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JAGDISH MANDAL  
v.  
STATE OF ORISSA AND ORS.

DECEMBER 11, 2006

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[G.P. MATHUR AND R.V. RAVEENDRAN, JJ.]

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*Contracts—Tenders—Issue of—Rejection of tender—Show cause notice—Requirement of—Decision of tender committee—Judicial review—Scope, power and ambit of—Tender invited for construction of canal in two stretches—Rates quoted by a contractor, being the lowest, recommended for acceptance—The said contractor furnished Earnest Money Deposit (EMD) by pledging a postal Term Deposit of Rs. 1,70,000—A written complaint was received by the Water Resources Department that the contractor had made a postal deposit of Rs. 7,000 and had defrauded the Department by altering the figure in the passbook as Rs. 1,70,000—On enquiry, the Superintendent of Post Offices sent a reply stating that the said Term Deposit Account for Rs. 1,70,000/- submitted by the contractor should not be taken into account for any official requirement—The tender committee held that the EMD submitted by the contractor was invalid and recommended the acceptance of the next lowest valid tender—Contractor filed a writ petition challenging the decision of the High Court—High Court directed to file a complaint against the contractor—But the police investigation showed that the passbook produced by the contractor was genuine—Thereupon, the High Court allowed the writ petition holding that the offer of work of the contractor was arbitrarily rejected by the tender committee—Correctness of—Held: Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides and not to check whether the choice or decision is 'sound'—Tender committee rightly rejected the tender of the contractor as it was not accompanied by a valid EMD—No show cause notice is required for rejection of the tender—High Court judgment set aside—Orissa Public Works Department Code, Clause 3.5.18.*

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*Contracts—Tenders—Rates—Unduly low rate—Quoting of—Effect—Tenders invited for construction of canal in two stretches—Rates quoted by a contractor, being the lowest recommended for acceptance—On scrutiny, tender committee found such unduly low rate in respect of a large and last*

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*item of work was likely to jeopardize the completion of the work—Hence, tender committed rejected the tender of the contractor and recommended acceptance of the next lowest valid tender—High Court allowed the writ petition of the contractor—Correctness of—Held: Unduly low and unworkable rate or rates is a ground for rejection of tenders—The Committee has applied its mind and rejected the tender by assigning a reason which is neither irrational nor arbitrary—High Court judgment set aside.*

*CA No. 5699 of 2006*

The second respondent, acting on behalf of the Water Resources Department, invited tenders for 'construction of Right Extension Main Canal' (first stretch) by a tender notice. The offer of the fifth respondent was the lowest and that of the appellant was the second lowest. The Executive Engineer recommended the acceptance of the tender of the fifth respondent.

The fifth respondent furnished the Earnest Money Deposit (EMD) by pledging a postal Term Deposit of Rs. 1,70,000/-. A written complaint was received by the Department alleging that the fifth respondent had made a postal deposit of only Rs. 7,000/- and had defrauded the Department by altering the figure in the passbook as Rs. 1,70,000/-. On enquiry, the Superintendent of Post Offices sent a reply stating that the said Term Deposit Account for Rs. 1,70,000/- submitted by the fifth respondent should not be taken into account for any official requirement.

The tender committee held that the EMD submitted by the fifth respondent was invalid and recommended the acceptance of the next lowest valid tender of the appellant.

The respondent filed a writ petition challenging the rejection of his tender. On directions of the High Court a complaint was filed against the fifth respondent. However, the investigation report submitted by the police showed that the passbook was genuine as Rs. 1,70,000/- had actually been deposited by the fifth respondent. The High Court allowed the writ petition filed by the fifth respondent holding that the offer of the fifth respondent was arbitrarily rejected by the tender committee. Hence the appeal.

*CA No. 5700 of 2006*

Tenders were also invited in regard to the adjoining stretch that is 'construction of Right Extension Main Canal' (second stretch) by a tender

**A** notice issued by the second respondent. The fifth respondent was the lowest tenderer and the appellant was the second lowest tenderer. The Executive Engineer recommended the acceptance of the tender of the fifth respondent. As against the estimated rate of a certain item, which accounted for nearly one-fifth of the estimated cost of the work, the fifth respondent quoted a rate which was less than 1% of the estimated rate and thus an unduly low rate.

**B** The tender committee rejected the lowest tender submitted by the fifth respondent as the rate quoted by him was unworkable under any circumstances. The committee, therefore, recommended the acceptance of the next lowest valid tender of the appellant.

**C** The High Court allowed the writ petition filed by the fifth respondent on the assumption that the tender of the fifth respondent, in respect of the second stretch, was not accepted solely as a consequence of non-acceptance of the fifth respondent's tender in respect of the first stretch. Hence the appeal.

