

Shagun Mahila Audyogik Sahakari ... vs The State Of Maharashtra, Thr. ... on 27 August, 2021

Author: A.S. Chandurkar

Bench: A. S. Chandurkar, G.A. Sanap

WP 1632-21

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Judgment

IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
NAGPUR BENCH, NAGPUR.
WRIT PETITION NO. 1632/2021

Shagun Mahila Audyogik Sahakari Sanstha Maryadit,
Nagpur, 10, registered under the Maharashtra
Cooperative Societies Act, 1960, 10, East High Court
Road, Ramdaspath, Nagpur, through its Authorised
Officer Vaibhav Shekhar Rai.

PETITIONER

.....VERSUS.....

1. The State of Maharashtra,
Through its Secretary,
Department of School Education and Sports,
Madam Cama Road, Mantralaya, Mumbai-32.
2. Directorate of Primary Education, Maharashtra
State, through its Deputy Director (Education),
Midday Meals Scheme Cell, Pune Region
Office, 17, Dr.Babasaheb Ambedkar Road,
Pune - 411 001.
3. The Director of Education (Primary),
17, Dr.Babasaheb Ambedkar Road,
Pune - 411 001.

RESPONDENTS

Shri Akshay A. Naik with Shri H.C. Chitale, counsel for the petitioner.
Shri S.P. Dharmadhikari, Senior Advocate with Shri A.S. Fulzele, Additional
Government Pleader for the respondents.

CORAM : A. S. CHANDURKAR AND G.A. SANAP, JJ.

DATE : 27TH AUGUST, 2021.

ORAL JUDGMENT (PER : A.S. CHANDURKAR, J.)

RULE. Heard finally.

2. The challenge raised in this writ petition filed under Article 226 of the Constitution of India is to the tender notice dated 18.03.2021 that has been floated by the respondent no.3 for transportation of rice from the godowns of the Food Corporation of India and also for supply of WP 1632-21 2 Judgment other food-grains, pulses, oil, spices and condiments to schools under the Mid-Day Meal Scheme in the District of Nagpur. An alternate prayer is made seeking a declaration that the tender

condition insofar as it related to collection of samples of food-grains and condiments as well as their testing as a basis for eligibility of a bidder is illegal.

3. It is the case of the petitioner that it is a Society registered under the provisions of the Maharashtra Co-operative Societies Act, 1960 and is engaged in the upliftment of women by providing them work. On 18.03.2021 the respondent no.3-Director of Education (Primary), Pune issued a tender notice inviting bids for transportation of rice and other food-grains under the Mid-Day Meal Scheme in the District of Nagpur. The rice and food-grains were to be supplied to about 2296 schools in the district. The petitioner- Society being eligible to participate in the tender process purchased the tender form and took steps to submit its bid. On noting the tender conditions the petitioner made a representation raising objections in the pre-bid meeting. These objections however were turned down on 01.04.2021 and this has led to the filing of the present writ petition.

4. Shri Akshay Naik, learned counsel for the petitioner submitted that the challenge raised to the tender notice was with regard to Clauses 2.2(i), 5.1(v), 5.2 and 8.2 in particular. According to him as WP 1632-21 3 Judgment per the conditions in Clause 2.2(i) a prospective bidder was required to submit samples of various food-grains and spices as per the specifications mentioned in Annexure-A to the tender notice. Annexure-A stipulated various technical specifications. The samples were required to be submitted in two sets and one set of the sample was to be sent for testing to the laboratory. In this regard it was submitted that though each bidder was required to submit samples in two sets, the sub-clause indicated that one set of the sample would be sent to the laboratory but there was no clarity with regard to the fate of the other sample. This indicated lack of transparency on the part of the Authority calling for the bids. It was further submitted that each bidder was required to have a license/certificate under the Food Safety and Standards Act, 2006 and as per Clause 5.1(v) the two samples were required in quantity of 500 Grams and each sample was required to be duly packed and sealed on four sides in a transparent poly-pack. Any marking/sticker or name of the firm was not permitted to be mentioned in the poly-pack. An apprehension was expressed on behalf of the petitioner that in the absence of any identification of the bidder submitting the two samples it would be easily possible to either mix the samples of the bidders or through inadvertence it was likely that the samples submitted by one bidder could be treated as those submitted by some other bidder. This again indicated lack of clarity and transparency. With regard to Clause WP 1632-21 4 Judgment 7.1(vi) and (vii) it was submitted that the samples were required to be submitted through Government or Government Accredited Laboratories and only on satisfactory laboratory report could the bidder proceed further. Clause 7.2(ix) provided for disqualification of a bidder in case the report of the laboratory testing was not satisfactory. As regards Clause 8.2 it was submitted that sub-clause (iii) provided for random selection of samples for laboratory testing thereby granting complete discretion to the Department officials who were authorized to pick the said random samples. If the sample of the food-grains did not confirm with the required standards in the laboratory testing the payment against the said lot of food-grains was not liable to be made. Referring to Annexure-A and the quality specifications it was submitted that various standards pertaining to moisture and foreign matter etc. were prescribed and it was urged that after submission of the bid alongwith the samples the bidder lost control over the same and it was always possible that due to passage of time or improper storage the specifications with regard to moisture and foreign matter could undergo a change.

