

Before S. S. Nijjar and J. S. Narang, JJ

M/S VISHVJYOTI TRADING LTD. AND OTHERS—
Petitioners

versus

STATE OF PUNJAB AND OTHERS—*Respondents*

C.W.P. No. 16298 OF 2004

14th October, 2004

Constitution of India, 1950—Art. 226—Govt. inviting tenders by issuing notice for supply of A.C. pressure pipes on annual rate contract basis—After submission of tender by petitioners rate contract settled between parties—Respondents inserting a condition for supply in the rate contract giving preference to SSI Units of the State and Supplier/Traders of the State—Challenge by Suppliers outside the State of Punjab—Whether the condition inserted by the Punjab State is arbitrary or irrational—Held, no—Condition based on a policy decision of the State of Punjab neither arbitrary nor irrational—No legal right of the petitioners infringed as there is no total embargo on the supply from them—Petition liable to be dismissed.

Held, that in the notice inviting tender, a preference clause has been inserted in favour of SSI Units/large scale units of Punjab State, respectively, for a period of seven years. It, therefore, appears that there is policy of the State of Punjab to give some protection to the industry based in the State of Punjab. Condition No. 9 only brings into effect the protection which is sought to be given to the small scale units of the State of Punjab. We are unable to accept that the aforesaid condition is either arbitrary, irrational or not based on a policy decision of the State of Punjab. A bare perusal of the Clause shows that it has been inserted on the basis of decision taken at the government level. Therefore, the condition is clearly based on a policy decision of the State of Punjab. It provides that first preference shall be given to SSI units. After the capacity of SSI Units is exhausted, the second preference will be given to the suppliers and traders based in Punjab. Thereafter, the supply orders will be given to SSI units outside the State of Punjab. The aforesaid preference cannot be said to be either irrational or arbitrary. We are of the considered opinion that no legal right of the petitioner has been infringed.

(Para 9)

A.K. Chopra, Sr. Advocate with

Ashish Chopra, Advocate, for the petitioners.

JUDGEMENT

(1) We have heard the learned counsel for the petitioners at length and perused the paper-book.

(2) In this writ petition under Articles 226/227 of the Constitution of India, the petitioners challenge Instruction No. 9 contained in Endorsement No. 13796-895, dated 6th October, 2004 in the rate contract dated October 6, 2004 (Annexure P-6), as ultra vires the Constitution of India and the terms and conditions of the notice Inviting Tender No. 7/2003/2004, as also of the rate contract.

(3) In the case of **Ramana Dayaram Shetty versus The International Airport Authority of India and others (1)** the Supreme Court considered the questions :—What are the constitutional obligations on the State when it takes action in exercise of its statutory or executive power? Is the State entitled to deal with its property in any manner it likes or award a contract to any person it chooses without any constitutional limitations upon it? What are the parameters of its statutory or executive power in the matter of awarding a contract or dealing with its property? After considering the entire matter, the Supreme Court has held as under :—

11. Today the Government, in a welfare State is the regulator and dispenser of special services and provider of a large number of benefits, including jobs contracts, licences, quotas, mineral rights etc. The Government pours for the wealth, money, benefits, services, contracts, quotas and licences

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some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, can it be said that they do not enjoy any legal protection? Can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure? Is the position

of the Government in this respect the same as that of private giver ? We do not think so. The law has not been slow to recognise the importance of this new kind of wealth and the need to protect individual interest in it and with that end in view, it has developed new forms of protection. Some interests in Government largess, formerly regarded as privileges, have been recognised as rights while others have been given legal protection not only by forging procedural safeguards but also by confining/structuring and checking Government discretion in the matter of grant of such largess. The discretion of the Government has been held to be not unlimited in that the Government cannot given or withhold largess in its arbitrary discretion or at its sweet will.....”

12. We agree with the observations of Mathew, J, In V. Punnan Thomas versus State of Kerala AIR 1969 Ker 81 (FB) that : “That Government, is not and should not be as free as an individual in selecting the recipients for its largess. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal”.

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But the Court, speaking through the learned Chief Justice, responded that the Government is not like a private individual who can pick and choose the person with whom it will deal, but the Government is still a Government when it enters into contract or when it is administering largess and it cannot, without adequate reason, exclude any person from dealing with it or take away larges arbitrarily.....

“The democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions..... The activities of the Government have a public element and, therefore, there should be fairness and equality.”

