IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.7321 of 2015

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Rakesh Kumar Sah Son of Gajendra Prasad Sah, resident of village- Roshana Bazar, Post Office + Police Station- Pranpur, District- Katihar

.... Petitioner/s

Versus

1. The Union of India through the Secretary, Department of Petroleum & Natural Gas, Shastri Bhawan, New Delhi
2. The Secretary, Department of Petroleum & Natural Gas, Shastri Bhawan, New Delhi
3. The Indian Oil Corporation Limited, Corporate Office, lot No. 3079/3, Sadia Nagar, J.B. Tito Marg, New Delhi- 110049 through its Chairman
4. The Chairman, Indian Oil Corporation Limited, Corporate Office, lot No. 3079/3, Sadia Nagar, J.B. Tito Marg, New Delhi- 110049
5. The Director (Marketing), Indian Oil Corporation Limited, G-9, Ali Yavar Jung Marg, Bandra (East), Mumbai- 400051
6. The General Manager, Indian Oil Corporation Limited (Marketing Division), Bihar State Office, Loknayak Jaiprakash Bhawan (5th Floor), Dak Bunglow Chowk, Patna- 800001
7. The Senior Divisional Sales Manager, Indian Oil Corporation Limited, (Marketing Division), Begusarai Divisional Office, P.O. Barauni Oil Refinery, District- Begusarai (Bihar) 851114
8. The Manager (Refinery Coordination) Barauni Marketing Terminal, Indian Oil Corporation Limited (Marketing Division), Begusarai, Bihar- 854114
9. The State of Bihar through the District Magistrate, Katihar
10. The District Magistrate Katihar
11. The Deputy Collector Land Reforms, Katihar
12. The Circle Officer, Pranpur, District- Katihar
13. Sri Satish Prasad, son of not known the then Circle Officer, Pranpur, District- Katihar
14. Sri Binod Kumar Gupta, son of Rameshwar Lal Gupta, of Village- Mahadeopur, P.O.- Mahadeopur, P.S.- Pranpur, District- Katihar
15. Sri Jeewan Lal Agarwal, Son of Biseshwar Lal Agrawal, resident of village- Mahadeopur, P.O. Mahadeopur, P.S.- Pranpur, District- Katihar

.... Respondent/s

with

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Civil Writ Jurisdiction Case No. 9456 of 2015

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Jiwan Lal Agrawal Son of Sri Biseshwar Lal Agrawal, resident of Village + P.O.- Mahadevpur, P.S.- Pranpur, District- Katihar.

.... Petitioner/s

Versus

1. Indian Oil Corporation Ltd. Corporate Office, Lot No. 3079/3 Sadia Nagar, J.B. Tito Marg, New Delhi-110049 through its Chairman.
2. The Chairman, Indian Oil Corporation Ltd., Corporate Office, Lot No. 3079/3, New Delhi-110049.
3. The Director (Marketing), Indian Oil Corporation Ltd. Indian Oil Bhawan, G-9,

Aliyavar Jung Marg, Bandar (East), Mumbai- 400051.

4. The General Manager, Indian Oil Corporation Ltd. (Marketing Division), Bihar State Office, Lok Nayak Jaiprakash Bhawan, 5th Floor, Dak Bunglow Chowk, Patna-800001.
5. The Chief Manager (R.S.), Indian Oil Corporation Ltd. Bihar State Office, Lok Nayak Jai Prakash Bhawan 5th, Floor, Dak Banglow Chowk, Patna.
6. The Senior Divisional Sales Manager, Indian Oil Corporation Ltd.(Marketing Division), Begusarai Divisional office, P.O.- Barauni Oil Refinary, District- Begusarai (Bihar).
7. The Manager (Reginary Coordination), Barauni Marketing Terminal, Indian Oil Corporation Ltd.(Marketing Division), Begusarai (Bihar).
8. The Circle Officer, Bihar, Patna.
9. Binod Kumar Gupta Son of not known, resident of Village + P.O. Mahadevpur, P.S.- Pranpur, District- Katihar.
10. Rakesh Kumar Sah Son of Gajendra Prasad Sah, resident of Roshana Bazar, P.O. + P.S.- Pranpur, District- Katihar

.... Respondent/s

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Appearance :

(In CWJC No.7321 of 2015)

For the Petitioner/s	:	Mr. Sanjeev Kumar Mishra, Adv. Mr. Piyush Saurav, Adv.
For the IOCL	:	Mr. Anil Kumar Jha, Sr. Adv. Mr. Sanat Kr. Misha, Adv.
For the Resp. No.14	:	Mr. Dhirendra Kr. Jha, Adv. Mr. Jibendra Mishra, Adv.
For the Resp. No.15	:	Mr. Bhola Prasad, Adv. Mr. Mukesh Kr. Jha, Adv. Mr. Rajendra Narayan, Adv.
For the State	:	Mr. S.S. Prasad- SC8 Mr. Sanjay Kumar, AC to SC-8

(In CWJC No.9456 of 2015)

For the Petitioner/s	:	Mr. Rajendra Narayan, Sr. Adv. Mr. Mukesh Kr. Jha, Adv. Mr. Bhola Prasad, Adv.
For IOC	:	Mr. Anil Kumar Sinha, Adv. Mr. Amlesh Kumar Verma, Adv.
For the Resp. No. 9	:	Mr. Dhirendra Kr. Jha, Adv.
For the State	:	Mr. Binay Kumar, AC to SC-10

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CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 18-09-2017

Heard learned counsel for the parties in both the cases.

