IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.10055 of 2021 (O&M)
Date of decision:- 21.05.2021

Yogesh Gupta …..Petitioner

Versus

Food Corporation of India and another ...Respondents

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

Present:- Mr. J.S.Arora, Advocate, for the petitioner.
Mr. Sunish Bindlish, Advocate, for the respondent No.1-FCI.

(The aforesaid presence is being recorded through video conferencing since the proceedings are being conducted in virtual Court).

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RAVI SHANKER JHA, CHIEF JUSTICE (oral)

In response to the NIT dated 12.03.2021, floated by respondent-FCI for appointment of handling and transport contractor (HTC) at the Killianwali Centre under FCI Division, Faridkot, the petitioner submitted his tender. This petition has been filed for the technical bid submitted by the petitioner has since been rejected by the authorities on 04.05.2021 and whereafter even his representation against his disqualification has also been rejected vide order dated 11.05.2021.

Learned counsel for the petitioner submits that the petitioner's tender was rejected on two grounds; firstly, the note recorded by the auditors on the profit & loss account as also the balance sheet for the financial year 2017-18 was missing in the documents (profit & loss account and Balance Sheet) for the subsequent year i.e. financial year 2018-19. Secondly, there was also a discrepancy as regards the dates mentioned on the balance sheet and the profit & loss account for the same year (2018-19), appended with the bid submitted by the petitioner.

It is urged that the note upon which insistence is placed by the respondents was not an essential part of the audited accounts and therefore, even in the absence of the alleged note, the petitioner's bid on the basis of the audit report and accounts submitted by him could not have been rejected.

Learned counsel for the petitioner further submits that even though the date mentioned on the balance sheet is 30.10.2020 and profit & loss account was 28.10.2020, but that was only a typographical mistake/error and therefore, ought to have been ignored by the Technical Evaluation Committee.

Further the rates submitted by the petitioner were lower than the rates submitted by respondent No.2 and therefore, the act of the respondent authorities in rejecting the petitioner's technical bid would result in financial loss to the Food Corporation of India. Thus, the impugned orders dated 04.05.2021 and 11.05.2021 deserve to be set aside.

Learned counsel for the respondent-Food Corporation of India *per-contra,* submits that the petitioner's audited accounts for the year 2018-19 did not contain an audit note and this fact is admitted by the petitioner. It is further submitted that the discrepancy in the dates mentioned on the profit & loss account and the balance sheet is also not disputed by the petitioner. It is submitted that in such circumstances as these requirements were mentioned in the tender notice itself and were to be strictly complied with by all tenderers, they cannot be treated as minor discrepancies, and therefore, could not have been ignored. It is urged that the authorities have examined all the objections raised by the petitioner vide a detailed order dated 11.05.2021 and have rejected the representation of the petitioner, which does not call for any interference.

Learned counsel for the respondent-FCI further submits that a bare perusal of the documents/accounts submitted by the petitioner for the financial year 2017-18 at page Nos. 140 and 141 of the petition clearly show that the audit note was appended separately by the auditors in the profit & loss account and the balance sheet whereas the audit note is missing in the profit & loss account and the balance sheet submitted by the petitioner for the year 2018-19.

Learned counsel for the respondent-FCI further submits that in such circumstances and in view of the provisions of Clause 8(iii), Clause 8(c)(iii) as well as clause 8(f) and (g) of Appendix-II of the MTF, the tender documents submitted by the petitioner were termed as incomplete and therefore, he was technically disqualified.

We have heard learned counsel for the parties at length.

As far as the factual aspect is concerned, it is pertinent to note that the petitioner in his representation filed before the respondent-authorities, while replying to the deficiency in relation to the audit note, has stated that "***though the said note may be inadvertently missed………..".*** As regards the discrepancy in the dates mentioned on the profit & loss account and the balance sheet for the financial year 2018-19, the petitioner in the said representation has stated "***that the tax audit report of my client for the FY 2018-19 was signed on 30.10.2020 and the UDIN for the same has also been generated on the said date. However, the date on profit & loss account page was inadvertently mentioned as 28.10.2020***."

When confronted with the aforesaid two statements made by the petitioner in the representation dated 05.05.2021, learned counsel for the petitioner has not disputed the same and, therefore, in the instant case, the deficiencies/lacunas that have been pointed out by the respondents are admitted and not disputed. Infact, the same are also borne out and established by the documents filed by the petitioner.