5. On the aforesaid basis, it was urged that there was absence of transparency in the tender process and even when judged by the "Wednesbury Principle" the same was unreasonable. After submission of the bid alongwith the requisite samples the matter was entirely within the WP 1632-21 5 Judgment control of the tender authority more so when it was not possible to identify the samples submitted by a particular bidder. An apprehension was expressed that this could result in a pick and choose approach which would be against the spirit of fairness. The tender having been invited by the State it was its duty to act fairly but the same was not evident in the light of aforesaid tender conditions. Despite the fact that statutory remedy was provided on rejection of samples under the Food and Safety Act, 2006 such remedy was not available on the sample not being found satisfactory by the Authorities and instead the consequence of the bid being non-responsive would follow. The learned counsel also referred to Clause 2.1 of the tender document to indicate that a period of about sixteen days was granted for submission of samples which could affect the quality of the samples if submitted on the first day itself. Referring to the reply filed on behalf of the respondent nos.2 and 3 and especially paragraph 5 thereof it was sought to be urged that the Authority sought to include new terms for the first time which were not present in the tender document. Without issuing any corrigendum and making other bidders aware of the same it was not permissible for the Authority to modify the tender conditions. In that regard the learned counsel placed reliance on the decision in *Mohinder Singh Gill & Another Versus The Chief Election Commissioner, New Delhi & Others* [(1978) 1 SCC 405] to urge that it was only the tender document that could govern the matter.

WP 1632-21 6 Judgment Reference was also made to the decision in *Reliance Energy Ltd. & Another Versus Maharashtra State Road Development Corpn. Ltd. & Others* [(2007) 8 SCC 1] to urge that considering the vagueness in the aforesaid clauses of the tender document which resulted in violation of the doctrine of "level playing field", this Court could interfere in exercise of Article 226 of the Constitution of India. In the light of aforesaid contentions it was submitted that the reliefs prayed for in the writ petition ought to be granted.

6. Per contra, Shri S.P. Dharmadhikari, learned Senior Advocate for the respondents submitted that the entire premise of the challenge raised by the petitioner to various clauses in the tender notice were based on apprehension which was without any basis. Except for referring to certain clauses in the tender notice a challenge was sought to be raised without any further particulars and the challenge was speculative in nature. It was submitted that there were no allegations of mala fides made by the petitioner nor was any party impleaded in that regard. Referring to the principles laid down in paragraph 94 of the decision in *Tata Cellular Versus Union of India* [(1994) 6 SCC 651] it was submitted that the scope to interfere in a challenge to the terms of invitation to tender was limited as invitation to tender was in the realm of contract. He submitted that various tender conditions were determined WP 1632-21 7 Judgment by body of experts and in the nature of work that was sought to be got executed under the tender, sample testing of the food-grains and pulses to be supplied was necessary. The practice of sample testing was prevalent since long and same was not being done for the first time in this tender. Referring to the decision in *Meerut Development Authority Versus Association of Management Studies & Another* [(2009) 6 SCC 171] it was submitted that a bidder was entitled only to the right to equality and fair treatment in the matter of evaluation of competitive bids and the scope to challenge the terms and conditions of the tender

