

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.11.2019

CORAM :

THE HONOURABLE MR.JUSTICE N.KIRUBAKARAN
and
THE HONOURABLE MR.JUSTICE P.VELMURUGAN

W.A.No.3302 of 2019
and
C.M.P.No.21189 of 2019

N.Gunasekaran

... Appellant

Vs

1.State of Tamil Nadu rep. by its,
Secretary to Government,
Highways & Minor Ports Department,
Secretariat, Chennai - 600 009.

2.The Chief Engineer,
Construction and Maintenance,
Highways Department, Guindy,
Chennai - 600 025.

3.The Superintending Engineer,
Highways (C&M),
Chennai Circle, No.299, Anna Salai,
Teynampet, Chennai - 600 006.

... Respondents

PRAYER: Writ Appeal filed under Clause 15 of the Letters patent against the order dated 25.09.2019 passed in W.P.No.28340 of 2019 on the file of this Court.

WP.NO.28340/2019:

Calling for the records relating to the Govt order in GO.(MS) NO 162, Highways and Minor Ports (HN1) Department dated 1.10.2012 on the file of the 1st Respondent and the subsequent tender notice in Tender Notice No 10/2019-2020/HDO, dated 28.8.2019 on the file of the 3rd Respondent quash the same and Direct the Respondents to issue fresh tender Notifications to Participate in the tender by the Petitioner.

For Appellant : Mr.S.Doraiswamy

For Respondents: Mr.Vijay Narayan, Advocate General
assisted by Mr.Vijayaprakash Narayan,
Government Pleader.

J U D G M E N T

(Order of the Court was delivered by N.KIRUBAKARAN, J)

This Court reminds me of a dialogue in Tamil Cinema of actor Sivaji Ganesan in a film viz., "புது அரசாங்கம் வந்தால் எல்லாமே புதுசு" which means "If a new administration comes, everything will be done afresh". This case would stand as an example that if there is a change of Government, the policies will also be changed. In the State of Tamil Nadu, it is a fact that when there is change of Government, the policies definitely would be changed without considering that whether the current policy is good for the people or not.

2.The issue in this case is introduction of package system in awarding the contract by grouping various works in a single package. Originally, the said system was introduced in the year 2003 and subsequently, it was withdrawn in the year 2006, when there was a change of Government. The same was reintroduced in the year 2012, when again, there was a change of Government, moving back to the very old system which was introduced in the year 2003. The policy changes according to the ruling party, according to its wish. However, what is to be seen is, whether the policy decision taken by the Government is firstly in larger interest of people or it is in violation of Article 14 of the Constitution of India or arbitrary.

3.In this case, the petitioner is aggrieved over G.O.(Ms). No.162, Highways & Minor Ports (HN1) Department, dated 01.10.2012 by which the package system was introduced in Highways Department for doing road works. By package system, a number of works can be grouped to a value of Rs.5 Crore to Rs.15 Crore as a major work for easy execution. According to the petitioner/appellant, the said Government Order has been passed only to favour a selected few contractors thereby eliminating the other competent contractors from the field violating Article 14 of the Constitution of India.

4.The petitioner/appellant intended to take part in the tender vide Tender Notice No.10/2019-2020/HDO, dated 28.08.2019. However, because of the conditions prescribed, the appellant was disqualified to take part in the tender. The tender notice consists of 21 packages within the Chennai city. The major works covered in the tender are improvement of roads, construction of drain, Precast Box culvert, footpath etc., However, the condition put forth in the tender that the tenderer should have achieved average annual turn over in the last five years of 40% of the value of the contract is arbitrary in nature as it is aimed at eliminating the appellant from participating in the tender.

5.Mr.S.Doraiswamy, learned Counsel for the appellant would submit that the regular contractors who are dependent upon these works are made ineligible and only a selected few contractors are chosen as beneficiaries by introduction of this package system. The package system has been withdrawn as early as on 04.08.2006 by virtue of G.O.Ms.No.125 and reasons have been stated in Paragraph No.2 of the said Government Order.

6.When such is the position, there is no occasion for the Government to supersede the said Government Order and issue a fresh Government Order viz., G.O.(Ms).No.162 dated 01.10.2012 in which many clauses have been introduced which cannot be fulfilled by the appellant as well as by the similarly placed persons. He relied upon the Judgment of Hon'ble Supreme Court in the case of "Ramana Dayaram Shetty Versus International Airport Authority of India & Others" reported in "CDJ 1979 SC 206" to contend that the actions of the Government should not be tainted with arbitrariness and if it is found to be arbitrary, the Court has got powers to strike down such action. It is contended that one such arbitrary action in this case is reintroduction of package system and the consequent conditions imposed in the impugned tender.

