

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
BENCH AT AURANGABAD**

WRIT PETITION NO. 10696 OF 2014

M/s K.K. Vidyut, Ahmednagar
Ahmednagar, District Ahmednagar
through its Proprietor,
Shri Keshav Bhausahab Kale
age 41 years, occ. Business
r/o Sarola Kasar, Ahmednagar
Dist. Ahmednagar 414005.

.. PETITIONER

VERSUS

1. The Union of India
Through its Secretary
Telecom and Information Technology
Of Union of India,
New Delhi
2. Bharat Broadband Network Limited
Undertaking of Central Government of India
Room No. 312, 3rd Floor, C-Dot Campus
Mandigaon road, Chaattarpur
New Delhi 30
Through its Managing Director.
3. Bharat Sanchar Nigam Ltd.
Central Government Enterprises
Head Office at Bharat Sanchar Bhavan
Harish Chandra Mathur Lane,
Janpeth, New Delhi 01
Through its Chairman Cum Managing Director.
4. Bharat Sanchar Nigam Ltd
Circle Office, for State of Maharashtra
Office of CGT, MH Circle, 6th Floor
A-wing, Adm. Building, Juhu Road,
Santakruz(W), Mumbai 54
Through its chief General Manager.
5. Bharat Sanchar Nigam Ltd.
Ahmednagar, DTO Compound
Ahmednagar, District Ahmednagar
Through its General Manager,
Telecom.
6. Bharat Sanchar Nigam Ltd.
Aurangabad, District Aurangabad

Through its General Manager
Telecom.

7. Bharat Sanchar Nigam Ltd.
Osmanabad, District Osmanabad.
Through tis Divisional Engineer Telecom
(NOFN Project), Mahadaji Shinde Telephon
Exchange Building, near Poona Club
Pune.
8. The State of Maharashtra
Through its Secretary
Rural and Urban Development Department,
Mantralaya, Mumbai 32.

.. RESPONDENTS

Mr. R.B. Raghuwanshi with Mr. D.S. Bagul, advocates for petitioner.
Mr. S.B. Deshpande, Asst. Solicitor General for respondents 1 to 7.
Mr. G.R. Ingole, AGP for the State.

**WITH
WRIT PETITION NO. 10842 OF 2014**

M/s K.K. Vidyut, Ahmednagar
Ahmednagar, Dist. Ahmednagar
through its Proprietor,
Shri Keshav Bhausahab Kale
age 41 years, occ. Business
r/o Sarola Kasar, Ahmednagar
Dist. Ahmednagar.

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Aurangabad, District Aurangabad
Through its General Manager
Telecom.
7. The State of Maharashtra
Through its Secretary
Rural and urban Development Department
Mantralaya Mumbai 32.
8. M/s Laxmi Constructions
Ahmednagar.

.. RESPONDENTS

Mr. R. B. Raghuwanshi with Mr. D.S. Bagul, advocates for petitioner.
Mr. S.B. Deshpande, Asst. Solicitor General for respondents 1 to 7.
Mr. G.R. Ingole, AGP for the State.

**WITH
WRIT PETITION NO. 10844 OF 2014**

M/s K.K. Vidyut, Ahmednagar
Ahmednagar, Dist. Ahmednagar
Through its Proprietor
Shri keshav Bhausaheb Kale
age 41 years, occ. Business
r/o Sarola Kasar, Ahmednagar
Dist. Ahmednagar 414 005.

.. PETITIONER

VERSUS

1. The Union of India
Through its Secretary

Telecom and Information Technology
Of Union of India,
New Delhi

2. Bharat Broadband Network Limited
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Room No. 312, 3rd Floor, C-Dot Campus
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Aurangabad, District Aurangabad
Through its General Manager
Telecom.
7. The State of Maharashtra
Through its Secretary
Rural and urban Development Department
Mantralaya Mumbai 32.
8. M/s Laxmi Constructions
9. M/s Sudhir Associates

.. RESPONDENTS

Mr. R. B. Raghuwanshi with Mr. D.S. Bagul, advocates for petitioner.
Mr. S.B. Deshpande, Asst. Solicitor General for respondents 1 to 7.
Mrs. A.V. Gondhalekar, AGP for the State.

