



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
06.01.2022	01.02.2022

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

W.P. NO. 25008 OF 2021

AND

W.M.P. NOS.26333, 26335, 30087 & 30088 OF 2021

Kineco Ltd.
rep. by Authorised Signatory
Ms. Manisha Naik
The Company Secretary &
Compliance Officer
41, Pilerne Industrial Estate
Bardez, Goa 403 511.

..Petitioner

- Vs -

1. The Union of India
Thru' the Railway Board
Ministry of Railways
Raisina Road, New Delhi 110 001.
2. The Principal Chief Materials Manager
Administrative Building
Integral Coach Factory
Chennai 600 038.
3. Ms. Hindustan Fiber Glass Works(A Partnership concern)
CIB-231/3 & 231/4
GIDC Industrial Estate
Pora Ramangamdi
Vadodara, Gujarat 391 243.
4. Ms.CMT Mechanised System Pvt. Ltd.
(A company registered under the Companies Act 1956)
CIB-235/1, GIDC Industrial Estate
Pora Ramangamdi
Vadodara, Gujarat 391 243.
5. Ms. Century Polymer Industries(A partnership firm)
CIB-235/2 & 235/3, GIDC Industrial Estate
Pora Ramangamdi
Vadodara, Gujarat 391 243.

..Respondents



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 2nd respondent and quash the same and consequently direct the second respondent herein to call for re-tender.

For Petitioner : Mr.P.H.Arvind Pandian, SC, for
M/s. A.Umapathy

For Respondents: Mr. V.Radhakrishnan, SC, assisted by
Mr. P.T.Ramkumar, SC Counsel for RR-1 & 2
for Railways
Mr. P.S.Raman, SC, for
M/s. S.Dakshinamoorthy for R-3
Mr. R.Thirumurthy for R-4
Mr. Vijay Narayan, SC, for
Mr. Arun C.Mohan for R-5

ORDER

The enlarged role of the Government in economic activity and its corresponding ability to give economic 'largesse' was the bedrock of creating what is commonly called the 'tender jurisdiction' with the objective of having greater transparency in the process was the observation of the Hon'ble Supreme Court in the decision in Uflex Ltd. - Vs - Government of T.N. & Ors. (2021 SCC OnLine SC 738).

2. The present petition has been filed assailing the award of tender and placement of order on the 3rd respondent, as arbitrary, unjust, unreasonable, illegal and in stark violation of the tender conditions stipulated in the Notice Inviting Tender dated 21.09.2021, which is against the transparency, which is the bedrock of any tender process floated by the Government.

3. It is the case of the petitioner that pursuant to the Notice Inviting Tender (for short 'NIT') dated 21.09.2021, the petitioner had placed his bid for the supply of 354 sets of interior furnishing along with other persons. It is the case of the petitioner that bid documents were also submitted by respondents 3 to 5. It is the further averment of the petitioner 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 had reserved the right to place order on any firm/firms for any quantity without assigning reasons and as per clause 10.11.4, the firms, who quote in cartel, warning was



issued that their names would be deleted from the list of approved sources.

4. It is the further averment of the petitioner that on opening of the bid document of the petitioner along with respondents 3 to 5, it was noticed that the bulk suppliers position was secured by respondents 3 to 5. It is the averment of the petitioner that respondents 3 to 5 are closely related and that they have formed a cartel and colluded with each other to manipulate the bids. Coming to know of the said fact of suspected cartel formation, the petitioner had addressed a communication to the 2nd respondent providing all the details and to take action to suspend the tender process. It is the further averment of the petitioner that without taking action on the said complaint dated 9.11.2021, reverse auction was conducted on 10.11.2021 in which respondents 3 to 5 have successfully lowered the level of competition as three out of the five participants were controlled through the cartel formation as it pertained to similar management/promoters/shareholders. Due to the inaction on the part of the 2nd respondent, which is in direct contravention of clause 10.11 of the Bid Document, and no enquiry having been conducted into the suspected cartel formation of respondents 3 to 5, left with no alternative the petitioner has come before this Court by filing the present petition.

5. Learned senior counsel appearing for the petitioner submitted that Clause 10.11 prohibits cartelisation and 10.11.3 and 10.11.4 deals about the action that would be taken by the 2nd respondent with regard to suspected cartelisation. It is the submission of the learned senior counsel for the petitioner that even according to respondents 1 and 2, cartelisation was suspected between respondents 3 to 5 by the Tender Committee, which has resulted in an action being initiated leading to enquiry to be conducted by the Vigilance Department of the Railways.

6. It is the further submission of the learned senior counsel for the petitioner that it is not only at the behest of the petitioner that vigilance enquiry has been undertaken by the Railways. Even prior to the complaint of the petitioner, at the instance of one All India Lokadhikar Sanghatan and few other vendors, similar complaint was raised against respondents 3 to 5, in which action has been initiated and an enquiry has been directed to be undertaken by the vigilance cell of the Railways and pursuant to the said direction, the vigilance cell of the Railways has also taken up the matter and are investigating the purported cartel formation between respondents 3 to 5.



7. It is the further submission of the learned senior counsel for the petitioner that the Tender Scrutiny Committee had suspected cartelisation between respondents 3 to 5 and had, in fact submitted its report to the 2nd respondent. It is the submission of the petitioner that the Tender Accepting Authority/2nd respondent may accept or modify or reject the recommendations of the Tender Scrutiny Committee, but while discharging his public duty the said authority must assign valid and justifiable reasons for modifying or rejecting the recommendations of the Tender Committee. The said Authority cannot brush away the recommendations without any valid reasons, or according to its whims and fancies.

8. It is the further submission of the learned senior counsel for the petitioner that respondents 3 to 5 are located in close proximity to one another and are promoted by an extended family. It is the further submission of the learned senior counsel for the petitioner that the tender documents were uploaded from the same IP address, which resulted in the complaint by the petitioner and appreciating the stand of the petitioner, the Tender Committee had suspected cartelisation between respondents 3 to 5, which has been, prima facie, held to be justiciable even by the vigilance cell on preliminary investigation. Though in normal circumstances, the Tender Committee would not have gone into the IP address of the respondents, but it is only based on the complaint of the petitioner and also the earlier complaint by other entities relating to cartelisation between respondents 3 to 5. It is the submission of the learned senior counsel for the petitioner that all the three firms uploaded the tender documents through the same IP address, which clearly establishes cartel formation by respondents 3 to 5.

9. It is the further submission of the learned senior counsel for the petitioner that even on the earlier complaint, show cause notice has been issued against respondents 3 to 5 and the matter is seized of by the Railway Board and pending consideration. When similar issue is pending consideration by the Railway Board, it is the submission of the learned senior counsel for the petitioner that giving the tender to the 3rd respondent is not only unjust and arbitrary exercise of power vested with the 2nd respondent, but is in total contravention of Clause 10.11 of the tender conditions. The act of the 2nd respondent in not only giving the tender to the 3rd respondent citing urgency, but also with a clause therein that the quantity may also be increased clearly reveals that all is not well with the act of the 2nd respondent, more especially when allegations have been levelled against respondents 3 to 5 presently and even on the earlier occasion and the matter is seized of by the Railway Board. Pending finalisation of the case by the Railway



Board, granting the tender to the 3rd respondent is not only against the tender conditions, more especially, clause 10.11, but also against the authority of the Railway Board, which is yet to decide on the report filed against respondents 3 to 5.

