IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Writ Petition No.13918 of 2017
Date of Decision: July 25, 2017

Rajbir Singh

...Petitioner

Versus

Union of India & others

...Respondents

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

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Present: Mr.Arun Bansal, Advocate,
for the petitioner.

Mr.P.K.Khindria, Advocate,
for respondent Nos.2 & 3.

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AMIT RAWAL, J.

1. Petitioner, being resident of Village Dhatrah, Tehsil Safidon, District Jind, has invoked the extraordinary writ jurisdiction by approaching this Court under Articles 226/227 of the Constitution of India seeking the following relief:-

> "*Civil Writ Petition under Article 226/227 of the Constitution of India praying for issuance of writ of certiorari, mandamus or any other appropriate writ, order or direction by way of issuing*
>
> *Writ of mandamus directing the official respondents to allot the tender to petitioner and to permit him to operate and run Cafeteria, Advance Trauma Centre, PGIMER, Sector 12, Chandigarh in pursuance of tender notice opened on dated 22.12.2015 (Annexure P-1);*
>
> *Further a writ of mandamus staying the fresh tender*

process for 23.06.2017 (Annexure P-12) during the pendency of the writ petition qua Cafeteria, Advance Trauma Centre, PGIMER, Sector 12, Chandigarh, and not to allow/permit any body else or any other person to open/operate from said place in any way;

And or any other appropriate writ, order or direction, which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case may kindly be issued."

2. Mr.Arun Bansal, learned counsel representing the petitioner, by referring to instructions/guidelines (Annexure P-1) submitted that the respondents came out with a notice inviting sealed tenders for licensing out Cafeteria, Advance Trauma Centre, PGIMER, Sector 12, Chandigarh fixing the time for submissions of the tenders on or before 22.12.2015 by 11.00 AM, to be opened at 12.00 Noon on the same very date. The tender form contained copy of the instructions/guidelines, the terms and conditions of licensing and various other documents which were required to be submitted alongwith Earnest Money Deposit (EMD). The technical bid offer was to check the eligibility of the tenderer and willing to pay lease money per month.

3. He further submitted that the petitioner, being fully eligible, submitted the tender complete in all respects along with the requisite EMD amount of Rs.1.00 lac vide FDR before 11.00 AM and was found to be second highest bidder at Rs.3,37,000/-, whereas the highest bidder was one Ram Saroop at Rs.5.00 lacs. Resultantly, respondents issued letter to the highest bidder, but he backed out from taking the premises/Cafeteria on lease and the petitioner, being second highest bidder, was/is eligible for allotment, in the alternative for the refund of his earnest money. The respondents again issued a letter to the highest bidder, however, he did not

respond. Thereafter, the highest bidder approached this Court by filing Civil Writ Petition No.1907 of 2017, which was disposed of vide order dated 1.3.2017 on the premise that the petitioner therein had already got the relief as sought for. However, during the interregnum, the petitioner vide letter dated 7.1.2017 and another letter dated 6.2.2017 (Annexure P-4), requested the respondents to refund his earnest money as more than a year had elapsed. The respondents responded to the aforementioned letter vide their letter dated 7.4.2017 (Annexure P-5) offering the aforementioned Cafeteria premises to him being the second highest bidder, but with a rider to accept the same bid as offered by the highest bidder, i.e., Rs.5.00 lacs per month. In this process, the parties to the lis exchanged the correspondences. The petitioner stood by on the bid price of Rs.3,37,000/- as offered by him owing to the fact that it was not viable to run the aforementioned Cafeteria at Rs.5.00 lacs per month.

4. He further submitted that the respondents neither accepted nor rejected the offer of the petitioner. Similar letter dated 1.5.2017 was also issued to the third highest bidder, who had given the bid at Rs.3,35,000/-. Vide letter dated 12.5.2017 (Annexure P-9), the petitioner again requested the respondents to allow him to run the Cafeteria being the second highest bidder, but no response was received. By referring the aforementioned fact, he drew the attention of the Court to Clause 9 of the terms and conditions to buttress his argument that in case the highest bidder backs out or does not accept the bid, he was required to be debarred for a period of two years and earnest money forfeited. The respondents are delaying the process in allotment of tender. Once the highest bidder failed to accept the bid, therefore, the petitioner sought the indulgence of this Court by filing Civil

Writ Petition No.13196 of 2017, which was withdrawn vide order dated 2.6.2017 to pursue the representation dated 12.5.2017. However, on 23.6.2017 (Annexure P-12), the respondents have issued the fresh tender process for leasing out the aforementioned Cafeteria.

