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(2010) 08 OHC CK 0036

In the Orissa High Court

Case No : Writ Petition (C) No. 9446 of 2010

Jagadamba Packaging Pvt. Ltd. — APPELLANT

Vs

Union of India (UOI) and Others — RESPONDENT

Date of Decision : 17-08-2010

Acts Referred:
Competition Act, 2002 — Section 2, 3(3)
Constitution of India, 1950 — Article 14, 19, 21

Citation : (2011) 2 BC 413 : (2010) 110 CLT 722

Hon'ble Judges : B.P. Das, J;B.N. Mahapatra, J

Bench : Division Bench

Final Decision : Allowed

Judgement

B.N. Mahapatra, J.—This Writ Petition has been filed with a prayer to quash the tender No. MM/09100465 dated 28.01.2010 floated for supply of 45874 numbers of ammunition container 39 AIL which was awarded in favour of Opp. Part Nos. 4 & 5 & to give a further direction to Opp. Parties authorities to award the said tender in favour of the Petitioner.

2. Bereft of unnecessary details, the facts & circumstances giving rise to the present Writ Petition are that the Opp. Part No. 3-Indian Ordnance Factory, Badmal, Bolangir, Orissa, through its General Manager, floated an advertisement in the website for supply of Nos. 45874 AMMN container 39 A/L. The said tender paper was supplied to the Petitioner by Opp. Part No. 3. The Petitioner submitted the tender paper which was opened on 05.03.2010. On that date, Opp. Parties-authorities rejected the technical bid of the Petitioner & consequently its financial bid was not opened. The said tender work was awarded in the ratio of 50:50 in favour of both Opp. Part No. 4-Bhawani Industries & Opp. Part No. 5-Meghnani Industries. Being aggrieved by such action of the Opp. Parties-authorities, the Petitioner has filed this Writ Petition.

3. Mr. A.K. Mohanty, Learned Senior Advocate appearing on behalf of the Petitioner vehemently argued that the grounds of rejection of the Petitioner''s

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technical bid have not been communicated to the Petitioner. The Petitioner came to know about the grounds of rejection only after the counter affidavit was filed by the Opp. Parties in this Court. The three grounds on which the Petitioner''s technical bid was rejected are (i) Non-production of blue print of factory layout showing machine position, (ii) Non-production of purchase invoice of machinery, & (iii) Non-confirmation as regards PSD, Arbitration & penalty clause. It was submitted that all the tender processes are governed & guided by the Material Management & Procurement Manual (in short MMPM). As per Clause 6.17 of the said manual, the three grounds on which the technical bid of the Petitioner was rejected are not classified as essentials of tender. Therefore, rejection of the technical bid without seeking any further information from the Petitioner is not sustainable. In support of such contention, reliance was placed on the decision of the Apex Court in B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others, .

It was further contended that earlier on 14.09.2008, a tender was floated for the same container 39 A/L in respect of 78,300 numbers in which the present quantity of 45,874 numbers was included & the Petitioner-Company also submitted its tender paper for the same. In January 2009, the capacity verification of the Petitioner''s firm was conducted by a team of officers of Ordinance Factory, Chanda, who confirmed & recommended for opening of the price bid. Hence, the Petitioner''s tender ought not to have been rejected at the time of opening of technical bid. The PSD, Arbitration & Penalty clauses have been confirmed by the Petitioner by signing the tender paper which specifically contains these clauses. Apart from this, in the tender notice, there is no requirement for confirmation of the above clauses separately. Confirmation of PSD is also not required at the stage of submitting tender paper because Clause-10 of the general instructions of the tender provides that the firm has to deposit PSD within one month of placement of supply order. Attacking the action of Opp. Part No. 3 in awarding tender in favour of Opp. Part Nos. 4 & 5, it was argued that as per the tender notice, bidders were required to submit the Earnest Money Deposit (EMD). Opp. Part Nos. 4 & 5 do not come under Clause-5.1.2 of MMPM &, therefore, cannot be exempted from EMD. Since the Opp. Part Nos. 4 & 5 has not deposited EMD, their tender papers are liable to be rejected in terms of Clause 5.1.4 of MMPM. The quality system of the Opp. Parties 4 & 5 was verified by a team of authorities. The report dated 09.04.2010 submitted by them reveals that the owner of the firm made a commitment, if development order is given to develop 39 A/L container, the deficient facility will be established, if any, as per satisfaction of the customer. It is argued that in spite of the said deficiency, Opp. Part No. 3 has illegally awarded the tender in favour of Opp. Part Nos. 4 & 5. Moreover, Opp. Part Nos. 4 & 5 are one & the same person as reveals from the address & fax number. Opp. Part No. 4 is the son of the person who has sworn the affidavit for Opp. Part No. 4. The two firms namely M/s. Meghnani Industries & M/s. Bhawani Industries belong to two members of one family. Opp. Part Nos. 4 & 5, do not have industrial electricity

