

HIGH COURT OF MADHYA PRADESH, BENCH AT INDORE
DIVISION BENCH : HON'BLE SHRI JUSTICE S. C. SHARMA
& HON'BLE SHIR JUSTICE VIRENDER SINGH

Writ Petition No.12474/2019

M/s Air Perfection
Versus
The State of Madhya Pradesh & Others

Counsel for the Parties : Shri Pushyamitra Bhargava, learned counsel for the petitioner.

Shri S.K. Purohit, learned Government Advocate for the respondent / State.

Shri Manoj Munshi, learned counsel for respondent No.2.

Whether approved for reporting : Yes

Law laid down : The Notice Inviting Tender can certainly be challenged before the High Court and the conditions therein can be subjected to judicial scrutiny only if the conditions are unreasonable, they smacks with *malafides* or have been framed to favour to a particular person. Unless and until *malafide* is involved and the conditions are unreasonable, they cannot be subjected to judicial review. The memorandum dated 17.12.2012 read with 07.05.2004 of the Central Vigilance Commission are guidelines on pre-qualification criteria, are illustrative and an organization does have a right to modify the guidelines for specialized jobs/works, if it feels necessary to do so.

Significant paragraph numbers : 17 to 33

ORDER

(Delivered on this 18th Day of July, 2019)

(S.C SHARMA)
J U D G E

(VIRENDER SINGH)
J U D G E

HIGH COURT OF MADHYA PRADESH: BENCH AT INDORE

W.P. No.12474/2019

M/s Air Perfection v/s State of Madhya Pradesh & Others

Indore, dated 18.07.2019

Shri Pushyamitra Bhargava, learned counsel for the petitioner.

Shri S.K. Purohit, learned Government Advocate for respondent No.1 / State.

Shri Manoj Munshi, learned counsel for respondent No.2.

The petitioner before this Court, a partnership firm through its partner Vikas Nema, has filed this present petition being aggrieved by the terms and conditions of the Notice Inviting Tender (hereinafter referred as N.I.T.) i.e. N.I.T. No.03/PMAY/2019-20 for Supply, Installation, Testing, Commissioning & Maintenance of Lifts including Allied Works under PMAY at Bhuritekri, Dudhiya-Devguradiya, Bada, Bangerda, Budhaniya and Badabangerda extension, M.P.

02. The petitioner's contention is that the petitioner / Firm fulfills all the eligibility conditions in the N.I.T. except Clause-2 and 3. Clause-2 provides for minimum annual turnover of Rs.100.00 crores and Clause-3 provides that a bidder should have installed 1000 lifts in the last three years.

03. During the pendency of the present writ petition, one more condition has been introduced by the respondents, which provides that bidder should have a manufacturing unit. The petitioner's contention is that the Central Vigilance Commission has issued guidelines dated 17.12.2002 in

respect of the process of issuing N.I.T., acceptance of N.I.T. and award of contract. It has further been contended that the guidelines issued by the Central Vigilance Commission dated 17.12.2002 are binding upon the respondents.

04. The petitioner has placed heavy reliance upon the aforesaid guidelines and his contention is that as per the guidelines, the annual financial turn over of the last three years should not exceed 30% of the estimated cost of the contract and in those circumstances, the petitioner grievance is that the terms and conditions prescribed in the N.I.T. on account of which, the petitioner is being ousted, are unreasonable and illegal and deserves to be quashed.

05. The petitioner has placed reliance upon several judgments delivered in the cases of *Tata Cellular v/s Union of India* reported in 1994 (6) SCC 651, *Union of India v/s Dinesh Engineering Corporation* reported in 2001 (8) SCC 491, *Meerut Development Authority v/s Assn. of Management Studies* reported in 2009 (6) SCC 171, *Subhash Kumar Lata v/s R.C. Chhiba & Another* reported in 1989 AIR 458, *K.K. Bhalla v/s State of M.P. & Others* reported in 2006 (3) SCC 581 and *Faish Choudhary v/s D.G. Doordarshan* reported in 1989 AIR 157 and has prayed for the following reliefs:-

- (1) Summon the entire relevant record from the possession of the authorities;
- (2) Upon holding that the impugned eligibility conditions in Annexure CA Financial 1.II and 1.III of as defined in Pre-qualification Criteria of the NIT as malafide, arbitrary and illegal, issue a Writ of

Mandamus or any other appropriate direction, quashing the same.

