M/S Utkal Suppliers vs M/S Maa Kanak Durga Enterprises on 9 April, 2021

Equivalent citations: AIR 2021 SUPREME COURT 1896, AIRONLINE 2021 SC 193

Author: R.F. Nariman

Bench: Rohinton Fali Nariman, B.R. Gavai, Hrishikesh Roy

REPORTA

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL NOS. 1517-1518 OF 2021
[ARISING OUT OF SLP (CIVIL) NO.4222-4223 OF 2021]

M/S UTKAL SUPPLIERS ...APPELLANT

VERSUS

M/S MAA KANAK DURGA ENTERPRISES & ORS. ...RESPONDENTS

JUDGMENT

R.F. Nariman, J

1. Leave granted.

2. These appeals arise out of a Tender Call Notice ["TCN"] dated 30.12.2019 issued by Respondent No.4, viz., the Office of the Superintendent, SCB Medical College and Hospital, Cuttack. By this TCN, sealed tenders in a two-bid system (technical and financial) are invited from eligible registered diet preparation and catering firms/suppliers etc. having a valid labour licence and a food licence with a minimum of three years of relevant experience in the field of preparation and distribution of therapeutic and non-therapeutic diet to government or private health institutions having a minimum of 200 beds Date: 2021.04.09 15:10:20 IST Reason:

> for the year 2019-2020. In the "Terms of Reference" attached to the TCN, clauses VI.3.3 and VI.3.9 are important and are set out hereunder:
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> "VI.3 Eligibility criteria:
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> xxx xxx xxx

3. The bidder should have a minimum of 3 years' experience in diet preparation and its supply/services in Govt. or Private Health Institutions only having minimum 200 no. of beds. xxx xxx xxx

9. The bidder should have valid labour licence (registration no. & date) of Labour Department." Further, under clause VI.13, the right to reject any bid is set out as follows:

"VI.13 Right to Accept or Reject the Bid:

The Hospital Administration reserves the right to accept or reject any bid and the bidding process and reject all such bids at any time prior to award of contract, without showing any reason thereby." Equally, under clause VI.16, the administration of the SCB Medical College and Hospital reserves under its sole discretion to disqualify any bid document if any of the documents enumerated in the said clause have not been submitted by the bidder. Clause VI.16(f) reads as follows:

"VI.16 Disqualification:

The Administration of the SCB Medical College Hospital, seeking this bid, reserves under its sole discretion to disqualify any bid document if the following documents have not submitted by the bidder:

xxx xxx xxx

f) Labour License from competent authority" Under clause VI.20, sub-clause (6) states:

"VI.20 General Information to Bidder:

xxx xxx xxx

6. The agency would recruit required number of staff for cooking and serving so that diet can be supplied to the indoor patients in time. List of personnel with their Aadhar card copy should be submitted to the office positively."

3. Pursuant to the aforesaid, four bids were received by the Tender Committee – from the Appellant, Respondent no.1, Respondent no.5 and Respondent no.6. Vide the Technical Committee meeting dated 17.02.2020, Respondent no.1 and Respondent no.6 were held to be disqualified inter alia for the reason that they had not submitted a valid labour licence, i.e., a contract labour licence from the competent authority, as per the TCN requirement. The Appellant and Respondent no.5 were shortlisted for opening of financial bids.

4. At this stage, Respondent no.1 filed a writ petition on 19.02.2020 apprehending that it may be disqualified. This writ petition was dismissed as being premature on 20.02.2020.

5. On 24.02.2020, the Tender Committee opened the financial bids of the Appellant and Respondent no.5, and found the Appellant to be the lowest bidder, quoting an average cost of Rs.82/- per patient per day.

6. Meanwhile, Respondent no.1 filed a writ petition dated 13.03.2020, praying that the Tender Committee proceedings be set aside and that Respondent no.1 be awarded the tender.

7. By a work order dated 27.11.2020, the Appellant was awarded the tender at the approved rate. Pursuant thereto, an agreement dated 27.11.2020 was entered into between the Appellant and Respondent no.4 for a period of one year. The High Court, by the impugned judgment dated 23.03.2021, referred to the facts and thereafter held:

"9. As mentioned above, Clause 9 of the eligibility criteria is candid and clear requiring valid license of Labour Department. The said stipulation never mandates the license to be issued under the Contract Labour (Regulation and Abolition) Act, 1970. In the wake of the purpose, which is to supply diet, therapeutic and non-therapeutic to the patients to the hospital, we fail to concede to the submissions of requirement of labour license under the Contract Labour (Regulation and Abolition) Act, 1970. Rather the submission of the Petitioner that, the same is required under the Odisha Shops and Commercial Establishments Act appears more acceptable. Therefore, the contention of the Opposite Parties requiring the labour license under the Contract Labour (Regulation and Abolition) Act, 1970 does not seem justified in view of the stipulation made in the TCN. When the submission of labour license (registration no. and date) by the Petitioner under the Odisha Shops and Commercial Establishments Act is not disputed, in our considered opinion the same satisfies the requirement sought for at Clause 9.

