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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment : 07th January, 2020*

\+ W.P.(C) 12527/2019

SOM DATT LANDMARK HOTELS AND RECREATIONS PRIVATE LIMITED ..... Petitioner

Through: Mr.Jitender Mehta, Advocate

versus

INDIAN RAILWAY CATERING AND TOURISM CORPORATION LIMITED(IRCTC) AND ANR. ..... Respondents

Through: Mr.Nikhil Majithia, standing counsel for IRCTC/R-1.
Mr.Manish K.Bishnoi, Mr.Umang Raj, Mr.Sachin Sharma and Mr.Anurag Sarda, Advts. for R-2.

CORAM:
HON'BLE MR. JUSTICE G.S.SISTANI
HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

G.S. SISTANI, J. *(ORAL)*

1. With the consent of the parties, the writ petition is set-down for final hearing and disposal.

2. The challenge in this writ petition is to the process followed by respondent no.1, whereby, the petitioner contends the respondents have illegally opened the financial and technical bids simultaneously. In the writ petition following prayers have been made:

> *"(i) To pass any writ petition under article 226 of constitution of India for the issuance of writ of certiorari or any other writ or direction for declaring the process adopted by the IRCTC i.e. illegally and unofficially opening of the financial bids without opening the technical bids of the bidders in the Notice Inviting*

Tender (NIT) for open e-tenders i.e. Open E-Tender No. 2019/1RCTC/CATG./DCS/VGT for provision of onboard catering services in Vande Bharat/GATIMAN/Tejas Express Trains in Partial/Complete unbundling model for the Train No. 22435-36 as illegal, arbitrary, unconstitutional, null and void-ab-initio and is liable to be quashed and set aside;

(ii) To pass any writ petition under article 226 of constitution of India for the issuance of writ of mandamus or any other appropriate writ, order or direction thereby directing the respondent to cancel the said tender i.e. Open E-Tender No.2019/IRCTC/CATG./DCS/VGT for provision of onboard catering services in Vande Bharat/GATIMAN/Tejas Express Trains in Partial/Complete unbundling model for the Train No. 22435-36;

3. In the month of September 2019 Respondent no.1 issued a Notice Inviting Tender for E-Tender no. 2019/IRCTC/CATG./DCS/VGT for provision of onboard catering services in Vande Bharat/GATIMAN/Tejas Express Trains in the Partial/Complete unbundling model. The last date for submission and opening of the bids was 04.10.2019.
4. It is the case of the petitioner that as per Clause 4.0 of the Tender Document, relating to 'Evaluation of Offer', the process of evaluation of bids was to be in two stages i.e. the Technical Bid was to be opened first and thereafter, the Financial Bid was to be opened of the persons shortlisted on the basis of their Technical Bids. The complaint of the petitioner is that since as per the terms of the tender, the Technical and Financial Bids were to be opened separately and not together, the entire tendering process stands vitiated and the tender should be recalled and cancelled.
5. Notice was issued in this matter vide order dated 27.11.2019.
6. Learned counsel appearing for respondent No.1 has candidly admitted the inadvertent error in the opening of the technical and financial bids

simultaneously. In the reply filed by respondent No.1, the procedure adopted for receiving and opening of bids has been explained in para 3 of the reply, which we reproduce below:

> *"3. It is stated that as per Notice Inviting Tender, the pre-bid meeting was fixed on 20.09.2019 and the bids were required to be submitted by 04.10.2019. It is stated that the initial date for opening of the bids was 04.10.2019 and the bids were to be evaluated in a two packet system i.e. technical and financial bids. The bids were to remain valid for a period of 120 days from the date of opening of e-tender. It is stated that the bids were required to be uploaded directly on a third party website i.e. www.tenderwizard.com/IRCTC. That the bidders were required to register themselves on tenderwizard website and were required to obtain user id and password in order to submit their bids. It is pertinent to point out that the user id and password obtained by a bidder, upon registration with tenderwizard website, was an independent process and such details were unknown to IRCTC and could not be accessed by IRCTC. Thereafter a bidder directly uploads his bids to the said website and IRCTC has no access to the bids being submitted to tenderwizard website till the actual scheduled date of opening of bids, when the same are opened through digital signatures of officials of two different departments. It is stated that the entire process is done electronically and the same can be viewed in real time basis on their own computers by each party who has participated in the tender process by successfully registering on the tenderwizard website."*