In the present case, both the writ applications are arising from the same Letter of Intent (herein after to be referred to as "LOI") which has been issued by the Indian Oil Corporation in favour of Binod Kumar Gupta and, as such, both the cases are being disposed of by this common order. For brevity and convenience, the fact of C.W.J.C. No. 7321 of 2015 is being taken into consideration.

At the outset, before dealing with the merit of the case, it is mentioned that it is the second round of litigation, earlier Rakesh Kumar Sah, the petitioner had moved this Court in C.W.J.C. No. 21557 of 2014 in which the petitioner and the respondents were parties, was remanded back with a direction to examine the grievance of the petitioner afresh and while doing so, will give notice and/or opportunity of hearing not only to Rakesh Kumar Sah who is the petitioner in the present case but, also to others namely Sri Binod Kumar Gupta and Sri Jiwan Lal Agarwal and pass an order within a period of three months and, in pursuance thereof, after hearing the parties, reasoned orders have been passed for each parties, namely, Jiwan Lal Agarwal, Binod Kumar Gupta and Rakesh Kumar Sah, the present parties of these cases.

The short fact of this case is that an advertisement was published on 19.8.2011 in the Daily Newspaper, Dainik Jagran for appointment of Dealer (retail outlet) under the Kishan Sewa Kendra at Mahadeopur in the district of Katihar. In pursuance thereof, four persons have participated in the tender, namely, Rakesh Kumar Sah, Bharat Chandra Prasad who is no longer in race of selection of the dealer, Binod Kumar Gupta and Jeewan Lal Agarwal. The Indian Oil Corporation notified the merit list and, according to the merit list, Rakesh Kumar Sah obtained 85.93, secured highest marks, Bharat Chandra Prasad secured 78.11 marks, Jiwan Lal Agarwal secured 59.47 marks and Binod Kumar Gupta obtained 55.55 marks. So Binod Kumar Gupta was at the bottom. Binod Kumar Gupta was given the "0" marks under the heading Capability to provide infrastructure & facilities whereas Rakesh Kumar Sah had obtained 100 out of 100 marks from Site Inspection Committee. The ground for granting '0' marks was that the proposed land is standing in the name of State of Bihar, is reflected from Register-II as Gairmazarua Bihar Sarkar in revenue village Sakraili. After declaration of the result, the Corporation, vide letter dated 3012.2012, (Annexure-5) requested the District Magistrate, Katihar to arrange "No Objection" informing that the Indian Oil Corporation has proposed to establish the retail outlet in favour of Rakesh Kumar Sah of Mauza Mahadeopur, request was made that N.O.C. should be issued in favour of "Indian Oil Corporation Ltd. (MD)", Begusarai, Bihar, whereupon, the Circle Officer, vide letter dated 5.3.2013 (Annexure-6), replied that letter of Indian Oil Corporation with respect to Khata No. 147, Khesra No. 274, Area 0.22 which has been offered to Rakesh Kumar Sah having been recognized the land, in question, situated at Mahadeopur whereas the land offered by Jivan Lal Agarwal vide Khata No. 6 Khesra No. 3, Area 0.13.5 is situated at revenue mouza Sakraili and it has been informed that the revenue Mauza of Mahadeopur and Sakraili are two different revenue Mauza and bears different revenue thana. The District Magistrate, Katihar, vide letter dated 20.3.2013 (Annexure-6), granted N.O.C. for setting up the retail outlet by the Indian Oil Corporation, whereafter, a complaint was made by Jiwan Lal Agarwal to the Senior Divisional Manager, Indian Oil Corporation Limited, Begusarai in which he has pointed out that he has been given higher marks in other items but, has been granted '0' marks under the heading "land" felt astonished with the manner he was treated by the Selection Committee. He has also pointed out the marks which were given to other contenders were not in proper calibration, raised grievance that it was only a table work and challenged the allotment of LOI to Rakesh Kumar Sah, the present petitioner, claimed that under sinister design allotment of LOI has been made, requested for enquiry and proper action and consideration. The Indian Oil Corporation examined a fresh, revisited the entire matter again, the marks were reevaluated and, after proper calibration, the Selection Board reset the marks and fixed the seniority. The letter dated 17.6.2014 (Annexure-16) shows, after due exercise of assessment, Binod Kumar Gupta was declared highest marks scorer secured 89.61, Jivan Lal Agarwal has been shown to have obtained 87.32 and Rakesh Kumar Sah has been shown to have obtained 84.53. So the entire seniority was turned turtle. The person who was at bottom has gone at the top and the person who was at the top has gone to bottom, whereafter, being aggrieved of the decision of the Selection Board, Rakesh Kumar Sah approached this Court in C.W.J.C. No. 21557 of 2014 with a direction of giving fresh hearing and pass an order. The order which has been passed against Rakesh Kumar Sah, the present petitioner and Jivan Lal Agarwal, who is the second petitioner, is under consideration in the present writ application.

