

THE BHARAT COKING COAL LTD. & ORS.

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v.

AMR DEV PRABHA & ORS.

(Civil Appeal No. 2197 of 2020)

MARCH 18, 2020

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[S. A. BOBDE, CJI. B. R. GAVAI AND SURYA KANT, JJ.]

Tenders – A notice inviting tender was issued by appellant-BCCL for purposes of ‘Hiring of HEMM for removal of OB, extraction and transportation of coal with fire fighting.....’ – The appellant aimed of contracting firm which offered the lowest cost estimate for fulfilment of the tender work – The bidding was stated to be conducted online – When the auction proceeded, there were connectivity problems leading to failure in submission bids – In the interregnum, the last bid of Rs. 2345 crores made by respondent No. 1 at 12:33 p.m. went unresponded for thirty minutes and auction was automatically closed at 1:03 p.m. – Respondent no. 1 was declared lowest bidder – However, taking notice of technical issues, the auction was restarted at 2.30 p.m. and same was communicated to all bidders – Accordingly, various bids were received by many participants including respondent no. 1 – The auction proceeded to the extended time of 1 hour and 27 minutes – The LOA was issued to the successful bidder, i.e. respondent no. 6 – Respondent no. 1 filed writ petition for declaring that it was successful bidder and for quashing the LOA issued to respondent no. 6 – It was contended that there were lapses on the part of the appellant – The Single Judge of the High Court dismissed it – However, a Division Bench of the High Court held that there were procedural lapses and quashed the LOA issued by the appellant and directed reconduction of the auction – On appeal, held: The Division Bench of the High Court was cognizant of the principles surrounding scope of judicial review in tenders, however, it failed to effectively evaluate whether larger public interest was being affected – The interest of the respondent no.1 was purely private and monetary in nature – There are concurrent finding of the second Independent External Monitors, CERT-In, TCL, as well as the Central Vigilance Commission that the auction process was not afflicted by collusion, and confirmed the existence of connectivity problems which necessitated resumption

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- A *of the auction process – Before resumption of auction process, it is clear that the message was communicated to all the bidders, stating that the auction process would be extended by a period equivalent to the time between closure of auction at 1:03 p.m. and resumption at 2.30 p.m. – Not only did such uniform communication put all*
- B *bidders on an equal footing, but there was no possibility of any confusion given the clear wordings of the email – The minutes after the resumption of the auction process, bids started coming in and more than a dozen bids were received subsequently – Therefore, the impugned order of the Division Bench of the High Court is not correct in its conclusion that there were substantial procedural lapses*
- C *on part of the appellant – Resultantly, the judgment of the Division Bench is set aside.*

Disposing of the appeals, the Court

HELD: Maintainability of Writ Petition

- D **1. The scope of judicial review in tenders has been explored in-depth in a catena of cases. It is settled that constitutional courts are concerned only with lawfulness of a decision, and not its soundness. Phrased differently, Courts ought not to sit in appeal over decisions of executive authorities or instrumentalities. Plausible decisions need not be overturned, and latitude ought**
- E **to be granted to the State in exercise of executive power so that the constitutional separation of powers is not encroached upon. However, allegations of illegality, irrationality and procedural impropriety would be enough grounds for courts to assume jurisdiction and remedy such ills. This is especially true given**
- F **our unique domestic circumstances, which have demonstrated the need for judicial intervention numerous times. Hence, it would only be the decision-making process which would be the subject of judicial enquiry, and not the end result (save as may be necessary to guide determination of the former). [Para 29][616-**
- G **C-E]**
- H **2. In cases where a constitutional right is infringed, writs would ordinarily be the appropriate remedy. In tender matters, such can be either when a party seeks to hold the State to its duty of treating all persons equally or prohibit it from acting arbitrarily; or when executive actions or legislative instruments**

are challenged for being in contravention to the freedom of carrying on trade and commerce. However, writs are impermissible when the allegation is solely with regard to violation of a contractual right or duty. Hence, the persons seeking writ relief must also actively satisfy the Court that the right it is seeking is one in public law, and not merely contractual. In doing so, a balance is maintained between the need for commercial freedom and the very real possibility of collusion, illegality and squandering of public resources. [Para 32][617-C-E]

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3. In the present case, although it is clear that the Division Bench of the High Court was cognizant of these principles surrounding scope of judicial review, however, it failed to effectively evaluate whether larger public interest was being affected. On the contrary, this Court feels that the interest of Respondent No. 1 was purely private and monetary in nature. [Para 36][618-G]

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4. The first respondent has failed to demonstrate which public law right it was claiming. The main thrust of AMR-Dev Prabha's case has been on the fact that at 1:03PM on 05.05.2015 it was declared the lowest bidder (or L-1). However, being declared the L-1 bidder does not bestow upon any entity a public law entitlement to award of the contract. [Para 40][620-C]

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Infirmities in the auction process

5. Having the benefit of a detailed inquiry report of the Central Vigilance Commission ("CVC"), this Court is of the firm opinion that both the appellant and Respondent No. 4 acted in a bona fide manner and as per their abilities. Even if it is true that BCCL could have assumed more responsibility and C1-India could have exercised a more proactive role in checking for internet issues, yet the possibility of improvement can't be a ground for striking down an authority's action. Additionally, no allegation of the decisions being accentuated by illegal gratification, or otherwise being fraudulent or contrary to a statute have either been clearly made or established. [Para 44][621-E-G]

