IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No. 25949 of 2017
Date of decision: 14.11.2017

M/s Alcon Transformer Industries & another

……Petitioners

Vs.

Punjab State Power Corporation Limited & others

…..Respondents

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

Present: Mr. Vivek Suri, Advocate for the petitioners.

Ajay Kumar Mittal,J.

1. Prayer in this petition filed under Articles 226/227 of the Constitution of India is for quashing the tender enquiry No.QW-272/PO-W dated 20.09.2017, Annexure A.5 alongwith corrigendum Annexure P.7 whereby conditions qua the pre-qualification criteria for old suppliers have been issued and the condition for average turnover has been increased to ₹ 1.38 crores from ₹ 1 crore. A direction has also been sought to the respondents to consider the petitioners for the aforesaid tender enquiry.

2. A few facts relevant for the decision of the controversy involved as narrated in the petition may be noticed. Petitioner No.1 is a sole proprietor firm. It is registered with the office of District Industries Center, Malerkotla and has been categorized as a micro unit. It has been authorized to manufacture the transformers. Similarly, petitioner No.2 is a firm registered with Registrar of Firms. It is also registered as a Micro Industries with the Department of Industries. The petitioners executed various works from the year 2007 till 2016 and repaired the transformers

of various capacities against the tender enquires floated by the respondents from time to time. The work executed by them was also acknowledged and the payments of the petitioners were released by the respondents from time to time. The respondents on their own used to allot the work by giving the quantity of the transformers to be repaired as per their own wish to the petitioners. The petitioners have never been blacklisted by the respondents. In the last year, about 28 firms had qualified but the respondents on their own allotted work to 14 firms and the remaining work was not allotted. The petitioners were also not allotted any work. For the last 30 years the respondents were following the procedure laid down in the Work Regulation, 1997 which was issued by the erstwhile Punjab Electricity Board and the said rules/regulations were termed as Contractors Rules, 1997. As per the past practice of the respondents, while inviting quotations for repair of the transformers, the condition was that the tenderers must have a turnover of minimum of ₹ 1.0 crore for repair/manufacturing of transformers or electrical works during the last financial year. The tenderers were required to submit documentary evidence regarding the turnover alongwith tender. Similarly, another tender enquiry dated 17.05.2016 which related to repair of the damaged aluminium wound distribution transformers of capacity 25 to 100 KVA contained the similar condition of turnover of minimum of ₹ 1.0 crore during the last financial year or current financial year upto date of submission of the tender. The respondent-Corporation promulgated the Punjab State Power Corporation Limited Purchase Regulation, 2017 which came into effect from 10.08.2017 and the various definitions were introduced therein. By applying the above said Purchase Regulation 2017, the respondents issued a tender enquiry dated 20.09.2017 for repair of damaged Aluminium Wound Distribution Transformers. Various conditions were laid down from time to time. The petitioners alongwith other firms represented to the respondents that since the terms were at variance from the past tenders as such, they would be deprived of the livelihood. It was also stated in the representation that since there was an abrupt rise of turnover from ₹ 1 crore to ₹ 27.60 crores and since the repair rates were low as such, all the industries would be closed and many workers would be rendered jobless. The representation of the petitioners as well as other firms was decided and corrigendum was issued. Consequently, the date was extended upto 17.11.2017 and the average annual turnover for the last three financial years was prescribed to be atleast ₹ 1.38 crores. According to the petitioners, imposition of the condition with regard to the turnover from ₹ 1 crore to ₹ 1.38 crores is illegal and violative of Articles 14 of the Constitution of India. A representation Annexure P.8 was filed on 02.11.2017 bringing this to the notice of respondent No.2, but there was no response to the same. Hence the instant petition by the petitioners before this Court.

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

4. Admittedly, tender enquiry dated 20.09.2017 was advertised by respondent No.3 for repair of damaged Aluminium Wound Distribution Transformers. In addition to the various other conditions one of the condition which was followed for the last 30 years with regard to average turnover was increased from ₹ 1 crore to ₹ 1.38 crores. The petitioners filed a representation (Annexure P.8) to the respondents for modification of the condition. Having received no response, the petitioners filed writ petition in this Court with the prayer mentioned above. 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 so prescribed 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 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."

5. 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.

6. 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.
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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)

> "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;
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> (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;
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> (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."

7. Learned counsel for the petitioners was unable to demonstrate that the condition of annual turnover as prescribed now at ₹ 1.38 crores for the last three financial years, which was earlier ₹ 1.00 crore, was on account of any malafide action or to benefit any particular person. In such circumstances, the said condition cannot be held to be arbitrary or unreasonable falling within the domain of judicial review of this Court under Articles 226/227 of the Constitution of India.

8. Accordingly, in view of the above, no ground for interference in writ jurisdiction 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

November 14, 2017 **(Amit Rawal)**
'gs' **Judge**

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