

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

WP(C) No. 466/2023
CM No. 1961/2024
CM No. 358/2024
CM No. 1109/2023
CM No. 2607/2023
c/w
WP(C) No. 3256/2023
CM No. 7886/2023
CM No. 2128/2024

M/s A L Construction

....Petitioner(s)/Appellant(s)

Through :- Mr. Manik Dutt, Advocate.

V/s

UT of Jammu and Kashmir and others

....Respondent(s)

Through :- Mrs. Monika Kohli, Sr. AAG for R-4
Mr. Ravinder Gupta, AAG for R-1 to 3 & 5.

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

ORDER
10.05.2024

CM No. 2607/2023 in WP(C) No. 466/2023

1. Heard learned counsel for the parties at length on the application filed by Mrs. Monika Kohli, learned Sr. AAG appearing on behalf of respondent No.4, seeking vacation of the interim order dated 01.03.2023, passed by this Court in WP(C) No.466/2023.
2. The learned counsel submits that the interim order is operating harshly against the respondents, because of the passing of the interim order in the case, the prestigious police project, namely the construction of IRP Battalion Headquarters at Kishtwar (By way of construction of five Storey Hostel block

including Mess cum dining hall in ground floor and separate toilet/bathroom blocks 20+20 and septic/soakage block-B, C & D), construction of double storey sentry post 10 Nos., construction of Guard Room 04 Nos., construction of drain for road and parade ground/ sports stadium, Construction of HPC culvert for road and Parade Ground/Sports Stadium, Construction of G.I. wire crates (Gabion), Construction of 2.10 m B/Wall, Construction of 4.0 mtr Height R/Wall' for an amount of Rs.1752 lacs; and construction of Anti Corruption Bureau Office, Doda at Village Kathori, Patnitop Udampur (by way of construction of Police Station, Construction of 3 BHK (GO's), construction of 2 BHK (NGOs), construction of SSP residence, external development and allied works of Anti Corruption Bureau at District Doda for an amount of Rs. 1713.50 lacs, approved by Ministry of Home Affairs, Govt. of India, New Delhi, which are being monitored /supervised at the highest level of the Govt., have been held to ransom with each passing day and the same is at the cost of public exchequer.

3. She further submits that the continuation of the interim direction is in nobody's interest and, accordingly, prays lifting of the interim direction, as this would cause no prejudice to the petitioner.

4. The learned counsel further submits that, in the instant case, the overwhelming public interest is involved. In support of her arguments, she has placed reliance on the judgments passed by the Supreme Court in the case '**The Silppi Constructions Contractors v. Union of India and anr.** reported in **2019 SCC OnLine SC 1133** and '**Air India Ltd. v. Cochin International Airport Ltd.** reported in **(2000) 2 SCC 614**.

5. The learned counsel further submits that the interim direction is harshly working against the interest of the respondents and also against public

interest. The law is crystal clear on this issue, as the Supreme Court, in a number of judgments, held that the court should not ordinarily interfere in matters relating to tender or contract.

6. She further submits that this project involves question of national security, as it pertains to the construction of Battalion headquarters and office of Anti Corruption Buerau, Doda, which has been stalled. The withholding of the various projects, details whereof mentioned in the preceding paragraph, having national importance relating directly to the security of the nation, would have deleterious consequences, as the question of national security is at stake. She, finally, argues that the interim direction passed on 01.03.2023 be modified in the interest of public at large coupled with the security of the State.

7. Per contra, Mr. Manik Dutt, learned counsel, appearing on behalf of the petitioner, submits that this court has rightly issued the interim directions by staying the communication No.EE/R&B/K/11029 dated 20.02.2023 issued by respondent No.2, because by virtue of the said communication, the work completion certificates issued to the petitioner were declared null and void, notwithstanding the fact that the petitioner was declared L1.

8. Learned counsel appearing on behalf of the petitioner further submits that the respondent No.2, in order to delay the release of pending payment to the petitioner for the earlier executed work, has issued the impugned communication, which has rightly been stayed by this court.

9. Learned counsel further submits that the action of the respondents in declaring his work completion certificates as null and void is causing hindrance in the new contractual works for which the petitioner is being considered and it would have adverse impact on the integrity of the petitioner.

10. Lastly, it is argued by the learned counsel for the petitioner that in order to effectively adjudicate the issue and give quietus to the controversy, the court has rightly passed the interim direction.

11. I have thoughtfully considered the rival submissions made by the learned counsel for the parties and perused the record minutely.

