108 (Proceedings through V.C.)

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

1. CWP No.19431 of 2020

Tyagi and Brothers ...Petitioner

Versus

Food Corporation of India and others ... Respondents

2. CWP No.19432 of 2020

Tyagi and Brothers ...Petitioner

Versus

Food Corporation of India and others ... Respondents

Date of Decision: 16.11.2020

CORAM:- HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH

HON'BLE MR. JUSTICE ASHOK KUMAR VERMA

Present: Mr.Vikas Bahl, Sr.Advocate with
Mr.Nikhil Sabharwal, Advocate for the petitioner(s)

Mr.K.K.Gupta, Advocate for the respondents

ASHOK KUMAR VERMA, J.

1. This order will dispose of CWP Nos.19431 and 19432 of 2020 as common questions of law and facts are involved in both the writ petitions. However, for the sake of brevity and convenience, a glimpse of facts is being taken from CWP No.19431 of 2020.

2. The petitioners have approached this Court through these writ petitions invoking extraordinary writ jurisdiction under Articles 226/227 of

the Constitution of India praying for issuance of writ in the nature of Certiorari for quashing the orders dated 5.11.2020 (Annexure P-15) and 1.10.2020 (Annexure P-6) passed by the official respondents with regard to Tender Reference No.SANDC/13/HTC/TE/JULY 2020 and Tender title namely, HTC NIGHDU whereby the Technical Bid of the petitioner has been rejected.

3. Respondents no.1 and 2 issued an E-tender notice dated 1.7.2020 (Annexure P-1) for appointment of Handling and Transport Contractors for movement of food grains and allied material by road to the depots of adjoining regions from the centres of Haryana regions for a period of two years. Pursuant to the aforesaid E-tender notice, the petitioner(s) submitted his technical bid for being appointed as HTC (Handling and Transport Contractor) on 20.7.2020 vide Annexure P-2.

4. It is the case of the petitioner that it came into existence and commenced its business on 6.10.2018 which is apparent from the issuance of Udyam Registration Certificate dated 16.7.2020 (Annexure P-3). On the day of inception of its business i.e. on 6.10.2018, the petitioner obtained its GST Registration Certificate (Annexure P-4). It is the case of the petitioner that the tender has been filed by the petitioner under the "Inexperienced Category". Respondent no.2 rejected the technical bids of the petitioner vide order dated 1.10.2020 (Annexure P-6). Aggrieved against the impugned order (Annexure P-6), the petitioner approached this Court by filing CWP No.18036 of 2020. This Court disposed of the said writ petition vide order dated 30.10.2020 (Annexure P-13A) by directing the official respondents to treat the earlier writ petition as a representation on behalf of the petitioner against the order dated 1.10.2020 and decide the same expeditiously. Pursuant to the directions of this Court, the official respondents passed the impugned order dated

5.11.2020 (Annexure P-15). Aggrieved against the aforesaid impugned orders, the petitioner has approached this Court through this writ petition filed under Articles 226/227 of the Constitution of India.

5. In the impugned order (Annexure P-15), it is the stand of the official respondents that the petitioner was not having the requisite experience of the contract value of the Tender Enquiry. As such the petitioner submitted the bid in the "Inexperienced Category". The petitioner as against the requirement of the tender under Clause 23 of the NIT uploaded the Balance Sheet (of Tyagi and Brothers), Profit & Loss Account (of Tyagi and Brothers), Income Tax Return (of Jai Pal), Audit Report in the prescribed form (of Jai Pal), all relating to the financial years 2018-19. The petitioner also uploaded the PAN Card bearing no.COIPP3772E (of Jai Pal). No other financial statements of the earlier years were uploaded by the petitioner.

6. Number of complaints of the bidders were received against each other. One of the bidders, namely, Meharbaan Singh also made a complaint against the petitioner regarding concealment of facts that the petitioner has submitted the Income Tax Return for the financial year 2018-19 (AY 2019-20). In the complaint, it was stated that the petitioner- M/s Tyagi and Brothers have filed the return for the financial year 2017-18 as well which was not attached with the tender application, tender enquiry dated 22.7.2020. It was further stated in the complaint that the petitioner was filing the Income Tax Return and other financial statements even prior to the financial year 2018-19 also. After verification of the identity of the complainant, the complaint was put before the Technical Evaluation Committee. On receipt of the complaint, a letter was sent to the Income Tax Officer and in response thereto, Income Tax Officer reported that against the aforesaid PAN No.COIPP3772E, Income Tax Return for the financial year 2017-18 was also filed by Jai Pal.

