HONOURABLE SRI JUSTICE P. NAVEEN RAO

WRIT PETITION No. 26696 of 2019

Date : 06.12.2019

Between:

M.Rama Rao, s/o. Satyanarayana Rao,
Aged about 49 years, occu: Special Class Contractor,
r/o.Hazipur village and mandal, Mancherial district.

....Petitioner

And

State of Telangana, rep.by its Prl.Secretary,
Transport, Roads & Buildings (R.I) Department,
Secretariat, Hyderabad and others.

.... Respondents

The Court made the following:

HONOURABLE SRI JUSTICE P. NAVEEN RAO

WRIT PETITION No. 26696 of 2019

ORAL ORDER:

Heard learned counsel for petitioner and learned Government Pleader for Roads and Buildings.

2. Facts as averred in the affidavit filed in support of the writ petition disclose that on 7.11.2019 tender notice was issued calling for bids to undertake the work of forming diversion road to Kalyanikhani open cast mine on Kasipet-Manikpur road for a distance of 6 Kms. The estimated cost of the work is shown as Rs.22 crores. The work is to be executed in 12 months. Last date for submission of bids was 2.12.2019. Petitioner is aggrieved by the tender conditions requiring the bidder to own machinery to undertake the work of laying the road and not allowing joint ventures to bid for the work. Petitioner claims to have made representation on 24.11.2019 against those conditions. Petitioner alleges inaction in considering his objections and not extending the last date as arbitrary and discriminatory. Petitioner, seeks mandamus against inclusion of clause to own the machinery and not allowing joint ventures as arbitrary, illegal and unconstitutional.

3. Learned counsel for petitioner contended that in Clause 13 (g) of the tender notification, bidder is required to own 7 items and complying with said requirement is not possible to many contractors; that such condition is never imposed in earlier tender notifications; is without power and competence of the Superintending Engineer (R & B) and said conditions are tailor made to favour a contractor. He placed reliance on G.O.Rt.No. 300 Transport, Road & Buildings (R.1) Department dated 28.5.2018. He would further submit that all other departments allow joint venture units/firms/companies to participate in the tenders but illegally that facility is not extended in this tender notification.

4. According to learned Assistant Government Pleader, the requirement of owning machinery is confined to first item in Clause 13 (g) of the tender notification and is in accordance with G.O.Rt No.300 dated 28.5.2018. He would further submit that joint ventures to submit bids are allowed where value of the work is Rs.100 crores and above. Learned Assistant Government Pleader produced letter No.RW/NH-37010/4/2010-EAP (Printing) Vol-IV, dated 05.03.2019 which prescribe the standard request for proposal (RFP) for National Highways and Centrally Sponsored road works proposed to be implemented on EPC Mode of Contract. It contains guidelines. According to guideline No.21.11 (h) no joint venture upto Estimate Project cost of Rs.100 Crores and joint venture is permissible in case of maintenance works to be taken up on EPC Mode. According to learned Assistant Government Pleader, the said instructions/guidelines are adopted by the State Government and the Roads & Buildings Department and the competent authorities are directed to follow the said guidelines in prescribing the tender conditions.

5. The offending Clause, to the extent relevant reads as under:

> **"13: Eligibility criteria for opening the price bid:**
> ....
> ...
>
> (g) **Should possess the key / Critical equipment**: (either owned with proof or leased with lease deed as per the prescribed format and proof of ownership of lessor or to be procured against mobilization advance with supporting document of plan of procurement of the key and critical equipment in Sl No. 2 to Sl No. 7 for this work. Machinery is Sl No.1 should be owned).
> ......
>
> II) The contractor shall procure the hot mix material to the work site duly maintaining the required laying temperature as per the specification as per G.O.Ms No. 46 T (R&B) Dept dt 17.1.2005.

1	Owned Batch type HMP 100-120 TPH within 100 Kms distance from the work site	1 No
2	Hydro static sensor paver	1 No
3	Tippers	10 Nos
4	Pub Mill/ WMM plant	1 No
5	Ajax / Ready Mix Contrete	1 No
6	Steel centering	500 sqm
7	Quality Control Lab equipment	1 set

> As per G.O.Rt No. 300 T,R & B(R.1) Department Dt 28.5.2018 the tenderer shall exhibit proof of owning of Batch type hot mix plant of capacity 100-120 TPH and such Batch type Hot mis plant shall be located within a distance of 100 Kms from the last point of working reach for which bids are invited.
> ……”

6. It is seen from the extracted portion of the Clause, the bidder is required to own Batch type hot mix plant of capacity 100-120 TPH and located within 100 Kms distance. All other (6) items can be hired. What is required is to produce proof of ownership / lease deed with proof of ownership of lessor or to procure against mobilization advance. Thus, Clause is flexible and petitioner need not own all the machinery. Learned counsel for petitioner proceeded on wrong assumption that the tender notification requires to own all the machinery. Further, Clause (ii) of G.O.Rt 300 dated 28.5.2018 stipulates that for the bituminous work of value of Rs.2 crores and more, the bidder must own Batch type hot mix plant of capacity 100-120 TPH and located within 100 Kms distance. Thus, item 1 in Clause 13 (g) is in accordance with G.O.Rt. No. 300 dated 28.5.2018.

