

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

Reserved on: 09.08.2023
Pronounced on: 18.08.2023

WP(C) No. 862/2023

Tata Mobile 207 DI and MahindraPetitioner(s)
Max Mobile Pickup Cooperative
Ltd.

Through: Mr. S. R. Hussain Advocate

Vs

State of J&K & Ors. Respondent(s)

Through: Mr. T.M. Shamsi DSGI with
Ms Yasmeena, Advocate
Mr. Z.A.Qureshi Sr. Advocate
with
Ms Razia Amin, Advocate

CORAM: HON'BLE MR. JUSTICE SANJAY DHAR, JUDGE

JUDGMENT

1. The petitioner has challenged the decision of official respondents No.1 to 4 whereby they have accepted the bid of respondent No.5 and awarded tender in its favour. The petitioner has also sought a direction upon the official respondents to award the contract in his favour.

2. It appears that respondent No.4 had invited online bids from the registered Cooperative Transport Societies of Kargil region for provision of Civil Hired Transport (CHT) of load carrier 1/1.5-ton pickup (4x4). The NIT was issued vide No. 174/Cont/2023-24/ST-11 (4x4) dated 23.11.2022 through GeM portal in terms of Bid No. GEM/2022/B/2776503 dated 09.12.2022.

3. The petitioner as well as respondent No.5 also responded to the aforesaid NIT and submitted their bids. The last date for submission of bids was fixed as 02.01.2023 at 11:00 am and the bids were to be opened on the same day at 11.30 am. One of the conditions of the bid document was that minimum average annual turnover of the bidder for three years should be Rs.20.00 lacs, whereas the past experience required for the same/similar service was fixed as two years. On 02.01.2023, technical bids were opened by the Technical Evaluation Committee of the official respondents at 11.30 am and all the four participating bidders were found to be technically compliant. Thereafter, on 07.01.2023 financial bids were opened on GeM Portal and respondent No.5 was found to be L-1 bidder, whereas the petitioner was found as L-2 bidder. On 12.02.2023, the contract was awarded to respondent No.5.

4. The petitioner has challenged the action of the official respondents of awarding contract to respondent No.5 primarily on the ground that the said respondent did not possess the requisite experience of two years for same/similar service in terms of the tender conditions. It has also been contended that respondent No.5 did not possess minimum average annual turnover of Rs.20.00 lacs for the past three years. It has been submitted that respondent No.5-Cooperative Society, as per its own showing, came into existence on 24.07.2021 when certificate of registration as a Cooperative Society was issued by the Administration of UT of Ladakh, therefore, by no stretch of imagination, it can be stated that respondent No.5 was having either the requisite experience or the requisite turnover. It is contended that respondent No.5 was ineligible to participate in the

tendering process, but the official respondents have not only entertained its bid, but have awarded the contract in its favour. On this ground it is urged that the action of the official respondents is illegal and liable to be quashed.

5. The official respondents have contested the writ petition by filing a reply thereto. In their reply, after narrating the facts, the said respondents have submitted that, for a bidder to be eligible for participating in the tender, which is subject matter of the instant writ petition, it was not necessary that the bidder should have past experience of similar nature of service as a cooperative Society and that even the past experience of a bidder as non-cooperative society could also be taken into consideration. It has been submitted that respondent No.5 had the experience of four years of providing the services of Tata Mobile Vehicles to different Government Institutions and, in this regard, the said respondent had submitted a certificate from Sub Divisional Magistrate, Drass, Kargil, therefore, even if respondent No.5 was constituted as a Cooperative Society only on 24.07.2021, still then, it had the past experience of more than five years even prior to its registration as a Cooperative Society which fact was taken into account by the official respondents while entertaining its technical bid. It has been further submitted that the financial bid submitted by respondent No.5 was found to be the lowest, as such, the contract was awarded in its favour.

6. Thus, according to the official respondents, there has been no irrationality or illegality in its action of awarding contract to respondent No.5. The said respondents have further submitted that the contract, which

is subject matter of the writ petition, involves providing of Tata Mobile pickup 4x4 vehicles for carrying ration to the forward posts and if the contract awarded in favour of respondent No.5 is cancelled at this stage when only a month or so is left before the onset of harsh winter in Kargil region, it will cause grave prejudice to the official respondents as it would not be possible for them to supply ration to the Jawans, who are deputed at forward posts during the harsh winter season. According to the official respondents, it is going to take at least a couple of months to award fresh tender and by the time the fresh process is completed, the passes leading to forward posts would get blocked which, in turn, would entail compromising the safety and security of the soldiers posted at the forward posts.

