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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.04.2022

DELIVERED ON : 28.04.2022

CORAM :

THE HON'BLE MR.MUNISHWAR NATH BHANDARI, CHIEF JUSTICE

AND

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

W.A.Nos.194, 336 and 197 of 2022

W.A.No.194 of 2022:

M/s.Hindustan Fiber Glass Works,
(a partnership concern)
CIB-231/3 & 231/4,
GIDC Industrial Estate,
Por Raman Gamdi,
Vadodara, Gujarat-391 243.

.. Appellant/3rd Respondent

Vs

1.Kineco Limited,
rep. by its Authorised Signatory Ms.Manisha Naik,
The Company Secretary & Compliance Officer,
having its Registered Office at
41, Pilerne Industrial Estate,
Bardez, Goa-403 511.1st Respondent/Petitioner

2.The Union of India,
through the Railway Board,
Ministry of Railways
Raisina Road, New Delhi-110 001.

3.The Principal Chief Materials Manager,
Administrative Building,
Integral Coach Factory,
Chennai - 600 038.



4.M/s.CMT Mechanised Systems Pvt. Ltd.,
(a Company registered under the Companies Act, 1956)
having its registered office at
CIB-235/1, GIDC Industrial Estate,
Por Raman Gamdi,
Vadodara, Gujarat - 391 243.

5.M/s.Century Polymer Industries,
(a Partnership Firm)
having its Office at
CIB-35/2 & 235/3 GIDC Industrial Estate,
Por Raman Gamdi,
Vadodara, Gujarat - 391 243. .. Respondents/Respondents

W.A.No.336 of 2022:

M/s.Century Polymer Industries,
(a Partnership Firm)
having its Office at
CIB-35/2 & 235/3 GIDC Industrial Estate,
Por Raman Gamdi,
Vadodara, Gujarat - 391 243. .. Appellant/Respondent 5

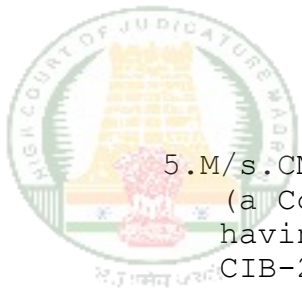
Vs

1.Kineco Limited,
rep. by its Authorised Signatory Ms.Manisha Naik,
The Company Secretary & Compliance Officer
having its Registered Office at
41, Pilerne Industrial Estate,
Bardez, Goa-403 511. .. 1st Respondent/Petitioner

2.The Union of India,
through the Railway Board,
Ministry of Railways,
Raisina Road, New Delhi-110 001.

3.The Principal Chief Materials Manager,
Administrative Building,
Integral Coach Factory,
Chennai - 600 038.

4.M/s.Hindustan Fiber Glass Works
(a partnership concern)
CIB-231/3 & 231/4
GIDC Industrial Estate, Por Raman Gamdi,
Vadodara, Gujarat-391 243.



5.M/s.CMT Mechanised Systems Pvt. Ltd.,
(a Company registered under the Companies Act, 1956)
having its registered office at
CIB-235/1, GIDC Industrial Estate,
Por Raman Gamdi,
Vadodara, Gujarat - 391 243. .. Respondents/Respondents

W.A.No.197 of 2022:

M/s.CMT Mechanised Systems Pvt. Ltd.,
(a Company registered under the Companies Act, 1956)
having its registered office at
CIB-235/1, GIDC Industrial Estate,
Por Raman Gamdi,
Vadodara, Gujarat - 391 243. .. Appellant/4th Respondent

Vs

- 1.Kineco Limited,
rep. by its Authorised Signatory Ms.Manisha Naik,
The Company Secretary & Compliance Officer
having its Registered Office at
41, Pilerne Industrial Estate,
Bardez, Goa-403 511.
- 2.The Union of India,
through the Railway Board,
Ministry of Railways
Raisina Road, New Delhi-110 001.
- 3.The Principal Chief Materials Manager,
Administrative Building,
Integral Coach Factory,
Chennai - 600 038.
- 4.M/s.Hindustan Fiber Glass Works
(a partnership concern)
CIB-231/3 & 231/4
GIDC Industrial Estate,
Por Raman Gamdi
Vadodara, Gujarat-391 243.
- 5.M/s.Century Polymer Industries,
(a Partnership Firm)
having its Office at
CIB-35/2 & 235/3 GIDC Industrial Estate,
Por Raman Gamdi,
Vadodara, Gujarat - 391 243. .. Respondents/Respondent



Prayer: Writ Appeals filed under Clause 15 of the Letters Patent against the order dated 01.02.2022 in W.P.No.25008 of 2021.

