



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Civil Writ Petition No.880/2017

Reserved on : 19.5.2017

Date of Decision : May 26, 2017

Ashok Chauhan

...Petitioner.

Versus

State of Himachal Pradesh & others

...Respondents.

Coram:

The Hon'ble Mr. Justice Sanjay Karol, Acting Chief Justice.

The Hon'ble Mr. Justice Ajay Mohan Goel, Judge.

Whether approved for reporting? Yes.

For the Petitioner : Mr. Suneet Goel, Advocate.

For the Respondents : Mr. Shrawan Dogra, Advocate
General with Mr. Romesh Verma,
and Mr. Anup Rattan, Additional
Advocate General.

Sanjay Karol, Acting Chief Justice

The following issues arise for consideration in the present petition – (a) as to whether work executed by a contractor, in his capacity as a sub-contractor, can be considered to have been executed by “a contractor” as defined under sub-clause (iii) of clause (2) of Conditions of Contract, and (b) whether work so executed by the petitioner that of “Open Excavation of Roads and Barrage”

Whether reporters of the local papers may be allowed to see the judgment?

...2...

and “underground excavation work of Head Race Tunnel with concrete lining and other allied works” as a contractor can be construed to be similar to the “work”, “contracted to be executed”, so defined under sub-clause (1) of Clause 2 of the Conditions of Contract.

2. The Himachal Pradesh Public Works Department invited tenders for construction of following work, with an estimated cost of ₹22,00,32,747/-:

“NAME OF WORK Construction of Rajiv Gandhi Multipurpose Sports Stadium at Katasani Shimla, Tehsil and District Shimla, H.P. (Sh. Construction of Building portion, WS and SI, Site Development Rain harvesting tank, Septic Tank and approach road and C/o sitting steps.”

3. The tender document prescribes both “General Rules and Directions” as also the “Conditions of Contract”, containing the definition clause.

4. The relevant clauses of the tender document, with which we are concerned, for the purpose of convenience and ready reference, are extracted as under:

“General Rules and Directions”

.....

19. The contractor shall submit list of works which are completed/in hand (progress) in the following form:

Work Done Detail: In last five years with base year indicated in performs of schedule “F”

...3...

Sr. No.	Name of HP Govt. Division or State or Central PSU's	Name of work	Cost of completion			Remarks (Indicate in % of completion of awarded components)
			Awarded amount	Completion amount	Penalty if any and paid thereunder	
1.	2.	3.	4.			5.

Work in hand Detail

Name of work.	Name of HP Govt. Division or State or Central PSU's where work is executed	Amount of work completed			Position of works in progress (indicate in % of completion of awarded components)	Stipulated date of completion	Remarks
		Awarded amount	Amount of work done upto last running bill	Penalty if any and paid thereafter.			
1	2	3			4	5	6

These statements should be countersigned by the Engineer in charge, not below the rank of an Executive Engineer or equivalent in State/Central Govt. PSU's with his seal."

"28. Eligibility criteria:

28.1 (This eligibility condition shall be applicable for those works of amount put to tender is up to Rs.50.00 lacs) As per Govt notification the contractor should not have more than two contracts at a time each of Rs.100.00 lacs or more in any HPPWD circles. The contractor has to submit the list of incomplete works in hand on the proforma mentioned at S.No.19 of General Rules and Directions.

28.2 (This eligibility condition shall be applicable for those works of amount put to tender is more than 50.00 lacs)

28.2.a :Bidding Capacity:- Bidders who meet the minimum qualification criteria will be qualified only if their assessed available bid capacity for construction works is equal to or more than the total bid value. The available bid capacity will be calculated as under:

$$\text{Assessed Available Bid capacity} = (A \times N \times M - B)$$

where

A=Maximum value of civil engineering works executed in any one year during the last five years (updated to the price level of the financial year in which bids are

...4...

revised at the rate of 8 percent a year) taking into account the completed as well as works in progress.

