

**(2007) 09 J&K CK 0002**  
**In the Jammu And Kashmir High Court**

|                                     |    |            |
|-------------------------------------|----|------------|
| Royal Constructions                 | Vs | APPELLANT  |
| IRCON International Ltd. and Others |    | RESPONDENT |

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**Date of Decision :** 13-09-2007

**Acts Referred:**

Constitution of India, 1950 — Article 14

**Citation :** (2008) 1 JKJ 115

**Hon'ble Judges :** Mansoor Ahmad Mir, J

**Bench :** Single Bench

**Final Decision :** Dismissed

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## Judgement

Mansoor Ahmad Mir, J.—By this common judgment, I am going to dispose of both the above titled writ petitions.

2. Sealed open tenders were invited on two packet system on prescribed form from bonafide Kashmiri firms/companies/joint ventures in terms of

tender notice-annexure-A for execution of the work, description of which is given in annexure-A. After receiving the technical and the financial bids

in two envelops, the technical bids were opened on 19th of July, 2007 and the writ petitioners-firms were found to be the lowest tenderers for the

two works A and B indicated in the tender notice-annexure-A and accordingly respondent No. 3 vide communication-annexure B asked writ

petitioners to attend the office of respondents on 2nd of August, 2007 but the respondents avoided to open the financial bid on 2nd of August,

2007 and on questioning /enquiry it was made to understand that negotiation would be held in order to bring down the rates in terms of Clause-

13.0 containing in instructions to tenderer/s but came to know that fresh tender notice-annexure-C came to be issued on 21st of August 2007

relating to the same work. The writ petitioners challenge the tender notice dated 21st of August, 2007 on the ground that it has adversely affected

the rights of the petitioners and their tenders came to be wrongly rejected though being the lowest tenderers. It is prayed that the impugned tender

notice dated 21st of August, 2007 be quashed and the respondents be directed to allot the work in terms of the tender notice-annexure-A to the

petitioner.

3. Respondents have resisted the petition on the ground that Kashmir Railway Project has been declared as National Project; the Qazigund-

Baramulla railway line is to be completed in 2007-08 and any delay in its completion would be against the public interest and will adversely affect

the economy of the State. The writ petitions are also not maintainable on the ground that issuance of fresh NIT in respect of the work in question is

purely in the public interests and came to be issued just to protect the financial interests of the railways and public exchequer. It is based on expert

opinion.

4. In terms of Clauses 2.0 and 12.0 of instructions to the tenderers-part of the tender document, the IRCON has a right to reject the tenders and it

is not under legal obligation to tender an explanation and the tenderer has no right to seek explanation for rejection of any tender. Lowest

tenderers-petitioners have quoted rates 70% above and that is against the interests of public and that is why the fresh tender notice came to be

issued. Central Vigilance Commission has specifically provided and prescribed that there should be no post tender negotiations with lowest

tenderer except in certain exceptional circumstances and situations and those circumstances and situations are described and enumerated in the

said instructions-RI. The work-subject matter of the tender does not fall within the exceptions carved out and mentioned in RI.

5. The respondents have also rejected the tender of the petitioner-Royal Constructions on the ground that it had not complied with the Clauses 9.1

and 9.3 of the instructions to the tenderers for the reasons that it has not deposited the earnest money in terms of the tender notice.

6. Heard. The sole question involved in this writ petition is that whether the petitioners can question the rejection of his tender being the lowest and

could they question the issuance of fresh tender-annexure-C?

7. In order to reply this question, it is necessary to reproduce herein what was the cause for re-tendering the work.

8. It is profitable to reproduce the relevant portion of the reply submitted by respondents 1 to 3 herein:

5-6...The rate value of the tender was Rs. 1.24 Crores. The tenderer M/S Rather Brothers Construction Co., had quoted total Rs. 1.89 Crores. It

was observed by the Technical Committee that the rates quoted by the petitioner were very high, unreasonable and therefore, unacceptable. It was

also observed by the Technical Committee that the rates may be high due to poor competition.

As per Central Vigilance Commission (copy enclosed), "it was directed that there should no post-tender negotiations with L-1, except in certain

exceptional situations. Such exceptional situations would include procurement of proprietary items, items with limited sources of supply and items

where there is suspicion of a cartel formation". It was noticed that such situation do not seem in this case.

It was decided, that as around 41 quarters are already completed and balance around 50 are in progress and will be completed shortly. Hence re-

tender is to be done to explore the possibility of reduction in rate. Hence the tender was discharged.

In this connection it is also to be submitted that lowest tenderer/petitioner had quoted a rate of 70% above for Schedule "A" which is major value

item (74.71 lakhs out of Rs. 1.24 Crores) generally accepted rates for building work for Schedule "A" are 40 to 50% above. Open tender has

been called again, on 21.08.2007 and is scheduled for opening on 06 09.2007. It is re-submitted that in terms of Clause 2.0 and Clause 12.0 of

the instructions to the tenders (which is the part of the tender document and duly accepted by the tenderer), it has been clearly mentioned that

IRCON reserves the right to deal with tenders and also it has been made obligatory not to demand explanation for cause of rejection of any

tender.

9. Learned Counsel for the respondents also produced the copy of letter indicating the details of fresh tenders and it appears that reply is based on

the said document. While going through the reply as well as the document produced, it Appears that main cause for rejecting the tenders of the

petitioners though being the lowest tenderers was purely in the public interest because the rates quoted by the lowest tenderer were quoted 70%

above. In terms of the Clause 2.0 and 12.0 contained in instructions to the tenderer/s, the respondents are empowered and within their rights to

reject wholly or partly any tender or all tenders without assigning any reason and it is also not obligatory on the part of the authority to assign

reasons. It is profitable to reproduce Clauses 2.0 and 12.0 of the instructions to the tenderer/s herein:

## 2.0 RIGHT OF IRCON TO DEAL WITH TENDERS:

IRCON reserves the right of not to invite tenders for any work or works, to invite open or limited tenders and when tenders are called to accept a

tender in whole or in part or reject any tender or all tenders without assigning reasons for any such action.

## 12.0 GROUNDS FOR REJECTION

It shall not be obligatory on the Accepting Authority to accept the lowest tender and no tenderer/tenderers shall demand any explanation for the cause of rejection of his/her tender.

10. It appears that due to poor response and competition, the respondents have rejected the tenders of the petitioners solely on the ground that

rates quoted were exorbitant and high and are against the public interests. Keeping in view the relevant clauses contained in the instructions to the

tenderer/s, I am of the considered view that respondents-concerned authority was within its powers, competence and jurisdiction to reject the

tender and issue fresh tender-re-tender the work in the interests of public. The lowest tenderer has no right to challenge the same and cannot

compel the concerned authority to assign the reasons. Apex Court in case titled Tata Cellular Vs. Union of India, has taken the same view. It is

profitable to reproduce para-85 of the said judgment herein:

85. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to

prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review.

Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or

any other tender is always available to the Government. But, the principles laid

down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

11. It is not the case of the petitioners that respondent authorities have exercised the power for any collateral purpose. The purpose assigned is only the public interest. The petitioners have neither pleaded specifically malafides nor have arrayed any such person in personal capacity as party respondent against whom malafides would have been alleged/attributed.

12. Apex Court also in case titled Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others, has held that terms of invitation to tender are not open to judicial scrutiny. Administrative-policy decisions cannot be questioned and the courts would interfere with the administrative policy decisions only if it is arbitrary, discriminatory, mala fide or actuated by bias. It is profitable to reproduce paras 9 and 12 of the said judgment herein:

9. It is well settled now that the Courts can scrutinize the award of the contracts by the Government or its agencies in exercise of its powers of judicial review to prevent arbitrariness or favouritism. However, there are inherent limitations in the exercise of the power of judicial review in such matters. The point as to the extent to judicial review permissible in contractual matters while inviting bids by issuing tenders has been examined in depth by this Court in Tata Cellular v. Union of India 1994 (6) SCC 651. After examining the entire case law the following principles have been reduced.

