M/S N.G. Projects Limited vs M/S Vinod Kumar Jain on 21 March, 2022

Author: Hemant Gupta

Bench: V. Ramasubramanian, Hemant Gupta

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1846 OF 2022
(ARISING OUT OF SLP (CIVIL) NO. 2103 OF 2022)

M/S. N.G. PROJECTS LIMITED .....APPELLA

VERSUS

M/S. VINOD KUMAR JAIN & ORS. .....RESPONDENT

ORDER

HEMANT GUPTA, J.

1. The challenge in the present appeal is to an order dated 6.1.2022 passed by the Division Bench of the High Court of Jharkhand at Ranchi whereby the appeal filed by the State against the order of the learned Single Bench allowing the Writ Petition No. 5416 of 2019 was dismissed.

2. The Special Leave Petition came up for hearing before this Court on 7.3.2022, when the following order was passed: -

> "Leave granted.
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> The appeal is allowed.
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> The appellant shall be permitted to complete the project but will not claim escalation for the period the matter was pending before the Court.
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> Detailed Judgment/Order to follow".

3. The Road Construction Department of Jharkhand invited tenders on Date: 2022.03.21 16:46:49 IST Reason:

7.6.2019 for reconstruction of Nagaruntari – Dhurki – Ambakhoriya Road.

Respondent No. 1 participated in the tender process and also submitted Bank Guarantee as bid security but such tender was cancelled on 20.8.2019 and fresh Notice Inviting Tender1 was invited for reconstruc- tion of the said Nagaruntari – Dhurki – Ambakhoriya road.

4. The Tender Evaluation Committee held a meeting for technical evaluation of bids and 13 out of 15 bids were held to be non-responsive in terms of Standard Bidding Document2, including that of respondent No. 1. The reason for arriving at such conclusion was that respondent No. 1 submitted a letter along with the amended Bank Guarantee to the effect that such letter forms an integral part of Bank Guarantee. Such Bank Guarantee was not in the format as prescribed in the SBD. It was also found that the Bank Guarantee was valid from 8.7.2019 to 7.3.2020, which was prior to the date on which NIT was issued on 20.8.2019, apart from the fact that the amount mentioned in numerical and in words were different. Still further, the bid capacity of respondent No. 1 amounting to Rs.60.66 crores was less than the estimated cost of work of Rs.1,05,71,13,019/-. Additionally, the affidavit and undertaking supporting the bid were not properly notarized.

5. The technical bid of the appellant was declared to be substantially responsive and after due evaluation of its financial bid, work contract was issued to the appellant on 3.10.2019. The appellant started the work on the stipulated date of commencement on 22.10.2019 and completed earth work for 21.9 kms out of the 24 kms proposed road. As per the 1 For short, the 'NIT' 2 For short, the 'SBD' appellant, it had completed work of approximately Rs.8.5 crores and had mobilized the plants and machinery to Garwa.

6. Respondent No. 1 filed a Writ Petition on 11.10.2019 for quashing of the decision of the Technical Evaluation Committee holding its bid to be non- responsive.

7. The State in its counter affidavit has taken the following objections:

(i) State could not have accepted the amended bank guarantee as it had conditions beyond what was stipulated in the format.

(ii) An amendment changes the prescribed format.

(iii) By abundant caution, the Bank was asked to verify the said Bank Guarantee but there has been no reply as on date.

(iv) NIT is of 20.8.2019 but the Bank Guarantee is from 9.7.2019 to 8.3.2020.

(v) The undertaking and affidavit has not been duly notarized.

(vi) Bid Capacity is also negative.

(vii) The other tender referred to in the writ has since been cancelled.

(viii) Financial details of bid cannot be known till opening of the bid.

8. After the pleadings were completed, the learned Single Bench of the High Court passed a common order in respect of two other works and the work in question on 14.1.2020, setting aside award of contract granted to the appellant. The learned Single Bench of the High Court passed the following directions:

> "48. Under the aforesaid facts and circumstances, all the writ petitions are disposed of by passing following orders:-
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> (i) xx xx xx
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> (ii) The decision of the Tender Committee dated 3 rd October, 2019, for the work, namely, "Reconstruction of Nagaruntari-

Dhurki-Ambakhoriya Road (MDR-139)" in relation to W.P.(C) No. 5416 of 2019 is hereby quashed. All the consequential action of the State respondents taken in relation to the said tender including the award of the tender in favour of the private respondent – M/s. N.G. Projects Limited is also quashed. The State respondents are directed to issue fresh tender for the said work and to proceed accordingly.

