



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 15187 OF 2023

Jai Bhavani Mandap & Electrical Decoration,
Through its Proprietor,
Shri Dnyaneshwar P. Padamgirwar,
Age : 42 years, Occu. : Proprietor,
R/o. New Mondha, Kadhi Mandi,
Parbhani, Tq. and Dist. Parbhani

.. Petitioner

Versus

1] The District Collector,
Parbhani

2] The Collector / District Election Officer,
Parbhani, Election Branch,
Parbhani

.. Respondents

...
Advocate for petitioner : Mr. D.S. Bagul
AGP for the respondent – State : Mr. K.N. Lokhande
...

**CORAM : MANGESH S. PATIL &
NEERAJ P. DHOTE, JJ.**

DATE : 13 DECEMBER 2023

ORDER (MANGESH S. PATIL, J.) :

The learned AGP tenders across the bar a communication received by him from the Deputy Election Officer Parbhani dated 12-12-2023 *inter alia* informing that in respect of the tender in question, corrigendum has been issued and notified on the portal on 07-12-2023.

2. The learned advocate for the petitioner seeks leave to amend the petition. Leave is granted. Amendment to be carried out forthwith.

3. Heard. Rule. Rule is made returnable forthwith. Learned AGP waives service for the respondents. At the joint of the parties, the matter is heard finally.

4. The petitioner is intending to participate in the tender process initiated by the respondent no. 2 who is the Collector and the District Election Officer, Parbhani for erection / supply of pendals, furniture and necessary items on rent for the ensuing elections of Member of Parliament and State Legislative Assembly likely to be held in 2024. Petitioner is assailing clause nos. 9 and 10 of the tender document. Initially condition no. 9 was to the effect that the bidder should annex necessary experience certificate of any one year from the last 7 years duly signed by the competent authority about having undertaken a similar work and condition no. 10 was to the effect that the bidder should annex inter alia necessary certificate of the auditor about the turnover of the last three years, average of which shall be minimum 60% of the estimated cost, which was declared to be 6 Crore.

5. The communication dated 12-12-2023 tendered by the learned AGP as mentioned herein-above mentions that a corrigendum was issued to the original tender notice, on 07-12-2023, whereby the

original condition no. 9 has been modified to the effect that the experience of similar two works with the requirements of cost of such two works to be at least 60% of the estimated cost of Rs. 6 Crores, was solicited. Condition no. 10 was modified to the effect that instead of 60%, average of the turnover for the last three years to be certified by the auditor was expected to be at least more than 40% of the estimated cost of the present work i.e. Rs. 6 Crores.

6. The learned advocate Mr. Bagul would take us through similar tenders floated in various other districts to buttress his submission that no such stringent conditions have been incorporated in those districts, namely, Beed, Latur, Dharashiv, Hingoli, Nanded and Pune. He would submit that if the Collectors of these districts who are also the District Election Officers of their respective districts, as is the respondent no. 2 of Parbhani district, have put up reasonable conditions, the conditions in the present tender are harsh and stringent. Those have been objectively incorporated to weed out petitioner and similar individuals and with a view to benefit one Sahyog Seva Mandap.

7. Mr. Bagul would submit that since it is a matter of public money, the petitioner and similar such establishments are entitled to participate and care should have been taken to resort to tender process wherein there would be maximum participation which would

save public money. Imposition of such stringent conditions is aimed at reducing the competition and favouring an individual establishment. In consonance with what has happened in other districts, the request was made for relaxing the conditions no. 9 and 10 but not to any avail. The respondent no. 2 is adamant in going ahead with the tender process with stringent conditions. It would be detrimental to the level playing field expected to be followed as laid down in the matter of ***Reliance Energy Ltd. and another Vs. Maharashtra State Road Development Corporation Ltd.; (2007) 8 SCC 1***. He would also rely upon the decision of this Court in the matters of ***M/s. K.K. Vidyut, Ahmednagar Vs. The Union of India and others*** (writ petition no. 10696 of 2014) and connected matters, wherein this Court had resorted to comparison in respect of a similar contract pursuant to the tender process undertaken by the BSNL. By referring to the ***Reliance Energy Ltd.*** (supra), the concept of level playing field was also resorted to. Mr. Bagul would also place reliance on the decision of ***Vaishnorani Mahila Bachat Gat Vs. The State of Maharashtra and others; (2019) 15 SCC 718***. He would submit that this Court should step in and issue directions for relaxation of conditions no. 9 and 10.

