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(1997) 04 DEL CK 0072

In the Delhi High Court

Case No : Civil Writ Petition No. 2509 of 1996

Gammon Constanzo Jv — APPELLANT

Vs

National Highways Authority of India and Others — RESPONDENT

Date of Decision : 04-04-1997

Acts Referred:
Constitution of India, 1950 — Article 226

Citation : (1997) 3 AD 237 : (1997) 67 DLT 18

Hon'ble Judges : Chander Mohan Nayar, J

Bench : Single Bench

Advocate : P.N. Lekhi, S. Bhartari, Mukul Rohatagi, A.Y. Chitale, S.A. Chitale and R.K. Singh, for the Appellant;

Judgement

C.M. Nayar, J.

(1) By this writ petition, the petitioner has prayed for quashing of decision in the matter of issuance of letter of acceptance for contract No. I and the decision regarding non responsiveness of the bid of the petitioner taken in the meeting held on March 9,1996 and for issuance of writ of mandamus to direct respondents 1 and 2 to evaluate the bid submitted by the petitioner strictly in accordance with the criteria laid down in the "Instructions to Bidders and Invitation to Bid".

(2) The facts as stated in the writ petition are that the petitioner is a joint venture company comprising of Gammon India Limited and M/s. F. Lli Costanzo S.P.A. Italy. Both the constituents of the joint venture are established Engineers and Contractors and have been engaged in the business of Civil Engineering Construction and similar projects. Respondent No. 1 is National Highways Authority of India (hereinafter referred to as "NHAI''), a statutory authority constituted under the National Highways Authority Act, 1988 (hereinafter referred to as ''the Act'') and is responsible amongst others for construction and improvements of National Highways in the country. Respondent No. 2 is the Chairman of the Authority and respondent No. 3 is the Ministry of Surface

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Transport which is the concerned Ministry having administrative control over respondent No. 1. Respondent No. 4 is a joint venture company constituted for the purpose of bidding for Contract. No. I and is alleged to have been awarded the contract. Asian Development Bank (hereinafter referred to as ''ADB'') agreed to give to the Government of India a loan of Us $245 Million bearing interest at the rate of 6.89% per annum and repayable over 20 years after a moratorium of 4 years and in respect of which Government of India subsequently entered into a loan agreement dated March 22, 1995.

(3) The Government of India appointed Nhai as the Agency to undertake the activities and actions required to be followed and complied with for availing the Adb loan. The Ministry of Surface Transport consequently on behalf of Nhai Issued Invitation for pre-qualification of contractors, as referred to in the pre-qualification document for the following five contracts including contract I which is the subject matter in the present petition :

"CONTRACT-1 Haryana and Rajasthan States, National Highway No. 8 Laning, including strengthening of existing 2 lane payment, between Gurgaon in Haryana State and Kotputli in Rajasthan State (Km. 36.63 to Km. 162.50). It will not be necessary to refer to contracts Ii, Iii, Iv and V as they do not arise for consideration in this writ petition. The instructions to applicants, inter alia, prescribes that to be eligible for pre-qualification, the applicants shall provide evidence of their eligibility and of their capability and adequacy of resources to carry out the contracts effectively and to this end all applications for prequalification submitted pursuant there to were required to include, inter alia, details of contracts executed and at hand during the five years preceding the date of application in the format Schedules A to J set out in the prequalification document. The information required by Schedule ''G'' was regarding the current litigation, debarring/expelling of applicants or abandonment of work by an applicant. It further required the applicant or any of its constituent firm to state whether any of them had been debarred or expelled by any agency in India during the last five years and if yes, to give details or whether the applicant or any of its constituent failed to perform any contract work in India during the last five years and if yes, to give details. The relevant clauses as contained in instructions to Applicants'' in the pre-qualification documents read as follows : "Clause 3, 6,4 of the instructions prescribed the minimum eligibility criteria that an applicant must meet and Sub Clauses 3.6. 4.4 thereof required that "an applicant or any of its constituent partners should in the last five years have neither failed to perform on any contract nor been expelled nor any of their contract has been rescinded for any reason". Clause 3.8 of the instructions further provides that "even though an applicant may meet the above criteria, he is liable to be disqualified if they have made misleading or false representations in the documents, statements, attachments submitted".

Schedule ''G'' read as follows :

"INFORMATION Regarding Current Litigation, DEBARRING/ Expelling Of Applicant

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Or Abandonment Of Work By Applicant 1. (a) Is the applicant currently involved in any litigation relating to the contract works..... No (b) If yes, give details 2. (a) Has the applicant or any of its constituent firms been debarred/ expelled by any Agency in India, during the last 5 years ..... No (b) If yes, give details : 3. (a) Has the applicant or any of its constituent firms failed to perform on any contract work in India during the last 5 years .....No (b) If yes, give details : Na Note : The Ministry may require the applicant to verify the information provided in this Schedule and may, on the basis of this verification, reject the application if the information provided is found to be incorrect." Clauses 28, 33 and 34 may be reproduced as under : "28. Examination of Bids and Determination of Responsiveness.- 28.1. Prior to the detailed evaluation of bids, the Employer will determine whether each bid (i) meets eligibility criteria of the Bank; (ii) has been properly signed; (iii) is accompanied by he required securities; (iv) is substantially responsive to requirements of the bidding documents; and (v) provides any clarification and/or substantiation that the employer may require pursuant to Sub-Clause 15.4. 28.2. A substantially responsive bid is one which confirms to all the terms, conditions and specifications of the bidding documents without material deviation or reservation. A material deviation of reservation is one - (i) which affects in any substantial way the scope, quality or performance of the works, (ii) which limits in any substantial way, inconsistent with the bidding documents the Employers'' rights or the bidder''s obligations under the Contract, or (iii) whose rectification would affect unfairly the competitive position of the other bidders presenting substantially responsive bids. 28.3. If a bid is not substantially responsive it will be rejected by the employer and may not subsequently made responsive by correction or withdrawal of the non-conforming deviation or reservation. 33. Award 33.1 Subject to Clause 34, the employer will award the contract to the bidder whose bid has been determined to be substantially responsive to the bidding documents and who has offered the lowest evaluation bid price, provided that such bidder has been determined to be (i) eligible in accordance with the provisions of the Sub-Clause 3.1; and (ii) qualified in accordance with the provisions of Clause 5. 34. Employer''s Right to Accept any Bid and Reject any or all Bids. 34.1 Notwithstanding Clause 33, the Employer reserves the right to accept or reject any bid and to annul the bidding process and reject all bids, at any time prior to award of Contract, without thereby incurring any liability to the affected bidder or bidders of any obligation to inform the affected bidder or bidders of the grounds for the Employer''s action."

