(2014) 08 J&K CK 0032

In the Jammu And Kashmir High Court

Case No : Others Writ Petition (OWP) No. 1086/2014

Aryan Aviation Pvt. Ltd. APPELLANT

Vs

State and Others RESPONDENT

Date of Decision : 08-08-2014

Acts Referred:

Citation : (2015) 1 JKJ 514

Hon'ble Judges : Tashi Rabstan, J.

Bench : Single Bench

Advocate : Sunil Sethi, Sr. Advocate and Sudershan Sharma, Advocate, for the Appellant; H.A. Siddiqui, A.A.G., for the Respondent

Final Decision : Dismissed

Judgement

Tashi Rabstan, J.â?"The challenge in this petition is to Communication No. DCK/Adm/14/704-05 dated 01.07.2014 issued by the Deputy

Commissioner, Kishtwar and Communication No. 402/GS. Machail Yatra/14/470 dated 03.07.2014 issued by the Divisional Commissioner,

Jammu vide Communication dated 03.07.2014 the Divisional Commissioner authorized the Deputy Commissioner, Kishtwar to open the financial

bid of M/s. U-Tair India Pvt. Ltd., respondent No. 4 herein, and allot the contract after finalization of the rates. When this case was taken up on

31.07.2014, Mr. Sethi, learned senior counsel submitted at the Bar that looking to the nature of controversy and commencement of the contract

with effect from 01.08.2014 this case may be heard finally, which was not opposed by learned counsel appearing for respondents. Therefore, with

the consensus of learned counsel appearing for the parties, this petition was admitted to hearing and taken up for final disposal.

2. The facts as borne out from the writ record and as pleaded by the writ petitioner are that the Deputy Commissioner, Kishtwar, respondent No.

3 herein, issued Notice Inviting Tenders on 31.05.2014 inviting tenders for providing Helicopter service for Machail Yatra-2014 commencing with

effect from 01.08.2014 to 30.08.2014, and the last date for submission of tenders was fixed for 15.06.2014 upto 4 PM. In view of holiday on

15.06.2014, a Corrigendum came to be published on 14.06.2014 extending the date of submission of tender documents to 16.06.2014 upto 4

PM. The petitioner also submitted the tender documents. As per the averments made in the petition, the technical bid was opened on 23.06.2014

in presence of all Members of the Committee and the bidders. It is averred than on opening of the tenders the petitioner-Company came to know

that only 4 tender forms including that of the petitioner had been received by respondent No. 3, out of which two tenders came to be rejected on

the ground that one bidder, namely, M/s. Trikuta Travel Planners was a simple travel agent and not an operator, whereas another bidder, namely,

M/s. Pinnacle Air Pvt. Ltd. was having only one Helicopter, thus both were lacking the basic eligibility as per the tender notice.

3. The concern of petitioner-Company is that as per practice it was not formally communicated regarding rejection of its tender, though as per the

information received, the tender of petitioner-Company was rejected because of non-furnishing of affidavit as required in terms of Clause 7(h) of

the tender notice. It is contended that the petitioner had objected to the opening of technical bid on the ground that there was no technical expert

from the Office of Directorate General of Civil Aviation, Government of India. New Delhi, who alone was the competent authority to open and

accept/reject the technical bid. It is further contended that the technical bid of petitioner-Company seems to have been rejected with mala fide

intention and revengeful attitude because the petitioner had raised serious objection at the time of opening of the technical bid. It is further

contended that awarding of contract in Favour of respondent No. 4 is illegal and bad in law as it is lacking the eligibility criteria in terms of the

tender notice.

