

ASIA FOUNDATION AND CONSTRUCTION LTD.

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v.

TRAFALGAR HOUSE CONSTRUCTION (I) LTD. AND ORS.

DECEMBER 17, 1996

[S.C. AGRAWAL AND G.B. PATTANAİK, JJ.]

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*Judicial Review—In the area of contractual Jurisdiction—It is not within the permissible limits of interference for a Court of law, in the absence of any allegation of malice or ulterior motive or finding by the court of any malafide or favouritism in the grant of a contract.*

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For construction of a wharf intended for mechanised handling facility of coal at Paradip Port, Asian Development Bank at Manila agreed to give loan. A prequalified notice was issued inviting offers and the pre-qualification documents received were sent to the Committee of consultants for evaluation. The Consultants submitted their evaluation report recommending six firms including the appellant and the respondent No. 1 for the construction of the wharf. The tender committee of the Port Trust reviewed the evaluation made by the consultants and recommended all six firms. The Board of Trustees of the Paradip Port Trust approved the said six firms and invited bids. Out of the six firms, only three submitted their bids, namely the appellants, respondent No. 2 and one Mahibba Engineering (M) BHD Malaysia. The bids were sent to the consultant for evaluation report. The consultants concluded that the first respondent's bid was the lowest. Tender Committee accepted the recommendations of the consultants and submitted the same to Asian Development Bank for approval.

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Asian Development Bank, by its communication dated 23.4.1996 intimated that they were unable to support the bid evaluation report and cannot accept the proposed bid change in quantity. The Bank came to the conclusion that the lowest evaluated substantially responsive bidder was the appellant and recommended the contract of the construction of the wharf be awarded to the appellant. The special tender committee formulated its view and communicated the same to Asian Development Bank. Bank indicated that the suggestions given were on due consideration of the practicability of mobilising finance quickly. The tender committee called

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**A** the appellant for some clarifications. The project manager addressed a letter stating that in view of the additional information available there was no technical barrier or commercial disincentive to award the contract to the appellant.

**B** Even before the contract was awarded respondent No. 1 approached the High Court. After the contract was finally awarded in favour of the appellant by Board resolution, the writ petition was amended seeking the relief of quashing the award. The appellant filed their counter affidavit. The High Court took note of several clauses in the bid documents and came to the conclusion that the award of contract should be made to the bidder whose bid has been determined to be the lowest evaluated bid and who meets the appropriate standards of capability and financial responsibility. **C** The High Court came to the conclusion that it would be in the public interest to quash the award in favour of the appellant and accordingly quashed the award. Hence this appeal.

**D** Allowing this appeal, this Court

**HELD : 1.1.** It is not for the court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is concerned with the manner in which those decisions have been taken. **E** The administrative action which is subject to control by judicial review, can be classified into (1) illegality, (2) irrationality, (iii) procedural impropriety. Principle of Judicial Review is intended to prevent arbitrariness or favoritism and in the matter of award of contract, if power had been exercised for any collateral purpose, Judicial Review is exercised in the larger public interest. [217-G-H; 218-A-D] **F**

**1.2.** In the matter of tender, the lowest bidder may not claim any enforceable right to get the contract though ordinarily the authorities should accept the lowest bids. [218-F]

**G** **1.3.** Court cannot lose sight of the fact of escalation of cost on account of delay and the time involved. In a coordinated project if one component is not worked out the entire project gets delayed and will cost enormously on that score if rebidding is done. High Court lost sight of this fact. In the facts and circumstances of this case rebidding would be grossly **H** detrimental to public interest. [219-B-C]

*Tata Cellular v. Union of India*, [1994] 6 SCC 651, relied on.

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 16734 of 1996.

From the Judgment and Order dated 10.10.96 of the Orissa High Court in O.J.C. No. 6457 of 1996.

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K. Parasaran, S. Ganesh, Garrab Banerjee, R.N. Karanjawala, Arvind Kumar, Ms. Ruby Ahuja and Manik Karanjawala for the Appellants.