Prayer in W.P.No.25008 of 2021 : Writ Petition filed under Article 226 of the Constitution of India praying this Court to issue a Writ of Certiorarified Mandamus calling for the records relating to Notice Inviting Tender in Tender No. 07211657 issued on 21.09.2021 on the file of the Second Respondent and quash the same and consequently direct the second Respondent herein to call for retender.

W.A.No.194 of 2022:

For the Appellant : (i) Mr.Kapil Sibal
Senior Counsel

(ii) Mr.Ankur Chawla
Senior Counsel

(iii) Mr.P.S.Raman
Senior Counsel
for Mr.S.Dhakshinamoorthy

For the Respondents : Mr.Sriram Panchu
Senior Counsel
for Mr.A.Umapathy
for respondent No.1

Mr.R.Sankaranarayanan
Addl. Solicitor-General
assisted by
Mr.P.T.Ramkumar
Standing Counsel
for respondent Nos.2 and 3

Mr.R.Thirumoorthy
for respondent No.4

Mr.Arun C.Mohan
for respondent No.5

W.A.No.336 of 2022:

For the Appellant : Mr.V.Govardhanan

For the Respondents: Mr.Sriram Panchu
Senior Counsel
for Mr.A.Umapathy
for respondent No.1



Mr.R.Sankaranarayanan
Addl. Solicitor-General
assisted by
Mr.P.T.Ramkumar
Standing Counsel
for respondent Nos.2 and 3

- (i) Mr.Kapil Sibal
Senior Counsel
- (ii) Mr.Ankur Chawla
Senior Counsel
- (iii) Mr.P.S.Raman
Senior Counsel
for Mr.S.Dhakshinamoorthy
for respondent No.4

Mr.R.Thirumoorthy
for respondent No.5

W.A.No.197 of 2022:

For the Appellant : Mr.R.Thirumoorthy

For the Respondents : Mr.Sriram Panchu
Senior Counsel
for Mr.A.Umapathy
for respondent No.1

Mr.R.Sankaranarayanan
Addl. Solicitor-General
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Mr.P.T.Ramkumar
Standing Counsel
for respondent Nos.2 and 3

- (i) Mr.Kapil Sibal
Senior Counsel
- (ii) Mr.Ankur Chawla
Senior Counsel
- (iii) Mr.P.S.Raman
Senior Counsel
for Mr.S.Dhakshinamoorthy
for respondent No.4

Mr.Arun C.Mohan
for respondent No.5



COMMON JUDGMENT

THE CHIEF JUSTICE

By these writ appeals, the order dated 01.02.2022 in W.P.No.25088 of 2021 has been assailed.

2. For the sake of convenience, W.A.No.194 of 2022 is taken as a lead case and the parties are referred to as per their array in the said appeal.

3. The writ petition was filed to challenge the award of work to the appellant pursuant to the tender floated by the railways, alleging it to be in gross violation of tender conditions stipulated in the Notice Inviting Tender (NIT) dated 21.09.2021.

4. The facts in a nutshell are as under: Pursuant to the Notice Inviting Tender (for short 'NIT') dated 21.09.2021, the petitioner/non-appellant placed his bid for the supply of 354 sets of interior furnishing along with other parties. It is averred that one of the main conditions of tender as found in Clause 10.11 of the NIT is that cartel formation is prohibited and in case of suspected cartel formation, as per Clause 10.11.3, purchaser reserves the right to place order on any firm/firms for any quantity without assigning reasons. As per Clause 10.11.4, the firms, which quote in cartel, would be warned that their names would be deleted from the list of approved sources.

5. It is stated that on opening of the bid documents of the appellants and others, it was noticed that the bulk suppliers position was secured by the appellants in cartel. It is the averment of the petitioner/non-appellant that the appellants are closely related and that they have formed a cartel and colluded with each other to manipulate the bids. On knowing about the suspected cartelisation, the petitioner/non-appellant had addressed a communication to the third respondent providing all the requisite details to suspend the tender process.

6. It was further stated that without taking action on the said complaint dated 9.11.2021 made by the petitioner/non-appellant, reverse auction was conducted on 10.11.2021 in which the appellants have successfully lowered the level of competition as three out of the five participants were controlled through the cartel formation, as it pertained to management/promoters/shareholders out of relatives. As the third



respondent did not pay heed to the said complaint made by the petitioner/non-appellant and had also not conducted any enquiry into the suspected cartel formation by the appellants, the writ petitioner/non-appellant filed the writ petition.

