

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

NAGPUR BENCH : NAGPUR

M.C.A. (REVIEW) NO. 1087/16 IN WRIT PETITION NO. 5818 OF 2016.

**(Consortium of Titagarh Firema Adler S.P.A. - Titagarh Wagons Limited .vs.
Nagpur Metro Rail Corporation Limited & another)**

Office Notes, Office Memoranda of
Coram, appearances, Court's orders
or directions and Registrar's orders.

Court's or Judge's orders

Mr. S.G. Aney, Senior Counsel with Dr. Anjan De, Advocate for
petitioner/applicant.

Mr. S.K. Mishra, Senior Counsel with Mr. Kaustubh Deogade,
Advocate for respondent no. 1.

Mr. Sunil Manohar, Senior Counsel with Mr. A.A. Naik,
Advocate for respondent no. 2.

CORAM : B.R. GAVAI & V.M. DESHPANDE, JJ.

DATED : NOVEMBER 22, 2016.

1] The application is a classic example as to how under the garb of review application, an attempt is made by an unsuccessful litigant to reopen the entire issue which is finally concluded by this Court.

2] The petitioner herein had approached this Court by way of Writ Petition No. 5818/16 basically seeking for a relief for calling the record pertaining to the Bid No. NIRS-1/2016 (ICB) dated 25.1.2016 and declare that the respondent no.2 has disqualified and declare that the opening of price bid of respondent no.2 was illegal, arbitrary, irrational and unreasonable and violative of Article 14 and Article 19(1)

(g) of the Constitution of India.

3] Before the petition was decided by us, the matter was heard at length. We had heard Shri C.S. Kaptan, the learned Senior Counsel for the petitioner, Shri S.K. Mishra, the learned Senior Counsel for the respondent no.1 and Shri Sunil Manohar, the learned Senior Counsel for the respondent no.2.

4] The arguments which were advanced on behalf of the petitioner in the said petition could be crystallized as under :-

I. That Clause 26 of the tender document prevented a person from getting any knowledge about the technical qualification of the competitor till the contract is awarded and as such, the said clause was patently arbitrary, unreasonable and violative of Article 14 of the Constitution of India.

II. That the respondent no.2 was not having the requisite experience as required under the tender documents of its own but was relying on the experience of its subsidiary.

Perusal of our order would reveal that after the matter was heard at length and when we had disclosed that we are dismissing the petition,

an attempt was made to seek withdrawal of the petition. However, we did not permit the same for the reasons specifically recorded in our order under review.

5] By an elaborate order, after considering the various judgments of the Hon'ble Apex Court on the issue, we had dismissed the petition. In so far as the first ground is concerned, we had specifically come to a conclusion that though the petitioner was very well aware about the said condition at the time of submitting his bid, he had chosen to submit his bid in spite of the same condition being there and only after he came to know that he was not the lowest bidder, he chose to challenge the said condition.

6] In so far as the second ground is concerned, we had specifically come to a conclusion that the respondent no.2 had come into existence after merger of two companies, i.e. CRC Corporation and CNR Corporation and as such, the experience of both these Corporations now became the experience of the respondent no.2.

7] Except the aforesaid two grounds, no other ground was pressed into service before us. We may state that we have specifically observed in our judgment that one of the grounds on which judicial

review of an administrative action would be permissible is a malafide action to favour someone. When a specific query was made in that regard as to whether the petitioner was resting the case on the ground of malafide action on the part of some officer of the respondent no.1, it was submitted before us that no such case is sought to be made out by the petitioners before the Court. In any case, such a case could not have been argued, inasmuch as no individual, whose malafide action was alleged, was either made party or any specific allegations in that regard averred in the petition.

8] We had specifically referred to two recent judgments of Hon'ble Apex Court in the case of **Afcons Infrastructure Limited .vs. Nagpur Metro Rail Corporation Limited & another** (Civil Appeal No. 9078/16 decided on 15.9.2016) and **Central Coalfields Limited .vs. SLL-SML (Joint Venture Consortium)** reported in **2016 (8) SCALE 99**, apart from referring to the celebrated case of **Tata Cellular .vs. Union of India** reported in **(1994) 6 SCC 651**.

