

(1991) 07 GUJ CK 0015
In the Gujarat High Court

Alang Marine Pvt. Ltd. and Another

APPELLANT

Vs

Gujarat Maritime Board and Others

RESPONDENT

Date of Decision : 22-07-1991

Acts Referred:

Constitution of India, 1950 — Article 226, 226

Citation : (1991) 2 GLR 1321

Hon'ble Judges : G.N. Ray, C.J.;C.K. Thakker, J

Bench : Division Bench

Judgement

G.N. Ray, C.J.—In this Appeal, the appellant, Alang Marine Pvt. Ltd., an unsuccessful tenderer for a job of construction and supply of steel hull Twin Self Propelled and Self Hopper Grab Dredger for the port of Porbandar, has challenged the correctness of the decision of the single Judge of this Court, made on April 24, 1991, in the writ petition under Article 226 of the Constitution of India, being Special Civil Application No. 1574 of 1991, inter alia, challenging the acceptance of the said tender by the respondents in favour of respondent No. 5-Messrs Chaugule & Co. Ltd.

2. The appellant contended, inter alia, that the Gujarat Maritime Board is a statutory body, authorised by the statute, to enter into contract with a third party for implementing contract of job for the ports in the State of Gujarat. Although the State Government of Gujarat has a deep concern for the development of ports in the State and bears the burden of financial implications concerning the ports and the Maritime Board itself is constituted by the nominees of the State Government, the Legislature, in its wisdom, has not authorised the State Government to deal with or enter into contracts for various jobs to be undertaken in connection with the functioning of the ports in Gujarat. It is the Maritime Board, which only can enter into contract. As a matter of fact, the tender was floated by the Maritime Board and it also processed the tender papers by making evaluation of tenderers, both on the score of suitability from the point of view of technical expertise and capability and also from the point of view of

the quantum of money quoted for the tender work. On such considerations, the appellant-Company was adjudged quite suitable and capable of implementing the contract and the tender amount for the job being lowest, the appellant-Company was also found most suitable. In the aforesaid facts, the tender form of the appellant should have been accepted if the Maritime Board and other respondents had acted fairly and properly. But for reasons best known to the respondents, which remain inexplicable, there was a last moment manoeuvre by the State Government and by making private negotiations with the respondent No. 5, the tender amount was allowed to be lowered by the respondent No. 5 against all norms and fair play in order to favour the said respondent No. 5 with the said job contract.

3. The appellant also contended that it is quite manifest that the State Government accepted the tender of the respondent No. 5 and informed the said respondent to contract the Maritime Board. Such acceptance of contract by the State Government and superimposition of such acceptance on the Maritime Board are absolutely illegal and without jurisdiction and contrary to the provisions of the Gujarat Maritime Board Act. Hence, in any event, the acceptance of tender form of the respondent No. 5 must be struck down. The learned single Judge, however, did not accept the said contentions of the appellant and dismissed the writ petition, inter alia, on the finding that on evaluation of expertise and capability by the Deputy Director of Gujarat Maritime Board, the respondent No. 5 was found most suitable and dependable and it was decided that the job contract should be entrusted to respondent No. 5, which has successfully executed the nature of sophisticated works involved in the job contract in other Ports. It was also noted by the learned single Judge that by agreeing to drawn bills in the State of Gujarat by the respondent No. 5, the amount ultimately quoted by the respondent No. 5 was also very suitable. Accordingly, no illegality or irregularity has been committed by the respondents in accepting the tender of respondent No. 5. As aforesaid, such decision of the learned single Judge is under challenge in the instant Appeal.

4. Mr. Thakore, the learned Counsel appearing for the appellant, has very strongly contended that the Government of Gujarat has no jurisdiction, authority or power to take any decision as to who should be the tenderer and such power to take decision in the matter of contract is statutorily vested in the Maritime Board under the Gujarat Maritime Board Act, the question of deep pervasive control of the State Government in the functioning of the Maritime Board and the Ports in Gujarat, the financial liability of the State Government in the functioning of the Ports and for that matter of the functioning of the Maritime Board are not all relevant in the matter of taking any decision of contract for executing any job by a third party for the Ports in Gujarat. The Legislature has entrusted such power to enter into contract to the Maritime Board and any action by the State Government contrary to the statutory provisions is per se illegal and without jurisdiction. He has contended that under the said Act, the State Government has the authority to sanction amount for implementing scheme framed by the