	Lasst Five years (excluding current year)	Amount of work done in each financial year
Total annual valume of civil engineering construction work executed and payments received in the last five years preceding the year in which bids are invited (Attach/ upload certificate from Chartered Accountant)	(Rs. In lakhs) Year-2011-12 Year-2012-13 Year-2013-14 Year-2014-15 Year-2015-16	

N = Number of years prescribed for completion of the works for which bids are invited (period up to 6 months to be taken as half-year and more than 6 months as one year).

M = 2

B = Value, at the current price level, of existing commitments and on-going works to be completed during the period of completion of the works for which bids are invited. The details should be on the formats indicated in condition no 19.

28.2.b: Minimum work done condition:- Minimum one similar work done of amount not less than 40% (forty percent) of the estimated cost (without Liquidated Damage or compensation) in last five years".

(Emphasis

supplied)

5. **"Conditions of Contract"**

"2. In the contract, the following expressions shall, unless the context otherwise requires, have the meanings hereby respectively assigned to them:-

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- (i) The expression **works** or **work** shall, unless there be something either in the subject or context repugnant to such construction, be construed and taken to mean the works by or by virtue of the contract contracted to be executed whether temporary or permanent, and whether original, altered, substituted or additional.
- (ii)
- (iii) The **Contractor** shall mean the individual, firm or company, whether incorporated or not, undertaking the works and shall include the legal personal representative of such individual or the persons composing such firm or company, or successors of such firm or company and the permitted assignees of such individual, firm or company.
(Emphasis supplied)

6. Petitioner, who is a Class-A Contractor, has executed works, certificates whereof, relevant for adjudication of the present lis, are extracted as under:

(1) **Certificate No.1**

" WORK DONE CERTIFICATE

Name of Sub Contractor :- Ashok Chauhan & Co.

.....

Name of work:-

Contract agreement no.SK/CII-HRT Balance work, dated 25/11/2014 for construction of 5.0m Dia-Shaped Head Race Tunnel (HRT) from RD-0.00 to RD-11145.00 complete in all respect – Balance works for Sawra Kuddu HEP (111 MM) in Distt. Shimla (HP) Inida.

Agreement:-

SC/100/3351/LOI/01, Dated 15/03/2015

Value of work Executed:-

55,93,61,306.14

Work executed:- Feb'2017

M/s Ashok Chauhan & Co. sub contractor of HCC has executed the Underground excavation work of Head Race Tunnel with concrete lining & other allied works as per above mentioned agreement are as under:-

S.N	Description	Unit	Quantity
1	Underground Excavation	Cum	39,795,629
2	Removal of slush	Cum	13601.533
3	Hauling of excavated material	Cum	5586.109
4	Structural steel works	MT	278.015
5	Rock bolting & Rock Anchoring	RMT	10,082.00
6	Drilling holes	RMT	10,415.284
7	Steel reinforcement	MT	1,62.188
8	Grouting	MT	2445.89
9	Shotcrete	Cum	6,43.443
10	Concrete	Cum	63,719.374
11	Admixtures	Kg	5,02,359.073
12	Dewatering	Kwh	2,60,997.30

The certificate is issued to M/s. Ashok Chauhan & Co. on their request for their future Tendering purpose only."

(2) Certificate No.2

"Certificate Regarding Performance of Contractor

Name of Contractor -	Ashok Chauhan & Co.
Permanent Address -	Durga Niwas, Below HIMFED Building, BCS, New Shimla, HP
Name of work -	Award of "Construction of Civil Works" for (Package-II) Chanju-1 Hydroelectric Project Head Race Tunnel.
Date of Award -	12-08-2011.
Criteria for Award -	Lowest bidder in terms of unit rate.
Value of Work Awarded -	Rs.29,87,19,150/-
Value of work Executed -	Rs.18,83,08,601 (Scope reduced by client)
Status of Work -	Completed in June,15

...7...

