(2018) 08 J&K CK 0045

In the Jammu And Kashmir High Court

Case No : Letter Petent Appeal No.54 Of 2018, Miscellaneous Petition No..2 Of 2018 & 3 Of 2018

M/S Ladakh Road Lines @APPELLANT@Hash State Of Jammu & Kashmir & Others

Date of Decision : 14-08-2018

Acts Referred:

Citation : (2018) 08 J&K CK 0045

Hon'ble Judges : Alok Aradhe, J;Dhiraj Singh Thakur, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

In this intra Court appeal, the appellant has assailed the validity of order dated 06.06.2018 passed by the learned Single Judge in OWP

Nos.632/2018.Â In order to appreciate the appellant's challenge to the impugned order and the issues involved in the petition, it is necessary to set out

the facts, which are stated infra:

The Facts:

2) The e-tender notice was issued on 02.05.2017 by the respondent No.3, namely, Provincial Level Contract Committee, by which e-tenders were

invited under double cover system from the reputed and registered Transport Firms/Companies for supply of Trucks for transportation of goods for the

year 2017-18 and 2018-19. The last date for submission of bids was 22.05.2017.Â On 24.05.2017 the technical bids were to be opened whereas the

financial bids were scheduled to be opened on 25.05.2017.Â The appellant as well as respondent No.4 responded to the aforesaid tender notice by

submitting their bids.Â The technical bids were opened on 24.05.2017 in which the appellant as well as respondent No.4 were found to be qualified by the Contract Committee.Â

3) The appellant after opening of the technical bids submitted a representation to the Minister for Consumer Affairs and Public Distribution

Department on 24.05.2017 in which it was stated that respondent No.4â??s bid was not technically responsive.Â The financial bids were opened on

25.05.2017 in which bid of respondent No.4 was found to be the lowest.Â The appellant again submitted a complaint/representation to the Minister

for Consumer Affairs and Public Distribution Department on 26.05.2017.Â However, it is the case of the appellant that no action was taken on its

representation.Â Thereupon, the appellant approached this Court by filing a writ petition, namely, OWP No.731/2017 in which the learned Single

Judge passed an order of status-quo on 31.05.2017 with regard to the e-tender notice dated 02.05.2017.Â The aforesaid writ petition was disposed of

by learned Single Judge by an order dated 16.03.2018 with the following directions:-

â??i) The official respondents shall take a final decision on the representation/ complaint filed by the petitioner against the decision of the official

respondents declaring respondent No.4 technically qualified to participate in the financial bid.Â The decision, as aforesaid, shall be taken by the

official respondents within a period of four weeks from the date a certified copy of this order is received by them.Â

ii) While taking decision on the representation/ complaint of the petitioner the official respondents shall be well within their right to consider as to

whether the petitioner who was declared qualified in the technical bid alongwith respondent No.4 was also technically qualified to participate in the

price bid or not. The decision to be taken by the official respondents would be by way of a speaking order to be conveyed to the petitioner as well as

respondent No.4.

iii) Further decision with regard to award of contract to the eligible lowest bidder shall depend upon the consideration as directed above.

iv) The official respondents shall, however, be at liberty to re-tender the contract in question, if none of the bidders who had responded to the e-tender

are found to be eligible to execute the contract or the official respondents otherwise feel such course to be in public interest.â??

4) In pursuance of directions issued by the learned Single Judge in the said writ

petition, the appellant submitted a representation to the Director,

Consumer Affairs and Public Distribution Department on 19.03.2018.Â The representation was considered vide order dated 27.03.2018 and sanction

was accorded to the allotment of the contract for hiring of trucks for carrying food grains for the year 2017-18 and 2018-19 in favour of respondent

No.4.Â Thereafter by an order dated 31.03.2018 the contract in question was awarded to respondent No.4.Â Â

5) The appellant filed another writ petition, namely, OWP No.632/2018 before this Court in which order dated 31.03.2018 by which contract in

question allotted to respondent No.4, was challenged by the appellant, inter alia, on the ground that technical bid of the respondent No.4 was not

responsive as per terms and conditions of Notice Inviting Tender, as it neither had the turnover, nor had the requisite number of trucks, and the

experience.Â Therefore, its financial bid could not have been opened and the Commissioner/Secretary to Government, Consumer Affairs and Public

Distribution Department did not decide the representation of the appellant as per directions issued by this Court in OWP No.731/2017.Â

6) In the said writ petition, an interim order was passed on 17.04.2018 by which the official respondents were directed not to release the contract

amount in favour of the respondent No.4.Â Thereafter, by an interim order dated 24.04.2018, learned Single Judge stayed the order dated 31.03.2018

by which contract in question was allotted in favour of the respondent No.4.Â The appellant filed a contempt petition, namely, Contempt Petition

No.103/2018 in which notice was issued on 08.05.2018.Â It is pertinent to mention that the State Road Transport Corporation filed another writ

petition, namely, OWP No.785/2018 which was clubbed with OWP No.632/2018.Â Both the aforesaid writ petitions were decided by a common

order dated 06.06.2018.Â Paragraph 19 of the impugned order reads as under:-

Â â??19. It appears that for physical verification of the fleet of the trucks of the respondent no.4, for carrying the food grains of the respondent

department, a Committee was constituted by the respondent no.2. The said Committee conducted the verification of the owned and hired trucks of

M/S Iqbal Motors Transport Service-respondent no.4, on 30th and 31st March 2018 at various spots including Gulab Bagh, Shaheed Gunj Godowns,