The primary grievance has been raised by the petitioner that the land which has been offered by Binod Kumar Gupta cannot be a proper land for establishment of retail outlet by the Indian Oil Corporation. Two reasons have been given by the petitioner, namely, Rakesh Kumar Sah, the first objection has been raised that the land is standing in the name of State of Bihar which cannot be transferred or leased out for the purpose of establishment of retail outlet and the second objection has been raised that the land is situated in the village Sakraili not in the village Mahadeopur whereas as per advertisement, the Indian Oil Corporation has to establish the retail outlet in the village Mahadeopur which is different to village Sakraili. Thus, neither the land is situated in the place where it has to be established retail outlet nor the land which has been offered is the land of State of Bihar can be subjected for establishment of retail outlet, submitted that the entire exercise of the Indian Oil Corporation suffers from illegality in the manner the marks has been given to Binod Kumar Gupta, thereby the marks has been increased whereas the marks that has been given to the petitioner such as ‘100’ has been made to ‘96’ as well as he has given ‘0’ marks for “fixed and movable assets”. Jivan Lal Agarwal has raised a only grievance with regard to granting ‘0’ mark for “fixed and movable assets”, did not raise grievance in other items as in other items, the marks have been enhanced as earlier it was low. So in this case, two questions are to be answered, whether the land which has been offered by Binod Kumar Gupta can be utilized for the purpose of establishment of retail outlet by the Indian Oil Corporation and second whether reduction of marks to Rakesh Kumar Sah and Jivan Lal Agarwal with respect to fixed and movable asset being ‘0’ marks is a correct exercise of power or suffers from any illegality. Rakesh Kumar Sah has raised that he was granted 100 marks by site inspectin committed but, second time, it has been made 96. The Indian Oil Corporation has annexed the report which indicates that, in fact, Rakesh Kumar Sah in fact obtained 96 marks not 100 marks. So, there is no such force in the submission of Rakesh Kumar

Sah.

One thing is clear in the entire pleadings of the petition neither Rakesh Kumar Sah has raised any malafide nor Jivan Lal Agarwal has raised any malafide against any member of the Selection Committee.

Learned counsel for the Indian Oil Corporation as well as Binod Kumar Gupta have taken plea that after re-exercise it was found that in earlier exercise, wrong marks were given to Jivan Lal Agarwal as well as Rakesh Kumar Sah, that has only been corrected and they have been given proper marks as per brochure. It has been submitted that the brochure provides in detail the manner marks would be granted and there is no illegality or irregularity in granting marks in second time to both petitioners and further it has been argued that so far the location and classification of the land is concerned, no malafide has been raised by the petitioner in selection, examination under judicial review will be limited , the petitioner cannot be allowed to challenge the locatin for installation of the retail outlet which lies withn the domain and satisfaction of management so much so that both the counsels have drawn attention of this Court towards the fact that Sakraili is part of Mahadeopur, only there is a difference of revenue panchayat and they have also drawn attention of this Court to the report of Circle Officer dated 04.04.2014 as well as letter of the

D.C.L.R. dated 18.3.2015 where both of them have stated that Sakraili is the part of Mahadeopur and Sakraili is also called as Mahadepur may be a different revenue mouza. Further it has been argued by the learned counsel for the Indian Oil Corporation as per brochure detail information furnished, must be supported by documentary evidence. Though both the petitioners have furnished information but, have not attached any documentary evidence or the certificate corroborating details of supplied information.

Learned counsel for Binod Kumar Gupta has submitted that certain portion of the proposed land has been acquired by the Government, compensation amount has been received by him, in such view of the matter, the submission of the petitioners the land has been shown in the revenue record as Anabad Bihar Sarkar is of no substance.

