

Sr.No.205

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

**CWP No.7474-2020(O&M)
Date of decision:23.07.2020**

Gaurav Kumar

... Petitioner(s)

versus

Food Corporation of India and another ... Respondent (s)

CWP No.7442-2020(O&M)

M/s Jind Transport Company

.....Petitioner(s)

versus

Food Corporation of India and another ... Respondent(s)

CWP No.7454 of 2020(O&M)

Varun (Proprietorship Firm)

..... Petitioner(s)

versus

Food Corporation of India and another Respondent(s)

CWP No. 7455 of 2020(O&M)

Varun (Proprietorship Firm)

..... Petitioner(s)

versus

Food Corporation of India and another Respondent(s)

CWP No.7456-2020(O&M)

Varun (Proprietorship Firm)

..... Petitioner(s)

versus

Food Corporation of India and another Respondent(s)

**Coram: Hon'ble Mr. Justice Ajay Tewari
Hon'ble Mr. Justice Jasgurpreet Singh Puri**

**Present: Mr. V.K.Jindal, Sr. Advocate with
Mr. Akshay Jindal, Advocate**

Mr. Akshay Bhan, Sr. Advocate with
Mr. Alok Mittal, Advocate
for the petitioner(s).

Mr. Gaurav Chopra, Advocate and
Mr. Anurag Chopra, Advocate
for the petitioner(CWP-7474-2020) and
for the respondent/caveator(CWP-7454-2020).

Mr. Chetan Mittal, Sr. Advocate with
Mr. Sumeet Goel, Advocate and
Mr. S.K.Sahore, Advocate
for the respondents - FCI.

Jasgurpreet Singh Puri, J.(Oral)

This judgment shall dispose of bunch of five writ petitions bearing CWP No.7442 of 2020, CWP No.7454 of 2020, CWP No.7455 of 2020, CWP No. 7456 of 2020 and CWP No. 7474 of 2020.

Prayer in CWP No. 7474 of 2020 is for issuance of writ in the nature of mandamus directing the respondents Food Corporation of India (hereinafter, referred to as 'FCI') to implement the letters dated 08.05.2020(Annexure P-6) and 12.05.2020(Annexure P-7) and to open the financial bids of the technically qualified bidders in pursuance to the initial tender enquiry dated 28.03.2020(Annexure P-1). Further prayer has been made to quash the subsequent e-Tender Notice / Tender enquiry dated 23.04.2020 (Annexure P-4) with a further prayer directing the respondents FCI to allot the work of the contract in favour of the petitioner.

However, in the remaining four writ petitions bearing CWP No.7442 of 2020, CWP No.7454 of 2020, CWP No.7455 of 2020, CWP No. 7456 of 2020 prayer has been made by the petitioners which is diametrically opposite to the aforesaid CWP No.7474 of 2020. For convenience, facts have been taken from CWP No.7442 of 2020. In these four writ petitions, the petitioners have sought issuance of writ in the nature of certiorari for

setting aside the communication dated 12.05.2020(Annexure (P-11) whereby the cancellation of tender dated 28.03.2020 (Annexure P-1) was revoked and with a further prayer to proceed with opening of tender enquiry dated 23.04.2020(Annexure P-8).

The facts of these writ petitions are summarised as follows:-

CWP No.7474 of 2020

In CWP No. 7474 of 2020, Food Corporation of India which is a Statutory body set up under the Food Corporations Act, 1964 engaged in distribution, procuring and maintaining satisfactory level of operational and buffer stocks of food grains throughout the territory of India and to ensure national food security invited e-Tender for appointment of Handling and Transport Contractors (hereinafter, referred to as 'HTC'). Vide tender enquiry dated 28.03.2020 (Annexure P-1), the system of inviting on-line tenders is based upon two bid system at Central Public Procurement Portal for appointment of contractor for a period of two years. First bid pertains to technical bid and second bid pertains to financial bid. The aforesaid e-Tender pertains to two districts namely, FCI District Rohtak and FCI District Hisar. However, the subject matter of the present petition pertains only to FCI District Rohtak from which tender was invited for three places namely, Alewa Negura, Pillukhera and Julana. On receiving bids from various contractors including the petitioner and the petitioners of the connected writ petitions, FCI technically examined the bids and a number of bidders were found to be technically disqualified/ineligible. In HTC Pillukhera, one tenderer out of nine was found to be technically qualified, in HTC Julana, two tenderers were found to be qualified out of seven and in HTC Alewa Negura centre two tenderers were found to be technically qualified out of

