

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO. 8554 OF 2021

M/s Shobhana Transport Company,) (Government Transport Contractor)) A partnership firm, incorporated as per) the provisions of the Indian Partnership) Act, 1932, having its office at) old Mondha, Nanded-431640 through) it's Partner) Shri. Sanjay S/o. Tukaram Mahajan,) Age – 35 years, Occupation – Business) R/o. Old Mondha, Nanded.)	...Petitioner
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VERSUS

State of Maharashtra) Through Principal Secretary,) Food and Civil Supply, Consumer) Protection Department,) Mantralaya, Mumbai -400032.)	...Respondent
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Mr. Ashish Sonawane a/w Ms. Ayodhya Patki i/b Mr. Vilas Sonawane for Petitioner in WP/8554/2021 & CP/479/2021.

Mr. A. A. Kumbhakoni, Sr. Adv. a/w Mr. P. P. Kakade, GP a/w Mr. Akshay Shinde, B PNL a/w Mr. B. V. Samant, AGP for State in all WPs.

**CORAM : S. V. GANGAPURWALA, ACJ &
SANDEEP V. MARNE, J.**

RESERVED ON : 15th FEBRUARY, 2023.

PRONOUNCED ON : 1st MARCH, 2023.

JUDGMENT (per : SANDEEP V. MARNE, J.)

1. Rule. Rule is made returnable forthwith. By consent of parties, Petition is heard finally.

2. In this petition, filed under Article 226 of the Constitution of India, petitioner sets up a challenge to the letter dated September 30, 2021 issued by the Desk Officer, Food and Civil Supplies and Consumer Protection Department, Maharashtra holding the petitioner's bid ineligible. Petitioner seeks the direction for opening its financial bid for awarding contract for transport of food grains and other essential items to Fair Price Shops in Nanded district.

3. Brief facts of the case are that petitioner is a partnership firm engaged in the business *inter alia* of transportation of food grains. Petitioner was awarded a contract for transportation of food grains in respect of Nanded district during January 2007 to September 2009 and the tenure of the contract was extended on same terms and conditions up to 15th March, 2018. It is petitioner's case that the contract involved single phase transportation of food grains from base depots of Food Corporation of India (**FCI**) to the circle level depots identified for Nanded district. That contract did

involve transportation of foodgrains to Fair Price Shops (**FPS**) and the concerned FPSs used to pick up and transport their own supplies from the circle level depots to their respective shops.

4. Government Resolution dated 15th January, 2012 came to be issued laying down guidelines for awarding contracts for transportation of food grains and other essential items to FPSs. The Government Resolution envisaged two phase transportation viz. Phase-1 from FCI warehouses to government godowns and Phase-2 from government godowns to FPSs. In respect of five circles in Mumbai-Thane area as well as in Municipal Corporations of Pune, Nashik, Nagpur, Aurangabad and Solapur, direct transportation from FCI warehouses to FPSs is required to be undertaken. Paragraph 5 provides for eligibility conditions for the bidders.

5. In pursuance of the Government Resolution dated 15th January, 2021, Request for Proposal (**RFP**) was issued by the State Government inviting e-tenders for various districts. Condition No. QC-6 in clause 4 of the RFP provided eligibility criteria to bid in pursuance of the tender notice. Along with RFP, district sheet for Nanded came to be published providing the figures of quantity of work experience to be fulfilled by each bidder. Petitioner submitted

his bid for Nanded district and in support, relied upon experience certificate dated 24th June, 2021 issued by District Supply Officer, Nanded. Petitioner's bid has been held ineligible by impugned order dated 30/09/2021 citing the reason that the petitioner does not fulfill the experience criteria of second phase transportation. Petitioner is challenging the rejection of his technical bid in the present petition.

6. The petition is resisted by the State Government by filing affidavit in reply in which the exact reason for rejection of petitioner's technical bid is disclosed. It is stated that two phase transportation work was implemented in Nanded w.e.f. 16/03/2018 by adopting tender process in which the petitioner was not awarded contract. It is further stated that the petitioner does not have the experience of door step delivery which is mandatory under condition No. QC-6 of clause 4 of the RFP, so also under clause 5.2 of the Government Resolution dated 15th January, 2021.

