



IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CWP-13546-2023(O&M)
Reserved on: 12.08.2024
Pronounced on: 18.09.2024

LINDE INDIA LIMITED

....Petitioner

Versus

PGIMER, CHANDIGARH AND OTHERS

.....Respondents

CORAM: HON'BLE MR. JUSTICE ARUN PALLI
HON'BLE MR. JUSTICE VIKRAM AGGARWAL

Present: Mr. Akshay Bhan, Senior Advocate, with
Mr. Vivek Sethi, Advocate, and
Mr. Abishai Alfred George, Advocate
for the petitioner.

Mr. Amit Jhanji, Senior Advocate, with
Ms. Eliza Gupta, Advocate
for respondents No.1 to 4-PGIMER.

Mr. Deepak Sabherwal, Advocate, and
Mr. Vaneet Soni, Advocate
for respondent No.5.

VIKRAM AGGARWAL, J.

1. The petitioner is stated to be engaged in the business of manufacturing, procuring and supplying industrial and medical gases as also related products and services to a wide range of customers across the country. It claims to be a subsidiary of Linde Plc. which is, as averred in the writ petition, the world's largest gas company which designs, engineers, installs and commissions industrial gas plants. It is stated to be in operation for the last 140 years and is further stated to have over 6500 active patents. The petitioner claims to be the preferred supplier of medical gases to all major hospitals including the Post Graduate Institute of Medical Education and Research, Chandigarh (respondents

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No.1 to 4) (for short 'PGIMER') and claims to be supplying oxygen to PGIMER since 2013.

2. The basic grievance of the petitioner is the award of contract for the supply of liquid medical oxygen (for short 'LMO') to respondent No.5 in contravention of the provisions of the Notice Inviting Tender (NIT) and by illegally relaxing the eligibility conditions.

3. It, therefore, prays for the issuance of a certiorari quashing the action of PGIMER in declaring respondent No.5 as eligible/qualified by granting relaxation of both experience and financial eligibility criterias without there being any such provision in the NIT dated 17.11.2022 (Annexure P-5). It also prays for the issuance of a certiorari quashing the order dated 21.04.2023 (Annexure P-13) vide which respondent No.5 was declared as the lowest bidder for supplying of LMO @ Rs.12.24 per cubic meter as against the petitioner's quoted rate of Rs.18.47 per cubic meter despite the fact that respondent No.5 did not fulfil the experience and financial eligibility criterias. It also prays for quashing of the order dated 02.06.2023 (Annexure P-18) vide which the objections/representations submitted by the petitioner were rejected. It further prays for the quashing of order dated 08.06.2023 (Annexure P-19) which was passed subsequent to the directions issued by a Co-ordinate Bench but was identical to the order dated 02.06.2023. It lastly prays for the issuance of a mandamus directing PGIMER to allot the work of supply of LMO to the petitioner.

FACTS

4. The facts, as set out in the writ petition, are that a tender (Annexure P-4) was floated on the Government e-market Place (GeM) on 11.08.2022 for supply of LMO for a period of 02 years at PGIMER. The bid document specifically laid down that in case any bidder was seeking exemption from

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experience/turnover criteria, the supporting documents were required to be uploaded for evaluation. A corrigendum dated 24.08.2022 was issued vide which the submission date was extended from 26.08.2022 to 20.09.2022. Pre-bid meetings were held on 02.09.2022 and 16.09.2022 after which two corrigendum(s) dated 22.09.2022 and 30.09.2022 with minor alterations were issued. However, this tender was cancelled on 10.10.2022. The cancellation, as per the petitioner, was without any reason and on the whims and fancies of the PGIMER.

5. After the said cancellation, an open tender dated 17.11.2022 (Annexure P-5) was issued for supply of LMO at PGIMER for a period of 02 years. The eligibility conditions were duly laid down which contained conditions as regards experience of supply to minimum five Government/Private hospitals in North India with at least 250 beds capacity each for 02 years. The bidders were further required to have experience of minimum 10 years with their own manufacture/maintenance and transport of LMO. As regards the financial status, it was laid down that the bidder must have an average annual turnover of Rs. 200 crores during the last 03 financial years. However, there was no provision in the said tender for any relaxation of the aforesaid conditions and no deviation was permitted. A corrigendum dated 01.12.2022 (Annexure P-6) was issued vide which the parallel contract/splitting ratio between L1 and L2 was changed from 70:30 to 80:20.

