

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

**CWP No.26065 of 2017
Date of Decision.06.12.2017**

Sarvesh Prasad

.....Petitioner

Vs

Bharat Petroleum Corporation Ltd. and others

.....Respondents

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

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

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AMIT RAWAL J.

The petitioner has filed the present writ petition against the impugned order dated 27.10.2017 (Annexure P-33) passed in pursuance to the directions rendered by this Court in CWP No.21640 of 2017 on 21.09.017 and after affording an opportunity of hearing to the petitioner.

Before advertng to the arguments of Mr. Tejeshwar Singh, learned counsel appearing on behalf of the petitioner, it would be apt to give pre-face of the matter giving cause of action to the petitioner to invoke the extraordinary jurisdiction of this Court.

Bharat Petroleum Corporation i.e. respondent Nos.1 and 2 caused an advertisement dated 27.02.2017 (Annexure P-1) listed on its website inviting applications for providing manpower and other services in its Corporation Owned and Corporation Operated Retail Outlets i.e. COCOs for the following areas:-

1. Bilaspur, NH8, Gurgaon, Haryana.
2. Asalwas, NH8, Rewari, Haryana.
3. Sector-38, Gurgaon, Haryana.

4. Sector-44, Gurgaon, Haryana.

The brochure of selection provided for the aforementioned COCOs contained certain parameters and conditions making the candidate eligible. For adjudication of the controversy involved in the present writ petition, the emphasis has been laid to Clause 5.2.2 of the brochure which reads as under:-

“5.2.2. Entrepreneurial Capability: Capability to provide suitable Manpower (not applicable for DGR).

Sr. No.	Sector	DGR Nominee	Others (thru advertisement)
	Maximum marks	NA	25
(i)	<i>Having capability to provide suitable manpower with documentary evidence for the following:</i> <i>Having experience in providing or directly engaging manpower for minimum 1 year.</i> <i>Full marks for experience of providing or engaging minimum 10 persons as manpower.</i> <i>Proportionately less marks to be awarded for experience of providing less number of manpower.</i>	NA	25

The other eligibility criteria provided was that on the date of application the Service Provider has to be registered with EPF and ESIC within a specified period before commencement of contract and he should not be convicted by a Court of law for any criminal offence involving moral turpitude or economic offences.

In pursuance to the advertisement issued, the petitioner submitted application for all the aforementioned areas enclosing the

following certificates:-

1. Certificate issued by M/s Krishna Filling Station.
2. Corresponding ESIC Registration Certificate dated 23.02.2012 of Krishna Filling Station.
3. Certificate issued by M/s Om Parwati Security Services Pvt. Ltd. certifying it being an ISO certified company dealing in human resources and even outsourcing the manpower through petitioner as they have their retail franchise w.e.f. December, 2015.
4. Corresponding EPFO Registration Certificates dated 4.1.2016.
5. Certificate issued by M/s Jindal Arya Impex Pvt. Ltd. certifying that the petitioner having provided more than 10% as manpower for more than one year.

Before the petitioner could be interviewed, the Territory Manager of the respondent-Corporation vide letter dated 30.06.2017, requested the petitioner to submit certain documents by 21.07.2017 i.e. documentary evidence for having experience of one year in providing or directly engaging manpower i.e. wage register along with returns filed with any statutory authorities like ESIC, PF, Labour Commissioner etc.

On 20.07.2017, the petitioner replied to the said letter and submitted all the documents as requested by respondent-Corporation by giving details of the requisite certificates issued by Krishna Filling Station, Om Parwati Security Services Pvt. Ltd., ESIC Registration Certificate, Corresponding Wage-cum-Attendance Register and Corresponding Receipts of remittances made to ESIC from March 2016 to February, 2017.

The petitioner received a letter dated 31.07.2017 (Annexure P-15) from the Territory Manager Retail, Rewari for appearing in the interview scheduled for 19.08.2017.

The provisional merit list-cum-result was declared on 19.08.2017 (Annexure P-21) whereby the petitioner was not given 25 marks against the column of “capability to provide suitable manpower”. The petitioner stated to have approached this Court by way of civil writ petition bearing No.21640 of 2017 which was disposed of on 21.09.2017 with a direction to respondent No.2 to take a decision on the complaint dated 7.9.2017 (Annexure P-20) submitted to the authorities for not awarding marks against the column of providing manpower. In pursuance to the directions of this Court, impugned order dated 27.10.2017 (P-33) came to be passed.

