
(2020) 03 CAL CK 0002

In the Calcutta High Court

Case No : Writ Petitions (WP) No. 10, 11 Of 2020

Kumarbhai Manharlal Desai

APPELLANT

Vs

Union Of India And Another

RESPONDENT

Date of Decision : 04-03-2020

Acts Referred:

Constitution Of India, 1950 — Article 19(1)(g), 19(1)(6), 226

Citation : (2020) 03 CAL CK 0002

Hon'ble Judges : Sabyasachi Bhattacharyya, J

Bench : Single Bench

Advocate : B. Hasukar, C. Sinha, D. Banerjee, Samrat Sen, R.N. Ghose, S. Santal

Final Decision : Dismissed

Judgement

Sabyasachi Bhattacharyya, J

The Court:-

1. The writ petitions have been filed by the petitioner challenging two separate Notices Inviting Tender (NIT) bearing No.

IRCON/2053/TN/SHM/Lift/2019/72 in W.P. No.10 of 2020 and No. IRCON/2052/TN/SRC/Lift/2019/73 in W.P. No.11 of 2020 respectively.

2. By virtue of the said notices, published on December 17, 2019, the IRCON, that is, the respondent no.2, invited bids pertaining to installation of lifts

and escalators at Shalimar (W.P. No. 10 of 2020) and Santragachi (W.P. No. 11 of 2020) railway stations and buildings respectively.

3. The primary argument of the petitioner is that the said tenders were floated to favour only a certain manufacturer and/or a group of manufacturers

and to outcast all other eligible bidders.

4. The tenders, as initially published, contained a condition which restricted those

to only a particular list of makes/brands. Upon the petitioner making a representation on December 18, 2020, challenging the insertion of specific brands in the tenders, the respondent no. 2 published a Corrigendum on January 4, 2020 which deleted the stipulation as to particular brands but, according to the petitioner, introduced further criteria which ensured that only the deleted brands could qualify.

5. Upon the writ petitions being filed challenging such clauses, in particular clauses 7 and 8, it transpired during hearing that the clause 1 also contained restrictions that could be interpreted to apply only to domestic contractors and not international ones, thereby denying a level playing field to the domestic contractors.

6. During pendency of the writ petitions, as per submissions of the learned senior counsel of the respondent no. 2 in court, the expression “domestic” was removed, thereby obviating the applicability of the said restriction only to domestic contractors but made the same universally applicable to all contractors participating in the tender processes.

7. The primary contention of the petitioner, while challenging clauses 7 and 8 of the respective tenders, is that according to the said clauses, the bidder should have manufactured, supplied and commissioned successfully at least 50 escalators of a particular type in certain particular places such as railway/metro rail/airports/stadiums/public road/monorail/high speed rail/Mass Rapid Transport Systems etc., of the government during the last seven years (ending last day of the month previous to the one in which the tenders were invited). Clause 8 applied a similar restriction regarding having commissioned at least 500 lifts in similar places as mentioned in clause 7.

8. Learned counsel for the petitioner argues that since the participation was restricted to the requisite number of escalators and elevators being installed mostly in railways and similar government buildings, the said tenders automatically excluded numerous other contractors, who might otherwise have experience in installing the requisite or more number of escalators and elevators in other public places which have a large number of footfalls and take heavy loads, such as big shopping malls, other government buildings etc.

9. It is submitted on behalf of the petitioner that the respondent no. 2 has adopted an approach by which it will be ensured that only the brands which

were deleted would be able to qualify. Thus, what could not be directly achieved by specifying the brands, was sought to be achieved indirectly by

making the clauses restrictive to such an extent that only the previously named brands would be able to participate.

