

HIGH COURT of CHHATTISGARH, BILASPUR**WPC No. 155 of 2021**

- Digdarshi Women Group Through Its President, Rekha Verma D/o Shri B. Verma, Aged About 48 Years, R/o Near J.J. Hospital Torwa. Bilaspur Chhattisgarh

---- Petitioner**Versus**

1. State of Chhattisgarh, Through - Secretary, Urban Administration And Welfare Department, Mantralaya, Mahanadi Bhawan, Atal Nagar, Naya Raipur, District Raipur Chhattisgarh
2. Collector, Bilaspur, District Bilaspur Chhattisgarh
3. Municipal Corporation, Bilaspur, Through Municipal Commissioner, Municipal Corporation, District : Bilaspur, Chhattisgarh
4. Zone Commissioner, Zone No. 1, Municipal Corporation, District - Bilaspur Chhattisgarh

----Respondents

For Petitioner	: Shri Vivek Sharma, Advocate
For Respondents- 1 and 2/State	: Shri Sidharth Dubey, Dy GA
For Respondents- 3 and 4	: Shri Pankaj Agrawal, Advocate

Hon'ble Shri PR Ramachandra Menon, Chief Justice &
Hon'ble Shri Justice Parth Prateem Sahu
Order on Board

Per Parth Prateem Sahu, J.
19.01.2021

1. Petitioner is a Society registered under the Societies Registration Act. As per the pleadings made in the Writ Petition, Petitioner has been engaged earlier for similar work by the respondent- Municipal Corporation. Thereafter, again participated in the tender proceedings initiated by the Corporation for supply of labourers and Supervisor for Department Zone of Municipal Corporation, Bilaspur. Somehow, earlier tender proceedings stand cancelled in its entirety and thereafter, new tender notification has been issued vide Annexure P1 System Tender No.70147, NIT No.1773 dated 21.12.2020.
2. Petitioner/Society has filed this Writ Petition challenging tender notification Annexure P1 dated 21.12.2020 seeking following reliefs:

“10.1 That, the Hon'ble court may kindly be pleased to call the records pertaining to System Tender No.70147 NIT No.1773 dated 21.12.2020 for perusal of the Hon'ble court.

10.2 That, the Hon'ble may kindly be pleased to issue appropriate writ, orders, direction to set aside/quash the terms and condition Clause No.13 (xi) arising out of System Tender No.70417 NIT No.1773 dated 21.12.2020 issued by the respondent No.4 (Annexure P1)

10.3 That, the Hon'ble may kindly be pleased to issue appropriate write/order/direction to Respondent Corporation to provide opportunity to the petitioner to participate in the tender process and conclude the tender process on the basis of earlier experience certificate issued by the respondent corporation to the petitioner.

10.4 That Respondent State may be directed to take necessary disciplinary action against responsible authorities of Respondent Corporation and may impose cost of Rs.1,00,000/- for the harassment caused to the petitioner.

10.5 The Hon'ble Court may kindly be pleased to grant any other relief as deemed fit on the basis of material on available in the petition.”

3. Submission of Shri Vivek Sharma, learned counsel for the petitioner is that respondent-Corporation has earlier issued Tender Notification for supply of labourers and Supervisors vide NIT-1012 which stands cancelled and on 07.07.2020, fresh NIT No.1134 for Zone-1 and NIT No.18 for Zone-6 were published, which were put to challenge by the petitioner vide WPC-1601 of 2020 and WPC-1732 of 2020 respectively. The Writ Petition was allowed and a direction was issued to Municipal Corporation to permit the petitioner for its participation in the fresh tender proceedings. Said tender proceedings also stand cancelled and thereafter, present tender notification dated 21.12.2020 has been floated for the same work ie “**supply of 60 labourers and supervisors for**

department Zone-1 Municipal Corporation, Bilaspur". Learned counsel submits that in earlier tender notification, there was experience clause as mentioned in Clause 14 (xii) for submission of Experience Certificate of similar nature of work in past three years of value not less than 80% of value of work notified in the tender notification, whereas, in the present tender notification AnnexureP1 respondent-Corporation has amended the said clause of Experience Certificate. It has been mentioned in Clause 13 (xi) wherein the Corporation has asked for the experience certificate for last three years ie 2017-18, 2018-19 and 2019-2020 of the value of similar nature of work should not be less than 60% of the tender amount in each year. He submits that this condition has been inserted in the tender document with an ulterior motive, only to oust the petitioner from participation in the tender proceeding of said work. He further submits that action on the part of respondent-Corporation to amend the 'Experience Certificate' clause is with *mala fide* intention, only to deprive the petitioner from participation. He further pointed out that in earlier tender proceedings which stood cancelled, petitioner was L1 which itself shows the present action of respondent-Corporation to be arbitrary and with *mala fide* intention.

4. Shri Pankaj Agrawal, learned counsel for the Municipal Corporation, Bilaspur submits that the terms and conditions asking for Experience Certificate of Contractor/Bidder in similar nature of work is not only for the petitioner but it will apply to all the contractors. He also pointed out the nature of experience sought for in the present tender notification is to analyse and evaluate the efficiency and capacity of contractor to ensure proper execution of work which is for cleanliness of the city. He submits that if the contractor will not have the experience of same nature as asked for, then there will be chance of

non-execution of work and maintaining proper cleanliness which will affect the hygiene of residents of Bilaspur Municipal Corporation. He also pointed out that there is no arbitrary action in any manner on the part of Corporation but the terms and conditions mentioned in the tender notification are only for ensuring proper execution of work.

