IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.14905 of 2022

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Eden Smart Agrotech Pvt. Ltd. having registered Office at Flat No. 5E, Maruti Building, Dr. U.N. Brahmachari Street, Kolkata through its General Manager, Maruti Nandan Pilani, Male, aged about 35 Years, Son of Sachida Nand Singh, resident of Village Shahpur, P.O. Pinjaur, P.S. Parasbigha, District Jehanabad.

... ... Petitioner/s

Versus

1. The Union of India through Secretary, Department of Petroleum and Natural Gas, New Delhi.
2. Secretary, Department of Petroleum and Natural Gas, New Delhi.
3. Chairman-Cum-Managing Director, Bharat Petroleum Corporation Ltd. Bharat Bhawan, 4 and 6, Currimbhoy Road, Ballard Estate, Mumbai-400001.
4. Procurement Manager Cum Procurement Leader, Central Procurement Organization (Marketing), Bharat Petroleum Corporation Ltd., A Installation, Sewree, Fort Road, East Mumbai-40015.

... ... Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. Ashish Giri, Adv.
	:	Mr. Sumit Kumar Jha, Adv.
	:	Ms. Riya Giri, Adv.
For BPCL	:	Ms. Aditi Hansaria, Adv.
For the Respondent/s	:	Mr. Additional Solicitor General

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CORAM: HONOURABLE MR. JUSTICE A. ABHISHEK REDDY
CAV JUDGMENT

Date : 07-10-2024

Heard the learned counsel for the parties.

The present writ petition has been filed for the following reliefs:-

> *"i. To issue writ/order or direction in the nature of certiorari for setting aside order dated 31.08.2022 issued under signature of Procurement Managaer Cum Procurement Leader (CPO Marketing). Bharat Petroleum Corporation Limited, by which the representation of the petitioner dated 16.05.2022 and 13.08.2022 have been rejected and petitioner has been intimated that no*

points/marks have been granted to it under the heading "commitment of early commissioning of plant" due to correction in the affidavit submitted by it and hence the affidavit was not accepted.

ii. To issue writ/order or direction in the nature of mandamus for a direction to the respondent authorities to award contract/allotment of dedicated ethanol plant in Bihar in reference to the bid submitted in light of BPCL., Ethanol, Procurement, EOI. Ref. No. 1000374174 dated 27.08.2021.

iii. To hold and declare that the impugned decision of the respondents dated 31.08.2022 for not granting 20 marks to the petitioner under the heading "committement of early commissioning of plant" as affidavit submitted by the petitioner in this regard found to be not valid. is arbitrary, malafide and also violative of Article 14 of Constitution of India.

iv. To hold and declare that the petitioner's affidavit could not have been rejected and accordingly was liable for grant of 20 marks under the heading "commitment of early commissioning of plant" and thus, becoming eligible for grant of ethanol procurement work as points/marks would thus be 90 instead of 70.

V. To any other relief or relief's for which the petitioners are found to be entitled in the facts and circumstances of the case."

3. Learned counsel for the petitioner has stated pursuant to the tender issued by the respondent-Corporation, the petitioner has applied for the same along with all necessary documents. That the petitioner has been given marks of 70 instead of 90 on the ground that in the affidavit filed by the petitioner under the heading for "commitment of early commission of the plant", there is interpolation/ correction in the affidavit. That the period mentioned therein has been changed from two years to one year without their being counter-signature of the notary or by the deponent (Annexure-7/A). Learned counsel has stated that the said document was filed along with his application and there was no subsequent interpolation or change made in the affidavit. That the petitioner prior to the notarization of the said affidavit has made the necessary corrections and submitted the document. That due to the granting of less marks to the petitioner, he could not secure 90 marks and was awarded only 70 marks. Learned counsel has stated that in case the authorities had any doubt, they ought to have given an opportunity to the petitioner to submit a fresh notarized affidavit or given him a chance to explain the correction in the affidavit. Learned counsel has further stated that the affidavit containing the clause is a non-essential condition which could have been ignored by the authorities. Learned counsel has relied on the judgment of the Hon'ble Supreme Court in the case of ***Rashmi Metaliks Limited And Another Vs. Kokata Metropolitan Development Authority And Other*** reported in ***(2013) 4SCC (Civ) 650,*** in the case of ***Poddar Steel Corporation Vs. Ganesh Engineering Works And Others*** reported in ***1991 3 Supreme Court Cases 273,*** and in the case of ***Manoj Kumar Vs. Union of India and Others.*** reported in ***2024 SCC Online SC 163***, and also the judgment of the this Hon’ble Court in the case of ***Unibro Infraserv Pvt. Ltd., Siwan Vs. State of Bihar and Others*** reported in ***AIR 2021 Pat 153,*** in the case of ***Aarpee Infra Projects (P) Ltd. Vs. State of Bihar & Ors.*** in support of his case.