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10. It is the further submission of the learned senior counsel for the petitioner that it is borne out by record that the IP address from which the tender document of respondents 3 to 5 have been uploaded is one and the same and that the amounts quoted are in close proximity to each other, but quite far away from the rest of the bidders. It is also the admitted case of respondents 3 to 5 that the said respondents are extended family carrying on business activities individually. In such a backdrop, when respondents 3 to 5 belong to an extended family and the tender documents having been uploaded from a single IP address and the amounts quoted by respondents 3 to 5 being separated by a marginal amounts, though not identical amounts, clearly reveal that the cartelisation suspected by the Tender Committee is not without any basis and is, in fact, based on sound logic and understanding of the technical aspects of the matter.

11. It is the further submission of the learned senior counsel for the petitioner that IP address is unique to every router on the network, which stands connected with the computer and the three firms, even according to respondents 3 to 5 are said to be different entities, how the submitted tender documents emanated from the same IP address needs to be explained properly by respondents 3 to 5 before bids by any of the firm could be accepted by the 2nd respondent. However, without calling for any explanation from respondents 3 to 5, citing urgency, the 2nd respondent has flouted the conditions imposed in the tender document, more especially clause 10.11.

12. It is the further submission of the learned counsel for the petitioner that in case of suspected cartel formation, as per clause 10.11.3, purchaser had reserved the right to place order on any firm/firms for any quantity without assigning reasons and as per clause 10.11.4, the firms, who quote in cartel, warning was issued that their names would be deleted from the list of approved sources. It is the submission of the learned senior counsel for the petitioner that the right to place order on any firm/firms for any quantity, vested with the purchaser as per clause 10.11.3 would be in exclusion to the suspected members of the cartel. It is the further submission of the learned senior counsel for the petitioner that clause 10.11.4 clothing power on the authority to delete the names of the bidders from the list of approved sources, in case of quoting in a cartel, the earlier complaint against respondents 3 to 5 by some other persons alleging cartel formation, leading to



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vigilance enquiry and decision pending before the Railway Board, grant of tender in favour of the 3rd respondent would not be legally sound and proper as any affirmative action by the Railway Board against the 3rd respondent, holding positively against suspected cartel formation, would impact the award of tender by the 2nd respondent to the 3rd respondent and would strike at the power of the Railway Board, vis-a-vis the 2nd respondent.

13. It is the further submission of the learned senior counsel for the petitioner that the financial bids submitted by respondents 3 to 5 would disclose that the respondents had uploaded their bids not only from the same IP address, but the said bids have been submitted in an interval of fifteen minutes. It is the further submission of the learned senior counsel for the petitioner that an analysis of the bids in the first round of auction would also reveal that respondents 3 to 5 have quoted more or less same rate with a maximum difference of Rs.7,635/-. It is the further submission of the learned senior counsel that post e-reverse auction, the price differences between the rates quoted by the said respondents 3 to 5 has become further more slender and negligible.

14. It is therefore the submission of the learned senior counsel for the petitioner that all these aspects have been taken into consideration by the Tender Committee while making a recommendation as to suspected cartel formation between respondents 3 to 5. The commonality in IP address coupled with the timing of submitting the online tender and the amount quoted by respondents 3 to 5 would lead to the inevitable conclusion that the respondents 3 to 5 had indulged in collusive bidding by cartel formation. The conclusion, according to the learned counsel for the petitioner, as to cartelization and collusive bidding is reasonable, plausible, logical and a valid one in the light of the available materials and attendant circumstances. It is the further submission of the learned senior counsel for the petitioner that it is only the 3rd respondent who had sought negation of this finding despite the fact that the 3rd respondent has effectively been allowed the entire contract by the 2nd Respondent despite a concrete finding having been recorded against respondents 3 to 5.

15. Learned senior counsel appearing for the petitioner vociferously submitted that the affidavit of an alleged xerox shop owner deposing about the similarity in the IP address provided to respondents 3 to 5 cannot be taken note of by this Court, more so when the Tender Committee had categorically doubted the genuineness of respondents 3 to 5 and had suspected cartelisation and in the absence of respondents 3 to 5 mounting any challenge to the said finding recorded by the Tender



Committee, it is submitted that this Court will not be justified in sitting in appeal over a finding recorded by the Tender Committee, when the scope of this Court with regard to such matters is very limited.

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16. It is the further submission of the learned senior counsel for the petitioner that the said affidavit cannot be taken even at face value by this Court to arrive at any prima facie conclusion as the said affidavit is bereft of any details, such as the service was provided to Respondent entities, copy of bills raised to them, payment receipts made by them, installation and authorisation details of the 11 concerned internet service provider, details of facility available at the shop, evidence for running of the shop, CCTV footages, if any, etc. Such being the case, it is the submission of the learned senior counsel that the said affidavit filed by the 3rd respondent to the exclusion of respondents 4 and 5 cannot form the basis to arrive at any decision to doubt the findings recorded by the Tender Committee, when respondents 4 and 5 have not whispered anything about the said xerox shop having been utilised for the purpose of submitting the tender document.

17. It is the further submission of the learned senior counsel for the petitioner that the 2nd respondent allotting the entire work to the 3rd Respondent, who is labelled as a collusive bidder by the Tender Committee, is not justified legally and morally and the award of the entire contract to the 3rd Respondent after castigating and branding respondents 3 to 5 of cartel formation. Though the stand of the 2nd respondent that the above decision to award the contract to the 3rd respondent was on the basis of the discretion vested in it under Clause 10.11.1.

18. It is the submission of the learned senior counsel for the petitioner that clause 10.11.1 has been given a wrong interpretation by the 2nd respondent to award the contract in favour of the 3rd respondent unmindful of clauses 10.11.3 and 10.11.4, wherein it has been provided that wherever cartel formation is suspected, the purchaser is vested with the right to place order on any firm/firms for any quantity and that the firms, which quote in cartel, their names would be deleted from the list of approved vendors. It is the submission of the learned senior counsel that once cartel formation has been suspected by the Tender Committee and similar complaint against respondents 3 to 5 already having been made and is pending decision before the Railway Board after enquiry by the vigilance cell of the Railways, the act of the 2nd respondent is wholly arbitrary, capricious, unreasonable and unjustifiable.



