

Raunaq International Ltd.

Vs

I. V. R. Construction Ltd. and Others

Civil Appeal No. 4892 of 1998

(Sujata V. Manohar, G. B. Pattanaik JJ)

09.12.1998

JUDGMENT

SUJATA V. MANOHAR, J. -

1. The Maharashtra State Electricity Board, the appellant in Civil Appeal No. 4893 of 1998 floated a tender dated 20-12-1997 for design, engineering, manufacture, supply, erection and commissioning of large diameter pipes and steel tanks with all accessories and auxiliaries as prescribed in the bid documents for Units 3 and 4 of Khaperkheda Thermal Power Station, Maharashtra, each unit being of 210 MW. The qualifying requirements of bidders as specified in the tender were, that the bidder should have designed, fabricated/manufactured, supplied, erected and successfully commissioned large diameter piping system comprising the supply of MS pipes not less than 2000 mm diameter and laid/buried for a minimum total length of 3 kms in a thermal power station and the same should be in successful operation for the past two years as reckoned on the date set for opening of the bid. Further, the bidder should have a minimum turnover of Rs. 7.5 crores per annum for the last 3 consecutive years.

2. Under clause 1.4 of the qualifying criteria, it was provided :

"Notwithstanding anything stated above, the owner reserves the right to assess the bidders' capability and capacity to perform, should the circumstances warrant such an assessment in the overall interest of the owner."

Pursuant to the invitation, the appellant-Maharashtra State Electricity Board received tenders from eleven bidders including M/s. I.V.R. Construction Ltd. and M/s. Raunaq International Ltd., who are the two contestants before us. After screening of the bids, a note was submitted by the Technical Director of the Maharashtra State Electricity Board for the consideration of the Board of Directors. The note stated that out of the offers received, four offers were from tenderers who qualified as per the qualifying criteria. M/s. I.V.R. Construction Ltd., Hyderabad was stated to be one of the four such offerers. The note also mentioned that two offerers which included M/s. Raunaq International Ltd., though not meeting the qualifying requirements, had done CW piping for 210 MW units. M/s. I.V.R. Construction Ltd. were recommended by the Technical Director for the placement of the order. The said Company, however, fell short of the requisite experience by one year. The note also stated that the offer of M/s. Raunaq International Ltd. was the most competitive, being Rs. 43,28,316 less than the price quoted by M/s. I.V.R. Construction Ltd.

3. In this connection, it is pointed out by the Maharashtra State Electricity Board that M/s. Raunaq International Ltd. have designed, fabricated and commissioned MS pipes of 2000 mm diameter

buried underground, but for a distance less than 3 kms. They also have the requisite experience of doing such work for thermal power units of 210 MW. They have more than 2 years' experience in this work.

4. The Board of Directors of the Maharashtra State Electricity Board, at its meeting held on 29-6-1998, after considering the note submitted by the Technical Director, decided to accept the offer of M/s. Raunaq International Ltd. in view of the price advantage to the Board and adequate experience of M/s. Raunaq International Ltd. of having completed similar type of work for 210 MW units. The offer of M/s. Raunaq International Ltd. was accordingly accepted and the tender was awarded to it.

5. M/s. I.V.R. Construction Ltd. challenged the decision of the Board in a writ petition filed in the High Court of Bombay. The High Court has passed the impugned interim order under which the High Court stayed the operation of the letter of intent dated 20-7-1998 issued to M/s. Raunaq International Ltd. Hence the present appeal.

6. In these proceedings, the Maharashtra State Electricity Board has filed an affidavit of its Technical Director. It is stated in this affidavit that the offer of M/s. Raunaq International Ltd. was accepted on account of the price advantage to the Board, its offer being the lowest; and also in view of the adequate experience which M/s. Raunaq International Ltd. possessed, having completed similar work in other 210 MW thermal power stations. This was done by relaxing the qualifying criterion which the Board said, it had the right to do, in view of clause 1.4 set out above. The Maharashtra State Electricity Board has also pointed out that M/s. I.V.R. Construction Ltd. also do not satisfy all the qualifying criteria because they do not have two years' experience of such work which is prescribed under the qualifying criteria. Their total experience is of less than a year.

