A KANHAIYA LAL AGRAWAL

v.

UNION OF INDIA

JULY 29, 2002

B [S. RAJENDRA BABU AND P. VENKATARAMA REDDI, JJ.]

Government Contracts—Supply of material—Invitation of tenders—One of the tenderers offering tender with rebate—Acceptance of such tender—
C *Whether illegal or arbitrary—Held, since such an offer was made at the time of submission of tender and such an offer was given as an additional inducement to accept the offer expeditiously the acceptance thereof is not illegal or arbitrary.*

In these appeals, the question that arose for consideration was
D **whether the tender offered by the appellant-tenderer with the rebate could have been accepted and whether such acceptance would affect the interests of any other party.**

Allowing the appeals, the Court

E **HELD: 1.1. Bureaucratic delay is a notorious fact and delay in finalising tenders will cause hardship to the tenderer. In such circumstances, if a hardened businessman makes an attractive offer of concessional rates if tender is finalized within a shorter period, it cannot be said that the rates offered are offered subject to conditions. The rates offered are clear and the time within which they are to be accepted is also**
F **clear. As long as such offer does not militate against the terms and conditions of inviting tender it cannot be said that such offer is not within its scope. All that is required is that offer made is to be kept open for a minimum period of 90 days. Offer in compliance of that term has been made by the appellant. The concession or rebate given is an additional**
G **inducement to accept the offer expeditiously to have a proper return on the investment made by the tenderer in the equipment and not keeping the labour idle for long periods which is part of commercial prudence. The commercial aspect of each one of the offers made by the parties will have to be ascertained and, thereafter a decision taken to accept or reject a tender. [287-E-G]**

H

1.2. Appellant made his offer of concessional rates along with the tender while respondent No.5 made such offer after opening of the tenders. It is difficult to conceive that respondent No.5 who is a prudent businessman would not be aware of commercial practice of giving rebate or concession in the event of quick finalization of a transaction. What the appellant offered was part of the tender itself while respondent No.5 made such offer separately and much later. There was nothing illegal or arbitrary on the part of Railway Administration in accepting the offer of the appellant, which was made at the time of submitting the tender itself. [288-B-C]

G.J. Fernandez **v.** *State of Karnataka and Ors.*, **[1990] 2 SCC 488, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4359-4361 of 2002.

From the Judgment and Order dated 27.2.2002 of the Madhya Pradesh High Court in LPA No. 173, 198, 211 of 2001at Jabalpur.

Prakash Shrivastava for the Appellant.

Anoop Chaudhary and Ranjit Kumar, Shiv Sagar Tiwari, Bishesha Nand Jha, Manish Singhvi and Anil Katiyar for the Respondents.

The Judgment of the Court was delivered by

RAJENDRA BABU, J. Leave granted.

The first respondent invited tenders for execution of five items of work including supply, delivery and stacking of 75,000 cubic metre Machine crushed track ballast as per specifications at its depot in Naurozabad and loading it into railway wagons. The supply period was for 24 months. The conditions in the tender notice required that the rates at which supply was to be made had to be stated in words as well as in figures against each item of work as per Schedule attached thereto; that the tenders submitted with any omissions or alteration of the tender document were liable to be rejected; however, permissible corrections could be attached with due signature of tenderers; that the tenderer should hold the offer open till such date as may be specified in the tender which was for a minimum period of 90 days from the date of opening of the tender; that contravention of the conditions would automatically result in forfeiture of security deposit; that the tender was liable to be rejected for non-compliance of any of the conditions in the tender form.

A Five tenders were received. The appellant made his tender on 27.02.2001 with a covering letter that if his offer is accepted within the stipulated time rebate would be offered by him to the effect that in case the contract was given to him within 45 days, 60 days and 75 days, he would extend rebate of 5%, 3% and 2% respectively on the rates tendered by him. Respondent No. 5 had made a similar offer but after five days of the opening of the B tender, while the appellant had made such offer of rebate even at the time of making the tender in the letter accompanying the tender documents. However, respondent No. 5 offered to reduce rates by 1.25% if accepted in 30 days and 1% if accepted in 45 days. The 1st respondent accepted the tender offered by the appellant on the rates subject to rebate. Agreement was entered into by C him on 19.04.2001. Respondent No.5 filed a writ petition claiming that his tender should have been accepted, as the rates offered by him are the lowest.

The learned Single Judge, before whom acceptance of the tender offered by the appellant was challenged, took the view that the tender notice did not admit of an offer being made in the form of rebate as offered by the appellant D and it was also clear that an offer made by respondent No. 5 after the opening of the tender is of no consequence and gave the direction of taking fresh offers from the appellant and Respondent No. 5. The matter was carried in appeal to the Division Bench. The Division Bench, after adverting to several decisions on the question of award of contracts, stated that the tender notice E did not contemplate any attachment of conditions by giving rebate which would amount to alteration of the tender document which is impermissible; that the tender should be unconditional and relaxation, if any, should have been notified to all the tenderers to enable them to change their rates; that all the tenderers should have been treated equally and fairly, and on that basis, took the view that the tender of Respondent No.5 is at a lower rate and hence, F acceptable and set aside the order of the learned Single Judge directing fresh negotiations with the parties. The Division Bench directed that supply of material by the appellant be stopped forthwith and balance material be taken from Respondent No.5 at the rate furnished by him. Hence, these appeals against the order of the High Court.

G This Court is normally reluctant to intervene in matters of entering into contracts by the Government, but if the same is found to be unreasonable, arbitrary, *malafide* or is in disregard of mandatory procedures it will not hesitate to nullify or rectify such actions.

H It is settled law that when an essential condition of tender is not complied

with, it is open to the person inviting tender to reject the same. Whether a condition is essential or collateral could be ascertained by reference to consequence of non-compliance thereto. If non-fulfilment of the requirement results in rejection of the tender, then it would be essential part of the tender otherwise it is only a collateral term. This legal position has been well explained in *G.J. Fernandez* v. *State of Karnataka and Ors.*, [1990] 2 SCC 488.

In the present case, the short question that falls for consideration is whether the tender offered by the appellant with the rebate could have been accepted and whether such acceptance would affect the interests of any other party.

The letter dated 27.2.2001 accompanying the tender made by the appellant after setting out rate offered by him also set out certain circumstances with a note in the following terms :-

"Note :- I would like to offer if the tender is finalised in my favour:

(a) 5% reduction in rate within 45 days;

(b) 3% reduction in rate within 60 days;

(c) 2% reduction in rate within 75 days;

(d) to make use of the machinery at the quickest possible time."

Bureaucratic delay is a notorious fact and delay in finalising tenders will cause hardship to the tenderer. In such circumstances, if a hardened businessman makes an attractive offer of concessional rates if tender is finalized within a shorter period, it cannot be said that the rates offered are subject to conditions. The rates offered are clear and the time within which they are to be accepted is also clear. As long as such offer does not militate against the terms and conditions of inviting tender it cannot be said that such offer is not within its scope. All that is required is that offer made is to be kept open for a minimum period of 90 days. Offer in compliance of that term has been made by the appellant. The concession or rebate given is an additional inducement to accept the offer expeditiously to have a proper return on the investment made by the tenderer in the equipment and not keeping the labour idle for long periods which is part of commercial prudence. The commercial aspect of each one of the offers made by the parties will have to be ascertained and, thereafter a decision taken to accept or reject a tender.

The Division Bench of the High Court proceeded on the basis that the

A offer of concession is contrary to the terms of tender but we have demonstrated to the contrary.

Now the appellant made his offer of concessional rates along with the tender while Respondent No.5 made such offer after opening of the tenders. It is difficult to conceive that the Respondent No.5 who is a prudent B businessman would not be aware of commercial practice of giving rebate or concession in the event of quick finalization of a transaction. What the appellant offered was part of the tender itself while the Respondent No. 5 made such offer separately and much later. There was nothing illegal or arbitrary on the part of Railway Administration in accepting the offer of the C appellant, which was made at the time of submitting the tender itself.

In the result, we allow these appeals by setting aside the orders made by the High Court both by the Division Bench and the learned Single Judge and dismiss the writ petition. No costs.

D N.J. Appeals allowed.