9] Today, by way of present Review Application, the review is sought on various grounds. The petitioner has been graceful enough to point out the various grounds of review under various sub-headings, which are as under :-

I. Wrong deliberate evaluation of price bids by respondent no. 1 is malafide and in order to favour the respondent no.2 and illegally oust the petitioner although the petitioner on all counts is L-1 by a huge margin,

II. Deliberate and malafide wrong evaluation relating to the technical qualification and experience of the respondent no.2 and suppression of vital and material facts by respondent no. 2.

10] Shri S.G. Aney, learned Senior Counsel appearing on behalf of the petitioner, submits that on following two grounds, the present Review Application is liable to be entertained by this Court :-

i. While exercising the principle of Wednesbury's reasonableness, the order in review failed to take into account relevant omissions in the process of scrutiny, like (a) how rate discount cannot be granted and (b) improper calculation of service tax which renders the applicant's bid lowest,

ii. that there was suppression of relevant facts by respondent no.2 before the authorities.

11] With great respect to the learned Senior Counsel, we may state that neither there is any foundation in the petition for the aforesaid two grounds, nor were those grounds argued before this Court when the petition was heard on merits.

12] Apart from that, we find that the two grounds which are found in the Review Application are totally out of the scope of the petition. As has already been pointed out by us that in the petition, neither the persons against whom any malafides are attributed were made parties nor any specific averments made in the petition to attribute the malafide intention to a particular individual.

13] Shri S.G. Aney, learned Senior Counsel appearing on behalf of the petitioner, submitted that when an action would fall in the ambit of malice in law, it may not be necessary to implead the persons against whom malafides are attributed as a party respondent. We find that by no stretch of imagination the present case would fall in the ambit of malice in law. If it is a case of the applicant that the tender processing authorities in order to favour the respondent no.2 have deliberately made some omissions or have committed some malafide act in order to help the respondent no.2 to get the contract, then in that event such of the officers of the respondent no.1 who are attributed with such an act

or omission, were necessary parties. So also it was necessary for the petitioner to make specific averments against those individuals. As already discussed hereinabove, though a specific query was made in that regard, the learned Senior Counsel appearing on behalf of the petitioners, at that stage, fairly stated that no such malafides are attributed in the memo of petition. In the light of this factual position, seeking review on the ground that there was a wrong deliberate evaluation of price bids by respondent no.1 and the same act was malafide in order to favour the respondent no.2 and to illegally oust the petitioner, in our view, is an imagination of a fertile brain of the draftsman.

14] We further find that the Review Application depicts total non-application of mind. In paragraph no. 6.8 of the application, the draftsman of the Review Application, has averred that the respondent no.2 has not formed any JV/Consortium and as such, it was not eligible to bid in the tender process. We do hope that the draftsman of the Review Application understands the basic distinction between a Joint Venture/Consortium and an incorporation of a new company after merger of two companies into one.

15] It is further to be noted that though the memo of petition runs

into 22 pages, the review application runs into 39 pages. We have no hesitation to say that the Review Application has been drafted without application of mind. The rules require that while filing a Review Application, a lawyer should certify that good grounds exist for seeking review of the order. We are at pains to say that in the present case the said certification has been done in the most casual manner, only to show compliance with the requirement of the rules.

16] We, therefore, find that the present Review Application is nothing else but a futile attempt on behalf of the unsuccessful litigant to reopen the entire issue after having failed before this Court.

17] The Review Application is, therefore, rejected with costs which are quantified at Rs.1,00,000/- (Rupees One Lakh). The costs be paid to the Chief Minister's Drought Relief Fund within a period of two weeks from today and the receipt of the same be placed on record in the aforesaid period.

Judge

Judge

J.