7. Therefore, looking to the fact that relaxation of criteria would have been required in respect of M/s. I.V.R. Construction Ltd. also and in view of the fact that the offer of M/s. Raunaq International Ltd. is the lowest, if the Board has accepted the offer of M/s. Raunaq International Ltd. after weighing their requirements against the qualifications of the two competing bidders, we fail to see how the High Court could have intervened and stayed the operation of the award of contract to M/s. Raunaq International Ltd.

8. This is not a case where any mala fides have been alleged against any member of the Board. Nor is there any allegation of any collateral motive forwarding the contract to M/s. Raunaq International Ltd. The only ground of challenge in the writ petition filed by M/s. I.V.R. Construction Ltd. is that M/s. Raunaq International did not fulfil the qualifying criterion of having laid such pipeline for a distance of 3 kms. But the challenger, M/s. I.V.R. Construction Ltd. also does not fulfil the qualifying criterion. In these circumstances, we fail to see any basis for passing the impugned order.

9. The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which are of paramount importance are commercial considerations. These would be :

- (1) the price at which the other side is willing to do the work;
- (2) whether the goods or services offered are of the requisite specifications;
- (3) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the

tenderer to fulfil the requirements of the job is also important;

(4) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;

(5) past experience of the tenderer and whether he has successfully completed similar work earlier;

(6) time which will be taken to deliver the goods or services; and often

(7) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

10. What are these elements of public interest ? (1) Public money would be expended for the purposes of the contract. (2) The goods or services which are being commissioned could be for a public purpose, such as, construction of roads, public buildings, power plants or other public utilities. (3) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (4) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work - thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g., a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers.

12. When a petition is filed as a public interest litigation challenging the award of a contract by the State or any public body to a particular tenderer, the court must satisfy itself that the party which has brought the litigation is litigating bona fide for public good. The public interest litigation should not be merely a cloak for attaining private ends of a third party or of the party bringing the petition. The court can examine the previous record of public service rendered by the organisation bringing public

interest litigation. Even when a public interest litigation is entertained, the court must be careful to weigh conflicting public interests before intervening. Intervention by the court may ultimately result in delay in the execution of the project. The obvious consequence of such delay is price escalation. If any retendering is prescribed, cost of the project can escalate substantially. What is more important is that ultimately the public would have to pay a much higher price in the form of delay in the commissioning of the project and the consequent delay in the contemplated public service becoming available to the public. If it is a power project which is thus delayed, the public may lose substantially because of shortage in electricity supply and the consequent obstruction in industrial development. If the project is for the construction of a road or an irrigation canal, the delay in transportation facility becoming available or the delay in water supply for agriculture being available, can be a substantial setback to the country's economic development. Where the decision has been taken bona fide and a choice has been exercised on legitimate considerations and not arbitrarily, there is no reason why the court should entertain a petition under Article 226.

13. Hence before entertaining a writ petition and passing any interim orders in such petitions, the court must carefully weigh conflicting public interests. Only when it comes to a conclusion that there is an overwhelming public interest in entertaining the petition, the court should intervene.

14. Where there is an allegation of mala fides or an allegation that the contract has been entered into for collateral purposes and the court is satisfied on the material before it that the allegation needs further examination, the court would be entitled to entertain the petition. But even here, the court must weigh the consequences in balance before granting interim orders.

15. Where the decision-making process has been structured and the tender conditions set out the requirements, the court is entitled to examine whether these requirements have been considered. However, if any relaxation is granted for bona fide reasons, the tender conditions permit such relaxation and the decision is arrived at for legitimate reasons after a fair consideration of all offers, the court should hesitate to intervene.

16. It is also necessary to remember that price may not always be the sole criterion for awarding a contract. Often when an evaluation committee of experts is appointed to evaluate offers, the expert committee's special knowledge plays a decisive role in deciding which is the best offer. Price offered is only one of the criteria. The past record of the tenderers, the quality of the goods or services which are offered, assessing such quality on the basis of the past performance of the tenderer, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded. At times, a higher price for a much better quality of work can be legitimately paid in order to secure proper performance of the contract and good quality of work - which is as much in public interest as a low price. The court should not substitute its own decision for the decision of an expert evaluation committee.

