(2016) 12 MAD CK 0051

In the Madras High Court

Case No : Writ Appeal Nos. 509, 543, 545 and 931 of 2016 and CMP Nos. 6946, 9942, 7360, 7361, 11892 and 11893 of 2016

M/s. Kumbhat Holographics APPELLANT

Vs

State of Tamil Nadu RESPONDENT

Date of Decision : 01-12-2016

Acts Referred:

Citation : (2017) 1 CTC 83 : (2017) 1 WritLR 361

Hon'ble Judges : Mr. Huluvadi G. Ramesh and Mr. V. Parthiban, JJ.

Bench : Division Bench

Advocate : Mr. P.S. Raman, SC, for Mr. E. Kumaresan, Advocates, for the Appellants(WA 509 of 16); Mr. R. Parthasarathy, Advocate, for the Appellants(WA 543 and 545 of 16); Mr. P. Wilson, SC, for Mr. Richardson Wilson, Advocate, for the Appellants(WA 931 of 16); Mr.

Final Decision : Dismissed

Judgement

Huluvadi G. Ramesh, J.—These writ appeals are directed against the order passed by the learned single Judge dated 10.03.2016, whereby, the learned single Judge dismissed the writ petitions on the ground that the Tender Calling Authority has right to impose conditions in consonance with the Tender Transparency Act, 1998. Aggrieved by the said order, the present writ appeals have been preferred.

2. The brief facts, which are necessary for the disposal of the appeals, as could be culled out from the affidavit filed by the appellants/petitioners, are as hereunder :-

The appellants are either registered partnership firm or proprietary concern or company, doing business in the manufacture of holograms. The second respondent issued tender notification on 11.12.2015, for the supply of holograms, with certain pre-qualifications. The pre-qualifications prescribed included that the applicant should be a company registered under the Companies

Act, that the application should be possessed of eight years of experience and that the applicant should have supplied holograms to any State Excise Department. It is the imputation of the appellant that the above conditions were tailor-made and have been incorporated to suit the 3rd respondent, who was the successful bidder in the 2011 auction and auctions held prior to 2011 as well. In such a factual scenario, left with no other alternative, the appellants filed writ petition before this Court to quash the impugned tender notification and to issue a tender notification in tune with the notification issued in the year 2011.

3. Before the learned single Judge, it was contended by the learned counsel for the petitioners/appellants herein that the pre-qualifications prescribed in the tender notification amounts to arbitrariness, unreasonable and is in gross violation of the concept of level playing field. The conditions imposed in the tender also amounts to unfair practise on the part of the 2nd respondent to favour the 3rd respondent to the detriment of the other tenderers. The qualifications prescribed in the tender notification are tailor made to make only the 3rd respondent a viable tenderer to the detriment of the other persons, who are also in the field of manufacture of holograms. It was further contended by the learned counsel for the petitioners/appellants that the tender floated in the year 2011 for the very same procurement of holograms did not contain such of the clauses as found in the present tender, which clearly goes to prove that the conditions set forth in the present tender are only to the advantage of the 3rd respondent.

4. The respondents countered the stand of the petitioners/appellants that tender was floated only based on the recommendation made by the Technical Specification Committee, constituted by G.O.Ms.No.25 dated 25.8.2015, after a detailed study. The experience of eight years was prescribed to ensure that the bidder had been in continuous manufacture of holograms, so that they would possess adequate man power and technical skills. Similarly, the technical experience of eight years was imposed to ensure quality of holograms and to avoid duplication and to have successful execution of the contract.

5. The learned single Judge, after considering the submissions made on behalf of both parties and perusing the materials available on record, dismissed the writ petitions holding that the petitioners/appellants have no right to question the fixation of pre-qualification and that the second respondent has every right and power to fix the pre-qualifications to meet the standards and performance of the materials. Aggrieved by the said order, the appellants are before this Court.

