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IN THE HIGH COURT OF DELHI AT NEW DELHI

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W.P.(C) No. 8971 of 2009

COSMO TOURS & TRAVELS & ORS. Petitioners
Through: Mr. Rajiv Dutta, Senior Advocate with
Mr. Ashish Mohan and Mr. Kumar Dushyant,
Advocates.

versus

UNION OF INDIA & ORS. Respondents
Through: Mr. Ravinder Agarwal, Advocate for
UOI.
Mr. Manu Shalia, Advocate for R-3.

CORAM: JUSTICE S. MURALIDHAR

1. Whether reporters of local paper may be allowed
to see the order? No
2. To be referred to the report or not? Yes
3. Whether the report should be referred in the digest? Yes

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ORDER
12.04.2010

CM No. 6410 of 2009

Exemption allowed subject to all just exceptions.

The application is disposed of.

W.P.(C) No. 8971 of 2009 & CM Nos. 6409 & 7555 of 2009

1. Petitioner No.1 is a company incorporated in Russia having its registered office in Moscow. Petitioner No.2 is its Managing Director who is an Indian citizen. The prayer in this writ petition is to quash the conditions contained in the request for proposal ('RFP') issued on the website of the Indian Embassy in Russia on or around 29th April 2009 pertaining to issuance of a fresh tender for 'visa outsourcing' on behalf of the Indian Embassy in Russia.

2. The precise conditions contained in the above RFP which according to the Petitioners, are arbitrary and unreasonable are as under:

“(b) The bidder must have experience of operating a centre for visa services on behalf of a Diplomatic Mission or Missions for at least one year with electronic data entry, dealing with at least 250 applications per day on an annual average basis.”

3. As pleaded in the petition in para B, the above condition according to the Petitioners was “arbitrary and tailor-made to ensure a monopoly is created in favour of M/s. VFS Global Ltd. which, in the submission of the Petitioner, is the only agency (at least in Russia) capable of fulfilling the aforesaid condition.”

4. The Petitioners state that Petitioner No.1 has been in the field of travel and tourism and has *de facto* been performing “all the duties and functions of an agent handling visa applications for the Indian Embassy, Moscow since 2002.” It is submitted that the above condition “draws an irrational classification between agencies which have previously operated a centre for visa services on behalf of a Diplomatic Mission and those agencies which have experience in handling visa application without running a visa center.” It is stated that the above classification has no rational nexus with the object sought to be achieved. It is further stated that on an average in a year only a maximum of 200 applications can be handled by the Indian Embassy in Moscow and, therefore, no tenderer would be able to comply with the condition of handling 250 applications per day. Further it is not as if every Indian Embassy abroad requires compliance with the above condition by a

visa outsourcing agency. Even for the Indian Embassy in the United States of America, no such condition has been imposed for the purposes of awarding the contract of visa outsourcing. It is pointed out that of the 44 visa outsourcing centres of Indian Embassies abroad, contracts have been awarded for 22 visa centres to VFS Global Ltd., which fulfills the above criteria. Contracts for 2 visa centres have been awarded to TT Services Ltd. In 20 other centres the above criteria has not been stipulated and they have been awarded to entities other than VFS Global and TT Services Ltd. Such visa outsourcing work is being carried on successfully in those 20 centres. It is therefore submitted that the impugned condition imposed in the RFP issued for Indian Embassy in Moscow is arbitrary and unreasonable.

5. This Court did not grant any interim order in favour of the Petitioner. It was however clarified that the award of any contract in the meanwhile would be subject to the final outcome of the writ petition. During the pendency of the writ petition, the contract of visa outsourcing in the Indian Embassy in Moscow was awarded to Respondent No.3 TT Services Ltd. which was thereafter added as a party Respondent to the present writ petition.

6. Mr. Rajiv Dutta, learned Senior counsel appearing for the Petitioner referred to the prevaricating stand of the Respondents at various points of time in the present matter. There was a flip-flop as regards the RFP conditions. Initially, when the RFP was first issued in May 2009, it was felt that the conditions for qualification were harsh and, therefore, should be withdrawn. Later, some of the conditions were withdrawn. However, in the

RFP issued in April 2009 the above conditions were re-introduced. According to Mr. Dutta, the impugned conditions are inconsistent with the mandatory requirement of Rule 137 of General Financial Rules ('GFR') as well as guidelines of the CVC. Both these require the conditionalities attached to a tender not to be very harsh so as to create a monopoly of a few qualified bidders. He also placed reliance upon the decision of the Supreme Court in *Meerut Development Authority v. Association of Management Studies JT 2009 (6) SC 169*.