7. To buttress his contention, learned counsel for petitioner sought to rely on Clause (i) of G.O.Rt No. 300 dated 28.5.2018. It is seen from this Clause that the specifications mentioned therein for hot mix plant are applicable if value of work is less than Rs.2 crores. Petitioner, though owns a Hot Mix Plant but it is not the same as required by Clause (ii) of G.O.Rt No. 300 dated 28.5.2018. It is thus apparent that petitioner does not have the eligibility. Apparently, to cover up his ineligibility, petitioner is raising plea of bias and stipulating conditions in tender notification are tailor made to an unspecified person.

8. In matters of formulating tender conditions, employer has wider latitude and scope of judicial review is minimal. At the threshold, Court cannot interject the tender process on the ground that some of the terms of invitation to tender are not palatable to a person who is not

fitting into the parameters. It is within the domain of employer to prescribe tender conditions. Court may interfere, in exercise of power of judicial review, to assess the terms of tender notification, within the limited parameters of judicial review, if such conditions are palpably and demonstrably illegal, irrational, tailor made to suit a contractor, *mala fide*, against public interest and no reasonable man could have stipulated such conditions.

9. The wholesome rule in regard to judicial interference in administrative decisions is that if the Government takes into consideration all relevant factors, eschews from considering irrelevant factors and acts reasonably within the parameters of the law, Courts should keep off the same [paragraph 18, **Federation of Rly. Officers Assn. v. Union of India[1]].** Legality of policy and not the wisdom or soundness of the policy is the subject of judicial review [paragraph 16, **Directorate of Film Festivals v. Gauraw Ashwin Jain[2]].** On the scope of judicial review against the decisions of executive, more particularly decisions involving technical matters, in **Union of India v. J.O., Suryavamshi[3]**, Supreme Court warned the Courts to resist the temptation to usurp the power of executive.

10. At this stage a brief recapitulation of the law on judicial review on contracts and particularly on tender conditions is necessary:

10.1. In **MICHIGAN RUBBER (INDIA) LTD. V. STATE OF KARNATAKA[4],** Supreme Court held**:**

> "23**.** From the above decisions, the following principles emerge:
>
> (*a*) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the

[1] (2003) 4 SCC 289
[2] (2007) 4 SCC 737
[3] (2011) 13 SCC 167
[4] (2012) 8 SCC 216

State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(*e*) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government."

(emphasis supplied)

10.2. In **Asia Foundation & Construction Ltd. Vs. Trafalgar House Construction (I) Ltd**.[5], while referring to guidelines laid down in **Tata Cellular v. Union of India** [(1994) 6 SCC 651], Supreme Court held as under:

"9. ……. The High Court in construing certain clauses of the bid documents has come to the conclusion that such a correction was permissible and, therefore, the Bank could not have insisted upon granting the contract in favour of the appellant. We are of the considered opinion that it was not within the permissible limits of interference for a court of law, particularly when there has been no allegation of malice or ulterior motive and particularly when the court has not found any mala fides or favouritism in the grant of contract in favour of the appellant. In *Tata Cellular* v. *Union of India* [(1994) 6 SCC 651] this Court has held that:

"The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers,

2. committed an error of law,

3. committed a breach of the rules of natural justice,

4. reached a decision which no reasonable tribunal would have reached or,

5. abused its powers.

Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. ***Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:***

---

[5] (1997) 1 SCC 738

(*i*) ***Illegality***: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it;

(*ii*) ***Irrationality***, namely, Wednesbury unreasonableness.

(*iii*) Procedural ***impropriety.***

The above are only the broad grounds but it does not rule out addition of further grounds in course of time."

(emphasis supplied)

10.3. In **Reliance Airport Developers (P) Ltd.** v. **Airports Authority of India**[6], Supreme Court elaborated on these three parameters. Supreme Court observed:

"65. In other words, to characterise a decision of the administrator as "irrational" the court has to hold, on material, that it is a decision "so outrageous" as to be in total defiance of logic or moral standards. Adoption of "proportionality" into administrative law was left for the future.