Agreement No.-

IA Energy/Chanju-1/Package-II/
2011-438

They have executed the Road works, underground excavation of Head Race Tunnel, HRT Adit, and all Other allied works. The breakups of items as per above mentioned agreement no. are as under:-

Sl. No.	Description of items	Unit	Quantity	Remarks
1	Open Excavation in Roads and Barrage			
1.1	Soft Rock	Cum	6707.29	
1.2	Hard Rock	Cum	5308.38	
2	Underground excavation in Tunnelling	Cum	52265.502	
3	Rock Bolt and Rock Anchor	Rmt	3977.70	
4	Drilling holes	Rmt	3775.33	
5	Structural Steel Works	MT	109.277	
6	Shotcrete	Cum	3.108	
7	Wire mesh	Sqm	8.00	
8	G.I. Gabion Blocks (Wire crates)	Cum	4469.80	
9	Dewatering	Kwh	290947.39	
10	Cement Concrete works.	Cum	1801.095	

Liquidated damages or anynay other

Panel action if imposed - No
Comments on the capabilities of the contractor:-
Technical Proficiency Very Good
Financial Soundness Excellent
Mobilization of T&P Very Good
General Behaviour Excellent

The excavation was completed by Contractor with in time. His mobilization of men, material & machinery is also very good. Contractor is very serious & prompt while performing his duties. The quality of the work and management at the site is very appreciable. He will certainly be assets of any organization of any organization for performing time bound and quality works of the tunnel Excavation."

(3) **Certificate No.3**

"Certificate Regarding Performance of Contractor

Name of Contractor -

Ashok Chauhan & Co.

...8...

Permanent Address - Durga Niwas, Below HIMFED Building, BCS, New Shimla, H.P.
Name of work: Award of "Construction of Civil Works" (Package-1) for Chanju-1 Hydroelectric Project (River Diversion Feeder Tunnel and Desilting Chamber and Head Race Tunnel up RD 0-518 including Adit-1.
Date of Award - 13-09-2011
Criteria for Award - Lowest Bidder in terms of unit rate.
Value of Work Awarded - Rs.18,58,97,200/-
Value of Work Executed - Rs.22,68,00,793/-
Status of Work - Completed in June, 15
Agreement No. - IA Energy/Chanju-1/Package-1/2011-458

They have executed the Road works, underground excavation of Head Race Tunnel, Diversion works, HRT Adit, Silt Flushing Tunnel, De-silting Chamber, Adit to SFT, Adit to Gate Shart, Adit to Gate Hoist Chamber, Transition between De-silting chamber, Silt connection Tunnel & all other allied works. The breakups of items as per above mentioned agreement no. are as under:

Sl.No.	Description of Items	Unit	Quantity	Remarks
1	Open Excavation in Roads and Barrage			
1.1.	Soft Rock	Cum	356325.87	
1.2	Hard Rock	Cum	86340.17	
2	Underground excavation in Tunnelling	Cum	31863.16	
3	Rock Bolt and Rock Anchor	Rmt	13288.25	
4	Drilling holes	Rmt	12848.00	
5	Structural Steel works	MT	42.113	
6	Shotcrete	Cum	462.082	
7	Wire mesh	Sqm	4412.59	
8	G.I. Gabion Blocks (Wire crates)	Cum	7527.31	

9	Dewatering	Kwh	42190.80	
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Liquidated damages or any other

Panel action if imposed -	No
Comments on the capabilities of the contractor:-	
Technical Proficiency	Very Good
Financial Soundness	Excellent
Mobilization of T&P	Very Good
General Behaviour	Excellent

The excavation was completed by Contractor with in time. His mobilization of men, material & machinery is also very good. Contractor is very serious & prompt while performing his duties. The quality of the work and management at the site is very appreciable. He will certainly be assets of any organization of any organization for performing time bound and quality works of the tunnel Excavation."

