THE HIGH COURT OF MADHYA PRADESH
Writ Petition No.4281/2019
Fishermen Sahakari Sangh Matsodyog Sahakari Santha Maryadit, Gwalior Vs. The State of M.P. and others

Gwalior, Dated :27/01/2020

Shri Vivek Jain, Advocate for petitioner.

Shri R.K. Soni, Government Advocate for State.

Shri H.K. Shukla, Advocate for respondent no.4.

This petition under Article 226 of the Constitution of India has been filed seeking the following reliefs:-

> "i) That, the order annexure P/1 and the actions consequential thereto may kindly be quashed,
>
> ii) any other relief deemed fit in the facts and circumstances of the case doing justice in the matter including costs be also awarded."

2. By order dated 14/2/2019 the Commissioner has recalled its approval dated 6/2/2019.

3. According to the petitioner, the necessary facts in short are that the petitioner is a Cooperative Society registered under M.P. Cooperative Societies Act. Pehsari Reservoir situated in District Gwalior was handed over to the Zila Panchayat under the policy framed by the State for awarding fishing rights. Accordingly, notice inviting tenders were issued and the petitioner also applied for grant of lease. As per Clause 1.2 of the policy after receiving the applications, recommendations has to be obtained from the Fisheries Department and thereafter, the concerning Panchayat shall finalize the matter within 30 days and forward the same to the competent

authority. It is submitted that the lease has to be granted by the Zila Panchayat, therefore, the Divisional Commissioner is the competent authority as per Clause 5.1 of the policy. The applications which were received were sent to Assistant Director, Fisheries, for its recommendations and the comparative chart was prepared and the petitioner was placed at the top of the panel. Certain objections were made as to the working area of the petitioner and ultimately the Agricultural Standing Committee by its resolution dated 4/8/2018 decided to recommend award of fisheries rights to the petitioner. The said resolution dated 4/8/2018 was not challenged by any of the tenderers. Thereafter, the matter was forwarded to the Commissioner by the Collector. The Commissioner in its turn directed the Joint Registrar, Fisheries, to place its comments after examining the matter. After receiving the recommendations dated 28/1/2019 from the Joint Director, Fisheries, the Commissioner gave his approval and thereafter, an order dated 8/2/2019 was issued by the respondent no.3 and the lease deed was signed after depositing the lease rent on 11/2/2019. It is submitted that before the lease deed could be registered, the Commissioner recalled its own approval at the behest of the Departmental Minister and hence, the present petition has been filed against the order dated 14/2/2019 passed by the Commissioner,

Gwalior Division, Gwalior by which his approval dated 6/2/2019 has been kept in abeyance.

4. Challenging the order dated 14/2/2019 it is submitted by the counsel for the petitioner that once the approval was granted by the Commissioner, then he has no jurisdiction to review its own order and to direct for keeping the same in abeyance. Further, the respondent no.2 has *malafidely* acted on the recommendation of the concerning Minister and thus, it is a colourable exercise of power. It is further submitted that since the resolution dated 4/8/2018 passed by the Agricultural Standing Committee was never challenged by respondent no.4 and, therefore, now the respondent no.4 is estopped from interfering in the matter.

5. *Per contra,* it is submitted by the counsel for the respondents no.1 and 2 that since the lease deed has not been registered so far, therefore, it cannot be said that the procedure for grant of lease has been concluded and no right has accrued in favour of the petitioner so far. It is further submitted that the respondent no.2 has passed the impugned order thereby keeping its own approval in abeyance in exercise of power under Section 85 of M.P. Panchayat Raj Adhiniyam. Further, it is submitted that the order dated 14/2/2019 is not a final order, but it is an order of interlocutory in nature and

merely the recommendation / approval sent by the Commissioner, Gwalior Division, Gwalior by its letter dated 6/2/2019 has been kept in abeyance and the final decision is yet to be taken in the matter.

6. The respondent no.4 has also filed its return and has submitted that the proposal to grant lease to the petitioner is contrary to the policy and when the defect in allotment process was brought to the knowledge of the Commissioner, then only the approval has been kept in abeyance and no final order has been passed so far.

7. Heard learned counsel for the parties.

8. Section 107 of Transfer of Property Act reads as under:-

> **"107. Leases how made** —A lease of immoveable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made only by a registered instrument.
>
> All other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession.
>
> Where a lease of immoveable property is made by a registered instrument, such instrument or, where there are more instruments than one, each such instrument shall be executed by both the lessor and the lessee:
>
> Provided that the State Government may from time to time, by notification in the Official Gazette, direct that leases of immoveable property, other than leases from year to year, or for any term exceeding one year, or reserving a

yearly rent, or any class of such leases, may be made by unregistered instrument or by oral agreement without delivery of possession."

