SUPREME COURT OF INDIA

Sanjay Kumar Shukla

Vs.

Bharat Petroleum Corporation Ltd.

C.A.Nos.1871-1872 of 2014

(P. Sathasivam CJI. and Ranjan Gogoi JJ.)

07.02.2014

JUDGMENT

RANJAN GOGOI, J.

1. Leave granted.

2. These appeals are directed against the common judgment and order dated 16.05.2012 passed by the High Court of Judicature at Patna in Letters Patent Appeal Nos.1845 and 1916 of 2011. By the aforesaid impugned order, the High Court has directed that the respondent No.7 herein who was placed at serial No.2 of the select list/merit panel for award of dealership of retail outlet under the respondent No.1, i.e. M/s. Bharat Petroleum Corporation Ltd., be offered the said dealership after completing the process contemplated under the selection procedure in force in the Corporation.

3. A summary of the essential facts is delineated hereinbelow:-

> The first respondent Corporation issued an advertisement dated 30.05.2010 for award of dealership of retail outlets in different locations including Areraj, East Champaran District in the State of Bihar. The selection was to be made in accordance with the norms laid down by the Corporation and available in a booklet published on 15.09.2008 under the caption "procedure for selection of petrol/diesel retail outlet dealers" (hereinafter referred to as the "Norms"). On the basis of the applications received for grant of the dealership in question, a selection was held wherein the appellant was placed

at Sl.No.1 with 78.04 marks whereas the respondent No.7 who had secured 77.75 marks was placed at Sl.No.2. The dealership was to be offered to the most meritorious candidate after necessary field verification. The norms contemplated issuance of a Letter of Intent (LoI) on the expiry of 30 days from the date of publication of the select list/merit panel or till disposal of complaints, if any, with regard to the selection made by the Corporation. A grievance redressal mechanism is expressly laid down in the 'Norms'.

4. Aggrieved by the selection, the respondent No.7 filed a complaint dated 25.01.2011 before the Corporation raising a two-fold grievance. The first was with regard to award of 'zero' marks to the Respondent, against a maximum of 'four' awardable under the head "Fixed and Moveable Assets". The second grievance raised was that the land offered by the appellant was under litigation and was not immediately available for use of the retail outlet. The complaint filed by the respondent No.7 was promptly answered by an order of rejection dated 28.01.2011 on the ground that the Technical Evaluation Committee in its report had found the land offered by the appellant suitable for development of the retail outlet and that the issue raised by the respondent in the objection/complaint would be dealt with in the process of grant of No Objection Certificate (NOC) by the District Magistrate to whom a reference of the matter is required to be made. In so far as the claim of the respondent No.7 with regard to award of marks is concerned, the same was rejected on the ground that the respondent had not furnished any document in support of his title to the assets mentioned by him in his application.

5. Aggrieved by the rejection of his complaint, the respondent No.7 moved the High Court by means of a writ petition registered and numbered as C.W.J.C. No.6125 of 2011. No Letter of Intent had been granted to the appellant at that stage. A learned Single Judge of the High Court by order dated 29.09.2011 took the view that in so far as award of marks to the respondent No.7 is concerned no fault can be found in the decision of the Corporation inasmuch as the respondent No.7 did not produce any document of title in respect of assets mentioned by him in his application for the dealership. In fact, the learned Single Judge came to the further conclusion that such failure on the part of the respondent No.7 amounted to suppression/concealment of relevant facts. In so far as the present appellant is concerned, the learned Single Judge came to the conclusion that the requisite NOC from the District Magistrate in respect of the land offered by the appellant not having been granted, the Corporation cannot be expected to wait indefinitely. Consequently, the learned Single Judge directed that the selection process be redone.

6. Aggrieved by the order dated 29.09.2011 passed by the learned Single Judge both the appellant and the respondent No.7 filed their respective Letters Patent Appeals. The Division Bench of the High Court by the impugned order dated 16.05.2012 substantially agreed with the findings recorded by the learned Single Judge in so far as both the parties are concerned. However, taking note of Clause 16 of the Norms i.e. "Procedure For Selection Of Petrol/Diesel Retail Outlet Dealers", the Bench took the view that once the appellant was found to be disentitled, the dealership should have been awarded to respondent No.7, he being, at serial No.2 of the merit list. Consequential directions were issued by the Division Bench of the High Court. Aggrieved, the present appeals have been filed.

7. Contending that the findings of the learned Single Judge with regard to suppression/concealment had not been set aside by the Division Bench of the High Court in its order dated 16.05.2012, the respondent No.7 had moved SLP (C) No.28324 of 2012 against the aforesaid part of the order dated 16.05.2012. The SLP filed by the respondent No.7 was dismissed by this Court by order dated 05.10.2012.

