NAFR

HIGH COURT OF CHHATTISGARH BILASPUR

Order Reserved on 24.01.2020
Order Delivered on 19.03.2020

Writ Petition (C) No.3992 of 2019

M/s CP Bhatia and Associates (A Partnership Firm registered Under Indian Partnership Act) Through its Partner Chandra Prakash Bhatia, S/o Damodar Dash Bhatia, Aged about 47 Years, R/o, C 245, Shailendra Nagar, Raipur, District Raipur Chhattisgarh.

---- Petitioner

Versus

1. State of Chhattisgarh Through The Secretary, Department of Excise, Mantralay, Mahanadi Bhavan, Atal Nagar, Raipur Chhattisgarh.

2. Managing Director Chhattisgarh State Marketing Corporation Limited (CSMCL), Excise Building, Fourth Floor, Chokra Nala, Labhandi, District Raipur Chhattisgarh.

---- Respondents

For Petitioner	: Shri Rohit Sharma, Advocate
For Respondent No.1/State	: Shri Siddharth Dubey, Dy. Govt. Advocate
For Respondent No.2	: Shri Rajeev Shrivastava, Advocate

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice
Hon'ble Shri Parth Prateem Sahu, Judge

C A V Order

Per Parth Prateem Sahu, Judge

1. Challenge in this writ petition is to the eligibility criteria prescribed by Respondent-Chhattisgarh State Marketing Corporation Limited (hereinafter referred to as the Respondent

-CSMCL) in the “tender for appointment of Chartered Accountants Firms for assignment of internal audit of retail vending liquor shops”, of which, the Petitioner became ineligible to participate in the tender proceedings.

2. Relevant facts for disposal of this writ petition are that, the Respondent-CSMCL had issued tender notification dated 24.10.2019 and the last date for submission of tender document was fixed as 05.11.2019. The Petitioner who is a partnership Firm has challenged the eligibility criteria as mentioned in Clause-2.1 of the tender notification on various grounds.

3. The submission of learned counsel for the Petitioner is that Respondent-CSMCL has earlier floated tenders, which were cancelled for one or the other reason and again under the same condition i.e. eligibility criteria, present tender notification bearing No.CSMC/Tender/2019-20/2E has been floated. Experience clause as mentioned in Clause 2.1 is framed in a manner to extend the benefit to the Chartered Accountants Firms already engaged previously with Respondent-CSMCL. The action of Respondent-CSMCL is violative to Articles 14 and 19 of the Constitution of India and cancellation of earlier tenders is deliberate attempt and foul play to achieve hidden objects. The eligibility criteria prescribed in the tender notification is violative to the directions issued by the Central Vigilance Commission. It is further pointed that the tender notification, in which, the Petitioner became successful was cancelled and thereafter, insertion of clause in eligibility criteria i.e. Clause 2.1 is an arbitrary exercise by Respondent-CSMCL to oust the tenderer like Petitioner from the competition. The date of publication of the notification is in a planed way during the period of Diwali festival, therefore, the action on the part of Respondent-CSMCL is arbitrary with foul play and an eye wash.