As per Indian Oil Corporation, in terms of brochure, the petitioners were to attach document in support of declaration made in the tender document but, did not attach the supporting documents and, as such, they were granted '0' marks, at the same time, learned counsel for the Indian Oil Corporation has drawn the attention towards report which shows that Rakesh Kumar Sah has in fact secured 96 marks but, he has wrongly been shown that he has obtained 100 marks. In support of the contention, the Indian Oil

Corporation has produced Annexure 6/5 which indicates in what manner the marks has been granted and next page of the document where the marks has been given indicates 96. So, the claim of counsel for Rakesh Kumar Sah reduction of his marks from '100' to '96' granted by Site Inspection Committee is bad in law, is misplaced, of no substance in view of the fact that document itself shows the petitioners in fact obtained '96' marks, at the second time, on revisiting, error committed at first time has been corrected. Learned counsel for the Indian Oil Corporation has submitted that if the supporting document corroborating details of information was not filed, in such circumstances, granting '0' marks cannot be said wrong exercise of power requires interference. In support of submission, the Indian Oil Corporation has placed reliance on brochure as well as relied upon the judgment of this Court in the case of ***M/s Indian Oil Corporation Limited Vs. Raj Kumar Jha & Ors.*** reported in ***2012(2) PLJR 783***, there the Division Bench of this Court has refused to interfere in the matter as in that case, an affidavit was to be filed with respect to pendency of criminal case against him in any court of law but, in the affidavit, it was mentioned that no criminal case was pending in "Karyalaya" in place of "Nayayalaya". It was argued that it was a typographical error and that should be ignored but, the Court has said that it may be a typographical error or may be a mischief or may be a misrepresentation, it is difficult to draw a line when error ends and mischief or misrepresentation begins and the best way to avoid discrimination, is strict adherence to the standards mentioned in the advertisement. This matter was also related to granting license for LPG distributorship. It will be relevant to quote paragraph no.9 & 10 of the aforesaid judgment which reads as follows:-

> *"9. We are of the opinion that the Corporation being the State within the meaning of Article 12 of the Constitution is supposed to act fairly, reasonably and uniformly and has to be objective in its approach. Once the standard is set out in the advertisement, the Corporation has to adhere to the said standard without any variation. In case, the Corporation allows any alteration the same will amount to subjective approach which is frowned upon by the Courts time and again. To remain objective the Corporation is required to adhere to the standards mentioned in the advertisement. In the present case, it is not in dispute that the application made by the writ petitioner was not in conformation with the requirements mentioned in the advertisement. In our opinion, the Corporation was justified in rejecting the application of the writ petitioner.*
>
> *10. The learned single Judge ought not to have interfered with the decision of the Corporation which was taken in consonance with the terms and conditions contained in the advertisement. Besides; may be, in the present case it was a mere typographical error. However, there might be a case of mischief or misrepresentation also. It is difficult to draw a line where an error ends and a mischief or misrepresentation begins. The best way to avoid*

> *discrimination is strict adherence to the standards mentioned in the advertisement."*

In the contract matter, the power of judicial review is very limited to the extent that the Court has to examine the decision making process has been done in a proper manner, whether it suffers from malafide and the conclusion has been arrived as such no reasonable persons could have formed such opinion. Even though, some legal points are made out, the Court may refuse interference unless public interest is attracted as the Court must exercise its discretion while exercising the power under Section 226 of the Constitution of India with great caution and care in furtherance of the public interest not merely on the making out of legal point. The court should always keep in his mind the larger public interest in order to decide whether its interference is called for or not and when it comes to a conclusion that overwhelming public interest requires interference, the Court would interfere. In that view of the matter, even if some legal points are made out but, the Court should not turn and interfere in the matter unless public interest is required. The paramount consideration in those cases is to subserve the public interest not the private interest. This Court in the case of ***Brajesh Chandra Mishra Vs. The Union of India & Ors.*** reported in ***2011(2) PLJR 660*** was related to grant of LPG distributorship was granted in favour of the advocate. In that case, the grant was challenged on the ground that he was working as an advocate and had no occasion to gain experience as practicing advocate could not engage himself while working advocate to the employer in other business or profession but the plea was taken by the advocate that while working as an advocate, he had also worked as honorary Manager during the spare time and, thereby, got sufficient experience in the petroleum product but, the Single Judge interfered in the grant given to the advocate, namely, Sri Brajesh Chandra Mishra, the same was challenged, the Court has held that the Corporation has the last word. Unless the malafides were alleged and established or unless there were a glaring and apparent defect in the award of marks, the Court should not exercise power of judicial review under Article 226 of the Constitution of India. The Court while exercising the power of judicial review, it must not work as an appellate court over the decision of the Corporation. It is beyond the jurisdiction of the Court while exercising the power of judicial review to re-examine the materials and to arrive at its own conclusion contrary to the decision of the Corporation. It will be relevant to quote paragraph no.17 of the said judgment which reads as follows:-

> *"17. We see no illegality in the appellant" s making application for L.P.G. distributorship while he was holding a sanad to practise as a lawyer. Until he was awarded the distributorship and he started the business he was not required to surrender the sanad. As to the validity of the experience*

