

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

WRIT PETITION NO. 5460/2021

M/s Krushna Kumar Gokulchand,
A Registered Partnership Firm, Having its office at,
New Radha Kisan Plots, Krishnakunj, Akola.
Through its Partner, Anil Kumar S/o Gokulchand Sharma,
Aged about 51 Years, Occ: Business,
R/o New Radha Kisan Plots, Krishnakunj, Akola.

PETITIONER

-VERSUS-

1. State of Maharashtra, through its Secretary,
Department of Food, Civil Supplies and Consumer
Protection, Mantralaya Annex, Mumbai – 400 032.
2. Principal Secretary, Department of Finance,
State of Maharashtra, Mantralaya Annex.,
Mumbai – 400 032.
3. M/s Silver Road Lines,
Shani Mandir Chowk, Near Weekly Market, Yavatmal
– 445 001. Through its Partner & Authorised
Signatory, Rajendra Vitthal Rao Deshmukh.
4. M/s Raj Transport,
“Radha Kunj” Kapad Lane, Latur – 413512
Through its Managing Partner,
Manthraj Madhusudan Bhutda.
5. M/s Omprakash Kundanmal Kotecha,
Nagar Naka, Nagar Road, Tq. District Beed -
431 122. Through its Priprietor,
Omprakash Kundanmal Kotecha.

RESPONDENTS

Shri S.P. Dharmadhikari, Senior Advocate with Shri S.M. Vaishnav, counsel for
the petitioner.

Ms N.P. Mehta, Assistant Government Pleader for the respondent nos.1 and 2.

Shri M.G. Bhangde, Senior Advocate with Shri A.J. Chandak, counsel for the
respondent no.3.

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

DATE ON WHICH ARGUMENTS WERE HEARD : 07TH JANUARY, 2022.

DATE ON WHICH JUDGMENT IS PRONOUNCED : 14TH JANUARY, 2022.

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 30.09.2021 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 2021 to 2024. 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 09.08.2021 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 16.08.2021. The petitioner on 15.08.2021 removed those deficiencies by furnishing various documents in that regard. After scrutiny the petitioner was informed on 30.09.2021 that it was not qualified to participate in the tender process for two reasons. It was stated that the requisite experience of work as prescribed in the tender notice was not satisfied and secondly the details furnished with regard to ownership of vehicles and those taken on lease for operation were insufficient and did not meet the prescribed requirements. Being aggrieved, the petitioner has challenged the aforesaid communication.

3. Shri S.P. Dharmadhikari, learned Senior Advocate for the petitioner submitted that the respondent no.1 was not justified in concluding that the petitioner was not qualified to participate in the tender process for the reasons assigned in the impugned communication. Referring to various clauses of the request for proposal dated 21.05.2021 as well as the Government Resolution dated 15.01.2021 alongwith its Corrigendum dated 03.06.2021 it was contended that the petitioner was duly qualified to participate in the tender process and all necessary requirements were satisfied by it. Referring to Clauses 5.1 and 5.2 of the Government Resolution dated 15.01.2021 it was submitted that as prescribed in Clause 5.1 a bidder was required to have experience of transportation of food-grains in the preceding five financial years out of which such experience for one year should be with regard to work done under any Government/ Semi Government contract. Such requisite experience was required in the concerned district for which the tender was invited and such experience was to be atleast 33% Metric Tonnes of the work of transportation in that district for the preceding three years. Such experience ought to be in the name of the bidder. As per Cause 5.2 a certificate of the Competent Authority was necessary to indicate such experience. As per the Corrigendum dated 03.06.2021 submission of audited financial statements for the previous five financial years from 2015-16 to 2019-20 were necessary. The same was also stipulated in Clauses QC5 and QC6 of the request for proposal document. Inviting attention to the District-Sheet pertaining to Buldana District it was submitted that as per Item 8

thereof in the last three financial years total transportation was 424800 Metric Tonnes. As per the Experience Certificate issued by the District Supply Officer Buldana dated 11.06.2021 for the period from April-2015 to March-2016 the food-grains transported were 12,46,403 Quintals or 124640 Metric Tonnes. For the period from April-2016 to 22.09.2016 the food-grains transported were 7,63,030 Quintals or 76303 Metric Tonnes. When these two figures were considered together it was clear that the petitioner had experience of transporting 33% Metric Tonnes as required as the total experience gained by a bidder could be taken into consideration in that regard. It was submitted that on a proper and complete reading of Clause 5.1 it was clear that the petitioner had requisite transportation experience as stipulated by the said clause. It was then submitted that in case of any discrepancy between the District-Sheet and the Government Resolution dated 15.01.2021 the terms mentioned in the Government Resolution would prevail and not the matter stipulated in the District-Sheet. That District-Sheet could not be read in a manner contrary to the Government Resolution. For said purpose reliance was placed on the judgment of the Aurangabad Bench in **Writ Petition No.9279 of 2021** decided on 13.10.2021 [*M/s Shalimar Transport and Carting Contractor Versus The Government of Maharashtra & Others*].

