

Orissa High Court

Raj Kishore Das vs State Of Orissa And Ors. on 5 August, 1985

Equivalent citations: AIR 1986 Ori 222

Author: G Patnaik

Bench: P Misra, G Patnaik

JUDGMENT G.B. Patnaik, J.

1. The unsuccessful tenderer for grant of exclusive privilege of wholesale supply of country spirit in the district of Koraput for the year 1985-86 is the petitioner impugning in this writ petition the settlement of the said privilege on opposite party No. 4.

2. Pursuant to the tender notice issued under the signature of the Excise Commissioner, Orissa (Opposite party No. 3) dated 26-12-1984 (Annexure A), the petitioner submitted his tender. There were three tenderers competing in the field and admittedly the petitioner's tender was the lowest being Re. 0.89 paise per L. P. Litre. According to the petitioner's case, he being the lowest tenderer, his offer should have been normally accepted, but without accepting his tender and even without cancelling the same, opposite party No. 3 entered into negotiation with the petitioner as well as other tenderers. In the negotiation, the petitioner had offered to reduce the price to Re. 0.84 paise per L. P. Litre. But the privilege was settled with opposite party No. 4 after fixing the rate on negotiation with him at the rate of Re. 0.80 paise per L. P. Litre. This settlement of the privilege with opposite party No. 4 on negotiation has been challenged in this writ petition to be illegal, unconstitutional and contrary to the tender notice itself.

3. In the return filed by the opposite parties, it has been contended that the tender notice clearly stipulated that the Member, Board of Revenue (Opposite Party No. 2) had the right to reject any or all tenders fully or partly without assigning any reason. It also further stipulated that the Member had a right to negotiate with any or all the tenderers or any other party or to re-invite the tender if he so desired. In this view of the matter, it was not necessary for the competent authority to reject the tenders before entering into negotiation. The excise authorities having invoked their power of negotiation and having settled the privilege with opposite party No. 4 whose rate offered was lowest, have acted in accordance with the tender notice and, therefore, there is no illegality in the same.

4. At the hearing of this case, Mr. Ashok Mohanty, the learned counsel for the petitioner, mainly raised two submissions. According to the learned counsel, the competent authorities having decided to call for tenders and having obtained the same could not enter into negotiation without rejecting the tenders. In the present case, the tenders not having been rejected, the process of settlement by negotiation is vitiated and the order of settlement with opposite party No. 4 is liable to be struck down. The learned counsel further submitted that there was no guideline fixed in the tender notice as to how a negotiation should be done and this enabled the concerned authority to confer a privilege on his chosen favourite and such an action must be held to be an arbitrary exercise of power and should be struck down.

5. The learned Additional Government Advocate, Mr. Panigrahi, appearing for the State and Mr. Sahu appearing for the grantee, opposite party No. 4, contended that the tender notice itself made it

absolutely clear that the competent authorities were not bound to accept any tender and tenders could be rejected without assigning any reason and further the privilege could be settled on negotiation. It was not necessary for the excise authorities to pass an order of rejection before entering into the process of negotiation and so long as the negotiation was done bona fide, in the interests of public revenue, the same could not be quashed by this Court. It was further contended that the word "negotiation" would indicate that no guideline could be fixed as to how the negotiation should be conducted and when this power had been conferred on high authorities, it must be presumed to have been validly done unless the contrary was proved. According to them, the petitioner has not pleaded any materials from which an oblique motive can be inferred and consequently the action of opposite party No. 3 in the matter of settling the privilege with opposite party No. 4 cannot be held to be invalid in any manner.