(iii) xx xx xx"

9. The Division Bench of the High Court dismissed two appeals against two other tenders on 7.10.2021. However, in appeal against the work in question, the Division Bench of the High Court noticed the fact that the appellant had already started the execution of the work and that part of the work had already completed but held that there was no valid distinction with the case of other two works against which Letters Patent Appeal was dismissed on 7.10.2021. The Division Bench of the High Court returned the following findings:

> "22. On a comprehensive comparison of the bid security document submitted by the writ petitioner and the appellant, we gather that the bid security document submitted by both the tenderers failed to adhere to the specifications professed by the employer. While the appellant in the final paragraph of the bid security document made the bank guarantee extendable at the bank's sole discretion contrary to the requirement of the format and the bid document whereunder the employer had the right reserved to get the bank guarantee extended and notice for such extensions to the bank waived, the writ petitioner had also deviated on this count by introducing a notwithstanding clause which was not part of the format...
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> 23. The principles of law as enunciated by the Apex Court and profusely relied upon by this Court in the judgment dated 7 th October, 2021 therefore do squarely apply to the facts of the present case as well. If the opinion of the learned Single Judge on those counts do not suffer from any perversity, there is no reason for the appellate

court to take a different view of the matter and substitute its opinion.

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25. Having analyzed the reasonings rendered by the learned single Judge in the conspicuous facts of the case, we are of the view that the decision of the tender evaluation committee in accepting the technical bid of the successful tenderer M/s. N.G. Projects Limited while rejecting the technical bid of the petitioner did not conform to uniform standards as professed by it. The selection of one and rejection of another was neither in consonance with the specific terms of the NIT and SBD read with the addendum, nor was on uniform yardstick."

10. We find that the interference in contract awarded to the appellant is wholly unwarranted and has caused loss to public interest. Construction of roads is an essential part of development of infrastructure in any State. The learned Single Bench and the Division Bench of the High Court were exercising power of judicial review to find out whether the decision of the State was manifestly arbitrary or unjust as laid down by this Court in Tata Cellular v. Union of India3 and to act as appellate authority over the decision of the State. This Court in Tata Cellular held as under:

"70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or 3 (1994) 6 SCC 651 favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State.

It is expected to protect the financial interest of the State . The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.

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77. 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. As a matter of fact, in R. v. Secretary of State for the Home Department, ex Brind [(1991) 1 AC 696] , Lord Diplock refers specifically to one development, namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should, "consider whether something has gone wrong of a nature and degree which requires its intervention".

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94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administra-

tive action.

(2) The court does not sit as a court of appeal but merely re-

views the manner in which the decision was made.

(3) The court does not have the expertise to correct the ad-

ministrative decision. If a review of the administrative de- cision is permitted it will be substituting its own decision, without the necessary expertise which itself may be falli- ble.

(4) The terms of the invitation to tender cannot be open to ju-

dicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to ac- cept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by ex- perts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administra- tive sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbi- trariness not affected by bias or actuated by mala fides. (6) Quashing decisions may impose heavy administrative bur-

den on the administration and lead to increased and un- budgeted expenditure.

Based on these principles we will examine the facts of this case since they commend to us as the correct principles."

11. Learned counsel for the appellant also referred to a judgment reported as Central Coalfields Limited & Anr. v. SLL-SML (Joint Venture Consortium) & Ors.4 wherein it was held that it was not for the Court to substitute its opinion in respect of acceptance of bank guarantee. It was held that when a particular format for a bank guarantee is prescribed, then the bidder is required to stick to that particular format alone with the caveat that the State reserves the right to deviate from the terms of the bid document within the acceptable parameters. This Court held as under:

> "32. The core issue in these appeals is not of judicial review of the administrative action of CCL in adhering to the terms of NIT and the GTC prescribed by it while dealing with bids furnished by participants in the bidding process. The core issue is whether CCL acted perversely enough in rejecting the bank guarantee of JVC on the ground that it was not in the prescribed format, thereby calling for judicial review by a constitutional court and interfering with CCL's decision.
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> 37. For JVC to say that its bank guarantee was in terms stricter than the prescribed format is neither here nor there. It is not for the employer or this Court to scrutinise every bank guarantee to determine whether it is stricter than the prescribed format or less rigorous. The fact is that a format was prescribed and there was no reason not to adhere to it. The goalposts cannot be rear- 4 (2016) 8 SCC 622 ranged or asked to be rearranged during the bidding process to affect the right of some or deny a privilege to some.
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> 47. The result of this discussion is that the issue of the accep-

tance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in Ramana Da- yaram Shetty [Ramana Dayaram Shetty v. International Airport Authority of India, (1979) 3 SCC 489] the terms of NIT cannot be ignored as being redundant or superfluous. They must be given a meaning

and the necessary significance. As pointed out in Tata Cellular [Tata Cellular v. Union of India, (1994) 6 SCC 651] there must be judicial restraint in interfering with administrative ac- tion. Ordinarily, the soundness of the decision taken by the em- ployer ought not to be questioned but the decision-making process can certainly be subject to judicial review. The sound- ness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no re- sponsible authority acting reasonably and in accordance with rel- evant law could have reached" as held in Jagdish Man- dal [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] fol- lowed in Michigan Rubber [Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216] .

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49. Again, looked at from the point of view of the employer if the courts take over the decision-making function of the employer and make a distinction between essential and non-essential terms contrary to the intention of the employer and thereby re- write the arrangement, it could lead to all sorts of problems in- cluding the one that we are grappling with. For example, the GTC that we are concerned with specifically states in Clause 15.2 that "Any bid not accompanied by an acceptable Bid Security/EMD shall be rejected by the employer as non-responsive". Surely, CCL ex facie intended this term to be mandatory, yet the High Court held that the bank guarantee in a format not prescribed by it ought to be accepted since that requirement was a non-essen- tial term of the GTC. From the point of view of CCL, the GTC has been impermissibly rewritten by the High Court."

12. In Afcons Infrastructure Limited v. Nagpur Metro Rail Corporation Limited & Anr.5, this Court held that the owner or the employer of a project, having authored the tender documents, is the best person to un- derstand and appreciate its requirements and interpret its documents. It was held as under:

> "13. In other words, a mere disagreement with the decision-mak- ing 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, irra- tionality or perversity must be met before the constitutional court interferes with the decision-making process or the deci- sion.
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> 15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to un-

derstand and appreciate its requirements and interpret its docu- ments. The constitutional courts must defer to this understand- ing 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 possi- ble that the owner or employer of a project may give an interpre- tation to the tender documents that is not acceptable to the con- stitutional courts but that by itself is not a reason for interfering with the interpretation given."

13. This Court sounded a word of caution in another judgment reported as Silppi Constructions Contractors v. Union of India and Ors.6, wherein it was held that the Courts must realize their limitations and the havoc which needless interference in commercial matters could cause. In contracts involving technical issues, the Courts should be even more 5 (2016) 16 SCC 818 6 2019 SCC OnLine SC 1133 reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain . As laid down in the judgments cited above, the Courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference would cause unnecessary loss to the public exchequer. It was held as under:-

> “19. This Court being the guardian of fundamental rights is duty bound to interfere when there is arbitrariness, irrationality, mala fides and bias. However, this Court in all the aforesaid decisions has cautioned time and again that courts should exercise a lot of restraint while exercising their powers of judicial review in contractual or commercial matters. This Court is normally loathe to interfere in contractual matters unless a clear-cut case of arbitrariness or mala fides or bias or irrationality is made out. One must remember that today many public sector undertakings compete with the private industry. The contracts entered into between private parties are not subject to scrutiny under writ jurisdiction. No doubt, the bodies which are State within the meaning of Article 12 of the Constitution are bound to act fairly and are amenable to the writ jurisdiction of superior courts, but this discretionary power must be exercised with a great deal of restraint and caution. The Courts must realize their limitations and the havoc which needless interference in commercial matters can cause. In contracts involving technical issues the courts should be even more reluctant because most of us in judges' robes do not have the necessary expertise to adjudicate upon technical issues beyond our domain. As laid down in the judgments cited above the courts should not use a magnifying glass while scanning the tenders and make every small mistake appear like a big blunder. In fact, the courts must give "fair play in the joints" to the government and public sector undertakings in matters of contract. Courts must also not interfere where such interference will cause unnecessary loss to the public exchequer.
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> 20. The essence of the law laid down in the judgments referred to above is the exercise of restraint and caution; the need for overwhelming public interest to justify judicial intervention in matters of contract involving the state instrumentalities; the courts should give way to the opinion of the experts unless the decision is totally arbitrary or unreasonable; the court does not sit like a court of appeal over the appropriate authority; the court must realize that the authority floating the tender is the best judge of its requirements and, therefore, the court's interference should be minimal. The authority which floats the contract or tender and has authored the tender documents is the best judge as to how the documents have to be interpreted. If two interpretations are possible then the interpretation of the author must be

accepted. The courts will only interfere to prevent arbitrariness, irrationality, bias, mala fides or perversity. With this approach in mind, we shall deal with the present case." (Emphasis supplied)

