

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 5542 OF 2018

1. Electrical Contractors Association
of Maharashtra, (Ahmednagar Region)
Ahmednagar, through its Chairman,
Shri Umesh Chandrakant Rekhe,
Age : 47 Years, Occu. : Business,
R/o 4-4-29, Rama Nivas, Sub Jail
Chowk, Ahmednagar.
2. Builder's Association of India,
Ahmednagar Center,
Through its Secretary,
Shri Milind Mhatarba Vaykar,
Age : 47 Years, Occu. : Business,
R/o Subhash Colony, J-9, Shivneri
Chowk, Ahmednagar,
Tq. & Dist. Ahmednagar. .. Petitioners

Versus

1. Union of India
Through its Secretary,
Indian Railway, New Delhi.
2. The Chief Administrative Officer,
(Construction) Central Railway,
Mumbai, 6th Floor, Administrative
Building, C.S.T., Mumbai – 1. .. Respondents

Shri P. M. Shah, Senior Counsel i/by Shri D. S. Bagul, Advocate
for Petitioners.

Shri Manish N. Navandar, Advocate for Respondent Nos. 1 and
2.

**CORAM : S. V. GANGAPURWALA AND
SUNIL K. KOTWAL, JJ.**

Closed for Judgement on : 26.07.2018

Judgment Pronounced on : 24.08.2018

JUDGMENT (Per S. V. Gangapurwala, J.) :-

. The petitioners have assailed the tender notice dated 14.05.2018 issued by the respondent No. 2 for Daund – Manmad doubling project. As per the tender notices the work of Daund – Manmad doubling project is divided into four parts. As such issued four different composite tenders. The total cost of the tender work is Rs. 423.4 crores. The work includes (1) Earth work, (2) Bridge work, (3) Blanketing and supply of ballast and (4) S and T utility and shifting and telecom portion. The work is named as earth work in embankment, cutting and bridge approaches, construction of retaining wall, side drains and construction of minor bridges, railway under bridges, supply of ballast, shifting of S and T utility, shifting/dismantling of structure of insuring safety of the existing running line, cable, OHE, etc. Daund – Manmand doubling project.

2. The eligibility condition in Clause No. 4.1.1 is, “as regards similar nature of work shall mean 'any work involving earth work information for railway/highway/road/airport runway/dam/canal with or without construction of bridge/culvert/canal structures.”

3. Mr. P. M. Shah, the learned senior counsel for petitioners submits that, tenders issued are composite tenders. Clause 4.1.1 of the tender notice restricts the competition from other eligible tenderers. The contractor having experience of any work involving earth work formations are only entitled to participate in the tender process. The electrical contractors, though they have valid licenses and the members of the Builders Association who are having vast experience in supply of ballast are debarred from participating in the tender process. The petitioner No. 1 is an association of Electrical Contractors and the petitioner No. 2 is a Builder's Association.

4. The learned senior counsel further submits that, under the present composite tender notices, the supply of ballast is more than Rs. 51.29 Crores. The supply of ballast is a part of tender document. Schedule 5-A, 5-NS items under the head blanketing and supply of ballast gives details with regard to blanketing and supply of ballast.

5. The technical eligibility criteria provided under clause 65.16.1(b) (i) and (ii) of the tender document provides that, "in case of composite work (Work involving more than one distinct component, such as Civil Engineering Work, S & T Utility, Electrical Work, OHE etc in case of major bridges – Structure, super structure, etc.), for each component, at least 35% of the

value of any of such components individually for single similar nature of work should have been satisfactorily completed by the J.V. firm or by any member of the J. V. firm in the previous three financial years and the current financial year upto the date of opening of the tender. The member satisfying Technical Eligibility criteria for the largest component of the work shall be the lead member and that member shall have majority (at least 51%) share of interest in the J.V. firm.” Clause 65.16.1 (b) (ii) provides that, “in such cases what constitutes a company in the composite work shall be clearly predefined with estimated tender cost of it, as part of the tender documents without any ambiguity. Any work or set of work shall be considered to be a separate component only when the cost of the component is more than 2 crore each”. According to the learned senior counsel, though the joint venture is permissible, the lead member would only be the one satisfying the criteria for the largest component of the work, which naturally would be earth work. The petitioners would never be in a position to individually fill in the tender.

6. The learned senior counsel further submits that, at the same time tenders are also issued for Pune – Miraj doubling project. The separate tender is issued for electrical work and separate tender for earth work and construction of bridges and separate composite tenders for track linking, which includes supply of ballast. The learned senior counsel submits that, objection was raised on 04.06.2018 to the tender notice thereby

clearly bringing it to the notice of respondents that, special technical criteria has been made applicable for tenders of Daund – Manmad project, whereas it is not applicable in tenders for Pune – Miraj project. The nature of the work of tenders in Pune – Miraj doubling line is related to track linking, which has the component of track linking, ballast supply, flash butt and alumni termite welding. These are considered specialized work and tenders are floated separately for these works. The eligibility criteria (Technical) is track linking work. If the tenderer has executed track linking work, he shall be eligible for ballast supply, flash butt welding and AT welding works. In the present case for ballast supply, same needs to have quarry, crusher and it requires many statutory clearances from the State Government Departments. The ballast supply contractors will become sub contractors and it will inflate the rates. All rules, regulations and machinery set up is different for ballast supply work. The original ballast supplier contractors are unable to quote for all these tenders and have to become sub-contractor in these projects. It will increase the rate of ballast eventually and would result in loss of railway/public money. Pursuant to the objection of petitioners, the eligibility criteria condition has been deleted in the tender notice published for doubling of Pune – Miraj Project and inserted suitable conditions to all the ballast suppliers. Even the respondent No. 1 while constructing Ahmednagar – Beed – Parali project issued separate tenders for supply of ballast from the contractors.

7. The learned senior counsel further submits that, the authorities are acting as per their whims. In the present case, composite tenders are issued for four different types of works and on the other hand issued separate tenders for transportation. For the same nature of work the tenders published for Pune – Miraj Doubling project, the eligibility conditions have been relaxed and changed after the objection is taken. Whereas, in the present tender, the eligibility condition does not allow, the ballast contractors to bid individually and they can only remain the sub contractors and will always be at the mercy of the lead member in case of joint venture.

8. The learned senior counsel further submits that, the respondents have not adhered to the concept, “level playing field”. Restrictive eligibility condition in the tenders are unreasonable. The respondents are expected to adhere to same terms and conditions in the State and cannot be permitted to prescribe different conditions for the same work via different tenders. The learned senior counsel relies on the judgment of the Division Bench of this Court in a case of **M/s K. K. Vidyut, Ahmednagar Vs. The Union of India and others** in ***Writ Petition No. 10696 of 2014*** with other connected writ petitions decided on **29th January, 2015**. The learned senior counsel also relies on the judgment of the Division Bench of this Court in a case of **Aurangabad Electrical Contractors Association**

Aurangabad and others Vs. State of Maharashtra reported in (2015) 1 Mh. L. J. 182.

9. The entire discretion is conferred upon the civil contractors to choose electrical contractor for entering into joint venture or for appointment of special contractors for getting electrical work of the project executed through him. Such an action is illegal, discriminatory, unreasonable.

10. The learned senior counsel further submits that, the composite tenders be quashed and set aside or in the alternative the respondents be directed to adopt the same terms and conditions adopted by the office of the respondent No. 2 under corrigendum dated 06.07.2018 published in connection with Pune – Miraj doubling project.

11. Mr. Navandar, the learned counsel for respondents submits that, the tenders published by the railway administration and assailed by the petitioners are not composite tenders. No electrical work is involved in the tender. The work is of civil nature. More than 99% of work in the tender is of civil work nature. The petitioners had made representation on 04.06.2018 and at that time the petitioners were explained that, the tenders are not composite consisting of electric works and civil work. It is clarified that, the work includes shifting of signal and telecom cables that is S and T portion merely to the

extent of only 0.20% to 0.35%. The learned counsel further submits that, joint ventures are allowed in these tenders. These tenders had opening date of 12.06.2018. The present petition is after thought and is filed just five days prior to the opening of tender, after finding that, its members would not find place in the joint venture to bid. The learned advocate further submits that, after civil work for doubling of Daund – Manmad is nearly completed, the electrical department of railway may start limited electrical work, such as electrification of platforms, new OHE line, traction, substation, power station, etc. and may publish tenders according to their requirements at appropriate time and at that time all the members of the petitioner No. 1 can participate in such tenders involving electrical works provided they fulfill pre-qualification terms and conditions of such tenders.