10. Coming to the other shortfall as contended by the Opposite Parties regarding lack of three years' experience in terms of Clause 3 of the eligibility criteria, the admitted case of the parties are that the Petitioner has submitted the certificate issued by All India Institute of Medical Science, Bhubaneswar relating to experience of providing patient dietary service in AIIMS since 8th August, 2015 till 26th October, 2018. This has been negatived by the Opposite Party No.3 by saying that the period of service of the Petitioner in AIIMS, Bhubaneswar was not in chronological order and the certificate furnished by the Petitioner was having gap period of extension order from 6th August, 2017 to 31st July, 2018. Such analysis of Opposite Parties in our considered view is flimsy on the face of Annexure-9 which is the experience certificate issued in favour of the Petitioner by the AIIMS, Bhubaneswar. Moreover,

the period of experience from 8th August, 2015 to 26th October, 2018 when exceeds three years period, the same appears to be satisfying the requirement of Clause-3 without any hesitation." xxx xxx xxx "13. It is admitted by the Opposite Parties that in the meantime during pendency of the writ petition, Opposite Party No.5 has been issued with the work order on 27th November, 2020 and he commenced with the supply of work with effect from 1st December, 2020. This undoubtedly a development made during pendency of the writ petition and as such is governed by the principle of lis pendens and of course such development happened in the meantime is subject to final result of the writ petition.

14. In view of the discussions made above as the bid of the Petitioner is found rejected illegally and contrary to the conditions of the TCN and the Petitioner specifically states that he was the lowest in the financial bid which the Opposite Parties has not replied cleverly, the action of Opposite Parties in rejecting the bid of the Petitioner and selecting Opposite Party No.5 for the purpose to grant him the contract, the same can safely be opined as mala fide action of the Opposite Parties. Accordingly, the grant of contract in order dated 27th November, 2020 under Annexure-F/3 is quashed.

15. In the result while quashing Annexure-F/3, Opposite Party Nos.1 to 3 are directed to issue work order in favour of the Petitioner in the event his financial bid is found lower than Opposite Party No.5 to commence the supply work with effect from 1st March, 2021. Needless to say that Opposite Party No.5 may continue his supply till 28th February, 2021."

8. Shri Siddhartha Dave, learned Senior Advocate, appearing on behalf of the Appellant, has argued that the High Court could not have second-guessed the authority's reading of its own tender and held that a registration certificate granted under the Orissa Shops and Commercial Establishments Act, 1956 ["Orissa Act"] could replace a labour licence under the Contract Labour (Regulation and Abolition) Act, 1970 ["Contract Labour Act"], as required by the authority. He also argued that the minimum three years' experience, as per the requirement contained in clause VI.3.3 was missing, as the experience certificate furnished by Respondent no.1 had a gap period from 06.08.2017 to

31.07.2018 which could not be made up and which was wrongly sought to be made up by the High Court. He also argued that it was perverse to hold that the action of the authority in granting the contract in favour of the Appellant was mala fide, and further went on to argue that after quashing the work order in favour of the Appellant, the High Court exceeded its jurisdiction in directing the authority to grant the work order to Respondent no.1.

9. Shri Aditya Kumar Chaudhary, learned counsel appearing on behalf of Respondent no.1 countered each of the aforesaid submissions. He pointed out that under Section 1(4) of the Contract Labour Act, the Act would apply only to an establishment in which 20 or more workmen are

employed. As the TCN did not require that establishments/firms etc. that applied have 20 or more workmen, it is obvious that it is not this Act that was the subject matter of clause VI.3.9 but it was the Orissa Act, the registration certificate under which was produced to the satisfaction of the High Court by Respondent no.1. He also countered the argument that three years' experience was not made out in the case of Respondent no.1 and referred to certain certificates issued by the All India Institute of Medical Sciences, Bhubaneswar, which made it clear that it had such experience. He argued that in the present case, the High Court had not exceeded the parameters of judicial review as it found mala fides attributable to the authority and also argued that the contract was to be awarded to Respondent no.1 only if it was found that its financial bid was lower than that of the Appellant.

