Supreme Court of India

U.O.I. And Ors. Etc. Etc vs Hindustan Development Corpn.And ... on 14 January, 1993

Equivalent citations: 1994 AIR 980, 1993 SCR (3) 108

Author: K J Reddy

Bench: Reddy, K. Jayachandra (J)

PETITIONER:
U.O.I. AND ORS. ETC. ETC

Vs.

RESPONDENT:
HINDUSTAN DEVELOPMENT CORPN.AND ORS. ETC. ETC.

DATE OF JUDGMENT14/01/1993

BENCH:
REDDY, K. JAYACHANDRA (J)
BENCH:
REDDY, K. JAYACHANDRA (J)
RAY, G.N. (J)

CITATION:
1994 AIR 980 1993 SCR (3) 108
1993 SCC (1) 467 JT 1993 (1) 94
1993 SCALE (1)56

ACT:
Indian Contract Act. 1872 : Sections 5,8,38--Government contract--Tender--to supply of cast steel bogies to Railway--Formation of cartel by three tenders--Railway's finding--Whether--bona fide-Dual pricing--Whether discriminatory--Allotment of quantity to renders--Supreme Court directions.

HEADNOTE:
The Railway Board entered into contracts with 12 manufacturers for the supply of cast steel bogies to be used for building the wagons, every year. Among them H.D.C., Mukand and Bhartiya had capacity to manufacture larger quantities. In 1991 two new firms Simplex and Beekay also entered the field.
For the year 1992-93, a tender notice for procurement of 1900 cast steel bogies was issued to the Regular suppliers as well as to Simplex and Beekay the new entrants.
The tender notice stated therein that the last date for submission of offers was 27.11.91 by 2.30 P.M. and the tenders to be opened at 3 P.M. on the same day; that the price was subject to the price variation clause and the base date for escalation purpose was 1.9.91; that the Railways

reserved the right to order additional quantity upto 30 % of the quantity ordered during the currency of the contract on the same price and terms and conditions with suitable extensions in delivery period.

The price quoted by H.D.C., Mukand and Bhartiya firms was identical, i.e. Rs. 77. 666 per bogie. Other tenderers price varied between Rs. 83.000 and Rs.. 84, 500 per bogie.

The Government's announcement of reduction of custom duty

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on the import of steel scrap and dispensation of freight equalisation fund for steel came after the opening of the tenders and before the finalisation of the tenders.

The Tender Committee recommended that the three manufacturers who quoted an identical lowest rates without any cushion for escalation between 1.7.91 and 1.9.1991 formed a cartel; that the reasonable rate per bogie was to be Rs. 76,000 by taking into consideration of the two concessions announced by the Government; and that the existing procedure to be followed on the question of distribution of quantities to the tenderers.

On 4.2.92, the Committee signed the recommendations. On the same date, the Member (Mechanical) of the Committee received letter from H.D.C. and Mukand, wherein the tenderers offered to substantially reduce the prices because of the concessions.

The Advisor (Finance) examined the matter and observed that if it was intended to continue the existing policy of fixing a rate and distributing the order among all the tenderers, then negotiations might not be useful; that review of the existing policy would take time; and that the present tender be decided on the basis of the existing policy.

The Member (Mechanical), the next higher authority recommended the acceptance (if the Tender Committee's recommendation.

The Finance Commissioner approving the recommendations of the committee, noted that the tenderers who quoted the identical rates had formed a cartel; that a counter offer of Rs. 76,000 be accepted but in the case of H.D.C., a price lower by Rs.1 1,000 to he offered as per their post-tender letter dated 4.2.92; that the present formula regarding the distribution of quantities be applied to all tenderers except the three who formed a cartel; that some recoveries from the three tenderers he made on the basis of their letters wherein they quoted prices which were much less than the updated price on 1.9.91 of Rs.79.305; that the post-tender letters be ignored and that for short-term gains the Department could not sacrifice long-term healthy compensation.

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The Minister for Railways, the approving authority agreeing with the recommendations of the Finance Advisor, noted that the three tenderers had formed a cartel and they he offered a price lower by Rs. 1 1.000 with reference to the counter-offer recommended by the Tender Committee and the quantities also be suitable adjusted to break the cartel and ordered for redistribution of the quantities exercising 30% option.

The Chairman, Railway Board, when received the file for implementation of the orders from the Minister, noted that action be taken as decided by the Minister, which had resulted in dual-pricing, namely, one to the three tenderers and the higher one to the other tenderers and therefore, the Minister to consider whether they could counter-offer the lower price to all the tenderers as that would result in saving much more.

When the matter was sent to the Finance Commissioner, he observed that as some of the units were sick units and owe a lot of money to the nationalised banks; it would be in the national interest to accept dual-pricing.