94. The principles deducible from the above are:

- (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 of reasonableness (including its other facts 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.

12. It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny the same being in the realm

of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary

concomitant for an administrative body in an administrative sphere. The Courts would interfere with the administrative policy decision only if it is

arbitrary, discriminatory, mala fide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular

circumstances. The Courts cannot strike down 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. The Courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.

13. Apex Court in case titled Noble Resources Ltd v. State of Orissa, reported as 2006 AIR SC 5408 laid down the principle in which

circumstances, the court can interfere in contractual matters and when and how judicial review is permissible. It is profitable to reproduce para-15

and 30 of the said judgment herein:

15. It is trite that if an action on the part of the State is violative of the equality clause contained in Article 14 of the Constitution of India, a writ petition

would be maintainable even in the contractual field. A distinction indisputably

must be made between a matter which is at the threshold of a contract and a breach of contract; whereas in the former the court's scrutiny would be more intrusive, in the latter the court may not ordinarily exercise its discretionary jurisdiction of judicial review, unless it is found to be violative of Article 14 of the Constitution. While exercising contractual powers also, the government bodies may be subjected to judicial review in order to prevent arbitrariness or favouritism on its part. Indisputably, inherent limitations exist, but it would not be correct to opine that under no circumstances a writ will lie only because it involves a contractual matter.

30. Another field where judicial review is permissible would be when mala fide or ulterior motives is attributed. In *Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others*, , this Court held:

...We are of the considered opinion that it was not within the permissible limits of interference for a court of law, particularly when there has been no allegation or malice or ulterior motive and particularly when the court has not found any mala fides or favouritism in the grant of contract in favour of the appellant....

14. Apex Court also in case titled *B.S.N. joshi & Sons Ltd. v. Nair Coal Services Ltd.* reported as 2006 AIR SCW 5834 laid down the same principle. It is profitable to reproduce para-57 of the said judgment herein:

57. It may be true that a contract need not be given to the lowest tenderer but it is equally true that the employer is the best judge therefore; the same ordinarily being within its domain, court's interference in such matter should be minimal. The High Court's jurisdiction in such matters being limited in a case of this nature, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record.

15. Keeping in view the ratio laid down in the said judgments, the court's can interfere when the public interest is involved and the action of the authority concerned is affecting the public interests in any way. Applying the test to the instant case, the respondents have rejected tenders while exercising powers in terms of the instructions (supra) only on the ground that rates quoted were against the public interests. Tenderer has no right in

terms of the instruction (supra) to demand an explanation for the cause of rejection of tender(s).

16. The respondents have specifically averred that there cannot be post tender negotiation because the case of the petitioner does not fall within

the exception given in the circular issued by Central Vigilance Commission-RI. Thus the expert opinion, could not be questioned.

17. The respondents have also rejected the tender of the petitioner-Royal Constructions also on the ground that tenderer has not complied with the

terms contained in Clauses 9.1 and 9.3 of the instructions to the tenderers. It is profitable to reproduce the said clauses herein:

#### 9.1 MODE OF EARNEST MONEY:

In respect of this work, the tender must be accompanied with an Earnest Money Deposit for a sum as prescribed in tender notice in any of the

forms mentioned below failing which the tender will not be considered and will be summarily rejected. The EMD shall be valid for at least the

validity period of offer unless otherwise specifically indicated and shall be extended if required for by IRCON.

(i) By a Demand Draft/Pay Order from any Scheduled Bank in India in favour of IRCON International Ltd., payable at New Delhi.

(ii) By a Fixed Deposit Receipt issued by any Scheduled Bank in India endorsed in favour of IRCON International Limited, New Delhi.

9.3 Tenders not accompanied with earnest money deposit shall be summarily rejected.

18. Admittedly, it has not deposited the earnest money in terms of the tender notice. Thus, only on this ground its tender was to be rejected.

19. In view of the above discussion, I am of the considered view that petitioners have not carved out a case for admission. Accordingly, the writ

petitions are dismissed along with all connected CMP(s). Interim direction, if any, shall stand vacated.