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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7894 OF 2018

Sumeet Facilities Ltd. .. Petitioner
Vs.
Central Railways, Pune Division & ors. .. Respondents

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Mr. Mayur Khandeparkar i/by Seoul Shah a/w. Mr. Chaitanya Nikte and Mr. Prasad Sarvankar for the petitioner.
Mr. T.J. Pandian for respondent Nos. 1 to 3.
Mr. Ravish A. Mishra for respondent No.4.

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CORAM : B.R.GAVAI &
M.S. KARNIK, JJ.
DATE : 21st AUGUST, 2018

ORAL JUDGMENT (PER B.R.GAVAI, J.) :-

The petitioner challenges rejection of his technical bid by the respondent - Railways. The respondent–Railways had invited tenders for carrying out work of mechanized cleaning, watering of trains including clearing of depot premises and provision of On Board Housekeeping Services with linen distribution in trains maintained at Coaching Depot, Pune and housekeeping of Coaching Depot, Pune (hereinafter referred to as "tender work" for the sake of brevity). In response to said tender Notice, six bidders including petitioner and respondent

No.4 submitted their bids. The bids of the petitioner as well as four other bids were found to be technically not qualified and as such the respondent No.4 was the sole bidder found to be technically qualified.

2. Since the petitioner was intimated that his bid was not technically qualified, the petitioner has approached this Court questioning the decision of respondent–Railways in holding the petitioner ineligible in the technical bid.

3. Shri Khandeparkar, learned Counsel for the petitioner has made following submissions :

(i) The respondent – railways have failed in taking into consideration the work allotted to the petitioner by Tamilnadu Medical Services Corporation Ltd. which is ongoing project. It is submitted that if the percentage of said work was taken into consideration by Railway Authorities then Railway Authorities would have found that the petitioner possessed requisite necessary experience as required under tender document.

(ii) The financial capacity of the petitioner has been incorrectly assessed by ignoring the un-audited balance-sheet and the accounts for financial year 2017-18. It is submitted that since the accounts for the said year are not yet audited, the statement of the accounts of the petitioner as certified by the C.A. ought to have been considered. Learned Counsel submitted that in any case the requirement of filing of Affidavit as required under tender condition, could not be said to be applicable to the current financial year and has to be applicable only for earlier financial years.

(iii) The act of awarding contract in respect of respondent No.3 is malafide inasmuch as the respondent No.4 had given his bid of 27% higher than the contract value till his bid has been accepted, though after negotiation he has agreed for 3.59% above the contract value.

4. Shri Pandian, learned Counsel for respondent Nos. 1 to 3 – Railways, on the contrary submitted that the tenders of the bidders have undergone scrutiny by a high level technical committee consisting of four senior officers of the Railway

Department. He submits that after considering all the relevant factors the Committee found that the tender of the petitioner was not satisfying the qualifications as required under the tender documents and therefore, after due consideration the petitioner was held to be technically disqualified.

5. We will deal with the last submission of Shri Khandeparkar first. His submission is that the Railway Authorities have acted in malafide manner only to award contract in favour of respondent No.4. If a party alleges 'malice in fact' then the person against whom such an allegation is made is required to be impleaded as party respondent. No doubt that such requirement would not be necessary if a case fits into 'malice in law'. It is not the case of the petitioner that the present case to fall in the category of 'malice in law'. It is their case that the officers of Railway Authorities have acted malafidely so as to favour the respondent No.2. However, neither any of such officers have been impleaded as party respondent nor any specific averments are made in the petition to attribute malice.

6. The law on judicial review of administrative action in tender matters has been very well crystallized by the Apex Court in the case of **TATA Cellular vs. Union of India** reported in **[(1994) 6 SCC 651]**. In paragraph 77 the Apex Court has held as under :

> “ **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.
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> 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.”

7. It can thus be seen, that as held by Their Lordships that the Court can only examine the decision making process of the authority and not the final decision of the decision making authority. The Court can examine only as to whether the decision making authority has understood the law properly and taken the decision fairly and that the decision making process does not suffer from any procedural impropriety. The limited inquiry that is permissible is as to whether the action of the authority can be termed to be arbitrary, irrational or illegal.

