

(2010) 04 BOM CK 0157
In the Bombay High Court
Case No : Writ Petition No. 466 of 2010

Jamshedpur Utilities and Services Company Limited and
Prakash Chandra Shukla, General Manager, Water Services
Division, Jamshedpur Utilities and Services Company Limited

APPELLANT

Vs

The State of Maharashtra and Others

RESPONDENT

Date of Decision : 27-04-2010

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 19(1), 226, 329
Contract Act, 1872 — Section 7(2)
Finance Act, 1994 — Section 65
Sales of Goods Act, 1930 — Section 64A
Special Economic Zones Act, 2005 — Section 26(1), 26(2)

Citation : (2012) 3 BomCR 646

Hon'ble Judges : J.N. Patel, J;A.P. Bhangale, J

Bench : Division Bench

Advocate : N.H. Seervai, Vaibhav Joglekar and Das Gupta, instructed by Jhangiani Narula and Associates, for the Appellant; D.A. Nalawade, Government Pleader for Respondent No. 1, Atul Rajyadhyaksha Akhil Dubey, A.A. Khan, Bhushan Bankar, Rahul Sharma, instructed by M. Tripathi and Co. for Respondent Nos. 2 to 4, S.U. Kamdar and Vagish Mishra, for the Respondent

Judgement

A.P. Bhangale, J.—Rule. The learned Counsel appearing for the respondents waives service. By consent, rule is made returnable forthwith and taken up for final hearing. Heard the learned Counsel for the respective parties.

2. By this petition under Article 226 r/w Articles 14, 19(1)(g) and 39(b) of the Constitution of India the petitioners have prayed for the relief of declaration that acts and omissions of respondent Nos. 2 to 4 in rejecting the tender of petitioner No. 1 and awarding the contract to respondent No. 5 are per-se arbitrary, illegal, unjust, unfair, unreasonable and unconstitutional and have also prayed for issuance of appropriate writ to quash and set aside the rejection letters dated 19-1-2010 and 5-2-2010 issued to the petitioners informing that the contract is awarded to respondent No. 5, or for a writ of mandamus to respondent Nos. 2 to

4 to withdraw and cancel the letters dated 19-1-2010 and 5-2-2010.

3. The facts leading to the petition in brief are thus:

Petitioner No. 1 is a duly incorporated company, described in short as "JUSCO" . Petitioner No. 2 is its General Manager, Water Services Division and authorised representative. Respondent No. 2-Maharashtra Airport Development Company Limited (for short, "MADC") is a special purpose company promoted by respondent No. 1-State of Maharashtra. Respondent Nos. 3 and 4 are Vice-Chairman and the Managing Director respectively of MADC. Respondent No. 5 is a company named Veolia Water (India) Private Limited (for short, "Veolia"). On 16-10-2009 MADC floated a tender notice on their website for operation and comprehensive maintenance of water supply and sewerage system for serving the customers within the Multimodel International Airport Hub at Nagpur (for short, MIHAN area). The services were required in relation to the authorised operation of Special Economic Zone (SEZ) signified by the proposed land use plan for the MIHAN area prepared by MADC. By letter dated 30-10-2009 MADC informed in the corrigendum in respect of changes in the eligibility criteria. The prospective bidders including JUSCO attended the pre-bid meeting on 4-11-2009 in the office of MADC at Mumbai, in which, queries about service tax in SEZ area were specifically raised and answered. The Minutes of the said meeting were forwarded to the petitioners and to the other prospective bidders on 7-11-2009. The MADC had also informed JUSCO by its letter dated 2-12-2009 that the bid shall be due for submission on 14-12-2009 and the technical proposal, if possible, will be opened on the same day. On 14-12-2009, JUSCO submitted its technical and financial bids to MADC. Apart from the petitioners, respondent No. 5 Veolia, Berlinwasser and Nagarjuna Construction Company (NCC) had submitted the bids.

4. The prospective bidders were required by MADC to make their respective representations before the Evaluation Committee of MADC. The NCC was disqualified, while the price bids of JUSCO, Berlinwasser and Veolia were opened as below:

The price bid of JUSCO was the lowest but one of the officials of MADC brought to the notice of the Vice-Chairman and the Managing Director of MADC that JUSCO had filed format F-12 under service tax as 10.03% and wrote a disclaimer at the bottom that "All our quoted prices" are exclusive of the service tax. Since the words "All our quoted prices" were used, MADC sought to apply service tax @ 10.3% on JUSCO's quoted price of 50.76 crores revising it to Rs. 55.99 crores (Rs. 1.43 cores higher than Veolia's quoted price). Thus, MADC announced that Veolia is L-1 bidder despite objection by JUSCO that service tax should not be loaded to its price for evaluation.

