

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

CMP No. 1911 of 2025 in

CWP No. 1676 of 2025

Reserved on: 30.01.2025

Date of decision 31.01.2025.

Sudhir Srivastava Innovations Pvt Ltd.

... Applicant/Petitioner

Versus

The Directorate of Medical Education & Ors.

...Non-applicants/Respondents

Coram

Hon'ble Mr Justice Rakesh Kainthla, Vacation Judge.

Whether approved for reporting? Yes

For the applicant : Mr. Ankur Khandelwal, Advocate.

For the Non-applicants : Mr. Pranay Pratap Singh, Additional Advocate General with Mr. Sanjay Dutt Vasudeva, Deputy Advocate for General for non-applicants No.1 to 4.

: Mr. Ashok Aggarwal, Senior Advocate with M/s. Dr. Sanjay Kumar, Zoeb Cuterywala, Arpita Sawhney, Rahul Tyagi Advocates through V.C. and Mr. Ankit Thakur, Advocate, present the Court for non-applicant No.5.

Rakesh Kainthla, Judge

The non-applicant No.1 issued a tender for the installation of machinery for Robotic Surgery at Atal Institute of Medical Super Specialty Chamiana, Shimla H.P. (Non-applicant No.2) and Dr Rajender Prashad Medical Collage, Tanda, Kangra, Himachal Pradesh (Non-applicant No.3). The present applicant participated in the tender by submitting a bid. The Technical Committee conducted an inspection and found that the Robotic System shown by the applicant at Rajiv Gandhi Cancer Institute did not demonstrate the use of the staplers, the applicant demonstrated only one stapler at its factory in Gurugram, which was still in the developmental stage and lacked articulation upto 120° , as mandated by tender specification point No. 23 & A2. The stapler was demonstrated on animal tissues and its use in humans was not exhibited. Therefore, it was not advisable to approve the system in its current state.

2. The applicant sent an email dated 31.12.2024 (Annexure P-13), raising its concerns about the evaluation process. It requested the recall of the evaluation process and conducting a fair evaluation process. Non-applicant No.1 sent a reply on 4th December 2024, attaching a letter written by it to the applicant in November 2024 about the visit of the Committee to observe the compliance of

the technical specifications and quality of the product. The applicant responded by sending another e-mail dated 07.01.2025 stating that it was making arrangements for Technical Committee visit for the demonstration of the Surgical Robotic System. Non-applicant No.1, in the meantime, opened the financial bid and rejected the technical bid.

3. Feeling aggrieved from the action of non-applicant No.1, the petitioner/applicant has filed a writ petition seeking a direction to consider the representation of the petitioner/applicant and evaluate the bid of the applicant after allowing the applicant to demonstrate the Surgical Robotic Unit. The petitioner/applicant also filed an interim application seeking direction to the non-applicants/respondents not to proceed with the award of the contract during the pendency of the petition.

4. I have heard Mr Ankur Khandelwal, learned counsel for the applicant, Mr. Pranay Pratap Singh, learned Additional Advocate General with Mr Sanjay Dutt Vasudeva, learned Deputy Advocate General for non-applicant/respondents No.1 to 4, and Mr. Ashok Aggarwal, learned Senior Advocate with M/s. Dr Sanjay Kumar, Zoen Cuterywala, Arpita Sawhney, Rahul Tyagi, and Ankit Thakur learned counsel for non-applicant/respondent No.5.

5. Mr Ankur Khandelwal, learned counsel for the applicant/petitioner submitted that the applicant demonstrated the use of the machine in the Rajiv Gandhi Cancer Institute where a gynecological procedure was being carried out which did require the use of the staplers. The use of the staplers was demonstrated to the Committee on animal tissues in the laboratory. The applicant submitted a representation dated 31.12.2024 against the rejection of the technical bid and a response was sent by the non-applicant No.1 regarding the technical evaluation of the machine by the Technical Committee. The non-applicant No.1 could not have opened the financial bid without allowing the applicant to demonstrate the use of the machine. The whole process adopted by non-applicant No.1 is arbitrary. Hence, it was prayed that direction be issued to non-applicant No.1 to permit the applicant to demonstrate the use of the machine to the Technical Committee. He relied upon the judgment of the High Court of Delhi in *Macpower CNC Machines Limited vs Union of India, WP (C) 3942/2020* decided on 24.12.2020 and the judgment of High Court of Patna in *Samanta Security and Intelligence Services Pvt. Ltd. vs State of Bihar 2023 SCC Online Pat 3186* in support of his submission.