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7. The learned Single Judge allowed the writ petition holding that the award of contract to the appellant, despite suspicion of cartel formation, is arbitrary and unreasonable. The learned Single Judge directed the third respondent to initiate fresh tender process and proceed in accordance with law.

8. Mr.Kapil Sibal, learned senior counsel for the appellant, submitted that Clause 10.11.1 mandates that if most of the approved firms quote equal rates and there exists a suspicion of cartelisation, the third respondent reserves the right to place orders to one or more firms with exclusion of the others without assigning any reason. The third respondent, in the case on hand, placed order representing 50% of the total quantity in view of Clause 10.11.2, as the allegation of cartel formation cannot be proved without an enquiry. It is stated that only pursuant to the enquiry, when it is found that there is a cartel formation, that the procedure under Clause 10.11.4 can be followed. However, without considering the true intent of Clauses 10.11, the learned Single Judge has quashed the tender and contract in favour of the appellant thereby jeopardizing the larger interest of the appellant.

9. Learned Senior Counsel further submitted that the appellant is a bulk supplier of the sets of interior furnishing sought by the respondent railways. An allegation of cartelization was made based on the rates quoted by the appellant and two others said to be in cartel and also in reference to the use of a common IP address, though the learned Single Judge himself made an observation that they do not have the technical expertise to decide the matter in reference to the IP address. Therefore, suspicion of cartelization was based on the rates quoted by the appellant along with two others said to be in cartel and it was alleging them to be relatives. He submitted that the appellant firm has two partners and they have no corporate relationship with the other two appellants. The terms and conditions of the bid document do not prohibit uploading of the tender from the same IP address. However, ignoring the said facts, a finding regarding cartelization was recorded despite the pendency of the matter before the Railway Board/CVC at that time and now with the CCI. A finding on the allegation of cartelization is yet to be rendered by the CCI,



but based on the suspected cartelization, the impugned order was passed.

10. It is also submitted that the Integral Coach Factory, Chennai, furnished a report dated 3.1.2022 to the effect that the appellant and respondents 4 and 5 alleged to be in cartel are three different independent entities having separate manufacturing units. The above report of the ICF completely dispels the notion that the appellant and respondents 4 and 5 form a single economic entity and this vital fact was ignored by the learned Single Judge.

11. The learned Single Judge has inferred the effect on reverse bidding due to cartelization. It was mainly on the ground that out of the successful bidders in the technical bid, 50% of them were to be called for reverse bidding as per the terms of NIT. Since there was an allegation of cartelization by the appellant along with respondents 4 and 5, it was inferred that they quoted lowest rate matching to each other and eliminated others from participating in the reverse bidding, because out of nine bidders, five bidders called for reverse bidding and out of it, three (the appellant and two others) were in cartel.

12. The effect of cartelization has also been taken into consideration, i.e., to get the contract on higher price with cartelization to affect the public exchequer. Taking into consideration the aforesaid, the Division Bench of this Court passed an order on 28.02.2022 with the consent of parties to allow all the qualified bidders to participate in the reverse bidding. It was as an exception and with the consent of the parties, that too, after giving an opportunity to the learned counsel representing the respective parties to take consent for it. Pursuant to the order dated 28.02.2022, nine bidders were called for reverse bidding, however, only two bidders participated in the reverse bidding. The petitioner/non-appellant did not participate in the reverse bidding. Therefore, the allegation of cartelization to eliminate the bidders to avoid competition get washed, rather the order in the writ petition should be quashed on the aforesaid ground itself. It is otherwise not affecting the public auction because rate quoted by the appellant was 0.18% less than the reserve prices.

13. In view of the aforesaid, a prayer is made to set aside the judgment of the learned Single Judge. Reference of certain judgments of the Apex Court has been given to support the arguments and would be referred while dealing with the arguments of both the parties.



14. Mr.Sriram Panchu, learned Senior Counsel for the petitioner/non-appellant has contested the appeals in support of the judgment of the learned Single Judge. It is stated that despite cartelization by the appellant along with two others, the second respondent in the writ petition had awarded 50% of the work to the appellant and had further decided to award the remaining 50% of the work also. It is despite a report of the Tender Committee, which has categorically suspected cartelization by the appellant and respondents 4 and 5, yet second respondent in the writ petition had accepted the bid. The allegation of cartelization was approved by the petitioner/non-appellant by producing all relevant materials. It was not only in reference to the rate quoted by the appellant and two others, but their relation with each other. It was also referring to one IP address used by three bidders i.e. the appellant and two others. It is therefore that the Tender Committee made a report suspecting cartelization, yet ignoring the aforesaid and Clause 10.11 of the NIT, work was awarded to the appellant.