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connection & they have only commercial connection. It shows that they do not have any industry. The ground taken by the Opp. Parties that the Petitioner''s firm has formed a cartel, is not taken as a ground in the order of rejection of the bid. The stand taken in the counter affidavit that on the request of some tenderers including the Petitioner, the opening date of tender was extended from 26.02.2010 to 05.03.2010 is not correct as the Petitioner Company never asked for any extension of time. Concluding his argument Mr. Mohanty submitted that rejection of the Petitioner''s technical bid & award of the contract in favour of Opp. Part Nos. 4 & 5 are illegal, arbitrary, unfair & violative of Article 14 of the Constitution.

4. Mr. S.D. Das, Learned Asst. Solicitor General of India appearing for Opp. Parties 1 to 3 submitted that so far as ordnance factory is concerned, the supplies were received from various suppliers. Eighty per cent of the supplies are received through established registered suppliers by way of limited tender & the rest twenty per cent of the supplies are received through new companies/firms/ organizations by way of open tender. The selected tenderers from amongst these tenderers are ultimately treated as registered suppliers after execution of the orders. In the instant case, tender was given due publicity. The tender was invited as per Annexure-2 to the writ application, but the Petitioner has not filed the complete copy of Annexure-1. Being a new entrant, the tenderer has to satisfy the requirement & the conditions under Clauses 1 & 2 of the technical terms & conditions for manufacturing of container 39 A/L to be confirmed by bidder item-wise in writing against each point. As per Clauses, the firms who fail to submit the necessary documents are treated as ineligible firms & their offers are rejected without further correspondence. The committee found non-submission of various requirements as per Clauses 1 & 2 & came to the conclusion that the Petitioner failed to supply blue print of the factory layout showing machine position & purchase invoices of machinery. The Petitioner-Company has also not confirmed regarding PSD, Arbitration & penalty clause. The Petitioner failed to qualify in the technical bid & as such its price bid was not opened. On 2.5.2010, the Petitioner was intimated about rejection of its tender as per Clause 6.28 of MMPM. Opp. Parties are not required to give detailed reason for rejection as per Clause 6.28 of the MMPM. M/s. The Petitioner-Company is owned & financed by M/s. Paper Tube Industries who is an established supplier for this item with Shri Neeraj Raizada having common ownership & signatories for both the companies. The Petitioner having participated in the process, without reservation cannot question the process after having failed to qualify in the technical bid. Since the Petitioner''s price bid was not opened, Opp. Parties had no knowledge about its price. Petitioner''s registration otherwise with any factory does not confer any right to ignore T.E. requirements. The submission that the Petitioner was found suitable by the factory at Chanda is no ground at all as it failed to produce the required papers. SSI containing details of plant & machinery cannot be substituted for invoices showing purchaser, make, model & machine number. The report of the Addl.

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Comptroller & the Auditor General of India reveals that the Petitioner was indulged in cartel formation. In the meantime, the authorities concerned have placed order with Opp. Parties 4 & 5. Award of tender to Opp. Parties 4 & 5 has been done as per the standard norms & procedures followed by the OFBL. The tender has been processed & awarded in a fair & transparent manner with equal & similar treatment. The production unit of Opp. Part Nos. 4 & 5 was physically checked & verified by a team of officers. The ownership of land, plant & machinery have been examined. The valuation reports clearly confirm the capability of Opp. Part Nos. 4 & 5.

