

Court No. - 16

Case :- WRIT - C No. - 1048 of 2002

Petitioner :- M/S Narain Construction Through Its Partner Lucknow

Respondent :- State Of U.P. Though Secy. Audyogik Vikas
Lucknow And Anothe

Counsel for Petitioner :- G.S.L. Verma,Kaushal Kishore,R.K.
Srivastava,Rakesh Kumar Chaudhary

Counsel for Respondent :- C.S.C.,Dipak Seth,Lohitaksha
Shukla,Sanjay Kumar,Surangama Sharma,Rakesh Kumar Singh

Hon'ble Ashwani Kumar Mishra,J.

Hon'ble Samit Gopal,J.

1. The Indian Turpentine and Rosin Company Ltd., Clutterbuck Ganj, Bareilly was a Government undertaking that had been declared *sick* under the Sick Industrial Companies Act (SICA),1985 (hereinafter referred to as *sick Government company*). Proceedings for its revival were pending before the Board of Industrial and Financial Re-construction (BIFR). Secretary, Department of Industrial Development of Government of U.P. invited tenders vide memorandum of information (Annexure No.2 to the writ petition) for takeover/sale of the *sick Government company*. Offers were invited from interested parties for takeover of the sick Government company. Items included in the tender notice consisted of factories; distillery (alcohol) unit and ETP; other land and building consisting of (a) head office and (b) hospital compound.

2. The petitioner before this Court is a partnership firm, which submitted its bid in respect of land and building of (a) head office

and (b) hospital compound. The head office land and building included an area of 19260 sq. mts. and its reserved price was fixed at Rs.116.443 lacs. The other item in respect of which the petitioner submitted its bid was the land and building included in the hospital compound ad-measuring 11362 Sq. mts. having reserved price of Rs.67.916 lacs.

3. The advertisement specified that tendering party had to submit bid along with earnest money of 2.5% of the reserve price by way of a bank draft in favour of U.P. Government. Clause (III) of the terms and condition of the advertisement specified general conditions. Clauses 4 and 5 of Clause (III) reads as under:-

"4. The Government reserves the right to reject all or any tender without assigning any reason thereof. The Government also reserves the right to sell all plants/blocks together or any plant/block seperately.

5. Payment is to be made as follows:

20% of the amount within one month. There will be moratorium of one year. Remaining amount is to be paid in 3 equal yearly instalments with 14% interest on balance amount."

4. It is apparent that in addition to the bids invited for the *head office* and *hospital compound* for which petitioner had submitted its bid, the advertisement also invited bids for distillery (alcohol) unit and ETP for which the reserved price was fixed at Rs.1750.56 lacs.

5. The bids submitted by the petitioner pursuant to the above advertisement was considered by the State Government vide Government Order dated 21.12.2001. In so far as the offer submitted by the petitioner is concerned, the State Government noticed the bid amount for the two heads of property amounting to Rs.158.20 lacs and Rs.82.94 lacs and observed that upon deposit of the entire amount in one lump-sum, the bid of the petitioner be

accepted. It is this order of the State Government of 21.12.2001 with which the petitioner company is primarily aggrieved on the ground that Clause 5 (III) providing for deposit of bid money in installment has been modified.

6. The basis of challenge to the decision of the State Government is the fact that in respect of distillery alcohol unit, the State Government permitted the deposit to be made by other bidder M/s Superior Industries of 20% bid amount initially and after one year moratorium deposit the balance amount in three installments. The installments were to be paid along with 14% interest. Clause-2 of the Government Order dated 21.12.2001 in respect of distillery unit is also reproduced:-

“2. डिस्टिलरी अल्कोहल इकाई व ईंटी०पी० जिसकी भूमि, भवन तथा प्लान्ट व मशीनरी के लिये मै० सुपीरियर इण्डस्ट्रीज लि० का रु० 1106.00 लाख की प्राप्त निविदा एवं उसमें निविदा की 20% धनराशि जमा करने के बाद एक वर्ष के मोरेटो रियम के पश्चात् 6 समान किशतों में वसूल की जाये। किशतों में वसूल की जाने वाली धनराशि पर 14% वार्षिक ब्याज देय होगा। इससे पहले तीन सप्ताह के अन्दर इस कम्पनी द्वारा एक नियत समय सीमा के अन्दर पुनर्वासित करने के सम्बन्ध में मै० सुपीरियर इण्डस्ट्रीज लि० से प्रतिबद्धता का एक बाध्यकारी पत्र *binding letter of commitment* प्राप्त कर लिया जाये।”

