IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.18712 of 2018 (O&M)

Date of Decision : 14.08.2018

M/s Goverdhan Mines & Minerals

....Petitioner

Versus

State of Haryana and others

....Respondents

CORAM : HON'BLE MR.JUSTICE MAHESH GROVER
HON'BLE MR.JUSTICE MAHABIR SINGH SINDHU

Present: Mr.Girish Agnihotri, Sr. Advocate with
Mr.Vijay Pal, Advocate and
Mr.Ishaan Bhardwaj, Advocate
for the petitioner.

Mr. Lokesh Sinhal, Addl.AG, Haryana.

Mr.Vikas Behl, Sr.Advocate with
Mr.Nikhil Sabharwal, Advocate
for respondent No.5.

....

MAHESH GROVER, J. (Oral)

CM-11639-CWP-2018

C.M.is allowed. Written statement accompanied by Annexures R-5/1 to R-5/7 filed on behalf of respondent No.5 is taken on record.

CWP No.18712 of 2018

The petitioner has filed the instant writ petition with a prayer to quash the order dated 25.07.2018 whereby the bid offered by the petitioner for mining has been cancelled and permission refused arbitrarily.

On 24.07.2017, an e-auction notice invited bids for extraction of minor minerals from the mines of Districts Mahendergarh, Biwani and Dadri to be granted through e-auction scheduled for consideration on 21.08.2017/22.08.2017. For the mine in question i.e. Dadam in District Bhiwani the reserved price offered was Rs.115.00 crores. The auction fell through as no one responded. Another e-auction notice was put up on 29.08.2017 and for the said mine i.e. Dadam the process was slated for 20.09.2017 till 22.09.2017 with the same reserved price of Rs.115.00 crores. Once again the auction fell through with no prospective bidder coming forward.

On 10.11.2017, the process of e-auction was again set in motion to be conducted on 06.12.2017 and 07.12.2017. The reserved price now was reduced from Rs.115.00 crores to Rs.92.00 crores which was in tune with Rule 51(4) of the Haryana Minor Mineral Concession, Stocking and Transformation of Minerals and Prevention of Illegal Mining Rules, 2012 (in short 'the Rules'). On 08.12.2017, another e-auction notice was put up for the same mine and the process was scheduled for 04.01.2018/05.01.2018 with reserved price of Rs.92.00 crores per annum and a lease period of 10 years.

In response to this last notice with a reserved price of Rs.92.00 crores the petitioner made a bid of Rs.92.12 crores. On 05.01.2018 when the bid closed at 12.00 p.m. the petitioner being the sole bidder was asked to deposit the requisite amount and on the very same day i.e. 05.01.2018 the petitioner deposited Rs.9.20 crores being 10% of the amount and the official respondents in turn responded and while acknowledging the receipt of Rs.9.20 crores deposited by the petitioner advised him to deposit another sum of Rs.1.20 lac, which was done on the very same day at about 3.20 p.m. For the purpose of reference, the messages exchanged through e-mail, are extracted herebelow :

> "You have quoted an highest bid of Rs.92,12,00,000/- against the reserve price of Rs.92,00,00,000/- for obtaining the mining lease of the Stone mine of "Dadam" in the e-auction held on 04-05.01.2018. The EMD amount of Rs.9,20,00,000/- has been already paid by you. As per the terms and conditions of the e-auction notice dated 08.12.2017, you are required to deposit 10% of the highest bid i.e.Rs.09,21,20,000/-.
>
> Accordingly you are requested to deposit the balance amount of Rs.01,20,000/- as 10% of annual bid security amount in the ESCROW account of the Department.
>
> The account details of the department are as under :-
>
> Account Name/title=GOHE-PROC EMD ESCROW Account A/C DSND – MINGEO
>
> Account No.=001305010048
>
> IFSC=ICIC0000013
>
> Thanks & Regards
>
> Neeraj Kumar
> Mining Officer
>
> ………………………………………………………………………………
>
> Goverdhan Mines<govardhanmines@gmail.com> Fri,Jan 5,2018 at.3.20PM
>
> To: Department of Mines and Geology, Haryana" <me.mines-Hry@nic.in>
>
> Cc: praveshsharma2009@gmail.com.neeraj.Hry@gmail.com
>
> Dear sir,
>
> As per trailing mail, we have submitted the above said amount i.e.rs.1,20,000/- (0ne lac twenty thousand only) vise UTR no.-PUNBH18005418974:GOHE PROC EMD Dated-05.1.18 against Balance amount.
>
> Kindly do the needful."

