

M/S. MONARCH INFRASTRUCTURE (P) LTD.

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v.

COMMISSIONER, ULHASNAGAR MUNICIPAL  
CORPORATION AND ORS.

MAY 8, 2000

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[S. RAJENDRA BABU AND S.N. PHUKAN, JJ.]

*Contract—Award of—Tender process—Eligibility conditions prescribed—Prescribed conditions altered after last date for submission of tenders but before their opening—Tenderer not satisfying said conditions awarded contract—Challenged—Held, Tenderer not fulfilling prescribed conditions on last date for submission of tenders—If tender terms/conditions altered after last date for submission of tenders, fresh tender process was only alternative permissible—Modified tender conditions cannot be restricted to existing bidders only—Award quashed—Arbitrariness—Constitution of India, Article 14.*

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*Judicial review—Scope of—Tender process—Award of contract—Administrative action—Intervention by court—When—Held, when Government action is arbitrary, discriminatory, contrary to public interest or malafide—Constitution of India, Article 14.*

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**Respondent - Municipal Corporation issued notice inviting tenders for appointing agents for collection of Octroi. Clauses 6(a) and 6(b) were qualifying conditions for tenderers. Tender of M was opened despite the fact that it did not qualify said condition clauses on the ground that Clause 6(a) had been waived and upon finalisation of tenders, contract was awarded in favour of M. Appellant-K filed writ petition challenging award of contract to M which was allowed by High Court on the ground that Municipal Corporation had acted arbitrarily in considering bid of M which did not fulfil the prescribed eligibility conditions for submission of tenders as Clause 6(a) was deleted after last date for submission for tenders. High Court did not accept next highest bid of K by restricting application of modified tender conditions to only existing bidders but gave liberty to Municipal Corporation to invite tenders afresh to enable everyone to participate under modified tender conditions. Aggrieved by the order of High Court, K & M have filed the present appeals.**

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A Appellant-K contended the sequence of events indicated *mala fide* on the part of Commissioner of Municipal Corporation which affected sanctity of tender process; and that clauses 6(a) and 6(b) had been deleted in new tender process to favour M.

B This Court by an order allowed steps for calling tenders as directed by High Court but directed not to finalise them until further orders. M made the highest offer in this tender process.

Disposing the appeals, the Court

C HELD : 1. While public interest is paramount there should be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated alike. The legal position is thus - (i) The Government is free to enter into any contract with citizens but the court may interfere where it acts arbitrarily or contrary to public interest; (ii)  
D The Government cannot arbitrarily choose any persons it likes for entering into such a relationship or to discriminate between persons similarly situated; (iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons. Broadly stated, the courts would not interfere with the matter of administrative action or  
E changes made therein unless the Government's action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is *mala fide*. [1165-A-E]

F 2.1. The High Court was justified in setting aside the award of contract in favour of M because it had not fulfilled the conditions relating to Clause 6(a) of the Tender Notice but the same was deleted subsequent to the last date of acceptance of the tenders. [1165-E-H]

G 2.2. If a term of the tender having been deleted after the players entered into the arena it is like changing the rules of the game after it had began and, therefore, if the Government or the Municipal Corporation was free to alter the conditions fresh process of tender was the only alternative permissible. The course adopted by the High Court in the circumstances is justified because by reason of deletion of a particular condition the wider net will be permissible and a larger participation or  
H more attractive bids could be offered. [1165-H; 1166-A-B]

**2.3. Public interest would be definitely served by reason of allowing the tender process to be completed by accepting the highest offer made by M. [1167-A]**

**3. The conditions of the "Notice Inviting Tender" is that the same should be accompanied by a Demand Draft/pay order or cash and in no other form. Therefore, the Municipal Corporation is justified in rejecting the tender offer made by R as not fulfilling the conditions of the Tender Notice because he only submitted photocopy of the Demand Draft along with other relevant documents. [1166-C-E]**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3288 of 2000  
Etc.

From the Judgment and Order dated 31.3.2000 of the Bombay High Court in W.P. No. 1663 of 2000.

