

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 13.02.2018

+ **W.P.(C) 1384/2018 & CM APPL. 5742-5743/2018**

A B GRAIN SPIRITS PVT LTD & ANR Petitioners

Through: Mr. Tanmaya Mehta, Adv. with
Mr. Ankit Virmani, Mr. Jyoti
Prakash Sahu, Ms. Rinkel Singh,
Advs.

versus

**GOVERNMENT OF NATIONAL CAPITAL TERRITORY OF
DELHI Respondent**

Through: Mr. Ramesh Singh, Standing
Counsel with Mr. Aniruddha
Deshmukh, Adv.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE A. K. CHAWLA

S. RAVINDRA BHAT, J.

1. The writ petitioner is aggrieved by the tender conditions introduced by the respondent, the Government of NCT of Delhi (hereafter "NCT") and challenges them as unduly restrictive, opposed to competition and violative of Article 14 of the Constitution of India.

2. The petitioners claim to be under a common management of Adie Broswon Group; they are existing concessionaries operating a fleet of buses in four clusters. The first petitioner operates three clusters and the second petitioner operates one cluster. They deploy a total of 771 buses. Both share a common Managing Director, Ms. Jasdeep Kaur Chadha.

The petitioners' common grievance is that previous tender policies of the NCT enabled an entity to operate from five clusters, which has now been reduced to four. The other grievance is that the NCT has introduced fresh limitations (hitherto not existent) on cross-holding and promotership, which stipulate that different companies shall together not be permitted to operate more than four clusters.

3. The petitioners claim to be the operators of the largest fleet of buses in the city of Delhi. In beginning of January, 2018, NCT issued a "Request for Qualification and Proposal Document" (RFQP) to members of the public, inviting interested parties to step forward and quote for providing bus services. The petitioners are aggrieved by the following tender conditions:

"Instructions to Bidders:

"2.2.4 (of Part I)....

"Each bidder can win a maximum of four (4) projects out of the total potential 17 Projects except for Type 2 and Type 3 Bidder who can win a maximum of one cluster only..."

....Clause 3.4.1 of Part I.....:

3.4 Special Conditions of Eligibility

3.4.1 Each bidder can win a maximum of four (4) projects out of the total potential 17 Projects except for Type 2 and Type 3 Bidder who can win a maximum of one cluster only..."

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Schedule 10 to Draft Concession Agreement set out in Part II of the RFQP

"1. Shareholding Restrictions

1.1 Type 1 Bidder

a) ...

b) Type 1 Bidder can win maximum of four (4) Projects and can hold shares in a maximum of only four Clusters at any given time.

e) Any Person cannot hold shares in more than four Clusters at given point of time directly or indirectly through its parent or subsidiary entity.

f) Promoter or Director or any person having common controlling shares or other ownership interest is not allowed in more than four clusters at any given point of time.

g) Any person cannot have any interest in more than four (4) Clusters either through debit/loan of any form, equity of any form and grant of any form.

h) Any two persons or business entity involved in a single company shall be treated as Promoter group. Such Promoter group or individual promoter/entity cannot hold any business interest beyond four (4) Clusters."

4. The petitioners articulate two main grievances – *first*, the reduction of the cap on maximum clusters which one entity can operate from five (in the previous tender) to four (in the present tender); *second*, introduction of new limitations on cross-holding/ promotership stipulating *inter alia*, that different companies, which are separate and distinct persons under law, shall together not be permitted to operate more than 4 clusters if they have some common promoter or shareholder or ownership interest, i.e. disqualifying such linked companies from operating more than 4 clusters in aggregate. It is submitted that the effect of the new restrictions - to treat different bidders having common

promoters or controlling shareholders as one entity and then to impose a maximum cap of 4 projects/clusters thereon - are new restrictions, hitherto not existent. The petitioners highlight that in determining violation of fundamental rights, it is the impact of the measure which is relevant, and in the present case, the impact is directly to exclude only and only the petitioners and the Adie Broswon Group of Companies.

5. Mr. Tanmaya Mehta, learned counsel argues that both conditions, which are departures from the previous RFQP, would only exclude the Petitioners, and have been specifically designed to achieve that end, because other than the Adie Broswon Group, no other existing operator is operating more than one cluster in Delhi. Adie Broswon Group is the only group which has been been operating 4 clusters i.e. cluster Nos. 3, 4, 5 and 9 within Delhi for the last several years, through its group companies AB Grain Spirits Pvt. Ltd. (3 clusters) and Great Value Fuels Pvt. Ltd. (1 cluster).

6. The impugned modifications, in departure from conditions of previous RFQP, are designed to arbitrarily and unfairly discriminate against the Petitioners, and exclude and eliminate them from the tender process. They are the only concessionaires already operating more than one cluster, and are, therefore, the only persons automatically excluded by the new conditions *vis-a-vis* the existing operators in Delhi.

7. It is submitted that in the earlier RFQP and Concession Agreements, the cap was of 5 clusters (as opposed to the current cap of 4 clusters/projects), and moreover, the restriction in the present form - of cross-controlling or promoter shareholding on different companies bidding under any RFQP merely because another company having some

common promoter or shareholder is already operating in other Clusters - was not there in the earlier clusters. This would be apparent on a comparison of RFQP and/or agreement for Cluster Nos. 6,7,8 and 9 [*inter alia* Schedule 11] on the one hand, and the present RFQP [*inter alia* Schedule 10 to the RFQP].

8. It is submitted that the impugned conditions are wholly irrational and arbitrary, and have no nexus with the object sought to be achieved by issuance of this tender, as set-out in the RFQP itself, viz. providing safe, secure, efficient and reliable operation of buses in Delhi. These conditions are devoid of any basis or rationale because the economics for operation of buses are regulated or defined by the Government primarily in the contract itself. The monetary benefits to be received by the Private Stage Carriage Service operator are already fixed under the RFQP and furthermore, the revenue collection in the buses is solely in the hands of NCT. Thus, there is no scope for any monopoly or anti-competitive practices, and therefore, no basis exists for limiting the total number of Clusters that a Bidder can operate in as there can be no apprehension of anti-competitive practice by an operator operating in 4 or more Clusters.

9. The petitioners argue that the higher number of clusters that a person operates, the better operational experience would such person have. The impugned conditions act so as to eliminate experienced and capable operators such as the Petitioners from the tender and are, therefore, contrary to the entire object of the tender.

10. The NCT, which was represented by its standing counsel, Mr. Ramesh Singh, on advance notice, refuted the petitioners' contentions, pointing out that a public agency has considerable "play in

the joints” to devise tender conditions best suited to cater to rapidly changing demands of the society. It was urged that though the tender conditions prohibit a group company from bidding for more than one cluster, and the maximum permissible bid combination can be for a cluster of four, these changes do not result in discrimination, direct or indirect. Rather, the city would be ensured more than four operators (i.e. combinations of zones/areas in clusters) to cater to 17 defined areas. The petitioners undoubtedly would be impacted; however, the mere fact that they are impacted to some extent does not militate against the reasonableness of the measure. It was submitted that the restriction on group or interrelated companies bidding for more than one cluster is to promote greater participation, and curb the possibility of concentration of bus operations in a few hands and avoid monopolistic or market dominating situations. Thus the measure was conceived in larger public interest.

11. Learned counsel for NCT produced the relevant file notings which contained the discussion that led to the impugned changed conditions. They reveal that consistently, the administrative view was that allowing five clusters to one company would tend to result in its dominance of the sector and that it would be more feasible to allow no more than 3 or 4 clusters, per company, including cross-holdings. This proposal was approved at the highest quarters of the NCT government. The note to the Cabinet pointedly referred to the two proposed changes, i.e. the cluster limitation and the bidding company or companies’ cross-shareholding restrictions. The Cabinet meeting approved these proposals.

12. The scope of judicial review under Article 226 of the Constitution in tender matters involving a public authority is narrow and limited. It is not all errors which fall within the Court's remit, to cure. Only illegality, procedural irregularity and *mala fides* are the essential grounds on which such review of pure administrative decisions, is permitted to the Courts. Among the catena of decisions of the Supreme Court, it would be useful to refer to the seminal decision in *Tata Cellular v. Union of India*, (1994) 6 SCC 651, where, having reviewed the law on award of public contracts, the Supreme Court laid down the following guiding principles. Three of the outlined principles are reproduced below:

“3. 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.

4. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

5. 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 quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free arbitrariness not affected by bias or actuated by mala fides.”

13. In *Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216, the Supreme Court laid down that there must be two questions that the Court must ask itself while exercising judicial review in tender matters involving a public authority:

“Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: “the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”; and
(ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226.”

Previously, in *Master Marine Services Pvt. Ltd. v. Metcalfe and Hodgkinson Pvt. Ltd.*, AIR 2005 SC 2299, the Supreme Court noted:

“After an exhaustive consideration of a large number of decisions and standard books on Administrative Law, the Court enunciated the principle 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 quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of

reasonableness but must be free from arbitrariness not affected by bias or actuated by mala fides.”

14. The petitioners’ grievance is twofold; they are the quantitative restriction that no bidder or group companies can tender for more than four clusters, and the restriction or limitation on companies with common shareholding and management (or related companies, so to say). Both are impeached as being unreasonable, arbitrary and solely designed to oust them.

15. No doubt, the introduction of the impugned conditions does limit the petitioners’ business possibilities with the NCT in Delhi. But, at the same time, the Court notes that they are operating one cluster now, with 771 buses. The right to carry on trade does not guarantee the right to success in trade or commerce, nor does it assure profit. Likewise, every restriction or limitation is not unreasonable. The materials placed on the record by way of the NCT’s files disclose a conscious and informed decision to introduce the new conditions. The petitioner no doubt may be impacted; possibly, there is no other group entity that is impacted at this juncture. However, *per se* such restrictions cannot be characterized as having been designed with an “evil eye and an unequal hand” to *target* the petitioner. The impact, no doubt, is directly felt; however, mere adverse impact by way of diminished business or commercial possibilities does not render the impugned conditions discriminatory. The petitioners are free to enter into business relationships and contracts with other entities and public sector agencies in the city of Delhi and offer any other services, through their fleet of buses to the members of the public or

a section of the public. The restrictions are therefore neither unreasonable, nor arbitrary, nor *mala fide*.

16. In view of the above discussion, it is held that the petition is meritless. It is therefore, dismissed without order on costs.

S. RAVINDRA BHAT, J

A. K. CHAWLA, J

FEBRUARY 13, 2018

