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

% *Date of Judgment : 23rd October, 2019*

+ W.P.(C) 13317/2018, CM Appl. 51784/2018

SHRI SHYAM LAL KHATANA Petitioner

Through Mr. Utkarsh & Ms. Anshu Priyanka,
Advocates.

versus

FOOD CORPORATION OF INDIA AND ORS. Respondents

Through Mr. Om Prakash, Mr. Pradeep Kumar
Tripathi & Mr. Rajeev Ranjan Pathak,
Advocates for R-1 & R-2.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

G.S. SISTANI, J. (ORAL)

1. Petitioner claims to be a contractor specializing in handling food products. The petitioner participated in the e-tender notice dated 09.10.2018 floated by respondents Nos.1 and 2 for appointment of a regular handling contractor at FSD Narela in the Delhi Region. Respondent No.3 has been impleaded as a party, being one of the bidders in the e-tender notice, who was declared as L1.
2. Mr. Utkarsh, learned counsel for the petitioner submits that respondent No.3 should not have been declared successful as clause 6(iv) of the tender document has not been complied with by respondent No.3 since the terminal validity of the MSME registration is not documented; and thus his bid should have been declared 'non-responsive'. Clause 6(iv) reads as under:

“6 (iv) MSEs registered with the prescribed agencies are exempted from payment of EMD and

cost of tender and should enclose the proof of their being registered with agencies mentioned in the tender document. Their registration should be valid as on last date of submission of tender and they should also mention the terminal validity of their Registration, failing which their offer shall not be considered for benefits detailed in MSE Notification of Govt. of India dated 23.3.2012 or any other notification issued thereafter.”

3. Mr. Om Prakash, learned counsel appearing for respondents Nos.1 and 2 submits that respondent No.3 was declared as L1 as his price was half the price quoted by the petitioner. Counsel for respondents Nos.1 and 2 further submits that the contention of counsel for the petitioner is misplaced since, admittedly respondent No.3 is an MSE registered company; and that proof of registration with agencies mentioned in the tender documents was to be provided, which in fact was provided by respondent No.3. Counsel further contends that as per clause 6(iv) the registration was required to be valid as on the last date of submission of the tender and bidders were also required to mention the terminal validity of the registration, which respondent No.3 did.
4. Reliance is also placed on the remarks by the GM (DIC) which, according to Mr. Om Prakash, would fulfil the requirement of clause 6(iv) as in fact it covers the terminal validity of the registration. Counsel submits that this was also the understanding of the petitioner since he also submitted the documents in-line with the documents submitted by respondent No.3; and that there is no separate column in the certificate which specifically provides the terminal validity of the certificate of MSME registration.
5. We have heard learned counsels for the parties.

6. The only ground urged before us today is that the bid of respondent no.3 should have been declared 'non-responsive' since respondent no.3 did not fulfil condition 6(iv) of the tender inasmuch as the terminal validity of the registration of respondent no.3 was not documented.
7. Based on the original record available with him, counsel for respondent No.1 has submitted that both the petitioner and respondent No.3 have submitted almost identical documents in compliance of clause 6(iv) of the tender. The MSE certificate of the successful tenderer is scanned below :

