

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

- 1. CWP No. 14019 of 2020**
Reserved on: 10th November, 2020
Decided on: 17th November, 2020

Kulbir Singh and CompanyPetitioner

VERSUS

Food Corporation of India and othersRespondents

- 2. CWP No. 14021 of 2020**

Kulbir Singh and CompanyPetitioner

VERSUS

Food Corporation of India and othersRespondents

- 3. CWP No. 14022 of 2020**

Kulbir Singh and CompanyPetitioner

VERSUS

Food Corporation of India and othersRespondents

- 4. CWP No. 14023 of 2020**

Kulbir Singh and CompanyPetitioner

VERSUS

Food Corporation of India and othersRespondents

- 5. CWP No. 14024 of 2020**

Kulbir Singh and CompanyPetitioner

VERSUS

Food Corporation of India and othersRespondents

6. CWP No. 14025 of 2020

Lovepreet SinghPetitioner

VERSUS

Food Corporation of India and othersRespondents

7. CWP No. 14026 of 2020

Lovepreet SinghPetitioner

VERSUS

Food Corporation of India and othersRespondents

8. CWP No. 14044 of 2020

Kulbir Singh and CompanyPetitioner

VERSUS

Food Corporation of India and othersRespondents

9. CWP No. 14047 of 2020

Kulbir Singh and CompanyPetitioner

VERSUS

Food Corporation of India and othersRespondents

10. CWP No. 17123 of 2020

Kulbir Singh and CompanyPetitioner

VERSUS

Food Corporation of India and othersRespondents

11. CWP No. 17124 of 2020

Kulbir Singh and CompanyPetitioner

VERSUS

Food Corporation of India and othersRespondents

12. CWP No. 17125 of 2020

Kulbir Singh and CompanyPetitioner

VERSUS

Food Corporation of India and othersRespondents

**CORAM: JUSTICE S. MURALIDHAR
JUSTICE AVNEESH JHINGAN**

Present: Mr. Vikas Bahl, Senior Advocate with
Mr. Nikhil Sabharwal, Advocate for the Petitioners.

Mr. Chetan Mittal, Senior Advocate with
Mr. Sumeet Goel, Advocate for the Food Corporation of India.

Mr. Udit Raj, Advocate for the Respondent Nos. 1 and 2.

Mr. Anurag Chopra, and Mr. Gaurav Chopra, Advocates
for the Respondent No. 3 in CWP Nos. 14019, 14021 to 14026,
14044, 14047 and 17123 of 2020.

Mr. K.K. Gupta, Advocate for the Respondent No. 3 in
CWP No. 17124 and 17125 of 2020.

Mr. Bhupender Ghai, Advocate

Dr. S. Muralidhar, J.

1. This is a batch of 12 writ petitions by two Petitioners viz., M/s. Kulbir Singh and Co. and Lovepreet Singh. While CWP Nos. 14021, 14022, 14023, 14024, 14044, 14047, 17123, 17124 and 17125 of 2020 have been filed by M/s. Kulbir Singh and Co., CWP Nos. 14025 and 14026 of 2020 have been filed by Lovepreet Singh.

2. The challenge in these writ petitions is to the decision of the Respondent No. 1/Food Corporation of India ('FCI'), rejecting the technical bids submitted by the Petitioners, pursuant to a notice inviting tenders for being appointed as Handling and Transport Contractor ('HTC') in the various FCI centres in Haryana.

Background Facts

3. By an e-tender notice dated 23rd April, 2020 FCI invited tenders for appointment of HTCs in 7 centres in District Kurukshetra and 11 centres in District Karnal. By another e-tender notice dated 1st July, 2020 FCI invited tenders for appointment of HTCs in 6 centres in District Hisar, 8 centres in District Karnal, 3 centres in District Kurukshetra and 1 centre in District Faridabad.