Therefore, the rile was again put up to the approving authority. He agreed with the recommendations of the Commissioner and the Tender Committee and directed for their implementation.

As per the final decision taken by the approving authority the three tenderers were issued a counter-offer of Rs.65,000 per bogie by telegram and other tenderers were given a counter-offer of Rs.76,000/ per bogie.

After the receipt of the telegram dated 18.3.92 H.D.C. and Mukand riled writ petitions in the Delhi High Court challenging the discriminatory counter-offer. Bhartiya had-riled a writ petition in the Calcutta High Court. It was withdrawn and another writ petition was riled later in the Delhi High Court.

In the writ petitions filed by H.D.C.and Mukand, the High Court issuing notice to the respondents,stayed the operation of the telegram dated 18.3.92.

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In reply to the telegram, H.D.C. and Mukand also wrote to the Minister of Railways offering to supply the bogies at the rate of Rs.67.000 per bogie, which was accepted by the Railway.

Pending the writ petitions, the High Court passed an interlocutory order, directing the Railway to accept the allocation of bogies recommended by the Tender Committee at the rate of Rs.67.000 per bogie subjected to the final decision in the writ petitions.

The Railway's petition for special leave to appeal filed against the interlocutor%, order of the High Court was dismissed.

Thereafter, the High Court allowed the writ petitions riled by H.D.C and Mukand and directed that all the tenderers should make the supplies at the rate of Rs. 67.000 per bogie and allocation of quantity to be considered afresh on a reasonable basis.

The Union of India filed appeal by special leave (S.L.P. (c) Nos. 11897-98/92) against the judgment of the High Court. The other SLPs. were riled by the affected tenderers who

figured as respondents Nos. 4 to 12 in the writ petitions before the High Court. The High Court disposed of Bharatiya's writ petition in terms of the judgment in the other two writ petitions (W.P.Nos. 1152 and 1157/ 92) wherein they were shown as respondent No. 13). As Bharatiya alias Besco did not question the judgment of the High Court, they were arrayed as respondent in the S.L.P. riled by the Union of India.
The Union of India submitted that the three big manufactures i.e. M/s H.D.C., Mukand and Bhartiya formed a cartel and the same was evident from the fact that each one of them quoted an identical price which was a cartel price'; that the Government in the matters of economic policy for good and sufficient reasons and in the public interest could reject the lowest offer with a view not to allow any monopoly and to encourage competition among the recognised manufacturers; that the dual pricing adopted by the Railways under the circumstances was not discriminatory; that the Railways had rightly taken into account the two concessions and found that the price at the rate of Rs.67,000 per bogie was not reasonable and, workable and it was only a cartel price and that Rs. 76,000 was the reasonable price
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and on that basis made a counter-offer to other manufacturers except to these three big manufacturers; that the Railways took into consideration all the relevant factors and on rational basis the quantities were allotted; and, therefore, they were not given larger share.
The nine smaller manufacturers in general supported the submissions of the Union of India.
The respondent- M/s H.D.C. supporting the finding of the High Court submitted that the award of the contract for supply of bogies was vitiated by mala-fides and that disproportionate allotment of quota of bogies and. dual pricing were based on malafides and estraneous considerations violating Article 14 of the Constitution; that the reasons put forward on behalf of the Railways were disingenuous and bereft of rationale.
M/s Mukand-respondent submitted that the dual set of counter offers and allocation of disproportionate quantities were highly arbitrary and that the practice and police of the past 10 years of placing orders on all manufacturers in respect of the quantities worked out on the basis of standard quantity formula at a uniform price, gave rise to legitimate expectations among all bogie manufacturers and irrational departure from the existing policy was arbitrary and unreasonable; that the making of law tender offers could not by Itself be visited with punty consequences like dual pricing and reducing the allotment of legitimate quantities.
M/s. Bhartiya submitted that the Tender Committee erred In treating m/s Bhartiya also as a member of the cartel and that the allotment of quantities was arbitrarily reduced; that M/s Bhartiya never made an offer of Rs. 67,000 and

there was nothing in writing to that effect and that merely because of the statement of the counsel during the proceedings before the High Court, it should not be understood that they were willing to supply at the rate of Rs. 67,000 and that they should not be treated differently from the other nine manufacturers.

Disposing of the Special Leave Petitions, this Court,

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HELD: 1.1. Since the offers of the three tenderers were identical and the price was somewhat lower, the Tender Committee entertained a suspicion that a cartel had been formed and the same got further strengthened by the post-tender attitude of the said manufacturers which further resulted in entertaining the same suspicion by the other authorities in the hierarchy of decision making body including the Minister of Railways. (124-D)

1.2. All the Railway authorities including the Minister acted in a bonafide mannerin taking the stand that the three manufacturers formed a cartel. (124F)

1.3. There is no enough of material to conclude that M/S H.D.C., Mukand and Bhartiya formed a cartel. Because of mere quoting identical tender offers by the Said three manufacturers for which there is some basis, the conclusion, that the "id manufacturers had formed a cartel does not appear to be correct. (124-C)

1.4. The current contract priced based on the updated price is Rs.79,505. The three manufacturers offered at Rs. 77,600. Taking into consideration the later concessions, the Tender Committee decided that the price of Rs. 76,000 is reasonable. (124-F)

1.5. The fixation of price at Rs. 67,000 per bogie straightaway without necessary and proper consideration and appraisal regarding the viability and other aspects by some experts, is not just and fair from many points of view. A fresh consideration is called for, particularly from the point of view of safeguarding the interests of the public exchequer and giving necessary protection to the smaller manufacturers. (125-B)

1.6. The Tender committee is directed to reconsider the question of fixation of reasonable price. The Tender Committee shall consider, the offer of Rs. 67,000 made by M/s H.D.C. and Mukand along with the data that would he given by them in support of that and the percentage of profits available to all the manufacturers and other relevant aspects and then fix a resonable price, at which the manufacturer would be able to supply. (125-C)

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1.7. At a belated post tender stage the Railway authorities did not deem it fit to reconsider the question of fixation of price in the light of the post tender offers made by M/s H.D.C. and Mukand, as by then they were of the opinion that the three big manufacturers have formed a cartel and quoted a cartel price. The stand by the Railways to adopt dual pricing under the circumstances is bona fide and not malafide. However, dual pricing on principle may not appear to be rational since the Railways have been following certain formula in fixing the price which is made applicable to all the manufacturers. But under certain circumstances dual pricing may be reasonable.-(125-E-F)

1.8. M/s H.D.C. and Mukand came forward with firm offer of a price at Rs. 67,000 per bogie. M/s Bhartiya also got committed to supply at the same price. All the three of them did not even challenge the order of the High Court. These three big manufacturers must be deemed to be in a position to supply at the rate of Rs.67,000 and thus they form a distinct category. The smaller manufacturers belong to a different category and if a different price is fixed for them it is not discriminatory. (125-F-G)

1.9. If the price that is to be fixed by the Tender Committee as directed by the Court happens to be more than Rs. 67,000 then that would he applicable to the smaller manufacturers only and not to M/s H.D.C., Mukand and Bhartiya who on their own commitment have to supply at the rate of Rs. 67,000. (126-A)

1.10. The price thus fixed by the Tender committee which applies only to the smaller manufacturers shall be deemed to be final and the respective contracts shall be deemed to he concluded so for the price is concerned. (126-B)

1.11. The formation of an opinion that a cartel was formed had no firm factual foundation; reduction of quota by way of reprisal can not be justified. The Minister of Railways as the final authority, after considering various relevant factors, may be justified in taking a particular decision in the matter of allotment of quota but such decision must be taken on objective basis. But, in this case, all the smaller manufacturers deserving a favourable treatment in the mat-
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ter of allotment of quota, have not been equally treated in the sense that one or two of them got larger quantities. Though this does not appear to be a serious departure, yet in these matters the Govt. is expected to be just and fair to one and all. In future the authorities would make a proper consideration of the relevant factors in respect of each tenderer in an objective manner in allotting the quantities. (126-E-H)

1.12. The three manufacturers M/s H.D.C., Mukand and Bhartiya-should be allocated the quantities as per the recommendations of the Tender Committee. However, this Court does not want to disturb at this stage the quantities finally allotted by the competent authority to the small manufacturers as that would cause great hardship to them. (127-C)

The Railway authorities was left to make necessary adjustments next year in the matter of allocation of quantities to them taking into consideration these

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allotments given to them this year.  It will be open to  the
Railways  to exercise 30% option if not  already  exercised.
The time to complete the supply is extended upto  31.3.1993.
(127-D-F)
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JUDGMENT:

CIVIL APPELLATE JURISDICTION: S.L.P (C) Nos. 1189798 of 1992 etc. etc. From the judgment and Order dated 28.8.1992 of the Delhi High Court in Civil Writ Petition Nos. 1152 & 1157 of 1992. V.R. Reddy, Addl. Solicitor General, Kapil Sibbal, P.P. Rao, Rama Jois, A. Temton, Dr. Shankar Ghosh, K.K Venugopal, Harish Salve, F.S. Nariman, A.N. Haksar, Shanti Bhushan, K.N. Bhat, T.R. Andhyarujina, C.V. Subba Rao, P.P. Singh, Mrs B. Sunita Rao, Sudhir Kulshreshtha, Rohit Tandon, Parijat Sinha, Ms Sunanda Roy, Ms. S. Bhattacharya, B.D. Ahmed, Man Mohan Singh, Gopal Subramanium, D.N. Mishra, A.M. Dittia, P. K. Ganguli, Manoj K. Das, Amit Prabhat, Tripurary Roy, K.L. Mehta, S. Ganesh, Pratap Venugopal, K.J. John, Pramod Dayal, Ajay K. Jain and D.N. Najjunda Reddy for the appearing parties.

