IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Civil Writ Petition No.26 of 2017
Date of Decision: July 19, 2017

Khem Singh

...Petitioner

Versus

Food Corporation of India, Khadya Sadan, 16-20 Bara Khamba Lane, New Delhi & others

...Respondents

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

Present: Mr.Parminder Singh, Advocate,
for the petitioner.

Mr.Sumeet Goel, Advocate,
for respondent Nos.1 to 4.

Mr.M.K.Singla, Advocate,
for respondent No.5.

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AMIT RAWAL, J.

Petitioner has filed the present writ petition by invoking the extraordinary writ jurisdiction of this Court under Articles 226/227 of the Constitution of India praying for issuance of a writ in the nature of certiorari for quashing the order dated 4.1.2017 (Annexure P-10), vide which his technical bid has been rejected on the ground that the profit and loss account statement was falling short, with a further prayer for issuing mandamus directing the official respondents to consider the tender bid of the petitioner for HC Ahmadgarh and HC Malerkotla being the lowest bidder by opening the financial bid, with a further prayer for issuance of writ in the nature of prohibitory restraining the respondents to award the contract work to other bidder.

Mr.Parminder Singh, learned counsel representing the petitioner submitted, that the petitioner, who is a contractor and working with the Food Corporation of India (for short "FCI") and the State agencies since 1999 having the relevant experience in the field, applied for the E-tender well within time along with the required documents. Respondent No.2 floated E-tenders for HC Malerkotla and HC Ahmadgarh, i.e., for transporting, loading of food-grains in the railhead depot. The E-tender was issued on 4.11.2016 and the last date for submission of the bid was 23.11.2016. The opening date of the bid was 24.11.2016. The petitioner filed Annexure-X containing the details of amount of the tender, form fee and earnest money deposit (EMD) and against the HC Malerkotla, tender Form No.2016_FCI_139375_48 has been allocated to the petitioner and against tender bid of HC Ahmadgarh, tender Form No.2016_FCI_139375_37, has been allocated.

He further submitted that the petitioner also submitted an affidavit in respect of payment of EPF along with confirmation letter from the Manager (Contract), who had further obtained letter from the Assistant Provident Fund Commissioner. Not only this, the petitioner also uploaded his experience on the site of the respondents. Requirement of furnishing income tax return was also complied with, in essence, income tax return acknowledgment along with computation of income, profit and loss account statement and balance sheet was also attached, as Annexure P-3.

He also submitted that the petitioner was surprised to receive the notice dated 3.11.2016 (Annexure P-4) from the office of the respondents, whereby he was informed that three bids in the names of

Darshan Singh, Angrej Singh and Khem Singh were received and for the purpose of finalization of the bids, since certain discrepancies were found, which were required to be clarified. He drew the attention of the Court to the following discrepancies as noticed in the letter Annexure P-4):-

(P & L account submitted earlier)	(P & L account submitted now)
Transportation charges=50996/2.00 To labour paid=6279161.00 To gross profit=1621036.00	Transportation charges=10622351.00 To labour paid=756482.00 To gross profit=1621036.00

The petitioner duly replied the aforementioned notice vide reply dated 5.11.2016 (Annexure P-5) enclosing an affidavit dated 4.11.2016 along with profit and loss account statement (Annexure P-6). He further submitted that the income tax return was not revised as there was no change in gross profit as well as in net profit and hence, the same income tax return was filed. The official respondents sought a clarification from the Chartered Accountant of the petitioner with regard to the profit and loss account statement, who, vide letter dated 8.11.2016 (Annexure P-7), also clarified the same. However, vide impugned order Annexure P-10, the bid of the petitioner was rejected on the premise that the profit and loss account statement submitted by the petitioner was found to be invalid. The technical bid submitted by the petitioner of HC Malerkotla was also rejected, whereas that of the other bidder had been found to be technically fit.

