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HIGH COURT OF CHHATTISGARH, BILASPUR

Order Reserved on : 22.11.2019
Order Pronounced on : 13.12.2019

Writ Petition (C) No. 3366 of 2019

Harchandrai Bagomal Daal Mill, Behind Mowa School, Daldal Seoni Road, Mowa, Raipur Chhattisgarh PIN- 492005

---- Petitioner

Versus

1. Union of India Through Its Secretary, Department of Agriculture And Cooperation Ministry of Agriculture And Farmers Welfare, Krishi Bhawan Rajendra Prasad Road, New Delhi - 110001
2. National Agricultural Cooperative Marketing Federation Limited Through Its Managing Director, NAFED House, Siddhartha Enclave Ring Road, Ashram Chowk, New Delhi- 110014
3. Chhattisgarh State Civil Supplies Corporation Limited Through Its Director, Hitavada Parisar, Avanti Vihar, Telibandha, Raipur, Chhattisgarh. PIN- 492001

---- Respondents

For Petitioner	: Dr. N.K. Shukla, Senior Advocate with Shri Mrinal Agrawal, Advocate.
For Respondent No.1	: Shri P. Chetan Kumar, Standing Counsel.
For Respondent No.2	: Shri Abhinav Kardekar, Advocate.
For Respondent No.3	: Shri Vivek Ranjan Tiwari, Advocate.

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice
Hon'ble Shri Parth Prateem Sahu, Judge

C A V Order

Parth Prateem Sahu, Judge

1. The Petitioner who is a registered partnership firm and dealing with the business of milling of various kinds of pulses including Chana Dal (Gram) has questioned the eligibility condition of tender proceedings held through Respondent No.2 for supply of milled Chana to

Chhattisgarh State Civil Supplies Corporation Limited under implementation of Central Government Scheme offering Rs.15/kg. subsidy on PSS/PSF stock of Chana Whole for utilization under various welfare Schemes of the State of Chhattisgarh. The terms and conditions for auction was made available by National Agricultural Cooperation Marketing Federation Limited (hereinafter referred to as 'NAFED') e-portal (nafed.agribazaar.com) and the Petitioner finding himself to be not fulfilling Clause 3(b) of the eligibility condition, has filed this writ petition with following relief(s) :-

> "10.1 The Hon'ble Court may kindly be pleased to direct the respondent NAFED to remove clause 3(b) of the Notice Inviting Tender which deals with the condition of experience of supply of chana from the tender so that the petitioner and others may get chance to participate in the tender proceedings.
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> 10.2 Cost of the petition may also be granted to the petitioner.
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> 10.3 Any other relief which this Hon'ble Court deems fit and proper may also kindly be granted to the petitioner, in the interest of justice."

2. Learned senior counsel appearing for the Petitioner submitted that imposing Clause 3(b) in eligibility condition is arbitrary, unreasonable, irrational and not having any nexus with the object sought to be

achieved. He further submitted that action on the part of Respondent No.2 is not only arbitrary, but discriminatory as Respondent No.2 invited bids for supply of milled Chana to Chhattisgarh State Civil Supplies Corporation Limited under implementation of Central Government Scheme offering Rs.15/kg subsidy on PSS/PSF stock of Chana Whole for utilization under various Schemes of the State of Chhattisgarh. He further submitted Clause 3(a) of eligibility condition restricts the participation of more bidders and Clause 3(b), which is experience clause, wherein the supply made to Central/State Government Institutions/PSU/Co-operative agencies appointed by the Government only is recognized. He further submitted that in State of Kerala and Gujarat, no such eligibility condition is made part of the tender document. He further submitted that as per scope of work, the work is only with respect to lift the un-milled stock of Chana from the place identified by Respondent No.2; as in this case mentioned by learned counsel is Indore, Madhya Pradesh and thereafter, it is to be milled and to be packed in small packets of 1 kg., therefore, it does not come within the work of supply from the Petitioner or by other participants in the bid. He further submitted that Clause 3(a) of the eligibility condition is violative to Article 301 of the Constitution of India, therefore, both eligibility conditions i.e. 3(a) and 3(b) are required to be struck down. He also submitted that Petitioner is in the business of Dal Mill for last several years and had made supply to other private concerns/business firms. He lastly submitted that earlier, experience clause as mentioned in Clause 3(b) for supply of 10,000 metric ton of packed pulses in past two years to any Central/State Government Institutions/PSU/Co-operative agencies appointed by the Government, but that has been reduced to 5,000 metric ton of packed pulses in past three years to any Central/State Government Institutions/PSU/Co-operative agencies appointed by the Government by subsequent notification, which shows that action on the part of Respondent No.2 is only to grant undue advantage to some persons/bidders.