> *certificate and the marks given to him under the head experience , we believe that the Corporation had the last word. Unless mala fides were alleged and established or unless there were a glaring/apparent defect in the award of marks, no Court exercising power of judicial review under Article 226 of the Constitution should interfere in the matter. The Court is not supposed to sit in appeal over the decision of the Corporation. It is beyond the jurisdiction of the Court exercising power of judicial review to re-examine materials and to arrive at its own conclusion contrary to the decision of the Corporation. In our opinion, the learned Single Judge ought not to have examined the validity of the experience certificate produced by the appellant to hold it to be a false document after an indepth reasoning process. Once the Corporation had examined the materials, had investigated the genuineness of the experience certificate, had believed the same to be true, the learned Single Judge ought not to have re-examined the materials to hold that the experience certificate was not genuine."*

In the case of ***Dhananjay Singh Vs. The Union of India & Ors.*** reported in ***2010 (1) PLJR 59*** having been held that the power of judicial review under Article 226 of the Constitution of India has a limited scope specially in the matter of contractual matter. The Court does not sit in the appeal over the decision as an appellate authority. It is generally on two grounds that judicial review is entertained by the

Court. It is either for the purpose of a wrong committed in the decision making process but not the decision itself or where the decision is per-se arbitrary and not sustainable in law and the Court will not act as an appellate authority to revise the judgment of the Corporation. It will be relevant to quote paragraph nos. 5 of the aforesaid judgment which reads as follows:-

> *"8. Firstly, there appears to be still a persisting misconception about jurisdiction of this Court to interfere in such matters under Article 226 of the Constitution. The jurisdiction of judicial review has a limited scope when it comes especially to contractual matters. This Court does not sit in appeal over the decision of the authorities as if, it were an appellate authority. It is generally on two grounds that judicial review is entertained by this Court. It is either for the purposes of a wrong committed in the decision making process but not the decision itself or where the decision is per se arbitrary and unsustainable in law. As would be apparent, the petitioner wanted this Court to sit more as an appellate authority to revise the judgment of the Corporation. That in my view is not this court's jurisdiction."*

In the case of ***Sanjay Kumar Shukla Vs. Bharat Petroleum Corporation Limited & Ors.*** reported in ***(2014) 3 SCC 493***, the issue of judicial review came for consideration and the scope for interference. This matter relates to grant of dealership of obtaining the retail outlet at Areraj, East Champaran. There also the question arose of granting the ‘0’ marks to the respondents against the maximum ‘4’ marks under the head of fixed and moveable assets and second grievance was raised that land offered by the appellant was under litigation and was not immediately available for the use of retail outlet. The fact of the present case is very near to the fact of Sanjay Kumar Shukla case. In that case also, the respondent has filed a complaint which was answered by an order of rejection on the ground that Technical Evaluation Committee, in its report, had found the land offered by the appellant suitable for development of retail outlet and the issue raised by the respondent in the objection cum complaint was dealt with in the process of grant of NOC by the State to whom a reference of matter was made. The claim of grant of marks was rejected on the ground that the respondents had not furnished any document in support of the statement made. In this case also the fact is the same. Here the petitioners have also not submitted the document in support of the statement made by them in the tender document. In that case the Single Judge has held that the respondents did not produce any document of title in respect of assets claimed by him in his application for dealership. Such failure on the part of the respondent amounted to suppression/concealment of relevant facts but, while dealing with Sanjay Kumar Shukla case, the Court has held that N.O.C. having been not granted by the District Magistrate, the Corporation cannot wait for indefinite period and, consequently, the Hon'ble Single Judge directed for selection process is to be re-done. The Division Bench has agreed to the findings of the Single Judge with respect to the land offered by the respondent without attaching the document which led to grant of '0' marks but, the Division Bench moved further giving direction to the respondent Corporation that the respondent of that case, at serial no.2, should be granted the LOI, was challenged before the Hon'ble Apex Court. In that case, the Hon'ble Apex Court has placed reliance on the judgment in the case of Raunaq Internatinal Ltd. Vs. I.V.R. Construction Ltd., Air India Ltd. Vs. Cochin International Airport Ltd. reported in (2000) 2 SCC 617, Master Marine Services (P) Ltd. Vs. Metcalfe & hodgkinson (P) Ltd. reported in (2005) 6 SCC 138 has held that the award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It can also accept the offer even if it happens to be the highest or lowest. The State and its Corporation are bound to adhere to the standards and procedure laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found vitiated by malafide, unreasonableness and arbitrariness. The duty is caste upon the Court under the judicial review to examine fairness in action of State of instrumentality of State even if some defect is found in the decision making process, the Court must exercise discretionary power under Article 226 of the Constitution of India with great care and caution, only in furtherance of the public interest not merely on the making out of legal point. The Court should always keep in mind the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene. It will be relevant to quote paragraph nos. 16, 17, 18 and 19 of the aforesaid judgment which reads as follows:-