5. JUSCO entered in to further communication vide letter dated 8-1-2010 inviting attention of the Vice-Chairman and the Managing Director of MADC to the Notification dated 3-3-2009 and the amended notification dated 20-5-2009,

issued by the Central Government and the clarification in Sr. No. 26 of the Minutes of the pre-bid meeting held on 4-11-2009 in which it was clarified that "Management Contractor shall avail of exemption available in SEZ area" . JUSCO sought to clarify that the contract was service tax neutral and the loading of service tax was unjustified and, therefore, JUSCO shall be treated as L-1 bidder. The representative of JUSCO met respondent No. 3 on 11-1-2010 to explain that the services provided in relation to the authorised operation of SEZ are exempted from service tax and that in any event the entire price bid of JUSCO could not be loaded with 10.3% service tax. By the letter dated 12-1-2010, JUSCO once again clarified that its price offer of Rs. 50,76,42,123/- did not include the service tax for the reasons stated and also undertook to attend meeting at the place of MADC's choice to give necessary clarification.

6. MADC then sent a caveat through an Advocate without responding to the further communication from JUSCO and on 19-1-2010 intimated JUSCO that its price bid was not in conformity with the tender specification and that its request to carry out further financial evaluation of the bidders without considering service tax could not be considered.

7. JUSCO by the letter dated 27-1-2010 contended that its price bid was arbitrarily evaluated by erroneously adding the notional service tax @ 10.3% to the tune of Rs. 5,22,87,138.66 on the entire quoted price. JUSCO also contended that their price bid was firm and the lowest. It requested MADC not to proceed in the matter and/or not to award the project to any one. Respondent No. 3 by his letter dated 5-2-2010 informed JUSCO that the intended contract covered areas of SEZ and areas outside SEZ as specified in the scope of work so MADC had to load the quoted bid price with the service tax. JUSCO also contended that it had performed higher than respondent No. 5 in technical evaluation. The petitioner thus contended that respondent Nos. 2 to 4 acted arbitrarily and unauthorisedly to revise the price bid by adding 10.3% as notional service tax and treated the petitioners bid as higher than the price bid of respondent No. 5, although the bidders were entitled to claim exemption from service tax as specifically clarified by the respondents in the pre-bid meeting. According to the petitioners, the tender bid was service tax neutral in view of exemptions available. According to the petitioners, respondent No. 2 to 4 were not entitled to add service tax in respect of 70% area which was within SEZ.

8. Shri Chandra Shekhar Gupta, Superintending Engineer of MADC opposed the petition by filing his affidavit in reply. According to Shri Gupta, JUSCO has not made out any case of arbitrariness or unreasonableness in the decision to award the contract to respondent No. 5. It is further contended that the petitioners had not complied with the bid instructions publicly announced while inviting bids. The services were required to be provided by the bidders under the bid scheme for larger area which included SEZ and non-SEZ as per the plan of MIHAN project. The bid instruction had required the bidders to quote firm price inclusive of taxes, duties and levies to enable MADC to ascertain the ultimate financial

liabilities that they shall bear. The bidders were, therefore, required to survey the area for which the services were to be outsourced and after making up their mind to quote a firm price beyond which MADC would not be saddled with any additional financial burden. The petitioners indicated in their bid that the service taxes would be 10.30% yet put a disclaimer in the footnote that the prices are not inclusive of service tax and if levied, they would be entitled to reimbursement. The MADC, therefore, had no way to ascertain their ultimate liability other than to add 10.30% component in the price quoted by the petitioners which MADC did. The petitioners had, while quoting the price excluded the component of service tax and yet reserved their right to claim the reimbursement from MADC by putting a disclaimer in the footnote that the price quoted is exclusive of service tax. Thus the offer was not unconditional. The petitioners had adopted manipulatory approach to have a cake and eat it too. The petitioners as bidders were expected to examine all the instructions, forms, terms, specifications in voluminous bidding document. Clause 5.3 itself provided that failure of bidder to furnish all information on documentation, as required by the bid document, may result in rejection of the bid. The petitioners could not have excluded service tax from F-12 as liability from the bid price for the reason as Clause 13.3 unequivocally instructed the bidders. Clause 13.3 reads thus:

13.3 All duties, taxes and other levies payable by the contractor under the contract or for any other cause, as of the date 28 days prior to the deadline for submission of bids, shall be included in the rates and prices and the total bid prices submitted by the bidder

Thus, there was no unconditional offer from the petitioners as required u/s 7(2) of the Indian Contract Act. The petitioners were well aware of MIHAN area consisting of SEZ and non-SEZ areas. The petitioners averred in paragraph 4.27 of the petition that the water requirement for SEZ area was 70.04% and non-SEZ area 29.6%. The petitioners were well aware of the fact that the operation and comprehensive maintenance of water and sewerage system were required for both the SEZ and non- SEZ area. In a pre-bid meeting, it was clarified (vide Sr. No. 26) in unequivocal term that if the service tax was applicable, based on proof of the payment by the municipal corporation, the same would be reimbursed at the actual. It is thus submitted that the taxes had to be included in the bid price, although taxes were refundable upon proof of payment by the successful bidder (contractor). Thus, the petitioners had no justification to add tax at 10.30% and to make a footnote of disclaimer in F-12 when it was imperative for the petitioners to include service taxes in the bid price quoted. Thus it is contended by MADC that the contract has been awarded to respondent No. 5 after following the procedure in the bid documents without any arbitrariness or unreasonableness in awarding the contract. All conditions of tender were publicly announced and no case is made out of any deviation by MADC from the tender documents and conditions. Hence, MADC prayed for dismissal of the writ petition in limine.

9. The learned Counsel for respondent No. 2 submitted with reference to ruling in *BECIL Vs. Arraycom India Ltd. and Others*, that if the bid consists of two or more interpretations making it an ambiguous proposal, it may be rejected. In administrative matters, it is urged in view of ruling in *Tata Cellular Vs. Union of India*, that judicial review has limited scope in administrative matters and judiciary must observe restraint in such matters.

10. Further reference is made to the ruling in *Coastal Marine Construction and Engineering Limited v. Oil and Natural Gas Corporation Limited* Writ Petition No. 41 of 2010 decided on 18-2-2010 by a Division Bench to which one of us (Shri J.N. Patel, J.) was a party to argue that the principles were summarised for judicial review of an administrative action.

(i) Modern trend points to judicial restraint in administrative action.

(ii) The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made.

(iii) The Court does not have expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(iv) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of the contract. Normally speaking, the decision to accept the tender or award the contract is relished by process of negotiations through several tiers. More often than not such decisions are made qualitatively by experts.

(v) The Government must have freedom of contract, in other words "a fair play in the joints" is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of *Wednesbury* principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness, not affected by bias or actuated by mala fides.

(vi) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. The learned Counsel for MADC also referred to ruling in *Tata Cellular v. Union of India* (supra). In paras 93 and 94, the Apex Court observed thus:

93. 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.

94. Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfilment 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 understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

11. In Jagdish Mandal Vs. State of Orissa and Others, the Apex Court in para 22 observed:

22. Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound" . When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succor to thousands and millions and may increase the project cost manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:

(i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone;

OR

Whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting

reasonably and in accordance with relevant law could have reached" ;

(ii) Whether public interest is affected.

If the answers are in the negative, there should be no interference under Article 226. Cases involving blacklisting or imposition of penal consequences on a tender/contractor or distribution of State largesse (allotment of sites/shops, grant of licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

12. Mr. Kamdar, learned Counsel appearing for respondent No. 5, supported the submissions advanced by the learned Counsel Mr. Rajadhyaksha and contended that the procedure in-bid document was not complied with by the petitioners and they had raised conditional offer by excluding service tax from their bid price offer and, therefore, MADC was well within its freedom/discretion in accordance with the bid documents to reject the tender of the petitioners. He contended that the petitioners have alternative remedy to file civil suit to claim damages, if the petitioners so desire. The High Court has limited jurisdiction of judicial review which, in the facts and circumstances of the case, cannot be exercised as the contract is already awarded to respondent No. 5 who have taken steps towards performance of the contract with MADC.

13. In support of his submissions, Mr. Kamdar placed reliance on the decisions of the Apex Court in West Bengal State Electricity Board Vs. Patel Engineering Co. Ltd. and Others, and Directorate of Education and Others Vs. Educomp Datamatics Ltd. and Others, as well as of this Court in Marathwada Radio Communication Systems Vs. D.G.M. BSNL and Others, . In W.B. State Electricity Board's case (supra), the Apex Court has observed thus:

31. ...Tenders are invited on the basis of competitive bidding for execution of the work of the Project as it serves dual purposes. On the one hand it offers a fair opportunity to all those who are interested in competing for the contract relating to execution of the work and, on the other hand it affords the appellant a choice to select the best of the competitors on a competitive price without prejudice to the quality of the work. Above all, it eliminates favouritism and discrimination in awarding public works to contractors. The contract is, therefore, awarded normally to the lowest tenderer which is in public interest. The principle of awarding contract to the lowest tenderer applies when all things are equal. It is equally in public interest to adhere to the rules and conditions subject to which bids are invited. Merely because a bid is the lowest the requirements of compliance with the rules and conditions cannot be ignored. It is obvious that the bid of Respondents 1 to 4 is the lowest of bids offered. As the bid documents of Respondents 1 to 4 stand without correction there will be inherent inconsistency between the particulars given in the annexure and the total bid amount, it (sic they) cannot be directed to be considered along with the other bids on the sole ground of being the lowest.

In para 12 of its decision in Educomp Datamatics Limited's case (supra), the

Apex Court has observed thus:

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

In para 5 of the decision in Marathwada Radio Communication's case (supra), a Division Bench of this Court has observed thus:

5. ...This Court would be overstepping the limits of the jurisdiction under Article 226 of the Constitution if it were to compel the respondents to dilute the tender conditions. No such exercise is permissible in the jurisdiction of the Court under Article 226 of the Constitution while exercising the power of judicial review. If a public authority insists on imposing tender conditions which would ensure the award of a contract to a bidder with a certain degree of technical expertise or of a certain level of financial solvency, there is nothing arbitrary in that decision....

14. Mr. Seervai made reference to the decision in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, about review of administrative action/order and extent and scope of principle of natural justice. The para 8 of the said decision reads thus:

8. 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 and 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, :

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 and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming better as they grow older.

Further, in paras 54 and 55, the Apex Court has observed thus:

54. The learned Addl. Solicitor General welcomed the dramatic pace of enlargement in the application of natural justice. But he argued for inhibiting its spread into forbidden spaces lest the basic values of Article 329 be nullified. In short, his point is that where utmost promptitude is needed "and that is the *raison d'être* of exclusion of intermediate legal proceedings in election matters "natural justice may be impractical and may paralyze, thus balking the object of expeditious completion. He drew further inspiration from another factor to validate the exclusion of natural justice from the Commission's actions, except where specifically stipulated by statute. He pointed out what we have earlier mentioned "that an election litigation is one in which the whole constituency of several lakhs of people is involved and, if the Election Commission were under an obligation to hear affected parties it may, logically, have to give notice to lakhs of people and not merely to candidates. This will make an ass of the law and, therefore, that is not the law. This *reductio ad absurdum* also has to be examined.

55. Law cannot be divorced from life and so it is that the life of the law is not logic but experience. If, by the experimental test, importing the right to be heard will paralyze the process, law will exclude it. It has been said that no army can be commanded by a debating society, but it is also true that the House of Commons did debate, during the days of debacle and disaster, agony and crisis of the Second World War, the life-and death aspects of the supreme command by the then British Prime Minister "to the distress of all our friends and to the delight of all our foes" - too historic to be lost on jurisprudence. Law lives not in a world of abstractions but in a cosmos of concreteness and to give up something good must be limited to extreme cases. If to condemn unheard is wrong, it is wrong except where it is overborne by dire social necessity. Such is the sensible perspective we should adopt if ad hoc or haphazard solutions should be eschewed.

