



**HIGH COURT OF MADHYA PRADESH:
JABALPUR**

(DIVISION BENCH: HON'BLE SHRI JUSTICE S.K.SETH &
HON'BLE SHRI JUSTICE H.P.SINGH JJ)

W.P.No. 10817 of 2016

M/s. Supreme Transport

vs.

State of M.P & another

ORDER

(Delivered on 19.7.2016)

Seth, J:

1) Petitioner, a Mumbai based private limited Company, is challenging the Clause 11(e) of the NIT dated 26.5.2016 (Ann.P-26) floated by respondent No.2 inviting tenders from eligible bidders for providing air taxi services to various destinations located in and outside Madhya Pradesh.

2) The impugned condition of the NIT reads as follows :- "11(e): At the time of bid submission the bidder-member of the consortium who has been blacklisted, suspended by any state or central government, or any agency, authority, or body of any state or central government, or has previously entered into an agreement with the state of Madhya Pradesh or the MPSTDC for air taxi operations and such contract has been



terminated for default of the bidder, shall not be eligible to participate in the bid process." (**emphasis added by us**).

3) In the present case, the only question that arises for our consideration is whether the impugned condition is arbitrary, and as such, is liable to be struck down.

4) Undisputed relevant facts, necessary for deciding the present petition are as under. That on the 4th of February, 2015, an NIT was issued by respondent No. 2 on behalf of respondent No. 1, inviting tenders from eligible prospective bidders for providing air taxi services to various destinations in and outside Madhya Pradesh (at least 4 in M.P).

5) The Petitioner's bid was accepted and a Letter of Acceptance (LOA) was issued and an Air Operation Agreement (AOA) was duly executed between the petitioner and respondent No.2 on 14th of March 2015 to start the commercial operation of air taxi service at the earliest, but not later than 4 months from the date of AOA after completing all formalities including statutory requirements.



6) It is undisputed that petitioner-company could not fulfill its contractual obligations within the stipulated time and failed to start the commercial air taxi service.

7) This led to notice of termination of contract, and later on vide communication dated 5.12.2015 contract was terminated which is not challenged before us in this petition.

8) Respondents issued fresh NIT dated 26.5.2016 inviting tenders from eligible bidders for providing air taxi services to various destinations located in and outside Madhya Pradesh(including 4 cities). Pre-qualification as contained in Clause 11 (e) of the fresh tender makes petitioner ineligible to participate in the bidding process. Hence this writ petition.

9) Shri R.N.Singh, learned Senior Advocate appearing for petitioner submitted earlier petitioner could not commence the air taxi service because of default of Director General Civil Aviation which led to the termination of the earlier contract. He, however, submitted that he is not challenging the



earlier termination of contract in this petition;but the exclusion of the petitioner company from the bidding process is arbitrary, penal in nature. He further submitted that by now everything necessary to start commercial air taxi operation, like availability of two 9 seater aircrafts; base of air taxi service; deployment of requisite technical and ground staff;statutory permissions; etc.are in position and petitioner is all set to commence commercial air taxi, operations within no time and respondents instead of allotting the work to petitioner, have totally excluded it from consideration because of the impugned condition. It is against the public interests and the condition is arbitrary and discriminatory, and as such, is liable to be struck down. He invited our attention to the following decisions: Michigan Rubber (India) Ltd. v. State of Karnataka (2012) 8 SCC 216; Meerut Development Authority v. Association of Management (2009) 6 SCC 171; Tata Cellular v. UOI (1994) 6 SCC 651; Shri Shyamji Transport v. Food Corporation of India (2015) 1 SCC 440; Reliance Energy Ltd. v. Maharashtra State Devp. Corporation (2007) 8 SCC 1.



10) Shri Anshuman Singh, Advocate appeared for respondent No. 2 and sought a day's time to file a reply. As it was not objected to by Shri R.N.Singh, prayer was allowed and a reply was filed on behalf of respondent No. 2, main contesting party.

11) Shri Anshuman Singh appearing for respondent No. 2 submitted that earlier termination was on account of default of petitioner as it could not fulfill the earlier contract and failed to commence air service taxi operations within the stipulated or extended time and as such there is nothing wrong with the impugned pre-qualification condition. He further submitted that the petitioner for its failure could not be permitted to throw blame on the DGCA and get away with it. He submitted that in the realm of contract, an authority, inviting tender has wide discretion to set out conditions, including pre-qualification in the NIT which is only an intimation to invite offers from eligible prospective bidders.