6. It is the case of the petitioner that respondent No.5 was incorporated as a company on 23.01.2021 and when the tender dated 17.11.2022 was floated, it was less than 02 years old and had commenced operations at its very first plant in August 2022. It was granted a license for manufacturing of drugs on 25.08.2022 and, therefore, it did not satisfy any of the eligibility criterias. Relevant documents

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in this regard have been placed on record (Annexures P-7 and P-8). It has been averred that even the financial criteria was not fulfilled as respondent No.5 did not have an average turnover of Rs. 200 crores during the last three financial years.

7. The technical bids were opened on 14.12.2022 and only the petitioner was found to be technically qualified. Despite this, PGIMER considered the certificate submitted by respondent No.5 with regard to it being a recognized startup MSME and decided to relax the turnover clause by forming an evaluation team to visit its plant on 07.03.2023, which as per the petitioner, was in gross violation of the terms and conditions of the NIT.

8. This led to the submission of a detailed representation dated 10.03.2023 (Annexure P-9) by the petitioner followed by a subsequent reminder dated 15.03.2023 (Annexure P-10). In the meantime PGIMER, vide communication dated 12.04.2023 (Annexure P-11), ordered the petitioner to continue the ongoing supply of oxygen from 18.04.2023 to 17.07.2023 on the same rates, terms and conditions.

9. Since the PGIMER decided to open the price bid, another representation dated 13.04.2023 (Annexure P-12) was submitted by the petitioner but despite that, a communication dated 21.04.2023 (Annexure P-13) was received from PGIMER intimating the petitioner that respondent No.5 had been declared as L1 because of a lower quoted rate @ Rs.12.24 per cubic meter as against the rate quoted by the petitioner of Rs.18.47 per cubic meter.

10. This led to the filing of the **CWP-8739 of 2023** by the petitioner which was disposed of vide order dated 27.04.2023 (Annexure P-14) by a Coordinate Bench with a direction to PGIMER to decide the representations submitted by the petitioner within a period of one week. A fresh representation dated 01.05.2023 (Annexure P-15) was also moved. However, no decision was

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taken by the PGIMER leading to the issuance of a legal notice dated 18.05.2023 (Annexure P-16) followed by another writ petition bearing number ***CWP-12513 of 2023***. This writ petition was also disposed of on 01.06.2023 (Annexure P-17) on the basis of a statement given by PGIMER that its Director was already seized of the matter and appropriate orders would be passed within a week.

11. Finally, a response dated 02.06.2023 (Annexure P-18) was received vide which the claim of the petitioner was rejected. This response was followed by an order dated 08.06.2023 (Annexure P-19) which was passed purportedly in compliance of the directions issued by the Co-ordinate Bench. This led to the filing of the instant writ petition.

RESPONDENT'S VERSION

12. The writ petition has been opposed by the respondents. In the written statement filed by PGIMER, it has been submitted that the petitioner itself had been purchasing oxygen from respondent No.5 which has not been disclosed in the writ petition. It has been averred that a technical committee had been constituted by PGIMER to visit the site/plant of respondent No.5 on 07.03.2023 to assess the capacity and capability of its plant and as to whether it was adequate to cater to the demand of LMO of PGIMER without any interruption and failure. The committee found that respondent No.5 had a production capacity of 178 metric tons per day as opposed to the requirement of around 17 metric tons per day and, therefore, it was recommended that in case the tender was awarded to respondent No.5, it could supply LMO to PGIMER. On the date of the visit, it was also found that the petitioner was loading material on its trucks at the premises of respondent No.5. Upon inquiry, it was revealed that the petitioner had regularly been purchasing liquid oxygen and liquid nitrogen from respondent No.5. The site visit



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report dated 07.03.2023 has been placed on record as Annexure R-1 and the photographs are Annexure R-2.

13. It has been averred that the bid submitted by respondent No.5 was 34 % lower than that submitted by the petitioner and would result in saving of more than Rs.5 crores to PGIMER. It has been averred that the issues raised in the writ petition are beyond the scope of writ jurisdiction of this Court under Article 226 of the Constitution of India. Reference in the written statement has been made to the judgments in the case of '*Agmatel India Pvt. Ltd. Vs. Resoursys Telecom*', **2022 (5) SCC 362** and '*Jagdish Mandal Vs. State of Orissa and Others*', **(2007) 14 SCC 517**.