The following Order of the Court was delivered by K. JAYACHANDRA REDDY, J. All these Special Leave Petitions arise out of the common judgment of the High Court of Delhi in Civil Writ Petitions Nos. 1 152 and 1 157/92. We heard these matters for considerable length of time. Eminent counsel appearing on both sides advanced detailed arguments. After the conclusion of the hearing it was represented that having regard to the constraint of time factor, namely that the contracts with the Railways entered into by the manufacturers who are parties, have to be completed very soon the judgment in these matters has to be delivered as early as possible or at least the conclusions have to be given soon. We are conscious of the fact that it is likely to take considerable time to deliver a detailed judgment. However having gone through the records carefully and after due consideration of the various arguments advanced, we have reached the conclusions given hereunder and we propose to deliver the detailed judgment at a later stage giving all the reasons in support of these conclusions. We, however, think it necessary to state a few relevant facts and the issues involved in a concised form before we set out our conclusions.

Every year the Railway Board enters into contracts with the manufacturers for the supply of cast steel bogies which are used in turn for building the wagons. Cast steel bogies come under a specialised item procured by the Railways from the established sources of proven ability. There are 12 suppliers in the field who have been regularly supplying these items. Two new firms Simplex and Beekay also entered the field. Among them admittedly M/s H.D.C., Mukand and Bhartiya are bigger manufacturers having capacity to manufacture larger quantities. On 25, 10.91 a limited tender notice for procurement of 19000 cast steel bogies was issued to the regular suppliers as well as the above two new entrants for the year namely from 1.4.1992 to 31.3.93. The last date for submission of offers to the Ministry of Railways was 27.11.91 by 2.30 P.M. and the tenders were to be opened on the same day at 3 P.M. It was also stated therein that the price was subject to the price variation clause and the base date for the purpose of escalation was 1.9.91 and that the Railway reserved the right to order additional quantity upto 30% of the ordered quantity during the currency of the contract on the same price and terms and conditions with suitable extensions in delivery period. The offers were to remain open for a period of 90 days. On that day the tenders were opened in the presence of all parties. The price quoted by the three manufacturers i.e M/s H.D.C., Mukand and Bharatiya was an identical price of Rs. 77,666 per bogie while other tenderers quoted between 83.000 and 84,500 per bogie. After the tenders were opened and before the same could be finalised, the Government of India announced two major concessions namely reduction. of custom duty on the import of steel scrap and dispensation of freight equalisation fund for steel. The tenders were put up and and placed before the Tender Committee of the Railways which considered all the aspects. The committee concluded that three of the tenderers namely M/s H.D.C., Mukand and Bharatiya who had quoted identical rates without any cushion for escalation between 1.7.91 and 1.9.91, have apparently formed acartel. The Tender committee also noted that the rates quoted by them were the lowest. Taking into consideration the reduction of Rs. 1500 as a result of the concessions in respect of the reduction of custody duty on the import of steel scrap and dispensation of the freight equalisation fund for steel, the Tender Committee concluded that the reasonable rate would be Rs.76,000per bogie. On the question of distribution of quantities to the various manufacturers the Tender committee decided to follow the existing procedure. The Tender Committee. signed these recommendations on 4.2.92 but on the same day the Member (Mechanical) of the Committee received letters from M/s H.D.C. and Mukand. M/s H.D.C. in its letter stated that in view of the concessions and also on the basis that per kg. rate of casting per bogie could be reduced from Rs.37.50 to Rs.29 the cost of casting can also be reduced and therefore they would be in a position to supply the bogies at a lesser rate, in case a negotiation meeting is called. M/s Mukand in its letter also offered to substantially reduce the prices and they would like to co-operate with the Railways and the Government and bring down the prices as low as possible and asked for negotiations. Though this was post- tender correspondence, the Department felt that the offers made by M/s H.D.C. and Mukand could be considered. The whole matter was examined by the Advisor (Finance) in the first instance and by an elaborate note he observed that the need for encouraging open competition to improve quality and bring down costs has been