5. We have heard learned counsel for respective parties.

6. What is discernible from the pleadings and submissions made by learned counsel for the petitioner is that the petitioner is aggrieved only with term/Clause 13(xi) of Annexure P1 Tender Notification which reads as under :

“13(xi). Experience Certificate (Govt/ Semi Govt) of similar nature of work (labour supply of drain cleaning or road sweeping) in last three years (FY 2017-18, 2018-19, 2019-20) of value of work done in each of the last three years should not be less than the 60% of the tender amount [Experience Certificate issued by HOD or office Head or Health Officer]”

7. To appreciate the submission made by learned counsel for the petitioner, we also find it appropriate to extract the terms and conditions of earlier tender notification pointed out by the petitioner and placed on record as Annexure P4. The relevant Experience clause mentioned in Clause 14 (xii) is extracted below for ready reference:

“14(xii). Experience Certificate of similar nature of work in past three year of value not less than 80% of value of work.”

8. From bare perusal of both the tender notifications, it is evident that experience clause ie submission of Experience Certificate was there in the earlier tender notification also. In the present tender notification, respondent-

Corporation has asked for Experience Certificate for three years and in each of the three years, value of work done by the contractor should not be less than 60% of tender amount.

9. Fixing of terms and conditions for performing any work under tender notification is for the employer to fix, looking to the nature of work and their need. Employer is the best authority to consider the terms of fixing of qualification of a Contractor/Bidder, so as to ascertain that the work which has been notified should be executed and completed to the satisfaction.

10. In the case at hand, tender notification is for 'supply of 60 labourers and Supervisor for department Zone-1'

11. Scope of judicial review in tender matters is very limited. The Court cannot exercise its powers as an Appellate authority over the action of employer while issuing tender notification and fixing terms and conditions for execution of work as mentioned therein.

12. Hon'ble Supreme Court in case of **Tata Cellular Vs Union of India** reported in (1994) 6 SCC 651 has considered the principles to deal with tender matters and held thus :

“77. xxxxxx 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 Brind²⁸, 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."

13. In case at hand, the petitioner except for the submission that the experience clause as mentioned in Clause 13 (xi) to be arbitrary and *mala fide*, could not made out as to how the condition has been incorporated for any ulterior purpose when the said term and condition will also govern other contractors, who might be participating in the tender proceedings. If any term or condition is not suitable for the contractor, as in the case the petitioner, by itself will not make said term or condition to be arbitrary and in violation of Article 14 of the Constitution of India.

14. Hon'ble Supreme Court in case of **Michigan Rubber (India) Limited Vs State of Karnataka and others** (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 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 M/S Michigan Rubber(I) Ltd vs State Of Karnataka & Orse 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.”

15. As held in the aforementioned ruling of Hon'ble Supreme Court, the petitioner cannot claim its fundamental right to carry on business with respondent-Corporation.

16. So far as the pleadings and submission made by learned counsel for the appellant with regard to *mala fide* action on the part of respondent authorities, except mentioning of word '*mala fide*' in pleadings, nothing has been mentioned by the petitioner, but mentioning that in earlier tender proceeding petitioner stood L1 but that tender proceeding was cancelled.

17. Merely the fact that petitioner earlier participated in tender proceedings which stood cancelled, where the petitioner was L1 itself is not sufficient to say that respondent authorities acted *mala fide*. The allegation of *mala fide* demands proof of high degree of credibility.

18. Hon'ble Supreme Court in case of **Ajit Kumar Nag Vs General Manager (PJ), Indian Oil Corporation Ltd., Haldia and others** reported in (2005) 7 SCC 764 has held thus :

“56.....It is well-settled that the burden of proving mala fide is on the person making the allegations and the burden is "very heavy". [vide E.P. Royappa v. State of Tamil Nadu & Anr. (1974) 4 SCC 3]. There is every presumption in favour of the administration that the power has been exercised bona fide and in

good faith. It is to be remembered that the allegations of mala fide are often more easily made than made out and the very seriousness of such allegations demands proof of a high degree of credibility. As Krishna Iyer, J. stated in *Gulam Mustafa & Others v. State of Maharashtra & Others* (1976) 1 SCC 800; "It (Mala fide) is the last refuge of a losing litigant".

19. In the matter of **Directorate of Education and others Vs Educomp Datamatics Limited and others** reported in (2004) 4 SCC 19 Hon'ble Supreme Court has held thus:

"11. This principle was again re-stated by this Court in *Monarch Infrastructure (P) Ltd. vs. Commissioner, Ulhasnagar Municipal Corporation and Others* [2000 (5) SCC 287]. It was held that 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 to prescribe the terms and conditions of the tender. It is not for the courts to say whether the conditions prescribed in the tender under consideration were better than the one prescribed in the earlier tender invitations.

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."

20. Taking into consideration the overall facts and circumstances of the case, nature of pleadings and the reliefs sought for by the petitioner in the tender proceedings and in view of aforementioned ruling of Hon'ble Supreme Court, we

do not find any tenable ground to interfere with Annexure P1 Tender Notification dated 21.12.2020.

21. Writ Petition being *sans* merit, is liable to be and it is hereby dismissed.

Sd/-
(PR Ramachandra Menon)
Chief Justice

Sd/-
(Parth Prateem Sahu)
Judge

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