4. The terms and conditions attached to the tender were specified in the e-tender notices itself. Relevant to the present petitions is Clause 5, which stipulated that "all HTCs have to ensure that all statutory provisions such as EPF/ESI/Contract Labour Act etc. are strictly complied with." Also relevant is clause 25, which reads as under:

"25. The tenderer should be registered with EPFO as an independent employer, having separate code number as required for an employer under the provision of EPF and MP Act, 1952 and the EPF scheme framed there under and upload scanned copy of EPF Code falling which tender will be summarily rejected."

5. On 10th May, 2020, pursuant to the e-tender notice dated 23rd April, 2020, M/s. Kulbir Singh and Co., a proprietorship, through its sole proprietor Kulbir Singh, submitted technical bids for 7 different centres in District Karnal viz., Jagadhari, Ambala Cantt., Khizrabad, Mustafabad, Mulana, Bilaspur and Chhichhrauli. It must be mentioned here that, pursuant to the aforesaid e-tender notice, Lovepreet Singh, son of Kulbir Singh, the Petitioner in CWP Nos. 14025 and 14026 of 2020, submitted technical bids on 11th May, 2020 for two of the very same centres in District Karnal that M/s. Kulbir Singh and Co. had submitted technical bids for i.e. the centres at Jagadhri and Mullana. On 18th July, 2020, pursuant to the e-tender notice

dated 1st July, 2020, M/s. Kulbir Singh and Co. submitted technical bids for 3 centres in District Karnal viz., Radaur, Karnal and Jundla.

6. On 20th July, 2020, a letter was sent by the Assistant General Manager on behalf of the Regional General Manager, FCI at its regional office in Panchkula, to both Petitioners drawing their attention to a complaint made by M/s. Jagjiwanpal Singh and Company. The said complaint had pointed out that Kulbir Singh and Co. had claimed experience for the HTC Karnal contract for the period from 12th September, 2016 to 11th September, 2018. A perusal of the EPFO Website had revealed that Kulbir Singh and Co. was paying Employee Provident Fund ('EPF') for the family members and sons of Kulbir Singh viz., Lovepreet Singh and Atinder Singh. It was found that Lovepreet Singh was, in his personal capacity, a participant in all tenders along with M/s. Kulbir Singh and Company and was running contracts in his name for the FCI. It was further pointed out as under:

“the profit and loss account ('P&L account') and the income tax return ('ITR') uploaded with the technical bid of M/s. Kulbir Singh and Co. Kurukshetra and Sh. Lovepreet Singh, the income has been shown as business income on the one hand and on the other hand M/s. Kulbir Singh and Co. has shown Sh. Lovepreet Singh and Sh. Atinder Singh as labourers as per monthly wage register and remitting EPF for them.”

7. The letter further pointed out that aforementioned complaint had been investigated by a committee of three Managers. The findings of the said committee were set out in the letter. It was stated *inter alia* that from the copies of EPF challans and muster roll, it was revealed that the composite payment had been made in the EPF account by M/s. Kulbir Singh and Company in the name of Lovepreet Singh and Atinder Singh and other family members. Further, both Atinder Singh and Lovepreet Singh were operating contracts for the FCI at different centres in their personal capacity in the past. A perusal of the financial statements of the preceding three years, uploaded by Lovepreet Singh, confirmed that only business income had been shown in the profit and loss (P&L) account, whereas he had been shown to be a labourer/workman employed with M/s. Kulbir Singh and Co. in its muster rolls.

8. The letter also stated that both Kulbir Singh and Lovepreet Singh had shown themselves as independent business proprietors, whereas Lovepreet Singh's name had been reflected in the muster rolls of M/s. Kulbir Singh and Co. and the EPF was being remitted in his name by the firm. This was in violation of the terms and conditions set out in the Model Tender Form ('MTF') and Notice Inviting Tender ('NIT'). The Know Your Customer ('KYC') details of the family members of Kulbir Singh, as uploaded on the website of the ESI by Kulbir Singh and Co., showed that "father's name, DOB and address was the same as in the technical bid documents submitted by Kulbir Singh and Co. and Lovepreet Singh in the tenders floated on 14th May, 2020. From the above, it had transpired that "to save the EPF on account of labour, EPF amount has been intentionally paid by M/s. Kulbir Singh and Company, Kurukshetra to his family members and his sons."

