IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 03.09.2019

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THE HONOURABLE MR. JUSTICE M. SATHYANARAYANAN

AND

THE HONOURABLE MR. JUSTICE N.SESHASAYEE

WP.No.23662 of 2019
and WMP.No.23494 of 2019

K.Ashok Kumar ... Petitioner

Vs

M/s.Andhra Bank,
Rep. By The Assistant General Manager,
Credit Card Division,
II Floor, Andhra Bank Building,
Sultan Bazar, Koti,
Hyderabad-500 095. ...Respondent

PRAYER:- Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari to call for the records of the tender notification having Reference No.782/5/2019-20/RFP/01 dated 30.05.2019 of the respondent and quash the same.

For Petitioner : Mr.V.Arunagiri

O R D E R

[Order of the Court was delivered by M.SATHYANARAYANAN, J.]

The writ petition, styled as a Public Interest Litigation, is filed by a practicing Advocate and according to him, the respondent is a Banking Company incorporated under the provisions of the Banking Company's (Acquisition and Transfer of Undertaking) Act, 1980 and it had called for a Request for Proposal (RFP), vide Reference Number.782/5/2019-20/RFP/01 dated 30.05.2019 for providing card procuring, processing of Debit/Credit/Prepaid card, Chip and Contactless (Dual Interface NCMC Complain) card personalization with facility management at the Bank Credit Card Division as per specifications, terms and conditions specified in the RFP for a period of three years.

2. The petitioner would further aver that the respondent had split the tender in two rounds as "Technical Bid" and "Indicative Commercial Bid" and also fixed eligibility criteria for the bidders to participate in the tender. The petitioner has given a comparison chart of the requirement and eligibility requirement and took a stand that the tender notification itself is contradictory and making eligible the foreign bidders to participate in the tender through their agent/representative in India, which will cause serious data threat, as personal data of millions of Indian customers shall be outsourced to outside India. The petitioner would also aver that despite the fact that the respondent Bank had modified the terms and conditions of the tender by an addendum dated 13.06.2019, the flaws pointed out by the petitioners have not been rectified and therefore, the petitioner has been constrained to approach this Court by filing this writ petition.

3. Mr.V.Arunagiri, learned counsel appearing for the petitioner would submit that on account of the fixation of higher eligibility criteria, many of the Indian companies are not in a position to participate in bidding and therefore, this Court may issue appropriate direction to the respondent to reduce the terms and conditions, so that many companies in India can participate in the bid. It is also the submission of the learned counsel appearing for the petitioner that on account of the permission granted to foreign entities to participate in the bid, in future it may result in data breach which may not augur well for the security of millions of users.

4. This Court has considered the submissions made by the learned counsel appearing for the petitioner and also perused the entire materials placed before it.

5. Admittedly, the petitioner is a practicing Lawyer and he is not one of the participants of the bid / tender floated by the respondent Bank and he is also not involved in the said field of activity.

6. The Hon'ble Supreme Court in the decision in State of Uttaranchal v. Balwant Singh Chaufal and Others [(2010) 3 SCC 402] has dealt with a Public Interest Litigation filed by a lawyer and it is relevant to extract the following portion of the said decision:

> "It was expected from a member of noble profession not to invoke jurisdiction of the Court in a matter where controversy itself is no longer res integra. The petitioner, a local practising lawyer, ought to have bestowed some care before filing his writ petition in public interest under Article 226 of the Constitution. The controversy raised by the

petitioner was decided 58 years ago by the High Court in Karkare, AIR 1952 Nag 330, which was approved by the Constitution Bench way back in 1962 in Atlas Cycle, AIR 1962 SC 1100. When the controversy is no longer res integra and the same controversy is raised repeatedly, then it not only wastes precious time of the Court and prevents the Court from deciding other deserving cases, but also has immense potentiality of demeaning a very important constitutional office, and the person who has been appointed to that office. This is a clear case of abuse of process of the Court in the name of public interest litigation. A degree of precision and purity in presentation is a sine qua non for a petition filed by a member of the Bar under the label of Public Interest Litigation. It is expected from a member of the Bar to at least carry out the basic research whether the point raised by him is res integra or not. The lawyer who files such a petition cannot plead ignorance. This is a classic case of abuse of process of court. A practising lawyer has deliberately abused process of the court. In that process, he has made a serious attempt to demean an important constitutional office. The petitioner ought to have refrained from filing such a frivolous petition."

