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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ W.P.(C) 2991/2024, CM APPL. 12314/2024 & CM APPL. 12315/2024

THE RICE EXPORTERS ASSOCIATION OF INDIA & Anr.
..... Petitioners

Through: Mr. Dama Seshadri Naidu, Senior Advocate with Mr. Venkata Raghuvamsy D., Ms. Sivani Kakumanu and Mr. PDV Srikar, Advocates

versus

NATIONAL AGRICULTURAL COOPERATIVE MARKETING FEDERATION OF INDIA LTD & Ors. ..... Respondents

Through: Mr. Rajshekhar Rao, Senior Advocate with Mr. Aaditya Vijaykumar, Ms. Akshita Katoch, Ms. Shreya Shree Singh and Ms. Meherunnisa A Jaitely, Advocates for R-1
Mr. Abhishek Singh, Mr. J. Amal Anand, Mr. Elvin Joshy, Ms. Alisha Sharma, Mr. Shashwat Tyagi, Mr. Vikram Singh Dalal, Advocates for R-2
Mr. Ravi Prakash CGSC, Mr. Abhishek Singh G.P., Ms. Astu Khandelwal & Mr. Aalok Kumar, Advocates for Respondents Nos. 3 and 4/UOI
Mr. Amit Sibal, Senior Advocate with Mr. Ankur Mittal, Mr. Devesh Matta, Advocates for IREF

% Date of Decision: 28th February, 2024

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

JUDGMENT

MANMOHAN, ACJ: (ORAL)

CM APPL. 12315/2024 (for exemption)

1. Allowed, subject to all just exceptions.

2. Accordingly, the present application stands disposed of.

W.P.(C) 2991/2024 & CM APPL. 12314/2024

3. Present writ petition has been filed under Article 226 of the Constitution of India seeking a direction to set aside the e-tender document ('impugned tender') bearing no. 001 dated 22nd February, 2024 issued by Respondent No. 1/NAFED and further seeking a direction to the Respondent No. 1/NAFED to issue the tender process afresh with utmost transparency, either by inducting/appointing a 'Facilitation Agency' in a transparent manner or without the involvement of any random Facilitation Agency, and by giving an equal opportunity to all exporters to participate and qualify in the tendering process with fair and reasonable restrictions in the said domain, such as having valid export licenses or previous experience.

4. It is stated that the Petitioner No. 1 is an association of rice exporters that exports rice from India and has over 100 members across the country. The Petitioner No. 2 is the secretary of the Petitioner No. 1.

5. National Agricultural Co-operative Marketing Federation of India Ltd ('NAFED') i.e., Respondent No. 1 has issued the impugned tender for export of 35,000 MT of 25% broken non-basmati white rice to Cote

D'Ivoire up to Abidjan Port seaport on CIF (LO) basis.

6. Indian Rice Exporters Federation ('IREF') is a not-for-profit multistate apex level export federation, registered under the Companies Act, 2013, having its Head Office at 73 LGF, World Trade Centre, Connaught Place, New Delhi – 110001. IREF has been appointed by Respondent No. 1 as the Facilitation Agency for the impugned tender.

6.1. The tender document provides criteria(s) for the eligibility of bidders, under which, the bidder must fulfill both technical and qualitative criteria(s) as set out in Annexure IV of the tender document, in order to be considered technically qualified for submitting a bid, as stipulated under Clause no. 10.1 of the tender document.

6.2. The paragraph no. 1 of the aforesaid Annexure IV provides for the eligibility under technical criteria, which states that the bidder should be duly registered as an empaneled exporter with the Respondent No. 1 or the bidder must be duly registered as a member of IREF who is eligible as per applicable empanelment criteria of Respondent No. 1/NAFED.

6.3. The Clause no. 2.3 of the tender document provides that the Respondent No. 1/NAFED will receive bids for subject tender, as per the terms set forth in the tender document and other documents to be provided, including the Tripartite Agreement to be executed by the successful bidder(s), Respondent No. 1/NAFED and the Facilitation Agency in the form set out in Tripartite Agreement enclosed with the tender document. The draft of the said Tripartite Agreement has been enclosed with the tender documents as Annexure V.

Arguments by the parties

7. The learned senior counsel appearing for the Petitioners, states that

the Respondent No. 1 has appointed IREF as the Facilitation Agency to monitor the impugned tender process. He states that the inclusion of IREF as the Facilitation Agency is without any rationale or nexus and is manifestly arbitrary. He states that IREF has come into existence only six months ago. He states that the Facilitation Agency is involved in every step of the impugned tender bid process, from evaluation to awarding of the tender. He states that IREF and its members will be participating in the tender process and competing against Petitioner No. 1 and its members.

