SUPREME COURT OF INDIA

Siemens Aktiengeselischaft & S.Ltd.

Vs.

DMRC Ltd.

C.A.No.2068 of 2014

(T.S. Thakur and C.Nagappan JJ.)

14.02.2014

JUDGMENT

T.S. THAKUR, J.

1. Leave granted.

2. A Division Bench of the High Court of Delhi has by a common order passed in Writ Petition (C) No.1853 of 2013 filed by the appellant and Writ Petition No.2615 of 2013 filed by Alstom Transport India Ltd. declined to interfere with the award of a contract for the supply of 486 Standard Gauge Cars Electrical Multiple Units meant for use in Phase-III of the Mass Rapid Transit System ('MRTS' for short) for Delhi and its extension corridors. The High Court has taken the view that the process of evaluation of the bids received from eligible bidders culminating in the award of a contract in favour of respondent No.2-Hyundai Rotem Company ('HR' for short) was transparent and did not suffer from any illegality, irregularity or perversity of any kind to warrant interference by it. The High Court held that the bidders were well aware of and had accepted the tender conditions which were free from any vagueness or uncertainty. The parameters of evaluation conditions were also held to have been applied uniformly to all the bidders under a procedure that was open, transparent and fair as required by law. The present appeal assails the correctness of that judgment and order. Alstom Transport India Ltd. & Ors.-Writ-Petitioners in connected Writ Petition No.2615 of 2013 have, however, remained content with the view taken by the High Court and have not chosen to appeal.

3. Respondent-Delhi Metro Rail Corporation ('DMRC' for short) has planned to implement Phase-III of the MRTS for Delhi to keep pace with the ever increasing traffic demands in Delhi. Phase-III of the MRTS, Delhi comprises metro corridors of Mukundpur-Rajori Garden-Dhaula Kuan - Maujpur - Gokulpuri and Janakpuri (West)–Munirka - Kalkaji - Kalindi Kunj - Botanical Garden - (Noida). The project, it is common ground, is financed with the help of a loan secured by the DMRC from Japan International Cooperation Agency ('JICA' for short). The loan agreement, inter alia, stipulates the bid procedure to be followed by DMRC. What is noteworthy is that the procedure, inter alia, provides for submission of tenders to JICA for review, concurrence and analysis of bids by the DMRC and reserves with the JICA the discretion to convey its views regarding the analysis of the bids and the proposal for award of the works.

4. In keeping with the requirements of the agreement between DMRC and JICA, the former invited sealed tenders in two parts (Technical & Price Bid) on International Competitive Bid ('ICB' for short) basis for the design, manufacture, supply, testing, commissioning and training of 486 number of Standard Gauge Cars Electrical Multiple units referred to earlier at an estimated budget cost of Rs.3500 crores funded by JICA. Pre-bid meetings were held to answer the queries, if any, raised by the bidders. The DMRC in the meantime issued as many as 9 Addenda which necessitated the change in the dates fixed for submission of bids to enable the bidders to formulate their offers and make their bids in accordance with the terms and conditions finally stipulated for the purpose. DMRC eventually received eight bids including one submitted by the appellant before us. The technical bids were opened on 18th September, 2012 whereupon only six of the bidders including the appellant were declared to be eligible. With the opening of the technical bids GEC values which the bidders were required to submit as a part of their technical bid and which were relevant and to a great extent critical for evaluation of the price bid under the applicable terms and conditions also became known to the bidders. The financial bids offered by these six bidders were then opened on 9th February, 2013 and the bid amount along with GEC values offered by each bidder announced by the DMRC. The price quotations of the six bidders found eligible were as under:

|Bidder |Grand Total in |INR per Car |Position before | | |INR |(without |Loading due to | | | |loading) |difference in | | | | |GEC values | |Siemens Consortium |3625,27,92,409 |7,45,94,223 |L-1 | |Bombardier |4242,27,83,378 |8,72,89,678 |L-2 | |Consortium | | | | |Hyundai ROTEM |4290,57,94,689 |8,82,83,528 |L-3 | |Alstom Consortium |4373,87,65,001

|8,99,97,459 |L-4 | |CAF Consortium |4614,18,66,794 |9,49,42,113 |L-5 | |Hitachi + BHEL |4891,32,60,656 |10,06,44,569 |L-6 |

