

2022 LiveLaw (SC) 295

**IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
M.R. SHAH; B.V. NAGARATHNA; JJ.**

Special Leave to Appeal (C) No(s). 1616 & 1673 /2022; February 11, 2022

BALAJI VENTURES PVT. LTD.

VERSUS

MAHARASHTRA STATE POWER GENERATION COMPANY LTD. & ANR.

Tender - Owner should always have the freedom to provide the eligibility criteria and/or the terms and conditions of the bid unless it is found to be arbitrary, mala fide and/or tailor made. The bidder/tenderer cannot be permitted to challenge the bid condition/clause which might not suit him and/or convenient to him- It is an offer to the prospective bidder/tenderer to compete and submit the tender considering the terms and conditions mentioned in the tender document.

Constitution of India, 1950; Article 226 - Tender Jurisdiction - Interim order-disapprove and deprecate the grant of interim relief virtually allowing the writ petitions at an interim stage - If by way of interim relief, a tenderer/petitioner is permitted to participate in the tender process without insisting upon the tender clause which was under challenge and subsequently the writ petition is dismissed what would be the consequences.

Summary - SLP challenging High Court order dismissing the writ petition challenging a tender condition - Dismissed - The clause cannot be said to be arbitrary, mala fide and/or tailor made and the same shall be applicable to all the bidders/tenderers and there is justification also shown providing such a clause.

(Arising out of impugned final judgment and order dated 24-01-2022 in WP No. 5260/2021 passed by the High Court Of Judicature at Bombay At Nagpur)

For Petitioner(s) Mr. Dhruv Mehta, Senior Adv. Mr. Rameshwar Prasad Goyal, AOR Mr. Gagan Sanghi, Adv. Mr. D.V. Chauhan, Adv. Mr. Nikhil Kirtane, Adv.

ORDER

1. Feeling aggrieved and dissatisfied with the impugned judgment and order dated 24.01.2022 passed by the High Court of Judicature at Bombay Bench at Nagpur in Writ Petition No.5260 of 2021 and Writ Petition No.5444 of 2021 by which the High Court has dismissed the said writ petitions preferred by the petitioner in which the petitioner – bidder challenged the Clause 1.12(V) of the tender document, the original writ petitioner has preferred the present Special Leave Petitions.

2. That the respondent herein Maharashtra State Power Generation Company Ltd. floated a tender inviting bids for transportation of raw coal against RoadcumRail allocation from various mines of Western Coalfields Limited to the Thermal Power Station to its Principal Power Station. That one of the tender conditions was that bidder should have permission and consent of private siding owner to operate the Vimla siding for dispatch of coal to TPS of Mahagenco and the permission/consent of Vimla private siding owner to operate the siding should be submitted along with the bid, failure of which, the bid will not be considered and the siding should be available for the entire period of the contract. The petitioner herein – original writ petitioner challenged the said Clause 1.12(V) before the High Court by way of Writ Petition No.5260 of 2021 and Writ Petition No.5444 of 2021. The aforesaid writ petitions came up for hearing before the Division Bench on 14.12.2021 and 20.12.2021 respectively. The High Court entertained the said writ petitions and passed an interim order directing that the original petitioner shall be allowed to take part in the tender process without insisting upon the impugned requirement of obtaining NOC from Vimla and such opportunity shall also be provided to all other prospective bidders and for that purpose, the deadline for submission of the bids shall be extended by further suitable time, which should be decided by the respondents. By way of interim relief, the Division Bench also directed to issue a corrigendum to the tender notice on the lines that clause 1.12 (V) condition would not be insisted upon or would be treated as an optional or further time shall be given to the prospective bidders for fulfilment of the same conditions. The interim order reads as under:

“6. Considering the submissions and also the request made on behalf of the respondent for grant of time, we are of the view that some interim relief before grant of further time would have to be provided in the matter. Accordingly, we direct that the petitioner shall be allowed to take part in the tender process without insisting upon the impugned requirement of obtaining NOC from Vimla and such opportunity shall also be provided to all other prospective bidders and for that purpose, we further direct that the deadline for submission of the bids shall be extended by a further suitable time, which may be decided by the respondent and a corrigendum to the tender notice on the lines that clause 1.12 (V) condition would not be insisted upon or would be treated as an optional or further time shall be given to the prospective bidders for fulfillment of this condition, whichever is found to be convenient by the respondent shall be issued so that all interested parties would have a reasonable notice of change in the terms and conditions of the tender notice and that would ensure equality of opportunity to all the bidders.

7. We would also like to examine the reasonableness of the impugned condition, as the condition seeks involvement of a private party in a tender floated for disposition of public property and therefore, the private operator, "Vimla Infrastructure (India)

Private Limited", be added by the petitioner as a party respondent to this petition by making necessary amendment to the cause title forthwith."

