IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO. 7104 OF 2024

1) Moreshwar Mahila Prathamik Grahak Sahakari Sanstha Limited at Rajur Tq. Bhokardan, Dist. Jalna, Through its Manager Shri. Madhukar Sheshrao Shelke, Age 52 years, Occ Service, R/o. Rajur, Tq. Bhokardan, Dist. Jalna.

2) Mangal Supplies, Swami Samarthnagar Ambad Road, Jalna Dist. Jalna.Through its Proprietor Deepak Baliram Kolte, Age 38 years, Occ. Business, r/o. Swami Samarthnagar Ambad Road, Jalna, Dist. Jalna. ... **Petitioners**

VERSUS

1) The State of Maharashtra Through the Secretary for Medical Education and Drugs Department, Mantralaya, Mumbai.

2) The Commissioner, Medical Education and Research Commissionerate, Saint Georges Hospital, Mumbai.

3) The Director of Medical Education and Research, Mumbai, Saint Georges Hospital, Mumbai. ... **Respondents**

...

Advocate for Petitioners : Mr. V.D. Hon, Senior Advocate, i/b Mr. A.V. Hon
Addl. Government Pleader for Respondents/State : Mr. P.S. Patil

CORAM : MANGESH S. PATIL & SHAILESH P. BRAHME, JJ.

DATE : 20.07.2024

JUDGMENT : (SHAILESH P. BRAHME, J.)

Rule. Rule is made returnable forthwith. Heard both sides finally at the stage of admission.

2. The petitioners are challenging clauses no. 19 and 20 of government resolution dated 12.06.2024 and analogous condition nos. 15 and 16 of ‘E’ tender notice dated 18.06.2024. They are further seeking direction to dispense with the conditions under challenge and to accept their bid.

3. The petitioners are experienced tenderers/contractors for supply of food grains, vegetables and fruits and they are interested in participating in the tender process. Petitioner no. 1 had successfully executed a contract for the year 2019-2020. A government resolution dated 12.06.2024 was issued stipulating the modality of tender process for supply of food grains, vegetables and fruits to the government colleges and hospitals. Pursuant to the resolution, respondent no. 2 floated ‘E’ tender notice on 18.06.2024 along with the conditions. The impugned conditions are part of the government resolution dated 12.06.2024 as well as tender notice dated 18.06.2024. As per tender programme bids were to be opened on 22.07.2024.

4. It is the case of the petitioners that they raised objections on 24.06.2024 to the tender conditions in question. A ‘pre-bid meeting’ was conducted on 24.06.2024. The objections of all the tenderers including petitioner no. 2 were considered. No change was effected to the original tender conditions. The process is likely to be completed with arbitrary and illegal tender conditions, which are tailor made.

5. The learned senior counsel Mr. Hon appearing for the petitioners submits that clauses no. 19 and 20 of the government resolution dated 12.06.2024 and condition nos. 15 and 16 of tender notice dated 18.06.2024 are arbitrary and patently illegal. Those have been incorporated for the first

time with an oblique motive to eliminate the petitioners and other competent bidders. Those have been incorporated to favour only selected bidders. The impugned conditions are against the principles of 'level playing field'. The conditions are onerous and have no nexus to the purpose sought to be achieved.

6. The learned senior counsel further submits that the respondents have not filed any affidavit in reply to justify the impugned conditions. He would submit that Schedule E(1) of the tender notice is inconsistent with clauses no. 19 and 20 of the government resolution as well as condition nos. 15 and 16 of tender notice. He would submit that clause no. 20 and condition no. 16 are patiently arbitrary and perverse. The petitioners seek to rely upon following judgments :

1) **Reliance Energy Ltd. And another Vs. Maharashtra State Road Development Corporation Ltd and others; (2007) 8 Supreme Court Cases 1.**

2) **Vaishnorani Mahila Bachat Gat Vs. State of Maharashtra and others; (2019) 15 Supreme Court Cases 718.**

3) **Sharma Transports, Banglore Vs. Airport Authority of India and another; 2002 (3) Mh.L.J. 83.**

7. Per contra, the learned Additional Government Pleader Mr. P.S. Patil would oppose the submissions of the learned senior counsel for the petitioners. He would submit that the petitioners did not submit objection within time prescribed. The reply was filed on 01.07.2024 to justify the impugned conditions and the clauses. In a pre-bid meeting the respondents-authorities considered the objections and overruled them. He would further submit that no material is placed on record to demonstrate any favouritism or violation of 'level playing field'. He would rely upon the judgment of **Michigan Rubber (India) Limited Vs. State of Karnataka and others; (2012)**

8 Supreme Court Cases 216. It is informed that the respondents have received 10 bids, which are to be opened on 22.07.2024.

