

THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN
AND

THE HON'BLE Mr. JUSTICE ABHINAND KUMAR SHAVILI

WRIT APPEAL NO.1323 OF 2017

JUDGMENT: (Per the Hon'ble Mr. Justice Abhinand Kumar Shavili)

1. This appeal, under Clause 15 of the Letters Patent, is preferred against the order passed by the learned Single Judge in W.P. No. 34549 of 2016 dated 22.8.2017, whereunder the said writ petition filed by the appellant-writ petitioner questioning the action of respondent Nos.1 and 2 in declaring the consortium of respondent Nos.3 and 4, lead by respondent No.4, as successful bidders, though they failed to fulfill the eligibility criteria, was dismissed.

2. Heard Sri Vedula Venkata Ramana, learned Senior Counsel for Sri A. Tulasi Raj Gokul, learned Counsel for the appellant, and the learned Special Government Pleader on behalf of learned Advocate-General for the official respondents and Sri S. Niranjan Reddy, learned Senior Counsel for Ms. Gorantla Sri Ranga Pujitha, Counsel for the unofficial respondents.

3. (i) The appellant-writ petitioner claims to be a non-profit organization registered under Andhra Pradesh Societies Registration Act, 2001, and a pioneer in the field of Emergency Medical Responses Services. At present, the appellant-writ petitioner is providing 108 Emergency Ambulance Services in 14 States and 2 Union Territories on non-profit basis. Respondent Nos.3 and 4, comprising the consortium, lead by respondent No.4, also claim to have par-excellence service in the said field. Respondent No.3 was established in the year 1997 and claims to be one of the largest companies in India providing indigenous integrated services with

manpower of more than 50,000, having offices in more than 50 cities and serving more than 600 clients, nation-wide. Respondent No.4, which is the lead member of the consortium, registered under the Companies Act in England and Wales, also claims to be the largest ambulance service provider in the private sector, providing emergency, non-emergency and specialized ambulance services like bariatric, organ transport, secure patient transport etc. since last 8 to 9 years. It is averred that the company owns and operates more than 500 ambulances and specialized patient transport vehicles in the United Kingdom and Wales. It is further averred that respondent No.4 is associated with NHS Ambulance Trusts to provide ambulance services to NHS trusts. It is stated that respondent Nos.3 and 4 have been operating as a consortium providing services in the field of Emergency Medical/Ambulance Services in India from the year 2003 and are operating 108 emergency medical services for the Government of Maharashtra.

(ii) On 27.06.2016, the Commissioner of Health and Family Welfare, Government of Andhra Pradesh, floated "Request For Proposal" (for short "RFP"), inviting the proposals/bids from eligible bidders for operation and maintenance of Emergency Response Services, for a period of three years. The scope of services under RFP would be mainly to operation and maintenance of ambulance services through 108 toll free number, to identify and respond to medical emergencies through an existing fleet of 439 ambulances and to establish and operate an exclusive 24 x 7 call centre for managing and coordinating the ambulance services. The eligibility criteria, as per Section 5 of RFP, is that "the bidder should have at least 3 years of experience in operation of Pre-hospital "Emergency Response Services" with a minimum fleet supported by a control room,

with a call centre set up by the entity/bidder/applicant. The minimum fleet should be 33% of the total fleet, required to be operationalized. The RFP further prescribes that the bidder can be a foreign company but before signing the agreement it will have to form an Indian company registered under the Indian Companies Act, 1956. In case of consortium, the lead bidder is required to fulfill the technical eligibility criteria. The appellant-writ petitioner as well as the un-official respondents submitted their technical and financial bids.

(iii) On 20.08.2016, the Commissioner of Health and Family Welfare, Government of Andhra Pradesh, completed the evaluation process of technical bid in the presence of all the bidders and declared both parties as technically qualified. The appellant and the 3rd respondent were declared as eligible on technical evaluation. On 22.08.2016, the financial bid evaluation was done in the presence of technically qualified bidders, wherein the 3rd respondent was declared as L1. On 24.08.2016 the appellant-writ petitioner being aggrieved by the technical and financial evaluation, submitted a representation to the 2nd respondent raising various issues regarding the eligibility of the un-official respondents more importantly to the effect that the 3rd respondent is not qualified technically. On 16.09.2016, the 1st respondent-Government, after due verification, issued the letter of intent to the un-official respondents. On 28.09.2016, the appellant-writ petitioner addressed another letter to respondent No.2, informing that the lead member of consortium is not technically qualified, as it does not have enough experience, in operation of emergency response services with a call centre. The said letters refer to an e-mail dated 27.09.2016 received from the Information Governance Officer, South Central Ambulance Service (SCAS), NHS Foundation Trust, U.K., who,

while replying to the query, stated that the 4th respondent does not operate any call centre. On 07.10.2016, an agreement was entered into between respondent No.2 and respondent Nos.3 and 4, which lead to filing of the above writ petition.

