

(2015) 04 GUJ CK 0051

In the Gujarat High Court

Case No : Special Civil Application Nos. 3513 and 4873 of 2015 and Civil Application No. 3009 of 2015 in Special Civil Application No. 3513 of 2015

Selsites

APPELLANT

Vs

State of Gujarat and Others

RESPONDENT

Date of Decision : 28-04-2015

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 226

Citation : (2015) 4 BC 607

Hon'ble Judges : V.M. Sahai, A.C.J; R.P. Dholaria, J

Bench : Division Bench

Advocate : Hriday Buch, for the Appellant; Parth Bhatt, AGP, Advocates for the Respondent

Final Decision : Allowed

Judgement

R.P. Dholaria, J.—Since the issues involved are similar in the captioned writ petitions, they are disposed of by this common judgment and Special Civil Application No. 3513 of 2015 is treated to be the lead writ petition.

2. The basic issue involved in these writ petitions is, whether any deviation from tender conditions is permissible after floating the tender and after issuing work order, without giving opportunity to all interested persons.

3. The circumstances which have given rise to the filing of these writ petitions in a nutshell are as under:-

3.1 The petitioners are in the business of outdoor advertising in the city of Ahmedabad, since last many years. The respondent No. 3, Ahmedabad Municipal Transport Service floated tender notice bearing No. 12/13 x 14 for putting up advertising boards and/or hoardings of 4 ft. (15 x 4 ft dimension) over bus shelters for a period from 1.4.2014 to 31.3.2017 along with several specifications and other conditions. Respondent No. 4 was the highest bidder and after

negotiations, they agreed to raise the offer to Rs. 2,85,00,000/- per annum and ultimately work order was issued to respondent No. 4 on 4.3.2014.

3.2 It is the say of respondent No. 3 that as per the standard drawings, respondent No. 4 would get 160 square feet of clear place to exhibit advertisement. However, after issuance of work order, development plan, i.e. General Development Control Regulation ("GDCR" for short) came into force and clause 20.1.3 of the said GDCR stipulated minimum ground clearance of 10 feet (3 meters) for permitting advertisement of bill board and as a result, respondent No. 4 was entitled only for 60 square feet from above the roof of the bus shelter (15 feet x 4 feet) and they were not entitled to exhibit advertisement below the roof of the shelter. Respondent No. 4 demanded refund of proportionate amount considering the deduction of display area from 160 sq.ft. to 120 sq.ft. and in the alternative requested to permit 20 feet x 8 feet above the bus shelter so as to satisfy total requirement of 160 sq.ft. as per the tender notice. After negotiations, permission to erect board of 20 feet x 6 feet on the roof of the shelter was granted to respondent No. 4. The above proposal was also offered to other tenderer, i.e. Krishna Communication, who declined to accept the said proposal.

3.3 It is the case of the petitioner that since the tender conditions were rigid and not feasible; they refrained from participating in the above tender process. However, after floating the tender, respondent Nos. 2 and 3 clearly altered and tailored material conditions of the contract so as to help respondent No. 4 in earning substantial benefits at the cost of public exchequer. Respondent No. 4 offered an amount of Rs. 2.85 crores for putting up advertisement boards of 15 x 4 ft. dimension and thereafter, he is permitted to put up the advertisement boards of 20 x 6 ft. dimension without any additional amount on pro-rata basis. Thus, such permission given by respondent Nos. 2 and 3 is completely arbitrary and has deprived opportunity to persons like the petitioner who are interested to submit their tender with said relaxation.

3.4 It is also the case of the petitioner that the tender was floated for a period of 3 years, i.e. with effect from 1.4.2014 to 31.3.2017. However, the work order issued to respondent No. 4 on 4.3.2014 is for a period of 4 years, i.e. with effect from 1.4.2014 to 31.3.2018. Further, respondent Nos. 2 and 3 erred in giving grace period of 150 days more vide order dated 26/29.12.2014 contrary to tender condition No. 1.16 which clearly stipulates that there will be no grace period in any eventuality.

