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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 13994/2019 & C.M. 55922/2019 & CM No.**
55921/2019

AMIT KUMAR

..... Petitioner

Through: Mr. Aditya Goel and Ms Srishti
Bansal, Advocates.

versus

UNION OF INDIA

..... Respondent

Through: Mr. Bhagvan Swarup Shukla,
CGSC with Mr. Nikhil
Bhardwaj and Mr. Sarvan
Kumar Shukla, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIBHU BAKHRU
HON'BLE MR. JUSTICE C.HARI SHANKAR

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ORDER
27.12.2019

VIBHU BAKHRU, J

1. The petitioner has filed the present petition, *inter alia*, praying that the respondent be directed to consider the petitioner's bid submitted pursuant to the tender floated by the respondent for the procurement of Uniform and Kit Bag for participants for the Republic Day Parade Camp, 2019-2020.

2. The respondent had issued a notice dated 10.12.2019, inviting tenders from eligible bidders to supply Uniform and Kit Bag for participants of the Republic Day Parade Camp to be held from 1st to 31st January, 2020. The said tenders were to be submitted online. The last date and time for submission of the tenders was fixed as 12.30 PM on 23.12.2019. The technical bids were to be opened on 24.12.2019 or, any subsequent day/time in the presence of bidders. Financial bids of those bidders qualifying the technical bid were scheduled to be opened on 26.12.2019.

3. The bids were opened as scheduled. The technical bids were opened on 24.12.2019 and the financial bids were opened on 26.12.2019.

4. The petitioner's bid was rejected on the ground that he had not complied with the tender conditions by submitting the necessary undertaking declaring that he/his firm had never been blacklisted by any Ministry/Department/Office/Organisation of the Government of India. Thus, his financial bid was not opened.

5. Clause 6 of the Tender Conditions specifically listed the necessary documents to be furnished by the eligible bidders. The said clause is set out below:

“5. Documents for Technical Bid:-

- (a) Earnest Money Deposit (EMD)
- (b) Self-attested copy of the PAN card
- (c) Income Tax Return filed for the last financial year (i.e. A.Y 2019-20)
- (d) Experience Certificate

- (e) Goods and Service Tax Registration Certificate
- (f) Sample to be enclosed
- (g) Undertaking declaring that the firm has never been blacklisted by any Ministry/Department/office/organization of Government of India.”

6. Thus, undisputedly, the petitioner was required to submit his undertaking that he has never been blacklisted by the Ministry/Department/office/organization of Government of India. Concededly, the petitioner did not furnish an undertaking in the aforesaid terms. He submitted a certificate stating as under:

“NSIC: NSIC/GP/WAZ/2014/0009233

TO WHOM SO EVER IT MAY CONCERN

THIS IS TO CERTIFY THAT THE FIRM OR ITS PROPRIETOR HAS NOT BEEN BLACK LISTED BY ANY STATE GOVERNMENT DEPARTMENT AND THAT NO CRIMINAL CASE/COMPLAINT IS PENDING OR REGISTERED AGAINST OUR FIRM ITS PROPRIETOR ANYWHERE IN INDIA

THANKING YOU,

YOURS FAITHFULLY,

FOR SAGAR INTERNATIONAL

(Signature of proprietor)"

7. Admittedly, the above certificate was not in conformity with the tender conditions. The fact that the petitioner's bid was rejected was informed to the petitioner by a letter dated 26.12.2019.

8. The learned counsel appearing for the petitioner states that even though the petitioner had not submitted the undertaking as required; nonetheless, his bid should be considered since he complied with the necessary eligibility criteria, inasmuch as, neither he nor his firm has been blacklisted by Government of India or any of its department/organisations. He relied on *M/s Supreme Infrastructure India Limited v. Rail Vikas Nigam Limited and An.: W.P. (C) 3817/2012 decided on 12.12.2012*, in support of his contention that a common sense approach is required to be taken while evaluating tenders.

9. It is now well settled that tender conditions have to be strictly complied with. Since, in the present case, it is admitted that the petitioner has not complied with the tender conditions, inasmuch as, he had not submitted an undertaking as required; this Court does not find any fault in rejecting the bid of the petitioner by the Tender Evaluation Committee.

10. The Supreme Court in *Central Coalfields Limited and Another. vs SLL-SML (Joint Venture Consortium) and Others: (2016) 8 SCC 622* has expressly held that the question regarding whether the bidder has complied with the tender condition must be looked from the point

of view of the employer. The Court held that whether a term of the NIT is essential or not, is a decision to be taken by the employer and the courts would not be justified in questioning the decision of the employer. The relevant extract of the said decision is set out below:

“47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in *Ramana Dayaram Shetty* [*Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489] the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in *Tata Cellular* [*Tata Cellular v. Union of India*, (1994) 6 SCC 651] there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision “that no responsible authority acting reasonably and in accordance with relevant law could have reached” as held in *Jagdish Mandal* [*Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517] followed in *Michigan Rubber* [*Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216] .

48. Therefore, whether a term of NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in *Ramana Dayaram Shetty* [*Ramana Dayaram*

Shetty v. International Airport Authority of India, (1979) 3 SCC 489]. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot.”

11. The Supreme Court referred to the decision of the Privy Council in ***Nazir Ahmad vs King Emperor: (1936) AIR PC 253 (2)*** and held as under:

“52. There is a wholesome principle that the courts have been following for a very long time and which was articulated in *Nazir Ahmad v. King Emperor* [*Nazir Ahmad v. King Emperor*, AIR 1936 PC 253 (2) : (1935-36) 63 IA 372 : 1936 SCC OnLine PC 41], namely: (SCC OnLine PC)

“... where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden.”

There is no valid reason to give up this salutary principle or not to apply it mutatis mutandis to bid documents. This principle deserves to be applied in contractual disputes, particularly in commercial contracts or bids leading up to commercial contracts, where there is stiff competition. It must follow from the application of the principle laid down in *Nazir Ahmad* [*Nazir Ahmad v. King Emperor*, AIR 1936 PC 253 (2) : (1935-36) 63 IA 372 : 1936 SCC OnLine PC 41] that if the employer prescribes a particular format of the bank guarantee to be furnished, then a bidder ought to submit the bank guarantee in that particular format only and not in any other format. However, as mentioned above, there is no inflexibility in this regard and an employer could deviate from the terms of the bid document but only within the parameters mentioned above.”

12. The decision in the case of *Supreme Infrastructure India Limited* (*supra*) is of little assistance to the petitioner. In that case, a typographical error had crept in the price quoted by the petitioner. Although the total price for the quantity of steel to be supplied, which was the multiple of the unit price and quantity, was correctly quoted, the quantity to be supplied had been inadvertently quoted as the unit price. It is in this context that the court had held that a basic common-sense approach cannot be thrown to the winds and the employer cannot shut its eyes to obvious errors. The said decision is not an authority for the proposition that an employer is bound to consider and evaluate the tender even though the bidder has not furnished the same in conformity with the terms of the invitation to tender.

13. It is also relevant that the financial bids have already been opened. In view of this and considering the fact that the petitioner had admittedly not furnished the documents as required, this Court does not consider it appropriate to interfere with the respondent's decision of rejecting the bid of the petitioner. The petition is accordingly dismissed.

14. The pending applications are also disposed of.

VIBHU BAKHRU, J

C.HARI SHANKAR, J

DECEMBER 27, 2019

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