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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 2634/2024, CM APPL. 10864/2024, CM APPL. 10865/2024
& CM APPL. 10866/2024**

DIN BANDHU DASS

..... Petitioner

Through: Mr. Narender Hooda, Senior
Advocate with Mr. Rishabh Raj Jain,
Mr. Shaurya Lamba and Mr. Kaushal
Kapoor, Advocates

versus

**INDIAN INSTITUTE OF TECHNOLOGY
DELHI**

..... Respondent

Through: Mr. T. Singhdev, Mr. Aabhaas
Sukhramani, Mr. Abhijit Chakravarty,
Mr. Tanishq Srivastava, Mr. Bhanu
Gulati, Ms. Anum Hussain, Ms.
Ramanpreet Kaur, Advocates

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Date of Decision: 22nd February, 2024

CORAM:

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MS. JUSTICE MANMEET PRITAM SINGH ARORA

JUDGMENT

MANMOHAN, ACJ: (ORAL)

CM APPLs. 10865-66/2024 (for exemption)

Allowed, subject to all just exceptions.

Accordingly, the present applications stand disposed of.

W.P.(C) 2634/2024 & CM APPL. 10864/2024

1. Present writ petition has been filed under Article 226 of the Constitution of India seeking a direction to remove or modify the eligibility



Clause nos. 4 and 6 as the tender evaluation criteria in the notice inviting tender ('impugned NIT') bearing No. IITD/ESTATE/(SP-4418)/2024, dated 23rd January, 2024.

2. The Respondent Institute has issued the said impugned NIT for the establishment, operation, maintenance, and comprehensive management of a commercial establishment (Eating Outlet) at Ground Floor of Synergy Building at IIT Delhi.

2.1. The tender document provides for 'Initial Eligibility Criteria', under which the bidder should have an annual average turnover of Rs. 12 Crores per annum for the last three financial years, as stipulated under Clause No. 4, and the bidder should enclose a financial solvency certificate issued by a banker for an amount not less than Rs. one Crore, as stipulated under Clause No. 6.

2.2. Aggrieved by the introduction of the aforementioned Clause Nos. 4 and 6 of the Initial Eligibility Criteria for participation in the impugned NIT, the Petitioner has filed the present petition.

3. Learned senior counsel appearing for the Petitioner states that the Respondent Institute vide notice inviting tender bearing no. IITD/ISTA(SP-1691)/2018 ('earlier NIT'), dated 1st June, 2018 had invited tenders for running the staff canteen at IIT Delhi. He states that the eligibility criteria for participating in the earlier NIT was that the bidder should have minimum financial turnover of Rs. 25 Lakhs per annum each during the last three consecutive years and the bidder should produce a solvency certificate from scheduled bank for an amount not less than Rs. 25 lakhs.

3.1. He states that the Respondent Institute has introduced a new eligibility criterion for running the same canteen in the premises of IIT Delhi, thereby



increasing the requirement of annual average turnover to be Rs. 12 Crores. He states that the substantial increase in requirement of 'annual average turnover' from Rs. 25 Lakhs to Rs. 12 Crores is arbitrary, irrational, whimsical, and vitiated by bias. He states that to his knowledge, the annual turn-over of the canteen is approximately Rs. 2 crores. He states that in view of this, the criteria of Rs. 12 crores is irrational. He states that the substantial change in the financial eligibility criteria of the impugned NIT has been introduced with a malafide intention to allot the said tender to a specific party and oust the parties like Petitioner from participating in the tender bidding process. In support of his arguments, learned Senior Counsel for the Petitioner has relied upon the judgment passed by Coordinate Bench of this Court in *Dhingra Construction Co. v. Municipal Corporation of Delhi & Others*¹ to contend that the pre-qualification criteria should not be made stringent so as to arbitrarily restrict the entry of bidders.

4. In reply, learned counsel for the Respondent Institute states that there cannot be any interference by this Court in the present matter, as it pertains to tender issuance process. He states that the Court must refrain from interfering with tender conditions unless the Petitioner can satisfy the principles laid down by the Supreme Court in *Tata Cellular v. Union of India*².

