

(2004) 09 DEL CK 0005

In the Delhi High Court

Case No : CW 12934 of 2004 W.P. (C) . No. 12934 of 2004 and CM No. 8968 of 2004

Alan Dick and Company Ltd.

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 28-09-2004

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2004) 114 DLT 440 : (2004) 77 DRJ 638

Hon'ble Judges : S. Ravindra Bhat, J;D.K. Jain, J

Bench : Division Bench

Advocate : Chetan Sharma and Vivek Singh and Nidhi Baweja, for the Appellant; Sidharth Mridul and Tanuj Khurana, for the Respondent

Judgement

D.K. Jain, J.—RULE D.B.

2. With the consent of learned counsel for the parties, the matter is taken up for final disposal at this stage itself.

3. Challenge in this writ petition is to the decision of the Indira Gandhi National Open University (for short "IGNOU"), an autonomous body and respondent No.2 herein to accept the bid submitted by respondent No.4 for supply of Combiners/Multiplexes. The prayer in the writ petition is for rejection of the said bid and for a direction to respondent No.2 to consider and accept the technical bid submitted by the petitioner.

4. Brief outline of the factual matrix, which has given rise to the present judicial action, is as follows:

In June-July 2004, IGNOU invited tenders for supply of Combiners/Multiplexes for combining the Radio Frequency Transmitter power, in cascade; of two or more FM Transmitters operating on different frequencies; for feeding to a single Antenna System. The tender was to be submitted on the basis of "two bid system", namely, the "technical bid" and the "commercial bid", in separate

sealed covers. The petitioner, engaged in the business of communication networks on global basis and claiming to be a pioneer in this field, specializing in manufacturing and supplying Combiners/Multiplexes, submitted its bid as per the prescribed procedure, on 16 July 2004. The technical bids were opened on the same day in the presence of all the bidders and after preliminary scrutiny, five bids were sent to the technical committee for evaluation. Out of the said five bids, two bids were rejected at the threshold for not complying with the requisite conditions. Thus, only three bidders were left in the fray. The stand of the petitioner is that bid of respondent No.4 ought to have been summarily rejected as they had quoted for two suppliers, namely, RFS and JAMPRO, in contravention of the office memorandum issued by the Chief Vigilance Commission ('CVC' for short) vide office memorandum dated 7 January 2003 and, Therefore, the technical bids of the petitioner and respondent No.3 were required to be evaluated by the technical committee.

The plea of the petitioner is that when they learnt that their technical bid was not being considered because the VSWR Bandwidth mentioned by them as 100 Khz at Srl.No.10 of Annexure-V of the tender documents was being taken as + 50 Khz by respondent No.2, vide letter dated 27/28 July 2004 they clarified that their input and output product have + 100 Khz Bandwidth and hence overall Bandwidth could not be less than 100 Khz on both sides of the carrier. It was also pointed out that the Bandwidth being + 100 Khz had also been mentioned in the electrical data furnished in the tender documents. It is alleged that at the time of evaluation of the technical bids, complete specifications given in the annexures to the tender documents were not placed before the committee despite request by the petitioner and only technical chart prepared by respondent No.2 was placed before the technical committee. The plea of the petitioner is that the haste shown in the opening of the ""commercial bid"" on 29 July 2004 itself shows that the action of the respondent No.2 in rejecting the technical bid was actuated by mala fide. Hence the present writ petition.

5. The writ petition is contested by IGNOU. In the reply affidavit filed on its behalf it is stated that the technical bid of the petitioner was rejected by the technical committee because the petitioner had deviated from the tender specifications as follows:

S.No. Tender Specification Petitioner's specification
2.6 Channels Bandwidth Channels Bandwidth /VSWR Bandwidth + 100 Khz / VSWR Bandwidth 100 Khz
4.1 Power monitoring Units Power monitoring is by computer (software being provided)

6. We have heard Mr. Chetan Sharma, learned senior counsel for the petitioner and Mr. Sandeep Sethi, learned senior counsel for respondent No.2.

