GAHC010201832022

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

Case No. : WP(C)/6531/2022

BANDISH ENTERPRISE
A PARTNERSHIP FIRM DULY REGISTERED UNDER THE INDIAN PARTNERSHIP ACT, HAVING ITS REGISTERED OFFICE AT 1/7 BHAWESHWAR SHIKHAR, R B MEHTA MARG GHATKOPAR EAST MUMBAI, MAHARASHTRA INDIA PIN-400078 REP. BY ITS PARTNER SHRI BANDISH SARVAIYA AND AUTHORISED BY SUNIL KR JAIN

VERSUS

THE NUMALIGARH REFINERY LTD. AND 7 ORS.
LOCATED AT MORANGI GOLAGHAT ASSAM AND A GOVT OF INDIA ENTERPRISE AS REP. BY ITS CHAIRMAN MANAGING DIRECTOR AND HAVING ITS REGISTERED OFFICE AT 122A G.S. ROAD CHRISTIAN BASTI GUWAHATI-781005

2:THE CHIEF GENERAL MANAGER ()MARKETING)
NUMALIGARH REFINERY MORANGI
DIST. GOLAGHAT
ASSAM PIN-785699

3:THE DEPUTY GENERAL MANAGER (MARKETING) HEAD OF WAX MARKETING
NUMALIGARH REFINERY MORANGI
DIST. GOLAGHAT
ASSAM PIN-785699

4:M/S NITIN KUMAR GOEL
A PARTNERSHIP FIRM HAVING ITS REGISTERED OFFICE SITUATE AT PLOT 60 BLOCK B IFC HOLAMBI KALAN NARELA PHASE 1 NEW DELHI PIN-110082 AND REP. BY SHRI NITIN KUMAR GOEL AS ITS PARTNER

5:UNICORN PETROLEUM INDUSTRIES PVT. LTD.

A COMPANY INCORPORATED UNDER THE PROVISIONS OF THE COMPANIES ACT
1956 HAVING ITS REGISTERED OFFICE AT UNIT NO. 1 RIDDHI SIDDHI CORPORATE PARK V N PURAV MARG SION TROMBAY ROAD CHEMBUR MUMBAI PIN-400071 AND REP BY SHRI SANJAY G PAREKH AS ONE OF ITS DULY AUTHORIZED DIRECTORS

6:M/S RAJ SPECIALITY CHEMICALS PVT LTD
A COMPANY INCORPORATED UNDER THE PROVISIONS OF THE COMPANIES ACT
1956 AND HAVING ITS REGISTERD OFFICE SITUATED AT 74 SOUTH EMPEROR STREET
TUTICORIN TAMIL NADU PIN-682001 AND REP BY SHRI RAKESH AGARWAL AS ONE OF ITS DULY AUTHORIZED DIRECTORS

7:SHREENATHJI ENTERPRISES
A PROPRIETORISHIP FIRM HAVING ITS REGISTERED OFFICE SITUATED AT SY NO. 57 KADU AGRAHARA ROAD
KAMMASANDRA (V) VIRGONAGAR POST BIDRAHALLI HOBLI BANGALORE (E) 560049 AND REP .BY SHRI RAKESH KHANDELWAL AS ITS AUTHORIZED REPRESENTATIVE AND ATTORNEY

8:SHAKANBARI ENTERPRIESE (INDIA) PVT. LTD.
A COMAPANY INCORPORATED UNDER THE PROVISIONS OF THE COMPANIES ACT
1956 AND HAVING ITS REGISTERED OFFICE SITUATED AT 1/1A NANDA MULLICK LANE KOLKATA WEST BENGAL PIN-700006 AND REP. BY SHRI SANJAY DHANDHARIA KOLKATA AS ONE OF ITS DULY AUTHORIZED DIRECTOR

Advocate for the Petitioner : MR. P K GOSWAMI

Advocate for the Respondent : MR. N DEKA (r-1,2,3)

BEFORE

THE HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the petitioner :Mr. PK Goswaim, Sr. Advocate
Mr. P Choudhury, Advocate

For the Respondents : Mr. J Roy, Senior Advocate

Mr. N Deka, Advocate

Date of Hearing : 16.11.2022

Date of Judgment & Order : 30.11.2022

JUDGEMENT & ORDER (CAV)

Heard Mr. PK Goswami, learned Senior counsel assisted by Mr. P Choudhury, learned counsel for the petitioner. Also heard Mr. J Roy, learned Senior counsel assisted by Mr. N Deka, learned standing counsel for the Numaligarh Refinery Ltd.