3.5 Thus, the above said action on the part of respondent Nos. 2 and 3 is clearly illegal and arbitrary. The same is in violation of Article 14 of the Constitution of India. Alteration of the basic and material condition of the contract, not only after floating the tender but also awarding the work will result in depriving all opportunities to persons like the petitioner who might have been interested to submit their tenders. If respondent Nos. 2 and 3 had invited tender for putting up cross boards of 20 x 6 ft, not only the petitioner but several other persons

would have participated in the tender process and more revenue could have been generated. By indulging into such arbitrary exercise, respondent Nos. 2 and 3 have denied an opportunity to other interested and eligible persons. The petitioner has, therefore, prayed to quash and set aside the impugned work orders dated 4.3.2014 and 26/29.12.2014 passed by respondent Nos. 2 and 3 and to direct them to invite fresh bids for putting up boards of 20 x 6 feet over the bus shelters, and till final disposal of the writ petition, to stay the operation, implementation and execution of the impugned work orders dated 4.3.2014 and 26/29.12.2014 passed by respondent Nos. 2 and 3.

4. In the affidavit-in-reply filed on 3.3.2015, respondent No. 4 has inter-alia submitted that the petitioner has no legal or equitable interest in the contract awarded to them as the petitioner had not participated in the tender process. As per the tender document, they were entitled to use 160 sq.ft area for displaying advertisement, i.e. 60 sq.ft. over the roof of bus shelter, 60 sq.ft. on the back glass panel inside the bus shelter and 40 sq.ft. on the side kiosk. However, under the GDCR, no hoardings, billboards, glass panels and kiosks are allowed within 3 meters from the ground level. Thus, instead of 160 sq.ft., they were left with only 60 sq.ft. of space to be utilized over the roof of the bus shelter. Therefore, they requested respondent Nos. 2 and 3 to refund the proportionate amount for the loss of 100 sq.ft. or in the alternative to allow them to place boards of 20 x 8 sq.ft. over the roof of the bus shelter and ultimately they were allowed to place boards of 20 x 6 sq.ft. over the roof of the bus shelter with other additional conditions. Respondent No. 4 has further submitted that under the tender conditions, it is specifically permitted to place the boards in cross angle. It also provides to put up hoardings of larger size of more than 15 ft. Thus, the grievances raised by the petitioner are totally ill-founded and has no merit.

4.1. In Affidavit-in-rejoinder filed on 24/3/2015, the petitioner has inter-alia submitted that they have stated in para 5 of the petition that in the tender inquiry floated in the year-2014, they did not participate looking to the tender conditions/specifications with regard to shape and size of the boards. Therefore, the question of locus would be completely irrelevant and in any case, when such glaring illegality is brought to notice, this aspect further pales into insignificant. The petitioner has further contended that contrary and misleading averments have been made by respondent No. 4 with respect to GDCR. The aspect of minimum ground clearance to put up the billboards/hoardings on public road of 3 meters is in existence since 11.2.2013, i.e. date on which the draft GDCR was published. The petitioner has further contended that condition No. 4.03 specifically states that only "V" and/or "BOX" type boards shall have to be placed over the bus shelters and instead respondent No. 4 has put up straight board in cross angle, which is not permissible as per the said specification.

5. Vide affidavit-in-reply filed on 24.3.2015, respondent No. 3 has inter-alia submitted that being a public body, they have taken all due care to act in consonance with the tender notice and in view of the change of the situation in

the GDCR, they have also taken due care in regard to the public exchequer. In fact, all the tenderers were given equal opportunity even while reducing the original space. The petitioner has never participated in any tender proceedings for exhibition of the advertisement of bus shelter. Thus, it is apparent that the captioned writ petition is filed with an oblique motive. Even otherwise, as per settled legal proposition, the petitioner is required to be relegated to competent Civil Court for redressal of its grievances. However, by affidavit-in-rejoinder filed on 31.3.2015, the petitioner has inter-alia contended permitting respondent No. 4 to put up bigger boards cannot be termed as "addition" or "additional work". Permitting respondent No. 4 to do so, that too after awarding the contract and under the garb of change of GDCR amounts to do something indirectly which is not permissible to be done directly. Respondent No. 3 being public authority cannot be permitted to evade law by "shift" or "contrivance".