Parimpora Truck Terminals and Lethapora.Â The learned counsel for the respondents have, during the course of arguments, produced the report of

the Committee constituted for physical verification of the fleet of the trucks of the petitioner, which, at request, is taken on record.Â The said physical

verification report is accompanied by two lists; one is with respect to those vehicles, physically verified by the Committee, which are owned by the

respondent no.4; and the second is regarding those vehicles, which have been hired by the respondent no.4. The respondent no.1 is shown to have

owned 27 vehicles and hired 172 vehicles for fulfillment of the contract in question.Â Therefore, it is only after the physical verification of the fleet of

the trucks for carrying of food grains of the respondent department that the impugned allotment orders have been issued by the respondent

department. The plea of the petitioner that the respondent no.1 does not possess the required fleet of the trucks for carriage of the food grains has

been taken care of and dealt with by the respondent department meticulously and cautiously.Â Be that as it may, the gravamen groused by the

petitioner that the respondent No.4 did not fulfill the prerequisites required in terms of the tender notice, has been redressed.Â This Court, while

passing the judgment dated 16th March 2018 in OWP no.731/2017 tilted Ladakh Road Lines v. State of J&K and others, has made it clear that this

Court cannot decide the disputed questions of fact vis-a-vis compliance of terms and conditions of the contract as it is better left to be decided by the

experts associated in the evaluation of the bids.Â It was keeping in view the said position that this Court directed the official respondents to take a

final decision on the representation/complaint of the petitioner. The official respondents have complied with the directions passed by this Court in

OWP no.731/2017 and constituted a Committee, which physically verified the fleet of the trucks of the petitioner and it was found that the respondent

no.4 possess the fleet of trucks as was one of the important conditions of the tender notice.Â Be that as it may, the official respondents have

complied with and implemented the judgment dated 16th March 2018 passed by this Court in OWP no.731/2017, in letter and spirit.Â This, therefore,

clinches the whole controversy raised by the petitioner in OWP No.632/2018.â??

Accordingly, the writ petition, preferred by the appellant, namely, OWP No.632/2018 was dismissed.

The Submissions:

7) Learned counsel for the appellant submitted that the respondent No.4 does not have either work experience or requisite turnover of 50.00 Crores

inÂ Â Â Â 5 years and also does not have the requisite number of trucks.Â It is submitted that the list of vehicles supplied by the respondent No.4

has not been authenticated by the Regional Transport Officer.Â The appellant on opening of the technical bids submitted a representation on

24.05.2017.Â However, respondent No.2 instead of addressing the issues raised by the appellant in the representation, proceeded to open the

financial bids on 26.05.2017. Thereupon, the appellants submitted another representation on 26.06.2017 in which, inter alia, it was stated that the

respondent No.4 does not have the requisite experience/turnover and did not furnish the valid proof of attachment of 100 vehicles. However, even the

aforesaid representation was not decided.Â Thereupon, the appellant approached this Court by filing a writ petition in which an ad-interim order

directing maintenance of status-quo with regard to the contract in question was passed by the learned Single Judge on 31.05.2017.Â The writ petition

was disposed of vide order dated 16.03.2018 with a direction to the respondents to examine the appellantâ??s as well as respondent No.4â??s

eligibility to participate in the technical bids.Â In pursuance of the aforesaid order, the appellant submitted a representation on 19.03.2018 and pointed

out that many trucks mentioned in the list of trucks supplied by respondent No.4, were attached to Bombay Kashmir Transport Services.Â However,

the aforesaid representation was not considered and neither any decision was taken with regard to the directions contained in Paragraphs (i) and (ii) of

order dated 16.03.2018.Â Thereafter, on 31.03.2018 the respondent No.4 submitted a new list of vehicles from which it is evident that the trucks

mentioned in the previous list supplied by the respondent No.4 at the time of submission of tender were detached and the details of other trucks were

furnished, which were shown to have been attached.Â Thus, the respondent No.4 submitted fresh tender and the same was accepted by the

respondent No.2, which is not permissible in law.Â It is further submitted that the respondent No.4 did not have the requisite number of trucks on the

date of submission of bid.Â Â

8) It is further submitted that from the order dated 31.03.2018 it is not discernible that on 30th and 31stMarch, 2018 the verification of trucks owned

by respondent No.4 and trucks hired by it was carried out by the respondent Nos.1 to 3.Â It is also submitted that the report of the Committee dated

31.03.2018 has been taken on record without supplying the copy of the same to the appellant.Â It is argued that the physical verification of the trucks

was conducted after the order of allotment.Â It is urged that, in fact, the verification of the number of trucks was to be considered by the Committee

already constituted in Clause 22 of the N.I.T., which has not been done.Â Without carrying out the inspection as provided in Clause 22 of the Notice

Inviting Tender, an order was issued in favour of the respondent No.4 on 27.03.2018.Â The respondent No.4 itself informed the Committee on

29.03.2018 that the vehicles which were initially attached with it have been detached and allegedly the inspection was shown to have been carried out

on 30th and 31st March, 2018, whereas the orders for award of contract in favour of respondent No.4 was issued on 27.03.2018 and 30.03.2018.Â

No cogent material was available with the official respondents to issue order of allotment in favour of respondent No.4.Â It is also urged that the

appellant was not afforded an opportunity of hearing before deciding the representation and the respondent No.4 has not fulfilled the mandatory

conditions of the contract.Â In support of his submissions, learned counsel for the appellant, referred the decisions of the Supreme Court in the cases

of M/S Monarch Infrastructure (P) Ltd. vs. Commissioner, Ulhasnagar Municipal Corporation & Or., (2000) 5 SCC 287 and Kesar Enterprises

Limited v. State of U. P. & others, AIR 2011 SC 2709.

