

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.8618 OF 2024

Rudraksh Tours & Travels
Through the Proprietor
Chetan Sakharam Khairnar
Age- 38 years, Occ- Business
Address -Plot no. 9 & 10
Flowra Town, Near Global Vision
High School, Ambad, Nasik

..Petitioner

Versus

1. The Managing Director/Vice Chairman
Maharashtra Airport Development
Company Limited (MADC)
8th Floor, World Trade Centre-1
Cuffe Parade, Mumbai-400005.
2. Maharashtra Airport Development
Company Limited (MADC)
MADC Engineering Department Mumbai 8th Floor,
World Trade Centre-1 Cuffe Parade,
Mumbai-400005.
3. Rohan Tours & Travels
Through The Proprietor
Ground Floor, Shop No.1
Suvidhinath HSG Co-Op Society
Shingada Talao, Nashik-422002.
4. Union Of India
Through The Secretary,
Airport Authority of India
Rajiv Gandhi Bhavan, Safdarganj Airport,
New Delhi-110003.

..Respondents

...

Advocate for Petitioner : Mr. Tushar Sonawane a/w. Mr. Yuvraj S.
Choudhari

Advocate for Respondent Nos.1 & 2 : Mr. S.T. Shelke

...

**CORAM : S.G. MEHARE AND
SHAILESH P. BRAHME, JJ.**

**RESERVED ON : NOVEMBER 12, 2024
PRONOUNCED ON : NOVEMBER 29, 2024**

JUDGMENT :- (PER S.G. MEHARE, J.)

1. Rule. Rule made returnable forthwith. Heard finally with the consent of the parties.

2. The petitioner has impugned the communication dated 02.08.2024 of respondents nos.1 and 2 rejecting his tender during technical evaluation by the duly constituted committee.

3. Respondents nos.1 and 2 had invited the tenders to hire the LMV vehicles with valid commercial use/permit at Shirdi Airport. The petitioner had submitted his tender on 09.05.2024 and 13.05.2024. Respondents nos.1 and 2 had raised the clarification from the petitioner and sought the details. The petitioner has removed the deficiencies. Thereafter, on 18.07.2024, the petitioner received communication from respondent no.2 that his E-tender has been technically qualified. The financial bid opening is scheduled on 19.07.2024 at 12.00 hrs at MADC Head Office, Mumbai. He was also informed that if he wishes to attend the opening of financial bids, he may present on the given date at the MADC Head Office, Mumbai. However, on 02.08.2024, he suddenly received the impugned communication rejecting his bid during technical evaluation. The

issuance of the tender, the submissions of the tender by the petitioner, a communication to him dated 18.07.2024 are not in dispute.

4. The petitioner alleges against respondents nos.1 and 2 that they under the influence of one of the tenderers highhandedly and arbitrarily rejected his tender even after the communication dated 18.07.2024. His counsel has vehemently argued that such acts are arbitrary and against the principles of natural justice. This amounts to discrimination and the decision of respondents nos.1 and 2 is violative of Article 14 and 19(1)(g), 21 of the Constitution of India. He further argued that such an exercise of the power in favour of respondent no.3, who was one of the bidders is arbitrary. The petitioner was at L-1 bid compared to other bidders. Respondents nos.1 and 2 entered into an illegal exercise to disqualify the petitioner on technical evaluation contrary to their own correspondence dated 18.07.2024, whereby the petitioner was qualified in technical evaluation. The acts of respondents nos.1 and 2 are mala fide to avoid the tender to the petitioner to favour the party of their choice. He also vehemently argued that in view of arbitrary and mala fide acts of respondents nos.1 and 2, this Court needs to exercise its judicial review power by setting aside the impugned communication dated 02.08.2024 and further direct respondent nos.1 and 2 to impart the tender in a legal manner by following the fresh courses denovo. He also argued that the selection of respondent no.3 by illegal process

deserves to be quashed and set aside. Granting tender to respondent no.3 favourably has clear colorable exercise at the hands of respondents nos.1 and 2 by indulging in the arbitrary and illegal exercise. The acts on the part of respondent nos.1 and 2 are bad in law in view of the judgment of the Apex Court in Montecarlo Ltd. Vs. NTPC Ltd., (2016) 15 SCC 272 and Afcons Infrastructure Ltd. In sum and substance, his arguments were that once the technical bid was accepted without any substantial review, material, and reasons, respondent nos.1 and 2, arbitrarily, illegally and mala fide ousted the petitioner from the tender process during the technical evaluation. Hence, the petition deserves to be allowed.