15. Mr. Seervai then placed reliance upon the ruling in *Commissioner of Police, Bombay Vs. Gordhandas Bhanji*, . The para 9 of the said ruling reads thus:

9. An attempt was made by referring to the Commissioner's affidavit to show that this was really an order of cancellation made by him and that the order was his order and not that of Government. We are clear that 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 and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

16. Mr. Seervai then referred to the ruling in *M/s. Monarch Infrastructure (P) Ltd. Vs. Commissioner, Ulhasnagar Municipal Corporation and Others*, . The paras 10 and 11 of the said ruling read thus:

10. There have been several decisions rendered by this Court on the question of tender process, the award of contract and have evolved several principles in regard to the same. Ultimately what prevails with the courts in these matters is that while public interest is paramount there should be no arbitrariness in the matter of award of contract and all participants in the tender process should be treated alike. We may sum up the legal position thus:

(i) The Government is free to enter into any contract with citizens but the court may interfere where it acts arbitrarily or contrary to public interest.

(ii) The Government cannot arbitrarily choose any person it likes for entering into such a relationship or to discriminate between persons similarly situate.

(iii) It is open to the Government to reject even the highest bid at a tender where such rejection is not arbitrary or unreasonable or such rejection is in public interest for valid and good reasons.

11. Broadly stated, the courts would not interfere with the matter of administrative action or changes made therein, unless the Government's action is arbitrary or discriminatory or the policy adopted has no nexus with the object it seeks to achieve or is mala fide.

Mr. Seervai also made a reference to the ruling in *Reliance Energy Limited and Another Vs. Maharashtra State Road Development Corporation Ltd. and Others*, . The para 39 of the said ruling reads thus:

39. In *Reliance Airport Developers Pvt. Ltd. Vs. Airports Authority of India and Others*, the Division Bench of this Court has held that in matters of judicial review the basic test is to see whether there is any infirmity in the decision-making process and not in the decision itself. This means that the decision-maker must understand correctly the law that regulates his decision-making power and he must give effect to it otherwise it may result in illegality. The principle of "judicial review" cannot be denied even in contractual matters or matters in which the Government exercises its contractual powers, but judicial review is intended to prevent arbitrariness and it must be exercised in larger public interest. Expression of different views and opinions in exercise of contractual powers may be there, however, such difference of opinion must be based on specified norms. Those norms may be legal norms or accounting norms. As long as the norms are clear and properly understood by the decision maker and the bidders and other stakeholders, uncertainty and thereby breach of the rule of law will not arise. The grounds upon which administrative action is subjected to control by judicial review are classified broadly under three heads, namely, illegality, irrationality and procedural impropriety. In the said judgment it has been held that all errors of law are jurisdictional errors. One of the important principles laid down in the aforesaid judgment is that whenever a norm/benchmark is prescribed in the tender process in order to provide certainty that norm/standard should be clear. As stated above "certainty" is an important aspect of the rule of law. In *Reliance Airport Developers* the scoring system

formed part of the evaluation process. The object of that system was to provide identification of factors, allocation of marks of each of the said factors and giving of marks at different stages. Objectivity was thus provided.

17. The learned Counsel also made a reference to Section 64A of the Sale of Goods Act to argue that the principle that no party shall be made to unnecessarily gain or suffer on account of increase or decrease of the purchase price of the goods, will be attracted to support the petitioners' case.

18. Learned Counsel Mr. Rajadhyaksha, appearing for respondent No. 2, contended that the Central Government was pleased to exempt from the whole of the service tax the following taxable services vide Section 65 (Clause 105) of the Finance Act:

(i) which are provided in relation to authorised operations in Special Economic Zone (SEZ), and

(ii) which are received by a developer or units of SEZ, whether or not taxable services are provided inside the SEZ.

Thus, the services rendered from outside the SEZ are also exempted, subject to compliance of the above conditions. According to the learned Counsel, the developer or unit of SEZ can get/obtain exemption from the service tax provided that:

(a) The developer or unit of SEZ get the list of services concerned approved by the Approval Committee.

(b) The developer or unit of SEZ must use the specified service in relation to authorised operations in SEZ.

(c) The exemption shall be by way of refund except for services consumed wholly within SEZ.

(d) The developer or unit shall claim refund.

In other words, services which relate to authorised operations in SEZ and are received by a developer or unit of SEZ are exempt from service tax. However, in the following situations services are not exempt from the service tax:

(i) Which do not relate to authorised operations in SEZ but are received by a developer or unit of SEZ.

(ii) Which are related to authorised operations in SEZ but are not received by a developer as unit of SEZ.

(iii) Services which are not related to authorised operations in SEZ and are not received by a developer or unit of SEZ.

