Santosh

IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 71 OF 2023

PARESH G. KAMAT AND ASSOCIATES THR. ITS PARTNER PARESH G. KAMAT …. Petitioner.

Versus

STATE OF GOA THR. CHIEF SECRETARY AND 4 ORS …. Respondents

Mr A.F. Diniz, Senior Advocate, with Mr Ryan Menezes, Stephanie C.C. Alvares, and Mr Nigel Fernandes, Advocates *for the Petitioner.*

Mr D.J. Pangam, Advocate General, with Ms Maria Correia, Addl. Govt. Advocate *for Respondents-State.*

CORAM : M. S. SONAK &
BHARAT P. DESHPANDE, JJ.

Reserved on : 6th February 2023.
Pronounced on : 7th February 2023.

ORAL ORDER : (M.S. Sonak, J.)

1. Heard Mr A.F. Diniz, learned Senior Advocate who appears along with Mr Ryan Menezes, learned Counsel for the Petitioner and Mr D.J. Pangam, learned Advocate General who appears along with Ms Maria Correia, learned Additional Govt. Advocate for the Respondents-State.

2. The Petitioner, after its tender bid was rejected, has instituted this Petition, seeking the following relief :

> *"(a)that by any appropriate writ, order or direction, under Article 226 of our Constitution, this Hon. Court may be pleased to quash and set aside and/or strike down the impugned Further Conditions of the Tender vide Sub-Clauses (a), (b), (c) & (d) of Clause 2 of the said Tender Notice and Sub-Clauses (i), (ii),(iii) & (iv) of Clause 1.2.1 of the said NIT and/or and the decision of the Tender Evaluation Committee taken at its meeting on 27/10/2022, and communicated by email dated 22/11/2022, that the Petitioner stands ineligible to participate in the tender process, along with the selection of any bidders, as the successful bidder, if any, and/or award of the contract and/or issue of the work order to such bidder, if any, with all legal effects and consequences, and to direct the Respondents to conduct the tender process afresh, without the imposition of any further conditions of eligibility;"*

3. The communication dated 22/11/2022, by which the Petitioner was informed that the Tender Evaluation Committee has rejected its bid, cites the following three reasons for rejection:

(a) ARN not furnished;

(b) Indicated losses during F.Y. 2020-21 and 2021-22; and

(c) Not furnished similar work certificate.

4. The Notice Inviting Tender (NIT) requires the tenderers to submit a certificate of registration for GST and acknowledgement of up-to-date filed returns. Clause 6(b) of the NIT provided that the tenderers shall scan and upload the certificate of registration for GST and acknowledgement of up-to-date filed returns. The last date for submission of tenders was 30/9/2022.

5. The record shows that the Petitioner submitted the certificate of registration for GST. But the acknowledgement of the up-to-date filed return was not scanned and uploaded as required by clause 6(b). Moreover, Mr Diniz, the learned Senior Advocate for the Petitioner, handed a copy of this acknowledgement after the learned Advocate General concluded his arguments and pointed out that even as of now, no such acknowledgement was produced by the Petitioner either along with the Petition or separately.

6. Thus, it is clear that the Petitioner did not submit the acknowledgement of the up-to-date filed return on or before the last date of submitting the tender. Mr Diniz, however, referred to Form GSTR-1 and Form GSTR-3B and urged that these forms constitute acknowledgement of up-to-date filed returns. However, there is no arbitrariness in the view taken by the Tender Evaluation Committee that this would not amount to compliance with the requirement of scanning and uploading acknowledgement of up-to-date filed returns. Because some other view was plausible, the apparent deviation by the Petitioner was not bound to be condoned. The Petitioner cannot insist on setting the entire tender process at nought for his failure to submit the required document.

7. The learned Advocate General referred to page 384 of the paper book to point out the form in which the acknowledgement of up-to-date filed returns is issued. This form notes that the assessee has filed the returns successfully, and the particulars are also stated therein. The form handed in by Mr Diniz is indeed the acknowledgement form, which also says that the Petitioner has filed the return successfully. The argument that this form was not filed because the requirement in the NIT was confusing cannot be accepted. There is nothing on record to suggest that the other tenderers were confused. Besides, from the perusal of the NIT, there is no ambiguity about the requirement of scanning and uploading the acknowledgement of up-to-date filed returns.

