

(2013) 07 CAL CK 0030

Calcutta High Court

Case No: F.M.A. No. 1939 of 2013 and C.A.N. No. 6074 of 2013

Rekha Tamang

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision: July 4, 2013

Citation: (2013) 4 CHN 547

Hon'ble Judges: Arun Mishra, C.J; Joymalya Bagchi, J

Bench: Division Bench

Advocate: Ashok Gupta and Sailesh Kumar Gupta, for the Appellant; Abhratosh Majumder, for the Respondent

Final Decision: Dismissed

Judgement

Arun Mishra, C.J.

Heard Mr. Gupta, learned Counsel appearing on behalf of the appellant and Mr. Majumdar, learned Counsel appearing on behalf of the State. In the instant appeal, the legality of the judgment and order dated 28.5.2013 passed by the Single Bench in W.P. 15653 (W) of 2013 dismissing the writ petition has been questioned.

2. The tender was invited for effecting the supply. Para "2" of the tender inviting notice provided that application for tender shall be accompanied by various documents such as, valid vat registration certificate, photocopy of the income tax return, PAN card, the attested photocopy of the memorandum of association and the last available audit report in case of firm/amalgamation of more than one firms and proof of authorised dealer or sub-dealer of reputed brand of cement of ACC, Ambuja, Lafarge or Birla and at the same time, condition No. 3(a) in the notice inviting tender is to the effect that the application shall be accompanied by a credential certificate of Rs. 35 lakhs in the shape of payment certificate for the similar type of supply made in a particular complete financial year either through a single supply order or through multiple supply order within the last two financial years.

3. The tender papers were not issued to the appellant/petitioner as he did not file the aforesaid credential certificate of Rs. 35 lakhs of having completed the similar type of supply within the last two financial years.

4. The petitioner has questioned the reasonableness of the condition 3(a) and contended that the same is violative of Article 14 of the Constitution of India.

5. The Single Bench has dismissed the writ petition. Being aggrieved by the said order of the Single Bench, the intra Court appeal has been preferred.

6. Shri Gupta, learned Counsel appearing on behalf of the appellant has submitted that condition is unreasonable and arbitrary and there is no rationality behind imposing the condition of credential certificate of Rs. 35 lakhs in the shape of payment certificate for the similar type of supply within the last two financial years. Earlier, the condition of last two financial years had not been imposed. It has been imposed for the first time in the NIT in question. It has been submitted that the condition is unreasonable and arbitrary. The petitioner has been illegally deprived of from participation by the aforesaid unreasonable and arbitrary condition. It is submitted that the petitioner had effected the supply to the extent of Rs. 1 crore during the year 2010-11. It was also submitted that no reason has been communicated to the petitioner for non-issuing the tender form. It was also submitted that condition of technically qualified bidders should not have been insisted at the time of supplying tender document itself. The tenders ought to have been accepted and thereafter technical bid evaluation ought to has been done. There cannot be any waiver of the fundamental right under Article 14 of the Constitution of India. The learned Counsel has also relied upon of the decision of the Hon"ble Supreme Court in [Rashbihari Panda etc. Vs. State of Orissa](#) . It has been submitted on behalf of the appellant/petitioner that the condition of "last two financial years" in condition No. 3(a) of the NIT could not have been imposed so as to encourage monopoly of the existing successful tenderers of the last two years. The interpretation of condition 3(a) as made is not proper condition of last two financial years and in respect of multiple supply orders.

7. Mr. Majumder, learned Counsel appearing on behalf of the respondent has supported the decision rendered by the Single Bench and submitted that the conditions of eligibility are within the realm of the contract and cannot be interfered by the Court by making judicial review. The condition No. 3(a) cannot be said to be illegal or arbitrary.

8. The condition No. 3(a) of the NIT dated 25.4.2013 read thus:

3. a) The application paper shall be accompanied by a Credential Certificate of Rs. 3500000/- (Rupees Thirty five lakhs) only which is in the shape of payment Certificate for the similar type of supply made in a particular complete financial year either through a single supply order or through multiple supply orders within the last two financial years. The credential should be issued by any govt. Agency not below the

office of the Executive Officer of the Panchayat Samity or the office of the Council Development Officer.