7. At this point in time, we may also observe that the contractor stands awarded work, similar to the work, subject matter of lis, for a sum of approximately ₹3 crores, which we have not considered, for the simple reason that such information never came to be furnished alongwith the technical bid.

8. Petitioner executed the works, in relation to Certificate No.1 (supra), as a Sub-Contractor, for a Public Sector Undertaking, and works in relation to Certificates No.2 & 3 (supra) stand executed by him as a Contractor, for a private enterprise.

9. It is not in dispute that finding the petitioner to be ineligible, only for the reason that he had not executed any work, that of the Government/Public Sector

...10...

Undertaking, as a Contractor, technical bid, so submitted by him, stands rejected by the respondents.

10. Respectfully, we are not in agreement with the submission made by the learned Advocate General that Condition No.19 is essential, and that it is required to be read with or as a condition prescribed under Clause 28, prescribing the eligibility criteria. Conditions No.19 & 28 fall under that part of the tender document, which prescribes "General Rules and Directions". Save and except for Condition No.19, there is nothing in the document, more so in the clause prescribing the eligibility criteria, that only such of those contractors, who executed work for "last five years", and that too only of the State of Himachal Pradesh or any other State/ Central Public Sector Undertaking, shall be eligible. Conversely, there is nothing to exclude such of those contractors, who never ever executed any work that of the Government or Public Sector Undertaking. Conditions of the tender document are evidently and unambiguously clear. In fact Condition No.28, that of the eligibility criteria, stipulates a condition, debarring a contractor who is simultaneously executing two contracts of the

...11...

State Government, having value of more than ₹1 crore. This perhaps is to break monopoly and to ensure that a contractor does not have more work in hand than that can be executed ordinarily. Reference of Conditions No.19 in condition No.28.1 is only for ascertaining such qualification/ disqualification. Clause 28.1, exclusionary in nature, debars certain category of contractors. It is clause 28.2 which stipulates the eligibility criteria. The crux lies in this clause.

11. Expression "work" in the definition clause is only with reference to the work, subject matter of the contract and not the previous work so executed by the concerned contractor.

12. "Contractor" so defined is only to mean an entity and in this case the individual, who is engaged for undertaking the "works", so stipulated "under the contract".

13. What is contemplated in the tender is that there has to be a contractor who has capacity to undertake and execute the work for which tender stands issued and also to ensure that previously he had carried out similar works of at least 40% of the total sanctioned

value of the work for which the tender is issued. Of course, he must not fall within the limitations of clause 28.1.

14. There is no dispute that once a person participates in a tender process, thereafter he cannot be allowed to challenge the said process, more so for the reason that he has been declared unsuccessful. However, in this case, petitioner has not challenged the conditions of tender, on the basis of which he participated in the process. Grievance of the petitioner is that respondents have misread, misconstrued and misapplied Clauses 19 & 28.2.b of the tender document and thus erroneously and illegally rejected his technical bid.

15. It is not in dispute that the petitioner, in his own capacity, as a contractor has executed works worth ₹18,83,00,000/- (Approx.) and ₹22,68,00,000/- (Approx.), Though this work stands executed by him for private parties, yet it remains a fact that the works executed are of civil nature, may be for a hydroelectric project. Besides this, work done certificate, issued in favour of the petitioner by a Public Sector Undertaking, also

...13...

acknowledges execution of the work, executed by the petitioner, in his capacity as a sub-contractor. It is relevant to take note that though the primary contractor was HCC, but however, HPPCL acknowledged factum of satisfactory completion of the actual work by the petitioner. Also, the work done certificate has not been issued in favour of the primary contractor, but the present petitioner, certifying that petitioner executed the works and not the Primary Contractor. Significantly, this work done certificate is not being ignored by the respondents on the ground that the works so executed by the petitioner is not similar to the work for which the tender has been issued. Objection of the respondents is that the said work was not executed by the petitioner in his capacity as a contractor but that as a sub-contractor. In other words, it is evident that had the said work been executed by the petitioner in his capacity as a contractor, then technically, he would have qualified for further participation in the bidding process.

