

**THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN
AND
THE HON' BLE SRI JUSTICE GUDISEVA SHYAM PRASAD**

Writ Appeal No.1792 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 of the learned Single Judge in W.P.M.P. Nos. 44585 and 44586 of 2017 in W.P. No. 35879 of 2017 dated 27.10.2017. The respondents in the said Writ Petition are in appeal against the aforesaid order. The respondent herein filed the Writ Petition seeking a mandamus to declare Condition No. iii in para-3 of GO Rt No. 180 dated 19.6.2017 as arbitrary and violative of Articles 14 and 19(1)(g) of the Constitution of India.

Condition No. iii, in para-3 of the GO Rt No. 180 dated 19.6.2017, reads thus:

“For all the works, irrespective of the cost, the bidders may be permitted to either own or lease the said Batch type Hot Mix Plant of 100/120 TPH capacity located within a distance of 100 km, from site of Work and produce the necessary Documents at the time of submission of bid, if the work involves the component of DBM/BC.”

This condition was suspended by the interim order under appeal without the appellants herein being afforded an opportunity to file their counter-affidavit. What appears to have weighed with the learned Single Judge is the submission, urged on behalf of the respondent herein, that the condition, requiring the bidder to own or lease a hot mix plant within 100 kms from the site of the work, was *per se* arbitrary; imposition of such a restriction would deprive the State of getting the best contractors for executing the work; and the State could

always insist on such a condition after the bid is awarded and a contract is entered into.

In the order under appeal, the learned Single Judge observed that it would be absurd to expect other bidders to invest in a hot mix plant, or to take it on lease, without knowing whether or not the bidder would get the contract; owning or leasing a hot mix plant could be made a condition of the contract, after it was awarded to a bidder; insisting on owning or leasing of the same within 100 km from the site of the work, at the time of submission of the bid, would practically confine bidders to the local area depriving the State from getting the best possible contractors for execution of the work; the contention, urged on behalf of the appellants, that after the contract is awarded to a bidder, if the bidder does not start the work utilizing a hot mix plant within 100 kms from the site of the work, the project would be delayed was not tenable as it was always open to the State to cancel the award of tender to that bidder, and give it to the next bidder.

The scope of interference in judicial review proceedings under Article 226 of the Constitution of India, on a challenge to the imposition of conditions for participation in the tender process, is extremely limited as the State, which awards the work, would be the best of its requirements. 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 would not be justified. **(M/s. Michigan Rubber (I) Ltd. v. State of Karnataka¹; CSR Infratech India Pvt Ltd v. Government of A.P²).**

¹ Judgment of the Supreme Court in Civil Appeal No.5898 of 2012 dated 17.08.2012

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**³). 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 shown, there is little scope for interference with the view taken by the authorities in inviting tenders. (**Reliance Airport Developers (P) Ltd. v. Airports Authority of India**⁴; **Siemens Public Communication Networks (P) Ltd. v. Union of India**⁵).

In **B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.**,⁶, 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;

² (2014) 4 ALD 652

³ (2000) 2 SCC 617

⁴ (2006) 10 SCC 1

⁵ (2008) 16 SCC 215

⁶ (2006) 11 SCC 548

- (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).

Interference in judicial review proceedings is permissible only when the process adopted or decision made by the authorities are *mala fide*, or is intended to favour someone, and in case where the process adopted or decision made is so arbitrary and irrational that the Court can say that the decision is such that no responsible authority acting reasonably, and in accordance with the relevant law, could have arrived at such a decision. (**Michigan Rubber (India) Limited vs. State of Karnataka and Others**⁷)

Sri G. Rama Gopal, learned counsel for the respondent-writ petitioner, would submit that the condition prescribed in the Circular is *mala fide*; it is tailor made to suit bidders executing works in close proximity to the subject work; and expecting the bidder to keep a hot mix plant ready for use, even without knowing whether or not he would be awarded the work, is unreasonable and violative of Article 14 of the Constitution of India.

While it may not be proper for us to express any opinion on the merits of submission of the learned counsel for the respondent-writ petitioner, as the Writ Petition is still pending on the file of the learned Single Judge, suffice it to hold that in the absence of the person, against whom *malice* is alleged, being arrayed as a respondent *eo-nominee*, this court would, ordinarily, not examine such a plea. (**State of Bihar vs. P.P. Sharma**⁸). In any event, the learned Single Judge has not interfered with the condition, stipulated in the Government Order, on this score.

⁷ (2012) 8 Supreme Court Cases 216

⁸ AIR 1991 SC 1260

With regards the contention that this condition has been stipulated to suit the contractors executing works nearby, Learned Government Pleader for Transport would submit, not without justification, that it is not as if this condition has been prescribed for the first time for the subject work; the condition, that a hot mix plant should be owned and kept for use in proximity of 50 kms of the Work Site, was under challenge in W.P. No.25424 of 1999, which was dismissed by a Division Bench of this Court by its order dated 21.12.1999; a challenge to a similar condition was also repelled by this Court by its order in W.P. No. 11704 of 2001 dated 11.2.2002; and the contention that the condition was made to suit the requirements of tenderers, executing such contracts in proximity to the subject work, is therefore not tenable.

A reading of the aforesaid two judgments does appear to support the submission of the Learned Government Pleader. *Prima facie*, it does appear that such a condition has not been introduced for the first time for the present work, and similar conditions have been in vogue for the past nearly two decades. In any event, the appellants-respondents are entitled to justify imposition of such a condition by filing a counter-affidavit. As the burden to establish arbitrariness, and violation of Article 14 of the Constitution of India, lies heavily on the respondent-writ petitioner, and it is always open to the State to place necessary material before the learned Single Judge to explain the reasons why such a condition was imposed (**State of Jammu and Kashmir vs. T.N. Khosa**⁹), passing an interim order, which in effect amounts to allowing the Writ Petition itself, may not be justified.

The learned Single Judge, has, by the order under appeal, not only suspended the condition stipulated in the Circular, but has also

⁹ AIR 1974 SC Page 1

permitted the respondent-writ petitioner to participate in the process of tender though he did not fulfil the condition stipulated in Para-3 of GO Rt No.180 dated 19.6.2017. The relief, of participation in the tender process, could have been granted only after the tender condition, aforementioned, is set aside. Such a direction, at the admission stage even before the appellants-respondents could file a counter-affidavit, is, in our view, an error which necessitates interference in proceedings under Clause 15 of the Letters Patent. The order under appeal is set aside, and the Writ Appeal is allowed.

Suffice it to make it clear that award of the work shall be subject to further orders in the Writ Petition. The appellants shall file their counter-affidavit in the Writ Petition within two weeks from today. It is open to the respondent-writ petitioner to request the learned Single Judge to take up the Writ petition any time after two weeks. It is also made clear that the observations in this order reflect only our prima facie opinion; and the Writ Petition shall be heard on its merits without being influenced by the observation made herein.

Miscellaneous Petitions pending, if any, shall also stand closed. There shall be no order as to costs.

(RAMESH RANGANATHAN, ACJ)

(GUDISEVA SHYAM PRASAD, J)

29th November, 2017

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