Before D.K. Jain, C.J. & Hemant Gupta, J.

GOEL PROJECTS PRIVITE LIMITED,—*Petitioner*

versus

UNION OF INDIA AND OTHERS,—*Respondents*

C.W.P. No. 1442 of 2005

24th August, 2005

Constitution of India, 1950—Art. 226—Respondent floating a tender for designing and construction of a filtration and water treatment plant—Bid of respondent No.4 was found to be the lowest but figures in the bid were filled with lead pencil—Respondent inviting revised/fresh price bids from the same three tenderers who participated—Petitioner also submitting a revised bid—Whether the decision of respondent No. 2 to award the work to respondent No. 4 on the basis of fresh bid can be said to be unreasonable or irrational, warranting interference particularly when there is no allegation of mala fides or bias—Held, no—High Court has power of judicial review to examine the validity of an admistrative action.

Held, that there is no material on record, which compels us to come to the conclusion that the impugned decision is arbitrary, discriminatory or mala fide. The notings show that the exercise to ask the same tenderers to submit revised 'Q' bids was undertaken keeping in view the urgency of the matter, namely, inadequacy of potable water supply to the buildings, to be used by the Armed Forces. According to the respondents, a fresh tendering process would have consumed six months time.

(Para 21)

Further held, that though failure of respondent No. 2 to reject the 'Q' bid of respondent No. 4 and to permit him to submit a fresh 'Q' bid may fall within the purview of judicial review, yet under the given circumstances the impugned decision of respondent No. 2 to award the work to respondent No. 4 cannot be said to be unreasonable or irrational, warranting interference, particularly when there is no

allegation of mala fides or bias. It appears that the paramount considerations which weighed with the MES in taking the impugned decision was the delay in completion of the project. On facts in hand, we find it difficult to hold that the said decision is one which no sensible person could have arrived at, having regard to the aforenoted broad principles. We are convinced that the decision is bona fide.

(Para 22)

Akshay Bhan, Advocate, *for the petitioner.*

Kamal Sehgal, Advocate, *for respondents No. 1 to 3.*

Munish Singhal, Advocate, *for respondent No. 4.*

JUDGMENT

D.K. JAIN, C.J.

Rule DB.

(2) Having regard to the nature of the issue involved, with the consent of learned counsel for the parties, the matter is taken up for final disposal at this stage itself.

(3) In this writ petition, under Article 226 of the Constitution of India, the petitioner questions the legality and propriety of letters, dated 13th January, 2005 and 24th February, 2005, whereby the objections raised by it against the award of contract for setting up of filtration and water treatment plant in favour of respondent No. 4 have been rejected. Beside, respondent No. 4, Union of India through Secretary, Ministry of Defence, the Chief Engineer, Military Enginerring Services Bhatinda Zone, (MES', for short), Bhatinda Cantt. and Natasha Construction Company, New Delhi have been impleaded as respondent No. 1 to 3 respectively.

(4) To appreciate the controversy involved in the case, a brief reference to the background facts would be necessary. These are as follows :

In September, 2003, MES (respondent No. 2) floated a tender for designing and construction of a filtration and water treatment plant at Faridkot. The tender was to be submitted

in two parts, namely, technical and financial, christened as "T" bid and "Q" bid respectively. Both the bids were to be submitted in two separate envelopes, marked as 'T' and 'Q' bid.

(5) Pursuant to the said Notice Inviting Tender (for short, 'the NIT'), the petitioner submitted its tender. In addition, five other parties submitted the tenders, which were opened on 6th January, 2004. However, the 'Q" bids were sealed for future opening. 'T' bids were scrutinised and some clarifications were sought from all the six tenderes. After exhaustive correspondence on 'T' bids, only three bids were cleared. After the scrutiny of the technical bids and to bring all the tenderes at per on technical specifications, respondent No. 2 asked for revised 'Q' bids from the three tenderers, based on alteration in the technical specifications. The revised 'Q' bids were to be opened on 6th January, 2005. The three tenderers submitted their revised 'Q' bids, which were opened by respondent No. 2. However, the 'Q' bid of respondent No. 4, though lowest, was not announced, because it was found that they had filled in their rates in pencil and had mentioned the rates only in figures and not in words, the requirements in the NIT. It seems that instead of awarding tender to the next lowest bidder, namely, the petitioner, respondent No. 2 decided to ask all the three tenderers to submit their revised 'Q' bids by 28th January, 2005.

(6) Aggrieved by the said decision, the petitioner made a representation to respondent No. 2 for accepting its tender, being the second lowest tenderer. The representation of the petitioner was rejected,—*vide* letter dated 13th January, 2005. The work was ultimately awarded to respondent No. 4,—*vide* letter dated 24th February, 2005. The said action of the official respondents is challenged as illegal, arbitrary and unsustainable in law mainly on the ground that the 'Q' bid of respondent No. 4, filled in lead pencil, should have been outrightly rejected and they could not be permitted to participate in the tendering process thereafter, particularly when, being an enlisted contractor of long standing, they knew that the rates could not be written in lead pencil. It is pleaded that the action of respondent No. 2 in entertaining an incomplete bid document would encourage malpractices as a contractor would take a chance in the first instance,

by filling up the rates in lead pencil to know the competitive position and then revise his rates in the second round if the department asks for revised bids, as it happened in the instant case. It is also pleaded that respondent No. 4, being a 'C' category contractor, was otherwise not qualified because only 'B' category contractors could participate in the bidding. It is also alleged that respondent No. 4 did not possess the requisite experience, which was a condition precedent for issue of the tender document.

(7) The petition is resisted by the respondents. In the written statement filed on behalf of respondent No. 1 and 2, it is stated that the petitioner, not being the lowest bidder in the first call and not having participated in the second call, despite opportunity, cannot challenge the action of respondent No. 2 in awarding the contract in favour of respondent No. 4. It is also pleaded that the writ petition is otherwise rendered infructuous as the contract has already been awarded in favour of respondent No. 4 on 24th February, 2005 and the total time period for execution of the work is one year. It is stated that respondent No. 4 has already started execution of the work from 11th March, 2005. It is also pointed out that after the technical scrutiny, the official respondents asked all the bidders to submit revised 'Q' bids based on alterations in technical specifications during the technical scrutiny, that the bid of respondent No. 4 was found to be the lowest, but it was seen that the figures in the bid were filled with lead pencil and thus, his bid was found to be invalid. It is pleaded that since the lowest tender was found to be invalid, as per paragraph 425 of the Regulations of Military Engineering Service, the accepting officer was competent to invite fresh price bids from the technically qualified bidders.

(8) In the additional affidavit filed on behalf of respondent No. 2, the plea of the petitioner with regard to the requisite experience of respondent No. 4 in regard to a similar type of work has been controverted and it is pointed out that the tenders were issued by the accepting officer based on the recommendations of the Selection Committee. In support of its stand that a one class below contractor could be permitted to tender, reliance is placed on administrative instructions, dated 21st July, 2000, wherein it is provided that where insufficient applications for issue of tenders are received from the

contractors of the appropriate class, contractors of the lower class may be selected for issue of tenders, provided their past performance is satisfactory and they are considered capable of handling the work. In view of the said stipulation, the action of the official respondents in inviting fresh price bids is stated to be fair, reasonable and as per regulations. In support of the plea that action of the official respondents, being fair and reasonable, this Court may not like to intervene, reliance is placed on the decisions of the Supreme Court in **AIR India Ltd.** *versus* **Cochin International Airport Ltd., (1)** and **Directorate of Education and others** *versus* **Educomp Datamatics Ltd. and others (2).**

(9) We have heard Mr. Akshay Bhan, learned counsel appearing for the petitioner, Mr. Kamal Sehgal, learned counsel appearing on behalf of respondents No. 1 to 3 and Mr. Munish Singhal, learned counsel for respondent No. 4. We have also perused the original record, which has been placed before us.

(10) Referring us to various clauses of the tender document, Mr. Bhan has strenuously urged that respondent No. 4's bid, having been declared as invalid under Clause 10(a) because it was filled up in lead pencil and the quoted price was also not indicated in words, the bid of respondent No. 4 had to be ignored and it was incumbent upon respondent No. 2 to award the contract in favour of the petitioner. Learned counsel asserted that respondent No. 4 was even otherwise ineligible to participate in the tender because he was neither a class 'B' category contractor, nor had the requisite experience of "similar works", which were the essential eligibility conditions in the NIT. Learned counsel thus, submits that the action of the official respondents in accepting the bid of respondent No. 4 is *ex facie* arbitrary and an act of favouritism and therefore, deserves to be quashed.