Soli J. Sorabjee, V.A. Mohta, Sr. Advs., S.B. Upadhyay, Ashok Kr. Gupta and Zaki Ahmad Khan for the Respondents.

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The Judgment of the Court was delivered by

PATTANAİK, J. : Leave granted.

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This Appeal by Special Leave is directed against the judgment dated 10th October, 1996, of the Division Bench of Orissa High Court in Original Jurisdiction case No. 6457 of 1996. By the impugned judgment the High Court has quashed the ultimate decision of the Paradip Port Trust in terms of the Resolution dated 23.8.96 to award the contract to AFCONS, the present appellant, as well as the letter of communication by Paradip Port Trust to AFCONS dated 24.8.96 and had further directed the Port Trust to effect negotiations with AFCONS, the present appellant as well as the Trafalgar House Construction of India Ltd. who was the petitioner in OJC and respondent No. 1 herein, giving them opportunity to make fresh offers and then lowest bidder should be given the awards. The High Court also further directed that if there cannot be any negotiation within one month from the date of the judgment then the Port Trust will be free to ask for rebidding for the particular project which is the subject matter of the Writ Petition. It is not necessary to narrate the entire gamut of facts. Suffice it to state that for construction of Wharf intended for creation of mechanised handling facility of coal at Paradip Port the Asian Development Bank at Manila had agreed to give loan to the extent of 134.85 million US dollars and it was intended that a part of this amount would be utilised for the construction of the Wharf. The entire project consists of nine major packages and non completion of any package would make the entire

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- A project unworkable. A pre-qualification notice was issued inviting the offers and then on receipt of the pre-qualification documents those were sent to a Committee for evaluation. The consultants submitted their evaluation recommending six firms including the appellant and respondent No. 1 for the construction of the Wharf. The Tender Committee of Port Trust
- B reviewed the evaluation made by the consultants and recommended the names of all the six firms. The aforesaid evaluation report was sent to the Financial Institution, namely, the Asian Development Bank for obtaining its views. The Board of Trustees of Paradip Port Trust thereafter approved the said six firms and then invited for bids by their letter dated
- C 27.9.95. The last date for submission of bids was 27th December, 1995, 11.00 a.m. Out of the six firms only three firms submitted their bids, namely, the appellant, the respondent No. 1 and one Muhibbah Engineering (M) BHD, Malaysia. In accordance with the prescribed procedure the bids were opened and were processed. After examining all the bids and determination of responsiveness of the bidders three bids were sent to the
- D consultant for evaluation report. The consultant found some discrepancy in the bid documents about the amount of concrete required for pre-cast planks for the Wharf Deck. The consultants then corrected the error and after making re-calculation came to the conclusion that respondent No. 1's
- E bid was the lowest. The Tender Committee of Paradip Port Trust accepted the recommendation of the consultants and submitted the same for approval of the Financial Institution, namely, the Asian Development Bank. The Bank by its communication dated 23rd April, 1996, stated that they are unable to support the approach set out in the Bid Evaluation Report and they cannot accept the proposed bid change in the quantity. The Bank
- F also came to be conclusion that the lowest evaluated substantially responsive bidder is AFCONS, the present appellant, and accordingly recommended that the contract of construction of the Wharf be awarded to AFCONS. On receipt of the view of the Bank and since substantial amount of finance was to be given by the Bank as loan the Port Trust again asked
- G their consultants about the earlier bid evaluation. The Special Tender Committee again met on 16.5.96 and then formulated its views and communicated the same to the Bank on 12.5.96. The Bank wrote back on 5th
- H June, 1996 suggesting that the contract be awarded to AFCONS so that the works can be financed from the loan and if the contract is awarded to anyone else then no loan would be financed and if the Port Trust is inclined