As regards the second ground on which the petitioner was held to be disqualified, it was submitted that as per Clause 5.9 of the Government Resolution dated 15.01.2021 it was necessary for a bidder to have transportation capacity for a period of 25 days of a month which could be

through self-owned vehicles or vehicles under the bidders control. Clause 7 and 7.1 in the District-Sheet pertained to the said requirement and as per the figures stated therein for the first phase, the requirement prescribed was 473.44 Metric Tonnes and that prescribed for the second phase was 440 Metric Tonnes. Inviting attention to the affidavits dated 16.06.2021 and 20.07.2021 with regard to self-owned vehicles and the vehicles under the petitioner's control respectively, it was clear that the petitioner had satisfied the said requirement as prescribed. The total capacity of the self-owned vehicles and of the vehicles under control exceeded 913.44 Metric Tonnes that was prescribed by the District-Sheet. These affidavits were filed pursuant to the opportunity granted by the respondent no.1 to remove the deficiencies as per the communication dated 09.08.2021. Despite the aforesaid the respondent no.1 in the impugned communication had observed that the petitioner did not satisfy the minimum requirement as prescribed in that regard. This conclusion was erroneous and was arrived at to keep the petitioner out of the fray. The financial bid of the respondent no.3 now having been opened it was clear that the rates quoted by the petitioner in its financial bid were much lower than those quoted by the respondent no.3. It was thus submitted that on considering the provisions of the Government Resolution dated 15.01.2021 in the light of the documents submitted by the petitioner it was clear that the bid submitted by the petitioner could not be said to be non-responsive as it did not satisfy the requirements prescribed. Both the grounds assigned by the respondent no.1 were incorrect and despite

being duly qualified to participate in the tender process the petitioner had been kept away for no justifiable reason. It was thus submitted that on aforesaid grounds the impugned communication dated 30.09.2021 ought to be set aside and the petitioner ought to be permitted to participate in the further tender process.

4. Shri M.G. Bhangde, learned Senior Advocate for the respondent no.3 opposed the aforesaid submissions and supported the action of the respondent no.1 holding the petitioner to be disqualified for further participation in the tender process. He submitted that Clauses 5.1 and 5.2 of the Government Resolution dated 15.01.2021 had been rightly considered by the respondent no.1 while holding the experience obtained by the petitioner to be insufficient. It was his submission that it was not permissible to club the experience gained in one year with that gained in another year. Since the experience in transportation of food-grains under any Government/Semi Government contract of at least one year was required, such experience ought to be 33% of the total transportation undertaken in the concerned district in the last three years. When the experience of the petitioner was seen in that regard as per certificate dated 11.06.2021 it was clear that the same was insufficient and less than 33%. The 33% experience prescribed as per the District-Sheet was transportation of 140184 Metric Tonnes while the experience shown by the petitioner was only 124640 Metric Tonnes for the period from April-2015 to March-2016. The Tendering Authority was therefore justified in

concluding that the petitioner lacked the requisite experience. It was then submitted that the contention as urged on behalf of the petitioner of the District-Sheet being contrary to the provisions of the Government Resolution dated 15.01.2021 had not been pleaded in the writ petition nor was such challenge raised therein. This contention therefore did not deserve consideration.

As regards the ownership of vehicles as prescribed it was submitted that the last date for submission of the bids was 11.06.2021. As per the affidavits submitted by the petitioner it was clear that on 11.06.2021 the petitioner neither owned any vehicle nor did it have any vehicle under its control. The affidavits having been sworn on 16.06.2021 and 20.07.2021 it was clear that these affidavits were not part of the bid documents and it was not permissible for the petitioner to subsequently rely upon the same. It was further submitted that though in the communication dated 15.08.2021 issued by the petitioner while removing the deficiencies a reference was made to Annexures 4 to 4h, these annexures were not placed on record to indicate that the two affidavits referred to by the petitioner were in fact submitted alongwith the communication dated 15.08.2021. The vehicles of which ownership of the petitioner was shown were purchased after 11.06.2021. The rejection of the petitioner's bid on that count was also justified. It was thus submitted that the interpretation of the Tendering Authority on requiring transportation experience in one year could not be said to be perverse to warrant interference. If a possible view of the matter was taken by the Tendering

Authority there would be no reason for the Court to interfere therein and substitute its view for that of the Tendering Authority. It was thus submitted that no case for interference with the impugned communication dated 30.09.2021 had been made out by the petitioner.