Allowing the appeals, the Court

**D** **HELD:** 1.1. 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 the 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 of 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. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderer with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interference, either interim or final, may holdup public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters, in exercise of powers of judicial review,

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should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone.

(ii) Whether the process adopted or decision made is so arbitrary and irrational that the court can say; 'the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached'.

(iii) Whether public interest is affected. [621-A-G]

1.2. If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

*Sterling Computers Ltd. v. M & N Publications Ltd.*, [1993] 1 SCC 445, *Tata Cellular v. Union of India* AIR (1996) SC 11, *Raunaq International Ltd. v. L.V.R. Construction Ltd.*, [1999] 1 SCC 492, *Air India Ltd. v. Cochin International Airport Ltd.*, [2000] 2 SCC 617, *Association of Registration Plates v. Union of India*, [2005] 1 SCC 679, and *B.S.N. Joshi v. Nair Coal Services Ltd.*, [2006] 11 SCALE 526, referred to.

2.1. Clause 3.5.18 of the Orissa Public Works Department Code (Code) requires the authority considering the tenders to take into consideration several points while determining the validity of the tenderers. Two of the points to be so taken into account are whether the tenderer has made the specified Earnest Money Deposit (EMD) and whether the rates quoted contain any unduly low and unworkable rates. [622-B, C]

2.2. It was but natural for the Water Resources Department to seek confirmation from the Postal Department as to whether the Term Deposit Passbook was genuine and valid. Its query elicited a reply from the Superintendent of Post Offices that the Term Deposit passbook for Rs. 1,70,000/- produced by the fifth respondent was not to be acted upon. Therefore, the Committee concluded that the tender of the fifth respondent was defective as not being accompanied by a valid EMD. It cannot be said that the Committee acted unreasonably and arbitrarily, in arriving at the said decision. Clause 3.5.18 of the Code makes it clear that acceptance of any

**A** tender is entirely at the discretion of the accepting authority and no tenderer can require the authority to show cause for rejection of the tender.

**B** 2.3. The Committee was neither blacklisting the tenderer nor visiting any penal consequences on the tenderer. It was merely treating the tender as defective. There was, therefore, no need to give an opportunity to the tenderer to show cause at that stage. [624-C]

**C** 3. In this case, the Committee in fact acted on a factual basis, namely, the communication from the Superintendent of Posts that the TD passbook should not be acted upon. Even if the said information furnished by the Superintendent of Posts was subsequently found to be incorrect, that will not invalidate the action taken by the Committee on such information. [625-E]

*Barium Chemicals Ltd. v. The Company Law Board*, [1966] Supp. SCR 311, and *Secretary of State for Education and Science v. Metropolitan Borough of Tame side*, (1976) All ER 665, held inapplicable.

**D** 4. Where the absurdly low rate is in regard to a large item of work, which has to be executed at the very end, it is possible for the Committee to suspect some ulterior motive on the part of the tenderer. If the Committee felt that there was a reasonable possibility of the contractor leaving the work midway on account of the rate quoted for the last item of work being found to be unworkable, thereby putting the work in jeopardy, it can certainly reject the tender as it affects the reliability of the contractor to perform the work. Unduly low and unworkable rate or rates is a ground for rejection of tenders (vide Note to Clause 3.5.18). The *modus operandi* of quoting low rates in regard to some items of work and thereby securing the contract and then raising disputes by making large claims, is not uncommon among the contractors. The very purpose of constituting a Committee for scrutinizing the tenders is to find out whether any freak low rate will affect the work if the contract is awarded to the tenderer. If the Committee found that the tender of the fifth respondent should be rejected on that ground, the said decision cannot be termed as unreasonable or arbitrary. The Committee has applied its mind and rejected the tender by assigning a reason which is neither irrational nor arbitrary. Neither the High Court nor this Court can sit in appeal over such technical assessment. There is no infirmity in the decision-making process or the decision. [626-D-H]

**H** CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5699 of 2006.

From the Final Judgment and order 25.1.2006 of the High Court of Orissa, Cuttack in WP (C) 4769 of 2005. A

S.K. Dholakia, Manoj Kumar Das, Nikilesh Ramachandran for the Appellant.