6. In additional affidavit-in-reply filed on 6.4.2015, respondent No. 4 has inter-alia submitted that it is settled law that the Constitutional Court would interfere in a contractual matter of this nature only if the basic eligibility criterion or qualification for participation is relaxed. A minor change in respect of other aspects of the tender conditions except eligibility criteria cannot be made a subject matter of judicial review and that too after execution of the contract. After awarding the contract, sometimes unforeseen circumstances and exigencies may demand slight modification or alteration in the terms and conditions of the contract. Such modification or alteration cannot constitute a cause of action for filing a legal action. Moreover, the contention raised by the petitioner regarding executing contract for 4 years period instead of 3 years period is also based on misunderstanding of the facts and hence not sustainable in law. After acceptance of the bid, negotiations and deliberations took place. During deliberations, it was found that as against the costs of the project, the contract period was insufficient vis-a-vis the time that may be consumed in carrying out the work. Finally, in view of huge investment involved in the project, it was decided that the grant of extension for one year would serve the administrative interest. Such an extension is not an illegal or arbitrary exercise of the power. The respondent No. 4 has further contended that in view of subsequent developments, they are required to carry out mammoth task of putting up advertisement boards of larger dimension and during the period of such modification, they would tend to lose business. Therefore, they are justified in demanding grace period and the respondent Nos. 2 and 3 are justified in accepting their request. Thus, the contention of the petitioner about impropriety of granting grace period is devoid of any substance. The respondent No. 4 further contended that the fact that the petitioner has no locus standi is substantiated by filing of second petition for the same relief by another business rival. It is clear from the sequence of events that the second petition has been filed with a view to ensuring that if the first petition fails on the ground of lack of standing of the petitioner, the second would salvage the litigation brought by the business rivals.

6.1 By affidavit-in-rejoinder filed on 7.4.2015, the petitioner has inter-alia

contended that there is a specific clause that the tenderer will not be able to make any change in the bus shelter. If that is so, the municipal authorities are not permitted to change the entire nature of contract after awarding the same. However, respondent No. 4 admits that they will have to substantially modify the existing bus shelter, which amounts to change in the material terms. By no stretch of imagination, a prudent businessman would continue to permit a tenderer to put up 20 x 6 ft. board at the rate charged for 15 x 4 ft. board. Moreover, no powers are vested with the municipal authorities to extend the period of contract to 4 years instead of 3 years and in any case, this is the only reason which makes the whole exercise discriminatory and violative of Article 14 of the Constitution of India.

7. We have heard Mr. Hriday Buch, learned counsel appearing for the petitioner, Mr. Parth Bhatt, learned Assistant Government Pleader appearing for respondent No. 1, Mr. Kamal B. Trivedi, learned Advocate General assisted by Mr. Satyam Chhaya, appearing for respondent Nos. 2 and 3, Mr. P.C. Kavina, learned Senior Counsel assisted by Mr. Manan Bhatt, learned counsel appearing for respondent No. 4 in Special Civil Application No. 4873 of 2015 and Mr. Asim Pandya, learned counsel appearing for respondent No. 4 in Special Civil Application No. 3513 of 2015.

7.1 Upon hearing learned counsel for the petitioner, by order dated 27.2.2015, the parties were directed to maintain status-quo and thereafter upon hearing respective parties at length, by order dated 8.4.2015, judgment was reserved and interim relief granted earlier was extended till the delivery of judgment.