7. Appearing for the petitioner Mr. Sonawane would contend that petitioner fulfills work experience mentioned in the district sheet for Nanded published alongwith RFP. That as against the requirement of transportation of 1,61,656 MT disclosed in the district sheet, petitioner has transported 1,74,734.70 MT during 2015-2016

and 1,77,183.90 MT during 2016-2017. He would therefore submit that the petitioner meets the requisite eligibility criteria stated in RFP.

8. Mr. Sonawane would further contend that rejection letter gave the vague reason that petitioner does not fulfilling the experience in second Phase transportation. He would rely on judgment of this court bench at Aurangabad **M/s. Shalimar Transport and Carting Contractor Vs. The Government of Maharashtra and Ors.** W. P. No. 9279 of 2011 decided on 31/10/2021 wherein this court has held that the cumulative work experience in first phase and second phase is required to be taken into consideration. He would therefore submit that petitioner's bid cannot be rejected only on the ground of non-meeting experience of second phase.

9. So far as the reason disclosed in the affidavit in reply of petitioner not possessing experience of door step delivery is concerned, Mr. Sonawane would contend that neither the Government Resolution dated 15th January, 2021 nor RFP contemplates possession of such experience as a mandatory requirement. He would further submit that the door step delivery (delivery to FPS) is covered by second phase of transportation and

that this court in **Shalimar** (supra) has already held that cumulative experience of Phase-1 and Phase-2 is required to be taken into consideration. Non possession of experience of Phase-2 transportation is totally irrelevant. Mr. Sonawane would then rely upon judgment of this Court in **Prithiviraj Enterprises Vs. State of Maharashtra and Ors.**, Writ Petition No. 750 of 2021 decided on 28th January, 2021 wherein this Court has recorded clarification issued by the State Government that contractors who have carried out transportation work only in the phase one without undertaking transportation relating to second Phase, will also be considered eligible. Mr. Sonawane would therefore contend that the work experience of second phase is totally irrelevant. He would further contend that till the year 2018, there was no concept of second Phase transportation in Nanded district and that therefore petitioner cannot be disqualified on account of non-possession of work experience of second Phase. He would further submit that the ultimate work that is required to be executed is transportation of food grains and that therefore Petitioner's bid cannot be rejected on hypertechanical reasons such as non-possession of experience of door step delivery. That rejection of bid of the petitioner would result in the respondents not receiving sufficient competitive bids, which is

an objective described under clause 6.8 of the RFP.

10. *Per contra* Mr. Kumbhakoni, Ld. Senior Advocate for State Government would oppose the petition contending that petitioner's bid is not rejected on account of non-possession of work experience of required quantity of transportation of food grains as published in the district sheet for Nanded. That there is another mandatory condition both in the GR as well as in the RFP of work experience of door step delivery of food grains, which Petitioner admittedly does not possess. He would submit that door step delivery to FPS is one of the most important components of contract as the same contractor is required to be complete entire delivery cycle from FCI warehouse to FPS. It is therefore necessary that the successful contractor must have experience of delivering food grains at FPS. Inviting out attention to the pleadings in the petition, Mr. Kumbhakoni would submit that petitioner has admitted that he does not possess experience of door step delivery. He prays for dismissal of the petition.

11. Rival contentions of the parties now fall for our consideration.

12. There is no dispute to the position that under clause 5 of the Government Resolution dated 15th January, 2021, so also under condition No. QC-6 of clause 4 of RFP, the bidders are required to possess work experience of transportation equivalent to 33% transportation undertaken in the district for which bid is submitted. Work experience is required to be possessed in any one of the 5 preceding years. For the sake of convenience of bidders, the exact experience needed for each district has been published through district sheets annexed to each of the RFPs. For district Nanded, the total volume of transportation undertaken in past 03 years was 4,89,868 MT, 33% of which is arrived at 1,61,656 MT. Though some degree of confusion was created on account of publication of separate figures of work experience for Phase-1 and Phase-2, the confusion was clarified by judgment of this court in **Shalimar Transport** (*supra*) in which this court held in paragraph No. 9 as under -

