

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

Reserved on:- 04.12.2024
Pronounced on:- 27.12.2024

Case No. WP(C) 1540/2024

01. M/S K.P Singh Lau Through its proprietor
Kavinder Pal Singh, Aged 57 years
R/O H.No. 84 Sec. No. 05, Trikuta Nagar
Near Zero Size Gym, Jammu 180012.

02. Charanjit Singh, Aged 55 years
S/o Gurbaksh Singh R/O H.No. 157,
Sec-3, Extn. Vasant Vihar
Ward No. 53, Trikuta Nagar,
Jammu 180020

... Petitioner(s)

V/s

01. Union of India
Through its Secretary
Ministry of Petroleum and Gas, New Delhi.

...Respondent(s)

02. Bharat Petroleum Corporation Limited
Bharat Bhavan, Currimbhoy Road, Road No. 4 & 6, Ballard
Estate, Mumbai-400001 (Opp. Grand Hotel)
through its Chairman-cum- Managing Director

03. Chief General Manager, Bharat Petroleum
Corporation Ltd. Bharat Bhavan, Currimbhoy Road,
Road No. 4 & 6, Bollard Estate,
Mumbai-400001 (Opposite Grand Hotel)

04. Plant Manager, Bharat Petroleum Corporation Ltd.
Rail Head, Narwal, Jammu.

Coram: HON'BLE MR. JUSTICE WASIM SADIQ NARGAL, JUDGE

JUDGMENT

PRAYER

1. Through the medium of instant petition, the petitioners are invoking writ jurisdiction of this Court under Article 226 of the Constitution of India and is seeking the following reliefs:

- a) *“Writ of certiorari quashing the tender dated 20.03.2024, because the same has been floated by the official respondents with a mala fide intention, as the initial tender 01.11.2023, was cancelled by the official respondents without any rhyme and reason;*
- b) *Writ of certiorari quashing the tender condition whereby the vehicles of the petitioner have not been accepted and blacklisted from the tendering process as the same is perverse and illegal in the eyes of law;*
- c) *Writ of mandamus commanding the official respondents to allow the vehicles of the petitioners to participate in the tender process and the condition with regard to the age of the vehicles may kindly be quashed in the justice equity and fair play*
- d) *Any other relief, order or direction that the Hon'ble Court deems fit may kindly be granted in favor of the petitioner and against the respondent in the interest of justice, equity and fair play.*

2. Before proceeding further in the matter, and to settle the controversy in question, it is indispensable to give brief resume of the facts of the case, which, are summarized as under:-

FACTUAL MATRIX OF THE CASE

3. The specific case of the petitioners in the instant petition is that the petitioners are transporters by profession and owns fleet of trucks and tankers. In addition to that, the petitioners are performing the contracts of transportation with several oil companies including the respondents herein. The nature of business of petitioners is transportation of petroleum products and LPG gas through the Union Territory of Jammu and Kashmir as well as in other States.
4. That the respondent-Bharat Petroleum Corporation limited, which is a public sector undertaking, floated the first notice inviting tender no. BPCL/RETAIL/POL/BULK/JAMMU/2023-28. The said tender was floated for the bulk transportation of POL products (MS/HSD/SKO/ATF/Branded Fuels etc) by the top loading tank lorries from BPCL, Jammu depot to various location (Depots/ Retail Outlets/ Direct Customers' etc .) within the State and outside State.
5. It is stated that the date of the tender was fixed from 01.11.2023 to 22.11.2023. Moreover, it was stated that the contract of tender shall be for a period of five years i.e from 2023-2028. Therefore, for the purpose of contract, the bids were invited to provide top loading Tank Lorries for the bulk transportation of POL, and following requirements were made with respect to the number of top loading Tank Lorries and their indicative volumes:-

Details				
No. of Tank Lorries	12 kl	14 kl	20 kl	Total
	43	176	6	225

**Indicative Volumes (KL/ MONTH) shall be;
FDZ: 5200 kl
BFDZ: 16200 KL”**

6. It is specific case of the petitioners’ that the petitioner no.1 owns 13 petrol tankers (Tank Lorries), each having the capacity of 14 kl which were duly manufactured and registered in the year 2023. Accordingly the petitioner No.1 has also submitted its bids before the official respondents along with other necessary documents. The petitioner no. 1 also made a payment of Rs. 85000/- as Earnest Money Deposit.
7. That pursuant to the E-NIT dated 01.11.2023, the petitioner no.2 also submitted its bids, and offered five tank lorries. It is pertinent to mention herein that the petitioner no.2 had submitted its bid under MSE category and he also undertook to submit all the MSE supporting documents as specified in the E-NIT. As per the “Micro, Small and Medium Enterprises Development Act” the reservation to MSE was to be made applicable, which would be as @25% for MSE bidders out of which 4% was for MSE SC/ST and 3% for MSE Women. Furthermore the petitioner no.2 deposited an amount of Rs. 25000/- as Earnest Money Deposit.
8. The aforementioned tender floated vide tender No. BPCL/RETAIL/POL/BULK/JAMMU/2023-28 published on 01.11.2023, was cancelled by the respondents on 22.11.2023, without assigning any cogent reasons.

