Directorate Of Education & Ors vs Educomp Datamatics Ltd. & Ors on 10 March, 2004

Bench: R.C. Lahoti, Ashok Bhan

CASE NO.:
Appeal (civil) 2407†411 of 2003

PETITIONER:
Directorate of Education & Ors.

RESPONDENT:
Educomp Datamatics Ltd. & Ors.

DATE OF JUDGMENT: 10/03/2004

BENCH:
R.C. Lahoti & Ashok Bhan

JUDGMENT:

J U D G M E N T BHAN, J.

The core point which calls for determination in these appeals is the extent of judicial review permissible in exercise of jurisdiction under Article 226 of the Constitution to the terms of tender prescribing eligibility criteria. Whether the High Court could change the terms incorporated in the tender notice on the ground of its being inappropriate and that the objective would be better served by adopting a different eligibility criteria?

Directorate of Education, Government of National Capital Territory of Delhi, appellants herein, took a decision to establish computer labs in the National Capital Territory area in all government schools by the year 2003 in collaboration with private sector. Under the scheme evolved (computer education project), the education department is to provide functional literacy to the students from class VIth to Xth and teaching of computer science and informatics practices subjects to plus two stage, as per CBSE syllabus.

In the first phase for the year 2000-2001, 115 schools were taken up for imparting computer education. Tenders were called from the firms having a turnover of Rs. 2 crores. As per terms of tender notice the firm was to provide hardware to establish the lab in the concerned schools. The total contract was for a sum of Rs.14.62 crores. Since the lowest tenderer was not in a position to carry out the project in 115 schools, the contract was divided amongst four parties. In the year 2001-2002 the turn over clause was amended, instead Rs. 2 crores the turn over of Rs. 5 crores was prescribed. Because of the several representations filed the tender was cancelled and fresh tenders were invited from the firms having a turnover of Rs. 2 crores or above. The tender was for 275 schools, the total cost of the project being approximately Rs. 30 crores. The lowest tenderer was again not in a position to take up the entire project. The other seven tenderers agreed to lower their

prices to bring it at par with the rate of the lowest tenderer. Thus the contract had to be distributed amongst eight parties, i.e., 35 schools each to seven parties and 28 to one party. For the final phase of 2002-2003 the tenders were called for all the 748 schools. The cost of project was approximately Rs. 100 crores. Because of the difficulty faced in the earlier years that the lowest tenderers were not able to implement the entire project, the government took a policy decision to deal with one company having financial capacity to take up such a project instead of dealing with a number of small companies which were unable to take up the entire project individually. Accordingly, Government took a decision to invite tenders from firms having a turnover of Rs. 20 crores or more for the last three financial years ending with 31.3.2002. The decision was taken to provide quality education which was the top priority of the department as it was felt that it would be easier for the department to deal with one company which is well managed and not seven or eight who individually are not in a position to take up the whole project compelling the Government to distribute the contract amongst bidders at the lowest rate having no scope to negotiate the rates any further.

Aggrieved by the term of clause inviting tenders from firms having a turnover of Rs. 20 crores or more, the respondents filed writ petitions in the High Court of Judicature at Delhi.

Writ petitions were heard by a Division Bench. The Bench came to the conclusion that neither the increase in number of schools nor the quality of education to be provided appeared to have nexus with the financial turnover of the bidder inasmuch as the financial turnover had nothing whatsoever to do with the computer education. It was held that the term was arbitrary and it had nothing to do with the objective sought to be achieved, namely, the quality of education to be imparted. That the impugned condition appeared to have been incorporated solely with an intent to deprive a large number of companies imparting computer education from bidding and to monopolize the same for big companies. Accordingly, the writ petitions were allowed and the offending clause was struck down being arbitrary and irrational.

Aggrieved against the aforesaid judgment of the High Court, the present appeals by way of special leave petitions were filed. On 24th March, 2003 leave was granted and as an interim measure, the appellants were permitted to go ahead with the processing of the tender applications but no contract was to be awarded without taking further orders from this court. This order was modified on 14th April, 2003. It was directed that the tender bids of all the respondents be considered without reference to the financial qualification of the turnover of Rs. 20 crores. However, the acceptance of the bid was kept in abeyance till the passing of the final order in the appeals.

