

**HIGH COURT OF JAMMU AND KASHMIR & LADAKH
AT JAMMU**

WP(C) No. 2528/2023
c/w
CCP (S) No. 288/2023
WP(C) No. 2442/2023

Reserved on: 16.11.2023
Pronounced on: 29.12.2023

M/S Vikas Transport Company

...Petitioner(s)

Through :- Mr. K. S. Johal, Sr. Advocate with
Mr. Karman Singh Johal, Advocate.

V/S

UT of J&K and ors.

.....Respondent (s)

Through :- Mr. Deewakar Sharma, Dy. AG
Mr. R. Koul, Advocate
Mr. Z A Shah, Sr. Advocate with
Mr. Najmul Saqib Saharwardy, Advocate.
Mr. R. K. Gupta, Sr. Advocate with
Mr. Udhay Bhaskar, Advocate
Mr. Primoksh Seth, Advocate.

Coram: HON'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE

JUDGMENT

1. Facts of both the petitions are intertwined in nature, thus they are being disposed of by way of this common judgment.
2. Petitioner participated in e-NIT No. JKRTC/GML/CHT/582 dated 14.08.2023 (hereinafter referred to as the 'earlier tender') floated by the respondents, details whereof shall be discussed in later part of this judgment.

Since the tendering process was being procrastinated, petitioner approached this Court by way of WP(C) No. 2442/2023 and this Court, as an interim measure, restrained the respondents from cancellation of the said tender. However, respondents floated e-NIT No. JKRTC/GML/CHT/639 dated 18.09.2023 whereby earlier tender came to be cancelled, which is impugned in WP(C) No. 2528/2023.

3. Petitioner has invoked writ jurisdiction of this Court under Article 226 of the Constitution of India to implore for the quashment of e-NIT dated 18.09.2023 [“impugned NIT”] and order dated 22.09.2023 issued by the respondents for cancellation of earlier tender. Consequently, petitioner seeks issuance of a writ in the nature of Mandamus commanding the respondents to recall impugned NIT and take the earlier tender to its logical conclusion by allotting the contract in its favour.

4. Before a closer look at the grounds urged in the memo of petitions, it shall be expedient to have an overview of some uncontroverted facts of the case.

5. By means of an e-NIT No. JKRTC/GML/CHT/J/517 dated 06.06.2023, a tender came to be floated by the respondents for supply of load carriers/mini load carriers for transportation of food grain, sugar (mechanical/Pony) to JKSRRTC for various stations/door steps of Jammu Province for the year 2023-2026. Said tender was rendered infructuous due to nil response. As a result, fresh e-NIT (earlier tender) came to be floated by the respondents for the same work. The date of procuring the tender documents was fixed from 16.08.2023 to 28.08.2023 and technical bids were to be opened online on 29.08.2023. The said period came to be extended by the respondents from time to time upto 11.09.2023. The petitioner participated in the tender process and submitted tender documents both with technical and financial bids before 28.08.2023. Other transport firms

including M/S Star Transport Company, a proprietorship concern also participated in the said tendering process through its proprietor, namely, Sh. Masood Ahmad. In the meantime, petitioner approached this Court by way of writ petition, WP(C) No.2442/2023 and this court vide order dated 20.09.2023, as an interim measure directed that the process of earlier tender floated by the respondents shall not be cancelled or re-tendered. Meanwhile respondents floated the impugned NIT by cancelling the earlier tender, which was published in the newspaper on 19.09.2023.

6. The case set out by the petitioner is that respondents despite having knowledge of the interim order dated 20.09.2023 passed by this Court in WP(C) No. 2442/2023, went ahead to cancel the earlier tender by virtue of order dated 22.09.2023 and floated the impugned NIT before cancellation of the earlier tender which is not permissible under law. According to the petitioner, he had no knowledge about the impugned NIT as it was never uploaded on the web portal of the respondents upto 21.09.2023. It is also allegation of the petitioner that impugned order of cancellation of earlier tender appears to have been fudged by the respondents to suit one M/S Star Transport and to seek bail out from contempt of interim order dated 20.09.2023 passed by this Court. According to the petitioner, terms and conditions of the earlier tender were substantially changed by the respondent in the impugned NIT to accommodate and facilitate M/S Star Transport Company to fulfill the requisite eligibility criteria, since it failed in the technical qualification of the earlier tender.

7. According to the petitioner, since M/S Star Transport was ineligible for participation in the earlier tender, therefore, impugned tender came to be floated by the respondents by reducing the strength of fleet owned by the bidder, cost of tender and average annual turnover of the bidder for past three years and

omitting the requirement of age of the fleet to facilitate M/S Star Transport to compete in the impugned tendering process.