16. Further, if one were to carefully peruse the works, which were executed by the petitioner as a sub-contractor/contractor, we do not find any major

...14...

difference in the works so executed, with the "works" required to be executed. In fact works executed by him in his capacity as a contractor and sub-contractor are similar in nature. Therefore, in the absence of any specific clause in the tender document that work experience of a contractor gained under the private party shall not be looked into for the purposes of determining the eligibility, ignoring the said experience of the present petitioner, is an arbitrary action of the respondents.

17. Terms and conditions of a tender document have to be read as they are. Neither of the parties can either add something or subtract anything therefrom. In the absence of there being an express rider contained in the tender document itself, that experience gained by a contractor with a private body shall not be taken into consideration or that experience gained by a contractor as a sub-contractor shall not be taken into consideration, for the purposes of assessing eligibility, the experience so gained by a contractor cannot be discarded arbitrarily by the other party on its whims and fancies.

18. Subject matter of lis is that of civil construction, including water supply, sewerage, site

development, rain water harvesting, approach road, which we find is similar to the work already executed by the petitioner with the execution of works, namely open excavation in roads and barrage and underground excavation work of head race tunnel with concrete lining and other allied works.

19. Careful perusal of certificates reproduced supra (Pages 122, 123 & 124) would reveal that the major component of the work executed by the contractor is of concrete; steel re-enforcement; structural steel works; excavation and removal of slush; and cement concrete works.

20. To emphasize on construction of the agreement making Condition No.19 to be essential, our attention is invited to the response filed by the State (Page 152 of the Paper Book), wherein the terms of PMGSY works bidding document is referred to, which averment, we extract as under:

“.....Moreover, in the state PWD works wherever sub-contractor are allowed/considered to participate in the bidding process, it is clearly mentioned in the tender document as in the state PMGSY works bidding document (clause 4.4A(b) of Instructions to Bidders (ITB), Section 2) of which states as under:

“Satisfactorily completed, as prime Contractor or sub-contractor, at least one similar work equal in value to one-third one-fourth in case of Naxal/LWE affected districts) of the estimated cost of work.....”

Similarly, had it been mentioned in the bidding document of this work that sub-contractor can participate in the bidding process, the bid of the petitioner would have definitely been allowed/considered.....”

21. We are afraid, such condition cannot be imported into the contract in question for two reasons – (a) work sought to be executed is not under PMGSY Scheme, (b) it is not one of the conditions of the contract. For proper construction of the contract, which is unambiguously clear, aid cannot be taken that of a totally separate and a different contract, for had it been the intent of the Department to create a distinction between the prime contractor and a sub-contractor, reference thereof should have been made accordingly.

22. We take support from the decision rendered by the Hon’ble Supreme Court of India, in *M.R. Engineers and Contractors Private Limited v. Som Datt Builders Limited*, (2009) 7 SCC 696, wherein it is observed as under:

“16. There is a difference between reference to another document in a contract and incorporation of another document in a contract, by reference. In the first case, the parties intend to adopt only specific portions or part of the referred document for the purposes of the contract. In the second case, the parties intend to incorporate the referred document in entirety, into the contract. Therefore when there is a reference to a document in a contract, the court has to consider whether the reference to the document is with the intention of incorporating the contents of that document in entirety into the contract, or with the intention of adopting or borrowing specific portions of the said document for application to the contract.

17. We will give a few instances of incorporation and mere reference to explain the position (illustrative and not exhaustive). If a contract refers to a document and provides that the said document shall form part and parcel of the contract, or that all terms and conditions of the said document shall be read or treated as a part of the contract, or that the contract will be governed by the provisions of the said document, or that the terms and conditions of the said document shall be incorporated into the contract, the terms and conditions of the document in entirety will get bodily lifted and incorporated into the contract. When there is such incorporation of the terms and conditions of a document, every term of such document, (except to the extent it is inconsistent with any specific provision in the contract) will apply to the contract. If the document so incorporated contains a provision for settlement of disputes by arbitration, the said arbitration clause also will apply to the contract.

