

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 442 OF 2016

MR. P.A. MUSTHAFA, THR. ITS CONST
ATT. MR. ABDUL VAHID.

... Petitioner

Versus

AIRPORT AUTHORITY OF INDIA, REP.
BY ITS DEPUTY GENERAL MANAGER AND
2 ORS.,

... Respondents

Mr. Ashwin D. Bhobe and Ms. S. Bhobe, Advocates for the
petitioner.

Mr. Sandesh D. Padiyar, Advocate for the respondent nos.1 and
2.

Mr. N. N. Sardessai, Senior Advocate with Mr. G. Panandiker,
Advocate for the respondent no.4.

Coram:- F. M. REIS &
NUTAN D. SARDESSAI, JJ.

Date:- 7th February, 2017

ORAL ORDER :

Heard Mr. A. D. Bhobe, learned counsel appearing
for the petitioner, Mr. S. D. Padiyar, learned counsel appearing
for the respondent nos. 1 and 2 and Mr. N. Sardessai, learned
Senior Counsel appearing for the respondent no.4.

2. The challenge in the above petition is to the e-tender process initiated by the respondent no.1 pursuant to an advertisement issued in the local news paper dated 15.10.2015. It is the contention of Mr. Bhobe, learned counsel appearing for the petitioner that the petitioner had submitted his technical bid for the e-tender attaching all the requisite documents and in fact the petitioner was technically qualified for such tender. The learned counsel further pointed out that in terms of clause 3(b) of the tender, it was incumbent upon the petitioner to produce a certificate either from the Airport or Bus Station or from the manufacturer etc. inter alia confirming that the machine belonging to the petitioner which would be used was equipped with an EPOS system. The learned counsel further pointed out that the petitioner was a successful bidder at Madurai International Airport and in fact according to him the machine installed at Madurai Airport had such EPOS system. The learned counsel further submitted that inspite of the certificate sought from the Airport Authority at Madurai, the petitioner was unable to obtain such certificate as such authority had refused to issue

such certificate and as such the petitioner had attached a certificate from the manufacturer inter alia confirming the installation of such EPOS system. The learned counsel further pointed out that as the petitioner was duly qualified for the technical bid, there was no reason for the petitioner to believe that the technical bid could be rejected. The learned counsel further submitted that to his surprise the petitioner learnt that his technical bid has been rejected pursuant to the letter received from the respondent no.1 dated 15.03.2016. It is further pointed out that on going through such communication, the petitioner learnt that the bid was rejected as the requisite certificate of the existence of EPOS in the machine of the petitioner was not duly certified. The learned counsel further pointed out that the petitioner thereafter filed the above Writ Petition inter alia to stop further process of the e-tender as according to the petitioner the rejection of the bid of the petitioner was arbitrary and without any justification. The learned counsel further pointed out that in the reply filed by the respondent no.1, it revealed that the respondent no.1 had sought some information from the

manufacturer at Bulgaria with regard to the authenticity or otherwise of the certificate submitted by the petitioner in view of a complaint lodged by one of the prospective bidders, which revealed that no such EPOS system was installed in the machine of the petitioner. It is further pointed out that this reason disclosed in the reply was not even apparent in the rejection communication sent by the respondent no.1 to the petitioner. It is further pointed out that the respondent no.1 was not justified to take into consideration such letter from the manufacturer as according to him no decision with that regard could have been taken without following the principles of natural justice. The learned counsel further pointed that as the respondents have relied upon irrelevant material to reject the technical bid, the decision taken by the respondent no.1 with that regard is arbitrary and unsustainable in law. It is further pointed out that a certificate of such nature is irrelevant as it does not have any nexus to the nature of services sought by the respondent no.1 based on the e-tender process. It is further pointed out that if the respondent no.1 had a doubt with regard to the competence or

otherwise of the petitioner, they could have sought information from Madurai Airport authority to ascertain the validity of the claim of the petitioner that such system was in placed in such machine. The learned counsel thereafter has taken us through the different clauses in the e-tender to point out that the decision taken by the respondent no.1 in rejecting the technical bid is essentially unsustainable in law.