7. In Hero Ecotech Ltd. v. Commissioner of Backward Classes Welfare [2018 (4) CTC 47], a Single Bench of this Court has considered the judicial review as to the rejection of technical bid of the writ petitioner and also took note of the fact that the petitioner therein was not a participant in the tender process and also not involved in the field of activity for which the tender was floated and it is relevant to extract para 32 of the said decision:

"32. The prayer in this Writ Petition is for issuance of a Certiorari to call for the records of the proceedings in Tender No./2017, dated 11.11.2017 on the file of the First Respondent and to quash the same as illegal and without jurisdiction. The petitioner has challenged the Tender Document No.2 of 2017, by raising an objection that the same was made to fit in large manufacturers such as Respondents 2, 3 & 4. Admittedly, the petitioner is not a participant in the Tender Consultant. Certainly, the petitioner with the above stated status, is not entitled to maintain this Writ Petition by questioning the present impugned proceedings, as I find that this individual does not have any locus standi to question the same. Thus, I find that this Writ Petition is not maintainable at the instance of the Writ Petitioner and accordingly, the same is dismissed. No costs. The connected Miscellaneous Petitions are closed."

In the case on hand, the petitioner claims to be a practicing lawyer and admittedly, he is not one of the participants to the tender floated by the respondent Bank and he is also not involved in the line of activity. Of-course being a lawyer be cannot involve himself in commercial activity which would amount to unethical practice and as such, the petitioner has no locus standi to entertain this writ petition and this Court also approves the view taken by the learned Single Judge in the above cited decision.

8. In Montecarlo Ltd. v. NTPC Ltd. [2016 (10) Scale 50], the Hon'ble Supreme Court has considered the scope of judicial review in Techno Commercial Bid and in paragraph No.24, observed as follows:

> "24. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and sometimes third party assistance from those unconnected with the owner's organization is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which

the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints."

9. In Consortium of Titagarh Firema Adler S.P.A. - Titagarh Wagons Ltd. v. Nagpur Metro Rail Corporation Limited (NMRCL) [(2017) 7 SCC 486], the scope of judicial review in Technical, Commercial or Expert matters came up for consideration and in paragraph No.31, it was held as follows:

> "In a complex fiscal evaluation the Court has to apply the doctrine of restraint. Several aspects, clauses, contingencies etc., have to be factored. These calculations are best left to experts and those who have knowledge and skills in the field. The perception of feasibility of completion of the project have to be left to the wisdom of the financial experts and consultants. The courts cannot really enter into the said realm in exercise of power of judicial review."

10. In Municipal Corporation, Ujjain and another v. BVG India Limited and Others [2018 (5) Scale 128], the principles of judicial review which have to be applied in decisions relating to acceptance of tender and award of contract have been considered and in paragraph No.6, it was observed by the Hon'ble Apex Court that,

> "However, there are inherent limitations in exercise of that power of judicial review. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government..... The right to choose cannot be considered to be an arbitrary power. Of course if the said power is exercised for any collateral purpose, the exercise of that power will be struck down."

In paragraph No.21, it was observed among other things that,

> "The principles of equity and natural justice do no operate in the field of commercial transactions. Wherever a decision has been taken appropriately in public interest, the Court ordinarily should exercise

> judicial restraint. 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."

As regards evaluation of tenders and awarding contracts, the Hon'ble Supreme Court in Paragraph No.35 of the decision observed that,

> "Evaluating tenders and awarding contracts are essentially commercial transactions / contracts. If the decision relating to award of contract is in public interest, the Courts will not, in exercise of the power of judicial review, interfere even if a procedural aberration or error in awarding the contract is made out. The power of judicial review will not be permitted to be invoked to protect private interest by ignoring public interest... Attempts by unsuccessful bidders with an artificial grievance and to get the purpose defeated by approaching the Court on some technical and procedural lapses, should be handled by Courts with firmness. The exercise of the power of judicial review should be avoided if there is no irrationality or arbitrariness." (emphasis supplied)

11. This Court has already held that the petitioner has no locus standi to file this writ petition and before filing so, did not bestow his best attention in collecting material particulars and also did not look into the legal position in the matters involving commercial or technical bids or expertise and in the light of the principles enunciated by the Hon'ble Supreme Court in the decisions cited supra, this Court cannot interfere over the same.

12. It is also pleaded by the petitioner that on account of the fixation of higher eligibility criteria, many of the companies in India cannot participate in the tender and therefore, wants this Court to reduce the tender eligibility criteria. Once again it is to be pointed out that this Court, in exercise of it's jurisdiction under Article 226 of the Constitution of India, cannot do that exercise, as it falls within the exclusive domain of the tender floating authority.

13. This Court, on a careful scrutiny and consideration of the entire materials as well as appreciation of the submission

made by the learned counsel for the petitioner, is of the considered view that the present writ petition lacks merit and substance and deserves dismissal.

14. In the result, this Writ Petition is dismissed at the admission stage itself. No costs. Consequently, connected miscellaneous petition is also dismissed.

jvm

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To
The Assistant General Manager,
M/s.Andhra Bank,
Credit Card Division,
II Floor, Andhra Bank Building,
Sultan Bazar, Koti, Hyderabad-500 095.

+1cc to Mr.V.Arunagiri, Advocate, SR.No. 76840

WP.No.23662 of 2019

Kak(30/09/2019)