

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 3197 OF 2015

RAJLAXMI INFRATECH PVT. LTD., PARBHANI
VERSUS
STATE OF MAHARASHTRA AND ANOTHER

.....
Advocate for petitioner : Mr. Shivprasad G. Jadhavar
A.G.P. for respondent Nos. 1 and 2 : Mr. K.J. Ghute Patil
.....

**CORAM : R. M. BORDE AND
V. K. JADHAV, JJ.**

DATED : 24th MARCH, 2015

PER COURT (PER V. K. JADHAV, J.):

1. By this writ petition, the petitioner is challenging the tender notice issued by respondent No.2. The petitioner has raised objection to condition at Sr. No.8 of the tender notice.

Brief facts, giving rise to the writ petition, are as follows:-

2. Respondent No.2, by issuing tender notice No. B-1/1:2014-15, invited tenders for construction of cement Nalla Bandhara. The Water Conservation Department, Government of Maharashtra, vide Government Resolution dated 5.12.2014, has prepared and sponsored a programme, spread over five years under the title "Jalyukt Shivar Abhiyan" under "Water For All - Drought Free

Maharashtra, 2019". In order to wipe out the persistently faced drought situation effectively and permanently, the said programme was prepared and sponsored by the State of Maharashtra. The first E tender notice No. B-1/1: 2014-15 was published, calling tender for construction of Cement Concrete Nalla Bandhara clubbed together in clusters of 3 to 6 Bandharas in 152 no. of tenders. The cluster Nos. 3 to 6 Bandharas are formed in one tender, according to the site conditions and convenience for construction. In exceptional cases, the Bandharas goes up to 10 in one cluster.

3. As per condition No.8 of tender notice, individual contractor is allowed to participate in the bidding process and bidder will be awarded maximum two clusters of work in a financial year all over Maharashtra, under the Scarcity Eradication Programme sponsored by the Water Conservation Department of the State of Maharashtra as aforesaid. According to the petitioner, respondent No.2 by exercising its arbitrary powers put condition No.8. Thus, the tender notice issued by respondent No.2 is not valid tender. Even though the petitioner has raised his objection to the condition No.8 of the tender notice, the same is not considered by the respondent authorities. Hence, this writ petition.

4. The learned counsel for the petitioner submits that even

though the petitioner has quoted lowest offer for more than two clusters, only two cluster work was to be allotted to him as per condition No.8 of the tender notice. Learned counsel further submits that previously the petitioner had completed similar type of work allotted to him by the Government and on inspection, the competent authority has also given excellent remarks to the petitioner about completion of said work. The learned counsel further submits that the respondent authorities are expected to protect the monetary interest of the State. The respondent authorities however, are not protecting the monetary interest of the State by refusing lowest offer of the petitioner under the pretext of condition No.8, as aforesaid.

5. Learned counsel for the petitioner, to substantiate his contentions, has placed reliance on the following cases;-

- 1) Tata Cellular, v. Union of India, reported in AIR 1996 SC 11 (1),
- 2) Jagdish Mandal v. State of Orissa & Others, reported in 2006 DGLS(Soft.)934 and
- 3) Unreported judgment of this Court dated 29.01.2015 in writ petition No. 10696 of 2014 with other connected writ petitions.

6. Learned A.G.P. for the respondents submits that various works proposed to be taken under the scheme of 'Jalyukta Shivar Abhiyan'. Even the Divisional Level Committees in every Divisions of the

State, comprising of Divisional Commissioner as Chairman and other members, are formed to effectively co-ordinate the different agencies involved in the programme. Similarly, the District and Taluka Level Committees are also formed under the Chairmanship of District Collector and Sub Divisional Officers (Revenue), respectively, to look after all aspects of the programme. The learned A.G.P. further submits that the Government has proposed and planned to construct 50000 'Cement Concrete Nalla Bandharas' during the next five years and it is planned to construct 10000 such structures all over the State by the end of June, 2015. So far as Marathwada region is concerned, it has been allotted 1682 such structures out of said 10000 structures. The stipulated period for completion of Bandharas in one tender is kept at three calendar months and the cost of each tender varies from 30 lacs to 70 lacs, depending on number of Bandharas in one cluster. Each tender comprises of six Bandharas as an average.

The learned A.G.P. further submits that condition No.8 of the tender notice directing to award two tenders having 12 works to one contractor, is inserted in the tender notice to complete the work within stipulated period of three calendar months, considering one week of construction to each work with proper planning and simultaneous activities. The learned A.G.P. submits that awarding more than two

tenders to one contractor will not be practical and there can be a possibility of subletting the tender by the awardee contractor. The learned A.G.P. further submits that tender condition No.8 is quite reasonable and formulated by keeping in mind the monetary interest of State and achievement of the target of the scheme. The learned A.G.P. lastly submits that there is no merit and substance in the writ petition and the same deserves to be dismissed.

7. The petitioner has raised objection to condition at Sr. No.8 in the tender notice, which is reproduced as under:-

“8) Though every individual contractor is allowed to participate in the bidding process, in spite that the bidder will be awarded maximum two cluster of works of CNB's, all over Maharashtra under water conservation department. The bidder shall have to submit affidavit on Rs. 100/- stamp paper in the form of Annexure, (while submitting T-1 envelope) after successful completion of bidding process if bidder has quoted lowest offer for more than two cluster, only two works shall be allotted & bidder shall infield not raise any objection or claim on account of this.”

8. In the case of **Tata Cellular vs. Union of India (supra)** the Hon'ble Apex Court dealt with the scope of judicial review in the matters of this kind. In para 85 of the judgment, the Hon'ble Apex Court has made the following observations:-

"85. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercises of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down."