2. **The Challenge in the writ petition**:

I. The present writ petition is filed assailing clause 2.0, 6.0, 7.1, 8.1 and 16 of the e-notice dated 01.07.2022 issued by the Numaligarh Refinery Ltd (hereinafter referred to as NRL) for appointment of Wax Distributor in six new locations, namely, Agartala, Ahmadabad, Bhupal, Kanpur, Patna and Amritshar. However, during the course of argument, the petitioner has given up the challenge to the clause 2.0, 7.1, 8.1 and to clause 16, however, the challenge to clause No. 6 is being urged by the learned counsel for the petitioner. This court under its order dated 21.10.2022 issued notice to the respondent Nos. 1,2 and 3. However, no notice was issued to the private respondents.

II. The petitioner is a registered partnership firm and is engaged in business of supply of polymers, plasticizers, Waxes, industrial and chemical raw materials and finished petroleum products and is an existing distributor of Numaligarh Refinery Ltd. for paraffin wax product and such distributorship was granted by virtue of an agreement executed in the year 2015 and same is extended till 2025. The petitioner is not bidder in respect of the e-notice in question but alleges disruption of

level playing field.

3. **The Arguments Advanced on behalf of the petitioner**:

Mr. Parthiv K. Goswami, learned Seniorn Counsel argues the Followings:

I. Clause 6 is violative of the fundamental and the Constitutional right of the petitioner inasmuch as the same would eventually drive the petitioner out of the business.

II. The clause 6, permitting multiple distributors would result in a comparative cost advantage to the distributors of IOCL products, who could sell at a laser price and undercut market of the petitioner and other distributors of respondent No. 1. In support of such contention, Mr. Goswami highlights the paragraph 12 and paragraph 18 of the writ petition and the statement showing the price advantage of the IOCL distributors.

III. Mr. Goswami further contends that as the statements made at paragraph 18 and paragraph 22 of the writ petition are not denied by the respondent NRL and therefore, it is now an admitted fact that the distributor of IOCL wax are having cost advantage and if such distributors are allowed to participate or allowed to be distributors of NRL simultaneously, they will have cost advantage and eventually the petitioner will be out of the market.

IV. The provision of clause 23 and 24 of the distributorship agreement entered into by the petitioner are similar to that of the proposed agreement for the prospective dealers, which debars multiple distributorship under different OIL companies. Though the present petitioner has sought permission to be distributor of multiple dealership as per provision of the said clauses i.e. clause 23 and 24, however, since 2014 the NRL has not granted consent to any distributor of NRL to be a distributor of the another company. Thus the said clause 24 has been understood by all the parties including the NRL to operate as a bar to multiple distributorship under different

Oil Companies.

However, from the affidavit-in-opposition filed by the respondent, it is clear that now the Respondent No.1 is trying to shift its stand by taking a contrary position that the said clause 24 is not an absolute bar and they would have no objection to IOCL distributor being appointed as a NRL distributor so long as the said IOCL distributor is able to uplift the assured quantity under NRL distributorship agreement. Such stand is unreasonable, arbitrary and is discriminatory, submits Mr. Goswami, learned Senior counsel.

V. It is the further argument of Mr. Goswami that such stand of the respondent No. 1 is also inconsistent with Clause 12 of the distributorship agreement, which provides that in case of any failure to lift the assured quantity, the distributor is liable for termination and therefore if the argument of the NRL is to be accepted, there will be no occasion for insertion of Clause 24.

VI. The respondent NRL has all throughout been refusing permission to their distributors for multiple distributorship and now they have taken an unfair stand that there has never been any bar and that the new tender does not represent any change in policy.

VII. The selected parties at Agartala and Amritsar are existing IOCL distributor as is evident from the paragraph 25 of the affidavit-in-opposition of the NRL. The primary concern of the petitioner is entry of IOCL distributor as they have cost advantage as the prices of Wax produced by IOCL are less pricier and therefore those distributors would be in a position to sell NRL products at cheaper price than the petitioner, who has always been refused to have multiple distributorship and thereby disturbed the level filling field.

VIII. Mr. Goswami submits that fare play demands that this court should direct the NRL to insist upon the IOCL distributor, now selected at Agartala and Amritsar to relinquish their IOCL distributors consistent with the past conduct and policy of NRL by not giving any

permission to the earlier distributor to have multiple distributorship.

IX. The NRL has failed to act fairly and reasonably while exercising their discretion and therefore the NRL, if intends to grant consent to IOCL distributor, then they must impose such conditions which would neutralize the cost advantage enjoyed by IOCL distributor and thereby maintain the level playing field.