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6. This Court does not deem it necessary to venture into the existence of technical problems of limited bandwidth, for the

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A same is a question of fact. However, given the concurrent finding of the second IEM, CERT-In, TCL, as well as the CVC, we feel that the Division Bench erred in holding that there were no technical difficulties. Furthermore, such a conclusion is at odds with subsequent occurrences. A finding that there were no internet problems implies that no other bidder deemed it appropriate to
B counter the bid of Rs 2345 crores offered by Respondent No. 1 at 12:33PM and that it was the competitively determined lowest price. However, it is obvious that minutes into the resumption of the auction process bids started coming in and more than a dozen bids were received subsequently, with the last bid of Rs 2043
C crores having been made mere seconds before closure of the auction at 7:27PM. [Para 46][622-H; 623-A-B]

7. There is also no need to venture into questions concerning quantum of extension of time. It is clear that the same message was communicated by CI-India to all, stating that the
D auction process would be extended by a period equivalent to the time between closure of auction at 1:03PM and resumption at 2:30PM. Not only did such uniform communication put all bidders on an equal footing, but there was no possibility of any confusion given the clear wordings of the email. When it is not the case of
E Respondent No. 1 that they thought that auction would close at 7:35PM and hence they were taken by surprise at the early closure, nor did they in fact highlight or object to such interpretation over the course of the resumed auction process, the question is moot and a finding ought not to be given on it. [Para 49][623-G; 624-A-B]

F Deference to authority's interpretation

8. Lastly, this Court deems it necessary to deal with another fundamental problem. It is obvious that Respondent No. 1 seeks to only enforce terms of the NIT. Inherent in such exercise is interpretation of contractual terms. However, it must be noted
G that judicial interpretation of contracts in the sphere of commerce stands on a distinct footing than while interpreting statutes. [Para 51][624-D-E]

9. In the present facts, it is clear that BCCL and C1-India have laid recourse to Clauses of the NIT, whether it be to justify
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condonation of delay of Respondent No. 6 in submitting performance bank guarantees or their decision to resume auction on grounds of technical failure. BCCL having authored these documents, is better placed to appreciate their requirements and interpret them. [Para 52][624-E-F] A

10. The High Court ought to have deferred to this understanding, unless it was patently perverse or mala fide. Given how BCCL's interpretation of these clauses was plausible and not absurd, solely differences in opinion of contractual interpretation ought not to have been grounds for the High Court to come to a finding that the appellant committed illegality. [Para 53][624-F-G] B C

Jagdish Mandal v. State of Orissa (2007) 14 SCC 517 : [2006] 10 Suppl. SCR 606; *Maa Binda Express Carrier v. North-East Frontier Railway* (2014) 3 SCC 760 : [2013] 12 SCR 529; *Shobikaa Impex (P) Ltd. v. Central Medical Services Society* (2016) 16 SCC 233 : [2016] 5 SCR 319; *Raunaq International Ltd. v. IVR Construction Ltd.* (1999) 1 SCC 492 : [1998] 3 Suppl. SCR 421 – relied on. D

RD Shetty v. International Airport Authority of India (1979) 3 SCC 489 : [1979] 3 SCR 1014; *Tata Cellular v. Union of India* (1994) 6 SCC 651 : [1994] 2 Suppl. SCR 122; *Ram and Shyam Co v. State of Haryana* (1985) 3 SCC 267 : [1985] 1 Suppl. SCR 541; *Master Marine Services (P) Ltd v. Metcalfe & Hodg Kinson (P) Ltd.* (2005) 6 SCC 138 : [2005] 3 SCR 666 – referred to. E F

Case Law Reference

[1979] 3 SCR 1014	referred to	Para 15	
[1994] 2 Suppl. SCR 122	referred to	Para 15	
[1985] 1 Suppl. SCR 541	referred to	Para 23	G
[2006] 10 Suppl. SCR 606	relied on	Para 33	
[1998] 3 Suppl. SCR 421	relied on	Para 39	
[2013] 12 SCR 529	relied on	Para 40	

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- A [2005] 3 SCR 666 referred to Para 41
[2016] 5 SCR 319 relied on Para 47

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 2197 of 2020.

- B From the Judgment and Order dated 12.04.2018 of the High Court of Jharkhand at Ranchi in LPA No. 466/2017.

With

Civil Appeal Nos. 2198, 2199 and 2200 of 2020.

- C K.K. Venugopal, AG, A.N.S. Nadkarni, ASG, P.S. Narasimha, N.K. Kaul, Dr. A.M. Singhvi, Ajit Kumar Sinha, Jamshed P. Cama, Kiran Suri, Sr. Advs., Amit Sharma, Dipesh Sinha, Ms. Ayiala Imti, Ankur Talwar, Ms. Chinmayee Chandra, Muneesh Malhotra, Manpreet Kaur, Vanya Khanna, Rajat Bhardwaj, Avishkar Singhvi, Ms. Ashwarya Sinha, Alok K. Singh, Nipun Katyal, Ivan, L. Nidhram Sharma, Anil Kumar Mishra-I, Ms. Suruchi Kumar, Mayan Parsad, Idrish Mohammed, D Supantha Sinha, Rajnish Prasad, Mukul Singh, Sayooj Mohandas, Gurmeet Singh Makker, Arvind Kumar Sharma, Santosh Sharma, B.V. Balaram Das, Advs. for the appearing parties.

