

(2023) 12 J&K CK 0061

In the Jammu And Kashmir High Court

Case No : ?Latters Patent Appeal No. 49 Of 2022, Civil Miscellaneous Case No. 3419 Of 2022, 4028 Of 2023

Tarlochan Singh And Others

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 29-12-2023

Acts Referred:

Constitution Of India, 1950 — Article 226

Citation : (2023) 12 J&K CK 0061

Hon'ble Judges : Tashi Rabstan, J;Rajesh Sekhri, J

Bench : Division Bench

Advocate : Rahul Pant, Arushi Shukla, Anuj Dewan Raina, Abhishek Wazi

Final Decision : Dismissed

Judgement

Tashi Rabstan, J

1. The instant appeal has been filed against the judgment dated 13.05.2022 passed in WP(C) No. 1776/2021 titled Tarlochan Singh and others V. Union of India and others whereby the learned Writ Court has refused to quash the Notice dated 20.08.2021 and dismissed the writ petition. Although without conceding to the prayer of the writ petitioners-appellants herein to allot additional requirement of Tank Trucks (TTs) yet the Writ Court granted liberty to respondent No.2-Corporation to consider their grievance as projected by them in the writ petition if the TTs are still required by them.

2. Factual matrix of the case, as is gatherable from perusal of the file, is that the respondents floated a Tender Notice No.RCC/NR/PSO/OPS/ PT-141/ 20-21 for transportation of bulk petroleum products by road for advanced winter supplies (AWS) for bulk Oil Storage and handling location in J&K (UT) for a period of three years with an option for extension up to further two years but at the sole discretion of the Corporation. As per clause 1.4 of NIT, the tenderer had to offer minimum three number of TTs in case of General and General MSE tenders and

minimum two numbers in case of SC/ST. The tenderers had to participate with ready built TTs as well as with Purchase Invoice chassis. The writ petitioners-appellants, claiming to be eligible, participated in the tendering process and their rates were found as Lot-1 as the rates were quoted per KL/Km. In the Reverse Auction process, the tenderer was allowed to place his offer in terms of the percentage of the departmental estimate displayed on the portal and the band allowed for the same was 0% to -10% of the departmental estimate.

3. Before the Writ Court, the case projected by the writ petitioners-appellants in their writ petition was based on the claim that upon issuance of tender notice by respondent No.2, they participated in the bidding process for supplying TTs of 12-14KL capacity in the contract in question for advance supply and writ petitioners-appellants were also placed in Lot-1 of the lot system prescribed by the respondent No.2 in the NIT. The writ petitioners-appellants further projected that since engagement of the contractors was in the order, as prescribed in the NIT as per the ranking system evolved by the respondent No.2, as such, whatever was the shortfall in the TTs was to be fulfilled by allotting the same to the writ petitioners-appellants. Thus, the writ petitioners-appellants aggrieved of the Notice issued by the respondent No.3 dated 20.08.2021 whereby the existing advanced winter supplies transport contractors were asked to offer bids for the additional requirement of TTs (12-14 KL) instead of giving opportunity to the existing transport contractors to provide TTs to meet the shortfall of 25 TTs, had come up with a writ petition.

4. The stand taken by the respondent no.2 in their objections before the Writ Court was that after the closure of the tender, the additional TTs requirement could be offered to the existing contractors who are higher in ranking than the writ petitioners-appellants in Lot-1 prepared in pursuance of the NIT. It was also the case of the respondents that they were within their rights to meet the additional requirement of TTs from the existing dealer/ dealer-transporters as per the provisions of the DOA at established L-1 rates. Learned Single Judge after hearing the parties has rejected the claim of the writ petitioners vide judgment dated 13.05.2022.

5. Learned counsel for the writ petitioners-appellants has reiterated the grounds agitated by him before the learned Single Judge by contending that the judgment is not sustainable in view of the fact that the writ petitioners-appellants were next in the ranking in Lot-1, as such, they were entitled to be given an opportunity to offer their TTs for the additional demand of 25 TTs. Moreover, instead of giving offer to the existing contractors, it is they who should have been given the opportunity.