10. Although the petitioner otherwise meets the experience requirements both as per the original tender documents as well as the last Corrigendum,

that is, the petitioner has the requisite numbers and types of installations, due to the arbitrary restriction of the places of installation, the petitioner did

not have any opportunity to participate in the tenders. Such insistence, if allowed to continue, would perpetuate a situation where only the presently

protected brands would continue to rule the sphere of public solicitation processes and would monopolize the business in favour of those specific

brands or their cartels. For the previous few years, it is argued, only those specific brands which were initially mentioned, and later on deleted, had the

opportunity to participate in the construction of such installations in the sphere of railway stations and allied buildings and as such, the restriction

regarding the fresh tenders in respect of the similar structures would unreasonably preclude others, having similar or more experience in installing

similar products in other buildings having similar workload, from participating in the impugned tenders.

11. Learned counsel for the petitioner argues that the conditions insisted upon by the respondent no.2 are not merely strict but traverse to the zone of

being restrictive and are hit by the "Make in India Policy" adopted by the Central Government, in particular clause 10(b) thereof, as well as the

resolution of the Railway Board itself, which is supposed to encourage domestic companies.

12. The places of installations specified in the impugned tenders have no particular significance, since experience in manufacturing similar installations

for buildings bearing similar workloads for the machines to be installed, could have been sufficient to ensure the superior quality of the products to be

installed by the contractors.

13. The respondents, it is argued by the petitioner, have altogether failed to demonstrate any reason underlying the sequence of events which render it

necessary to incorporate such specific conditions in the tender documents as regards the place of previous installations, to suit the purpose of the

brands which were deleted, even after making the cosmetic change of deleting the brands from the tender documents.

14. In this context, learned counsel for the petitioner relies on the decision reported at (2012) 8 SCC 216 [Michigan Rubber (India) Limited vs. State of Karnataka and others], wherein an exception was carved out by the Supreme Court to the general principle that there should be judicial restraint in interfering in contractual and tender matters. It was held therein that, when it is apparent that administrative decisions have been taken or the authority has framed the tenders actuated by buyers and ulterior motives, such situations call for inference by the court in judicial review.

15. In the present case, the scenario is the same as befits such exception, since the changes introduced were restrictive to particular places regarding which only a few chosen brands had previous experience.

16. It is further argued that the tender processes were also violative of the PWD guidelines.

17. Learned counsel for the petitioner next relies on an unreported judgment dated August 16, 2018, passed in W.P. No. 12880 of 2018 [Omega Elevators vs. National Health Mission], by a division bench of the Madhya Pradesh High Court. In the said case, the National Health Mission introduced a clause of specific manufacturers indirectly by deleting such specific condition in the NIT but by introducing a clause that the make of the lifts shall be as approved by PWD (PIU). As such, the conditions were found to favour certain specific manufacturers or the distributors of such manufacturers alone and, as such, were held to be arbitrary, since the same did not provide a level playing field to all the manufacturers, and were consequentially set aside. The respondents therein were directed to invite fresh bids after removing the manufacturer specific conditions in the NIT or relying upon the manufacturer specific conditions as approved by the PWD.

18. In reply, learned senior counsel appearing for the respondent no.2, the primary contesting respondent, argues that, to demonstrate that the tender is violative on the ground that clauses 7 and 8 of Corrigendum III result in unreasonable exclusion of local suppliers beyond what is essential for ensuring quality or creditworthiness of the supplier, it was imperative for the writ petitioner to demonstrate that the eligibility criteria prescribed in such clauses are per se perverse, palpably absurd, arbitrary, unreasonable and mala fide. The

number of elevators and escalators required by the bidders to have successfully manufactured over the last seven years was absolutely necessary for the purpose of the project for which the tenders were floated. The institutions specified in clauses 7 and 8 pertain squarely to the area of expertise consistent with the project for which such tenders were floated. Since the Santragachi and Shalimar station buildings and platforms under the Station Development Project of the South Eastern Railway were institutions of public use, where there would be heavy footfall with heavy loads being carried for long hours on continuous basis day after day, involving both public safety and longevity of the installed equipment, such conditions are of the essence and it was mandatorily required that prior experience in installing similar products in similar institutions was ensured for the project-in-question.