Clauses 5 and 13 of the Tender Documents (volume I deal with the qualification of bidders and documents to be submitted read as follows :

"5. Qualification of the Bidder (a) submit a written power of attorney authorising the signatory of the bid to commit the bidder, and (b) update the following information, submitted with their application for pre-qualification and continue to meet the minimum threshold criteria, set out in the pre-qualification documents. (i) evidence of access to lines of credit and availability of other financial

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resources. (ii) financial predictions for the current year and the two following years, including the effect of known commitments. (iii) work commitments acquired since pre-qualification. (iv) current litigation. (v) evidence of the availability of the required nominated key personnel in the site organisation proposed for the administration and execution of the contract. (vi) Any other information details furnished at the time of pre-qualification which require to be updated. -13. Documents comprising the Bid. 13.1. The bid to be prepared and submitted by the bidder for consideration shall comprise the following : (a) Completed form of Bid and Appendix thereto duly signed in accordance with Clause 5 hereof Along with the complete set of Bid Documents (Volume 1 to Volume 5) mentioned in Clause 9 hereof Along with three additional copies of Volumes 3 and 5 duly marked as "COPY", (b) (i) Bid Security amounting to Rs. 26.0 million. (ii) Special Management Service Contract Securities amounting to Rs..... or equivalent in freely convertible currencies from each of the parties signing the Construction Management Service Agreement in cases where the bidder has been pre-qualified in association with a construction management firm. (c) Bill of Quantities with the rates (both in figures as well as in words) and amounts for all items of work duly filled in alongside the respective quantities in Section Vi in Volume 3, (d) Schedules of Basic Data for the Bid duly completed in Section Vii in Volume 3; (e) Copies of Schedules A to J of the Prequalification Document furnished by the bidder at the time of prequalification, letter of approval of prequalification and statements of changes which may have occurred since prequalification, as mentioned in Clause 5.1 hereof, in Volume 5; (f) .....

(4) The petitioner submitted its bid for being pre-qualified by respondent No. 1 and it is alleged that the bid of the petitioner was the lowest regarding contract No. 1 and respondent No. 1 has sidelined the bid of the petitioner on the ground of non-responsiveness which is based on irrelevant consideration. The decision of the respondent Authority as contained in the Resolution dated 9th March, 1996 may be reproduced as follows :

"MINUTES Of The Special Meeting Of The Authority Held On 9.3.1996 At 4.00 P.M. In Conference Hall, Maharani Bach, New DELHI. Chairman, Nhai presided over the meeting Member (T)/DG(RD), Member (F & A) and Member (PI) attended the meeting 2. General Manager 1, General Manager Ii, General Manager Iii, General Manager (Finance) and Dgm (F & A) & Dgm (I & PS) were also present as invitees. 3. In this meeting, the following decisions were taken : 1. Responsiveness of bids M/s. Gammon India Ltd. and M/s. Shankaranarayana Construction Co. were considered as non-responsiveness because of their poor performance in the work of Sikar-Pilani Road in Rajasthan under World Bank Loan Assistance and construction of Tunnel No. 9 of Konkan Railway Corporation Ltd. India respectively. As such, the bids of M/s. Gammon India Ltd. F.LLI Costanzo Jv and of M/s. Graham-Satyam Shankarnarayana Jv have not been considered for further evaluation. 2. It was pointed out by Member (Technical) that as the bid prices are not clustered around the lowest quoted bids, it was

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decided to evaluate the 5 lowest bids in respect of each contract. The bids were evaluated as per conditions in the bidding document. The bid evaluation report in respect of each of the 5 contracts is enclosed at Enclosures I to IV. Based on the evaluation, the lowest evaluated bid for each of the Contract are detailed below: (i) Contract I Biria GTM-Enterpose Ltd. (JV) Rs. 2,621,620,529 (ii) Contract Ii BSC-RBM Pati (JV) Rs. 1,341,439,940 (iii) Contract Iv Bridge and Roof India Ltd. Rs. 587,170,632 (iv) Contract V Madhucon-Binapuri (JV) Rs. 1,472,714,547 This was approved by Authority."

(5) The main grievance of the petitioner is that the respondent-Authority has acted in disregard and defiance of the bid documents by holding the bid to be non-responsive and have clearly acted in an arbitrary manner. The petitioner is sought to be ousted from the arena of consideration on the basis of alleged performance of M/s. Gammon India Limited with regard to contract entirely different from the present contract.

