

(2016) 11 KAR CK 0011

In the Karnataka High Court

Case No : Writ Appeal No. 3529 of 2009 connected with Writ Appeal No. 4057 of 2009 (GM-TEN)

Logwell Forge Limited

APPELLANT

Vs

Bangalore Metro Rail Corporation Limited

RESPONDENT

Date of Decision : 04-11-2016

Acts Referred:

Constitution of India, 1950 — Article 12, Article 14, Article 226, Article 227

Karnataka High Court Act, 1961 — Section 4

Karnataka Transparency in Public Procurements Act, 1999 — Section 2(d), Section 2(d)

Citation : (2017) 2 KantLJ 358

Hon'ble Judges : Jayant Patel and Aravind Kumar, JJ.

Bench : Division Bench

Advocate : Sri. Ashwin Prabhu, Advocate, for the Appellant; Sri. S.S. Naganand, Senior counsel A/W, for the Respondent; Sri. S. Sriranga, Advocate, for the Respondent No. 1; Sri. Rajendra M.S. For M/s Holla & Holla Associates, for the Respondent No. 2; Notice to hel

Final Decision : Dismissed

Judgement

1. These two intra-Court appeals are directed against the order dated 11-9-2009 passed in Writ Petition No. 16187 of 2009 where under the writ petition filed seeking for a writ of mandamus to direct the first respondent therein to suitably amend the restrictive conditions imposed in Clauses 9.8.2.1 and 9.8.2.11 of Tender No. BMR/CC/TRACK 2, issued in February 2009 came to be rejected.

2. The parties are referred to as per their rank in the writ petition and also "writ petitioner" as petitioner and first respondent-Bangalore Metro Rail Corporation Limited as "BMRCL".

3. Facts in brief which has led to filing of these appeals are as under:

BMRCL is a joint venture of Government of Karnataka and Government of India. Said Corporation has been entrusted the responsibility of implementation of Metro Railway Project for the City of Bangalore which is a Mass Transit Rail

System. A tender notification came to be issued by BMRCL, for supply, installation, testing and commissioning of track work and installation of third rail system for Bangalore Metro Rail Project, Phase I. One of the important and critical component used in track work is the "Rail Fastening System", which is a component used in track work. Clause 9.8 of the Tender Document stipulated the user of the fastening system in the tracks and Bangalore Metro Rail was using ballastless tracks. Under the said clause 9.8.2.1 of the tender document, it was stipulated that "the fastening system VOSSLOH - 336 shall be used for all plain lying ballastless tracks". It also specified that depending upon the radius of the tracks, fasteners with different number of anchor boards are to be used. Various specifications were indicated under the said clause. In short, tender condition mandates the bidders to use only VOSSLOH-336 fastening system for the tracks, washing plants and inspection Bay tracks. Said clauses also stipulated the bidders to procure guarantee from suppliers against any manufacturing defects in service for a period of two years from the date of commencement of train service.

4. In the light of the said clauses stipulating use of VOSSLOH-336 fastening system and petitioner claiming to be capable of supplying identical product of fastening system at competitive rates, being aggrieved by the said conditions imposed in the tender document namely, use of VOSSLOH - 336 fastening system, preferred writ petition contending inter alia that it is a public limited company registered under the Companies Act, 1956 and is engaged in the manufacturing of forging components, auto parts, railway parts etc., it was also claimed that it has an association with Swiss Company-Schwiab AG, which manufactures rail fastening systems like Tension Clamp SKL 12 and supplies it to the German Railways (DB) and had formed strategic partnership with companies in Europe for supply of fastening system 336 which is being used by many Metros around the world including Delhi Metro Rail Corporation. Petitioner claim to be capable of supplying identical product of fastening system at competitive rates and contending that fastening system having Tension Clamp SKL 12, which is similar to fastening system as that of VOSSLOH 336 and as such, the imposition of the condition in the tender document specifying only a particular brand to be used is a condition in complete disregard to the provisions of Karnataka Transparency in Public Procurements Act, 1999 (for short "Act") and the Rules framed thereunder (for short "Rules") and against Article 14 of the Constitution of India. It was also contended that said clause has been inserted only with an intention to favour the second respondent and to prevent others from competing as the prime ground amongst other grounds urged.

5. It was also contended that in the clause 9.8.2.1 the BMRCL while inviting tender ought to have incorporated the words "or equivalent" after the words "fastening system VOSSLOH - 336".