9) On the other hand, learned senior counsel for the respondent No.4 submitted that the object of the contract in question is transportation of food

grains to the remote rural areas, therefore, the contract in question has an element of public interest in it.Â It is further submitted that the last date for

submission of technical bids was 24.05.2017 and the technical bids were to be opened on the same day, whereas, the financial bids were to be opened

on 25.05.2017.Â After evaluation of the technical and financial bids, the respondent No.4, was found to be lowest bidder.Â The appellant submitted

a representation on 26.06.2017 on the ground that respondent No.4 does not satisfy the requirements of technical bids.Â The writ petition, namely

OWP No.731/2017 was filed by the appellant on 31.05.2017 in which ad-interim order of status-quo was passed which was eventually decided on

16.03.2018 and on account of said interim order of the learned Single Judge, the Consumer Affairs and Public Distribution Department suffered

losses.Â Eventually, the contract was awarded to the respondent No.4 on 31.03.2017.Â By referring to the corrigendum, it is urged that the

verification of the trucks was to be done after the financial bids were opened. It is also urged that a tenderer is required to furnish 100 hard copies of

registration certificates or list of vehicles which was duly attested by the Regional Transport Officer and requirement of furnishing list of vehicles

attested by the Regional Transport Officer was an optional requirement of Notice Inviting Tenders.Â It is urged that on 04.04.2017, a list was

furnished of vehicles which were duly associated with respondent No.4 and signed by the Regional Transport Officer.Â On account of interim order

dated 31.03.2018 passed by the learned Single Judge of this Court, the verification of the vehicles as prescribed under Clause 22 could not be

undertaken. It is further urged that the object of the conditions contained in the Notice Inviting Tender is to ensure availability of 100 vehicles for the

purpose of transportation and the State Government after being satisfied with regard to availability of 100 vehicles with respondent No.4 has issued an

order awarding the contract in favour of respondent No.4.Â It is pointed out that no condition in the Notice Inviting Tender is provided that the

vehicle cannot be changed and the process of verification of vehicles was thwarted on account of interim order passed by this Court. At the relevant

time, respondent No.4 had 100 vehicles available with it and it is no body's case that the respondent No.4 did not have 100 vehicles available with it at

the time of either submission of technical bid or at the time of awarding of contract in favour of it.Â It is also submitted that there is no material on

record to show that the respondent No.4 did not have 100 vehicles.Â Â

10) While referring to Clause 39 of the Notice Inviting Tender, it is also pointed out that the condition with regard to work experience did not provide

that a tenderer should have 5 years' experience preceding 2017 and it prescribes for overall experience.Â It is further submitted that the approximate

value of the contract is 30.00 Crores and the work experience cannot be equated with the value of contract.Â It is argued that on 29.05.2017,

respondent No.4 has submitted the documents with regard to 5 years' work experience and the directions issued by the learned Single Judge of this

Court have been complied with by the competent authority while awarding the contract in favour of respondent No.4. It is urged that the Government

has taken a decision on the representation, which was submitted by the appellant and the decision of the Government may be right or wrong but the

same would not affect the decision with regard to the grant of contract in favour of respondent No.4.Â Â It is further submitted that the Government

has decided to grant the contract in question in favour of the respondent No.4 after examining the eligibility of the respondent No.4.Â It is also urged

that there is no need of affording an opportunity of hearing to the appellant before rejecting the representation and awarding the contract to respondent

No.4 and principles of natural justice did not apply at the precontract stage.Â It is also contended that the bids of the appellant as well as respondent

No.4 have been adjudged by the same yardstick, and in any case there has been substantial compliance with the terms and conditions of the contract

by the respondent No.4 and since 31.03.2018, it has successfully executed the contract for the past nearly four months.Â Learned senior counsel for

the respondent No.4 has also invited the attention of this Court to the verification conducted by the Committee on 31.03.2018.Â It is also pointed out

that respondent No.4 had offered the rebate of 30.60% in the price bid, whereas, the appellant had only offered rebate of 15.80%.Â Therefore, there

is an element of public interest involved in the grant of contract in favour of respondent No.4 as the public exchequer would be saved by awarding the

contract to respondent No.4, who is admittedly the lowest bidder.Â In support of his submissions, learned senior counsel for respondent No.4 placed

reliance on Central Coalfields Ltd. & Anr. vs. SLL-SML (Joint Venture Consortium) & others, (2016) 8 SCC 622.Â Â

11) Learned Additional Advocate General representing respondent Nos.1 to 3 while adopting the submissions made on behalf of respondent No.4, has

submitted that on account of ad-interim order passed by this Court the public exchequer has suffered.Â Attention of this Court has also been invited

to Clauses 17 and 22 of the Notice Inviting tender and it has been urged that before awarding the contract to respondent No.4, the respondent No.2

has recorded the satisfaction about eligibility of respondent No.4 as per terms and conditions of the contract.Â In support of his submissions, learned

Additional Advocate General placed reliance on the decision of the Supreme Court in the case of G. J. Fernandez vs. State of Karnataka and others,

(1990) 2 SCC 488.

