

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

SPECIAL LEAVE PETITION(CIVIL)NOS. 13802-13805 of 2019

THE SILPPI CONSTRUCTIONS
CONTRACTORS

... PETITIONER(S)

VERSUS

UNION OF INDIA AND ANR. ETC. ETC.

... RESPONDENT(S)

ORDER

1. Keeping in view the urgency of the matter, after detailed hearing the Special Leave Petitions were dismissed and we had directed that a reasoned order would follow. Hence the present order.

2. Respondent Nos. 1 and 2 issued notice inviting tenders for two works at Kochi. The estimated cost of the works were Rs. 53 crores and Rs. 72 crores respectively. The petitioner “The Silppi Constructions Contractors”, (hereinafter referred to as the firm) uploaded its competitive bid on the site and complied with all the conditions. The technical bids of the petitioner were rejected by the tendering authorities on 28.03.2019. The petitioner filed

appeals before the appellate authority on 28.03.2019 itself which were rejected on 09.04.2019.

3. Thereafter, the petitioner filed a writ petition in the High Court of Kerala and the main ground raised was that no reasons were given either while rejecting its tender or the appeals. In the counter filed to the writ petition the stand taken by the respondents was that the petitioner's tenders were rejected since the petitioner did not satisfy the eligibility criteria for submission of the bid. It was also specifically urged that a sister concern of the petitioner's firm namely "M/s Silppi Realtors and Contractors Pvt. Ltd.", (hereinafter referred to as the sister company), had not renewed its enlistment and had adverse remarks against it in respect of workload return of 'SS' Class Contractors for the quarter ending September, 2017. It was urged that since the adverse remarks had been given to the sister company the petitioner firm could not be awarded the contract.

4. The learned single judge allowed the appeal holding that the order passed by the appellate authority was not a speaking order and, therefore, not legally sustainable. The learned single judge

also observed that the adverse remarks made against the sister company could not be used against the petitioner. The learned single judge went on to hold that the remarks against the sister company were not justified. The writ petition was accordingly allowed and the respondents 1 and 2 were directed to consider the financial bid of the petitioner.

5. Respondent nos. 1 and 2 and some of the tenderers who were not parties before the learned single judge filed writ appeals. These writ appeals were allowed by the division bench holding firstly, that the scope of interference in contractual matters is very limited; secondly, that the learned single judge ought not to have interfered with the decision of the administrative authorities with regard to the sister company since it was not shown that the said decision was mala fide; thirdly, since the sister company had not challenged the adverse remark the learned single judge could not have set aside the same in the writ petition filed by the petitioner-firm; and lastly, the direction of the learned single judge to direct the tendering authorities to consider the financial bid of the petitioner virtually meant that the technical bid of the petitioner was accepted.

6. Aggrieved, the original writ petitioner is before us in these petitions. This Court in a catena of judgments has laid down the principles with regard to judicial review in contractual matters. It is settled law that the writ courts should not easily interfere in commercial activities just because public sector undertakings or government agencies are involved.

7. In **Tata Cellular vs. Union of India**¹, it was held that judicial review of government contracts was permissible in order to prevent arbitrariness or favouritism. The principles enunciated in this case are :-

“94.

(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 decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(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.

Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but

1 (1994) 6 SCC 651

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.”

8. In ***Raunaq International Ltd. vs. I.V.R. Construction Ltd.***², this Court held that superior courts should not interfere in matters of tenders unless substantial public interest was involved or the transaction was mala fide.

9. In ***Air India Limited vs. Cochin International Airport Ltd.***³, this Court once again stressed the need for overwhelming public interest to justify judicial intervention in contracts involving the State and its instrumentalities. It was held that Courts must proceed with great caution while exercising their discretionary powers and should exercise these powers only in furtherance of public interest and not merely on making out a legal point.

² (1999) 1 SCC 492

³ (2000) 2 SCC 617

10. In **Karnataka SIIDC Ltd. vs. Cavalet India Ltd.**⁴ it was held that while effective steps must be taken to realise the maximum amount, the High Court exercising its power under Article 226 of the Constitution is not competent to decide the correctness of the sale affected by the Corporation.