14. It has been averred that there is no arbitrariness in the action of the PGIMER as whatever has been done is in public interest and the award of relaxation to respondent No.5 was in conformity with the General Financial Rules, 2017 (for short 'GFR 2017') as well as the Government of India instructions issued from time to time for relaxation to startups in matters of public procurement (Annexure R-3). It has also been averred that Rule 173 (1) of the GFR 2017 provides for relaxation of conditions of prior turnover and experience for startups subject to meeting quality and technical specifications. Accordingly vide communications dated 10.03.2016 and 20.09.2016 (Annexures R-4 and R-5), the Government of India gave relaxation to startups like respondent No.5 in all matters of public procurement. It is the case of PGIMER that, under the circumstances, no illegality had been committed. Reliance has also been placed upon the case of '*N.G. Projects Ltd. Vs. Vinod Kumar Jain*', **2022 Live Law (SC) 302** and '*Delhi Electrical Contractor Welfare Association Vs. BSES Yamuna Power Ltd. and Another*', **2022 Live Law (Del) 656**. As regards the scrapping of the previous tender, it has been averred that since none of the participants/bidders

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in the first tender including the petitioner were registered on the GeM Portal, representations were received from them including from the petitioner and it was on account of this reason that the tender was scrapped. Reliance has been placed upon the letter dated 01.09.2022 (Annexure R-6) submitted by the petitioner in this regard.

15. Learned counsel for the parties were heard.

ARGUMENTS FOR THE PETITIONER

16. Mr. Akshay Bhan learned Senior counsel representing the petitioner took us through almost all the documents placed on record right from the initial tender dated 11.08.2022, the letters of appreciation etc. issued to the petitioner, the subsequent tender dated 17.11.2022, the terms and conditions, different communications issued from time to time as have been referred while detailing the facts, the orders passed by Co-ordinate Benches in ***CWP-8739 of 2023*** and ***CWP-12513 of 2023*** as also the impugned orders dated 02.06.2023 and 08.06.2023. It was vehemently submitted by learned Senior counsel that respondent No.5 was not eligible both in terms of experience and turnover and that relaxation was illegally given. Reference was made to Rule 173 of the GFR 2017 wherein it has been submitted that the condition of prior experience may be relaxed for startups subject to meeting of quality and technical specifications and making suitable provisions in the bidding document. It was urged that in the absence of any provision having been made in the bidding document as regards relaxation in experience and turnover, the PGIMER could not have subsequently considered the grant of relaxation to respondent No.5. It was submitted that PGIMER had thrown all norms and rules to the winds by considering respondent No.5 in gross violation of the terms and conditions of the NIT. Learned Senior counsel submitted that the eligibility conditions were in fact tailor made to suit



respondent No.5. It was strenuously urged that Clauses 7 (iv, v, viii and x) were not complied with by respondent No.5 despite it having been specifically provided in Part B that a tender which does not fulfill the requirements of the NIT or would give evasive information, it would be liable to be ignored.

17. Learned Senior counsel submitted that if at all, some error had been committed by PGIMER by not incorporating the relaxation provisions, nothing stopped it from issuing a corrigendum but in any case, it was not permitted to violate the terms and conditions of the NIT which were binding not upon the bidders but also upon PGIMER. In support of his contentions, reliance was placed upon the judgments passed by the Supreme Court of India in the cases of '*National High Speed Rail Corporation Limited Vs. Montecarlo Limited and Another*', 2022 LiveLaw (SC) 108 and '*Vidarbha Irrigation Development Corporation Vs. M/s Anoj Kumar Garwala*', Law Finder Doc Id 1347711 as also the judgment passed by the Bombay High Court in the case of '*Jalgaon Golden Transport Pvt. Ltd. Vs. The Union of India and Others*', 2021 (2) BCR 249.

