

(2016) 01 RAJ CK 0027
In the Rajasthan High Court
Case No : Civil Writ Petition No. 16998/2015

G.S. and Company

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 21-01-2016

Acts Referred:

Constitution of India, 1950 — Article 14, Article 19(1)(g), Article 21, Article 226

Citation : (2016) 01 RAJ CK 0027

Hon'ble Judges : Bela M. Trivedi, J.

Bench : Single Bench

Advocate : Sameer Jain, for the Appellant; Rajdeep Rastogi, Addl. Solicitor General and Ashish Kumar, for the Respondent

Final Decision : Dismissed

Judgement

Bela M. Trivedi, J.—1. The petition has been filed by the petitioner under Article 226 of the Constitution of India, seeking the following prayer:--

"In view of the facts and circumstances of the case, it is most respectfully prayed that this Hon''ble Court may be pleased to:

(a) issue an appropriate writ, order or direction to set aside, quash the RFP dated 29.10.2015(Annex-5) issued by the Respondent No. 1 to the extent of Clause-15(a) Eligibility condition whereby experience with State Government/ PSU is not considered and therefore making the same as illegal, unconstitutional and opposed to public policy;

(b) pass any such other order or orders as may be deemed fit by this Hon''ble Court in the facts and circumstances of the case in the favour of petitioner."

2. As per the case of the petitioner, the petitioner is a registered manpower supply agency and human resource contractor having vast and varied experience, and is also possessing the requisite statutory licenses. The respondent No. 1 in January, 2015 had issued a Request for Proposal (RFT) for

outsourcing of 315 conservancy Safai Walas at the Station Head Quarters in Jaipur. The petitioner having qualified itself in the said tender, the work order was allotted to it on 29/4/2015 for executing the said work for the period from 1/4/2015 to 31/5/2016 as per the RFP annexed at Annexure-6. It appears that thereafter some dispute having arisen between the petitioner and the respondent No. 1, the respondent No. 1 had stopped making payment to the petitioner and therefore the petitioner had given a legal notice, seeking arbitration in terms of the agreement. Thereafter certain correspondence ensued between the parties but the dispute could not be resolved. The respondent No. 1 thereafter floated fresh tender for RFP (Annexure-5) for the period from 1/12/2015 to 31/3/2016, in which the following terms and conditions was incorporated in the eligibility criteria:--

"15. Eligibility Criteria.

(a) The contractor shall have at least three years experience in any Central Govt. Organisation or Formations or Units of Army/Navy/Air Force. (Experience with State Govt/PSUs/private organizations will not be considered). The details of the monetary value, client proof of satisfactory completion etc are to be submitted.

(b) The tenderer should have had a minimum business turnover of not less than Rs. One Crore during each of the last three financial years in execution of services of similar nature. Documentary evidence of adequate financial standing, audited profit and loss accounts and balance sheet, annual turnover of Rs. One Crore in the each of last three financial years are to be submitted alongwith tender.

(c) The tenderer cannot employ any sub-contractor for executing any part of the work assigned in this contract.

(d) The buyer reserves all right to reject/accept any/all tender(s) without assigning any reason."

3. As per the case of the petitioner, the said condition of eligibility criteria was inserted intentionally and malafidely to debar the petitioner from participating in the said tender process, and to favour the respondent No. 4 and hence the petitioner has filed the petition, challenging the said condition 15(a) to the extent of excluding the experience with State Government/PSU from the eligibility criteria. The petition has been resisted by the respondent Nos. 1 to 3 by filing the reply denying the allegations made therein and further contending inter alia that the petitioner having committed financial irregularities, audit objections were raised, and that the challans submitted by the petitioner were also found at variance with the names with which the agreement was signed, for which enquiry was constituted to investigate the issue. It has further been contended that since the petitioner had stopped the work of conservancy services, the respondents had floated the tender incorporating the terms and conditions, which were approved by the duly constituted Procurement Committee of the respondents. According to the respondents, inclusion/exclusion of certain terms and conditions

in the tender or RFP is an ongoing evolutionary process, and there was no arbitrariness or malafide in inserting the condition No. 15(a) as alleged by the petitioner.

4. It is sought to be submitted by the learned counsel Mr. Sameer Jain for the petitioner that the petitioner was working with the respondents, since last about two years, however certain disputes having arisen, they had stopped making payment and therefore the petitioner had stopped the conservancy services, for which dispute the petitioner had already made demand for the appointment of Arbitrator. Assailing the condition No. 15(a) of the RFP in question, it has been vehemently submitted by Mr. Jain that such a condition is not only arbitrary and discriminatory, but has been inserted only with a view to debar the petitioner from participating in the tender process and to favour the respondent No. 4. Placing heavy reliance on the decision of Supreme Court in case of *Tata Cellular v. Union of India*, , (1994) 6 Supreme Court Cases 651, he submitted that though the scope of judicial review is very limited, the Court can always examine the facts of each case to see whether the decision of the respondents is free from arbitrariness, not affected by bias or actuated by malafides. He has also relied upon the judgment of Supreme Court in case of *Reliance Energy Limited v. Maharashtra State Road Development Corpn Ltd. & Ors.* , (2007) (8) SCC 1 to submit that the standards applied by the Courts in judicial review must be justified by constitutional principles which govern the proper exercise of public power in a democracy, and that the petitioner is entitled to invoke the doctrine of "level playing field" as in the instant case the respondents, by inserting the condition in question, have acted in arbitrary manner resulting into unequal and discriminatory treatment.

