

M/S Galaxy Transport ... vs M/S New J.K. Roadways, Fleet Owners And ... on 18 December, 2020

Equivalent citations: AIR ONLINE 2020 SC 959

Author: R.F. Nariman

Bench: K.M. Joseph, Navin Sinha, Rohinton Fali Nariman

REPORTAB

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. _____ OF 2020
(@ SPECIAL LEAVE PETITION (CIVIL) NO. 12766 OF 2020)

M/S GALAXY TRANSPORT AGENCIES, CONTRACTORS,
TRADERS, TRANSPORTS AND SUPPLIERS

...APPELLANT

VERSUS

M/S NEW J.K. ROADWAYS, FLEET OWNERS AND TRANSPORT
CONTRACTORS & ORS.

...RESPONDENTS

JUDGMENT

R.F. Nariman, J.

1. Leave granted.

2. In this appeal, the Inspector General of Police, Kashmir Zone, Zonal Police HQR's Kashmir, Srinagar ["ZPHS"], being Respondent No. 4 before us, invited online tenders (e-tenders) vide e-N.I.T. No. 01 of 2020 dated 18.02.2020 ["N.I.T."] from reputed transporters, registered firms/associations for the supply of various types of commercial vehicles (without fuel) for the carriage of troops and equipment for the Financial Year 2020-2021. Pursuant to the N.I.T., 4 parties, namely, M/s Associated Contractors; M/s Quareshi Transport Co.; M/s Galaxy Transport Agencies, Contractors, Traders, Transports and Suppliers ["Appellant"]; and M/s New J.K.

Roadways, Fleet Owners and Transport Contractors [“JK Roadways”] submitted their bids for consideration and the same were uploaded through an e-tendering system. The tender process consisted of a technical bid and a financial bid. The Tender Opening Committee met on 11.03.2020 and found that JK Roadways, Respondent No. 1 herein, and Associated Contractors did not meet the qualifying requirements of the technical bid, leaving Quareshi Transport Co. and the Appellant, who were considered technically eligible for the allotment of the contract. The Appellant’s financial bid being the lowest, vide an order dated 30.03.2020, the Appellant was allotted the contract for the supply of commercial vehicles for the Financial Year 2020-2021.

3. A writ petition was filed by JK Roadways seeking the quashing of the allotment of the contract in favour of the Appellant. Before the learned Single Judge of the High Court of Jammu and Kashmir at Srinagar [“Single Judge”], three contentions qua the Appellant’s technical eligibility were made by JK Roadways, which were decided in the following manner, by a judgment dated 30.06.2020:

3a. Firstly, the learned Single Judge found that though the service licence of the Appellant was only valid upto 31.03.2020, it had sought an extension of its service licence prior to its expiry. Since a lockdown was imposed on account of the outbreak of COVID-

19, a General Order dated 30.03.2020 [“General Order”] was issued, through which the validity of all documents relating to transportation services were deemed to be extended till 30.06.2020. This being the case, this contention was decided against JK Roadways, and it was held that the Appellant fulfilled the eligibility condition of holding a valid service licence.

3b. Secondly, it was found that the Appellant did in fact own 30 vehicles including heavy motor vehicles [“HMV”] and light motor vehicles [“LMV”], as a list of 36 vehicles was furnished to ZPHS, the tendering authority. Since a complaint in this regard had been made by the unsuccessful bidders, the same was forwarded to the Senior Superintendent of Police, Srinagar [“SSP”] to ascertain the veracity of the documents furnished. The SSP submitted a report finding that though 5 vehicles were found to be owned by individuals other than the Appellant, 31 vehicles were still owned by the Appellant, as a result of which the eligibility condition was satisfied. It was also found that insofar as 1 vehicle was concerned, it was indeed owned by the Appellant as there existed a typographical error in the registration number of the vehicle.

3c. Thirdly, as far as the eligibility criteria of having work experience of at least 5 years, not being less than Rs. 2 crores was concerned, the learned Single Judge found that work experience certificates from 2014 to 2018 were submitted and since the tendering authority was the best judge as to whether such eligibility condition had in fact been satisfied, a judicial hands-off was mandated.

3d. Finally, the learned Single Judge concluded:

“16. Considering the submissions of the parties and in view of the law laid down by the Supreme Court and also the fact that the contract is for the year 2020-21, which

has already commenced w.e.f. 1st April, 2020, public interest would be severely jeopardized if the respondents are not allowed to execute the contract because the bid of respondent No. 5 was the lowest. It is, therefore, in public interest not to interfere in the allotment of contract in favour of respondent No. 5, who satisfied the criteria as laid down in technical bid as he had furnished list of HMV & LMV vehicles which was the most essential condition of the tender. Thus, the petitioner having been found ineligible cannot now question allotment of contract to respondent No. 5 because the petitioner is not similarly situated.”

