

HIGH COURT OF JAMMU AND KASHMIR

AT JAMMU

LPAOW No. 02/2015

Date of Judgment: 19.02.2015

M/S Jasco Carriers
199 A/D Gandhi Nagar, Jammu
Through its Managing Partner
Mohd Ayaz Bhat; age 59 years
S/O Sh. Abdul Gani Bhat
Appellant

Vs.

1. State of Jammu and Kashmir
Through Secretary to Government
Public Works (R&B) Department
Jammu and Kashmir Government
Civil Secretariat Jammu.
2. Director/Chief Engineer
Stores Procurement department
Jammu.
3. Deputy Director (Central)
Stores Procurement department
Jammu.
4. M/S Randhir Mehta & Co.
C/O Yard No. 6, Transport Nagar, Narwal,
Jammu.
5. JAKFED
Through its Managing Director
B. C. Road, Ambphalla, Jammu.

Respondents

Coram:

Hon'ble Mr. Justice N. Paul Vasanthakumar, Chief Justice
Hon'ble Mr. Justice Bansi Lal Bhat, Judge

Appearing counsel:

For the Appellant(s)	:	Mr. S. K. Shukla, Advocate.
For the Respondent(s)	:	Mr. A. V. Gupta, Sr. Advocate with Mr. Ajay Abrol, Advocate for respondent No.4.

i/	Whether to be reported in Press/Media	:	Yes
ii/	Whether to be reported in Digest/Journal	:	Yes

N. Paul Vasanthakumar, CJ

1. This appeal is preferred against the order of the learned single Judge made in OWP No.1112 of 2014 dated 21.11.2014 wherein the learned single Judge has upheld the award of contract in favour of 4th respondent by third respondent by order dated 22.7.2014 pursuant to the tender notice issued on 22.5.2014.

2. The case of the appellant before the learned single Judge was that the third respondent invited bids vide e-tender No.DSP/e-NIT-02 of 2014-15, dated 22.5.2014 from registered Transporters/Carriage Contractors for transportation of packed Bitumen in drums from Railhead Jammu to Central Stores of Stores Procurement Department, Pampore, Kashmir. According to the appellant, it has submitted tender documents, complete in all respects, and the tender was to be submitted for technical bid as well as for price bid. The 4th respondent also submitted technical bid for the award of contract and the technical bids were opened on 23.6.2014 and it is averred that the technical bid of 4th respondent was not in compliance with Clause 7(a)(i)(e) & (g) of the NIT and therefore 4th respondent was not eligible to participate in the tender. It is the grievance of the appellant that the respondents 2 and 3, instead of rejecting the technical bid of 4th respondent, allowed him to participate in the price bid by treating 4th respondent as eligible in the technical bid. The said action was challenged by the appellant in OWP No.1091 of 2014 and prayed for declaring the 4th respondent as disqualified.

3. When the case was listed on 22.7.2014 before the learned single Judge, it was informed that the contract was finalized in favour of the 4th respondent by order dated 18.7.2014 and the same was intimated by third respondent to

M/s. Indian Oil Corporation Limited, pursuant to which the work order was issued on 22.7.2014. Hence the appellant has filed this writ petition to quash the award of contract, contending that the 4th respondent is not eligible for awarding the contract.

4. The official respondent filed counter affidavit contending that three bids were received and all were opened in the presence of the tenderers on 23.6.2014 by the expert body comprising of high officials headed by the Chief Engineer, who is the second respondent herein. As against clause 7 (1)(a)(i)(e) & (g) , 4th respondent annexed the Certificate of Performance issued by JAKFED along with the technical bid and the same having been found acceptable, 4th respondent was allowed to participate in the price bid after getting clarification from JAKFED regarding Certificate of Performance and the JAKFED also clarified that the turnover of 4th respondent was more than one crore in the preceding year in respect of transportation business with JAKFED. Hence the 4th respondent was allowed to participate in the price bid and on opening the price bid it was found that the 4th respondent quoted the lowest amount and it was ranked as L1. The 4th respondent has been duly registered as Transport Carriage Contractor with the Transport Commissioner, J&K and JAKFED being controlled and administered by the State Government as its Officers are posted as Managing Directors and in various

other high ranking position, and the same being aided by the State Government, it is an instrumentality of the State and after negotiation with 4th respondent, the rate quoted by it was slashed from Rs.2,305/- to Rs.2,250/- from Jammu to Srinagar and from Rs.515/- to Rs.500/- from Jammu Railway Station to Jammu Procurement Store. Therefore the award of contract in favour of 4th respondent is legal and valid.