6. According to the learned senior counsel and learned counsel appearing for the appellants, the terms of tender is in violation of G.O.Ms.No.25, Home, Prohibition & Excise (P&E (VII) Department, dated 25.8.2015. As per the said G.O., Technical Specification Committee was constituted and it recommended that the technical specification of proposed hologram has to be generic in nature, in order to ensure wider participation by incorporating certain features that are available with more than three bidders. Therefore, as per the tender conditions, only three

bidders would be qualified for participation, which would defeat the mandate of G.O. which specifies that there should be more than three bidders.

7. It is their further contention that the condition prescribed in tender with respect to technological experience of eight years is only to suit the sixth respondent, when the standard required experience is only three years, as fixed earlier in 2006 and 2011. While eight years of experience has been prescribed for two Master Technologies, namely Dot Matrix and Conventional 2D/3D origination system, no experience was prescribed for the third Master Technology, namely Dual Head Lithography, when the fact remains that the sixth respondent did not possess any experience in Dual Head Lithography and therefore, the condition imposed is arbitrary and irrational, particularly, when the Committee did not suggest to increase the experience from 3 years to 8 years and it is only the Tender Accepting Authority who had increased the years of experience to suit the sixth respondent.

8. It is also their contention that introduction of Clause 4.1 in the tender notification enabling only the companies to participate in the tender, by debarring the Proprietorship/Partnership from participating in the tender, would make it clear the mala fide intention of the second respondent to enable only the sixth respondent to be eligible to participate in the tender, as the sixth respondent is a company registered under the Companies Act.

9. Relying upon Rule 32 of the Tamil Nadu Transparency in Tender Rules, 2000, it is submitted on behalf of the appellants that the reasons for prescribing pre-qualification of tenders have to be recorded in writing. But, the reasonings of the Tender Specification Committee have not been produced to show that the pre-qualification was prescribed only with bona fide intention.

10. Contending that though the tender floated in the year 2011 was for a term of three years only and as per Clause 41 of the Tender, the period of contract cannot be extended beyond one year, the term of contract was extended beyond 30.9.2015, which would show that the second respondent has acted with mala fide intention only to benefit the sixth respondent.

11. Referring to the communication dated 07.01.2016, obtained by way of Right to Information Act, which was said to be issued by a member of the Technical Specification Committee, stating that majority of the Members decided to adhere to the terms and conditions specified in the tender floated in 2011 and consequently, to issue a corrigendum to the present tender, it is contended that though the meeting was held on 07.01.2016, one of the Member signed it only on 01.9.2016 and therefore, it can be inferred that there was some difference of opinion among the Members in finalising the tender conditions and thus, the tender notification is arbitrary and unreasonable and tainted with mala fide.

12. In support of their contentions, the appellants relied upon the decision:

(a) Air India Ltd. v. Cochin International Airport Ltd. [(2000) 2 SCC 617];

(b) B.S.N. Joshi and Sons Ltd. v. Nair Coal Services Ltd. [(2006) 11 SCC 548];

(c) Meerut Development Authority v. Association of Management Studies [(2009) 6 SCC 171];

(d) Michigan Rubber (India) Ltd. v. State of Karnataka [(2012) 8 SCC 216];

(e) Maa Bindra Express Carrier v. North East Frontier Railway [(2014) 3 SCC 760]; and

(f) State of Punjab v. Bandeep Singh [(2016) 1 SCC 724].

13. Mr. V. Ayyadurai, learned Additional Advocate General appearing for the State contended that the second respondent has scrupulously followed the recommendation of the Technical Specification Committee, which was constituted by G.O.Ms.No.25 dated 25.8.2015. According to the second respondent, five bidders are fully qualified with the conditions imposed in the tender notification and therefore, it cannot be stated that the mandate of G.O.Ms.No.25 dated 25.8.2015 was defeated.