R. Venkataramani, Ashok Panigrahi, Satya Mitra Garg, Sibho Sankar Mishra for the Respondents. B

The Judgment of the Court was delivered by

**R.V. RAVEENDRAN, J.** Leave granted in both the special leave petitions. C

These two appeals by special leave, arise out of a common judgment dated 25.1.2006 passed by the Orissa High Court allowing Writ Petition (Civil) Nos. 4769/2005 and 4768/2005 filed by Narayan Mohanty (common fifth respondent in these two appeals). In the said petitions, Narayan Mohanty had challenged the award of construction contracts to Jagdish Mandal and Laxman Sharma (respective appellants in these appeals) in Upper Indravati Irrigation Project ('UIIP' for short). The State, the Executive Engineer (Right Canal Division No.III), the Chief Engineer (UIIP), and Superintending Engineer (UIIP) who were the common respondents 1 to 4 in the said two writ petitions hold the same rank in these two appeals. D

*Facts in SLP [C] No.3196/2006 (re : first stretch)* E

2. The second Respondent, acting on behalf of the Water Resources Department, State of Orissa, invited tenders for "construction of Right Extension Main Canal from RD 8.01 km to 9.03 km including structures" by tender notice dated 9.11.2004. The estimated value of the work as per the tender schedule was Rs.1,69,10,506. In response, 17 tenders were received. The offer of the fifth respondent was the lowest (Rs.1,22,99,099) and the offer of appellant (J. Mandal) was the second lowest (Rs.1,29,36,579). The Executive Engineer recommended the acceptance of the tender of fifth respondent. F

3. The fifth respondent furnished the Earnest Money Deposit (EMD) by pledging a postal Term Deposit of Rs.1,70,000/- (Passbook No.154120 dated 6.12.2004 issued by the Post Master, Mukhiguda) in favour of the second respondent. A written complaint was received by the Department alleging that fifth respondent had made a postal deposit of only Rs.7,000 and had defrauded the Department by altering the figure in the passbook as Rs.1,70,000. In view G

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A of the said complaint, the Superintending Engineer wrote to the concerned Post Office on 3.2.2005 requesting confirmation about the authenticity of the said Term deposit. A similar letter was addressed by the Chief Engineer on 11.3.2005 to the Post Master General, Berhampur Zone, seeking information as to whether fifth respondent had made a deposit of Rs.1,70,000 on 6.12.2004 or any subsequent date. The Superintendent of Post Offices, Kalahandi Division, sent a reply dated 14.3.2005 to the Superintending Engineer stating that the said TD Account for Rs.1,70,000 submitted by fifth respondent should not be taken into account for any official requirement.

C 4. The tenders were scrutinized and considered by the Project Level Committee ('Committee' for short) consisting of the Superintending Engineer, (Right Canal Circle), the Financial Advisor and Chief Accounts Officer (UIIP), the Executive Engineer (UIRC Division No. III), and the Assistant to Chief Engineer (UIIP). The details of their deliberations and recommendations are contained in the proceedings dated 24.3.2005. The Committee found that fifth respondent, the appellant (Jagdish Mandal) and Dinesh Kumar Panda were the first, second and third lowest tenderers. Having regard to the communication dated 14.3.2005 of the Superintendent of Post Offices not to take note of Term Deposit for Rs.1,70,000, the Committee held that the EMD submitted by fifth respondent was invalid and consequently his tender was 'non-responsive'. It therefore recommended the acceptance of the next lowest valid tender of Jagdish Mandal.

E 5. The office of the Post Master General, Berhampur, sent a reply dated 30.3.2005 to the Chief Engineer, UIIP, reiterating that TD Account No.154120 for Rs.1,70,000 of fifth respondent should not be taken into account.

F 6. On coming to know about the rejection of his tender, the respondent herein filed W.P. No.4769/2005 seeking a direction to respondents 1 to 4 not to award to Jagdish Mandal or any other contractor, and a further direction for awarding the work to him. The Accepting Authority, however, accepted the offer of Jagdish Mandal and awarded the work to him under an agreement dated 18.4.2005.

G 7. When the writ petition came up for consideration, the High Court desired to know the reason as to why the Postal authorities had advised that T.D. Account No.154120 dated 6.12.2004 of fifth respondent should not be taken into account. Therefore, the Chief Engineer (UIIP), addressed a letter dated 19.8.2005 to the Post Master General, Berhampur, requesting for reasons.

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The reasons were furnished in the following reply dated 25.8.2005 of the Post Master General : A

“I am directed to intimate that 1 yr. TD A/c No.154120 for Rs.1,70,000/- has not actually been opened at Mukhiguda SO on 06.12.2004 depositing the amount. But one pass book bearing 1 yr. TD A/c No.154120 has been prepared out of record by the holder Sri Narayan Mohanty in connivance with the SPM Mukhiguda and the said P.B. has been pledged to the Executive Engineer RCD III, Jungarh on 06.12.2004 itself. B

As 1 yr. TD A/c No.154120 has been prepared without any amount deposited in post office it has been intimated in this office letter of even no. dt. 30.3.2005 not to take into account the TD A/c No.154120 for Rs.1,70,000/- submitted by Sri Narayan Mohanty towards office requirement.” C