Placing reliance on the judgment of the Apex Court in Meerut Development Authority Vs. Association of Management Studies and Another, , Mr. Das argued that a tender is an offer. It is something which invites & is communicated to notify acceptance. It must be unconditional; must be in the proper form, the person by whom tender is made must be able to & willing to perform his obligations.

5. Mr. S.C. Lal, Learned Senior Advocate appearing on behalf of Opp. Part Nos. 4 & 5 submitted that Opp. Part No. 4- Shree Bhawani Industries & Opp. Part No. 5- Meghnani Industries are separate legal entities having separate sales tax registration numbers, DIC registration numbers & different places of business. Opp. Part No. 3 had deputed a team of officers to the factory premises of opposite. Party Nos. 4 & 5 who made physical verification of the land, plant, machinery & capacity of the said Opp. Parties to produce 39 A/L containers which are the subject matter of the tender. Opp. Part Nos. 4 & 5 have adequate experience & financial capability to execute the tender & had deposited the Performance Security Deposit (PSD) after the supply order was placed by Opp. Part No. 3. Petitioner''s tender has been rightly rejected by Opp. Part No. 3 for non-fulfillment of the standard conditions attached to the tender notice under Annexure-1 for forming a cartel, which practice has been prohibited u/s 3(3)(a) & (d) of the Competition Act, 2002. The use of letter head of M/s. Packwell Paper Tube Industries clearly shows that the Petitioner has formed a cartel with M/s. Packwell Paper Tube Industries. From the audit report dated 07.01.2010 of the Additional Comptroller & Auditor General of India, it is evident that M/s. Packwell Paper Tube Industries had formed & indulged in cartel &, therefore, the Petitioner''s tender has been rightly rejected. Since the tenders of other parties including the Petitioner were rejected as they could not qualify in the technical bid, there is no question of considering the price bid of the Petitioner. Soon after receipt of the tender notice, Opp. Parties 4 & 5 have made substantial investment in raw materials for effective supply of 39A/L containers.

6. On the rival contentions, the questions that fall for consideration by this Court are as follows:

(i) Whether Opp. Part No. 3-Indian Ordnance Factory, Badmal, Dist. Bolangir, Orissa represented through its General Manager, is justified in rejecting the technical bid of the Petitioner without giving any opportunity to it to rectify the

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alleged defects/deficiencies found in the technical bid?

(ii) Whether Opp. Part No. 3 has illegally & in unfair manner accepted the tenders of Opp. Part Nos. 4 & 5 ignoring the requirements provided in MMPM?

7. To deal with question No. (i) it is necessary to have an idea about the tender in question. The tender document is in two parts: (a) technical bid; & (b) financial bid. Further, the requirements in the tender notice are classified into two categories: those which lay down the essential conditions of eligibility & the other which are merely ancillary & subsidiary to the main object. The essential tender conditions must have been adhered to. If a party fails, and/or neglects to comply with the requisite conditions, which are essential for consideration of its bid, it cannot supply the details at a later stage. However, in case of conditions, which are not essential conditions but merely ancillary & subsidiary they can be complied with at a later stage.

8. In the instant case, Opp. Part-authorities rejected the technical bid of the Petitioner & consequently did not open the financial bid. As reveals from paragraph-3 of the Comparison Chart (Annexure-B/1 to the counter affidavit filed on behalf of Opp. Part Nos. 1, 2 & 3), the technical bid of the Petitioner was rejected on the following grounds i.e. (i) Non-production of blue print of factory layout showing machine position, (ii) Non-production of purchase invoice of machinery, & (iii) Non-confirmation as regards PSD, Arbitration & penalty.

9. According to the Petitioner, the above three grounds on which its technical bid was rejected are not classified as the essentials of the tender under Clause 6.17 of MMPM. Therefore, in terms of para 6.17, the Opp. Parties-authorities could have given opportunity to the Petitioner to remove the defects & asked for documents from the Petitioner before rejecting the technical bid. At this juncture, it is necessary to know what is contemplated in para 6.17 of the MMPM, which deals with initial analysis of tenders received.

