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(Proceedings through video conferencing)

HIGH COURT OF CHHATTISGARH, BILASPUR

Order reserved on 21/06/2021
Order delivered on 23/07/2021

WPC No. 2208 of 2021

- Surinder Kumar Rana Security Agency registered office at Shop No. B-22, First Floor, Phase-2, Vaishnavi Vihar, Bilaspur, Chhattisgarh, Pin Code-495001, through its Proprietor Shri Surinder Kumar Rana, S/o Late Shri Sagar Chand Rana, aged about 58 years, District : Bilaspur, Chhattisgarh

---- Petitioner

Versus

1. Union of India, through The Secretary, Ministry of Defence, Government of India, Department Ex-Serviceman Welfare, South Block, New Delhi.

2. Directorate General of Resettlement Through its Principal Director, Government of India, Ministry of Defence, West Block- IV , R.K. Puram, New Delhi. Pin Code- 110066.

3. Directorate Resettlement Zone (Central) Through its Additional Director General, Government of India, Ministry of Defence, C/o Hq's Central Command, Lucknow (UP) Pin Code- 226002.

4. Central Mine Planning and Design Institute Limited (CMPDI) (Government of India Undertaking) Through its Chairman-Cum-Managing Director (CMD), Gondwana Place, Kanke Road, Ranchi, District- Ranchi , Jharkhand.

5. Regional Director, Central Mine Planning and Design Institute Limited (CMPDI) Ri-V, SECL Complex, Seepat Road, Bilaspur, District- Bilaspur, Chhattisgarh.

6. Shri Aalok Shrivastava HoD (P&A), Central Mine Planning and Design Institute Limited (CMPDI), Ri-V, SECL Complex, Seepat Road Bilaspur, District- Bilaspur, Chhattisgarh.

7. Jasbir Singh Bath Security Agency, Address- House No.A-12/16, Sector-3, Uday Nagar Society, Telibandha, Raipur, District-Raipur, Chhattisgarh.

8. Anil Yadav Security Agency, Address- Excel Tower, 3rd Floor, Zone-1, Near Deen Dayal Garden, Vyapar Vihar, Bilaspur, District- Bilaspur, Chhattisgarh.

9. Malini Jain Security Agency, Address- House No. 19/236, GE Road, Chidiyawala Makan, Sahdev Nagar, Rajnandgaon, District- Rajnandgaon, Chhattisgarh.

---- Respondents

For Petitioner	:	Mr. Amrito Das, Advocate
For Respondent No.1	:	Mr. Ramakant Mishra, Assistant Solicitor General
For Respondent No.4 to 6	:	Mr. Vivek Chopda, Advocate
For Respondent No.8	:	Mr. Kishore Bhaduri, Sr. Advocate with Mr. Sabyasachi Bhaduri, Adv.
For Respondent No.9	:	Mr. Ashish Surana, Advocate

Hon'ble Shri Prashant Kumar Mishra, Acting Chief Justice

Hon'ble Shri Parth Prateem Sahu, Judge

CAV ORDER

Per Parth Prateem Sahu, J

1. The petitioner, a proprietorship firm of an ex-serviceman, engaged in providing security services empanelled with respondent No.3, has filed this writ petition feeling aggrieved by the insertion of Clause Nos.6, 8 & 23 (d) by respondent No.5 in the impugned tender notification dated 26.3.2021 (Annexure P-1) and rejection of his bid. The petitioner has prayed for following reliefs:-

"10.1. That, this Hon'ble Court may kindly be pleased to call for the entire record from CMPDI pertaining to the issuance of the impugned e-Tender dated 26.03.2021 for its kind perusal.

10.2. That, this Hon'ble Court may kindly be pleased to issue an appropriate writ quashing and setting aside Clause 6, Clause 8 and Clause 23 (d) of the e-Tender dated 26.03.2021 (ANNEXURE-P/1) issued by the CMPDI to the extent it prescribed 58 years as the upper age limit.

10.3. That, this Hon'ble Court may kindly be pleased to issue an appropriate writ declaring Clause 6, Clause 8 and Clause 23 (d) of the e-Tender dated 26.03.2021 (ANNEXURE-P/1) issued by the CMPDI to the extent it prescribed 58 years as the upper age limit as being without jurisdiction and consequently being null and void.

10.4. That, this Hon'ble Court may kindly be pleased to issue an appropriate writ quashing and setting aside the Order dated 30.04.2021 (ANNEXURE-

P/12) issued by CMPDI rejecting the bid submitted by the petitioner and thereby direct the Respondent CMPDI to consider the bid submitted by the Petitioner as being responsive.

