

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 6515 OF 2016

M/s. Hughes & Hughes Chem Ltd., ... Petitioner.

V/s.

1. Union of India
2. Chief Mechanical Engineer, Central Railway
3. Senior Divisional Mechanical Engineer
(Coaching) Divisional Railway Manager
(Mechanical)
4. M/s. All Services Global Pvt. Ltd., ... Respondents.

Mr. Milind M. Sathye, for the Petitioner.

Mr. T.J. Pandian for Respondent No.1.

Ms. Premlata Modani for Respondent No.4.

**CORAM : NARESH H. PATIL AND
SMT. BHARATI H. DANGRE,JJ.**

ORDER RESERVED ON : 08th JUNE, 2017

ORDER PRONOUNCED ON : 21st JUNE, 2017

ORDER : (PER - SMT. BHARATI H. DANGRE,J)

1 The Petitioner, a public limited company, has approached this Court, seeking issuance of appropriate writ for quashing the Tender issued by Respondent No.3 on 19.05.2016 for the Annual Maintenance and Operation Contract of Bio-Toilets. The Petitioner has also sought a writ in the nature of

mandamus, directing the concerned Respondents to invite a fresh tender for Annual Maintenance and Operation Contract (hereinafter referred to as AMOC) of Bio-Toilets in coaches of Mumbai Division for a period of one year by suitably amending the clause 2(i)(b) of Part-I-A of the Tender Document and thereby seeks amendment to his prayer “similar work”. The Petitioner has also sought stay to the tender process initiated vide Tender Notice dated 19.05.2016.

2 The brief factual matrix involved in the present petition is as stated below :

i. That the Petitioner is a public limited company having set up in the year 1991 with Technical Collaboration of Hughes and Hughes Limited of United Kingdom. According to the Petitioner the said company is recognized by District Industries Centre, Mewat, Haryana as a company engaged in the business of maintenance and operation of bio-toilets. According to the petitioner, the company owned by the Petitioner is a leader in providing maintenance and operation of bio-toilets in India, to several divisions/zones of Indian Railways.

ii. The Respondent No. 3, Senior Divisional Mechanical Engineer (Coaching) office of the Divisional Railway Manager, Chhatrapati Shivaji Terminus, Mumbai Division, has floated a tender on 19.05.2016 and initiated

a process of allotment of Annual Maintenance & Operation Contract (AMOC) of Bio-toilets in the coaches in Mumbai Division for the period of one year. The estimated costs of said tender published by Respondent No. 3 was Rs. 1,95,92,000/-. The petitioner is aggrieved by the Clause 2(i)(b) of Part -I A of the tender document, which is placed on record by the petitioner at Annexure "D". Said Clause 2 prescribes eligibility conditions to be complied with by the tenderer(s) in respect of the minimum eligibility criterion. Clause (2) (i) of the Tender Documents reads as follows :

"2. Eligibility Conditions :

i. **Tenderer(s) have to satisfy the following minimum eligibility criterion:** (a) Total Contract amount received during the last three years and in the current financial year should be minimum 150% of the advertised tender value of work. Tenderer(s) shall submit documents to this effect, in the form of attested certificates from employer/client, or audited balance sheet duly certified by Chartered Accountant (b) As proof of technical experience/ competence, the tenderer(s) should have physically completed at least one similar work for minimum value of 35% of the advertised tender value of work in the qualifying period i.e. current year and three previous financial years (even though the work might have commenced before the qualifying period). Total value of similar nature of work completed during qualifying period and not the payment received within the qualifying period alone shall be considered for the purpose. **Similar work implies, "Mechanized cleaning of coaches in Indian Railways or AMOC of bio-toilets**

or supply/fitment of bio-toilets in coaches of Indian Railway”.

3 The Petitioner raises an objection to the inclusion of “mechanized cleaning of coaches in Indian Railways” in the scope of “similar work”. It is the contention of the petitioner that said clause has been inserted unilaterally and with an intention to shower wrong benefit to such class/category of contractors. According to the petitioner these conditions have never been previously imposed and the eligibility criteria has been diluted to accommodate the contractors who are engaged in the cleaning of coaches of the Indian Railways and they do not have any experience in maintenance of the bio-toilets which, according to the petitioner, is a specialized work and does not qualify to be included into the definition of “similar work” for AMOC of bio-toilets. It is also the contention of the petitioner that in other divisions of the Railways such relaxation in favour of the contractors, having expertise in mechanized cleaning of coaches in Indian Railways, has not been permitted while granting AMOC contract.

