(2000) 04 OHC CK 0023

In the Orissa High Court

Case No : Org. Jurdn. Case No''s. 589 and 1802 of 2000

Welfare Thrift and Multipurpose Co-operative Society Ltd. and Another	APPELLANT
Vs	
State of Orissa and Others	RESPONDENT

Date of Decision : 10-04-2000

Acts Referred:
Constitution of India, 1950 — Article 14

Citation : AIR 2000 Ori 134 : (2000) 90 CLT 560

Hon'ble Judges : Pradipta Ray, J;L. Mohapatra, J

Bench : Division Bench

Advocate : Pradip Mohanty, B.P. Ray, Pujari and B. Sahoo and S.R. Pattnail, L. Mishra, K.K. Jona and S. Mohanty, for the Appellant; Additional Government Advocate, Sisar Das, R.K. Mohapatra. A.K. Mohanty and A.K. Tandi, for the Respondent

Judgement

Mohapatra, J.—The petitioner in O.J.C. No. 589 of 2000 is a co-operative society registered under the Co-operative Societies Act. The petitioner in O.J.C. No. 1602 of 2000 is a partnership firm. Both the petitioners have challenged the award of a contract in favour of M/s. Jaiswal Ferrous Industries Ltd., described as opposite party No. 4 in both the writ applications.

2. The facts leading to filing of the writ applications are that due to non-disposal of materials, such as, condemned unserviceable machinery, automobile scraps, spares and components for crane, shovel and other types of machineries, pipe fitting materials, etc, stored with the Central Stores, Hirakud, the State Government was incurring huge expenditure, that is, about 50 lakhs per annum towards maintenance of stores at Hirakund. Therefore, a decision was taken by the State Government to dispose of all these materials through process of tender and pursuant to such decision, tender call notice No. 1 of 1999-2000 was published in national dailies as well as local newspapers. In response to such tender call notice, petitioners in both the cases, opposite party No. 4 and nine others submitted tenders. Out of 12 tenders received, 7 were declared invalid,

including that of the petitioner in O.J.C. No. 589 of 2000. The rest 5 tenderers are the following :

(1) M/s. N. H. L. Enterprises (petitioner in O.J.C. 1802/2000)

(2) M/s. Maheswari Brothers

(3) M/s. Vijay Kumar Agrawal

(4) M/s. Jaiswal Ferrous Industries Ltd. (opposite party No. 4 in both the cases)

(5) M/s. Sky Enterprises.

The upset price was fixed at Rs. 4,53,90,100/- and the prices quoted by the aforesaid 5 tenderers were as follows :

(1) M/s. N.M.L, Enter prisers Rs. 3,72,68,451/- (2) M/s. Maheswari Brothers Rs. 3.01.00.005/- (3) M/s. Vijay Kumar Agrawal Rs. 3,00,00,331/- (4) M/s. Jaiswal Fer rous Industries Ltd. Rs. 2,71,00,000/- (5) M/s. Sky Enterpri ses Rs. 2,52,00,000/-

Since the prices offered by all the above five tenderers were much less than the upset price, the firms were requested by the Chief Engineer vide letter dated 13-10-1999 to attend the office to the Chief Engineer on 26-10-1999 for negotiation. It is found from the record that letter issued to Sky Enterprises to attend the negotiation on 16-10-1999 was received back undelivered. The letter issued to M/s. Vijay Kumar Agrawal also was not issued in the correct address. However, on 26-10-1999 the petitioner in O.J.C. No. 1802/2000 submitted its revised offer of Rs. 3,75,99,451/- and the opposite party No. 4 submitted its revised offer of Rs. 3,75,00,000/-. After the said offers were placed before the State Level Committee for scrutiny, a decision was taken to go in for further negotiation, as two of the bidders, as stated earlier, had not been noticed of such negotiation. Accordingly, on 10-11-1999 letters were again issued inviting the aforesaid 5 tenderers to attend negotiation on 23-11-1999. Out of the 5 tenderers, petitioner in O.J.C. 1802/2000 submitted a revised offer of Rs. 3,79,99,451/-, opposite party No. 4 submitted revised offer of Rs. 3,01,00,000/-, and M/s. Maheswari Brothers submitted revised offer of Rs. 3,15,99,999/-. Since there were no other offers, the State Government decided to accept the offer of opposite party No. 4 and the said decision of the State Government to award the contract in favour of opposite party No. 4 is under challenge in both the writ applications.

3. So far as O.J.C. No. 589/2000 is concerned, the grievance of the petitioner is that it is a registered co-operative society and is exempted from depositing the Earnest Money Deposit (''EMD,'' for short) which is evident from the Resolution of the Government of Orissa in the Co-operation Department, dated 22-7-1995, annexed as Annexure-7 to the rejoinder filed by the petitioner, and, therefore, at the time of submission of tender the petitioner had not deposited the EMD as required under the tender call notice. The further grievance of this petitioner is

that its offer was Rs. 4,11,00,012/- which is such more than what has been offered by opposite party No. 4 even after second round of negotiation and, therefore, rejection of the tender submitted by the petitioner for not depositing the EMD as well as acceptance of tender for a much lesser amount are illegal and tainted by mala fide.

