

SUNWAY INTERNATIONAL (PVT) LTD AND ANOTHER

Vs.

AIRPORT AND AVIATION SERVICES (SRI LANKA) LTD AND OTHERS

SUPREME COURT
ALUWIHARE, J.
DE ABREW, J.
DEHIDENIYA, J.
SC/FR/147/2017
JANUARY 11, 17, 2019

Fundamental rights—Infringement of Articles 12(1), 14(1)(g) of the Constitution—Violation of tender procedure—Highest bidder and highest responsive bidder—Time—bar objection—Lex non cogit ad impossibilia Nemo judex in causa sua

The 1st petitioner company and the 2nd petitioner, its managing director, operate a business that provides services in the nature of a tour operator and a travel and air ticketing agent. At the public tender conducted by the 1st respondent, Airport & Aviation Services (Sri Lanka) Limited, the 1st petitioner put forward a bid to operate the Travel Service Counter No. 1 at the arrival public concourse in the Bandaranaike International Airport. The tender was awarded to the 11th respondent by the Ministerial Procurement Committee (MPC) by waiving off the financial capacity requirement stated in the tender document and in disregard of the recommendations made in favour of the 1st petitioner by the Technical Evaluation Committee (TEC). The petitioners, despite being the fourth highest bidder, complained of infringement of their fundamental rights enshrined in Article 12(1) and 14(1)(g) of the Constitution on the basis that the 1st petitioner was the highest responsive bidder by virtue of fulfilling all the conditions in the tender document, and the award of the tender to the 11th respondent was in violation of the tender procedure.

Held:

- (1) Not only natural persons but even the companies incorporated in Sri Lanka being juristic persons are entitled to the protection granted under Articles 12(1) and 14(1)(g) of the Constitution.
- (2) The waiving off of the requirement of financial capability stipulated in the tender document in favour of the 11th respondent after the

closure of the bids merely on the basis of higher bid value, amounts to a violation of Article 12(1) of the Constitution. If there was a genuine need to waive a certain eligibility requirement to serve the interests of the 1st respondent, the process provided by clause 11. 1 of the instructions to bidders ought to have been followed.

(3) Article 14(1)(g) recognises a general right in every citizen to do work of a particular kind and of his choice. However, it does not confer the right to hold a particular job or to occupy a particular post of one's choice. The petitioners have not adduced sufficient evidence to support the contention that the decision of the MPC to waive off a requirement and award the tender to the 11th respondent infringed their general right and freedom to engage in their lawful occupation as tour operators and travel and ticketing agents. The right to carry on an occupation as travel agents cannot be equated to the right to work in a particular post under a particular contract, such as the disputed tender agreement in the present case. The petitioners have failed to establish the violation of Article 14(1)(g) of the Constitution.

(4) Until there is a final refusal by the relevant authorities to grant relief, seeking alternative relief should not be a bar to an application under Article 126. It is only when the appellate authority refuses to interfere and grant redress that the injury complained of becomes effective and the fundamental right is infringed. While the time limit is mandatory, in exceptional cases, by the application of the principle *lex non cogit ad impossibilia*, if there is no lapse, fault or delay on the part of the petitioner, the court has the discretion to entertain an application made out of time. The petitioners have established that they were prevented from invoking the jurisdiction of the court due to circumstances beyond their control and due to remissness on the part of the respondents. The time-bar objection cannot succeed.

Cases referred to:

1. Environmental Foundation Ltd v. Urban Development Authority of Sri Lanka and others [2009] 1 Sri LR 123 at 131, 132
2. Noble Resources International Pte Ltd v. Hon. Ranjith Siyambalapatiya and others [2016] BLJ 161
3. Gamaethige v. Siriwardena and others [1988] 1 Sri LR 384 at 402

4. SmithKline Beecham Biologicals S. A. and another v. State Pharmaceutical Corporation of Sri Lanka and others [1997] 3 Sri LR20
5. Baxalta Bioscience India Pvt Ltd v. State of Telangana, Health, Medical and Family Welfare Department and others (CA/ WRIT/40315/2016, CA Minutes of 13. 03. 2017)
6. Jayawickrama v. Prof. W. D. Lakshman, Vice Chancellor, University of Colombo and others [1998] 2 Sri LR 235 at 249
7. Pamkayu (M) SND BHD (Appearing by its Attorney, Hemachandra) and another v. Liyanaarachchi, Secretary, Ministry of Transport and Highways and another [2001] 1 Sri LR 118 at 125
8. Ramana Dayaram Shetty v. International Airport Authority of India and others 1979 AIR 1628
9. Fertilizer Corporation Kamgar Union (Regd.), Sindri and others v. Union of India and others 1981 AIR 344
10. Elmore Perera v. Major Montague Jayawickrema, Minister of Public Administration and Plantation Industries and others [1985] 1 Sri LR 285 at 323

APPLICATION under Article 126 of the Constitution for infringement of fundamental rights.

Shavindra Fernando, P. C., with Eliza Kandappa for the Petitioner.

N. M. Riyaz with Madhushani Chandrika for the 11th Respondent.

Yuresha De Silva, S. S. C., for the 1st- 10th and 14th Respondents.

cur. adv. vult.

December 2, 2019

ALUWIHARE, J.

The 1st Petitioner Company, Sunway International (Pvt) Ltd. (Hereinafter sometimes referred to as the ‘Petitioner Company’) and the 2nd Petitioner, who is the Managing Director/Founder of the said Sunway International (Pvt) Ltd., together in partnership operate a Destination Management Company under the name and style of “Sunway Holidays” which provides, inter alia, services in the nature of a tour operator and a travel and air ticketing agent.