ARGUMENTS FOR THE RESPONDENTS

18. Mr. Amit Jhanji, learned Senior counsel representing PGIMER submitted with equal vehemence that there is no illegality in granting relaxation to respondent No.5. It was submitted that the first tender had been cancelled on the request of the bidders including the petitioner and on account of some error, the provisions regarding relaxation were not incorporated in the subsequent NIT. It was submitted that a technical committee was duly formed which visited the premises of respondent No.5 and found it to be suitable in all respects. This led to respondent No.5 being declared as technically compliant after which the price bids were opened and the bid of respondent No.5 was found to be L1 and would make a difference of Rs.5 crores to PGIMER. Under the circumstances, it was decided



to award the contract to respondent No.5. It was submitted that under the GFR 2017, there was a specific provision to grant relaxation in experience and turnover criteria to startups and it is nobody's case that no such provision exists. The only thing is that such relaxation was not provided for in the NIT on account of an oversight but eventually, it was decided by the authorities that respondent No.5 should not be made to suffer on account of such technicalities.

19. Learned Senior counsel submitted that the scope of interference in tender matters is extremely limited. The office notings were also produced for the perusal of the Court which would go on to show that there is no fault with the decision making process and that there was no occasion for PGIMER to favour anyone. It was submitted by learned Senior counsel that minor deviations from the terms and conditions of the NIT would not lead to the conclusion that the action was *mala fide*. Reliance in this regard was placed upon the judgment passed by the Supreme Court of India in the case of '***Bharat Coking Coal Limited and Others Vs. Amr Dev Prabha and Others***', (2020) 16 SCC 759.

20. Learned counsel representing respondent No.5 has also filed written statement on behalf of respondent No.5 and addressed arguments on the same lines.

ANALYSIS AND FINDINGS

21. We have considered the submissions made by learned counsel for the parties and have also perused the relevant documents placed on record as also the office notings produced by PGIMER. The documents placed on record produced by PGIMER have also been considered. We have also examined the law on the subject as also the judgments relied upon by both sides.

22. Before adverting to the merits of the case in hand, it would be apposite to run through the essential terms and conditions of the NIT, the relevant

provisions of the GFR 2017, the relevant decisions taken by PGIMER reflected in the office notings and the law on the subject.

23. The first tender was floated on 11.08.2022 and it duly contained Clauses as regards preference to Micro and Small Enterprises (MSEs) and exemption from experience and turnover criteria:-

<u>Bid Document</u>	
- - - - -	
<i>Document required from seller</i>	<i>Experience Criteria, Bidder Turnover, Certificate (Requested in ATC), OEM Authorization Certificate, OEM Annual Turnover, Additional Document 1 (Requested in ATC) in case any bidder is seeking exemption from Experience/Turnover Criteria, the supporting documents to prove his eligibility for exemption must be uploaded for evaluation by the buyer.</i>
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3. ***Purchase preference to Micro and Small Enterprises (MSEs): Purchase preference will be given to MSEs as defined In Public Procurement Policy for Micro and Small Enterprises (MSEs) Order, 2012 dated 23.03.2012 issued by Ministry of Micro, Small and Medium Enterprises and its subsequent Orders/Notifications issued by concerned Ministry. If the bidder wants to avail the Purchase preference for services, the bidder must be the Service provider of the offered Service. Relevant documentary evidence in this regard shall be uploaded along with the bid in respect of the offered service. If L-1 is not an MSE and MSE Service Provider (5) has/have quoted price within L-1+ 15% of margin of purchase preference /price band defined in relevant policy, then 100% order quantity will be awarded to such MSE bidder subject to acceptance of LI bid price.***

This tender was, however, cancelled on account of representations having been submitted by the bidders including the petitioner. It would be relevant to add here that the petitioner has very conveniently not disclosed in the writ petition that it had submitted a representation that it was not registered on the GeM Portal for LMO and on the contrary, it has been averred in the writ petition that the tender was cancelled for no reason and at the whims and fancies of the PGIMER. Be that



as it may, the second tender was issued on 17.11.2022 and admittedly, the relaxation to startups etc. was not provided for in the same.

24. Rule 173 of the GFR 2017 provides as under:-

'Transparency, competition, fairness and elimination of arbitrariness in the procurement process. All government purchases should be made in a transparent, competitive and fair manner, to secure best value for money. This will also enable the prospective bidders to formulate and send their competitive bids with confidence. Some of the measures for ensuring the above are as follows:-

(i) the text of the bidding document should be self-contained and comprehensive without any ambiguities. All essential information, which a bidder needs for sending responsive bid, should be clearly spelt out in the bidding document in simple language. The condition of prior turnover and prior experience may be relaxed for Startups (as defined by Department of Industrial Policy and Promotion) subject to meeting of quality & technical specifications and making suitable provisions in the bidding document. The bidding document should contain, inter alia.