Despite all this the Letter of Intent was not issued to the petitioner for as long as 7 months while the petitioner persisted with representations and legal notices. Finding no response the petitioner was constrained to file CWP-17829-2018, upon which this Court issued notice for 26.07.2018 and while doing so noticed the contention of the petitioner which we extract herebelow :-

> "The petitioner states that he was a highest bidder in an open auction

> held on 04/05.01.2018 having bid an amount of Rs.92,12,00,000/-, out of which as per requirement he deposited Rs.9,21,20,000/- on the same day. Despite this the Letter of Intent has not been issued to the petitioner and as a consequence he has been deprived of his right to mine the area for which he had offered the highest bid and was accepted by the respondents. Learned counsel also contends that similarly situated persons who had bid for other mines were granted the Letters of Intent within two weeks but the petitioner has been made to suffer for no ostensible reason even though he had deposited the requisite amount on the very same day. It is further contended that he is not being permitted to operate the mines and the amount of Rs.9,21,20,000/- has also been retained by the respondents.
>
> Notice of motion for 26.07.2018.
>
> At this stage, Ms.Kirti Singh, Deputy Advocate General, Haryana, who is present in Court, accepts notice on behalf of the respondents."

On the very next day i.e. 26.07.2018 the respondents passed the order impugned in the present writ petition wherein it is stated that although the bid of Rs.92.12 crores was offered by the petitioner in the auction held on 04/05.01.2018 but the permission to operate is being refused as the State has decided to operate it through the PSU in public interest and it was ordered that Rs.9,21,20,000/- deposited by the petitioner as initial bid be refunded immediately along with interest @ 6% per annum or as per FD's instructions/concurrence, whichever is higher, for the period from the date of deposit to the date of refund, as compensation. It was stated in the impugned order that as per condition No.12 of the auction notice, no bid shall be regarded as successful bid unless accepted by the government. In the instant case, before the final decision could be taken/communicated, the Managing Director, HSIIDC, a State

Government Public Sector Undertaking submitted a request for granting the mining lease of Dadam to the HSIIDC to ensure systematic and scientific operations, conservation of minor minerals, availability of construction material at reasonable rates to consumers both in public and private sectors and to ensure proper market intervention to defeat any monopoly by the private lessees. We would extract, for the purpose of reference, the reasoning that has gone into the refusal, as under :-

> "3. You are aware that as per condition no.12 of the auction notice no bid shall be regarded as successful bid unless accepted by the government. In the present case, before final decision could be taken/communicated, the Managing Director, HSIIDC a State Government Public Sector undertaking submitted a request for granting the mining lease of Dadam to the HSIIDC to ensure systematic and scientific operations, conservation of minor minerals, availability of construction material at reasonable rates to consumers both in public and private sectors and to ensure proper market intervention to defeat any monopoly by the private lessees."

Clause 12 of e-auction notice, which has been relied upon, is also set out below :

> "12. The bids offered/received during the e-auction process shall be provisionally accepted and the Director shall obtain the orders of Government thereon. No bid shall be regarded as successful bid unless accepted by the Government."

It is also important to reproduce Clause 10 of e-auction notice, since the respondents have argued their case on a combined reading of conditions 10 and 12, which read as under :

> "10. The highest bidder would be informed about the same confirmation that he being declared as highest bidder- as per which he shall be liable to deposit 25% of the annual bid/dead rent as "security" and one month's

advance dead rent. The above said amount shall be deposited as per following schedule :

(a) an amount equal to 10% of the annual dead/rent/highest bid, after adjusting the EMD deposited for said mine, as 'initial bid security' within 24 hours of conclusion of bidding process. The payment has to be made through RTGS/NEFT by secured online payment gateway;

(b) balance amount of bid security i.e.15% of the annual dead rent along with one month's advance dead rent before commencement of the mining operation or before expiry of the period of 12 months, whichever is earlier;"

The official respondents have filed their reply and as observed, offered justification with reference to conditions No.10 and 12, extracted above.

The HSIIDC made an application for being impleaded as a party which was allowed and they too have filed the reply wherein it was stated that in the absence of any alleged mala fides by the private respondents to the action of the State, they cannot mount any challenge to the grant of contract to them done in public interest, particularly when the HSIIDC was operating other mines in the same area.

We have heard the learned counsel for the parties.

On facts, there is no dispute of the petitioner being the highest bidder after the State failed in its attempt to attract a prospective bidder at least on four occasions. The petitioner deposited the amount in response to the communication by the Government is also not in dispute. The amount was retained by the State for as long as 6/7 months, is also admitted. The order was passed on 26.07.2018 when the court proposed the intervention after it issued a notice on

25.07.2018. The justification offered lies in conditions No.10 and 12 and it has vehemently been argued before us that the bid was provisional and it created no right in petitioner's favour. The bid would be regarded successful only if the Government accepted it. The petitioner has with equal vehemence stated that the bid was indeed accepted by the Government which is a fact now being concealed by the government, in order to justify its arbitrary action.

