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IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CIVIL WRIT PETITION NO.337 OF 2018

Sumeet Facilities Limited

..Petitioner.

V/s.

The Senior Divisional Mechanical Engineer,
Pune Division, Central Railway & Ors.

..Respondents.

Mr.Amit Deshpande i/b. Rajesh Mirchandani for the petitioner.

Mr.T.J.Pandian for respondent Nos.1 to 4.

***CORAM: NARESH H.PATIL AND
NITIN W.SAMBRE, JJ.***

DATE : JANUARY 16, 2018

PC.:- (PER NITIN W.SAMBRE, J.)

The petitioner has approached this Court with the following reliefs :-

“(a) to issue an appropriate Writ, Order or Direction of the same or similar nature under Articles 226 & 227 of the Constitution of India directing the respondents to modify the

eligibility criteria so that the petitioner Company and similar companies can submit their bid and after examining the legality, validity, propriety and correctness of the entire tender process, quash and set aside the criteria;

- (b) That pending the hearing and final disposal of the petition, this Hon'ble Court be pleased to restrain the respondents from going ahead with the Tender Process. ”

2. The petitioner claims to be a limited company registered under the Companies Act, 1956 and is in the business of providing various facility services and allied services for more than 20 years.

3. The respondent-railways floated a tender notice inviting offer for mechanised cleaning of Pune railway station and watering on board house-keeping with linen distribution for trains maintained at coaching depot, Kolhapur. The tenders were in two parts, technical bid and financial bid.

4. Clause (2) of the eligibility criteria of the tender notice reads as under :-

“2. Eligibility Criteria :-

Tenderers have to satisfy the following minimum eligibility criterion:

A. Technical Criteria :- *The Tenderer should have completed at least one similar single work for a minimum value of 35% of advertised Tender Value in last three years (i.e. current financial year & three previous financial years)*

Similar work means

“Mechanised cleaning of coaches in any of the coaching depots of Indian Railways”

OR / AND

“Mechanised en-route cleaning of trains during their stoppage under the 'Clean Train Station' Scheme

OR / AND

Providing 'On board Housekeeping Services on trains.’”

OR / AND

Mechanized cleaning of stations in Indian railways.

B. Financial Criteria:- *Total contract amount received during the last 3 financial years and in the current financial years should be a minimum of 150% of advertised tender value. Tenderer shall submit the documents to this effect in the form of attested certificates from the employer / client, audited balance sheet duly certified by Chartered Accountant, TDS*

certificates or annual income Tax returns filed with Income Tax Department.”

5. Clause (b) of the criteria which the petitioner is objecting, as according to him, the respondents, in illogical and arbitrary manner has set out the tender conditions so as to favour particular contractor and to avoid healthy competition. As such, it is prayed that the tender conditions needs to be relaxed and the parties like present petitioner be permitted to participate by changing the financial criteria. So as to justify the claim for issuing directions for modification of the tender conditions, the learned counsel for the petitioner invited our attention of this Court to the judgment dated June 12, 2009 delivered by the High Court of Patna in C.W.J.C. No.14884 of 2008 and confirmed in an appeal being L.P.A. No.199/2009 on March 30, 2009 so as to claim that based on the said judgment, this Court can order modified conditions so as to facilitate the participation of the petitioner and similar parties in the tender process and till then not to proceed with the tender.

6. The counsel for the respondents-railways submits that

the petition is devoid of merits as allegations made in the petition are vague in nature. According to him, the petitioner has not come up with a specific case as to agency to whom the respondents intends to favour. According to him, prayer clause (a) would reflect that the petitioner is interested in changing the tender conditions for himself and other similarly placed tenderers, who are not before the Court. According to him, the petition needs to be disposed of, as the tenders, the subject matter of this petition, are already opened. As such Respondents seek dismissal of the petition.

7. Considered the rival submissions. It is required to be noted that the scope of judicial review of tender process or tender conditions is very limited and restricted. In contractual matters on the issue of acceptance and / or refusal of the tender, the scope of judicial review is permissible particularly to the extent of arbitrariness and favoritism. The principles of natural justice or equity cannot be read in the process of tender for the purpose of adjudicating the rights of the parties while going into the judicial review of the decision on the tenders.

