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Before Shaukat Aziz Siddiqui, J

ABID MEHMOOD---Petitioner

versus

CAPITAL DEVELOPMENT AUTHORITY through Chairman and another---Respondents

Writ Petition No.3131 of 2011, decided on 25th January, 2012.

Capital Development Authority Ordinance (XXIII of 1960)--

---Preamble---Constitution of Pakistan, Arts.18, 25 & 199---Constitutional petition---Award of contract-Auction for development and operation of Filling Station- "Pre-qualification"---Petitioner assailed legality of "pre-qualification" notice advertised by Development Authority on the ground that applications were invited only from national and multinational oil marketing companies and unreasonable non-refundable processing fee was advertised in said notice---Validity---Very purpose of auction of any State property was to receive maximum consideration, therefore, to confine the qualification for said auction to the extent of national and multinational oil marketing companies was totally unwarranted---For petrol pump/filling station, experience of exploration was not required and there were instances where individuals had experience of up to five decades of successfully running more than one filling station---Criteria introduced by the Authority did not come within the Meaning of the phrase "intelligent differentia" and was contrary to the settled law-High Court declared restrictions imposed on "pre-qualification" on auction for development and operation of filling stations through which only national and multinational oil companies had been allowed to participate, as illegal, unjust, against settled law, an infringement of Fundamental Rights guaranteed by the Constitution, discriminatory, ineffective and a result of colourable exercise of authority---High Court set aside such restrictions and directed the Authority to advertise afresh the notice of pre-qualification by removing the restriction of allowing only national and multinational oil companies to participate and directed the Authority to bring down the non-refundable processing fee to a reasonable level---Constitutional petition was allowed, accordingly

Arshad Mehmood's case PLD 2005 SC 193 quoted.

PLD 2010 SC 759; .Miss Shazia Batool v. Government of Balochsitan and others 2007 SCMR 410 and Thal Industries Corporation Limited v. Government of the Punjab 2007 SCMR 1620 rel.

Sher Afzal Khan for Petitioner.

Shoukat Rehman for Respondents.

Date of hearing: 23rd January, 2012.

JUDGMENT

SHAUKAT AZIZ SIDDIQUI, J.---Through instant petition, Abid Mehmood, petitioner called in question the legality, propriety and mandate of "Pre-Qualification" for auction of development and operation of Filling Station, advertised on 2-11-2011 through leading newspapers published under the name and seal of respondent No.1 i.e Capital Development Authority, Islamabad.

2. The grievance of the petitioner is that CDA imposed unreasonable restrictions of inviting applications only from National/Multinational Oil Marketing Companies and payment of non-refundable amount of Rs.20,00,000/- (twenty lac) as processing fee. The learned counsel further submits that this device of CDA is tainted with mala fide, so that leading operators may be accommodated which according to the learned counsel is in direct violation of Article 18 of

3. On the other hand, stance of CDA is that through notice for Pare-Qualification" main aim to invite the OMCs was to attract "serious bidders" with solid experience and background. Learned counsel for respondent submits that since petitioner is defaulter of Rs.65,643,317/-for the plot auctioned in year 2009, therefore, he is not entitled to take part in the pre-qualification process.

4. I have heard the learned counsel for the parties, perused the documents annexed with the petition and find that the criteria set by CDA is not only, hypothetical but against the fundamental rights guaranteed by the constitution of Islamic Republic of Pakistan. When asked from learned counsel

for CDA that what is the formula to determine seriousness of a bidder? The learned counsel replied that any person who shows keen interest can be termed as serious bidder. When asked that whether a person who deposits Rs.20,00,000/- (non-refundable) is not a serious bidder? The learned counsel very frankly replied that in such eventuality, bidder is serious. The very purpose of auction of any state property is to receive maximum, as consideration, therefore, to confine the qualification to the extent of National and Multinational Companies is totally unwarranted. For Petrol Pumps/Filling Stations experience of exploration etc. is not required and there are instances where individuals have experience of over five decades of running of more than one filling station, successfully. The Hon'ble Supreme Court of Pakistan in one of the most celebrated judgment in "Arshad Mehmood's case" reported as PLD 2005 SC 193 has held as under:--

Art. 18---Freedom of trade, business or profession--- "Reasonableness of restriction "---
Definitions.

Following definitions can be considered for purpose of ascertaining the meaning of "reasonableness of restriction" on the fundamental rights of the citizens to conduct any lawful trade of business: --

(i) The limitation imposed upon a person on enjoyment of a right should not be arbitrary or of an excessive nature beyond what is required in the interest of the public.'

(ii) The Court would see both to the nature of the restriction and procedure prescribed by the statute for enforcing the restriction on the individual freedom. Not only substantive but procedural provisions or statute also enter into the verdict of its reasonableness.

(iii) The principles of natural justice are an element in considering reasonableness of a restriction but the elaborate rules of natural justice may be excluded expressly or by necessary implication where procedural provisions are made in the statute.

(iv) Absence of provisions for review makes the provisions reasonable.

(v) Retrospectivity of a law may also be the relevant factor of law, although a retrospectivity of law does not make it automatically unreasonable.

(vi) Reasonable restriction also includes cases of total prohibition of a particular trade or business which deprive a person of his fundamental right under certain circumstances.

5. In the estimation of this court, criteria introduced by respondent does not come within the phrase of "intelligent differentia" and is contrary to the dictum of the apex Court referred herein above. In the same judgment it has also been held that:--

Art.25---Equality of citizens--Classification---Differentia between both the classes must have rational nexus to the object sought to be achieved by such classification.

Another, lightship, reported as PLD 2010 SC 759 (Human Rights Cases Nos.4668, 1111/07 & 15283-G/2010) is also strictly applicable on the issue brought before this court. Further guidance has been sought from authoritative pronouncements given in the case of Miss Shazia Batool y. Government of Balochistan and others (2007 SCMR 410) and **THAL INDUSTRIES CORPORATION LIMITED v. GOVERNMENT OF THE PUNJAB, (2007 SCMR 1620)**

In this view of the matter instant petition is allowed, restrictions imposed on "Pre-Qualification" of auction of development and operation of Filling Stations through which only National and Multinational companies have been allowed to participate is declared as illegal, unjust, besides the dictums laid down by the court of apex, an infringement to fundamental rights guaranteed by the constitution to Islamic Republic of Pakistan, discriminatory, ineffective and result of colorable exercise of authority, therefore, same are set aside. The respondents are directed to advertise afresh by removing the restriction of allowing National and Multinational Oil Companies only and also by bringing the amount of Rs.20,00,000/- (non-refundable) to a reasonable level.

K.M.Z./39/ISL

Order accordingly.