Maritime Board for improvement and working of the Ports, if for any reason the estimated cost for implementing the sanctioned scheme exceeds twenty-five percent of the amount sanctioned by the State Government, it is imperative for the Maritime Board to seek further sanction before entering into any contract for the implementation of such scheme. But the power of the State Government is only confined to sanctioning additional amount for implementing the sanctioned scheme. In the garb of sanctioning additional amount, the State Government cannot usurp the power and function of the Maritime Board in deciding who should be entrusted with the contract for implementing the scheme and/or with whom the contract should be entered into. Mr. Thakore has submitted that the original sanction for the job in question was for Rs. 2.29 crores. After the tender was invited by the Maritime Board, it transpired that the lowest tender was much higher than the original sanction and far exceeded 25% of the sanctioned amount. Accordingly, the State Government was approached to raise the sanction and for the purpose of taking effective decision to sanction additional amount, the rates quoted by different tenderers were submitted to the State Government. In considering the question of additional sanction the State Government was neither called upon to decide the suitability or otherwise of any of the tenderers nor it had any authority or jurisdiction to decide as to whose tender form should be accepted. Any exercise of power in this regard by the State Government must be held illegal and without jurisdiction. Mr. Thakore has also contended that the State Government has negotiated with Messrs Alcock Ash Down and the respondent No. 5-Company for settling the offer of such tenderers. The telegram dated 15-1-1991 to respondent No. 5 clearly indicates that such negotiation was made by the State Government and not by the Maritime Board. It is clearly demonstrated that the Government itself accepted the offer of respondent No. 5 after holding negotiation with respondent No. 5. By letter dated 15-3-1991, the Government itself informed respondent No. 5 that its tender was accepted. Mr. Thakore has also contended that apart from the fact that the acceptance of the tender of respondent No. 5 by the State Government was per se illegal and without jurisdiction, even on merits the tender of the appellant ought to have been accepted if the concerned authorities had acted impartially and fairly. In the instant case, tenders were invited by two sealed envelopes, consisting of technical bid and price bid. Price bid was to be opened only after opening the technical bid and the Maritime Board was satisfied on consideration of the technical bids of the tenderers about their suitability. In the instant case, technical evaluation on the question of the suitability of the tenderers, was made and the price bids of those tenderers, who have been found suitable, were opened on 8-2-1991. After the price bids were made known on 8-2-1991, the parties could not be permitted to modify the price bid, thereby frustrating the sanctity of bids by calling sealed tenders. On 8-2-1991, the price bid of the respondent No. 5 was Rs. 6,52,05,900.00, plus escalation in prices of various items and variation in foreign exchange rates. On the same terms, the price bid of the appellant was Rs. 5,71,16,000.00. On the date of opening the tender, the petitioner's bid was lowest. Unfortunately, in order to favour the

respondent No. 5, the respondent No. 5 was allowed to lower the price bid by holding negotiation with it by the State Government and by allowing the respondent No. 5 to draw bills in Gujarat, the price bid of respondent No. 5 became less than that of the appellant's bid. The Maritime Board also called the appellant to reduce its bid and the appellant having quoted very competitive price could lower its bid only to some extent. The State Government did not call the appellant for negotiation and/or for clarification on the technical competency although negotiation were made with Alcock Ash Down and the respondent No. 5. Mr. Thakore has contended that on evaluation of technical bid of the appellant, the appellant was found suitable but in order to favour the respondent No. 5, fresh evaluation was made in order to show that the respondent No. 5 should be preferred to the appellant. The appellant was not called for to clarify questions relating to foreign exchange component in the dredger, collaboration agreement with Singanor, an internationally reputed firm, and personnel presently employed by the appellant. If the appellant had been given a chance to clarify various aspects of technical bid, the appellant could have fully satisfied about its suitability and edge over other tenderers, including respondent No. 5. Mr. Thakore, has also contended that the evaluation report of the appellant is also improper, incorrect, and based on suppression of relevant facts. He has contended that as it was decided by the State Government to give the contract to respondent No. 5, evaluation was made in a slipshod manner for finding out a justification to prefer respondent No. 5. He has taken pains to demonstrate that from the point of view of technical competency, the appellant was most suitable and on improper consideration of some factors and on non-consideration of some relevant factors, a biased and incorrect evaluation of the appellant was made.