18. On the other hand, where there is only a reference to a document in a contract in a particular context, the document will not get incorporated in entirety into the contract. For example if a contract provides that the specifications of the supplies will be as provided in an earlier contract or another purchase order, then it will be necessary to look to that document only for the limited purpose of ascertainment of

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specifications of the goods to be supplied. The referred document cannot be looked into for any other purpose, say price or payment of price. Similarly if a contract between X and Y provides that the terms of payment to Y will be as in the contract between X and Z, then only the terms of payment from the contract between X and Z, will be read as part of the contract between X and Y. The other terms, say relating to quantity or delivery cannot be looked into.”

23. By now, it is well settled that normally Courts do not interfere in the tender/contractual matters, while exercising its power of judicial review. Petitioner is required to show – (a) that the authority has acted with malafide, (b) that the decision is so arbitrary and irrational that no responsible authority, acting reasonably, could have arrived at such conclusion, (c) public interest is involved. (Transfer Case (Civil) Nos.43 of 2015, 64 of 2015, 65 of 2015 (SC), *Reliance Telecom Ltd. & Anr. V. Union of India & Anr.*, decided on 12.1.2017; *State of Jharkhand v. M/s CWE-SOMA Consortium*, AIR 2016 SC 3366; *Central Coalfields Limited v. SLL-SML (Joint Venture Consortium)*, (2016) 8 SCC 622; *Michigan Rubber (India) Limited v. State of Karnataka and others*, (2012) 8 SCC 216; *Air India Ltd. v. Cochin Internal Airport Ltd*, (2000) 2 SCC 617; and *Tata Cellular v. Union of India*, (1994) 6 SCC 651.

24. In *Tata Cellular (supra)*, the apex Court has observed as under:

“(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 malafides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure. Based on these principles we will examine the facts of this case since they commend to us as the correct principles.

25. The principles, so enunciated by the apex court, stand referred to and relied upon, by this Court in

CWP No.9337 of 2013, titled as *Ashok Thakur v. State of Himachal Pradesh & others*, decided on 6.5.2014; and CWP No.359 of 2017, titled as *M/s Zenith Event and Service and another v. State of H.P. and others*, decided on 19.4.2017, the decisions relied upon and referred to by the learned Advocate General, during the course of hearing.

26. We clarify that reference of the decisions was only for inviting our attention to the aforesaid principles.

27. In any case, we have gone through the said decisions and find them not to have adjudicated or decided the issue with which we are concerned.

28. Recently, the apex Court in Civil Appeal No.12065 of 2016, titled as *CRRC Corporation Ltd. v. Metro Link Express for Gandhinagar & Ahmedabad (MEGA) Company Ltd.*, decided on 15.5.2017, has observed as under:

“.....But where a decision is taken that is manifestly in consonance with the language of the tender document or subserves the purpose for which the tender is floated, the court should follow the principle of restraint. Technical evaluation or comparison by the court would be impermissible. The principle that is applied to scan and understand an ordinary instrument relatable to contract in other spheres has to

be treated differently than interpreting and appreciating tender documents relating to technical works and projects requiring special skills. The owner should be allowed to carry out the purpose and there has to be allowance of free play in the joints.”

29. Also, in *Central Coalfields Limited & another v. SLL-SML (Joint Venture Consortium) & others*, (2016) 8 SCC 622, the apex Court observed as under:

“47. The result of this discussion is that the issue of the acceptance or rejection of a bid or a bidder should be looked at not only from the point of view of the unsuccessful party but also from the point of view of the employer. As held in Ramana Dayaram Shetty the terms of the NIT cannot be ignored as being redundant or superfluous. They must be given a meaning and the necessary significance. As pointed out in *Tata Cellular* there must be judicial restraint in interfering with administrative action. Ordinarily, the soundness of the decision taken by the employer ought not to be questioned but the decision making process can certainly be subject to judicial review. The soundness of the decision may be questioned if it is irrational or mala fide or intended to favour someone or a decision "that no responsible authority acting reasonably and in accordance with relevant law could have reached" as held in *Jagdish Mandal* followed in *Michigan Rubber*.

