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

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Date of Order: 29th May, 2019

+ W.P.(C) 5844/2019 & CM APPL 25484/2019

UTTAR PRADESH RAJKIYA NIRMAN NIGAM..... Petitioner

Through Mr. J.P. Singh, Senior Advocate with
Mr. Sudhir Yadav, Mr. Jatin Parashar
and Ms. Mrigna Shekhar, Advocates

versus

EMPLOYEES STATE INSURANCE CORPORATION AND ORS.

..... Respondents

Through Mr. K.P. Mavi, Mr. Puneet Kumar
Rastogi, Mr. Sidharth Sadana,
Advocates for the respondents along
with Mr. Paramjit Singh, SSO(ESIC)

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE JYOTI SINGH

G.S. SISTANI, J. (ORAL)

CM.APPL 25485/2019 (Exemption)

1. Exemption allowed, subject to all just exceptions.
2. The application stands disposed of.

W.P.(C) 5844/2019

3. The petitioner participated in a e-tender for repair and maintenance work of the ESIC Model Hospitals Basaidarpur and ESIC Model Hospital Rohini, Sector 15, New Delhi on 28.01.2019 and 03.04.2019. The tender pertaining to Rohini stands rejected, which has led to the filing of the present writ petition.

4. Mr. J.P. Sengh, learned Senior Counsel appearing for the petitioner submits that the petitioner is a public sector undertaking and has fulfilled all the tender conditions and for the reasons best known to the respondents, the tender has been rejected.
5. Mr. Mavi, learned counsel for the respondents had entered appearance on the last date of hearing and sought time to produce the record and seek instructions in the matter. It is submitted by Mr. Mavi that the tender of the petitioner was non-responsive as the condition no.12 (i), (ii), and (iii) read with conditions no.10 and 11 were not fulfilled. He submits that in the absence of the petitioner having fulfilled the aforesaid conditions along with valid ESI registration certificate and valid EPF registration certificate, the tender has been rejected.
6. Mr. J.P. Sengh, learned Senior Counsel for the petitioner submits that the petitioner being a public sector undertaking, no registration is required. Reliance is placed on Section 1 sub-section 4 of the Employees' State Insurance Act, 1948. Additionally, Mr. Sengh submits that the petitioner was found successful for the tender floated in the year 2018 and no such objection was raised.
7. We have heard the learned counsels for the parties. Relevant conditions of the tender, being condition no. 12 (i), (ii), and (iii) read with conditions no.10 and 11 and 17 of the tender, read as under:

“12. The bid submitted shall become invalid if;

- (i) The bidder is found ineligible vis - a - vis eligibility criteria.
- (ii) EMD of requisite amount and in the prescribed manner is not deposited by the bidder.

(iii) The bidder does not upload all the documents as required under the bid.

...

10. The tender for the work shall remain open for acceptance by ESI Corporation for a period 90 days from the Gate of opening of the tender/ bid.

11. ESI Corporation reserves the right to accept or reject any bid or annul the whole bidding process without assigning any reason whatsoever.

...

17. The list of documents to be scanned and uploaded within the period of bid submission :

- (i) Copy of EMD.
- (ii) Letter of Transmittal.
- (iii) Certificate of Work Experience as per Form - A.
- (iv) Performance Certificate of Work Experience as per Form - B.
- (v) Certificate of Financial Turnover from Chartered Accountant as per Form - C.
- (vi) Details of organizational structure of the bidder as per Form - D,
- (vii) Certificate of Registration for Goods and Service Tax (GST).
- (viii) Any other documents as specified in the bid documents.
- (ix) Pan Card
- (x) Valid ESIC Registration Certificate”

8. It is not in dispute that the petitioner did not provide the valid ESI and EPF registration certificates. The reasons for this, according to Mr. Sengh is that being a public sector undertaking, the petitioner is exempted and for which reliance is placed on Section 1 sub-section 4 of the Employees’ State Insurance Act, 1948, and Section 1 sub-section 3

of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 read with Section 16, which we also reproduce below:

“1. Short title, extent, commencement and application. —

(1) This Act may be called the Employees' State Insurance Act, 1948.