(6) Respondents 1 and 2 have filed counter affidavit wherein it is pleaded as follows: Gammon Constanzo Jv on the basis of information furnished in Schedules A to J of prequalification document was found eligible and pre-qualified. They were, accordingly, allowed to submit their bids valid for 180 days after the date of opening of tender on January 5,1996. Out of the five contracts for which respondent No. 1 invited bids, the company submitted its bid in respect of contract I, namely, Haryana and Rajasthan States National Highway No. 8, four laning including strengthening of existing 2 lane payment between Gurgaon in Haryana State and Kotputli in Rajasthan. At the time of opening of the bids on January 5, 1996 the petitioner quoted a total bid price of Rs. 2,536,602,711.00 and the total bid price quoted by respondent No. 4 was Rs. 2,513,501,832.00 . The bid of the petitioner, Therefore, cannot be held to be lowest. Before the Authority could complete evaluation process and make its recommendation for its concurrence for approval it was brought to the notice that M/s. Gammon India Limited, the Indian constituent of the petitioner had abandoned the work pertaining to the widening strengthening and reconstruction of Sikar-Pilani Road up to Haryana Border in Rajasthan and that liquidated damages were imposed on it by the employer. Thereafter, respondents by their letter dated February 15, 1996 called upon Gammon India Limited to furnish its comments in respect thereof. The said communication

Reads as follows: "Sir, Please refer to the bid dated 5th January, 1996 submitted by the Joint Venture of Gammon (India) Limited & M/s. F.LLI Contanzo S. p.a. Italy. 2. It has been brought to our knowledge that M/s. Gammon (India) Limited had abandoned the work pertaining to widening, strengthening and reconstruction of Sikar-Pilani road up to Haryana border in Rajasthan, and that the Company was, Therefore, expelled from .he work and liquidated damages imposed on it by the employer. It is, however, noticed that this information, if correct, has not been given in the Schedules applicable to the prequalification of Joint Venture in respect of above works, the updated details of which were to be

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submitted in volume 5 of the said bid. 3. You are requested to please give your comments in the matter immediately, but latest by 22nd February, 1996."

By letter dated February 8, 1996 the respondents also wrote to Secretary, Pwd, Government of Rajasthan for furnishing of complete details with regard to State Projects as mentioned above. The reply dated February 3, 1996."

"Dear Shri Narain, With reference to you letter dated the 8th February, 1996 in regard to the work of widening, strengthening and reconstruction of Sikar-Pilani-Loharu road up to Haryana border allotted to M/s. Gammon India Ltd. and your specific quarry regarding the performance of M/s. Gammon India Ltd. who have been pre-qualified as a Joint Venture Company Along with a foreign partner, the position is as follows : The work of widening, strengthening and reconstruction of Sikar-Pilani-Loharu road up to Haryana border involving 133 Kms length amounting to Rs. 17.29 crores was taken up as a part of world Bank Assisted State Road Project involving 4 States in which 5 roads were of Rajasthan by M/s. Gammon India Ltd., Bombay with stipulated dates of commencement and completion as 4.1.1991 and 3.1.1994 respectively. The contractor was selected after pre-qualifying exercise. Basically the experience of the firm in bridge construction seemed to have been taken into account in which the firm is quite strong in performance. But in road construction they were a novice at the time when this work was allotted to them. The road work was quite simple involving widening, strengthening and grade improvement Along with minor C.D. works reconstruction of an existing single lane road. But the firm because of bad management, lack of technical personnel and the absence of, requisite machinery for executing the work failed to deliver the requisite physical and financial progress. The work went very much behind schedule and as on 6/94, which is three months after scheduled dated of completion, hardly 20% of the physical progress could be achieved and the work was abandoned by the contractor after executing the work worth about Rs. 4 crores. The World Bank withdrew the loan assistance on this particular road because of these situations. The firm has paid all dues including liquidated damages levied on it and is not a defaulter in terms of the dues but as far as the performance of the firm is concerned, on your road project better performance than of Sikar-Pilani-Loharu road can be achieved only with more technical personnel and machinery input which the firm is certainly capable of but could not deliver on the particular project in Rajasthan. If it is a bridge contract in which the firm has been qualified then certainly good performance can be expected from the firm. You may form a view on these lines. With regards, Yours sincerely, sd/- (B.G. Sharma) 13.2.1996"

(7) The respondents on the above basis contend that since the petitioner admitted that the work relating to Sikar-Pilani road was not completed by Gammon India Limited and the said Company had paid to Government of Rajasthan the liquidated damages imposed on it for the non performance of the work and as the petitioner had neither disclosed this information in Schedule "F'' nor in Schedule ''G'' of the Prequalification Documents and had thereby

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suppressed and concealed the said facts and since as per the provision of Clause 3.8 the applicant is liable to be disqualified if it has made misleading and false representation in the document, statements and attachments submitted in the prequalification application, the petitioner was liable to be disqualified. The petitioner secured prequalification by concealing and suppressing the facts relating to one of its constituents Gil and, Therefore, in any view of the matter neither their bid met the requirements of the Tender nor did the petitioner satisfy the minimum threshold criteria as set out in the Prequalification Document and consequently the bid of the petitioner was treated as non-responsive by the respondents. In the above background the bid of respondent No.4 was evaluated as lowest and after the receipt of approval from Adb the same was not and accepted.

(8) The learned Counsel for the petitioner has argued that there was no verification done with regard to the alleged abandonment of the project on Sikar-Pilani Road and the decision suffers from lack of procedural fairness. It was the duty of the Authority to act impartially and the petitioner having been adjudged as pre-qualified for the work in question should have been a notified warded the contract. The Explanation as given in the reply dated February 29, 1996 ought to have been accepted. The following pleas have been raised by the petitioner in this communication:

"A. Part A Schedule ''G'' of P.Q. Documents : Heading reads as under : "Information Regarding Current Litigation, Debarring/Expelling of Applicant or Abandonment of work by Applicant." There is no current litigation. Hence, the reply is ''NO'' only. There is no ''debarring/expelling of Applicant. Hence the reply is ''NO'' only. There is no work like Abandonment in the Fidic Conditions or in the Contract Laws. The words are: (a) Termination (b) Repudiation (c) Suspension (d) Foreclosure Since these are not reflected, we fail to appreciate as to how the question of abandonment could be brought out. In fact, such a word has arisen in the Inter-Departmental correspondence only which has been protected by CIL. As regards the specific question of Schedule ''G'' is concerned, kindly refer to our letter of 22.2.1996.