The following Judgment of the Court was delivered:

- E **JUDGMENT**

1. Leave Granted.

2. These appeals have been preferred by Bharat Coking Coal Ltd. (hereinafter, “BCCL”) being aggrieved by the order dated 12.04.2018 passed by a Division Bench of the High Court of Jharkhand at Ranchi, wherein a writ petition filed by AMR-Dev Prabha (Respondent No. 1) had been allowed and the auction process conducted by M/s C1 India Pvt Ltd (Respondent No. 4, hereinafter “C1-India”) was set aside and the resultant award of tender by BCCL to M/s RK Transport Co (Respondent No. 6) had also been quashed.

- G ***FACTUAL BACKGROUND***

3. BCCL, a subsidiary of Coal India Ltd, operates coking coal mines in India and as part of its operations regularly outsources many mining and processing functions to external entities. Such allocation of tasks is done through competitive bidding processes, with Respondent No. 4 [M/s C1 India Pvt Ltd (hereinafter “C1 India”) – an online

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procurement facilitator] being appointed as the service provider for e-tendering of its contracts. A

4. A Notice Inviting Tender (“NIT”) was issued by the appellant on 09.03.2015 for purposes of ‘*Hiring of HEMM for removal of OB, extraction and transportation of coal with fire fighting from XIV, XII, XI/XII, XII, XI, IX/X, V/VI/VII/VIII, IV/VIII, IV(T), IV(B), III, II I(T) and I(B) seams at Patch-DE (Mega Project) of Dhansar-Ena colliery of Kusunda Area along with crushing of coal by portable crusher*’ (NIT No 312). An initial estimate of Rs 1694.84 crores was prepared by the appellant, with the aim of contracting the firm which offered the lowest cost estimate for fulfilment of the tender work. B C

5. The bidding was slated to be conducted on the online e-reverse auction platform of C1-India on 04.05.2015 and 05.05.2015, with C1-India having near complete supervision and autonomy over the auction process. In turn, C1-India had hosted its server with Tata Communications Ltd (“TCL”) which was also providing internet connectivity through a leased line to C1-India. As per terms of the NIT, the auction would close at 6:00PM on 05.05.2015. However, the auction would automatically terminate in case any particular bid went unresponded for a period of 30 minutes. In case of any technical faults at the service provider’s end, the auction period was to be paused and extended by the period of the fault; however, bidders were to be responsible for connectivity problems at their end. D E

6. Although the auction proceeded smoothly on the first day, on 05.05.2015 at around 12:55PM, C1-India is stated to have received certain telephone calls from various participants claiming that there were connectivity problems leading to failure in submitting bids. An email was thus sent by C1-India to TCL at 12:59PM stating “*my link is down*”. In response, TCL informed C1-India through an email at 2:11PM that bandwidth issues had indeed been experienced owing to a dual fiber cut in their intra-city network as well as a fault in their patch cord. In the interregnum, the last bid of Rs 2345 Crores made by M/s AMR-Dev Prabha (Respondent No. 1) at 12:33PM went unresponded for thirty minutes, and the auction was automatically closed at 1:03PM. F G

7. Taking conscious notice of these technical issues communicated by TCL and estimating that a lower price could be discovered had such fault not arisen, C1-India (allegedly with the concurrence of BCCL officials) took a decision to restart the auction process at 2:30PM. Such H

A resumption, with the possibility of extension of time, was communicated to all bidders telephonically, as well as through emails sent between 2:17PM and 2:36PM. Accordingly, various bids were received by many participants, including numerous bids from the now aggrieved Respondent No. 1 and the ultimately successful Respondent No. 6. The auction proceeded to the extended time of 1 hour and 27 minutes (calculated as being the time of interruption between the erroneous closure at 1:03PM and subsequent resumption at 2:30PM), and Respondent No. 6 was declared successful with a bid of Rs 2043 crores at 7:27PM.

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8. This was communicated to BCCL, which then after assessing eligibility of M/s RK Transport (Respondent No. 6, hereinafter “RK Transport”), issued Letter of Acceptance (“LOA”) on 30.05.2015. As per earlier agreed contractual terms, a Performance Bank Guarantee had to be submitted within 28 days of receipt of LOA. Respondent No. 6 was unable to do so, and it requested BCCL to provide an additional two months for compliance. The appellant returned the Earnest Money Deposit (“EMD”) to all unsuccessful bidders, including Respondent No. 1, through speed post on 18.06.2015. Finally, the requisite guarantees were submitted after a delay of 49 days, which was condoned by the appellant and job was started on the ground.