8. It is further allegation of the petitioner that M/S Star Transport owned by Mr. Masood Ahmed has another firm by the name and style of M/S Masood Ahmed involving the business other than transportation and M/S Star Transport has misled the respondents by providing false information of its transport business by supplementing the turnover of M/S Masood Ahmad in the turnover of M/S Star Transport in order to fulfill the financial capability of the said company.

9. According to the petitioner, respondents have cancelled the earlier tender despite the fact that petitioner was technically and financially eligible in all respects and was competent to be awarded the said contract.

10. Petitioner has assailed the impugned tender primarily on the following grounds that:

- i. impugned tender is actuated with malice and tailor made to accommodate M/S Star Transport and earlier tender has been cancelled by the respondents without assigning any reasons thereof;
- ii. impugned tender is contrary to the Central Vigilance Commission (CVC) guidelines and lacks transparency; and
- iii. impugned tender has been issued by the respondents in violation of the interim order dated 20.09.2023 passed by this court in WP(C) No. 2442/2023.

11. Countervailing the stand taken by the petitioner, official respondents No. 2 to 5, *per contra*, are affront with the contention that earlier tender was uploaded for participation of the bidders, opening of technical bid was extended from time to time and finally bids submitted by only two bidders were opened on 12.09.2023. Since the technical bid of M/S Star Transport did not qualify the

technical parameters of e-tender and only petitioner was left in the fray, therefore, the tender finalization Committee comprising of five senior officers of the respondent-Corporation, constituted for the said purpose, was of the opinion that said tender was required to be re-tendered due to poor participation and proposed to relax some terms and conditions of the said tender to procure a competitive rate. These recommendations were approved by the competent authority. Therefore, while cancelling the earlier tender, impugned NIT came to be floated and opening date was fixed for 04.10.2023. It is further contention of the respondents that impugned NIT came to be issued and uploaded on the web portal after cancelation of the earlier tender by the respondents, after following proper procedure and evaluation of CVC guidelines, on the recommendations of the designated tender Committee duly approved by the competent authority as earlier tender was cancelled on 18.09.2023 and impugned NIT came to be floated on the same day on 18.09.2023, which was visible on the web portal on 19.09.2023 and was published same day in the newspaper on 19.09.2023. According to the respondents, as soon as fresh tender is uploaded on the portal the existing tender gets automatically cancelled. It is thus contention of the respondents that earlier tender had already been cancelled and fresh NIT had been issued before interim order dated 20.09.2023 came to be passed by this Court and the petitioner, despite being fully aware has concealed this fact from this Court while filing WP(C) No. 2442/2023.

12. Denying the allegations that tender committee recommended modifications in the impugned tender to accommodate M/S Star Transport Company, it is contention of the respondents that on the proposal of tender committee certain terms and conditions of earlier tender were found inadequate, therefore, modifications were recommended to ensure maximum participation of

the bidders and modified conditions attracted more bidders in the process. It is submission of the respondents that the Corporation evaluated CVC guidelines in fairness to ensure maximum participation and transparency in its financial interest. According to the respondents, Corporation, being master and author of the tender document, is otherwise within its competence to alter, add or modify tender conditions as and when required for requisite cause.

13. It is further contention of the respondents that since technical eligibility of the third party i.e. Star Transport Company after evaluation by the tendering committee had been rejected in the earlier tender, therefore, no malafide can be attributed to the respondents. Respondents have prayed for dismissal of the petitions.

14. Before adverting to the merit of the case, it is pertinent to mention that M/S Star Transport Company laid a motion for being impleaded as a party respondent in the present case and this Court vide order dated 13.10.2023 dismissed the application on the ground that said company was neither appropriate nor necessary party to the *lis*. However it was permitted to address the Court as an intervener in the present petition. The intervener M/S Star Transport has been represented by M/S Z. A. Shah and R. K. Gupta, learned Senior Advocates.

15. Having heard learned counsels for the parties, I have perused the record and considered the case law cited at bar.

16. Mr. K. S. Johal, learned Sr. Advocate appearing for the petitioner at the threshold argues by way of preliminary submissions that impugned action of the respondents in the present case lacks bonafide and this court in exercise of its jurisdiction of judicial review in administrative actions of State is obliged to prevent arbitrariness, irrationality, unreasonableness and bias.