12. The interim direction, modification, whereof, is implored by virtue of this application, is reproduced below for the sake of facility:

“ORDER

The petitioner was allotted construction work of ‘New Model Degree College Complex at Padder, Kishtwar which he completed on time. The respondent No.2 certified that the completion of work by the petitioner was to the entire satisfaction of the department vide his certificate dated 04.09.2021. Subsequently, vide communication dated 23.11.2022, it was again certified that the petitioner has executed the work for construction of New Model Degree at Padder satisfactorily to the tune of Rs.1150.00 Lacs.

The grievance of the petitioner is that the respondent No.2 vide is communication dated 20.02.2023 addressed to respondent No.4 stated that the progress executed by the petitioner’s firm is less than 10.5 Crore and further requested that all the related correspondence made earlier be treated as null and void.

It is submitted that this has resulted in withdrawal of all the earlier certificates issued to him and is causing hindrance in the new contractual works for which the petitioner is being considered and it would have adverse impact on their work.

Issue notice to the respondents, returnable within four weeks.

Requisite for the same within one week.

List on 31.03.2023.

Meanwhile, subject to objections from the other side and till next date of hearing, the communication No.EE/R&B/K/11029 dated 20.02.2023 shall stay.”

13. Without commenting upon the merits of the case, this court deems it proper to consider the application filed by the respondents seeking vacation of the interim order, which is harshly working against the interest of the respondents involving public interest and security of the State.

14. There has been a significant increase in the scrutiny of tenders in writ proceedings under Article 226 of the Constitution of India and it appears that almost every tender, whether small or big is now routinely challenged through writ petitions. However, the Apex Court has repeatedly held that the judicial review is equivalent to judicial restraint in these cases. The manner in which the decision was made is being scrutinized, not the decision itself, as the writ court lacks the expertise to correct such decisions by substituting its own decision for the authority's decision.

15. The Supreme Court, in a celebrated judgment titled **Tata Cellular Vs. Union of India**, reported in (1994) 6 SCC 651 has, inter alia, held that the judicial intervention in the tender process should be kept to a bare minimum in order to preserve institutional autonomy. The Government must have freedom of contract. It is held that 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.

16. The court does not sit as a court of appeal but merely, review the manner in which the decision was made. Further, 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. The principles enunciated in the case of Tata Cellular (supra) are reproduced below :

“94.

(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 quasiadministrative 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.”

17. In [Air India Limited vs. Cochin International Airport Ltd.](#) (2000) 2 SCC 617, the Supreme Court has held as:

“This Court once again stressed the need for overwhelming public interest to justify judicial intervention in contracts involving the State and its instrumentalities. It was held that Courts must proceed with great caution while exercising their discretionary powers and should exercise these powers only in furtherance of public interest and not merely on making out a legal point.”

18. In [B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd.](#), (2006) 11 SCC 548, it was held that:

“It is not always necessary that a contract be awarded to the lowest tenderer and it must be kept in mind that the employer is the best judge therefor; the same ordinarily being within its domain. Therefore, the court's interference in such matters should be minimal. The High Court's jurisdiction in such matters being limited, the Court should normally exercise judicial restraint unless illegality or arbitrariness on the part of the employer is apparent on the face of the record.”

19. In **Municipal Corporation, Ujjain and Another vs. BVG India Ltd. and Others**, (2018) 5 SCC 462 it was held that by the Supreme Court that the

authority concerned is in the best position to find out the best person or the best quotation depending on the work to be entrusted under the contract. The Court cannot compel the authority to choose such undeserving person/company to carry out the work. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work.

20. The Supreme Court in the case of **Air India Ltd. v. Cochin International Airport Ltd.** reported in (2000) 2 SCC 617 in which the Supreme Court, on the issue of larger public interest, has observed as under:

7. The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in R.D. Shetty v. International Airport Authority, 1979 (3) SCC 488; Fertilizer Corporation Kamgar Union v. Union of India, ; Asstt. Collector, Central Excise v. Dunlop India Ltd, , Tata Cellular v. Union of India, ; Ramniklal N. Bhutta v. State of Maharashtra, and Raunaq International Ltd. v. I.V.R. Construction Ltd., . 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 vitiated by mala fides, unreasonableness and arbitrariness. The

State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision making process the Court must exercise its discretionary power under [Article 226](#) with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should intervene.

21. Thus, the conspectus of the aforesaid pronouncements would show that the Hon'ble Supreme Court has consistently opined that judicial intervention in the decisions of the public authorities relating to the award of contracts ought to be limited.

22. The entire case of the petitioner is that, in spite of the fact that he was declared L1, the respondent No.2, by virtue of the impugned communication has declared the work completion certificates issued to the petitioner as null and void.

23. I have perused the record minutely and I do not find any allegation of malafide in both the petitions against the respondents and thus, I do not find any reason, at this stage, being a constitutional court, to extend the interim order, which has caused grave prejudice to the respondents in completing the said projects, which are in public interest and are of national importance.