10.5. That, this Hon'ble Court may kindly be pleased to issue an appropriate writ directing CMPDI to consider the bid submitted by the Petitioner and to pass an appropriate order.

10.6. That, any other relief which this Hon'ble Court deems fit in the present facts and circumstances of the case may kindly be granted."

2. Facts of the case, in nutshell, are that the petitioner, an ex-serviceman, is registered and empanelled with the Director General, Resettlement (for short 'the DGR'), an office attached with the Department of Ex-servicemen Welfare, Ministry of Defence. The Department of Ex-servicemen Welfare vide Office Memorandum dated 9.7.2012 had issued guidelines for the purpose of empanelling security agencies owned by the ex-servicemen. The purpose of empanelment is for their sponsorship from the DGR and to ensure transparency in operation/ sponsorship. The petitioner is also empanelled with the DGR. By the Office Memorandum dated 01.12.1994, as amended from time to time, issued by the Department of Public Enterprises, all the Central Government Public Sector Undertakings / Enterprises (CPSUs/CPSEs) were instructed to take security cover from the security agencies sponsored by the DGR.

3. On 26.3.2021 the respondent No.5 had issued e-tender notice for services from the security agencies sponsored by the DGR on a contractual basis for a period of two years at CMPDI, RI-V, Bilaspur, Korba Camp, Raigarh Camp, Surajpur, Koriya and

other areas under the jurisdiction of RI-V, Bilaspur. As per eligibility criteria clause of this e-tender notice, at the time of submission of bid, age of the proprietor of a security agency should be less than 58 years. The said age criteria of less than 58 years is further mentioned under Clauses 8 & 23 (d) of the tender document. The petitioner has challenged the aforementioned criteria by way of filing this writ petition on the ground that the petitioner was empanelled with the DGR on 14.7.2020 and thereafter granted sponsorship by the DGR on 9.2.2021. The petitioner also holds a valid license under the Private Security Agencies (Regulation) Act, 2005 (for brevity 'the Act of 2005'). On 9.7.2012 the DGR had issued guidelines, which were amended from time to time, mentioning clause of eligibility for the empanelment, functioning of security agencies/corporations, employment of security personnel, quota of guards, wages to be paid to the employees engaged by the DGR sponsored security agencies of ex-servicemen, mode of requisition, sponsorship, dis-empanelment, penalty etc. Under the guidelines issued by the Department of Ex-servicemen Welfare vide Office Memorandum dated 9.7.2012, maximum age for empanelment has been fixed as '60 years'. The guidelines issued by the DGR being Nodal Agency also govern the respondent No.5-CMPDI and are having binding effect. As per Clause-26 of these guidelines, the proprietor of a security agency shall be granted sponsorship upto the age of 60 years.

The e-tender process of respondent No.5-CMPDI is not a global open tender wherein the employer can prescribe for its independent terms and conditions. The conditions enumerated in the tender notification (Annexure P-1) frustrate the object of grant of sponsorship by the DGR. Fixing of age of a proprietor of security agency to be less than 58 years in the tender notification is not having sound reason, arbitrary and is in contradistinction to clause 14 (b) of the guidelines. Clauses 6, 8 & 23 (d) of the tender notification are unreasonable and arbitrary. The sponsorship by the DGR was granted to the petitioner on 9.2.2021. It is respondent No.5 who had not issued the tender notification immediately and has delayed its issuance. Due to arbitrary act of delay in issuance of tender notification from the date of sponsorship when the petitioner was below 58 years of age, it cannot be made a reason for disqualifying the petitioner. Respondent No.5 being a government undertaking is required to act strictly in terms of the guidelines and directions issued by the DGR. Respondent No.4 is a Government of India undertaking and having its office and work place in different States of the country, but floating e-tenders with different conditions for identical nature of work in different States, which is arbitrary and motivated with extraneous considerations. The petitioner submitted representation on 17.4.2021 through email before the respondent No.4 on which the respondent awarder sought clarification. The DGR clarified with the regard to applicability of age limit and as such, the petitioner was confident that the arbitrary clauses in the tender notification dated 26.3.2021 would be rectified. Representation submitted by the petitioner was replied vide email dated 27.4.2021 rejecting the representation of petitioner. Last date for submission of bid was 28.4.2021. Petitioner in the last hour submitted the bid and further sent legal notice. Technical Bid submitted by the petitioner came to be rejected on 30.4.2021 (Annexure P-2) considering that on the date of submission of bid, petitioner was more than 58 years.

