IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.15394 of 2017
Date of decision: 20.7.2017

M/s Rulia Mal Amar Chand

……Petitioner

Vs.

Union of India and others

…..Respondents

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

Present: Mr. Ashwani Kumar Chopra, Senior Advocate with
Mr. Akshit Chaudhary, Advocate for the petitioner.

Ajay Kumar Mittal,J.

1. The petitioner through the instant petition under Articles 226/227 of the Constitution of India prays for issuance of a writ in the nature of certiorari for quashing/striking down Clause 1(vii) of letter dated 20.6.2017, Annexure P.2 issued by respondent No.2, whereby not only the right of the petitioner and other retail outlet dealers to participate even in the tender process is sought to be taken away/infringed but L-1 rates that would be arrived at during the finalization of the road transportation tender 2017-22 for the location Sangrur IRD for the general transporters category, are sought to be made applicable for retail outlet dealers/direct Consumers through the expression of interest process by even taking away the right to question the said L1 rates in the general transport tender. Direction has also been sought to the respondents to provide same rates/price band, if any, for transportation of the petrol/diesel to the retail

outlet dealers offering their own transport tanks which is being provided by the other major oil corporations.

2. A few facts relevant for the decision of the controversy involved as narrated in the petition may be noticed. The petitioner is a partnership concern of Mr. Vikram Dutt Kapoor and Mr. Rajiv Kapoor. Respondent No.2 is a Government of India Enterprise and carries on the business of refining and sale of petroleum products and more particularly petrol and diesel. The petitioner is a retail outlet dealer under respondent No.2. It deals with retail sale of petroleum products at Raikot, District Ludhiana. On 5.6.2012, respondent No.2 invited a tender for transportation of bulk white oil petroleum products by road, Ex Sangrur Depot for award of contract for road transportation for a period of five years w.e.f 1.7.2012. For the first time, in the said tender, a price band was provided according to which the minimum and maximum rate that could be quoted in the tender was prescribed. Prior to the year 2012, there was as such no price band ever fixed by respondent No.2 for the transportation of petroleum products from major depots to the locations of retail outlets. On January 15, 2015, the petitioner entered into a memorandum of agreement (MOA) with respondent No.2. Respondent No.2 appointed the petitioner as its dealer for the retail sale or supply of petrol/diesel/motor ils/grease and such other products as mentioned in the said MOA. There are other two corporations namely Indian Oil Corporation Limited and Bharat Petroleum Corporation Limited who are also Government of India Enterprises like the petitioner. The sale or supply of petroleum products in the entire country is governed by respondent No.2 and aforementioned two corporations. The pricing structures, dealer margins and dealer appointments are all controlled by

the Central Government. On 25.3.2015, Indian Oil Corporation after following due tender process for awarding contract of transportation of petroleum products issued letter of intent for transportation of MS/HSD Ex Sangrur Terminal. The tender rates fixed under the aforesaid tender by respondent No.2 were to continue for five years which period had expired. Respondent No.2 for giving contract for transportation for further period issued separate but identical letters to Retail outlet dealers. The petitioner has been issued the said letter to submit the expression of interest as per the draft provided alongwith the letter. The petitioner received the said letter on 6.7.2017. Under clause 2, under the heading "general terms and conditions", it has been laid down that expression of interest in duly sealed condition alongwith the earnest money deposit shall be submitted by due date at the Regional office of respondent No.2. The date had been extended to July 17, 2017. The petitioner received the communication dated 20.6.2017 on 6.7.2017. The petitioner challenges the act of respondent No.2 while incorporating clause 1(vii) in the communication dated 20.6.2017 vide which the right of the petitioner and other retail outlet dealers to participate in the tender process is sought to be taken away/infringed and L1 rates that would be arrived at during the finalization of the road transportation tender, 2017-22 for the location Sangrur IRD for the general transporters category are sought to be made applicable for retail outlet dealers/direct consumers/SKO resellers offering transportation tanks through the expression of interest process and even the right to question the said L1 rates in the general transport tender is also sought to be taken away. The petitioner asserts that clause 1(vii) in the Expression of interest letter is arbitrary, whimsical, illegal, unconstitutional and opposed to the principles of natural justice, equity and fair play and respondent No.2 is liable to be directed to provide same rates/price band, if any, for transportation of the petrol/diesel to the retail outlet dealers offering their own transport tanks which is being provided by the other major oil corporations. Hence the instant writ petition by the petitioner.

