right upon him to be appointed as a Service Provider. Following clause from the selection letter issued in favour of petitioner on 08.03.2021 (Annexure P-5) was pressed into service.

"This is only preliminary intimation towards your selection for award for contract for Service Provider. However, the award of contract is subject to compliance of terms and conditions of the Corporation in this regard."

We find from the record that things did not remain static at the stage of declaration of result. The petitioner's selection on 08.03.2021 as Service Provider for COCO Retail Outlet was followed by issuance of LOI to him for the location in question. The LOI was issued on 05.07.2021.

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5. The respondent Nos.2 and 3 next contended that even the issuance of LOI in favour of the petitioner on 05.07.2021, did not confer any right in him to have the letter of appointment (LOA). (2015)13 SCC 233 (Rishi Kiran Logistics Private Limited Vs. Board of Trustees of Kandla Port Trust & Others) was pressed into service to highlight the submissions that Letter of Intent merely indicates intention to enter into contract into future. It has no binding force. The respondents' submission is that the petitioner cannot seek specific enforcement of the LOI dated 05.07.2021 as: -

(a) LOI was only a proposed award. No binding contract came into existence by the issuance of LOI;

(b) Due to change in policy guidelines for selection of retail Service Provider for COCO Outlets, the OMCs had decided to issue fresh advertisements in cases where LOI was issued but LOA and agreement, had not been yet signed. Therefore, respondent Nos.2 and 3 be permitted to cancel the LOI issued in favour of petitioner and to re-advertise the location.

5(a) LOI: - A Proposed Award.

5(a)(i) For determining the nature of LOI, it would be appropriate to extract the relevant portion of LOI dated 05.07.2021 (Annexure P-6) issued in favour of the petitioner: -

"Sub:- Proposed award of contract for Service Provider for COCO Retail Outlet at Location: Nalagarh, District Solan, State: Himachal Pradesh.

We refer to our advertisement dated 12.08.2020 for the award of contract of Service Provider for our COCO RO at the above location and the subsequent interview held at HPCL Retail Regional Office Shimla on 05.03.2021.

Please be informed that by this Letter of Intent, we propose to award contract of Service Provider for operating our COCO Retail Outlet at the above location on the following terms & conditions: -

(i) You will arrange for requisite manpower as per the requirement of Corporation for operation of the subject COCO Retail Outlet and ensure compliance of applicable statutory guidelines/law with regard to engagement of manpower like ESI, PF etc.

(ii) You will provide Bank Guarantee of Rs.70.0 Lacs (Rs. Seventy Lacs Only) from a schedule bank within 30 days of this letter.

(iii) You will arrange for necessary Registration and obtain the requisite Licenses from the Statutory Authorities which are required for operation of the COCO Retail Outlet.

(iv) This letter of intent will stand automatically withdrawn and cancelled on the happening of any of the following events: -

a) It is found that you have suppressed and/or misrepresented any material facts

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in your application.

b) In case you are found to be convicted for any criminal/economic offence involving moral turpitude,

(v) This is merely a letter of intent and it not to be construed as Contract for Service Provider. You will be awarded the contract upon complying with the terms and conditions spelt out herein above by the issuance of appointment letter along with signing of our standard agreement between you and us.

Should you require any further detail/guidance, please get in touch with our office at the address mentioned below: -

Hindustan Petroleum Corporation Limited

3rd Floor, Hameer House, Lower Chakkar,

Shimla, PIN-171005

Please acknowledge receipt of this letter."

Emphasizing upon Clause 5 of above LOI and avowed stated subject of the LOI, learned senior Counsel for respondent Nos. 2 and 3 OMC contended that the letter dated 05.07.2021, (Annexure P-6) was only a Letter of Intent and not Letter of Appointment. Issuance of Letter of Intent in petitioner's favour cannot be construed to mean that a valid contract had come into existence between the parties. Hence, respondent Nos. 2 and 3 were not bound to issue LOA in favour of the petitioner.

5(a)(ii) In (2021) 9 Supreme Court Cases 166 (South Eastern Coalfields Limited and others Versus S. Kumar's Associates AKM (JV), Hon'ble Apex Court was seized of a situation in a tender matter where the bidder had neither submitted the performance security deposit nor signed the integrity pact. Consequently, work order was not issued to him. It was inter-alia held that the issue whether a concluded contract had been arrived at inter se the parties is dependent on the terms and conditions of the NIT, the LoI and the conduct of the parties. An LoI merely indicates a party's intention to enter into a contract with the other party in future. No binding relationship between the parties at this stage emerges and the totality of the circumstances have to be considered in each case. It is no doubt possible to construe a letter of intent as a binding contract if such an intention is evident from its terms, which must be clear and unambiguous.