In the sequence of events reading up to the present application, it is submitted by the Petitioners that in response to a public notice published

in the newspapers on 4th December 2015, inviting bids to operate the six (06) Travel Service Counters at the arrival public concourse of the Bandaranaike International Airport (BIA), Katunayake, issued by the Chairman of the Airport and Aviation Services (Sri Lanka) Limited (2nd Respondent), the Petitioner Company submitted its bidding documents on 27th December 2015, for the Travel Service Counters Nos. 1, 3 and 5.

The Petitioners maintain that ‘Sunway Holidays’ was in complete compliance with Clause 6 of Instructions to Bidders marked as P5, which lays down the “Eligibility and Qualification Requirements of Bidders.” The relevant excerpts from the said Clause are reproduced below for ease of reference:

6. Eligibility and qualification requirements of Bidders

(a) The bidder should be a duly registered company with the Registrar of Companies . . . or a duly registered firm with the Registrar of Business names in case of partnerships or individuals.

(b) The bidder shall have valid license to carry on business as a travel agent issued by Sri Lanka Tourism Development Authority . . .

(c) Firms, Companies or Institutions registered outside Sri Lanka may also apply . . .

(d) The prospective bidder must possess financial capability for the proposed operation throughout the contract period without any interruption, disruption or premature termination of the contract. Such financial capability should be supported by financial documents such as Balance Sheets, Income Statements and annual audited accounts together with cash flow statements for the immediate past three years that shall be attached to the Qualification Questionnaire.

(e) The Bidders shall have at least 3 years of experience in the relevant field.

(f) The proposed operation of the bidder stated in the Bid document should be related to the objectives of Bidder’s Registered Business.

It is averred by the Petitioners that, at the time of submitting the bid, they together formed a Business Firm duly registered with the Provincial Registrar of Business names of Western Province (P2), possessing the required licence issued by the Sri Lanka Tourism Development Authority to carry on business as a travel agent, and possessed the financial capability to operate the Travel Service Counters during the contract period, without any *“interruption, disruption or premature termination of the contract”*.

It is the Petitioners’ claim that even though the Petitioner Company was the fourth highest bidder for Counter No. 01, it was nevertheless the **highest ‘responsive’ bidder** by virtue of fulfilling all of the above requirements, and owing to the other three (03) bidders who had submitted higher bids than the Petitioner Company, suffering certain infirmities. These infirmities were, viz. the 11th Respondent-Airport Tourist Drivers Association having no financial capability to meet the bid submitted, therefore not being qualified as per Clause 6. d., the 12th Respondent-Sunhill Group of Hotels having no license from Sri Lanka Tourism Development Authority nor financial capability, therefore not being qualified as per Clauses 6. b and d, and the 13th Respondent-Ancient Lanka Tours and Travels having no licence, nor the financial capability, nor the experience-and failing to qualify as per Clauses 6. b, d and e.

In these circumstances, the Petitioners contend that, despite being assured at the pre-bid briefing on 23rd December 2015 that the conditions of the bidding documents will be adhered to and the tender will not be merely awarded on the basis of being the highest bidder, the tender for the operation of Counter No. 1 was awarded to the 11th Respondent-Airport Tourist Drivers Association-by the decision of the Ministerial Procurement Committee dated 6th April 2016 (hereinafter also referred to as “MPC”) (8th, 9th and 10th Respondents), allegedly in disregard of Clause 6. d [financial capability of the bidder] of the Instructions to Bidders and in disregard of the recommendations provided after a technical evaluation by the Technical Evaluation Committee (hereinafter also referred to as “TEC”) (5th, 6th and 7th Respondents).

It is claimed by the Petitioners that the TEC Report dated 29th January 2016 (marked 2R3) which evaluated the bids received, revealed that the TEC had recommended to the Tender Board that Counter No. 1 should be awarded to the Petitioner Company, and that in the said Report, the

11th Respondent was not even identified as an eligible and a responsive bidder by the Committee (Page 3 of 2R3). However, the minutes of the MPC Meeting held on 6th April 2016 (marked 2R5), indicate that the MPC had decided that *“the awards must be awarded to the **highest bidders ranked according to bid value and should be amended by waiving off financial capacity requirement given in the tender document. . . .**”* (emphasis added), and decided to award the tender for Counter No. 1 to the 11th Respondent on the basis that it would yield a higher income to the 1st Respondent-Airport & Aviation Services (Sri Lanka) Limited.

It is therefore averred by the Petitioners, that the tender for the operation of Counter No. 1 has been awarded to the 11th Respondent merely on the basis of higher bid value, in violation of the published eligibility requirement in the tender documents, pertaining to the requisite financial capability to operate the Travel Service Counters, and it therefore amounts to a changing of the ‘goal post’ after the bids have been closed on 30th December 2015 and the evaluation process had commenced with the TEC recommendations submitted.

Aggrieved by the above decision of the Ministry of Transport and Civil Aviation, the Petitioners submitted an appeal on 2nd May 2016, to the Secretary of the Ministry of Transport and Civil Aviation, setting out their grounds of protest. However, they had not received any communication of the decision of the Appeal Board. Thereafter, the Petitioners had written to the Head of Commercial and Properties of Bandaranaike International Airport (BIA) seeking a hearing with regard to the matter, to no avail.

The 11th Respondent had thereafter commenced the operation of the Counter No. 1 on 1st January 2017. The Petitioners assert that after the commencement of operations, there was a delay of over 3 months in the 11th Respondent entering into the relevant contract agreement (entered into only on 24th April 2017) which the Petitioners point out, was in violation of Clause 13. 7 of the Instruction to Bidders, by virtue of which *“the successful Bidder shall enter into a Contract Agreement with the Company within 14 days from the Letter of Award . . . Failure to enter into a contract within the stipulated time period shall be a just cause for the annulment of the award.”* But no such step had been taken against the 11th Respondent in the present case.

