

**THE HONOURABLE SRI JUSTICE A.V.SESHA SAI**

**WRIT PETITION No.38302 OF 2016**

**ORDER:**

This writ petition filed under Article 226 of the Constitution of India calls in question the Tender Notice bearing No.006465/Advt.I/Outdoor/2016, dated 13.10.2016, and terms and conditions in the Tender Schedule for Empanelment of Outdoor Advertising agencies.

2. Heard Sri Ch.V.Prasad Babu, learned counsel for the petitioners, learned Government Pleader for Information and Public Relations appearing for respondent No.1; learned Government Pleader for Municipal Administration and Urban Development appearing for respondent No.2; learned Government Pleader for Finance and Planning appearing for respondent No.3 and Smt Jyothi Eswar Gogineni, learned counsel appearing for respondent Nos.4 to 13, apart from perusing the material available on record.

3. According to the petitioners, they are in the business of outdoor advertising for the last 15 years and got sufficient experience in the said field. Respondent No.1 issued the impugned tender notice, dated 13.10.2016, inviting sealed tenders from the experienced and eligible Outdoor Publicity agencies/firms etc. for empanelment with I & PR Department for a period of (03) years to carry out the publicity campaigning in respect of the following three categories:

***“Category-I (Own Media): Hoardings, Central Median Boards, Pole Boards, Bus Shelters.***

**Category-II (Sole Concessionaries Media): Buses, Trains, Bus Stations, Railway Stations, Airports, Tickets and Receipts.**

**Category-III (Other Media): Wall Paintings, Flex Wall Hangings, Pillar Boards, Auto Rickshaw Backs, Acrylic Boards.”**

In the present writ petition, the petitioners herein assail condition No.7 read with eligibility criteria as stipulated vide Annexure-D.

4. Condition No.7 of the terms and conditions of the tender and Annexure-D read as under:

**“7. The bidder should submit the statement of financial turnover of outdoor media of company of every year for the last three financial years i.e. 2015-16, 2014-15 and 2013-14 duly certified by the Chartered Accountant. The minimum turnover of eligibility is given in Annexure-D.”**

**Annexure-D**

**Turnover Eligibility Criteria:**

|                     |                                                                                        |                                                      |                                                                                         |
|---------------------|----------------------------------------------------------------------------------------|------------------------------------------------------|-----------------------------------------------------------------------------------------|
| <b>Category-I</b>   | <b>a)</b>                                                                              | <b>Hoardings, Central Median Boards, Pole Boards</b> | <b>Rs.5.00 Crores per annum average in three years (2015-16, 2014-15 &amp; 2013-14)</b> |
|                     | <b>b)</b>                                                                              | <b>Bus Shelters</b>                                  | <b>Rs.2.00 Crores per annum average in three years (2015-16, 2014-15 &amp; 2013-14)</b> |
| <b>Category-II</b>  | <b>N.A.) as turnover accounted for while awarding sole concession)</b>                 |                                                      |                                                                                         |
| <b>Category-III</b> | <b>Rs.1.00 Crore per annum average in three years (2015-16, 2014-15 &amp; 2013-14)</b> |                                                      |                                                                                         |

5. According to the petitioners, stipulation of conditions as mentioned in Condition No.7 read with Annexure-D is highly arbitrary, illegal, unreasonable and without any basis. It is further submitted by the learned counsel for the petitioners that the impugned action also suffers from lack of rationality and it affects

the public interests also. It is also the submission of the learned counsel for the petitioners that the stipulation of such conditions in the tender would be highly detrimental and suicidal to small corporates like the petitioners and also to the funds of the State Government.

6. *Per contra*, it is submitted by the learned Government Pleader that there is neither illegality nor there exists any infirmity in the impugned action and there is absolutely no involvement of public interest in the present writ petition and in the absence of the same, the impugned action is not amenable for judicial review under Article 226 of the Constitution of India. Condition No.7 read with Annexure-D stipulating the eligibility criteria is a prerogative of the respondents and in the absence of any arbitrariness and violation of any statutory provisions, the said stipulation or the condition cannot be found fault with. In support of his submissions and contentions, learned Government Pleader places reliance on the following judgments:

**G.Jayakrishnan v. Tamil Nadu State Marketing Corporation Ltd., Coimbatore and others<sup>1</sup>, M/s.Sharda Flour Pvt. Ltd., Bilaspur, petitioner v. State of Chhattisgarh and others, respondents<sup>2</sup>, M/s. Deepak Builders, appellant vs. The State, respondents<sup>3</sup>** and the judgment of the Hon'ble Apex Court in Civil Appeal No.4248 of 2017, dated 09.03.2017, in the case of **Chhattisgarh State Industrial Development Corporation Ltd**