4. Respondent Nos.4 to 6 filed their return to writ petition raising an objection with regard to maintainability of writ petition mentioning that petitioner had participated in the tender process by submitting its bid and after becoming unsuccessful has filed this writ petition. The condition fixing maximum age of proprietor of sponsored security agency of ex-serviceman has been inserted in the e-tender on the basis of policy decision taken by the Competent Authority after due deliberation. The age in the tender notification has been fixed to be less than 58 years because maximum age for being empanelled with the DGR is 60 years and the period of contract is for two years. Earlier also clarification has been sought in this regard from the DGR, vide email dated 4.4.2016 the DGR has clarified that terms of NIT are completely within the domain of the Tendering Authority and they only act as a Nodal Agency for forwarding names of qualified ex-servicemen. The Competent

Authority in the deliberation has taken into consideration the lapses on the part of the sponsored security agencies run by ex-servicemen’s in not carrying out the work in accordance with the terms of agreement in past. They have violated the labour laws and also indulged themselves in claiming false payment from the respondents. Litigations are still pending before the District Court, Bilaspur. They are not paying their legal dues under the relevant Labour Law which has led to increase in financial burden upon respondent CMPDI. The DGR is only a Nodal Agency which sponsors the security agencies of ex-servicemen empanelled with it. The DGR's empanelment of ex-servicemen is only upto the age of 60 years, on completion of 60 years, the DGR places such ex-serviceman and his security agency in the non-operational list and thereafter no audit of the security agency's documents/report takes place. Earlier also dispute arose between the ex-servicemen agencies and respondent CMPDI & its subsidiaries, which was forwarded to the DGR, who, in turn, forwarded the same to the ex-serviceman agencies. The DGR is not having any control over the agencies of ex-servicemen on their dis-empanelment and coming into list of non-operational after completion of 60 years. The maximum punishment under the guidelines which can be awarded to an ex-serviceman is of dis-empanellment. The DGR does not facilitate CPSUs in resolving the dispute arising between them and the ex-servicemen which made the respondent No.4 to take a policy decision to safeguard their interest and to safeguard public money to a substantial extent. Age fixed in the eligibility criteria to be below 58 years is having rational of protecting interest of the CPSUs, which is for public good. Petitioner's case is not that condition fixing age limit below 58 years is for the benefit of a particular bidder or to favour someone. As per Office Memorandum dated 13.9.2018 issued by the Department of Public Enterprises, Government of India, there is clear instruction for CPSUs to seek manpower for security services from the DGR sponsored agencies. The DGR is to sponsor more than one security agencies making better chances to choose suitable outfit keeping in view their specific requirement. The DGR is only a nodal agency for the purpose of granting sponsorship to the ex-servicemen in accordance with the Memorandum dated 9.7.2012. It does not in any way has its effect on the terms of NIT. Solitary ground raised by the petitioner of arbitrary action on the part of the respondents is not correct because eligibility criteria in the tender notification has been fixed pursuant to the policy decision taken after due deliberation by the competent authority to safeguard the interest of respondent No.5. The pleadings and the grounds raised in the writ petition were denied for the reasons mentioned therein.

5. Respondent No.8, who is one of the sponsored security agency of ex-serviceman and successful bidder, has filed reply to writ petition denying all the pleadings made therein. It

is pleaded that four security agencies were sponsored by the DGR i.e. petitioner and respondent No.7, 8 & 9. The e-tender was floated on 26.3.2021, bid of petitioner was rejected on 30.4.2021 but the petitioner has approached this Court by filing writ petition only after issuance of Letter of Acceptance in favour of respondent No.8. The conditions of tender notification have been challenged after becoming unsuccessful. The petitioner had participated in the tender process with open eyes, hence he cannot be allowed to turn around and challenge the clauses/conditions of tender document after becoming unsuccessful. The terms and conditions of tender are to be challenged at the threshold. Even after intimation about rejection of representation on 27.4.2021, the petitioner has not approached this Court, hence the petitioner is not having equity in his favour. The conditions of tender challenged in the writ petition are purely a policy decision, there is no infirmity, illegality or arbitrariness in it and the same are based upon the sound rational that during the currency of contract concerned the security agency must have a valid empanelment.

6. Respondent No.9 also submitted reply to writ petition supporting the stand of respondent No.4 and specifically pleading that Office Memorandum dated 9.7.2012 i.e. guidelines issued by the DGR, as amended by the Office Memorandum dated 6.1.2013, are the guidelines for functioning of DGR empanelled ex-servicemen for security

services. The guidelines do not govern and regulate the terms and conditions of tender. The terms and conditions to be incorporated in the tender are purely a policy decision of the entity inviting bids based on the interest and goal of the organization.