17. Mr. Johal, while reiterating the grounds urged in the memo of appeal has argued that since the impugned tender notice does not reflect the cancellation of earlier tender, therefore, it is evident that respondents have issued the impugned NIT without cancellation of the earlier tender which is not permissible. Mr. Johal further submits that even reasons for cancellation of earlier tender are not forthcoming. He by referring to the terms and conditions of the earlier tender as compared to the impugned NIT has tried to impress upon this Court that reduction in the fleet of trucks from 15 to 10 and cost of the tender from Rs.50.00 crores to Rs.35.00 crores have been introduced to facilitate M/S Star Transport to fulfill the requisite eligibility criteria. He vehemently argued that impugned tender has been crafted by the respondents in such a way so as to facilitate the intervener, M/S Star Transport to compete in the impugned tendering process and M/S Star Transport has submitted manipulated certificates of Chartered Accountants by inflating his turnover to satisfy the eligibility criteria of the impugned NIT. According to Mr. Johal, respondents have arbitrarily cancelled the earlier tender despite the fact that petitioner was technically and financially eligible in all respects and was entitled to be awarded the contract in terms of clause 5.6.7 of the CVC Guidelines. Mr. Johal has submitted that since action on the part of the respondents is actuated with malice to accommodate M/S Star Transport and contrary to the CVC guidelines, therefore, administrative action of the respondents in cancelling the earlier tender and issuance of impugned tender to accommodate a company of their choice is required to be reviewed by this Court in exercise of its review jurisdiction to prevent arbitrariness and malafide. He has relied upon **TATA CELLULAR v. Union of India; (1994) 6 SCC 651**, **M.P. Power Management Co. Ltd. Jabalpur v. Sky Power Southeast Solar India Power (P) Ltd. and others; 2023 (2) SCC 703** and a judgment passed by

this Court in **Manzoor Ahmad Malik v. UT of J&K and ors. in WP(C) No. 2394/2023.**

18. *Ex adverso*, learned Senior counsels appearing for the intervenor, in the foremost, have questioned locus of the petitioner-Company to assail the impugned tender. They have also questioned maintainability of the petitions in view of existence of arbitration clause in the tender notice. They are also of the view that since the subject work, in view of the impugned tender, stands re-tendered, therefore, earlier petition [WP(C) No. 2442/2023], filed by the petitioner is rendered infructuous.

19. Mr. R. Koul learned counsel appearing for the official respondents has relied upon **M/S N.G. Projects Limited v. M/S Vinod Kumar Jain and others; (2022) 6 SCC 127** to maintain the stand taken in the objections.

20. Mr. R. K. Gupta, learned Senior Advocate appearing for the intervener has argued that it is evident from the cancellation order dated 18.09.2023 that earlier tender was cancelled by the respondents due to unduly restricted conditions. According to Mr. Gupta, the decision taken by the tendering committee having been accepted by the competent authority cannot be called into question and this Court cannot sit, as a court of appeal, over the said decision approved by the competent authority. Mr. Gupta submitted that in view of the terms and conditions of the tender, respondents reserve a right to reject any tender even without assigning any reason and it is, otherwise, absolute prerogative of the Government to cancel a tender and re-tender the work. According to Mr. Gupta, this Court in exercise its jurisdiction of judicial review has to see whether fairness is coming forth from the decision taken by the competent authority or not and since earlier tender has been cancelled by the tendering Committee approved by the competent authority, by assigning valid reasons that the terms

and conditions of earlier tender were unduly restricted and specifications were harsh, therefore, no arbitrariness can be attributed to the respondents in issuing the impugned tender. He has relied upon **State of Jharkhand and ors. v. CWE-Soma Consortium; 2016 (14) SCC 172.**

21. Mr. Z. A. Shah, learned Senior Advocate for the intervenor has submitted that in contractual matters, there is freedom to the contracting authority except in cases of arbitrariness, malafide, and in case tender is not in public interest. Mr. Shah submits that allegation of the petitioner that terms and conditions of the impugned tender have been modified to suit M/s Star Transport is fallible because three bidders have participated in the tendering process and petitioner was never excluded or debarred from participating in the impugned tender. Learned senior counsel has urged that it is prerogative of the contracting authority to provide terms and conditions in the tender notice.

22. Mr. Johal, in rebuttal, has relied upon **2007 (14) SCC 568** to maintain the stand that impugned tender is contrary to the CVC guidelines those are mandatory in character. On the question of locus, Mr. Johal has relied upon **Ramana Dayaram Shetty v. The International Airport Authority of India and ors.; AIR 1979 SC 1628** to submit that tendering process can be called into question by a person even if he has not participated in the tendering process.