eight. However, instead of proceeding further for opening the financial bids of the qualified tenders, the General Manager/Haryana FCI scrapped the tender enquiry on the ground that there is less participation of bidders. Due to disqualification of more number of bidders, there will be a financial loss to the corporation and therefore, thought it fit to scrap the tender enquiry. In this way, the tender enquiry dated 28.03.2020 pertaining to the aforesaid centers was scrapped. Thereafter, fresh tenders were invited vide tender enquiry dated 23.04.2020 (Annexure P-4).

Petitioner namely, Gaurav Kumar was one of the technically qualified bidder for the aforesaid centres and being dis-satisfied by the aforesaid action of the FCI Regional office in scrapping the tender, served a legal notice dated 16.04.2020 (Annexure P-5) addressed to The Chairman cum Managing Director, Food Corporation of India, The Executive Director (Contract) Food Corporation of India, New Delhi and the General Manager, Food Corporation of India, Regional Office, Panchkula. The said legal notice was examined by the FCI Headquarters in detail and vide Annexure P-6 dated 08.05.2020 it was decided by the Headquarters to accept the request made by the petitioner and to further proceed with the initial tender dated 28.03.2020. A perusal of the aforesaid decision taken by the FCI Headquarters shows that various reasons have been given in the order itself which are reproduced as follows:-

"Please refer to above communicators on the subject cited. In this connection the matter has been examined in consultation with legal division of Hqrs and it has been observed that the main justification put forth by RO(Hr) for scrapping the tender is that

due to disqualification of may tenders on the newly introduced condition of EPF registration, FCI may suffer financial loss due to lesser competition. The above justification does not appeal to logic for the following reasons:-

1. It is obligatory on the part of the bidders to carefully persue the tender document and submit the bid only if they fulfill all the terms and conditions thereof. The tender process under the MTF is so strict that it does not permit the bidders to submit any new documents after submission of tender. The basic object and purpose of such a stringent condition is that the bidders shall exercise due diligence while submitting tender and precious time, money and effort of FCI is not wasted in the retendering process. Scrapping of tender merely on the ground of submission of defective tender by some bidders would run contrary to the above objected and purpose and would indirectly provide an opportunity to casual bidders to remove the defects, which are not permitted to be removed under normal tender process. The amendments regarding EPF registration were made/circulated vide Hqrs letter dated 05.02.2020 that is much prior to scraped tender and thus, such amendment cannot justify the submission of defective tenders.

2. *The ground of financial loss cited in support of scrapping of tender is also devoid of merit as without opening the price bid and without comparison of rates it cannot be concluded that the rates quoted under the scrapped tenders were more than the rates received under the re-tender.*

3. *The scrapping of tender is also contrary to explicit in instruments issued by vigilance Division, Hqrs vide letter no. Vig.2(2)2007\Vol.1 dated 15.5.2009 wherein it has been specifically clarified that there is no bar in accepting single tender and such tender should not be summarily rejected only on the basis of it being a single tender Receiving more number of valid tenders ipso factor does not guarantee lesser rates. Thus, the action of scrapping the tender for the above reason is inconsistent not only from commercial perspective but is also not legally sustainable.*

4. *The action of scrapping on the ground of single tender is also inconsistent with the practice followed by Haryana Region as the legal notice clearly points out numerous instances where RO Haryana has awarded work in last one and half year when only one/two bidder(s) remained in the fray. the comments of RO(Hr) nowhere denies the said allegation.*

5. *It is also strange that tender was re-floated to*

ensure larger participation but while re-floating the tender 14 days time was allowed for submission of bids as against the prescribed period of 21 days.