7. Mr. Ravinder Agarwal, learned counsel appearing for the Union of India, on the other hand, raises a preliminary objection to the maintainability of the petition. Relying upon the decision of the Supreme Court in *Indo-China Steam Navigation Co. Ltd. v. Jasjit Singh 1983 ELT 1392 (SC)* and of this Court in *Star India P. Ltd. v. The Telecom Regulatory Authority of India 146 (2008) DLT 455* he submits that Petitioner No.1 being a foreign company could not possibly seek to enforce any fundamental right under Article 19(1)(g) of the Constitution of India. He submitted that although the petition was made to appear as one seeking the enforcement of the fundamental right under Article 14 of the Constitution of India, it was in fact seeking enforcement of the fundamental right under Article 19(1)(g) of the Constitution. It is pointed out that it is not as if only one party qualified in the bidding process. There were three such parties which were invited for the negotiations at the bidding stage. In fact, the contract was awarded not to M/s. VFS Global Ltd. but to TT Services Pvt. Ltd. Therefore the very basis of the challenge by the Petitioner was non-existent. Relying upon the judgment of the Supreme Court in *Association of Registration Plates v.*

Union of India (2005) 1 SCC 679, it is submitted that it was ultimately for the Government to prescribe the conditions for bidding. Merely because the Petitioner did not possess the necessary qualification, cannot be a ground for holding the impugned conditions to be arbitrary.

8. Learned counsel appearing for the TT Services stressed that the running of a visa centre was very different from the work of a visa agent which was really the experience that the Petitioner No.1 had. On the other hand, the visa centre in Moscow which is now being run by TT Services has involved a huge financial outlay for making it operational.

9. This Court has considered the above submissions. The first question that arises is whether the petition in the present form is maintainable at the instance of Petitioner No.1 which happens to be a Russian company. Although Petitioner No.2 is its Managing Director and is an Indian citizen, the challenge is in fact by Petitioner No.1 whose bid was unsuccessful for the contract of visa outsourcing.

10. As long as the writ petition only seeks enforcement of the fundamental right under Article 14 of the Constitution which fundamental right is available to all persons, there should be no difficulty in entertaining such writ petition on behalf of Petitioner No.1. If, however, as is contended by the learned counsel for Respondents, what is sought to be enforced is a right under Article 19(1)(g) of the Constitution, then obviously the writ petition would not be maintainable. This position has been explained by the

Supreme Court in *Indo-China Steam Navigation Co. Ltd.* in the following

words:

“The plain truth is that certain rights guaranteed to the citizens of India under Art. 19 are not available to foreigners and pleas which may successfully be raised by the citizens on the strength of the said rights guaranteed under Art. 19 would, therefore, not be available to foreigners. That being so, we see no substance in the argument that if S. 52A is construed against the appellant, it would be invalid, and so, the appellant would be able to resist the confiscation of its vessel under Art. 31(1). We ought to make it clear that we are expressing no opinion on the validity of S.52A under Art. 19(1)(f). If the said question were to arise for our decision in any case, we would have to consider whether the provisions of S. 52A are not justified by Art. 19(5). That is a matter which is foreign to the enquiry in the present appeal.”

11. The present petition is being entertained only because the challenge by the Petitioners to the impugned conditions RFP issued by the Respondents for visa outsourcing at the Indian Embassy in Moscow is limited to the extent that such conditions are alleged to be arbitrary and unreasonable and, therefore, violative of Article 14 of the Constitution.

12. It is plain from the RFP that the Indian Embassy in Moscow was seeking to use the latest and best practices worldwide in the field of visa outsourcing. The Respondents were entitled to insist upon possession by bidders of appropriate and adequate experience in handling of visa centres for Diplomatic Missions abroad. Learned counsel for the Respondents is justified in pointing out that the experience of a visa agent, which is what the

Petitioner No.1 was, is very different from running a full-fledged visa centre. A visa centre does not merely forward applications for visa to the Embassy, as is usually done by a visa agent. At a visa centre, a preliminary screening of all the applications is done keeping in view the criteria prescribed by the country's embassy abroad. That is not a mechanical exercise and requires expertise. If for performing that task, the Government requires a certain minimum experience in handling visa application for Diplomatic Mission abroad having modern technology that cannot be termed as arbitrary. The number of applications that are required to be dealt with on a daily basis also is best left to the assessment of the Respondents. This Court is unable to hold that any of the above conditions is either arbitrary or unreasonable.