4. Upon notice, respondents have filed objections. Respondents 1 to 3 in their objections stated that in pursuance of NIT published on

31.05.2014 and Corrigendum dated 15.06.2014 the petitioner along with three more bidders submitted their bids. Initially only 3 tenders had been

sold, therefore, in order to have larger participation, time for submission of tender documents was extended upto 23.06.2014. The Deputy

Commissioner, Kishtwar constituted a special committee consisting of six officials for opening and evaluation of technical bids. The technical bid of

the petitioner was found deficient on two counts - (i) the petitioner did not file the required affidavit as laid down in the NIT and (ii) the petitioner

was not having three light engine Helicopters on his Non-Scheduled Operator's Permit (NSOP) as per the requirement of NIT.

5. To further counter the claim of petitioner, it is averred by respondents 1 to 3 that the technical bid was opened on 23.06.2014 in presence of

Members of the Committee as well as the bidders including the petitioner. Thus, it is contended, the petitioner was very much aware of the afore-

mentioned deficiency, which fact has even been admitted in the writ petition. Even the petitioner was also informed about the rejection of its

technical bid on 23.06.2014 itself. Not only this, the petitioner was also sent a written communication to this effect by the Addl. Deputy

Commissioner, Kishtwar vide letter No. 219/DCK/Gen/2014 dated 07.07.2014.

6. Mr. Siddiqui, learned AAG, appearing on behalf of respondents 1 to 3 further contended that after rejection of technical bid of the petitioner, a

detailed technical evaluation report was prepared by the said committee. Deputy Commissioner, Kishtwar vide his Communication No.

DCK/Adm/14/704-05 dated 01.07.2014 submitted die report to Divisional Commissioner, respondent No. 2 herein, for seeking his approval.

Consequent upon examination of the report of the Committee, respondent No. 2 accorded approval for opening die financial bid of private

respondent No. 4 because the private respondent was the only successful bidder in the technical bid. Accordingly, the contract was awarded in

Favour of private respondent No. 4 by respondent No. 2 vide Communication No. 212/DCK/Gen/2014 dated 04.07.2014. Thereafter an

agreement for proper execution of the contract was also drawn between the official and private respondents vide agreement dated 04.07.2014.

Thus, it is contended, the entire process of awarding of contract was done in a most transparent and open manner.

7. Private respondent No. 4 in the objections claimed that since it was the only eligible bidder as per the terms and conditions of the NIT,

therefore, it has rightly been awarded the contract. It is contended that after opening the financial bid the rates were negotiated and it offered the

rates lower than the quoted one. It is contended that after allotment of the contract it has already made arrangement of 3-4 light helicopters,

besides making arrangements of ground staff, firefighting equipments, fuel storage etc. for smooth execution of the contract. Not only this, even it

has sold more than 5000 tickets for the pilgrimage at the national level and has also obtained approval of the Standard Operating Procedure from

the Director General of Civil Aviation.

8. It is also contended by respondent No. 4 that it is a 100% subsidiary of U-Tair Aviation JSC, Russia, which is the biggest Helicopter Company

and a major world Helicopter Operator. The parent company of private respondent has an annual turnover of upto US' three billion and has more

than 40 years of experience. It is contended that it was also awarded the contract of providing Helicopter Service during the Machail Yatra-2013

and the same was successfully executed by it. It was also awarded contract of providing Helicopter Service to the annual pilgrimage of Mani

Mahesh in Himachal Pradesh. Thus, it is claimed that the private respondent has sufficient working experience of flying Helicopters in hilly areas of

Himachal Pradesh and Jammu & Kashmir.

9. Heard learned counsel appearing for the parties and perused the original record.

10. Mr. Sethi, learned senior counsel while placing reliance on Clauses 2, 3, 7(a) and 7(b) of the tender notice argued that private respondent No.

4 is lacking in mountain flying experience of five years as required under Clause 7(a) of the tender notice. The further argument of Mr. Sethi is that

since the petitioner had raised serious objection as regards opening of the technical bid in absence of technical expert from the Office of DGCA,

New Delhi the official respondents with revengeful attitude and mala fide intention rejected its technical bid on flimsy grounds. He further claimed

that the petitioner had furnished the affidavit as per Clause 7(h) of tender notice. In support of his arguments, he has also relied upon a judgment

passed by a coordinate Bench of this Court reported as Deccan Charters Ltd. v.

