

M/S Sam Built Well Pvt. Ltd. vs Deepak Builders on 14 December, 2017

Equivalent citations: AIR 2018 SUPREME COURT 44, 2018 (2) SCC 176, AIR 2018 SC (CIVIL) 578, (2018) 1 ALLMR 965 (SC), (2018) 1 WLC(SC)CVL 271, (2018) 2 BANKCAS 73, (2017) 14 SCALE 275, (2018) 1 PAT LJR 172, (2018) 1 RECCIVR 494, (2018) 1 CURCC 94, 2018 (2) KCCR SN 117 (SC)

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Bench: Navin Sinha, R.F. Nariman

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 21858 OF 2017
(Arising out of Special Leave Petition (Civil) No.22055 of 2017)

M/s Sam Built Well Pvt. Ltd. ... Appellant

Versus

Deepak Builders & Ors. ... Respondents

JUDGMENT

R.F. Nariman, J.

1. Leave granted.

2. The present appeal involves a notice inviting tenders (NIT) dated 16th March, 2017 by which the director of the Institute of Nano Science and Technology, Mohali, invited percentage rate composite bids from eligible firms/contractors in a two bid system for construction of the Institute of Nano Science and Technology Campus at Knowledge City, Sector 81, Mohali, consisting of research, academic and administrative buildings together with hostel, residential, amenity and utility buildings. The estimated cost of the said project was Rs.162.18 crores, with earnest money payable being Rs.1.72 crores. The period of completion was stated to be 20 months and the last date for submission of tender was 10 th April, 2017. Clause 8 of the said NIT is important and states as under:

“8. Contractors/bidders who fulfill the following minimum criteria shall be eligible to apply. Joint ventures/consortium are not accepted.

(a) Should have satisfactorily completed the works as mentioned below during the last date of submission of bids.

(i) Three similar completed works each costing not less than Rs.64.9 crores, or

(ii) Two similar completed works each costing not less than Rs.97.3 crores,

(iii) One similar completed work of aggregate cost not less than Rs.129.7 crores.

Similar work shall mean work of “construction of institutional/educational buildings campus with minimum five storeys RCC framed structure building including electrical, plumbing, fire fighting, HVAC works under composite contract executed in India in a single contract.”

3. Several persons submitted their bids, including Respondent No.1, who claimed that it had done “similar work” as follows:

Sr. Name of Completion Current cost Remarks No. work date after addition of 7% per annum
1 Construction 31.03.2016 Rs. 97.76 Cr. It has of District Current basement Administrative enhanced value plus 5 complex at as per clause storeys RCC Sector-76, 2.2.4 framed SAS Nagar, structure Rs. 97.76 cr x Mohali 107% = Rs.104.60 Cr.

2. Construction 05.10.2011 Rs.62.65 cr. It has of Office Current basement Building of enhanced value plus six Punjab Mandi as per clause storeys RCC Board, 2.2.4 framed Phase-11, SA structure Rs. 62.25cr x Nagar, Mohali 114% =70.96cr.

c	Construction of Jang-e-Azadi Memorial Project at Kartarpur, Jalandhar (Phase-1)	16.03.2015	Rs.172.32 cr	It has height of 42 meters i.e. more than 8 storeys RCC framed structure
4	Construction of Judicial Court Complex at Sector 76, SAS Nagar,	23.12.2015: 14 courts out of 25 courts were inaugurated on 23rd Dec.,	Work of Phase 2 for remaining courts in progress. Work of Rs. 75.28 cr. was completed upto	It has basement plus 5 storeys RCC framed structure

Mohali	2015 and are functioning from the building. Work of Phase 2 for remaining courts in progress.	31.03.2017 and balance work in progress
5	Total Value	Rs.423.16 Cr.