In light of the above circumstances, the Petitioners allege that awarding of the tender of Counter No. 1 to the 11th Respondent, who is ill-qualified,

and allowing the 11th Respondent to continue operating Counter No. 1, have violated and continue to violate the Fundamental Rights guaranteed to the Petitioners under Articles 12(1) and 14(1)(g) of the Constitution. Leave to Proceed was granted by this Court for the alleged violation of the said two Articles.

As such, the Petitioners seek a declaration on the violation of their Fundamental Rights, pray for compensation and a direction by the Court, awarding the tender for the operation of the Counter No. 1 to the Petitioners-for a period of three (03) years forthwith, or by 1st January 2020 and three (03) years thenceforth.

It was the contention of the 11th Respondent that, due to the 1st Petitioner Company not being a 'citizen', and the 2nd Petitioner not having disclosed his citizenship in the Petition, they do not qualify for the protection provided by Article 14(1)(g). Consequently, it was contended that by reason of Article 12(1) being prayed conjunctively with Article 14(1) (g), the Petitioners have no standing to claim relief under the regime of Fundamental Rights.

The 1st Petitioner is a limited liability company duly incorporated in Sri Lanka under the Companies Act, No. 1982 and Act No. 7 of 2007 (Certificate of incorporation marked as P1), and therefore qualifies as a juristic person/corporate entity. 'Sunway Holidays' is the registered business name of the Firm of which the 1st Petitioner-Sunway International (pvt) Ltd and the 2nd Petitioner are partners (Certificate of Registration of the Firm marked as P2).

As a juristic person, the 1st Petitioner Company possesses locus standi to make a Fundamental Rights application against a violation of the right to equality before the law and equal protection of the law, as protection under Article 12(1) extends to juristic persons as well, by reason of that Article's reference to "*all persons.*" Resonating this principle, His Lordship Justice Sharvananda in the treatise, "Fundamental Rights in Sri Lanka" (at page 43, - 44,) states that, "*[T] here is nothing in principle which prevents a corporation or company from securing the equal protection of the law specified in Article 12 . . . the word 'person' in the several Articles including Article 17 in Chapter III of the Constitution will have to be construed to include both a natural person and a body corporate.*"

However, regarding a violation of Article 14(1)(g) namely, the freedom to engage in any lawful occupation, trade, business or enterprise, only

‘citizens’ are empowered to avail themselves of the protections provided therein. In this regard, His Lordship Chief Justice S. N. Silva made the following observation in the case of Environmental Foundation Limited v. Urban Development Authority of Sri Lanka and others:¹

*An objection has been raised that the Petitioner cannot have and maintain this application, since it is an incorporated company and that the fundamental rights guaranteed by Articles 12(1) and 14(1) (a) can be invoked only by **persons** and in the case of Article 14(1) (a) by a citizen. In my view the word “**persons**” as appearing in Article 12(1) should not be restricted to “natural” persons but extended to **all entities having legal personality**. . . Although Counsel contended that Article 14(1) should be read differently in view of the reference to a “**citizen**”, I am of the view that this distinction does not carry with it a difference which would enable a company incorporated in Sri Lanka, to vindicate an infringement under Article 12(1) and disqualify it from doing so in respect of an infringement under Article 14(1). (Emphasis added)*

The view that the protection afforded under Articles 12(1) and 14(1) can be extended to incorporated companies in Sri Lanka was reiterated by His Lordship Chief Justice K. Sripavan in *Noble Resources International Pte Limited v. Hon. Ranjith Siyambalapitiya and others*.² Therefore, by parity of reasoning, the 1st Petitioner Company, which is an incorporated company in Sri Lanka as evidenced by P1 and P2, is entitled to the protection granted under Article 12(1) and 14(1)(g).

The 2nd Petitioner is a citizen of Sri Lanka (as evidenced by P2) and also the Founder, the Managing Director and a partner in the partnership formed under the name and style of “Sunway Holidays.” In such capacity, the rejection of the bid of the partnership firm, thereby entitles him to have sufficient standing to avail himself of the Fundamental Right guaranteed to him as a natural person and a citizen under Articles 12(1) and 14(1)(g).

The learned Senior State Counsel appearing for the 1st to 10th and the 14th Respondents made submissions by way of a preliminary objection regarding the maintainability of this application, in light of the one month period stipulated in Article 126(2) of the Constitution, and that this application should be dismissed in *limine*.

In terms of Article 126(2) of the Constitution, an action for infringement/ imminent infringement of a Fundamental Right by executive or administrative action should be brought within one month of such impugned action.

It is common ground that the decision of the Ministerial Procurement Committee to reject the Petitioners' bid was communicated to them by way of a letter dated 28th April 2016 (P6/2R6). Thereafter, on 14th July, the 1st Respondent (Airport and Aviation Services (Sri Lanka) Ltd.) had notified the Petitioners that the disputed tender has been cancelled by the Secretary, Ministry of Transport and Civil Aviation (P11). On 25th October 2016 the 1st Respondent had again notified the Petitioners that the Secretary to the Ministry had reverted the aforesaid decision to cancel the disputed tender and that the tender stands valid. (P12/2R9).

The Respondents contend that the Petitioners took no action in this regard from that point of time, up until 11th April 2017, when they came to Court to file the present application.