12) By way of rejoinder reply, learned counsel for the appellant submitted that as per terms and conditions of the NIT the bidder was required to own

25 vehicles and 100 vehicles should have remained attached with him on the date of submission of the bid.Â The bidder was also have required to

have requisite turnover of 50.00 Crores in 5 years or 5 years' work experience of supplying goods.Â In this connection, learned counsel for the

appellant has invited the attention of this Court to Clause 2(o), (s) and (t) of the Notice Inviting Tender and has submitted that the list of trucks which

was attached with the bid, was required to be certified by the Regional Transport Officer.Â It is also argued that the financial bid was required to be

opened only after evaluation of the technical bid, which was to be done after scrutinizing the documents.Â It is further submitted that the respondent

No.4 did not have the requisite number of trucks, therefore, it was ineligible to participate in the process of tender.Â Attention of this Court has also

been invited to the information obtained by the appellant under the Right to Information Act and it has been pointed out that at the time of submission

of bid, the respondent No.4 had furnished the list of 71 vehicles and had given the number of vehicles which were attached with Bombay Kashmir

Transport Service and the respondent No.4 neither had 100 vehicles nor had the turnover as required under the terms and condition of the Notice

Inviting Tender.Â Lastly, it is urged that respondent No.2 before issuing work order ought to have asked Jammu and Kashmir State Road Transport

to supply trucks and on failure of Corporation to supply trucks, could have issued the order for supply of trucks in favour of respondent No.4.

Relevant conditions of Notice Inviting Tender:

13) Before proceeding further, it is appropriate to refer the relevant clauses of the Notice Inviting Tender, which read as under:-

Â â??3.Â Â Â Scope of Contract

Â To qualify for Bid, bidders must have following Technical qualification).

Â Cover-I (Technical Bid)

Â It should contain the following details:

â?¦â?¦â?¦â?¦â?¦.â?¦â?¦.

(o) The turnover during the last one year (exclusively on account of goods carriage through trucks) should not be less than Rs.10.00 crore accrued in

a year for the last 5 years (Copy of Balance Sheet, Profit & Loss Account, duly audited for the last five years).Â

â?¦â?¦â?¦â?¦â?¦â?¦â?¦â?¦â?¦â?¦.

(s) The tenderer should have minimum five years experience for carrying of goods/commodities to any Government Department/ Corporation/Semi

Government/enterprises. (Note:Â The experience certificates should be supported by relevant work orders and its successful execution &

completion, issued by the competent authority of the executantsâ?? department/ agency).Â

(t) List of trucks with proper registration number duly Authenticated by competent transport authority.Â

(u) Every participating bidder must have a minimum fleet of 50 Heavy Commercial Vehicles (Trucks) of minimum pay load 9 MTs owned by him with

valid documentary proof.Â Moreover, the bidder should also have at least 100 heavy commercial vehicles (Trucks) attached with this own fleet.Â

Hard copies of the relevant RCs/Route Permits/Certificate of attachment issued or list certified by the concerned RTO shall have to be

submitted/uploaded alongwith the Technical Bid (Details as per Annexure â?? Aâ??).Â

â?¦â?¦â?¦â?¦â?¦â?¦â?¦â?¦â?¦â?¦.

Cover-II (Financial Bid)- Checklist as Annexure B to theNIT Financial Bid in the format of BOQ, uploaded on the site for supply of Trucks for

Transportation of Goods 2016-17 & 2017-18.Â The Financial bid of those tenderers only shall be opened who are found eligible for the same after the

scrutiny of the documents contained in Cover-I (Note. No financial bid will be accepted in Off-Line Mode).Â

Price Bid as per Annexure-C has to be scanned, encrypted and uploaded on the provided website alongwith the tender document.Â Â

It was also stated in clause 7(c) that tenders should be strictly in conformity with the prescribed terms and conditions and should not contain any

conditions other than those prescribed and tenders which deviate from defined terms and conditions are liable to be rejected.Â It was also stated that

during the inspection, if the information details furnished in technical bids by the bidder, is at any stage found false/incorrect, the bidder shall be liable

for disqualification and EMD shall be forfeited and the final decision with regard to the award of contract shall be taken only after the submission of

inspection report by the nominated officer deputed for the purpose.Â

Â With regard to work experience and experience certificate, it was stated in clause 39 (a) to (d), as under:-

39. Work experience and experience certificate:-

a) Tenderer should have at least five yearsâ?? experience of transportation duly obtained from Manufacturer/PSU/Govt. Department/Public Limited

Company/Private Limited Company dealing in the field of fertilizers/Food grains, Cement, Sugar, Coarse grains or any other commodity.Â The

tenderer was required to have executed any of the immediate preceding five years the work of value;

In case of the partnership, only the experience of the firm will be reckoned and for the purpose, the experience of the individual partnership will not be

counted.Â

b) Experience certificate in the proforma prescribed at Annexure-F shall be produced from customers stating proof of satisfactory execution and

completion of the contract(s) besides duly certifying nature, period of contract and value of work handled.Â

c) Every participating bidder must have minimum fleet of 50 heavy commercial vehicles (Trucks) of minimum payload of 9 MT of its own and at least

100 heavy commercial vehicles attached to his own fleet and an affidavit in this regard had to be submitted/uploaded.Â

d) The year for the purposes of experience had to be taken as financial year (1st April to 31st March) excluding the financial year in which tender

enquiry is floated.â??