> *"16. In Raunaq International Ltd. Vs. I.V.R. Construction Ltd. & Ors. [(1999) 1 SCC 492], (paragraphs 9, 10 and 11) this Court had held as follows : (SCC pp. 500-01)*
>
> > *"9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at*

a commercial decision, considerations which are of paramount importance are commercial considerations. These would be:
(1) the price at which the other side is willing to do the work;
(2) whether the goods or services offered are of the requisite specifications;
(3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;
(4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;
(5) past experience of the tenderer and whether he has successfully completed similar work earlier;
(6) time which will be taken to deliver the goods or services; and often (7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.
Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work — thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g., a delay in [pic]commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be *decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers."*

17. In Air India Ltd. Vs. Cochin International Airport Ltd. & Ors.[(2000) 2 SCC 617], there was a further reiteration of the said principle in the following terms:-

"7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in Ramana Dayaram Shetty v. International Airport Authority of India[(1979) 3 SCC 489], Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India[(1981) 1SCC 568], CCE v. Dunlop India Ltd.[(1985 1 SCC 260)], Tata Cellular v. Union of India[(1994) 6 SCC 651], Ramniklal N. Bhutta v. State of Maharashtra[(1997) 1 SCC 134] and Raunaq International Ltd. v. I.V.R. Construction Ltd.[(1999) 1 SCC 492] The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision

considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene." (Emphasis is ours)

18. Similar reiteration is to be found in Master Marine Services (P) Ltd. Vs. Metcalfe & Hodgkinson (P) Ltd. & Anr.[(2005) 6 SCC 138]; Tejas Constructions and Infrastructure Private Limited Vs. Municipal Council, Sendhwa and Another[(2012) 6 SCC 464] and several other pronouncements reference to which would only be repetitive and, therefore, is best avoided.

19. We have felt it necessary to reiterate the need of caution sounded by this Court in the decisions referred to hereinabove in view of the serious consequences that the entertainment of a writ petition in contractual matters, unless justified by public interest, can entail. Delay in the judicial process that seems to have become inevitable could work in different ways. Deprivation of the benefit of a service or facility to the public; escalating costs burdening the public exchequer and abandonment of half completed works and projects due to the ground realities in a fast changing economic/market scenario are some of the pitfalls that may occur."

In the case of ***Sajeesh Babu K. Vs. N.K. Santhosh & Ors.*** reported in ***AIR 2013 SC 141*** the Court has held that the Court must show deference and consideration to the recommendation of the Expert Committee consisting of distinguished experts in the field, unless there is an allegation of malafide against the member of Selection Committee, only then, it requires strict judicial scrutiny. When there is no allegation of malafide against the Expert Committee, normally it is wise and safe for the Court to leave the decision of this nature to Experts who are more familiar with the technicalities/nature of the work. It will be relevant to quote paragraph nos. 17 & 18 of the aforesaid judgment which reads as follows:-

> *"17) In a recent decision of this Court in Basavaiah (Dr.) vs. Dr. H.L. Ramesh & Ors., (2010) 8 SCC 372 wherein similar issue, namely, recommendations of Expert Committee and evaluation as well as judicial review under Art. 226 of the Constitution was considered by this Court. A short question involved in that case was that whether the appellants therein (Dr. Basavaiah and Dr. Manjunath) were qualified to be appointed as Readers in Sericulture? One Dr. H.L. Ramesh, respondent in both the appeals therein challenged the appointments of both the appellants on the ground that they were not qualified for the post of Readers in Sericulture. Learned single Judge, on 11.10.2004, after examining the pleadings and scrutinizing the arguments of the parties dismissed the writ petition filed by Dr. H.L. Ramesh – respondent in W.P. No. 24300 of 1999. Dr. H.L. Ramesh, aggrieved by the said judgment, preferred a writ appeal before the Division Bench of the High Court. The writ appeal was allowed and the appointments of the appellants therein were set aside leaving it open to the University of Mysore to make fresh selection in accordance with the law. The appellants, aggrieved by the said judgment, filed special leave petitions before this Court. In the High Court as well as in this Court, the University filed affidavit stating that the Expert Committee consisting of highly qualified 5 distinguished experts evaluated the qualification, experience and the published works of the appellants and found them eligible and suitable. In such circumstance, this Court observed in paragraph Nos. 20 & 21 as under:*

> *"20. It is abundantly clear from the affidavit filed by the University that the Expert Committee had carefully examined and scrutinised the qualification, experience and published work of the appellants before selecting them for the posts of Readers in Sericulture. In our considered opinion, the Division Bench was not justified in sitting in appeal over the unanimous recommendations of the Expert Committee consisting of five experts. The Expert Committee had in fact scrutinised the merits and demerits of each candidate including qualification and the equivalent published work and its recommendations were sent to the University for appointment which were accepted by the University.*
>
> *21. It is the settled legal position that the courts have to show deference and consideration to the recommendation of an Expert Committee consisting of distinguished experts in the field. In the instant case, the experts had evaluated the qualification, experience and published work of the appellants and thereafter recommendations for their appointments were made. The Division Bench of the High Court ought not to have sat as an appellate court on the recommendations made by the country's leading experts in the field of Sericulture."*

