IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No. 9953 of 2015
Decided on : 01.08.2017

Hyderabad Golden Roadlines and others

. . . Petitioners

Versus

Union of India and others

. . . Respondents

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

PRESENT: Mr. Manoj Bajaj, Advocate
for the petitioners.

Mr. Raman Sharma, Advocate
for respondents No. 2 to 4.

Mr. Puneet Gupta, Advocate
for respondents No. 5 to 7.

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AJAY KUMAR MITTAL, J.

1. The petitioners through instant petition under Articles 226/227 of the Constitution pray for declaring the action of respondents No.2 to 4 in violating the sequence of preference while awarding the contract of transportation of packed LPG cylinders to respondents No.5 to 7, who had quoted higher rates than the petitioners, as illegal, arbitrary, discriminatory and violative of Articles 14, 16 and 19(1)(g) of the Constitution of India. Further prayer has been made for a direction to respondents No.2 to 4 to award the contract strictly in accordance with the order of merit and sequence of preference.

2. A few facts relevant for decision of the controversy involved as narrated in the petition may be noticed. The petitioners are engaged in the business of transportation of packed LPG cylinders of Bharat Petroleum

Corporation Limited (BPCL) for the last many years. The last contract was awarded in January, 2012, for a period of two years, which was extended by one year i.e. upto January, 2015. In November, 2014, respondents No.2 to 4 published notice inviting e-tenders for transportation of packed LPG cylinders. The period of contract was to commence w.e.f. 01st February, 2015. The petitioners and various other transporters including respondents No.5 to 7 applied pursuant to the notice. On 23.12.2014, after completion of the credential bid process, the bid price was opened to formulate the list of transporters category wise. The successful transporters were grouped in different categories from L-1 onwards i.e. L-2, L-3 and so on upto L-7. L-1 became the cheapest rate category, whereas, the last category L-7 became the highest price category. The rates quoted by the petitioners were lesser than the rates quoted by respondents No. 5 to 7 and thus, they were placed in category L-3 and L-4, whereas, respondents No. 5 to 7 were placed in category L-5 and L-7. On 19.01.2015, the BPCL authorities held negotiations with the petitioners and various other contractors. The rates of transportation were reduced marginally. Since the petitioners and other transporters who were working on old rates of 2012, were waiting for allocation of new contracts, on the request of BPCL authorities, agreed to continue transportation at old rates on the assurance that the new rates will be implemented soon. The work of transportation came to a standstill as new rates finalized by the BPCL on 23.12.2014 were not being implemented. On 03.03.2015, the BPCL issued *ad-hoc* rates agreed on 19.01.2015 for a period of one month i.e. upto 31.03.2015. Since the diesel prices were reduced between 19.01.2015 and 03.03.2015, the applicable cut was applied on 03.03.2015. On 07.04.2015, CWP No. 3973 of 2015 filed by various transporters including the petitioners seeking relief by implementation of new contract rates was not pressed on the basis of statement given by the BPCL authorities that the process of allotment of contract was to be finalized within one week. In April, 2015, the BPCL authorities awarded the contract of transportation of 44 trucks to respondents No.5 to 7, whereas, petitioners No.1 and 2 had been awarded contract for 1 and 3 trucks, respectively, and petitioner No.3 had received no contract. In fact, respondents No.5 to 7 had been awarded contract at the rate which were given by the petitioners and accepted by the BPCL authorities. According to the petitioners, the BPCL authorities themselves have violated the order of merit and sequence of preference to extend undue benefit to respondents No.5 to 7, who are real brothers and are placed in merit in category of L-5 and L-7 than the petitioners. The petitioners assert that the action of the BPCL is arbitrary, discriminative and violative of Articles 16 and 19(1)(g) of the Constitution of India as well as the terms and conditions/guidelines of the BPCL. Hence, the instant writ petition by the petitioners.

3. Written statement has been filed on behalf of respondents No.2 to 4 – Bharat Petroleum Corporation Limited. It has been *inter alia* stated that since the tender process had been undertaken by the BPCL in consonance with the rules and the regulations, the writ petition deserves to be dismissed. Writ petition under Article 226 of the Constitution of India, is an extraordinary remedy and cannot be used for enforcement of contractual disputes and remedies which can be resorted to on the basis of the agreement executed between the parties. With regard to the averment that respondents No.5 to 7 had quoted higher rates for the same category, it

was stated that after negotiations, the rates were brought down to provide transportation services at the same rates quoted by the petitioners. On these premises prayer for dismissal of the writ petition has been made.

4. We have heard learned counsel for the parties.

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 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:
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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;

(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."

> 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 therefore.

9. In the present case, learned counsel for the petitioners has not been able to produce any material on record to substantiate the claim that the impugned action taken by the BPCL authorities suffers from the vice of arbitrariness or discriminatory, warranting interference by this Court under

Articles 226/227 of the Constitution of India. The State Authorities are the best judge in awarding the contract and it shall not be in the domain of judicial review to examine comparative merit of the bidders unless it is shown to be actuated with malafide or is for extraneous consideration. Leaned counsel for the petitioners was unable to demonstrate any aberration on the part of the State authorities to substantiate that any favouritism had been done or any pick & choose policy had been adopted. Further, he has also not been able to controvert the applicability of the decisions mentioned above to the facts of the present case. Consequently, finding no merit in the petition, the same is hereby dismissed.

(AJAY KUMAR MITTAL)
JUDGE

(AMIT RAWAL)
JUDGE

August 01, 2017
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Whether speaking/reasoned: ***Yes***
Whether Reportable: ***Yes***