3. Per contra, learned counsel appearing for Respondent No.2 submitted that so far as Clause 3(a) of the eligibility condition is concerned, it was not challenged by the Petitioner in his writ petition, therefore, without there being any pleading, the Petitioner cannot be permitted to raise a ground in oral submission. He further submitted that total supply of Chana Whole (Gram) is of 35,000 metric ton within a period of 7 months from September 2019 to March 2020, which comes as 5,000 metric ton per month, but in the experience clause, it has generously made 5,000 metric ton of packed pulses in past three years to any Central/State Government Institutions/PSU/Co-operative agencies appointed by the Government. He further submitted that there is no arbitrariness in amending the condition of experience of supply from 10,000 metric

ton to 5,000 metric ton as it has not been made to give undue advantage to any of the interested bidder, but it has been relaxed for the benefit of all interested bidders including the Petitioner; in fact, the Petitioner is also a beneficiary of the act of reducing the experience of supply of packed pulses in past three years. He further submitted that there is an agreement between Respondent No.2 and Respondent No.3 for the purpose of supply of 35,700 metric ton of milled Chana from September 2019 to March 2020 and different conditions have been made for supply under the said agreement along with penalty clause. He further submitted that imposing of experience clause is only to avoid penalty clause because if imposed, then it will be a loss of Respondent No.2. Looking to the volume of work, the experience which is required under the auction document is not harsh or irrational. The requirement of supply comes to about 5,000 metric ton per month whereas experience has been sought only with respect to supply of 5,000 metric ton in past three years. He further submitted that Respondent No.2 is a Co-operative Society, therefore, no writ petition can be lie against it. He also submitted that in case of Kerala, the State is procuring Urad, Moong and Toor varieties of pulses in a bag of 30 kg. packing, whereas in State of Chhattisgarh, the State is procuring Chana in 1 kg. poly packing, further packing in 50 kg. PP Bags, therefore, nature of work of Kerala and Chhattisgarh cannot be equated. He lastly submitted that writ petition being devoid of substance, it is liable to be dismissed.

4. We have heard learned counsel appearing for the parties and perused the records.

5. Perusal of the writ petition, particularly, relief clause, which is extracted above, would clearly show that the challenge in this writ petition is only with respect to Clause 3(b) of the eligibility condition and there is no challenge with regard to Clause 3(a) of the eligibility condition mentioned in the notification. As Clause 3(a) is not challenged specifically in the writ petition, the Petitioner cannot be granted any relief only on account of oral submission made by him.

6. So far as challenge to Clause 3(b) of the eligibility condition mentioned in the terms and conditions of tender notification, the experience which has been sought by Respondent No.2 is only with respect to supply of 5,000 metric ton of packed pulses in past three years to any Central/State Government Institutions/PSU/Co-operative agencies appointed by the Government, whereas Clause-27 of the agreement entered between Respondent No.2 and Respondent No.3 specifically provides that total quantity of milled Chana (Gram) is of 35,700 metric ton between September 2019 to March 2020, which is within a period of 7 months. If total quantity is divided by the total period/month provided for supply of milled Chana,

it comes more than 5,000 metric ton per month, whereas the experience of supply sought is only with respect to 5,000 metric ton in past three years. Clause 24, which prescribes the quantity of milled Chana to be packed is of 1 kg. and to be packed in multicolour poly pack of 60 microns and further, 1 kg. packed milled Chana is further required to be packed in 50 kg. of poly packs in new HDPE bags after stitching.

7. Looking to the nature of packing and volume of work, the mentioning of experience clause in the notification cannot be said to be arbitrary or is having no nexus with the object sought to be achieved, particularly, when the article i.e. milled Chana is required to be packed in a small unit i.e. of 1 kg. packet. It is not a case of supply of milled Chana in a big jute bags or other bags bearing 30 kg., 50 kg. or more, which do not consume such a time or technology for its packing.