9. Accordingly, it was concluded that Kulbir Singh and Co. had not complied with the Employees Provident Fund and Miscellaneous Provisions Act, 1952 ('EPF Act'), as required under the terms and conditions of the contract. The Petitioners were therefore asked to submit their written replies to the instant letter latest by 6.00 p.m. on 21st July 2020.

10. On 21st July 2020, both M/s. Kulbir Singh and Co. and Lovepreet Singh submitted replies claiming that there was no violation of the terms and conditions of MTF; that they had always been 'sincere and dedicated' towards their duties and responsibilities. Both of them reserved the right to file a detailed reply and sought 7 days' time for that purpose.

11. On 23rd July, 2020, in relation to the technical bids received pursuant to the e-tender notice dated 23rd April, 2020, the FCI issued a 'Technical Bid Evaluation Summary' setting out the names of the entities/persons whose technical bids had been accepted and declaring that the Petitioners' technical bids had been rejected. The reasons for such rejection of the technical bids were set out in some detail, most of which were mentioned in the letter dated 20th July, 2020 issued to the Petitioners.

12. As far as the technical bids received pursuant to the e-tender notice dated 1st July are concerned, FCI on 14th September, 2020, similarly issued technical bid evaluation summaries in relation thereto. The names of the entities/persons whose technical bids had been accepted were set out and the Petitioners' technical bids were declared rejected. Reasons identical to those offered in the FCI's evaluation summary dated 23rd July, 2020 were set out for such rejection.

Earlier Litigation

13. Aggrieved by rejection of its technical bids, made for various centres pursuant to the e-tender notice dated 14th May, 2020, the Petitioners M/s. Kulbir Singh and Co. and Lovepreet Singh filed writ petitions in this court (CWP No. 11026 of 2020 and batch) challenging such rejection. By separate orders dated 31st July, 2020 in each of the petitions, this Court recorded the statement of Mr. Chetan Mittal, learned Senior Counsel for the FCI that the details of the impugned order did not tally with its particulars mentioned in the prayer clause, at which point, Mr. Vikas Bahl, learned Senior Counsel appearing for the Petitioners, sought leave to withdraw the petitions with liberty to file fresh petitions with better particulars. Accordingly, while granting such liberty to the Petitioners, the Court dismissed the petitions as withdrawn.

14. Pursuant to the liberty granted by the Court, the Petitioners again filed a set of writ petitions (CWP No. 11483 of 2020 and batch) in this Court. On 10th August, 2020, the following order was passed in each of these petitions:

“With the consent of learned counsel for both the parties, the matter is being taken up and heard via video conferencing.

This petition has been filed against the rejection of the petitioner's technical bid by the Food Corporation of India. It is pointed out that as per clause XVIII(c) in the tender documents, the petitioner has to approach the authorities by raising a dispute against the rejection of his technical bid.

Learned senior counsel appearing for the Food Corporation of India submits that in case the petitioner does so within three days along with all the necessary documents, the General Manager, Food Corporation of India shall consider and decide the dispute within a period of 10 days thereafter. He further submits that in case the

dispute is raised, the same shall be decided by the General Manager without being influenced by the stand taken by them before this Court after giving an opportunity of hearing, either physical or through video conferencing, to the petitioner. It goes without saying that in case a decision is taken by the authorities in favour of the petitioner, all necessary consequences and benefits accruing therefrom would accrue to the petitioner.

With the aforesaid observation, the petition filed by the petitioner is disposed of permitting the petitioner to move the Corporation or raise a fresh dispute before the authorities within three days along with all the documents which shall thereafter be considered and decided by the General Manager, Food Corporation of India, within a period of 10 days thereof in accordance with the statement made by the learned Senior Counsel appearing for the Food Corporation of India.”