4. JK Roadways filed a letters patent appeal before the Division Bench of the High Court of Jammu and Kashmir at Srinagar [“Division Bench”]. By the impugned judgment dated 16.10.2020, the Division Bench recorded:

“14) Though the appellant has raised a number of grounds in the appeal yet during the course of arguments, the main thrust of arguments advanced by the learned counsel for the appellant was on the following grounds:

(I) That the official respondents were not justified in rejecting bid of the appellant on the ground that it had submitted only the list of heavy motor vehicles and that the list did not contain the particulars of light motor vehicles;

(II) That the respondent No.5 despite lacking the requisite experience in supply of vehicles, was awarded the contract, which action has amounted to award of contract in favour of an ineligible bidder to the exclusion of an eligible bidder.”

5. After setting out Condition No. 31 of the N.I.T., the Division Bench concluded:

“16) From a perusal of the aforesaid condition, it is clear that the official respondents while formulating the tender notice have used the expression “HMV/LMV” meaning thereby that a tenderer had the option of furnishing the particulars of either HMVs or LMVs or both types of vehicles. No other construction can be given to the expression “HMV/LMV”. If the official respondents desired that a tenderer must own both types of vehicles i.e. HMVs as well as LMVs, they could have easily used the word “and” instead of “/” in between HMV and LMV in the tender notice, use whereof refers to “or”. This is not the case over here. Thus, if the appellant has furnished the list of Heavy Motor Vehicles only, he has done what a reasonable and prudent person would do upon going through the tender condition quoted hereinabove. The action of the official respondents of rejection of technical bid of the appellant on the ground of non-furnishing of list of both types of vehicle is, therefore, irrational, arbitrary and perverse. Therefore, the contention of the appellant in this regard is full of substance and deserves to be accepted.

17) Mr. B. A. Dar, Sr. AAG, has submitted that the tender notice condition stated “both HMV/LMV” which meant that the tenderers had to provide details of both

HMV and LMV vehicles. Per contra learned Sr. counsel for the appellant has contended that the very appellant was found eligible in respect of the same condition and was awarded the same work for the previous five years which was satisfactorily completed.

18) We are unable to agree with the submission of Sr. AAG. As already noted, if the respondents required provision of details of both HMV and LMV vehicles, they would have placed “and” between them. This has not been done.”

6. As a result, the Division Bench found that JK Roadways, having satisfied Condition No. 31 of the N.I.T., was wrongly disqualified by the tendering authority. So far as the requirement under Condition No. 27 of the N.I.T. of holding work experience of at least 5 years was concerned, the Division Bench found that the Appellant had experience of supplying vehicles only for a few months in the years 2014 and 2015 and therefore, the Appellant could, at best, be said to hold work experience of supplying vehicles for 1 year only. Thus, Condition No. 27 of the N.I.T., being an essential condition, remained unfulfilled by the Appellant. Resultantly, the judgment of the Single Judge dated 30.06.2020 was set aside and the contract awarded in favour of the Appellant was quashed. The official respondents were directed to invite fresh tenders and complete the process within a period of 1 month from the date of the order of the Division Bench.

7. On 04.11.2020, this Court issued the following order:

“Issue notice.

There shall be an ad-interim stay of operation of the impugned judgment and order of the High Court.

Counter affidavit within one week by Respondent No.1. Likewise, counter affidavit to be filed by the State within two weeks. Rejoinder affidavit within one week thereafter.”

8. As a result of this Court’s order, the Appellant has continued executing the awarded work till date, with roughly 3 months left for the completion of the contract period.

9. Shri Rana Mukherjee, learned senior advocate appearing on behalf of the Appellant, argued that the Division Bench was wrong on both counts. According to him, a plain reading of Condition No. 31 of the N.I.T. showed that “both HMV/LMV” had to be supplied, and as JK Roadways only supplied a list of HMTVs, it was obviously ineligible.

Further, he placed reliance upon the judgments of this Court stating that the authority that floats the tender is the best judge on how a tender condition should be read. Accordingly, the Division Bench overstepped its mark in construing the eligibility conditions of the N.I.T. contrary to the tendering authority's interpretation. Insofar as the work experience condition was concerned, he adverted to the work experience certificates from the Financial Years 2014-2015 to 2018-2019, which showed that the Appellant possessed the necessary work experience, which had also been demonstrated to the Tender Opening Committee, which had, in turn, reflected the same in a tender scrutiny report, showing that it had applied its mind in rendering the Appellant a technically qualified bidder. With respect to the service licence, Shri Mukherjee relied upon the conclusions of the Single Judge and stated that since this contention was given up before the Division Bench, this Court ought not to allow this point to be re-agitated.