7. Respondent No.1 to 3 submitted reply to the petition pleading therein that to ensure welfare of ex-servicemen the office of the DGR relied on various government Acts, Orders, Policies etc. for granting /awarding welfare schemes. The Office Memorandum dated 9.7.2012, as amended on 6.1.2013, is one of them. The Office Memorandum issued by the Ministry of Defence is to be followed in its letter and spirit. The DGR empanelement certificate issued to an ex-serviceman is valid till he attains the age of 60. However, the existing contract of ex-servicemen will be allowed to continue upto the period of completion of contract. Over age security agencies are also bound by all the terms and conditions which are applicable to the proprietor of less than 60 years. The sponsorship is granted to the DGR empanelled security agencies in a cyclic order of seniority for a period of one or two years, which is extendable by another one or two year on performance basis. Respondent No.4 has prescribed the age of proprietor ex-serviceman to be less than 58 years on the date of submission of bid, which is contrary to the policy of the Ministry of Defence which prescribes upper age limit of 60 years. On the date of sponsorship i.e. 9.2.2021, the petitioner was less than 58

years but respondent No.4 delayed issuance of NIT for more than 45 days for which the petitioner cannot be penalized. The DGR vide email dated 22.4.2021 has clarified that age limit to be considered for the contract is 60 years. The senior-most sponsored security agency should have been awarded the contract.

8. Mr. Amrito Das, learned counsel appearing for the petitioner would submit that respondent No.5 is bound to stipulate eligibility criteria in tender notification as mentioned under the guidelines dated 9.7.2012, but arbitrarily inserted Clause No.6, 8 & 23 (d) fixing age of proprietor of security agency to be less than 58 years on the date of submission of bid. The action on the part of respondent No.5 is contrary to the guidelines issued by the DGR. The principal employer/ awarder of contract is not having any authority and jurisdiction to prescribe for any other eligibility criteria independently contrary to the guidelines of the DGR. He further points out that respondent CMPDI is bound with the guidelines issued by the DGR as subject tender is not a global open tender. Fixation of age limit to be not less than 58 years in the tender notification contrary to the guidelines of the DGR will frustrate the welfare object in grant of sponsorship to ex-serviceman. The terms and conditions of the tender notification floated for providing security services must be in tune of the guidelines of the DGR, which specifically prescribes the upper age limit to be 60 years for empanelment and sponsorship. On the date of

grant of sponsorship, the petitioner was less than 58 years of age. Referring to Clause 21 of the guidelines dated 9.7.2012 it is submitted that the seniority has to be given preference in an eventuality of quoting same rates by all the DGR's sponsored security agencies. This shows that senior proprietor sponsored by DGR is having preference. The petitioner is senior most proprietor amongst the four sponsored security agencies participated in the tender process. Out of total four empanelled and sponsored security agencies, only two were found eligible. It is submitted that action of respondent No.5 in floating tender on 26.3.2021, though all the four security agencies have been granted sponsorship in the month of February, 2021 itself, smacks of malafide. Delay in floating the NIT itself shows the intention of respondent No.5 was to oust the petitioner. He further pointed out that petitioner immediately after floating of tender has made correspondences challenging the clauses of tender notification fixing age limit to be below 58 years on the date of submission of bid. Representation submitted by the petitioner was rejected only on 27.4.2021, whereas last date for submission of bid was 28.4.2021. Looking to the correspondences made by the DGR in reply to the correspondences of respondent No.4, the petitioner under the hope of rectification of error submitted his bid. He further pointed out that the DGR, which is one of the departments under the Ministry of Defence, in its letter written to the respondent CMPDI has supported the stand of petitioner by stating that the proprietor of a security agency empanelled & sponsored by the DGR has to be considered for award of contract upto the age of 60 years. Overlooking the guidelines and letters of the DGR fixed the age limit for proprietor of sponsored security agency to be below 58 years for their participation in tender process. He submits that the entire action on the part of the respondent CPMDI in fixing the maximum age to be less than 58 years for participation is arbitrary and contrary to the guidelines of the DGR dated 9.7.2012, as amended by Office Memorandum dated 6.1.2013. He submits that the order rejecting technical bid of the petitioner is liable to be set aside and it be directed to consider bid of the petitioner and to pass necessary orders in accordance with the guidelines issued by the DGR.

