

The High Court of Madhya Pradesh Bench at Indore

Case Number	W.P.No. 17290/2020
Parties Name	Mohammad Sultan Khan Vs. Union of India & Ors.
Case Number	W.P.No. 18637/2020
Parties Name	Mohammad Sultan Khan Vs. Union of India & Ors.
Date of Order	22/07/2021
Bench	<u>Division Bench:</u> Justice Sujoy Paul Justice Anil Verma
Judgment delivered by	Justice Sujoy Paul
Whether approved for reporting	YES
Name of counsel for parties	Shri Arjun Agrawal, learned counsel for the petitioners. Shri Himanshu Joshi, learned counsel for the official respondent(s). None for the private respondents despite service.
Law laid down	*Article 226 of the Constitution – Judicial review of contract matter – Law summarised- if the decision making process is shown to be arbitrary, unreasonable and hits Wednesbury principles, interference can be made *Clause 8 of the NIT – The bidder was required to furnish informations regarding the vehicle to be provided by him. The respondent No.4 has not filled up relevant entries of the prescribed form and did not file relevant documents along with his tender. The technical bid of respondent No.4 was rightly rejected by the department. *Review of decision by Department - After rejecting the technical bid of respondent No.4,

	<p>the Department reviewed its decision without there being any enabling provision which was held to be impermissible. Review of decision to make respondent No.4 as eligible was taken for no valid reasons. Thus, the impugned decisions of review whereby respondent No.4 was held to be eligible are set aside and direction was issued to consider the petitioners.</p> <p>*Validity of a decision/order- Needs to be tested on the reasons mentioned therein and cannot be validated by substituting reasons by filing counter affidavit before the Court.</p>
Significant paragraph numbers	11 to 21

ORDER
(Passed on 22nd July, 2021)

Sujoy Paul, J:-

In these petitions, the parties are at loggerheads on the validity of decision of the respondents in accepting bid of private respondent after declaring him as disqualified. It is further prayed that since petitioners are the lowest bidders and qualified the technical bid, they may be awarded the tender. Since both the petitions are similar, on the joint request of the parties, the matters were analogously heard and decided by this common order.

- 2) Facts are taken from WP No.17290/2020.
- 3) The respondent/department issued a notice inviting tender (NIT) on 26/06/2020 (Annexure P/5) for transport of posts on the route Indore to Burhanpur. It was pointed out that the only difference in the connected matter is that the route involved therein is different. The petitioners, respondent No.4 and other persons submitted their tender submission form. The petitioners duly submitted their signed tender documents. Petitioners duly filled up all the relevant columns of the prescribed tender form. They furnished the necessary

information against relevant columns and also filed supporting documents which is evident from a bare perusal of Annexure P/6, P/7 & P/8. It is pointed out that respondent No.4 also submitted his signed tender document (Annexure P/10). However, he did not submit the details of proposed vehicles which was the heart and soul of the tender because tender was for transfer of posts. The relevant page of tender document (Page-113) was left blank and no vehicle details have been provided by respondent No.4. In addition, respondent No.4 submitted an affidavit stating that if his bid is accepted and in turn, tender is awarded to him, respondent No.4 will provide a new vehicle for the purpose of fulfilling the mandatory requirement/eligibility criteria of the tender.

4) Shri Arjun Agrawal, learned counsel for petitioners submits that technical bids were opened on 28/07/2020 and respondent No.4 was found to be disqualified in the technical bid because he did not provide details of vehicle and stated in the affidavit that new vehicle will be provided if contract is awarded to him. Criticising the impugned minutes dated 07/10/2020 (Annexure P/13), Shri Agrawal urged that the technical bid of private respondents were rejected on 28/07/2020, but for no valid reasons, the said decision was *reviewed* without therebeing any enabling provision for review and respondent No.4 was permitted to participate in further tender process. In reply the respondents supported their action by contending that respondent No.4 furnished vehicle details with the bid, but since documents were not legible, he produced legible copies of said documents and, therefore, on 07/10/2020, the technical bid was reviewed.