In order to lend support to the averments made in the writ petition and challenge to the aforementioned order, he submitted that there is no difference so far as the gross profit and the error occurred only in the case of labour and transportation charges, which was subsequently corrected. The technical bid of the petitioner was rejected by providing wrongful gain to the other bidders as the statement accompanied by income tax return was sufficient requirement of conditions of tender. The action of respondent Nos.2 and 4 is discriminatory by overlooking the discrepancies of profit and loss account statement of the other persons and, thus, urged this Court that the impugned order is liable to be set-aside.

Per contra, Mr.Sumeet Goel, learned counsel representing respondent Nos.1 to 4 submitted that no cause of action accrued to the petitioner to challenge the impugned order. In fact, in the reply of the petitioner accompanied by an affidavit, it has candidly been admitted that the earlier profit and loss statement uploaded in tender of TC Ahmedgarh dated 21.6.2016, there was some mistake as some expenses were counted under the head “labour paid charges” instead of mentioning the same under “transportation charges”. The same was corrected by his Chartered Accountant on 4.7.2016. However, at the time of submitting the tender for TC Bhunerheri dated 29.8.2016, the corrected profit and loss statement was uploaded. In fact, the petitioner had uploaded two different profit and loss statements for the same financial year, one in tender of TC Ahmedgarh and other for TC Bhunerheri. The revised statement had not been filed in the office of Income Tax. The correct profit and loss account statement was mandatorily required to be uploaded with the Income Tax Department by the tenderer.

During the course of the hearing, he has referred to relevant portion, i.e., Part-C of the bid tender containing list of documents to be uploaded as well as letter dated 9.11.2016 written by their office to the Income Tax Officer, Ward No. 7(4) Ayekar Bhawan, Krishi Nagar, Ludhiana seeking information on the following points:-

> “*(i) Whether Sh.Khem Singh revised the P&L acctt with income tax department as on date or not.*

(ii) Whether Sh.Khem Singh has revised ITR after submitting new P&L account statement and is it permitted in the provisions of IT Act under time constraints.

(iii) Whether said P&L Acctt is valid without revision of same in IT Department.

(iv) Whether any person can have more than one P&L account for same financial year for different purpose and is it permitted under any act or applicable law."

In response to the aforementioned questions, the Income Tax Officer, vide letter dated 11.11.2016, has given the following answers:-

Sr.No.	***Question***	***Reply***
1	Whether Sh.Khem Singh revised the P&L Account with income tax department as on date or not.	Perusal of the Income Tax Department Data it is evident that Sh.Khem Singh S/o Sh.Baldev Singh has filed his return of Income for the Assessment Year 2014-15 on dated 20.09.2014. No revised return of Income has been filed by Sh.Khem Singh for Assessment Year 2014-15.
2	Whether Sh.Khem Singh has revised ITR after submitting new P&L account statement and is it permitted in the provision of I.T.Act, under time constraint.	As no revised return of Income filed by Sh.Khem Singh for Assessment Year 2014-15 therefore no question arise of submitting new P&L account.
3	Whether said P&L account is valid without revision of same in IT Department	No
4	Whether any person can have more than one P&L account for same financial year for different purpose and is it permitted under any act or application law.	No, as per the Income Tax Act, 1961 there is no such provision.

In order to further buttresses his argument, he has referred to the original record, i.e., information filled up by the tenderer, wherein he had undertaken that all information furnished is correct and in case it is found to be incorrect or untrue, Food Corporation of India is within its right to disqualify him without giving any notice or reason thereof and by referring to the record, drawn the attention of this Court to various undertakings, extracted in documents Flags-1, 2 and 3, i.e., Appendix-I (Forwarding Letter), Undertaking for acceptance of terms and conditions of Notice Inviting Tender and Appendix-II (General Information to Tenderers. The relevant portions of the aforementioned documents uploaded by the petitioner read thus:-

> "1. *I/We certify that all information furnished by me/us is correct and true and in the event that the information is found to be incorrect/untrue, the Food Corporation of India shall have the right to disqualify me/us without giving any notice or reason therefor or summarily terminate the contract, without prejudice to any other rights that the Corporation may have under the Contract and Law.*
>
> *2. In case any provisions of this tender are found violated, then your department/organization shall without prejudice to any other right or remedy be at liberty to reject this tender/bid including the forfeiture of the full said earnest money deposit absolutely along with taking action as per other remedies available under law.*
>
> *3. Duly audited P&L account and Balance Sheet of relevant completed years for which experience certificate has been submitted by tenderer. In case partnership, only the experience of the firm will be reckoned and for the purpose the experience of the Individual Partners will not be counted. Yes/No"*

He, thus, urged this Court for dismissal of the writ petition.