6. Mr.Parnay Partap Singh, learned Additional Advocate General for the non-applicant/respondents No.1 to 4, submitted that the scope of

judicial review in the award of tender is quite limited. The Court cannot examine the merit of the decision taken by the State and is only concerned with the decision-making process. In the present case, the decision was taken by a team of highly qualified doctors, and the Court should not sit in appeal over their decision. The letter issued in November was not served upon the petitioner/applicant, and non-applicant No.1 sent the same by way of an email. This action of applicant No.1 should not be construed as providing an opportunity for the applicant to demonstrate the use of the machines to the Committee again. The principle of natural justice does not apply to the tender process. He relied upon judgments of Hon'ble Supreme Court passed in *Jagdish Mandal vs State of Orissa & others* (2007) 14 SCC 517, *Municipal Corporation, Ujjain and another vs BVG India Limited and others* (2018) 5 Supreme Court Cases 462, *Uflex Limited vs Government of Tamil Nadu & others* (2022) 1 SCC 165, *N.G. Projects Limited vs Vinod Kumar Jain & others* (2022) 6 Supreme Court Cases 127 and *Omsairam Steels & Alloys Private Limited vs State of Odisha* (2024) 9 Supreme Court cases 697 in support of his submission.

7. Mr. Ashok Aggarwal, learned Senior Counsel for respondent/non-applicant No.5, submitted that the jurisdiction of the Court in the tender process is quite limited. The Court examines the

process and not the merit of the decision. The applicant was allowed to demonstrate the use of the machine to the Technical Committee, which found that the machine did not comply with the tender specification. This Court should not substitute its view in place of the view of the Technical Committee. He relied upon the judgment of Hon'ble Supreme Court *in Tata Cellular vs Union of India (1994) 6 SCC 651, B.S. N Joshi & Sons Ltd. vs Nair Coal Services Ltd and others (2006) 11 Supreme Court Cases 548, Balaji Ventures Pvt. Ltd. vs Maharashtra State Power Generation Company Ltd. & another 2022 SCC OnLine SC 1967, M/S N.G. Projects (supra) and Jagdish Mandal (supra)* in support of his submission.

8. I have given a considerable thought to the submission made at the bar and have gone through the record carefully.

9. The Hon'ble Supreme Court exhaustively dealt with the scope of judicial review in *Tata Cellular v. Union of India, (1994) 6 SCC 651* and observed at page 687: -

“94. The principles deducible from the above are:

- (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 the 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, 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 the Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness and not affected by bias or actuated by mala fides.
- (6) Quashing decisions may impose a heavy administrative burden on the administration and lead to increased and unbudgeted expenditures.”

10. It was held in *Jagdish Mandal v. State of Orissa (2007) 14 SCC 517: 2006 SCC OnLine SC 1373* that while undertaking the judicial review, the Court has to ask the question whether the process adopted was mala fide or arbitrary and whether the public interest is affected, if the answer is in the negative, the Court should not interfere with the action taken by the authority. It was observed at page 531:

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether a choice or decision is made “lawfully” and not to check whether a choice or decision is “sound”. When the power of judicial review is

invoked in matters relating to tenders or the 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 the award of the contract is bona fide and is in the public interest, courts will not, in the exercise of the 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 the 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 the exercise of the 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 blacklisting 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.”

11. This position was reiterated in *Municipal Corpn., Ujjain v. BVG India Ltd.*, (2018) 5 SCC 462: (2018) 3 SCC (Civ) 291: 2018 SCC OnLineSC 278, and it was held that when the decision-making process is so arbitrary or irrational that no responsible authority proceeding reasonably or lawfully could have arrived at such a decision, the power of judicial review can be exercised. It was observed at page 477:

“27. Thus, only when a decision-making process is so arbitrary or irrational that no responsible authority proceeding reasonably or lawfully could have arrived at such decisions, the power of judicial review can be exercised. However, if it is bona fide and in the public interest, the court will not interfere in the exercise of the power of judicial review even if there is a procedural lacuna. The principles of equity and natural justice do not operate in the field of commercial transactions. Wherever a decision has been taken appropriately in the public interest, the court ordinarily should exercise judicial restraint. When a decision is taken by the authority concerned upon due consideration of the tender document submitted by all tenderers on their own merits and it is ultimately found that the successful bidder had in fact substantially complied with the purpose and object for which the essential conditions were laid down, the same may not ordinarily be interfered with.”

