

(2019) 05 MP CK 0042

Madhya Pradesh High Court

Case No: Writ Petition No. 9000 Of 2019

Mahavir Coal Resources Pvt. Ltd

APPELLANT

Vs

Madhya Pradesh Power
Generating Co. Ltd. And Others

RESPONDENT

Date of Decision: May 2, 2019

Acts Referred:

- Constitution Of India, 1950 - Article 14, 226

Citation: (2019) 2 JLJ 497 : (2019) 3 MPLJ 210

Hon'ble Judges: S.K. Seth, CJ; Vijay Kumar Shukla, J

Bench: Division Bench

Advocate: Amit Seth

Final Decision: Dismissed

Judgement

Vijay Kumar Shukla, J

1. Invoking writ jurisdiction under Article 226 of the Constitution of India, the petitioner has challenged the condition contained in clause 1 of the

Technical Qualification of the Notice Inviting Tender (NIT), dated 20-4-2019 for transportation of RoM coal from NCL mines to Railway Sidings and

loading in Indian Railway wagons for onward transportation through end to end Road-cum-Rail (RCR) mode to Shri Singaji Thermal Power Project, Khandwa.

2. The petitioner-company is a Private Limited Company engaged in the business of trading, supply and transportation of coal. The grievance of the

petitioner is that conditions stipulated in clause 1 of the impugned NIT, requiring the work experience for transportation of coal of State owned Power

Generating Companies/NTPC/Captive Power Utility of any PSU of India, is illegal, arbitrary and violative of Article 14 of the Constitution of India, as

it creates a class within a class amongst tenderers, who had experience of transportation of coal with State owned Power Generating Companies etc.

and other than State owned companies. It is submitted that prior to the impugned NIT the respondents had issued an NIT on 3rd November, 2018 for

the same work and the tenderers who had the work experience of similar nature with other Power Utility (Private Power Generating Company] were

also held qualified to participate in the NIT. It is asserted that by excluding such tenders, who had work experience of similar nature with Other Public

Utilities/Private Power Generating Companies has created a monopoly in favour of a class of contractors who had work experience of transportation

of coal with State owned Power Generating Companies. He strenuously urged that the aforesaid impugned condition has no reasonable nexus with the

nature of the work, for which the NIT has been issued. He further submitted that the aforesaid impugned condition is a Tailor-Made and, therefore,

being arbitrary and discriminatory, be quashed and the respondents be directed to amend the clause 1 of the impugned condition of the NIT dated 20-

4-2019 and the petitioner be allowed to participate in pursuance to the said NIT by providing Level Playing field.

3. To buttress his contentions, he referred to the judgment passed by the Apex Court in the cases of Meerut Development Authority vs. Association

of Management Studies and another, (2009) 6 SCC 171; National Highways Authority of India vs. Gwalior-Jhansi Expressway Limited, (2018) 8 SCC

243; and an order dated 30-01-2019 passed by the Karnataka High Court in W.P. Nos.55568-55571/2018 [M/s Ashodaya Cement Products and

others vs. Bangalore Electricity Supply Company Ltd. and another].

4. In the case of Meerut Development Authority (supra) relied by the learned counsel for the petitioner itself, the Apex Court has held that the Court

is not concerned with the merits or correctness of the decision, but with the manner in which the decision is taken or the order is made. The Courts

have inherent limitations on the scope of any such enquiry. The relevant extract read as under:-

40. There is no difficulty to hold that the authorities owe a duty to act fairly but it is equally well settled in judicial review, the court is not concerned with the merits or correctness of the decision, but with the manner in which the decision is taken or the order is made. The Court cannot substitute its own opinion for the opinion of the authority deciding the matter.

41. The distinction between appellate power and a judicial review is well known but needs reiteration. By way of judicial review, the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then the court cannot act as an appellate court by substituting its opinion in respect of selection made for entering into such contract. But at the same time the courts can certainly examine whether 'decision making process' was reasonable, rational, not arbitrary and violative of Article 14. [See: *Sterling Computers Ltd.*].

5. The Apex Court in the case of *Michigan Rubber (India) Limited vs. State of Karnataka and others*, (2012) 8 SCC 21 dealing with the scope of interference in the matter of tender conditions ruled thus:

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 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.

6. In the case of Siemens Aktiengesellschaft and Siemens Ltd. vs. Delhi Metro Rail Corporation Ltd. and another, (2014) 11 SCC 28 the Supreme

Court quoted from the judgment reported as (1994) 6 SCC 651 (Tata Cellular v. Union of India) and (2007) 14 SCC 517 (Jagdish Mandal v. State of

Orissa) to hold as under:

"23. 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.â€

7. In the case of (Montercarlo Ltd. vs. N.T.P.C Ltd., (2016) 15 SCC 272 it was held that in the competitive commercial field in the matter of award

of contract through tender, the conditions regarding bidderâ€™s expertise and technical capability and capacity are decided by the experts. In the

matter of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have

sanguinity and are workable and realistic.

8. In the case of Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd., (2016) 16 SCC 81,8 it was held that the owner or the employer of

a project, having authored the tender documents, is the best person to understand and appreciate its requirements to achieve the work which is sought

to be executed. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or

perversity in the understanding or appreciation or in the application of the terms of the tender conditions.

9. The principle deducible from the above discussion, is that interference by the Courts in such matter is required only when the decision taken by the

authority is irrational or arbitrary, or is vitiated by bias, favouratism or malafide.

10. In view of the aforesaid, we do not find any merit in the arguments advanced by the learned counsel for the petitioner, because it is the sole

prerogative of the authority inviting tenders to lay down the eligibility conditions for a particular nature of work. Merely because in the earlier NIT, the

tenderers who had executed the work with Other Private Power Generating Companies were also eligible, would not estop the respondents to

prescribe different eligibility criteria in the subsequent tender and limiting it only in respect of the tenderers, who have executed the work for

transportation of coal with State owned Power Generating Companies, NTPC, Captive Power Utility of any PSU in India.

11. In the light of aforesaid enunciation of law by the Apex Court in various judgments, we do not perceive any arbitrariness, malafide in the Clause 1

of the NIT, dated 20-4-2019 for inviting tenders for transportation from the tenderers who had experience of transportation of coal with State owned

Power Generating Companies, warranting any interference in exercise of power of judicial review under Article 226 of the Constitution of India..

12. Consequently, the writ petition being sans substance, is hereby dismissed.