

(2010) 12 MAD CK 0159

In the Madras High Court

Case No : Writ Petition No. 25992 of 2010 and M.P. No's. 1 and 2 of 2010

Kits and Concepts (India) Private Limited

APPELLANT

Vs

The Director of School Education and Sri Parasakthi
Educational Needs

RESPONDENT

Date of Decision : 10-12-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2010) 12 MAD CK 0159

Hon'ble Judges : M. Jaichandren, J

Bench : Single Bench

Advocate : V. Raghavachari, for the Appellant; Dakshayani Reddy, Additional Government Pleader, for the Respondent

Final Decision : Dismissed

Judgement

M. Jaichandren, J.—Heard the learned Counsel appearing for the Petitioner and the learned Additional Government Pleader appearing for the Respondents.

2. It has been stated that the Petitioner company is engaged in the setting up of mathematics laboratories and it is a pioneer in the said subject. It had established many such laboratories in the government schools. It had also been imparting training to the teachers on the use of the mathematics laboratories through the resource persons from the Ramanujan Museum and the Mathematics Education Centre, Chennai. It had also conducted many workshops and lectures in all the districts in the State of Tamilnadu.

3. It has also been stated that a tender was called for by the first Respondent, for the year 2008-2009 in which the Petitioner company had participated. The Petitioner and the second Respondent were found to be qualified and they were in the zone of consideration. However, it was found that the tender submitted by the second Respondent was contrary to the tender conditions. The second Respondent was not qualified, as per the tender condition, which had stated that

the bidders should have expertise in making high precision components and that they must have supplied the mathematics laboratory articles, satisfactorily, to a minimum of 100 schools, during any one year of the previous three years or to any recognized State or Central Government Educational institutions, including, Colleges and Universities. Even though the second Respondent had not satisfied the said condition, its bid had been considered due to extraneous reasons.

4. It had also been stated that the second Respondent had no expertise in the field, nor it had imparted training to teachers in the use of mathematics laboratory items. Further, on 28.1.2009, the Petitioner had displayed its materials for inspection. While the Petitioner had displayed all the necessary materials, the second Respondent had displayed only 27 items, out of the 78 items.

5. It had also been stated that in the tender called for by the first Respondent, for the year 2009-2010, there were only two bidders. However, the position of the second Respondent had remained unchanged. Even though the second Respondent was not qualified to participate in the bidding process, it was permitted to do so. Further, the materials displayed by the second Respondent were not approved by the expert committee, as they do not satisfy the quality and the other specifications prescribed. However, the second Respondent had been given one month's time to rectify the defects and to display its projects for inspection, on 8.2.2010, even though the first Respondent had no authority to do so. Once again, the first Respondent had called for tender, for the year 2010-2011. A new condition had been introduced in the tender notice stating that the annual turnover of the participant should be Rs. 200 lakhs during any one of the past three years, namely, 2007-2008, 2008-2009 and 2009-2010. It was intended only for the sake of eliminating the other participants, in order to favor the second Respondent.

6. The learned Counsel appearing on behalf of the Petitioner had submitted that no condition can be fixed in the tender notification that has no nexus or object to the selection process. The fixation of the minimum turnover for participating in the tender process for the object of imparting the education in colleges, is unreasonable. Such a condition had been introduced only for the sake of preventing the other participants from taking part in the tender process and in order to favor the second Respondent. Such a qualification fixed by the first Respondent should have relevance and it should relate to the products that are likely to be considered. The tender condition fixed by the first Respondent is arbitrary, as it is violative of the provisions of the Competition Act, 2002.

7. The learned Counsel had also submitted that Clauses-2 and 3 of the tender conditions should be read together. In such a case, the Petitioner could also be qualified to participate in the tender. It had also been submitted that the quality of the products of the Petitioner company is far better than the quality of the products of the second Respondent. Further, the Petitioner company is more experienced in setting up mathematics laboratories and in imparting the

necessary education to the teachers concerned. However, the second Respondent does not have such qualifications. Therefore, the tender conditions found in the tender notification of the first Respondent, especially, the condition relating to the turn over of the tenderers, cannot be held to be valid. In such circumstances, the Petitioner has preferred the present writ petition before this Court, under Article 226 of the Constitution of India.