6. Before entering into an examination of the rival contentions, it would be profitable to note that a citizen cannot claim any inherent right to sell intoxicating liquor. The trade in liquor is a business attended with danger to the community and, therefore, State has wide powers to regulate the said business of vending intoxicating liquor. The manner and extent of regulation rests in the discretion of the governing authority. That authority may vest in such officers as it may deem proper the power of passing upon applications for permission to carry it on and to issue licence for that purpose. The Act and the Rules prescribe the authority who can regulate and the manner in which the regulations can be imposed. So far as the grant of exclusive privilege of wholesale supply of country spirit is concerned, provisions have been made as to how the said privilege can be granted in favour of a citizen. It is undisputed that the competent authority who decides to settle the privilege by calling for tenders is not bound to accept the lowest tender and may decide to settle the privilege by negotiation. There is not much force in the contention of Mr. Mohanty for the petitioner that once the competent authority has decided to settle the privilege by calling for tender, then he must accept the lowest tender or he must reject the same by giving good reasons and then proceed to any other mode of settling the privilege. This matter came up for consideration before this Court in the case of Harinarayan Jaiswal v. State of Orissa, ILR (1971) Cut 1186 and this Court had upheld a similar contention which had been advanced by Mr. Mohanty for the petitioner in this case. But in appeal by the State to the Supreme Court, the Supreme Court reversed the decision of this Court in State of Orissa v. Harinarayan Jaiswal, AIR 1972 SC 1816. It was held by their Lordships of the Supreme Court: --

".....The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. Hence quite naturally, the legislature has empowered the Government to see that there is no leakage in its revenue. It is for the Government to decide whether the price offered in an auction sale is adequate. While accepting or rejecting a bid, it is merely performing an executive function. The correctness of its conclusion is not open to judicial review. We fail to see how the plea of contravention of Article 19(1)(g) or Article 14 can arise in these cases. The Government's power to sell the exclusive privileges set out in Section 22 was not denied. It was also not disputed that those privileges could be sold by public auction. Public auctions are held to get the best possible price. Once these aspects are recognised, there appears to be no basis for contending that the owner of the privileges in question who had offered to sell them cannot decline to accept the highest bid if he thinks that the price offered is inadequate. There is no concluded contract till the

bid is accepted. Before there was a concluded contract, it was open to the bidders to withdraw their bids. See *Union of India v. Bhimsen Walaiti Ram*, (1970) 2 SCR 594 : AIR 1971 SC 2295. By merely giving bids, the bidders had not acquired any vested rights. The fact that the Government was the seller does not change the legal position once its exclusive right to deal with those privileges is conceded. If the Government is the exclusive owner of those privileges, reliance on Article 19(1)(g) or Article 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government nor can there be any infringement of Article 14, if the Government tries to get the best available price for its valuable rights....."

In paragraph 19 of the aforesaid judgment, the Supreme Court further observed : --

"It was next urged that having had recourse to the auction method once, the Government was precluded from either calling for tenders or to sell by negotiation. The High Court has accepted that contention. We are unable to agree with the High Court in its conclusion. Neither the provisions of the Act nor the order issued by the Government lends any support to such a conclusion. Once the Government declines to accept the highest bid, the auction held became useless. Similar is the effect when the Government refused to accept the highest tender. That left the Government free to have recourse to other methods. The power given to the Government by the Act to sell the exclusive privilege in such other manner as it thinks fit is a very wide power. That power is unrestricted. It undoubtedly includes the power to sell the privileges in question by private negotiation."

In our view the aforesaid observations of the Supreme Court apply with full force to the present case.

7. The tender notice itself in paragraph 2 states : --

".....The Member, Board of Revenue, Orissa reserves the right to reject any or all tenders fully or partly without assigning any reason. The Member also reserves the right to negotiate with any or all the tenderers or any other party or to re-invite tenders if he so desires."

This being the position, we do not find any force in the contention of Mr. Mohanty that the competent authority was ineligible to enter into negotiation having decided to settle the privilege by calling for tenders or the said authority acted illegally in adopting the mode of settling by negotiation without rejecting the tenders for any good reasons. The said contention is accordingly rejected.

8. So far as the second contention of Mr. Mohanty is concerned, it is based on the ground that without fixing any guidelines for negotiation, the provision for settling the privilege by negotiation must be held to be arbitrary. But we find from the writ petition itself that the validity of the provision providing for settlement of the privilege by negotiation has not been challenged. It is only the particular action that has been challenged in the present case. That apart, in view of the observations of the Supreme Court, quoted earlier, such a provision conferring power on high authorities of Government to settle the exclusive privilege either by tender or by auction or by negotiation cannot be held to be violative of Article 14 of the Constitution. It is true, no doubt, that it