4. A common counter-affidavit was filed by the un-official respondents in the writ petition disputing the averments made in the affidavit filed in support of the writ petition. They placed on record the documents, which would show that the lead consortium satisfies the eligibility criteria as prescribed in Section 5 of the RFP.

5. Similarly, respondent No.2 also filed his counter, clarifying the typographical error which was rectified immediately, and further stating that the tender was awarded to the consortium only after being satisfied that the lead consortium fulfilled all the eligibility criteria and that the same cannot be found fault with.

6. Additional affidavit came to be filed on behalf of the Government, stating that under Article 299 of the Constitution of India, the Government acting on behalf of the Governor, vide notification, may authorize a specific authority to carryout certain functions, and therefore, the contention raised by the appellant-writ petitioner that respondent No.2 is not authorized to enter into an agreement is improper and incorrect. It is further stated that the Government has also authorized the Commissioner of Health and Family Welfare to transfer the services from the existing operator to the operator selected in the tender. It is submitted that an amount of Rs.1.41 lakhs per month per ambulance is being charged by the appellant- petitioner which is causing huge loss to the exchequer when compared to the financial bid of the unofficial respondents' financial bid.

7. After considering the documents on record and hearing the arguments on both sides, the learned Single Judge dismissed the writ petition by order dated 22.8.2017. Aggrieved by the same, the present appeal has been preferred.

8. The contentions raised by the learned Counsel for the appellant are as follows:

(i) In the evaluation of tender, the 3rd respondent is notified as a technically eligible tenderer and the 3rd respondent was shown as L1 in the financial evaluation. At both evaluations, the name of the 4th respondent was not mentioned and obviously, the 4th respondent has been made to enter into the fray when the 3rd respondent is found ineligible, in order to facilitate the 3rd respondent, and that the technical evaluation was not completed on 20.8.2016 but it went on till 16.9.2016 and hence, the financial evaluation cannot precede the technical evaluation. The technical evaluation of the 4th respondent made it clear that the 4th respondent is not even having a call center number and thus, in a non-transparent and hasty manner, the letter of intent has been issued to the consortium, which itself is contrary to the notification in the website dated 22.8.2016.

(ii) In the documents submitted by the unofficial respondents to the State in terms of Section 7 Appendix B of NIT, there has been no disclosure about the existence of consortium at the time of submission of tender and hence, the inference can be drawn that the consortium has been introduced subsequently and that since the tenders are not online tenders, there is every possibility of supplementing documents to the tender of the 3rd respondent and thereby the unofficial respondents were made eligible by projecting them as consortium.

(iii) Though the agreement has been signed by the State through the 2nd respondent in favour of the consortium of respondents Nos.3 and 4, the same has not come into force due to the stay order passed by the learned Single Judge in the above writ petition and also since the consortium has to set up an integrated call center net work. The agreement in favour of non-juristic person and without formation of a special purpose vehicle i.e., Indian Company, is patently illegal being contrary to Section 5 of the NIT, and even as per the pleadings of respondents Nos.3 and 4, no special purpose vehicle is formed till date and hence, the agreement in favour of respondents Nos.3 and 4 is liable to be set aside on the ground that it is patently contrary to Section 5 of the NIT.

9. (i) It is submitted on behalf of respondents Nos.1 and 2 that the contention raised by the appellant-writ petitioner that respondent No.2 is not authorized to enter into an agreement is improper and incorrect and that the Government has also authorized the Commissioner of Health and Family Welfare to transfer the services from the existing operator to the operator selected in the tender. It is submitted that an amount of Rs.1.41 lakhs per month per ambulance is being charged by the appellant-petitioner which is causing huge loss to the exchequer when compared the price quoted by the unofficial respondents.

(ii) It has been contended by the learned Special Government Pleader that by mistake, the 3rd respondent's name had been stated to the effect that it was qualified in the technical bid instead of consortium and the same mistake had occurred even in the financial bid opening document. But the fact remains that respondents Nos.3 and 4 had participated in the Request for Proposal (RFP) as consortium. The learned Special Government Pleader admitted that if independently respondent No.3 is

not technically qualified and if the case of the 3rd respondent is considered as consortium with that of the 4th respondent then the consortium as well would be qualified and that the consortium of respondents Nos.3 and 4 was taken into account in view of the fact that the consortium of respondents Nos.3 and 4 have quoted very competitive price and hence, the official respondents had issued a letter of intent to the consortium formed by respondents Nos.3 and 4 and accordingly, an agreement was entered into with the consortium of respondents Nos.3 and 4 on 7.10.2016.

