

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.**

WRIT PETITION NO. 4084/2021

M/s Tirath Singh Bhatia,
A proprietorship Firm, through Proprietor
Tirath Singh Bhatia, aged 75 years,
Shri Gurunanak Gate, Gondia-441601.

PETITIONER

-VERSUS-

1. The State of Maharashtra, through its Secretary,
Department of Food, Civil Supplies and Consumer
Protection Department, 2nd floor, Mantralaya Annex
Building, Madam Cama Road, Mumbai – 400 032.
2. Rajkumar Gulati, Occ. Business,
114, Sadoday Enclave, Kadbi Chowk, Nagpur.
3. Kripalsingh Premsingh Gulati, Occ. Business,
Gulati Building, Main Road, Washim-444995.
4. M.O. Holani, Occ. Business,
Baheti Complex, Hingoli Road, Bafna,
Anand Nagar, Nanded 431605.

RESPONDENTS

Shri R.S. Parsodkar, counsel for the petitioner.
Ms N.P. Mehta, Assistant Government Pleader for the respondent no.1.
Shri M.G. Bhangde, Senior Advocate with Shri M.P. Khajanchi, counsel for the
respondent no.2.

CORAM : A. S. CHANDURKAR AND SMT. PUSHPA V. GANEDIWALA, JJ.

DATE : 20TH JANUARY, 2022.

ORAL JUDGMENT (PER : A.S. CHANDURKAR, J.)

In view of notice of final disposal, issued earlier, we have heard the learned counsel for the parties by issuing **RULE** and making it returnable forthwith.

2. The petitioner is aggrieved by the communication dated 12.08.2021 by which it has been disqualified as being ineligible for further participation in the tender process initiated by the respondent no.1. On 19.05.2021 the respondent no.1 issued a tender notice in the

matter of transport of food-grains for public distribution for a period of three years. The request for proposal for appointment of transporters to transport food-grains and other essentials to Fair Price Shops was issued on 21.05.2021. As per the schedule, interested bidders were required to submit their documents by 5.30 p.m. on 11.06.2021. The work in question was to be undertaken in accordance with the Government Resolution dated 15.01.2021 which laid down various guidelines in that regard. After scrutiny of the bids, on 30.07.2021 the respondent no.1 called upon the petitioner to remove certain defects that were found in the documents furnished by the petitioner. The same was to be done by 06.08.2021. The petitioner on 06.08.2021 removed those deficiencies by furnishing various documents in that regard. After scrutiny the petitioner was informed on 12.08.2021 that it was not qualified to participate in the tender process for the reason that the requisite experience of work as prescribed in the tender notice was not satisfied by the petitioner. Being aggrieved, the petitioner has challenged the aforesaid communication.

3. Shri R.S. Parsodkar, learned counsel for the petitioner submitted that the technical bid of the petitioner has been rejected by the respondent no.1 despite the fact that the petitioner duly satisfied the requirements of Clauses QC 6 and QC 9 of the Tender Document as well as the requirement prescribed by Clauses 5.1 and 5.2 of Government Resolution dated 15.01.2021. Referring to the judgment dated 28.06.2021 in **Writ Petition No.750 of 2021** [*Prithviraj Enterprises Versus*

State of Maharashtra & Another] as well as the clarification issued by the State Government that was considered therein, it was submitted that a tenderer having experience of transportation of the first phase of Clause QC 9 was sufficient and it was not necessary to have experience of the second phase as stipulated. Inviting attention to the District-Sheet pertaining to Gondia district it was submitted that as per Clauses 11 and 11.1 thereof, the requisite experience in transportation of food-grains as required was 70793 Metric Tonnes for each phase. As per the experience certificates issued by the Competent Authority dated 15.04.2021 and 20.04.2021, it was clear that the petitioner had sufficient experience which exceeded the minimum experience prescribed in the request for proposal document as well as the District-Sheet. Despite submitting these experience certificates the respondent no.1 on 30.07.2021 issued a communication seeking to point out certain defects in the bid submitted by the petitioner. One of the queries made was that the transportation undertaken with regard to the second phase was on a lower side and a clarification in that regard was sought. The petitioner on 06.08.2021 clearly stated that as per the judgment of this Court in Writ Petition No.750 of 2021 it was sufficient to have experience of the first phase in the matter of transportation. Despite that the respondent no.1 in an illegal and arbitrary manner proceeded to reject the technical bid of the petitioner on the ground that the experience in transportation as required in the district was insufficient insofar as the petitioner was concerned. He submitted that though the State Government had clarified that the