9. The Hon'ble Apex Court in the aforesaid case has further laid down that duty of the Court to confine itself to the question of legality and its concern should be whether the decision making authority exceeded its powers and committed error of law. The Court concerned should also to see that whether the decision making authority has committed breach of Rules of natural justice and abused its powers. On the backdrop of these observations, in para 94 of the judgment, the Hon'ble Apex Court has made following observations:-

"94. Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) Illegality : This means the decision-maker must understand correctly the law regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety."

10. The Hon'ble Apex Court has also observed that the above are only broad grounds but it does not rule out addition of further grounds in the course of time. The Hon'ble Apex Court has also considered the other facets of irrationality. Firstly, to review of decision maker's evaluation of the facts. It is observed that the Courts will intervene where the facts taken as a whole could not logically warrant conclusion of the decision-maker and secondly the decision would be regarded as unreasonable if it is partial and unequal in its operation as between different classes. The Hon'ble Apex Court has also taken into consideration the principles i.e.

- i) the Court does not sit as a court of appeal but merely reviews the manner in which the decision was made,
- ii) the judicial restraint in administrative action and
- iii) the court does not have expertise to correct the administration decision.

It has also been observed by the Hon'ble Apex Court that the terms of invitation of tender cannot be open to judicial scrutiny because invitation of tender is in the realm of contract. Normally speaking, the decision to accept the tender or award contract is reached by process of negotiations through several tiers. More often than not, such decision are made qualitatively by experts. Lastly, it is observed by the Hon'ble Apex Court in this regard that the Government must have freedom of contract and quashing decision may some time impose heavy administrative burden on the administration and lead to increase an unbudgeted expenditure.

11. In the case of ***Jagdish Mandal v. State of Orissa & Others (supra)*** the Hon'ble Apex Court has considered that the scope of interference in judicial review of tender process and award of contracts is limited only to the cases where there are material violation of the terms relating to scrutiny and acceptance of tenders or where the decision is vitiated either by arbitrariness/irrationality or by malafides/favouritism. In the said case, the judgment of Tata

Cellular (supra) is also referred.

12. The Division Bench of this Court in writ petition No. 10696 of 2014, by referring the judgment in the case of of Tata Cellular (supra) observed that the conditions imposed by respondents in the tender process are discriminatory and arbitrary eligibility conditions so far as Ahmednagar District is concerned. In the said judgment, it is further observed that the respondent B.S.N.L., which is a Project Implementation Agency in the State, is expected to adhere to the same terms and conditions in the State and cannot be permitted to prescribe different conditions in different districts of the State.

13. In the light of above, the test is required to be adopted in the instant case to consider whether something has gone wrong of a nature and degree, which requires intervention of the Court.

14. In the instant case, the Water Conservation Department, Government of Maharashtra, has prepared and sponsored a scheme spread over next five years titled as “Jalyukta Shivar Abhiyan” Water for all drought free Maharashtra, 2019.” Various works proposed to be taken under this programme includes (I) Catchment Area Development, ii) Cement Nalla Bandharas in Series with deepening and widening, iii) Reviving of old Water Bodies, iv) repairs of existing

Kolhapur Type Weirs and Storage Bandharas etc.. There are in all 13 proposed works. The work put to tender in the instant case is of construction of cement concrete Bandharas only. The magnitude of the said scheme for next five years covers the whole State of Maharashtra. It is proposed and planned by the Government to construct 'Cement Concrete Nalla Bandharas' during the next five years and it is planned to construct 10000 such structures all over the State by the end of June, 2015. The stipulated period of completion of Bandharas in one tender is kept at three calendar months.

15. We have carefully gone through the contents of the scheme/programme. It appears that the programme is meticulously prepared with a view to achieve the target in the next five years in phase manner. It also appears that in case of any delay in the sequence of proposed completion of work in phase manner, the purpose behind entire scheme/programme would be frustrated.

16. On perusal of contents in affidavit in reply filed on behalf of respondent No.2, it appears that cluster of 3 to 6 Bandharas are formed in one tender according to the site condition and ease for construction. In exceptional cases, the Bandharas goes upto 10 in one cluster. Cost of each tender varies from 30 lacs to 70 lacs

depending on number of Bandharas in one cluster. Each tender comprises of 6 Bandharas as an average.

17. We have also perused the contents of Resolution passed in the meeting dated 22.1.2015 held under the Chairmanship of Secretary, Water Conservation Department, wherein the decision has been taken that though every individual contractor is allowed to participate in the bidding process, the bidder will be awarded maximum two cluster of works all over Maharashtra under Water Conservation department in order to avoid subletting of the contract and consequential delay in execution of work.

18. In view of the above, we do not find that condition No.8 of the tender notice is unclear, unreasonable or irrational. The decision taken by the High Level Committee of Water Conservation Department in its meeting held on 22.1.2015 cannot be termed as unreasonable or arbitrary.

19. It also appears that the scheme is formulated to achieve the target of "Jalyukt Shivar Abhiyan" under "Water For All - Drought Free Maharashtra, 2019". It has also stated in the affidavit in reply presented on behalf of respondent No.2 that if the situation demands for allotting more than 2 tenders to a contractor, then the District

Committee under the Chairmanship of concerned Collector may take a decision in the case, on its own merits. Furthermore, the respondents may also take care while allotting the work to negotiate with bidder if he has quoted high rates compared to the rates quoted by the bidder, who is not eligible in view of aforesaid condition No.8, to protect the monetary interest of the State and to avoid financial loss to the public exchequer.

20. In view of the above discussion, we do not find any merits in the petition and hence, the same stands rejected. In the circumstances, there shall be no order as to costs.

(V. K. JADHAV, J.)

(R. M. BORDE, J.)

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