6. *It is also pertinent to mention here that the DoP lies with the GM(R) to the contractual matters but such decision Hos cannot be arbitrary and should be in the interest of the organization and should be consistent, judicious and logical CVC guidelines dated 24.03.2005 O/O No. 15/3/05 stipulates that the tender applications could be rejected without assigning any reason but such a clause does not mean that the tender accepting authority is free to take decisions in an arbitrary manner. He is bound to record clear logical reasons for any such actions of rejection/recall of tenders on the file.*

7. *The well-established judicial principle is that the discretion conferred on a public authority is not an unbridled power. It must be exercised in a just and fair manner. In contractual matters, High Court exercised writ jurisdiction under Article 226 of Consitution of India, wherever it is found that the Public Authority has acted in an arbitrary manner. In several cases, in several cases, the Hon'ble Punjab and Haryana High Court has admitted writ petitions against FCI for the alleged irregularities and in some cases the Hon'ble Court ordered for personal*

appearanace of CMD/filing of counter affidavit by CMD. Thus, it is absolutely necessary that the authorities conferred with full powers under DoP take appropriate decisions strictly in accordance with law and prescribed procedure.

In view of the above, competent Authority has directed to extend the date of Re-floating which is scheduled to be opened on 08.05.2020 for a further period of 7 days. Meanwhile, price bid of tender dated 28.03.2020 may be opened and decision on award of contract be taken which is consistent with the general principles/guidelines being followed in the region for award of contract."

After the passing of the aforesaid order dated 08.05.2020, the date of second tender dated 23.04.2020 was extended and the financial bid of the first tender dated 28.03.2020 was opened on 18.05.2020. Thereafter, the connected writ petitions were filed in this Court and this Court vide order dated 22.05.2020 ordered the parties to maintain status-quo till the next date of hearing and thereafter, vide orders dated 04.06.2020 status quo order was directed to be continued. Thereafter, tender dated 28.03.2020 in which financial bids already stood open could not be finalized by the FCI due to the interim orders.

CWP No. 7442 of 2020, CWP No.7454 of 2020, CWP No.7455 of 2020, CWP No. 7456 of 2020

Since the subject matter and the prayer claimed in all these four writ petitions bearing CWP No.7442 of 2020, CWP No.7454 of 2020, CWP No.7455 of 2020, CWP No. 7456 of 2020 is similar in nature, the

summarization of the facts of these four cases are taken up together. The precise challenge which has been made in these writ petitions is that the action of the FCI in revoking the scrapping of the earlier tender is bad in law. The petitioners have already participated in the second tender dated 23.04.2020 and submitted their bids for evaluation. It is also pertinent that all the petitioners in these aforesaid four writ petitions had participated in the first tender dated 28.03.2020 but were declared disqualified/ineligible by the FCI during technical evaluation. It is an admitted position that these petitioners did not challenge their disqualification probably because earlier tenders stood scrapped which was however, revived later vide order dated 08.05.2020. The grievance of writ petitioners in these petitions is that after scrapping of the first tender, they have participated in the second tender and therefore, they have earned a right for being considered in second tender which must be processed till its logical conclusion by the FCI. In other words, they are aggrieved by restoration of first tender dated 28.03.2020 in which admittedly, they stood disqualified.

Arguments raised by Learned counsels

Shri Gaurav Chopra, learned counsel for the petitioner in CWP No.7474 of 2020 contended that even though the earlier tender dated 28.03.2020 was scrapped on the ground that there was less competition but the said mistake of the regional office of FCI, Panchkula stood rectified by the Headquarters of the FCI vide Annexure P-6 dated 08.05.2020 on the basis of legal notice served by the petitioner upon FCI. Learned counsel for the petitioner has further submitted that the first tender dated 28.03.2020(Annexure P-1) was illegally scrapped which prejudiced his legal rights because there was no justification for scrapping the same. In case the