18) It is clear that in a matter of appointment/selection by an Expert Committee/Board consisting of qualified persons in the particular field, normally, the Courts should be slow to interfere with the opinions expressed *by the experts, unless there is any allegation of mala fides against the experts who had constituted the Selection Committee. Admittedly, in the case on hand, there is no allegation of mala fides against the 3 experts in the Selection Committee. In such circumstances, we are of the view that it would normally be wise and safe for the courts to leave the decision of selection of this nature to the experts who are more familiar with the technicalities/nature of the work. In the case on hand, the Expert Committee evaluated the experience certificates produced by the appellant herein, interviewed him by putting specific questions as to direct sale, home delivered products, hospitality/service industry etc. and awarded marks. In such circumstances, we hold that the High Court ought not to have sat as an appellate Court on the recommendations made by the Expert Committee."*

This judgment has held that the opinion of Expert should normally be accepted, not to be interfered with same unless there is an allegation of malafide against any of the member or members of experts participated in the decision making process.

In the case of ***JSW Infrastructure Limited & Anr. Vs. Kakinada Seaports Limited & Ors.*** reported in ***AIR 2017 SC 1175*** the scope of judicial review in contract matter has been gone into and having held that writ court should not interfere unless the decision has been taken, is totally arbitrary, perverse and malafide. The Court cannot act as a Court of appeal, only can exercise power of judicial review within the defined principle and must act with restraint while dealing with contractual matters. It will be relevant to quote paragraph nos. 10 & 11 of the aforesaid judgment which reads as follows:-

> *"10. In Jagdish Mandal vs. State of Orissa[4] this Court held that evaluation of tenders and awarding contracts are essentially commercial functions and if the decision is bonafide and taken in the public interest the superior courts should refrain from exercising their power of judicial review. In the present case there are no allegations of mala fides and the appellant consortium has offered better revenue sharing to the employer.*
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> *11. In Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. & Anr.[5] This Court held as follows :-*
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> > *"14.....a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision making process or the decision.*
> >
> > *xxx xxx xxx*
> >
> > *16. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity*

in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.

17. In the present appeals, although there does not appear to be any ambiguity or doubt about the interpretation given by NMRCL to the tender conditions, we are of the view that even if there was such an ambiguity or doubt, the High Court ought to have refrained from giving its own interpretation unless it had come to a clear conclusion that the interpretation given by NMRCL was perverse or mala fide or intended to favour one of the bidders. This was certainly not the case either before the High Court or before this Court....” The view taken in Afcons (supra) was followed in Monte Carlo Ltd. Vs. NTPC Ltd.[6] . Thus it is apparent that in contractual matters, the Writ Courts should not interfere unless the decision taken is totally arbitrary, perverse or mala fide.”

In the case of ***Central Industrial Security Force & Ors. Vs. Abrar Ali*** reported in ***AIR 2017 SC 200*** where this Court has held that re-appreciation of evidence is not permissible while exercising the power under Article 226 of the Constitution of India by the High Court. The Court, exercising power under Article 226, is not an appellate court but, limited to exercise the power of judicial review. It is relevant to quote paragraph no.8 of the aforesaid judgment which reads as follows:-

> *"8. Contrary to findings of the Disciplinary Authority, the High Court accepted the version of the Respondent that he fell ill and was being treated by a local doctor without assigning any reasons. It was held by the Disciplinary Authority that the Unit had better medical facilities which could have been availed by the Respondent if he was really suffering from illness. It was further held that the delinquent did not produce any evidence of treatment by a local doctor. The High Court should not have entered into the arena of facts which tantamounts to re-appreciation of evidence. It is settled law that re-appreciation of evidence is not permissible in the exercise of jurisdiction under Article 226 of the Constitution of India. In State Bank of Bikaner and Jaipur v. Nemi Chand Nalwaiya reported in (2011) 4 SCC 584, this Court held as follows:*
>
> *"7. It is now well settled that the courts will not act as an appellate court and reassess the evidence led in the domestic inquiry, nor interfere on the ground that another view is possible on the material on record. If the inquiry has been fairly and properly held and the findings are based on evidence, the question of adequacy of the evidence or the reliable nature of the evidence will not be grounds for interfering with the findings in departmental enquiries. Therefore, courts will not interfere with findings of fact recorded in departmental enquiries, except where such findings are based on no evidence or where they are clearly perverse. The test to find out perversity is to see whether a*

tribunal acting reasonably could have arrived at such conclusion or finding, on the material on record. The courts will however interfere with the findings in disciplinary matters, if principles of natural justice or statutory regulations have been violated or if the order is found to be arbitrary, capricious, mala fide or based on extraneous considerations. (Vide B.C. Chaturvedi v. Union of India [(1995) 6 SCC 749: 1996 SCC (L&S) 80: (1996) 32 ATC 44], Union of India v. G. Ganayutham [(1997) 7 SCC 463: 1997 SCC (L&S) 1806], Bank of India v. Degala Suryanarayana [(1999) 5 SCC 762: 1999 SCC (L&S) 1036] and High Court of Judicature at Bombay v. Shashikant S. Patil."

