

DDR

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
WRIT PETITION NO. 1553 OF 2018

Hughes & Hughes Chem Ltd.	.. Petitioner
Vs.	
Union of India & ors.	.. Respondents

.....

Mr. M.M. Sathye along with Mr. S.P. Shinde for the petitioner.
Mr. T.J. Pandian for the respondent Nos.1 and 2.
Mr. Sukanta Karmakar for the respondent No.3.

.....

**CORAM : B.R.GAVAI &
M.S. KARNIK, JJ.**

DATE : 4th OCTOBER, 2018

JUDGMENT (PER M.S.KARNIK, J.) :-

Rule. Rule is made returnable forthwith.

2. Heard by consent of the parties.

3. By filing this Petition under Article 226 of the Constitution of India, the petitioner which is carrying on the business of maintenance and operation of Bio Toilets for Indian Railways, challenges the letter dated 26/10/2017 issued by

respondent No.2 – Railways thereby awarding the tender in favour of respondent No.3. The petitioner has also prayed for quashing the decision of the respondent No.2 and the tender committee to disqualify the petitioner, on the ground of not having fulfilled the eligibility criteria as per clause 2(i)(b) of Part 1A of Terms and Conditions of the Tender Notice No.DRM.Mech.BB.2017.07 dated 24/7/2017. The petitioner also prayed for consequential reliefs.

4. The question that falls for consideration in this petition is as to whether the decision of the respondent No.2 and the tender committee to disqualify the petitioner on the ground of not fulfilling the eligibility criteria as per clause 2(i)(b) of the tender notice is valid or not.

5. Brief facts leading to the filing of the petition can be stated thus :-

The petitioner is a Public Limited Company set up in 1991 with technical collaboration of Hughes & Hughes Ltd. of United Kingdom. The petitioner company is involved in the

business of maintenance and operation of Bio Toilets for Indian Railways.

6. The Respondent No.2 – the Senior Divisional Mechanical Engineer in the office of the Divisional Railway Manager in the Mumbai Division of Central Railway at Mumbai is directly concerned with the work of maintenance of Bio Toilets in the railway coaches. The Respondent No.2 issued Notice Inviting Tenders (NIT) on 24/7/2017 and its first corrigendum dated 9/8/2017 for AMOC of Bio Toilets in coaches of Mumbai Division.

7. Bio toilets are next generation eco-friendly waste management solution, which reduces solid human waste to bio gas and water with the help of bacterial inoculums. The existing Bio toilets are partly maintained by Indian railways themselves and partly by specialized contractors who have core competency in maintaining these bio toilets. It is the petitioner's case that they have been getting work contracts for providing maintenance and operation of Bio toilets in India, in several

Divisions / Zones of Indian Railways from the end of 2014. The petitioner company is recognized as a small scale industry by the District Industries Centre, Mewat, Haryana since 29/7/2015 as a company engaged in the business of maintenance and operation of Bio toilets. The petitioner claims to have successfully completed 26 contracts worth Rs.14.52 Crores and at present 31 contracts worth Rs.53 Crores are under execution. Learned Counsel for the petitioner invited our attention to the Table (Exhibit-P-2) depicting the contracts which the petitioner company has completed till date and those which are under execution.

8. Pursuant to the NIT dated 24/7/2017 the petitioner submitted its bid on 29/8/2017. Four bids were received i.e. from the petitioner ranked as L1, respondent No. 3 ranked as L2, M/s. Banka Biolo Private Limited ranked as L3 and All Services Global Private Limited ranked as L4. The financial bid submitted by the petitioner is lowest. Learned Counsel for the petitioner pointed out that the difference between the lowest bid

submitted by the petitioner and that of the respondent No.3 is of a huge amount of almost of Rs.67 lakhs i.e. 15% of gross offer value of the petitioner. According to the learned Counsel, the petitioner quoted Rs.1,850/- per toilet per year for first year and Rs.2000/- per toilet for the second year totalling to an amount of Rs.5,02,00,000/-. He pointed out that the Respondent No.3 quoted Rs.2,120/- per toilet per year for the first year and Rs.2,250/- per toilet for the second year totalling to an amount of Rs.5,69,40,000/-.