Mr. Tejeshwar Singh, learned counsel appearing on behalf of the petitioner made the following submissions to support the prayer sought in the writ petition:-

(i) A legal opinion dated 14.08.2017 (Annexure P-16) had been rendered by Advocate of Supreme Court of India. As per the said opinion, keeping in view the provisions of Clause 5.2.2 of the brochure for selection of service provider and the documents submitted by the petitioner to the Selection Committed personally on 27.09.2017, the respondent-authority ought to have granted maximum marks of 25 under the head “Capability to Provide Suitable Manpower.” The respondent-authority had erroneously failed to award 25 marks whereas other candidates have been awarded more marks than the

petitioner.

(ii) The documents viz; wage register, ESIC Registration Certificate issued by ESIC and the agreement (Annexure P-38) entered into between the petitioner and the Krishna Filling Station leads to irresistible conclusion that the petitioner is a service provider and impugned action of the respondent authorities in not awarding 25 marks is erroneous, which is totally against Clause 5.2.2 and is thus, not sustainable in the eyes of law.

(iii) The agreement dated 7.6.2012 (Annexure P-38) was entered into between the petitioner and Krishna Filling Station whereby the manpower had been provided as agreed to between the parties and the statement of account (Annexure P-37) is the testimony of the same. It also discloses the receipt of payment from other petrol pumps. Thus, there was a non-application of mind on the part of the Selection Committee in not granting 25 marks to the petitioner on the premise that EPF, ESIC and salary registers were not in the name of the petitioner.

(iv) For grant of full 25 marks, Clause 5.2.2 mandates two clear options to be given. The candidate should have experience of providing manpower of minimum 10 persons for a minimum period of one year or should have experience in directly engaging minimum 10 persons for minimum one year . The documents referred to in Annexures P-5 to P-9, P-12, P-13, P-16, P-25 to P-27 and P-29 & 30 clearly mentioned that

the petitioner had requisite experience in providing manpower and therefore, was entitled to full 25 marks. Non-awarding of 25 marks to the petitioner is violation of Article 19(1)(g) of the Constitution of India, which vitiates the entire selection process as it is riddled with mala fide and bias as the Selection Committee ignored and mis-interpreted the clear and unambiguous mandate of Clause 5.2.2.

(v) The petitioner never claimed that he had been directly engaging manpower, and as such was not under obligation to provide ESIC certificate. The agreement dated 7.6.2012 executed between the petitioner and Smt. Jaya Rashmi Chauhan, proprietor of M/s Krishan Filling Station leaves no doubt of providing the manpower and Guarantee Bond dated 17.11.2012 (Annexure P-30) which fulfilled the requirement of supplying manpower for period exceeding one year.

(vi) It was claimed that the order dated 12.10.2017 (Annexure P-31) was not a speaking order as it failed to advert to documents annexed at the time of submission of application and later on, which clearly established that the petitioner ought to have been awarded 25 marks. Accordingly, prayer was made for this Court to set aside the impugned order by allowing the writ petition.

(vii) Instead of 71.33 marks out of 100 marks, the petitioner would have secured 96.33 marks in case 25 marks were included and would have been the highest amongst other candidates entitling him for allotment of contract.

We have heard learned counsel for the petitioner, appraised the paper book and in our opinion the documents emphatically relied upon by the petitioner are in the name of Krishna Filling Station and other persons and not in the name of the petitioner. The agreement (Annexure P-29) and guarantee bond (Annexure P-30) and certificates issued by various agencies raises disputed question of fact, for which writ court would not be the appropriate remedy. The said documents are required to be proved by leading evidence to establish that the petitioner fulfilled the condition enumerated under Clause 5.2.2. Even the wages registers and ESIC certificates are also in the name of Krishna Filling Station. The statement of accounts (Annexure P-37) relating to transactions commencing from 01.04.2016 to 31.03.2017 from certain filling stations to whom the petitioner stated to have supplied manpower, would also have to be established and would primarily a question of fact. The *lis* in the present circumstances would not fall within the realm of judicial review while exercising power under Article 226/227 of the Constitution of India.

Ordinarily, the adjudication in exercise of writ jurisdiction under Article 226/227 of the Constitution of India is on the basis of admitted documents and facts. It would be apt to refer to the observations and findings rendered by the respondent in the impugned order. For the sake of brevity, the order dated 27.10.2017 and ESIC receipt etc. are reproduced herein below:-

“We write with reference to your letter ref. Nil dated 07.09.2017 received by us on 11.09.2017 on the above subject and your further reply vide letter ref. Nil dated 27.09.2017 against our letter ref RT.SP.BP Asalwas, dated 12.09.2017, the order dated 21.09.2017 of Hon'ble High Court of Punjab & Haryana & your letter dated 06.10.2017 received by us on 11.10.2017.