The issue raised by the petitioner regarding absence of the note in the audit documents being a minor discrepancy is concerned, it is observed that the authorities while rejecting the petitioner's representation had also taken into account the opinion of the certified Chartered Accountant of the Food Corporation of India:-

> "***On going through the opinion received from the Certified CA of the FCI, it is observed that the Chartered Accountant has clearly stated that "as per the Guidance Notes on auditing issued by the Institute of Chartered Accountant of India (ICAI), every CA has to mention the following on the audit documents:-***
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> - ***M.No. of the CA signing the report,***
> - ***Firm Name (if signing under firm name,***
> - ***Firm Registration Number,***
> - ***Designation,***
> - ***Signature with firm/individual seal,***
> - ***Note on audit of document***
> - ***Date and place of signing.***
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> ***Therefore, if anything from the above not mentioned on the documents, then that document will be considered as incomplete in respect of audit."***

From a perusal of the Model Tender Form (MTF), it is clear that a duly audited profit & loss account and the balance sheet are mandatorily required to be filed by the tenderer along with the tender application and as per the instructions issued by the Institute of Chartered Accountants, referred to by the respondents in their order dated 11.05.2021 rejecting the representation of the petitioner, it is clear that a note on the audited documents is an integral and necessary part of the audited profit &

loss account and the balance sheet. It is also clear that as there is a discrepancy and mismatch in the date of the balance sheet and the audited profit & loss account filed by the petitioner for the year 2018-19, cannot be said to be in accordance with the requirements of the tender documents. It is also clear from a perusal of paragraph 8(d) of the MTF that a tender which does not comply with the instructions contained in the MTF would be summarily rejected and that a tender which is not accompanied by all the schedules/annexures intact and duly filled in and signed may be ignored under paragraph 8(g) and that the tenderer does not have any right or opportunity to alter, modify or withdraw any offer at any stage after submission of the tender form.

From a perusal of the impugned order dated 04.05.2021 passed by the respondent-authorities, it is clear that the reasons for rejection of the petitioner's technical bid are that the note on audit is not given in the profit & loss account and the balance sheet submitted by the petitioner for the financial year 2018-19 and that there is a discrepancy in the dates between the balance sheet and the profit & loss account. Likewise, the impugned order dated 11.05.2021 (Annexure P-12) shows that the authorities duly considered the issues raised by the petitioner but in the wake of his admissions, regarding absence of an audit note in the profit & loss account, balance sheet as also the discrepancies in the dates mentioned in the balance sheet and profit & loss account for the financial year 2018-19, rejected his representation.

It is settled law that the scope of the interference by the High Court in exercise of its powers under Article 226 of the Constitution of India in tender matters or in respect of judicial review of administrative action is limited and restricted to cases of arbitrariness, unreasonableness and procedural impropriety. Further in such cases the Court is not required to look into the soundness of the decision but the lawfulness of the decision making process. The Courts cannot sit in appeal over the decisions of the Executive Authorities or instrumentalities and the State in such cases ought to be granted latitude and play in the joints while exercising such powers. The law also requires that in such cases paramount public interest should also be kept in mind by the Courts.

The Supreme Court in the case of ***The Bharat Coking Coal Ltd. and others v. AMR Dev Prabha and others, 2020 SCC Online SC 335,*** has reiterated these principles of law in paragraphs No. 28 to 34, which are reproduced herein as under:-

> "***(I) Maintainability of writ petition***
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> **28.** The scope of judicial review in tenders has been explored in-depth in a catena of cases. It is settled that constitutional courts are concerned only with lawfulness of a decision, and not its soundness. Phrased differently, the courts ought not to sit in appeal over decisions of executive authorities or instrumentalities. Plausible decisions need not be overturned, and latitude ought to be granted to the State in exercise of executive power so that the constitutional separation of powers is not encroached upon. However, allegations of illegality, irrationality and procedural impropriety would be enough grounds for courts to assume jurisdiction and remedy such ills. This is especially true given our unique domestic circumstances, which have demonstrated the need for judicial intervention numerous times. Hence, it would only be the decision-making process which would be the subject of judicial enquiry, and not the end result (save as may be necessary to guide determination of the former).
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> **29.** This position of law has been succinctly summed up in *Tata Cellular* v. *Union of India* [*Tata Cellular* v. *Union of India*, (1994) 6 SCC 651] , where it was famously opined that:
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> "*77.* … Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfilment 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:
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> (*i*) *Illegality*: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.
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> (*ii*) Irrationality, namely, *Wednesbury* unreasonableness.
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> (*iii*) Procedural impropriety."

30. But merely because the accusations made are against the State or its instrumentalities does not mean that an aggrieved person can bypass established civil adjudicatory processes and directly seek writ relief. In determining whether to exercise their discretion, the writ courts ought not only confine themselves to the identity of the opposite party but also to the nature of the dispute and of the relief prayed for. Thus, although every wrong has a remedy, depending upon the nature of the wrong there would be different forums for redress.