5. Significantly, however, the above did not represent the true inter se position of the bidders. That was so because apart from the price quotation, the terms and conditions of the tender notice required loading of GEC values duly converted into Indian rupee to the price quotation of each eligible bidder. The GEC values in turn comprised two distinct components, namely, 'X' factor representing the electricity consumption for the operation of the train without HVAC and 'Y' factor for operation of HVAC. The GEC values offered by the six bidders found technically compliant were as under:

|S.No. |Bidder |Other than |HVAC ('Y') |Total| | | |HVAC ('X) | | | |1 |ALSTOM |1434 |595 |2029 | |2 |BTC |1621 |564 |2185 | |3 |CAFC |1159 |790 |1949 | |4 |HBC |1767 |514 |2281 | |5 |HRC |1259 |567 |1826 | |6 |SIEMENS |1560 |786 |2346 |

6. In terms of Annexure ITT-8 the GEC value of respondent No.2 which was the lowest was taken as the baseline for the purpose of loading the rupee equivalent of the higher values offered by other bidders on to their price bids. The Indian rupee conversion of the said value above the baseline, proportionate to the higher GEC values was worked out as under:

|S.No.|Bidder |GEC |GEC for |INR | | | |('X' + |loading | | | | |'Y') | | | | | |KWH | | | |1 |ALSTOM |2029 |203 |6,911,264,587.08 | |2 |BTC |2185 |359 |12,222,384,171.24 | |3 |CAFC |1949 |123 |4,187,613,518.28 | |4 |HBC |2281 |455 |15,490,765453.80 | |5 |HRC |1826 |O |0 | | | | |(baseline) | | |6 |SIEMENS |2346 |520 |17,703,731,947.20 |

7. The position that emerged after the GEC values component was loaded to the price bid of the bidder was as under:

|Bidder |Grand |INR per|Posit|Grand |INR per |Posit|Total|SEC | | |Total in |Car |ion |Total |Car |ion |Energ|valu| | |INR |(withou|befor|(with |(with |after|y |e | | | |t |e |energy |loading)|loadi|(kWH)|(kWH| | | |loading|Loadi|loading) | |ng | |/ | | | |) |ng |in INR | | | |1000| | | | | | | | |GTKM| | | | | | | | |) | |Siemens|3625,27,92|7,45,94|L-1 |5395,65,24|11,10,21|L-4 |2346 |55.7| |Consort|,409 |,223 | |,355 |,655 | | |1 | |ium | | | | | | | | |Bombard|4242,27,83|8,72,89|L-2 |5464,51,67|11,24,38|L-5 |2185 |51.8| |ier

|,378 |,678 | |,548 |,616 | | |9 | |Consort| | | | | | | | |ium | | | | | | | | |Hyundai|4290,57,94|8,82,83|L-3 |4290,57,94|8,82,83,|L-1 |1826 |43.3| |ROTEM |,689 |,528 | |,690 |528 | | |6 | |Alstom |4373,87,65|8,99,97|L-4 |5065,00,29|10,42,18|L-3 |2029 |48.1| |Consort|,001 |,459 | |,588 |,168 | | |8 | |ium | | | | | | | | |CAF |4614,18,66|9,49,42|L-5 |5032,94,80|10,35,58|L-2 |1949 |46.2| |Consort|,794 |,113 | |,313 |,601 | | |8 | |ium | | | | | | | | |Hitachi|4891,32,60|10,06,4|L-6 |6440,40,26|13,25,18|L-6 |2281 |54.1| |+ BHEL |,656 |4,569 | |,108 |,572 | | |7 |

8. It is evident from a comparative study of the charts extracted above, that while the appellant was L-1 in the price bid, it went down to L-4 after GEC value was loaded to its price bid. On the contrary respondent No.2-HR who was L-3 in the price bid rose to L-1 position on account of its low GEC value in comparison to a higher GEC value offered by the appellant.