8. Mr Diniz relied on ***Kanhaiya Lal Agrawal vs. Union of India and ors***. – (2002) 6 SCC 315 and ***Indian Railway Catering and Tourism Corporation Vs. Doshion Veolia Water Solutions Private Limited and ors***. – (2010) 13 SCC 364 to submit that scanning and uploading the acknowledgement of up-to-date filed returns was not an essential condition of the NIT.

9. The two decisions refer to a situation where the tenders were complete in all respects, but the tenderers offered a concessional rate or rebate for early finalisation of the tender. In such circumstances, the Hon'ble Supreme Court held that where the tenders were strictly in compliance with the conditions, merely because a note was added offering concessional rates or rebates did not amount to a breach of any terms and conditions of the tender. Such an issue does not even remotely arise in the facts of the present case. Therefore, the decisions relied upon do not further the contention made on behalf of the Petitioner.

10. The learned Advocate General relied on a decision of the coordinate Bench in ***Arav Infratech Pvt. Ltd. vs. State of Goa and ors***. – Writ Petition No.1260/2021(F) decided on 2/12/2021. In paragraph 37 of this decision, a coordinate bench held that the Respondents were the best persons to understand and appreciate the requirements and interpret the documents, i.e. the tender documents. The interpretation had no perversity, illegality, malafides or arbitrariness. As authors of the tender documents, their interpretation cannot be rejected outright unless the same is perverse, illegal, arbitrary or affected by mala fides. These observations were made in the context of the Petitioner failing to submit the GSTR-3B form, a document necessary for evaluating the Petitioner's bid in the said matter.

11. Regards the second ground of rejection, the tender condition required that the tenders should not have incurred any loss (profit after tax should be positive) in more than two years during the last five years ending 31st March 2022. The expression *"in more than two years"* indicates that the losses should have been at least three financial years. From the reasons disclosed to the Petitioner, it appears that the Petitioner had incurred losses only during the F.Y. 2020-21 and F.Y. 2021-22. Thus, for this reason, the Petitioner's tender should not have been rejected by the Tender Evaluation Committee. But the conclusion of the Committee will have to be sustained in the context of the first and the third reasons.

12. The third reason for rejecting the Petitioner's tender was that the Petitioner failed to furnish a *"similar works certificate".* For this, a reference will have to be made to clause 1.2.1(i) of the NIT, which reads as follows :

> *"1.2.1 Criteria of eligibility for submission of bid documents*
>
> *(i) Three similar works each costing not less than Rs.710.00 Lakh or two similar each costing not less than Rs.1065.00 Lakh or one similar work costing not less than Rs.1420.00 Lakh in the last seven years*

ending the Previous day of last date of submission of tenders.

Similar work : Shall mean composite/independent Water Resources works such as Bandharas, Jetties, Lift Irrigation schemes, construction of canal network works etc.

The value of executed works shall be brought to current costing level by enhancing the actual value of work at simple rate of 7% per annum, calculated from the date of its completion to previous day of last date of submission of tenders."

13. In its representation dated 27/9/2022, addressed to the Executive Engineer, Petitioner gave the following particulars regards the certificates submitted by it along with the bid :

"2. (a) Similar works: Please see attached values of completed certificates:-

(1)Certificate 1: Value in 2018-Rs.7,24,93,573/-

Value in 2022 – Rs.9,50,24,286/

(2)Certificate 2: Value in 2019-Rs.5,24,77,844/-

Value in 2022 – Rs.6,42,87,615/-

(3)Certificate 4 : Value in 2022 – Rs.8,27,37,961/-

14. From the above, it is evident that Certificate 2 certified that the Petitioner had completed the work valued at ₹ 5,24,77,844/- in 2019. Accordingly, the value of this work in 2022 was stated at

₹6,42,87,615/-. This was less than ₹710.00 lakhs. Clause 1.2.1 of the NIT specified that a tenderer must have completed three similar works, each costing not less than ₹710.00 lahks, to be considered eligible. From the particulars furnished by the Petitioner, it is evident that the Petitioner did not meet this eligibility criterion.

