IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 1887 OF 2015

Messrs Classic Caterers	**}**	**Petitioner**
versus		
Union of India and Anr.	**}**	**Respondents**

Mr. Rohan Cama with Ms. Sapna Rachure for the Petitioner.

Mr. Suresh Kumar with Ms. Sangeeta Yadav for the Respondents.

CORAM :- S. C. DHARMADHIKARI &
B. P. COLABAWALLA, JJ.

DATED :- SEPTEMBER 22, 2015

P.C. :-

By this Petition under Article 226 of the Constitution of India, the Petitioner seeks a writ of certiorari or any other appropriate writ, order or direction calling for the records pertaining to a communication dated 27th March, 2015 and referred as an order of the Respondent No. 2, and on scrutiny thereof as to its legality and validity to quash it.

2) The Petitioner seeks this relief in the backdrop of the following facts:-

By a commercial circular No. 35 of 2010 dated 21st July, 2010, the Ministry of Railways formulated new catering policy to be followed by all railway zones. Accordingly, in 2013, standard bid document was finalised by Respondent No. 1. Annexures 'A' and 'B' are copies of these documents. Based on the conditions in standard bid document, zonal railways issued tenders for various trains. It is submitted that maximum tenders were finalised and contracts were awarded on the basis of the same. Suddenly, on 27th March, 2015, the impugned communication has been issued without any modification in the policy. It is complained that when the Petitioner became aware of this communication on 8th April, 2015, it was revealed to it that the evaluation criteria for techno-commercial bid for consortium/joint venture prescribed earlier has, vide the impugned letter, been changed. That is how the Petitioner protested and complained that the modification or change in the criteria has ruled out the possibility of a Joint Venture entering the fray. Now, the Petitioner would be visited with all the consequences of the changed evaluation criteria. The Petitioner, therefore, cannot apply for the subject contract, although the last date for submission of the tender forms came to be extended.

3) The Petitioner, thus, complains that by virtue of this criteria, a joint venture will not be able to participate in the public

contract for providing catering services to the railways and that is how there is a violation of the constitutional mandate enshrined in Articles 14 and 19(1)(g) of the Constitution of India.

4) Mr. Cama appearing on behalf of the Petitioner invited our attention to the earlier circular and particularly the stipulation at page 81 of the paper book. He would submit that as far as earlier declaration form for techno-commercial experience is concerned, the technical criteria, particularly evolved with regard to the total number of professionally qualified staff with minimum three years experience employed by the bidder and thereafter the total number of base kitchens owned and operated by the bidder, would indicate that a consortium/joint venture were allowed to bid on the footing that in many cases the single entity cannot fulfill the criteria of annual turnover in crores. Now, by the impugned modification and effected by the communication at Annexure 'C' at page 155 of the paper book, what has been done by the Government of India, Ministry of Railways is that all zonal railways are advised to adopt the revised evaluation criteria uniformly as per the enclosed Annexure A/5 to this communication. The sample case, on the basis of which the revised criteria shall be applied, would indicate that though the declaration in the requisite form has to be filled in by the joint venture, as far as the evaluation is

concerned, there is now a complete modification. The total number of professionally qualified staff with minimum three year experience employed by the bidder is the information which is sought and when this information is sought, what has been stated in the criteria column is that if this number extends 20 then score of marks would be 10 and if it is less than 20 but more than 16, it would be 8 and if it is less than 16 to 12, it would be 6. Even with regard to the total number of kitchens owned and operated by the bidder, the format and the criteria has some changes. Mr. Cama therefore submits that by this process, a joint venture will not be able to bid and as far as the prior circular and criteria was concerned, the evaluation of a bid of joint venture was fair, just and reasonable. There need not be any change and as now brought about and if any change has to be made, it should not have been given a retrospective effect. Meaning thereby, if last date for submission of the bid was extended, that does not mean that the impugned communication must apply. The impugned communication therefore has ruled out completely the participation of joint ventures. This act is contrary to the constitutional mandate and therefore must be struck down. Mr. Cama has sought to rely upon Annexure A/5 and which was earlier in force and now the change effected therein especially about total number of kitchens owned and operated by bidder. Mr. Cama also placed reliance on a Judgment of the Hon'ble Supreme Court of India in the case of *New Horizons Limited and Anr vs. Union of India and Ors.* reported in **(1995) 1 SCC 478**.

5) Mr. Cama has also brought to our notice a prior Judgment of the Hon'ble Supreme Court of India in the case of *M/s. G. J. Fernandez vs. State of Karnataka and Ors*. reported in **AIR 1990 SC 958** on the point that any relaxation, concession or modification in the standard terms and conditions prescribed in the notice inviting tender can be questioned and can be set aside even at the instance of a party like the Petitioner who has not submitted the bid or the tender. Mr.Cama has also submitted that the law laid down, namely, that if the Petitioner sits by or allows the tender process to go through and thereafter questions it merely because it was unsuccessful is a principle which cannot be applied by the Respondents to this case.

