IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No. 28261 of 2017
Decided on : 13.12.2017

Vishal Sethi and others

. . . Petitioners

Versus

Indian Oil Corporation Ltd. and others

. . . Respondents

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

PRESENT: Mr. Kanwaljit Singh, Sr. Advocate with
Mr. Abhishek Bajaj, Advocate
for the petitioners.

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Ajay Kumar Mittal, J.

1. The petitioners through the instant petition filed under Articles 226/227 of the Constitution of India, pray for quashing of clause No. 'D' at page 8/134 of the tender document (Annexure P-1) which allows the distributor to have arrangement with another distributor for carrying his LPG beyond his/her own use. Direction has also been sought to the respondents to consider only such distributors for own use who have quoted L1 and whose trucks have been qualified in the ranking system as envisaged in the tender.

2. A few facts relevant for decision of the controversy involved as narrated in the petition may be noticed. The petitioners are transporters of packed LPG cylinders that requires the truck with their bodies of prescribed specifications and caged top and back side with locking system and approvals from Explosive Department. Though the petitioners are not permanent or fixed LPG transporters of the respondents, but keeping in view the specified/prescribed specifications of the body of trucks, stringent

safety measures and regulated sale and supply of LPG cylinders have been taken by them for the last many years. The Indian Oil Corporation Limited through its Regional Contract Cell, Northern Regional Office at 1, Aurobindo Marg, Yusuf Sarai, New Delhi – 110016, issued a notice inviting E-tender under Two-Bid system from *bona fide* bidders for transportation of Indane LPG cylinders in vertical position on unit rate basis Ex Jalandhar (Punjab) LPG Bottling Plant. The time period for down loading the said tender and uploading the bid was 28.07.2017 and 22.08.2017 respectively and opening date of technical bid was fixed as 23.08.2017. The number of trucks required and the classifications thereof was mentioned in the tender under the heading "Own Use Trucks". It was provided that distributor can also transport other distributor's load for improving the utilization of the bidder's truck. According to the petitioners, the said provision in Clause No. 'D' is contrary to and in conflict with clause 9 of the general conditions of the tender, which provides that distributors quoting more than own load requirement as given in Annexure 'A' of the tender document shall be evaluated for their own loads first and the remaining trucks shall be evaluated at par with other bidders. According to the petitioners, there is a total opaqueness in the tender as it does not disclose any working or justification by which Indian Oil Corporation Limited has decided number of load/truck requirement of distributors. Hence, the instant writ petition by the petitioners.

3. We have heard learned counsel for the petitioners.

4. The primary challenge in the writ petition is to Clause No. 'D' at page 8/134 of the tender document, the relevant portion of which reads

thus:-

> "D.**OWN USE TRUCKS**:
>
> Indane LPG Distributor, can offer trucks in their name, limited to their own use requirement as given in Annexure 'A' of this tender document. Such trucks shall be treated as Own use trucks.
>
> In case of distributors who have only part utilization of trucks they can make an understanding with only one or maximum two other IOC LPG Distributors who do not have trucks so that the part utilization can be reduced. Any of the trucks under such understanding can be utilized for meeting the requirement of any of the members. For e.g., if a distributor requires 2.1 trucks as determined by Annexure 'A' (of 306 nominal capacity) for own load requirement, and the distributor offers 3 trucks of 306 capacity against this tender, then the distributor can make an understanding with only one or maximum two other distributors who do not have own load requirement of 1 truck or above (as given in Annexure 'A') so that the part utilization of 3rd truck improves upto full utilization but not beyond."

5. The petitioners claim that above provision is contrary to and in conflict with Clause 9 of the General Conditions of the tender, relevant portion of which is in the following terms:-

> "Distributor quoting for only their own requirement has to match the established offered L-1 rate for all the trucks for his own requirement at the first instance. Such truck/s shall not be utilized for any other distributor/load and markets. Such offer will be made as mentioned under tender evaluation."

6. Clause No. 'D' at page 8/134 of the tender document relates to 'OWN USE TRUCKS' whereunder, in the case of distributors who have

only part utilization of trucks they can make an understanding with only one or maximum two other IOC LPG Distributors who do not have trucks so that part utilization can be reduced. Clause 9 of the General conditions of the tender provides that where the distributor quotes the rates of trucks for their own requirement then it has to match the established offered L-1 rate for all the trucks at the first instance and such trucks shall not be utilized for any other Distributor/load and markets.

7. As noticed herein above, Clause 'D' at page 8/134 of the tender document deals with part utilization of own use trucks whereas Clause 9 of the general terms and conditions of the tender relates to exclusive use by the distributor and therefore, it cannot be said to be contradictory in any manner as they are dealing with different situations. The plea of the petitioner is, thus, without any merit.

8. Further, it is trite law that 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. In the present case, the impugned condition in clause 'D' has been imposed by the respondent authorities keeping in view the overall interest of the public and in the totality of the facts and circumstances of the case. Learned counsel for the petitioners has not been able to produce any material on record to show that the said condition is arbitrary, illegal or unfair.

9. 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."

10. 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.

11. 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)
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> > "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:
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> "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and
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> (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."
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> 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."

12. 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

(AMIT RAWAL)
JUDGE

December 13, 2017
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Whether speaking/reasoned: ***Yes***
Whether Reportable: ***Yes***