

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

**CWP No. 17890 of 2017  
Date of decision: 07.9.2017**

**Yummy Bites, Booth No. 1031, Gole Market, Talwara Township, Tehsil Mukerian, District Hoshiarpur through its Proprietor, Mr. Pawan Kumar.**

**.....Petitioner**

**Vs.**

**State of Punjab and another**

**.....Respondents**

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

Present: Mr. Harminder Singh, Advocate for the petitioner

Mr. I.P.S. Doabia, Additional AG Punjab

Mr. Annupam Singla, Advocate for the respondent No.2

**Ajay Kumar Mittal,J.**

1. This order shall dispose of CWP Nos. 17890, 17892 and 17894 of 2017 as learned counsel for the parties are agreed that the issue involved in all these appeals is identical. However, the facts are being extracted from CWP No.17890 of 2017.

2. Prayer in CWP No.17890 of 2017 filed under Articles 226 and 227 of the Constitution of India is for quashing Clause 'G' of the eligibility conditions prescribed in the bid document Annexure P-11 to award the contract for hostel mess and facility shop for meritorious school for Gurdaspur which prescribes that the contractor must have average annual turnover of ₹ 1.50 crores in similar type of work during the last three financial years, as the said condition is unreasonable, arbitrary, irrational,

and eliminates fair competition, having no nexus with the object to be achieved. Further, direction has been sought to the respondents to invite fresh tender on the basis of reasonable average annual turnover of the contractor for the last three years.

3. A few facts relevant for the decision of the controversy involved as narrated in the petition may be noticed. The society for promotion of quality education for poor and meritorious students of Punjab-respondent No.2 has been set up by the Government of Punjab to run the meritorious residential schools set up by it. The society comprises of Chief Minister, Education Minister, Chief Secretary, Principal Secretary, Department of School Education and Deputy Commissioner of the concerned District. In the meritorious residential schools, poor students who have passed the matriculation examination from Government Schools in the State of Punjab and have scored more than 80 per cent marks are admitted to the 10+1 and 10+2 classes in the non-medical, medical and commerce streams. The students are provided free education, lodging/boarding, books, stationary and uniforms. On 4.08.2014, six meritorious schools, started functioning in the State of Punjab which are situated at Amritsar, Bathinda, Jalandhar, Ludhiana, Patiala and Mohali. Each of these six schools has about 900 students. All the meritorious schools are 100 per cent residential and affiliated to the Punjab School Education Board and 70 per cent of students are girls. In December, 2015, the society invited separate e-tenders for seven existing meritorious schools i.e. Ludhiana, Amritsar, Jalandhar, Patiala, Bathinda, Mohali and Talwara for a period of two years, through the Deputy Commissioner of concerned District. However, in Clause 'G' relating to the eligibility of the contractor, different annual turnover during the last financial three years was prescribed for each school. The incumbent mess

contractors of the aforesaid seven meritorious schools challenged Clause 'G' of the tender document, relating to the requirement of turnover in the last three years by filing separate writ petitions before this Court i.e. CWP No.8 of 2016 and other connected writ petitions. On January 5, 2016, the aforesaid writ petition came up for hearing before this court. Notice was issued and meanwhile, it was ordered that till further orders, the work order shall not be issued in favour of any party. Liberty was given to the respondents to adopt adequate measures for continuing to run the mess in the meantime. On 12.1.2016, it was recorded that in the event of respondents permitting the petitioner to continue till the disposal of the petition, he undertakes to make good any loss that may be caused to the respondents in the meantime. Thereafter, the respondents allowed the incumbent mess contractors to continue running the hostel mess. The respondents contested the writ petitions by submitting that the society had informed the Deputy Commissioner of each district vide letter dated 2.11.2015 to fix the turnover as per the CVC guidelines dated 17.12.2002 and the turnover shall not be less than anticipated bill for three months. By applying the aforesaid CVC guidelines, the respondents justified the prescription of turnover for the meritorious school Jalandhar as ₹ 1.50 crores. Vide detailed judgment dated 2.6.2016, this Court disposed of all the writ petitions by holding that the prescription of different turnover for different schools was an arbitrary and irrational act on the part of the respondents and showed a flaw in the decision making process. The Court further held that there was no rationale while working out and finally stipulating the required turnover. In such circumstances, this court quashed and set aside Clause 'G' of the bid document and directed the respondents to issue a fresh tender and if they wished to stipulate a required turnover, they must do so in a rationale and