9. It is stated that the initial tender was cancelled by the respondents, and thereafter, a second notice was floated inviting tender (NIT) bearing reference No. BPCL/RETAIL/POL/BULK/JAMMU/2024-2029 on 18.01.2024, for inviting tenders for transportation of bulk POL products by top loading tank lorries from BPCL, Jammu Depot to various locations (depots/ retail outlets/ direct customers, etc) within the State and outside the State. It is further stated that the tendering process was a two-bid system through online mode. The date of the second tender floated was fixed from 18.01.2024 to 20.01.2024 and the contract of the tender was five years from the date as mentioned in the letter of intent.

10. In the tender dated 18.01.2024, the tank lorry requirements were stated as:-

Details				
No. of Tank Lorries	12kl	14kl	20kl	Total
	99	177	7	283

Indicative volumes (KL/MONTH) shall be:
FDZ : 6122 kl
BFDZ: 22653 kl”

11. The second tender floated by the respondents was again cancelled on 08.02.2023, without assigning any reason, in relation to which the petitioners contended that they were eligible as they had qualified the essential requisites as stated in the tender. Consequently, after cancellation of the above mentioned two tender notices, the respondents thereafter issued another E-NIT bearing No. BPCL/RETAIL/POL/BULK/JAMMUDEPOT/2024-2029. The said E-NIT

was issued under two bid system for the same purpose as mentioned in the above said two tenders, the third tender issued was published on 20.03.2024 and the date was fixed from 20.03.2024 to 10.04.2024 and the term of the tender was fixed for five years from the date mentioned in the letter of intent.

12. The requirements of the tender was as follows:

Details				
No. of Tank	12kl	14kl	20kl	Total
Lorries	99	177	7	283

Indicative volumes (KL/MONTH) shall be:
FDZ: 6122 kl
BFDZ: 22653 kl”

13. The further case of the petitioners is that the bids of the petitioners were rejected on the ground that the fleet of the petitioners did not qualify the criteria in the descending order as the respondents got the offers from other successful bidders who have the new fleet of vehicles and consequently, only four (4) vehicles of the petitioner No. 1 were selected and 13 were rejected and all the vehicles of petitioner No.2 were rejected.

14. Hence, being aggrieved of the arbitrary action of the respondents, the petitioners have filed the instant petition.

SUBMISSION ON BEHALF OF THE PETITONERS

15. Learned counsel for the petitioner submits that, the petitioners’ primary contention revolves around the arbitrary, illegal, discriminatory and mala fide intention of the respondents which has resulted in the petitioners being deprived of the reasonable opportunity of participation, outcome of which

has turned up in violating the Articles 14, 19 and 21 of the Constitution of India.

16. Further, it is the case of the petitioners, that they are aggrieved of irrational action of the respondents pursuant to various E-NITs, which were floated consequently, upon cancelling of the E-NITs one after another without giving any cogent reasons and there has been inordinate delay on the part of the respondents in deciding the successful bidder. Moreover, the petitioners have claimed that it is due to the conduct of the respondents only which has resulted in the disqualification of the tank lorries of the petitioners on the baseless ground that the same have rendered old, as it was by the virtue of the descending order (Age wise) that the tank lorries were to be selected by the respondents for the contract.

17. The learned counsel for the petitioner submits that, the respondents, Bharat Petroleum Corporation limited a public sector undertaking floated its earlier two tenders on 01.11.2023 and on 18.01.2024 respectively. So far as the 1st tender is concerned, petitioner No.1 and 2 submitted their bids along with all necessary documents. However, the same was cancelled on 22.11.2023, by the respondents without assigning any reason.

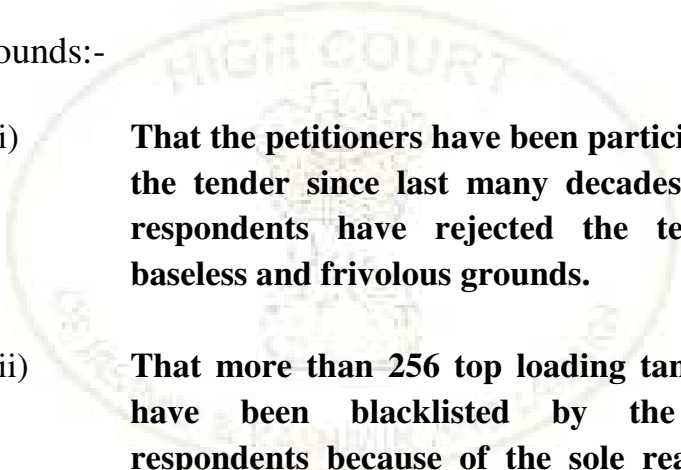
18. As far as the 2nd tender is concerned, it is stated that petitioners were eligible bidders as they possessed the essential requisites as stated in the tender, but the second tender was again cancelled by the respondents on 08.02.2024, without assigning any reason.