4. Pre-bid meetings were conducted in March, 2017 and ultimately Respondent No.1 submitted its tender on 7 th April, 2017. 5 out of 16 bidders, who initially came forward, participated in the tender process. Admittedly, a technical evaluation report dated 24th April, 2017 stated that the eligibility criteria contained in Clause 8 of the NIT was not met by Respondent No.1. This was reiterated by two other expert bodies, namely, Tata Consultancy Services and the Building Works Committee of the Institute. Respondent No.2 then addressed a letter to Respondent No.1 informing it about its ineligibility. On 3rd May, 2017, Respondent No.1 filed a Writ Petition which was dismissed by the learned Single Judge stating that “similar work”, which requires to be considered under Clause 8 of the NIT, would be work which involves not only construction of administrative blocks, but also several other buildings. Looking at the four projects, the last of which was admittedly kept out of consideration, it was found that none of the work could be said to be “similar” in nature and referring to the fact that three specialists had stated that Respondent No.1 was ineligible, the Court adopted the hands-off posture, considering the limited parameters of judicial review. However, by the impugned judgment dated 4 th August, 2017, the Division Bench of the High Court allowed the appeal of Respondent No.1 and set aside the judgment of the learned Single Judge stating that though there was no malafides in the present case, the judgment of the learned Single Judge was incorrect and that, therefore, Respondent No.1 was clearly eligible. The appeal was then disposed of by directing Respondent No. 2 to consider Respondent No.1’s bid, along with other eligible bids, and award the contract after assessing the bids on all permissible criteria.

5. Pursuant to the said judgment, we have been informed that the tender was ultimately awarded on 20 th August, 2017 to Respondent No.1, inter alia, for the reason that Respondent No.1 quoted a figure of roughly 4 to 5 crores less than that of the Appellant. Further, even though we are in December, 2017, the Appellant has, admittedly, not yet left the site of construction and resultantly Respondent No.1 has not yet commenced work.

6. Dr. A.M. Singhvi, learned senior counsel appearing on behalf of the Appellant, has taken us through three expert committee reports in the present case. According to the learned senior counsel, it is incorrect to state that the National Building Code of

India, 2016, which is framed by the Bureau of Industrial Costs and Prices, does not apply to the facts of the present case inasmuch as the special conditions of the tender specifically make the said Code applicable and that, therefore, the expert committee reports based, inter alia, on the provisions of the Code, cannot be interfered with. Also, according to the learned senior counsel, the learned Single Judge correctly appreciated that in tender matters, judicial review is very limited and argued before us that the Division Bench, while setting aside the judgment of the learned Single Judge, has not kept in view the parameters of judicial review of tenders. Equally, according to the learned senior counsel, it being clear that there are no malafides or perversity involved, it would not be possible for a Writ Court, sitting in judicial review, to interfere with the tender process as has been done by the Division Bench.

7. Per contra, Shri Mukul Rohatgi, learned senior counsel appearing for Respondent No.1, supported the impugned judgment and stated that the National Building Code of India was only made applicable in so far as safety aspects of the buildings are concerned. This being the case, according to him, all the expert committee reports in relying upon the provisions of the said Code could not have done so. Also, according to him, one look at the three projects that have been carried out by Respondent No.1 would show that they are all projects consisting of buildings which have basement plus 5 or more storeys and that, therefore, it is clear that they were “similar works” within the meaning of the expression contained in Clause 8 of the NIT, as these were nothing other than institutional buildings that were constructed by Respondent No.1.

8. Dr. Singhvi, in rejoinder, stated that none of the three works could possibly be called “similar work” because an entire complex had to be constructed, and similar work was also defined to mean, “construction of institutional/educational buildings campus with minimum five storeys RCC framed structure building...”. According to the learned senior counsel, one building, albeit of 5 storeys or more, would not suffice.

9. Having heard learned counsel for both parties, it is important to set out the parameters for judicial review in cases like the present one. In a similar case, namely, Afcons Infrastructure Ltd. v. Nagpur Metro Rail Corpn. Ltd., (2016) 16 SCC 818 at 825-26, paragraph 4.2(a) of Section III of the tender conditions in that case again spoke of a certain minimum number of “similar contracts” as previous work experience.