15. Learned Senior Counsel has made a specific reference to Clause 10.11.1 to state that it was not applicable in the instant case for the reason that none of the bidders was in the approved list so as to invoke the said Clause of NIT. In fact, Clause 10.11.3 would have been applicable, but suspecting cartelization, the work could not have been awarded to a party of cartel, but could have been to other party in view of the discretion vested in the railways. A reference of Clause 10.11.4 has also been given to show the required action under the said Clause, but as the second respondent in the writ petition colluded with the appellant, no action was taken despite a doubt recorded by the Tender Committee.

16. In view of the above, the learned Single Judge has rightly recorded his finding not only in regard to cartel formation by the appellant along with two others, but doubting the bonafide of the second respondent to accept the bid given by the appellant herein. The learned Single Judge has considered the allegation regarding the IP address, which is unique to each router, and no two routers on the network can have the same IP address. The said finding was accepted by the tender accepting committee and was even accepted by the appellant by filing an affidavit of the internet service provider. Once aforesaid get proved, nothing more was required to be established. Rather, finding formation of cartel, the respondent railways ought to have proceeded to invoke Clause 10.11.4 of the NIT. The act of the Tender Accepting Authority has been discussed elaborately after the decision of the Tender Committee showing doubts about



the cartel formation by the appellant along with two others. There was no material with the Tender Accepting Authority to ignore the doubt shown by the Tender Committee and there was no urgency to place the order on the appellant when the matter was pending examination with the Railway Board on the allegation of cartel formation. He further argued that if the Railway Board comes to an opinion that there was cartel formation, then the award of work cannot be justified and, therefore, in those circumstances, the Tender Accepting Authority was required to wait for the outcome of the inquiry pending with the Railway Board/CVC during the pendency of the writ petition and finally to Competition Committee of India. Therefore, the judgment of the learned Single Judge has been supported by learned Senior Counsel appearing for the petitioner/non-appellant.

17. Learned Senior Counsel has even referred to the interim order passed by this Court on 28.02.2022. He submitted that it has no effect on the issue even if the petitioner/non-appellant did not participate in the reverse bidding. In fact, the appellant had given lower rate for supply of the articles to eliminate the competition, but in such cases, party fails to supply the quantity ordered by the other party. The aforesaid could not have been ignored because mere quoting of the rate on a lower side may not justify the formation of cartel. Rather, it may be to grab the business opportunity which prevents the opportunity of other firms from securing orders and developing their business. Such an effort of the appellant was required to be analyzed by the Tender Accepting Authority. But ignoring the aforesaid, the contract was awarded to the appellant. The effort of the railways should have been even to prevent monopolization of the procurement by the appellant or by others when the railway had cancelled the order earlier to M/s.CMT Mechanised Systems Private Limited and M/s.Century Polymer Industries, as they failed to make supply on the costs given by them.

18. It is also stated that the allegation of cartel formation was made by the petitioner/non-appellant immediately after opening the financial bid realizing that matching rates have been quoted by the appellant and other two parties having relation with each other. A complaint prior to it was made by All India Lok Adhikar Sangathan on 30.06.2021 itself. Therefore, the plea raised by the appellant regarding delay in raising the allegation of cartelization by the appellant along with others has rightly dealt with by the learned Single Judge.

19. Apropos the report dated 3.1.2022 of the Integral Coach Factory, Chennai, to the effect that the appellant and two



other alleged to be in cartel are three different independent entities having separate manufacturing units, it is submitted that the said report does not discuss about the nature of the complaint made by All India Lok Adhikar Sangathan.

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20. Learned Senior Counsel for the petitioner/non-appellant has also referred to certain judgments to support his arguments, which would be considered while considering the rival submissions of the parties.

21. In reference to the rival submissions made by learned counsel for the parties, the following questions are framed for our discussion:

(i) If there was suspected cartelization, what can be the line of action in terms of the NIT?

(ii) What can be the consequences of cartelization in the process of bidding?

(iii) What are the powers of this Court exercising jurisdiction under Article 226 of the Constitution of India in the matter of tender?

First Question:-

22. Challenge to the acceptance of final bid of the appellant was made by the petitioner/non-appellant alleging cartelization by it along with two others, for which a report was made by the Tender Committee. However, ignoring the said allegation, the Tender Accepting Authority awarded work to the appellant. Learned Senior Counsel for the petitioner/non-appellant made much reliance to Clause 10.11 of the NIT on the allegation of suspected cartelization. To deal with the issue, we quote Clause 10.11 of the NIT:

"10.11.1 - Wherever all or most of the approved firms quote equal rates and cartel formation is suspected, Railways reserves the right to place orders on one or more firms with exclusion of the rest without assigning any reasons thereof.