19. The learned counsel for the petitioners submits that thereafter another E-NIT was issued on 20.03.2024. It has been contended by the petitioners that they were fulfilling all the essential requirements as mentioned in the

tender, despite that the bids of the petitioner in the said tender were rejected on the ground that the fleet of the petitioners does not qualify the criteria in the descending order as the respondents have got the offers from other successful bidders who have new fleet of vehicles.

20. It has also been submitted by the learned counsel for the petitioner that the last selected vehicle was found to be registered on 07.11.2024 and in the case of petitioner No.1, only 4 vehicles were selected, and 13 were rejected, whereas, all the vehicles of petitioner no.2 were rejected.

21. Being aggrieved of the illegal action of the respondents in rejecting the bid of the petitioners, they have challenged the same, precisely, on the following grounds:-

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- (i) **That the petitioners have been participating in the tender since last many decades and the respondents have rejected the tender on baseless and frivolous grounds.**
 - (ii) **That more than 256 top loading tank lorries have been blacklisted by the official respondents because of the sole reason that tank lorries in descending order have been selected.**
 - (iii) **That the official respondents have been trying to misuse their official power in order to award the contracts to certain vested interests and the same is not only arbitrary in nature but also prejudicial towards the interest of the petitioners.**
 - (iv) **That the only reason stated for the rejection of the tank lorries is that the same have rendered old, but it is pertinent to contend that it is due to the respondents who have been time and again delaying the tender process over the year which is without any sufficient cause and on this sole ground the vehicles of the**

petitioner have been categorized as not eligible for the participation.

- (v) That the only motive of the respondents to delay the tender process was to grant considerable period of time to certain vested interest/ their blue eyed person in order to prepare their vehicles as per the essential requisites necessary for carrying out the bulk transportation of POL products.**
- (vi) That the respondents delayed the tender process for more than six months in order to accommodate their blue eyed persons who were not prepared technically to participate in the tendering process. It became clear to the petitioners that there was conspiracy involved, when for the third time the tender was floated and it was for the first time that some new persons were figured out to be successful bidders. This makes it clear that the respondents provided sufficient time to the blue eyed persons to prepare themselves for participating in the tender process. It is also submitted that in case the first tender is brought to its conclusion the petitioners would have been successful bidders.**
- (vii) That it becomes clear from the issuance of first tender to the third tender dated 20.03.2024, that the respondents have hatched conspiracy since the very beginning to ensure that contract is awarded to some particular persons and the very act of the respondents is not in consonance with the principle as enshrined in Article 14 of the Constitution of India.**
- (viii) That the cause of action arising out of the present tender falls within the sphere of public contract. The respondents being public functionary are subject to the conditions of reasonableness and fair play as well as in the public interest.**
- (ix) The vehicles of the petitioner have not been accepted in the tender for the reason they are**

not falling within the timeline as proposed in the notice inviting tender, and such ineligibility has accrued due to the inordinate delay on the part of the respondents.

- (x) **That the course adopted by the respondents in not accepting the vehicles of the petitioner in the tender is outside the purview of the contract and the tender and same is contrary to the principle of legitimate expectancy. The respondents being the public functionary are expected to act fairly in the matter and the conduct of the respondents in blacklisting the vehicles in order to give a preferential role to certain vested interests are violative of Article 14, 19 and 21 of the Constitution of India.**

SUBMISSIONS ON BEHALF OF THE RESPONDENTS

22. Per contra, learned counsel appearing on behalf of the respondents has pleaded that no fundamental, legal, statutory, contractual or constitutional right of the petitioners has been infringed and no cause of action has accrued to the petitioners to file the instant writ petition, since, there are no averments pleaded in the petition as to how the alleged cause of action has accrued to the petitioners to invoke the jurisdiction of this Court under Article 226 of the Constitution of India, therefore the petition deserves dismissal.

23. Learned counsel appearing on behalf of the respondents has further submitted that the petitioners after having participated in the selection process and having failed to be declared as the successful bidders, have turned around and thrown the challenge on the tendering process floated by the respondents. It is the specific case of the respondent that the tendering process has been finalized and the contract stands already allotted to successful bidders and in the absence of the impleadment of the successful

bidders to whom the contract stands allotted, the reliefs sought in the writ petition cannot be granted. The instant petition as such is not maintainable as the petitioners have challenged the Advertisement Notice and the terms and conditions of the same after having participated in the same.

24. It has been vehemently contended by the respondents that the allocation of tank lorries of the successful bidders has been done strictly as per the terms and conditions of the Tender NIT -15894 document, which was published by the Central Procurement Organization Wing of the respondent-corporation and , therefore, petitioners cannot have any grievance against the selection process and in such circumstance the instant petition do not warrant any interference by this Court, under Article 226 of the Constitution of India, as the same is beyond the scope of judicial review related to award of contracts.