requisite experience gained from the transportation of the food-grains in the first phase was sufficient, the respondent no.1 had taken into consideration the experience required for both the phases. This was clearly contrary to the clarification given by the State Government and hence it was clear that the technical bid of the petitioner was illegally disqualified. Inviting attention to the judgment of the Division Bench in *Shri Vyankatesh Trading Company Versus Food Corporation of India & Another* [(2016) 5 BCR 717], it was submitted that illegal rejection of the petitioner's technical bid was not sustainable in law. The learned counsel further submitted that though by passing an ad-interim order on 14.10.2021 making the work order if issued subject to further orders in the writ petition, the respondent no.1 illegally proceeded to issue the work order in favour of respondent no.2 on 24.12.2021. By amending the writ petition, it was submitted that said work order was also under challenge. Thus it was urged that the impugned order dated 12.08.2021 having been passed in a manner contrary to the Government Resolution dated 15.01.2021 as well as the request for proposal the same was liable to be set aside. Consequentially, the work order issued to the respondent no.2 would not survive. Since the financial bid of the petitioner was much lower in comparison to the financial bid of the respondent no.2 which came to be accepted, it was urged that the petitioner was entitled to be granted the said work order. It was thus prayed that the reliefs as prayed for be granted to the petitioner.

4. Ms N.P. Mehta, learned Assistant Government Pleader for the respondent no.1 supported the impugned action. It was pointed out that after considering the experience certificates furnished by the petitioner alongwith the technical bid, it was found that the petitioner did not have requisite experience that was prescribed therein. The certificates produced by the petitioner did not indicate actual experience since such experience was required to be shown to be eligible for further participation in the tender process. The certificates relied upon indicated cumulative experience gained over a period of more than two years. Reference was also made to the affidavit-in-reply filed by the respondent no.1 and it was denied that the petitioner's technical bid had been illegally or arbitrarily rejected. The learned Assistant Government Pleader placed reliance on the judgment of this Court in **Writ Petition No.5460 of 2021** [*M/s Krushna Kumar Gokulchand Versus State of Maharashtra & Others*] decided on 14.01.2022.

5. Shri M.G. Bhangde, learned Senior Advocate for the respondent no.2 opposed the submissions as made by the petitioner. He submitted that the respondent no.1 by issuing a Corrigendum on 03.06.2021 had clarified that the experience with regard to transportation as required by Government Resolution dated 15.01.2021 and the request for proposal document pertained to successive preceding five years for the period from 2015-16 to 2019-20. The certificates relied upon by the petitioner referred to a combined period of two to three years and actual

transportation experience was not indicated in any certificate. Moreover, the said certificates indicated experience in handling and transportation of food-grains. There was no bifurcation in the said certificates to indicate the quantity of food-grains transported in one financial year as was required. It was also pointed out that the petitioner has sought to rely upon experience certificates for the period after April-2020 which was therefore not relevant in the light of the Corrigendum as issued. It is on that basis that the respondent no.1 had found that the petitioner was lacking in the requisite experience as demanded by the tender notice. The learned Senior Advocate further submitted that there was no merit in the submission of the petitioner that its financial bid being lower than the rates quoted by the respondent no.2, the same ought to be accepted. Once it was found that the petitioner was not duly qualified in the submission of its technical bid there was no question of considering its financial bid. He also placed reliance on the decision of this Court in *M/s Krushna Kumar Gokulchand* (supra). It was thus prayed that no interference was called for in the facts of the present case.