In compliance with the aforesaid directions letters were sent to all the 13 bidders/parties for opening of the commercial bids on 30th July, 2003 at 3.30 P.M.. Technical bids of four companies, i.e., Tata Infotech Ltd., Educomp Datamatics Ltd., UPTEC Computer Consultancy Ltd., Sterlite Foundations were rejected after scrutiny by the tender opening committee as these firms did not fulfill the criteria laid in the tender notice. The financial bids of other 9 companies were opened and the bid given by M/s SSI Limited was found to be the lowest. Interlocutory Application Nos. 1 to 5 of 2003 were filed for placing these facts on record. Facts which emerged from the opening of the bids were that the four companies having a turnover of Rs. 20 crores or above participated in the tender

and M/s SSI Limited with a turnover of more than Rs. 20 crores was the lowest amongst them.

Shri Kirit N Raval, learned Solicitor General of India appearing for the appellants contended that the terms of tender prescribing the eligibility criteria are not subject to judicial review in view of a number of decisions of this Court. That the High Court while exercising jurisdiction under Article 226 of the Constitution does not sit as a Court of Appeal, it merely reviews the manner in which the decision has been taken. It was well settled that the Courts in exercise of jurisdiction under Article 226 do not transgress into the field of policy decisions taken by the government. As against this, the learned counsel appearing for the respondents supported the impugned judgment and the reasons recorded therein. Faced with the situation that SSI Ltd. having a turnover of more than 20 crores was the lowest tenderer and capable of taking up the entire project on its own, it was argued that fresh tenders should be invited because of the fall in price in the computer hardware and lowering of duty on the imports of the computers or its components.

It is well settled now that the courts can scrutinise the award of the contracts by the government or its agencies in exercise of its powers of judicial review to prevent arbitrariness or favoritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent of judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by this Court in Tata Cellular vs. Union of India [1994 (6) SCC 651]. After examining the entire case law the following principles have been deduced.

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

[Emphasis supplied] In Air India Limited vs. Cochin International Airport Limited [2000 (2) SCC 617], this Court observed:

> "The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness."

[Emphasis supplied] This principle was again re-stated by this Court in Monarch Infrastructure (P) Ltd. vs. Commissioner, Ulhasnagar Municipal Corporation and Others [2000 (5) SCC 287]. It was held that the terms and conditions in the tender are prescribed by the government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is not for the courts to say whether the conditions prescribed in the tender under consideration were better than the one prescribed in the earlier tender invitations.

It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. That the government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts 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 fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

Directorate of Education, Government of NCT of Delhi had invited open tender with prescribed eligibility criteria in general terms and conditions under tender document for leasing of supply, installation and commissioning of computer systems, peripherals and provision of computer education services in various government/ government aided senior secondary, secondary and middle schools under the Directorate of Education, Delhi. In the year 2002-2003, 748 schools were

to be covered. Since the expenditure involved per annum was to the tune of Rs. 100 crores the competent authority took a decision after consulting the technical advisory committee for finalisation of the terms and conditions of the tender documents providing therein that tenders be invited from firms having a turnover of more than Rs. 20 crores over the last three years. The hardware cost itself was to be Rs.40-45 crores. The government introduced the criteria of turnover of Rs. 20 crores to enable the companies with real competence having financial stability and capacity to participate in the tender particularly in view of the past experience. We do not agree with the view taken by the High Court that the term providing a turnover of at least Rs. 20 crores did not have a nexus with either the increase in the number of schools or the quality of education to be provided. Because of the increase in the number of schools the hardware cost itself went upto Rs. 40-50 crores. The total cost of the project was more than 100 crores. A company having a turnover of Rs. 2 crores may not have the financial viability to implement such a project. As a matter of policy government took a conscious decision to deal with one firm having financial capacity to take up such a big project instead of dealing with multiple small companies which is a relevant consideration while awarding such a big project. Moreover, it was for the authority to set the terms of the tender. The courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. While exercising the power of judicial review of the terms of the tender notice the court cannot say that the terms of the earlier tender notice would serve the purpose sought to be achieved better than the terms of tender notice under consideration and order change in them, unless it is of the opinion that the terms were either arbitrary or discriminatory or actuated by malice. The provision of the terms inviting tenders from firms having a turnover of more than Rs. 20 crores has not been shown to be either arbitrary or discriminatory or actuated by malice.

This apart SSI having a turnover of more than Rs. 20 crores was the lowest bidder. Faced with the situation that the bids given by the respondents were not competitive with the bid given by SSI Limited, learned counsel for the respondents contended that because of the fall in price in the computer hardware and lowering of duty on the imports of the computers or its components the government should invite fresh bids. It is not for us to comment as to what course is to be adopted by the appellants, in the changed circumstances attributable to lapse of time. It is for them to decide whether to continue with the tenders already floated, if necessary be making negotiations so as to bring down the rates quoted or to invite fresh tenders.

For the reasons stated above, the appeals are accepted. The judgment of the High Court is set aside and the writ petitions filed by the respondents are dismissed with no order as to costs.