Legal Principles:

14) After having noticed, the relevant tender conditions, we may advert to the well settled legal principles delineated by catena of decisions of the

Supreme Court. In Raunaq International Ltd. Vs. IVR Construction Ltd., (1999) 1 SCC 492, it has been held that Court should not interfere in

exercise of power of judicial review in dispute between the two rival tenderers in the absence of public interest.Â Similarly view was taken in Sanjay

Kumar Shukla vs. Bharat Petroleum Corpn. Ltd., (2014) 3 SCC 493 and it has been held that the Court should be vigilant against agitation of private

disputes under the writ jurisdiction when there is no improper exercise of power on the part of public authority.Â It has further been held that power

of judicial review has to be exercised only when justified by public interest having due regard to the fact situation of the case.Â In Bakshi Security

and Personnel Services (P) Ltd. Vs. Dev Kishan Computed (P) Ltd., (2016) 8 SCC 446, the Supreme Court summarized the principles with regard to

interference in contractual matters and it was held that power of judicial review cannot be invoked to protect the private interest over the public

interest or to decide contractual disputes.Â It has been further held that before exercising the power of judicial review, the Court must pose to itself

the questions, namely, whether process adopted or decision made is mala fide or intended to favour someone, whether process adopted or decision

made is so arbitrary and irrational that no responsible authority acting reasonably in accordance with law could have reached such a decision and

whether public interest is affected.Â In JSW infrastructure Ltd. Vs. Kakinada Seaports Ltd. (2017) 4 SCC 170, the Supreme Court once again

reiterated the principles of judicial review/interference in contractual matters and held that if decision of the authority suffers from arbitrariness or

perversity, then Constitutional Court can interfere with the decision making process.Â

15) It is well settled in law that discretion to grant largesse including award of jobs, contracts, quotas, license and so on must be structured by rational,

relevant and non- discretionary standard or norms. If the Government departs from such standard or norms, its action would be liable to be struck

down unless the Government can establish that departure was not arbitrary, but was based on some valid principles which in itself was not irrational,

irrelevant, unreasonable or discriminatory (See:Narendra Kumar Maheshwari vs. Union of India, 1990 (Supp) SCC440). It is equally well settled legal

proposition that it is open to the State to prescribe conditions in the tender, prescribing the eligibility criteria and if the State can justify the tender

conditions in the context of particular contract, the Courts will not interfere and whenever there are different alternatives, it is not for the courts to

suggest that a particular alternative is justified. In awarding contract, the public interest is of paramount consideration and there should be no arbitrariness in awarding the contract and all participants in the tender process must be treated alike. In the celebrated case ofTata Cellular vs.Union

of India(1994) 6 SCC 651, the Supreme Court while dealing with the scope of judicial power of review held that it would apply to exercise of

contractual powers by Government bodies in order to prevent arbitrariness or favoritism. It has been held that the ground upon which the

administrative action is subject to control by judicial review is on the grounds of illegality, irrationality and procedural impropriety. It has further been

held that terms of the invitation to tender are not open to judicial scrutiny because invitation to tender is in the realm of contract and more often than

not, such decisions are made qualitatively by experts. It has further been held that 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 quasiadministrative sphere.

However, the decision must not only be tested by the application of Wednesbury principle of reasonableness but must be free from arbitrariness not

affected by bias or actuated by mala fides.Â Â Â Â

16) The principles regarding award of contract were again reiterated by the Supreme Court in Director of Education vs. Educomp Datamatics

Limited, (2004) 4 SCC 19 and it was held that Government must have a free hand in setting the terms of tender and the Courts cannot strike down the

terms of tender prescribed by the Government because it feels that some other terms in the tender would have been fairer, wiser or more logical. The

courts can interfere only if the policy decision is arbitrary, discriminatory or actuated by malice. In Shimnit Utsch India Private Limited vs. West

Bengal Transport Infrastructure Development Corporation Limited, (2010) 6 SCC 303, the Supreme Court while taking note of the law laid down

inAssn. of Registration Plates vs. Union of India(2005) 1 SCC 679, reiterated that State Government has the right to get the right and most competent

person and in the matter of formulating conditions of tender documents, unless the action of tendering authority is found to be malicious and is a

misuse of statutory powers, the tender conditions are unassailable. In Siemens Aktiengeselischaft and Seimens Limited vs. Delhi Metro Rail

Corporation Limited and others, (2014) 11 SCC 288, it was held that tenders floated by the Government are amenable to judicial review only in order to prevent arbitrariness and favoritism and protect the financial interest of the State and the public interest. Thus, the scope of judicial review is

confined as to whether there was any illegality, irrationality or procedural impropriety committed by the decision making authority. It has further been

held that the court cannot sit in appeal over the soundness of the decision made by the competent authority and the Court can only examine whether

the decision making process was fair, reasonable, transparent and bonafide with no perceptible injury to public interest.Â In Centre forPublic Interest

Litigation vs. Union of India(2016) 6 SCC 408 has held minimal interference is called for by the Court of Judicial Review with a decision taken by the

technical experts after due deliberations inasmuch as the Courts are not well equipped to fathom into such domain which is left to the discretion of the

executive. It has further been held that primary and secondary purpose of review is to ensure that administrative bodies act in efficient, transparent,

fair, unbiased manner and keep in forefront public interest.Â Â Similar view has been taken in TANGEDCO vs. CSEPDI- Trishe Consortium, (2017)

4 SCC 318 and Sam Built Well (P) Ltd. Vs. Deepak Builders, (2018) 2 SCC 176.

Findings:

17) In the backdrop of aforesaid well settled legal principles and the relevant Clauses of the Notice Inviting Tender, the facts of the case in hand may

be examined. The appellant has assailed the grant of contract in question in favour of respondent No. 4 inter alia on the following grounds:-Â Â Â

(i) The respondent No 4 submitted a list of 26 vehicles owned by him which was supported by an affidavit, but the same was not attested by the

Regional Transport Officer.