9. Allotment of the award in favour of HR as the lowest bidder, thus, appeared as a writing on the wall to the appellant who sent a communication dated 12th February, 2013 to DMRC alleging that the GEC values offered by HR were untenable and unsustainable and pointing out that since the appellant's price bid was lesser than that of the HR by 665 crores (approx.) it should be taken as L-1 instead of determining the inter se position of the bidders on the basis of a supposedly anticipated saving in the consumption of energy on a lifecycle of 30 years. Yet another letter dated 25th February, 2013 the appellant called for evaluation of energy values by an independent third party agency so as to ascertain whether the GEC values offered by HR were achievable. Yet another letter dated 1st March, 2013 to the same effect having failed to cut any ice with the DMRC, the appellant preferred Writ Petition No.1853 of 2013 before the High Court of Delhi. That writ petition was notified for hearing on 1st May, 2013. In the meantime DMRC issued a Letter of Acceptance in favour of HR under intimation to the appellant. The appellant, therefore, sought a restraint order against the award of the contract before the High Court who in turn accepted an undertaking given by the counsel for the DMRC and HR that they will not act in pursuance of the letter of award pending disposal of the writ petition.

10. Alstom Transport India Ltd. was the only other bidder aggrieved by the award of the contract who filed Writ Petition No.2615 of 2013 challenging the tender process. Both the writ petitions were eventually heard by the High Court on 1st May, 2013 and dismissed by the order under appeal before us.

11. Appearing for the appellant, Mr. U.U. Lalit, learned senior counsel, fairly conceded that the appellant had not alleged any mala fides, bias or bad faith in the matter of evaluation of the bids by the DMRC or any process connected therewith nor even in the award of the contract in favour of HR, the successful bidder. He contended that the tender notice no doubt required GEC values to be offered by the bidders to be made use of in the process of the evaluation of the bids but such values were not sacrosanct or immune from scrutiny and evaluation to determine whether the same were at all achievable. He submitted that since all the six bidders competing for the contract are significant players in the international market, they could with a reasonable amount of certainty say whether or not the GEC values offered by the bidders were sustainable. It was contended by Mr. Lalit that while the GEC value offered by the appellant was the highest, the one offered by the respondent successful bidder for 'X' factor was wholly untenable. He urged that the terms of the tender notice required the GEC values offered by the bidders to be validated before they could be used for processing the bids. He drew considerable support from a report submitted by the Director, Ministry of Urban Development, Government of India, to suggest that the stimulation test conducted by DMRC as a part of the process of verification and validation of the GEC value offered by HR was not accurate and urged that the Government of India had appointed a two-member Committee to check the evaluation process of the bids. The report of the Committee filed by the Government in this Court in a sealed cover could, according to the learned Counsel, throw considerable light on the subject and help this Court in deciding whether an independent verification of the GEC values was necessary.

12. Mr. Andhyarujina, learned counsel for the respondent-DMRC, on the other hand, argued that the bids offered by the eligible tenderers were evaluated by three different Committees i.e. the Evaluation Committee, the Appraisal Committee and finally by the Tender Committee in a fair and transparent manner. On receipt of the representations from the appellant- Siemens, Bombardier, Alstom and Hitachi regarding the GEC values offered by HR, the Board of Directors of DMRC constituted a sub-Committee to consider the said representations. The Board sub-Committee consisted of six directors out of whom three were Functional Directors besides MD of the DMRC, a nominee Director of MoUD of Indian Railways and one independent Director. The Sub-Committee met on 4th and 5th March, 2013 and thoroughly examined the issues raised in the representation and found the detailed explanations provided in the Tender Committee Minutes to be satisfactory. The Sub-Committee, therefore, agreed with the recommendations of the Tender Committee culminating in the issue of a Letter of Acceptance to respondent- HR.

Our attention was drawn to the counter- affidavit filed by the DMRC in which the process of evaluation of the bids and the GEC values has been set out. The counter-affidavit further states that the DMRC was fully satisfied about the achievability of the GEC values offered by HR. There was, therefore, no room for validation of the GEC values by any outside agency.