19. It is next submitted by learned senior counsel for the respondent no.2 that the impugned clauses, being nos. 7 and 8 in the impugned tenders, did not restrict the past experience only to railway buildings but covered railways, metro railways, airports, stadiums, public roads, monorails, high speed rail and other Mass Rapid Transport Systems, therefore, not being restrictive in nature but being in consonance with and necessary for the construction of the project-in-question.

20. It is further argued that the PWD guidelines are of no relevance to the railways and cannot be a basis for any argument on that score.

21. It is argued by the respondent no.2 that since the respondent no.2, in the subject tenders, is not seeking bidders with past experience of having installed lifts/escalators in only railway stations but has expanded the types of institutions where the bidders could demonstrate past experience to several other government institutions where the lifts and escalators are meant for public use with heavy footfall and heavy loads for long hours on continuous basis, day after day. Airports, stadiums and other Mass Rapid Transport Systems were also included apart from institutions relating to railways and as such, the argument, that the eligibility criteria would result in the perpetuation of a class of bidders who alone would qualify for such tenders by virtue of having worked for the railways for the past few years, is fallacious.

22. The writ petitioner has failed to demonstrate as to how the institutions of public use specified in clauses 7 and 8 of Corrigendum III, where the

bidders must have past experience of having successfully commissioned lifts and escalators, is dissimilar to and incongruous with the institutions where the lifts and escalators are to be installed under the subject tenders. It has not been argued or established that the respondent no.2 seeks past experience in institutions which are totally dissimilar to and have no functional similarity with the institutions where the proposed lifts and escalators are to be installed, thus failing to prove that such criteria are restrictive, perverse, arbitrary or unreasonable.

23. It is next argued by learned senior counsel for the respondent no.2 that, where the writ petitioner seeks to make out a high case that the tender conditions result in unreasonable exclusion of local suppliers, it was imperative to demonstrate that local suppliers cannot and do not match the requirements of clauses 7 and 8 of Corrigendum III to the tenders. The writ petitioner has merely exhorted its own abject incapacity in that regard. The lack of wherewithal of a single domestic manufacturer, namely the writ petitioner, is insufficient and inadequate to sustain such allegation. The writ petitioner must demonstrate, if not prove, that there are no domestic/Indian manufacturers who would satisfy the aforesaid eligibility criteria and that those criteria are so stringent that none else but the five brands which were previously deleted would be able to qualify. Such a case has not been pleaded or demonstrated manifestly at all by the petitioner. In the absence of the eligibility criteria having been demonstrated to be technically superfluous or unnecessary, to ensure the quality or creditworthiness of the supplier, the writ petitions ought to fail.

24. Since no mala fides by way of both malice in fact and malice in law, with particulars thereof, are not pleaded specifically in the writ petitions and/or demonstrated or proved, the challenge to the tender conditions cannot be upheld.

25. Also placing reliance on Michigan Rubber (supra), the respondent no.2 submits that the modern trend points to judicial restraint in administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made, since the court does not have the expertise to correct the administrative decision. If a review of such administrative decision of the present technical nature is permitted, the court would

be substituting its own decision, without the necessary expertise, which itself

may be fallible.

26. Moreover, it is argued that the invitations to tender cannot be opened to judicial scrutiny since those are in the realm of contract.

27. The government must have the freedom of contract and fair play in the joints is a necessary concomitant for an administrative body to function in

an administrative sphere or quasi-administrative sphere. The decision must not only be tested by the application of the â??Wednesbury principleâ??

of reasonableness but also on the anvil of arbitrariness, bias or being actuated by mala fides. Quashing such decisions may impose heavy

administrative burden on the administration and lead to increased expenditure beyond the budget of the government.

28. In this regard, the decision reported at (1994) 6 SCC 651 [Tata Cellular vs. Union of India], has been relied on in paragraph no.11 of Michigan

Rubber (supra).

