

(2019) 09 BOM CK 0018
In the Bombay High Court
Case No : Writ Petition No. 1470 Of 2019

Electrical Contractors Association Of Maharashtra	APPELLANT
Vs	
City And Industrial Development Corporation Of Maharashtra Ltd And Ors	RESPONDENT

Date of Decision : 05-09-2019

Acts Referred:

Constitution Of India, 1950 — Article 14, 19(1)(g), 21, 298

Citation : (2019) 09 BOM CK 0018

Hon'ble Judges : Pradeep Nandrajog, CJ; Revati Mohite Dere, J; Bharati Dangre, J

Bench : Full Bench

Advocate : P.J. Thorat, Nitin Gangal, Namita M. Mestry, Ashok Kadam

Judgement

Pradeep Nandrajog, CJ

1. The present reference is on account of the order dated 13th February, 2019 passed by a Division Bench of this Court and the question for consideration is found in paragraph 12 of the said order. The said question reads as under :-

"In the light of the principles which govern the exercise of judicial review, in contractual matters, whether the decision of the Division Bench in Writ Petition No. 3196 of 2013 in Aurangabad Electrical Contractors Association & Ors. vs. The State of Maharashtra, dated 10th April, 2014, holding that the Government Resolution, dated 27th January 2014 and the Government Circular, dated 24th March 2011, are violative of the provisions of Articles 14, 19(1)(g) and 21 of the Constitution of India and thereby directing that separate tenders be invited for civil and electrical works, is correct?"

2. The decision dated 10th April 2014 in Writ Petition No. 3196 of 2013 Aurangabad Electrical Contractors Association & Ors. vs. the State of Maharashtra laid a challenge to a Government Resolution dated 27th January 2004 followed by a Circular dated 24th March 2011 issued by the Public Works Department of the State of Maharashtra pertaining to construction of buildings

costing more than Rs. 1 Crore. The State Government Resolution required a composite tender to be floated inviting offers to execute the civil and electrical works. The Circular issued by the Public Works Department noted that in execution of civil and electrical works, the Government Resolution was not being followed and thus required officers of the Public Works Department to adhere to the Government Resolution. The decision noted a decision of a learned Single Judge of the Kerala High Court reported as (2011) 1 KLT 157 Government Electrical Contractors' vs. The State of Kerala & Ors., in which similar issue regarding composite tender to execute civil and electrical works was considered. Noting various decisions of the Supreme Court and in particular the decision reported as (2007) 8 SCC 1 Reliance Energy Limited & Anr. vs. Maharashtra State Road Development Corporation Ltd. & Ors., the learned Single Judge had held as under :-

"18. Judged in the light of the above principles, the question to be considered herein is whether the circulars Exts. P3, P6 and P8 provide any level playing field for any electrical contractors. The system of inviting tender only through the civil contractor will effectively deny any opportunity to submit tender for electrical contractors independently. The civil contractor will have to name the electrical contractor, going by Ext.P8 circular. It is therefore entirely upto the civil contractor to quote the rates for execution of the work and name the electrical contractors. The chance of the electrical contractor getting any work entirely depends upon the volition of the civil contractor. The same will result in absence of any competition from among electrical contractors, as the contractors will not be able to compete for the work on their own by submitting the tender. Therefore, the prospect of civil contractors getting monopoly in the field is writ large. They can on their own whims and fancies, join along with any of the electrical contractors whom they name, in the tenders. Even though it is provided that registration of electrical contractor/electrician will be a precondition for carrying out the electrical works in PWD, that alone will not help the electrical contractors to participate in the tender, as pointed out already. Thus, the same violates the concept of level playing field resulting in violation of Article 19(1)(g) of the Constitution, as held in Reliance Energy's case (supra). Article 14 will be attracted while testing the validity of a Government policy. On both counts the circulars are invalid and arbitrary and discriminatory."

3. The said decision of the learned Single Judge of the Kerala High Court heavily relied upon the observations of the Supreme Court in paragraphs 36 and 38 in Reliance Energy Limited & Anr. case (Supra), which read as under :-

"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 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.* (2007) 2 SCC 1, Articles 21/14 are the heart of the chapter on fundamental rights. They cover various aspects of like. "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 aforesaid 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.

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38. When tenders are invited, the terms and conditions must indicate with legal certainty, norms and benchmarks. This "legal certainty" is an important aspect of the rule of law. 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".

4. We note that a Division Bench of the Punjab and Haryana High Court in the decision reported as (2018) 0 Supreme (P&H) 1241 *Electrical Contractors Welfare Association Haryana vs. State of Haryana & Ors.* also relied upon the aforementioned observations of the Supreme Court in *Reliance Energy Ltd & Anr.* case (Supra) to hold that such composite tender would violate Articles 14 and 19(1)(g) of the Constitution of India.

5. The Government under Article 298 of the Constitution of India has the power to execute contracts in the realm of its activities in the commercial sphere. With a view to obtain the most competitive prices and obviate arbitrariness, the process of award of any government works to private players is usually made

through a tender process. The intensity of review exercised by the Courts upon the terms comprised in the tender is limited and confined to examine whether the terms comprised therein are ex-facie irrational and not germane to the subject matter of the award or if they are tailor-made in a manner so as to confer benefit upon one participant to the exclusion of others, rendering the tender-process a sham. The Higher Courts of the land have since time immemorial expressed a note of caution that the Courts would not sit in judgment over the terms comprised in the tender as "policy-makers" and embark upon the hazardous exercise to second-guess their efficacy. The Courts have recognised the element of special knowledge and expertise required in drafting such eligibility criteria and other terms/ conditions, which only the Grantor is best suited to devise upon taking cognizance of the peculiar requirements each project entails.

6. The Supreme Court in its decision reported as (1994) 6 SCC 651 *Tata Cellular v Union Of India* while extensively dealing with the scope of the judicial review in the matters pertaining to Government contracts, pertinently observed:

"71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters whether contractual or political in nature or issues of social policy; thus they are not essentially justifiable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

72. Lord Scarman in *Nottinghamshire County Council v. Secretary of State for the Environment*, 1986 AC 240, 251:(1986)1 All ER 199 proclaimed: 'Judicial review' is a great weapon in the hands of the judges; but the judges must observe the Constitutional limits set by our parliamentary system upon the exercise of this beneficial power."

7. Commenting upon this Michael Supperstone and James Goudie in their work *Judicial Review* (1992 Edn.) say:

"If anyone were prompted to dismiss this sage warning as a mere obiter dictum from the most radical member of the higher judiciary of recent times, and therefore to be treated as an idiosyncratic aberration, it has received the endorsement of the Law Lords generally. The words of Lord Scarman were echoed by Lord Bridge of Harwich, speaking on behalf of the Board when reversing an interventionist decision of the New Zealand Court of Appeal in *Butcher v. Petrocorp Exploration Ltd.* (1990) 1 QB 146: (1989) 1 All ER 509 18 March 1991. "

8. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself.

9. In the decision reported as (1982) 3 All ER 141 *Chief Constable of the North Wales Police v. Evans*, at pg. 154 Lord Brightman said:

"Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made. Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

10. In the same case Lord Hailsham commented on the purpose of the remedy by way of judicial review under RSC, Ord. 53 in the following terms :

"This remedy, vastly increased in extent, and rendered, over a long period in recent years, of infinitely more convenient access than that provided by the old prerogative writs and actions for a declaration, is intended to protect the individual against the abuse of power by a wide range of authorities, judicial, quasi-judicial, and, as would originally have been thought when I first practiced at the Bar, administrative. It is not intended to take away from those authorities the powers and discretions properly vested in them by law and to substitute the courts as the bodies making the decisions. It is intended to see that the relevant authorities use their powers in a proper manner."

11. Thus, the duty of the court is to confine itself to the question of legality. Its concern should be: (i) Whether a decision-making authority exceeded its powers? (ii) Committed an error of law, (iii) committed a breach of the rules of natural justice, (iv) reached a decision which no reasonable tribunal would have reached or, (v) abused its powers.

