

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

WP(C) No. 1602/2021; CM No. 5391/2021

Dated: 17th of August, 2021.

Rural Contractors Welfare Association & Ors.

... Petitioner(s)

Through:

Mr Mohammad Ashraf Wani, Advocate.

Versus

Union Territory of JK & Ors.

... Respondent(s)

Through: -

Mr M. A. Chashoo, AAG.

CORAM:

Hon'ble Mr Justice Ali Mohammad Magrey, Judge.

(JUDGMENT)

01. By medium of the instant Petition, the Petitioners have challenged the NIT No. 59 of R&B/4727-37 of 2021-22 dated 28th of July, 2021 and NIT No. 60 of R&B/4899-4908 of 2021-22 dated 29th of July, 2021.

A direction is also sought in the name of the Respondents to allow all the Contractors to participate in the bidding process for the works which have been put to tender in terms of the aforesaid tender notices.

02. Learned Counsel for the Petitioners submitted that the Respondents, by incorporating the condition in the impugned NITs to the effect that all the Contractors shall upload card verification certificate, has deprived most of the Contractors in participating in the process, thereby

resulting in reduction of competition. It is further submitted that the aforesaid condition has seriously prejudiced the rights and interests of the Petitioners and that the same has been done only with a view to give benefit to some blue-eyed Contractors.

03. Heard the learned counsel for the parties, perused the pleadings on record and considered the matter.

04. At the very outset, what requires to be stated is that as per settled legal position, the tender issuing authority is the best judge of its interests/needs and that it is always open to the said authority to suitably prescribe the eligibility criteria so as to best serve its purposes. Whenever a term/ condition is prescribed in the eligibility criteria, it might hurt the interests of someone or the other, but, for that reason, the said term/ condition in the eligibility criteria cannot be labelled as *malafide* or arbitrary.

05. Besides, the Courts are expected to exercise judicial restraint in interfering with the administrative action, particularly in the matter of tender or contract. Ordinarily, the soundness of the decision taken by the tender issuing authority 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, firstly, if the decision made is so arbitrary and irrational that the Court can say that the decision is such that no responsible authority acting

reasonably and in accordance with relevant law could have reached or; second, if the process adopted or decision made by the authority is *malafide* or intended to favour someone or; third, if the public interest is affected. In the case on hand, the decision of the Respondents in fixing the terms and conditions in the impugned NITs cannot be said to be one where they have acted in a manner in which no responsible authority acting reasonably and in accordance with the relevant law would have acted. Furthermore, a bare perusal of the pleadings on record, does not indicate that the decision made by the authority is *malafide* or intended to favour someone. Likewise, the third ground of public interest is also not affected in the present case because while it may be in public interest to have greater competition, it is also in public interest that all the tender conditions are complied with as prescribed by the tender issuing authority and that there is no uncertainty in that area.

06. Law on the subject of scope of judicial review in the matters of Contract is no more *res integra*.

07. In case titled '*Tata Cellular V. Union of India: (1994) 6 Supreme Court Cases 651*', at Paragraph No.94, Hon'ble the Supreme Court of the country, while dealing with the issue similar to the one subject matter of the instant Petition, evolved 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."*

08. In case titled '***Sterling Computers Limited V. M&N Publications Ltd: (1993) 1 SCC 445***', the Apex Court, at Paragraph No.12, has laid down as under:

"In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. But even in such matters they have to follow the norms recognized by courts while dealing with public property. It is not possible for courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of 'play in the joints' to the executive."

09. Again, the Apex Court, in case titled '*Directorate of Education & Ors. V. Educomp Datamatics Ltd. And Ors: (2004) 4 SCC 19*', while applying the principles enunciated in Tata Cellular's case (*supra*), at Paragraph No.12, observed, thus:

"12. It has been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The Courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, malafide or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The Courts cannot strike down the terms of the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wise or logical. The Courts can interfere only if the policy decision is arbitrary, discretionary or malafide."

On an appreciation of the law laid down above, what comes to limelight is that the modern trend points to judicial restraint in administrative action and that the Court does not sit as a '*Court of Appeal*', but merely reviews the manner in which the decision was made. It has also been declared that Court does not have the expertise to correct the administrative decision and that 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. Furthermore, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere and quashing administrative decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

10. It is, thus settled that public authorities must be left with the same liberty as they have in framing the policies, even while entering into contracts because many contracts amount to implementation or projection of policies of the Government. But it cannot be overlooked that unlike policies, contracts are legally binding commitments and they commit the authority which may be held to be a State within the meaning of Article 12 of the Constitution of India in many cases for years. It is for this reason that the Courts have impressed that even in contractual matters the public authority should not have unfettered discretion. In contracts having commercial element, some more discretion has to be conceded to the authorities so that they may enter into contracts with persons keeping an eye on the augmentation of the revenue. But, even in such matters, they have to follow the norms recognized by Courts while dealing with public property. It is not possible for the Courts to question and adjudicate every decision taken by an authority because many of the Government Undertakings, which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a *quasi-judicial* authority while awarding contracts. Under some special circumstances, a discretion has to be conceded to the authorities who have to enter into contract by giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bonafide manner, although not

strictly following the norms laid down by the Courts, such decisions are upheld on the principle laid down by Justice Holmes that Courts, while judging the constitutional validity of executive decisions, must grant certain measure of freedom of 'play in the joints' to the executive.

Looking at the instant case in the above perspective, the Petitioners have not been able to establish before the Court that the decision taken by the Respondents in fixing the terms and conditions of the impugned NITs is an arbitrary exercise of power or that the same was/ is *malafide* in nature. In '*Jagdish Mandal v. State of Orissa: (2007) 14 SCC 517*', at Paragraph No.22, the Hon'ble Supreme Court held, thus:

"22. 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."

From a bare perusal of the pleadings placed on record, it is more than apparent that the decision taken by the Respondents in fixing the terms

and conditions with respect to the impugned NITs was certainly not irrational in any manner whatsoever or intended to favour anyone.

11. For all that has been said and done hereinabove, I do not find any merit in this Petition. It entails dismissal and is, accordingly, *dismissed*, along with the connected CM(s).

12. No order as to costs.

(Ali Mohammad Magrey)
Judge

SRINAGAR

August 17th, 2021

"TAHIR"

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| i. | Whether the Judgment is reportable? | Yes/ No. |
| ii. | Whether the Judgment is speaking? | Yes/ No. |