We had summoned the records and have perused the same. We notice from the records that a proper proposal was set up before the Principal Secretary, Department of Mines on 05.01.2018 itself for approval and it is specifically noticed by the Minister concerned "approved as per rules and instructions".This approval was granted after it was approved by the Principal Secretary. When confronted with this situation, learned counsel for the respondents then tried to put forward an argument that this decision was never communicated and that should imply non-acceptance by the Government or at least non-conclusion of the contract.

We do not find this argument to be attractive. The best case set up by the respondents is on insistence of conditions No.10 and 12 to contend the bid being provisional, was to be regarded successful if accepted by the Government. This was complete on the very same day and thus the government has absolutely no justification to withhold communication of this decision from the petitioner for as long as 7 months and in the interregnum clandestinely give the contract to HSIIDC.

Both, the counsels for the HSIIDC and the State have projected public interest to be the driving force behind the decision of the government but strangely the terms and conditions on which the HSIIDC has been permitted to operate have not been disclosed in the form of any verifiable material that would indicate a more beneficial proposal than the one offered by the petitioner which though accepted, was discarded to award the contract in favour of the HSIIDC without any reasons.

The petitioner in order to reveal the hollowness of the argument brought to our notice that the HSIIDC made an offer in Feb.2018 only to withdraw it, and without there being any further offer by them the contract was still given to it in June 2018.

The State and the HSIIDC then tried to justify the grant with reference to Section 17-A(2) which we set down below for reference :

> "**17-A. Reservation of area for purposes of conservation.**--
>
> (1) ....
>
> (1-A) ....
>
> (2) The State Government may, with the approval of the Central Government, reserve any area not already held under any prospecting licence or mining lease, for undertaking prospecting or mining operations through a Government company or corporation owned or controlled by it and where it proposes to do so, it shall, by notification in the Official Gazette, specify the boundaries of such area and the mineral or minerals in respect of which such areas will be reserved."

To a pointed question as to whether this procedure was followed before giving the rights to the HSIIDC, the answer was in the negative. It is not in dispute that even till today the aforesaid course has not been adopted assuming the decision was justified. Reliance was placed on a judgment rendered in CWP-26454-2014 to contend that even a post facto approval in terms of Section 17-A(2) would be justified.

The judgment relied upon does not help the cause of the respondents as facts in that case were entirely different. In that case, on the day of auction a decision had already been taken to grant the lease in favour of the HSIIDC without disclosing it to the participants who went ahead with the auction process and were awarded the lease. The court took a view that it would not entitle the bidders in the petition to seek cancellation in favour of HSIIDC and at best they were entitled to rescind the contract and to seek refund of the amount paid thereunder. Even in that case with reference to Section 17-A(2) the court observed that HSIIDC would not commence the mining operations without complying with the provisions of law, namely, obtaining the approval from the central government and issuance of notification in the official gazette. This was primarily on the statement made by the counsel for the State. There is absolutely no observation by the court regarding the stage at which Section 17-A(2) is to be resorted to i.e. whether prior or subsequent to the grant of the contract.

On a careful analysis we are further of the opinion that not only the facts of the case relied upon were irrelevant to the present controversy the State has acted in a deplorable manner. Firstly, it made numerous attempts to attract prospective bidders at a price of

Rs.115.00 crores and when it failed to do so it reduced the price to Rs.92.00 crores and even then it was on second attempt it attracted the prospective bidder i.e. the petitioner. The HSIIDC is obviously in the business of mining as well which we notice not only from the present case but also from the case relied upon by the respondents. If that is so, then when the e-auction notice was set up, it was open to the HSIIDC to participate in the auction as any other prospective bidder and face the market forces. It did not respond at all even though auction notices were put up number of times. Once the petitioner's bid had been accepted, as noticed from the record, on the very same day i.e. 05.01.2018 there was no justification with the State to sit over the matter for as long as 7 months and then clandestinely let the HSIIDC in through the back door without even intimating the petitioner. The action becomes more arbitrary if it is to be seen that HSIIDC once offered itself (though after the bid was offered) in Feb.2018 only to backtrack and resurfaced in June 2018 to walk away with the contract without disclosing how the public interest was served and without intimation to the petitioner, who certainly had an interest in the process.

In commercial matters the State functionaries, which are in the same business as the one for where expressions of interest are invited through auction process necessarily have to compete, which was never done and even if the HSIIDC was to be considered at a subsequent stage, which according to us is not a justifiable course, even then the terms offered by the HSIIDC should at least have been put to the petitioner in a matter of competitive bidding so as to enable him to either seek exit or offer more than what the Corporation did.

Neither of these courses were adopted by the State and consequently, we are convinced that the action of the State is highly arbitrary and the award of mining lease to the HSIIDC wrapped in mystique which the State can ill afford unless it wants to invite upon itself the charge of absolutely arbitrariness.