8. The said communication dated 25.8.2005 was placed before the High Court with an affidavit of the Executive Engineer. When the matter came up on 29.8.2005, the High Court appears to have observed that the Department should prosecute the fifth respondent if he had dishonestly and fraudulently tried to secure a contract by utilizing a fake Post Office T.D. Account book. The Government Advocate, conveyed the said observations and instructed the Chief Engineer (UIIP), to lodge a complaint with the Police. Accordingly, the Executive Engineer lodged a complaint dated 9.9.2005 with the Officer-in-Charge of Junagarh Police Station, requesting appropriate action against fifth respondent. The Officer-in-Charge of Junagarh Police Station submitted an investigation report to the Advocate General stating that his investigation of the records showed that Rs.1,70,000 had been deposited by Narayan Mohanty on 6.12.2004 with the Sub-Post Master, Mukhiguda and a one year T.D. Account No.154120 was opened, and opined that the passbook was genuine. The said report was also placed before the High Court. D E F

9. The High Court by its judgment dated 25.1.2006 allowed the writ petition filed by fifth respondent. It held : G

“The materials as produced before us clearly show that the tender committee is wrong in coming to the conclusion that the term deposit passbook submitted by the petitioner was a forged one. We also find that though the letter of the Superintendent of Post Offices, Bhawanipatna did not state that the said term deposit made by the H

A petitioner was a fake one nor any reason was assigned in the said letter as to why the said term deposit should not be taken into account, the tender committee mechanically came to the conclusion that the offers of the petitioner for both the above works were non-responsive. *In view of the subsequent development, during pendency*

B *of both the writ applications and the investigation report submitted by the police to the learned Advocate General, after due investigation, we are of the view that the offers of the petitioner made for both the works have been arbitrarily rejected by the tender committee for no fault of the petitioner."*

C (emphasis supplied)

In view of the said finding, the High Court quashed the agreement between the Department and Jagdish Mandal (appellant) and directed the Committee to reconsider the case of Narayan Mohanty (fifth respondent) by accepting the T.D. passbook submitted by him as valid *vis-a-vis* other tenderers and

D take a final decision in regard to award of the contract *de novo*. The said decision is challenged by Jagdish Mandal.

*Facts in SLP(c) No. 7817/2006 (re : second stretch)*

10. Tenders were also invited in regard to the adjoining stretch, that is

E 'Construction of Right Extension Main Canal from RD 9.03 km to 10.02 km', by tender notice dated 9.11.2004 issued by the second Respondent. The estimated cost of the tender schedule work was Rs. 2,23,10,768. There were 14 tenders in response to the said tender notice. Fifth respondent was the lowest tenderer (Rs.1,45,80,338). Laxman Sharma, the appellant was the second

F lowest tenderer (Rs.1,69,56,180). The Executive Engineer recommended the acceptance of the tender of fifth respondent.

11. One of the main items of work to be executed was 'cement concrete lining' - Item No. 19 of the tender schedule. It was the last among the items of work to be executed. It accounted for nearly one-fifth of the estimated cost of the work. The estimated rate for that item was Rs.2020.50 per cu.m. and

G the estimated total cost was Rs.41,47,581. The fifth respondent, however, quoted a rate of Rs.20 per cu.m., for item no. 19, in all Rs.41,055. The rate quoted was less than 1% of the estimated rate and thus an unduly low rate.

12. The Committee considered the tenders on 24.3.2005. By proceeding

H dated 24.3.2005, the lowest tender submitted by the fifth respondent was

rejected for the following reasons :

- (a) That in regard to the adjoining work (RD 8.01 km to 9.03 km), the tenderer was found to have committed a fraudulent act in manipulating the TD pass-book relating to EMD.
- (b) In regard to Tender schedule item no.19 (CC lining) which involved 18.37% of the total tendered value, the tenderer had quoted a rate which was 99.01% less than the estimated rate, and it was unworkable under any circumstances.
- (c) Though the rate analysis submitted by the tenderer, for schedule Item No.4 showed the rate as Rs. 45/-, he had quoted the rate as Rs.65/- which showed a tendency to manipulate the rates.

The Committee, therefore, recommended that the next lowest tender, (submitted by Laxman Sharma) for acceptance. The accepting authority acting on the said recommendations, awarded the work to Laxman Sharma under an agreement dated 18.4.2005. Feeling aggrieved, Narayan Mohanty filed Writ Petition (C) No. 4768 of 2005 seeking a direction to the department not to award the said work to Laxman Sharma and for a further direction to award the work to him.

