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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 2929 OF 2017

D. G. Road Safety Pvt. Ltd.	...	Petitioners
Vs.		
Maharashtra State Road Development Corporation Ltd.	...	Respondents

Mr. Uday Warunjikar, for the Petitioners.

Mr. Prashant Chavan i/b Ms. Reshmarani Nathani, for Respondents.

CORAM : V. M. KANADE, &
A. S. GADKARI, JJ.

DATE : MARCH 14, 2017

PC.

1. Rule. Rule made returnable forthwith. By consent of parties, petition is taken up for final hearing.

2. Heard the learned counsel appearing on behalf of the Petitioners and the learned counsel appearing on behalf of the Respondents. By this petition, which is filed under Article 226 of the Constitution of India, the Petitioners are seeking to challenge the issuance of tender vide Tender Reference No. T-1871 and Tender i.d.

No. 190688-1, and an appropriate writ, order and direction to quash and set aside the said tender.

3. On 24th January, 2017 the Respondents – Maharashtra State Road Development Corporation Limited issued a notice inviting the tender for providing & fixing safety Crash barriers, comprising of Thrie Metal Beam Crash Barrier on median side & “W” metal beam crash barrier on shoulder side on Mumbai-Pune Expressway at various locations. The total length of the crash barrier to be installed is about 186 Km. and the cost of the work as per bill of quantity is about Rs. 67,48,40,741.1/- and the time limit before which the work is to be completed is 12 months. The last date for submission of tender was 27th February, 2017. The Petitioners did not make any bid in respect of the said tender notice. On 28th February, 2017 a technical bid was opened and the present petition has been filed on 6th March, 2017.

4. Mr. Warunjikar, the learned counsel appearing for the Petitioners submitted that all the terms of the tender are made to suite a particular person. He invited our attention to the terms of the tender notice and submitted that the terms of the tender notice, particularly, clauses 2.2, 2.3, 2.5, 2.6(b), 2.7 and 4.0 were all made to suite / favour

one particular bidder. He submitted that therefore, the terms of the tender bid were tailor-made to suite a particular person. He submitted that these terms are clearly arbitrary and created a doubt about the integrity and bona fides of the Respondents. He submitted that it is only one company which has requisite qualification prescribed under the said tender, and therefore, it was obvious that the said tender conditions were made to favour this one manufacturing company. Secondly, he submitted that in the pre-bid meeting which was held, several questions were asked by many manufacturers, raising the some doubts, which were raised by the Petitioners in this petition. He invited our attention to the questions which were asked and the answers given by the Respondents in the said pre-bid meeting. He submitted that though the Petitioners were present they did not ask any question since the questions which they raised in the petition were asked by the other persons, who were present in the pre-bid meeting.

5. On the other hand, Mr. Chavan, learned counsel appearing on behalf of the Respondents submitted that it was not open for the Petitioners to question the terms of the tender bid. He submitted that no details have been given by the Petitioners about

themselves and their capacity to carry out the said tender work. Secondly, he submitted specific mala fides were not pleaded in the petition. Thirdly, it is submitted that there is gross delay in filing the petition. He pointed out firstly, that the Petitioners did not give his bid upto 27th February, 2017 and after the technical bid was opened on 28th February, 2017, the petition was filed on 6th March, 2017. He submitted that on this ground, the petition is liable to be dismissed. Secondly, it is pointed out that the Respondents in order to ensure the safety of people, who are plying their vehicles on the expressway, have given safety aspect a primary consideration while formulating the tender conditions. He submitted that the Apex Court in catena of judgments has laid down the principles, which should be kept in mind before interfering with the tender process. He relied on the following judgments of the Apex Court:

- (i) *Tata Cellular, Appellant Vs. Union of India, Respondent*¹;
- (ii) *Raunaq International Ltd., Appellant Vs. I.V.R. Construction Ltd. & Ors., Respondents*²;
- (iii) *Michigan Rubber (India) Ltd., Appellant Vs. State*

1 AIR 1996 S.C. 11

2 (1999) 1 SCC 492

of Karnataka & Ors., Respondents¹; and

(iv) *Directorate of Education & Ors., Appellants Vs.
Educomp Datamatics Ltd. & Ors.².*

6. In rejoinder, the learned counsel for the Petitioners opposed these submissions and submitted that so far as question of mala fides is concerned, Petitioners have specifically pleaded in the petition that the conditions of the tender bid was tailor-made to suite a particular person. He submitted that the Petitioners did not ask questions because their questions were asked by the others parties present in the pre-bid meeting. On the point of delay, he submitted that it was open for the Petitioners to raise this issue after the technical bid was opened, and as such, there was no delay in filing the petition.

7. After having heard both the counsel at length, we are of the view that it will not be possible to accept contentions of the learned counsel appearing on behalf of the Petitioners. The law on the point of the scope of judicial review in matters pertaining to tenders, which are issued by the State or its instrumentalities is quite well settled.

