

D/L. 22.
July 3, 2023.
MNS.

WPA No. 15162 of 2023

Shiba Prosad Banerjee
Vs.
The Union of India and others

Mr. Swarup Paul,
Mr. Surya Maity,
Mr. Anirban Chakraborty,
Mr. Anish Roy

... for the petitioner.

Mr. Asok Kumar Chakrabarti,
Ms. Sayani Roy Chowdhury

...for the respondent-authorities.

Mrs. Aparna Banerjee

...for the respondent no. 6.

Affidavit-of-service filed in Court today be kept
on record.

Learned counsel appearing for the petitioner
contends that a corrigendum has been issued to a
tender floated by the respondent authorities in respect
of supply of cooked diet to a particular Cancer
Hospital.

It is contended that the terms of the
corrigendum virtually seek to bring about a sea
change in the primary clauses of the original tender.

It is contended that although the original tender stipulated that the previous experience of similar work had to be for the last three financial years, the said period has been increased to five financial years in the corrigendum. Secondly, whereas the original tender contemplated the previous work experience to be of similar nature for supply of patient diet work orders, the corrigendum restricts such work in respect of Cancer hospitals only, thereby preventing several operators and contractors from participating in the bid process, in order to curtail competition.

It is contended that the restriction-in-question does not have any conceivable nexus with the purpose of the tender, since the cooked diet contemplated in case of other hospitals is similar to that of Cancer hospitals.

It is further argued that the corrigendum, if allowed to come through, would tantamount to making the tender terms tailor-made, to suit particular contractors who have worked in similar projects only in respect of the Cancer hospitals and, that too, for the last five years.

It is argued that such change in the basic tender conditions, at the eleventh hour, ought not to be permitted.

Learned counsel also submits that in the pre-bid meeting, in which the petitioner participated, it was given out that the petitioner was to seek a proper clarification on certain issues by way of making a representation. Such representation has been filed on June 7, 2023. However, no reply thereto has been given by the respondent authorities as yet.

Learned Senior Counsel appearing for the Union of India submits, by placing reliance on *N.G.Projects Limited Vs. Vinod Kumar Jain and others*, reported at 2022 SCC OnLine SC 336, that the essence of the law laid down in the judgment considered therein is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the State instrumentalities; the courts, it was held, should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable. Further, it is argued that the Tender Issuing Authorities are the best judge as to how the documents are to be interpreted. If two interpretations are possible, then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, *mala fides* or perversity.

Learned counsel appearing for the Tender Issuing Authority contends that the nature of diet to be

provided to Cancer patients, who are exclusively treated in Cancer hospitals, has certain distinctions from other ordinary patients. As such, the stress on previous work experience of supplying cooked diet to Cancer hospitals exclusively, which is one of the criteria in the corrigendum, is justified, since directly connected with the purpose of the tender.

Insofar as the stipulation of five financial years' previous experience is concerned, it is submitted that the same falls within the discretionary domain of the Tender Issuing Authorities.

Upon hearing learned counsel, it is seen that the petitioner has relied on a co-ordinate Bench judgment delivered on December 15, 2022 in *WPA 27778 of 2022 (M/s. Rupa Enterprises Vs. The State of West Bengal and others)*, wherein a similar clause pertaining to previous experience regarding ESI Hospitals was set aside by the learned Single Judge on the ground of arbitrariness.

However, as rightly pointed out by learned counsel for the respondents, there are specific distinctive features between the said case and the present one. Although, in the said judgment, the court considered a clause pertaining to supply of cooked diet for indoor patients at the ESI Hospital, Baltikuri, Howrah, and the clause set aside also pertained to

prior experience of supplying such food to ESI Hospitals, the yardstick for setting aside the clause, as stipulated in the said judgment, was different.

The learned Single Judge held that the purpose of floating a tender, particularly by Government entities, is to ensure transparency.