This fact was concealed by the petitioner. The technical bid of the petitioner was rejected by the Technical Evaluation Committee and the report was uploaded on the portal of the FCI on 1.10.2020 (Annexure P-6). The price bids of the technically qualified bidders were opened on 5.10.2020 and the contract was awarded in favour of M/s Lalit Kumar & Co. who has been arrayed as respondents no.3&4 and in the writ petition.The said contractor furnished the required documents, bank guarantee etc. vide his letter dated 19.10.2020 and joined for execution of the work on 20.10.2020 which was prior to the passing of the order dated 30.10.2020 (Annexure P-13A) by this Court in the previous writ petition filed by the petitioner. In any case, against the report of the Technical Evaluation Committee, a bidder is at liberty to raise grievance by making representation to the General Manager (Region) within three days of the report in terms of Clause XVIII(c) of the Model Tender Form (for short "MTF") and during the said period if any representation is received,then the same will be decided firstly and the opening of the price bid will be deferred till its decision. In the present case, no such representation was made by the petitioner against the report of the Committee.

7. We have heard learned counsel for the parties and perused the paper-book.

8. It is the star argument of Mr. Vikas Bahl learned Sr. Counsel appearing for the petitioner that the petitioner is a "Firm" having its independent existence different from the individual person Jai Pal. We do not agree with the contention of the learned Sr. Counsel. In the impugned order (Annexure P-15), the official respondents have peeped into this aspect in detail. As per Clause 23 of the E-Tender Notice (Annexure P-1), parties submitting bid under "Inexperienced Category" should furnish the documents

mentioned therein. Clause 23 of the E-Tender Notice/NIT (Annexure P-1) is reproduced as under:-

> "23. The parties submitting bid under inexperienced Category for HTC and RTC shall also furnish following documents, failing which the tender will be summarily rejected:-
>
> i. Attested copy of Registered deed of partnership/Memorandum and Articles of Association/by-laws/certificate of registration etc. as applicable.
>
> ii.Power of Attorney of person signing the tender.
>
> iii.**Duly audited P&L Account and Balance sheet for preceding 3 financial years or since inception whichever is later. (Emphasis supplied)**
>
> **iv.Copy of Income Tax Return of last three years or since inception whichever is later. In case of partnership firm less than three year old/proprietor firm, Income Tax returns of the partners/proprietor may be furnished." (Emphasis supplied)**
>
> v. Bank statements of last one year in case of non-assessee.
>
> vi. Copy of PAN Card."

9. The aforesaid requirement has been specified in Clause 8 of Appendix-II of the NIT. In the undertaking dated 20.7.2020 for acceptance of terms and conditions of NIT, the petitioner has undertaken under his signatures as under:-

> **"4. In any case provisions of this Notice inviting tender are found violated, then your department/organization shall without prejudice to any other right or remedy be**

at liberty to reject this tender/bid including the forfeiture of the full said earnest money deposit absolutely alongwith taking action as per other remedies available under law." (Emphasis supplied)

10. It is the case of the official respondents that petitioner, Tyagi and Brothers is not a firm and is a proprietorship concern which is apparent from registration certificate of GST (Annexure P-4), EPF Code number issued by the EPFO. A perusal of GST Certificate (Annexure P-4) shows that in the column of Legal Name, the name of one "Jai Pal" is shown and in the column of Trade Name, the name of "Tyagi & Brothers" is shown and in the column of Constitution of Business, "Proprietorship" is shown. From these documents, it is amply clear that the petitioner is a proprietorship concern. Tyagi and Brothers was only trade name with its sole Proprietor "Jai Pal". Even the Income Tax Return for the financial year 2018-19 was submitted in the name of Jai Pal. The Audit report of the Chartered Accountant in the prescribed form No.3CB for the financial year 2018-19 is also in the name of Jai Pal. The PAN Card is also in the name of Jai Pal, and therefore, it is wrong to say that the petitioner- Tyagi and Brothers is a firm different from that of Jai Pal. Admittedly, a sole proprietorship concern cannot be said to be a separate entity from that of its proprietor. Even in the case of partnership, a partnership concern is not a separate legal entity from that of its partners. It has been rightly averred by the official respondents that it is only in case of companies registered under the Companies Act which are separate legal entity from that of its share holders. It is clear that the petitioner was a sole proprietorship concern with its sole proprietor Jai Pal.