(3) Issue a Writ of Mandamus directing the respondent authorities to consider the objections raised by the petitioner.

(4) Issue a Writ of Mandamus directing the respondents authorities to permit the petitioner to take part in the NIT proceedings.

(5) Issue a Writ of Mandamus directing the respondent authorities to consider the candidature of the petitioner and its' bid for award of the Tender Contract.

(6) Award cost of the litigation in favour of the petitioner.

06. In the rejoinder, the petitioner has stated that the petitioner is having vast experience in the matter of installation of lifts / elevators. The petitioner has also challenged the corrigendum No.3 issued on 08.07.2019, which provides that the bidder should be an entity having their own manufacturing unit for manufacturing lifts. In the rejoinder, the petitioner has placed reliance upon a judgment delivered by the Division Bench of Gujrat High Court in the case of ***Coastal Marine Construction & Engineering Limited v/s Union of India*** and has prayed for quashment of the terms and conditions, which are coming in way of the petitioner.

07. A reply has been filed in the matter and the respondents have admitted the issuance of tender by them. The respondents have further stated that they have undertaken the construction of multi storey residential

buildings under the Prime Minister Awas Yojna and about 138 lifts are to be installed in the multi storey building.

08. The respondents have further stated that lifts / elevators to be installed are going to cater the need of people belonging to all age group and they want to procure robust and durable lifts so that they have a life span of 25 to 30 years.

09. It has also been stated that the object of procuring lifts directly from the manufacturer is to ensure supply of lifts directly from the manufacturer and avoid intermediaries. It has also been stated that in case, supply is directly availed from the manufacturers, the availability of spare part and components in time is also assured.

11. It has also been stated that because they are procuring lifts directly from the manufacturer, it will reduce the cost and such condition cannot be said to be a tailor-made condition. The respondents have also stated that the pre-qualification eligibility criteria in the documents is reasonable and is for fair competition for all manufacturers of lifts.

12. The respondents have also stated that they have invited tender for supply of 138 lifts within a period of six months, and therefore, annual installation is going to be 276 lifts. Hence, a pre-eligibility criteria for installation of 1000 lifts in three years with an annual average of 333 lifts is fair and reasonable.

13. It has also been stated that in the past, small time businessmen and small firms have participated in various tenders and the respondents are having a bitter experience,

when they leave work incomplete. The respondents have stated that the project in question is being directly funded under the Prime Minister Awas Yojna and they are answerable to the Central Government also. They cannot delay the project and they have to provide quality houses with quality lifts to the public at large.

14. It has been argued before this Court that terms and conditions do not violate the Fundamental Right guaranteed to the petitioner and scope of interference by this Court in respect of tender conditions is limited keeping in view the judgment delivered in the case of *Coastal Marine Constitution Limited (supra)*.

15. It has also been stated that Central Vigilance Commission memorandum dated 07.05.2004 clarifies that the guidelines dated 17.12.2002, on pre-qualification eligibility criteria, are illustrative and the organization may suitably modify these guidelines for specialized jobs / works, if considered necessary. The respondents have stated that they have issued the tender keeping in view their requirements and no case for interference is made out in the matter.

16. Heard learned counsel for the parties at length and perused the record. The matter is being disposed of at motion hearing stage itself with the consent of the parties.

17. The undisputed facts reveals that a N.I.T. i.e. N.I.T. No.03/PMA&/2019-20 was issued on 10.06.2019 for Supply, Installation, Testing, Commissioning & Maintenance of Lifts including Allied Works under PMAY at Bhuritekri, Dudhiya-Devguradiya, Bada, Bangerda,

Budhaniya and Badabangerda extension, M.P. The petitioner is aggrieved by Clause-1 and 2 of the N.I.T. as well as corrigendum issued by the respondents dated 08.07.2019.

18. The petitioner has placed heavy reliance upon the Central Vigilance Commission Guidelines issued on the subject dated 17.12.2002.