25. It has been pointed out by the respondents that after the conduct of pre-bid meeting in respect of the first E-NIT No. BPCL/RETAIL/POL/BULK/JAMMU/2023-2028, a representation was submitted by the transporters which raised issues with regard to issuance of the fresh E-NIT. Consequently, another representation came to be filed by the transporters with regard to the fixation of bench mark rates accompanied with other issues. On 17.11.2023 the J&K Tank Owners Association, through its association submitted that the tender rates were not workable and requested the respondent- Corporation to review all the rates, otherwise, the transporters will be left with no other option, but to withdraw TLs from loading at the risk and responsibility of respondent-Corporation. On 18.11.2023, the transporters gathered outside the depot of

the respondent-Corporation and did not allow any tank lorry to come outside the depot and thus, forcefully closed the depot. This issue with regard to the strike was immediately brought to the notice of the Dy. Commissioner Jammu, SSP, Jammu, SDPO Jammu City East and the Inspector of Police.

26. The respondents have further submitted that it was due to the illegal strike by the prospective bidders/transporters, the respondent-Corporation issued a notice for extending the date of the tender from 22.11.2023 to 27.11.2023. The efforts were made on behalf of the Corporation, in order to resolve the issue raised by the transporters as a meeting was convened between the transporters and BPCL officials, but it did not result in amicable solution, and the transporters left the meeting threatening that they will go on strike from 24.11.2023 disrupting the supply of the petroleum products in J&K and Ladakh. An immediate action was taken by the respondent-Corporation requesting the Dy. Commissioner Jammu vide communication dated 23.11.2023 to provide security to the depot of the Corporation and asked for mediating and resolving the unauthorized strike by the transporters/ prospective bidders.

27. After the meetings have taken place between the Corporation and the bidders, and the corporation felt that there was no scope of resolving the issue and it had become impossible for the respondent-Corporation to go ahead with the already issued tender process initiated in terms of E-NIT dated 01.11.2023, they were left with no other option, but to cancel the same on 27.11.2023 and the said cancellation was communicated to each of the bidder through system generated e-mail.

- 28.** It has also been submitted by the counsel appearing on behalf of the respondents that after the cancellation of the said E-NIT, the payment of Rs. 85,000/- made by the petitioner No.1 has been refunded and the refund of Rs. 25,000/- to the petitioner No.2 was under process.
- 29.** It has been further submitted by the respondents that the tendering committee after taking into consideration the demand of the tankers/ tank lorries owners cancelled the 1st NIT and consequently floated the 2nd NIT. Despite the fact that respondents agreed to the demands of the owners of the tank lorries and despite the fact that the bench mark rate was comparatively raised and the number of TLs were increased as compared to those issued under 1st tender notice and as per the demands made by the bidders/ transporters, the transporters again agitated and protested against the second tender issued. The J&K Tank Owners Association through its president submitted a memorandum dated 23.01.2024 against the issuance of 2nd NIT on 23.01.2024 objecting the BMR rates not being viable and that the 12KL and 14KL TLs were placed in the same rate level and further demanded that the tender should be 10% above the IOCL rates and it has been stated that nothing less than the above mentioned demands were accepted and in fact the transporters threatened to withdraw their fleet w.e.f 27.01.2024. These facts and circumstances were informed by the respondent-Corporation to the Deputy Commissioner vide its communication dated 24.01.2024 and requested for providing security to the depot and to resolve the unauthorized strike by the transporters.
- 30.** It is the case of the respondents that due to the compelling circumstances whereby the transporters again went on strike on 27.01.2024, blocking the

entries of the TLs to the depot, supply of the POL could not be made to the dealers and most of the petrol pumps remained dry for two days, effecting the public at large and the respondents were left with no other option but to cancel the 2nd tender notice as well on 08.02.2024.

31. In reply to one of the averments made by the petitioners, that their vehicles have been blacklisted, it has been submitted by the respondents that the selection of the successful bidders has been done by the respondent corporation in a transparent manner and as per the terms and conditions of E-NIT dated 20.03.2024 and there is no infirmity in conducting the selection process by the respondents. As per the requirement of the tender dated 20.03.2024 against 99 tank lorries of 12 kl, 176 tank lorries of 14 kl and 7 tank lorries of 20 kl were required as per the advertisement, in response to which the respondent -Corporation received 122 bidders with 683 fresh tank lorries and 211 chasis booking slips i.e. total of 894 offers. After technical and commercial bid evaluation only 102 bidders with their corresponding 667 tank lorry and 114 chasis booking slips offered i.e. total 781 were short listed. Allocation of 283 tank lorries was done based on the reservation and allocation criterion of NIT in terms of Clause 10.0, 11.0 and 26.0. On the basis of criterion laid down in the E-NIT particularly in reference to its Clause 26.5(c), the allocation of the tank lorries has been made to the selected transporters/bidders based on the age limit of their tank lorries. However, 4 tank lorries out of 17 of petitioner no. 1 were selected and none of the tank lorries of petitioner no. 2 were selected based upon the criterion mentioned in Clause 26.5(c) of the E-NIT.

32. Therefore, learned counsel for the respondents have denied the averments made by the petitioner that more than 256 top loading tank lorries have been blacklisted, since the mere non-allocation/selection of tank lorries on the basis of the criteria laid down in the E-NIT does not amount to blacklisting of the tank lorries.

33. The respondents have contended that the delay in the finalization of the tendering process has been on account of circumstances beyond the control and power of respondent-Corporation and no deliberate or intentional delay can be attributed to the respondent in the finalization of the tendering process and the averments of hatching a conspiracy and floating a third tender in order to select the blue eyed person is without any basis and have been made only after participating in the tendering process without raising any objection to the terms and conditions of the unit.

34. Therefore, the respondents have disagreed with the fact that the petitioners have been denied the right of reasonable opportunity of participating in the tendering process, in fact, the petitioners have failed to procure the order of allocation of tender tank lorry after fully participating in the tendering process and are however estopped from challenging their non-selection on the basis of terms and conditions set out in the E-NIT.

Legal Analysis

35. Heard learned counsel for the parties and perused the record.

36. In the aforesaid backdrop and having considered the whole spectrum of arguments and the counter arguments addressed by the learned counsel appearing for the parties, this court is of the view that the decision in this petition hinges on determination of the following issues:-

Issue No.1 *What is the scope of judicial review in tender matters?*

Issue No. 2 *Whether a right is accrued to an ineligible party to challenge the terms and conditions of the tender and whether the terms and conditions of the tender can be tailor made at the behest of the party to suit eligibility?*

Issue No.3 *The scope of interference by a constitutional court in tender matters involving substantial public interest, and whether the individual interest has to be given due weightage over and above public interest?*

Issue No.4 *Whether a party, having participated in the tender process, can challenge the terms and conditions of the tender?*

Issue No.1 *What is the scope of judicial review in tender matters?*

37. As far as issue no. 1 is concerned, the scope of judicial review in tender matters is primarily concerned with ensuring that the decision making process of the authorities is lawful, fair, and reasonable. The law is well settled that the Constitutional Courts do not sit as appellate authorities to review the merits of the decisions made by the Government or its agencies but rather focus on the legality and procedural regularity of the decision making process.

38. In the present case, the primary ground of challenge by the petitioners revolves around the arbitrary, discriminatory and unreasonable nature of the eligibility criteria of the impugned tender; in view of which, this Court before going into the merits of the case, finds it essential to discuss the scope of Judicial review.

39. With a view to decide the aforesaid question, it would be apt to refer to the decision of Apex Court rendered in judgement titled, “*Tata Cellular v/s Union of India (1994) 6 SCC 651*”, in which the Hon’ble Supreme Court has laid

down several principles that guide the judicial scrutiny of the administrative actions involving tenders. In para 94 of the judgement the principles culled out are as follows:-

- (i) *“Judicial Restraint , the modern trend points to judicial restraint in administrative action, meaning that the courts should be cautious in interfering with administrative decisions unless there is a clear violation of law or principles of natural justice*
- (ii) *The court does not function as an appellate body; it merely reviews the decision- making process rather than the merits of the decision itself.*
- (iii) *The court lacks the necessary expertise to correct administrative decisions; thus, they should refrain from substituting their own decisions for those made by the administrative bodies.*
- (iv) *The terms of the invitation to tender are 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*
- (v) *The government must have the freedom of contract. In other words, a fair play in the joints is 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 actual mala fide.*

(vi) *Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure”*

40. Similarly, the decision of the Supreme Court in “*Directorate of Education and ors v. Educomp datamatics Ltd and ors., 2004 (4) SCC 19*” reiterates the said position. The Hon’ble Apex Court in that case was examining a tender notice, which stipulated a turnover of Rs 20.00 crore as a condition of eligibility and held that the Government must have a free hand in stipulating the terms of the tender document and held that it must have reasonable play in the joints as a concomitant necessary for an administrative body in the administrative sphere. The Apex Court has been pleased to observe at para-12 as under:-

“12. “It has clearly 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, mala fide or actuated by bias, it is entitled to pragmatic adjustments which may be called by the particular circumstances. The courts do not 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, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.”

41. Also, the law with regard to the scope of judicial review in tender matters has been settled in case titled, **BTL EPC Ltd vs. Macawber Beekay Pvt. Ltd. and ors**, rendered by Hon'ble Apex Court in Civil Appeal No. 5968/2023, wherein in para 35 & 48, following has been held:-

“35. it is settled law that in contracts involving complex technical issues, the Court should exercise restraint in exercising the power of judicial review. Even if a party to the contract is ‘State’ within the meaning of Article 12 of the Constitution of India and as such is amenable to the writ jurisdiction of the High Court or the Supreme Court, the Court should not readily interfere in commercial or contractual matters. This principle has been retreated in the recent judgment of this court, in Tata Motors Ltd v. Best held:-

48. This Court being the guardian of fundamental rights is duty-bound to interfere when there is arbitrariness, irrationality, mala fide and bias. However, this court 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 clear cut case of arbitrariness or mala fide or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered between the 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 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 issue the courts should be even more reluctant because most of us in Judges' robes do not have the necessary expertise to adjudicate upon technical issue beyond our domain. The courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder."

42. Therefore, in view of the settled legal position, it is clear that the scope of judicial review in tender process is extremely limited, and keeping in view the law discussed above, it is clear that the Court being the guardian of fundamental rights is duty bound to interfere when there is a strong foundation of arbitrariness, irrationality, mala fide and bias. However, in the instant case, the petitioners have failed to make out a case under the ambit of the above mentioned principles and in absence of any strong foundation of arbitrariness, irrationality, mala fide and bias, this Court refrains from showing any indulgence in the instant matter.