8. An effective resolution of the contentious issues that have emerged from the arguments made on behalf of the rival parties would require specific notice of the relevant documents brought on record by the parties at different stages of the proceedings before the High Court as well as this Court. As none of the said documents are disputed and the authenticity/genuineness thereof is not questioned, considering the relevance of the same to the subject matter, we are of the view that the facts unfolded by the said documents can be ignored only at the cost of a fair adjudication of the lis between the parties. We, therefore, proceed to take note of the said facts in proper sequential order.

9. After the selection for the dealership was finalized by the Corporation on 30.12.2010, a reference was made to the District Authority on 24.01.2011 for grant of NOC to enable the Corporation to apply for the necessary licence under the Petroleum Rules, 2002. By communications dated 11.07.2011 and 16.07.2011 the District Authority informed the Corporation that NOC cannot be granted on account of the fact that the land, on which outlet was proposed, was involved in Partition Suit No.7 of 2006. It would be of some significance that the appellant was impleaded as defendant in the said suit on 04.02.2011 i.e. after 5 years of its institution and that too after the finalization of the select list/merit panel by the Corporation. An order of injunction to restrain the District Authority from issuing

NOC was sought by the plaintiff in Partition Suit No.7 of 2006 which was refused by the learned Trial Court on 19.07.2011. Taking note of the aforesaid fact i.e. refusal of injunction, the District Authority, once again, sought for a report from the Sub-Divisional Officer whether NOC can be granted. This was on 04.08.2011. The Sub-Divisional Officer sought the opinion of the Government Advocate and submitted a report dated 18.08.2011 recommending grant of NOC. These documents, though vital, were not before the High Court but have been placed before us. After the learned Single Judge had decided the writ petition by ordering a fresh selection, an amendment application dated 17.10.2011 was filed in Partition Suit No.7 of 2006 for deletion of the land offered for the dealership from the purview of the suit. The said amendment was allowed by the learned Trial Court on 19.10.2011. In the L.P.A. filed by the appellant, i.e. L.P.A. No.1845 of 2011 the amendment application for deletion of the land in question as well as the order dated 19.10.2011 of the learned Trial Court allowing the said amendment application were enclosed. The High Court overlooked the same and did not consider the effect thereof on the rights and entitlements of the respective parties. It also appears that on 26.12.2011, on behalf of the Corporation, a reminder was issued to the District Authority for grant of the NOC applied for by the Corporation on 24.01.2011. There is another letter on record dated 30.12.2011 from the District Magistrate to the Territory Manager (Retail) Bharat Petroleum Corporation Limited in the matter of grant of NOC. In the said letter reference has been made to the order of the learned Single Judge in the C.W.J.C. No.6125 of 2011 dated 29.09.2011. In the ultimate paragraph of the said letter it is stated that:-

> "Thus, in view of the present context, kindly inform about your final decision regarding issuance of NOC whether issuance of NOC can be considered or not."

> The aforesaid letter dated 30.12.2011 is an English translation of the original. The contents of the last paragraph quoted hereinabove has left the true meaning thereof clouded though the appellant contends that the said paragraph should be read as containing a query from the Corporation as to whether in view of the learned Single Judge's order passed in the writ petition, NOC can be issued or not. Be that as it may, another suit i.e. T.S.No.638 of 2011 involving land in question had been instituted though the same has been dismissed on 6.1.2014 as not maintainable. Above all, Partition Suit No.7 of 2006 has been dismissed as withdrawn on 7.1.2014 on an application filed by the plaintiff. No other pending litigation involving the land has been brought to the notice of the Court.

10. In the present case even before the Letter of Intent in respect of the dealership could be issued to the appellant the proposed grant came to be challenged before the High Court by the respondent No.7 who had impugned the decision of the Corporation dated 28.01.2011 rejecting the complaint filed by him against the selection made. Initially, the District Authority had taken the stand that the NOC in respect of the land offered by the appellant cannot be issued as the same was found to be involved in a litigation i.e. Partition Suit No.7 of 2006. While the writ petition was pending there was a change in the stand of the District Authority in the matter of grant of NOC. Yet, the same was not brought to the notice of the learned Single Judge. A vital fact, therefore, escaped notice. The fact that the appellant was impleaded in the suit on 04.02.2011, i.e. nearly 5 years after the institution thereof and after the selection was finalized by the Corporation on 30.12.2010 was before the High Court; yet the same had been overlooked by the learned Single Judge. The Division Bench hearing the Letters Patent Appeals also overlooked the fact that the learned Trial Court by order dated 19.10.2011 had allowed the deletion of the land in question from the purview of the said partition suit on an application filed by the plaintiff. This is, notwithstanding, the fact that the amendment application dated 17.10.2011 as well as the order thereon dated 19.10.2011 was brought on the record of the L.P.A. by the appellant. That apart, the facts brought on record of the present appeal by the parties is of considerable significance. The subsequent report of the Sub-Divisional Officer dated 18.8.2011 recommending grant of NOC; the reminder of the Corporation dated 26.12.2011 to the District Authority for grant of NOC; the institution of Title Suit No.638 of 2011 in respect of the land in question and the dismissal thereof by order dated 06.01.2014 on the ground of maintainability as well as the dismissal of Partition Suit No.7 of 2006 on 07.01.2014 (on withdrawal) are too significant to be ignored, as already held. Relevant facts have been ignored at different stages of consideration of the matter by the High Court and in the light of the totality of the facts now placed before us, we unhesitatingly come to the conclusion that in the present case there was a deliberate and not very bona fide attempt on the part of the respondent No.7 to deny the fruit of the selection made in favour of the appellant by the Corporation as far back as on 30.12.2010. The situation, therefore, has to be remedied and it is the precise manner thereof which must now engage the attention of the Court.