higher authorities rectified the mistake then the first tender enquiry dated 28.03.2020 (Annexure P-1) could be brought to the logical conclusion by processing the same in accordance with law. He has further submitted that the petitioners of the other four connected writ petitions can not raise any grievance with regard to the continuation of the tender enquiry dated 28.03.2020 because they had participated in the tender enquiry and were rendered disqualified/ineligible during technical evaluation process. Therefore, according to learned counsel for the petitioner firstly, they had participated in the tender enquiry and consequently, they are estopped from challenging the continuation of the tender process and secondly, they having been rendered disqualified and having not challenged their disqualification, their grievance is unsustainable. Learned counsel further argued that public interest has to be given primacy in such like contracts, and therefore, the order Annexure P-6 passed by the Headquarters FCI should be implemented in its *letter and spirit*. Learned counsel further argued that second enquiry dated 23.04.2020 (Annexure P-4) is liable to be quashed. The petitioner is entitled to allotment of work in respect of all the three centres namely, HTC Alewa Negura, Pillukhera and Julana particularly, in view of the fact that he is technically qualified bidder and L-1 in the tender process. In support of his contentions, learned counsel for the petitioner has further relied upon the various judgments passed by the Hon'ble Supreme Court rendered in ***Tata Cellular versus Union of India; 2015 AII SCR(OCC), Jagdish Mandal versus State of Orissa and others; 2006(14) Scale 224, Central Coalfields Limited and another versus SLL – SML (Joint Venture Consortium) and others; 2016(4)R.C.R.(Civil) 919, Montecarlo Limited versus National Thermal Power Corporation Limited;(2016) 15 Supreme Court Cases 272,***

Municipal Corporation, Ujjain and another versus BVG India Limited and others; (2018) 5 Supreme Court Cases 462, B.S.N.Joshi & Sons Ltd. Versus Nair Coal Services Ltd. And others; (2006) 11 Supreme Court Cases 548 and this Court rendered in CWP No.6473 of 2019, titled as Ceigall Gawar(JV) A-898, Tagore Nagar, Ludhiana versus State of Punjab and others, decided on 22.05.2019.

Learned Senior counsel Shri V.K.Jindal, Sr. Advocate with Shri Akshay Jindal, Advocate, Shri Akshay Bhan, Sr. Advocate with Shri Alok Mittal, Advocates have put in appearance on behalf of the petitioners in CWP No.7442 of 2020, CWP No.7454 of 2020, CWP No.7455 of 2020, CWP No. 7456 of 2020. Learned Senior counsels for the petitioners have contended that the action of FCI Headquarters whereby the scrapping of the tender has been revoked is not sustainable in law because once the authority entering into contract has taken a decision to scrap the tender then, there is no provision for revoking the said scrapping. Learned Senior counsels contended that there is neither any provision for revoking of any of the tender documents nor there is any power of review by any authority to justify the revocation of scrapping of tender. It was contended that the action of the respondents FCI was manifestly illegal being unjust to the petitioners. It was further submitted that when new tender has already been floated there is no need to revoke the scrapping of the earlier tender. Learned Senior counsels further submitted that the rights stood vested in the petitioners the moment they participated in the second tender, and therefore, the second tender needs to be put to its logical conclusion. It was further submitted by the learned Senior Counsels that the earlier tender dated 28.03.2020 (Annexure P-1) was scrapped in public interest because there

was less competition and that since there was no concluded contract the tender could have been scrapped at any time in public interest. It was further contended that there was no need to challenge the order passed by the FCI Headquarters dated 08.05.2020 as the same was only an internal communication and the petitioners in these four petitions are not privy to the same. In support of their contentions, learned Senior counsels have relied upon the judgments of this Court rendered in CWP NO.6895 of 2018, CWP No. 15397 of 2018 and CWP NO.18881 of 2011 and prayed that the respondents may be directed to proceed with the opening of the second tender enquiry dated 23.04.2020. Learned counsels have further argued that FCI Headquarters had no jurisdiction to revise the decision of the regional office because the competent authority to enter into contract is the regional office and not the headquarters.

Shri Chetan Mittal learned Senior counsel with Shri Sumeet Goel, Advocate and Shri S.K.Sahore, Advocate for the respondents-FCI has argued that the scrapping of tender enquiry dated 28.03.2020(Annexure P-1) by the Regional Office FCI, Haryana was not in accordance with law and therefore, when the matter was re-considered on the basis of legal notice served by the petitioner namely, Gaurav Kumar, then the Headquarters passed a detailed and reasoned order based upon various circulars of the FCI and other CVC guidelines. Shri Mittal further submitted that the mistake committed by the Haryana Regional Office stood rectified by the Headquarters and therefore, it was directed that the initial tender enquiry dated 28.03.2020 must proceed to its logical end. He has submitted that tender enquiry dated 28.03.2020 was scrapped on the ground that since more number of bidders were rendered ineligible/disqualified, the competition has

