HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU

OWP No. 2576/2018, IA No. 1/2018.
Caveat No. 4098/2018

Date of decision: 31.12.2018

M/s K. C. Food Pvt. Ltd. Vs State of J&K and ors.

Coram:

HON'BLE MR. JUSTICE DHIRAJ SINGH THAKUR, JUDGE.

Appearance:

For the petitioner(s) : Mr. S. K. Anand, Advocate.
For the respondent(s) : Mr. Sudesh Magotra, GA.
Dy. Director, ICDS Present in person.
For the Caveator : Mr. M. K. Bhardwaj, Sr. Advocate with
Mr. Gagan Kohli, Advocate.

Caveat No. 4098/2018

Caveat stands discharged.

OWP No. 2576/2018

1. Petitioner challenges the order dated 17.11.2018 whereby despite being L-1 in the bidding process for supply of glucose biscuits, the order has been placed with respondent No. 4. The action is justified by the official respondents on the ground that whereas the glucose biscuits being manufactured by the petitioner in the name of KC Biscuits was a local brand, the respondent No. 4 had agreed to supply glucose biscuits of a well known brand i.e. Parle-G.

Briefly stated the material facts are as under

2. E-Tenders were invited by the Government of J&K for supplying 15,000 quintals of glucose biscuits with the required specifications.

Bidding process involved a two bid system i.e. technical bid and the financial bid. The technical bid was supposed to be accompanied with sealed samples duly signed by the bidder as also accompanied with analytical test report from the Government approved laboratory/authority or NABL accredited Food Laboratory approved by FSSAI.

3. The financial bids of only those bidders who qualified the technical bid were supposed to be opened. Clause 14 of the NIT deserves a reference and is reproduced hereunder:

> *"…..SLPC reserves the right to accept or approve even high rates on the basis of* ***quality of product/goods to be supplied viz-a-viz laboratory test report****."*

4. Petitioner as also respondent No. 4 qualified in the technical bid. In the financial bid, the rate quoted by the petitioner was 6835 per quintal as against 6845 per quintal quoted by respondent No. 4. Petitioner thus emerged as an L-1 without any price preference.

5. It appears that certain news items appeared in the media with headlines **"Items declared substandard in 2017, ICDS selects same biscuit brand again"**. This perhaps was only in relation to one M/s Rattan Oil Mills, an SSI unit, who had emerged as L-1 bidder in respect of Kashmir Division without any price preference for supply of glucose biscuits. The Purchase Committee with a view to play safe, in view of the press report recorded a decision in one of the meetings, which is as under:-

> *"The Committee Members after detailed discussions, were of the opinion that as per the standard industrial policy, price preference upto 20% should be given to SSI units for the encouragement of these SSI units. In view of the news items carried in the press media, it shall not be advisable as press media has pleaded for procurement of branded items by virtue of which industrial policy gets violated and tender floated cannot be brand specific. Therefore, the Committee Members were of the unanimous opinion that the SMD, ICDS J&K (Chairman, SLPC) should take up the matter with the Government for seeking necessary guidance with regard to the procurement of item glucose biscuits."*

6. The Director Finance, Social Welfare Department vide communication dated 27.09.2018 addressed to the State Mission Director, ICDS, responded in the following manner:-

> *"In this connection, it is requested to deliberate upon the issue in threadbare at your own level and decide about the purchase to be made. But in any case, the quality of the item (brand) should not be compromised as the item is to be provided to lacs of children enrolled in Anganwari Centres."*

7. Pursuant to the response aforementioned, the State Level Purchase Committee in its meeting held on 13.11.2018 negotiated directly with respondent No. 4, who was L-2 in the bidding process, as against the rate quoted by him @ Rs. 6845 per quintal made him to agree to a lower rate of Rs. 6780 per quintal and on that basis issued the supply order dated 17.11.2018, which is impugned in the present petition.

8. Learned counsel for the petitioner attributed the selection of respondent No. 4, to bias and malafides. It was alleged that the official

respondents had created record, in the shape of press reports with a view to justify allotment of the contract in favour of respondent No. 4. It was urged that the respondent No. 4 was one of the suppliers, who was deeply entrenched in the system and had been supplying various nutritional items to the official respondents for a number of years and with a view to maintain that monopoly had in connivance with the official respondents found a novel way to subvert the fairness in the bidding process.

9. It was urged that in case, price had to be further brought down or negotiated, nothing could prevent the Purchase Committee to invite the petitioner for negotiations. It was also urged that even today the petitioner would be ready to supply biscuits @ Rs. 6770, as against the slashed rate of Rs. 6780, at which respondent No. 4 had offered to make the supplies.

