

Gurbax Singh
2018-05-18 16:57

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

CWP No. 8799 of 2018
Date of decision: 08.05.2018

**Anish Aggarwal age about 33 years son of Sh. Sham Sunder Aggarwal
R/o H.No. 27, Gopal Park, District Kapurthala**

.....Petitioner

Vs.

**State of Punjab through Secretary Department of Food, Civil Supplies
and Consumer Affairs, Civil Secretariat, Punjab Chandigarh and others.**

.....Respondents

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL,
ACTING CHIEF JUSTICE**

HON'BLE MR. JUSTICE TEJINDER SINGH DHINDSA

Present: Mr. Prateek Pandit, Advocate for the petitioner.

Mr. Avinit Awashti, AAG, Punjab

Mr. Siddhant Chattopadhyaya, Advocate for respondent No.4.

Ajay Kumar Mittal,(ACJ).

1. Prayer in this petition filed under Articles 226/227 of the Constitution of India is for quashing the allotment of work to respondent No.5 for transportation of Food Commodities for the Rabi Season year 2018-19 pursuant to tender notice dated 15.03.2018, Annexure P.1 by rejecting the bid of the petitioner. Direction has also been sought to respondent Nos. 1 to 4 to cancel the allotment of work made in favour of respondent No.5. Prayer has also been made for a direction to respondent Nos. 1 to 4 to re-allot the work pursuant to tender notice dated 15.03.2018 by considering the bid of the petitioner.

2. A few facts relevant for the decision of the controversy involved as narrated in the petition may be noticed. The petitioner is the owner of the

sole proprietorship firm namely M/s Anish Enterprises. The said firm is engaged in providing transportation services to Government of Punjab and other Government institutions for transporting foodgrains and commodities. The petitioner firm provides trucks and manpower to the Government and various agencies for the aforesaid purpose. Vide tender notice dated 15.03.2018, Annexure P.1, the respondent authorities invited bids from the interested parties for transportation of food grains for the Rabi Season year 2018-19. The allotment of tender was to be made by a tender Allotment Committee in each District headed by Deputy Commissioner of the District, District heads of various procurement agencies and officials of the Department of Food and Civil Supplies. The period of the said tender was from 01.04.2018 to 31.03.2019. The tendering process was to be completed through e-tendering. The tenders were to comprise of two stages i.e. technical bid and financial bid. Only those bidders who qualified in the technical bid were to be considered for the financial bid. The tenders were to be accepted collectively after forming clusters for one or more grain markets in the District. The tender fee was fixed at ₹ 5000/- per cluster. The bids were to be evaluated by the Tender Allotment Committee and tender was to be finalized after negotiations with the bidder quoting the lowest rate. The eligible criteria for technical bids was prescribed in the tender policy. The petitioner being fully eligible submitted its bid in respect of Dhilwan-2 cluster. The said cluster comprised of grain markets of Bhandal Bet and Hamira. The petitioner deposited the required earnest money. The requirement for trucks for the said cluster came to 40 trucks as per the transport policy. The tender bid was submitted by the petitioner within time. The petitioner deposited the requisite fee and submitted the list of trucks for carrying out the work of transportation. The petitioner also submitted the relevant documents i.e. PAN

Card and Aadhar Card etc. Vide corrigendum dated 16.03.2018, Annexure P.6, it was clarified that financial bids not falling in the range of 50 per cent less to 120 per cent above the Schedule of Rates (SOR) would be summarily rejected. For the cluster Dhilwan-2 six bidders submitted their bids. Though the date for opening the technical bid was mentioned as 23.03.2018, the petitioner received a message from the respondent that all the bidders shall present copies of RCs/verification report of trucks before the Tender Allotment Committee dated 24.03.2018. The petitioner accordingly appeared alongwith relevant documents but respondent No.4 refused to accept the RCs/verification report submitted by the petitioner. The petitioner came to know that the tender for Kapurthala-1 had been allotted to respondent No.5 @ 115 above the SOR whereas the petitioner had submitted his bid to do the same work @ 95 above SOR. The petitioner gave a written representation to the respondent authorities but no action was taken. Hence the instant petition by the petitioner.