10.4. In **Directorate of Education and others** Vs. **Educomp Datamatics Ltd and Others[7],** Supreme Court held as under:

"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)

"*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 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

[6] (2006) 10 SCC 1
[7] AIR 2004 SC 1962

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.

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

(Emphasis supplied)

10.5 In **Air India Ltd. v. Cochin International Airport Ltd**[8]**,** Supreme Court made following observations which are apt to this case:

"***In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny***. (paragraph-10) ; ***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*** .. (paragraph-11); ***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.***(paragraph-12); ***The courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. While exercising the power of judicial review of the terms of the tender notice the court cannot say that the terms of the earlier tender notice would serve the purpose sought to be achieved better than the terms of tender notice under consideration and order change in them*** (paragraph-13).

10.6. In **Meerut Development Authority Vs Assn. of Management Studies,** Supreme Court held as under:

"27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above stated ground, the reason being the

[8] (2000) 2 SCC 617

> terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations."

10.7. In **The Krishna District Petrol & HSD Dealers Association, Vijayawada and The Executive Director, IOCL, A.P.State Office, Himayathnagar, Hyderabad[9]** the scope of counter offer by the employer to accept transportation contract at the rate offered by L-1 tenderer was considered. In the judgment dated 30.12.2014 on considering the precedent decisions, this Court held:

> "33. The principles that emerge from the above precedents are, the writ court has limited jurisdiction in matters concerning contracts and invitation to bid for contract; Court must adopt restraint in contract matters; the Court does not sit as a Court of appeal in such matters; the State/its instrumentalities have to be given greater latitude in formulating tender conditions and awarding of contracts; In matters concerning financial implications it should be left to the concerned authority to decide the conditions of eligibility and the price at which contract can be awarded; Courts cannot interfere in terms of invitation to tender; No one has a right to insist that the contract to be awarded to him; Courts can interfere only if actions of tendering authority is found to be malicious or misused statutory powers; That the process adopted and decision made is so arbitrary and irrational that no authority acting reasonably and in accordance with relevant law could have reached and if public interest is affected."

11. Learned counsel for petitioner does not dispute that the machinery mentioned in the tender notification are required to lay the road.

12. Various tender conditions including required machinery are all evaluated by experts as per the requirements for laying of road. The Court cannot go into the aspect whether the tender conditions are validly prescribed or whether such conditions are required. Except making

---

[9] W.P. No. 572 of 2014 dated 30.12.2014

vague allegation that the tender conditions are tailor made to suit a particular person, petitioner does not highlight as to how said tender conditions are palpably and demonstratably illegal and that there is no requirement to get seven categories of machinery to undertake laying of road and that the Hot Mix Plant with specifications mentioned in the tender conditions is not required. As noticed above, in G O Rt No. 300, Government prescribed that Hot Mix Plant of higher capacity should be owned by the contractor who is bidding for the work where volume of the work is more than Rs.2 crores. Therefore, it cannot be said that the tender conditions are not valid.

13. Moreover, it is for the respondents/ R & B Department to choose appropriate eligibility criteria and Court cannot assess what conditions are required and be prescribed and suggest eligibility criteria different from the one chosen by respondents/R & B Department, more particularly in matters fixing parameters for identifying a contractor to develop infrastructure facilities. Court is ill-equipped to dwell into such matters.

14. The contention of learned counsel for petitioner that illegally joint ventures are not allowed is opposed by the learned Assistant Government Pleader, stating that as per the norms prescribed for awarding contracts, joint ventures are allowed only if value of the work is more than Rs.100 crores, therefore, joint venture system is not applicable in the present case. In view of the Government of India guidelines which are adopted by State Government as value of tender is less than Rs.100 crores, petitioner cannot insist as a matter of right that even for such tenders, the joint venture should be allowed. If it is the policy of the Government to permit joint ventures only if the value of the tender is more than Rs.100 crores Court cannot hold the policy as not valid and permit persons like petitioners to participate in the tenders by

floating joint venture. Be that as it may, tender conditions do not permit joint venture.

15. Further more in the facts of this case, the last date for submission of tenders prescribed in the tender notification was 2.12.2019 and writ petition itself was instituted on 2.12.2019 and as petitioner has not submitted his tender document, the Court cannot direct extension of last date specified in the tender conditions.

16. Therefore, I see no merit in the writ petition. Accordingly, the writ petition is dismissed. Miscellaneous petitions, if any pending, are closed.

P NAVEEN RAO,J

DATE: 06-12-2019
TVK

HONOURABLE SRI JUSTICE P. NAVEEN RAO

RIT PETITION No. 26696 of 2019

Date : 06.12.2019

tvk