Accordingly, issue No. 1 is decided against the petitioners and in favour of the respondents

Issue No. 2 :- Whether a right is accrued to an ineligible party to challenge the terms and conditions of the tender and whether the terms and conditions of the tender can be tailor made at the behest of the party to suit eligibility?

43. The petitioners have alleged that the eligibility criteria as reflected in the tender notice i.e, the descending age of the vehicles, and as contended by the

respondents that the vehicles have rendered old, is without any rationale and logical basis.

However, after perusing of the record meticulously this Court is of the view that the said criteria mentioned *supra* was adhered to for allocation of tank lorries of the successful bidders, strictly as per the terms and conditions of the Tender NIT-15894 document, which was published by the Central Procurement Organisation. As per the clause 26.5 (c) of the E-NIT, the allocation of the (Tank Lorries) TLs has been made to the successful bidders based on the age of the tank lorries. It is however to be noted that it is on the basis of the same clause 26.5 (c) that 4 out of 17 offered TLs of petitioner no. 1 have been selected. Thus, the petitioners cannot blow hot and cold in the same breath as the petitioners are beneficiary of the said criteria and simultaneously, are estopped under law to raise any grouse, when the said criteria does not suit their eligibility, in absence of any prejudice being projected by the petitioners. Thus, it can safely be concluded that no prejudice has been caused to the petitioners in view of the aforesaid criteria for which the petitioners are also the beneficiaries and there is no foundation of mala fide on part of the respondents as such. Even otherwise, the law has been settled at naught by the Apex Court in authoritative pronouncements that for the convenience of the parties participating in the tender process, the terms and conditions of the tender cannot be tailor-made to suit their eligibility. On the premise that the criteria in the tender notice in which the petitioner participated without any grouse was not to the liking of petitioners, the petitioners after having participated in the selection process are stopped under law to question the same through the medium of the instant petition.

44. In the context of legal framework surrounding tenders, a party that is deemed ineligible does not possess the right to challenge the terms and conditions of a tender later on. The established legal principle is that the terms of the invitation to the tender are generally not subject to judicial review as they fall within the realm of contract law. However, limited judicial scrutiny may be available if it can be demonstrated that the terms were arbitrarily designed or tailored to favour a specific party, effectively excluding all others from the bidding process. However, in the instant case, it can be clearly made out that the bidding process was conducted in fair manner without any illegality, mala fide or irrationality. In the instant case, the petitioners have failed to make out a case of interference as this Court do not find that the criteria was irrational, which has restricted the zone of consideration of all the level playing bidders or the conditions are so tailor-made to suit the convenience of a particular person with a view to eliminate all others from participating in the bidding process.

45. Reliance is placed in the judgment rendered by the Apex Court in the case of **Meerut Development Authority vs. Association of Management Studies and Anr. (2009) 6 SCC 171**, the operative part of the judgment is reproduced as under:-.

“26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in proper form, the person by whom a tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in case where it is established that the terms of the invitation to the

tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.

“27. The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tender in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the above stated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the Authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.

28. It is so well settled law and needs no restatement at our hands that disposal of the public property by the state or its instrumentalities partakes the character of a trust. The methods to be adopted for disposal of public property must be fair and transparent providing an opportunity to all the interested persons to participate in the process.

29. The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exists good and sufficient reasons, such as the highest bid not representing the market price but there cannot be any doubt that

the Authority's action in accepting or refusing the bid must be free from arbitrariness or favouritism."

46. Therefore, keeping in view the above mentioned judicial pronouncements, it is made clear that the scope of judicial review is very limited and is available in cases, where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process. The perusal of the record in the instant case transpires that the petitioners being ineligible are precluded from challenging the terms and conditions of the tender notice after having participated in the same without any demur and this Court has no hesitation in holding that the conditions of the tender documents which fall within the realm of contract cannot be tailor made to suit the convenience of a particular party.

Accordingly, question No. 2 is answered in favour of the respondents and against the petitioners.

Issue No.3 *The scope of interference by a Constitutional court in tender matters involving substantial public interest, and whether the individual interest has to be given due weightage over and above public interest?*

47. In the context of tender cases, particularly those involving significant public interest, the scope of interference by the Constitutional court is notably limited. Courts usually refrain from intervening in the decision making process of awarding contracts unless there is a clear indication of arbitrariness, discrimination or mala fide. The guiding principle is that the Court's role is not to assess the soundness of the decisions but to ensure that the decision making

process adheres to law and does not violate principle of fairness. While individual interests are acknowledged, they must be weighed against the broader public interest, which is a paramount in specific tender cases. The constitutional Courts maintain a restrained approach, focusing on the fairness of the process rather than the outcomes of individual tender.

48. The Apex Court in a Judgment titled *Raunaq International Ltd. v. I.V.R 1999 SCC (1) 492*, has been pleased to observe as under:-

“When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the state, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenders, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenders may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by intervention, the proposed project may be considerably delay thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers.”

