

(2014) 09 SHI CK 0161
In the High Court Of Himachal Pradesh
Case No : CWP No. 4897 of 2014-J

Mahalakshmi Oxyplants Pvt. Ltd.

APPELLANT

Vs

State of Himachal Pradesh

RESPONDENT

Date of Decision : 10-09-2014

Acts Referred:

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

Citation : AIR 2015 HP 47 : (2015) 2 ShimLC 890

Hon'ble Judges : Mansoor Ahmad Mir, C.J.; Tarlok Singh Chauhan, J

Bench : Division Bench

Advocate : Trilok Jamwal, Advocate for the Appellant; Shrawan Dogra, Advocate General, Romesh Verma, V.S. Chauhan, Additional Advocate Generals, J.K. Verma, Deputy Advocate General, Manohar Lal Sharma, Advocate, Dilip Sharma, Senior Advocate and Manish Sharma, Advocate for the Respondent

Final Decision : Dismissed

Judgement

Tarlok Singh Chauhan, J.—Petitioner has called in question the tender notice (Annexure P-7), issued by respondent No. 3, whereby tenders have been invited for supply of Medical Oxygen Gas to IGMC and its Associated Hospitals, on the ground that it contains conditions which are aimed just to oust the petitioner from offering the tender and participating in the tender process.

2. The respondents have resisted the writ petition by the medium of replies.

3. Precisely, the case of the petitioner is that the official respondents had issued contract to the private respondent in the year 2007, was supplying all Medical Oxygen Gases on the basis of tender/contract, constraining the petitioner to file CWP No. 260 of 2014, titled as Mahalakshmi Oxyplants Pvt. Ltd. versus State of H.P. and others, seeking command to the respondents to issue fresh tenders, which was disposed of by this Court vide judgment and order, dated 24th June, 2014 (Annexure P-6). In pursuance, the impugned tender notice has been issued with mala fide exercise with the aim to oust the petitioner, by imposing the conditions, which precluded the petitioner to participate in the tender process.

4. Respondents No. 1 and 2 have filed reply and stated that the entire exercise is being made by respondent No. 3 in terms of the directions passed by this Court vide judgment and order, dated 24th June, 2014, (Annexure P-6) made in CWP No. 260 of 2014 (supra) and they have no role to play in issuing the tenders and the bid documents.

5. Respondent No. 3 has resisted the petition on the ground that the tender notice has been issued in terms of judgment and order, dated 24th June, 2014, made by this Court in CWP No. 260 of 2014 and in order to have the best supply, that too, from a firm, which is having good credentials and capability of having quality control system with a good financial background. Further stated that it is the prerogative of the Executive-Authority to issue tender, to impose conditions, which are required to have best competition in order to get the best quality and quick supply, thus, the conditions imposed are just to ensure that the supply of Medical Oxygen Gasses is made within time, which is a life saving drug, that too.

6. The conditions imposed by the respondents have been mentioned in sub-paras (v), (vi), (vii) and (viii) of para 11 of the writ petition. While going through the said conditions, it appears that the respondents have imposed these conditions just to ensure that a person/firm, who is having a strong financial background and capacity, should participate and supply is made without any break.

7. It is worthwhile to mention herein that the petitioner has not arrayed any person in his personal capacity in order to allege mala fide or malice or to establish the same. Also, there is nothing in the writ petition which can be made basis for holding that these conditions have been imposed with mala fide exercise.

8. The question is-whether such conditions can be called in question by any person, who is not fulfilling the eligibility criterion?

9. It is beaten law of land that issuance of tender notice, opening of financial bids, technical bids and contracts made cannot be subjected to judicial review unless, on the fact of it, it is mala fide, illegal, unconstitutional and the said contract is made against the public interest just to favour a particular person.

10. This Court in CWP No. 9337 of 2013-D, titled as Shri Ashok Thakur versus State of Himachal Pradesh & others, decided on 6th May, 2014, held that tenders cannot be questioned unless case for judicial review is carved out. It is apt to reproduce para 8 of the judgment herein:

"8. At the outset, it may be stated that this Court would interfere in tender or contractual matters in exercise of power of judicial review only in case the process adopted or decision made by the authority is malafide or intended to favour someone or the process adopted or decision made is so arbitrary and irrational that no responsible authority acting reasonably and in accordance with relevant law could have reached and lastly in case the public interest is affected. If the answers to these questions are in the negative, then there should be no

interference by this Court in exercise of its powers under Article 226 of the Constitution of India."

