

## **M/s Adesh Logistics Private Limited and another Vs Food Corporation of India and another**

**Court:** High Court Of Punjab And Haryana At Chandigarh

**Date of Decision:** Aug. 14, 2012

**Acts Referred:** Constitution of India, 1950 " Article 226, 227

**Citation:** AIR 2013 P&H 18 : (2012) 168 PLR 347

**Hon'ble Judges:** G.S. Sandhawalia, J; Ajay Kumar Mittal, J

**Bench:** Division Bench

**Advocate:** Anand Chhibbar, with Mr. Ranjit Chawla, for the Appellant; K.K. Gupta, for the Respondent

**Final Decision:** Dismissed

### **Judgement**

Ajay Kumar Mittal, J.

This order shall dispose of CWP Nos. 10253 and 11827 of 2012 as according to the learned counsel for the

parties, the facts and issues involved therein are identical. For brevity, the facts are taken from CWP No. 10253 of 2012. In this petition filed

under Articles 226/227 of the Constitution of India, the petitioners have impugned the action of the respondents in returning the tender form and

rejecting the technical bids vide letters dated 19.5.2012 (Annexure P-14) and dated 23.5.2012 (Annexure P-15) while not taking into account the

experience and qualifications of one of the Directors of the petitioner Company who in an individual capacity holds the necessary experience to

meet the requirements of the respondents.

2. Briefly stated, the facts necessary for adjudication of the present petition are that petitioner No. 1-company is in the business of logistics. Its

authorized share capital is Rs. 1 lac divided into 10000 equity shares of Rs. 10/- each. There are only two shareholders of petitioner No. 1 each

holding 5000 equity shares and they are also the promoters, subscribers and the directors. The respondents issued an advertisement dated

2.2.2012 inviting sealed tender under the "Two Bid System" (Technical and Price Bid) for the appointment of regular handling and transport

contractors for loading/unloading/handling and transport of foodgrains and allied materials etc. for a period of two years at Food Corporation

Depots/Godowns/Rail Heads etc. in various centres in different Districts in the State of Haryana. In pursuance thereto, petitioner No. 1 submitted

the tender form on 1.3.2012 along with earnest money (2% of the contract value) for 11 centres in District Hisar. The work experience certificates

of petitioner No. 2 were also submitted along with the tender form as the company was incorporated in the year 2012. The technical bid of the

applicants was to be opened on the same day i.e. on 1.3.2012 whereas the price bid of the successful applicants was to be opened subsequently

on a later date. On 24.4.2012, the certificate was obtained by the respondent-Corporation from the certified firm of the company secretaries

stating that the experience earned by the Director to be included while calculating experience of a company. Apprehending that the technical bids

of petitioner no. 1-company may be rejected on the ground of inexperience in the field of logistics as the same was established on 17.1.2012 and

could not be considered to be holding the due amount of experience as required for handing of the contract, it executed an affidavit dated

25.4.2012 offering to give 10% additional Bank guarantee in lieu of lack of experience. On 15.5.2012, petitioner No. 1 wrote a letter to the

respondents extending the validity of its offer which was due to expire on 16.5.2012. Vide letters dated 19.5.2012 and 23.5.2012, the technical

bids of petitioner no. 1-company were rejected by the respondents on the ground of lack of requisite experience. Hence, the present writ petition.

3. We have heard learned counsel for the parties.

4. Learned counsel for the petitioners submitted that the respondents vide letter dated 19.5.2012 (Annexure P-14) had rejected the technical bid

of the petitioner on following counts:-

(a) The petitioner was a company incorporated under the Companies Act, 1956 which is a legal entity and the Directors of the company were

separate as their liability is limited to the extent of the value of their share, thus, the experience of a Director could not be treated to be experience

of the company.

(b) The subsequent offer for depositing 10% additional bank guarantee in lieu of experience was the offer subsequent to the submission of the

tender form and, therefore, could not be accepted at that stage.