7. It is strenuously urged by Mr. Sharma that the decision of IGNOU to accept the bid of respondent No.4 is vitiated because adequate clarifications, essential for understanding the bids submitted by the petitioner, were not sought for and

the ex-post haste in awarding the tender demonstrates that the said respondent wanted to favor respondent No.4. It is asserted that the bid submitted by the petitioner ought to have been accepted as the same strictly conformed to the technical specifications and mandatory conditions of the tender documents and the entire process in this behalf smacks of bias, partiality and manipulation. In support of the proposition that respondent No.2 should have complied with the direction of the CVC scrupulously, learned counsel has placed reliance on the decision of the Supreme Court in *West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others*, .

8. Mr. Sandeep Sethi, on the other hand, while supporting the decision of respondent No.2 to award the tender in favor of respondent No.4 has contended that since admittedly the tender documents submitted by the petitioner did not contain the requisite technical specifications, the technical committee on proper evaluation decided to reject petitioner's technical bid. It is submitted that the tender conditions being highly technical, it was for the technical committee to decide whether the requisite particulars furnished in the technical bid matched with the essential technical specifications of the product required to be supplied. It is urged that the tender conditions did not envisage for any corrections or clarifications on the bids submitted and Therefore, the technical committee was under no obligation to provide an opportunity to the petitioner to explain the reason for their omission. It is asserted that it is not a fit case for judicial review.

9. Having considered the matter in the light of the material placed on record by the petitioner and IGNOU, we are of the view that there is no substance in the present writ petition. It is true that Article 226 of the Constitution confers on the High Courts power of judicial review to examine whether an administrative action is valid or not. The powers of the High Court under the said Article are undoubtedly very wide and must be exercised to keep the public authorities within due bounds and for upholding the rule of law. At the same time it is a cardinal axiom that every power has legal limits and Therefore even power of judicial review has self-imposed limitations and restraints. The present trend of the pronouncements, particularly in contractual matters, is for judicial restraint in administrative action and ordinarily the Courts have been slow to interfere in matters relating to administrative functions unless they are convinced that the impugned decision is illegal, irrational or lacks fairness in procedure. While exercising the power of judicial review, the Court is more concerned with the decision making process rather than the merit of the decision itself. At the same time, for scrutinising the decision making process, it becomes inevitable to also appreciate the facts of a given case, as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. Nonetheless, the power of the Court of judicial review, cannot be placed at the same pedestal as that of its power in an appeal, where the Court is concerned with the merits of the decision, unlike in review where it is mainly concerned with its legality. The touchstone for exercise or otherwise the power of review is the doctrine of "Wednesbury Unreasonableness" as propounded in *Associated*

Picture House Vs. Wednesbury Corporation (1947) 2 All ER 640. The subtle difference between the powers of the Court in an appeal and judicial review was beautifully set out in the following concise passage in Wade's Administrative Law (8th Edition):

""The system of judicial review is radically different from the system of appeals. When hearing an appeal the court is concerned with the merits of a decision: is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an appeal the question is `right or wrong?' On review the question is `lawful or unlawful?""

It is averred that the above two specifications being vital, the technical committee did not find the above variations acceptable or suitable for the requirement of the University. It is also stated that the technical committee noted that the power monitoring units mentioned in the tender specifications were intended to measure the REAL RF power at the input and output ports, whereas the specification of the petitioner, offering power monitoring by computer (software) is remote monitoring method of measuring the power at the input and output ports. Additionally, it is pointed out that the technical committee, which consisted of eminent persons both from within and outside University, rejected the offer of the petitioner purely on the ground of deviation from the tender technical specifications and not on any extraneous consideration as alleged by the petitioner. As regards the clarification furnished by the petitioner, it is pointed out that on learning that the tender was being rejected by the technical committee on the said ground at its meeting held on 23 July 2004, the petitioner sent a letter dated 24 July 2004 to the Director, EMPC, enclosing therewith original product specifications/data sheet. The said original data sheet showed the VSWR Bandwidth as 400 Khz, whereas in the product specifications/data sheet submitted along with the tender documents, the VSWR Bandwidth is shown as 100 Khz. It is also alleged that the petitioner had provided a doctored and manipulated copy of its product's specification/data sheet along with tender documents with mala fide intent to wrongly represent that its product specification matched with the tender specification. As regards the allegation of the petitioner that the bid of respondent No.4 was considered in contravention of the afore-mentioned office memorandum by the CVC, the stand of IGNOU is that the said advice is merely directory and not mandatory. In any case, in the present case, there has been no violation of the said advice inasmuch as the technical committee approved only the RFS modal quoted by respondent No.4 and the other alternate product (JAMPRO) offered by them was rejected before consideration of the Price Bid. It is also pointed out that the successful bidder, respondent No.4, is a Central Public Sector Enterprise and as per the office memorandum dated 14 June 2002 issued by the Ministry of Heavy Industries and Public Enterprises, Department of Public Enterprises, autonomous bodies like IGNOU, under the Central Government ought to give purchase preference for products and services of the Central Public Sector Enterprises, like respondent

No.4.