to rebid then also there would be no loan from the Bank. The Bank indicated that the suggestions given by the Bank is on due consideration of the practicability of mobilizing finance quickly. On receipt of the said response from the Bank the Tender Committee met on 14.6.96 and then decided to call the appellant to have some clarifications. In the meeting dated 17.6.96 the appellant appeared before the Tender Committee and responded to the clarifications sought for. The project manager addressed a letter on 12th July, 1996, stating therein that if the additional commercial information had been available at the time of assessment then the outcome would appear to favour award to AFCONS. It also further stated that completing the bid evaluation and making its recommendation of award to Essar the consultant has done so in a professional and impartial manner based upon the information available at that time. It was further stated that in view of the additional information now available there was no technical barrier or commercial disincentive to award to AFCONS, the appellant herein. But even before the award was made in favour of the appellant the respondent No. 1 had approached the High Court, obviously being aware of the fact that the appellant's bid is going to be accepted and after the final award in favour of the appellant by Board's Resolution dated 3rd August, 1996, the Writ Petition was amended seeking the relief of quashing of the award in question.

The appellant in this counter-affidavit filed before the High Court not only denied the allegations made in the Writ Petition but also submitted that factually all through the bid of the appellant has been the lowest. It was also stated that the consultant had not taken into account the customs duty which was payable while making the evaluation in question. The Paradip Port Trust in its affidavit before the High Court had urged that since the loan was to be sanctioned by the Asian Development Bank and the Asian Development Bank did not agree to sanction loan if the contract is awarded to Essar or the contract is re-bid, on reconsideration of the entire situation the Port Trust awarded the contract in favour of the appellant. The Port Trust also stated that on receipt of the additional information and taking into consideration the same the Trust was of the view that the award to AFCONS would appear to be acceptable and appropriate. The Port Trust further made it clear that the re-bid was not in the interest of the project and not only it would jeopardise the entire loan sanctioned by the Asian Development Bank but there is every pos-

A sibility of bid being substantially higher.

B The High Court by the impugned judgment took note of several clauses of the bid documents which consists of several parts and came to the conclusion that the award of contract should be made to the bidder whose bid has been determined to be the lowest evaluated bid and who meets the appropriate standards of capability and financial responsibility. It also came to the conclusion that under the documents there is a scope for amending the bid documents and there is scope for modification of the bids as well as there is scope for correction of errors. It further came to the conclusion that a detailed procedure has been laid down to appreciate the responsiveness of the bids technically and there is also a scope for evaluation of the bids. The High Court further came to hold that. "It is also not appreciated and it has not been explained by Asian Development Bank authorities who have not cared to appear in the case inspite of notice, as to why the Asian Development Bank authorities did not appreciate the evaluation of the bids and on correction the offer of the petitioners being lower than that of AFCON. The special fancy of the Asian Development Bank authorities in favour of AFCON has not been justified with reasons before this Court for reasons best known to the Asian Development Bank authorities. According to the High Court the power of judicial review in the arena of contractual jurisdiction has been widened as has been held by the Supreme Court in *Mahabir Auto Store & Ors. v. Indian Oil Corporation & Ors.*, [1990] 1 SCR 818, as well as in *Food Corporation of India v. M/s. Kamdhenu Cattle Feed Industries*, [1993] 1 SCC 71, but each case has its own peculiar facts and circumstances and ultimate decisions had to be arrived at as the situation demands under the parameters of law as it permits. Having considered the facts and circumstances leading to the award of contract in favour of the appellant the court came to conclusion that it would be in the public interest to quash the award in favour of the appellant and accordingly it quashed the same and issued directions, as already stated.