B. Part B Factual Details/Background and Evidences etc: It is a fact that Gil was awarded a Contract in January 1991 and the works were to be completed in January, 1994. The work was divided in four sections, each consisting of about 26 kms. with intermediate target dates for completion of each section. Gammon India Limited (GIL) had engaged M/s. Manusell, Singapore, renowned foreign consultants to manage the job. Accordingly, the Contract Agreement provided for payment in foreign currency. Gil had also planned to take up the construction in a continuous fashion without any intermediate obstructions. Accordingly, Gil had mobilised the necessary construction equipment.

However, on commencement of the construction operations, GIL''S bill for foreign exchange component was not entertained. This has resulted in GIL''S inability to employ the foreign consultants, as the foreign consultants had withdrawn due to

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non-payment. This has resulted in set back to the Management of the Project. Besides, some of the working drawings were made available after 13 months of award i.e. February, 1992. Even in April, 1994 (after 3 months of stipulated completion date) all construction drawings were not issued. There were large number of obstructions on route which could not be cleared by the Department. The obstructions included trees, electrical posts, water pipelines, telephone lines etc. In fact, these obstructions could not be cleared by the Department even after the date of original completion. The land acquisition could not be completed in time and in consequence only separate stretches were handed over to Gil in part without continuity. In consequence Gil was unable to carry out the work in the manner originally planned. The work had to be rescheduled in bits and pieces involving to and for movement of construction equipments which were not originally planned for. The cross section profiles have been unilaterally changed by the Department during the course of construction. This has resulted in substantial delays to the construction. As a result, the construction time spilled over beyond the original period. The application for extension of time was submitted to the Department. However, the application was not entertained. Our escalation payments were stopped. In addition regular monthly payments were also erratic. This has resulted in a financial force majeure condition. Despite a number of pleas from Gil, the Department did not consider the various factual conditions and decided to ''finalise the work at the incomplete stage''. They had also arbitrarily levied Liquidated Damages. The decision to finalise the incomplete work with effect from 3,1.1994 was communicated to Gil only on 15.6.1994. Vide Exhibit I, Gil categorically established defaults on the part of the Department and that there was no abandonment of the contract but prevention on the part of the Department making the contract works impossible and impracticable and should the contents of letter dated 15.6.1994 be the decision of the Executive Engineer, then they invoked Arbitration as per Clause 67 and initiated by making a categoric mention of the said intention in crystal clear terms and also requested the Department to nominate their arbitrator under intention to Gil as also to take steps for requested the Executive Committee of Indian Roads Congress of nominating Chairman of the Committee which would resolve the disputes. This letter of 5.9.1994 was never replied by the Department, which established defacto-dejure that department had nothing in counter to substantiate and that the Department agreed with the defaults pointed out by Gil in respect of various issue including their unilateral premature action of seeking encashment of Bank Guarantees as well as that the Department agreed that there was no so called "abandonment" of work by GIL. Curiously, Department did not nominate their Arbitrator till today and thereby prevented Gil, to proceed with the work with concurrent Arbitration which is a term of the Contract Agreement. Also, Arbitration clause itself provided that Arbitration could not be commenced unless an attempt has first been made by the parties to settle such dispute amicably. Thus, amicable settlement is a condition engrafted in the Contract Agreement. Since Department was not willing to proceed with Arbitration till the final bill be settled and as the Department worked out arbitrarily a so called final bill inter

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alias whimsically considering liquidated damages (which is already contested by Gil and inducted as disputes for Arbitration as per clause 67) of Rs. 134.13 lacs and made a negative so called bill of Rs. 61,77,204.00 and as it is clearly stipulated in Contract Agreement that if liquidated damages (rightly or wrongly) be levied by the Department, the Contractor shall pay to the Employer the relevant sum. Gil was forced to deposit the said amount clearly stipulating: Quote "However, subject to keeping alive our right for resolving the disputes pertaining to liquidated damages by arbitration, we have agreed to deposit Rs. 61,77,204.00 vide our letter No. ADK/CAMP/Jaipur-1 of 5th instant. Unquote Gil was forced to take this course of action, as releasing of payment/deposit to the. Department, was obligatory in terms of the Contract Agreement and more so to get the disputes settled through Arbitration, which again, is a term of Contract Agreement. This letter of Gil which squarely records all the details is given as Exhibit 2. From the above evidences, it would be crystal clear that all information given in Schedule ''G'' of P.Q. Documents was correct and unambiguous.

(9) Part C Merits and Demerits of the unilateral action by the Department Contractual and Legal Dissection: Quote

"A Contract can be performed; by a contractor only when the Employer discharges their ''Reciprocal Obligations'', which are conditions precedent to the performance of the contractor. In other words, if the Employer fails to discharge these obligations, the Contractor''s performance becomes impossible and impracticable. In such, a case, the contractor is virtually prevented from performing on the contract due to actions/inactions on the part of the Employer which is also termed as a "breach'' by the Employer." Unquote The ''breach'' by the Employer has been detailed under Para B above. The Employer committed manifold breaches by virtue of their actions and inactions by not handing over site (even as late as April 1994, 3.2 km of site was handed over), by not releasing legitimate payments due to Cil, by not releasing foreign exchange for 15 months right at the start of the project, by not providing unhindered site free of conditions, by not even defining the scope of work, by not issuing working drawings etc. This list is unending. As per Fidic Conditions, Gil was not only entitled to receive extension of time but, also compensating payments as per terms of the Contract and the Engineer had to follow impartially as per Clause 2.6 of Fidic conditions. Even though there is no necessity for giving the legal justification, we have submitted the same because we find that copy of the letter dated 10.2.1996 has been endorsed to the Joint Venture for purposes of action, which if not clarified are likely to prejudice the interest of the Joint Venture, inasmuch as, it would create some confusion. For the sake of clarity and to avoid any confusion, we have presented the true picture with all evidences on record." In the above communication the petitioner has broadly taken the following pleas: (A) there is no current litigation in which the petitioner or its constituent company is involved and there is no debarment and expulsion of the petitioner; (B) the words used in the conditions or in the contract are termination, repudiation, suspension and foreclosure. The abandonment is not stated as a

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ground to refuse the contract to the petitioner or to treat the offer as non-responsive; (C) there was delay due to non payment of bill for foreign exchange component resulting in inability to employ the foreign consultants which resulted in setback to the management of the project. The working drawings were made available after 13 months of award and there were large number of obstructions which could not be cleared by the Department; (D) the land acquisition could not be completed in time and in consequence only separate stretches were handed over to the petitioner in part without continuity resulting in rescheduling all works in bits and pieces; (E) the petitioner was forced to deposit the amount of Rs. 61,77,204.00 subject to keeping alive the right for resolving the disputes pertaining the liquidated damages by arbitration. The payment of the amount as liquidated damages was, Therefore, not denied. These admitted facts will clearly indicate that that petitioner company faced problems in the work of Sikar-Pilani Road in Rajasthan though it is stated to be due to the breaches and lapses on the part of the employer."

