

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Writ Petition (C) No. 2977 of 2020**

Mohammad Imran Meman (registered in class 'B' under unified registration system I.D. is CGeRo2002') Proprietor Mohammad Imran Meman, S/o Abdul Rahim Meman, Aged About 35 Years, R/o Ward No. 04, Khatkhathi Road, Basna, District Mahasamund (C.G.).

---- Petitioner**Versus**

1. State of Chhattisgarh Through the Secretary, Public Works Department, Mahanadi Bhawan, New Raipur, District : Raipur, C.G.
2. Engineer In Chief, Public Works Department, Raipur C.G.
3. Managing Director, CG State Agricultural Marketing Board (Mandi) Raipur C.G.

---- Respondents

For Petitioner	: Shri Mohit Kumar, Advocate
For Respondent/State	: Shri Siddharth Dubey, Dy. Govt. Advocate
For Respondent No.3	: Shri Animesh Tiwari, Advocate

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice**Hon'ble Shri Parth Prateem Sahu, Judge****Order on Board****Parth Prateem Sahu, Judge****26/11/2020**

1. Challenge in this writ petition is to the terms and conditions forming part of Notice Inviting Tender No.B-6/Tender/363/Godown/20-21/3725 issued by respondent No.3 vide Annexure P/1.
2. Facts of the case relevant for disposal of this petition are that, respondent No.3 had issued e-procurement tender notification on

29/10/2020 bearing No.B-6/Tender/363/Godown/20-21/3725 for construction of godowns at different locations within the State of Chhattisgarh. Respondent No.3 identified 35 locations for construction of godowns having different estimated values. Last date for submission of online bids was fixed as 19/11/2020 and physical submission of bids has been fixed as 25/11/2020. A corrigendum notification was issued on 18/11/2020 whereby last date for submission of bids and opening of bids has been extended as 28/11/2020, for submission of physical bid and for opening of bids submitted by tenderers as 01/12/2020. In the amended notification, relaxation has also been given by mentioning that terms and conditions as mentioned at Sl.No.1 to 6 in tender notification to be omitted for the work value upto Rs.1 Crore.

3. The petitioner has approached this Court by filing writ petition with following reliefs :-

“10.1 That, the Hon'ble Court may be pleased to issue a writ of an appropriate nature quashing/setting aside the impugned NIT dated 29/10/2020 bearing system tender No.68853 and its corrigendum dated 18/11/2020 issued by the respondents.

10.2 That, the Hon'ble Court may be pleased to declare the conditions of “Godown Construction including truss and sheeting work on roof” to be a non-essential condition for works more than 01 crore also and direct

the respondent authorities to allow the petitioner to participate in the tender.

10.3 That, alternatively this Hon'ble Court may be pleased to direct the respondents to consider the objection of the petitioner filed by way of representation before proceeding with the tender process.

10.4 Any other relief, which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case be granted.”

4. Shri Mohit Kumar, learned counsel for the petitioner submits that when once respondent No.3 has found it appropriate to omit the terms and conditions at Sl.No.1 to 6 as mentioned in amended notification for the work value upto Rs. 1 Crore, then it should apply for all works; respondent No.3 could not classify the same work of construction of godowns as work value below Rs.1 Crore and work value of above Rs.1 Crore when all the work is for construction of godowns only. He further contended that respondent No.3 has clubbed more than one godown under one head and thereby value of work has been increased above Rs.1 Crore and due to clubbing of construction of more than one godown under one head, many of the contractors like petitioner is ousted from the tender proceedings. The action of clubbing of construction of more than one godown is arbitrary, unfair and there is no nexus between the value of work and different terms and conditions fixed for value less than Rs.1 Crore and value of work above Rs.1 Crore. The qualification/eligibility

conditions fixed in the NIT by respondent No.3 is arbitrary, unfair, unreasonable and malafide. Imposition of terms and conditions may restrict/limit participation in the subject tender process, which may result in huge loss to State ex-chequer. In support of his submission, he places reliance on the verdict rendered by Hon'ble Supreme Court in case of **New Horizons Limited and Another v. Union of India and Others** reported in **(1995) 1 SCC 478**.

5. Per contra, Shri Animesh Tiwari, learned counsel for respondent No.3 while controverting the submission made by learned counsel for the petitioner submits that idea and understanding of the petitioner with regard to terms and conditions prescribed looking to the work value is wrong and misconceived. He points out that construction of godown has been shown district wise under the tender notification Annexure P/1. Further, value of work and requirement of construction of work has been categorized as *Mandi* and *Upmandi*. Specification of construction of different godowns at different places to be constructed, looking to their geographical area may differ. Respondent No.3 after taking into consideration overall facts and circumstances, size of godown and its place of construction, has given relaxation by omitting terms and conditions as prescribed in the tender notification initially on 29/10/2020 for the godowns which are having value of upto Rs.1 Crore. It is contended that relief as prayed for by the petitioner in Clause 10.2 cannot be granted to him as construction of godown can only be treated to be completed only

after laying down truss and sheeting work on roof. Fixation of terms and conditions for any work which are required to be done for the employer is exclusively within the domain of the employer. He pointed out that Annexure P/5 relied upon by the petitioner is with regard to lump-sum contract, whereas present tender notification is a contract based on schedule of rates. It is further contended that respondent No.3 issued guidelines on 01/10/2019 for all the contract works based on applicable schedule of rates and there are further classification of work i.e. less than Rs.1 Crore, more than Rs.1 Crore to 5 Crore and work value of more than Rs.5 Crore. The terms and conditions and required documents prescribed are to assess the eligibility and efficiency of the contractor who are interested to participate in the construction work. The petitioner is aggrieved with the experience clause of construction work, which is put to assess the eligibility and efficiency of the contractor in civil work of high value of work. The petitioner cannot challenge the terms and conditions, if it does not suit to him.