49. In another case, the Hon’ble Apex Court in *“Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517* has been pleased to observe as under:- “

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

and mala fides. Its purpose is to check whether the choice or decision is made “lawfully” and not to check whether the 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 stays 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.”

50. The primary ground which has been urged by the petitioners is that the respondents have acted with mala fide intention to cancel the tender notices time and again with a view to confer benefit to their blue eyed persons at the cost of the petitioners. However, petitioners have not laid down any strong foundation with regard to the ground of mala fide nor there is any specific averment in the pleadings and in absence of specific pleadings in this regard, the ground of mala fide cannot be gone into. Even otherwise, petitioners have not arrayed any party in the array of respondents against whom such mala fides have been alleged and thus, the grounds of mala fide cannot be gone into by this Court in the light of the evasive pleadings or the parties being arrayed by name. Legal precedents establish that allegations of mala fide must be specific and demonstrable, and the individual against whom such allegations are made must be included as parties to the proceedings. This is crucial because a finding of mala fide is a serious indictment and can have severe consequences for the individuals involved. It has been time and again affirmed by the Apex Court in various judgments that without naming the parties involved, allegations of mala fide lack the necessary foundation to be considered valid in tender matters.

51. This Court is fortified with the judgment of the Apex Court in case titled *Midley Minerals India Ltd. v. State of Orrisa 2004(12) SCC 39*, in which it has been observed as under:

“...It is trite that plea of mala fide has to be specific and demonstrable. Not only this, but the person against whom the mala fide are alleged must be made a party to the proceedings and given reasonable opportunity of hearing.”

52. The Apex court in case titled *Ajit Kumar Nag v. Indian Oil Corporation Ltd. (2005) 7 SCC 764* declared that allegations of mala fide need proof of high degree and that an administrative action is presumed to be bona fide unless the contrary is satisfactorily established. The court in para 56 has observed as follows;-

“..it is well settled that the burden of proving mala fide is on the person making the allegations and the burden is very heavy. There is every presumption in favour of the administration that the power has been exercised in bona fide and in good faith. It is to be remembered that the allegations of mala fide are often more easily made than made out and the very seriousness of such allegations demands proof of high degree of credibility.”

53. In *Gulam Mustafa v. State of Maharashtra 1976(1) SCC 800*, the Apex clearly observed that,

“It (mala fide) is the last refuge of a lost litigant.”

In the instant petition, despite the petitioners having alleged mala fide against the respondent-Corporation, have not arrayed any party-respondent by name as is essential as per the observations made by the Hon’ble Supreme Court in the aforesaid judgments.

54. This court has elaborately dealt with a similar situation in case titled “**R6 Technologies Private Limited vs. UT of Jammu & Kashmir and ors WP(C) No. 1347/2024 decided on 05.08.2024**”, wherein the following observations were made with regard to the fact, whether individual interest has to be given due weightage over and above public interest. In para 79 the court has observed as follows;

“It is no more res integra that the power of the judicial review will not be permitted to be invoked to protect the private interest at the cost of the public interest, or to decide a contractual dispute. Importantly, even if a case for interference is made out, the Hon’ble Supreme court has sounded a caveat that the courts should always keep the larger public interest in mind in order to decide whether an intervention is called for or not. Only when it comes to the conclusion that overwhelming public interest requires interference, the Court should intervene. But insofar as the present case is concerned, this court is of the view that no overwhelming public interest is involved, however, the only interest if any, is private in nature and the reasons do not compel this court to interfere in the matter which, if be done will be at the cost of the public interest. Thus, the challenge thrown by the petitioner to the impugned tender is ill founded and devoid of any merit.”

55. Thus, according to what has been discussed hereinabove, this court is not convinced with the fact that public interest is at stake rather it is between the private participants of the bidding process and is private in nature, also with regard to the mala fide intention alleged against the respondents- Corporation since no person has been arrayed as party by name it cannot be borne that the respondents had the ill- intention against the petitioners. Therefore the said issue is made out in favour of the respondents and against the petitioners.

Issue No.4 *Whether a party, after having participated in the tender process, is precluded from challenging the conditions of the tender?*

56. In the present case, the petitioners have challenged the terms and conditions of the tender after having participated in the same. In context of a tender participation, the legal principle established is that a party who participates in a tender process cannot subsequently challenge the terms and condition of that tender. This principle is rooted in the idea that the participation implies acceptance of the terms and conditions laid out in the tender documents. If a party has participated without protest, then they are generally estopped from raising the objections later on. The principle is based on the legal doctrine of estoppel, which prevents a party from asserting a claim or a right that contradicts what they have previously stated or agreed to by their actions. This legal framework ensures fairness and predictability in the tender process, preventing parties from opportunistically challenging terms and conditions after engaging and participating in the process.

57. In the instant case, the petitioners have challenged the tender condition whereby the vehicles of the petitioners have not been accepted. It is pertinent to mention herein that the petitioners were fully aware of the terms and conditions of clause 26.5(c) of E-NIT, and both the petitioners were alive to the aforesaid condition and this was precisely the reason that some of the TLs offered by the petitioner no.1 were selected and not even a single tank lorry offered by the petitioner no.2 was selected. Therefore after having participated in the tender process and taking a chance, the petitioners being ineligible are subsequently, estopped under law to challenge the same.