13. It was further contended by Mr. Andhyarujina that the tender conditions specifically provide for levy of a penalty in case of failure of the committed GEC values. He referred to ERTC 3.24.1 according to which the defaulting Contractor shall be liable to pay penalty at the rate of Rs.4.03 crores per unit of electricity committed in excess of the GEC values declared by it. The penalty stipulated thus works out to be approximately 18.47% which is significantly higher than the rupee component loaded for each unit, argued the learned counsel. This implies that the lowest tenderer is under an onerous obligation to make good the GEC values or else end up paying a penalty at a rate which is higher than the amount by which the financial bid has been loaded on a per unit of energy basis. The Letter of Acceptance issued to HR also makes a specific provision for levy of penalty and, thus, fully secures the interest of the DMRC.

14. Reliance upon the additional documents and the report of the Committee appointed by the MoUD was, according to Mr. Andhyarujina, wholly misplaced. He submitted that there was no occasion for the Government to appoint a Committee for evaluation of the bids received by DMRC which was an autonomous entity. The appointment of the Committee at the instance of the Minister in disregard of the observations made by the Secretary MoUD was not proper, argued the learned counsel, especially when the matter was pending adjudication before the High Court. The appointment of the Committee was in any case not disclosed to the High Court by the Union of India on 1st May, 2013 when the matter was taken up for hearing. It was contended that the DMRC had at all times maintained that there was no question of any enquiry by an outside body regarding the evaluation of the bids received by it not even by the Government of India. He drew support for that submission from the following statement made in the affidavit filed by the Union of India in this Court:

> "All tenders are floated and finalized by respective Metro Rail Corporations including DMRC. MoUD has no role in award/cancellation of any contract/tender."

15. It was argued that the DMRC had also in its reply dated 14th August, 2013 sent to the Government clearly stated that it would not respond to the preliminary observations of the Committee as the matter had in the meantime travelled to this Court and was sub judice. Legal opinion obtained by the DMRC from a Senior Advocate of this Court, also advised that in a matter that is sub judice, any report by any outside Enquiry Committee appointed by the Government would be impermissible and improper nor would it be advisable for DMRC to participate in any such exercise. In the premises it was contended that the Report by the Enquiry Committee submitted to this Court in a sealed cover need not be looked into as the same was wholly extraneous to a judicial review of the process of evaluation and eventual award of the contract by DMRC, the authority competent to do so. Relying upon the decisions of this Court in Amrik Singh Lyallpuri v. Union of India & Ors. (2011) 6 SCC 535 and Union of India v. K.M. Shankarappa (2001) 1 SCC 582, it was argued that administrative review of a judicial decision was not legally permissible. It was also contended by Mr. Andhyarujina that pursuant to the allotment made in his favour, HR had taken substantial steps towards implementation of the project and that interference with the award of the contract at this belated stage was neither in public interest nor otherwise justified in the facts and circumstances of the case.

16. Appearing for the respondent No.2-HR, Mr. Venugopal, learned senior counsel adopted the submissions of Mr. Andhyarujina and took strong exception to the constitution of a Committee by the Minister of Urban Development, Government of India on a subject which was subjudice before the High Court. It was contended by Mr. Venugopal that the constitution of the Committee was not only against the sound advice tendered by the Secretary to the Government, Minister of Urban Development Department but was tantamount to interference with the course of justice. Relying upon the decision of the Full Bench of the High Court of Patna in The King v. Parmanand and Ors. AIR 1949 Patna 222 and D. Jones Shield v. N. Ramesam & Ors. AIR 1955 AP 156; In Re: P.C. Sen AIR 1970 SC 1821 and Jang Bahadur Singh v. Baij Nath Tiwari AIR 1969 SC 30, Mr. Venugopal argued that when a matter is pending adjudication before a Court of law, nothing can be done which might disturb the course of justice by either interfering with the judicial process or prejudging the merits of the case or by usurping the functions of the Court having seisin over the proceedings. Any such practice, argued the learned counsel, was fraught with danger and would amount to opening the door for contempt for those responsible for such interference. It was further contended by Mr. Venugopal that judicial review in tender cases was limited to examining the decision-making process and not the decision itself. Reliance in support of that