G Mr. Parasaran, learned senior counsel appearing for the appellant submitted that the award of the contract by the State or a public authority can no doubt be judicially reviewed but a court would interfere with the award if it comes to the conclusion that the award of contract is vitiated by arbitrariness, unfairness, illegality or irrationality. In other words, if the H mistake committed by the authority in awarding the contract is of such a

nature requiring intervention then the court may set right the decision. In this view of the matter and in view of the revised opinion of the Trust dated 12th July, 1996, and the opinion of the Asian Development Bank who is to grant the loan for completion of the project the High Court was not justified in interfering with the contract awarded in favour of the appellant. He further contended that in a project of this magnitude with which the Court was concerned, since the lowest tenderer has no right to get the contract, unless the decision of the authority in awarding the contract can be said to be vitiated with arbitrariness of undue favouratism, it would not be for the court to interfere with the decision. Mr. Parasaran, learned senior counsel further urged that the conclusion of the High Court that respondent No. 1 was the lowest bidder is factually incorrect and on the other hand the appellant in all situation prior to negotiation as well as after the negotiation continued to be the lowest bidder and, therefore, there was no infirmity with the decision of the Asian Development Bank approving the bid of the appellant and there was no illegality with the decision of the Paradip Port Trust in awarding the contract in favour of the appellant.

Mr. Sorabjee, learned senior counsel appearing for respondent No. 1 and Mr. Mohta, learned senior counsel appearing for respondent no. 3 on the other hand contended, that in view of the conceded position as noticed by the High Court that on error being corrected it is the respondent No. 1 who was the lowest bidder and yet the authorities awarded the contract in favour of the appellant, it was sufficient for the court to annul the decision in the larger public interest. Mr. Sorabjee, learned senior counsel further urged that the power to award contract lies with the Paradip Port Trust and Port Trust had been forced by the Bank to grant the contract in favour of the appellant. As has been observed by the High Court itself Bank did not appear nor had given any explanation for preferring the appellant than respondent No. 1 even though respondent No. 1 was the lowest bidder. Consequently such decision on the face of it must be held to be arbitrary and the High Court was fully justified in interfering with the decision of awarding the contract in favour of the appellant. Mr. Sorabjee, learned senior counsel also urged that if this Court is of the view that a re-bidding would take an unduly long period which may eventually result in escalation of the cost then this Court may issue appropriate direction as it thinks fit. Mr. Sorabjee, learned senior counsel also in course of arguments produced before us a telex message from the Asian Develop-

A ment Bank whereunder the Bank has agreed to the direction of the High Court for re-bidding but indicates that re-bidding has to be carried out following the procedure acceptable to the Bank which will include a bidding period of atleast 60 days and; therefore, there cannot be any objection to the direction of the High Court for re-bidding.

B Mr. Upadhyay, learned counsel appearing for Paradip Port Trust on the other hand submitted that the ultimate decision of the Trust awarding the contract in favour of the appellant neither can be said to be arbitrary nor unfair or illegal and on the other hand, the decision was in the public interest and, therefore, it was not proper for the High Court to interfere with the said decision. The learned counsel further urged that in the mean time agreement has already been executed and the direction of the High Court to negotiate with the parties did not yield result and, therefore, the only other option is for re-bidding and such a re-bidding will not only consume further time as the procedure for re-bidding will have to be adhered to, but also the possibility of escalation of cost on such re-bidding cannot be obviated and, as such in the larger public interest the appellant should be permitted to execute the work.

E Having considered the rival contentions the only question that arises for our consideration is whether the High Court was justified in the facts and circumstances of the case to interfere with the award of contract in favour of the appellant and whether such interference would subserve any public interest for which the Court purports to have exercised its power of judicial review.