9. It is apparent from a reading of the aforesaid condition 3(a) that credential certificate of Rs. 35 lakhs in the shape of payment certificate for similar type of supply made in a particular complete financial year through single supply order or through multiple supply orders within the last two financial years was inserted. The rider of last two financial years is applicable for both where supply is made through a single supply order or through multiple supply order. There is independent requirement that such supply through single or multiple supply order should have been effected within the last two financial years. Thus, the submission to the contrary with respect to interpretation raised by the learned Counsel appearing on behalf of the appellant cannot be accepted.

10. The aforesaid condition has been questioned on the ground that the same being unreasonable and violative of Article 14 of the Constitution of India. Merely by the fact that the condition had not been imposed earlier. It cannot be termed as illegal, arbitrary or unreasonable in any manner. The condition appears to be quite reasonable one and in order to ensure the person making the supply currently. A credential certificate of Rs. 35 lakhs required within the period of last two financial years. Prima facie, the intendment appears to be the persons should be in business and must be supplying similar articles in recent past. The other conditions imposed in para 2(e) also indicates that the proof of authorised dealer or sub-dealer of reputed brand of cement of ACC, Ambuja, Lafarge or Birla was also necessary. In that connection, it cannot be said that the condition, which has been imposed in 3(a) is unreasonable or illegal.

11. It is also trite law that the conditions of inviting tender are with the realm of contract and are beyond the scope of judicial review, as laid down by the Hon'ble Supreme Court in [Tata Cellular Vs. Union of India](#) . The Apex Court has laid down that the terms and conditions of the tender are not to be interfered by the Court and the terms of the invitation of the tender cannot be open to judicial scrutiny because the invitation of tender is in the realm of contract. The Apex Court in Tata Cellular (Supra) has laid down thus:

94. The principles deducible from the above are:

- (1)The modern trend points to judicial restraint in administrative action.
- (2) The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made.
- (3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by *mala fides*.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Based on these principles we will examine the facts of this case since they commend to us as the correct principles.

12. It is not open for the Court to substitute its wisdom and to say that such experience of supply ought to have been insisted for the last period of five years or so. Applying the Wednesbury's principles of reasonableness, the decision cannot be said to be unreasonable which could not have been reached by a person of a reasonable prudence acting in reasonable manner. Thus, the condition is not amenable to judicial review and it is found to be appropriate and not arbitrary.

13. The learned Counsel appearing for the appellant has relied upon the decision of the Hon'ble Supreme Court in *Rasbihari Panda* (Supra), in which the facts were completely different. Tender was invited from persons desirous of purchasing Kendu leaves. The condition in instant case is not confined to the existing suppliers. The observations made by the Hon'ble Supreme Court that the exclusions of all persons interested in the trade, who were not in the previous year licensees, was *ex facie* arbitrary and it had no direct relation to the objective of preventing exploitation of pluckers and growers of Kendu leaves, nor it had any just and reasonable relation to the object sought to be achieved. The Apex Court further observed that the scheme adopted by the Government first of offering to enter into contracts with certain named licencees and letter inviting tenders from licences who had in the previous year carried out their contracts satisfactorily is liable to be adjudged void on the ground that it unreasonably excludes traders in Kendu leaves from carrying on their business. The Apex Court has laid down thus:

18. The classification based on the circumstances that certain existing contractors had carried out their obligations in the previous year regularly and to the satisfaction of the Government is not based on any real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved i.e.,

effective execution of the monopoly in the public interest. Exclusion of all persons entrusted in the trade, who were not in the previous year licensees is *ex facie* arbitrary; it had no direct relation to the object of preventing exploitation of pluckers and growers of kendu leaves, nor had it any just or reasonable relation to the securing of the full benefit from the trade to the State.