Harish N. Salve, Solicitor General F.S. Nariman, D.A. Dave, Shanti Bhushan, Ashok Desai, Dr. Rajeev Dhawan, S.S. Ray, Vikram Nankani, Ishwar Nankani, R.N. Karanjawala, Ms. Ruby, S. Ahuja, Sandeep Mittal, B.P. Singh, D.K. Rustagi, Pankaj Monga, Anip Sachthey, Anupam Lal Das, Ms. Sandhya Rajpal, Arijit Prasad, S.K. Jain, K.C. Sethi, M.J. Lalwani, A.P. Dhamija and Mrs. Manik Karanjawala for the appearing parties.

The Judgment of the Court was delivered by

**RAJENDRA BABU, J.** Leave granted in all the three sets of petitions.

Ulhasnagar Municipal Corporation issued a Notice inviting tender for appointment of agents for collection of Octroi subject to the terms and conditions set forth therein fixing 4 p.m. on March 23, 2000 to be the time of submission of the tender and fixing 5 p.m. on the same day for opening of the tenders. On March 21, 2000 M/s. Millenium Infrastructure (P) Ltd. filed a writ petition No. 1456 of 2000 in the High Court at Mumbai challenging the imposition of two conditions contained in Clauses 6(a) and 6(b) of the Tender Booklet as unconstitutional and seeking deletion of these two conditions as pre-requisite for its participation in the tender. On March 21, 2000, a Division Bench of the High Court and having heard the parties adjourned the matter till March 24, 2000 at 11 a.m. by making it clear that

A there shall be no interim relief except that the Ulhasnagar Municipal Corporation shall not issue work order till further orders. However, on March 23, 2000 M/s. Millenium Infrastructure (P) Ltd. withdrew the aforesaid writ petition. Five persons tendered their documents and papers and they are M/s. Konark Infrastructure (P) Ltd., appellant in Civil Appeal arising out of S.L.P. (C) No. 6717-18 of 2000, M/s. Monarch Infrastructure (P) Ltd., appellant in Civil Appeal arising out of 6298 of 2000 and respondent No. 3, M/s. Jai Krishna Infrastructure (P) Ltd., respondent No. 4, M/s. Oriental Veneers (P) Ltd. respondent No. 5, M/s. Sample Infrastructure, respondent No. 6 in the Appeal filed by M/s. Konark Infrastructure (P) Ltd. The Commissioner of the Ulhasnagar Municipal Corporation, however, intimated the tenderers that as the High Court was seized of a writ petition he did not propose to open the tenders until further orders from the High Court on March 24, 2000. However, he sought for information of the numbers of the tenders filed and the tenderers qualifying and not qualifying conditions Clauses 6(a) and 6(b) of the Tender Booklet. On March 24, 2000 the tenders were opened and an objection was raised that M/s. Monarch Infrastructure (P) Ltd. did not fulfil the conditions either under Clause 6(a) or Clause 6(b) in spite of which, it is stated, the Commissioner insisted on opening the same. The Commissioner informed the parties that Clause 6(a) had been waived of by reason of the order made by the Government in exercise of its powers under Section 451 of the Municipal Corporation Act, 1949. The Commissioner allowed M/s. Monarch Infrastructure (P) Ltd. to furnish a certificate as to Clause 6(b) by a Chartered Accountant as to its networth which discloses Rs. 4.5 crores approximately. The Commissioner proceeded to finalise the tenders on the basis that Clause 6(a) had stood waived or deleted in view of the order of the Government issued under Section 451 of the Municipal Corporation Act and awarded the contract in favour of M/s. Monarch Infrastructure (P) Ltd. The appellant M/s. Konark Infrastructure (P) Ltd. filed a writ petition challenging the award of contract to M/s. Monarch Infrastructure (P) Ltd. on various grounds.

G The High Court allowed the writ petition filed by M/s. Konark Infrastructure (P) Ltd. and held that the deletion of clause 6(a) of the Tender Booklet took place after offers were received on March 23, 2000 and the offers had been received on the basis of clause 6(a) and Clause 6(b) which would define the conditions of eligibility. Therefore, the High Court held that the Municipal Corporation had acted arbitrarily in considering the bid of M/s. Monarch Infrastructure (P) Ltd. which did not fulfil the eligibility