7. Attention of the Court has been invited to the fact that in respect of the distillery unit, which was also an item specified in the same advertisement, ultimately, a decision has been taken to transfer the distillery and the effluent treatment plant in favour of M/s Superior Industries by permitting it to deposit the bid amount in six installments after initial deposit of 20% bid money with the moratorium of one year, but similar treatment has been denied to the petitioner. It is urged on behalf of the petitioner that this discriminatory treatment meted out to the petitioner is wholly arbitrary and cannot be sustained. In support of such contention, the petitioners have relied upon the judgments of the Supreme Court in *Tata Cellular Vs. Union Of India* 1994 SCC (6) 651, *Union*

of India Vs. International Trading Co. (2003) 5 SCC 437, Association of Registration Plates Vs. Union of India and others 2005 1 SCC 679 and Tejas Construction and Infrastructures Pvt. Ltd. Vs. Municipal Council, Sendhwa & another SLP (C) No.16175 of 2011.

8. The above submission of the petitioner is opposed by the State as well as respondent No.3 i.e. the sick Government company. It is contended on behalf of the respondents that the sick Government company was registered under the provisions of Indian Companies Act and was declared sick under the provisions of the Sick Industrial Companies Act of 1985 (SICA). The matter relating to its revival was placed before the BIFR relating to transfer of the distillery as well as other assets of the sick Government company.

9. The State Government in respect of the distillery had unequivocally undertaken to convert the distillery from industrial alcohol to potable alcohol and this assurance was also mentioned in the advertisement. The transfer of distillery was otherwise to be made as a running concern. It is submitted that the transfer of distillery was a separate and distinct part of the transaction inasmuch as the unit was being transferred on as is where is basis as a going concern. It was with the intent to revive the unit as a running concern that the advertisement contained a clause permitting the user to be altered from industrial alcohol to potable alcohol. Learned counsel for the respondent Company submits that the offer of M/s Superior Industries was for taking over the distillery as a running concern. However, the State Government, subsequently, refused to alter the user from industrial alcohol to

potable alcohol and such decision of the Government was also approved by the BIFR on 23rd of July, 2002. This decision of BIFR was put to challenge before this Court in Writ Petition No.2779(M/S)/2002. The writ petition of M/s Superior Industries was allowed by the learned Single Judge of this Court on 17.12.2002. Operative portion of the order dated 17.12.2002 is reproduced hereinafter:-

"In view of the facts and circumstances mentioned above, the writ petition is allowed. The orders dated 23.7.2002 passed by the Board for Industrial & Financial Reconstruction, Bench-III, New Delhi and dated 27.8.2002 passed by Sri Bhupendra Singh, Secretary, Government of U.P., Lucknow, are quashed. The opposite parties no.1 & 2 are directed to convert the industrial alcohol licence into potable alcohol licence and to execute agreement and hand over possession to petitioner within 6 weeks and the petitioner shall also deposit 20% of the bid-amount with the State Government as terms of the tender within three weeks from the date of receipt of this order. The petitioner shall also be granted facility of deferred payment of government revenue for a period of five years as the industrial unit whose revival is sought, is sick and therefore, if the facility of deferred payment of government revenue is granted to the petitioner, it will aid and abet in the revival of the sick industrial unit. The BIFR is also directed to monitor the scheme approved by it for revival/rehabilitation subject to the directions given above and also follow the provisions of the Act."

10. Pursuant to the aforesaid direction of the writ Court, the assets of the company under the sick company insofar as it is related to the distillery was dealt with.

