

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD
WRIT PETITION NO.11026 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,
District Ahmednagar 414 005.

Petitioner

Versus

01 The Union of India,
through its Secretary,
Telecom and Information
Technology of Union of India,
New Delhi.

02 Bharat Broadband Network
Limited,
Undertaking of Central Government
of India, Room No.312, 3rd Floor,
C-Dot Campus, Mandigaon Road,
Chhattarpur, New Delhi – 30,
through its Managing Director.

03 Bharat Sanchar Nigam Ltd,
Central Government Enterprises,
Head Office at Bharat Sanchar Bhavan,
Harish Chandra Mathur Lane,
Janpath, New Delhi-01,
through its Chairman-cum-
Managing Director.

04 Bharat Sanchar Nigam Ltd.,
Circle Office, for State of Maharashtra,
Office of CGMT, MH Circle, 6th Floor,
A-Wing, Adm. Building, Juhu Road,
Santakruz (W), Mumbai-54,
through its Chief General Manager.

05 Bharat Sanchar Nigam Ltd.,

Aurangabad, District Aurangabad,
through its General Manager,
Telecom.

Respondents

Mr.R.B.Raghuvanshi, advocate with Mr.D.S.Bagul, advocate for
the petitioner.

Mr.S.B.Deshpande, Assistant Solicitor General for Respondents
No.1 to 5.

WITH
WRIT PETITION NO.11028 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,
District Ahmednagar 414 005.

Petitioner

Versus

01 The Union of India,
through its Secretary,
Telecom and Information
Technology of Union of India,
New Delhi.

02 Bharat Broadband Network
Limited,
Undertaking of Central Government
of India, Room No.312, 3rd Floor,
C-Dot Campus, Mandigaon Road,
Chhattarpur, New Delhi – 30,
through its Managing Director.

03 Bharat Sanchar Nigam Ltd,
Central Government Enterprises,
Head Office at Bharat Sanchar Bhavan,
Harish Chandra Mathur Lane,
Janpath, New Delhi-01,
through its Chairman-cum-
Managing Director.

04 Bharat Sanchar Nigam Ltd.,
Circle Office, for State of Maharashtra,
Office of CGMT, MH Circle, 6th Floor,
A-Wing, Adm. Building, Juhu Road,
Santakruz (W), Mumbai-54,
through its Chief General Manager.

05 Bharat Sanchar Nigam Ltd.,
Aurangabad, District Aurangabad,
through its General Manager,
Telecom.

06 The State of Maharashtra,
through its Secretary,
Rural and Urban Development
Department, Mantralaya,
Mumbai-32.

Respondents

Mr.R.B.Raghuvanshi, advocate with Mr.D.S.Bagul, advocate for the petitioner.

Mr.S.B.Deshpande, Assistant Solicitor General for Respondents No.1 to 5.

Mrs.A.V.Gondhalekar, A.G.P. for Respondent No.6.

CORAM : R.M.BORDE &

P.R.BORA, JJ.

DATE : 29th January, 2015

JUDGMENT (Per R.M.Borde, J.):

1 Heard. Rule. Rule made returnable forthwith and heard finally by consent of learned Counsel for respective parties.

2 The petitioner is a Proprietorship firm engaged in the business of execution of electrical contracts, possessing valid license issued by the competent authority under the provisions of Indian Electricity Act. The petitioner also possesses valid license

issued by the Nashik Electrical Department, P.W.D., Nashik Division, Nashik,. The petitioner claims to have experience in laying down underground electrical cable which includes electrical installation work and other similar nature of work.

3 Respondent No.1-Union of India has undertaken a programme for strengthening and augmenting Optical Fiber Base Network for Broadband Connectivity to *Panchayats* so as to provide connectivity to the rural population of the Country. It is decided to provide Optical Fiber Cable connectivity approximately to 2.5 lakhs *Gram Panchayats* in the Country and estimated cost of the project is Rs.20,000/- crores.

4 Respondent No.2-Bharat Broadband Network Limited is incorporated as an executing agency for carrying out the work. Respondent No.2, Public Sector Undertaking, has appointed 3 Project Implementation Agencies and one of such agencies, is BSNL i.e. Respondent No.5 herein, which has been assigned 16 States for providing broadband connectivity by means of Optical Fiber Cable Network. So far as Maharashtra State is concerned, BSNL is the Project Implementation Agency and in furtherance of the programme of providing connectivity, Respondent No.5-BSNL has floated a tender inviting bids for laying optical Fiber cable for National Optical Fiber Network project in Phulambri block of Aurangabad district, which is subject matter of W.P.No.11026/2014. A similar tender has also been floated for Gangapur block, which is the subject matter of W.P.No.11028/2014.

5 The eligibility condition prescribed in the notice inviting tenders, under clause 4f, reads thus:

4 Eligibility Criteria:

f 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 financial year (i.e. from 01.04.2009 to 31.03.2014). The experience certificate signed by Officer not below the rank of STS level officer of BSNL/MTNL and Senior Manager 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.