conditions on the last date which was prescribed for the submission of the tenders. Therefore, the High Court took the view that once a decision was taken to delete the application of Clause 6(a) and offers which were received on March 23, 2000 being made on the basis of existence of Clause 6(a), fairness and equal treatment required that the process should be carried out afresh to determine whether better or higher offers would be received upon the deletion of the same and that evidently having not been done, a restricted application of the modified tender conditions to only the existing bidders, the Municipal Corporation had been deprived of the opportunity which it could have had of obtaining higher or better bids. On that basis, the High Court allowed the writ petition. However, it was noticed that by reason of the deletion of Clause 6(a) of the Tender Booklet a wider net was available and, therefore, the Municipal Corporation should have the benefit of as wide a field as should be reasonably possible. In that view of the matter, it did not direct the Municipal Corporation to accept the higher bid of M/s. Konark Infrastructure (P) Ltd. and thereby while quashing the award of contract in favour of M/s. Monarch Infrastructure (P) Ltd. made it clear that the Municipal Corporation would be at liberty to invite a fresh tender for the purpose of awarding the contract for collection of octroi on terms and conditions which would be prescribed by the Municipal Corporation. Further, it was made clear that the aforesaid process should be completed within a period of four weeks and some interim arrangement for collection of octroi shall be made subject to certain conditions.

This order made by the High Court is called in question by the appellants. On April 17, 2000 when this matter came up for consideration before this Court, we made an order while issuing notice to all the parties to continue the interim arrangement subject to certain modifications and to take steps for calling tenders as directed by the High Court but shall not finalise until further orders.

Shri Shanti Bhushan, the learned senior counsel, and Dr. Rajiv Dhawan, learned senior counsel, appearing for M/s. Konark Infrastructure (P) Ltd. submitted that (i) that the order of the Government under Section 451 of the Municipal Corporation Act deleting Clause 6(a) of the Tender Booklet is *ultra vires* said section as it does not fall within its scope; (ii) the certificate filed by M/s. Monarch Infrastructure (P) Ltd. issued by Mahesh Makhija & Co., Chartered Accountant on March 24, 2000 computed the networth on the basis of equity capital/preference capital/share application money/deposit from

- A directors lying with the company as cheques on hand inasmuch as net worth can only be ascertained with reference to equity and undistributed profits. Sequence of events indicated *malafides* on the part of the Commissioner of the Municipal Corporation in allowing M/s. Monarch Infrastructure (P) Ltd. to participate in the tender process in spite of the non-fulfilment of conditions prescribed in Clause 6(a) and Clause 6(b) of the Tender Notice. Thus the sanctity of the tender process was affected.
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It is now brought to our notice by Shri Harish Salve, learned Solicitor General appearing for the Municipal Corporation, that after the interim order was made by us three persons offered valid bids and details are hereinafter set forth as under :

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Name	Old (12 Months) Rupees	New (11 Months)	New Proportionate for 12 Months
Reserve Price	36,33,30,000	34,00,00,000	
Monarch Infra. Pvt. Ltd.	40,41,40,500	40,81,50,000	44,52,54,545
Konark Infra. Pvt. Ltd.	38,16,22,221	35,31,21,111	38,52,23,030
Jai Krishna Infra.	38,11,11,111	37,51,00,000	40,92,00,000

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- It is also stated that Ramchand Mahadeo Rao also offered a bid for a sum of Rs. 41,51,00,000, details of which we will advert to a little later, and it is indicated that he is willing to raise it to Rs. 42 crores.
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- The question that arises for consideration in these cases are (i) whether the High Court is justified in setting aside the award of contract in favour of M/s. Monarch Infrastructure (P) Ltd.; (ii) whether the direction for fresh process of tender instead of awarding the contract in favour of M/s. Konark Infrastructure (P) Ltd. is justified in the facts and circumstances of the case, and (iii) the effect of the steps taken now by the Municipal Corporation to call for fresh tenders.
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- Shri Shanti Bhushan and Dr. Rajiv Dhawan, for the appellant, pointed out that the sanctity of the tender process must be maintained and principles in relation to award of contract should be settled instead of merely making an order which is expedient in the circumstances of the case. Both of them submitted that in the new tender process Clauses 6(a) and 6(b) have been altogether deleted which is only to favour M/s. Monarch Infrastructure (P) Ltd. and, therefore, we should not encourage such activity in these matters.
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There have been several decisions rendered by this Court on the question of tender process, the award of contract and evolved several principles in regard to the same. Ultimately what prevails with the courts in these matters is that while public interest is paramount there should be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated alike. We may sum up the legal position thus :

- (i) The Government is free to enter into any contract with citizens but the court may interfere where it acts arbitrarily or contrary to public interest;
- (ii) The Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate;
- (iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons.

