

MAA BINDA EXPRESS CARRIER AND ANR.  
v.  
NORTHEAST FRONTIER RAILWAY AND ORS.  
(Civil Appeal No. 10751 of 2013)

NOVEMBER 29, 2013

[T.S. THAKUR AND VIKRAMAJIT SEN, JJ.]

*Government Contracts:*

*Tenders – Cancellation of tender process for deficiencies therein – Held: Submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept – Bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of Government – All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders — To that extent the tenderer has an enforceable right – In the instant case, there were serious deficiencies in the entire tender process, which would have resulted in substantial financial loss to Railways and it was neither in public interest nor necessitated by any legal compulsion – Therefore, the decision to cancel the tender process was in no way discriminatory or mala fide – It did not violate any fundamental right of the appellant nor could the action of respondent be termed unreasonable so as to warrant any interference from the Court – Costs.*

*Tenders – Terms of – Judicial review of – Held: Power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party — Award of a contract is*

- A *essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision – This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor*
- B *made to benefit any particular tenderer or class of tenderers – Judicial review.*

C In response to a notice dated 12.7.2011 inviting tenders for the grant of a three year lease of 23 tonnes of space in VPH (Parcel Van) on train No.15960/15959 Kamrup Express, the bid of the appellant for a sum of Rs.1,46,872/- per trip for the proposed lease was found to be the highest. However, the tender process was discharged by the railway administration on account of technical and administrative reasons. The communication

D dated 6.9.2011, in that regard sent to the appellant, was assailed in a writ petition before the High Court. The Single Judge allowed the writ petition with a direction that so long as the appellant undertook to accept the penalty clause as a part of the contract between the parties, the

E railway administration would consider its bid for acceptance and resultant allotment of the contract. However, the writ appeal filed by the Railways was allowed and the writ petition of the appellant dismissed.

F **Dismissing the appeal, the Court**

HELD: 1. Submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the

G tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders

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are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. [para 8] [537-A-C]

2.1. Power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party. In the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the court competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest. In *Michigan Rubber (India) Ltd.*, principles of law applicable in this regard to the process for judicial review have been identified. [para 8-10] [536-H, E-F; 538-A-B]

*Raunaq International Ltd. v. I.V.R. Construction Ltd. and Ors.* 1998 (3) Suppl. SCR 421 = (1999) 1 SCC 492 *Meerut Development Authority v. Association of Management Studies and Anr. etc.* 2009 (6) SCR 663 = (2009) 6 SCC 171 and *Air India Ltd. v. Cochin International Airport Ltd.* (2000) 1 SCR 505; *Tata Cellular v. Union of India* 1994 (2) Suppl. SCR 122 = (1994) 6 SCC 651, and *Jagdish Mandal v. State of Orissa and Ors.* 2006 (10) Suppl. SCR 606 = (2007) 14 SCC 517; *Michigan Rubber (India) Ltd. v. State of Karnataka and Ors.* 2012 (8) SCR 128 = (2012) 8 SCC 216 – relied on.

2.2. Award of a contract is essentially a commercial transaction which must be determined on the basis of considerations that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor made to benefit any particular tenderer or class of tenderers. So also the authority inviting tenders can enter into negotiations or grant relaxation for *bona fide* and cogent reasons

A provided such relaxation is permissible under the terms governing the tender process. [para 8] [537-C-E]

B 2.3. In the instant case, it is not in dispute that tender documents were not accompanied by the terms and conditions applicable to the proposed contract. That being so, award of a contract without specifying the terms subject to which the same had to be worked was bound to result in serious administrative and legal complications. The absence of a penalty clause from the tender documents was similarly a serious deficiency in the entire tender process. That apart, not only is the reserve price higher than the amount offered by the appellant but even the market survey has brought forth rates higher than what was offered by the appellant. Allotment of any contract at the rate offered by the appellant would, therefore, result in a substantial financial loss to the railways which is neither in the public interest nor necessitated by any legal compulsion. Time lag in such matters plays an important role as it indeed has in the case at hand. [para 7] [535-G-H; 536-A-B, E-G]