10. Clause 5.1 nowhere suggest the tenderer to possess experience of Phase-I or Phase-II. It only requires work experience upto 33% of the work of transportation carried out during past three years. The said experience may be either in Phase-I or Phase-II. **The debate whether 33% experience of transportation of Phase-I or Phase- II is irrelevant and is merely entering into verbal jugglery.** Clause 5.1 as reproduced *supra* requires work experience

of the capacity of 33% of the work of transportation carried out during previous three years in the District, meaning thereby the total work of transportation inclusive of Phase-I and Phase-II. To illustrate if total transportation of Phase-I and Phase-II in the District is 100/- i.e. 50 of each then tenderer should have experience of 33. The said 33 may be of First Phase only and he may not have any experience of Second Phase but if the tenderer has experience of 25% of the transportation carried out during previous three years in the District he cannot say that it is more than 33% of First Phase so he is qualified. The 33% capacity should be of the total transportation of the food grains taken place during previous 3 years and not of only either First or Second Phase.

(emphasis ours)

13. Another confusion was with regard to contractors who had work experience in 5 circles of Mumbai-Thane and some Municipal Corporations where the transportation is done in single Phase from FCI Base Depot to FPSs. Since there was ambiguity about eligibility of such tenderers, in **Prithviraj Enterprise** (*supra*) the State Government issued following clarification

“In respect of interpretation of the Clauses 5.1 and 5.2 of the Government Resolution dated 15th January, 2021 and the consequent RFP issued on 21st June, 2021, it is clarified on behalf of the State as under.

The eligibility criteria specified in Clauses 5.1 and 5.2 of the Government Resolution dated 15th January, 2021 and the consequent RFP issued on 21st June, 2021 does also include the contractors, if any, with the experience

set out hereunder provided that they satisfy all other criteria of eligibility, spelt out in the aforesaid two documents, including the aforesaid two clauses 5.1 and 5.2.

Those contractors who have carried out transportation work only in the first phase of the two phase transportation work, without undertaking the transportation work related to the second phase, of the scheme, which is the subject matter of the exercise in issue.”

(emphasis provided)

14. Thus, after issuance of the clarification by the State Government, even bidders having experience of direct transportation (in single phase) have also become eligible in the tender process.

15. Petitioner has submitted bid for Nanded district. Petitioner has relied upon experience certificate dated 24th June, 2020 issued by District Supply Officer, Nanded certifying that it has transported more than the required quantity of food grains during the years 2015-2016 and 2016-2017.

16. The only reason why petitioner is declared ineligible is non possession of experience of door step delivery. Door step delivery in the present case means delivery of food grains to FPS and

arranging heaps in such shops. Petitioner's work experience of transportation of food grains in Nanded district is up to 15th March, 2018, when the transportation was undertaken only from FCI Base Depot to Government Godowns (warehouses). There was no system of contractors transporting food grains from Government Godowns (warehouses) to FPSs. The system of second phase delivery to FPSs begun from 16th March, 2018 and Petitioner did not earn that contract through it participated in the tender process. On this count, it does not have the experience of transportation of food grains to FPS. There is no denial about this factual position.

17. The only issue that petitioner raises is about the requirement of possession of work experience of door step delivery. Relying on the clarification issued by the State Government in **Prithviraj Enterprises** (*supra*), petitioner contends that the Government itself has clarified that all contractors who have carried out transportation only in single phase and (without undertaking second phase transportation) have also been considered eligible. It is petitioner's case that it has undertaken transportation in the first phase from FCI Base Depots to Government Godowns (warehouses) and that therefore his case is fully covered by the

clarification. On the other hand, Mr. Kumbhakoni has contended that the clarification was subject to the caveat that '*provided they satisfy all other criteria of eligibility.*' He has contended that the condition of possession of experience of door step delivery is an independent condition which must be fulfilled by every bidder.

18. For the sake of convenience, we reproduce clause 5.2 of the Government Resolution dated 15th March, 2021 (translated from marathi) as under -

5.2 The work experience mentioned in paragraph 5.1 above should be the experience of government / semi-government transport work of Dwar Poch Yojana (door step delivery) or other scheme of Central / State Government which are compatible with this scheme. In order to accept the experience of transport work from Central Government, State Government and Semi-Governmental Institutions, a copy of the order of all these works and the experience certificate of the competent officer has to be submitted.