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CORAM : R.M. BORDE &**P.R. BORA, JJ.****DATE : 29th JANUARY, 2015.****JUDGMENT : (PER R. M. BORDE , J.)**

1. Heard.
2. Rule. Rule made returnable forthwith. With the consent of the parties, petitions are taken up for final disposal at admission stage.
3. Petitioners who are electric contractors are objecting to the eligibility condition recorded in tender notice clause no. 12.2 on the ground that said condition is discriminatory and is aimed at restricting competition amongst the bidders and to facilitate appointment of contractor of the choice of respondents.
4. Union of India – respondent no. 1 herein declared a program aimed at providing broadband connectivity in the rural area. Program involves work of laying down Optical Fibre Base Network for Broadband Connectivity to Panchayats with a view to provide universal service for rural population of the country. A decision in that regard has been taken by the Union Government on 20.10.2011. Under the program, connectivity is required to be provided to approximately 2.5 lac Gram Panchayats and the project cost is around 20,000 Crores. Respondent no. 2 Bharat Broadband Network Limited, a public limited company, is incorporated for carrying out the program. Respondent no. 2 Bharat Broadband Network Limited has

appointed three Project Implementation Agencies in the country; (i) BSNL, which was assigned projects in 16 States, (ii) RAILTEL, which is assigned projects in 10 States and, (iii) PGCIL which is assigned projects in 5 States. So far as Maharashtra circle is concerned, BSNL has been appointed as Project Implementing Agency. In furtherance of implementation of program formulated by Union of India, BSNL, Ahmednagar, Project Implementation Agency in the State of Maharashtra, invited first tender notice on 02.12.2013 calling bidders to tender offer for Optical Fibre Cable (OFC) laying in Kopergaon block. Similar tender notices were published for Shrirampur block. Tender process initiated in pursuance to said notice was not pursued and second tender notice came to be issued for Cluster I to Cluster IV in Kopergaon block. Said notice was also not pursued and the third tender notice came to be issued for the same Clusters i.e. Cluster I to Cluster IV on 23.09.2014. Petitioners contend that qualifying terms and conditions were changed while issuing revised tender notice. It is contended that the terms and conditions have been changed limiting the competition amongst the bidders with a view to select bidders of the choice of respondents. It is further contended that limiting competition is detrimental to the Project Implementation Agency. It is further contended that in order to ensure transparency in public procedure and to maximise economy and efficiency of the Government procurements and to provide healthy competition amongst tenderers, equitable terms shall have to be prescribed applicable uniformly to the tenderers. Such procedure facilitates elimination of irregularities and also extends financial benefits to the public institution.

5. The relevant eligibility clause restricting competition amongst tenders objected to by petitioners recorded in tender notice which is subject matter of challenge in Writ Petition No. 10696/2014 reads thus :

1) Experience of OFC laying / OFC fault restoration work/UG telecom cable laying / fault restoration work in DOT/BSNL/MTNL directly or through PSU's authorized by DOT or PSU of Govt. of India or State Govt. or any other telecom service provider shall be acceptable.

2) Experience of OFC laying / OFC Fault restoration work / UG telecom cable laying/ fault restoration work any other telecom service provider also shall be acceptable. Experience certificate should be issued by officer not below the rank of DGM of BSNL / MTNL/DOT or similar certificate issued by competent authority of Central Gov. /State Gov./Gov. undertaking/Semi Gov. in case of private telecom service provider the certificate should be issued by CTO (Chief Technical Officer) of the company.

Similar is the eligibility condition prescribed in tender notice issued on 22.09.2014 which is subject matter of Writ Petition No. 10842/2014 and tender notice dated 23.09.2014 which is subject matter of Writ Petition No. 10844/2014. Tender notice under challenge in Writ Petition No. 10694/2014 relates to works undertaken in Kopergaon taluka Cluster I to Cluster IV whereas tender notice dated 23.09.2014 which is subject matter of Writ Petition no. 10844/2014 relates to NOFN project Clusters I and II in Shrirampur Taluka and, tender notice dated 22.09.2014 as well as corrigendum dated 27.09.2014 which is subject matter of Writ Petition No. 10842/2014 relates to OFCN project Clusters I and II in Rahata taluka, Dist. Ahmednagar. Under relevant tender condition, bidders having experience of OFC /OFC fault restoration work/UG telecom cable /fault restoration work

in DOT/BSNL/MTNL directly or through PSUs authorised by DOT or PSU of Government of India or State Government or any telecom service provider only are eligible to apply. It is thus clear that the experience expected is only in respect of contracts of department of Telecom/BSNL/MTNL and in respect of the works directly or through PSUs authorised by department of Telecom or public sector undertaking of the Central Government or State Government or only of other Telecom service providers. It is thus clear that competition is limited amongst the bidders who have experience of work with department of Telecom or BSNL or MTNL etc. Project work is in respect of laying down optical fibre cable which calls for an experience in the work of trenching and laying down UG cable. Under the tender notice in question, it is only such of those tenderers who have experience of telecom optical fibre cables and having experience with DOT/BSNL/MTNL etc. are held eligible. If a contractor possesses experience of executing similar type of work with other agencies, he is excluded from the competition. It is not a matter of dispute that BSNL is Project Implementation Agency for 16 States in India. BSNL is an agency for implementation of the project in all the districts in Maharashtra.