Petitioners’ Representations

15. Thereafter, both Petitioners submitted to the FCI, separate detailed representations dated 12th August, 2020 against each instance of rejection of their technical bids, made pursuant to the e-tender notice dated 14th May, 2020. Broadly speaking, the following grounds were averred in the representations:

- (a) The bidders who have been declared technically qualified, being “in one way or another related to one another” were acting in collusion to eradicate genuine competition by filing false and frivolous complaints.
- (b) The order rejecting the technical bid is in violation of the principles of natural justice inasmuch as it was passed without affording the Petitioners an adequate opportunity to be heard. In being asked to respond on 21st July, 2020 to the letter dated 20th July, 2020 which had asked them to show cause, the Petitioners were not given sufficient time to tender an effective response.
- (c) There is no condition in the MTF and the NIT, which bars a bidder from employing his sons and remitting EPF to them. The Petitioners have also duly complied with all requirements under the EPF Act and no case is pending against them either under the EPF Act, the Income Tax Act, or any other statute.

(d) The ITRs of the Petitioner Lovepreet Singh show that all of his earnings, but for the FCI's Road Transport Contract, are from contracts with the FCI. The earnings of Lovepreet Singh are shown under "Professional as well as Business Income".

(e) There is no requirement under the MTF or the NIT to submit monthly wage register or muster rolls. Further, none of these documents relied upon were submitted to the Petitioners. Thus, the finding that the Petitioner M/s. Kulbir Singh and Co. has recorded the sons of the sole proprietor as the labourers, is liable to be ignored.

(f) Specific to the bids submitted by the Petitioner M/s. Kulbir Singh and Co., it was submitted that a tabular comparison of the financial bids of various technically qualified bidders and that of the Petitioner revealed that the Petitioner's financial bid "is the lowest among the technically qualified bidders".

FCI's Orders in the Representations

16. The FCI after considering the aforesaid representations, as also the report of the Regional Technical Bid Evaluation Committee, passed orders dated 27th August, 2020 rejecting the representations. The essential findings which formed the basis of the orders are as under:

(a) The Petitioners did not avail the remedy available under clause XVIII (c) of the MTF, which provides for a grievance resolution mechanism, before the opening of the price bids, in the event of a bidder being aggrieved by an order of technical disqualification. The contention that there had been a violation of the principles of natural justice is, therefore, wrong.

(b) The Petitioners are in violation of clauses VI (a) and (b) (i) and IX (c) of Annexure-I of the MTF and clause 14 (1) of the Employees Provident Scheme 1952. The Petitioner M/s. Kulbir Singh and Co. has not deposited the EPF of the actual labourers employed. Further, M/s. Kulbir Singh and

Co. has not produced any attendance register to show who the actual workmen and to demonstrate that this tallies with the EPF record.

(c) The P&L account of the Petitioner Lovepreet Singh does not “reflect any income or salary as a workman”. A perusal of the record showed that Lovepreet Singh was operating HTC contracts at various centres while being simultaneously shown as workman in another site.

Present Petitions

17. Aggrieved by the rejection of their representations dated 12th August, 2020 by the above orders dated 27th August, 2020, the Petitioners filed CWP Nos. 14019, 14021, 14022, 14023, 14024, 14025, 14026, 14044 and 14047 of 2020. On 10th September, 2020, when these petitions were first listed for hearing, the Court issued notice of motion therein.

18. Subsequently, on 12th October, 2020, CWP Nos. 17123, 17124 and 17125 of 2020, challenging FCI's orders dated 14th September, 2020 rejecting M/s. Kulbir Singh and Co.'s technical bids, were filed. When these petitions were first listed for hearing on 15th October, 2020, the Court, while issuing notice of motion therein, directed that the petitions be listed along with CWP No. 14019 of 2020.

19. On 10th November, 2020, the petitions were taken up for final hearing, with the pleadings having been completed

Submissions on behalf of the Petitioners

20. To begin with, Mr. Vikas Bahl, learned Senior Counsel appearing for the Petitioners, drew the attention of the Court to the comparison of the financial bids submitted by the technically qualified bidders with that of the present Petitioners to contend that the present Petitioners had offered “drastically lower rates” for the same work. He referred to the tabular chart, set out in the representation submitted by M/s. Kulbir Singh and Co., which showed that the difference in percentage in some of the centres was well above 30%. Mr.