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<sup>1</sup> AIR 2006 MADRAS 81

<sup>2</sup> AIR 2005 CHHATTISGARH 12

<sup>3</sup> AIR 1996 RAJASTHAN 178

**and Another, Appellants vs. M/s.Amar Infrastructure Ltd. and others, respondents.**

7. It is contended by Smt Jyothi Eswar Gogineni, learned counsel for the unofficial respondents, that the present writ petition filed under Article 226 of the Constitution of India is not maintainable and the petitioners herein have no *locus standi* to file the present writ petition in the absence of any arbitrariness and *mala fides* on the part of the respondent authorities. It is further submitted that since the petitioners herein did not submit their tenders in response to the tender notification, they are not entitled to question the conditions in the tender. It is also the submission of the learned counsel that having not filed any tenders in respect of categories II and III, it is not open for the petitioners herein to assail the entire notification. It is further submitted that it is ultimately for the authorities to stipulate the conditions in the tender and the conditions in the tender cannot be the subject matter of the writ petition under Article 226 of the Constitution of India.

8. In the above backdrop, now, the issue that boils down for consideration of this Court is:

***“Whether the present writ petition is maintainable under Article 226 of the Constitution of India and whether the petitioners herein are entitled for any relief from this Court?”***

9. According to the petitioners herein, the impugned condition stipulating Rs.5.00 crores turnover for the last three years is not

only prejudicial to the petitioners herein, but also arbitrary on the part of the respondents. According to the learned counsel for the petitioners, absolutely, there is neither any basis for the respondents nor there is any rationality in stipulating such a condition and such stipulation is made only for the purpose of eliminating the small corporates like the petitioners herein from the zone of consideration.

10. On the other hand, according to the learned Government Pleader and the learned counsel for the unofficial respondents herein, the very writ petition filed by the petitioners is not maintainable under Article 226 of the Constitution of India and that the condition in the tender notification cannot be questioned.

11. It is stated in the counter-affidavit filed by the official respondents that in response to the impugned tender notification, dated 13.10.2016, as many as 15 agencies came forward and filed their tenders in respect of Category No.I. It is also the case of the official respondents that the department stipulated such a condition of having Rs.5.00 crores annual turnover to facilitate the short listing of the advertising agencies for empanelment so that the advertising agency, which is genuinely holding own Hoardings, Central Median Boards, Pole Boards and Bus Shelters etc., is able to execute the work within time and with quality. It is also the reason assigned by the respondents in the counter-affidavit that the department will have to assure quality in the execution of the work and within the time in an efficient manner. It is also the averment of the counter-affidavit of the official respondents herein that the nature of work covered by the tender notification is to give

wide publicity to Government Welfare and Development Schemes and its policies, as such, it would be difficult to define the work in the tender schedule terms and conditions. In this context, it is pertinent to refer to the judgments cited by the learned Government Pleader. In the case of G.Jayakrishnan's case (1 supra), the Hon'ble Madras High Court, at paragraph Nos.4 to 7, held as under:

*"4. It may be mentioned that writ jurisdiction is discretionary jurisdiction - vide [Chandra Singh v. State of Rajasthan](#) (2003) 6 JT (SC) 20 : (AIR 2003 SC 2889) para 42. Hence, even if there is violation of law, this Court is not bound to issue a writ vide [R. Nanjappa v. District Collector, Coimbatore](#) (2005 Writ LR 47). To obtain a writ, the petitioner must not only show violation of law, he must also show that he has suffered some prejudice on account of such violation of law. This is because writ jurisdiction is equity jurisdiction. To obtain a writ, the petitioner must satisfy the Court on both points, viz. (1) violation of law by the respondent and (2) on account of such violation, the petitioner has suffered some prejudice. If the petitioner only shows violation of law but fails to satisfy the Court that he has suffered some prejudice, no writ will be issued in his favour.*

*5. In this case, even assuming that Rule 20(1) of the said Rules has been violated, there is no prejudice caused to the petitioner inasmuch as admittedly the petitioner has submitted the tender application on 4-1-2005. After all the purpose of giving 15 days time is to give adequate time to people to submit their tenders. Hence, the petitioner suffered no prejudice due to violation of Rule 20(1). Hence, on this ground the petitioner cannot obtain a writ from this Court under [Article 226](#) of the Constitution. This contention is, therefore, rejected.*

