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HIGH COURT OF CHHATTISGARH, BILASPUR

Order Reserved on 3.10.2019
Order Delivered on 21/10/2019
WPC No. 3040 of 2019

1. Shri Sai Ram Enterprises (Partnership Firm), Through-Partner Durga Prasad Agrawal, S/o Late Shri Vishwa Kumar Agrawal, aged about 43 years, Registered Office At Village Bangoli, Tahsil Tilda, District Raipur, Chhattisgarh.

---- Petitioner

Versus

1. The Chhattisgarh State Marketing Corporation Limited, Through The Managing Director, Abkari Bhawan, Near Chokra Nala, Labhandih, Raipur, Chhattisgarh.
2. The General Manager Chhattisgarh State Marketing Corporation Limited, Abkari Bhawan, Near Chokra Nala, Labhandih, Raipur, Chhattisgarh.
3. M/s Vijay Trading Co., Proprietor Vijay Chadda, S/o Surendra Mohan Chadda, A/o 36 Years, R/o House No.604, H.R. Tower, Raimura Apartment, D.D. Nagar, Raipur, District Raipur, Chhattisgarh (Declared L-1 In tender proceedings).
4. The Deputy General Manager, Chhattisgarh State Marketing Corporation Limited, Abkari Bhawan, Near Chokra Nala, Labhandih, Raipur, Chhattisgarh.

----Respondents

For Petitioner	:	Shri Amiyakant Tiwari, Advocate.
For Respondent No.1, 2 & 4	:	Shri Rajeev Shrivastava, Advocate.
For Respondent No.3	:	Shri Mateen Siddique, Advocate

Hon'ble Shri P. R. Ramchandra Menon, CJ
Hon'ble Shri Parth Prateem Sahu, J

C A V Order

Per Parth Prateem Sahu, J.

1. This writ petition has been filed by the petitioner seeking quashment of order dated 30.7.2019 (Annexure P-9) passed by respondent No.4 by which Letter of Intent No.2006 dated

22.7.2019 issued in favour of the petitioner has been cancelled.

2. Brief facts giving rise to filing of this petition are that respondent No.1 issued Notice Inviting Tender (NIT) bearing No. CSMC/Tender/2019-20/01 (A) dated 31.1.2019 inviting tenders/ bids for transport of country liquor & foreign liquor (spirit & malt) to various retail units in Raipur, Durg & Bilaspur Division. Last date for submission of tender and opening of technical bid was 21.1.2019 at 4 p.m. In furtherance of the aforesaid NIT, the petitioner and respondent No.4 submitted their tender/bid. On 20.2.2019 respondent No.1 issued corrigendum notice amending eligibility criteria and extending date for submission of tender and opening of technical bid upto 26.2.2019. After opening of technical bid, respondent No.3 was declared as 'lowest bidder (L1)' and the petitioner as 'second lowest bidder (L2)'. As per Clause 8.3 of the tender document, respondent No.4 called upon the petitioner to submit his consent for executing upto 30% work of transportation of liquor on the single rate quoted by respondent No.3. The petitioner submitted his consent on 1.4.2019, but he was informed that as he failed to submit his consent within time, therefore, the entire contract work of liquor transportation has been awarded to respondent No.3. Aggrieved therewith the petitioner preferred a petition bearing WPC No.1412/2019 before this Court. The said writ petition came up for hearing on 12.4.2019 before a Division Bench of

this Court and on the said date, the respondent authorities were directed as an interim measure to allow execution of award of contract to respondent No.3 to the extent of 70% only. Subsequently, the petitioner withdrew said writ petition on 26.6.2019. On 19.7.2019 respondent No.4 issued a detailed order allotting/awarding 30% transportation work of foreign liquor to the petitioner. In this order there is mention about filing of writ petition by petitioner, passing of interim order by a Division Bench, withdrawal of writ petition, submission of representation by petitioner and acceptance thereof by the respondent authority concerned. Pursuant to the order dated 19.7.2019, respondent No.4 sent letter dated 22.7.2019 to the petitioner to convey his consent for execution of contract work to the extent of 30% of foreign liquor, which was replied by the petitioner on 27.7.2019 stating that on the assurance of respondent No.1 that 30% transportation work of country liquor & foreign liquor both will be allotted/awarded to the petitioner, he withdrew writ petition and therefore requested for allotment/award of transportation work of foreign liquor & country liquor to the extent of 30%. Respondent No.4 vide order dated 30.7.2019 cancelled the Letter of Intent dated 22.7.2019 issued to the petitioner which made the petitioner to approach this Court seeking for following reliefs:-

> “10.1.That, in the above facts and circumstances the impugned order Annexure-P/9 may kindly be quashed and further the respondent state

authorities may kindly be directed to allow the petitioner to work according to the tender document clause 8.3 till the end of the financial year issuing work order in his favour, in the interest of justice.