 भारत सरकार Govt. of India सूक्ष्म, लघु और मध्यम उद्यम मंत्रालय MINISTRY OF MICRO, SMALL & MEDIUM ENTERPRISES	 MSME सूक्ष्म, लघु और मध्यम उद्यम MICRO, SMALL & MEDIUM ENTERPRISES																
	उद्योग आधार 	Udyog Aadhaar															
E	<table border="1" style="width: 100%; border-collapse: collapse;"> <tr> <td>Type of Enterprise</td> <td>Micro</td> <td>Small</td> <td>Medium</td> </tr> <tr> <td>Manufacturing</td> <td>A</td> <td>B</td> <td>C</td> </tr> <tr> <td>Services</td> <td>D</td> <td>E</td> <td>F</td> </tr> <tr> <td>UAM No.</td> <td colspan="3">HR18E0003728</td> </tr> </table>	Type of Enterprise	Micro	Small	Medium	Manufacturing	A	B	C	Services	D	E	F	UAM No.	HR18E0003728		
Type of Enterprise	Micro	Small	Medium														
Manufacturing	A	B	C														
Services	D	E	F														
UAM No.	HR18E0003728																
Udyog Aadhaar Registration Certificate																	
Udyog Aadhaar Number		HR18E0003728															
Name of Enterprise		SHIVA TRANSPORT COMPANY															
Location of Plant Details																	
SN	Flat/Door/Block No.	Name of Premises/Building Village	Road/Street/ Lane	Area/Locality	City	Pin	State	District									
1	456/1	BARODA ROAD	GOHANA	GOHANA	SONEPAT	131301	HARYANA	SONIPAT									
Official Address of Enterprise		456/1 BARODA ROAD GOHANA HARYANA 131301															
		District	SONIPAT	State	HARYANA	PIN	131301										
		Mobile No.	8900000005	Email	SHIVA.TRANSPORT@GMAIL.COM												
Date of commencement		01/04/2003															
Major Activity		SERVICES															
Enterprise Type		Small															
Previous Registration details-If any																	
National Industry Classification Code																	
SN	NIC 2 Digit	NIC 4 Digit	NIC 5 Digit Code	Activity Type													
1	49 - Land transport and transport via pipelines	4923 - Freight transport by road	49231 - Motorised road freight transport	Services													
2	49 - Land transport and transport via pipelines	4923 - Freight transport by road	49232 - Non-motorised road freight transport	Services													
3	52 - Warehousing and support activities for transportation	5221 - Service activities incidental to land transportation	52219 - Other land transport services n.e.c.	Services													
4	52 - Warehousing and support activities for transportation	5224 - Cargo handling	52241 - Cargo handling incidental to land transport	Services													
5	78 - Employment activities	7810 - Activities of employment placement agencies	78100 - Activities of employment placement agencies	Services													
Acknowledgement		Date of Filing	25/07/2018	Date of Printing	10/12/2018												
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8. A careful reading of the MSME certificate would show that there is no separate column indicating the terminal validity of the registration; and having regard to the fact that both the petitioner and respondent No.3 had submitted almost identical documents in compliance with clause 6(iv), we are of the view that it was indeed the understanding of the petitioner as well that providing a copy of a valid MSME certificate itself would be adequate compliance of showing the terminal validity of the MSME registration of the bidder.
9. Moreover, we may note that when the matter came-up on the first date of hearing i.e. 10.12.2018, it was pointed-out by counsel for respondents Nos.1 and 2 that the tender had already been awarded to respondent No.3. We are informed that in fact, work has also commenced on 13.12.2018.
10. Another reason why we find no justification to interfere by way of this writ petition is that while examining matters pertaining to tenders, the role of judicial review is narrow. The petitioner must show that the decision making process is either arbitrary, *mala-fide* or fanciful; or that the tendering process is legally flawed;
11. In the case of ***Air India Ltd. v. Cochin International Airport Ltd. and Others***, (2000) 2 SCC 617, the Apex Court has held in para -7 as under:

*“7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in **Ramana Dayaram Shetty v. International Airport Authority of India** [(1979) 3 SCC 489], **Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India** [(1981) 1 SCC 568], **CCE v. Dunlop India Ltd.** [(1985) 1 SCC 260 : 1985 SCC (Tax) 75], **Tata Cellular v. Union of India** [(1994) 6 SCC 651], **Ramniklal N. Bhutta v. State of***

Maharashtra [(1997) 1 SCC 134] and ***Raunaq International Ltd. v. I.V.R. Construction Ltd.*** [(1999) 1 SCC 492] The award of a 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 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. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.

12. It would be useful to also refer to the observations of the Supreme Court in ***Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited and Another***, (2016) 16 SCC 818, more particularly paras 11, 15, and 16, which read 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.

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15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.

16. In the present appeals, although there does not appear to be any ambiguity or doubt about the interpretation given by NMRCL to the tender conditions, we are of the view that even if there was such an ambiguity or doubt, the High Court ought to have refrained from giving its own interpretation unless it had come to a clear

conclusion that the interpretation given by NMRCL was perverse or mala fide or intended to favour one of the bidders. This was certainly not the case either before the High Court or before this Court.

13. Applying the settled law as referred to above to the facts of the present case, we are satisfied that the action of the respondents in awarding the tender to respondent no.3 (L-1) is neither arbitrary nor unreasonable nor fanciful.
14. Accordingly, we find no ground to interfere by way of this writ petition; and the same is accordingly dismissed. Interim order dated 10.12.2018 stands vacated. Pending applications, if any, also stand disposed of.

G.S. SISTANI, J

ANUP JAIRAM BHAMBHANI, J

OCTOBER 23, 2019

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