11. Faced with this situation, the petitioner pleaded that submission of Audited Profit & Loss Account, balance sheet and Income Tax Return was not the essential condition of the tender and therefore, the same should have been ignored by the official respondents. Clause 23 of the NIT reproduced above clearly provides that if the documents mentioned therein were not furnished, the tender will be summarily rejected. The respondents have rightly relied on the judgment of the Supreme Court in **Central Coalfields Ltd. and another vs. SLL- SML (Joint Venture Consortium) and others,** 2016 AIR (SC) 3814 wherein it has been held that furnishing documents for the purpose of bid is an essential requirement in the bidding process. In paragraph 48, the Supreme Court held as under:-

> *"48. Therefore, whether a term of the NIT is essential or not a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in Ramana Dayaram Shetty. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot."*

12. Learned Sr. Counsel appearing for the petitioner(s) has vehemently argued that the petitioner has not been afforded an opportunity of hearing which is in gross violation of principles of natural justice and therefore, impugned orders deserve to be set aside on that ground alone. On

the other hand, the official respondents pleaded that there is no such provision in the NIT/MTF for granting any opportunity of hearing or any show cause notice by the Technical Evaluation Committee before submitting the report dated 1.10.2020 (Annexure P-6). The Technical Evaluation Committee passed a detailed speaking order (Annexure P-6) and declared the petitioner "Technically Disqualified". In the said order, the Committee arrived at the conclusion that technical bid uploaded by the petitioner is not as per MTF/NIT. As discussed above, the Committee looked into the complaint filed against the petitioner and made a detailed enquiry with regard to the Income Tax Return and declared the petitioner as "Technically Disqualified" vide its report dated 1.10.2020. Clause XVIII (c) of the MTF provides that one can make representation against the report of the Committee within three days of the report and if such a representation is received, then the same will be decided firstly and the opening of the price bid will be deferred till its decision. But in the case of the petitioner, no such representation was made by the petitioner. By the conduct of the petitioner since no representation was made against the aforesaid report, it can be presumed that the petitioner was having no grievance against the said report. Suffice it to say that the petitioner missed the train and at this stage, he cannot be allowed to plead that he has not been provided any opportunity of hearing. Furthermore, the report of the Committee is a speaking one as the same has been made after thorough enquiry. Furthermore, pursuant to the directions of this Court contained in the order dated 30.10.2020 (Annexure P-13A) passed in the earlier writ petition filed by the petitioner whereby the official respondents were directed to treat the earlier writ petition as a representation on behalf of the petitioner against the order dated 1.10.2020 and decide the same expeditiously. Pursuant to the directions of this Court, the official respondents passed a detailed order dated

5.11.2020 (Annexure P-15) which is also a speaking one wherein the official respondents dealt with all the aspects of the matter by giving valid reasons in right perspective. The requirement to give reasons has also been added to the rules of natural justice. In **S.N.Mukherji vs. Union of India**, AIR 1990 SC 1984, the Hon'ble Supreme Court extensively considered the principles which would govern exercise of a particular power by an administrative authority including exercise of judicial or quasi judicial functions. In this behalf the Apex Court had observed thus:

> *"35. ...In our opinion, therefore, the requirement that reasons be recorded should govern the decisions of an administrative authority exercising quasi- judicial functions irrespective of the fact whether the decision is subject to appeal, revision or judicial review. It may, however, be added that it is not required that the reasons should be as elaborate as in the decision of a court of law. The extent and nature of the reasons would depend on particular facts and circumstances. What is necessary is that the reasons are clear and explicit so as to indicate that the authority has given due consideration to the points in controversy. The need for recording of reasons is greater in a case where the order is passed at the original stage."*

13. The requirements of natural justice depend on the circumstances of each case, the nature of the enquiry, the rules under which the official respondents are acting, the subject matter being dealt with and so forth. In the present case, the official respondents passed two detailed orders which are Annexures P-6 and P-15 and have fully acted in accordance with the provisions of the NIT/MTF. Further more, the petitioner has not challenged

the vires of the provisions of the NIT/MTF. In our considered view, in the present case, not only justice has been done but has manifestly been seen to have been done.