7.1. He states that as per Clause no. 2.3 of the tender document, the successful bidder has to execute a Tripartite Agreement with the Respondent No. 1 and the Facilitation Agency i.e., IREF. He states that Facilitation Agency/IREF hired by the Respondent No. 1 is also a competitor in the impugned tender process; as the members of IREF are potential bidders. He states that if a member of Petitioner No.1 is successful in getting the award of the tender, the Facilitation Agency/IREF will be its inspector and the supervisor as well during the implementation process. In this regard, he relies upon recital nos. 16 and 27 of the Tripartite Agreement. The said Clause no. 2.3 of the tender document reads as under: -

> *"**2. Invitation for bids***
>
> *2.3. NAFED shall receive bids for the export of Rice pursuant to this e-Tender, in accordance with the terms set forth in this e-Tender and other documents to be provided, **including the tripartite agreement to be executed by the successful bidders, NAFED and the Facilitation Agency in the form set out in annexed Tripartite Agreement**."*

(Emphasis Supplied)

The said recital nos. 16 and 27 of the Tripartite Agreement reads as under: -

> *"**16. SATISFACTION CERTIFICATE:***
>
> *16.1 **Facilitation Agency shall coordinate agreement execution***

Signature Not Verified
Digitally Signed By:Rashmi Dabas
Signing Date:04.03.2024 18:25:06

> ***including issuing satisfaction certificates to NAFED upon successful completion of supplies****.*
>
> ***27. TRANSACTION MONITORING AND MANAGEMENT:***
>
> *27.1* ***The Supplier acknowledges that NAFED/Facilitation Agency will monitor the implementation of this Agreement*** *and therefore the* ***Supplier shall be required to submit all relevant documents/information as may be required by the NAFED/Facilitation Agency*** *in order to enable the NAFED/ Facilitation Agency to monitor the implementation of this Agreement.*
>
> *27.2* ***The Supplier shall provide regular updates in relation to the export of Rice to the NAFED/ Facilitation Agency, as may be required by them to assess the Supplier's performance****. In the event a Supplier fails to fulfil its obligations under this Agreement, NAFED may procure the quantity of Rice allotted to such Supplier from an alternate entity to ensure uninterrupted supply of Rice in relation to the export of Rice, which shall be at the risk and cost of the Supplier."*

(Emphasis Supplied)

7.2. He submits that the Petitioners are not pressing the prayer for stay of the impugned tender process and rather submits that the impugned tender process can continue forthwith. He states that the grievance of the Petitioners is only with the role/interference of the Facilitating Agency and its participation in the tender process and the subsequent implementation. He apprehends that the Facilitation Agency/IREF could be biased against the members of the Petitioner No.1, as members of the Facilitation Agency/IREF will also participate in the impugned tender. He states that since the satisfaction certificate has to be issued by IREF, the Petitioner No. 1 apprehends that its members will be prejudiced by IREF.

8. In reply, the learned senior counsel for the Facilitation Agency/IREF states that the Facilitation Agency/IREF has not been arrayed as a party in the present writ proceedings. He states that non-impleadment of IREF is malafide. He states that IREF has a membership of 4,000 rice exporters,

whereas the Petitioner No. 1 has a membership of 100 rice exporters. He states that there is no question of competition between rice exporters association, as the bidders participating in the impugned tender will be individual rice exporters, and not these associations.

8.1. He states that there are two stages in the impugned tender process. The first stage being the evaluation of the bids and award of the tender; wherein, the Facilitation Agency/IREF which has signed the Memorandum of Understanding ('MOU') with Respondent No. 1/NAFED has no role in the evaluation of the tender bids. He further states that the Facilitation Agency/IREF is not involved in selecting a technically qualified bidder or in deciding who receives the tender award. In this regard, he relies upon Clause No. 10 of the tender document read with Annexure IV, which reads as under: -

> *"**10. Eligibility of Bidders***
>
> *10.1. <u>To be considered as technically qualified for submitting a bid, a Bidder must fulfil the applicable conditions of eligibility, i.e., the Technical Criteria and the Qualitative Criteria as set out in Annexure IV</u>."*

(Emphasis Supplied)

8.2. He states that the technical evaluation committee has to evaluate the bids and as per Clause no. 11.2 of the tender document, the documents submitted by the bidder will be verified by Respondent No. 1/NAFED. He states that Respondent No. 1/NAFED is responsible to determine who will be the successful bidder. In this regard, he relies upon Clause nos. 13.2 and 16.1 of the tender document.

