IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

Civil Writ Petition No. 15210 of 2015 (O&M)
Date of Decision: 22nd March, 2016

Shri Ganesh Fire Equipments Pvt. Ltd. through its Marketing Manager Shri Anil Tyagi

..Petitioner

Versus

State of Punjab and others ..Respondents

CORAM: HON'BLE MR. JUSTICE S.J.VAZIFDAR, ACTING CHIEF JUSTICE.
HON'BLE MR. JUSTICE ARUN PALLI.

1. Whether Reporters of local papers may be allowed to see the judgment?
2. Whether to be referred to the Reporters or not ?
3. Whether the judgment should be reported in the Digest?

Present : Mr. Vivek Sethi, Advocate, for the petitioner.
Mr. J.S.Puri, Additional Advocate General, Punjab, for the respondents.

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S.J.VAZIFDAR, ACTING CHIEF JUSTICE

The petitioner has challenged clause 2.1 of Section VI of the Technical Specifications of a tender dated 08.06.2015 issued by the respondents inviting bids for fabrication and supply of a multipurpose fire tender in so far as it requires one of its components, namely, the pump, to be only of the makes specified therein. The pumps manufactured by the petitioner are not included.

2. The respondents by a notice dated 08.06.2015 invited bids for the fabrication and supply of multipurpose fire tender with a view to strengthen its capacity for "disaster management fire fighting and rescue" operations. Clause 2.1 which is impugned in this petition reads as under:-

> "2.0 PUMP
>
> 2.1. The pump shall be centrifugal type, Multi Pressure, CE Marked Godiva, Rosenbauer, Firefly make, multi pressure (combined High Low Pressure) type having output capacity of

> 2250 LPM at 7.5 kg/cm2 at 3 mtrs. suction lift at MTP condition. The low pressure side will be of single stage and the high pressure side also with single stage giving regenerative type impeller."

Clauses 2.2 and 2.13 stipulate the performance parameters of the pump. There are several other clauses also that stipulate the tests that the pump would be subject to. As we mentioned earlier, the petitioner's grievance is that the tender conditions limit the makes of the pump to be utilized to those mentioned in clause 2.2. It is contended that this is discriminatory, arbitrary and unfair as it excludes other manufacturers whose pumps are equally suitable and meet the requisite parameters.

3. The respondents' preliminary objection to the effect that the petition is not maintainable as the petitioner is not a bidder is not well founded.

4. It is true that most decided cases relating to tenders deal with challenges brought by or against the bidders or prospective bidders. They are also brought by intending bidders contending that they have been wrongly held to be ineligible and by those who are unable to participate in the tender process because of the requirements of the tender conditions they are unable to fulfill. The latter challenge the term in the tender documents itself inter-alia on the ground that it is arbitrary, unreasonable, unfair or otherwise illegal. There are bidders who challenge the eligibility of other bidders. Decided cases have entertained such challenges on various grounds. The authorities in such cases, however, do not bar the maintainability of actions such as the one before us. They do not deal with a case such as the one before us. We must, therefore, deal with the contentions on merits.

5. In Natural Resources Allocation in Re: Special Reference No.1 of 2012 a Constitution Bench of the Supreme Court answered the reference made by the President of India under Article 143(1) of the Constitution of India. In paragraph-96, it was held:-

> "96. The underlying object of Article 14 is to secure to all persons, citizens or non-citizens, the equality of status and opportunity referred to in the Preamble to our Constitution......................Besides, Article 14 is expressed in absolute terms and its effect is not curtailed by restrictions like those imposed on Article 19(1) by Articles 19(2) to 19(6). However, notwithstanding the absence of such restrictions, certain tests have been devised through judicial decisions to test if Article 14 has been violated or not."