submission was placed by the learned counsel upon the decisions of this Court in Tata Cellular v. Union of India (1994) 6 SCC 651; Asia Foundation & Construction Ltd. v. Trafalgar House Construction (1997) 1 SCC 738; Monarch Infrastructure (P) Ltd. v. Ulhasnagar Municipal Corpn., (2000) 5 SCC 287; Jagdish Mandal v. State of Orissa (2007) 14 SCC 517 and Heinz India (P) Ltd. v. State of U.P. (2012) 5 SCC 443. It was submitted that the decision making process in the instant case was transparent, fair and reasonable and that the High Court had after a careful examination of all aspects correctly held that there was no illegality or irregularity in the said process to warrant interference.

17. Principles governing judicial review of administrative decisions are now fairly well-settled by a long line of decisions rendered by this Court, since the decision of this Court in Ramana Dayaram Shetty v. International Airport Authority of India and Ors. (1979) 3 SCC 489 which is one of the earliest cases in which this Court judicially reviewed the process of allotment of contracts by an instrumentality of the State and declared that such process was amenable to judicial review. Several subsequent decisions followed and applied the law to varied situations but among the latter decisions one that reviewed the law on the subject comprehensively was delivered by this Court in Tata Cellular's case (supra) where this Court once again reiterated that judicial review would apply even to exercise of contractual powers by the Government and Government instrumentalities in order to prevent arbitrariness or favouritism. Having said that this Court noted the inherent limitations in the exercise of that power and declared that the State was free to protect its interest as the guardian of its finances. This Court held that there could be no infringement of Article 14 if the Government tried to get the best person or the best quotation for the right to choose cannot be considered to be an arbitrary power unless the power is exercised for any collateral purpose. The scope of judicial review, observed this Court, was confined to the following three distinct aspects:

> (i) Whether there was any illegality in the decision which would imply whether the decision making authority has understood correctly the law that regulates his decision making power and whether it has given effect to it;
>
> (ii) Whether there was any irrationality in the decision taken by the authority implying thereby whether the decision is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at the same; and

(iii) whether there was any procedural impropriety committed by the decision making authority while arriving at the decision.

18. The principles governing judicial review were then formulated in the following words:

(i) The modern trend points to judicial restraint in administrative action.

(ii) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(iii) 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.

(iv) 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.

(v) 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. 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.

(vi) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

19. In M.P. Oil Extraction v. State of M.P. & Ors. (1997) 7 SCC 592, this Court held that if an objective and rational foundation for the fixation of royalty is disclosed, the Court will not interfere with the exercise of governmental decision by undertaking an exercise to determine whether or not a better fixation was possible in the circumstances. This Court struck a note of caution that in economic and policy matters the scope of judicial review was limited.

20. It is unnecessary and platitudinous for us to burden this judgment with reference to the decisions of this Court on the subject for the governing principles are so well-known and well-settled that any review of the law on the subject is bound to be simply repetitive without any meaningful contribution to the existing legal literature on the subject. We remain content by referring to two only of a plentitude of judicial pronouncements on the subject in which the legal position has been succinctly restated. One of these decisions was delivered in Jagdish Mandal v. State of Orissa & Ors. (2007) 14 SCC 517, where too this Court was dealing with the exercise of power of judicial review in matters relating to tenders and award of contracts. This Court identified the special features should be borne in mind while judicially reviewing award of contracts. We can do no better than extract the following observations of this Court in this regard:

> "22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes."
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> (emphasis supplied)

21. More recently in Heinz India (P) Ltd. & Anr. v. State of U.P. & Ors. (2012) 5 SCC 443, this Court speaking through one of us (Thakur, J.) examined the legal dimensions of judicial review and quoted with approval the following passage from Reid v. Secy. of State for Scotland (1999) 1 All ER 481 which succinctly sums up the law.

> "Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that

> the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decisions itself it may be found to be perverse, or irrational or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of evidence."