(a) Description and Specifications of goods including the nature, quantity, time and place or places of delivery.

(b) the criteria for eligibility and qualifications to be met by the bidders such as minimum level of experience, past performance, technical capability, manufacturing facilities and financial position etc. or limitation for participation of the bidders, if any.

(c) eligibility criteria for goods indicating any legal restrictions or conditions about the origin of goods etc. which may require to be met by the successful bidder.

(d) the procedure as well as date, time and place for sending the bids.

(e) date, time and place of opening of the bid.

(f) Criteria for evaluation of bids special terms affecting performance, if any.

(g) Special terms affecting performance, if any.

(h) Essential terms of the procurement contract.

In addition to this, the office memorandums dated 20.09.2016 and 10.03.2016 provide for such relaxation.



***“No.F.20/2/2014-PPD (Pt.)
Ministry of Finance
Department of Expenditure
Procurement Policy Division***

***516, Lok Nayak Bhawan, New Delhi
Dated the 20th September, 2016***

OFFICE MEMORANDUM

Subject: Relaxation of Norms for Startups Medium Enterprises in Public Procurement regarding Prior Experience – Prior Turnover criteria.

- 1. The undersigned is directed to refer to this Department O.M. of even number dated 25th July, 2016, wherein it was clarified that all Central Ministries/Departments may relax condition of prior turnover and prior experience in public procurement to all Startups [whether Micro and Small Enterprises (MSEs) of otherwise] subject to meeting of quality and technical specifications in accordance with the relevant provisions of GFR, 2005.***
- 2. A doubt has arisen if it makes optional for Central Ministries/Departments to relax condition of prior experience and prior turnover in public procurement to Startups. In this regard, it is again clarified that normally for all public procurement, the Central Ministries/Departments have to ensure that criteria of prior turnover and prior experience for all Startups is relaxed subject to their meeting of quality and technical specifications.***
- 3. However, there may be circumstances (like procurement of items related to public safety, health, critical security operations and equipments etc.) where procuring entities may prefer the vendors to have prior experience rather than giving orders to new entities. For such procurements, wherever adequate justification exists, the procuring entities may not relax the criteria of prior experience/turnover for the Startups.***
- 4. This issues with the approval of Finance Secretary.”***

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***“Government of India
Ministry of Micro, Small & Medium Enterprises
O/o the Development Commissioner (MSME)
Nirman Bhawan, A-Wing, 7th Floor
Maulana Azad Road, New Delhi-110108
Tel. 011-23061091
Fax No.011-23060536***

Policy Circular No. 1(2)(1)/2016-MA

Dt. 10th March, 2016



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To**All Central Ministries/Departments/CPSUs/All Concerned**

Subject: Relaxation of Norms for Startups and Micro & Small Enterprises in public procurement on Prior Experience-Prior Turnover criteria.

- (1) The Government of India has notified Public Procurement Policy of Micro and Small Enterprises (MSEs) Order 2012 with effect from 1st April and 20% procurement from Micro & Small Enterprises of the total procurement by Central Ministries/Departments/CPSUs has become mandatory with effect from 1st April, 2015.***
- (2) The Government of India has announced 'Startup India' initiative for creative a conducive environment for Startups in India.***
- (3) The Startups are normally Micro and Small Enterprises which may not have a track record. These will have technical capability to deliver the goods and services as per prescribed technical and quality specifications and may not be able to meet the qualification criterion relating to prior experience-prior turnover.***
- (4) In exercise of Para 16 of Public Procurement Policy for Micro and Small Enterprises Order 2012, it is clarified that all Central Ministries/Departments/Central Public Sector Undertakings may relax condition of prior turnover and prior experience with respect to Micro and Small Enterprises in all public procurement subject to meeting of quality and technical specifications.***
- (5) This issues with the approval of Union Minister of Micro, Small and Medium Enterprises."***

25. The office notings reveal that the site visit to the plant of respondent No.5 was recommended on 18.01.2023. It was proposed that the competent technical committee would visit the site to assess the capacity and capability of respondent No.5 to maintain and fulfil the supply and demand of PGIMER without any interruption and failure. No doubt, an observation was also made that inadvertently in the NIT, provision regarding relaxation had not been made. Ultimately, the technical committee visited the site of respondent No.5 and submitted its report on 16.03.2023 and, it was held that respondent No.5 would be eligible as per the report of the technical committee. It was found by the committee that the capacity of the plant of respondent No.5 was 178 tons per day



and the consumption of PGIMER was 17 tons per day. It was also found that respondent No.5 was supplying LMO to various hospitals including the Maharishi Markandeshwar Institute of Medical Studies, Mullana Dayanand Medical College and Hospital, Ludhiana, Civil Hospital, Ambala City and Ministry Hospital, Ambala.