7.On the other hand, Mr.Vijay Narayan, learned Advocate General would submit that it is a policy decision taken by the Government in the interest of the public to see that the works are completed at the earliest so that public is not put to inconvenience especially with regard to laying of roads, footpath, construction of drainage and culvert etc., He would submit that the introduction of the clause viz., the tenderer should have achieved average annual turn over in the last five years of 40% of the value of the contract is to test contractor's financial position and also the machinery, he handles. Ineligible tenderers are eliminated at the initial

stage itself so that the tender process could be completed very smoothly and effectively in the interest of the public.

8. With regard to the change of policy, he would submit that it has been categorically stated in the impugned Government Order itself, the circumstances under which the policy has been changed. The Government in its discretion and in the interest of the State has brought such changes. When such is the position, the same cannot be challenged before this Court. He would rely upon the Judgment of the Hon'ble Supreme Court in the case of "Shimnit Utsch India Private Limited and another Versus West Bengal Transport Infrastructure Development Corporation Limited and others" reported in "(2010) 6 Supreme Court Cases 303", to contend that policy may change with changing circumstances including political scenerio.

9. Heard the parties and perused the records.

10. A perusal of the tender document would disclose that the works which have been included in the tender are Improvement works including upkeeping for a period of 60 months in Chennai City Roads, Construction of drains including footpath, Construction of Precast Box culvert, providing protective wall, paver block and SS Hand Rails works, providing interlocking CC block, Cycle Track, Median Works including up keeping in Tambaram (H) C&M, Widening, Improvements, providing interlocking Paver Block including footpath and construction of Minor bridge etc., The above works are confined in 21 packages to develop several divisions of the city.

11. From the nature of works mentioned above, it is proved that these are essential works which are required to be done with speed so that the roads are repaired swiftly and the drains and footpaths are also constructed quickly. Further, these are all the most required infrastructures for the public as the roads are being used by the public. If any part of the road is damaged, definitely, it would cause inconvenience to the public and therefore, only to eliminate the delay in executing the works, the package system is said to have been introduced. The G.O.Ms.No.162 dated 01.10.2012 categorically gives the reasons for introduction of package system which are extracted as follows:

"8. The chief Engineer (Construction and Maintenance), Highways Department in his letter sixth read above has proposed certain guidelines/conditions for the proposed packaging system which are as follows:

(I) Plan Works:

(a) The works are to be packaged for Rs.5 Crores to 15 Crores.

(b) The works in a Sub-Division are to be clubbed to form a single package.

(c) Whenever the works in a subdivision is less than rs.5 Crores, the works in that sub-division are to be clubbed with adjoining sub-division, within the division to form a single package of Rs.5 Crores to Rs.15 Crores.

(d) Whenever the works in a subdivision are more than Rs.15 Crores, the works within the subdivision are to be clubbed in a way to form a package of Rs.5 Crores to Rs.15 Crores. The number of packages within subdivision shall be kept minimum as far as possible. The value of package shall be kept equal as far as technically possible.

(e) When the value of the individual work exceeds Rs.6 Crores, tender may be invited as individual work.

(f) The works are not to be clubbed across divisions, schemes in any case.

(II) Non Plan works:

For non plan works, the works are to be clubbed in each subdivision irrespective of the value of the package. However the upper limit shall not exceed Rs.15 Crores.

(III) Natural Calamity works:

The emergency works carried out during natural calamities are to be exempted from packaging.

(IV) Centrally Sponsored Schemes: (Deposit works/Other department works)

The packaging is not applicable to centrally sponsored schemes/deposit works and other service department works."

12. After taking into consideration of the hardships and difficulties in single tender system, the Government took a policy decision by giving the above enumerated reasons for reintroduction of package system. When the Government has applied its mind taking into consideration of the hardships, difficulties and delay in concluding the works in a time bound manner, the package system has been introduced and the same cannot be found fault with.