5. However, the learned counsel Mr. Rajdeep Rastogi for the respondents placing reliance upon the same judgment of Supreme Court in case of *Tata Cellular* (supra) submitted that the scope of judicial review being very limited in contractual matters, the Court cannot sit in appeal over the decision of the respondents authorities and say whether better condition should have been incorporated in place of the condition in question. Mr. Rastogi has also relied upon the decisions of Supreme Court in case of *Directorate of Education v. Educomp Datamatics Ltd.*, , (2004) 4 SCC 19, in case of *Monarch Infrastructure (P) Ltd. v. Commissioner Ulhasnagar Muni. Corp.* , (2000) 5 SCC 287, in case of *Sanjay Kumar Shukla v. Bharat Petroleum Corporation Limited and Ors.* , 2014(3) SCC 493 and in case of *Air India Ltd. v. Cochin International Airport Ltd. & Ors.*, (2000) 2 SCC 617 to submit that the State can choose its own terms of invitation to tender and such terms are not open to judicial scrutiny. Mr. Rastogi taking the Court to the prayer clause contained in the petition, submitted that the prayer is of academic in nature, inasmuch as the petitioner has challenged only the part of the condition, which deals with the exclusion of experience with the State Government/PSU, but otherwise also the petitioner does not fulfill the condition of three years experience. Mr. Rastogi has relied upon *Bharat Amratlal Kothari & Anr. v. Dosukhan Samadkhan Sindhi & Ors.* , (2010) 1 SCC 234 to

submit that the High Court exercising jurisdiction under Article 226 can not grant the prayer which is not asked for by the petitioner. Lastly, he submitted that the condition in question was required to be incorporated considering the sensitive and essential nature of services rendered by the respondents, and any adverse order passed by the Court shall affect the working of the respondents.

6. Having heard the learned counsels for the parties at length, and having gone through the documents on record, it appears that the petitioner has challenged the Clause 15(a) of the RFP (Annex.5) to the extent of eligibility criteria, whereby the experience with State Government/PSU has been excluded. Before examining the validity of the said condition, it would be appropriate to deal with the scope of judicial review in contractual matters. In the landmark case of *Tata Cellular(supra)*, it has been elaborately discussed as to what is the scope and ambit of judicial review in contractual matters. The Supreme Court, after discussing various decisions, has deduced the following principles in para 94 which read 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."

7. In case of *Michigan Rubber (India) Ltd. v. State of Karnataka*, , (2012) 8 SCC 216, the Supreme Court after a comprehensive review has summed up the principles of law applicable to the process for judicial review, 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 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 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 fundamental right to carry on business with the Government".

8. It would be also relevant to reproduce the observations made by Supreme Court in respect of doctrine of "level playing field" in case of Reliance Energy Ltd. v. Maharashtra State Road Development Corpn Ltd. (supra), relied upon by Mr. Jain for the petitioner. It has been observed in para 36 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 freestanding 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 Tamil Nadu, Article 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 globalization, 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 liberalization 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 results 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 "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."

9. In view of the aforesaid legal position, it is clear that the scope of judicial review in the matters relating to award of contract by the State or its instrumentality is very limited. The terms of invitation to tender is not open to judicial scrutiny. 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 well settled that in the matter of formulating the conditions of a tender document and awarding the contract, the greater latitude is required to be conceded to the State Authorities and unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, the interference of the Court is unwarranted. It is also settled legal position that when Article 19(1)(g) confers fundamental right to carry on business, the citizen is entitled to invoke the doctrine of "level playing field" which provides space within which equally placed competitors are allowed to bid so as to serve the larger public interest.

10. So far as the facts of the present case are concerned, apart from the fact that the petitioner has challenged the condition No. 15(a) only to the extent of eligibility criteria which excludes the experience with the PSUs and State Organisations, the petitioner has failed to specifically aver in the petition as to how it would qualify if that part of the said condition was removed. Though it is true that no such condition was incorporated by the respondents in the RFP of earlier years, as rightly stated by the respondents in their reply, the exclusion and inclusion of the terms and conditions in the tender or RFP is a part of evolutionary process. The insertion of the new condition at the recommendation of high level Committee i.e. Procurement Committee consisting of the officers of Major General level of the respondents in accordance with para 1(a) of Rule 160 of General Finance Rules, 2005 (Annexure-R/7) could not be said to be arbitrary or malafide in absence of any material on record. It is stated by the respondents

in their reply that various defence organisations including the Army Service Corporations, Military Engineering Services etc. select the bidders by incorporating the specific qualifying condition in their bidding document and such task is the prerogative of the Procurement Committee. The Court also finds substance in the submission made by the learned counsel for the respondents that the insertion of the condition i.e. possessing work experience with Central Government/Army, Navy or Air Force was necessary for restricting the bidders considering the nature of work and the place of work where the prospective bidders were expected to supply their services. The decision of the respondents to incorporate the condition No. 15(a) in the RFP being in the realm of contract, it is not open to judicial scrutiny as per the aforestated legal position settled by the Supreme Court. The learned counsel for the petitioner has also failed to point out as to what malafides were intended by the respondents in inserting the said condition. The Court therefore is of the opinion that the said condition could not be said to be arbitrary, illegal or malafide as alleged by the petitioner.

11. In that view of the matter, the petition being devoid of merits is dismissed. By this order, the stay application and other pending application, if any also stand dismissed.