recommended by the Government and if it is intended to continue the existing policy of fixing a rate and distributing the order among all the manufacturers, then negotiations may not be useful as uniform prices offered to all manufacturers have to be sufficient even for the smaller and less economical units and that as any review of the existing policy would take time, the present tender can be decided on the basis of the existing policy. With this noting the file was immediately sent to the Member (Mechanical), the nest higher authority. He with some observation, however recommended the acceptance of the Tender Committee's recommendations. The file was then put up to Financial Commissioner, He noted that the Tender Committee was convinced that the three manufacturers who quoted identical price of Rs. 77,666 had formed a cartel. He also considered the offers made by M/s H.D.C. and Mukand and observed that these three manufacturers who quoted a cartel price intended to get a larger order on the basis of such negotiated price which would eventually nullify the competition from the other manufacturers and lead to their industrial sickness and subsequently to monopolistic price situation. lie, however, approved the Tender committee's recommendations that a counter-offer of Rs. 76,000 may be accepted but in the case of M/s H.D.C. a price lower by Rs. 1 1,000 may be offered as per their letter dated 4.2.92. lie also recommended that the two manufacturers M/s. Cimmco and Texaco may the given orders to the extent of their capacity or quantity offered by them whichever is lower in view of the fact that they are wagon builders and the present formula regarding the distribution of quantities may he applied to all manufacturers except the three who have formed a cartel. He also recommended some recoveries from these three manufacturers who are alleged to have formed a cartel on the basis of their letters wherein they have quoted prices which were much less than the updated price as on 1.9.91 of Rs. 79,305. He also made certain other recommendations and finally concluded that the post tender letters may be ignored and that for short-term gains the Department can not sacrifice long- term healthy competition. After these recommendations of the Financial commissioner the file was put up to the approving authority i.e. the Minister for Railways, who in general agreed with the recommendations of the Financial Advisor. He also noted that these three manufacturers have formed a cartel. He also noted that subsequent to the Financial commissioner's note, besides M/s H.D.C. and Mukand has also offered to reduce the price by 10% or more vide their letter dated 19.2.92 if called for negotiations. Taking these circumstances into consideration the Minister ordered that all these three firms may be offered a price lower by Rs. 1 1,000 with reference to the counter-offer recommended by the Tender committee and the quantities also be suitably adjusted so that the cartel is broken. The Minister also noted that as a result of this a saving of about Rs. 11 crores would be effected. In his note, the Minister also ordered redistribution of the quantities. Heal so ordered that3O% options should straightaway be exercised. After the approving authority took these decisions,the file went to he Chairman Railway Board for implementing the decisions. The noted that action will be taken as decided by the Minister but added that action will be taken as decided by the Minister but added that it results in dual-pricing namely one to the three manufacturers and the higher one to the others and therefore the Minister may consider whether they could counter-offer the lower price to all the manufacturers as that would result in saving much more. The file was then again sent to and was considered by the financial Commissioner who noticed this endorsement made by the Chairman, Railway Board. He however noted that so far all the other firms are concerned it is Rs.3305 less than the present contract price but it would not be equitable to offer the lower price put forward by the three manufacturers as it would make the other units enviable and that incidentally the price of' Rs. 76,000 now proposed to be counteroffered to the other firms is also in line with the recommendation of the Tender committee. The, however, noted that some of the units were sick units and owe a lot of money to the nationalised banks and it would therefore be in the national interest to accept dual-pricing. Therefore the file was again put up to the approving authority who agreed with the recommendations of the Financial Commissioner and the render Committee and directed that the same may be implemented. In view of this final decision taken by the approving authority a telegram was issued to the three manufacturers giving them a counter-offer of Rs. 65 000 per bogie. The counter-offer was also made to the other nine manufacturers at the rate of Rs. 