(ii) The respondent No. 4 submitted a list of vehicles attached with it which was supported by an affidavit, however, the same was not

certified/attested by the Regional Transport Officer.

(iii) The work experience certificate furnished by respondent No. 4 was not complete as per the requirement of NIT, as the respondent No. 4 has

produced the experience certificate of five years, but has not produced any experience certificate for the year 2014-2015 and has produced the

certificate for the year 2010-2011, which could not be taken into consideration.

(iv) The respondent No. 4 did not have the turnover of Rs. 10.00 Crores in each of the preceding five years and did not have the overall turnover of

Rs. 50.00 Crores in preceding five years.

(v) The financial bid of respondent No. 4 was opened by the committee despite the fact that the appellant had submitted a representation dated

24.05.2017 and without decision on the representation of the appellant, the financial bid of respondent No. 4 should not have been opened on

25.05.2017.Â Â

(vi) The respondent No. 4 neither had 100 trucks attached to it nor the tender committee verified the factum of attachment of the trucks as laid down

in Clause 22 of the NIT.Â Â Â

(vii) From the affidavit dated 27.03.2018 submitted by the respondent No.4 itself, it was evident that it did not have 100 vehicles attached to it at the

time of submission of its bid and subsequently a fresh bid was submitted by respondent No. 4 which was accepted by the respondent Nos.1 to 3 which

is impermissible in law as in view of the terms and conditions of the NIT.Â Â

(viii) The Commissioner/Secretary to Government, Food Civil Supplies and Consumers Affairs Department did not decide the representation submitted

by the appellant as per the directions issued by this Court in OWP No. 731/2017.Â Â Â Â Â Â

18) Now we may proceed to deal with the grounds of challenge ad-seriatim. The fact that respondent No. 4 was the owner of 25 trucks has neither

been questioned by the appellant nor by the official respondents. Therefore, the fact that the respondent No. 4 at the relevant time was the owner of

25 trucks in question is beyond any pale of controversy. From careful scrutiny of Clause 3(u) of the NIT, it is evident that the requirement of at least

having 100 vehicles attached with the fleet of the bidder was required to be established by furnishing the hard copies of the relevant RCâ??s/Route

Permits/Certificate of attachment issued by concerned RTO. The aforesaid documents were required to be submitted with the technical bid. The

respondent No. 4 had produced the hard copies of registration certificates of the vehicles and had also produced the affidavits in support thereof.

Therefore, submission of the list certified by the concerned RTO by a tenderer was an optional requirement of the Notice Inviting Tender, and the

bidder could establish the fact of having 100 vehicles attached to its fleet either by submitting hard copies of RCâ??s/Route Permits/Certificate of

attachment issued or list certified by the concerned RTO. The aforesaid requirement of having 100 trucks attached to the fleet of the bidder would

have been fulfilled on furnishing of any of the aforesaid documents, which has been done in the instant case by respondent No. 4.Â For the facility of

reference, we may refer to Clause 18(b) of the NIT which reads as under:-Â

Â â??Self-attested certificate Nos. of vehicles attached with the company/firm along-with list of valid proof of attachment. Notary attested Xerox

copies of Route Permits/RCs or the certificates of attached from the concerned RTO.â??Â

Thus, it is axiomatic that the tender notice did not require that list of vehicles furnished by a bidder should be certified by the RTO alone.

19) Clause 39 of the notice inviting tender provided that the tenderer should have at least five years of experience of transportation to be obtained

from specified entities. The aforesaid clause further provided that tenderer should have executed in any of the immediate preceding five years the

work of value of contract. It is pertinent to mention here that under Clause 39(a) of the NIT, the tenderer was required to possess five years of

experience of transportation of food-grains. Thus, the experience of five years in transportation of food-grains could have been in any period and not

necessarily preceding five years from the date of Notice Inviting Tender, but during these years the tenderer should have executed the work of value

of contract which, according to the tender notice was Rs. 30.00 Crores. The respondent No. 4 had already executed the work worth Rs. 30.00

Crores. The official respondents have in this regard taken a stand in the following terms:-Â Â

â??Moreover, the bidder has also submitted the documents with regard to the five year experience of the firm in transportation of food-grains.â??Â

Thus, the official respondents have recorded their satisfaction that respondent No. 4 had the requisite experience and had also executed the work of

value of contract within last five years.Â Â Â Â Â

20) In the amended terms and conditions of the Notice Inviting Tender, it was provided that annual turnover of the tenderer shall be Rs.10.00 Crores

in a year and Rs.50.00 Crores for last five years instead of accruing in a year for last five years. Thus, the requirement of turnover of a tenderer was

Rs.10.00 Crores in a year or Rs.50.00 Cores in last five years. In other words, the turnover of a firm in a particular year may be less than 10.00

Crores, but in any case, it had to be Rs.50.00 Crores in last five years. The respondent No. 4 had turn-over of Rs.50.00 Crores for last five years

which was certified by the Director, Food Civil Supplies and Consumer Affairs Department in the communication dated 29.05.2015. The requisite

certificates were also produced by respondent No. 4 to show that its turnover for last five years was more than Rs.50.00 Crores. Therefore, it is

evident that respondent No. 4 had satisfied the conditions with regard to turnover as provided in the Notice Inviting Tender.Â Â Â

21) As per the schedule mentioned in the Notice Inviting Tender, the financial bids were required to be opened on 25.05.2017 i.e., the next day after

the opening of the technical bid. Therefore, the opening of the financial bid could not have been deferred in view of Clause IV of the Notice Inviting