¹ (2012) 8 SCC 216

² (2004) 4 SCC 19

8. The Apex Court in the case of *Tata Cellular (supra)* has in terms observed that the Court cannot interfere with the terms of the tender, and at the highest it can examine whether the tender process is fair, just and reasonable. The Apex Court in para 113 of the said judgment, after examining various judgments of the Apex Court, culled out the principles which are deducible from the said judgments.

Para 113 of the said judgment reads as under :

“113. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The Court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the

decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.”

9. Clause (4) of the aforesaid para in terms states that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. In the present case, the Petitioners have challenged the terms of the contract, and stated that these terms are framed to suite a particular person. In our view, it cannot be forgotten that the tender was issued for the purpose of providing safety to the vehicles and its passengers to ply their vehicles on the expressway. It is a matter of common knowledge that almost on every alternate day accidents take place and lives are lost on account of there being no proper barrier between the two lanes. The Respondents, therefore, keeping in mind this fact, have prepared the tender terms. In any case, we are not experts in the field and we cannot question the decision of the Respondents in preparing the terms of the tender bid and it is not open to judicial scrutiny.

10. The Apex Court in the case of *Raunaq International Ltd* (*supra*) has in para 9 of the judgment laid down the considerations which are of paramount importance in arriving at commercial decision. Para 9 of the said judgment reads as under :

“9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount importance are commercial considerations. These would be:

(1) the price at which the other side is willing to do the work;

(2) whether the goods or services offered are of the requisite specifications;

(3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfill the requirements of the job is also important;

(4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;

(5) past experience of the tenderer, and whether he has successfully completed similar work earlier;

(6) time which will be taken to deliver the goods or services; and often

(7) the ability of the tenderer to take follow up action,

rectify defects or to give post contract services. Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.”

11. Similarly, in para 10 of the same judgment, the Apex Court has observed as under :

“10. What are these elements of public interest ? (1) Public money would be expended for the purposes of the contract; (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfillment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in re-doing the entire work - thus involving larger outlays or public money and delaying the availability of services, facilities or goods, e.g. A delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.”

Perusal of the aforesaid observations clearly reveal that award of a contract whether it is by a private party or by a public body or State is essentially a commercial transaction and the considerations for

arriving at a commercial decision cannot be ignored.

12. The Apex Court thereafter in the case of *Michigan Rubber (India) Ltd. (supra)* in para 23, after taking into consideration the various judgments of the Apex Court has culled out the principles which emerge from the said judgments. Para 23 of the said judgment reads as under :

“23. From the above decisions, 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;

(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 proved 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;

(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;

(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

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.”

13. In our view, the ratio of these judgments squarely apply to the facts of the present case. The terms of the tender document have been formulated in order to ensure that the work is to be carried out by an expert to meet the requirements of constructing the barriers in order to avoid the accidents which regularly take place on Mumbai Pune expressway.

14. Lastly, the Apex Court in the case of *Directorate of Education & Ors (supra)* in para 9 and 12 of the judgment has observed as under:

“9. It is well settled now that the courts can scrutinise the award of the contracts by the government or its agencies in exercise of its powers of judicial review to prevent arbitrariness or favoritism. However, there are inherent limitations in the exercise of the power of judicial

review in such matters. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by this Court in *Tata Cellular v. Union of India* AIR 1996 SC 11. After examining the entire case law the following principles have been deduced: (SCC pp 687-88, para 94)

"94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of *Wednesbury* principle of reasonableness

(including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

[Emphasis supplied]”

“12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. That the government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias, it is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down 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. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.”

15. From the aforesaid two paragraphs, it is crystal clear that the terms of invitation to tender are not open to judicial scrutiny since the same being in the realm of contract. Taking into consideration the ratio of judgments laid down by the Apex Court, on which reliance is

placed by the learned counsel appearing on behalf of the Respondents, it is obvious that the contention of the learned counsel appearing on behalf of the Petitioners is unacceptable. The commercial decisions are taken by the State or its authorities keeping in mind the public interest while preparing the terms of the tender bid. In the present case, the whole purpose is to provide safety to the vehicles and its passengers. We do not find any arbitrariness in the tender process, which has been followed by the Respondents, and lastly, the Petitioners have waited till the technical bid was opened, and thereafter the petition was filed. The Petitioners themselves did not take part in the tender process, and if they have found that the tender conditions are arbitrary, they could have immediately filed the petition after the tender notice was published on 24th January, 2017. Viewed from any angle, we do not find any substance in the grievance raised by the Petitioners in this petition. Writ petition is, therefore, dismissed.

Sd/-
[A. S. GADKARI, J.]

Sd/-
[V. M. KANADE, J.]

Vinayak Halemath