12. The learned advocate further submits that, earth work and minor bridges are normally done simultaneously by civil contractors, which gives good continuity for both earth work as well as minor bridge work. The earth work, blanketing, supply of ballast is civil work and normally done by civil contractors. The activities relating to crusher and its by-products are required for tender work. In earth work many times plenty of material involved are quarry products. The stone aggregates for concrete and bridges and ballast are also quarry products. Considering all these in mind, the tender has been issued. The

tender inviting authority has to plan and execute the tender work and all aspects have been taken into consideration. It is not possible to separate these work, as it could mess up the work in the event of poor coordination between different contractors. The project is of national importance and has to be executed in time. The tender is open for joint venture firms and contractors. The members of the petitioners could form joint venture and could have participated in the tender.

13. The learned counsel further submits that, the proportion of supply of ballast varies from 4% to 12.5%. All major works are civil works including supply of ballast. There is no favouritism to a specific class of contractor.

14. The learned counsel submits that, the work of Pune – Miraj line is totally different. It is a Pway work that is permanent work of track/line. Pway contractors are different. The ballast supply and Pway work are civil works. The said work has nothing to do with the work involved in the present tender. Both the works cannot be equated. As such no question arises of discrimination. The railway administration has acted fairly and in public interest.

15. The learned counsel further submits that, thirteen bidders have participated. Out of these thirteen bidders, seven are joint ventures and six are non joint ventures. The ones who cannot

form joint ventures have approached this Court. They cannot obstruct the developmental work. The learned counsel submits that, the terms and conditions being reasonable, in accordance with nature of work has properly framed the eligibility conditions.

16. Mr. Navandar, the learned counsel further submits that, this Court would not have territorial jurisdiction to entertain the present petition. The work involved in the tender for a route of Daund – Manmad would come with the jurisdiction of the Principal Seat at Bombay. It is further submitted that, as per the clause in the tender the Court at Mumbai alone would have jurisdiction to entertain any dispute.

17. Mr. P. M. Shah, the learned senior counsel submits that, the jurisdiction of this Court under Article 226 of the Constitution of India cannot be curtailed by an agreement. The learned senior counsel relies on the judgment of the Division Bench of this Court in a case of **M/s S. K. Transline Pvt. Ltd. Vs. The State of Maharashtra and others** in **Writ Petition No. 14847 of 2017 dated 16.01.2018**. The learned senior counsel further submits that, even otherwise 90% of work under the tender is in Ahmednagar district, which is within the territorial jurisdiction of this Court.

18. We have considered the submissions canvassed by the

learned counsel for respective parties.

19. In a case of M/s S. K. Transline Pvt. Ltd. Vs. The State of Maharashtra and others (supra) to which one of us (S. V. Gangapurwala, J.) was a party had observed that, jurisdiction of this Court under Article 226 of the Constitution of India is sacrosanct. It is an extraordinary jurisdiction. The jurisdiction under Article 226 of the Constitution of India cannot be circumvented and circumscribed by an agreement. So also 90% of the work even as per the tender notice is within Ahmednagar district. This Court has territorial jurisdiction with regard to the disputes arising within jurisdiction of Ahmednagar district. It is also clarified by the petitioners and clause in the agreement also prescribes that the Deputy Chief Engineer Structure Ahmednagar is competent authority for execution of agreement.

20. In view of the above, this Court can exercise territorial jurisdiction in entertaining the present petition.

21. As far as objection of the petitioner No. 1 to the extent of electrical work is concerned, it has been clarified by respondents that, the electrical work involved in the present case is hardly of 0.20% to 0.35% only. There is no electrical work as such involved and after completion of the civil work, fresh tenders will be issued for electrical work. In view of that, the grievance of the petitioners with regard to non issuance of separate electrical

tender does not deserve any consideration.

22. The other grievance of the petitioners is with regard to ballast work. According to respondents the proportion of supply of ballast is to the extent of 4% to 12.5% of the total work and that the work is predominantly of civil nature. The total work involved is of Rs. 423.4 crores and the supply of ballast is for an amount of Rs. 51.29 crores. The same would be not more than 12.5%.