7. Respondent No.5 in its reply to the writ petition has contended that even prior to its incorporation as a Cooperative Society on 24th July, 2021, it was involved in the activity of providing services of Tata Mobile Vehicles for more than 10 years with four years experience as a separate registered Cooperative Society. In this regard, a copy of the certificate issued by the Sub Divisional Magistrate, Drass has been relied upon by the said respondent. It has been further submitted that, after opening of the technical bids, the petitioner had made a representation before official respondents, but, later on, the same was withdrawn by it, but this fact has been concealed by the petitioner. According to respondent No.5, this amounts to concealment of a material fact which entails dismissal of the writ petition.

8. I have heard learned counsel for the parties and perused the material

on record.

9. The main issue, that is required to be determined, in this case is, as to whether the successful bidder i.e., respondent No.5 was having the requisite experience of two years for same or similar service. It is not in dispute that respondent No.5 has been registered as a Cooperative society on 24th July 2021, whereas the last date for submission of bids was 02.01.2023 meaning thereby that the period of two years since the constitution of respondent No.5 as a Cooperative Society had not even expired at the time of submission of the bids. It is also not in dispute that only a registered Cooperative Societies of Kargil region were eligible to participate in the bidding process. It is being claimed by the official respondents that even the experience as a non-registered Cooperative Society can be taken into account. The question that arises for determination is as to whether, in the facts and circumstances of the case, the action of the official respondents in entertaining the bid of respondent No.5 can be examined by this Court in exercise of its powers of judicial review. In order to answer this question, it would be apt to notice some of the celebrated judicial precedents dealing with scope of judicial review in matters relating to award of tenders.

10. A three-Judge Bench of the Supreme Court has in **Tata Cellular vs Union of India, (1994) 6 SCC 651**, after referring to its earlier decisions, laid down the following principles:

- (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; and,

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

11. In Jagdish Mandal vs. State of Orrissa, (2007) 14 SCC 517, the Supreme Court observed that a contract is a commercial transaction and while evaluating tenders and awarding contracts, which are essentially commercial functions, the principles of equity and natural justice stay at a distance. It was held that, if a decision relating to award of contract is *bona fide* and is in public interest, the Courts will not exercise their power of judicial review to interfere, even if, there is a procedural error in assessment or prejudice has been caused to a tenderer.

12. In Afcons Infrastructure Limited vs. Nagpur Metro Rail Corporation Limited and another, (2016) 16 SCC 818, a two-judge Bench of the Supreme Court laid down the test to the following effect:

“13. In other words, a mere disagreement with the decision

making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision making process or the decision.

14. xxxxxxxxxxxxxxxxxxxxxxxx

15. *We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given”.*

13. From the foregoing analysis of law on the subject, it is clear that the scope of power of judicial review in the matters relating to award of tenders is very limited in nature. It is only if the approach of the Tender Awarding Authority is arbitrary or *mala fide* or the procedure adopted is meant to favour one that the power of judicial review can be exercised in such matters. In the backdrop of aforesaid legal position and bearing in mind the limited scope of judicial review in administrative matters, especially those pertaining to tenders, let me now advert to the facts of the instant case.

14. As per the clause relating to the experience contained in bid

document, past experience required for same/similar service is two years.

The clause relating to experience criteria as contained in the bid document reads as under:

“Experience Criteria: In respect of the filter applied for experience criteria, the Bidder or its OEM (themselves or through resellers) should have regularly, manufactured and supplied same or similar category products to any Central/State Government Organization/PSU/Public Listed Company for number of Financial years as indicated above in the bid document before the bid opening date. Copies of relevant contracts to be submitted along with bid in support of having supplied some quantity during each of the Financial years. In case of bunch bids, the category of primary product having highest value should meet this criterion”.

15. From a perusal of the aforesaid clause, it is clear that, for a bidder to be eligible to participate in the subject tender, it was essential for it to have supplied some quantity during each of the financial years and the number of years of past experience was prescribed as two years. The official respondents have interpreted this clause to mean that the bidder should have two years experience for same or similar service either as a registered Cooperative Society or even prior to its registration as a Cooperative Society. According to the official respondents, this is a possible interpretation of the clause relating to experience criteria and since respondent No.5 had produced a document issued by the Sub Divisional Magistrate, Drass evidencing the fact that it had experience of about four years in supplying Tata Mobile Vehicles even prior to its registration as a Cooperative Society, therefore, the said respondent

fulfilled the requisite criteria.