The petitioner emphasizes that the AMOC work of bio-toilets is a specialized work and the petitioner company and other adequate number of firms are only eligible for allotment of the said work, which would make the bio-toilets' functioning more smooth and effective.

4 It is to be noted that this Petition was filed on 07.06.2016 and came to be listed before this court on 11.07.2016. On the said date, this court was pleased to direct Respondent Nos. 2 and 3 i.e. the Railway to file reply. However in para 3 of the order dated 11.07.2016 the following observations were made :

“3. Learned counsel Mr. Sathe submits that the petitioner's existing AMOC is with the petitioner and it will expire on 15th September, 2016. In view of the statement, we are not inclined to grant ad-interim relief. However, if the work order if any, in pursuance of the tender would be subject to the final outcome of the petition.”

5 Thereafter, the matter was listed before this court on 16.09.2016 and at the request of the Railway, two weeks time was granted to file sur-rejoinder. The Petitioner's contract was extended upto 30.09.2016 subject to furnishing the bank guarantee and this court took note of the said fact. On 21.09.2016, the successful bidder was allotted the work under the impugned tender notice being the lowest bidder. Subsequently, an application for amendment was moved and it came to be allowed by this court on 20.12.2016 by which the successful bidder viz. M/s. All Services Global Private Limited, Goregaon (E), Mumbai, was impleaded as Respondent No.4.

The matter is pending for adjudication since then after issuing a notice for final disposal at the stage of admission.

6 The matter was heard by us on 08.06.29017. We have heard Mr. Milind Sathye, learned counsel for the Petitioner, Mr. T.J. Pandian for Railway and Ms. Premlata Modani, learned counsel for Respondent No.4.

7 The learned counsel for the Petitioner reiterated the contentions as raised in the petition and he vehemently argued that the petitioner possesses all the expertise in maintenance and operation of the bio-toilets and the action of the Railways in allowing the contractors of mechanized cleaning of coaches to participate in the tender notice, which is not a work of “similar nature”, is arbitrary. The counsel for the petitioner also contended that all the divisions / zones of Indian Railways are following constantly the definition of “similar nature work” though the language may be different, permitting only the manufacturers, bidders or AMOC of bio-toilets contractors, and it is strenuously argued that all these three categories are the persons who are engaged directly in this industry; whereas the mechanized cleaning contractor has no role to play in maintenance of bio-toilets.

8 The learned counsel for the petitioner placed strong reliance on the guidelines for the Annual Maintenance

and Operation Contract for Biological Toilets (DRDE Type) fitted in Indian Railway BG Coaches issued by the Indian Railways.

It is canvassed by Advocate Sathaye that the Research Development and Standards Organization (RDSO) is the apex body of the Indian Railway to take all technical decisions and that the guidelines for the Annual Maintenance and Operation Contract for Bio-Toilets are issued by the Carriage Directorate of RDSO in the month of January, 2015. The term “similar work” has been defined under para 3.0 (d) of the said guidelines and it reads as below :

3.0. (d) **Similar work** – Similar work implies “Annual Maintenance and Operation Contract of Bio-Toilet executed in Railway Coaches at Stations/Depots”.

Or

Cleaning/Maintenance of Bio-Toilet work executed in Railway Coaches/stations premises, registered housing societies, reputed hotels and in other central and state govt. Departments in adequate nos. & for sufficient duration.”

It is contended by Advocate Sathaye that the RDSO has revised the guidelines in the month of August, 2015 vide letter No.IRCAMTECH/GWL/M/Bio-Toilet/AMOC/1.0, August,

2015. The said guidelines have been annexed by the Petitioner at Annexure “G” to the paper book. The term “similar nature of work” has been defined under para 3.0 (e), which reads as below :

“3.0 (e) Similar nature of work :

i) Since it would be very difficult for the tenderers to qualify minimum eligibility criteria since the work has been introduced only in past two years and also the technology is still evolving.

The following definition of similar work is proposed :-

“Mechanized cleaning of coaches in Indian Railways or AMOC of Bio-Toilets or supply/fitment of bio toilets in coaches of Indian Railways.”