7. The reasons for the inadvertent error of opening both bids together are stated in para 6 of the reply, which is also reproduced below:

> *"6. That the open E-Tender No. 2019/IRCTC/Catg./DCS/VGT was opened on 10.10.2019 in accordance with the revised schedule stated in Corrigendum-3. It is stated that while opening the technical bid from www.tenderwizard.com/IRCTC, it was found that the financial bid was also accessible to the committee. It is stated that both the technical and financial bids were available at the same*

time on account of a technical error only at the online tendering portal i.e. www.tenderwizard.com/IRCTC. It is stated that both the technical and the financial bids were examined and considered together as a single packet bid. The tender committee, on an evaluation of the technical bids found all parties to be technically qualified and accordingly their financial bids were considered.
.....”

8. Mr.Nikhil Majithia, counsel for respondent No.1 has submitted that the committee deliberated upon the inadvertent error and was satisfied that no prejudice has been caused to any of the bidders on account of this error; and accordingly, a decision was taken to go ahead with the tendering process and consider the tender as a single packet bid. Para 8 of the reply is also reproduced below:

> *“8. It is stated that all the bids were considered together and no bidder was disqualified at the time of consideration of the financial bid. It is stated that since all parties were duly considered including their financial bids, there was no room or occasion to give advantage to any bidder and the tender was decided on a single bid system. It is submitted that no prejudice has been caused to the Petitioner as all financial bids were intact at the time of opening of the tender and no benefit was given or provided to any third party. It is stated that the recommendation of the Tender Evaluation Committee for treating the present tender as a single bid system was considered by the highest authority of IRCTC i.e. the Chief Managing Director who has also approved of the aforesaid course of action since no prejudice has been caused to any party.”*

9. The original record has also been produced by Mr.Majithia. Relevant extracts of the Minutes of Meeting of the tender committee to shortlist applicants are reproduced below:

> *“In view of above, TC recommends to decide the tender as Single bid as this is most suitable option in present*

circumstances and recommends to send the bids of successful bidders for forensic audit. Advantages of this option are as follows:

- *Takes care of legitimate rights of H1 bidders as there is no fault of bidder in this lapse. Thus prevents litigation in court.*
- *Prevents likely loss to IRCTC.*
- *Avoids cartelization of bidders.*
- *More judicious and transparent process in prevailing circumstances.*

It may be again noted, being e-Tender no uploaded documents and uploaded financial bids can now be changed."

10. We have heard learned counsels for the parties and have considered their rival submissions.

11. The petitioner is justified in raising an objection that respondent No.1 did not follow its own tender conditions; but despite the persistent queries raised by the court, the petitioner is unable to show any prejudice caused to it on account of simultaneous opening of the technical and financial bids. We have also examined the explanation given in the reply filed by respondent No.1, which is duly supported by the affidavit of the Joint General Manager of respondent No.1. Even otherwise, it is not disputed that the petitioner was 'L-3' and as such would not have been awarded the tender in any case.

12. We may also take note of the fact that since both technical and financial bids were digitally uploaded by the bidders, there was no room for any tampering. Additionally, none of the bids was rejected as being technically unresponsive, which in our view, works to the benefit of all bidders and not to their disadvantage.

13. We therefore find no material infirmity in the tendering process. The law is well settled that the court would be slow in interfering in

decisions relating to tender matters; and the scope of judicial review is restricted. It would be useful at this point to refer to the judgement in the case of ***Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited and Another*** reported as (2016) 16 SCC 818, wherein the Supreme Court has held as under:

> *"11. Recently, in Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) [Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622 : (2016) 4 SCC (Civ) 106 : (2016) 8 Scale 99] 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."*
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> *xxxx xxxx xxxx xxxx*
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> *"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."*

15. Also, in ***Silppi Constructions Contractors v. Union of India and Another*** reported as 2019 SCC OnLine SC 1133, the Supreme Court has held as under:

> *"19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. 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.*
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> *20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state*

instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case."

16. In the light of the above discussion, we find no ground to interfere by way of this writ petition. The same is accordingly dismissed.

G.S.SISTANI, J

ANUP JAIRAM BHAMBHANI, J

JANUARY 07, 2020
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