

**THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN
AND
THE HON'BLE SRI JUSTICE ABHINAND KUMAR SHAVILI**

Writ Appeal No.1676 of 2017

JUDGMENT: {Per the Hon'ble the Acting Chief Justice Ramesh Ranganathan}

This appeal, under Clause 15 of the Letters Patent, is preferred against the order passed by the Learned Single Judge in W.P.No.9283 of 2017 dated 03.11.2017. The 1st respondent in W.P.No.9283 of 2017 is the appellant herein. The first respondent herein filed the Writ Petition to declare the action of the respondents therein in not considering their application with prequalification requirement, and in proceeding with the tender process without communicating the status of their application, as arbitrary, illegal and in violation of Article 14 of the Constitution of India. A consequential direction was sought to the respondents therein to proceed with the tender process in respect of the notification, regarding the work of "Construction of R.R.Masonry Compound Wall at Ibrahimpatnam land for testing facilities for BEL-Hyderabad Unit", after issuing tender schedule to the 1st respondent-writ petitioner, after receiving their bid and considering and evaluating the same along with other tenders, and to issue a work order in favour of the lowest tenderer.

Facts, as has been noted in the order under appeal, are that a notification was issued by the appellant herein on 26.08.2016 to engage agencies for carrying out the work of "construction of R.R.Masonry Compound Wall at Ibrahimpatnam land for testing facilities for BEL-Hyderabad Unit" at an approximate value of Rs.395 lakhs. The prequalification criteria stipulated, among the mandatory prequalification requirements, was that the agency

should have completed two similar works each costing not less than Rs.198 lakhs per annum. Clause (8.0) stipulated that the prequalification will be carried out based on the details furnished by the agencies, feed back from the clients, inspection of the completed/ongoing works etc of the agencies, if required by BEL and at its sole discretion.

The case of the appellant before us is that the evaluation committee took into consideration the fact that the 1st respondent-writ petitioner had executed two projects at BEL, Hyderabad viz, Construction of RCC hanger building & D&E Building; the agency was unable to meet the deadlines; the work was progressing at a snail's pace; several attempts, to ensure timely execution of the project by the Department, proved futile; the agency was also not able to meet the required progress schedule submitted by them; since the present work was urgent in nature, the agency may not meet the time schedule; and, hence, the agency was not considered.

While the decision of the evaluation committee was not communicated to the 1st respondent-writ petitioner, the appellant herein had detailed the reasons which weighed with them, for their having rejected the respondent-writ petitioner's bid at the pre-qualification stage, in their counter-affidavit filed before the Learned Single Judge. While the 1st respondent-writ petitioner, in their reply-affidavit, have placed the blame, for the delay in timely execution of the earlier work on the appellant herein, the fact remains that neither of these rival contentions were examined nor adjudicated by the Learned Single Judge in the order under appeal.

Sri Prabhakar Peri, learned counsel for the 1st respondent-writ petitioner, would draw our attention to Page 3 of the order under appeal, wherein the contents of the reply affidavit filed by the 1st respondent-writ petitioner were noted to submit that the Learned Single Judge was aware of the rival submissions. We must express our inability to agree with the submission of the learned counsel that mere noting of the contents of the reply affidavit should be treated as if the Learned Single Judge has considered and adjudicated upon the contentions urged by the first respondent-writ petitioner therein.

The only ground, on which relief was granted to the 1st respondent-writ petitioner, is that neither the tender evaluating committee nor the appellant had communicated reasons, for rejection of the 1st respondent-writ petitioner's bid at the pre-qualification stage, to them. Unlike a statutory order, which requires the reasons to be mentioned therein and not to be supplemented later by way of an affidavit, in other cases, more so in cases where an exercise of evaluation of tenders has been undertaken, reasons can always be furnished in the affidavit subsequently filed before the Court; and it would then be open to the Court, on the basis of the material placed before it and on perusal of the records, to satisfy itself whether or not the reasons, for rejection of the bid, disclose arbitrariness or unreasonableness on the part of the competent authority, resulting in their action falling foul of Article 14 of the Constitution of India. The obligation to assign reasons, as held by the Supreme Court in **Star Enterprises v. City and Industrial Development**¹, is in cases

¹ (1990) 3 SCC 280

where the highest offer (bid) is rejected, and the bid of another is accepted.

