

**HIGH COURT OF JAMMU AND KASHMIR AT
JAMMU**

OWP no. 726/2014

CMA No. 978/2014

COA No. 107/2014

Date of decision: 30.12.2014

Madan Lal Goel	vs.	Food Corporation of India and ors.
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Coram:

HON'BLE MR. JUSTICE JANAK RAJ KOTWAL, JUDGE

Appearing counsel:

For petitioner(s):	Mr. U. K. Jalali, Sr. Advocate with Mr. Anuj Sawhney, Advocate
For respondent(s):	Mr. A. H. Bhat, Advocate for R-1 to 6. Mr. K. S. Johal, Sr. Advocate with Mr. Aashray Choudhary, Adv. for R-7. Mr. Pranav Kohli, Advocate for R-8

(i)	Whether to be reported in Press, Journal/Media:	Yes/No
(ii)	Whether to be reported in Journal/Digest:	Yes

1. Respondent No. 1, the Food Corporation of India, Regional Office, Jammu, issued E-Tender Notice No. Cont/32(3)JK/Tender/2014-15 dated 26. 4. 2014 inviting online tenders for movement of stocks by road from FSD New Godown, Jammu to thirteen destinations in the State for a period of two years. The tenders were invited under two bid system, that is, technical bid and price bid. The tender notice *inter alia* provided for 'Qualification conditions for Bidding', clauses (I) and (II) whereof, which relate to

previous experience of a tenderer and are relevant, read:

(I) Tenderer should have experience of Transportation duly obtained from Manufacturer/PSU/Govt. Dept./ Public Ltd. Company/ Private Limited Company dealing in the field of Fertilizer, Food Grains, Cement, Sugar, Coarse grains or any other commodity. Tenderer should have executed in any of the immediate proceeding five years work of value:

(a) At least 25% of the estimated contract value in one single contract:

OR

(b) 50% of the estimated contract value in different contracts.

2. Petitioner submitted separate bids for eight destinations. In proof of his experience, petitioner produced certificate issued by 'Haldiram Snacks Pvt. Ltd.' (Annexure E to the writ petition), which reads:

"To whom so ever it may concern

This is to certify that M/s Shri Balajee Transport Corporation (Reg.) 101 DDA Market, Dilhad Garden Garden, Delhi-110095, was appointed Road Transport Contractor for carriage of M/s Haldiram Snacks Pvt. Ltd. Stocks (Pulses/Peanut) from Rajashtan and Gujarat to our works at Noida (Utter Pradesh), for a period of 1 year vide work order number HSPL//RTC/2012-13/927 dated 27.3.2012 and have successfully executed and completed the work of the value of Rs. 8,49,98,021/- (Rs. Eight Crore Forty nine lac ninety eight thousand and twenty one only) as per our books of records. The performance of the firm has remained satisfactory.

The station wise volume of stock lifted and payment released to M/s Shree Balaji Transport Corporation (Regd.) is indicated as under:

S.	Station From	Station To	Period of contract	Volume in MT	Value of work
1.	Rajkot (Near by) Gujarat-Peanuts	Noida	01.04.2012 to 31.03.2013	21475	44904675.00
2.	Bikaner (Near by) Rajashta Pulses	Noida	01.4.2012 to 31.3.2013	35702	40093346.00

3. Petitioner's technical bids succeeded for six destinations. However, bids in regard to two destinations, namely, Mir Bazar and Srinagar, were rejected and according to the petitioner the rejection was intimated through e-mail. Respondent No. 1 also e-mailed to the petitioner the Tender Committee Report dated 22.05.2014 disclosing *inter alia* the reason leading to the rejection of the petitioner's technical bids in regard to the above said two destinations. Petitioner has produced copy of this report as Annexure 'D'. Relevant in the report reads:

Re- FSD New Godown to FSD MirBazar:

- '5. M/s Balajee Transport Corp. has submitted the requisite document of Appendix-II & III, Annexure-A. Experience certificate, Certificate of Registration, Duty Audited Balance Sheet P&L Account, Copy of Income Tax Return and Pan Card along with E.M.D. and Cost of Form. On the

evaluation of the same it is found that the bidder does not have the requisite experience in the certificate enclosed neither in 50% of experience clause nor in 25% of experience clause hence the bidder cannot be considered/qualified to participate in financial bid in this centre.'