8. We have considered the rival submissions of the parties. Undisputedly, the condition nos. 15 and 16 of the tender notice dated 18.06.2024 are founded on clauses no. 19 and 20 of the government resolution dated 12.06.2024. The impugned condition nos. 15 and 16 in verbatim are as follows :

> "15) At least one work in the last three years up to the last date of submission of tender to the tenderer for the said tender, including experience of supplying food grains, grocery materials, vegetables and fruits and other non-vegetable items to at least 45 Government/Semi-Government Institutions/Government Hospitals/Residential Schools/Hostels in Maharashtra or at least 6600 Individuals should have experience in daily food supply and should have completed work of at least Rs.12 crores by the last date of submission of tenders through the same service.
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> 16. The tenderer shall also provide the manpower (loading-unloading etc.) required for the supply of goods to the Government/Semi-Government Institutions in the State, accordingly, in a single work order completed in the last three years till the last date of submission of tenders in Government/ Semi-Government Establishments in Maharashtra at 25 different places should have experience of providing minimum 50 manpower elsewhere."

9. The tender in question is floated for supply of food grains, vegetables, fruits etc. to the Government Medical Colleges and Hospitals attached to it. The duration of the contract is of three years. The tender conditions are based upon the government resolution dated 12.06.2024. The impugned conditions correspond to clauses no. 19 and 20 of the government resolution

dated 12.06.2024. Though an affidavit in reply is not filed in the present writ petition by the respondents, the purpose for incorporating the conditions can be gathered from the reply dated 01.07.2024.

10. Considering the duration of the contract and the nature of work, it would be reasonable for the respondent-employer to expect more experienced and competent contractors to participate in the bids. The condition no. 15 and clause no. 19 has an option . This indicates that there is rationale. It is the wisdom and discretion of the employer to choose the conditions/clauses which are best suited for the work to be performed.

11. The impugned conditions are stringent but they cannot be branded *per se* arbitrary or illegal. Even if the submission of the learned senior counsel for the petitioners are accepted that few bidders are likely to be excluded because of this stringent conditions, that would not lead to violation of principles of 'level playing field'. We have not been shown violation of any statutory or constitutional provision.

12. Though it is submitted that the impugned conditions are tailor made and incorporated with an oblique motive, no material is placed on record to show as to how the petitioners have been targeted for their exclusion in the tender process. There is no material to show that the impugned conditions are designed to favour a particular bidder. For want of necessary particulars, we are not inclined to accept the submissions of the learned senior counsel for the petitioners.

13. It is informed by the learned Addl. Government Pleader that there are 10 bidders in the fray. It means there are bidders, who are complying with the conditions and interested in participating the tender process. Had the impugned conditions been arbitrary and absurd *per se*, the respondents would not have received response.

14. Though, previously such type of conditions were not incorporated,

that would not preclude the respondents from introducing the impugned conditions. The impugned conditions are fall out of a policy decision. The petitioners fail to point out any perversity, patient illegality and arbitrariness in the government resolution dated 12.06.2024.

15. The petitioners rely upon the judgment of **Reliance Energy Limited (supra)**. Its paragraph no. 36 reads as follows:

> *"36. We find merit in this civil appeal. Standards applied by courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy. Article 14 of the b Constitution embodies the principle of "non-discrimination". However, it is not a free-standing provision. It has to be read in conjunction with rights conferred by other articles like Article 21 of the Constitution. The said Article 21 refers to "right to life". It includes "opportunity". In our view, as held in the latest judgment of the Constitution Bench of nine Judges in I.R. Coelho v. State of T.N.3, Articles 21/14 are the heart of the chapter on fundamental rights. They cover various aspects of life. "Level playing field" is an important concept while construing Article 19(1)(g) of the Constitution. It is this doctrine which is invoked by REL/HDEC in the present case. When Article 19(1)(g) confers fundamental right to carry on business to a company, it is entitled to invoke the said doctrine of "level playing field". We may clarify that this doctrine is, however, subject to public interest. In the world of globalisation, competition is an important factor to be kept in mind. The doctrine of "level playing field" is an important doctrine which is embodied in Article 19(1)(g) of the Constitution. This is because the said doctrine provides space within which equally placed competitors are allowed to bid so as to subserve the larger public interest. "Globalisation", in essence, is liberalisation of trade, Today India has dismantled licence raj. The economic reforms introduced after 1992 have brought in the concept of "globalisation". Decisions or acts which result in unequal and discriminatory treatment, would violate the doctrine of*

