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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **DECIDED ON: 17.05.2017**

+ **W.P. (C) 3410/2015, CM APPL.6107 & 21655/2015**

M/S JUPITER WAGONS LTD. Petitioner
Through: Mr. U. Hazarika, Sr. Advocate, Mr.
Neeraj Malhotra, Sr. Advocate with Mr. Rupal
Luthra and Ms. Abhinandana Kain, Advocate.

Versus

UNION OF INDIA & ORS Respondents
Through: Ms. Geetanjali Mohan, Advocate for
Railways.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE PRATHIBA M. SINGH

S.RAVINDRA BHAT, J. (ORAL)

1. The Petitioner, is an incorporated company that supplies fabricated bogies for coaches used by the Railways, and has been carrying on business since 27.06.2006. It is aggrieved by the respondent/Indian Railways' (hereafter "Railways") inaction with respect to a tender issued by the latter, for procuring 500 railway wagons. The petitioner, in this proceeding under Article 226 of the Constitution, complains of arbitrariness by the Railways.

2. The Railways has its own manufacturing units for passenger coaches, and, alternatively, procures the same from M/s. BEML Ltd. on nomination basis. All orders for general second class passenger coaches, before 2013, were procured from these two sources, without issuing any tender. With continually increasing passenger traffic, especially on second class

passenger coaches, and inadequacies of specialized machinery and equipment, impediments faced by the Railways to meet the growing requirements of the Railway sector, the respondent was hindered in obtaining supplies of second class passenger coaches solely from its manufacturing units or on nomination basis from M/s BEML Ltd. Both sources had limited manufacturing capacities. In these circumstances, and in order to provide for transparency in the matter of acquisition of general second class passenger coaches, it was decided by the Railway Board, in the year 2013, to procure general second class passenger coaches through tender process, thus allowing participation of the private sector.

3. The Railway Board therefore, published tender No. 2012/RS (PF&EC)-142/Coaches/14 dated 07.03.2013 for the manufacture and supply of 500 units of “*All metal integral light weight RCF design second class coach (GS) with bogie mounted air brakes (fully furnished)*”. The said tender was published in all leading newspapers across India, including Kolkata i.e., where the Petitioner is situated, inviting technical and financial bids. This was the first time that the Indian Railways had called for public participation in procuring passenger coaches. The Petitioner participated in the aforesaid tender floated by the Railway authorities for the manufacture and supply of 500 units of general second class passenger coaches. The tender documents contained various terms and conditions put forth as eligibility criteria, i.e. the pre-conditions which were to be met by the interested participants in the tender process. The material portion of Clause 1.1 of the INVITATION TO TENDER AND INSTRUCTIONS TO TENDERERS read thus:

“1.1 ELIGIBILITY CRITERIA

1.1.1 All tenderers should fulfill the following eligibility criteria:

*(a) **Bulk orders***

...

*(b) **Developmental orders***

Developmental orders may be considered on firms who have requisite infrastructure facilities as per clause 3 of the specification.

...”

Clause 3.0 of Part - I (General Requirements) of the PARTICULAR SPECIFICATION stipulated infrastructural requirements for participating in the tender process. These infrastructural requirements also included at Clause 3.14, spelling out the various plant and machinery to be purchased by the manufacturers interested in participating in the subject tender process. The petitioner urges that the contents of the tender documents, which were acted upon by it, meant that its position altered irrevocably, because it entered into binding commitments by making direct investments exceeding ₹30 crores besides other indirect investments, as a result of which the value of the unit was over ₹300 crores, solely in order to meet the eligibility criteria and infrastructural requirements, etc. for participating in the tender process.

4. The tender participants were also required to deposit an amount of Earnest Money with the Railways, prior to the opening of the tender, in terms of Clause 13.0 of the INVITATION TO TENDER AND INSTRUCTIONS TO TENDERERS. According to Sub-clause (i) of Clause

14.2 that provided that the Earnest Money could be deposited by way of Bank Guarantee, the Petitioner submitted a Bank Guarantee dated 17.04.2013 for a sum of ₹10 lakhs with the Railways. The intending bidders submitted their technical and financial bids to the railways, and on the opening date of the tender, i.e., 07.06.2013, and further to the tender opening process, the Petitioner emerged as the lowest bidder.

5. Pursuant to the Petitioner being the lowest bidder and the successful tenderer, the Railway authorities asked it to submit a detailed break-up of the prices of GS coaches in various heads and in terms of this request, the Petitioner provided the said break-up by a letter dated 14.03.2014.