However, the sequence of events which led to this delay needs to be examined. Upon the receipt by the Petitioners of the letter of award (P6) communicating the rejection of their bid by the MPC, immediately on 2nd May 2016, within a week of notice, the Petitioners preferred an appeal (P7) to the Secretary of Ministry of Transport and Civil Aviation, in compliance with Clause 8. 3 of the Government Procurement Guidelines 2006 on Goods and Works. Thereafter, on 25th May 2016, the 1st Respondent had written to the Petitioner Company requesting them to further extend their bid bond and the bid until August 31st and September 30th, respectively (by letter marked P8) on the basis that the evaluation of the tender was in progress. The Petitioners complied with the request the very next day [as evidenced by P9(a), (b), (c) and P10].

As referred to earlier, on 14th July 2016 (after the Petitioners had appealed against the MPC decision), they were informed by letter marked as P11 that the impugned tender was cancelled, only to be informed again on 25th October 2016 that the above decision to cancel the tender had been reverted by the Secretary to the Ministry of Transport and Civil Aviation and the former tender stands valid (by letter marked P12), thereby restoring the status quo ante.

Thereafter, the Petitioners who were still unaware of the status of their appeal, had written to the 1st Respondent seeking a hearing with regard

to their appeal (P13) on 10th November 2016, but their request was not granted. On 22nd December 2016 they wrote to the 2nd Respondent with regard to the Writ Application concerning this tender before the Court of Appeal, bearing Case No. CA (WRIT) 402/2016 which was pending, and requested to hold any decision for awarding the tender till the final determination of that case (P14).

They had again written to the 2nd Respondent on 18th January 2017 and 1st March 2017 (The Writ Application referred to above had been dismissed on the same date). They only received a response on 7th March 2016 by the 1st Respondent that the counters were awarded in December 2016 and are currently in operation. A final letter dated 1st April 2017 was addressed by the Petitioners to the 4th Respondent-Secretary of the Transport and Civil Aviation Ministry-calling for immediate attention to this matter before calling for fresh bids in order to initiate a re-bid for the same Counter.

It is the Petitioners claim that until the making of the present application which was necessitated by fresh bids being called for Counter No. 1, the Petitioners were unaware of whether their appeal was considered or not. They aver that they were not granted a hearing, nor informed of the decision and the reasons for the decision of the Appeal Board which sat on 10th June 2016.

A pertinent observation in this regard has been made by Dr. Jayampathy Wickramaratne in *'Fundamental Rights in Sri Lanka'* at page 460 stating that, *"Until there is a final refusal by the relevant authorities to grant relief, seeking alternative relief should not be a bar to an application under Article 126. In fact, it is only when the appellate authority refuses to interfere and grant redress that the injury complained of becomes effective and fundamental right infringed."* (Emphasis added)

In the absence of a communication to the effect that their appeal had been rejected, the general principle on exemption from the time limit of one month, as set out by His Lordship Justice Mark Fernando in *Gamaethige v. Siriwardena and others* 3 needs consideration. His Lordship states as follows, *"While time limit is mandatory, in exceptional cases, on an application of the principle lex non cogit ad impossibilia, if there is no lapse, fault or delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time."*

Therefore, the Petitioners have established that they were prevented from invoking the jurisdiction of this Court due to circumstances which were beyond their control and owing to no lapse on their part, but due to the remissness on the part of the Respondents. Therefore, the preliminary objection regarding the maintainability of this application due to it being time-barred is overruled.

Having thus clarified the preliminary issues, attention must be paid to the main grounds of contention of the Petitioners which can be synthesized as follows:

Whether the Tender Guidelines were not adhered to in awarding the tender

The TEC Report (2R3) had recommended that Counter No. 1 be awarded to the 1st Petitioner, Sunway International (Pvt) Ltd. The MPC, however, by its decision dated 5th April 2016 (2R5) had decided to unilaterally waive off the requirement of financial capacity laid down under clause 6. d, which stipulates the “*Eligibility and qualification requirement of Bidders*” in the Instructions to Bidders (P5). The document referred to (P5) requires that the financial capacity of the bidders be proved by tendering audited statements of accounts for the immediate past 3 years. The MPC’s decision to award the tender for Counter No. 1 to the 11th Respondent (who was disqualified by the TEC for not being a responsive bidder) was based on the motive of obtaining the maximum income for the benefit of the 1st Respondent Company.

In the decision of the MPC Meeting held on 6th April 2016 (R25), under the heading ‘decisions’ it is stated as follows:

*Having pursued the bids to obtain maximum income to the company, MPG members are of the opinion that the awards must be awarded to the **highest bidders ranked according to the bid value and should be amended by waiving off financial capacity requirement given in the tender document, in the following manner for a period of 03 years. (Emphasis added).***

The MPC had through this decision, in a context of national competitive bidding, changed the ‘goal post’ after the closure of bids on 30th December 2015 and after the TEC evaluation. If there was a genuine need to waive a certain eligibility requirement to serve the interests of the 1st Respondent, the process provided by Clause 11. 1 of the Instructions to

Bidders (P5) could have been resorted to, and an Addendum amending the bidding have been issued by the Tender Board, *“prior to the deadline given for submission of bids”* and communicated to, and acknowledged by the bidders.

Therefore, it is observed that according to 2R5 and the affidavit of the 2nd Respondent, the overriding concern of the MPC in awarding the Counters according to its new recommendation, had been the additional financial gain amounting to Rs. 80, 190, 686/= which can be accrued by waiving off one requirement of eligibility. Similarly, the 11th Respondent avers in paragraph 26 of the written submissions that the TEC recommendation was “wrong” due to the fact that the 11th Respondent offered a phenomenally higher price than that offered by the Petitioner Company. It must be noted, however, that the 11th Respondent had at no point challenged the TEC’s determination that the 11th Respondent was not a ‘responsive bidder’.

