

Gurbax Singh
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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**CWP No.12596 of 2016
Date of decision: 05.08.2016**

M/s J.K.Con. Feb.

.....Petitioner

Vs.

HSI IDC and others

.....Respondents

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE RAMENDRA JAIN**

Present: Mr. Ashok Sharma Nabhewala, Advocate for the petitioner.

Ajay Kumar Mittal,J.

1. The petitioner through the present petition under Articles 226/227 of the Constitution of India prays for quashing Clause VIII (1)(2) of the Purchase Order (Agreement) dated 10.12.2010, Annexure P.2 being in contravention to Clause 6 of the original Work Order (Agreement) Annexure P.1 entered into by respondent No.1 with respondent No.2 and in violation of the general and special conditions of contract. Further prayer has been made for quashing appointment of respondent No.3 as the sole arbitrator in reference to the dispute between the petitioner and respondent No.2. Direction has also been sought for appointment of a fresh arbitrator with the

consent of the petitioner and respondents.

2. A few facts relevant for the decision of the controversy involved as narrated in the petition may be noticed. Respondent No.1 entered into a contract (Work order) dated 28.9.2010 for design, manufacture, supply, erection, testing and commissioning of electrical and civil works for 16/20 MVA, 132/11 KV sub station at Kundli and Bahadurgarh for a price of ₹ 15,71,46,624.19. In the contract, Annexure P.1, Clause 6 refers that in case of any dispute, arbitration shall be carried out as per Clause 10 of the Special conditions of the contract. As per Clause 7 of the conditions of the contract, respondent No.2 further entered into a sub contract with the petitioner on 10.12.2010 in which the work was to be executed at Kundli site as per clause I(f) - "specification means the detail specifications and drawings approved by HSIIDC, for execution of the subject work." The petitioner executed the work of HSIIDC and carried out civil works for erection of 132/11 KV sub station at HSIIDC Industrial estate at Kundli for a sum of ₹ 2 crores on behalf of respondent No.1. The limitation period for execution of civil works was 5.5 months fixed by respondent No.1 but due to the delay caused by non supply of the drawings and at the instance of HSIIDC, respondent No.1 and also subsequently carrying out amendments in drawings by HSIIDC, the work was almost complete by 26.9.2012. The petitioner submitted bills amounting to ₹ 98,62,276/- for the work done as per the contract (Work order) dated 10.12.2010. Respondent No.2 failed to make the payment to the petitioner on account of the work executed by it on the site. The petitioner sent an e-mail message to respondent No.2 for full and final settlement. The petitioner also sent a legal notice dated 22.3.2013 to both the respondents to discharge their liability and make payment of ₹ 98,62,276/- within 15 days. Further

legal notice was sent to the respondents on 14.5.2013 for appointment of arbitrator in terms of the contract. The matter finally came to this court in application arbitration Case No.127 of 2013 wherein petition was filed by the petitioner on 12.8.2013 under Section 11(6) of the Arbitration and Conciliation Act, 1996 (in short, “the Act”). Respondent No.2 took the stand that vide letter dated 18.6.2013, it had already appointed respondent No.3 as the sole arbitrator and intimation was given to the petitioner on the same day. While passing the order dated 12.2.2014, this court observed that once an arbitrator was appointed, the question of invoking jurisdiction under Section 11(6) of the Act did not arise and therefore, the petitioner withdrew the petition with liberty to file the fresh petition before this court for the purpose of removal of the Arbitrator. Since respondent No.2 had appointed sole arbitrator respondent No.3 at the back of the petitioner without obtaining its consent, the petitioner submitted a request dated 21.2.2014 to change the arbitrator and appoint a new arbitrator in terms of the order dated 12.2.2014 passed by this Court. No response was received from respondent No.2. The petitioner filed a similar petition under section 11(6) of the Act but it was not entertained and rejected vide order dated 10.4.2015, Annexure P.12. Thereafter, the petitioner filed application under section 13 of the Act on 17.7.2015 for recusal of the arbitrator from the arbitration proceedings. Reply was submitted by respondent No.2 on 21.8.2015. Vide order dated 5.12.2015, respondent No.3 rejected the application. Hence the instant writ petition by the petitioner with the prayers mentioned above.

3. We have heard learned counsel for the petitioner.

4. Challenge in this petition is to Clause VIII (1) (2) of the Purchase Order (Agreement) dated 10.12.2010, Annexure P.2 being in contravention to Clause 6 of the Original Work Order (Agreement),

Annexure P.1. Nothing was shown to demonstrate that the condition contained in the said clause is unfair or unreasonable. It was within the domain of the respondents to have put any reasonable condition in the Purchase Order. No material has been produced by the learned counsel for the petitioner to show that there was any malafide in putting the said condition or it was to benefit somebody. Once it is so the imposition of the said condition could not be faulted.

5. The Apex Court in ***Maa Binda Express Carrier and another v. North East Frontier Railway and others'* (2014) 2 CHN 96 (SCC)** with regard to the scope of judicial review in contractual matters, inter alia, noticed that for formulating conditions of a tender document and awarding a contract, the State authorities are required to be conceded greater latitude and their action is not open to judicial review unless it can be demonstrated to be malicious, arbitrary, unreasonable or misuse of its statutory powers. The relevant observations recorded therein are extracted as under:-

10. The scope of judicial review in contractual matters was further examined by this Court in ***Tata Cellular v. Union of India* (1994) 6 SCC 651, *Raunaq International Ltd.'s case (supra)* and in *Jagdish M andal v. State of Orissa and Ors .* (2007) 14 SCC 517 besides several other decisions to which we need not refer.**

11. In ***Michigan Rubber (India) Ltd. v. State of Karnataka and Ors .* (2012) 8 SCC 216**, the legal position on the subject was summed up after a comprehensive review and principles of law applicable to the process for judicial review identified in the following words: (SCC p. 229 paras 19-20)

“19. From the above decisions, the following principles emerge:

(a) The basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national

priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.

20. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say:

"the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and

(ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226."

(emphasis supplied)

12. As pointed out in the earlier part of this order the decision to cancel the tender process was in no way discriminatory or mala fide. On the contrary, if a contract had been awarded despite the deficiencies in the tender process serious questions touching the legality and propriety affecting the validity of the tender process would have arisen. In as much as the competent authority decided to cancel the tender process, it did not violate any fundamental right of the appellant nor could the action of the respondent be termed unreasonable so as to warrant any interference from this Court. The Division Bench of the High Court was, in that view, perfectly justified in setting aside the order passed by the Single Judge and dismissing the writ petition."

6. With regard to the second prayer for quashing the appointment of respondent No.3 as the sole arbitrator and to appoint a fresh arbitrator, the petitioner has an efficacious and effective remedy under the provisions of

the Act.

7. In view of the above, no ground for interference in writ jurisdiction under Articles 226//227 of the Constitution of India is made out. Consequently, finding no merit in the petition, the same is hereby dismissed.

(Ajay Kumar Mittal)
Judge

August 05, 2016
‘gs’

(Ramendra Jain)
Judge