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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Date of Decision: 12.02.2013

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W.P.(C) 5709/2012

MISRILALL MINES PVT LTD AND ANR

..... Petitioners

Through: Mr. S. Dasgupta, Mr. Sandip Kr. Dutta &
Mr. Siddharth Gautam, Advs.

versus

MMTC LTD AND ORS

..... Respondents

Through: Mr. Sanjeev Puri, Sr. Adv. with
Mr. Gautam Awasthi, Adv. for R-1 to 5.
Mr. Sunil Kumar, Adv. for R-6.

CORAM:

HON'BLE MR. JUSTICE SANJAY KISHAN KAUL

HON'BLE MS. JUSTICEINDERMEET KAUR

1. The petitioner No.1 claims to be a producer of Friable Chrome Ore and Chrome Concentrate having a mine containing natural reserve in the State of Orissa. Respondent No.6/Union of India constituted, designated and nominated respondent No.1/MMTC as the sole canalizing agency under the Export & Import Policy framed from time to time under the Foreign Trade (Development & Regulation) Act, 1992 (hereinafter referred to as the 'said Act').
2. The dispute originally arose on account of a meeting of Chrome Ore Producers held on 10.7.2012 wherein representatives of petitioner No.1 were present. The minutes recorded of the said meeting show that when respondent No.1 introduced e-auction method for sale of chrome ore and chrome ore concentrates to seven enlisted empanelled buyers, the same was challenged by the petitioners by filing a writ petition before

the High Court of Calcutta. The said writ petition is stated to be still pending though no interim orders were granted in those proceedings. Petitioner No.1 is stated to have sent communication to respondent No.1 suggesting that a global tender with certain conditions would be the appropriate methodology rather than having an empanelled list of buyers who would be entitled to purchase through the process of e-auction. The views expressed by the representatives of other sellers are also noticed in the said minutes.

3. Petitioner No.1 claims that though the e-tender system was introduced by respondent No.1, later on the said respondent exempted petitioner No.1 from reserve price fixation and also online forward auction with regard to the export of cargo of petitioner No.1. However, practically speaking petitioner No.1 was not permitted to make export on one pretext or the other.
4. The respondent No.1 sought to introduce global e-tender system for export vide communication dated 20.7.2012. The said letter reads as under:

“MMTC LOGO

By Courier

No.MMTC/2012-13/CR/7554

20th July, 2012

To,
Shri S.K. Jain,
Director, M/s. Misrilal Mines Pvt. Ltd.,
“MINERAL HOUSE” 27 A, Camac Street
KOLKATA-700016.

Sub: Global E tender for export of Chrome ore/Concentrate

Dear Sir,

During the Chrome Producers Meet held on 10th July, 2012, the selling

mechanism of chrome ore and chrome concentrate was discussed. Besides in the pre bid conference held on 15th June, 2012 the prospective bidders had also suggested for adoption of global tender for exports of chrome ore/concentrate.

Now it has been decided that MMTC shall invite global E tender for sale of chrome ore/concentrate offered quantity by the suppliers. There shall be two bid systems (Part I: Technical Bid and Part II: Price Bid) in the tender. The brief details of Global tender are as under:

- i) **TECHNICAL BID**
Bidder shall fulfill the following criteria and submit supporting documents in tender box.
 - (a) Turnover: Minimum average annual turnover of US\$50 millions (Average turnover for last 3 years; in case of years of operation being less than 3 years, average of completed years of operation).
 - (b) Networth: Minimum networth of US\$ 5 million as on last annual balance sheet.
 - (c) Past experience: Minimum experience of one year in minerals business.
 - (d) Credit rating: Minimum 'satisfactory' or equivalent (i.e. from D&B, S&P, Moody's ICRA, CRISIL, CARE etc.).
 - (e) Bank reference report along with letter of credit limit.
 - (f) EMD: Bidder shall submit an EMD for amount equivalent to 3% of the cargo value in the form of BG/FUND TRANSFER.
 - (g) Performance guarantee: An undertaking to furnish PBG for 10% of the total contract value.
 - (h) Payment term: An undertaking to make payment through an irrevocable letter of credit with TT reimbursement clause. Load port results are final and LC shall be negotiated for 100% payment on Loadport results basis.
 - (i) MTPL, Singapore a 100% subsidiary of MMTC will be exempted from submission of security deposit, performance guarantee bond and

establishment of letter of credit towards the value of cargo.

ii) **PRICE BID (E-TENDER MODE)**

Bidder shall submit Price bid in MMTC e-portal and indicate prices in USD per MT FOBT, Paradip

MMTC shall endeavour to issue global tender at least twice in a calendar quarter. The global tender shall be kept open for minimum 21 days. The bidder shall submit their technical bid in physical mode in the drop box and price bid through electronic mode in our E portal. The successful bidder shall furnish PBG within 10 calendar days from the date of communication.

In view of the above, we request you to kindly arrange to intimate us the following:

1. Quantity to be offered for export during the quarter.
2. Lotwise quantity details.
3. Complete physical and chemical specifications.
4. Shipment schedule.

Kindly arrange to send your offer on or before 24th July, 2012.

Thanking you,

Yours faithfully,
For MMTC Ltd.
Sd/-

(A Hembram)
Dy. General Manager (Minerals)”

5. The petitioner is now aggrieved by the introduction of clauses (a) to (d) of condition (i) “Technical Bid”, which are stated to be impeding competition. It is the say of the petitioners that the objective of any process for the benefit of respondent No.1 should be to get the best possible revenue and security for the said revenue, an aspect stated to be

set out in clause (h) of condition (i). The petitioners want the right to locate its prospective foreign buyers at such price which may be mutually agreed to between the parties and not to disallow the petitioners from exporting their cargo for want of compliance of clauses (a) to (d) of condition (i).