The decision to award the tender based solely on the concern of accruing a higher income, to the detriment of other qualifications, renders the determination of a bidder’s “responsiveness” by the Tender Board, nugatory (Clause 13. 3 of P5). Furthermore, the meticulously detailed ‘eligibility requirements’ (Clause 6 of P5), the provisions for a ‘technical evaluation’ to be performed by the TEC, (mandated under Clause 13. 5 of P5) as well as the Government Procurement Guidelines of 2006, are also rendered futile by such an arbitrary decision.

The Clause 13. 3 and 13. 5 of Instructions to Bidders read as follows:

13. 3 Examination of Bids and Determination of Responsiveness

*Prior to the detailed evaluation of the Bids, the **Tender Board 01 will determine** whether each bid;*
*(a) **meets the eligibility and qualification requirements stipulated in the Bidding Documents . . .***
*(d) **is substantially responsive to the requirements of the Bidding Documents (Emphasis added).***

13. 5 Selection

*The bids which are determined to be **substantively responsive** shall be evaluated by a **Technical Evaluation Committee** appointed by the Tender Board 01. Selection of the bidders will be made by the Tender Board 01 **based on such detailed evaluation which shall be in the best interest of the company.** (Emphasis added)*

A similar procedural requirement is stipulated in the Clause 7. 9. 10 of the Procurement Guidelines 2006 on detailed bid evaluation which states thus:

Bids shall be first evaluated strictly according to the criteria and methodology specified in the bidding documents and such evaluated Bids shall be compared to determine the lowest evaluated substantially responsive Bid. (Emphasis added)

However, it is the contention of the 11th Respondent that the eligibility requirements in Clause 6 should be read with Clause 13. 5 of Instruction to Bidders (P5), having regard ultimately to the ‘best interest’ of the 1st Respondent Company. The 11th Respondent further avers in paragraph 31 (c) of statement of objections that it was selected not solely on the basis of being the highest bidder, but also due to its *“long and uninterrupted service . . . absence of complaints, excellent service, modern fleet, uniformed disciplined drivers . . .”* inter alia, which are all factors extraneous to the eligibility requirements laid down by Clause 6 of Instructions to Bidders, thus, are of no relevance as far as eligibility requirements are concerned.

The 8th Respondent-Chairman of the Ministerial Procurement Committee-in his affidavit avers that, Counter No. 1 was awarded to the 11th Respondent, as the highest bid of Rs. 75, 487, 860. 00 was submitted by the 11th Respondent, whereas, the value of the bid submitted by the Petitioner was only Rs. 40, 514, 400. 00.

The 1st to 10th and the 14th Respondents further aver in their written submissions that documents submitted by the bidders in accordance with Clause 6(d) pertaining to their financial capabilities were examined, even though in the MPG decision it is stated that the said requirement of financial capability should be waived off. They state that the requirements given in Clause 6(d) were after all ultimately, in light of Clause 13. 5, for the bidders to submit the necessary documents in order to assess their ability to perform the Contract based on best interest of the Company

Petitioners’ counter-argument is that the above Clause on ‘best interest’ cannot be misused to change the ‘goal post’ when the bids have been closed and the tender evaluation period had commenced, which is a practice essentially frowned upon in awarding of public tenders.

These averments elaborated above are indicative of the fact that the overriding concern in the selection process has only been the highest income receivable from the tenders which had been equated to the best interest of the 1st Respondent Company. Emphasis should have been given by the MPC to the selection of one out of the ‘responsive bidders’ who had fulfilled all the requirements for eligibility, which were laid down and communicated to bidders through the Instructions to Bidders (P5) to serve a certain rational purpose and to ensure transparency of the Government Procurement Process.

The MPG decision has also not given any weight to the evaluation Report submitted by the TEC, and the MPC appears to have completely disregarded the consideration of the same, which is a necessary step made obligatory by Government Procurement Guidelines.

The case of *SmithKline Beecham Biologicals S. A. and another v. State Pharmaceutical Corporation of Sri Lanka and others* is of relevance here, as it concerns a similar scenario where the Respondent-a State Corporation-awarded a tender for supplying the Rubella vaccine to an unqualified company that offered the lowest bid, but, however, was not the lowest ‘responsive’ bidder. The said company was awarded the tender by adopting the minimum cost to the State as the ultimate criterion. His Lordship Justice Dr. Amerasinghe at page 55 opined that, “[T] he only complete was that of SmithKline Beecham Biologicals and therefore it was the only tender that qualified for evaluation. The Tender Board misdirected itself by believing that it was obliged to recommend the acceptance of the tender of Biocine S. P. A. because its price was “the lowest responsive offer.” It may have been the lowest offer, but at the relevant date . . . it was not a “responsive” offer at all, for Biocine S. P. A. had failed to comply with the condition of registration.”

In addition to the higher income, the 1st Respondent in the present case avers that the past performance (as opposed to 03 years’ experience in the field) of the 11th Respondent in operating the Counter No. 1 in 2016 and being in the operation of various other counters since 2005 to the satisfaction of the 1st Respondent, influenced the MPC’s decision to award the Counter to 11th Respondent. Such considerations violate the requirements laid down in the bidding documents and the Government Procurement Guidelines 2006. This is apparent from a scrutiny of the Guidelines.

The Clause 7. 9. 1 of the Guidelines, lays down the general principles of bid evaluation by the TEC as follows:

7. 9. 1 (a) The manner in which the bids are to be evaluated, including the criteria for selection of the lowest evaluated bid must be stipulated in the bidding document.