13. It was submitted by Mr. Dutta, the learned Senior counsel appearing for the Petitioners that in so far as the requirement concerning the use of the latest technology in the visa centres, the Petitioner has no quarrel. It is aggrieved essentially by the requirement of having to show experience of one year in running a visa centre for a Diplomatic Mission abroad. This virtually ruled the Petitioner out of reckoning.

14. This Court notes that the process for inviting the tenders by outsourcing started more than 2 years ago when in May 2007 the first RFP was made known. Some of its conditions were deleted in the second RFP which came a year later. Thereafter some of the conditions were deleted and some included in yet another RFP which was issued in April 2009. As already held by this Court, the said conditions are neither arbitrary nor unreasonable.

The Petitioners should have known at least since May 2007 that they had to

keep abreast with the latest technology. They cannot be heard to complain that the conditions were harsh or imposed all of a sudden. In a competitive world, the one who can provide the best service will be preferred.

15. The reliance upon the observations of the Supreme Court in the *Meerut Development Authority* case is misplaced. In para 17 of the said decision it was held that if any of the conditions were tailor-made to suit only one party to the exclusion of “all other contesting parties,” then the Court might be persuaded to interfere. However, that is not the case here. At least three parties qualified in the pre-bid stage. They were invited for negotiations. Therefore, it is not, as if only one party qualified and was awarded with the contract. Further the premise on which the Petitioner approached this Court was that the conditions were tailor-made to suit M/s. VFS Global Ltd. However, as it turned out, the contract was not awarded to M/s. VFS Global Ltd. but to TT Services Ltd. Therefore, the very premise on which the Petitioner approached this Court has been shown to be non-existent.

16. In *Association of Registration Plates* it was pointed out by the Supreme Court in para 38 as under:

“38. In the matter of formulating conditions of a tender document and awarding a contract of the nature of ensuring supply of high security registration plates, greater latitude is required to be conceded to the State authorities. Unless the action of tendering Authority is found to be malicious and misuse of its statutory powers, tender conditions are unassailable. On intensive examination of tender conditions, we do not find that they violate the equality clause under Article 14 or

encroach on fundamental rights of a class of intending tenderer under Article 19 of the Constitution. On the basis of the submissions made on behalf of the Union and State authorities and the justification shown for the terms of the impugned tender conditions, we do not find that the clauses requiring experience in the field of supplying registration plates in foreign countries and the quantum of business turnover are intended only to keep out of field indigenous manufacturers. It is explained that on the date of formulation of scheme in Rule 50 and issuance of guidelines thereunder by Central Government, there were not many indigenous manufacturers in India with technical and financial capability to undertake the job of supply of such high dimension, on a long term basis and in a manner to ensure safety and security which is the prime object to be achieved by the introduction of new sophisticated registration plates.”

Further, it was observed in para 42 of the same decision that “merely because a few manufacturers like the Petitioners do not quality to submit the tender, being not in a position to satisfy the terms and conditions laid down, the tender conditions cannot be held to be discriminatory.”

17. Turning to the requirement of the GFR, this Court finds that although Rule 137 states that the specifications worked out “should meet the basic needs of the organisation without including superfluous and non-essential features,” under Rule 160 it has been emphasised that “all Government purchases should be made in a transparent, competitive and fair manner, to secure best value for money.” It has further been emphasised in Rule 160 (i) that the text of the bidding document “should be self-contained and

comprehensive without any ambiguities”. Even the CVC in its guidelines has emphasised that the conditions for qualification should not be too onerous. However it has been emphasised that tender should be invited from “firms having requisite experience depending upon the size of the contract in a fair and transparent manner.” This Court does not find anything in the impugned conditions which are inconsistent with the requirements of the GFR or the CVC guidelines.

18. For the aforementioned reasons, this Court finds that the impugned conditions in the RPF for visa outsourcing in the Indian Embassy in Moscow cannot be said to be arbitrary and unreasonable. No ground is made out for holding that the impugned conditions are violative of Article 14 of the Constitution of India.

19. The writ petition is accordingly dismissed with costs of Rs.10,000/- which will be paid by the Petitioners to the Respondent UOI within four weeks. The applications are dismissed.

S. MURALIDHAR, J.

APRIL 12, 2010
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