8. Mr. Hriday Buch, learned counsel for the petitioner has contended that respondent No. 4 has offered an amount of Rs. 2.85 crores per annum for putting up advertisement boards of 15 x 4 ft. dimension. However, after awarding the contract, the municipal authorities have permitted them to put up advertisement boards of 20 x 6 ft. dimension with no extra cost, which is prima facie illegal and arbitrary and has deprived all opportunity to the persons like the petitioner who are interested to submit their tender with the relaxation extended to respondent No. 4. Thus, the municipal authorities have clearly altered material conditions of the contract which has direct bearing on the nature of the contract and work to be performed. The said material conditions are waived and tailored only with a view to help respondent No. 4 in earning substantial benefits at the cost of public exchequer. Further, respondent No.4 was showered with grace period of 150 days which is totally illegal and contrary to tender condition No. 1.16 which specifically provides that no grace period will be given in any eventuality. Moreover, the benefit to be earned by respondent No. 4 is on the boards that are to be put over the bus shelters. The commercial viability of the advertisements to be put up inside the bus shelters or on the kiosks was never a decisive factor. Thus, the respondents are trying to make eyewash by justifying permission to put up boards with larger dimension over the bus shelters at the cost of public exchequer.

8.1 Mr. Buch has further submitted that the contention raised by the respondents regarding change in GDCR is completely false and misleading. There is no change in clause 20.1.3 of the draft GDCR and final GDCR. The draft GDCR was published on 11.2.2013. Thus, before floating the tender, everybody including the respondents, knew about the said clause which stipulates minimum ground clearance of 10 feet (3 meters) for permitting advertisement of bill board. Now, making hue and cry regarding introduction of GDCR and to change the material conditions of the contract under the garb of change in GDCR is illegal and cannot be permitted. Moreover, the tender was floated for a period of 3 years. However, work order issued is for period of 4 years. On this very ground, the impugned work order needs to be quashed. Respondent Nos. 2 and 3 are the "State" within the meaning of Article 12 of the Constitution of India. Therefore, most vital conditions of the tender conditions cannot be given go by or relaxed after floating the tender and after giving the work order without giving any opportunity to all interested persons. Had the respondents invited tender for putting up cross boards of 20 x 6 ft. not only the petitioner but several other persons would have participated in the tender process and thereby the municipal authorities would have earned more revenue. By indulging into such arbitrary exercise, the municipal authorities have denied all opportunity to other interested persons like the petitioner. Mr. Buch has, therefore, requested to quash the impugned orders and to direct the municipal authorities to float fresh tender. In support of the above contentions, decision of the Hon"ble Supreme Court in Noida Entrepreneurs Association Vs. NOIDA and Others, AIR 2011 SC 2112 : (2011) 6 JT 223 : (2011) 5 SCALE 505 : (2011) 6 SCC 508 : (2011) 8 SCR 25 : (2011) AIRSCW 5014 : (2011) AIRSCW 3154 was referred to point out that in para 24 of the judgment, the Hon"ble Supreme Court held as under:-

"24. So far as these allegations are concerned, it is evident from the record that M/s. Anil Kumar and Co. has been allotted originally the work on the basis of tender for Rs. 2.75 crores in Sector "Gamma" in Greater Noida, in connection with the construction of water drains. However, they had been awarded additional work by Shri Ravi Mathur, IAS, Respondent 4, worth Rs. 3.75 crores on a "deviation basis". In fact, awarding such work cannot be termed as an "addition" or "additional work" because the work is worth Rs. 1 crore more than the amount of original contract. In such a fact situation, even if there had been no financial loss to Greater Noida, indisputably, the additional work for such a huge amount had been awarded without following the procedure prescribed in law. More so, there is nothing on record to show as to whether the said contractor M/s. Anil Kumar and Co. was eligible to carry out the contract worth Rs. 6.50 crores. Awarding the contract under the garb of so-called extension, amounts to doing something indirectly which may not be permissible to be done directly. Admittedly, such a course of action is not permissible in law."