9. According to the petitioner as nothing was heard about award of the contract in favour of the petitioner, on inquiry, the petitioner was informed that they were not fulfilling the criteria under Clause 2(i)(b) of the Terms and Conditions of the Tender Document.

10. Learned Counsel for the petitioner invited our attention to Clause 2(i)(b) of the Terms and Conditions of the Tender Document. Learned Counsel submits that, as the

advertised value of the tender was Rs.5,87,40,000/-, the petitioner was supposed to have experience of having completed the work to the extent of 35% of the said value in a single contract in last three years as per the said Clause, which works out to be around Rs.2,05,59,000/-.

11. Learned Counsel invited our attention to the certificate from Madurai Division of Southern Railway, certifying that the petitioner had completed the work of overall value of Rs.2,13,47,693/- between 1/1/5/2016 to 15/8/2017. Learned Counsel thus contends that the petitioner had completed the work of more than Rs.2,20,00,000/- under a single contract till 29/8/2017, which was much more than what was required under Clause 2(i)(b) of the eligibility terms and conditions. Learned Counsel submits that, the stand of the respondent No.2, that the said certificate cannot be relied upon since the contract in respect of which the said certificate has been issued has not yet been completed is arbitrary and untenable.

12. Learned Counsel for the petitioner was at pains to point out that the requirement as per the said condition was not completion of the contract but completion of work to the extent of the said value. In support of his submission, learned Counsel for the petitioner relied upon the decision of the Hon'ble High Court of Patna dated 22/1/2009, in the case of *M/s. Ajay Kumar Vs. The Indian Railways and ors.* in CWJC No.14884 of 2008. Learned Counsel would therefore submit, that the expression “completed” used in the said clause has to be read to mean “work completed to the extent of the said value” as held by the Hon'ble Patna High Court. Learned Counsel therefore submit that, having regard to the experience which the petitioner has and further in the light of the certificate dated 29/8/2017, which clearly shows that the petitioner has executed the completion of work to the extent of the prescribed value, this is a fit case where the contract be awarded to the petitioner, more so, when the difference of the bid price quoted between the petitioner and the respondent No.3 is almost Rs.67 lakhs.

13. Per contra, learned Counsel for the respondent No.2 – Railways submits that the petitioner is misinterpreting the tender condition No.2(i)(b). Learned Counsel submits, that eligibility condition clearly stipulates that as proof of technical experience / competence, the tenderer should have physically completed at least one similar work for minimum value of 35% of the advertised tender value. He submits that, the Tender Committee while evaluating the tenders considered the bid submitted by the petitioner including the certificate issued by Southern Railway and found that, though the rate quoted by the petitioner was lowest, they were ineligible in technical criteria based on the certificate which was not a completion certificate. In his submission, it is the respondent No.2 and the tender evaluation committee who is best suited to interpret the tender conditions. According to him, the requirement of “physically completed at least one similar work for minimum value of 35% of the advertised tender value” is sufficient to indicate that what is expected of the tenderer was the total value related to the work done in a completed contract.

14. Learned Counsel in support of his submission relied upon the following decisions of the Apex Court :-

i) **Central Coalfields Limited & another vs. SLL – SML (Joint Venture Consortium) & others – (2016) 8 SCC 622.**

ii) **Municipal Corporation, Ujjain & anr. vs. BVG India Limited and others in Civil Appeal No. 3330 of 2018.**

iii) **Consortium of Titagarh Firema Adler S.P.A. - Titagarh Wagons Ltd. vs. Nagpur Metro Rail Corporation Ltd. & anr. (2017) 7 SCC 486.**

iv) **TATA Cellular vs. Union of India –(1994) 6 SCC 651.**

v) **Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd. and another – (2016) 16 SCC 818.**

15. Learned Counsel for the Railways also relied upon the decision of this Court in the case of (i) **Consortium of Titagarh Firema Adler S.P.A. - Titagarh Wagons Ltd. vs. Nagpur Metro Rail Corporation Ltd. & anr. in Writ Petition No. 5818 of 2016 (Nagpur Bench)** and (ii) **BEML Limited vs. Nagpur Metro Rail Corporation Limited (NMRCL) and Ors. in Writ Petition No. 6116 of 2016 (Nagpur Bench).**

16. Learned Counsel for the Railways thus submitted that the respondent No.2 having authored the tender documents, it is the respondent No.2 who is the best person to understand and appreciate its requirements and interpret the documents. He submits that, there is no perversity in the appreciation or in the application of the terms of the tender conditions. He submits that, if according to respondent No.2 the words in the said clause “physically completed similar works” is read to mean in respect of a completed contract, it cannot be said that the interpretation placed by the respondent No.2 is perverse or malafide or intended to favour one of the bidders. He submits that, therefore there is no reason to interfere with the decision of the Railways.