29. The reasonableness of the restrictions is to be determined in an objective manner and not from the standpoint of interest of the general public or all

of the persons interested, upon whom the restrictions apply. Merely because in a given case it operates harshly, a restriction cannot be labelled as

unreasonable. In determining whether there was any unfairness involved, the nature of right allegedly infringed, the underlying purpose of the

restriction imposed, the extent and urgency of the evil sought to be remedied, the disproportionate nature of the imposition and the prevailing condition

at the relevant time have to enter into the zone of consideration.

30. The reasonableness of legitimate expectation has to be determined with respect to the specific circumstances relating to the trade or

business-in-question. Canalization of a particular business in favour of even a specified individual is reasonable where the interests of the country are

concerned or where the business affects the economy of the country. In this regard, Michigan Rubber (supra) relied on Union of India vs.

International Trading Co. [(2003) 5 SCC 437], in paragraph no.13 of the former.

31. Greater latitude, it is argued, is required to be conceded to State authorities in the matter of formulating conditions of a tender document and

awarding a contract, unless the action of the tendering authority is found to be malicious and a misuse of its statutory powers. Otherwise tender

conditions are unassailable. Selecting one manufacturer through a process of

open competition is not equivalent to creation of any monopoly as contended, in violation of Article 19(1)(g), read with clause (6) of the said Article, of the Constitution of India. It is argued, by referring to the relevant terms of the notices inviting tenders, that there cannot be any grievance, as ventilated by the petitioner, that the selection of a competent contractor for assigning a job of supply of a sophisticated article through an open tender procedure, by creating monopoly. Such grievance is baseless. The question of deliberately excluding the domestic manufacturers and new entrepreneurs in the field is not indicated from the records. It is nowhere evident from the clauses of the impugned NITs that the terms and conditions thereof were tailor-made to promote parties with foreign collaborations and to exclude indigenous manufacturers. As such, judicial interference is uncalled for in the present case. *Michigan Rubber (supra)* relies in paragraph no. 19 thereof, in this regard, on the *Association of Registration Plates vs. Union of India*, reported at (2005) 1 SCC 67.9 It is further argued that if the decision relating to award of contract is bona fide and in public interest, courts will not exercise the power of judicial review to interfere with such process.

32. It is further argued that even if the private interest of the petitioner was shown to be hampered, which is not the present case, the remedy of the petitioner lies in damages in a civil court at best, since the matter pertains to a contractual dispute. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, it is argued, to make mountains out of molehills of some technical/procedural violation or some prejudice particularly to the individual writ petitioner, cannot be a ground of exercising the power of judicial review.

33. Such interference may hold up a public work for years or delay relief and succour to millions of people and may increase the project cost manifold.

Therefore, it is argued, if the process adopted or decision made by the authority is not mala fide or intended to favour someone or is made so arbitrary and irrational that it can be said to be such that no responsible authority, acting reasonably and in accordance with relevant law, could have reached or that the public interest is affected, there should be no interference under Article 226 of the Constitution. *Jagdish Mandal vs. State of Orissa* reported at (2007) 14 SCC 517, relied on in paragraph no.21 of the *Michigan Rubber*

(supra), is also relied upon by the respondent no.2. Association of

Registration Plates (supra) would appear to match the factual matrix of the instant case and similar considerations would lie in the present case as well.

34. It is argued on behalf of the respondent no.2 that the principles laid down in Michigan Rubber (supra) support the contention of the respondent no.2 rather than that of the petitioner.

35. By placing particular reliance on the first clause of Corrigendum III of the respective impugned tenders, learned senior counsel for the respondent no.2 argues that it has been made applicable to all the contractors to meet the criterion of possessing the experience of having successfully completed similar works during the last seven years in India.

36. Moreover, the subsequent clause 1 of essential qualifying criteria [in sub-clause (a), as amended,] specifies that "similar works" means that the manufacturing bidder should have experience in supply, installation, testing and commissioning of lifts and escalators/travellators in India under one or more than one contract and specified the value of the credentials.

