

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.11911 of 2018

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247 Facility Services Pvt. Limited, No. 216/20, 6th Cross, 60 Feet Road, 1st Stage, Indra Nagar, Bangaluru - 560038 (Karnataka) through its Local Officer and Authorized Signatory Sri Anil Kumar son of Sri R.M. Mehta resident of Village/Mohalla - Musallahpur, P.O. - Mahendru, P.S. - Kadamkuan, District - Patna, Pin Code - 800006 (Bihar).

... .. Petitioner/s

Versus

1. State Bank of India having its Local Head Office at West Gandhi Maidan, Patna - 800001 through its Chief General Manager.
2. Chief General Manager, State Bank of India, Local Head Office, West Gandhi Maidan, Patna - 800001.
3. Circle Security Officer, State Bank of India, Circle Security Department, Local Head Office, 1st Floor, West Gandhi Maidan, Patna - 800001.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Raju Giri, Advocate
		Mr. Santosh Kumar Mishra, Advocate
For the Respondent/s	:	Mr. Sanjeev Kumar, Advocate

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CORAM: HONOURABLE JUSTICE SMT. NILU AGRAWAL
C.A.V. JUDGMENT

Date : 31-07-2018

Heard Mr. Raju Giri, counsel for the petitioner and Mr.

Sanjeev Kumar, counsel for the Respondents-State Bank of India.

2. Petitioner seeks quashing of invitation for Expression of Interest(EOI) dated 25.05.2018 issued by the respondents-State Bank of India, Patna Circle for preparation of panel of contractors/firms/ companies(service providers) for hiring of security agencies for providing guards for ATMs and offices of the Bank located in the State of Bihar and Jharkhand, as contained in Annexure-1.



3. Petitioner also challenges certain clauses of Expression of Interest invited by the respondent-Bank as making them mandatory i.e.

(a) The service provider should be registered with the competent authority of the State Government under Private Security Agencies (Regulation) Act, 2005 (hereafter referred to as the PSARA Act) in the State of Bihar and Jharkhand both.

(b) The service provider should have its registered well established office in Bihar and Jharkhand both.

4. The petitioner is a Company registered in India under the Companies Act, 1956 and had a long experience to work as service provider care taker for hiring of security agencies for guards to ATMs and offices of the State Bank of India.

5. The short facts giving rise to the present writ application is that an Expression of Interest was invited by the State Bank of India, Patna Circle to prepare a panel of reputed, reliable and experienced contractors/ firms/ companies (service providers) for hiring of security agencies for providing guards for ATMs and offices of the Bank located in the State of Bihar and Jharkhand. The applicants, who complied with the statutory requirements under PSARA Act and satisfied the eligibility



criteria as per Annexure-1 of the Expression of Interest, were required to respond.

6. Petitioner being aggrieved by certain clauses of the Expression of Interest as contained in Annexure-1 represented before respondent no. 3 vide letter dated 4.6.2018 for removal of clause to have PSARA Licence and local registered office for participation in the tender as they were service providers having an all India registration and as service providers would hire security agencies.

7. Petitioner, at the outset, submits that the Expression of Interest was an invitation to the service providers for hiring of security agencies for providing guards and such service providers would not be essentially security agencies whom they as service providers would have hired, as such, clause (b) and (f) of the eligibility criteria as per Annexure-1 of the Expression of Interest is discriminatory and violative of Article 14 of the Constitution of India and the invitation to tender is tailor made to suit a person or a class of persons with a view to eliminate the petitioner from participating in the bidding process. Clause (b) and (f) of the eligibility criteria is extracted hereinbelow :

“b. The Service Provider should be registered with the competent authority of



the State Govt. under Private Security Agencies(Regulation) Act 2005 in the state of Bihar & Jharkhand both.(Registration in both states is a must for eligibility for tender).

f. The Service Provider should have its registered/ well established office in Bihar & Jharkhand both states.”

8. Petitioner contends that the tender for appointment of caretaker agencies for caretaker services by the Respondent-Bank for Hyderabad, New Delhi and Assam, which is Annexure-2 series, does not mandate Clause (b) and (f) as the eligibility criteria, although, the scope and nature of work of both the caretakers and security guards are same. The tender notice of Hyderabad, New Delhi and Assam in relation to caretakers and the present tender contained the same clauses, which is Clause 2 Annexure-3(Annexure-1 of the writ application) of the present Expression of Interest and Clause 2 of the scope of work as per Annexure-7 of the tender document of Assam so far as the scope of work is concerned. He submits that the scope of work of service provider hiring security agencies for providing guards is the same as that of a caretaker i.e. he shall not carry any fire-arms either on his person or keep the same in the site, shows that the nature of work is of that by care taker and since the petitioner would be a service provider,



hiring the security agencies, the inclusion of mandatory provision of PSARA Licence would be highly discriminatory only to provide benefit to specified security agencies for extraneous considerations and would be violative of principles of natural justice and Articles 14, 19(1)(g) and 301 of the Constitution of India. He further submits that the arbitration clause in the Expression of Interest is also not in consonance with Section 12(5) of the Arbitration and Conciliation Act, 1996, although, this is not part of the relief prayed by the petitioner.

9. As per Section 4 of the PSARA Act no person shall carry on or commence the business to provide security agencies unless he holds a licence issued under this Act and the petitioner not being a security agency, but an eligible service provider, would not be required to comply with the statutory requirement of Section 4 of the PSARA Act. On these grounds of the stringent restrictions imposed as per eligibility criteria (b) and (f) of mandatory registration under PSARA Act, the petitioner has sought quashing of Expression of Interest dated 25.05.2018.