Section 17 of the Registration Act, 1908 (in short "the Act, 1908") reads as under:-

"**17. Documents of which registration is compulsory**.—(1) The following documents shall be registered, if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:—

(a) instruments of gift of immovable property;

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property;

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

[(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right,

title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property:]

Provided that the [State Government] may, by order published in the [Official Gazette], exempt from the operation of this sub-section any lease executed in any district, or part of a district, the terms granted by which do not exceed five years and the annual rents reserved by which do not exceed fifty rupees.

[(1A) The documents containing contracts to transfer for consideration, any immovable property for the purpose of section 53A of the Transfer of Property Act, 1882 (4 of 1882) shall be registered if they have been executed on or after the commencement of the Registration and Other Related laws (Amendment) Act, 2001 and if such documents are not registered on or after such commencement, then, they shall have no effect for the purposes of the said section 53A.]

(2) Nothing in clauses (b) and (c) of sub-section (1) applies to—

(i) any composition deed; or

(ii) any instrument relating to shares in a joint stock Company, notwithstanding that the assets of such Company consist in whole or in part of immovable property; or

(iii) any debenture issued by any such Company and not creating, declaring, assigning, limiting or extinguishing any right, title or interest, to or in immovable property except in so far as it entitles the holder to the security afforded by a registered instrument whereby the Company has mortgaged, conveyed or otherwise transferred the whole or part of its immovable property or any interest therein to trustees upon trust for the benefit

of the holders of such debentures; or

(iv) any endorsement upon or transfer of any debenture issued by any such Company; or

(v) [any document other than the documents specified in sub-section (1A)] not itself creating, declaring, assigning, limiting or extinguishing any right, title or interest of the value of one hundred rupees and upwards to or in immovable property, but merely creating a right to obtain another document which will, when executed, create, declare, assign, limit or extinguish any such right, title or interest; or

(vi) any decree or order of a Court [except a decree or order expressed to be made on a compromise and comprising immovable property other than that which is the subject-matter of the suit or proceeding]; or

(vii) any grant of immovable property by [Government]; or

(viii) any instrument of partition made by a Revenue-Officer; or

(ix) any order granting a loan or instrument of collateral security granted under the Land Improvement Act, 1871, or the Land Improvement Loans Act, 1883; or

(x) any order granting a loan under the Agriculturists, Loans Act, 1884, or instrument for securing the repayment of a loan made under that Act; or

[(xa) any order made under the Charitable Endowments Act, 1890 (6 of 1890), vesting any property in a Treasurer of Charitable Endowments or divesting any such Treasurer of any property; or]

(xi) any endorsement on a mortgage-deed acknowledging the payment of the whole or any part of the mortgage-money, and

> any other receipt for payment of money due under a mortgage when the receipt does not purport to extinguish the mortgage; or
>
> (xii) any certificate of sale granted to the purchaser of any property sold by public auction by a Civil or Revenue-Officer.
>
> [*Explanation.*—A document purporting or operating to effect a contract for the sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money.]
>
> (3) Authorities to adopt a son, executed after the 1st day of January, 1872, and not conferred by a will, shall also be registered."

9. By referring to Section 17 (2) (vii) of the Act, 1908, it is submitted by the counsel for the petitioner that any grant of immovable property by the Government is exempted from registration and, therefore, it is incorrect to say that as the lease deed has not been registered, therefore, no right would accrue to the petitioner.

10. Considered the submissions.

11. The petitioner has relied upon the policy and directions issued by the State Government for grant of fishing lease by the Panchayat. The opening words of the said policy and guidelines read as under:-

> ''राज्य शासन द्वारा त्रिस्तरीय पंचायतों, नगर पंचायत, नगर पालिका तथा नगर निगम और अन्य विभाग को उनके

> अधिकारिता के तालाब/जलाशय में मत्स्य पालन हेतु पट्टा देने का अधिकार सौंपा गया है।''

12. Thus, it is clear that the lease has to be granted by the concerning Panchayat and not by the Government. Thus, in the considered opinion of this Court, the lease deed to be executed by the concerning Panchayat is not exempted from registration as provided under Section 17 (2) (vii) of the Act, 1908.

13. Now the next question for consideration is that "merely because a approval was made in favour of the petitioner, whether any vested right has accrued in favour of the petitioner or not?"

