IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No. 21994 of 2016
Date of decision: 20.12.2016

Manufacturers of Petroleum Specialties Association and others

……Petitioners

Vs.

Uttar Haryana Bijli Vitran Nigam Limited and another

…..Respondents

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

Present: Mr. Hemant Sarin, Advocate for the petitioners.

Mr. Deepak Balyan, Advocate for the respondents.

Ajay Kumar Mittal,J.

1. The petitioners through the present writ petition filed under Articles 226/227 of the Constitution of India pray for quashing the impugned notice and the tender documents dated 5.10.2015, Annexures P.1 and P.2 respectively.

2. A few facts relevant for the decision of the controversy involved as narrated in the petition may be noticed. Petitioner No.1 is a company licenced and registered under Section 8 of the Companies Act, 2013 (in short, “the Act”) on June 13, 2014. Thereafter, it was incorporated under the provisions of the Act as a company limited by guarantee on July 24, 2014. Its main object is to promote and protect trade, commerce and industries in India and in particular trade, commerce and industries connected with petroleum specialty and lubricant products and/or specialty oils. Petitioner Nos. 2 to 5 are pioneers in the manufacture of petroleum specialty products, lubricant products and specialty oils including insulating oil in drums for transformers and switchgears. They have been supplying Transformer oil (TO)/Insulating oil to customers in more than 75 countries including customers in the domestic Indian market such as various electricity boards, PGCIL, BHEL, ABB, Alstom, Siemens, Transformer Rectifiers etc. They have also been supplying the TO/insulating oil to several government undertakings all over India. Respondent No.1 is a government of Haryana undertaking which undertakes the power distribution and retail supply business in the northern parts of Haryana. It is registered under the Act and commenced its operations in July 1999 on inheriting the distribution business of the erstwhile Haryana State Electricity Board. It has issued 27,59,193 connections in various categories in the area under its jurisdiction. The petitioners are aggrieved by the condition in the notice inviting tender dated 5.10.2016, Annexure P.1 and the tender documents, Annexure P.2 which excludes all private sector companies from participating in the tender process. The said notice and the tender documents contain an oppressive clause “procurement of following material directly from PSUs only”. According to the petitioners, respondent No.1 and

the erstwhile HSEB used to buy TO/Insulating oil from the private players including the members of petitioner No.1 but for the past few years, orders were being directly placed on public sector undertakings without advertising the procurement openly. Previously, the private sector companies did participate in the tender process and were also successful suppliers to respondent No.1/HSEB. Infact, in 2012, respondent No.1 had floated a tender for supply of TO/Insulating oil when there was no restriction on participation by private players. In the said tender, petitioner No.2 quoted the lowest rates and was awarded the tender. Petitioner No.2 fulfilled the supply to respondent No.1 without any complaint whatsoever about quality. The petitioners assert that insertion of the impugned condition in the notice inviting tender and the tender documents is contrary to the mandate of the guidelines for determination of tariff by bidding process for procurement of power by distribution licenses issued by the Ministry of Power on 19.1.2005 and published in the Gazette of India. The underlying objectives and the principle of the competitive bidding guidelines is essentially promotion of competitive bidding, reduction of cost of procurement, price of electricity and benefit for consumers. Aggrieved by the impugned condition in the impugned notice and the tender documents, the petitioners are before this Court through the instant writ petition.

3. In the written statement filed on behalf of respondent Nos. 1 and 2, it has been inter alia stated that on the basis of the executive policy decision of the government with the purpose to cut short the procurement of time and to meet the regular requirement of transformer oil directly from the PSUs, the respondents floated the present tender restricting to PSUs only. The respondents followed the procedure for procurement of transformer oil directly from PSUs since 2013 and the petitioners never challenged the

decision in the past and only for first time they have challenged the notice and the tender through association as petitioner No.1 who has no locus standi. With regard to the rate quoted by the petitioners in the year 2012, the chart Annexure P.2A with the petition shows that there is no substantial difference of price on account of quoting the lowest rates. Moreover, as regards the rates quoted by the petitioners, it is dependent upon the international market price of the crude oil. As per clause 7 of the terms and conditions of the bidders, the rates quoted shall be variable as per IEEMA price. On these premises, prayer for dismissal of the petition has been made.

4. We have heard learned counsel for the parties.

5. Learned counsel for the petitioners submitted that the impugned condition in the notice inviting tender and the tender documents prohibits and eliminates competition and amounts to a restrictive trade practice as private sector enterprises have an equal right to participate in the tender process by purchasing the tender documents, filling the same and submitting their bid. It is against the public interest and policy. The impugned condition has resulted in creating an illegal monopoly in favour of PSUs to the complete exclusion of all private sector companies in the field. It is violative of the fundamental right to trade under Article 19(1)(g) and discriminatory under Article 14 of the Constitution of India. Reliance has been placed on judgments in ***Caterpillar India Pvt. Limited vs. Western Coal Fields Limited and others,*** (2007) 11 SCC 32, ***Essex Farms Pvt. Liited vs. Union of India,*** 1885(57) DLT 8 (Del.), ***Ramana Dayaram Shetty vs. International Airport Authority of India and others***, (1979) 3 SCC 489 and ***Mahabir Auto Stores vs. Indian Oil Corporation***, (1990) 3 SCC 752.