5. The contesting respondent nos.1 and 2 have filed an affidavit in reply. They have come up with a case that initially the petitioner had supplied the experience certificate dated 17.02.2023. After a query by the answering respondents, the petitioner supplied the experience certificate dated 15.05.2024 as per Exhibit-R4. In the technical evaluation, it was advertently not noticed that the experience certificate dated 15.05.2024 was also not confirming the eligibility criteria. After the complaint, in the re-scrutiny this deficiency was noticed and the petitioner was declared disqualified in the technical bid. The petitioner had suppressed the material facts and furnished the documents which were not asked for. Therefore, he does not deserve discretionary relief. The claim of the petitioner that

he stood L-1 bidder should be clarified how does he know that he is L-1 bidder unless and until the bidder's technical evaluation outcome is updated on e-tender portal? The financial bids of the bidders are inaccessible to MADC. Hence, the answering respondents do not have knowledge regarding the financial quote of the petitioner.

6. Learned counsel for the contesting respondents did not dispute the fact that the communication dated 18.07.2024 was addressed to the petitioner. The learned counsel for contesting respondents submitted that in affidavit in reply, it has been clarified that it was mistakenly communicated. The constituted committee during technical evaluation found that the petitioner is not entitled because the petitioner did not comply with the Special Term and Conditions 1(d) of the tender notice. He would vehemently argue that the petitioner did not produce the experience certificate from the private company that he has an annual contract. Besides that, the details of such company and the required experience were also not submitted. The very requirements and experience were lacking. The tender inviting authority has reserved its right to cancel the bid at anytime. There is no law prohibiting the tenderer to cancel the bid at any time. He would submit that the case laws relied upon by the petitioner would not assist him. He would submit that there was no valid contract. Hence, the petitioner has no right to ask for the cancellation of the bid and open it denovo. He relied on the case of

M/s. N.G. Projects Limited Vs. Vinod Kumar Jain and Others, (2022) 6 SCC 127.

7. Learned counsel for the petitioner has submitted the affidavit in rejoinder to counter the submissions of respondent nos.1 and 2 that the communication dated 18.07.2024 was mistakenly issued. In rejoinder, it has been submitted that the petitioner did not lack anything. Therefore, the conduct and act of respondent nos.1 and 2 is nothing but to support respondent no.3 in arbitrary manner just to avoid him the tender. To bolster his argument, he relied on the case of Banshidhar Construction Pvt. Ltd. Vs. Bharat Coking Coal Limited and Others, Civil Appeal No.11005 of 2024 (@ Special Leave Petition (Civil) No.17383/2024) of the Hon'ble Supreme Court dated October 4th, 2024. He would submit that the objections of respondent nos.1 and 2 are unfounded. Hence, his petition should be allowed.

8. The petitioner raised the first question that once the tender inviting Authority accepted the technical bid, they have no reason to reject the tender on the same ground.

9. In the case of Reliance Energy Ltd and Another Vs. Maharashtra State Road Development Corporation Ltd and Others, (2007) 8 SCC 1, the Hon'ble Supreme Court had laid down the law that if there is vagueness or subjectivity in the said norms it may result in unequal and discriminatory treatment. It may violate doctrine of "level playing field". The expression of different views and

opinions in exercise of contractual powers may be there, however, such difference of opinion must be based on specified norms and those norms may be legal norms or accounting norms. As long as the norms are clear and properly understood by the decision-maker, the bidders and other stakeholders, uncertainty and thereby breach of the rule of law will not arise. In order to provide certainty that norm/standard should be clear. In that case, the State had not specified the accounting norms with clarity for calculation of the “net cash profit” for a certain number of years, one of the criteria specified in the tender conditions. Under these premises, the Hon’ble Supreme Court observed that it had led to confusion and uncertainty as to whether appellant-writ petitioners had met the criterion in question, leading ultimately to their disqualification from the bidding process. Hence, if an important recognized accounting norm for calculating profits had been kept out, as in the present case, without any reason, then the decision excluding the appellant on that basis is arbitrary, whimsical and unreasonable.