12. It was held in *Uflex Ltd. v. State of T.N.*, (2022) 1 SCC 165: 2021 SCC OnLine SC 738 that the tenderer can always seek damages in a Civil Court and the Writ Court should resist the temptation to interfere by exercising the power of judicial review on imaginary

grievances, wounded pride and business rivalry. It was observed at page 173:

“The enlarged role of the Government in economic activity and its corresponding ability to give economic “largesse” was the bedrock of creating what is commonly called the “tender jurisdiction”. The objective was to have greater transparency and the consequent right of an aggrieved party to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India (hereinafter referred to as “the Constitution”), beyond the issue of strict enforcement of contractual rights under the civil jurisdiction. However, the ground reality today is that almost no tender remains unchallenged. Unsuccessful parties or parties not even participating in the tender seek to invoke the jurisdiction of the High Court under Article 226 of the Constitution. The public interest litigation (“PIL”) jurisdiction is also invoked towards the same objective, an aspect normally deterred by the Court because this causes proxy litigation in purely contractual matters.

2. The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance. [*Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517*]

3. We cannot lose sight of the fact that a tenderer or contractor with a grievance can always seek damages in a civil court and thus, “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 the power of judicial review, should be resisted”. [*Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517*]

13. It was held in *Omsairam Steels & Alloys (P) Ltd. v. State of Odisha, (2024) 9 SCC 697: 2024 SCC OnLine SC 1711* that the Court has to strike a fair balance between the interests of the Government and the private entities. It was observed at page 704:

“21. It is well settled that, normally, the courts would be loath to interfere in commercial matters, especially when such interference has the effect of delaying the execution of mega projects of national importance.

22. This Court in *Silppi Constructions Contractors v. Union of India [Silppi Constructions Contractors v. Union of India, (2020) 16 SCC 489]* held: (SCC p. 501, para 19)

“19. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions [Ed. : The reference appears to be to *Tata Cellular v. Union of India, (1994) 6 SCC 651; Raunaq International Ltd. v. I.V.R. Construction Ltd., (1999) 1 SCC 492; Air India Ltd. v. Cochin International Airport Ltd., (2000) 2 SCC 617; Ksidc Ltd. v. Cavalet India Ltd., (2005) 4 SCC 456; Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd., (2005) 6 SCC 138; B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd., (2006) 11 SCC 548; Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517; Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216; Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818; Montecarlo Ltd. v. NTPC Ltd., (2016) 15 SCC 272; Municipal Corpn., Ujjain v. BVG India Ltd., (2018) 5 SCC 462; (2018) 3 SCC (Civ) 291; Caretel Infotech Ltd. v. Hindustan Petroleum Corpn. Ltd., (2019) 14 SCC 81] has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to*

*interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides bias or irrationality is made out. ... The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues, the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments [Ed. : The reference appears to be to *Tata Cellular v. Union of India*, (1994) 6 SCC 651; *Raunaq International Ltd. v. I.V.R. Construction Ltd.*, (1999) 1 SCC 492; *Air India Ltd. v. Cochin International Airport Ltd.*, (2000) 2 SCC 617; *Ksidc Ltd. v. Cavalet India Ltd.*, (2005) 4 SCC 456; *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd.*, (2005) 6 SCC 138; *B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.*, (2006) 11 SCC 548; *Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517; *Michigan Rubber (India) Ltd. v. State of Karnataka*, (2012) 8 SCC 216; *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.*, (2016) 16 SCC 818; *Montecarlo Ltd. v. NTPC Ltd.*, (2016) 15 SCC 272; *Municipal Corpn., Ujjain v. BVG India Ltd.*, (2018) 5 SCC 462; (2018) 3 SCC (Civ) 291; *Caretel Infotech Ltd. v. Hindustan Petroleum Corpn. Ltd.*, (2019) 14 SCC 81] cited above, the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the Government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer." (emphasis supplied)*

23. Thus, it is evident that while undertaking the exercise of judicial review of matters relating to tenders, the court has to strike a fair balance between the interests of the Government, which is always expected to advance the financial interests of the State and private entities. As observed by this Court, not every small mistake must be perceived through the lens of a magnifying glass and blown up unreasonably...."

14. Therefore, it is apparent from the judgments of the Hon'ble Supreme Court that the Courts cannot interfere with the tender process unless the same is arbitrary, mala fide, unreasonable or biased.

15. The other judgments cited at the Bar have taken more or less a similar view.

16. In the present case, the Technical Committee conducted the inspection and issued a report stating that the machine of the applicant did not meet the tender specifications point No. 23 and A2. The Stapler was not demonstrated on humans but was demonstrated on animal tissues and it was not advisable to approve this system in its present State.

