THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE MS JUSTICE J.UMA DEVI

WRIT APPEAL NO.862 OF 2018

JUDGMENT: {Per the Hon'ble the Acting Chief Justice Ramesh Ranganathan}

This appeal, under Clause 15 of the Letters Patent, is preferred by the Telangana State Road Transport Corporation against the order passed by the learned Single Judge in WP.No.31113 of 2016 dated 12.03.2018.

Facts, to the limited extent necessary, are that the appellant invited tenders, for allotment of sweeping and cleaning of the main, Class-A and Class-B Bus Stations, and the maintenance of C Class Bus Stations in Nalgonda Region, on 23.02.2016. Pursuant thereto a letter of acceptance was offered to the successful bidder on 14.03.2016. Aggrieved thereby, the respondent-writ petitioners filed WP.No.8604 of 2016 to declare the action of the respondents in deviating from the essential conditions laid down in the tender notification, as well as the tender schedule issued by the Regional Manager, vide tender notification dated 23.02.2016, and to declare the action of the Regional Manager, in resorting to drawal of lots of the tenderers who did not even fulfil the eligibility criteria of fulfilling the essential conditions in the tender notification as well as the tender schedule, as violative of Article 14 of the Constitution of India. A consequential direction was sought to declare the tender, submitted by respondents 3 and 6, as invalid tender applications; and to direct the Regional Manager not to finalise the tenders by awarding any work to any of the persons who have been picked up in terms of drawal of lots, pursuant to the tender notification dated 23.02.2016, and consider and finalise the tender applications submitted by them and any other eligible tenderers only in terms of the notification dated 23.02.2016. An interim order was passed in WP.No.8604 of 2016 on 04.05.2016, and the Regional Manager was directed to re-examine the entire material filed by respondents 3 and 6, and take a decision afresh. The appellants claim to have undertaken an exercise of review on 05.07.2016 and 22.07.2016, and to have recorded the minutes of such an exercise on 25.07.2016. Pursuant thereto, the most suitable tenderers were issued work allotment orders on 10.07.2016 inviting them to enter into an agreement with the appellant.

Questioning the work allotment orders, issued by the appellants to respondents 4 and 6 in WP.No.8604 of 2016 (respondents 3 and 4 in W.P.No.31113 of 2016), the respondents-writ petitioners herein filed W.P.No.31113 of 2016; and a *status quo* order was passed on 15.09.2016. This order of *status quo* was in force till the Writ Petitions were eventually disposed of by the order under appeal dated 12.03.2018. As a result of the interim orders, in both the Writ Petitions, the appellant has been unable to enter into an agreement with the successful tenderers for the past two years four months ever since 23.02.2016.

During the course of final hearing of both the Writ Petitions, and after having put forth their submissions for some time, the appellant filed an application seeking permission of the Learned Single Judge to withdraw the tender notification, and to issue a notification afresh. This request of the appellant was rejected by the learned Single Judge observing that, when the vacate stay petitions were taken up for consideration, the Counsel had agreed for the final disposal of the Writ Petitions; after the respective submissions were heard the appellant was directed, by order dated 31.01.2018, to produce the record whereby tenders were evaluated; at that stage, I.A.No.1 of 2018 was filed on behalf of the appellant-Corporation stating that they had decided to cancel the entire tender notification due to long lapse of time; it was averred that the period of contract was two years, and such period was over; the entire tender process was completed, the contractors were short listed, and contracts were awarded; all along, the appellant-Corporation had hotly contested the claim of the respondents on eligibility criteria; it had justified its action in processing the tenders of respondents 3 and 4; the matter was extensively argued, and the case was at the state of final disposal; and, therefore, the Court was not inclined to grant leave to the appellant-Corporation.

While Sri G.Vidyasagar, learned Senior Counsel appearing on behalf of the appellant, would submit, placing reliance on the judgments of the Supreme Court in **Maa Binda Express Carrier v. North-East Frontier Railway**[1] and **Rishi Kiran Logistics (P) Ltd v. Kandla Port Trust**[2], that the High Court, in exercise of its jurisdiction under Article 226 of the Constitution of India, is concerned only with the decision making process and not the decision itself; it is only if such a decision making process is held to be vitiated, would the decision taken pursuant thereto be set aside; while illegality in the decision making process may have justified the tender being set aside, the decision whether or not to

[1] **(2014)3 SCC 760**
[2] **(2015)13 SCC 233**

finalise the tenders issued two years earlier, or to invite tenders afresh, is a matter for the appellant Corporation to decide, and not for the Court to impose; the appellant-Corporation was of the view that, since two years had elapsed since the tenders were notified, fresh tender should be invited; the understanding of the learned Single Judge, regarding certain clauses of the agreement, was at variance with the understanding of the Corporation in respect thereto; the appellant was of the view that such ambiguities should be suitably clarified, and a fresh tender notification should be issued; and the appellant-Corporation cannot be denied its right to cancel the present tenders, and issue tenders afresh, more so as similar clauses are prescribed in all tenders issued by the appellant-Corporation throughout the State of Telangana.

