THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE Mr. JUSTICE M. GANGA RAO

Writ Appeal Nos.571, 1312 & 1318 of 2017

Common Judgment: **(Per the Hon'ble The Acting Chief Justice Ramesh Ranganathan)**

These three appeals are preferred against the order passed by the learned Single Judge in W.P. No. 7004 of 2017 dated 7.4.2017. While the appellant in W.A. No. 1318 of 2017 is the petitioner in W.P. No. 7004 of 2017, the appellant in W.A. No. 1312 of 2017 is the 2nd respondent, and the appellant in W.A. No.571 of 2017 is the 3rd respondent therein. The parties shall, hereinafter be referred to as they are arrayed in the Writ Petition.

Facts, to the extent necessary, are that the 2nd respondent invited tenders for grant of licence for design, procurement, installation, operation and maintenance of children play inflatable and entertainment in NTR Gardens, Hyderabad for a period of three years. The petitioner and the 3rd respondent were among the four (4) participants in the tender process. The invitation to tender consisted of two parts, the first related to the technical qualifications and the second to the financial bid. The dispute, in these three Writ Appeals, is mainly whether the 3rd respondent, whose bid was accepted by the 2nd respondent, fulfilled the technical eligibility criteria prescribed in the tender conditions. Suffice it to note that, on both the petitioner and the 3rd respondent being found successful at the technical evaluation stage, their financial bids were opened; and while the 3rd respondent offered a bid of a rupee less than Rupees One Crore, i.e

Rs. 99,99,999/-, the petitioner submitted a bid, Rs.27,00,000/- less than that of the 3rd respondent, ie for Rs.72,99,999.99ps.

Before the learned Single Judge, the petitioner's complaint was that (1) the Experience Certificate produced by the 3rd respondent did not indicate her having experience in installation of amusement rides/activity in the last five years prior to the bid date; (2) she did not have the net worth of Rupees Fifty Lakhs at the close of the audited financial year preceding the bid due date; the Chartered Accountant's Certificate produced by them was defective, as the Chartered Accountant did not certify that the Certificate was being issued based on an audit of the 3rd respondent's financial statements/accounts; and (3) with respect to the requirement of the average annual turnover of the 3rd respondent exceeding Rs.35,00,000/-, though a Chartered Accountant Certificate was produced, the same had not been certified as having been given based on the audited financial statements/accounts.

The 3rd respondent had also submitted a copy of the income tax return filed by her on 21.1.2017 two days prior to the last date of submission of the bid ie, 23.1.2017. She had also produced a Certificate issued by "Maha Utsav Mela" as proof of her having experience in operation and maintenance of amusement rides/related activities in the previous five years.

By the order under appeal, the learned Single Judge rejected the petitioner's contentions regarding the net worth of the 3rd respondent, and her average annual turnover, not fulfilling the conditions stipulated in the tender conditions. The Learned Single Judge held that the 3rd respondent had submitted a certificate issued by the Chartered Accountant; the requirement, in terms of the eligibility criteria, was only a Certificate being issued by the Chartered Accountant for the audited financial year; and there was no stipulation that the same was required to be based either on the audited financial statements/accounts. The learned Single Judge, however, found merit in the submission, urged on behalf of the petitioner, that the 3rd respondent did not fulfil the technical capacity requirement of the bid. He held that, while the requirement in the tender notification was that the bidder should have experience of installation, operation and maintenance of amusement rides, the Certificate produced by the 3rd respondent made no reference to installation; and therefore the bid, submitted by the 3rd respondent, did not fulfil the prescribed technical qualifications. Aggrieved thereby, the petitioner, the Hyderabad Metropolitan Development Authority ("HMDA" for short), and the 3rd respondent have invoked our jurisdiction under Clause 15 of the Letters Patent.