26. Having made a reference to the relevant provisions, office notings etc. we now proceed to examine the law on the subject. Challenge to policy decisions, administrative action, issuance of tenders, holding of auctions, sale of plots, resumption proceedings have all been raked up before the Courts on various occasions. The question which fell for consideration before the Supreme Court of India and various high Courts in these kind of litigations was as to whether policy decisions, administrative actions etc. can be interfered with exercising the power of judicial review or as to whether the Courts were to refrain from doing so. Though there are a catena of judgments on the subject, reference to few of them would be noteworthy. In the case of '*Jagdish Mandal versus State of Orissa and others*' (supra), the Supreme Court of India was seized of a challenge to the award of construction contracts to one Jagdish Mandal and Laxmi Sharma. The High Court of Orissa had allowed the writ petition filed by the unsuccessful bidder after which the matter reached the Supreme Court. The Supreme Court of India examined the scope of interference in judicial review of tender processes and award of contracts. While referring to various judgments on the subject, the Supreme Court of India held that judicial review of administration action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. It was held that its purpose is to check whether choice or decision is made lawfully and not to check whether choice or decision is sound. It was held that 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. It was held that a contract is a commercial transaction and evaluating tenders and awarding contracts are essentially commercial functions. The Supreme Court of India laid down that the principles of equity and natural justice stay at a distance and that if the decision relating to the award of a 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. It was held that the power of judicial review would not be permitted to be invoked to protect private interest at the cost of public interest or to decide contractual disputes. It was held that 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. It was held that such interferences, whether 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. It was held that under the circumstances, before interfering in such matters in exercise of the power of judicial review, a Court should pose to itself the questions whether the process adopted or decision made by the authority is mala fide or is intended to favour someone and that whether the public interest is affected;

“19. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. 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 Page 0102 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 black-listing 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."

27. In the case of '*Silppi Constructions Contractors versus Union of India and Anr. Etc.*' 2020 (16) SCC 489 also the Supreme Court of India referred to the judgments on the subject and held as under:-

"19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and



again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

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."

The Supreme Court of India, therefore, held that the Courts, being the guardian of fundamental rights would be duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. It was held that in all the judgments referred to by the Supreme Court of India, the Courts had been cautioned time and again that



they should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters and that the Courts are normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. It was held that the Courts must realize their limitations and the havoc which needless interference in commercial matters can cause. It was held that in matters 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. It was held that the Courts should not use a magnifying glass while scanning tenders and make every small mistake appear like a big blunder. It was held that in fact, the Courts must give 'fair play in the joints' to the Government and public undertakings in matters of contract and must also not interfere where such interference will cause unnecessary loss to the public exchequer. It was held that the essence of the law laid down in the judgments which had been rendered from time to time 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. It was held that the Court does not sit like a Court of appeal over the appropriate authority and must realize that the authority concerned is the best judge of its requirements and, therefore, interference of the Courts should be minimal. It was held that if two interpretations are possible, then the interpretation of the author must be accepted and that the Courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity.

28. Very recently, the Supreme Court of India took a similar view in the case of '*State of Punjab and others versus Mehadin*', 2022 (5) SCC 648 and



while referring to the cases of '*Jagdish Mandal versus State of Orissa and others*' and '*Silppi Constructions Contractors versus Union of India and Anr.*' *Etc.* (supra) as also the judgment in the case of '*TATA Cellular versus Union of India (1994)*', 6 SCC 651 reiterated the view.