Re- FSD New Godown to FSD Srinagar:

'4. **M/s Balajee Transport Corp.** has submitted the requisite document of Appendix-II & III, Annexure-A, Experience certificate, Certificate of Registration, Duty Audited Balance Sheet P&I Account, Copy of Income Tax Return and Pan Card along with E.M.D. and Cost of Form. On the evaluation of the same it is found that the bidder does not have the requisite experience in the certificate enclosed neither in 50% of experience clause nor in 25% of experience clause, hence the bidder cannot be considered/qualified to participate in financial bid in this centre.'

4. Contextually, the official respondents in their reply have stated that the Tender Opening Committee after evaluation of the experience certificate produced by the petitioner, qua the eight destinations, found it deficit in respect of the bids for Srinagar and Mir Bazar locations. The petitioner, therefore, did not qualify for opening of the financial bid for the said two destinations.
5. Record produced by Mr. A. H. Bhat, learned counsel for the official respondents, reveals that the certificate produced by the petitioner was analyzed by the Tender Committee similarly in regard to the above mentioned destinations and this analysis was recorded as per below:

S. No.	Particulars of documents	C.P. No.	Remarks
13.	<p>Experience in preceding five years work of value w.e.f. 2009-10 to 2013-14</p> <p>(i) If value of single contract more than 25% of Cont.</p> <p>(ii) If value of all contracts more than 50% of Contract value.</p>	8-9	<p>01.04.2012 to 31.3.2013 Rs. 4,49,04,225/ (Single contract) Rs. 4,00,93,346/ (Single Contract)</p> <p>work performed in r/o two station.</p> <p>Work order No. HSPL//RTC/2012-13/927 dated 27.3.2012 from m/s Haldiram Snacks Pvt. Ltd. enclosed.</p>

6. The view taken by the Tender Committee in rejecting the petitioner's financial bid, obviously, was that the certificate produced by the petitioner relates to two different transport contracts, one for transporting peanuts from Rajkote to Noida valuing Rs. 4,49,04,225/ and other for transporting pulses from Bikaner to Noida valuing Rs. 4,00,93,346/.

7. Petitioner's financial bids for these two locations, therefore, were not opened. By the medium of this writ petition, petitioner assails the rejection and seeks:

(I) writ order or direction in the nature of **certiorari** to quash the rejection of his technical bid; and

(II) writ order or direction in the nature of **mandamus** commanding the official

respondents or the competent authority to open the price bids of the petitioner in respect of the above said two locations.

8. Heard. I have perused the record.
9. Petitioner's contention is that the impugned rejection is irrational and arbitrary. Mr. U. K. Jalali, learned Senior Advocate, appearing for the petitioner, submitted that the experience certificate produced by the petitioner along with his tender documents on its plain reading unambiguously shows that petitioner had executed transportation work in one single contract valuing more than 25% of the value of each of the two contracts for which petitioner's bids have been rejected. Reading out the copy of the experience certificate produced by the petitioner, Mr. Jalali sought to point out that it refers to the same allotment order and the same contract period so taking the two assignments as two different contracts was without any basis. Mr. Jalali argued that the interpretation given to the certificate by the Tender Committee was blatantly irrational and smacks of non-application of mind and cannot pass the test of fairness and reasonableness. Rejection of the bids on the basis of such interpretation of the certificate is even vulnerable to attaching the element of *mala fide* to the decision of rejection taken by the respondents. An irrational, arbitrary and unreasonable decision of

an instrumentality of the State cannot escape judicial review by the court to undo injustice to the aggrieved party, submitted Mr. Jalali.

- 10 Per contra, bottom line of submissions made by learned counsel for respondents was that the power of judicial review of this Court does not extend to substituting the view taken by members of the Tender Committee, who have expertise in the field. Learned counsel submitted that the certificate produced by the petitioner clearly referred to two contracts. The certificate though was found sufficient in respect of six bids but did not qualify for the remaining two so allegation of *mala fide* is baseless and irrational. Mr. K. S. Johal, learned Senior Advocate, appearing for respondent No. 8 and Mr. Parnav Kohli, learned counsel for respondent No. 7 additionally and vehemently questioned the maintainability of reliefs sought by the petitioner contending that prior to the filing of this writ petition by the petitioner, contracts for transportation to the said two destinations have been allotted to respondent Nos. 7 and 8 but the petitioner has not challenged these allotments so the writ of mandamus as sought by the petitioner cannot be granted. In reply to this contention, Mr. Jalali, however, submitted that this Court on proof of the fact that petitioner's bids were wrongly and illegally rejected,

has the power to mould the relief by quashing the allotments made pursuant to such rejection. Mr. Jalali referred to and relied upon Ram kumar Barnwal v Ram Lakhan, 2007 (5) Supreme 53 and M/S PRP Exports v The Chief Secretary Government of Tamil Nadu, 2014 (1) Supreme 218.