Para 6.17 "The Purchase Officer will scrutinize the tenders received to find out whether these are complete in all respects & binding on the tenderers. There may be some offers which are not complete. Such incomplete offers can be broadly classified into two groups:

(A) Where the offer is complete with regard to the essentials of the tender though some other details may be missing.

(B) Where the offer is not complete with regard to essentials.

As regards incomplete tenders falling under Group (A) these may be considered, provided the offer is specific with regard to the following basis requirements:

(i) Description & specifications.

(ii) Rates, Duties & Taxes.

(iii) Delivery terms.

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In other words, there should be no ambiguity regarding the items being offered, the prices quoted & the terms of delivery. Where with regard to these basic requirements, the offers contain vague & ambiguous stipulations or avoid specific replies to the queries in the tender documents, like whether the store conform to technical particulars/specifications, drawings as specified in the schedule to tender, such offers will not be considered complete with regard to the essentials. If some other details are missing from such an offer, for example, list of plant & machinery, details of NSIC registration etc. which do not affect financial terms & conditions, the Purchase Officer may make a reference to the firm seeking further information, provided soliciting of such information will not amount to revision of the offer.

Such references & clarifications must be made quickly with a target date for reply to that finalization of the tender is not delayed. For making such references or accepting a clarification from the firms for such details, the Purchase Officer will not require approval from any superior authority. It is, however, reiterated that no clarifications shall be obtained or accepted from the firm, (even if submitted unilaterally by the firm) which have an effect of changing the essentials of the tender or its inter se position or would give an unintended benefit to the tenderer.

As regards tenders falling under Group (B), such offers should be ignored & rejected straightway & no reference should be made to the firm or clarifications accepted, if submitted by the tenderer unilaterally.

For the guidance of the purchase officers, an illustrative & no exhaustive list of the instances in which the tenders may be ignored & rejected straightway is given below:

(a) Received after due date & time of tender opening (late tenders):

(b) Unsolicited offer i.e. offer from tenderer other than those asked to quote against the tender.

(c) In the form of Letter Head/Fax/Telex/Telegram not followed up by formal tenders in time. (within 7 days of opening of T.E.)

(d) Not accompanied with Earnest Money asked for in case the firm responded is not registered with NSIC.

(e) Does not indicate delivery period by which supplies can be made or delivery offered is vague.

(f) Does not indicate the terms of delivery.

(g) Ambiguous with regards to any of the essentials i.e. the items being offered, prices quoted, & the terms of delivery.

(h) Tender samples as required in the enquiry conditions have not been submitted by the due date.

10. A conjoint reading of groups (A) & (B) of para 6.17 makes it clear that an

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incomplete tender falling under Group (A) maybe considered provided the offer is specific with regard to the basic requirements such as (i) Description & Specification (ii) Rates, Duties & Taxes (iii) Delivery of terms. In other words, there shall not be any ambiguity with regard to items being offered, the price quoted & the terms of delivery. In the instant case it is no body''s case that the offer of the Petitioner is not specific with regard to (i) Description & Specification (ii) Rates, Duties & Taxes (iii) Delivery terms or there is any ambiguity regarding the items offered, price quoted & terms of delivery. Therefore, the grounds on which the technical bid of the Petitioner is rejected are not the essentials of the tender. The conditions are merely ancillary & subsidiary, which are covered under Group (A) of para 6.17. Our above view is further strengthened by the illustrations given in para 6.17 for guidance of the Purchase Officer under which the tenders may be ignored & rejected straightway. The grounds on which the technical bid has been rejected are not coming under the said illustrations. Para 6.17 further reveals that if some other details are missing from an offer, e.g., list of plants & machinery, details of NSIC registration etc. which don''t affect financial terms & conditions, the Purchase Officer may make a reference to the firm seeking further information provided soliciting of such information will not amount to revision of the offer.