19. It is the submission of the learned senior counsel that clause 10.11.1 has been exercised arbitrarily and discriminatorily in the present tender by the 2nd respondent. It is the submission of the petitioner that the said clause cannot be interpreted to perpetuate or aid cartel formation and that it must be interpreted in such a manner so as to achieve the object of the tender, viz., transparency, fairness and competitive prices. The Tender Committee having suspected cartel formation by respondents 3 to 5 the 2nd Respondent ought not to have awarded the contract to the 3rd respondent. Such a decision is per se illegal and tainted with mala fides.

20. It is the further submission of the learned senior counsel that to construe clauses 10.11.1 or 10.11.3 as granting unfettered discretion on the purchaser to place orders on the bidders involved in cartel formation, especially when other clauses mandate the purchaser not to place orders on such bidders, and in the event of any suspicion as to cartel formation, clause 10.5 providing power to consider the untried/new firms or the past firms, who have supplied, the 2nd respondent ought to have followed clause 10.5. The act of the 2nd respondent clearly shows that arbitrariness is writ large in the recommendations, as the 2nd respondent, while confirming the findings of the Tender Committee with reference to cartel formation, had directed to place an order for 130 sets on the 3rd respondent with special option clause to increase the quantity to 324 sets within the currency of the contract in addition to the normal 30% option clause. The above act of the 2nd respondent in the award of tender to the 3rd respondent smacks of mala fides, which warrants this Court to invoke its supervisory jurisdiction to exercise its inherent power under Article 226 of the Constitution to interfere with the award of tender, though not the Courts normally interfere in matters relating to award of contract, so long as arbitrariness, perversity, unreasonableness and illegality are not writ large on the entire tender process. The present tender process not only is arbitrary, illegal, perverse and unreasonable, but is in blatant violation of the conditions of the tender document and without any valid reason, discretion having been exercised, the said discretion is discriminatory and warrants interference by this Court.

21. It is the further submission of the learned senior counsel for the petitioner that urgency in the requirement of tendered quantity, pleaded by the 2nd respondent, cannot be a ground for promoting cartelization at the behest of a public authority expending money from the public exchequer and, therefore, the placement of orders on the 3rd respondent by the 2nd respondent is per se illegal and invalid. It is further pointed out that direction was also issued by the 2nd respondent



that the tender for remaining quantity not covered in this tender to be floated on top-most priority and should be opened within December 2021 itself. Strangely, the entire tendered quantity of 324 was ordered from the 3rd Respondent under the guise of special option clause. That being the case, what remains to be tendered is not explained and though the above note was dated 24.11.2021, however, within 5 days thereafter, the balance quantity of 184 sets was re-tendered. No reason whatsoever, except for urgency and invocation of the special option clause, has been pleaded by the 2nd respondent, which strikes at the root of the award of tender.

22. It is the further submission of the learned senior counsel that initially the 4th respondent filed memo before this Court to the effect of adopting the counter of the 3rd respondent, which was followed suit by the 5th respondent. The above act of respondents 3 to 5 would go to reveal that the cartel formation suspected by the Tender Committee cannot be brushed aside for it all the three respondents were separate entities, the counter filed by one would not be available to the other before the same is filed before the Court. The above act of respondents 3 to 5 only reveals that the concept of extended family put forth by respondents 3 to 5 had stood extended in the filing of the counter by the 3rd respondent, which has then been adopted by respondents 4 and 5.

23. It is the further submission of the learned senior counsel that inspite of the memo being filed adopting the counter, without the leave of this Court, respondents 4 and 5 have filed separate counters. This would only show that realising the fallacy in their argument with regard to cartel formation, belatedly, the respondents 4 and 5 have thought it fit to file separate counter, which only vindicates the stand of the Tender Committee as to the suspicion of cartel formation among respondents 3 to 5.

24. It is the further submission of the learned senior counsel that though adverse findings have been recorded against them by the Tender Committee, yet respondents 3 to 5 have not challenged the adverse findings recorded against them and without any pleadings or evidence, counter has been filed by respondents 3 to 5 questioning the said findings. The stoic silence of respondents 3 to 5 even in their counter and absence of any appeal questioning the findings of the Tender Committee have allowed the findings of the Tender Committee to attain finality.

25. Learned senior counsel in support of his submissions placed reliance upon the following decisions :-



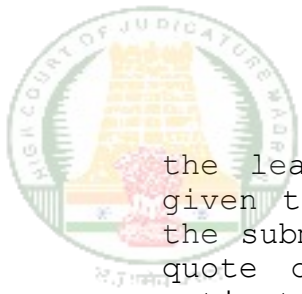
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- i) E.Narasimha - Vs - Commissioner of Prohibition & Excise (2000 SCC OnLine AP 469);
- ii) Techno Precision Engineers Pvt. Ltd.- Vs - Western Coalfields Ltd. (2014 SCC OnLine Bom 4674);
- iii) M.Rajendran - Vs - Secretary to Government (2016 (3) LW 898); and
- iv) People's all India Anti-Corruption and Crime Prevention Society - Vs - Usha International Ltd. (Order dated 17.3.2021 in case No.90/2016 passed by Competition Commission)

26. Per contra, learned senior counsel appearing for respondents 1 and 2, on the basis of the counter filed by the said respondents submitted that the 2nd respondent, who is the decision making authority, had constituted a Tender Committee consisting of the Chief Materials Manager/Fur, FA & CAO and CWE/Fur as the members of the committee. The said Committee had recommended the names of 11 firms, viz., 8 for the purpose of bulk order and 3 for developmental order for opening their financial bid. Among the 8 firms who were found eligible for bulk order, 50% of the bidders were to be selected for reverse auction and the petitioner, being L6 in the said list of 8 bidders, was not considered for participating in the reverse auction and respondents 3 to 5 stood qualified.

27. It is the further stand of respondents 1 and 2, as is seen from the counter and based on which submission is made that the 2nd respondent, who is the decision making authority, in the light of the finding of the Tender Committee and on appreciation of the entire facts, came to the conclusion that there has been suspected cartel formation between respondents 3 to 5. Further, a representation was also given by the petitioner alleging that respondents 3 to 5 are controlled and managed by the same set of promoters, and that there is cartel formation, which made them qualify for the reverse auction. It is the further submission of the learned senior counsel for respondents 1 and 2 that since the price quoted by the 3rd respondent was 0.18% lesser than the estimated rate, the 2nd respondent, in spite of the suspicion entertained by the Tender Committee as to cartel formation on the part of respondents 3 to 5, had approved the bid of the 3rd respondent in exclusion of respondents 4 and 5 and further directed splitting up of the bulk order.

28. It is further fairly conceded by the learned senior counsel for respondents 1 and 2 that a similar complaint as that of the petitioner was earlier given by all India Lokadikar Sanghathan against respondents 3 to 5 alleging cartel formation, which is still under active enquiry and final decision is yet to be taken by the Railway Board. It is also fairly submitted by



the learned senior counsel that show cause notices have been given to respondents 3 to 5 and also three other firms. It is the submission of the learned senior counsel that in view of the quote of the third respondent being less by 0.18% than the estimated rate and that the subject tender itself being a retender and that the said materials are very urgently required, while direction was issued to the convenor of the Tender Committee to forward the complaint of the petitioner to the vigilance cell of ICF for further investigation, considering the urgency of the situation, the 2nd respondent decided to place order for 130 sets on the 3rd respondent.

29. It is the submission of the learned senior counsel for respondents 1 and 2 that the petitioner is not entitled to challenge the impugned tender notice as he was not qualified for the e-reverse auction and, therefore, the present petition is liable to be dismissed. It is the further submission of the learned senior counsel that the 2nd respondent, being the decision making authority, is clothed with power to award the contract by modifying the conditions provided in the tender document and, therefore, the petitioner cannot claim that the award of contract is against the conditions in the tender document.

30. It is the further submission of the learned senior counsel that though the complaint is under investigation relating to the suspected cartel formation between respondents 3 to 5 and show cause notices have been given and final orders are yet to be passed by the Railway Board, however, the 2nd respondent, following the provisions contained in para 10.11.1, exercising his discretion, decided to place 50% of the bulk order on the 3rd respondent to the exclusion of respondents 4 and 5.

31. It is the further submission of the learned senior counsel that valid reasons have been given by the 2nd respondent to place orders on the 3rd respondent, inspite of the fact that alleged cartel formation between respondents 3 to 5 has been suspected. It is the submission of the learned senior counsel that the reasons assigned by the 2nd respondent that the rates quoted by the 3rd respondent are 0.18% less than the estimated rate quoted by Finance Department and further reason that the impugned tender itself being a retender and items are required urgently and to meet the aforesaid immediate requirement, only 50% of the order is placed on the 3rd respondent clearly demonstrate that the 2nd respondent has applied his mind to the materials placed before him with regard to suspected cartel formation and has arrived at the said decision, which cannot be said to be arbitrary, illegal and unreasonable. It is the further submission of the learned senior counsel that in the



award of tender, the 2nd respondent has followed the principles of commercial prudence in conformity with the general conditions of tender and, therefore, as held by the Hon'ble Supreme Court in *Uflex & Ors. - Vs - Government of Tamil Nadu & Ors.* (2021 SCC OnLine SC 738), principles of equity and natural justice have to be distanced.

32. It is the further submission of the learned senior counsel that the author of the document is the best person to understand and appreciate its requirements and the 2nd respondent, being the author of the document, has appreciated the conditions in proper perspective and based on cogent and logical reasoning had decided to award the tender, that too only to the extent of 50% in favour of the 3rd respondent, while giving necessary direction to the Tender Committee to follow up on the complaint with the Railway Board with regard to suspected cartel formation and, therefore, the said act of the 2nd respondent cannot be said to be perverse, irrational or contrary to the tender conditions and the attribution of mala fides does not merit acceptance.

33. It is the further submission of the learned senior counsel that the technical bid was opened on 29.10.21 and details of the participants were uploaded in the website on the same day, however, the petitioner did not make any representation immediately regarding the cartelisation of respondents 3 to 5 and only after evaluation of financial bid on 6.11.2021, coming to know that he will not be entitled for being selected for participation in the reverse auction, the present representation alleging cartelisation has been made, which clearly shows that the petitioner is only inclined to stall the tender process.

34. In support of his submissions, learned senior counsel appearing for respondents 1 and 2 placed reliance on the following decisions :-

- i) *Galaxy Transport Agencies - Vs - New JK Roadways* (2020 SCC OnLine SC 1035);
- ii) *Silpi Constructions - Vs - Union of India & Anr.* (2020 (16) SCC 489);
- iii) *Jagdish Mandal - Vs - State of Orissa* (2007 (14) SCC 517);
- iv) *Afcons Infrastructure Ltd. - Vs - Nagpur Metro Rail Corporation Ltd.* (2016 (16) SCC 818);
- and
- v) *Uflex & Ors. - Vs - Government of Tamil Nadu & Ors.* (2021 SCC OnLine SC 738)

35. Learned senior counsel appearing for the 3rd respondent submitted that the petitioner has not challenged the terms and



conditions of the bid document and has only alleged that the 3rd respondent is involved in cartelisation with respondents 4 to 5, which has not been proved through any documents. It is the submission of the learned senior counsel that the 2nd respondent is at liberty to place orders, even if cartel formation is suspected, on the basis of clause 10.11.1 of the bid document, which provides that wherever all or most of the approved firms quote equal rates and cartel formation is suspected, Railway reserves the right to place order on one or more firms with exclusion of the rest without assigning any reasons thereof. In exercise of power under clause 10.11.1, the 2nd respondent, exercising his discretion, and taking into account the fact that the tender has already been retendered and that the items are required urgently, had placed orders on the 3rd respondent, being satisfied that the rate quoted by the 3rd respondent is 0.18% lower than the estimated rate.

36. It is the further submission of the learned senior counsel that the Courts, in exercise of its powers of judicial review, shall not interfere in contractual matters, unless there exists arbitrariness, irrationality, unreasonableness, bias and mala fide. It is the submission of the learned senior counsel that a choice decision made lawfully cannot be tested as to its soundness, as in evaluating tenders and awarding contracts, the parties are governed by the principles of commercial prudence. In this regard, learned senior counsel placed reliance on the decision of the Hon'ble Supreme Court in *Uflex* case (supra).

37. It is the further submission of the learned senior counsel that the 2nd respondent, being the competent authority in the award of contract, being satisfied with the rate quoted by the 3rd respondent, which is much lesser than the estimated rate, has thought it fit to award part of the contract to the 3rd respondent. It is the further submission of the learned senior counsel that fairness in acting will vary from case to case and broadly the administrative action, which could be tested in judicial review would only fall within the three parameters set forth by the Hon'ble Supreme Court in *Tata Cellular - Vs - Union of India* (1994 (6) SCC 651), wherein it has been laid down that (i) illegality, (ii) irrationality, viz., *Wednesbury's* reasonableness and (iii) procedural impropriety alone are the grounds, which if infringed, would weigh with the court in exercising its power of judicial review. However, in the present case the bidding process took place in a competitive manner in which the 3rd respondent was declared as the successful bidder and in the absence of any irrationality, illegality and perversity in the said decision of the 2nd respondent, this Court, sitting in judicial review shall not interfere with the decision arrived at by the 2nd respondent.



38. It is the further submission of the learned senior counsel for the 3rd respondent that the partners of the 3rd respondent have no relationship with respondents 4 and 5. It is further submitted by the learned senior counsel that the terms and conditions of the bid document neither prohibits uploading of the tender document from the same IP address nor does it prohibit related parties from taking part in the tender process.

39. It is the further submission of the learned senior counsel that the interim report, which was provided to the 3rd respondent only showed a cursory finding in which the Tender Committee had opined that the IP address, being unique to a router and no two routers on the network can have the same IP address, therefore, went on to prima facie suspect cartelisation. In this regard, learned senior counsel placed before the Court the affidavit submitted by the internet service provider, viz., M/s.Nikunj Xerox, which has placed on affidavit that their computer and router was used for over 10 companies including respondents 3 to 5, which was the reason for the IP address being common to all the three respondents.

40. It is the further submission of the learned senior counsel that the 2nd respondent, through a reasoned order, has rejected the findings of the Tender Committee and awarded the tender to the 3rd respondent holding that the existing guidelines on cartel formation do not cover the present circumstances as the rates quoted by the 3rd respondent are neither the same as that of the other cartel members nor exorbitant. Further, the 2nd respondent has also recorded a finding that cartel formation does not stand established as respondents 3 to 5 have not quoted equal rates. In such circumstances, it is the submission of the learned senior counsel that clause 16.1.7 of the bid document has conferred full powers on the Principal Chief Materials Manager to take decisions on the complaints and that being the case, the 2nd respondent, in exercise of his discretion, has taken the decision to award part of the contract to the 3rd respondent, the said act of the 2nd respondent cannot be interfered in the guise of judicial review.

41. It is the further submission of the learned senior counsel that pursuant to the interim report dated 24.11.21, another report dated 3.1.22 has been filed in which a finding has been recorded that respondents 3 to 5 are three different independent entities having separate manufacturing units. It is therefore the submission of the learned senior counsel that the interim report merged with the report dated 3.1.22, where a finding has been rendered that there was no cartelisation between respondents 3 to 5.



42. It is the further submission of the learned senior counsel that merely because respondents 3 to 5 shared the same IP address from which the tender document was uploaded, the same cannot be stated to be an indication of cartelisation and in aid thereof, the affidavit of the xerox shop from which the tender document had been uploaded has been filed. Further, to buttress that the above is a flimsy ground to allege and suspect cartelisation, learned senior counsel for the petitioner placed reliance on the decision of the Division Bench of the Bombay High Court in SK Translines Pvt. Ltd. - Vs - Maharashtra State Warehousing & Ors. (MANU/MH/2073/2016), wherein the Division Bench of the Bombay High Court has held that the fact that IP address is identical alone would be stretching too far for coming to the conclusion that there has been cartel formation.

43. It is the further submission of the learned senior counsel that the petitioner and respondents 3 to 5 have participated in many bids over the years and nowhere the petitioner has ever raised the allegation of cartelisation between respondents 3 to 5 and only because his bid has been negatived, the petitioner has come up with the issue of cartelisation. The above act of the petitioner clearly reveals that he has suppressed material facts about the bids in which the petitioner and respondents 3 to 5 have participated. It is the further submission of the learned senior counsel that the mere fact that respondents 3 to 5 belong to an extended family would not be enough to allege cartelisation as the said issue is wholly extraneous to the terms of the bid, as the tender document, nowhere precludes the members of the extended family from participating in the bid. Further, in the absence of any evidence to suggest arrangement or understanding between respondents 3 to 5 and there being no loss caused to the exchequer due to the tender having been awarded in favour of the 3rd respondent, the case of the petitioner is wholly filed in vested interest and it is not true and genuine and the same deserves to be dismissed. In support of his submissions, learned senior counsel relied on the following decisions :-

- i) Excel Corp. Care Ltd. - Vs - Competition Commission of India & Ors. (2017 (8) SCC 47);
- ii) SK Translines Pvt. Ltd. - Vs - Maharashtra State Warehousing & Ors. (MANU/MH/2073/2016); and
- iii) Mahanagar Telephone Nigam Ltd. - Vs - Canara Bank & Ors. (2020 (12) SCC 767)

44. Learned senior counsel appearing for the 5th respondent that it has been wrongly impleaded in the present writ petition. It is the submission of the learned senior counsel that the 5th respondent having not reaped any benefit in the alleged NIT process, the impleadment of the 5th respondent in the present writ petition is an abuse of process.



45. It is the further submission of the learned senior counsel that the stand of the petitioner that respondents 3 to 5, in connivance, had acted as a cartel and in the larger conspiracy, the 5th respondent has played its part to circumvent the bid. It is the further submission that respondents 3 to 5 are different entities and are not controlled by the same set of individuals and merely because the 5th respondent carries on similar/identical works/business and carries on similar family name would not go to mean that respondents 3 to 5 are related.

46. It is the further submission of the learned senior counsel that the petitioner has filed the petition on frivolous grounds, as it was unsuccessful in the tendering process and the position of the 5th respondent is in no way better to that of the petitioner, as the 5th respondent also stand on a similar footing having not been awarded the contract.

47. It is the further submission of the learned senior counsel that normally the Courts would not interfere with the tender unless it is arbitrary, discriminatory, mala fide or actuated by bias. The report of the ICF Vigilance cell dated 3.1.22 having clearly held that respondents 3 to 5 have separate factories and work address and the said report vindicates respondents 3 to 5 from any collusion among themselves.

48. Learned senior counsel emphasised that the service provided by an Internet Service Provider in a closed network such as respondents 3 to 5, the IP address of all the persons within the said group would be one and the same, as the service is received from a single source and, therefore, the case of the petitioner that the IP address is the same would reveal cartel formation is too large an ask for this Court to accept. Merely because the IP address is the same for respondents 3 to 5 would not be suffice to hold that respondents 3 to 5 have entered into a cartel formation to defeat the rights of the other tenderers.

49. Learned senior counsel for the 5th respondent on the other fronts, adopted the contentions of the learned senior counsel for the 3rd respondent and submitted that the petitioner, only to defeat the rightful claim of the successful bidder, as the petitioner having been unsuccessful has launched this petition, which is wholly devoid of merits and substance and the same deserves to be dismissed.

50. Learned counsel appearing for the 4th respondent, while filing separate counter and written submissions, however, adopted the submissions advanced by the learned senior counsel appearing for respondents 3 and 5 and further submitted that the 4th respondent is in no way connected with respondents 3 and 5



and the alleged cartel formation by the petitioner is purely a figment of imagination, even as per the pleadings and written submissions and not materially established by any document. Therefore, the present petition at the instance of the petitioner is liable to be dismissed.

51. This Court paid its active consideration to the submissions advanced by the learned counsel appearing for the parties and perused the materials and the relevant clauses to which this Court's attention was drawn as also the decisions on which reliance has been placed by the learned counsel on either side.

52. The Hon'ble Supreme Court in the case of Tata Cellular - Vs - Union of India (1994 ((6) SCC 651), in a matter relating to judicial review in contractual issues, has elucidated the following principles :-

"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."

(Emphasis Supplied)

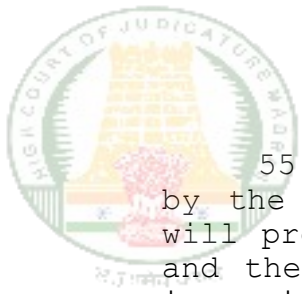
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53. The decision of the House of Lords in Trollope & Colls Ltd. - Vs - North West Metropolitan Regional Hospital Board (1973 (1) WLR 601 (HL)), which finds place in the decision of the Hon'ble Supreme Court in Uflex case (supra) has eruditely dealt with on the contract between the parties and for more clarity, the relevant portion is quoted hereunder :-

"...the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings : the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract : it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them : it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves."

(Emphasis Supplied)

54. In Vidarbha Irrigation Development Corporation - Vs - Anoj Kumar Garwala (2019 SCC OnLine SC 89), the Hon'ble Supreme Court, after analysing a catena of decisions on the subject and following the ratio laid down in Poddar Steel Corporation - Vs - Ganesh Engg. Works (1991 (3) SCC 273) has held that the requirements in a tender notice can be classified 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 condition in appropriate cases.



55. This Court, keeping in mind the above ratio laid down by the Hon'ble Supreme Court in the decisions referred supra, will proceed to analyse the legality in the award of the tender and the fairness of the procedure adopted by the 2nd respondent in arriving at a conclusion to award the tender in favour of the 3rd respondent.

56. The case on hand squarely falls within the ratio laid down in Poddar case (supra), as this Court has to find out whether Clause 10.11, which speaks about "suspected cartelisation" is a mandatory condition to be adhered to in stricto sensu or is an ancillary condition, which can be diluted by the decision making authority by applying his discretionary power. Further, to plead that the award of tender is in direct violation of clause 10.11, thrust is laid on five factors:-

- i) When suspicion of cartel formation is made out by the Tender Committee, award of tender to the 3rd respondent, by the 2nd respondent brushing aside the said view is wholly arbitrary, illegal and perverse;
- ii) Submission of tender documents from common IP address;
- iii) The respondents are related, in that they are members of the extended family;
- iv) The prices quoted, though not identical, but they are in close proximity;
- v) Even in the earlier tender process, complaint has been lodged against cartelisation by another entity against respondents 3 to 5, which is pending passing of orders before the Railway Board.

57. Before proceeding to analyse the contentions and counter contentions raised on behalf of the parties, the whole gamut of the argument being laid on clause 10.11 of NIT, for better clarity, the relevant clauses are quoted hereunder:-

"10.11 Cartel Formation :

10.11.1 - Wherever all or most of the approved firms quote equal rates and cartel formation is suspected, Railway 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.

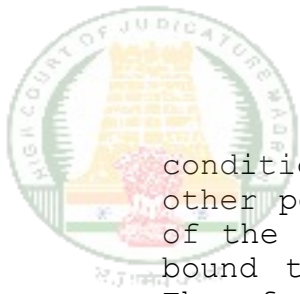
10.11.3 - Wherever cartel formation is suspected, purchaser reserves the right to place



63. It is borne out by record that it is not the complaint of the petitioner, which is the cause for any enquiry by the Vigilance Cell of the Railways. Even earlier to the complaint of the petitioner, one Lokadikar Sanghathan has made complaint against respondents 3 to 5 in addition to few others alleging cartelisation even prior to the present tender, which complaint is under the active consideration and enquiry of the Vigilance Cell and the Railway Board. Therefore, allegation as to cartelisation between respondents 3 to 5 had already surfaced at the instance of one Lokadigar Sangathan, which is seized of by the Railway Board. Therefore, suspicion as to cartelisation between respondents 3 to 5 is nothing new in this tender, as such allegation has already been made against respondents 3 to 5. The present complaint of the petitioner is second in line to the similar complaint against respondents 3 to 5.

64. A complaint of similar nature already subsisting against respondents 3 to 5 and the Tender Committee also, prima facie, has entertained a suspicion as to formation of cartelisation between respondents 3 to 5, a duty is cast upon the 2nd respondent to consider the said aspect in the light of the complaint already subsisting against respondents 3 to 5, which is pending before the Railway Board for its decision. Unless the Railway Board absolves respondents 3 to 5 from the said allegation, clause 10.11.4 would have to be invoked against respondents 3 to 5 by the purchaser.

65. As already pointed out above, when the Tender Committee has suspected cartel formation between respondents 3 to 5, the 2nd respondent, while accepting the said fact and also opining that there exists a prima facie case against respondents 3 to 5, which has been unequivocally averred by the 2nd respondent in its counter and written submissions, for flimsy reasons, viz., materials urgently required and already the consideration is on the basis of retender has given a go-by to the mandatory condition, which has been prescribed in clause 10.11 of the NIT by the 2nd respondent to award the tender in favour of the 3rd respondent. When it is the 2nd respondent, who is the author of the tender document, has thought it fit to insert a clause in the NIT relating to suspected cartel formation and the further action that would enure against such individuals indulging in cartel formation, throwing the said clause to the winds, the 2nd respondent had acted in a manner, which is totally against the spirit of the tender conditions and also in gross violation of the mandatory condition imposed vide clause 10.11.1. Once the condition imposed is to be mandatorily adhered to, as held by this Court above, it is incumbent on the part of the 2nd respondent, the author of the tender document, to scrupulously follow the said condition and even the author of the document, for even 'n' number of reasons cannot ignore the mandatory



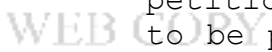
condition and flout the conditions to the benefit of one or other person or even in case of the purchaser being in dire need of the materials, as the purchaser being a Government entity, is bound to follow a transparent process in the award of tender. Therefore, the act of the 2nd respondent in awarding the tender to the 2nd respondent is in violation of the tender conditions prescribed in clause 10.11 of the NIT.

66. Further, as pointed supra, in a like issue, on the complaint by one Lokadikar Sangathan, enquiry has been initiated and enquiry has been conducted by the Vigilance Cell of the Railways and the matter is seized of by the Railway Board and a decision of the Railway Board is awaited. Such being the case, the prudent approach for the 2nd respondent would have been to await the decision of the Railway Board before awarding the contract to the 3rd respondent. When the 2nd respondent has accepted that suspected cartel formation is there, as opined by the Tender Committee, the 2nd respondent ought not have awarded the tender in favour of the 3rd respondent and such an action of the 3rd respondent is beyond the comprehension of this Court. The reasons assigned by the 2nd respondent for awarding the tender to the 3rd respondent would pale into insignificance on proper appreciation of clause 10.11 of the NIT. As stated above, clause 10.11 being a mandatory condition in the NIT, the 2nd respondent cannot dilute the mandatory conditions so as to suit the necessity.

67. Be that as it may. Respondents 3 to 5, in unison, have raised a contention that the petitioner kept quiet without raising any complaint as to cartel formation till the tenders were opened and only after knowing the amount of the tender and his case being rejected that the petitioner has submitted the complaint. It is also contended by respondents 3 to 5 that the petitioner has been actively participating in other tenders along with respondents 3 to 5 and nowhere the petitioner has raised the issue of cartel formation by respondents 3 to 5.

68. With regard to the second limb of the contention that the petitioner though participated with respondents 3 to 5 in other tenders, however, has not raised any issue of cartel formation between respondents 3 to 5, it is to be pointed out that all those cases in which the petitioner and respondents 3 to 5 participated are not before this Court and the conditions therein are also not in issue before this Court. Therefore, the participation in the said tenders without any complaint being raised cannot be put against the petitioner in the present petition.

69. Coming to the first limb of the contention that the petitioner has kept silent till the tender documents were opened



70. True it is that no complaint has been raised by the petitioner prior to the opening of the tender. However, it is to be pointed out that at the earliest point of time, there was nothing to suggest that respondents 3 to 5 were likely working in a cartel. The matter only came to light on the opening of the tender, where quotes in close proximity to each other has been given, which raised a brow of suspicion on respondents 3 to 5. Not only the quotes, but also the submission of the tender form from a common IP address also raised a suspicion on the alleged cartel formation between respondents 3 to 5. Initially, but for the quotes, which are in close proximity, separated only by about few thousand rupees, there was no material to cast any doubt on alleged cartel formation, except for the earlier complaint filed by Lokadikar Sangathan, which has been enquired into by the Vigilance Cell of the Railways and pending decision of the Railway Board.

72. Further, what is more startling is the fact that in the bulk supplier tender, except for one tenderer, who is shown to be L-2, viz., Acme India, who has quoted in the price range as has been quoted by respondents 3 to 5, all other tenderers have quoted rates, which are far in excess of the amounts quoted by respondents 3 to 5.

<https://hcservices.ecourts.gov.in/hcservices/>



not without basis, but on a clear appreciation of materials available before it. It is further to be pointed out that on suspicion being raised by the Tender Committee, the 2nd respondent, being the approving/decision making authority in the award of tender has also accepted the view expressed by the Tender Committee, which is also available in the Note File and also averred by the 2nd respondent in the counter and written submission filed before this Court.

74. One of the main ground for the Tender Committee to entertain a suspicion as to cartel formation is the fact that all the three tender documents pertaining to respondents 3 to 5 have been uploaded from an identical IP address. However, to counter the same, it is the submission of the 3rd respondent that the Internet Service Provider has provided the connection to many persons within the industrial area, where respondents 3 to 5 have their factory, under a common IP address. It is the submission of the 3rd respondent that the tender document was uploaded from one of the xerox shops functioning within the area and to buttress the said submission, an affidavit has been filed before this Court, by the proprietor of the said shop from which which the tender document is alleged to have been uploaded.

75. This Court is not an expert to deal with technicalities as to the manner in which the internet service provider provides connection to an individual. It is well within the domain of the experts. However, this Court is also not a novice to brush aside the fact that each and every router through which the internet service is provided to a particular computer is provided with a unique IP address as the said address is the basis on which the computer is identifiable. The IP address is similar to the residential address or a passport number, which is unique to the occupier of the house or the holder of the passport.

76. However, an affidavit is placed before the Court with a view to establish the fact that the tender document was uploaded from the said xerox shop which has the internet facility and which has the said IP address. However, this Court, sitting under Article 226 of the Constitution of India cannot go into the said issue and entertain the affidavit filed across the Bar by the 3rd respondent, as the authenticity of the document and the veracity of the deponent of the said document has been assailed by the petitioner contending that the said document cannot be accepted to come to a conclusion that the tender document was filed from the said shop. It is the stand of the petitioner that the affidavit filed to substantiate the IP address cannot be relied on by this Court to come to a conclusion one way or the other.



77. This Court is conscious of the fact that mere filing of affidavit by a party before this Court would not suffice to hold that the fact stands established, more so, when it is disputed by the petitioner. The said aspect being a disputed fact, this Court cannot go into the same sitting under Article 226. Further, as stated above, this Court is not an expert to give an opinion one way or the other with regard to the identical IP address, which has been used by respondents 3 to 5 to upload their tender documents.

78. It is to be pointed out that already a similar issue as to cartel formation between respondents 3 to 5 is pending enquiry by the Vigilance Cell and a decision on the same is pending before the Railway Board. This Court is of the considered view that the Vigilance Cell of the Railways is the best entity to probe the issue as regards the issue relating to IP address. A full-fledged investigation by the Vigilance Cell of the Railways would threadbare reveal the source from which the tender documents were uploaded and would also give a quietus to the issue.

79. Though the learned senior counsel appearing for the 3rd respondent has placed reliance on a decision of the Bombay High Court pertaining to a similar issue relating to IP address, however, this Court is not inclined to rely on the same as the same being a technical issue, this Court cannot give any opinion on the same and merely because the Bombay High Court was of the opinion that the documents having uploaded from the same IP address would not be a safe bet to infer that there is cartel formation, this Court is not inclined to sail along with the decision of the Bombay High Court on the said aspect as doing such a thing would be nothing but putting the cart before the horse. This Court is not inclined to rely on the said decision to arrive at any finding and leaves the matter to the judicious scrutiny of the 1st respondent to conduct a probe to find the truthfulness in the said aspect.

80. This Court, having held that clause 10.11 of NIT is a mandatory condition and the suspected cartel formation, opined by the Tender Committee, ought to have been properly considered by the 2nd respondent while finalising the tender process, was it right on the part of the 2nd respondent to award the tender to the 3rd respondent, who is suspected to be a member of the cartel.

81. The petitioner, to assail the award of the 2nd respondent, contends that when the 3rd respondent is suspected to be a member of the cartel by the Tender Committee, which has been accepted by the 2nd respondent as well, the 2nd respondent ought to have awarded the contract to any other tenderer barring



88. In the case on hand, there is no quarrel that the rate quoted by the 3rd respondent is 0.18% lower than the quote given by the petitioner. It has been argued that the petitioner, being an unsuccessful bidder, to stall the tender process, has come before this Court to disentitle the 3rd respondent of his successful bid. It is true that the 3rd respondent has quoted a rate 0.18% lower than the petitioner, but it is not as if there is no other tenderer, who has quoted an amount, which is not in close proximity with the rate quoted by the 3rd respondent.

89. The main grievance expressed by the petitioner on cartel formation flows out from the further tender process that has been stated in the NIT. The initial bids, on being opened, 50% of the bidders, who have quoted the lowest bid in the first leg, are invited for the reverse auction. The grievance of the petitioner is that due to cartel formation, respondents 4 and 5 have eventually succeeded in wiping out most of the other tenderers, barring one individual, viz., Acme India, as the total number of tenderers in the bulk purchase category was 8 and 50% of the same was 4 and in selection of the four members, respondents 3 to 5 have been successful as L-1, L-3 and L-4 while Acme India was L-2. In the absence of cartel formation other entities would have come within the zone of consideration for entering into reverse auction.

90. Only 4 firms have been selected for reverse auction, as per the terms of NIT, which included respondents 3 to 5. The said fact is not in dispute. That being the case, the stand of the petitioner cannot be easily brushed aside and so also the suspicion of cartel formation by the Tender Committee, which has also been accepted by the 2nd respondent assumes significance. In the said backdrop, can the any firm/firms found in clause 10.11.3 would also include respondents 3 to 5 being the suspected members of the cartel.