29. Most recently, while examining the challenge to the central vista project in the case of '*Rajeev Suri Versus Delhi Development Authority*', 2022 (11) SCC 1, a Constitution Bench of the Supreme Court of India examined the scope of judicial review of an Administrative or so to say quasi legislative action. It was held that the rule of law as accepted and settled in India, with regard to judicial interference in administrative and executive or policy matters is no more res integra. It was held that the duty enjoined upon the judiciary is to ensure checks and balances and to place itself between the Government and citizens when they come face to face in a Court of law and that it is meant to act as an equalizer and ensure that the flow of decisions from executive to citizens is overseen through the prism of well-established principles, as and when called upon to do so. It was held that the judicial organ is not meant to impose the citizens' or even its own version of good governance upon the Government in the name of Rule of Law in exercise of its power of judicial review.

30. The Apex Court examined the issue threadbare starting from observations made by Lord Brightman in the case of Chief Constable of the North Wales Police v. Evans [1982] 1 WLR 1155 to the observations of the Supreme Court of India in the case of '*TATA Cellular versus Union of India*' (supra), the observations made by Graham Aldus and John Alder in their book 'Applications for Judicial Review, Law and Practice' and while examining the need for heightened judicial review, the Supreme Court of India declined to interfere in the

Central Vista Project and held as under:-



“167. To sum up the above discussion, it may be noted that judicial review primarily involves a review of State action - legislative, executive, administrative and policy. The primary examination in a review of a legislative action is the existence of power with the legislature to legislate on a particular subject matter. For this purpose, we often resort to doctrines of pith and substance, harmonious construction, territorial nexus etc. Once the existence of power is not in dispute, it is essentially an enquiry under Article 13 of the Constitution which enjoins the State to not violate any of the provisions of Part-III in a lawmaking function. The review of executive action would depend upon the precise nature of the action. For, the domain of executive is wide and is generally understood to take within its sweep all residuary functions of the State. Thus, the precise scope of review would depend on the decision and the subject matter. For instance, an action taken under a statute must be in accordance with the statute and would be checked on the anvil of ultra vires the statutory or constitutional parameters. The enquiry must also ensure that the executive action is within the scope of executive powers earmarked for State Governments and Union Government respectively in the constitutional scheme. The scope of review of a pure administrative action is well settled. Since generally individuals are directly involved in such action, the Court concerns itself with the sacred principles of natural justice - audi altrem partem, speaking orders, absence of bias etc. The enquiry is also informed by the Wednesbury principles of unreasonableness. The review of a policy decision entails a limited enquiry. As noted above, second guessing by the Court or substitution of judicial opinion on what would constitute a better policy is strictly excluded from the purview of this enquiry. Under the constitutional scheme, the government/executive is vested with the resources to undertake necessary research, studies, dialogue and expert consultation and accordingly, a pure policy decision is not interfered with in an ordinary manner. The burden is heavy to demonstrate a manifest illegality or arbitrariness or procedural lapses in the culmination of the policy decision. However, the underlying feature of protection of fundamental rights guaranteed by the Constitution must inform all enquiries of State action by the constitutional Court.”

31. In the back-drop of the provisions, terms and conditions and on the touchstone of the principles enunciated in the judgments referred to above, we proceed to examine the rival contentions.



32. Admittedly the first tender contained a provision for grant of exemption to startups which, however, went missing in the second tender. If the matter was to be examined from a limited angle, the decision to grant exemption to respondent No.5 would be unsustainable. However, the matter has to be examined from all possible angles. The GFR 2017 shows that such exemption was duly permissible. It, therefore, means that it is not the case that no such exemption was permissible and despite that respondent No.5 was considered. Once that is so, it would have to be examined as to what would be the effect of non-mentioning of such provisions in the NIT. No doubt, the terms and conditions of the NIT are binding. However, it has to be borne in mind that in the first tender, such conditions were duly existing. In the second tender, these conditions could not be incorporated as a result of an oversight. A conscious decision was then taken which is evident from the office notings and a perusal of the office notings shows that there is no flaw or *mala fides* in the decision making process and decisions were taken on account of the provisions in the GFR 2017 and in the interest of PGIMER. As has been noticed in the preceding paragraphs also, the GFR 2017 does provide for an exemption to recognized MSME startups and the petitioner falls within the said criteria. It is nobody's case that the petitioner was not eligible as per the said criteria and still, the respondents have gone ahead and have awarded the contract to the petitioner. This Court finds that the decision was taken by the respondents in the interest of PGIMER and not to favour respondent No.5. The law on the subject clearly reveals that in exercise of judicial review, the Courts can at best examine the decision making process and are not really concerned with the decision. In any case, the financial bid of respondent No.5 which was duly opened after it was declared technically compliant was found to be substantially lower than that of the petitioner resulting into saving of Rs.5



crores to PGIMER. It cannot, therefore, by any stretch of imagination be said that the decision of the PGIMER was illegal or arbitrary though an irregularity having been committed cannot be denied. However, the entire action cannot be said to be *mala fide* and is not, therefore, required to be set aside only on account of an irregularity having been committed.