14. Last but not the least, learned Sr. Counsel for the petitioner has vehemently argued that the petitioner had quoted the rate of 56% ASOR whereas the contract has been awarded in favour of respondent no.3 at the rate of 61% ASOR. This argument was vehemently controverted by the official respondents. It is the case of the official respondents that since the technical bid of the petitioner was rejected, the price bid of the petitioner was not opened. In a similar situation, a Division Bench of this Court dealt with this issue extensively in **Ceigall Gawar (JV) A-898, Tagore Nagar, Ludhiana vs. State of Punjab and others** (CWP No.6473 of 2019 decided on 22.5.2019) and held as under:-

> *"59. There appears to be force in this argument as well. The authorities had no knowledge about the quantum of the bid offered by the petitioner as his financial bid was never opened and thus there was no reason or occasion before the authorities to make a comparative assessment of two bids. Thus the decision taken by respondent No.4 to accept the bid offered by respondent No.5 cannot be faulted on the ground that the bid offered by the petitioner was lower than the one offered by respondent No.5.*
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> *60. 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.

61. In view of the facts and circumstances of the present case, enumerated hereinabove, neither the tender conditions nor the procedure followed for finalizing the bid can be held to be arbitrary, irrational or against the public interest. Furthermore, once the petitioner participated in the tender process without objecting to the tender conditions, he cannot be permitted to take u-turn and challenge the tender."

15. The aforesaid observations of this Court are fully applicable to the facts and circumstances of the present case. In the present case, it is not proper to compare between the petitioner and respondent no.3. Respondent no.3 has technically qualified the bid and on the opening of the price bid, the rate quoted by respondent no.3 was the lowest amongst the qualified bidders whereas the petitioner's bid was not opened and rejected at the first sight and respondent no.3 who qualified the bid and on the opening of the price bid, the rate quoted by respondent no.3 was the lowest amongst the qualified bidders. As such, one cannot compare between the two odds. Furthermore, the petitioner cannot blow hot and cold with the same breath. The petitioner did not question the terms and conditions of the E-tender Notice/NIT and after applying under the said terms and conditions and having failed in opening the bid, the petitioner cannot be allowed to object to the same. Furthermore,

respondent no.3 furnished the required documents, bank guarantee etc. vide his letter dated 19.10.2020 and joined for execution of the work on 20.10.2020 which was even much prior to the passing of the order dated 30.10.2020 (Annexure P-13A) by this Court in the previous writ petition filed by the petitioner. At this stage, it would not be proper for this Court to unsettle the settled.

16. Learned Sr. Counsel has relied on number of judgments which are as under:-

I. Caretel Infotech Ltd. vs. Hindustan Petroleum Corporation Limited & Ors. (2019 AIR (SC) 3327 (para 21);

II. Rashmi Metaliks Ltd. and another vs. Kolkata Metropolitan Development Authority and others, 2013 (10) SCC 95 (paras 2,10, 13);

III. Om Prakash Sharma vs. Ramesh Chand Prashar and others, (2016) 12 SCC 632 (paras 2,4, 10, 12 & 13);

IV. M.E.Infraprojects Pvt. Ltd. and other vs. Municipal Corporation of Greater Mumbai and others, 2018(5) BCR 841 (paras 16 to 24)

V. National Insurance Company Ltd. vs. Pranay Sethi and others, 2017 AIR (SC) 5157

VI. Reliance Energy Limited & Another vs. Maharashtra State Road Development Corporation Ltd. & Others, 2007(8) SCC 1 (paras 7, 9, 10, 18, 24 & 36).

The judgments relied upon by the learned Sr. Counsel are not applicable to the peculiar facts and circumstances of the present case. In Caretel Infotech Ltd., supra, the Hon'ble Supreme Court was dealing with the consequences of blacklisting, banning and putting the appellant on holiday list. In that situation, the Hon'ble Supreme Court held that if initiation of blacklisting was to be specified, then that ought to have been included in the format and there is a specific clause with the specific format provided for requiring disclosures. As such the issue involved before the Hon'ble Supreme Court was fully distinguishable from the facts and circumstances of the present case and the same are not applicable to the facts and circumstances of the present case. The other judgments relied upon by the learned Sr. Counsel for the petitioners are also totally on different footing and are clearly distinguishable and the same have no applicability to the peculiar facts and circumstances of the present case.

17. Similarly, this court will not countenance interference with the decision at the behest of an unsuccessful bidder in respect of a technical or procedural violation. This was quite clearly held by the Hon'ble Apex Court in **Jagdish Mandal vs. State of Orissa & Ors.,** 2007 14 SCC 517 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."

18. Consequently, we do not find any ground to interfere with the orders (Annexures P-6 and P-15) impugned in both the writ petitions and therefore, both the writ petitions are dismissed.

(ASHOK KUMAR VERMA)
JUDGE

(AUGUSTINE GEORGE MASIH)
JUDGE

16.11.2020
MFK

Whether speaking/reasoned *Yes*

Whether Reportable *Yes*