(4) Is the action of the State of Punjab in consonance with the law laid down by the Supreme Court is the significant question which arises in this writ petition. As the controversy revolves around the interpretation of NIT and the rate contract, the facts need to be noticed, but briefly.

(5) Petitioner No. 2 is the manufacturer of AC Pressure Pipes situated in Madhya Pradesh. Petitioners No. 1, 3 and 4 are trading in pressure pipes and are situated outside the State of Punjab. Respondents No. 1 to 3 issued notice inviting tender (for short "NIT") by tender notice NO. 7/2003/2004 for the supply of A.C. Pressure pipes duly ISI marked as per IS-1592-2003 (4th Revision) with latest amendments, if any, complete with A.C. coupling alongwith rubber rings duly ISI marked as per IS : 5382-1985 (1st Revision) (Amendment No. 1) (Re-affirmed-1998) Rype-3, with latest amendments, if any, suitable for use of potable water characteristics according to clause 4.2 of IS 1592-2003 (4th Revision) period from 6th October, 2004 to 5th October, 2005) on annual rate contract basis. Condition No. 17 of NIT was as under :—

"17. Price Preference :

The price preference as mentioned under the Condition No. 10 to 12 (of printed sheet attached) will be available to SSI Units/large scale units of Punjab State, respectively for period of 7 years. This period shall be calculated in case of Small Scale Units of the State from the date of their permanent registration in respect of specific item and in case of large scale units from the date of commencement of commercial production. The tenderers are therefore, required to submit documentary proof in this respect from the concerned authority alongwith their offers, failing which their claim for price preference will not be considered."

(6) The petitioners submitted the necessary tender and the rate contract was settled. It was uniform rate applicable to all the firms listed in the list of suppliers. By Condition No. 11, it was provided as follows :—

"11. The supplies will be made by the firms as per commitment of supply given by them as mentioned in Schedule "A" on first come first serve basis. The firm will maintain datewise

record of order received by them and supplies executed by them during each month. They shall also send quarterly statement of supply to this office.”

(7) Although only a price preference had been provided for in the notice inviting tender, the respondents had inserted Condition No. 9 in the rate contract which was as follows :—

“9. It has been decided at the Govt. level that while placing order first preference shall be given to SSI Units of the State of Punjab. After exhausting the supply capacity of the SSI Units of the State, then second preference be given to Suppliers/Traders who are Punjab based. After exhausting supply capacity of SSI Units and Traders of State only then supply order to outside SSI Units shall be placed.”

(8) Mr. A.K. Chopra, learned Senior Counsel appearing for the petitioners has vehemently argued that a commitment has been taken from the suppliers in terms of the condition No. 11 that the supply would be given by them on “First Come First Serve” basis. But at the same time, Condition No. 9 has virtually blocked the supply from the suppliers outside the State of Punjab. According to the learned counsel, the Condition No. 9 is not based on any policy or government circular under which the preference as envisaged under it could be given. The instruction is clearly beyond the scope of NIT. In fact, it is contrary to the terms as contained in the NIT. The instruction is arbitrary, irrational and discriminatory. The instruction has been “tailor-made” to favour a particular manufacturer. This instruction has been added for the first time in the rate contract issued by the State of Punjab. There is only one firm according to Mr. A. K. Chopra, which appears at Sr. No. 22 which falls within the definition of SSI. The Clause seems to have been inserted to benefit the supplier at Sr. No. 22 and the other two suppliers at Sr. Nos. 20 and 21 who are based within the State of Punjab. Other 24 suppliers from all India have been shut out. According to the learned counsel, the action of the respondents is indefensible and violates Article 14 of the Constitution of India. In support of the submission, the learned Senior Counsel has relied on the judgments of the Supreme Court in the case of **M/s Erusian Equipment and Chemicals Ltd. versus State of West Bengal and another (2)**,

Shri Harminder Singh Arora versus Union of India and others (3) and Poddar Steel Corporation versus Ganesh Engineering Works and others (4).