(iii) The learned Special Government Pleader further contends that since the task of handling an important service like that of handling ambulances in the need of emergencies is for the benefit of public at large, the official respondents had taken extra care specially in view of the fact that the appellant submitted representations to the effect that respondents Nos.3 and 4 independently did not satisfy the eligibility criteria and they are not competent to run a fleet of ambulances, more so, in emergency situation. He further contends that the official respondents wanted to make it sure that the consortium consisting of respondents Nos.3 and 4 fully satisfies the task of handling emergency ambulance services as sought additional information in its monthly review meetings on 16.9.2016 and after being satisfied that the consortium fulfills all the standards as prescribed for Request for Proposal (RFP), the official respondents had issued a letter of intent to the consortium so formed by respondents Nos.3 and 4 on 16.9.2016 and accordingly, entered into an agreement with the consortium on 7.10.2016.

(iv) The learned Special Government Pleader further contends in respect of discrepancies pointed out by the appellant in the technical bid

evaluation report at page No.586 of the material papers filed along with the writ appeal that while preparing the report in respect of consortium of unofficial respondents, there was power cut and one of the members was in a hurry to leave the station and in such circumstances, the entire report in respect of unofficial respondents was handwritten and in respect of other bidders, it was typed as there was power supply during preparation of report of other bidders except the unofficial respondents. He further contends that the fact that respondents Nos.3 and 4 submitted one E.M.D. itself would show that there was consortium even at the time of submitting the documents in pursuance of Request for Proposal and hence, no interference by this Court is warranted as no illegality or irregularity was found in the work awarded in favour of consortium so formed by the unofficial respondents.

10. The contentions submitted by the learned Counsel appearing on behalf of the unofficial respondents are as follows:

(i) The representatives of the appellant were present in the technical evaluation of the bids on 20.8.2016 and in the financial evaluation of the bids on 22.8.2016, but they did not raise any objections and that the agreement was entered into by the 2nd respondent with the unofficial respondents on 7.10.2016 and that the appellant filed the writ petition on 13.10.2016 and these facts show malafides on the part of the appellant.

(ii) The bid for the RFP dated 27.6.2016 has been submitted by consortium of respondents Nos.3 and 4 and appendix B form submitted by the consortium of respondents 3 and 4 along with the bid document, records the participation of consortium, with the 4th respondent as the lead member of the consortium and that the consortium of respondents Nos.3

and 4 is also operating 108 ambulance services in Maharashtra and Delhi in which the appellant participated and lost out to the consortium of respondents 3 and 4 and that the appellant even in the tender of Maharashtra alleged malafides on the part of the State authorities and that the allegations of the appellant were rejected and tender awarded to the consortium of respondents Nos.3 and 4 was upheld by the Bombay High Court.

(iii) The consortium of respondents Nos.3 and 4 fulfills all the eligibility criteria mentioned in Section 5 of the RFP, including the requirement of 3 years experience in operation of pre-hospital emergency response services supported by a call center, and that the 4th respondent being the lead member of the consortium is leading emergency and ambulance service provider and operating over 500 ambulances and specialized patient transport vehicles, which are equipped with pre-hospital emergency response services supported by a call center in United Kingdom and that the 4th respondent has been providing these ambulances equipped with pre-hospital emergency response services to NHS Trust (Department of Health, Government of UK) for the last 9 years and that all the ambulances provided by the 4th respondent are supported by a call center owned and operated by the 4th respondent and that the letter dated 24.2.2015 issued by NHS-SCAS Trust (Department of Health, Government of UK) annexed with the bid document, confirms that the 4th respondent has fully equipped staffed ambulance services supported with a call center.

(iv) The website does not specify the reach time of the ambulance as sought to be misrepresented by the appellant and it pertains to the reply time to an e-mail received by the 4th respondent and that the service-level indicators mentioned at page 57 of RFP are only service level indicators of

the scope of work under the RFP and do not constitute the eligibility criteria under RFP.

