

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

PRESENT:

THE HON'BLE JUSTICE ARINDAM MUKHEREJEE.

W.P.A 5687 of 2020

With

IA No: CAN 1 of 2020 (CAN 3574 of 2020)

With

IA No: CAN 2 of 2020

With

IA No: CAN 3 of 2020

GOBINDA MAITI

VS.

THE STATE OF WEST BENGAL & ORS.

For the Petitioner : Mr. Nilanjan Bhattacharyya,
Mr. Sujay Kumar halder,
Mr. Kaustav Shome
... Advocates.

For the
Midnapore Municipality : Mr. Anami Sikdar.
.... Advocate.

Heard on : 30.09.2020.

Judgment on : **21st October, 2020.**

Arindam Mukherjee, J.:

1) Midnapore Municipality (Respondent No.1) published a Notice Inviting Tender (in short NIT) on 27th January, 2020 for Sinking of 2 nos of Deep Tube Well of 300mm X 200mm dia 180 meter deep with PVC Pipe and Fiber Glass Stainer within Midnapore Municipality, Location Ward No.22 at Kamarpara and Ward No.23 at Horijonpally

(hereinafter referred to as the said work) for an aggregate value of Rs.18,94,185/- (hereinafter referred to as the said value) which is at page 15 of the writ petition. Clause 9 of the said NIT provides for the “Eligibility Criteria for participation in the tender”. Clause 9(i) which reads as follows:-

- i) *Indenting tenderers should produce the minimum value 30% of the estimated amount put to tender during 5 (Five) years prior to the date of issue of this tender notice.*

OR,

Indenting Tenderers should produce credential of 2(Two) similar nature of work, each of the minimum value of 30% of the estimated amount but to tender during 5 (Five) years prior to the date of issue of this tender notice.

OR,

Indenting Tenderers should produce credential of one single running work of similar nature which has been completed to the extent of 80% or more and value of which is not less than the desired value at (i) above;

In case of running works, only those tenderers who will submit the certificate of satisfactory running work from the concerned Executive Engineer, or equivalent competent authority will be eligible for the tender. In the required certificate it should be clearly stated that the works in process satisfactorily and also that no penal action has been initiated against the executed agency, i.e., tenderer.

- 2) The Respondent No.1 accepted the Technical Evaluation of Bid of Gobinda Maiti (petitioner), S& P Enterprise and M/S Shine Construction (respondent No.3).

3) The petitioner says that the total value of credential submitted by Respondent No.3 in terms of Clause 9(i) is Rs.10,42,594/- but the same includes only Rs.3,19,017/- as similar nature of work and the rest of the value pertains to allied work and as such the said respondent No.3 does not fulfil the eligibility criteria. The petitioner relies upon the “nota bene” portion of Clause 9(i) to contend that the value of the allied works should not be treated as value of the credential under the said Clause and as such the respondent No.1 should be held to be ineligible. The petitioner in order to elaborate his stand relies upon a notice inviting tender dated 6th September, 2017 (at page 29 of the writ petition) and contends that the work of Sinking of a Deep Tube Well (100 mm X 200 mm) with PVC pipe including laying of water supplying pipes to different building at Training institute ARD, Nazargunge, Paschim Midnapore being the subject work in the said 2017 tender and cited by respondent No.3 in support of its eligibility criteria includes dismantling of RCC floors, beam along with concrete work which are not of similar nature and should not be treated as part of the estimate value of work in support of credential. It is also the case of the petitioner that the credential regarding previous work experience with a particular value provided in the NIT is an essential condition and the respondent No.1 in order to favour the respondent No.3 has relaxed such essential terms of the tender which is impermissible in

law. The petitioner, therefore, invites interference by this Court into the matter in exercise of powers of judicial review. The petitioner cites the following judgments in support of this contention:-

- a) (1979) 3 SCC 489 [Ramana Dayaram Shetty VS. International Airport Authority of India & Ors.] : (paragraphs 10 and 34)**
- b) (1991) 3 SCC 273 : [Poddar Steel Corpn. v. Ganesh Engineering Works] : (paragraph 6)**
- c) (1994) 6 SCC 651 : [Tata Cellular v. Union of India] : (paragraph 94)**
- d) (2005) 1 SCC 679 : [Assn. of Registration Plates v. Union of India] : (paragraphs 38 and 43)**
- e) (2006) 11 SCC 548 [B.S.N. Joshi & Sons Ltd. v. Nair Coal Services Ltd.]: (paragraphs 66 and 69)**
- f) (2007) 14 SCC 517 [Jagdish Mandal v. State of Orissa] : (paragraph 22)**
- g) (2016) 16 SCC 233 [Shobikaa Impex (P) Ltd. v. Central Medical Services Society] (paragraph 24)**
- h) Judgement of the Hon'ble Supreme Court delivered on 18th March, 2020 in Civil Appeal No.2197 of 2020 (The Bharat Coking Coal Ltd. & Ors. Vs. AMR Dev Prabha & Ors.)**