(9) Having considered the entire matter, we are unable to accept the submissions made by the learned Senior Counsel for the petitioners. In the notice inviting tender, a preference clause has been inserted in favour of SSI Units/large scale units of Punjab State, respectively, for a period of seven years. It, therefore, appears that there is a policy of the State of Punjab to give some protection to the Industry based in the State of Punjab. Condition No. 9 only brings into effect the protection which is sought to be given to the small scale units of the State of Punjab. We are unable to accept that the aforesaid condition is either arbitrary, irrational or not based on a policy decision of the State of Punjab. A bare perusal of the Clause shows that it has been inserted on the basis of decision taken at the Government level. Therefore, the condition is clearly based on a policy decision of the State of Punjab. It provides that first preference shall be given to SSI Units. After the capacity of SSI Units is exhausted, the second preference will be given to the suppliers and traders based in Punjab. Thereafter, the supply orders will be given to SSI Units outside the State of Punjab. In our opinion, the aforesaid preference cannot be said to be either irrational or arbitrary. We are of the considered opinion that no legal right of the petitioner has been infringed. The judgment of the Supreme Court in the case of **A.K. Mithiborwala and others** (*supra*) lays down the proposition that before a firm is blacklisted, it should be given an opportunity of hearing. In this case, we are not dealing with a situation where the petitioners have been blacklisted. There is no total embargo on the supply from the petitioners. In the case of **Shri Harmindre Singh Arora** (*supra*) it was held that the State or its instrumentalities cannot act arbitrarily when entering into contracts. In that case although no price preference had been incorporated in the tender notice, the concerned authority subsequently gave a 10% price preference to Government Undertakings. In the present case, the rate contract has been fixed after the price preference has been given to the SSI Units based in Punjab. Therefore, there is no addition or alteration in the NIT as vehemently argued by Mr. Chopra.

(3) AIR 1986 S.C. 1527

(4) (1991)3 S.C.C. 273

(10) In the case of **Poddar Steel Corporation Supra** the Supreme Court was dealing with a case where the appellant had given the highest tender. The tender of the respondent No. 1 and some other bidders were rejected as defective. The appellant had, therefore, deposited a sum of Rs. 15.00 lacs. Respondent No. 1 challenged the decision of the authority by filing writ petition before the Allahabad High Court contending that there is no defect in the tender. It was also argued that the tender of the appellant could not have been validly accepted as the necessary condition of payment of Rs. 50,000 as earnest money with the tender had not been complied with. The only defect in the tender of the appellant was that it was accompanied by a cheque of the Union Bank of India and not of the State Bank of India. Therefore, Clause 6 of the Tender had not been obeyed literally. In the facts and circumstances of that case, the Supreme Court held as follows :—

“6..... As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case, the authority issuing the tender may be required to enforce them rigidly. In the other cases, it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases.....”

(11) In our opinion, the aforesaid observations do not advance the submissions of Mr. Chopra any further. Condition No. 9 of the rate contract is clearly in furtherance of Condition No. 17 of NIT. We find no inconsistency in both the clauses. We are unable to hold, as vehemently argued by Mr. Chopra, that condition No. 9 has resulted in frustration of the entire contract. In support of the submission, the learned counsel had placed strong reliance on Condition No. 11 of the rate contract. In our opinion condition No. 11 does not advance the case of the petitioners. It takes the commitment from the suppliers to give the supplies on “First Come First Serve Basis”. It is not a condition

imposed on the intending purchasers to place orders with the firm that first approaches them with the supplies. If that were the intention, the commitment would have been taken from the proposed buyers and not from the proposed suppliers. The choice is given to the purchasers for placing orders with the suppliers. It is not vice versa. To interpret the clause in any other manner would be to do violence to the plain language of the clause. The Clause is wholly unambiguous. Therefore, it has to be interpreted by giving the words their natural meaning. It clearly provides that the supplies will be made by the firms as per commitment of supply given by them as mentioned in Schedule A. The aforesaid Schedule merely sets out the commitment of the proposed suppliers. There is no corresponding commitment on the intending purchaser. The Clause further provides that the firm will maintain date-wise record of orders received by them and the supplies executed by them. Quarterly, statements of the supplies sent are also to be submitted to the Assistant Controller, Punjab. It is only when the quotations are accepted by the Controller, that binding contract is created between the State of Punjab and the supplier. We are, therefore, unable to hold that any legal right of the petitioners have been infringed. Having been listed in the firm of suppliers in the rate contract, merely makes petitioners eligible suppliers. It creates no corresponding obligation on the State of Punjab to necessarily place orders for supplies with any of the firms mentioned in the list of suppliers. We are of the considered opinion that the action of the respondents fully satisfies the test of "reasonableness" as laid down in the case of **Ramana Dayaram Shetty** (*supra*) by the Supreme Court. The action of the respondents cannot be said to be whimsical or fanciful. There is a rational nexus with the object sought to be achieved under the State Policy. Therefore, the action cannot be said to be either unreasonable or arbitrary.

(12) In view of the above, we find no merit in the writ petition and the same is dismissed.

R.N.R.