5. Mr. Thakore has contended that the public authority in the matter of grant of contract or largesses is bound to act fairly and reasonably and cannot be permitted to adopt double standards in favour of one and in discrimination of other. The Supreme Court, in International Airport Authority's case, and also in other cases, has clearly laid down that grant of contract or largesses without proper justification and arbitrary and unfair action on the part of the public authority cannot be permitted. In this connection, Mr. Thakore has referred to a decision of the Supreme Court made in the case of Star Enterprises and Others Vs. City and Industrial Development Corporation of Maharashtra Ltd. and Others, . It has been held in the said decision that the State or its instrumentality entering commercial field must act in consonance with the rule of law. While dealing with tenders, it has a duty to look for the best deal and for that, it may accept highest bid. But if it rejects the lowest bid and accepts higher bid, it must record reasons and communicate the same to the concerned party and duty to record reasons arises out of need for public accountability of executive action and enables administrative and judicial review and lends credibility to such action. Relying on the said decision, Mr. Thakore has contended that no reason was communicated to the appellant as to why the lowest bid of the appellant was not accepted and highest bid of respondent No. 5

was accepted and, therefore, negotiation was made with respondent No. 5. Mr. Thakore has submitted that the learned single Judge failed to appreciate the relevant facts and has come to an erroneous decision, resulting in grave injustice to the appellant. He has submitted that as the acceptance of tender of respondent No. 5 is absolutely illegal, the same should be struck down.

6. Mr. Raval, the learned Additional Advocate General, appearing for the State-respondents, has submitted that if a close scrutiny is made on various provisions of the Gujarat Maritime Board Act, it will be evident that the State Government has deep and pervasive control over the Maritime Board. The finance comes from the State Government for the working of the Board and the functioning of the Ports. The members of the Boards are selected by the State Government. Any scheme for improving and working of the Ports to be framed by the Board requires sanction by the State Government. Even when cost of any sanctioned scheme exceeds by more than 25% prior approval of enhanced cost from the State is required to be taken. For all intent and purpose, the Maritime Board is an instrumentality of the State Government. It is an admitted position that initial sanction for the scheme in question was for Rs. 2.29 crores. But scrutinising tender forms, it transpired that the lowest bid exceeded more than 180% of the sanctioned amount. The Board, therefore, forwarded the tender forms of all the tenderers for proper evaluation of the financial implication of the sanctioned scheme and consequential sanction of the additional amount. Even for properly deciding the reasonable costs for the approved scheme, evaluation of all the tender forms was required to be made, and in order to sanction additional amount, such exercise was made. He has submitted that in the facts of this case, no violation of the statutory provisions of the Gujarat Maritime Board Act was made. Mr. Raval has submitted that it transpired to the State Government that the scheme involved sophisticated expertise and experience in the field and the scheme involved considerable financial implication in the vicinity of Rs. 6.5 crores, with stipulation of escalation of costs on account of increase in prices of various items of machinery parts and increase in foreign exchange rates. The Grab Dredger has components requiring import from foreign countries. Such a scheme requires a very careful consideration and a tender cannot be accepted simply because the price bid is lower or lowest. The State Government, being ultimately responsible for the financial implications involved in the Scheme and effective implementation of the scheme for the improvement of Porbandar Port cannot but consider the suitability of different tenderers. The State Government has not called for the tenders but Maritime Board had called for such tenders. The Maritime Board forwarded all the tender forms together with relevant facts. It was in this context the State Government has made the aforesaid exercise and having noted that the respondent No. 5 was found most suitable and dependable, had held negotiation with it to lower down its bid further. In the facts of the case, therefore, there was no independent action of the State Government in floating the tenders and accepting the same. He has further submitted that many of the members of the Maritime Board ceased to hold office

and there has been considerable delay in finalising the contract for the job; thereby escalating the cost considerably. As it was evident that any further delay will be detrimental to the interest of the State Government, the Board and the Port in question and as the time under the offer of tender was running out, the State Government, in its anxiety to conclude the contract, sent telex to respondent No. 5, who was otherwise most suitable and dependable tenderer. It was only in this context further negotiation was held with respondent No. 5, who not only lowered its price bid, but also clarified that by drawing bills at Gujarat, there will be further reduction in the price bid, because sales tax rate at Gujarat was less. Mr. Raval has submitted that the Competent Authority in the Maritime Board made technical evaluation of the tenderers, by taking into consideration all relevant factors and it came to the finding that the respondent No. 5 had executed identical nature of work in Madras and Mormugao (Goa) Ports and it was most dependable from the viewpoint of technical expertise, experience, trained personnel etc. and involvement of foreign exchange would be less if respondent No. 5 would be entrusted with the contract. Mr. Raval has submitted that, in the aforesaid facts, the contract should be given in favour of respondent No. 5. Hence, even if it is assumed that there has been technical irregularity or illegality in finalising the contract in favour of respondent No. 5, no useful purpose will be served by making a de novo consideration of the tenderers. Because, by such consideration, the same result will ensue. The learned single Judge has also held that in the facts of the case, acceptance of respondent No. 5 was justified and no interference by the writ Court was called for. He, therefore, submitted that the appeal should be dismissed.