(b) The evaluation of bids shall be consistent with the method, terms, and conditions disclosed in the bidding documents. (Emphasis added)

Furthermore, Clause 7. 8. 2 classifies deviations from Instructions to Bidders as minor deviations which are acceptable, or major deviations which are unacceptable. As per Clause 7. 8. 4, major deviations include:

(e) Eligibility requirements (if specified);

(n) Bids which are not responsive to critical, technical or commercial requirements in the bidding documents.

Thus, the waiving off of an eligibility requirement in favour of the 11th Respondent, qualifies as a major deviation from the tender documents. Furthermore, the Guidelines define a substantially responsive bid as “one which conforms to all the terms, conditions and specifications of the bidding documents, without material deviation or reservation” (Clause 7. 8. 6), by which estimation, the bid of the 11th Respondent is rendered unresponsive and unacceptable to compete for Counter No. 1.

This classification of deviations from Bidding Documents as major or minor, is widely accepted and was made reference to by the Andhra Pradesh High Court in *Baxalta Bioscience India Pvt. Ltd v. The State of Telangana, Health, Medical and Family Welfare Department and others*,⁵ where it was stated that “*The requirements in a tender notice can be classified into two categories-those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case, the authority issuing the tender may be required to enforce them rigidly. In the other cases, it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases.*” (Emphasis added)

According to the above classification, and in light of the MPC’s primary objective of awarding the tender being the accruing of the highest possible

income, the financial capability and solvency of the bidders to meet the unrealistic rates they have submitted, becomes an essential condition of eligibility. Therefore, Clause 6. d can be considered a requirement which must be rigidly enforced, rather than be waived off.

Such deviations are questionable in the light of Clauses 5. 3. 19 and 5. 3. 20 of the Guidelines on “Evaluation criteria”, which state:

1. 1. 19 (a) *The bidding documents shall a/so specify the relevant factors, in addition to price, to be considered in bid evaluation and the manner in which they will be applied for the purpose of determining the lowest evaluated bid.*

1. 1. 20 (b) *The disclosed criteria shall not be modified or additional criteria shall not be introduced during evaluation. (Emphasis added)*

In the instant case, not only had the MPC taken factors which were extraneous to the eligibility criteria into consideration, but had also deviated from them after the evaluation process had commenced and the TEC had submitted their recommendations as to eligible bidders. The undesirability of such practices was highlighted by this Court in a number of decisions.

In the case of *Jayawickrama v. Prof. W. D. Lakshman, Vice Chancellor, University of Colombo and others*,⁶ dealing with a decision of the Post graduate Institute of Medicine and its Board of Management and Study, His Lordship Justice Mark Fernando observed that, “*It is true that regulations can be amended. But even the authority which made the regulations is bound by them, unless and until they are duly amended; and disregarding its own regulations is not a method by which that authority can amend them.*” (Emphasis added)

His Lordship Justice Amerasinghe expressing his view in *Pamkayu (M) SND BHD (Appearing by its Attorney, Hemachandra) and another v. Liyanaarachchi, Secretary, Ministry of Transport and Highways and another*,⁷ stated that, “*The award of a tender must be based on compliance with the terms and conditions of the tender documents on the date and at the time specified for the closing of the tender. An offer that does not comply with the terms, conditions and specifications at that date and time must be rejected in the same way as a late offer.*”

As held in SmithKline Beecham (supra at page 44), “[T]he Guidelines make it clear that a Tender Board may only consider bids which are **responsive and qualified** by substantially conforming with the tender documents. **The State and its agencies are bound by and must rigorously and scrupulously observe the procedures laid down by them on pain of invalidation of an act in violation of them.**” (Emphasis added)

In a similar vein it was held in Noble Resources International (supra, at pages 155 and 161) that “[I]t is essential to the maintenance of the rule of law that **every organ of the State must act within the limits of its power.** . . . When specific provisions are laid down in the Government Procurement Guidelines- 2006 and in the Bid Documents, **the rule of law will imply that the requirements of those provisions are not violated.**” (Emphasis added)

Thus, taking account of the circumstances of the present case, it is evident that the 8th to 10th Respondents have acted in blatant disregard of and in violation of the Government Procurement Guidelines, as well as the eligibility requirements in the tender documents, in awarding Counter No. 1 to the 11th Respondent.

It must also be inquired into at this point, whether rules of natural justice were breached in deciding the appeal of the Petitioners. When an appeal was preferred by the Petitioner on 2nd May 2016 in accordance with the Clause 8. 3 of the Guidelines to the Secretary, Ministry of Transport and Civil Aviation, an Appeal Board to hear the appeals of unsuccessful bidders was appointed by the Secretary to the said Ministry (as evidenced by 2R7). It consisted of the Chairmen and members of the TEC and MPC, who were involved in the technical evaluation and made the decision to award the Counter No. 1 to the 11th Respondent-the very decision against which the appeal was made.

Consequently, the said MPC Chairman and members sitting in the Appeal Board, determined the correctness of their own decision, and so affirmed the decision of the MPC dated 30th March 2016. This is against the widely accepted principle of natural justice, *Nemo iudex in causa sua* - no one shall be the judge of his own case-which signifies that no person can judge a case in which he/she has an interest. Albeit, however, the TEC members had signed the Appeal Board’s decision, they made reference to their initial position in the TEC report, by making

a notation under their signatures which reads, “*Ref. TEC memo to AASL Secretary TB1 (attached) dated 30. 06. 2016.*” Therefore, the decision of the MPC members sitting in the Appeal Board (marked 2R7), appears to be in clear violation of this rule of natural justice.

