

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CWP No. 7026 of 2016 (O&M)

Date of Decision: 5.9.2016

M/s Zimidara Transport Company, Khanna

....Petitioner.

Versus

Food Corporation of India and others

...Respondents.

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

PRESENT: Mr. Anurag Chopra, Advocate for the petitioner.

Mr. J.S. Puri, Advocate for respondents No.1 and 2.

Dr. Rau PS Girwar, Advocate for respondent No.3.

AJAY KUMAR MITTAL, J.

1. In this writ petition filed under Articles 226/227 of the Constitution of India, the petitioner has, *inter alia*, prayed for issuance of a writ in the nature of mandamus for declaring the action of respondent No.2 illegal for not allotting the work for appointment of Transport Contractor (TC) for TC at Malerkotla to the petitioner being the lowest bidder in the tender enquiry dated 8.2.2016 (Annexure P-4) issued by respondent No.2; to direct respondent No.2 to allot the work for TC Malerkotla to the petitioner being L1 in the tender enquiry, Annexure P-4 and to direct respondent No.2 not to issue fresh enquiry for re-inviting tenders for appointment of TC at Malerkotla.

2. A few facts necessary for adjudication of the instant writ

petition as narrated therein may be noticed. Food Corporation of India (FCI) vide notice dated 14.8.2015 had invited tenders for the appointment of Transport Contract (TC) at Malerkotla accompanied with instructions for online bid submission. The said tender was subject to the decision of CWP No. 23472 of 2015. The said writ petition was allowed by this Court vide order dated 23.12.2015 (Annexure P-1) and set aside the work order issued in favour of respondent No.3. However, the liberty was granted to respondents No.1 and 2 to invite fresh bids and enter into adhoc agreements if necessary in the meantime. In pursuance thereto, respondent No.2 invited fresh tenders on 8.2.2016 (Annexure P-4) accompanied with instruction for online bid submission. The petitioner submitted its bid vide letter dated 5.2.2016 (Annexure P-2) for the appointment of TC at Malerkotla. Respondent No.3 also submitted its bid vide letter dated 5.2.2016 (Annexure P-3). The tender for appointment of TC was governed by the instructions, Annexure P-5, issued by respondent No.1. In response to the instructions issued by the Food Corporation of India (FCI), the petitioner submitted the requisite documents along with the forwarding letter. The technical bids of the petitioner and respondent No.3 were found valid and they were found eligible for the opening of the financial bid. The petitioner submitted the price bid dated 5.2.2016 (Annexure P-6) at 76% Above Schedule of Rates (ASOR) whereas respondent No.3 quoted its price bid dated 5.2.2016 (Annexure P-7) at 86% ASOR. According to the petitioner, respondent No.2 should have allotted the work of TC at Malerkotla to the petitioner being the lowest bidder (L1). However, respondent No.2 has not allotted the work to the petitioner till date and wanted to issue a fresh tender process on the ground that the earlier price as quoted by the petitioner vide

tender dated 14.8.2015 was much less than the price quoted now. Accordingly, the petitioner sent a legal notice dated 8.4.2016 (Annexure P-8) to respondents No.1 and 2 for the allotment of the work of TC at Malerkotla, but no action has been taken thereon. Hence, the present writ petition.

3. Upon notice of motion having been issued, respondents No.1 and 2 filed written statement controverting the averments made in the writ petition whereas respondent No.3 filed counter affidavit. It was pleaded by respondents No.1 and 2 that the petitioner and respondent No.3 applied for a tender for TC at Malerkotla vide tender enquiry dated 8.2.2016. During the process of technical evaluation, two writ petitions were filed which were disposed of on their statement that they would look into the objections raised by the petitioners in the said writ petitions. Thereafter, all the technical bids were evaluated properly and both the bidders were found technically qualified. The speaking orders were passed on 1.4.2016 and on the said date, the financial bids of both the bidders were opened. The price bid of the petitioner was 76% ASOR whereas respondent No.3 was 86% ASOR. On finding the rate not to be viable as quoted by the lowest bidder, i.e. the petitioner, the competent authority had rightly scrapped the tender on 8.4.2016 and invited fresh tenders in the best interests of the FCI. Even as per the directions of this Court, the previous EMD of the petitioner was to be adjusted against the fresh tender, but the petitioner did not participate in the fresh tender. It was further pleaded that in the fresh tender dated 5/9.5.2016, three bids were received which were found to be technically responsive. The price bids of all the three bidders were opened, the summary whereof is as under:-

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|----|-------------------|----------|
| 1. | Shri Navtej Singh | 85% ASOR |
| 2. | Shri Dinesh Kumar | 86% ASOR |
| 3. | Shri Gaurav Kumar | 62% ASOR |

The lowest rate given by Shri Gaurav Kumar justified the decision of the competent authority. The other averments were denied and a prayer for dismissal of the writ petition was made. Respondent No.3 controverted the averments made in the writ petition.