In rebuttal, Mr.Parminder Singh by referring to Paragraphs 12 to 14 of the judgment rendered by the Hon'ble Supreme Court in **<u>Rashmi Metaliks Ltd. and Anr. Versus Kolkata Metropolitan Development Authority and Ors.,</u>** **2013 (10) SCC 95** contented that while rejecting the tenders, the statutory functionary is required to give reasons. It cannot be supplemented by fresh reasons and further that the submission of the latest income tax return was not essential element or ingredient or concomitant of the subject notice inviting tender.

We have heard the learned counsel for the parties, appraised the paper book, judgment cited as well as the records produced before us for adjudication of the aforementioned lis. In our opinion, the grievance of the petitioner cannot be vindicated and liable to be rejected. It does not fall within the realm of judicial review, for, on conjoint reading of the undertaking given by the petitioner read with information, extracted above, sought by the Food Corporation of India from the office of the Income Tax, it reveals that the petitioner had not submitted the correct profit and loss account statement. The comparison chart of the profit and loss account statements submitted earlier and subsequently shows mark difference towards the charges of the labour as well as transportation. In the earlier submitted profit and loss account statement, transportation charges have been shown to be ₹50,996/-, whereas in the subsequent one, ₹1.00 crore odd amount has been depicted. Similarly, in the earlier statement, labour charges have been shown as ₹62,79,161/- and in the subsequent one at ₹7,56,482/-. Be that as it may, the fact remains that the aforementioned profit and loss account statement is unilateral act of the petitioner in the absence of having submitted the revised return to the Income Tax Department, thus, the information provided by the petitioner was found to be incorrect making him ineligible. In other words, the petitioner is not entitled to challenge the action in view of the undertaking given while submitting the documents (supra).

There is no dispute to the ratio decidendi culled out in **Rashmi**

Metaliks Ltd.'s case (supra), but the findings are based upon the facts of each case. In the said case, in the notice inviting tender, the submission of the income, profit or loss statement was not an essential requirement, whereas in the present case, it is otherwise, therefore, the same cannot come to the rescue or aid of the petitioner.

The Hon'ble Supreme Court in **Maa Binda Express Carrier and Anr. Versus Northeast Frontier Railway and Ors., AIR 2014 SC 390,** while relying upon the judgment rendered in **Jagdish Mandal Versus State of Orissa and Ors., (2007) 14 SCC 517** in Para 10 held that the indulgence of the Court in the contractual matters, should be minimum. In essence the power of judicial review, should not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The Court should be circumvent, much less exercise judicial restraint unless illegality or arbitrariness on the part of the Government in the aforementioned matter is apparent. Para 10 reads thus:-

> *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.* ***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:*
>
> *"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."

The aforementioned view is also noticed and followed by the Division Bench of this Court in **Civil Writ Petition No.21994 of 2016 (Manufacturers of Petroleum Specialties Association and others Versus Uttar Haryana Bijli Vitran Nigam Limited and another),** decided on 20.12.2016, wherein this Court has held as under:-

"xx xx 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. xx xx"

The decision of the respondents in rejecting the bid of the petitioner of not having correctly furnished the profit and loss account statement alongwith the bid documents does not suffer from any illegality or arbitrariness or can be said to be malafide.

In view of what has been observed above, no ground for interference is made out under articles 226/227 of the Constitution of India. Consequently, finding no merit in the writ petition, the same is dismissed.

Original record given by Mr.Goel during the course of hearing is ordered to be returned against proper receipt.

(AJAY KUMAR MITTAL) **JUDGE**	**(AMIT RAWAL)** **JUDGE**

July 19, 2017
ramesh

Whether speaking/reasoned	**Yes/No**
Whether Reportable:	**Yes/No**