12. In the year 1947 the Court of Appeal confirmed a similar approach pertaining to the review of executive discretion, in the decision reported as (1948) 1 KB 223: (1947) 2 All ER 680 Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn ., This case was concerned with a complaint by the owners of a cinema in Wednesbury that it was unreasonable of the local authority to licence performances on Sunday only subject to a condition that 'no children under the age of 15 years shall be admitted to any entertainment whether accompanied by an adult or not'. In an extempore judgment, Lord Greene, M.R. drew attention to the fact that the word 'unreasonable' had often been used in a sense which comprehended different grounds of review, where it was said that the dismissal of a teacher for having red hair (cited by Warrington, L.J. in Short v. Poole Corpn. (1926) 1 Ch 66, 91: 1925 All ER Rep 74, as an example of a 'frivolous and foolish reason') was, in another sense, taking into consideration extraneous matters, and might be so unreasonable that it could almost be described as being done in bad faith; see also R. v. Tower Hamlets London Borough Council, ex p Chetnik Developments Ltd., 1988 AC 858, 873: (1988) 2 WLR 654: (1988) 1 All ER 961. He summarised the principles as follows:

"The Court is entitled to investigate the action of the local authority with a view to seeing whether or not they have taken into account matters which they ought not to have taken into account, or, conversely, have refused to take into account

or neglected to take into account matter which they ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that, although the local authority had kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority has contravened the law by acting in excess of the power which Parliament has confided in them."

13. The Supreme Court in its decision reported as (2012) 8 SCC 216 *M/S Michigan Rubber (India) Ltd. v The State of Karnataka & Ors* while examining a challenge to the pre-qualification criteria in a government tender for supply of tyres, tubes and flaps, observed:

"35. As observed earlier, the Court would not normally interfere with the policy decision and in matters challenging the award of contract by the State or public authorities. In view of the above, the appellant has failed to establish that the same was contrary to public interest and beyond the pale of discrimination or unreasonable. We are satisfied that to have the best of the equipment for the vehicles, which ply on road carrying passengers, the 2nd respondent thought it fit that the criteria for applying for tender for procuring tyres should be at a high standard and thought it fit that only those manufacturers who satisfy the eligibility criteria should be permitted to participate in the tender. As noted in various decisions, 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. 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. In the case on hand, we have already noted that taking into account various aspects including the safety of the passengers and public interest, the CMG consisting of experienced persons, revised the tender conditions. We are satisfied that the said Committee had discussed the subject in detail and for specifying these two conditions regarding pre-qualification criteria and the evaluation criteria. On perusal of all the materials, we are satisfied that the impugned conditions do not, in any way, could be classified as arbitrary, discriminatory or mala fide."

[Emphasis Supplied]

14. The Supreme Court in its decision reported as 1999 (1) SCC 492 *Raunaq International Ltd., vs. I.V.R. Construction Ltd.* while dealing with a challenge to the award of tender where a relaxation had been granted by the Government to one particular contractor taking into consideration the competitive price offered by him, the Court observed:

"9. The award of a contract, whether it is by a private party or by a public body

or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount importance are commercial considerations. These would be: (1) The price at which the other side is willing to do the work; (2) Whether the goods or services offered are of the requisite specifications; (3) Whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial man power or requiring specific skills are to be offered, the financial ability of the tenderer to fulfill the requirements of the job is also important; (4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality; (5) past experience of the tenderer, and whether he has successfully completed similar work earlier; (6) time which will be taken to deliver the goods or services; and often (7) the ability of the tenderer to take follow up action, rectify defects or to give post contract services. Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

10. What are these elements of public interest?

(1) Public money would be expended for the purposes of the contract; (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities; (3) The public would be directly interested in the timely fulfillment of the contract so that the services become available to the public expeditiously; (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer..."