(11) Per contra, learned counsel for respondents No. 1 to 3 has submitted that the petition deserves to be dismissed on the short ground of delay and laches on the part of the petitioner in approaching the Court. Learned counsel contends that the petitioner took a chance by submitting a revised bid, when these were invited from all the three bidders, including respondent No. 4, and therefore, cannot now be permitted to complain. It is also pointed out that the work awarded

(1) (2000)2 S.C.C. 617
(2) (2004)4 S.C.C. 19

to respondent No. 4 is already in progress for the last almost 6 months. It is thus, pleaded that the petition deserves to be dismissed, particularly when no *mala fides*, factual or legal, can be attributed to the respondents.

(12) Before adverting to the issue involved, it will be useful to recapitulate the broad para-meters, which have to be kept in view while testing an administrative decision in judicial review. Article 226 of the Constitution confers on the High Courts a very wide power of judicial review to examine whether the administrative action is valid or not. It is acknowledged that the principles of judicial review can apply to the exercise of contractual powers by the government or its instrumentalities in order to prevent arbitrariness or favouritism. The power of judicial review, being an inherent part of the basic structure of the Constitution, cannot be abrogated in any manner, but at the same time, there are certain self-imposed limitations and restrains, which have to be observed while exercising the power of judical review. In any case, in judical review, the Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made.

(13) The famous case of **Associated Provincial Picture Houses Ltd.** *versus* **Wednesbury Corpn., (3)** commonly known as 'Wednesbury's case', is treated as a leading case as laying down various basic principles relating to judical review of administrative and statutory discretion. In the said decision, the emphasis was on the "reasonableness" of the decision of the administrator. It was observed that to arrive at a decision on "reasonableness", the Court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administration must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at.

(14) The principles of judical review of administrative action were further summarised in **Council of Civil Service Unions** *versus* **Minister for the Civil Service (4)**, wherein Lord Diplock confined it to "illegality", "procedural impropriety" and "irrationality".

(3) (1947)2 All E.R. 680
(4) (1984)3 All E.R. 935

At the same time, he said that more grounds could in future become available, including the doctrine of proportionality. Explaining the expression "irrationality", Lord Diplock said :

> "By 'irrationality', I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see **Associated Provincial Picture Houses Ltd.** *versus* **Wednesbury Corp.** [1947] 2 All ER 680, (1948) 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

(15) In other words, to characterise a decision of the administrator as 'irrational', the Court has to hold, on material, that it is a decision so outrageous as to be in total defiance of logical or moral standards. All these decisions and principles, culled out therefrom, have been noticed in extenso in **Tata Cellular** *versus* **Union of India (5)** and then in **Union of India** *versus* **G. Ganayutham. (6).** In essence, while emphasising that in exercising the option of judicial review, the Court is more concerned with the decision-making process, rather than the merits of the decision itself, it was *inter alia*, held that the decision impugned must not only be tested by the application of "Wednesbury" principles of reasonableness but must be free from arbitrainess, not affected by bias or actuated by *mala fides.*

(16) In **Directorate of Education** *versus* **Educomp Datamatics Ltd.** *(supra),* the same principles have been reiterated, while observing that in exercise of the power of judicial review, it is open to the Court to scrutinise the award of contract by the government or its agency to prevent arbitrariness of favouritism, their Lordships of the Supreme Court have said that the Courts would interfere with the administrative policy decision, only if it is arbitrary, discriminatory, *mala fide* or actuated by bias.

(17) Therefore, the question, which arises for consideration, is whether, on the material available on record, the decision taken by respondent No. 2 to ask for revised 'Q' bids from all the three bidders, who were initially found to be technically qualified is "so outrageous"

(5) (1994) 6 S.C.C. 651
(6) (1997) 7 S.C.C. 463

as to be in total defiance of logic or moral standards that no sensible person, who had applied his mind to the question involved, could have arrived at it or that it is arbitrary or actuated by *mala fides* ?

(18) In order to answer the question, we deam it necessary to refer to some of the notings contained in the files produced before us by the official respondents.