8. Clause 31 of the said agreement provides for imposition of penalty at the rate of 2% + GST in not supplying the agreed quantity within time. The imposition of penalty certainly will cause monetary loss to Respondent No.2, therefore, it is for Respondent No.2 to make all such necessary conditions relating to milling, packaging and supply as part of the notification so that for the fault of others, Respondent No.2 may not suffer any monetary loss which is a Co-operative Society at National level as it is evident from the name of

Respondent No.2 itself, i.e. 'National Agricultural Cooperation Marketing Federation Limited'. It is for the employer or agency/institution calling offers from interested candidates by way of issuing tender notification to make such conditions, which may be protecting its interest. No doubt, the conditions to be imposed should not be arbitrary, unreasonable or irrational.

9. The Hon'ble Supreme Court in the matter of **Directorate of Education and Others v. Educomp Datamatics Ltd. and Others**[1] has issued guidelines as to when the Courts can exercise its power of judicial review and held thus :-

> “9. It is well settled now that the courts can scrutinise the award of the contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favouritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by this Court in *Tata Cellular v. Union of India, (1994) 6 SCC 651*. After examining the entire case-law the following principles have been deduced. (SCC pp. 687-88, para 94)

[1] **(2004) 4 SCC 19**

"94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(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 of 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 from arbitrariness not affected by bias or actuated by mala fides.*
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> (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.
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> [emphasis supplied]

11. This principle was again restated by this Court in *Monarch Infrastructure (P) Ltd. v. Commr., Ulhasnagar Municipal Corpn. (2000) 5 SCC 287*. It was held that the terms and conditions in the tender are prescribed by the Government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is not for the courts to say whether the conditions prescribed in the tender under consideration were better than the ones prescribed in the earlier tender invitations.

12. It has clearly been held in these decisions that the terms of the invitation to

> tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide."

10. Further, Hon'ble Supreme Court in the matter of **Ajit Kumar Nag v. General Manager (PJ), Indian Oil Corporation Ltd., Haldia and Others**[2], has held that burden of proving malafide is on the person making allegation only and held thus :-

> "56. …........... It is well-settled that the burden of proving mala fide is on the person making the allegations and the burden is "very heavy". [*vide E.P. Royappa v. State of T. N., (1974) 4 SCC 3*]. There is

2 **(2005) 7 SCC 764**

> every presumption in favour of the administration that the power has been exercised bona fide and in good faith. It is to be remembered that the allegations of mala fide are often more easily made than made out and the very seriousness of such allegations demands proof of a high decree of credibility. As Krishna Iyer, J. stated in *Gulam Mustafa v. State of Maharashtra, (1976) 1 SCC 800 (SCC p.802, para 2)*; "It *(mala fide)* is the last refuge of a losing litigant".

11. Further, Hon'ble Supreme Court in the matter of **Global Energy Ltd. v. Adani Exports Ltd.**[3], has held that the terms of the invitation of the 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.

12. Further, Hon'ble Supreme Court in the matter of **Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. and another**[4]**,** held thus:-

> "12. 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

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[3] **(2005) 4 SCC 435**
[4] **(2005) 6 SCC 138**

> 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, 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 also must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. (See para 113 of the Report, SCC para 94)."

13. Again in the matter of **Michigan Rubber (India) Limited v. State of Karnataka and Others**[5], Hon'ble Supreme Court while discussing earlier verdicts of the Supreme Court, held thus :-

[5] **(2012) 8 SCC 216**

“35. As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonable. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the Courts would interfere. The Courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, CMG consisting of experienced

> persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail and for specifying these two conditions regarding pre-qualification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide."

14. From the aforementioned law laid down by Hon'ble Supreme Court, it is amply clear that tender proceedings can be interfered only when the action on the part of employer is arbitrary, discriminatory, malafide or actuated by bias.

15. In the instant case, in view of nature of work required to be done by tenderer, its volume and its execution, we do not find that putting of an experience clause is arbitrary or discriminatory in any manner. The Petitioner failed to point out anything to say that experience clause in the eligibility condition is due to some malafide or actuated by bias.

16. So far as the tender notification in other State i.e. Kerala is concerned, in State of Kerala, the supply is in the packaging of 30 kg. and there may be justified reason based on past experience of Respondent No.2 for not putting such clause of experience. Eligibility criteria particularly the experience clause forming part of tender

document is put looking to the need and requirement of the agency floating tender.

17. In view of discussions made above and considering the law laid down by Hon'ble Supreme Court in aforementioned cases, we do not find any substance on the submissions made by learned senior counsel. The writ petition being devoid of any substance, is liable to be and is hereby dismissed.

Sd/-	Sd/-
(P.R. Ramachandra Menon) **Chief Justice**	**(Parth Prateem Sahu)** **Judge**

Yogesh