17. Learned Counsel appearing on behalf of the the respondent No.3 has invited our attention to the affidavit filed on behalf of the respondent No.3 and has adopted the stand taken by the respondent No.2. He further submits that the work in respect of the said contract has already started and progressed substantially.

18. Heard learned Counsel for the parties.

19. As indicated earlier the short question that falls for consideration is whether the decision of the Tender Committee to disqualify the petitioner on the ground of not having fulfilled eligibility criteria as per clause 2(i)(b) of the tender notice is valid or not. Clause 2(i)(b) of the terms and conditions of the tender document reads thus :-

“As proof of technical experience/competence, the tenderer(s) should have physically completed at least one similar work for minimum value of 35% of the advertised tender value of work in the qualifying period i.e. current years and three previous financial years (even though the work might have commenced before the qualifying period). Total value of similar nature of work completed during qualifying period and not the payment received within the qualifying period alone shall be considered for the purpose. Similar work implies, “Mechanized cleaning of coaches in Indian Railways or AMOC of Bio-toilets or supply / fitment of bio-toilet in coaches of Indian Railways” Certificates for works executed for private individuals / organization shall not be considered.”

(emphasis supplied)

It can thus be seen that, the requirement of the tender condition is that the tenderer should have physically completed at least one similar work for minimum value of 35% of the advertised tender value of work in the qualifying period. It is pertinent to

note that the eligibility condition further stipulates that it is the total value of similar nature of work completed during the qualifying period and not the payment received within the qualifying period alone shall be considered for the purpose. It is the case of the petitioner that he has completed the work of overall value of Rs.2,13,47,693/- during the qualifying period and thus has completed the work of more than Rs.2,20,00,000/- under the single contract, which was much more than what is required under Clause 2(i)(b) of the eligibility criteria. The Railways on the other hand have interpreted the said clause to mean that it is not the overall value of work done under ongoing contract but the certificate should be in respect of work completed, in other words it should be in respect of a contract fully executed.

20. We are therefore essentially called upon to appreciate the requirement of the tender condition 2(i)(b) and interpret the same. The question is whether it is possible for us to interpret the condition, even if there is any doubt or

ambiguity upon the interpretation as placed by the respondent No.2 with regard to the tender condition. We also need to consider whether the interpretation given by the respondent No.2 to the said clause is perverse or malafide and intended to favour one of the bidders and is it open for us to give our own interpretation to the tender condition.

21. The Apex Court in the case of **TATA Cellular** (*supra*) has observed, that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. However, there are inherent limitations in exercise of that power of judicial review. Government is the guardian for the financial State. It is observed by the Apex Court in paragraph 77 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.

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, Wednesday 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*²⁸, 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".

22. It would also be material to note that the Apex Court in the case of **Municipal Corporation, Ujjain** (*supra*) has held that the modern trend points to judicial restraint in administrative action. The Court does not sit as a Court of Appeal, but merely reviews the manner in which the decision was made. 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. 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 a quasi-administrative sphere. However, the decision must not only be tested by the application of the Wednesbury principle of reasonableness, but must also be free from arbitrariness and not affected by bias or actuated by malafides. The Apex Court further goes on to hold that, the judicial review of administrative action is intended to prevent arbitrariness. The purpose of judicial review of administrative action is to check whether the choice or decision is made lawfully and not to check, whether the choice or decision is sound. If the process adopted or decision made by the authority is not malafide and not intended to favour someone ; if the process adopted or decision made is neither so arbitrary nor irrational that under the facts of the case it can be concluded that no responsible authority acting reasonably and in accordance with relevant law could have reached such a decision ; and if the public interest is not affected, there should be no interference under Article 226. The

Apex Court has thus held, that even when some defect is found in the decision making process, the Court must exercise its discretionary power under Article 226 with great caution and should exercise them only in furtherance of public interest and not merely on the making out of a legal point. It is well settled that the Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should interfere.