14. With respect to the contention that the experience in Dot Matrix and conventional origination of 2D/3D prescribed as 8 years, it is contended by the learned Additional Advocate General that in order to maintain stability of sticky hologram labels and also to avoid duplication of labels, such a condition was imposed. Though the experience imposed in the year 2011 was only for 3 years, it has been increased to 8 years based on the report of the Expert Committee which visited many States and considered the condition of experience imposed there and therefore, the said condition cannot be termed to be arbitrary or unreasonable.

15. The learned Additional Advocate General contended that the condition that the bidder should be a company is not only imposed in the State of Tamil Nadu, but also in the State of Maharashtra and that it was imposed after taking note of various factors that would enure to the benefit of the second respondent and therefore, it cannot be stated that the said condition has been prescribed only to suit the sixth respondent.

16. It is further contended by the learned Additional Advocate General that there is no violation of Rule 32 of the Tamil Nadu Transparency in Tender Rules, 2000 in the instant case and that similar conditions have been imposed in the tenders floated by various State Governments.

17. It is also contended by the learned Additional Advocate General that the tender floated in the year 2011 was only for a period of three years and it was subsequently extended, in view of administrative reasons and the same cannot be either questioned or taken to their advantage by the appellants.

18. In support of his contentions, the learned Additional Advocate General relied upon the following decisions:

(a) M/s. Holoflex Limited v. State of Tamil Nadu [WP Nos.24803 & 27388 of 2003 dated 27.01.2004—High Court of Madras];

(b) M/s. Process Color v. The Secretary for Home, Government of Tamil Nadu [WP No.6027 of 2007 dated 02.5.2007

- High Court of Madras];

(c) Shimnit Utsch India (P) Ltd. v. W.B. Transport Infrastructure Development Corpn. Ltd. [(2010) 6 SCC 30];

(d) Uflex Limited v. State of Tamil Nadu [WP No.8090 of 2011 dated 29.6.2011—High Court of Madras];

(e) K.K. Builders v. State of Kerala [2012 5 RAJ 284];

(f) Centre for Public Interest Litigation v. Union of India [(2016) 6 SCC 408];

(g) M/s. Holoflex Ltd. v. State of M.P. [WP No.4448 of 2016 dated 06.9.2016 - High Court of M.P.]; and

(h) R.Kalyanasundaram v. State of Tamil Nadu [WP No.26214 of 2015 dated 18.11.2015—High Court of Madras].

19. We have considered the rival submissions made on both sides and also perused the materials available on record.

20. The only primordial issue that has to be considered now is whether the second respondent had imposed pre-qualifications in such a manner that it suits only the sixth respondent, as alleged by the appellants.

21. Before proceeding further, a brief outline of the facts is necessary for deciding the issue. The Government of Tamil Nadu procures hologram excise labels from private firm, by way of contract, to affix them in the Indian Made Foreign Spirit (IMFS) and Beer Bottles, either manufactured in the State or imported by the State, in order to arrest illicit flow of liquor and to collect excise revenue and also to have accurate accounting. The contract is for a period of three years. By G.O.Ms.No.25, Prohibition and Excise Department dated 25.8.2015, a Technical Specification Committee was constituted to study the system of excise labels in other States in respect of advanced and high security features in the holograms and Tender Scrutiny and Finalisation Committee was constituted to finalise the tender for procurement of hologram excise labels. Based on its recommendation that technical specification of the proposed hologram has to be generic in nature, the tender was floated on 11.12.2015. The pre-qualifications prescribed in the said tender notification are challenged by the appellants on the ground that it was tailor-made to suit the sixth respondent alone.

22. With the above backdrop, let us have a look at the pre-qualifications prescribed in the tender notification 11.12.2015, which reads as follows:

"General Terms and Conditions

Qualification criteria for technical bid

4.1 The bidder should have licensed manufacturing facility including the Master Origination facility in India in the same premises. In case a bidder has collaboration with any international manufacturer of Master Origination Facility, such Mastering Facility should be located in India and in the same premises only. The bidder should be a Company registered in India, under the Companies Act 1956/2013.