6. The respondent No.2 in his reply has clearly taken a stand that the tendering process initiated in the year 2020 for the transportation of bulk petroleum products w.e.f. 01.10.2020 or such other date as specified for a period of three years with an option for extension of the same for a further period of two years, was concluded with issuance of letter of intent to the successful bidder in terms

of LOI and subsequently some of the contractors could not meet the requirement or complete various formalities including security deposit, purchase invoice and physical verification of tanks etc., as such, there was shortfall of 25 TTs, thus, compelling respondent No.2 to meet the requirement, for which notice came to be issued on 20.08.2021 and the same came to be challenged before the writ Court.

The respondent No.2 also relied upon Circular dated 20.11.2015 whereby policy has been framed by respondent No.2 in which it is provided that after closure of the tender for any additional requirement of TTs either within the original NIT number or the revised NIT number, additional requirement can be inducted from the existing dealer/dealer transporter/ general transporters as per the provisions of DOA at established L-1 rates. It is relevant to mention here that circular dated 20.11.2015 was never challenged by the writ petitioners-appellants herein.

7. Heard learned counsel for the parties and perused the record.

8. During arguments, learned counsel for the parties submitted that the respondents have issued a Notice dated 14.06.2023 for engagement of 60 TTs as ad hoc requirements at Jammu Depot, which has been challenged by the writ petitioners-appellants in another writ petition No.1706/2023. We have called the record of said writ petition in which grounds of challenge are that notice of engagement of ad hoc requirements of TTs of 60 included 25 TTs that were notified in terms of impugned Notice dated 20.08.2021 and the subsequent notice has been challenged by the writ petitioners-appellants herein before the Writ Court in which the Writ Court vide order dated 03.07.2023 passed detailed order and also passed interim order in the said writ petition.

9. The writ petitioners-appellants in the recently filed writ petition before this Court bearing WP(C) No.1706/2023 have prayed for following reliefs:

(a) an appropriate writ, order or direction in the nature of writ of certiorari quashing the notice dated 14.06.2023 whereby all AWS transport contractors are invited to offer 60 TTs (with valid RTO registration and PESO License) to meet the requirement (12-14KL) on ad hoc basis against tender No.RCC/NR/PSO/OPS/PT-141/20-21 in contravention to the order passed by the Hon'ble Division Bench in LPA No49/2022 titled Tarlochan Singh and others Vs. Union of India and others and the same is arbitrary, irrational, discriminatory seriously infringing the fundamental rights of the petitioners.

(b) For issuance of writ of mandamus commanding the respondents to allot the additional requirement of 60 Nos. of TTs (12-14KL) to the petitioners under transport category at Jammu Depot in pursuance to the terms and conditions of tender No.RCC/NR/PSO/OPS/PT-141/20-21 and in consonance with the directions passed by the Division Bench of Hon'ble High Court of J&K and Ladakh in LPA No.49/2022 titled Tarlochan Singh and others Vs. Union of India and others.

(c) For issuance of Writ of prohibition prohibiting the respondents from allotting

the transportation of 60Nos of (12-14KL) TTs other than the successful L-1 bidders falling in LOT-1 and LOT-2 ranking prepared by the respondents in pursuance to the tender No. RCC/ NR/ PSO/ OPS/ PT-141/20-21 and in consonance with the directions passed by the Division Bench of Hon'ble High Court of J&K and Ladakh in LPA No. 49/2022 titled Tarlochan Singh and others Vs. Union of India and others.

10. The operative part of the interim order in the above said writ petition reads as under:

"In the meantime, in case the Deputy General manager, Jammu Deport of the respondent No.2-Indian Oil Corporation (IOC) Limited intends to carry out the operation of the impugned notice to its operational end, then the Deputy General Manager of the respondent No.2-Indian Oil Corporation (IOC) shall first offer to the petitioners the shortfall supply of the 25 TTs even if it is meant to be on adhoc basis figuring as qualified bidders in Lot-2 by reference to the advertisement no.RCC/NR/PSO/OPS/PT-141/20-21 dated 15.10.2020."

11. Perusal of interim order dated 03.07.2023 passed by learned Single Judge would show that writ petitioners-appellants who had pleaded before learned Single Judge that after existing Lot-1, respondent No.2 has moved to Lot-2 and in this view of the matter, interim order came to be passed. Perusal of the said order further shows that as pleaded by writ petitioners-appellants in the said writ petition that the requirement of TTs advertised vide Notification dated 14.06.2023 was to the extent of 60TTs and the same included 25 TTs that was the shortfall in the earlier bidding process vide NIT dated 15.10.2020. Therefore, it is clear that the writ petitioners-appellants had projected before the Writ Court that the process initiated for additional requirement of 60 TTs included 25 TTs, which is subject matter of the present appeal. A perusal of the interim order passed in the aforesaid case shows that respondent No.2 have been directed to first offer to the writ petitioners-appellants the supply of the shortfall of 25 TTs even if it is meant to be on ad hoc basis figuring as qualified bidders in Lot-2.

12. A perusal of circular dated 20.11.2015 relied upon by respondent No.2 will show that respondent No.2 was well within its right to meet the additional requirement of TTs, either out of the original NIT number or the revised NIT number from the existing dealer/dealer-transporter/general transporters as per the provisions of DOA at established Lot-1 rates and such contractors could be given the offer at established Lot-1 rates. It is not the case of any of the party that Lot-1 rate as fixed in pursuance of the bidding process initiated in the year 2020 has been violated. The contractors, who were already in existing Lot-1 and have been awarded the contract, have been approached for additional requirement of additional 25 TTs by virtue of notice challenged in the writ petition.

13. The contention of the writ petitioners-appellants is that 25 TTs form part of the initial requirement as notified in the NIT, as such, they should have been

offered to the contractors in Lot-1 who had not been earlier awarded the contract, is not correct as in view of the issuance of LOI to the bidder in Lot-1 as per their ranking in the bidding process was over and if some of the selected contractors were not in position to satisfy the respondent No.2, the respondent no.2 was well within its right to offer such additional requirements / shortfall to the existing dealers/dealer-contractors/general transporters, who had already been allotted the contract in pursuance of the bidding process. The writ petitioners-appellants cannot claim any right to be offered the contract as long as they were fairly considered as per ranking system evolved by respondents and the contract was allotted in the order of ranking in Lot-1.

14. Learned counsel for the writ petitioners-appellants has relied upon judgment of the Apex Court in a case titled as Jai Bholenath Construction v. The Chief Executive Officer, Zilla Parishad, Nanded and others reported in 2022 LiveLaw (SC) 542. It may be made clear here that the said judgment is not at all applicable to the facts and circumstances of the present case. The writ petition has not been dismissed on the ground by relying upon the judgment passed in M/s N.G.Projects Ltd. v. M/s Vinod Kumar Jain reported in 2022(5) SCALE 105. The aforesaid judgment deals with a situation where the Hon'ble Supreme Court had interfered with the decision to declare an eligible bidder as ineligible in a flagrant violation of the principles of natural justice. The case is not relevant in the backdrop of present writ petition as the writ petitioners-appellants have not been technically disqualified at any stage, but they claim that they should be offered additional requirement instead of offering the same to the existing contractors.

15. A perusal of the relief claimed in the writ petition shows that impugned in the writ petition was a notice dated 20.08.2021 whereby all the AWS transport contractors of Jammu Depot were informed that there was an additional requirement of 25 Nos. (12-14 KL) TTs under transport category at Jammu Depot against the tender No. RCC/NR/PSO/PT-141/20-21. In the said notice, it was envisaged that all the terms and conditions of the existing tender No. RCC/NR/PSO/PT-141/20-21 would be applicable to the newly offer TTs also. While examining Clause 4 (e) of the general terms and conditions to the original tender, it is clearly stipulated therein that the official respondents can engage additional contractors/TTs at any time without giving any notice whatsoever to the contractor/s already appointed against the Tender, meaning thereby the notice, impugned before the writ court, has been issued strictly as per the general terms and conditions of the original tender. Once the writ petitioners-appellants have participated in the tendering process without throwing any challenge to Clause 4(e) of the General Terms and Conditions, after being unsuccessful at the time of the conclusion of the bidding process initiated by main tender, they cannot be permitted to question the notice impugned in absence of any challenge to the terms and conditions contained in the Notice of 2020.