10. In Jagdish Mandal V. State of Orissa, (2007) 14 SCC 517, it has been observed in para 19 that the judicial review of administrative action is intended to prevent arbitrariness, irrationality unreasonableness, bias, and malafides. The purpose is to check whether the choice of decision is made ‘lawfully’ and not to check whether the choice of decision is ‘sound’. Evaluating tenders and

awarding contracts are essentially commercial function. Principles of equity and natural justice have to stay at a distance. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers 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 power of judicial review, should be resisted”.

11. The Hon’ble Supreme Court laid down the test for interfering in tender or contractual matters in exercise of power of judicial review as follows:

(i) 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: ‘the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached”;

(ii) Whether public interest is affected.

12. It has been further observed that if the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of

sites/shops, grant of licences, dealerships, and franchises) stand on a different footing as they may require a higher degree of fairness in action.

13. The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias, and mala fides.

14. In para 17 of M/s. N.G. Projects (supra), it has been observed that, therefore, the position of law with regard to the interpretation of terms of the contract is that the question as to whether a term of the contract is essential or not is to be viewed from the perspective of the employer and by the employer. Applying the aforesaid position of law to the present case, it has been the contention of Respondent No. 1 that the format for bank guarantee was not followed strictly by the State and that the relaxation given was not uniform, in that Respondent No. 1 was singled out.

15. In the case of Silppi Constructions Contractors Vs. Union of India, (2020) 16 SCC 489, it has been observed that the Courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not

interfere where such interference will cause unnecessary loss to the public exchequer.

16. In Tata Cellular Vs. Union on India (1994) 6 SCC 651 in para 94 laid down certain principles for judicial review of administrative action that reads thus ;

“94. The principles deducible from the above are :

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

Based on these principles we will examine the facts of this case since they commend to us as the correct principles. “

17. In para 22 of the M/s. N.G. Projects Limited (*supra*), it has been observed that the satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance.

18. Further, in para 23, it has been observed that 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 malafide 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.

19. In para 26, it has been observed that any contract of public service should not be interfered with lightly and in any case, there should not be any interim order derailing the entire process of the services meant for larger public good.

20. In the case of Banshidhar (supra) relied upon by the petitioner, the question before the Hon'ble Supreme Court was whether the Respondent Bharat Coking Coal Limited (BCCL) was justified in rejecting the Technical bid of the Appellant, while accepting the Technical bid of the Respondent No.8 – Company, and declaring it to be successful bidder, though the Respondent no.8 had not complied with the mandatory requirement of submitting the important documents relating to the qualification criteria as contained in Clause 10 of the Notice Inviting Tender (NIT) dated 16.08.2023, and thereby had failed to qualify the Eligibility criteria laid down therein ? In that case, the controversy was revolving around the interpretation of Clause 10 of NIT dated 16.08.2023. Interpreting Clause 10 of NIT, the Hon'ble Supreme Court observed that from the bare perusal of the afore stated Clause 10, it clearly transpires that the Bidders were required to furnish the information and the scanned copies of the documents relating to qualification criteria particularly to substantiate their Financial Capacity. For the purpose of substantiating Financial Capacity, the Bidders were obliged to submit the scanned copies (self-certified and notarised/certified) of the Audited Annual Reports for the last three financial years as chosen by the Bidder, comprising of the audited balance sheets and profit and loss accounts of the Bidder, along with other documents as stated therein. This was the mandatory requirement of the NIT, the same

being related to the qualification criteria as also transpiring from Clause 2.2.5 of the RFB.

21. In the above case, after technical bid of the appellant was rejected for not complying with the mandatory conditions, the respondent/authority had accepted the technical bid of the respondent no.8. Therefore, the Court held that the respondent/BCCL has miserably failed to justify as to how the technical bid of respondent no.8 was accepted when it had not submitted the requisite important documents related to the qualification criteria as mentioned in Clause 10 of the NIT. The Hon'ble Supreme Court discussing further the legal prepositions propounded in catena of decision by the Hon'ble Supreme Court on the restraints of judicial review and the Courts does not sit as a Court of appeal in the matter of awards and contract has allowed the appeal holding that the action of respondent was illegal and respondent/BCCL was directed to initiate the fresh tender process for the project and to proceed with the same in question and in accordance with the law.