15. Mr Diniz, based upon CPWD Works Manual 2014, submitted that the eligibility condition requiring the tenderers to submit certificates of three similar works costing not less than ₹710.00 lahks was arbitrary because the same was contrary to the CPWD Works Manual 2014 on which it was based. He submitted that the estimated cost of ₹17,74,53,801/- for the tendered work included a GST component of 12%. He offered that if this GST component was excluded, then, in terms of the CPWD Works Manual, the Respondents could have insisted upon three similar works, each costing not less than ₹633.00 lahks and not ₹710.00 lahks.

16. Mr Diniz submitted that the Petitioner's Certificate-2 referred to works valued at ₹6,42,87,615/-. Therefore, he proposed that the relevant tender condition should be struck down or, in any case, read down as works costing not less than ₹633.00 lahks. However, this contention is too tenuous to admit acceptance.

17. Firstly, the basis for excluding the GST component is not entirely clear. Secondly, the learned Advocate General pointed out that the Petitioner seeks the exclusion of the GST component from the estimated costs of the works. Still, the Petitioner has included the GST component for works in Certificate -2 to arrive at a figure of ₹6,42,87,615/-. Therefore, if the Petitioner seeks exclusion of the GST component from the estimated costs, then the Petitioner cannot include the GST component for determining eligibility.

18. In any case, even the CPWD Works Manual, assuming the same is applicable, speaks about three similar works, each of value **not less than 40% of the estimated costs put to tender**. The expression "*not less than*" makes it clear that the State was free to prescribe the works valued at more than 40% of the estimated costs. Therefore, the tender condition cannot be faulted because the cost of Rs 710 Lakhs is more than 40% of the estimated costs based on the Petitioner's assessment, which is quite suspect.

19. In any case, the Petitioner, based upon its interpretation of the terms and conditions of the NIT and the CPWD Works Manual, cannot question the terms and conditions of the NIT or urge for reading down such terms and conditions. Moreover, the

Petitioner's invitation to read down the eligibility condition was actually an invitation to rewrite the terms and conditions of the NIT, which is an exercise that the Court will not easily undertake.

20. The conditions of the tender that the Petitioner has impugned can hardly be styled as arbitrary or discriminatory. In ***Directorate of Education and ors. Vs. Educomp Datamatics Ltd. and ors.-*** (2004) 4 SCC 19, the Hon'ble Apex Court has held that the terms of the invitation to tender are not open to judicial scrutiny because the invitation to tender is in the realm of contract. The Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, malafide or actuated by bias.

21. The Government is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

22. Moreover, in such matters, it is generally for the authorities to set the terms of the tender. The courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory, or actuated by malice. While exercising the power of judicial review of the terms of the tender notice, the Court cannot say that the terms of the earlier tender notice would serve the purpose sought to be achieved better than the terms of the tender notice under consideration and order change in them, unless it believes that the terms were either arbitrary of discriminatory or actuated by malice. To the same effect are the observations of the Hon'ble Supreme Court in case of ***Municipal Corporation, Ujjain and anr. Vs. BVG India Limited and ors.*** (2018) 5 SCC 462.

23. In this case, the term inviting tenders from parties who have completed three similar works, each costing Rs. 710 lakhs, is not arbitrary or discriminatory or actuated by malice. Sufficient justification is placed on record to justify these figures. These figures have a nexus with the estimated costs of the works. These figures are consistent with the norms in the CPWD manual, irrespective of its binding character.

24. Thus, the Petitioner has not made any case to strike down or read down the tender conditions. Further, the Petitioner has failed to meet the eligibility requirement of completing similar works, each costing not less than Rs. 710 lakhs. Furthermore, the Petitioner does not contend having completed similar works, each costing not less than ₹1065.00 lakhs or one similar work costing not less than 1420.00 lakhs.

