

# **Asia Foundation & Construction Ltd vs Trafalgar House Construction (I) Ltd. & ... on 17 December, 1996**

**Equivalent citations: AIRONLINE 1996 SC 321, (1997) 1 SCJ 60, 1997 (1) SCC 738, (1997) 2 REC CIV R 17, (1997) 84 CUT LT 192, (1997) 1 JT 309, (1997) 1 JT 309 (SC)**

**Author: S.C. Agrawal**

**Bench: S.C. Agrawal**

PETITIONER:

ASIA FOUNDATION & CONSTRUCTION LTD.

Vs.

RESPONDENT:

TRAFALGAR HOUSE CONSTRUCTION (I) LTD. & ORS.

DATE OF JUDGMENT: 17/12/1996

BENCH:

S.C. AGRAWAL, G.B. PATTANAIAK

ACT:

HEADNOTE:

JUDGMENT:

THE 17TH DAY OF DECEMBER, 1996 Present:

Hon'ble Mr. Justice S.C. Agrawal Hon'ble Mr. Justice G.B. Pattanaik K. Parasaran, Sr. Adv. S. Ganesh, Gaurab Banerjee, R.N. Karanjawala, Arvind Kumar, Ms. Ruby Ahuja and Manik Karanjawala, Advs. with him for the appellants. Soli J. Sorabjee, V.A. Mohta, Sr. Advs., S.B. Upadhyay, Ashok Kr. Gupta, Zaki Ahmad Khan, Advs. with then for the Respondents.

**J U D G M E N T** The following Judgment of the Court was delivered:

J U D G M E N T PATTANAIK. J.

Leave granted.

This Appeal by Special Leave is directed against the judgment dated 10th October, 1996. By the impugned judgment the High Court has quashed the ultimate decision of Paradip Port Trust in terms of the Resolution dated 23.8.96 to award the contract to AFCONS, the present appellant as well as the letter of communication by Paradip Port Trust to AFCONS dated 24.8.96 and has further directed the Port Trust to effect negotiations with AFCONS, the present appellant as well as the Trafalgar House Construction of India Ltd. who was the petitioner in OJC and respondent no. 1 herein, giving them opportunity to make fresh offers and then lowest bidder should be given the Award. The High Court also further directed that if there cannot be any negotiation within one month from the date of the judgment then the Port Trust will be free to ask for rebidding for the particular project which is the subject matter of the Writ Petition. It is not necessary to narrate the entire gamut of facts Suffice it to state that for construction of Wharf intended for creation of mechanised handling facility of coal at Paradip Port the Asian Development Bank at Manila had agreed to give loan to the extent of 134.85 million US dollars and it was intended that a part of this amount would be utilised for the construction of the Wharf. The entire project consist of nine major packages and none completion of any package would make the entire project unworkable. A pre- qualification notice was issued inviting the offers and then on receipt of the pre-qualification documents those were sent to a Committee for evaluation. The consultants submitted their evaluation recommending six firms including the appellant and respondent no. 1 for the construction of the Wharf. The Tender Committee of Port Trust reviewed the evaluation make by the consultants and recommended the names of all the six firms. The aforesaid evaluation report was sent to the Financial Institution, namely, the Asian Development Bank for obtaining its views. The Board of Trustees of Paradip Port Trust thereafter approved the said six firms and them invited for bids by their letter dated 27.9.95. The last date for submission of bids was 27th December, 1995, 11.00 a.m. Out of the six firms only three firms submitted their bids, namely, the appellant, the respondent no. 1 and one Muhibbah Engineering (M) BHD, Malaysia. In accordance with the prescribed procedure the bids were opened and were processed. After examining all the bids and determination of responsiveness of the bidders three bids were sent to the consultant for evaluation report. the consultant found some discrepancy in the bid documents about the amount of concrete required for pre-cast planks for the Wharf Deck. The consultants then corrected the error and after making re-calculation came to the conclusion that respondent no. 1's bid was the lowest. The Tender Committee of Paradip Port Trust accepted the recommendation of the consultants and submitted the same for approval of the Financial Institution, namely, the Asian Development Bank. The Bank by its communication dated 23rd April, 1996, stated that they are unable to support the approach set out in the Bid Evaluation Report and they cannot accept the proposed bid change in the quantity.