Tender which specifically provided that bids will be opened online as per the time schedule mentioned in paragraph No. 1. It is also pertinent to note

that remedy of filing the representation is non-statutory remedy and none of the terms and conditions of the Notice Inviting Tender provide for

submission of such a representation. Therefore, mere filing of representation by the appellant could not have detained the official respondents from

opening the financial bid as per the terms and conditions of the Notice Inviting Tender, particularly taking into account the nature of contract i.e.,

supply of food-grains in various districts of Kashmir province which has an element of public interest in it and such a contract cannot brook any

further delay.Â Â Â Â

22) So far as the issue with regard to availability of the trucks with the respondent No. 4 at the time of submission of the bid is concerned, from the

perusal of the record, it is evident that the list of trucks was furnished by the respondent No. 4 along-with hard copies of registration certificates. On

opening of the technical bid on 24.05.2017, the technical bids of appellant and respondent No. 4 were found to be responsive to the Notice Inviting

Tender and after the opening of the financial bid on 25.05.2017, the respondent No.4 was found to be the lowest bidder. Thereafter, the verification of

fleet of trucks would have taken place in terms of Clause 22 of the Notice Inviting Tender thereafter an order granting contract to the respondent No.

4 would have been issued. However, on 31.05.2017, the appellant approached this Court by filing a writ petition, namely, OWP No.731/2017 and

learned Single Judge by an order dated 31.05.2017 directed that status quo with regard to the Notice Inviting Tender in question be maintained by the

parties.Â In view of the aforesaid order, no action with regard to verification of trucks could be taken by the respondent Nos.1 to 3. However, on

07.06.2017, the Financial Advisor asked the Director, Department of Food, Civil Supplies and Consumer Affairs to inspect and cross check the list of

vehicles submitted by respondent No. 4 and also to obtain cost analysis of the offer price. From perusal of additional affidavit filed by respondent No.4

in OWP No. 731/2017, it is axiomatic that the inspection as per Clause 22 of the Notice Inviting Tender was conducted by the official respondents on

06.07.2017 and 07.07.2017. Eventually, after the decision of the writ petition namely OWP No. 731/2017 on 16.03.2018, the Director, Department of

Food, Civil Supplies and Consumer Affairs, directed that formal order of allotment of contract be issued in favour of respondent No. 4 after

assessment of fleet of trucks. The official respondents satisfied themselves with regard to the fact that respondent No.4 possessed 100 trucks and

thereafter the order of allotment was issued in favour of respondent No. 4. Thus, from our narration of facts, it is evident that the process under

Clause 22 of the Notice Inviting Tender could not be undertaken by the official respondents as the appellant approached this Court in which an ad-

interim order was passed on 31.05.2017 and the aforesaid order remained in force till the decision of the writ petition i.e., till 16.03.2018. Therefore,

the respondent No. 4 was required to furnish another list of vehicles showing that 100 vehicles are attached to its fleet. The appellant, therefore,

cannot be allowed, now to contend that respondent No. 4 did not have the fleet of 100 vehicles at the time of submission of his bid or that he submitted

a new bid, as no party can be allowed to suffer due to pendency of proceeding before this Court.Â Even otherwise the aforesaid fact cannot be

verified at this point of time.Â An order of status quo was granted at the instance of the appellant in the writ petition due to which the verification of

the list of trucks submitted by respondent No. 4 could not be undertaken. It is pertinent to mention here that the object of requirement of having 100

vehicles attached in the fleet is to ensure availability of trucks for supply of food-grains. There is no requirement in the Notice Inviting Tender that if a

particular truck is mentioned in the list furnished to the Contract Awarding Committee in May 2017, the same list alone was required to be verified even after a year. Under the terms and conditions of Notice Inviting Tender, it is the number of trucks which are required to be kept available and not

any particular truck. Therefore, in the peculiar fact situation of the case, no fault can be found with the action of respondent Nos.1 to 3 in awarding

the contract in question in favour of respondent No.4.Â Â

23) So far as the conditions of the appellant is that the Commissioner/Secretary did not decide their representation as per the directions of this Court in

OWP No. 731/2017 is concerned, we need not dilate on this aspect any further except for stating that the respondent Nos.1 to 3 had found the

technical bid of respondent No.4 to be suitable on 24.05.2017 and aforesaid decision of the Contract Awarding Committee was not invalidated by this

Court. Subsequently, after the intervention of this Court, the issue with regard to availability of trucks with respondent No. 4 was again examined and

it was found that respondent No.4â??s technical bid was suitable inasmuch as it owned 25 trucks and its turnover was more than Rs.50.00 Cores in

last five years and it had the fleet of 100 trucks attached with it and respondent No.4 possessed the requisite experience. Thus, while deciding the

representation the Director satisfied itself with regard to fulfillment of all terms and conditions of Notice Inviting Tender by respondent No.4. In case

the appellant is of the opinion that the representation has not been decided, as per the directions issued by this Court, at best, the appellant would be

entitled to file the proceeding for contempt against the Commissioner/Secretary by way of an independent proceeding.Â However, even assuming

that the Commissioner/Secretary did not decide the representation submitted by the appellant as per the directions issued by this Court in OWP No.

731/2017, the same would not per se invalidate the decision of the official respondents to award the contract in favour of respondent No. 4.

24) So far as the submissions made on behalf of the appellant that there is no mention of physical verification of fleet of trucks in the reply/objections

of the respondents is concerned, it is pertinent to note that the first order was passed on 07.06.2013 with regard to the verification of the trucks.