were limited to that aspect. Taking the Court through various clauses in the tender document it was submitted that under Clause 5.1(v) a bidder was required to submit two samples of the twelve items mentioned therein having quantity of 500 Grams. In other words about 24 samples were required to be submitted by each bidder alongwith the bid and it was not likely that these 24 samples would be submitted loosely. Since each sample was to weigh 500 Grams it was but natural that the samples would be submitted in a box/container and hence the apprehension expressed by the petitioner that identification of the same would not be possible after submission of the bid was baseless. In that regard he invited attention of the Court to paragraph 5 of the affidavit filed on behalf of the respondent nos.2 and 3 to submit that all due care and caution was being taken not only to maintain secrecy but also to ensure WP 1632-21 8 Judgment that the samples were not interchanged amongst bidders. As regards the submission that there was no clarity as to the fate of the second sample that was required to be submitted it was indicated that the second sample was retained and then forwarded to the Collector of the concerned district for subsequent verification/checking to ensure that the food- grains and pulses supplied were in accordance with the sample as provided by the bidder. All steps were taken to ensure that equal treatment was meted out to all bidders. It was urged that the affidavit filed by the respondent nos.2 and 3 did not seek to supplement any clauses of the tender notice and the same merely discloses the manner in which the samples provided were to be tested as prescribed under the tender. Drawing attention to the observations in paragraphs 23 and 24 of the decision in *Michigan Rubber (India) Limited Versus State of Karnataka & Others* [(2012) 8 SCC 216] it was urged that in absence of any allegations of mala fides or favouritism there was hardly any scope to interfere at this stage. Moreover there was no public interest affected and on the contrary on account of pendency of the present proceedings the allotting of the work was delayed. He also referred to the Government Resolution dated 01.12.2016 in which modality for purchase of food-grains under the Mid-Day Meal Scheme was stipulated. The learned Senior Advocate also referred to the judgment dated 04.01.2019 in Writ Petition No.12863 of 2018 [*Shri Balaji Trading Company Versus WP 1632-21 9 Judgment The State of Maharashtra & Another*] decided at the Aurangabad Bench of this Court as well as to the judgment of the Division Bench in Writ Petition No.3647 of 2017 [*Mayur Packaging Works Versus State of Maharashtra & Another*] dated 18.07.2017 at the Nagpur Bench. Similar challenges as raised by the petitioner had been adjudicated and no merit therein was found. It was thus submitted that the writ petition was liable to be dismissed.

7. In reply it was submitted by the learned counsel for the petitioner that the decisions relied upon by the respondents were clearly distinguishable in view of the fact that the aspect of transparency had not been decided therein. On the contrary it had been noticed that the tenders were being allotted to particular persons/contractors due to which the Court had directed an enquiry to be held in the matter. It was also submitted that since the statements made in paragraph 5 of the reply were not part of the tender document the same could not be relied upon. Taking an overall view of the matter it was clear that the terms referred were unreasonable and lacking transparency thus making out a case for interference in writ jurisdiction.

8. We have heard the learned counsel for the parties at length and we have perused the material placed on record. In view of the fact WP 1632-21 10 Judgment that the petitioner has raised a challenge to certain clauses of the tender notice the parameters as laid down by the Hon'ble

Supreme Court in Meerut Development Authority (supra) that the terms of invitation to tender cannot be open to judicial scrutiny as the invitation to tender is in the realm of contract and that a limited judicial review would be available in cases where it is established that the terms of the invitation to tender are so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process will have to be kept in mind. No doubt, the method to be adopted for disposal of public property must be fair and transparent providing an opportunity to all interested persons to participate in the process. Similar observations have been made in Tata Cellular (supra). In Michigan Rubber (India) Limited (supra) the Court before interfering in a tender matter in exercise of power of judicial review ought to consider as to whether the process adopted is so arbitrary and irrational that no responsible Authority acting reasonably and in accordance with relevant law could have adopted the same and further whether public interest stands affected. The authority floating the tender is the best judge of its requirements and the Court will interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity as held in Silppi Constructions Contractors Versus Union of India [2019 SCC Online SC 1133]. Keeping these aspects in mind the challenge as raised can be examined.

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9. The principal challenge raised by the petitioner is to the lack of transparency and fairness on the part of the Authority inviting the tender in the context of Clause 5.1(v) inasmuch as there is no clarity as to the fate of the second sample which a bidder is required to submit alongwith the bid as the first sample is subject to testing at the authorized laboratory. Absence of any identification on the samples as submitted giving rise to possibility of deliberate exchange is also apprehended. In this regard we may refer to the averments in paragraph of the reply filed on behalf of the respondent nos.2 and 3 while dealing with said contention. Paragraph 5 reads as under:-

"5. I say and submit that, the samples are submitted in boxes by bidders. Such boxes carry names of the bidders. Two sets of sample received from tenderers are stored in a sealed room in Directorate of Primary Education. Out of the set of two samples, one is sent to NABL, accredited lab while the other is kept in sealed room as mentioned above.