11. In **Master Marine Services (P) Ltd. vs. Metcalfe & Hodgkinson (P) Ltd.**⁵ it was held that while exercising power of judicial review in respect of contracts, the Court should concern itself primarily with the question, whether there has been any infirmity in the decision-making process. By way of judicial review, Court cannot examine details of terms of contract which have been entered into by public bodies or State.

12. In **B.S.N. Joshi & Sons Ltd. vs. Nair Coal Services Ltd.**⁶ it was held that it is not always necessary that a contract be awarded to the lowest tenderer and it must be kept in mind that the employer is the best judge therefor; the same ordinarily being within its domain. Therefore, the court's interference in such

4 (2005) 4 SCC 456

5 (2005) 6 SCC 138

6 (2006) 11 SCC 548

matters should be minimal. The High Court's jurisdiction in such matters being limited, 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.

13. In **Jagdish Mandal vs. State of Orissa**⁷ it was held:

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

14. In **Michigan Rubber (India) Ltd. vs. State of Karnataka & Ors.**⁸ it was held that if State or its instrumentalities acted reasonably, fairly and in public interest in awarding contract,

7 (2007) 14 SCC 517

8 (2012) 8 SCC 216

interference by Court would be very restrictive since no person could claim fundamental right to carry on business with the Government. Therefore, the Courts would not normally interfere in policy decisions and in matters challenging award of contract by State or public authorities.

15. In ***Afcons Infrastructure Ltd. vs. Nagpur Metro Rail Corporation Ltd.***⁹ it was held that a mere disagreement with the decision-making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision-making process or the decision. The owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.

⁹ (2016) 16 SCC 818; 2016 KHC 6606

16. In **Montecarlo vs. NTPC Ltd.**¹⁰ it was held that where a decision is taken that is manifestly in consonance with the language of the tender document or sub-serves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.

17. In **Municipal Corporation, Ujjain and Another vs. BVG India Ltd. and Others**¹¹ it was held that the authority concerned is in the best position to find out the best person or the best quotation depending on the work to be entrusted under the contract. The Court cannot compel the authority to choose such undeserving person/company to carry out the work. Poor quality

10 AIR 2016 SC 4946

11 (2018) 5 SCC 462

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.

18. Most recently this Court in **Caretel Infotech Limited vs. Hindustan Petroleum Corporation Limited and Others**¹² observed that a writ petition under Article 226 of the Constitution of India was maintainable only in view of government and public sector enterprises venturing into economic activities. This Court observed that there are various checks and balances to ensure fairness in procedure. It was observed that the window has been opened too wide as every small or big tender is challenged as a matter of routine which results in government and public sectors suffering when unnecessary, close scrutiny of minute details is done.

19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of

12 2019 (6) SCALE 70

restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realise their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings

in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.

20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realise that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender, and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind we shall deal with the present case.

21. It has been urged by the learned counsel for the petitioner that the Division Bench of the High Court erred in holding that the writ petition was not maintainable without making all the tenderers parties to the petition. At the outset, we may state that the Division bench of the High Court has held that in all cases challenging the decision of the tendering authority, all the eligible tenderers should be made parties. We do not think such a broad proposition could be laid down as an inflexible rule of law. Supposing the tender documents are not sold/delivered to a party wanting to submit a tender, in such a case the other tenderers would not be necessary parties. In the present case the petitioner was only challenging the rejection of its technical bid. At this stage the other tenderers were not necessary parties. The position may be otherwise if a tenderer challenges a bid awarded to another or challenges the rejection of his bid at a later stage. In our view the writ petition was maintainable even in the absence of other tenderers because till that stage there was no successful tenderer. Who are the necessary parties will depend upon the facts of each case.

22. It was next urged that the Division Bench erred in holding that the adverse remarks recorded against the sister company could not be gone into in the absence of any challenge by the sister company. We accept this contention. In our considered view if the tendering authority is using any adverse material of the sister company against the petitioner firm then the petitioner firm would be entitled to urge that the adverse remarks are not called for or that the adverse remarks are not justified or that the adverse remarks cannot be taken into consideration while considering the tender of the petitioner firm.