13. W.P. [C] No.4768/2005 was heard and disposed of along with W.P. (C) No. 4769 of 2005, by a common judgment. In the said judgment, the High Court only considered and dealt with the facts relating to the first stretch which was the subject matter of W.P. (C) No. 4769 of 2005. It did not consider the facts relating to the second stretch which was the subject matter of W.P. (C) No. 4768 of 2005. It proceeded on the assumption that the tender of fifth respondent in respect of the second stretch, was not accepted, solely as a consequence of non-acceptance of the fifth respondent's tender in respect of the first stretch. As the High Court set aside the decision of the Committee in regard to first stretch, it also set aside the decision of the committee regarding the second stretch. The said decision is challenged by Laxman Sharma.

*Question for consideration :*

14. The learned counsel for the appellants submitted that the scope of interference in judicial review of tender processes and award of contracts is limited only to cases where there are material violation of the terms relating to scrutiny and acceptance of tenders or where the decision is vitiated either

A by arbitrariness/irrationality or by *mala fides*/favoritism. It was contended that as the fifth respondent failed to plead or make out any of these grounds in his writ petitions, the High Court ought not to have interfered with the contracts awarded to the appellants.

B 15. In the first case, it was contended that the decision of the committee that the EMD was defective, was based on the communication dated 14.3.2005 of the postal authorities requiring the committee not to take note of the TD passbook for Rs.1,70,000; that the Post Master General had also subsequently confirmed vide communications dated 30.3.2005 and 25.8.2005 that the TD passbook furnished by the fifth respondent was manipulated/forged and not to be acted upon; and that the High Court committed an error in ignoring the findings of the postal department, and in relying on an incomplete inquiry report of the Officer in-charge of the Junagarh police station, submitted during the pendency of the writ petition. Reliance is also placed on the reports placed by the State Government before this Court in pursuance of the order dated 4.9.2006 which showed that Rs.1,70,000 was not deposited by the fifth respondent on 6.12.2004.

E 16. In the second case, it was contended that the High Court had wrongly allowed the writ petition, without even referring to the facts or considering the contentions. It was submitted that the High Court ought to have considered the separate reasons given by the Committee for rejection of the tender of the fifth respondent, that is, quoting of unduly low rate for item no.19 and quoting a manipulated rate for item no.4.

F 17. The learned counsel for Respondents 1 to 4 broadly agreed with the contentions urged by the appellants. The fifth respondent, however, supported the reasoning of the High Court. On the contentions urged, the question that arise for consideration is whether the High Court in exercise of power of judicial review, was justified in quashing the award of the contract relating to first stretch to Jagdish Mandal and award of contract relating to second stretch to Laxman Sharma and directing reconsideration of tender.

G *Scope of Judicial Review of award of contracts :*

18. We may refer to some of the decisions of this Court, which have dealt with the scope of judicial review of award of contracts.

H (18.1) In *Sterling Computers Ltd v. M & N Publications Ltd*, [1993] 1 SCC 445, this Court observed :

“While exercising the power of judicial review, in respect of contracts entered into on behalf of the State, the court is concerned primarily as to whether there has been any infirmity in the decision making process..... the courts can certainly examine whether ‘decision making process’ was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution.”

(18.2.) In *Tata Cellular v. Union of India*, AIR (1996) SC 11, this Court referred to the limitations relating to the scope of judicial review of administrative decisions and exercise of powers in awarding contracts, thus:

- (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 action. 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. More .....often than not, such decisions are made qualitatively by experts.
- (5) The Government must have freedom of contract. In other words, a fairplay in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facets pointed out above) but must 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.

This Court also noted that there are inherent limitations in the exercise of power of judicial review of contractual powers. This Court also observed that the duty to act fairly will vary in extent, depending upon the nature of cases,

A to which the said principle is sought to be applied. This Court held that the State has the right to refuse the lowest or any other tender, provided it tries to get the best person or the best quotation, and the power to choose is not exercised for any collateral purpose or in infringement of Article 14.

B (18.3) In *Raunaq International Ltd., v. I.V.R. Construction Ltd.*, [1999] 1 SCC 492, this Court dealt with the matter in some detail. This Court held:

C “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.

G 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.

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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 re-doing the entire work - thus involving larger outlays or 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.

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."