causes some amount of heart-burning to the traders like the petitioner, but keeping in view the nature of trade with which we are concerned in this case, some amount of discretion must be vested in the Government or its high officers who are required to do the job of settlement. It would have been no doubt much better for the concerned authority while entering into negotiation to find out from the petitioner who was undoubtedly the lowest tenderer if he would be agreeable to sell the spirit at the rate with which they have negotiated with opposite party No. 4, but the action of the competent authority cannot be said to be a malicious one nor the settlement in question can be said to be one with oblique motive, merely because the competent authority did not ask again the petitioner while entering into negotiation on the basis of the offer they received from opposite party No. 4. This is a matter purely for the concerned authorities to decide as to how best the privilege in question should be settled keeping in mind the public revenue in question. On the materials produced in this case, it is not possible for us to come to the conclusion that the impugned settlement in favour of opposite party No. 4 is in any manner vitiated being actuated with malice or the said opposite party No. 4 has been conferred the benefit arbitrarily.

9. Mr. Mohanty for the petitioner very much relied on the decision of the Supreme Court in the case of *Ramana Dayaram Shetty v. The International Airport Authority of India*, AIR 1979 SC 1628, and contended that the observations of the Supreme Court in *Harinarayan Jaiswal's case*, AIR 1972 SC 1816, referred to supra, had been diluted to a great extent by this decision of the Supreme Court. The learned counsel stressed on the observations made in *Ramana's case* in paragraph 11. The said observations are quoted hereinbelow in extenso : --

"To-day the Government, in a welfare State is the regulator and dispenser of special services and provider of a large number of benefits, including job contracts, licences, quotas, mineral rights etc. The Government pours forth wealth, money, benefits, services, contracts, quotas and licences. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare. Then again, thousands of people are employed in the State and the Central Government and local authorities. Licences are required before one can engage in many kinds of businesses or work. The power of giving licences means power to withhold them and this gives control to the Government or to the agents of Government on the lives of many people. Many individuals and many more businesses enjoy largess in the form of Government contracts. These contracts often resemble subsidies. It is virtually impossible to lose money on them and many enterprises are set up primarily to do business with Government. Government owns and controls hundreds of acres of public land valuable for mining and other purposes. These resources are available for utilisation by private corporations and individuals by way of lease or licence. All these mean growth in the Government largess and with the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, can it be said that they do not enjoy any legal protection? Can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure? Is the position of the Government in this respect the same as that of a private giver? We do not think so.

The law has not been slow to recognise the importance of this new kind of wealth and the need to protect individual interest in it and with that end in view, it has developed new forms of protection. Some interests in Government largess, formerly regarded as privileges, have been recognised as rights while others have been given legal protection not only by forging procedural safeguards but also by confining, structuring and checking Government discretion in the matter of grant of such largess. The discretion of the Government has been held to be not unlimited in that the Government cannot give or withhold largess in its arbitrary discretion or at its sweet will. It is insisted, as pointed out by Professor Reich in an especially stimulating article on 'The New Property' in 73 Yale Law Journal 733, 'that Government action be based on standards that are not arbitrary or unauthorised.' The Government cannot be permitted to say that it will give jobs or enter into contracts or issue quotas or licences only in favour of those having grey hair or belonging to a particular political party or professing a particular religious faith. The Government is still the Government when it acts in the matter of granting largess and it cannot act arbitrarily. It does not stand in the same position as a private individual."

Notwithstanding the observations made in paragraph 11, the learned Judges referred to Harinarayan Jaiswal's case, (AIR 1972 SC 1816) in paragraph 25 and did not differ with the conclusions reached by the Supreme Court in the said case in any manner. This being the position, we are firmly of the view that Ramana's case, AIR 1979 SC 1628 does not support the petitioner's contention in any manner.

10. The learned counsel then placed reliance on the decision of a learned single Judge of the Calcutta High Court in the case of Barun K. Sinha v. District Magistrate, Murshidabad, AIR 1982 Cal 19 which no doubt supports Mr. Mohanty's contention to some extent. But in view of the decisions of the Supreme Court, referred to earlier, it is not necessary for us to find out the reasonings of the said learned Judge of the Calcutta High Court when he struck down the order of the Government accepting the higher tender while rejecting lower one.

11. In the ultimate result, therefore, we do not find any merits in this application which is accordingly dismissed, but in the facts and circumstances of the case, there would be no order for costs.

P.C. Misra, J.

I agree.