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9. Three months after closure of the auction, Respondent No. 1 preferred a Writ Petition before the High Court of Jharkhand at Ranchi on 10.08.2015, praying for a declaration that it emerged as the successful L-1 bidder at 1:03 PM on 05.05.2015, and for quashing of the LOA issued by the appellant to Respondent No. 6 for being arbitrary. Simultaneously, it was also prayed that directions be issued to BCCL for awarding the contract to them and for conducting enquiry into the entire matter.

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10. During the pendency of the Writ Petition, Respondent No. 1 invoked Clause 20 of the NIT which provided for an integrity pact under which two Independent External Monitors (“IEM”) had been appointed. A report was received from one of these two IEMs on 23.09.2016 which held that there had been no technical problem and that resumption of the auction process at 2:30PM was unjustified. It is relevant to mention that this report was submitted by the first IEM, acting unilaterally and without according hearing to C1-India and RK Transport.

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11. Simultaneously, the appellant approached the second IEM who post receiving response from all parties presented a divergent report

with the observation that there was no possibility of collusion and noting that the interruption in bandwidth had been established and thus the subsequent resumption by C1-India was in consonance with specified procedure. A

12. In light of such conflict, BCCL first approached the Standardization, Testing & Quality Certification (STQC) Directorate seeking an audit, and later upon them expressing inability to do so owing to the technical nature of the dispute; the appellant approached the Director General of CERT-In (an independent body under the Ministry of Communications & IT of the Government of India). An 'Incident Analysis Report' was consequently submitted by the CERT-In to BCCL on 30.12.2015. This report broadly concurred with the observations of the second IEM and found that the process was not afflicted by collusion, and confirmed the existence of connectivity problems which necessitated resumption of the auction process. B C

13. On 16.08.2017, the learned Single Judge dismissed the first respondent's writ, holding that a level playing field had been provided by BCCL to all bidders; there indeed was a connectivity issue and the subsequent resumption of auction was as per terms of the NIT; award of contract to RK Transport was not arbitrary for not only was it L-1 but also had offered a bid much better than that of AMR-Dev Prabha. Further, the first respondent was held to have acquiesced to any possible irregularity in the process by participating in the resumed auction, and BCCL's condonation of delay in submission of guarantee by RK Transport was held to be permissible and in public interest. D E

14. This was challenged by Respondent No. 1, before a Division Bench of the High Court. During the pendency of the letters patent appeal, on 18.09.2017, counsel for AMR-Dev Prabha offered a lower bid of Rs 1950 Crores for the job, which they portrayed as being far better than their earlier bid of Rs 2345 Crores which they had made at 12:33PM on 05.05.2015. This, however, was refused by the appellant and instead a work order was issued to Respondent No. 6 on 23.11.2017, who shortly afterwards commenced work. F G

15. The Division Bench allowed the appeal vide impugned judgment dated 12.04.2018 and quashed the LOA issued by BCCL in favour of RK Transport and held that all consequent work was invalid. The Division Bench of the High Court further directed reconduction of the auction and ordered a vigilance enquiry into the matter. Taking H

A cognizance of the ratio of *RD Shetty v. International Airport Authority of India*¹ and *Tata Cellular v. Union of India*² wherein this Court had elucidated the breadth and permissibility of judicial review in tender matters, the High Court opined that it was concerned not with the outcome but only the manner in which the decision to award work-contract was arrived at.

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16. Analysing the terms of the NIT, the High Court held that it was the bidder's responsibility to comply with system requirements, with BCCL not being liable for any technical difficulties or connectivity failures. Tender could be paused only in case of technological/system failure at the service provider's end and once concluded, could only be revoked in limited circumstances. Not only were the complaints non-actionable for C1-India was continuously connected to TCL which meant there were no problems at the service provider's end, but even otherwise C1-India failed to pause the auction process during the crucial period which it ought to have as per the terms of the NIT.

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17. Noting the absence of any call records or other proof of technical complaints by the bidders, the delay in communication of resumption of auction process (observing how emails were sent till 2:37PM whereas auction resumed at 2:30PM), failure to revoke/cancel declaration of AMR-Dev Prabha as L1 bidder and erroneous calculation of the extended time (7:27PM instead of 7:35PM), the Court held that BCCL and C1-India failed to maintain the sanctity of the auction process and committed serious illegality which raised doubts on procedural propriety and indicated arbitrariness in the decision making process. Such deviations from terms of the NIT were held to not only be mere aberrations, but indicative of a complete lack of fair play which affected integrity of the entire process, rendering it contrary to public interest and consequently illegal.

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CONTENTIONS OF PARTIES

18. Assailing the order of the High Court primarily on preliminary counts, BCCL vehemently contended that the present case was not one where judicial review was possible. It highlighted that the scope of writ jurisdiction in contractual dealings of the State or its instrumentalities was extremely limited, and deference to commercial wisdom of the

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¹(1979) 3 SCC 489.

²(1994) 6 SCC 651.

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executive ought to be the norm. The decision making process was shown as not being illegal as there was no allegation of receipt of extraneous gratification or violation of any statute; nor irrational as the decision of resuming the auction process to arrive at a better price wasn't such which would offend the sensibilities of a reasonable person; nor arbitrary as there was substantial discretion granted by the terms of the NIT. Respondent No. 1's participation in the tender process post-resumption was contended to bind him from making any further judicial challenge, and alternate remedies under contract and civil law were demonstrated. It was further stated that the entire process had been upheld by multiple independent authorities, not least being the CERT-In and one of the two IEMs.