Thereupon, a Committee was constituted to inspect the trucks of respondent No. 4 on 06.07.2017. However, on account of pendency of the writ

petition before this Court, no further action in the matter could be taken and after the decision was rendered in OWP No. 731/2017, the Government directed the Director, Consumer Affairs and Public Distribution Department to carry out the physical verification of the trucks. Thus, when the

objections were filed in OWP No. 731/2017, there was no complete verification of the trucks done by official respondents, but when the writ petition

out of which this appeal arises was filed, there was verification of the trucks which is mentioned in the order dated 31.03.2018. The order dated

31.03.2018 expressly makes mention of the verification done by the Committee on the instructions of the Government dated 29.03.2018.Â Â Â Â Â

25) The nature of contract in question is executory in nature. The contract requires the successful bidder to transport the food-grains in Kashmir

province. The contract as an element of public interest as its purpose is to ensure availability of food-grains to public in general in various parts of the

Kashmir Division. It is noteworthy that respondent No. 4 had offered a rebate of 32.60% as against the rebate offered by the appellant of 15.85%.

From perusal of communication dated 21.12.2017 addressed by Director, Consumer Affairs and Public Distribution Department to the Additional

Advocate General, it is axiomatic that Department of Food, Civil Supplies and Consumer Affairs, was suffering loss to the extent of Rs.5.00 lacs per

day, as per the rates quoted by respondent No. 4. Thus, by accepting the offer of respondent No. 4, the additional cost of Rs.36.00 Crores has been

saved by the Government, whereas, if the rate of the appellant is accepted, the Government would have suffered the loss of Rs.21.00 Crores in view

of the rates quoted by respondent No. 4. Thus, the element of public interest also tilts in favour of respondent No. 4.Â For this reason also no case

for interference in exercise of powers of judicial review in the fact situation of the case is made out as the dispute essentially pertains between two

tenderers.

26) So far as reliance is placed by the learned counsel for the appellant in the case of Monarch Infrastructure Private Limited v. Commissioner Ulhas

Nagar, Municipal Corporation & Ors. (supra) is concerned, in the said decision, Bombay Provincial Municipal Corporation had deleted the applicability

of Clause 6 (a) of the Notice Inviting Tender and the bidders had submitted their tenders before deletion of the said Clause. The Municipal

Commissioner awarded a contract to one of the tenderers on the basis of the deleted Clause. The Supreme Court, therefore, found fault with the procedure adopted by the Corporation and held that only alternative was to initiate a fresh process of tender. Therefore, the aforesaid decision is of no

assistance to the appellant in the facts of the case. Similarly, the reliance is placed in the case of Kesar Enterprises Limited v. State of UP & Ors.

(supra) is concerned, there is no requirement of rules of natural justice being followed at pre-contract stage. No opportunity of hearing was required to

be afforded to the appellant before granting the contract in favour of the respondent No.4. Therefore, the aforesaid decision also does not apply to the

facts of the case.Â In the instant case, the only question to be examined is whether respondent No. 4 had satisfied the requirements of technical

qualification. The Contract Awarding Committee after evaluation of the technical bid of respondent No.4 found it to be suitable. The eligibility of the

respondent No. 4 was examined by the Director, Food Civil Supplies and Consumer Affairs Department as well as the State Government.Â In so far

as submission that before issuing work order, Director, Food Civil Supplies and Consumer Affairs Department, should have asked the Jammu and

Kashmir State Road Transport Corporation to supply trucks is concerned, suffice it to say, that the same was neither urged before the learned Single

Judge nor any ground has been taken in this appeal.Â Therefore, the same cannot be permitted to be urged for the first time in this appeal, in view of

law laid down inAbhishek Kumar vs. Hindustan Petroleum Corpn. Ltd., (2016) 12 SCC 308.Â So far as nonsupply of report of the Committee to the

appellant is concerned, the same has not caused any prejudice to the appellant as the report of the Committee was to be considered by the Committee,

which on due consideration has taken a decision to award the contract in favour of the respondent No.4.Â This Court cannot sit in appeal over the

decision taken by the Contract Awarding Committee in exercise of powers of judicial review. The decision to award the contract in favour of

respondent No. 4 in the facts and circumstances of the case neither suffers from arbitrariness nor favouritism. The decision does not suffer from any

illegality, irrationality or procedural impropriety. In Sanjay Kumar Shukla, (supra) the Supreme Court has sounded a word â??cautionâ? that Court

should be vigilant against agitation of private disputes under the writ jurisdiction when there is no improper exercise of power on the part of the public

authority. It has further been held that the power of judicial review has to be exercised only when justified by public interest, having due regard to the fact situation of the case.Â Â Â Â Â Â Â Â Â Â Â Â Â

27) In the instant case, we are satisfied that while accepting the offer of respondent No. 4, there has been no improper exercise of power by the

respondent Nos.1 to 3.Â The decision to award the contract in favour of respondent No.4 neither suffers from any arbitrariness, irrationality, illegality,

perversity nor malafides.Â In case, the contract awarded to respondent No. 4 is set aside, the public interest would be adversely affected as the

public exchequer would suffer. It is pertinent to mention here that the respondent No. 4 has been awarded the contract on 31.03.2018 and has

successfully executed the contract to the satisfaction of the official respondents for the past about more than three months.Â Therefore, for this

reason also, no case for interference is made out.Â We, therefore, agree with the conclusion arrived at by learned Single Judge but for different

reasons which have been stated supra.Â Â Â Â Â Â

28) In the result, we do not find any merit in the appeal, the same fails and is hereby dismissed.

