

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :-

The Hon'ble Justice Moushumi Bhattacharya

W.P.A 9429 of 2022

SGS India Private Limited & Anr.

vs.

Union of India & Ors.

For the petitioners	:	Mr. Anindya Kumar Mitra, Sr. Adv. Mr. Deepan Kumar Sarkar, Adv. Ms. Ananya Sinha, Adv. Ms. Anshumala Bansal, Adv. Ms. Parthana Singha Roy, Adv.
For the UOI	:	Mr. Debashis Basu, Adv. Mr. Arun Bandyopadhyay, Adv.
For the respondent no. 2	:	Mr. Aniruddha Chatterjee, Adv. Mr. S. Prasad Chattopadhyay, Adv. Mr. Arjun Samanta, Adv.
For the respondent no. 3	:	Mr. Abhrajit Mitra, Adv. Mr. Sarvapriya Mukherjee, Adv. Ms. Somdutta Bhattacharyya, Adv. Ms. Debomita Sadhu, Adv.
Last Heard on	:	08.05.2023
Delivered on	:	18.05.2023

Moushumi Bhattacharya, J.

1. The petitioner no. 1 is a company engaged in the business of inspection and certification of jute products. The petitioner no. 2 is a Director of the first petitioner. The petitioners seek a declaration that the eligibility criteria for selection of inspection agencies as fixed by a Notification dated 23.8.2016 should be valid and binding on the respondents and also for a mandamus commanding the respondents to desist from giving any effect to the eligibility criteria fixed under Notice Inviting Tender (NIT) dated 31.12.2019 as being in deviation from the Notification dated 23.8.2016.

2. The respondents are the Jute Commissioner under the Ministry of Textiles, Government of India (respondent no. 2), Cotecna Inspection India Private Limited, a participant Inspection Agency in the tender under review (respondent no. 3) and the Indian Jute Industries' Research Association (respondent no. 4).

3. The petitioners filed CAN 1 of 2023 for amendment of the writ petition by including one Eskaps (India) Private Limited as another participating bidder in the tenders and also for a mandamus on the respondents to cancel a decision dated 5.1.2023 disqualifying the technical bid of the petitioner no. 1. In the amendment application, the petitioners also sought for quashing of the decision of the respondent no. 2/Jute Commissioner holding the respondent nos. 3 to 5 eligible for empanelment as inspection agencies.

4. Learned counsel appearing for the parties have made their arguments both on the writ petition as well as amendment application.

5. The Notification dated 23.8.2016, the NIT dated 31.12.2019 as well as the Tender dated 2.2.2022 were for empanelment of Inspection Agencies for examination and testing of jute bags conforming to the quality parameters for holding food-grains. The empanelled Inspection Agencies are to inspect the quality of jute bags as per the Bureau of Indian Standards (BIS). The petitioners claim that the Notification dated 23.8.2016 containing a Request for Proposal for carrying out the inspection of the quality of jute bags formulated the correct standards and criteria for empanelment of Inspection Agencies. Learned counsel appearing for the petitioners submits that the criteria must be in conformity with the object and purpose of the statutory power conferred on the Jute Commissioner vide the Jute Textile Control Order, 2016.

6. Counsel submits that the NIT of 2019 did not serve the object and purpose of appointment of Inspection Agencies and that the 2022 Tender also fails to meet the requirement. According to counsel, the petitioners are aggrieved by the subsequent orders of modification of the eligibility criteria which also were not suitable for preserving the purpose of the Notification of 2016 which was to ensure that jute bags are of BIS standards. Counsel urges that the eligibility criteria of the selection of Inspection Agencies is to ensure that the agencies are competent to serve the statutory object of ensuring the quality of jute

textile in the market and protect the end-users and that the subsequent NIT of 2019 and a Tender of 2022 have diluted the standards.

7. Counsel places a comparative chart of the criteria of the 2016, 2019 and 2022 NITs/Notifications to submit that the 2022 Notification has diluted the criteria for the empanelment of Inspection Agencies without any reasonable basis. According to counsel, the dilution/modification was made only to favour the respondent no. 3 who has been empanelled as one of the successful bidders. Counsel disputes the selection of the respondent no. 3 on the eligibility grounds under the 2016 Notification. It is submitted even if the subsequent modifications are accepted as a policy decision, such decision would be amenable to judicial review. It is submitted that the petitioner no. 1 was in any event eligible to participate in the 2022 Tender.