11. The Apex Court in M/s. Poddar Steel Corporation Vs. M/s. Ganesh Engineering Works and others, , held as follows:

It is true that in submitting its tender accompanied by a cheque of the Union Bank of India & not of the State Bank Clause 6 of the tender notice was not obeyed literally, but the question is as to whether the said Non-compliance deprived the Diesel Locomotive Works of the authority to accept the bid. As a matter of general proposition it cannot be held that an authority inviting tenders is bound to give effect to every term mentioned in the notice in meticulous detail, & is not entitled to waive even a technical irregularity of little or no significance. The requirements in a tender notice can be classified into two categories - those which lay down the essential conditions of eligibility & the others which are merely ancillary or subsidiary with the main object to be achieved by the condition. In the first case the authority issuing the tender may be required to enforce them rigidly. In the other cases it must be open to the authority to deviate from & not to insist upon the strict literal compliance of the condition in appropriate cases

Also see B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others,

In Union of India and others Vs. Hindustan Development Corpn. and others, the Apex Court held that the Government while entering into contracts or issuing quotas is expected not to act like a private individual but should act in conformity with certain healthy standards & norms. Such actions should not be arbitrary, irrational or irrelevant. In the matter of awarding contracts inviting tenders is considered to be one of the fair ways. If there are any reservations or restrictions then they should not be arbitrary & must be justifiable on the basis of some

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policy or valid principles which by themselves are reasonable & not discriminatory.

In a case where validity of the conditions in a tender as such are not questioned, the Government has the right to either accept or reject the lowest offer but that of course, if done on a policy, should be on some rational & reasonable grounds. The test of reasonableness, which pervades the constitutional scheme particularly in the context of Articles 14, 19 and 21, finds its positive manifestation & expression in the lofty ideal of social & economic justice which inspires & animates the Directive Principles & Article 14 strikes at arbitrariness in State action.

12. In view of the above, we have no hesitation to hold that the grounds on which the technical bid of the Petitioner was rejected are not the essentials of the tender in terms of para 6.17 of the MMPM & the Opp. Parties authorities are not justified in rejecting the technical bid of the Petitioner without making any reference to the Petitioner seeking those information in terms of para 6.17 of the MMPM.

13. The other stand of the Petitioner that needs consideration in the present context is regarding capacity verification of the Petitioner''s firm which was conducted by a team of officers of the Ordnance Factory, Chanda, pursuant to an earlier tender floated for the same container 39 A/L, who confirmed & recommended the Petitioner''s tender for price bid. According to the Petitioner, pursuant to an earlier tender notice floated "for container 39 A/L for quantity of 78300 for Ordnance Factory, Chanda, Ordnance Factory Bolangir & Ordnance Factory Dehuroad, the Petitioner-Company submitted its tender. In June, 2009 the capacity verification of the Petitioner''s Company was conducted by a team of officers of Ordnance Factory, Chanda who confirmed & recommended for price bid. Our attention was drawn to the correspondence dated 14.5.2010 (Annexure-13) made by the Joint General Manager for General Manager, Ordnance Factory, Badmal, Dist: Bolangir, Orissa with a copy to the Petitioner, which reads as follows:

Sub: Confirmation of CV done for Container 39 A/L regarding Source of development advertise tender inquiry No. 200800399/A dated 14-09-2008 opened on 07-11-2008 for a qty of 78,300 for O.F. Chanda, O.F. Bolangir & O.F. Dehuroad.

Ref: M/s Jagadamba Packaging Ind Pvt. Ltd. Sonipat Ltr. No. CV/SPI/S/2 dated 14-05-2010

Vide letter quoted above, M/s. Jagadamba Packaging Ind Pvt. Ltd. Sonipat has requested to confirm CV (capacity verification) done by O.F. Chanda for Container 39 A/L which is required in connection with O.F. BL Advt. T.E. No. MM/09/100385 dated 03-12-2009.

Capacity verification of M/s. Jagadamba Packaging Ind Pvt. Ltd., Sonipat was carried out by Team of Officers of O.F. Chanda in June 2009 for subject item

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against Source Generation Advt. TE No. 200800399/A dated 14.09.2008, Technical bid opened on 07-11-2008 & recommended for opening of Price Bid of the said TE.