reduced and it may cause financial loss to the FCI. However, the headquarters on considering the reasons given by the Regional Office Haryana took a conscious decision that any given tender should not be scrapped merely on the ground that there is only a single tender because re-inviting of the tenders may not guarantee a better deal and sometimes it may also prove to be counter productive. Learned Senior counsel has further pointed out towards the reasons given by the FCI Headquarters in order dated 08.05.2020 (Annexure P-6) that the ground of financial loss cited in support of scrapping of tender is devoid of any merit because without opening the price bid and without comparison of the rates, it can not be concluded that rates quoted under the scrapped tenders were more than the rates received under any other e-Tender. It has further been incorporated in the said order that the scrapping of the tender is contrary to explicit orders issued by the vigilance division headquarters vide letter dated 15.05.2020(Annexure P-13) where it has been specifically clarified that there is no bar in accepting a single tender and that such tender should not be summarily rejected only on the basis of it being a single tender and that receiving more number of valid tenders *ipso facto* does not guarantee lesser rates. Further more, reference has also been made to CVC guidelines dated 24.03.2005 that the tender applications could be rejected without assigning any reason but such a clause does not mean that the tender accepting authority is free to take decision in an arbitrary manner. Learned Senior Counsel has further argued that the contracting party is FCI and there is delegation of powers with the General Manager(R) in contractual matters to enter into contract with the contractors.

Shir Mittal, while answering the argument raised by learned

counsel for the petitioners with regard to delegation of powers has submitted that vide '*Storage of Contract Manual*' issued by the FCI, Headquarters, the FCI itself being an entity is the authority to enter into contract. However, powers are delegated to the regional offices for the purposes of entering into the contract. He has referred to Chapter 37 of the aforesaid Storage and Contract Manual and the relevant portion of the same is reproduced as follows:-

37. DELEGATION OF POWERS

37.1 The Food Corporation of India, under Section 37 of the Food Corporation Act, 1964 may, by general or special order in writing, delegate to the Chairman or any other member of the Board of Directors or the Secretary or other officer of the Corporation, subject to such conditions, if any, as may be specified in the order such of its powers and functions under this Act as it may deem necessary.

37.2 Under the aforesaid provision of the Act, the Board had delegated financial and cognate powers to officers of the Corporation at different levels for various matters including storage operations and contracts.

37.3 The delegation of powers had been reviewed by the Board from time to time. The delegations relating to storage and contract matters is placed at Appendix 37.3.

37.4 The delegation of powers is subject to the

existing policies, procedures, guidelines and instructions prescribed by the Corporation from time to time. Where any doubt or question of interpretation of the delegation of powers arise, the Managing Director in consultation with the Executive Director (Finance) will be competent to issue necessary clarification interpretations.”

It has been submitted by learned counsel for the FCI that the order dated 08.05.2020 passed by the FCI Headquarters has already been implemented and the price bid of the petitioner in CWP No. 7474 of 2020 has already been opened on 18.05.2020, and therefore, the grievance of the petitioner stand redressed to that extent. He has further submitted that after the opening of the financial bid of the petitioner, contract could not be awarded to anybody in view of the status quo order passed by this Court on 22.05.2020 and 27.05.2020. It has further been submitted in the reply that after evaluating the financial bid of the petitioner namely, Gaurav Kumar, decision will be taken as to whether the contract is to be awarded or not depending upon the financial evaluation of the price bid considering the financial viability etc., and therefore, the basic grievance of the petitioner in CWP NO. 7474 of 2020 has been redressed. He has further submitted that the other prayer of the petitioner with regard to his right of getting the work allotted is devoid of any merit because there is no vested right conferred upon the petitioner in this regard and it will all depend upon the evaluation of the financial bid.