In the given facts, we are not inclined to accept the submissions of respondent Nos.2 and 3. Admittedly the LOI was to be followed by the LOA. The LOA was not issued to the petitioner, that is why he has moved this petition. The LOA was to be issued to the petitioner subject to fulfilment of the conditions mentioned in the LOI. It is nobody's case that the petitioner did not fulfill the conditions stated in the LOI. Clause 1 of the LOI pertains to arranging the requisite manpower. The petitioner, on 18.08.2021, informed the respondents that he had arranged the requisite manpower for running the Retail Outlet. Clause 2 of LOI entailed

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providing of bank guarantee of Rs.70,00,000/- from a scheduled bank by the petitioner. It is an admitted factual position that the petitioner had furnished the requisite bank guarantee to the respondents within the stipulated period. Under the 3rd Clause of the LOI, the petitioner was to obtain necessary registration and licence for running the COCO Retail Outlet. It is not in dispute that the petitioner had obtained the necessary registration and licence. Thus, all formalities required to be completed by the petitioner, had actually been completed by him. Respondent Nos. 2 and 3 even rejected a complaint made against selection of the petitioner as COCO Service Provider vide a detailed order passed on 25.06.2021. It is the respondents, who did not perform their part. The petitioner repeatedly requested respondent Nos. 2 and 3 to issue him the LOA. Rishi Kiran Logistics case supra relied upon by the respondent -OMC pertained to a tender process for allotment of plots. It was inter-alia observed by the Hon'ble Apex Court in the said case that when the LOI is hedged with condition that final allotment would be made after obtaining requisite clearances, it may then depict an intention to enter into contract at a later stage. However, if completion of formalities takes undue long time and prices of land shot up in the interregnum, then the respondent had a right to cancel the process, which had not resulted in a concluded contract. This situation does not exist in the case in hand. Present case does not pertain to tender process stricto-senso. All requisite formalities as per the LOI were completed by the petitioner. Respondent Nos. 2 and 3- OMC have not even made any grievance about want of completion of requisite formalities at the end of petitioner. Thus the submission that LOI will not lead to the LOA cannot be countenanced in the given facts.

5(b) Factual Reasons assigned by the respondents for not issuing LOA to the petitioner.

We may now examine the factual reasons given by the respondents for not issuing the LOA in favour of the petitioner.

5(b)(i) According to the respondents, on 05.08.2021, the Ministry of Petroleum and Natural Gas (MoP&NG) issued following letter to all OMCs: -

"M-12043(11)/171/2021-OMC-PNG

Government of India

Ministry of Petroleum & Natural Gas

***

Shatri Bhawan, New Delhi

Dated the 5 th August, 2021

To

The Director (Marketing),

IOCL/BPCL/HPCL

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Subject: Appointment of Service Providers for COCO

Retail Outlets-reg.

Sir,

This Registry is receiving complaints from various affected parties and stakeholders on concerns regarding fair selection and transparency in the process of appointment of Service Providers for COCO Retail Outlets by the PSU OMCs.

2. It is in this context that all the PSU OMCs are hereby directed to ensure implementation of fair, uniform and transparent selection criteria while deciding on selection of service providership for COCO ROs and that weightage of interview for the selection criteria is kept not more than 20% as provided in the extant policy guidelines.

3. It may be noted that any deviation from the acceptable framework of norms and intent of unified and comprehensive policy guidelines in place in this regard will be viewed very seriously in this Ministry.

4. In light of the above PSU OMCs are advised in their won interest to strictly adhere to the said policy and to ensure that the selection process of service providers for COCO Retail Outlets is done in a fair and transparent manner.

This issues with the approval of competent authority.

Yours faithfully,

Sd/-

(A.K. Sinha)

Under Secretary (OMC Section)"

5(b)(ii) Bharat Petroleum Corporation Limited (BPCL- one of the OMCs) informed the MoP&NG vide letter dated 16.09.2021 that the issue of fair selection and transparency in the process of appointment of Service Provider highlighted by the Ministry had been deliberated by the OMCs. That need was felt for revising the existing COCO Service Provider appointment guidelines. It was further informed that "all the selection process of COCO Service Providers for the COCO locations, which were advertised and interview were scheduled, have been cancelled and the ongoing selection process of COCO Service Provider, for which the interviews were already conducted, have been put on hold with immediate effect." The petitioner was accordingly informed by respondent Nos. 2 and 3 (HPCL) on 22.10.2021 (Annexure P-18) that in the cases where LOI is issued but LOA and agreement is not yet signed with COCO Service Provider, "in such cases OMCs have decided to put on hold the selection process of COCO Service Provider".

5(b)(iii) We may also note that the petitioner in his rejoinder, had made specific

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averment that COCO Retail Outlets have been awarded by OMCs to different people even after issuance of the LOI to the petitioner on 05.07.2021. Referring to information received by him under the Right to Information Act (Annexure R-4), petitioner pointed out such like instances including the one where LOI was issued on 19.07.2021 and Retail Outlet was handed over on 24.09.2021 despite the decision taken by all OMCs on 16.09.2021 not to handover Retail Outlets where only LOIs had been issued. There is no rebuttal to this submission.