9 According to Mr.Sathaye the RDSO is the apex body to take all technical decision and he argued that the guidelines issued in January, 2015 clearly excluded the mechanized mode of cleaning the coaches of railway. However, he contended that the guidelines issued in August, 2015, defining the term “similar work” were only proposed and not final. According to him “the mechanized cleaning of coaches in Indian Railways”, which was sought to be included in “similar nature of work” for the AMOC of Bio-Toilets was only proposed and no final decision was taken by the Railways. Even otherwise, according to Mr.Sathaye, in all other parts

and divisions of Railways, the old definition of “similar work” was being implemented and thus with the expertise of cleaning and maintenance of bio-toilets work executed in railway coaches/stations premises, registered housing societies, reputed hotels and in other central and state government departments were only considered to be eligible for the AMOC of bio-toilets. He, therefore, sought for quashing and setting aside the tender notice and prayed for issuance of a fresh tender for the said purpose by suitably amending the clause 2(i)(b) of part -I A of the tender document.

10 The learned counsel for the Railway relied upon a detailed affidavits filed by the Railway, sworn by Shri Sanjay K. Sharma, Senior Divisional Mechanical Engineer (COG), Central Railway, Mumbai CST dated 25.07.2016 as also on the sur-rejoinder filed on 28.09.2016. The counsel for the Railway argued that the Government of India, Ministry of Railways (Railway Board), had amended their Minimum Technical Eligibility criteria in works tenders, for the tender costing upto Rs.10 lakhs and according to the said policy letter, which has been annexed by Railway at Exh. A-1, the “similar nature of work” should be clearly defined by the PHODs of the Zonal Railways and it should be strictly followed by the concerned Zonal Railways and the same is directed to be indicted in the NIT/Tender document also.

11 The counsel for the Railway has also placed on record the guidelines for Annual Maintenance and Operation Contract for Biological Toilets (DRDE Type) fitted in Indian Railway BG Coaches on which the petitioner has also placed reliance including the amended guidelines of August, 2015. The counsel for the Railway has also placed on record the note by which proposed amendment to the definition of “similar nature of work” for AMOC of Bio-toilets was introduced. The said document is placed on record at Exh. “F” alongwith the affidavit of Railway. The counsel for the Railway has justified the amendment of the definition of “similar work” in the backdrop of the non-availability of experienced contractors and as technology is still evolving, a long duration of contract was not found to be feasible. Similarly, it was also pointed out that the RDSO, while effecting amendment in August, 2015, noted that since it would be very difficult for the tenderer(s) to qualify minimum eligibility criteria since the work has been introduced only in past two years and also the technology is still evolving, the definition of “similar work” was proposed to be read as “mechanized cleaning of coaches in Indian Railways or AMOC of bio-toilets or supply/fitment of bio-toilets in coaches of Indian Railways.”. The Railways also justified the inclusion of the said clause in relation to the similar nature of work and it is contended by the learned counsel for the Railways that the job involved in the tender is labour oriented and to be

performed by fitters, plumbers, cleaners etc., under qualified supervisors. It is argued that as per the condition of the tender, it is the responsibility of the contractor to arrange to deploy their own man power/superiors to ensure satisfactory performance of the contract work and, therefore, it cannot be said that AMOC is specialized in the work. The Railways have also placed on record alongwith their affidavit, the progress of tender process for the work of AMOC for coaches in Mumbai Division from the year 2012 to demonstrate that no offers were received or the offers received were in singular, as a result of which the entire process was required to be discharged in absence of experienced bidders. A note relied upon by the Railway at Annexure "C" to their affidavit where the definition of "similar nature of work" was proposed for CME's approval, which is contained in the amendment of RDSO in August, 2015 and approved by the CME.

12 Respondent No. 4, the successful bidder has also filed his reply and contended that he is lowest bidder and he was qualified as per the terms and conditions of the tender document. It is also contended that 80% of the work is complete since the work order was allotted to Respondent No. 4 on 21.09.2016 and the contract was for a period of one year. The counsel for the Respondent No.4, therefore, prays for dismissal of the writ petition in view of the contract allotted to him, being at the fag end.

13 In the backdrop of the facts involved in this matter, we have given our anxious consideration to the arguments advanced by the learned counsel of the parties and also perused the documents annexed by the parties along with the petition and the affidavit-in-reply. The Petitioner has prayed for quashing and setting aside of the conditions contained in Clause 2(i) (b) of Part -I A of the tender notice published by the Respondent No. 3 on 19.05.2016. By this time, the scope of interference by this court in exercise of powers under Article 226 of the Constitution of India in the tender process is well recognized through various judicial pronouncements. It is a settled proposition of law that the scope of interference by this court in such a matter is very restricted and limited, where the action of the State is reasonable and fair and is in the public interest. In the matters of formulating the conditions of tender document and awarding contract, the greater latitude is required to be given to the government and unless the action is found to be malicious and mis-use of its statutory powers, no interference by this court is called for.