(10) Reference is made to the judgments as reported in Liberty Oil Mills and Others Vs. Union of India (UOI) and Others, ; National Institute of Mental Health and Neuro Sciences Vs. Dr. K. Kalyana Raman and others, ; Dr Rash Lal Yadav Vs. State of Bihar and Others,

(11) Paragraph 15 from the judgment as reported in Liberty Oil Mills and Others, (supra) is cited to reiterate the proposition that an order cannot be made without due investigation and without giving a reasonable opportunity to the affected party and by following the principles of natural justice:

"5. Clause 8, we have seen, empowers the Central Government or the Chief Controller of Imports and Exports to debar a person from importing goods or from receiving licences or allotment of imported goods for a specified period if such person is guilty of any of the acts of commission or omission enumerated in the clause. An order of this immensity cannot obviously be made without due investigation and without giving a reasonable opportunity to the affected party. Clause 8-A and8-B refer to orders which may be made pending investigation into the allegations under Clause 8 and by necessary implication expose the investigative content of Clause 8. Clause 10 expressly stipulates that action under Clause 8 may not be taken unless a reasonable opportunity is given to the party concerned. Neither clause 8 nor Clause 10 prescribes the procedure to be followed before a final order under Clause 8 is made. Has a show-cause notice to be issued first, then followed by an investigation and finally concluded by yet another show-cause notice? Or is it enough if a show-cause notice is issued after the investigation in concluded and the person concerned is asked to explain the evidence gathered against him ? When may investigation be said to have commenced ? Should investigation be necessarily preceded by a show-cause notice ? We do not think that the Central Government or the Chief Controller is bound to follow any rigid, hidebound, pre-determined procedure. The procedure may be different in each case and may be determined by the facts,

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circumstances and exigencies of each case. The authority may design its own procedure to suit the requirements of an individual case. The procedure must be fair and not so designed as to defeat well-known principles of justice and thus deny justice. That is all. If the procedure is fair it matters not whether the investigation is preceded, interjected or succeeded by a show-cause notice. The word Investigation'' is not defined but in the context it means no more than the process of collection of evidence or the gathering of material. It is not necessary that it should commence with the communication of an accusation to the person whose affairs are to be investigated. That may follow later. When facts come to the notice of the Government or the Chief Controller of Imports which prima fade disclose an act or omission of the nature mentioned in Clause 8, the authority may straight away communicate the allegations to the person concerned, seek his answer and proceed to further investigate or the authority may consider it more prudent to further satisfy itself by seeking other evidence or material before communicating the allegations to the person concerned. There is no rule of justice or fair play which requires the authority to seek the comments of the person concerned before embarking upon an investigation. Investigation commences as soon as the authority decides to take the first step whether by way of seeking evidence or by way of seeking an Explanation from the person concerned. On the initiation of a proceeding under clause 8 by the commencement of investigation, the authority has to address itself to the question whether any action of an interim nature to prevent further harm or mischief is warranted pending investigation. Licences may have already been issued and allotment of imported goods may have already been made. The authority may consider it desirable to prevent the person from importing goods pursuant to the licences or to prevent him from obtaining the imported goods allotted to him through the specified agencies. If so, the authority may make an order under Clause 8-A suspending the importation of goods, the grant of licences or the allotment of imported goods. But Clause 10 provides that no action under Clause 8-A may be taken without giving a reasonable opportunity to the person concerned. It is obviously though that the right such as it may be, to obtain a license or allotment of goods having become crystallised into a license or an allotment, an order under Clause 8-A may have immediate and grave prejudicial repercussions on the person concerned making it desirable that he should be heard before an order of suspension is made. So it is that Clause 8-A contemplates a pre-decisional hearing. On the other hand, licences may not yet have been issued and allotments may yet have to be made. The appropriate authority may be satisfied that it would not be in the public interest to issue licences or make allotments to the person concerned without ascertaining further details with regard to the allegations against him. In such cases, the authority may make an order of ''abeyance'' under Clause 8-B. Though the language of Clause 8-B is capable of being rad as if it applies to both allotments already made and allotments yet to be made, a reference to the marginal head, in the background of what has been provided for in Clause 8-A, makes it clear that Clause 8-B applies only to allotments yet to be made and licences yet to be

