

W. P. No.4151/2017

21.03.2017

Shri Parag Chaturvedi, learned counsel for the petitioner.

Shri Pranay Gupta, learned counsel for the respondent on caveat.

With consent of learned counsel for the parties the matter is heard.

Petitioner, seeks quashment of Notice Inviting Tender dated 03.02.2017 and the corrigendum issued on 28.02.2017.

The tender notice issued by respondent is for fixing the agency for transportation of milk in insulated motor vehicle from Bhopal, Sagar and Betul Dairy Projects.

Petitioner is currently operating on the basis of the contract awarded in the year 2014.

Grievance raised by the petitioner is against certain condition stipulated in the Tender Notice as regard to specific weight specification of the Insulated Motor Vehicle. As also against withdrawal of the condition of having transport licence.

The condition which find mention in the NIT against which the grievance is raised are that the

applicant must possess insulated motor vehicle manufactured in 2013 thereafter, having weight carrying capacity 08.15/6.5/4.8/3.8 and 02 ton.

It is urged that said condition has been stipulated in the Tender Notice to extend benefit to the chosen one. It is contended that earlier in 2014 no such condition were laid down and the petitioner who owns a vehicle having carrying capacity of 4.375 ton being equivalent to TATA 709 was given the contract for a period of two years vide agreement dated 19.11.2015 with a further stipulation that there in Clause 15/34 that the period was extendable by three years with the mutual consent.

It is contended that the issuance of fresh tender before completion of two years is bad for the reason that no opportunity of hearing was afforded nor the discretion Clause 15/34 has been explored. It is urged that the respondent is estopped from introducing new conditions. It is submitted that the action by respondent violates the principle enshrined under Article 14 and 19(1)(g) of the Constitution.

In the context of these submissions petitioner seeks quashment of the NIT and direction to extend the petitioner's term of contract for a period of three years.

Respondent on his turn has contradicted the contention raised by the petitioner. It is urged that being the employer, it is its prerogative to lay down condition which it thinks to be more beneficial while denying the claim for renewal of contract for three years, it is contended that clauses 15/34 does not lay down that the respondent is bound to extend the term which could be only by mutual agreement. It is further contended that there is no such term in the agreement with the petitioner that, in future tender the respondent will not introduce any new eligibility clause. On these submissions respondent seeks dismissal of petition.

Considered the rival submissions.

As to the contention that the petitioner has an incessant right for extension of contractual period on that the respondent in future tender cannot introduce new eligibility criteria is taken note of and rejected at the outset. As no such Clause is borne out from the existing agreement between the petitioner and respondent that in future the respondent will not lay down condition regarding eligibility. Therefore, the contention that the respondent in arbitrary exercise of power has laid down new condition in the fresh NIT

deserves to be and is negated.

As to the claim regarding continuation of the Contract in term of Clause 15/34 of the Agreement dated 19.11.2015, suffice it to say that the said clause comes into operation when the parties mutually agree for extension. Evidently, no material has been commended at would suggest that the respondent has any inclination to extend the contract. Furthermore, the clause being reciprocal the respondent cannot be compelled to extend the term.

Now coming to the contention regarding stipulations in the NIT this Court is not impressed with the contentions raised on behalf of the petitioner that the stipulations contained in the NIT as pre- conditions for grant of contract suffer from vice of unreasonableness, unfairness and arbitrariness. These concepts as has been held in the case of **Assistance Commissioner vs. Issac Peter : (1994) 4 SCC 104** are concept known to the field of administrative law rather in a contractual matter even where one of the parties is government. It has been held "In short, the duty to act fairly is sought to be imported into the contract to modify and alter its terms and to create an obligation upon the State which is not there in the

contract. We must confess, we are not aware of any such doctrine of fairness or reasonableness. Nor could the learned counsel bring to our notice any decision laying down such a proposition. Doctrine of fairness or the duty to act fairly and reasonably is a doctrine developed in the administrative law field to ensure the rule of law and to prevent failure of justice where the action is administrative in nature. Just as principles of natural justice ensure fair decision where the function is quasi-judicial, the doctrine of fairness is evolved to ensure fair action where the function is administrative. But it can certainly not be invoked to amend, alter or vary the express terms of the contract between the parties. This is so, even if the contract is governed by statutory provisions, i.e., where it is a statutory contract or rather more so.”

Even otherwise, it being a prerogative of the government to lay down the terms and conditions on which contract can be awarded, the scope of judicial review is very limited as has been noted in the case of **Puravankara Projects Ltd. vs. Hotel Venus International : (2007) 10 SCC 33** wherein it is held that “tender terms are contractual and it is the privilege of the government which invites the tender

and Courts do not have any jurisdiction to judge as to how the tender terms would be framed.”

In **Michigan Rubber (India) Ltd. vs. State of Karnataka & ors. : (2012) 8 SCC 216** the Supreme Court while observing that 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. And that 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 has held that :

"23 (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 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. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to

favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached" ? and

(ii) Whether the public interest is affected ?

If the answers to the above questions are in negative, then there should be no interference under Article 226."

In the case at hand, merely because certain terms and conditions has been stipulated by the respondent in notice inviting tender to be a pre-qualification for the purpose of grant of contract; in absence of a substantiation of allegation that the same has been introduced in favour of particular person or to single out the petitioner from the fray, it cannot be termed that the terms are arbitrary and has been introduced with the malafide intention.

In view whereof, petition being devoid of substance stands **dismissed**.

(SANJAY YADAV)
JUDGE