5. The learned single Judge considered the submissions, particularly with reference to the Certificate of Performance produced by 4th respondent from JAKFED, which was in compliance with Clause 7(1)(a)(i)(e) & (g) and dismissed the writ petition, against which the present writ appeal is preferred.

6. Mr.S.K.Shukla, learned counsel appearing for the appellant contended that on opening of technical bid on 23.6.2014, the third respondent found some deficiencies with regard to the documents furnished by various tenderers including the appellant and 4th respondent. The Purchase Committee meeting was held on 20.7.2014 wherein all tenderers were called upon to make good the deficiencies. The appellant was given five days time to get renewed the licence issued by the Chairman, State Transport Authority, as the certificate produced already was not in conformity with the terms and conditions of NIT, and accordingly appellant also produced the renewed licence. The 4th respondent, who had

not submitted the Certificate of Performance in the prescribed format and confirming to the requirements, was also given time and he having produced the same, which was not in compliance with the format and the acceptance of the technical bid submitted by 4th respondent was erroneous and the consequential acceptance of price bid in favour of the 4th respondent has vitiated the entire proceedings. The learned counsel further submitted that even though interference in tender matters are very limited, 4th respondent having not fulfilled the eligibility criteria, the decision to accept the technical bid as well as permitting 4th respondent to participate in the price bid and the consequential award of contract are not proper and the learned single Judge was not right in upholding the action of the 3rd respondent.

7. Mr. A. V. Gupta, learned senior counsel appearing for 4th respondent submitted that the 4th respondent having produced the Certificate of Performance from JAKFED, which is aided by the Jammu & Kashmir Government, is an instrumentality of the State. The expert body having found that 4th respondent as eligible to participate in the price bid, and the price quoted by the 4th respondent being lowest and the same was also reduced after negotiation, the contract was awarded in favour of 4th respondent and the learned single Judge rightly upheld the same, which cannot be interfered with. The learned counsel

also submitted that the contract was for a period of one year and the period will expire on 31.3.2015 and the 4th respondent is carrying on the transportation work and the agreement was also executed on 28.11.2014 and the left over period being less than six weeks, no interference is called for at this distance of time.

8. The official respondents supported the stand of the 4th respondent and argued that in tender matters, appellant has no vested right to claim award of contract and it is the prerogative of the Government to award contract to anyone of the eligible person and the 4th respondent having been found eligible and the rate quoted by it is far less than the other tenderers, including the appellant, the contract was awarded in favour of 4th respondent and there is no merit in the writ appeal.

9. We have considered the rival submissions, perused the records and the decision rendered by the learned single Judge.

10. The point arises for consideration in this appeal is, as to whether the award of contract in favour of the 4th respondent for transportation of bitumen in the drums from Rail Head Jammu to Central Stores of Stores Procurement Department, Pampore, Kashmir, is justified or not.

11. It is not in dispute that the appellant, the 4th respondent along with one other person submitted technical bid for the award of contract and the technical bids were opened on

23.06.2014 and none of the bidders, including the appellant enclosed the relevant documents with the technical bid and all the bidders were given opportunity to produce the additional documents. The appellant as well as the 4th respondent admittedly produced the additional documents to satisfy Clause 7(1)(a)(i)(e) & (g) of the tender document. The 4th respondent produced the certificate issued by the JAKFED, which was treated as Certificate of Performance as required under Clause 7 (a) and (e). The relevant certificate was verified from the JAKFED, which also certified that the fourth respondent has performed the job valuing more than one crore during the financial year 2013-14.

12. The contention of the learned counsel for the appellant is that JAKFED is not the State Government or Central Government, but a Public Sector undertaking and therefore, in the strict sense, the proficiency certificate issued by JAKFED to the fourth respondent is not satisfying the eligibility criteria. The learned counsel for the appellant fairly admitted that the JAKFED is aided by J&K Government and its Managing Director is a Government Officer, appointed by the Government.