E 2.4. Therefore, the decision to cancel the tender process was in no way discriminatory or *mala fide*. On the contrary, if a contract had been awarded despite the deficiencies in the tender process serious questions touching the legality and propriety affecting the validity of the tender process would have arisen. In as much as the competent authority decided to cancel the tender process, it did not violate any fundamental right of the appellant nor could the action of the respondent be termed unreasonable so as to warrant any interference from this Court. The Division Bench of the High Court was, in that view, perfectly justified in setting aside the order passed by the Single Judge and dismissing the writ petition. [para 11] [539-E-G]

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**Case Law Reference:**

1998 (3) Suppl. SCR 421 relied on para 6

2009 (6) SCR 663 relied on para 9

1994 (2) Suppl. SCR 122 relied on para 9

2006 (10) Suppl. SCR 606 relied on para 9

2012 (8) SCR 128 relied on para 9

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10751 of 2013.

From the Judgment and order dated 06.06.2012 of the High Court of Guwahati, Assam in Writ Appeal No. 79 of 2012.

Dr. Abhishek Manu Singhvi, C. Mukund, Priyankar Saha, Ekta Bhasin, Pankaj Sain, Amit Bhandari, Charul Sarin, Bijoy Kumar Jain for the appellants.

R.P. Bhatt, A.K. Srivastava, Vikas Malhotra, P. Agrawala, Rajat Mathur, Shreekant N. Terdal for the respondents.

The Judgment of the Court was delivered by

**T.S. THAKUR, J. 1.** Leave granted.

2. This appeal arises out of a judgment and order dated 6th June, 2012 passed by a Division Bench of the Gauhati High Court whereby Writ Appeal (C) No.79 of 2012 has been allowed; judgment and order dated 4th February, 2012 passed by a Single Bench of that Court set aside and Writ Petition (C) No.4668 of 2011 filed by the appellants dismissed.

3. In terms of a notice dated 12th July, 2011 Divisional Commercial Manager, Tinsukia invited tenders for the grant of a three year lease of 23 tonnes of space in VPH (Parcel Van) on train No.15960/15959 Kamrup Express. Among those who responded to the tender notice was the appellant herein who

A offered a sum of Rs.1,46,872/- per trip for the proposed lease. The tender process was discharged by the railway administration on account of technical and administrative reasons no matter the appellant's offer was the highest. A communication dated 6th September, 2011, addressed to the  
 B appellant was in that regard issued to the appellant who assailed the same in W.P. (C) No.4668 of 2011 before the High Court of Gauhati.

4. In their counter affidavit the railways defended the  
 C cancellation/discharge of the tender not only on the ground that the appellant had acquired no vested right for allotment of the contract in its favour merely because its bid was found to be the highest, but also on the ground that the power to cancel/  
 D withdraw the tender notice had been specifically reserved by the railway administration in its favour. That apart, the cancellation of the tender process was sought to be justified also on the ground that the railway administration had discovered a serious deficiency in the same in as much as the tender forms had been issued without enclosing therewith the terms and conditions subject to which the contract could be  
 E allotted or awarded. It was also contended that an all important penalty clause had not been incorporated in the tender documents. These omissions and deficiencies were according to the respondent sufficient for cancellation of the tender process to be followed by a fresh process in due course.

F 5. A learned Single Judge of the High Court of Gauhati before whom the matter was argued took the view that the discharge of the tender process had caused prejudice to the appellant by reason of his rates having become public. It was  
 G also held by the learned Single Judge that every public authority was required to act fairly while granting contracts and that reasons for cancellation of the tender process should have been set out in the communication sent to the appellant instead of being disclosed subsequently in the affidavit filed in opposition  
 H to the writ petition. The learned Single Judge accordingly

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allowed the writ petition with a direction that so long as the appellant undertook to accept the penalty clause as a part of the contract between the parties the railway administration would consider its bid for acceptance and resultant allotment of the contract within 15 days of receipt of the undertaking.

6. Aggrieved by the judgment and order abovementioned, the railway administration preferred Writ Appeal (C) No.79 of 2012 before the Division Bench of the High Court of Gauhati. Relying upon the decision of this Court in *Raunaq International Ltd. v. I.V.R. Construction Ltd. and Ors.* (1999) 1 SCC 492 the Division Bench held that the appellant acquired no right to claim the award of the contract merely by reason of its bid being the highest. It further held that the scope of judicial review being limited in tender matters, the Court had to restrain itself from interfering with the process so long as the decision of the competent authority was not against public interest, irrational, *mala fide* or illegal. It was also held that merely because the order discharging tender process was silent as to the reasons for the decision the same did not prevent the Court from looking into the records to find out the basis on which the cancellation was ordered. So also the argument that exposure of rates offered by the appellant would result in prejudice to the appellant was rejected as a ground to justify interference with the decision of the railway administration which was otherwise held to be legal and bona fide. The present appeal assails the said decision as seen earlier.