Bahl submitted that while rejecting the Petitioners' technical bids, the FCI stood to suffer a huge monetary loss.

21. Secondly, Mr. Bahl submitted that the technically qualified bidders i.e. M/s. Jagjiwanpal Singh, Sandeep Bhardwaj, Mandeep Virk (Proprietor of M/s. Mandeep Transport Co.), Sandeep Singh, Proprietor of Sandeep Transport Co., Rajinder Singh etc., were acting in collusion by filing false and frivolous complaints against the present Petitioners. There was also nepotism, inasmuch as Suresh Kumar father of Siddhant Bhardwaj was a partner with Jagjiwanpal Singh in the firm M/s. Panjetta Transport Company.

22. Thirdly, it was submitted that no reasonable opportunity had been afforded to the Petitioners before passing the impugned orders. Whereas M/s. Kulbir Singh and Company had applied for 10 HTC in 10 centres, Lovepreet Singh had applied for 2 centres. However, it was only in respect of the centre at Khizrabad that the 'SCN' dated 20th July, 2020 was issued. On the aspect of denial of sufficient time to file a reply to 'SCN' and such denial causing prejudice to the Petitioners, reliance was placed on the decision in ***Ridhi Sidhi Collection v. Union of India (2019) 368 ELT 852***.

23. Fourthly, Mr. Bahl submitted that the reasons given in the speaking order passed by the FCI pursuant to the representation of the Petitioners, travelled beyond the 'SCN' and this was impermissible in law. In support of this plea, he relied on the decisions of this Court in ***Gopal Singh Jania v. State of Punjab, 2004 (3) RCR (Civil) 745***, ***K.N.T. Nair v. Chandigarh Administration, 2002 (4) RCR (Civil) 210*** and ***Mewa Singh v. Union Territory Chandigarh, 2009 (25) RCR (Civil) 637***.

24. Fifthly, he submitted that the complaints were vague and unsubstantiated. He contended that the finding of the committee, set up by the FCI to look into the complaints, that Kulbir Singh had employed his sons for an earlier contract and was remitting EPF for them during the period of such contract, was erroneous. He referred to the terms and conditions of the

e-tender notices and submitted that there is no condition therein or even in the MTF or in any other law, which prohibited a person from employing his sons and remitting EPF for them. There was no requirement in the terms and conditions of the e-tender notices which specified who the employees should be or what the minimum number of such employees should be. In support of his plea that the bidder was required to submit information as per the MTF and not any general information, Mr. Bahl relied on the decision of the Supreme Court in ***Caretel Infotech Ltd v. Hindustan Petroleum Corporation Limited AIR 2019 SC 3327***.

25. Specific to Lovepreet Singh, Mr. Bahl submitted that it was erroneous on the part of FCI to reject his bid on the ground that the P&L account submitted did not show the bifurcation of his business income from his employment as a labourer by M/s. Kulbir Singh and Company. Referring to the ITRs filed, he pointed out that it did reflect the business income and therefore, there was no withholding of the information.

26. Mr. Bahl accordingly submitted that the rejection of the technical bids of both M/s. Kulbir Singh and Company as well as Lovepreet Singh were arbitrary and violative of Article 14 of the Constitution. Placing reliance on the decision of this Court in ***Brij Gopal Construction Co. Pvt. Ltd. v. State of Haryana, AIR 2015 P&H 27*** he submitted that since the rejection of the technical bid was on arbitrary and irrational grounds, such rejection should be set aside, the award of the contracts to the contesting Respondent No. 3 in each of the petitions held to be illegal and, a fresh process for award of contracts be initiated by the FCI.

27. In support of the plea that when none of the essential tender conditions were violated, the tender could not be rejected, reliance was placed on the decisions in ***Rashmi Metaliks Ltd. v. Kolkata Metropolitan Development Authority (2013) 10 SCC 95, Om Prakash Sharma v. Ramesh Chand Prashar (2016) 12 SCC 632*** and ***M.E. Infraprojects Pvt. Ltd. v. Municipal Corporation of Greater Mumbai 2019 (1) Mh. LJ 56***.