23. The executive power of the Government is *inter alia* extended, to the making of a contract, in terms of Article 298 of the Constitution of India and it enjoys absolute prerogative to decide whether to enter into a contract with a person or not subject, of course, to the requirement of reasonableness under Article 14 of the Constitution.

24. The necessity of judicial review of administrative actions and decisions was emphatically voiced by the Apex Court in **TATA CELLULAR** (supra)

whereby Hon'ble Supreme Court has held that principles of judicial review would apply to the exercise of contractual powers by Government bodies with a view to prevent arbitrariness or favoritism. Hon'ble Supreme Court, as recent as this year, in **M.P. Power Management Co.** (supra) reiterated the principles enunciated in **TATA Cellular** to concluded that there can be variety of circumstances, after a contract is entered into, which may provide a cause of action to a party to the contract with the State to seek relief by filing a writ petition. However, an action will also lie when State purports to award a largesse, which relates to a stage of prior to the contract being entered into, the Apex Court ruled. It was also held that there is no bar for the writ court even to decide disputed questions of facts particularly when the matter surrounds demystifying of documents only and it is also vested with the power of judicial review even in cases of existence of an arbitration clause in contract. Hon'ble Supreme Court has clearly ruled that a wide variety of circumstances may generate cause of action for invoking Article 14 of the Constitution, which would be guided by the overwhelming need to obviate arbitrary State action. Relevant observations captured in para 82 of the judgment read thus:

“XXX XXX XXX

82.4. An action will lie, undoubtedly, when the State purports to award any largesse and, undoubtedly, this relates to the stage prior to the contract being entered into [See R.D. Shetty (supra)]. This scrutiny, no doubt, would be undertaken within the nature of the judicial review, which has been declared in the decision in Tata Cellular vs. Union of India.

82.5. After the contract is entered into, there can be a variety of circumstances, which may provide a cause of action to a party to the contract with the State, to seek relief by filing a Writ Petition.

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82.7. The existence of an alternate remedy, is, undoubtedly, a matter to be borne in mind in declining relief in a Writ Petition in a contractual matter. Again, the question as to whether the Writ Petitioner must be told off the gates, would depend upon the nature of the claim and relief sought by the petitioner, the questions, which would have to be decided, and, most importantly, whether there are disputed questions of fact, resolution of which is necessary, as an indispensable prelude to the grant of the relief

sought. Undoubtedly, while there is no prohibition, in the Writ Court even deciding disputed questions of fact, particularly when the dispute surrounds demystifying of documents only, the Court may relegate the party to the remedy by way of a civil suit.

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82.9. The need to deal with disputed questions of fact, cannot be made a smokescreen to guillotine a genuine claim raised in a Writ Petition, when actually the resolution of a disputed question of fact is unnecessary to grant relief to a writ applicant.

82.10. The reach of Article 14 enables a Writ Court to deal with arbitrary State action even after a contract is entered into by the State. A wide variety of circumstances can generate causes of action for invoking Article 14. The Court's approach in dealing with the same, would be guided by, undoubtedly, the overwhelming need to obviate arbitrary State action, in cases where the Writ remedy provides an effective and fair means of preventing miscarriage of justice arising from palpably unreasonable action by the State."

25. Apex Court, thus, concluded that cause of action can be triggered by a wide variety of circumstances for determination as to whether action of the State is arbitrary or not and writ court in exercise of its power under judicial review has to apply its mind to the facts and circumstances of each case to decide as to whether having regard to the nature of controversy to be resolved, writ Court will entertain a petition or not. Therefore, there is no dispute to the settled position of law, as argued by Mr. Johal, learned Senior Counsel for the petitioner, that principles of judicial review would apply to the exercise of contractual powers by Government bodies with a view to prevent arbitrariness or favoritism and "tender jurisdiction" is vested in the High Courts under Article 226 of the Constitution to ensure transparency on the part of such Government bodies. However, be it noted that Hon'ble Supreme Court in **TATA CELLULAR** made these observations with a caveat that there are inherent limitations in exercise of power of judicial review and High Courts can interfere on very limited grounds on the anvil of Article 14 of the Constitution. Relevant excerpt is extracted below as a ready reference:

“70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favoritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.”

26. Hon’ble Supreme Court while reiterating the aforequoted principles of law enunciated in **TATA CELLULAR** further clarified in **NG Projects Limited** (supra) that it is settled law with respect to interpretation of terms of contract that the question as to whether the terms and conditions of a contract are essential or not, is to be viewed from the perspective of the employer only and writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer because writ court does not have the requisite expertise. Relevant excerpt reads as below:

“In view of the above judgments of this Court, the Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a malafide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work.”