X. Mr. Goswami strenuously argues that the comparative cost advantage of parties having multiple distributorship will result in the petitioner being denied a level playing field which is in breach of their Constitutional right. In support of such contention, Mr. Goswami relies the decision of Hon'ble Apex court in ***Reliance Energy Ltd vs Maharashtra State Road Development Corporation Ltd.*** reported in ***(2007) 8 SCC 1***.

XI. The petitioner has been able to demonstrate that the respondent No. 1 does not have sufficient capacity and has been struggling even to meet the target of the existing distributor. Therefore, incorporation of further distributorship will damage the entire business of the other distributors.

XII. Regarding the locus standi of the petitioner in filing the present writ petition, raised by the NRL in their affidavit-in-opposition, the learned Senior counsel submits that it is settled law that even non-participant can challenge a tender process, if it violates constitutional right and therefore the non-participation of the petitioner in tender process will not debar the petitioner from challenging the impugned clauses of the impugned e-tender notice. In support of his contention, Mr. Goswami relies on the decision of the Hon'ble Apex Court in the case of ***Ramana Dayaram Shetty Vs the International Airport Authority of India*** reported in ***(1979) 3 SCC 489***.

XIII. Mr. Goswami further argues that contractual spheres are amenable to writ jurisdiction if they are arbitrary, unreasonable and

discriminatory. In support of his contention, he relies on the decision of the Hon'ble Apex court in ***Unitech Limited & Ors. vs. Telengana State Industrial Corporation & Ors*** reported in ***2021 SCC Online 99***.

4. **Argument on behalf of NRL Limited**:

Countering such argument, Mr. Roy, learned Senior counsel submits followings:

I. The policy of the NRL has been consistent and it is the pleaded case of the NRL that there is no change in their policy norms inasmuch as in the earlier tender process by which the petitioner and other distributors were appointed, a similar clause was there and such clause has been explained at paragraph 22 of the affidavit-in-opposition.

II. It is the consistence stand of the NRL that though a bidder having dealership of another company is eligible to participate in the tender process, in the event such a bidder is selected, then prior to starting of supply and sell of wax, such a bidder will have either to give up the dealership of the other company or seek written permission from NRL to continue with the same.

III. Similar was the clause 5 of the earlier e-tender notice, under which the petitioner and other distributors were selected and similar clause 6 is incorporated in the impugned e-tender notice.

IV. The clauses 23 and 24 of the distributorship agreement, are part of both the earlier e-tender and the present e-tender and are also similar. Therefore, there are no changes in the policy decision of the NRL.

V. Mr. Roy further contends that the discretion to allow multiple distributorship has always been there and has been reflected in the earlier e-tender notice as well as present e-tender and such discretion are exercised on the basis of different parameters, including market condition. Therefore, this court in exercise of its writ jurisdiction may not like to interfere with such policy decision inasmuch as the alleged

rejection of the prayer of the distributors to have multiple distributorship is not under challenge in the present writ petition. Therefore, this court may not like to go into the earlier decisions, when same are not subject matter of challenge in the present case.

VI. Mr. Roy also contends that the stand of the NRL is clear and consistent that being a distributor of NRL the agreement requires that the distributor should lift a particular minimum quantity and on failure to meet half yearly target, the NRL is authorized to terminate distributorship agreement and if the distributor is able to meet the annual target as per the distributorship agreement, as a marketing tragedy NRL would not have any objection, if a particular distributor has distributorship of other companies. Therefore, the grant and non-grant of multiple distributorship will depend upon given fact and circumstances of the each claim.

VII. Mr. Roy further contends that the selection of distributorship at Agartala and Amritsar is always subject to the selected distributor withdrawing from the distributorship of other company or having an approval to continue with such distributorship from the NRL authorities and NRL authority will exercise such discretion to grant or not to grant such approval taking note of the actual market condition and its policy.

VIII. There are several distributors of different companies already in the market and the distributors of NRL have to compete with them and therefore, the petitioner cannot claim that the distributors of other oil companies having a distributorship of NRL would have a price advantage.

IX. The page 132, which is heavily relied on by the petitioner to show the cost advantage of IOCL will clearly show that the IOCL is always releasing their price a few days after NRL and the difference is a few hundred rupees per metricton. Such price is not very significant. Moreover, this is the market policy of the IOCL to keep their prices below the NRL prices and that is how the market runs and the petitioner being a prudent businessman should be aware of such price difference.

5. **<u>The determination</u>:**

I. This court has given anxious considerations to the arguments advanced by the learned counsels for the parties. Perused the materials available on record including the pleadings made by both the parties.