6. We have heard the learned counsel for the parties at length and we have perused the relevant documents that were placed on record. The challenge as raised by the petitioner is to the conclusion of the Tendering Authority that the petitioner was not qualified to participate in the further tender process as the petitioner did not have experience of minimum

transportation of food-grains as prescribed by Clause 5.1 of the Government Resolution dated 15.01.2021.

Before considering the validity of the impugned communication it would be necessary to keep in mind the scope that is available for the Court to interfere under Article 226 of the Constitution of India in such matters. Adjudication of the challenge as raised by the petitioner would require consideration of Clauses 5.1 and 5.2 of the Government Resolution dated 15.01.2021 as well as Clauses QC 6 and QC 9 of the request for proposal document. In this regard reference can be made to the decision in *Afcons Infrastructure Limited Versus Nagpur Metro Rail Corporation Limited & Another* [(2016) 16 SCC 818] wherein it was held that the author of the tender document is the best person to understand and appreciate all of its requirements. Interpretation of the terms of the tender document should be best left to the Tendering Authority and a mere disagreement with the decision making process or the decision of the administrative authority is no ground/reason for a Constitutional Court to interfere in such matters. The threshold of *mala fides*, intention to favour someone or arbitrariness, irrationality or perversity must be met before the Constitutional Court interferes with the decision making process or the decision itself. This decision has been thereafter referred to in *JSW Infrastructure Limited & Another Versus Kakinada Seaports Ltd. & Others* [2017(4) Mh.L.J. 855]. *Afcons Infrastructure Ltd.* (supra) has also been referred to in *Municipal Corporation, Ujjain & Another Versus BVG India Limited & Others* [(2018) 5 SCC 462] which was decided by

the Bench of three learned Judges of the Hon'ble Supreme Court. The Hon'ble Supreme Court considered the question as to whether independent evaluation of technical/financial bids could be done by the High Court. It was observed that only when the decision making process is so arbitrary or irrational that no reasonable authority proceeding reasonably or lawfully could have arrived at such decision that the power of judicial review could be exercised. Yet again in *Caretel Infotech Ltd. Versus Hindustan Petroleum Corporation Limited & Others* [AIR 2019 SC 3327] it was reiterated by holding that it would not be proper for the Court to substitute its understanding of the tender document in place of what was understood by the Tendering Authority. In the absence of any illegality, arbitrariness, irrationality or unreasonableness there would be no reason to interfere with the conclusion of the Tendering Authority only on the ground that a different interpretation from the one recorded by the Tendering Authority can be arrived at.

7. Keeping the aforesaid legal position in mind the grounds raised by the petitioner in the challenge to the impugned communication could be considered. The petitioner contends that the manner in which the guidelines as laid down in the request for proposal have been considered was not correct and that the petitioner had the requisite experience on the basis of the experience certificates issued to it.

8. Clauses 5.1 and 5.2 of the Government Resolution dated 15.01.2021 when translated read as under:

“5.1) Work Experience:

Tenderer should have the experience of the work of Government/Semi-Government food grain transportation of minimum one year out of previous five continuous financial years. Work experience of the tenderer should be upto the capacity of 33% of the work of transportation which has been carried out during previous three years in the district where he is filling the tender for district/zone. It is necessary that the said experience should be in the name of the tenderer himself who is filing the tender.

5.2) The experience of the work mentioned at para 5.1 above should be of doorstep delivery scheme and work of any other schemes of Government/Semi-Government transportation of Central/State Government similar to this scheme. For considering the experience of transportation with Central/State Government and Semi-Government undertakings, copies of all work orders and experience certificate of the Competent Authority will be required to be submitted.”

These clauses would have to be read as a whole and on doing so it becomes clear that what is required is that a tenderer should have the experience of transportation of food-grains in the previous five financial years out of which such experience for at least one year should be with regard to work of Government/Semi Government Institutions. The work experience should be up to the capacity of 33% of the work of transportation that has been carried out during the previous three years in the District where the tender is sought to be submitted. Such experience should be in the name of the tenderer itself. As per the

Corrigendum issued by the respondent no.1 on 03.06.2021 the requisite experience in transportation was to be shown from 2015-16 to 2019-20.