22. There is no gainsaying that in any challenge to the award of contact before the High Court and so also before this Court what is to be examined is the legality and regularity of the process leading to award of contract. What the Court has to constantly keep in mind is that it does not sit in appeal over the soundness of the decision. The Court can only examine whether the decision making process was fair, reasonable and transparent. In cases involving award of contracts, the Court ought to exercise judicial restraint where the decision is bonafide with no perceptible injury to public interest.

23. The High Court has, in the case at hand, undertaken that exercise and concluded that there was neither any illegality nor any irregularity in the process of evaluation of the bids or the final allotment of the contract. That view has come to be assailed by the appellant on what is essentially a short point raised by Mr. Lalit in support of the appeal. The contention, as noticed earlier, is that while no malafide or extraneous considerations have prevailed to vitiate the decision of the DMRC allotting the contract in favour of HR, the process of evaluation of the bids offered by the eligible bidders should have in the facts and circumstances of the case included validation of the GEC values offered by HR to determine whether they were achievable having regard to the ground realities and the laws of physics relevant to the consumption of energy. That contention does not suggest any illegality in the process of allotment of the contract in favour of HR, for no violation of any law, rule or regulation governing the process of invitation of tenders by the DMRC or its evaluation and acceptance has been alleged or argued

before us. No such statutory or other provision has been brought to our notice which could possibly provide to the appellant a reason to contend that the allotment of the contract was itself illegal or in breach of any such provision or procedure prescribed thereunder. It is no body's case that the decision-making authority had not understood the law that regulates its decision making power or failed to give effect to it. We have, therefore, no hesitation in holding that the allotment of contract did not suffer from any illegality as it is understood in the matter of judicial review of administrative action and as that expression has been used by this Court in Tata Cellular's case (supra). It is also not the case of the petitioner that the decision taken by the DMRC is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind could have arrived at the same. Perversity or irrationality in the decision or the decision making process is also not a ground that can be invoked in the case at hand.

24. The contention urged by Mr. Lalit may at best constitute an irregularity in the process of evaluation of the bids. That an irregularity can itself, in certain situations result in invalidating a process, cannot be disputed. The question, however, is whether there was any irregularity in the evaluation of the bids in the present case and if so whether the same was sufficient to invalidate the evaluation process or the ultimate award of the contract. Whether or not there was any irregularity in the process of evaluation of the bids shall in turn have to be examined by a reference to the conditions of the tender notice under which the tenders were invited, received, processed, evaluated and eventually accepted. It is common ground that the price bid offered by the tenderers was not itself determinative. What was equally important was the GEC values comprising X and Y factors which the tenderers had to disclose in their technical bids. That the values offered had to be converted into Indian Rupees and loaded to the price bid of the tenderers is also beyond question. That each one of the bidders had offered their GEC values comprising X and Y factors separately was also beyond doubt. There is no error even in the conversion of such values in terms of Indian Rupees nor is there any dispute about the effect of such loading of values to the price bid of all the tenderers because of which loading the bid offered by HR eventually emerged as L-1 with appellant-Siemens sliding to L-4 position. That being so, the process of evaluation of bids could not be faulted as the same was strictly in accordance with the norms stipulated for such evaluation. Even Mr. Lalit fairly conceded that there was nothing that could be criticized in that process. What DMRC, according to him, should have done was to check whether the GEC values offered by the bidders were achievable. Inasmuch as no such verification was

undertaken the evaluation process was flawed. There is, in our opinion, no merit in that contention. The reasons are not far to seek. In the first place, the contention urged by Mr. Lalit does not find support from any provision in the tender notice. There is nothing in the tender document to suggest that the GEC values had to be tested for their achievability. As rightly contended by Mr. Lalit all the six bidders declared eligible are world leaders in the field and have sufficient expertise and know-how not only about the design and technology which they use but also about their capacity to validate their respective GEC values. If that be so, DMRC could be supremely confident that the GEC values offered by HR were achievable especially when such values offered by some of the bidders for X and Y factors were lower than those offered by HR. At any rate the DMRC had sufficiently protected itself because under the terms and conditions stipulated in the tender notice failure of the successful tender to make good the GEC values offered by them would result in a penalty which was higher than the GEC value factor that was loaded to the price bid. We, therefore, do not see any real basis for the contention that the DMRC was supposed to go any further than it did in protecting its interest. In the absence of any specific stipulation or requirement for validation of the GEC values by the DMRC and its experts or by any outside agency such a requirement could not be implied into the tender process. Inasmuch as the DMRC found the bid offered by HR to be acceptable, keeping in view the GEC values offered by it, the former had committed no illegality in the evaluation of the bids or in making its choice of the contractor.