10. Having heard learned counsel appearing on behalf of the Appellant and Respondent no.1, what is clear is that the authority concerned read its own TCN to refer to the licence to be submitted by bidders as the labour licence under the Contract Labour Act. This is also clear from a reading of the tender document as a whole, and in particular, clauses VI.20.6, VI.20.20 and VI.20.21, which read as follows:

> "VI.20 General Information to Bidder:
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> xxx xxx xxx
>
> 6. The agency would recruit required number of staff for cooking and serving so that the diet can be supplied to indoor patients in time. List of personnel with their Aadhar card copy should be submitted to the office positively. xxx xxx xxx
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> 20. The behaviour of the staff of the agency towards the patients/attendants should be conducive and disciplinary action would be taken by the Hospital Administration against the staff of the said agency violating the behavioural norm in consultation with the concerned agency.
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> 21. The agency would be responsible to make alternative arrangements in cases of situations such as staff strike, local strike [Bandh/Hartal] etc. ensuring that the patients get diet in the appropriate time." Sub-clauses (20) and (21), in particular, make it clear that the staff employed would be employed by the agency as contract labour, the agency being responsible to make alternative arrangements in cases where their staff goes on strike.

11. This Court has repeatedly held that judicial review in these matters is equivalent to judicial restraint in these matters. What is reviewed is not the decision itself but the manner in which it was made. The writ court does not have the expertise to correct such decisions by substituting its own decision for the decision of the authority. This has clearly been held in the celebrated case of Tata Cellular v. Union of India, (1994) 6 SCC 651, paragraph 94 of which states as follows:

> "94. The principles deducible from the above are:

> (1) The modern trend points to judicial restraint in administrative action.
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> (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.
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> (3) The court 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.
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> (4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.
>
> (5) 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 fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. xxx xxx xxx"

12. Equally, this Court in Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818 ["Afcons"], has laid down:

> "14. We must reiterate the words of caution that this Court has stated right from the time when Ramana Dayaram Shetty v. International Airport Authority of India [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous — they must be given meaning and their necessary significance. In this context, the use of the word "metro" in Clause 4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person 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 is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given." This view of the law has been

subsequently followed repeatedly – see Montecarlo Ltd. v. NTPC Ltd., (2016) 15 SCC 272 [at paragraph 25], Caretel Infotech Ltd. v. Hindustan Petroleum Corpn. Ltd., (2019) 14 SCC 81 [at paragraphs 38 and 39], and State of Madhya Pradesh v. U.P. State Bridge Corporation Ltd., 2020 SCC OnLine SC 1001 [at paragraphs 24 to 26].

13. In Galaxy Transport Agencies v. New J.K. Roadways, 2020 SCC OnLine SC 1035, after referring to paragraph 15 of Afcons (supra), it was held:

> "15. In the judgment in Bharat Coking Coal Ltd. v. AMR Dev Prabha, 2020 SCC OnLine SC 335, under the heading "Deference to authority's interpretation", this Court stated:
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> "51. Lastly, we deem it necessary to deal with another fundamental problem. It is obvious that Respondent No. 1 seeks to only enforce terms of the NIT. Inherent in such exercise is interpretation of contractual terms. However, it must be noted that judicial interpretation of contracts in the sphere of commerce stands on a distinct footing than while interpreting statutes.
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> 52. In the present facts, it is clear that BCCL and India have laid recourse to Clauses of the NIT, whether it be to justify condonation of delay of Respondent No. 6 in submitting performance bank guarantees or their decision to resume auction on grounds of technical failure. BCCL having authored these documents, is better placed to appreciate their requirements and interpret them. (Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd., (2016) 16 SCC 818)
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> 53. The High Court ought to have deferred to this understanding, unless it was patently perverse or mala fide. Given how BCCL's interpretation of these clauses was plausible and not absurd, solely differences in opinion of contractual interpretation ought not to have been grounds for the High Court to come to a finding that the appellant committed illegality." (emphasis in original)
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> 16. Further, in the recent judgment in Silppi Constructions Contractors v. Union of India, 2019 SCC OnLine SC 1133, this Court held as follows:
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> "20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be

> accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case." (emphasis in original)
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> 17. In accordance with these judgments and noting that the interpretation of the tendering authority in this case cannot be said to be a perverse one, the Division Bench ought not to have interfered with it by giving its own interpretation and not giving proper credence to the word "both" appearing in Condition No. 31 of the N.I.T. For this reason, the Division Bench's conclusion that JK Roadways was wrongly declared to be ineligible, is set aside."