Broadly stated, the courts would not interfere with the matter of administrative action or changes made therein unless the Government's action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is *mala fide*.

If we bear these principles in mind, the High Court is justified in setting aside the award of contract in favour of M/s. Monarch Infrastructure (P) Ltd. because it had not fulfilled the conditions relating to Clause 6(a) of the Tender Notice but the same was deleted subsequent to the last date of acceptance of the tenders. If that is so, the arguments advanced on behalf of M/s. Konark Infrastructure (P) Ltd. in regard to allegation of *mala fides* of the Commissioner of the Municipal Corporation in showing special favour to M/s. Monarch Infrastructure (P) Ltd. or the other contentions raised in the High Court and reiterated before us are insignificant because the High Court had set aside the award made in favour of M/s. Monarch Infrastructure (P) Ltd. The only question therefore remaining is whether any contract should have been awarded in favour of M/s. Konark Infrastructure (P) Ltd.. The High Court had taken the view that if a term of the tender having been deleted after the players entered into the arena it is like changing the rules of the game after it had began and, therefore, if the Government or the Municipal

A Corporation was free to alter the conditions fresh process of tender was the only alternative permissible. Therefore, we find that the course adopted by the High Court in the circumstances is justified because by reason of deletion of a particular condition the wider net will be permissible and a larger participation or more attractive bids could be offered.

B Now it is necessary to consider the case of Ramchand Mahadev Rao. One of the conditions to make offer is regarding the earnest money deposit for a sum of Rs. 1.70 crores in the form of crossed Demand Draft/Pay Order or Cash. Ramchand Mahadev Rao got prepared a cheque for Rs. 1.70 crores as required from the bank and submitted the tender just before the expiry of  
C the time on April 19, 2000. He further alleges that in haste and confusion he misplaced the Demand Draft and was in a wrong impression that a mere photocopy of the draft duly notarised will be sufficient and, therefore, he submitted photocopy of the Demand Draft along with other relevant documents. The conditions of the "Notice Inviting Tender" is that the same should  
D be accompanied by a Demand Draft/pay order or cash and in no other form. It is clear from the statement made by him as to in what manner he could gather an impression that a photocopy of the Demand Draft duly notarised would be sufficient nor it could be said that it is naive to accept a mere statement that Demand Draft for a sum of Rs. 1.70 crores obtained for the purpose of submitting the same along with the tender documents could be  
E misplaced in the manner suggested in the application. Therefore, the Municipal Corporation is justified in rejecting the tender offer made by Ramchand Mahadev Rao as not fulfilling the conditions of the Tender Notice.

F Now we will turn to the last question formulated by us. The High Court had directed the commencement of new tender process subject to such terms and conditions, which will be prescribed by the Municipal Corporation. New terms and conditions have been prescribed apparently bearing in mind the nature of contract, which is only collection octroi as an agent and depositing the same with the Corporation. In addition earnest money and the performance of bank guarantee are insisted upon; collection of octroi have to be made  
G on day to day basis and payment must be made on weekly basis entailing, in case of default, cancellation of the contract. We cannot say whether these conditions are better than what were prescribed earlier for in such matters the authority calling for tenders is the best judge. We do not think that we should intercede to restore status quo ante the conditions arising in clauses 6(a) and  
H 6(b) of the Tender Booklet and bid offered much earlier by M/s. Monark

Infrastructure (P) Ltd. should be accepted, for it filed a writ petition, which was allowed with direction for calling for fresh tenders. Public interest in the present case would be definitely served by reason of allowing the tender process to be completed by accepting the highest offer made by M/s. Monarch Infrastructure (P) Ltd. subject to raising its bid to Rs. 42 crores matching with that of Ramchand Mahadeo Rao, though invalid, for Rs. 41,51,00,000 for the period of 11 months which he is willing to raise to Rs. 42 crores. We are not allowing M/s. Konark Infrastructure (P) Ltd. or M/s. Jai Krishan Infrastructure such an opportunity as they had made lower bids.

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We dispose of the appeals by upholding the order made by the High Court and by giving further directions as stated above.

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Appeals disposed.