Submissions on behalf of the FCI

28. Countering the above submissions, Mr. Chetan Mittal, learned Senior Counsel appearing for the FCI/Respondent No. 1, referred to the decision of the Supreme Court in ***State of Orissa v. Harinarayan Jaiswal (1972) 2 SCC 36***, to contend that the government had the power to reject any or all bids without assigning reasons. In support of his submission that there is no requirement of communication of the reasons for rejection of the bid as long as those reasons were available on record, he referred to the decision dated 8th May, 2007 of the Allahabad High Court in ***City Infrastructure (India) Pvt. Ltd. v. New Okhla Industrial Development Authority*** (Civil Misc. Writ Petition No. 31442 of 2006), wherein the law settled by the Supreme Court in ***Star Enterprises v. CIDCO Maharashtra (1990) 3 SCC 280*** had been explained. He also relied on the decision of the Supreme Court in ***Jagdish Mandal v. State of Orissa (2007) 14 SCC 517*** to contend that in cases of rejection of tenders, there was no necessity of issuing an 'SCN' or even passing a speaking order.

29. Mr. Mittal then submitted that once a complaint is received in respect of a technical bid submitted pursuant to the e-tender floated by the FCI, it is obligatory on the part of the FCI to enquire into such complaint. He referred to the decisions in ***Haryana Urban Development Authority v. Orchid Infrastructure Developers Pvt. Ltd., (2017) 4 SCC 243***, ***Tata Cellular v. Union of India (1994) 6 SCC 651*** ***Asia Foundation and Construction Ltd. v. Trafalgar House Construction (I) Limited (1997) 1 SCC 738***, to point out that the scope of judicial review in matters of nature such as the one at hand was limited and that certain flexibility was to be allowed in the administrative decision-making process. According to him, the proposition that emerges from a reading of these judgments is that an administrative decision could be interfered with only if it was so unreasonable that no sensible person would have arrived at such decision.

30. He submitted that a contractor was liable to make contributions in accordance with the EPF Act and the schemes framed thereunder in respect

of the labourers employed. In the event of a default by the contractor in making such deposits, it is FCI which has to make such contributions on behalf of the contractor, for which FCI shall be entitled to set off the said amount against the amount due to the contractor.

31. Specific to the facts at hand, Mr. Mittal submitted that M/s. Kulbir Singh and Co. had not produced any record to show who the actual workmen undertaking the allotted work of the FCI were. Instead, two of the sons and his relatives were shown as workmen. He stated that the enquiries revealed that the M/s. Kulbir Singh and Company had not deposited the EPF of the actual labourers employed by him but instead was depositing EPF of his sons and family members. He also referred to the P&L account forming part of the ITR submitted by Lovepreet Singh to show that it did not reflect any income received by him as a workman. Mr. Mittal drew the Court's attention to the fact of more than 90 cases concerning default in depositing EPF pending in various Courts and the substantial financial liability that such cases collectively entailed, just for the Punjab region, as far as the FCI is concerned. He submitted that it was too much of a risk for the FCI to undertake if a contractor was going to be showing only his sons and relatives as his employees while keeping back information about actual employees. He accordingly submitted that the rejection of the technical bids was neither unreasonable nor arbitrary.

Scope of Interference under Article 226 of the Constitution

32. The above submissions have been considered. At the outset, the settled legal position as regards the scope of interference by the High Court in exercise of its jurisdiction under Article 226 of the Constitution in matters such as the one at hand, bears noting. Illustratively, reference may be made to the following observations of the Supreme Court in ***Star Enterprises Star Enterprises (supra)***, where the scope of judicial review in the context of rejection of the highest offers to public tender invitation was being considered:

“10. In recent times, judicial review of administrative action has become expansive and is becoming wider day by day. The traditional limitations have been vanishing and the sphere of judicial

scrutiny is being expanded. State activity too is becoming fast pervasive. As the State has descended into the commercial field and giant public sector undertakings have grown up, the stake of the public exchequer is also large justifying larger social audit, judicial control and review by opening of the public gaze; these necessitate recording of reasons for executive actions including cases of rejection of highest offers. That very often involves long stakes and availability of reasons for action on the record assures credibility to the action; disciplines public conduct and improves the culture of accountability. Looking for reasons in support of such action provides an opportunity for an objective review in appropriate cases both by the administrative superior and by the judicial process. The submission of Mr. Dwivedi, therefore, commends itself to our acceptance, namely, that when highest offers of the type in question are rejected reasons sufficient to indicate the stand of the appropriate authority should be made available and ordinarily the same should be communicated to the concerned parties unless there be any specific justification not to do so.”

33. Subsequently, in *Tata Cellular (supra)*, the Supreme Court after noting a series of decisions on the scope of judicial review of administrative decisions summarized the position in this regard as under:

“92. The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers?
2. Committed an error of law.
3. committed a breach of the rules of natural justice.
4. reached a decision which no reasonable tribunal would have reached or.
5. abused its powers.

93. Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:

- (i) Illegality: This means the decision- maker must understand correctly the law that regulates his decision-making power and must give effect to it.
- (ii) Irrationality, namely, Wednesday unreasonableness.
- (iii) Procedural impropriety.

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108. 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.”

34. In ***Jagdish Mandal*** (*supra*), the Supreme Court, after noticing the judgment in ***Tata Cellular*** (*supra*) and the decisions rendered thereafter, recapitulated the legal position 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 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.”

Analysis and Conclusion

35. With the above legal position in the background, the Court now proceeds to analyze whether there is any scope for the interference of the Court with decisions to reject the Petitioners’ technical bids.

36. It is seen that in the present case, the tender conditions were very clear that by virtue of Clause 11 of the MTF, the FCT could reject the bid without assigning any reason. Clause 11 reads as under:

“11. Food Corporation of India reserves the right to reject any or all the tenders without assigning any reason and does not bind itself to accept the lowers or any tender. The successful Tenderer will be intimated of the acceptance of his tender by a letter/telegram/fax/email”

37. The Court notes that the validity of clauses such as the aforesaid one has in fact been upheld by the Supreme Court in ***State of Orissa v. Harinarayan Jaiswal*** (*supra*) and the Allahabad High Court in ***City Infrastructure (India) Pvt. Ltd.*** (*supra*). In the last-mentioned decision, the High Court while dealing with an identical tender condition, which conferred a right on the

government authority to “reject any tender/tender including the highest tender/tender without assigning any reason”, observed as under:

“37. There cannot be any denial that there cannot be any exclusion of a tenderer in the process without there being any valid reason. There has to be valid reason for exclusion of a tenderer from the process. In the present case only communication to the petitioner as disclosed on the record is a letter dated 25th May, 2006 sent by NOIDA to the petitioner that his bid failed to fulfil the eligibility criteria of technical bid. The said is not a communication of any reason but only informing the decision. The reasons have been brought on the record along with the counter affidavit, along with which the report of the Technical Foundation Committee dated 22nd May, 2006 has been filed. Thus when called upon, the respondent have disclosed the reasons on the basis of which the bid of the petitioner was rejected.

Although Clause 7.8.2 reserves the right of Chief Executive Officer to reject any tender including the highest tender without assigning any reason but the valid reason has to be there for any action of the authority. The reasons having come on the record, we are not inclined to quash the decision of the Respondents only on the ground that reason was not communicated. The judgment of the Apex Court in *Star Enterprises'* case (supra) laid down that reasons has to be there and they should be ordinarily communicated but from the above no such proposition can be carved out that non communication of the reason is always fatal.”

38. In the case at hand, the FCI has in fact set forth detailed reasons in its initial orders rejecting the Petitioners' technical bids, as well as the orders rejecting the Petitioners' representations against such rejection. It also does not appear to the Court that the reasons given by the FCI for rejection of the technical bids are either irrational or unreasonable. Clause 5 of the terms and conditions of the e-tender notices, makes it plain that the HTCs have to ensure that all statutory provisions of the EPF Act/Contract Labour Regulation and Prohibition Act and the ESI Act are complied with. Further, there is a specific Clause No. 14 (1) under the EPF Scheme making a person, who seeks to avoid payment thereunder knowingly or makes a false statement or false representation liable to be punished with imprisonment. With the mandate of these provisions being clear, the FCI could not have afforded to overlook a complaint alleging violation of such provisions.

