

Gurbax Singh
2016.10.17 16:27

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

**CWP No.18917 of 2016
Date of decision: 14.09.2016**

M/s ICOMM Tele Limited

.....Petitioner

Vs.

Punjab State Water Supply and Sewerage Board and another

.....Respondents

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

Present: Mr. Rajiv Kataria, Advocate for the petitioner.

Ajay Kumar Mittal,J.

1. By way of present petition under Articles 226/227 of the Constitution of India, the petitioner prays for a direction that Clause 25(viii) of the Notice Inviting Tender (NIT)/contract be declared as bad in law being arbitrary, unconstitutional and against the principles of public policy. Further direction has been sought to release the sum of ₹ 19.336 crores to the petitioner being withheld by the respondents on account of deduction from various running bills.

2. A few facts relevant for the decision of the controversy involved as

narrated in the petition may be noticed. The petitioner is a company incorporated under the Companies Act, 1956 and is having its registered office at Hyderabad. It is involved in various civil/electrical works in the country. In the year 2008, respondent No.2 issued a notice inviting tender for the extension and augmentation of water supply, sewerage scheme, pumping station and sewerage treatment plant at Mansa, Bhikhi, Budhlada, Bareta, Sardoolgarh and Talwandi Sabo towns on turnkey basis. The notice inviting tender contained various clauses including clause 25 for arbitration. Respondent No.2 issued a letter on 28.11.2008, Annexure P.5, in which technical issues were discussed regarding the scope of work. According to the petitioner, so far as the other terms and conditions of the contract are concerned, no opportunity was given to it to make any changes in the same and it was required to sign the contract on the dotted line which was basically a standard form contract. The said letter infact was the final acceptance of the tender for which formal agreement was to be written. Accordingly, an agreement was signed between the parties. The petitioner had no option except to accept the contract which was already written and typed on the dotted lines. After the completion of the work, so many payments remained unpaid. The petitioner had to incur extra costs for certain works which it was entitled to receive from the respondents. On 13.10.2014, Annexure P.7, a letter was written by the petitioner to Executive Engineer, Punjab Water Supply and Sewerage Board, Water Works Road, Mansa to release the said payments wherein a demand of ₹ 1933.60 lacs was raised. According to the petitioner, those payments were not disputed which were only on account of unilateral money retained by the respondents. Having received no response, the petitioner wrote a letter on 23.12.2014, Annexure P.8, to respondent No.2. Thereafter, when the petitioner wanted to invoke

the provisions of clause 25 of the NIT, it sought the appointment of an arbitrator other than some officials of the respondents. It made a request that it be exempted from depositing 10% of the claims before the arbitration as these were the payments on hold with the respondents. The respondents refused to entertain the request of the petitioner and rather asked it to deposit 10% amount as “deposit at call”. After the issuance of letter dated 25.2.2015, Annexure P.9 by the petitioner, vide letter dated 2.7.2015, Annexure P.11, by respondent No.1, the petitioner was advised to proceed in the matter as per the contract agreement and in other words, the petitioner was asked to invoke the provisions of Section 25 of the NIT. The petitioner again made a request for invoking the contract for the appointment of an independent arbitrator other than the officials of the respondents and also made a request to exempt the petitioner from depositing 10% of the claim amount as per the provisions of clause 25(viii) of the NIT. The petitioner asserts that it is being deprived of its legal rights and the amount of more than ₹ 19 crores is not being paid to it by the respondents. Hence the instant writ petition.

3. We have heard learned counsel for the petitioner.

4. It would be expedient to quote Clause 2.5(viii) of the NIT which reads thus:-

“It shall be in essential terms of this contract that in order to avoid frivolous claims the party invoking arbitration shall specify the dispute based on facts and calculations stating the amount claimed under each claim and shall furnish a deposit at call for 10% of the amount claimed, on a scheduled bank in the name of the arbitrator, by his official designation who shall keep the amount in deposit till the accouchement of the award. In the event of an award in favour of the claimant, the deposit shall be

refunded to him in proportion to the amount awarded with reference to the amount claimed and the balance, if any, shall be forfeited and paid to the other party.”

5. A perusal of the above clause shows that a condition was put in the NIT by the respondents that in case of any dispute, the party invoking arbitration was required to specify the dispute and the amount claimed under each item and deposit 10% of the amount claimed in the name of the arbitrator. In case of award in favour of the claimant, the deposit was to be refunded to him in proportion to the amount awarded and the balance if any was to be forfeited and paid to the other party. It had been incorporated in the contract to avoid frivolous claims of a party. The said condition in no way can be said to be arbitrary or unreasonable. In case, any condition in the NIT was not acceptable to the petitioner, it was open for it not to respond to the NIT. Once having participated in response to NIT, it was too late in the day to claim that it was arbitrary or unreasonable and thus unsustainable. It was within the domain of the respondents to have put any reasonable condition in the NIT. Learned counsel for the petitioner has failed to substantiate that Clause 25(viii) in the NIT as reproduced above is illegal or arbitrary. No material was 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 said condition could not be faulted.

6. 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 Mandal 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.”

7. The Supreme Court in **Jagdish Mandal v. State of Orissa and others 2007(14) SCC 517** examining the issue of scope of judicial review in the matters of contracts had held that the contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision is bona fide and is in public interest, courts will not in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes.

8. Adverting to the judgments relied upon by the learned counsel for the petitioner, it may be noticed that in ***Central Inland Water Transport Corporation Limited and another vs. Brojo Nath Ganguly and another***, AIR 1986 SC 1571, it was held by the Apex Court that the courts will, not enforce and will when called upon to do so, strike down an unfair and unreasonable contract or an unfair and unreasonable clause in a contract entered into between the parties who are not equal in bargaining power. There is no dispute with this proposition. The position in the present case is different. Herein, the condition imposed under clause 25(viii) of the contract relating to arbitration, which has been incorporated to avoid frivolous claims made by a party, has not been shown to be unfair or unreasonable. Thus, the

petitioner cannot derive any advantage from the said decision. The above judgment was followed by this Court in *IFFCO TOKIO General Insurance Company Limited vs. Permanent Lok Adalat (Public Utility Services) Gurgaon and others*, 2012(1) RCR (Civil) 901.

9. In view of the above, we do not find any ground to interfere in exercise of writ jurisdiction under Articles 226/227 of the Constitution of India. Consequently, finding no merit in the petition, the same is hereby dismissed.

(Ajay Kumar Mittal)
Judge

September 14, 2016
'gs'

(Ramendra Jain)
Judge

Whether speaking/reasoned

Yes/No

Whether reportable

Yes