19. No service tax is required to be paid if the services which are the subject-matter of exemption, are consumed wholly within SEZ and if services which are

the subject matter of exemption, are consumed partly within SEZ and partly outside SEZ are liable for levy of service tax subject to refund. In such a case exemption is a matter of refund to be determined by the service tax authorities and does not absolve the service provider (petitioner or respondent No. 5, as the case may be) in the first instance from initially paying the entire service tax for the services rendered under the contract.

20. The bid documents contained the detail instructions to put the prospective bidders on notice of all the above requirements of operation and comprehensive maintenance of water supply and sewerage system for services of customers in MIHAN area, Nagpur.

21. Thus, it appears that the exemptions from service tax payable under Chapter V of the Finance Act, 1994 (32 of 1994) on taxable services provided to a developer or unit to carry on the authorised operations within the meaning of Section 26(1)(e) of the Special Economic Zones Act, 2005 can be claimed subject to Sub-section (2) of Section 26 of the Act. The Central Government may prescribe, the manner, in which, and, the terms and conditions subject to which exemptions, concessions, drawback or other benefits can be granted to a developer or entrepreneur. The learned Counsel for the MADDC, therefore, submitted that there was no justification for the petitioners to make their offer conditional by adding a footnote in F-12. It was contrary to the provision in the bid documents.

22. In the light of the affidavits on the record, submissions and citations, we have perused the bid documents in this case. While evaluating the price bids, during the tender evaluation process, employer may consider best price offer selection (BPOS) to meet the post qualifying criteria or credentials of the bidder who is apparently lowest in quotation. It may be possible that during the tender evaluation, employer may not find and may not consider the lowest bidder suitable for awarding the contract, in that case the next higher tenderer or competing bidder may be considered suitable.

23. It is well-settled legal position that a tender is nothing but an offer. In the bid documents (tender notice) it was specifically laid down that in terms of ITB 34.2(b) the employer will apply the following additional steps to the evaluation of following proposals:

(a) The financial proposals of the bidders who have scored 75 marks in the evaluation of technical proposal shall only be opened.

(b) For price evaluation the following four major cost components shall be considered by MADDC:

(i) Total fixed operating cost (FOC)

(ii) Total variable operating cost (VOC)

(iii) Total management fee (MF)

(iv) Set up costs (SC).

The list is not exhaustive.

24. Thus, the tender terms provided for bid price evaluation with reference to various cost components including the above major cost components. Therefore, if after the price bid of JUSCO was evaluated with reference to various cost components and resultantly JUSCO's price bid was found higher than the next high price bidder (respondent No. 5 in this case), there can be no complaint by the petitioners for not awarding contract to JUSCO. The MADC, who invited tender, was in the best position to use its expertise, evaluate all the price bids with reference to all the cost components for services to be rendered and to decide whether or not to accept the offer made by the bidder. The price bids were required to be considered with reference to all the ramifications as to total costs for the services to be rendered by the bidder. As the Apex Court has time and again explained that there shall be "play in the joints" to enable the authorities concerned to take decision in contractual matters, it comprehends taking appropriate decision in accepting or rejecting tenders by adopting the BOPS method. Therefore, unless the petitioners make out a positive case based upon substantial public interest to call for fresh tenders, or that refusal to accept the tender was actuated by arbitrariness or mala fides, it is not permissible for this Court in exercise of writ jurisdiction under Article 226 of the Constitution of India to interfere with the decision of MADC to award contract to respondent No. 5-Veolia Water (India) Private Limited.

25. In *Sterling Computers Limited and Others Vs. M and N Publications Limited and Others*, it is observed by the Apex Court that in contracts having commercial element, some more discretion is to be conceded to the authorities giving them liberty to assess overall situation for the purpose of taking decision as to whom the contract be awarded and at what terms so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. It is not possible for Courts to question and adjudicate every decision taken by an authority. The Apex Court made reference to the principle enunciated by Justice Holmes that, Courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive. Judicial restraint in the matter of judicial review of an administrative action is required to be observed as Court does not sit as a Court of Appeal but merely to review the manner in which such decision was made by an administrative authority.