23. We then come to the moot question as to whether the petitioner firm and the sister company are “Related Firms”, within the meaning of Clause 1.19 of the Manual of Contracts, 2007. The said Clause reads as follows :-

1.19 Related firms

- (a) In the trade of works contracts, “business relationship” is the most important factor. This is corroborated with the provision to be made in the notice of tender as such a Contractor or Corporation, wishing to be registered as an approved Contractor, should give particulars of all MES registered Contractors with whom he/it has business relationship, irrespective of the fact whether there is blood/close relationship or not. These would include all sister concerns of the Contractor or Corporation also.

- (b) In case of Contractors having blood/close relation with each other but not any business relation whatsoever, particulars of such related contractors need not be given under serial no.7 of the enlistment form. In such cases, it would not be correct to deny issue of tenders to these contractors if they otherwise fulfil all requirement in selection for issue of tenders. However, while deciding a tender in favour of one party, it shall be ensured that fair competition has taken place.
- (c) A Contractor/Corporation is termed to have “business relationship” with other Contractor(s)/ Corporation(s) when one or more partner(s)/directors (s) are common.

24. It is not disputed before us that all the partners of the petitioner firm are the directors of the sister company and, therefore, there can be no manner of doubt that the petitioner firm and the sister company are related firms having a business relationship. Therefore, adverse remarks made against the sister concern can be used against the petitioner firm. To be fair to the learned counsel for the petitioner this point was not seriously contested before us.

25. That brings us to the most contentious issue as to whether the learned single judge of the High Court was right in holding that the appellate orders were bad since they were without reasons. We must remember that we are dealing with purely administrative decisions. These are in the realm of contract. While rejecting the tender the person or authority inviting the tenders is not required to give reasons even if it be a state within

the meaning of Article 12 of the Constitution. These decisions are neither judicial nor quasi-judicial. If reasons are to be given at every stage, then the commercial activities of the State would come to a grinding halt. The State must be given sufficient leeway in this regard. The Respondent nos. 1 and 2 were entitled to give reasons in the counter to the writ petition which they have done.

26. Two reasons were given by the Department. One was that the sister company had been given a contract for some construction in Chennai zone and there was a huge delay in the execution of the project. According to the petitioners, extension had been granted to them from time to time by the authorities and the grant of extension itself indicates that there were reasonable grounds for extension of the project and, therefore, this ground could not have been taken to reject the technical bid.

27. The second reason was that in another contract awarded to the sister company, the sister company had failed to perform its part of the contract leading to cancellation thereof. The stand of the petitioner was that the dispute between the parties was

referred to arbitration and the arbitrator passed an award in favour of the sister company. Hence, there was a finding in favour of the petitioner. According to the respondents, the award was under challenge before the Court.

28. As far as the second objection is concerned, we agree with the petitioner that once an award has been passed in favour of the petitioner that issue could not be used against the petitioner. The Award being a binding adjudication would hold the field unless set aside.

29. However, as far as the first objection is concerned, merely because extension of time has been granted, it does not in any manner mean that the Department has come to the conclusion that the contractor is not at fault. Sometimes extension is granted because a lot of money has already been invested and cancellation of contract and appointment of new contractors would lead to unnecessary litigation and increase in costs. We may also point out that though we have held that the petitioner firm can challenge the correctness of the material used against the sister concern, we cannot lose sight of the fact that in the

present case the sister company has not got its enlistment renewed. Some of the adverse remarks were conveyed to the sister company much prior to the issuance of notice inviting tenders in the present case. The sister company not only did not get its enlistment renewed but also did not care to even represent against the adverse remarks. It has been pointed out to us that as per the Manual on Contracts, 2007 if any adverse remarks are conveyed to the enlisted contractor the said contractor has a right to represent against the same. If no representation is made it is obvious that the contractor has accepted the adverse remarks. In this case the adverse remarks were accepted by the sister company. At the least, there was acquiescence if not acceptance. Therefore, this was a factor which could be taken into consideration by the respondents.