5) The petitioners raised their eyebrows on such review by contending that :-

- i) there exists no enabling provision to review a decision and hence such review is impermissible and runs contrary to the judgments of Supreme Court reported in *(1971) 3 SCC 844*

(Patel Narshi Thakershi & Ors. vs. Shri Pradyuman Singhji Arjunsinghji). Reliance is placed on Division Bench judgment of Calcutta High Court in *APOT No.344/2013 (Electrosteel Castings Ltd. vs. Kolkata Municipal Corporation & Ors.)* decided on 07/08/2013.

ii) In contract matters, interference can be made if the procedure of taking decision is arbitrary and faulty. The impugned decisions in these cases are irrational, arbitrary and malicious in nature. Reliance is placed on *(2000) 2 SCC 617 (Air India vs. Chochin International Airport Ltd.)* and *(2001) 2 SCC 451 (W.B. State Electricity Board vs. Patel Engineering Co.)*.

iii) If the impugned order/minutes do not contain the reason for review i.e. providing legible documents at subsequent stage, this defence taken for the first time by way of counter affidavit in the Court cannot be entertained as per Constitution Bench judgment of Supreme Court in *(1978) 1 SCC 405 (Mohinder Singh Gill vs. Chief Election Commissioner)*.

6) In nutshell, Shri Agrawal, learned counsel for the petitioners submits that after having declared respondent No.4 as ineligible at the stage of technical bid, it was no more open to the respondents to review their decision. Moreso, when there exists no enabling provision and no valid reason for undertaking the said exercise.

7) Countering the said argument, Shri Himanshu Joshi, learned counsel for the Department supported the impugned decision and award of contract in favour of respondent No.4. He submits that although on 28/07/2020, the respondent No.4 was held to be disqualified at the stage of examining the technical bid, he was found to be eligible subsequently on 28/07/2020. The decision to review was taken by the Department pursuant to the direction of Chief Post Master General. He submits that review committee's decision dated

07/10/2020 (Annexure R/4) is in consonance with law. There is no fault in the process adopted by the respondents. By placing reliance on **(2007) 14 SCC 517 (Jagdish Mandal vs. State of Orissa & Ors.)** and **(2020) 16 SCC 759 (Bharat Coking Coal Limited & Ors. vs. Amr Dev Prabha & Ors.)**, Shri Joshi urged that the scope of interference in Article 226 of Constitution in contractual matters is limited. In absence of arbitrariness, malice or any serious flaw in the process in which decision is taken, interference is not warranted. The petitioner in his E-mail (page-149) and in Annexure P/5 dated 26/06/2020 himself accepted that relevant papers of respondent No.4 were made available to the department after opening of technical bid. Thus, no fault can be found in the impugned minutes and consequential award of contract to the private respondents.

8) Nobody appeared for private respondents in both the cases in spite of due service of notice.

9) Parties confined their arguments to the extent indicated above.

10) We have bestowed our anxious consideration on rival contentions and perused the record.

11) Before dealing with rival contentions we deem it proper to remind ourselves with the scope of judicial review in contractual matter. *Lord Diplock* stated in **(1985) 1 AC 374, at 415 (Council of Civil Services Union vs. Minister for Civil Services):-**

“.....one can conveniently classify under three heads the grounds on 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'.”

12) In ***Council of Civil Services Union (supra)***, *Lord Diplock* has suggested a three-fold classification of the various grounds on which an administrative decision can be reviewed by a court. These grounds are:

(i) 'Illegality' which means that the “decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it”.

It means that the decision-maker must keep within the scope of his legal power. Illegality means that the decision-maker has made an error of law; it represents infidelity of an official action to a statutory purpose. Such grounds as excess of jurisdiction, patent error of law, etc. fall under the head of “illegality”.

(ii) 'Irrationality' denotes unreasonableness in the sense of *Wednesbury* unreasonableness.

(iii) Procedural Impropriety- The expression includes failure to observe procedural rules including the rules of natural justice or fairness wherever these are applicable.”

The Supreme Court followed the dictum of *Lord Diplock* in *Council of Civil Services Union (supra)* in *Tata Cellular vs. Union of India, (1994) 6 SCC 651*.

13) The Apex Court in catena of judgments held that the judicial review of a contractual matter is permissible on certain parameters. In *Tata Cellular (supra)* and *Elektron Lighting Systems (P) Ltd. vs. Shah Investments Financial Developments & Consultants (P) Ltd., (2015) 15 SCC 137*, the Apex Court opined that the judicial review in contract matter is permissible if action impugned is shown to be arbitrary. In *Ramana Dayaram Shetty vs. International Airport Authority of India, (1979) 1 SCC 489*, *Dutta Associates (P) Ltd. v. Indo Merchantiles (P) Ltd., (1997) 1 SCC 53*, *Heinz India (P) Ltd. v. State of U.P., (2012) 5 SCC 443* and *Kalinga Mining Corpn. v. Union of India, (2013) 5 SCC 252*, the Supreme Court ruled that if decision making process or the decision is unreasonable, interference can be made even in contractual matters. In *Sterling Computers Ltd. v. M & N Publications Ltd., (1993) 1 SCC 44*, *Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd., (2005) 6 SCC 138*, *Michigan Rubber (India) Ltd. v. State of Karnataka, (2012) 8 SCC 216* and *State of Jharkhand v. CWE-SOMA Consortium, (2016) 14 SCC 172*, the *Wednesbury principle* is also applied to test