26. A tender has to be an unconditional offer which is communicated intending to invite acceptance thereof. It has to be in proper form. The offerer must be ready and willing and capable of performing his obligations under the proposed contract. The terms of invitation to the tender being within realm of the contract are not open to judicial scrutiny unless there is arbitrariness, favouritism or unreasonableness. The freedom of contract allows the decision making authority concerned not to accept even the highest bid as it may prefer other tender in its

own best interest for good and sufficient reasons. In judicial review, a Writ Court cannot enter into in-depth details of the contract which have already been awarded and entered into because of inherent limitations on the scope of such inquiry. The Writ Court is not concerned with merits of decision to enter into contract but with the manner in which such decision is taken as to whether it is taken legally, rationally by following the basic procedure and whether it is reasonable which any reasonable man will arrive at. We have to bear in mind the well-settled principles and apply them to the facts of the case in hand while exercising powers of judicial review in extra-ordinary writ jurisdiction. No hard and fast rule can be laid down. Statutory or public authority has power to deal with a contractual matter and assign reasons if tender is to be refused or rejected. A reasoned decision, in all probability, is not liable to be vitiated in law while withstanding judicial scrutiny.

27. In Meerut Development Authority Vs. Association of Management Studies and Another, the Apex Court has observed thus:

26. A tender is an offer. It is something which invites and is communicated to notify acceptance. Broadly stated it must be unconditional; must be in the proper form, the person by whom tender is made must be able to and willing to perform his obligations. The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. However, a limited judicial review may be available in cases where it is established that the terms of the invitation to tender were so tailor-made to suit the convenience of any particular person with a view to eliminate all others from participating in the bidding process.

In para 41, the Apex Court has further observed thus:

41. The distinction between appellate power and a judicial review is well known but needs reiteration. By way of judicial review, the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. The courts have inherent limitations on the scope of any such enquiry. If the contract has been entered into without ignoring the procedure which can be said to be basic in nature and after an objective consideration of different options available taking into account the interest of the State and the public, then the court cannot act as an appellate court by substituting its opinion in respect of selection made for entering into such contract. But at the same time the courts can certainly examine whether the "decision-making process" was reasonable, rational, not arbitrary and violative of Article 14. (See Sterling Computers Limited and Others Vs. M and N Publications Limited and Others, .

28. In G.B. Mahajan and others Vs. The Jalgaon Municipal Council and others, the Apex Court after referring to its earlier decisions and the law on the subject, concluded thus:

46. While it is true that principles of judicial review apply to the exercise by a

government body of its contractual powers, the inherent limitations on the scope of the inquiry are themselves a part of those principles. For instance, in a matter even as between the parties, there must be shown a public law element to the contractual decision before judicial review is invoked. In the present case the material placed before the court falls far short of what the law requires to justify interference.

29. Coming back to the facts of the present case, the MADC (employer) was at liberty in view of Clauses 31.3 and 31.4 to reject the bids it found were not substantially responsive to the requirements of the bidding documents.

30. In *State of Orissa and Others Vs. Gopinath Dash and Others*, the Apex Court observed thus:

5. While exercising the power of judicial review of administrative action, the Court is not the Appellate Authority and the Constitution does not permit the Court to direct or advise the executive in the matter of policy or to sermonise qua any matter which under the Constitution lies within the sphere of the legislature or the executive, provided these authorities do not transgress their constitutional limits or statutory power. See *Asif Hameed and others Vs. State of Jammu and Kashmir and Others*, and *M/s. Shri Sitaram Sugar Co. Ltd. and another Vs. Union of India and others*, . The scope of judicial enquiry is confined to the question whether the decision taken by the Government is against any statutory provisions or it violates the fundamental rights of the citizens or is opposed to the provisions of the Constitution. Thus, the position is that even if the decision taken by the Government does not appear to be agreeable to the Court, it cannot interfere.

6. The correctness of the reasons which prompted the Government in decision-making taking one course of action instead of another is not a matter of concern in judicial review and the Court is not the appropriate forum for such investigation.

7. The policy decision must be left to the Government as it alone can adopt which policy should be adopted after considering all the points from different angles. In the matter of policy decisions or exercise of discretion by the Government so long as the infringement of fundamental right is not shown the courts will have no occasion to interfere and the Court will not and should not substitute its own judgment for the judgment of the executive in such matters. In assessing the propriety of a decision of the Government the Court cannot interfere even if a second view is possible from that of the Government.