8. For appreciating the legal submissions, it will be necessary to refer to the certain conditions of the tender documents. Clause 1.2.2 deals with “Evaluation of the tenders”. Clause (B) provides for “Minimum Eligibility Criteria”. Sub-clause (a) thereof provides for “Work Experience”. Sub-clause (b) thereof provides with regard to “Financial Standing”. It will be relevant to refer to the “Notes” which is appended to Clause (B) of Clause 1.2.2 which reads thus :

<u>“Notes :</u>

Financial data for latest last three audited financial years and current financial year has to be uploaded by the tenderer in Appendix-15 of Form of Tender along with audited balance sheets. The financial data in the prescribed format shall be certified by Chartered Accountant with his stamp and signature. In case audited balance sheet of the last financial year is not made available by the bidder, he has to submit an affidavit certifying that 'the balance sheet has actually not been audited so far”. In such a case the financial data of previous '3' audited financial years will be taken into consideration for evaluation. If audited balance sheet of any other year than the last year is not uploaded, the tender will be considered as non-responsive.”

It will also be relevant to refer to the 'Table' appended to Clause 1.2.2.1 of the said tender documents :

S. No.	Weightage	Technical Criteria	Documentation	Scoring
1	20%	**Previous Work Done** The bidder shall submit documents related to completed/ on-going similar service contracts during the last three previous financial year and the current financial year along with the details of payments received and percentage penalties imposed therein, to classify the completed /on-going similar service contracts in the following categories : 1) Payment received more than or equal	- Certificate from client firm authorizing payment received along with percentage penalties imposed, contract wise for completed/ongoing similar service contracts with satisfactory performance.	Scoring Method: For each completed/on-going similar service contracts with satisfactory performance shall be as under : (a) 100 Marks if 1 project > 80%, 2 projects >50% or 3 or more projects > 40% value completed or underway. (b) 50 Marks if 1 project >50% or 2 projects > 40% value completed or underway. (c) 20 Marks if 1 project > 40% value completed No marks if all

		to 80% or 50% or 49% of the current advertised bid value and percentage penalties imposed therein.		projects < 40% value completed Deduction for Percentage penalty imposed in the respective completed / on-going similar service contracts; The Score of each completed /on-going similar service contracts with satisfactory performance shall be reduced by a percentage equal to the percentage penalty imposed in respective contract. No reduction for percentage penalty less than 5% Contract where percentage penalty is more than 20% shall not be considered for calculation of scores for this purpose.
2	35%	Turnover (in last three and current Financial Year) **(Less than 1.5 times the value of work is not eligible)**	As per audited balance sheet certified by the CA.	(a) 100 marks – More than 25 times advertised value of work (b) 70 marks – 10-25 times advertised value of work (c) 50 marks – 5 -10 times advertised value of work (d) 30 marks-1.5-5 times advertised value of work.
3	20%	Number of years in operations	Company establishment	(a) 100 marks – More than 8 years

		(Firms having less than 1 year of experience are not eligible)	certificate and company's work order copy/ agreement copy / completion certificate etc. as proof of operation. Years shall be counted from the date of agreement of the work.	(b) 80 marks – 5-8 years (c) 60 marks – 2-5 years (d) 40 marks – 1-2 years For JV firms, Numbers of years in operation can be assessed based on the percentage participation of each member subject to condition that after applying percentage participation, each member should necessarily have experience of minimum 1 year.
4	25%	**Size of Workforce** Workforce available with the firm at the time of tendering should be minimum 35% of total requirement of labours in the subject work **Minimum workforce required for this work is about 400 persons per day**	EPFO challan/bank account statement in support of available manpower (duly submitted to EPFO) in respect of the previous four quarters preceding the date of opening of Bid should be submitted in support of their qualification.	(a) 100 Marks if the Bidder's workforce on roll is between greater than 3 times of the total workforce required in this Bid. (b) 70 Marks if workforce on roll is more than 35% of total work force required in this bid and up to 3 times the total workforce required in this Bid. (c) No marks if workforce on roll deployed in less than the 35% of total workforce required in this Bid For JV firms, size of workforce can be arrived by applying percentage

				participation of each member to the average labours (average of quarters) engaged by each member during last three years in operation, however engagement of labours by any member should not be less than 1 year.