5(b)(iv) Fresh guidelines for selection of Service Providers of COCO Retail Outlets were framed on 07.04.2022 by the OMCs [Annexure A-1(Colly)]. These guidelines were approved by MoP&NG on 20.04.2022. Hence, the respondents decided to call for fresh advertisements for all their COCO locations where LOA had not been issued.

In the given facts, the reasons offered by the respondent Nos. 2 and 3 for not issuing the LOA in favour of the petitioner, cannot be sustained. The advertisement for appointment of Service Provider for COCO Retail Outlet at Nalagarh, District Solan, was issued on 12.08.2020 under the applicable guidelines then in force, i.e. issued on

31.03.2020. The MoP&NG in its letter dated 05.08.2021 did not direct the OMCs either to frame new guidelines or to apply any newly framed guidelines to the selection process initiated under the old guidelines in force at the relevant time. The Ministry had only directed the OMCs to ensure implementation of fair, uniform and transparent selection criteria while deciding on selection of service providership for COCO ROs and that weightage of interview during the selection process, should be kept not more than 20% as provided in the extant policy guidelines. The Ministry had merely directed the OMCs that their existing policy guidelines providing for giving weightage of the interview only up to the extent of 20% should be strictly adhered to in the process for selection of Service Provider for COCO Retail Outlets. Out of total 100 marks allocated in the 2020 guidelines, 80 marks were for scrutiny of the applications and 20 marks were kept for the interview. The OMCs were directed by the Ministry to insure the implementation of fair, uniform and transparent selection criteria. There was no direction to frame new guidelines. The OMCs on their own had decided to frame new guidelines for selection of Service Provider for COCOs. The new guidelines framed by the OMCs on 06.05.2022 do not even stipulate that the same are to be applied retrospectively i.e. to the selection process undertaken in terms of guidelines framed on 31.03.2020. In this context, it would be worthwhile to quote the following para from the judgment passed by the Hon’ble Apex Court on 22,09.2022 in Civil Appeal No(s) 1699-1723 of 2015, (Bharat Sanchar Nigam Ltd. and others Etc. Versus M/s Tata Communications Ltd. etc.) wherein it was held that administrative/executive orders or circulars in absence of any legislative competence cannot be made applicable with retrospective effect. Only law could be made retrospectively that too if it was expressly provided in the statute: -

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"30. The power to make retrospective legislations enables the Legislature to obliterate an amending Act completely and restore the law as it existed before the amending Act, but at the same time, administrative/executive orders or circulars, as the case may be, in the absence of any legislative competence cannot be made applicable with retrospective effect. Only law could be made retrospectively if it was expressly provided by the Legislature in the Statute. Keeping in mind the afore-stated principles of law on the subject, we are of the view that applicability of the circular dated 12th June, 2012 to be effective retrospectively from 1st April 2009, in revising the infrastructure charges, is not legally sustainable and to this extent, we are in agreement with the view expressed by the Tribunal under the impugned judgment."

Learned Deputy Solicitor General of India appearing on behalf of respondent No.1 has neither disputed the factual position of the case nor it is his submission that in the given facts of the case, new guidelines framed by the OMCs on 06.05.2022 could have been applied retrospectively to the selection process undertaken by respondent Nos. 2 and 3 under the then applicable policy guidelines framed on 31.03.2020. Leaned Deputy Solicitor General of India has also stated the obvious that the MoP&NG had not even directed the OMCs to frame fresh guidelines rather the OMCs were directed to ensure fair selection and transparency in the process of appointment of Service Providers for COCO Retail Outlets. Further that the Ministry had directed the OMCs that while deciding on selection of Service Providership for COCO ROs, weightage of interview should not be more than 20% as provided in the extant policy guidelines.

6. In view of the above discussion, it becomes apparent that respondent Nos. 2 and 3 had arbitrarily and illegally did not take the selection process for selection of Service Provider in COCO Retail Outlet, Nalagarh, District Solan initiated on 12.08.2020 in terms of 2020 guidelines to its logical conclusion.

7. For all the foregoing reasons, we find merit in this petition. The same is accordingly allowed. Respondent Nos. 2 and 3 are directed to take further steps in terms of Letter of Intent issued to the petitioner on 05.07.2021 (Annexure P-6). Depending upon petitioner's completing the requisite formalities to the satisfaction of respondent Nos.2 and 3, the Letter of Appointment for COCO Retail Outlet at Nalagarh, District Solan, be issued in his favour. The entire exercise be completed within a period of eight weeks from today. The pending miscellaneous application(s), if any, also stands disposed of.

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