9. Mr. P.C. Kavina, learned Senior Counsel assisted by Mr. Manan Bhatt, learned counsel appearing for respondent No. 4 in Special Civil Application No. 4873 of 2015 raised a preliminary objection against the maintainability of the petition on

the ground that no relief could be granted to the petitioner who has not participated in the tender process. The petitioner cannot have the luxury to throw stones on others when he has not participated in the tender process and is not a party to the contract. It was submitted that if the preliminary objection of the respondents is upheld, then no occasion would arise to decide the other points raised in the petition. Mr. Kavina has further contended that the power of judicial review in respect of contracts involves assessment of any frailty in the decision making process and if such process is found to be reasonable and rational, the Court should not interfere with the decision. In support of above contentions, learned senior counsel heavily relied upon the following decisions of the Hon''ble Supreme Court:-

1. The decision of the Hon''ble Supreme Court in B.S.N. Joshi and Sons Ltd. Vs. Nair Coal Services Ltd. and Others, AIR 2007 SC 437 : (2006) 2 CTLJ 247 : (2006) 10 JT 131 : (2006) 11 SCALE 526 : (2006) 11 SCC 548 : (2006) 8 SCR 11 Supp was cited for the proposition that the Courts should not interfere if exercise of the power by employer in awarding contract by relaxing tender conditions is fair, reasonable and bona fide.

2. Further reliance was placed on the decision of the Hon''ble Supreme Court in Jagdish Mandal Vs. State of Orissa and Others, (2008) 2 CTLJ 538 : (2007) 14 SCC 517 : (2006) 10 SCR 606 Supp , wherein, the Hon''ble Supreme Court held in para 22 of the judgment as under:-

"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 the 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 work for years, or delay relief and succour 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 tenderer/contractor or distribution of State largesse (allotment of sites/shops, grant of licence, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action.

3. The decision of the Hon'ble Supreme Court in Tejas Constructions and Infrastructure Pvt. Ltd. Vs. Municipal Council, Sendhwa and Another, (2012) 3 BC 74 : (2012) 5 SCALE 113 : (2012) 6 SCC 464 was cited for the proposition that the power of judicial review in respect of contracts primarily involves examination of any infirmity in the decision making process, and if such process is reasonable, rational and non-arbitrary, the Court would not interfere with the decision.

10. Mr. Asim Pandya, learned counsel for respondent No. 4 in Special Civil Application No. 3513 of 2015 vehemently argued that the petitioner does not possess any tender site or private approved site for putting up hoardings or bill boards in the city of Ahmedabad. The petitioner had not even participated in the tender process and as such the petitioner has no legal or equitable interest in the contract awarded to respondent No. 4. In the tender process, respondent No. 4 and one Krishna Communications were the only persons who participated and submitted their bids. The contract was awarded to respondent No. 4 as they were the highest bidder. As per the tender documents, they were allowed to put advertisement over the area of 160 sq.ft., i.e. 60 sq.ft over the roof of the bus shelter, 60 sq.ft. on the back glass panel fixed inside the bus shelter and 40 sq.ft. on the side kiosk. However, after awarding the contract, GDCR came into force which stipulated minimum 3 meters ground clearance for displaying advertisement boards, which in turn allowed respondent No. 4 with only 60 sq.ft. of space to be utilized over the roof of the bus shelter. Thereafter, respondent No. 4 took up the matter with the municipal authorities for suitable compensation and after long deliberations, permission was granted only to display advertisement board of 20 x 6 sq.ft. over the roof of the bus shelter. Thus, in fact out of 160 sq.ft. as per the tender documents, respondent No. 4 was permitted for only 120 sq.ft. Thus, they have to suffer loss of 40 sq.ft. display area. Moreover, respondent No. 4 has to bear more loss due to the fact that they have to fetch big customers for displaying their product over the larger dimension boards whereas they could have got more small customers for displaying their

product in smaller dimension and under the tender conditions, they are permitted to place boards in cross angle. Mr. Pandya vehemently argued further that after acceptance of the bid, negotiations and deliberations took place which consumed lot of time, and therefore on their request, one year extension was granted in administrative interest. However, upon asking, he could not place any material in support of his above contention.