In Union of India & Ors. v. P. Gunasekaran reported in (2015) 2 SCC 610, this Court held as follows:

"12. Despite the well-settled position, it is painfully disturbing to note that the High Court has acted as an appellate authority in the disciplinary proceedings, re-appreciating even the evidence before the inquiry officer. The finding on Charge I was accepted by the disciplinary authority and was also endorsed by the Central Administrative Tribunal. In disciplinary proceedings, the High Court is not and cannot act as a second court of first appeal. The High Court, in exercise of its powers under Articles 226/227 of the Constitution of India, shall not venture into re-appreciation of the evidence. The High Court can only see whether:

(a) the inquiry is held by a competent authority;

(b) the inquiry is held according to the procedure prescribed in that behalf;

(c) there is violation of the principles of natural

justice in conducting the proceedings;
(d) the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;
(e) the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;
(f) the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;
(g) the disciplinary authority had erroneously failed to admit the admissible and material evidence;
(h) the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;
13.(i) the finding of fact is based on no evidence.
13. Under Articles 226/227 of the Constitution of India, the High Court shall not:
(i) re-appreciate the evidence;
(ii) interfere with the conclusions in the inquiry, in case the same has been conducted in accordance with law;
(iii) go into the adequacy of the evidence;
(iv) go into the reliability of the evidence;
(v) interfere, if there be some legal evidence on which findings can be based.
(vi) correct the error of fact however grave it may appear to be;
(vii) go into the proportionality of punishment unless it shocks its conscience."

In view of the aforesaid discussions, applying the principle in the present case, both the petitioners have challenged the status and location of the land as well as they have also challenged the expert having been granted ‘0’ marks in place of ‘4’ marks under the head of “fixed and movable assets” as they were granted earlier ‘4’ marks which has been reduced to ‘0’ marks. The ground has been mentioned that they have not attached the document in support of the status which is required as per brochure of the Company. It is in the similar line of the Sanjay Shukla Case (supra), there also the same issue was raised of granting ‘0’ marks having not attached the document, grant of ‘0’ marks was not interfered with, so in this view of the matter, granting ‘0’ marks by the Committee cannot in any manner be held to be arbitrary and wrong exercise of power. So far as the status of land which has been offered by the Binod Kumar Gupta is concerned, as having been claimed by the petitioner that this falls in the jurisdiction of revenue Mauza Sakraili not Mahadeopur where as per advertisement, the retail outlet is to be established. This objection is not sustainable on two grounds that it is the Indian Oil Corporation who has done the field verification, found, the location, where the retail outlet has to be established, is proper and the Court should not interfere in such matter as the word of the Corporation is last unless it suffers from malafide or procedural irregularity. So far the claim of the petitioner has been made that the land is of the State of Bihar and cannot be offered for establishment of the retail outlet is not required to be taken cognizance in view of letter of the D.C.L.R., Katihar dated

18.3.2015 has given his report that the land, in question, situated to the Sakraili Mouza which falls under the village of Mahadeopur and he has given the sketch map and proposed shape of retail outlet.

The other objection of the petitioner that the proposed land in Land Revisional Survey Register-2 has been recorded Gairmazarua Bihar Sarkar, cannot be a proper land for establishment of retail outlet, is not suitable, is not sustainable in view of the statement recorded in the report of the D.C.L.R. dated 18.3.2015 (Annexure-25) from where it appears that the land was settled with the name of Kalu Dhobi who sold the land to Murari Lal Agarwal who in the year 1994 transferred 10 decimal of land to Sunita Gupta and the land is still standing in her name and Sunita Gupta is getting the rent receipt. On that land, Dharamkanta of Binod Kumar Gupta is working, the land belongs to Binod Kumar Gupta. Inasmuch as, the State Government had earlier acquired the land, for which Binod Kumar Gupta has received compensation for the land from the Government.

In view of the aforesaid discussions, it cannot be said that the decision of the Corporation suffers from any illegality, irrationality and arbitrariness, they followed the proper procedure in decision making process and while exercising the power of judicial review, this Court can only see the decision making process, cannot see the decision as an appellate court. At the same time, this court is not required to reassess the material for arriving to a different finding as that of the Corporation. The Court must give due weight, requires interference when allegation of malafide is made out, which is not in these cases.

In view of the above discussions, this Court does not find any merit in both the writ applications and the same are, accordingly, dismissed.

(Shivaji Pandey, J)

Rishi/-

AFR/NAFR	NAFR
CAV DATE	NA
Uploading Date	21.09.2017
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