25. Secondly, because even assuming that the process of validation of the GEC values and their achievability was an implied condition in the evaluation process, DMRC had on the basis of an internal simulation satisfied itself that the GEC values were not unachievable. The High Court has referred to the simulation results and so has our attention been drawn to the said result from the original record produced by DMRC. We do not see any illegality or irregularity in the process of verification conducted by the DMRC to test the achievability of the GEC values. It is true that DMRC had conducted the simulation in regard to the GEC values offered by HR only but then in the absence of any condition in the tender notice requiring DMRC to conduct such verification even in regard to other GEC values, there was no need for it to undertake any such exercise. DMRC was, in our opinion, entitled to adopt such methods as were reasonable to satisfy itself above about the GEC values and their achievability offered by lowest tenderer in whose favour it was considering the award of the contract. The upshot of the above discussion, therefore, is that the process by which the bids were evaluated and

eventually accepted was transparent, fair and reasonable and does not, therefore, call for any interference from this Court.

26. That brings us to the question whether the Government of India was justified in appointing a Committee to test the evaluation of bids and, if so, whether this Court ought to look into the Report of the Committee. There is more than one aspect that needs to be kept in view in this regard. The first and foremost is the fact that the Committee was appointed at a stage when the matter was already pending before the High Court. Considerable time was spent by learned counsel for the parties in debating whether the constitution of the Committee by the Government itself tantamounted to interference with the course of justice, hence contempt. We do not, however, consider it necessary to pronounce upon that aspect in these proceedings especially because we have not been called upon to initiate such contempt proceedings. All that we need say is that once the Government had known that the entire issue regarding the validity of the process adopted by DMRC including the transparency and fairness of the process of evaluation of the bids was subjudice before the High Court of Delhi and later before this Court, it ought to have kept its hands off and let the law take its course. It could have doubtless placed all such material as was relevant to that question before the High Court and invited a judicial pronouncement on the subject instead of starting a parallel exercise. The Government could even approach the High Court and seek its permission to review the process of evaluation either by itself or through an expert Committee if it felt that any such process would help the Court in determining the issues falling for consideration before the Court more effectively. Nothing of that sort was, however, done. On the contrary even when the Secretary to the MoUD pointed out that the matter is subjudice and any further action in the matter could await the pronouncement of the Court, the Hon'ble Minister heading MoUD directed the constitution of the Committee with the following terms:

> "2(1) To examine if a fair, equitable and transparent tender process was followed by DMRC, as per the prescribed guidelines".

27. We have no manner of doubt that the terms of reference give a clear indication that the process initiated by the Government was a parallel process of the adjudication of the very same issue as fell for consideration before the High Court and at a later stage before this Court. We fail to appreciate how the Government could have possibly done this. Confronted with this situation Mr. Mohan Parasaran, learned Solicitor General, argued that a reference to the Committee was not meant to subvert judicial process but to only find ways and means to formulate

policies and procedures for future allotment of contracts. We have no hesitation in rejecting that submission. The Reference Order extracted above speaks for itself. It no where states that the Committee has to look at anything beyond the process of evaluation of tenders received by DMRC. It does not even remotely suggest that the Government is concerned about the procedures that may be followed in the future or anxious to devise transparent methods by which such contract should be allotted. What is notable is that the Committee's hands were not stayed by the Government even when the High Court had pronounced upon the validity of the procedures adopted by the DMRC and the matter reached this Court. Continuance of the process of review even after the High Court had delivered its judgment amounted to subjecting the judicial pronouncement to an administrative review. There was no question of any such judicial determination or adjudication being subjected to any administrative review albeit in the name of a Committee constituted for the purpose.