14. In National High Speed Rail Corpn. Ltd. v. Montecarlo Ltd.7, this Court sounded a word of caution while entertaining the writ petition and/or granting stay which ultimately may delay the execution of the Mega projects. It was held as under:

"95. Even while entertaining the writ petition and/or granting the stay which ultimately may delay the execution of the Mega projects, it must be remembered that it may seriously impede the execution of the projects of public importance and disables the State and/or its agencies/instrumentalities from discharging the constitutional and legal obligation towards the citizens. Therefore, the High Courts should be extremely careful and circumspect in exercise of its discretion while entertaining such petitions and/or while granting stay in such matters. Even in a case where the High Court is of the prima facie opinion that the decision is as such perverse and/or arbitrary and/or suffers from mala fides and/or favouritism, while entertaining such writ petition and/or pass any appropriate interim order, High Court may put to the writ petitioner's notice that in case the petitioner loses and there is a delay in execution of the project due to such

7 2022 SCC OnLine SC 111 proceedings initiated by him/it, he/they may be saddled with the damages caused for delay in execution of such projects, which may be due to such frivolous litigations initiated by him/it. With these words of caution and advise, we rest the matter there and leave it to the wisdom of the concerned Court(s), which ultimately may look to the larger public interest and the national interest involved."

15. In Uflex Ltd. v. Government of T.N.8, this Court stated that the enlarged role of the Government in economic activity and its corresponding ability to give economic "largesse" was the bedrock of creating what is commonly called the "tender jurisdiction". The objective was to have greater transparency and the consequent right of an aggrieved party to invoke the jurisdiction of the High Court under Article 226 of the Constitution of India beyond the issue of strict enforcement of contractual rights under the civil jurisdiction. However, the ground reality today is that almost no tender remains unchallenged. Unsuccessful parties or parties not even participating in the tender seek to invoke the jurisdiction of the High Court under Article 226 of the Constitution. The Court held as under:-

"2. The judicial review of such contractual matters has its own limitations. It is in this context of judicial review of administrative actions that this Court has opined that it is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. The purpose is to check whether the choice of decision is made lawfully and not to check whether the choice of decision is sound. In evaluating tenders and awarding contracts, the parties are to be governed by principles of commercial prudence. To that extent, principles of equity and natural justice have to stay at a distance.

[Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] 8 (2022) 1 SCC 165

> 3. We cannot lose sight of the fact that a tenderer or contractor with a grievance can always seek damages in a civil court and thus, "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". [Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517] xx xx xx
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> 42. We must begin by noticing that we are examining the case, as already stated above, on the parameters discussed at the inception. In commercial tender matters there is obviously an aspect of commercial competitiveness. For every succeeding party who gets a tender there may be a couple or more parties who are not awarded the tender as there can be only one L-1.

The question is should the judicial process be resorted to for downplaying the freedom which a tendering party has, merely because it is a State or a public authority, making the said process even more cumbersome. We have already noted that element of transparency is always required in such tenders because of the nature of economic activity carried on by the State, but the contours under which they are to be examined are restricted as set out in Tata Cellular [Tata Cellular v. Union of India, (1994) 6 SCC 651] and other cases. The objective is not to make the Court an appellate authority for scrutinising as to whom the tender should be awarded. Economics must be permitted to play its role for which the tendering authority knows best as to what is suited in terms of technology and price for them." (Emphasis supplied)

16. In Galaxy Transport Agencies v. New J.K. Roadways9, a three-judge bench again reiterated that the authority that authors the tender document is the best person to understand and appreciate its requirements, and thus, its interpretation should not be second-guessed by a court in judicial review proceedings. It was observed as thus:

> 9 2020 SCC OnLine SC 1035 "17. In accordance with these judgments and noting that the interpretation of the tendering authority in this case cannot be said to be a perverse one, the Division Bench ought not to have interfered with it by giving its own interpretation and not giving proper credence to the word "both" appearing in Condition No. 31 of the N.I.T. For this reason, the Division Bench's conclusion that JK Roadways was wrongly declared to be ineligible, is set aside.
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> 18. Insofar as Condition No. 27 of the N.I.T. prescribing work experience of at least 5 years of not less than the value of Rs. 2 crores is concerned, suffice it to say that the expert body, being the Tender Opening Committee, consisting of four members, clearly found that this eligibility condition had been satisfied by the Appellant before us. Without therefore going into the assessment of the documents that have been supplied to this Court, it is well settled that unless arbitrariness or mala fide on the part of the tendering authority is alleged, the expert evaluation of a particular tender,

> particularly when it comes to technical evaluation, is not to be second-guessed by a writ court.

Thus, in Jagdish Mandal v. State of Orissa, (2007) 14 SCC 517, this Court noted:

> "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 commer- cial 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 ex- ercise of power of judicial review, interfere even if a proce- dural 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 dis- putes. The tenderer or contractor with a grievance can al- ways seek damages in a civil court. Attempts by unsuc- cessful 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 exer- cising power of judicial review, should be resisted. Such in- terferences, 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. Therefore, a court before interfering in tender or contrac- tual matters in exercise of power of judicial review, should pose to itself the following questions:
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> (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 licences, dealerships and franchises) stand on a different footing as they may require a higher degree of fairness in action." xx xx xx

20. This being the case, we are unable to fathom how the Division Bench, on its own appraisal, arrived at the conclusion that the Appellant held work experience of only 1 year, substituting the appraisal of the expert four-member Tender Opening Committee with its own."

17. Therefore, the position of law with regard to the interpretation of terms of the contract is that the question as to whether a term of the contract is essential or not is to be viewed from the perspective of the employer and by the employer. Applying the aforesaid position of law to the present case, it has been the contention of respondent No. 1 that the for-

mat for bank guarantee was not followed strictly by the State and that the relaxation given was not uniform, in that respondent No. 1 was sin- gled out. The said contention has found favour with the Courts below.

18. In the present matter, respondent No. 1 submitted its first bank guaran-

tee on 8.7.2019 in relation to the first tender for the same project. How- ever, this first tender was cancelled through a notice, as acknowledged by respondent No. 1. This being the case, being fully aware of the fact that the first tender was no more in force and given that there was specifically a new tender in place, respondent No. 1 was required to sub- mit a bank guarantee in the format specified as per the Agreement. However, respondent no. 1 opted to use the same bank guarantee which was drawn on 8.7.2019, albeit with a letter from the bank indicating that there is now an amendment with regard to the dates and the contract therein. It is patently clear that if the format for a bank guarantee is an essential condition of the Contract, the format in which the respondent has opted to submit it is a substantial variation in the terms of the con- tract. If the variation that is done by respondent no. 1 is considered to be an acceptable variation, then it would create an onerous burden on the tendering authority to ensure that each underlying bank guarantee is valid and further to consider whether the amendment letter itself was with the full knowledge and consent of the bank. As it were, on the facts of the case, the State informed the High Court that it had attempted to verify the amendment but there was no response from the Bank. This being the case, it is submitted that the relaxation in the format to bank guarantee was rightly not provided to the respondent.

19. The Specific Relief Act, 1963 was amended by Central Act 18 of 2018 when clause (ha) was inserted in Section 41 of the said Act to say:

> "(ha) if it would impede or delay the progress or completion of any infrastructure project or interfere with the continued provision of relevant facility related thereto or services being the subject matter of such project."

20. Such amendment was in pursuance of the report submitted on 20th June 2016 of the Expert Committee. The report is as under:-

> "The Expert Committee set on examining Specific Relief Act, 1963 submits its Report to Union Law & Justice Minister Recommends modifications for ensuring ease of doing business The Expert Committee set on examining the Specific Relief Act, 1963 today Submitted its Report To Union Law & Justice Minister Shri D.V.Sadananda Gowda here in New Delhi. In its report the committee has recommended modifications in the Specific Relief Act, 1963 for ensuring the ease of doing business.