8. Learned counsel appearing for the respondent no. 2 Jute Commissioner submits that the respondent no. 2 has been vested with the duty to look after the work of procurement of jute gunny bags and that the 2022 Tender has been called only to regularise the entire process of inspection of jute bags. Counsel submits that the petitioner has been continuing as the Inspection Agency along with 4-5 others since 2016 with a major share of the work for the inspection of jute bags. Counsel submits that the decision to widen the competition by way of the 2022 Tender is a policy decision which cannot be interfered with until and unless the same is arbitrary and that the 2022 (the present Tender) has invited applications from leading Inspection Agencies for

empanelment. Counsel submits that the technical bid of the petitioners was rejected on the ground of technical disqualification and misleading information given in the bid document. Counsel submits that the declaration sought for in relation to the 2016 Notification is without basis since the said Notification was only a Request for Proposal and can have no binding effect on the present Tender dated 2.2.2022. Counsel further submits that the order passed by the Jute Commissioner on 2.11.2021 dropping some of the charges levelled against the respondent no. 3 Cotecna is an appealable order under paragraph 10 of the Jute and Jute Textiles Control Order, 2016.

9. Learned counsel appearing for the respondent no. 3 Cotecna, one of the empanelled Inspection Agencies who participated in the 2022 Tender, submits that having participated in the Tender, the petitioner no. 1 is precluded from challenging the terms of the said Tender. Counsel submits that the petitioners had also participated in the 2019 NIT and had filed a writ petition challenging the eligibility of the respondent no. 3 to participate in the said Tender. Counsel submits that the petitioners have suppressed several material facts from the Court including the aforesaid and also the Notice sent by the Jute Commissioner seeking clarifications from the petitioners and the petitioners silence/lack of response to the said Notice. Counsel submits that the petitioners had challenged the eligibility criteria under the 2019 NIT in May, 2022. Counsel urges that the petitioners' grievance is solely directed at the widening of competition since the petitioner no. 1

was one of the empanelled agencies since 2016. It is submitted that the petitioner no. 1 was in any event ineligible to participate in the 2022 Tender having been blacklisted on 23.5.2019 by a Government organisation.

10. The petitioners' case is that the NIT of 2019 and the Tender of 2022 (the present Tender) for empanelment of Inspection Agencies for jute products should be on the basis of the Notification dated 23.8.2016. The petitioners claim that the criteria contained in the 2016 Notification were modified and diluted by the 2019 and 2022 NITs/Tenders and that the modification is contrary to the object of the Jute Control Order, 2016. The complaint is that the Jute Commissioner/respondent no. 2 diluted the terms of the 2016 Notification for inducting the respondent no. 3 as the empanelled Inspection Agency. The petitioners have challenged both the 2019 as well as the 2022 Tenders on the aforesaid basis.

11. The decision of the Court is based on the respective cases made out by the petitioners, the Jute Commissioner and the respondent no.3 (empanelled bidder) and the material disclosed in the proceeding and is given on the following issues.

The conduct of the petitioners : a case of Approbation and Reprobation

12. The above finding is based on the following undisputed facts. The petitioner no. 1 participated in the 2022 Tender and submitted its bid on 4.4.2022. It is hence arguable whether the petitioner no. 1 can

challenge the terms of the Tender regardless of the case sought to be made out by the petitioners. The Supreme Court in *Air Commodore Naveen Jain v. Union of India*; (2019) 10 SCC 34 held that the applicant before the Court was estopped from challenging the policy after participating in the selection process on the basis of the policy. The point of participation and thereafter challenging the process was also dealt with by a Division Bench of this Court in *Airport Authority of India v. Masti Health & Beauty Private Limited*; 2022 SCC OnLine Cal 2690 as well as by a Division Bench of the Bombay High Court in *Rosmerta Technologies Ltd. v. State of Goa*; 2014 SCC OnLine Bom 891 which dealt with a candidate appearing in the exam without protest and subsequently challenging the same upon being unsuccessful in the examination. Decisions cited on behalf of the petitioners have held that a tender in which a person has not participated at all cannot be challenged by such person since no real prejudice can be claimed to have been caused in such event; Ref: *Subir Ghosh v. State of West Bengal*; 2020 SCC OnLine Cal 2213 and *Praxair India Private Limited vs. Central Vigilance Commissioner*; 2022 SCC OnLine Cal 466. Considering these decisions, even if it is assumed that the petitioner can challenge the tender process, this is not a case where the terms of the Tender were tweaked or modified to the petitioners disadvantage after the petitioners participated in the Tender. Hence, this Court is of the view that the petitioners cannot seek the interference of the Court in the 2022 Tender process.