The Apex Court, thus maintains that role of the review court should be confined to examination of decision making process.

27. If the present case is approached with the aforesaid principles of law, what comes to the fore is that tender finalization committee comprising of five senior officers of respondent-corporation was of the opinion that earlier tender was required to be re-tendered due to poor participation and for ensuring larger participation in order to procure a competitive rate. The finding of the tender finalization Committee held on 15.09.2023 is as below:

“For opening/evaluation of Technical Bids committee was constituted vide No. JKRTC/GML/F-26/ten/629 dated 11.09.2023 while analyzing/evaluating the documents attached with the Technical Bid the committee is of the opinion that both the bidders have uploaded the required documents as per the E-NIT. However, it has been observed that M/S Star Transport has owned ten trucks registered in the name of the firm instead of fifteen trucks as asked in the E-NIT. Besides, the firm do not have required experience certificate and as such the firm do not qualify Technical parameters and only one firm i.e. M/S Vikas Transport Company Technically qualify.

After threadbare discussions the Committee framed consensually the opinion that there is poor participation in the e-tender and as such, may be re-tendered with certain modifications in the terms and conditions deemed appropriate for greater participation. The conditions that are proposed to be modified are as under:

- 1. Instead of fifteen (15) own fleet of Load Carriers/Mini Load Carriers, it should be ten (10) own fleet of Load Carriers/Mini Load Carriers. However, the bidder should have 50 Mini Load Carriers attached.**
- 2. The contract period should be of two years instead of three years and extendable further for one year in view of satisfactory performance of two years.**
- 3. The value of contract be fixed as Rs.30 Crores instead of 35 Crores.”**

28. It is evident that Committee suggested relaxation of some terms and conditions of the earlier tender with an intention to make the area of operation wider. Pertinently, these recommendations were duly approved by the competent authority.

29. Allegation of the petitioner is that terms and conditions of earlier tender were substantially altered by the respondents in the impugned NIT to accommodate and facilitate M/S Star Transport Company to fulfill the requisite eligibility criteria because said company had failed in the technical suitability

evaluation of the earlier tender. Learned Senior counsel for the petitioner has taken this Court through various documents/certificates of the Chartered Accountants issued in favour of M/S Star Transport Company to contend that since said company was neither technically nor financially capable to compete in the earlier tender, therefore, impugned tender was tailor made by the respondents by reducing the requirement of annual turnover with the sole intention to accommodate the said company. However, a perusal of the record would show that tender finalization committee decided to re-tender due to poor participation in the tendering process because in the earlier tender only two bids were opened and since the technical bid of M/S Star Transport, the intervenor, did not qualify the technical parameters of e-tender and only petitioner was left in the fray. On the recommendation of the designated tender committee certain terms and conditions of earlier tender were found inadequate, therefore, the committee recommended to relax some terms and conditions to ensure maximum participation in the tender process and these recommendations came to be approved by the competent authority. Record bears testimony to the fact that modified/relaxed conditions yielded result as it attracted more bidders to participate in the process as three bidders participated whose technical bids have been opened by the tender Committee. Therefore, allegation of the petitioner that terms and conditions of the earlier tender were relaxed by the respondent-Corporation with a view to accommodate the intervenor company, is baseless for the simple reason that evaluation process of the documents of bidders, who have participated in the impugned tender is still under way and respondent-corporation is yet to take a final decision and there is nothing to suggest that bid submitted by the intervenor would be accepted by the respondents. It is own case of the petitioner that since the intervenor-M/S Star Transport Company failed in the

technical suitability evaluation of the earlier tender, therefore, its bid was rejected by the respondents. In these circumstances, it does not lie in the mouth of the petitioner to say that terms and conditions of the impugned tender have been relaxed to accommodate M/S Star Transport Company whose tender had already been rejected by the respondents in the earlier tender process. Moreover, the petitioner-Company was never excluded by the respondents from participating in the impugned tender process.

30. Be that as it may, it is settled law that if the tender conditions permit relaxation of essential conditions thereof, the public authority issuing the tender document is at liberty to grant any relaxation for any bonafide reason and such relaxation shall be binding on the bidders. The respondent-Corporation, in the present case, was otherwise competent to reject the tender without assigning any reason thereof, which is evident from the contents of the earlier tender notice dated 14.08.2023, which reads as below:

“The Managing Director JKRTC reserves the right to reject any tender without assigning any reason thereof.”