(18.4.) In *Air India Ltd. v. Cochin International Airport Ltd*, [2000] 2 SCC 617, this Court summarized the scope of interference as enunciated in several earlier decisions thus :

"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 paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender

A conditions permit such a relaxation, for *bona fide* reasons, if the  
 tender conditions permit such a relaxation. It may not accept the offer  
 even though it happens to be the highest or the lowest. But the State,  
 its corporations, instrumentalities and agencies are bound to adhere  
 B to the norms, standards and procedures laid down by them and  
 cannot depart from them arbitrarily. Though that decision is not  
 amenable to judicial review, the court can examine the decision-making  
 process and interfere if it is found vitiated by *mala fides*,  
 unreasonableness and arbitrariness. The State, its corporations,  
 instrumentalities and agencies have the public duty to be fair to all  
 C concerned. *Even when some defect is found in the decision-making  
 process the court must exercise its discretionary power under Article  
 226 with great caution and should exercise it only in furtherance of  
 public interest and not merely on the making out of a legal point.  
 The court should always keep the larger public interest in mind in  
 order to decide whether its intervention is called for or not. Only  
 when it comes to a conclusion that overwhelming public interest  
 D requires interference, the court should intervene."*

[Emphasis supplied]

(18.5.) In *Association of Registration Plates v. Union of India*, [2005]  
 1 SCC 679, this Court held:

E ".....Article 14 of the Constitution prohibits government from arbitrarily  
 choosing a contractor at its will and pleasure. It has to act reasonably,  
 fairly and in public interest in awarding contracts. At the same time,  
 no person can claim a fundamental right to carry in business with the  
 F government. All that he can claim is that in competing for the contract,  
 he should not be unfairly treated and discriminated, to the detriment  
 of public interest. ..."

(18.6.) In *B.S.N. Joshi v. Nair Coal Services Ltd.*, [2006] 11 SCALE 526,  
 this Court observed :

G "It may be true that a contract need not be given to the lowest  
 tenderer but it is equally true that the employer is the best judge  
 therefor; the same ordinarily being within its domain, court's  
 interference in such matter should be minimal. The High Court's  
 H jurisdiction in such matters being limited in a case of this nature, the  
 Court should normally exercise judicial restraint unless illegality or

arbitrariness on the part of the employer is apparent on the face of the record.” A

19. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and *malafides*. 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. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions :

- (i) Whether the process adopted or decision made by the authority is *mala fide* or intended to favour someone.

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say : ‘the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached.’

- (ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving black-listing or imposition of penal consequences on a tenderer/contractor or distribution of state largesse (allotment of sites/ H

A shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

*Re : Contract for First Stretch*

B 20. The tender procedure requires all tenders involving Rs.10 lakhs or more to be evaluated by a Project Level Committee (with four members described in para 4 above) and their findings/recommendations have to be placed before the approving/accepting authority. Clause 3.5.18 of the Orissa Public Works Department Code ('code' for short) requires the authority considering the tenders to take into consideration several points while determining the validity of the tenders. Two of the points to be so taken into account are whether the tenderer has made the specified EMD and whether the rates quoted contain any unduly low and unworkable rates.

D 21. The tender conditions give an option to the tenderer, to furnish earnest money deposit, by pledging NSC/postal time deposit/postal saving passbook/deposit receipts issued by any nationalized Bank. The first respondent pledged a postal TD Account passbook relating to a Deposit of Rs.1,70,000 in fulfilment of the condition regarding EMD. The Department is entitled to verify the genuineness of the TD passbook to ensure that the required EMD is furnished. In this case, even before the Committee could consider the tenders, a complaint was also received alleging that the TD passbook produced by fifth respondent was tampered and manipulated. It was therefore but natural for the Department to seek confirmation from the Postal Department as to whether the TD Passbook was genuine and valid. Its query elicited a reply from the Superintendent of Post Offices that the Term Deposit passbook for Rs.1,70,000 produced by the fifth respondent was not to be acted upon. Therefore, the Committee concluded that the tender of fifth respondent was defective as not being accompanied by a valid EMD. It cannot be said that the Committee acted unreasonably and arbitrarily, in arriving at the said decision. The Committee did not send show cause notice to the fifth respondent before rejecting the TD passbook and consequently the tender, as Clause 3.5.18 of the Code makes it clear that acceptance of any tender is entirely at the discretion of the accepting authority and no tenderer can require the authority to show cause for rejection of the tender.

H 22. We have already noticed that while the Committee acted on the letter dated 14.3.2005 of the Superintendent of posts, the High Court acted on an Inquiry Report submitted by the Officer in Charge of Junagarh Police Station