While sending the samples for testing the representatives of tenderer may remain present. The representatives are asked to ensure that seal of the boxes of samples is intact and not tampered with. Thereafter, the boxes are opened in the presence of senior officers from the Directorate. Sample boxes carry names of the tenderer therefore, these boxes are changed and samples are put in boxes by made specifically for this purpose by WP 1632-21 12 Judgment the respondents which do not carry any label indicating name of the bidder. Then, secret coding is done before sending samples to NABL accredited labs by senior officials from the Directorate. Secret coding is done to maintain secrecy at the time of sample testing. It indicates that at the time of testing no one knows which sample belongs to which party.

The NABL Labs have been asked to submit the reports in sealed envelope only. Reports so received are opened at the time of technical bid opening in presence of tenderer's representatives. Sealed envelopes carry signatures of Tender Committee Members as well as tenderer representatives. Generally, process of testing needs three to four weeks.

Here I assure Hon. High Court that this procedure is being followed for more than a decade. This way, complete secrecy is maintained and impartial testing results are obtained. It is evident from the procedure adopted for testing that the Respondents wish to do testing in transparent and impartial manner."

Perusal of this paragraph indicates that out of the two samples submitted by the bidder one is sent to the authorized laboratory while the other is kept in a sealed room. At both stages the representatives of the bidder are permitted to remain present. Adequate care and caution has been taken to ensure secrecy of the fate of the laboratory test with a view to ensure impartiality.

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10. We find that the statements made in paragraph 5 highlight the procedural aspects that are to be followed by the Authorities on receipt of the bids alongwith the samples. It is found that sufficient safeguards have been provided therein and presence of representatives of the bidder is also permitted. Though it was urged on behalf of the petitioner that the statements made in paragraph 5 amount to providing additional terms in the tender notice and the same is impermissible in law, we are not in a position to accept this contention. It is found that the procedural aspects as to the manner of handling the samples has been narrated in paragraph 5 and the said procedure is to be followed for each bidder. In the light of what has been stated in paragraph 5 we find that the apprehension expressed by the petitioner in that regard is misplaced. There is no lack of clarity or transparency in the manner of handling the samples after the same are submitted alongwith the tender document. The observations in *Mohinder Singh Gill & Another* (supra) relied upon by the learned counsel for the petitioner do not carry the case of the petitioner any further.

It is found that the challenge raised by the petitioner is based more on apprehension than any allegation that the terms of the tender notice seek to favour a particular bidder or are so framed to ensure elimination of other bidders. As stated above, the scope of interference while examining a challenge to the terms of invitation to tender is WP 1632-21 14 Judgment limited. There are no allegations of any mala fides on the part of the respondents. There is no basis for us to hold that the stipulations in Clause 5 are so arbitrary and irrational that no responsible Authority could have prescribed such terms. Same is the position with Clause 8 prescribing General Conditions of Contract. It is also found that a somewhat similar challenge was considered in *Mayur Packaging Works and Shri Balaji Trading Company* (supra). No doubt, it was submitted by the learned counsel for the petitioner that the aspect of transparency was not considered in those cases. We have accordingly considered that aspect too and we do not find that the challenge as raised in the present proceedings can succeed.

11. On consideration of the entire material on record we do not find any ground made out within the parameters as laid down by the Hon'ble Supreme Court in the decisions referred to hereinabove. It cannot be said that the terms inviting tender are so unreasonable so as to offend the 'Wednesbury Principle' as urged. We are therefore not inclined to interfere in exercise of jurisdiction under Article 226 of the Constitution of India. The writ petition is thus dismissed. Rule stands discharged. The parties shall bear their own costs.

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12. At this stage, learned counsel for the petitioner seeks continuation of the interim relief that was operating since 09.04.2021. This request is opposed by the learned counsel for the respondents. It has however been informed that on 17.08.2021 by issuing a corrigendum revised time schedule has been fixed. As per that revised time schedule, the submission of sample was to be done by 11.00 a.m. today.

In that view of the matter, the interim relief granted earlier shall continue for a period of four weeks from today and it shall cease to operate automatically thereafter.

(G.A. SANAP, J.)

(A.S. CHANDURKAR, J.)

APTE