IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Writ Petition (M/S) No. 3861 of 2018

Roop Singh Kathayat. .....Petitioner

Versus

State of Uttarakhand & others. ...Respondents

with

Writ Petition (M/S) No. 3928 of 2018

Girdhar Singh Adhikari. .....Petitioner

Versus

State of Uttarakhand & others. ...Respondents

Mr. Shobhit Saharia, Advocate for the petitioner in WPMS No. 3861 of 2018.
Mr. Sanpreet Singh Ajmani, Advocate for the petitioner in WPMS No.3928 of 2018.
Mr. M.S. Bisht, Brief Holder for the State of Uttarakhand.
Mr. S.S. Chauhan, Advocate for U.R.R.D.A.
Mr. P.C. Petshali, Advocate for respondent-Mr. Laxmi Dutt Binwal.

Dated: 18th December, 2020

Hon'ble Manoj K. Tiwari, J.

Uttarakhand Rural Roads Development Agency (hereinafter referred to as 'U.R.R.D.A') has been entrusted with the task of construction and maintenance of motor roads under Pradhan Mantri Gram Sadak Yojana (for short 'P.M.G.S.Y.'). U.R.R.D.A. invited tenders for different works of construction and maintenance of roads by issuing notice from time to time. Roop Singh Kathayat and Girdhar Singh Adhikari (petitioners in the two writ petitions) and Laxmi Datt Binwal (private respondent in both the writ petitions) responded to the tender notice. Technical bid submitted by both the petitioners have been declared to be responsive by the Technical Evaluation Committee. Since the technical bid of the private respondent too was declared to be responsive, therefore, petitioners have filed these writ petitions challenging the decision to declare bid of private respondent as responsive.

2. The decision taken by Technical Evaluation Committee in favour of private respondent has been challenged on two grounds:

(i) in the certificate regarding ongoing work submitted by the private respondent, anticipated date of completion of work is not mentioned and, on this ground alone, his technical bid, in respect of some other works, was declared to be non-responsive and his challenge to the decision taken by Technical Evaluation Committee was unsuccessful and the writ petition filed by him was dismissed;

(ii) private respondent has no experience of executing Stage-I work, which involves hill side cutting, hill slope stabilization etc., and the certificate produced by him was in respect of Stage-II work, which includes bituminous work, construction of side drain, laying down of pavement etc., therefore, he is not qualified for executing the present work.

3. Before going into merits of the contentions raised by the petitioners, this Court reminds itself of its limits in dealing with such matters. It is settled law that the owner or employer of a project, who has authored the tender documents, is the best person to understand and appreciate the requirements and interpret its documents. Hon'ble Supreme Court in the case of Afcons Infrastructure Ltd. Vs. Nagpur Metro Rail Corporation Ltd. & another, reported in (2016) 16 SCC 818, has held that even if an interpretation to the tender document given by owner/employer of the project is not acceptable to the constitutional Courts, but that by itself will not be sufficient reason for interfering with the interpretation given. Paragraph nos. 11 to 15 of the said judgment are extracted below:

"**11.** Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) it was held by this Court, relying on a host of decisions that the decision-making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision-making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision-making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us.

12. In Dwarkadas Marfatia and Sons v. Port of Bombay it was held that the constitutional courts are concerned with the decision-making process. Tata Cellular v. Union of India went a step further and held that a decision if challenged (the decision having been arrived at through a valid process), the constitutional courts can interfere if the decision is perverse. However, the constitutional courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority. This was confirmed in Jagdish Mandal v. State of Orissa as mentioned in Central Coalfields.

13. In other words, 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.

14. We must reiterate the words of caution that this Court has stated right from the time when Ramana Dayaram Shetty v. International Airport Authority of India was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous — they must be given meaning and their necessary significance. In this context, the use of the word "metro" in Clause 4.2(a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The

> constitutional courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given."

4. It is equally well settled that judicial review of administrative action is concerned with the decision making process and this Court cannot sit in appeal over the decision taken by an Administrative Authority. This Court will interfere in contractual matters of the State only if the decision making process is malafide or is intended to favour someone or a decision is so arbitrary or irrational that no responsible authority, acting reasonably and in accordance with law, could have reached. Merely, because there is some error in the decision, cannot be a sufficient ground for interference.