.....

(4) It shall apply, in the first instance, to all factories (including factories belonging to the Government) other than seasonal factories.

....

1. Short title, extent and application. - [(1) This Act may be called the Employees' Provident Funds and Miscellaneous Provident Act, 1952.]

.....

(3) Subject to the provisions contained in section 16, it applies-

(a) To every establishment which is a factory engaged in any industry specified in Schedule I and in which [twenty] or more persons are employed, and

(b) To any other establishment employing [twenty] or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf:

Provident that the Central Government may, after giving not less than two months' notice of its intention so to do, by notification in the Official Gazette, apply the provisions of this Act to any establishment employing such number of persons less than [twenty] as may be specified in the notification.]

...

16. Act not to apply to certain establishments. - [(1) This Act shall not apply-

(a) to any establishment registered under the Co-operative Societies Act, 1912 (2 of 1912), or under any other law for the time being in force in any State relating to cooperative

societies, employing less than fifty persons and working without the aid of power; or

(b) to any other establishment belonging to or under the control of the Central Government or a State Government and whose employees are entitled to the benefit of contributory provident fund or old age pension in accordance with any Scheme or rule framed by the Central Government or the State Government governing such benefits; or

(c) To any other establishment set up under any Central, Provincial or State Act and whose employees are entitled to the benefits of contributory provident fund or old age pension in accordance with any scheme or rule framed under that Act governing such benefits;”

9. Mr. Mavi, learned counsel for the respondents submits that Section 1, sub-section 4 of the ESI Act has to be read with Section 90 and 91A, which we also reproduce below:

“1. Short title, extent, commencement and application. —

(1) This Act may be called the Employees’ State Insurance Act, 1948.

.....

(4) It shall apply, in the first instance, to all factories (including factories belonging to the Government) other than seasonal factories.

....

90. Exemption of factories or establishments belonging to Government or any local authority. — The appropriate Government may, [after consultation with the Corporation], by notification in the Official Gazette and subject to such conditions as may be specified in the notification, exempt any factory or establishment belonging to [***] any local authority, [from the operation of this Act], if the employees in any such factory or establishment are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act.

[91-A. Exemptions to be either prospective or retrospective. — Any notification granting exemption under section 87, section 88, section 90 or section 91 may be issued so as to take effect [prospectively] on such date as may be specified therein.]”

10. A conjoint reading of Section 1, sub-section 4 together with Section 90 and 91A makes it clear that proviso 4 to Section 1 would not ipso facto apply. The same has to be read with section 90 and 90A of ESI Act, else the said two Sections i.e. 90 and 90A would stand defeated. Thus, prima facie, we find no infirmity in the stand taken by the respondents.
11. In the case of *Jagdish Mandal v. State of Orissa and Others and etc.*, reported at (2007) 14 SCC 517, it was held as under:

“**22.** Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made “lawfully” and not to check whether choice or decision is “sound”. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A 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 relating to award of contract 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 tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or

final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. 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”;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tender/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.”

12. Having regard to the settled position of law, we are of the considered view that the stand taken by the respondents cannot be termed as arbitrary, irrational or unreasonable. Even otherwise, no *malafides* have been alleged, which would require interference under Article 226 of the Constitution of India.
13. However, having regard to the petitioner being a public sector undertaking and also having regard to the fact that in the year 2018, such an objection was not raised by the respondents, we grant liberty to the petitioner to make a representation before the respondents within two days, which shall be considered by the respondents and a reasoned order shall be passed by the respondents within 07 days.
14. With these directions, the writ petition stands disposed of.

CM.APPL 25484/2019(stay)

15. The application stands disposed of in view of the order passed in the writ petition.
16. Dasti to the parties under the signature of Court Master.

G.S. SISTANI, J

JYOTI SINGH, J

MAY 29, 2019
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