19. The Central Vigilance Commission Guidelines do provide for a criteria for issuance of tender and the factors, which are to be kept in mind while issuing an N.I.T. The Central Vigilance Commission guidelines have been modified from time to time and the Central Vigilance Commission vide office memorandum dated 07.05.2004 has clarified that the guidelines dated 17.12.2002 can be suitably modified by an organization for specialized jobs / works, if considered necessary.

20. As per the return filed by the respondents, it has been stated that as many as 138 lifts are to be procured within a period of six months, and therefore, the annual installation will be 276 lifts. Hence, pre-qualification eligibility criteria of installation of 1000 lifts in three years with an annual average of 333 lifts is fair and reasonable.

21. The conditions in respect of turnover of Rs.100.00 crores in three years is fair and reasonable keeping in view the magnitude of supply. The number of lifts and average annual turnover of Rs.100.00 crores, in previous three years, has co-relation with each other and it is just double the average annual estimated cost of the tender. The estimated cost of the tender is Rs.22.85 crores, and

therefore, the annual turnover shall be 45.70 crores and in those circumstances, a clause finds place in respect of annual turn over. It can never be said to be unreasonable. It is not a case where the respondents have tailor-made the terms and conditions of the N.I.T. to favour any individual. The judgment delivered in the case of *Haffkine Bio-Pharmaceutical Corporation Limited v/s Nirlac Chemicals Through its Manager & Others reported in 2018 (12) SCC 790* does not help the petitioner keeping in view the nature of work and the conditions of the N.I.T. especially keeping in view the qualification issued by the Central Vigilance Commission.

22. This Court has carefully gone through the judgment delivered in the case of *Tata Cellular (supra)* and it is certainly true that Government / Administrative Body functioning in an administrative sphere has to act in a fair and transparent manner not effected by bias or actuated by *malafide*. The petitioner has not been able to establish that bias or *malafide* involved in the process. Merely because the condition is not suiting to the petitioner, it cannot be said that the respondents have acted in an unfair manner in order to favour someone.

23. Similarly, this Court has carefully gone through the judgment delivered in the case of *Union of India v/s Dinesh Engineering Corporation (supra)* and again keeping in view the aforesaid judgment, it can never be said that the respondents have violated the recognized norms, nor it can be said that the terms and conditions of the tender are unreasonable and arbitrary. The judgment again does not

help the petitioner, as the conditions imposed in the N.I.T. are reasonable conditions and they have been introduced in the N.I.T. keeping in view the specialized nature of work and to assure procurement of quality lifts to the house, which are being constructed for the weaker section of the society.

24. This Court has also taken into accounts the other judgments referred by the learned counsel for the petitioner in the case of *Meerut Development Authority (supra)*, *R.C. Chhiba (supra)*, *K.K. Bhalla (supra)* and *Fasih Choudhary (supra)*, however, there is no evidence on record to establish that the authorities have abused the power vested with them or there has been *malafide* exercise of power on the part of the authorities. The respondents are the best judge to frame terms and conditions of the N.I.T. and keeping in view the specialized work, they have issued the tender with the conditions, which are under challenge. A similar view has been taken by the Division Bench of Gujrat High Court in the case of *Coastal Marine Engineering Construction Limited (supra)* upholding the action of the respondents therein in respect of tender conditions.

25. In the considered opinion of this Court, keeping in view the fact that tender relates specialized job, large number of lifts are to be procured and also keeping in view the fact that tender document has been prepared after consulting the specialist on the subject, it can never be said that the respondents have violated the guidelines issued by the Central Vigilance Commission. By no stretch of

imagination, it can be said that the action of the respondents is violative of Articles 14, 19(1)G and 20 of the Constitution of India. This Court does not find any reason to hold that the terms and conditions of the N.I.T. are arbitrary and illegal, and therefore, if the petitioner does not fulfill the terms and conditions as per the N.I.T., the question of permitting the petitioner to participate in the process does not arise.