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19. Adopting such stand, Respondent No. 4 (C1-India) contended that the slight delay in the decision-making process, wherein it did not immediately take action, was because C1-India as a responsible e-services provider was first attempting to determine whether the interruption was at the bidders' end or its own. By the time a response had been received from the entity responsible for hosting and connectivity (i.e. TCL), the auction had stopped by itself. Instead, it was argued that upon receipt of written response from TCL at 2:11 PM, C1-India expeditiously took a decision in consultation with BCCL, and started informing all participants and resumed bidding at 2:30PM. It was underscored that no prejudice had been caused to any bidder. Respondent No.1 had more than an adequate opportunity of bidding, as it itself submitted eight bids during the resumed time frame. Further, such participation combined with silence for three-months afterwards evidenced that AMR-Dev Prabha did not consider itself to be L-1 and the present legal challenge was nothing but commercial opportunism. With regard to the calculation of extended time, counsel for C1-India submitted that such was immaterial as the quantum of extension had uniformly been communicated to all bidders, and everyone had the same information and hence an equal opportunity. The resumption decision was claimed to have been taken in good faith and upon a judicious consideration of all factors. It was thought to be in public interest, and in retrospect, had only resulted in substantial savings for the public exchequer.

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20. Counsel for the appellant, along with that for C1-India highlighted how the goalpost was being changed by Respondent No.1 throughout the litigation. Whereas before the High Court AMR-Dev

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- A Prabha sought adherence to terms of NIT and strict procedural compliance, but later they wished to settle the matter at a lower price claiming larger public interest. This was claimed to demonstrate how AMR-Dev Prabha's interest was, in fact, personal and not public, and only to win the tender one way or the other and not to maintain the sanctity of the auction process. The lack of on-the-spot protest, neither
- B during the auction process, nor at the time of availing refund of the Earnest Money Deposit; and the substantial delay in filing the writ petition (after more than 3 months of close of the auction process and 2 months from issue of the LOA) was nothing but an afterthought aimed at making a commercial opportunity out of litigation. Hence, the present proceedings
- C were claimed to be an abuse of the process of law by AMR-Dev Prabha and only a chance for arm twisting BCCL to award to it the tender, no better than a contractual enforcement of private rights.

21. Instead, it was submitted, that any possible infirmity was merely minor and inconsequential. There had been a substantive compliance of
- D the tender process and the Clauses of the Notive Inviting Tender (NIT), and public interest of ensuring the lowest price discovery had been kept at the forefront. It was contended that hyper technical compliance was often not possible, nor desirable as often-a-times strict procedural compliance could defeat the ends of substantive equality, like in the present case.
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22. Reliance was placed on the CERT-IN report to demonstrate lack of any mala fide or tampering in the process. The interruptions at the end of TCL were claimed to be but natural and a part of operational inefficiencies which were not unheard of in e-tendering processes.

- F 23. On the other side, Respondent No. 1 claimed that it had been declared as the lowest bidder (L-1) by virtue of automatic conclusion of the auction process at 1:03PM, post which any resumption was impermissible and contrary to contractual terms. Further, a colour was sought to be cast, by claiming that such resumption was to benefit particular parties. The refusal of BCCL to accept the new bid which
- G was more than Rs 400 crores less than the previous offer was claimed to demonstrate this. Per AMR-Dev Prabha, public interest ought to be prioritised, which according to *Ram and Shyam Co v. State of Haryana*³ would entail that the State instrumentality accept the best available price, irrespective of formal technicalities.

H ³(1985) 3 SCC 267.

24. No adverse inference could be drawn against Respondent 1's participation in the resumed bidding process as the resumption itself was illegal. The auction was closed and not paused, and hence no resumption of a closed bidding process was possible. Even otherwise, it was asserted that grant of extension of 1 hour and 27 minutes was wrong. The time should have been calculated from the time when the internet was affected, which as per the appellant themselves was from 12:55PM as informed to them by TCL. Hence an extension of 1 hour and 35 minutes (and not 1 hour and 27 minutes) was appropriate, per which the auction ought to have concluded at 7:35 PM, and not 7:27 PM. Similarly, emails for resumption at 2:30PM, were shown as having been sent to some participants at 2:17PM and to others at 2:36PM. Further, two persons were claimed to have logged into the system at 2:29PM, that is, one minute before resumption of the e-auction process, which wrongly gave them an upper hand in the e-auction process. Other allegations were also made regarding login by one entity using two accounts, which was contended as being impermissible per the NIT.

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25. All this was postulated to cast a serious cloud of doubt over the entire auction process. Even during the pendency of the writ petition before the High Court, instead of complying with an order dated 04.11.2015 to produce all relevant records, BCCL was said to have impermissibly referred the matter to CERT-In. However, the first IEM had held that the server of the appellant was well connected to the server of the TCL and that there was no problem on the appellant's end which would necessitate stoppage or resumption of the auction process.