6. It is interesting to note that in different districts BSNL has provided different eligibility conditions. It is only in Ahmednagar district it appears that the competition is restricted to a specified class having work experience only in Telecom sector and with department of Telecom/BSNL/MTNL or experience with other PSU authorised by DOT or PSU of Government of India or State Government etc. There is absolutely

no nexus with the object to be achieved in prescribing restrictive eligibility tender conditions. So far as tender notice issued on 30.08.2014 for Osmanabad district is concerned, the eligibility criteria prescribed reads as below :

(i) Bidders should have completed excavation of the trenches at minimum depth of 1.0 mtr for laying of cables in BSNL/MTNL/DOT/Govt. PSU/Govt. Department and Licensed Telecom Service Provider for minimum 25% of the Estimated Cost of the cluster, he is bidding for, during any three financial years in total out of last successive five financial years upto the date of NIT. *If he bids for multiple clusters, then he should submit experience details of 25% of the sum of the estimated cost of all the clusters he bids for in total.

The experience certificate should be issued by the officer not below the rank of Divisional Engineer or tender approving authority in case of BSNL/MTNL/DOT/Govt. PSU/Govt. Department and by work order issuing authority in case of licensed telecom service provider.

So far as tender notice issued on 16.10.2014 for Nasik district is concerned, experience expected is as recorded in paragraph no. 9 of the tender notice which reads as below :

ix. Experience : The Tenderer should have experience of having successfully/satisfactorily completed similar work of Trenching and Laying of O.F.cable/O.F.Cable Fault Restoration Work/Trenching and Laying of UG Copper Cable/UG Copper Cable Fault Restoration Work in unit(s) of BSNL/MTNL/DOT or any Department or PSU of State/Central Government or Licensed Private Telecom Service Providers, for at least of the amount 35% of total Estimated Cost of all respective participated Cluster(s) in the block, during last five years ending last day of month previous to the one in which NIT is issued/floated (i.e. from 01.10.2009 to 30.09.2014). The experience certificate signed by Officer not below

the rank of STS level officer of BSNL/MTNL and Senior Manager/Chief Technical Officer in case of any other licensed Private Telecom Operator is required to be attached. The period of work done successfully/satisfactorily and amount of work should be mentioned in the experience certificate.

So far as tender notices issued for Nasik and Osmanabad districts are concerned, experience of a bidder of similar work of trenching and laying of O.F. Cable/O.F. Cable Fault Restoration Work/Trenching and Laying of UG Coper Cable/ UG Coper Cable Fault Restoration Work in Units of BSNL/MTNL/DOT or any department or PSU of State/Central Government is sufficient whereas in the instant matter, competition is restricted amongst the bidders who have done job work of O.F. Cable laying/ O.F. Cable Fault Restoration/ UG Telecom Cable Laying / Fault Restoration Work with DOT/BSNL/MTNL directly or through PSUs authorised by DOT or PSU of Government of India or State Government or any other telecom service provider. Experience of bidder with any Government department is not valid. It is also expected that the bidder shall have completed the job work either directly or through DOT/MTNL/BSNL etc. Thus, competition is restricted only amongst the bidders who have experience with DOT/BSNL/MTNL. The tenders in Ahmednagar district as well as Nasik and Osmanabad districts are floated by the same public sector undertaking i.e. Bharat Sanchar Nigam Limited. There is no reason as to why there shall be restrictive competition only in Ahmednagar district. It has not been explained as to what is the object of prescribing restrictive conditions. It cannot be denied that it is perfectly within the domain of BSNL to prescribe conditions. But, however, there has to be uniformity in the conditions in all

the districts and specially when the project implementing agency is the same i.e. BSNL. The restrictive conditions imposed in respect of Ahmednagar district are arbitrary and do not have any nexus with the object to be achieved. It is also interesting to note that BSNL is a Project Implementation Agency in the States of Assam, Karnataka and Rajasthan. Petitioners have placed on record notices inviting tenders issued by BSNL in Assam, Rajasthan and Karnataka States. It is noticed that such restrictive conditions as in the instant case do not find place in the tender notices issued in the abovereferred States in respect of similar type of work. It is thus clear that the restrictive tender conditions imposed in Ahmednagar district are discriminatory and having no nexus with the object to be achieved and as such are arbitrary.

7. Respondents have presented affidavit-in-reply wherein it is denied that the tender conditions are arbitrary or discriminatory. It is also contended that instant petitions are not entertainable in view of decision rendered by this Court in Writ Petition No. 9745/2014 decided on 10.11.2014. It is contended that identical clause contained in the tender notice was objected in the said petition. However, the Division Bench of this Court refused to cause interference in the matter and dismissed the petition with liberty to petitioner to take such steps as are open in law.

