

CATERPILLAR INDIA PVT. LTD.
v
WESTERN COAL FIELDS LTD. AND ORS.

MAY 18, 2007

[DR. ARIJIT PASAYAT AND S.H. KAPADIA, JJ.]

Constitution of India, 1950; Article 14:

Purchase preferences—Private sector and public sector—Machines manufactured by Public Sector Enterprise and Private Limited Company—Respondent Coal Fields purchasing the machines—Allegedly purchase preferences given to PSEs arbitrarily in terms of an Office Memorandum issued by Government—Discrimination—Held: Before allowing such purchase preference protection to Public Sector Enterprises as a matter of uniform policy, necessity of such protection has to be examined individually and differential treatment is called for—The Central Government is directed to do the industry-wise assessment in terms of the detailed directions given in the judgment to identify such enterprises—In case there is already cost effectiveness in any PSE, there may not be any need for the trade preference being given to such public sector enterprises.

Government policy—Memorandums—Substitution of the word “shall” in place “may”—Effect of—Discussed.

The petitioners/appellants have made a grievance that the key players in the market are petitioners, a Private Sector Company and Bharat Earth Movers Ltd., a Public Sector Enterprise. The earth moving machines manufactured by them are purchased by the respondents – Coalfields. Prior to 1992 purchase preference was given and the lowest and the second lowest bidders were being described as L-1 and L-2. The purchase preference policy kept on extending by issuing Office Memorandums to that effect. The policy was last extended for a further period of three years retrospectively with effect from 18.7.2005 and the word “may” was then substituted by the word “will” in the Circular/Office Memorandum. The legality of the Office Memorandum was challenged by the petitioners on the ground that by substitution of the word ‘may’ by the word ‘will’ is arbitrary. The word ‘may’ gives a wider option

A to the tenderers and all the tenderers were on a level playground without any unnecessary protection to any of the parties.

The issue arose for determination in these transferred petitions and appeals was validity of Circular/Office Memorandum issued by the Central Government providing for purchase preference to Public Sector Enterprises.

B Appellant contended that the Office Memorandum whereby purchase preference given to Public Sector Enterprises is arbitrary and effects the legitimate expectation of the various parties since it creates a monopoly and the policy is without any sanctity of law.

C Disposing of the petitions and appeal, the Court

D HELD: 1.1. The increase in effectiveness of Public Sector Enterprises cannot be done on a uniform policy without examination as to whether such protection is necessary for a particular PSE. It has to be examined individually as to whether any differential treatment is called for. These are the aspects which need to be considered by the concerned Ministries. It is, therefore, directed that industry-wise assessment be done and if there is already cost effectiveness in any PSEs there may not be any need for the preference being given. The examination should be on the line as to whether any preference is called for and what would be the margin of preference which would ensure level playing field. It should also be fixed specifically and while fixing the minimum amount it should be ensured that breaking of the quantity should be rational, so that there is no likelihood to introduce an element of uncertainty. If the object was to invite foreign direct investment, the impact of the preference on such investment has to be considered. It shall also be considered as to whether some amount of discretion as was given earlier has to be re-introduced. There cannot be certainly any rigid inflexible policy. Because of the substitution of the word 'may' by 'will' there is essentially reversal of the policy. [Paras 9 and 10] [255-D-E; F-H]

E 1.2. The following directions are issued:

F (1) The exercise, as noted above, shall be undertaken by the concerned Ministry of the Central Government:

G (2) The interim arrangements operative presently shall continue till a fresh re-consideration is made by the concerned departments of the Government of India;

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(3) The interim orders shall not be restricted to the petitioners, appellants and the respondents. It shall only be binding on the parties who are L-1 and L-2 in the concerned transaction. While fixing the norms, the capacity to delivery of the concerned PSEs and the competitors has also to be taken note of. [Para 10] [255-H; 256-A-C]

CIVIL ORIGINAL JURISDICTION : Transferred Case (C) No. 4 of 2004.

WITH

T.C. Nos. 5, 11 & 12 of 2004 & 3 of 2005 and C.A. No. 2738 of 2007.

A. Saran, B. Dutta and R. Mohan, ASGs., Anil B. Dewan, Dushyant Dave, K. Paragsaran, Shanti Bhushan, R.F. Nariman, R.K. Anand, Ashok H. Desai, Sr. Adv., Nina Gupta, Ramesh Singh, Lalit Bhasin, Shweta Chadha, Akansha, Neha, Bina Gupta, V. Shekhar, A. Subba Rao, Anirudh Sharma, Pradeep K. Dubey, V. Subramanian, Jagdeep Dhankar, Mohit Paul, Arijit Prasad, Anip Sachthey, S.W.A. Qadri, Kiran Bhardwaj, R.C. Kathia, D.S. Mahra, Anil Katiyar and V.K. Verma for the appearing parties.

The Judgment of the Court was delivered by

DR. ARIJIT PASAYAT, J. 1. Leave granted in SLP (C) No. 24219/2003.

