GAHC010078052019

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/2434/2019

M/S. PLABANS TRADE AND AGENCY AND ANR.
REP. BY ITS PROPRIETOR.

2: PLABAN DAS
S/O NARAYA DAS
PROPRIETOR OF M/S PLABANS TRADE AND AGENCY. R/O AMBARI
G.N.B.ROAD
AGP BYE LANE
P.O-GUWAHATI
P.S.-LATASHIL
HOUSE NO.-03
GUWAHATI-781001
ASSAM
DIST.-KAMRUP (M

VERSUS

BHARAT PETROLEUM COREPORATION LTD. AND 3 ORS.
REP. BY ITS MANAGING DIRECTOR, NRL LPG DU, NUMALIGARH, NRMT
P.O KANAIGHAT, DIST.-GOLAGHAT, ASSAM, PIN-785699

2:THE DEPUTY GENERAL MANAGER
LOGISTIC (LPG) EAST

BHARAT PETROLEUM CORPORATION LTD. GIRIN PARK
KOLKATA
MANAGER CO-ORDINATION LPG NRL NUMALIGARH
ASSAM

3:MANAGER COORDINATION
LPG
NRL
NUMALIGARH

4:EXECUTIVE MANAGER
LPG
BPCL
NUMALIGAR

Advocate for the Petitioner : MR. D MOZUMDER

Advocate for the Respondent : MR. S S ROY

BEFORE
HONOURABLE MR. JUSTICE SANJAY KUMAR MEDHI

JUDGMENT

Date : 08-12-2020

The extraordinary jurisdiction of this Court conferred under Article 226 of the Constitution of India is being sought to be invoked by filing this writ petition. The grievance is in connection with discontinuing the arrangement of hiring of vehicles of the petitioners by the respondent-Corporation. The petitioners are also aggrieved by a notice dated 12.03.2019 whereby fresh offers have been invited from eligible persons, however, with a rider that would oust the petitioners even from participating in the tender process.

2. I have heard Shri D Mazumdar, learned Senior Counsel assisted by Shri S Biswas, learned counsel for the petitioner. I have also heard Shri S Borthakur along with Shri SS Roy, learned counsel for the respondents. The counsel for the respondents have also produced the record.

3. The facts of the case, as projected in the writ petition, may be narrated in the following manner.

4. The petitioner no. 1 is a sole proprietorship firm with the petitioner no. 2 as its proprietor and claim to be having vast experience in the business of transportation. The respondent–Bharat Petroleum Corporation Limited (BPCL) (herein after referred to as respondent-Corporation) had floated a Notice Inviting Tender (NIT) dated 09.03.2015 for

procurement of trucks specialized in carrying LPG cylinders. During the currency of the said NIT, the requirement of such trucks increased and therefore a notice for hiring additional vehicles was issued on 08.07.2017. Pursuant to the said notice, the petitioners offered two nos. of vehicles, out of which one was subsequently withdrawn and one had continued. The same was followed by a second NIT dated 07.12.2017 and since it was felt that more vehicles would be necessary, the second NIT was followed by another notice dated 16.05.2018. It is the case of the petitioner that pursuant to such notice, the petitioner had purchased two new vehicles by taking bank loans and had placed the same before the authorities. However, when the arrangement with the petitioners was continuing, another notice dated 12.03.2019 had been issued by the respondent-Corporation for hiring 10 (ten) numbers of additional trucks with the intention to do away with the existing arrangements. The petitioners are accordingly aggrieved by the said move of the respondent-Corporation and has put to challenge the notice dated 12.03.2019 as well as prayed for continuing with the existing arrangement.

5. Shri Mazumdar, learned Senior Counsel for the petitioners submits that the action of the respondent-Corporation in publishing the subsequent notice dated 16.05.2018 calling for additional vehicles itself indicates that the existing arrangement was inadequate in terms of numbers of vehicles and therefore more vehicles were sought to be hired. It is submitted that the object of the Corporation being to increase the number of vehicles to be taken on hire, there was no discernible reason to discontinue with the existing arrangement with the petitioners. It is further submitted that in absence of any allegation regarding performance or involvement of any forgery in the documents, the action to discontinue with the vehicle of the petitioners was wholly unreasonable and hit by Article 14 of the Constitution of India. It is further submitted that the aforesaid arrangement was the source of livelihood of the petitioners and therefore, the impugned action is violative of the rights guaranteed under Article 21 of the Constitution. It is further submitted that apparently there is no nexus with the action to discontinue with the arrangement with the petitioner with the object which is to increase the number of vehicles as substantiated by the notice dated 16.05.2018 calling for more vehicles.

6. *Per contra* Shri S Borthakur, learned counsel representing the Corporation has submitted that the writ petition itself was not maintainable in view of the fact that the petition suffers from suppression of material facts and accordingly, the petitioners are not entitled to invoke the equitable jurisdiction of this Court under Article 226 of the Constitution of India. To bring home the allegation of suppression, the learned counsel has submitted that incorrect statements have been pleaded in the writ petition. According to respondent-Corporation, the notice dated 16.05.2018 was never acted upon and it is the subsequent notice dated 17.05.2018 which was acted upon. This fact was not only known to the petitioners but also substantiated by the document which was marked as Attachment-1 to the response to the notice dated 17.05.2018. The said document which has been annexed as Annexure-6 to the affidavit-in-opposition would show that the offer made by the petitioners was in response to the notice dated 17.05.2018 and not 16.05.2018. It is submitted that there is a vast difference with the notice dated 16.05.2018 and 17.05.2018. Whereas 16.05.2018 notice was for requirement of additional trucks for transportation of packed LPG cylinders, as per the notice dated 17.05.2018, such requirement was categorically stated to be on *ad hoc* basis till new trucks as per the new tender gets inducted. For ready reference, the heading of the notice dated 16.05.2018 and 17.05.2018 are extracted hereinbelow: -

> "*LPG/PKD/ER/2017/03/NRL PACKED* *Date : 16.05.2018*
>
> *NOTICE*
>
> *REQUIREMENT OF ADDITIONAL TRUCKS FOR TRANSPORTATION OF PACKED LPG CYLINDERS EX NRL DU, NUMALIGARH, ASSAM.*"

> "*BPCL/LPG/ER/2014/07/NRL PACKED* *Date : 17.05.2018*
>
> *NOTICE*
>
> *REQUIREMENT OF ADDITIONAL TRUCKS ON ADHOC BASIS AS THESE TRUCKS WILL BE ALLOWED TO PLY OLY TILL NEW TRUCKS AS PER NEW TENDER GETS INDUCTED FOR TRANSPORTATION OF PACKED LPG CYLINDERS EX NRL LPG DU, NUMALIGARH, ASSAM.*"

7. It is submitted that that since there was some delay in finalizing the second NIT dated

07.12.2017, the said step of hiring vehicles on *ad hoc* basis was taken which however, made it clear that such arrangements were only till the period new trucks were inducted as per the new NIT. It is submitted that this vital fact has been willfully suppressed only for the purpose of making out a case. It is further submitted that so far as the second NIT dated 07.12.2017 is concerned, Clause-42 is with regard to induction of additional trucks as per which a sequence was fixed for fulfilling the requirement and this clause is not the subject matter of challenge in the writ petition. It is submitted that in matters of this nature which are undoubtedly commercial, the decisions taken by the authorities should not normally be interfered with unless the same is found to be glaringly unreasonable or vitiated by *mala fide* writ large on the face of it. The learned counsel further refers to Clause-34 (a) of the NIT of 2015, the terms and conditions of which were applicable. The said clause provides for redressal of disputes by arbitration and this facts apart from being suppressed, would also act as a bar for the petitioners to file the present petition. The learned counsel has also placed before this Court the relevant records of the case in a file and has referred to the original papers.

8. In support of his submissions, Shri Borthakur, learned counsel for the respondent-Corporation places reliance upon the following decisions of the Hon'ble Supreme Court: -

1. *UP Financial Corporation & Ors. Vs. Naini Oxigen & Acetylene Gas Ltd*., reported in **(1995) 2 SCC 754**;

2. *KD Sharma Vs. Steel Authority of India Ltd. & Ors.*, **(2008) 12 SCC 481**;

3. *Central Coal Fields Ltd. Vs. SLL-SML (Joint Venture Consortium & Ors.)*, **(2016) 8 SCC 622**.

9. In the case of ***UP Financial Corporation & Ors*** (supra), the Hon'ble Supreme Court held that the Corporation being an independent autonomous body, decisions taken are normally not liable for any challenge even if such decision may be erroneous. The challenge would be maintainable only when the said decision is vitiated by *mala fides*.

10. In the case of ***Central Coal Fields Ltd. Vs. SLL-SML (Joint Venture Consortium & Ors.)*** (supra), the Hon'ble Supreme Court after taking into consideration the existing case laws on the subject, has laid down that in matters involving tender conditions or decisions of the authority in the same, there should be minimal interference by the Courts unless, such decision is absolutely arbitrary and irrational and against the interest of public service.

11. The case of ***KD Sharma*** (supra) has been cited in support of the submission that this Court in exercise of powers under Article 226 of the Constitution of India exercises equitable jurisdiction and as a pre-requirement, the person who invokes such jurisdiction has to come with clean hands.

12. Rejoining his submissions, Shri Mazumdar, learned Senior Counsel for the petitioners submits that the allegation of suppression has to be tested only with regard to material facts and in this case, no material facts have been suppressed and, therefore, the petitioners are at liberty to approach this Court for enforcement of their fundamental rights. As regard the clause for arbitration is concerned, it is submitted that there cannot be any absolute bar in invocation of the writ jurisdiction when there is clear violation of the fundamental rights and the principles of natural justice. The learned Senior Counsel finally points out that this Court vide order dated 10.04.2019 had stayed the notice dated 12.03.2019 which is still in operation.

13. The rival contentions of the learned counsel for the parties have been duly considered and the materials placed before this Court, including the records of the case in original, which have been placed before this Court, have been carefully examined.

14. Firstly, this Court would like to take up the objection regarding alternative remedy in the form of arbitration as provided in clause 34 (a) of the NIT. Though a dispute redressal mechanism has been prescribed, the same, in the opinion of this Court, may not stand as an absolute bar for exercise of the writ jurisdiction by this Court. The Hon'ble Supreme Court in the case of ***Whirlpool Corporation Vs. Registrar of Trade Marks***, reported in **(1998) 8**

SCC 1 has laid down as follows: -

> " *14. The power to issue prerogative writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provision of the Constitution. This power can be exercised by the High Court not only for issuing writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the Fundamental Rights contained in Part III of the Constitution but also for "any other purpose".*
>
> *15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. Bu the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the Fundamental rights or where there has been a violation of the principles of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged. There is a plethora of case law on this point but to cut down this circle of forensics whirlpool, we would rely or some old decisions of the evolutionary era of the constitutional law as they still hold the field.*"

In that view of the matter, this Court would not like to non-suit the petitioners on the technical ground of availability of an alternative remedy and is inclined to adjudicate the dispute on merits. This Court has also taken note of the fact that pleadings have been exchanged and this writ petition is pending since the year 2019.

15. Coming to the merits of the case, it is seen that though the writ petitioners are referring to the notice dated 16.05.2018, the same appears to be not acted upon. On the

other hand, this Court finds force in the submission of the Corporation that it is the notice dated 17.05.2018 which was acted upon as the same is substantiated by the Attachment-1 submitted by the petitioners while offering the two vehicles which was said to be in terms of the notice dated 17.05.2018. This Court has also noted that there is a vast difference in the two notices and the notice dated 17.05.2018 which has been acted upon in clear terms lays down that requirement of additional trucks was on *ad hoc* basis which would be allowed to ply only till new trucks, as per the new tender notice, gets inducted. The aforesaid plea of the Corporation has not been denied by the petitioners in the rejoinder-affidavit dated 28.02.2020 in specific terms and rather, the denial is based on surmises. For ready reference, the relevant pleadings of the re-joinder-affidavit dated 28.02.2020 are quoted hereinbelow: -

> "*The deponent states that in the process of placement of vehicles various documents were required to be signed and the respondent authorities might have craftily procured the seal and signature of the deponent on the so called notice dated 17.05.2018. But the said notice was never brought to his notice nor did the deponent voluntarily and knowingly put his seal and signature thereon*."

16. This Court has noted that the plea of the Corporation regarding no challenge made to Clause-42 of the NIT is also admitted by the petitioners in paragraph 10 of the affidavit-in-reply dated 28.02.2020. In view of such admission, this Court is of the opinion that the present challenge is not maintainable.

17. The law relating to tenders has been crystallized by the Hon'ble Supreme Court in a number of decisions and the decisions referred by the petitioner in the case of ***Central Coal Fields Ltd.*** (supra) would guide in resolution of the present dispute. The relevant paragraph is extracted hereinbelow: -

> "*43. Continuing in the vein of accepting the inherent authority of an employer to deviate from the terms and conditions of an NIT, and reintroducing the privilege-of-participation principle and the level playing*

field concept, this Court laid emphasis on the decision making process, particularly in respect of a commercial contract. One of the more significant cases on the subject is the three-judge decision in Tata Cellular v. Union of India (1994) 6 SCC 651 which gave importance to the lawfulness of a decision and not its soundness. If an administrative decision, such as a deviation in the terms of the NIT is not arbitrary, irrational, unreasonable, mala fide or biased, the Courts will not judicially review the decision taken. Similarly, the Courts will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation. This was quite clearly stated by this Court (following Tata Cellular) in Jagdish Mandal v. State of Orissa in the following words: (SCC p. 531, para 22)

> *"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."*

This Court then laid down the questions that ought to be asked in such a situation. It was said: (Jagdish Mandal case, SCC p. 531, para 22)

> *"22…..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."

18. The Hon'ble Supreme Court in the case of ***Caretel Infotech Ltd. Vs. Hindustan Petroleum Corporation Ltd. & Ors.***, reported in **(2019) 14 SCC 81** has held that the owner/authority which had floated the tender would be the best judge for interpretation of any of the clause of the tender.

19. Apart from the aforesaid shortcomings and demerits of the petitioners, what is intriguing is that the petitioners have not been able to show existence of any legally enforceable right to continue with the arrangement of their vehicles to be under hire by the Corporation. Though the learned senior Counsel may be correct in pointing out that there was no date fixed for the arrangement to come to an end, the said submission is rendered otiose by the notice dated 17.05.2018 which specifically states the time for which the vehicles hired on *ad hoc* basis would be allowed to continue. At the same time, no legally tenable grounds for challenging the notice dated 12.03.2019 have been made out and in any case, taking into account the interest of public service, such challenge at the instance of an ineligible/unsucessful bidder is not liable to be taken into consideration.

20. In view of the aforesaid facts and circumstances, this Court is of the opinion that no case for interference has been able to be made out by the petitioners and accordingly, the writ petition is dismissed. Consequently, the order dated 10.04.2019 stands vacated.

21. The original records are returned back to the learned counsel for the Corporation.

JUDGE

Comparing Assistant