The Bank also came to the conclusion that the lowest evaluated substantially responsive bidder is AFCONS, the present appellant, and accordingly recommended that the contract of construction of the Wharf be awarded to AFCONS. On receipt of the views of the Bank and since substantial amount of finance was to be given by the Bank as loan the Port Trust again asked their consultants about the earlier bid evaluation. The Special Tender Committee again met on 16.5.96 and then formulated its views and communicated the same to the Bank on 12.5.96. The Bank wrote back on 5th June, 1996 suggesting that the contract be awarded to AFCONS so that the works can be financed from the loan and if the contract is awarded to anyone else then no loan would be financed and if the Port Trust is inclined to rebid then also there would be no loan from the Bank. The Bank indicated that the suggestions given by the Bank is on due consideration of the practicability of mobilizing finance quickly. On receipt of the said response from the Bank the Tender Committee met on 14.6.96 and then decided to call the appellant to have some clarifications. In the meeting dated 17.6.96 the appellant appeared before the Tender Committee and responded to the clarification sought for. The Project Manager addressed a letter on 12th July, 1996, stating therein that if the additional commercial information has been available at the time of assessment then the outcome would appear to favour award to AFCONS. It also further stated that completing the bid evaluation and making its recommendation of award to Essar the consultant has done so in a professional and impartial manner based upon the information available at that time. It was further stated that in view of the additional information now available there was no technical barrier or commercial disincentive to award to AFCONS, the appellant herein. But even before the award was made in favour of the appellant the respondent no. 1 had approached the High Court, obviously being aware of the fact that the appellant's bid is going to be accepted and after the final award in favour of the appellant by Board's Resolution dated 3rd August, 1996, the Writ Petition was amended seeking the relief of quashing of the award in question.

The appellant in its counter-affidavit filed before the High Court not only denied the allegations made in the Writ Petition but also submitted that factually all through the bid of the appellant has been the lowest. It was also stated that the consultant has not taken into account the customs duty which was payable while making the evaluation in question. The Paradip Port Trust in its affidavit before the High Court had urged that since the loan was to be sanctioned by the Asian Development Bank and the Asian Development Bank did not agree to sanction loan if the contract is awarded to Essar or the contract is re-bid, on reconsideration of the entire situation the Port Trust awarded the contract in favour of the appellant. The Port Trust also stated that on receipt of the additional information and taking into consideration the same the Trust was of the view that the award to AFCONS would appear to be acceptable and appropriate. The Port Trust further made it clear that the re-bid was not in the interest of the project and not only it would jeopardise the entire loan sanctioned by the Asian Development Bank but there is every possibility of bid being substantially higher.

The High Court by the impugned judgment took note of several clauses of the bid documents which consists of several parts and come to the conclusion that the award of contract should be made to the bidder whose bid has been determined to be the lowest evaluated bid and who meets the appropriate standards of capability and financial responsibility. It also came to the conclusion that under the documents there is a scope for amending the bid documents and there is scope for modification of the bids as well as there is scope for correction of errors. It further come to the conclusion that a detailed procedure has been laid down to appreciate the responsiveness of the bids technically and there is also a scope for evaluation of the bids. The High Court further came to hold that "It is also not appreciated and it has not been explained by Asian Development Bank authorities who have not cared to appear in the case inspite of notice, as to why the Asian Development Bank authorities did not appreciate the evaluation of the bids and on correction the offer of the petitioners being lower than that of AFCON. The special fancy of the Asian Development Bank authorities in favour of AFCON has not been justified with reasons before this Court for reasons best known to the Asian Development Bank authorities." According to the High Court the power of judicial review in the arena of contractual jurisdiction has been widened as has been held by the Supreme Court in *Mahabir Auto Stores & Ors. vs. Indian Oil Corporation & Ors.* (1990) 1 SCR 818, as well as in *Food Corporation of India vs. M/s. Kamdhenu Cattle Feed Industries* (1993) 1 SCR 71, but each case has its own peculiar facts and circumstance and ultimate decision has to be arrived at as the situation demands under the parameters of law as it permits. Having considered the facts and circumstances leading to the award of contract in favour of the appellant the court came to the conclusion that it would be in the public interest to quash the award in favour of the appellant and accordingly it quashed the same and issued directions, as already stated.