19. Similarly condition No. QC-6 in clause 4 of the RFP reads thus -

"The bidder must have the work experience as per district sheet in M. Tons. From 'Foodgrains Transport business for Govt / Semi Government Organisations of 1 year in

the successive preceding Five years.”

“The bidder must have the work experience of doorstep delivery schemes or similar to any such schemes from ‘Foodgrains Transport business for Central Government, State Government / Semi Government Organisations.”

20. Thus, work experience of requisite quantity in second phase is different concept than work experience of door step delivery. Two conditions cannot be mixed together. The clarification was required to be issued by the State Government with a view to remove an anomaly where large capacity contractors catering to Mumbai- Thane circles and Municipal Corporations (delivering directly to FPSs from FCI base depots) were getting disqualified in the technical bids on account of lack of experience of second phase transportation. The State Government did not intend to disqualify contractors catering to those area merely because they were directly transporting food grains from FCI base depots to FPSs as per mandatory condition of their past contract (without routing through the government godowns). Those contractors however had the experience of door step delivery to FPSs. With a view to bring such transporters within the ambit of tender process, the State

Government has issued clarification, which is reproduced in **Prithviraj** (*supra*). However, such clarification would not mean that bidders like petitioner lacking experience of transportation of food grains to FPS would acquire eligibility.

21. As contended on behalf of the State Government, door step delivery (delivery to FPSs) is an important component of the transportation cycle. This is a reason why specific condition is stipulated both in paragraph No. 5.2 of the Government Resolution as well as second sub-paragraph condition No. QC-6 of clause 4 of the RFP that bidders must possess experience of door step delivery. Transportation of food grains from FCI base depots to Government Godowns (warehouses) can be undertaken in bulk employing larger capacity vehicles and involving possibly lesser manpower. As against this, delivering food grains to FPSs would need different level of expertise of delivery in smaller quantities at multiple locations through smaller vehicles requiring higher manpower. This is the reason why the State Government expects bidders to possess experience of door step delivery. By no stretch of imagination, it can be contended that possession of such door step delivery experience is not mandatory.

22. It is settled law that tendering authority is the best judge to decide the eligibility criteria of the tender and the court cannot sit as an appellate authority over the same. It is also well settled that in the event of two interpretations with regard to tender condition being possible, the interpretation placed by the tendering authority is required to be accepted and not the one placed by ineligible bidders. Reference in this regard can be made to the following judgments of the Supreme Court:

a) In **Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited & Anr.** (2016) 16 SCC 818 the Apex Court held that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. It was held as under:

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. **It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."**

(emphasis supplied)

b) In **Silppi Constructions Contractors v. Union of India and Ors** 2019 SCC OnLine SC 1133 the Apex Court held as under:

20. The essence of the law laid down in the judgments referred to above 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 should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; **the court does not sit like a court of appeal over the appropriate authority; the court must realize that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender and has authored the tender documents is the best judge as to how the documents have 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. With this approach in mind, we shall deal with the present case.”

(emphasis supplied)

c) In **Michigan Rubber (India) Ltd. v. State of Karnataka**, (2012) 8 SCC 216 the Apex Court has summarized the contours of scope of judicial review in tender matters after considering its various judgments. It is held as under:

From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) Fixation of a value of the tender is entirely within the purview of the executive and the courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers, interference by courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by court is very restrictive since no person can claim a fundamental right to carry on business with the Government.

(emphasis supplied)

23. We have therefore no hesitation in holding that petitioner does not possess mandatory work experience of door step transportation of food grains to FPS. Petitioner is rightly held ineligible in the tender process. The impugned decision of the State Government does not suffer any infirmity.

24. The petition is devoid of merits. It is dismissed with no order as to costs. Interim order granted earlier shall stands vacated. Rule is discharged.

SANDEEP V. MARNE, J.

S. V. GANGAPURWALA, ACJ

25. At this stage, the learned advocate for the petitioner seeks continuation of the interim order. Mr. Kumbhakoni, learned senior advocate for the respondent opposes the said request.

26. We have held that admittedly the petitioner did not possess the experience.

27. In view of that the request for continuation of interim order is rejected.

SANDEEP V. MARNE, J.

S. V. GANGAPURWALA, ACJ