13.It is seen that the beneficiaries are going to be the public. These works are indeed to be executed with speed as people are using the roads and they should not be put to hardship at any point of time due to delay in execution of works. Even if there is any repair, that needs to be completed at once. Therefore, the conditions stipulated in the tender document to see that eligible tenderers alone could participate in the tender process who have got man power, financial capacity and equipments. Otherwise, there will be a delay in execution of works and works will not be completed in time resulting in inconvenience to the public.

14.When that is the policy decision taken by the Government in the interest of the public, as explained in the impugned Government Order, this Court cannot set aside the said Government Order. This Court is also convinced that the said Government Order has been introduced only in public interest. When public interest is paramount, no other criteria could be considered by this Court.

15.As rightly pointed out by the learned Advocate General by relying upon the Judgment of the Hon'ble Supreme Court reported in "(2010) 6 Supreme Court Cases 303" that policy may change with changing circumstances including changes in the political scenario as stated by this Court in the opening paragraph of this judgment. The Hon'ble Supreme Court in detail analyzed as to, how the policy of the Government cannot be interfered with and the relevant Paragraphs of the above Judgment of the Hon'ble Supreme Court are usefully extracted as follows:

"'31. Before we refer to some of the important decisions of this Court dealing with the aspects of judicial review in the matters of government contracts, tenders and change in policy, it is appropriate to notice the observations made in a couple of English decisions and one Australian case on judicial review in the matters of change in administrative policy.

32. In Hughes v. Dep'tt. of Health and Social Security², Lord Diplock, J. said:

"....Administrative policies may change with changing circumstances, including changes in the political complexion of governments. The liberty to make such changes is something that is inherent in our constitutional form of government....." 1985 AC 776

33. In Attorney-General for the State of New South Wales v. Quin³, Mason C.J. (majority view, Australian High Court) observed :

"Once this is accepted, I am unable to perceive how a representation made or an impression created by the Executive can preclude the Crown or the Executive from adopting a new policy, or acting in accordance with such a policy, in relation to the appointment of magistrates, so long as the new policy is one that falls within the ambit of the relevant duty or discretion, as in this case the new policy unquestionably does. The Executive cannot by representation or promise disable itself from; or hinder itself in, performing a statutory duty or exercising a statutory discretion to be performed or exercised in the public interest, by binding itself not to perform the duty or exercise the discretion in a particular way in advance of the actual performance of the duty or exercise of the power....."

34. In R. v. Secretary of State for Transport, Ex parte Richmond upon Thames London Borough Council & Ors.⁴ while laying down that the Wednesbury reasonableness test alone was applicable for finding out if the change from one policy to another was justified, Laws, J. stated :

"The court is not the Judge of the merits of the decision-maker's policy. ...The public authority in question is the Judge of the issue whether 'overriding public interest' justifies such a change in policy...But this is no more than to assert that a change in policy, like any 1990 64 ALJR 327 (1994) 1 All E.R. 577 discretionary decision by a public authority, must not transgress Wednesbury principles....."

35. Now, we consider the decisions of this Court. In Mohd. Fida Karim and Anr. v. State of Bihar & Ors.⁵, while dealing with a case of change in Government policy for licence under Bihar Excise Act, this Court held thus :

".....The new policy of adopting the method of auction- cum-tender is certainly a change of policy. The reason for change of policy given by the Government is that it realised that making settlement for five years would give rise to monopolistic tendency, which

will not be in public interest, at the same time the interest of revenue was not fully protected in the former policy. This clearly goes to show that the Government wanted to adopt a new policy in public interest to be made applicable from the year 1991-92. Learned Counsel appearing on behalf of the State of Bihar submitted in clear terms that the earlier policy was wrong and the Government realised its mistake and thus adopted a new policy to augment its revenue and to avoid monopolistic tendency. We do not find anything wrong in taking such view by the State Government and to change its policy considering the same to be in public interest....."

36. This Court in *Sterling Computers Limited v. M/s. M & N Publications Limited & Ors.*⁶, while dealing with judicial review in a matter relating to publication of telephone directories of Mahanagar Telephone Nigam Limited (a (1992) 2 SCC 631 (1993) 1 SCC 445 Government of India Undertaking) made the following observations :

"12. At times it is said that public authorities must have the same liberty as they have in framing the policies, even while entering into contracts because many contracts amount to implementation or projection of policies of the Government. But it cannot be overlooked that unlike policies, contracts are legally binding commitments and they commit the authority which may be held to be a State within the meaning of Article 12 of the Constitution in many cases for years. That is why the courts have impressed that even in contractual matters the public authority should not have unfettered discretion. In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. But even in such matters they have to follow the norms recognised by courts while dealing with public property. It is not possible for courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be

conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive."