6. We have noticed the contentions aforesaid of learned counsel for the petitioners on 12.9.2012 while issuing notice and had directed by an interim order that, in the mean time, offer made by the petitioners vide annexure P-6 be examined by respondents 1 to 5. This annexure P-6 was qua the interest expressed by one of the foreign buyers Avani Resources of Singapore made through their letter dated 26.6.2012 showing interest for purchasing the material of the petitioners.
7. We are informed that insofar as this communication is concerned, Avani Resources satisfied clauses (a) to (d) of condition (i) and the exports were made.
8. The writ petition has been contested by the respondents on various accounts including of misleading the Court, an endeavour at forum shopping in view of the earlier petition filed in the Calcutta High Court and mixing up the issues of the earlier enlisted seven (7) overseas buyers under the e-auction process as compared to the current endeavour of a global tender through e-process. Another serious objection raised by the respondents is qua the *locus standi* of the petitioners as according to the respondents, if anyone can have objections as to the terms & conditions sought to be introduced, being clauses (a) to (d) of condition (i) it is the buyers and not the sellers like petitioner No.1.
9. Learned senior counsel for respondents 1 to 5 sought to canvas before us that in the capacity of a canalizing agent, petitioner No.1 enters into

separate contracts with the buyers and sellers. It, thus, has obligations towards both. Once there are buyers available in the market as per the terms & conditions set out by respondent No.1 as a canalizing agency, the purchase offers are then put up to the sellers like petitioner No.1. It is, thus, his say that the discretion lies with respondent No.1 to lay down such terms & conditions as would secure the payment and in order to deal with the category of buyers, terms & conditions can be set out by respondent No.1.

10. Learned senior counsel for respondents 1 to 5 seeks to rely upon the judgement of the Supreme Court in Michigan Rubber (India) Ltd. Vs. The State of Karnataka & Ors. (2012) 8 SCC 216. Learned counsel has drawn our attention to the observations made in para 21 of that judgement which quotes the conclusion from Jagdish Mandan Vs. State of Orissa & Ors. (2007) 14 SCC 517 as under:

“21. xxxx xxxx xxxx xxxx xxxx xxxx xxxx xxxx xxxx

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made ‘lawfully’ and not to check whether choice or decision is ‘sound’. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains

out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached';

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

In fact, references have been made to different pronouncements and principles culled out in para 23 as under:

"23. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.”

Lastly para 35 has been referred to which states as under:

“35. As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonable. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been

fair, wiser or logical. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, CMG consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail and for specifying these two conditions regarding pre-qualification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or *mala fide*.”

11. We have heard learned counsel for the parties. We have also taken note of the submissions of the learned counsel for the petitioners that respondent No.1 cannot have an uncanalized power as the power has been conferred under the said Act by the Government of India and the function of respondent No.1 is to only carry out the export and import policy of the Central Government. We are, however, of the view that as far as the controversy in the present writ petition is concerned, it really pertains to the mode and manner in which respondent No.1 seeks to work out its role as a canalizing agency in terms of the export and import policy. The petitioner No.1 had a grievance with the earlier policy enlisting seven (7) buyers. It is the petitioners who proposed that global tender would be the answer. Such a course of action was accepted by respondent No.1. Of course, learned counsel for the petitioners submits that the proposal for the global tender through e-process was not accompanied with suggestions or a consent on the part of the petitioners qua clauses (a) to (d) of condition (i) but what we have to consider is whether the conditions so imposed can be said to be so arbitrary or illegal that no reasonable person could come to the conclusion of framing such a policy (Wednesbury’s principle) or that the terms & conditions have been tailor made to suit a particular person/entity [Decision Oriented Systematic Analysis (DOSA)].

12. The averments made in the writ petition do not seek to even suggest the second one. It is within the parameters of the first that learned counsel for the petitioners has made an endeavour to bring his case in. It is also cannot be disputed that it is not the function of this Court to sit as an appellate court over policy decisions and it is within the domain of respondent No.1 to lay down the policies. It is true that respondent No.1 holds a dual obligation arising from the role it performs, i.e., the first one arising from the process culminating in the contract with the buyer and the second one when those offers are put to the sellers. In order to safeguard its commercial interests, insofar as the contract with the buyer is concerned, clauses (a) to (d) of condition (i) have been inserted as part of "Technical Bid". No doubt clauses (g) & (h) of condition (i) also seek to safeguard the interest of respondent No.1 but then it cannot be said that respondent No.1 is devoid of the authority of creating additional assurances to safeguard its commercial interests as is sought to be done by clauses (a) to (d) of condition (i).
13. There is also force in the contention of the learned senior counsel for respondents 1 to 5 that petitioner No.1 cannot really make a grievance as a seller as it is the buyers who can be aggrieved by the terms & conditions. It cannot be that a proxy battle can be fought by petitioner No.1. Of course interest of petitioner No.1 is to safeguard its economic interest but that cannot be at the cost of compromising the financial interest of respondent No.1 as a canalizing agent who has taken steps to safeguard those interests.
14. Insofar as proceedings at Calcutta are concerned, learned counsel for the petitioners fairly stated that the petition filed has become infructuous by reason of the fact that the earlier policy stands amended and the present endeavour being one arising from a fresh policy, the petitioner was

within its right to assail the new policy.

15. We are, thus, of the view that respondent No.1 acted within its domain to lay down terms & conditions for safeguarding its interest qua independent contracts with the buyers and sellers separately.
16. We are, thus, not inclined to exercise jurisdiction under Article 226 of the Constitution of India.
17. The writ petition is dismissed leaving the parties to bear their own costs.

SANJAY KISHAN KAUL, J.

FEBRUARY 12, 2013
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INDERMEET KAUR, J.