From paragraph-95 onwards, the Supreme Court referred to the manner in which Article-14 had been dealt with. It observed that for the first couple of decades the "classification test' was adopted which allowed for a classification between entities as long as it was based on an intelligible differentia and displayed a rational nexus with the ultimate objective of the policy. It was observed that after the judgment of the Supreme Court in *E.P. Royappa v. State of Tamil Nadu, (1974) 4 SCC 3*, the 'arbitrariness' doctrine was introduced which dropped a pedantic approach towards equality and held the mere existence of arbitrariness as violative of Article 14, however equal in its treatment and that building upon the opinion delivered in Royappa's case (supra), Bhagwati, J., in *Maneka Gandhi Vs. Union of India & Anr. 1978(1) SCC 248*, introduced the principle of reasonableness and held that legally as well as philosophically reasonableness, is an essential element of equality or non- arbitrariness. The Supreme Court held:-

> "**101.** *Ramana Dayaram Shetty* v. *International Airport Authority of India* [(1979) 3 SCC 489: AIR 1979 SC 1628] explained the limitations of Article 14 on the functioning of the Government as follows: (SCC p. 506, para 12)
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> > "*12.* … It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

After referring to several other judgments, the Supreme Court held:-

> "**107.** From a scrutiny of the trend of decisions it is clearly perceivable that the action of the State, whether it relates to distribution of largesse, grant of contracts or allotment of land, is to be tested on the touchstone of Article 14 of the Constitution. A law may not be struck down for being arbitrary without the pointing out of a constitutional infirmity as *McDowell case* [(1996) 3 SCC 709] has said. Therefore, a State action has to be tested for constitutional infirmities qua Article 14 of the Constitution. The action has to be fair, reasonable, non-discriminatory, transparent, non-capricious, unbiased, without favouritism or nepotism, in pursuit of promotion of healthy competition and equitable

> treatment. It should conform to the norms which are rational, informed with reasons and guided by public interest, etc. All these principles are inherent in the fundamental conception of Article 14. This is the mandate of Article 14 of the Constitution of India."

6. The terms and conditions of the notices inviting tenders must also satisfy the mandate of Article 14. They must be reasonable, fair and rational. They must not be unfair or arbitrary. These parameters, however, are not restricted to the subject matter of notices inviting tenders. They must be extended to anything arising therefrom, related thereto or in connection therewith.

7. The State and its instrumentalities are the largest owners and trustees of the nation's resources moveable and immovable, tangible and intangible. Absent anything else, every citizen is entitled to participate in the States commercial ventures be it for procuring goods and services or whilst disposing of or otherwise dealing with its resources. A particular citizen cannot be excluded arbitrarily at the whims and fancies of the State or its instrumentalities that invite tenders.

8. This principle would be circumvented if the State or its instrumentalities are permitted to limit arbitrarily and without justification the makes/brands of the products and material that go to make up or are involved in the manufacture of the final product in respect whereof the bids are invited. The State cannot be expected to invite separate bids for the subsidiary or ancillary products that form a part of the main product required by it. A tender for such subsidiary or ancillary products may not, therefore, be issued. If the State required such subsidiary or ancillary products itself, it would not be entitled to exclude any particular bidder without valid reason. We see no reason then in permitting the State to exclude the manufacturers

or suppliers of such subsidiary or ancillary products in the tender process initiated for acquiring the main or final product. When a person's products are excluded from the list of products used in connection with the product for which bids are invited, the rights of the party interested in such ancillary or subsidiary products are vitally affected. Such parties are, therefore, entitled to challenge the action of the State as being arbitrary, unfair and even otherwise illegal.

9. The challenge to the maintainability of the petition on the ground that the petitioner is not a bidder must, therefore, fail.

10. The State is, however, entitled to insist upon the quality of the products and services to be acquired by it conforming to certain specifications and to meet the stipulated parameters. The State is entitled to ensure this by any reasonable means.

11. Take for instance, tenders for the supply of machinery. The manufacturer of such machinery requires the use of several components which we have referred to as subsidiary or ancillary products. A party inviting tenders often stipulates a list of approved manufacturers and suppliers from whom such products are to be obtained by the bidders. It is not necessary in every case for the party inviting bids to prepare a list of the approved suppliers in respect of each tender. They may do so on a case to case basis but that is not always necessary. There are several cases where parties prepare a list of approved suppliers in advance, for contracts to be entered into in the future. This obviates delay when the need for such products or services arises. The bids may then be invited only from such approved manufacturers or suppliers. The test of quality having already been undertaken by preparing an approved list of manufacturers and suppliers, the delay is obviated when the bids are to be invited.

12. So long as the list is approved in a reasonable and fair manner, the stipulation to this effect cannot be held to be arbitrary or unfair. The party inviting tenders is entitled to determine the manner in which the list of approved suppliers or manufacturers is to be arrived at. There is no set formula for the same. The mode and manner whatever it may be must conform to the constitutional mandate of reasonableness and fairness eschewing arbitrariness and unfairness. Reliance upon a committee of experts for this purpose is one such method. This method may be resorted to especially where the products or services are required for the performance of work or functions of a sensitive nature.

13. The Supreme Court rejected the submission that the mandate of Article 14 is that any disposal of natural resources for commercial use must be for revenue maximization and thus by auction. It was held that disposal of all natural resources through auction is not a constitutional mandate (paragraph-120). It was also observed that the Supreme Court had on a number of occasions delivered judgments directing means for disposal of natural resources other than by auction. For instance, in *M & T Consultants, Secunderabad vs. S.Y. Nawab 2003(8) SCC 100,* the Supreme Court held:-

> "17. A careful and dispassionate assessment and consideration of the materials placed on record does not leave any reasonable impression, on the peculiar facts and circumstances of this case, that anything obnoxious which requires either public criticism or condemnation by courts of law had taken place. It is by now well settled that non-floating of tenders or absence of public auction or invitation alone is no sufficient reason to castigate the move or an action of a public authority as either arbitrary or unreasonable or amounting to mala fide or improper exercise or improper abuse of power by the authority concerned. Courts have always leaned in favour of sufficient latitude being left with the authorities to adopt their own techniques

> of management of projects with concomitant economic expediencies depending upon the exigencies of a situation guided by appropriate financial policy in the best interests of the authority motivated by public interest as well in undertaking such ventures."

14. The State and the instrumentalities of the State are, therefore, entitled to latitude to adopt their own techniques of management of projects and works. These observations are not limited to economic policies. They can and indeed must be extended to other spheres of State activities and actions as well keeping in mind always that such action must meet the well established tests. They must for instance be reasonable and fair, not arbitrary or unfair. If not inviting tenders or not holding public auctions cannot always be said to be arbitrary, unreasonable or unfair, it follows that a decision to procure goods of certain makes or brands equally cannot always be said to be arbitrary, unreasonable or unfair.

15. Keeping these tests in mind we must now determine whether clause 2.1 is reasonable, rational and fair or irrational, arbitrary or otherwise illegal. In *Sharma Transport* v. *Govt. of A.P.* [(2002) 2 SCC 188], the Supreme Court held:-

> "*25.* ... In order to be described as arbitrary, it must be shown that it was not reasonable and manifestly arbitrary. The expression 'arbitrarily' means: in an unreasonable manner, as fixed or done capriciously or at pleasure, without adequate determining principle, not founded in the nature of things, non-rational, not done or acting according to reason or judgment, depending on the will alone."

16. As the notice inviting bids itself establishes, the respondents invited bids for the supply of goods, namely, fabrication and supply of multipurpose fire tender, which are to perform not only important but crucial

life saving functions and activities. The importance of fire tenders requires no elaboration. It is self evident. It is rightly not contended to the contrary. We do not even wish to imagine the consequences of such goods malfunctioning or even underperforming. It was not only necessary but essential for the respondents to ensure procurement of the best quality fire tenders of which pumps are a vital component. We are satisfied that they have done so in a reasonable and fair manner. In fact as is evident from what transpired after this petition was filed, the respondents' *bona fides* have been established.

17. We will first refer to the facts leading to the respondents' decision to limit the make of the pumps to those manufactured by three manufacturers. We will then demonstrate how during the course of these proceedings the petitioners were given an opportunity with the consent of the respondents to establish the quality of their pumps. However, the agency suggested by the petitioners themselves submitted an adverse report about their pumps.

18. As the affidavit in reply states, the multi purpose fire tender is used for fire fighting and rescue operations in the event of a mishap due to fire. The fire tender is assembled by the manufacturer by outsourcing the other small components which are installed in the main product, namely, the multi purpose fire tender. The pump forms an essential component in the working of the main product. The role/function of the pump is crucial. This is admitted. Keeping the importance of the pump in mind, the respondents decided to seek the opinion of experts. A committee was formed for the purchase of the multipurpose fire tender. In fact the earlier tender process initiated on 29.01.2015 was cancelled and the present tender process was initiated after the aforesaid exercise was undertaken for determining the best

quality of pumps to be used in the manufacture of the multi purpose fire tender.

The committee was formed by an order dated 24.02.2014 of the Government of Punjab, Local Government Department (Trust Services Cell). The order stated that to strengthen the fire brigade in the State of Punjab ₹ 91.90 crores had been sanctioned for the purchase of fire rescue equipment and machinery. The order stated that for this purpose a committee of the officers mentioned therein was constituted. The committee comprised of the Additional Director-cum-Commissioner, Municipal Corporation, Mohali, the Chief Engineer (Trust) Local Government Department, Punjab, the Superintendent Engineer (Technical), Municipal Corporation, Mohali, the Deputy Controller, Municipal Corporation, Mohali, the Assistant Mandal Fire Officer, Municipal Corporation, Barnala and the Assistant Divisional Fire Officer, Municipal Corporation, Hoshiarpur.

The Committee was required inter-alia to specify the make of the pump. The quality of the pump would ensure the quality of the multipurpose fire tender. The committee invited suggestions from the technical experts of the department who opined that the best pumps available in the market were those mentioned in clause 2.1. The Committee accepted the recommendations of the two Additional Divisional Fire Officers dated 06.12.2014. The two ADFOs had sought the opinion from various other organizations that had procured similar equipment. The Fire Fly High Low Pressure Pump had reportedly been used in the State of Gujarat, Delhi, Haryana and Maharashtra. Chief Fire Officers or the Station Fire Officers or the Director Fire Services of these States confirmed that they had been using the Fire Fly pumps satisfactorily.

The committee also recommended the other makes mentioned in clause 2.1. Accordingly clause 2.1 stipulated that the pumps must be of the make mentioned in clause 2.1. The petitioner has not questioned the quality of the makes stipulated in clause 2.1.

19. The Committee's decision to include the pumps of the makes mentioned in clause 2.1 cannot, therefore, be faulted. The petitioner however challenges the exclusion of the pumps manufactured by it from clause 2.1.

20. Where the State or its instrumentalities invites tenders and specifies the approved makes, manufacturers or suppliers, they must be open to considering other manufacturers, suppliers and makes as well. It is indeed not possible for the party inviting tenders to consider every manufacturer, every supplier and every make while specifying the list of approved manufacturers, suppliers and makes. However, if a demand is made by a party for having its products or services also considered, the party inviting tenders must entertain the application and evaluate the same on its own merits. It cannot indiscriminately refuse to consider other options. Although this may not be necessary or possible for the tender in question at that point of time, it would be necessary for the future. This is for the reason that often time may not permit an evaluation at the time of inviting bids. There will in many cases be myriad factors to be taken into consideration in this exercise. It is neither possible nor desirable to enumerate them. The factors and the combination thereof as well as the weightage to be given to each of them will differ from case to case and at times even from tender to tender. This would depend upon, to use the rather hackneyed but useful phrase, the facts and circumstances of each case

21. The petitioner has been given a fair opportunity of having its product considered even for the tender in question. A Division Bench of

which one of us (S.J.Vazifdar, A.C.J.) was a party passed the following order dated 03.11.2015:-

> "The respondents are willing to have the petitioner's pumps evaluated to ascertain whether their names ought to be included in the list of approved manufacturers. It is agreed between the parties that the Chief Fire Officer, Delhi Fire Department shall evaluate the petitioner's pumps either by himself or by constituting a panel which would also include the Chief Fire Officer, Delhi. The Chief Fire Officer Delhi/panel constituted by him shall issue the necessary directions about the manner in which evaluation is to be carried out. The Chief Fire Officer/panel shall afford the petitioner and the respondents an opportunity to produce additional documents and evidence.
>
> The fee of the Chief Fire Officer/panel constituted by him for carrying out this order shall be in the first instance borne by the petitioner and shall be subject to further orders. Chief Fire Officer, Delhi Fire Department is requested to submit his report by the next date of hearing to this Court.
>
> Adjourned to 20.11.2015."

22. The Chief Fire Officer, Delhi submitted a report dated 17.11.2015. The same was annexed by the respondents alongwith their affidavit dated 20.11.2015. The report inter-alia reads as under:-

> "The premises found comprising of 4 lath machines. 1 Pump was mounted on a Water Tender No other pump of HP/LP was available. The manufacturer was asked by the Committee to offer some pump other than mounted on water tender for testing however due to non availability of such type of pump the manufacture turned down the request. The only pump available was subjected to hydraulic pressure test as per norms however the pump failed on the test due to leakage from pump casing at two places (photographs enclosed). It is submitted that no further test was conducted as the pump failed in the first test only.
>
> Enclosed: As above.

The test was conducted under the supervision of following panel members:-

1. Sh. Santokh Singh, (Chief Fie Officer, Delhi Fire Service).
2. Sh. A.K.Malik, (Divisional Officer, Delhi Fire Service).
3. Sh. Sanjay Kashyap, (Automobile Engineer, Delhi Fire Service).
4. Sh. Naresh Batta, S.E. (Representative of Commissioner of Municipal Corporation of SAS Nagar).
5. Sh. Bhupinder Singh, ADFO, (Representative of Director, Local Government Punjab).
6. Sh. Nand Kishore, Director, (Representative of petitioner Shri Ganesh Fire Equipments (P) Ltd.)".

23. The learned counsel appearing on behalf of the petitioner stated that the report ought to be rejected as the representative of the respondents was on the panel. The submission is not well founded. The concluding part of the report states: "The test was conducted <u>under the supervision of</u> following panel members". The name of the respondents' representative is included. However, the respondents' representative did not evaluate the pump. The evaluation was by the Chief Fire Officer as required by the order dated 03.11.2015. The evaluation was not by but under the supervision of the six persons mentioned therein. The doubt, if any, on this aspect is set at rest by the fact that even the respondents' representative was present and his name also appears in the report alongwith the name of the respondents' representative.

24. Faced with this, the petitioner relying upon several reports contended that the report of Delhi Fire Officer is incorrect and that he did not apply the correct parameters.

25. We are afraid that it is not possible for us in a petition under Article 226 of the Constitution of India to adjudicate upon these matters. In the facts and circumstances of this case we are satisfied that the respondents

did not exclude the petitioners products arbitrarily or unfairly. Nor did they limit the makes to those specified in clause 2.1 unjustly or with any oblique motive. The respondents' decision was in the best interest of public safety.

26. In the circumstances, the petition is dismissed.

(S.J.VAZIFDAR)
ACTING CHIEF JUSTICE

22.03.2016 (ARUN PALLI)
'ravinder' JUDGE

To be referred to the reporter	√Yes	No.