10.1 Mr. Pandya further contended that after awarding the contract, sometimes unforeseen circumstances and exigencies may demand slight modification or alteration in the terms and conditions of the contract. Such modification or alteration cannot constitute a cause of action for taking a legal action. It is settled law that the Court would interfere in a contractual matter of this nature only if the basic eligibility criterion or qualification for participation is relaxed. A minor change in tender conditions cannot be made subject matter of judicial review and that too after execution of the contract. Lastly, Mr. Pandya submitted that the status quo granted by this Court is causing unbearable hardships and if it is continued then respondent No. 4 will be financially ruined. The petitioner has no case much less a prima facie case. He has, therefore, requested to dismiss these writ petitions and to vacate the ad-interim relief granted in favour of the petitioner.

11. Having heard the respective parties at length and after perusing the records placed before us, we are totally convinced on following two counts:-

(i) That draft GDCR was published long before the impugned tender was floated which stipulated minimum ground clearance of 10 feet (3 meters) for permitting advertisement of bill boards. Everybody will have inkling that it would also be a part of the final GDCR. Moreover, adherence to GDCR is also one of the mandatory conditions of the tender documents. Thus, it is naturally expected that every parties to the tender process are in know of the aforesaid mandatory stipulation and would have entered into the tender process with open eyes. However, the conduct of the municipal authorities to enter into negotiations with the bidder, after awarding the contract, under the guise of change in GDCR and to permit them to put up advertisement boards of larger dimension, i.e. 20 x 6 ft. instead of 15 x 4 ft. as shown in the tender documents, so as to alter the material conditions of the tender documents smacks of favoritism. Such a course amounted to deviation and in violation of the mandatory conditions of displaying 15 x 4 ft. advertisement boards as shown in the tender documents. Since these conditions were mandatory, they could not have been relaxed by the municipal authorities. In any case, if any subsequent change in law is noticed then the municipal authorities ought to have cancelled the contract as per the conditions and should have invited bids afresh.

(ii) The period of contract is an essential ingredient of any contract entered into by the respective parties. The impugned tender documents stipulate the period of contract for three years from 1.4.2014 to 31.3.2017. However, in defiance of such mandatory conditions, respondent No. 3 has issued work order in favour of

respondent No. 4 for four years from 1.4.2014 to 31.3.2018 on 4.3.2014, which is not permissible under law and the same points to some sinister design and that too in the event that respondent No. 4 was bestowed upon 150 days of grace period contrary to tender condition No. 1.16 which specifically provides that no grace period will be given in any eventuality. It is the case of respondent No. 4 that after acceptance of the bid, negotiations and deliberations took place which consumed lot of time, and therefore on their request, one year of extension was granted in administrative interest. However, upon asking, they could not place any material in support of above contention.

11.1 It is noticed from the settled legal position emanating from the decisions of the Hon"ble Supreme Court referred to in para 9, that the rule against arbitrariness is firmly established if in the decision making process, the State or its instrumentalities or its agencies, in exercise of its public functions in matters of contract, acts in an unreasonable, arbitrary or mala fide way or in disregard of the mandatory conditions, then it is the virtuous duty of the Court to interfere with the decision and to strike down the palpable illegality noticed. It is also a settled law that the decision making process can be examined by this Court in its power of judicial review and the Court can intervene in cases where discrimination is noticed.