In addition, the Petitioners had written to the 1st Respondent seeking a hearing with regard to their appeal (P13) on 10th November 2016, but their request was not granted, nor was the decision of the Appeal Board and reasons for such decision communicated to the Petitioners. This is in violation of Clause 8. 4. 1 (b) of the Procurement Guidelines which provides an opportunity for an aggrieved party to make representations at a hearing in support of his/her appeal. The Clause is reproduced below:

8. 4. 1(b) After investigating into such representations, the Appeal Board shall submit its independent report to the Cabinet of Ministers, with copy to the Secretary of the Line Ministry and such report shall:

(i) provide their reasons for endorsement of the decision of the Cabinet Appointed Procurement Committee; or

(ii) for rejecting same together with their independent recommendation of contract award. (Emphasis added)

The tenor of the Guidelines suggests that an “*investigation into such representations*” made by aggrieved parties should be carried out. But on the contrary, at the Appeal Board meeting on 10th June 2016, the Board had cursorily rejected all appeals without a hearing, and the appeal of the Petitioners was rejected on the ground that “*The Tender Board has imposed new conditions on Airport Tourist Drivers Association . . . in order to safeguard that revenue would be paid without interruption*”, thus making amends for the 11th Respondent’s lack of required financial capability (2R7).

Therefore, it can be observed that, as held in Noble Resources International (supra) at 160, “[*T*] *he failure on the part of the Procurement Appeal Board (PAB) to afford a hearing to the Petitioner is in violation of the principles of “natural justice” . . . If the PAB had considered the appeal of the Petitioner, without giving the Petitioner an opportunity of being heard, any decision taken by the PAB . . . would be in violation of the audi alteram partem rule . . .*” In light of these circumstances, it is established that the conduct of the Appeal Board members (5th to 10th Respondents) was in violation of this principle of natural justice.

It is pertinent in the present case to discuss whether the awarding of the tender for Counter No. 1 to the 11th Respondent is in violation of the Petitioners' Fundamental Right to equality before the law and equal protection guaranteed by Article 12(1) of the Constitution.

The actions of the MPC members, namely, the waiving off of the essential requirement of financial capability at the bid evaluation stage, and introducing a different threshold of financial capability for the 11th Respondent by way of an additional sum equivalent to one-month rental applicable to the final year of contract, *in lieu* of the stricter requirement stipulated in Clause 6. d, are in themselves discriminatory and arbitrary.

Such conduct has clearly changed the 'goal post' and hindered the providing of an equal opportunity, by precluding other bidders who could have otherwise submitted a higher bid than the 11th Respondent, unencumbered by the financial capability requirement, from participating in the bidding process. Had the waiver been notified at the point of calling for bids, more entities would have been eligible to submit bids.

It is also discriminatory towards all the other bidders in the present case, who were evaluated by the TEC, including the Petitioners, based on all the prescribed qualification requirements, including that of financial capability, while the 11th Respondent's compliance to it was dispensed with.

Especially, owing to the stipulation in Clauses 12. 4 and 13. 5 of the Instructions to Bidders that only one counter space will be allocated per bidder, the Petitioner Company was not considered by the TEC for any other counter after recommending it to Counter No. 1. In such a backdrop, modifying the requirements later on and rejecting the Petitioners has meted out unfair treatment and denied equal opportunities to the Petitioners.

It should also be noted at this point, that the Procurement Guidelines comprehensively provide the procedure to follow in cases where the Bidders provide unrealistic rates, such as the 'phenomenal' rates offered by the 11th Respondent, albeit where such bids are substantially responsive:

Unrealistic Rates

7. 9. 11 Upon selection of the lowest substantially responsive bid:

(a) If such bidder has quoted unrealistically low rates on critical or very important items, the bidder shall be requested to prove to

the satisfaction of the TEC, how the bidder intends to procure such items/perform the Works/provide the Services as per the quoted rates, for such purposes the bidder may be asked to provide a rate analysis.

(b) If the TEC continues to entertain some doubt about the contractor's/supplier's ability to procure such items/perform the Works/provide the Services as per the quoted rates despite explanation/justification provided, a higher performance security may be requested to mitigate such risks. (Emphasis added)

There is no evidence submitted to substantiate the fact that the 11th Respondent had been requested to prove how it intends to provide services for the quoted rate and the 1st Respondent in the written submissions had merely stated that *“the 11th Respondent had operated Counter No. 1 in the year 2016 and had been operating various counters since 2005 to the satisfaction of the Company . . . “*. Such peripheral considerations are suggestive of unequal treatment among bidders who are similarly circumstanced and of differentiated application of eligibility requirements and Guidelines.

Furthermore, even if such proof and justification was tendered by the 11th Respondent, the imposition of a higher performance security in the present case (one-month additional rental) can only be deemed as evidence of *“some doubt about the contractor's ability to provide the service as per the quoted rates”*, continuing to be entertained.

This waiving off of requirements also frustrated the legitimate expectations of the Petitioners. The arbitrariness of waiving off one requirement (Clause 6(d)) in favour of the 11th Respondent, is further apparent in the hypocrisy of the Appeal Board's decision by which the appeals of Ancient Lanka Tours & Travel (Pvt.) Ltd. And Sunhill Group of Companies were rejected for not fulfilling one of the eligibility requirements [the absence of the license of the SLTPB in accordance with Clause 6(b)].