16. *Per contra*, learned counsel for the petitioner has vehemently contended that such an interpretation cannot be given to the clause relating to experience as contained in the bid document. According to learned counsel for the petitioner, it is only the experience as a registered Cooperative Society which has to be taken into consideration. It has been contended that the interpretation adopted by the official respondents to the clause relating to the past experience is irrational and arbitrary, therefore, its action of awarding tender to respondent No.5 is illegal. In this regard, the learned counsel has relied upon the judgments of Bombay High Court rendered in the case of **Kirloskar Brothers Ltd vs. Kalyan Dombivli Municipal Corporation and others**, 2010 (7) MhLJ 285 and Calcutta High Court in the case of **Reliable Facilities Services vs. Chittaranjan National Cancer** (WPA 25725/2022, decided on 23.12.2022).

17. The argument put forward by learned counsel for the petitioner appears to be attractive at the first blush, but then, the question arises as to whether this Court, in exercise of its judicial review, would be within its powers to interpret the tender conditions in a manner which is not acceptable to the Employer or the Authority who has issued the tender document. The law on this aspect of the matter is, by now, settled. It has been the consistent view of the Courts that, if the interpretation given by the author of a tender document is, *prima facie*, in consonance with the language of the tender document, the Court would prefer to keep restraint.

18. In the case of **Galaxy Transport Agencies vs. New J.K. Roadways, 2020 SCC Online SC 1035**, a three-Judge Bench of the Supreme Court laid down that the author of the tender document is the best person to understand and appreciate its requirements and, thus, its interpretation should not be second-guessed by a Court in judicial review proceedings. It was observed as under:

“17. In accordance with these judgments and noting that the interpretation of the tendering authority in this case cannot be said to be a perverse one, the Division Bench ought not to have interfered with it by giving its own interpretation and not giving proper credence to the word “both” appearing in Condition No. 31 of the N.I.T. For this reason, the Division Bench’s conclusion that JK Roadways was wrongly declared to be ineligible, is set aside.

18. Insofar as Condition No. 27 of the N.I.T. prescribing work experience of at least 5 years of not less than the value of Rs. 2 crores is concerned, suffice it to say that the expert body, being the Tender Opening Committee, consisting of four members, clearly found that this eligibility condition had been satisfied by the Appellant before us. Without therefore going into the assessment of the documents that have been supplied to this Court, it is well settled that unless arbitrariness or mala fide on the part of the tendering authority is alleged, the expert evaluation of a particular tender, particularly when it comes to technical evaluation, is not to be second-guessed by a writ court. Thus, in [Jagdish Mandal v. State of Orissa](#), (2007) 14 SCC 517, this Court noted:

“22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality,

unreasonableness, bias and mala fides. 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

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.” (pages 531-532) (emphasis supplied)

19. Similarly, in *Montecarlo Ltd. v. NTPC Ltd.*, 2016 (15) SCC 272, this Court stated as follows:

“26. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinised by the technical experts and sometimes third- party assistance from those unconnected with the owner's organisation is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise.

Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the

principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.

20. This being the case, we are unable to fathom how the Division Bench, on its own appraisal, arrived at the conclusion that the Appellant held work experience of only 1 year, substituting the appraisal of the expert four-member Tender Opening Committee with its own.

19. The aforesaid position of law has been reiterated and reaffirmed by the Supreme Court in its latest judgment of **M/S N. G. Projects Limited vs. M/S Vinod Kumar Jain and others, 2022 LiveLaw SC 302** as also in **M/S Agmatel India Pvt. Ltd vs. M/S Resoursys Telecom and others, 2022 LiveLaw SC 105.**

20. From the foregoing analysis of law on the subject, it is clear that author of a tender document is to be taken as the best person to understand and appreciate its requirements and if interpretation of a particular clause of the tender is, *prima facie*, in consonance with the language of the tender document or sub-serving the purpose of the tender, the Court would not interfere. It is also clear that, in the matters relating to technical evaluation, the Court would generally not interfere, even if the interpretation given to the tender document by its author is not as such acceptable to the Court. That by itself would not be a reason for interfering with the interpretation given.