13. Although the petitioners have also challenged the 2019 NIT, the records show that the petitioner no. 1 had also participated in the 2019 NIT and had also challenged the eligibility of the respondent no. 3 to participate in the said Tender by filing a writ petition in this Court: WPA No. 6080 of 2021. The petitioners were also successful in obtaining an order from a Coordinate Bench which, on 6.8.2021, directed the Jute Commissioner to consider the representation of the petitioner no. 1 with regard to the disqualification of the respondent no. 3. By an order dated 2.11.2021, the Jute Commissioner disqualified the respondent no. 3 which is part of records. Therefore, the petitioners have no *locus* to challenge the 2019 and the 2022 Tenders after having participated in and taken advantage of the same.

Suppression of material facts

14. The petitioners were granted interim relief by an order dated 26.9.2022. By the said order, the respondents were directed to maintain *status quo* as on that date until the matter was heard out. On that date, the Court was given to believe that the subject matter of challenge was the Notification of 2019 as opposed to a Notice Inviting Tender of 2019. The interim order was modified on 15.12.2022 on the factual clarification given on behalf of the respondent no. 3 and the Jute Commissioner was permitted to proceed with the Tender but to finalise the Tender only upon obtaining leave of the Court.

15. Apart from the petitioners' participation in the 2019 as well as the 2022 Tenders, the Court was not informed at the material point of time that the respondent no.2/Jute Commissioner had sent a Notice to the petitioner no. 1 on 5.8.2022 seeking clarifications from the petitioner no. 1 with regard to several eligibility issues. The petitioners had replied to the letter on 16.8.2022 but had refused to answer any of the clarifications sought for by the Jute Commissioner. On 2.9.2022, the Jute Commissioner had once again asked the petitioner no. 1 to answer the queries in the letter of 5.8.2022 stating that the tender process is being held up by reason of the petitioners' refusal to clarify the factual issues. The petitioner no. 1 wrote back on 5.9.2022 seeking 2 weeks' time to respond to the queries of the Jute Commissioner.

16. None of the above facts were told to the Court at the time of obtaining the interim order.

17. The Court was also unaware that the writ petition was filed as far back as on 19.5.2022 without the petitioners taking any steps for ad-interim relief. The matter was mentioned for listing only on 6.9.2022 after which the petitioner no. 1 requested for postponement of clarifications of the Jute Commissioner's queries on 12.9.2022 on the ground of the matter being *sub judice*. The writ petition was modified thereafter on 26.9.2022 when the interim relief was granted to the petitioners.

18. The Court was not made aware of these relevant facts including of the petitioners' participation in both the 2019 and 2022 Tenders. The factual position was clarified to some extent at the time of modification of the interim order on 15.12.2022. In *Prestige Lights Ltd. v. State Bank of India*; (2007) 8 SCC 449, the Supreme Court referred to the celebrated case of *R. v. Kensington Income Tax Commrs.*; (1971) 1 KB 486 and held that in exercising extra ordinary power, a Writ Court will bear in mind the conduct of the party who is invoking jurisdiction and that the very basis of writ jurisdiction rests on disclosure of true, complete and correct facts.

The case made out is essentially of narrowing down of competition

19. The petitioner no. 1 was admittedly one of the empanelled Inspection Agencies from 2016-2022. The petitioner no. 1 was also given 65% of the work from 2016-2017 to 2021-2022; the remaining 35% of the work was being shared by the other Inspection Agencies. The petitioners' case is not one of exclusion from the Tender- as would be evident from the prayers in the writ petition before the petitioners applied for amendment. The prayers in the writ petition are essentially to restrain the respondents from diluting the eligibility criteria fixed under the Notification dated 23.8.2016 and from giving effect to the Tender dated 2.2.2022.

20. The case made out in the writ petition, pre-amendment, was for declaration of the 2016 Notification as valid and binding on the

respondents. The rejection of the petitioners' technical bid came much later on 5.1.2023 and necessitated the amendment application.

21. It is evident therefore that the writ petition was for challenging the 2019 and 2022 Tenders which widened the field of participation of Inspection Agencies by permitting more parties to participate in the Tender.

22. The Supreme Court has frowned upon any attempt to challenge a tender for narrowing of the field of competition; *G.J. Fernandez v. State of Karnataka; (1990) 2 SCC 488* held that injustice is less apparent where the attempt of the applicant before the Court is only to gain immunity from competition.