8. Per contra, the learned AGP would submit that this Court cannot prevail over the discretion vested with the respondent no. 2. He has applied his mind and has exercised the discretion in incorporating

the conditions which cannot be a subject matter of judicial review. There is no concrete evidence about the conditions having been incorporated to obviate any competition or to deprive the petitioner an opportunity of participation or to favour anybody even though name of Sahyog Seva Mandap has been incorporated in the petition by way of modification, in handwriting, in the memo of the petition.

9. He would advert our attention to similar clauses in respect of the tender notice published in Latur district. He would submit that against the estimated cost of Rs. 5 Crores, condition no. 10 requires the average turnover for the last three years to be minimum of 35% of Rs. 5 Crores. He would submit that every Collector cum District Election Officer is entitled to incorporate appropriate condition according to his discretion. There are no parameters laid down by the Election Commission. There is bound to be some variance in every district in respect of the terms and conditions. No inference can be drawn merely on the basis of and pointing out the variance. It cannot be a subject matter of judicial review.

10. We have considered the rival submissions and perused the papers.

11. At the outset, it is necessary to note that though the petitioner has been demonstrating as to how the impugned conditions

are more stringent than the ones from the tender notices issued in many other districts, in our considered view, when the District Election Officer has been authorized to float the tender process in respect of his own district, in the absence of any mandate or direction by the superiors or the election authority, there is bound to be some variance in every respect.

12. It is trite that as laid down in the matter of ***N.G. Projects Ltd. v. Vinod Kumar Jain; (2022) 6 SCC 127***, appropriateness of a particular term or condition in the tender notice cannot be a subject matter of judicial review. It is the discretion of the employer as to which conditions to be incorporated and would suit its purpose. The relevant observations from the ***N.G. Projects*** (supra) are as under:-

“23. In view of the above judgments of this Court, the writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a mala fide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present day Governments are expected to work.”

13. We are precisely pointing out the afore-mentioned observations from **N.G. Projects** (supra) as the petitioner has been relying upon the decision in the matter of **K.K. Vidyut** (supra) of a Division Bench of this Court which was decided on 29-01-2015 when the **N.G. Projects'** decision was not holding the field. Be that as it may, appropriateness of a particular term or condition would be in the exclusive domain of the employer and unless there is sufficient and cogent reason and material to demonstrate that the conditions have been incorporated with some ulterior motive to favour someone, the Courts cannot undertake a judicial review. The Courts have been put on guard even when there is some arbitrariness and even the tender is allotted in a *mala fide* manner. Merely because the petitioner is finding it inconvenient, there could be no challenge to the terms and conditions which would be applicable to every bidder equally.

14. In the matter of **Reliance Energy Ltd.** (supra), the issue was in respect of accounting treatment to be given to non-cash expenses while applying the methodology for ascertaining net cash profit (NCP) of 200 Crores, to demonstrate the financial condition of the bidder as per the tender condition no. 7.2.2. The principle of 'level playing field' laid down therein will have to be understood in the context in which it was invoked in paragraph no. 36.

15. Here is a case where the petitioner is objecting to the two conditions of the tender notice which would operate equally to all the bidders. Therefore, the petitioner is not entitled to derive any benefit from the decision in the matter of **Reliance Energy Ltd.** (supra). As far as **Vaishnorani Mahila Bachat Gat** (supra) is concerned, it was a tender floated for supply of supplemental nutrition under the Incorporated Child Development Scheme and Supplementary Nutritional Program undertaken under the National Food and Safety Act, 2013, contrary to the directions of the **PUCL** matter **(2004) 12 SCC 104**. It was found that the tender conditions were arbitrary and illegal. It was found that the notice inviting tender was not in the spirit of the orders passed by the Court and in the light of the peculiar circumstances discussed therein, the conditions were held to be arbitrary. It was noticed that the conditions were inconsistent with the Central government guidelines of involvement of self help groups in supply of take home ration and de-centralization of ICDS (Integrated Child Development Scheme) and supplemental nutritional program with the help of self help groups and non involvement of contractors. Since the matter in hand is regarding supply of pandal, furniture etc. for the ensuing elections, the petitioner is not entitled to bank upon the decision in the matter of **Vaishnorani Mahila Bachat Gat** (supra).

16. Considering the above state-of-affairs, we do not find any arbitrariness or unreasonableness in the impugned two conditions of the tender notice floated by the respondent no. 2.

17. The petition is dismissed.

18. Rule is discharged.

[NEERAJ P. DHOTE]
JUDGE

[MANGESH S. PATIL]
JUDGE

arp/