5. He further submitted that the practice of the respondents in inviting the fresh bidders and not offering the allotment to the second highest bid lacks transparency, much less objectivity on the part of the respondents in the E-tender process as the petitioner has come to know that the respondents, in order to benefit the present occupant and the persons of their choice, are not allotting the premises to the petitioner being the second highest bidder after H-1 backed out and even to the third highest bidder. Respondents have not taken any decision on the representation and in this process are causing loss to the petitioner and other tenderers in lacs of rupees and as per the information (Annexure P-13), sought under the Right to Information Act , the petitioner was apprised that the licence of the earlier licensee has been extended till the occupation by the new allottee. Such action of the respondents is not only arbitrary but violative of provisions of Article 14 of the Constitution and, thus, urged this Court for allowing the writ petition.

6. Mr.P.K.Khindria Advocate has put in appearance on behalf of respondent Nos.2 and 3 and filed his Vakalatnama. He submitted that no doubt the fresh tender process has been issued, but in pursuance to the action of the respondents in calling the fresh bidders, the petitioner is at liberty to participate in the fresh tender as the highest bidder backed out and the petitioner had refused to carry on the work at the offered highest bid and, thus, urged this Court for dismissal of the writ petition.

7. We have heard the learned counsel for the parties, appraised the paper book and having given our considerable thought to the arguments of Sarv Shri Bansal and Khindria, are of the view that the writ petition is liable to be dismissed

8. The scope of judicial review in the matters of award of contract was examined by the Apex Court in **<u>BSN Joshi Versus Nair Coal Services Ltd.,</u> 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 therefore, 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 **<u>Jagdish Mandal Versus State of Orissa and others,</u> 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 Versus 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.

11. From the above, it emerges that in a commercial tender, the petitioner cannot dictate the terms and conditions and get the tender of his own choice. Clause 9 of the terms and conditions of notice inviting tender reads as under:-

> "*The licence will be given for two years which is awardable in order of highest bid and shall be governed by the provisions of the Public Premises (Eviction/Regulations) Act and rules framed there under from time to time for the purpose of any action in case of default. In case the first highest bidder backs out and fails to take possession of the premises he/she will be debarred for two years and the earnest money shall be forfeited and the next two tenderer(s) in order of licence fee rates/bids may be considered for/offer the license as per direction of the Authority. If the next two tenderer(s) also back (s) out and fail(s) to take possession of the premises, their earnest money shall also be forfeited, debarred for next two years, the tender may be cancelled and the fresh tender will be floated.*"

12. The petitioner was the second highest bidder and after the

highest bidder Ram Saroop, who had given the bid of Rs.5.00 lacs, had backed out, the offer was given to the petitioner to carry on the work of Cafeteria at the offer price of Rs.5.00 lacs. The petitioner had refused to accept the said offer and the respondents, who were left with no alternative, gave the offer to the third highest bidder. Having not achieved the purpose, the respondents called for new tender, which was within their domain. The action of the respondents in inviting fresh tender is in consonance with Clause 9 noted above. Even the issue relating to forfeiture of earnest money and blacklisting of the highest bidder cannot be considered in the absence of his impleadment as necessary and proper party in the writ petition.

13. For the reasons aforementioned, we do not find any illegality in not awarding the contract in favour of the petitioner. No ground for interference is made out under Articles 226/227 of the Constitution.

14. Resultantly, finding no merit in the writ petition, the same is dismissed.

(AJAY KUMAR MITTAL)
JUDGE

(AMIT RAWAL)
JUDGE

July 25, 2017
ramesh

Whether speaking/reasoned **Yes/No**

Whether Reportable: **Yes/No**