22. This case also revolves around the non-compliance of sub-clause (d) of Clause-1 Eligibility Criteria under the head Special Terms and Conditions. Hence, it is reproduced as follows :

“d) Bidder shall have 03-year experience of providing vehicles to Govt./Semi-govt./Pvt. Companies on annual contract basis, Performance Certificate/s from such entities showing the

details of the vehicles provided, and required experience shall have to be submitted.”

23. Reading the above terms, there is no matter of doubt, the condition was very specific that the bidder should submit the experience/performance certificate from the entities mentioned in the condition above. Experience with 3 years on an annual contract basis and it must mention or show the details of the vehicles provided.

24. The Experience/Performance Certificate placed on record does not specifically and in clear terms reveal that the petitioner had a contract on an annual basis of supplying vehicles to the Health and Family Welfare Training Centre, Nashik. In view thereof, it is to be considered Whether this sub-clause (d) was complied with.

25. It is not disputed that after inviting the petitioner for the financial bid, respondent no.3 had raised the objections and then the decision by the constituted committee was taken, rejecting his technical bid. The impugned communication reflects that there were reasons for rejection and enclosure was supplied to the petitioner. Therefore, by letter dated 02.08.2024, he requested the respondent/authority to provide the details with an explanation and justification for rejecting his bid before proceeding to open the financial bid. It is also not disputed that the respondent/authority did not submit or inform him of the reasons with an explanation as

requested by him. For the first time, the respondent/authority is coming up with a case that the technical bid of the petitioner was rejected for not furnishing the experience/performance certificate on an annual contract basis. It is also not disputed that at the initial stage for the same deficiencies, the petitioner was called to clarify and submit the experience/performance certificate. He had complied with it and then it was communicated to him that his technical bid was accepted.

26. The General Terms and Conditions of the tender particularly Term No. 28 provide for resolving the dispute. It has been provided therein that any dispute shall be resolved amicably through mutual discussion between senior representatives of both parties. However, the terms and conditions of the tender notice do not provide for constituting any committee for deciding the objections after accepting the technical bid. At the same time, in the tender notice in the Instructions clause, the respondent/authorities have reserved their rights to reject any or all tenders without assigning any reason whatsoever. The rights were also reserved to cancel the tender process at any stage without assigning any reason. Though the impugned communication reflects that the reasons were assigned, those were not supplied to the petitioner. However, surprisingly the reasons for rejecting the technical bid were made known to the petitioner by way of affidavit in reply by the respondent/authorities.

27. The Delhi High Court in the case of PKF Sridhar and Santhanam Vs. Airports Economic Regulatory Authority of India in W.P. (C) 12385/2021 and CM APPL. 38924/2021 dated 06.01.2022 has taken a view that even the clause which stipulates that the tender inviting authority not assign reasons for not accepting any bid, or rejecting the bids, does not mean that they should not have any valid reasons to justify their conduct. The respondent/authority is a public authority. The burden would fall of accepting or rejecting the tenders on the public exchequer. Every public authority dealing with public funds discharges a public trust and is bound to act with financial prudence.

28. The facts of this case further reveal that on the same ground of an experience certificate, an explanation was called. The petitioner has complied with the queries. However, when respondent no.3, who was the competitor raised the same grounds without assigning reasons by constituting committee, his bid accepted earlier was rejected. The reasons for rejecting the technical bid were not disclosed with the impugned communication and on his request. Such a conduct of the public authority raises doubt. Therefore, the arguments of the learned counsel for contesting respondents that it being authority has the right to cancel tenders without assigning reasons has no force. It is also the fact that the technical bid of the petitioner was accepted on getting the shortfalls complied with and

on the same objections by respondent No.3, again the petitioner was disqualified in technical evaluation. In tender inviting notice a term was specific , that after the technical bid is accepted , the financial bid will be opened. Exactly the said condition was initially followed. However, suddenly, the petitioner was disqualified on technical evaluation is a circumstance that smelled favouritism to a third party. Hence, there appears a substance in the objection of the petitioner that reopening the technical evaluation again is unfair, bias, and arbitrary. Suddenly, the right under Article 14 has been *prima facie* violated.