37. The very next clause, as revised, stipulates that the firm shall have in India (lifts, escalators/travellators):

- (i) Manufacturing and testing facility,
- (ii) Research and development center and
- (iii) Dedicated training centre to train its personnel.

The lift manufacturing experience has been restricted to not less than ten years in India and manufacturing experience of escalators/travellators to not less than three years in India.

38. The domestic production capacity of the factory in India has been fixed at a minimum of 1200 lifts per annum and 100 escalators/travellators per annum respectively.

39. Clause 6 of the amended NIT provides that the manufacturer of the lifts and escalators/travellators, taken together, should have service centres in Kolkata in addition to 16 numbers in other towns/cities including at least ten numbers in other State Capitals in India.

40. As such, the "Make in India" Policy, as argued by the petitioner, has been sufficiently taken care of exhaustively.

41. Even as per clauses 7 and 8, the previous experience of manufacturing, supplying and commissioning successfully at least 50 numbers of escalators and 500 numbers of lifts of particular types for public use is not restricted only to railway stations but airports, stadiums, public roads etc., which are similar in nature as regards the heavy load to be carried continuously. Such options have been stipulated, thereby not restricting the bidders only to the contractors who had previous experience of seven years in working with the railways alone.
42. Learned senior counsel for respondent no. 2 argues that such clauses, not being arbitrary, ought to be maintained.
43. Upon hearing both sides and considering the cited judgments as well as the written arguments of the parties, it is evident that the established principle of law, as laid down by the Supreme Court, is that generally judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides, and not 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.
44. In the present case, the petitioner has palpably failed to demonstrate that clauses 7 and 8 of Corrigendum III of the tenders-in-dispute were restrictive in any manner, or arbitrary and/or irrational, unreasonable or tainted by bias and mala fides in any manner whatsoever. It has not been pleaded in details and/or established as to any other domestic manufacturer of equivalent qualifications suffering due to the said clauses and/or that there were no domestic manufacturers who would satisfy the criteria as stipulated in the impugned clauses.
45. The clauses-in-dispute are not restrictive at all, but rather necessary and consistent with the purpose for which the projects were going to be commenced, for which the tenders were floated.
46. The respondent no.2 has rightly argued that the said clauses did not restrict manufacturers to past experience only in railway institutions but applied to airports, stadiums and other government institutions of similar nature as well, which were required to bear heavy workloads for continuous hours.
47. Merely because the petitioner, in his personal capacity, does not satisfy the

qualifications sought for in the impugned clauses, it cannot be a ground for interfering with the tender process, since the impugned tenders are otherwise rational and make sense inasmuch as they are proportionate with the heavy workloads which will be imposed on the elevators and escalators going to be installed under the projects covered by the tenders.

48. The argument as regards the impugned clauses being restrictive does not stand good ground at all, since the qualifications stipulated in the said clauses are absolutely in consonance with the purpose of the projects. Merely because certain kinds of government buildings were specified, which were wide enough to be contemplated as sufficient by the authority inviting tender, being of similar nature as the sites for which the projects were intended, the said clauses cannot be struck down as irrational, arbitrary or mala fide, let alone to favour any particular group of companies or other entities.

49. The PWD guidelines, as cited by the petitioner, are entirely irrelevant in the present context, since those have no nexus with the railways or the clauses in dispute.

50. The petitioner miserably failed to discharge his burden of proving that no other domestic company than the five, which were deleted earlier, have the experience to qualify for the impugned tenders.

51. In such view of the matter, there is no justification in interfering with the impugned tenders at all.

52. Accordingly, W.P. No.10 of 2020 and W.P. No.11 of 2020 are dismissed on contest, without any order as to costs.

53. Urgent certified website copies of this order, if applied for, be made available to the parties upon compliance with the requisite formalities.