In the context of tremendous developments which have taken place since 1963 and the present changed scenario involving contract based infrastructure developments, public private partnerships and other public projects, involving huge investments; and changes required in the present scheme of the Act so that specific performance is granted as a general rule and grant of compensation or damages for non-performance remains as an exception, the committee decided i. To change the approach, from damages being the rule and specific performance being the exception, to specific performance being the rule, and damages being the alternate remedy..

ii. To provide guidelines for reducing the discretion granted to Courts and tribunals while granting performance and injunctive reliefs.

iii. To introduce provisions for rights of third parties (other than for Government contracts).

iv. To consider addressing unconscionable contracts, unfair contracts, reciprocity in contracts etc., and implied terms.

The committee observed that there is a need to classify diverse Public utility Contracts as a distinct class recognising the inherent public interest/importance to be addressed in the Act. Any public work must progress without interruption. This requires consideration whether a court's intervention in public works should be minimal. Smooth functioning of Public works projects can be effectively managed through a monitoring system and regulatory mechanism. The role of courts in this exercise is to interfere to the minimum extent so that public works projects will not be impeded or stalled."

21. Since the construction of road is an infrastructure project and keeping in view the intent of the legislature that infrastructure projects should not be stayed, the High Court would have been well advised to hold its hand to stay the construction of the infrastructure project. Such provision should be kept in view even by the Writ Court while exercising its juris- diction under Article 226 of the Constitution of India.

22. The satisfaction whether a bidder satisfies the tender condition is primarily upon the authority inviting the bids. Such authority is aware of expectations from the tenderers while evaluating the consequences of non-performance. In the tender in question, there were 15 bidders. Bids of 13 tenderers were found to be unresponsive i.e., not satisfying the tender conditions. The writ petitioner was one of them. It is not the case of the writ petitioner that action of the Technical Evaluation Committee was actuated by extraneous considerations or was malafide. Therefore, on the same set of facts, different conclusions can be arrived at in a bona-fide manner by the Technical Evaluation Committee. Since the view of the Technical Evaluation Committee was not to the liking of the writ petitioner, such decision does not warrant for interference in a grant of contract to a successful bidder.

23. In view of the above judgments of this Court, the Writ Court should re-

frain itself from imposing its decision over the decision of the employer as to whether or not to accept the bid of a tenderer. The Court does not have the expertise to examine the terms and conditions of the present- day economic activities of the State and this limitation should be kept in view. Courts should be even more reluctant in interfering with contracts involving technical issues as there is a requirement of the necessary ex- pertise to adjudicate upon such issues. The approach of the Court should be not to find fault with magnifying glass in its hands, rather the Court should examine as to whether the decision-making process is after com- plying with the procedure contemplated by the tender conditions. If the Court finds that there is total arbitrariness or that the tender has been granted in a malafide manner, still the Court should refrain from interfer- ing in the grant of tender but instead relegate the parties to seek dam-

ages for the wrongful exclusion rather than to injunct the execution of the contract. The injunction or interference in the tender leads to addi- tional costs on the State and is also against public interest. Therefore, the State and its citizens suffer twice, firstly by paying escalation costs and secondly, by being deprived of the infrastructure for which the present-day Governments are expected to work.

24. The State has paid over a sum of Rs.3,98,52,396/- to the appellant till date, though the stand of the appellant is that it had submitted bills of work of Rs.8.5 crores. The termination of contract would cause additional financial burden on the State and also deprive the amenity of road for a longer period. Learned counsel for the appellant has stated that it shall not claim escalation of costs for the period when the writ petition before the High Court was pending and there was a stay granted.

25. In view thereof, we find that the action of the respondent in setting aside the letter of acceptance granted to the appellant suffers from manifest illegality and cannot be sustained. Consequently, the appeal is disposed of with a direction to the respondent State to allow the appellant to resume and complete the work by excluding the period spent in the stay of execution of the contract.

26. A word of caution ought to be mentioned herein that any contract of public service should not be interfered with lightly and in any case, there should not be any interim order derailing the entire process of the services meant for larger public good. The grant of interim injunction by the learned Single Bench of the High Court has helped no-one except a contractor who lost a contract bid and has only caused loss to the State with no corresponding gain to anyone.

27. We also find that multiple layers of exercise of jurisdiction also delay the final adjudication challenging the grant of tender. Therefore, it would be open to the High Courts or the Hon'ble Chief Justice to entrust these petitions to a Division Bench of the High Court, which would avoid at least hearing by one of the forums.

.....J. (HEMANT GUPTA) .....J. (V. RAMASUBRAMANIAN) NEW DELHI;

MARCH 21, 2022.