17. Normally before such a project is undertaken, a detailed consideration of the need, viability, financing and cost-effectiveness of the proposed project and offers received takes place at various levels in the Government. If there is a good reason why the project should not be undertaken, then the time to object is at the time when the same is under consideration and before a final decision is taken to undertake the project. If breach of law in the execution of the project is apprehended, then it is at the stage when the viability of the project is being considered that the objection before the appropriate authorities including the court must be raised. We would expect that if such objection or material is placed before the Government, the same would be considered before a final decision is taken. It is common experience that considerable time is spent by the authorities concerned before a

final decision is taken regarding the execution of a public project. This is the appropriate time when all aspects and all objections should be considered. It is only when valid objections are not taken into account or ignored that the court may intervene. Even so, the court should be moved at the earliest possible opportunity. Belated petitions should not be entertained.

18. The same considerations must weigh with the court when interim orders are passed in such petitions. The party at whose instance interim orders are obtained has to be made accountable for the consequences of the interim order. The interim order could delay the project, jettison finely worked financial arrangements and escalate costs. Hence the petitioner asking for interim orders in appropriate cases should be asked to provide security for any increase in cost as a result of such delay or any damages suffered by the opposite party in consequence of an interim order. Otherwise public detriment may outweigh public benefit in granting such interim orders. Stay order or injunction order, if issued, must be moulded to provide for restitution.

19. A somewhat different approach may be required in the cases of award of a contract by the Government for the purchase of items for its use. Judicial review would be permissible only on the established grounds for such review including mala fides, arbitrariness or unreasonableness of the *Wednesbury* variety. Balance of convenience would play a major role in moulding interim relief.

20. There is a third variety of transactions entered into by the Government which comes up for consideration before the courts. This is where the Government grants licences or permissions for a fee or consideration to private parties, enabling them to commercially exploit such a licence or permission. The principles of judicial review are no different in such a case. However, grant of stay or injunction in such cases may or may not result in prejudice to the public revenue, depending on the facts of the case. At times, granting of a licence or permission may cause public harm, e.g., in the case of damage to the ecology. Interim orders will have to be moulded in such cases on a consideration of all relevant factors, providing for restitution where required in public interest.

21. It is unfortunate that despite repeated observations of this Court in a number of cases, such petitions are being readily entertained by the High Courts without weighing the consequences. In the case of *Fertilizer Corpn. Kamgar Union (Regd.) v. Union of India* (1981) 1 SCC 568) this Court observed that if the Government acts fairly, though falters in wisdom, the court should not interfere. The Court observed : (SCC p. 584, para 35)

"35. A pragmatic approach to social justice compels us to interpret constitutional provisions, including those like Articles 32 and 226, with a view to see that effective policing of the corridors of power is carried out by the court until other ombudsman arrangement ... emerges. ... The court cannot usurp or abdicate, and the parameters of judicial review must be clearly defined and never exceeded. If the Directorate of a government company has acted fairly, even if it has faltered in its wisdom, the court cannot, as a super auditor, take the Board of Directors to task. This function is limited to testing whether the administrative action has been fair and free from the taint of unreasonableness and has substantially complied with the norms of procedure set for it by rules of public administration."

22. In *Tata Cellular v. union of India* ((1964) 6 SCC 651) this Court again examined the scope of judicial review in the case of a tender awarded by a public authority for carrying out certain work. This Court acknowledged that the principles of judicial review can apply to the exercise of contractual powers by government bodies in order to prevent arbitrariness or favouritism. However,

there are inherent limitations in the exercise of that power of judicial review. The Court also observed that the right to choose cannot be considered as an arbitrary power. Of course, if this power is exercised for any collateral purpose, the exercise of that power will be struck down : (SCC p. 675, para 71)

"71. Judicial quest in administrative matters has been to find the right balance between the administrative discretion to decide matters ... and the need to remedy any unfairness. Such an unfairness is set right by judicial review."

After examining a number of authorities, the Court concluded (at pp. 687-88) as follows :

- (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.
- (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 or quasi-administrative sphere. However, the decision can be tested by the application of the "Wednesbury principle" of reasonableness and the decision should 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.

