

\$~16

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

Date of decision: 06th November, 2019

+ W.P.(C) 4053/2019

M/S A.R. HOSE PVT. LTD.

..... Petitioner

Through: Mr.Vipul Ganda, Mr.Vikas Yadav,
Ms.Dipika Ganda and Mr.Aman
Chaudhary, Advts.

versus

UNION OF INDIA AND ANR.

..... Respondents

Through: Mr.Ashim Sood, CGSC for R-1.
Ms.Meenakshi Arora, Sr.Adv. with
Ms.Mala Naryan, Ms.Neha Dawar,
Mr.Rahul Narayan and Mr.Digvijay,
Advts. for R-2/IOCL.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

G.S.SISTANI, J. (ORAL)

1. This petition has been filed by the petitioner under Article 226 of the Constitution of India seeking a writ of mandamus against the respondents to quash decision dated 26.03.2019 of respondent No.2, whereby it is contended that the technical bid of the petitioner was rejected without giving justifiable reasons and with the sole motive to favour another bidder.
2. Some necessary facts which are required to be noticed for disposal of this writ petition are that on 11.07.2018, a notice was issued by respondent No. 2 inviting E-tender for setting-up new LPG Bottling

facilities at 60 different locations from private bottlers having ready built plant/willing to construct new LPG bottling facility.

3. Accordingly, a common tender for all 60 identified locations was floated. The object was that the successful bidder should be able to create adequate plant and infrastructural facilities and possess competence to engage in the activities required for handling of the LPG bottling operations with caution and safety.
4. The petitioner claims to be a registered company dealing in LPG products and having sound financial track record to carry-out the work of refilling LPG cylinders by establishing a new bottling plant.
5. The petitioner company participated in the E-tender issued by respondent No. 2 for one location *i.e.* Nagaon and submitted the required documents.
6. On 03.12.2018 a techno-commercial query was raised by respondent No. 2 on its e-portal, which was duly replied to by the petitioner company on 10.12.2018. After evaluation of the pre-qualification criteria, eligibility criteria and technical bid documents, the petitioner was found eligible for Round II; and was interviewed on 25.01.2019, when original digital records were submitted on the e-portal. After the interview, the petitioner was found eligible for Round III and was called for site-inspection.
7. The complaint of the petitioner is that the technical bid of the of the petitioner has been rejected after site-inspection in Round III, without respondent No.2 giving any cogent grounds/reasons for doing so.
8. Mr. Ganda, learned counsel for the petitioner submits that within 24 hours of rejection of the petitioner's technical bid, respondent No. 2

hurriedly fixed the time for opening of financial bid on 27.03.2019 at 4.10 p.m. Mr. Ganda submits that the rejection of the tender by the respondents is baseless, *mala fide* and arbitrary; and has been done with a view to accommodating particular parties, in whose favour respondent No.2 had pre-decided that the tender should be awarded.

Site at Nagaon

9. Mr. Ganda submits that the purported ground of rejection of the technical bid of the petitioner was that the registered lease deed of the offered plot was not submitted and the document which was submitted was a deed of agreement. It is further submitted that though the document submitted is titled as 'Deed of Agreement', the said document is, in essence and substance, a lease deed; and that the said deed has also been executed and duly registered in the office of the Registrar.
10. Ms. Meenakshi Arora, learned senior counsel appearing for respondent No.2, while relying on the essential pre-qualification conditions of the tender, submits that the petitioner offered only 3.39 acres of land instead of the requirement of 3.5 acres, by reason of which one final opportunity was granted to the petitioner to provide for a registered sale/lease deed for a land area of at least 3.5 acres. The petitioner availed of the said final opportunity and submitted a lease deed for the offered plot; however, the same was found to be not a lease deed but a deed of agreement. Hence, the technical bid of the petitioner was rightly rejected by respondent No.2. Ms. Arora further submits that in response to letter dated 28.02.2019 sent by respondent No.2, vide letter dated 06.03.2019 the Senior Sub-Registrar (Sadar) had clarified and

confirmed that the Deed of Agreement cannot be considered as a lease deed as it contained Clause 18, which provided that both the parties shall have to execute the final lease deed after partition and change of classification of leasehold land as per the process of law. Reliance is placed on Clause A of Part II of Pre-qualification Criteria, which we reproduce below: -

“Part II. For Bidders Willing to Construct. New Bottling Plant at the advertised Location:

A. Technical	(i) Land admeasuring at least 3.5 Acres with either clear title owned by the Bidder AND / OR have registered lease in the name of the bidder, AND/ OR Firm allotment letter from State Govt. or State Govt. body situated in the “Advertised location” and willing to construct LPG Bottling Plant as per OISD-169-A guidelines on the offered land at his own cost.	a. Self-attested Copy of Clear Title deed in the name of bidder/Registered Lease deed for the land upon which the Bottling plant is constructed.”
--------------	--	---

XXXXXX

“9. Selection/Evaluation Procedure:

Round I- Evaluation of Technical Bid Documents

....Despite, the above in case of any shortfall in the documents, the bidder shall be provided with only ONE opportunity provided with only 01(One) and final chance to submit any shortfall of documents which will be communicated to them on the e-portal within a time bound period of 7 (seven) days. It will be the bidder’s responsibility to access the e-tendering portal on a daily

basis to check communication in this regard. In case the bidder fails to submit any documents or submits incomplete documents within the given time, the bid will be rejected....”

11. Ms. Arora further submits that as per the section 21-A of the Registration (Assam Amendment) Act 2009, an immovable property can be registered only after obtaining a No-Objection Certificate (NOC) from the Deputy Commissioner of the concerned district. However, in the present case the petitioner had failed to obtain the NOC before the registration of the Deed of Agreement.
12. We have heard learned counsel for the parties and have considered their rival submissions.
13. Mr. Ganda strongly contends that a reading of the deed submitted in respect of the offered plot would show that the same is, in substance, a lease deed which is only titled as Deed of Agreement. In response to the said contention, Ms. Arora submits that the lease document submitted is a Deed of Agreement and to satisfy the essential conditions of the tender document a bidder is required to submit a registered lease deed. On examination of a copy of the said document and the letter of the Senior Sub-Registrar annexed at pages 59 and 75 of the petition, it is seen that the document submitted is in fact a deed of agreement and not a lease deed. A perusal of Clause A of Part II of the tender document shows that a bidder is required to have a clear title to the offered land and/or have a registered lease deed in his name for the offered land, which condition the petitioner had failed to comply with.
14. The law on the scope of judicial review in tender matters is well-

settled. A brief reference to some judicial precedents may not be out of place. In the case of *Tata Cellular v. Union of India* reported as (1994) 6 SCC 651, the Supreme Court held as under:

"70. ...the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down."

xxxx

xxxx

xxxx

xxxx

"94. The principles deducible from the above are:

- (1) The modern trend points to judicial restraint in administrative action.*
- (2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
- (3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.*

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

15. Thereafter in the case of ***Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited and Another*** reported as (2016) 16 SCC 818, the Supreme Court held as under:

"11. Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) [Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99] it was held by this Court, relying on a host of decisions that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision should not be

interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us."

xxxx

xxxx

xxxx

xxxx

"13. In other words, 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."

16. Following the principles of ***Tata Cellular*** (supra) and ***Afcons Infrastructure Limited*** (supra) the Supreme Court in ***Municipal Corporation, Ujjain and Another v. BVG India Limited and Others*** reported as (2018) 5 SCC 462, has further held as under:

"64. Thus, the questions to be decided in this appeal are answered as follows:

64.1. Under the scope of judicial review, the High Court could not ordinarily interfere with the judgment of the expert consultant on the issues of technical qualifications of a bidder when the consultant takes into consideration various factors including the basis of non-performance of the bidder;

64.2. ...

64.3. It is not open to the court to independently evaluate the technical bids and financial bids of the parties as an

appellate authority for coming to its conclusion inasmuch as unless the thresholds of mala fides, intention to favour someone or bias, arbitrariness, irrationality or perversity are met, where a decision is taken purely on public interest, the court ordinarily should exercise judicial restraint."

17. Also, in ***Silppi Constructions Contractors v. Union of India and Another*** reported as 2019 SCC OnLine SC 1133, the Supreme Court has held as under:

"19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the

courts must give “fair play in the joints” to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

18. In view of the above discussion, we do not find any ground to interfere in the decisions taken by respondent No. 2. We accordingly find no merit in the petition; which therefore stands dismissed.

CMs. APPL. 39950/2019 (impleadment) & 18291/2019(stay)

19. In view of the order passed in the writ petition, the applications also stand dismissed.

G.S.SISTANI, J

ANUP JAIRAM BHAMBHANI, J

NOVEMBER 06, 2019//