4. *Per contra*, the learned counsel appearing on behalf of the respondents has vehemently opposed the very maintainability of the present writ petition and stated that the expression of interest was published on 27.08.2021. Thereafter, the corrigendum was issued on 05.09.2021 and the petitioner has submitted his application/ bid on 17.09.2021. As per the terms of the NIT the petitioner had to give the affidavit in the prescribed format and any deviation from the said format could had resulted in rejection of the bid itself. The authorities duly taking into consideration the fact that the interpolation/ corrections in the affidavit submitted by the petitioner did not carry the counter signature of the petitioner nor that of the notary has ignored the said affidavit. Learned counsel has stated that the subsequent affidavit given by the notary stating that the corrections made in the original affidavit was prior to his notary will not hold any water as the same has been issued after a period of more than two years and clearly an after thought. Further, it is stated that most of the allotments have already been done and as of today the requirement of Bihar State is fully met.

Further, it is stated that even if 10 marks were allotted to the petitioner, still he could not have qualified and the petitioner could have secured only 80 marks whereas the cut off marks for the initial allotment was at 90 marks. Learned counsel has relied on the judgment of Hon'ble Supreme Court in the case of ***Silppi Constructions Contractors V. Union of India*** reported in ***AIR ONLINE 2019 SC 2766.***

5. Admittedly as seen from the record, the petitioner along with his expression of interest had to submit an affidavit stating that the commissioning of plant for which the application is made will be done within a period of one year or two year from the due date of EOI. Depending on the number of years, the petitioner states in his affidavit marks will be awarded. For one year the marks awarded will be 20 and for two years it is 10 marks. In the affidavit submitted by the petitioner, it appears that it was originally written as two years and thereafter, after putting a whitener, the number two was changed into one year. However, it is to be noted that neither the petitioner nor the notary who has notarized the affidavit have appended their signature at the place where the correction was made from two years to one year. On this ground, the affidavit submitted by the petitioner was not considered. As per the expression of interest, the applicants are awarded marks for different criteria and in so far as the commitment to the effect that they shall commission the plant within a period of one year from the date of EOI, the marks that could had been awarded was 20 marks and in case the commitment for commissioning of the plant within a period of two years, the marks that could have been awarded is 10 marks.

6. Though learned counsel for the petitioner has vehemently argued that the condition of submitting the affidavit for commissioning the plant and start production cannot be an essential condition and the same has to be ignored is without any substance. Once an NIT is issued calling for tenders each and every condition that has been put in place by the person calling for the tenders are essential and important. Particularly, where marks are being awarded on the basis of the affidavit submitted by them, it cannot be said that the condition is a non-essential one. Though the counsel for the petitioner has relied on the above cited judgments, the same are not applicable to the facts of this particular case. This is not a case where a clerical mistake is sought to be corrected or a minor condition is sought to be fulfilled. Where substantial marks are to be allotted on the basis of commitment for completing the project, the contention of the petitioner that the said condition is non-essential is without any legal basis. The person/ firm floating the tender are the best judges to impose the criteria or condition essential for fulfillment of their objectives. In this particular case, the period of completion of the project is an essential criteria for awarding the contract or granting them the necessary permission. This Court sitting under Article 226 of the Constitution of India cannot substantiate its wisdom and decide what is essential and what is not essential.

7. The Hon'ble Supreme Court in the case of ***Silpii Constructions Contractors V. Union of India*** reported in ***AIRONLINE 2019 SC 2766*** has held as under;

> *"13. In Jagdish Mandal vs. State of Orrisa 7 it was held:*
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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…….."

14. In Michigan Rubber (India) Ltd. vs. State of Karnataka and Ors. 8 it was held that if State or its instrumentalities acted reasonably, fairly and in public interest in awarding contract, 7 (2007) 14 SCC 517 8 (2012) 8 SCC 216 interference by Court would be very restrictive since no person could claim fundamental right to carry on business with the Government. Therefore, the Courts would not normally interfere in policy decisions and in matters challenging award of contract by State or public authorities.

15. In Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd. 9 it was held that 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 decisionmaking process or the decision. 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. 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. 9 (2016) 16 SCC 818; 2016 KHC 6606

16. In Montecarlo vs. NTPC Ltd. 10 it was held that where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is *applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.*

17. In Municipal Corporation, Ujjain and Another vs. BVG India Ltd. and Others 11 it was held that the authority concerned is in the best position to find out the best person or the best quotation depending on the work to be entrusted under the contract. The Court cannot compel the authority to choose such undeserving person/company to carry out the work. Poor quality 10 AIR 2016 SC 4946 11 (2018) 5 SCC 462 of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work.

18. Most recently this Court in Caretel Infotech Limited vs. Hindustan Petroleum Corporation Limited and Others 12 observed that a writ petition under Article 226 of the Constitution of India was maintainable only in view of government and public sector enterprises venturing into economic activities. This Court observed that there are various checks and balances to ensure fairness in procedure. It was observed that the window has been opened too wide as every small or big tender is challenged as a matter of routine which results in government and public sectors suffering when unnecessary, close scrutiny of minute details is done.

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 12 2019 (6) SCALE 70 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 clearcut 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.*

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."

8. Having regard to the above mentioned facts and circumstances, this Court does not find any merit in the present writ petition which warrants any interference. However, as it has come on record that some of the companies for which allotment has been made have not yet commissioned the plants and in case the authorities plan on cancelling the said allotment and giving it to the next person in line, the case of the petitioner can also be considered sympathetically.

9. With the above direction, the present writ petition stands dismissed.

(A. Abhishek Reddy, J)

Ayush/-

AFR/NAFR	NAFR
CAV DATE	14.05.2024.
Uploading Date	08.10.2024.
Transmission Date	NA