14. It is well established principle of law that a vested right would accrue only when the contract is concluded. In the present case, this Court is of the considered opinion that unless and until the lease deed is registered, it cannot be said that any vested right had accrued in favour of the petitioner. Even otherwise, this Court in exercise of its power under Article 226 of the Constitution of India can merely consider the decision making process.

15. The Supreme Court in the case of **Ramana Dayaram Shetty v. International Airport Authority of India,** reported in **(1979) 3 SCC 489** has held as under :

> **11.** Today the Government in a welfare State, is the regulator and dispenser of special services and provider of a large number of benefits,

including jobs, contracts, licences, quotas, mineral rights, etc. The Government pours forth wealth, money, benefits, services, contracts, quotas and licences. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State and local welfare. Then again, thousands of people are employed in the State and the Central Governments and local authorities. Licences are required before one can engage in many kinds of businesses or work. The power of giving licences means power to withhold them and this gives control to the Government or to the agents of Government on the lives of many people. Many individuals and many more businesses enjoy largesse in the form of Government contracts. These contracts often resemble subsidies. It is virtually impossible to lose money on them and many enterprises are set up primarily to do business with Government. Government owns and controls hundreds of acres of public land valuable for mining and other purposes. These resources are available for utilisation by private corporations and individuals by way of lease or licence. All these mean growth in the Government largesse and with the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth may be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, can it be said that they do not enjoy any legal protection? Can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure? Is the position of the Government in this respect the

same as that of a private giver? We do not think so. The law has not been slow to recognise the importance of this new kind of wealth and the need to protect individual interest in it and with that end in view, it has developed new forms of protection. Some interests in Government largesse, formerly regarded as privileges, have been recognised as rights while others have been given legal protection not only by forging procedural safeguards but also by confining/structuring and checking Government discretion in the matter of grant of such largesse. The discretion of the Government has been held to be not unlimited in that the Government cannot give or withhold largesse in its arbitrary discretion or at its sweet will. It is insisted, as pointed out by Prof. Reich in an especially stimulating article on "The New Property" in *73 Yale Law Journal 733*, "that Government action be based on standards that are not arbitrary or unauthorised". The Government cannot be permitted to say that it will give jobs or enter into contracts or issue quotas or licences only in favour of those having grey hair or belonging to a particular political party or professing a particular religious faith. The Government is still the Government when it acts in the matter of granting largesse and it cannot act arbitrarily. It does not stand in the same position as a private individual.

12. We agree with the observations of Mathew, J., in *V. Punnan Thomas* v. *State of Kerala* that:

"The Government, is not and should not be as free as an individual in selecting the recipients for its largesse. Whatever its activity, the Government is still the Government and will be subject to restraints, inherent in its position in a democratic society. A democratic Government cannot lay down arbitrary and capricious standards for the choice of persons with whom alone it will deal."

The same point was made by this Court in *Erusian Equipment and Chemicals Ltd.* v. *State of West Bengal* where the question was whether blacklisting of a person without giving him an opportunity to be heard was bad? Ray, C.J., speaking on behalf of himself and his colleagues on the Bench pointed out that blacklisting of a person not only affects his reputation which is, in Poundian terms, an interest both of personality and substance, but also denies him equality in the matter of entering into contract with the Government and it cannot, therefore, be supported without fair hearing. It was argued for the Government that no person has a right to enter into contractual relationship with the Government and the Government, like any other private individual, has the absolute right to enter into contract with any one it pleases. But the Court, speaking through the learned Chief, Justice, responded that the Government is not like a private individual who can pick and choose the person with whom it will deal, but the Government is still a Government when it enters into contract or when it is administering largesse and it cannot, without adequate reason, exclude any person from dealing with it or take away largesse arbitrarily. The learned Chief Justice said that when the government is trading with the public, "the democratic form of Government demands equality and absence of arbitrariness and discrimination in such transactions. . . The activities of the Government have a public element and, therefore, there should be fairness and equality. The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure". This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of

> giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences, etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.