9. Mr. Vivek Chopda, learned counsel appearing on behalf of respondents No.4 to 6 submits that the tender notification was issued much earlier on 26.3.2021, the petitioner has not challenged the terms and conditions of tender at the earliest as representation challenging the terms and conditions of tender is filed only on 22.4.2021. Representation of petitioner was rejected on 27.4.2021 and thereafter the petitioner participated in the tender process by submitting his bid and only after becoming unsuccessful, the petitioner has preferred this writ petition. He submits that once the petitioner had participated in the tender process, the writ petition on the grounds raised therein is not maintainable. He further submits

that the guidelines of the DGR cannot be made binding for fixation of eligibility criteria in the tender / NIT. Respondent-employer/awarder of contract has considered and acted in accordance with instructions contained in the office memorandum issued by the Department of Public Enterprises and engaged the security agency sponsored by the DGR. The eligibility criteria as mentioned in the office memorandum / guidelines dated 9.7.2012 is with regard to empanelment of ex-serviceman with the DGR for sponsorship. As per guidelines, the age shown for empanelment is for the purpose of providing contract upto 60 years of age. Referring to the eligibility criteria/guidelines dated 9.7.2012, he submits that respondent CMPDI has not done any violence to the guidelines as even after fixing the age to be less than 58 years on the date of submission of bid, the proprietor of security agency will provide security services up to two years, meaning thereby maximum age of 60 years as mentioned under the guidelines of the DGR. He further submitted that the condition in the tender notification of fixing the age to be less than 58 years on the date of submission of bid has been inserted recently looking to the past experience of the respondent employer wherein the contractors engaged in security services after their removal from the empanelled list of the DGR on attaining the age of 60 years, were not acting according to the terms of contract and not complying with the provisions of the labuor laws etc. The respondent employer had to indulge in litigation with the security agencies, some of which are pending before the competent Court causing financial loss. Looking to the problems faced by the respondent-employer in the contract with the proprietor of the DGR sponsored security agencies upon becoming above 60 years, the respondent employer wrote letter to the DGR but no proper action has been taken. Maximum punishment under the guidelines, as mentioned in Clause 26, is of dis-empanelment. Respondent employer/ awarder of contract after due deliberation with higher authorities, has taken a policy decision to fix maximum age of proprietor of security agency to be less than 58 years on the date of submission of bid so that the contract can be concluded within or upto age of 60 years, which is the maximum age prescribed for empanelment of ex-serviceman with the DGR. Hence, the act of fixing the age limit to be less than 58 years in the subject tender notification does not violate the guidelines of the DGR, rather it is within the object of the guidelines dated 9.7.2012. He further submits that submission made by learned counsel for the petitioner that different terms and conditions are fixed at different places is not correct. Reference made by learned counsel for the petitioner with regard to issuance of tender notification by Ranchi office is under peculiar circumstances, there the security agency engaged was dis-empanelled, therefore, the tender notification has been issued in a very haste manner. Issuance of tender notification for the purpose of engaging security agency for providing security services is commercial transaction. The employer is having all the rights and liberties to fix the terms and conditions of contract looking to its need, requirement and protecting interest. It is further pointed out that allegation of malafide argued by learned counsel for the petitioner is not correct. In the letter of sponsorship itself the period for completion of tender process is prescribed as 90 days. Due to situation beyond the control of the employer on account of declaration of containment zone due to Covid-19 pandemic under the guidelines issued by the Ministry of Home Affairs, the tender notification could not be processed immediately, but even after obstructions concluded the tender proceedings within the period prescribed in the sponsorship letter. Hence, the submission of learned counsel for the petitioner that respondent employer has deliberately caused delay in floating tender notification is not sustainable. He submits that except pleading and oral submission, no material is placed on record to prove the malafide as alleged.

In support of the contention he places his reliance on the decisions of Hon'ble Supreme Court in cases of **Jagdish Mandal Vs. State of Orissa & others** reported in **(2007) 14 SCC 517**; **Afcons Infrastructure Limited Vs. Nagpur Metro Rail Corporation Limited and Another** reported in **(2016) 16 SCC 818**; **Slippi Constructions Contractors vs. Union of India & anr** reported in **(2020) 16 SCC 489**.

10. Mr. Kishore Bhaduri, learned Senior Advocate representing

respondent No.8 submits that respondent No.8 emerged as successful bidder. The letter of acceptance has been issued to respondent No.8 on 8.5.2021. The tender proceedings have been concluded in a very transparent manner. Respondent employer at the time of floating tender notification has very categorically mentioned the eligibility criteria fixing the age of proprietor of security agency to be less than 58 years on the date of submission of bid. The petitioner was aware about the consequences of fixing of age limit but he has not challenged the same immediately before the Court. In fact, the petitioner participated in the tender proceedings with open eyes and after becoming unsuccessful and after issuance of letter of acceptance in favour of respondent No.8, he has filed this writ petition. The petitioner once participated in the tender proceedings after going through the terms and conditions with open eyes, could not be permitted to challenge the same after becoming unsuccessful. The petition is liable to be dismissed on this count alone. He further submits that writ petition is filed at a belated stage, representation of the petitioner was rejected on 27.4.2021, technical bid of the petitioner was rejected on 30.4.2021, whereas the instant petition has been filed only on 10.5.2021, hence the writ petition is liable to be dismissed. In support of his submission, learned counsel places his reliance on the judgements passed by the Hon'ble Supreme Court in **Meerut Development Authority vs. Association of Management Studies & anr** reported in **(2009) 6 SCC 171**; **Tata Cellular vs. Union of India** reported in **(1994) 6 SCC 651** & **Michigan Rubber (India) Limited vs. State of Karnataka & ors** reported in **(2012) 8 SCC 216**.