37. In the case of Tata Cellular v. Union of India 7, a three-Judge Bench of this Court extensively considered the English decisions as well as the previous decisions of this Court in the matter of judicial review and scope relating to government contracts and tenders and deduced the legal principles in paragraph 94 of the report thus :

"(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 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 (1994) 6 SCC 651 (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

38. That the award of a contract, whether it is by private party or by a public body or the State is essentially a commercial transaction was highlighted by this Court in *Raunaq International Ltd. v. I.V.R. Construction Ltd. & Ors.*⁸ In that case, this Court spelt out the following considerations that weigh in making a commercial decision :

"(1) the price at which the other side is willing to do the work;

(2) whether the goods or services offered are of the requisite specifications;

(3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;

(4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;

(5) past experience of the tenderer and whether he has successfully completed similar work earlier; (1999) 1 SCC 492

(6) time which will be taken to deliver the goods or services; and often

(7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services."

39. Again in the case of *Punjab Communications Ltd. v. Union of India & Ors.*⁹, a two-Judge Bench of this Court elaborately examined the principles of legitimate expectation and a change in policy by the

Government. While dealing with second question formulated by the Court viz., whether if essentially the Government decided to fund the proposed contract for Eastern U.P. from its own resources, it was permissible for the Government to change its policy into one for providing telephones for rural areas in the entire country and whether 'legitimate expectation' of the appellant in regard to the earlier notification required the Court to direct that a notification for Eastern U.P. should be continued, this Court held in paragraph 45 of the report thus:

"45. It will be noticed that at one stage when the ADB loan lapsed, the Government took a decision to go ahead with the project on its own funds. But later it thought that the scheme regarding telephones in rural areas must cover not only the villages in Eastern U.P. but also in other backward rural areas in other States (1999) 4 SCC 727 The statistics given in the counter-affidavits of the Union of India to which we have already referred, show that there are other States in the country where the percentage of telephones is far less than what it is in Eastern U.P. The said facts are the reason for the change in the policy of the Government and for giving up the notification calling for bids for Eastern U.P. Such a change in policy cannot, in our opinion, be said to be irrational or perverse according to Wednesbury principles. In the circumstances, on the basis of the clear principles laid down in *ex p Hargreaves* and *ex p Unilever*, the Wednesbury principle of irrationality or perversity is not attracted and the revised policy cannot be said to be in such gross violation of any substantive legitimate expectation of the appellant which warrants interference in judicial review proceedings."

40. In the case of *Monarch Infrastructure (P) Ltd. v. Commissioner., Ulhasnagar Municipal Corporation & Ors.*¹⁰, this Court was concerned with the question relating to NIT issued by Ulhasnagar Municipal Corporation for appointment of agents for collection of octroi and revision of terms and conditions thereof. This Court held :

".....The High Court had directed the commencement of a new tender process subject to such terms and conditions, which will be prescribed by the Municipal Corporation. New terms and conditions have been prescribed apparently bearing in mind the nature of

contract, which is only collection of octroi as an agent and depositing the same with the Corporation. In addition, earnest money and the performance of bank guarantee are insisted upon; collection of octroi has to be made on day-to-day basis and payment must be made on a weekly basis entailing, in case of default, (2000) 5 SCC 287 cancellation of the contract. We cannot say whether these conditions are better than what were prescribed earlier for in such matters the authority calling for tenders is the best judge. We do not think that we should intercede to restore status quo ante the conditions arising in clauses 6(a) and 6(b) of the Tender Booklet and the bid offered much earlier by Konark Infrastructure (P) Ltd. should be accepted, for it filed a writ petition, which was allowed with a direction for calling for fresh tenders....."

41. In *Union of India and Anr. v. International Trading Co. and Anr.*¹¹, this Court held that non-renewal of permit by the Government to a private party on ground of change in its policy cannot be faulted if such change is founded on Wednesbury reasonableness and is otherwise not arbitrary, irrational and perverse. It was held:

"22. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities and adopt trade policies. As noted above, the ultimate test is whether on the touchstone of reasonableness the policy decision comes out unscathed.