25. Therefore, the decision of the Technical Evaluation Committee, treating the Petitioner as not eligible under Clause 2(a) of the NIT, can hardly be styled as arbitrary or discriminatory. In such matters, the scope of judicial review is also quite limited.

26. In ***Tata Cellular vs Union of India*** (1994) 6 SCC 651, the Hon'ble Apex Court has held that the modern trend points to judicial restraint in administrative action. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Generally, the decision to accept the tender or award the contract is reached by the process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts. Further, the Government must have freedom of a contract. In other words, free play in the joints is necessary for an administrative body functioning in an administrative or quasi-administrative sphere. However, the decision must not only be tested by applying the

Wednesbury principle of reasonableness but must be free from arbitrariness, not affected by bias or actuated by mala fides. Further, the Court must also be alive to the position that quashing decisions may impose a heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

27. The Hon'ble Supreme Court also cautioned that the High Courts, for want of necessary technical expertise to understand and appreciate the conditions of the tender documents, are to merely review how the said administrative decisions are made by the public authorities and ought not to correct such decisions by substituting and imposing its own choices. Thus, the Hon'ble Supreme Court has held that the judicial review in such matters is mainly concerned with the decision-making process and not the actual decision itself.

28. In ***Jagdish Mandal vs State of Orissa*** (2007) 14 SCC 517, the Hon'ble Supreme Court has proposed a two-prong test to determine the extent of judicial interference in such matters. The first question to be posed is whether the process adopted or decision made by the authority is mala fide or intended to favour someone or whether the process adopted or decision made is so arbitrary and irrational that the Court can say that the decision is such that no responsible authority acting reasonably and following relevant law could have reached. The second question to be posed is whether the public interest is affected. If the answers to the two questions are negative, ordinarily, there should be no interference in the exercise of judicial review of administrative action.

29. In ***Uflex Ltd. vs State of T.N.*** (2022) 1 SCC 165, the Hon'ble Supreme Court held that attempts by unsuccessful tenders with imaginary grievances, wounded pride and business rivalry to make mountains out of molehills of some technical/procedural violation or some prejudice to self and persuade Courts to interfere by exercising the power of judicial review, should be resisted. The present Petitioner has not even established any breaches on the part of the Government.

30. Even if some indulgences were to be extended to the Petitioner in the context of acknowledgement of up-to-date filed returns, it is apparent that the Petitioner failed to meet the eligibility requirement prescribed in Clause 2(a) of the NIT. Even otherwise, no case is made to extend any indulgence because, in tender matters, it is ordinarily not even within the province of the Court to extend such indulgences to parties who fail to comply with the terms and conditions of the tender notice. Ultimately, this is not a matter affecting the Petitioner and the Respondents only. If any indulgence were to be extended to the Petitioner, the similarly placed parties would perhaps legitimately complain that no such indulgence was extended to them or that they were unaware of the possibility of such indulgences being extended.

31. The contention that because the Petitioner was a Class IA contractor eligible to undertake works up to a limit of Rs.20 crores, the eligibility conditions now impugned must be struck down or read down as not applying to the Petitioner is misconceived. Both requirements are not mutually inconsistent and can simultaneously exist in the NIT. Else a Class IA contractor having no recent experience or specialized experience would insist on eligibility.

32. The class of the contractor is the minimum qualification. Based on such minimum qualification, neither can other eligibility conditions included in the NIT be questioned, nor can a tenderer insist upon waiver of such other eligibility conditions. Moreover, clause 5.0 of the Rules of Enlistment of Contractors in PWD/WRD, 2020, clarifies that the enlistment of a contractor in PWD/WRD shall only entitle him to be considered for participation in tenders subject to the conditions laid down in each Notice Inviting

Tenders. It shall not confer any right on him to be issued the tender papers or for the work award.

33. Therefore, considering the above aspects cumulatively, we dismiss this Petition.

34. However, there shall be no order for costs.

BHARAT P. DESHPANDE, J. **M.S. SONAK, J.**

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