during the pendency of the writ petition. When the SLP came up for consideration on 25.1.2006, this Court directed the State to place on record the report of the Superintendent of Post Offices and the Police investigation report. Accordingly, the State placed three reports before this Court. The first is the detailed Vigilance Enquiry Report of the Postal Department holding that the TA Account pass book no.154120 issued by Sub-Post Master, Mukhiguda should not be considered as genuine. The second is the Inquiry Report dated 16.9.2006 of the Officer in charge of Junagarh police station reiterating his earlier report submitted to the High Court that the pass book is genuine and a sum of Rs.1,70,000 was deposited by fifth respondent in postal TA Account No.154120 on 06.12.2004. The third is the report of the Superintendent of Police, Kalahandi, dated 28.10.2006, opining that fifth respondent did not deposit Rs.1,70,000 on 6.12.2004 and that the Sub-Post Master, Mukhiguda had shown the date of deposit as 6.12.2004 in order to help fifth respondent to get his tender accepted. While the inquiry report of the Postal Vigilance Cell and the letters from postal department clearly holds that the TD Account Passbook No.154120 produced by fifth respondent was not genuine, the report of the office in charge of the police station, concludes that the passbook is genuine and not forged. But significantly the subsequent police report dated 28.10.2006 by a higher authority, namely the Superintendent of Police, Kalahandi, states that fifth respondent had obtained a pre-dated passbook in connivance with the Sub-Post Master Mukhiguda.

23. We have referred to various reports only to show that there exist divergent views about the genuineness of the TD passbook. It is wholly unnecessary to record a definite finding on the issue whether the TD passbook submitted by one of the tenderers towards EMD is genuine or forged. In this case, as the Superintendent of Post Offices informed the department that the postal TD passbook produced by fifth respondent should not be acted upon, the Committee proceeded to hold that his tender was 'non-responsive' or defective as it was not accompanied by a valid EMD. In such circumstances, the limited question that had to be considered in a writ petition filed by the unsuccessful tenderer is whether the Committee acted unreasonably in taking such a decision. There can be no doubt that it did not. The tender was to be accompanied by an EMD as prescribed. If the postal department which issued the TD passbook pledged by the fifth respondent towards EMD, said that it should not be acted upon, there is no question of the Committee then holding any further enquiry about its genuineness and holding up the evaluation of tenders. For example if a Pay Order/Banker's Cheque/Demand Draft issued by a Bank is produced as EMD and the Bank informs that such

A pay order/cheque/DD should not be acted upon, the authority concerned is not expected to suspend the process of evaluation and hold an enquiry in regard to the validity of genuineness, but act upon the information received from the Bank and treat the EMD as defective and proceed with the evaluation of tenders on that basis.

B 24. The learned counsel for fifth respondent submitted that the department ought not to have acted on a complaint received against him, without giving him an opportunity to show cause. This contention has no merit. Whether any complaint is received or not, the department is entitled to verify the authenticity of the document pledged as earnest money deposit.

C Such verification is routinely done. The Committee was neither blacklisting the tenderer nor visiting any penal consequences on the tenderer. It was merely treating the tender as defective. There was, therefore, no need to give an opportunity to the tenderer to show cause at that stage. We no doubt agree that the Committee could have granted an opportunity to the tenderer to explain the position. But failure to do so cannot render the action of the

D Committee treating the EMD as defective, illegal or arbitrary.

25. The limited scope of judicial review by the High Court envisaged examination of the question whether there was any material irregularity in the decision making process or whether the decision of the Committee and consequential rejection of fifth respondent's tender was irrational, unreasonable

E or arbitrary. The validity of the decision of the Committee taken on the material available at the time of consideration of tenders, cannot be tested with reference to a subsequent police enquiry report submitted in the writ proceedings. Nor can it be held that the Committee acted arbitrarily in not accepting the passbook, on the basis of some report opining that the TD

F passbook is genuine. The High Court was not sitting in appeal over the decision of the Committee. The High Court could not, therefore, by relying on a subsequent police enquiry report, the correctness of which is yet to be established, to hold that the Tender Committee was wrong in rejecting the TD passbook. Further, the High Court missed the issue. The question for consideration was not whether the TD passbook pledged by the fifth

G respondent is genuine or not. The question for consideration was whether the committee acted arbitrarily or irrationally in rejecting the said TD passbook.

26. The learned counsel for fifth respondent submitted that if the Committee had proceeded on an incorrect basis of facts, then the decision

H was open to judicial review. Reliance was placed on the following observations

of the House of Lords in *Secretary of State for Education and Science v. Metropolitan Borough of Tameside*, [1976] 3 All ER 665 : A

“In many statutes a Minister or other authority is given a discretionary power and in these cases the court’s power to review any exercise of the discretion, though still real, is limited. In these cases it is said that the courts cannot substitute their opinion for that of the Minister; they can interfere on such grounds as that the Minister has acted right outside his powers or outside the purpose of the Act, *or unfairly, or on an incorrect basis of fact*. But there is no universal rule as to the principles on which the exercise of a discretion may be reviewed;” B

Reliance is also placed on the following observations of this Court in *Barium Chemicals Ltd. v. The Company Law Board*, [1966] Supp. SCR 311 C