10.11.2 - Firms are expected to quote for quantity not less than 50% of tendered quantity. Offers for a quantity less than 50% of tendered quantity will be considered unresponsive and liable to be rejected.

10.11.3 - Wherever cartel formation is suspected, purchaser reserves the right to place orders on any firm/firms for any quantity without assigning any reason thereof.



10.11.4 - The firms who quote in cartel are warned that their names may be deleted from list of approved sources.

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10.11.5 - Whenever tender is floated with purchase restrictions from sources by nominated authorities and there exists a suspected cartel situation by approved sources or the rates available from approved source/sources are adjudged unreasonably high, despite fair efforts as permissible, the purchase reserves the right to place orders on firms outside the approved vendors list, even beyond prescribed limits, if any.

10.11.6 - In the event of the offers conforming to any aspect of the definition of cartel mentioned in The Competition Act, 2002 (12 of 2003) in addition to the existing remedies, the purchase also reserves the right to refer the matter to the Competition Commission of India (CCI), which is a statutory body constituted under The Competition Act, 2002 (12 of 2003) for providing necessary relief to the purchaser who represent Central Government organisation serving the public. In addition, the purchaser also draws attention of the tenderers to Chapter VI of The Competition Act, 2002 (12 of 2003) which deals with penalties. This will be in addition to other rights and remedies to the Railway Administration under the contract and law."

23. The Clause 10.11 aforesaid has been quoted to answer the first question qua the allegation of suspected cartelization. As per Clause 10.11.1, whenever all or most of the approved firms quote equal rates and cartel formation is suspected, the Railway reserves the right to place orders on one or more firms with exclusion of the rest without assigning any reasons thereof.

24. According to the petitioner/non-appellant, the Clause aforesaid is not applicable to the case on hand for the reason that there was no approved firm in this case and for which a reference has been given to the remarks of the Tender Committee stating that there is no approved list available for the tender items. In view of the above, we would consider the matter in reference to the other sub-clauses of Clause 10.11 of the NIT.

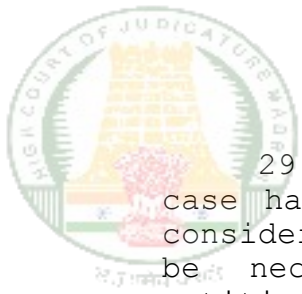


25. Clause 10.11.3 provides wherever cartel formation is suspected, purchaser reserves the right to place orders on any firm/firms for any quantity without assigning any reason thereof. The provision aforesaid gives discretion to the purchaser to place orders on any firm/firms for any quantity without assigning any reason. According to the petitioner/non-appellant, it could have been a firm out of cartel. The learned Single Judge has also given interpretation in this effect that while invoking Clause 10.11.3, the order can be placed on any firm other than firms suspected of cartelization.

26. We do not find interpretation aforesaid to be proper, because Clause 10.11.3 does not exclude any party which includes even cartel formation suspect. It rather give discretion to the Railway to place orders on any of the party without assigning reasons. In view of the above, we are unable to accept the finding recorded by the learned Single Judge giving interpretation to Clause 10.11.3 to exclude party to cartel for placing orders of any quantity to other party without assigning any reason.

27. Clause 10.11 of the NIT nowhere directs exclusion of the party, if it is suspected for the cartel formation. In fact, as per Clause 10.11.6, the purchaser has been given right to refer the matter to the Competition Commission of India [CCI], which is a statutory body constituted under the Competition Act, 2002 for providing necessary relief to the purchaser, who represents the Central Government organisation serving the public. The aforesaid is in addition to other rights to the Railway Administration to deal with the case in case cartel is suspected.

28. Here, it would be relevant to refer Clause 10.11.5, which provides that whenever tender is floated with purchase restrictions from sources by nominated authorities and there exists a suspected cartel situation by approved sources or the rates available from approved source/sources are adjudged unreasonably high, despite fair efforts as permissible, the purchaser reserves the right to place orders on firms outside the approved vendors list, even beyond prescribed limits. The provision aforesaid is to avoid acceptance of the bid on an unreasonably high rate and, in fact, the general consequence of cartel is to get the contract on unreasonably higher price. The Clause aforesaid may not be applicable in this case, but can be taken as a guiding factor in case cartel results in quoting higher rate, then the Railway can invoke its discretion to award work to any party outside the approved vendors list, at its discretion without assigning any reason as per Clause 10.11.3.