39. In this context, the stark fact that is unable to be satisfactorily explained by the Petitioners is how apart from the two sons of Kulbir Singh, who themselves are contractors in their individual capacity with the FCI, and some of his family members, there is none else shown as labourers employed by M/s. Kulbir Singh and Company. In other words, the Petitioners have not been able to account for their not depositing EPF in names of any other employee. Further, the Petitioners have been unable to offer any reasonable explanation for not producing the records, including the attendance register, to show who the actual workmen discharging the work of the FCI were. It is one thing to say that there is no specific condition attached to the tender prohibiting the contractor from employing his own relatives and sons, but entirely another to offer no reasonable explanation when the specific complaint is that the contractor is seeking to avoid its statutory liability by claiming that only his sons and relatives are his employees .

40. Even as regards Lovepreet Singh, on a perusal of the P&L account appended to the ITR, it is seen that he has not specified any income separately attributable to his purported employment as a labourer with M/s. Kulbir Singh and Company. The Income Tax Act, 1961 specifies the possible sources of income. Income from salary would be separate and distinct from income from business and profession. Lovepreet Singh has failed to do so in his ITR and has no reasonable explanation to offer despite opportunities. Considering that the contract is for transportation and handling of food grains, the decision of the FCI to disbelieve the stand taken by M/s. Kulbir Singh and Company in this regard, in the tender documents submitted, cannot be said to be without basis.

41. A comparison of the financial bid submitted by the Petitioner M/s. Kulbir Singh and Co., with that of bidders whose technical bids were accepted, would not be warranted at this stage, considering that the Petitioners had not even crossed the stage of technical bid. In any event, there is no hard and fast rule that only the person offering the lowest amount for undertaking a particular work should invariably be selected, irrespective

of such person not being otherwise qualified or suitable. Reference in this regard may be made to the following observations in ***Montecarlo Limited v. National Thermal Power Corporation Ltd. (2016) 15 SCC 272:***

“25. Recently in *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd. (2016) 16 SCC 818* 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 owners organization is taken. This ensures objectivity. Bidders 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 subserves 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.”

42. The above legal position was reiterated subsequently in *Tamil Nadu Generation and Distribution Corporation Ltd. (TANGEDCO) v. CSEPDITRISEH Consortium (2017) 4 SCC 318* as under:

“36. At this juncture we are obliged to say that in a complex fiscal evaluation the Court has to apply the doctrine of restraint. Several aspects, clauses, contingencies, etc. have to be factored. These calculations are best left to experts and those who have knowledge and skills in the field. The financial computation involved, the capacity and efficiency of the bidder and the perception of feasibility of completion of the project have to be left to the wisdom of the financial experts and consultants. The courts cannot really enter into the said realm in exercise of power of judicial review. We cannot sit in appeal over the financial consultants’ assessment. Suffice it to say, it is neither ex facie erroneous nor can we perceive as flawed for being perverse or absurd...”

43. The Court negatives the plea that there was any violation of the principles of natural justice. The Petitioners have been afforded adequate opportunities of heard and their representations have also been considered and disposed of by the FCI by detailed orders dealing with all contentions. For all the aforementioned reasons, the Court is unable to find anything unreasonable or arbitrary in the rejection of the Petitioners’ technical bid. Accordingly, the Court sees no reason to interfere with the impugned orders of the FCI.

44. The writ petitions are dismissed, but in the circumstances, with no order as to costs.

45. A copy of this judgment be placed in the connected petitions.

(S. MURALIDHAR)
JUDGE

(AVNEESH JHINGAN)
JUDGE

November 17, 2020
jk

Whether speaking/reasoned	Yes/No
Whether reportable	Yes/No