8. The authorities who float tenders, particularly the Government authorities, are guardians of the public money as they are duty bound to protect the financial interest of the Government. While doing so, though the principles enshrined in Article 14 of the Constitution of India are required to be kept in mind, particularly when the authorities try to get the best of such tenderers. A tendering authority who is vested with the authority of inviting offers/tenders, has every right to choose a qualified person based on his qualifying the terms of the tender.

9. It is required to be appreciated as to whether the terms of the tender could be open to judicial scrutiny because of fixation of certain financial criteria. While appreciating the decision of the tendering authority, particularly having regard to the restricted scope of judicial review, until it is demonstrated that the tender conditions are arbitrary, discriminatory or actuated by malice, the Court cannot interfere by either striking down the conditions or interfering with the decision making process of awarding of tender. Though a Court can exercise its discretionary powers while going for judicial review of the administrative decision in tender

matters, it is expected of this Court to exercise the discretionary powers with care, caution and in the public interest. The choice or decision made by the authorities has to be lawful so as to protect the interest of public at large. Such decision cannot be interfered with merely for the asking. The public interest will always have an upper hand over private interest in contractual matters like that of a tender with which the Court is dealing with. This Court is required to exercise the power of judicial review to find whether the process adopted and decision made is *bona fide* and not intended to favour someone, and whether it is arbitrary and irrational.

10. The aforesaid principles can be borne out from the Judgment of the Apex Court in the case of ¹*Consortium of M/s. Siemens Aktiengesellschaft and Siemens Ltd. V/s. Delhi Metro Rail Corporation & Anr.*

11. In the backdrop of above, if the submissions of the learned counsel for the petitioner are to be evaluated, it is to be found

¹ 200 (2013) Delhi Law Times 651 (DB)

that the petitioner is seeking relaxation of the financial criteria, to which admittedly, he is not satisfying so as to participate in the tender process.

12. Perusal of the tender condition along with the object of the public work to be performed by the tenderer if considered, it is required to be appreciated that it is a service oriented industry. Members of the public and passengers who will be travelling by the railways are required to be provided with mechanised maintainance, maintaining hygiene and cleanliness, etc. What could be noticed from the clause of the tender work is the financial criterias laid down by respondent No.1 for participating in the tender is reasonable and not arbitrary. Perusal of the eligibility criteria cannot be termed to be one intended to favour a particular class of tenderer or party. At least, no such case is made out by the petitioner so as to demonstrate that it is violative of Article 14 of the Constitution of India. The Apex Court in the case of ²*Global Energy Ltd. and Another V/s. Adani Exports Ltd. and others* in paragraph 10 while dealing with a similar situation has observed

² (2005) 4 Supreme Court Cases 435

that the Court has no powers in its limited jurisdiction or judicial scrutiny to change or modify or mild down the tender condition, unless those are discriminatory or actuated by malice. Para 10 of the said judgment reads thus:-

“10. The principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice. This being the position of law, settled by a catena of decisions of this Court, it is rather surprising that the learned Single Judge passed an interim direction on the very first day of admission hearing of the writ petition and allowed the appellants to deposit the earnest money by furnishing a bank guarantee or a bankers' cheque till three days after the actual date of opening of the tender. The order of the learned Single Judge being wholly illegal, was, therefore, rightly set aside by the Division Bench. ”

13. So far as reliance placed by the learned counsel for the petitioner on the judgment of the Patna High Court is concerned, it is required to be noted that the facts of the case of the petitioner cannot be equated with the facts that is decided by the Patna High

Court, which is relied upon. It is to be noted that that Patna High Court in the said matter was dealing with the issue of eligibility whereas in the present case, it is the petitioner who himself is admitting that he is not satisfying the eligibility criteria and rather seeking relaxation of the eligibility criteria.

14. This Court cannot sit in an appeal over the decision of respondent No.1 of framing the tender conditions. At least the jurisdiction vested in this Court under 226 of the Constitution of India does not permit it.

15. In the wake of above, in our opinion, no case for interference in the extra-ordinary jurisdiction is made out. The petition as such fails and is dismissed.

(NITIN W.SAMBRE, J.)

(NARESH H.PATIL, J.)