The Supreme Court in the case of **Sterling Computers Ltd. v. M & N Publications Ltd.,** reported in **(1993) 1 SCC 445** has held as under :

> **12.** At times it is said that public authorities must have the same liberty as they have in framing the policies, even while entering into contracts because many contracts amount to implementation or projection of policies of the Government. But it cannot be overlooked that unlike policies, contracts are legally binding commitments and they commit the authority which may be held to be a State within the meaning of Article 12 of the Constitution in many cases for years. That is why the courts have impressed that even in contractual matters the public authority should not have unfettered discretion. In contracts having commercial element, some more discretion has to be

conceded to the authorities so that they may enter into contracts with persons, keeping an eye on the augmentation of the revenue. But even in such matters they have to follow the norms recognised by courts while dealing with public property. It is not possible for courts to question and adjudicate every decision taken by an authority, because many of the Government Undertakings which in due course have acquired the monopolist position in matters of sale and purchase of products and with so many ventures in hand, they can come out with a plea that it is not always possible to act like a quasi-judicial authority while awarding contracts. Under some special circumstances a discretion has to be conceded to the authorities who have to enter into contract giving them liberty to assess the overall situation for purpose of taking a decision as to whom the contract be awarded and at what terms. If the decisions have been taken in bona fide manner although not strictly following the norms laid down by the courts, such decisions are upheld on the principle laid down by Justice Holmes, that courts while judging the constitutional validity of executive decisions must grant certain measure of freedom of "play in the joints" to the executive.

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17. It is true that by way of judicial review the Court is not expected to act as a court of appeal while examining an administrative decision and to record a finding whether such decision could have been taken otherwise in the facts and circumstances of the case. In the book *Administrative Law*, Prof. Wade has said:

"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within

the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too tightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which legislature is presumed to have intended. The decisions which are extravagant or capricious cannot be legitimate. But if the decision is within the confines of reasonableness, it is no part of the court's function to look further into its merits. 'With the question whether a particular policy is wise or foolish the court is not concerned; it can only interfere if to pursue it is beyond the powers of the authority."

But in the same book Prof. Wade has also said:

"The powers of public authorities are therefore essentially different from those of private persons. A man making his will may, subject to any rights of his dependants, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest.

There are many cases in which a public authority has been held to have acted from improper motives or upon irrelevant considerations, or to have failed to take account of relevant considerations, so that its action is ultra vires and void."

18. While exercising the power of judicial

review, in respect of contracts entered into on behalf of the State, the Court is concerned primarily as to whether there has been any infirmity in the "decision making process". In this connection reference may be made to the case of *Chief Constable of the North Wales Police* v. *Evans* where it was said that: (p. 144a)

"The purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised or enjoined by law to decide for itself a conclusion which is correct in the eyes of the court."

By way of judicial review the court cannot examine the details of the terms of the contract which have been entered into by the public bodies or the State. Courts have inherent limitations on the scope of any such enquiry. But at the same time as was said by the House of Lords in the aforesaid case, *Chief Constable of the North Wales Police* v. *Evans* the courts can certainly examine whether "decision-making process" was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution.

The Supreme Court in the case of **Tata Cellular v. Union of India,** reported in **(1994) 6 SCC 651** has 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 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.

* * *

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*, 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".

* * *

94. The principles deducible from the above are:

(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of *the invitation to tender* cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept 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 experts.

(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 administrative 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 arbitrariness not affected by bias or actuated by mala fides.

> (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

The Supreme Court in the case of **Dutta Associates (P) Ltd. v. Indo Merchantiles (P) Ltd** reported in **(1997) 1 SCC 53,** has held as under :

> **7.** In the circumstances, we affirm the judgment of the Division Bench in writ appeal on the grounds stated above and direct that fresh tenders may be floated in the light of the observations made in this judgment. We reiterate that whatever procedure the Government proposes to follow in accepting the tender must be clearly stated in the tender notice. The consideration of the tenders received and the procedure to be followed in the matter of acceptance of a tender should be *transparent, fair and open*. While a bona fide error or error of judgment would not certainly matter, any *abuse of power for extraneous reasons*, it is obvious, would expose the authorities concerned, whether it is the Minister for Excise or the Commissioner of Excise, to appropriate penalties at the hands of the courts, following the law laid down by this Court in *Shiv Sagar Tiwari* v. *Union of India* (*In re, Capt. Satish Sharma and Sheila Kaul*).

The Supreme Court in the case of **Raunaq International Ltd. v. I.V.R. Construction Ltd** reported in **(1999) 1 SCC 492** has held as under :

> **9.** The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision, considerations which

are of paramount importance are commercial considerations. These would be:

(*1*) the price at which the other side is willing to do the work;

(*2*) whether the goods or services offered are of the requisite specifications;

(*3*) whether the person tendering has the ability to deliver the goods or services as per specifications. When large works contracts involving engagement of substantial manpower or requiring specific skills are to be offered, the financial ability of the tenderer to fulfil the requirements of the job is also important;

(*4*) the ability of the tenderer to deliver goods or services or to do the work of the requisite standard and quality;

(*5*) past experience of the tenderer and whether he has successfully completed similar work earlier;

(*6*) time which will be taken to deliver the goods or services; and often

(*7*) the ability of the tenderer to take follow-up action, rectify defects or to give post-contract services.