3. Learned counsel for the petitioner submitted that the action of respondent No.2 in not letting the petitioner and other retail outlet dealers to participate in the bidding process is hit by Article 14 as well as 19(1)(g) of the Constitution of India. The very purpose and object sought to be achieved has been frustrated by incorporation of the impugned clause. The impugned action of respondent No.2 is hit by the principle of promissory estoppel as well as by the principle of legitimate expectation. Respondent No.2 having made the petitioner to own and possess the transport tanker vehicle to uplift the petroleum products for which it has entered into Memorandum of association with respondent No.2, it was made to believe that it will be able to take full advantage and benefits attached to the same. Thus, respondent No.2 is estopped to incorporate the provision in clause 1(vii). Respondent No.2 acted in arbitrary manner in ignoring the mandatory conditions and procedure and favouring some bidders to the exclusion of the petitioner.

4. We have heard learned counsel for the petitioner.

5. The scope of judicial review in the matters of award of contracts was examined by the Apex Court in ***B.S.N. Joshi & Sons Limited vs. Nair Coal Services Limited and others,*** (2006) 11 SCC 548, it was held by the Apex court that the legal principles operating in this field are no longer res integra but their application would depend upon facts and circumstances of each case. Tender conditions may have to be

construed differently having regard to the fact situation operating in each case. No hard and fast rule can be laid down therefore. It was further 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. The relevant observations recorded by the Apex Court read thus:-

> "66.We are also not shutting our eyes towards the new principles of judicial review which are being developed, but the law as it stands now having regard to the principles laid down in the aforementioned decisions may be summarized as under:-
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> i) if there are essential conditions, the same must be adhered to;
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> ii) if there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;
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> iii) if, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing.
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> iv) The parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance with another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly, illegal and without jurisdiction.
>
> v) When a decision is taken by the appropriate authority upon the consideration of the tender document

submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with.

vi) The contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority.

vii) Where a decision has been taken purely on public interest, the court ordinarily should exercise judicial restraint.

67. Law operating in the field is no longer res integra. The application of law, however, would depend upon the facts and circumstances of each case. It is not in dispute before us that there are only a few concerns in India who can handle such a large quantity of coal. Transportation of coal from various collieries to the thermal power stations is essential. For the said purpose, apart from transportation job, the contractor is required to see that coal of appropriate grade is supplied. The appellant herein is in business for the last 52 years. It had been taking part in contracts involving similar jobs in various parts of India. It had all along been quoting a low rate. According to it, despite the same it has been generating profits.

68. The employer concededly is not bound to accept a bid only because it is the lowest. It must take into consideration not only the viability but also the fact that the contractor would be able to discharge its contractual obligations. It must not forget the ground realities. MAHAGENCO considered all aspects of the matter while accepting the appellant's offer. In its counter affidavit, it categorically stated that the appellant would be able to perform the contractual undertaking even at such a low rate."

6. In ***Jagdish Mandal vs. State of Orissa and others,*** (2007) 14 SCC 517, the Supreme Court held that while invoking power of judicial review in matters as to tenders or award of contracts, certain special features should be borne in mind that evaluation of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters. If the decision relating to award of contract is bonafide and is in public interest, courts will not interfere by exercising power of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer is made out. 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 law could have arrived at it or it affected the public interest. The relevant observations recorded by the Supreme Court read thus:-

> "22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. Its purpose is to check whether choice or decision is made lawfully and not to check whether choice or decision is sound. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A 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 relating to award of contract is bonafide 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 tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self and persuade courts to interfere by exercising power of judicial review should be resisted. Such interferences, ether interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. 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 malafide 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."

ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

7. The Apex Court in ***Maa Binda Express Carrier and another v. North East Frontier Railway and others,*** (2014) 3 SCC 760 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 Mandal v. State of Orissa and Ors . (2007) 14 SCC 517*** besides several other decisions to which we need not refer.
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> 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)
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> "19. From the above decisions, the following principles emerge:
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> (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;
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> (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."

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."

8. In the present case, learned counsel for the petitioner has primarily laid challenge to condition 1(vii) incorporated in the tender document on various grounds as noticed in para 3 above. It was within the domain of respondent No.2 to prescribe the conditions enumerated thereunder. Learned counsel for the petitioner has not been able to substantiate that the case is covered by any of the exceptions in the aforesaid decisions. In such circumstances, no fault can be found with the tender document warranting interference by this Court. Consequently, finding no merit in the petition, the same is hereby dismissed.

(Ajay Kumar Mittal)
Judge

July 21, 2017 **(Amit Rawal)**
'gs' **Judge**

Whether speaking/reasoned **Yes**
Whether reportable **Yes**