14. The High Court has not adverted to any of these decisions, and in second-guessing the authority's requirement of a licence under the Contract Labour Act, has clearly overstepped the bounds of judicial review in such matters. In any case, a registration certificate under Section 4 of the Orissa Act cannot possibly be the equivalent of a valid labour licence issued by the labour department. Section 4 of the Orissa Act reads as follows:

> "4. Registration of establishment.–(1) Within the period specified in sub-section (4), the employer of every establishment shall send to the Inspector of the area concerned, a statement in the prescribed form, together with such fees as may be prescribed, containing–
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> (a) the name of the employer arid the manager, if any;
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> (b) the postal address of the establishment;
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> (c) the name, if any, of the establishment;
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> (d) the category of the establishment, that is whether it be a shop, commercial establishment, hotel, restaurant, cafe, boarding or eating house, theatre or other place of public amusement of entertainment; and
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> (e) such other particulars as may be prescribed. (2) No adolescent shall be allowed to work in any employment for more than six hours in a day. (3) In the event of any doubt or difference of opinion between an employer and the Inspector as to the category to which an establishment should belong, the Inspector shall refer the matter-to the Chief Inspector who shall, after such enquiry as may be prescribed, decide the category of such establishment and his decision shall be final for the purpose of this Act.
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> (4) Within thirty days from the date mentioned in Column (2) below in respect of an establishment mentioned in Column (1), the statement together with fees shall be sent to the Inspector under sub-section (1)– Establishment Date from which the period of 30 days to commence (1) (2)

(i) Establishment existing The date on which this Act on the date on which this comes into force. Act comes into force

(ii) New establishments The date on which the establishment commences its work.

A reading of this Section would show that the registration of an establishment under the Orissa Act is to categorise the establishment as a shop, commercial establishment, hotel, etc. and not for the purpose of issuing a labour licence which, in the context of the present TCN, can only be a labour licence under the Contract Labour Act.

15. The argument of Respondent no.1 with reference to Section 1(4) of Contract Labour Act is wholly misplaced. Section 1(4) of the said Act reads as follows:

"1. Short title, extent, commencement and application.— xxx xxx xxx (4) It applies—

(a) to every establishment in which twenty or more workmen are employed or were employed on any day of the preceding twelve months as contract labour;

(b) to every contractor who employs or who employed on any day of the preceding twelve months twenty or more workmen:

Provided that the appropriate Government may, after giving not less than two months' notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any establishment or contractor employing such number of workmen less than twenty as may be specified in the notification." The requirement of this Act that its applicability be extended only to establishments in which there are 20 or more workmen can be done away with by the appropriate government under the proviso, making it clear that this is not an inflexible requirement. In any case, the acceptance of such argument would amount to second-guessing the authority's interpretation of its own TCN which, as has been stated hereinabove, cannot be so second-guessed unless it is arbitrary, perverse or mala fide.

16. The High Court's characterising the action of accepting the Appellant's tender as mala fide is itself open to question. The plea of mala fide made in the writ petition reads as follows:

"22. That, in the meantime the petitioner ascertained that the tender inviting authorities have connived with the Opp. Party No. 4 to 6 and it is also ascertained that Opp. Party No. 4 to 6 belong to one establishment and are supplying the same contract to the SCB, so accordingly, with a malafide intention both have connived and a pre-planned attempt has been made to oust the petitioner on a flimsy ground. The entire exercise has been done by Opp. Party No. 3 to award the contract to Opp. Party No. 5 as they are still continuing the aforesaid work and the entire endeavour of the Opp. Party No. 3 is to create some litigation so that, the opposite parties can continue

> during pendency of the writ application." This plea was answered by the authority in its counter affidavit filed before the High Court as follows:
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> "15. That in reply to the averments made in paragraphs 22 to 25 of the writ petition it is humbly and respectfully submitted that, the bidding process has been concluded in a transparent manner adhering to the required guidelines made thereto.

It is further stated that the petitioner failed to comply with two basic requirements under eligibility criteria stipulated in the tender conditions i.e. (i) submission of valid Labour licence;

(ii) submission of proper certificate of continuous three years' experience in diet preparation and supply to Government/Reputed Private Health Institution having minimum 200 bed strength. As a result, the Tender Committee disqualified the bid of the petitioner. It is further submitted that after thorough examination of the documents, M/s. Utkal Suppliers (O.P. No. 5) came out to be the L-1 bidder in the tender process and the same was sent to the higher authorities for detailed examination of technical and financial bids. SLPC being the competent authority as per F.D. Notification No.22393/Fdt.08.06.2012 after due examination of records has recommended to place the work order with the L-1 bidder. Accordingly, the work order has been issued in favour of the L-1 bidder (O.P. No. 5) vide this office letter No. 23347 dated 27.11.2020 and the selected firm has taken up diet services work in the hospital w.e.f. 01.12.2020." A reference to the aforesaid pleadings would also go to show that except for an incantation of the expression mala fide, no mala fide has in fact been made out on the facts of this case.

17. The High Court's judgment is consequently set aside and the appeals are allowed. The Appellant is to be put back, within one week from the date of this judgment, to complete performance under the agreement entered into between the Appellant and the authority on 27.11.2020.

.....J. [ROHINTON FALI NARIMAN] .....J. [B.R. GAVAI] New Delhi;

April 09, 2021.