29. The issue as to whether the cartel formation in this case has resulted in quoting unreasonably higher rate would be considered while addressing the other issues. It would however be necessary to refer to the allegation made by the petitioner/non-appellant against the appellant in reference to lower price quoted by them to eliminate the competition. Thus, even according to the petitioner/non-appellant also, the cartel formation has not resulted in quoting higher price and, in any case, while addressing the first issue framed by us, a reference of Clause 10.11 has been given to show that the aforesaid Clause does not mandate exclusion of a party to the alleged cartel. Rather, for that, Clause 10.11.4 provides that the firms who quote in cartel to be warned and their names may be deleted from list of approved sources. It cannot be based on suspicion, but when the allegation of cartel formation is proved either by the Railways by conducting an inquiry through the CVC or by referring it to the CCI. According to the Railways, now the matter has been referred to the CCI after its initial examination/inquiry by CVC. Thus, what we find that the direction of the learned Single Judge to cancel the tender, so as the contract for 50% of the quantity given to the appellant is contrary to Clause 10.11 of the NIT and, accordingly, the first question is answered.

Second Question:-

30. The second question is quite relevant and material having consequences on the public auction. The consequences of cartel formation by the parties is generally viewed to eliminate competition and to get the contract on higher price affecting the public exchequer. In the instant case also, an allegation was made for elimination of bidder to avoid competition. It is after narrating the fact that after opening of the technical bid, only nine parties could qualify and, therefore, pursuant to the terms of the NIT, 50% of the parties would be called for reverse bidding. Since there was suspected cartelization by the appellant along with two others, having quoted approximately the same rate, they were called for the reverse bidding along with one more bidder, eliminating others from the competition. Realising the aforesaid, the Court asked the parties to take instruction for consent for invitation of all the parties for reverse bidding who were found technically qualified. It is during the pendency of the appeal and on the agreement of the parties, the following order was passed on 28.02.2022:

"By these writ appeals, challenge is made to the judgment dated 01.02.2022 by which the writ petition preferred by the petitioner/non-appellant was allowed.

2. The matter pertains to a tender floated by the Railways. The allegation of cartelisation was made



against the appellants and the learned Single Judge has recorded the finding on the aforesaid allegation. The finding of the learned Single Judge has been challenged by the appellants.

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3. Mr.Kapil Sibal, learned Senior Counsel, submitted the allegation to be without basis. Before taking and entering into the issues raised by either parties, we would, with the agreement of the parties, direct the Railways to hold reverse bidding afresh by calling all the 9 bidders, who are stated to be bulk suppliers.

4. In terms of the tender, only 50% of it could be called. But as an exception and to come out with an appropriate solution, keeping the rights of all the parties reserved for arguments on all the issues, if remain, we are directing the Railways to call all the 9 bulk suppliers for reverse bidding and after analysing the price quoted by them, the result may be brought before the Court.

5. After completion of the process given above and production of the result of the bidding, as directed, we will allow all the parties to argue the case, if required. The process evolved by this Court for reverse bidding is with agreement and as an exception in this case alone and for the purpose.

6. The order has been passed with the agreement of parties otherwise in public interest. None of the parties would be affected by participating in the reverse bidding in any manner and otherwise their right to contest the matter on all the issues has been kept alive and accordingly, let the interim order passed by the Court be carried out by the Railways at the earliest. Looking to the urgent requirement of procurement by the Railways, let it be completed within a period of two weeks. Let the matter be listed on 16.03.2022."

31. The order aforesaid was passed with consent of the parties and, accordingly, the Railways proceeded pursuant to the aforesaid interim order and called all nine parties, who could qualify in the technical bidding. The appellant, apart from one more, participated in the reverse bidding. It is despite invitation to all the nine bidders, which includes the petitioner/non-appellant. A report to this effect by the Railways was taken on record. The report aforesaid is having



consequence on the matter. It is for the reason that the main allegation regarding elimination of the petitioner/non-appellant and other parties gets washed once they were permitted to participate in the reverse bidding. The petitioner/non-appellant having been given an opportunity to participate in the reverse bidding abstained for the reason best known to them. In view of the above, the allegation of elimination of competition gets vitiated in the facts of this case and it otherwise remains for the sake of it.

32. The interim order passed by this Court with the consent of parties was to find out the real effect of the suspected cartel. Whether it has effected on the rates with elimination of the competition. The allegation by the petitioner/non-appellant is now for quoting a lower rate by the appellant to eliminate the competition. Thus, the allegation of cartel formation has not effected the public exchequer.