Mr. Parasaran, learned senior counsel appearing for the appellant submitted that the award of a contract by the State or a public authority can no doubt be judicially reviewed but a court would interfere with the award if it comes to the conclusion that the award of contract is vitiated by arbitrariness, unfairness, illegality or irrationality. In other words, if the mistake committed by the authority in awarding the contract is of such a nature requiring intervention then the court may set right the decision. In this view of the matter and in view of the revised opinion of the Trust dated 12th July, 1996, and the opinion of the Asian Development Bank who is to grant the loan for completion of the project the High Court was not justified in interfering with the contract award in favour of the appellant. He further contended that in project of this magnitude with which the Court was concerned, since the lowest tendered has no right to get the contract, unless the decision of the authority in awarding the contract can be said to be vitiated with arbitrariness or undue favouritism, it would not be for the court to interfere with the decision. Mr. Parasaran, learned senior counsel further urged that the conclusion of the High Court that respondent no.1 was the lowest bidder is factually incorrect and on the other hand the appellant in all situation prior to negotiation as well as after the negotiation continued to be the lowest bidder and, therefore, there was no infirmity with the decision of the Asian Development Bank approving the bid of the appellant and there was no illegality with the decision of the Paradip Port Trust in awarding the contract in favour of the appellant.

Mr. Sorabjee, learned senior counsel appearing for respondent no. 1 and Mr. Mohta, learned senior counsel appearing for respondent no. 3 on the other hand contended, that in view of the conceded

position as noticed by the High Court that on error being corrected it is the respondent no. 1 who was the lowest bidder and yet the authorities awarded the contract in favour of the appellant, it was sufficient for the court to annul the decision in the larger public interest. Mr. Sorabjee, learned senior counsel further urged that the power to award contract lies with the Paradip Port Trust and Port Trust had been forced by the Bank to grant the contract in favour of the appellant. As has been observed by the High Court itself Bank did not appear nor had given any explanation for preferring the appellant that respondent no. 1 even though respondent no. 1 was the lowest bidder. Consequently such decision on the face of it must be held to be arbitrary and the High Court was fully justified in interfering with the decision of awarding the contract in favour of the appellant. Mr. Sorabjee, learned senior counsel also urged that if this court is of the view that a re-bidding would take an unduly long period which may eventually result in escalation of the cost then this Court may issue appropriate direction as it thinks fit. Mr. Sorabjee, learned senior counsel also in course of arguments produced before us a telex message from the Asian Development Bank whereunder the Bank has agreed to the direction of the High Court for re-bidding but indicates that re-bidding has to be carried out following the procedure acceptable to the Bank which will include a bidding period of at least 60 days and, therefore, there cannot be any objection to the direction of the High Court for re-bidding.

Mr. Upadhyay, learned counsel appearing for Paradip Port Trust on the other hand submitted that the ultimate decision of the Trust awarding the contract in favour of the appellant neither can be said to be arbitrary nor unfair or illegal and on the other hand, the decision was in the public interest and, therefore, it was not proper for the High Court to interfere with the said decision. The learned counsel further urged that in the mean time agreement has already been executed and the direction of the High Court to negotiate with the parties did not yield result and, therefore, the only other option is for re-bidding and such a re-bidding will not only consume further time as the procedure for re-bidding will have to be adhered to, but also the possibility of escalation of cost on such re-bidding cannot be obviated and, as such in the larger public interest the appellant should be permitted to execute the work.

Having considered the rival contentions the only question that arises for our consideration is whether the High Court was justified in the facts and circumstances of the case to interfere with the award of contract in favour of the appellant and whether such interference would subserve any public interest for which the Court purports to have exercised its power of judicial review.