19. Validity of the law by which the State assumed the monopoly to trade in a given commodity has to be judged by the test whether the entire benefit arising therefrom is to enure to the State, and the monopoly is not used as a cloak for conferring private benefit upon a limited class of person. The scheme adopted by the Government first of offering to enter into contracts with certain named licensees, and later inviting tenders from licensees who had in the previous year carried out their contracts satisfactorily is liable to be adjudged void on the ground that it unreasonably excludes traders in Kendu leaves from carrying on their business. The scheme of selling Kendu leaves to selected purchaser or of accepting tenders only from a specified class of purchasers was not "integrally and essentially" connected with the creation of the monopoly and was not on the view taken by this Court in [Akadasi Padhan Vs. State of Orissa](#), protected by Article 19(6)(ii): it had therefore to satisfy the requirement of reasonableness under the first part of Article 19(6). No attempt was made to support the scheme on the ground that it imposed reasonable restrictions on the fundamental rights of the traders to carry on business in Kendu leaves. The High Court also did not consider whether the restrictions imposed upon persons excluded from the benefit of trading satisfied of the test of reasonableness under the first part of Article 19(6). The High Court examined the problem from the angle whether the action of the State Government was vitiated on the account of any oblique motive and whether it was such as a prudent person carrying on business may adopt.

14. It is apparent that the aforesaid observation of the Apex Court are in totally different factual matrix. Here, in the instant case, existing licences are not preferred the condition No. 3(a) is similar to everybody. Moreover, there is no averment of any bias against any person or of favour alleged in the matter. Thus, we find that the observations made in the decision by the Hon"ble Supreme Court are not at all attracted in the instant case.

15. Reliance has also been placed by the learned Counsel appearing on behalf of the appellant on a Single Bench decision of this Court in [Gouranga Lal Chatterjee and Others Vs. State of West Bengal](#), and the decision of the Hon"ble Supreme Court in the case of [Mrs. Maneka Gandhi Vs. Union of India \(UOI\) and Another](#), . In M/s. Gouranga Lal Chakraborty's case (Supra), this Court had observed that contracting power of the State is subject to Article 14 and the said Article is an antithesis to all shades of arbitrary and unreasonable power. It has also been observed that Clause 32, viz., the employer's right to accept or reject any tender without informing the affected bidder of the grounds of such rejection is *ultra vires* of Article 14.

16. The observations made in the case of M/s. Gouranga Lai Chakraborty (Supra) are not attracted in the instant case. There is no doubt that the contracting power is subject to Article 14 of the Constitution of India. However, at the same time, it cannot be said that due to non-supply of the reasons, petitioner has been prejudiced. The petitioner knew very well what conditions were required to be fulfilled for obtaining the tender form, which he did not fulfil. He very well knew the reasons and thus, has questioned legality of condition No. 3(a) which came in the way for supply of the tender document as petitioner was unable to file requisite eligibility document for supply of tender form as per condition No. 3(a). Obviously, he was ousted. Since he very well knew the reason for non-supply of tender document to him, it cannot be said that there is any violation of Article 14 of the Constitution of India.

17. The respondents have laid down terms and conditions clearly and also the eligibility criteria in the terms of conditions No. 1, 2 & 3 and also in the other conditions as mentioned in the NIT. Thus, the reasons are apparent and principles of natural justice cannot be said to be violated. We find no reason to accept the submission made by the learned Counsel appearing on behalf of the appellant. It was not necessary to supply the reason when petitioner very well knew why he was not qualified as he failed to qualify condition No. 3(a). The petitioner failed to file the requisite certificate as per condition No. 3 (a).

18. The submissions with respect to the waiver of fundamental right is equally futile, there being no question of waiver involved in this case. We find that the condition No. 3(a) of the NIT is not arbitrary, unreasonable and it cannot be said to be violative of Article 14 of the Constitution of India.

19. The submissions is made by the learned Counsel appearing on behalf of the appellant that technical bid ought to have been accepted without insisting as to the condition of eligibility criteria or condition No. 3(a) for supply of tender document. We find that since the tender conditions and issuance of tender is also in the realm of contract, it cannot be said that such conditions are illegal and arbitrary. Thus, the aforesaid procedure adopted for supply of tender document as provided in condition No. 3(a) cannot be said to be illegal and arbitrary in any manner whatsoever.

20. Thus, we find no ground to interfere with the order passed by the Single Bench. The appeal is liable to be dismissed and the same is accordingly dismissed.

21. In view of the dismissal of the appeal, connected application being CAN No. 6074 of 2013 is also dismissed.

22. However, the parties are to bear their own costs. Urgent photostat certified copy of this order, if applied for, be given to the appearing parties upon compliance of necessary formalities.