10. The scope of judicial review of administrative decision and exercise of contractual powers of the Government bodies was examined in depth by the Supreme Court in *Tata Cellular Vs. Union of India*, and on an exhaustive consideration of long line of earlier decisions on the point, the following principles were deduced:

""94. The principles deducible from the above are:

- (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* principles of reasonableness (including its other facts 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.""

11. Recently, a similar issue came up for consideration of the Apex Court in *Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others*, . While observing that the Courts can scrutinize the award of contracts by the Government or its agencies in exercise of their powers of judicial review to prevent arbitrariness or favoritism, their Lordships of the Supreme Court observed as under:

""It has clearly been held in these decisions that the terms of the invitation to tender are not open to judicial scrutiny, the same being in the realm of contract. That the Government must have a free hand in setting the terms of the tender. It must have reasonable play in its joints as a necessary concomitant for an administrative body in an administrative sphere. The courts would interfere with the administrative policy decision only if it is arbitrary, discriminatory, *mala fide* or actuated by bias. It is entitled to pragmatic adjustments which may be called for by the particular circumstances. The courts cannot strike down the terms of

the tender prescribed by the Government because it feels that some other terms in the tender would have been fair, wiser or logical. The courts can interfere only if the policy decision is arbitrary, discriminatory or mala fide.'"

12. Viewed in the light of the broad principles enunciated in the afore-mentioned decisions, we are of the view that there is no material on record to come to the conclusion that the decision of the second respondent to award the tender to respondent No.4 is arbitrary, discriminatory, mala fide or actuated by bias. Admittedly, the technical details furnished by the petitioner in their tender documents were not strictly as per the terms and conditions of the Notice Inviting Tender. What is the ultimate effect of the variations in the specifications, noted above, is not for this Court to judge in judicial review. The Court is not concerned with the merits of the decision taken by respondent No.2. The technical committee, consisting of experts, evaluated the petitioner's bid and came to the conclusion that it did not match with the requisite specifications indicated in the tender conditions. It was a conscious decision by the technical committee and we find it difficult to substitute our opinion for that of the technical Committee, even if we were convinced with the stand of the petitioner that the variations in the specifications in the tender conditions were very minor. The plea of the petitioner that before rejecting the bid the respondents should have sought clarification from them is noticed to be rejected. No such methodology is envisaged in the NIT. On the contrary, Clause 15(i) of the general conditions of contract clearly provides that if complete information is not furnished, no further reference will be made. There is no gain saying that all the tender conditions have to be adhered to scrupulously, for otherwise, as observed by the Apex Court in West Bengal Electricity Supply case (supra) any relaxation or waiver of a tender condition, unless so provided in the NIT, would encourage and provide scope for discrimination, arbitrariness and favoritism, which are totally opposed to the Rule of law and our constitutional values. Relaxation of any condition in favor of one bidder would create justifiable doubt in the minds of other bidders and provide room for manipulation to suit the whims of the state agencies in picking and choosing a bidder for awarding contracts by way of a bounty. Such an approach has to be avoided at any cost. Moreover, having regard to the fact that respondent No.4 happens to be a central public sector undertaking, we are unable to even comprehend that the decision of the technical committee would be actuated by malafides or bias or that it is arbitrary or discriminatory. We do not find any substance in the stand of the petitioner that award of tender in favor of respondent No.4 is in contravention of the memorandum issued by the CVC. The language of the said memorandum clearly suggests that it is advisory in nature.

13. For the foregoing reasons, the writ petition, being bereft of any merit, is dismissed with no order as to costs.

D.K. JAIN, J.

September 28, 2004 S.RAVINDRA BHAT, J.