In the said case, the court specified that it did not intend to change any of the terms and conditions of the tender-in-question and the scrutiny was limited to the act of restricting the competition only to those who have served ESI hospitals.

The key expression in the said judgment was that the condition was found to be arbitrary “by reason of lacking a discernible nexus between the requirement and the scope of the tender”.

Taking the said judgment on its intrinsic value, the impugned criterion in the said tender was that the participant in the tender process had to have served cooked diet in ESI hospitals only. However, the expression “ESI” merely pertains to a particular class of employees, to whom the hospital facilities are available as perquisites of their employment. The said expression, however, does not have any connection with the particular disease sought to be treated in the hospitals or the particular type of patients vis-à-vis their ailments.

However, in the present case, “Cancer” is the name of a particular disease, which is exclusively treated in the hospital-in-question, for which the impugned tender was floated. Thus, an intelligible criterion for choosing candidates for food supply can very well be previous expertise and/or experience in supply of cooked diet specifically to Cancer patients in Cancer hospitals.

The particular nutrition to be provided to Cancer patients, who exclusively are inmates of the hospital for which the tender is floated, has a direct nexus with the previous work experience of the supplier in similar spheres of work. A general experience in working in other hospitals, treating all diseases, may be on a quite different footing than the food supplied specifically to Cancer patients exclusively treated in Cancer hospitals. As such, it cannot be said that there was no discernible nexus between the requirement and scope of the tender in the instant case.

Since the said ground was the determinant in the previous judgment for holding the ESI restriction to be arbitrary, in the absence of any such arbitrariness in the present case, it cannot be said that the clause-in-question is vitiated.

Insofar as the number of previous years of experience is concerned, even in the said cited

judgment, the learned Single Judge affirmed a 5-year experience clause in the tender. That apart, even independently of such judgement, the time for which previous experience, as sought by the employer, is exclusively within the domain of discretion and expertise of the Tender Issuing Authority and its own experts.

It is entirely beyond the expertise of the court of law to decide on such issue at all. Hence, inasmuch as the present impugned corrigendum is concerned, the primacy of the Tender Issuing Authority regarding the type of candidates expected by the employer for participation in the tender process to supply cooked diet to a Cancer hospital has to be respected.

Hence, the challenge to the corrigendum fails on both the above scores.

As far as the allegation that the corrigendum has been floated in the eleventh hour is concerned, the same also does not hold water, since sufficient participation time was available to the participants, including the petitioner, in the tender process, even after the publication of the corrigendum. In any event, since the petitioner submits that it may not be considered eligible in view of not having work experience for five years in a Cancer hospital, the said determinant is not relevant in the present context.

However, in so far as the qualifications of the petitioner are concerned, this Court cannot enter into a conclusive finding as regards the same, since it may also be that the petitioner has had the requisite experience as sought in the corrigendum itself as well.

Be that as it may, in view of the above observations, the challenge to the corrigendum fails. In so far as the non-consideration of the representation of the petitioner is concerned, the same has also come too late in the day, since the specific stipulation in the Notice Inviting Tender was that all doubts have to be creased out in the pre-bid meeting. Having not done so, at the behest of whoever, the petitioner cannot be permitted to do so now, thereby having an edge over the other competitors in that regard. Hence, adhering to the tender conditions, the issue raised in the said representation cannot be reopened at this juncture.

However, since learned counsel for the petitioner submits that the petitioner, in the case of failure in the writ petition, be given sufficient time to participate in the tender process, if otherwise eligible, the last date for submitting the bids is deemed to be extended till July 10, 2023.

The respondent authorities shall notify such altered last date of bid submission in their official website by tomorrow.

However, in view of the above observations, the challenge in the writ petition fails.

Accordingly, WPA No. 15162 of 2023 is dismissed on contest in the light of the direction given above to the respondent authorities.

There will be no order as to costs.

Urgent photostat certified copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.

(Sabyasachi Bhattacharyya, J.)