CEO, SMVDSB, 2011 (2) JKJ 752 [HC].

11. Before dealing with each aspect of the case, it would be appropriate to reproduce Conditions 2, 3, 7(a) & 7(b) of the tender notice:

2. The Bidder should possess a fleet of at least three airworthy light helicopters along with all required statutory and other clearances for

operational safety etc from the DGCA, BCAS, Ministry of Defence or any other concerned authority as may be required for operating in the air

space of J & K.

3. The successful bidder (hereinafter referred to as Operator) shall be required to park three operating helicopters at Kishtwar. Each operator

should be in a position to put immediately in place an additional standby helicopter of the same specifications as approved, in the event of an

emergency or in case the regular helicopter becomes unworthy of flight, failing which a penalty at the rate specified under Clause will be imposed.

The Operator shall operate its helicopter service from the heliports at Kishtwar/ Gulabgarh and Machail. The bidder must be willing to operate with

another operator flying on the said route with a minimum limit of one operating Helicopter per operator at a time.

7(a) The Bidder must have flying experience of 05 years in similar kind of operator and each of the flying pilots possessing a requisite mountain

flying experience as per DGCA rules on 15.04.2014.

(b) The Bidder must have minimum fleet of three (3) airworthy Helicopters, endorsed on its NSOP for Kishtwar District (other than its accidental

helicopter(s) which are not to be counted and cleared/approved by DGCA for flight operations.

12. A perusal of the above referred conditions reveals that a bidder should possess at least three airworthy light Helicopters endorsed on them

Non-Scheduled Operator's Permit (NSOP) for Kishtwar District (other than its accidental helicopter) along with all required statutory and other

clearances for operational safety etc. from the DGCA, BCAS, Ministry of Defence or any other concerned authority. The eligible bidder and each

of the flying pilots must have requisite mountain flying experience as per DGCA Rules as on 15.04.2014.

13. A perusal of the record reveals that the petitioner had stated to have a total of six Helicopters, out of which three were endorsed as Non-

Scheduled Operator's Permit (NSOP) and three were not. Out of three Helicopters endorsed as NSOP, one (Call Sign VT VKS) was reported

as accidental and its certificate was valid only upto 15.03.2013. The next one, i.e. Call Sign VT-SIM was not a light Helicopter, rather it was

multi-engine Helicopter. The last one, i.e., Call Sign VT-SVK was the only Helicopter among the six Helicopters offered by the petitioner which

was found not to be valid enough to clear the technical bid of the petitioner.

14. Now it would be relevant to reproduce Item Nos. 08, 20 and 28 of Schedule 'A' of the Technical Bid submitted by the petitioner hereunder.

15. On going through the technical bid submitted by the petitioner, it seems that at Item No. 08 the petitioner had offered only two Helicopters,

whereas at Item No. 20 the petitioner has stated to be having a total number of six Helicopters; meaning thereby the petitioner had offered only

two Helicopters, i.e., VT-SVK and VT-PPS for the yatra-in-question, while as per Clauses 2 & 3 of the tender notice, a bidder should possess

and park three airworthy light helicopters at Kishtwar during the period of yatra. Further, as per list of Non-Scheduled Operator's Permit Holders,

the petitioner has been shown to be having three Helicopters endorsed as NSOP i.e., VT-VKS, VT-SIM and VT-SVK, whereas as per Item 08

(supra) the petitioner had offered only two Helicopters, out of which one Helicopter, i.e., VT-PPS has not been shown in the list of NSOP Holder;

meaning thereby the petitioner actually had offered only one Helicopter for the yatra-in-question. Further, as per Item 28 (supra) it was declared

by the petitioner that none of its Helicopters was involved in any fatal accident, whereas as per record one of its Helicopters was reported as

accidental. Thus, it seems the petitioner had concealed material facts while submitting the technical bid.