13. As rightly contended by the learned counsel for the appellant as well as the official respondents, the JAKFED is not only funded by the State Government and its Managing Director

is appointed by the Government, but the control of the JAKFED is under the Government of J&K and as such it is coming within the meaning of instrumentality of the State, which can be termed as other agency. Clause 7(g) of the tender document clearly states that the person submitting the bid can give the photocopies of the order and the name of the agency or the department from whom the orders for execution of work were received and executed. The certificate issued by JAKFED dated 3.7.2014 reads as follows:

“NO:AGM/Km/2014-15/97 Dated:03.07.2014
 The Deputy Director(Central)
 Stores Procurement Department
 (J&K) Jammu.
 Subject: Carriage Contract with M/S Randhir Mehta & Co.
 Reference: Your office letter No.DSP/814 dated 03.07.2014.
 Sir,

It is to apprise you that M/s Randhir Mehta & Co. is a Registered Transport Contractor Operating Transport Business at vide licence No.227/AGI/STAJK dated:17.06.2013 we have a precedent that we place our orders/indents only to those Transporters who are registered with Transport Commissioner. Mr. Randhir Mehta & Co. is associated with our organization from the last five years. Each & every order placed on him has been performed successfully and diligently. M/S Randhir Mehta & Co. is one of our approved Transport Contractors.

Yours faithfully,
 S/d-
 Asstt. General Manager,(K/M)
 JAKFED Jammu”

14. The learned Single Judge considered this issue in depth and upheld the order of contract in favour of the 4th respondent by stating the reason that while accepting the bid of the 4th respondent, the appellant has not objected the acceptance and without any demur, appellant participated in further proceedings, namely submitting the price bid. It is an admitted position that the appellant has quoted higher amount than the

4th respondent in the price bid and the 3rd respondent having found that the 4th respondent is satisfying the requirement of eligibility and the price bid quoted by it is lower, which was further reduced after negotiations, confirmed the said bid in favour of the 4th respondent. The 3rd respondent having found that the 4th respondent is satisfying the eligibility norms and the bid having been confirmed in favour of the 4th respondent, the jurisdiction of this Court is very limited, especially when the appellant is seeking to enter into the contract with the 3rd respondent.

15. The issue as to how for the Court can interfere in contractual matters was already considered by the Hon'ble Supreme Court in the following decisions.

(i) In the decision reported in **(1994) 6 SCC 651 (Tata Cellular v. Union of India)** in paragraph 94 it is held as under:

“(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 matter 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.”

(ii) In **(1999) 1 SCC 492 (RAUNAQ INTERNATIONAL LTD. V. I.V.R. CONSTRUCTION LTD.)**, the Supreme Court held that the writ Court would not be justified in interfering with the commercial transaction in which the State is one of the parties to the same except where there is substantial public interest involved and in cases where the transaction is mala fide.

(iii) In **(2000) 2 SCC 617 (AIR INDIA V. COCHIN INTERNATIONAL AIRPORT LTD.)**, the Supreme Court held that the award of contract is essential in commercial transaction, which involves commercial consideration and results in commercial decision. In paragraph 7, it is further held,

“7. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny.”

(iv) In **(2004) 4 SUPREME COURT CASES 19 (DIRECTORATE OF EDUCATION V. EDUCOMP DATAMATICS LTD. AND OTHERS)**, the point that arose for consideration, was the extent of judicial review in exercise of

jurisdiction under Article 226 of the Constitution of India to the terms of tender prescribing eligibility criteria and whether the High Court could change the terms incorporated in the tender notice on the ground of its being inappropriate and that the objective would be better served by adopting different eligibility criteria? The Hon'ble Supreme Court of India has taken into consideration the decisions in Tata Cellular's case and Air India's case (cited in (a) and (c) above) and the decision in **(2000) 5 SCC 287** MONARCH INFRASTRUCTURE (P) LTD. V. COMMISSIONER, ULHASNAGAR MUNICIPAL CORPORATION) and observed as follows:

“11. This principle was again restated by this Court in Monarch Infrastructure (P) Ltd. v. Commr., Ulhasnagar Municipal Corpn. (2000) 5 SCC 287. It was held that the terms and conditions in the tender are prescribed by the Government bearing in mind the nature of contract and in such matters the authority calling for the tender is the best judge to prescribe the terms and conditions of the tender. It is not for the courts to say whether the conditions prescribed in the tender under consideration were better than the ones prescribed in the earlier tender invitations.