4) On behalf of respondent No.1 it is submitted that in the NIT dated 6th September, 2017 there is no division as to the value of work as alleged by the petitioner. The entire work value, therefore, has to be considered for the credential of the respondent No.3. It is further submitted that the objection raised by the petitioner and two others regarding the credential of the petitioner after the technical bid was opened has been considered by the Executive Engineer,

West Midnapore Division, Municipal Engineering Directorate i.e. the respondent No.1 Annexure R3 at page 22-23 and Annexure R5 at page 27 of the affidavit-in-opposition of the said respondent is the relevant document. Annexure R5 is the Completion Certificate of the work cited by the respondent No.3 in support of its credential. Page 23 is the clarification given by the Executive Engineer after due scrutiny on the objection being raised to show that respondent No.3 has paid tax commensurate to the work value cited by them in support of the credential. It is also submitted that the Executive Engineer being a technically qualified person having certified the credential of the respondent No.3 after considering the objection raised by the petitioner there remains no further issue for judicial review as to the tender process. The financial bid has been opened. The respondent No.3 is the lowest bidder as will appear from page 25 of the affidavit-in-opposition of the respondent No.1 and as such the Executive Engineer has given his view to the Administrator of Respondent No.1 Municipality to the effect that respondent No.3 can be recommended for the work. The respondent No.1 cited the judgment reported in **2016 (8) SCC 446 [Bakshi Security and Personnel Services Private Limited Vs. Devkishan Computed Private Limited & Ors.]** to suggest that the essential conditions of the tender have not been relaxed.

5) In *R. D Shetty (supra)* the Hon'ble Supreme Court formulated the scope of judicial review by approving the rule enunciated by Mr. Justice Frankfurter in *Viteralli v. Saton*. It was held that the said also emanates from Article 14 of the Constitution but does not rest merely on that article. It is also a rule of administrative law which has been judicially evolved as a check against exercise of arbitrary power by the executive authority and has an independent existence apart from Article 14. The Hon'ble Supreme Court after reviewing several judgments held in the said report that State is entitled to refuse to enter into relationship with any one yet if it does so, it cannot arbitrarily choose any person it likes for entering into such relationship and discriminate between persons similarly circumstanced, but it must act in conformity with some standard or principle which meets the test of reasonableness and non-discrimination and any departure from such standard or principle would be invalid unless it can be supported or justified on some rational and non discriminatory ground. (para 21 page 512). An eligibility criteria was held to be essential term and there can be no departure from strict adherence thereto. This will not only cause discrimination amongst those who participated in the tender but will also bar a person from applying who thought that the eligibility criteria mentioned in the tender condition will be strictly followed and he is not in a position to fulfil the same thereby is unable to

apply not having such eligibility if the essential condition as to eligibility is subsequently diluted.

6) In Poddar Steel (supra) the Hon'ble Supreme Court has clarified the requirement in tender notice into two categories -- Those which lay down the essential conditions of eligibility and the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from and not to insist upon the strict literal compliance of the conditions in appropriate cases.

7) In the Tata Cellular (supra) it was held that the principles of judicial review would apply to the exercise of contractual power by Government bodies in order to prevent arbitrariness or favouritism. The need is to remedy any unfairness judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision making process itself. The Hon'ble Supreme Court in the said report deduced certain principles for judicial review which are as follows:-

“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.*

Based on these principles we will examine the facts of this case since they commend to us as the correct principles.”

8) In Association of Registration (supra) the Hon’ble Supreme Court has held that unless the action of tendering authority is

found to be malicious and a misuse of its Statutory Powers, tender conditions are unassailable. It has been also held *“43. Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and in public interest in awarding contract.”*

9) In B.S.N. Joshi (supra) the Hon'ble Supreme Court after considering several judgments held that the role of superior Courts in judicial review has been expanded and formulated the following principles:-

“66. 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 summarised 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 with 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.”

It was also held in that report “that having regard to the fact that huge public money is involved, a public sector undertaking in view of the principles of good corporate governance may

accept such tenders which are economically beneficial to it. It may be true that essential terms of the contract were required to be fulfilled. If a party failed and/or neglected to comply with the requisite conditions which were essential for consideration of its case by the employer, it cannot supply the details at a later stage or quote a lower rate upon ascertaining the rate quoted by others.”

10) In Jagdish Mandal (supra) after reviewing earlier decisions the Hon’ble Supreme Court in paragraph 22 thereof at page 531 of SCC held as follows:-

“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."

11) In *Shobika Impex* (supra) the Hon'ble Supreme Court considered the judgments cited by the petitioners and several others only to approve the views expressed in these judgments.

12) In *Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd.*, (2016) 16 SCC 818 the Hon'ble Supreme Court has held as follows:-

“13. In other words, 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.”

“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.”

13) In the most recent judgment of the Hon'ble Supreme Court *Bharat Coking Coal (supra)* after review of all major judgments operating in the field of judicial review as to government contract it has been held in paragraph 35 thereof as follows:-

“35. It is thus imperative that in addition to arbitrariness, illegality or discrimination under Article 14 or encroachment of freedom under Article 19(1)(g), public interest too is demonstrated before remedy is sought. Although the threshold for the latter need not be high, but it is

nevertheless essential to prevent bypassing of civil courts and use of constitutional avenues for enforcement of contractual obligations.”

