IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No. 19167 of 2020
Date of decision: 11.11.2020

M/s Nanuan's Partnership Firm through its partner Manjinder Singh
... Petitioner

Versus

Airport Authority of India through its Chairman, and others
... Respondents

CORAM: HON'BLE MR. JUSTICE RAVI SHANKER JHA, CHIEF JUSTICE
HON'BLE MR. JUSTICE ARUN PALLI, JUDGE

Present: Mr. Harkesh Manuja, Advocate,
for the petitioner.

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ARUN PALLI, J.

The matter is being taken up and heard by video conferencing owing to the prevailing Pandemic (COVID-19).

The petitioner prays for a Certiorari to set aside the communication dated 6.10.2020 (Annexure P-3), extending the bid opening date (technical), and asking for shortfall documents, awarding tender to respondent No.4 (Heera Travels Pvt. Ltd.) [Annexure P-6], letter dated 19.10.2020 (Annexure P-10), and order dated 7.11.2020 (Annexure P-13), rejecting the representation of the petitioner, for respondent No.4 did not possess a valid 'No Dues Certificate' (for short 'NDC'), as stipulated in the tender document (Annexure P-2), on the last date for submitting the bid, i.e. 26.9.2020. Further, to set aside the rejection of financial bid of the petitioner (Annexure P-5), and for the petitioner was the next highest bidder (H2), respondent No.2 be directed to declare the petitioner as successful bidder.

In brief, the case set out by the petitioner is that E-tender for providing car rental services at Chandigarh International Airport was floated by respondent No.2 (CHIAL) on 18.09.2020, vide tender ID 2020-AAI-54301-2. The crucial dates were:-

Publish Date	18-Sept-2020
Sale Start Date	18-Sept-2020-1855 hrs onwards
Sale End Date	26-Sept-2020 at 1855 hrs
Bid Submission Start Date	18-Sept-2020-1855 onwards
Bid Submission End Date	26-Sept-2020 at 1855 hrs
Bid Opening Date (Technical)	28-Sept-2020 at 1800 hrs
Bid Opening Date (Financial)(Probable)	05-Oct-2020 at 1800 hrs

The petitioner submitted its bid, along with the necessary documents. Although, the bid opening date (technical) was 28.9.2020, and the financial bid was to be opened on 5.10.2020, but neither the technical bids were opened on the appointed date, nor any communication was received from the official respondents in this regard. However, on 6.10.2020, petitioner received an E-mail (Annexure P-3), which indicated that petitioner was found to be technically responsive, but as other participants failed to submit all the necessary documents with their bids, the technical evaluator required them to furnish the shortfall documents between 6.10.2020 to 9.10.2020. Though, nothing was communicated with respect to opening the technical and financial bids. However, on 15.10.2020, the petitioner received another communication via E-mail (Annexure P-4), that its bid (technical), during technical evaluation by the duly constituted committee, had since been accepted and the financial bid shall be opened on 15.10.2020, at 2:30 P.M. On 16.10.2020, the petitioner received another communication via E-mail (Annexure P-5), and was conveyed that its bid (financial) was opened and rejected during financial evaluation, being H2 (bidder). And, as per the tender summary report (Annexure P-6), the contract was awarded to respondent No.4 being the highest bidder (H1). For the entire information qua all the participants was available on the website of the authorities, the petitioner noticed that NDC (Annexure P-7), furnished by respondent No.4, during technical evaluation of its bid could neither be termed or construed as NDC, nor was it issued to respondent No.4. And, for without submitting the requisite document (NDC), in terms of the tender condition, respondent No.4 was awarded the contract, the petitioner, being genuinely aggrieved, vide letters dated 16.10.2020 (Annexure P-8) and 17.10.2020 (Annexure P-9), lodged its protest to the respondents, and sought an explanation in this regard. However, in response, the authorities, vide letter dated 19.10.2020 (Annexure P-10), justified the NDC submitted by respondent No.4. Whereafter, the petitioner submitted another representation dated 20.10.2020 (Annexure P-11), but, as the same was not responded to, he approached this Court, vide Civil Writ Petition No.17794 of 2020, which was disposed of on 29.10.2020 (Annexure P-12), requiring the respondents to consider and pass a detailed order on its representation. But as, vide order dated 7.11.2020 (Annexure P-13), the authorities rejected the said representation, thus this petition.