7. Mr. Mohit Shah, the learned Counsel appearing for the Maritime Board, has supported Mr. Raval. He has further contended that the Maritime Board floated the tender and processed the tender papers and as it was necessary to seek approval of the State Government for additional sanction, the tender papers were submitted for proper evaluation of the costs involved in the scheme and consequential sanction. He has submitted that although technical bid of all the tenderers was considered for the primary purpose of finding whether such tenderer was suitable for the job, comparative evaluation for a final decision for finding out which of the tenderer was the most suitable and dependable, was not made initially. Such critical evaluation was, later on, made by taking into consideration all relevant factors, including experience, expertise, capability to implement the job and proper maintenance of the dredger, involvement of foreign exchange necessitated for bringing foreign parts etc. On such evaluation, the respondent No. 5 was adjudged most suitable and dependable. By negotiation, respondent No. 5 has also lowered the price bid and by clarification made by the respondent No. 5 that the bills would be drawn at Gujarat, the price bid of the respondent No. 5 has become lowest. Not only that, by drawing the Bills at Gujarat, the Government of Gujarat will get substantial amount, i.e. about Rs. 29,00,000/- by way of sales tax. He has submitted that negotiation was also made with the appellant and the price bid was lowered to some extent

by the appellant. Mr. Shah has contended that even if it is assumed that negotiation with respondent No. 5 by the State Government was not warranted and there has been deviation in the norms, in the special facts of the case, the Court should take note that even if the price was not allowed to be lowered by respondent No. 5 by negotiation, the lowest tender of the appellant could not have been accepted for the reasons indicated hereinbefore. Since respondent No. 5 was found most suitable and dependable tenderer, exercise to lower down the price bid on negotiation had been made. He has contended that the appellant, in its technical bid for the tender, did not mention about its experience, its nature of collaboration with Singanor or the personnel having proper expertise employed by it. In the column of experience, the appellant mentioned that it was a new company, thereby indicating that it has not yet gained experience of its own in the field. Mr. Shah also contended that the Maritime Board has made critical evaluation of the suitability of tenderers on the score of technical competency, dependability, etc. and has come to the finding that the respondent No. 5 is the most suitable and dependable tenderer. There is no material on which it can be reasonably held that the technical evaluation was mala fide and was made on irrelevant and extraneous considerations. Such evaluation, therefore, cannot be held to be bad and illegal even if it is assumed that the case of the appellant could be better appreciated and other evaluation was possible. Such evaluation on technical competence must be left to the concerned authority. He has submitted that, in the greater national interest, the implementation of the scheme should not be delayed and in the facts of the case, selection of respondent No. 5 is neither improper, not mala fide. The appeal, therefore, should be dismissed.

8. After considering the respective contentions of the learned Counsels appearing for the parties and considering the facts and circumstances of the case, it prima facie appears that although there is deep and pervasive control of the State Government on the composition of the Maritime Board and on its functioning and also on the functioning of the Ports in Gujarat under the Board, the Gujarat Maritime Board has been statutorily entrusted with the task of entering into contracts for implementing the schemes relating to Ports in Gujarat." Statutory power, must be exercised strictly in accordance with the statute and on the score of the Board being an instrumentality of the State Government because of deep and pervasive control, the State Government cannot usurp the statutory duties and functions of the Board if on no circumstances, such power has not been given to the State by the statute. The concern of the State Government for effective implementation of the Scheme cannot be underestimated, but the just anxiety of the State Government to ensure proper implementation of an approved Scheme relating to a Port in Gujarat by selecting proper person will not empower the State Government to usurp the statutory power of the Board to enter into contract with third parties if such action is not warranted under the statute. The learned Counsels appearing for the State and the Board have argued at length to contend that the Government has also power to finalise contract, but