II. The bone of contention is the clause 6. Therefore, the same is quoted herein below:

"***6.0 Multiple Distributorship Norms:***

There is no restriction in engaging any person or next to their kin as distributor having wax distributorship of NRL or any other company."

III. The paraffin wax distributorship agreement, is annexed to the impugned NIT. The Clauses 23 and 24 of the said agreement reads as follows:

"***23. The Distributor shall not purchase, obtain or otherwise acquire possession from any person, firm or company any product used, stocked or sold by the Distributor in or in connection with distribution business in the products hereunder without the previous consent in writing of NRL, which consent NRL may refuse, very or withdraw at any time or from time to time at its entire discretion.***

24. The Distributor hereby undertakes to take the consent of NRL before selling and distributing the products of any other Oil Company or producer."

IV. Clause 5 of the earlier NIT under which the present petitioner and the respondent Nos. 4 to 8 were selected and engaged as distributors is similar to Clause 6, which reads as follows:

"***Multiple distributorship norms: the same would not be applicable as this is a distributor for special products."***

V. Clauses 23 and 24 of the agreement of distributorship entered into between the petitioner and the NRL are replicas of the clauses 23 and 24 of the agreement of distributorship annexed with impugned NIT.

VI. Thus from the aforesaid, it is clear that in the NIT issued in the year 2014, in which the petitioner participated and got engaged as distributor, permits those entities having multiple distributorship subject to Clause 23 and 24 of the agreement. Similar is the case in relation to the NIT under Challenge.

VII. Clause 23, common to both the agreements stipulates that a distributor is debarred from purchasing, obtaining or otherwise acquiring from any person, firm or company any product used, stocked or sold by the distributor in connection with the distributorship business of NRL without previous consent in writing for the NRL.

The NRL is further empowered under the agreement to give consent to have multiple distributorship simultaneously or may refuse such consent, may very or withdraw consent granted at any time or from time to time, at its discretion.

VIII. Clause 24 further clarifies such policy of the NRL. The distributors are to undertake that they will take consent from the NRL before selling and distributing products of any other oil company or producer. Such policy was available in the earlier tender process inasmuch as in the impugned tender process.

IX. Thus a reading of clause 6 of the present NIT, clause 5 of the earlier NIT and clauses 23 and 24 of the Distributorship Agreement reflects the policy of the NRL that distributors having multiple distributorship can participate in the tender process but cannot continue to purchase, obtain, possess etc from any firm, company etc. same product (in the present case it is wax) without prior consent of the NRL and grant of such consent and refusal of such consent or to very or withdraw such consent, is at the discretion of the NRL.

X. Therefore, it cannot be said that there is a change of policy. The stand of the NRL that it has to take a policy decision depending upon time and market condition cannot be faulted with. It is correct that an instrumentality of a State while exercising a discretion vested must

judiciously exercise such discretion and subject to judicial review. However, whether any rejection has been done in exercise of such discretion judiciously or not can be judicially reviewed in a given case, when such questions are raised, but not in the present case inasmuch as earlier rejection of the petitioner and other distributors to have multiple distributorship cannot be read to be a policy of the NRL to absolutely bar multiple distributorship. Furthermore, there is continuation of similar clauses/terms of the contract. The stand of NRL that that such discretion is exercised on the basis of market condition, demand and supply etc. cannot also be faulted with inasmuch as this court is not an expert authority to determine the niceties of market dynamics of a product.

XI. The argument advanced regarding comparative cost advantage and the page 132, which has heavily been relied on by the writ petitioner reflects that the same has been prepared by the petitioner to show that there are price differences between the products of NRL and product of IOCL. There may be differences in the prices of products but the petitioner had opted to be distributor of NRL knowing fully well about the clause 5 in the tender as well as knowing fully well about the restrictive clause 23 and clause 24 of their agreement. Therefore, the petitioner cannot complain that the IOCL distributors will have cost advantage and therefore, multiple distributorship should not be allowed. The petitioner also can not complain that Clause 6 will lead to their discrimination as the petitioner has not been granted permission to have multiple distributorship, more particularly for the reason that the decision to reject the petition's prayer to have multiple distributorship is not under challenge.

XII. It is well settled that this court cannot interfere with such policy decision until and unless it is proved to be violative of any fundamental right of the petitioner or unreasonable and discriminatory and this court for the reasons discussed hereinabove, do not find the policy of the NRL discriminatory or violative any of the fundamental right of the petitioner.