21. Coming to the facts of the instant case, the official respondents, who are authors of the tender document, have interpreted the clause relating to experience in a manner to read it as experience as a registered cooperative society coupled with the experience of the said entity prior to its registration. The said interpretation given by the official respondents appears to be acceptable, though another possible interpretation of the clause relating to experience would be that only the experience as a registered Cooperative Society has to be taken into account. But, in the light of the legal position on the subject, discussed hereinbefore, it would not be open to this Court to discard the interpretation given by the official respondents to the clause relating to experience and adopt the interpretation which the petitioner desires this Court to adopt, though the same is a possible interpretation of the said clause. In view of this legal position, it may not be possible for this Court to interfere in the decision taken by the Technical Evaluation Committee of official respondents in entertaining the tender of respondent No.5.

22. Learned counsel for the petitioner has also argued that this Court, while extending the order of stay, has, vide its order dated 14.06.2023, expressed its serious doubts about the manner in which the acceptance letter regarding tender in question has been issued in favour of respondent No.5. The learned counsel has submitted that, in the said order, the Court has also expressed its doubts about the manner in which the bid of respondent No.5 was submitted only half an hour before closure of bidding process and that, in the Board proceedings, there is mention of only three bids and not four bids. The learned counsel has submitted that,

all these factors go on to show that the bidding process has been rigged in favour of respondent No.5.

23. So far as the acceptance letter dated 11.02.2023 is concerned, this Court, in its order dated 14.06.2023, had expressed doubts about the said letter on the ground that the same is un-numbered. In the said order, it has been noted by this Court that, after opening of financial bids, respondent No.5 was found to be L-1 bidder and order on file No.1821/CHT/14/Q2 (vii) dated 04.02.2023 was issued in favour of respondent No.5.

24. A perusal of the record shows that on 04.02.2023, sanction was accorded to acceptance of tender of respondent No.5 and, on 11.02.2023, acceptance of tender note was issued to respondent No.5. It is further revealed that, the contract was awarded and uploaded on GeM Portal on 12.02.2023, screenshot whereof has been placed on record by the official respondents. The whole process has been uploaded on Gem Portal and, in absence of any cogent material to show any tampering with the bidding process that has been conducted through Gem Portal in the instant case, it cannot be stated that the bidding process has been compromised. It is true that, in the physical file of the Board proceedings, instead of four, only three bids are mentioned, but the official respondents have explained in their reply that the same was due to clerical/typographic error and they have also placed on record a copy of the Board proceedings in which details of all the four bidders have been mentioned. Therefore, the contention of learned counsel for the petitioner that, on account of the observations made by this Court, in its order dated 14.06.2023, it has to be presumed that the official respondents have acted in a dubious manner

thereby compromising the bidding process, cannot be accepted.

25. Even otherwise, the Supreme Court in the case of **Silppy Constructions Contractors vs Union of India and others, 2019 SCC Online SC 1133** has held that the Courts must realise their limitations and the havoc which needless interference in commercial matters could cause. It would be apt to reproduce the following observations of the Supreme Court made in the said case:

“9. 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 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 clearcut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of [Article 12](#) of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. 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 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”.

26. Thus, while considering a case relating to award of tenders, the Courts have to avoid making a mountain out of mole hill and unnecessarily interfere in the functioning of the Tender Awarding Authorities by sitting in appeal over their decision. Even in a case where the Court is of a, *prima facie*, opinion that the decision of the Tender Awarding Authority may not be strictly in accordance with law and there may be certain procedural aberrations or errors, the Courts should stay their hands off, particularly in a case where public interest is involved.

27. In the instant case, if the award of tender to respondent No.5 is interfered with at this juncture, the official respondents will have to take resort to fresh tendering process. Even if they terminate the contract of respondent No.5 and, thereafter, award the same to the next lowest bidder, it would take a considerable period of time to undertake such an exercise. We are already in the month of August and within a few days from now, the passes leading to forward posts of Kargil region are going to close for next six to eight months. If, at this juncture, the impugned action of the official respondents is quashed, it will have serious consequences on safety and security of our Jawans who are manning the forward posts in extremely adverse conditions. Thus, public and national interest is going to be seriously prejudiced in case this Court interferes in the

impugned action of the official respondents at this moment of time, particularly when due to the stay order passed by this Court, a considerable time has been lost and the official respondents must be feeling pressing need to rush the ration and other equipments to the forward posts.

28. For the foregoing reasons, I do not find it a fit case where this Court should exercise its power of judicial review of the impugned action of the official respondents. Accordingly, the writ petition is dismissed. Interim orders shall stand vacated.

(Sanjay Dhar)
Judge

Srinagar
18.08.2023
“Bhat Altaf, PS”

Whether the order is speaking: **Yes/No**
Whether the order is reportable: **Yes/No**