4.1. He states that the facts, which weighed with the Respondents while settling the pre-qualification criteria, were based on the feedback received from the teaching staff, non-teaching staff and the students who are the only users of the canteen. He states that no member of the general public has

¹ 2005 (79) DRJ 383 (DB) (Para 27)

² (1994) 6 SCC 651



access to this canteen and, therefore, the tender conditions have been set down to meet the requirement of the users. He states that the size of the canteen is approximately 5,000 sq. feet and it is one of the largest canteen in the IIT, Delhi premises. He further states that the average annual turnover of the canteen is Rs. 1.5 Crores. He states that there are 11,000 students and 5,000 staff members (including teaching and non-teaching staff) in the campus of the Respondent Institute. He states that on any given day the canteen has to serve/cater a moving population of around 17,000 people and canteen is opened all seven days in the week and is operated in two shifts of eight hours each.

4.2. He states that the Respondent Institute was compelled to terminate the contract with erstwhile agency/service provider in the 4th year of the contract, in light of numerous complaints received from the students and the staff. He states that these complaints were made with regards to the quality of the food not being maintained, unhygienic conditions and the place not being habitable for seating and eating there. He states that the existing contract was for five years, renewable at every year on the discretion of the Respondent-Institute. However, the contract had to be terminated in the fourth year itself in light of the non-performance of the said contractor.

4.3. He states that in consideration of the need of the students and staff members of the Respondent-Institute, an assessment was made, basis the generality of other establishments, and on that basis, the present NIT was issued. He states that in order to avoid the ill-experience with the last service provider, the present pre-qualification criteria was settled after due application of mind. He states that the Respondent-Institute seeks a bidder, who has the requisite capital and wherewithal to run and operate a canteen



with high standards of hygiene and food quality.

4.4. He contends that this Court while exercising its jurisdiction under Article 226 of the Constitution of India would refrain from interfering in tender conditions and contractual matters. In this regard, he relies upon the judgment passed by the Supreme Court of India in ***Directorate of Education and Others v. Educomp Datamatics Ltd. and Others***³ and judgment of this Court passed in ***Delhi Electrical Contractor Welfare Association v. BSES Yamuna Power Ltd. and Anr***⁴.

5. We have considered the submissions of the learned senior counsel for the Petitioner and the learned counsel for the Respondent-Institute.

6. In the writ petition, though challenge has been made to Clause Nos. 4 and 6 of 'Initial Eligibility Criteria', yet the arguments were addressed by the Petitioner only with respect to Clause 4. The relevant Clauses 4 and 6 read as under:

"4. The bidder should have an annual average turnover of Rs.12 Crores per annum, during the last three financial years. Annual average turnover certificates and audited turnover statements duly certified by a chartered accountant along with Profit & Loss Statements are required to be furnished as proofs of the same.

6. The bidder should enclose a financial solvency certificate issued by a banker for an amount not less than Rs. 1 Crore."

(Emphasis supplied)

7. The Respondent-Institute has contended that the condition for inviting tenders from a bidder having a turn-over of Rs. 12 crore per annum, during the last three financial years is based on its experience with the last contractor, who was unable to maintain desired standards of food quality, hygiene and ambience of the canteen. The Respondent-Institute has stated

³ (2004) 4 SCC 19 (Paragraph 13)

⁴ 2022: DHC: 2567-DB (Paragraph 26)



that the tendering authority is of the view that a bidder, who has a higher turn-over, would be able to maintain and operate the canteen with a higher standard which the Respondent-Institute aspires for. The Respondent-Institute has also explained that the volume of the users for the canteen is 17,000 persons and the canteen has to be operated 16 hours a day and all days of the week. The Respondent-Institute has stated that its experience with the contractor, who emerged as the L1 bidder in pursuance to the earlier tender in year 2018 has been unsatisfactory and all these factors have led to changing the terms of the pre-qualification criteria.

8. It is well settled that the Constitutional Courts interfere with tender conditions only when plainly evident case of arbitrariness and unreasonableness by tendering authority is made out by the petitioner, which cannot be countenanced and the need for exercise of restraint in tender matters has been recently emphasised by Supreme Court in *Tata Motors Limited v. Brihan Mumbai Electric Supply & Transport Undertaking (BEST) & Others*⁵, wherein the relevant portion reads as under:

“48. 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 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

⁵ 2023 SCC OnLine SC 671



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. **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.** (See: *Silppi Constructions Contractors v. Union of India*, (2020) 16 SCC 489)

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51. We are of the view that the High Court should have been a bit slow and circumspect in reversing the action of BEST permitting EVEY to submit a revised Annexure Y. We are of the view that the BEST committed no error or cannot be held guilty of favoritism, etc. in allowing EVEY to submit a revised Annexure Y as the earlier one was incorrect on account of a clerical error. This exercise itself was not sufficient to declare the entire bid offered by EVEY as unlawful or illegal.