17. The applicant wrote a letter dated 31.12.2024 admitting that the use of the Stapler was not demonstrated to the Committee. It explained that the Committee was present for one surgery (Gynecology), which did not require the use of the Stapler. This letter further mentioned that Technical Committee was invited to visit the laboratory to observe Stapler's functionality on animal tissues. Thus, the findings of the Technical Committee are not in dispute. The Committee was in the best position to know about the suitability of

the machine on humans, and this Court cannot supersede the view of the Technical Committee while exercising the jurisdiction under Article 226 of the Constitution of India.

18. It was submitted that the applicant had sent the objections to the report of the Technical Committee in response to which non-applicant No.1 sent a letter (Annexure P-6) regarding the visit of the Technical Evaluation Committee, which showed that an opportunity was given to the applicant to demonstrate the Robotic Surgery and the applicant was prevented from availing this opportunity. This amounts to a violation of natural justice, making the opening of the financial bid bad. Reliance was placed upon the judgment of *Samanta Security (supra)* in support of this submission. The High Court of Patna held that the normal course of the tender process is informing such a person about the technical bid and providing an opportunity to file an objection or suggestion, and thereafter, the opening of the financial bid is required to be processed. Hon'ble Supreme Court specifically held in *Tata Motors Ltd. v. Brihan Mumbai Electric Supply & Transport Undertaking (BEST)*, 2023 SCC OnLine SC 671 that the principle of equity and natural justice have to stay at a distance in evaluating the tenders. It was observed:

“54. As observed by this Court in *Jagdish Mandal v. State of Orissa, reported in (2007) 14 SCC 517*, that while invoking the power of judicial review in matters as to tenders or award of contracts, certain special features should be borne in mind that *evaluations of tenders and awarding of contracts are essentially commercial functions and principles of equity and natural justice stay at a distance in such matters*. If the decision relating to the award of the contract is *bona fide* and is in the public interest, courts will not interfere by exercising powers of judicial review, 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 invoked to protect private interest at the cost of public interest or to decide contractual disputes.” (Emphasis supplied)

19. In view of the judgments of the Hon’ble Supreme Court, the judgment of the High Court of Patna incorporating the principle of natural justice in the evaluation of the tender cannot be followed.

20. A reliance was also placed upon the judgment of the High Court of Delhi in *Macpower CNC Machines (supra)*. However, the facts show that the tender document empowered the purchaser to seek clarification of the bid and to rectify non-material non-conformities. It was laid down by the Delhi High Court that the purchaser had acted on assumptions, and the decision was arbitrary and whimsical. It was further found out that the purchaser had sought clarification from the other bidders but not from the writ petitioner, which amounted to discrimination. It was held that uniformity is to be adopted, and opportunity could not have been provided selectively.

21. In the present case, it was not shown that any assumptions were made or an opportunity was given to any bidder to make the representation, and the applicant was discriminated against by denying this opportunity. Hence, no advantage can be derived from the judgment cited by the applicant.

22. It was submitted that no action was taken on the representation of the applicant. This is not correct. The instructions filed by the non-applicants/State show that the Member Secretary of Technical Committee had responded to the objections raised by the applicant vide letter dated 06.01.2025 stating that a straight stapler with no movement at the hinge was demonstrated. One stapler was fired on animal tissue. The applicant did not have any other stapler, and the opportunity to use the stapling device did not arise. Therefore, non-applicants No.1 to 4 had taken the version of the Technical Committee and found that objections raised by the applicant to the report of the Technical Committee were not correct.

23. It was submitted that the letter of rejection was not communicated to the applicant. Mr. Parnay Partap Singh, Additional Advocate General for respondents No.1 to 4 has rightly submitted that the documents were to be uploaded on the official website as per the

terms and conditions of the tender and the applicant was to check the website to know about the progress/status of the tender process. Even otherwise, the applicant was aware of the rejection by the Technical Committee, which is evident from the fact that it had sent a letter to the non-applicant no. 1 on the same day. Hence, this submission will not assist the applicant.

24. In the present case, the non-applicants took action based on the report of the Technical Committee, which consisted of experts in the field. The Committee concluded that the applicant's machine did not fulfill the requisite standard. Hence, the action of the respondents cannot be said to be arbitrary, justifying the invocation of the jurisdiction under Article 226 of the Constitution of India.

25. In view of the above, there is no ground for grant of interim relief. Hence, the application fails, and the same is dismissed. The order passed on 27.01.2025 shall stand vacated.

26. The observation made hereinabove shall remain confined to the disposal of the applicant and will have no bearing, whatsoever, on the merits of the case.

31st January, 2025
(ravinder)

(Rakesh Kainthla)
Vacation Judge