

(2015) 05 SHI CK 0081
In the High Court Of Himachal Pradesh
Case No : CWP No. 1971 of 2015

Inder Singh Chauhan

APPELLANT

Vs

State of Himachal Pradesh and Others

RESPONDENT

Date of Decision : 28-05-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2015) 05 SHI CK 0081

Hon'ble Judges : Tarlok Singh Chauhan, J

Bench : Single Bench

Advocate : Suneet Goel, for the Appellant; Shrawan Dogra, Advocate General, Virender Kumar Verma, Rupinder Singh, Additional Advocate Generals and Kush Sharma, Dy. Advocate General, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Tarlok Singh Chauhan, J.—By medium of this petition, the petitioner has sought the following substantive reliefs:

"a) That the respondents may be directed to produce the entire record pertaining to the case.

b) That minimum work done condition No. 28.2.b of the General Rules and Directions and the eligibility criteria contained therein and tender document, whereby in order to be eligible for the work detailed in para 6 of the petition contractor is required to have done work of amount not less than 40% (forty percent) of the estimated cost (without liquidated damage or compensation) in last five years may be quashed and set aside as far as contractors holding "Class A" enlistment is concerned.

c) That the respondents may kindly be directed to consider the bid of the petitioner for the works detailed in para 6 of the petition on the basis of performance certificate submitted by him on merits.

d) That in case the respondents oust the petitioner after evaluating the technical bid, such action of the respondents may be quashed and set aside and they may be directed to consider the bid of the petitioner."

2. The brief facts as stated are that the petitioner is a Class A contractor duly enlisted with the respondents. The respondents on 24.2.2015 floated with the tenders for various road works. The last date for submission of bid was fixed on 16.3.2015, whereafter the technical bids were to be carried out on 17.3.2015. The petitioner submitted his bid for the work of "Kaina Kot Jubbal Road" an upgradation of "Mural Kelvi Dadot Dhapli Battar Road". The petitioner deposited the earnest money as also the cost of the tender document. After opening of the technical bids on 17.3.2015, it was revealed that four persons had submitted their bids for the aforesaid works. After the valuation of the technical bids, the financial bids were to be carried out on 21.3.2015 but for some reasons the same was not to be carried out on 21.3.2015 and it is alleged that the respondent No. 3 orally informed the petitioner to submit document qua "works related to the road" done by him of amount not less than 40% (forty percent) of the estimated cost (without liquidated damage or compensation) in last five years in order to consider his bid. It is this condition of the tender that has been challenged by the petitioner on the ground that the same is illegal, unjustified, arbitrary, void and smacks of colourable exercise of the power on the part of the respondents. It is alleged that there is no legal sanction behind such condition. It is further contended that the respondents are bent upon ousting the petitioner by invoking the aforesaid illegal and arbitrary condition, even though, the petitioner is otherwise eligible to be considered for awarding of the tender.

3. In response to the petition, the respondents have filed the reply wherein it is stated that since the petitioner has failed to comply with condition No. 28.2 (b) i.e. minimum one similar work done of amount not less than 40% of the estimated cost (without liquidated damages or compensation) in the last five years, therefore, his case cannot be considered.

4. I have heard learned counsel for the parties and have gone through the records of the case carefully.

5. At the outset, it may be observed that the scope of judicial review in tender or contractual matters is extremely limited and this has been noticed by a learned Division Bench of this Court (authored by me) in CWP No. 9337 of 2013 titled Shri Ashok Thakur v. State of H.P. and others, decided on 6th May, 2014 wherein this very condition i.e. 28.2.(b) of the tender document was called in question and the learned Division Bench held:

"7.....The petitioner was ineligible for even being considered for the tender as per the conditions No. 28.2.a and 28.2.b which read as under:--

"28.2.a: Bidding Capacity:- Bidders who meet the minimum qualification criteria will be qualified only if their assessed available bid capacity for construction of works is equal to or more than the total bid value. The available bid capacity will

be calculated as under: Assessed Available Bid capacity= (A×N×M-B)

A= Maximum value of civil engineering works executed in any one year during the last five years(updated to the price level of the financial year in which bids are revised at the rate of 8 percent a year) taking into account the completed as well as works in progress.