10. Shri Altaf H. Naik, learned senior advocate appearing on behalf of JK Roadways, reiterated the three submissions made before the Single Judge and also sought to argue that the work experience certificates supplied by the Appellant were in the name of "Galaxy Agencies" and therefore, could not be counted to the credit of the Appellant. He vehemently argued that the Appellant did not possess a service licence for the relevant period, the licence having expired on 31.03.2020 and not having been renewed by the General Order, when properly read. Thus, the eligibility conditions were not satisfied by the Appellant. Equally, the Division Bench was right in saying that insofar as the work experience requirement was concerned, the Appellant had only 1 year of experience, which would not meet the essential requirement of the N.I.T. Finally, he also advanced submissions on JK Roadways being qualified on a reading of Condition No. 27 of the N.I.T.

11. Smt. Shashi Juneja, additional standing counsel appearing on behalf of the Union Territory of Jammu & Kashmir, supported the grant of the contract in favour of the Appellant and said that the Division Bench was incorrect in its construction of Condition No. 27 of the N.I.T. She also submitted that the Tender Opening Committee, being an expert body and having scrutinised the documents supplied by the Appellant, cannot now be second-guessed by the judgment of the High Court.

12. Having heard the learned counsel for the parties, it is first necessary to set out the N.I.T.'s "Terms and Conditions/Qualifying Criteria". Condition Nos. 27 and 31 of the N.I.T., which are material to this case, state as follows:

"Terms and Conditions/Qualifying Criteria xxx xxx xxx

27. The firm/association shall have working experience of at least Five years with documentary proof and work should not [be] less [than] 2 Crores.

xxx xxx xxx

31. The firm/tenderer should have owned at least 30 nos. of vehicles both HMV/LMV and attached 200 vehicles with the firm alongwith documentary proof."

13. Even a cursory glance at Condition No. 31 of the N.I.T. would show that the 30 vehicles referred to, are “both HMV/LMV”. The tendering authority has construed this condition to mean that both types of vehicles, i.e., HMV and LMV, need to be included in the list of the 30 vehicles submitted by each bidder.

14. In a series of judgments, this Court has held that the authority that authors 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. In *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.*, 2016 (16) SCC 818, this Court held:

“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.” (page 825) (emphasis supplied)

15. In the judgment in *Bharat Coking Coal Ltd. v. AMR Dev Prabha* 2020 SCC OnLine SC 335, under the heading “Deference to authority’s interpretation”, this Court stated:

“51. Lastly, we deem it necessary to deal with another fundamental problem. It is obvious that Respondent No. 1 seeks to only enforce terms of the NIT. Inherent in such exercise is interpretation of contractual terms.

However, it must be noted that judicial interpretation of contracts in the sphere of commerce stands on a distinct footing than while interpreting statutes.

52. In the present facts, it is clear that BCCL and India have laid recourse to Clauses of the NIT, whether it be to justify condonation of delay of Respondent No. 6 in submitting performance bank guarantees or their decision to resume auction on grounds of technical failure. BCCL having authored these documents, is better placed to appreciate their requirements and interpret them. (*Afcons Infrastructure Ltd v. Nagpur Metro Rail Corporation Ltd*, (2016) 16 SCC 818 at para

15)

53. The High Court ought to have deferred to this understanding, unless it was patently perverse or mala fide. Given how BCCL’s interpretation of these clauses was plausible and not absurd, solely differences in opinion of contractual interpretation ought not to have been grounds for the High Court to come to a finding that the appellant committed illegality.” (emphasis supplied)

16. Further, in the recent judgment in *Silppi Constructions Contractors v. Union of India*, 2019 SCC OnLine SC 1133, this Court held as follows:

“20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court’s interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.” (emphasis supplied)

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.” (page 288)

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.

21. As was correctly pointed out by Shri Mukherjee, learned senior counsel appearing on behalf of the Appellant, the contention as to the invalidity of the Appellant’s service licence for the requisite period does not appear to have been argued before the Division Bench, though argued before and rejected by the learned Single Judge. This being the case, we do not think that the scope of this appeal be enlarged to include any such point which appears to have been given up before the Division Bench.

22. Also, the argument that the Appellant has submitted work experience certificates in the name of “Galaxy Agencies”, which is a separate entity from “Galaxy Transport Agency”, has not been argued either before the Single Judge or before the Division Bench. In this circumstance, we reject this point also.

23. The Division Bench’s judgment dated 16.10.2020 is therefore set aside and the learned Single Judge’s judgment dated 30.06.2020 is restored. The appeal is disposed of in the aforesaid terms.

..... J.

(ROHINTON FALI NARIMAN) J.

(NAVIN SINHA) J.

(K.M. JOSEPH) New Delhi;

December 18, 2020.