Even when the State or a public body enters into a commercial transaction, considerations which would prevail in its decision to award the contract to a given party would be the same. However, because the State or a public body or an agency of the State enters into such a contract, there could be, in a given case, an element of public law or public interest involved even in such a commercial transaction.

10. What are these elements of public interest? (*1*) Public money would be expended for the purposes of the contract. (*2*) The goods or services which are being commissioned could be for a public purpose, such as, construction of

roads, public buildings, power plants or other public utilities. (*3*) The public would be directly interested in the timely fulfilment of the contract so that the services become available to the public expeditiously. (*4*) The public would also be interested in the quality of the work undertaken or goods supplied by the tenderer. Poor quality of work or goods can lead to tremendous public hardship and substantial financial outlay either in correcting mistakes or in rectifying defects or even at times in redoing the entire work — thus involving larger outlays of public money and delaying the availability of services, facilities or goods, e.g., a delay in commissioning a power project, as in the present case, could lead to power shortages, retardation of industrial development, hardship to the general public and substantial cost escalation.

11. When a writ petition is filed in the High Court challenging the award of a contract by a public authority or the State, the court must be satisfied that there is some element of public interest involved in entertaining such a petition. If, for example, the dispute is purely between two tenderers, the court must be very careful to see if there is any element of public interest involved in the litigation. A mere difference in the prices offered by the two tenderers may or may not be decisive in deciding whether any public interest is involved in intervening in such a commercial transaction. It is important to bear in mind that by court intervention, the proposed project may be considerably delayed thus escalating the cost far more than any saving which the court would ultimately effect in public money by deciding the dispute in favour of one tenderer or the other tenderer. Therefore, unless the court is satisfied that there is a substantial amount of public interest, or the transaction is entered into mala fide, the court should not intervene under Article 226 in disputes between two rival tenderers.

The Supreme Court in the case of **Air India Ltd. v. Cochin International Airport Ltd** reported in **(2000) 2 SCC 617** has held as under :

> **7.** The law relating to award of a contract by the State, its corporations and bodies acting as instrumentalities and agencies of the Government has been settled by the decision of this Court in *Ramana Dayaram Shetty* v. *International Airport Authority of India*, *Fertilizer Corpn. Kamgar Union (Regd.)* v. *Union of India*, *CCE* v. *Dunlop India Ltd.*, *Tata Cellular* v. *Union of India*, *Ramniklal N. Bhutta* v. *State of Maharashtra* and *Raunaq International Ltd.* v. *I.V.R. Construction Ltd.* The award of a contract, whether it is by a private party or by a public body or the State, is essentially a commercial transaction. In arriving at a commercial decision considerations which are paramount are commercial considerations. The State can choose its own method to arrive at a decision. It can fix its own terms of invitation to tender and that is not open to judicial scrutiny. It can enter into negotiations before finally deciding to accept one of the offers made to it. Price need not always be the sole criterion for awarding a contract. It is free to grant any relaxation, for bona fide reasons, if the tender conditions permit such a relaxation. It may not accept the offer even though it happens to be the highest or the lowest. But the State, its corporations, instrumentalities and agencies are bound to adhere to the norms, standards and procedures laid down by them and cannot depart from them arbitrarily. Though that decision is not amenable to judicial review, the court can examine the decision-making process and interfere if it is found vitiated by mala fides, unreasonableness and arbitrariness. The State, its corporations, instrumentalities and agencies have

> the public duty to be fair to all concerned. Even when some defect is found in the decision-making process the court must exercise its discretionary power under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the court should intervene.

The Supreme Court in the case of **Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd** reported in **(2005) 6 SCC 138** has held as under :

> **12.** After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The court does not sit as a court of appeal but merely reviews the manner in which the decision was made. The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible. The Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy

> administrative burden on the administration and lead to increased and unbudgeted expenditure. (See para 113 of the Report, SCC para 94.)