23. Reasonableness of restriction is to be determined in an objective manner and from the standpoint of interests of the general public and not from the standpoint of the interests of persons upon whom the restrictions have been imposed or upon abstract consideration. A restriction cannot be said to be unreasonable merely because in a given case, it operates harshly. In determining whether there is any unfairness involved; the nature of the right alleged to have been infringed, the underlying purpose of the restriction imposed, the extent and urgency of the evil (2003) 5 SCC 437 sought to be remedied thereby, the disproportion of the imposition, the prevailing condition at the relevant time, enter into judicial verdict. The reasonableness of the legitimate expectation has to be determined with respect to the

circumstances relating to the trade or business in question. Canalisation of a particular business in favour of even a specified individual is reasonable where the interests of the country are concerned or where the business affects the economy of the country."

42. In the case of Directorate of Education and Ors. v. Educomp Datamatics Ltd. and Ors.¹², this Court, inter alia, applied the principles enunciated in Tata Cellular⁷ and Monarch Infrastructure (P) Ltd.¹⁰ and held as follows :

"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."

16. In that case, the question that fell for consideration was change of policy with regard to allowing the local manufacturers for supply of High Security Vehicle Registration Plates. Though the Hon'ble Supreme Court upheld the tender document when challenged by Indian Manufacturers in the case of "Association of registration plates Versus Union of India and others" reported in "(2005) 1 Supreme Court Cases 679", subsequently, there was a change in the policy of the Government to allow the local manufacturers also to supply the High Security Vehicle Registration Plates (HSVRPs). When the policy allowing local manufacturer to participate in the tender was challenged by the foreign manufacturers and the Hon'ble Supreme Court held that the subsequent policy cannot be interfered with because of the change in circumstances, even though the Hon'ble Supreme Court earlier upheld the tender by which only the foreign supplier alone was eligible to participate in the tender. In Paragraph No.58, the Hon'ble Supreme Court holds that unless it is arbitrary, the policy of the Government cannot be

interfered with and the said paragraph is usefully extracted as follows:

"58.The statement of law expounded in S.Nagaraj is beyond question. As noticed above, in Assn. of Registration Plates this Court did not find any fault with the controversial conditions in NIT and overruled all objections raised by the petitioners therein in challenge to those conditions. The impugned conditions of NIT in that group of cases were not held to be arbitrary, discriminatory or irrational nor amounted to creation of any monopoly as alleged. The declaration of law by this Court in Assn. of Registration Plates is that in the matter of formulating conditions for a contract of the nature of ensuring supply of HSRP, greater latitude needs to be accorded to the State authorities. We find it difficult to hold that by virtue of that judgment the impugned conditions were frozen for all times to come and the States were obliged to persist with these conditions and could not alter them in larger interest of the public. In our view, the decision of this Court in Assn. of Registration Plates did not create any impediment for the States to alter or modify the conditions in NIT if the circumstances changed in material respects by lapse of time."

Hence, it is evident that change in policy of the Government has been upheld by the Hon'ble Supreme Court.

17.In this case on hand, the condition imposed is that every tenderer should have achieved annual turn over in the last five years of 40% of the value of the contract. The appellant is no way near to that amount. Even though he is a class I contractor, the works done by him are stated as follows viz.,

- (i)Cleaning the road, black & white painting.
- (ii)white washing
- (iii)removal of deposited earth
- (iv)De-silting the culvert & drains, greeneries, maintenance
- (v)removal of debries
- (vi)supply of carted earth
- (vii)drain (70m) repairing of footpath, centre median, platform & handrails
- (viii)supply of labour & mini lorry

whereas, works awarded here are different for which he does not have the man power or machine support and financial capacity to execute the contract. Hence, the contentions put forth by the appellant, very elaborately by Mr.S.Doraiswamy, learned Counsel for the appellant cannot be accepted.

18.Hence, the appeal fails and the same is dismissed. No costs. Consequently, connected miscellaneous petition is closed. However the matter is kept pending for larger issue by raising appropriate queries.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To

1. The Secretary to Government,
State of Tamil Nadu
Highways & Minor Ports Department,
Secretariat, Chennai - 600 009.
2. The Chief Engineer,
Construction and Maintenance,
Highways Department, Guindy,
Chennai - 600 025.
3. The Superintending Engineer,
Highways (C&M),
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+1cc to Mr.S.Doraiswamy, Advocate sr.91229

सत्यमेव जयते

W.A.No.3302 of 2019
and

C.M.P.No.21189 of 2019

nr 06/11/2019

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