This shows that a team of officers of Ordnance Factory, Chanda conducted the capacity verification of the Petitioner for three Ordnance Factories including Ordnance Factories, Bolangir & recommended for opening of price bid. However, as the work was delayed due to the authorities, the Petitioner requested not to open the price bid as it was not possible to supply the materials at the quoted price. Further, since all the tenderers were not agreeable to supply the materials at the rate quoted in the year 2008, the same was dropped. In the technical bid, the Petitioner therefore had specifically mentioned that "Capacity Verification had been done by Ordnance Factory, Chanda during last year which can be verified from Ordnance Factory, Chanda". It was therefore argued that the capacity verification of the Petitioner-Company having been done which included all requirements, i.e., layout & existence of factory, machinery etc. & capability for manufacturing, Petitioner was found qualified in the technical bid & it was eligible for opening of the price bid. Hence, the Petitioner''s tender should not have been rejected at the time of opening of technical bid. Moreover, at para-13 of the writ application, the Petitioner averred that it had already supplied the same materials to the Opp. Parties authorities on the earlier occasions which fact has not been denied in the counter affidavit. All this further goes to show that the technical bid or the Petitioner has been arbitrarily rejected by Opp. Part No. 3 without giving any opportunity to the Petitioner to fulfill the deficient tender conditions.

14. The allegation of the Opp. Parties is that the Petitioner has formed & indulged in cartel with M/s. Packwell Paper Tube Industries which practice is prohibited u/s 3(3)(a) & (d) of the Competition Act, 2002. Therefore, the Opp. Parties have rightly rejected the tender of the Petitioner. It was argued by the Opp. Parties that the Petitioner used a letter-head of M/s. Packwell Paper Tube Industries during the tender process wherein a request was made by the Petitioner for further time to submit the drawings & specifications. The use of such letter head of M/s. Packwell Paper Tube Industries by the Petitioner proves that the Petitioner formed a cartel with M/s. Packwell Paper Tube Industries.

15. The terminology ''Cartel'' as defined u/s 2(c) of the Competition Act, 2002 is as follows:

Section 2(c) "cartel" includes an association of producers, sellers, distributors, traders, or service providers who, by agreement amongst themselves, limit control or attempt to control the production, distribution, sale or price of, or, trade in goods or provisions of services

The Apex Court in Hindustan Development Corporation and Ors. (supra), held that the cartel is an association of producers who by agreement among themselves attempt to control production, sale & prices of the product to obtain

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a monopoly in any particular industry or commodity. It amounts to an unfair trade practice which is not in the public interest. The intention to acquire monopoly power can be spelt out from formation of such a cartel by some of the producers. The monopoly is the power to control prices or exclude competition from any part of the trade or commerce among the producers. The price fixation is one of the essential factors. The mere offer of a lower price by itself does not manifest the requisite intent to gain monopoly & in the absence of a specific agreement by way of a concerted action suggesting conspiracy, the formation of a cartel among the producers who offered such lower price cannot readily be inferred, though it may appear to be predatory. The word ''predatory'', according to the dictionary, means characterized by plundering, pillaging, or robbery.

Whether in a given case, there was formation of a cartel by some of the manufacturers which amounts to an unfair trade practice, depends upon the nature of the agreement & on the surrounding circumstances that give rise to an inference that the parties intended to restrain the trade & monopolize the same.

16. In the instant case, no case of cartel is made out by the Opp. Parties. Undisputedly, the price bid of the Petitioner has not been opened. It is, therefore, premature to say that the Petitioner has formed cartel with any other tenderer. Thus, the allegation of the Opp. Parties that the Petitioner formed cartel with M/s. Packwell Paper Tube Industries is unfounded. The allegation that the audit report dated 07.01.2010 of the Additional Comptroller & Auditor General of India indicates that M/s Packwell Paper Tube Industries had formed & indulged in cartel formation is irrelevant in this context so far as the present tender is concerned. Moreover, three grounds assigned in the Comparison Chart (Annexure-B/1) to reject the technical bid of the Petitioner do not include grounds of formation of cartel by the Petitioner. Law is also well settled that validity of an order is to be judged by the reasons mentioned therein & it cannot be developed either by oral submission or by filing affidavit. The Apex Court, in Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, , held as follows:

The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned & cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to Court on account of a challenge, get validated by additional grounds later brought out. We may here draw attention to the observations of Bose J. in Commissioner of Police, Bombay Vs. Gordhandas Bhanji, (at p. 18):

Public orders publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect & are intended to affect the actings & conduct of those to whom they are addressed & must be construed objectively with reference to the language used

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in the order itself. Orders are not like old wine becoming better as they grow older.

17. So far as question No. (ii) is concerned, the allegation of the Petitioner is that the tender of the Opp. Part Nos. 4 & 5 has been accepted illegally in violation of the requirements of MMPM. Clause 5.1.4 speaks that "Offers of the firms submitted without EMD as demanded are to be ignored summarily". According to the Petitioner, since Opp. Part Nos. 4 & 5 submitted their tenders without EMD, their offers should have been summarily rejected. It is further argued that in the tender notice, there is no mention about exemption of EMD to anybody. As Opp. Part Nos. 4 & 5 do not come under Clause 5.1.2 of MMPM, they should not be exempted from furnishing the EMD. The comparative chart reveals that Opp. Part Nos. 4 & 5 have claimed for exemption of EMD & the Opp. Parties authorities accepted their tender by allowing such exemption. Opp. Parties authorities do not have any authority whatsoever to exempt deposit of EMD.

18. To deal with this question, it is necessary to know the provisions relating to deposit & exemption of EMD. Chapter-5 of MMPM speaks about EMD. The relevant clauses of Chapter-5 is quoted below:

5.1 EARNEST MONEY DEPOSIT: As per the General Financial Rules (Note-2 below Rule 273), Earnest Money Deposit should be called for from the tenderers, who are participating against OPEN tender enquiry, if they are not registered with DGOF/DGOA/DGS & D/NSIC. The following guidelines may be observed while calling for EMD.

5.1.1 Quantum of EMD:

(a) The EMD is to be charged at the rate of 2% of the estimated value of the store subject to a ceiling of Rs. 2 lakhs.

(b) EMD should be calculated taking into account the value of all the components & the exact amount of EMD is to be indicated in the invitation to the Tender Enquiry/Tender Notice.

(c) For tenders of the value of rupees one lakh or less, EMD need not be called for.

5.1.2 Firms Who May be Exempted From Furnishing EMD: Firms who are registered with sister Ordnance Factories/DGS & D/NSIC for the same item/ process/ technology may be exempted from payment of EMD. Organizations like KVIC/NSIC who are treated as registered suppliers against DGS& D contracts on the prescribed norms are also exempted from furnishing EMD. EMD cannot be waived by General Managers once specified in Tender. Enquiry unless where firm satisfies waival condition as given in TE. This is to be made clear in bold capital letters in TE.

5.1.4 Ignoring the Offer of Firms Not Accompanied with EMD: Offers of the firms submitted without EMD as demanded are to be ignored summarily.

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As per tender notice dated 28.01.2010 (Annexure-I), bidders are required to submit EMD for an amount of Rs. 2, 84, 419. Clause 5.1.4 of Chapter-5 speaks that the offers of the firm submitted without EMD are to be ignored summarily. However, Clause 5.1.2 speaks about the firms, which may be exempted from furnishing EMD. Admittedly, the Petitioner is not coming under the category of the firms covered under Clause 5.1.2. The said clause further provides that the EMD cannot be waived by the General Manager once specified in the Tender Enquiry unless where the firm satisfies waiver conditions as stipulated in TE. It is not disputed that the Opp. Part Nos. 4 & 5 have not furnished EMD along with their tender papers & they are not coming under the categories of industries specified in Clause 5.1.2. Therefore, the stand taken by Opp. Parties that the Opp. Part Nos. 4 & 5 were exempted from depositing the EMD is not sustainable. In view of the provisions of Clause 5.1.4 which provide to summarily ignore offers of the firm without EMD, the tender papers of the Opp. Part Nos. 4 & 5 are liable to be ignored summarily on this solitary ground alone.