31. It is manifest from the aforesaid that though respondent-Corporation was within its rights to cancel the earlier tender without assigning any reason, it did not do so and earlier tender came to be cancelled only after the tender finalization committee suggested relaxation of some terms and conditions with an intention to make the area of operation wider and after these recommendations were approved by the competent authority. Therefore, respondents have cancelled the earlier tender by assigning valid reasons, though it was competent to cancel the tender without assigning any reason.

32. Learned Senior Counsel for the petitioner has also argued that impugned tender has been floated by the respondents contrary to CVC Guidelines which

provides for procedure in case of a single quote or Single valid acceptable quote.

Mr. Johal has argued that cancellation of earlier tender was arbitrary, actuated with malice and against public interest. By referring to clause 5.6.7 of CVC Guidelines, learned senior counsel would submit that in a case where a single quote or a single valid acceptable quote is received against limited tender or where a tender has resulted in a single vender situation, it needs to be processed and taken to its logical conclusion.

33. *Per contra*, Mr. R. Koul learned counsel for the respondents has submitted that it is evident from the entire tendering process that CVC Guidelines were scrupulously adhered and the impugned tender came to be floated by the respondent-Corporation only after evaluation of CVC Guidelines in fairness to ensure transparency in its financial interest.

34. Clause 5.6.7 of “Manual for Procurement of Works” issued by “Government of India, Ministry of Finance Department of Expenditure” (updated June, 2022) which deals with ‘consideration of lack of competition’, reads as below:

“5.6.7 Consideration of Lack of Competition

Sometimes, against advertised/ limited tender cases, the procuring entity may not receive a sufficient number of bids and/ or after analysing the bids, ends up with only one responsive bid – a situation referred to as ‘Single Offer’. As per Rule 21 of DFPR (explanation sub-para), such situation of ‘Single Offer’ is to be treated as Single Tender. The contract may be placed on the ‘Single Offer’ bidder provided the quoted price is reasonable. However restricted powers of Single tender mode of procurement would apply. Before retendering, the procuring entity is first to check whether, while floating/ issuing the enquiry, all necessary requirements and formalities such as standard conditions, industry friendly specification, wide publicity, sufficient time for bidding, and so on, were fulfilled. If not, a fresh enquiry is to be issued after rectifying the deficiencies. It has become a practice among some procuring entities to routinely assume that open tenders which result in single bids are not acceptable and to go for retender as a safe course of action. This is not correct. Re-bidding has costs: firstly the actual costs of retendering; secondly the delay in execution of the work with consequent delay in the attainment of the purpose for which the procurement is being done; and thirdly the possibility that the re-bid may result in a higher bid. Lack of competition shall not be determined solely on the basis of the number of bidders. Even when only one bid is submitted, the process may be considered valid provided following conditions are satisfied:

- i) **The procurement was satisfactorily advertised and sufficient time was given for submission of bids;**
- ii) **The qualification criteria were not unduly restrictive; and**
- iii) **Prices are reasonable in comparison to market values.**

However restricted powers of Single tender mode of procurement would apply. In case of price not being reasonable, negotiations (being L1) or retender may be considered as justifiable. Unsolicited offers against LTEs should be ignored, however Ministries/ Departments should evolve a system by which interested firms can enlist and bid in next round of tendering.”

35. A careful perusal of clause 5.6.7 of CVC Guidelines would show that though there is no bar to accept a single tender, however, it can be considered valid provided procurement was satisfactorily advertised and sufficient time was given for submission of bids, the qualification criteria was not unduly restrictive and prices were reasonable. It implies that single tender can be accepted only with detailed justification in support of the acceptance with the approval of competent authority.

36. Be that as it may, administrative guidelines are recommendatory in nature and compliance thereof cannot be enforced through courts. Rules and guidelines are different. While rules are binding commands or mandatory in character, guidelines are merely recommendatory which provide guidance in setting standards. They give a direction for a particular course of action, thus directory in nature.

37. In the present case, respondent-Corporation decided in its wisdom to go for re-tendering by cancelling the earlier tender because of restrictive nature of conditions introduced in the earlier tender. The lack of competition in the present case was due to restrictive specifications in the earlier tender which did not permit many vendors to participate. Therefore, tender Committee of the respondent-corporation decided to review the specifications of the earlier tender to facilitate wider competition. It is trite position of law that when an authority

takes a decision to cancel a tender due to lack of adequate competition and in order to make it more competitive and it decides to invite fresh tenders, it cannot be said that there is any malafide or arbitrariness. It is also well settled that so long as the bid of a particular bidder has not been accepted, the highest bidder acquires no vested right to have the auction concluded in his favour and the person or the authority, who has issued the tender is well within its rights to cancel the tender due to poor participation or if there is no competition. This was so held by the Apex Court in **State of Jharkhand v. Cwe-Soma Consortium** (supra) in the following words:

“12. In case of a tender, there is no obligation on the part of the person issuing tender notice to accept any of the tenders or even the lowest tender. After a tender is called for and on seeing the rates or the status of the contractors who have given tenders that there is no competition, the person issuing tender may decide not to enter into any contract and thereby cancel the tender. It is well-settled that so long as the bid has not been accepted, the highest bidder acquires no vested right to have the auction concluded in his favour (vide Laxmikant and Ors. v. Satyawan and Ors. (1996) 4 SCC 208; Rajasthan Housing Board and Anr. v. G.S. Investments and Anr. (2007) 1 SCC 477 and Uttar Pradesh Avas Evam Vikash Parishad and Ors. v. Om Prakash Sharma (2013) 5 SCC 182).”

38. It is also trite that there is no obligation on the part of the State or an authority issuing a tender notice to accept any tender or even the lowest tender, because, as already discussed, writ court in exercise of its review jurisdiction cannot sit as a court of appeal. Hon’ble Supreme Court **TATA CELLULAR** has cautioned that High Courts for want of necessary technical expertise to understand and appreciate the conditions of tender documents are to merely review the manner in which administrative decisions are made by the public authorities and ought not correct such decisions by substituting and imposing their own decisions. The review court, as discussed, is primarily concerned with the manner in which decision is made in a particular case. The Apex Court while drawing a distinction between an appeal and judicial review made it clear that

while hearing an appeal, the court is concerned with the merits of the decision under appeal and since power of judicial review is not an appeal from the decision, the writ court cannot substitute its own decision. It is, thus, clear that writ Court must avoid imposing its judgment on the employer's decision regarding acceptance or rejection of a tender bid, unless there is substantial evidence of some serious issue.

39. The right of the Government to choose best quotation cannot be treated as an infringement of Article 14 of the Constitution of India, as held in **TATA CELLAR**. The Apex Court in **N.G. Projects Limited** even went on to add that writ Courts should refrain from exercising their “tender jurisdiction”, even in cases of total arbitrariness and instead direct the unsuccessful bidders to pursue alternate remedy before the civil Court, to seek damages for the wrongful exclusion. The Apex Court made this observation as a word of caution so that public projects and interests of citizens do not suffer at the cost of personal vendetta.

40. The essence of law laid down in the judgments referred to above is exercise of restraint and caution in administrative actions in the matters of contract. It is clear that State reserves the right to deviate from the terms of the bid document within acceptable parameters. Mere disagreement with the decision making process of the Government is no reason for the writ court to interfere in judicial review.

41. Thus, having analyzed the reasons tendered by the tender finalization Committee and the manner in which it decided to review the specifications of earlier tender, the criteria set out in the impugned tender cannot be said to have been evolved as tailor made to suit the intervenor company and knock off the petitioner. Therefore, the finding of the tender evaluation Committee cannot be

termed as actuated with malice or vitiated by arbitrariness or Wednesbury's unreasonableness.

42. The next contention of the petitioner that impugned tender has been floated by the respondents in violation of the interim order dated 20.09.2023 passed by this court in WP(C) No. 2442/2023 before cancellation of the earlier tender dated 14.08.2023 is also without any basis for the following reasons.

43. Petitioner approached this court by way of WP(C) No. 2442/2023 and this court vide order dated 20.09.2023, as an interim measure, directed that the process of earlier tender dated 14.08.2023 floated by the respondents shall not be cancelled or re-tendered. A perusal of the record reveals that earlier tender dated 14.08.2023 came to be cancelled by the designated tender committee on 18.09.2023 and impugned tender was issued on the same day and uploaded on the web portal of the respondent-Corporation and published in the newspaper on 19.09.2023 i.e. prior to the issuance of interim order dated 20.09.2023 passed by this Court. As a matter of fact, there is admission on the part of the petitioner in para 13 of the writ petition, though in suppressed words, that impugned e-NIT dated 18.09.2023 was published in the newspaper by the respondents on 19.09.2023 by cancelling the earlier tender dated 14.08.2023. Petitioner is guilty of misleading this court by stating that earlier tender was cancelled by the respondents by virtue of order dated 20.09.2023 as the said document annexed with the petition pertains to downloading of cancellation of earlier tender and the date of downloading is 22.09.2023. It is evident that fresh e-NIT impugned in the present petition, came to be issued by the respondents, by cancelling the earlier tender and uploaded on the web portal after following proper procedure on the recommendations of the designated tender committee duly approved by the competent authority as earlier tender was cancelled by the respondents on

18.09.2023, the impugned tender was floated on the same day on 18.09.2023 which was visible on the web portal of the respondents and was published in the newspaper on 19.09.2023 i.e. well before issuance of interim order passed by this Court on 20.09.2023 in WP(C) No. 2442/2023. Otherwise too, I find legal force in the argument of Mr. R.K. Gupta, learned counsel for the intervenor that as soon as fresh tender is uploaded on the portal, the existing tender gets automatically cancelled.