23. A profitable reference can be made to the observation of the Apex Court in the case of **Afcons Infrastructure Ltd.** (*supra*) on judicial interference in such matters which read thus :

“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 the tender documents that is not acceptable to the constitutional Courts but that by

itself is not a reason for interfering with the interpretation given.

16. In the present appeals, although there does not appear to be any ambiguity or doubt about the interpretation given by NMRCL to the tender conditions, we are of the view that even if there was such an ambiguity or doubt, the High Court ought to have refrained from giving its own interpretation unless it had come to a clear conclusion that the interpretation given by NMRCL was perverse or mala fide or intended to favour one of the bidders. This was certainly not the case either before the High Court or before this Court.”

24. The Apex Court further observed that when a decision is taken by the concerned authority upon due consideration of the tender documents submitted by all tenderers on their own merits and it is ultimately found that the successful bidder had in fact substantially complied with the purpose and object for which the essential conditions were laid down, the same may not ordinarily be interfered with.

25. The question of interpretation of the tender document had come up for consideration before this Court in the case of **BEML Limited** (*supra*). It would be appropriate to refer to paragraphs 14 and 15 of the said decision which reads thus :-

“14. It could thus be seen that Their Lordships have in unequivocal terms held that this Court should refrain from giving its own interpretation unless it is found that the interpretation given by the employer is perverse, mala fide or intended to favour one of the bidders.

15. It will also be appropriate to refer to the earlier Judgment of the Apex Court in the case of Central Coalfields Limited .vs. SLL - SML (Joint Venture Consortium) reported in 2016 (8) Scale 99, wherein Their Lordships have held thus :-

"**47.** The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in Ramana Dayaram Shetty, the terms of the NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in Tata Cellular there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in Jagdish Mandal followed in Michigan Rubber."

48. Therefore, whether a term of the NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in Ramana Dayaram Shetty. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot. "

26. Coming back to the facts of the present case it is seen that the tender condition is not under challenge. What is sought to be challenged is the interpretation placed by the Railways on the tender condition in Clause 2(i)(b). The Railways have interpreted the words “physically completed” and “similar nature of work completed during the qualifying period” to mean that it is not the value of overall work done under the ongoing contract, but it should be in respect of a completed contract. The respondent No.2 having authored the tender document, it is for the respondent No.2 to understand and appreciate its requirement and interpret the tender document. It is not possible for us to take a different view, as we do not find that there is malafide and perversity in the interpretation or in the application of the terms of the tender condition. As held by the Apex Court even if the interpretation given to the tender document is not acceptable to this Court, that by itself is not a reason for interfering with the interpretation given. In the light of the law laid down by the Hon'ble Apex Court covering this issue, & in view of the authoritative of pronouncement by the

Hon'ble Apex Court, we are not inclined to accept the view taken by the Patna High Court in **M/s. Ajay Kumar** case (*supra*).

27. In our opinion, there does not appear to be any ambiguity or doubt about the interpretation given by the respondent No.2 to the said clause. In our view, even if there was such an ambiguity or doubt, we would still refrain from giving our own interpretation to the tender condition. In the facts of the present case we are unable to come to a clear conclusion that the interpretation given by the respondent No.2 is perverse or malafide or intended to favour one of the bidders.

28. The contention of the learned Counsel for the petitioner that awarding of the tender in favour of the respondent No.2 calls for interference on the ground that the difference in the price bids between the petitioner and the respondent No.3 is almost Rs.67 lakhs, can only be stated to be rejected. Once the petitioner has been held ineligible for award of the contract, it would not be open for him to then contend

that the contract awarded in favour of the respondent No.3 would stand vitiated merely because the bid of the respondent No.3 is higher compared to that of the petitioner.

29. In this view of the matter we find that the interpretation placed by the respondent No.2 of Clause 2(i)(b) cannot be said to be erroneous, leave aside the same being perverse. In the result, we do not find any merit in the petition.

30. The Petition deserves to be dismissed and is accordingly dismissed.

31. Rule is discharged with no order as to costs.

(M.S. KARNIK, J.)

(B.R.GAVAI, J.)