F The Asian Development Bank came into existence under an Act called the Asian Development Act, 1966, in pursuance of an International agreement to which India was a signatory. This new financial institution was established for accelerating the economic development of Asia and the Far East. Under the Act the Bank and its officers have been granted certain immunities, exemption and privileges. It is well known that it is difficult for the country to go ahead with such high cost project unless the financial institutions like World Bank or the Asian Development Banks grant loan or subsidy, as the case may be. When such financial institutions grant such huge loan they always insist that any project for which loan has been sanctioned must be carried out in accordance with the specification and within the scheduled time and the procedure for granting the award

must be duly adhered to. In the aforesaid premises on getting the evaluation bids of the appellant and respondent No. 1 together with the consultant's opinion after the so-called corrections made the conclusion of the bank to the effect "the lowest evaluated substantially responsive bidder is consequently AFCONS" cannot be said to be either arbitrary or capricious or illegal requiring court's interference in the matter of an award of contract. There was some dispute between the Bank on one hand and the consultant who was called upon to evaluate on the other on the question whether there is any power of making any correction to the bid document after a specified period. The High Court in construing certain clauses of the bid document has come to the conclusion that such a correction was permissible and, therefore, the Bank could not have insisted upon granting the contract in favour of the appellant. We are of the considered opinion that it was not within the permissible limits of interference for a court of law, particularly when there has been no allegation of malice or ulterior motive and particularly when the court has not found any *mala fides* or favouritism in the grant of contract in favour of the appellant. In *Tata Cellular v. Union of India*, [1994] 6 SCC 651 this Court has held that :

"That duty of the court is to confine itself to the question of legality. Its concern should be :

1. Whether a decision-making authority exceeded its powers.
2. Committed an error of law,
3. Committed a breach of the rules of natural justice,
4. Reached a decision which no reasonable tribunal would have reached or,
5. Abused its powers.

Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decision have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under :

A (i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it;

(ii) Irrationality, namely, Wednesbury unreasonableness.

B (iii) Procedural impropriety.

The above are only the board grounds but it does not rule out addition of further grounds in course of time."

C Therefore, though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the Court that in the matter of award of a contract power has been exercised for any collateral purpose. But on examining the facts and circumstances of the present case and on going through the records we are of the considered opinion that none of the criteria has been satisfied justifying court's interference in the grant of contract in favour of the appellant. We are not entering into the controversy raised by Mr. Parasaran, learned senior counsel that the High Court committed a factual error in coming to the conclusion that respondent No. 1 was the lowest bidder and the alleged mistake committed by the consultant in the matter of bid evaluation in not taking into account the customs duty and the contention to Mr. Sorabjee, learned senior counsel that it has been conceded by all parties concerned before the High Court that on corrections being made respondent No. 1 was the lowest bidder. As in our view in the matter of a lowest bidder may not claim an enforceable right to get the contract though ordinarily the concerned authorities should accept the lowest bid. Further we find from the letter dated 12th July, 1996, that Paradip Port Trust itself has come to the following conclusion :

G "the technical capability of any of the three bidders to undertake the works is not in question.

two of the bids are very similar in price.

H If additional commercial information which has now been provided by bidders through Paradip Port Trust, had been available at the time of assessment, the outcome would appear to the favour award to AFCONS."

This being the position, in our considered opinion, High Court was not justified in interfering with the award by going into different clauses of the bid document and then coming to the conclusion that the terms provided for modifications or corrections even after a specified date and further coming to the conclusion that respondent No. 1 being the lowest bidder there was no reason for the Port Trust to award the contract in favour of the appellant. We cannot lose sight of the fact of escalation of cost in such project on account of delay and the time involved and further in a coordinated project like this, if one component is not worked out the entire project gets delayed and the enormous cost on that score if re-bidding is done. The High Court has totally lost sight of this fact while directing the rebidding. In our considered opinion direction of re-bidding in the facts and circumstances of the present case instead for being in the public interest would be grossly detrimental to the public interest.

In the premises, as aforesaid, we set aside the impugned judgment of the Orissa High Court and direct that the contract awarded in favour of the appellant Paradip Port Trust be affirmed and the appellant may execute the work expeditiously. We further make it clear that the appellant will not be entitled to claim any escalation of the bid amount on the ground of any delay in issuing the work order on account of the pendency of the present litigation. This appeal is, therefore, allowed. But in the circumstances without any order as to costs.

K.S.G.

Appeal allowed.