11. As against M/s Superior Industries Ltd., the bid of the petitioner company was in respect of the land and building consisting of head office and the hospital compound which were not being transferred as an ongoing concern. It is pointed out that the proposal of the Government to transfer the property aforesaid was placed before the BIFR which passed an order on 12th of November, 2001, whereby the proposal to transfer land and building was by way of a lump-sum payment. It is submitted that the decision of BIFR dated 12.11.2001 is not under challenge. It is submitted that in the absence of there being any challenge to the order of BIFR

which permitted the land and building to be transferred by way of lump-sum payment pursuant to bid the prayer of the petitioner for claiming parity with M/s Superior Industries is misconceived and the petitioner having otherwise failed to honour the terms indicated by the BIFR cannot now be permitted to raise any claim in respect of such property. The respondents also submit that the petitioner had merely deposited Rs. 4.63 lacs as 2.5% of the bid amount and has not deposited any further amount on account of the pending litigation. It is submitted that the value of the property has increased manifold and, therefore, it is inequitable otherwise for such property to be transferred to the petitioner on the terms offered by. The stand taken by the respondents-Company is adopted by the State Counsel who also submits that on account of subsequent development, particularly the change in the valuation of the property over a period of time, it would not be just for this Court to exercise its jurisdiction under Article 226 of the Constitution in favour of the petitioner.

12. The respondents rely upon the decision of the Supreme Court in Tata Motors Ltd. Vs. The Brihan Mumbai Electric Supply & Transport Undertaking (Best) and others decided on 19.05.2023 in Civil Appeal No.3899 of 2023, State of Punjab and others Vs. Mehar Din: Civil Appeal No(s).5861 of 2009, Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. and another (2016) 16 SCC 818 as well as Tejas Constructions and Infrastructure Pvt. Ltd. Vs. Municipal Council, Sendhwa and another (2012) 6 SCC 464.

13. In reply, learned counsel for the petitioner states that the petitioner has always been ready and willing to deposit the bid

amount in terms of the advertisement and merely on account of delay in disposal of the petition, the equities do not turn against the petitioner. It is submitted that the petitioners are willing to deposit the due amount along with 14% interest. It is further stated that the condition of tender unilaterally cannot be changed by the respondent.

14. We have heard Sri Rakesh Kumar Chaudhary along with Sri Ansuman Patel for the petitioner as well as Sri Rakesh Kumar Singh along with Ms. Surangama Sharma, learned counsel for the sick Company as well as Sri Rahul Shukla, learned State Counsel for the State of U.P. and have perused the materials placed on record.

15. The controversy raised in the present writ petition is with regard to the sale of some of the property of sick Government company in question. The records of the writ petition reveal that offers were invited from the interested parties for takeover of the sick Government Company as an ongoing concern. The surplus land and building of the sick Government company was also offered for sale to interested parties. The description of the properties have been specified in the advertisement. Item No.1 of the advertisement is the factories which is sub divided in two parts i.e. rosin and other units and distillery (alcohol unit and ETP). The other part of the advertisement is in respect of land of building.

16. We have already noticed that petitioner's bid was in respect of land and building of *head office* and the *hospital compound* which consisted of two parcels of land with buildings constructed there. The advertisement also contains terms and conditions including

Clause 5(III) of the conditions which provides for initial deposit of 20% of the amount within one month. A moratorium of one year is then provided whereafter the remaining amount is to be paid in three equal yearly installments with 14% interest on the balance amount.

17. So far as the petitioner is concerned, it has submitted bids in respect of head office and hospital compound, which is above the reserve price specified in the advertisement. This bid of the petitioner is directed to be accepted on the condition that the entire bid amount be deposited in one go. This is pursuant to the Government Order under challenge in this writ petition. The Government Order relies upon the order passed by the BIFR dated 12.11.2001, according to which the bid could be accepted in the event the entire bid money is deposited in one go. The order dated 12.11.2001 of the BIFR also contains a note that in case of any problem, the Government of U.P. can come and join discussion with the Hon'ble Members.

18. The petitioner claims parity with the bidder of distillery (alcohol) unit and ETP i.e. M/s Superior Industries and claims benefit of Clause 5(III) of the general condition of tender which permitted deposit of 20% of the amount within one month, whereafter there has to be a moratorium of one year and the remaining amount was to be paid in three equal yearly installment with 14% interest with the balance amount.

19. In order to appreciate the submissions advanced on behalf of the petitioner, a careful analysis is required to be made of the

advertisement itself. The advertisements is primarily in two parts. The first part is takeover of rosin unit and distillery unit of the sick Government Company as an ongoing concern. The second part is in respect of surplus land and building of the sick Government Company offered for sale to interested parties. So far as the first part of the property is concerned, the unit was to be taken as an ongoing concern and the object of the respondents was to facilitate the transfer of the distillery unit as an ongoing concern. Clause 5(III) of the general conditions of contract providing for 20% deposit of the bid amount within one month followed with moratorium of one year apparently is intended to regulate the sale of first part of the property which was to be transferred as an ongoing concern.