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26. On maintainability, although Respondent No. 1 admitted to having alternate remedies, but it argued that there could be no hard and fast rule preventing it from approaching writ courts. On the point of delay, in their counter-affidavit, Respondent No. 1 has contended that the cause of action arose after Respondent No. 6 failed to submit the Performance Guarantee within 28 days per the tender clauses.

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27. Substantial emphasis was placed on the offer made by the Respondent No. 1 to the appellant during the course of hearing of the writ petition, the rejection of which was claimed as being contrary to public interest and settled law which aims at prioritising value maximisation of the public exchequer.

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A *ANALYSIS*

28. Two clear issues-in-dispute arise from the above discussion. The first pertains to the maintainability of the writ considering the nature of tender processes, and the second concerns application of that standard to the facts of the present case to determine whether there were lapses on part of BCCL and C1-India.

B (I) *Maintainability of Writ Petition*

29. The scope of judicial review in tenders has been explored in-depth in a catena of cases. It is settled that constitutional courts are concerned only with lawfulness of a decision, and not its soundness.⁴ Phrased differently, Courts ought not to sit in appeal over decisions of executive authorities or instrumentalities. Plausible decisions need not be overturned, and latitude ought to be granted to the State in exercise of executive power so that the constitutional separation of powers is not encroached upon.⁵ However, allegations of illegality, irrationality and procedural impropriety would be enough grounds for courts to assume jurisdiction and remedy such ills. This is especially true given our unique domestic circumstances, which have demonstrated the need for judicial intervention numerous times. Hence, it would only be the decision-making process which would be the subject of judicial enquiry, and not the end result (save as may be necessary to guide determination of the former).

30. This position of law has been succinctly summed up in *Tata Cellular v. Union of India (supra)*, where it was famously opined that:

F “77. ... 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:

G (i) *Illegality*: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

⁴ Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium), (2016) 8 SCC 622; Siemens Aktiengesellschaft & Siemens Ltd. v. DMRC Ltd., (2014) 11 SCC 288.

H ⁵ Air India Ltd v. Cochin International Airport Limited (2000) 2 SCC 617.

- (ii) Irrationality, namely, Wednesbury unreasonableness, A
(iii) Procedural impropriety.”

31. But merely because the accusations made are against the State or its instrumentalities doesn't mean that an aggrieved person can bypass established civil adjudicatory processes and directly seek writ relief. In determining whether to exercise their discretion, writ courts ought not only confine themselves to the identity of the opposite party but also to the nature of the dispute and of the relief prayed for. Thus, although every wrong has a remedy, depending upon the nature of the wrong there would be different forums for redress.

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32. In cases where a constitutional right is infringed, writs would ordinarily be the appropriate remedy. In tender matters, such can be either when a party seeks to hold the State to its duty of treating all persons equally or prohibit it from acting arbitrarily; or when executive actions or legislative instruments are challenged for being in contravention to the freedom of carrying on trade and commerce. However, writs are impermissible when the allegation is solely with regard to violation of a contractual right or duty. Hence, the persons seeking writ relief must also actively satisfy the Court that the right it is seeking is one in public law, and not merely contractual. In doing so, a balance is maintained between the need for commercial freedom and the very real possibility of collusion, illegality and squandering of public resources.

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33. Such a proposition has been noticed by this Court even earlier in **Jagdish Mandal v. State of Orissa**⁶ in the following words:

“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,

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⁶ (2007) 14 SCC 517.

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A *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
B *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
C *power of judicial review, should be resisted. Such*
interferences, either interim or final, may hold up public works
for years, or delay relief and succour to thousands and millions
and may increase the project cost manifold.”

(emphasis supplied)

D 34. Such conscious restraint is also necessary because judicial
intervention by itself has effects of time and money, which if unchecked
would have problematic ramifications on the State’s ability to enter into
contracts and trade with private entities. Further, it is not desirable or
practicable for courts to review the thousands of contracts entered into
by executive authorities every day. Courts also must be cognizant that
E often-a-times the private interest of a few can clash with public interest
of the masses, and hence a requirement to demonstrate effect on ‘public
interest’ has been evolved by this Court.⁷

F 35. It is thus imperative that in addition to arbitrariness, illegality
or discrimination under Article 14 or encroachment of freedom under
Article 19(1)(g), public interest too is demonstrated before remedy is
sought. Although the threshold for the latter need not be high, but it is
nevertheless essential to prevent bypassing of civil courts and use of
constitutional avenues for enforcement of contractual obligations.

G 36. In the present case, although it is clear that the Division Bench
of the High Court was cognizant of these principles surrounding scope
of judicial review, however, it failed to effectively evaluate whether larger
public interest was being affected. On the contrary, we feel that the
interest of Respondent No. 1 was purely private and monetary in nature.

H ⁷ Jagdish Mandal v. State of Orrisa, (2007) 14 SCC 517 ¶ 22.