19. The capacity verification completion report dated 9.4.2010 in respect of Opp. Parties 4 & 5 (Annexure-G/1 to the counter-affidavit) reads as follows:

the owner of the firm committed, if development order given to develop 39A/L container the deficient facility will be established if any as per the satisfaction of the customer

This report further reveals that out of the total mark of 300, O.P. No. 4 has secured 201 & O.P. No. 5 has secured 195. In spite of all the above irregularities, O.P. No. 3 has awarded the tender work to them. It is further noticed that O.P. No. 5 is the son of the person who has sworn the affidavit for O.P. No. 4.

Apart from the above, in paragraph-6 of the Comparison Chart it is stated that Bhawani Industries, Raipur & Meghnani Industries, Raipur complied with all the terms & conditions of the tender for which recommendation was made for opening of the price bid, but in the same comparison chart against the "Payment Term" the remark "not complied" has been given in respect of O.P. Nos. 4 & 5.

20. All the above facts cast clouds of suspicion in the mind of the Court with regard to the fairness in awarding the tender work in favour of Opp. Parties 4 & 5. Law is well settled that every action of the State & its instrumentality should be fair, legitimate & above board & without any affection or aversion. See Haji T.M. Hassan Rawther Vs. Kerala Financial Corporation, ; E.P. Royappa Vs. State of Tamil Nadu and Another, & State of Andhra Pradesh and Another Vs. Nalla Raja Reddy and Others,

Law is also well settled that in contractual sphere as in all other State actions, the State & all its instrumentalities have to conform to Article 14 of the Constitution of which non-arbitrariness is a significant facet. There is no unfettered discretion in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly & to adopt a procedure which is ''fair play in action''. Due observance of this obligation as a

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part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State & its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore, necessary to consider & give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review. See Food Corporation of India Vs. M/s. Kamdhenu Cattle Feed Industries,

21. In paragraph 2(e) of the Writ Petition, it is averred that O.P. No. 3 has awarded the tender work in favour of O. Ps. 4 & 5 for a much higher bid of Rs. 299 in comparison to the Petitioner''s bid of Rs. 185 thereby causing loss of more than Rs. 52 lakhs to the exchequer of Ministry of Defence. In its counter, O.P. No. 3 has not denied the said averment of the Petitioner.

22. In view of the above, the decision of the Apex Court in Meerut Development Authority (supra) relied upon by Mr. Das is of no help to the Opp. Parties. On the other hand, in the said decision, the Apex Court held that bidders participating in the tender process have the right to equality & fair treatment in the matter of evaluation of competitive bids offered by-interested persons in response to the notice inviting tender in a transparent manner & free from hidden agenda.

23. For the reasons stated in the foregoing paragraphs rejection of the Petitioner''s technical bid & awarding the tender work in favour of O. Ps. 4 & 5 is illegal, arbitrary & violative of Article 14 of the Constitution.

24. Considering the overall facts situation of the case, we direct O.P. No. 3 to give an opportunity to the Petitioner to fulfil the deficient tender conditions. If it satisfies the tender conditions, the tender work may be awarded in favour of the Petitioner. We make it clear that if the tender is awarded in favour of the Petitioner, it is always open for Opp. Part No. 3 to ensure about the quality of material supplied by the Petitioner to it. Opp. Parties 4 & 5, however, shall be paid the dues in terms of their offer to the extent of supply made by them till today. O.P. No. 3 shall not accept any further supply henceforth from O. Ps. 4 & 5. This order is being passed to safeguard the interest of pubic exchequer & in the interest of O.P. No. 3, which is directly under the supervision & control of the Ministry of Defence, Government of India & going to sustain loss of more than Rs. 52 lakhs by awarding the tender work in irregular/unfair manner in favour of O. Ps. 4 & 5.

25. The Writ Petition is allowed with the aforesaid observation & direction. No order as to costs.

B.P. Das, J.

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