The scope of judicial review, in matters relating to tender, is extremely limited. While exercising its powers of judicial review, this Court would not sit in judgment over the decision of the tender evaluating committee. In the matter of formulating conditions of a tender document, and in 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, interference by Courts is not warranted. If the State or its instrumentalities act reasonably, fairly and in public interest in awarding the contract, interference by the Court is limited. (**M/s. Michigan Rubber (I) Ltd. v. State of Karnataka**²; **CSR Infratech India Pvt Ltd v. Government of A.P.**³). The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender, and that is not open to judicial scrutiny. (**Air India Ltd v. Cochin International Airport Ltd**⁴). Price need not always be the sole criterion for awarding a contract. But the State is bound to adhere to the norms, standards and procedures laid down, and cannot depart from them arbitrarily. Though the decision is not amendable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by malafides, unreasonableness and arbitrariness. (**Air India Ltd.**⁴). If two views are possible, and no mala fides or arbitrariness is alleged or shown, there is little scope for interference with the view taken by the authorities in inviting tenders. (**Reliance Airport Developers**

² Judgment of the Supreme Court in Civil Appeal No.5898 of 2012 dated 17.08.2012

³ (2014) 4 ALD 652

⁴ (2000) 2 SCC 617

(P) Ltd. v. Airports Authority of India⁵; Siemens Public Communication Networks (P) Ltd. v. Union of India⁶).

In **B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.,⁷**, the Supreme Court observed:-

“We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarized as under:

- (i) **if there are essential conditions, the same must be adhered to;**
- (ii) **(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;**
- (iii) (iii) if, however, a deviation is made in relation to all the parties in regard to any of such condition, ordinarily again a power of relaxation may be held to be existing;
- (iv) (iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of the tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;
- (v) (v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;
- (vi) (vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;
- (vii) (vii) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.” (emphasis supplied).

In **Consortium of Titagarh Firema Adler, SPA, Titagarh Wagons Ltd v. Nagpur Metro Rail Corporation Ltd⁸**, the Supreme Court held that examination by the Court, of the eligibility criteria, must be addressed regard being had to the essential conditions; as held in **Montecarlo Ltd v. NTPC Ltd.⁹** and **Tata Cellular v. Union of India¹⁰**, administrative decisions must not only be tested by the application of the Wednesbury

⁵ (2006) 10 SCC 1

⁶ (2008) 16 SCC 215

⁷ (2006) 11 SCC 548

⁸ (2017) 7 SCC 486

⁹ 2016 (10) SCALE 50

¹⁰ (1994) 6 SCC 651

principle of reasonableness, but must also be free from arbitrariness, not affected by bias or actuated by malafides; and, as held in **Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd**¹¹, interpretation placed by the authorities on the tender conditions should not be interfered with, save malafides or perversity in understanding or appreciating the documents.

The Learned Single Judge has not examined whether or not the reasons furnished by the appellant in their counter-affidavit, for rejecting the tender of the first respondent-writ petitioner at the prequalification stage, is valid. He has also not considered whether such rejection is arbitrary and unreasonable.

We consider it appropriate, in such circumstances, to set aside the order under appeal and restore the writ petition to file. It is open to both the parties to put forth their submissions before the Learned Single Judge, when the matter is heard afresh, on whether or not the decision of the appellant, to reject the 1st respondent-writ petitioner's tender at the prequalification stage, is so arbitrary and unreasonable as to violate Article 14 of the Constitution of India.

The Writ Appeal is disposed of accordingly. Miscellaneous petitions pending, if any, shall also stand disposed of. There shall be no order as to costs.

(RAMESH RANGANATHAN, ACJ)

(ABHINAND KUMAR SHAVILI, J)

09th November, 2017
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¹¹ 2016 (8) SCALE 765

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