Sri Mahmood Ali, learned counsel for the 3rd respondent, would submit, not without justification, that the very fact that the amusement rides have been operated and maintained would show that the bidder also had experience in installation for, without installing these rides/activities, the question of operating and maintaining these rides/activities would not arise. While fairly stating that this conclusion of the learned Single Judge may not be justified, Sri P.S. Rajasekhar, learned counsel for the petitioner, would contend that the 3rd respondent's bid does not fulfil any of the other technical qualifications stipulated in the tender notification; the experience certificate produced by the 3rd respondent was from a partnership firm called “Maha Utsav Mela” whose managing partner was none other than her father; the 3rd respondent is, admittedly, not a partner of the said partnership firm; the experience claimed by “Maha Utsav Mela”, in installation, operation and maintenance of amusement rides, would not extend to the 3rd respondent merely because she was associated with her father; the condition in the tender notification, of the bidder having the financial capacity of a minimum net worth of Rs.50.00 lakhs, is also not satisfied by the 3rd respondent; the minimum net worth is required to be computed at the close of the ***“audited financial year preceding the bid due date”***, and is required to be certified by a qualified Chartered Accountant; likewise, the tender conditions also require the bidder to have an average annual turnover of at least Rs.35.00 lakhs in the past two audited financial years preceding the bid due date, and this annual turnover is also required to be certified by a practicing Chartered Accountant; and this condition has also not been fulfilled by the third respondent.

The fact that certificates were produced by the 3rd respondent, from a qualified/practicing Chartered Accountant, is not in dispute. The tender notification required not mere production of a Certificate from the Chartered Accountant, but for the Chartered Accountant to certify that the bidder had a minimum net worth of Rs. 50.00 lakhs ***“at the close of the audited financial year”***. The word “***audited***” in clause 8(B)(c)(i) of the tender notification cannot be ignored or brushed aside as mere surplussage. Emphasis placed by the tender conditions on “***audited financial year”*** can only mean that the minimum net worth of Rs.50.00 lakhs should be reflected in the audited financial statements of the year preceding the bid due date. As the bid due date was 23.1.2017, the minimum net worth of Rs.50.00 lakhs should have been reflected in the audited financial statements of the 3rd respondent for the financial year 2015-16 (ie 1st April, 2015 to 31st March, 2016). Likewise the requirement of Clause 8(B)(C)(ii) of the tender conditions, that the bidder should have an average annual turnover of Rs.35.00 lakhs, must also be reflected in the audited financial statements of the 3rd respondent for the two financial years 2014-15 and 2015-16, as the aforesaid tender condition required the bidder to have an average annual turnover of atleast Rs.35 Lakhs in the past ***"two (02) audited financial years"*** before the bid due date.

The Certificate produced by the 3rd respondent, from M/s. Deepak Daga & Associates, Chartered Accountants, is titled ***"Networth Certificate"***, and records that the 3rd respondent was in the business of amusement rides, and her net worth in Indian Rupees was stated as per the information and details given to them. The said Certificate further records that it was issued at the specific request of the 3rd respondent to submit the same for participating in the tender. This certificate makes no reference even to the existence of an audited financial statement for the year 2016-17 reflecting the net worth of the 3rd respondent as exceeding Rs.50 Lakhs. It is evident, from a bare perusal of the certificate itself, that it was issued on the basis of information and details furnished to the Chartered Accountants, and does not reflect their having even perused the audited financial statements of the 3rd respondent for the financial year 2015-16.

During the course of hearing of the Writ Petition a balance sheet, attested by M/s. Deepak Daga & Associates, was filed. This balance sheet only contains the seal and the signature of M/s.Deepak Daga & Associates, and does not reflect their having audited the books of accounts of the 3rd respondent before issuing a Certificate for, if they had audited the books of accounts of the 3rd respondent, nothing prevented the Chartered Accountants from stating so in the Certificate issued by them earlier. In any event, the balance sheet for the year 2015-16 alone would not suffice with respect to Clause 8(B)(C)(ii) as the minimum average annual turnover of Rs.35 Lakhs is for the past two audited financial years ie, 2014-15 and 2015-16, and not 2015-16 alone. It is evident, therefore, that the 3rd respondent does not fulfil the financial capacity requirement of Clause 8(B)(C)(i) & (ii) of the tender conditions.

The Experience Certificate, submitted by the 3rd respondent of having one year completed experience in installation, operation and maintenance of amusement rides/activities, is dated 12.1.2017 whereby the Managing Partner of the Maha Utsav Mela certified that the 3rd respondent was operating and maintaining amusement rides like ranger, break dance and Columbus etc in their exhibitions at Maha Utsav Mela for more than five years starting from the year 2012. In support of the plea that the 3rd respondent had the requisite experience, certain documents were filed in the writ petition which included a letter addressed by the Chief Executive Officer, Secunderabad Cantonment Board to the Maha Utsav Mela on 25.6.2012 granting them permission for holding exhibition from 16.8.2012 to 30.10.2012 at the

Cantonment Garden, Picket, Secunderabad. Another Certificate filed by the 3rd respondent, in the Writ Petition, is the letter issued by the HMDA to organize a Maha Utsav Mela from 3.4.2013 to 31.5.2013 at the Peoples Plaza. This letter of the HMDA dated 22.3.2013 makes no reference to installation, operation and maintenance of amusement rides. Yet another Certificate, on which reliance is placed on behalf of the 3rd respondent, is the "No Objection Certificate" issued by the GHMC in April, 2013 conveying their no objection for conducting Maha Utsav Mela from 12.4.2013 to 10.6.2013 at Peoples Plaza, and granting a temporary trade licence for the said period, subject to fulfilment of the licence conditions. The said letter relates to grant of permission to conduct a Handloom Handicrafts Exhibition. Even this letter makes no reference to the 3rd respondent having experience in installation, operation and maintenance of amusement rides.

As noted hereinabove, the 3rd respondent is not a partner in Maha Utsav Mela , and her claim of experience is based on the fact that her father is the Managing Partner of the said partnership firm, and he has stated that she was associated with them in conducting amusement rides in the Melas organized by them. The requirement under the tender notification is that the bidder should have one year completed experience in installation, operation and maintenance in amusement rides/activities in the last five years prior to the bid due date. As the bids are required to be submitted only by proprietory firms/partnership firms/registered firms, having experience of installation, operation and maintenance, the experience of Maha Utsav Mela, a partnership firm of which the 3rd respondent is not even a partner, would not suffice for the 3rd respondent to claim that she has the stipulated minimum experience. It is evident, therefore, that the 3rd respondent does not fulfil the technical qualifications prescribed in the bid documents.

Sri V. Narasimha Goud, learned Standing Counsel for the 2nd respondent, would however contend that, in the bid evaluating meeting held on 15.2.2017, the petitioner had raised an objection only to the bid submitted by M/s. Sadguru Techno Fab Limited. The attendance sheet dated 15.02.2017 records the petitioner having objected to the submission of experience certificate, by M/s. Sadguru Techno Fab Ltd, after the date prescribed for on-line submission. Sri P.S. Rajasekhar, learned counsel for the petitioner, would draw our attention to the averments in the rejoinder filed by the petitioner wherein it is stated that, since the information relating to the 3rd respondent was displayed only on 16.2.2017, the petitioner's objection, regarding submission of their experience certificate by Sadguru Techno Fab Limited on 15.2.2017, would not disable them from raising objections to the bid acceptance of the 3rd respondent at a later date as the bid documents of the 3rd respondent was uploaded after 15.02.2017 i.e only on 16-2-2017.

It is settled law that no person can be held to have waived his fundamental rights under Article 14 of the Constitution [**Olga Tellis v. Bombay Municipal Corporation**[1]). If the 2nd respondent, in accepting the bid of the 3rd respondent, is held to have acted arbitrarily and in violation of Article 14 of the Constitution of India, the mere fact that the petitioner did not raise an objection, to the

[1] AIR 1986 SC 180

technical qualifications of the third respondent in the meeting held on 15.2.2017, (which he could not, as he came to know of the 3rd respondent's failure to fulfil the technical qualification criteria only on 16.02.2017 when her bid documents were uploaded), would be of no consequence.

Sri V. Narasimha Goud, learned Standing Counsel for the 2nd respondent, would place reliance on the judgment of the Supreme Court in **Consortium of Titagarh Firema Adler, SPA, Titagarh Wagons Ltd, v. Nagpur Metro Rail Corporation Limited**[2], and a Division Bench Judgment of this Court in **P.L.R. Projects Pvt. Ltd. v. The Government of Andhra Pradesh**[3] in support of his submission that, as no allegations of malafides are made against the 2nd respondent, their decision to award the contract to the 3rd respondent would not necessitate interference. While malice, by itself, would vitiate the decision, absence of malafides would not necessitate restraint either, if the action of the 2nd respondent is held to be arbitrary and in violation of Article 14 of the Constitution.

In **Consortium of Titagarh Firema Adler, SPA, Titagarh Wagons Ltd**[2], an objection was taken before the Bombay High Court that the lowest bidder was not technically qualified. The tender conditions required the bidder to have an experience of a total number of 60 metro cars out of which 30 cars should either be Stainless Steel or Aluminium; the 2nd respondent had the experience of a total 594 metro cars, and all of them were of Stainless Steel; and the 2nd respondent also had the experience of 432 metro cars outside the country of origin. The Bombay High

[2] (2017) 7 SCC 486
[3] 2012 (4) ALD 474

Court (Nagpur Bench) held that the decision making process of technical evaluation was guided by relevant factors. In appeal the Supreme Court, after a detailed examination of the tender conditions, held that examination by the Court, of the eligibility criteria, must be addressed regard being had to the essential conditions; as held in **Montecarlo Ltd v. NTPC Ltd**.[4] and **Tata Cellular v. Union of India**[5], administrative decisions must not only be tested by the application of the Wednesbury principle of reasonableness, but must also be free from arbitrariness, not affected by bias or actuated by malafides; and, as held in **Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd**[6], interpretation placed by the authorities on the tender conditions should not be interfered with, save malafides or perversity in understanding or appreciating the documents.

As noted hereinabove, the tender conditions required the bidder to have the financial capacity of a minimum net worth of Rs.50.00 lakhs at the close of the audited financial year preceding the bid due date, and to have an average annual turnover of Rs.35.00 lakhs in the past two audited financial years preceding the bid due date. Fulfilment of these two conditions must be borne out by the audited financial statements of the 3rd respondent, which, as noted hereinabove, is not reflected in the certificate issued in the 3rd respondent's favour by M/s. Deepak Daga & Associates, Chartered Accountants. It is evident, therefore, that the conclusion of the 2nd respondent regarding fulfilment by the 3rd respondent, of the technical capacity prescribed as the eligibility

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[4] 2016 (10) SCALE 50
[5] (1994) 6 SCC 651
[6] 2016 (8) SCALE 765

criteria, suffers from perversity, and is vitiated by arbitrariness, as it is ex-facie evident that the 3rd respondent has not fulfilled these conditions.

In **P.L.R. Projects Pvt. Ltd**[3], a Division Bench of this Court, following the judgment of the Supreme Court, in **BSN Joshi & Sons Ltd. v. Nair Coal Services**[7], held that the petitioner therein had remained mute and unmoved when the technical and price bids were opened; they did not raise the selected bidder's ineligibility at the outset; and failure of the petitioner to follow up with the authorities, till a lapse of more than two months, must inevitably weigh against it. Following the judgment in **Ritesh Tewari v. State of U.P**[8], the Division Bench held that a writ of mandamus is not issued merely because it is lawful to do so, it is not be exercised to set right mere errors of law which do not occasion substantial injustice, and a writ could only be issued in case of grave miscarriage of justice or where there has been a flagrant violation of the law.