10. It was urged that respondent No. 4, in the ordinary course ought to have been blacklisted, inasmuch as, it had failed to make supply of peas, for which he was found the lowest tenderer in the supply order dated 08.10.2018. This fact, however, has been admitted by the Deputy Director, ICDS Project, Jammu, who was present in the Court to the extent that no supplies of peas at all had been made by respondent No. 4, even when the period for making the supplies had since expired.

SCOPE OF JUDICIAL REVIEW.

11. The scope of judicial review in contractual matters is no longer res integra. The Apex Court in **Tata Cellular vs. Union of India,**

(1994) 6 SCC 651 held that while the principles of judicial review would apply to the exercise of contractual powers, the same were accompanied with inherent limitations and that a right balance had to be struck between the administrative discretion to decide matters and the need to remedy any unfairness or arbitrariness by judicial review. In paragraph 94 of the said judgment, the following principles were deduced:

> *"(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. In **B.S.N Joshi and sons ltd vs. Nair Coal Services Ltd and others, (2006) 11 SCC 548**, the Apex court in paragraph 66 after noticing various pronouncements of the Apex Court on the subject deduced the principles of judicial review in paragraph 66, which reads as under:

"i) If there are essential conditions, the same must be adhered to;

ii) If there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied where it is possible for all the parties to comply with all such conditions fully;

iii) If, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be held to be existing

iv) The parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance of another part of tender contract, particularly when he was also not in

a position to comply with all the conditions of tender fully, unless the court otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without jurisdiction..

v) When a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential conditions were laid down, the same may not ordinarily be interfered with.

(vi) The contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted by the lowest tenderer, public interest would be given priority.

(vii) Where a decision has been taken purely on public interest, the Court ordinarily should exercise judicial restraint."

13. In **Reliance Airport Developers Pvt. Ltd vs. Airports Authority of India & ors, (2006) 10 SCC 1**, the apex court held that judicial review was intended to prevent arbitrariness and must be exercised in larger public interest.

14. In **M/s Master Marine Services Pvt. Ltd vs. Metcalfe & Hodgkinson Pvt. Ltd and ors, (2005) 6 SCC 138 and Jagdish Mandal vs. State of Orissa and ors, (2007) 14 SCC 517**, the Apex Court crystallized the following tests for judicial review in administrative action.

"Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and malafides. 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 succour 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.

15. In **Tejas Construction and Infrastructure Pvt. Ltd vs. Municipal Council, Sendhwa and anr, (2012) 6 SCC 464**, the position of law as stated hereinabove was reiterated.

16. In **Michigan Rubber (India) Limited vs. State of Karnataka and ors, (2012) 8 SCC 216**, the Apex Court held that the basic requirement of Article 14 was fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. In paragraph 23 of the judgment, it was held as under:

"From the above decision, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no

person can claim fundamental right to carry on business with the Government."

ESSENTIAL/NON-ESSENTIAL CONDITION

17. In **Poddar Steel Corporation vs. Ganesh Engineering works and ors, (1991) 3 SCC 273**, the Apex Court drew a distinction between an essential condition of eligibility and others, which are merely ancillary or subsidiary and held as under:

> *"It is true that in submitting its tender accompanied by a cheque of the Union Bank of India and not of the State Bank the clause no. 6 of the tender notice was not obeyed literally, but the question is as to whether the said non- compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, and is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories-those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the condition in appropriate cases. This aspect was examined by this Court in GJ Fernandez v. State of Karnataka 7 Ors., [1990] 2 SCC 488 a case dealing with tenders. Although not in an entirely identical situation as the present one, the observations in the judgment support our view. The*

High Court has, in the impugned decision, relied upon Ramana Dayaram Shetty v. International Airport Authority of India & Ors., [1979] 3 SCC 489 but has failed to appreciate that the reported case belonged to the first category where the strict compliance of the condition could be insisted upon. The authority in that case, by not insisting upon the requirement in the tender notice which was an essential condition of eligibility, bestowed a favour on one of the bidders, which amounted to illegal discrimination. The judgment indicates that the Court closely examined the nature of the condition which had been relaxed and its impact before answering the question whether it could have validly condoned the shortcoming in the tender in question. This part of the judgment demonstrates the difference between the two categories of the conditions discussed above. However it remains to be seen as to which of the two clauses, the present case belongs."

18. In the background of the judgments discussed hereinabove, it needs to be seen as to whether the decision taken by the Purchase Committee on 30.11.2018, awarding the contract in favour of respondent No. 4 is sustainable or not.