"12. When a petition is filed as a public interest litigation challenging the award of a contract by the State or any public body to a particular tenderer, the court must satisfy itself that party which has brought the litigation is litigating bona fide for public good. The public interest litigation should not be merely a cloak for attaining private ends of a third party or of the party bringing the petition. The court can examine the previous record of public service rendered by the organisation bringing public interest litigation..."

[Emphasis Supplied]

15. Since the decision of the learned Single Judge of the Kerala High Court has propelled the reasoning of a Division Bench of this Court in Writ Petition No. 3196 of 2013 and the decision of the Division Bench of the Punjab and Haryana High Court, it becomes necessary for us to analyze the reasoning of the learned Single Judge of the Kerala High Court.

16. As noted above, the learned Single Judge of the Kerala High Court has, in turn, sustained momentum to his decision with reference to the observations of

the Supreme Court in paragraphs 36 and 38 of the decision in Reliance Energy Ltd. & Anr. case (Supra). Thus, this, compels us to take another step backward to analyze the ratio of the law in Reliance Energy Ltd. & Anr. case (Supra).

17. A perusal of the report of the said decision reveals that the State of Maharashtra through Maharashtra State Road Development Corporation Ltd. ("MSRDC") had floated a global tender and invited bids for completing Mumbai Trans Harbour Link between Mumbai and Navi Mumbai on Build-Operate-Transfer basis. Reliance Energy Limited and Hyundai Engineering and Construction Company Ltd. formed a consortium - REL/HDEC with a view to jointly bid for the said project.

18. Under the Pre-Qualification document an international firm of experts were appointed as Consultant by the MSRDC and it was upon their active aid/advice that the MSRDC convened the Tender process and evaluated the bids. Relevant would it be to note that the bidders were required to submit financial statements of three financial years subject to the condition that the latest ought not to be earlier than the financial year ending 31st December 2002. Further, as mandated under Clause 7.2.2 of the Pre-Qualification document the consortium was also required to evidence a net cash profit of Rs. 200 crores. The said consortium was excluded from the second stage of bidding on the ground that it failed to meet the criteria envisaged under Clause 7.2.2.

19. The decision of MSRDC to disqualify the consortium was subject matter of challenge before the Court. It was contended that the decision of the MSRDC was arbitrary and unjustified inasmuch as the Pre-Qualification document failed to specify any Accounting Standard (AS). In view thereof, it was urged that it would not be open to MSRDC to disqualify the consortium by applying AS 26 and disregarding the alternate internationally acceptable Accounting Standard-GAPP that had been employed by the consortium.

20. In wake of the factual conspectus as highlighted by us herein above, the Apex Court observed that a meaningful reading of Article 14 of the Constitution in conjunction with Article 21 led to the conclusion that the right to life would enwomb within its fold the right to "opportunity". Underscoring the importance of these provisions of the Constitution, reference was made by Their Lordships to a decision of nine Judges reported as (2007) 2 SCC 1 I.R Coelho v. State of T.N wherein it had been inter alia observed that Article 14 and Article 21 lay at the heart of the chapter on Fundamental Rights.

21. The Court proceeded further to observe that the doctrine of "level playing field" as embodied under Article 19(1)(g) was liable to be invoked in such cases, however subject to the caveat that it would bow to over-arching considerations of public interest. The Court emphasised the significance of the principle of "level playing field" by noting that in the era of globalisation it engendered fair competition amongst equally placed competitors to subserve the larger public good. It was clarified that Article 14 would also apply to the policies of the

government in contractual matters and if the decisions in such realm fall foul of the anvils of reasonableness, such decisions are liable to be declared as unconstitutional.

22. Significantly, the Court observed that when tenders are invited, the terms and conditions must indicate with legal certainty the norms and benchmarks required to be scrupulously adhered to. Such certainty was described as an important concomitant of the rule of law. Conversely, if vagueness or subjectivity creeps in such norms it would result in the vice of invidious discrimination and be in teeth with the doctrine of "level playing field". It would be pertinent to highlight that the Court further held that such norms, whether they be legal norms or accounting norms, must be clear and unambiguous, capable of being properly understood by the decision-maker and the bidders in the same sense.