28. Mr. Parasaran argued that the Committee's proceedings did not amount to sitting in appeal over the judgment of the High Court. The Committee may have not said anything adverse to view taken by the High Court but if the Committee were to find fault with the evaluation process which the High Court has held to be valid it indirectly amounted to putting a question mark on the judgment of the High Court itself. Suffice it to say what the Government ought to have stayed its hands once the matter landed in the Court. Inasmuch as the Government did nothing of this kind, it did not act properly. Beyond that we do not consider it necessary or proper to say anything at this stage.

29. It was contended by Mr. Lalit that the report submitted by the Committee appointed by the Government ought to be taken as expert opinion on the subject and given due weight. That position was disputed by Mr. Andhyarujina appearing for DMRC and Mr. Venugopal appearing for HR. That the Committee comprised a former Finance Secretary to the Government of India and a Civil Engineer, none of whom could claim to be expert in the field relevant to the achievability of the GEC values, was not disputed by Mr. Parasaran who urged that the Committee may have taken the opinion of some experts on the subject. Even assuming that the Committee has taken expert advice regarding the tenability of the GEC values offered by HR, it would simply mean that there is a conflict between the views taken by the experts of DMRC and those consulted by the Committee. Any such conflict cannot be resolved by this Court in exercise of its powers of judicial review. So long as the view taken by the experts of the authority competent to take a final decision is a possible view the very fact that some other experts have

expressed doubts about the sustainability of the GEC values will not be enough for us to declare that the values offered by HR are indeed unachievable. This Court has in Federation of Railway Officers Association v. Union of India (2003) 2 SCR 1085, stated the wholesome principle applicable in such situations in the following words:

> "Further, when technical questions arise and experts in the field have expressed various views and all those aspects have been taken into consideration by the Government in deciding the matter, could it still be said that this Court should re-examine to interfere with the same. The wholesome rule in regard to judicial interference in administrative decisions is that if the Government takes into consideration all relevant factors, eschews from considering irrelevant factors and acts reasonably within the parameters of the law, courts would keep off the same."

30. Reference may also be made to the decision of this Court in N.D. Jayal v. Union of India (2004) 9 SCC 362 where this Court observed:

> "This Court cannot sit in judgment over the cutting edge of scientific analysis relating to the safety of any project. Experts in science may themselves differ in their opinions while taking decisions on matters related to safety and allied aspects. The opposing viewpoints of the experts will also have to be given due consideration after full application of mind. When the Government or the authorities concerned after due consideration of all viewpoints and full application of mind took a decision, then it is not appropriate for the court to interfere."

31. Reliance by the appellant upon the report of the Committee is misplaced also for the reason that the same was ex parte. It is common ground that HR was never associated with the process of evaluation or verification if any conducted by the Committee. In the absence of any such opportunity to the party whose GEC values were being test checked for their achievability, the report can hardly provide a sound basis for a writ court to upset a decision which the competent authority has taken after due deliberations by not one but four different Committees including experts in the field. That apart, Mr. Parasaran fairly submitted that even the Government have not accepted the report submitted by the Committee so far. He urged that since the matter was pending in this Court, the Government has simply placed the report of the Committee in a sealed cover for the Court to decide as to what value has to be attached to it. That being the position, the preparation and

submission of a report that does not even take the view point of the party affected by it into consideration can hardly provide to this Court a good reason to scuttle the entire process at this stage when HR, the successful bidder, has already taken substantial steps in the direction of executing the works allotted to it.

32. Last but not the least, if the note submitted by the Director in the MoUD is an indication of what the Committee may have said, the difference in the GEC values pointed out in the report of the Director, may have led to CAF which was also an eligible bidder emerging as L-1 and not the appellant. In terms of cost of the project it would hardly make a sizable difference so as to justify a reversal of the steps that have already been taken for execution of a project that is of utmost importance for the people living in the national capital execution whereof can brook no delay especially when the same is being financed by an agency from outside the country.

33. In the result this appeal fails and is, hereby, dismissed with costs of Rs.5,00,000/- to be deposited within six weeks from today with the Supreme Court Advocates-on-Record Welfare Fund.