28.2.b Minimum Work done condition:- Minimum one similar work done of amount not less than 40% (forty percent) of the estimated cost (without liquidated damage or compensation) in last five years"

The respondents have accordingly prayed for dismissal of the writ petition.

8. At the outset, it may be stated that this Court would interfere in tender or contractual matters in exercise of power of judicial review only incase the process adopted or decision made by the authority is malafide or intended to favour someone or the process adopted or decision made is so arbitrary and irrational that no responsible authority acting reasonably and in accordance with relevant law could have reached and lastly incase the public interest is affected. If the answers to these questions are in the negative, then there should be no interference by this Court in exercise of its powers under Article 226 of the Constitution of India.

9. In Tata Cellular Vs. Union of India, AIR 1996 SC 11 : AIR 1994 SC 11 : (1994) 4 JT 532 : (1994) 6 SCC 651 : (1994) 2 SCR 122 Supp the Hon"ble Supreme Court emphasized the need to find the right balance between administrative discretion to decide the matters, on the one hand, and the need to remedy any unfairness, on the other, and observed:(SCC pp 687-88, para 94)

"(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle (1948) 1 KB 223: (1947) 2 All PR 680 (CA) of reasonableness (including its other facets pointed out above) but must be free from arbitrariness, not affected by bias or

actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

10. In *Raunaq International Limited Vs. I.V.R. Construction Ltd. and Others*, AIR 1999 SC 393 : (1999) 1 ARBLR 431 : (1998) 8 JT 411 : (1998) 6 SCALE 456 : (1999) 1 SCC 492 : (1998) 3 SCR 421 Supp : (1999) 1 UJ 600 : (1999) AIRSCW 53 , the Hon"ble Supreme Court reiterated these principles governing the process of judicial review and held that the writ Court would not be justified in interfering with commercial transactions in which the State is one of the parties to the same except where there is substantial public interest involved and in cases where the transaction is malafide. The elements of public interest were spelled out as under:--

"10. What are these elements of public interest? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work - thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g., a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation."

11. Even when some defect is found in the decision-making process, the Court must exercise its discretionary power 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 intervene. This was so held by the Hon"ble Supreme Court in *Air India Ltd. v. Cochin International Airport Ltd.* , (2000) 2 SCC 617 .

12. In *Aruna Rodrigues and Ors. versus Union of India and Ors.* 2012 AIR SCW 3340, it was observed by the Hon"ble Supreme Court that the Courts who have no expertise to determine the issues of technical nature should not venture into determining such questions and it was held as under:--

"2.This Court, vide its order dated 1st May, 2006, directed that till further orders, field trials of GMOs shall be conducted only with the approval of the Genetic Engineering Approval Committee (for short "GEAC"). I.A. No. 4 was filed, in

which the prayer was for issuance of directions to stop all field trials for all genetically modified products anywhere and everywhere. The Court, however, declined to direct stoppage of field trials and instead, vide order dated 22nd September, 2009 directed the GEAC to withhold approvals till further directions are issued by this Court, after hearing all parties. Except permitting field trials in certain specific cases, the orders dated 1st May, 2006 and 22nd September, 2009 were not substantially modified by the Court. As of 2007, nearly 91 varieties of plants, i.e., GMOs, were being subjected to open field tests, though in terms of the orders of this Court, no further open field tests were permitted nor had the GEAC granted any such approval except with the authorization of this Court. This has given rise to serious controversies before this Court as to whether or not the field tests of GMOs should be banned, wholly or partially, in the entire country. It is obvious that such technical matters can hardly be the subject matter of judicial review. The Court has no expertise to determine such an issue, which, besides being a scientific question, would have very serious and far-reaching consequences."