19. Records have been produced by the official respondents. On a perusal of the decision taken on 30.1.2018 by the State Level Purchase Committee, it can be seen that no reasons at all have been given as to why respondent No. 4 was chosen over and above the petitioner and negotiations conducted with him to reduce the price to bring it down to Rs. 6780 per quintal as against his earlier quoted rate of Rs. 6845/- per quintal. In the minutes recorded, only a general

reference has been made to the communication dated 27th of September, 2018 issued by the Administrative Department.

19. On a perusal of the communication dated 27th of September, 2018, which has already been reproduced in the preceding paragraphs, it is clear that it was left to the Purchase Committee to deliberate upon the issue in threadbare with regard to the proposed purchase and the only condition prescribed was that the quality of the item (brand) should not be compromised. The Purchase Committee without discussing the issue of quality or even brand proceeded simply by allotting the contract in favour of respondent No. 4 without even in the least considering as to whether the product sought to be supplied by the petitioner was lacking in any manner in quality.

20. Insofar as the issue of quality is concerned, the requisite certificates appear to have been issued by the concerned agencies, certifying quality based upon which alone the petitioner was held to have qualified the technical bid. In fact, the Purchase Committee appears to have confused the issue of quality with the issue of brand. A brand need not necessarily reflect quality. A popular brand may owe its popularity more to marketing strategy rather than its intrinsic quality. A brand need not necessarily ensure or guarantee quality of a product for all times in future. In any case, there was no quantifiable data with the Purchase Committee on the issue of branding between the petitioners product and the one supplied by respondent No. 4.

20. The decision to allot the contract in favour of respondent No. 4 on the face of it can be said to be arbitrary because there was no material before the purchase committee as to how they had preferred the brand of respondent No. 4 over the brand of the petitioner herein.

It needs to be highlighted that the petitioner in his petition has claimed that it is a known and a recognized manufacturer of Glucose Biscuits in the State and is supplying biscuits through the length and breadth in the country. It also claims to its credit an ISO certificate certifying that the company of the petitioner was conforming to the Food Safety Management System Standards. The Purchase Committee did not consider any of the above information, which would enable it to question the product being manufactured by the petitioner much less did it have any data on the basis of which it could come to a conclusion either that the petitioner's product had no brand value or that the product Parle G was better in quality than that of the petitioner's product. In the absence of any quantifiable data , the decision taken by the Purchase Committee in its meeting held on 29.11.2018 can only be held to be totally arbitrary and therefore, unsustainable in law. The decision has also the effect of perpetually providing an unequal playing field tilted heavily in favour of respondent No. 4, who would year after year bag the supply contracts rather monopolize such a contract based upon this unintelligible differential, which can neither be countenanced nor permitted in law.

In fact, the issue of brand could not have at all been gone into by the Purchase Committee inasmuch as, according to Clause 14 of the NIT, the State Level Purchase Committee had a right to accept or approve even a higher rate based only on the quality of the product or goods to be supplied **"viz-a-viz the laboratory test report".** It did not have any right to reject the offer made by the petitioner based on the issue of brand. This clause 14 of the NIT was an essential condition and ought to have been observed faithfully by the official respondents. Any decision taken contrary to this essential condition as

contained in Clause 14, therefore, can be said to be illegal and thus unsustainable in law.

It would be apt to refer to the Apex Court judgment in **Harminder Singh Arora vs. Union of India, AIR 1986 SC 1527** where it was held that once the Govt. decides to award a contract on the basis of bid by tender, it must abide by the terms and conditions and that rejecting the most suitable offer of a private contract in contravention of the terms of the tender would be arbitrary and violative of Article 14.

This was a case where the tender of the appellant submitted in regard to supply of fresh milk was found to be lowest, yet the tender of Govt. Milk Scheme was accepted despite the fact that it had submitted its tender for pasteurized milk and not for fresh buffalo or cow milk as was the requirement of the tender document. What was held by the Apex court in paragraph 27 was as under:

> **"In the instant case, the instrumentalities of the State invited tenders for the supply of fresh buffaloes and cows milk and, therefore, this case has to be decided on the basis of bid by the tenderers. There was no question of any policy in this case. It is open to the State to adpot a policy different from the one in question. But if the authority or the State Government chooses to invite tenders then it must abide by the result of the tender and cannot arbitrarily and capriciously accept the bid of respondent No. 4 although it was much higher and to the detriment of the State. The High Court, in our opinion, was not justified in dismissing the writ petition in limine by saying that the question relates to the contractual obligation and the policy decision cannot be termed as unfair or arbitrary. There was no question of any policy decision in the instant case. The contract of supply of milk was to be given to the lowest bidder under the terms of the tender notice and the appellant being the lowest bidder he should have been granted the**

contract to supply, especially, when he has been doing so for the last so many years."