3. In the written statement filed by District Controller, Food, Civil Supplies and Consumer Affairs, Kapurthala on behalf of respondent Nos 1 to 3, it has been inter alia stated that the petitioner did not appear before the Tender Allotment Committee either on 23.03.2018 and 24.03.2018 even after he had received the intimation for the same through text message on 23.03.2018. Respondent No.5 had been awarded tender at 92 per cent above SOR while the petitioner claimed that he had quoted the rate of 95 per cent above SOR. It has been further stated that the Tender Allotment Committee followed the instructions of the Government completely.

4. We have heard learned counsel for the parties.

5. Admittedly, the respondent authorities vide tender notice dated 15.03.2018, Annexure P.1, invited bids from interested parties for

transportation of food grains for the Rabi Season year 2018-19. Vide corrigendum dated 16.03.2018, Annexure P.6, it was clarified that financial bids not falling in the range of 50 per cent less to 120 per cent above the SOR would be summarily rejected. The petitioner being eligible applied for the tender in respect of Dhilwan-2, cluster. The petitioner submitted the bid within the stipulated period and deposited the requisite fee alongwith relevant documents. As per stand of the respondents, the petitioner quoted the rate of 95 per cent above SOR while respondent No.5 had been awarded tender at 92 per cent above SOR which fact was disputed by the petitioner. Thus, there was dispute on facts.

6. Before proceeding further, it would be advantageous to refer to the scope of judicial review in the tender matters at the first instance.

7. 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.”

8. 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.

9. 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."

10. Moreover, there is dispute on facts which cannot be adjudicated in writ proceedings under Articles 226/227 of the Constitution of India. Examining the scope of writ jurisdiction under Article 226 of the Constitution of India where disputed questions of fact are involved, a Division Bench of this Court in *N.C.Mahendra vs. Haryana State Electricity*

Board and others, AIR 1984 Punjab 26 had laid down that ordinarily a writ would not issue in favour of a person where disputed questions of fact are raised. The relevant portion reads thus:-

“12. An identical legal position ensures within this country and High Courts have repeatedly held that the exercise of jurisdiction under Article 226 of the Constitution is discretionary and not obligatory without being exhaustive, it is settled law that the court would not ordinarily issue a writ in favour of a person, who has (i) an adequate alternative remedy, (ii) who is guilty of delay which is unexplained, (iii) who is guilty of conduct disentitling him to relief, (iv) where the interest of justice do not require that relief should be granted, (v) where the petitioner raises a disputed question of fact, (vi) where the grant of writ would be futile, and (vii) where the impugned law has not come into force. It would follow from the above that the grant or refusal of a writ is within the judicial discretion of the court and that indeed is the line which divides the extra ordinary remedy from the ordinary one by way of a civil suit.” (emphasis supplied).

11. The Supreme Court in ***State Cadre Authority and another vs. K.S.Bajpal and others***, (1990) (Suppl.) SCC 713, ***Bhagubhai Dhanabhai Khalasi and another vs. The State of Gujarat and others***, (2007) 4 SCC 241 and ***Mukesh Kumar Agrawal vs. State of UP and others***, (2009) 13 SCC 693 has held that wherever disputed question of fact is raised in writ proceedings, the writ petition was not an appropriate remedy. Reference may also be made to the judgment of the Apex court in ***Dwarka Prasad Agarwal (D) by Lrs and another vs. B.D.Agarwal and others***, AIR 2003 SC 2686 wherein it was observed as under:-

“We may, however, hasten to add that as at present advised we do not intend to enter into the contention of the petitioners that

their fundamental right under Article 19 of the Constitution of India had been infringed. This court would have entered into the question, if the facts were undisputed or admitted. The question as regard infringement of fundamental right and that too under Article 19 of the Constitution of India cannot be gone into when the facts are disputed. Whether Dwarka Prasad Agarwal and consequently the substituted petitioners are owners of the newspapers and if so to what extent being disputed, it cannot be said, that by reason of the impugned order dated 3.9.1992 passed by the first respondent herein alone, the fundamental right of the petitioners under Article 19 had been infringed.”

12. In view of the dispute on facts, we do not find any ground to interfere in writ jurisdiction under Articles 226 & 227 of Constitution of India. Consequently, the writ petition stands dismissed. However, the petitioner may approach the Civil Court, if so advised.

(Ajay Kumar Mittal)
Acting Chief Justice

May 08, 2018
‘gs’

(Tejinder Singh Dhindsa)
Judge

Whether speaking/reasoned
Whether reportable

Yes
Yes