8.3. He states the second stage begins after the tender is awarded to the eligible bidder, this is when the Facilitation Agency/IREF's involvement is required. He states that the Facilitation Agency/IREF's role is to ensure the smooth execution of the agreement and the Facilitation Agency/IREF's services might be utilized for inspection at any stage of the supplies, which is only possible after the impugned tender has been awarded. In this regard, he relies upon Clause no. 9.4 of the tender document, which reads as under:-

> *" 9.4. In order to **ensure smooth execution of the agreement**, NAFED may utilize the services of Facilitation agency for random inspections at any **stage of the supplies**."*

(Emphasis Supplied)

8.4. He states that in view of the prayers sought by the Petitioners, the present writ petition is pre-mature and the apprehension of bias is imaginary, as the role of the IREF will commence after the award of the tender.

9. The learned senior counsel for Respondent No. 1/NAFED states that there is absolutely no prohibition on the members of the Petitioner No. 1 to meet the empaneled criteria, as stipulated under paragraph no. 1.1 of Annexure IV of the tender. He states that even if a bidder is a registered member of the Facilitating Agency/IREF, the bidder will not automatically become an eligible bidder. He states that it is mandatory for a bidder to be eligible as per the empanelment criteria of Respondent No. 1/NAFED, as stipulated under paragraph no. 1.2 of Annexure IV.

9.1. He states that it is the Respondent No. 1/NAFED who issues the bid, evaluate the bids and awards the bid. He states that the role of the Facilitation Agency/IREF is to facilitate the smooth execution of the agreement at the post award stage.

9.2. He states that members of the Petitioner No. 1 association have also registered for empanelment with Respondent No. 1/ NAFED. He states the issue of conflict of interest does not exist, is without any basis and has been raised with a sole motive to delay the impugned tender process.

9.3. He states that no writ is maintainable against Respondent No. 1 and he also has an objection to the maintainability of the present writ petition.

10. In response, learned senior counsel for the Petitioners states that IREF and Petitioner No.1 are competing agencies and the appointment of IREF as the Facilitation Agency gives an unfair advantage to IREF. He states that the Petitioner No.1 has reasonable apprehension of bias from Facilitation Agency/IREF against the members of Petitioner No.1. He states that any adverse report by Facilitation Agency/IREF against the members of Petitioner No.1, in furtherance of the Tripartite Agreement, during the implementation of the said agreement will prejudice the rights of the said members for participation in future tenders.

11. We have heard the learned senior counsels for the parties and perused the record.

12. The sum and substance of the present writ petition is the challenge to the appointment of IREF as a Facilitation Agency by Respondent No.1. The Petitioner No. 1 is aggrieved by the eligibility criteria set out at Annexure IV under the head Technical Criteria, and more specifically paragraph no. 1.2 therein, which enables a registered member of the IREF to qualify the said criteria. The Petitioners contend that the said criteria gives unfair advantage to the members of Facilitation Agency/IREF and puts the members of the Petitioner No. 1 at a disadvantage. The Petitioners contend that this criteria at paragraph 1.2 gives an advantage to IREF as it incentivizes exporters to become members of IREF and therefore, causes prejudice to Petitioner No.1. The Petitioners contend that the relaxation granted to the members of IREF at paragraph no. 1.2 is selective and unreasonably excludes the similar

advantage to the members of Petitioner No.1. The Petitioners contend that the criteria also arbitrarily disqualify individuals who hold valid licenses and experience in the trade from participating solely on account of their non-membership of IREF.

12.1. In addition, the Petitioners state that the Facilitation Agency/IREF is likely to be involved in every step of the impugned tender bid process, from qualification for the tender bid to award of the impugned tender. It is contended that in its role as a Facilitation Agency, IREF is bound to harbour a bias against exporters who are not its members. It is stated that since the individuals who run and operate IREF are also potentially the bidders in the individual capacity, it shall give rise to conflict of interest.

12.2. The Petitioners state that the selection and appointment of IREF as the Facilitation Agency is without an open tender process. It is stated that Respondent No.1 has not disclosed the reason for entering into the MoU for appointment of IREF as the Facilitation Agency.

13. The Respondent No.1 has stated that the Facilitation Agency/IREF has no role, whatsoever in the evaluation of the eligibility of the participating bidders and the award of the contract. It is further stated that as per the terms of the tender (Clause nos. 9.1 and 9.5) inspection is to be carried out by independent surveyors and agencies. It is also stated that the eligibility criteria set out at paragraph no. 1.2 of Annexure IV requires the bidder to be eligible for empanelment with Respondent No. 1/NAFED and merely, being the member of IREF is not sufficient.