Learned counsel for the petitioner submits, for there was no provision in the Notice Inviting E-Tender ('NIET' for short), which entitled the authorities to ask for shortfall documents, their action in extending the bid opening date (technical) was apparently erroneous and arbitrary. Further, the last date for submission of documents was 26.9.2020, and respondent No.4 did not have any NDC till then. Interestingly, it was only after issuance of letter dated 6.10.2020, which, in turn, was submitted by respondent No.4 as NDC, the authorities sent an E-mail on 6.10.2020, regarding shortfall documents only to provide an opportunity to respondent No.4 to qualify for technical evaluation. Therefore, this process was adopted with malafide intentions only for providing undue favour to respondent No.4. He asserts that a bare perusal of letter dated 6.10.2020, submitted by respondent No.4 as NDC, would show that in no way, it could be considered and/or termed as an NDC. For, it was only an intra-departmental communication, sent from the office of respondent No.3 to commercial department, and it was further specified therein that, "**commercial department may issue the certificate to agency**." Further, in reference to condition No.6 of NIET, which defines disqualification criteria, and that participants falling in the categories specified therein would not be eligible for consideration for the tender, he submits, for, in terms of letter dated 6.10.2020, an amount of Rs.9,72,746/- was payable by respondent No.4, on account of billing for the months of April and May, 2020, which remained pending, respondent No.4 could not have been declared successful in technical bid evaluation.

We have heard learned counsel for the petitioners and perused the records.

Undoubtedly, in terms of the tender schedule, the last date for submitting the bids was 26.9.2020. The bid (technical) was to be opened on 28.9.2020, and the bid opening date (financial) was 5.10.2020. However, it was in sync with the procedure notified on the website of the Government of India, "**etenders.gov.in**", which stipulates that a date could be extended once to enable the tenderers to furnish the required clarifications/documents, the bidders, who had not submitted the complete documents, were afforded an opportunity to make good the shortfall, using the shortfall documents option. Further, the extended date is uploaded on the website itself, and if still any bidder fails to furnish the required documents, no further extension is granted and the bid is rejected. Obviously, the purpose sought to be achieved was not to search for a reason to disqualify or declare the participant bidder(s) ineligible, but to raise the degree of competitiveness and shortlist the most suitable.

The argument that extending the bid opening date (technical), to upload the shortfall documents, was malafide and was only to extend undue favour to respondent No.4, is *ex facie* misplaced and erroneous. Significantly, besides the petitioner and respondent No.4, there were three other bidders, i.e. **Carzonrent India private Limited, Blue Drive India** and **Mridani Bus Service P. Ltd**., who participated in the tender process, and vide communication dated 6.10.2020 (Annexure P-3), they too were required to make good the shortfall in the documents submitted by them. Therefore, had any deficiency/shortfall been detected even in the documents furnished by the petitioner, it too would have been provided a similar opportunity. Thus, it was a level playing field for one and all. What needs a further emphasis, is that it was not a case where during technical evaluation process, the duly constituted committee having found that 4 of the 5 bidders had failed to furnish the requisite documents, and were, thus, liable to be disqualified being technically non-compliant, with an oblique motive, suspended the evaluation process to enable those bidders to submit the shortfall documents. Rather, immediately on opening the technical bid and having discovered that there was a shortfall in the documents submitted by 4 of the 5 bidders, in keeping with the procedure and practice, concededly in vogue and being adhered to in the past, the technical evaluator provided them an opportunity to furnish the necessary documents so that they could be technically evaluated. Which is why, and as shall be required to be noticed, post evaluation of the technical bids, two of the five bidders were found to be technically non-compliant. And, out of the rest three, i.e. petitioner, respondent No.4 and Blue Drive India (H3), everybody had an equal and a fair chance to be assigned the contract, subject, of course, to being the highest bidder (H1). But, yes, the argument of the petitioner would have been the same, had any of the other 3 bidders been the highest bidder (H1). Rather, we are reminded, at this juncture, to refer to the observations recorded by the Supreme Court in **Jagdish Mandal Vs. State of Orissa, (2007) 14 SCC 517:-**

> ***"22. ……..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……."***

Likewise, the argument advanced by learned counsel for the petitioner that document dated 6.10.2020 (Annexure P-7), being set out below, issued in favour of respondent No.4, could not be construed and termed as NDC, and in any case respondent No.4 did not possess the required certificate on 26.9.2020, i.e. the last date for submission of bids, also lacks conviction and cannot be countenanced:-

"**Dated-06/10/2020**

TO WHOMSOEVER IT MAY CONCERN

It is to certify that an amount payable by M/s HEERA TRAVELS PVT. LTD. is Rs. 9,72,746/- on account of billing for the month of April & May, 2020.

"In this regard, it is to mention that CHIAL board has approved for chargeability of license fee on the basis of pro-rate of passenger traffic, and the revised amount will be intimated to agency in due course on receipt of approval from CHAIRMAN CHIAL. Besides this agency has cleared all its dues. Further, there is Security Deposit of Rs. 14,59,122/- is lying in the books of CHIAL. Commercial department may issue the certificate to agency."