10.2.That, the petitioner may kindly be allowed the cost of the proceedings and appropriate compensation from resp. no.3 & 4; in the interest of justice."

3. Learned counsel for the petitioner submits that the tender was invited for transportation of country liquor and foreign liquor both, on a single rate, in Raipur, Bilaspur & Durg division and as per terms of NIT i.e. Clause 8.3, the work can also be allotted to second lowest bidder to the extent of 30% of total work. Therefore, action on the part of respondent No.4 in awarding/allotting 30% transportation work of foreign liquor only to the petitioner is contrary to terms and conditions of the NIT. He further submits that depot of foreign liquor is located at district place only, whereas depots of country liquor are located in other places also nearer to retail units and therefore the distance of transportation of foreign liquor to various retail units located in Raipur, Bilaspur & Durg division is much more than distance of retail units of country liquor. He submits that after properly assessing the value of contract, the rate for transportation of foreign liquor & country liquor both, has been quoted by the petitioner and respondent No.3. Therefore, if the

petitioner is allotted 30% work of transportation of foreign liquor only, then it will not be possible for him to execute the work on the basis of single rate quoted by respondent No.3 (lowest bidder) for transportation of country liquor & foreign liquor both. He further submits that order impugned dated 19.7.2019 (Annexure P-7) passed by respondent No.1 is contrary to the terms and conditions of NIT itself because respondent Nos.1, 2 & 4 are well aware that transportation of foreign liquor only on the single rate quoted for transportation of country liquor & foreign liquor both is not possible and feasible and instead of considering his letter/representation, Letter of Intent dated 22.7.2019 was cancelled. He further submits that respondents No.1 & 4 have extended undue advantage to respondent No.3 since beginning as the clause providing that a person against whom criminal case is registered will not be eligible to participate in the tender process has been deleted from present NIT, although it was very much there in the earlier tender document. Further, as per Clause-1 of the NIT i.e. Security Deposit, the successful tenderer is required to furnish bank guarantee within seven days from the date of award of contract, but respondent No.3 failed to comply with the said condition of NIT and sought further time vide letter dated 8.4.2019 (after lapse of seven days). Part of bank guarantee was submitted by respondent No.3 only on 20.4.2019 and balance part of bank guarantee was submitted on 28.5.2019 i.e. after about two months from the date of award of contract. However, respondent Nos.1 & 4 have not taken any action against respondent No.3 for non-submission of bank guarantee within prescribed period as provided in tender document. He also submits that discriminatory treatment has been given to the petitioner as the consent submitted by him on 1.4.2019 has not been taken into consideration and rejected by mentioning that he failed to submit his consent upto 29.3.2019, whereas respondent No.3 has been given about two months' time to submit bank guarantee, which is otherwise required to be submitted within seven days from the date of award of contract. Therefore, action of respondents No.1 & 4 is illegal, arbitrary and discriminatory and being so, the impugned order (Annexure P-9) is liable to be quashed and the petitioner is entitled to an order directing the respondents No.1 & 4 to award transportation work to the petitioner as per Clause 8.3 of the NIT i.e. 30% of total work of transportation of foreign liquor and country liquor to various retails units located in Raipur, Durg & Bilaspur division.

4. Mr. Rajeev Shrivastava, learned counsel representing respondents No.1, 2 & 4 submits that action on the part of respondents is strictly in accordance with terms and conditions enumerated in NIT. Respondents have neither acted in arbitrary manner nor treated the petitioner discriminately. He submits that tender was invited on single rate basis for transportation of foreign liquor and country liquor. As per

clause 8.3 of NIT, vide letter dated 6.3.2019 the petitioner, who was second lowest bidder, was called upon to submit his consent for executing 30% work on the single rate quoted by lowest bidder i.e. respondent No.3, but the petitioner failed to submit his consent till 29.3.2019 and therefore the entire contract work has been allotted/awarded to respondent No.3. He further submits that vide order dated 19.7.2019 the petitioner was allotted/awarded work of transportation of foreign liquor to the extent of 30% of total work and accordingly, vide letter dated 22.7.2019 consent of the petitioner was sought for execution of the said work, but instead of giving consent, the petitioner wrote letter to respondent No.4 demanding award/allotment of 30% of total work of transportation of foreign liquor and country liquor. Income of respondent No.1, 2 & 4 depends upon the sale of liquor to be transported from depot to various retail units and as the previous contract was going to expire on 31.3.2019, therefore, 100% contract work has been awarded to respondent No.3 on 30.3.2019. It is also contended that petitioner is also second lowest bidder in respect of tender floated for transportation of liquor in Bastar, Dantewada & Surguja Division and there he submitted consent within time and accordingly 30% work of transportation in those divisions has been allotted to him. He submits that no undue favour has been extended to respondent No.3 in any manner. Respondent No.3 wrote letter seeking extension of time to furnish bank guarantee and looking to the nature of contract, the same was accepted by respondent No.1 and time was extended for furnishing bank guarantee. He submits that the language of Clause 8.3 of NIT is not mandatory in nature for the reason that the word 'may' has been used in the said clause. Thus it is clear that the said clause is directory in nature and the discretion is left with the authority to consider allotment of work in the ratio of 70-30 between lowest tenderer and second lowest tenderer. The contract for transportation of liquor is for a period of one year from 1.4.2019 to 31.3.2020. No assurance at any point of time was given to the petitioner for award of 30% of total work of transportation of foreign liquor and country liquor. As the petitioner failed to timely submit consent in response to the Letter of Intent dated 22.7.2019, the order Annexure P-9 has been passed cancelling Letter of Intent issued in favour of the petitioner for transportation of 30% of foreign liquor. He submits that neither there is arbitrariness, illegality nor discrimination in awarding/allotting contract work to respondent No.3.

5. Mr. Mateen Siddique, learned counsel appearing for respondent No.3 submits that respondent No.3, pursuant to award of contract, had fulfilled all preliminary conditions of contract including furnishing of bank guarantee. Respondent No.3 had also entered into agreement, started transportation work of foreign liquor & country liquor by making huge investment and if the reliefs claimed by petitioner in writ

petition is granted to him, respondent No.3 will suffer huge loss. He submits that as the fault of non-submission of consent within stipulated time is attributable to the petitioner, therefore, he cannot blame others. He submits that the word ‘may’ has been used in Clause 8.3 of NIT and not the word ‘shall’, therefore, Clause 8.3 cannot be treated to be mandatory. Even otherwise, this clause gives discretion to the authorities to allot or not to allot 30% work to second lowest bidder. He submits that the petitioner slept over his right for reasonable time and therefore he is not entitled for any relief and his petition is liable to be dismissed with cost.

6. We have heard learned counsel for the parties and perused the record.

7. Perusal of the NIT reflects that bids were called from the eligible persons for transportation of country liquor and foreign liqour on single rate basis, that is to say, only one rate is required to be quoted for transportation of country liquor and foreign liquor both. During the course of argument, it was not disputed by learned counsel for respondents that depots of foreign liquor are located at district level, whereas depots for supply of country liquor to various retail units are located at several places and even in Tahsil area also. Clause 8.3 of the NIT specifically provides that work may also be allotted to second lowest bidder at the rate of lowest bidder, if agreed by second lowest bidder, in the ratio of 70% & 30% or as decided by Tendering Authority with lowest bidder given priority. In the

instant case, Clause 8.3 of NIT has been invoked by Tendering Authority by issuing letter dated 6.3.2019 to the petitioner seeking his consent for execution of transportation work of liquor on the single rate quoted by lowest bidder i.e. respondent No.3. Though this letter mentions about immediate submission of consent, but no time limit has been mentioned therein. Petitioner submitted his consent on 1.4.2019. When once Clause 8.3 has been invoked and it was decided by respondent authorities to award/allot work to the petitioner, then the submission of learned counsel for respondent Corporation that the word 'may' has been used in Clause 8.3 does not appear to be of much significance.

8. Clause 1.1 of NIT, which relates to 'Security Deposit' clearly mentions that if the accepted tenderer fails to remit the Security Deposit within the period of seven days from the date of award of contract, the Earnest Money Deposit (EMD) remitted by him will be forfeited and his tender will be held void. This clause further says that acceptance order will be issued after execution of a contract by the successful Tenderer and after production of bank guarantee for the EMD remittance. Thus it is clear that the NIT contains a mandatory condition with respect to submission of bank guarantee within a period of seven days from the date of award of contract and non-compliance thereof would make the tender immediately void. In the present case, the contract was awarded to respondent No.3 on 30.3.2019 and as such, he was required

to furnish bank guarantee within seven days therefrom i.e. upto 6th or 7th April, 2019, but he failed to do so. On the contrary, respondent No.3 wrote letter on 8.4.2019 seeking 15 days further time to furnish bank guarantee. Even in the extended period of time, respondent No.3 did not furnish full bank guarantee and on 20.4.2019 he furnished bank guarantee of Rs.1 Crore only as against total bank guarantee of Rs.3.60 Crore. Records further reveal that bank guarantee of balance amount has been furnished on 28.5.2019.

If the aforesaid events are taken into consideration along with Clause 1.1-Security Deposit, it is clear that failure to furnish bank guarantee within time prescribed in the NIT would make the tender of lowest bidder void. Meaning thereby, till 28.5.2019 the respondent authorities could not have entered into contract with respondent No.3, though the contract was awarded to respondent No.3, because execution of contract is subject to production of bank guarantee for EMD remittance. Thus, from the facts available on record, it is amply clear that though respondent No.3 has not complied with terms and conditions of the NIT but respondent No.1, 2 & 4, for the reasons best known to them, have not initiated any proceeding against him, as provided under the NIT.

9. Respondent No.1, 2 & 4 are machineries of the State and therefore it is incumbent upon the Tendering Authority to apply the same standard in respect of all the tenders and should not apply different yardsticks for different tenderers. In the present

case, respondents No.1, 2 & 4 have at one hand granted benefit of extension of time to furnish bank guarantee to respondent No.3, not for some days but for more than one & half month, and at the another hand, delay of couple of days on the part of petitioner in giving consent has been viewed seriously resulting in award of total contract to respondent No.3. Action on the part of respondents appears to be discriminatory for the petitioner vis-à-vis respondent No.3 as both of them have been treated differently. On the date of submission of consent by the petitioner, no contract was entered into between respondent authorities and respondent No.3 for the reason that Clause 1.1 of NIT clearly stipulates that acceptance order will be issued after execution of contract and production of bank guarantee for EMD remittance. Respondents No.1, 2 & 4 have not given any satisfactory reply as to on what pretext even after completion of extended period, if any, as sought by respondent No.3, no action whatsoever has been taken against respondent No.3, as provided under Clause 1.1 of NIT.

10. True it is that in tender or contract matters, interference by Court is very limited. Interference is permissible if the process adopted or decision made is malafide or intended to favour someone or the same is so arbitrary and irrational that no responsible authority acting under the law could have arrived at it or it affected the public interest.

11. Other facet of the facts of case is that when the petitioner withdrew his earlier writ petition in which an interim order was operating in his favour, respondent No.1 had passed the order for allotment/award of work mentioning Clause 8.3 and awarded 30% work of transportation of foreign liquor only. This is beyond the terms and conditions of the contract. When bids/tenders have been invited on single rate basis for transportation of country liquor and foreign liquor both, then 30% work cannot be bifurcated further for supply of only one type of liquor as has been done in the present case i.e. only for foreign liquor. Action of passing order on 19.7.2019 itself prima facie shows arbitrary action on the part of respondent No.1 as no order beyond the terms and conditions of NIT can be passed. No doubt, discretion has been provided to the authority whether to award contract of supply of country liquor and foreign liquor upto to 30%, but it does not mean that 30% work of transportation of one type of liquor only. Depot of foreign liquor is undisputedly situated in far places i.e. at districts level only, whereas depots of country liquor are situated much nearer to the retail units and therefore the single rate quoted by respondent No.3 for transportation of foreign liquor and country liquor both, cannot be made applicable for transportation of foreign liquor only.

12. Looking to the arbitrary act on the part of respondents thereby allotting 30% work of transportation of foreign liquor only, which is contrary to terms and conditions of NIT, this Court is

of the opinion that the petitioner is justified in making request by his letter dated 27.7.2019 to include work of transportation of country liquor also, as provided under Clause 8.3 of the NIT.