2.1 That thereafter the respondent issued a corrigendum on 01.12.2021 as a result of which clause 1.12(V) of the tender conditions came to be modified and the necessary permission/consent/no objection certificate at the time of submission of the bid was required to be submitted before opening of the price bid. The due date for submission of the bids was also extended. Pursuant to the corrigendum issued, the petitioner also participated in the tender floated. That thereafter the aforesaid writ petitions came to be heard by the learned Division Bench of the High Court. By the impugned judgment and order dated 24.01.2022, the Division Bench of the High Court after following the decisions of this Court in the case of Michigan Rubber (India) Limited Versus State of Karnataka & Others, (2012) 8 SCC 2016; Unflex Limited Versus Government of Tamil Nadu & Others, (2022) 1 SCC 165; Meerut Development Authority versus Association of Management Studies & Another, (2009) 6 SCC 171 and after observing that there is a valid justification for clause 1.12(V) of the tender document and after taking note of the stand on behalf of the Respondent No.2 – Vimla that there shall be uniform rates which would be quoted to each bidder depending on the nature of the service availed and after taking note of the case on behalf of the respondent Private Siding Agent that it was willing to issue the No Objection Certificate subject to fulfilment of general terms and conditions for rake handling as available for all siding users, and that there was no further response from the petitioner, the High Court has dismissed the writ petitions.

2.2 Feeling aggrieved and dissatisfied with the impugned judgment and orders passed by the High Court, the original writ petitioner has preferred the present Special Leave Petitions.

3. Shri Dhruv Mehta, learned Senior Advocate appearing on behalf of the petitioner has vehemently submitted that the High Court has not properly associated and/or considered the fact that clause 1.12(V) is an arbitrary and unreasonable qualifying requirement aimed at not providing a level playing field to the bidders. It is submitted that the High Court ought to have appreciated that the qualifying requirement in clause 1.12(V) of the tender was tailored to ensure that participation of a person in the tender was dependent on the will of the Respondent No.2 – private entity to give consent and claim service charges as it pleased from such person.

3.1 It is submitted that as such there was no justification at all for qualifying requirement in terms of clause 1.12(V) and to obtain the consent of a private entity.

4. Heard. At the outset, it is required to be noted that before the High Court, the petitioner challenged one of the tender condition/clauses.

5. Before we consider the submission on behalf of learned counsel for the petitioner on merits, we would like to observe and disapprove and deprecate the grant of interim

relief by the High Court vide orders dated 14.12.2021 and 20.01.2022 respectively. The interim relief which was granted by the High Court was as such a final relief which could have been granted after deciding the matter finally. The High Court passed an interim relief directing that the petitioner shall be allowed to take part in the tender process without insisting to the impugned requirement or obtaining NOC from Vimla and to issue a corrigendum to the tender notice. Thus, by way of interim relief the High Court directed to ignore the tender clause which was under challenge that too at the interim stage virtually allowing the main writ petition. We disapprove and deprecate the grant of such interim relief virtually allowing the writ petitions at an interim stage. The High Court ought to have appreciated that if by way of interim relief, a tenderer/petitioner is permitted to participate in the tender process without insisting upon the tender clause which was under challenge and subsequently the writ petition is dismissed what would be the consequences. In the present case itself subsequently the writ petition has been dismissed. The question may arise what will be the consequences of the interim order by which the petitioner was permitted to take part in the tender process without insisting upon the impugned requirement by obtaining NOC from Vimla. Therefore, no such interim relief could have been passed by the High Court.

5.1 Now so far as the impugned Judgment and order passed by the High Court dismissing the writ petitions is concerned, what was challenged before the High Court was one of the tender conditions/clauses. The High Court has specifically observed and noted the justification for providing clause 1.12(V). The said clause was to be applied to all the tenderers/bidders. It cannot be said that such clause was a tailor made to suit a particular bidder. It was applicable to all. Owner should always have the freedom to provide the eligibility criteria and/or the terms and conditions of the bid unless it is found to be arbitrary, mala fide and/or tailor made. The bidder/tenderer cannot be permitted to challenge the bid condition/clause which might not suit him and/or convenient to him. As per the settled proposition of law as such it is an offer to the prospective bidder/tenderer to compete and submit the tender considering the terms and conditions mentioned in the tender document.

5.2 In the case of ***Silppi Constructions Contractors vs. Union of India, (2020) 16 SCC 489***, it is observed in para 20 as under:

“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.”

5.3 In the case of ***Montecarlo Limited vs. National Thermal Power Corporation Limited, (2016) 15 SCC 272***, it is observed and held that the tender inviting authority is the best person to understand and appreciate its requirement and tender documents, so long as there are no mala fides/arbitrariness etc. It is further observed and held that the Government must have freedom of contract and such action can be tested by applying Wednesbury principle and also examining whether it suffers from arbitrariness or bias or mala fides.

6. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand and when it is found that clause 1.12(V) cannot be said to be arbitrary, mala fide and/or tailor made and the same shall be applicable to all the bidders/tenderers and there is justification also shown providing such a clause and even subsequently a corrigendum has been issued and even the Respondent No.2 private bidders also made it clear that uniform charge shall be quoted for each bidder and even clause 1.12(V) was modified to the extent the necessary permission/consent/no objection certificate that was required at the time of submission of the bid was now required to be submitted before the opening of the price bid and the date for submission of the bid was extended, the High Court has rightly dismissed the writ petition and has rightly refused to interfere with the decisions of the respondents providing clause 1.12(V) of the tender document.

7. We are in complete agreement with the view taken by the High Court. No interference of this Court in exercise of powers under Article 136 of the Constitution of India is called for.

In view of the above and for the reasons stated above, the Special Leave Petitions stand dismissed.