12) He further submitted that prospective bidder has no right to insist on the inclusion or exclusion clause in pre-qualification or other terms and conditions of the NIT. Terms and conditions of NIT are not amenable to judicial review under



Article 226 of the Constitution of India or in the alternative, he submitted that the scope of judicial review is very limited. There is no fundamental right to deal with the State or its authorities in contractual matters. Lastly, he submitted that the writ petition being devoid of merit and substance is liable to be thrown out *in limine* with costs. He placed reliance on Michigan Rubber(India) Ltd. v. State of Karnataka (2012) 8 SCC 216; Delhi Development Authority v. UEE Electricals Engg (2004)11 SCC 213; Shapers Construction (P) Ltd v. Airport Authority of India (1996) 10 SCC 760; Bharat Sanchar Nigam Ltd. v. Bhupendra Minhas (2008) 11 SCC 273; Global Energy Ltd. v. Adnani Exports (2005) 4 SCC 435; Directorate of Education v. Educomp Datamatics (2004) 4 SCC 19.

13) Shri P.K.Kaurav, Additional Advocate General, appearing for State Government on advance copy, supported submissions of Shri Anshuman Singh and submitted that the writ petition deserves to be dismissed at the threshold with costs as no cause for interference is made out in the writ petition. He referred to decisions of the Supreme Court in Tata Cellular V. UOI (1994) 6 SCC 651; Air India Ltd. Cochin v. International Airport Ltd. (2000) 2 SCC 617; Directorate of Education v.



Educomp Datamatics (2004) 4 SCC 19; Association of Registration of Plates v. UOI (2005) 1 SCC 679; Global Energy Ltd. v. Adani Exports Ltd (2005) 4 SCC 435; Michigan Rubber(India) Ltd. V. State of Karnataka (2012) 8 SCC 216.

14) We have heard the rival submissions at length. Perused documents and carefully considered various authorities cited at the Bar.

15) We have no illusions about our limitations in addressing the intricacies of public utility operation. It is not our function to act as a Super Board, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator. It would be the height of folly, to expect us to review intelligently the intricacies of public utility operation.

16) After careful consideration and critical analysis of the various judgments cited at the Bar, we can safely deduce following principles:-

A. No citizen, much less a corporate body, has any fundamental right to deal with the Government or its



authority in the contractual matter;

B. The modern trend points to judicial restraint in administrative action.

C. While exercising power of judicial review, Court cannot strike down the terms of the tender prescribed by the government because it feels that some other terms in the tender would have been better wiser or logical. Court do not sit as a court of appeal over the decision, but merely examine the manner in which the decision was made. They can interfere only when policy decision is arbitrary. 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";

(ii) Whether public interest is affected.



D. The Court should not forget that it 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.

E. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

F. 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-fide*.

G. Quashing administrative decisions may impose heavy burden on public Exchequer and lead to increased and unbudgeted expenditure.



17) Shri R.N.Singh, learned Senior Advocate at the outset made it clear that he is not challenging impugned condition on the ground of male-fide or favoritism. He also said that there was no hidden agenda.

18) This, then, considerably reduces canvass of our inquiry. Our inquiry is now confined to examining whether the pre-qualification violates Art. 14 or is it so arbitrary and irrational that a reasonable man cannot countenance it. Judging from the admitted facts and in the backdrop of principle stated above and the object of NIT to provide smooth, faster air connectivity in and outside Madhya Pradesh, our answer is in the negative. It is in the larger public interests to give fillip to the economy by energizing overall development in the air passenger transport sector. After analyzing the impugned pre-qualification condition on the anvil of justness and reasonableness vis-a-vis object sought to be achieved, we find there is a direct nexus between keeping away the prior defaulter from participating in the bidding process on the principle of once bitten twice shy. Petitioner cannot be heard to say that it should be allotted the work or be given another chance.



19) In view of the foregoing discussion, we find no merit and substance in the writ petition. Accordingly, it is hereby dismissed without any order as to costs. Respondents are free to proceed ahead in the matter of the NIT ignoring the bid, if any, submitted by the petitioner. Interim order stands vacated

20) Ordered accordingly.

(S.K.SETH)

(H.P.SINGH)

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