11. The petitioner has not questioned the decision-making process, but has only questioned the eligibility criterion on the ground that he has been rendered ineligible, which he cannot do, as stated hereinabove.

12. The Apex Court in the first case reported in *Tata Cellular Vs. Union of India*, , has held that in tender matters, the judicial review is not permissible unless there is arbitrariness or mala fide writ large on the face of it and has also laid down guidelines. It is apt to reproduce para 94 of the judgment herein:

"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 administrative and lead to increased and unbudgeted expenditures.

....."

13. The Apex Court in a series of cases from the year 1994 till 2005 has also discussed the ambit of the powers of the writ Court, the writ jurisdiction and in which circumstances the tender documents, tender process and the decision-making process can be questioned. It is apt to reproduce paras 38 to 40, 43 and 44 of the judgment rendered by the Apex Court in *Association of Registration Plates Vs. Union of India (UOI) and Others*, , herein:

"38. 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. Unless the

action of tendering authority is found to be malicious and a misuse of its statutory powers, tender conditions are unassailable. On intensive examination of tender conditions, we do not find that they violate the equality clause under Article 14 or encroach on fundamental rights of the class of intending tenderers under Article 19 of the Constitution. On the basis of the submissions made on behalf of the Union and State authorities and the justification shown for the terms of the impugned tender conditions, we do not find that the clauses requiring experience in the field of supplying registration plates in foreign countries and the quantum of business turnover are intended only to keep indigenous manufacturers out of the field. It is explained that on the date of formulation of scheme in Rule 50 and issuance of guidelines thereunder by the Central Government, there were not many indigenous manufacturers in India with technical and financial capability to undertake the job of supply of such high dimension, on a long-term basis and in a manner to ensure safety and security which is the prime object to be achieved by the introduction of new sophisticated registration plates.

39. The notice inviting tender is open to response by all and even if one single manufacturer is ultimately selected for a region or State, it cannot be said that the State has created monopoly of business in favour of a private party. Rule 50 permits the RTOs concerned themselves to implement the policy or to get it implemented through a selected approved manufacturer.

40. Selecting one manufacturer through a process of open competition is not creation of any monopoly, as contended, in violation of Article 19(1)(g) of the Constitution read with clause (6) of the said article. As is sought to be pointed out, the implementation involves large network of operations of highly sophisticated materials. The manufacturer has to have embossing stations within the premises of the RTO. He has to maintain the data of each plate which he would be getting from his main unit. It has to be cross-checked by the RTO data. There has to be a server in the RTO's office which is linked with all RTOs in each State and thereon linked to the whole nation. Maintenance of the record by one and supervision over its activity would be simpler for the State if there is one manufacturer instead of multi-manufacturers as suppliers. The actual operation of the scheme through the RTOs in their premises would get complicated and confused if multi-manufacturers are involved. That would also seriously impair the high security concept in affixation of new plates on the vehicles. If there is a single manufacturer he can be forced to go and serve rural areas with thin vehicular population and less volume of business. Multi-manufacturers might concentrate only on urban areas with higher vehicular population.

41.....

42.....

43. 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. 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, to the detriment of public interest. Undisputedly, the legal position which has been firmly established from various decisions of this Court, cited at the Bar (*supra*) is that government contracts are highly valuable assets and the court should be prepared to enforce standards of fairness on the Government in its dealings with tenderers and contractors.

44. The grievance that the terms of notice inviting tenders in the present case virtually create a monopoly in favour of parties having foreign collaborations, is without substance. Selection of a competent contractor for assigning job of supply of a sophisticated article through an open-tender procedure, is not an act of creating monopoly, as is sought to be suggested on behalf of the petitioners. What has been argued is that the terms of the notices inviting tenders deliberately exclude domestic manufacturers and new entrepreneurs in the field. In the absence of any indication from the record that the terms and conditions were tailor-made to promote parties with foreign collaborations and to exclude indigenous manufacturers, judicial interference is uncalled for."

14. The Apex Court in *Michigan Rubber (India) Ltd. Vs. The State of Karnataka and Others*, , has laid down some principles and has held that it is the prerogative of the department to fix any criterion and that cannot be made subject matter of a writ petition unless it is arbitrary or mala fide, which too appears on the face of it. It is apt to reproduce paras 23 and 35 of the judgment herein:

"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 the 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.

24.

25.....

26.....

27.....

28.....

29.....

30.....

31.....

32.....

33.....

34.....

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, 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."

15. In this judgment, the Apex Court, in paras 11 to 15, has also discussed and made reference to all the judgments of the Apex Court on the issue. In these judgments, the same ratio has been laid down and after taking note of all these judgments, the Apex Court has culled out the principles, reference of which has been made in para 23 (supra).