4. Learned counsel for the Respondent-CSMCL submitted return and denied all the adverse pleadings and allegations made in the writ petition. It is pointed out that the experience clause as mentioned in Clause 2.1 of the tender notification is only on account of fact that the Respondent-CSMCL was borne in the year 2017 itself, earlier the liquors are being sold by qualified liquor contractors who become successful in the bid proceedings. In the year 2017, a new taxation law has been incorporated and came into force known as 'Central Goods and Services Tax Act, 2017, which made the taxation law applicable in the work, for which, the Respondent-CSMCL has floated tender notification. Fixing of eligibility criteria is in the domain of the employer as per his need and requirement. It is also pointed out that it is the employer who is the best person to know and assess the eligibility and qualification of a person or Firm looking to the nature of work, for which, the tender has been floated and it is also for the employer to find out the best person or Firm for their work. Respondent-CSMCL has suffered financial loss in past year due to unexperienced professional for internal audit, which made the Respondent-CSMCL to insert experience clause as 2.1 in the present tender notification. The action on the part of Respondent-CSMCL is transparent and do not suffer from any arbitrariness and malafide and the conditions/eligibility criteria prescribed in the tender notification is not in violation of guidelines issued. The earlier tender notification i.e. Tender No.”2B” was cancelled on the advice of the Financial Consultant of the Respondent-CSMCL whereas Tender No.“2C” was cancelled on account of non-responsive bids. There is no malafide and arbitrariness on the part of the Respondent-CSMCL in cancelling the earlier tender notifications. Tender No.”2D” was cancelled due to some technical discrepancies found by the Respondent-CSMCL and thereafter, the present tender notification “2E” has been floated. The Respondent-CSMCL has published issuance of tender notification through the State Agency i.e. 'Chhattisgarh Samvad'. The submission of learned counsel for the Petitioner that the eligibility criteria so framed by the Respondent-CSMCL to benefit Chartered Accountants/Chartered Accountants Firms who were engaged in preceding year for internal audit is not correct, because out of five zones, in three zones, new Chartered Accountants Firms participated in tender proceedings and one of the Firms is outside of the State of Chhattisgarh. Learned counsel for Respondent-CSMCL lastly submits that action on the part of Respondent-CSMCL is fair, transparent and Petitioner's allegation is vague and prays for dismissal of the writ petition.

5. We have heard learned counsel appearing for the parties and perused the documents annexed along with the record of writ petition.

6. For better understanding the grievance of the Petitioner, it would be appropriate to extract Clause 2.1 of the tender notification, which reads as under :

> "2.1 The firm of Chartered Accountants who have experience of audit for at least 2 years in last 3 financial years, of Government Organization/Govt. PSU in Liquor business are only eligible to apply as Internal Auditors of Shops."

7. In view of the pleadings and submissions made by learned counsel for the Petitioner, the question for consideration before this Court is whether Clause 2.1 is arbitrary or it is inserted to extend undue benefit to any specific Firm of Chartered Accountants?

8. Undisputedly, the tender notification is for engagement of the professionals i.e. Firm of Chartered Accountants for the purpose of internal audit of retail vending liquor shops. It is also not in dispute that prior to year 2017, the retail sale of liquor was not managed by the Respondent-CSMCL, but it is managed by the private entities/persons after obtaining yearly contract for sale of country made liquor and foreign liquor separately. The explanation offered by learned counsel for the Respondent-CSMCL that the reason for inserting Clause 2.1 in the tender notification on account of the new tax system has been brought into effect by introducing a new Act known as "Central Goods and Services Tax Act, 2017" cannot be ignored. The submission of learned counsel for the Petitioner that Clause 2.1 has been inserted only to extend benefit to the Chartered Accountants Firms already engaged by Respondent-CSMCL in the previous years also do not appear to be correct when the pleading made by Respondent-CSMCL in its reply to the writ petition and application for grant of interim relief that out of five zones, in three zones, new Chartered Accountants Firms participated and this pleading has not been reverted by learned counsel for the Petitioner.

9. So far as the period of publication of tender notification during Diwali festival as raised by learned counsel for the Petitioner also do not stand because Respondent-CSMCL in very categorical terms pleaded that out of new Chartered Accountants Firms, who participated in the tender proceedings, one of the Firms is of outside the State of Chhattisgarh. The Chartered Accountants Firm which is situated outside of the Chhattisgarh participated in the tender proceedings itself shows that there was wide circulation of the tender notification. The wide circulation (publication) of the tender notification cannot be doubted looking to number of participants. There may be several reasons for participation of few tenderers. It is for the employer to fix the eligibility criteria/qualification of the tenderers looking to the nature of work, for which, the tender is floated by them.

10. The Hon'ble Supreme Court in the matter of **Global Energy Ltd. and another v. Adani Exports Ltd. and others** reported in **(2005) 4 SCC 435** has held that the terms of the invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice.

11. Further, the Hon'ble Supreme Court in the matter of **Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. and another** reported in **(2005) 6 SCC 138,** has held as under:-

> "12. After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made. 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. The Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an

> administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. (See para 113 of the Report, SCC para 94)."

12. Again, in the matter of **Michigan Rubber (India) Limited v. State of Karnataka and Others** reported in **(2012) 8 SCC 216,** the Hon'ble Supreme Court had considered that what action can be made to judicial review and held as under :-

> "23. From the above decisions, the following principles emerge:
>
> (a) * * *
>
> (b) * * *
>
> (c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;
>
> (d) * * *

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

13. In the aforementioned rulings, the Hon'ble Supreme Court has held that it is for the employer/State instrumentalities who is floating tenders to fix conditions of eligibility criteria and they should be left with free hand unless it is shown that the employer/State's action is found to be malicious, arbitrary and unreasonable.

14. Now, it is to be seen in view of the pleadings and submissions made by learned counsel for the Petitioner that whether Respondent-CSMCL has acted in arbitrary and unreasonable manner.

15. Learned counsel for the Respondent-CSMCL in its pleadings and submissions has submitted the reasons for insertion of Clause 2.1 in the subject tender notification. It is pointed out by him that due to lack of experience by the Chartered Accountants Firm engaged in the previous year, they have suffered financial loss and further that, new tax system has been brought into effect by the Legislature in the year 2017 known as "Central Goods and Services Tax Act, 2017", therefore, they have taken the period of two years experience within last three years. The explanation/reason assigned by the

Respondent-CSMCL for insertion of Clause 2.1 in the tender notification does not appear to be arbitrary and unreasonable because it is the employer who has to get his work done from a professional and if for any of the reason, loss is caused, then the sufferer will be the employer only. It is for this reason, Respondent-CSMCL/employer should have free to insert eligibility criteria and other conditions in the tender notification for getting best results and output by the persons/Firms engaged by it.

16. So far as the argument raised by learned counsel for the Petitioner that action on the part of the Respondents is arbitrary and therefore the entire proceeding is liable to be interdicted by issuing appropriate writ, as prayed for, is concerned, action on the part of the employer/authority floating tender is to be assessed only on the ground whether the decision making process of the concerned authority is proper or suffers from some infirmity. Hon'ble Supreme Court in the matter of **Sterling Computers Ltd. v. M & N Publications Ltd.** reported in **(1993) 1 SCC 445** has held in Para-18 thus;-

> “18. While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the 'decision making process'. By way of judicial review the Court cannot examine the details of the

> terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry. But the Courts can certainly examine whether 'decision making process' was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution."

17. Hon'ble Supreme Court in the matter of **Central Coalfields Limited and another v. SLL-SML (Joint Venture Consortium) and others** reported in **(2016) 8 SCC 622**, has held thus:-

> "47........ The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in *Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517* followed in *Michigan Rubber* (supra)."

18. As the submission of learned counsel for the Respondent has not been controverted by the learned counsel for the Petitioner that in three zones, new Firms of Chartered Accountants have participated and out of which, one of the Firm is outside of the State of Chhattisgarh also shows that the argument raised by learned counsel for the Petitioner that eligibility criteria, particularly, Clause 2.1 of the tender notification is tailor-made to extend the benefit to existing Chartered Accountants Firms, is also not sustainable and hereby repelled. The list of participated and selected Chartered Accountants Firms placed before us by the learned counsel for the Respondent-CSMCL shows that out of five zones, in three zones, new Chartered Accountants Firms have become successful and only in two zones, existing internal audit Chartered Accountants Firm have become successful. The Respondents have properly explained the reasons for including Clause 2.1 in tender notification.

19. In view of above, the allegation/ground raised by learned counsel for the Petitioner that Clause 2.1 of the tender notification is only to extend benefit to existing Chartered Accountants Firms do not stand.

20. For the foregoing reasons, we are of the considered view that the Petitioner could not make out any case for interference by this Court. The writ petition being devoid of substance, is liable to be and is hereby dismissed.

Sd/-	Sd/-
(P. R. Ramachandra Menon)	**(Parth Prateem Sahu)**
Chief Justice	**Judge**

Yogesh