*6. Learned Counsel then submitted that the tender conditions were arbitrary and illegal. One of the tender conditions was that the bidders must have a turnover of Rs.5,00,000/- in the preceding two years. Admittedly, the*

*appellant does not have a turnover of Rs. 5,00,000/- in the preceding two years and hence he does not satisfy one of the essential eligibility requirements.*

*7. The Supreme Court in [Directorate of Education v. Educomp Datamatics Ltd.](#) (2004) 4 SCC 19 : AIR 2004 SC 1962) has upheld the condition in the tender form requiring a turnover of more than Rs. 20 crore over the last three years. The Supreme Court observed that the purpose of imposing such a condition was to ensure that only companies having financial stability and capacity should participate in the tender. In our opinion, the same reasoning applies here also. Similar view was taken by a Division Bench of this Court, to which one of us (Markandey Katju, Chief Justice) was a party in W.A. No. 1498 of 2005 ([A. Gopal v. Airports Authority of India](#)), decided on 3-8-2005 (reported in AIR 2005 NOC 493). Since the appellant does not satisfy the eligibility criteria of having a minimum turnover of Rs. 5,00,000/- in the last two years, obviously he is not qualified to participate in the bidding process. Hence, it is not necessary for us to go into the question of validity of the other tender conditions which the appellant has challenged. The second contention is also rejected.”*

In the case of **M/s.Sharda Flour Pvt. Ltd., Bilaspur’s case (2 supra)**, the Chhattisgarh High Court, at paragraph Nos.17 and 18 held as follows:

**“17. Therefore, in view of the law laid down by the Hon'ble Apex Court in the above decisions, the Government is at liberty to fix the pre-qualification of the tenderer based on their experience, financial position. As held in the case of Raunaq International Ltd. (AIR 1999 SC 393) (supra), the Government can also take into consideration and fix pre-qualifications whether the intending tenderers can deliver the goods of the requisite specifications whether the tenderer is able to deliver the goods. Past experience of the tenderer and whether he has successfully completed similar work earlier and the ability of the tenderer to take up follow action. As per the decision in the case of Tata Cellular (AIR 1996 SC 11), the terms of the invitation to tender cannot be**

opened to judicial scrutiny because the invitations to tender is in the realm of contract.

18. In view of the above law, condition No. 20 (a) fixed by the respondents is not arbitrary in any manner, because the respondents have specifically stated that in pursuance of the Supreme Court's directions the respondents were required to supply Dalia of a requisite quality and standard to the children, women, lactating mother who belongs to weaker sections of the society and are suffering from mal nourishment. Therefore, the respondents fixed the past experience eligibility criteria as also the financial capacity of the intending tenderers and the Government was within its right to fix this criteria looking to the requirement and as per the law laid down by the Hon'ble Apex Court in the cases of Tata Cellular, Raunaq International Ltd. (AIR 1999 SC 393) and M/s. G.J. Fernandez (AIR 1990 SC 958) (supra). Not only this, the petitioner was not even eligible to file the tender because apart from condition No.20 (a), at the time of filing of the tender documents, he was not even qualifying the other conditions namely, condition Nos. 20 (b), 20 (c) and 20 (d). He started producing Dalia recently, i.e., from 20th May, 2003."

In M/s.Deepak Builders's case (3 supra), the Rajasthan High Court, at paragraph Nos.5, 6 & 10 held as follows:

*"5. The first question, which requires consideration, is regarding the scope of judicial review in contractual matters. The State and its functionaries, in a decision-making process, is obliged to act fairly and with justice and not arbitrarily. It has to apply its mind to all the relevant consideration without any bias and the irrelevant consideration must not form the basis of the decision. If the decision taken by the administrative authority even in the contractual matters is arbitrary or capricious or based on irrelevant consideration then their decisions are amenable to the judicial review because that would amount to violation of Art 14 of the Constitution of India. The State or its functionaries cannot be relieved from its obligation to comply with the basic requirement of Art.14 of the Constitution of India to act justly and fairly on the pretext that the dispute falls within the domain of contractual*