9. No doubt that, as submitted by Shri Khandeparkar that on-going project of Tamilnadu Medical Services Corporation Ltd. is also required to be taken into consideration by the authority, while considering the work experience of the petitioner. However, the requirement would show that insofar as on-going projects are concerned, the petitioner is required to submit certificate from his client showing as to how much payment he has received along with percentage and penalties imposed. The condition is equally applicable for completed as well as on-going similar projects. No doubt that the petitioner has submitted documents with regard to the completed project. However, insofar as on-going project which is allotted to the petitioner by Tamilnadu Medical Services Corporation Ltd. is

concerned, undisputedly no such certificate has been placed on record by the petitioner, issued by Tamilnadu Medical Services Corporation Ltd. Shri Khandeparkar submits that, even if such a document was not placed on record by the petitioner, the respondent–Railway Authorities were well aware about the said project being allotted to the petitioner inasmuch as the Railway Authorities have themselves called for the relevant information from the said Tamilnadu Medical Services Corporation Ltd.

10. Insofar as financial bid is concerned, Shri Khandeparkar submits that if the turn over of the petitioner in the financial year 2017-18 is taken into consideration, then the authorities would have arrived at the decision that the petitioner possessed the necessary qualification. However, it is to be noted that the tender conditions specifically requires that wherever the accounts and balance-sheets are not audited, the bidder is required to submit an affidavit certifying that the balance-sheet has actually not been audited so far. Undisputedly, the petitioner has not submitted such an affidavit. It is the

contention of Shri Khandeparkar that such condition is not applicable to current financial year and only to the subsequent financial year. The Apex Court in the recent case of **Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. and another** reported in **[AIR 2016 SC 4305]** has held that the Court would normally not interfere with the interpretation of the tender conditions as imposed by the employer, unless the interpretation is found to be totally perverse.

11. Insofar as the consideration of experience of the petitioner with regard to the work allotted to him by Tamilnadu Medical Services Corporation Ltd. is concerned, perusal of the Minutes of the Meeting would reveal that, the Committee has gone out of the way for considering the claim of the petitioner. The Committee was consisting of Senior DMR, Senior DFM and Senior DEN (Co). The Committee though found that the petitioner had not submitted the certificate from Tamilnadu Medical Services Corporation Ltd. as required under tender documents, nonetheless called for information with regard to

the payment made to the petitioner for completed work. However, the said Tamilnadu Medical Services Corporation Ltd. did not give details and advised the authorities to get details from the Director of Medical and Rural Health Services. The information was again sought from the said Director. The said Director gave details with regard to the payments of bills to the petitioner. However, the Committee found that the petitioner did not meet the required eligibility criteria. It is found that the work allotted to the petitioner by Tamilnadu Medical Services Corporation Ltd. also involved another services apart from housekeeping, therefore, bifurcation was sought from Tamilnadu Medical Services Corporation Ltd. However, Tamilnadu Medical Services Corporation Ltd. did not give bifurcation. The Committee suo moto evaluated the work component in the composite work on pro-rata basis and after undertaking that exercise they came to the conclusion that the petitioner is not qualifying the work experience as required under tender documents.

12. It will not be out of place to mention that solely on the ground of not submitting of certificate of Tamilnadu Medical Services Corporation Ltd. the respondent–Railways could have rejected the technical bid of the petitioner. However, instead throwing away the petitioner on the said ground, the Committee of the Senior Officers of the Railway Authorities called for the necessary information from the Authority for which the petitioner doing work so as to satisfy whether the said work to qualify the petitioner. The Authority acted in a fair manner so as to judge qualification of the petitioner. It cannot be said that the respondents-Railways have taken into consideration the material which is not relevant or failed to take into consideration the material which is relevant for its own decision. We find that the decision making process has been fair, transparent and reasonable. No case is made out to interfere with the decision taken by the respondent–Railways. In this view of the matter, the petition is dismissed.

(M.S. KARNIK, J.) **(B.R.GAVAI, J.)**