

SUPREME COURT OF INDIA

Madan B. Lokur ; R.K. Agrawal, JJ.

Afcons Infrastructure Ltd.v. Nagpur Metro Rail Corporation Ltd.

Civil Appeal No. 9078 of 2016

15.09.2016

(i) Constitution of India, 1950 , Art. 14, Art. 226 - Tender - Interference in the decision making process of the competent authority in accepting or rejecting the bid of a tenderer is permissible only if the decision making process is mala fide or is intended to favour someone - Likewise interference in such matters would not be warranted unless it is shown that the action of the authority concerned is so arbitrary or irrational that the Court could say that such action is one which no responsible authority acting reasonably and in accordance with law could have reached - In other words the decision making process or the decision should be perverse and not merely faulty or incorrect or erroneous - Metro Railways (Operation and Maintenance) Act, 2002, S. 2(i).

(ii) Tender - A mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere - The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision making process or the decision - Owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents - The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions - It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given - Constitution of India, 1950 , Art. 14, Art. 226.

Judgement

Madan B. Lokur, J.—In Civil Appeal No. 9078 of 2016 and Civil Appeal No. 9079 of 2016 filed by Afcons Infrastructure Ltd., the challenge is to the judgment and orders dated 28th July, 2016 and 11th August, 2016 passed by the Bombay High Court. In Civil Appeal Nos. 9080-9081 of 2016 filed by the Nagpur Metro Rail Corporation Ltd., the challenge is to the judgment and orders dated 28th July, 2016 and 12th August, 2016 passed by the Bombay High Court. The combined effect of all the impugned orders is that the High Court held that M/s. Guangdong Yuantian Engineering Company (GYT) of China and M/s. TATA Projects Limited (TPL) as a Joint Venture (hereinafter referred to as the 'GYT-TPL JV') are eligible to bid for a tender invited by the Nagpur Metro Rail Corporation Limited (for short 'NMRCL')

on 12th May, 2016.

2. Bids were invited by NMRCL for the design and construction of a viaduct in Reach-3 between Jhansi Rani Square and Lokmanya Nagar Stations from CH 7825M to CH 18212M on the East-West Corridor of Nagpur Metro Rail Project.

3. GYT-TPL JV gave its bid for the [contract](#) but NMRCL, by an e-mail dated 23rd July, 2016 communicated to GYT-TPL JV that its bid was disqualified at the technical bid opening. The comment/remark relating to the disqualification stated that the documents submitted by GYT-TPL JV do not meet the eligibility conditions as stipulated in Clause 4.2 (a) of Section III of the bid documents.

4. The controversy on the eligibility of GYT-TPL JV arises in view of Clause 4.2 (a) of Section III of the tender conditions which reads *inter alia* as follows:

4.2 (a) Specific Construction & Contract Management experience

A minimum number of similar contracts specified below that have been satisfactorily completed as a prime contractor, joint venture member during last 10 (ten) years i.e. up till 31.05.2016

(a) Should have received minimum INR 3200 Million from 1 contract in a metro civil construction work and should have completed viaduct length not less than 5 km in the same contract.

5. According to GYT-TPL JV, it had executed the Pearl River Delta intercity high speed railway project in China; it had received INR 3200 million from that project and it had constructed a viaduct of 7.284 km length under that contract. Before the High Court and before us, there was no controversy that GYT-TPL JV had received a minimum of INR 3200 million from its Pearl River Delta Intercity High Speed Railway Project and that whether it had completed a viaduct having a length of not less than 5 km. The sole question before the High Court was whether the Pearl River Delta Intercity High Speed Railway Project met the requirement of a `metro civil construction work'. According to NMRCL, an inter-city high speed railway project did not meet the requirements of a metro civil construction work.

6. The High Court disagreed with NMRCL in the following words:

"The civil construction work completed by the petitioner [GYT-TPL JV] in terms of condition no. 4.2 (a) was for an intercity high speed railway project in China and in the said contract, the petitioner had completed a viaduct of 7.284 km length...The petitioner has admittedly constructed a viaduct of not less than 5 km for the prestigious Pearl River Delta Intercity high speed railway project in China. We find on a reading of the tender conditions and particularly clause 4.2(a) thereof that a contractor or a joint venture company is required to have the experience in Metro Civil Construction work and of completing a viaduct having a length of not less than 5 kms. We do not appreciate the submission on behalf of the respondent that since the petitioner had constructed the viaduct for a high speed railway project, the petitioner would not have the experience of constructing a viaduct for a metro.

It is not disputed by the respondent that 'metro' would mean a railway or an underground railway. If that be so, we fail to fathom as to why the technical bid of the petitioner was disqualified though the petitioner has constructed a viaduct for Pearl River Delta Intercity high speed railway project in China of the length of 7.284 km. In our view, the petitioner has the experience of constructing a viaduct of not less than 5 kms. in length in a Metro Civil Construction work contract and had also received more than INR 3200 million for satisfactorily completing the said contract. The distinction sought to be made by the respondent NMRCL between the construction of a viaduct for Intercity High Speed Railway Project and the construction of a viaduct for the metro rail project, is illusory and not real. The action on the part of the NMRCL of disqualifying the petitioner's technical bid is clearly arbitrary and is liable to be set aside...."

7. There is no dispute before us that the Metro Railway (Construction of Works) Act, 1978 and The Metro Railways (Operation and Maintenance) Act, 2002 extend to Nagpur and are applicable to the Nagpur Metro Rail Project. The expression 'metro railways' has been defined in Section 2(i) of the Metro Railways (Construction of Works) Act, 1978 in the following words:

"(i) "metro railway" means a metro railway or any portion thereof for the public carriage of passengers, animals or goods and includes,-

(a) all land within the boundary marks indicating the limits of the land appurtenant to a metro railway.

(b) all lines of rails, sidings, yards or branches worked over for the purposes of, or in connection with, a metro railway,

(c) all stations, offices, ventilation shafts and ducts, ware-houses, workshops, manufactories, fixed plants and machineries, sheds, depots and other works constructed for the purpose of, or in connection with, a metro railway;"

A clearer definition is to be found in The Metro Railways (Operation and Maintenance) Act, 2002 in Section 2(i) thereof and this reads as follows:

"(i) "metro railway" means rail-guided mass rapid transit system having dedicated right-of-way, with steel wheel or rubber-tyred wheel coaches, but excluding tramways, for carriage of passengers, and includes-

(A) all land within the boundary marks indicating the limits of the land appurtenant to a metro railway,

(B) all rail tracks, sidings, yards or branches worked over for the purposes of, or in connection with, a metro railway,

(C) all stations, offices, ventilation shafts and ducts, warehouses, workshops, manufactories, fixed plants and machineries, sheds, depots and other works constructed for the purpose of, or in connection with, a metro railway;"

8. In view of the extension of these two statutes to the city of Nagpur, there can be no doubt that the definition of 'metro railway' or 'metro' would apply to the tender conditions floated for the purposes of the metro rail project of NMRCL.

9. It is submitted before us that an inter-city rail is completely different from a metro rail. An inter-city rail is between two cities and the trains are usually high speed trains. A metro rail is intra-city, it has a dedicated right-of-way, normally it does not have high speed trains and the frequency of trains is much greater than that of inter-city trains[1*]. A metro rail may extend, in some cases, to a suburb of a metropolitan city but it essentially remains an intra-city project. There is, therefore, a qualitative difference between an inter-city rail and a metro rail. By itself, this indicates a qualitative difference in a railway project that is inter-city and a railway project that is intra-city and the construction of a viaduct for a railway project that is inter-city and a railway project that is intra-city.

[1* In Delhi the time duration is approximately to 2-3 minutes during peak hours and 5-10 minutes during off peak duration in the city. Source: <http://www.delhicapital.com/delhi-metro/metro-train-timings.html> C.A. Nos.9078 of 2016 etc.]

10. The fact that GYT-TPL JV made constructions in a metropolitan city or in a metropolitan area during the execution of the Pearl River Delta inter-city high speed railway project, does not make that project an intra-city metro rail project – it continues to be an inter-city railway project. However, it is not necessary for us to delve into these issues or even adjudicate on them.

11. Recently, in **Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)** 2016(8) SCALE 99. it was held by this Court, relying on a host of decisions that the decision making process of the employer or owner of the project in accepting or rejecting the bid of a tenderer should not be interfered with. Interference is permissible only if the decision making process is mala fide or is intended to favour someone. Similarly, the decision should not be interfered with unless the decision is so arbitrary or irrational that the Court could say that the decision is one which no responsible authority acting reasonably and in accordance with law could have reached. In other words, the decision making process or the decision should be perverse and not merely faulty or incorrect or erroneous. No such extreme case was made out by GYT-TPL JV in the High Court or before us.

12. In **Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay** (1989) 3 SCC 293. it was held that the constitutional Courts are concerned with the decision making process. **Tata Cellular v. Union of India** (1994) 6 SCC 651. went a step further and held that a decision if challenged (the decision having been arrived at through a valid process), the constitutional Courts can interfere if the decision is perverse. However, the constitutional Courts are expected to exercise restraint in interfering with the administrative decision and ought not to substitute its view for that of the administrative authority. This was confirmed in **Jagdish Mandal v. State of Orissa** (2007) 14 SCC 517. as mentioned in Central Coalfields.

13. In other words, a mere disagreement with the decision making process or the decision of the administrative authority is no reason for a constitutional Court to interfere. The threshold of mala fides, intention to favour someone or arbitrariness, irrationality or perversity must be met before the constitutional Court interferes with the decision making process or the decision.

14. We must reiterate the words of caution that this Court has stated right from the time when **Ramana Dayaram Shetty v. International Airport Authority of India** (1979) 3 SCC 489 was decided almost 40 years ago, namely, that the words used in the tender documents cannot be ignored or treated as redundant or superfluous – they must be given meaning and their necessary significance. In this context, the use of the word ‘metro’ in Clause 4.2 (a) of Section III of the bid documents and its connotation in ordinary parlance cannot be overlooked.

15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional Courts must defer to this understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional Courts but that by itself is not a reason for interfering with the interpretation given.

16. In the present appeals, although there does not appear to be any ambiguity or doubt about the interpretation given by NMRCL to the tender conditions, we are of the view that even if there was such an ambiguity or doubt, the High Court ought to have refrained from giving its own interpretation unless it had come to a clear conclusion that the interpretation given by NMRCL was perverse or mala fide or intended to favour one of the bidders. This was certainly not the case either before the High Court or before this Court.

17. Under the circumstances, we find merit in the appeals filed by the appellants and set aside the judgment and orders passed by the High Court and restore the decision of NMRCL to the effect that GYT-TPL JV was not eligible to bid for the contract under consideration.

18. Before we conclude, it is necessary to point out that the High Court was of opinion that the eligible bidders were not entitled to be either impleaded in the petition filed in the High Court by the ineligible bidder GYT-TPL JV or were not entitled to be heard. With respect, this is not the appropriate view to take in matters such as the present. There are several reasons for this, one of them being that there could be occasions (as in the present appeals) where an eligible bidder could bring to the notice of the owner or employer of the project that the ineligible bidder was ineligible for additional reasons or reasons that were not within the contemplation of the owner or employer of the project. It was brought to our notice by Afcons Infrastructure in these appeals that GYT-TPL JV did not have any experience in the construction of a viaduct by the segmental construction method and that the translations of documents in Mandarin language filed in the High Court were not true English translations. Submissions made by learned counsel for Afcons Infrastructure in this

regard are important and would have had a bearing on the decision in the writ petition filed in the High Court but since Afcons Infrastructure was not a party in the High Court, it could not agitate these issues in the writ petition but did so in the review petition which was not entertained. It is to avoid such a situation that it would be more appropriate for the constitutional Courts to insist on all eligible bidders being made parties to the proceedings filed by an unsuccessful or ineligible bidder.

19. We make it clear that we have not considered the submissions of learned counsel for Afcons Infrastructure on the two issues of the segmental construction method and faulty translation of documents since they were not before the High Court and also because we do not find it necessary to adjudicate on them in the view that we have taken.

20. The appeals are allowed. The parties are left to bear their own costs.

Citation : (2016) AIR(SCW) 4305 : (2016) 6 AIRBomR 235 : (2016) AIRSC 4305 : (2017) 1 ALLMR 448 : (2016) 6 AllWC 5533 : (2016) 4 JLJR 166 : (2016) 9 JT 165 : (2016) 4 KLT 6 : (2016) 7 MLJ 172 : (2016) 8 Scale 765 : (2016) 16 SCC 818