4. Opposite parties 1 to 3 and opposite party No. 4 have filed two separate counters in O.J.C. No. 589/2000. Opposite parties 1 to 3 in their counter have stated that the tender call notice specifically required the tenderers to deposit 5 per cent, of the bid value as EMD and the petitioner had not deposited the required EMD. So far as exemption from depositing the EMD is concerned, it is stated in the counter that the recommendation of the Co-operation Department may not be binding on all Departments and the said recommendation was not concurred by the Finance Department. Therefore, the same is not acceptable to opposite parties 1 to 3 in matters of tenders at hand. It is further stated in the counter that accepting the recommendation as binding, the concession that has been extended to the co-operative societies under the said Resolution is in respect of business deal of the State Government where the Government Departments procure materials from the co-operative societies only authorised to carry on trade relating to such items. The exemption of deposit of EMD is not applicable when the business deal related to sale of materials/commodities through competitive bids. On these grounds the State Government justified the action in rejecting the tender submitted by the petitioner,

5. Opposite party No. 4 in its counter has stated that there is a specific clause with regard to submission of EMD in the tender document and the said clause stipulates that if the tender is not accompanied by the required EMD, the same shall be rejected outright and, therefore, there was no illegality in rejecting the tender submitted by the petitioner. It is further stated in the counter that since there is no provision in the detailed tender call notice for exemption of EMD which has been approved by the Government with concurrence of the Finance Department, the exemption claimed by the petitioner is of no value. On the other hand, open Code specifically states that any tender submitted without the required EMD shall be rendered invalid. On such grounds it is stated that submission of EMD along with tender is mandatory and failure to deposit EMD makes the tender invalid.

6. We have heard the learned counsel appearing for the parties and have perused the records submitted by the learned Addl, Government Advocate pursuant to the direction of this Court. The tender submitted by the petitioner in O.J.C. No. 589/2000 has been rejected only on the ground that the said tender did not accompany EMD. From the note sheet we find that while scrutinising the tenders submitted by all the 12 tenders certain points were noticed and recorded in the note-sheet. So far as the petitioner in O.J.C. No. 589/2000 is concerned, the following is recorded in the note-sheet.

xxx xxx xxx" "(3) Welfare T. & --Offered price Multipurposes Rs. 4,11.00.012/-

Consumer --Percentage 9.45% less Society Ltd., --EMD : Claims exemp- Cuttack tion --STCC/ITCC, furnished --Agreed to deposit EMD, if required even exem pted, on getting intimation. --Signed Schedule B.C.D. --No special terms furni nished xxx xxx xxx"

It further appears from the note that another co-operative society, namely, M/s. Bajrang Labours'' Welfare Co-operative Society Ltd., Bhubaneswar, had offered the highest price and had claimed exemption from depositing the EMD as per the Resolution of the Co-operation Department. From the following facts it is clear that the petitioner was under bona fide Impression that it was not required to deposit the EMD along with the tender ;

(a) Resolution of the Co-operation Department dated 22-7-1995, Annexure-7 to the rejoinder.

(b) Letter of the Co-operation Department addressed to all the Departments of the Government dated 22-1-1994 (Annexure-4) in which all the Departments were intimated that the Consumer Co-operative Societies may be exempted from payment of EMD and security deposits at the time of submission of tender for various business deals with the Government.

(c) Letter written by the Chief Engineer, Mechanical to the Under Secretary to Government in the Co-operation Department seeking clarification as to whether the cooperative societies such as the petitioner and M/s. Bajrang Labours Welfare Co-operative Society are exempted from depositing EMD (Annexure-5).

(d) Reply to the said query dated 16-11-1999 given by the Assistant Registrar, Cooperative Societies, Cuttack, stating that such co-operative societies are exempted from depositing EMD (Annexure-6).

7. Learned Additional Government Advocate has placed much reliance on Annexure-A to the counter-affidavit filed by opposite parties 1 to 3 which is a letter dated 2-12-1999 written by the Deputy Secretary to Government in the Co-operation Department to the Directors, Text Book Production and Marketing, Orissa. Relying on the said letter, the learned Addl. Government Advocate submits that the Deputy Secretary in the Co-operation Department in the said letter has clarified that such exemption is available only at the time of purchase made by the Government Departments and does not apply to sale transactions by the Government, We also find from the resolution dated 22-7-1991 (Annexure-7) as well as the Gazette Notification dated 4-8-1995, Annexure-8 that the exemption is available only at the point of purchase and not at the point of sale. Therefore, so far as the present tender is concerned, the society was/is not exempted from depositing the EMD. However, we cannot also lose sight of the fact that not only the petitioner but also another cooperative society, M/s. Bajranj Labours Welfare Co-operative Society, was also under the impression that the resolution applies to sale also. The Chief Engineer himself was also in doubt as to whether the exemption is applicable in respect of sale made by the State Government and had sought for clarification. The Assistant Registrar of the Co-