26. The Hon'ble Apex Court in the case of *Michigan Rubber (India) Limited v/s The State of Karnataka & Others reported in 2012 (8) SCC 216* in paragraphs-25 to 37 has held as under:-

“25. Respondent No. 1-the State, in their counter affidavit, highlighted that tyre is very critical and a high value item being procured by the KSRTC and it procured 900x20 14 Ply Nylon tyres along with the tubes and flaps in sets and these types of tyres are being used only by the State Transport Units and not in the domestic market extensively. It is highlighted that the quality of the tyre plays a major role in providing safe and comfort transportation facility to the commuters.

26. It is also pointed out by the Respondent-State that in order to ensure procurement of tyres, tubes and flaps from reliable sources, the manufacturers of the same with an annual average turnover of Rs. 200 crores during the preceding three years, were made eligible to participate in the tenders. In the tender issued for procurement of these sets during October, 2004, the appellant participated and based on the L1 rates, the orders for supply for 16,000 sets of tyres were placed on the firm. It is also pointed out that the appellant supplied 10,240 sets of tyres and remaining quantity was cancelled due to quality problems.

27. Materials has also been placed to show that the appellant participated in subsequent tenders and orders were released for supply of 900 x 20 14 PR tyres, tubes and flaps from October 2006 to September, 2007. It is also explained that after going into various complaints, in order to achieve good results, new tyre mileage and safety of the public etc., and after noting that vehicle/chassis manufacturers such as M/s Ashok

Leyland, M/s Tata Motors etc. have strict quality control system, it was thought fit to incorporate similar criteria as a pre-qualification for procurement of tyres.

28. It is also highlighted by the State as well as by the KSRTC that the tender conditions were stipulated by way of policy decision after due deliberation by the KSRTC. Both the respondents highlighted that the said conditions were imposed with a view to obtain good quality materials from reliable and experienced suppliers. In other words, according to them, the conditions were aimed at the sole purpose of obtaining good quality and reliable supply of materials and there was no ulterior motive in stipulating the said conditions.

- (a) Managing Director, Bangalore Metropolitan Transport Corporation
- (b) Managing Directors of four sister Corporations
- (c) Director, Security & Vigilance
- (d) Director, Personnel and Environment
- (e) Chief Accounts Officer
- (f) Chief Engineer (Production)
- (g) Chief Engineer(Maintenance)
- (h) Chief Accounts Officer(Internal Audit)
- (i) Controller of Stores and Purchase

29. Thus it is clear that the said CMG is a widely represented body within the Respondent No. 2-KSRTC.

30. Further materials placed by KSRTC show that the CMG met on 17.05.2007 and deliberated on the question of conditions to be incorporated in the matter of calling of tenders for supply of tyres, tubes and flaps. It is pointed out that in view of the experience gained over the years, it was felt by the said Group that the impugned two conditions should be essential qualifications of any tenderer. The said policy decision was taken in the best interest of the KSRTC and the members of the traveling public to whom it is committed to provide the best possible service. In the course of hearing, learned counsel for the respondents have also brought to our notice the Minutes of Meeting of the CMG held on 17.05.2007. The said recommendation of the CMG was ultimately approved by the Vice Chairman of KSRTC. In the circumstances, the said impugned two conditions were incorporated in the tender notice dated 05.07.2007.

31. It is also brought to our notice that the KSRTC is

governed by the provisions of the Karnataka Transparency in Public Procurements Act, 1999 and the Rules made thereunder, viz., Karnataka Transparency in Public Procurements Rules, 2000. Though in Condition No 2(a) in the tender notice dated 05.07.2007, the names of certain vehicle manufacturers were mentioned, after finding that it was inappropriate to mention the names of specific manufacturers in the said condition, it was decided to delete their names. Accordingly, a corrigendum was put up before the CMG and by decision dated 04.08.2007, CMG decided to revise the pre-qualification criteria by deleting the names of those manufacturers. Learned counsel for the respondents have also placed the Minutes of Meeting of the CMG held on 04.08.2007. It is also brought to our notice that the said corrigendum was also approved by the competent authority.

32. In addition to the same, it was not in dispute that the appellant- Company was well aware of both the original tender notices and the corrigendum issued. It is also brought to our notice that the appellant wrote a letter making certain queries with regard to the corrigendum issued by the KSRTC and the said queries were suitably replied by the letter dated 11.08.2007.