Learned counsel for the FCI while answering to the issues raised by the petitioners in the remaining writ petitions has submitted that

the petitioners have no vested right in them for making such a grievance particularly, in view of the fact that all the petitioners had participated in first tender enquiry dated 28.03.2020 in which they stood disqualified and the same have not been challenged by the petitioners at any stage. He has further submitted that the date of second tender dated 23.04.2020 has been extended subject to the out-come of the first tender. The petitioners have no vested right in seeking continuation of the second tender as it was only at the initial stage and even technical evaluation has not been made and therefore, has prayed for dismissal of these four writ petitions.

We have heard learned counsel for the parties at length through Video Conferencing. FCI floated an e-Tender for appointment of HTC Contractors. Vide Tender Enquiry dated 28.03.2020 (Annexure P-1), the subject matter of the present petitions pertain to three centres namely, Alewa Negura, Pillukhera and Julana. The petitioners of all the petitions participated in the tender enquiry. The petitioner, namely Gaurav Kumar in CWP No. 7474 of 2020 was declared as technically qualified whereas the petitioners of the remaining four writ petitions were declared as disqualified/ineligible in these centres. FCI follows two bid system through the Central Public Procurement Portal for appointment of HTC Contractors for two years. The first bid is for technical evaluation and therefore, is called '*Technical Bid*'. After technically evaluating the participants/bidders those who are declared technically qualified are further processed and their '*financial/price bids*' are opened. Thereafter, the financial bids are evaluated and after considering the financial viability and other relevant factors, the contract, if any, is awarded. In the present case, regional office of the FCI floated e-Tenders dated 28.03.2020 in which all the petitioners participated.

The petitioner in CWP No. 7474 of 2020 namely, Gaurav Kumar was declared as technically qualified whereas the petitioners in the remaining four petitions were declared as disqualified. Thereafter, the tender was scrapped by the FCI Regional Office, Haryana on the ground that large number of participants have been declared as disqualified and that it will lower the competition and therefore, scrapped the tender. Thereafter, Gaurav Kumar served a legal notice upon the respondents and acting upon the same, the FCI Headquarters re-assessed the entire issue and arrived at a conscious decision dated 08.05.2020 that such a ground for scrapping is not proper and therefore, directed that the scrapping of the tender stood revoked and the financial bids be opened for further evaluation. The date of the second tender dated 23.04.2020 was also directed to be extended.

The prayer which has been made by learned counsel for the petitioner in CWP No.7474 of 2020 is that letter dated 08.05.2020 passed by the FCI should be implemented and that the petitioner should be allotted the tender being L-1. So far as the first prayer of the petitioner is concerned, FCI in its reply has taken up a categorical stand that in pursuance of the aforesaid order, they have already opened the financial bid of the petitioner and after evaluating the financial bid, further course of action would be adopted. Therefore, grievance of the petitioner with regard to the implementation of the order dated 08.05.2020 had already been accepted by the respondents. So far as the second prayer of the petitioner with regard to seeking a direction for the allotment of the work to the petitioner is concerned, the same deserves to be rejected. It is a settled law that no right is vested in a bidder for the award of the contract even if the bidder is L-1 bidder. The employer is to evaluate the financial bids of all the qualified

technical bidders and after considering the financial viability and other relevant factors will arrive at a conclusion as to whether the contract is to be awarded or not. Therefore, being an L-1 bidder *ipso facto* does not confer any right for being awarded a contract.

So far as the prayer made by the petitioners in the remaining four writ petitions is concerned, the primary arguments which have been raised by the learned Senior Counsels are that once tender has been scrapped then the same can not be revived by higher authority and that there was no need to continue with the first contract because the second tender has already been floated. The submissions made by learned Senior counsels for the petitioners do not cut any ice. All the petitioners in the aforesaid four writ petitions had themselves participated in the first tender enquiry dated 28.03.2020 and were admittedly, rendered as disqualified but they did not challenge the said disqualification at any stage. The FCI took categorical stand that the order passed by the Regional Office, Haryana in scrapping of the tender could always be re-considered by the FCI, Headquarters in view of the fact that the FCI as an entity and a statutory body itself is the contracting party and had delegated the powers in contractual matters to the regional office. Therefore, a delegating authority can always rectify a mistake if any committed by delegatee. In our considered opinion, taking a decision by FCI Headquarters would not amount to any kind of appeal or revision but would only be an exercise of authority vested in the FCI itself. A perusal of the storage manual which has been reproduced above would show that the FCI delegates its powers to the other officers. Even a perusal of the opening lines of e-Tender notice would show that the tender is invited '*for and on behalf of the FCI*', by the General Manager which means that the

FCI as a statutory body and as an entity itself has invited the tenders through the General Manager who is competent to sign the contract and undertake various other processes as a delegatee. Thereafter, it cannot be said that the FCI Headquarters had no jurisdiction to rectify any error made by regional office of the FCI situated at Panchkula.