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issued. That clearly is the contextual construction of Clause 8-B. Read in any other manner, there will be a totally unnecessary overlapping of and a needless conflict between Clauses 8-A and 8-B, with freedom to the authority to pursue action either under Clause 8-A or Clause 8-B each providing a different procedure of its own. We do not think that it is permissible for us to read clauses 8-A and 8-B each providing a different procedure of its own. We do not think that it is permissible for us to read Clauses 8-A and 8-B in a manner as to create needless conflict and confusion when the two clauses are capable of existing separately, without encroaching upon each other. Contextual construction demands such a construction and we have no hesitation in adopting it. Clause 10 which provides for a reasonable opportunity before action is taken under Clause 8-A, done not make similar provision in the case of action under Clause 8-B though action under Clause 8-A as well as action under Clause 8-B are both in the nature of interim orders of temporary duration aimed at preventing further harm and mischief pending investigation into the allegations under Clause 8. Does it mean that the principle of natural justice of procedural fairness is to be altogether excluded when action is taken under Clause 8-B ? We do not think so. We do not think that it is permissible to interpret any statutory instrument so as to exclude natural justice, unless the language of the instrument so as to exclude natural justice, unless the language of the instrument leaves no option to the Court, procedural fairness embodying natural justice is to be implied wherever action is taken affecting the rights of the parties. It may be that the opportunity to be heard may not be pre-decisional it may necessarily have to be post-decisional where the danger to be averted or the act to be taken can brook no delay. If an area is devastated by flood, one cannot wait to issue show-cause notices for requisitioning vehicles to evacuate population. If there is an outbreak of an epidemic, we presume one docs not have to issue shows-cause notices to requisition beds in hospitals, public or private. In such situations, it may be enough to issue post-decisional notices providing for an opportunity. It may not even be necessary in some situations to issue such notices, but it would be sufficient but obligatory to consider any representation that may be made by the aggrieved person and that would satisfy the requirements of procedural fairness and natural justice. There can be no tape measure of the extent of natural justice. If may and indeed it must vary from statute to statute, situation to situation and case to case. Again, it is necessary to say that pre-decisional natural justice is not usually contemplated when the decisions taken are of an interim nature pending investigation or enquiry. Ad interim orders may always be made ex parte and such orders may themselves provides for an opportunity to the aggrieved party to be heard at a later stage. Even if the interim order do not make provision for such an opportunity, an aggrieved party has, nevertheless always the right to make an appropriate representation seeking a review of the order. The principles of natural justice would be satisfied it the aggrieved party is given an opportunity at his request. There is no violation of a principle of natural justice if an exparte ad interim order is made unless of course, the statute itself provides for a hearing before the order is made as in Clause 8-A. Natural justice

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will be violated if the authority refuses to consider the request of the aggrieved party for an opportunity to make his representation against the ex parte ad interim orders."

(12) In National Institute of Mental Health and Neuro Sciences, (supra) the requirements of procedural fairness were considered necessary in the administration action. The concept of natural justice in Dr. Rash Lal Yadav (supra) is referred to and explained in paragraph 6 which reads as follows :

"The concept of natural justice is not a static one but is an ever expanding concept. In the initial stages it was thought that it had only two elements, namely, (1) no one shall be a Judge in this own cause, and (ii) no one shall be condemned unheard. With the passage of time a third element was introduced, namely, of procedural reasonableness because the main objective of the requirement of rule of natural justice is to promote justice and prevent its miscarriage. Therefore, when the Legislature confers power in the State Government to be exercised in certain circumstances or eventualities, it would be right to presume that the Legislature intends that the said power be exercised in the manner envisaged by the statute. If the statute confers drastic powers it goes without saying that such powers must be exercised in a proper and fair manner. Drastic substantive laws can be suffered only if they are fairly and-reasonably applied. In order to ensure fair and reasonable application of such laws Courts have, over a period of time, devised rules of fair procedure to avoid arbitrary exercise of such powers. True it is, the rules of natural justice operate as checks on the freedom of administrative action and often prove time-consuming but that is the price one has to pay to ensure fairness in administrative action. And this fairness can be ensured by adherence to the expanded notion of rule of natural justice. Therefore, where a statute confers wide powers on an administrative authority coupled with wide discretion, the possibility of its arbitrary use can be controlled or checked by insisting on their being exercised in a manner which can be said to be procedurally fair. Rules of natural justice are, Therefore, devised for ensuring fairness and promoting satisfactory decision-making. Where the statute is silent and a contrary intention cannot be implied, the requirements of the applicability of the rule of natural justice is read into it to ensure fairness and to protect the action from the charge of arbitrariness. Natural justice has thus secured a foothold to supplement enacted law by operating as an implied mandatory requirement thereby protecting it from the vice of arbitrariness. Courts presume this requirement in all its width as implied unless the enactment supplies indications to the contrary as in the present case. This Court in A.K. Kraipak v. Union of India, after referring to the observations in State of Orissa v. Dr. (Miss) Binapani Dei observed as under: (SCC p. 272 para 20) "The aim of the rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law of the land but supplement it." These observations make it clear that if the statute, expressly or by necessary

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implication omits the application of the rule of natural justice, the statute will not be invalidated for this omission on the ground of arbitrariness."

(13) The judgment as reported in Doody v. Secretary of State for the Home Department, The 1993 3 AELR 92 also lay down the basic requirements of fairness in administrative decision. The following passage at page 106 reads as under :

"What does fairness require in the present case ? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the Courts have explained what is essentially an intuitive judgment. They are far too well-known. From them, I derive the following: (1) Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances; (2) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type; (3) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects; (4) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken; (5) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result, or after it is taken, with a view to procuring its modification, or both; (6) Since the person affected usually cannot make worthwhile representations without knowing what factors may weight against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

(14) The criteria to evaluate the concept of fairness was further described in R. v. Secretary of State for Wales, ex parte Emeny, 1996 (4) AER1. The following passages from pages 14 and 15 read as follows :

"Fairness :-If (as I have found) the Secretary of State was not acting irrationally in determining the appeal under para 4 of Schedule 14 to the 1981 Act, was he acting fairly in declining, in effect, to put the rival claims of the public users of the footpath and of the landowner to the test of oral examination ? The law has now developed to the point where, in the making of administrative decisions affecting rights, interests and legitimate expectations, there is a common law duty to act fairly. That is so, except where manifestly there is a contrary statutory intention. Whereas the Court may not interfere with the exercise of an administrative discretion on substantive grounds, save where the decision is so unreasonable that it is beyond the range of responses available to a reasonable decision make (see Bingham Mr in R. v. Ministry of defense, Ex P. Smith (1996) 1 All Er 257, (1996) Qb 517 it may interfere where the administrative problem focuses on procedural safeguards. In the course of his judgment in R. v. Penal on

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Take-overs and Mergers, Ex. P. Guinness pie (1989) 1 All ER509 , (1990) 1 Qb 146, Lloyd, LJ. indicated that the Court is the author and Sole Judge to set procedural standards, and it may do so to supplement statutory procedures. The Courts have not adopted a clear principle about this. There is a general presumption, at least in cases affecting individuals, that Parliament intends to act fairly and that accordingly the Judges can import additional safeguards to those provided by statute, where appropriate."