37. *First*, AMR-Dev Prabha's initial prayer sought to nullify the award of contract, which if granted, would have increased the sums payable by the State instrumentality from Rs 2043 crores to Rs 2345 crores. *Second*, the conduct of Respondent No. 1 over the course of the present proceedings, as highlighted by the appellants, further bolsters the lack of public interest. Whereas initially the first respondent was seeking quashing of the LOA issued to Respondent No. 6 owing to arbitrariness on part of BCCL and on the ground that sanctity of the auction process had been violated; later, before the Division Bench, Respondent No. 1 sought to make a new offer of Rs 1950 Crores. This shows how AMR-Dev Prabha's priority was only to secure the contract and not to uphold the law or protect larger public interest.

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38. Even otherwise, granting such a prayer means that Respondent No. 1 would have gotten a special opportunity of negotiation, to the detriment of all other participants, which would probably be a more egregious violation of equality envisaged under Article 14 than the procedural adherence which they were initially seeking to protect.

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39. Additionally, we are not impressed with the first respondent's argument that there is a certain public interest at stake whenever the public exchequer is involved. There are various factors in play, in addition to mere bidding price, like technical ability and timely completion which must be kept in mind. And adopting such interpretation would permanently blur the line between contractual disputes involving the State and those affecting public law. This has aptly been highlighted in ***Raunaq International Ltd. v. IVR Construction Ltd.***⁸

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"11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more

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⁸(1999) 1 SCC 492.

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A *than any saving which the court would ultimately effect in*
public money by deciding the dispute in favour of one tenderer
or the other tenderer. Therefore, unless the court is satisfied
that there is a substantial amount of public interest, or the
 B *transaction is entered into mala fide, the court should not*
intervene under Article 226 in disputes between two rival
tenderers.”

(emphasis supplied)

40. Further, the first respondent has failed to demonstrate which
 public law right it was claiming. The main thrust of AMR-Dev Prabha’s
 C case has been on the fact that at 1:03PM on 05.05.2015 it was declared
 the lowest bidder (or L-1). However, being declared the L-1 bidder does
 not bestow upon any entity a public law entitlement to award of the
 contract, as noted in *Maa Binda Express Carrier v. North-East*
*Frontier Railway*⁹:

D “8. The scope of judicial review in matters relating to award
 of contracts by the State and its instrumentalities is settled by
 a long line of decisions of this Court. While these decisions
 clearly recognise that power exercised by the Government
 and its instrumentalities in regard to allotment of contract is
 E subject to judicial review at the instance of an aggrieved party,
 submission of a tender in response to a notice inviting such
 tenders is no more than making an offer which the State or its
 agencies are under no obligation to accept. **The bidders**
participating in the tender process cannot, therefore, insist
that their tenders should be accepted simply because a given
 F **tender is the highest or lowest depending upon whether the**
contract is for sale of public property or for execution of works
on behalf of the Government. All that participating bidders
 are entitled to is a fair, equal and non-discriminatory treatment
 in the matter of evaluation of their tenders. It is also fairly
 G well settled that award of a contract is essentially a commercial
 transaction which must be determined on the basis of
 consideration that are relevant to such commercial decision.
 This implies that terms subject to which tenders are invited
 are not open to the judicial scrutiny unless it is found that the
 same have been tailor-made to benefit any particular tenderer

H ⁹ (2014) 3 SCC 760.

or class of tenderers. So also, the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.”

(emphasis supplied)

41. Instead, precedent laid down by this Court in **Master Marine Services (P) Ltd v. Metcalfe & Hodg Kinson (P) Ltd**,¹⁰ illustrates that if a prayer for re-bidding is on account of a desire to get a better price, then involvement of Article 14 of the Constitution would not be made out.

42. Further, regular recourse was made over the course of proceedings by learned senior counsel for the first respondent on terms of the NIT. Findings in the impugned order too were based upon disputed interpretation of such contractual terms. Thus, it is clear that there was neither any public law right of the first respondent which was affected, nor was there any public interest sought to be furthered.

(II) Infirmities in the auction process

43. On merits also, we do not feel that the impugned order is correct in its conclusion that there were substantial procedural lapses on part of BCCL and C1-India which amount to arbitrariness, and ought to be remedied by way of judicial review.

44. Instead, having the benefit of a detailed inquiry report of the Central Vigilance Commission (“CVC”), we are of the firm opinion that both the appellant and Respondent No. 4 acted in a bona fide manner and as per their abilities. Even if it is true that BCCL could have assumed more responsibility and C1-India could have exercised a more proactive role in checking for internet issues, yet the possibility of improvement can’t be a ground for striking down an authority’s action. Additionally, no allegation of the decisions being accentuated by illegal gratification, or otherwise being fraudulent or contrary to a statute have either been clearly made or established.

45. It would thus be apt at this stage to reproduce the concluding passage of fact finding enquiry conducted by CVC, which reads as follows:

¹⁰ (2005) 6 SCC 138.