It would be apposite to point out, that respondent No.4 (Heera Travels Pvt. Ltd.) happened to be the existing licencee. Significantly, vide letter dated 21.9.2020, it required the authorities to issue NDC, i.e. much before the last date for submission of the tender, i.e. 26.9.2020. However, for the Airport was closed for operations from 25.3.2020 to 24.5.2020, owing to national lockdown (COVID-19), the issue of chargeability during the closure period was pending consideration before CHIAL-Board. But, as the bills for April and May, 2020, had already been raised by the authorities to all operating commercial concessionaires, including respondent No.4, while issuing certificate dated 6.10.2020 (Annexure P-7), it was recited: although CHIAL-Board had approved that licence fee would be charged on the basis of pro-rata of passenger traffic for the period in question, but the revised amount would be intimated to the agency, **in due course**, on receipt of approval from the Chairman, CHIAL Board. Thus, it was not a case where there were any outstanding dues or respondent No.4 had failed to deposit a clear and determined sum. Suffice it to say, respondent No.4 was not a defaulter. That apart, it was specifically recited and clarified that agency had cleared all its dues. Rather, amount of Rs.14,59,122/-, furnished by respondent No.4 as security, still lay in deposits with the authorities. Further, in the matter at hands, the authorities, preceded by due consideration, clarified that expression, "***commercial department may issue the certificate to agency.***" conveys in no uncertain terms that contents of the document was nothing but a clearance as regards dues and it be conveyed to the agency. Therefore, the document (Annexure P-7), issued on behalf of the Chief Financial Officer, was a **'No Due Certificate'**, and there was no ambiguity therein.

Needless to assert that in commercial/contractual matters, none but the administrative authority itself is best equipped to interpret the covenant, its clauses and to construe any document executed in relation thereto. And, while exercising the power of judicial review, the Court would be required to step in only if analysis, understanding and conclusion drawn by the authorities is centered on apparent misconstruction, actuated by *malafide*, which defies logic. Which, we may hasten to record, is certainly not the position in the matter at hands. In any case, in terms of decision dated **10.10.2020** of CHIAL-Board, all commerce concessionaires were relieved from their contractual obligation for the closure period and accordingly, no concession fee/licence fee was to be levied on account of complete closure and non operation of flights from 25.3.2020 to 24.5.2020. And the specific case of the authorities is that it was after taking into consideration the said decision and confirmation from finance department that there were no dues in respect of M/s Heera Travels Pvt. Ltd. (respondent No.4), the financial bid/price bid of all the technically qualified bidders were opened.

We may now advert to condition No.6 of the NIET, in reference to which learned counsel for the petitioner submits that respondent No.4 being ineligible, was not entitled for consideration:-

> ***"6. DISQUALIFICATION CRITERIA: A party fulfilling the eligible criteria specified in the NIT can participate in the tender. However, any party (a company, firm or a person) falling under the following categories are not eligible for consideration of the tender. These clauses shall also form the part of tender documents/conditions.***

A plain reading of the provision (*ibid*) crystallises that a party which has more than one month's dues outstanding up to the month that precedes the month in which tender is published shall be ineligible for consideration. Meaning thereby, a bidder in the present case ought to have cleared all his dues till August, 2020, for tender was published in September, 2020. But, as demonstrated above, post decision of the CHIAL-Board, the issue as regards billing for the months of April and May, 2020, ceased to have any relevance. And, for respondent No.4 had cleared all its dues, it was fully entitled to participate and for consideration of its claim.

Thus, before we record our conclusion we may touch upon the scope and extent of interference in the administrative decision by this Court in exercise of power of judicial review. In **Jagdish Mandal vs. State of Orissa (*supra*)**, the Supreme Court held**:-**

> ***"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.***

In **Municipal Corporation, Ujjain & Anr. Vs. BVG India Limited and Ors. 2018(5) SCC 462,** the Supreme Court (in paragraph 10) observed ***"the judicial review of administrative action is intended to prevent arbitrariness. The purpose of judicial review of administrative action is to check whether the choice or decision is made lawfully and not to check whether the choice or decision is sound. If the process adopted or decision made by the authority is not mala fide and not intended to favour***

someone; if the process adopted or decision made is neither so arbitrary nor irrational that under the facts of the case it can be concluded that no responsible authority acting reasonably and in accordance with relevant law could have reached such a decision. And if the public interest is not affected, there should be no interference under Article 226."

In **<u>Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd., (2016) 16 SCC 818</u>,** the Supreme Court (in paragraph 13) held that: "***a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision-making process or the decision…...".***

In **'<u>The Silppi Constructions Contractors Vs. Union of India and another</u>**, (Special Leave Petition (Civil) Nos. 13802-13805 of 2019), the observations are, **"…..*No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact,***

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

In the wake of the position, as sketched out above, the only and the inevitable conclusion we could reach: the decision making process that preceded the decision of the Authority either to extend the date for opening the bids (technical), so as to enable all the bidders/tenderers to make good the shortfall in the documents submitted by them in sync with the procedure and practice being followed or declaring respondent No.4 technically compliant was neither unfair, nor arbitrary. Not actuated by any malafide either. On the contrary, being just and bonafide warrants no interference by this Court.

The petition being bereft of merit is accordingly dismissed.

(RAVI SHANKER JHA)
CHIEF JUSTICE

(ARUN PALLI)
JUDGE

November 11, 2020
AK Sharma

Whether speaking / reasoned: YES
Whether Reportable: