IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11-03-2025

CORAM

THE HONOURABLE MR JUSTICE S. M. SUBRAMANIAM
AND
THE HONOURABLE MR.JUSTICE K.RAJASEKAR

WA Nos. 2026 & 2028 of 2024
and
WP No. 21995 OF 2024
and
CMP Nos. 14412, 14415, 14420 & 14421 of 2024,
and
WMP No. 23969 & 23970 of 2024, WMP No. 5305 OF 2025,

WA No.2026 of 2024:

OTIS Elevator Company (India)
Limited
having its registered office at
9th Floor, Magnus Towers, Mindspace,
Off. Malad Link Road, Malad (West),
Mumbai – 400 064.

Appellant(s)

Vs

1. Union Of India
Ministry of Housing and Urban Affairs,

Nirman Bhawan, C-Wing,
Rajpath Area, Central Secretariat,
New Delhi – 110 011.

2.State Of Tamil Nadu
Ministry of Housing and Urban
Development, Secretariat,
Fort St. George, Chennai – 600 009.

3.Chennai Metro Rail Limited
METROS, No.327, Anna Salai,
Nandanam, Chennai – 600 035.

Respondent(s)

WA No. 2028 of 2024

OTIS Elevator Company (India)
Limited
having its registered office at
9th Floor, Magnus Towers, Mindspact,
Off. Malad Link Road, Malad (West),
Mumbai – 400 064.

Petitioner(s)

Vs

1. Union Of India
Ministry of Housing and Urban Affairs,
Nirman Bhawan, C-Wing,
Rajpath Area, Central Secretariat,
New Delhi – 110 011.

2.State Of Tamil Nadu
Ministry of Housing and Urban
Development, Secretariat,

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METROS, No.327, Anna Salai,
Nandanam, Chennai – 600 035.

Respondent(s)

WP No. 21995 of 2024

OTIS Elevator Company (India)
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Having Its Registered Office At
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3.Chennai Metro Rail Limited,
METROS, No.327, Anna Salai,
Nandanam, Chennai-600 035,
Tamil Nadu, India.

4.Japanese International Cooperation

Agency (JICA)
JICA India Office, 16th Floor,
Hindustan Times House,
18-20, Kasturba Gandhi Marg,
New Delhi-110 011, India.

Respondent(s)

WA No. 2026 of 2024

PRAYER

To set aside the Impugned Order dated 19-06-2024 passed by this Court in WP.No.10934/2024

WA No. 2028 of 2024

PRAYER

To set aside the impugned Order dated 19-06-2024 passed by this Court in WP.No.10948/2024

WP No. 21995 of 2024

PRAYER

Call for the records pertaining to the JICA Loan Agreement dated 21.12.2018 and inter alia, declare schedule 4-Procurement Procedure Section 2 (Eligible Nationality) of the same as illegal, arbitrary and unconstitutional and violative of Articles 14, 19(1)(g), 21, 298 and 299 and other applicable Articles of the Constitution of India, 1950 r/w. Section 27 and other applicable sections of the Indian Contract Act, 1872 and consequently direct the respondent No.1 to modify, amend or/alter the terms of the JICA Agreement dated 21.12.2018 for Clause Schedule 4-Procurement Procedure, Section 2(Eligible Nationality) in accordance with the same.

WA Nos. 2026 & 2028 of 2024

For Appellant(s): Mr.A.K.Sriram Senior Counsel
For Mr.Gaurav Chatterjee

For Respondent(s): Mr.AR.L.Sundaresan ASGOI
Assist. By Mr.V.Ashok Kumar
SPC For R1
Mrs.E.Ranganayaki AGP For R2
Mr.P.S.Raman AG Assist. By
Mr.Raghavendra Ross Divakar
and Mr.B.Gautham For M/s. Dua
Associates For R3

WP No. 21995 of 2024

For Petitioner(s): Mr.A.K.Sriram Senior Counsel
For Mr.Gaurav Chatterjee

For Respondent(s): Mr.AR.L.Sundaresan ASGOI
Assist. By Mr.V.Ashok Kumar
SPC For R1
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Mr.P.S.Raman AG Assist. By
Mr.Raghavendra Ross Divakar
and Mr.B.Gautham For M/s. Dua
Associates For R3
Mr.S.Sathish For R4

COMMON JUDGMENT

(Order of the Court was made by S.M.Subramaniam J.)

The Intra-Court Appeals have been instituted challenging the common order dated 19.06.2024 passed in W.P.Nos.10934 and 10948 of 2024.

2. Additionally, the writ petition in W.P.No.21995 of 2024 has been filed by the same appellant by the OTIS Elevator Company (India) Limited challenging the JICA Loan Agreement dated 21.12.2018. The petitioner seeks to declare schedule 4, Procurement Procedure, Section 2 (Eligible Nationality) of the same as illegal, arbitrary and unconstitutional and violative of Articles 14, 19(1)(g), 21, 298 and 299 of the Constitution of India, 1950 read with Section 27 and other applicable Sections of the Indian Contract Act, 1872. The petitioner further seeks a direction to 1st respondent to modify, amend or alter the terms of the Japan International Cooperation Agency (JICA) Agreement dated 21.12.2018, specifically Clause Schedule 4, Procurement Procedure, Section 2 (Eligible Nationality) in accordance with law.

3. As far as the writ appeals are concerned, the Writ Court has dismissed the writ petitions filed by the appellant challenging the eligibility criteria contemplated in tender notification. Thus, the writ appeals and writ petition are taken up together for hearing.

4. The learned Senior Counsel appearing on behalf of the writ appellant and the writ petitioner would mainly contended that the eligibility criteria fixed in the tender notification is not only arbitrary but lack in transparency and depriving opportunity of many companies to participate in the tender process. Specifically, Section V of the Tender Notification provides "Eligible source countries of Japanese ODA Loans". Clause A(3)(iii) stipulates that "The prime Contractor or, in the case of joint venture, the Indian partners shall be nationals of India or juridical persons incorporated and registered in India, and have their appropriate facilities for producing or providing the goods and services in India, and actually conduct their business there; in the case of a juridical person, a majority of the subscribed shares shall be held by nationals of India; and a majority of the full-time directors of the company are nationals of India (hereinafter referred to as the "Indian Company")".

5. Clause 4 stipulates that "Procurement of goods/services from Japanese manufacturer is mandatory under this contract as below:

a) Any goods/services of value, minimum 75% of Contract Price excluding CAMC, Taxes & Duties shall sourced from Japanese manufacturers /Companies/Suppliers/Sub-Contractors".

6. Clause 5(b) stipulates that "Not less than ten percent (10%) of shares are held by a single Japanese Company or juridical person stipulated in Section A. 3. (a) (ii)".

7. Relying on the above eligibility criteria, the learned Senior Counsel for the appellants / writ petitioners would contend that the above Clauses are discriminatory and paving way for a single company to be a successful tenderer thereby denying equal opportunities to other eligible and capable companies that meet the technical requirements to implement the project.

8. In the context of eligibility criteria, the Writ Court has taken a view that Chennai Metro Rail Limited (CMRL) has no roll since it is an international agreement between the Government of India and the JICA. Since, the

Government of India was not a party to the writ proceedings, the Writ Court held that it could not grant relief as such sought for by the appellant, which was declined as the Metro Rail project is only adopting the policy decision of Government and Government of India not being a party to the writ proceeding, the relief as such sought for is beyond the scope. Thus, the writ petition was rejected. That is one of the ground for instituting a separate writ petition challenging the international agreement between Government of India and JICA in the year 2018.

9. Mr.P.S.Raman, the learned Advocate General appearing on behalf of the State would mainly oppose the contentions on the ground that the contract between the Government of India and JICA is an international agreement. The Government of India borrowed funds from JICA at a low interest of 0.02% per annum for regional development, and as part of this agreement, certain conditions were imposed by JICA and accepted by the Government of India as a policy decision in the public interest. Thus, such nature of conditions stalling under the policy decision of Government of India in an international contract,

cannot be called in question in a writ petition before the High Court in India. It is far beyond the realm of judicial review as certain conditions cannot be effectively adjudicated by the Indian Courts. Therefore, the Writ Court has rightly rejected the plea on the ground that the JICA was not a party and the writ petition instituted by the very same appellant is not entertainable.

10. In support, the case of ***National High Speed Rail Corporation Limited vs. Montecarlo Limited and Another***[1], wherein the international contract between the Government of India and JICA was adjudicated by the Hon'ble Supreme Court of India. In paragraph 3.2, the submission of Shri.Metha, the learned Solicitor General was recorded as follows:

> "***3.2*** *It is further submitted by Shri Mehta, learned Solicitor General that in the present case when the original writ petitioner submitted its bid/technical bid and when the same was evaluated at the technical evaluation stage, the technical bid submitted by the original writ petitioner was found to be non-responsive on the ground of (i) non-signing of*

1. (2022) 6 SCC 401

Form CON: 2.0 pending litigation; and ii) non-signing of 3.0 litigation history in the physically submitted bid by the authorised representative of the original writ petitioner. It is submitted that as such the bid document was prepared by JICC and approved by JICA. It is submitted that in the present case when the bids submitted by the respective bidder were evaluated by JICC as per JICA'S International Guidelines, the same was approved by the Tender Committee of the appellant, which was finally concurred and approved by JICA. It is submitted that the decision to hold that the bid was non-responsive was of JICC, which has been approved by JICA."

11. In paragraphs 17 and 18, the Hon'ble Supreme Court made the following observations:

*"**17.** From the impugned judgment and order[2] passed by the High Court, it appears that what is weighed by the High Court is that some of the bidders were called for negotiation and the original writ petitioner was not called for the negotiation and*

2. 2021 SCC Online Del 4112

therefore the High Court has held that the action of the appellant is discriminatory and violative of Article 14 of the Constitution of India. However, the High Court has not appreciated that it was the decision of JICC concurred by JICA that the bid submitted by the original writ petitioner was non-responsive and non-compliant to the technical requirements of the bidding documents. It appears that JICC thought it fit to call clarification from some of the bidders at the initial stage, however, it was found that the bid submitted by the respondent-original writ petitioner was suffering from material deviation, JICC thought it fit not to call for any explanation and/ or clarification from the original writ petitioner and the bid submitted by the respondent-original writ petitioner was rejected at the first stage itself i.e. at the stage of technical evaluation.

18. *At the cost of repetition, it is observed that the appellant herein acted as per the decision of JICC concurred by JICA. As per the contractual obligation and the terms and conditions of the loan agreement as well as the Guidelines for procurement under the*

Japanese ODA loans and the memorandum of understanding and the terms and conditions on which JICA agreed to fund a huge sum of approximately Rs 1 lakh crores, JICC and JICA can be said to be the final authority and no contrary decision to the decision of JICC/JICA could have been taken by the appellant, more particularly, with respect to the bidding process, etc. It cannot be disputed that being the funding agency, who has agreed to fund such a huge amount, role of JICA is very important and JICA would always have an upper hand and the say in the entire Project. From the material on record, we are satisfied that the bidding procedure adopted is transparent, fair and does not suffer from any arbitrariness. It is required to be noted that as such there are no allegations of mala fides and/or favouritism either against the appellant or against JICC and/or JICA."

12. With reference to the contentions raised by the learned Advocate General, the learned Senior Counsel for the appellant would solicit the attention

of this Court to paragraph 29 of the very same judgment, where the Hon'ble Supreme Court posed a specific issue, and the relevant extract from paragraph 29 is as follows:

> *"**29.** Thus, from the aforesaid decisions, it can be seen that a court before interfering in a contract matter in exercise of powers of judicial review should pose to itself the following questions:*
>
> *(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"? And*
>
> *(ii) Whether the public interest is affected?*
>
> *If the answers to the above questions are in the negative, then there should be no interference under Article 226."*

13. Relying on the above issue framed by the Apex Court, the learned

Senior Counsel would reiterate that in the event of challenge on the ground of process adopted or a decision being arbitrary or irrational, the High Court can interfere. Therefore, there is no absolute bar to entertain a writ petition. The learned Senior Counsel emphasised that the merits raised by the appellant should be taken into consideration.

14. This Court is of the considered opinion that to establish arbitrariness and irrationality, the appellant/writ petitioner's contention that opportunities have been denied to several other companies to participate in the tender process. is insufficient, more specifically, in cases involving international agreements / contracts with special or specific conditions between two countries, mala fide arbitrariness or irrationality must be apparent and to be established factually for the purpose of granting relief. Even if established, relief cannot interfere with contractual obligations between two countries when one party to the contract/agreement is not a party to the proceedings in Indian Courts.

15. Therefore, the Hon'ble Supreme Court considered two key aspects in

the said case:

(1) The scope of power of judicial review of the High Court under Article 226 of the Constitution of India to adjudicate terms and conditions of an international contact / agreement between two countries.

(2) Whether the Indian Authorities while executing the agreement / contract have taken a decision in an arbitrary manner, so as to deprive any person to participate in the tender or otherwise.

16. The scope of adjudication in respect of second issue is limited to the implementation of the contract and cannot be extended to interfere with the terms and conditions agreed upon between the two countries, especially when one party is a foreign country.

17. In the present case, the Writ Court found that the eligibility criteria fixed in the tender notification were based on the contract between the Government of India and JICA and consequently, the Court held that the relief sought for by the appellant cannot be granted.

18. Let us now consider the observations further made by the Hon'ble Supreme Court of India in the case of ***National High Speed Rail Corporation Limited,*** cited *supra*. In paragraph 30 of the said judgment, it is held as follows:

> *"**30.** Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand and when a conscious decision was taken by JICC/JICA holding the bid submitted by the original writ petitioner as non-responsive/non-compliant to the technical requirements of the bidding documents and suffering from material deviation, we are of the opinion that the High Court has erred in interfering with the tender process and interfering with the decision of JICC/JICA rejecting the bid submitted by the original writ petitioner at technical stage."*

19. The scope of judicial review has been considered by the Apex Court in paragraphs 37 and 38 of the judgment as under;

> *"**37.** The scope of judicial review in such foreign funded contract should be far much less than*

the ordinary Government funded contracts funded from Consolidated Fund of India. The scope of judicial review in such foreign funded contracts/projects would be restricted and minimal. In such foreign funded contracts, the only ground for judicial review ought to be on a limited aspect i.e. the action of the executing authority does not suffer from favouritism or nepotism and based on the grounds which have been concealed from the foreign financing authority, if disclosed, would have persuaded the financing authority to cancel the contract.

38. *The High Court ought to have appreciated that the Bullet Train Project is a result of long-drawn deliberations between the Government of India on the one hand and the Government of Japan on the other. That thereafter a loan agreement came to be executed between Japan International Cooperation Agency ("JICA") and Hon'ble the President of India and JICA agreed to fund approximately Rs.1 lakh crores for the project on the terms and conditions mentioned in the loan agreement and the other agreed terms including the terms and conditions of the bid document shall be* *finalised by JICA/JICC. The bidding documents are based on JICA's standard bidding documents as well as based on JICA's procurement guidelines, which form an integral part of the loan agreement. Therefore, any decision contrary to the terms and conditions of the bidding document would be altering the terms and conditions of the loan agreement, which would not be permissible. JICA has a vital role to play in such contracts."*

20. Pertinently, the case cited *supra* also pertained to an agreement between Government of India and JICA. Therefore, the said principles laid down in that case are applicable to the present case.

21. The learned counsel appearing on behalf of the 4th respondent in the writ petition in addition to relying on the judgment in the case of ***National High Speed Rail Corporation Limited*** cited *supra* also cited the judgment of the Hon'ble Supreme Court in the case of ***Arun Kumar Agrawal vs. Union of India***

and Others[3]**,** wherein, the Apex Court made the following observations to a question raised:

> *"**30.** The question that falls for consideration in this case is whether this Court sitting in this jurisdiction is justified in interfering with a complex economic decision taken by a State or its instrumentalities in the absence of violation of any statutory provision or proof of mala fide or on extraneous and irrelevant considerations.*

22. The response provided by the Apex Court reads as under:

> *"**38.** We notice that the ONGC and the Government of India have considered various commercial and technical aspects flowing from the PSC and also its advantages that ONGC would derive if the Cairn and Vedanta deal was approved. This Court sitting in the jurisdiction cannot sit in judgment over the commercial or business decision taken by parties to the agreement, after evaluating and assessing its monetary and financial implications,*

3. CDJ 2013 SC 417

unless the decision is in clear violation of any statutory provisions or perverse or for extraneous considerations or improper motives. States and its instrumentalities can enter into various contracts which may involve complex economical factors. State or the State undertaking being a party to a contract, have to make various decisions which they deem just and proper. There is always an element of risk in such decisions, ultimately it may turn out to be a correct decision or a wrong one. But if the decision is taken bona fide and in public interest, the mere fact that decision has ultimately proved to be a wrong, that itself is not a ground to hold that the decision was mala fide or done with ulterior motives.

***39.** Matters relating to economic issues, have always an element of trial and error, so long as a trial and error are bona fide and with best intentions, such decisions cannot be questioned as arbitrary, capricious or illegal. This Court in State of M.P. and others v. Nandlal Jaiswal and others (1986) 4 SCC 566 referring to the Judgment of Frankfurter J. in Morey vs. Dond 354 US 457 held that "we must not* *forget that in complex economic matters every decision is necessarily empiric and it is based on experimentation or what one may call "trial and error method" and, therefore, its validity cannot be tested on any rigid "a priori" considerations or on the application of any straight jacket formula." In Metropolis Theatre Co. v. State of Chicago 57 L Ed 730 the Supreme Court of the United States held as follows:*

"The problem of government are practical ones and may justify, if they do not require, rough accommodation, illogical, if may be, and unscientific. But even such criticism should not be hastily expressed. What is best is not discernible, the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review. It is only its palpably arbitrary exercises which can be declared void."

23. Loan agreement for Chennai Metro Project (Phase-2) between Japan International Corporation Agency and the Hon'ble President of India dated

21.12.2018 states that "the Exchange of Notes between the Government of Japan and the Government of India dated December 2, 2018, concerning a Japanese loan to be extended with a view to promoting the economic stabilization and development efforts of India".

24. Article 1 is about Amount and Purchase of loan indicate that JICA agrees to lend the Borrower an amount not exceeding Seventy Five Billion Five Hundred and Niteen Million Japanese Yen (¥75,519,000,000) as the principal for the implementation of Chennai Metro Project (Phase 2) described in Schedule 1 attached to the agreement.

25. Interest and method of payment agreed between Government of India and JICA is that "the Borrower shall pay the interest to JICA semi-annually on December 20 and June 20 each year in arrears at the rate of zero point two percent (0.2%) per annum on the principal corresponding to categories (a) and (b) below disbursed and outstanding for each interest period: (a) the principal of the Loan allocated to Category (A) (Provided for in Section 1 of Schedule 2

attached): and (b) any principal reallocated to Category (C) (provided for in Section 1. of Schedule 2 attached) and disbursed with respect to Section 2. (1) (a) above".

26. In the context of the terms and conditions of loan procurement procedures also contemplated in the agreement and it reads as under:

> *"**Section 1. Guidelines to be used for procurement under the Loan***
>
> *(1) Procurement of all goods and services, except consulting services, to be financed out of the proceeds of the Loan shall be in accordance with the Guidelines for Procurement under Japanese ODA Loans dated April 2012 (hereinafter referred to as the "Procurement Guidelines").*
>
> *(2) Employment of consultants to be financed out of the proceeds of the Loan shall be in accordance with the Guidelines for the Employment of Consultants under Japanese ODA Loans dated April 2012 (hereinafter referred to as the "Consultant Guidelines")*

Section 2. Eligible Nationality

(1) The Eligible Nationality of the Supplier(s) for procurement of all goods and services (including consulting services) to be financed out of the proceeds of the Loan shall be the following:

(a) Japan and India in the case of the prime contractor; and

(b) All countries and areas in the case of the sub-contractors).

(2) With regard to Section 2. (1) above, in case where the prime contractor is a joint venture, such joint venture will be eligible provided that the nationality of a partner is Japan and/or India."

27. A reading of the agreement reveals that the Government of India agreed to specific terms and conditions for borrowing a loan from JICA. This agreement was a policy decision aimed to implement Chennai Metro Rail Project in the public interest.

28. The tender conditions, which was under challenge reveals that those

conditions agreed between Government of India and JICA, as contemplated under procurement procedures has been adopted. Since these conditions align with the contract between The Hon'ble President of India and JICA, High Court cannot adjudicate in exercise of powers of judicial review under Article 226 of the Constitution of India, more specifically, JICA is not a party to the legal proceedings in India.

29. In view of the above legal position, this Court finds no arbitrariness or illegality in prescribing the eligibility criteria in the tender notification.

30. Perusal of the eligibility criteria in terms of the agreement between Government of India and JICA is sufficient enough to form an opinion that the criteria is falling in line with the agreed conditions between two countries, which cannot be a subject matter of judicial review before this Court.

31. Therefore, this Court is not inclined to interfere with the writ order impugned and declines to grant the relief as such sought for. Consequently, the

Writ Appeals and Writ Petition are dismissed. The connected Miscellaneous Petitions are closed. There shall be no order as to costs.

(S.M.SUBRAMANIAM J.)(K.RAJASEKAR J.)
11-03-2025

Jeni
Index:Yes/No
Speaking/Non-speaking order
Internet:Yes
Neutral Citation:Yes/No

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