

Gurbax Singh
2017.10.26 10:19

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

**Civil Writ Petition No.13785 of 2017
Date of decision: September 05, 2017**

M/s Real Mazon India Ltd.

....Petitioner

versus

State of Punjab and others

....Respondents

***CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL
HON'BLE MR. JUSTICE AMIT RAWAL***

Present: Mr. Sanjeev Sharma, Sr. Advocate with
Mr. L.S. Sidhu, Advocate and
Mr. Shekhar Verma, Advocate for the petitioner.

Ajay Kumar Mittal, J.

1. The petitioner, in this petition, filed under Articles 226/227 of the Constitution of India, prays for issuance of a direction to respondents No.1 and 2 to consider it for awarding the contract for implementation of the High Security Registration Plates (for short, 'HSRP') Project in compliance with the requirements of Rule 50 of the Central Motor Vehicles Rules, 1989 (in short, "the CMV Rules"), New HSRP Order 2001 and the various orders passed by the Supreme Court of India. A further prayer has also been made to direct respondent No.1 to issue a fresh tender.

2. A few facts relevant for decision of the controversy involved as narrated in the petition may be noticed. The petitioner is a company incorporated under the provisions of the Companies Act, 1956. It is engaged in the business of manufacturing, supplying and affixation of High Security Registration Plates (HSRP) with the Union Territory of Chandigarh along

with some other states. On 28.03.2001, the Government of India vide its Gazette Notifications dated 28.03.2001, 22.08.2001 and 09.05.2002, made it mandatory for all the motor vehicles in India to be affixed with HSRP. On 15.09.2011 (Annexure P-3), respondent No.2 on behalf of respondent No.1 issued a notice inviting tender on Build Own Operate basis, inviting bids for selection of eligible manufacturer/vendor having type approval and requisite manufacturing capacity to produce, distribute and affix the HSRP in conformity with the specifications, in the above-mentioned notifications for all types of vehicles in the State of Punjab. The petitioner and respondent No.3 alongwith its Joint Venture Companies (respondents No.4 and 5) participated in the bidding process. Respondent No.3 i.e. M/s Agros Impex (I) Pvt. Ltd. was acknowledged as being the lowest bidder alongwith its joint venture partners i.e. respondents No.4 and 5 (Concessionaires companies). Accordingly, concession agreement dated 21.11.2011 was signed and executed between the concessionaire companies and respondent No.2. M/s Utsav Safety System was the second lowest bidder and the petitioner was the third lowest bidder. On 8.5.2012, the Transport Department, Government of Bihar terminated the authorization agreement for supply and installation of HSRPs on account of respondent No.3's inaction and inordinate delay in implementation of the scheme. Similarly, on 13.8.2012, the Transport Department, Government of Jharkhand terminated the agreement on the same ground. On 10.3.2014, M/s Rosemerta HSRP Venture Pvt. Limited – a special purpose vehicle formed by M/s Utsav Safety System Pvt. Limited and M/s Rosemerta Technologies Pvt. Limited was show caused by the Transport Department, Government of Delhi as to why proceedings for termination of contract be not initiated against it for failure to comply with various provisions of the agreement. On 26.8.2014, the office of Transport

Department of Uttar Pradesh set aside the bid submitted by respondent No.3 for execution of HSRPs schemes on account of fake income tax returns. Further respondent No.3 was declared ineligible to participate in any bid proceeding by any department of the State of Uttar Pradesh for two years. On 17.10.2014, the office of Transport Commissioner, Madhya Pradesh terminated the concession agreement between M/s Utsav Safety System and Government of Madhya Pradesh. On account of illegalities and violations perpetrated by the concessionaires, vide order dated 06.01.2015 (Annexure P-10), respondent No.2-State Transport Commissioner, Punjab, terminated the agreement dated 21.11.2011 with respondents No.3, 4 and 5 and further blacklisted for a minimum period of five years from participating in any of the government bid concerning HSRPs. Aggrieved by order dated 06.01.2015 (Annexure P-10) passed by the State Transport Commissioner, State of Punjab, respondents No.3 to 5 approached this Court by way of filing Civil Writ Petition No.911 of 2015, which was dismissed on 09.07.2015 (Annexure P-11). Thereafter, the Concessionaires companies approached the Supreme Court in SLP(Civil) No.21589 of 2015 which was also dismissed on 07.08.2015 (Annexure P-12). However, liberty was granted to the concessionaires companies to seek appropriate redressal in the arbitration proceedings in accordance with law with regard to the agreement executed by the parties and to challenge the impugned order before the competent Court in so far as blacklisting was concerned. Therefore, the concessionaires challenged the blacklisting order before this Court through CWP No.17768 of 2015, which is still pending. Meanwhile, during the course of arbitration proceedings initiated pursuant to the direction of the Supreme Court, respondent No.1 submitted a detailed application under Section 16 of the Arbitration and Conciliation Act, 1996 before the Arbitral

Tribunal (in short, 'the Tribunal'), inter alia, raising a preliminary objection as to the maintainability of the arbitration proceedings. The aforesaid application was rejected by the Tribunal on 31.03.2016 (Annexure P-14), which was subsequently impugned by the respondent-State before this Court in CWP No.9446 of 2016, wherein, this Court, vide order dated 13.05.2016 (Annexure P-15), had directed the State Transport Commissioner and the Chairman of the Board of Directors of the Concessionaires to make efforts for amicable settlement of the concerned dispute. However, the said writ petition was dismissed on 01.12.2016 (Annexure P-18). It came to the knowledge of the petitioner that respondents No.1 and 2 were in process of restoring the Concession Agreement dated 21.11.2011 (Annexure P-4). Hence, the instant writ petition by the petitioner.