(v) No pleading was taken by the appellant on the alleged improper submission of the user-certificate/non-submission of Appendix A by respondents Nos.3 and 4 and that respondents Nos.3 and 4 submitted the bid in the prescribed format with all necessary documents/user certificates and that the bid document submitted by respondents Nos.3 and 4 contains several user certificates in the form required under the RFP and these documents have not been filed along with the counter of respondents Nos.3 and 4 as the said plea is lacking in the writ petition of the appellant and has been raised subsequently at the time of arguments only.

(vi) The consortium of respondents Nos.3 and 4, with respondent No.4 as lead member, has the minimum fleet as required under Section 5 of the RFP.

(vii) The 2nd respondent after due application of mind and upon due satisfaction of the bid document submitted by consortium of respondents Nos.3 and 4, declared the consortium of respondents Nos.3 and 4 as technically qualified and as L1 and it is not within the domain of the appellant to challenge the satisfaction of the 2nd respondent in the absence of plea of malafides mentioned in the writ petition.

(viii) The scope of judicial review in tender matters is limited and if the decision is bonafide and in public interest, the Courts will be slow to exercise power of judicial review even if there is some procedural aberration and that the award of tender to the consortium of respondents Nos.3 and 4 is in public interest.

11. We have considered the submissions made by the parties. It has been contended by the learned Counsel for the appellant that respondents Nos.3 and 4 had participated independently, and in the technical bid, only respondent No.3 was declared as qualified and even in the financial bid also respondent No.3 alone was declared as qualified. It has been further contended that admittedly, respondent No.3 is not qualified as per the eligibility clause of Request for Proposal, and in order to make the 3rd respondent eligible the theory of consortium was introduced by including respondent No.4, and this entire exercise was carried out only after 22nd August, 2016 i.e., the date on which respondent No.3 was declared as L1 and the finalization of tenders had taken place subsequent to 22.8.2016 and only after getting some clarifications from the 4th respondent, the entire tender process was finalized on 16.9.2016. The appellant may not be faulted for making such submissions because respondents Nos.1 and 2 are also responsible for creating confusion initially by declaring respondent No.3 as qualified in the technical bid and showing the 3rd respondent alone as qualified even in the financial bid instead of consortium of both respondents Nos.3 and 4. But the fact remains that respondent Nos.3 and 4 had participated as consortium, and the error committed by respondents Nos.1 and 2 had been rectified without causing any prejudice to anyone, and admittedly, respondents Nos.3 and 4 are allowed to form as a consortium before responding to Request for Proposal. Therefore, no illegality has been committed by respondents Nos.1 and 2 in awarding the work in favour of consortium of respondents Nos.3 and 4, who were declared as L1 in the entire process.

12. On perusal of records, this Court finds certain discrepancies in respect of noting of details while finalizing the technical bid as well as

financial bid. But the fact remains that one of the officials of the appellant was present on 22.8.2016 and he had signed on the proceedings as well as the technical bid and financial bid, which clearly establishes that the appellant was aware that respondents Nos.3 and 4 had participated in the Request for Proposal as a consortium and not on individual bidders. Being aware that respondents Nos.3 and 4 had participated as consortium, the appellant had written a letter on 24.8.2016 to the official respondents to the effect that respondent Nos.3 is not technically qualified. The appellant had not stated about the fact of signing the official bid document cover of the consortium either in the affidavit filed in support of the writ petition or in the writ appeal. When the official respondents had produced the records, it has come to the light that the appellant's representative had signed cover as well as the proceedings of the financial bid of consortium, which means that the appellant was aware that the unofficial respondents had participated as consortium but not as independent tenderers. This Court after noticing the signature of the appellant's representative in the financial bid document, called for an affidavit from the concerned person, who had subscribed his signature. The said representative of the appellant had filed an affidavit before this Court admitting his signature. The conduct of the appellant in spite of having knowledge that respondents Nos.3 and 4 had participated as consortium, and knowing the fact that a representative of the appellant has signed the financial bid document of the consortium of respondents Nos.3 and 4 on 22.8.2016 itself, in taking a stand that the appellant is not aware of consortium is deprecated. The basic principle for invoking writ jurisdiction is that one must come to the Court with clean hands so as to avail remedies under writ jurisdiction. But in the instant case, the representative of the appellant in spite of knowing the fact that respondents Nos.3 and 4 participated as consortium, and the

consortium has been declared as L1, has not disclosed the same. The entire case has been projected as if the appellant is not aware of consortium comprising respondents Nos.3 and 4. For this reason alone the writ petition and the writ appeal are liable to be dismissed.