In Lloyd v. Mc Mahon, (1987) 1 AII.ER 1118 (1987) Ac 625 Lord Bridge of Harwich said :

".....it is well established that when a statute has conferred on anybody the power to make decisions affecting individuals, the Court will not only require the procedure prescribed by the statute to be followed, but will ready imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness."

But the duty does not attach to every decision of an administrative character. Many such decisions do not affect the rights, interests and legitimate expectations of the individual citizen in a direct and immediate way. Thus a decision to impose a tax or a general charge for services rendered to rate-payers, each of which indirectly affects the rights, interests or legitimate expectations of citizens generally, does not attract the duty to act fairly. This is because the decision affects the person, individually only as a member of the public or class of that public. An executive or administrative decision of that kind is truly a policy or political decision, and is not subject to Court intervention, except on strict Wednesbury grounds. The duty to act fairly depends, Therefore, on the construction of the particular statute. The point is put most helpfully by Mason, J. in the High Court of Australia in Kioa v. West, (1985) 159 Clr 550 :

"The expression "procedural fairness" more aptly conveys the notion of a flexible obligation to adopt fair procedures which are appropriate and adapted to the circumstances of the particular case. The statutory power must be exercised fairly, i.e. in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations.... when the doctrine of natural justice or the duty to act fairly in its application to administrative decision- making is so understood, the need for a strong manifestation of contrary statutory intention in order for it to be excluded becomes apparent. The critical question in most cases is not whether the principles of natural justice apply. It is : what does the duty to act fairly require in the circumstances of the particular case? It will be convenient to consider at the outset whether the statute displaces the duty when the statute contains a specific provision to that effect, for then it will be pointless to inquire what the duty requires in the circumstances of the case, unless there are circumstances not contemplated by the statutory provision that may give rise to a legitimate

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expectation. However, in general, it will be a matter of determining what the duty to act fairly requires in the way of procedural fairness in the circumstances of the case. A resolution of that question calls for an examination of the statutory for an examination of the statutory provisions and the interests which I have already mentioned. (My emphasis) Since the Courts have displayed, with whatever degree of judicial restraint might be appropriate, a willingness to supplement the Will of Parliament, there must exist some room for manoeuvre such as to permit judicial intervention to ensure fairness in the circumstances of the particular case. And where the statute has omitted to supply a procedure that will be fair to all claimants to a public right of way (as well as to land owners who might wish to resist such claims), any implication that such omission is deliberate cannot operate exclusively to all situations. The Court''s intrusion in a case of judicial review will not be to build into the statute a blanket procedure of fairness, but only to inject its notion of fairness, as and when conflicting documentary material in a particular case compels a means of testing the evidence in a public inquiry.

(15) MR.LEKHI has next argued that there has not been any proper verification for ascertainment of the correctness of the averments made against the petitioner. The definition of verification is referred to in BLACK''S Law Dictionary Sixth Edition page 1561 which reads as follows :

"Verification, confirmation of correctness, truth, or authenticity, by affidavit, oath, or deposition. Affidavit of truth of matter stated and object of verification is to assure good faith in averments or statements of party. Sheeley v. City of Santa Clam, 251 Cal. App 2d 83, 30 Cal. Rptr. 121. Sworn or equivalent confirmation of truth. For example, a verified complaint typically has an attached affidavit of plaintiff to the effect that the complaint is true. In accounting, the process of substantiating entries in books of account. See also acknowledgement; Affidavit; Authentication; Certification; Confirmation; Oath; Verify."

The learned Counsel has then referred to a quote from the book "LATIN For LAWYERS'' 3rd Edition (By Sweet R. Maxwell) which will read as follows :

"365. Qw alitiwd statue rit parte inaudita altera, eouum licet statuerit, haud aquas fuerit 6 Rep. 52.-He who decides anything, one party being unheard, though he decides rightly, does wrong. (See Maxim 84.)"

(16) The learned Counsel for the respondent Authority, Mr. Thakur, on the other hand has argued that there has been suppression of information on the part of the petitioner and the bid has been correctly held to be non-responsive after completely satisfying the requirements of natural justice and procedural fairness. The factual details as have been reiterated in the communications exchanged between the parties would clearly show that the petitioner had indeed abandoned the project on Sikar-Pilani Road and even paid liquidated damages. There has been no abuse of power and it is well settled that the scope of judicial review would not entitle the petitioner to seek adjudication on facts when no procedural

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irregularity and unfairness have been pointed out. The principles of natural justice have been substantially complied with and the present petition is liable to be dismissed.

(17) The facts of the present case will establish that the bid of the petitioner was held to be non-responsive because of poor performance of M/s. Gammon India Ltd. in the work of Sikar-Pilani road in Rajasthan under World Bank Loan Assistance Scheme. The necessary correspondence was exchanged between the parties and it was not denied by the petitioner that there was some problem on the above said project though it is reiterated that it was not due to the fault of the petitioner Company. The project was admittedly not completed by M/s. Gammon India Ltd. and some amount of liquidated damages was paid to the Government of Rajasthan. These facts did not form part of the information which was expected to be disclosed in Schedules "F'' or ''G'' of the pre-qualification documents. The respondent-Authority sent a detailed communication to the petitioner, as well as wrote to the Secretary, Pwd, Government of Rajasthan for furnishing of complete details with regard to the above said project. Reply was received wherein it was stated that M/s. Gammon India Ltd. was entrusted with the re-construction of Sikar-Pilani road up to Haryana Border involving 133 kms. length amounting to Rs. 17.29 crores which was taken up as part of World Bank Assisted Road Project and the firm because of bad management, lack of technical personnel and absence of requisite machinery for executing the work failed to deliver the requisite physical and financial progress. The work went very much behind schedule as in June, 1994, i.e. three months after the scheduled date of completion, hardly 20 per cent of the physical progress could be achieved. The World Bank withdrew the loan assistance on this particular road because of these situations. The firm paid all dues including liquidated damages levied on it and its performance was adversely commented upon. This is quite evident from the communication dated February 13, 1996 received from the Secretary Pwd to the respondent-Authority. The petitioner has not denied these averments but has only reiterated that the delay in completion of the project was not because of its own making but for the reasons, such as, breaches by virtue of actions and inactions of the employer by not handing over sites, by not releasing foreign exchange, by not making available working drawings etc. These instances have been reiterated to justify that the bid of the petitioner on the basis of the above reasoning could not be treated as non-responsive as it was not to be blamed.