5. Learned counsel for the petitioners submitted that the respondents were not justified in rejecting the technical bid of the petitioners as the

experience of the Director construed adequate experience for the company. The tenderer-petitioner-company was incorporated on 17.1.2012 and

the Director had requisite experience as per the requirement of Model Tender Form. Reliance was placed on the following judgments:-

(i) New Horizons Limited v. Union of India, 1997 Comp Cas 849;

(ii) Ganpati RV-Talleres Alegria Track Pvt. Ltd. Vs. Union of India (UOI) and Another,

(iii) Jay Engineering Work v. The Chairman, Tamil Nadu Electricity Board and others, W.P. No. 5915 of 2008 decided on 27.4.2009 by Madras

High Court;

(iv) Avula Contractions Pvt. Ltd., Secunderabad and another Vs. Senior Divisional Electrical Engineer, Traction Distribution, South Central

Railway, Vijayawada and others,

6. Continuing with the submissions, learned counsel further submitted that the petitioner-company had filed an affidavit on 25.4.2012 for furnishing

the bank guarantee of 10% of the contract amount in lieu of experience and in such a situation, the respondents could not deny the benefit of

opening the financial bid by rejecting the technical bid of the petitioners.

7. Elaborating further on the principle of judicial review in these matters, on the strength of the judgments of the Hon"ble Apex Court in Raunaq

International Limited Vs. I.V.R. Construction Ltd. and Others, and Directorate of Education and Others Vs. Educomp Datamatics Ltd. and

Others, it was urged that the action of the respondents in rejecting the technical bid on the ground of ineligibility was open to judicial review and the

respondents having acted arbitrarily their action was legally unsustainable.

8. Controverting the aforesaid submissions, learned counsel for the respondents relied upon the judgment in Bacha F. Guzdar Vs. Commissioner of

Income Tax, Bombay, and sought support from certain observations in Avula Contractions Pvt. Ltd., Secunderabad and another Vs. Senior

Divisional Electrical Engineer, Traction Distribution, South Central Railway, Vijayawada and others, to contend that the company was different

legal entity from that of the Directors and the experience of the Director could not be construed to be experience of the company. Emphasis was

laid on the word "tenderer" in the tender notice which required that the experience of the tenderer was essential. According to the learned counsel,

the petitioner-company was a tenderer and, therefore, the company which was constituted on 17.1.2012 did not have the requisite experience

while submitting the technical bid in pursuance to the advertisement dated 2.2.2012. It was further submitted that the extent of judicial review in

case of contractual matter as held by the Apex Court is to be sparingly exercised unless the petitioners were able to demonstrate that substantial

public interest was involved or there was malafide action on the part of the respondents. Reliance was placed on the judgments in Raunaq

International Ltd., Educomp Datamatics Ltd."s cases (supra) and Jagdish Mandal Vs. State of Orissa and Others,

9. Controverting the second submission, it was urged that furnishing of additional bank guarantee of 10% could not be equated or compensated in

place of the requisite experience. The same would amount to modification/alteration of the offer which was not permissible after the opening of the

technical bid.

10. The controversy to be resolved in this petition revolves around adjudication of following issues:-

(a) Whether experience of individual Director would constitute requisite experience of the tenderer company;

(b) Whether the action of the respondents in rejecting the tender of the petitioner-company was open to judicial review, by this Court in exercise of

writ jurisdiction under Articles 226/227 of the Constitution of India;

(c) Whether the petitioners could furnish 10% additional bank guarantee in lieu of experience which had not been submitted with the tender.

11. Examining the issue relating to experience of individual Director of petitioner-company could be counted as experience of the petitioner-

company itself so as to entitle the petitioner-company to be eligible for consideration of the allotment of tender, it would be apposite to refer to the

established legal position on the subject and apt to advert to the case law referred by the learned counsel for the petitioners.