11. Mr. R.K. Mishra, learned Assistant Solicitor General for respondent No.1 to 3 would argue that the guidelines issued by the DGR dated 9.7.2012 are binding upon the respondent CMPDI. As per these guidelines, ex-serviceman empanelled and sponsored by the DGR is entitled for participation in tender proceedings upto the age of 60 years and work of security services under a contract can be awarded before the proprietor of a security agency attains the age of 60 years. The specific clause is mentioned in the guidelines that period of empanelment to be extended upto the period of contract. The officers of DGR monitor's the empanelled agencies upto the period of completion of contract, hence submission made by learned counsel for respondent No.4 to 6 that employer is facing problems after completion of 60 years of the proprietor of security agency is not correct. He submits that the guidelines are issued by the DGR under the Ministry of Defence, hence the same are to be followed in its words and spirit and the PSUs or any central government undertaking cannot make its own eligibility criteria in tender notification for awarding contract of security services. He further raised the contentions as argued by Mr. Amrito Das, learned counsel for the petitioner.

12. Mr. Ashish Surana, learned counsel for respondent Nos.1 to 3 supported the submissions made by Mr. Vivek Chopda, learned counsel for respondent Nos.4 to 6 and further added that the guidelines issued by the DGR do not lay down any guideline for terms and conditions of tender to be issued by the Public Sector Undertaking. Criteria fixed in the guidelines is only with regard to the empanelment for the purpose of sponsorship. The employer like CMPDI is having all liberty for fixing the terms and conditions of tender to be floated by it. He submits that writ petition is not having any substance and the same is liable to be dismissed as such.

13. Mr. Amrito Das, learned counsel for the petitioner submits that proprietor of security service agency himself has not to stand as guard but the security personnel is to be deployed for whom maximum age prescribed in the guidelines is 65 years. Referring to Annexure P-12 filed along with rejoinder, he submits that the petitioner has acted diligently but due to lock-down filing was stopped, hence writ petition is filed immediately after opening of the Court. He submits that the guidelines have been issued with some purpose, hence the respondent employer, which is a public sector undertaking, has to consider and award the contract to the empanelled and sponsored ex-serviceman upto to the age of 60 years as per guidelines.

14. We have heard learned counsel for the parties and perused the record.

15. The short question which arise for consideration in the present case is whether respondent -employer/awarder of contract can independently fix terms and conditions in the NIT floated by it for security services by the agencies sponsored by the DGR to safeguard its colony premises, drilling camps & sites located in the Districts of Chhattisgarh?

16. To appreciate the submissions made by learned counsel for the petitioner that the guidelines dated 9.7.2012, as amended on 6.1.2013, issued by the DGR are having binding effect for the purpose of fixing terms and conditions of tender, we have gone through the Office Memorandum dated 9.7.2012 annexed with writ petition as Annexure P-7. The subject heading of the Office Memorandum dated 9.7.2012 reads as under:-

> "**Guidelines for functioning of DGR empanelled ex-servicmen for security services along with amendments issued vide office memorandum 28 (03)/2012/D(RES-1) dated 16.1.2013**."

The subject heading itself makes it clear that the guidelines were issued in respect of functioning of the DGR empanelled ex-servicemen for security services. There is no whisper that the same are to be followed strictly by the government public sector undertakings or enterprises for entering into contract. It further makes it clear that by way of Office Memorandum dated 1.2.1994 issued by the Department of Public Enterprises it has been made mandatory for the Central Public Sector Undertakings and Central Public Sector Enterprises to take cover from the security agencies sponsored by the DGR. The object behind issuing guidelines dated 9.7.2012 by the Ministry of Defence, Government of India is for the welfare of ex-servicemen and ensuring their reasonable income and to make the process of sponsorship for security agencies more transparent through online registration, data up-dation and putting up the list of ESMs registered/empanelled and sponsored on the website. The eligibility criteria clause and other clauses contained in the guidelines make it more clear that the age prescribed in Clause-5 'Eligibility Criteria for Empanelment' is for the purpose of empanelment of ex-servicemen for sponsorship by the DGR. A bare reading of the clauses of Office Memorandum dated 9.7.2012 make it clear that the same are in relation to functioning of the DGR, manner of sponsorship on rotation basis of the registered/empanelled ex-servicemen, fixing of quota of guards for each sponsored ex-serviceman, discipline and control. Clause 15 mentions that sponsorship will be valid for two years upto the age of 60 years of ex-serviceman. Taking of security cover from the security service agencies sponsored by the DGR only is binding upon the public sector undertakings and enterprises.