6. The petitioner's grievance is that even after a lapse of about two years, the Railway authorities had still not awarded the contract in its favour, despite it being the lowest bidder and having qualified in the technical criteria/specification, as well. It is also contended that the Railway authorities acted in an arbitrary manner, and that the Petitioner apprehends that the Railways might abandon and scrap the tender altogether, or award it to an unsuccessful third party. Citing *Union of India v. Dinesh Engineering Corpn.*, (2001) 8 SCC 491, the counsel for the Petitioner highlights how discretionary power of an authority ought to function within the requirements of the law, especially within Article 14 of the Constitution, and cannot be blatantly arbitrary. In *Dinesh Engineering (supra)* it was held that

“a public authority even in contractual matters should not have unfettered discretion and in contracts having commercial element even though some extra discretion is to be conceded in such authorities, they are bound to follow the norms recognised by courts while dealing with public property. This requirement is necessary to avoid unreasonable and arbitrary decisions being taken by public authorities whose actions are amenable

to judicial review. Therefore, merely because the authority has certain elbow room available for use of discretion in accepting offer in contracts, the same will have to be done within the four corners of the requirements of law, especially Article 14 of the Constitution.”

7. The Petitioner mentions having written to the Minister of Railways as well as the Chairman, Railway Board, Ministry of Railways by letters dated 07.10.2014 and 13.10.2014, respectively, but no action was taken in the matter. Moreover, the Central Vigilance Commission (CVC) by Circular No. 31/11/08 dated 06.11.2008 had issued instructions to the effect that tenders were required to be finalized and contracts to be awarded in a time bound manner within original validity of the tender, without seeking further extension of validity. Counsel for the Petitioner contended, in the present case, that several extensions of offer validity had been sought by the Respondent authorities, thus violating the express guidelines issued by the CVC. Accordingly, the Petitioners claim directions to the respondent, for taking steps to accept its tender and award the contract.

The petitioner, besides alleging arbitrariness also relies on the doctrine of legitimate expectation in support of its claim. The Petitioner relied on *Food Corporation of India v. M/s. Kamdhenu Cattle Feed Industries* (1993) 1 SC 71 to highlight the proposition with regard to “legitimate expectation”. It was observed, *inter alia* in that decision that:

“...to satisfy this requirement of non-arbitrariness in a State action, it is therefore, necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bonafides of the

decision in a given case.”

This proposition was also reiterated in *Navjyoti Coop- Group Housing Society etc. v. Union of India & Others* (1992) 4 SCC 477. The Petitioner also relied on the case of *Union of India v. Hindustan Development Corporation* (1993) 2 SCR 128, where the Supreme Court discussed the doctrine of legitimate expectation at length.

8. The Railways states that this was the first tender for GS coaches and that technical scrutiny of the offers by RDSO took some time. Since no benchmark of rates was readily available for certifying the rates received in this tender as reasonable, Tender Committee had to depend on manufacturing cost of RCF for similar coaches for this purpose. Further, RCF prices had to be adjusted suitably to take into account the cost of free supply materials like steel and wheel sets. It is stated that since the rate quoted by the L-1 firm (L-1 firm eligible for regular order) was higher than the manufacturing cost of similar coaches by RCF, Tender Committee recommended for price negotiation with the L-7 firm, M/s. Titagarh Wagons Ltd., Kolkata. This recommendation of tender committee for price negotiation with the L-1 firm eligible for regular order was as per the prevalent practice and in conformity with the existing guidelines of Central Vigilance Commission. It is also stated that in the meantime, coaching Production Programme for FY 2014-15 was under finalization in which only 169 GS coaches were proposed to be sourced from outside. It is also stated that the traffic directorate give their requirement of rolling stock for a particular year, and initiates the coaching production programme and which is then considered and cleared by the Finance Directorates. In addition, one

letter dated 02.06.2014 addressed to the then Minister of Railways was received from one Mr. V.K. Sharma, suggesting that orders should be placed on all L-1 to L-6 firm with a view to develop more sources and order on M/s. Titagarh Wagons Ltd. should also be placed at the L-1 price of ₹38,70,000/- per coach. A letter dated 13.06.2014 from Shri Salim Ansari, MP/RS addressed to Ministry of Railways to the same effect was received. These developments resulted in the return of the tender files for examination of the quantities needed for procurement in view of the Coaching Production Programme 2014-15 as well as the issues flagged.

9. It is stated by the Railways that Coaching Production Programme for 2014-15 was issued on 08.07.2014. As per this, only 169 GS coaches were required to be procured from BEML/other sources. The Tender Committee submitted their revised recommendations for procurement of 264 GS Coaches (regular order for 211 coaches on M/s Titagarh Wagons Ltd. and developmental order for 53 GS Coaches on M/s Jupiter Wagons Ltd.). The Advisor/Railway Stores endorsed these recommendations on 17.09.2014 subject to the procurable quantity being limited to 169 coaches as per the approved Coaching Production Programme and regular order for 80% quantity (135 coaches) on M/s. Titagarh Wagons Ltd. It was also recommended by Advisor/RS to deal the issue of developmental orders separately as it was felt that developmental orders should be placed on more than one firm. The views of the Advisor /RS were endorsed by Addl. Member (Finance) on 30.09.2014. However, the Member Mechanical on 01.10.2014 recorded his views to procure 500 coaches against this tender as originally recommended by the TC and also endorsed the views of Adv./RS&AM(F) regarding placement of developmental orders. The

Financial Commissioner (FC) did not agree with these views and returned the file to Tender Committee on 28.10.2014 with the remarks that in terms of the approved Coaching Production Programme, only 169 GS Coaches were to be sourced from BEML/ other sources and the procurable quantity should be restricted to 169 coaches only. Regarding developmental orders, FC did not agree to the suggestion of dealing with the same separately and desired that Tender Committee should revisit the issues and put up firm recommendations for entire procurable quantity.

10. According to the Railways, at this time, process of firming up Coaching Production Programme for next year, i.e., 2015-16 started and it was learnt that no quantity is being proposed for procurement from BEML/ Other sources. Concerned officer, who was acting as convener of the Tender Committee was also transferred without any replacement during this period. As a result, further action in this tender file got delayed. Finally, Tender Committee recommended on 06.04.2015 to discharge the tender as there was no requirement of GS Coaches to be sourced from BEML/ other sources during the year 2015-16. These recommendations of the Tender Committee were accepted by the Tender Accepting Authority on 10.04.2015. This acceptance was recorded though this Court had passed the status quo order on 8.4.2015, due to non-communication of the order.

11. After the affidavit was furnished, the court had adjourned the proceedings from time to time. Eventually, on 1 May, 2017, the court issued directions to the Railways, *inter alia*, to revisit the issue of cancelling/discharging the tender process, in the light of the material that 169 coaches' requirement was apparent. The court directed as to the number of coaches needed as on date, having regard to the Railways' in house

capacity and whether in the light of those facts, the issue with respect to tender discharge could be revisited. Consequent to this order, the Railways filed an affidavit stating that the Coaching Production Programme and other departments had appraised the needs of the Railways and concluded that there was no need of outside procurement and that the in house units could meet with its needs. It was also averred that the Railways would use the “Linke Hofmann Busch (LHB)” coaches for its needs, which are of a different category. In view of these changes and developments, the decision to discharge the tender cannot be reviewed.

12. The law governing the award of a contract by the State has been amply discussed and settled in several previous judgments of the Supreme Court. In *Air India Ltd. v. Cochin Int., Airport Ltd. & Ors.* AIR2000SC801, it was held that:

*“The award of contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are of paramount are commercial considerations. **The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract.** It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. ”*

The Supreme Court also stated that in such commercial decisions the Court ought to intervene only when it comes to a conclusion that there is an overwhelming public interest involved that requires interference. The law on judicial review of public contract awards was revisited in *Michigan Rubber*

(India) Limited Vs. State of Karnataka & Others (2012) 8 SCC 216 where it was held that:

“23. 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.

24. 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."

In *Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd.* &Anr 2016 SCC Online SC 940 the Supreme Court held as follows:-

"14.....a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision making process or the decision."