The Asian Development Bank came into existence under an Act called the Asian Development Act, 1966, in pursuance of an International agreement to which India was a signatory. This new financial institution was established for acceleration of the economic development of Asia and the Far East. Under the Act the Bank and its officers have been granted certain immunities, exemption and privileges. It is well known that it is difficult for the country to go ahead with such high cost projects unless the financial institutions like World Bank or the Asian Development Banks grant loan or subsidy, as the case may be. When such financial institutions grant such huge loan they always insist that any project for which loan has been sanctioned must be carried out in accordance with the specification and within the scheduled time and the procedure for granting the award must be duly adhered to. In the aforesaid premises on getting the evaluation bids of the appellant and respondent

no. 1 together with the consultant's opinion after the so-called corrections made the conclusion of the bank to the effect "the lowest evaluated substantially responsive bidder is consequently AFCONS" cannot be said to be either arbitrary or capricious or illegal requiring court's interference in the matter of an award of contract. There was some dispute between the Bank on one hand and the consultant who was called upon to evaluate on the other on the question whether there is any power of making any correction to the bid documents after a specified period. The High Court in construing certain clauses of the bid documents has come to the conclusion that such a correction was permissible and, therefore, the Bank could not have insisted upon granting the contract in favour of the appellant. We are of the considered opinion that it was not within the permissible limits of interference for a court of law, particularly when there has been no allegation of malice or ulterior motive and particularly when the court has not found any mala fides or favouritism in the grant of contract in favour of the appellant. In *Tata Cellular vs. Union of India* (1994) 6 SCC 651 this Court has held that :

"The duty of the court is to confine itself to the question of legality. Its concern should be:

1. Whether a decision-making authority exceeded its powers.
2. Committed an error of law.
3. Committed a breach of the rules of natural justice,
4. reached a decision which no reasonable tribunal would have reached or,
5. abused its powers.

Therefore, it is not for the Court to determine whether a particular policy or particular decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under :-

- (i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it;
- (ii) Irrationality, namely, *Wednesbury* unreasonableness.
- (iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time."

Therefore, though the principle of judicial review cannot be denied so far as exercise of contractual powers of government bodies are concerned, but it is intended to prevent arbitrariness or favouritism and it is exercised in the larger public interest or if it is brought to the notice of the Court that in the matter of award of a contract power has been exercised for any collateral purpose. But on examining the facts and circumstances of the present case and on opinion that non of the criteria has been satisfied justifying court's interference in the grant of contract in favour of the appellant. We are not entering into the controversy raised by Mr. Parasaran, learned senior counsel that the High Court committed a factual error in coming to the conclusion that respondent no. 1 was the lowest bidder and the alleged mistake committed by the consultant in the matter of bid evaluation in not taking into account the customs duty and the contention of Mr. Sorabjee, learned senior counsel that it has been conceded by all parties concerned before the High Court tat on correction being made respondent no. 1 was the lowest bidder. As in our view in the matter of a tender a lowest bidder may not claim an enforceable right to get the contract though ordinarily the concerned authorities should accept the lowest bid. Further we find from the letter dated 12th July, 1996, that Paradip Port Trust itself has come to the following conclusion :-

"the technical capability of any of the three bidders to undertake the works is not in question.

two of he bids are very similar in price.

If additional commercial information which has now been provided by bidders through Paradip Port Trust, had been available at the time of assessment, the outcome appear to the favour award to AFCONS."

This being the position, in our considered opinion, High Court was not justified in interfering with the award by going into different clauses of the bid document and then coming to the conclusion that the terms provided for modification or corrections even after a specified date and further coming to the conclusion that respondent no.1 being the lowest bidder there was no reason for the Port Trust to award the contract in favour of the appellant. We cannot lose sight of the fact of escalation of cost in such project on account of delay and the time involved and further in a coordinated project like this, if one component is not worked out the entire project gets delayed and the enormous cost on that score if re-bidding is done. The High Court has totally lost sight of this fact which directing the rebidding. In our considered opinion direction of re-bidding in the facts and circumstances of the present case instead of being in the public interest would be grossly detrimental to the public interest.

In the premises, as aforesaid, we set aside the impugned judgment of the Orissa High Court and direction that the contract awarded in favour of the appellant Paradip Port Trust be affirmed and the appellant may execute the work expeditiously. We further

make it clear that the appellant will not be entitled to claim any escalation of the bid amount on the ground of any delay in issuing the work order on account of the pendency of the present litigation. This appeal is, therefore, allowed. But in the circumstance without any order as to costs.