we have not yet been able to take a firm view on such contention that the statute authorises the State Government to float a tender and accept the same for implementing a scheme. It may, however, be noted that in view of other facts indicated hereafter, it was not found necessary to make a deeper probe in the matter to decide finally as to whether or not the Government, may, in an appropriate case, independently enter into a contract with third parties in implementing a scheme. Even if it is assumed that the State Government had no jurisdiction to enter into a contract with a third party in finalising the tender in implementing an approved scheme of the Maritime Board and on that score this Court is called upon to direct for striking down the contract made in favour of the respondent No. 5 and directing the Board to finalise the contract by making statutory exercise, in the special facts of the case it cannot be held that the Board had not made any exercise to find out the most suitable and dependable tenderer and the entire exercise has been made by the State Government in the garb of deciding the additional sanction for the approved scheme. It appears to us that although technical bids of the tenderers were considered initially and the appellant and other tenderers were found suitable for consideration, on evaluation of technical bid, such evaluation, in our view, was made for the primary purpose of scrutiny of technical bids of the tenderers for outright rejection if found unsuitable at that stage. When the tenderers were found suitable on primary scrutiny and their price bids were opened and taken into consideration for selection the most suitable and dependable tenderer, a more critical and comparative evaluation of technical bids was wholly justified. In the facts of the case, comparative evaluation at the later stage does not appear to be unjust or mala fide or made with the sole intention to favour respondent No. 5. It appears to us that the project or scheme involves substantial amount of money. Moreover, the implementation of the scheme involves considerable amount of foreign exchange with express terms for escalation of cost on the rise of price of the machineries to be supplied and change in the rate of foreign exchange. We may take judicial notice of the fact that because of recent step devaluation of rupee, more involvement of foreign exchange is bound to escalate the cost of the scheme considerably. It has been noted in the evaluation report of the Maritime Board, that the extent of foreign exchange involved in the tender of the appellant is more than that of the respondent No. 5. Such involvement of larger foreign exchange ex facie has greater financial implication. Moreover, the report indicates that the respondent No. 5 has executed the nature of the work under the tender in Madras and Mormugao Ports and on consideration of some relevant factors, the said respondent No. 5 was found more dependable.

9. There is some dispute about the extent of collaboration of the appellant with Singanor, an internationally reputed firm in the commission of Grab Dredger Scheme, and the availability of technically expert personnel for commissioning the scheme and after service. It also appears that in the technical bid submitted by the appellant in sealed envelope, against the column of experience, the appellant indicated that it was a new concern, thereby indicating, by necessary

implication, that on its own, it had not gained any experience by that time. The appellant has contended that its collaboration with Singanor and other aspects of its technical expertise were made known to the Maritime Board and if an opportunity would have been given to the appellant, they could have clarified the various aspects of expertise and competence to the full satisfaction of the concerned authority. It may be indicated that this Court has neither expertise for critical and comparative evaluation of technical competency of the appellant or the respondent No. 5, nor this Court should embark upon such exercise. We have already indicated that the critical and comparative evaluation by the Board did not appear to be unjustified or mala fide. Hence even if it is assumed that the evaluation might be incorrect and/or better and proper evaluation could have been made, the critical evaluation made by the Board cannot be scrapped. Such evaluation, being in the domain of the Board, the Board should be permitted to proceed with its evaluation if the same is not vitiated by mala fide or extraneous considerations. In the facts of the case, it appears to us that the State Government indicated its over-anxiety and tried to finalise the contract in favour of respondent No. 5, although it may not be called upon to do so. But, it appears to us that, in the facts of this case, the Board, on the basis of its critical and comparative evaluation, had independently come to the finding that for the contract in question, the respondent No. 5 was the most dependable and suitable candidate. Hence, even on the basis of the Board's evaluation, the respondent No. 5 was to be selected. In the circumstances, the ultimate decision made in favour of respondent No. 5 has not resulted in a material failure of justice. Interference by the writ Court for mere infraction of any statutory provision or norms, if such infraction has not resulted in any injustice, is not a matter of course. In this connection, reference may be made to the observation of the Honourable Supreme Court, in the case of A.M. Allison Vs. B.L. Sen, . The jurisdiction exercised by the writ Court is an equitable jurisdiction and if, ultimately, by the impugned decision, there has not been any material injustice, the writ Court may be well justified in refusing to interfere simply because there has been some infraction of law. In the facts and circumstances of the case, it appears to us that selection of respondent No. 5 for the contract in question is otherwise justified and even if the Board is directed to consider the cases of the tenders afresh on the basis of the materials before it and on critical evaluation of the tenders, the Board can justly accept the tender of respondent No. 5 for the reasons indicated earlier.

10. It may be noted here that a public authority, in order to inspire confidence in its functioning for the public interest and to satisfy the public accountability, which it owes, must act fairly and reasonably and if on the score of public interest, a higher tender is accepted in preference to a lower tenderer, it should not only record reasons for such decision, but also communicate its decision to the concerned parties. Although it does not appear that the appellant was informed of the Board's decision to select respondent No. 5, the reasons for such selection have been clearly indicated in the critical and comparative evaluation of

technical competency. We, therefore, do not find any reason to strike down the decision made in favour of respondent No. 5. The appeal, therefore, fails and is dismissed without any order as to costs. Interim order, if any, stands vacated and civil application stands disposed of. We, however, grant stay of the operation of this order for a period of ten days as prayed for by the learned Counsel for the appellant so that the appellant may move the Honourable Supreme Court.