31. In cases where a constitutional right is infringed, writs would ordinarily be the appropriate remedy. In tender matters, such can be either when a party seeks to hold the State to its duty of treating all persons equally or prohibit it from acting arbitrarily; or when executive actions or legislative instruments are challenged for being in contravention to the freedom of carrying on trade and commerce. However, writs are impermissible when the allegation is solely with regard to violation of a contractual right or duty. Hence, the persons seeking writ relief must also actively satisfy the Court that the right it is seeking is one in public law, and not merely contractual. In doing so, a balance is maintained between the need for commercial freedom and the very real possibility of collusion, illegality and squandering of public resources.

32. Such a proposition has been noticed by this Court even earlier in *Jagdish Mandal* v. *State of Orissa* (2007) 14 SCC 517] in the following words:

> "*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."

33. Such conscious restraint is also necessary because judicial intervention by itself has effects of time and money, which if unchecked would have problematic ramifications on the State's ability to enter into contracts and trade with private entities. Further, it is not desirable or practicable for courts to review the thousands of contracts entered into by executive authorities every day. Courts also must be cognizant that often-a-times the private interest of a few can clash with public interest of the masses, and hence a requirement to demonstrate effect on "public interest" has been evolved by this Court.

34. It is thus imperative that in addition to arbitrariness, illegality or discrimination under Article 14 or encroachment of freedom under Article 19(1)(*g*), public interest too is demonstrated before remedy is sought. Although the threshold for the latter need not be high, but it is nevertheless essential to prevent bypassing of civil courts and use of constitutional avenues for enforcement of contractual obligations. ..emphasis supplied."

In the case of ***Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers v. New J.K. Roadways, Fleet owners and Transport Contractors and others 2020 SCC Online SC 1035,*** the Supreme Court after analyzing the law laid down vide its various decisions has summarized that the authority that authors the tender document is the best person to understand and appreciate its requirements and its interpretation should not be second guessed by a Court in judicial review proceedings. The Supreme Court in the said decision has considered its earlier decisions in ***Afcons Infrastructure Ltd. V. Nagpur Metro Rail Corporation Ltd. 2016(16) SCC 818; The Bharat Coking Coal Ltd. and others v. AMR Dev Prabha (supra)*** *and* ***Silppi Constructions Contractors v. union of India 2019 SCC Online SC 1133,*** in paragraphs No. 14 to 17 which are reproduced herein as under:-

"**14.** In a series of judgments, this Court has held that the authority that authors the tender document is the best person to understand and appreciate its requirements, and thus, its interpretation should not be second-guessed by a court in judicial review proceedings. In *Afcons Infrastructure Ltd.* v. *Nagpur Metro Rail Corporation Ltd.*, (2016) 16 SCC 818, this Court held:

"**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."

(emphasis is by this Court).

15. In the judgment in *Bharat Coking Coal Ltd.* v. *AMR Dev Prabha* 2020 SCC OnLine SC 335, under the heading "*Deference to authority's interpretation"*, this Court stated:

> "51**.** Lastly, we deem it necessary to deal with another fundamental problem. It is obvious that Respondent No. 1 seeks to only enforce terms of the NIT. Inherent in such exercise is interpretation of contractual terms. However, it must be noted that judicial interpretation of contracts in the sphere of commerce stands on a distinct footing than while interpreting statutes.
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> 52. In the present facts, it is clear that BCCL and India have laid recourse to Clauses of the NIT, whether it be to justify condonation of delay of Respondent No. 6 in submitting performance bank guarantees or their decision to resume auction on grounds of technical failure. BCCL having authored these documents, is better placed to appreciate their requirements and interpret them. (*Afcons Infrastructure Ltd.* v. *Nagpur Metro Rail Corporation Ltd.*, (2016) 16 SCC 818)
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> 53. The High Court ought to have deferred to this understanding, unless it was patently perverse or mala fide. Given how BCCL's interpretation of these clauses was plausible and not absurd, solely differences in opinion of contractual interpretation ought not to have been grounds for the High Court to come to a finding that the appellant committed illegality." (emphasis supplied)

16. Further, in the recent judgment in *Silppi Constructions Contractors* v. *Union of India*, 2019 SCC OnLine SC 1133, this Court held as follows:

> "**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." (emphasis supplied)

17. In accordance with these judgments and noting that the interpretation of the tendering authority in this case cannot be said to be a perverse one, the Division Bench ought not to have interfered with it by giving its own interpretation and not giving

> proper credence to the word "*both*" appearing in Condition No. 31 of the N.I.T. For this reason, the Division Bench's conclusion that JK Roadways was wrongly declared to be ineligible, is set aside. (emphasis supplied)".

