

ELEKTRON LIGHTING SYSTEMS PVT. LTD. AND ANR. A

v.

SHAH INVESTMENTS FINANCIAL DEVELOPMENTS  
AND CONSULTANTS PVT. LTD AND ORS. ETC.

(Civil Appeal Nos. 9151-9152 of 2015) B

NOVEMBER 20, 2015

**[DIPAK MISRA AND PRAFULLA C. PANT, JJ.]**

*Contract – Online tenders invited by Municipal Corporation for replacement of existing street lights by LED fittings with refurbishment of street light infrastructure on Build, Operate and Transfer (BOT) basis – Thereafter the appellant (one of the bidders) offered to reduce its price bid if exclusive advertising rights were given to it – Technical bid of the appellant accepted while that of the other bidder rejected – Price bid of the appellant was negotiated – Work order issued to the appellant – Unsuccessful bidder challenged the grant of work order by filing writ petition – High Court quashed the work order – On appeal, held: The power u/Art. 226 of the constitution should be cautiously exercised in the matters of awarding contracts keeping in mind the public interest – In the facts of the case, High Court erred in holding that work order was illegally given to the appellants – However, the Municipal Corporation was not justified in giving the advertisement rights to the appellants without inviting tender for it – The grant of advertising rights was not part of the work for which tender was floated and was severable applying the doctrine of severability contained in s. 57 of Contract Act – Therefore, advertising rights given in the work contract shall stand quashed while rest of the work contract is upheld – Constitution of India, 1950 – Article 226 – Judicial Review – Scope of – Contract Act, 1872 – s. 57 – Doctrine of severability.* C  
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A *Judicial Review – Scope of – In administrative decisions and exercise of powers in awarding contracts – Discussed.*

*Doctrines/Principles – Doctrine of severability – Applicability of.*

B Partly allowing the appeals, the Court

HELD: 1. The scope of judicial review of administrative decisions and exercise of powers awarding contracts 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. (5) The Government must have freedom of contract. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness 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 discretionary power under Article 226 of the Constitution of India should be cautiously exercised in the matters of awarding contracts keeping in mind the public interest. [Paras 12, 13] [ 107-G; 108-A-H]

G *Tata Cellular v. Union of India* (1994) 6 SCC 651 : 1994 (2) Suppl. SCR 122; *Air India Ltd. v. Cochin International Airport Ltd. And Ors.* (2000) 2 SCC 617 : 2000 (1) SCR 505; *Jagdish Mandal v. State of Orissa and Ors.* (2007) 14 SCC 517 : 2006 (10)

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**Suppl. SCR 606 – relied on.**

A

*Sanjay Kumar Shukla v. Bharat Petroleum Corporation Limited (2014) 3 SCC 493 : 2014 (1) SCR 959 – referred to.*

**2.1 The High Court has erred in law in holding that the work order was illegally given to the appellants in respect of replacement of street lights by LED fittings and refurbishment of street light infrastructure on BOT basis. [Para 19] [113-A-B]**

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**2.2 The High Court took adverse view against the appellant on the ground that the MOU between the appellants and LED manufacturer was not placed on the record. The High Court failed to notice that none of writ petitioners had challenged acceptance of appellants' bid on that ground, and the appellants had no opportunity to place the same on the record of the court. The MOU was part of tender bid, and finds its mention in "Tender Committee Evaluation Report". [Para 16] [111-C-D]**

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**2.3 Another reason to take adverse view against the appellants, mentioned by the High Court is that attested copies of VAT returns were not presented by the appellants. The statement of the VAT returns for relevant financial years were duly filed by the appellants with the technical bid. Filing of VAT returns with technical bids gets corroboration also from "Tender Committee Evaluation Report". [Para 16] [111-D-F]**

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**2.4 There appears to be no hurry on the part of the municipal corporation, in awarding contract as the tender had been issued on 01.08.2014 and the same was finalized only on 03.09.2014, i.e. after a period of more than one month. Pre-bid meetings were held and the last date for submission of tender was extended twice**

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A from 20.08.2014 to 25.08.2014 and thereafter to  
28.08.2014, which by itself shows that the process was  
not carried out in haste. Exhaustive pre-bid meeting was  
held on 12.08.2014, which was stated to have been  
attended by eight prospective bidders and the minutes  
B of the pre-bid meetings running into several pages  
changed many terms in favour of the respondent  
Corporation to ensure even stricter contract execution  
responsibilities and thus became part of the tender  
through issuance of two corrigenda. The pre-bid meeting  
C was held to understand the requirements of the contract  
viz. the opinion of the prospective bidders, to give  
sufficient time for bid preparation, evaluation of bids and  
award of contract. One month was consumed in carrying  
out the said activities and in no way can it be termed as  
D a hurried process, as held by the High Court. [Para 18]  
[112-D-H]

3.1 The question of severance as contained u/s. 57  
of Contract Act arises only in the case of a composite  
E agreement consisting of reciprocal promises. The proper  
test for deciding validity or otherwise of an order or  
agreement is “substantial severability” and not “textual  
divisibility”. It is the duty of the Court to sever and  
separate trivial and technical parts by retaining the main  
F or substantial part and by giving effect to the latter if it is  
legal, lawful and otherwise enforceable. [Para 24] [116-  
D-F]

3.2 The offer by the appellant relating to exclusive  
G advertising rights was uncalled for and severable, and  
not a part of the work for which tender was floated. The  
municipal corporation which is a statutory body and  
instrumentality of the State, should have acted fairly by  
making it open for all eligible to submit their offers. As  
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such, the respondent No.3-Municipal Corporation was not justified in giving the advertisement rights to the appellants without inviting tender for it. To that extent, the respondent-Corporation has not acted fairly. As such, the manner in which the advertising rights are given to the appellants with the work order cannot be said to be fair and contract to that extent was liable to be quashed without interfering with rest of the work order. [Paras 21, 23] [115-E; 116-A-C]

*B.O.I. Finance Ltd. v. Custodian and Ors. (1997) 10 SCC 488 : 1997 (3) SCR 51; Shin Satellite Public Co. Ltd. v. Jain Studios Ltd. (2006) 2 SCC 628 : 2006 (1) SCR 933 – relied on.*

Case Law Reference

2014 (1) SCR 959	referred to	Para 7
1994 (2) Suppl. SCR 122	relied on	Para 12
2000 (1) SCR 505	relied on	Para 13
2006 (10) Suppl. SCR 606	relied on	Para 14
1997 (3) SCR 51	relied on	Para 24
2006 (1) SCR 933	relied on	Para 24

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 9151-9152 of 2015.

From the Judgment and Order dated 14.10.2014 of the High Court of Judicature of Bombay, Bench at Aurangabad in Writ Petition No. 7843 of 2014.

Dr. Abhishek Manu Singhvi, Sr. Adv., Pranab Kumar Mullick, Niraj Singh, Ms. Minakshi Midha, Mrs. Soma Mullick, Amit Dayal, Sebat Kumar Deuria, L. Nidhiram Sharma, Pranab Kumar Mullick for the Appellants.

A Shyam Divan, Sr. Adv., Sudhanshu S. Choudhari, Vatsalya Vigya, Ashish Prasad, A. Virmani, Rohit Sharma, Harish Pandey, Nahush Shah, Ms. Ramni Taneja, Ms. Savita Singh, Kunal A. Cheema, Nishant Katneshwarkar for the Respondents.

B

The Judgment of the Court was delivered by

C **PRAFULLA C. PANT, J.** 1. These appeals are directed against judgment and order dated 14.10.2014 passed by High Court of Judicature at Bombay, whereby Writ Petition Nos. 7843 of 2014 and 8211 of 2014, are allowed, and the work order dated 03.09.2014, and consequential agreement between the appellants and respondent No. 3, are quashed.

D 2. Succinctly stated the facts of the case are that on 01.08.2014 respondent no. 3 - Aurangabad Municipal Corporation (for short "municipal corporation") invited tenders for replacement of existing street lights by Light Emitting Diodes (LED) fittings with refurbishment of street light infrastructure on Build, Operate and Transfer (BOT) basis. The contractor was required to complete the project within one year and recover the payment from the municipal corporation through Ninety six Equated Monthly Installments (EMIs) over a period of eight years. Response to E-tender notice was required to be made in two separate parts, namely, technical bid and price bid. As per the tender notice, the tender forms were made available from 01.08.2014 to 20.08.2014. The period of submission of bids was extended up to 28.08.2014.

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G 3. The Tender Notice contained inter alia following conditions :-

"(i) Manufactures of LED Lights OR registered Clause A Electrical Contractors and are eligible to participate in the Tender.

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(ii) The Class A Electrical Contractors (Lead Partner) may only participate by having a Joint Venture agreement with the Manufacturer of LED Light Fittings. A

(iii) The Manufacturer of LED Light fittings (Lead Partner) may form a Joint Venture with Class A Electrical Contractor. B

(iv) The Manufacturer of LED Lights (Lead Partner) may form a Joint Venture with another Manufacturer of Electrical items, provided that the Lead Partner has entered into a MOU with a Class A Electrical Contractor towards execution of the tendered BOT project. C

(v) The Bidder should have achieved a minimum turnover of Rs. 25 crores in each of the three preceding financial years, total 75 crores in three years. D

(vi) Attested true copies of Sale Tax/VAT registration, Manufacturing certificate & DD for EMD to be submitted along with tender papers. E

xxx xxx xxx

(xiv) Bidder may be Joint Venture of maximum two companies/firms to jointly meet the commercial and technical conditions." F

xxx xxx xxx

4. The present appellants and respondent No.1/writ petitioners submitted their bids but technical bids of the latter were rejected as they did not fulfill the terms as per the tender notice. The price bid of appellants was negotiated by the respondent - municipal corporation, and proposal was sent to G H

A the standing committee of the corporation. Whereafter, as per  
the resolution, the work order was issued in favour of the  
appellants.

B 5. The two disqualified bidders filed the Writ Petitions  
C (W.P. Nos. 7843 of 2014 and 8211 of 2014) before the High  
Court of Judicature of Bombay, Aurangabad Bench,  
challenging their disqualification, and acceptance of the  
appellants' bid. The High Court vide impugned order held that  
though disqualification of writ petitioners was correct but  
extraordinary favour was shown to appellants who were  
awarded work order, as such, the same was quashed. Hence  
these appeals.

D 6. It is relevant to mention here that the writ petitioners  
have not challenged the order of the High Court, whereby their  
disqualification by the municipal corporation has been upheld.  
The disqualification and rejection of technical bid of the writ  
petitioners was mainly based on following three reasons:-

E (i) Neither the writ petitioner nor its joint venture partner  
was a registered Class-A contractor, nor any one  
of them was stated to be manufacturer of LED  
lights.

F (ii) None of the writ petitioners had achieved a  
minimum turnover of Rs. 25 crores in the three  
preceding financial years.

G (iii) The writ petitioners failed to submit minimum thirty  
pieces of different types of samples for the  
purposes of testing.

H 7. As such, so far as the disqualification of the writ  
petitioners (present respondent no. 1) is concerned, it requires  
no further examination. The only point to be considered by us  
is whether the High Court, even after finding that the technical



bids of the writ petitioners were rightly rejected, was justified in quashing the work order given to the appellants whose technical bid was accepted by the municipal corporation. A

8. On behalf of the appellants following submissions were made assailing the impugned order passed by the High Court:- B

(1). RE. ABSENCE OF MOU:

a) That the appellants duly entered into MOU on 14.08.2014 with M/s. Matoshree Electricals & Winding Works, a Class A Electrical Contractor as required in Clause 1.1(4) of tender. C

b) That the Technical Evaluation Report by AMC states that MOU had been duly filed by Petitioners. D

c) That the Writ Petitioners never raised this point in their Writ Petitions and even in the amended Writ Petitions. That is also the reason why the MOU was not filed before High Court. E

d) That this being an online tender, all documents filed by all the parties were accessible to all. Since the MOU had been uploaded, the issue was not raised in Writ Petition. F

(2). RE. NON-SUBMISSION OF ATTESTED COPIES OF VAT RETURNS: G

a) That the appellants had duly filed attested copies of VAT Returns in terms of Clause 1.2(1)(C) of tender. The Technical Evaluation Report by AMC states VAT Returns had been duly filed by them. G

b) That the Writ Petitioners never raised this point in their Writ Petitions and even in the amended Writ H

- A                    Petitions. That is why copies of VAT Returns were not filed before the High Court.
- c) That this being an online Tender, all documents filed by all parties were accessible to all. Since the VAT Returns had been uploaded, the issue was not raised in Writ Petition.
- B
- d) That the High Court erred in assuming that even joint venture partner which had zero turnover in a particular financial year had to file VAT Returns. It is submitted that VAT return was required only to establish the turnover requirement. Thus a joint venture partner had to file VAT returns only if its turnover exceeded zero.
- C
- D                    (3). Re. TURNOVER REQUIREMENT:
- a) That the Clause 1.1(5) requires that bidder should have achieved minimum turnover of Rs. 25 crores in each of the 3 preceding financial years, total 75 crores in 3 years. Clause 1.1(14) specifies bidder may be a joint venture of maximum two companies/firms to 'jointly meet' the commercial & technical conditions.
- E
- b) That the joint turnover of the two joint venture partners is in excess of Rs. 25 crores p.a. and Rs. 75 crores in 3 years. The fact that turnover of P-1 was nil, is inconsequential since requirement is joint compliance.
- F
- c) That the High Court at para 28 noted that jointly the turnover requirement is met but erroneously held against the appellants on the ground that turnover of appellant No.1 is nil.
- G

(4). RE. TREATING LETTER DATED 19.08.2014 AS A  
FINANCIAL OFFER:

- a) That the subject matter of letter dated 19.08.2014 was offer of a separate product and different period, which was not covered by the present tender. Hence question of the letter being a financial offer did not arise. B
- b) That the letter dated 19.08.2014 had the subject "Additional Suggestions towards tender-UNCONDITIONAL" and specifically stated that ".....These suggestions are unconditional and are being made in favour of the improvement for the City of Aurangabad. It shall be completely at your kind discretion to accept or reject these suggestions....." C D
- c) That the letter was considered separately by AMC. This is apparent from the Work Order. This is also corroborated by AMC's Additional affidavit before the High Court. E
- d) That the letter was uploaded alongwith the Technical Bid. The High Court erroneously held that the letter had been disclosed even before opening of the technical bid, which is contrary to its own recording that letter was submitted simultaneously with tender offer. In fact Shah Investments' amended Writ Petition itself records that letter dated 19.08.2014 was submitted with technical bid. F
- e) That the relevant figure for evaluation of tender was under the heading "TOTAL COST TO AMC for Evaluating the Lowest Bidder = (VI)+(VII)+(VII)". This figure was nowhere disclosed either in technical G H

A bid or in the letter dated 19.08.2014. Price bid comprised of 27 pages and none of the pages was attached as part of Technical Bid.

B f) That without prejudice to the aforesaid, the part of work order relating to letter dated 19.08.2014 is severable and even if that part is set aside, the remaining contract stands.

C (5). RE. TREATING GRANT OF ADVERTISING RIGHTS ON POLES AS BEYOND THE TERMS OF THE TENDER:

D That the work order is in two parts-one pertaining to award of the main contract and the other to additional suggestions of the appellants. It is submitted that the part pertaining to additional suggestions can be severed from main contract and directed to be removed from the work order. Thus, work order may be confined to award of main contract only.

E (6). RE. THE DECISION MAKING BY AMC BEING HASTY:

F a) That the Notice Inviting Tender was issued on 01.08.2014 and the whole process was completed on 03.09.2014. There was thus no undue haste.

G b) That the time period for submission of bids was extended twice which negates the factum of alleged haste.

H c) That the Commissioner of AMC being under orders of transfer had no bearing on the matter as the ultimate decision was taken by the Standing Committee of AMC.

d) That the decision making process shows due application of mind. A

(7). OTHER SUBMISSIONS:

a) That the High Court did not correctly appreciate the judgment of this Court in **Sanjay Kumar Shukla Vs. Bharat Petroleum Corporation Limited [(2014) 3 SCC 493]** where this Court reiterated need for caution in entertaining writ petitions in contractual matters, unless justified by public interest, since serious consequences could ensue. B C

b) That the High Court failed to appreciate that the petitions before it were not public interest petitions but were petitions of unsuccessful bidders. D

c) That the motives of the writ petitioners, who made bids despite knowing that they did not fulfill the essential requirements, were not considered. In fact, Shah Investments was a finance company. It is submitted that the Writ Petitioners were front men for others. E

d) That writ petitioner Shah Investment's W.P. No. 7843/2014 did not even contain any prayer to quash the petitioners' bid despite amendment. appellant No. 2 in present appeals was not even made a party in Polycab's W.P. No. 8211/2014. F

e) That impugned order imputes mala fides although there were no allegations of mala fide against any particular person in the writ petitions. G

9. On the other hand, on behalf of the respondent No. 1, it is argued that the work order in question was rightly quashed by the High Court for the following reasons:-

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- A (i) That the bidding for the present tender was to be conducted by a two-step e-tendering process. As per Clause 3 of the bid document, at the first stage the bidders were required to submit their technical bids, and the acceptable bids amongst these would be sent for field trials. Only the financial bids of those bidders whose samples qualify the technical stage were thereafter to be opened.
- B
- C (ii) That Clause 1.2(h) stipulated that in the event a bidder submits the price offer along with the technical bid, the tender bid shall be treated as withdrawn and EMD forfeited.
- D (iii) That it was an essential and mandatory condition of the tender as can be construed from the use of the word "shall" and the consequences attached to a breach of this clause, i.e., the bid treated to be as withdrawn and the consequent forfeiture of the EMD deposit.
- E (iv) That it is settled law that where there are essential conditions, the same must be adhered to. In the present case, the Respondent No. 3 - Corporation has no power to relax any of the terms of the bid document, and in any event no such power can be inferred in this context, as no relaxation can be granted from complying with a mandatory condition of the bid document.
- F
- G (v) That the contention of the appellants that the offer contained in the letter dated 19<sup>th</sup> August, 2014 was an unconditional offer made only for the consideration and benefit of the Respondent no. 3 - Corporation cannot save the appellants from the consequences of a breach of the terms of the bid document.
- H

- (vi) That the said letter dated 19<sup>th</sup> August, 2014 A  
admittedly contained the following offers and  
suggestions which have a direct bearing on the  
price offer made by the appellants:
- a. The letter divulged that the appellants would be B  
offering its services for the minimum guarantee  
period under the tender at the rate of Rs.95/- per  
fixture per month.
- b. The letter also stated that by implementing the C  
online monitoring system, the number of control  
panels to be utilized would be reduced to 600  
from 1200 as required by the bid document.  
Interestingly, no corresponding reduction in the D  
price was offered by the appellants. However, if  
the number of control panels required were to  
increase over 600, the appellants would install  
the same at the additional cost of the Respondent E  
No.3 - Corporation. This is a kind of offer which  
clearly exposes the mischievous intention of the  
appellants in negotiating a bargain which would  
be purely beneficial to itself at the cost of the  
public exchequer.
- c. The letter also made an offer to implement these F  
new technologies in consideration for being  
granted exclusive advertising rights on the street  
lights for the entire BOT period.
- (vii) That the offers and suggestions made in the said G  
letter, be it conditional or unconditional, were  
unquestionably a price offer, as is evident from the  
work order dated 3<sup>rd</sup> September, 2014 issued by  
the Respondent No. 3 - Corporation.
- (viii) That the submission of such letter *ipso facto* renders H

- A the bid of the appellants unresponsive, to be treated as withdrawn and EMD forfeited. The terms of the bid document do not give the Respondent No.3 - Corporation the authority to relax its terms unilaterally for any individual bidder, in a manner which would allow such bidder to circumvent a mandatory and essential terms of the bid document.
- B
- (ix) That having submitted such a price offer along with the technical bid, the appellants stood disqualified at the technical stage and, therefore, no question arises as to whether the Respondent No.3 - Corporation could choose to accept or reject these additional offers and suggestions of the appellants.
- C
- D (x) That the practice of indulging in post tender negotiations has been deprecated and labeled as a source of corruption and in pursuance of the same, the Central Vigilance Commission has issued Circular No.4/3/07 dated 3<sup>rd</sup> March, 2007 and has mandated that no post tender negotiations be held with L-1 except in certain exceptional situations as are mentioned therein. Admittedly, no such situation exists in the present case.
- E
- F (xi) That the acceptance of these additional offers and suggestions as contained in the Work Order dated 3<sup>rd</sup> September, 2014 has resulted in enlarging the scope of the tender. The period of the tender has been increased from eight years with a two years extended guarantee period to eight years with a four years extended guarantee period. The answering respondent/writ petitioner seeks compensation in return for providing the additional two years of guarantee. The scope of the tendered work has also been increased to include the grant
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- H



of exclusive advertising rights for the entire contract period which now stands revised to twelve years, for no consideration whatsoever. These are major deviations from the essential terms of the tender which cannot be permitted. A

(xii) The appellants during the course of arguments have tendered certain additional documents across the bar, to establish that the acceptance of the additional offers has been done after due consideration. However, a mere perusal of said documents such as the appellants' letter dated 2<sup>nd</sup> September, 2104, the minutes of the meeting of the Aurangabad Municipal Commission chaired by the Commissioner also dated 2<sup>nd</sup> September, 2014 and the minutes of the meeting of the Standing Committee of the Aurangabad Municipal Corporation dated 3<sup>rd</sup> September, 2014 would indicate the hurried manner in which the entire process of the tender has been finalized. B C D

10. Learned counsel for the municipal corporation has in substance supported the grounds taken by the appellants assailing the impugned orders passed by the High Court. E

11. We have considered submissions of learned counsel for the parties, and perused the papers on record. F

12. In ***Tata Cellular Versus Union of India***<sup>1</sup>, this court has held following limitations relating to scope of judicial review of administrative decisions and exercise of powers awarding contracts. In Para 94 this court has held as under:- G

"94. The principles deducible from the above are:

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

<sup>1</sup> (1994) 6 SCC 651

- A (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.
- B
- (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.
- C
- D (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 arbitrariness not affected by bias or actuated by mala fides.
- E
- F (6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.....”

G 13. In *Air India Ltd. Versus Cochin International Airport Ltd. And Others*<sup>2</sup>, this court has laid down the principle as to how the discretionary power under Article 226 should be cautiously exercised in the matters of awarding contracts keeping in mind the public interest. In Para 7 this court has held as under:-

H <sup>2</sup>(2000) 2 SCC 617

"7.....It can enter into negotiations before finally A  
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 B  
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 C  
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 D  
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 E  
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." F

14. In *Jagdish Mandal Versus State of Orissa and Others*<sup>3</sup>, this court has held as under:-

"22. Judicial review of administrative action is intended G  
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

<sup>3</sup> (2007) 14 SCC 517

A 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.

F 15. In the light of the law laid down by this Court, as above, we examined the facts of the present case. Admittedly, respondent No. 3 Municipal Corporation invited online tenders for replacement of existing street lights by LED fittings. The tender was required to be made of technical bid and price bid. It is not disputed that the appellants and the respondent G No. 1 uploaded their technical bid and submitted price/financial bid separately on the online portal of the municipal corporation. It is also admitted between the parties that the last date of submission of tenders was initially 20.08.2014, which was extended up to 28.08.2014. The technical evaluation of all the H

three bidders was carried out in their presence. It is relevant to mention here that the disqualification of other two bidders, who filed writ petitions, was found correct by the High Court, and said fact is not challenged before us. As such, the only issue required to be examined is as to whether the technical bid of the appellants was approved in accordance with the settled principle of law without giving them undue favour, or not.

16. The High Court has observed in the impugned orders that the MOU between the appellants and LED manufacturer M/s Matoshree Electricals & Winding Works, was not placed on the record. However, the High court failed to notice that none of writ petitioners had challenged acceptance of appellants' bid on that ground, and the appellants had no opportunity to place the same on the record of the court. The MOU was part of tender bid, and finds its mention in "Tender Committee Evaluation Report". The another reason to take adverse view against the appellants, mentioned by the High Court in the impugned order, is that attested copies of VAT returns were not presented by the appellants. It is pointed out before us that the statement of the VAT returns for relevant financial years were duly filed by the appellants with the technical bid. From the record, it reveals that filing of VAT returns with technical bids gets corroboration also from "Tender Committee Evaluation Report". In said report as to the requirement "VAT Returns of the Bidder", the Committee has mentioned - "OK. "10A, 10B, 10C, 10D", and acquaint the head - "Tender Condition Compliance" word "Yes" is mentioned. Regarding the condition of turnover of rupees twenty five crores, the High Court itself did not find infirmity and observed that the appellants did fulfill the condition of return of rupees twenty five crores in each of the preceding financial years as the turnover of the joint venture partner was to be taken into account.

A           17. It is pertinent to mention here that the tender was  
invited incorporating the National Lightening Code to ensure  
the safety of pedestrians and motorists. The tender also  
specified the Lux levels to be achieved and to be maintained  
for eight years. The power consumption required to be  
B guaranteed and the contractor was made liable to bear the  
difference between the excess of actual energy bill over the  
quoted energy bill. The contractor was made responsible for  
comprehensive maintenance for all installed equipment over  
C BOT period including any breakage, theft, loss on any account  
whatsoever. It is worthwhile to mention here that in the pre-bid  
meeting, representatives of eight bidders stated to have  
participated and clarified various points regarding the tender  
notice.

D           18. In our opinion, there appears to be no hurry on the  
part of the municipal corporation, in awarding contract as the  
tender had been issued on 01.08.2014 and the same was  
finalized only on 03.09.2014, i.e. after a period of more than  
one month. Pre-bid meetings were held and the last date for  
E submission of tender was extended twice from 20.08.2014 to  
25.08.2014 and thereafter to 28.08.2014, which by itself shows  
that the process was not carried out in haste. Exhaustive pre-  
bid meeting was held on 12.08.2014, which was stated to have  
been attended by eight prospective bidders and the minutes  
F of the pre-bid meetings running into several pages changed  
many terms in favour of the respondent Corporation to ensure  
even stricter contract execution responsibilities and thus  
became part of the tender through issuance of two corrigenda.  
G The pre-bid meeting was held to understand the requirements  
of the contract viz. the opinion of the prospective bidders, to  
give sufficient time for bid preparation, evaluation of bids and  
award of contract. One month was consumed in carrying out  
the said activities and in no way can it be termed as a hurried  
H process, as held by the High Court.

19. Therefore, in our opinion, the High Court has erred in law in holding that the work order was illegally given to the appellants in respect of replacement of street lights by LED fittings and refurbishment of street light infrastructure on BOT basis.

20. Now, we come to that part of work order and consequential agreement by which advertising rights were also granted to the appellants on the basis of letter dated 19.8.2014 sent by the appellants to the Municipal Corporation. The High Court has taken serious note of the letter dated 19.08.2014 (a day before submission of technical bid) in which the appellants has made "certain suggestions" to the municipal corporation. Copy of said letter is reproduced below: -

"The Commissioner,  
Aurangabad Municipal Corporation  
Aurangabad, Maharashtra

Sub: Additional Suggestions toward Tender-  
UNCONDITIONAL

Respected Sir,

We are participating in the tender for the LED Street Lighting due to be opened on 21<sup>st</sup> August, 2014, & there are some additional suggestions towards the same for your kind consideration. These suggestions are unconditional & are being made in favour of the improvement for the City of Aurangabad. It shall be completely at your kind discretion to accept or reject these suggestions.

We can offer to implement the Online Internet based

A Control & Monitoring of the Street Lights from the Switching point. The suitable systems shall use GSM based modems to control the switching ON & OFF of the street lights, to be installed in each control Panel. Though the cost of such a system is quite high, however we are hereby offering to implement the solution at a reduced price of Rs. 36,000/- per Control Panel along with the recurring costs of the GSM communication & software to Online monitor it, provided the Exclusive Advertising rights for all the Street Lights Poles are extended to us.

D The stipulated number of Control Panels is about 1200, as per the Tender. In case it is decided to implement the New Technology Online control System, we may mutually plan to reduce the number of existing Control Panels to about 600, as the Switching Point system load shall get substantially reduced after implementation of LED Lights. Thus we may offset the cost of reduced Control Panels by using Online Technology without burden of AMC. In case due to logistic issues, the Street Lighting cannot be controlled by the proposed 600 Panels, then whatever additional nos. may be required, cost for the same shall be borne by AMC.

F As a reciprocal towards implementation of the Online Monitoring & Control, we seek the Exclusive Advertising Rights for all the Street Light Poles.

G 2. Additional Extended Guarantee Period of Two Years:-

H We can extend the Additional Guarantee Period from



Two Years to Four Years, if required by AMC, on the same terms of Cost as per Part D, i.e. on payment of Rs.95/- per fixture per month. This offer has. A

Joint Venture Bidder  
(Electron Lighting System (P) Ltd.  
& Paragon Cable India) B

Sd/-  
Authorized Signatory" C

21. The above letter discloses that the suggestions were unconditional, leaving it open for the municipal corporation to accept or not to accept the same. Through the above quoted letter the appellants suggested that if exclusive advertising rights are given to the bidder on the street lights pole, the bidder would reduce price by Rs. 36,000/- per control panel. The stipulated number of control panel was 1,200/-, which could be reduced through mutual plan to 600/-. We are of the view that the above offer relating to advertising rights was uncalled for and severable, and not a part of the work for which tender was floated. Learned counsel for the appellants submitted that the appellants are ready to execute the work without taking benefit of said letter as per the work contract relating to replacement of street lights by LED on BOT basis. D  
E  
F

22. It is submitted on behalf of the respondent No.3 that though revenue from advertising in city of Aurangabad from other sources, for the financial years 2011-2012, 2012-2013 and 2013-2014 was Rs. 81,31,091=00, 81,15,438=00 and 89,03,976=00 respectively, but the same from advertising on Street Light Poles was nil for each of the three years. As such, the municipal Corporation did not commit any illegality in negotiating the matter with the appellants while awarding the work order to it. G  
H

A 23. In our opinion, the matter regarding advertising rights  
was separate, and the municipal corporation which is a  
statutory body and instrumentality of the State should have  
acted fairly by making it open for all eligible to submit their  
offers. As such, we think that the respondent No.3 was not  
B justified in giving the advertisement rights to the appellants  
without inviting tender for it. To that extent, in our opinion,  
respondent No.3 has not acted fairly. As such, the manner in  
which the advertising rights are given to the appellants with  
the work order cannot be said to be fair and contract to that  
C extent was liable to be quashed without interfering with rest of  
the work order.

24. Explaining the doctrine of severability contained in  
Section 57 of Indian Contract Act, 1872, in **B.O.I. Finance**  
D **Ltd., v. Custodian and others**<sup>4</sup>, a three Judge Bench of this  
Court has held that question of severance arises only in the  
case of a composite agreement consisting of reciprocal  
promises. In **Shin Satellite Public Co. Ltd. v. Jain Studios**  
E **Ltd.**<sup>5</sup>, this Court has observed that the proper test for deciding  
validity or otherwise of an order or agreement is "substantial  
severability" and not "textual divisibility". It was further held by  
this Court that it is the duty of the Court to sever and separate  
trivial and technical parts by retaining the main or substantial  
part and by giving effect to the latter if it is legal, lawful and  
F otherwise enforceable.

25. Therefore, in the facts and circumstances and for the  
reasons as discussed above, the appeals deserve to be partly  
allowed. Accordingly, we set aside the impugned orders  
G passed by the High Court to the extent it has quashed the work  
contract given to the appellants regarding replacement of  
existing street lights by LED fittings and refurbishment of street  
light infrastructure on BOT basis. The work order dated

<sup>4</sup> (1997) 10 SCC 488

H <sup>5</sup> (2006) 2 SCC 628

03.09.2014, to that extent given to the appellants shall stand valid. However, the advertisement rights given to the appellants, in the work contract, shall remain quashed. As to the advertisement rights, respondent No.3 may invite tenders before awarding contract in respect thereof. The appeals stand disposed of.

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26. No order as to costs.

Kalpana K. Tripathy

Appeals partly allowed.