(2015) 09 PAT CK 0042

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 16903 of 2014

Vikash Chandra Guddu Baba — APPELLANT

Vs

The State of Bihar and Others — RESPONDENT

Date of Decision : 03-09-2015

Acts Referred:

Bihar and Orissa Excise Act, 1915 — Section 22D
Constitution of India, 1950 — Article 226

Citation : (2015) 09 PAT CK 0042

Hon'ble Judges : I.A. Ansari, A.C.J;Chakradhari Sharan Singh, J

Bench : Division Bench

Advocate : Sudha Chandra, for the Appellant; Lalit Kishore, PAAG, Advocates for the Respondent

Final Decision : Dismissed

Judgement

I.A. Ansari, Acting C.J—Heard Mr. Sudha Chandra, learned Counsel, for the petitioner, and Mr. Lalit Kishore, learned Principal Additional Advocate General, appearing on behalf of the respondents.

2. Alleging fraud and irregularities having been committed in the grant of exclusive privilege for manufacture and supply of country liquor in 17 zones of the State for the period from 1st April, 2014, to 31st March, 2019, the petitioner, who claims himself to be a public spirited citizen, has prayed that the said award of exclusive privilege be cancelled in the larger public interest and fresh settlement be made in consonance with the provisions of Bihar Finance (Amendment) Rules, 2005, and regulations framed thereunder.

3. The reliefs, so sought for by the petitioner, are, admittedly, based on the report, dated 13.08.2014, submitted by the Office of the Comptroller and Auditor General of India, whereby Rule 131R(xiv) of Bihar Finance (Amendment) Rules, 2005, is alleged to have been violated and objection has been taken to the award of exclusive privilege on the ground that the contract should be awarded, ordinarily, to the lowest evaluated bidder (L-1) and contending that the omission

to incorporate provisions, in the tender process that other suppliers would also have to supply country liquor on the rate of L-1, constituted a departure from the established procedure adopted in the previous tender process resulting in a loss of revenue amounting to a sum of Rs. 341.32 crores (i.e., 68.26 crores per annum).

4. How valid are the objections raised by the audit report, dated 13.08.2014, aforementioned and whether the petitioner has been able to make out any case calling for this Court''s exercise of extra-ordinary jurisdiction, under Article 226 of the Constitution of India, need to be determined keeping in view the facts, which emerged from the pleadings on record and upon hearing the learned Counsel appearing before this Court. The facts, which have surfaced from the pleadings of the parties and materials on record and upon hearing learned Counsel for the parties concerned, are set out, in brief, hereinbelow.

5. The exclusive privilege for manufacture and supply of country liquor is awarded by the State Government in terms of the provisions embodied in Section 22D of Bihar Excise Act, 1915. The privilege, so conferred by the State government on a person, is to the exclusion of all others meaning thereby that upon award of such exclusive privilege in a particular zone to a person, he manufactures and supplies country liquor to Bihar State Beverage Corporation Limited, which is a State government undertaking and the monopoly wholesaler for sale of all forms of liquor. The supply by the awardee of the exclusive privilege is at a fixed rate determined at the time of award of contract. In the process of awarding exclusive privilege, the Government parts with its privilege to deal in liquor in favour of awardee. However, for awarding the privilege, the Government charges consideration money in the form of license fee, permit fee, movement fee, excise duty, etc. and the entire State, for this purpose, stands divided into various zones and an awardee is awarded exclusive privilege for manufacture and supply of country liquor in respect of the awarded zone.

6. Prior to the impugned tender process, the awardee was required to manufacture and supply country liquor in sachets and the mode of fixation of rate for the supply was through negotiations with the eligible tenderers and on the agreed rate for supply, the awardee of the exclusive privilege used to supply country liquor through Bihar State Beverage Corporation Limited after manufacturing country liquor and they were paid in accordance with the agreed rate for supply. On the basis of the determined rate for supply by the manufacturers, the wholesale rate for supply and maximum retail price is arrived at and notified and on the basis of the maximum retail price, so fixed, the licensee used to sell liquor to the consumers. The Government does not earn any additional revenue apart from the excise duty, license fee, movement fee and VAT from the awardee of such exclusive privilege.

7. During the period 2009-2012, the rate of supply of country liquor, manufacture by awardee, was fixed at Rs. 2.80/- per 200 sachets; whereas during the period 01.12.2012 to 31.03.2014, the modality for award of privilege

was changed and the award for privilege was not made through negotiations; rather, on the basis of the quoted price by the tenderers, L-1 was fixed at Rs. 2.14/-, which was much lower than the previous standard tender period. This lower rate had adversely affected the State''s revenue to the tune of Rs. 0.96 per sachet including VAT. In order, therefore, to protect the loss incurred on account of lower rates offered by the tenderers, the Government was forced to impose additional excise duty. This apart, the Government also enhanced the movement fee on country liquor.

8. Bearing in mind the past experience and loss of revenue, which had ensued on account of the lower rates being quoted, the Government appointed a consultant to recommend ways and means for settlement of exclusive privilege for manufacture and supply of country liquor so that the Government revenue is maximized. On the recommendation of the consultant, appointed for the purpose, a Committee, under the Chairmanship of the Chief Secretary, Government of Bihar, was constituted, which decided to fix a base rate on which country liquor was to be supplied by the manufacturers. The Committee also decided that on the basis of the base rate, so determined by another committee, the tenderers shall quote the rate and, upon being awarded a particular zone on the basis of the rate quoted in the tender, the tenderer shall be bound to pay the difference between the base rate and the quoted rate on the entire minimum guaranteed quantity of the zone, in question. The procedure of awarding of exclusive privilege consisted in awarding the contract to the lowest tenderer in a zone of his first preference and, thereafter, the remaining tenderers were to be awarded one supply zone each of their preference on the basis of their quoted rates subject, of course, to its availability and the process was to continue till all the supply zones are allotted.