Turnover

4.2 The bidder should have an annual turnover of not less than Rs.5 Crores per annum in security holograms for the preceding three financial years (2012-13, 2013-14 and 2014-15).

4.3 The bidder will be required to furnish copies of their audited profit and loss account and balance sheet for the preceding 3 financial years (2012-13, 2013-14 and 2014-15), duly certified/attested by a Chartered Accountant in this regard.

4.4 The bidder should submit copy of Registration with Ministry of Industry and Factory License. Experience

4.5 The bidder should have at least 08 (eight) years of experience in the field of manufacture of Security Hologram with master origination.

4.6 (a) The bidder should also have 08 (eight) years of experience individually in both Dotmatrix Origination System and in Conventional 2D/3D Origination system (08 years in Dotmatrix Origination system and also 08 years in Conventional 2D/3D Origination System). The experience will be considered from the purchase of machines i.e., invoice date/bill of entry/custom clearance, etc.

(b) The bidder should have supplied at least 20 crores full polyester based security hologram labels to any State Excise Department during any one of the last three financial years (2012- 13, 2013-14 and 2014-15). The Bidder must have direct agreement with the department or must have received direct purchase order from the department. The Bidder should also submit satisfactory performance certificate from the competent authority or end user.

(c) The bidder should submit an affidavit on a stamp paper of Rs.100/- confirming that the performance statement given is correct along with sample copy of purchase order, copy of invoices, proof of payment received from Purchasers etc.

(d) The bidder should not have obtained/obtaining liquor manufacturing licence or liquor distribution licence in any of the States of India. An affidavit in this regard should be submitted on a stamp paper of Rs.100/- along with the tender document."

23. The appellants are aggrieved only by conditions imposed in 4.1, 4.5 and 4.6

(a) and (b), namely that the bidder should be a company registered under the Companies Act, that the bidder should have at least eight years of experience in the manufacture of hologram and that the bidder should have eight years of technical experience and should have supplied at least 20 crores full polyester based security hologram labels to any State Excise Department.

24. As regards the condition that the bidder should be a company, the second respondent after analysing various advantages and disadvantages of the firm and the company, and in view of the fact that the company could not be closed all of a sudden and that element of uncertainty exists in the case of a firm, decided that the bidder should be a company, instead of firm. Even in the State of Maharashtra, the condition that bidder should be a company registered under the Companies Act was imposed in the tender floated in 2016.

25. Insofar as the condition that the bidder should have eight years of manufacture experience in of holograms is concerned, it is the stand of the second respondent that the experience of eight years in the manufacture of excise holograms, without any break would go to show that the bidder possess adequate man power and technical skills and therefore, there will not be any hindrance in the supply of holograms.

Though the appellants contended that manufacturing experience and technical experience are different and that other States did not impose such a condition and therefore, the said condition is arbitrary and unreasonable, the reason that the volume of supply of holograms is huge and therefore, to ensure safety, security and assured quality and also resources enduring continuous supply cannot be lightly ignored. Further, the said condition has been imposed only to ensure high security features in the excise labels and that it cannot be easily duplicable.

26. In the tender floated in the year 2011, one of the condition was that the bidder should have three years of experience in the manufacture of excise holograms. However, it cannot be contended that whenever a tender is floated, only three years of experience in the manufacture of holograms should be imposed. It is within the domain of the Government to fix the years of experience, in order to get a proper and quality hologram and therefore, the said condition cannot be said to be unreasonable or arbitrary.

27. Admittedly, the Department is using 2D/3D conventional origination and Dot matrix digital origination for the past 12 years. In fact, 2D/3D conventional origination and Dot matrix digital origination are in existence for the past three decades. Therefore, the contention of the appellants that the said condition was imposed only to favour the sixth respondent is rejected.