58. The mere non- allocation / selection of the tank lorries on the basis of the criteria laid down E-NIT is not arbitrary or illegal and same has been done keeping in view the public interest at large. Therefore, the averments made by the petitioner is bereft of any merit and liable to be rejected.

This Court is also fortified with the judgment of the Apex Court rendered in the case titled **New Bihar Biri Leaves co. v. State of Bihar (1981) 1 SCC 53**. In para 48 of the Judgement, the Apex Court has been pleased to observe as follows:-

“It is a fundamental principle of general application that if a person of his own accord, accepts a contract on a certain terms and works out the contract, he cannot be allowed to adhere to and abide by some of the terms and conditions which proved advantageous to him and repudiate the other terms of the same contract which might be disadvantageous to him. The maxim is qui approbate and non reprobate (one who approbates cannot reprobate). This principle, though originally borrowed from Scots Law, is now firmly embodied in English Common Law. According to it, a party to an instrument or transaction cannot take advantage of one part of a document or transaction and reject the rest. This is to say, no party can accept and reject the same instruments or transactions.”

Further the Apex Court in judgment titled **Ramesh Chandra Shah v. Anil Joshi (2013) 11 SCC 309**, observed as follows:-

“It is a settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome.”

59. The rationale behind this approach is to promote fairness, transparency, and finality in the tender process, preventing frivolous challenges after a party

has already availed itself of the opportunity to bid. As a result, any challenge to the terms of the tender post-participation is generally not entertained by the courts, unless there are exceptional circumstances such as fraud, arbitrariness, or violation of statutory norms. This position reflects a broader principle of good faith and due diligence, emphasizing the importance of raising objections at the appropriate stage rather than delaying or hindering the tender process by raising challenges thereafter.

60. Therefore, the petitioners at this stage are not allowed to challenge the terms and conditions of the tender since they have gladly and voluntarily participated in it and before or during the process they never agitated against the said terms and conditions which held them ineligible to be successful bidders. Therefore, the petitioners at this stage cannot challenge the terms and conditions of the tender notice being ineligible.

Accordingly, issue No. 4 is decided in favour of the respondents and against the petitioners.

CONCLUSION

61. Thus, in the light of what has been discussed hereinabove, coupled with the rival submissions of the parties and settled legal position, this Court observes as under:

- (i) The scope of interference by the Constitutional Courts in tender matters is minimal and confined to the extent when there is arbitrariness, irrationality, and unreasonableness, mala fide or bias. However, in the present case, the case of the**

petitioners do not fall within these exceptions carved out in light of the law laid down in Tata Cellular's case (Supra) and followed by the Apex Court in subsequent judgments. The Hon'ble Apex Court has even gone to the extent of observing that even if the case of a party falls within these parameters, the Court shall refrain from interfering in case, such interference would impede public interest. In the aforesaid backdrop, this Court is not inclined to interfere in the instant case in absence of any strong foundation on these exceptions carved out by the Hon'ble Apex Court.

- (ii) This court further holds that the conditions of the tender cannot be tailor made to suit the eligibility of a party, who is ineligible in terms of the tender conditions and such party has no vested right to challenge the terms and conditions being ineligible. The fact that the tender making authority has an expertise in technical and administrative field, thus, the respondent- Corporation, is the best person to frame the terms and conditions of the tender. The Court having no expertise cannot direct the tender making authority to frame the conditions in a way to suit the eligibility of a particular party who is being ousted from the consideration zone by virtue of being ineligible.
- (iii) This Court while dealing with the issue no. 3, whether the individual interest has to be given due weightage over and above public

interest, holds that while individual interests in a tender matter such as fairness, contractual rights and due process are important and must be safeguarded, they should not override the public interest. Public procurement must be conducted in a manner that serves the public good, ensuring transparency and efficiency. Public interest generally takes precedence, in the context of tender process. Thus public interest must be prioritized over private interest. Therefore the Courts are tasked with ensuring that the decision made by public authorities align with the broader goals of public welfare and any interference must be justified by clear demonstration of public interest.

- (iv) While dealing with the issue that whether a party who has participated in the tender process can challenge the terms and conditions of the said tender, this Court is of the considered view, that by participating in the bidding process, the bidder implicitly agrees to the rules, conditions, and requirements outlined in the tender document. Therefore, no opportunity is left with the party to challenge the same at a later stage, as he/she accepts the terms and conditions of the same and waives off his/her right while being silent during or before participating in the tender process and the stand of the Apex Court is clear in various authoritative pronouncements that once a

party participates in the tender process without any grouse/ demur, it is presumed that he/she is aware of all the terms and conditions of the said document and subsequently is estopped under law to question the same.

62. In view of the above, this Court holds that the challenge of the petitioner to the impugned notice inviting tender (NIT) is ill founded and the writ petition is devoid of any merit and is thus, liable to be dismissed.

63. Accordingly, the same is *dismissed* along with all connected application(s).

(Wasim Sadiq Nargal)
Judge

Jammu:
27.12.2024
Mihul



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