33. Having said that, it may not be out of place to notice that the tender had been issued for a period of two years and after having been awarded the work order, respondent No.5 is successfully supplying LMO to PGIMER and no complaint against respondent No.5 during this period has been pointed out. The major period of the contract is already over. Another thing that has to be borne in mind is that PGIMER is a premiere institute which is catering to patients from various states viz Punjab, Haryana, Himachal Pradesh, Jammu and Kashmir, Uttar Pradesh etc. It is a known fact that thousands of patients come to PGIMER on a daily basis for consultation, admission, procedures etc. and that PGIMER is overloaded and overburdened. LMO is one of the most critical supplies to PGIMER which is used in ICUs, operation theatres, minor OTs, general wards, private wards, procedure rooms, research areas etc. and its supply cannot be disrupted. Any interference at this stage would definitely result in disruption of supply of LMO. The credibility of respondent No.5 can also be gauged from the fact that the petitioner itself has been purchasing LMO from it. These are simply additional factors which dissuade this Court from interfering in the matter, the merits having already been discussed in the preceding paragraphs.

34. We have gone through the judgments relied upon by learned counsel for the parties as well. In the case of '***Bharat Coking Coal Limited and Others Vs. Amr Dev Prabha and Others***' (supra) which has been relied upon by learned Senior counsel representing the PGIMER, after examining the entire law on the



subject, it was held that even if there had been a minor deviation from the explicit terms of the NIT, it would not be sufficient by itself in the absence of *mala fide* for Courts to set aside the tender at the behest of an unsuccessful bidder. It was held that the impact of overturning an executive decision and its impact on the larger public interest in the form of costs, overruns and delays would have to be considered before setting aside such a decision:-

“Even if there had been a minor deviation from explicit terms of the NIT, it would not be sufficient by itself in the absence of mala fide for courts to set aside the tender at the behest of an unsuccessful bidder. 16 This is because notice must be kept of the impact of overturning an executive decision and its impact on the larger public interest in the form of cost overruns or delays.”

35. In so far the judgments relied upon by learned counsel representing the petitioner are concerned, the same pertain to the scope of judicial review in contractual matters and the law on the subject has been discussed in detail in the preceding paragraphs. Specific reliance was placed by learned Senior counsel on the judgment in the case of ‘**Vidarbha Irrigation Development Corporation Vs. M/s Anoj Kumar Garwala**’ (supra) wherein it was held by the Supreme Court of India that essential tender conditions which had to be strictly complied could not be waived off or condoned and any such condonation would amount to perversity in understanding or appreciation of terms of tender conditions which were amenable to interference by the Constitutional Courts. In that case, a tender was called by the Vidarbha Irrigation Development Corporation on 06.01.2018 for balance earth work to be done in a kanal. Three bidders responded to the tender out of which bid of respondent No.2 was the lowest. Certain issues arose as regards the bank guarantee it furnished and eventually, the Supreme Court of India held that the words used in the tender document cannot be ignored or treated as redundant or superfluous and that they must be given meaning and their

necessary significance. It was held that in the said case, an essential condition which had to be strictly complied with was not so complied with and under the circumstances, the appellant would have no power to condone lack of strict compliance. There is no quarrel with this proposition but in the instant case, such a condition with regard to relaxation was there in the first tender and thereafter, a conscious decision was taken to offer the relaxation to respondent No.5 on account of an inadvertent omission in the second tender. As has already been held by us, we have found the decision making process to be fair and the same, therefore, does not warrant interference. The judgment would, therefore, not come to the aid of the petitioner.

In view of the aforementioned facts and circumstances, we do not find any merit in the instant writ petition and the same is accordingly dismissed.

(ARUN PALLI)
JUDGE

(VIKRAM AGGARWAL)
JUDGE

Pronounced on: 18.09.2024
Prince Chawla

<i>Whether speaking/reasoned :</i>	<i>Yes/No.</i>
<i>Whether reportable :</i>	<i>Yes/No.</i>