23. The same view has been reiterated in *Asia Foundation & Construction Ltd. v. Trafalgar House Construction (I) Ltd.* ((1971) 1 SCC 738) the Court observing that judicial review of contractual transactions by government bodies is permissible to prevent arbitrariness, favouritism or use of power for collateral purposes. This Court added a further dimension to the undesirability of intervention by pointing out that where the project is a high-cost project for which loans from the World Bank or other international bodies have been obtained after following the specifications and procedure of such a body, it would be detrimental to public interest to interfere. The same principles have also been reaffirmed in *New Horizons Ltd. v. Union of India* ((1995) 1 SCC 478) with this Court again emphasising the need to allow for certain flexibility in administrative decision-making, observing that the decision can be challenged only on the Wednesbury principle of unreasonableness, i.e., unless the decision is so unreasonable that no sensible person would have arrived at such a decision, it should not be upset. In *Delhi Science Forum v. Union of India* ((1996) 2 SCC 405) this Court once again observed that if a reasonable procedure has been followed, the decision should not be challenged except on the Wednesbury principle of unreasonableness.

24. Dealing with interim orders, this Court observed in *CCE v. Dunlop India Ltd.* ((1985) 1 SCC 260 : 1985 SCC (Tax) 75 : (1985) 2 SCR 190) (SCR 190 at p. 196) that an interim order should not be granted without considering the balance of convenience, the public interest involved and the

financial impact of an interim order. Similarly, in *Ramniklal N. Bhutta v. State of Maharashtra* ((1997) 1 SCC 134) the Court said that while granting a stay, the court should arrive at a proper balancing of competing interests and grant a stay only when there is an overwhelming public interest in granting it, as against the public detriment which may be caused by granting a stay. Therefore, in granting an injunction or stay order against the award of a contract by the Government or a government agency, the court has to satisfy itself that the public interest in holding up the project far outweighs the public interest in carrying it out within a reasonable time. The court must also take into account the cost involved in staying the project and whether the public would stand to benefit by incurring such cost.

25. Therefore, when such a stay order is obtained at the instance of a private party or even at the instance of a body litigating in public interest, any interim order which stops the project from proceeding further must provide for the reimbursement of costs to the public in case ultimately the litigation started by such an individual or body fails. The public must be compensated both for the delay in implementation of the project and the cost escalation resulting from such delay. Unless an adequate provision is made for this in the interim order, the interim order may prove counter productive.

26. In the present case, it was submitted that the terms and conditions of the tender specified the requisite qualifying criteria before a person could offer a tender. The criteria which were so laid down could not have been relaxed because such a relaxation results in a denial of opportunity to others. In support, the respondents relied upon *Ramana Dayaram Shetty v. International Airport Authority of India* ((1979) 3 SCC 489). In that case, the Court had held judicial review as a check on the exercise of arbitrary powers by the State and as a check on its power to grant largess. The Court also observed that when the exercise of discretion is structured in terms of the tenders which have been invited, the discretion must be exercised in accordance with the norms so laid down. The same view has been taken by this Court in *Premium Granites v. State of T. N.* ((1994) 2 SCC 691) where this Court observed that where rational non-discriminatory norms have been laid down for granting of tenders, a departure from such norms can only be made on valid principles. These principles enunciated by this Court are unexceptional.

27. In the present case, however, the relaxation was permissible under the terms of the tender. The relaxation which the Board has granted to M/s. Raunaq International Ltd. is on valid principles looking at the expertise of the tenderer and his past experience although it does not exactly tally with the prescribed criteria. What is more relevant, M/s. I.V.R. Construction Ltd. who have challenged this award of tender themselves do not fulfil the requisite criteria. They do not possess the prescribed experience qualification. Therefore, any judicial relief at the instance of a party which does not fulfil the requisite criteria seems to be misplaced. Even if the criteria can be relaxed both for M/s. Raunaq International Ltd. and M/s. I.V.R. Construction Ltd., it is clear that the offer of M/s. Raunaq International Ltd. is lower and it is on this ground that the Board has accepted the offer of M/s. Raunaq International Ltd. We fail to see how the award of tender can be stayed at the instance of a party which does not fulfil the requisite criteria itself and whose offer is higher than the offer which has been accepted. It is also obvious that by stopping the performance of the contract so awarded, there is a major detriment to the public because the construction of two thermal power units, each of 210 MW, is held up on account of this dispute. Shortages of power have become notorious. They also seriously affect industrial development and the resulting job opportunities for a large number of people. In the present case, there is no overwhelming public interest in stopping the project. There is no allegation whatsoever of any mala fides or collateral reasons for granting the contract to M/s. Raunaq International Ltd.

28. In our view, the High Court has seriously erred in granting the interim order. The appeals are, therefore, allowed and the impugned order is set aside. M/s. I.V.R. Construction Ltd. shall pay to the appellants herein the costs of the appeals.