3. We have heard learned counsel for the petitioner.

4. The scope of judicial review in the matters of award of contract 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.”

5. 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.

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 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.

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."

7. The terms and conditions contained in the notice inviting tender and award of contract have to be examined having regard to the fact situation obtaining in each case. No hard and fast rule can be laid down

therefor. In the present case, the decision has been taken by the respondents keeping in view the overall interest of the public. 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.

8. Herein, Clause 4.17(2) of the tender document dealing with the termination of the contract reads thus:-

“4.17 TERMINATION OF THE CONTRACT

1. The Government will have a right to cancel the contract if the successful bidder causes any material breach of any or all conditions or any material breach of the Contract. Material breach of contract includes, but is not limited to the following:

XXXXXXXXXXXXXXXXXXXXXXX

2. In the event of termination, for any reason, during the currency of contract, transport department shall impose penalty/reserves the right to ask to continue till alternative arrangements are made/and reserve right to enter into contract with any person/company as the case may be as deemed fit by the State Transport Commissioner, Punjab, Chandigarh. The successful bidder would handover reports and databases maintained with their structure to the department for continuity of operations. In no case such data/information maintained by the successful bidder should be exploited or sold to third party for any other gain.”

9. A perusal of the above Clause shows that in the event of termination of any contract, the Transport Department shall impose penalty/reserve the right to ask to continue till alternative arrangements are

made/reserve right to enter into contract with any person/company as the case may be as deemed fit by the State Transport Commissioner, Punjab.

10. In the present case, a notice inviting tender was given, inviting bids for selection of eligible manufacturer/vendor having type approval and requisite manufacturing capacity to produce, distribute and affix the HSRP in conformity with the specifications as mentioned in the Government notifications. On 21.11.2011, the petitioner and respondent No.3 along with its joint venture companies (respondents No.4 and 5), participated in the bidding process. Respondent No.3 was declared the lowest bidder and the concession agreement dated 21.11.2011 (Annexure P-4) was signed and executed between the concessionaires companies and respondent No.2. M/s Utsav Safety System (L2) was the 2nd lowest bidder and the petitioner-Company was the 3rd lowest bidder. On 08.05.2012, the Transport Department, Government of Bihar terminated the authorization agreement for supply and installments of HSRPs dated 12.04.2012 between the State of Bihar and respondent No.3. The said agreement was terminated on account of respondent No.3-Company's inaction and inordinate delay for implementation of the scheme. On 26.08.2014, the office of Transport Commissioner, Uttar Pradesh set aside the bid submitted by respondent No.3 for execution of HSRPs Scheme on account of fake income tax returns. Respondent No.3 was further declared ineligible to participate in any bid proceeding by any department of State of Uttar Pradesh for two years. Similar was the position with regard to respondent Nos. 4 and 5. All these companies were blacklisted for a minimum period of five years from participating in Government bid concerning HSRPs. The termination order (Annexure P-10) was challenged by the companies before this Court through CWP No.911 of 2015, which was dismissed on 09.07.2015 (Annexure P-

11). The Special Leave Petition filed against the said order before the Apex Court was also dismissed vide order dated 07.08.2015 (Annexure P-12), However, liberty was granted to challenge the impugned order before the competent Court insofar as blacklisting of the companies was concerned. On 26.08.2015, the order of the blacklisting was challenged before this Court through CWP No.17768 of 2015. This Court vide order dated 26.08.2015 (Annexure P-13), stayed the order of blacklisting and the matter is still pending for final adjudication. On 04.03.2015, the Tribunal was constituted by the Indian Council of Arbitration for settlement of dispute pertaining to the concession agreement dated 21.11.2011 (Annexure P-4). Respondent No.2 submitted a detailed application under Section 16 of the Arbitration and Conciliation Act, 1996 on 31.03.2016 which was dismissed vide the order of the even date by the Tribunal (Annexure P-14). The said order was challenged by the respondent-State before this Court through CWP No.9446 of 2016. Vide order dated 13.05.2016 (Annexure P-15), a direction was given to the State Transport Commissioner and the Chairman of Board of Directors of the Concessionaires to make efforts for amicable settlement and the proceedings before the Tribunal were stayed till further orders. On 18.05.2016, a meeting was held between respondent No.2 and the concessionaire companies, wherein request was made to the State authorities to restore the terminated concession agreement dated 21.11.2011. According to the petitioner, it has been held by the Apex Court that it is the statutory duty and responsibility of the State to take strict action against the defaulter companies. On 02.10.2016, an application was filed in CWP No.9446 of 2016 by the petitioner for being impleaded as a party but the same was dismissed by this Court vide order dated 06.10.2016 (Annexure P-

17). On 01.12.2016 (Annexure P-18), the said writ petition was also dismissed.

11. From the narration of the facts, we find that the issue regarding the enforceability of the agreement/contract is under consideration in the writ petitions and before the arbitral Tribunal as noticed hereinbefore. Therefore, the question of either awarding of contract to the petitioner or for directions to issue fresh tender to respondent No.1 is totally unwarranted and cannot be accepted. Learned counsel for the petitioner has not been able to produce any material on record to show that such a prayer can be acceded to under the circumstances. Further, it is entirely within the domain of the competent authority to award the contract on such terms and conditions as may be deemed reasonable and fair or to issue fresh tender. Consequently, finding no merit in the petition, the same is hereby dismissed.

(Ajay Kumar Mittal)
Judge

(Amit Rawal)
Judge

September 05, 2017
'gs'

Whether speaking/reasoned?
Whether reportable?

Yes
Yes