- A *“It is significant to place on record that the notification of*
closure of the reverse auction generated by system at 13:03:47
hrs on 05.05.2015 submitted by M/s AMR Dev Prabha, in
fact, belongs to another bidder M/s. Montecarlo Ltd. Neither
BCCCL nor CI India Pvt. Ltd. have ever placed such
notification on record. It remains unclear as to how and when
B M/s. AMR Dev Prabha got possession of this document, which
actually belonged to M/s. Montecarlo Ltd. and which became
the basis for M/s. AMR Dev Prabha to stake their claim of
being the lowest bidder at 13.03.47 hrs. It is also seen that
this important fact, of generation of notification of closure of
C the auction by the system at 13:03:47 Hours, as the bid of M/
s AMR Dev Prabha remained unresponded for the specified
period of 30 minutes, was neither reported by CI India to
BCCCL nor to the participating bidders. Such, notification of
closure of the auction, even though generated during the
period of interruption in connectivity of the bidders with the
D server, should have been declared as ‘null and void’ before
restarting the auction process. Even, BCCL did not demand
any report from CI India Pvt. Limited for the interruption
period so as to take a call before proceeding further for
restart of the reverse auction process. Further, considering
E that during this period BCCL was aware of the connectivity
problem being faced by the bidders, it should have exercised
intense real time monitoring which have not been done. Failure
to do so is a reflection of the fact the adequate incident
management system was not put in place by the service
F provider M/s. CI India Pvt. Ltd. to handle such eventuality
effectively.
- G *While there was lack of control and supervision on part of*
BCCCL, however, the Committee has not come across any
evidence suggesting mala-fide on their part. As regards to
CI India Pvt. Ltd., their conduct has been found to be far
from satisfactory.”

- H 46. We do not deem it necessary to venture into the existence of
technical problems of limited bandwidth, for the same is a question of
fact. However, given the concurrent finding of the second IEM, CERT-
In, TCL, as well as the CVC, we feel that the Division Bench erred in

holding that there were no technical difficulties. Furthermore, such a conclusion is at odds with subsequent occurrences. A finding that there were no internet problems implies that no other bidder deemed it appropriate to counter the bid of Rs 2345 crores offered by Respondent No. 1 at 12:33PM and that it was the competitively determined lowest price. However, it is obvious that minutes into the resumption of the auction process bids started coming in and more than a dozen bids were received subsequently, with the last bid of Rs 2043 crores having been made mere seconds before closure of the auction at 7:27 PM.

47. With regard to other allegations concerning condonation of Respondent No. 6's delay in producing guarantees, we would only reiterate that there is no prohibition in law against public authorities granting relaxations for bona fide reasons. In *Shobikaa Impex (P) Ltd. v. Central Medical Services Society*¹¹, it has been noted that:

"... the State can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It has been further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the Court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point."

48. Even if there had been a minor deviation from explicit terms of the NIT, it would not be sufficient by itself in the absence of mala fide for courts to set aside the tender at the behest of an unsuccessful bidder.¹² This is because notice must be kept of the impact of overturning an executive decision and its impact on the larger public interest in the form of cost overruns or delays.

49. There is also no need to venture into questions concerning quantum of extension of time. It is clear that the same message was communicated by CI-India to all, stating that the auction process would be extended by a period equivalent to the time between closure of auction at 1:03PM and resumption at 2:30 PM. Not only did such uniform communication put all bidders on an equal footing, but there was no

¹¹ (2016) 16 SCC 233.

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A possibility of any confusion given the clear wordings of the email. When it is not the case of Respondent No. 1 that they thought that auction would close at 7:35PM and hence they were taken by surprise at the early closure, nor did they in fact highlight or object to such interpretation over the course of the resumed auction process, the question is moot and a finding ought not to be given on it.

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50. Additionally, we also do not see merit in the justification for delay in filing writ proffered by the first respondent. It is claimed that the cause of action arose when Respondent No. 6 failed to submit guarantees within a period of 28 days. However, we do not see how that would allow AMR-Dev Prabha to challenge the entire process of auction, or overcome the settled legal principle of privity of contract between Respondent No. 6 and the appellant.

(III) Deference to authority's interpretation

D 51. Lastly, we deem it necessary to deal with another fundamental problem. It is obvious that Respondent No. 1 seeks to only enforce terms of the NIT. Inherent in such exercise is interpretation of contractual terms. However, it must be noted that judicial interpretation of contracts in the sphere of commerce stands on a distinct footing than while interpreting statutes.

E 52. In the present facts, it is clear that BCCL and C1-India have laid recourse to Clauses of the NIT, whether it be to justify condonation of delay of Respondent No. 6 in submitting performance bank guarantees or their decision to resume auction on grounds of technical failure. BCCL having authored these documents, is better placed to appreciate their requirements and interpret them.¹³

F 53. The High Court ought to have deferred to this understanding, unless it was patently perverse or mala fide. Given how BCCL's interpretation of these clauses was plausible and not absurd, solely differences in opinion of contractual interpretation ought not to have been grounds for the High Court to come to a finding that the appellant committed illegality.

CONCLUSION

54. In light of the above discussion, the appeal filed by Bharat Coking Coal Ltd, as well as connected appeals filed by M/s RK Transport

H ¹³ Afcons Infrastructure Ltd v. Nagpur Metro Rail Corporation Ltd, (2016) 16 SCC 818 at ¶ 15.

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and M/s C1 India Pvt Ltd, are allowed. Resultantly, the appeal filed by AMR-Dev Prabha is dismissed. The Division Bench judgment of the High Court dated 12.04.2018 is set-aside and the writ petition filed by AMR-Dev Prabha is dismissed. No order as to costs. A

Ankit Gyan

Appeals disposed of.