(18) The fact, however, remains that there was some dispute with regard to Sikar-Pilani project and admittedly liquidated damages were paid to the Government of Rajasthan. The justification of the delay and abandonment cannot be the subject-matter of decision with regard to non-responsiveness of the bid of the petitioner. This Court is only to consider, as to whether, the decision taken against the petitioner was just and fair. It is not for the Court to determine the merits of particular policy or a decision as judicial review is only confined to the decision making process. It cannot substitute its own decision and act as an Appellate Authority. In case the respondent does not wish to deal with a party

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who has some record of disputes in earlier projects which are not denied, it will not be open for this Court to investigate the reasons and evaluate on merits all the claims of the parties inter se but will broadly consider the manner in which a decision is taken. Reference may be made to the judgment of the Supreme Court as reported in Asia Foundation and Construction Ltd. Vs. Trafalgar House Construction (I) Ltd. and Others, . Paragraph 9 reads as under :

"9. The Asian Development Bank came into existence under an Act called the Asian Development Act, 1966, in pursuance of an International agreement to which India was a signatory. This new financial institution was established for accelerating the economic development of Asia and the Far East. Under the Act the Bank and its officers have been granted certain immunities, exemption and privileges. It is well known that it is difficult for the country to go ahead with such high cost projects unless the financial institutions like World Bank or the Asian Development Banks grant loan or subsidy, as the case may be. When such financial institutions grant such huge loan they always insist that any project for which loan has been sanctioned must be carried out in accordance with the specification and within the schedule time and the procedure for granting the award must be duly adhered to. In the aforesaid premises on getting the evaluation bids of the appellant and respondent No. 1 together with the consultant''s opinion after the so called corrections made the conclusion of the Bank to the effect "the lowest evaluated substantially responsive bidder is consequently AFCONS" cannot be said to be either arbitrary or capricious or illegal requiring Court''s interference in the matter of an award of contract. There was some dispute between the Bank on one hand and the consultant who was called upon to evaluate on the other on the question whether there is any power of making any correction to the bid documents after a specified period. The High Court in construing certain clauses of the bid documents has come to the conclusion that such a correction was permissible and, Therefore, the Bank could not have insisted upon granting the contract in favor of the appellant. We are of the considered opinion that it was not within the permissible limits of interference for a Court of law, particularly when there has been no allegation of malice or ulterior motive and particularly -when the Court has not found any mala fides or favouritism in the grant of contract in favor of the appellant. It Tata Cellular v. Union of India, (1996) 6 Scc 651 this Court has held that: "The duty of the Court is to confine itself to the question of legality. Its concern should be: 1. Whether a decision-making authority exceeded its power? 2. Committed an error of law. 3. Committed a breach of the rules of natural justice. 4. Reached a decision which no reasonable tribunal would have reached or, 5. Abused its powers. Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under: (i) Illegality : This means the decision-maker must

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understand correctly the law that regulates his decision-making power and must give effect to it; (ii) Irrationality, namely, Wednesbury unreasonableness. (iii) Procedural impropriety. The above are only the broad grounds but it does not rule out addition of further grounds in course of time"

(19) The principles of judicial review as well as the scope of interference under Article 226 were briefly referred to in the judgment as reported in AIR 1997 993 (SC) . Paragraphs 16 and 17 of the judgment read as under :

"16. In Chief Constable of the North Wales Police v. Evans, the House of Lords has observed that : "The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment; reaches on a matter which it is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the Court."

This principle has been referred to with approval in innumerable decisions of this Court. This decision clearly sets out the limits of the supervisory power under Article 226 of the Constitution and emphasises that the jurisdiction under the said article is neither unlimited nor unrestrained, much less unguided. 17. A Constitution Bench of this Court held in Har Shankar v. Deputy Excise and Taxation, Commr. that : (SCC P. 748, para 22)

"The writ jurisdiction of High Courts under Article 226 of the Constitution is not intended to facilitate avoidance of obligations voluntarily incurred. Of course, where there is a statutory violation, interference would be permissible even in the case of a contract but not where the relevant facts are disputed and which dispute calls for an elaborate enquiry which cannot be conveniently done by the High Court in a writ petition."

(20) The Court is not expected to interfere with the exercise of administrative discretion on substantive grounds, save where the decision is so unreasonable that it is beyond the range of responses available to reasonable decision-maker. This is so established by the law as stated in R. v. Secretary of State for Wales, ex parte Emery (supra) which has been reproduced in the earlier part of the judgment. In the present case, the petitioner had been granted an opportunity to make representation before the final decision was taken to hold the bid to be nonresponsive. The facts as stated have not been denied though some justification is offered for not completing the Sikar-Pilani Road project. In this background, no further verification was necessary nor required, particularly, when the petitioner did not dispute the averments made by the respondent-Authority. The question of justification cannot form the basis of any adjudication in the present proceedings as the Court is only empowered to examine the decision-making process and not with reviewing the merits of the decision.

(21) In view of the above reasons, it cannot be said that the decision taken by respondent No. 1 is arbitrary, illegal and irrational or the Authority has abused its powers. The present petition is dismissed. There will be no order as to costs.

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