23. Adverting to the facts of the case the Apex Court observed that the accounting methods-"Reconciliation Method" employed by the Accountants of the consortium yielded the same result and only differed in the manner of presentation vis-à-vis the methodology adopted by the Consultants of MSRDC. The Court held that no meaningful reason was ascribed by the said Consultants for rejecting the course chartered by the Accountants of the consortium. In view thereof, the Court was pleased to set aside the decision of MSRDC to disqualify the consortium from participating further in the tender process.

24. A keen analysis of the said decision would evince that the observations of the Apex Court with regard to the applicability of the doctrine of "level playing field" emerge in context of the fact that the Court had lamented that the norms specified in a tender must be expressed with precise certainty so as to obviate any scope of misunderstanding. The Court had observed that the Pre-Qualification document conspicuously omitted to prescribe any particular Accounting Standard which was expected to be adhered to by the bidders. Such uncertainty in the norms comprised in the tender document itself was solely attributable to the instrumentality of the State and had the effect on impinging upon the principle of "level playing field".

25. Thus, the concept of a level playing field evolved by the Supreme Court has obviously been misread by the learned Single Judge of the Kerala High Court and the Division Bench of the Punjab and Haryana High Court to mean that for electrical works only registered electrical contractors can bid and as a result a composite tender would violate the principle of a level playing field. The Supreme Court used the expression in the context of norms in a tender being expressed with precision so that a player would not be surprised by a ball suddenly shooting or deviating on account of the pitch not being levelled.

26. This misreading of the judgment of the Supreme Court has resulted in the conclusion being drawn and since the premise of the two decisions i.e. of the learned Single Judge of the Kerala High Court and the Division Bench of the Punjab & Haryana High Court are flawed, the conclusions reached suffer from the

taint.

27. With reference to the law noted by us herein above concerning judicial scrutiny of a tender the position would be that since the basic requirement of Article 14 is fairness in action by the State, the norms specified in a tender would be within the domain of the executive and unless it is shown that a norm is malacious and intended to confer a benefit to an individual it would be treated as a valid norm.

28. The validity of a norm could be tested on the principle of a criteria having a reasonable nexus with the objects sought to be achieved. The object of a tender is to obtain the most competitive bid. The learned Single Judge of the Kerala High Court has held that a composite tender for civil and electrical works would have the danger of non-competitiveness qua the electrical works for the reason the civil contractor would be sub-contracting the work to the electrical contractor and the prospect of civil contractors getting monopoly in the field would be writ large. As per the learned Single Judge after monopolising the business the civil contractors at their whims and fancies would join the electrical contractors.

29. The reasoning of the learned Single Judge is flawed because it is theoritical and overlooks the realities of life. Law of life is experienced and not logic. In a competitive world where the civil contractor would have to get executed the electrical works through a licenced electrical contractor, all bidders would from the business point of view consult electrical contractors for the price to be quoted concerning the electrical works and since each would know that the others are doing so and they have to be competitive, the rates quoted are bound to be competitive and the question of any monopoly resulting does not arise. The observations of the learned Single Judge concerning level playing field have already been dealt with by us hereinabove and thus, we conclude that for building works of over Rs. 1 crore it is permissible to call for a composite tender because execution of electrical works are intertwined with the execution of the civil works. Before a roof is cast the iron rods are bound over which the concrete is poured. Before pouring the concrete the conduits are laid. The boxes are affixed from which fans and hanging lights would ultimately be affixed. Similarly, after the brick work is completed to erect a wall, channels are cut to affix the conduits and the boxes for the switches and thereafter plastering work is done. In large works it becomes a headache for the owners of the work to coordinate between the civil contractor and the electrical contractor. Thus, there is reasonableness in the decision of the owner to have the works executed through a single contractor responsible to the owner and answerable for the works, be it civil or be it electrical.

30. We answer the reference by holding that the Government Circular and Resolution are not ultra vires the Constitution of India and overrule the Division Bench Judgment of the Aurangabad Bench of this Court.

31. The file be placed before the appropriate Bench.