48. Therefore, whether a term of the NIT is essential or not is a decision taken by the employer which should be respected. Even if the term is essential, the employer has the inherent authority to deviate from it provided the deviation is made applicable to all bidders and potential bidders as held in *Ramana Dayaram Shetty*. However, if the term is held by the employer to be ancillary or subsidiary, even that decision should be respected. The lawfulness of that decision can be questioned on very limited grounds, as mentioned in the various decisions discussed above, but the soundness of the decision cannot

be questioned, otherwise this Court would be taking over the function of the tender issuing authority, which it cannot."

(Emphasis supplied)

30. The rules of construction of a contract stand reiterated by the apex Court, though in a case of Insurance Policy, in *Rahee Industries Limited v. Export Credit Guarantee Corporation of India Limited & another*, (2009) 1 SCC 138, as under:

"15. In this case the entire controversy revolves around interpretation of Clause 16 of the Policy. It is well-settled rule of construction that words in a contract (Policy herein) are to be understood in their ordinary meaning. However, this ordinary meaning will not prevail in two cases, namely, where a word has technical or legal meaning and secondly where the context requires otherwise."

(Also: *United India Insurance Co. Ltd. v. Pushpalaya Printers*, (2004) 3 SCC 694)

31. In *Harmony Innovation Shipping Limited v. Gupta Coal India Limited & another*, (2015) 9 SCC 172, the apex Court observed as under:

"48.When the aforesaid stipulations are read and appreciated in the contextual perspective, "the presumed intention" of the parties is clear as crystal that the juridical seat of arbitration would be London. In this context, a passage from *Mitsubishi Heavy Industries Ltd. v. Gulf Bank*, 1997 1 Lloyd's Rep 343 is worth reproducing:

"It is of course both useful and frequently necessary when construing a clause in a contract to have regard to the overall commercial purpose of the contract in the broad sense of the type and general

content, the relationship of the parties and such common commercial purpose as may clearly emerge from such an exercise. However, it does not seem to me to be a proper approach to the construction of a default clause in a commercial contract to seek or purport to elicit some self-contained 'commercial purpose' underlying the clause which is or may be wider than the ordinary or usual construction of the words of each sub-clause will yield." ◇

49. In *Cargill International S.A. v. Bangladesh Sugar & Food Industries Corpn*, 1998 1 WLR 461, Potter, L.J. balanced the two approaches and said (All ER pp.412h-j&413b):

"...In this connection [counsel] has rightly made the point that, when construing the effect of particular words in a commercial contract, it is wrong to put a label on the contract in advance and this to approach the question of construction on the basis of a pre-conception as to the contract's intended effect, with the result that a strained construction is placed on words, clear in themselves, in order to fit them within such pre-conception...On the other hand, modern principles of construction require the court to have regard to the commercial background, the context of the contract and the circumstances of the parties, and to consider whether, against that background and in that context, to give the words a particular or restricted meaning would lead to an apparently unreasonable and unfair result."