29. Both learned counsels were harping upon the interpretation of the experience certificate submitted by the petitioner. The petitioner has a case that the experience certificate was submitted in compliance with the tender conditions. While clarifying about the experience certificate on calling upon by the respondent nos.1 and 2, he by e-mail dated 13.05.2024, had clarified that all necessary experience certificates have been submitted to the Mahatender portal and the information was accurately provided. He has rightly pointed out that R-4 produced by the respondents is not the experience certificate dated 15.05.2024. On the contrary, it was a letter calling upon to submit the required details as there were shortfalls. The record does not reveal any experience certificate dated 15.05.2024. The performance/ experience certificate is dated 17.02.2023. The

learned counsel for the contesting respondents first time by oral argument came with a case that the petitioner did not produce the written annual contract. This is a newly added ground against the fact that they never informed the reasons, to the petitioner for rejection of his technical evaluation. In view of the submissions, it is to be considered whether the experience certificate complied with the tender conditions and whether its interpretation is legally correct and proper.

30. The Hon'ble Supreme Court in *Afcons Infrastructures Limited v Nagpur Metro Rail Corporation Limited and Another, 2016 (16) SCC 818* has laid the law that the owner or the employer of the project, having authored the tender documents, is the best person to understand and interpret the 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 the employer of a project may give an interpretation to the tender documents that is not acceptable to the Constitutional courts but that may not a reason for interfering with the interpretation given.

31. In *Tata Cellular (supra)*, it was held that there must be judicial restraints in interfering with administrative actions. Ordinarily, the soundness of the decision taken by the employer ought

not to be questioned but the judicial making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision “that no responsible authority acting reasonably and in accordance with law could have reached” as held in Jagdish Mandal (supra). The law is clear that the decision making process can certainly be subject to judicial review. Sound decision-making is the ability to objectively assess the situations and make decisions based on relevant information and past experience. Decision-making is the process of making choices by identifying decision, gathering information, and assessing alternative resolutions. The decision-making process is a reasoning process based on assumptions of values, preferences, and beliefs of decision-making. Judicial decision-making requires a sense of fairness and equity and a rigorous examination of evidence, arguments, and legal principles. Such decisions must be made on reasonable grounds and based on the supporting evidence. Considering the law laid down about the decision-making process, the experience certificates placed on record have been pressed into service. It was not disputed that the experience certificate indicates the three year’s experience. Though it was on call, it has been argued that it was an annual contract. There also appears substance in the argument of the learned counsel for the petitioner that on the same ground of objection by respondent no.3,

the petitioner was called upon to comply with shortfalls. Considering the facts and the arguments of respective counsels, there is a scope to believe that there was favour to one of the competitors. There are also traces of mala fides, arbitrariness, and irrationality in eliminating the petitioner at the technical evaluation stage.

32. The tenders were invited to provide travelling services. Its technical bid evaluation was very limited and experience/performance was one of the requirements. Before the technical bid was accepted, the concerned authority had assessed factors like experience and contract record. The tendering authority was apparently satisfied with the performance/experience certificate. It was not a mega project, it was just a service tender for two years only. In the circumstances, though the technical evaluation bid has been rejected by the constituting committee and considering the law as regards the rights under Article 14 of the Constitution of India and in the absence of any clause to constitute a committee for taking a further decision, the Court is of the view that while interpreting the experience condition there was mala fide and perverse in understanding the terms condition. This Court above has held that the decision-making of contesting respondents eliminating the petitioner after accepting his technical bid is arbitrary and irrational. Hence, for the above reasons, the petition deserves to be partly allowed.

33. Writ Petition is partly allowed.
34. The decision of the respondent/authority by impugned communication dated 02.08.2024 stands quashed and set aside.
35. The petitioner is allowed to participate in a financial bid by intimating him well in advance. It is clarified that by this order, the Court did not disturb the rights of the tendering authority to make an appropriate decision to verify other factors required for the financial bid.
36. No order as to costs.
37. Rule is made partly absolute in above terms.

(SHAILESH P. BRAHME, J.)

(S.G. MEHARE, J.)