9. Mr. Lalit Kishore, learned Principal Additional Advocate General, has correctly explained the procedure by the following illustration,

The base rate, for 200 ML of country liquor, was fixed at Rs. 5.78/- and if the tenderer had quoted a rate of Rs. 4/- for 200 ML of country liquor, then, in terms of the condition of the tender process, the tendered is required to pay, in advance, the differential amount of Rs. 1.78/- on the entire minimum guaranteed quantity of the zone, in question.

10. The Committee''s recommendation was approved, on 24.10.2013, by the Finance Department, Government of Bihar, and, thereafter, the Cabinet also approved the procedure so recommended and, upon approval by the Cabinet, the Government''s resolution was published, in this regard, in the Bihar Gazette.

11. Tender notice was, thereafter, issued inviting tenders for grant of exclusive privilege in pet bottles for the year 2014 to 2019. In terms of the policy, which was approved by the State Government, the manufacturing and packaging of country liquor were to be made in pet bottles; whereas the manufacturing and packaging of the country liquor, in the past, were in sachets.

12. It is contended by the State that as a result of the procedure, so resorted to, the Government would fetch an additional revenue of over Rs. 1000/- crores inasmuch as the awardee of the exclusive privilege would be required to pay the base rate by making payment of such differential amount as is required in order to bring his rate and the base rate at par with each other. This position could not be disputed on behalf of the petitioner.

13. What is, now, pertinent to note is that the Office of the Comptroller and Auditor General of India, following the audit conducted, has submitted a report, dated 13.08.2014, alleging violation of Rule 131R(xiv) of Bihar Finance (Amendment) Rules, 2005, and objected to the award of exclusive privilege, the objection raised being on the ground that the contract should, ordinarily, be awarded to the lowest bidder on the lower evaluated bid (L-1). It is alleged by the Comptroller and Auditor General of India, under the audit report, that the omission to incorporate a provision in the tender notice that other suppliers would also have to supply on the lowest evaluated bid (L-1) was a departure from the established procedure adopted in the previous tender process and resulting thereby in a total revenue loss of Rs. 341.32 crores (i.e., Rs. 68.26 crores per annum).

14. In response to the objection, which had been taken by the Comptroller and Auditor General of India, the Government contended that the concept of base rate was included in the tender process for the first time and since thereafter, the entire State stood divided into 17 different zones and, on the basis of the rates quoted by the tenderers, 17 tenderers were awarded the exclusive privilege, on the basis of L-1 to L-17, the tenderers having been chosen on the basis of tenderers'' choice of the zone and the rates quoted by them. It was also contended by the State that the introduction of base rate ensured uniformity in the supply rate and prevented loss of any revenue as had occurred in the past tender processes. The Government further contended that the process of awarding the exclusive privilege, which has been so introduced, for the period 2014-19, is a policy decision taken by the Cabinet of the State on approval of the Finance Department, Government of Bihar and, therefore, the objection raised by the audit report was neither valid nor warranted in law.

15. The objection of the Comptroller and Auditor General of India as well as the response of the Department concerned and the rejection thereof by the Comptroller and Auditor General of India were placed before the Public Accounts Committee and the Public Accounts Committee, vide its report, dated 10.10.2014, recommended, inter alia, resort to the process of re-tender. After considering the recommendation of the Public Accounts Committee, the Government took a decision not to accept the recommendations of the Public Accounts Committee.

16. Mr. Lalit Kishore, learned Principal Additional Advocate General, contends that the report of the Office of the Comptroller and Auditor General of India is imaginary and has failed to consider that there is no violation of any of the

provisions embodied in Bihar Finance (Amendment) Rules, 2005.

17. In fact, in response to a query made from learned Counsel for the petitioner, the petitioner could not counter as to how the Office of the Comptroller and Auditor General of India''s report can be said to be correct, when in the face of the pleaded case of the State Government, it was the loss of revenue, which was averted by taking resort to the impugned tender process inasmuch as there is uniformity in the manufacture and supply of country liquor in the sense that the awardee of the contract is bound to pay the differential amount between quoted rates and the base rates.

18. Undoubtedly, the Government was trying to adopt its policy to prevent the loss of revenue. A policy decision, which may be incorrect, cannot be made subject matter of challenge by the Office of the Comptroller and Auditor General of India unless the policy decision is shown to be affected by extraneous considerations and/or mala fide. There is no such material in the report of the Office of the Comptroller and Auditor General of India, which has been relied upon by the petitioner.

19. In fact, under the last tender process, which, according to the audit report, the Government ought to have followed, the loss of revenue to the Government had increased. The policy decision of a Government, approved by its Cabinet, cannot be questioned on account of its suitability or otherwise.

20. The power of judicial review is, admittedly, confined to the decision-making process and not to the merit of a decision. No flaw whatsoever could be pointed out in the decision-making process. No mala fide or fraud could be attributed to the respondents in the matter of awarding exclusive privilege by the impugned tender process.

21. Because of what have been discussed and pointed out above, we find no merit in the present writ application, which has been brought in the form of Public Interest Litigation.

22. Considering, therefore, the matter in its entirety and in the interest of justice, this writ petition is dismissed.

23. There will be no order as to costs.