the decision making process adopted in a contractual matter. Reference may be made to *Raunaq International Ltd. v. I.V.R. Construction Ltd.*, (1999) 1 SCC 492, *Air India Ltd. v. Cochin International Airport Ltd.*, (2000) 2 SCC 617, *Jagdish Mandal v. State of Orissa*, (2007) 14 SCC 517, *Reliance Energy Ltd. v. Maharashtra State Road Development Corpn. Ltd.*, (2007) 8 SCC 1, *Sanjay Kumar Shukla v. Bharat Petroleum Corpn. Ltd.*, (2014) 3 SCC 493 and *Siemens Aktiengesellschaft & Siemens Ltd. v. DMRC Ltd.*, (2014) 11 SCC 288, wherein Apex Court opined that apart from the facets of arbitrariness, unreasonableness and parameters relating to *Wednesbury principles*, the public interest element is also an essential facet which can be looked into in a contractual matter. (See also *Krsnaa Diagnostics Pvt. Ltd. State of M.P [2021 (1) J LJ 582]*).

14) In view of principles laid down in aforesaid cases, it is to be seen whether impugned decision taken by respondents is legal and justifiable. Indisputably, in the instant case when technical bid of candidates were opened on 28/7/2020, the respondent No.4 was held to be disqualified. He was found to be disqualified because of not fulfilling the requirement of Clause 8 of NIT which reads as under:-

“8. The make and model of the vehicle should be specified separately. Copies of registration certificate, fitness certificate and insurance should be enclosed along with technical bid. All the vehicles must have valid road permit to run in the territory of Madhya Pradesh.”

(emphasis supplied)

15) The respondent No.4 admittedly did not furnish the necessary informations regarding vehicles in the relevant columns of his tender form which is evident from a plain reading of his form and more particularly Annexure III of the prescribed form (Page 113). In this form he was required to provide following informations:-

Details of the Vehicle

(i)	Type of vehicle
(ii)	Make and Model
(iii)	Year of manufacture
(iv)	Registration No./Date
(v)	Type of fuel used
(vi)	Fitness/Road worthiness
(vii)	Insurance validity of the vehicle
(viii)	PAN No.
(ix)	GST No.
(x)	Annual turnover 2017-18
(xi)	Annual turnover 2018-19

16) The affidavit of respondent No.4 (page 136) clearly establishes that he intended to provide details of vehicle only when his bid is accepted. For this reason, admittedly the respondent No.4 was not found to be eligible. However, the three members review committee on 7/10/2020 took the impugned decision. Relevant portion of which reads as under:-

“जनरेट किये गये दस्तावेजों के आधार पर निविदाओं का विवरण चेक लिस्ट में दर्ज किये गए कुल 06 निविदाओं में से बाबा ट्रांसपोर्ट, 95 अरविन्द विहार, बाग मुगालिया, भोपाल एवं कबीर इंटरप्राइजेस, 115 बी, ग्रीन पार्क कॉलोनी, इंदौर – 452002 द्वारा प्रस्तुत निविदा, शर्तों के अनुकूल नहीं पायी गयी क्योंकि निविदाकर्ता द्वारा प्रस्तुत घोषणा पत्रक के आधार पर निविदा स्वीकृत होने पर उसके द्वारा नया वाहन क्रय करके उपलब्ध कराने की सहमति दी गयी है, जबकि निविदा ज्ञापन की शर्तों के अंतर्गत केवल उपलब्ध वाहन के लिये ही निविदा प्रक्रिया में भाग लिया जा सकता है।