5. Ms N.P. Mehta, learned Assistant Government Pleader for the respondent nos.1 and 2 adopted the submissions as urged on behalf of the respondent no.3. Reference was also made to the affidavit filed on behalf of the respondent no.1 opposing the writ petition. It was submitted that the decision taken by the respondent no.1 was after considering various clauses of the Government Resolution dated 15.01.2021 as well as the terms of request for proposal of document. The writ petition therefore did not deserve to be entertained.

6. We have heard the learned counsel for the parties at length and with their assistance we have perused the documents 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 on two counts. It was stated that 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. From the documents submitted the experience with regard to 124640 Metric Tonnes which was lower than the required minimum. So also the capacity of transportation based on self-owned vehicles and vehicles

under control of the petitioner was insufficient. Thus according to the Tendering Authority the bid of the petitioner did not meet the minimum prescribed experience/requirement thereof.

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 QC5 and QC6 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 if the work executed by the petitioner from 2001-02 and onwards was considered. As per the certificate issued on 11.06.2021 by the District

Supply Officer the petitioner had requisite experience. Similarly the conclusion that the petitioner did not have the requisite number of trucks owned by it or under its control was also incorrect. The bid of the petitioner being genuine and also according to it the lowest, the same ought to have been accepted. It is found that there is no specific ground raised by the petitioner that the decision of the Tendering Authority that is impugned has been deliberately arrived at with a view to keep the petitioner out of the fray or that it is tainted with *mala fides* or is so unreasonable that no person would have arrived at such conclusion. In other words, the challenge as raised is principally on the manner in which the Tendering Authority has interpreted Clause 5.1 in an incorrect manner thus concluding that the petitioner was not duly qualified to participate in the tender process. In the aforesaid premise the challenge as raised to the impugned communication would have to be considered.

8. Clauses 5.1 and 5.2 of the Government Resolution dated 15.01.2021 when translated and referred to in *M/s Shalimar Transport and Carting Contractor* (supra) 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. While according to the petitioner the experience of a bidder over more than one year in transporting Government/Semi Government food-grains could be taken into consideration while calculating the requisite experience of 33% during the previous three years, according to the respondent no.3 such experience ought to be in a particular year and the experience gained beyond the period of one year cannot be taken into consideration. The

Tendering Authority has considered the experience gained in one financial year in transportation of Government/Semi Government food-grain while determining required experience of 33%.

From the certificate of experience dated 11.05.2021 issued by the District Supply Officer it is clear that in April-2015 to March-2016 experience gained by the petitioner is 124640 Metric Tonnes while for the period from April-2016 to 22.09.2016 it is 76303 Metric Tonnes. As per the District-Sheet and especially Clause 8 thereof the total transportation of food-grains in the district in the preceding three years was 424800 Metric Tonnes and 1/3rd thereof was 140184 Metric Tonnes. The Tendering Authority in its affidavit has stated thus with regard to aforesaid:

“13. The District Sheet of Buldhana district is annexed as Exhibit-AR-3 of the which in column 8 provide the figures in M.Tons of the total foodgrains transported in the said district in the last 3 years. Whereas in columns 11 and 11.1 of the said sheet the figures in M.Tons of the 33% of the total foodgrains transported in first and second phase i.e. 1,34,868 M.Tons and 1,29,842 M.Tons are mentioned. Thus, the bidder is mandatorily required to show that in the last three years, atleast in one year, he has achieved and/or has crossed the said figures in first and second phase. The requirement is that the bidder is required to show the work experience of atleast one year in the last preceding three years to match the figure of 33% and not cumulative of total experience. In that view of the matter, the Respondent takes into consideration the highest of the figures in the last three years of the work experience certificate of the bidder and then consider whether

the said figure fulfils the figures as mentioned in the District Sheet of that particular district. The Petitioner does not have experience of door step delivery scheme of transportation of foodgrains. Therefore, since the Petitioner does not fulfil the experience as regards door step delivery schemes of foodgrains transportation, the Petitioner has been held to be disqualified.”