In matters of public contract the government has to act fairly and not treat the subject-matter of the contract as a largess to be distributed at its own whims and fancies, which again is impermissible as there has to be a supporting coherent policy even if discretion of the government has to be exercised. Besides, all these actions are subject to judicial review and the courts cannot be seen receding from their duty of exercising their powers to thwart arbitrariness.

In *Ramana Dayaram Shetty v. The International Airport Authority*, **(1979) 3 SCR 1014**, the Hon'ble Supreme Court held as under :-

> "This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The

power or discretion of the Government in the matter of grant of largess including award of jobs, contracts, quotas, licences etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

In *Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir*, **(1980) 3 SCR 1338,** on the question of the power of the Government in granting largess, it was observed as under :

"The second limitation on the discretion of the Government in grant of largess is in regard to the persons to whom such largess may be granted. It is now well settled as a result of the decision of this Court in Ramana D.Shelly v. International Airport Authority of India, (supra) that the Government is not free like an ordinary individual, in selecting the recipients for its largess and it cannot choose to deal with any person it pleases in its absolute and unfettered discretion. The law is now well established that the Government need not deal with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure. Where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with some standard or norm which is not arbitrary, irrational or irrelevant. The governmental action must not be arbitrary or capricious, but must be based on some principle which meets the test of reason and relevance. This rule was enunciated by the Court as a rule of administrative law and it was also validated by the Court as an emanation flowing directly from the doctrine of equality embodied in Article 14."

In *Food Corporation of India v. M/s Kamdhenu Cattle Feed Industries,* **(1992) 6 JT (SC) 259** the Hon'ble Supreme Court held as under :-

> "In contractual sphere as in all other State actions, the State and all its instrumentalities have to conform to Article 14 of the Constitution of which non- arbitrariness is a significant facet. There is no unfettered discretion in public law. A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fair play in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review.
>
> The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but

> failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent."

It has also been held by the Lordships of Hon'ble Supreme Court in *Tata Cellular v. Union of India* **1996 AIR (SC) 11,** as under :-

> "84. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of

Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

85. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review."

In *M/s. Siemens Aktiengeselischaft & S.Ltd. v. DMRC Ltd.* **2014 AIR (SCW) 1249** the Hon'ble Supreme Court observed to the following effect:-

"17. Principles governing judicial review of administrative decisions are now fairly well-settled by a long line of decisions rendered by this Court, since the decision of this Court in Ramana Dayaram Shetty v. International Airport Authority of India and Ors. (1979) 3 SCC 489 which is one of the earliest cases in which this Court judicially reviewed the process of allotment of contracts by an instrumentality of the State and declared that such process was amenable to judicial review. Several subsequent decisions followed and applied the law to varied situations but among the latter decisions one that reviewed the law on the subject comprehensively was delivered by this Court in Tata Cellular's case (supra) where this Court once again reiterated that judicial review would apply even to exercise of contractual powers by the Government and Government instrumentalities in order to prevent arbitrariness or favouritism. Having said that this Court noted the inherent limitations in the exercise of that power and declared that the State was free to protect its interest as the guardian of its finances. This Court held that there could be no infringement of Article14 if the

Government tried to get the best person or the best quotation for the right to choose cannot be considered to be an arbitrary power unless the power is exercised for any collateral purpose. The scope of judicial review, observed this Court, was confined to the following three distinct aspects:-

> (i) Whether there was any illegality in the decision which would imply whether the decision making authority has understood correctly the law that regulates his decision making power and whether it has given effect to it;
>
> (ii) Whether there was any irrationality in the decision taken by the authority implying thereby whether the decision is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at the same; and
>
> (iii) Whether there was any procedural impropriety committed by the decision making authority while arriving at the decision.

18. The principles governing judicial review were then formulated in the following words:-

> (i) The modern trend points to judicial restraint in administrative action.
>
> (ii) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
>
> (iii) 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.
>
> (iv) 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.

(v) 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. 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.

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

19-21. xx xx xx xx

22. There is no gainsaying that in any challenge to the award of contact before the High Court and so also before this Court what is to be examined is the legality and regularity of the process leading to award of contract. What the Court has to constantly keep in mind is that it does not sit in appeal over the soundness of the decision. The Court can only examine whether the decision making process was fair, reasonable and transparent. In cases involving award of contracts, the Court ought to exercise judicial restraint where the decision is bona fide with no perceptible injury to public interest."

We, therefore, accept the petition, set aside the impugned order and direct the official respondents to award the mining lease to the petitioner in terms of its approval taken at the highest level i.e. the Principal Secretary as also the Minister concerned. The needful be done as expeditiously as possible, preferably within a period of four weeks from the date of receipt of certified copy of the order.

No order as to costs.

(MAHESH GROVER)
JUDGE

14.08.2018
dss

(MAHABIR SINGH SINDHU)
JUDGE

Whether speaking/reasoned Yes/No
Whether reportable Yes/No