27.07.2021
Ct. No.13
Sl. No.114
pk/akd

W.P.A. 11830 of 2021 ***[via video conference]***

[M/s. Variety Pantry Services Pvt. Ltd. -Vs- Union of India & Ors.]

Mr. Saptangshu Basu .. Sr. Advocate
Mr. Priyankar Saha
Mr. Rudrajit Sarkar
Mr. Debangshu Dinda
Mr. Hemant Tiwari
… … for the petitioner

Mr. Amitesh Banerjee
Mr. Sanjib Kumar Trivedi
… … for the UOI

The writ petitioner is aggrieved by the stipulation of minimum turnovers of 20 crores for the last three years of any bidder, specified by the Group General Manager procurement in Expression of Interest No. EOI/MCS-2021/RSD July-(EOI) for catering in pantry cars in trains.

It is submitted that the minimum annual turnover of an intending bidder was three crores in the year 2015. The said amount was increased to about five crores in the year 2016 for category 'A' bidders. For the year 2021 the average minimum annual turnover of a bidder was increased to 20 crores from catering and hospitality business in the last five financial years.

It is argued by the learned senior counsel for the petitioners that his client could not participate in the aforesaid tendering process by reason of the high turnover stipulation in the EOI. It is submitted that the 20 crores turnover requirement in eligibility criteria does not bear any rational nexus with the objects sought to be achieved. It is submitted that there is no guarantee that a person with a higher turnover would be able to perform better or supply better quality of food and services. It is also argued that merely because the petitioner's turnover may be lesser than the stipulated 20 crores turnover within the last five years does not *ipso facto* mean that he would not be able to meet the quality of service and food and other amenities to be supplied by caterers.

It is submitted that the increase in the turnover requirement from 5 crores to 20 crores in the year 2021 is not only *per se* arbitrary but also aimed at excluding the writ petitioner from participation and to favour a certain section of bidders.

A similar issue was considered by this court yesterday in WPA 11258 of 2021 (*Chandan Sengupta vs. State of West Bengal & Ors.*).

It is now well settled that a State or instrumentality of State is required to be given leverage and/or 'play the joints' in stipulating conditions for distribution of the State largess. While doing so it is equally true that the State is required to be reasonable, fair and just.

The test to be applied has shifted from strict scrutiny of conduct of State in entering into private contracts as laid down in **Ramana Dayaram Shetty Vs. International Airport Authority of India** reported in **(1979) 3 SCC 489** to that of limited and lesser interference and more 'play in the joints' as laid down in the decision of the Supreme Court in the case of ***TATA Cellular Vs. Union of India*** reported in ***(1994) 6 SCC 651***.

Applying the aforesaid test laid down by the Hon'ble Supreme Court, this Court is of the view that the increase in the turnover requirement for every bidder to participate in the subject EOI issued by the Railways cannot be by itself be deemed as unreasonable or arbitrary. It can definitely be argued that the requirement of a higher turnover would definitely attract more financially sound bidders and increase the likelihood of a better quality of service. The existing quality of services provided by the existing caterers indeed leaves much to be desired.

The second argument of the petitioner as advanced by Mr. Saptangshu Basu, learned senior counsel, is that the turnover stipulation has been altered and substantially increased from 5 crores to 20 crores of minimum turnover only to exclude smaller players like the petitioner. Rights under Article 19(1)(g) of the Constitution are stated to be affected and the petitioner consequently is deprived.

This Court is reminded of a decision of the Hon'ble Supreme Court in the case of ***Michigan Rubber (India) Limited vs. State of Karnataka & Ors.*** reported in ***(2012) 8 SCC 216*** at paragraph 35 which has in no uncertain terms laid down that mere change in the eligibility criteria cannot be understood to be aimed at excluding anybody from participation in a tender process. Paragraph 35 of the aforesaid decision is set out hereinbelow:

> "**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."

It is indeed true that the petitioner has been excluded from participating in the aforesaid EOI by reason of the said stipulation. However, to impute arbitrariness or mala fides to the action of the State would be improper and undesirable. It cannot be said that there is no rational nexus between the stipulation on a higher eligibility criteria and the object sought to be achieved, i.e. better quality of services to train passengers.

The State is entitled to even in the area of private contract, to impose reasonable restrictions under Article 19 (6) and reasonable classification under Article 14 of the Constitution of India.

Learned senior counsel for the writ petitioner relies upon a judgement of the Division Bench of the Delhi High Court in the case of ***Centre for Aviation Policy, Safeth and Research CAPSR vs. Union of India & Ors.*** reported in ***2021 SCC OnLine Del 3692***. With respect to the Hon'ble Delhi High Court, this Court is unable to bring itself to apply the said decision in the facts of the case.

For the reasons stated hereinabove, the writ petition fails and is hereby dismissed.

There shall be no order as to costs.

All parties are to act on a server copy of this order duly downloaded from the official website of this court.

(Rajasekhar Mantha, J.)