16. As regards the contention of petitioner that respondent No. 4 is lacking in mountain flying experience of five years as required under Clause

7(a) of the tender notice, Mr. Gupta, learned senior counsel submitted that respondent No. 4 is a 100% subsidiary of U-Tair Aviation JSC,

Russia, which is the biggest Helicopter Company and has more than 40 years of experience.

17. The Apex Court in New Horizons Limited and Another Vs. Union of India (UOI) and Others, , while dealing with the identical issue, has held

as under:

23. Even if it be assumed that the requirement regarding experience as set out in the advertisement dated 22-4-1993 inviting tenders is a condition

about eligibility for consideration of the tender, though we find no basis for the same, the said requirement regarding experience cannot be

construed to mean that the said experience should be of the tenderer in his name only. It is possible to visualize a situation where a person having

past experience has entered into a partnership and the tender has been submitted in the name of the partnership firm which may not have any past

experience in its own name. That does not mean that the earlier experience of one of the partners of the firm cannot be taken into consideration.

Similarly, a company incorporated under the Companies Act having past experience may undergo re-organization as a result of merger or

amalgamation with another company which may have no such past experience and the tender is submitted in the name of the reorganised company.

It could not be the purport of the requirement about experience that the experience of the company which has merged into the reorganised

company cannot be taken into consideration because the tender has not been submitted in its name and has been submitted in the name of the

reorganised company which does not have experience in its name. Conversely there may be a split in a company and persons looking alter a

particular field of the business of the company form a new company after leaving it. The new company, though having persons with experience in

the field, has no experience in its name while the original company having experience in its name lacks persons with experience. The requirement

regarding experience does not mean that the offer of the original company must be considered because it has experience in its name though it does

not have experienced persons with it and ignore the offer of the new company because it does not have experience in its name though it has

persons having experience in the field. While considering the requirement regarding experience it has to be borne in mind that the said requirement

is contained in a document inviting offers for a commercial transaction. The terms and conditions of such a document have to be construed from the

standpoint of a prudent businessman.

When a businessman enters into a contract whereunder some work is to be performed he seeks to assure himself about the credentials of the

person who is to be entrusted with the performance of the work. Such credentials are to be examined from a commercial point of view which

means that if the contract is to be entered with a company he will look into the background of the company and the persons who are in control of

the same and their capacity to execute the work. He would go not by the name of the company but by the persons behind the company. While

keeping in view the past experience he would also take note of the present state of affairs and the equipment and resources at the disposal of the

company. The same has to be the approach of the authorities while considering a tender received in response to the advertisement issued on 22-4-

1993. This would require that first the terms of the offer must be examined and if they are found satisfactory the next step would be to consider the

credentials of the tenderer and his ability to perform the work to be entrusted. For judging the credentials past experience will have to be

considered along with the present state of equipment and resources available with the tenderer. Past experience may not be of much help if the

machinery and equipment is outdated. Conversely lack of experience may be made good by improved technology and better equipment. The

advertisement dated 22-4-1993 when read with the notice for inviting tenders dated 26-4-1993 does not preclude adoption of this course of

action. If the Tender Evaluation Committee had adopted this approach and had examined the tender of NHL in this perspective it would have

found that NHL, being a joint venture, has access to the benefit of the resources and strength of its parent/owning companies as well as to the

experience in database management, sales and publishing of its parent group companies because after re-organization of the Company in 1992

60% of the share capital of NHL is owned by Indian group of companies namely, TPI, LMI, WML, etc. and Mr. Aroon Purie and 40% of the

share capital is owned by IIPL a wholly-owned subsidiary of Singapore Telecom which was established in 1967 and is having long experience in

publishing the Singapore telephone directory with yellow pages and other directories. Moreover in the tender it was specifically stated that IIPL

will be providing its unique integrated directory management system along with the expertise of its managers and that the managers will be actively involved in the project both out of Singapore and resident in India.