10. To enforce his arguments petitioner relies on paragraphs 26 and 27 of the decision rendered by the Hon'ble



Supreme Court in the case of ***Meerut Development Authority vs. Association of Management Studies and another*** since reported in ***(2009) 6 SCC 171***, which is extracted hereinbelow :

“26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.

27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the abovestated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and



conditions of notice so provided for such negotiations.”

11. Thus, he submits that the Expression of Interest has not been floated with a fair and transparent intention and suffers from bias.

12. Learned counsel for the Bank has filed counter affidavit challenging the maintainability of the writ application on the ground that the petitioner is not entitled to challenge the policy decision of the respondent-Bank to invite Expression of Interest for preparation of panel of service providers consisting of security agencies for providing security guards for ATMs and offices of the Bank located in the State of Bihar and Jharkhand. He submits that Annexure-2 series are invitation for Expression of Interest for care take services of Hyderabad, New Delhi and Assam for ATMs sites but the present Expression of Interest is for hiring of security agencies and that service providers would be the security agencies eligible for participation in the said Expression of Interest. There is a difference in persons engaged as caretaker and security guard and that mandatory requirements of licence under PSARA Act have been mandated earlier also in earlier Expression of Interest by the Bank, which is Annexure-R/1, R/2 and R/3 of the counter affidavit. He further submits that the eligibility criteria (Clause-(f)) has been



clarified to be a service provider should have its registered office in the State of Bihar and Jharkhand Or a well established office within the State of Bihar and Jharkhand (emphasis mine) and does not require that he should have a registered and well established office in the two sites. It is also submitted that the proposal for hiring care taker agencies for care taker services, Annexure-2 series of the writ application was as per the need of the respondent-Bank and the present Expression of Interest is the policy decision of the Bank to avail the services of security guards. He contends that the activities of the Government and its instrumentalities have a public element and the terms of the invitation to tender cannot be opened to judicial scrutiny. The same principles have been deduced in the judgment of the Hon'ble Apex Court in the case of ***Tata Cellulor Vs. Union of India*** since reported in ***(1994) 6 SCC 651***, paragraph 94 which is extracted hereinbelow :

“94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own



decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.”

13. He further refers to the case of ***State of Orissa and others vs. Gopinath Dash and others***, since reported in ***(2005)13 SCC 495***, paragraph 5, 6 and 7 that in judicial review Constitution does not permit the Court to direct or advice the executive in the manner of policy. Paragraphs 5, 6 and 7 is extracted hereinbelow :

“5. While exercising the power of judicial review of administrative action, the Court is not the Appellate Authority and the



Constitution does not permit the Court to direct or advise the executive in the matter of policy or to sermonise qua any matter which under the Constitution lies within the sphere of the legislature or the executive, provided these authorities do not transgress their constitutional limits or statutory power. (See Asif Hameed v. State of J&K and Shri Sitaram Sugar Co. Ltd. v. Union of India). The scope of judicial enquiry is confined to the question whether the decision taken by the Government is against any statutory provisions or it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution. Thus, the position is that even if the decision taken by the Government does not appear to be agreeable to the Court, it cannot interfere.

6. The correctness of the reasons which prompted the Government in decision-making taking one course of action instead of another is not a matter of concern in judicial review and the Court is not the appropriate forum for such investigation.

7. The policy decision must be left to the Government as it alone can adopt which policy should be adopted after considering all the points from different angles. In the matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown the courts will have no occasion to interfere and the Court will not and should not substitute its own judgment for the judgment of the executive in such matters. In assessing the propriety of a decision of the Government the Court



cannot interfere even if a second view is possible from that of the Government.

14. He also relies on the decision rendered in the case of ***Michigan Rubber (India) Limited vs. State of Karnataka and others*** since reported in **(2012) 8 SCC 216**, paragraphs 23, 24 and 35, which is extracted hereinbelow :

“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 of 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.

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

35. As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonable. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy



the eligibility criteria should be permitted to participate in the tender. As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, CMG consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail and for specifying these two conditions regarding pre-qualification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide.”

15. It is submitted that the process adopted or decision taken by the Bank and the notice inviting Expression of Interest is as per the policy decision and requirement of the Bank, which is neither arbitrary or irrational since security agencies are to be hired for providing security guards. The mandatory provisions of the PSARA Act has to be followed and no interference is warranted under Article 226 of the



Constitution of India writ being not maintainable. He further brings to the notice of this Court that 24 bidders have participated from all over India in a healthy and competitive atmosphere and selection process is also in progress.

16. Learned counsel for the petitioner, however, in reply submits that the case of Tata Cellular (supra) is with regard to decision making of the Government, case of State of Orissa Vs. Gopinath Dash(supra) is regarding Government policy and the case of Michigan Rubber(India) Limited (supra) is about fair play, which are not applicable in the present case.

17. Having gone through the detailed averments and also considering the rival submissions, I do not find that the Expression of Interest is malafide or intended to favour someone and the eligibility criteria arbitrary and irrational.

18. Writ application is dismissed.

(Nilu Agrawal, J)

Rajesh/

AFR/NAFR	AFR
CAV DATE	25.07.2018
Uploading Date	31. 07.2018
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