Personal hearing was given to you by the undersigned on 13.10.2017 as per directives of the above Hon'ble High Court order in CWP 21640/2017.

We have carried out investigation into the grievance/complaints/allegations mentioned in your aforesaid letters along with the documents submitted by you in support of your grievance of being awarded "NIL" marks under the head-Capability to provide suitable manpower (25 marks).

Please note that the Marks under this head refer para 5.2.2 of Brochure for Selection COCO Service Provider Guidelines read with Clause 3.2 of the application form & our letter of reference RT.SP. Asalswas NH-8 (8/22) dated 30.06.2017 for providing copies of current registration of ESIC & PF as documentary evidence for being eligible for 25 marks under head-Capability to provide suitable manpower (25 marks).

The supporting documents (EPF/ESIC/Salary register etc.) provided by you in response to above and also with your complaint above, are in name of Om Parvati Security Services & Krishna Filling Centre and not in your name. These documents do not prove that you are provider of manpower or directly engaging manpower. As per the documents, you are working as franchise or General Manager in the mentioned firms and this does not make you eligible for 25 marks under the head as per guidelines for providing manpower or directly engaging manpower.

Our investigator as mentioned above reveals that you have been correctly evaluated by the Interview Committee under the parameter of Entrepreneurial Capability. Capability to provide suitable Manpower as per para 5.2.2 of the COCO Service Provider guidelines and your grievance/complaints/ allegations made by you have not been found factually correct/substantiated. Hence, your complaint is being filed and the matter is treated as closed. The complaint fee remitted by you is forfeited.

ESIC Receipt:

Employer's Code No. 11001165960000302

Employer's Name: Krishna Filling Station

Challan Period: Mar-2017

Challan Number: 01117110066705

Challan Created Date: 21-04-2017 16:07:49

Challan submitted date: 02-05-2017 14:20:36

Amount Paid: 5283.00

Transaction Number: CP83610621”

The Guarantee Bond (Annexure P-30) is also reproduced as under:-

“I, Sarvesh Prasad s/o Shri Rajendra Prasad, aged 36 yrs r/o A-310, Meera Bagh, New Delhi-110087 do hereby solemnly affirm and declare as under:-

1. That I have been appointed by M/s Krishna Filling Station, Minto Road, New Delhi-110002, through its Proprietor Mrs. Jaya Rashmi Chauhan to perform the following:-

a. To provide suitable staff on regular and casual basis as per need of petrol pump.

b. To manage and supervise functioning of the petrol pump on day to day basis.

c. To provide marketing support to promote sales & business of the petrol pump.

2. That I hereby undertake to guarantee to the extent of Rs.5,00,000/- (Rupees Five Lakhs only) and will stand liable to pay to M/s Krishna Filling Station the said amount in case of any damages or financial loss caused to the property of the company due to my negligence.

3. That Proprietor Mrs. Jaya Rashmi Chauhan will not be responsible for any liability of the executants of this deed.

4. The guarantee will be valid till the expiry of the Agreement executed between the parties i.e. the executant and M/s Krishna Filling Station through its Proprietor Mrs. Jaya Rashmi Chauhan.

New Delhi

Date:17.11.2012

sd/-

Executant

Witnesses:-

1. sd/- Krishan Kr.

2. sd/- Sudhir Arora.”

In view of the findings noted above, no case for interference in writ jurisdiction is made out.

Further, even the scope of judicial review in contractual/tender

Montecarlo Ltd. Vs. NTPC Ltd. 2016(15) SCC 272 while dealing with the scope of judicial review in the matter of Govt. contracts held as under:-

“23. Recently in *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.* a two-Judge Bench eloquently expounded the test which is to the following effect:-

“We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.”

24. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and sometimes third party assistance from those unconnected with the owner's organization is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these

tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.”

As an upshot of our finding, we do not find it appropriate case to interfere by exercising the powers under Articles 226 and 227 of the Constitution of India. However, it shall be open for the petitioner to seek redressal of his grievance in any competent court of law and fact, if so advised.

The writ petition is dismissed in the aforementioned terms.

(AJAY KUMAR MITTAL)
JUDGE

(AMIT RAWAL)
JUDGE

December 06, 2017

Pankaj*

Whether speaking/reasoned

Yes

Whether reportable

Yes