The Supreme Court in the case of **Jagdish Mandal v. State of Orissa** reported in **(2007) 14 SCC 517,** has held as under :

> **22.** Judicial review of administrative action is intended to prevent arbitrariness, irrationality, unreasonableness, bias and mala fides. Its purpose is to check whether choice or decision is made "lawfully" and not to check whether choice or decision is "sound". When the power of judicial review is invoked in matters relating to tenders or award of contracts, certain special features should be borne in mind. A contract is a commercial transaction. Evaluating tenders and awarding contracts are essentially commercial functions. Principles of equity and natural justice stay at a distance. If the decision relating to award of contract is bona fide and is in public interest, courts will not, in exercise of power of judicial review, interfere even if a procedural aberration or error in assessment or prejudice to a tenderer, is made out. The power of judicial review will not be permitted to be invoked to protect private interest at the cost of public interest, or to decide contractual disputes. The tenderer or contractor with a grievance can always seek damages in a civil court. Attempts by unsuccessful tenderers with imaginary grievances, wounded pride and business rivalry, to make mountains out of molehills of some technical/procedural violation or some prejudice to self, and persuade courts to interfere by exercising power of judicial review, should be resisted. Such interferences, either interim or final, may hold up public works for years, or delay relief and succour to thousands and millions and may increase the project cost

> manifold. Therefore, a court before interfering in tender or contractual matters in exercise of power of judicial review, should pose to itself the following questions:
>
> (*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.

The Supreme Court in the case of **Heinz India (P) Ltd. v. State of U.P.** reported in **(2012) 5 SCC 443** has held as under :

> **60.** The power of judicial review is neither unqualified nor unlimited. It has its own limitations. The scope and extent of the power that is so very often invoked has been the subject-matter of several judicial pronouncements within and outside the country. When one talks of "judicial review" one is instantly reminded of the classic and oft-quoted passage from *Council of Civil Service Unions* v. *Minister for the Civil Service*, where Lord Diplock summed up the permissible grounds of judicial review thus: (AC pp. 410 D, F-H and 411 A-B)

> "… Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. …
>
> By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the Judges, by whom the judicial power of the State is exercisable.
>
> By 'irrationality' I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness'. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that Judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. …
>
> I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an Administrative Tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

> **68.** We may while parting with the discussion on the legal dimensions of judicial review refer to the following passage from *Reid* v. *Secy. of State for Scotland* which succinctly sums up the legal proposition that judicial review does not allow the court of review to examine the evidence with a view to forming its own opinion about the substantial merits of the case. (AC pp. 541 F-H and 542 A)
>
> "Judicial review involves a challenge to the legal validity of the decision. It does not allow the court of review to examine the evidence with a view to forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from the procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decisions itself it may be found to be perverse, or irrational or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or of sufficient evidence, to support it, or through account being taken of irrelevant matter, or through a failure for any reason to take account of a relevant matter, or through some misconstruction of the terms of the statutory provision which the decision-maker is required to apply. But while the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies it is perfectly clear that in case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of evidence."

16. In the present case, by order dated 14/2/2019 the

Commissioner has merely kept his approval dated 6/2/2019 in abeyance. Thus, it is clear that the Commissioner has not taken a final decision as to whether his approval dated 6/2/2019 is liable to be recalled or not, therefore, this Court is of the considered opinion that this petition is premature.

17. It is further submitted by the counsel for the petitioner that once the approval dated 6/2/2019 was granted by the Commissioner, then he has no authority to review the same.

18. Considered the submissions made by the counsel for the petitioner.

19. Section 21 of the General Clauses Act reads as under:-

> **"21 Power to issue, to include power to add to, amend, vary or rescind notifications, orders, rules or bye-laws.-**Where, by any Central Act or Regulation, a power issue notifications, orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued."

20. From the plain reading of the said Section, it is clear that the authority who has a power to issue an order has an inbuilt power to rescind, modify and alter its own order. In the present case, the Commissioner in the light of certain allegations has decided to reconsider his approval dated 6/2/2019. Since no vested right has

accrued in favour of the petitioner and as the Commissioner is well within its right to rescind his own order, therefore, it cannot be said that the decision of the Commissioner to reconsider his approval dated 6/2/2019 is without jurisdiction. Since no final order has been passed by the Commissioner so far and Commissioner is well within its right to reconsider its own order dated 6/2/2019, which was issued in exercise of its administrative powers, this Court is of the considered opinion that no fault in the order dated 14/2/2019 issued by the Commissioner, Gwalior Division, Gwalior could be pointed out by the petitioner.

21. Accordingly, this petition fails and is hereby **dismissed.**

(G.S. Ahluwalia)
Judge

Arun*