अधीक्षक रेल डाक सेवा इंदौर द्वारा समिति के सदस्य श्री एम. के. श्रीवास, प्रवर अधीक्षक डाकघर इंदौर सिटी एवं श्री गोपाल मुजाल्दा, सहायक लेखाधिकारी (SB) कार्यालय पोस्टमास्टर जनरल इंदौर क्षेत्र को जारी पत्र क्रमांक डी3/सीएमएमएस/इंदौर-बुरहानपुर/आयडी/2019-21 इंदौर दिनांक 06.10.2020 के तारतम्य में आज दिनांक 07.10.2020 को समिति के सदस्यों द्वारा अधीक्षक रेल डाक सेवा इंदौर के कार्यालय में उपस्थित होकर तकनिकी बोली के कार्यवृत्त दिनांक 28.07.2020 की पुनः समीक्षा की गयी तथा अधीक्षक रेल डाक सेवा आयडी मंडल इंदौर को जारी क्षेत्रीय कार्यालय के पत्र क्रमांक मेल्स-14/16/इंदौर-बुरहानपुर/चेप-II, दिनांक 23.09.2020 में दिये

गये निर्देशों के परिपालन में निविदाकार बाबा ट्रांसपोर्ट, 95 अरविन्द विहार, बाग मुगालिया, भोपाल की निविदा को शामिल करते हुए तकनिकी बोली का पुनः संशोधित कार्यवृत्त जारी किया गया जिसके आधार पर निविदाकर्ता कबीर इंटरप्राइजेस, 115 बी, ग्रीन पार्क कॉलोनी, इंदौर – 452002 को छोड़कर शेष सभी पांच निविदाओं की तकनिकी बोली उपयुक्त मानी गयी, जिसका विवरण संलग्न अनेकजर (चेकलिस्ट) में दर्शित है।”

17) A plain reading of the aforesaid paragraphs makes it clear that technical bid of respondent No.4 was not found to be in consonance with conditions of NIT because he intended to provide details of vehicle after getting the contract. This decision was reviewed by three member committee but no enabling provision of review was shown to this court. The division bench of Calcutta High Court in *Electrosteel Castings Ltd* (supra) opined as under:-

“In the absence of any power reserved by the Corporation in terms and condition of NIT to review its decision, we are of the considered opinion that it was a misadventure on the part of the Corporation to make aforesaid concession which it could not have defended on merits and it was also incumbent upon the Single Bench to go into the legality of such concession. Concession could not have been made in respect of mandatory terms and conditions of the tender. It would be discriminatory to permit at a subsequent stage, such a waiver of a mandatory technical qualification due to subsequent event. Particularly in process of tender question of eligibility is to be examined with respect to a particular date.”

(emphasis supplied)

18) In absence of showing enabling provision, the decision to review the previous decision dated 7/10/2020 was wholly impermissible. Moreso when no reasons are assigned in the minutes dated 7/10/2020 as to what necessitated the committee to review the previous decision and treat respondent No.4 as eligible. In other words, the impugned minutes nowhere shows that the relevant documents of respondent No.4 were received by the Committee subsequently which compelled them to review the decision. This

defence is taken for the first time in the reply filed before this Court. In *Mohinder Singh Gill Vs. Chief Election Commission* (supra), the Apex Court opined as under:-

“8.....Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conducts of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself.

Orders are not like old wine becoming better as they grow older.”

(emphasis supplied)

19) In view of above judgments of supreme court it is clear that interference can be made in contract matters if decision making process is arbitrary, capricious and hits *Wednesbury principles*. The condition No.8 of NIT makes it obligatory for the bidder to furnish the details regarding make and model of vehicle. In addition, the copies of registration certificate, fitness certificate, insurance etc were required to be enclosed with the Tender form. As noticed, the necessary informations were not furnished by respondent No.4 as per Annexure III of tender document. His affidavit leaves no room for any doubt that he intended to provide details of vehicle after getting the contract. This clearly runs contrary to condition No.8 of NIT. The action of respondents in reviewing the previous decision without any enabling provision and for no valid reason cannot be countenanced. In our considered opinion, the respondent No.4 was rightly held ineligible in the meeting held on 28/7/2020 and decision to review the same is arbitrary, unjust, unreasonable and attracts *Wednesbury principles*. The decision making process is certainly arbitrary and runs contrary to Clause 8 of the NIT. Thus, the

impugned decision in both the cases whereby respondent No.4 was held to be eligible needs to be interfered with. Consequently, the contracts given to respondent No.4 also deserve to be set aside.

20) The petitioners have pleaded that they were the lowest bidder if respondent No.4 is excluded. Shri Himanshu Joshi did not dispute the same during the course of arguments. Thus, while setting aside the impugned decision dated 7/10/2020 and contracts given to respondent No.4 in both the cases, we deem it proper to direct the respondents to consider the claim of petitioners for grant of contracts. The entire exercise be completed within 30 days from the date of production of copy of this order.

21) The petitions **are allowed.**

(Sujoy Paul)
Judge

(Anil Verma)
Judge

vm/soumya