fair manner. It was further directed that the interim orders shall continue till the appointment of a regular contractor. On the opening of the meritorious school, Gurdaspur in August 2016, the Principal of the school invited quotations for running the Hostel Mess. As the rate of ₹ 140/- per day per student quoted by the petitioner was the lowest, the petitioner was awarded the mess contract for the meritorious school, Gurdaspur. At present, there are about 200 students in the meritorious school, Gurdaspur. The petitioner is running the hostel mess of meritorious school Gurdaspur till date for which it has invested ₹ 5 lacs to buy the utensils, defreezer etc. Vide public notice dated 28.7.2017, the society invited tender for all ten meritorious schools in Punjab for the period from 1.10.2017 to 30.9.2019. In pursuance to the public notice, the society issued the bid document for award of contract for running the hostel mess of meritorious school, Gurdaspur. As per clause G of the bid document, it has been stated that the contractor must have average annual turnover of ₹ 1.50 crores in the similar type of work during the last three financial years. According to the petitioner, the society has wrongly fixed the condition of turnover as ₹ 1.50 crores for school at Gurdaspur whereas in other five schools where the strength of students is 900, the annual turnover has also been fixed as ₹ 1.50 crores and for school at Talwara, for the strength of 200 students, the turnover has been fixed as ₹ 30 lacs. As per CVC guidelines, the prequalification is a process to select competent contractors having technical and financial capacity commensurate with the requirements of a particular procurement. The petitioner asserts that the action of the respondents to prescribe the unreasonable condition of very high turnover is violative of the right to equality, livelihood and life as guaranteed under Articles 14, 19 and 21 of the Constitution of India. Hence the instant petition by the petitioners.

4. In the written statement filed on behalf of respondent No.2, it has been inter alia stated that at present the contractors are running the hostel mess and canteen at the rate of ₹ 150/- approximately per student/per day and in case it is expected that the lowest bidder will submit his bid at the rate of ₹ 150/- per student per day, then the total estimated cost of the project will come to ₹ 9,85,55,000/- approximately for 900 students, 30% of which will come to ₹ 2,95,65,000/- which could be fixed as annual turnover as per CVC guidelines. For 500 students, the total turnover would have come to ₹ 1.65 crores. Hence the annual turnover of ₹ 1.50 crores has been rightly prescribed in the tender document by the committee. Further, affidavit of Maj. Gen. K.A.S.Bhullar (Retd.), Project Director, Society for promotion of Quality Education for Poor and Meritorious Students of Punjab School Education Board dated 4.9.2017 has been filed justifying the fixation of the average annual turnover for the schools at Sangrur, Ferozepur and Gurdaspur. On these premises, prayer for dismissal of the petition has been made.

5. We have heard the learned counsel for the parties.

6. Clause 'G' of the eligibility conditions prescribed in the bid document Annexure P.11 reads as under:-

“G. The contractor must have an average annual turnover of Rs.1.50 crores in similar type of work during the last three years, i.e. Financial Year 2014-15, 2015-16, 2016-17 or Financial Year 2015-16, 2016-17, 2017-18. Certified copies of the audited P&L statement and balance sheets by practicing CA for the last three years as above must be uploaded. The certificate shall clearly bear the name of the CA/Firm, postal address, telephone number, email and practicing licence No./registration no.”

7. A perusal of the above clause shows that a contractor is required to have an average annual turnover of ₹ 1.50 crores in similar type of work during the last three financial years.

8. Admittedly, in the present case, the petitioner is running the Mess contract at the Meritorious School, Gurdaspur since October 2016. On July 28, 2017, respondent No.2 invited separate tender for running the hostel mess at ten meritorious schools in the State of Punjab for two years at Amritsar, Bathinda, Ferozepur, Gurdaspur, Jalandhar, Ludhiana, Mohali, Patiala and Sangrur in 10+1 and at Talwara as well. The annual turnover of the prospective bidder prescribed in the last three years has been:-

| Location  | Average Annual turnover Required in last three years (Rs.) | EMD Required (Rs.) | Approximate Number of students) |
|-----------|------------------------------------------------------------|--------------------|---------------------------------|
| Jalandhar | 1.5 crore                                                  | 15.0 lacs          | 900                             |
| Mohali    | 1.5 crore                                                  | 15.0 lacs          | 900                             |
| Ludhiana  | 1.5 crore                                                  | 15.0 lacs          | 900                             |
| Amritsar  | 1.5 crore                                                  | 15.0 lacs          | 900                             |
| Patiala   | 1.5 crore                                                  | 15.0 lacs          | 900                             |
| Bhatinda  | 1.5 crore                                                  | 15.0 lacs          | 900                             |
| Sangrur   | 1.5 crore                                                  | 15.0 lacs          | 400                             |
| Ferozepur | 1.5 crore                                                  | 15.0 lacs          | 300                             |
| Gurdaspur | 1.5 crore                                                  | 15.0 lacs          | 200                             |
| Talwara   | 30 lac                                                     | 3.0 lacs           | 200                             |

The three writ petitions No.17890, 17892 and 17894 of 2017 relate to meritorious schools at Gurdaspur, Ferozepur and Sangrur where the

requirement of turnover in the last years has been prescribed as ₹ 1.50 crore per annum.