11. The core question arising for consideration is; whether the Tender Committee's interpretation of the experience certificate by taking the two assignments executed by the petitioner as two different contracts, was wrong inasmuch as it was irrational and arbitrary?
12. It is seen and was admitted by the learned counsel at bar that if the two assignments, that is, transportation of the peanuts from Rajkote to Noida and pulses from Bikaner to Noida executed by the petitioner are taken as two different contracts, in that case value of neither of them amounts to 25% of the estimated value of either of the two contracts, for which petitioner's bids have been rejected. However, collective value of the said two assignments shall be more than 25%.
13. It is seen that the experience clause provided in the tender notice was too categorical and unambiguous in making distinction between the value of 'single contract' and 'different contracts'. It may be restated, though at the cost of repetition, that a bidder should

have had in any of the immediate preceding five years the experience of executing transportation work of the value of at least 25% of the estimated value of the proposed contract in one single contract or 50% of the estimated value in different contracts. Such distinction was expected to be similarly evident in the certificate relied upon by a bidder. The certificate rather should not have been left to any interpretation.

14. The experience certificate produced by the petitioner on its reading and analysis fails to convey unequivocally that it relates to a single contract and in no case to two different contracts. It refers to transportation of goods from two different take off points situate in two different states. Correct though it is that it refers to one allotment order but single allotment order or single tender notice is no assurance for a contract being one and not more than one. Tendering more than one contract by a single tender notice or allotting more than one contract in favour of one tenderer by a single allotment/work order cannot be taken as impossibility. Even in the case on hand as many as thirteen contracts have been tendered by a single tender notice and it would not be impossible that a single allotment order for more than one contracts is issued in favour of a successful bidder.

- 15 It is seen that the certificate produced by the petitioner had been issued in the month of August, 2013 whereas the tender notice in question was issued on 26.04.2014. The petitioner instead of producing the certificate obtained some eight months back could well have obtained and produced a certificate in complete conformity with the tender notice showing clearly that the transportation was done by it in one single contract only. Petitioner having produced a certificate, which did not show unequivocally that it relates to one single contract, and left the matter open for the interpretation of the Tender Committee, the view taken by the Tender Committee, which is supposed to be comprised of experts in the field, cannot be said to be incorrect, muchless, irrational or arbitrary and cannot be reviewed in exercise of the power of judicial review of administrative decisions. This Court cannot substitute the view taken by the Tender Committee, which undoubtedly has experience and expertise in the field of examining and evaluating the tenders, unless the same is found unreasonable and arbitrary, given the limited scope of the power of judicial review, which by now is well settled and no more *res Integra*.
16. The administrative decisions of the State including award of contracts by the State or its instrumentalities generally are not amenable to the judicial review.

Greater latitude is required to be conceded to State and its instrumentalities in this sphere (Ref. Tata Cellular v Union of India, (1994) 6 SCC 651).

17. Ambit and scope of the power of judicial review in relation to tenders and awarding contracts by the State and its instrumentalities has been ornately restated by the Supreme Court in Jagdish Mandal v State of Orissa and Ors. (2007) 14 SCC 517 and I may quote paragraphs 22 of the reporting:

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made 'lawfully' and not to check whether choice or decision is 'sound'. When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a Tenderer is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up

public works for years, or delay relief and succor to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.

OR Whether the process adopted or decision made is so arbitrary and irrational that the court can say: 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached.'

ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing or imposition of penal consequences on a Tenderer /contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action."

18. For all that stated above, I hold that the rejection of petitioner's bids for the aforementioned two destinations by the official respondents does not deserve and call for any interference by this Court and this writ petition has no merit. The writ petition is, therefore, dismissed.

19. Disposed of.

(Janak Raj Kotwal)
Judge

Jammu
30.12.2014
Karam Chand*