6) On the other hand, Mr. Suresh Kumar appearing for the Respondents submitted that there is no substance in any of these contentions. He would submit that the Petitioner has no vested right and cannot insist upon trading or contracting with the Government or railways. The Petitioner can only question an act which is discriminatory and arbitrary but cannot urge that merely because there is a condition or term to be fulfilled or a criteria is evolved for evaluation of the bids, then, that condition or criteria itself rules out the

participation of the joint venture. The Petitioner, according to Mr. Suresh Kumar, is a firm carrying on business. There is no joint venture or partners in a bid who have approached this Court questioning the evaluation criteria. At the instance of the Petitioner, therefore, this criteria cannot be set aside.

7) On merits, he would submit that when there were suggestions from all zonal railways with regard to bringing proper uniformity in evaluation of the bids that the consultative process was commenced. After the consultative process ended, it was decided that the allocation of techno-commercial scores to consortium may be done in proportion to their share holding in the consortium/joint venture and arithmetic sum of the proportionate score be assigned to the participating consortium. The criteria was evolved bonafide and to reduce the possibility of giving different marks to the joint venture by the zonal railways. None of the legal rights of the Petitioner are taken away nor the Petitioner is made ineligible for participating in the tender process. Our attention is then invited to paras 7 and 8 of the affidavit in reply to urge that there is no merit in the Petition, because the Petitioner had not mentioned the name of the partner of the joint venture and how the revised criteria would be affecting it. The Petitioner has not submitted any tender. Therefore, how the eligibility

criteria evolved has impacted the Petitioner has not been clarified at all. In the circumstances, there is nothing arbitrary, illegal or discriminatory in the criteria evolved and the Petition deserves to be dismissed.

8) With the assistance of both Counsel, we have perused the Petition and the Annexures thereto.

9) We have found that the Petition is by a partnership firm, namely, M/s. Classic Caterers. In the entire memo of the Petition and while setting out the factual data, the Petitioner has not indicated as to how it alone can be termed as a joint venture. It has not indicated the names of the joint venture partners, their legal status and when did the Petitioner associate itself with any such entity or a joint venture and to bid for the contract of M/s. Western Railway. There is absolutely no indication as to how the Petitioner, a partnership firm can be termed as a joint venture. It is not clear as to which consortium/joint venture has authorised the Petitioner to question the criteria evolved. Thus, a sole legal entity without any backing, authorisation of a joint venture or consortium cannot move the Court and urge that such venture is illegally and arbitrarily prevented from participating in a public tender. There is no pleading that the Petitioner intended to bid jointly with another legal entity. In the absence of this basic material, ordinarily, we would have been justified in dismissing this Petition on this ground

alone. However, we do not intend to rest our conclusion on this technical ground in the light of the extensive material before us.

10) Before we proceed further, it would be proper to reproduce the legal principles and summarised by the Hon'ble Supreme Court from time to time. In the case of *M/s. Michigan Rubber (India) Ltd. vs. State of Karnataka and Ors.* reported in **AIR 2012 SC 2915,** the Hon'ble Supreme Court has summarised these legal principles as under:-

> "**19.** From the above decision, the following principles emerge:
> (a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;
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> (b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is provided to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;
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> (c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;
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> (d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and
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> (e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again,

> interference by Courts is very restrictive since no person can claim fundamental right to carry on business with the Government.
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> **31.** As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonable. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the Courts would interfere. The Courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, the CMG consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail and for specifying these two conditions regarding pre-qualification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way could be classified as arbitrary, discriminatory or mala fide."

11) We will have to decide the controversy in this Petition by applying these principles.

12) In any event, what we have noted is that all railway zones have been instructed by the Railway Board to give priority to provision of good quality food, drinking water and toilet facilities and ensure cleanliness on trains and stations. Further availability of *Janta Khana* should be ensured and national and regional cuisines in catering service