The next argument raised by learned senior counsels for the petitioners that the first tender enquiry dated 28.03.2020 was not a concluded contract and therefore, no right was vested in the petitioner namely, Gaurav Kumar. It is true that the contract was not a concluded contract but at the same time, the petitioner namely, Gaurav Kumar has not acquired any vested right for being allotted contract. The bid is at the stage of financial evaluation only. The technically qualified bidders in tender enquiry never acquire any vested right for getting the contract allotted even if they are L-1 after the financial evaluation has been made. It is always the employer who is to ascertain as to whether a contract is to be awarded to any contractor on the basis of technical and financial evaluation considering the financial viability, fluctuating market conditions and other relevant factors in this regard and therefore, the arguments raised by learned counsel for the petitioners that the earlier tender enquiry dated 28.03.2020 can not proceed being not a concluded contract is of no significance.

So far as the reliance placed by the learned counsels for the petitioners in CWP No.6895 of 2018, CWP NO.15397 of 2018 and CWP No.1888 of 2011 is concerned, they do not lend any support to the petitioners and are distinguishable. In CWP No.6895 of 2018, it was rather held that a business decision ought not be interfered with by the Court unless it is found to be malafide. CWP No. 15397 of 2018 pertained to challenge

laid to scrapping of tender and therefore, distinguishable from the present case as the present case pertains to Revocation of Scrapping of tender. CWP No.18881 of 2011 pertains to challenge laid to fresh tenders invited after scrapping first tender. This Court held that decision of this scrap tenders in the event of sole bidder is the discretion of the competent authority.

The law with regard to interference in tender or contractual matters in exercise of powers in judicial review is no longer *res-integra*. Hon'ble Supreme Court in ***Jagdish Mandal's case(supra)*** observed as follows:-

"Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. 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 black-listing or imposition of penal consequences on a tenderer/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"

In **Montecarlo Limited case(supra)** Hon'ble Supreme Court has observed as under:

"18. In Tata Cellular (supra) a three-Judge Bench after referring to earlier decisions culled out certain principles, namely, (a) the modern trend points to judicial restraint in administrative action, (b) the court does not sit as a court of appeal but merely reviews the manner in which the decision was made, (c) 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, and (d) the Government must have freedom of contract and that permits a fair play in the joints as a necessary concomitant for an administrative

body functioning in an administrative sphere or quasi-administrative sphere. Hence, the Court has laid down that 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.

19. In Jagdish Mandal v. State of Orissa and Ors[4] the Court has held that 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.

20. In Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd and Anr[5], it has been ruled that the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It has been further held that 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 powers 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.

21. In B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd. and Ors.[6] a two-Judge Bench, after referring to series of judgments has culled out certain principles which include the one that where a decision has been taken purely on public interest, the court ordinarily should apply judicial restraint.

22. In Michigan Rubber (India) Ltd. (supra) the Court referred to the earlier judgments and opined that before a court interferes in tender or contractual matters, in exercise of power of judicial review should pose to itself the question 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 judicial conscience cannot countenance. Emphasis was laid on the test, that is, whether award of contract is against public interest.

23. Recently in Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.[7] a two-

Judge Bench eloquently expounded the test which is to the following effect:-

“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.”

24. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinized by the technical experts and sometimes third party

assistance from those unconnected with the owner's organization is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or malafide or procedure adopted is meant to favour one. The decision making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or

suberves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints."