9. The petitioner placed reliance upon the judgment of this Court in *M/s Tarlok Kumar Mess Contractor vs. State of Punjab and others*, CWP No.8 of 2016, decided on 2.6.2016, to urge that the fixing of average turnover of last three years at 1.5 crores was arbitrary, irrational and unreasonable. We do not find any weight in the said contention. Earlier, in December 2015, State of Punjab had invited tenders on behalf of respondent No.2 society. However, under Clause 'G' of the tender documents floated by the State of Punjab, different turnover was fixed for different schools. This was challenged by various contractors before this Court vide CWP No.8 of 2016, which was allowed on 2.6.2016. The required turnover stipulated in clause 'G' of each of these contracts was as follows:-

| "Location | Annual<br>Turnover<br>Required (Rs.) |
|-----------|--------------------------------------|
| Talwara   | 1.0 crore                            |
| Jalandhar | 1.5 crore                            |
| Ludhiana  | 2.0 crore                            |
| Amritsar  | 2.5 crore                            |
| Patiala   | 2.8 crore                            |
| Bhatinda  | 4.5 crore                            |
| Mohali    | 1.60 crore                           |

In *M/s Tarlok Kumar Mess Contractor's* case (supra), the average rate per student per day for the same meal was about ₹ 150/- and the number of students in each school was 900. The annual turnover was projected at about

₹ 5.475 crores. Despite that, the eligibility conditions contained a turnover ranging from ₹ 1.50 crores to ₹ 4.50 crores. It was concluded by the Division Bench that there was no rationale while working out and finally stipulating the required varying turnover. Thus, clause 'G' in that case was quashed. However, liberty was granted to the respondents to stipulate a required turnover, if they wish, but it was to be done in a rational and fair manner.

10. Now the average annual turnover at ₹ 1.50 crores has been fixed for all the schools including at Gurdaspur, Ferozepur and Sangrur where the total sanctioned strength of 1000 students is there except at Talwara where the average sanctioned strength of the students is 200 and the annual turnover of ₹ 30 lacs has been prescribed by the committee. As per stand taken by respondent No.2 in the written statement, if ₹ 150/- is taken per student per day for 900 students, the estimated cost of the project will come to ₹ 9,85,55,000/- (Base rate of ₹ 150/- per student/per day x 900 students x 730 days), 30% of which will be ₹ 2,95,65,000/- which could be fixed as annual turnover as per CVC guidelines. For 500 students, it would come to ₹ 1.65 crores. Thus, in the present case, fixing of annual turnover of ₹ 1.50 crores by the committee in the tender document cannot be faulted. For Talwara school, for 200 students, the total turnover would come to ₹ 2,19,00,000/- 30% of which would come to ₹ 65,70,000/-. Thus, the total turnover in the said case at ₹ 30 lacs has been rightly fixed.

11. In the additional affidavit of Maj. Gen. K.A.S. Bhullar (Retd.), Project Director dated 04.09.2017, it has been stated that at Sangrur, 573 students; Ferozepur 317 students and at Gurdaspur 216 students have already been given admissions. Further, since in other six schools,

respondent No.2 has already admitted 800-900 students, therefore, it has been decided to invite options from the students of the said schools to change their school to Ferozepur or Gurdaspur. In case, students opt for change of their school, the number of students at Ferozepur and Gurdaspur is likely to increase. Moreover, the tenders have been invited for two years and in such circumstances, it cannot be presumed at this stage that how many students would get admission in the schools in the next year as contract is for two years i.e. 2017-18 and 2018-19.

12. Nothing has been shown by the learned counsel for the petitioner that the condition imposed is arbitrary, unreasonable or unfair in any manner. The respondent society is fixing the annual turnover on the basis of the sanctioned strength of the students and not on the basis of actual students admitted on the day of calling the tenders as the admissions are still going on, which as explained in the written statement and the additional affidavit dated 04.09.2017 cannot be said to be arbitrary or irrational in any manner. It is, thus, concluded that in the present case, the decision has been taken by the respondents keeping in view the overall interest of the public.

13. It is entirely within the domain of the competent authority to fix any condition in contracts. 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. The condition is amenable to judicial review if it fails to satisfy the test of reasonableness and fairness in action. 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.”

14. 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. In other words, 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.

15. 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.”

16. In view of the above, no ground for interference under Articles 226/227 of the Constitution of India is made out. Consequently, finding no merit in the petition, the same is hereby dismissed.

**(Ajay Kumar Mittal)**  
**Judge**

**September 07, 2017**  
**‘gs’**

Whether speaking/reasoned  
Whether reportable

**(Amit Rawal)**  
**Judge**

**Yes**  
**Yes**