

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 10150 OF 2018

Ashok s/o Bhagwat Ingole

Petitioner

Versus

The State of Maharashtra
& others

Respondents

Mr. N.K. Tungar, advocate for petitioner.

Mr. A.B.Girase, G.P. for respondent no. 1.

Mr. D.P. Palodkar, advocate for respondent no. 4.

CORAM : R.M.BORDE &

MANGESH S. PATIL, JJ.

DATE : 6th September, 2018

PER COURT:

1. Heard learned counsel for the respective parties.
2. Petitioner is praying for issuance of writ of mandamus or any other writ or order directing respondents no. 2 and 3 to disqualify respondent no. 4 in the tender process initiated in pursuance to the notice bearing no. 4/2018-19 dated 17.07.2018 published by respondent-State. Petitioner further seeks relief in the nature of direction to respondents to accept the bid offered by him and to issue work order in his favour.
3. Tender notice in question relates to construction of 100 bedded hospital described as MCH WING and DEIC at District Hospital, Beed. The estimated cost of the tender work is Rs. 14,15,49,938/- whereas the earnest money deposit is prescribed at Rs.14,15,499/-. The period of completion of

construction is 24 calendar months from the date of issuance of work order. As per the program declared by respondent-State, online bids were required to be submitted from 11.00 am on 17.07.2018 and the deadline of submission of bids was prescribed upto 13.00 pm on 21.08.2018. Technical bids contained in Envelope No. 1 was opened on 31.08.2018 at 2.24 pm and the summary thereof was uploaded. The financial bids were opened on the same day at 3.52 pm and the summary thereof was uploaded on internet. Petitioner is found to be L-2 bidder i.e. stands at second serial and the offer made by him was for an amount of Rs. 12,72,10,644.28 whereas respondent no. 4 is L-1 bidder who has quoted the lowest rates amounting to Rs. 12,71,82,617.33. Petitioner, after uploading of the financial bids, raised objection touching eligibility of respondent no. 4 who is the lowest bidder, by transmitting an email to the respondents at 7.18 pm on 31.08.2018. According to petitioner, since respondent no. 4 has committed breach of the mandatory requirements of signing each of the document digitally, his financial bid ought not to have been opened and he ought to have been held technically disqualified. Reliance is placed by petitioner on tender condition no. 1.4.21 which reads thus :

1.4.21 All the documents shall be given as per instruction given from Sr. No. 1.4.1 to 1.4.20 and shall be submitted Digitally signed by contractor in Envelope No. 1 correctly and completely otherwise his Envelop No. 2 will not be opened. Even though the Bidder meet the above qualifying criteria, they ar subject to be disqualified if they have made misleading or false representations in the Statements, attachments submitted in proof of the qualification requirements.

Note 5 appended to the aforesaid clause reads "All Scanned copies submitted online and Hard copies should be digitally signed, and clearly Readable, if not then Tender is liable to be Disqualified."

4. Petition is opposed by respondents contending that the petitioner has belatedly objected to the qualification of respondent no. 4 only after opening of the financial bids. It is contended that after realising that petitioner is L-2 i.e. second lowest offerer, he has chosen to object to the tender offer made by respondent no. 4 on the ground of eligibility. It is contended that some of the pages of the tender document furnished by respondent no. 4 bear digital signature however, some pages do not. It is specifically contended that petitioner has not objected the authenticity or correctness of any of the pages appended to the tender document by respondent no. 4 nor has alleged that any of the document is incorrect or fabricated or that respondent no. 4 has furnished a misleading information. It is also contended by respondents that petitioner has not alleged malafides against the employer. It is specifically contended by respondents that out of four bidders, three bidders including petitioner, respondent no.4 and one Sarda Construction were found to be technically qualified. The offer made by respondent no. 4 was found to be the lowest one and as such, the financial bid of respondent no. 4 is accepted. Belated objection raised by petitioner in the absence of allegations of malafides or allegations in respect of authenticity or correctness of the documents furnished by respondent no. 4 need not be entertained.