16. The Apex Court, in another case titled as Tejas Constructions and Infrastructure Pvt. Ltd. Vs. Municipal Council, Sendhwa and Another, , has discussed what is judicial review, how it is to be exercised in economic cases and other cases related to business. It is apt to reproduce paras 27 and 31 of the judgment herein:

"27. That leaves us with the second ground on which the appellant questioned the eligibility of Respondent 2 to offer a bid, namely, the non-execution by Respondent 2 of a single integrated water supply scheme for the requisite value. The appellant's case, in this connection, is twofold. Firstly, it is contended that the works executed by Respondent 2 for Vyare and Songadh were distinct and different works which did not constitute a single integrated water supply scheme hence could not be pressed into service to show satisfaction of the condition of eligibility stipulated under the tender notice. The alternative submission made by the learned counsel appearing for the appellant in connection with this ground is that the work executed by Respondent 2 for Upleta also did not satisfy the requirement of the tender notice inasmuch as the said work did not involve the construction of intake wells, which was an essential item of work for any integrated water supply scheme.

28.....

29.....

30.....

31. It is also noteworthy that in the matter of evaluation of the bids and determination of the eligibility of the bidders the Municipal Council had the advantage of the aid and advice of an empanelled consultant, a technical hand, who could well appreciate the significance of the tender condition regarding the bidder executing the single integrated water supply scheme and fulfilling that condition of tender by reference to the work undertaken by them. We, therefore, see no reason to interfere with the view taken by the High Court of the allotment of work made in favour of Respondent 2."

17. Applying these tests to the instant case, as discussed hereinabove, we are of the considered view that it is the prerogative and domain of respondent No. 3 to decide how to have a good supply, that too, of good quality and not from a person, who is not competent.

18. The Courts have no expertise to determine the issue whether the conditions imposed are relevant or otherwise and cannot interfere unless the petitioner carves out a case for interference in public interest.

19. The Apex Court in *Aruna Rodrigues & Ors. versus Union of India & Ors.*, reported in 2012 AIR SCW 3340, has laid down the same principle. It is apt to reproduce para 2 of the judgment herein:

"2. This Court, vide its order dated 1st May, 2006, directed that till further orders, field trials of GMOs shall be conducted only with the approval of the Genetic Engineering Approval Committee (for short "GEAC"). I.A. No. 4 was filed, in which the prayer was for issuance of directions to stop all field trials for all genetically modified products anywhere and everywhere. The Court, however, declined to direct stoppage of field trials and instead, vide order dated 22nd September, 2009 directed the GEAC to withhold approvals till further directions are issued by this Court, after hearing all parties. Except permitting field trials in certain specific cases, the orders dated 1st May, 2006 and 22nd September, 2009 were not substantially modified by the Court. As of 2007, nearly 91 varieties of plants, i.e., GMOs, were being subjected to open field tests, though in terms of the orders of this Court, no further open field tests were permitted nor had the GEAC granted any such approval except with the authorization of this Court. This has given rise to serious controversies before this Court as to whether or not the field tests of GMOs should be banned, wholly or partially, in the entire country. It is obvious that such technical matters can hardly be the subject matter of judicial review. The Court has no expertise to determine such an issue, which, besides being a scientific question, would have very serious and far-reaching consequences.

(Emphasis added)"

20. The Apex Court in a latest judgment in the case titled as *Pathan Mohammed Suleman Rehmatkhan versus State of Gujarat and others*, reported in (2014) 4 Supreme Court Cases 156, has also laid down the principles. It is apt to reproduce paras 11 and 14 of the judgment herein:

"11. We have extensively referred to these principles in *Arun Kumar Agrawal Vs. Union of India (UOI) and Others*, , where we have held as follows: (SCC p. 17, para 41)

"41.....This Court sitting in the jurisdiction cannot sit in judgment over the commercial or business decision taken by parties to the agreement, after evaluating and assessing its monetary and financial implications, unless the decision is in clear violation of any statutory provisions or perverse or taken for extraneous considerations or improper motives. States and its instrumentalities can enter into various contracts which may involve complex economic factors. State or the State undertaking being a party to a contract, have to make various decisions which they deem just and proper. There is always an element of risk in such decisions, ultimately it may turn out to be correct decision or a wrong one.

But if the decision is taken bona fide and in public interest, the mere fact that decision has ultimately proved to be wrong, that itself is not a ground to hold that the decision was mala fide or taken with ulterior motives."

12.....

13.....