28. As regards the contention of the appellants that the condition that the bidder should have supplied holograms to the Excise Department was imposed only with malafide intention, since the sixth respondent has been supplying to the Excise Department, it is the submission of the learned Additional Advocate General that

many States are adopting polysterised hologram excise labels and that the said condition did not limit it only to this State, but also to any other States. The respondent, with a view to ensure quality and unlimited supply of high security holograms, if thought it fit to impose a condition as above, which is not only done in the case on hand, but has admittedly been followed in many of the States, the said condition cannot be said to be prejudicial since it is always open to the Tender Inviting Authority to impose conditions, which would be beneficial to it as excise is one of the main revenue yielding items in the armoury of the State and safety and security coupled with timely supply are mandatory for prompt revenue generation. In the above scenario, the supply of very polysterised holograms to the Excise Department in time will enure only to the benefit of the second respondent in all manner. Hence, the said contention is also rejected.

29. It is contended that reasonings for prescribed pre-qualifications have not been recorded in writing, which is in violation of Rule 32 of the Tamil Nadu Transparency in Tenders Rules, 2000. Rule 32 speaks about the pre-qualification procedure to be adopted, which mandates that the Tender Inviting Authority shall, for reasons to be recorded in writing, provide for pre-qualification of tenderers on the basis of experience and past performance in the execution of similar contracts, capabilities of the tenderer with respect to personnel, equipment, manufacturing facilities, etc., as also the financial capacity.

30. An overall harmonious reading of Rule 32 would reveal that experience and past performance in the execution of similar contracts is a condition-precedent, around which the web has to be spun in selecting the tenderer, who has the requisite capabilities to execute the task of manufacture of holograms in such gargantuan proportion. Keeping the above requisites in mind, as mandated under Rule 32, the Technical Specification Committee has gone in extenso into the details as to the requirements, which requires to be put forth in the tender invitation to choose the best of the tenderer so as to flush out the illegal entrants. A cursory perusal of the Meeting Minutes No.6 dated 30.11.2015 as also the subsequent Meeting Minutes No.7 dated 7.1.2016 reveal that the respondents, with a stern hand, to weed out submission of tenders by persons of dubious credentials or credentials, which are far from the requisite required for entrustment of a job of such a magnitude, have thought to insert the above clauses, with which the appellants are aggrieved.

31. A perusal of the Meeting Minutes No.6 dated 30.11.2015 reveals that to bring in successful suppliers, who have been doing business for a long period of time so as to have the best of the persons to supply of the holograms and with good integrity, taking into consideration the requirement over the month, which runs to more than 30 crores holograms per month, the capability of the supplier and his previous experience were taken as the yardstick for consideration. Based on the requirements, the Technical Committee, comparing the requirements put forth by the other States in this regard, opined that persons doing business in

the same field at least for the past 8 to 10 years would be in possession of the technical skills and manpower to handle such a mammoth task. Therefore, it cannot be said that the Technical Committee has not taken into consideration Rule 32 and has not given any reasons, when, as a matter of record, it is evident that the Technical Committee has unanimously opined to consider persons who have been continuously doing business activities in the same field for at least for the past 8 to 10 years. The Tender Inviting Authority, taking into account the reasons given by the Technical Committee for insertion of the material clauses, has gone ahead with the tender incorporating the terms and conditions, which, by no stretch of imagination, could be termed as one without reasons, as the reasons given by the Technical Committee has to be read along with the specifications put in by the Tender Inviting Authority in the tender specification, which adequately satisfied Rule 32, which mandates that reasons should be recorded in writing. Therefore, the contention urged by the appellants that Rule 32 has been given a go-by, in that no reasons has been recorded in writing with regard to the pre-qualification is a farce and lacks conviction and, therefore, the said contention is liable to be dismissed.

32. As regards the contention that only three bidders would be qualified for participation in the tender, as per the tender notification, which would defeat the mandate of G.O.Ms.No.25, dated 25.8.2015, it would be relevant to note that the second respondent had received 11 bids, out of which, 7 bidders are companies, 8 bidders have eight years experience, 5 bidders have eight years technical experience and 5 bidders have supplied to State Excise Department. Therefore, it cannot be blindly stated that only 3 bidders are qualified to participate in the tender and accordingly, the contention of the appellants in this regard, is rejected.

33. In Air India Ltd. v. Cochin International Airport Ltd. [(2000) 2 SCC 617], while dealing with a matter involving award of contract, the Apex Court made it clear that the public authority is free not to accept the highest or the lowest offer and the scope of judicial review is confined to the scrutiny of decision making process, which can be annulled if the same is found to be vitiated by malafides, arbitrariness or total unreasonableness.

34. In B.S.N. Joshi and Sons Ltd. v. Nair Coal Services Ltd. [(2006) 11 SCC 548], the Apex Court held that tender conditions may have to be construed differently having regard to fact situation obtaining in each case and no hard and fast rule can be laid down therefor in Government contracts/tender.

35. In Meerut Development Authority v. Association of Management Studies [(2009) 6 SCC 171], the Apex Court held that the terms of invitation to tender are not open to judicial scrutiny as they lie in realm of contract. But, a limited judicial review is available if it is established that it is to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.

36. In Shimnit Utsch India (P) Ltd. v. W.B. Transport Infrastructure Development Corpn. Ltd. [(2010) 6 SCC 30], it is held by the Apex Court that 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.

37. In Michigan Rubber (India) Ltd. v. State of Karnataka [(2012) 8 SCC 216], the Apex Court held that the Government and their undertakings shall have free hand in setting ''terms of Tender'' and only if it is arbitrary, discriminatory, malafide or actuated by bias, then alone shall the Court interfere.

38. In Maa Bindra Express Carrier v. North East Frontier Railway [(2014) 3 SCC 760], the Supreme Court held that the Government has to act reasonably and fairly at all points of time and to that extent the tenderer has an enforceable right in the Court, which is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest.

39. In State of Punjab v. Bandeep Singh [(2016) 1 SCC 724], the question that arose was with regard to re-auction of properties which fetched highest bids, on the ground that the subject bids were only marginally higher than the reserve price. In that case, it was held by the Supreme Court that the Government does not have a carte blanche to take any decision it chooses to and that it cannot take a capricious, arbitrary or prejudiced decision and that its decision must be informed and impregnated with reasons.

40. In Centre for Public Interest Litigation v. Union of India [(2016) 6 SCC 408], it is held by the Apex Court that minimal interference is called for by the Courts, in exercise of judicial review of a government policy when the said policy is the outcome of deliberations of the technical experts in the fields inasmuch as courts are not well equipped to fathom into such domain which is left to the discretion of the execution and when it comes to the judicial review of economic policy, the courts are more conservative as such economic policies are generally formulated by experts.

41. A careful look at the decisions referred to above, relied upon by both sides, would make it clear that in the matter of contracts, the Court cannot interfere. However, if there is an element of bias, mala fide, arbitrariness or unreasonableness, the Court can exercise its discretionary power and review the same.

42. In the instant case, from the discussions made in the preceding paragraphs, it is evident that the pre-qualifications prescribed in the tender notification are only after due deliberations and based on the recommendations made by the Technical Specification Committee and that the said conditions were aimed at the sole purpose of obtaining good quality and unlimited supply of high security holograms, without any hindrance and also to avoid duplication of holograms.

Moreover, there is nothing on record to show that the act of the second respondent in imposing such a condition is only to favour the sixth respondent, as the efforts put in by the appellants to show that the impugned tender conditions are tailor made to suit the sixth respondent, were in vain.

43. In view of our foregoing reasons, we do not find any reason to interfere with the order of the learned single Judge and thus, the appeals deserve to be rejected. Accordingly, the appeals are dismissed and the order of the learned single Judge dated 10.3.2016 is confirmed. There shall be no order as to costs. Consequently, connected Civil Miscellaneous Petitions are also dismissed.