30. The eligibility criteria provided in the tender lays down that there should be no adverse remarks in the WLR of the competent engineering authority. Admittedly, there are adverse remarks in Work Load Return (WLR) of the sister company. It is obvious that the sister company having realised that it would not be awarded

any contract neither got its enlistment renewed nor tried to submit the tender. The directors of the sister company tried to get over these insurmountable objections by applying for the tender in the name of the petitioner firm. Not only are the names similar but as pointed above, all the directors of the sister company are partners in the petitioner firm. Therefore, these adverse remarks passed against the sister company could not be ignored.

31. Another important aspect of the matter is that as per the eligibility criteria for MES enlisted contractors only contractors falling in “SS Class” were eligible to apply. Admittedly, the petitioner firm was not an enlisted contractor and was therefore required to meet the eligibility criteria for other contractors. Relevant portion of the notice inviting tender reads as follows :-

8.	Eligibility Criteria	
	(A) For MES enlisted contractor	They should satisfy the following criteria :- (a) (b) (c) They should have enlistment in class “SS” Category a(i) (d) They should not carry adverse remarks in WLR of competent

		engineer authority.
	(B) For other contractors	The firm is not enlisted with MES shall meet the following criteria :- (a) (b) (c) They should meet the enlistment criteria of Class “SS” MES Contractors and Category a(i), i.e. having satisfactorily completed requisite value works, annual turnover, solvency, working capital, immovable property/fixed assets, T&P, Engineering establishment, no recovery outstanding in govt. department, police verification/passport etc. Enlistment criteria may be seen in para 1.4 of section 1 of part I of MES Manual on Contracts-2007 (Reprint-2102) as available in all MES formation. These firms shall also submit copy of police verification from police authority of the area where the registered office of the firm is located/notarized copy of valid passport of proprietor/each partner/each director. (d) They should not carry any adverse remarks in WLR/or any other similar report of any authority.

A bare reading of the eligibility criteria would clearly show that as far as MES enlisted contractors are concerned, they should be enlisted in “SS” Category a(i) and secondly, they should not carry adverse remarks in WLR of competent engineer authority. As far as other contractors are concerned, they are required to meet the same criteria as “SS” MES contractors category a(i) and these contractors was specifically told that they could see enlistment criteria in the MES Manual Contracts.

32. The Manual also provides criteria for enlisting of contractors. We are only concerned with Class “SS”. The relevant portion reads as follows :-

“.....
1. For enlistment in class ‘SS’, the company incorporated under the ‘Companies Act 1956’ shall only be eligible.
.....
.....”

Therefore, only companies incorporated under the Companies Act, 1956, are eligible to be enlisted as ‘SS’ Class Contractors. It is urged on behalf of the petitioner that in various other places dealing with the documents required to be submitted for enlistment in MES, the terms proprietors, partners, directors have been used, meaning that even firms can be enlisted as ‘SS’ Class contractors. We do not agree with this contention. The note quoted above clearly indicates that only incorporated companies can be enlisted as ‘SS’ Class contractors. Furthermore, Clause 1.5 deals with the documents to be submitted by the contractor for enlistment in MES. The relevant portion reads as follows :-

“(a)

(b) Affidavit for constitution of firm (only limited companies shall be enlisted in 'SS' Class).

.....
.....”
.....

This again shows that only limited companies can be enlisted in 'SS' Class. The Manual deals with enlistment of contractors in various classes. 'SS' is the highest class and for that only incorporated companies can apply. Therefore, in our opinion the petitioner was not eligible to submit the tender.

33. It was faintly contended that the requirement of being a company would be only for MES enlisted contractors and not for other contractors. The answer to this lies in the eligibility criteria for other contractors referred to above wherein it has been clearly mentioned that they should meet the enlistment criteria of Class 'SS' MES Contractors. Even otherwise it would be a travesty of justice if enlisted contractors should only be limited companies and unlisted unknown contractors, could be a firm, individual etc. This is not the purpose of the criteria.

34. In view of the above discussion, we find no merit in the petitions which stand dismissed vide order dated 21.06.2019. Application(s), if any, shall also stand dismissed.

.....J.
(Deepak Gupta)

.....J.
(Surya Kant)

New Delhi
June 21, 2019