9. It can thus be seen that while according to the Tendering Authority the work experience of one year in transportation of food-grains under Government/Semi Government contracts has been taken into consideration, the petitioner contends that the cumulative total experience ought to be taken into consideration. The question however is even if the interpretation as put forth by the petitioner is found to be a possible and plausible interpretation, can the same be substituted for the interpretation of the Tendering Authority which is also a possible interpretation. In other words, would it be justifiable for the Court to hold that the requisite experience as per its view ought to be taken into consideration by the Tendering Authority in place of its own interpretation. We are afraid that such course would not be permissible since the Tendering Authority is better suited to analyze its needs as regards requisite experience. In the absence of any allegation that the petitioner was sought to be deliberately kept out of the tender process or that the decision of the Tendering Authority was tainted with *mala fides* or that its decision was so arbitrary, irrational or unreasonable it would merely be an exercise of the Court substituting its view in place of the

view of the Tendering Authority. The Tendering Authority is justified in requiring such experience as prescribed to be gained in one year while on the other hand the interpretation put forth by the petitioner is also a possible interpretation. However, in view of the limited scope available in matters of this nature it would not be permissible for the Court to substitute its view/interpretation of the tender document in place of that of the Tendering Authority.

10. Coming to the aspect of ownership of vehicles which the petitioner has been found not to satisfy, it is seen that according to the petitioner on being informed by the respondent no.1 that there were certain deficiencies in its bid and the same were communicated on 09.08.2021, the petitioner sought to remove the same by its communication dated 15.08.2021. The petitioner has sought to rely upon affidavits dated 16.06.2021 and 20.07.2021 in that regard. The total capacity of the vehicles as indicated in those affidavits exceeds the minimum requirement. However, in the affidavit filed on behalf of the respondent no.1 in paragraph 20, it has been stated as under:

“20. After detailed scrutiny of the tender submitted by the tenderer/petitioner, it is observed that on the date of submission of tender i.e. 16th June, 2021 the tenderer/petitioner does not possess any owned and hired vehicles. Therefore, letter dated 9th August 2021 issued to the tenderer regarding the submission of this information within a period of 7 days. Accordingly, the petitioner produced the information of owned and hired vehicles by letter dated 15th

August, 2021. By this letter petitioner says that he has 28 owned vehicles with a capacity of 499 MT and 12 hired vehicles with a capacity of 205 MT. The tenderer is required to have a total carrying capacity of 913.44 MT as per Point no.7 and 7.1 of the District Sheet of Buldhana District. But as per the documents submitted by the petitioner, the petitioner has a carrying capacity of 704 MT. Therefore, since the petitioner does not possess owned and hired vehicles on the date of submission of tender and does not fulfill the eligibility criteria of QC-7 of clause 4 of the RFP document, the petitioner has been held to be disqualified.”

After this affidavit was filed by the respondent no.1 stating that as per the documents submitted by the petitioner it was having vehicles with carrying capacity of 704 Metric Tonnes there is no rejoinder filed by the petitioner disputing these averments and asserting that it had infact vehicles with capacity exceeding 913.44 Metric Tonnes as required. The statement made by the respondent no.1 that as per the documents submitted by the petitioner the carrying capacity of the vehicles was less than the minimum required therefore cannot be brushed aside. It is also a fact that Annexures 4 to 4h as referred to in the communication issued by the petitioner on 15.08.2021 are not on record to gather this aspect. It is in the aforesaid backdrop that the respondent no.1 in the impugned communication has observed that the petitioner did not own and was not having control over the requisite vehicles with minimum carrying capacity as prescribed. Hence there is no material on record to hold that this

conclusion recorded by the respondent no.1 is either illegal or arbitrary warranting interference on that ground.

Though the learned Senior Advocate for the respondent no.3 submitted that on the last date of submission of bids the petitioner did not own the necessary vehicles/vehicles under his control, since the respondent no.1 has considered the documents submitted by the petitioner and has then found the capacity of such vehicles to be insufficient, we are not inclined to non-suit the petitioner on the ground that the petitioner was shown to own his vehicles after the last date of submission of bids.

11. We thus find that there is no scope whatsoever to conclude that the respondent no.1 was not at all justified in holding the petitioner to be not qualified for further participation in the tender process. In absence of any material to indicate such rejection to be illegal, arbitrary, irrational or unreasonable accepting the contentions of the petitioner would merely amount to substitution of the view of the Tendering Authority with the view of this Court which has been held to be impermissible in law. Though the learned Senior Advocate for the petitioner referred to Clause 6.8 of Government Resolution dated 15.01.2021 to submit that the financial bid of the petitioner indicated much lower rates than those quoted by the respondent no.3, the same cannot be a reason to accept the contentions raised by the petitioner. 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.

12. 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. Pending civil applications also stand disposed of.

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

APTE