9. As per the District-Sheet prescribing the experience in transportation of food-grains as required, it is seen that by Clauses 11 and 11.1 thereof, the experience ought to be in transportation of 70793 Metric Tonnes for each phase. As per the certificate dated 20.04.2021 the Central Warehousing Corporation has certified that the petitioner had worked as its Handling and Transportation Service Provider at its Gondia warehouse for the work of rake handling and transportation of food-grains. The details of handling and transportation work carried out by the petitioner was stated to be from 27.03.2017 to 26.06.2019. It was certified that the volume of work 'handled' in Metric Tonnes was 130411.4862. As per the other certificate issued on the same date, the period certified is from 02.04.2019 to 01.07.2021 and the volume of work 'handled' in Metric Tonnes was 245145.491. In both these certificates it has been stated by the Issuing Authority that the petitioner had undertaken the work of regular handling and transportation of food-grains. The nature of contract executed was a handling and transportation contract. These certificates do not mention the volume of food-grains actually transported but they mention the volume of work handled. This was not the requirement prescribed by Clauses QC 6 and QC 9 as well as Clauses 11 and 11.1 of the District-Sheet which prescribed actual transportation of food-grains. Another certificate dated

15.04.2021 that has been relied upon also pertains to handling and transportation work between 04.01.2020 to 13.01.2022. In this certificate the volume of work 'handled' in Metric Tonnes was shown to be 189016. This certificate however shows the value of the work in handling and transportation by bifurcating the same. The certificate dated 15.04.2021 though indicates the contract period from 14.01.2020 it refers to the period till 13.01.2022. The experience of the petitioner after 01.04.2020 is not relevant for the present purpose. Similar is the case with regard to the second certificate dated 20.04.2021 since it pertains to the period ending on 01.07.2021. Perusal of the communication dated 12.08.2021 by which the technical bid of the petitioner was found to be disqualified indicates that the respondent no.1 had stated that the minimum required experience as prescribed was not possessed by the petitioner. The certificates furnished by the petitioner indicate experience in the work of handling and transport while the requirement as per the request for proposal was experience in transport alone. There is no bifurcation in the certificates dated 20.04.2021 to indicate the volume of food-grains transported. Further the experience shown by the certificate dated 15.04.2021 pertains to the period after 01.04.2020 except the period of three months prior thereto. Thus on a plain reading of Clauses QC 6 and QC 9 alongwith Clauses 11 and 11.1 of the District-Sheet, it becomes clear that the experience certificates submitted by the petitioner dated 15.04.2021 and 20.04.2021 fall short in indicating the minimum experience prescribed.

Though the learned counsel for the petitioner sought to contend that the technical bid was found to be non-responsive since the respondent no.1 had wrongly taken into consideration the experience required for both phases when infact it was clarified that experience in the first phase would be sufficient, the communication dated 12.08.2021 does not indicate that the petitioner's technical bid has been rejected on that count as urged. That order clearly states that the experience required in the first phase of transportation was insufficient from the documents submitted by the petitioner.

10. Thus from the aforesaid, we are satisfied that the Tendering Authority did not act in an arbitrary or illegal manner when it found that the petitioner did not have the minimum required experience in transportation of food-grains as per the experience certificates furnished by it. No other conclusion than the one recorded by the Tendering authority on 12.08.2021 can be arrived at. It was urged on behalf of the petitioner that the rates quoted by the petitioner in the financial bid were much lower than the rates quoted by the respondent no.2 and therefore the claim as made by the petitioner ought to be accepted. We do not find that such course would be permissible especially when the petitioner has not demonstrated that it was duly qualified to participate in the financial bid. In *Montecarlo Limited Versus National Thermal Power Corporation Limited* [(2016)15 SCC 272] it has been held that merely because the

financial bid of a bidder is the lowest the requisite compliance as demanded by the tender document cannot be ignored.

11. In the light of aforesaid discussion we do not find any reason to interfere in jurisdiction under Article 226 of the Constitution of India. The writ petition stands dismissed. Rule stands discharged. No costs.

(SMT. PUSHPA V. GANEDIWALA J.) (A.S. CHANDURKAR, J.)

APTE