

IN THE HIGH COURT OF ORISSA AT CUTTACK
W.P. (C) No.15758 of 2018

M/s. Proplus Associates and another ***Petitioners***
Mr. Chinmay Mohanty, Advocate

-versus-

State of Odisha and others ***Opposite Parties***

Mr. Debakanta Mohanty, Addl. Govt. Advocate
Mr. I.A. Acharya, Advocate

CORAM:
THE CHIEF JUSTICE
JUSTICE R.K. PATTANAİK

Order No.

ORDER
01.02.2022

Dr. S. Muralidhar, CJ.

23. 1. The challenge in the present petition is to the action of the Opposite Party Nos.1 to 5 in going for a fresh tender for leasing out low cost accommodation units for tourist/pilgrims at the Jagannath Ballav Craft Complex, Puri through Public Private Partnership (PPP).
2. The background facts are that by Notification dated 19th December 2017, a tender was invited for the above purpose and also for the purpose of leasing out the property “as is where is basis” for operation, upgrade, maintenance, furnishing etc. by a private player. The last date of submission of tender papers was 8th January 2018 at

3 pm. The Notice Inviting Tender (NIT) mandated *inter alia* that the bidder should submit a solvency certificate of Rs.25lakhs as on 31st March, 2017.

3. Two of the four technical bids were disqualified. After opening the financial bids on 12th January 2018, Petitioner No.1 (a proprietary concern of which Petitioner No.2 is the Sole Proprietor) who offered Rs.24,000/- became the L-1 bidder in comparison to L-2 who offered Rs.21,000/-. Petitioner No.1 was asked to submit a solvency certificate to the tune of Rs.25 lakhs. It is claimed that Petitioner No.1 complied with the said condition.

4.It is submitted that for more than 6 months thereafter no action was taken by the Opposite Parties 1 to 4. Suddenly on 18th June 2018, a fresh tender notification was issued for the same purpose.Claiming that the scrapping of the earlier tender process and going for a fresh tender was arbitrary, whimsical and mala fide, the present petition was filed.

5.On 21st January 2019, while directing to issue notice in the petition, it was ordered by the Court that “in the interim, no further order will be passed by the opposite parties pursuant to the fresh tender published for leasing out Low Cost Accommodation units for tourist/pilgrims used at Jagannath Ballav Craft Complex in the district of Puri through Public Private Partnership, under Annexure-6, till the next date.”The said interim stay has continued since.

6. In the counter affidavit filed in response to the writ petition, it is stated by the Opposite Parties 1 to 5 that on account of the substantial change in the terms and conditions of the tender, the earlier tender process was scrapped. Petitioner No.1, however, did not participate pursuant to the fresh tender notice in which Opposite Party No.6 was the successful bidder. The new tender conditions which increased the role and responsibility of the bidder read as under:

“(a) During the RathYatra, the accommodation will be reserved for 15 days in favour of Collector/ Asst. Director, Tourism, Puri.

(b) During the month of Kartika the accommodation will be used for stay of “Habisialis” for 35 days.

(c) Non-Veg and Liquor/ Alcohol are strictly prohibited within the accommodation of Jagannath Ballav Math Complex, as it is sacred place.

(d) Roof of Jagannath Ballav Math Complex cannot be used by the vendor for any purpose.

(e) No modification is permitted in the structure.

(f) Maximum rent per room per day will be Rs.400/- for Non-AC single bed, Rs.600/- for double bed Non-AC and for AC single bed will be Rs.800/- & for AC double bed Rs.1,200/-.”

7. It is denied by Opposite Parties 1 to 5 that the cancellation of the earlier tender was arbitrary or mala fide. It is pointed out that it is only because of the interim order passed by this Court that an agreement with the successful bidder (Opposite Party No.6) could not be formally entered into and that the continuation of the interim

order is adversely affecting the interests of Opposite Parties 1 to 5 as well as Opposite Party No.6. The rejoinder of the Petitioners reiterates the averments of the writ petition. It is averred that the earlier tender was granted only because the authority wants to award the tender “in favour of someone of their choice”.

8. This Court has heard the submissions of learned counsel for the parties. At the outset, the Court would like to recapitulate the settled legal position as regards the scope of judicial interference in matters concerning award and cancellation of tenders. In *Jagdish Mandal v. State of Orissa*(2007) 14 SCC 517 the Supreme Court explained that:

“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.”

9. In the present case, the principal contention of the Petitioner is that the action of the Opposite Parties 1 to 5 in cancelling the earlier tender and going for a fresh tender was arbitrary and mala fide and it was done with a view to favouring one chosen party. However, in the rejoinder filed to the counter affidavit apart from a bare denial, the Petitioner has not been able to dispute the fact that the fresh tender incorporated additional conditions for the bidder to comply with and these additional conditions would have required a fresh tender as it was a substantial addition to the earlier tender conditions. Apart from

bare averments of the action is mala fide, no material has been placed on record by the Petitioner to substantiate such allegation. Any allegation of mala fide has to be supported by some substantial prima facie material to persuade the Court to interfere. In ***M/S Utkal Suppliers v. M/S Maa Kanak Durga Enterprices 2021 SCC OnLine SC 301*** the Supreme Court reiterated the limited scope of interference by Courts and observed:

“Judicial review in these matters is equivalent to judicial restraint in these matters...the writ court does not have the expertise to correct such decisions by substituting its own decision for the decision of the authority.”

10. On the facts of that case it was observed by the Supreme Court that “except for an incantation of the expression mala fide, no mala fide had in fact been made out on the facts of this case.”

11. In the present case, the Petitioner has not discharged the burden of showing, even *prima facie*, that the impugned action of the Opposite Parties 1 to 5 is arbitrary or mala fide. Consequently, the Court is not persuaded to interfere. The interim order is vacated and the writ petition is dismissed, but in the circumstances, with no order as to costs.

12. As the restrictions due to resurgence of COVID-19 situation are continuing, learned counsel for the parties may utilize a printout of the order available in the High Court’s website, at par with certified copy, subject to attestation by the concerned advocate, in the manner

prescribed vide Court's Notice No.4587, dated 25th March, 2020, modified by Notice No.4798, dated 15th April, 2021, and Court's Office Order circulated vide Memo Nos. No.514 and 515 dated 7th January, 2022.

(S. Muralidhar)
Chief Justice

(R.K. Pattanaik)
Judge

S.K. Jena/P.A.