13. In the matter of **Ramana Dayaram Shetty v. The International Airport Authority of India & ors** reported in **AIR 1979 SC 1628**, Hon'ble Supreme Court has held as under:-

> “10........This renders it necessary to structure and restrict the power of the executive Government so as to prevent its arbitrary application or exercise. Whatever be the concept of the rule of law, whether it be the meaning given by Dicey in his "The Law of the Constitution" or the definition given by Hayek in his "Road to Serfdom' and 'Constitution of liberty" or the exposition set-forth by Harry Jones in his "The Rule of Law and the Welfare State", there is, as pointed out by Mathew, J., in his article on "The Welfare State, Rule of Law and Natural Justice" in democracy Equality and Freedom "substantial agreement in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power, wherever it is found". It is indeed unthinkable that in a democracy governed by the rule of law the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement. And to the application of this principle it makes no difference whether the exercise of the

power involves affection of some right or denial of some privilege.

12.We agree with the observations of Mathew, J., in V. Punnan Thomas v. State of Kerala AIR 1969 Ker 81 (FB) that: "The Government, is not and should not be as free as an individual in selecting the recepients 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"............” “..........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 largess arbitrarily. The learned Chief Justice said that when the Government is trading with the public, "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. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure." 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 norm 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 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."

21. This rule also flows directly from the doctrine of equality embodied in Art. 14. It is now well settled as a result of the decisions of this Court in E.P. Royappa v. State of Tamil Nadu (1974) 2 SCR 348: (AIR 1974 SC 555) and Maneka Gandhi v. Union of India, (1978) 1 SCC 248: (AIR 1978 SC 597) that Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State action must not be arbitrary but must be based on some rational and relevant principle which is non- discriminatory: it must not be guided by any extraneous or irrelevant considerations, because that would be denial of equality. The principle of reasonableness and rationality which is legally as well as philosophically an essential element of equality or non-

arbitrariness is protected by article 14 and it must characterise every State action, whether it be under authority of law or in exercise of executive power without making of law. The State cannot, therefore act arbitrarily in entering into relationship, contractual or otherwise with a third party, but its action must conform to some standard or norm which is rational and non-discriminatory. This principle was recognised and applied by a Bench of this Court presided over by Ray, C.J., in Erusian Equipment and Chemicals Ltd. v. State of West Bengal (AIR 1975 SC 266((supra) where the learned Chief Justice pointed out that 'the State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality. An ordinary individual can choose not to deal with any person The Government cannot choose to exclude persons by discrimination. The order of black- listing has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting--A citizen has a right to claim equal treatment to enter into a contract which may be proper, necessary and essential to his lawful calling-- It is true that neither the petitioner nor the respondent has any right to enter into a contract but they are entitled to equal treatment with others

> who offer tender or quotations for the purchase of the goods.' It must, therefore follow as a necessary corollary from the principle of equality enshrined in Article 14 that though the State is entitled to refuse to enter into relationship with any one, yet if it does so, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets the test of reasonableness and non-discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non-discriminatory ground."

14. In view of above law laid down by Hon'ble Supreme Court; discussions made herein above and considering the fact that respondent No.3 has not furnished bank guarantee towards security deposit within prescribed time limit and the same was furnished only after a lapse of about 1 month & 27 days from the date of award of contract; respondents No.1, 2 & 4 have invoked Clause 8.3 of the NIT to allot / award work to petitioner, who stood L2, at the first instance; an order was also passed on 19.7.2019 for allotment of work to the extent of 30%, but arbitrarily only for transportation of foreign liquor, which is beyond the terms of terms and conditions of contract, we are of the view that the petitioner has succeeded in making out a case for interference of this Court in the subject tender proceedings because the decision of respondents No.1, 2 & 4 to award 30% work of transportation of foreign liquor only is manifestly arbitrary and irrational.

15. Accordingly, the writ petition is allowed and impugned orders dated 19.7.2019 (Annexure P-6) & 30.7.2019 (Annexure P-9) are set aside. Respondent Nos.1, 2 & 4 is directed to allot/ award work of transportation of foreign liquor & country liquor both to the petitioner as per Clause 8.3 of the NIT. No order as to costs.

Sd/-	Sd/-
(P. Ramchandra Menon)	(Parth Prateem Sahu)
Chief Justice	Judge

roshan/-