5. The respondents have defended the decision taken in favour of private respondent by submitting that although anticipated date of completion of ongoing work was not mentioned by the private respondent; but, since stipulated date of completion of ongoing work was mentioned, therefore, based on the information given, anticipated date of completion was determined and, accordingly, technical bid of private respondent was found to be responsive.

6. Learned counsel appearing for U.R.R.D.A. submits that although technical bid of private respondent was earlier declared to be non-responsive, however, the composition of Technical Evaluation Committee, which

declared his bid as non-responsive, was different and that decision was taken in respect of some other work. He further submits that although writ petition by private respondent challenging rejection of his technical bid was dismissed, however, in Special Appeal No. 551 of 2019 filed by him, a Division Bench of this Court held that it is for the employer to take a decision regarding qualification of a bidder. Thus, according to learned counsel for the respondents, Technical Evaluation Committee, which consists of experts, has rightly taken a decision in favour of private respondent and challenge to said decision, is without any merit.

7. Learned counsel appearing for private respondent submits that technical bid of private respondent in respect of three works was declared to be non-responsive. Private respondent made representation against such decision in respect of one work alone and, after considering his representation, his technical bid was re-evaluated and was found to be responsive. He further submits that private respondent had not made representation in respect of other two works or else his bid would have been found to be responsive in respect of those works also.

8. Mr. S.S. Chauhan, learned counsel appearing for U.R.R.D.A. submits that, in respect of Package No. UT-04-31, technical bid of private respondent was initially declared as non-responsive; but on his representation, when the matter was re-considered, the Technical Evaluation Committee came to the conclusion that anticipated date of completion can be determined based on the stipulated date of completion given in the certificate and, accordingly, the bid of private respondent was found to be responsive.

9. This Court does not find any substance in the first contention raised on behalf of the petitioners. Anticipated date of completion of ongoing work can be determined on the basis of stipulated date of completion of work given in the Experience Certificate, as held by Technical Evaluation Committee, therefore, this Court will not interfere with the decision taken by the said Committee, which consists of domain experts. The decision taken by the Committee, in respect of private respondent, cannot be termed as malafide or perverse, so as to warrant interference of this Court in exercise of powers under Article 226 of Constitution of India. Merely because, on earlier occasion, bid of private respondent was declared to be non-responsive on similar ground and his challenge to the decision taken by Technical Evaluation Committee was unsuccessful, does not mean that the Technical Evaluation Committee cannot consider validity of his bid in response to future tenders, objectively. Moreover, Division Bench of this Court, in appeal filed by private respondent, has observed that it is for the employer to take decision regarding qualification of a bidder, therefore, the decision taken by Technical Evaluation Committee cannot be faulted merely because writ petition filed by private respondent had failed.

10. The second ground, on which decision taken by Technical Evaluation Committee has been challenged, is that private respondent had no experience of executing Stage-I work. Mr. S.S. Chauhan, learned counsel appearing for U.R.R.D.A. submits that categorization of road construction work under P.M.G.S.Y. is different from categorization of said work by State Public Works Department. He further submits that, in P.M.G.S.Y., road construction work is divided into two Stages, namely, Stage-I & Stage-II; while, in Public

Works Department, the said work is divided into three parts, namely, Part-I, Part-II and Part-III. He further submits that, in Public Works Department, work of hill cutting, construction of scupper and construction of retaining wall is included in Part-I and Part-II; while, under P.M.G.S.Y., said work is included in Stage-I. He further submits that, in P.M.G.S.Y., Stage-II involves laying of bitumen on the surface of the road; while, in Public Works Department, the said work is included in Part-III. He further submits that Technical Evaluation Committee examined the nature of work done by private respondent earlier and came to the conclusion that he has sufficient experience of doing similar work, consequently, his bid was found to be responsive.