33. It is also seen from the records that pursuant to the tender notice dated 05.07.2007, seven bids were received including that of the appellant- Company. They are:

- (i) M/s Apollo Tyres
- (ii) M/s Birla Tyres
- (iii) M/s Ceat Ltd
- (iv) M/s Good Year India
- (v) M/s JK Industries
- (vi) M/s MRF Ltd
- (vii) M/s Michigan Rubber (Former Betul Tyres)

It is brought to our notice that successful bidders were CEAT and JK Tyres. Accordingly, contracts were entered into with the said two companies by the KSRTC and the purchase orders were placed and they have also effected supplies and completed the contract and the KSRTC also made payments to the said suppliers.

34. It is pertinent to point out that the second respondent has also issued 4 (four) more tender notices after the tender notice dated 05.07.2007. The said tender notices were dated 04.03.2008, 22.08.2008,

24.10.2008 and 19.03.2009. Pursuant to the tender notices dated 04.03.2008, 22.08.2008 and 24.10.2008, contracts have been awarded and have been substantially performed. It is also brought to our notice that all the said four subsequent tender notices also contained identical conditions as that of the impugned conditions contained in tender notice dated 05.07.2007.

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, the 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.

36. The learned single Judge considered all these aspects in detail and after finding that those two conditions cannot be said to be discriminatory and unreasonable refused to interfere exercising jurisdiction under [Article 226](#) of the Constitution and dismissed the writ petition. The well reasoned judgment of the learned single Judge was affirmed by the Division Bench of the High Court.

37. In the light of what is stated above, we fully

agree with the reasoning of the High Court and do not find any valid ground for interference. Consequently, the appeal fails and the same is dismissed with no order as to costs.”

In light of the aforesaid judgment, it can safely be gathered that the Government and their undertakings do have a free hand in setting terms of a tender and unless the terms and conditions are arbitrary, discriminatory, *malafide* or actuated by bias, the scope of interference by Courts does not arise. In the aforesaid judgment it has also been held that the Court would not interfere in a matter because it feels that some other terms in the tender would have been fairer, wiser or more logical.

27. The scope of judicial scrutiny has been considered by the Hon'ble Apex Court time and again. In the case of *Afcons Infrastructure Limited v/s Nagpur Metro Rail Corporation Limited reported in 2016 (16) SCC 818*, the Apex Court has held as under:-

“We may add the owner or the employer of a project, having authored the tender documents, is the best persons to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there a *malafide* or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner of employer of a project may give an interpretation to the tender documents that is no acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given”.

28. The Apex Court in the case of *Reliance Telecom Limited & Others v/s Union of India & Others reported in 2017 (4) SCC 269* has again dealt with scope of interference in respect of the tender.

29. In the case of *Tata Cellular v/s Union of India* reported in 1994 (6) SCC 651 again the scope of judicial review has been looked into by the Hon'ble Apex Court. In the aforesaid case, it has been held that the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract and the Government must be allowed to have a fair play in the joints as it is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere.

30. The Apex Court in the case of *Monarch Infrastructure (P) Limited v/s Ulhasnagar Municipal Corporation & Others* reported in 2000 (5) SCC 287 was again dealing with the N.I.T. and it has been held that it cannot say whether the conditions are better than what were prescribed earlier, for in such matters, the authority calling the tenders is the best judge. The Court declined to restore *status quo ante*.

31. In the case of *Cellular Operator Association of India & Others v/s Union of India & Others* reported in 2003 (3) SCC 186, the Apex Court has held that in respect of the matters affecting policy and those that require technical expertise, the Court should show deference to, and follow the recommendations of the Committee which is more qualified to address the issues.

32. In the present case, N.I.T. has been issued based upon the recommendation of the Expert Committee, and therefore, question of interference by this Court, as terms and conditions are not unreasonable, does not arise.

33. In the considered opinion of this Court, the petitioner has failed to establish that the criteria adopted by the respondents is contrary to public interest, discriminatory or unreasonable. Hence, the question of interference by this Court does not arise.

Accordingly, the present writ petition stands dismissed.

Certified copy as per rules.

(S.C. SHARMA)
JUDGE

(VIRENDER SINGH)
JUDGE

Ravi