6. Shri Siddharth Dubey, learned counsel representing the State/respondents No.1 and 2 submits that tender notification has been issued by respondent No.3. He added to the submission already made by Shri Tiwari stating that it is an exclusive domain of the employer and tender issuing authority to formulate terms and conditions, which are beneficial to the interest of employer. It is contended that the petitioner has not made any submission with

regard to unreasonableness in fixing of terms and conditions or any malafide against respondent No.3/authorities.

7. We have heard learned counsel for the respective parties and perused the documents placed on record by the petitioner as well as Shri Tiwari, learned counsel for respondent No.3.
8. Challenge made by the petitioner in the writ petition is precisely for getting terms and conditions of tender notification to be relaxed for the work value of construction of godowns exceeding Rs.1 Crore. The challenge is on the ground that relaxing of terms and conditions by amended notification for the work upto Rs.1 Crore and not for the work above Rs.1 Crore to be arbitrary and unreasonable. Any of the terms and conditions of any tender notification cannot be said to be arbitrary and unreasonable merely on the ground that it does not suit to the petitioner or he could not able to fulfil those terms and conditions, which has been fixed by the employer. There may be so many reasons for relaxing the terms and conditions as mentioned in the amended notification to be omitted for the purpose of works mentioned in the subject tender notification having the work value upto Rs.1 Crore only and relaxation of those terms and conditions will be suitable and beneficial to the interest of the employer/respondent No.3. It is for the employer who wants to get any person or agency to be engaged by him for any work as in this case civil construction work to fix their eligibility criteria.

9. In tender matters, scope of judicial review is very limited. The Courts have to only see that there is no illegality, unreasonableness or arbitrariness in decision making process. Petitioner could not able to point out as to how the terms and conditions forming part of eligibility criteria is/are in any manner arbitrary or unreasonable.
10. The law with regard to interference in the tender proceedings is well settled by Hon'ble Supreme Court in case of **Tata Cellular v. Union of India** reported in **(1994) 6 SCC 651**, in which, Hon'ble Supreme Court has held thus :

“77. 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 fulfillment 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:

- (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, Wednesday 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. As a matter of fact, in *R. v. Secretary of State for the Home Department, ex Brind* reported in (1991) 1 AC 696, Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

11. Further, Hon'ble Supreme Court in case of **Central Coalfields Limited and Another v. SLL-SML (Joint Venture Consortium) and Others** reported in (2016) 8 SCC 622 while considering its earlier judgment on the issue held that any terms and conditions are the decision to be taken by the employer and soundness of that, cannot be questioned by the Court and held thus :

“38. In *G.J. Fernandez v. State of Karnataka*, (1990) 2 SCC 488 both the principles laid down in *Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489 were reaffirmed. It was reaffirmed that the party issuing the tender (the employer) “has the right to punctiliously and rigidly” enforce the terms of the tender. If a party approaches a court for an order restraining the employer from strict enforcement of the terms of the tender, the court would decline to do so. It was also reaffirmed that the employer could deviate from the terms and conditions of the tender if the “changes affected all intending applicants alike and were not objectionable”. Therefore, deviation from the terms and condition is permissible so long as the level playing field is maintained and it does not result in any arbitrariness or discrimination in *Ramana Dayaram Shetty (supra)* sense.”

12. Yet, in another case of **Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited and another** reported in (2016) 16 SCC 818, Hon'ble Supreme Court has held thus :

“12. In *Dwarkadas Marfatia and Sons v. Port of Bombay*, (1989) 3 SCC 293, it was held that the constitutional courts are concerned with the decision making process. *Tata Cellular v. Union of India*, (1994) 6 SCC 651 went a step further and held that a decision

if challenged (the decision having been arrived at through a valid process), the constitutional courts can interfere if the decision is perverse. However, the constitutional courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority. This was confirmed in *Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517 as mentioned in *Central Coalfields (supra)*.”

13. With regard to fixing of terms and conditions of tender document for eligibility criteria, Hon'ble Supreme Court in case of **Michigan Rubber (India) Limited v. State of Karnataka and others** reported in **(2012) 8 SCC 216** has held thus :

“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 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 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 fundamental right to carry on business with the Government.”

14. If facts of the case at hand is to be looked into in the light of
aforementioned law laid down by Hon'ble Supreme Court, what is

apparent that the petitioner is aggrieved only with regard to fixation of the terms and conditions of eligibility criteria by the employer in the subject notification pleading that it is violative to Article 14 of the Constitution of India and except the pleading, no material is placed on record or any argument has been raised that as to how the terms and conditions forming part of the tender notification are violative to Article 14 of the Constitution of India. The petitioner has not raised any ground or made any submission with regard to malafide on the part of respondent No.3. The contractors like the petitioner are not having any fundamental right to carry business with the Government. They can only be permitted to enter into contract, if they fulfil all the required terms and conditions, which has been made essential by the employer. We do not find any arbitrariness or unreasonableness in the action on the part of respondent No.3 for fixing the terms and conditions differently for the work upto Rs.1 Crore and the work value exceeding Rs.1 Crore.

15. For the foregoing reasons, we do not find any tenable ground to interfere with the tender proceeding. The writ petition being sans merit, is hereby dismissed.

Sd/-

(P. R. Ramachandra Menon)
Chief Justice

Sd/-

(Parth Prateem Sahu)
Judge