On the other hand Sri T.Sudhakar Reddy, learned counsel for the respondents-writ petitioners, would submit that it is only in order to avoid an adjudication of the dispute did the appellants choose to file an application at that stage seeking permission to withdraw the tender notification; the tender conditions stipulate that the period of contract should be for two years from the date on which an agreement is entered into; the two-year period cannot be computed from the date on which tender notification was initially issued; the Learned Single Judge was justified in interpreting the relevant clauses, and in holding that the Corporation had acted contrary thereto; and the respondent-writ petitioners' right, to have an agreement executed in their favour on their being found successful in the tender process, cannot be denied by the appellants by resorting to withdrawal of the tender notification itself.

The clause, which the learned Single Judge has held the appellants to have contravened, is clause (V) of the terms and conditions enclosed along with the tender. The said clause reads as under:-

> "For evaluating experience, relevant certificates issued by TSRTC/APSRTC or any other organisation, viz. Railways, Airports, IT Companies etc. shall be insisted as mentioned hereunder:
>
> (i) Major & a Class Bus Stations : Last 3 years
>
> (ii) B class Bus Stations : Last 2 years"

While the respondent-writ petitioners contended, before the learned Single Judge, that such of those tenderers, who did not submit certificates of experience for the last three years, were ineligible to participate in the bid, the contention, urged on behalf of the appellant-Corporation, was that insistence on such certificates is only for evaluating their experience, and did not disable even those who lacked the experience, of having executed such works in the prescribed organisations during the last three years, from participating in the tender process.

Reliance is placed by the appellants, on the qualifying parameters stipulated in the tender notification, which read as under:-

> **<u>QUALIFYING PARAMETERS:</u>**
>
> (I) LENGTH OF PERIOD IN THE RELATED FIELD FROM THE DATE OF REGISTRATION OF THE SSO TO TILL DATE.
>
> MARKS FOR EACH YEAR. 5
>
> MAX. MARKS. 35
>
> (II) No. of Organisations (only airports, Railway stations, Hospitals, IT companies and APSRTC Bus stations) in which they have rendered/are rendering services at present.

Marks for each Organisation.	10
Max. Marks.	30

In respect of Railways and APSRTC, if the SSO is rendering its services in more than one (1) Railway Station/Bus station, all of them shall be treated as a single organisation

(III) Nativity

The SSOs who are registered locally would be given preference rather than SSOs representing from other states Non-local areas.

(a) within mandal	35
(b) within District	30
(c) within State	25
(d) outside the State	10

The maximum marks for locally registered SSOs are 35

(IV) Each SSO shall get a minimum of 40 marks to be qualified in the tenders for further commercial offer evaluation. The SSO which is qualifed and quotes the lowest remuneration will be awarded the bus station sweeping and cleaning contract."

The submission of Sri G.Vidyasagar, learned Senior Counsel appearing on behalf of the appellant, is that Clause (IV) requires each tenderer to secure a minimum of 40 marks for their tender to qualify for further commercial offer evaluation; it is only those tenderers who secure the minimum 40 marks whose commercial offer (financial bid) would be evaluated; and the tenderer, who quotes the lowest remuneration, would be awarded the sweeping and cleaning contract in the bus station. Learned Senior Counsel would submit that the length of period in the related field, from the date of registration till date, has been allotted five marks for each year, and the maximum marks under this head is 35; the marks prescribed regarding the number of organisations, (i.e. only airports, railway stations, hospitals, IT companies and APSRTC bus stations in which they have rendered services at present), is 10 marks for each organisations, subject to a maximum marks of 30; and in respect of railways and APSRTC, if the tenderer has been rendering service in more than one railway station or bus station, all of them should be treated as a single organisation; marks are also awarded to nativity, and tenderers who are registered locally are given preference over tenderers from other states/non-local areas; while 35 marks were given for tenderers registered within the mandal, 30 marks were given to those who were registered within the district, 25 marks were given to those who were registered within the State, and 10 marks were given to those who were registered outside the State; though the maximum marks for locally registered tenderers is 35, a tenderer is required to secure a minimum of 40 marks to qualify at the technical evaluation stage, and for their financial bid (i.e., commercial offer) to be considered; and among the tenderers, who secured a minimum of 40 marks at the technical evaluation stage, the tenderer who quotes the lowest price is to be awarded the contract.