17. It is the case of respondents No.4 to 6 that prior to the year 2021 there was no such clause of fixing age limit below 58 years on the date of submission of bid, but considering the difficulties faced by CMPDI in the past regarding non-

performance of contractual obligations properly by the successful ex-servicemen after attaining the age of 60 years, made them to re-think and after due deliberation a policy decision was taken by the higher authorities to fix the age limit on the date of submission of bid. Learned counsel has further referred to Annexure R-2 wherein proposal has been made to incorporate necessary changes as suggested under Note-9 was approved under Note-10. He also referred to some documents of the year 2014-15 relating to one Colonel Gurvinder Singh Mann (Retd.), who was running a security agency to show that said proprietor had not complied with the provisions of the labour laws as also committed some false and forged acts.

18. It is for the employer/ awarder of contract to frame the terms and conditions according to its need and requirement. The decision taken for fixing the age on the date of submission of bid is a policy decision taken at headquarters level. The reference made by the petitioner of the NIT issued by Ranchi office where no age limit is prescribed has been explained that it was issued in haste manner due to compelling circumstances of the security agency being disempaneled. The reason assigned could not be controverted by the petitioner. Fixing the age to be less than 58 years is taken as policy decision to protect their interest. Even the guidelines of the DGR do mention that it is only made for bringing transparency in the empanelment of ex-servicemen with the

DGR for their sponsorship. The policy of fixing minimum age of participation is with an object that the contract period will come to an end within the maximum age of empanelment of sponsored security agency. The letter dated 4.4.2016 (email) part of Annexure R-1 issued by the DGR mentions that "**the DGR only forwards name of qualified vendors available in the State to the PSUs and does not have any role in tendering process**". This also makes it clear that the DGR is not having any role in fixing the terms and conditions of NIT to be floated by the employer/awarder of contract (PSU's). In the considered opinion of this Court, what is binding on the CPSUs or CPSEs is that they are required to take security cover from the security agencies sponsored by the DGR.

19. In the case at hand also, out of four sponsored security agencies for the work under subject NIT, two became eligible and respondent No.8, who is also sponsored by the DGR, was declared successful. The letter of acceptance was issued considering the guidelines of the DGR dated 9.7.2012, as amended in the year 2013. It is not the case that after rejection of bid of the petitioner upon declaring him ineligible, the contract was awarded to other security agency not sponsored by the DGR.

20. In the tender and contract matters, the scope of interference by the Court is very minimal. The jurisdiction of judicial review can be exercised if the approach is arbitrary, mala fide or the procedure adopted is meant to favour one. The Hon'ble

Supreme Court in case of **Directorate of Education & others** reported in **(2004) 4 SCC 19** while dealing with the issue of eligibility criteria in tender proceedings has held as under:-

> "11. This principle was again restated by this Court in Monarch Infrastructure (P) Ltd. v. Commissioner, Ulhasnagar Municipal Corporation, (2000) 5 SCC 287. It was held that the terms and conditions in the tender are prescribed by the Government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is not for the courts to say whether the conditions prescribed in the tender under consideration were better than the one prescribed in the earlier tender invitations.
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> 12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide."

21. The Hon'ble Supreme Court in case of **Tata Cellular (supra)** has laid down the parameters for interfering with the tender and contract matters. Relevant paragraph of the same is quoted below for ready reference:-

> “77.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 natural justice,
> 4. reached a decision which no reasonable tribunal would have reached or,
> 5. abused its powers.
>
> 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.
>
> The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact, in R. v. Secretary of State for the Home Department, ex Brind reported in (1991) 1 AC 696, Lord Diplock refers development, specifically

namely, the to one possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

22. In case of **Michigan Rubber (supra)**, the Hon'ble Supreme Court has held thus:-

> “24.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”? and
>
> (ii) Whether the public interest is affected?
>
> If the answers to the above questions are in negative, then there should be no interference under Article 226.”