8. The learned Counsel appearing on behalf of the first Respondent had submitted that the tender condition found in the tender notification issued by the first Respondent, dated 4.11.2010, had been incorporated only with the view to select the right tenderer having the experience and the financial stability to meet the requirements of the first Respondent. Both the second and the third conditions of the tender notice, dated 4.11.2010, are to be read, independently. The allegation of mala fides against the first Respondent, by the Petitioner, is baseless and contrary to the facts of the case. The tender condition that the Petitioner should have a turnover of at least double the purchase price is based on the policy decision. Further, the Petitioner, who had participated in the tender process, by submitting his tender cannot question the impugned condition in the tender notification, dated 4.11.2010.

9. The learned Counsel appearing on behalf of the first Respondent had also submitted that the allegations made on behalf of the Petitioner company are false and baseless. It is not open to the Petitioner to question the tender conditions prescribed in the tender notice, dated 4.11.2010. Further, this Court does not interfere in such matters by invoking its writ jurisdiction, under Article 226 of the Constitution of India.

10. The learned Counsel had relied on the following decisions in support of her contentions.

10.1. In Association of Registration Plates Vs. Union of India (UOI) and Others, , it has been held as follows:

Article 14 of the Constitution prohibits the government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract. At the same time, no person can claim a fundamental right to carry on business with the government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated against, to the detriment of public interest. Undisputedly, the legal position which has been firmly established from various decisions of the Supreme Court is that government contracts are highly valuable assets and the court should be prepared to enforce standards of fairness on government in its dealings with tenderers and contractors.

In the matter of formulating conditions of a tender document and awarding a contract of the nature of ensuring supply of high security registration plates, greater latitude is required to be conceded to the State authorities. 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. Unless the action of tendering Authority is found to be malicious and misuse of its statutory powers, tender conditions are unassailable.

10.2. In *Jagdish Mandal v. State of Orissa* 2007 (14) SCC 517, it has been held as follows:

When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. 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. Such interferences, either interim or final, may hold up public works for years, or delay relief and succor to thousands and millions and may increase the project cost manifold.

Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

i) Whether the process adopted or decision made by the authority is mala fide or intended to favor 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.

If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing 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.

10.3. In *Shimnit Utsch India Pvt. Ltd. and Another Vs. West Bengal Transport Infrastructure Development Corporation Ltd. and Others*, , it has been held as follows:

Government policy can be changed with changing circumstances and only on ground of change, a policy is not vitiated. Government has discretion to adopt a

different policy, alter or change its policy to serve public interest and make it more effective. But change in policy must be in conformity with Wednesbury reasonableness and free from arbitrariness, irrationality, bias and malice.

State or its tendering authority is bound to give effect to essential conditions of eligibility stated in a tender document and not entitled to waive such conditions. However, this does not take away its administrative discretion to cancel entire tender process in public interest provided such action is not actuated with ulterior motive, arbitrariness, irrationality or is in violation of some statutory provisions.

10.4. In *Sri Amman Associates Vs. State of Tamil Nadu*, it has been held as follows:

It is not for the Courts to interfere with the terms of tender notice unless it was shown that it was either arbitrary or discriminatory or actuated by malice.

11. In view of the averments made on behalf of the Petitioner, as well as the first Respondent and in view of the records available and on considering the decisions cited supra, this Court is of the considered view that the Petitioner has not shown sufficient cause or reason to grant the reliefs, as prayed for by the Petitioner, in the present writ petition. The Petitioner has not been in a position to show that the tender conditions are arbitrary, illegal and void, as alleged by the Petitioner.

12. The Petitioner has not been in a position to substantiate its claim that the first Respondent had acted in a mala fide manner in coming to the conclusion that the second Respondent was qualified to take part in the tender process. When it is a policy decision, according to which the tenderer should have a turnover of at least double the value of the tender items, this Court would not be inclined to interfere in such a decision.

13. Further, on a perusal of the records available before this Court, it is found that the second Respondent had been qualified to participate in the tender process, as it had satisfied the necessary conditions prescribed in the tender notice, dated 4.11.2010, issued by the first Respondent. The Petitioner has not been in a position to substantiate its claim that the second and the third conditions of the tender notice, dated 4.11.2010, are to be read together. Further, having participated in the tender process, it would not be open to the Petitioner to challenge the same. As such, the writ petition filed by the Petitioner is devoid of merits and therefore, it is liable to be dismissed. Hence, it stands dismissed. No costs. Consequently, connected miscellaneous petitions are closed.