76,000per bogie namely the price worked out by the Tender committee. Soon after the receipt of this telegram dated 18.3.92 M/s H.D.C. and Mukand filed writ petitions in the Delhi High Court challenging the so-called discriminatory counteroffer. M/s Bhartiya also filed a similar petition in Calcutta High Court but the same was withdrawn but another writ petition was filed later in the Delhi High Court. In the writ petitions filed by M/s H.D.C. and Mukand, the High Courts stayed the operation of the telegram dated 18.3.92 and issued notice to the Union of India and to the Executive Director and Director of the Railways (Stores) who figured as respondents in those writ petitions. M/s H.D.C. and Mukand also wrote to the Minister of Railways in reply to the telegram that they were not prepared to accept the counter-offer at the rate of Rs.65,000 and instead they offered to supply the bogies at the rate of Rs 67,000) per bogie. The Railways accepted this offer and intimated M/s H.D.C. and Mukand accordingly. The High Court, in an interlocutory stage pending the writ petitions, passed an order on 2.4.92 directing the Ministry to accept the allocation of bogies recommended by the Tender committee and to pay a price at the rate of Rs. 67,000 only per bogie and that would be subject to the final decision of the writ petitions. Being aggrieved by this order, the Railways filed a petition for special leave to appeal no. 5512/92 and this court while refusing to interfere at that interlocutory stage made the following observations on 28.4.92: "However, we may observe-and so direct that during the pendency of the writ petition if any of the suppliers in terms of the package of distribution indicated by the High Court (including the petitioners in the High Court in the writ petition), seek an "on account" payment representing the difference between the sum of Rs. 67,000 indicated as price by the High Court and the sun of Rs 76,000 contemplated by the Railways; the order of the High Court shall not prohibit the Government making such on-account payment to such suppliers on each wagon on the condition that the said on-account payment of Rs. 9,000 per bogie should be covered by a bank guarantee for its prompt repayment together with interest at 20% per anum in the event the on-account payment cannot be observed in the price structure that may ultimately come to be determined pursuant to the final decision in the writ petitions. The special leave petitions are disposed of accordingly." Thereafter the High Court took up the writ petitions for final hearing and by the impugned judgment allowed the writ petitions filed by M/s H.D.C. and Mukand and directed that all the suppliers should make the supplies at the rate of Rs. 67,000 per bogie and also set aside the quantity allocation and directed that the same should be considered afresh on a reasonable basis and pending such fresh consideration future supplies should he made on the basis of the recommendations ofthe Tender Committee. In the course of the judgment, the High Court also made certain observation to the effect that the decision of the approving authority is arbitrary and that this Government has no justification to offer a higher price than the market price to any supplier to rehabilitate it. It was further observed that the stand of the Railways that those three manufacturers formed a cartel is based on extraneous considerations. The learned judges of the High Court also observed that they failed to understand as to why the Railways authorities could not initiate negotiations with those manufacturers who had offered to reduce their offer which could result in saving crores of rupees to the Railways. Aggrieved by this judgment of the High Court the Union of India filed S.L.P. (civil) Nos. 1 1897-98/92. Before the High Court in the two writ petitions filed by M/s H.D.C. and Mukand the other manufacturers figured is respondents Nos. 4 to 12 and M/s Bharatiya otherwise Known as Besco figured as respondent No. 13. The other S.L.Ps. are filed by those nine manufacturers. M/s Bharatiya, respondent No. 13, has not questioned the judgment of the High Court. As mentioned above M/s Bharatiya filed a separate writ petition No. 1753/ 92 in the Delhi High Court after withdrawing an earlier writ petition filed in the Calcutta High Court. The same also was disposed of in terms of the judgment in the, other two writ petitions Nos. 1 152 and 1157/92. But they have not questioned the same. Consequently M/s Bhartiya figures as a respondent before us in the SLP filed by the Union of India. Before we proceed further. we would like to briefly indicate the main submissions made on behalf of all the parties to the extent relevant and important for arriving at the necessary conclusions. Learned counsel have advanced arguments on several other aspects which are incidental. We propose to deal with them and give our findings in our detailed judgment at a later stage.

