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Court : Chennai Madurai

Decided On : Jun-24-2016

Judge : M. Venugopal

Appeal No. : W.P. (MD) No. 10093 of 2016 & WMP (MD) Nos. 7910 & 7911 of 2016

Appellant : E. Kanthan

Respondent : The Commissioner, Hindu Religious and Charitable Endowment Department, Chennai and Another

Judgement :

(Prayer: Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari to call for the records in pursuant to the impugned tender notification issued by the 2nd Respondent vide Na.Ka.No.1910/1425/C4 dated 24.05.2016 and quash the same in so far as conditions Nos. 2 and 3.)

ORDER

1. Heard the Learned Counsel for the Petitioner; the Learned Special Government Pleader for the first respondent and the Learned Counsel for the second respondent.

2. The Petitioner has focused the instant writ petition praying for passing of an order by this Court in calling for the impugned tender notification issued by the second respondent in Na.Ka.No.1910/1425/C4, dated 24.05.2016 and to quash the same in so far as Condition Nos.2 and 3.

3. According to the petitioner, he is an authorised agent of 'The Hindu' New Daily for selling its products in Tirunchendur area and also preparing sweet items such as Halwa, Laddu and other snacks items and selling the same on order basis and also supplying sweet items for marriage parties etc. Further, he and his family members decided to prepare temple prasadam and sell the same.

4. The stand of the petitioner is that the second respondent had issued a tender notification in Na.Ka.No.1910/1425/C4, dated 24.05.2016, for preparation and sale of prasadam in Arulmigu Mariamman Thirukovil, Samayapuram, Trichy for the Fasli 1426, i.e. From 01.07.2016 to 30.06.2017. Although he is desirous of participating in the tender, he is not able to participate because of the restricting conditions imposed on the participants. The tender notification was issued on 24.05.2016 and the last date of submission of tender is 09.06.2016 till 2.00 p.m. and the tenders were to be opened on 09.06.2016 on 2.30 p.m.

5. The learned counsel for the petitioner contends that the condition Nos.2 and 3 in the tender notification dated 24.05.2016 are to the effect that the participants must have an experience in preparing prasadam in temples and sell the same for three continues years. Added further, the participant is to produce a certificate attested by a Chartered Accountant for remitting Income Tax Returns, Sales Tax and Service Tax for the last three years and these conditions are incorporated only to keep out persons like him and to enable the existing contractors to continue in such business.

6. The learned counsel for the petitioner strenuously contends that the impugned tender is only for preparation and selling the items of prasadam as mentioned in condition No.36 and mere seeing those items, it would point out that they do no involve any technical expertise. The learned counsel for the petitioner proceeds to take a plea that the impugned conditions in the tender dated 24.05.2016 are highly unjustifiable, unreasonable and deliberate and only with a view to create monopoly

for their interested persons in the said business on preparing and selling temple prasadam and therefore, it is violation of Article 19(1)(g) of the Constitution of India.

7. The learned counsel for the petitioner submits that in respect of Palani Temple, two persons (one existing Contractor and the present Contractor) were participated in the auction held on 10.06.2016 and if the condition Nos.2 and 3 of the tender notification dated 24.05.2016 in respect of the second respondent/temple are removed, then, there is a possibility for everyone to take part in the auction in question.

8. Added further, it is represented on behalf of the petitioner that in respect of Tiruchendur temple, the condition relating to sale of Coconuts and Bananas were cancelled. Moreover, the petitioner has 36 years experience in private catering and for the first time, he had decided to participate, but because of the restrictive conditions imposed on the participants, he was not able to participate in the open auction held on 10.06.2016.

9. In response, the learned counsel for the second respondent contends that the condition No.2 in the impugned tender related to the experience of participant and condition No.3 related to financial capacity of the participants and indeed, the said two conditions are absolutely necessary, in view of the nature of work.

10. The learned counsel for the second respondent brings it to the notice of this Court that the temple is receiving more than one lakh devotees everyday and only a person with such and experience and such financial status alone capable of running the job, without complaints, can participate in the tender. Added further, even a disturbance of the running of prasadam stall for an hour would not only affect the administration, but also affect the sentiments of lakh of devotees and only bearing in mind these essential aspects, the temple administration has incorporated these conditions and these conditions are all not first time implemented, but implemented long back.

11. The learned counsel for the second respondent takes a stand that on earlier occasions, auctions were conducted and bidders took part, only after compliance

of the condition Nos.2 and 3. Furthermore, it is represented on behalf of the second respondent that the petitioner cannot insist the temple administration to relax the norms. Taking into consideration the safety and health conscious of the devotees of the temple, the temple is aiming for experienced persons to participate and only for the smooth administration, the condition Nos.2 and 3 are imposed, besides that the participants ought to have capacity to execute the work.