24. I am fortified by the judgment of the Supreme Court in **Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corporation Ltd.** reported in (2016) 16 SCC 818, in which the Supreme Court has held as under:

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

process or the decision. 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. 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.”

25. In Silppi Constructions Contractors v. Union of India reported in *2019 SCC OnLine SC 1133*, the Supreme Court, on the issue of interference in tender matters where mala fides are alleged, has held as under:

19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clearcut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of [Article 12](#) of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realize their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As [laid down in the judgments cited above](#) the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give “fair play in the joints” to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

26. Although, the role of the court is minimal in contractual matters, unless there is a **strong foundation of arbitrariness, mala fides or bias or irrationality**. No such foundation has been laid down by the petitioner in both the petitions, thus, it is not a case where the court can perpetuate the damage

already caused by virtue of continuing/extending the interim direction, which is against the public interest and national importance. In absence of any such foundation, the court cannot perpetuate further damage in the instant petition by extending the interim direction, which is against the public interest.

27. On the question of interference by the court in tender matters, the Supreme Court has gone further to the extent of observing that the courts should refrain from staying Government tenders **even in case of total arbitrariness**.

28. In view of the law discussed above and in the facts and circumstances of the case, this court finds force in the arguments made by Mrs. Monika Kohli, Sr. AAG and holds continuation of the interim direction to be in nobody's interest, as it will serve no fruitful purpose to the parties, let alone petitioner who is declared as L1.

29. Rather, this court views the perpetuation of the interim direction by way of an obstacle to adjudicate the rights of the petitioner which have been projected in the instant petition and the petitioner is surely going to get no leverage out of it, if the same is continued. The proper course for the petitioner, instead of approaching this court by way of filing the instant petition, would have been to approach the respondents and get his documents authenticated from the competent authority, which would have cleared the mist and steered his further course.

30. Adverting to the issue in hand, since the respondents have interpreted the interim direction as a legal impediment in finalizing the tender, involving a sensitive question of national security as construction of Battalion headquarters and Anti Corruption Bureau Office, Doda and the other allied works, details whereof, are mentioned in the preceding paras, have been held at ransom.

31. This court, accordingly, is required to consider not only the interest of the contesting parties, but also, the element of larger public interest, whether to continue with the interim order or to vacate the same, continuation, whereof, would stare harshly at the project of such national importance.

32. It is beyond any cavil of doubt that before passing an interim order, the Courts should not only consider the prima facie case, balance of convenience and irreparable injury, but also has to consider the affect on public interest as well. The public interest, in the instant case, demands that project should not be stalled, thus, an interim order involving public interest must receive different consideration.

33. The court should always keep the larger public interest in mind in order to decide, whether its intervention is called for or not. Only when, the court comes to a conclusion that overwhelming public interest requires interference, under that circumstance, the court should intervene.

34. After hearing learned counsel appearing for the parties, this court is of the opinion that to buttonhole the project is in nobody's interest but is only antithetical to public interest. The passing of interim direction, in favour of the petitioner, has helped no-one, rather has only caused loss to the parties with no corresponding gain to anyone. The interim direction is visiting very harshly to the respondents. The project, in question, relates to larger public interest, more so, when the question of national security is involved.

35. This court, after perusing the record, is of the view that there was no blanket stay order, which could have caused legal impediment for the respondents to have finalized the tender, as merely, staying the communication would not *ipso facto* be construed as if the whole tendering process has been

stayed. The respondents have misinterpreted the staying of the communication as a stay on the entire tender process and yet with a view to clarify, the instant order is being passed.

36. In view of the preceding analysis, what has been urged by the learned counsels appearing for the parties, the law discussed above and in view of the settled legal position that private interest must be subservient to larger public interest, this Court deems it proper to modify the interim order dated 01.03.2023 by giving liberty to the respondents to proceed ahead with the tender issued vide E-NIT No.EE/PCD/PHQ/82/2021-22 dated 06.08.2022, or else the respondents are at liberty to re-tender, if circumstances so warrant.

37. However, the decision, which the respondents may take, shall be subject to the final outcome of the writ petition i.e. WP(C) No. 466/2023.

38. The observations made hereinabove will confine to the extent of the disposal of this application only and will have no bearing on the final adjudication of the writ petitions, which will be decided independently, without being influenced by the observations made while deciding the instant application.

39. CM No.2607/2023 is, accordingly, allowed.

40. List WP(C) No. 466/2023 with WP(C) No. 3256/2023 on **03.06.2024**.

(Wasim Sadiq Nargal)
Judge

Jammu:
10.05.2024
Raj Kumar