23. In **Afcons Infrastructure Limited (supra)** the Hon'ble Supreme Court considering its earlier decisions in **Tata Celluar's case (supra)** and **Jagdish Mandal's case (supra)**; **Central Coalfields's case (supra)** has held that mere disagreement with the decision-making process or decision of the administrative authority is no reason for the constitutional Court to interfere. Para-12 & 13 of the same are quoted below;-

> “12. In Dwarkadas Marfatia & Sons v. Board of

> Trustees of the Port of Bombay[3] it was held that the constitutional Courts are concerned with the decision making process. Tata Cellular v. Union of India[4] 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[8] as mentioned in Central Coalfields[5].
>
> 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."

24. In **Slippi Construction Contractors's case (supra)** the Hon'ble Supreme Court while holding that the Court should give way to the opinion of experts unless the decision is totally arbitrary or unreasonable and the Court does not sit like a court of appeal over the appropriate authority, has held as under:-

> "20. The essence of the law laid down in the judgements 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............"

In the aforementioned ruling the Hon'ble Supreme Court has held that the Court should exercise restraint and caution and should not use magnifying glass while scanning tenders; the Court must give "fair play in the joints" and should give way to the opinion of experts unless the decision is totally arbitrary or unreasonable.

25. In case of **Jagdish Mandal (supra)** the Hon'ble Supreme Court has held that judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides and to see whether the decision is made lawfully and not to check whether the decision is sound as the contract is a commercial transaction, principles of equity and natural justice stayed at a distance.

26. If in the light of above rulings of the Hon'ble Supreme Court the facts of present case are considered, the sole ground

raised by learned counsel for the petitioner in this petition is that the respondent No.5-awarder of contract has fixed the age limit of ex-serviceman contrary to the guidelines issued by the DGR which is binding in nature. As we have discussed in the preceding paragraphs that the guidelines issued by the DGR are in regard to functioning of the DGR empanelled ex-servicemen. The respondents have pleaded and argued before this Court that fixation of age on the date of submission of bid to be below 58 years has been made after due deliberation only to achieve the purpose. Even otherwise, it is only the sponsored ex-serviceman, who is operating security agency, meeting the eligibility criteria will be awarded contract. It is for the employer/awarder of contract to frame terms and conditions looking to its need as also protecting its interest.

27. For the foregoing reasons, we do not find any arbitrariness or unreasonableness in the decision taken by respondent No.5-employer/awarder of contract regarding insertion of condition that age of proprietor of sponsored security services agency should be below 58 years on the date of submission of bid.

28. So far as the allegation of malafide, as argued by learned counsel for the petitioner, on the ground that in order to oust the petitioner, the delay has been caused by respondent No.5 in floating tender notification, is concerned, except oral submission no material has been placed on record by the petitioner to substantiate the allegation of malafide. On the contrary, learned counsel for the respondent-CMPDI has

submitted that in the letter of sponsorship issued by the DGR there is mention that the proceedings of tender must be completed within a period of 90 days; due to declaration of containment zone on account of Covid-19 pandemic, some delay has occurred in floating tender notification but tender proceedings were completed within time. This submission does not appear to be incorrect. The whole country was suffering with spread of Covid-19 pandemic. Even otherwise, perusal of letter of acceptance would show that the tender was finalized within the period prescribed i.e. 90 days, as mentioned in the letter of sponsorship. Hence, the submission made by the learned counsel for the petitioner that issuance of tender notification after 45 days of the issuance of sponsorship letter is with ulterior motive and mala fide intention, is not sustainable. In case of **Ajit Nag vs. General Manager (PJ), Indian Oil Corporation Ltd. Haldia & ors** reported in **(2005) 7 SCC 764** the Hon'ble Supreme Court while dealing with the question of malafide in contract matters has held thus:-

> “56. ....It is well-settled that the burden of proving mala fide is on the person making the allegations and the burden is "very heavy". [vide E.P. Royappa v. State of T. N., (1974) 4 SCC 3]. There is every presumption in favour of the administration that the power has been exercised bona fide and in good faith. It is to be remembered that the allegations of mala fide are often more easily made than made out and the very seriousness of such allegations demands proof of

> a high decree of credibility. As Krishna Iyer, J. stated in Gulam Mustafa v. State of Maharashtra, (1976) 1 SCC 800 (SCC p.802, para 2); "It (mala fide) is the last refuge of a losing litigant".

29. For the foregoing reasons, we do not find any ground to interfere with the subject tender proceedings. Writ petition being devoid of substance is liable to be and is hereby dismissed. No order as to costs.

Sd/-	Sd/-
(Prashant Kumar Mishra)	(Parth Prateem Sahu)
Acting Chief Justice	Judge

roshan/-