The question before this Court was whether an inter-state high speed railway project could be similar to metro civil construction work. After laying down the parameters of judicial review and referring to various judgments for the same, this Court held:

“15. We may add that the owner or the employer of a project, having authored the tender documents, is the best person to understand and appreciate its requirements and interpret its documents. The constitutional courts must defer to this

understanding and appreciation of the tender documents, unless there is mala fide or perversity in the understanding or appreciation or in the application of the terms of the tender conditions. It is possible that the owner or employer of a project may give an interpretation to the tender documents that is not acceptable to the constitutional courts but that by itself is not a reason for interfering with the interpretation given.

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

This was certainly not the case either before the High Court or before this Court.”

10. In *Montecarlo Ltd. v. NTPC Ltd.*, (2016) 15 SCC 272 at 288, this Court referred to various judgments, including the judgment in *Afcons Infrastructure Ltd.* (supra), and concluded as follows:

“26. We respectfully concur with the aforesaid statement of law. We have reasons to do so. In the present scenario, tenders are floated and offers are invited for highly complex technical subjects. It requires understanding and appreciation of the nature of work and the purpose it is going to serve. It is common knowledge in the competitive commercial field that technical bids pursuant to the notice inviting tenders are scrutinised by the technical experts and sometimes third-party assistance from those unconnected with the owner's organisation is taken. This ensures objectivity. Bidder's expertise and technical capability and capacity must be assessed by the experts. In the matters of financial assessment, consultants are appointed. It is because to check and ascertain that technical ability and the financial feasibility have sanguinity and are workable and realistic. There is a multi-prong complex approach; highly technical in nature. The tenders where public largesse is put to auction stand on a different compartment. Tender with which we are concerned, is not comparable to any scheme for allotment. This arena which we have referred requires technical expertise. Parameters applied are different. Its aim is to achieve high degree of perfection in execution and adherence to the time schedule. But, that does not mean, these tenders will escape scrutiny of judicial review. Exercise of power of judicial review would be called for if the approach is arbitrary or mala fide or procedure adopted is meant to favour one. The decision-making process should clearly show that the said maladies are kept at bay. But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring

special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.”

11. We have already noticed that three expert committees have scrutinized Respondent No.1’s tender and found Respondent No.1 to be ineligible. The impugned judgment of the Division Bench of the High Court expressly states that no malafides are involved in the present case. Equally, while setting aside the judgment of the learned Single Judge, the Division Bench does not state that the three expert committees have arrived at a perverse conclusion. To merely set aside the judgment of the learned Single Judge and then jump to the conclusion that Respondent No.1’s tender was clearly eligible, would be directly contrary to the judgments aforestated. Not having found malafides or perversity in the technical expert reports, the principle of judicial restraint kicks in, and any appreciation by the Court itself of technical evaluation, best left to technical experts, would be outside its ken. As a result, we find that the learned Single Judge was correct in his reliance on the three expert committee reports. The Division Bench, in setting aside the aforesaid judgment, has clearly gone outside the bounds of judicial review. We, therefore, set aside the judgment of the Division Bench and restore that of the learned Single Judge.

12. Dr. Singhvi, learned senior counsel appearing for the Appellant, has stated that the Appellant is willing to match the offer of Respondent No.1. We record the aforesaid statement and order that the tender awarded to Respondent No.1 dated 20th August, 2017, based upon the Division Bench judgment, must be set aside, and the award of the tender to the Appellant must be restored. We hasten to add that it will be open to Respondent No.2 to accept Dr. Singhvi’s offer that the project will be executed at the amount indicated by Respondent No.1.

13. The appeal is allowed in the aforesaid terms with no order as to costs.

.....J. (R.F. Nariman)J. (Navin Sinha) New Delhi;

December 14, 2017.