In the case of ***Galaxy Transport Agency*** v. ***New J.K. Roadways*** (supra), the Supreme Court has also held that the decision of the Tender Opening Committee which is an expert body cannot and should not be interfered with unless it is established that it is arbitrary or *mala fide* and has quoted the decision rendered in the case of ***Jagdish Mandal v. State of Orissa 2007(4) SCC 517,*** wherein in paragraph-18, it has been held as under:-

> "**18.** Insofar as Condition No. 27 of the N.I.T. prescribing work experience of at least 5 years of not less than the value of Rs. 2 crores is concerned, suffice it to say that the expert body, being the Tender Opening Committee, consisting of four members, clearly found that this eligibility condition had been satisfied by the Appellant before us. Without therefore going into the assessment of the documents that have been supplied to this Court, it is well settled that unless arbitrariness or *mala fide* on the part of the tendering authority is alleged, the expert evaluation of a particular tender, particularly when it comes to technical evaluation, is not to be second-guessed by a writ court. Thus, in *Jagdish Mandal* v. *State of Orissa*, (2007) 14 SCC 517, this Court noted:
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> > "**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. 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";

(*ii*) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action." (emphasis supplied).

As far as the strict enforceability of the terms of the Model Tender Form is concerned, the Supreme Court has upheld the same in the case of ***Municipal Corporation v. BVG India Ltd. 2018 SCC Online 278*** and has quoted the decision rendered in the case of ***Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) 2016(8) SCC 622*** in paragraph No.21 which is reproduced herein as under:-

"**21**. In Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium) (2016) 8 SCC 622, it was observed as follows:

"38. In G.J. Fernandez v. State of Karnataka [(1990) 2 SCC 488] both the principles laid down in Ramana Dayaram Shetty v. International Airport Authority of India (1979) 3 SCC 489 were reaffirmed. *It was reaffirmed that the party issuing the tender (the employer) "has the right to punctiliously and rigidly" enforce the terms of the tender*. If a party approaches a court for an order restraining the employer from strict enforcement of the terms of the tender, the court would decline to do so. It was also reaffirmed that the employer could deviate from the terms and conditions of the tender if the "changes affected all intending applicants alike and were not objectionable". Therefore, deviation from the terms and conditions is permissible so long as the level playing field is maintained and it does not result in any arbitrariness or discrimination in Ramana Dayaram Shetty sense.

> 47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in ***Ramana Dayaram Shetty v. International Airport Authority of India 1979(3) SCC 489***, the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in ***Tata Cellular v. Union of India 1994 (6) SCC 651*** there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in ***Jagdish Mandal v. State of Orissa 2007(14) SCC 517,*** followed in ***Michigan Rubber India v. State of Karnataka, 2012(8) SCC 216***. (emphasis supplied)."

It is apparent from the aforesaid observation made by the Supreme Court in the case of ***Municipal Corporation v. BVG India Ltd.*** *(supra)* ***and Central Coalfields Ltd. v. SLL-SML*** *(supra)* that the punctilious and rigid application and enforceability of the terms of the tender is necessary to maintain a level playing field which in turn results in exclusion of any arbitrariness or discrimination in the decision making process.

In the light of the aforesaid principles laid down by the Supreme Court, it is to be seen as to whether the impugned decision making process undertaken by the respondent-authorities suffers from wednesbury unreasonableness or whether it is *mala fide* and not in public interest or is so arbitrary or perverse that it is patently illegal.

In the instant petition, there is no allegation of *mala fide.* Quite apart from the above, in view of the admitted deficiencies and the requirements of the Model Tender Form for filing the documents along with the audit note with no discrepancies and the fact that the authorities while rejecting the technical bid of the petitioner has taken these aspects into consideration. Further, the terms and conditions of the MTF were uniformly applied to all the tenderers. Thus, there is no procedural impropriety, illegality or arbitrariness in the decision taken by the respondent-authorities.

In view of the aforesaid analysis made in the light of the law laid down by the decisions of the Supreme Court we are of the considered opinion that the decisions of the Technical Evaluation Committee dated 04.05.2021 and 11.05.2021 are in accordance with law and do not suffer from any legal infirmity warranting interference by this Court. The impugned orders dated 04.05.2021 and 11.05.2021 are accordingly upheld. The petition filed by the petitioner being meritless is accordingly dismissed.

(RAVI SHANKER JHA)
CHIEF JUSTICE

(ARUN PALLI)
JUDGE

21.05.2021
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Whether speaking/reasoned	√Yes/No
Whether reportable	√Yes/No