22. Since the decision to go for a brand was purportedly taken on the basis of some newspaper reports, criticizing the supplies of biscuits made in the previous year, who had also been found to be the lowest this year, in Srinagar Division it became necessary to find out as to whether the issue of quality was at all gone into by the official respondents in regard to supplies made in the previous years. Since the concerned Deputy Director was present in the court, a specific question was posed to her as to whether any of the supplies made by the supplier of biscuits in the previous year was subject to any quality test or not, the answer was an emphatic 'NO'. In fact, if one were to refer to the terms and conditions of the NIT, which is relevant to the present controversy and in particular, clause 22 it becomes clear that any of the supplies made by the supplier was subject to verification and examination for quality and specifications mentioned in the NIT. Clause 22 of the NIT for purposes of reference is reproduced as under:

"The acceptance of supplies to be made by the supplier shall be subject to verification and examination as per the quality, specifications mentioned in the NIT by the Block Level Verification Committee. If the supply is rejected by the Verification Committee, and same shall be marked as Rejected Supply and subsequently the supply shall have to be lifted back and replaced by the supplier forthwith at his own risk an cost, if the same is delayed, penalty as may be decided by the State Level Purchase committee shall be imposed, besides the firm shall also be black listed."

23. A similar clause would most certainly be applicable for supplies made in the previous year as well. Assuming that some press reports had surfaced, it would have been open to the official respondents to verify the claims with regard to the supplies being sub-standard by subjecting the supplies through a thorough quality analysis. In any case, the supplies ought to have been regularly checked and verified for quality by the official respondents considering the fact that the same were to be made available to lacs of children in various anganwari centers in the State. Even in the present scenario, clause 22 ought to be implemented strictly and supplies made subject to checks for quality and specifications and strict action taken in case the same falls short on either count.

The State Level Purchase committee, therefore, appears to have digressed from the terms and conditions of the NIT and instead of taking a decision based upon the quality of the products appears to have used communication dated 27.9.2018 to allot the contract in favour of the respondent No. 4, which, to my mind, was impermissible in the facts and circumstances of the case.

24. Another issue highlighted by the learned counsel for the petitioner during the course of arguments was that in choosing respondent No. 4 as the supplier for biscuits to the tune of 15,000/- quintals, the official respondents had ignored the fact that the said respondent had failed to supply peas even as per the last contract and was in the normal course required to be black listed. It was urged that a supplier, who had failed to keep the commitment to make supplies of essential items as peas, to the children in the anganwari centers could not be trusted for making supplies of an essential food item like biscuits.

25. A reference to the record produced by the official respondents would show in the meeting held on 29.11.2018, the committee did record the failure on the part of the suppliers to supply peas in respect of Kashmir as well as Jammu divisions and that they were required to fulfill their obligations before 30.11.2018 failing which it was decided that hard steps including the forfeitures of EMD as also black listing would be taken. However, on being asked the Deputy Director, ICDS, present in the court, submitted that no supplies had at all been made by the respondent No. 4 and neither had the firm been blacklisted. However, since respondent No. 4 has admittedly not been blacklisted there was thus no bar for it to participate in the bidding process and if found successful to execute the supply contract, the supply contract made in favour of respondent No. 4 therefore, cannot be set aside only on the ground that it had failed to keep its commitment in the past.

26. Considering the facts and circumstances of the present case, in my opinion, the entire action of the official respondents in allotting the contract of supplying biscuits to respondent No. 4 who was not the lowest in the bidding process smacks of arbitrariness besides being violative of clause 14 which was an essential condition of the contract. Moreover, there was no power vested with the purchase committee in the NIT to substitute the condition of 'quality' with 'brand' contrary to the requirement of clause 14 of the NIT.

27. For the reasons mentioned above, the order impugned dated 17.11.2018 is quashed. The official respondents shall consider the petitioner for making supplies at the rate of Rs. 6770/- as offered by the petitioner during the course of arguments in the court as against Rs. 6780/- per quintal as was the rate determined for supplies to be made by respondent No. 4. Such of the supplies as had already been

received in the various centers/offices by official respondents be accepted for which payment to be made to respondent No. 4 at the contracted rates. However, no supplies hereinafter shall be accepted by the official respondents.

28. This court cannot lose sight of the fact that biscuits are to be supplied to lacs of children in various anangwari centers in the State. Quality, therefore, has to be ensured at all times by the official respondents.

29. With a view to ensure that quality is maintained at all times, official respondents shall ensure that samples be taken at random from the supplies made by the supplier at regular intervals. The samples shall be sent to more than two reputed laboratories to determine their quality and content. In case, any deficiencies are found, strict action be taken against the suppliers in terms of the NIT. The record of the quality check reports be maintained and preserved, cost of test reports shall be borne by the supplier.

(Dhiraj Singh Thakur)
Judge

Jammu
31.12.2018
Naresh