13. In the present case, the Respondent invited tender bids by publishing Tender No. 2012/RS (PF&EC)-142/Coaches/14, in which the Petitioner participated in its own volition. Clause 16 of the Corrigendum No.I of the tender notice clearly mentions that the Railways do not pledge to accept the lowest or any tender and reserved to itself the right of acceptance of the whole or any part of the tender or portion of the quantity offered. Though the Petitioner emerged as the lowest bidder in the tender process, it was incorrect for them to automatically assume that their bid would be accepted. This point was also reiterated in *Purxotoma Ramanata Quenim v. Makan*

Kalyan Tandel and Ors. AIR 1974 SC 651, where it was held that in matters relating to contracts with the Government, the latter is not bound to accept the tender of the person who offers the highest (in this case, the lowest) amount and may reject the same without necessarily assigning any reason for it. The state's flexibility in economic and commercial matters (which has led to the well worn phrase "free play in the joints") has been recognized by courts as a factor to allow it greater latitude – and a corresponding deference to executive judgment in such matters. Therefore, the petitioners' complaint that despite its bid emerging the lowest, the Railways "arbitrarily" did not accept it, cannot be judicially redressed.

14. The Petitioner's grievance that in contemplation of acceptance of their bid they made financial investments exceeding ₹30 crores, besides other indirect investments for meeting the pre-conditions and technical specifications to qualify for participation on the tender process, is unfounded since, they were not compelled to undertake any such expense by the Railways and the same conditions of qualification applied to all the other bidders as well, and were set out as pre-conditions in the tender documents. The tender process was merely an invitation to offer and not an offer itself, thus, the Respondent cannot be held accountable since no contract had been entered into between the Petitioner and the Railways.

15. This aspect was highlighted in *Dresser Rand S.A. v. BINDAL Agro Chem Ltd. and K. G. Khosla Compressors Ltd.* AIR2006SC871, where it was held that the tender document or invitation to bid, by itself, is neither an agreement nor a contract, and the process of bidding or submission of tenders would result in a contract when a bid or offer is made by a prospective supplier and such bid or offer is accepted by the tenderer. The

relevant portion from the judgment is as follows:

“Parties agreeing upon the terms subject to which a contract will be governed, when made, is not the same as entering into the contract itself. Similarly, agreeing upon the terms which will govern a purchase when a purchase order is placed, is not the same as placing a purchase order. A prelude to a contract should not be confused with the contract itself.”

16. Similarly, in *Michigan Rubber (India) Limited* (supra) the court dwelt on how preconditions or qualifications for tenders are necessary to ensure the capacity of the contractor and the resources to successfully execute the work. Thus, the earnest money and the other technical and financial pre-requisites in the tender in the present case, are aligned with similar purposes and are not to be understood to create a “legitimate expectation” of acceptance of bid by the Petitioners. The court recollects the decision in *Hindustan Development Corporation* (supra) where it was observed (quoting from *Att. Gen. for New South Wales v. Quin* 1990(Vol.64) Australian LJR 327) that

“The concept of legitimate expectation is "not the key which unlocks the treasury of natural justice and it ought not to unlock the gates which shuts the court out of review on the merits," particularly when the element of speculation and uncertainty is inherent in that very concept.”

17. The decision of the Railway authorities to procure general second class passenger coaches through a tender process was a first of its nature. To overcome the extreme pressure and load on the Railways, stretching to 1.15 lakh kms. covering 7172 stations and carrying 8.3 billion passengers per day and 1050.18 million tons of freight annually, it became imperative for the Railways to seek assistance from specialized bodies and/ or companies, such

as the Petitioner, for the manufacture and supply of passenger coaches and wagons. Hence, with this background it can be concluded that the decision to accept a bidder for sourcing the wagons would require extensive deliberation and the call could not be taken in haste. Merely because the tender process was completed and the Petitioner emerged as the lowest bidder was not sufficient to immediately finalize the decision to procure through the tender. Thus, it cannot be said that the Railway authorities have acted in an arbitrary and whimsical manner solely because they did not finalize the tender and award the contract to the Petitioner. The Petitioner's claim to have a "legitimate expectation" of the same is unfounded. In arriving at this conclusion, the court is supported by the decision in *Punjab Communications Ltd. vs. Union of India & Others* AIR 1999 SC 1801 where the Supreme Court delved into the principle of legitimate expectation elaborately in *Hindustan Development Corporation* which had presciently stated that:

"For legal purposes, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope even leading to a moral obligation cannot amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. Again it is distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate

expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense.”

In the light of the above, it can be conclusively held that the Petitioners grievances that its tender bid has been inordinately delayed in being accepted by the respondent due to arbitrariness, and that the Railways created a legitimate expectation are incorrect in law. The writ petition is therefore dismissed. There shall be no order as to costs.

MAY 17, 2017



**S. RAVINDRA BHAT
(JUDGE)**

**PRATHIBA M. SINGH
(JUDGE)**