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. Directorate of Education, Government of NCT of Delhi had invited open tender with prescribed eligibility criteria in general terms and conditions under tender document for leasing of supply, installation and commissioning of computer systems, peripherals and provision of computer education services in various government/government-aided senior secondary, secondary and middle schools under the Directorate of Education, Delhi. In the year 2002-03, 748 schools were to be covered. Since the expenditure involved per annum was to the tune of Rs. 100 crores, the competent authority took a decision after consulting the Technical Advisory Committee for finalisation of the terms and conditions of the tender documents providing therein that tenders be invited from firms having a turnover of more than Rs. 20 crores over the last three years. The hardware cost itself was to be Rs. 40-45 crores. The Government introduced the criterion of turnover of Rs. 20 crores to enable the companies with real competence having financial stability and capacity to participate in the tender, particularly in view of the past experience. We do not agree with the view taken by the High Court that the term providing a turnover of at least Rs. 20 crores did not have a nexus with either the increase in the number of schools or the quality of education to be provided. Because of the increase in the number of schools the hardware cost itself went up to Rs. 40-50 crores. The total cost of the project was more than Rs. 100 crores. A company having a turnover of Rs. 2 crores may not have the financial viability to implement such a project. As a matter of policy the Government took a conscious decision to deal with one firm having financial capacity to take up such a big project instead of dealing with multiple small companies which is a relevant consideration while awarding such a big project. Moreover, it was for the authority to set the terms of the tender. The courts would not interfere with the terms of the tender notice unless it was shown to be either arbitrary or discriminatory or actuated by malice. While exercising the power of judicial review of the terms of the tender notice the court cannot say that the terms of the earlier tender notice would serve the purpose sought to be achieved better than the terms of tender notice under consideration and order change in them, unless it is of the opinion that the terms were either arbitrary or discriminatory or actuated by malice. The provision of the terms inviting tenders from firms having a turnover of more than Rs. 20 crores has not been shown to be either arbitrary or discriminatory or actuated by malice.” (emphasis supplied)

(v) Similar view was taken by the Hon'ble Supreme Court of India in the decision reported in **AIR 2005 SUPREME COURT 2653 (GLOBAL ENERGY LTD. AND ANOTHER V. M/S.ADANI EXPORTS LTD. AND OTHERS)**, wherein, it has been held that The terms of the invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice.

(vi) In **(2007) 14 SCC 517 (JAGADISH MANDAL V. STATE OF ORISSA)**, in paragraph 22, it is held thus,

“22. 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.”

(vii) In **AIR 2009 SC 2894, (MEERUT DEVELOPMENT AUTHORITY V. ASSOCIATION OF MANAGEMENT STUDIES)**, it was held that the tender is an offer. It is something which invites and communicated to the intending tenderers to notify their acceptance. The terms of invitation of

tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

(viii) The decisions in (a) to (c), (f) and (g) above were followed in the decision of the Supreme Court reported in **(2012) 6 SCC 464 (TEJAS CONSTRUCTIONS & INFRASTRUCTURE (P) LTD. V. MUNICIPAL COUNCIL, SENDHWA)** and dismissed similar challenge by holding that in the absence of any *mala fide* or arbitrariness in the process of evaluation of bids and determination of the eligibility of the bidders, the Court shall not interfere. The appellant herein has not alleged any *mala fide* against any particular officer of the respondent.

(ix) In the decision reported as **AIR 2012 SC 2915 (M/S Michigan Rubber (India) Ltd. v. State of Karnataka and ors)** Hon'ble the Supreme Court held that the Government and its Undertakings must have a free hand in setting the terms of the tender and only where it is arbitrarily, discriminatory, *mala fide* or actuated by bias the Courts would interfere. If the State or its institutions acted fairly and in public interest is awarding contract, no interference is called for as no person can claim fundamental right to carry on business with the Government.

16. The learned Single Judge also relied on a judgment of Hon'ble Supreme Court reported in **2014 AIR SCW 1249 (M/S**

Siemens Aktiengesellschaft & S. Ltd vs. DMRC Ltd. In the said decision in paragraph no. 22 it is held as under:-

“in any challenge to the award of contract before the High Court and so also before this Court what is to be examined is the legality and regularity of the process leading to award of contract. What the Court has to constantly keep in mind is that it does not sit in appeal over the soundness of the decision. The Court can only examine whether the decision making process was fair, reasonable and transparent. In cases involving award of contracts, the Court ought to exercise judicial restraint where the decision is bona fide with no perceptible injury to public interest.”

It is also an admitted fact that pursuant to the award of contact, agreement was executed between the 4th respondent and the Government of J&K on 28.11.2014 and the period of the contract is also expiring on 31st of March 2015.

17. In view of the above decisions as well as the eligibility of the 4th respondent as found by the expert body, and its price bid being the lowest, the official respondents are justified in awarding the contract in favour of the 4th respondent and the same has rightly been upheld by the learned Single Judge. We are unable to find any reason to take a different view in this appeal.

In fine, the appeal is dismissed. No costs.

(Bansi Lal Bhat)
Judge

(N. Paul Vasanthakumar)
Chief Justice

Jammu,
19.02.2015
Anil Raina, Secy