should be introduced. A comprehensive policy including strict monitoring mechanism would be developed for achieving these objectives. That is how a new catering policy was formulated by the circular of 21st July, 2010. The objective of catering policy is to provide hygienic, good quality and affordable food to the traveling public by adopting best trade and hospitality industry practices. The policy will have an inclusive approach wherefrom the least advantaged passenger to the relatively affluent will be provided catering services in a socially responsible manner. That is how the railways had created an Indian Railways Catering and Tourism Corporation (IRCTC) earlier by its policy of 2005. The base kitchens and other stipulations in this policy would indicate as to how steps and for providing quality and good food were taken. There are several circulars and following the above and issued on 2nd January, 2013. There are also Board letters guiding the concerned for effective and proper implementation of this policy. Even when the techno- commercial bid had to be evaluated, as far as the joint ventures were concerned, the emphasis throughout was on the individual entities achieving a particular minimum score. Earlier also a form had to be filled in styled as declaration form for techno-commercial experience. This had to be filled in by joint venture and at appropriate stages it was to indicate the year of incorporation of catering business, average annual turnover, experience, quality certificates obtained etc. Total number of professionally qualified staff and base kitchens at the command and available to the consortium or joint venture were all to be indicated. Thus, the authority desired to satisfy itself as to the financial capacity, bench strength, experience in catering services of the joint venture partners. It should not be a facade but a genuine and bonafide joint venture. Thus, the joint bidding agreement and all other annexures as summarised above were to contain the necessary information, even in the earlier process. There were thus no vested right created in a particular category of bidder and to bid and thereafter obtain the contract. The joint ventures were always encouraged and could have submitted their bids. The evaluation criteria was known to them.

13) They participated earlier and can do so now as well. None of them complained earlier and now because information on financial capacity, experience, availability of professionally competent staff, number of kitchens available etc. of the individual entities in the joint venture or consortium had to be provided. Such insistence on providing vital information to public bodies in a open tender subserves larger public interest. We have not been shown any principle of law which would enable as to hold that mere insistence on furnishing information of the above nature and without any thing more rules out the

participation by a joint venture or consortium or prohibits joint bidding. Even in cases of such bids, the merit of the individual entities forming part of the venture can be assessed in order to find out whether they can shoulder the responsibility individually and jointly. The allotment of marks to individuals on the basis of their independent performance in the past enables the authority to judge their collective merit particularly in cases of recent or new joint ventures or consortium. Even if they are old and past hands their present standing in the market and commercial world needs to be ascertained especially while awarding huge public contracts. These are awarded at the cost of public exchequer. Hence, a score or allocation of marks, in order to take a decision after overall assessment of the competence of all categories of bidders, is the mode or method chosen by the railways. That itself is not challenged. However, what is questioned is the basis on which the experience of the joint venture, average annual turnover and financial standing, total experience is guaged. The arithmetic sum of financial standing in proportion to their members' shareholding in the consortium/joint venture is the basis on which the score for fulfillment of this criteria would be judged. In the absence of a concrete case with all details of a particular joint venture/consortium, whether any injustice has been caused or a joint venture/consortium could not effectively participate, cannot be decided. By itself, this method and based on rather a self assessment cannot be termed as objectionable. Its actual working or functioning and resulting in a serious prejudice or interference with a vested right of any party can always be questioned and impugned. Such is not the case before us.

14) What has to be indicated and with specific details is the techno-commercial experience. It has been stated in this column that in case of consortium/joint venture, experience of the lead member will be taken for consideration. In case of consortium/joint venture, arithmetic sum of annual turnover of all members in proportion to their share holding in the consortium/joint venture has to be considered. Column 4 in the self declaration form, copy of which is at page 156 of the paper book is about average financial standing of the bidder in the preceding five financial years. There also, in case of consortium/joint venture, arithmetic sum of financial standing of all members in proportion to their share holding in the consortium/joint venture is to be set out. Thereafter, in joint venture the arithmetic sum of annual turnover of all members in proportion to their share holding had to be indicated and score/marks were to be awarded accordingly. The total experience of the bidder in catering business together is the criteria evolved for all bidders and in cases of consortium/joint venture, arithmetic sum of annual turnover of all members in proportion to their share holding has to be indicated.

15) Mr. Cama does not question evolution of such criterias. His argument centers around some Items, which requires indication of total number of professionally qualified staff with minimum three year experience employed by the bidder. In case of consortium/joint venture, arithmetic sum of scores of all members in proportion to their share holding in the consortium/joint venture has to be indicated. Thus, the criteria and which has to be fulfilled is that the bidder must indicate the share holding of the partners in the consortium/joint venture. In proportion to that, it must indicate total number of professionally qualified staff at the largest performing unit, as determined in Form A-5. The score or marks are thus on the basis of the number of professionally qualified staff and with minimum experience. We have found that all these items and which are in the standard form of declaration have to be construed and are to be read as a whole. The emphasis is on the financial strength, experience and availability of competent and trained or professionally qualified staff together with number of kitchens owned. This is therefore the standard format devised, which would enable proper evaluation of the bids and particularly in the backdrop of the policy objectives. If the competence and financial strength of the bidder have to be judged and taking into account this data and figures which are provided by the bidder in the self declaratory form, then, we do not see how all this would cause

prejudice to the Petitioner. Its exclusion allegedly cannot be inferred merely because such criteria has been evolved. That is a common criteria. The details have to be filled in. As far as the circular is concerned, it only indicates that the zonal railways are advised to adopt this criteria uniformly. For better appreciation of the method, a sample case is given and Mr. Cama has relied upon the sample case. We do not see any prejudice being caused to any party or the Petitioner merely because the revised criteria is now applicable. None other than the Petitioner has come forward to question it. The Petitioner also cannot complain because on its own showing, apart from issuance of a tender notice, nothing was done. The last date of submission of the bid was extended admittedly. In such circumstances, we do not see any basis for the contention that the revised criteria is made applicable retrospectively or the rules are being changed midway.