14. We are of the view that these are purely policy decisions taken by the State Government and, while so, it has examined the benefits the project would bring into the State and to the people of the State. It is well settled that non-floating of tenders or absence of public auction or invitation alone is not a sufficient reason to characterize the action of a public authority as either arbitrary or unreasonable or amounting to mala fide or improper exercise of power. The courts have always held that it is open to the State and the authorities to take economic and management decisions depending upon the exigencies of a situation guided by appropriate financial policy notified in public interest. We are of the view that is what has been done in the instant case and the High Court has rightly held so. We, therefore, find no reason to entertain this SLP and the same is dismissed."

21. The Apex Court in *Siemens Aktiengesellschaft and S. Ltd. Vs. DMRC Ltd. and Others*, , has taken note of all the judgments right from the year 1949 and has culled out the principles. It is apt to reproduce paras 17, 18 and 22 of the judgment herein:

"17. Principles governing judicial review of administrative decisions are now fairly well-settled by a long line of decisions rendered by this Court, since the decision of this Court in *Ramana Dayaram Shetty Vs. International Airport Authority of India and Others*, which is one of the earliest cases in which this Court judicially reviewed the process of allotment of contracts by an instrumentality of the State and declared that such process was amenable to judicial review. Several subsequent decisions followed and applied the law to varied situations but among the latter decisions one that reviewed the law on the subject comprehensively was delivered by this Court in *Tata Cellular Vs. Union of India*, where this Court once again reiterated that judicial review would apply even to exercise of contractual powers by the Government and Government instrumentalities in order to prevent arbitrariness or favouritism. Having said that this Court noted the inherent limitations in the exercise of that power and declared that the State was free to protect its interest as the guardian of its finances. This Court held that there could be no infringement of Article 14 if the Government tried to get the best person or the best quotation for the right to choose cannot be considered to be an arbitrary power unless the power is exercised for any collateral purpose. The scope of judicial review, observed this Court, was confined to the following three distinct aspects:

(i) Whether there was any illegality in the decision which would imply whether the decision making authority has understood correctly the law that regulates his

decision making power and whether it has given effect to it;

(ii) Whether there was any irrationality in the decision taken by the authority implying thereby whether the decision is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at the same; and

(iii) whether there was any procedural impropriety committed by the decision making authority while arriving at the decision.

18. The principles governing judicial review were then formulated in the following words:

(i) The modern trend points to judicial restraint in administrative action.

(ii) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(iii) 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.

(iv) 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.

(v) 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. 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.

(vi) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

19.....

20.....

21.....

22. There is no gainsaying that in any challenge to the award of contract before the High Court and so also before this Court what is to be examined is the legality and regularity of the process leading to award of contract. What the Court has to constantly keep in mind is that it does not sit in appeal over the soundness of the decision. The Court can only examine whether the decision making process was fair, reasonable and transparent. In cases involving award of contracts, the Court ought to exercise judicial restraint where the decision is

bona fide with no perceptible injury to public interest"

22. This Court in CWP No. 9337 of 2013-D (supra), CWP No. 765 of 2014, titled as Namit Gupta versus State of H.P. and others, decided on 27th March, 2014, and CWP No. 4112 of 2014, titled as Minil Laboratories Pvt. Ltd. versus State of Himachal Pradesh and another, decided on 15th July, 2014, has laid down the same principle.

23. Keeping in view the ratio laid down by the Apex Court and by this Court, as discussed hereinabove, we are of the considered view that the respondents have, in their wisdom, thought it proper to incorporate the conditions in terms of the tender notice in order to have a better, which may conclude in the best, keeping in view the purpose of supplies aimed at.

24. Applying the principle to the instant case, no case for interference is made out.

25. We deem it proper to record herein that tenders have been issued, parties/firms have participated and the selection/tender process is over. The private respondent has made the grade and because of the orders made by this Court in this petition, it has not been able to execute the contract, which is against public interest and that too, at the cost of public exchequer.

26. The petitioner has already invoked the jurisdiction of this Court. Perhaps, he was expecting that the contract should have been awarded to it. Earlier, the supplies were made to the official respondents on cheaper rates, but because of the intervention of this Court, the arrangement stands cancelled and now, the supplies have to be made on higher rates, thus, has made the State to suffer because of the conduct of the petitioner.

27. The way the petitioner is trying to get the contract speaks itself and in order to prevent the litigation of such nature, we deem it proper to saddle the petitioner with costs. Accordingly, the writ petition is dismissed alongwith all pending applications, if any, with costs, quantified at Rs. 20,000/-.