Mr. Kapil Sibal, learned counsel appearing for the Union of India submitted that the three big manufacturers i.e. M/s H.D.C.. Mukand and Bhartiya formed a cartel and the same is evident from the fact that each one of them quoted an identical price which is a cartel price; and that the

Government in the matters of economic policy for good and sufficient reasons and in the public interest can reject the lowest offer with a view not to allow any monopoly and to encourage competition among the recognised manufacturers and that the dual pricing adopted by the Railways under the circumstances is not discriminatory. In this context it is also submitted that the Railways had rightly taken into account the two concessions and found that the price at the rate of Rs. 67,000 per bogie was not reasonable and workable and it was only a cartel price and that Rs. 76,000 was the reasonable price and on that basis made acounter-offer to other manufacturers except to these three big- manufacturers. The Railways had no option except to accept the offer of Rs. 67,000 by the three big- manufacturers as they took firm stand that the price is reasonable and that they would be able to supply on that rate and thereby a binding contract came into force so far these three manufacturers are concerned. Regarding the allocation of quantities the Railways have taken into consideration all the relevant factors namely that three of the nine manufacturers were BIER companies and the two others are also wagon builders having their entire business with Railways only and on that rational basis the quantities were allotted. It is also his submission that since the three big manufacture originally offered a cartel price and ill of them later apparently offered Rs. 67,000/-, in unworkable price, the Railways felt that they attempted to destroy the competition. Therefore they were not given larger share. Learned counsel relied on several authorities particularly touching the scope and ambit of Article 14 and the power of the court under Article 226 of the constitution of India. Mr. Sibal also strongly contended that the High Court grossly erred in making certain observations against the Railways namely that the stand of the Railways that those three manufacturers formed a cartel is based on extraneous considerations and somewhat similar observations in respect of the decision or the Railways on the question of price fixation. The other counsel appearing for the nine smaller manufacturers in general supported these submissions and also highlighted certain aspects in their individual cases. Shri K.K. Venugopal. learned counsel appearing for the respondent namely M/s H.D.C. submitted that the award of the contract for supply of bogies was vitiated by malafides and that disproportionate allotment of quota of bogeis and dual pricing were based on malafides and extraneous considerations violating Article 14 of the Constitution. tie further submitted that the reasons put forward on behalf of the Railways are disingenuous and bereft of rationale. The supported the finding of the High Court that the price should he fixed at Rs. 67,000 for every manufacturer. Shri Nariman, learned counsel appearing for M/s Mukand, another respondent submitted that the dual set of counter offers and allocation of disproportionate quantites are highly arbitrary and that the practice and policy of the past 10 years of placing orders on all manufacturers in respect of the quantities worked out on the basis of standard quantity formula at a uniform price, gave rise to legitimate expectations among all bogie manufacturers and irrational departure from the existing policy is arbitrary and unreasonable. He further submitted that the making of law tender offers can not by itself be visited with punty consequences like dual pricing and reducing the allotment of legitimate quantities. Shri Shanti Bhaushan, learned counsel appearing for M/s. Bhartiya submitted that the Tender Committee erred in treating M/s. Bhartiya also as a member of the cartel and that the allotment of quantities has been arbitrarily reduced. He however made one special submission namely that M/s Bhartiya never made an offer of Rs. 67,000 and there is nothing in writing to that effect and that merely because of the statement of the counsel during the proceedings before the High Court, it should not be understood that they are, willing to supply at the, rate of Rs. 67,000 and that they should not be treated by treated differently from the other nine manufacturers.

Taking all the aspects into consideration and for the purpose of giving our conclusions it may broadly be stated that M/s H.D.C. and Mukand gave post-tender offers at a low pride with the hope that they would get a larger quantity allotted. M/s Bhartiya also fell in line with them though did not specifically put it in writing. But during the course of the hearing of the writ proceedings, it was represented on behalf of M/s Bharatiya that they would be willing to supply at Rs. 67,000 if the court fixes that price. This is noted by the High Court in its judgment. The Railways authorities however concluded that in the beginning itself these three have formed a cartel and the price quoted by them was only a cartel price. The note by the Financial Commissioner is somewhat elaborate on this aspect and the Minister for Railways, the competent authority agreed with him and also directed that the quantities be suitably adjusted so that the cartel is broken. He also took into consideration the fact that some of the smaller units are sick and therefore they should be given a larger quantity to enable them to rehabilitate. The other recommendations of the authorities were also accepted. However in giving any directions we must bear in mind that the contract period is going to end shortly and till now all the manufacturers have been manufacturing and supplying pursuant to the interim orders. We may indicate at this stage that we shall discuss all these aspects later in detail in our judgment. After due and careful consideration of all the aspects, our conclusions are as follows:

(1) There is no enough material to conclude that M/s H.D.C., Mukand and Bhartiya formed a cartel. Because of mere quoting identical tender offers by the said three manufacturers for which there is some basis, the conclusion that the said manufacturers had formed a cartel does not appear to be correct. However since the offers of the said three tenders were identical and the price was somewhat lower, the Tender Committee entertained a suspicion that a cartel had been formed and the same got further strengthened by the post-tender attitude of the said manufacturers which further resulted in entertaining the same suspicion by the other authorities in the hierarchy of the decision making body including the Minister of Railways. Though there is no enough of material to establish formation of a cartel as is understood in the legal parlance but at the same time it cannot be contended that such an opinion entertained by the concerned authorities including the Minister was perse malicious or was actuated by any extraneous considerations. After a careful examination of the entire record and facts and circumstances of the case we are of view that all the Railway authorities including the Minister acted in a bonafide manner in taking the stand that the three manufactures formed a cartel.

(2) The current contract price based on the updated price is Rs. 79,305 The three manufacturers offered at Rs. 77,6000. 'Faking into consideration the later concessions, the Tender Committee decided that the price of Rs. 76,000 is reasonable. In the post tender correspondence M/s H.D.C. and Mukand offered to supply at a price of Rs. 67,000 per bogie, but no particulars as to how it would be reasonable, were given. However they have come forward before us with some particulars. M/s Bhartiya did not gave any such offering writing, but fell in line with them and did not choose to question the order of the High court fixing the price at Rs. 67,000 The Railways were of the view that it is an unreasonable price an smaller manufacturers cannot supply at that price and consequently they will get extinguished resulting in a monopoly by the big manufacturers. The High court has directed that supply should be at Rs. 67,000 by everyone. Taking into consideration all these aspects we are of the view that the fixation of price at Rs. 67,000 per bogie straightaway