6. The averments made in the petition came to be denied by BMRCL by filing detailed statement of objections and also contending inter alia that the provisions

of the Act and the Rules are inapplicable, since BMRCL is not "procurement entity" as defined under Section 2(d) of the Act. It was also contended that the Detailed Project Report (for short, "DPR") specified the project to be used as "VOSSLOH-336" which is the only system approved for the use in Metro Rail Corporation in India and same is time-tested and has been approved by the Railway Board. Hence, sought for dismissal of the writ petition. Second respondent challenged the locus standi of the petitioner on the ground that it is not bidder and the fastening system is one of the product used for integrated work of installation, testing, commissioning of the track record and installation of third range system. It was also contended that said fastening system has been tested by Research Designs and Standards Organisation (RDSO), Lucknow.

7. On the basis of the rival contentions, the learned Single Judge formulated following two points for consideration:

"(a) Whether the first respondent is a "procurement entity" within the definition of Section 2(d) of the Act and whether the provisions of the Act and the Rules are applicable?

(b) Whether the action of the first respondent in imposing the impugned condition in the Tender Document is in violation of Article 14 of the Constitution of India?"

8. After considering the elaborate arguments canvassed by the respective learned Senior Advocates, arrived at a conclusion that the project is funded by Government of India as well as Government of Karnataka and BMRCL is a wholly owned company of Government of Karnataka. It is also held the High Power Committee is constituted under the Chairmanship of the Chief Secretary of Government of Karnataka in order to solve several problems with regard to land acquisition, diversion of utilities, shifting of structures in the project alignment, rehabilitation of project affected persons etc. It was also noticed by the learned Single Judge that other members of the High Power Committee will be the Secretaries of concerned departments of the State Government, Heads of the Civil Bodies and group of Ministers is also set up to take policy decision and review the progress. It was also noticed that the BMRCL has got totally 12 Directors out of whom 5 are appointed by the Government of India and 5 are appointed by the Government of Karnataka and two other functional Directors are appointed by rest of the 10 Directors. In conclusion it was held that the Government of Karnataka though not fully controls the project, but to a substantial extent, it controls and the word "control" used in Section 2(d) of the Act should have to be understood to mean substantial control. As such, it was held that BMRCL is a "procurement entity" falling within the meaning of Section 2(d) of the Act.

9. Insofar as second question is concerned, the learned Single Judge observed on perusal of records that Delhi Metro Rail Corporation (for short "DMRCL") had been entrusted with the planning, design, implementation and operation of Delhi

Metro Project and on successful implementation of the said project, the Government of Karnataka had availed its (DMRCL) expertise for planning, investigation and preparation of a detailed project report for laying Metro lines in Bangalore City and had placed an order with DMRCL and the project report submitted by DMRCL had been accepted in its entirety for being implemented. The said report inter alia dealt with ballastless track on main lines (via ducts/tunnels) and Clause 7.2.3 provided for adopting VOSSLOH - 336 fastening system on both types of ballastless track structures and held that the same are time-tested, approved by the Railway Board after field trials and policy makers had not taken any chance particularly in respect of safety of people at large. In short, it came to be held that the Court cannot substitute its opinion to the experts opinion in the field and as such, rejecting the contention of the petitioner, dismissed the writ petition.

10. The writ petitioner being aggrieved by rejection of the writ petition has filed W.A. No. 3529 of 2009 and BMRCL being aggrieved by the finding recorded by the learned Single Judge that BMRCL is a "procurement entity" has preferred W.A. No. 4057 of 2009. Hence, these two appeals are clubbed and heard together.

11. We have heard Sriyuths Ashwin Prabhu, learned Advocate appearing for writ petitioner, S.S. Naganand, learned Senior Counsel for BMRCL and M.S. Rajendra, learned Advocate appearing for M/s. Holla and Holla for second respondent. Perused the records.