XIII. The Law is by now well settled that judicial review in tender matters should relate not to the decision itself but to the decision making process. It is further well settled that the writ court does not have the expertise to correct such a decision by substituting its own decision for the decision of the authority. This court can gainfully rely on the decision of ***Tata Cellular Vs. Union of India*** reported in ***(1994) 6 SCC 651,*** which is quoted as under:

"*94. The principles deducible from the above are:*

(1) The modern trend points to judicial restraint in administrative action.
(2) The court does not sit as a court of appeal but merely reviews how the decision was made.
(3) 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.
(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by the process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
(5) 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 the Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness and not affected by bias or actuated by mala fides.
(6) Quashing decisions may impose a heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

XIV. In ***Afcons Infrastructure Ltd. Vs Nagpur Metro Rail Corpn. Ltd.*** reported in ***(2016) 16 SCC 818*** it was held that a mere disagreement with the decision making process or with the decision of the administrative authority is no reason for the Constitutional court to interfere. The threshold of malafide intention to favour someone, arbitrariness, irrationality, and perversity must be satisfied before the Constitutional Court to interfere with the decision-making process or the decision.

XV. It is also well settled that the owner or employer of a project having authored the tender document is the best person to understand and appreciate its requirement and interpret its document. It is possible that the owner or employer of a project may give an interpretation to the tender document which is not acceptable to the Constitutional Court but that by itself is not a reason for interfering with the interpretation given.

XVI. In ***Silppi Constructions Contractors vs. Union of India and Another*** reported in ***(2020) 16 SCC 489***, the Hon'ble Apex Court held as follows:

> "*20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit as a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind, we shall deal with the present case."*

XVII. From the aforesaid pronouncement of the Hon'ble Apex court, it can safely be concluded that the Apex Court has consistently viewed that judicial review of a decision of public authorities, so far it relates to the award of the contract, should be limited. It is equally well settled that as the process of tender involves public authorities, the court does have the authority to intervene in terms of how a decision, action or process was arrived at.

Therefore, to intervene in such a situation, while making a judicial review of the action, the court must satisfy that the action of the authority is arbitrary, irrational, malifide, whimsical or contrary to law, done to favour someone, done with an urterior motive, misuses its power or such action has adversely affected public interest. The court can also intervene, if it is shown that a condition which is essential is not complied with or which is not essential is being insisted upon and applying such method contract work is allotted to some favoured party.

XVIII. As discussed hereinabove, this Court do not find the action of the NRL in incorporating the offending Clause 6 in the E-Tender to be arbitrary, irrational, malifide, whimsical or contrary to law or done to favour someone in as much as similar clauses were there in the shape of Clause 5 in the Tender Clause, in which the petitioner participated and got engaged as Distributor. The exercise of discretion under Clause 24 in refusing multiple distributorship cannot be termed as a policy decision not to allow multiple distributorship.

XIX. This court is also of the view that the decision of the NRL to allow entities having multiple distributor to participate in the tender and also having a policy that such multiple distributor shall be governed by clause 23 and 24 cannot be said to be unfair, unreasonable or arbitrary. It also does not violate any fundamental right of the petitioner so far the same relates to the rights and liabilities arising out of the distributorship contract entered into between the petitioner and the NRL.

XX. The policy of NRL to exercise its discretion in granting or non-granting permission to allow multiple distributorship to have its distributorship cannot be interfered with by this court in exercise of its power of judicial review until and unless exercise of such discretion, in a given case is under challenge before this court. This court cannot also presume a shift of policy regarding the fact of non grant multiple distributorship to be a policy of absolute Bar in view of the specific stand of the NRL that such

discretion is used in a given situation and depending upon the market condition.

XXI. As the learned counsel for the respondent NRL Mr. Roy has not argued on the point of locus standi of the petitioner to prefer the present writ petition being a non-participant in the impugned tender process, this court has not gone into the said aspect of the matter inasmuch as the parties has argued on the merit of the claim. The decision relied on by Mr. PK Goswami, learned Senior counsel i.e. Ramanna Dayaram Shetty (supra) and Unitech Limited (supra) do not require further discuss.

XXII. As this court has held that there is no policy change in allowing multiple distributorship and also held that the conditions of contract and tender relating to the NIT, 2014 and the impugned NIT are similar, therefore, the natural corollary is that there cannot be any change in the level playing field infringing / impacting any right of the petitioner. Accordingly, the decision of Hon'ble Apex Court in Reliance Energy (supra) is of no help to the case of the petitioner.

XXIII. For the aforesaid reasons and discussions, this writ petition stands dismissed.

JUDGE

Comparing Assistant