Sri G.Vidyasagar, Learned Senior Counsel, would further submit that the requirement of producing a certificate from the specified organisations, for the last three years, is confined only to Clause (II) of the qualifying parameters whereunder the marks awarded is 10 for each year, subject to a maximum of 30 marks; even if a candidate who does not have experience for the last three years participates in the bid, it would only result in his securing lesser marks than those who have three years experience; tenderers with two years or less of experience in the stipulated organisations, are not disabled from participating in the tender process; and, while they may secure lesser marks under this head, if they secure more marks under the other heads and an overall 40% marks, they are entitled to be considered as eligible for their financial bid to be evaluated, and to be awarded the contract if they are found to have quoted the lowest remuneration.

The learned Single Judge has, however, agreed with the contention of the respondent-writ petitioners, and has held that the object underlying past experience is culled out from Circular 6/10 and 5/12; in order to ensure that the contractors had the previous experience in the field in the previous assignment, and he was not adversely commented upon, was such a condition stipulated; working in the specified organisations also carried additional marks; and all this was to ensure that they would discharge the responsibilities properly in maintaining cleanliness in the bus station premises, and provide better services to passengers.

The Learned Single Judge further observed that, on a careful consideration of various clauses in these circulars and tender conditions, it was apparent that the tenderer must cross the hurdle of having experience, of working in the last three years preceding the tender notification, for further evaluation; this was an essential condition, and non-compliance would earn disqualification; and once the experience hurdle was crossed, the tenderer would normally move to the final stage, subject to his offer matching the offer of other eligible tenderers.

The Learned Single Judge was of the opinion that experience in the organisations mentioned in the tender documents and in the circulars issued immediately preceding the tender notifications, were crucial to acquire eligibility for being awarded the contract.

On the ground that respondents 3 and 4 (respondents 4 and 6 in WP.No.8604 of 2016) did not submit the experience certificates of having rendered similar works for the three years preceding the tender notification, as mentioned in clause II of Circular No.5/2012 and in Clause 3(V) of tender schedule, the learned Single Judge held that their tender should not even have been technically evaluated; and the contention that such experience was not mandatory, but was required only for evaluation, was not tenable. Holding that the appellant had grossly erred in holding respondents 4 and 6 to have qualified, in subjecting them to a final selection process of drawal of lots, and in awarding them the contracts in some of the bus stations notified in the tender notifications dated 23.02.2016, the Learned Single Judge observed that awarding of contract, in favour of these respondents, was not sustainable, and was liable to be set aside. The Learned Single Judge further held that, in the subsequent evaluation, as respondents 3 and 5 in W.P.No.8604 of 2016 were disqualified, and no contract was awarded to them, no opinion was expressed on their eligibility. While W.P.No.8604 of 2016 was disposed of, W.P.No.31113 of 2016 was allowed.

While the learned Single Judge has held that the requirement of experience of the last three years in certain organisations is mandatory, and is the eligibility criteria, the understanding of the appellant-Corporation, as put forth by Sri G. Vidyasagar, learned Senior Counsel, is that such certificates are only required for evaluating experience as is stipulated in Clause (III)(2) of the tender; besides experience, marks are also awarded for the length of registration, and the place of registration of the registered tenderers; and, consequently, holding that the requirement of experience is a qualification criteria would render the other two requirements in para III(i) and (iii) redundant.

While we may not be understood to have agreed with the submission of the learned Senior Counsel, as it is wholly unnecessary for us to do so, in the light of the order we propose to pass, we may also not be understood to have held that the said submission is wholly without merit for even if the construction placed, on the tender documents, by the appellant is held to be a possible view, and the view convassed on behalf of the respondent-writ petitioners is held to be more attractive, the learned Single Judge would, nonetheless, have been required to refrain from interference, as the High Court, in the exercise of its jurisdiction under Article 226 of the Constitution of India, does not sit in appeal over the decision of the appellant-Corporation.