12. The learned counsel for the petitioner projects and argument that the scope of 'Judicial Review' under Article 226 of the Constitution of India is restricted and limited and to lend support to this contention, he seeks in aid of the decision of the Hon'ble Supreme Court in MICHIGAN RUBBER (INDIA) LIMITED v. STATE OF KARNATAKA AND OTHERS reported in 2012 (8) SCC 216, at special page 229, whereby and where under, it is observed as follows:-

23. From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(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) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(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 short, the categorical plea taken on behalf of the second respondent/temple is that no individual can claim a fundamental right to carry on business with the Government and in the present case, there is no mala fide can be attributed on the action of tender authority and furthermore, there is no misuse of any statutory power.

14. By means of reply, the learned counsel for the petitioner submits that the decision of the Hon'ble Supreme Court in MICHIGAN RUBBER (INDIA) LIMITED v. STATE OF KARNATAKA AND OTHERS reported in 2012 (8) SCC 216, cited on behalf of the second respondent/temple, is not applicable to the facts and circumstances of the present case on hand.

15. At this juncture, it is to be pertinently pointed out that this Court on 08.06.2016, has passed the following order:-

Heard both sides.

It is made clear that the public auction stated on 09.06.2016 at 11.00 a.m. shall go on. However, the second respondent shall keep the offers received in a sealed cover and under his custody. Further, it is made clear that the sealed cover shall not be opened until further orders of this Court. In the meanwhile, the respondents are directed to file counter/obtaining necessary instructions.

16. It is to be borne in mind that a citizen has a fundamental right to carry on a business or trade. However, he has no fundamental right to insist upon the Government or any other person for doing business with him a per decision in ACHUTHAN C.K.V. v. STATE OF KERALA, reported in AIR 1959 SC 490.

17. No citizen has a fundamental right to insist upon the Government doing business with him, as per decision in DEVATA PRASAD SINGH CHAUDHARI v. CHIEF JUSTICE, HIGH COURT OF PATNA reported in AIR 1962 SC 201. An individual may have a right under the ordinary law to sue for specific performance or damages for breach of contract, in proper cases.

18. It is to be remembered that the right to enter into a contract pertaining to property or business, is a fundamental right enshrined by article 19(1)(f)-(g), but the rights arising under the contract are not fundamental rights guaranteed by the Constitution. A citizen has no fundamental right to insist on Government or any other person to do business with him, as per decision in KRISHNAN KAKKANTH v. GOVERNMENT OF KERALA, reported in AIR 1997 SC 128.

19. In this connection, this Court aptly points out the decision of Hon'ble Supreme Court in MICHIGAN RUBBER (INDIA) LIMITED v. STATE OF KARNATAKA AND OTHERS reported in 2012 (8) SCC 216, wherein at paragraph No.35, it is observed as under:-

As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonable. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the Courts would interfere. The Courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, the CMG consisting of experienced persons, revised the tender

conditions. We are satisfied that the said Committee had discussed the subject in detail and for specifying these two conditions regarding pre-qualification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide.

20. It cannot be gain said that selecting one manufacturer through a process of open competition is not a creation of any monopoly in violation of Article 19(1)(g) r/w. Article 19(6) of the Constitution of India, as per the decision in ASSOCIATION OF REGISTRATION PLATES v. UNION OF INDIAN AND OTHERS reported in AIR 2005 Supreme Court 469.

21. Admittedly, the scope of 'Judicial Review' is limited. In 'Judicial Review' the Court does not sit as a Court of appeal. However, it merely reviews the manner, in which, a decision is made. In reality, the terms of auction/tender notification, comes within the realm of contract and the tender notification in Law is an open invitation.

22. It is to be pointed out that the Court cannot interfere in the tender notification/Public Auction, just because it feels that some other conditions in the tender/Public auction would be more appropriate, fairer, wiser or reasonable or a logical one. Laying down necessary conditions or qualifications in the Public auction/tender notification are really meant with a view to ensure that a prospective participant has the ability, capability and necessary resources to execute the job in question in a successful manner.

23. In the present case on hand, this Court on going through the condition Nos.2 and 3 of the tender notification dated 24.05.2016, is of the considered view that the said conditions are imposed in the notification only to enable the persons, who possess adequate experience in preparing the prasadam and who had paid income tax, sales tax etc. for the past three years by furnishing certificate from the Chartered Accountant to take part in the auction. The said conditions are only prescribed in the tender notification dated 24.05.2016 only with a view to enable the fit/eligible/rightful/competent persons to take part in the public auction.

24. As a matter of fact, the condition Nos.2 and 3 of the impugned tender notification dated 24.05.2016 would not in any way give room for creating of any monopoly for the interested persons, in the considered opinion of this Court. The authority concerned is empowered to impose necessary restrictions/conditions in a tender notification. Suffice it for this Court to point out that the condition Nos.2 and 3 of the tender notification dated 24.05.2016 in the present case, cannot be said to be an unreasonable, arbitrary and capricious one. Further, they are not mala fide and do not suffer from any 'Bias or Malice in Law'. Looking at from that angle, the impugned tender notification dated 24.05.2016 of the Second Respondent/temple is legally valid one. Resultantly, the writ petition fails.

25. In fine, the writ petition is dismissed leaving the parties to bear their own cost. The connected Miscellaneous Petitions are also dismissed.

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