6 The petitioner-firm, which has submitted bids in response to both the tender notices for Phulambri as well as Gangapur blocks, is raising challenge to above referred clause no.4f, contained in the tender notice. The technical bid presented by the petitioner has been rejected by the Tender Evaluation Committee on 31.10.2014 in case of Phulambri block and on 14.10.2014 in case of Gangapur block and said action is subjected to challenge in these petitions.

7 So far as challenge raised to clause 4f, as recorded above, we do not find anything arbitrary or unreasonable in the said clause. Even otherwise, as has been observed by the Hon'ble Supreme Court in the matter of **Association of Registration Plates Vs. Union of India and others**, reported in (2005) 1 SCC 679, "Unless the action of tendering authority is found to be malicious and a 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 the class of intending tenderers under Article 19 of the Constitution". The clause requiring experience in the field and quantum of business turn over is quite reasonable. The petitioner has participated in the tender process and as such, at this stage, objection raised by the petitioner does not call for interference.

8 The petitioner is also objecting to the rejection of his technical bid. It is communicated to the petitioner on 31.10.2014 in respect of bids submitted by him for Phulambri and Gangapur blocks, that the experience certificate submitted by him, which is common for OH {Over Head} line/UG (Under Ground) cable firstly does not clarify the actual laying of UG cable work and OH line separately. It is further informed that his experience in respect of laying down UG (Under Ground) cable line is not sufficient to meet the requirement of 35% of the tender cost. The petitioner has tendered two work completion certificates issued by National Highways Authority of India, both dated 16.09.2013; and two work completion certificates dated 18.09.2013 and 23.09.2013, issued by Central Railways. It is observed that so far as certificates issued

by National Highways Authority of India are concerned, there is no clarification in respect of cost of the work done for laying down Over Head line and Under Ground cable. Similar is the case in respect of certificate dated 18.09.2013 issued by the Central Railways. The only one certificate issued by the Central Railways dated 23.09.2013 records that the petitioner has completed job of Under Ground cable laying for 1.5 Km distance.

9 According to the Respondents, the work experience recorded in the certificates do not fulfill the requirement under clause 4f of the eligibility criteria prescribed in the tender notice.

10 The petitioner has disputed the contentions raised by the Respondents by presenting rejoinder affidavit, wherein it has been stated that the work experience for laying under ground cable and associated work, under the certificates issued in his favour, is to the tune of Rs.1,55,60,431/- in respect of certificate dated 16.09.2013 and for an amount of Rs.26,90,233/- and Rs.11,45,225/- under certificates dated 20.09.2013 and 18.09.2013.

11 The contentions raised by the petitioner have been disputed by the Respondents contending that clarification was sought from the National Highways Authority of India in respect of certificates annexed by the petitioner with the tender notice and it has been informed that the work experience in respect of laying down of under ground cable is only to the extent of Rs.98,430/-. According to the Respondent, minimum amount of under ground cable works' experience is required to the tune of Rs.40 lacs,

whereas experience certificate annexed by the petitioner to the tender document fall short of the requirement and as such, his technical bid has been rejected.

12 So far as Gangapur block is concerned, it is informed that since none of the tenderer could qualify the eligibility requirements, a decision was taken to re-float the tender. During renewed tender process, tenders were opened on 09.12.2014 and petitioner is also one of the participants in the re-tender process. The petition in respect of Gangapur block is, therefore, rendered infructuous. We do not have any doubt that the petition, so far as Gangapur block is concerned i.e. Writ Petition No.11028 of 2014 is rendered infructuous and as such, deserves to be dismissed.

13 So far as Writ Petition No.11026 of 2014 is concerned, it is to be noted that the petitioner raises disputed questions of facts. The petitioner claims that the work experience possessed by him satisfies the requirement, whereas, the Respondents have disputed the contentions raised in that behalf. In our opinion, the questions, which are seriously disputed as regards eligibility of the petitioner, need not be examined in exercise of extraordinary jurisdiction under Article 226 of the Constitution of India.

14 The scope for interference in tender matters is limited. In paragraphs no.70 and 77 of the judgment in the matter of **Tata Cellular Vs. Union of India**, reported in 1994 (6) SCC 651, the Supreme Court has observed thus:

“70 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 exercise 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.

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 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 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 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. vs. Secretary of State for the Home Department, ex-Brind* (1991) 1 AC 696, 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”.

15 While exercising jurisdiction under Article 226 of the Constitution of India, in tender matters, what is required to be examined is as to whether fair and transparent procedure has been followed and whether decision making process is non arbitrary. In the instant matter, we do not find that the process adopted by the Respondents is non transparent or non arbitrary.

16 For the reasons recorded above, no interference is called for in the decision recorded by Respondent No.5 in rejecting technical bids submitted by the petitioners. Writ Petition is devoid of substance.

17 Both the Writ Petitions stand dismissed. Rule discharged. No order as to costs.

P.R.BORA
JUDGE

adb/wp1102614

R.M.BORDE
JUDGE