As held in SmithKline Beecham (supra) at page 29, when referring to inequality before 'law' and equal protection of the 'law', the 'law' mentioned therein is *“not confined to the enactments of Parliament, and includes the regulations, rules, directions, instructions, guidelines and schemes that are designed to guide public authorities.”* Therefore, the Government Procurement Guidelines of 2006 on Goods and Works, which in its Preface itself assures that the purpose of its enactment is

to, “*enhance the **transparency of Government procurement process to minimize delays and to obtain financially the most advantageous and qualitatively the best services and supplies for the nation***” should be upheld when awarding bidders on public tenders. (Emphasis added)

However, the waiving off of certain requirements and introducing lower thresholds, after the closure of bids, solely for increased revenue is a compromise on the quality as well as a stark violation of the transparency and certainty of Government Procurement Process.

A case concerning an identical scenario decided by the Supreme Court of India is of relevance here. In *Ramana Dayaram Shetty v. The International Airport Authority of India and others*, 8 tenders were invited for putting up and running a second class restaurant and two snack bars at the Bombay International Airport. Being a registered second class hotelier having at least five years’ experience was an eligibility requirement, which the 4th Respondent had not fulfilled. Yet his tender was accepted by the 1st Respondent, even in the absence of documentary evidence on the above requirement. It was held that such acceptance was clearly discriminatory since it excluded other persons similarly situated from tendering for the contract and it was arbitrary and without reason, thus violating the equality clause of the Constitution of India (Article 14 of the Indian Constitution, identical to the Article 12(1) of our Constitution). The Court held that:

*Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. It requires that State **action must not be arbitrary** but must be based on some **rational and relevant principle which is non-discriminatory**: it must not be guided by any **extraneous or irrelevant considerations**, because that would be denial of equality . . . **Equality of opportunity should apply to matters of public contracts**. . . The State has the duty to observe equality. An ordinary individual can choose not to deal with any person. The Government cannot choose to exclude persons by discrimination.*

Similarly, in *Pamkayu* (supra) at page 125 it was held that:

*The terms and conditions of a tender **cannot be arbitrarily dispensed with or varied by an evaluation committee or tender board to accommodate a particular tenderer**. If there are to be negotiations in regard to variations in conditions or specifications. all the tenderers should have due notice of such negotiations . . .*

*It is in that way that a ‘level playing field’ on which there is equal opportunity for persons to participate and compete on **identical terms**, and **transparency and uniformity** of the evaluation procedure of the tender process which the Guidelines on Government Tender Procedure aim to achieve, can be achieved. (Emphasis added)*

Therefore, it can be observed that neither equality of opportunity nor transparent State action based on rational and non-discriminatory principles, can be gathered from the actions of the 8th, 9th and 10th Respondents, who have acted arbitrarily, taking extraneous factors into account and extending favoured treatment, thereby creating inequality among the bidders. Therefore, by failing to ensure equality and equal protection of the law to the Petitioner, the said Respondents have acted in violation of Article 12(1) of the Constitution.

Article 14(1)(g) of the Constitution stipulates that “*Every citizen is entitled to the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise.*” However, this Fundamental Right is limited by the restrictions imposed by Articles 15(5) and 15(7). The Petitioners who were discriminated against by the arbitrary actions of the Respondents, suffered the injury of being precluded from operating Counter No. 1 during the 3 year tender period from 2017 to 2019.

In this regard, His Lordship Chief Justice *Y. V. Chandrachud in Fertilizer Corporation Kamgar Union (Regd.), Sindri and others v. Union of India and others*⁹ stated that, “*Article 19(1)(g) [which corresponds to Article 14(1)(g) of the Constitution of Sri Lanka] confers a broad and general right which is available to all persons to do **work of any particular kind and of their choice. It does not confer the right to hold a particular job or to occupy a particular post of one’s choice.***” (Emphasis added)

Resonating this view, His Lordship Chief Justice Sharvananda opined in *Elmore Perera v. Major Montague Jayawickrema, Minister of Public Administration and Plantation Industries and others*¹⁰ that, “*The right to pursue a profession or to carry on an occupation is not the same thing as the right to work in a particular post under a contract of employment . . . Article 14(1)(g) recognizes a general right in every citizen to do work of a particular kind and of his choice. It does not confer the right to hold a particular job or to occupy a particular post of one’s choice.*”

Therefore, the Petitioners have not adduced sufficient evidence to support the contention that the decision of the MPG to waive off a requirement and award the Counter No. 1 to the 11th Respondent infringed their general right and freedom to engage in the lawful occupation as tour operators and travel and ticketing agents. This is so, as the right to carry on an occupation as travel agents cannot be equated to the right to work in a particular post under a particular contract, such as the disputed tender agreement in the present case. Thus, it is my view that the Petitioners have failed to establish that their Fundamental Right enshrined in Article 14(1)(g) has been infringed.

In the aforesaid circumstances, I hold that the 1st and 2nd Petitioners' Fundamental Rights under Article 12(1), have been infringed by the 8th, 9th and the 10th Respondents, acting in their capacity of the Chairman and members respectively of the Ministerial Procurement Committee. The Court takes serious note of the fact that, in innumerable cases this Court had held, that the award of a tender must be based on compliance with the terms and conditions of the tender documents on the date and at the time specified for the closing of the tender and further, the State and its agencies are bound by and must rigorously and scrupulously observe the procedures laid down, in awarding tenders. The 8th, 9th and the 10th Respondents have acted in callous disregard and in flagrant violation of the stipulated eligibility and qualification requirements of bidders.

I award the 1st Petitioner a sum of Rs. 100, 000, as compensation and a sum of Rs. 50, 000 as costs, to be paid by the State. I also direct the 8th, 9th and 10th Respondents to personally pay a sum of Rs. 150, 000/- each to the 1st Petitioner as compensation.

DE ABREW, J. - I agree.

DEHIDENIYA, J. - I agree.

Application allowed.

Judgment by: Buwaneka Aluwihare, J.

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