*obligations. The administrative decision, given in contractual matters, can be impeached if it is arbitrary or violative of Art.14. The law discernible from the various judgments of the Supreme Court including the judgments on which reliance has been placed by the learned counsel for the appellant, is that the judicial review is not barred in contractual matters. The requirement of Art.14 and contractual matters are not alien concepts. They can exit together. The duty to act fairly is a part of fair procedure envisaged under Art.14 of the Constitution of India. Every activity of the State or its instrumentality must be informed by reasons. Its action must be based on some rational and relevant consideration and must not be susceptible to the vice of arbitrariness because arbitrariness is the negation of Rule of Law. The Constitution of India does not envisage or permit unfairness or arbitrariness in State action in any sphere of activity. Merely because the dispute falls within the domain of contractual obligation, it will not relieve the State or its instrumentality of its obligation to act fairly and justly. It would be difficult and unrealistic to exclude the State actions in contractual matters from the judicial review. Administrative decision even in contractual matters cannot be impeached if it is arbitrary, unreasonable, irrational, mala fide or violative of Art.14 of the Constitution of India.*

6. *The next contention, raised by the learned counsel for the appellant is that while inviting the bid for contract of pre-qualification, the condition of five years' experience was not mentioned and, therefore, this condition in short-listing the applicants cannot be pressed into service. The applicant-petitioner has placed on record Annexure-2 the Tender Form/pre-qualification documents for work in question. Condition No.11 of Part I of this document (at page 28 of the petition) states that all those tenderers who qualify the pre-qualification offer, will be eligible for submitting the tenders for the work and the tender forms to all such contractors will be issued from the Office of the Executive Engineer, Irrigation Division, Dungarpur, from 10.10.1995 to 12.10.1995. In the II Part of this document Annexure 2, Condition No.1, at page 31, relating to the pre-qualification document, is, also, to the same effect and provides that "the tender form will be issued only to those parties selected by the competent authority as having the*

*necessary qualification/suitability to perform the contract(s) satisfactorily.” Condition No.9 of Part II deals with the instructions to the applicants. Condition No.9.1 of this Part provides that a contractor may be pre-qualified for this contract depending upon his resources, capability, technical know-how etc. Condition No:9.15(c) (See page No.38 of the petition) requires the applicant to furnish the details of the experience and past performance of the tenderer of the work of similar nature within past five years and the details of the current work in hand and other contractual commitments. Condition No.9 and its sub-conditions, deal with the necessary conditions which the applicant/tenderer has to fulfill to clear the pre-qualifications test and one of such conditions is five years’ experience of the work of similar nature. On the recommendation of the Committee constituted by the State Government, this pre-qualification procedure was adopted for inviting tenders for all the work in the Irrigation Department, the established cost of which exceeds rupees one crore, The pre-qualification procedure provided by the Irrigation Department for inviting tenders for the work, the cost of which exceeds rupees one crore, cannot be said to be, in any way, arbitrary, unjust or improper.*

*10. The learned single Judge has considered the case of the petitioner-appellant in the right perspective and rightly held that there is no arbitrariness or mala fide on the part of the respondents in short-listing the tenderers. The authority always can lay down the guide-lines for the pre-qualification test for competing the tenderers looking to the nature of the work to be accomplished. The judgment, passed by the learned single Judge, therefore, does not require any interference.”*

As per the law laid down by the Hon’ble Apex Court in Civil Appeal No.4248 of 2017, dated 09.03.2017, in the case of **Chhattisgarh State Industrial Development Corporation Ltd and Another vs. M/s.Amar Infrastructure Ltd. and others, respondents**, it is clear that unless public interest is involved, there cannot be any interference under Article 226 of the Constitution of India.

12. In the instant case, by any stretch of imagination, it cannot be concluded that there is arbitrariness on the part of the respondents herein in stipulating the condition under challenge in view of the reasons assigned in the counter-affidavit filed by the official respondents.

13. In view of the law laid down in the above referred judgments, the stipulation of condition which is under challenge also cannot be found fault with. It is also to be noted that there are no *mala fides* attributed to the respondents herein. The contention of the learned counsel for the petitioners that there is no rationality in fixing the eligibility criteria, in the considered opinion of this Court, cannot be sustained in view of the reasons assigned in the counter-affidavit and in view of the principles laid down in the above referred judgments. Therefore, in these circumstances, this Court has no hesitation to hold that the present writ petition filed under Article 226 of the Constitution of India is not maintainable and the petitioners herein are not entitled to any relief from this Court under Article 226 of the Constitution of India.

14. For the aforesaid reasons, the Writ Petition is dismissed. There shall be no order as to costs.

15. Miscellaneous Petitions pending, if any, in this Writ Petition shall stand closed.

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**JUSTICE A.V.SESHA SAI**

23.03.2017  
AMD

**THE HONOURABLE SRI JUSTICE A.V.SESHA SAI**



**WRIT PETITION No.38302 OF 2016**

**Date: 23.03.2017**

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