12. It is the contention of Mr. Ashwin Prabhu, learned Advocate appearing for petitioner that imposition of Clause 9.8.2.1 in the tender notice is with an intention to stifle competition from rival fastener manufacturers such as the petitioner. It is contended that in the notice inviting tender in Clause 9.8.2.2 it has been indicated that the fastening system should consist of "insulator between foot of the rail and rib of the base plate for a second layer of insulation" and in the pictorial description amongst 13 items described under the heading "LEGEND", the word used is "insulator" and by relying upon the DPR, BMRCL has contended that the fastening system is referable to VOSSLOH-336 fastening and contends that what is not mentioned in the DPR is indicated in the tender. What is not apparent in this is the fact that VOSSLOH - 336 system which is prescribed by Delhi Metro is a system which is different from the one which is mandated in the tender. In the tender called by BMRCL, components of the system are enclosed along with tender, where they indicate the use of insulators are not found. Whereas, in the tender BMRCL wants additional insulations along with VOSSLOH-336. There is a difference in the system which is approved and tested which they are claiming to be tested and approved from the one which is there in the tender. He would also contend that in the pictorial description of tender document there are 13 components indicated and item No. 10 is specified as "insulator", which is the specification of the system which they are calling for under the tender. Whereas, in the DPR relating to DMRCL there are only 12

components and thereby it would clearly indicate that BMRCL has added one component.

13. The learned Advocate appearing for petitioner submits that learned Single Judge erred in holding that law must take a back seat in public interest and permitted the procurement, whereas, what the Supreme Court has said that in cases of procurement, what is necessary to be done in public interest is a scrupulous compliance with the rules of procurement which in this case has not been followed. He would also submit that VOSSLOH system now has a monopoly. He would contend that the Chennai Metro at that same point of time, have not specified the brand name and have informed that all tenderers, manufacturers of fastening system can submit their fastening system to the Railway Board for approval and they will shortlist the system and thereafter it would be in a position to procure it. However, BMRCL has assumed that there is only one manufacturer for the entire particular system and as such it has indicated the brand name for the particular fastening system which is improper and illegal.

14. He would also submitted that creating monopoly in favour of one supplier or manufacturer is violative of Article 14 of the Constitution of India vis-a-vis the Act and as such, the procurement of the fastening system by BMRCL is vitiated.

In support of his submissions, he relies upon the following judgments:

(1) West Bengal Electricity Board v. Patel Engineering Company Limited and Others(2001)2 SCC 451,

(2) Union of India and Another v. Dinesh Engineering Corporation and Another(2001)8 SCC 491;

(3) Nsoft (India) Services Private Limited, Bangalore v. Bangalore Electricity Supply Company Limited, Bangalore and Others ILR 2008 Kar. 3787.

15. Per contra, Sri S.S. Naganand, learned Senior Counsel appearing on behalf of BMRCL would contend that DMRCL is the one which had experience at that time and no other metro other than Calcutta was having any Metro Rail. Hence, BMRCL had approached Delhi Metro Rail and appointed them as agency for the proposed project which included conducting of survey and also furnishing technical feasibility report. Same was entrusted as a turn key job. He submits that DMRCL is an expert agency and insofar as fastening system, according to Delhi Metro Rail, the fastening system approved by Railway Board was recommended to be used. Since DMRCL had used the VOSSLOH system and same had been approved by the Railway Board by issuance of certificate, BMRCL had followed the specification that was indicated in the report. He would submit that BMRCL had requested for supplying all the installations and had also specified the type and grade of the material should possibly be used and one of them specified was VOSSLOH. No other tenderer had any grievance against this clause at the time of opening of the tender. Since the petitioner seems to be a rival contender insofar as the fastening system is concerned, the present writ

petition has been filed. He would submit BMRCL is procuring a complete rail system based on technical advise and the specification indicated in the tender document is based on the DMRCL report and as such he contends that Section 4(b) of the Act may not strictly apply.

16. He would also submit that the decision is based on the technical input or advise given by an independent technical body who has been appointed not only for this contract but for the entire project. He would contend that until and unless it shocks the judicial conscience of the Court and the challenge in these proceedings being for the use of VOSSLOH-336 fastening system which is based on technical advise, cannot be held as either shocking or illegal. Since there was no other material available to indicate that the fastening system of the petitioner was duly approved by the Railway Board and certificate issued thereunder, BMRCL has gone by the report of DMRCL and as such the order of the learned Single Judge does not call for interference.

17. In reply to the judgment of BESCO's case relied upon by the learned Advocate appearing for petitioner, he would submit that in the said case the Government intended to procure the services of a computer agency for the purpose of education in Government schools and in the notice inviting tender, the name of the company has been specified and thereby rendering it meaningless which is not the factual aspect in the instant case, inasmuch as, one of the component used for fastening system has been specified in the tender in question and as such, it stands on a different footing. He would also submit that other judgment relied upon by learned Advocate appearing for petitioner is inapplicable to the facts of the present case.