20. The moratorium of one year is indicative of the fact that the object of transfer was to revive the sick unit. That was the objective of the provisions of the SICA Act so that the sick unit itself could be revived. It is in that context that the respondents were to consider the offer made by M/s Superior Industries Ltd.

21. In so far as the transfer of distillery is concerned, M/s Superior Industries made its bid on the promise made by the respondent that they would allow the user of the distillery to be changed from industrial alcohol to potable alcohol. The State Government having made this specific representation in the advertisement, subsequently, altered its stand and refused permission to run the unit as a potable unit. It is in that context that the controversy was brought before this Court in the writ petition and the same was

allowed vide order dated 17.12.2002, which is already extracted above.

22. So far as the petitioner is concerned, its offer was not made in respect of the transfer of unit as a running concern. Its offer was only in respect of land and bidding. The object of moratorium or facility to pay the amount in installments was not to be applicable in respect of sale of land and building. The State Government accorded consideration to the bid submitted by the petitioner, for the purpose it was made, and the provisions of moratorium of one year and the benefit of installment was not extended to the petitioner as it was not a bid in respect of transfer of a running concern. The Government otherwise reserved the right to sell all plants or plots together or reserved the right to reject all or any of the tender in the contract. Though, this Clause cannot be treated as conferring absolute power on the respondents to change the bid but some discretion would have to be conceded to explain the conditions of contract and apply its provisions purposefully. The interpretation made by the State is in the context of the object for which the sale itself was to be made.

23. Since, the offer of the petitioner was in respect of the immovable property, neither the moratorium was relevant nor the condition of deposit of balance amount in installment could be claimed as a matter of right, inasmuch as deposit of amount in installments was a condition attached to the clause providing for moratorium and was intended in case of transfer as a running concern. Clause 5, therefore, cannot be made applicable to the petitioner as its intendment was to regulate the transfer of concern

as a running unit and not as a transfer of immovable property. The decision taken by the BIFR vide order dated 12.11.2001 is otherwise not under challenge. This decision of the BIFR is within the knowledge of the petitioner yet no challenge has been made to it. Under the provisions of SICA Act no property could otherwise be transferred without the approval of the Board. The decision of the State in declining to grant permission to the petitioner to deposit the amount as per Clause 5 cannot be said to be arbitrary or unreasonable. The law otherwise recognizes some play in joints on part of the State and its authority while dealing with transfer of State largesses. It is otherwise not the case of the petitioner that the decision of State was actuated by any malice nor any allegations of malafide etc. has been made.

24. We otherwise find that the petitioner has only deposited Rs.4.62 lacs as earnest money on 16.08.2001. On account of the ongoing dispute of the two parcels consisting of *head office* and *hospital compound* for the last nearly 24 years the value of the property has allegedly increased by almost forty times. In the affidavit of the respondents, it is stated that the prices have multiplied by more than 40 times. Once, we find that the decision of the respondents is not arbitrary or actuated by malice, we are not inclined to interfere in the writ petition, particularly, when substantial public interest otherwise would be sub-served, if the respondents are permitted to deal with the property, afresh. We also make it clear that any transfer of the property by the respondents would only be in a transparent manner in accordance with the law and opportunity would be given to one and all including the petitioner to submit its bid. The amount deposited by

the petitioner as earnest money would be adjusted against the fresh exercise undertaken by the respondents or else the respondents would return the money, on the request of the petitioner along with bank rate of 9% interest.

25. Though, various judgments are relied upon by the petitioner and the respondents, in support of their case, but in view of the settled legal position that any transfer of State largess can only be in a fair and transparent manner, and the consideration of petitioner's case being consistent with it, no further reference of cases are required to be made in this judgment.

26. In view of the above deliberations and discussions, this writ petition fails and is dismissed, in light of the observations made above. The interim order dated 27.02.2002 stands discharged.

Order Date:- 18.11.2024
Anurag/-

(Samit Gopal, J.) (Ashwani Kumar Mishra, J.)