> *"level playing field" embodied in Article 19(1)(g). Time has come, therefore, to say that Article 14 which refers to the principle of "equality" should not be read as a stand alone item but it should be read in conjunction with Article 21 which embodies several aspects of life. There is one more aspect which needs to be mentioned in the matter of implementation of the afore stated doctrine of "level playing field". According to Lord Goldsmith, commitment to the "rule of law" is the heart of parliamentary democracy. One of the important elements of the "rule of law" is legal certainty. Article 14 applies to government policies and if the policy or act of the Government, even in contractual matters, fails to satisfy the test of "reasonableness", then such an act or decision would be unconstitutional."*

16. The principles enumerated in the decision are binding. However, in that case, the petitioners had participated in the process and were excluded from second stage of bidding process. The decision of employer was challenged before the High Court unsuccessfully. Thereafter appeal was preferred before the Supreme Court which was allowed. In the case in hand, the petitioners fail to make out violation of doctrine of 'level playing field'. On facts, the case is distinguishable one and is not made applicable to the present matter.

17. Next judgment cited is of **Vaishnorani Mahnila Bachat Gat (supra**). Our attention is invited to paragraph no 49. In that matter, the petition was filed in the High Court challenging a notice and especially questioning the conditions. By the impugned conditions the local self-help groups were ousted by the money power of large corporate houses. It was a tender pertaining to supply of ready to cook food to Anganwadi Centres as supplementary nutritional food for children, pregnant women and lactating mothers, adolescent girls under Integrated Child Development Scheme. On facts, it was found by the Supreme Court that the conditions under question were arbitrary. It was demonstrated that impugned conditions were imposed so as to favour big players in the field. In the case in hand, we

have recorded that the petitioners failed to make out the case of arbitrariness or favouritism.

18. Lastly, the petitioners place reliance on the decision in the matter of **Sharma Transport (supra)**. We have gone through paragraph nos. 11, 12 and 13 of the judgment. On facts and circumstances of that case the condition was found to be unjustified and without there being any nexus to the object to be achieved. The facts are different from present case. The ratio of the judgment is not applicable to present case.

19. The learned Addl.Govt. Pleader has relied on the judgment of **Michigan Rubber (India) (supra)**. We have gone through paragraph nos. 22 and 24 of the judgment which stipulates scope of judicial review in the tender or contractual matters. Applying the same, we find that neither a case is made out for any *mala fides* nor of intended favouritism.

20. It would be apposite to refer to decision of the Supreme Court in the matter of **Airport Authority Vs. Center of Aviation; A.I.R. 2022 Supreme Court 4742**. It would be profitable to refer to following relevant paragraphs :

> *"6. Even otherwise, even on merits also, the High Court has erred in quashing and setting aside the eligibility criteria/tender conditions mentioned in the respective RFPs, while exercising the powers Under Article 226 of the Constitution of India. As per the settled position of law, the terms and conditions of the Invitation to Tender are within the domain of the tenderer/tender making authority and are not open to judicial scrutiny, unless they are arbitrary, discriminatory or mala fide. As per the settled position of law, the terms of the Invitation to Tender are not open to judicial scrutiny, the same being in the realm of contract. The Government/tenderer/tender making authority must have a free hand in setting the terms of the tender.*
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> *7. While considering the scope and ambit of the High Court Under Article 226 of the Constitution of India with respect to*

judicial scrutiny of the eligibility criteria/tender conditions, few decisions of this Court are required to be referred to, which are as under:

In the case of Maa Binda Express Carrier (supra), in paragraph 8, this Court observed and held as under:

8. The scope of judicial review in matters relating to award of contracts by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognise that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor-made to benefit any particular tenderer or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.

In the case of Michigan Rubber (India) Ltd. (supra), after considering the law on the judicial scrutiny with respect to tender conditions, ultimately it is concluded in paragraph 23 as under:

23. 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.

In the aforesaid decision, it is further observed that the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. It is further observed that the courts cannot interfere with 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.

Similar views have been expressed in the case of Educomp Datamatics Ltd. (supra) and Meerut Development Authority (supra)."

21. The case in hand represents that respondent no. 1 issued the government resolution dated 12.06.2024 and impugned conditions are

based on it. It is prerogative of the respondents to settle the terms of the tender based on policy. We, therefore, do not find any substance in the petition.

22. The Writ Petition is dismissed. Rule is discharged.

(SHAILESH P. BRAHME, J.) **(MANGESH S. PATIL, J.)**

mkd/-