In the case of ***Municipal Corporation, Ujjain***(supra) the Hon'ble Supreme Court has observed as under:-

"45. Evaluating tenders and awarding contracts are essentially commercial transactions/contracts. If the decision relating to award of contract is in public interest, the Courts will not, in exercise of the power of judicial review, interfere even if a procedural aberration or error in awarding the contract is made out. The power of judicial review will not be permitted to be invoked to protect private interest by ignoring public interest. Attempts by unsuccessful bidders with an artificial grievance and to get the purpose defeated by approaching the Court on some technical and procedural lapses, should be handled by Courts with

firmness. The exercise of the power of judicial review should be avoided if there is no irrationality or arbitrariness. In the matter on hand, we do not find any illegality, arbitrariness, irrationality or unreasonableness on the part of the expert body while in action. So also, we do not find any bias or mala fides either on the part of the corporation or on the part of the technical expert while taking the decision. Moreover, the decision is taken keeping in mind the public interest and the work experience of the successful bidder."

In ***B.S.N.Joshi's case***(supra) Hon'ble Supreme Court has observed 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"

In CWP No. 6473 of 2019, Division Bench of this Court while referring to the earlier decisions of the Hon'ble Supreme Court observed as under:

"The legal proposition which emerges from the

aforesaid discussion is that the prescription of the conditions in a tender document is within the domain of the employer and cannot be objected to unless the tender conditions are arbitrary or perverse. The decision making process cannot be challenged, except, where it is shown to be mala fide or for collateral reasons. It is not at all necessary that only the L1 bidder ought to be selected for the work. The eligibility criteria to be fulfilled by a bidder is one of the essential requirements and in such a situation it is not necessary to accept the lowest financial bid for the reason that the said bidder may not be having the capacity or experience or may not be found to be technically qualified to provide quality work."

The legal position which emerges would be that judicial review of any administration action is to prevent the unreasonableness, arbitrariness, irrationality, bias or malafide action. The contract is normally a commercial transaction and principles of equity and natural justice stay at a distance. In case a decision relating to award of a contract is bonafide and is in public interest then the courts normally restrain themselves from interfering in the same even if there is any procedural aberration or error in the assessment or prejudice to tenderer is made out. Furthermore, such power of judicial review would not be permitted to be invoked in order to protect any private interest at the cost of public interest. In case any conflict arises between public interest and private interest then obviously the public interest would prevail. Various parameters have been set by the Hon'ble Supreme Court

in this regard. In *Jagdish Mandal's case*(supra) the Hon'ble Supreme Court formulated three questions which the Court should pose to itself before interfering in a tender or contractual matter for exercise of judicial review for assessing legality of action of an employee Viz.(i) *whether the process adopted or decision made by the authority is malafide or intended to favour someone; or*

(ii) whether the process adopted or decision made is so arbitrary and irrational that the Court may say that the decision is such that no responsible authority acting reasonably and in accordance with law could have reached and

(iii) whether public interest is affected.

In our considered opinion in the present case all the three questions can be answered in negative so far as the prayers made by the petitioners in CWP No.7442 of 2020, CWP No.7454 of 2020, CWP No.7455 of 2020, CWP No. 7456 of 2020 is concerned. We do not find any illegality or perversity in the action of the respondents in reviving the scrapped tender by rectifying a mistake. There is nothing to show that Public interest has been adversely affected by the action of respondents.

Therefore, considering the totality of circumstances in the present cases, it is held as follows:-

a) CWP No. 7474 of 2020 is disposed of as having become infructuous to the extent of the prayer made by the petitioner with regard to implementation of the order dated 08.05.2020(Annexure P-6). It is directed that Tender Enquiry dated 28.03.2020 be processed further in accordance with law. The remaining prayer

of the petitioner with regard to seeking direction for allotment of work for HTC Alewa Negura, Pillukhera and Julana in favour of the petitioner as L-1 is rejected.

(b) CWP No.7442 of 2020, CWP No.7454 of 2020, CWP No.7455 of 2020, CWP No. 7456 of 2020 are hereby dismissed being devoid of merit.

(c) Since main writ petitions have been decided, all the interim orders stand vacated.

Considering the facts and circumstances of the case, no order is made as regards to costs.

[AJAY TEWARI]
JUDGE

[JASGURPREET SINGH PURI]
JUDGE

23.07.2020

Shivani Kaushik

<i>Whether speaking/reasoned</i>	<i>Yes/No</i>
<i>Whether Reportable</i>	<i>Yes/No</i>