7. We have heard learned counsel for the parties at some length. The material facts are not in dispute. It is not in dispute that tender documents were not accompanied by the terms and conditions applicable to the proposed contract. That being so, award of a contract without specifying the terms subject to which the same had to be worked was bound to result in serious administrative and legal complications. It is also not in dispute that no tender Box Opening Committee had been nominated with the approval of the Controlling Officer nor was any

A verification of tender documents conducted by the Division concerned for their genuineness. The absence of a penalty clause from the tender documents was similarly a serious deficiency in the entire tender process. Cancellation of the tender process could not, in that view, be said to be *mala fide* to call for interference by the High Court. The respondents have, in their written submissions filed before us, referred to Circular No.12 of 2006 by which guidelines for leasing out existing space in trains for the purposes of operating parcel services have been issued. These guidelines, *inter alia*, stipulate that a tender Committee shall be put together which requirement was also not complied with while issuing the tender notice in the instant case. That apart, the Ministry of Railways has, by Circular No.13 dated 31st May, 2012, revised the rate structure for booking of parcel and luggage services. The revised rate for Kamrup Express is Rs.4756/- per ton. The reserve price calculated on that basis comes to Rs.1 84,100/-. The offer made by the appellant was much below that amount. Besides, a market survey conducted in terms of an interim order passed by the High Court had revealed that the contract could fetch Rs.2,25,000/- per trip which was substantially higher than Rs.1,46,872/- quoted by the appellant. Suffice it to say that not only is the reserve price applicable as on date higher than the amount offered by the appellant but even the market survey has brought forth rates higher than what was offered by the appellant. Allotment of any contract at the rate offered by the appellant would, therefore, result in a substantial financial loss to the railways which is neither in the public interest nor necessitated by any legal compulsion. Time lag in such matters plays an important role as it indeed has in the case at hand.

G 8. The scope of judicial review in matters relating to award of contract by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognize that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject

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to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well-settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor made to benefit any particular tenderer or class of tenderers. So also the authority inviting tenders can enter into negotiations or grant relaxation for *bona fide* and cogent reasons provided such relaxation is permissible under the terms governing the tender process.

9. Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the Court who is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest. (See: *Meerut Development Authority v. Association of Management Studies and Anr. etc.* (2009) 6 SCC 171 and *Air India Ltd. v. Cochin International Airport Ltd.* (2000) 1 SCR 505).

10. The scope of judicial review in contractual matters was further examined by this Court in *Tata Cellular v. Union of India* (1994) 6 SCC 651, *Raunaq International Ltd.'s case* (supra) and in *Jagdish Mandal v. State of Orissa and Ors.* (2007) 14 SCC 517 besides several other decisions to which we need

A not refer. In *Michigan Rubber (India) Ltd. v. State of Karnataka and Ors.* (2012) 8 SCC 216 the legal position on the subject was summed up after a comprehensive review and principles of law applicable to the process for judicial review identified in the following words:

B “19. From the above decisions, the following principles emerge:

(a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;

(b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;

(c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;

(d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and

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(e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government. A

20. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions: B

(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"; and (ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226." C D

(emphasis supplied)

11. As pointed out in the earlier part of this order the decision to cancel the tender process was in no way discriminatory or *mala fide*. On the contrary, if a contract had been awarded despite the deficiencies in the tender process serious questions touching the legality and propriety affecting the validity of the tender process would have arisen. In as much as the competent authority decided to cancel the tender process, it did not violate any fundamental right of the appellant nor could the action of the respondent be termed unreasonable so as to warrant any interference from this Court. The Division Bench of the High Court was, in that view, perfectly justified in setting aside the order passed by the Single Judge and dismissing the writ petition. E F G

12. In the result this appeal fails and is hereby dismissed with costs assessed at Rs.25,000/-

R.P.

Appeal dismissed. H