11. We cannot help observing that in the present case exercise of the extraordinary jurisdiction vested in the High Court by Article 226 of the Constitution has been with a somewhat free hand oblivious of the note of caution struck by this Court

with regard to such exercise, particularly, in contractual matters. The present, therefore, may be an appropriate occasion to recall some of the observations of this Court in the above context. In Raunaq International Ltd. Vs. I.V.R. Construction Ltd. & Ors.[1], (paragraphs 9, 10 and 11) this Court had held as follows :-

> "9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. These would be:
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> (1) the price at which the other side is willing to do the work;
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> (2) whether the goods or services offered are of the requisite specifications;
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> (3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;
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> (4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;
>
> (5) past experience of the tenderer and whether he has successfully completed similar work earlier;
>
> (6) time which will be taken to deliver the goods or services; and often
>
> (7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.
>
> Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work — thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g., a delay in [pic]commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers."

12. In Air India Ltd. Vs. Cochin International Airport Ltd. & Ors.[2], there was a further reiteration of the said principle in the following terms:-

"7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court inRamana Dayaram Shetty v. International Airport Authority of India[3], Fertilizer Corpn. Kamgar Union

(Regd.) v. Union of India[4], CCE v. Dunlop India Ltd.[5], Tata Cellular v. Union of India[6],Ramniklal N. Bhutta v. State of Maharashtra[7] and Raunaq International Ltd. v. I.V.R. Construction Ltd.[8] The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene."

(Emphasis is ours)

13. Similar reiteration is to be found in Master Marine Services (P) Ltd. Vs. Metcalfe & Hodgkinson (P) Ltd. & Anr.[9]; Tejas Constructions and Infrastructure Private Limited Vs. Municipal Council, Sendhwa and Another[10] and several other pronouncements reference to which would only be repetitive and, therefore, is best avoided.

14. We have felt it necessary to reiterate the need of caution sounded by this Court in the decisions referred to hereinabove in view of the serious consequences that the entertainment of a writ petition in contractual matters, unless justified by public interest, can entail. Delay in the judicial process that seems to have become

inevitable could work in different ways. Deprivation of the benefit of a service or facility to the public; escalating costs burdening the public exchequer and abandonment of half completed works and projects due to the ground realities in a fast changing economic/market scenario are some of the pitfalls that may occur.

15. In the present case, fortunately, the litigation has not been very time consuming. Nothing has been suggested on behalf of the Corporation that the establishment of a retail outlet at Areraj, East Champaran District in the State of Bihar is not required as on date. It can, therefore, be safely understood that in the instant case the public of the locality have been deprived of the benefit of the service that the outlet could have generated. We have already indicated that the present litigation initiated by Respondent No. 7 does not constitute a very bonafide exercise on the part of the said Respondent and the entire litigation appears to have been driven by desire to deny the fruits of the selection in which the appellant was found to be the most eligible candidate. Whether the outlet is operated by the appellant or the Respondent No. 7 is of no consequence to the ultimate beneficiaries of the service to be offered by the said outlet. The above highlights the need of caution that was imperative on the part of the High Court while entertaining the writ petition and in passing orders therein. Be that as it may, in the totality of the facts of the present case, we are of the view that it would be just and proper to direct the Corporation, if it is of the view that the operation of the retail outlet is still justified by the exigencies, to award the same to the appellant by completing the requisite formalities in accordance with the procedure laid down by the Corporation itself.

16. Consequently, these appeals are allowed and the impugned order dated 16.05.2012 passed by the Division Bench of the High Court in L.P.A. Nos.1845 and 1916 of 2011 as well as the order dated 29.09.2011 passed by learned Single Judge in C.W.J.C. No.6125 of 2011 are set aside.

[1] (1999) 1 SCC 492
[2] (2000) 2 SCC 617
[3] (1979) 3 SCC 489
[4] (1981) 1 SCC 568
[5] (1985) 1 SCC 260
[6] (1994) 6 SCC 651
[7] (1997) 1 SCC 134
[8] (1999) 1 SCC 492
[9] (2005) 6 SCC 138

[10] (2012) 6 SCC 464