23. This view was expressed even in a case which involved a departure from the tender terms. This Court is hence of the view that the petitioners' challenge to the 2019 and 2022 Tenders is only for continuation of the petitioners' position as an existing Inspection Agency and to restrict the entry of more players in the Tender process. The petitioners do not have a justiciable case on this score.

Dilution of standards – the Writ Court is not the appropriate forum to decide the issue

24. The Jute and Jute Textiles Control Order, 2016 vests the Jute Commissioner with the power to inspect the quality of jute textiles and other ancillary powers after the abolition of the public procurement arm, Director General of Supplies and Disposal, in November, 2016. The

powers are regulatory in nature and the Jute Commissioner is the best Judge/authority to incorporate and modify the required criteria for selection of inspection agencies as long as the criteria (or the modification) is not arbitrary or mala fide.

25. There is nothing on record to show that the 2019 or 2022 Tenders have been framed in a manner so as to favour any one particular party including the respondent no. 3 or to exclude the petitioner no. 1 for that matter. In fact, the 2022 Tender widens competition and ensures participation of a greater number of Inspection Agencies.

26. Moreover, the challenge to the 2019 and 2022 Tenders is questionable since the petitioner no. 1 participated in both the Tenders and particularly took advantage of the 2019 NIT. In *Global Energy Ltd. v. Adani Exports Ltd.*; (2005) 4 SCC 435, the Supreme Court relied on *Tata Cellular v. Union of India*; (1994) 6 SCC 651 to hold that the terms of the invitation to tender cannot be open to judicial scrutiny since the invitation to tender is in the realm of contract. The Supreme Court was also of the view that the courts cannot whittle down the terms of the tender unless the terms are arbitrary, discriminatory or actuated by malice. There is no evidence of the 2022 Tender terms being discriminatory or mala fide.

27. In *Centre for Public Interest Litigation v. Union of India*; (2016) 6 SCC 408, a 3-Judge Bench of the Supreme Court held that a policy

decision does not call for any interference by the court in exercise of power to judicial review unless the policy decision is found to be arbitrary or based on irrelevant consideration or against the statutory provisions. In *Praxair India Private Limited* the eligibility criteria had been relaxed after publication of the NIT and a Co-ordinate Bench held that the relaxation was not illegal.

It is arguable whether the petitioner no. 1 was ineligible to participate in the Tender

28. Clause IV(2)(i) of the eligibility criteria for participation in the 2022 Tender requires the Bidder not to be blacklisted/banned/debarred by appropriate agencies of Government of India. The petitioner no. 1 was blacklisted on 23.5.2019 by IIM Kashipur which is a Government organisation. The blacklisting was kept in abeyance by an interim order dated 12.6.2020 made under section 17 of the Arbitration and Conciliation Act, 1996. The petitioner no. 1 participated in the Tender on 4.4.2022 when the blacklisting was kept in abeyance. The blacklisting was subsequently set aside by an award dated 17.9.2022.

29. Though the interpretation of the relevant tender condition rests with the tendering authority, the fact remains that the petitioner no. 1 did not declare this fact by submitting the relevant document in its own name. Reference in this context may be made to *Sudarshan Chits (I) Ltd. v. O. Sukumaran Pillai*; (1984) 4 SCC 657 where the Supreme Court held

that an order being kept in abeyance does not mean that it has ceased to exist. In *Dayamayee Mondal v. Indian Oil Corporation Limited; (2006) 4 CHN 491*, a Division Bench of this Court dwelt on the importance of possession of the requisite certificate at the time of application by a party.

30. The above discussion persuades this Court to hold that the writ petitioners do not have a case for relief, interim, final or otherwise. The petitioners seek to continue the position as existing from 2016-2022 as one of the enlisted Inspection Agencies and are hence against widening of the periphery of competition. There is nothing on record to suggest that the terms/eligibility criteria of the present Tender of 2022 are tailor-made to favour the respondent no. 3 or dilute the standards of selection in a manner which is unreasonable or *mala fide*. The harking back to the 2016 Notification after the petitioners have participated in the 2019 and 2022 Tenders is questionable, to say the least.

31. The conduct of the petitioners and the suppression made at the relevant stage of the proceedings further disentitles the petitioners to any equitable relief. The amendment to the writ petition was necessitated by the rejection of the petitioners' bid after filing of the writ petition and hence became necessary at the relevant point of time. The amendment however does not fortify the writ petition in terms of merit or making out a ground for grant of relief.

32. The interim orders dated 26.9.2022 and 15.12.2022 are vacated and WPA 9429 of 2022 is dismissed for the above reasons without any order as to costs.

Urgent photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(Moushumi Bhattacharya, J.)