23. In a case of **M/s K. K. Vidyut, Ahmednagar Vs. The Union of India and others** (*supra*) the Court was considering the different eligibility conditions prescribed by the B.S.N.L. in different districts of the country. It was only in Ahmednagar district the competition was restricted to a specified class having work experience only in telecom sector and that Department of Telecom/BSNL/MTNL or experience with other public sector undertaking (PSU) authorized by DOT or PSU of Government of India or State Government, etc. The Court found that there is absolutely no nexus with the object to be achieved in prescribing restrictive eligibility tender condition. Whereas in other district, such as Nashik experience of similar work of trenching and laying of O.F. cable/O.F. Cable Fault Restoration Work/Trenching and Laying of UG Coper Cable/UG Coper Cable Fault Restoration Work in Units of BSNL/MTNL/DOT or any department or PSU of State/Central Government is sufficient.

For the same nature of work, different eligibility conditions were prescribed in Ahmednagar and in other district. The Court found that there was no reason for restricting the competition only in Ahmednagar district.

24. In the present case, it has been contended that the work of Pune – Miraj doubling line and Daund – Manmad doubling line is not similar. The work of ballast is hardly 12.5%. In a case of Pune – Miraj doubling line the work is of track linking work. The ballast supply was to the extent of 23.77%. The same was a Pway work and it is suggested by respondents that the ballast supply and Pway work are civil works. In the present Daund – Manmad doubling line, it is contended that the nature of work is only civil engineering included supply of ballast. Major work is civil work consisting of earth work and bridge work also.

25. In the matters of tender, the Apex Court in a case of **Tata Cellular Vs. Union of India** reported in (1994) 6 SCC 651 has held that, the principles of judicial review would apply to the exercise of contractual powers by the Government bodies in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of that power of judicial review. It is not for the Court to determine whether a particular policy or a particular decision taken in the fulfillment of that policy is proper. It is only concerned with the manner in which those decisions have been taken. The following principles were

deduced by the Apex Court in the said judgment.

- (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 the 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.

26. The terms of the tender are not open to judicial scrutiny as

same is in the realm of contract.

27. The concept of level playing field as argued by the petitioners would differ from tender to tender and the nature of work to be performed pursuant to the tender. As observed supra in the case of Pune-Miraj doubling line, the ballast supply constituted 23.77% of the work, whereas in the tender on hand, the work of ballast supply is hardly 12.5%. The experts who have laid down the terms and conditions of the tender certainly have freedom to consider the manner in which the work is to be performed and the person suitable to perform the work. The respondents have contended that, earth work and minor bridges are normally done simultaneously by civil contractors which gives good continuity. The earth work, bridge work, blanketing and supply of ballast is a civil work and normally done by civil contractors. The respondents felt that in order to facilitate few suppliers of ballast, if separate tenders were flouted, the timely supply of ballast agreed under a contract may not be ensured and there would be conflict between two contractors and dispute may arise. The work of the bridges would be hampered. The respondents in order to eradicate all disadvantages associated with supply of ballast by separate tenders, such as wastage, supervision/security and expenses thereof and uncertainty of timely supply of ballast so also for efficient execution of tender work clubbed these similar civil work needed for formation of bed for laying tracks and did not issue separate

tenders for ballast. It also has considered the work of ballast is only to the extent of 12.5%. The same cannot be said to be arbitrary or unfair. The joint ventures are permitted. The ballast suppliers can become members of the joint venture. Civil work is of huge magnitude and quantum compared to ballast work, as such the lead member is the one satisfying criteria for the largest component of work which naturally would be the earth work. A person who is proficient in performing the work of only 12.5% as per the tender cannot expect to be lead member of the joint venture, in view of that, the said clause of eligibility to fill in the tender does not appear to be arbitrary or unreasonable and the member satisfying technical eligibility criteria for the largest component of work is the lead member and that member shall have majority of atleast 51%. Considering the facts of the present case, the judgment in the case of **M/s K. K. Vidyut, Ahmednagar Vs. The Union of India and others** (*supra*) would not apply.

28. In light of the above, the writ petition is dismissed. No costs.

[SUNIL K. KOTWAL, J.]

[S. V. GANGAPURWALA, J.]

bsb/July 18

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