On the other hand, learned counsel for the respondents supported the impugned notice and the tender documents.

6. Before proceeding further, it would be advantageous to reproduce the impugned condition in the notice inviting tender which reads thus:-

> "Offers are invited for procurement of following material directly from PSUs only for financial year 2016-17 on variable price and FOR destination basis anywhere in Haryana as per details given below…."

7. The cardinal issue that arises for consideration in this petition is whether the condition as quoted above inserted in the impugned notice is arbitrary and discriminatory.

8. The scope of judicial review in the matters of award of contract and laying down conditions in the tender document was examined by the Apex Court in ***BSN Joshi v. Nair Coal Services Ltd. 2006(11) SCALE 526,*** wherein it was held that the employer is the best judge in the matters of contract and the court's interference in such matter should be minimal. The Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent. It was held as under:-

> "It may be true that a contract need not be given to the lowest tenderer but it is equally true that the employer is the best judge therefor, the same ordinarily being within its domain, court's interference in such matter should be minimal. The High Court's jurisdiction in such matters being limited in a case of this nature, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record."

9. The Supreme Court in ***Jagdish Mandal v. State of Orissa and Others, 2007(14) SCC 517,*** 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 in such matters 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. The Court should exercise judicial restraint unless illegality or arbitrariness on the part of the Government in these matters is apparent.

10. 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 the State authorities are required to be conceded greater latitude in formulating conditions of a tender document and awarding a contract, 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.
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> **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:
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> (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;
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> (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;
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> (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;
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> (d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and
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> (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:
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> (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:
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> "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and
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> (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."

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."

11. The terms and conditions contained in the notice inviting tender have to be construed having regard to the fact situation obtaining in each case. No hard and fast rule can be laid down therefor. In the present case, on the basis of the executive policy decision of the government dated 30.11.2012, Annexure R.I, with the purpose to cut short the procurement

time and to meet the regular requirement of transformer oil directly from the Public Sector Undertakings, the respondents floated the present tender restricting the same to public sector undertakings only. The respondents are following the said procedure since the year 2013. The petitioners have challenged the same for the first time through the instant writ petition. It has been authoritatively held that in tender or contract matters, interference by courts is very limited. Power of judicial review will not be invoked to protect private interest at the cost of public interest or to decide contractual disputes. Interference is permissible if the process adopted or decision made is malafide or intended to favour someone or the same is so arbitrary and irrational that no responsible authority acting under the law could have arrived at it or it affected the public interest. In the present case, the decision has been taken by the respondents in restricting the tender only to public sector undertakings keeping in view the overall interest of the public. Learned counsel for the petitioners has not been able to produce any material on record to show that the impugned condition in the notice is arbitrary, malafide or irrational. Consequently, no interference is called for in writ jurisdiction.

12. In all fairness to learned counsel for the petitioners, adverting to the judgments relied upon by the learned counsel for the petitioners, it may be noticed that in ***Caterpillar India Pvt. Limiter's*** case (supra), the issue was with regard to purchase preference given to Public Sector enterprises. Grievance of the petitioners therein was that by imposing a condition like purchase preference, no option was left and monopolicy was being created. It was pleaded that the preference given to Public Sector Enterprises (PSEs) should be specific and margin of preference should be examined rationally.

The Apex Court held that industry-wise assessment be done to examine whether any preference was called for PSEs and what would be its margin to ensure level playing field. In ***Ramana Dayaram Shetty's*** case (supra), sealed tenders in prescribed form were invited for running restaurant and snack bars at Air port. Only a person running a registered II class hotel or restaurant and having at least five years experience as such was eligible to submit a tender. Tender of the person who did not fulfil the requisite qualifications was not accepted. In ***Mahabir Auto Stores***'s case (supra), the firm was carrying on business of sale and distribution of lubricants for long. The abrupt stoppage of supply of lubricants to the firm without any notice or intimation was held to be arbitrary. It was held that power of the State to enter into or not to enter into contract with individuals must be governed by rule of law and must be informed by reason. The case was not relating to conditions imposed in the tender documents. In ***Essex Farms Pvt. Limited's*** case (supra), the issue before the Delhi High Court was relating to the action of the State authorities whereby army authorities had issued circular restricting placing of order of meat only to Public Sector Units (PSUs) excluding otherwise eligible persons. Again, it was not a case specifying conditions in the tender notice. It was noticed on the perusal of the record that the decision to restrict the placing of orders for the supply of meat tinned on PSUs/Federation was not on the basis of reasons disclosed in the affidavits filed before the Court. Therefore, after considering the totality of facts and circumstances therein, it was held that such a condition was arbitrary and thus quashed. The propositions of law enunciated in these decisions cannot be questioned. However, each case has to be decided on its own facts. The factual matrix in the present case being different, the petitioners cannot derive any advantage from the said decisions.

13. In view of the above, no interference is called for with the impugned notice and the tender documents, Annexures P.1 and P.2 respectively in 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

December 20, 2016 **(Ramendra Jain)**
'gs' **Judge**

Whether speaking/reasoned Yes/No
Whether referred to reporter or not **Yes**