16. Learned senior counsel for respondents would aver that jurisdiction of the

High Courts under Article 226 of the Constitution of India with regard to challenge to the terms and conditions of a tender is extremely limited and the Supreme Court has held on numerous occasions that fixation of tender conditions is entirely within purview of executive and the Court has little role to play in the tender process except to interfere with such actions of executive which are palpably arbitrary or unreasonable. The Supreme Court has further recognized that the State has prerogative to impose preconditions and/or qualification for bidders to ensure that successful bidder has capacity and resources to successfully execute the awarded contract. In the above context, he submits that writ petitioners have failed to establish as to how arbitrariness has been occasioned at the instance of respondents and thus the appeal is liable to be dismissed. To buttress his arguments, learned senior counsel places reliance on *Michigan Rubber (India) Limited v. State of Karnataka*, (2012) 8 SCC 216; *Meerut Development Authority case* (supra); *Tata Cellular v. Union of India*, (1994) 6 SCC 651; *Monarch Infrastructure (P) Ltd v. Commr. Ulhasnagar Municipal Corporation*, (2005) 5 SCC 287; *Mutha Associates and Ors. v. State of Maharashtra and Ors.*, (2013) 14 SCC 304; and *Maa Binda Express Carrier and another v. North East Frontier Railway and others*, (2014) 3 SCC 760.

17. In *Tata Cellular case* (supra), the Supreme Court examined the scope of judicial review in the case of a tender awarded by a public authority for carrying out certain work. The Court acknowledged that the principles of judicial review can apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism.

However, there are inherent limitations in the exercise of that power of judicial review. The Court also observed that the right to choose cannot be considered as an arbitrary power. After examining a number of authorities, the Supreme Court concluded as by saying that:-

- (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.
- (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 or quasi administrative sphere. However, the decision can be tested by the application of the "Wednesbury principle" of reasonableness and the decision should 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 arid unbudgeted expenditure.

18. A contract is a commercial transaction and evaluating tenders and awarding contracts are essentially commercial functions. After saying this, the Supreme Court in *Jagdish Mandal v. State of Orissa and Ors.*, (2007) 14 SCC 517, has held that 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, the 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.

19. Pointing out that mere disagreement with the decision-making process of the authority is no reason for a Constitutional Court to interfere, the Supreme Court in *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.*, AIR 2016 SC 4305, observed that the owner of a project as author of tender, is best person to understand and appreciate its requirements and interpret its documents and that the Constitutional Courts must defer to this understanding and appreciation of the tender documents and it is possible that the owner may give interpretation to tender documents, which is unacceptable to the Constitutional Courts, but that per se is not a reason for interfering with the interpretation given. The Supreme Court, thus, held:

"13. In other words, a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision making process or the decision.

....

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given."

20. The allegation of mala fides would require a high degree of proof to rebut the presumption that administrative action has been taken bona fide, was laid down as one of the principles governing burden of proof of allegations of mala fides levelled by an aggrieved party. The Supreme Court in *Ajit Kumar Nag v. General Manager (PJ) Indian Oil Corprn. Haldia and others*, (2005) 7 SCC 764, observed thus:

".... It is well settled that the burden of proving mala fide is on the person making

the allegations and the burden is 'very heavy'. (vide *E.P. Royappa v. State of T.N.* [1974 (4) SCC 3]. There is every presumption in favour of the administration that the power has been exercised bona fide and in good faith. It is to be remembered that the allegations of mala fide are often more easily made than made out and the very seriousness of such allegations demands proof of a high degree of credibility. As Krishna Iyer, J. stated in *Gulam Mustafa v. State of Maharashtra* [1976 (1) SCC 800] : 'It (mala fide) is the last refuge of a losing litigant.'

21. The Supreme Court in *State of M.P. and Ors. v. Nandlal Jaiswal and Ors.*, (1986) 4 SCC 566, laid emphasis on the need for furnishing full particulars of allegations suggesting mala fides. The use of words such as 'mala fides', 'corruption' and 'corrupt practice' was held to be insufficient to necessitate an enquiry into such allegations. The Court observed:-

"39. Before we part with this case we must express our strong disapproval of the observations made by B.M. Lal, J. in Paras 1, 9, 17, 18, 19 and 34 of his concurring opinion. The learned Judge made sweeping observations attributing mala fides, corruption and underhand dealing to the State Government. These observations are in our opinion not at all justified by the record. In the first place it is difficult to appreciate how any such observation could be made by the learned Judge without any foundation for the same being laid in the pleadings. It is true that in the writ petitions the petitioners used words such as 'mala fide', 'corruption' and 'corrupt practice' but the use of such words is not enough. What is necessary is to give full particulars of such allegations and to set out the material facts specifying the particular person against whom such allegations are made so that he may have an opportunity of controverting such allegations. The requirement of law is not satisfied insofar as the pleadings in the present case are concerned and in the absence of necessary particulars and material facts, we fail to see how the learned Judge could come to a finding that the State Government was guilty of factual mala fides, corruption and underhand dealing."