5. On perusal of the petition, it does appear that the petitioner has emphasised only on the aspect of non-adherence to the tender condition number 1.4.21. It is not contended by petitioner that any of the documents annexed by respondent no. 4 with the tender form is either incorrect or fraudulent or misleading. Petitioner has also not alleged any malafides against respondent no. 4. The bid offered by respondent no. 4 having been found competitive and the lowest one, the same has been accepted by the employer i.e. respondent-authorities. In the absence of allegations of malafides or in the absence of any allegation relating to fabrication of documents or questioning authenticity or correctness of the documents furnished by respondent no. 4, the objection raised by petitioner in the instant petition does not deserve to be considered.

6. It also must be noted that the petitioner has not objected at the stage of opening of the technical bids of the tenderers. It is only after opening of the financial bids and having noticed that respondent no. 4 is the lowest offerer and the petitioner is second lowest, the petitioner has chosen to raise the objection. Belated objection raised by petitioner with a view to take chance shall not be encouraged.

7. The scope of judicial review in the tender matters has been considered by the Hon'ble Supreme Court in the matter of Tata Cellular vs. Union of India reported in **(1994) 6 Supreme Court Cases 651**. As has been observed by the Hon'ble Supreme Court, what is required to be seen is as to whether the State decision/action is in consonance with Article 14 and the decision making process is transparent. The principle of judicial review

would apply in the exercise of contractual powers by Government in order to prevent arbitrariness or favouritism. However, there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances and it is expected to protect the financial interest of the State. In the instant matter, by accepting the lowest offer of respondent no. 4, the respondent-employer has safeguarded the financial interest of the State. The right to choose cannot be considered to be an arbitrary power. However, if the power is exercised for any collateral purpose, the exercise of that power will be struck down. In the instant matter, there are no malafies alleged nor it has been contended that the exercise of power by the respondents is for any collateral purpose or arbitrary. The Hon'ble Supreme Court has observed in the matter of Tata Cellular (supra) in paragraphs no. 77 and 94 as quoted below :-

77. The duty of the court is to confine itself to the question of legality. Its concern should be :

1. Whether a decision making authority exceeded its powers ?
2. committed an error of law.
3. committed a breach of the rules of natural justice.
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can

be classified as under:

(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in *R.V. secretary of State for the Home Department ex Brind*, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention."

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 quasiadministrative 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 an unbudgeted expenditure.

Based on these principles we will examine the facts of this case since they commend to us as the correct principles.

8. In the matter of Asia Foundation and Construction Ltd. vs. Trafalgar House Construction (I) Ltd., **(1997) 1 SCC 738**, it has been observed by the Hon'ble Supreme Court that the judicial review of contractual transactions by Government bodies is permissible to prevent arbitrariness, favouritism or use of power for collateral purposes. There is a need to allow for certain flexibility in administrative decision making. The decision can be challenged only on the Wednesbury principle of unreasonableness i.e. unless the decision is so unreasonable that no sensible person would have arrived at such a decision, it should not be upset.

9. In Jagdish Mandal vs. State of Orissa **(2007) 14 SCC 517**, the Hon'ble Supreme Court held that evaluation of tenders and awarding contracts are essentially commercial functions and if the

decision is bona fide and taken in the public interest, the superior courts should refrain from exercising their power of judicial review.

10. In Afcons Infrastrucutre Ltd. vs. Nagpur Metro Rail Corporation Ltd., **(2016) 16 SCC 818**, it is observed in paragraphs 13 and 15 as quoted below :

"13. a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional court interferes with the decision-making process or the decision.

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to be tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."

11. The Courts dealing with the tender matters while considering the question of acceptance of an offer, shall not substitute its views in place of the views adopted by the employer.

The Courts are not vested with appellate jurisdiction and do not sit in appeal for the decisions rendered by the employer. In the instant matter, it is not alleged by petitioner that the decision-making process by respondents is vitiated on account of arbitrariness or there are any malafides attributable to the respondents. It is also not alleged that the documents furnished by respondent no. 4 are either fabricated or misleading. The interpretation applied by respondents and the decision arrived at cannot be said to be so inherent or improper so as to attract the Wednesbury principle. In these circumstances, to re-consider the decision of respondents-authorities would tantamount to exercise of appellate powers by this Court and it will not be permissible.

12. For the reasons recorded above, no interference is called for in the petition. Petition is devoid of substance hence stands rejected.

MANGESH S. PATIL
JUDGE

R.M.BORDE
JUDGE