In **BSN Joshi & Sons Ltd**[7], the Supreme Court observed:-

"We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarized as under:

(i) **if there are essential conditions, the same must be adhered to;**

(ii) **(ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;**

(iii) (iii) if, however, a deviation is made in relation to all the parties in regard to any of such condition, ordinarily again a power of relaxation may be held to be existing;

(iv) (iv) the parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of the tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction;

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[7] (2006) 11 SCC 548
[8] (2010) 10 SCC 677

(v) (v) when a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with;

(vi) (vi) the contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority;

(vii) (vii) where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint." (emphasis supplied).

The law declared in **BSN Joshi & Sons Ltd**[7], among others, is that the essential conditions of the tender must be adhered to; if there is no general power of relaxation, ordinarily, the same shall not be exercised; and the principle of strict compliance should be applied. In the present case, both the conditions relating to experience and the financial capacity of the bidders necessitated strict compliance as they are essential conditions of the tender. It is evident that the 3rd respondent did not comply with either of these twin conditions and, consequently, the 2nd respondent could not have awarded the work to the 3rd respondent. Awarding a work to a tenderer, who does not fulfill the essential qualifications stipulated in the tender conditions, would not justify restraint as substantial injustice would be caused on awarding the work to an ineligible bidder. The petitioner has raised an object on 18.02.2017, to the 3rd respondent being held to have technically qualified, just two days after the 3rd respondent's bid documents were uploaded on 16.02.2017, and not after two months as was the case in **P.L.R. Projects Pvt. Ltd**[3]. The petitioner had, in fact, filed the Writ Petition on 27.02.2017 less than a fortnight after the 3rd respondent was held to have technically qualified in the tender process.

We cannot, however, brush aside the fact that the 3rd respondent's bid exceeds the petitioner's bid by around 27.00 lakhs per year. Sri P.S. Rajasekhar, learned counsel for the petitioner, would submit that the petitioner is willing to match the bid of the 3rd respondent; and, if the work is awarded to them, they would pay the bid amount quoted by the 3rd respondent.

In the exercise of its jurisdiction under Article 226 of the Constitution of India, this Court would not undertake the task of awarding the work to the second highest bidder, merely because the highest bidder is found ineligible for being awarded the work, as these are matters which the 2nd respondent is required to decide. In these proceedings, we were called upon only to examine whether or not the 3rd respondent fulfilled the technical eligibility criteria, prescribed in the tender conditions, to be awarded the work. The question whether the petitioner is eligible to be awarded the work did not arise for consideration in these proceedings, and it is for the 2nd respondent to consider all these aspects. It is not as if rejection of the highest bid would obligate the 2nd respondent to award the work to the second highest bidder, for it is always open to them if they so choose, and for just and valid reasons, to invite bids afresh. Suffice it, while leaving all these matters for the 2nd respondent to consider, to make it clear that, in case the 2nd respondent decides to award the work to the petitioner, it shall do so only on the petitioner paying the highest bid amount of Rs. 99,99,999/- as quoted by the 3rd respondent.

Sri Mahmood Ali, learned counsel for the 3rd respondent, would request this Court to direct the 2nd respondent to return the amounts deposited by the 3rd respondent. On an application being made in this regard by the 3rd respondent, the 2nd respondent shall consider the same in accordance with law at the earliest, and in any event not later than one month from the date of receipt of such a request from the 3rd respondent.

Subject to the aforesaid observations, the order under appeal is set aside, and the 3rd respondent is declared ineligible to be awarded the subject work. All the three Writ Appeals are, accordingly, disposed of. Miscellaneous Petitions pending, if any, shall also stand disposed of. There shall be no order as to costs.

(RAMESH RANGANATHAN, ACJ)

(M. GANGA RAO, J)

10th October, 2017

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<u>THE HON'BLE THE ACTING CHIEF JUSTICE RAMESH RANGANATHAN</u>

<u>AND</u>

<u>THE HON'BLE Mr. JUSTICE M. GANGA RAO</u>

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