

Gurbax Singh  
2017.12.11 10:09

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

**CWP No.27299 of 2017  
Date of decision: 30.11.2017**

**M/s Hilltop Rubbers Pvt. Limited**

**.....Petitioner**

**Vs.**

**State of Haryana**

**.....Respondent**

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

Present: Mr. Sukhbir Singh, Advocate with  
Mr. Rishav Jain, Advocate for the petitioner.

**Ajay Kumar Mittal,J.**

1. Prayer in this petition filed under Articles 226/227 of the Constitution of India is for quashing clause at Sr.No.14 in the tender form and to allow the petitioners to participate in the proceedings of the said tender. Further prayer has been made for staying the proceedings of e-tender during the pendency of the petition.

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 private limited company represented through its Directors i.e. petitioner Nos. 2 and 3. The petitioner company is engaged in the business of manufacturing the retreading rubber material (procured). Respondent No.2 invited e-tenders for purchase of procured tread rubber and allied materials for retreading tyres vide e-tender dated 25.7.2017. The date and time of submission of e-tender on line was fixed for 21.8.2017 at 14.00 hours. On 21.8.2017, respondent

No.2 vide corrigendum extended the date of submission of request for proposal response on line to 5.9.2017 which was further extended from time to time upto 22.11.2017. According to the petitioners, the official respondents extended the date with malafide intention to favour one firm namely M/s Global Rubber Polymers and to cause loss and injury to the petitioners. Respondent No.2 illegally issued purchase order dated 25.8.2017 having order value for ₹ 1,00,82,540.00 to M/s Global Rubber Polymers without following the due process of tender for complete 12 months with the motive to benefit the said firm. The petitioners were shocked and surprised to find on 21.11.2017 that respondent No.2 had uploaded fresh terms and conditions for the said tender which was extended. The said clause reads as under:-

“Manufacturers who are having pending arbitration case and also having contested penalty raised by Haryana Roadways in Hon’ble District Court or Hon’ble High Court of Punjab and Haryana for performance of earlier supplied materials shall not be eligible to participate in the present tenders. Manufacturers having their penalty cases decided by Hon’ble Court will become ineligible if penalty imposed by Haryana Roadways is allowed to be refunded on final orders of the Courts/High Court.”

In the year 2013, the petitioner had been awarded purchase order for supply of retreading material by respondent No.2 and its work was found to be very good to the satisfaction of the authorities. The petitioner company had submitted the bank guarantee. In the year 2014, the petitioner sought the release of the said bank guarantee but respondent No.2 declined to release the same and illegally demanded certain amount almost after two years of completion of the purchase order dated 30.4.2013. Out of the total amount, certain amount was released whereas for the rest of the amount arbitration proceedings are pending. According to the petitioners, to favour a particular

company, new clause has been added in the contract to debar the petitioners. The representations filed by the petitioners having received no response, they are before this court through the instant writ petition.

3. We have heard learned counsel for the petitioners.

4. Admittedly, respondent No.2 invited e-tenders for purchase of procured tread rubber and allied materials for retreading tyres on 25.7.2017. The petitioners and other firms applied. The date of the tender was extended from time to time. A new clause was added with regard to the fact that the manufacturers who are having pending arbitration case and contested penalty raised by Haryana roadways in District court or High Court for performance of earlier supplied materials shall not be eligible to participate in the present tenders. According to the petitioners, the said condition is illegal. It is well settled that it is entirely within the domain of the authorities to lay down any condition unless the same is arbitrary, illegal, discriminatory or malafide. Learned counsel for the petitioners has not been able to produce any material on record to show that the said condition is illegal, arbitrary or irrational.

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 Mandal 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. 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, learned counsel for the petitioner has not been able to produce any material on record to show that the clause at Sr. No.14 added in the tender form is illegal, arbitrary or irrational.

9. In view of the above, no interference is called for 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**

**November 30, 2017**  
**‘gs’**

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

Whether speaking/reasoned  
Whether reportable

**Yes**  
**Yes**