91. What was the necessity in the tender document to have a clause relating to suspected cartel formation. The main reason that could be adduced for having the said clause in the NIT is only for the purpose of entertaining competition. Healthy competition is the backbone of any successful tender, particularly relating to Government and public sector, where public money is involved. The healthier the competition, the healthier the execution of the work and the maximum the benefit for the general public, as the exchequer would not be made to shell out more of the public funds for executing a project.

92. Cartel formation can not only derail the chances of other tenderers from the competition, but the award would also go to the hands of persons, who may not execute it qualitatively. The tender called for by the 2nd respondent,



being for the use of the public, who use the public transport system and who are the pay masters, quality is of paramount importance. But, the act of cartel formation, has the ability to wipe off quality and, therefore, the 2nd respondent had thought it fit to include clause 10.11 in the NIT as a mandatory condition.

93. Once there arises a suspicion as to cartel formation, the normal analogy that follows is that the firms, that have entered into cartel formation, would stand excluded from the purview of consideration. Considering the firms, that have entered into cartel formation, also within the ambit of firms for being considered for awarding tender would be nothing but giving the key to the treasure chest to the thief, who plans to steal the treasure. The members of the cartel, who plan to device mechanism to deceive the tender inviting authority by resorting to illegal means, should not be taken into consideration within the ambit of any firms/firms appearing in clause 10.11.3. Considering those firms, which have also indulged in cartel formation, for the purpose of award of tender would negate the whole clause 10.11. In such a situation, entities resorting to cartel formation, would quote in tandem to achieve the result, which they seek to achieve, like the present respondents 3 to 5, who have, by their act, negated almost all the other tenderers from the next leg of auction, viz., reverse auction. Expressly, this is the said scenario the author of the tender wanted to avoid, while including clause 10.11 in the NIT.

94. The above view of this Court gets strengthened from the fact that a perusal of clause 10.11.4 reveal that firms who quote in cartel were warned that their names may be deleted from list of approved sources, meaning thereby, that they will not be entitled to participate in any of the tenders floated by the Railways. In such a scenario, when the Railways has warned the firms that their names would be deleted from the list of approved sources, it cannot lie in the mouth of the 2nd respondent to contend that the discretion vested in him was exercised to award the tender to the 3rd respondent, who had quoted the lowest bid amount, when clause 10.11.4 provides for deleting the firm from the list of approved sources. This Court is at a loss to understand as to how on the one hand the tender could be awarded in favour of the 3rd respondent and on the other hand, the suspected cartel formation, being proved, respondents 3 to 5 could be deleted from the list of approved sources. The 2nd respondent cannot blow hot and cold that it could award the tender to the 3rd respondent inspite of the fact that decision as to cartel formation is pending before the Railway Board.

95. This Court poses a question to itself. If the outcome of the decision of the Railway Board relating to cartel



98. The above view arrived at by this Court finds strength from the decision of the Hon'ble Supreme Court in *Uflex Ltd. - Vs - Government of T.N. & Ors.* (2021 SCC OnLine SC 738), where the Hon'ble Supreme Court has broadly visualized the process of



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tender and the limitations in judicial review in the said process and the power of the Court to interfere in matters relating to award of tenders and the same is quoted hereunder :-

"The enlarged role of the Government in economic activity and its corresponding ability to give economic 'largesse' was the bedrock of creating what is commonly called the 'tender jurisdiction'. The objective was to have greater transparency and the consequent right of an aggrieved party to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India (hereinafter referred to as the 'Constitution'), beyond the issue of strict enforcement of contractual rights under the civil jurisdiction. However, the ground reality today is that almost no tender remains unchallenged. Unsuccessful parties or parties not even participating in the tender seek to invoke the jurisdiction of the High Court under Article 226 of the Constitution. The Public Interest Litigation ('PIL') jurisdiction is also invoked towards the same objective, an aspect normally deterred by the Court because this causes proxy litigation in purely contractual matters.

2. 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, 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.

3. We cannot lose sight of the fact that a tenderer or contractor with a grievance can always seek damages in a civil court and thus, "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."



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4. In a sense the Wednesbury principle is imported to the concept, i.e., the decision is so arbitrary and irrational that it can never be that any responsible authority acting reasonably and in accordance with law would have reached such a decision. One other aspect which would always be kept in mind is that the public interest is not affected. In the conspectus of the aforesaid principles, it was observed in *Michigan Rubber v. State of Karnataka* as under:

"23. From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) 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; and

(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive



since no person can claim fundamental right to carry on business with the Government.”
(Emphasis Supplied)

99. As observed by the Hon'ble Supreme Court, this Court would not have normally interfered with the award of tender by the 2nd respondent, had it not been for the fact that the author of the document, viz., the 2nd respondent, has not followed what he had sought to achieve by adding clause 10.11 in the NIT. As pointed out by the Hon'ble Supreme Court, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere and the decision of the said authority must be tested by the application of Wednesbury principle of reasonableness and must be free from arbitrariness not affected by bias or actuated by mala fides. Merely because the 2nd respondent has given certain reasons for placing the order on the 3rd respondent, that by itself would not be sufficient to hold that the 2nd respondent has applied his mind to all the materials, more so when the Tender Committee has suspected cartel formation, which has been accepted by the 2nd respondent. The above act of the 2nd respondent in accepting the suspicion of cartel formation raised by the Tender Committee, but giving a go-by to the said suspicion as also clause 10.11 of the NIT, clearly demonstrates that the act of the 2nd respondent is arbitrary, perverse, unreasonable, illegal and unsustainable and therefore, this Court in exercise of its powers of judicial review is inclined to interfere with the award of contract granted in favour of the 3rd respondent.

100. It is brought to the notice of this Court that pending the writ petition, the contract has been awarded to the 3rd respondent and this Court, vide its order dated 8.12.2021, while granting an order of stay of the award of contract had made it clear that if the contract had already been awarded, such award is subject to the result of the writ petition.

101. For the reasons aforesaid, this writ petition is allowed. However, liberty is granted to the 2nd respondent to go ahead with a fresh tender process and decide the same in accordance with law. The order of interim stay granted vide order dated 8.12.2021 in WMP No.26335/2021 is made absolute. Consequently, other connected miscellaneous petitions are closed. There shall be no order as to costs.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

GLN



To

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

WEB COPY

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

+1cc to Mr.P.T.Ramkumar, Advocate, S.R.No.6119
+1cc to Mr.Arun C.Mohan, Advocate, S.R.No.5842
+2cc to Mr.S.Dhakshanamoorthy, Advocate, S.R.No.5836
+1cc to Mr.V.Govardhanan, Advocate, S.R.No.5904
+1cc to R.Thirumoorthy, Advocate, Sr.No.6643(10/02/2022)
+1cc to M/s.A.Umapathy, Advocate, Sr.No.6346(10/02/2022)

W.P. NO. 25008 OF 2021

SPD(CO)
KKV/01/02/2022