“No doubt the formation of opinion is subjective but the existence of circumstances relevant to the inference as the sine qua non for action must be demonstrable. If the action is questioned on the ground that no circumstance leading to an inference of the kind contemplated by the section exists, the action might be exposed to interference unless the existence of the circumstances is made out.” D

These decisions are of no assistance. In this case, the committee in fact acted on a factual basis, namely, the communication from the Superintendent of Posts that the TD passbook should not be acted upon. Even if the said information furnished by the Superintendent of Posts was subsequently found to be incorrect, that will not invalidate the action taken by the Committee on such information. In this case, in fact, there is nothing to show even till now that the information given by the Superintendent of Posts in his letter dated 14.3.2005 was false. We are not expressing any opinion on the issue whether the TD pass book was really genuine or not as it does not directly arise for consideration in this case. All that is required to be noticed is that the High Court exceeded its power of judicial review in interfering with the contracts. E F

*Re : Contract for Second Stretch* G

27. The High Court has quashed the agreement relating to second stretch without even considering the matter on merits. It proceeded on the basis that both tenders of fifth respondent were rejected only on the ground of fabrication/manipulation of the term deposit pass book offered as EMD for H

A the first tender. We have already held, while dealing with the first tender, that there was no irregularity in the decision to exclude reject fifth respondent's tender. Therefore, the very basis for High Court's judgment for interfering with the award of the work in respect of the second tender disappears. Be that as it may. The Committee has given other reasons also for rejection of fifth respondent's tender, which merit consideration.

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28. The fifth respondent had submitted an unduly low rate in regard to item no. 19 (C.C. lining). It was the last item of work to be executed, and constituted nearly one fifth of the total estimated value of the work. In regard to the said work, as against the rate of Rs.2020.50 per cu.m., estimated by the department, the fifth respondent quoted an absurdly low rate of Rs. 20 only which was less than 1% of the estimated rate. It is obvious that he could not have executed the work at that rate. The CC lining being the last work, there was every likelihood of the tenderer executing the other items of work for which he had quoted much higher rates than others and leave out the last item, or raise same dispute thereby jeopardizing the work and causing delay.

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It is true that a contractor could have an answer by contending that he had priced the other items of work in a manner which enabled him to quote a very low rate for one of the items. But then the committee is entitled to consider the effect of such freak rates. Where the absurdly low rate is in regard to a large item of work, which has to be executed at the very end, it is possible for the committee to suspect some ulterior motive on the part of the tenderer.

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If the committee felt that there was a reasonable possibility of the contractor leaving the work midway on account of the rate quoted for the last item of work being found to be unworkable, thereby putting the work in jeopardy, it can certainly reject the tender as it affects the reliability of the contractor to perform the work. Unduly low and unworkable rate or rates, is a ground for rejection of tenders (vide Note to clause 3.5.18). The modus operandi of quoting low rates in regard to some items of work and thereby securing the contract and then raising disputes by making large claims, is not uncommon among the contractors. The very purpose of constituting a committee for scrutinizing the tenders is to find out whether any freak low rate will affect the work if the contract is awarded to the tenderer. If the committee found that the tender of fifth respondent should be rejected on that ground, the said decision cannot be termed as unreasonable or arbitrary. The committee has applied its mind and rejected the tender by assigning a reason which is neither irrational nor arbitrary. Neither the High Court nor this Court can sit in appeal over such technical assessment. There is no infirmity in the decision

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making process or the decision.

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29. Learned counsel for the fifth respondent pointed out that the Resident Audit Officer had made a report in regard to the extra cost involved due to rejection of the two lowest tenders of the fifth respondent and that report refers to the fact that Laxman Sharma had also quoted some low rates in regard to certain items of work. It is contended that ignoring low rates in the case of Laxman Sharma, but making it a ground for rejection of fifth respondent's tender, show bias and favouritism. The value of work in respect of which Laxman Sharma is said to have given low tender rates, is not specified. It is for the Committee to assess whether a particular low tender rate is likely to affect the execution of the work. Therefore, the fact that Laxman Sharma had also quoted low rates in regard to certain items of work, will not affect the decision of the Committee.

*Conclusion:*

30. We are therefore of the view that there were good and adequate reasons for the Committee to reject the lowest tenders of fifth respondent in both cases and there was no justification for the High Court to interfere with the contracts awarded to the respective appellant in these two appeals. We also record the statement made by the counsel for the appellants in the two appeals, on instructions, that the appellants are ready and willing to execute their respective works, without seeking any revision in rates or compensation for the delay in commencement of the work on account of pendency of the legal proceedings till now. The statement is recorded.

31. In view of our findings on the points above, both these appeals are allowed and the judgment of the High Court in the two writ petitions is set aside. The writ petitions filed by the fifth respondent are rejected. Parties to bear respective costs.

V.S.S.

Appeals allowed.