12. In New Horizons Ltd's case (supra), the Hon"ble Apex Court was seized of the matter where the issue was relating to consideration of the

experience of the constituents of the joint venture company as the experience of the joint venture. It was concluded that experience of the

constituents of the joint venture would count towards the experience of the joint venture.

13. The issue in M/s Ganpati RV Talleres Algeria Track Pvt. Ltd's case (supra) was relating to whether experience of the petitioners in the joint

venture could be counted towards the experience of the company. Following the judgment in New Horizons Ltd."s case (supra), it was answered

in the affirmative and the claim of the petitioners was accepted.

14. Jay Engineering Work's case (supra) was a matter where the petitioner who was a partnership firm had sought the experience of the partners

to be considered as experience of the firm for fulfilling the eligibility criteria. The Madras High Court allowing the writ petition had directed to

examine the technical bid of the petitioner as it satisfied the requirements of the tender specification.

15. In M/s Avula Constructions Pvt. Ltd."s case (supra) similar issue relating to experience of partners in a partnership concern was under

consideration before the Andhra Pradesh High Court where it was held that since the firm has no personality of its own and it is not a juristic

person, the constituents of the firm, i.e. the partners are the real representatives of the firm and, therefore, the experience of the partners can be

treated as the experience of the firm.

16. Having noticed the principle of law enunciated in these judgments, suffice it to notice that the same do not advance the case of the petitioners.

17. In the case of a joint stock company formed under Indian Companies Act, 1956, it is a juristic entity which is distinct from its shareholders.

However, partnership stands on a different footing where partnership firm is an association of persons which unite together to carry on the business

in the shape of a firm which is a compendious method of describing the partners. Partnership firm has no personality of its own apart from the

partners. The case of the petitioners is not that of a partnership concern or a joint venture. Petitioner No. 1 is a Private Limited Company

constituted under Indian Companies Act, 1956. The Hon"ble Supreme Court drawing distinction between shareholder of company and partner of

partnership firm in Mrs. Bacha F. Guzdar's case (supra) in para 9 noted as under:-

9. It was argued that the position of shareholders in a company is analogous to that of partners "inter se". This analogy is wholly inaccurate.

Partnership is merely an association of persons for carrying on the business of partnership and in laws the firm's name is a compendious method of

describing the partners. Such is, however, not the case of a company which stands as a separate juristic entity distinct from the shareholders. In

Halsbury's Laws of England, Vol.(3rd Ed), page 234, the law regarding the attributes of shares is thus stated:

A share is a right to a specified amount of the share capital of a company carrying with it certain rights and liabilities while the company is a going

concern and in its winding up. The shares or other interest of any member in a company are personal estate transferable in the manner provided by

its articles, and are not of the nature of real estate.

18. In view of the above, it cannot be said that the personal experience of the Directors of the petitioner company shall enure towards the

experience of the petitioner-Private Limited Company. Once that is so, the petitioner-company cannot claim that it was eligible fulfilling the

qualification of experience prescribed under the tender notice and consequently, the respondents were right in not considering the case of the

petitioner-company as technically qualified.

19. Adverting to the point of the scope of judicial review in the matter of allotment of tenders, it was considered in detail by a three Judge Bench of

the Hon"ble Apex Court in Tata Cellular Vs. Union of India, , wherein it was observed as under:-

94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be

substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally

speaking, the decision to accept the tender or award the contract is reached by 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.

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

20. In *Air India Ltd. Vs. Cochin Int., Airport Ltd. and Others*, law relating to award of contract by State and Public Sector Corporation was

discussed. It was held:-

The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a

commercial decision considerations which are of paramount are commercial considerations. The State can choose its own method to arrive at a

decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding

to accept one of the offers made to it.

Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions

permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations,

instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them

arbitrarily. Though that decision is not amenable to judicial review, the Court can examine the decision making process and interfere if it is found

vitiating by mala fides, unreasonableness and arbitrariness.