14) In *Bakshi Security* (supra) the view taken in 2012 (8) SCC 216 [*Michigan Rubber (India) Ltd. Vs. State of Orissa*] following the judgment in *Jagdish Mandal* (supra) was approved.

15) In addition to the judgments referred to at the bar one should also refer to the judgment reported in 2017 (2) SCC 599 [***Union of India v. Rajasthan High Court***] for the scope of judicial review and interference to executive action in exercise of jurisdiction under Article 226 of the Constitution of India. In paragraph 13, SCC page 606 it has been held as follows:-

“13. A suo motu exercise of the nature embarked upon by the High Court encroaches upon the domain of the executive. In a democracy based on the rule of law, the Government is accountable to the legislature and, through it, to the people. The powers under Article 226 are wide—wide enough to reach out to injustice wherever it may originate. These powers have been construed liberally and have been applied expansively where human rights have been violated. But, the notion of injustice is relatable to justice under the law. Justice should not be made to depend upon the individual perception of a decision-maker on where a balance or solution should lie. Judges are expected to apply standards which are objective and well defined by law and founded upon constitutional principle. When they do so, Judges walk the path on a road well-travelled. When judicial creativity leads Judges to roads less travelled, in search of justice, they have yet to remain firmly rooted in law and the

Constitution. The distinction between what lies within and what lies outside the power of judicial review is necessary to preserve the sanctity of judicial power. Judicial power is respected and adhered to in a system based on the rule of law precisely for its nuanced and restrained exercise. If these restraints are not maintained the court as an institution would invite a justifiable criticism of encroaching upon a terrain on which it singularly lacks expertise and which is entrusted for governance to the legislative and executive arms of Government.”

16) After considering the materials on record, the submissions advanced at the Bar and keeping in view the aforesaid authorities let me now scrutinise the case in hand.

- (i) No doubt Clause 9 of the NIT which speaks for the eligibility criteria is an essential condition of the contract. The executive authority formulated this condition to ensure that the work is entrusted to an experienced contractor and not to a novice in the relevant field. The executive engineer being a technically qualified person is certainly the best person to interpret the eligibility criteria as per the document and find out who amongst the applicants have the requisite eligibility qualification.
- (ii) The allegation of the petitioner is that the value of the work cited by respondent No.3 is not Rs.10,42,594/- but only Rs.3,19,017/- as the work value over and above

Rs.3,19,017/- pertains to allied work and should not be taken into consideration for fixing the eligibility criteria of respondent No.3. The fact remains that the respondent No.3 is eligible as per the benchmark set in the NIT if it had done work for Rs.10,42,594/-.

- (iii) The question which, therefore, falls for consideration whether Rs.3,19,017/- or Rs.10,42,594/- is the value of the work done by the respondent No.3. The objection raised by the petitioner and two others as against the respondent No.3 in this regard has been duly considered by the concerned executive engineer on the basis of the documents provided by the respondent No.3. On perusal of the Completion Certificate furnished by the respondent No.3 it is absolutely clear that there is no break up regarding any allied work as alleged by the petitioner. The Executive Engineer has also taken into account the amount of tax paid by the respondent No.3 against such work. On the basis of these documents the Executive Engineer has over ruled the objection raised by the petitioner and two other who are, however, not been made parties to this proceeding. There is as such no scope to review the finding of the Executive Engineer which is not only well documented but also will lead this Court to venture into an untravelled area without any expertise being against the

principles of judicial review as settled by various authorities discussed hereinabove.

- (iv) I find no arbitrariness or unreasonableness in the decision of the Executive Engineer. The petitioner has not been treated unfairly. There appears to be no malice or mala fide in the decision of the Executive Engineer. None of these things which calls for judicial review and interference by Court into executive action is also not demonstrated by the petitioner.
- (v) There is no relaxation to an essential condition of the contract. The respondent No.3 had given its credential while applying. Any document if at all submitted in support of such credential on the objection being raised by the petitioner and two others cannot be also said to be an opportunity provided to the respondent No.3 at a subsequent stage from submission of documents. Moreover, the process adopted by the executive authorities is transparent. The decision made is not 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” the same. The decision cannot also be said to be intended to favour the respondent No.3.
- (vi) It also appears to me that no public interest is affected by the decision of the respondent authorities. On the contrary any

interference would lead to increase in budgetary cost, delay the execution of the work i.e. Sinking of Deep Tube Well which is of utmost public interest.

17) In the facts and circumstances as aforesaid the writ petition is dismissed without, however, any order as to cost. All interim order including that dated 4th August, 2020 stands vacated. The respondent authorities shall be free to proceed with the tender process. The connected applications are also disposed of with the disposal of the main writ petitions. The connected applications are also disposed of with the disposal of the main writ petition.

Urgent photostat certified copy of this judgment and order, if applied for, be supplied to the parties on priority basis after compliance with all necessary formalities.

(ARINDAM MUKHERJEE, J.)