2. The point involved in these cases essentially is the purchase preference given to Public Sector Enterprises (in short the 'PSEs'). The petitioners have made a grievance that the key players in the market are petitioners-Caterpillar and Bharat Earth Movers Ltd. Most important purchaser for all these are coal fields, for example Western Coalfield and its subsidiaries-Coal India Ltd. They are invariably the purchasers in respect of earth moving machines. Prior to 1992 price preference was given to PSEs. Post 1992 purchase preference was given and the lowest and the second lowest bidders were being described as L-1 and L-2. Purchase orders were issued by the Coal India Ltd., broadly in the ratio of 60/40 and the L-2 was required to match the L-1 price. The language used earlier was "may" as indicated by Circular dated 13.1.1992. The purchase preference policy was extended by office memorandum dated 15.3.1995 for a further period of two years. It was further extended till 21.3.2000 by office memorandum dated 31.10.1997, subject to purchase being in excess of Rs.5 crores. By office memorandum dated 14.9.2000, the policy was extended till 31.3.2002. However, the minimum value of purchase was brought down to rupees one crore. By office memorandum dated 14.6.2002, the policy was

A extended till 31.3.2004 and the scheme was made valid for purchase of rupees five crores and above. By office memorandum dated 26.10.2004, which extended the policy for one year upto 31.3.2005 retrospectively from 1.4.2004. By office memorandum the policy was extended for a period of three years retrospectively with effect from 18.7.2005. The word 'may' was substituted by the word 'will' by this office memorandum. According to the petitioners the intention was to give somewhat longer period for stabilizing all PSEs. It never intended to create any monopoly.

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3. Grievance is made that by substitution of the word 'may' by the word 'will' is arbitrary. The word 'may' gives a wider option to the tenderers and all the tenderers were on a level playground without any unnecessary protection to any of the parties.

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4. It is pointed out that on 15.3.1995 office memorandum was issued extending the time to purchase preference upto 31st March, 1997. It was further re-introduced for a period of three years upto 31st March, 2000. Again, it was extended upto 31st March, 2002. By further office memorandum dated 14th June, 2002 the existing purchase preference is for products and services to central public sector enterprise was extended by two years upto 31st March, 2004. The legality of the office memorandum dated 14th June, 2002 is challenged contending that it is arbitrary and affects the legitimate expectation of the various parties. In fact it creates a monopoly and the policy without any sanctity of law.

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5. The respondents opposed the petition primarily on the ground that there is no substance in the allegations. Benefit is not given only in respect of the parties covered by these petitions. The office memorandum dated 13.1.1992 was issued by the Department of Public Enterprises, Ministry of Industry, Government of India stating that in respect of granting price preference to PSEs, Government may grant purchase preference to PSEs by price quoted by them which is less than 10% of the lowest price other conditions being equivalent. It was stated that the policy was valid for three years period as transaction within which PSEs were to adjust to the global new business environment and improve competitiveness efficiency.

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6. The above purchase preference policy was extended on 15.3.1995 for a further period of 2 years and it was stated that the said extension was final and the earlier policy would automatically lapse. During 1997 the purchase preference was further extended upto 31.3.2000. This was in relation to

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purchases in excess of Rs.5 crores. By the office memorandum dated 14.9.2000 the policy was extended till 31.3.2002 and the minimum value of purchase was brought down to Rs.1 crore from Rs.5 crores. A

7. By Office Memorandum dated 14.6.2000 the PSEs purchase preference was extended for a further period of 2 years till 31.3.2004 and the scheme was made valid in respect of purchase of Rs.5 crores and more. B

8. Grievance is made that with a view to show preference the practice of splitting the tender was introduced. This according to the petitioners had caused immense difficulties. By Office Memorandum dated 18.7.2005 Government of India re-introduced/extended the earlier purchase preference policy retrospectively from 1.4.2005 for a period of 3 years till 31.3.2008. This policy contains certain modified conditions which were different from the past policies. These policies are basically under challenge. The language used unlike the earlier policy on 14.6.2002 which used the expression that purchase preference may be granted, was 'will'. C

9. We find that the basic challenge is that by imposing a condition like purchase preference no option is left and a monopoly is being created. The increase in effectiveness of PSEs cannot be done on a uniform policy without examination as to whether such protection is necessary for a particular PSE. It has to be examined individually as to whether any differential treatment is called for. It is pointed out that there may be no competition left if 10% margin is given. In essence, the submission is that the preference should be given PSE specific and the margin also has to be examined rationally. D

10. We feel that these are the aspects which need to be considered by the concerned Ministries. We, therefore, direct that industry-wise assessment be done and if there is already cost effectiveness in any PSEs there may not be any need for the preference being given. The examination should be on the line as to whether any preference is called for and what would be the margin of preference which would ensure level playing field. It should also be fixed specifically and while fixing the minimum amount it should be ensured that breaking of the quantity should be rational, so that there is no likelihood to introduce an element of uncertainty. If the object was to invite foreign direct investment, the impact of the preference on such investment has to be considered. It shall also be considered as to whether some amount of discretion as was given earlier has to be re-introduced. There cannot be certainly any rigid inflexible policy. Because of the substitution of the word 'may' by 'will' there is essentially reversal of the policy. Therefore, the applications are E F G H

A disposed of with the following directions:

(1) the exercise, as noted above, shall be undertaken by the concerned Ministry of the Central Government within a period of 4 months from today;

B (2) The interim arrangements operative presently shall continue till a fresh re-reconsideration is made by the concerned departments of the Government of India.

C (3) The interim orders shall not be restricted to the petitioners, appellant and the respondents. It shall only be binding on the parties who are L-1 and L-2 in the concerned transaction. While fixing the norms, the capacity to delivery of the concerned PSEs and the competitors has also to be taken note of.

11. Appeal and applications are accordingly disposed of.

D S.K.S.

Appeal & Petitions disposed of.