13. In *Michigan Rubber (India) Ltd. Vs. The State of Karnataka and Others*, AIR 2012 SC 2915 : (2012) 4 BC 177 : (2012) 7 JT 446 : (2013) 1 RCR(Civil) 202 : (2012) 7 SCALE 414 : (2012) 8 SCC 216 : (2012) AIRSCW 4727 , the Hon"ble Supreme Court held as under:--

"35.....As noted in various decisions, the Government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, mala fide or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical....."

14. In *Heinz India Pvt. Ltd. and Another Vs. State of U.P. and Others*, (2012) 3 SCALE 607 : (2012) 5 SCC 443 : (2012) 50 VST 13 : (2012) AIRSCW 2059 : (2012) 2 Supreme 649 the Hon"ble Supreme Court examined the legal dimensions of judicial review and quoted with approval the following passage from *Reid v. Secy. of State for Scotland* (1999) 1 All ER 481.

"Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decisions itself it may be found to be perverse, or irrational or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through

some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of evidence."

The aforesaid principles were thereafter reiterated in Siemens Aktiengesellschaft and S. Ltd. Vs. DMRC Ltd. and Others, AIR 2014 SC 1483 : (2014) AIRSCW 1249 : (2014) 3 JT 290 : (2014) 2 SCALE 315 .

15. The Hon"ble Supreme Court in Pathan Mohammed Suleman Rehmatkhan Vs. State of Gujarat and Others, (2014) 1 JT 303 : (2013) 14 SCALE 385 : (2014) 4 SCC 156 : (2014) 3 SCJ 181 has acknowledged the authority of the State in matters of policy and decision making in the following terms:--

"10.....But we cannot lose sight of the fact that it is the Government which administers and runs the State, which is accountable to the people. The State's welfare, progress, requirements and needs of the people are better answered by the State, also as to how the resources are to be utilized for achieving various objectives. If every decision taken by the State is tested by a microscopic and a suspicious eye, the administration will come to a standstill and the decision-makers will lose all their initiative and enthusiasm. At hindsight, it is easy to comment upon or criticize the action of the decision-maker. Sometimes, decisions taken by the State or its administrative authorities may go wrong and sometimes they may achieve the desired results. Criticisms are always welcome in a parliamentary democracy, but a decision taken in good faith, with good intentions, without any extraneous considerations, cannot be belittled, even if that decision was ultimately proved to be wrong."

6. Admittedly, the petitioner has called in question the conditions of the tender document only after having participated in the same, therefore, the next question arises as to whether the petitioner can maintain this petition. This question too has been answered in Ashok Thakur"s case wherein this Court held:

"20. Further, incase the petitioner was at all aggrieved by the imposition of conditions No. 28.2.a and 28.2.b, then he ought to have questioned these conditions immediately on the floating of the tender before participating in the same.

23. This Court need not to burden the judgment any further as it is to be taken a settled law that after having consciously participated in the tender process, the petitioner is estopped from challenging any condition of the tender document. Reference however may be made to the judgment of the Hon"ble Supreme Court in M/s. Tafcon Projects Private Limited versus Union of India AIR 2004 SC 949."

7. That apart, it would be seen that the petitioner admittedly had not done one similar work of amount not less than 40% (forty percent) of the estimated cost as required under Clause 28.2 (b) of the tender document. The reliance placed

by the petitioner on the performance certificate qua civil work of Judicial Court Complex, Jubbal completed in the sum of Rs. 1,21,74,904/- and having worked on different stretches of Theog - Hatkoti Highway, the cumulative work together of which accounts to more than Rs. 1,00,00,000/- (one crore) is totally misplaced because the tender clearly stipulates that the work has to firstly relate to the road and secondly, the work must be "one similar work" and not multiple works of similar nature.

8. In view of the aforesaid discussion, I find no merit in this petition and the same is accordingly dismissed, so also the pending application(s) if any, leaving the parties to bear their own costs.