14. The technical criteria to be complied with by each bidder is set out at paragraph nos.1.1 and 1.2 of Annexure IV which reads as under:

*"**1. Technical Criteria***

The Bidder shall be required to be
1.1 duly registered as an empanelled exporter with NAFED; or
1.2 duly registered as a member of the Indian Rice Exporter Federation who are eligible as per applicable empanelment criteria of NAFED."

(Emphasis Supplied)

15. As is evident, a bidder who satisfies the criteria at paragraph no. 1.1 would qualify the technical criteria and as per the said paragraph, the bidder is not required to be a member of IREF. The Petitioner has not challenged the criteria set out at paragraph no. 1.1

15.1. The challenge is to paragraph no. 1.2 which enables the members of IREF who are eligible for empanelment of Respondent No.1 to participate in the impugned tender process. Therefore, eligibility set out at paragraph no. 1.2 is an alternative to eligibility set out at paragraph no. 1.1 and in fact, it enables the members who are not empanelled with Respondent No.1 to also participate in the tender bidding process. In fact, the effect of paragraph 1.2 is to enhance the number of eligible bidders.

15.2. A person who is not inclined to become a member of IREF is entitled to participate in the bid so long as he is empanelled with Respondent No.1/NAFED. Therefore, the contention of the Petitioners that the said conditions at paragraph no. 1.2 of Annexure IV is arbitrary or irrational is not made out.

16. The contention of the Petitioners that the Facilitation Agency/IREF has a role in evaluation of bids and award of tender is unsubstantiated from the tender terms. The learned senior counsels for Respondent No.1 and IREF have drawn this Court's attention to Clause nos. 11.2, 13.2 and 16.1 of the tender document to state that the entire process of evaluation and award of

the bids is stipulated to be undertaken by Respondent No.1 itself. The Petitioners have not disputed the said contention of Respondent No.1 during oral arguments and therefore, the submission of the Petitioners apprehending a role of the Facilitation Agency/IREF in the evaluation of the bids and award of the impugned tender is without any basis. The said Clause nos. 11.2, 13.2 and 16.1 read as under:

> *"11. **Technical Bid***
>
> *11.2. The **documents as submitted by the bidder will be verified by the NAFED for authenticity, completeness, and compliance with applicable regulations**. In the event that the NAFED identifies any discrepancies, inaccuracies, or missing documentation, the Bidder's application may be deemed non-compliant and automatically disqualified.*
> *...*
> *13. **Earnest Money Deposit (EMD) & Security Deposit (SD):***
>
> *13.2. **NAFED shall reject the Technical Bid** as non-responsive if it is not accompanied by the EMD as required under the terms of this E-Tender.*
> *...*
> *16. **Intimation to successful Bidders***
>
> *16.1. **After identification of the successful Bidder(s), NAFED shall issue a Letter of Award (LOA) in favour of Successful Bidder(s)**. The Successful Bidder(s) shall, within 2 days of the receipt of the LOA, sign and return the copy of the LOA in acknowledgement thereof and, fulfil any condition set out in the LOA within the time limit prescribed there under."*

(Emphasis Supplied)

17. The submission of the Respondent No.1/NAFED is duly borne out from the aforesaid Clauses and therefore, there is no merit in the submission of the Petitioners that the Facilitation Agency/IREF has any role in the evaluation of the eligibility of the bidders and award of the IMPUGNED tender.

18. The Petitioners during the oral hearing had alleged that the appointment of IREF as a Facilitation Agency has raised an apprehension of

bias in the minds of Petitioner No.1 for and on behalf of its members. Pertinently, no such allegation of bias has been raised in the grounds of the petition and therefore, the said plea ought not to be considered. It is well settled that a party which alleges bias must bring on record reasonable evidence to satisfy the Court with respect to a real likelihood of bias. The suspicion of bias cannot be made a standard as a proof of bias so as to interfere with the right of Respondent No.1 to appoint a Facilitation Agency. In this regard, it would be instructive to refer to the passage of the judgment of the Supreme Court in ***International Airports Authority of India v. K.D. Bali***[1], wherein the Supreme Court observed thus: -

> *"**5.** Several points were taken in support of the application for revocation. It was sought to be urged that the petitioner had lost confidence in the sole arbitrator and was apprehensive that the arbitrator was biased against the petitioner. It is necessary to reiterate before proceeding further what are the parameters by which an appointed arbitrator on the application of a party can be removed. It is well settled that there must be purity in the administration of justice as well as in administration of quasi-justice as are involved in the adjudicatory process before the arbitrators. It is well said that once the arbitrator enters in an arbitration, the arbitrator must not be guilty of any act which can possibly be construed as indicative of partiality or unfairness. It is not a question of the effect which misconduct on his part had in fact upon the result of the proceeding, but of what effect it might possibly have produced. It is not enough to show that, even if there was misconduct on his part, the award was unaffected by it, and was in reality just; arbitrator must not do anything which is not in itself fair and impartial. See Russel on Arbitration, 18th Edn., p. 378, and observations of Justice Boyd in Re Brien and Brien [(1910) 2 Ir R 83, 89]. Lord O'Brien in King (De Vosci) v. Justice of Queen's Country [(1908) 2 Ir R 285] observed as follows:*
>
> > *"By bias I understand a real likelihood of an operative prejudice, whether conscious or unconscious.* ***<u>There must in my opinion be reasonable evidence to satisfy us that there was a real likelihood of bias. I do not think that their vague suspicions of whimsical, capricious and unreasonable people should be made a standard</u>***

[1] 1988 2 SCC 360

> ***to regulate our action here.*** *It might be a different matter if suspicion rested on reasonable grounds — was reasonably generated — but certainly mere flimsy, elusive, morbid suspicions should not be permitted to form a ground of decision."*
>
> *(emphasis supplied)"*

18.1. We are of the considered opinion that the oral arguments speculating bias of IREF cannot be accepted as a substitute for evidence of such allegations. There is no material on record before this Court to come to a finding that the persons responsible for discharging the obligations under the Tripartite Agreement, will also be either the participating bidders or the finally selected eligible bidders. The allegations of bias in the absence of these facts cannot be opined upon.

19. The tender terms i.e., Clause no. 9.4 and the recitals of the proforma of the Tripartite Agreement set out the intent of Respondent No.1 behind appointing a Facilitation Agency. The Respondent No.1, during arguments, stated that the appointment of the Facilitation Agency was felt necessary to have ground assistance in ensuring smooth operations. The contention of the Petitioners that in similar tenders floated by KRIBHCO and NCCL there is no such involvement of a third-party facilitator, is not a ground for presuming that appointment of IREF as the Facilitation Agency is irrational. The discretion of the Respondent No. 1 to appoint a Facilitation Agency cannot be interfered on these specious pleas. The Petitioners have been unable to satisfy this Court that appointment of Facilitation Agency is arbitrary or irrational. In fact, during the course of arguments, the Petitioners contended that they would be satisfied if a third-party other than IREF is appointed as Facilitation Agency. The objection of the Petitioner is therefore, more specifically to IREF *per se*. Thus, there is no merit in the

challenge to the appointment of a Facilitation Agency.

20. The circumspection and restraint to be exercised by the Courts in the writ jurisdiction while entertaining challenge to the eligibility criteria laid down in a tender has been well settled, since the celebrated judgment of the Supreme Court in ***Tata Cellular v. Union of India***[2], which reads as under:

> *"**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."*
>
> (Emphasis supplied)

21. Similarly, in ***Balaji Ventures (P) Ltd. v. Maharashtra State Power Generation Co. Ltd. and Anr.***[3], the Supreme Court observed as under:

> *"**9.** Now so far as the impugned Judgment and order passed by the High Court dismissing the writ petitions is concerned, what was challenged before the High Court was one of the tender conditions/clauses. The High Court has specifically observed and noted the justification for providing*

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[2] (1994) 6 SCC 651
[3] 2022 SCC OnLine SC 1967

clause 1.12(V). The said clause was to be applied to all the tenderers/bidders. It cannot be said that such clause was a tailor made to suit a particular bidder. It was applicable to all. ***Owner should always have the freedom to provide the eligibility criteria and/or the terms and conditions of the bid unless it is found to be arbitrary, mala fide and/or tailor made. The bidder/tenderer cannot be permitted to challenge the bid condition/clause which might not suit him and/or convenient to him. As per the settled proposition of law as such it is an offer to the prospective bidder/tenderer to compete and submit the tender considering the terms and conditions mentioned in the tender document.****"*

(Emphasis supplied)

22. As noted above, the Petitioners have failed to show that the tender conditions impugned in this writ petition suffer from arbitrariness or are affected by bias. The Petitioners have also failed to satisfy this Court that the appointment of IREF as the Facilitation Agency by Respondent No.1 is unreasonable or irrational, which would invite interference under Article 226 of the Constitution of India.

23. With these observations, the petition along with pending applications stands disposed of.

ACTING CHIEF JUSTICE

MANMEET PRITAM SINGH ARORA, J

FEBRUARY 28, 2024/msh/MG

Click here to check corrigendum, if any