52. **Ordinarily, a writ court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer unless something very gross or palpable is pointed out. The court ordinarily should not interfere in matters relating to tender or contract. To set at naught the entire tender process at the stage when the contract is well underway, would not be in public interest.** Initiating a fresh tender process at this stage may consume lot of time and also loss to the public exchequer to the tune of crores of rupees. The financial burden/implications on the public exchequer that the State may have to meet with if the Court directs issue of a fresh tender notice, should be one of the guiding factors that the Court should keep in mind. This is evident from a three-Judge Bench decision of this Court in *Association of Registration Plates v. Union of India*, reported in (2005) 1 SCC 679.

53. The law relating to award of contract by the State and public sector corporations was reviewed in *Air India Ltd. v. Cochin International Airport Ltd.*, reported in (2000) 2 SCC 617 and **it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation.** It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal



point. **The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should interfere.**

54. As observed by this Court in *Jagdish Mandal v. State of Orissa*, reported in (2007) 14 SCC 517, that while invoking power of judicial review in matters as to tenders or award of contracts, certain special features should be borne in mind that evaluations of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters. **If the decision relating to award of contract is bona fide and is in public interest, courts will not interfere by exercising powers of judicial review even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. Power of judicial review will not be invoked to protect private interest at the cost of public interest, or to decide contractual disputes.**

(Emphasis supplied)

9. As noted above, the Respondent-Institute has reasonably explained the factors which weighed with the tendering authority for setting the pre-qualification criteria at Clause Nos. 4 and 6. Learned counsel for the Petitioner has not disputed the said facts, and rightly so, as the issue of complaints and feedbacks received by the Respondent from the staff and students with respect to lack of quality and hygiene, is not to the Petitioner's personal knowledge. Confronted with these facts, the sole argument raised by the Petitioner is that Clause No. 4 of the impugned tender is *per-se* arbitrary. To contend arbitrariness, Petitioner merely relies upon the corresponding term set in the earlier NIT issued in the 2018 when requirement of annual turnover was set at Rs. 25 lakhs for the eligible bidder and the fact that the annual turn-over of the canteen is approximately Rs. 1.5 crores.

10. We are of the considered opinion that the tendering authority is in the best position to set down the criteria for identifying the best person for the



work in hand. The consideration of the Respondent-Institute to secure higher quality food and service at the canteen for its staff and students cannot be said to be an extraneous consideration. Poor quality of food, hygiene conditions and lack of infrastructure by the existing contractor in the canteen are valid considerations for re-setting the conditions. Since the successful bidder of the earlier NIT, wherein the annual turn-over was fixed at Rs. 25 lakhs, was unable to deliver the desired quality and high standard which the Respondent Institute aspires for, leading to the making changes in the pre-qualification tender terms cannot be said to be *ex-facie* arbitrary and irrational. The calculations undertaken or assessments made by the tendering authority to come to a conclusion that for a canteen which has an annual turn-over of Rs. 1.5 crores, the eligible bidder must have a solvency certificate of Rs. 1 crore (as per impugned Clause No. 6) appears to be reasonable. There is no doubt that poor quality of food and lack of hygiene would have led to hardship for the staff and the students, who are at the campus and use the canteen continuously and regularly. The canteen is an essential service for the staff and students and the decision taken by the tendering authority to have a bidder with higher financial capabilities to achieve the higher standard in quality of food and hygiene cannot be termed to be arbitrary or irrational.

11. Not only the present petition is without substance but it has been filed after considerable lapse of time. The Petitioner has approached this Court at the eleventh hour, just before the day i.e., 24th February, 2024, when the technical bids are scheduled to open for seeking a stay of the process. The delay has not been sufficiently explained and it also casts doubt on the bonafide of the petitioner. The present petition suffers from delay and laches



and therefore, deserves to be dismissed on this ground as well.

12. In view of the above, the Respondent-Institute has satisfactorily justified and clarified the necessity and rationale of raising the financial qualifying criteria of a bidder to an annual average turnover of Rs. 12 Crores in the preceding three financial years. Therefore, this Court is not inclined to quash or modify the Clause Nos. 4 and 6 of the impugned NIT.

13. Accordingly, the present writ petition is dismissed along with pending application

ACTING CHIEF JUSTICE

MANMEET PRITAM SINGH ARORA, J
FEBRUARY 22, 2024/hp/MG