(19) From the minutes, dated 11th January, 2005, it appears that when 'Q' bids were opened, as scheduled on 6th January, 2005, by the two opening officers nominated by the Chief Engineer, the revised 'Q' bid submitted by respondent No. 4 was not announced, as the amount was filled in pencil, which was not considered to be appropriate, as declaring any price bid as *non-bona fide* was considered to be the prerogative of the accepting officer only. It was noted that since the petitioner had quoted high rates, its tender could not be considered for acceptance. For the sake of ready reference, the relevant portion of the said minutes (No. 4) are extracted below :

> "4. As per the latest instructions no tender other than the lowest can be considered for acceptance and the revised offer submitted by the lowest tenderer M/s Surendra Kumar Bansal cannot be considered for acceptance as the same is filled in pencil. As per the instruction to tenderers (Ser. No. 10 Ser. page No. 04 of tender), tender should be filled with neat, legible and correct entries both in figures as well as in words. Thus it can be seen that M/s Surendra Kumar Bansal has not submitted a *bona fide* offer as firstly they have filled their rates in pencil and secondly they have inserted their rates in figures only and not in words. Due to his failure to submit a *bona fide* offer, a show cause notice to contractor is required to be issued for obtaining his explanation and deciding further action, if any to be taken against the firm.
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> 5. Keepting in view above, the options left with Department is to go for retendering which involves fresh action starting from issue of NOT/Press Advertisement, receipt of applications for issue of tender, issue of tender, opening and finalisation of T bid and then opening of Q bid etc.

which will take minimum 06 months besides this the valuable time consumed at all levels in finalisation of T bids from 6th January, 2004 to 6th January, 2005 shall be wasted. It has been confirmed by E-4 section of this HQ that there is no change in the scheme and T bids as cleared by them shall hold good. Correspondence exchanged with E-4 in this regard is exhibited at (F-66 and F-67). It has been brought out by CWE/GE that main works of building are at advanced stage and any delay in execution of work for subject tender will hamper use of buildings due to inadequacy of water supply to these buildings. Thus it is considered appropriate in the interest of work that time consumed in finalisation of T bid is saved and all the participating tenderers are asked to submit their revised offer, i.e. Q bid which can be opened on any date decided by this HQ, if agreed to.

6. The matter was also discussed with Jt. Dir. Gen. (Contracts) E-in-Cs Branch, who also is the opinion to recall the 'Q' Bid only from the participating bidders whose 'T' Bids are already cleared.

7. In view of the above, it is recommended to invite revised Q bid only from all the three contractors participated in this tender and their T-Bid earlier cleared shall hold good. If approved this will also be communicated to E-in-C's Branch and HQ CEWC for their appraisal."

The matter was put up to the Chief Engineer, who approved the proposals.

(20) From the afore-extracted paragraphs, we find that there is substance in the submission of learned counsel for the petitioner that the official respondents were bound to scrupulously adhere to the conditions stipulated in the NIT, namely, the filling up of the tender documents neatly and clearly in pen and confining the eligibility to tender only 'B' category contractors, and since respondent No. 4 did not fulfil both the conditions, its bid should not have been entertained. There is no gain saying that non-adherence to the tender conditions encourages and provides scope for discrimination, arbitrainess and

favouritism, which are totally opposed to rule of law and our constitutional values. (see : **West Bengal Electricity Board** *versus* **Patel Engineering Co. Ltd. (7).** Nevertheless, these observations in favour of the petitioner do not conclude the issue at hand. As noted above, the real question for determination is whether the decision of respondent No. 2 to permit respondent No. 4 to submit his revised 'Q' bid can be said to be arbitrary, discriminatory or actuated by *mala fides* and therefore, liable to be set aside, when tested on the touch-stone of the aforenoted broad principles.

(21) Having carefully perused the original record, particularly the afore-extracted minutes, we are of the view that there is no material on record, which compels us to come to the conclusion that the impugned decision is arbitrary, discriminatory or *mala fide.* The notings show that the exercise to ask the same tenderers to submit revised 'Q' bids was undertaken keeping in view the urgency of the matter, namely, inadequacy of potable water supply to the buildings, to be used by the Armed Forces. According to the respondents, a fresh tendering process would have consumed minimum six months time.

(22) We are, therefore, of the considered opinion that though failure of respondent No. 2 to reject the 'Q' bid of respondent No. 4 and to permit him to submit a fresh 'Q' bid may fall within the purview of judicial review, yet under the given circumstances, delineated above, the impugned decision of respondent No. 2 to award the work to respondent No. 4 cannot be said to be unreasonable or irrational, warranting interference, particularly when there is no allegation of *mala fides* or bias. It appears that the paramount considerations, which weighed with the MES in taking the impugned decision was the delay in completion of the project. On facts in hand, we find it difficult to hold that the said decision is one which no sensible person could have arrived at, having regard to the aforenoted broad principles. We are convinced that the decision is *bona fide.*

(23) Thus, in the final analysis, we do not find merit in the writ petition and the same is dismissed accordingly, with no order as to costs.

R.N.R.

(7) AIR 2001 S.C. 682