

Gurbax Singh
2017.08.29 14:39

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

**CWP No. 17226 of 2016
Date of decision: 08-08-2017**

Futura Sugarcane Pvt. Limited

.....Petitioner

Vs.

State of Haryana and others

.....Respondents

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

Present: Mr. Sumeet Goyal, Advocate with Ms. Manju Goyal,
Advocate, for the petitioner.

Ajay Kumar Mittal,J.

1. Prayer in this petition under Articles 226/227 of the Constitution of India is for quashing the tender condition incorporated in clause 4.2 (printed as 6.2) in Section IV: 'Eligibility criteria of tender document' dated 5.7.2017, Annexure P.3 as it requires US-FDA certificate for sutures items and mesh. Further direction has been sought to the respondents not to disqualify the bid of the petitioner in pursuance to the above mentioned condition in the tender.

2. A few facts relevant for the decision of the controversy involved as narrated in the petition may be noticed. The petitioner is a reputed company having vast experience in manufacturing, distributing, supplying etc. of various medicinal and surgical products. It is in the business of sutures and mesh in India. It is supplying medicines, medicinal and surgical products to various Haryana Govt. departments

and other States like Punjab Health System Corporation, Rajasthan Medical Services Corporation etc. It is aggrieved by the condition in clause 4.2 in the tender notice dated 5.7.2017, Annexure P.3 which restricts its participation in the tender process by excluding it from the purview of consideration in eligibility criteria for want of US-FDA certificate. The petitioner filed representation dated 10.7.2017, Annexure P.4 against the above said condition to respondent No.3 with a prayer to remove the same from the tender document. Having received no response, the petitioner has approached this Court through the instant writ petition.

3. We have heard learned counsel for the petitioner.

4. Before proceeding further, it would be advantageous to refer to the scope of judicial review in the tender matters at the first instance.

5. The scope of judicial review in the matters of award of contract and laying down conditions in the tender document 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.”

6. 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.

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 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.”

8. Having scrutinized various legal pronouncements of the Apex Court laying down parameters for judicial intervention, we reproduce the impugned condition in Clause 4.2 (typed as 6.2) in the notice inviting tender which is the bone of contention in this petition. It reads thus:-

“GMP (Good Manufacturing Practice)

The manufacturer should have a valid WHO-GMP inspection certificate in line with the WHO certification scheme and certificate of Pharmaceutical Products (COPP) on Pharmaceuticals being quoted from the appropriate Regulatory Authority (RA). Bidder should submit a valid (at the time of bid submission date) product wise Certificate of WHO-GMP and COPP issued by Regulatory Authority of State/CDSCO) for each items offers. For sutures items and mesh US-FDA certificate is required.”

9. The cardinal issue that arises for consideration in this petition is whether the condition as quoted above inserted in the impugned notice is arbitrary and discriminatory and, therefore, liable to be set aside.

10. The terms and conditions contained in the notice inviting tender have to be construed 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. Learned counsel for the petitioner has not been able to produce any material on record to show that the impugned condition in the notice is arbitrary, malafide or irrational except to urge that incorporation of the said condition would oust the petitioner or Indian Companies from submitting tender or that it would be difficult to get US-FDA certificate whereas local drug authorities are available. The learned counsel for the petitioner could not demonstrate that the aforesaid condition imposed was a result of malafide intention of the respondents or to benefit any party. In the absence of the same, the said condition could not be faulted.

11. In all fairness to learned counsel for the petitioner, advertent to the judgments relied upon by him, it may be noticed that in ***Michigan Rubber (India) Limited vs. State of Karnataka and others***, (2012) 8 SCC 216, it was held by the Apex Court that the Government and their undertakings must have a free hand in setting terms of the tender and only if they are arbitrary, discriminatory, malafide or actuated by bias, would the courts interfere. In ***Siemens Aktiengesellschaft and Siemens Limited vs. Delhi Metro Rail Corporation Limited and others***,

(2014) 11 SCC 288, it was held by the Apex Court that contracts are amenable to judicial review only in order to prevent arbitrariness and favouritism and protect the financial interest of State and the public interest. The scope of such review is confined to the issue as to whether there was any illegality, irrationality or procedural impropriety committed by the decision making authority. The courts cannot sit in appeal over the soundness of the decision made by the competent authority. Similar was the position in *M/s Kasturi Lal Lakshmi Reddy vs. state of Jammu and Kashmir and another*, (1980) 4 SCC 1 and *Ramana Dayaram Shetty vs. International Airport Authority of India and others*, (1979) 3 SCC 489. The propositions of law enunciated in these decisions cannot be questioned. However, each case has to be decided on its own facts. The factual matrix in the present case being different, the petitioner cannot derive any advantage from the said decisions.

12. In view of the above, no interference is called for with the impugned condition in the tender document, Annexure P.3 in writ jurisdiction under Articles 226/227 of the Constitution of India. Consequently, finding no merit in the petition, the same is hereby dismissed.

(Ajay Kumar Mittal)
Judge

August 08, 2017
‘gs’

(Amit Rawal)
Judge

Whether speaking/reasoned
Whether reportable

Yes
Yes