11. The question raised by the petitioners regarding qualification of private respondent cannot be gone into by this Court while exercising power of judicial review. Whether private respondent had experience of doing similar work and whether the Experience Certificate produced by private respondent, supports his claim of having executed similar work, was examined by the Technical Evaluation Committee consisting of subject experts. The experts, after considering the relevant material, have formed an opinion that private respondent has sufficient experience of doing similar work. The decision taken by the subject experts cannot be said to be arbitrary or perverse so as to warrant interference by this Court.

12. This Court finds substance in the contention raised on behalf of the respondents that second ground of challenge by the petitioners is based on categorization of work by a different agency, namely, Public Works Department. Whether private respondent has experience of

executing Stage-I work or not was considered by the Technical Evaluation Committee and a decision has been taken. In the absence of expertise in such matter, it is better not to interfere with the decision of experts, unless it is shown to be malafide or perverse. There is no material on record to suggest that the decision taken by Technical Evaluation Committee in respect of private respondent is malafide. The decision cannot be said to be perverse also. Therefore, the second ground of challenge is also without any substance. Thus, there is no scope for interference in the matter.

13. There is another aspect of the matter. Pursuant to the order passed by Co-ordinate Bench in WPMS No. 3861 of 2018 on 14.11.2019, the Tender Evaluation Committee re-considered the technical bid of the private respondent, in its meeting held on 18.12.2019. Minutes of the said meeting have been brought on record alongwith supplementary counter affidavit dated 28.11.2019 filed by Executive Engineer, P.M.G.S.Y., Lohaghat in WPMS No. 3861 of 2018. A perusal of the minutes of the said meeting reveals that Technical Evaluation Committee re-visited the issue and again came to the conclusion that technical bid of private respondent is responsive. In the absence of any challenge to the said decision taken by the Committee, this Court cannot go into validity or otherwise of said decision.

14. Mr. S.S. Chauhan, learned counsel appearing for U.R.R.D.A. has apprised the Court that petitioner in WPMS No. 3861 of 2018, has quoted much higher price compared to private respondent for the work (Package No. UT-04-31) and the difference between bid of Roop Singh Kathayat and the private respondent is more than ₹ 90,00,000/-. Thus,

according to him, award of contract to the private respondent will result in saving of more than ₹ 90,00,000/- to the public exchequer. He further apprised the Court that regarding other work, which is subject matter of WPMS No. 3928 of 2018, contract was awarded to private respondent, who was the lowest bidder and more than 90% of the work has been completed by now.

15. Mr. Sanpreet Singh Ajamni, learned counsel appearing for the petitioner in WPMS No. 3928 of 2018, has placed reliance on a judgment rendered by Hon'ble Supreme Court, in the case of "Maa Binda Express Carrier & another Vs. North-East Frontier Railway & others" reported in (2014) 3 SCC 760. Relevant paragraphs, on which reliance was placed, are extracted below:

> "**11.** In Michigan Rubber (India) Ltd. v. State of Karnataka and Ors. (2012) 8 SCC 216 the legal position on the subject was summed up after a comprehensive review and principles of law applicable to the process for judicial review identified in the following words:
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> > "23. From the above decisions, the following principles emerge:
> >
> > (a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;
> >
> > (b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

> (c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;
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> (d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and
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> (e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.
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> 20. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:
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> (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"; and
>
> (ii) Whether the public interest is affected.
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> If the answers to the above questions are in negative, then there should be no interference under Article 226."

16. Hon'ble Supreme Court in the aforesaid judgment has held that interference in contractual matters of the State has to be minimal and interference can be made only when the process adopted is malafide or is intended to favour someone, or the decision made is so arbitrary and irrational that no responsible authority acting reasonably and in accordance with relevant law could have reached.

17. Since petitioners have not been able to show that the decision taken by the Technical Evaluation Committee is malafide or so arbitrary or irrational that no responsible authority could have reached, therefore, the law laid down by Hon'ble Supreme Court in the said judgment does not support the case of the petitioners.

18. For the aforesaid reasons, there is no scope for interference with the decision taken by the Technical Evaluation Committee in respect of private respondent.

19. Accordingly, the writ petitions fail and are dismissed.

(Manoj K. Tiwari, J.)
18.12.2020

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