18. As regards the contention of petitioner that it was not formally communicated regarding rejection of its tender, it has specifically been submitted

by the official respondents that the petitioner was informed about the rejection of its technical bid on 23.06.2014 itself when the same was opened

in presence of petitioner, besides a written communication to this effect was also sent to it by the Addl. Deputy Commissioner, Kishtwar vide letter

dated 07.07.2014.

19. The next contention of Mr. Sethi is that Condition 7(b) of the tender notice provides that the bidder must have a minimum of three light

airworthy helicopters endorsed as NSOP for Kishtwar District and since there was no such endorsement on respondent No. 4's helicopters for

Kishtwar District, therefore the official respondents have clearly violated the eligibility conditions.

20. Mr. Gupta, learned senior counsel for respondent No. 4 submitted that not a single participant, of the bid was possessing such an endorsement

for Kishtwar District because the same is not required in terms of letter dated 19.07.2013 addressed to it by the Office of the Director General of

Civil Aviation, Government of India, Civil Aviation Department, a copy whereof produced in the open Court is made part of the file. He further

argued that even otherwise respondent No. 4 is having permission to operate its helicopters throughout the Country, therefore, it is not necessary

to obtain separate such endorsement for Kishtwar District. Relevant paragraph of the said communication is reproduced below:

The Standard Operating Procedures (SOP) for Machail Mata-Gulabgarh on Eurocopter AS 350 B3 type of helicopter submitted by you vide

letter under reference, have been examined in this Directorate and the same is approved keeping in view the operational aspects.

21. As regards the contention of petitioner that the official respondents with revengeful attitude and mala fide intention rejected its technical bid on

flimsy grounds, the law with regard to bias and mala fide is that the allegation should be specific, detailed and should inspire confidence in the Court

that the same is true on the face of it. Mr. Sethi, learned senior counsel, while laying stress on mala fide on the part of official respondents relied

upon Annexure R1, R2, R6 & R7 of the objections filed by the official respondents. He while relying on these annexures alleged that the contract-

in-question was awarded on 04.07.2014 and agreement to this effect was also executed on the same date, however, the petitioner was informed

about the rejection of its technical bid vide communication dated 07.07.2014 which was sent through post on 14.07.2014, i.e., much after

awarding of the contract in favour of respondent No. 4, contending thereby that the same is sufficient to prove mala fide against the official

respondents. He also stated that no cogent reason has been forwarded in the said communication regarding the rejection of technical bid of the

petitioner.

22. As per petitioner's own admission in the contents of the writ petition, the technical bids were opened in presence of all the bidders including the

petitioner. Although no reasons were given in communication dated 07.07.2014 regarding rejection of petitioner's technical bid, but the Technical

Evaluation Report submitted by the Committee clearly cites the reasons regarding rejection of technical bid of the petitioner. One of the reasons

given was that the petitioner was lacking in three light weight helicopters to be parked at Kishtwar during the period of pilgrimage. Therefore, there

seems no illegality or any irregularity in the process of evaluation of the bid. Thus, the petitioner has failed to demonstrate the alleged revengeful

attitude or mala fide against the official respondents.

23. The judgment referred to by learned counsel for petitioner is not applicable to the case in hand because the said case stands on a different

footing. The High Court under Article 226 has a very limited scope to interfere in the matters pertaining to the contract.

24. The Supreme Court in its latest judgment delivered in case, titled as, M/s. Siemens Aktiengeselischaft & S. Ltd. v. DMRC Ltd., 2014 AIR

SCW 1249 , while referring to its earlier judgment delivered in Jagdish Mandal Vs. State of Orissa and Others, , has held as under:

.......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.