16) As far as the case of *New Horizons Limited* (supra) is concerned, in that case, the Hon'ble Supreme Court, on facts, found that by the advertisement published in various newspapers, the Department of Telecommunications, Telecom District, Hyderabad invited sealed tenders from competent agencies for printing, binding and supply of specified number of telephone directories in English for three annual issues commencing from 1993. It was mentioned that the successful

tenderer will be permitted to procure on his own classified advertisement and cover page advertisements. He had to indicate the experience in compiling, printing and supply of telephone directories. Thereafter, the terms and conditions were referred and five persons including Appellant No. 1 *New Horizons Ltd.* submitted the tender. The offers were considered by the Tender Evaluation Committee and the bid/offer of fourth Respondent before the Hon'ble Supreme Court came to be accepted. The Appellant was communicated that its offer cannot be considered. That is how it questioned the entire process by filing the Writ Petition in the Delhi High Court urging that the joint venture company established by four entities coming together could have placed its bid and that was not prevented. However, while evaluating their experience and in devising the criteria evolved for that purpose, the authorities have acted arbitrarily. After the Delhi High Court dismissed the Writ Petition, the matter was carried to the Hon'ble Supreme Court. The argument canvassed was that the High Court was in error in considering whether NHL fulfilled the condition regarding experience and the authorities should have taken into consideration the experience of NHL, which is joint venture company approved by the Government of India. The authority should have lifted the corporate veil. Far from assisting the Petitioner, the observations in para 23 would indicate as to how the experience is relevant and germane criteria. When public tenders have to be evaluated and for awarding a public contract, then, it is incumbent upon the authorities to evolve a criteria such as experience, financial strength etc. However, the assumption with regard to joint venture was an issue raised before the Hon'ble Supreme Court. The Hon'ble Supreme Court, therefore, while allowing the Appeal and setting aside the judgment of Delhi High Court, found that the credentials are to be examined from the point of commercial experience, financial background, the persons in control, their expertise to execute the work etc. That is why the name of the company is not determinative and decisive but the person behind it. The joint venture constituting the same would have to satisfy this commercial criteria. Thus, no different or distinct criteria could be evolved because there is a joint venture. The experience of the individual can be gone into.

17) Thus, evaluation of the criteria of the nature evolved in the present case is not at all prohibited and the judgment of the Hon'ble Supreme Court does not assist the Petitioner before us but reinforces our conclusions.

18) In the case of *M/s. G. J. Fernandez* (supra) as well, there was a relaxation given to one of the bidders and for submission of certain documents. The submission of such documents was a term and condition in the notice inviting tenders. That was not being questioned.

The consequence thereof and whether the term or condition would be strictly applied or substantial compliance thereof is permissible is the argument, which has been duly considered in the Judgment. The relaxation or concession to one of the bidders should not visit others with a consequence of that party being left out of consideration. The criteria evolved should be applied uniformly. In that case as well, the Hon'ble Supreme Court found that rigidly enforcing all conditions was not the rule. The relaxation in that case did not adversely affect or prejudice the case of the party before the Hon'ble Supreme Court. In the absence of any prejudice therefore, the decision of the authority was upheld. We do not see how such a case can be of any assistance to a party like the Petitioner, who had not submitted any bid either as an individual or as a joint venture. In the circumstances, we do not think that the criteria evolved in the present case can be questioned.

19) We are not throwing out the Petitioner on any hyper technical ground or the objections raised by the Respondents. Therefore, the rule that the Petitioner having participated in the process cannot question the final decision can never be applied in the facts and circumstances of the present case.

20) As a result of the above discussion and finding that there is nothing arbitrary or discriminatory about the criteria evolved, we have

no alternative but to dismiss the Petition. It is accordingly dismissed. The ad-interim order is vacated forthwith.

21) At this stage, a request is made to continue the ad-interim order passed by this Court restraining the Respondents from awarding the contract, though the process was allowed to be completed by this Court. Meaning thereby, the final decision was not allowed to be implemented. The said order cannot be continued at the instance of the Petitioner. The request is refused.

(B.P.COLABAWALLA, J.) **(S.C.DHARMADHIKARI, J.)**

CERTIFICATE

Certified to be true and correct copy of the original signed judgment/order.