

CWP No. 13995 of 2017

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

**CWP No.13995 of 2017
Date of decision: 03.08.2017**

Indus Towers Limited

.....Petitioner

Vs.

Union of India and others

.....Respondents

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

Present: Mr. Vishal Gupta, Advocate for the petitioner.
Mr. B.K.Mehta, Advocate for the respondents.

Ajay Kumar Mittal,J.

1. Through the instant petition under Articles 226/227 of the Constitution of India, the petitioner prays for quashing the minutes of the meeting dated 14.3.2017, Annexure P.5 held in the office of Cantonment Board, Ferozepur, whereby the tenders as published in the newspaper on 22.9.2016 for parking of communication towers at 26 sites through e-tender vide tender notice dated 20.9.2016 and corrigendums dated 19.10.2016 and 21.10.2016, were cancelled and the bid by the petitioner had been rejected and tenders have been ordered to be invited afresh, being illegal, unjust and arbitrary. Further prayer has been made for a direction that the respondents be restrained from inviting fresh tenders.

2. A few facts relevant for the decision of the controversy

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involved as narrated in the petition may be noticed. The petitioner company is engaged in the business of establishment, maintenance and provision of telecommunication infrastructure including installation and operation of cellular towers for its own purposes and on behalf of its joint venture companies to enable the cellular mobile operators to provide the mobile services. The respondent Board in pursuance to the policy for setting up of Cell towers on wheels as interim arrangement to extend communication network in the military station/cantonments published e-tender dated 20.9.2016 in the newspaper for parking of communication towers at 26 sites. As only one bid was received, re-tendering was ordered to be done. The respondent Board got published advertisement for re-tendering on 16.11.2016 and 17.11.2016. The petitioner company submitted the bid in respect of all the 26 sites, security amount and the necessary documents. The respondent Board received three bids in total including the bid by the petitioner company. The petitioner had given bid in respect of all the 26 sites whereas the other two companies did not submit bid in respect of all the sites. The bid of the petitioner was found to be the highest and the same was accepted by the Board. Instead of accepting the bid of the petitioner, the respondent Board in its meeting on 14.3.2017 took a decision for inviting fresh tender. According to the petitioner, no communication regarding fresh tender was sent to it. The petitioner came to know in the first week of June 2017 that the tender had been ordered to be reissued. Hence the instant writ petition by the petitioner company with the prayer as mentioned above.

3. A written statement has been filed by respondent No.3 wherein it has been inter alia stated that the instant petition is not maintainable in view of clause 18 of terms and conditions of the tender notice which provides for resolution of all disputes by way of arbitration. It has been

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further stated that although it may not be mandatory to have a representative of Director General in the meeting of the Board while deciding the question of allowing parking of communication towers, yet in view of strategic location of Ferozpeur Cantonment which is a few kms from India Pakistan international border, it would be a measure of abundant caution for the security and safety of the country to ask for technical input from Director General Signals. On these premises, prayer for dismissal of the petition has been made.

4. We have heard learned counsel for the parties.

5. It is well settled that in contractual matters, interference by courts is warranted only when the administrative action is illegal, arbitrary or discriminatory. In the present case, although the bid of the petitioner was initially accepted by the respondents but since the communication towers were to be installed in military cantonment area, for security reasons, after taking opinion from Director General Signals, fresh tenders were ordered to be invited.

6. The scope of judicial review in the matters of award of contracts was examined by the Apex Court in ***BSN Joshi Vs. Nair Coal Services Limited*** 2006(11) SCALE 526, wherein it was held that the employer is the best judge to award contract and the court's interference in such matters 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."

The said view was reiterated by the Supreme Court in ***Jagdish Mandal Vs. State of Orissa and others*** (2007) 14 SCC 517 wherein it was held that the contract is a commercial transaction and the court's indulgence under Article 226 of the Constitution of India in such matter should be minimal. Principles of equity and natural justice stay at a distance. 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.

7. 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 for formulating conditions of a tender document and awarding a contract, 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 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 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.”

(emphasis supplied)

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. Learned counsel for the petitioner has not been able to produce any

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material on record to show that the impugned action taken by the respondents is arbitrary, illegal or discriminatory or to controvert the applicability of the above decisions to the facts of the present case. The respondents were the best judge to decide about the issuance of fresh tender particularly due to security reasons as the Communication towers were to be installed in the military Cantonment area. Even otherwise, it was not shown that the action of the respondents in inviting fresh tender was actuated with malafide or was capricious in any manner. Consequently, finding no merit in the petition, the same is hereby dismissed.

(Ajay Kumar Mittal)
Judge

August 03, 2017
'gs'

(Amit Rawal)
Judge

Whether speaking/reasoned

Yes

Whether reportable

Yes