without necessary and proper consideration and appraisal regarding the viability and other aspects by some experts, is not just and fair from many points of view. A fresh consideration is called for, particularly from the point of view of safeguarding the interests of the public exchequer and giving_ necessary protection to the smaller manufacturers. Consequently we set aside this direction of the High Court and direct the Tender Committee to reconsider the question of fixation of reasonable price. The Tender committee shall consider the offer of Rs, 67,000 made by M/s H.D.C. and Mukand along with the data that would be given by them in support of that and the percentage of profits available to all the 3 manufacturers and other relevant aspects and then fix a reasonable price. at which the manufacturer would be able to supply. The Tender Committee shall within two weeks from today complete the process. (3) At a belated post tender stage Railways authorities did not deem it fit to reconsider the question of fixation of price in the light of the post tender offers made by M/s H.D.C. and Mukand, as by then they were of the opinion that the three big manufacturers have formed a cartel and quoted a cartel price. The stand by the Railways to adopt dual pricing under these circumstances is bonafide and not malafide. However. dual pricing on principle may not appear to be rational since the railways have been following certain formula in fixing the price which is made applicable to all the manufacturers, But under certain circumstances dual pricing may be reasonable. In the instant case M/ s H.D.C. and Mukand came forward with firm offer of a price at Rs. 67,000 per bogie. M/s Bharatiya also got committed to supply at the same price. All the three of them did not even challenge the order of the High Court. These three big manufacturers just be deemed to be in a position to supply at the rate of Rs. 67,000 and thus they form a distinct category. The smaller manufacturers belong to a different category and if a different price is fixed for them it is not discriminatory.

(4) If the price that is to be fixed by the Tender Committee as directed by us happens to be more than Rs. 67.000 then that would be applicable to the smaller manufacturers only and not to M/s H.D.C., Mukand and Bhartiya who on their own commitment have to supply at the rate of Rs. 67,000.

(5) The price thus fixed by the Tender committee which applies only to the smaller manufacturers shall he deemed to be final and the respective contracts shall be deemed to be concluded so for the price is concerned.

(6) Now coming to the allotment of quota of bogies the Tender Committee made recommendations on the basis of the existing practice. The Minister of Railways in his ultimate decision has made some variations taking into consideration tile recommendations of the Financial commissioner and other authorities. The has however not accepted these recommendations fully. In making these variations, the Minister accepting ultimately reduced the allotment of quota to the said three tenderers substantially by way of reprisal. In view of our finding that the formation of an opinion that cartel was formed had no firm factual foundation; such a reduction of quota by way of reprisal can not be justified. we are however, not inclined to accept the contention made on behalf of M/s H.D.C., Mukand and Bhartiya that no departure from the recommendations of the Tender committee is permissible in the absence of any established policy which was also known by the tenderers. From the records it appears that in the past also there have been such variations. In our view, the Minister of Railways as the final authority. after considering various relevant factors, may

he justified in taking a particular decision in the matter of allotment of quota but such decision must be taken on objective basis. But, in this case. it appears to us that all the smaller manufacturers deserving a favourable treatment in the matter of allotment of quota, have not been equally treated in the sense that one or, two of them got larger quantities. Though this does not appear to be a serious departure, yet in these matters the Govt. is expected to be just and fair to one and all. We hope that in future the authorities would make a proper consideration of the relevant factors in respect of each tenderer in an objective manner in allotting the quantities.

(7) In view of the interim orders, during the pendency of writ petitions before the High Court, and until now all the manufacturers have been supplying as per the allotments by the Tender Committee. The High Court in its judgment finally directed the Railways to reconsider the allocation on reasonable basis. It is submitted on behalf of the smaller manufacturers that they have made necessary manufac- turing arrangements on the basis of the final allotment. On behalf of the M/s H.D.C., Mukand and Bhartiya, it is submitted that their legitimate quotas also are cut short and that they are entitled to larger quantities in view of the low price offered by them. Having considered the contentions made by all- the manufacturers direct that the there manufacturers M/s H.D.C., Mukand and Bhartiya should be allocated the quantities as per the recommendations of the Tender committee. We, however. do not want to disturb at this stage the quantities finally allotted by the competent authority to the small manufacturers as that would cause great hardship to them. We leave it to the Railway authorities to make necessary adjustments next year in the matter of allocation of quantities to them taking, into consideration these allotments given to them this year. To that extent we modify the order of the High Court. (8) It will he open the Railways to exercise 30% option, if not already exercised.

(9) Taking all the circumstances and the time factor into consideration the time to complete the supply is extended upto 31.3.1993.

Accordingly these Special Leave petitions are disposed of. There will he no order as to costs.

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    V. P. R.                SL Ps disposed of.
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