3. On the other hand, Mr. Padiyar, learned counsel appearing for the respondent nos. 1 and 2 has minutely taken us through the different terms and conditions of the e-tender to point out that there was a right reserved for the respondent no.1 to call for any information and examine the veracity or otherwise of any certificate submitted by the bidders. It is further pointed out that besides the petitioner, the certificates of all other bidders were also sent for verification from the respective manufacturers. It is further submitted that in consonance with such right reserved, the respondent no.1 sent a letter to the manufacturer to confirm the veracity of the certificate submitted

by the petitioner. It is further pointed out that by a reply dated 26.12.2015 the manufacturer informed the respondent no.1 that no EPOS system was installed in the machine supplied to the petitioner based on the invoice produced by the petitioner. The learned counsel further pointed out that as the essential term of the e-tender itself was not satisfied by the petitioner, the question of accepting the technical bid of the petitioner would not at all be justifiable. The learned counsel further pointed out that the principles of natural justice are not applicable to such commercial decision taken by the respondent no.1 to decide the acceptance of a bid by the respondent no.1 in the e-tender. The learned counsel further submitted that the judicial review in such matter is very limited and in fact according to him the Apex Court in the judgment reported in **(2007) 14 SCC 517** in the case of ***Jagdish Mandal V/s State of Orissa and others*** has reiterated the restrictions in the judicial review in tender matters. The learned counsel has also taken us through the facts of the said case to point out that in identical circumstances, the Apex Court found that the question of interfering in the decision taken to

reject the bid on the basis of the investigation carried out by the authority to verify the correctness of the certificate submitted came to be interfered with. The learned counsel further submitted upon instructions that the installation of similar machines at Madurai Airport with EPOS system or not was not an essential term of the e-tender and in any event the machine offered was different. The learned counsel as such submits that the contention of the petitioner that such EPOS system was installed at Madurai is irrelevant. The learned counsel as such points out that the petition be accordingly rejected.

4. Mr. Sardesai, learned Senior Counsel appearing for the respondent no.4 has supported the submissions of Mr. S. D. Padiyar, learned counsel appearing for the respondent nos. 1 and 2.

5. We have considered the submissions of the learned counsel and we have also gone through the records. Before examining the rival contentions, it would be appropriate to refer to the observations of the Apex Court in the judgment in the

case of *Jagdish Mandal* (supra) wherein it has been observed at para 22 thus :

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or

contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say : “the decision is such that no responsible authority acting reasonably and in

accordance with relevant law could have reached.”;

ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.”

6. Looking to the said observations as referred to herein above, a judicial review of this Court in the commercial functions of the authorities in the tender process are clearly laid down. In the present case, on going through the terms and conditions of the subject e-tender, the fact that there was a right reserved for the respondent no.1 to verify the correctness or otherwise of the certificate submitted along with the e-tender cannot be disputed. In exercise thereto, the respondent no.1 was justified to examine the veracity of the certificate produced by

the petitioner stated to have been from the manufacturer. The letter received from the manufacturer dated 26.12. 2015 referred to herein above clearly states that the subject machine offered by the petitioner in the e-tender was not installed with a EPOS system. Mr. Bhobe, learned counsel appearing for the petitioner has not disputed the authenticity of the said letter received by the respondent no.1 from the concerned manufacturer nor the correctness of the contents therein. In such circumstances, one of the basic conditions of the e-tender was not satisfied by the petitioner and as such, the question of accepting the technical bid of the petitioner would not at all arise. Though Mr. Bhobe, learned counsel appearing for the petitioner has strenuously pointed out that there are malafides attributed to some of the officers attached to the respondent no.1 as according to him the certificate sought by the petitioner from Madurai Airport was not issued at their behest, nevertheless, we find that the question of examining the correctness or otherwise of such allegation in the present petition under Article 226 of the Constitution of India would not at all be justified as they are not parties to the petition.

The contention of Mr. Bhobe, learned counsel appearing for the petitioner that such confirmation could have been obtained from the Madurai Airport authority and veracity of the certificate from the manufacturer was not at all be necessary cannot be accepted. The letter addressed by the manufacturer to the respondent no.1 categorically states that EPOS was not installed to the machine supplied to the petitioner and intended to be issued in the subject tender. As such, we find that as the respondent no.1 has acted in accordance with the terms and conditions of the e-tender, the question of alleging that there was arbitrariness on the part of the respondent no.1 in the decision making process when the respondent no.1 was entitled to verify the correctness of such certificate would not arise at all. Hence, we find that there is no case made out for any interference in the e-tender process in the present Writ Petition. The petition stands accordingly rejected.

NUTAN D. SARDESSAI, J.

F. M. REIS, J.

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