33. It is invariably alleged that cartel formation by the bidders is to get the contract on higher rate. In the instant case, the cartel formation suspected is not against all the parties, but the appellant along with two others. The rates quoted by them were 0.18% below the rates given by the Railways and otherwise lowest among all the bidders. Thus, the second effect of the cartel formation to get the order or contract on the higher rate could not be proved and otherwise, when the competition was made open by inviting all parties for the reverse bidding, it was open for the petitioner/non-appellant and others to quote lower rate than what was offered by the appellant herein.

34. In the light of the facts aforesaid, we find that the basic effect of cartelization has no impact on the facts of this case. An elaborate discussion in that regard would have been made if there had been no interim order with the consent of the parties to allow participation of nine bidders. With the aforesaid discussion, question No.2 is answered accordingly.

Question No.3:-

35. The question No.3 is regarding the scope and the power of the Court while exercising jurisdiction under Article 226 of the Constitution of India. The issue aforesaid was discussed by the Apex Court in the case of Tata Cellular v. Union of India, reported in (1994) 6 SCC 651 and has otherwise been considered by the learned Single Judge in his judgment. Paragraph 94 of the said judgment is relevant and is quoted hereunder for ready reference:

- "94. The principles deducible from the above are:
(1) The modern trend points to judicial restraint in administrative action.



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cases, the provision of elimination does not exist under Clause 10.11 of the NIT. The rates quoted by different parties is tabulated as under:

Organisation	AIP	Bid Status
Hindustan Fibre Glass	4,100,000	Bulk Supplier L1
Acme India	4,105,600	Bulk Supplier L2
CMT Mechanised System Pvt. Ltd.	4,111,322	Bulk Supplier L3
Century Polymer Industries	4,118,449	Bulk Supplier L4
AB Composites	4,681,060	Bulk Supplier L5
Kineco	4,697,362	Bulk Supplier L6
Airflow Equipments	4,698,999	Bulk Supplier L7
Universal Engineers	4,959,999	Bulk Supplier L8
Chennai Radha Engineering	8,130,018	Bulk Supplier L9

37. If the rates given in columns 5, 6 and 7 are taken into consideration, one can easily make an allegation of cartel against those parties also, because the rates quoted by them are also approximately in the same rage, but allegation of cartelisation has not been made against them despite the fact that the petitioner/non-appellant himself exists in column No.6. In any case, the interference with the tender matters or in the matter of contract is quite limited, as held by the Apex Court in *Uflex Ltd. v. Government of Tamil Nadu*, 2021 SCC Online SC 738:

"The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness,



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bias and mala fide. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance."

(emphasis supplied)

38. In the decision aforesaid, the Apex Court emphasised that the tender process ought not to be lightly interfered with. The relevant portion of the said judgment is quoted hereunder:

"In commercial tender matters there is obviously an aspect of commercial competitiveness. For every succeeding party who gets a tender there may be a couple or more parties who are not awarded the tender as there can be only one L-1. The question is should the judicial process be resorted to for downplaying the freedom which a tendering party has, merely because it is a State or a public authority, making the said process even more cumbersome. We have already noted that element of transparency is always required in such tenders because of the nature of economic activity carried on by the State, but the contours under which they are to be examined are restricted as set out in Tata Cellular and other cases. The objective is not to make the Court an appellate authority for scrutinizing as to whom the tender should be awarded. Economics must be permitted to play its role for which the tendering authority knows best as to what is suited in terms of technology and price for them.

Insofar as the participating entities are concerned, it cannot be contended that all and sundry should be permitted to participate in matters of this nature. In fact, in every tender there are certain qualifying parameters whether it be technology or turnover. The Court cannot sit over in judgment on what should be the turnover required for an entity to participate."

[emphasis supplied]

39. The Railways was having discretion to award the contract after governing itself by the terms of NIT. Clause 10.11.3 gives discretion to awarding contract when there is an suspicion of cartelisation and it can be to any party without

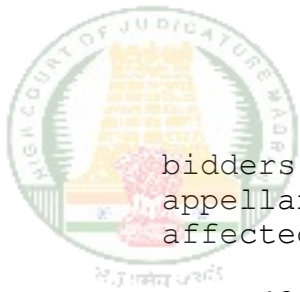


even specifying the reasons. The clause aforesaid, however, does not provide for elimination of the party against whom allegation of cartelisation has been made. Rather, when allegation is proved, it can result in the consequence as given in paragraph 10.11.4. But the argument raised by the petitioner/non-appellant is to eliminate the parties to the cartel based on suspicion itself, which is not one of the terms of the tender by which the Railways is to be governed.