The Hon'ble Apex court had an occasion to deal with the similar conditions incorporated in the tender document and it has laid down the scope of judicial review in such matter in the case of **Tata Cellular vs. Union of India**, reported in (1994) 6 Supreme Court Cases 651, wherein the

Hon'ble Apex Court has emphasized the need to find the right balance between the administrative discretion to decide matters on one hand and the need to remedy any unfairness.

14 It would appropriate to refer to the judgment of the Hon'ble Apex Court in the case of **Michigan Rubber (India) Limited vs. State of Karnataka and Ors.**, reported in (2012) 8 Supreme Court Cases 216; wherein the Hon'ble Apex Court in paragraph 23 has culled out the principles for interference in the conditions of a tender document. Paragraph 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 the 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 if a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the 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 a fundamental right to carry on business with the Government.

The Hon'ble Apex Court further observed in paragraph 24 as under :

“24. 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” ? and

(ii) Whether the public interest is affected ?

If the answer to the above questions are in the negative, then there should be no interference under Article 226.”

15 In the backdrop of the aforesaid decisions, we have examined the case in hand. The Petitioner has specifically relied upon the guidelines issued by the RDSO and has argued that the guidelines of January, 2015, which excluded the mechanized cleaning of coaches of Indian Railways, was the right approach. However, the RDSO itself has amended the guidelines in August, 2015 which have been approved and given effect too by the Railways itself and it has included “mechanized cleaning coaches of Indian Railways” in the category of “similar work” for AMOC of bio-toilets. The Railways have offered a justification for the same, which according to us, is found to be plausible that since the Railway had invited the tender for the previous years for AMOC but no bidders had come forward to participate in the tender process. Reliance is placed on the fact that the concept of “bio-toilets” is forthcoming concept and the scope of work of AMOC would cover plumbing, fitting, collections of samples, exterior cleaning etc. which is to be carried out by deploying the requisite manpower. As per the tender document, the Railway itself thought it fit to include the agency, having expertise of mechanized cleaning of coaches of Indian Railways or those agencies who have the experience of supply/fitment of bio-toilets in coaches of Railways to be qualified of the work.

Respondent No. 3 who has floated the tender on 19.05.2016 for Mumbai Division has accepted the inclusion of the definition of “similar nature of work” in its tender, which was in fact approved by the RDSO in August, 2015. Moreover the petitioner has not challenged the guidelines issued by the RDSO in August, 2015. If the Petitioner is of the opinion that RDSO is the supreme authority to take technical decisions and those guidelines should be binding, in absence of challenge to the guidelines issued by the RDSO, it is difficult for us to interfere in the tender conditions, contained in the tender published by the Respondent No. 3 on 19.05.2016.

Further the tender condition No. 2(i)(b) cannot be said to be arbitrary or irrational nor can it be said that it is against the public interest. The Railways who have invited the tenders are the best judge to decide the manner in which it wants the bio-toilets to be operated and maintained. The Petitioner who is one of the manufactures of the bio-toilets cannot claim monopoly by saying that since it has manufactured the bio-toilets, it is only he who possesses the expertise in operating and maintaining the same. The Petitioner cannot also contend that it is only his fundamental right to carry on business with the government. The petitioner is also found to be the second lowest bidder after participation in the tender process and the Respondent - Railways has not been put to any financial loss by allotting the tender to

Respondent No.4. As the Railway has demonstrated that the scope of the work for operation and maintenance of the bio-toilets involves element of human agency and the petitioner has continued with such man-power, which was already engaged in the activity of fitting and manually cleaning of bio-toilets, it can be seen that the Respondent No. 4 who is specialized in mechanized cleaning of railways compartments has the same man power, who can successfully implement the maintenance and operation contract of bio-toilets of the Respondent No. 3.

16 Another reason on which the relief needs to be declined to the petitioner is that the contract was allotted in favoiur of the Respondent No. 4 on 21.09.2016 and as it is contended by the Respondent No. 4 that 80% of the work is complete, in such circumstances we are of the express view that since the impugned condition no. 2(i)(b) Part I A of the tender document published by the Respondent No.3 is neither arbitrary nor malicious, no interference is warranted in the said tender process.

17 The Writ Petition deserves to be dismissed. It is dismissed accordingly.

(SMT. BHARATI H. DANGRE,J.)

(NARESH H. PATIL,J.)