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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

<u>*Date of decision: 01.06.2016*</u>

\+ W.P.(C) 4893/2016 & CM No.20432/2016 (*stay*)

GAURAV GOEL ..... Petitioner

Through: Mr. Akhil Sibal with Mr. Kunal Sinha, Advs.

versus

UNION OF INDIA & ORS ..... Respondents

Through: Mr.Sanjay Jain, ASG along with Mr.Ravi Prakash, CGSC for UOI. Mr. Pankaj Diddee, Adv. for Mr. Sudarsh Menon, Adv. for R-3.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE JAYANT NATH

<u>ORDER</u>

<u>Ms. G. Rohini, Chief Justice</u>

1. This petition by way of Public Interest Litigation has been filed assailing the procedure followed by the respondent Nos.1 to 3 for empanelment of pre-qualified companies/entities for the purpose of providing to the borrowing Governments for implementation of Indian Development and Economic Assistance Scheme (IDEAS).

2. We have heard Sh.Akhil Sibal, the learned counsel appearing for the petitioner and Sh.Sanjay Jain, the learned ASG along with Mr.Ravi Prakash, Central Government Standing Counsel appearing for the respondent Nos.1 & 2.

3. As could be seen from the material available on record, the Scheme called IDEAS has been formulated by the Government of India for grant

of financial assistance to other developing countries for support of developmental and other projects as recommended by Ministry of External Affairs. The Export-Import Bank of India (EXIM Bank)/respondent No.3 herein is the implementing agency and lends the money in the form of "Lines of Credit" (LoC). The implementation of Scheme was initially governed by the Guidelines dated 23.01.2004 which were superseded by the Guidelines dated 23.07.2010 and again by the Guidelines dated 07.12.2015 issued by the Department of Economic Affairs, Ministry of Finance.

4. On 16.03.2016, EXIM Bank issued "Application Document" inviting applications for empanelment of Engineering, Procurement and Construction (EPC)/Turnkey Contractors in the Broad Sectoral Headings specified therein for a period of one year initially and extendable by another term. The EXIM Bank had also invited "Expression of Interests" from interested Indian Consultancy Firms for empanelment of at least three Consultancy Firms in each Broad Sector preferably. The empanelment of pre-qualified companies is still under-process.

5. It is alleged in the present writ petition that EXIM Bank has appointed the respondent No.4 herein as a Consultant for the purpose of empanelment of consultants as also for evaluation of the contractors and to take decisions in respect of pre-qualification in tender process and thereafter. It is also alleged that the shareholders of the respondent No.4 company are actively involved in tendering for LoC and are competitors for those seeking empanelment and pre-qualification and thus the appointment of the respondent No.4 is arbitrary and illegal. The further allegation is that the "Application Document" dated 16.03.2016 issued for the purpose of empanelment of the contractors as well as the "Expression

of Interests" inviting Indian consultancy firms to carry out the pre-qualification are contrary to the Guidelines dated 07.12.2015. Thus, a writ of Certiorari is sought to quash the Tender Application Document dated 16.03.2016 as well as the "Expression of Interests" apart from cancelling the appointment of the respondent No.4 company as a Consultant. The petitioner has also questioned the validity of the Guidelines dated 07.12.2015 contending that the procedure prescribed thereunder restricts the choice of the borrowing country to award contract to the companies empanelled with the EXIM Bank only and thus ousts the other companies from participating in the contract. This, according to the petitioner, would result in restrictive competition.

6. A perusal of the Guidelines dated 07.12.2015 shows that the same has provided for monitoring mechanism on the execution of the work on the project, evaluation and review of the same, recovery of overdues, ethics and integrity to be observed during project preparation, bidding, procurement and execution process. Clause 16 has also provided for "operational guidelines" for the convenience of borrowing Governments as well as Indian exporters and Indian missions abroad. The said "operational guidelines" included the procedure for selection of projects, preparation of Detailed Project Reports (DPR) and Bidding and Procurement Procedure. Clause (C) of Operational Guidelines which provides for Bidding and Procurement procedure reads as under:

> "(i) Information on projects sought to be undertaken through LoC financing will be displayed on the website of the Lending Bank and also disseminated by it to industry associations to give wide publicity. Borrowing Governments should be encouraged to do the same.

(ii) The lending Bank will invite Expression of Interest from Indian companies/entities and undertake a pre-qualification exercise for each project at its cost. The list of pre-qualified companies/entities will be provided to the borrowing Government. Thereafter, the project will be put to bid under a competitive bidding process by the borrowing Government/its agency. For bidding process under the LoCs, eligibility of participation is limited to Indian entities registered in Indian and/or incorporated/established under any law in force in India. However, such an entity if blacklisted by any multilateral agency or any authority in India or the borrowing country will not be eligible to participate for the period it is blacklisted.

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7. The Guidelines also enable the Government of India/EXIM Bank to appoint an independent Indian Project Management Consultant (PMC) for the project through fair and transparent bidding. Clause (F) of the Operational Guidelines which provides for the same reads as under:

"(i) Where considered necessary by GoI/Lending Bank, an independent Indian Project Management Consultant (PMC) for the project should be appointed through fair and transparent bidding, including for preparation of DPR. If the borrower wants to appoint the PMC on nomination basis, the PMC charges have to be borne by LoC borrower. However, this condition can be considered for relaxation on the request of the borrowing Government supported by detailed justifications.

(ii) If the borrowing Government requests MEA or the lending bank to nominate/appoint a PMC on its behalf, MEA may do so based on extant GoI rules and procedures.

(iii) The borrowing country can also appoint a Consultation of international repute as per their need/policy. However, in such a case the charge of the Consultant will be borne by the LoC borrower. The PMC scope of work should cover the design, bidding (including preparation of tender documents and evaluation of bids), monitoring of implementation, evaluation of operations and maintenance, and post-commissioning stages of a project."

8. On a combined reading of the various provisions of the Guidelines dated 07.12.2015 vis-à-vis the conditions prescribed under the impugned "Application Document" and the "Expression of Interests", we do not find any substance in the petitioner's contention that the pre-qualification exercise undertaken by the respondent No.3 Bank is contrary to the Guidelines and the object of the Scheme. In our considered opinion, the pre-qualification exercise undertaken by Respondent No.3 is nothing but short-listing of Indian business entities that are willing to participate in the tenders floated by the borrowing governments. The short-listing is a process to select the best entities having technical and financial capability commensurate with the requirements of particular procurement among those who have come forward to participate. In the absence of any allegation that the criteria adopted for short-listing is unreasonable or not based on rational and intelligible differentia which has a nexus to the object sought to be achieved, we are unable to hold that the procedure adopted by respondent No.3 is arbitrary or illegal. It may be true that short-listing was not provided initially under the Guidelines dated 23.01.2004 and 23.07.2010, however, the Guidelines dated 07.12.2015 which are in operation as of today specifically provide for the same. In the absence of any statutory prohibition, the provision for short-listing cannot be held to be either illegal or arbitrary on any ground whatsoever. The allegation that such short-listing would restrict the choice of borrowing Government is baseless and does not stand for any reasoning.

At any rate, it is un-understandable as to how the same would result in loss to the public exchequer.

9. The only allegation which appears to have some basis and deserves consideration by this court is the appointment of the respondent No.4 company as the Consultant.

10. While denying the allegation made by the petitioner, it is submitted by the learned ASG on instructions that the appointment of the respondent No.4 is only for the purpose of assisting the respondent No.3 Bank for creating a database and the ultimate decision for short-listing is of the respondent No.3 Bank only. It is further submitted that the respondent No.3 Bank being the implementing agency is a mere facilitator and that the empanelment of the contractors would be finalized by the respondent Nos.1 and 2. It is also brought to our notice by the learned ASG that the pre-qualifications are set by the borrowing companies themselves and not by the respondent Nos.1 to 3. In these circumstances, we do not find substance in any of the contentions advanced by the petitioner.

11. Even otherwise absolutely no case is made out to show that the petition is intended for enforcement of public interest. We find that the issue sought to be espoused even remotely is not relatable to actual interest of public at large. As held in ***Balco Employees Union (Regd.) v. Union of India,*** **(2002) 2 SCC 333**, public interest litigation is not meant to be a weapon to challenge every financial/economic decision taken by the Government in exercise of the administrative power. The observations made in Paragraphs 88 and 97 in ***Balco Employees Union (Regd.) supra*** in this regard may be usefully reproduced hereunder:

"88. It will be seen that whenever the Court has interfered and given directions while entertaining PIL it has mainly been where there has been an element of violation of Article 21 or of human rights or where the litigation has been initiated for the benefit of the poor and the underprivileged who are unable to come to court due to some disadvantage. In those cases also it is the legal rights which are secured by the courts. We may, however, add that public interest litigation was not meant to be a weapon to challenge the financial or economic decisions which are taken by the Government in exercise of their administrative power. No doubt a person personally aggrieved by any such decision, which he regards as illegal, can impugn the same in a court of law, but, a public interest litigation at the behest of a stranger ought not to be entertained. Such a litigation cannot per se be on behalf of the poor and the downtrodden, unless the court is satisfied that there has been violation of Article 21 and the persons adversely affected are unable to approach the court.

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97. Judicial interference by way of PIL is available if there is injury to public because of dereliction of constitutional or statutory obligations on the part of the Government. Here it is not so and in the sphere of economic policy or reform the court is not the appropriate forum. Every matter of public interest or curiosity cannot be the subject-matter of PIL. Courts are not intended to and nor should they conduct the administration of the country. Courts will interfere only if there is a clear violation of constitutional or statutory provisions or non-compliance by the State with its constitutional or statutory duties. None of these contingencies arise in this present case."

12. For the reasons stated supra, we are not inclined to entertain this petition.

13. However, having regard to the allegations made by the petitioner that the shareholders of the respondent No.4 company are actively involved in tendering for LoC and the apprehension expressed that the involvement of the respondent No.4 in the process of pre-qualification would vitiate the entire process of short-listing, the learned ASG on instructions submitted that the respondent No.4 company will not be involved in the process of short-listing except for the purpose of assisting the respondent No.3 for creating a database. The said statement is hereby placed on record.

14. Subject to the above, the writ petition is dismissed.

CHIEF JUSTICE

JAYANT NATH, J

JUNE 01, 2016
kks/pmc