32. In *Bharat Aluminium Company v. Kaiser Aluminium Technical Services Inc.*, (2016) 4 SCC 126, the apex Court observed:

"10. In the matter of interpretation, the court has to make different approaches depending upon the instrument falling for interpretation. Legislative

drafting is made by experts and is subjected to scrutiny at different stages before it takes final shape of an Act, Rule or Regulation. There is another category of drafting by lawmen or document writers who are professionally qualified and experienced in the field like drafting deeds, treaties, settlements in court, etc. And then there is the third category of documents made by laymen who have no knowledge of law or expertise in the field. The legal quality or perfection of the document is comparatively low in the third category, high in second and higher in first. No doubt, in the process of interpretation in the first category, the courts do make an attempt to gather the purpose of the legislation, its context and text. In the second category also, the text as well as the purpose is certainly important, and in the third category of documents like wills, it is simply intention alone of the executor that is relevant. In the case before us, being a contract executed between the two parties, the court cannot adopt an approach for interpreting a statute. The terms of the contract will have to be understood in the way the parties wanted and intended them to be. In that context, particularly in agreements of arbitration, where party autonomy is the grundnorm, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions and the use of the expressions at the proper places in the agreement.

11. Contextually, it may be noted that in the present case, the respondent had invoked the provisions of English law for the purpose of the initiation of the unsettled disputes. It has hence, while interpreting an agreement, to be kept in mind that the parties, intended to avoid impracticable and inconvenient processes and procedures in working out the agreement. Potter J. made a similar observation in *Cargill International S.A. v. Bangladesh Sugar and Food Industries Corporation*, 1998 1 WLR 461 (WR p.468):

"As Saville, J. observed in another context in *Palm Shipping Inc. v. Kuwait*

Petroleum Corpn., 1988 1 Lloyd's Rep 500 at 502:

'...It is not a permissible method of construction to propound a general or generally accepted principal ... and then... to seek to force the provisions of the (the contract) into the straightjacket of that principle.....'

On the other hand, modern principles of construction require the court to have regard to the commercial background, the context of the contract and the circumstances of the parties and to consider whether, against that background and in that context, to give the words a particular or restricted meaning would lead to an apparently unreasonable and unfair result."

(Emphasis supplied)

33. In *Vishnu (Dead) by LRs. V. State of Maharashtra & others*, (2014) 1 SCC 516, the apex Court observed:

"35. Before concluding, we may observe that circulars issued by the State Government may provide useful guidance to the authorities involved in the implementation of the project but the same are not conclusive of the correct interpretation of the relevant clauses of the agreement and, in any case, the Government's interpretation is not binding on the Courts. In the result, the appeals are dismissed."

34. In the instant case, we find the respondents-authorities to have made redundant the eligibility criteria, which is impermissible in law to do. The goal post is sought to be changed, confining eligibility qua limited persons, thus carving out a class for contractors having worked only for the Government, which is neither the

intent nor the prescription of the tender document. Thus, the scope of judicial review is certainly within the parameters laid down by the apex Court. ◇

35. Submission of the learned Advocate General that the respondents understand the difference between a prime contractor and a sub-contractor, is not based on correct interpretation, for the document does not create any such distinction, more so that of the eligibility clause.

36. Only with the rejection of the technical bid, petitioner approached this Court, but then, as already stands clarified, petitioner does not lay any challenge to the terms of the tender document. It is the misinterpretation, resulting into erroneous rejection of the technical bid, which prompted the contractor to approach this Court.

37. On 2.5.2017, by way of interim order, this Court directed the respondents to allow the petitioner to participate in the financial bid, which however, was directed to be kept in a sealed cover and that tender be not allotted to anyone without leave of the Court. Learned Advocate General clarified that the process of tender is computerized. In fact, it is an E-Tender. In our

...27...

considered, view such fact would not make any difference. Process of bidding has to be relegated back to the stage of rejection of technical bid(s), both of the petitioner or anyone else, only on account of misconstruction of such of the terms of the tender document.

38. Hence, for all the aforesaid reasons, decision of the authorities, in rejecting the technical bid of the petitioner, being illegal, is quashed and as such the respondents-authorities are directed to consider the technical bid, as also the financial bid, of the petitioner, alongwith other bidders, in accordance with law.

In view of the above discussion, present petition stands disposed of, so also pending application(s), if any.

(Sanjay Karol),
Acting Chief Justice

(Ajay Mohan Goel),
Judge.

May 26, 2017^(sd)