8. The Court should constantly remind itself of what the Supreme Court of the United States said in *Metropolis Theater Co. v. City of Chicago* 57 L Ed 730 : 228 US 61 (1912);

The problems of government are practical ones and may justify, if they do not require, rough accommodations, illogical it may be, and unscientific. But even

such criticism should not be hastily expressed. What is the best is not always discernible, the wisdom of any choice may be disputed or condemned. Mere errors of government are not subject to our judicial review.

These rulings would indicate that the administrative authority while exercising power is expected to take decision by using its own expertise in its best interest. It has freedom of contract and to adopt appropriate policy and to self-serve its interests, judicial inquiry or review has scope only when fundamental right of citizen is violated or decision is contrary to any law or the constitution. Why a particular policy decision was taken and what were the reasons which prompted the authority to take that decision are disputable questions of facts which are not to be investigated by a Writ Court. Correctness of such decision can be challenged by way of a suit before the competent civil Court which can enter into questions of disputed facts and law. A policy decision must be left within the domain of sound exercise of discretion by the Government authority who considers all the angles of bid documents before exercising discretion.

31. Having considered the rulings cited before us and the well-settled legal position, we have to be very slow to interfere with the discretion of awarding contract in such cases. There is presumption in favour of official acts that they were performed in normal course of business unless contrary is shown. Hence, allegations of misuse of power cannot be easily relied upon vide: *Municipal Corporation of Delhi Vs. Qimat Rai Gupta and Others*, . Further more, Court cannot substitute its own opinion in the matter requiring necessary expertise to choose a right bidder.

32. It is true that in the matter of awarding contract an instrumentality of the State (within Article 12) cannot act arbitrarily and, therefore, it is not immune from judicial review of an administrative action. The petitioners have to specifically aver in the petition as to the mala fide, arbitrariness and substantiate those averments by producing material on the record to justify such frontal pleas in the petition. Invitation to tender, as such, is only an invitation to an offer and does not vest any legal or indefeasible right in a bidder to claim that he shall only be awarded the contract. Even otherwise, the petitioners have remedy to file civil suit for damages for loss of contract, if they are so advised.

33. The balance of convenience appears tilted in favour of continuance with the contract awarded to respondent No. 5. In our view, the project "MIHAN" at Nagpur which will facilitate imports and exports to and from India has already been delayed and it is in national as well as larger public interest that it shall be allowed to progress expeditiously, unhindered by precious time and money consuming litigation initiated by unsuccessful tender bidders against the successful bidder and MADC/State on the other hand. We feel that it was exclusively a prerogative and a freedom of contract for MADC to take the best decision in its own interest in ordinary course of official business pursuant to price bids received to award contract by accepting or rejecting tender bids put forward before it. We do not find any acceptable ground like arbitrariness or mala

fide or any manifest error on the part of MADC to interfere with the discretion exercised by MADC to choose respondent No. 5 for awarding the contract. The tender by respondent No. 5 appears to have been accepted after proper appreciation of facts by MADC who were well within their right to accept appropriate bid in their own interest.

34. Every employer before accepting tender or price bid for a proposed agreement is entitled to examine the proposal minutely, study and do needful about the financial implication thereof before accepting the tender or the price bid. The action of MADC to consider loading service taxes over the price bid due to financial implication of the footnotes made in Form-12 in the bid by JUSCO, therefore, cannot be faulted. The financial implications in a contract cannot be disregarded by the parties before they decide to enter into a contract and incur contractual obligations. Estimated costs have to be worked out or borne in mind before awarding a contract in a realistic objective and professional manner by any Government agency/authority. Economic indices for various input costs, taxes etc. cannot be overlooked. We, therefore, do not find any fault with MADC to reject the tender of the petitioners. The conditional offer may or may not be accepted. It was a proposal for a contract for comprehensive maintenance of water supply and sewerage system for servicing customers at MIHAN. Overall cautious approach as to its financial implications was necessary.

35. For all the reasons aforesaid, in our opinion, the rejection by respondent No. 2- MADC of the bid put forward by JUSCO (the petitioners) was neither arbitrary nor unreasonable. The decision to reject JUSCO's bid did not suffer from non-application of mind nor it is discriminatory. It does not suffer from any infirmity and hence do not warrant any interference by us in exercise of writ jurisdiction under Article 226 of the Constitution of India. Hence the petition is dismissed. The rule is discharged. No order as to costs.