operative Societies had also the impression that (t applied to the business deals with regard to sale and had accordingly intimated the Chief Engineer. Thus, the impression of the petitioner was bona fide and we cannot find fault with the petitioner for not depositing the EMD under a bona fide belief that it being a Co-operative Society was not required to deposit the EMD as per the said resolution. Apart from the said fact, we also find from the note-sheet that although the petitioner had claimed exemption from depositing the EMD, it had agreed to deposit the EMD, if required, on getting intimation. From the records as well as from the counter filed by opposite parties 1 to 3 it is clear that the tender submitted by the petitioner was rejected outright only on thq ground of non-deposit of the EMD and no intimation was sent to the petitioner asking it to deposit the EMD before rejection of the tender. We cannot also lose''slght of the fact that the offer of the petitioner was the highest amongst the three parties before us and the difference between the price quoted by the petitioner and the negotiated price offered by opposite party No. 4 is near about Rs. 3,00,000/-.

8. The learned counsel appearing for opposite party No. 4 argued that as the petitioner did not deposit the required EMD which is 5 per cent, of the bid value it could make any offer and the State Government was Justified in rejecting the tender on the ground of non-deposit of EMD as the tender call notice specifically stipulated that tender not accompanied by EMD shall be rejected outright. The learned counsel further submitted that the scope of interference by this Court in the matters of tender is very limited. In his note of submission he has referred to the decisions reported in Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others, : Bharati Shipyard Pvt. Ltd. Vs. Paradeep Port Trust and Another, : M/s. G. J. Fernandez Vs. State of Karnataka and others, G. J. Fernade v. State of Karnataka AIR 1981 SC 344: 1980 Lab IC 1367); Fertiliser Corporation Kamagar Union (Regd.), Sindri v. Union of India and Ramana Dayaram Shetty Vs. International Airport Authority of India and Others,

We have carefully gone through the said decisions. It is evident from the decisions reported in (1994) 6 SCC 651 : AIR1994 SCW 3344 (supra) that the Apex Court has laid down the principles to be followed by Courts while exercising its power of judicial review in matters of tender. Their Lordships have held that the principles of judicial review would apply to the exercise of contractual powers by the Government bodies in order to prevent arbitrariness of favouritism. Their Lordships, however, have further stated that there are inherent limitations in exercise of that power of judicial review. The right to refuse the lowest or any other tender is always available to the Government, but the principles laid down by Art. 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no quotation of infringement of Art. 14 if the Government tries to get the best price or the best question. The right to chose cannot be considered to be an arbitrary power. Though the Court is not sitting in appeal against the decision of the State Government in accepting a particular tender, it is open for the Court to examine the legality of the process adopted in accepting a tender. Their Lordships have specified the areas where the Court can interfere in the matters of tender viz. (a) where a decision making authority exceeds its power; (b) committed an error of law; (c) committed a breach of rules of natural justice; (d) reached a decision which no reasonable Tribunal would have reached; and (e) abused its powers.

10. There is no dispute with regard to limitations of this Court while deciding a case of this nature. We, however, cannot close our eyes if there is violation of the principles laid down in Article 14 of the Constitution while refusing a tender. In the present case, as is evident from the note-sheet, the petitioner not only claimed exemption from deposit of EMD, but also agreed to deposit the same in the event the petitioner was intimated that it was not entitled to any exemption. Admittedly the Department did not give any intimation to the petitioner to deposit the EMD before rejecting its tender. As observed by us earlier, the petitioner was under a bona fide belief that it was not required to deposit the EMD as per the resolution of the Co-operation Department. This belief cannot be said to be baseless or imaginary. EMD is required to be deposited to prevent frivolous and speculative offers and to test financial capacity of the offerers. When the petitioner expressly indicated that if required, it was ready to deposit the EMD before consideration of his offer, we find that the petitioner should have been given an opportunity of depositing the EMD before rejecting its offer particularly when it was about Rs. 30 lakhs more than the next offer, interest of the public revenue should not be ignored on mere technical ground. In view of discussions made above, and keeping in mind the offer of the petitioner which is almost Rs. 30,00,000/- more than the offer of opposite party No. 4, we are of the view that opposite parties 1 to 3 should go in for fresh negotiation. We accordingly direct:--The opposite parties 1 to 3 will hold fresh negotiation with the offerers whose claims were considered earlier and with the petitioner society if it deposits the required EMD within seven days from today. Fresh negotiation will be held on 26-4-2000. While taking a final decision the concerned authorities will keep in mind the upset price fixed and interest of the revenues.

11. We have not considered the case of Bajrang Labours Welfare Co-operative Society whose tender was also rejected for non-deposit of EMD as it had not offered to deposit EMD in the event exemption was not allowed.

12. The grievance of the petitioner in O.J.C. No. 1882 of 2000 is that the negotiation held between the petitioner in the said case and opposite party No. 4 was not in accordance with regular practice and the offer of opposite party No. 4 was illegally accepted without giving him an opportunity of taking part in the final stage of negotiation. We are not examining the merits of the case in view of the fact that is O.J.C. No. 589 of 2000 we have already directed that there shall be a fresh negotiation and to the said fresh negotiation the petitioner in the present case will also be invited.

13. With the aforesaid directions, both the writ applications are disposed of.

Pradipta Ray, J.

14. I agree

