

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

CJ Court

Case: LPA No. 24 of 2022
Cav No. 350 of 2022

Rakesh Gupta

.....Appellant/Petitioner(s)

Through :- Sh. Sunil Sethi, Sr. Advocate with
Sh. Navyug Sethi, Advocate.

v/s

Airport Authority of India

.....Respondent(s)

Through :- Sh. Inderjeet Gupta, Advocate for
Caveator.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MS. JUSTICE MOKSHA KHAJURIA KAZMI, JUDGE

ORDER
31.03.2022

01. Heard Sh. Sunil Sethi, Senior counsel assisted by Sh. Navyug Sethi learned counsel appearing for the petitioner and Sh. Inderjeet Gupta, counsel appearing for the caveator/respondent.

02. Caveat No. 350 of 2022 stands discharged.

03. In this appeal, a challenge has been thrown to the judgment and order dated 22.03.2022 passed by the writ court in writ petition WP(C) No. 2761 of 2021 '*Rakesh Gupta vs. Airports Authority of India and others*' whereby the petition was dismissed and the court declined to interfere with the tendering process in granting contract for maintaining and managing the food and beverage outlets at Civil Airport Jammu.

04. The facts reveal that the Airports Authority of India invited tenders/bids for maintaining and managing the food and beverages outlet at

the Civil Airport of Jammu. Accordingly, '*Request for Proposal*' (RFP) was issued on 13.07.2021 involving a two-tier system consisting of a technical and financial bid.

05. The petitioner-appellant contends that according to the eligibility conditions, he fulfilled all the technical eligibility criteria and that his technical bid could not have been rejected on the ground of ineligibility so as to award the contract to respondent no.4. The petitioner is providing in-flight catering services since 01.02.2016 to 31.01.2018 and since 01.02.2018, the same agreement has been extended till 09.02.2023 on the same terms and conditions. The turnover of the petitioner in the two years of the last three years had been over one crore and, as such, was fully eligible.

06. According to the Clause 2.1.4 and 2.1.5 of the RFP, for the purposes of the award of the above contract, the bidder must have a minimum turnover from F&B business during two years in the last seven years to the tune of ₹ 1.00 crore only for Jammu Airport.

07. The petitioner-appellant is a proprietor of M/s Airport Restaurant. He was granted license and an agreement was entered into with him on 18.09.2019 as a '*Flight Kitchen Operator*'. The turnover of the petitioner from the date of the said agreement, i.e., for the three years, 2018-19, 2019-20 and 2020-21 was ₹ 1.33 crore, ₹ 1.96 crore and ₹ 58.78 lacs.

08. At a glance, it do appears that the petitioner has a turnover of more than a crore in two years of the last seven years but the expert committee in its meeting of LCAC held that the above period of contract with the petitioner would be counted from 17.09.2019, the date of his entering into

agreement for *in-flight kitchen operator*. In this view of the matter, only the turnover of the year 2019-20 and 2020-21 has to be taken into account and, admittedly, petitioner in the aforesaid two years only had the turnover of ₹ 1.96 crore and ₹ 58.76 lacs. Thus, in the second year his turnover was much less than the minimum provided under the eligibility condition. Accordingly, his technical bid was rightly rejected.

09. The submission of learned counsel for the petitioner-appellant is that previous to the petitioner, the said restaurant of the petitioner - M/s Airport Restaurant, of which the petitioner is the proprietor, was being run by his mother and before her by his father as a sole proprietorship firm. Therefore, the experience or the turnover of the said restaurant during the period it was being run by his mother and father is also supposed to be taken into consideration. The aforesaid restaurant of the petitioner is being run in the sole proprietorship and not by any separate legal entity. The sole proprietorship has the entity of the proprietor only. The firm is only the trade name but the business is owned by the proprietor.

10. In the instant case, the petitioner is bidder and, therefore, his business experience/turnover has to be considered for the purposes of his eligibility rather than the business which was carried by his mother or father.

11. Sh. Sethi further submits that in the year 2020-21 the business of the petitioner was low on the account of COVID-19 situation and, as such, some latitude in this regard ought to have been given as the in-flight kitchen had remained un-operational for a long time.

12. The learned Single Judge has dealt with the above aspect and has observed that COVID-19 pandemic was a worldwide phenomenon and it has affected one and all and, if the petitioner is entitled to any grace in this regard, similar benefit has to be extended to all concerned which would not be in the fitness of things.

13. The writ court further relying upon '*Maa Binda Express Carrier and another vs. Northeast Frontier Railway and others*' (2014) 3 SCC 760 and '*Tata Cellular vs. Union of India*' (1994) 6 SCC 2016 mentioned the parameters laid down for judicial review in the matters of grant of tenders and noted that the long series of decisions in this regard clearly recognize that power exercised by the Government and its instrumentalities in regard to the allotment of contract is subject to judicial review but the bidders cannot insist that their tenders should be accepted simply for the reason their tender is highest or lowest. It is fairly well settled that award of a contract is essentially a commercial transaction and the terms on which tenders are invited are not open to judicial scrutiny unless when they are found to be tailor made to benefit any particular person or tenderer.

14. It has further been laid down that the modern trend points to judicial restraint in such administrative action; the court does not sit as a court of appeal but merely reviews the manner in which the decision is taken; the court does not have the expertise to correct the administrative decision; and, if such judicial review is permitted, it would be substituting court's decision without necessary expertise, which may be fallible and the Government

must have freedom of contract subject to fair play and non-application of arbitrariness.

15. In recent decision of Supreme Court in **Civil Appeal No. 1846 of 2022**, '*M/s N. G. Projects Limited versus M/s Vinod Kumar Jain and others*' decided on 21.03.2022, it has been laid down as under:

“23.....the Writ Court should refrain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary expertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after complying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a malafide manner, still the Court should refrain from interfering in the grant of tender but instead relegate the parties to seek damages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to additional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work.

16. In view of the aforesaid facts and circumstances, and the principle of law enunciated by the Supreme Court, we are of the opinion that learned

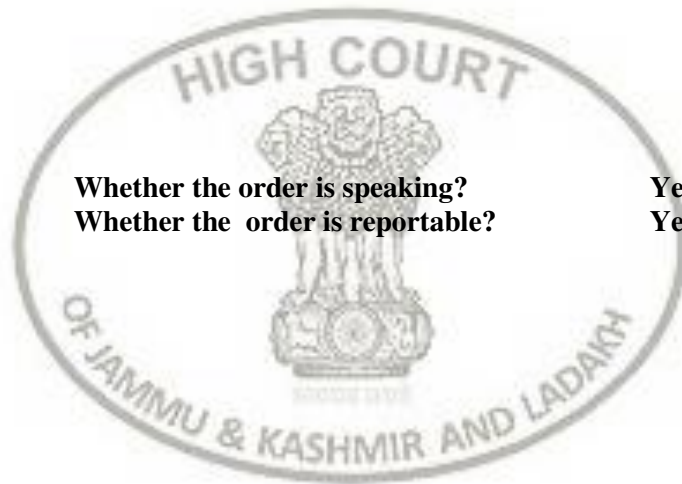
Single Judge has not committed any error of law in refusing to exercise its discretionary jurisdiction so as to dismiss the writ petition.

17. The appeal is devoid of merit and is, accordingly, dismissed.

(MOKSHA KHAJURIA KAZMI)
JUDGE

(PANKAJ MITHAL)
CHIEF JUSTICE

JAMMU
31.03.2022
Sunita.



Yes/No
Yes /No