21. Hon"ble Supreme Court summarizing the scope of judicial review and the interference of superior courts in the awards of contracts in *B.S.N.*

*Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others*, , noticed as under:-

67. We are not oblivious of the expansive role of the superior courts on judicial review.

68. We are also not shutting our eyes towards the new principles of judicial review which are being developed; but the law as it stands now having

regard to the principles laid down in the aforementioned decisions may be summarized as under:

i) If there are essential conditions, the same must be adhered to;

ii) If there is no power of general relaxation, ordinarily the same shall not be exercised and the principle of strict compliance would be applied

where it is possible for all the parties to comply with all such conditions fully;

iii) If, however, a deviation is made in relation to all the parties in regard to any of such conditions, ordinarily again a power of relaxation may be

held to be existing;

iv) The parties who have taken the benefit of such relaxation should not ordinarily be allowed to take a different stand in relation to compliance of

another part of tender contract, particularly when he was also not in a position to comply with all the conditions of tender fully, unless the court

otherwise finds relaxation of a condition which being essential in nature could not be relaxed and thus the same was wholly illegal and without

jurisdiction.

v) When a decision is taken by the appropriate authority upon due consideration of the tender document submitted by all the tenderers on their

own merits and if it is ultimately found that successful bidders had in fact substantially complied with the purport and object for which essential

conditions were laid down, the same may not ordinarily be interfered with.

(vi) The contractors cannot form a cartel. If despite the same, their bids are considered and they are given an offer to match with the rates quoted

by the lowest tenderer, public interest would be given priority.

(vii) Where a decision has been taken purely on public interest, the Court ordinarily should exercise judicial restraint.

22. Recently, the Hon"ble Supreme Court in Siemens Public Communication Networks Pvt. Ltd. and Another Vs. Union of India (UOI) and

Others, after analyzing the judicial precedents in para 39 had concluded as under:-

39. On examining the facts and circumstances of the present case, we are of the view that none of the criteria has been satisfied justifying Court"s

interference in the grant of contract in favour of the appellants. When the power of judicial review is invoked in the matters relating to tenders or

award of contracts, certain special features have to be considered. A contract is a commercial transaction and evaluating tenders and awarding

contracts are essentially commercial functions. In such cases principles of equity and natural justice stay at a distance. If the decision relating to

award of contracts is bona fide and is in public interest, Courts will not exercise the power of judicial review and interfere even if it is accepted for

the sake of argument that there is a procedural lacuna.

23. For the Courts to examine validity of allotment of tenders, it is essential for the person approaching the Court with a grievance to establish that

the decision making process is faulty, or it is vitiated by malafides, unreasonableness or arbitrariness. The award of contract in the case of a private

party or by a public body or the State is essentially a commercial transaction for which commercial considerations shall have precedence. It is open

to the State to evolve its own methodology for arriving at a decision. The courts shall exercise judicial restraint in such administrative action as they

do not sit as a Court of appeal to substitute its own views.

24. Examining the factual matrix involved herein, in our opinion, none of the grounds for Court's intervention in the grant of contract has been

satisfied. The respondents have evaluated the tenders and found the petitioner-company not to be qualified as it did not fulfill the eligibility criteria

of experience as laid down by the respondents. No malafides, arbitrariness, unreasonableness or variation in any procedure had been pointed out

so as to nullify the evaluation of the technical bids and award of the contract.

25. Lastly, the plea of the petitioners that an affidavit dated 25.4.2012 was filed for furnishing the bank guarantee of 10% in lieu of experience also

cannot be accepted as the same could not be treated to be equivalent to the requisite experience. Further, as argued by learned counsel for the

respondents it would have amounted to changing or modifying/altering the offer after the evaluation of the technical bid which was not permissible.

The contention of the petitioners is, thus, meritless and is hereby rejected. In view of the above, we do not find any merit in the writ petitions and

the same are hereby dismissed. No costs.