22. There is no gainsaying that in any challenge to the award of contact before the High Court and so also before this Court what is to be

examined is the legality and regularity of the process leading to award of contract. What the Court has to constantly keep in mind is that it does not

sit in appeal over the soundness of the decision. The Court can only examine whether the decision making process was fair, reasonable and

transparent. In cases involving award of contracts, the Court ought to exercise judicial restraint where the decision is bona fide with no perceptible

injury to public interest.

25. However, in the case-in-hand the petitioner-Company, as per conditions of the tender notice, was not found eligible in the technical bid.

26. Further, the main challenge in this petition is to the Communication dated 03.07.2014 vide which the Divisional Commissioner, Jammu

authorized the Deputy Commissioner, Kishtwar to open the financial bid of respondent No. 4, and allot the contract after finalization of the rates. It

is relevant to mention here that the petitioner has not questioned the Communication dated 04.07.2014 vide which the contract-in-question was

allotted in favour of respondent No. 4 nor has questioned the agreement for execution of the contract and in absence of the same, the petition-in-

hand is not maintainable.

27. When this case was taken up on 24.07.2014, Mr. R.K. Gupta, learned senior counsel while referring to the objections filed on behalf of

respondent No. 4, raised the preliminary objection regarding the maintainability of writ petition on the ground that the petitioner has not disclosed

whether he is an employee of petitioner-Company and in which capacity he has filed the writ petition. In response to the preliminary objection, the

petitioner filed a supplementary affidavit. He, while referring to Annexure ""B"" issued by one of the Directors of the petitioner-Company, namely

Neeraj Rathi, stated that he has been appointed as a Coordinator by the petitioner-Company and has been authorized to coordinate all activities in

relation with the aviation in the State of Jammu & Kashmir and Himachal Pradesh.

28. Mr. Gupta, on the other hand, pleaded that the petitioner has not produced any resolution of the Board of Directors of the Company

authorizing him to file the instant petition nor has shown any authority of the Directors to issue such a certificate, or, that he is an employee of the

Company. Mr. Gupta, thus, argued that in absence of the same, the writ petition is not maintainable in the light of Sections 291 and 292 of the

Companies Act 1956. In support of his contention, he has referred to a judgment of the High Court of Himachal Pradesh, titled as, Apple Valley

Resort v. H.P. State Electricity Board, relevant paragraphs whereof are reproduced hereunder.

25. The irresistible conclusion is that Section 291 of the Companies Act, 1956, provides that except where express provisions is made that the

powers of a Company in respect of a particular matter are to be exercised by the Company in general meeting, in all other cases the Board of

Directors are entitled to exercise all its powers. Individual Directors have only such powers as are vested in them by the Memorandum and

Articles.

26. In the absence of a specific resolution of the Board of Directors authorizing Shri Arun Sharma to institute the present petition for and on behalf

of the petitioner Company or the power conferred on the Director by the Memorandum and Articles of Association, the present petition cannot be

said to have been laid by a duly authorized and competent person for and on behalf of the petitioner Company. The same is bad and liable to be

dismissed on this short ground alone.

29. It appears that the petitioner, who has filed the instant writ petition, has not annexed any resolution of the Board of Directors of the petitioner-

Company authorizing him to file the instant petition, although he has been authorized only by one of the Directors of the Company to file the instant

petition. Had all the Members of the Board of Directors passed the resolution authorizing the petitioner herein to file the present petition, then it

would have created estoppel on their part to file another writ petition for the very same relief, if this writ petition preferred by the present petitioner

is dismissed. The person signing the petition must state his capacity or authority to sign the petition on behalf of the Company - whether registered

or not. However, in the present case, no such authority has been given by all Members of the Board of Directors of the petitioner-Company, as

admittedly there is no annexure to this effect in the memo of writ petition.

30. For the aforesaid reasons, I do not find any merit in the writ petition and the same is accordingly dismissed along with the connected CMA.

Registry is directed to return the record to Mr. Siddiqui against proper receipt.