22. To the above effect is the decision of the Supreme Court in *Smt. Swaran Lata v. Union of India & Ors.*, (1979) 3 SCC 165. The Supreme Court held that in the absence of particulars, the Court would be justified in refusing to conduct an investigation into the allegations of mala fides. Even when the court examining validity of an action may find a circumstance to be disturbing, the Supreme Court in *A Paeeiakaruppan v. Sobha Joseph*, (1971) 1 SCC 38, held that it cannot uphold the plea of mala fides on the ground of mere probabilities. A note of caution was similarly sounded by the Supreme Court in *E.P. Royappa v. State of T.N.*, (1974) 4 SCC 3, where the Supreme Court held that it ought to be slow to draw dubious inferences from incomplete facts particularly when imputations are grave and they are made against the holder of an office which has high responsibility in the administration. The following passage from the decision is apposite:

"92. Secondly, we must not also overlook that the burden of establishing mala

fides is very heavy on the person who alleges it. The allegations of mala fides are often more easily made than proved, and the very seriousness of such allegations demands proof of a high order of credibility. Here the petitioner, who was himself once the Chief Secretary, has flung a series of charges of oblique conduct against the Chief Minister. That is in itself a rather extraordinary and unusual occurrence and if these charges are true, they are bound to shake the confidence of the people in the political custodians of power in the State, and therefore, the anxiety of the Court should be all the greater to insist on a high degree of proof. In this context it may be noted that top administrators are often required to do acts which affect others adversely but which are necessary in the execution of their duties. These acts may lend themselves to misconstruction and suspicion as to the bona fides of their author when the full facts and surrounding circumstances are not known. The Court would, therefore, be slow to draw dubious inferences from incomplete facts placed before it by a party, particularly when the imputations are grave and they are made against the holder of an office which has a high responsibility in the administration. Such is the judicial perspective in evaluating charge of unworthy conduct against ministers and other high authorities, not because of any special status which they are supposed to enjoy, nor because they are highly placed in social life or administrative set up—these considerations are wholly irrelevant in judicial approach—but because otherwise, functioning effectively would become difficult in a democracy. It is from this standpoint that we must assess the merits of the allegations of mala fides made by the petitioner against the second respondent.”

23. In the case in hand, as per the terms and conditions of the NIT and the Circular of 2015, the respondents have liberty to procure additional TTs without insisting upon the earlier successful bidder. Since the writ petitioners were successful bidders in the tender and the initial requirement of TTs was met, so the life of the tender was complete and the writ petitioners could not later on bank upon the tender to claim right to supply additional TTs. There is no express clause in the tender which obliges the respondents—corporation to extend the benefit of the same to the bidders, who were earlier successful in the tender. Moreover, the writ petitioners/appellants have otherwise no grievance qua the terms and conditions mentioned in the tender notice and rightly so as they participated in it and were also successful bidders in the same. The conditions of the tender notice gave discretion and choice to the Corporation to proceed in the matter. The Circular of 2015 issued by the respondent—Corporation also give discretion to the respondents in the matter of procuring additional TTs so the writ petitioners cannot claim any vested right for additional TTs which was sought to be procured by the Corporation through impugned notice of 20.08.2021.

24. There is no public interest involved in the matter to persuade this Court to interfere with the impugned judgment of learned Single Judge inasmuch as it does not suffer from any infirmity and the claim raised by the appellants of legitimate expectation is misconceived. The respondent No.2 was well within its right to offer additional requirement of 25 TTs also to the existing contractors

who had already been awarded the contract and who were definitely figuring higher in ranking in Lot-1 than the writ petitioners-appellants herein. It may not be out of place to mention here that when requirement of 60TTs was notified, the writ petitioners-appellants herein were also considered on ad hoc basis pursuant to interim order passed by this Court in WP (C) No.1706/2023.

25. After giving our thoughtful consideration and deep contemplation to the issues agitated in the appeal, we arrive at an inescapable conclusion that the judgment passed by learned Single Judge, being an elaborate and reasoned one, deserves no interference from us, as the same cannot be found fault with, while viewing from any angle. The learned Single Judge, in our view, has rightly put the controversy to quietus. The judgment of learned Single Judge is, thus, upheld.

26. The net result is that the Appeal is dismissed along with application(s) being bereft of merit. Registry to place copy of this order in the record of WP(C) No.1706/2023.