40. Moreover, in view of the judgment of the Apex Court in the case of *Uflex Ltd. v. Government of Tamil Nadu*, supra, interference in commercial matters, especially in regard to the decision to analyse the tender and award the contract, should be minimal and it can be only when it is found to be in violation of any statutory provision or suffers from serious allegation of favouritism or discrimination. The allegations should not be merely for the sake of it, but must be proved by adducing material. The case of the said nature is not made out here. Though some allegation has been made against the Tender Accepting Authority, we do not find it to have been substantiated by any material and, therefore, there was no reason for the learned Single Judge to cancel the tender, so as the contract, when it is not so provided in the conditions of NIT. The matter is pending consideration before the CCI and based on the presumption of cartelisation, the direction could not have been given to cancel the tender or the contract.

41. An argument has been raised that if interference with the contract is not made and later on the allegation of cartelisation stands proved, then the award of the contract would be vitiated. We are unable to accept the argument aforesaid, because there is an other side to it, which cannot be ignored. For instance, after examination of the allegations, if it is not found proved and yet the parties are eliminated from getting the contract, then there would be consequences. Therefore, based on presumption itself that cartelisation would be proved, a decision cannot be taken in advance to eliminate the contracting party and, that too, when it is not so provided in the NIT.

42. That apart, we do not find that the cartel formation, as alleged by the petitioner/non-appellant, has affected the public exchequer. Though an allegation has been made that lower rates have been given to eliminate the competition, we are unable to accept the aforesaid, because largely the purpose to form cartel is to get maximum higher rate for performance of work and invariably it happens when all the parties participating in the bid join together to form a cartel and not few of them. In the above matter, the said issue has been taken care of by allowing the participation of all the successful



bidders in the technical bid, which includes the petitioner/non-appellant. Therefore, in the present matter, the cartel has not affected the public exchequer.

43. For the foregoing reasons, the writ appeal is allowed and the judgment passed by the learned Single Judge is set aside. It is, however, with a clarity that if the allegation of cartelisation gets proved in the proceedings before the CCI, the Railways would proceed to take action as given under Clause 10.11.4 and the terms of the NIT and for that purpose, the present judgment would not be taken as a hindrance.

There will be no order as to costs. Consequently, C.M.P.Nos.1439, 2659 and 1491 of 2022 are closed.

Sasi/bbr

28.04.2022

(Order of the Court was made by the Hon'ble Chief Justice)

After pronouncement of the judgment, an oral request was made by learned senior counsel appearing for the petitioner/non-appellant to keep the judgment in abeyance for a period of two weeks, as the petitioner/non-appellant intends to file SLP before the Apex court.

2. The oral request has been seriously opposed by learned Additional Solicitor-General appearing for the Railways. It is submitted that the procurement of interior furnishing has already been delayed due to the litigation, though it was urgently required. He submitted that purchase order was given to the appellant even prior to the disposal of the writ petition and therefore, the judgment may not be kept in abeyance and otherwise the delay will affect the Railway Administration even for carrying out the work. In fact, there is a delay in it and a further delay will affect the rights, more so, when it has already been concluded by this Court.

3. Learned senior counsel appearing for the petitioner/non-appellant submitted that the purchase order already issued is only for 50% of the material sought to be procured by the Railways and for the rest 50%, a decision is yet to be taken. Therefore, at least to that extent, the oral prayer for keeping the judgment in abeyance may be passed.

4. We have considered the submissions made by learned counsel for parties and find that so far as the purchase order for procurement of 50% of the tender items is concerned, it was placed even before the disposal of the writ petition and, as



stated by learned Additional Solicitor-General for the Railways, any delay may further affect the Railway Administration. Thus, to that extent, we are not inclined to keep the judgment in abeyance.

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5. So far as the remaining 50% of the tender material is concerned, the matter is yet to be processed. Thus, we are inclined to pass an order to keep the judgment in abeyance for the procurement of the remaining 50% for a period of two weeks from today so that the petitioner/non-appellant may pursue its remedies before the Apex Court.

6. The oral request of the petitioner/non-appellant is decided with the aforesaid.

Sd/-
Assistant Registrar (CS-III)

//True copy//

Sub Assistant Registrar

bbr

To

1.The Railway Board,
Union of India,
Ministry of Railways,
Raisina Road, New Delhi-110 001.

2.The Principal Chief Materials Manager,
Administrative Building,
Integral Coach Factory,
Chennai - 600 038.

+1cc to Mr.Arun C.Mohan, Advocate SR.No.29899

+1cc to Mr.S.Dhakshinamoorthy, Advocate SR.No.29426

+1cc to Mr.Ishaan George, Advocate SR.No.29338

W.A.Nos.194, 336 and 197 of 2022

BR(CO)
GMY(06/05/2022)