18. Having heard the learned Advocates appearing for the parties and on perusal of the records as well as judgment under challenge, we would like to notice at this stage itself that the primary concern of the Court is to see whether there is any infirmity in the decision making process and the judicial review or scrutiny would be limited to that extent. The Courts would not substitute its view to that of the experts. The scope of judicial review would be restricted to the decision making process and not the decision by itself. It has been held by the Hon'ble Apex Court in the case of Tata Cellular v. Union of India AIR 1996 SC 11 as under:

"86. 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 justiciable and the need to remedy any unfairness. Such an unfairness is set right by judicial review.

87. Lord Scarman in Nottinghamshire County Council v. Secretary of State for the Environment, 1986 AC 240 at 251 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 beneficent power."

88. Commenting upon the Michael Supperstone and James Goudie in their work on "Judicial Review" (1992 Edn.) at p. 16 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 Limited*, 18th March, 1991."

89. Observance of judicial restraint is currently the mood in England. The judicial power of review is exercised, to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention; the other covers the scope of the Court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action.

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

93. The duty of the Court is to confine itself to the question of legality. Its concern should be:

1. whether a decision making authority exceeded its powers?
2. committed an error of law;
3. committed a breach of the rules of natural justice;
4. reached a decision which no reasonable Tribunal would have reached; or
5. abused its powers.

94. Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

(i) **Illegality** : This means the decision maker must understand correctly the law that regulates his decision making power and must give effect to it.

(ii) **Irrationality**, namely, *Wednesbury* unreasonableness.

(iii) **Procedural impropriety**."

19. Keeping the above principles in mind, when the facts on hand are examined, it would clearly indicate that first respondent-BMRCL is implementing Metro

Railway Project for the City of Bangalore and in this regard had entrusted with the planning, design, implementation and operation to DMRCL for taking field studies and accordingly a DPR came to be submitted as per Annexure-R1. It is indicated in the said DPR under Clause 7.2.3 to the following effect:

"7.2.3 On the viaducts, it is proposed to adopt plinth type ballastless track structure with RCC derailment guards integrated with the plinths (shown in Fig. 7.2). In tunnels, slab type track structure is to be adopted (shown in Fig. 7.3 and 7.4). Further, it is proposed to adopt VOSSLOH-336 Fastenings System (shown in Fig 7.5) on both types of ballastless track structures, with a base-plate to base-plate spacing of 65 c.m. on viaducts and 70 c.m. in tunnels. Most of the components of VOSSLOH 336 Fastening system are now indigenously available. The toe load design for the clips is to be finalised at the detail design stage."

There is no dispute to the fact that BMRCL had obtained the DPR from DMRCL and on account of the above clause found in the DPR which had been accepted by the BMRCL, notice inviting tender came to be floated based on such report. As per Clause 9.8.2 the fastening system for ballastless tracks has been specified in Clauses 9.8.2.1 and 9.8.2.2. The use of the words "VOSSLOH - 336" in the notice inviting tender by the BMRCL is based on the DPR submitted by DMRCL. The Delhi Metro Rail had approached the Railway Board way back in the year 2002 and had obtained the approval from the Railway Board for the use of VOSSLOH - 336 fastening system for ballastless tracks on elevated structure of Delhi Metro Rail. Thus, the said fastening system which was used by the DMRCL was time-tested and on account of the same, DMRCL in its report had recommended under Clause 7.2.3 extracted herein above the use of VOSSLOH - 336 fastening system for the ballastless tracks to be used in the implementation of Bangalore Metro Rail. These aspects have been examined and considered in detail by the learned Single Judge and held that the project as conceived, contemplated use of VOSSLOH - 336 fastening system and alteration of the same would result in altering or modifying the integrated detailed project report which had already been approved and based on which, the work had already been carried out. It has also been observed by the learned Single Judge that the Railway Board would have approved the use of VOSSLOH - 336 fastening system after subjecting the said system to various tests and there being no other fastening system approved by the concerned authority for use in Metro Rail Projects in India, held that petitioner cannot insist the distributors of fastening system - 336 manufactured by Schwing AG should be given a chance to participate in the bid. The said fastening system indicated by the BMRCL in the notice inviting tender as such cannot be held to be either illegal or improper, particularly when the experts like that of the Railway Board having approved the same taking into consideration the safety of the passengers travelling in the Metro Rail as paramount consideration. The Courts cannot sit in the armchair of the experts and substitute its view to that of the experts or in other words, the Court lack expertise in the technical matters as the one which is unfolded in the present case on hand and as such, it would not be just and proper to over rule the

technical report or in other words, to arrive at a conclusion that any other fastening system can be used by the BMRCL. The reasoning adopted by the learned Single Judge which is based on the authoritative pronouncement of the Apex Court cannot be held as either perverse or has resulted in any material illegality calling for exercise of appellate jurisdiction.