13. Apart from all the above aspects, we have asked specifically the appellant during the course of arguments whether the telephone number 03332-407-407 furnished in the material papers in the appeal belongs to the 4th respondent and whether such number exists or not. The appellant admitted that the said number belongs to the 4th respondent and the same is in existence. We have also asked specifically during the course of arguments whether the material papers gathered subsequently, if at all permissible, would make the 4th respondent, who is the lead member of the consortium eligible or not. Then, the appellant stated that it makes the 4th respondent, who is a lead member of the consortium, eligible. Now, the only issue for adjudication in this appeal is whether the above aspects were taken into consideration by the official respondents while finalizing the technical bid evaluation or financial bid evaluation and whether this material was available with them.

14. The appellant had relied upon email dated 27.9.2016 received from Information Governance Officer, South Central Ambulance Service (SCAS), NHS foundation Trust, U.K., which was only a reply to the specific queries raised thereto, but that itself would not be a complete information in respect of respondent No.4, and the official respondents were satisfied about the eligibility of the consortium.

15. Yet another contention raised by the appellant is that the 4th respondent before signing an agreement would be a registered company in

India. It has been brought to the notice of this Court by the Counsel appearing for the unofficial respondents that the 4th respondent had got registered as an Indian Company though the agreement was entered into by the Consortium consisting of respondents Nos.3 and 4. Under Clause 15 of Letters Patent, at best this Court can direct the official respondents to redo the exercise. But when a consortium comprising of respondents Nos.3 and 4 taken as a whole, even according to the appellant, they would be eligible and therefore, no useful purpose would be served even if a direction is given to the official respondents to redo the entire exercise.

16. The scope under Clause 15(a) of the Letters Patent is very limited and the judicial review in the matter of tender process is very limited and even if certain lacunae are there, in the entire process of finalizing the tenders if such lacunae do not go to the root, then the Court will be very reluctant to interfere. No doubt, the entire exercise done by the official respondents was not error free and the same was rectified without causing any prejudice to any one. But those are all trivial issues. When once the consortium of unofficial respondents fulfills the eligibility criteria all those trivial issues fall into insignificance warranting no interference by this Court.

17. The Hon'ble Supreme Court in **Jagdish Mandal Vs. State of Orissa**¹ held as follows:

“If the decision relating to award of a contract is bona fide and 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

¹ (2007) 14 SCC 517

judicial review will not be invoked to protect private interest at the cost of public interest.”

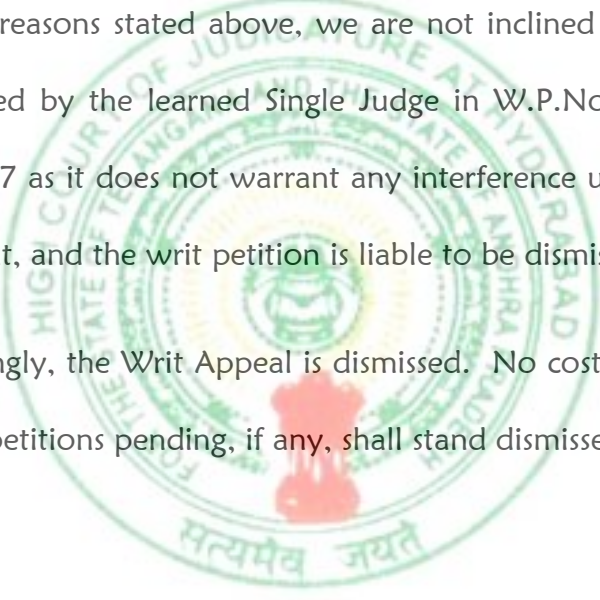
The Hon’ble Supreme Court even in **B.S.N. Joshi Vs. Nair Coal Services**² held as follows:

“The only issue which has to be looked into is whether the successful tenderers had in fact substantially complied with the purport and object for which essential conditions were laid down.

In view of the above scenario, the Courts will be reluctant to interfere.

18. For the reasons stated above, we are not inclined to interfere with the order passed by the learned Single Judge in W.P.No.34549 of 2016, dated 22.8.2017 as it does not warrant any interference under clause 15(a) of Letters Patent, and the writ petition is liable to be dismissed.

19. Accordingly, the Writ Appeal is dismissed. No costs. Consequently, miscellaneous petitions pending, if any, shall stand dismissed.


(RAMESH RANGANATHAN, ACJ)

(ABHINAND KUMAR SHAVILI, J)

7th December, 2017
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² (2006) 11 SCC 548

THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN

AND

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WRIT APPEAL NO.1323 OF 2017

(Judgment delivered by the Hon'ble Mr. Justice Abhinand Kumar Shavili)

7th December, 2017

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