In any event, the question whether the tender should be finalised or cancelled is a decision for the Corporation, in its wisdom, to take. Save manifest arbitrariness or unreasonableness in such a decision, or if the decision is vitiated by malafides, this Court would, ordinarily, defer to the wisdom of Corporation in deciding whether or not to proceed with the tender process or to cancel the tender.

In this context, it is useful to take note of the observations of the Supreme Court in **Maa Binda Express Carrier**[1] which read as under.

"…..**The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its**

instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. **This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers.** So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.

As pointed out in the earlier part of this order, the decision to cancel the tender process was in no way discriminatory or mala fide. On the contrary, if a contract had been awarded despite the deficiencies in the tender process serious questions touching the legality and propriety affecting the validity of the tender process would have arisen. Inasmuch as the competent authority decided to cancel the tender process, it did not violate any fundamental right of the appellant nor could the action of the respondent be termed unreasonable so as to warrant any interference from this Court. The Division Bench of the High Court was, in that view, perfectly justified in setting aside the order passed by the Single Judge and dismissing the Writ Petition……..” (emphasis supplied)

Again in **Rishi Kiran Logistics (P) Ltd**[2], the Supreme Court observed as under.

“…..When competing claims are private interest versus public interest, then in the case of disposal of public property the question would be whether the right of the person, who has earned the right to the public property in a public auction, is to be preferred over the right of the public in ensuring that valuable public assets were not disposed of except for a fair price and in a fair and transparent manner. **Whether this Court should, in judicial review, sit in judgment over the decision of a public body which is of the view that it need not go further ahead with the tender process. It is true if such a decision is taken without any reasons to support it or mere ipse dixit it would be arbitrary. In this case there are reasons. The High Court analysed the reasons and has taken the view that those reasons are valid. In our view in matters particularly to the disposal of valuable assets by the State when the State seeks to explore the possibility of getting higher price……**" (emphasis supplied)

As held in the aforesaid judgments of the Supreme Court, if the decision to cancel the tenders, and to invite tenders afresh, is taken without any reason to support it, or is a mere *ipsi dixit* of the competent authority, it may be held to be arbitrary or unreasonable. As long as the decision is based on reason, Courts would not interfere with such a decision to cancel the tender. The Learned Single Judge has not even held that the decision of the appellant-Corporation to cancel the tender notification is either arbitrary or unreasonable.

The reason, stated in the application filed before the learned Single Judge, is that more than two years have elapsed since the tender notification was issued on 23.02.2016. In addition, Sri G. Vidyasagar, learned Senior Counsel, would submit that, since the interpretation placed on the particular clause, in the tender notification, by the learned Single Judge would have a bearing throughout the State, as similar conditions are prescribed while inviting bids for allotment of sweeping and cleaning works in all bus stations in the entire State of Telangana, the appellant-Corporation intends to remove the ambiguities in the tender document, and thereafter invite fresh tenders. These reasons, in our opinion, suffice for the appellant-Corporation to cancel the earlier tender notification, and to issue a notification afresh inviting tenders.

It must be borne in mind that a tender is merely an offer. It is only if, pursuant thereto, a work allotment order is issued, and an agreement is entered into between the parties, can it then be held that, since there is a binding agreement in existence, the appellant-Corporation would be disabled from cancelling the tender notification issued prior thereto. In the present case, while work allotment orders were issued on 10.07.2016 inviting the successful bidders, including the respondent-writ petitioners, to execute agreements with the Corporation, no such agreement was entered into in view of the order of *status quo* passed by this Court. By the mere act of participating in the tender process, and being held to be the successful bidders, the respondent-writ petitioners cannot claim, as of right, that an agreement should be entered into with them, or that the appellant is disentitled from issuing a tender notification afresh. Suffice it therefore, without expressing any opinion on the merits of the order of the learned Single Judge and on the construction placed by him on clause (ii) of the qualifying parameters, to hold that the learned Single Judge was not justified in refusing to permit the appellant to withdraw the earlier tender notification, and to issue a notification afresh.

The order under appeal is set aside, and the appellant-Corporation is permitted to withdraw the earlier tender notification, with liberty to issue a tender notification afresh. Needless to state that, if the terms and conditions of the tender notification to be issued afresh are similar to those which fell for consideration in W.P.No.31113 of 2018, it is open to the respondent-writ petitioners to question the same in appropriate legal proceedings.

The Writ Appeal is, accordingly, disposed of. There shall be no order as to costs. Miscellaneous petitions, if any, pending shall stand closed.

(RAMESH RANGANATHAN, ACJ)

(J.UMA DEVI, J)

28th June 2018
RRB