20. In fact, the learned Single Judge has also examined as to whether the component of the writ petitioner can be construed as the similar product indicated in the notice inviting tender and negated the same at paragraph 23 by following words:

"23. The petitioner has relied upon the document at Annexure-E written by Schwihaag AG to the petitioner to contend that the tension clamp SKL 12 manufactured by Schwihaag AG is used in fastening system 336 and that the same SKL 12 is also used in VOSSLOH 336. But, the very letter Annexure-E also reveals that difference between VOSSLOH 336 fastening system and Schwihaag AG fastening system 336 is the anchor bolt and in some cases, an additional insulting plate which is used for electrical stray current insulation. Which means, there is certain difference between the VOSSLOH 336 fastening system and Schwihaag AG fastening system 336. Under such circumstances, it cannot be said that the product of Schwihaag AG is exactly similar to the product of VOSSLOH 336 fastening system. Be that as it may, this Court cannot substitute its opinion to the experts' opinion in the field. It is for the concerned authorities of the Railway Board to find out as to whether Schwihaag AG fastening system 336 can be appropriately used for Bangalore Metro Rail System or not."

Merely because there is another alternate available or the fastening system of the petitioner is equivalent to that indicated in the notice inviting tender, by itself would not be a ground to interfere with the policy decision of the experts. It is this precise exercise which has also been undertaken by the learned Single Judge by relying upon the judgment of the Apex Court in the case of Directorate of Education and Others v. Educomp Datamatics Limited and Others AIR 2004 SC 1962 to arrive at a conclusion that the Courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide. The said findings recorded by the learned Single Judge does not call for any interference at our hands.

21. Insofar as feeble argument canvassed by the learned Senior Counsel appearing for the Corporation that the BMRCL is not a "procurement entity" also would not merit acceptance, inasmuch as, the arguments canvassed before the learned Single Judge in this regard having been repelled for justifiable reasons, morefully indicated in paragraph 17, we are of the considered view that the said finding also does not call for interference. The said finding is to the following effect:

"17. The contention of the learned Counsel for the respondents that the 1st respondent is not controlled by the Government of Karnataka is not tenable. The control and the management signifies the controlling and directive power. The

controlling authority must be in a position to dominate the affairs of the undertaking. Such a control would be either in respect of the management of its affairs or in respect of its finances or with regard to the capital structure. Ultimately, what is required to be noted is as to whether there is substantial control by the State Government on the project or not. Having regard to the above facts and circumstances, this Court is of the opinion that the State Government substantially controls the project. The said conclusion reached by this Court is amply fortified by the fact that Tender Notification is published in the State Tender Bulletin as per the provisions of the Karnataka Transparency in Public Procurements Act. Thus, the tender inviting authority itself is satisfied with the fact that the provisions of the Act are applicable. Inasmuch as, the 1st respondent is the "procurement entity" within the meaning of Section 2(d) of the Act. In view of the same, this Court holds that the 1st respondent is a "procurement entity" within the meaning of Section 2(d) of the Act. Thus, the provisions of the Act and the Rules made thereunder are attracted."

22. In the light of the said finding recorded by the learned Single Judge, we reiterate that BMRCL is substantially controlled by the State Government having effective and pervasive control for conducting day-to-day administration and is an instrumentality and agency of the State amenable to Article 12 of the Constitution of India. As such, the finding recorded by the learned Single Judge that BMRCL is a "procurement entity" within the meaning of Section 2(d) of the Act would not call for interference.

For the reasons indicated herein above, we proceed to pass the following:

ORDER

- (1) W.A. Nos. 3529 and 4057 of 2009 are hereby dismissed.
- (2) The order dated 11-9-2009 passed in W.P. No. 16187 of 2009 (GM-TEN) is hereby affirmed.
- (3) Costs made easy.