4. Learned counsel for the petitioner submitted that respondent No.2 has not allotted the work of Transport Contractor at TC, Malerkotla despite the petitioner having been found the lowest bidder (L1) in the tender inquiry dated 8.2.2016 (Annexure P-4). It was further submitted that the financial bid of the petitioner was illegally not considered by respondent No.2 and the scrapping/rejecting the said tender was unsustainable. Learned counsel has relied upon the judgment of Delhi High Court in **Inderjit Mehta v. Union of India and others 2016(1) RAJ 525.**

5. On the other hand, learned counsel for respondents No.1 and 2 submitted that all the technical bids were evaluated properly and both the bidders were found technically qualified. The financial bids of both the bidders were opened in which the price bid of the petitioner was 76% ASOR whereas respondent No.3 was 86% ASOR. It was further submitted that since the rate quoted by the lowest bidder, i.e. the petitioner was not viable, therefore, the competent authority had scrapped the tender and called for the fresh tenders. It was urged that the action of the official respondents was totally justified. In support of these contentions, learned counsel has relied upon the Apex Court judgment in **Jagdish Mandal v. State of Orissa and others (2007) 14 SCC 517.**

6. Learned counsel for respondent No.3 submitted that respondent No.3 had suffered due to the conduct of the petitioner as the petitioner had agreed for floating the new tender enquiry. However, the Friends Transport Company did not participate in the new tender enquiry which had been floated by the FCI on 8.2.2016.

7. After hearing learned counsel for the parties, we do not find any merit in the writ petition.

8. The FCI vide notice dated 14.8.2015 had invited tenders for the appointment of Transport Contract (TC) at Malerkotla. The said tender was subject to the decision of CWP No. 23472 of 2015. The said writ petition was allowed by this Court vide order dated 23.12.2015 (Annexure P-1) and the work order issued in favour of respondent No.3 was set aside. However, liberty was granted to respondents No.1 and 2 to invite fresh bids. In response thereto, respondent No.2 invited fresh tenders on 8.2.2016 (Annexure P-4) accompanied with instruction for online bid submission. The petitioner and respondent No.3 submitted their respective bids vide letters dated 5.2.2016 (Annexures P-2 and P-3, respectively) for the appointment of TC at Malerkotla. The technical bids of the petitioner and respondent No.3 were found valid and they were found eligible for the opening of the financial bid. The price bid of the petitioner was at 76% Above Schedule of Rates (ASOR) whereas respondent No.3 quoted its price bid dated 5.2.2016 (Annexure P-7) at 86% ASOR. The competent authority found the rates quoted by the petitioner not to be viable and had scrapped the tender on 8.4.2016 and invited fresh tenders in the best interests of the FCI. In pursuance to the last tender enquiry dated 5/9.5.2016, the three bids were received which were found to be technically

responsive. The price bids of all the three bidders were opened, in which the bids of Shri Navtej Singh was 85% ASOR, Shri Dinesh Kumar was 86% ASOR and one Shri Gaurav Kumar was 62% ASOR.

9. According to the petitioner, it was the lowest bidder in pursuance to tender notice dated 8.2.2016 but the official respondents had scrapped tender enquiry dated 8.2.2016 (Annexure P-4) and called for fresh tender dated 5/9.5.2016. It was within the domain of respondents No.1 and 2 to have scrapped the tender and to call for the fresh tender. The scope of judicial review in such circumstances is limited to where the action of the official respondents is shown to be suffering from malafides or is arbitrary. Nothing had been produced to show that the cancelling of tender process initiated in pursuance to tender notice dated 8.2.2016 was actuated with malafides or was to benefit somebody. The said respondents had taken the decision for fresh tender in the best interest of the FCI. In such a situation, the inviting of fresh tender by the respondent-FCI cannot be faulted. Further, no letter was issued to the petitioner awarding contract in its favour and, therefore, no legally enforceable right had accrued in favour of the petitioner.

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 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 the 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."

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 said view was reiterated by the Supreme Court in **Jagdish Mandal's case (supra)**.

12. Further, referring to the judgment of Delhi High Court in **Inderjit Mehta's case (supra)** relied upon by the learned counsel for the petitioner, suffice it to notice that in the said pronouncement the Court considering the factual matrix involved therein had concluded that the action of the respondents was unsustainable whereas in the present case the scrapping of the tender is in the interest of the FCI as the earlier financial bids received were not viable for them. This pronouncement, thus, does not advance the case of the petitioner.

13. In view of the above, there is no illegality or perversity in the tender dated 5/9.5.2016 issued by respondent No.2 warranting interference by this Court under Articles 226/227 of the Constitution of India. Consequently, finding no merit in the writ petition, the same is hereby dismissed.

14. Since the writ petition has been dismissed on merits, the pending applications do not survive consideration and are also dismissed.

(AJAY KUMAR MITTAL)
JUDGE

September 5, 2016
gbs

(RAMENDRA JAIN)
JUDGE

Whether Speaking/Reasoned

Yes/No

Whether Reportable

Yes