11.2 Once the bids were opened and contract was awarded to respondent No. 4, respondent Nos. 2 and 3 could not have resorted to any discussion or negotiation with respondent No. 4 under the guise of change in GDCR and permit them to put up advertisement boards of larger dimension than shown in the tender documents. Such a course amounted to deviation and in violation of the mandatory conditions of the tender documents and they could not have been relaxed by respondent Nos. 2 and 3. It clearly discriminate against the other interested persons including the petitioner with whom no such negotiation for enabling alteration in the tender documents were at all made. In any case, if any subsequent change in law is noticed and if it felt that such change in law has completely and significantly altered the nuances of the contract, then respondent Nos. 2 and 3 ought to have cancelled the contract as per the conditions and should have invited fresh bids so that all interested persons can participate rightfully in the tender process. Had respondent Nos. 2 and 3 invited tender for putting up cross boards of 20 x 6 ft. not only the petitioner but several other persons would have participated in the tender process and thereby the municipal authorities would have earned more revenue. Therefore, the conduct of respondent Nos. 2 and 3 to enter into negotiations with the bidder, after awarding the contract, under the guise of change in GDCR and to permit them to put up advertisement boards of larger dimension then as shown in the tender documents is clearly discriminatory against the persons like the petitioner and violative of Article 14 of the Constitution of India.

11.3 It was vigorously contended that the respondent Nos. 2 and 3 has all the power to relax the conditions of the tender and award the contract to respondent

No. 4, who was the highest bidder. There can be no dispute over the proposition that the State agencies or its instrumentalities exercising their public functions by inviting offers for work or services have the necessary leeway, in their commercial wisdom, to act in their best commercial interest, and therefore, may relax a requirement or condition, which it was permissible to be relaxed under the terms and conditions announced, in a manner which is not discriminatory and calculated to favour the beneficiary of such relaxation. However, the power of relaxation of non essential condition of a tender will not include the power to allow a chosen tender to change the material conditions of the tender documents, as noted above. Thus, it is not as if respondent Nos. 2 and 3 exercised any legitimate power of relaxation, but instead, it showed a special favour to respondent No. 4 by allowing it to alter the material conditions of the tender documents, as narrated above. Therefore, the very basis on which the arguments against the maintainability of these writ petitions was advanced, in our opinion, is fallacious and even non-warranted. This smoke screen of preliminary objection cannot, therefore, hide the illegality committed by respondent Nos. 2 and 3 in the decision making process of allowing respondent No. 4 to alter the material conditions of the impugned tender documents without giving similar opportunity to other interested persons like the petitioner.

11.4 A public authority, while exercising its public functions, should be vigilant enough to recognize its responsibility to maintain suitable balance between its lawful obligation of performing its due and proper functions on behalf of the public and the corresponding requirement of having due regard for the legal rights and interest of the individual or group of individuals. There needs to be a means of redress and the Court while exercising its power of judicial review can step in or intervene to correct such palpable wrong in cases where a public authority falters and transgress rule of law by exercising its power to make contract arbitrarily and acts with unjustifiable discrimination denying equality of treatment, as has happened in the present case.

12. For the reasons that we have given hereinabove, we are convinced that the decision of respondent Nos. 2 and 3 in awarding the contract to respondent No. 4 is discriminatory, arbitrary and smacks of favoritism, and therefore, unconstitutional and void being violative of Article 14 of the Constitution of India. The impugned award of contract by respondent Nos. 2 and 3 to respondent No. 4 by issuing impugned work orders dated 4.3.2014 and 26/29.12.2014 are hereby set aside. The respondent Nos. 2 and 3 are at liberty to invite fresh bids in accordance with law and on the essential terms and conditions notified by it for the contract. The captioned writ petitions stand allowed accordingly. No order as to costs.

12.1 Since the above writ petitions are allowed, Civil Application No. 3009 of 2015 for vacating interim relief stands disposed of.

An oral prayer has been made by Mr. Kavina, learned senior counsel assisted by Mr. Manan Bhatt, learned counsel appearing for respondent No. 4 in Special Civil

Application No. 4873 of 2015 that operation of the judgment be stayed for 2 and 1/2 months. We do not find any reason to stay our judgment. Oral prayer is rejected accordingly.