44. As already stated, learned Senior Advocates appearing for the intervenor and learned counsel for the respondent-Corporation, at the foremost, questioned locus of the petitioner to assail the impugned tender on the ground that since petitioner has not participated in the impugned tender, he has no right to assail the tendering process. Mr. Johal, learned Senior Advocate appearing for the petitioner, to counter has relied upon **Ramana Dayaram Shetty** (supra) to submit that tender process can be called into question by a person even if he has not participated in the tendering process.

45. In **Ramanaya Dayaram Shetty**, the appellant was precluded from submitting a tender because of the reason of the condition of eligibility whereas tender of one of the respondents was accepted even though he did not satisfy the condition of eligibility. The grievance of the appellant was that he was differently treated and if it were known that non fulfillment of condition of eligibility would be no bar consideration of a tender, he also would have submitted a tender and competed for obtaining a contract. Facts of **Ramanaya Dayaram Shetty** are distinguishable from the facts and circumstances attending the present case for the reason that neither petitioner in the present case was precluded from submitting the tender because of the reason of any condition of

eligibility of the impugned tender nor tender of anybody else has been accepted.

As a matter of fact, evaluation of tender document is underway.

46. The Supreme Court in **Uflex Ltd. v. State of Tamil Nadu; (2022) 1 SCC 165**, lamented that although the objective of “tender jurisdiction” of the High Courts under Article 226 of the Constitution was to ensure transparency in administrative actions and decisions, today the ground reality is that no tender document issued by a public authority remains unchallenged by unsuccessful bidders/tenderers and parties not even participating in a tender seek to question the tendering process by invoking review jurisdiction of the High Courts. This observation also came to be noticed by the Apex Court in **N.G. Projects** in the following words:

“15. In **Uflex Ltd. v. State of T.N. (2022) 1 SCC 165**, this Court stated that the enlarged role of the Government in economic activity and its corresponding ability to give economic “largesse” was the bedrock of creating what is commonly called the “tender jurisdiction”. The objective was to have greater transparency and the consequent right of an aggrieved party to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India beyond the issue of strict enforcement of contractual rights under the civil jurisdiction. However, the ground reality today is that almost no tender remains unchallenged. Unsuccessful parties or parties not even participating in the tender seek to invoke the jurisdiction of the High Court under Article 226 of the Constitution.”

47. It is evident from the aforequoted observation that a person or a company who has not participated in a tendering process has no locus to question the tendering process. In this view of the matter, since petitioner has not participated in the impugned tendering process, he has no locus to assail the impugned tender.

48. In view of the foregoing, the essence of legal position right from **TATA CELLULAR (1994)** to **N.G. Projects (2022)** to **M.P. Power Management Co. Ltd. Jabalpur (2023)** is judicial restraint in administrative decision in the matters of contract. Principles of judicial review are attracted to the exercise of contractual powers by Government and its instrumentalities and High courts are

vested with the “tender jurisdiction” under Article 226 of the Constitution to ensure greater accountability and transparency. However, “tender jurisdiction” is to be exercised by the High Court in rarest of rare cases on very limited grounds on the anvil of Article 14 of the Constitution. Microscopic examination of the terms and conditions of a contract, by the review court is not permissible. The public authority issuing a tender notice is at liberty to grant any relaxation for a bonafide reason and such relaxation is binding on the bidders. The CVC/administrative Guidelines are recommendatory in nature and cannot be enforced through Courts. The writ Court must avoid imposing its judgment on the decision of the employer regarding acceptance or rejection of a tender bid unless such decision is *per se* actuated with malice or arbitrariness

49. For what has been observed and discussed above and viewed from any angle, both the writ petitions are devoid of merit, hence dismissed and contempt is dropped.

Jammu:
29.12.2023
(Paramjeet)



(RAJESH SEKHRI)
JUDGE

Whether the Judgment is speaking?
Whether the Judgment is reportable?

Yes
Yes