8. It is to be noted that in the instant matter tender conditions floated in other districts namely Nasik and Osmanabad apart from the tender conditions incorporated in similar notices issued in Assam, Rajasthan,

Chhatisgarh and Madhya Pradesh have been brought to our notice. Although the petitioner has participated in the tender process, this Court, while issuing interim order on 27.11.2014, permitted respondents to continue with the process. However, it is declared that the result of the tender notice shall be subject to the outcome of the petition. By interim order dated 16.12.2014, the Division Bench of this court has granted status quo in respect of tender process. It was noticed that inspite of directions to respondents, communication dated 21.11.2014 appears to have been issued to the petitioner holding him disqualified. It was also contended that the process adopted for finalisation of bids is e-tender process and it was open for the respondents to communicate the decision, if any, on mobile, telephone or by email. Copy of the decision is produced which also records the date as 21.11.2014 in handwriting although the communication is type written. We may not go into the allegations levelled by petitioners at this stage since we have noticed that the eligibility condition in the tender notice itself is arbitrary and discriminatory limiting the competition amongst the bidders. It also does appear that petitioners have been thrown out of competition on the ground that experience is not in consonance with the terms of the tender notice and as such it was decided not to open the financial bid. It also appears on perusal of decision dated 21.11.2014 that so far as Cluster I is concerned, there were only two bidders and both were found to be ineligible, so far as Cluster II is concerned, petitioner, who was the only bidder, was found ineligible, so far as Cluster III is concerned, out of three bidders two bids were rejected on technical ground and so far as Cluster IV is concerned, petitioner is thrown out of competition on technical

ground and thus there were only two bidders. It does appear that as a result of restricting competition by providing discriminatory eligibility condition, there were very few bidders who participated in the process.

9. As has been recorded by us earlier that the tender process is subject to outcome of the petition, we are of the considered opinion that discriminatory eligibility condition restricting competition contained in clause 12.2 of the tender notice deserves to be quashed and as a consequence, tender process adopted till this date shall have to be declared illegal. It would be open for respondents to publish fresh tender notice by incorporating suitable and non-discriminatory eligibility condition.

10. The scope of interference in tender matters is stated in the matter of Tata Cellular Vs. Union of India reported in 1994(6) SCC 651. The Supreme Court has observed that the principle of judicial review would apply to the the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. However, there are limitations in exercise of power of judicial review. The Government is the guardian of the finances of the State and 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. In paragraph no. 77 of the judgment, it is observed thus :

77. The duty of the court is to confine itself to the question of legality. Its concern should be : 1. Whether a decision-making authority exceeded its powers ? 2. Committed an error of law, 3. committed a breach of the rules of natural justice 4. reached a decision which no reasonable tribunal would have reached or, 5. abused its powers. Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment 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 that regulates his decision-making power and must give effect to it. (ii) Irrationality, namely, Wednesbury unreasonableness. (iii) Procedural impropriety. The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R.v. Secretary of State for the Home Department, ex Brind Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, “consider whether something has gone wrong of a nature and degree which requires its intervention.”

Reference can be made to the judgment of the Supreme Court in the matter of Reliance Engergy Ltd. and another Vs. Maharashtra Stat Road Development Corporation Ltd. and others reported in (2007) 8 SCC 1 wherein the Supreme Court has explained the concept of 'level playing field'.

It is observed in paragraph no. 36 of the judgment thus :

“.....” “Level playing field” is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDFC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of “level playing

field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalisation, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. "This is because the said doctrine provides space within which equally placed competitions are allowed to bid so as to subserve the larger public interest. "Globalisation", in essence, is liberalisation of trade. Today India has dismantled licence raj. The economic reforms introduced after 1992 have brought in the concept of "globalisation". Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of "level playing field" embodied in Article 19(1)(g). time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the aforesaid doctrine of "level playing field". According to Lord Goldsmith, commitment to the "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters fails to satisfy the test of "reasonableness", then such an act of decision would be unconstitutional."

In the instant matter, it is observed that by virtue of providing discriminatory and arbitrary eligibility conditions so far as Ahmednagar district is concerned, respondent BSNL has not adhered to the doctrine of "level playing field". Restrictive eligibility condition incorporated in the tender cannot be said to be reasonable. BSNL 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.

11. For the reasons recorded above, tender condition contained in clause

12.2 of the impugned tender notice is quashed and set aside. It would be open for the respondent to float fresh tender notice by prescribing non-discriminatory tender conditions. Rule made absolute accordingly. In the facts and circumstances of the case, there shall be no order as to costs.

12. Pending civil application, if any, does not survive and stands disposed of.

(P. R. BORA)
JUDGE

(R. M. BORDE)
JUDGE

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